The Protection of Confidentiality in Arbitration

Balancing the Tensions

Between Commerce and Public Policy

Julian Christopher Patric Brown

Doctor of Philosophy

London Metropolitan University

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'The English have always been more given to peacableness and industry than other people and rather than go so far as London and be at so great charges with Attorneys and Lawyers, they will refer their differences to the Arbitration of their Parish Priests … or to the Arbitration of honest neighbours'

- *Angliæ Notitia by Edward Chamberlayne, 1684*

'The two systems (arbitration and litigation) ought indeed to be properly regarded as co-ordinate rather than rival'[1]

- *Lord Parker CJ*

[1] Lord Parker CJ cited in R. Finch, 'London: Still the Cornerstone of International Commercial Arbitration and Commercial Law?'(2004) 70(4)Arbitration 2004 256, 269.

Abbreviations

AAA	American Arbitration Association
AALCO	Asian African Legal Consultative Organization
ABA	American Bar Association
ACIC	Arbitration Centre of Iran Chamber
ACICA	Australian Centre for International Commercial Arbitration
ADCCAC	Abu Dhabi Conciliation and Arbitration Centre
ADGM	Abu Dhabi Global Market
AIA	Italian Arbitration Association
AIAC	Asian International Arbitration Centre
ALF	Association of Litigation Funders
ASA	Association Suisse de l'Arbitrage (Swiss Arbitration Association)
ASEAN	Association of Southeast Asian Nations
ATE	After-the-event insurance
BAIAC	Beihai Asia International Arbitration Centre
BTE	Before-the-event insurance
CAS	Court of Arbitration for Sports
CCIAG	Corporate Counsel International Arbitration Group
CEDR	Centre for Effective Dispute Resolution
CEPANI	Belgian Centre for Arbitration and Mediation
CFA	Conditional Fee Agreement
CFBU	Consumer Financial Protection Bureau
CIArb.	Chartered Institute of Arbitrators
CIETAC	China International Economic and Trade Arbitration Commission
CIETAC HK	China International Economic and Trade Arbitration Commission, Hong Kong Arbitration Centre
Civ. Div.	Civil Division
Ch. D.	Chancery Division
CJ	Chief Justice
Com. Ct.	Commercial Court
CTF	Coffee Trade Federation
CLC	International Convention on Civil Liability for Oil Pollution Damage, 1992
CLC (Bunkers)	International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunker Convention), 2001
CPR	Civil Procedure Rules
DBA	Damages-based-agreement
DBA Regulations	Damages-Based Agreement Regulations 2013.
DAC	Departmental Advisory Committee [on Arbitration Law]
DIAC	Dubai International Arbitration Centre
DIFC	Dubai International Financial Centre Arbitration Institute
DIS	Deutsche Institution für Schiedsgerichtsbarkeit (German Institute of Arbitration)
EC	European Community
ECA	European Court of Arbitration
ECAFE	United Nations Economic Commission for Asia and the Far East
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms.
ECOSOC	United Nations Economic and Social Council
EEC	European Economic Community
EU	European Union
FAA	Federal Arbitration Act of United States of America (1926)
FCC	Finland Chamber of Commerce
FD&D	Freight, Demurrage and Defence

FOSFA	Federation of Oils Seeds and Fats
GA	General Average
GAFTA	Grain and Feed Trading Association
GMAA	German Maritime Arbitrators Association
HKIAC	Hong Kong International Arbitration Centre
HRA	Human Rights Act 1998
IACS	International Association of Classification Societies.
IBA	International Bar Association
IBA Rules	IBA Rules of Ethics for International Arbitrators
ICA	Indian Council of Arbitration
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICCA	Handbook International Council for Commercial Arbitration Handbook
ICDR	International Centre for Dispute Resolution (American Arbitration Association)
ICSID	International Centre for Settlement of Investment Disputes
IDRC	International Dispute Resolution Centre
ILA	International Law Association
J	Judge
Jackson Report	Review of Civil Litigation Costs: Final Report (2009)
JCAA	Japan Commercial Arbitration Association
KCAB	Korean Commercial Arbitration Board
LCIA	London Court of International Arbitration
LJ	Lord Justice
LR	Lloyd's Register Classification Society
Lloyd's Rep.	Lloyd's Law Reports
LMAA	London Maritime Arbitrator's Association
LME	London Metal Exchange
LMLN	Lloyd's Maritime Law Newsletter
LRBA	London Rice Brokers' Association
MIArb.	Malaysian Institute of Arbitrators
MODU	Mobile Offshore Drilling Unit
NAFTA	North American Free Trade Agreement
NAI	Netherlands Arbitration Institute
PCA	Permanent Court of Arbitration (The Hague)
QMU	Queen Mary University
RICS	Royal Institution of Chartered Surveyors
SCAI	Swiss Chambers' Arbitration Institution (Swiss Chambers)
SCC	Stockholm Chamber of Commerce Arbitration Institute
SCMA	Singapore Chamber of Maritime Arbitration
SIAC	Singapore International Arbitration Centre
SIArb.	Singapore Institute of Arbitrators
SMA	Society of Maritime Arbitrators
TAE	The Academy of Experts
TAI	Thai Arbitration Institute
TPF	Third Party Funding/Third Party Funder
UIA	Union Internationale des Avocats
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model law on International Commercial Arbitration
UNCITRAL Rules 1976	UNCITRAL Arbitration Rules of 1976
UNCITRAL Rules	UNCITRAL Arbitration Rules of 2010
VIAC Rules	VIAC Rules of Arbitration (Vienna Rules)
VLCC	Very large crude carrier
WIPO	World Intellectual Property Organisation

Wreck Removal Convention	Nairobi International Convention on the Removal of Wrecks
ZCC	Zurich Chamber of Commerce

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ICSID Cases

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Malaysia

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New Zealand

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Norway

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Singapore

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Review of Civil Litigation Costs: Final Report (The Stationary Office: 2009), Lord Justice Jackson.

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AAA	International Dispute Resolution Procedures; Including Mediation and Arbitration 2014
ACIC	Arbitration Rules of the Arbitration Centre of Iran Chamber of Commerce 2002
ACICA	ACICA Rules Incorporating Clauses for Arbitration and Mediation 2016
ADCCAC	Abu Dhabi Procedural Regulations of Arbitration 2013
AIAC	Asian International Arbitration Centre (formerly known as KLRCA) 2018
ASA	Swiss Arbitration Association 1987
BAC	Beijing Arbitration Rules 2019
BCDR	Rules of Arbitration of The Bahrain Chamber for Dispute Resolution 2017
BIAC	Bangladesh Arbitration Rules 2019
BIMCO	The Baltic and International Maritime Council 2019
BVI	British Virgin Islands International Arbitration Centre 2016
CAC	Saudi Arabia Arbitration Rules and Mediation Rules 2016
CAJAC	Shanghai International Economic and Trade Arbitration Commission, Arbitration Rules 2015
CAS	Court of Arbitration of Sports Code of Sports-Related Arbitration 2019
CCAC	Canadian Commercial Arbitration Centre, Arbitration Clause 2008
CRCICA	The Cairo Regional Centre for International Commercial Arbitration, Arbitration Rules 2011
CEDR	CPR Procedures & Clauses, CPR Rules for Administered Arbitration of International Disputes, 2019
CEPANI	The Belgian Centre For Arbitration and Mediation, Arbitration Rules 2013
CIArb.	Chartered Institute of Arbitrators, Arbitration Rules 2015
CICA	The Court of International Commercial Arbitration of the Chamber of Commerce and Industry of Romania 2018
CIETAC	China International Economic and Trade Arbitration Commission Rules 2015
CAS	Court of Arbitration of Madrid Statutes and Rules 2015
DIA	The Danish Institute of Arbitration, Rules of Arbitration Procedure 2013
DIAC	Rules of Commercial Conciliation and Arbitration of Dubai Chamber of Commerce 2007
DIS	DIS Arbitration Rules 2018
EMAC	Emirates Maritime Arbitration Rules 2016
EAC	European Arbitration Chamber Rules of International Commercial Arbitration Court Under the European Arbitration Chambers 2015
ECA	Arbitration Rules of The European Court of Arbitration 2015
FAI	Arbitration Rules of the Finland Chamber of Commerce 2013
FOSFA	Federation of Oils, Seeds and Fats Associations Rules of Arbitration 2012
GAFTA	The Grain and Feed Trade Association, Arbitration Rules 2018
GMAA	German Arbitration Rules 2017
HKIAC	Hong Kong International Arbitration Centre Administered Arbitration Rules 2018
IBA	International Bar Association Rules on Taking Evidence in International Arbitration 2010
ICAC	Rules of The International Commercial Arbitration Court at the Ukraine Chamber of Commerce and Industry 2018
ICC	Arbitration Rules 2017
ICSID	International Centre for Settlement Of Investment Disputes 2006
IICP&R	International Institute for Conflict Prevention & Resolution CPR Rules for Administered Arbitration of International Disputes 2019
ICA	Bylaws and Rules The International Cotton Association Limited
JAMS	JAMS International Arbitration Rules and Procedures 2016
JCAA	The Japan Commercial Arbitration Association Commercial Arbitration Rules 2019
KCAB	Korean Commercial Arbitration International Arbitration Rules 2016

LCIA	LCIA Arbitration Rules 2014
LMAA	The London Maritime Arbitrators Association 2017
LME	London Metal Exchange Rules and Regulations 2019
MAC	Rules of Maritime Arbitration Commission The Chamber of Commerce and Industry of Russia 2017
MIArb.	The Malaysian Institute of Arbitrators Arbitration Rules 2000
NAFTA	NAFTA Investor-State Arbitrations Dispute
NAI	Netherlands Arbitration Rules 2015
OCC	Rules of The Arbitration and Dispute Resolution Institute of The Oslo Chamber of Commerce 2017
AFA	Paris Association For Arbitration 2017
PCA	Permanent Court of Arbitration Rules 2012
SCAI	Swiss Rules of International Arbitration 2012
SCC	Arbitration Institute of the Stockholm Chamber of Commerce Arbitration Rules 2017
SCMA	SCMA Rules 2015
SAC	Scottish Arbitration Rules 2012
SIAC	Investment Arbitration Rules of the Singapore International Arbitration Centre 2017
SIArb	The Singapore Institute of Arbitrators Arbitration Rules 2018
SMA	Society of Maritime Arbitrators Maritime Arbitration Rules 2018
Thai	The Thai Arbitration Institute 2016
TOMAC	The Rules of Arbitration of Tokyo Maritime Arbitration Commission 2014
UNICTRAL	United Nations Commission on International Trade Law 2010
VIAC	Vienna Rules of Arbitration and Mediation 2018
WIPO Rules	WIPO Arbitration Rules of 2002

Abstract

When the Arbitration Act 1996 came into force on 31 January 1997 it had two aims: to consolidate the existing laws and codify arbitration practice as it then was in England and Wales. The Departmental Advisory Committee (DAC) then charged with drafting the new Act elected not to address the issue of confidentiality, preferring the law to develop on a case-by-case basis. Appropriate at the time, a quarter of a century on that approach to confidentiality and privacy is looking increasingly anachronistic: society demands transparency in all its various branches, not least the judicial system. This thesis argues that the Arbitration Act 1996 should be reformed with respect to privacy and confidentiality. It begins by exploring the differences between privacy and confidentiality and tracing the development of those concepts. A comparative analysis is conducted of arbitral confidentiality in jurisdictions outside England and Wales, and the rules and terms of selected arbitral institutions worldwide. The various studies into arbitration since the 1970's provide insights not only into the views and opinions of those closely involved in arbitration, but also potential alternative approaches.

Widespread criticism of the status quo has come from many quarters: academics, practitioners, lawyers as well as senior members of the judiciary. Two aspects of the Arbitration Act 1996 that are commonly considered as being in need of reform are those relating to the appeal of arbitral awards and confidentiality. Focusing on the primary issues of confidentiality in arbitration, the thesis asks who and what are bound by these obligations? Is confidentiality an implied term as held by Potter LJ in *Ali Shipping Corporation v Shipyard Trogir*[2] - an approach subsequently criticised by the Privy Council in *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich (Bermuda)*[3], where their Lordships expressed reservations about the desirability or merit in so characterising a duty of confidentiality? Lord Hobhouse viewed any attempt at generalisation to be unworkable:

> It runs the risk of failing to distinguish between different types of confidentiality which attach to different types of document or to documents which have been obtained in different ways and elides privacy and confidentiality. Generalisations and the formulation of detailed implied terms are not appropriate.[4]

This thesis explores the reasons why confidentiality should be codified with respect to the arbitral process. That those involved - the parties, institutions, arbitrators, solicitors and witnesses - should be bound by its provisions. It argues that there is a pressing need to address the gaps in

[2] *Ali Shipping Corporation v Shipyard Trogir* [1998] 2 All ER 136; [1999] 1 WLR 314 (*Ali Shipping*).
[3] *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich (Bermuda)* [2003] 1WLR 1041; [2003] UKPC 11 (on appeal from Bermuda).
[4] ibid [1050].

the current law such as the consolidation of proceedings and the use of materials generated during the course of an arbitration. Equally important is the need to create a framework that determines how awards are used in related arbitrations and litigation, whilst meeting the societal expectations of judicial transparency. The stunting of commercial law and the hindering of its development due to the dearth of published awards is addressed threefold: by making award publication the default rule; requiring copies of all arbitral awards to be deposited with the courts; and enabling redacted awards to be published. The modernisation proposals continue by addressing and requiring transparency when third party funding is utilised; by defining and addressing exceptions including those in the interests of justice and what constitutes in the public interest. I view it as a fundamental necessity that the ethics, transparency and disclosure obligations of every arbitrator is core to ensuring the integrity and continued success of English arbitration. The arguments that excessive intervention, whether judicially or by statute, risk London's place in the world of arbitration are in my view misguided. An emphasis on openness, ethics and transparency will ultimately be more beneficial to English arbitration. The thesis concludes by proposing amendments that codify privacy and confidentiality in the Arbitration Act 1996.

Keywords

Arbitration; awards; concurrency, confidentiality; consolidation; development of the law; ethics; materials; privacy; public interest; reform; third party funding; transparency.

To Siti, Ezra and Elijah

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Aims

Privacy and confidentiality are fundamental features of arbitration. Yet their nature is frequently misunderstood, the terms being used interchangeably and oft misapplied. This should come as no surprise given the differing systems of civil and common law that may play a role and the notable differences that exist even between common law countries. Different laws may apply to the substantive dispute that has been referred to arbitration; to the arbitration itself including the procedure of the arbitration and the role of national courts in supervising or supporting it; to the arbitration agreement including issues as to its scope, effect, construction or validity; and to the award – including matters pertaining to enforceability, validity and recognition. Despite the freedom to choose the substantive law that will apply to their dispute, parties to international arbitration cannot always contract out of any applicable institutional rules or terms governing the dispute that may amend or replace the non-mandatory provisions of the procedural law at the seat of the arbitration. The potential for confusion and uncertainty is not only apparent, it is real. The consequences that flow from this, the issues that arise as a result and how to effectively address them whilst taking into account the disparate needs of the many stake holders are addressed.

This thesis will deal primarily with voluntary arbitration, more specifically relating to international commercial arbitration, whilst taking note of some of the concepts and philosophies arising out of investment and intellectual property arbitration. It will analyse the elements of confidentiality in juxtaposition with the interest of justice and the public interest in arbitration, offering a critique as to whether the latter outweighs the former. It addresses the current tensions between the contradictory rules on confidentiality as interpreted by the courts and whether they should be relaxed or abolished altogether given the potential for parties who are familiar with arbitration to abuse the advantage of confidentiality. It argues that codification by means of amendments to the Arbitration Act 1996 is a more appropriate approach. The potential impact on the desirability of London as a venue for international commercial arbitration as a method of dispute resolution a change in the law might entail, the unequal bargaining power of arbitrating parties and the desirability of greater transparency in arbitration are amongst the peripheral factors to consider.

Traditionally most texts did not address in any substantive form privacy or confidentiality in arbitration, the authors considering the issue as deserving of little or no comment. Despite that lack, there are relevant questions e.g., Who and how are individuals bound by it? How far does it extend? What are the remedies and penalties for breach? What are the exceptions? And how do privacy and confidentiality differ? In the absence of codification, it has been left to courts to determine the nature and extent of these questions. To understand why England chose not to

codify arbitral confidentiality requires an understanding and examination of the historical development of English commercial law.

Whilst addressing the principal elements of confidentiality, this thesis recognises that not all issues are equal - either in importance or the extent to which the courts have been required to consider them. The courts for example have regularly been called upon to decide issues relating to the use of awards and materials. Some issues have been touched on more lightly and infrequently, such as consolidation. Third party funding, award publication or what constitutes a public interest exception have yet to receive any detailed scrutiny. Only now has England's highest Court turned its mind to the ethical questions of transparency and the obligations of disclosure incumbent on an arbitrator.

It is more than 20 years since Neill's warning that: 'should English law no longer regarded the privacy and confidentiality of arbitration proceedings . . . as a fundamental characteristic of the agreement to arbitrate . . . there would be a flight of arbitrations … to more hospitable climes'.[5] Nevertheless, much has changed in the world in those intervening years. As this thesis will shew, academics, practitioners, the judiciary and commentators are broadly in agreement that there is scope for refinement and improvement in the current law on confidentiality in relation to arbitral proceedings. That reform is long overdue.[6]

Methodology

Confidentiality, if no longer the very essence of arbitration that it was once perceived to possess, is sufficiently recognised that its very existence to a large extent hinders research and analysis: arbitration awards are usually private and not published, generally coming only into the public domain in the event of an appeal. This thesis will rely principally on the core materials to which critical analysis will be brought i.e., case law, statute, academic texts, surveys, journals, foreign laws and the rules of various arbitral institutions. The principal methodologies used are as follows.

[5] Patrick Neill, 'Confidentiality in Arbitration,' 12 Arb. Int'l. 287 (1996) at 315 - 316.

[6] To take but a single example relating to consolidation, one only has to take a brief dip into the sad fable of *Interbulk Ltd. v Aiden Shipping Co. Ltd. ("The Vimeira")* [1984] 2 Lloyd's Rep. 66, [75] where Goff LJ urged a legislative solution be found such as that found in Hong Kong, deploring the fact that 'English arbitration law provides at present no power either to arbitrators or the Court to ensure that both arbitrations will be considered by the same tribunal either at the same hearing or at immediately succeeding hearings to avoid the danger of inconsistent awards'. Skilfully analysed in V V Veeder's 'Multi-party disputes: Consolidation under English law The Vimeira – a Sad Forensic Fable' (1986) 2 Arbitration International 4, 310. See also Anthony Diamond, 'Multi-Party Arbitrations A Plea for a Pragmatic Piecemeal Solution' (1991) 7 Arbitration International 408. The 1978 Commercial Court Committee in its Report on Arbitration (Cmnd. 7284) recommended that the High Court should have a statutory power to order arbitrations be consolidated.

1. An analysis of how the concept of confidentiality in arbitration has developed in English law; to identify the law's current strengths and weaknesses with a view to determining to what extent reform is required.

2. Conducting a comparative analysis of how arbitral confidentiality has developed outside England, including both common and civil law jurisdictions, in order to understand the diversity of approaches: how other countries had solved (or attempted to solve) the difficulties identified in this thesis. Focusing on international rather than domestic arbitration statutes, primarily on the pragmatic grounds that there are too many domestic arbitration laws in (say) Australia or the USA to include within the limits of a study such as this, where every State has the option to promulgate its own arbitration laws. Initially the legal systems of 112 countries were the subject of review. These included states which were active in the area of international arbitration; had relevant laws and possessed arbitral centres in their jurisdictions. For practical considerations this was subsequently reduced to 12 for more detailed consideration. The initial net had been cast too wide. It had included countries that did not publish in English. More importantly, that initial analysis revealed a number of countries had little substantive jurisprudence on arbitration law: the concept of arbitral confidentiality was often entirely absent. Inexorably there was a natural coalescence around those countries that had recognised the issues and/or had developed modern approaches and solutions to such issues as consolidation, the public interest or the publication of awards. It was those countries laws therefore that came under special focus i.e., the UNCITRAL Model Law and the following 11 countries: Australia, Canada, France, Germany, Hong Kong, Malaysia, New Zealand, Norway, Singapore, Sweden and the United States.

3. By analysing how selected arbitral institutions approached the principles and issues of confidentiality in their respective rules and terms. The challenge with respect to identifying which arbitral institutions to study in some respects mirrored that for the overseas jurisdictions. Amongst the determining factors was the availability and accessibility of published information e.g., whether an institution's rules were published on-line and in English: in practice all major centres do both. More importantly perhaps, the relative activity of the arbitral centre in the context of international arbitration. Whilst noting that this methodology may have its detractors, I view it as a pragmatic compromise: an institution's popularity amongst users is a relevant and significant factor

in its appeal to an international audience.[7]

Four tables highlighting the data collated appear at the end of Chapter 1. Table 1 details the arbitral activity of 25 international arbitral centres for the period 2005 - 2019. Table 2 compares the approaches of the UNCITRAL Model Law and the following countries: Australia, Canada, France, Germany, Hong Kong, Malaysia, New Zealand, Norway, Singapore, Sweden and the United States. Table 3 makes similar comparisons for the following institutions: the AAA/ICDR, CIETAC, DIS/GMAA, HKIAC, IBA, ICC, LCIA, LMAA, SCMA, SIAC and SCC. These methodologies provided the tools to aid identifying suitable and effective approaches with respect to privacy and confidentiality in international commercial arbitration and insights as to what form confidentiality amendments to the Arbitration Act 1996 might take. Table 4 is a typology of arbitral studies spanning four decades, from 1979 to 2019.

[7] See for example the ICC's written submissions in *Halliburton Co v Chubb Bermuda Insurance Ltd and others* [2018] EWCA Civ 817 (*Halliburton v Chubb*) to the Supreme Court: 'It is not apparent to the ICC, however, that the respective significance of an arbitral institution's perspective on the issues in this appeal is to be measured purely by the number of arbitrations that institution administers'.

Chapter 1: An Introduction to Confidentiality in Arbitration

'All government, indeed every human benefit and enjoyment, every virtue, and every prudent act, is founded on compromise and barter'.[8]

- *Edmund Burke*

Preamble: A Hypothetical Case Study - iWidgets

Should you had been fortunate enough to have been in the vicinity of EC4 on the appropriate day and bestowed of both sufficient curiosity and time on your hands, you might have walked into the Rolls Building, off Fetter Lane. Noting that there was hearing scheduled to be heard by the Intellectual Property List (ChD)[9] concerning the iWidget - a useful, popular and profitable device - you elect to sit in the public gallery to view the proceedings. The designer of the iWidget had outsourced their manufacture. Two satisfied commercial parties, until the designer discovered that the manufacturer was selling imitations of the iWidget. The designer sued, alleging that the manufacturer had improperly retained copies of the iWidget drawings, using them to make pirated versions of the iWidget.[10]

You may have heard the evidence being presented. Watched the examination and cross examination of witnesses and the conflict of expert testimony on the fundamental characteristics of an iWidget. Perhaps you listened intently to the judge's summing up and been impressed by the efficiency of the English judicial system. Or not, depending on your political temperament and outlook: 'The informed observer of today can perhaps be expected to be aware of the legal traditions and culture of this jurisdiction … But he may not be wholly uncritical of this culture'.[11]

Weeks pass. Perusing the Law Section of *The Times* one Thursday, you come across a report of the iWidget judgement. Having been an observer to part of the proceedings at least, you may well have formed your own conclusions as to the correctness or otherwise of the outcome. The

[8] Edmund Burke, HC Deb 22 Mar 1775.
[9] The Intellectual Property List is a specialist court within the Business and Property Courts of the High Court of Justice, based at the Rolls Building in London. It was set up to deal with claims and appeals concerning patents, registered designs, copyright issues, trademarks, semiconductor topography rights and plant varieties, claims and appeals concerning intellectual property rights.
[10] Whilst the iWidget is a fictional creation, my thanks nonetheless to V V Veeder and his ginger beer analogy with arbitration in 'Arbitrators and Arbitral Institutions: Legal Risks for Product Liability?' (2016) 5 Am. U. Bus. L. Rev. 335 for acting as the conceptual catalyst.
[11] *Lawal (Appellant) v Northern Spirit Limited* [2003] UKHL 35, [22] (Lord Steyn).

key part of this short fictional narrative is that however briefly was your interaction with the English legal system, what you experienced can be described as 'open justice,' a judicial principle that can be traced back from before the Magna Carta to the present day.[12] It should not be overlooked that it was after all English lawyers who substantially drafted the European Convention on Human Rights, of which Article 6 upholds the right 'to a fair and public hearing'.[13]

What if that dispute had come to arbitration? Our venue has now perhaps moved a five-minute walk away to the IDRC at Fleet Street. Endeavour to obtain access and see how far you get. Probably not past the pleasant but politely firm receptionist. The parties, the evidence, the arguments, and the results - the arbitration award - would in all probability be neither reported nor published. If one of the parties had appealed, it is possible that the matter may have found its way into the law reports. But there is no guarantee. The CPR Rules provide at 62.10 the default position that whilst arbitration claims be heard in private, it does not apply to the confidentiality of judgments.[14] Parties can and do request the court to anonymise the appeals process, although recent judgements suggest that the courts are in favour of greater openness in this regard, a subject discussed in depth in Chapter 8.

At this point a nagging question may have arisen in your mind along the lines of: 'why should I care?' An understandable sentiment. Arcane aspects of a business dispute between commercial parties of whom you may know little and care somewhat less, are unlikely to appeal to the average citizen. But instead of iWidgets, let us suppose that the dispute had been between an energy company and a public utility, the outcome of which would determine the size of the price increase of your domestic electricity charges. Discretionary spending on our hypothetical iWidgets may not hold your attention. But it is likely that you pay for domestic gas or electricity and very much hold a view about the size of your utility bill. The English courts have not had such a clearly defined public interest case as that of *Esso Australia Resources Ltd v Plowman (Minister for*

[12] If our hypothetical iWidgets resonated in some small way, it may have called to mind *Prince Albert v Strange* (1849) 1 Mac & G 25; 41 ER 1171, widely regarded as the first English case that dealt specifically with breach of confidence as a potential basis for granting relief. The claimant sought to prevent the publication of a catalogue containing unpublished etchings made by Queen Victoria and the Prince. An employee of the Royal printer made unauthorised copies of plates provided which later appeared in the catalogue. Lord Cottenham held that the Queen and Prince had property rights in the etchings and that an injunction could be founded upon 'breach of trust, confidence, or contract' because the impressions must have come into the defendant's possession by such breach.
[13] Buxton LJ (1999) Chapter 6 in *The Human Rights Act and the Criminal Justice and Regulatory Process*, Hart Publishing. A key author of the ECHR was lawyer and MP David Mexwell-Fyfe, whose contribution to the Convention was so significant that he has been described as: 'the doctor who brought the child to birth'.
[14] See *Symbion Power LLC v Venco Imtiaz Construction Co* (with respect to the public interest in publishing judgments challenging arbitral awards) and *Teekay Tankers Ltd v STX Offshore and Shipbuilding Co Ltd* (on whether non-parties should be allowed access to confidential information in a party's particulars of claim) both discussed in Chapter 7.

Energy and Minerals (Esso/BHP v Plowman),[15] a 1995 Australian decision rejecting the hitherto uncontroversial English concept of arbitral confidentiality. *Esso/BHP v Plowman* addressed some difficult political and philosophical choices that had not been previously considered: specifically the public's right to know how consumer energy prices were set.

That private arbitration scenario could have been mirrored in almost any jurisdiction. Singapore has its equivalent to the IDRC at Maxwell Chambers, the 1930's former colonial customs house (and one-time driving centre) in Singapore. Or at the AIAC (formerly the KLRCA), a modern integrated dispute resolution centre dealing with arbitration, mediation, Islamic finance and sports (CAS) disputes, located at the Bangunan Sulaiman, a building that originally housed the Federated Malay States Railway in Kuala Lumpur.[16] Welcome to the secretive world of arbitration. If the wider public thinks at all about arbitration, it would most probably view it as some form of private justice. It certainly has its own ecosphere of privacy, confidentiality and secrecy from which outsiders are excluded. But should that be so? Can self-policing in any form of judicial dispute resolution be acceptable? This thesis takes the position that it is not, that there is a fundamental need to frame society's reasonable expectations: it should not be the preserve of a small, professional clique. As will be explored in this thesis, criticism of the status quo is widespread amongst academics, lawyers and the judiciary: practitioner's views tend to be more evenly balanced, as highlighted by the opposing arguments in the submissions to the Supreme Court in *Halliburton Co v Chubb Bermuda Insurance Ltd and others* [2018] EWCA Civ 817 (*Halliburton v Chubb*).

The aspects of the Arbitration Act 1996 viewed as being in need of reform typically relate to the appeal of arbitral awards and confidentiality. This thesis asks who and what are bound by these obligations. Is confidentiality an implied term as per *Ali Shipping Corporation v Shipyard Trogir* [1998] 2 All ER 136; [1999] 1 WLR 314 (*Ali Shipping*) or does the Privy Council's expressed reservations to that approach in *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich (Bermuda)* (*AEGIS v European Re)*[17] better reflect the law? Lord Hobhouse dismissed as unworkable any attempt at generalisation and the formulation of detailed implied terms as being inappropriate. Is that approach still relevant, or sustainable? This thesis argues that confidentiality should be codified with respect to all aspects of the arbitral process. Firstly to encompass the actors involved: the parties, institutions, lawyers, arbitrators

[15] [1994] 1 VR 1.
[16] The Centre was established under the Asian African Legal Consultative Organization ("AALCO"), an international organization comprising 47-member states from across the region.
[17] *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich (Bermuda)* [2003] 1WLR 1041; [2003] UKPC 11 (on appeal from Bermuda).

and witnesses. Secondly to address the many gaps in the law of arbitral confidentiality.

Those gaps have long been there, as the number of years judges have been grappling with the issues of consolidation, the use of arbitral materials and arbitration awards highlight. More recently have concerns about the lack of development of the law have surfaced. It took the world's largest and most expensive oil spill from the MODU "Deepwater Horizon" to bring to the fore arguments about the ethics and transparency of arbitrators.[18] The televised proceedings in the Supreme Court have helped open a window into what were otherwise remote, arcane branches of the law. Concerns over how to deal with third party funding demand attention. In my view Lord Thomas was broadly correct: the dearth of published awards has stunted and hindered the development of commercial law.[19] It is addressed threefold: by making award publication the default rule; requiring copies of all arbitral awards to be deposited with the courts; and enabling the publishing of redacted awards. Ultimately parliament needs to define and address the gaps in the law: including identifying what constitutes 'in the interests of justice' and 'in the public interest', as well as the extent and scope of any exceptions.

The starting point in this Chapter is to analyse and understand how arbitration has developed in England: to study the internal and external dynamics that have guided us to the current problematic state. How the commercial imperatives to maintain London as an international arbitration centre have acted to resist change and continue to shape its evolution. If this was a political analysis, it would be hard not to describe the views of the establishment as reactionary: the DAC and its successors views of confidentiality has remained unchanged for more than 40 years. Chapters 2 and 3 compare how overseas legal systems and selected arbitral institutions have viewed these concerns and the steps that they have taken. Chapters 4 and 5 address the less controversial topics related to the use of materials and awards, consolidation and concurrency. Chapter 6 deals with third party funding, a development not envisaged when the 1996 Act became

[18] In *United States v BP Exploration & Prod. (In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010)* 148 F. Supp. 3d 563; 2015 U.S. Dist. LEXIS 160150; 2015 AMC 2921; 81 ERC (BNA) 2205, Barbier J ruled in the Findings of Fact and Conclusions of Law of Phase Two Trial on January 15, 2015, that 4 million barrels of crude oil were released from the reservoir, of which 3.19 million barrels or approximately 168 million gallons were released into the Gulf of Mexico (0.81 million barrels of oil were recovered). Such figures can be difficult for the human mind to comprehend. In a shipping context, 4 million barrels of crude oil is the equivalent of two fully loaded 300,000 tonnes deadweight VLCC's (very large crude oil carriers) i.e., a 600,000-tonne spill. By comparison the *Exxon Valdez* spilled around 37,000 tonnes of crude oil into Prince William Sound, Alaska on 24 March 1989. The UK's worst spill was from the *Torrey Canyon*, which went aground at Pollard's Rock on Seven Stones reef between the Cornish mainland and the Isles of Scilly on 18 March 1967, spilling more than 100,000 tonnes of crude oil into the English Channel.

[19] Lord Thomas' strong views with respect to a lack of arbitration appeals appeared to have softened by the time of his April 2017 speech in Beijing, where he recognized that the majority of appeals emanate from commodity and shipping arbitration disputes, which markets do not generally 'opt out' of the ability to appeal to the courts on a point of law. See 'Commercial Dispute Resolution: Courts and Arbitration', The National Judges College, Beijing 6 April 2017 at 7.

law. Chapter 7 aims to define and formulate an approach to public interest exceptions. Chapter 8 has a more philosophical underpinning in relation to the law's development through s.69 appeals and award publication. Chapter 9's concerns in relation to the ethical transparency of arbitrators is hardly new, but the focus on disclosure and how that should be managed is very much at the forefront of current legal thinking. Chapter 10 summarises the thesis and concludes with proposals for reform. The four tables described in the methodology appear at the end of Chapter 1.

Fast, Cheap, Private?

The typical textbook mantra is misleading. Arbitration is neither fast nor cheap. It is however private and supposedly confidential. But how and why? And to what extent? But first, what is arbitration and why do parties arbitrate? 'Giles Jacob's Law Dictionary' of 1729 defined an 'arbitrator' for the first time:

> An Arbitrator is a private extraordinary Judge between Party and Party, chosen by their mutual Consents, to determine Controversies between them. And Arbitrators are so called because they have an arbitrary Power; for if they observe the Submission and keep within due bounds their Sentences are definitive, from which there lies no Appeal.[20]

Hirst LJ described arbitration in *O'Callaghan v Coral Racing*[21] as 'a procedure to determine the legal rights and obligations of the parties judicially, with binding effect, which is enforceable in law, thus reflecting in private proceedings the role of a civil court of law'. Despite there being no statutory definition of arbitration, the courts have developed tests to determine parties' intentions regarding whether they agreed to arbitrate. Arbitration proceedings may arise from an arbitration agreement voluntarily entered into by the parties or from statutory provisions, such as employment arbitration tribunals or consumer arbitrations.

As to why parties might prefer to arbitrate rather than litigate, the following case highlights the potential pitfalls faced by those engaged in international commerce when a contract sours and a dispute arises. Nelson Honey, a New Zealand company supplying honey and William Jacks, a Singaporean distribution company, had been doing business together for several years. There was no written contract. Two consignments of honey were rejected by the buyers for being off specification. William Jacks' sued Nelson Honey in Singapore.[22] Nelson Honey sued William

[20] Jacob, New Law Dictionary (1729) title 'Arbitrator'.
[21] [1998] EWCA Civ 1801.
[22] *William Jacks & Co (Singapore) Pte Ltd v Nelson Honey & Marketing (NZ) Ltd* [2015] SGHCR 21

Jacks in New Zealand.[23] Both Courts held that they had jurisdiction to hear the dispute. The case illustrates one reason behind arbitration's popularity amongst internationally trading companies: it avoids the risk of parallel and concurrent proceedings in two different jurisdictions. The court records show that the Singapore claimants filed a notice of discontinuation. There are no judgments from either case, but it is likely that they settled.[24] Two competing judicial sets of proceedings were likely to have focused minds on the issues of cost and the possibility of inconsistent judgements - an echo of Longmore LJ's warning in *Abu Dhabi Gas Liquefaction Co. Ltd v Eastern Betchel Corporation (Abu Dhabi Gas).*[25]

Gaillard created a terminology that divided participants in international arbitration into one of three categories. The first comprised the arbitrators and parties, the 'essential actors'. Essential, on the premise that there is no arbitration without parties or without arbitrators, but arbitration can exist without anyone else.[26] In Gaillard's view the parties are probably the social category that feels the most neglected in contemporary arbitration. He cited as an example the CCIAG (a group for corporate counsels actively involved in international arbitration) whose web site home page proclaims:

> The CCIAG is an Arbitration users' interest group, aiming at an optimized management of disputes in the best interest of the users… Simply put, the CCIAG is the voice of the users.[27]

No doubt the CCIAG is a worthy institution committed to the fair and efficient promotion of dispute settlement: a representative voice of the primary users of arbitration however, it is not. Gaillard is not alone in his view that the institution of arbitration has evolved with insufficient attention being paid to the primary needs and concerns of its core users.[28] Numerous studies and surveys into arbitration provide a barometer of the sentiments and preferences of those connected with arbitration.[29] Notwithstanding the perception that these (typically sponsored) surveys, are focussed on targeting specific market segments and audiences, there are two more pertinent criticisms. Firstly, that the surveys disproportionately collate the views of those involved in institutional rather than ad hoc arbitrations, despite the overwhelming statistical evidence of the

[23] *Nelson Honey & Marketing (NZ) Ltd v William Jacks and Company (Singapore) Pte Ltd* [2015] NZHC 1215.
[24] With thanks to Petra Butler and Dhjarshini Prasad (2020) 'A Study of International Commercial Arbitration in the Commonwealth' Commonwealth Secretariat at 2.2 for highlighting the Nelson Honey and William Jacks dispute.
[25] *Abu Dhabi Gas Liquefaction Co. Ltd v Eastern Betchel Corporation* [1982] 2 Lloyd's Rep. 425.
[26] Emmanuel Gaillard, 'Sociology of International Arbitration' (2015) 31 Arbitration International 1.
[27] http://www.cciag.com accessed 10 February 2019.
[28] Gaillard's two other categories of social actors are service providers who dedicate their activity exclusively, or almost exclusively, to international arbitration; and value providers such as states and certain types of NGO's.
[29] See Table 4 for a typology of arbitration surveys carried out between 1979 and 2019.

preference for the latter.

The second criticism is that a disproportionate number of the respondents to these surveys are the secondary tier of users i.e., the service providers such as law firms, barristers' chambers and arbitral institutions. That the surveys therefore do not adequately represent the real users or arbitration such as the ship owners, charterers, shippers, buyers and sellers of goods, trading companies, construction firms, insurers or banks for example that form the bulk of the claimants and respondents in commercial arbitration. How narrow is the range of views captured? Appendix C of the 2006 Report on the Arbitration Act 1996[30] provides a breakdown on the types of users who responded. That for 'A Party' was 8 out of 500 responses, i.e., less than two percent. As the report highlighted, the number of actual parties who responded directly whilst disappointing, was not considered surprising in the light of experience.[31] Combined with the other core users such as arbitrators, together they made up just over one third of the respondents. Lawyers by comparison accounted for almost two thirds (64 percent) of those who took part in the survey. Was that 2006 survey a correct reflection?[32] Probably. Only a quarter of the responses to a 2012 survey conducted by White & Case and the Queen Mary University[33] came from arbitrators and none were identified as having originated from a party. It is a stark reminder that the views of those who use and pay for arbitration are largely absent.

The Development of Arbitration in England

The origins of arbitration are unclear. All that can be said with certainty is that as a dispute resolution mechanism it is rooted in antiquity, pre-dating legal systems and the courts. Lord Mustill described it as a dispute resolution process more than 2500 years old.[34] Others propose earlier origins. They include 'Domke on Commercial Arbitration' and Callaghan, who suggests that there is evidence for its existence in 2550 B.C. Heraldus' *Animadversiones* describe a court of reconcilement that existed among the Greeks.[35]

[30] Bruce Harris 'Report on the Arbitration Act 1996' [2007] 23 Arbitration International 3.
[31] ibid para 10.
[32] Whether the survey was tilted towards (say) lawyers or arbitrators is not known. Details of the methodology are described as a mailing list compiled from various (unspecified) sources, with in excess of 2,200 emails being sent out to individuals and bodies, who were also asked to pass details of the survey to others who might be interested.
[33] White & Case and the Queen Mary University: International Arbitration Survey: Current and Preferred Practices in the Arbitral Process - (2012). The initial phase of the survey was an online questionnaire comprising 100 questions completed by 710 respondents of whom the majority of respondents were primarily private practitioners (53 percent), followed by arbitrators (26 percent), in-house counsel (10 percent), as well as counsel from arbitral institutions, academics and expert witnesses (together, 11 percent). Refer to Table 4 for a more expansive commentary.
[34] Newman & Hill (2004) p.1.
[35] I at 372.

References to arbitration practice in the Roman period abound. Indirect evidence points towards arbitration being used during the Roman occupation of the British Islands for the settlement of commercial disputes. The famed Roman jurist Javolenus Priscus - an expert on the law of arbitration and quoted frequently in Justinian's Digest - was appointed by the emperor Domitian in AD 84 as *legatus iuridicus* in Britannia. The role was not only as the governor Agricola's legal adviser, but also as the emperor's deputy in charge of the administration of justice. Agricola's son-in-law Tacitus tells us that in the time of Claudius, that Londinium was a place 'not distinguished by the colonial title, but particularly famed for the number of its merchants and the extent of its commerce.'[36] Roebuck takes the view that: 'it is likely that a system similar to that described in Roman Arbitration applied here contemporaneously'.[37] The Apostle Paul's direction to the Corinthians to appoint people from their own community for the purpose of resolving disputes rather than submitting disputes to the court for resolution would be a concept familiar to the modern commodity arbitrator.[38] Over time this arbitral linkage extended from the Greeks to the Romans to the law merchants.

In the aftermath of the Roman occupation, merchants, Guilds, land owners, the nobility and other groups continued to use arbitration to settle disputes. The King, the Chancellor and the King's Council resorted to arbitration to settle ecclesiastical and commercial conflicts. For the landed gentry it offered a means to settle property disputes. It provided a means to agree on compensation for physical assault and homicide. City and borough courts were active in promoting arbitration, whether in disputes between private litigants or between craft and religious guilds. A lady could bring an arbitration for a man's failure to honour a promise to marry.[39] Mcsheffrey recounts how in 1480 Edward IV wrote to the Mercers' Company and asked them to arbitrate a dispute that appears to involve a deal amongst two of their members, who had made 'a sinister bargain' to arrange a marriage for one to marry the wife of another mercer for the sum of 540 Flemish pounds. Despite the unusual subject matter (by implication, an apparently murderous plot) by the king's letter and the Mercers' Company's own court minutes, such a matter was considered capable of being dealt with by private arbitration of the Worship Company of Mercers.[40]

Shakespeare wrote: 'The end crowns all, And that old common arbitrator, Time, Will one

[36] James S Reid (1913) *Municipalities of the Roman Empire*, 228.
[37] *Bricks Without Straw: Arbitration in Roman Britain* (2007) 23 Arbitration International (2007) 143.
[38] I Corinthinans 6:1-4.
[39] Although the right for damages was lost if she should marry another before the award was made.
[40] Mcsheffrey S, *Marriage, Sex, and Civic Culture in Late Medieval London* (2006) University of Pennsylvania Press. According to the King, as the woman was still married to a husband very much alive 'such a bargain could only be kept by conspiring to kill'.

day end it'.[41] Throughout the middle ages the administration of justice depended on the cooperation of local society, the Crown lacking the means or resources (through the modern tools of a police force or standing army) to enforce what was primarily a punitive system of justice. These disadvantages manifested themselves in inefficiency and corruption. Compare the similarities between Spelman's sixteenth century comments: 'the vast majority of cases commenced in the central courts never reach trial; the issue of a writ is as much an inducement to compromise as it is a threat to pursue the law to its conclusion'[42] with those of Biggs LJ, who estimated that around 90 percent of civil cases settle before trial.[43] Arguably little progress in four centuries - or evidence of common sense and pragmatism ruling the day?

The earliest surviving manuscript recording an arbitration award of any kind in England since the Roman occupation dates to 1249. Arising from a dispute between two Jewish brothers who sought to arbitrate the physical division of land left to them equally by their late father, the fragmentary Hebrew manuscript is kept in Westminster Abbey.[44] In his Alexander Prize Essay on arbitration and law in the Middle Ages, Powell noted: 'Violent self-help is the only form of extra-judicial remedy for the settlement of disputes which has attracted much notice from historians[45]' However it was not simply a matter of choice between self-help and the law. There were alternatives: mediation, negotiation or submission to the award of elected arbitrators. Bacon, commentating on law in the Anglo Saxon period, noted that physical force was the natural method of redressing wrongs: '[w]hen men are grouped in small families or communities, this leads naturally to the blood feud'.

Recourse to court was considered to be an unpopular innovation that was disliked and with difficulty followed: '…regarded, in fact, much as some of us regard the submission of international disputes to arbitration'.[46] The suggestion that going to court was as tiresome and unwelcome an innovation as arbitration itself was unmistakeable. Typical of the arbitration awards of the medieval period that came before the courts for enforcement was the case of *Anonymous*[47] concerning an appeal over the date and substance of an award: 'all suits and quarrels should cease and determine, and that the defendant should pay to the plaintiff forty pounds, for

[41] Troilus and Cressida.
[42] *The Reports of Sir John Spelman*, ed. J. H. Baker (Selden Soc., xciii- xciv, 1976- 7) ii.
[43]Briggs LJ, Civil Courts Structure Review: Interim Review https://www.judiciary.gov.uk/wpcontent/uploads/2016/01/CCSR-interim-report-dec-15-final-31.pdf accessed 19 April 2020.
[44] Westminster Abbey Muniment WAM6816. See An Arbitration Award from AD124. Professor Derek Roebuck. *ICCA Newsletter* # 5, April 2014.
[45] Powell, Edward. 'Arbitration and the Law in England in the Late Middle Ages: The Alexander Prize Essay'. *Transactions of the Royal Historical Society*, vol. 33, 1983, 49.
[46] Holdsworth W.S., *A History of English Law*, Methuen & Co, (1903) 43.
[47] (1564) 2 Dyer 243b and 73 E.R. 538.

recompense of a slander'.

In their discussion of the medieval guilds Pollock and Maitland wrote:

> There can hardly exist a body of men permanently united by any common interest that will not make for itself a court of justice if it be left for a few years to its own devices.[48]

The guilds gave rise to the local commercial courts of the middle ages. Over the centuries, the common law courts absorbed most of these special jurisdictions and in so doing incorporated into the common law many of their mercantile rules. The discrepancy between law and commercial practice - an inevitable outcome of the reactive manner in which courts facilitated the development of the law - encouraged merchants to settle their differences without resort to the courts. There was however a problem. Agreements to arbitrate were not enforceable at common law. Lord Coke had held in *Vynior's Case*[49] that agreements to arbitrate were revocable by either party. The steady expansion of the economy and the growing demand for arbitration made the need for legislation increasingly obvious, culminating in the first codification of English laws on arbitration by an act of Parliament in 1698.[50]

In his commentary of the 1698 Act, Blackstone wrote of the importance and usefulness of 'peaceable and domestic' arbitration tribunals, especially for settling matters and other mercantile transactions: 'which are difficult and almost impossible to be adjusted on a trial at law, the legislature has now established the use of them'.[51] It was drafted on behalf of the Board of Trade by John Locke, no admirer of the legal profession, who in a journal entry for 1674, listed among those who hindered trade 'multitudes of lawyers'.[52] The Act made it lawful for Merchants and Traders desiring to end any 'Controversie Suit or Quarrel' for which there was no other remedy

[48] Pollock and Maitland (1898) *The History of English Law*, 667.
[49] 8 Co. Rep. 81b, 77 Eng. Rep. 597 (1609).
[50] William III, 1697-8: An Act for determining Differences by Arbitration. [Chapter XV. Rot.Parl. 9 Gul. III.p.3. n.5], 'Whereas it hath been found by experience, that references made by rule of court have contributed much to the ease of the subject, in the determination of controversies, because the parties become thereby obliged to submit to the award of the arbitrators…now, for promoting trade, and rendering the award of arbitrators more effectual in all cases for the final determination of controversies referred to them by merchants and traders, or others, concerning matters of account of trade, or other matters, be it enacted…' in *Statutes of the Realm: Volume 7, 1695-1701*, ed. John Raithby (s.l, 1820), 369-370. *British History Online* http://www.british-history.ac.uk/statutes-realm/vol7/pp369-370 accessed 26 November 2019.
[51] Bl Comm 17.
[52] Henry Horwitz & James Oldham, 'John Locke, Lord Mansfield, and Arbitration During the Eighteenth Century' (1993) 36 The Historical Journal 137, 139. 'Locke divided the population into two categories: ' those that contribute any way to your trade' and ' such as are either idle... or which is worse hinder trade... [as] Multitudes of lawyers'. See also James Oldham and Su Jin Kim, 'Arbitration in America: The Early History' (2013) 31 Law & Hist. Rev. 241, 246.

but by a personal action or suit in equity to go to arbitration.[53]

Seeking a formula that would encourage private dispute settlement between merchants without recourse to the courts, Locke's solution was based on the familiar and well-understood practice of consensual referrals of litigated cases to arbitration. Referrals (or references, both terms being still in use) had an important advantage over private arbitration. When a reference was agreed to, the agreement was made a rule or order of court, thus making the arbitration agreement and so generally the award also, enforceable by law. Mathew Bacon was one of the eighteenth century's ablest law commentators. Critical of the obscurity of legal literature of the day he wrote:

> It is one of the greatest Objections to our Laws, that the Way to the Knowledge of them is so dark and rugged, so full of Windings and Turnings, that the most Knowing very often find it difficult to be able to pronounce with Certainty.[54]

To address that lack of awareness he published a compilation of the practice of English arbitration entitled: 'The Compleat Arbitrator: or, the Law of Awards and Arbitraments' in 1731. It was the first self-help guide to assist lawyers pick their way through the 'windings and turnings' of the system. Arbitration was further regulated in the nineteenth century. The Civil Procedure Act, 1833, rendered the authority of an arbitrator irrevocable. The Common Law Procedure Act, 1854 was substantially devoted to arbitration and is considered to have formed the foundation for subsequent arbitration laws. It introduced for the first time the provision to allow an arbitrator to state his award in the form of a Special Case for the opinion of the court. The Board of Trade Arbitrations Act 1874 was an Act to amend the powers of the Board of Trade with respect to inquiries, arbitrations, appointments, and other matters under Special Acts; it also amended the Regulation of Railways Act of 1873, so far as regards the reference of differences to the Railway Commissioners in lieu of Arbitrators.

The second half of the nineteenth century saw an increasing use of standard form contracts containing arbitration clauses. Coinciding with the steady increase in the number of commercial arbitrations, it pointed towards the need to improve the legal framework. This manifested itself in the Arbitration Act 1889. The Arbitration Act 1934 was a result of the recommendations of a

[53] The details of many of these arbitrations were lodged in court and, through a database maintained by The National Archives, provide a rich historical source of information. See https://discovery.nationalarchives.gov.uk accessed Good Friday, 2020.

[54] Bacon set out to make the law of arbitration more accessible following the introduction of the 1698 Act. In a radical change of approach, his treatise *A New Abridgment of the Law* compiled the law by subject matter rather than the then practice of listing statutes and cases under alphabetical headings.

Committee chaired by MacKinnon J in 1927. A further consolidation of the arbitration legislation was brought about by the Arbitration Act 1950 which reproduced in consolidated form (without amendment) the law contained in the Arbitration Acts, 1889 to 1934. Confidentiality and privacy were not addressed. The Arbitration Act 1975, which gave effect to the New York Convention under English law, was concerned only with non-domestic arbitrations and required the English courts to stay English proceedings brought in breach of an arbitration clause in a non-domestic agreement.[55]

During the final reading of the Arbitration Bill in the House of Lords in February 1979, Lord Hacking expressed the view that the Bill would provide the foundation for the development of an international arbitration centre based in London. That the country's future in international arbitration lay not only in the reforming of our laws but also in the provision of appropriate facilities for arbitrations: 'a well-equipped building, arbitration halls, conference rooms and a library; an efficient secretariat and a service for reporting arbitrators' decisions'.[56]

The Arbitration Act 1979 introduced sweeping changes. Judicial control of arbitrations was reduced. It abolished the general power of review of the Courts by means of case stated and replaced it with specific but limited powers of review. The 1979 Act also contained a number of 'tidying-up' amendments to the Arbitration Act 1950. The Brussels Convention of 1968 was implemented into English Law by means of the Civil Jurisdiction and Judgments Act 1982, which impacted on the ability of arbitrators to order security. The Consumer Arbitration Agreements Act 1988 provided a means of protecting consumers from being bound by the operation of arbitration clauses.

The Impetus for Change

The uncertainty of English arbitration law in the years prior to the Arbitration Act 1996 gave it a complex and uncertain hew, being dealt with by the Arbitration Acts 1950, 1975 and 1979 and a large body of case law. As Lord Fraser of Carmyllie summarised the then situation:

> Anyone coming for the first time into contact with an English arbitration, and wishing to

[55] One of the most important international Conventions with respect to arbitration was the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). This laid down a system for the judicial recognition and enforcement of arbitration awards made in other countries without challenge to the merits of the award.

[56] If any region has taken up that challenge however, it is Asia. Singapore with its Maxwell Chambers/Maxwell Chambers Suites and Malaysia in the form of the AIAC. Hong Kong is also aiming to capitalise on the colonial legacy/arbitration connection with a new hub in the historic French Mission Building (previously utilised as the Court of Appeal) from 2021.

> acquaint himself with the relevant principles of law, might reasonably look to the current Arbitration Acts (those of 1950, 1975 and 1979) for a coherent exposition of the central principles of arbitration law. If so, he would be disappointed.[57]

What emerges from a review of the English cases prior to 1996 was the implied obligation arising out of the nature of arbitration for both parties not to use or disclose materials obtained in the arbitration for any other purpose. This included documents prepared for and used in the arbitration or disclosed or produced in the course of the arbitration; transcripts or notes of the evidence in the arbitration; witness evidence given in the arbitration; and the award, save with the consent of the other party or pursuant to an order or leave of the court.

International developments led directly to reform of English arbitration law. Doubts as to the efficacy of the New York Enforcement Convention were voiced by a number of small trading nations, with various suggestions for improving it being put forward to the United Nations in 1977. But it was the United Nations Commission on International Trade Law (UNCITRAL) which provided a more far-reaching solution. Rather than choosing to strengthen the New York Convention, it sought the adoption by trading nations of a common series of rules for international arbitrations. UNCITRAL agreed on proposals for a Model Law, that was officially adopted by the United Nations in June 1985. That intensified an existing concern in England of the risk that foreign lawyers and participants[58] would be further discouraged from using English law and arbitration. The implementation by various countries competing with London for international commercial arbitration of the Model Law exacerbated those concerns. The Model Law itself was modified in a number of respects much later in 2006. One of the changes was the addition of a new Article 2A, which attempted to ensure consistency of interpretation in all countries which have adopted the Model Law as part of their domestic law.

The Departmental Advisory Committees

The Departmental Advisory Committee (DAC) was established by the Department of Trade and Industry to advise on potential changes to the Arbitration Acts, a remit later widened as to whether England should enact the UNCITRAL Model Law. The DAC reporting in 1978 prior to the passing of the Arbitration Act 1979 was critical of English arbitration law, considering the courts as being too willing to intervene in the arbitral process. Arbitrating in England was seen as unattractive for foreign users, with London being viewed at risk of losing out to overseas jurisdictions as an international commercial arbitration venue. Criticisms included its

[57] HL Deb 18 Jan 1996, vol 568, col 761, quoting Mustill & Boyd.
[58] The UNCITRAL Model Law on International Commercial Arbitration: a Consultative Document (1987).

inaccessibility to lay and foreign users alike. It was perceived as being slow and expensive: 'litigation without wigs'.[59] But not all of the DAC's recommendations were adopted. Whilst the 1979 Act did significantly restrict the right of appeal and so put a break on intervention by the Courts, nonetheless it did not address the more fundamental problems.

The DAC, under the chairmanship of Mustill LJ, reported in June 1989. It considered that the existing law was unsatisfactory, was found predominantly in case law and inaccessible to all but specialist lawyers. That the relevant statute law was spread out in the Arbitration Acts of 1950, 1975 and 1979 and a mixture of subordinate legislation was considered unhelpful. The DAC had the difficult task of balancing a conflicting array of jurisdictional approaches, including those of the numerous arbitral organisations. There was an awareness that privacy and confidentiality were seen by its users as essential, defining characteristics of English arbitration, a view bolstered by the findings of contemporary studies. Research by the London Business School's in 1992 for example, found that confidentiality was ranked ahead of neutrality and enforceability as the most important perceived benefit for US and European users of international commercial arbitration.[60]

Coinciding with the DAC's deliberations, the English courts were being required to examine the legal basis for such principles and the extent of the exceptions 'without seriously questioning the existence of the general principles themselves'.[61] Collectively these cases highlighted the difficulties in codifying an area of law that was still very much a work in progress, although the 1995 Appeal Court decision in *Ali Shipping* was helpful in establishing an obligation of confidentiality in arbitration, with specified exceptions.

The Mustill Report took two divergent views for the United Kingdom. For Scotland it recommended adoption of the Model Law.[62] But for England, Wales and Northern Ireland it advocated an alternative approach, drawing up a new Act on the grounds that case law and practice were too well developed to justify the Model Law's wholesale incorporation. This Act would state the key principles of the English law of arbitration, both statutory and where practicable, those of the common law. The principal drive was to ensure London continued to be

[59] The origin of the expression is unclear, but appears to have been first used in print by Maxwell J Fulton in *Commercial Alternative Dispute Resolution* (Law Book Company 1989) 55.
[60] The London Business School's 1992 study on behalf of the LCIA of Fortune 500 US corporations. Cited by the DAC Report on the Arbitration Bill dated February 1996, paras 10-17.
[61] These were principally: *Oxford Shipping Co Ltd v Nippon Yusen Kaisha (The Eastern Saga)* [1984] All ER 835; *Dolling-Baker v Merrett* [1990] 1 WLR 1205; *Hassneh v Me*w [1993] 2 Lloyd's Rep. 243); *Hyundai Engineering v Active* (unreported, 9 March 1994); *Ins Company v Lloyd's Syndicate* [1995] 2 Lloyd's Rep. 272; *London & Leeds Estates Limited v Paribas Limited (No. 2)* [1995] 02 EG 134).
[62] Enacted as part of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 chap 40.

the preferred venue for international arbitration: 'We are satisfied that these … would answer the needs of keeping English arbitration law up to date and remaining in the vanguard of the various systems currently enjoying the preference of regular international users'.[63] Despite those admirable aims, the first draft Bill in February 1994 did little more than consolidate the existing statutes of 1950, 1975 and 1979.

In an Interim Report in April 1995, the DAC was forced to acknowledge that the draft Bill circulated in February 1994, whilst a 'highly skilful piece of work' was not what most users actually wanted. Instead of consolidating the existing Acts, a new Bill should be drawn up, grounded on the objectives set out but reinterpreted more along the lines of a restatement of the law, in clear and 'user-friendly' language. The Bill would so far as possible follow the structure and spirit of the Model Law.[64] A fresh review transpired and the DAC, now under the new chairmanship of Saville LJ, produced a completely new draft Bill in December 1995.

The 1996 DAC Report took the view that unsettled areas of the law were better left to the common law to evolve and so did not address them in the draft Act. One such area regarded privacy and confidentiality. Recognising this area deserved special mention, the Report highlighted the long-held assumptions of privacy and confidentiality as general principles in English commercial arbitration, subject to various exceptions. That privacy and confidentiality, with certain exceptions, were long assumed to be generally applicable principles in English commercial arbitration and that the English courts had only recently been called upon to: 'examine both the legal basis for such principles and the breadth of certain of these exceptions, without seriously questioning the existence of the general principles themselves'.[65]

The DAC noted that some arbitral institutions such as WIPO and the LCIA responded to the Australian decisions by amending their arbitration rules to provide expressly for confidentiality and privacy. On the other hand there was no statutory guidance with respect to confidentiality in the UNCITRAL Model Law whatsoever. Whilst the Committee was persuaded of the desirability of placing these general principles on a firm statutory basis: 'grave difficulties arose over the myriad exceptions to these principles - which are necessarily required for such a statutory provision'. As the DAC explained: 'it soon proved controversial and difficult'. Quoting Lord Mustill on the difficulty of defining what constituted 'confidential' in a House of Lords decision

[63] Report on the UNCITRAL Model Law on International Commercial Arbitration issued by the Departmental Advisory Committee on Arbitration Law, Her Majesty's Stationery Office, Department of Trade and Industry (1989). The Report was published as 'A New Arbitration Act for the United Kingdom?' in 3 Arbitration International (1990).
[64] ibid para 108
[65] Report on the Arbitration Bill 1996 para 11.

In Re. D (Minors) (Adoption Reports: Confidentiality)[66]*:*

> To give an accurate exposition of confidentiality at large would require a much more wide-ranging survey of the law and practice than has been necessary for a decision on the narrow issue raised by the appeal, and cannot in my opinion safely be attempted in the abstract.[67]

The DAC considered that codifying the principles of confidentiality could create two issues they viewed as intractable: the codification of arbitral confidentiality and setting out effective sanctions for breach of the parties' obligation of non-disclosure. It highlighted some of the exceptions to privacy and confidentiality which were considered to be 'manifestly legion and unsettled in part'. It made reference to the 1930 *Lena Goldfields Case* where the arbitration tribunal in London opened the hearing to the press but not the public. That had been justified in order to defend the proceedings against fierce criticisms that appeared in the USSR state-controlled newspaper Pravda: on 9 September 1930 the paper attacked the tribunal for making an award without the third Soviet arbitrator, that as 'bad jugglers of figures' unable even to amuse children, 'they ought to find their audience amongst the savages of the Pacific islands who do not know how to count up to three'. A reciprocal dig at the British.[68] Lloyd George defended his negotiations with the Soviet Trade Delegation in the House of Commons: 'Were we responsible for the Czarist Government? … [for] its corruption, its misgovernment, its pogroms, its scores of thousands of innocent people massacred? …this country has opened up most of the cannibal trade of the world, whether in the South Seas or in Kumassie'.[69] The reference to cannibals was, according to Gromyko and Ponomarev, neither popular, nor well received in the Kremlin.[70]

Other exceptions and difficulties that the DAC touched on included: that an award may become public in legal proceedings (as in stating a special case); abroad during enforcement (under the 1958 New York Convention); if subjected to judicial scrutiny through an appeal; or a company's disclosure requirements for accounting or regulatory purposes. Various other non-parties could have legitimate interest in being informed as to the content of a pending arbitration such as a P&I Club, parent company and even the supervising arbitral institution (e.g., FOSFA or the ICC, both of which approve a tribunal's draft award). The DAC considered that formulation of statutory principles would result in the creation of new impediments to the practice of English

[66] [1995] 3 WLR 483.
[67] ibid [496D].
[68] Nussbaum, A. 'Arbitration Between the Lena Goldfields Ltd. and the Soviet Government' (1950) 36 Cornell Law Review 31-53.
[69] HC Deb 7 June 1920 vol 130, col 169.
[70] Gromyko and Ponomarev (ed.), *Soviet Foreign Policy 1917-1980, Vol. 1 (1917-1945)* (Moscow, 1981) 129.

arbitration. Rather than clarifying the law, it would achieve the opposite, causing greater uncertainty and result in an increase in litigation. That even if acceptable statutory guidelines could be formulated, there would remain the issue of enforcing sanctions for non-compliance.

The DAC preferred an approach whereby institutional rules filled in the gaps and specified the necessary provisions if desired. That whilst the breadth and existence of certain exceptions remained disputed, these were best resolved by the English courts on a pragmatic case-by-case basis. And should all the unresolved issues become judicially resolved, then it would remain possible to add a statutory provision by way of amendment to the Bill. In my view this is a key point. That to a large extent a number of the issues - certainly with regard to the use of arbitral materials, awards and protecting a legal right for example - have been addressed and decided by the courts.

As the DAC's then Chairman, Lord Saville's speech at the 1995 Denning Lecture provided valuable insight into the Committee's collective mind, in which he compared the two extreme views of privacy. On the one side was the view that if parties agree to resolve their disputes through the use of a private arbitration rather than public court proceedings, then the court system should play no part at all apart from involvement - where required - to enforce awards. The opposing view urged active judicial oversight on the grounds that the state was responsible for justice: arbitration being just another form of dispute resolution, justice dictated that certain rules should apply and the courts therefore should not hesitate to intervene as and when necessary.[71] The DAC chose not to address these issues. As a result, the Arbitration Act 1996 does not enact the generally implied principles of privacy and confidentiality into arbitration proceedings.

Saville LJ later described the development of the arbitration legislation as a process of putting 'new wine into old bottles'.[72] Reflecting the cautious approach taken by the DAC to the two crucial areas of consolidation and confidentiality, the Final Report stated:

> We made a number of suggestions… [in paragraphs 383 – 386 of the 1996 Report]. First we suggested a reference to privacy and confidentiality. This suggestion was not adopted, since we finally concluded (especially as the law on this topic is in a stage of development) that it would be better to have no express reference at all…[73]

The Government agreed with the DAC, pointing out that there were exceptions to confidentiality in the case of New York Convention awards, which are enforceable in public

[71] The Denning Lecture 1995 'Arbitration and the Courts' (1995) 61 Arbitration 157.
[72] ibid 157, 158.
[73] DAC Supplementary Report on The Arbitration Act 1996 para 44.

proceedings, and, as is shown in the cases, in the common law itself. The Government determined that the matter should be resolved by the courts in the usual developmental fashion. After extensive consultation, but with relatively few changes, this became the Arbitration Act 1996, which began: 'An Act to restate and improve the law relating to arbitration pursuant to an arbitration agreement…'. The DAC's view that it would be for the courts to determine the ambit of confidentiality within arbitration is, as Dennington and Turner would later note, something with which the courts are still grappling.[74]

The Arbitration Act 1996

When the Arbitration Act 1996 came into force on 31st January 1997 it restated English arbitration law in modern, accessible language, adopting such parts of the UNICTRAL Model Law where necessary. It consolidated previous legislation whilst updating and clarifying various provisions applicable to English Arbitrations. The Act's objectives, as set out in Section 1, being to: 'obtain the fairest solution of disputes by an impartial tribunal… subject only to such safeguards as are necessary in the public interest'. Divided into mandatory and non-mandatory provisions - dealing with, for example, costs, awards, powers of the arbitrators and appeal procedures - it is silent on both privacy and confidentiality. By the conventional standards of traditional English parliamentary drafting, the Act was considered 'radically innovative and unconventional'.[75] The Act also aimed to promote England as a venue for international arbitration.

A minority of commentators such as Landau considered that the draft Act suffered from 'common law quirks' and had developed an 'isolationist approach'.[76] The overwhelming response however was positive and was widely welcomed: 'The Act has … given English arbitration law an entirely new face, a new policy, and new foundations'.[77] Recognising the influence of 'foreign and international methods and concepts' the Act embodied a rebalancing of the relationships between parties, advocates, arbitrators and the courts, replacing English judicial authorities by statute as the principal source of arbitration law.

During the second reading of the Bill in the House of Lords Lord Wilberforce explained the

[74] Sarah Derrington and James Turner *The Law and Practice of Admiralty Matters* (2004) 291-313.
[75] *Bernstein's Handbook of Arbitration* John Tackaberry, Ronald Bernstein & Arthur Marriott (4th edn Sweet & Maxwell 2003).
[76] Toby T Landau, 'The Regularization of International Commercial Arbitration: Comparative Trends and Tensions' pages 449-450 in Koichi Hamada, Mitsuo Matsushita, Chikara Komura (Eds) *Dreams and Dilemmas in the Asia-Pacific: Economic Friction and Dispute Resolution*, (ISEAS 2000).
[77] Lord Mustill & Stewart Boyd QC, *Commercial Arbitration* (2001 Companion Volume to the Second Edition) Preface.

essence of the new philosophy and revised relationship between arbitration and the courts: 'I have never taken the view that arbitration is a … poor relation to court proceedings. I have always wished to see arbitration … free to settle its own procedure and free to develop its own substantive law.[78]' The Act was passed the year following the publication of the 'Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales' by the Rt Hon the Lord Woolf, which itself led to far-reaching reform of the Civil Procedure Rules. The strong support for the Arbitration Act 1996 was in keeping with the new spirit of optimism in the judicial modernisation already well underway. Commentators at the time such as Carbonneau praised it as: '[d]espite some minor flaws, the 1996 United Kingdom Arbitration Act is an outstanding, indeed masterful, legislative framework on arbitration'.[79] The flaws being referred to were the restricted right of appeal on questions of law and the view that the Act would have benefitted from a more transparent set of regulatory provisions, matters that we shall return to in due course.[80]

Preparatory materials such as the DAC Reports would typically only be taken into account where there was an ambiguity in the statute's wording.[81] Nevertheless, the DAC reports are routinely used by the English courts as aids to interpreting the Arbitration Act 1996. Clarke LJ provided a strong endorsement in the Court of Appeal in *Cetelem SA v Roust Holdings Ltd*[82]: that it was legitimate and appropriate to construe the Act's meaning consistently with the view of the DAC as expressed in their Report, noting the number of cases in which the court has treated the DAC Report as a valuable aid to the construction of the 1996 Act.[83] The continued relevance of the DAC Reports on arbitration is reinforced when considering recent law reports. In 2019 there were three s.68 applications from arbitrations to the courts where the subsequent judgements cited the DAC Reports.[84]

The Lack of Codification

The importance of commercial certainty and clarity has been long recognised by the

[78] HL Deb HL 18 January 1996, vol 568, col 778.
[79] Thomas E. Carbonneau, 'A Comment on the 1996 United Kingdom Arbitration Act' (1998) 22 Tul Mar LJ 131.
[80] ibid 132.
[81] The historical and preferred approach by English Courts, the literal rule, was to look for a statutes' ordinary and natural meaning in an effort to respect the will of Parliament. As Scarman LJ highlighted in *Black-Clawson International Ltd* v *Papierwerke Waldhof Aschaffenburg AG* [1975] 2 Lloyd's Rep. 11, that and other rules of statutory interpretation are not infallible: 'I think it wrong to torture the language…to make its effect consistent with the common law'.
[82] [2005] EWCA Civ 618.
[83] ibid [40].
[84] *P v D and Others* [2019] EWHC 1277 (Comm); *A v B* [2019] 1 Lloyd's Rep. 275; *Dera Commercial Estate v Derya Inc (The Sur)* [2019] 1 Lloyd's Rep. 5.

judiciary: 'In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other.'[85] Lord Mansfield would not infrequently return to the theme: 'Convenience is the basis of mercantile law,'[86] a view expanded on by Lord Devlin in *Kum and Another v Wah Tat Bank Ltd*: 'The function of the commercial law is to allow, so far as it can, commercial men to do business in the way in which they want to do it and not to require them to stick to forms that they may think to be outmoded. The common law is not bureaucratic.' [87]

It is therefore an intriguing question to ask - how can it then be that aspects of one of the most common systems for resolving disputes – one with which society has arguably had several millennia to perfect – remains subject to such uncertainty and debate? There are several views. A commonly held one is that the secrecy now inherent in arbitration has created a backlash against anonymous corporations fighting their legal battles before nameless judges, in private hearings behind what some view as a veil of secrecy: where in almost all cases even the outcomes are unknown. This view was perhaps most forcefully (and notoriously) articulated in 2010 in a New York Times article which described investment arbitration proceedings under NAFTA as follows:

> Their meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small number of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged.[88]

This common thread of criticism pervades the views of many scholars when it comes to investment arbitration. Gus Van Harten argued that arbitration is inappropriate for investment treaty disputes, because they 'concern the exercise of general regulatory powers that are typically subject to judicial review under constitutional or administrative law'.[89] Choudhury queried whether the current regime of investment arbitration was in crisis.[90] Waibel *et al* considered: 'the

[85] *Vallejo and Another v Wheeler* (1774) 1 Cowper 143, [153] (Lord Mansfield).
[86] *Medcalf v Hall (*1782) Reports Argued and Determined in the Court of the King's Bench. Cases in Trinity Term in the Twenty Second George III.
[87] [1971] 1 Lloyd's Rep. 439, [444], demonstrating that the concept of commercial certainty is not just a relic from Hanoverian England. For examples of a more modern philosophical treatment of the subject see E.W. Thomas, *The Judicial Process*: *Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press 2005) 287 – 289; Lord Dyson, *Justice: Continuity and Change* (Hart Publishing 2018) 173 – 178; Tom Bingham, *The Rule of Law* (Allen Lane 2010) 37 – 40.

[88] Anthony DePalma, 'NAFTA's Powerful Little Secret: Obscure Tribunals Settle Disputes, But Go Too Far, Critics Say' New York Times (11 March 2001).
[89] Gus Van Harten, 'Perceived Bias in Investment Treaty Arbitration' in M. Waibel et al (eds.) *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010) 434. See also Investment Treaty Arbitration, Procedural Fairness and the Rule of Law (2010).
http://digitalcommons.osgoode.yorku.ca/scholarly_works/364 accessed 2 March 2020.
[90] Barnali Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest

rising discontent over the perceived and actual problems of the international investment regime risks undermining the tremendous gains in the rule of law on cross-border investment flows achieved over the last decades.[91]' An alternative approach might see the currently debated and often heatedly argued issues amongst the arbitral community as being the embodiment of a dynamic, evolving *Lex Mercatoria*: the very opposite of ossification, as the law and legal systems adapt and change to meet the needs of a constantly evolving global business community.

A more nuanced view holds that confidentiality came increasingly to the fore as an issue after the special case procedure was abolished. The reason for this long period of silence regarding confidentiality in English arbitration law can be found in the relevant statutory acts. English courts traditionally retained an extensive degree of control over arbitral proceedings. Section 5 of the Common Law Procedure Act 1854 and later s.21 of the Arbitration Act 1950 provided for the power to state a special case for the opinion of the court on a question of law. The court's power to require referral of any question of law that it thought ought to be decided by it, was considered by many to be a deterrent to the bringing of international arbitration in England. The frequent court intervention in arbitration proceedings had another effect: it compromised confidentiality. There was in any case little point in arguing for or against confidentiality when cases were liable to be exposed to the glare of publicity through court proceedings. That power was less frequently used and had largely fallen away by the late 1970's. Section 3 of the Arbitration Act 1979 significantly curtailed the special case procedure and it was abolished completely in the Arbitration Act 1996. Under the new regime, appeals were allowed in very limited circumstances under s.67–71. With that restriction parties became increasingly conscious of the confidential nature of arbitration and started raising it more frequently. There is thus a correlation between confidentiality and the extent of the right of appeal. However, it cannot be credited as being the only or even the main reason. The English cases referred to in the 1996 DAC Report as well as its reference to *Esso/BHP v Plowman* testify that the issues existed well before the 1996 Act was passed.

The Commercial Imperatives of London Arbitration

What was the reasoning behind the curtailing of the right of appeal? Lord Byron's speech in the Second Reading of the Arbitration Bill in the House of Lords is insightful. Recounting a post settlement lunch with German and Italian counterparts in which his German client remarked on

Contributing to the Democratic Deficit' (2008) 41 Vand J Transnational Law 775.
[91] Michael Waibel, Asha Kaushal, Kyo-Hwa Chung & Claire Balchin (Eds) *The Backlash Against Investment* Arbitration (Kluwer Law International, 2010).

the lack of ships, televisions and computers built being in the UK and the Italian opponent disparaged British cuisine, both however expressed confidence when it came to English law, the courts and arbitration (notwithstanding the familiar complaints about delay and expense). The point of the story was explained as being to emphasise the central place that English arbitration had in the resolution of disputes, particularly in the international field:

> Not only is dispute resolution in the City of London a major industry and major earner of foreign currency, but it is also a vital lubricant to other forms of commerce… There is no doubt that government have an important role in keeping the wheels well oiled.
>
> '…[t]he great balancing act which this Bill has had to perform is between those who wish to exclude the courts from all aspects of arbitration procedure and those who would like to preserve a significant measure of court supervision. Generally, I believe that this Bill has got that balancing act about right…'. [92]

International arbitration is a legal service and the default mechanism for the settling of international disputes, with London being the world's leading centre. The UK's capital possesses a heavy concentration of insurers, brokers, solicitors, ship operators and not least the pool of trade specialists who sit as arbitrators. Various commodity trade associations with their own specialist arbitration panels call London their home: the Grain and Feed Trade Association (GAFTA), the Federation of Oil Seeds and Fats (FOSFA), the Sugar Association of London (SAL) and the London Metal Exchange (LME) are some of the most well-known. London is also the centre of dispute resolution for many other commodities including coffee, cocoa, rice and cotton. Of them all however, arbitrations held under the London Maritime Arbitrator's Association (LMAA) Terms are the most prolific. Ad hoc arbitrations conducted under the LMAA's Terms are the most significant globally in terms of numbers of international commercial arbitrations, particularly for shipping disputes. Table 1 provides a comparison of arbitration statistics amongst the leading institutions for the period 2005 - 2019. In 2016, two of the most 'popular' arbitral institutions, the SIAC reported 343 cases; the HKIAC 262. The comparable figure for the LMAA was 1,720, highlighting its significant contribution to London's dominant position in global arbitration.

Whilst ad hoc arbitrations appear to have been ignored in the typical international commercial

[92] HL Deb 18 January 1996 vol 568 cc760-94. Lord Byron went on to say: 'Although London is still the leading world centre for arbitration there are plenty of competitors only too anxious to attract arbitrations to their own jurisdictions. It is now more than 10 years since the UNCITRAI, Model Law was introduced and adopted by a number of countries without this country doing anything to improve its statutory framework except for the odd change here and there. It has been widely perceived in the commercial and legal communities where arbitration is used that unless something was done fairly quickly London's position could be seriously eroded'.

arbitration surveys, their significance and economic contribution to the United Kingdom should not be overlooked. Shipping is the largest constituent industry in the United Kingdom in terms of economic activity. Maritime UK estimated that the sector directly supported more than £40 billion in business turnover, £14.5 billion in Gross Value Added (GVA) and 185,700 jobs for UK employees in 2015. The turnover contribution by the maritime business services industry - comprising shipbroking, legal, insurance, consultancy, accountancy and financial services - was in excess of £4.5 billion.[93] Shipping, legal services and arbitration are major contributors to the UK economy. And it is in that context that worries have arisen with respect to arbitration and the associated principles of confidentiality. Sir Patrick Neill captured the concerns of many practitioners in the 1995 Bernstein Lecture when he stated:

> If some Machiavelli were to ask me to advise on the best method of driving international arbitration away from England I think that I would say that the best way would be to reintroduce... all the court interference that was swept away... 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.[94]

Chapter 1 Summary

Confidentiality in arbitration can be approached from various perspectives: commercial and business needs; public policy; legal efficacy; natural justice and not least, the development of mercantile and commercial law. It is argued that the principal tensions result where the needs of the commercial world come up against those of natural justice and public policy. Ultimately these contradictory positions prompt the question: is there a case for reform of the Arbitration Act 1996? And its corollary - if so to what extent? Paulsson & Rawding considered the current state of the law regarding confidentiality in international arbitration and concluded that a general obligation of confidentiality did not exist: that at best the concept was in the early stages of development. In their view, as most national jurisdictions had not addressed the issue at all, parties should take matters into their own hands, by suggesting that parties stipulate a provision for confidentiality into the arbitration clause.

A robust defence of the status quo came from Bruce Harris in a forthrightly argued article prepared as the tenth anniversary of the Act approached.[95] In 2006 the Commercial Court Users' Committee ("CCC"), then chaired by Thomas J, carried out a comprehensive survey into how the

[93] https://www.maritimeuk.org/value/
[94] Sir Patrick Neill, 'Confidentiality in Arbitration' (1996) 62 Arbitration International 3 (Supplement).
[95] 'Report on the Arbitration Act 1996'. Bruce Harris 23 Arbitration International 437.

Arbitration Act 1996 had worked in practice. In its Report the CCC emphatically recommended that no attempt be made to change the law in respect of confidentiality.[96] Commentating on the CCC's published findings, Cohen, reached a diametrically opposed conclusion, interpreting the report as providing majority support in favour of releasing at least some part of the award to the public. Confidentiality was identified as being the biggest issue. Interestingly, user sentiment was in favour of releasing at least some part of the award to the public. Some commentators have proposed that the default position should be publication of an award i.e., an opt-out regime such as operates in the USA and elsewhere.[97] Cohen makes some very valid points.[98]

Commentators are divided on the issue of reform. By attempting to codify confidentiality there is the risk of forcing parties to arbitrate in confidence. As Young and Chapman suggested, having demonstrated how difficult drafting a confidentiality rule of sufficient clarity applicable in all circumstances was, perhaps it was better to leave the issue of confidentiality to be determined by the parties, an approach that: '…not only has the benefit of simplicity, but it would also allow the parties to decide the extent to which an obligation of confidentiality …should apply in their particular circumstances'.[99]

In my view however it is clear that the benefits of revising the Arbitration Act with respect to confidentiality outweigh the disadvantages of the status quo. The areas for which reform is required include awards and their publication; consolidation; materials; privacy; its application to parties, witnesses, legal counsel & tribunals; third party funding; potential exceptions, such as protecting a legal right or the public interest and finally ethics and transparency. When formulating confidentiality, the drafters of the Arbitration Act found the challenge 'controversial and difficult'. The 'myriad of exceptions' and 'qualifications that had to follow' proved in their mind's insurmountable obstacles. The aim of this thesis is an ambitious one, to build on the work started by Lords Mustill and Saville and mount those insurmountable obstacles. Support for change is identifiable within the 1996 DAC Report itself, which concluded the confidentiality section: 'In due course, if the whole matter were ever to become judicially resolved, it would remain possible to add a statutory provision by way of amendment to the Bill'.[100] That point has arguably long been reached: the law is more than sufficiently resolved to permit the codification

[96] Prepared for the Commercial Court Users' Committee, the British Maritime Law Association, the London Shipping Law Centre and other bodies.
[97] Michael Cohen, 'A Missed Opportunity to Revise the Arbitration Act 1996', (2007) 23 Arbitration International 461
[98] As for the 2006 CCC study itself, the raw data appears to have been lost to researchers. Approaches to members of the committee in the Autumn of 2019 indicated that none of the original source documents had been retained.
[99] Michael Young & Simon Chapman, 'Confidentiality in International Arbitration – Does the exception prove the rule? Where now for the implied duty of confidentiality under English law?' (2009) 27 ASA.Bulletin 26, 32-33.
[100] ibid para 17.

of statutory provisions for the less uncontroversial areas of the Arbitration Act 1996. The 1996 DAC Report was a product of an earlier legal age. Societal expectations and demands have evolved. And so, inexorably, must the law. Examples of how approaches to these issues have been developed in overseas jurisdictions are the subject of Chapter 2.

Table 1. Case Load Summary Selected Arbitral Institutions 2005 – 2019

By Year

Institution	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
AAA/ICDR[101]	-	-	-	-	-	888	994	996	1165	1052	1064	1050	1026	993	882
AIAC[102]	20	N/A	N/A	N/A	42	22	52	135	156	112	113	157	134	115	163
BAC	53	53*	37	56	72	32	38	26	44	41	52	69	77	88	-
CICA[103]	75	79	54	60	63	57	28	29	19	20	35	35	25	24	39
CIETAC[104]	427	442	429	548	559	418	470	331	375	387	437	483	476	522	617
CMAC[105]	-	-	-	-	-	-	-	-	137	120	136	69	-	-	-
DIAC	-	-	77	100	292	431	440	379	310	174	177	207	201	161	208
DIS[106]	72	75	100	122	176	155	178	97	107	120	112	141	121	116	110
HKIAC	281[107]	-	448	-	429	291	275	293	260	252	271	262	297	265	308
ICAC[108]	-	-	319	-	-	-	-	306	428	696	922	553	-	-	-
ICC	-	-	599	-	817	793	795	759	767	791	801	966	810	842	869
ICSID[109]	-	-	35	-	-	-	-	50	40	38	52	48	53	56	39
JCAA[110]	-	11	12	12	17	21	17	18	24	11	20	18	14	13	9
KCAB[111]	-	47	59	47	78	52	77	85	77	87	74	-	78	62	70

[101] https://adr.org/research
[102] Previously the KLRCA.
[103] Response received by email to request for information, 27 February 2020.
[104] http://www.cietac.org/index.php?m=Page&a=index&id=40&l=en
[105] http://www.cmac.org.cn/?page_id=1545&lang=en Consolidated figures from Beijing, Shanghai and Tianjin Commissions.
[106] http://www.disarb.org/de/39/content/statistik-id79
[107] Dr Loukas Mistelis 'International Arbitration - Corporate Attitudes and Practices - 12 Perceptions Tested: Myths, Data and Analysis Research Report' (2004) 15 Am. Rev. Int'l Arb.
[108] https://icac.org.ua/wp-content/uploads/Statictics-and-Practice-of-the-ICAC_2017_eng.pdf In 2012-2017 one quarter of arbitrations were with parties from CIS states.
[109] https://icsid.worldbank.org/en/Documents/resources/The%20ICSID%20Caseload%20Statistics%202020-1%20Edition-ENG.pdf
[110] Japanese Arbitration: Green Tea and Sympathy? http://the-tclr.org/wp-content/uploads/2017/04/TCLR_5-web-03.pdf
[111] https://globalarbitrationnews.com/wp-content/uploads/2020/07/2019-KCAB-ANNUAL-REPORT_FINAL.pdf - KCAB figures provided are for numbers of foreign arbitrations.

By Year

Institution	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
LCIA[112]	118	133	137	215	272	246	224	265	290	296	326	303	285	317	395
LMAA	-	-	1540	2058	2511	2026	2050	2207	1759	2049	1813	1720	1496	1561	1756
PCA[113]						11	11	27	35	39	42	40	41	56	49
SCMA	-	-	-	-	6	14	16	20	20	25	37	46	38	56	41
SIAC[114]	74	90	86	99	160	197	188	235	259	222	271	343	452	402	479
SCC[115]	56	74	87	85	96	91	96	92	86	94	103	103	96	76	88
SMA[116]	214	177	203	193	176	195	153	148	108	104	129	92	84	57	27
SCAI[117]	-	-	58	-	-	-	-	92	68	105	100	81	74	83	96
VIAC[118]	-	-	40	-	-	-	-	70	56	56	40	60	59	44	51
WIPO[119]	-	-	-	-	-	40	41	31	36	71	82	114	136	155	179

[112] https://www.lcia.org/LCIA/reports.aspx
[113] https://docs.pca-cpa.org/2020/03/7726c41e-online-pca-annual-report-2019-final.pdf
[114] https://www.siac.org.sg/2014-11-03-13-33-43/facts-figures/statistics
[115] https://sccinstitute.com/statistics/
[116] The SMA does not publish statistics, but all awards are published. The SMA entries are a guide to caseload only, as the numbers are for the awards published each year. https://0-www-lexisnexis-com.emu.londonmet.ac.uk/uk/legal/international?countryId=1517130&sourceId=urn:contentItem:csi:1069983&page=4&character=S&contentTypeId=all accessed 11 April 2020.
[117] https://www.swissarbitration.org/files/515/Statistics/SCAI%20Stats%202019_PDF_v20200609_for%20publication.pdf
[118] https://www.viac.eu/de/service/statistiken
[119] WIPO does not break down its ADR figures between 'Good Office Requests' (between about half and two thirds of the total cases) and the balance consisting of mediation, arbitration and expert determination) https://www.wipo.int/amc/en/center/caseload.html accessed 4 April 2020.

Table 2. Arbitral Confidentiality Provisions in Selected Jurisdictions

Country	Year Issued	Persons to whom confidentiality provisions extend			Application to Documents		General Application				
		Arbitrators	Parties	Witnesses	The Award	Materials	Existence of the Arbitration	Privacy of Hearings	Consolidation Concurrency	TPF	Transparency
UNCITRAL Model Law	2006	-	-	-	-	-	-	-	-	-	Art.12
Australia	1974	s.23C	s.23C	-	s.23D	s.23D	-	-	s.24	-	s.18A
Canada	1985	-	-	-	-	-	-	-	-	-	Art.12
France	2011	-	-	-	-	Art.1464	-	Art.1464 Art.1479	-	-	Art.1456
Germany	1998	-	-	-	-	-	-	-	-	-	s.1036
Hong Kong	2017	-	s.18	-	s.18	s.18	-	-	Schedule 2 s.2	s.98	s.25
Malaysia	2018	-	s.41A	-	s.41A	s.41A	-	-	-	-	s.14
New Zealand	2019	s.14B	s.14B	-	s.2(1)b	s.2(1)b	-	s.14A	Schedule 2 s.2	-	s.12
Norway	2004	-	-	-	s.5	s.5	s.5	s.5	-	-	s.14
Singapore	2002	-	-	-	-	-	-	-	-	-	1st Schedule Art.12
Sweden	2019	-	-	-	-	-	-	-	s.23a	-	s.8, s.9
United States											
FFA	1925	-	-	-	-	-	-	-	-	-	-
UAA	1955	-	-	-	-	-	-	-	-	-	-
RUAA	2000	-	-	-	-	s.17(e)	-	-	s.10	-	s.12

Table 3. Confidentiality Provisions in Selected Arbitral Institutions

Institution	Version	Persons to whom confidentiality provisions extend				Application to Documents		General Application				
		Administering Institution	Arbitrators	Parties	Witnesses	The Award	Materials	Existence of the Arbitration	Privacy of Hearings	Consolidation	TPF	Transparency
UNCITRAL Rules	2010	-	-	Art.34.5	-	Art.34.5	-	-	Art.34.5	-	-	Arts.11~13
AAA/ICDR	2014	Art.30, 37	Art.30, 37	-	-	Art.30, 37	Art.30, 37	-	Art.23.6	Art.7 ~ 8	-	Art.13 ~14
CIETAC Rules	2015	Art.38	Art.38	Art.38	Art.38	-	-	-	Art.38	Art.14, 19, 29	-	Art.31 ~ 32
DIS	2018	Art.44.1	Art.44.1	Art.44.1	-	Art.44.1, 44.2	Art.44.1	-	-	Art.8, 17, 18	-	-
GMAA	2017	-	§5.1		-	§14.6	-	-	-	-	-	§5.1, 6
Ethics (coe)[120]	undated	-	-	--	-	coe.9	-	-	-	-	-	coe.3 ~ 5
HKIAC[121]												
Rules	2018	Art.45.2	Art.45.2	Art.45.1	Art.45.2	Art.45.1, 45.3, 45.5	Art.45.1, 45.3	Art.45.1	-	Art.27, 28, 29, 30	Art.44	Art.11.4
PN (pn)	2016	-	-	-	-	-	-	-	-	pn	-	-
SAR (sar)	2013	-	-	-	-	-	-	-	sar.35.4	-	-	-
ETAR (etar)	2002	-	-	-	-	etar.26	etar.26	-	etar.9.6	-	-	-
IBA[122]												
Evidence	2010	-	Art.3.13	Art.3.13	Art.3.8	Art.3.13	Art.2.2, 3.8, 9.2(e), 9.3, 9.4, 3.13	-	-	-	-	Art.5
Conflict (GS)	2010	-	-	-	-	-		-	-	-	GS6	GS1~GS7

[120] The GMAA Code of Ethics (coe).

[121] Main references are to the Administered Arbitration Rules 2018. Other references are to the Practice Note on Consolidation of Arbitrations (pn); Securities Arbitration Rules 2013 (sar); Electronic Transaction Arbitration Rules 2002 (etar).

[122] Main references are to the IBA Rules on the Taking of Evidence in International Arbitration. Other references are to the General Standards (GS) contained in the Guidelines on Conflicts of Interest in International Arbitration 2010.

Institution	Version	Persons to whom confidentiality provisions extend				Application to Documents		General Application				
		Administering Institution	**Arbitrators**	**Parties**	**Witnesses**	**The Award**	**Materials**	**Existence of the Arbitration**	**Privacy of Hearings**	**Consolidation**	**TPF**	**Transparency**
ICC[123]												
Rules	2017	App I Art.6, App II Art.1	Art.22(3)	Art.22(3)	-	Art.34 App II Art.1, 6	App II Art.1	-	-	Art.6 ~ 10	-	Art.11
Notes (ntp)	2019	-	-	-	-	ntp.40 ~ 46	-	ntp.34 ~ 39	-	-	-	ntp.18 ~ 30
LCIA	2014		Art.30.2	Art.30.1		Art.30.1, 30.3	Art.30.1	-	Art.19.4	Art.22	-	Art.5.3 ~ 5.5, 21.2
LMAA												
Terms	2017	-	-	-	-	r.28	-	-	-	r.16	-	-
Ethics (aoe)	undated	-	aoe.6.6	-	-	aoe.6.6	aoe.6.6	-	-	-	-	aoe.1, 4
SCC	2017	Art.3 App I Art.9	Art.3	-	-	Art.42, App I Art.9	-	-	Art.32.3	Art.13 ~ 15	-	Art.18 ~ 19, 23
SCMA	2015	-	r.44	r.44	-	r.36.8, 36.9, 44	r.44	-	r.28.5	r.33.3	-	r.15 ~16
SIAC												
Arb Rules	2016	r.40.1	r.39	r.39	r.39	r.32.12, 39	r.24.4	r.39.3	r.24.4	r.7 ~ 8, 12	-	r.13 ~ 14, Sched 1.5
Investment (iar)	2017	-	iar.37	iar.37	iar.37	iar.30.3, 37, 38	iar.21.4, 37	-	iar.21.4	iar.9	iar.24(l), 33.1, 35	iar.10 ~11

[123] Main references are to the ICC 2017 Arbitration Rules. Other references are to the 2019 ICC Notes to the Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration (ntp).

Table 4. Summary of Arbitration Surveys 1979 to 2019

Year	Name of Survey	Author(s)	Comment
1979	-	Professor Tore Sandvik	A limited survey of [20] Norwegian users asked to rank the different reasons for choosing arbitration. 'Voldgifs-og domstolsbehandling' (1979) Tidsskrift for Rettsvitenskap, 456.
1992		London Business School/LCIA	A survey of Fortune 500 US corporations conducted by the London Business School on behalf of the LCIA in 1992 found that confidentiality was ranked ahead of neutrality and enforceability as the most important perceived benefit for US and European users of international commercial arbitration. Cited by the DAC Report on the Arbitration Bill dated February 1996 (paragraphs 10 – 17).
1996	A Survey on Arbitration and Settlement in International Business (1991 and 1996)	Dr. Buhring-Uhle	Two surveys of the perceived advantages of international commercial arbitration in connection with a doctoral thesis he presented to the University of Hamburg. Published in Arbitration and Mediation in International Business (1996). The researchers asked participants for their reasons in choosing international commercial arbitration to resolve their disputes. Approximately one hundred and fifty questionnaires were distributed to arbitrators, attorneys and in-house counsel in over twenty countries. A total of ninety-one individuals from seventeen countries responded and Dr. Buhring-Uhle personally interviewed sixty-eight. The respondents came from the U.S., Europe, Scandinavia, South America, Middle East and Australia: most were American or European. The results indicated that confidentiality was ranked as the third most important advantage of arbitration in a list of eleven, behind only the neutrality of the tribunal and the international enforcement by treaty of awards.
1998		Cornell University/PERC Institute on Conflict Resolution	Fortune 1000 companies in the U.S.were asked why they had chosen arbitration rather than state courts for resolving disputes. The response rate was > 60%. 43 percent of the respondents answered that preserving confidentiality was a reason to use arbitration. The study revealed a previously overlooked aspect: that the more frequently companies used arbitration, the more important was confidentiality perceived to be ranging from 55 percent (for very frequent users of arbitration) to 37 percent (those who had never or rarely used arbitration).
2001	The [Norwegian] Legislative Committee's Proposal NOU 2001: 33 s.1-5	-	A legislative committee was formed prior to the introduction of the Norwegian Arbitration Act 2004, of which one of its tasks was to take opinions on the issue of confidentiality. Norwegian users of arbitration expressed a broad range of opinion to this question. The Norwegian Bar Association supported the legislative committee's proposals. The Confederation of Norwegian Enterprise, the Norwegian Financial Services Association and the Federation of Norwegian Coastal Shipping stressed that discretion and confidentiality was often a decisive reason for parties to choose arbitration.
			Conversely, the Nordisk Defence Club, a specialized form of P&I Club providing legal insurance cover in the marine industry, requested for even more publicity than the legislative committee had proposed. In summary there was no consensus on the importance of confidentiality within the business community in Norway, a view ultimately reflected in the Act.

2002		Terje I. Våland	Terje I. Våland conducted the Norwegian survey among the offshore industry and concluded that arbitration is chosen with the specific aim of avoiding publicity. Konflikter i petroleumsklyngen (2002), page 6.
2003		AAA Dispute-Wise (2003)	In 2003, the AAA undertook a major research study aimed at examining the attitudes and experiences associated with the use of arbitration and alternative dispute resolution. The study examined how these techniques and practices were employed by a broad sample of businesses, ranging from Fortune 1000 companies to privately held businesses. The study compared and updated the arbitration and mediation usage trends discussed in the 1998 Cornell study. The percentage of companies reporting privacy as being extremely/very Important was 37%, ranking it ninth out of eleven categories, behind Cost (72%), Winning (72%), Predictability (65%), Speed (60%), Fairness (60%), Finality (58%), Maintain relationships (53%) and Industry expertise of neutrals/arbitrators (43%): but ahead of the ability to appeal (26%) and International capabilities (12%). The number of respondents who stated that the reasons for using arbitration preserves confidentiality increased from 43% to 54% during the period 1998 to 2003.
2003	(Originally entitled 'International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People')	Global Center for Dispute Resolution Research; Naimark and Keer	This 2003 U.S. study compiled responses from 145 participants involved in AAA international arbitrations why they opted for international commercial arbitration. Participants were asked to rank eight issues in their order of importance: speed of outcome, privacy, receipt of a monetary award, a fair and just outcome, cost-efficiency, finality of decision, arbitrator expertise, and continuing relationship with opposing party. An overwhelming majority (81%) ranked a 'fair and just result'. The importance given to privacy was low - 8 percent for all participants in the survey, putting it in the bottom third. Other attributes, such as a fair and just result, a monetary award, the finality of the decision, and arbitrator expertise, all ranked significantly higher than privacy in terms of importance to the participants. Naimark and Keer explained that 'subsequent discussions with arbitrators in a round-table setting revealed a view that privacy is an often-overrated attribute' in international arbitration.
2005	International Arbitration - Corporate Attitudes and Practices - 12 Perceptions Tested: Myths, Data And Analysis Research Report	QMU	The main outcome of this survey is that arbitration is a popular and generally the preferred dispute resolution mechanism. Some inhouse lawyers interviewed explained that though their corporations maintain a dispute resolution policy, such policies are not cast in stone and can always be modified by negotiation. Reputation of the potential arbitrator within the international arbitration community was mentioned by all our interviewees as one of the most important factors they consider when choosing an arbitrator for appointment. ... Amongst in-house lawyers interviewed, 30 of the 40 corporations always instruct specialist arbitration firms or firms with a substantial international arbitration practice. ... There is a perception that international arbitration is a rather young dispute resolution mechanism and in-house counsel have yet to gain significant experience in managing international arbitration cases. ... A set of guideline questions, divided into quantifiable data, effectiveness of arbitration, choices and policy, strategy, perceptions, procedure and future of international arbitration, was forwarded to interviewees before each interview and formed the basis of the interview.
2006	The 2006 Commercial Court Users Committee Survey	Commercial Court Users Committee	The Commercial Court Users' Committee, then chaired by Thomas J, concluded that such a review should be carried out. The committee emphatically recommended that no attempt be made to change the law in respect of confidentiality. Cohen proposed that the default position should be publication of an award i.e., an opt-out regime such as operates in the USA and elsewhere.

2006	International Arbitration: Corporate Attitudes and Practices	PWC; QMU	This study sought the views of in-house counsel at major corporations around the world in order to test twelve perceptions around international arbitration. It was conducted over a six-month period. The first part was an online questionnaire completed by 103 respondents. This was followed by 40 interviews. Respondents from the industrial manufacturing, energy, banking/capital and engineering/construction industries accounted for 61% of the industry sectors. Privacy was ranked third behind flexibility and enforceability in terms of the important advantages of international arbitration, highlighting the importance to many respondents of arbitration as 'an effective way to keep business practices, trade secrets, industrial processes, intellectual property, as well as proceedings with a possible negative impact to the brand, private'. It is interesting to note the inherent tension as users were also aware that not everything in arbitration is automatically secret or confidential, merely that proceedings are private and may be confidential. The paper records that 76% of the respondents opted for institutional over ad hoc arbitration; the methodology section lists 8% of respondents coming from the automotive and transportation sectors.
2007	A Comparative Study on the Arbitration Systems of LMAA and the GMAA	Wiebke Harke, LLM Student, University of Northumbria at Newcastle	A special focus on the level of satisfaction of the Northern German users of the system.
2008	International Arbitration: Corporate Attitudes and Practices	QMU & PriceWaterhouse -Coopers	Conducted over a six-month period, this study summarizes data from 82 questionnaires and 47 interviews. Surveyed major corporations that were users of arbitration services. Conducted in two phases over six months. Most of the disputes involving interviewed corporations arose from commercial transactions and construction disputes (52%) with 11% from the shipping sector. Phase 1 consisted of an online questionnaire completed by 82 respondents comprising general counsel, heads of legal departments or counsel, at the end of 2007 and early 2008. Phase 2 comprised 47 face-to-face or telephone interviews with corporate counsel in the first half of 2008 (30 minutes for telephone interviews to two hours for face-to-face interviews). Face-to-face interviews were conducted in the UK, USA, Sweden, Switzerland, Greece, Japan, Mexico and Brazil.
			The survey focused on corporate attitudes and practices, such as settlements, outcomes and enforcement. If privacy and confidentiality were addressed in the study, there was no mention of these aspects in the published report. The report was very useful however in one particular respect, in that it published a table of reported statistics from various arbitration institutions. The top three for 2007 were ICC (599), AAA/ICDR (621) HKIAC (448). Care must be exercised in handling such figures as different institutions use different methods of reporting the number of cases handled e.g., the number of cases (which might include default appointments but be categorised as ad hoc) may not necessarily the same as number of administered arbitrations. By comparison, the LMAA recorded 1540 appointments in 2007.
2009		ICC	The ICC followed up on its 1998 survey on arbitration practise, with a Special Supplement in 2009 entitled 'Confidentiality in Arbitration: Commentaries on Rules, Statutes, Case Law and Practice'. More a series of discussion papers rather than a survey, it aimed to initiate discussions on revising the ICC Rules.
			Summarizing the state of institutional rules, Dimolitsa (2009) concluded: 'We are far from an international consensus on the parties' obligation of confidentiality, my personal opinion is that the Rules should remain unchanged in this respect given their genuinely international and open character'.

2010	International Arbitration Survey: Choices in International Arbitration	QMU & White & Case LLP	The objective of this study was to determine the key factors that drive corporate choices about arbitration: how are decisions made about arbitration, who influences these decisions and what considerations are uppermost in the minds of corporate counsel when they negotiate arbitration clauses. Phase 1 consisted of an online questionnaire comprising 78 questions completed by 136 respondents. Respondents were general counsel, heads of legal departments, specialist legal counsel and regional legal counsel. Phase 2 comprised 67 face-to-face or telephone interviews with corporate counsel. 62% of respondents said confidentiality is 'very important' to them in international arbitration. This figure rose to 86% when 'very important' and 'quite important' categories were combined. While international arbitration is private, respondents were aware that it is not necessarily confidential and may not be considered so by the counterparty. It was acknowledged that confidentiality was at times 'porous'. This was particularly so when it came to the obligation on corporations - particularly publicly listed ones - to report to shareholders and make disclosures in their annual accounts and reports. The sentiment was expressed that commercial arbitration matters are not of great interest to outsiders and do not generally involve sensitive commercial information. Therefore, in many cases confidentiality is not a prime consideration. Respondents identified the key aspects of the arbitration that they think should be kept confidential: top choices included the amount in dispute (76%), the pleadings and documents submitted in the case (72%) and the full award (69%). The (lack of) published awards was highlighted to be of concern by some users, who expressed a desire to see more awards available in the public domain in order to understand the arbitral process better and to look at the previous decisions of potential arbitrators. It was also acknowledged that this might be inconsistent with the desire for confidentiality of their own awards. 61% of respondents considered that the arbitration institution, the lawyers involved, the national courts, the parties and the tribunal should all bear the responsibility of keeping the arbitration confidential.
2011	Costs of International Arbitration Survey	CIArb	According to the survey, a typical claimant spends approximately £1,580,000, while respondents spent an average of £1,413,000. Significant sums. However, the small sample size and the low number of arbitrations the statistics are derived from - a survey of 254 international commercial arbitrations conducted between 1991 and 2010 - suggest the survey captured a disproportionate number of large and expensive claims that exaggerate the true cost of a typical arbitration.
2012	International Arbitration Survey: Current and Preferred Practices in the Arbitral Process	QMU & White and Case	Phase 1 was an online questionnaire comprising 100 questions completed by 710 respondents of whom the majority of respondents were primarily private practitioners (53%), followed by arbitrators (26%), in-house counsel (10%), as well as counsel from arbitral institutions, academics and expert witnesses (together, 11%). The majority of respondents (71%) had been involved in more than 5 international arbitrations in the five years prior to the study, and most of them (57%) worked for organisations that were involved in more than 20 arbitrations in the preceding 5 years. Phase 2 comprised 104 telephone interviews, each lasting on average 15 minutes. Amongst the issues the study aimed to address was to what extent had truly harmonised practices emerged in international arbitration in the context of international arbitration having grown and flourished.
			Had a cross-fertilisation of these practices and procedures occurred? And if such practices were emerging, did they reflect the preferred practices of the international arbitration community? The study found that the IBA Rules on the Taking of Evidence in International Arbitration ('the IBA Rules') were used in 60% of arbitrations: in 53% as guidelines and in 7% as binding rules. A clear majority of respondents (85%) found the IBA Rules to be useful.

2013	Corporate Choices in International Arbitration: Industry Perspectives	QMU & White and Case	This survey had a particular focus on how arbitration was used in the Energy, Construction and Financial Services industries. Phase 1 comprised an online questionnaire of 82 questions was completed by 101 respondents (general counsel, heads of legal departments or counsel). Phase 2 comprised over 30 interviews with corporate counsel and ranged from 20 to 90 minutes. The survey looked at comparative choices in dispute resolution i.e., comparing arbitration to litigation, mediation and expert determination in various sectors. The benefits in international arbitration were ranked. Respondents were asked to rank the following perceived benefits of arbitration in order of importance for their industry sector: neutrality, expertise of decision maker, flexibility of procedure, costs, speed, enforceability, and confidentiality. Respondents rated the benefits into seven categories ranging from 1 (most important) to 7 (least important). In Energy, neutrality, flexibility, confidentiality and expertise of decision maker were the top four perceived benefits. At the other end of the spectrum, costs and speed were least likely to be viewed as benefits of arbitration. Similar results were obtained from companies in the Construction sector. If the results are analysed slightly differently, confidentiality came in as the second most important benefit (21%), behind neutrality in the 'most important' category. If the results from the first and categories are aggregated, then confidentiality fell to third with 37%, behind 'expertise of the decision maker' (47%) and neutrality (43%).
2014	Publication of International Arbitration Awards and Decisions	New York City Bar	The authors viewed the trend towards more publication as a potential catalyst that - for good or ill - would impact on international arbitration, particularly those issues of confidentiality, concentration of knowledge and expertise and the extent to which arbitral decisions and awards should have persuasive or precedential effect. It was recognised that whilst publication of arbitral awards and challenges to arbitrators had become more common, it was not without controversy. The results shewed significant diversity in the rules and practices of the institutions. Several published selected, redacted decisions.
			A number published nothing, whilst others published all awards. The LCIA was unique in publishing redacted decisions on challenges to arbitrators. The conclusions drawn by the authors were that those contemplating or advising on arbitration matters should be aware of and factor in the confidentiality provisions and publication policies when selecting the institution to administer a dispute
2015	International Arbitration Survey: Improvements and Innovations in International Arbitration	QMU & School of International Arbitration	Soft law instruments such as the IBA Rules of Taking Evidence and the IBA Guidelines on Conflict of Interest now appear to have universal acceptance. The same 2015 Queen Mary study found only 5% of respondents finding them 'not useful'.
2015	Arbitration Study	Consumer Financial Protection Bureau (CFBU)	The survey investigated how arbitration clauses are utilised in the field of consumer credit. Report to Congress, pursuant to Dodd–Frank Wall Street. Reform and Consumer Protection Act § 1028(a). The report recognised that arbitration is a private although not a confidential process. See, e.g., Amy J. Schmitz, 'Untangling the Privacy Paradox in Arbitration' 54 U. Kan. L. Rev. 1211, 1211 (2006) ('Arbitration is private but not confidential . . . Arbitration is private in that it is a closed process, but it is not confidential because information revealed during the process may become public'.).

			It found that arbitration hearings are closed to the public, and awards in consumer arbitrations typically are not published. Schmitz, (2006) at 1216. It noted that the AAA Consumer Rules, contemplated the possibility that redacted arbitration awards would be made public, as is the case with AAA employment arbitration. As the study highlighted, arbitration rules typically do not impose express confidentiality or nondisclosure obligations on parties to the dispute, although arbitrator ethics rules do impose confidentiality obligations on arbitrators. e.g., American Bar Association & American Arbitration Association, Code of Ethics for Arbitrators in Commercial Disputes, Canon VI(B) (Mar. 1, 2004) 'The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision'. In summary the study found that most arbitration clauses were silent on confidentiality and did not impose any nondisclosure obligation on the parties.
2016	Pre-empting and Resolving Technology, Media and Telecoms Disputes	Pinsent Masons & QMU	Built on 343 questionnaires and 62 personal interviews. TMT refers to Technology, Media and Telecoms. The survey asked users and suppliers of technology about the main types of TMT disputes that arise and examined how can they be efficiently resolved. It focused on the types of technology, media and telecoms disputes that arise. 70% of respondents came from the IT, energy and manufacturing industries. It followed the familiar two-phase format. Phase 1 was an online questionnaire of 55 questions completed by 343 respondents: 42% from civil law, 32% from common law with 21% of the respondents combining both legal traditions. Phase 2 consisted of 62 face-to-face or telephone interviews ranging from 15 to 120 minutes. Unsurprisingly perhaps for a modern sector where the perception would be that innovation, technology and the preservation trade secrets would rank highly, 60% of respondents ranked confidentiality and privacy as 'very important'. Third behind 'enforceability' (68% of respondents ranking it as 'very important') and to 'avoid litigation in a foreign jurisdiction' (65%). The study found that when a dispute resolution policy specified arbitration, the three most important elements were institution, seat and confidentiality.
2016	Enhancing Hong Kong's position as the leading international arbitration centre in Asia-Pacific	KPMG	KPMG was commissioned by the Hong Kong Trade Development Council to assess the role played by the arbitration sector in Hong Kong's legal sector and the economy generally and to assess its competitiveness within a broader international and regional context. 'Enhancing Hong Kong's position as the leading international arbitration Centre in Asia-Pacific' (2016) page 19. A key shortcoming identified was a lack of opportunities for aspiring arbitrators to view first-hand how arbitrators work in handling arbitration proceedings, unless they have themselves acted as counsel or solicitors, concluding: 'given the confidentiality around the arbitration proceedings this is not surprising'.
2018	International Arbitration Survey: The Evolution of International Arbitration	QMU & White & Case	87% of respondents believed that confidentiality in international commercial arbitration is of importance. Most respondents think that confidentiality should be an opt-out, rather than an opt-in, feature. The most valuable characteristics of arbitration**:** respondents were asked to identify the characteristics of international arbitration that they find most valuable. The two most frequently selected options were 'enforceability of awards' (64%) and 'avoiding specific legal systems/national courts' (60%). This reinforces the continued success of the New York Convention and the benefit to parties of eluding the potential biases and specificities of domestic courts. The third and fourth spots were taken by 'flexibility' (40%) and 'ability of parties to select arbitrators' (39%), respectively, followed in fifth place by 'confidentiality and privacy' (35%).
2018	ICCA-Queen Mary Task Force on Third-Party Funding	ICCA & QMU	The Task Force's starting objective was the identification of issues that arise in relation to third-party funding in international arbitration, and the determination of what outputs, if any, would be appropriate to address those issues. the Task Force inquiries focused on 1) What issues does funding raise in international arbitration? and 2) How should those issues be addressed?

2019	Commonwealth Secretariat	Commonwealth Secretariat	The study was requested by Senior Officials of Commonwealth Law Ministries at a meeting with the Secretariat in London in October 2018. The Commonwealth Secretariat invited any of the following Commonwealth entities and individuals to provide input to the study: lawyers, arbitrators, enterprises and academic institutions. The study was launched by the Commonwealth Secretariat to identify and address challenges to accessing international commercial arbitration across the Commonwealth. Through the study, the Secretariat aims to understand the use of international commercial arbitration in addressing commercial disputes across the Commonwealth, and which member countries may strengthen the accessibility and effectiveness of international commercial arbitration. The Secretariat is seeking views on the study, which must be submitted via questionnaire by 30 April 2019.
			Five of the 50 questions addressed confidentiality. 14. What are the four key factors (please rank 1 being the most important, 4 being the least important) that determine the preferred method for resolving B2B disputes? 29. What are the three most valuable characteristics of arbitration? 30. What are the three worst characteristics of arbitration? 45. In your opinion, what are the three most pressing issues in your country that need to be resolved to strengthen international arbitration? 46. In your opinion, what are the three most pressing issues in the Commonwealth that need to be resolved to strengthen international arbitration?
			This writer has had the privilege of sighting the draft unpublished Executive Summary which in part concluded: 8. The impact of arbitration on the development of the law might be perceived as a challenge. The confidential nature of arbitration may hinder the practical application and interpretation of the law, which in turn can delay law reform. 20. …Arbitration also generally offers privacy and confidentiality in the dispute resolution process, particularly in common law jurisdictions such as the Commonwealth member countries. 128. The confidential nature of arbitration awards has the potential to deprive policy makers and academics of valuable insights regarding the practical application and interpretation of the law in question… In addition, the legal profession and the courts might lose valuable precedent. The importance of binding precedents and authoritative interpretation of contractual clauses are heightened in industries which use standard form contracts.

Chapter 2: Confidentiality in Overseas Jurisdictions

'I do not work on a theory. Instead I ask: what will make this work? … I choose a solution which offers a higher probability of success, but if it fails, I have some other way. Never a dead end'.[124]

- *Lee Kuan Yew*

Introduction

The 'Arbitrage International Commercial' Volume 1 ('International Commercial Arbitration' in English) was published at the occasion of the 1956 Paris Congress of the Union Internationale des Avocats (UIA). Subtitled 'A World Handbook' it offered a description of the law and practice of arbitration of 16 countries of Western Europe and of the United States. Volume 2 following in 1960, expanded the contributions to five Latin-American and seven Eastern Europe countries. As the UIA President, Mr Hans Peter Schmid noted in the (translated) English Preface: 'For the settlement of international commercial disputes arbitration presents in many cases the best answer'. Neither Volume 2 running to 483 pages nor its slightly slimmer predecessor at 400 pages however, addressed the privacy or confidentiality or arbitration proceedings in any of the jurisdictions or societies listed. The USSR, Yugoslavia and the London Dried Fruit Association[125] have long since gone.[126] But the issues of privacy and confidentiality remain and the extent to which those various jurisdictions have addressed them is the subject of this chapter.

The overseas laws examined were chosen based on their various contributions to the issue of arbitral confidentiality. It should come as no surprise that the more flexible common law jurisdictions are better represented in this regard. The courts in Australia, England, France, the USA and Sweden have handed down judgments specifically dealing with the issue. New Zealand, Norway and Spain[127] adopted legislation addressing it. Firstly however, it is appropriate to examine the UNCITRAL Model Law. There are 80 countries in 111 jurisdictions which have adopted legislation based on the UNCITRAL Model Law on International Commercial Arbitration (1985), as amended in 2006.[128] It was used it as a point of reference by the drafters of the Arbitration Act 1996. Table 2, Arbitral Confidentiality Provisions in Selected Jurisdictions, summarises the confidentiality requirements for the laws and jurisdictions discussed in this

[124] Tom Plate, *Conversations with Lee Kuan Yew, Citizen Singapore: How to Build a Nation (*Marshall Cavendish, Singapore 2010).
[125] It survived on as the London Dried Fruit Association Benevolent Fund until, finally being wound up in 1965. See https://archiveshub.jisc.ac.uk/search/archives/6e292b40-2d9f-34d9-9de8-74cb3e3e8705 accessed 3 March 2020.
[126] All of which contained entries in those two volumes.
[127] Spanish Arbitration Act 2004 Art.24.
[128] https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status accessed 4 December 2019.

chapter.

The UNCITRAL Model Law

The first point to make is that the UNCITRAL Model Law does not address confidentiality, a widely criticised omission. Mantilla-Serrano considered such a state of affairs as unsatisfactory[129], principally because countries that had adopted the Model Law wholesale would have no confidentiality regime at all, leading to potential uncertainty e.g., in the situation where the arbitrators hail from outside the jurisdiction and are unfamiliar with the arbitration law applicable to its seat. Even if the country has addressed confidentiality, there is in all probability going to be a lack of uniformity of approach. Divergent views are likely to arise with respect to what constitutes confidential material e.g., evidence, statements, expert witness testimony, affidavits, skeleton arguments and the arbitral award. These are not uncommon issues in international commercial arbitrations in the absence of codification. Less discussed is the matter of openness in the arbitral process itself. Take an arbitration with its seat in a jurisdiction possessing a more robust approach to confidentiality, such as Singapore, England, France or New Zealand for example. The strict obligations of confidentiality ought to produce an environment more conducive to openness in the conduct of the proceedings. Compare that to countries with legitimate concerns that disclosed documents may potentially fall into the public domain and public scrutiny; or that the existence of the dispute can be divulged to third parties as in the United States, Sweden or Australia. Would those environments reduce the parties openness in the proceedings? The answer is unclear. The five most preferred and widely used seats are London, Paris, Hong Kong, Singapore and Geneva.[130] But recent research suggests that it is not issues of privacy or confidentiality driving those figures: these attributes rank behind 'general reputation and recognition'; 'formal legal infrastructure'; 'neutrality and impartiality of its legal system and the national arbitration law'; and 'track record in enforcing agreements to arbitrate and arbitral awards'.[131]

When UNCITRAL's Working Group met in 2016 to discuss a revision of its 'Notes on Organizing Arbitral Proceedings', there was no appetite to amend the Model Law to address confidentiality. Whilst noting that confidentiality is perceived as being an 'advantageous and helpful feature of international commercial arbitration' the committee recognised the lack of

[129] 'UNCITRAL Model Law: Missed Opportunities for Enhanced Uniformity' (2008) 31 UNSW Law Journal 1.
[130] According to two of the QMU's most recent surveys: 'International Arbitration Survey: Improvements and Innovations in International Arbitration' (2015); and 'International Arbitration Survey: The Evolution of International Arbitration (2018). See Table 4.
[131] ibid Chart 3.

uniformity of approach in domestic laws or arbitration rules and the extent to which the duty applies. The Secretariat highlighted the options available to parties in an arbitration should the issue of confidentiality be a concern, including the parties agreeing their own confidentiality regime and the expectation that arbitrators should keep the arbitral proceedings confidential.[132] These recommendation were subsequently adopted and incorporated into UNCITRAL's 'Notes on Organizing Arbitral Proceedings'.

In essence UNCITRAL side stepped the issue: unable to cater to multiple jurisdictions and disparate legal philosophies it pushed the responsibility for confidentiality back to the individual states that had adopted the Model Law: '[t]he Notes do not seek to promote any practice as best practice, given that procedural styles and practices in arbitration vary and each of them has its own merit…' [133] This might be regarded as unfortunate. UNCITRAL missed a rare opportunity to bring a degree of harmonization to the practice of international arbitration. It is of interest to note however, that two of the proposals made (the exceptions and required disclosure suggestions) were straight out of Colman J's judgement in *Hassneh Insurance Co of Israel v Mew* [1993] 2 Lloyd's Rep 243 (*Hassneh Insurance)*. The other three can be found in any number of institutional rules.

The Model Law thus provides a template for those jurisdictions with no existing arbitration statutes or case law to fall back on but provides limited assistance in formulating a solution to codification of confidentiality. Böckstiegel (2009) described a growing harmonization between national arbitration laws even where the Model Law is not followed, driven by commercial pressures. That harmonization is apparent in some of the overseas jurisdictions looked at below.[134]

Australia

There are two principle nationwide arbitration acts, as well as the state and territory laws that regulate domestic commercial arbitrations. The Australia Capital Territory's Commercial Arbitration Act 2017 is applicable to domestic commercial arbitrations. The International Arbitration Act 1974 (Cwlth) covers international commercial arbitrations and the enforcement of foreign arbitral awards, last being amended in 2018. The Attorney General pointedly addressed

[132] 'Settlement of commercial disputes: Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings. Note by the Secretariat' https://undocs.org/en/A/CN.9/WG.II/WP.194 accessed 11 April 2020.
[133] '2016 Notes on Organizing Arbitral Proceedings of the United Nations Commission on International Trade Law' at https://undocs.org/en/A/RES/71/137 accessed 11 April 2020.
[134] Karl-Heinz Böckstiegel, 'Past, Present, and Future Perspectives of Arbitration' (2009) 25 Arbitration International 3, 301

the confidentiality issue when he introduced the Commercial Arbitration Bill 2016, recognising that 'confidentiality is a key feature of the arbitration process, as it protects commercial interests and potential reputational harm'.[135] The Bill aimed to ensure greater certainty to the parties that their arbitration would be 'cost effective, unbiased and fair'.[136]

Australia's Commercial Arbitration Bill 2016 provides for limited grounds for the disclosure of confidential information e.g., in the case of a public interest reason. Sections 23C ~ 23G (disclosure of confidential information) address disclosure of confidential information, circumstances in which confidential information may be disclosed, the circumstances when an Arbitral tribunal may allow disclosure, and circumstances when a Court may prohibit or permit disclosure. The Act defines 'confidential information' in relation to arbitral proceedings as being information that relates to the proceedings or to an award made in the proceedings. It is detailed and includes: all pleadings, submissions, and other information supplied to the arbitral tribunal by a party to the proceedings; all evidence supplied to the arbitral tribunal; any notes made by the arbitral tribunal of oral evidence or submissions; transcripts of oral evidence or submissions; any rulings, directions or orders of the arbitral tribunal; the award(s) of the arbitral tribunal. 'Disclose' in relation to confidential information is defined as giving or communicating the confidential information in any way. The public interest exception is formalised with respect to investor state arbitrations. Sections 23C to 23G do not apply to arbitral proceedings to which the Transparency Rules apply.[137]

Esso/BHP v Plowman

The 1995 Australian High Court decision in *Esso/BHP v Plowman* decided by a majority of four to one, upholding the decisions of the lower courts, firmly rejected the English principles in *Dolling-Baker v Merrett*,[138] determining that there was no general over-riding principle of confidentiality which attached to documents disclosed in an arbitration.[139] Stung perhaps by the criticism following *Esso/BHP v Plowman,* Australia subsequently developed detailed provisions relating to confidentiality at both federal and state level.

At the time, it was viewed in England as a dramatic decision, prompting Sir Patrick Neill's

[135] Commonwealth, *Parliamentary Debates*, Legislative Assembly for the ACT, 15 December 2016, 246, (Mr Ramsay, Attorney-General).
[136] Commonwealth, *Parliamentary Debates*, Legislative Assembly for the ACT, 21 March 2017, 771, (Mr Ramsay, Attorney-General).
[137] The confidentiality provisions in the two Acts are nearly identical. They also closely follow those found in State laws such as Northern Territories (2011), Queensland (2013) and Western Australia (2012).
[138] [1990] 1 WLR 1205.
[139] *Esso/BHP v Plowman* is dealt with in detail in Chapter 7.

1995 Bernstein Lecture 'Machiavelli' speech.[140] A special edition of Arbitration International was devoted to the confidentiality theme, with an editorial,[141] articles by Jan Paulsson and Nigel Rawding,[142] Michael Collins QC[143] and two by Hans Smit.[144] Nosworthy[145] considered that as a result of the decision many documents which would previously have been considered private and confidential could now find their way into the public domain; that as the parties and tribunal had the power to agree that documents would be treated as confidential, this was capable of being addressed by means of a supplementary arbitration agreement. Pryles reviewed the results of a survey of international commercial arbitration conducted by Dr. Buhring-Uhle. Respondents rated confidentiality as the third most important advantage of arbitration (out of eleven options). Pryles commented: 'Outside Australia the decision … in Esso Australia has not been well received'.[146] Bagner later considered that following *Esso/BHP v Plowman* (and also the Swedish case of *Bulgarian Foreign Trade Bank Ltd v AI Trade Finance Inc* (Case T-1881-99, Swedish Sup Ct, 27 October 2000) (*Bulbank*) the assumption that 'confidentiality is an obvious and inherent part of commercial arbitration' was no longer tenable.[147] New Zealand reacted by explicitly rejecting the approach of *Esso/BHP v Plowman*, amending the law in support of the English stance.[148]

It was not as if *Esso/BHP v Plowman* was completely unexpected however: the signs were there to see for a careful observer of Australian arbitration law. Two years earlier Miller (1993) presciently commented that '[p]ublic policy can rarely be objectively ascertained, and its potential to influence and even determine the result of an international arbitration'.[149] There is a certain sense of over-reaction to *Esso/BHP v Plowman.* The criticism of Mason CJ's reasoning echoes the attacks on some of Lord Denning's judgements, both men being possessed of a reformist, pragmatically intellectual approach to the law. Denning was not infrequently accused of being more concerned with the notion of justice and reaching an equitable decision as he was the strict application of the law.[150] But Mason CJ's decision seems, in my view at least, as being an

[140] Sir Patrick Neill, 'Confidentiality in Arbitration' (1996) 12 Arbitration International 287, 316.
[141] (1995) 11 Arbitration International 231.
[142] Jan Paulsson, Nigel Rawding, 'The Trouble with Confidentiality' (1995) 11 Arbitration International 303.
[143] Michael Collins, 'Privacy and Confidentiality in Arbitration Proceedings' (1995) 11 Arbitration International 321.
[144] Prof Hans Smit, 'Case-note on Esso/BHP v Plowman (Supreme Court of Victoria)' (1995) 11 Arbitration International 299; 'Confidentiality in Arbitration'(1995) 11 Arbitration International 337.
[145] Ian Nosworthy & Andrew Robertson, 'A Setback for Arbitration - High Court Rules No Implied Confidentiality in Arbitral Proceedings' (1995) ACLN Issue 42.
[146] 'Assessing Dispute Resolution Procedures' (1996) 7 Am. Rev. Int'l Arb. 267.
[147] Hans Bagner, 'The Confidentiality Conundrum in International Commercial Arbitration' (2001) 12 ICC International Court of Arbitration Bulletin 1, Spring, 18
[148] New Zealand Arbitration Act 1996 Art.14.
[149] Dan Miller, 'Public Policy in International Commercial Arbitrations in Australia' (1993) 9 Arbitration International 2.
[150] There is no shortage of literature on the subject of Lord Denning's judicial activism. For an informative and sympathetic overview see Michael Kirby 'Lord Denning and Judicial Activism' (1999) 14(1) The Denning Law

eminently correct one. It could be argued that this is a revisionist approach through the prism of today's standards and expectations. Nevertheless, like Lord Denning before him, I would suggest that he was possessed of a progressive streak in regard to his judicial philosophy and temperament. If rather than having justified the decision on the grounds that confidentiality was not an implied term, the focus had been one of public interest, the judgement might have been considered less controversial and better received generally. This therefore was not a maverick decision, but one in keeping with the development of a modern, coherent philosophy whereby the rights of a society must be balanced against those of all its users. The law serves not only the rich and the powerful.[151] Unfortunately the court did not explore the boundaries of a public interest exception. Brennan J, agreed with the Chief Justice that there was a public interest exception to the principle: but it had not having arisen in the appeal and so considered: '… [it] unnecessary and inappropriate to discuss the boundaries of that exception'.[152]

Transfield Philippines Inc & Ors v Pacific Hydro Ltd & Ors[153] (Transfield Philippines)

The uncertainties caused by *Esso/BHP v Plowman* were addressed again in *Transfield Philippines.* Transfield Philippines, believing that there might have been judicial or governmental impropriety in earlier arbitration proceedings in the Philippines, sought the Supreme Court of Victoria to excuse them from any implied undertaking not to use the documents obtained by discovery other than for the purposes of the arbitration. Hollingworth J was unpersuaded that the Court had jurisdiction to release a party from such an implied undertaking given in separate arbitral proceedings: Transfield's application was dismissed on the grounds that it was brought in breach of the arbitration agreement. *Transfield Philippines* pulls back a little from *Esso/BHP v Plowman.* It undid some of the damage that case did to the perception that the Australian courts had undermined arbitral confidentiality, arguably narrowing the differences between English and Australian law in the process. It will be relatively rare for documents to be produced outside the usual discovery process. Australian courts are likely to still view as confidential documents that have been produced subject to an implied undertaking not to use them other than for the purposes of the arbitration and be reluctant to relieve a party from that undertaking.

Journal 127.

[151] A recurring theme amongst US commentators. See for example Adam Cohen (2020) who described how the US Supreme Court '[s]ided with the rich and powerful against the poor and weak, in virtually every area of the law'. *Supreme Inequality: The Supreme Court's 50-Year Battle for a More Unjust America* (Penguin 2020).

[152] *Esso Australia Resources Ltd v The Hon Sydney James Plowman & Ors.*[1995] HCA 19 [26].

[153] [2006] VSC 175.

Wilmar Sugar Pty Ltd v Burdekin District Cane Growers Ltd [2017] QSC 3 (Wilmar Sugar)

The most recent restatement of the Australian approach, again with a strong public interest dimension, came in *Wilmar Sugar* where the Supreme Court of Queensland was given an opportunity to consider the issue of confidentiality of arbitral proceedings. A dispute had arisen between the operator of various sugar cane mills in Queensland and growers that supply sugar cane to those mills. The mills crush sugar cane and manufacture raw sugar.[154] Negotiations for a supply contract broke down and the parties were obliged by statute to refer the dispute to arbitration. The tribunal ordered the respondent growers be allowed to disclose certain confidential information to two government members of parliament, an order the mill owners appealed to the courts to prevent. The issue for the court to determine was whether a public interest in disclosure outweighed the confidentiality of the arbitration. Jackson J agreed with the arbitrator and allowed the disclosure.[155] Unusually the judge provided confidential reasons to the parties, considering it impossible to be specific about the confidential information in the public reasons for judgment: '…to identify the relevant subject matter, …would arguably communicate the substance of the balance of the confidential information which the applicant seeks an order to preserve'. *Wilmar Sugar* emphasises that Australian courts appear sympathetic to and will generally uphold a public interest exception to confidentiality, even if its extent remains opaque.

Canada

Based on the UNCITRAL Model Law, Canada's Federal Commercial Arbitration Act, RSC 1985, c 17 (2nd Supp) applies in limited circumstances where at least one of the parties to the arbitration is a government department or corporation or in relation to maritime and admiralty matters. As a result, the jurisdiction of the majority of arbitration cases in Canada falls under the laws of the relevant province or territory, at which level separate legislation for international and domestic arbitration has been enacted. Whilst only Quebec has legislated for confidentiality, there is some modern jurisprudence.

Quebec is a civil law jurisdiction with a Code of Civil Procedure (CCP) that governs procedures applicable to private dispute prevention and resolution. Chapter C-25.01 at Article 1

[154] Historically, the sugar industry in Queensland was highly regulated and up until the passing of the Sugar Industry Amendment Act 2005 (Qld), Queensland Sugar Ltd held an effective monopoly. Even after deregulation however, choice for growers remained limited because of practical factors relating to harvesting and getting the harvested sugar cane to the mill for crushing: the perishable nature of cane, transport costs and that most cane farming regions are only in the vicinity of one mill or of mills owned by the same mill owner.

[155] Although the reasoning perhaps was slightly tortuous - the court took the view that there was a drafting mistake in the Act at s.27H(1) which (following *Adams v Lambert* (2006) 228 CLR 409, [21] made it permissible to so read the section in order to avoid absurdity - there was no appeal.

'Principles of Procedure Applicable to Private Dispute Prevention and Resolution Processes' notes that the main private dispute prevention and resolution processes are negotiation between the parties, and mediation/arbitration, in which the parties call on a third person to assist them. Three Articles explicitly reference confidentiality. Article 4 requires that the parties and 'the third person assisting them' undertake to preserve the confidentiality of anything said, written or done. Article 5 is uncommon in that it allows for that 'third person' to disclose information for research, teaching or statistical purposes without being a breach of confidentiality, provided no personal information is revealed.[156] Article 644 exempts the arbitrator from breaching the confidentiality of the arbitration process by stating conclusions and reasons in the award.

In *Rhéaume v Société d'investissements l'Excellence inc*[157] the Quebec Court of Appeal had to consider the following issues: the extent of the obligation of deliberative secrecy imposed on arbitrators; if there had been a breach of the obligation, whether the award should be annulled; and whether Quebec arbitrators were subject to an obligation of confidentiality, and if so, what was the sanction for a breach of the obligation? The court highlighted that the rule of deliberative secrecy was as important in arbitration as it was in litigation, a hallmark of judicial independence worthy of protection in order to ensure that decisions: '[a]re made with circumspection and reflection and in freedom… the process of discussion and compromise among different points of view would not work if stripped of its confidentiality'.[158]

Whilst recognising that the arbitrators conduct was not above criticism, the court took the view that it would be wholly inconsistent with the intention of the legislature and the trend in the courts to treat every breach of the procedure, however minor and however inconsequential, as requiring a court to annul an award. A court should balance the nature of the breach, determining whether it was of such a nature as to undermine the integrity of the process. After analysing the domestic and overseas authorities, Hilton J refused to recognize an implicit obligation of confidentiality associated with the arbitral process binding on arbitrators and parties alike.

Ontario had the opportunity to address confidentiality in *Adesa Corporation v Bob Dickinson Auction Services Ltd.*[159] The case involved an application for the production of transcripts from an arbitration in which the Claimants (but not the Respondents) were parties. The information sought was in relation to identical issues in front of both the court and arbitration. The court held

[156] An interesting concept that, whilst outside the scope of this thesis, is deserving of further consideration and research.
[157] 2010 QCCA 2269.
[158] James Kenneth McEwan and Ludmila Barbara Herbst, *Commercial Arbitration in Canada, A Guide to Domestic and International Arbitrations,* (Aurora, Cartwright Group, 2008) 9.
[159] *Adesa Corporation v Bob Dickinson Auction Services Ltd* [2004] O.J. No. 4925.

that there was a confidentiality provision in the arbitration agreement and made a finding of fact that there was an expectation of privacy in the arbitration. While accepting that there were advantages to confidentiality, Cameron J held that confidentiality was not essential to the arbitration process, remarking: 'I am not persuaded that the confidentiality of the arbitration process … is so important as to outweigh the need in this court for justice if that requires the disclosure'.[160]

The Supreme court of British Columbia took a more typically English approach in *Hi-Seas Marine Ltd v Boelman.*[161] Davies J, viewing the contradictory positions taken in England and Australia, noting the lack of decided authority on this point in his own jurisdiction, commented that: 'While it may eventually be necessary for the courts of this province to comprehensively address the contradictory positions taken … it is not necessary that I do so in this case'.[162] Nevertheless, the transcript of evidence taken in an arbitration to be produced for court was allowed, the court being unsympathetic to the prospect of being prevented from so doing by the private nature of arbitration. Despite a lack of statutory provisions, Canada's case law provides some guidance as to how the State's courts view confidentiality with respect to materials (supportive) and awards (pragmatic).

France

The main provisions applicable to arbitration in France are set out in Book IV of the Code of Civil Procedure.[163] Article 1469 addresses the principle of confidentiality of the arbitrators' deliberations,[164] with further provisions set out in the French Civil Code.[165] French arbitration law is not based on the UNCITRAL Model Law. Whilst France does not as such follow the English doctrine of precedent, French lower courts nevertheless generally follow the decisions of higher courts and so decisions of the Court of Cassation and of the Court of Appeal in Paris become important in interpreting the law. French case law recognizes and strictly supports the confidentiality of arbitration.

One of the most important reported cases in French law with respect to international arbitration is *Aita v Ojjeh*[166] by the Court of Appeal of Paris, as it reviewed almost all challenges

[160] ibid [56].
[161] (2006) BCSC 488.
[162] ibid [67].
[163] Promulgated in Decree No. 2011-48 of 13 January 2011, Articles 1442 to 1527.
[164] Nouveau Code de Procedure Civile or NCPC.
[165] Articles 2059 to 2061.
[166] *Aita v Ojjeh* [1986] Revue de 1'Arbitrage 583 (Cour d' Appel de Paris, 18 February 1986).

to awards. The Court issued a judgment against the party seeking annulment in France of an award that had been published in London by Lord Wilberforce acting as umpire. It held that the very bringing of a challenge to the court violated the principle of confidentiality for causing 'a public debate of facts which should remain confidential' and that it is in 'the very nature of arbitral proceedings that they ensure the highest degree of discretion in the resolution of private disputes, as the two parties had agreed'. The Court in a somewhat unusual move, imposed a significant penalty on the party bringing the appeal. Paulsson & Rawding viewed the reasoning of the Court of Appeal as troubling, suggesting that the court was punishing a politically motivated attempt to set aside an English award in the French courts.[167] Whether such a perception is justified is unclear. But the reasoning of the Court of Appeal does appear to be unsatisfactory on two grounds. The judgement failed to articulate the extent of the limit of any duty of confidentiality. Neither did it provide authority for the view that the nature of arbitration intrinsically calls for confidentiality. As Paulsson and Rawding diplomatically commented: 'This was not, perhaps, a context that lent itself to a careful balancing of considerations'. [168]

The Paris Court of Appeal decision in *Société National Company for Fishing and Marketing 'Nafimco' v Société Foster Wheeler Trading Company AG*,[169] which held that there was no prima facie presumption of confidentiality, is strongly indicative that the French courts are still grappling with the concept and searching for a settled guiding principle. Seemingly questioning the confidential nature of arbitration, the court required the party alleging that confidentiality had been breached to explain the existence and reasons for a principle of confidentiality in French international arbitration law.

Germany

German arbitration law is contained in s.1025 to s.1066 of the German code of civil procedure or Zivilprozessordnung ("ZPO").[170] The ZPO is based on the UNCITRAL Model Law (1985). It contains no provisions addressing confidentiality and is silent on whether arbitration proceedings are confidential. There is no consensus in Germany as to the confidentiality obligations of the parties and is subject to debate as to whether an implied obligation can be

[167] Paulsson J & Rawding N, 'The Trouble with Confidentiality' (1995) 11 Arbitration International 303, 312; first published (1994) ICC International Court of Arbitration Bulletin 48.
[168] ibid. See also Alexis C. Brown, 'Presumption Meets Reality: an Exploration of the Confidentiality Obligation in International Commercial Arbitration' (2001) 16 Am Univ Int Law Rev 969, 975. See Jean Louis Delvolve, Vraies et fausses confidences, ou les petit et le grands de l'arbitrage, 1996 Rev. Arb. 373, 391;
[169] Cour d'appel de Paris (1ère Ch. C), 22 January 2004, in: Rev. Arb. 2004 Issue 3, 647–657.
[170] Germany's Arbitral Proceedings Reform Act came into force on 1 January 1998.

derived from the arbitration agreement.

It is generally accepted that arbitrators - unlike the parties - are under an implied general duty of confidentiality. Confidentiality will in the most part depend on the parties' agreement, by expressly choosing the 2018 DIS Rules (which contain an explicit confidentiality provision in s.44) or, as in the case of maritime arbitrations, adopting the 2013 GMAA Rules. In 1991 and 1992 Dr. Buhring-Uhle undertook two surveys of the perceived advantages of international commercial arbitration in connection with a doctoral thesis he presented to the University of Hamburg.[171] They asked participants for their reasons in choosing international commercial arbitration to resolve their disputes. Approximately one hundred and fifty questionnaires were distributed to arbitrators, attorneys and in-house counsel in over twenty countries (though mostly American or European). A total of ninety-one individuals from seventeen countries responded and Dr. Buhring-Uhle personally interviewed sixty-eight. The results indicated that confidentiality was ranked as the third most important advantage of arbitration in a list of eleven, behind only the neutrality of the tribunal and the international enforcement by treaty of awards.[172]

Hong Kong

Hong Kong is a Model Law jurisdiction, having incorporated the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006) in the Arbitration Ordinance. It applies to all arbitrations (domestic or international) seated in Hong Kong. Hong Kong adopted a new arbitration law, the Hong Kong Arbitration Ordinance (Cap. 609, Laws of Hong Kong) (Arbitration Ordinance) in 2011, subsequently amended in 2013 and again in 2017. The Hong Kong Ordinance is not only one of the most modern and up to date, it also codified the implied duty of confidentiality imposed on the parties under pre-existing Hong Kong law under s.18, itself being modelled on s.14 of the New Zealand Arbitration Act (prior to its amendment in 2007). Confidentiality provisions were originally introduced in 2011. Choong & Weeramantry are probably correct that the Hong Kong Administration views confidentiality as one of the main reasons parties choose to settle disputes by arbitration.[173] Fang considered Hong Kong arbitration attractive on the grounds that the duty of confidentiality will bind the proceedings and negate the specific need to draft a specific confidentiality clause. Whilst that view may be correct, there is

[171] See Table 4 for a further description of the surveys.
[172] Christian Buhring-Uhle, L Kirchhoff & Gabriele Scherer, *Arbitration and Mediation in International Business* (2nd edn Kluwer Law International 2006).
[173] John Choong & Romesh Weeramantry, *The Hong Kong Arbitration Ordinance: Commentary and Annotations* (Sweet & Maxwell 2011) 90.

no supporting empirical data.[174]

Parties are prohibited from disclosing information relating to arbitral proceedings, including the awards. The Arbitration Ordinance provides four clear principle exceptions to the duty of confidentiality in s.18(2). Namely, that the publication, disclosure or communication of information concerning an arbitration can be made: in pursuance of a legal right or interest of the party; to enforce or challenge the award; where obliged to do so by law - whether to a court, government or regulatory body; and to the party's professional or other advisers. Provisions relating to the privacy of the arbitration are also addressed. Section 16 requires that proceedings are to be heard otherwise than in open court, a move away from pre 2011 Ordinances under which the presumption was that arbitration-related court proceedings would be heard in open court. Section 17 details restrictions on reporting of proceedings heard otherwise than in open court whilst s.17(4) gives the court discretion to direct that reports of the judgment may be published in law reports and professional publications if the court considers that judgment to be of major legal interest.

The text of the Ordinance suggests that subject to the various exceptions identified, the implied duty of confidentiality under the common law applies to all pleadings, evidence, documents, the hearing and the award that arise out of the arbitration. The Hong Kong courts held in *Parakou Shipping Pte Ltd v Jinhui Shipping and Transportation Ltd*[175] that those exceptions apply where a party wishes to disclose an award obtained in a previous arbitration. The HK Arbitration Ordinance, bearing several similarities with New Zealand law from which it borrowed, provides some thoughtful ideas, particularly in the context of award publication.

Malaysia

Malaysia's Arbitration Act 2005 (Act 646) is based on the Model Law. The 2005 revision however did not address confidentiality, the Malaysian courts continuing to rely on common law principles.[176] Only following the 2018 amendment and a new s.41A (modelled on s.18 of Hong Kong's Arbitration Ordinance) did the Act address confidentiality.[177] Section 41A provides that unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to arbitral proceedings, including any award. There are disclosure

[174] Kun Fan, 'The New Arbitration Ordinance in Hong Kong' (2012) 29 Journal of International Arbitration 6.
[175] [2010] HKEC 1503.
[176] In *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and Other* [2018] 1 MLJ 1 Malaysia's Federal Court observed that the whole topic of confidentiality of arbitral proceedings was unregulated by the Arbitration Act.
[177] Arbitration (Amendment) (2) Act 2018.

exemptions with respect to protecting or pursuing a party's legal right or interest; enforcing or challenging the award; when obliged by law to do so; and to a party's professional or any other adviser.

One of the first cases following the implementation of the 2005 Act (although without the benefit of the 2018 confidentiality provisions of s.41A) was *Malaysian Newsprint Industries Sdn Bhd v Bechtel International, Inc & Anor*.[178] Abdul Malik Ishak J expressed the view that: 'Privacy of the hearing and confidentiality are two major benefits of arbitration … it is now accepted, by all and sundry, that arbitrations are private and confidential'.[179] The High Court adopted the English law position, that a presumption of confidentiality arises as an implied term of an arbitration agreement, even in the absence of an express term for confidentiality.

Third party confidentiality was again addressed in *Jacob and Toralf Consulting Sdn Bhd & Ors v Siemens Industry Software Gmbh & Co KG & Ors.*[180] The claimants had sought to expunge a document that had been exhibited to an affidavit in a Singapore ICC arbitration, on the grounds that arbitration proceedings are private: that all documents produced or created for the purpose arbitration are confidential in nature and cannot be used by third parties without the prior leave of the court.[181] The respondents argued that common law principles were inapplicable. The document was not in itself a confidential document and the information it contained had been in the public domain for three years, relying on two English cases. *Coco v AN Clerk (Engineers) Ltd*[182] where Meggary J held that: '[t]here can be no breach of confidence in revealing to others something which is already common knowledge…' And *AG v Guardian Newspapers Ltd (No 2)*[183] where Lord Goff determined that: '[o]nce it has entered what is usually called the public domain…the principle of confidentiality can have no application to it'.[184]

Komathy J took the view that in neither case did the principles apply to arbitration proceedings. Even if the document contained information that was not inherently confidential or information that was already in the public domain: 'it is still subject to the obligation of privacy and is a document private to the parties to the arbitration and the arbitral tribunal'. That an arbitration hearing was a private process between the parties to an arbitration agreement to which third parties had no access: 'It stands to reason that documents generated for use at that hearing

[178] [2008] 5 MLJ 254.
[179] ibid [57], [60].
[180] [2013] MLJU 1621. Malayan Law Journal (Unreported).
[181] Relying on *Malaysian Newsprint Industries Sdn Bhd* [2008] 5 MLJ 254 and the English cases of *Ali Shipping* and *Dolling Baker v Merrett.*
[182] (1969) RPC 41, 47.
[183] [1988] 3 All ER 545
[184] ibid [659].

should remain private and confidential'. In the court's view there was no point in excluding third parties from an arbitration hearing, if they were later able to use such documents without the permission of the party who had produced them. In so doing it would be 'tantamount to opening the door of the arbitration venue to a third party and would serve to compromise the arbitration'.[185] It was a point of view reiterated in Malaysia's Court of Appeal in *Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd.*[186]

The powers of a court to order redaction of an award or to parts thereof were addressed in the Malaysian High Court in *Sabah Electricity*[187] which affirmed that where proceedings are commenced to register and enforce an award in Malaysia, the High Court does not have the power to order a redaction of any part of the award sought to be registered and enforced. The court distinguished the lack of powers it had to do so under the Act, unlike jurisdictions such as Singapore.

This common law interpretation of confidentiality remained settled until *Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd*[188] *(Rafiq v Nautilus)* where Goon J held that the prohibition under s.41A of the Arbitration Act 2005 did not extend to non-parties to the arbitration. Whilst the common law principles of confidentiality attached to an arbitration had been superseded, the implied obligation between the parties to an arbitration could not be extended to non-parties to an arbitration. *Rafiq v Nautilus* raises the issue that whilst s.41(A) allows a party to the arbitration to disclose confidential documents where litigation proceedings are brought against it, the Act does not contemplate the situation where a third party commences proceedings against one of the parties to an arbitration and in the process relies on confidential documents in that arbitration. It would appear that the prohibition against third parties publishing, disclosing or communicating information relating to arbitration proceedings is no longer the law in Malaysia. However, there is arguably a disconnect between the judgement and s.8 of the Arbitration Act 2005 which provides that no court shall intervene in matters governed by it. If that analysis is correct, then the Malaysian common law rule prohibiting third parties from using confidential documents produced in arbitral proceedings should still apply, the matter not being specifically regulated by the Arbitration Act 2005 itself.

The impact of the repeal of s.42 of Malaysia's Arbitration Act 2005, deleting the provision

[185] [2013] MLJU 1621, [30].
[186] [2016] 2 MLJ 697.
[187] *Sabah Electricity Sdn Bhd (previously known as Lembaga Letrik Sabah) v Sandakan Power Corporation Sdn Bhd* (2017) WA-24NCC(ARB)-17-02/2017.
[188] [2019] 10 MLJ 693.

for challenging arbitral awards on questions of law is also currently unclear. Ezeoke considered that the Malaysian courts experienced difficulty in dealing with applications under s.42 prior to its repeal, highlighting the inconsistent approaches of the courts and their struggle to find a balanced approach towards arbitration.[189] Nevertheless, the repeal of s.42 has removed an element considered fundamental to English arbitration and that features widely in the arbitration laws of many other common law jurisdictions.

Broadly following the principles of English law with respect to arbitral confidentiality, Malaysia can however be seen to have diverged with respect to appeals and its application to third parties.

New Zealand

New Zealand's response to the uncertainty caused by *Esso/BHP v Plowman* was to include a specific confidentiality clause in New Zealand's Arbitration Act 1996. The provisions of s.14 provided that an arbitration agreement - unless otherwise agreed by the parties - was deemed to provide that the parties would not publish, disclose, or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings. Section 14 still however gave rise to interpretive difficulties.

In *Television New Zealand Ltd v Langley Productions Limited*[190] the New Zealand courts accepted that confidentiality is lost once a matter came before it on a matter of appeal. The dispute was between Television New Zealand ("TVNZ") and a newsreader, John Hawkesby. TVNZ contended that the dispute should be referred to arbitration and stressed the importance of confidentiality. Hawkesby submitted that arbitral proceedings would deny him 'the opportunity to try and salvage his damaged reputation in a public forum' and submitted that the High Court should settle the dispute. The two parties subsequently agreed to refer the dispute to arbitration. The award was in Hawkesby's favour and TVNZ appealed. The public speculated over the likely outcome. Deciding that publication of the award would be appropriate, TVNZ applied to the court to waive the confidentiality provisions of the arbitration agreement. Robertson J concluded that as a matter of principle, the confidentiality provisions could not automatically extend to subsequent High Court proceedings. That once High Court proceedings were initiated, the principles applicable to the High Court would determine the question of access and public

[189] Ezeoke C, 'Challenging arbitral awards on the question of law in Malaysia: is it gone for good?' (2019) 22 Int. ALR 56
[190] [2000] 2 NZLR 250.

knowledge. The court considered (in an approach reminiscent of both Bentham and Hallam) that: 'The openness of justice is a central tenet of our system. Proceedings will be open for reporting and scrutiny unless there are exceptional reasons which militate against that'.[191]

The court held that it was inappropriate to conduct confidential court proceedings because the matter was of serious public interest; that the parties had both changed their positions as to the importance of confidentiality as it suited them; and that the express adoption by the parties in their arbitration agreement allowing an automatic right to appeal against the award. Robertson J held that whilst the arbitral award 'should be made available for public scrutiny and without any impediment being created by the confidentiality term in the contract' recognised that there would be some cases where it would be appropriate for the Court to exercise a discretion in circumstances where confidentiality was an essential ingredient.

It is unclear however the extent to which this is still the law in New Zealand subsequent to the 2007 amendments. The New Zealand Law Commission recommended in 2003 that it be replaced by a more elaborate provision,[192] those amendments being adopted on 18 October 2007. Amongst other amendments, significantly enhanced provisions for confidentiality came into force. These included that all arbitration hearings are private and that arbitrators are obliged to conduct them as such is stipulated under s.14A. That arbitration agreements, with certain exceptions, are deemed by default to provide that disclosure of confidential information is prohibited under s.14B. Exceptions include disclosure to a professional or other adviser or if the disclosure is necessary in order for example: to ensure that a party has a full opportunity (a potentially troubling phrase: compare this with the English law position of 'reasonable opportunity')[193] to present the party's case, as required under article 18 of Schedule 1; for the establishment or protection of a party's legal rights in relation to a third party; in order to make an application to a court; and when reasonably required. The circumstances under which an arbitral tribunal may allow disclosure of confidential information is addressed in s.14D. Section 14E deals proscribes the High Court's role in allowing or prohibiting disclosure of confidential information, for example if arbitral proceedings have been terminated or party lodges an appeal concerning confidentiality. The decision of the High Court is final under s.14E for which there

[191] CL 7/99, HC Auckland, 7 February 2000. See also *Cullen Investments Ltd v G Lancaster & Another* 27/9/02, Chambers J, HC Auckland.
[192] New Zealand Law Commission 'Improving the Arbitration Act 1996'. (2003) Report 83, para 53.
[193] The formulation in s.33(1) of the [English] Arbitration Act 1996 is based on Art.18 of the Model Law, differing mainly in that that the Model Law refers to 'full opportunity' to present the case, whereas section 33(1) refers to 'reasonable opportunity'. The DAC Report at 165, makes the point that the formulation 'full opportunity' may lead to unreasonable delays, contrary to the interests of justice.

is no further appeal.

New Zealand's approach is arguably out of step with jurisdictions such as England, Hong Kong and Singapore which provide greater assurance of arbitral confidentiality with respect to related court proceedings. Nevertheless, the 2007 amendments were considerable changes, in terms of scope and philosophy. They make New Zealand one of few countries with a very specific and detailed confidentiality code for arbitrations. The text of s.14 comprises over 120 lines and two pages, highlighting the potential complexity of codifying arbitral confidentiality.

Minor changes were incorporated by the Arbitration Amendment Act 2016 which was adopted in 2017. The New Zealand Ministry of Justice was unpersuaded that other possible changes such as including extending the presumption of confidentiality in arbitration to the conduct of related court proceedings were necessary and the Arbitration Amendment Act 2019 did not impact on the confidentiality provisions. The extent to which (or whether) evidence and pleadings can be relied on in other proceedings has not yet been tested in the courts.

Norway

There are few statistics with respect the number of arbitrations that take place in Norway. The Oslo Institute administers between three and five cases per year. Knudtzon cited a survey that shewed 372 arbitration awards being filed in the Oslo Court between 1987 and 2001.[194]

The position prior to the adoption of the 2004 Act was that confidentiality provisions were uncertain: there was 'no legislation… no case law, but plenty of literature'.[195] A legislative committee was formed prior to the introduction of the Norwegian Arbitration Act 2004[196], of which one of its tasks was to take opinions on the issue of confidentiality.[197] Norwegian users of arbitration expressed a broad range of opinion to this question. During the lengthy consultation process, arguments were made that Norwegian arbitration practice needed more openness; that it would benefit from the publishing and making available for reference more awards. It was clear that there was no consensus amongst Norwegian users of arbitration with respect to how far the confidentiality provisions were to be liberalised.

The Norwegian Bar Association supported the legislative committee's proposals. The

[194] Stephen Knudtzon, 'Arbitration in Norway: Features of the Oslo Chamber of Commerce' (2013) in G. Cordero-Moss (ed), *International Commercial Arbitration: Different Forms and their Features* (Cambridge: Cambridge University Press 2013).
[195] Nisja O, 'Confidentiality and public Access in Arbitration – the Norwegian Approach' (2008) 11 Int ALR 187.
[196] The Lov om voldgift (2004/05/14 nr. 25) in Norwegian.
[197] The Legislative Committee's proposal at NOU 2001: 33 section 1-5.

Nordisk Defence Club, one of the largest P&I Defence Club users of maritime arbitration representing both ship owners and charterers were not only sympathetic to greater openness, they requested an even greater degree of transparency than that proposed. Was that a disinterested, detached viewpoint or one borne out of pragmatism? As one of the largest defence clubs, there would be a practical benefit of award publication: the more arbitration awards in the public domain, the better strategically placed a defence insurer might be to evaluate when to settle and when to fight a case.

By contrast the Confederation of Norwegian Enterprise (NHO), the Norwegian Financial Services Association and the Federation of Norwegian Coastal Shipping all stressed that discretion and confidentiality were the decisive reasons for parties to choose arbitration. Terje I. Våland's survey conducted amongst participants involved in offshore industry in Norway concluded that arbitration is chosen with the specific aim of avoiding publicity.[198] In summary there was no consensus on the importance of confidentiality within the business community in Norway, a view ultimately reflected in the Act.

Transparency and simplicity prevailed however when the Norwegian Arbitration Act 2004 was enacted into law: applicable to both domestic and international arbitrations, the Act is based upon and closely follows the UNCITRAL Model Law. The duty of confidentiality and public access is set out at Art.5, which provides that the arbitral proceedings and the award are not be subject to a duty of confidentiality, unless otherwise agreed by the parties. Third parties are excluded from hearings without the permission of the parties. Of note is that Art.36 requires the arbitral tribunal to send one signed copy of the arbitral award to the Municipal Court for filing in the archives of the Court. Whether and to what extent the depositing of awards with the Municipal Court might affect the award's confidentiality is unclear. The old Civil Procedure Act 1915 provided that the arbitral tribunal was to send a signed copy of its award to the local District Court's archives,[199] an obligation that according to Nisja, few tribunals fulfilled.[200] Whilst there was no implication that this made the awards publicly available - the aim reputedly being for statistical purposes - neither the old or new provisions appears to have been tested: there are no authorities or other data to indicate whether non-participants to an arbitration have sought access to an award filed with the Municipal Court. Overall it is clear that Norway has moved towards greater arbitral openness and transparency, favouring disclosure rather than confidentiality.

[198] Terje I. Våland, Konflikter i petroleumsklyngen (2002) 6.
[199] s.465 para 2.
[200] Nisja (2008) 188.

Nisja considered that the Norwegian Arbitration Act 2004 was better received and less criticised than had been predicted. Overall users appear satisfied that the clarity on the issue of confidentiality has brought. There are no significant concerns that confidentiality now requires an 'opt in' rather than 'opt out' approach.

Singapore

The Government's active policy to develop Singapore as an international arbitration centre has seen a steady increase in arbitration activity in the Lion City. Maxwell Chambers, an arbitration centre launched in 2010 with Government funding, increased its floor capacity threefold with the addition of the former Red Dot Museum in 2019. The white stucco colonial-era building in Tanjong Pagar, built in 1928 as a police force barracks, became the Traffic Police Headquarters until 1999. Now renamed Maxwell Chamber Suites, together with Maxwell Chambers they form the world's first and largest integrated international dispute resolution centre.

The Model Law, except for Chapter VIII, has the force of law in Singapore. International arbitration in Singapore is governed by the International Arbitration Act (Cap 143A) (IAA) whilst domestic arbitration is governed by the Arbitration Act (Cap 10) (AA) which is based on the 1985 UNCITRAL Model Law i.e., without the 2006 amendments. Whilst neither the AA and nor the IAA explicitly impose a duty of confidentiality, an implied obligation of confidentiality in arbitrations has been recognised by the Singapore courts. There is limited case law dealing with arbitral confidentiality. In *Myanma Yaung Chi Oo Co Ltd v Win Win Nu*,[201] Kan J dealt with the issues of confidentiality of arbitration proceedings and documents disclosed in those proceedings. On whether there was an implied duty of confidentiality, the court preferred the English position in *Ali Shipping* over the Australian one in *Esso/BHP v Plowman*. The court reasoned that parties consider that arbitration hearings are private whilst court proceedings are open and public: their reasonable expectations therefore would be that proceedings were confidential. On whether it is necessary to first obtain the leave of court before disclosure of the arbitration proceedings, the court held that leave was not automatically required. When it is reasonably necessary to disclose, the duty of confidentiality is lifted. If, however the other party disputes the necessity, it can apply to the courts who will then determine if it is reasonably necessary. The principle of confidentiality in arbitration was affirmed by the Singapore High Court in *AAY v AAZ*[202] as a 'general principle or doctrine of arbitration law developed through the common law'. The following year in *AZT v*

[201] [2003] SGHC 124.
[202] [2011] 1 SLR 1093.

AZV[203] the Singapore High Court took a further step towards the enhancement of confidentiality in arbitration when it ordered court documents relating to an arbitration to be sealed.

Singapore's formal position of favouring confidentiality in arbitration is broadly welcomed by the arbitration community.[204] There is nonetheless a political dimension to the push for greater openness, the cause of award publication being championed by senior members of the judiciary. Menon CJ of the Supreme Court of Singapore was supportive of greater publication of arbitration awards in the keynote address to the SCMA in October 2019.[205] The Chief Justice expressed the view that limited rights of appeal were having an adverse impact on the development of the law, citing references, including Lord Thomas's 2017 speech. Award publication is analysed in Chapter 8, Development of the Law.

The Singapore courts have a relatively strict attitude towards and are supportive of arbitral confidentiality. The exceptions to that obligation are: the public interest or the interests of justice require disclosure; an order or leave of the court has been obtained; consent has been obtained from the party which originally produced the documents; and where disclosure is reasonably necessary for the protection of the legitimate interests of one party. Interestingly the biggest threat to arbitration in Singapore are their courts, which are consistently ranked amongst the best judicial systems in Asia. The resulting perception is that disputes may be resolved as quickly and efficiently through litigation (and its development of international commercial courts) as through arbitration.

Minor amendments to the International Arbitration Act were scheduled to be approved by Parliament in early October 2020. Section 9B introduces a new provision containing a default process for appointing arbitrators in multi-party arbitrations where a tribunal appointment procedure has not been specified. Section 12(1) was updated to recognize the powers of an arbitral tribunal to enforce confidentiality obligations. However, as the confidentiality provisions must already have been specified within the arbitration agreement itself, it is unclear what practical effect the amended s.12(1) may have: in practice few arbitration clauses include any confidentiality provisions.[206]

Sweden

[203] [2012] SGHC 116.
[204] Gordon Smith and Meef Moh 'Confidentiality of Arbitrations—Singapore's Position Following the Recent Case of *Myanma Yaung Chi Oo Co Ltd v Win Win Wu'* (2004) 8 Vindobona Journal 39.
[205] Menon CJ, 'The Race to Relevance' (Singapore, SCMA 10th Anniversary Keynote Address 4 October 2019).
[206] International Arbitration (Amendment) Bill, Bill No. 29/2020.

The privacy or confidentiality of proceedings is not addressed by the Swedish Arbitration Act.[207] In practice, arbitral proceedings are held in private. Whilst there is a general view that the tribunal must maintain confidentiality throughout the arbitration, case law suggests that there is no obligation of confidentiality unless there is a contractual agreement to that effect. The Swedish Arbitration Act does contain a disclosure requirement at s.9, which is unchanged from the earlier legislation: 'A person who is asked to accept an appointment as arbitrator shall immediately disclose all circumstances which …. might be considered to prevent the person from serving as arbitrator'. That duty is an ongoing one, as an arbitrator is required to inform the parties and the other arbitrators of any change in circumstance.

Sweden's principal contribution to case law on arbitral confidentiality was the Swedish Supreme Court's decision in 2000 in *Bulgarian Foreign Trade Bank Ltd v AI Trade Finance Inc*[208] *(Bulbank). Bulbank* was considered an important challenge to the concept of arbitral confidentiality. The Bulgarian Foreign Trade Bank challenged an arbitration tribunal's jurisdiction on the ground that no arbitration agreement existed between the parties. The tribunal issued an interim award holding that it had jurisdiction. The award was published in Mealey's 'International Arbitration Report'. Following publication of the final award, the bank applied to the Swedish court to declare the award invalid on the grounds that publication of the interim award was a material breach of the contractual requirement of confidentiality. The Stockholm city court determined that under Swedish law, specifically ECE Rules, Art.29, the proceedings are held *in camera* and should be confidential: 'there is a presumption within the private sector of community life that confidentiality prevails unless otherwise agreed or prescribed by law'. The court held that publication of the arbitration decision had violated an implied obligation of secrecy in arbitration agreements and took the severe step of vacating the arbitration award.[209] This drastic action led commentators such as Bagner and Rosenberg to question an award's binding nature.[210]

Following an appeal, the Supreme Court declared that as a matter of Swedish law, no legal duty of confidentiality in arbitration exists, whether by implication or inherent in an agreement to arbitrate. Neither did the Swedish Arbitration Act provide for any duty of confidentiality. The Court acknowledged that companies choose arbitration for the confidentiality connected to arbitration proceedings. Nevertheless, it held that there was no duty of confidentiality on arbitrating parties unless there was an agreement to that effect. Recognising that the general

[207] SFS 1999:116 was updated as per SFS 2018:1954 and entered into force on 1 March 2019.
[208] (Case T-1881-99, Swedish Sup Ct, 27 October 2000).
[209] Judgment of the Stockholm City Court, translated and reprinted in 13(11) Int. Arb. Rep. (1998) A-1, A-9.
[210] Hans Bagner 'Confidentiality – A Fundamental Principle in International Commercial Arbitration?' (2001) 18(6) Journal of International Arbitration 243.

public does not have the right to be present at oral hearings and does not have the right to access written documents in the file, nonetheless the court saw no contradiction for parties to be entitled to disclose to third parties information concerning the arbitration proceedings, that it could not: 'necessarily assume that the parties are bound by a confidentiality undertaking'.

The Swedish Supreme Court addressed the confidentiality of arbitral documents in 2012 in *Euroflon Tekniska Produkter AB v Flexiboys I Motala AB*.[211] The matter began as an application for court assistance in taking evidence from a third party in an on-going arbitration, that was objected to on the basis that the requested material lacked evidentiary value and contained trade secrets that should only be disclosed in extraordinary circumstances. When it came before the Supreme Court, it decided that under s.26 of the Swedish Arbitration Act the evidentiary value of the requested material is a question exclusively for the tribunal that authorizes the request for assistance, which the court may not review. The court's review is limited to the legality of the disclosure order and whether an exception for the disclosure exists. The court found no legal impediments to ordering the disclosure and conducted a balancing test, concluding that extraordinary circumstances to except disclosure did not exist. The Supreme Court affirmed the District Court's decision and ordered the disclosure of the requested material.

Rubino-Sammartano asked whether in certain law regimes third parties may commit a tort by divulging confidential information, quoting the Svea Court of Appeal in *Bulbank:* 'the publicising of information in arbitration proceedings could be viewed as a breach of the duty of good faith'.[212] This is a relatively unexplored area of the law that may yet need to be addressed in the future. The Swedish legal framework provides no basis for arbitral confidentiality. There is an obligation for arbitrators to disclose circumstances which might prevent the person from serving as arbitrator. But with no definitions or guidelines as to what those circumstances might be, the obligation is vague by nature. Swedish case law is not particularly supportive of the principles of arbitral confidentiality.

United States

The passage of the Federal Arbitration Act (FFA) in 1925 predates and is thus not based on the UNCITRAL Model Law. Each State has adopted their own arbitration statutes based on either the Uniform Arbitration Act or the Revised Uniform Arbitration Act. The FAA contains no

[211] [2012] Case No O 1590-11.
[212] Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (London: Kluwer law International 2001) 804-805.

explicit provision regarding the confidentiality of arbitral proceedings and neither Act requires the parties or the arbitrators to protect information as confidential. Nevertheless, there is a movement toward treating privacy and confidentiality on different footings and a growing move to limit the extent of that confidentiality.

Case law does not demonstrate any general duty of confidentiality in arbitration. The principle United States case is *United States v Panhandle Eastern Corp.* 118 FRD 346 (D. Del. 1988) (*Panhandle*) where a district court held that confidentiality does not necessarily attach to documents obtained in arbitration. The Government had applied to the court for the production of documents arising out of an earlier ICC arbitration in which the respondent was a party. The respondent sought to resist disclosure on the grounds that ICC Rules require documents relating to an arbitration to be kept confidential. The court rejected that argument, ruling that the Internal Rules applied only to members of the ICC Court, not to parties to the arbitration or to the arbitral tribunal. Because the arbitration agreement and applicable arbitration rules did not provide for the confidentiality of the proceedings, the government could access the documents. *Panhandle* finds its roots in domestic arbitration-related court decisions.

In *AT v State Farm Mutual Automobile Insurance*[213] the court determined that whilst arbitrations conducted under the rules of the American Arbitration Association provide for confidentiality, this was not so under the Uniform Arbitration Act of 1975[214] which was silent on the subject: as the arbitration statute provides that an arbitration award can be filed, enforced, and challenged in court, the arbitration proceedings 'become an open public record'. With no express confidentiality agreement in place, there was considered to be no disclosure restriction.

Whilst there is some contrary authority from the Texas Court of Appeals in *Rutherford v Blanks*[215] concerning the confidentiality of the arbitral tribunal's deliberations, the move to restrict grounds for confidentiality is clear. United States courts have used the doctrine of unconscionability to limit arbitration clauses that require the award to remain confidential when the parties are of unequal bargaining power e.g., involving repeat participants. In *Luna v Household Finance Corp*[216] the court reasoned: 'The advantages repeat participants possess over 'one time' participants in arbitration proceedings are widely recognized in legal literature and by federal courts'. It was a point raised by Ashford when he dealt with documentary discovery and

[213] 989 P.2d 219 (Colo. App., 1999).
[214] §13-22-201, et seq., C.R.S.1998.
[215] No. 04-95-00770-CV, 1996 Tex. App. LEXIS 2578 (Texas Ct. App., June 28, 1996).
[216] 236 F. Supp 2d. 1166 (W.D. Wash. 2002).

the concerns related to the release of technically sensitive material in arbitration.[217] After looking at how different jurisdictions approached the issues of confidentiality, Ashford concluded that it was for the arbitral tribunal to provide the necessary directions consistent with the applicable arbitral rules and encourage consensus with the aim of limiting excessive discovery and discovery requests.

Lipsky & Seeber published the results of a study conducted by Cornell University in conjunction with the PERC Institute on Conflict Resolution[218] of United States Fortune 1000 companies. The aim was to determine the reasons companies chose arbitration over state courts for resolving disputes. The response rate exceeded 60 percent.[219] Of the respondents, 43 percent[220] answered that preserving confidentiality was a reason to use arbitration. The study revealed something new: the more frequently companies used arbitration, the higher the value placed on confidentiality. The figures ranged from 55 percent (for very frequent users of arbitration) to 37 percent (those who had never or rarely used arbitration).[221] The AAA followed up on the Cornell study, comparing and updating the arbitration and mediation usage trends in a new study in 2003, examining the attitudes and experiences associated with the use of arbitration and alternative dispute resolution. It contained a broad sample of businesses, ranging from Fortune 1000 corporations to privately held companies. The percentage reporting Privacy as being extremely/very important was 37 percent, ranking it ninth out of eleven categories.[222] The number of respondents who stated that the reasons for using arbitration preserves confidentiality increased from 43 percent to 54 percent during the period 1998 to 2003.[223]

With respect to arbitrator ethics and transparency, much of USA law stems from the case of *Commonwealth Coatings Corp. v Continental Casualty Co*.,[224] a decision under the FAA. The Supreme Court held that an undisclosed business relationship between an arbitrator and one of the parties constituted 'evident partiality' requiring the award to be vacated. The court however was divided on the standards for disclosure. The majority concluded that disclosure of 'any dealings that might create an impression of possible bias' or creating 'even an appearance of bias'

[217] Peter Ashford 'Documentary Discovery and International Commercial Arbitration'. (2016)17 Am. Rev. Int'l Arb. 89.
[218] David Lipsky & Ronald Seeber, 'The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations' (1998) Ithaca, NY: Institute on Conflict Resolution. See Table 4.
[219] ibid 8.
[220] ibid 17.
[221] ibid 19.
[222] ibid Table 4. Behind Cost (72 percent), Winning (72 percent), Predictability (65 percent), Speed (60 percent), Fairness (60 percent), Finality (58 percent), Maintain relationships (53 percent) and Industry expertise of neutrals/arbitrators (43 percent). But ahead of the ability to appeal (26 percent) and International capabilities (12 percent).
[223] ibid Table 5.
[224] 393 U.S. 145 (1968).

would amount to evident partiality.[225] Two justices supported a more limited test i.e., disclosure of 'a substantial interest in a firm which has done more than trivial business with a party'.[226] Three justices gave dissenting opinions.

The statutory regimes, case law and consistent feedback from American users of dispute resolution point to an environment where confidentiality is less important than other aspects of arbitration. For participants in the United States, it would appear that cost, winning and significantly, a 'fair and just result' are by far the most important factors. In the context of international investment and trade disputes there is a widespread view that confidentiality in such arbitrations should not be maintained.[227]

Chapter 2 Summary

As a means of dispute resolution, arbitration is global. That interconnectedness compels an understanding of how the issues of privacy and confidentiality are addressed in different jurisdictions. The varied approaches towards arbitral confidentiality within and between common and civil law jurisdictions is significant. There are countries whose statutes have no confidentiality provisions. Others such as Australia and New Zealand have detailed, prescriptive requirements. England primarily relies upon case law. The unsurprising result is that international law does not lend itself to clarity of legal interpretation. Whilst the U.S., Scandinavia and Australia, have weakened or diminished the concept of confidentiality in arbitration, England, New Zealand and Singapore by contrast, have further entrenched it. This chapter has seen how confidentiality in arbitration has developed outside England with a range of different statutory approaches and judicial interpretations. A comparative analysis suggests that there are practical lessons to be learnt, particularly from the commonwealth countries of Australia, Canada, New Zealand and Singapore, and from the civil law jurisdictions of Norway and Sweden.

Whilst this Chapter has addressed and compared approaches outside England in selected jurisdiction, Chapter 3 looks at how the absence or otherwise of statutory regimes dealing with confidentiality has encouraged institutions to step in and provide a parallel framework of 'soft law'.

[225] ibid [149] (Black J).
[226] ibid [150] (White J, Marshall J).
[227] See Loukas A. Mistelis 'Confidentiality and Third Party Participation: *UPS v Canada and Methanex Corporation v United States*' (2005) 21 Arbitration International 211.

Chapter 3: Confidentiality in Institutional Rules

'Convenience is the basis of mercantile law'.[228]

- *Lord Mansfield*

The Origins of Arbitral Institutions

The origins of arbitral institutions are almost as opaque as the origins of arbitration itself. They certainly predate the first English Statute of 1698. The Privy Council was active in appointing arbitrators for commercial matters throughout the sixteenth, seventeenth and eighteenth centuries.[229] The early London Guilds, forerunners of the livery companies, used arbitration to decide commercial disputes, their elected master's acting as arbitrators in disputes involving guild members. The 'Treaty of Amity, Commerce, and Navigation, Between His Britannic Majesty and the United States of America' of 1794 ("the Jay Treaty")[230] established three arbitral commissions to settle claims arising out of the American Revolution[231] and can be viewed as an early forerunner of international arbitration commissions. The 1871 Treaty of Washington provided a mechanism whereby disputes relating to British neutrality during the American Civil War were settled by arbitration.

It was with the aim of avoiding what seen even then as an inevitable war with the Empire of Germany that the Marquess of Bristol rose on 25 July 1887 to call attention to the subject of international arbitration, moving: 'That this House, in view of the yearly increasing armaments of European nations, is of opinion that the formation of an international tribunal for the reference of national disputes in the first instance is highly to be desired'. [232] There was no body of international law to which countries in dispute could agree on to submit – a chimera as per Lord Stanley - nor was there any effective means of enforcement. Those concerns pre-dated the New York Convention by nearly 80 years. In the days when all of Europe was Catholic, it was to the Court of Rome that nations turned as the natural arbitrator of their disputes. A practice fallen into disuse, it was resurrected in the early 1870's when the Papal See arbitrated a dispute over the Caroline Islands between the German Empire and Spain: in so doing prevented what had seemed an imminent war. 'Men's minds on the Continent had been prepared for a revival of the

[228] *Medcalf v Hall* (1782) Cases in Trinity Term in the Twenty Second George III.
[229] Derek Roebuck 'The London Centre for International Commercial Mediation and Arbitration in the Reign of Elizabeth I' (2014) 30 Arbitration International 3, 577.
[230] HL Deb 4 June 1872, vol 211, col 1096.
[231] https://www.nps.gov/articles/jay-s-treaty.htm, accessed 30 March 2020.
[232] HL Deb 25 July 1887, vol 317, col 1831.

intervention of the Court of Rome, in order to diminish the evils of unjust wars'.[233] Lord Stanley went on to remind the House that a Court of Arbitration existed already, referring to the first international arbitration institute, the forerunner of today's LCIA.

The LCIA is one of the oldest arbitral institutions in the world, having started out in life as the tribunal of the Court of Common Council of the City of London, renamed the London Court of Arbitration in 1903 and then the London Court of International Arbitration in 1981.[234] The Permanent Court of Arbitration (PCA) was established by the Convention for the Pacific Settlement of International Disputes, during the first Hague Peace Conference in 1899 with the object: 'of seeking the most objective means of ensuring to all peoples the benefits of a real and lasting peace, and above all, of limiting the progressive development of existing armaments'.[235]

The oldest Institute in the USA is the American Arbitration Association, established in 1926. New arbitral institutions are regularly being created. One website that sets itself the almost Sisyphean challenge of setting out the world's leading arbitration institutions has links to more than 220.[236]

The Growth and Harmonisation in Arbitral Institutions

The extent to which harmonization currently exists in international dispute resolution took longer than Salisbury's three generations.[237] But the current fragmented landscape would be familiar to an observer from the nineteenth century, despite a Model Law, the UNCITRAL arbitration rules and the New York Convention on Enforcement of Awards. Nevertheless, there is evidence of a developing convergence, a commonality in approach amongst arbitral institutions, a fact regularly highlighted by commentators.[238] Arbitral institutions are generally independent, or semi-autonomous organisations, whose capability to update their rules in response to legal developments is unshackled from cumbersome, sometimes inefficient legislatures and political

[233] HL Deb 25 July 1887, vol 317, col 1832.
[234] Maxi Scherer, Lisa Richman & Remy Gerbay, *Arbitrating under the 2014 LCIA Rules: A User's Guide* (London: Wolters Kluwer, 2015), 563–567.
[235] https://pca-cpa.org/en/about/introduction/history/, accessed 30 March 2020.
[236] See https://www.international-arbitration-attorney.com/arbitral-institutions-and-arbitration-courts/ accessed 13 April 2020. Most Chinese arbitral institutes are omitted e.g., the BAIAC, a 'belt and road' Chinese initiative launched in August 2019.
[237] 'I do not believe that one man in one hundred supposes that such an issue as my noble Friend desires, intensely desirable as it is, will be witnessed by ourselves, by our children, or by our grandchildren HL Deb 25 July 1887, vol 317, col 1834. See also Paul Smith, *Lord Salisbury on Politics: A selection from his articles in the Quarterly Review, 1860-1883* (Cambridge: Cambridge University Press, 1972).
[238] See for example James Carter, 'The International Commercial Arbitration Explosion More Rules, More Books, So What?' (1994) 15 Mich. J Int'l L 785; or the American judge Charles Brower 'W(h)ither International Commercial Arbitration?' (2008) 24 Arbitration International 2, 181.

interference. After *Esso/BHP v Plowman* in Australia and *Bulbank* in Sweden, various commentators such as Bagner,[239] Qureshi[240] & Weixia[241] correctly predicted that the likely response by arbitral institutions would be to develop and promote their own rules in order to restore equilibrium and ensure that the status quo was maintained.

Arbitral institutions supply what might be described as the soft law of arbitration, a framework that underpins the arbitration mechanism chosen by the parties. Most arbitral institutions have their own rules.[242] The LMAA, an association of practicing arbitrators, promulgate terms. There is no practical difference in the terminology: providing the rules or terms are not in conflict with the law of the seat or the arbitration they will be equally valid. Although the institutions vary in their approach to the obligations of confidentiality, the privacy of arbitration hearings is (almost) universally recognized e.g., the LCIA requires that: 'All hearings shall be held in private, unless the parties agree otherwise in writing'.[243] Confidentiality is less well defined, as analysis of the various arbitral rules shews.

Fesler examined the extent to which parties' assumptions as to confidentiality were justified in international commercial arbitration and set out to determine whether there was a 'discernible international consensus in law, arbitration rules and practice' as to how those confidentiality obligations were dealt with. He considered that neither academic literature nor case law provided a definitive answer on the confidentiality issue: recognising that arbitral institutions are competing for business, there was unlikely to be any significant harmonisation of arbitral institution rules in that respect. I am unpersuaded that analysis has stood the test of time. One thing that has been apparent is the convergence globally in institutional arbitral rules. Rules allowing the appointment of an emergency arbitrator for example, have been adopted by, amongst others, the ICC, LCIA and SIAC. The necessity of such a standardisation in approach is debateable: in English law it may even be detrimental. Section 44(3) of the Arbitration Act 1996 allows the courts to grant emergency relief. But that relief may not be available if the parties have contracted to an institution having emergency arbitrator provisions. In *Gerald Metals SA v The Trustees of the Timis Trust and others*,[244] the court held that the effect of the LCIA emergency arbitrator

[239] Hans Bagner, 'Confidentiality in International Commercial Arbitration Practice to be Considered by the Swedish Supreme Court'. (1999) 14(9) Mealey's International Arbitration Report 29.
[240] Khawar Qureshi, 'Back to the drafting board?' (2004) 154 NLJ 7132, 898; Khawar Qureshi, 'Back to the drafting board? Part 2'. (2004) 154 NLJ 7133, 934.
[241] Gu Wexia, 'Confidentiality Revisited: Blessing Or Curse In International Commercial Arbitration?' (2004) 15 Am. Rev. Int'l Arb. 607.
[242] One exception is the Scottish Arbitration Centre, which is currently formulating its institutional rules. https://scottisharbitrationcentre.org/?page_id=683 accessed 30 March 2020.
[243] Article 19(4) Oral Hearing(s) of the LCIA Rules. Similar wording may be found in the at Art.22(3) of the ICC Rules; WIPO's Art.53(c) and Art.25(4) of the UNCITRAL Rules.
[244] [2016] EWHC 2327.

provisions on the scope of the court's jurisdiction under s.44 limited a court's power to grant a freezing injunction.

Fesler is on surer footing when he states that if confidentiality is to be assured, the only likely successful mechanism is if the parties incorporated an appropriate confidentiality clause into the arbitration agreement.[245] That may well be true in many jurisdictions, although in the common law jurisdictions of England, New Zealand and Singapore, despite their lack of codification and/or piecemeal approach, confidentiality is generally well protected. A more accurate assessment might be the advice to choose your jurisdiction carefully: and that if confidentiality is an especially important component, ensure that it is clearly addressed in the dispute resolution provisions within the contract.

This chapter analyses the differences in approach of the main international arbitral institutions. As with the preceding chapter on overseas jurisdictions, it aims to identify the most useful features that may be of assistance in approaching reform in English law. There are several areas that an arbitral institution can address in its rules with reflect to confidentiality: the privacy of the proceedings; consolidation; the disclosure of awards & materials; what might constitute a public interest; the publication of awards; ethics and transparency; and third party funding.[246] Table 3, Arbitral Confidentiality Provisions in Selected Arbitral Institutions, summarises the confidentiality requirements for the institutions discussed in this chapter.

American Arbitration Association (AAA) and ICDR Rules

The AAA's Commercial Arbitration Rules and Mediation Procedures (2013) apply to the AAA's domestic arbitrations, the International Dispute Resolution Procedures (2014) applicable to international arbitrations. The comments below apply to the International rules. Naimark & Keer compiled responses from 145 participants involved in AAA international arbitrations as to why they opted for international commercial arbitration.[247] Participants were asked to rank eight issues in their order of importance: speed of outcome, privacy, receipt of a monetary award, a fair and just outcome, cost-efficiency, finality of decision, arbitrator expertise, and continuing relationship with opposing party. The importance given to privacy was low - eight percent for all

[245] Michael Fesler, 'The Extent of Confidentiality in International Commercial Arbitration' (2012) 78 Arbitration 1
[246] Investment arbitrations in general fall outside of the scope of this thesis e.g., ICSID which provides facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the Convention are not discussed.
[247] Richard W. Naimark & Stephanie E. Keer, 'What Do Parties Really Want From International Commercial Arbitration?' (2003) Dispute Resolution Journal 78.

participants in the survey, putting it in the bottom third.[248] The study suggested that privacy or confidentiality were not the most valued aspects of international commercial arbitration. Open dialogue discussions with arbitrators led Naimark and Keer to the view that privacy is a frequently overrated quality in international arbitrations.

Article 37(1) Confidentiality requires that: 'Confidential information disclosed during the arbitration by the parties or by witnesses shall not be divulged by an arbitrator or by the Administrator except as provided in Art.30. Article 37(2) 'the members of the arbitral tribunal and the Administrator shall keep confidential all matters relating to the arbitration or the award'. Unless the parties agree otherwise, the tribunal may make orders concerning the confidentiality of the arbitration or any matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.

The wording of Article 30(3) is a little convoluted. It permits that an award may be made public only with the consent of all parties or as required by law, with the exception that the Administrator may publish or otherwise make publicly available selected awards, orders, decisions, and rulings that have become public in the course of enforcement or otherwise. It also goes on to provide that, unless otherwise agreed by the parties, the Administrator may publish selected awards that have been edited to conceal the names of the parties and other identifying details.

Not only are arbitrators required to be impartial and independent, upon accepting appointment an arbitrator is required under Article 13.3 to sign a Notice of Appointment, affirming availability to serve and the arbitrator's independence and impartiality. An arbitrator must disclose any circumstances that may give rise to justifiable doubts as to impartiality or independence. The ICDR has as one of its aims rules that reflect best international practices. That philosophy is reflected in the quite different treatment of the confidentiality provisions between domestic and international arbitration.

China International Economic and Trade Arbitration Commission (CIETAC)

The most well-known arbitral institution in China is probably the China International Economic and Trade Arbitration Commission (CIETAC). Others familiar to international arbitration practitioners will include the Beijing Arbitration Commission/Beijing International

[248] ibid 80. Other attributes, such as a fair and just result, a monetary award, the finality of the decision, and arbitrator expertise, all ranked significantly higher than privacy in terms of importance to the participants.

Arbitration Centre (BAC/BIAC); the Shenzhen Court of International Arbitration (SCIA); and the Shanghai International Economic and Trade Arbitration Commission/Shanghai International Arbitration Centre (SHIAC).[249]

It is important to note however, that China has more than 260 arbitration institutions, each with its own set of rules. The Chinese government's laws and rules on arbitration are still in a state of development. In the meantime, the Guo Ban Fa (1995) No 44 'Notice of the State Council on Printing and Distributing', 'Plan for the Reorganization of Arbitral Institutions', 'Provisional Procedures for the Registration of Arbitration Commissions', 'Measures on Arbitration Fees to be Charged by the Arbitration Commissions' and the 'Circular on Furthering the Work of Reorganizing Arbitral Institutions' are all still in force. China's Plan for the 'Reorganization of the Arbitral Institutions' was designed to restrict arbitral commissions so that only one unified arbitration commission could be established per city in order to avoid unnecessary duplication or competition. The 'Provisional Procedures for the Registration of Arbitration Commissions' requires that each such institution adopt 'Appendix I Model Articles of Association of the Arbitration Commission,' which includes the following two provisions. Article 22, which requires that the arbitrators shall maintain the secrecy of the arbitration process and not reveal information such as the case proceedings, status of the arbitration tribunal's decision or any trade secrets. And Art.25, whereby the arbitration shall not be held publicly unless both parties agree. If state secrets are involved (undefined) the arbitration may not be held in public.

All arbitral institutions in China are thus required by supplementary legislation to include confidentiality provisions with respect to the proceedings and decisions, and to ensure hearings are held in private.[250] CIETAC is amongst the few institutions to directly address the private nature of arbitrations.

Article 38.2 is significantly more prescriptive than other mainland Chinese institutional rules. It stipulates that for cases heard *in camera*, the parties and their representatives, the arbitrators, the witnesses, the interpreters, the experts consulted by the arbitral tribunal, the appraisers appointed by the arbitral tribunal and other relevant persons shall not disclose to any outsider any substantive or procedural matters relating to the case. This would appear to apply to the disclosure of awards. Meetings under Art.38.1 Confidentiality are to be held *in camera*. The concept of party autonomy however is less well developed in China: even if both parties request an open

[249] The arbitration rules of CIETAC, BAC and SHIAC were last amended in 2015, those for the SCIA in 2016.
[250] See The ICCA Reports No 5: *Compendium of Chinese Commercial Arbitration* Laws (2019).

hearing, the final decision remains the prerogative of the arbitral tribunal.

CIETAC publishes a Code of Ethics for Arbitrators. These set out various principles and emphasise the importance of arbitrators maintaining independence, impartiality and fairness. The Code gives guidance as to when arbitrators should not accept an appointment, situations where they should make disclosure or apply for withdrawal. Under Art.51 the arbitral tribunal is required to submit its draft award to CIETAC for scrutiny before signing the award. It is unclear whether CIETAC falls under the Art.38.2 catchall of 'and other relevant persons' and thus whether CIETAC in its capacity as administrator is bound by the requirements of confidentiality.

German Arbitration Rules (DIS and GMAA)

Die Deutsche Institution für Schiedsgerichtsbarkeit e.V. (DIS), or the German Institution of Arbitration in English, offers administrated arbitral proceedings pursuant to the DIS Arbitration Rules and other ADR procedures. The old 1998 Rules required at s.43.1 that the parties, the arbitrators and the persons at the DIS Secretariat involved in the administration of the arbitral proceedings maintain the conduct of arbitral proceedings confidential. The language used however was arguably unclear when it came to how far that obligation extends to others: 'The parties … shall maintain confidentiality towards all persons regarding the conduct of arbitral proceedings, and in particular regarding the parties involved, the witnesses, the experts and other evidentiary materials'. The wording suggested that it was the parties, tribunal and administrators who had a confidential duty towards other participants (my emphasis) not that witnesses or experts, for example, are bound by such a duty. 'Persons acting on behalf of any person involved in the arbitral proceedings shall be obligated to maintain confidentiality' would presumably apply to the legal representatives.

Aiming to modernise the DIS Arbitration Rules to bring them into line with international arbitration best practice, a two-year consultation process resulted in major procedural changes in the revised 2018 Rules. The revisions focussed on institutional changes and the increased time/cost efficiency in arbitration proceedings. One meaningful change was that privacy and confidentiality were more clearly addressed. Article 44.1 requires that the parties, counsel, arbitrators, and DIS employees shall not disclose to anyone any procedural orders or awards, or any evidence that is not publicly available, including its existence, names of the parties, nature of the claims and names and details of any experts or witnesses. A disclosure exemption is provided at Art.44.2 when required to by law or to protect a legal right i.e., to the extent required by applicable law, by other legal duties or to effect the recognition, enforcement or annulment of an

arbitral award. As with the 1998 Rules, there is no specific confidentiality obligations with respect to witnesses or experts. Awards may not be published without the prior written consent of all the parties. The DIS may however publish statistical data or other general information concerning arbitral proceedings, provided that no party is identified by name and that no particular arbitration is identifiable on the basis of such information.

Consolidation is specifically dealt with in Art.8 (DIS 2018). Article 17 addresses the consolidation of multi-contract arbitrations and Art.18 that for multi-party arbitration. In all cases any dispute as to whether the parties have so agreed consolidation when there is no express agreement in writing to that effect, shall be decided by the arbitral tribunal.

The German Maritime Arbitration Association (GMAA) is not an institution but an association of practicing arbitrators, not unlike the LMAA. The GMAA Rules were last published in 2017. It does not administer nor otherwise interfere in the individual proceedings. Rules are published based on German procedural law and the UNCITRAL rules. The confidentiality requirements under the GMAA are simpler than those for the DIS. Issues as to the proceedings, obligation of parties and witnesses is not defined. However, in addition to the Association Rules, the GMAA publishes an (undated) Code of Ethics for arbitrators accessible on-line.[251] § 9 entitled Confidentiality of the Deliberations, sets out that the deliberations of the arbitral tribunal and the contents of the award itself, are to remain confidential in perpetuity unless the parties release the arbitrators from this obligation. An arbitrator is prohibited from participating in, or giving any information for the purpose of assistance in, any proceedings to consider the award unless, exceptionally, he considers it his duty to disclose any material misconduct or fraud on the part of his fellow arbitrators.

GMAA 2017 § 14.6 allows, unless a party objects, that the arbitral tribunal shall be entitled to publish the award under the name of the vessel but redacted as to the names of the parties and other identifying details. Allowing the name of the ship to be included in a published award would appear to negate the intent of providing anonymity: whist the charterer's names may remain hidden, little effort would be required to identify the vessel's owners and managers with the publication of the ship's name. § 5.1 requires that every arbitrator has a duty of impartiality and confidentiality.

The amended and updated DIS Rules do not fundamentally effect or change the rights or obligations of the parties to an arbitration. Party autonomy is maintained; consolidation remains

[251] https://gmaa.de/index.php/en/arbitration/code-of-ethics#CoE%209 accessed 2 March 2020.

an option only by agreement of the parties. Having a Code of Ethics for arbitrators is arguably a more effective and practical method than endeavouring to incorporate detailed ethical considerations within institutional rules.

Hong Kong International Arbitration Centre (HKIAC)

HKIAC boasts four sets of administered rules, five sets of ad hoc rules (if the two versions of UNCITRAL Rules are included) and four 'Others'. Four sets of Rules are of particular relevance to arbitration: the Administered Arbitration Rules (2018) which came into force on 1st November 2018; the Domestic Arbitration Rules (2014); the Securities Arbitration Rules (1993); and the Electronic Transaction Arbitration Rules (2002). In addition to containing confidentiality provisions very similar to those in the Electronic Transaction Rules, the Domestic Rules incorporate domestic legislation, specifically Arbitration Ordinance Chapter 609 of 2010. For the sake of consistency this section will focus on the rules applicable to international arbitrations.

Administered Arbitration Rules 2018

The Administered Arbitration Rules 2018 at Articles 45.1 and 45.2 prohibit the HKIAC, tribunal secretary, parties, arbitrators, experts and witnesses publishing, communicating or disclosing any information relating to the arbitration or any award made in the arbitration, unless otherwise agreed by the parties. Article 45.4 emphasizes that the deliberations of the arbitral tribunal are also confidential. The exemptions to publication or disclosure by a party as outlined at Art.45.3 are similar (though more detailed) to those increasingly found in various institutions that have updated their rules in recent years i.e., to protect or pursue a legal right or interest; to enforce or challenge the award; in legal proceedings before a court; to a government body, regulatory authority, court or tribunal where the party is obliged by law to do so; to a professional/other adviser including any actual or potential witnesses or experts; to a party or arbitrator relating to joinder, consolidation, single arbitration under multiple contracts or concurrency as per Articles 27, 28, 29 or 30; or to a third party funder.

HKIAC may order consolidation even if the parties to each arbitration are different, making consolidation possible for related disputes arising under a web or chain of contracts e.g., in charter party chains. Article 27 contains a provision to allow an additional party to be joined to an existing arbitration. Article 29 permits a claimant to commence a single arbitration under multiple contracts. The HKIAC also publishes a 'Practice Note on Consolidation of Arbitrations'. Effective from 1st January 2016, it empowers HKIAC to combine arbitrations where they involve

a common question of law or fact; for claims arising out of the same transaction or series of transactions; and where the arbitration agreements are compatible.

Publication of an award is permitted under Art.45.5 provided all identifying information including the parties' names are deleted and that HKIAC receive no objection from a party to its publication. The HKIAC is one of the few centres to address third party funding in detail at Art.44. See Chapter 6 for a discussion on the HKIAC's TPF provisions.

Under Art.11.4 a prospective arbitrator is to confirm in writing verifying that he or she is impartial and independent. Any circumstances likely to give rise to justifiable doubts as to impartiality or independence must be disclosed prior to confirmation or appointment. This remains an ongoing obligation throughout the reference. The same requirements are required of any tribunal secretary appointed under Art.13.4.

Other HKIAC Provisions

The Electronic Transaction Arbitration Rules at Art.26 stipulates that no information relating to the arbitration shall be disclosed by any person without the written consent of 'each and every party to the arbitration'. It is assumed that this reference is to the arbitrating parties in dispute and is not a sweeping inclusion of (say) the arbitrators or witnesses etc.[252] The Securities Arbitration Rules at Art.35.4 provides that hearings shall be held *in camera* unless the parties agree otherwise. The Electronic Transaction Arbitration Rules are similar at Art.9.6 which require that unless the parties agree otherwise, all meetings and hearings shall be in private.

HKIAC has with the 2018 updates gone to great lengths to keep their Rules relevant to current arbitration practice. They are one of the few institutions to address third party funding, although there are no identified sanctions should a party receiving litigation funding fail to disclose the fact. The HKIAC Rules provide an excellent template for any institution that wishes to include in its rules a modern and comprehensive overview of confidentiality provisions.

International Bar Association (IBA)

The International Bar Association (IBA) is not an arbitration institute, but an association

[252] By an exchange of emails, HKIAC confirmed that: 'Our understanding is that the reference "*each and every party to the arbitration*" does not encompass people who are <u>not</u> parties to the arbitration, i.e., arbitrators and witnesses. Such is consistent with the definitions in the Arbitration Ordinance (Cap. 609) and also our 2018 HKIAC Administered Arbitration Rules, which defines "party" or "parties" as meaning "*a party to an arbitration agreement or, in relation to any arbitral or court proceedings, means a party to the proceedings*" or "*Claimant, Respondent and/or additional party*", respectively'. Email from HKIAC 6 October 2020.

representing legal practitioners, bar associations and law societies. Its membership comprises about 80,000 lawyers globally and approximately 190 bar associations and law societies in more than 170 countries. The IBA publishes rules and guides with respect to arbitration, two of which are of particular relevance here: 'Rules on the Taking of Evidence in International Arbitration (2010)' and 'Guidelines on Conflicts of Interest in International Arbitration (2014)'.

Rules on the Taking of Evidence in International Arbitration (2010)

Article 2.2 requires that the arbitral tribunal consult with the parties at an early stage of the proceedings in order to agree on the level of confidentiality applicable to the evidence in the arbitration. Article 3.8 deals with the exceptional circumstance of when the production of a document is considered to have such a degree of confidentiality attached that even its disclosure is objected to. In such circumstances the tribunal may appoint an independent and impartial expert to review and determine the merits of the objection. Article 3.13 is general clause providing that any document submitted in the arbitration - subject to it not being in the public domain - shall be kept confidential by the parties and the tribunal. It also allows the tribunal to specify the terms of confidentiality to any document. Article 9 concerns the admissibility of evidence. It allows the tribunal at Art.9.2(e) to determine whether to exclude from evidence or production any document or statement on the grounds of commercial or technical confidentiality. Special provision is also made in connection with documents to which legal privilege attaches at Art.9.2 and Art.9.3. Article 9.4 is a fail-safe by which the tribunal may make any evidence confidential.

The obligation of confidentiality as per Art.3.13 applies to the parties and the tribunal only. The 'exceptional circumstances' scenario in Art.3.8 extends the confidentiality provision to the independent and impartial expert called in to review and determine the disclosure of a disputed document. Exceptions to confidentiality are set out at Article 3.13 - a legal duty; to protect or pursue a legal right; or to enforce or challenge an award in court.

Article 5 dealing with Party Appointed Experts has the rare provision at Art.5.2(c) of requiring the expert's reports to contain a statement of their independence from the Parties, their legal advisors and the tribunal. The IBA Rules are silent however with respect to the confidentiality of witness evidence, the Guidelines directing users to the applicable institutional or ad hoc rules.[253]

[253] Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration.

Guidelines on Conflicts of Interest in International Arbitration (2014)

The 2014 Guidelines set out the general standards of independence and disclosure to govern the selection, appointment and ongoing role of an arbitrator. They are divided into two parts. Part 1 deals with the general standards with respect to impartiality, independence and disclosure; Part 2 addresses the practical application of the general standards. The document focuses specifically on the scope of disclosure obligations incumbent on arbitrators and party representatives.

At its core is the philosophy enshrined in General Standard 1: 'Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated'. General Standard 2 deals with conflicts of interest, requiring that if an arbitrator has doubts as to their ability to be impartial and independent, they must decline the appointment. General Standard 3 concerns disclosure by the arbitrator. If from a party's perspective there are facts or circumstances which may give rise to doubts as to an arbitrator's impartiality or independence, that arbitrator must disclose them to the arbitral institution/appointing authority (as appropriate), the parties and to the co-arbitrators prior to accepting the appointment. Further General Standards deal with Waiver by the Parties (GS4); Scope (GS5); Relationship (GS6); and Duty of the Parties and the Arbitrator (GS7).[254]

General Standard 6 recognises that there may be cases where a legal entity has a direct economic interest in the arbitration or a duty to indemnify a party for any award. In such circumstances that legal entity may be considered the identity of the party to the arbitration. In practice this is likely to mean third-party funders and insurers in relation to the dispute who may have a direct economic interest in the outcome of the arbitration.

Part 2 deals with the practical application of the General Standards. Recognising that if the Guidelines are to be relevant, they must address practical scenarios and detail appropriate guidance as to what constitutes a conflict of interest as well as what does - or does not - need to be disclosed. These examples are of practical benefit to the parties, courts, institutions and not least, the arbitrators (who it has to be remembered) are the ones who might find themselves at the

IBA. See https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx accessed 30 March 2020.

[254] 'Despite a comment in the original version of the Guidelines that their application extended to non-legal professionals serving as arbitrator … A consensus emerged in favour of a general affirmation that the Guidelines apply to both commercial and investment arbitration, and to both legal and non-legal professionals serving as arbitrator', *IBA Guidelines on Conflicts of Interest in International Arbitration 2014.*

wrong end of a potential challenge through the courts. The Guidelines categorise situations which may occur in the form of three lists. A Red List divided into waivable and non-waivable parts; an Orange List and a Green List.

These two IBA guides make important contributions, applying to arbitrators irrespective of whether they are legal practitioners. Whilst the Guidelines do not override the arbitral rules or governing law of the arbitration chosen by the parties, the IBA sought to find broad acceptance within the international arbitration community for their provisions with respect to the impartiality and independence of arbitrators. QMU's 2012 study into the emergence of harmonised practices in international arbitration found that the IBA Rules were used in 60 percent of arbitrations. Nevertheless, the IBA Guidelines are voluntary. They will have limited relevance, particularly with regard to ad hoc and commodity arbitrations, most of whose arbitrators are not lawyers and will not be members of the IBA. Notwithstanding the QMU study referred to above, the IBA Guidelines are not generally used in ad hoc arbitrations.[255]

International Chamber of Commerce (The ICC)

The ICC followed up on its 1998 survey on arbitration practise, with a Special Supplement in 2009 entitled 'Confidentiality in Arbitration: Commentaries on Rules, Statutes, Case Law and Practice'. More a series of discussion papers than a survey, it aimed to initiate discussions on revising the ICC Rules. Summarizing the state of institutional rules, Dimolitsa concluded: 'We are far from an international consensus on the parties' obligation of confidentiality, my personal opinion is that the Rules should remain unchanged in this respect given their genuinely international and open character'.[256] The Arbitration Rules were issued in 2012 and amended in 2017. In 2019 the ICC published a 'Note to the Parties and Arbitral Tribunals on the Conduct of Arbitration'.

Joinder, multiple contracts and multiple parties are addressed under Articles 7, 8 and 9. The ICC Court also retains a wide discretion to consolidate related arbitrations under Art.10. It may do so by agreement of all the parties; or if all the arbitrations fall under the same arbitration agreement; where there is more than one arbitration agreement, if the arbitrations are between the

[255] White & Case and the Queen Mary University: 'International Arbitration Survey: Current and Preferred Practices in the Arbitral Process' (2012). In 53 percent they were used as guidelines and in 7 percent as binding rules. Most respondents (85 percent) found the IBA Rules to be useful. That most ad hoc and commodity arbitrations do not incorporate the IBA Guidelines highlights the limited pool from which the respondents to some of these surveys are drawn. See Table 4.

[256] Antonias Dimolitsa (2009) 'Institutional Rules and National Regimes Relating to the Obligation of Confidentiality on Parties in Arbitration'. ICC Special Supplement 2009: Confidentiality in Arbitration: Commentaries on Rules, Statues, Case Law and Practice.

same parties; or the disputes in the arbitrations arise in connection with the same legal relationship, and the Court determines that the arbitration agreements are compatible. When arbitrations are consolidated, they are to be consolidated into the arbitration that first commenced, unless otherwise agreed by all parties.

The ICC may allow academic researchers to access awards and 'other documents of general interest' with the exception of materials used in the arbitration proceedings, subject to an undertaking to submit for approval to the ICC text intended for publication.[257] The ICC retains copies of all awards, Terms of Reference and decisions of the Court.[258]

Article 11(1) requires that every arbitrator must be and remain impartial and independent of the parties involved in the arbitration. Article 11(2) requires a prospective arbitrator to sign a statement of impartiality and independence before appointment or confirmation. Any facts or circumstances that call into question the arbitrator's independence in the eyes of the parties - or any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality - are to be disclosed in writing to the Secretariat. Article 11(3) states that this is an ongoing obligation.

Obligations of confidentiality apply to the arbitrator, institution, parties and witnesses. The arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration where requested to do so under Art.22(3), as well as take measures for protecting trade secrets and confidential information.

London Court of International Arbitration (LCIA)

As befits one of the world's oldest arbitration institutions, the LCIA Rules provide one of the most coherent regimes addressing privacy and confidentiality. The Rules were updated in 2014 and 2020,[259] bringing them more broadly into line with the more recent innovations of, say, the HKIAC or SIAC.

Article 22 grants additional powers of consolidation. Specifically, at Art.22(ix) the tribunal can, with the approval of the LCIA Court and provided the parties agree, order the consolidation of one or more other arbitrations into a single arbitration. Article 22(x) permits the tribunal, with the approval of the LCIA Court, to order the consolidation of an arbitration with one or more other arbitrations to which the LCIA Rules apply, and the arbitration agreement is either the same

[257] Appendix II - Internal rules of the International Court of Arbitration, Art.1(5) and (6).
[258] ibid at Article 1(7).
[259] The LCIA's 2020 Rules were due to come into force on 1st October 2020.

or compatible. That is subject to no other arbitral tribunal having been formed by the LCIA Court for such other arbitration(s): or if there have, when those tribunals are composed of the same arbitrators. A tribunal has the power to allow third persons to be joined in the arbitration under Art.22(viii) where the parties so consent.

The 2014 edition of the LCIA Rules subtly revised Art.30 by removing the preamble to Art.30.1. Deleted was the caveat 'Unless the parties expressly agree in writing to the contrary'. The parties are now required to undertake at Art.30.1 to keep confidential all awards and materials in the arbitration created for the purpose of the arbitration and all other documents produced not otherwise in the public domain. Article 30.2 provides that the deliberations of the arbitrators is to remain confidential to its members, save as required by any applicable law. Article 31.2 deals with Limitation of Liability. It provides that once the award has been issued, neither the LCIA, the arbitrators or experts involved are under any legal obligation to provide a statement concerning any aspect of the arbitration; nor can they be compelled to become a witness in any legal or other proceedings in connection with an arbitration.

The scope of arbitral confidentiality in the context of a challenge to an LCIA arbitral award in the High Court was provided by Teare J in *UMS Holdings v Great Station Properties SA*.[260] The respondent challenged an award under s.68, the hearing for which was heard in public. The challenge failed and the resulting judgment was treated as public. The respondent contended that the claimant remained under an obligation of confidentiality under Art.30 of the LCIA Rules; that the s.68 challenge had not removed that confidentiality provision, not any resulting judgment. The respondent subsequently applied for an order to the effect that the award could not be used by that party for any purpose other than the proceedings, applying *NAB v Serco Limited.*[261] Teare J concluded that the appeal had resulted in the award entering the public domain and therefore concluded that the obligation under Art.30 of the LCIA Rules (which gave rise to an undertaking 'to keep confidential' all awards) no longer continued to exist. However, the judge was troubled by the suggested conclusion that the claimant was free to do with the award as desired, particularly in the context that the court did not know the claimant's intention with regard to the award. The award was a confidential document that had only entered the public domain due to the s.68 challenge which the court had considered should be heard in public paying due regard to the principle of open justice. Noting the court's inherent jurisdiction to regulate the consequences of a decision that a s.68 challenge be heard in public, Teare J determined: '[w]here the Award has entered the public domain because of the court's own order …Some uses of the Award (for

[260] [2017] EWHC 2473 (Comm).
[261] [2014] EWHC 1225 (QB) [26], [36].

example, showing it to a business associate) would be inimical to the confidentiality which normally attaches to awards'.[262]

Article 30.1 provides that there is an exception to the confidentiality provision i.e., when required as a legal duty, to protect or pursue a legal right or to enforce or challenge an award in legal proceedings. Only the parties are under an obligation of confidentiality under Art.30.1. Under Art.30.3 the LCIA confirms that it will not publish any award or any part of an award without the prior written consent of all parties and the tribunal. Under Art.5.4, prior appointment by the LCIA Court, each arbitral candidate is required to furnish to the Registrar a written declaration detailing any circumstances which are likely to give rise to any justifiable doubts as their impartiality or independence. Article 5.5 makes that initial written declaration at Art.5.4 an ongoing duty of disclosure i.e., in the event that any new circumstances arise.

When the LCIA's 2014 Rules were first published they provided one of the most coherent regimes addressing privacy and confidentiality and they remain relevant. The LCIA's limitation of liability article is a protective, if unusual provision.

London Maritime Arbitrator's Association (LMAA)

The LMAA is an association of practicing arbitrators, comprising around 33 Full Members and several hundred supporting members. London receives more maritime arbitration disputes than any other arbitration centre worldwide: in 2019 the LMAA estimated 1,756 new arbitrations had been started under LMAA Terms and 529 awards published.[263] Maritime arbitrations in London are conducted under the Arbitration Act 1996, most of which under the LMAA Terms. The LMAA Terms are periodically updated, most recently in 2017. In addition to the main Terms, there are small claims and intermediate claims procedures.

Rule 16 outlines the powers of the tribunal which at 16(b) provides that where two or more arbitrations appear to raise common issues of fact or law, the tribunals may direct that they shall be conducted and, where an oral hearing is directed, heard concurrently. Rule 16 (ii) provides that the documents disclosed by the parties in one arbitration shall be made available to the parties to the other arbitration. Rule 16 (iii) that the evidence given in one arbitration shall be received

[262] [2017] EWHC 2473 (Comm) [23].
[263] http://www.lmaa.org.uk/event.aspx?pkNewsEventID=208da443-7800-4720-84b3-7f4f3f5fc9ce accessed 13 April 2020. For 2014 - 2019 the LMAA's published figures are based on information provided by Full and Aspiring Full Members and barristers known to accept appointments on LMAA Terms. They do not include data from other Supporting Members or arbitrator. The LMAA considers that the published numbers therefore understate the complete figures. See Table 1 for a comparison of number of references between institutions.

and admitted in the other arbitration, subject to all parties being given a reasonable opportunity to comment upon it. The LMAA Terms are silent with respect to consolidation.

Rule 28 allows for the publication of awards where the tribunal considers that an arbitration decision merits publication. Notice must be given to the parties of its intention to release the award for publication. Unless either or both parties inform the tribunal of an objection to publication within three weeks, the award may be publicised in an anonymised format so as to preserve anonymity as regards the identity of the parties, of their legal or other representatives, and of the tribunal. In practice, a proportion of the awards are published in Lloyd's Maritime Law Newsletter (LMLN). Such awards are not infrequently referred to in other maritime arbitrations.

The LMAA also publishes an on-line guide 'Advice on Ethics'. This is an internal document applicable only to the LMAA's arbitrator members, drawing on the IBA Guidelines on Conflicts of Interest in International Arbitration. It provides detailed guidelines on both independence and impartiality.[264] It provides that an arbitrator is not to disclose any materials received in the course of the reference, nor may the Award or any part of it be disclosed except with the consent of the parties. At s.6.6 it highlights that the proceedings, evidence and the Award are confidential.

Despite its unique importance in maritime arbitrations, the LMAA Terms do not address the issues of privacy or confidentiality, allowing these matters to be determined either directly by the parties, or failing that English case law and the provisions of the Arbitration Act 1996. The LMAA has never embraced the concept of confidentiality in its Terms. Its views on codification have been more attuned to those of the DAC and the 2006 CCC, on which committees' various members of the LMAA have sat.

Singapore Chamber of Maritime Arbitration (SCMA)

The Singapore Chamber of Maritime Arbitration was originally established in November 2004 under the umbrella of the Singapore International Arbitration Centre (SIAC). From May 2009 the SCMA began operating as a separate entity from the SIAC. Like the SIAC it is indirectly government funded. The SCMA publishes various sets of rules and guidelines but does not administer arbitrations. Arbitrations held under SCMA Rules would be categorised as ad hoc. The SCMA issues four sets of Rules - SCMA Arbitration Rules 2015 (3rd Edition), Singapore Bunker Claims Procedure (SBC TERMS), the SCMA Expedited Arbitral Determination of

[264] Available online at http://www.lmaa.org.uk/uploads/documents/Advice%20on%20Ethics%20-%20Updated%20Sep%202016.pdf. Last accessed 5 March 2020.

Collision Claims (SEADOCC) and a Small Claims Procedure. As the latter three rules are little used in practice, this section will consider only the SCMA Arbitration Rules 2015 (3rd Edition).

Under Rule 33, Additional Powers of the Tribunal, where two or more arbitrations appear to raise common issues of fact or law, the Tribunals are empowered to direct that the two or more arbitrations may be heard concurrently. Rule 44 Confidentiality provides that the arbitrators and parties shall at all times treat all matters relating to the arbitration, its existence and any award as confidential. Disclosure of such matters is only permitted with the prior written consent of the other party or the parties, or with respect to specific exceptions. Rule 44 sets out the exceptions of disclosure on a party or arbitrator. i.e., for the purpose of making a court application; to enforce an award; pursuant to an order of court; to comply with the law; or to comply with the requirements of any regulatory body. The application of confidentiality in Rule 44 applies only to the parties and the arbitrators. The position of the institution, witness and experts is not addressed.

Rule 28.5 provides that the arbitration meetings and hearings are to be in private unless the parties agree to the contrary. Rule 36 The Award requires at 36.8 that the Tribunal send a copy of the Award to the SCMA within 14 days from the date of collection by one of the parties. Rule 36.9 permits the publication of redacted awards (so as to preserve the anonymity of the parties, legal representatives and of the Tribunal) for academic and professional purpose, unless any party files an objection to publication within 60 days of the date of the publication of an Award. The SCMA has taken the position that publication of summaries of awards is important for the development of arbitration law and practice and arbitration in Singapore.

Rule 15 provides that the Tribunal shall always remain independent and impartial and shall not act as an advocate. A prospective Arbitrator is to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. The SCMA Rules are in a large part a mirror of those found at the SIAC from which institution the SCMA was created. Some aspects of confidentiality are addressed, but generally only relating to the arbitrators and the parties. No obligations are set out that place a similar obligation on witnesses, experts, or the SCMA secretariat.

Singapore International Arbitration Centre (SIAC)

The SIAC began in 1991 as an independent, not-for-profit organisation. The SIAC supervises and monitors the progress of cases, reviewing and scrutinising all arbitrations awards

before publication. The SIAC has been issuing a revised set of rules approximately every three years since 2007: the current Rules in force are the 6th Edition 2016. The first edition of the Investment Arbitration Rules of the Singapore International Arbitration Centre, a specialised set of rules for the conduct of international investment arbitration came into force on 1st January 2017.

Rule 7 describes the procedures for the SIAC Court to allow at its discretion joinder of additional parties. Rule 8 covers the detailed provisions for consolidation of two or more arbitrations under the SIAC Rules into a single arbitration. Under Rule 24.4 any recordings, transcripts, or documents used in relation to the arbitral proceedings shall remain confidential. Rule 39.1 requires that the parties, arbitrators, experts or any person appointed by the Tribunal, including for example an administrative secretary, shall treat all matters relating to the arbitration, including pleadings, evidence, other materials and the award as confidential unless the parties agree otherwise. This does not apply to any matter that is in the public domain. The discussions and deliberations of the arbitrators is likewise confidential. Rule 40.1 under Decisions of the President, the Court and the Registrar binds the parties to accept that any discussions and deliberations of the SIAC Court are confidential.

The obligations of confidentiality under Rule 39.1 applies to the parties, arbitrators, or any person appointed by the Tribunal, including any administrative secretary. Rule 39.1 references experts, but the wording is imprecise:

> A party and any arbitrator, … and any person appointed by the Tribunal, including any administrative secretary and any expert, shall at all times treat all matters relating to the proceedings and the Award as confidential.

It is unclear as to whether this rule applies to any expert giving evidence in the arbitration or only those appointed by the Tribunal. Rule 39.2 lists the exceptions to the confidentiality obligations of Rule 39.1. They include: when making an application to court for enforcement or challenge of an ward; when required to comply with an order of court; to pursue or enforce a legal right or claim; when required in accordance with the laws the disclosure is a requirement of regulatory body or other authority; when so ordered by the Tribunal; on application by a party; or with respect to joinder or consolidation under Rule 7 or Rule 8.

Rule 24.4 provides that all meetings and hearings shall be in private, unless otherwise agreed by the parties. Under Rule 32.12 the SIAC may, with the consent of the parties and the Tribunal, redact the names of the parties and other identifying information and publish any award. Third

Party Funding is not addressed in the SIAC Rules. However the SIAC's Investment Arbitration Rules (1st Edition, 1 January 2017) at Rule 24(l) allow a tribunal to order the disclosure of: the existence of a TPF arrangement; the identity of the TPF; details of the TPF's interest in the outcome of the proceedings; whether or not the TPF has committed to undertake any adverse costs order. The tribunal is allowed to take into account any TPF arrangements when apportioning the costs of the arbitration (Rule 33.1) and when ordering in its Award that all or a part of the legal or other costs of a Party be paid by another Party (Rule 35).

Rule 13 details the Qualifications of Arbitrators. Rule 13.5 obliges an arbitrator to disclose to the parties, to the other arbitrators and to the Registrar any circumstances that may give rise to justifiable doubts as to his impartiality or independence that may arise during the arbitration. Once appointed, *ex parte* communications between arbitrators and parties or a party's representatives are prohibited under Rule 13.6. Prior to that appointment such communications are limited to advise a potential candidate an outline of the nature of the dispute; the anticipated proceedings; making enquiries as to the candidate's qualifications, availability or independence; or to discuss the suitability of candidates for selection as a presiding arbitrator where the parties or party-nominated arbitrators are involved in that selection. No party or person representing them is permitted to have any *ex parte* communication relating to the case with any candidate for presiding arbitrator.

The SIAC is one of the few institutions to provide remedies for a party's breach of confidentiality. Rules 39.4 states that in the event of a breach of Rule 39, a tribunal has the power to take appropriate measures, including issuing an order or award for sanctions or costs. It also deals in detail with the potential issue of *ex parte* communications between arbitrators and the parties. There is an interesting dichotomy between the strict rules of confidentiality found in institutions such as the SIAC and the more open approach of publication promoted by the Singapore Judiciary and the SCMA. Whereas the SIAC's 2013 Rules under Rule 28.10 permitted the publication of redacted awards without the parties' or tribunal's consent, the 2016 Rules reversed those provisions. The current default rule is that there is no publication except by the consent of the parties and the tribunal, a recognition perhaps of the lack of international consensus on the publication of awards. It is likely that the SIAC recognised the potential harm of such a policy: it risked driving away potential users of the institution to jurisdictions more jealously protective of their user's secrets. The SIAC felt the chill of the debate between development of the law and arbitral confidentiality.

Stockholm Chamber of Commerce (SCC)

Founded in 1917, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) is one of the world's leading forums for dispute resolution, prized for its independence and recognised as a neutral centre for the resolution of east-west trade disputes. It also play a singular role in the international system developed for bilateral and multilateral investment protection worldwide: more than 120 of the current bilateral investment treaties (BITs) cite Sweden or the SCC as the forum for resolving disputes between investors and the state. The SCC is the world's second largest institution for investment disputes. The SCC Rules, the Arbitration Rules and the Rules for Expedited Arbitration entered into force on 1st January 2017. In addition to arbitration rules, the SCC publishes Guidelines to serve as a practical tool and source of information for arbitrators appointed in SCC arbitrations, e.g., providing information on case administration, arbitration costs, timelines and the structure and contents of the final award. The latest version was published in October 2019.[265]

Article 11(iii) gives the Board powers to determine whether claims made under multiple contracts shall proceed in a single arbitration pursuant to Art.14 and at Art.11(iv) whether to consolidate cases pursuant to Art.15. Article 14 addresses multiple contracts being brought together in a single arbitration. Claims may proceed in a single arbitration provided that the SCC does not manifestly lack jurisdiction and subject to the Board consulting the parties and is required to have due regards to (a) whether the arbitration agreements under which the claims are made are compatible; (b) whether the relief sought arises out of the same trans-action or series of transactions; (c) and whether such an arrangement would enhance the efficiency and expeditiousness of the proceedings. Article 15(1) deals specifically with consolidation which the Board may direct if: (a) the parties agree to consolidate; (b) all the claims are made under the same arbitration agreement; or (c) where the claims arise out of the same transaction(s) and the Board considers the arbitration agreements to be compatible. Article 15(2) specifies that the determining factors for the Board to consider in regard to consolidation are the stage of the pending arbitration as well as the efficiency and expeditiousness of the proceedings. The Board may release any appointed arbitrator in the case of a consolidated arbitration.

Article 3 Confidentiality states that unless otherwise agreed by the parties, the SCC, the Arbitral Tribunal and any administrative secretary of the Arbitral Tribunal are to maintain the confidentiality of the arbitration and the award. This is somewhat similar to the wording in

[265] https://sccinstitute.com/media/1067295/scc-guidelines-for-arbitrators.pdf. Last accessed 5 March 2020.

Appendix I, Art.9 that requires the SCC to maintain the confidentiality of the arbitration and the award and to deal with the arbitration in an impartial, efficient and expeditious manner. Submissions by a third party are addressed at Art.3(6). A 'third person' may apply to the Arbitral Tribunal for access to submissions and evidence filed in the arbitration, for which application the tribunal is required to consult with the parties before deciding. The tribunal is required to take into account, and if necessary, safeguard any confidential information.

Consolidation is addressed as is the obligation on the tribunal and arbitrators to maintain the confidentiality of the award. However, the phrase 'maintain the confidentiality of the arbitration' suggests a requirement to maintain confidential the existence of the arbitration, rather than specifically any materials. Parties, witnesses and third parties are not subject to any obligation of confidentiality. Where consolidation occurs, the Board's power to release any arbitrator already appointed, potentially undermines party autonomy and the fundamental principle - at least in common law countries - of the right of a party to choose its own arbitrator.

Chapter 3 Summary

The arbitral institutions studied in this chapter and the rules by which they operate account for a significant proportion of international commercial and maritime arbitrations conducted globally. The preservation of confidentiality of documents produced, materials created and the award itself is confined to just four arbitral institutions: LCIA, SIAC, WIPO and CIETAC. Some important arbitral rules are silent on confidentiality, such as the UNCITRAL Rules and those of the ICC. The rules of the AAA and UNCITRAL provide for confidentiality of the award. This incomplete and contradictory patchwork of rules addressing confidentiality mirrors the divided sentiments that exist in both common and civil law jurisdictions.

Buys argued that the costs and benefits of confidentiality against the needs of transparency need to be carefully assessed by all those involved in the arbitral process, proposing that arbitral institutions should amend their rules to create a presumption that awards will be published unless both parties object in advance, thus benefiting the arbitration community.[266] In some cases that has happened, although with some not entirely unexpected consequences. As noted above, enforced publication under the SIAC Rules lasted just one editorial revision: the default publication under the 2013 rules was dropped in 2016 as it was perceived by users as an unfriendly

[266] Cindy G. Buys, (2003) The Tensions Between Confidentiality and Transparency in International Arbitration, 14 Am. Rev. Int'l Arb. 121.

and unwelcome development.

The most useful of the institutional rules from the perspective of any potential English reform are those of the HKIAC and SIAC, between them addressing not just confidentiality provisions, but also a sanction mechanism for their breach. Whilst many institutions have addressed the need to disclose circumstance that are likely to, or might give rise to justifiable doubts as to an arbitrators impartiality or independence, none provide (the IBA Rules excepting) a definition or examples of what constitutes 'justifiable doubts'. It is precisely this vagueness that has led to the situation of the Supreme Court appeal in *Halliburton v Chubb* that will be explored in Chapter 8.

Having traced the evolution of arbitral confidentiality in England, discussed how those concepts are addressed in overseas jurisdictions and by the major arbitral centres, we next turn our attention to some of the basic and arguably less controversial areas: the use of arbitral materials and awards in Chapter 4, consolidation and concurrency in Chapter 5 and - a relative newcomer among the group who inhabit our legal village[267] - third party funding in Chapter 6.

[267] To paraphrase Lord Hope in *Helow v Secretary of State for the Home Department (Helow)* [2008] UKHL 62; [2008] 1 WLR 2416, [1] – [3].

Chapter 4: Of Privacy, Materials and Awards

'There is no principle in English law by which documents are protected from discovery by reason of confidentiality alone'[268]

- *Lord Wilberforce*

Introduction

The Arbitration Act 1996 is silent with respect to the confidentiality of affidavits, pleadings, submissions, witness statements of fact or expert, transcripts of evidence, directions, or any other documents ancillary to the arbitral process. For the sake of convenience they are referred to collectively in this thesis as 'materials'. Nor does the Arbitration Act 1996 address the confidentiality or use that may be made of arbitral awards. This chapter aims to remedy that shortcoming by means of statutory amendments, proposals that would fall under the DAC's 'less controversial' category of codification. Case law however does provide substantial protection against disclosure of materials generated in the course of arbitration proceedings. This is in no small part due to the principles developed in *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 (*Tournier*) which strongly influenced the development of the exceptions subsequently set out by the English courts.

Tournier brought an action against the respondent bank for slander. Unsuccessful in the court of first instance, Tournier appealed. One of the grounds was for breach of an implied contract by the bank not to divulge a customer's information, a matter the appeal court considered to be of considerable public importance. Bankes LJ considered the trial judge had erred in what was a: 'difficult and hitherto only very partially investigated branch of the law'. Too much reliance had been placed on *Hardy v Veasey*[269] which had raised - but not decided - various questions in relation to the duty of banker towards a customer not to disclose his affairs. The court was faced with difficult questions. Was the duty a legal or a moral one? If it was a legal one, did it arise out of contract or out of tort? The Court held that whilst the duty was a legal one arising out of contract, it was qualified, not absolute: 'It is not possible to frame any exhaustive definition of the duty. The most that can be done is to classify the qualification and to indicate its limits'.[270] The difficulties, as the court saw it, was the extent of the obligation.

Noting that 'There appears to be no authority on the point'[271] Bankes LJ directed the jury to

[268] *Scientific Research Council v Nasse,* [1980] AC 1028, 1065 (Lord Wilberforce).
[269] LR 3 Ex 107.
[270] [1924] 1 KB 461, [484].
[271] ibid [473].

the limits and qualifications of the bank's contractual duty of secrecy to its customer, classifying the qualifications as follows: where disclosure is under compulsion by law; where there is a duty to the public to disclose; where the interests of the bank require disclosure; where the disclosure is made by the express or implied consent of the customer. Keenly aware of the potential pitfalls, he continued: 'It is very necessary to speak with caution on this question upon which there is no authority'. The court also considered what was reasonable and proper for the bank's own protection[272] and in terms of what was 'reasonably necessary for the protection of the bank's own interests'.[273] On one view the difficulties in approaching the issue of confidentiality may in part be due to an over-reliance on the analogy with banking principles in *Tournier* and because the obligations of privacy and confidentiality may differ. As Thomas LJ was to conclude in *Emmott v Michael Wilson & Partners Ltd*[274] '[t]he law relating to arbitrations may need to parallel the distinction in the general law where the law relating to privacy and confidentiality are distinct'.

The Private Nature of Arbitration

One of the less controversial aspects of international commercial arbitration is its private nature. It is not, as remarked by the editors of *Arbitration International*, 'a spectator sport'.[275] The privacy of arbitration is supported by a long line of authorities. *Cook and Songate's Case*[276] noted the propensity of arbitration to avoid litigation and controversy, it being 'a good and sufficient consideration, because it was to avoid controversies & suits'. As the nineteenth century cases make it clear, there was an implicit understanding arbitration agreements involved an obligation of privacy. In *Russell v Russell* (1880) 14 Ch D 471 the litigants were brothers and partners. The contest between them assumed, in the words of Jessel MR 'a very unpleasant phase'. One brother had accused the other of fraud: accusations indignantly denied. The judge considered that it was undesirable for the partnership to continue:

> As a rule, persons enter into these contracts with the express view of keeping their quarrels from the public eyes, and of avoiding that discussion in public, which must be a painful one … If ever I could imagine a case to which that observation would emphatically apply it is the case before me.[277]

These traditional principles resurfaced in *Union-Castle Mail Steamship Co. Ltd. v Houston*

[272] ibid [481] (Scrutton LJ).
[273] ibid [486] (Atkin LJ).
[274] [2008] 1 Lloyd's Rep 616, [635] (Thomas LJ).
[275] Editorial, 'The Decision of the High Court of Australia in Esso/BHP v Plowman' (1995) 11 Arbitration International 231.
[276] (1588) 4 Leon 31.
[277] *Russell v Russell* (1880) 14 Ch D 471, [474].

Line Ltd[278] where Greer LJ noting in his usual earthy fashion that businessmen prefer arbitrations to hearings in court as arbitrators do not sit in public and therefore are 'not called upon to wash soiled linen in public or to disclose their business to other people'.[279]

The difficulties that arise emanate from a failure to differentiate between 'confidentiality' and 'privacy,' an omission in both statute and in many cases, of the rules of arbitral institutions. Professor Lew explained the difference between the two in his export report for the court in *Esso/BHP v Plowman.* Privacy refers to the right of persons other than those directly involved in the dispute (such as arbitrators, parties, legal counsel, witnesses etc.) to attend and be made aware of the arbitration. Confidentiality referred to the obligation on those involved in those proceedings, specifically the arbitrators and the parties, not to divulge materials connected to the reference such as evidence, transcripts of the hearings or the award.[280] In Lew's opinion: 'there is no general binding rule that arbitration proceedings are private and confidential precluding the parties divulging details to third parties'.[281] Regardless of the correctness of that view in 1995, many arbitral institutions do now specifically impose a duty of confidentiality upon the tribunal and parties.

The court confirmed in *Oxford Shipping Co. Ltd. v Nippon Yusen Kaisha* ("*The Eastern Saga*") [1984] 2 Lloyd's Rep 373 that arbitrations are private proceedings by virtue of an implied term in the arbitration agreement, from which members of the public may be excluded by the arbitrators. The very concept of private arbitration was derived from the parties agreement to submit to arbitration any disputes arising between them and only between them: '[i]t was therefore implicit in this that strangers would be excluded from the hearing'.[282]

Unresolved and uncertain however is whether the arbitrators have the right to exclude any person whom either party wishes to be present if that person is not a representative. On this the Arbitration Act 1996 is also silent. In *Tillam v Copp*[283] Wilde CJ was of the view that an arbitrator has a general discretion as to the mode of conducting the inquiry before him and refused to set aside an award on the ground that the arbitrator had refused permission for a stranger to be present in order to assist the respondent's solicitor. Conversely Turner LJ held in *Haigh v Haigh*[284] that the arbitrator's exclusion of the son of one of the parties who was involved in the running of the

[278] [1936] 55 Lloyd's Law Rep 136.
[279] ibid [137].
[280] Dr Julian D.M. Lew, 'Expert Report of Dr Julian DM Lew (in Esso/BHP v Plowman)' (1995) 11 Arbitration International 283, 285.
[281] ibid 283.
[282] [1984] 2 Lloyd's Rep 373 [379] (Leggatt J).
[283] (1847) 136 ER 857.
[284] (1861) 45 ER 838, [841].

business was unjustified and so set aside the award. These two older cases thus demonstrating the inconsistency of approach and an unsettled view as to what is good law. If arbitrators do have a discretion, it would be subject to their overriding duty in s.33(1)(a) of the Arbitration Act 1996 to secure a fair hearing.[285]

In *Hassneh Insurance Co. of Israel & Ors v Steuart J. Mew*[286] Colman J considered that the concept of private arbitration as deriving from the fact that the parties had agreed to submit to arbitration particular disputes arising between them, quoting Leggatt J in *The Eastern Saga* that it was implicit that strangers should be excluded from the hearing and the conduct of the arbitration. Neither the tribunal nor the parties could insist that the dispute be heard or determined concurrently with another dispute, irrespective of how closely associated with each other those disputes were or how convenient such a course of action might be. Parties who refer their disputes to arbitration are entitled to assume that the hearing will be conducted in private, it being an assumption that: 'arises from a practice which has been universal in London for hundreds of years and, I believe, undisputed'- it was the one facet that gave arbitration an important advantage over the courts as a means of dispute resolution. The informality and candour attaching to a hearing being held in private was, in the court's view, an essential ingredient of arbitration.[287]

Collins LJ considered in *Emmott v Michael Wilson & Partners* that it does not necessarily follow that as arbitrations are held in private, all that follows is thus confidential. Because arbitration is private, that privacy would be violated by the publication or dissemination of documents deployed in the arbitration. Lord Hoffman recognised in *West Tankers Inc v Ras Riunione Adriatica di Sicurta SpA* [2007] UKHL 4 (*The Front Comor*) that the most important consideration was that arbitration was the practical reality for those engaged in commercial disputes. People choose arbitration precisely to be outside the procedures of any national court, frequently preferring the privacy, informality and absence of any prolongation of the dispute by appeal which arbitration offers.[288]

Industry surveys are of limited value in this regard as they typically conflate the two concepts into a single enquiry i.e., 'privacy and confidentiality'[289] Nevertheless, in the White and Case

[285] That private nature is underlined in the Civil Procedure Rules, CPR 62.10(3)(b) which provide that subject to the power of the court to order that an arbitration claim may be heard in public or in private, all arbitration claims will be heard in private, except the hearing of a preliminary point of law under s.45 of the Arbitration Act 1996 or an appeal on a question of law arising out of an award under s.69.
[286] [1993] 2 Lloyd's Rep 243.
[287] ibid [247].
[288] [2007] UKHL 4; [2007] 1 Lloyd's Rep. 391, [395].
[289] For example both the 2018 and 2015 White and Case surveys. 'International Arbitration Survey: The Evolution of International Arbitration'; 'International Arbitration Survey: Improvements and Innovations in International Arbitration'; and the Pinsent Masons-QMU 2016 'International Dispute Resolution Survey'.

2018 survey, 46 percent of in-house counsel selected 'confidentiality and privacy' as being among the top three most valuable characteristics of arbitration. Nearly 40 years earlier Professor Tore Sandvik carried out pioneering work in this field. With a background in construction disputes,[290] Sandvik asked 20 experienced Norwegian practitioners to rank from one to six the different reasons for choosing arbitration, with one was most important and six least important.[291] Avoiding publicity was given a value of 4.64[292] i.e., not very important. Sandvik concluded that avoiding publicity in general was not a motivating factor for choosing arbitration.[293] Setting aside the limitations inherent from Sandvik's small sample size, it nevertheless implies that not all users need or expect their disputes to be confidential.

Trakman's premise that a primary reason for parties to choose arbitration is the expectation that their business and personal confidences will be maintained, remains valid, being supported by the empirical data of many of the more recent studies.[294] Kouris argued that reinstating legitimate arbitral confidentiality would be a major benefit.[295] Whilst uncontroversial it goes against the current trend towards greater transparency. The 2020 Commonwealth Secretariat Report recommended that: 'Member jurisdictions might want to consider… A provision that sets out the confidentiality and privacy obligations of the parties'.[296]

It is evident from the materials and cases reviewed that arbitration is considered a private matter between the parties. It follows that it would be uncontroversial and, in my view, desirable that the first amendments of the Arbitration Act 1996 addressed the privacy of the process. To that end the following privacy provision is proposed.

> Privacy
> Unless otherwise agreed by the parties, all meetings and hearings shall be in private.

Who Decides Confidentiality: Competence-Competence

Competence-Competence, the jurisprudential doctrine whereby an arbitral tribunal has the jurisdiction to rule as to the extent of its own competence on an issue before it does not generally feature highly in the authorities. However, the finding that the confidentiality - or privacy -

[290] Tore Sandvik, 'Voldgifs-og domstolsbehandling' (1979) Tidsskrift for Rettsvitenskap, 456. See Table 4.
[291] ibid 465-466.
[292] ibid 466.
[293] ibid 472.
[294] Leon Trakman 'Confidentiality in International Commercial Arbitration' (2002) 18 Arbitration International 1.
[295] Steven Kouris 'Confidentiality: Is international arbitration losing one of its major benefits?' (2005) 22 Journal of International Arbitration 127.
[296] Petra Butler and Dhjarshini Prasad (2020) 'A Study of International Commercial Arbitration in the Commonwealth' Commonwealth Secretariat, 4.1.2

obligation was implied into the arbitration agreement led the court in *Emmott v Michael Wilson & Partners*[297] to consider the hitherto unexplored area of where jurisdiction lay to determine matters of confidentiality. Collins LJ considered that any dispute as to its scope would fall within the scope of the arbitration agreement. Thomas LJ was of the opinion that the decision as to who had jurisdiction to determine the ambit of the obligations of confidentiality should primarily be one for the arbitral tribunal.[298] The court concluded that a dispute between the parties as to the agreement over the limits of the obligation of confidentiality should ordinarily be determined by the arbitral tribunal, not by a court.

This was a new, and as it stands an underdeveloped philosophical concept, since the question of which forum should decide on confidentiality matters had not been raised in the earlier cases. This expanded role for the arbitral tribunal accords with current views of competence-competence, of promoting the effectiveness of arbitration such that the tribunal itself should be the starting point for determining confidentiality. However, there will be some limits on what tribunals may be expected to determine, particularly for example to any public interest argument.

In line with the Court of Appeal's view on competence-competence, and a definition of confidential materials having already been set out, the following codification will allow the tribunal to identify the limits of that confidentiality for the purposes of the arbitration.

> Competence of arbitral tribunal to rule on the confidentiality of documents
> In consultation with the parties, the arbitral tribunal may rule on the issue of confidentiality of any materials pertaining to the arbitration.

Who is Subject to the Duty of Confidentiality?

Arbitration typically involves three distinct groups of participants to whom a duty of confidentiality could be considered to apply: the arbitrators, including where involved the arbitral institutions; the parties to the arbitration; and third parties such as witnesses and legal counsel. In the category of third parties fall Third Part Funders ("TPF's"). Due to the distinct issues raised by TPF, it is treated as a discrete topic in Chapter 6.

The Parties

Most of the major institutions impose a requirement of confidentiality upon the parties,

[297] *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184; [2008] 1 Lloyd's Rep 616.
[298] ibid [634].

although sanctions for its breach are rarely addressed. The SIAC Rules are one of the few to empower a tribunal to take appropriate measures, including issuing an order or Award for sanctions or costs if a party breaches the confidentiality provisions.[299] It has thus far not been tested in court.

Arbitrators & Tribunals

To what extent are arbitrators and arbitral tribunals bound by confidentiality in proceedings? The short answer is that in the case of many ad hoc arbitrations possibly none. There is no provision in the Arbitration Act 1996 that binds arbitrators or tribunals to any obligation of confidentiality. If such an obligation does exist, it must either derive from a common law duty or arise from the set of arbitral rules or terms that apply to the reference. It is arguable of course that the risk of an arbitrator betraying a confidence might seem remote. Several institutions do apply such strictures on the tribunals formed under their rules, although to what mischief they mean to prevent is unclear. And if there is an identifiable need for such a provision to be incorporated into in the Arbitration Act 1996, what form would be appropriate? Reviewing the arbitration landscape seven years after *Esso/BHP v Plowman*, Oakley-White pointedly asked exactly who is under the duty of confidence i.e., whether it was the tribunal, institutional staff or witnesses[300], noting that institutions had made limited and sporadic attempts to address the issue: 'one is left with a rich but irregular and disjointed tapestry of research from which to seek to formulate a cohesive definition of confidentiality and its limits'.[301] Table 3, Confidentiality in Selected Arbitral Institutions, highlights this dichotomy.

The lack of codification from the arbitral institutions (e.g., neither the ICC nor LCIA impose an obligation of confidentiality on arbitrators) is not a reason however to shrink from proposing a formal regulatory regime. The primary benefit of codification is clarification and consistency. The following is proposed:

> Prohibition of disclosure of confidential information
> Every arbitration agreement to which this section applies is deemed to provide that the arbitral tribunal must not disclose confidential information.

[299] SIAC Rules r.39.4.
[300] Olivier Oakley-White, (2003) 'Confidentiality Revisited: Is International Arbitration Losing One of its Major Benefits?' 6 Int. ALR N29.
[301] ibid 29.

Arbitral Institutions

The Arbitration Act 1996 is silent as to the extent that arbitral institutions are bound by the confidentiality of the process that they oversee. Some arbitral institutions that administer arbitrations (e.g., the SCMA) require their secretariats to maintain the confidentiality of the process, although the philosophy and rationale is unclear and goes enunciated. Perhaps it merely reflects the ongoing convergence of arbitral institutions' rules. There is no jurisprudence of which I am aware that might indicate how a court might treat a breach of confidentiality on the part of an arbitral institution. Several of the major arbitral institutions do not address their own obligations.[302]

Of the national laws that have addressed the issue, New Zealand's Arbitration Act 1996 as amended in 2012 provides a helpful guide. The Act sidesteps directly addressing the confidentiality requirements incumbent upon an arbitral institution by defining in the 'Interpretation' provisions as s.2(1)(a) an arbitral tribunal as being: '… a sole arbitrator, a panel of arbitrators, or an arbitral institution'. What constitutes confidential information is precisely defined by the Act. Thus the confidentiality obligation at 14B(1): '…the parties and the arbitral tribunal must not disclose confidential information' applies equally to the arbitral institution as to the arbitrators/tribunal.

The range of provisions by the various institutional rules prompt the following questions: would an amendment to the Arbitration Act with respect to arbitral confidentiality serve any purpose in the absence of any case law to suggest that there is a mischief in need of addressing? Or would such an amendment be a tidy up exercise to ensure that all aspects of the issues of confidentiality had been considered? Probably the latter, but for reasons of consistency I consider it appropriate to be addressed. New Zealand supplies a simplicity of approach i.e., by including in the definition of an arbitral tribunal an arbitral institution and propose borrowing their phraseology.

> Definitions
> An arbitral tribunal means a sole arbitrator, a panel of arbitrators, or an arbitral institution.

Legal Counsel and Obligations of Confidentiality

In England and Wales solicitors are regulated by the Solicitors Regulation Authority (SRA). Chapter 4 of the SRA's Code of Conduct provides that the protection of confidential information

[302] For example, CIETAC, ICC, LCIA, SCMA and the SIAC.

is a fundamental feature of the solicitor-client relationship. It describes the duty on the part of the solicitor to keep the client's affairs confidential, an ongoing obligation that continues even after the matter is closed.[303] That duty to keep a client's affairs confidential unless disclosure is required by law, or with the client's consent in my view obviates the need for a specific statutory provision addressing or imposing confidentiality provisions on a parties' legal counsel.

The likelihood of a party appointing a non-lawyer (and therefore one who would not be bound by the SRA's Code of Conduct) to represent him in a commercial arbitration dispute is in most instances remote. In the case of overseas solicitors, they would be bound by their own equivalent codes of conduct. In France for example, lawyers are bound by an oath that incorporates the principle of confidentiality, which covers 'verbal or written communications between lawyers and their clients'.[304] For European lawyers the 'Code of Conduct for European Lawyers' applies,[305] which lays down fundamental principles of professional conduct applicable to lawyers throughout the EC that requires: 'A lawyer shall respect the confidentiality of all information that becomes known to the lawyer in the course of his or her professional activity'.[306] The impact of the United Kingdom's departure from the EU on legal services and indirectly solicitor representation in arbitration, is however currently unclear.

There is one scenario where a non-lawyer does represent a party in an arbitration. In trade bodies such as FOSFA, an appeal of a FOSFA arbitration award in the first instance goes to a FOSFA Board of Appeal. At that appeal hearing each party may state their case and may appear either personally or be represented by a listed representative i.e., a Trading, Full Broker or Full Non-Trading member of FOSFA. Counsel, solicitors, or any members of the legal profession are specifically barred from appeal hearings. Nevertheless, such a representative would still be required to follow the existing confidentiality rules concerning arbitrators and so fall under the heading of third parties.

Witnesses

In *London & Leeds Estates Ltd v Paribas (No. 2)* Mance J extended the concept of confidentiality to witnesses as well as the tribunal.[307] The claimant landlord's expert witness

[303] The Solicitors Regulation Authority, (2011) 'Code of Conduct' (Version 19), chap 4.
[304] See for example the Conseil national des barreaux 'Professional Regulations – Obligations' at https://www.cnb.avocat.fr/en/professional-regulations-obligations accessed 4 March 2020.
[305] Published by the Representant les avocats d'Europe, a society representing Europe's lawyers.
[306] See https://www.advokatsamfundet.se/globalassets/advokatsamfundet_sv/advokatetik/2006_code_en.pdf. accessed 4 March 2020.
[307] *London & Leeds Estates Ltd v Paribas (No. 2)* [1995] 1 EGLR 102; [1995] 2 EG 134.

allegedly gave testimony that was contradictory to other evidence that he had given in two other sets of proceedings. The court held that confidentiality was not an absolute bar to the enforcement of the production of documents by subpoena, but it was a relevant consideration in deciding whether such a subpoena was necessary for the fair resolution of the proceedings and should be permitted. Privacy and confidentiality could be overridden where it was in the public interest or in the interests of individual litigants: 'These applications raise interesting questions regarding the use in a current arbitration of subpoenas … with a view to obtaining an expert witness' proofs produced in evidence in two previous arbitrations'. Where a witness had given inconsistent evidence in the arbitrations it was in the public interest that, where a witness denies a prior inconsistent statement, evidence of such previous expression be put in evidence: 'legitimate interest' outweighed objections on grounds of privacy or confidentiality. Mance J is understood to have been referring to the 'public interest' in the sense of 'the interests of justice,' namely the importance of a judicial decision being reached upon the basis of the truthful or accurate evidence of the witnesses concerned.

Disclosure of Materials

There is no set definition of 'materials' in either the literature or the authorities. Nor do institutional rules consistently address precisely what they mean by materials: numerous terms including evidence, affidavits, transcripts etc. are variously used. Colman J in *Dolling-Baker v Merrett*[308] referred to: 'transcripts or notes of the evidence in the arbitration or the award,' as well as evidence given by any witness in the arbitration, as coming under the umbrella of confidentiality. With the aims of simplicity and consistency it will be helpful to provide a clear definition. The following is proposed:

> Definitions
> Materials
> For the purposes of this Act, materials are defined as all documents generated in the course of an arbitration, whether generated e.g., by the tribunal, an arbitral institution, the parties or third parties, or legal representation, including but not limited to affidavits, pleadings, submissions, witness statements of fact or expert, transcripts of evidence, directions or other documents ancillary to the arbitral process.

The evolution of the concept of confidentiality attaching to materials in arbitration can be traced through a series of English cases beginning with the Court of Appeal decision in *Dolling-Baker v Merrett*. The claimant claimed against the respondent's payments due under a policy of

[308] [1990] 1 WLR 1205.

reinsurance for which the first respondent was one of the insurers and the second respondents were the placing brokers. The claimant had applied for an order for discovery against the first respondent. Phillips J granted the application. The first respondent appealed and applied for an injunction restraining the second respondent from disclosing those documents to the claimant. The judge refused the application whereupon the first respondent appealed against both orders. The court granted an injunction restraining one party from disclosing in any subsequent action documents relating to an arbitration. Parker LJ recognised the essentially private nature of an arbitration, coupled with the implied obligation of a party who obtains documents on discovery not to use them for any purpose other than the dispute in which they were obtained save with the consent of the other party, or pursuant to an order (or leave) of the court.

Drawing on the HL decision in *Science Research Council v Nassé*,[309] the court referred to the established principle that if confidentiality attaches to documents for which discovery is sought, that is a relevant factor to be taken into account before an order is given. Parker LJ declined however to give a precise definition of the extent of the obligation, noting that just because a document is used in an arbitration does not automatically confer upon it privilege or confidentiality relevant to subsequent proceedings. Nor was it a question of public interest: if the document is relevant, its relevance remains. That the obligation existed in some form was in the court's view 'abundantly apparent,' an implied obligation arising out of the nature of arbitration itself. 'When a question arises as to production of documents or indeed discovery by list or affidavit, the court must … have regard to the existence of the implied obligation, whatever its precise limits may be'.[310] The Court of Appeal overruled the court of first instance that had ordered disclosure to be given of all the documents relating to the arbitration and stipulated that, in determining whether to order disclosure, the court must first take account of the duty of confidentiality relating to that arbitration and consider whether the same outcome could be achieved by other means.

In *Hassneh Insurance Co. of Israel & Ors v Steuart J. Mew* [1993] 2 Lloyd's Rep. 243 (*Hassneh Insurance*) the respondent commenced arbitration claiming to recover under various policies against the reinsurers. The respondent reinsured wished to disclose to the brokers the interim award and the reasons in order to make a claim against their brokers. The claimants objected to the disclosure of other documents, such as pleadings, witness statements or transcripts

[309] (1980) AC 1028, (HL). An employment/discrimination case heard by Lord Denning in the CA, who held that confidential personnel records of a person who was promoted should not be made available to a person who considered they had been unfairly overlooked in order to bring a discrimination case against the employers.
[310] [1990] 1 WLR 1205, 1211-1212 (Parker LJ).

and sought an injunction to restrain the disclosure as a breach of confidence. Colman J's starting point was to investigate the nature and scope of the duty of confidentiality which applies in relation to arbitrations and the documents in them, remarking: 'Surprisingly, there is little authority on the point, at least in English law'. Applying the principles of *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd*[311] the court concluded that as with litigation, there was there is an implied undertaking not to use documents disclosed in arbitration proceedings for any other purpose, except in relation to the dispute in which the document was disclosed.

Documents such as pleadings witness statements, disclosed documents in the arbitration and transcripts were subject to a duty of confidence: it was the final determination of rights expressed in the award, which was pertinent as against third parties, not the raw materials for that determination. There was nothing to justify the voluntary disclosure to a third party of such arbitration documents: to disclose such documents without the consent of the other arbitrating party would be a breach of the obligation of confidence. Colman J, noting the implied obligation identified in *Dolling-Baker v Merrett* as the basis for the confidentiality attaching to documents used in an arbitration, concluded that such an obligation can exist: 'only because it is implied in the agreement to arbitrate'. That like any other implied term it must be capable of reasonably precise definition and based on custom or business efficacy. Colman J's view that there was an implied term in every agreement to arbitrate ought to be uncontroversial.[312] Hearings are held in private. It must logically follow that a principle of privacy extends to documents created for the purpose of that hearing.

In *Hyundai Engineering v Active*,[313] Phillips J concluded that whilst any person who acquired confidential information arising from an arbitration would be subject under English law to the self-same duties of confidentiality as the party to the arbitration, those duties were not always self-evident: '[t]he nature and extent of the duty of confidentiality applicable to documents and information obtained in arbitration proceedings is by no means fully chartered'. Whilst the Court considered that it was unclear whether the duty of confidentiality arose out of a contractual term or by virtue of the relationship between the parties, it considered that a duty of confidentiality must be subject to limits.

Emmott v Michael Wilson & Partners Ltd[314] was a complex dispute born out of a failed

[311] [1975] QB 613; [1974] 7 WLUK 157.
[312] Notwithstanding that approach was later rejected by the CA in *Ali Shipping*, itself in turn criticised in *AEGIS v European Re*.
[313] *Hyundai Engineering & Construction Co Ltd v Active Building & Civil Construction Co Ltd (in liquidation) ('Hyundai Engineering v Active')* Unreported, judgment delivered 9 March 1994.
[314] [2008] EWCA Civ 184; [2008] 1 Lloyd's Rep 616.

partnership involving the provision of legal services in Kazakhstan. Related proceedings are still on-going, 12 years after first judgement was handed down in the Court of Appeal by Carnwath, Thomas and Lawrence Collins LJJ in 2008. It has spanned multiple jurisdictions, including England, The Bahamas and Australia. A dispute to which Jessel MR's caution: 'of avoiding that discussion in public, which must be a painful one' is singularly apt.[315] It is relevant to the discussion of arbitral confidentiality as it directly addressed the issue of disclosure in the interests of justice.

Michael Wilson and Partners Ltd ("MWP") commenced arbitration proceedings against a former employee, Emmott, alleging fraud and conspiracy, allegations that were subsequently withdrawn. In related claims against two other former MWP employees, MWP applied the following year to amend proceedings in New South Wales and the British Virgin Islands to allege fraud and conspiracy against Emmott in order to 'bring a level of parity to the proceedings presently being conducted in New South Wales, the British Virgin Island and England'. Concerned that allegations of fraud and conspiracy continued to be made against him, Emmott applied to the Court for an order that he be at liberty to disclose the documents in the London arbitration to the respondents in the BVI and NSW proceedings so that they could be disclosed to the courts because (a) MWP's case in the arbitration was materially inconsistent with that advanced in the BVI and NSW proceedings and that (b) MWP was presenting a misleading or inaccurate picture. Flaux J considered that disclosure to be in the interests of justice to avoid the foreign courts being misled. MWP appealed against the decision.

In giving the main speech Lawrence Collins LJ outlined the nature and degree of privacy and confidentiality in arbitration, referring extensively to Leggatt J in *The Eastern Saga*, the DAC Reports and compared the various Institutional Rules. He pertinently noted: 'It is not always easy to distinguish confidentiality and privacy…quite different rules may apply in different contexts'.[316]

The Court proceeded to look at four different types of cases. Firstly, a party to litigation in the courts may seek discovery or disclosure of documents generated in an arbitration: the court will compel disclosure only if it considers it necessary for the fair disposal of the case, citing *Science Research Council v Nassé* and *Dolling-Baker v Merrett*. It did not consider confidentiality an absolute bar in a second type of case, where a party to an arbitration seeks the assistance of the court to obtain through a witness summons material deployed in another

[315] *Russell v Russell* (1880) 14 Ch D 471, [475].
[316] [2008] 1 Lloyds Rep. 616, [627].

arbitration.[317] The third type of case was where issues arise about the disclosure of documents on the court file relating to an arbitration as identified by Colman J[318] or whether the judgment of a court given in relation to an arbitration should be published.[319] In this instance the court viewed that the privacy of arbitration was an important, but not decisive factor. Lawrence Collins LJ identified the fourth and most relevant type in relation to the proceedings. A party to an arbitration may have an interest in disclosing documents generated in an arbitration (including the award itself) to third parties[320] or in another arbitration (as in *Ali Shipping*[321] and *AEGIS v European Re*[322]*)* and the other party to the arbitration may seek to restrain disclosure by injunction. The court recognized that it exercises a discretion in which privacy or confidentiality is an important factor in the balance.

The court identified three relevant legal concepts or categories in these cases: (a) privacy, in the sense that because arbitration is private that privacy would be violated by the publication or dissemination of documents deployed in the arbitration; (b) confidentiality in the sense where it is used to refer to inherent confidentiality in the information in documents, such as trade secrets or other confidential information generated or deployed in an arbitration; and (c) confidentiality in the sense of an implied agreement that documents disclosed or generated in arbitration can only be used for the purposes of the arbitration.

The court then proceeded to consider the emergence from recent English authorities a separate, implied obligation of confidentiality arising out of the nature of arbitration itself that the parties would not disclose materials generated in the course of the arbitration for any other purpose. That obligation extended to documents, transcripts, witness statements, notes of the evidence and the award itself. Not as a matter of business efficacy, but implied as a matter of law.[323] The court's tentative view was that '[b]ecause the confidentiality rule has developed as an implied term of the arbitration agreement, any dispute as to its scope would fall within the scope of the arbitration agreement'.[324] The court held that the implied agreement was really a rule of substantive law masquerading as an implied term. The content of the obligation may depend on the context in which it arises and on the nature of the information or documents at issue. 'The

[317] As in *London and Leeds Estates Ltd v Paribas Ltd (No 2)* [1995] 1 EGLR 102.
[318] *Glidepath BV v Thompson* [2005] 2 Lloyd's Rep. 549.
[319] As in *Department of Economic Policy and Development of the City of Moscow v Bankers Trust Co.* [2005] QB 207.
[320] Citing Colman J's judgements in *Hassneh Insurance Co of Israel v Mew* and *Insurance Co v Lloyd's Syndicate.*
[321] *Ali Shipping Corporation v Shipyard Trogir* [1998] 2 All ER 136; [1999] 1 WLR 314.
[322] *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich (Bermuda)* [2003] 1WLR 1041; [2003] UKPC 11 (on appeal from Bermuda).
[323] [2008] 1 Lloyds Rep. 616, [629] (Lawrence Collins LJ).
[324] ibid [632] (Lawrence Collins LJ).

limits of that obligation are still in the process of development on a case-by-case basis'.

The key principles as to when disclosure will be permissible were: (a) with consent, express or implied; (b) where there is an order or leave of the court; (c) when reasonably necessary for the protection of the legitimate interests of an arbitrating party; (d) where the interests of justice require disclosure; and (perhaps) (e) where the public interest requires disclosure. Lawrence Collins LJ concluded that the interests of justice required disclosure. Thomas LJ agreed on the grounds that the public interest also reasonably required the use of those documents in other proceedings.[325] The court left open the door for further debate: 'I prefer to treat this case as falling under 'interests of justice' exception, clearly recognised in *Ali Shipping*, and to leave for another occasion exploration of the boundaries of a possible 'public interest' criterion'.[326]

Colman J also dealt with an application by a non-party to an arbitration for copies of documents on the court file in arbitration proceedings involving allegations of fraud against respondents in a joint venture in *Glidepath Holding BV v Thomson*.[327] The applicant, who was not a party to those proceedings, sought various documents such as the particulars of claim, witness statements and procedural orders, on the grounds that they would assist him in his claim in an employment tribunal. The court rejected the application: permission would not be granted to a non-party to inspect evidence without the permission of all the parties to the arbitration, unless necessary to protect or establish a legal right. The applicant failed to establish that access to the documents in question was reasonably necessary to protect or establish his legal rights which he sought to enforce in the proceedings before the employment tribunal. Nor was the confidentiality of the documents overridden by the public interest in providing him access to them. *Glidepath BV v Thomson* highlighted that third parties not directly involved in an arbitration wishing to obtain documents face a significant hurdle. Brandishing the phrase 'in the public interest' is inadequate justification unless there is an overriding interest of justice. Mere convenience is not enough.

In *John Milsom & Others v Mukhtar Ablyazov,*[328] the claimant receivers were appointed by the court in pursuance of a freezing injunction and other orders of the court. The issue before the court was whether a temporary notice regime should be made permanent, discharged or replaced by some other restriction upon the use or disclosure of the documents by the receivers. After

[325] ibid [637] (Thomas LJ).
[326] ibid 638 (Carnwath LJ).
[327] [2005] 2 Lloyd's Rep. 549.
[328] [2011] EWHC 955 (Ch).

reviewing the authorities Briggs J concluded:

> [a]rbitration confidentiality or privacy is not absolute. Its preservation in any particular situation, for example an arbitration appeal, is only the starting point and may be overridden where either the public interest or, I would add, the interests of justice require.[329]

In *Westwood Shipping Lines*[330] the court also dealt with document disclosure and had to consider whether to allow the claimant to rely on documents used in an arbitration. Westwood time-chartered a vessel (from GMB) which in turn had chartered the vessel from her head owners (Kimberley). At a time of strong market charter party rates, Westwood sub-chartered the vessel back to GMB. The market dropped and GMB purported to terminate the sub-charter. Westwood brought a claim against GMB both for breach of the sub-charter and also for breach of the main charter between themselves and GMB. A London arbitration award was in the claimants' favour, subsequent to which GMB went into liquidation in Germany.

The claimants brought an application under s.44 of the Arbitration Act 1996 for liberty to rely upon certain documents in the arbitration in support of a proposed claim which they had issued in the Commercial Court against a number of entities and individuals alleging an unlawful conspiracy. The claimants alleged that there was a backdated agreement which purported to waive any rights that GMB had against Kimberley in the arbitration chain, thereby precluding any claim under the head charter. The claimants submitted that confidentiality had been waived because the documents were referred to at a creditors' meeting; alternatively the documents were in the public domain because they were referred to in a judgment dealing with the claimants' attempt to enforce the arbitration award or that one of the exceptions to confidentiality recognised in *Emmott v Michael Wilson & Partners Ltd*[331] applied.

In Flaux J's view just because an arbitration becomes public through an appeal for example, does not mean that all the material in the arbitration loses its confidential status: 'In the present case the interests of justice clearly required disclosure…the court should not allow confidentiality of arbitration materials to stifle the ability to bring to light wrongdoing'. An order was be made for disclosure of all the relevant arbitral materials, the award and the reasons.

Westwood Shipping Lines was a case in which the interests of justice clearly required

[329] ibid [30].
[330] *West Shipping Lines Inc and another v Universal Schiffahrtsgesellschaft MBH and another* [2012] EWHC 3837 (Comm).
[331] [2008] 1 Lloyd's Rep 616.

disclosure for two reasons. Firstly, the claimants would have been precluded from making what was otherwise an arguable claim. Secondly because there appeared to be strong evidence of illegality having taken place. The court applied the same principle as in *Emmott v Michael Wilson & Partners*, namely that the confidentiality of arbitration materials should not prevent wrongdoing from being brought to light. The case also provided a helpful exposition in regard to the principles attaching to the privacy of an appeal hearing. The liquidator had attempted to have the appeal proceedings treated as private. In determining as to whether the judgment should be in public (whereas the hearing had taken place in private) Flaux J referred to Mance LJ in *Department of Economics, Policy and Development of the City of Moscow v Bankers Trust* [2005] QB 207 *("City of Moscow v Bankers Trust")* that during the course of hearings in private, the court should be ready to hear representations as to whether the hearing should be continued in public: '…even though the hearing may have been in private the court should … bear in mind that any judgment should be given in public, where this can be done without disclosing significant confidential information'.[332]

Overseas Approaches to Disclosure of Materials

A widespread view that the Australian court decision in *Esso/BHP v Plowman* significantly undermined arbitral confidentiality is perhaps overstated and explored in more detail in Chapter 7. That court held that documents produced under compulsion are subject to a duty to be used solely for the purposes of the arbitration, but all other aspects of confidentiality were rejected, not considering that this principle required that all information disclosed during an arbitration should remain confidential: 'The existence of this obligation does not provide a basis for the wide ranging obligation of confidentiality … to all documents and information provided in and for the purposes of an arbitration'.[333] It is probably accurate to state that in Australia only documents produced as a matter of compulsion by a court or a tribunal have attached to them a measure of confidentiality: everything else is fair game.

The Singapore High Court considered the confidentiality of arbitration proceedings and documents disclosed in those proceedings in *Myanma Yaung Chi Oo Co Ltd v Win Win Nu*[334] The Court reaffirmed that jurisdiction's view that there is an implied duty of confidentiality in arbitrations subject to the limitations considered by the court. The claimant was a company jointly set up by the parties but subsequently wound up due to disagreements between the joint venture

[332] ibid [231].
[333] *Esso Australia Resources Ltd v The Hon Sydney James Plowman & Others* [1995] HCA 19, 43 (Mason CJ).
[334] [2003] SGHC 124.

entities. The first respondent was a Myanmar government-controlled company. The second respondent commenced arbitration proceedings against the government of Myanmar for wrongful expropriation of its investment in the claimant company. In Singapore, the claimant filed an action against both respondents. The respondents applied to stay the action pending the arbitration proceedings. The claimant objected to the respondent making use of documents referred to in the arbitration and applied to strike them out.

On appeal from the assistant registrar's decision to grant the orders sought by the claimant, the High Court had to determine two issues. Whether parties in arbitration proceedings have a duty to maintain the confidentiality of the documents, and whether leave of court was necessary for a party to disclose such documents. The leading English and Australian authorities were considered. On the issue of the confidentiality of the documents, the court preferred the English line of reasoning: parties who opt for arbitration are aware of and influenced by the fact that arbitration hearings are held in private, whilst litigation through the courts involves open hearings. It is in keeping with the parties' expectations that proceedings should be considered confidential. The court held that when it is reasonably necessary to disclose, the duty of confidentiality is lifted, and that prior or retrospective permission of the court is not required.

The respondents succeeded on the legal issues but failed on the facts. The case is of interest because it confirmed that in the Singapore Court's view that it was not necessary to draw a distinction between the type of information disclosed. Unfortunately the court did not discuss the reasoning in *AEGIS v European Re*. Whether Singapore would also follow the reasoning of the Privy Council i.e., that such an approach ran the risk of failing to distinguish between different types of confidentiality which attach to different types of documents, or to documents which have been obtained in different ways and the Privy Council's expressed reservations about the approach taken in *Ali Shipping* of characterizing a duty of confidentiality as an implied term, remains to be seen.

Despite a limited statutory point of reference, the Canadian courts have been supportive of the view that there was a general public interest in preserving the confidentiality of materials filed in court in pending arbitration.[335] Quebec's Art.5 allowing for the 'third person' - typically the arbitrator or mediator in the dispute - to disclose (non-personal) information for research, teaching or statistical purposes without breaching the confidentiality provisions, is also worth exploring. Canadian courts have taken the view that there is an implied undertaking by parties not to use

[335] See *Telesat Canada v Boeing Satellite Systems International Inc* 2010 ONSC 22 (Ont Sup Ct) [14], [25], [27].

information obtained through the course of an arbitration for collateral purposes. The New Zealand Arbitration Act, having defined confidential information as including the award and materials used in an arbitration,[336]goes on to prohibit its disclosure.[337]

Institutional Approaches to Disclosure of Materials

Institutions have been quicker to address the issue of confidentiality of arbitral materials than national laws, a reflection of their (generally) private status and ability to modify rules more speedily than parliaments. The ICDR for example does not specifically address the confidentiality of materials outside the obligations imposed on arbitrators.[338] The tribunal may however make orders concerning the confidentiality of the arbitration or any matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information. The BAIAC rules provide that all recordings, transcripts, or documents used in relation to the arbitral proceedings shall be private and confidential.[339] CIETAC rules stipulate that for cases heard *in camera*, anyone involved in an arbitration is prohibited from disclosing any substantive or procedural matters.[340] The DIS Rules addresses the prohibition of disclosing evidence.[341] The HKIAC's various rules and articles that refer to 'no information relating to the arbitration shall be disclosed' is probably sweeping enough to include all materials in an arbitration.

The IBA Rules do not so much proscribe limits on using arbitral materials, as they require the arbitral tribunal to consult with the parties so as to agree on the level of confidentiality applicable to the evidence in the arbitration.[342] The tribunal may nonetheless make any evidence confidential if it considers it necessary.[343] The ICC rules do not address restrictions on the use of materials: their provision for academic researcher's access to documents of general interest specifically excludes materials used in the arbitration proceedings. The LCIA rules require the parties to keep confidential all materials in the arbitration not otherwise in the public domain.[344]

It is unclear whether a court would approach the SCMA's Rule 44 to keep confidential 'all matters relating to the arbitration' as being sufficiently precise to be capable of including

[336] New Zealand Arbitration Act 1996 s.2(1).
[337] ibid s.14B(1).
[338] Articles 37(1) and 37(2).
[339] Article 31.
[340] Article 38.2.
[341] Article 44.1.
[342] Articles 2.1 and 2.2.
[343] Article 9.4.
[344] Article 30.1.

materials: this aspect has not been tested in the courts. There is no such equivocation under the SIAC Rules which require any materials to remain confidential.[345] Similarly precise are the WIPO Rules which provide that all materials shall be treated as confidential and expressly state that they not be disclosed to any third party.[346]

Summary

Lord Roskill, during the Second Reading of the Arbitration Act proposed that a fourth general principle should be inserted, namely, that arbitrations, documents used in them and any resulting awards be confidential. The matter was considered by the DAC in its 1996 Report. Its proposed solution was an amendment to what is now s.81(2) of the Act, creating an express saving for the common law rules on confidentiality and privacy to apply. The approach was ultimately not adopted by the Government. Having defined confidential information as including both materials and awards, and demonstrated adequate justification for amendment, the proposed wording for a prohibition of disclosure of confidential information will be addressed in the following section.

Disclosure of Awards

The reference to disclosure of awards in this section refers to releasing information about the existence or contents of an arbitral award, otherwise than for the purposes of journal or institutional publication. The publication of awards and their contribution to the development of the law is discussed in Chapter 8.

The issue of the use of awards as well as materials arose in *Hassneh Insurance*.[347] Colman J held that an award could be disclosed, including the reasons, to that third party in order to found a defence or as the basis for a cause of action if it was reasonably necessary for the establishment or protection of an arbitrating party's legal rights vis-à-vis a third party,[348] citing *Tournier v National Provincial and Union Bank of England*.[349] The effect of the *Hassneh Insurance* decision was two-fold. Firstly, an agreement to arbitrate contained an implied term which imposed on both parties to it a duty to keep confidential from third parties the award, the reasons and all other documentary materials relating to the arbitration. Secondly the implied term further qualified that duty by the exception that the award and reasons might be disclosed as of right if it was reasonably

[345] Rule 24.4.
[346] Article 78.
[347] [1993] 2 Lloyd's Rep. 243.
[348] ibid [249].
[349] [1924] 1 KB 461.

necessary for one party to disclose them for the purpose of the establishment of that party's legal rights against a third party, either in order to found a defence or as the basis for a cause of action.

Colman J revisited similar issues to those raised in *Hassneh Insurance* in *Insurance Co. v Lloyd's Syndicate*.[350] The assured obtained an arbitration award against a leading reinsurer. Whilst not binding on the following reinsurers, the assured asserted its entitlement to disclose the award and the reasons for it to the five following re-insurers in order to persuade them to accept liability. The claimants refused consent on the ground that the award was confidential to them and that they were entitled to enforce that duty of confidence. An ex parte injunction was granted restraining disclosure of the arbitration award by the respondent. The claimants sought to continue that injunction. In both cases, the issue was in what circumstances the principle that an arbitration award is confidential to arbitrating parties should be modified to enable the award to be released to a third party i.e., how necessary does disclosure of the award have to be for the protection of the parties' legal rights before he is entitled to disclose it as of right?

Colman J held: (a) that there was no contractual liability on the reinsurers to be bound by the award against the leading underwriters; (b) that, given the implied term in the arbitration agreement that the respondents owed a duty of confidence in respect of the award, the scope of the qualifications to that duty were to be implied as a matter of business efficacy; (c) that disclosure would only be permitted if it was sufficiently necessary in order to enforce or protect the legal rights of a party and that would be the case only if such rights could not be enforced or protected without disclosure; (d) that the award and reasons would not be a necessary element in the establishment of the re-assured's claim; and that therefore, whilst the claimants would not suffer any commercial detriment if the award were disclosed, they were entitled to an injunction restraining disclosure since the grant of such would not cause hardship. The themes as first teased out by *Tournier* are clear in this judgement. Colman J therefore went further than in *Hassneh Insurance* and held that the test of 'reasonable necessity' applied only to disclosure where it was 'unavoidably necessary' to protect the legal rights of a party.

Whilst acknowledging the undesirability of holding five separate arbitrations over essentially identical factual issues, Colman J pointed out that the parties could have avoided this by inserting an appropriately drafted 'follow the leader' underwriters' settlement clause. In finding for the claimants, Colman J set out the following principles: (a) A party was only entitled to disclose an arbitration award to a third party if such disclosure was necessary to establish that party's legal

[350] [1995] 1 Lloyd's Rep. 272.

right against a third party - disclosure was not justified if disclosure was merely helpful; (b) Disclosure of the award would only be persuasive - it would not establish any legal right; (c) The duty of confidentiality was an implied covenant to maintain the (unquantifiable) benefit of secrecy for both parties, it was unnecessary to establish a loss to justify its enforcement; (d) The Court's exercise of discretion did not apply as the respondent had failed to establish that hardship would result.

The nature and scope of the implied term of confidentiality were further developed in *Ali Shipping Corporation v Shipyard Trogir* [1998] 2 All ER 136; [1999] 1 WLR 314 *(Ali Shipping).* The respondent shipyard failed to complete a hull construction. Ali Shipping, owned by Greenwich who in turn also owned three other one-ship companies (each of which had contracted with the same yard to build vessels) rescinded the contract and claimed damages. Each of those one-ship companies failed to pay the first instalments of the price of their respective contracts. In the subsequent arbitration, the shipyard sought to pierce the corporate veil and have all Greenwich-owned companies treated as one to permit the yard's plea of justification and/or set-off in respect of their claims for the unpaid instalments.

The arbitrator rejected the yard's arguments and refused to pierce the corporate veil, holding that the use of one-ship companies in connection with such transactions was a normal way of doing business, and that the 'contractual arrangements were made by the parties deliberately observing the separate nature of the legal personalities involved'. Whatever the position under the contracts for the other three one-ship companies, it was irrelevant to the issue of the respondents' liability to Ali Shipping and rejected the shipyard's claim for set off. The arbitrator awarded Ali Shipping £34m. The Court of Appeal refused to lift the corporate veil as between the various companies and treated them as independent third parties, so that the scope of the duty of confidentiality arose. The court held that the duty of confidentiality in relation to arbitration awards and documents used in arbitrations takes effect as a term implied in arbitration agreements as a matter of law and not on the basis of the presumed intention of the parties: '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 proceeding'.[351]

Potter LJ's exceptions to disclosure are closely modelled on *Tournier* and were set out as follows: (a) consent, i.e., where disclosure is made with the express or implied consent of the party who originally produced the material; (b) order of the court e.g., an order for disclosure of

[351] [1999] 1 WLR 314, [321] (Potter LJ).

documents generated by an arbitration for the purposes of a subsequent court action; (c) permission of the court; (d) disclosure when, and to the extent to which, it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; and (e) where the interests of justice so require. Potter LJ explained: 'it is not enough that an award or reasons might have a commercially persuasive impact on the third party to whom they are disclosed'.[352]

The Privy Council expressed reservations about Potter LJ's approach in *Ali Shipping* in an appeal from the Bermuda High Court that came before the Privy Council in *AEGIS v European Re*. Two disputes arose under a reinsurance agreement between the parties. Both disputes were referred to arbitration before two separate tribunals. In the first arbitration ('the Boyd arbitration') the parties agreed that the arbitration would be confidential. An award was rendered in favour of European Reinsurance who sought to rely on it in the second arbitration ('the Rowe arbitration'). AEGIS submitted that this would be in breach of the confidentiality agreement and obtained an injunction preventing disclosure of the award. The injunction was later discharged by the Court of Appeal of Bermuda and AEGIS appealed to the Privy Council to have the injunction reinstated. In the confidentiality agreement in the Boyd arbitration the parties had agreed that: 'The arbitration result will not be disclosed at any time to any individual or entity, in whole or in part, which is not a party to the arbitration between AEGIS and European Reinsurance'. In construing that wording, the Privy Council held that it could not conceivably impose an absolute ban on disclosure of the award, as this would clearly render the award incapable of being enforced in the courts. Lord Hobhouse addressed the issue of the confidentiality of arbitration awards:

> However Potter LJ… having followed Dolling-Baker v Merrett… affirming the privacy of arbitration proceedings, went on to characterise a duty of confidentiality as an implied term… and then to formulate exceptions to which it would be subject… Their Lordships have reservations about the desirability or merit of adopting this approach… Generalizations and the formulation of detailed implied terms are not appropriate.[353]

The Privy Council drew a distinction between documents used in proceedings and a subsequent award: they were different classes of documents and subject to different rules of confidentiality. An award was confidential as between the parties and as between the parties and the arbitrators. However, an award should be capable of enforcement, notwithstanding its confidential nature. The Privy Council further held that it was an implied term of the arbitration agreement that the parties agreed to perform the award. The confidentiality agreement was

[352] [1999] 1 WLR 314, [327] (Potter LJ).
[353] *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich (Bermuda)* [2003] 1WLR 1041; [2003] UKPC 11, [20].

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

The unexpected Privy Council decision in *AEGIS v European Re* attracted significant comment. Dundas contended that the Privy Council 'imposed new limitations on confidentiality in arbitration and, in effect, rebuked Potter LJ for beginning the attempt, in *Ali Shipping v Shipyard Trogir*'. The industry view is that the different approaches by Potter LJ and the Privy Council are bound to resurface in due course. Rawding and Seeger were more sceptical of the *AEGIS v European Re* decision, asking what, if any, is the scope of the implied duty of confidentiality.[354] Loh and Lee argued that the strong Privy Council decision in *AEGIS v European Re* casts doubt on whether a similar case to *Ali Shipping* would survive an appeal. The criticism of *Ali Shipping* by the Privy Council in *AEGIS v European Re* has in my view needlessly muddied the waters of the debate. Both decisions are capable of being viewed as correct and mutually consistent. *AEGIS v European Re* can be differentiated on the facts, having dealt not with strangers to an arbitration, but two arbitration awards with the same parties. Whichever analysis is correct, *AEGIS v European Re* exemplifies the ongoing development and inherent tensions between judicial philosophy and policy considerations. Despite the divergent views as expressed in the CA in *Ali Shipping* and the Privy Council in *AEGIS v European Re*, there is sufficient agreement in scope to approach codification with respect to both use of materials and arbitral awards, notwithstanding the courts have not delineated the full extent of the exceptions.

In *UMS Holding Ltd and others v Great Station Properties SA* [2017] EWHC 2473 (Comm) *(UMS Holdings)* Teare J held that the Courts had an inherent jurisdiction to regulate access to an award that was in the public domain (by virtue of a public enforcement challenge hearing) and granted an order prohibiting disclosure of an award even though it was not subject to a confidentiality obligation under Art.30 of the LCIA Rules then in force.

Overseas Approaches to Awards

Despite a lack of statutory provisions, Canada's case law offers some interesting counterpoints to other jurisdictions e.g., compare the approach of Ontario's courts in declining to seal an award on the basis that indiscriminate confidentiality risks undermining public confidence in the judicial system, with the comparatively secretive regime operating in Scotland, where s.15

[354] Nigel Rawding and Karolos Seeger, 'Aegis v European Re and the Confidentiality of Arbitration Awards' (2003) 19 Arbitration International 483.

provides that the court must grant the order, with fairly limited exceptions. In the United States the State courts more routinely deal with applications to stay or to enforce an award as they frequently have no supervisory role with respect to arbitral awards. A court may seal files relating to arbitral proceedings in order to preserve their confidentiality.[355] In New Zealand, as with materials, awards are similarly subject to a prohibition on disclosure subject to certain exceptions specified such as by order of the tribunal or court or in the interests of justice.

Institutional Approaches to Awards

The arbitral institutions typically view award disclosure with a similar proscriptive approach as they do for materials e.g., the ICDR, CIETAC, DIS, SIAC and WIPO. Where exceptions to disclosure are addressed - at least amongst rules that have been updated in recent years - they are similarly couched. For the HKIAC for example they include: to protect or pursue a legal right or interest; to enforce or challenge the award; in legal proceedings before a court; to a government body, regulatory authority, court or tribunal where the party is obliged by law to do so.[356] The LCIA states that it will not publish any award or any part of an award without the prior written consent of all parties and the tribunal.[357] The ICC does not address award publication. By contrast to its indeterminate approach to the confidentiality of materials, the SCMA specifically provides that the award is confidential, disclosure of which allowed only with the prior written consent of the parties.[358]

Penalties for Breach

Harpwood's view that the tort of breach of confidence was a developing area of the law that would in time be explored in more detail by the courts has not yet come about.[359] Determining what penalties should be proscribed for such a breach of confidence in relation to an arbitration was of course one of the very concerns that vexed the DAC in their deliberations: 'Indeed, even if acceptable statutory guidelines could be formulated, there would remain the difficulty of fixing and enforcing sanctions for non-compliance. The position is not wholly satisfactory'.[360]

Whilst formulating a solution for breach of confidentiality has not yet been addressed by the

[355] See James Veach 'The Law and Practices on the Confidentiality of Reinsurance Arbitration Awards – How Courts View Applications to Seal' (2000) Insurance Advocate 22.
[356] Administered Arbitration Rules 2018, Article 45.3.
[357] Article 30.3.
[358] At Rule 44.
[359] Vivienne Harpwood, *Modern Tort Law*, (6th edn Cavendish Publishing 2005) 404.
[360] The DAC Report on the Arbitration Bill, February 1996, para 17.

courts, I consider it appropriate to include a positive reference with the following:

> Breach of Confidentiality
> The Tribunal has the power to take appropriate measures, including issuing an order or Award for sanctions or costs, if a Party breaches any of the confidentiality provisions of this Act.

Chapter 4 Summary

The examples from overseas jurisdictions on the use of materials and awards is sparser than that for the arbitral institutions, most of whom address confidentiality to varying degrees. The richer jurisprudence in England and Wales with respect to the use of materials prepared for or used in an arbitration and awards after the arbitration is concluded is well developed and articulate, receiving support in both the High Court and Court of Appeal. The views of the Privy Council as to the distinction between the confidentiality attached to materials and awards and their disagreement as to whether confidentiality should be considered an implied term is a judicial tension between the courts that is yet to be resolved. Nonetheless, there is sufficient support within the decided cases to provide a firm foundation on which to craft a suitable amendment of the Arbitration Act.

The hurdle set by Saville J in the DAC Report: 'if the whole matter were ever to become judicially resolved, it would remain possible to add a statutory provision by way of amendment to the Bill'[361] has to a substantial extent been satisfied. The following provision with regard to confidential information i.e., awards and materials is proposed.

> Prohibition of disclosure of confidential information
> Every arbitration agreement to which this section applies is deemed to provide that the arbitral tribunal, parties, legal counsel and witness must not disclose confidential information, except:-
> (a) to a professional adviser; or
> (b) to the extent necessary for the establishment or protection of a party's legal rights; or
> (c) for the making and prosecution of an application to a court under this Act; or
> (d) if the disclosure is in accordance with a court order; or
> (e) the disclosure is authorised or required by law; or
> (f) for the purposes of obtaining litigation funding.

This chapter has addressed the confidentiality of arbitral materials and awards and the extent to which they can be used, both in relation to the arbitration proceedings for which they were handed down and externally, in non-related proceedings e.g., a different arbitration. The indirect

[361] ibid.

use of materials in court proceedings are discussed in Chapter 7, The Public Interest Exception. The following chapter continues the debate with a related issue that has long vexed the courts, namely that of consolidation and concurrency of arbitral proceedings.

Chapter 5: Consolidation & Concurrency

'Somebody said that it couldn't be done,
...
He started to sing as he tackled the thing
That couldn't be done, and he did it'[362]
- *It Couldn't Be Done. Edgar Guest*

Issues in Consolidation

Consolidation, whereby multiple disputes are consolidated into a single arbitration, goes to the heart of arbitral confidentiality, involving fundamental principles of party autonomy, privacy and the confidentiality of materials. The issue is one with which the courts have been grappling with mixed results for decades, exemplifying the tension that exists between due process and efficiency. Reform is long overdue.

The main drawback in the current law in this regard can be summarised as follows: Without the ability to order consolidation or concurrent hearings of related disputes, there is a possibility of different tribunals reaching inconsistent decisions on the facts or the law in the two disputes. It may result in a party to one of the two arbitrations being unable to obtain or adduce the evidence relevant to his case e.g., evidence disclosed by claimant A in the head charter arbitration being unavailable to respondent C in the sub charter arbitration, whereas B will not seek to call it and cannot be compelled to do so. Holding successive hearings before either the same tribunal or different panels with common membership raises an issue of potential unfairness to the parties involved in the later hearings if the earlier tribunal was influenced by evidence in earlier hearing, which is unbeknown to the party in question and which had no opportunity to challenge.

In general terms, consolidation of two or more claims involving all related parties and disputes such as in a chain arbitration involving back-to-back charter parties and arbitration clauses, aims to prevent the repetition and duplication of the same or similar evidentiary materials, minimise costs and avoid different tribunals arriving at contradictory outcomes arising out of the same factual matrix. Fortese and Hemmi commented however that consolidation may end up being less efficient and more costly '…for a party with a small claim, the settlement of which is likely to take longer and is, accordingly, less cost-effective'.[363] An order for concurrent hearings

[362] Edgar Guest (1881-1959) 'It Couldn't Be Done' The source of inspiration perhaps for Michael Mustill's 'They said that the thing just couldn't be done, But he smiled and he said that he knew it. He tackled the thing that couldn't be done, And he couldn't do it'. in 'Maritime Arbitration: The Call for a Wider Perspective' (1992) 9(2) Journal of International Arbitration 5.
[363] Fabricio Fortese and Lotta Hemmi, 'Procedural Fairness and Efficiency in International Arbitration' (2015) 3(1)

could give rise to delay in scheduling hearings due to the need to accommodate the diaries of a greater number of people: if not carefully managed hearings can become unwieldy. The fundamental question is whether related claims can (or should) be consolidated into one proceeding. On balance, I would answer that question as a qualified yes.

Whilst the Civil Procedure Rules make it possible for the defendant to join a third party to judicial proceedings, the Arbitration Act 1996 makes no provision for proceeding between more than two parties. Section 35 provides only that the parties are free to agree on the consolidation of arbitration proceedings or concurrent hearings. Without such an agreement from the parties, the arbitrators have no power to order either consolidation of concurrency. Such agreements are not unsurprisingly difficult to achieve once a dispute has arisen.

Underlying the clarity of s.35 there is significant discussion. This is particular so in two specific areas. In the construction industry, where main/subcontractor disputes are common throughout the value chain - from large infrastructure projects, offices, factories down to domestic conversions and renovations. And in the shipping industry, typically in the chartering of ships where extended charter party chain or string contract disputes are common features of the trade. Goods on board a ship are bought and sold multiple times during the course of a voyage. Ships can be chartered, sub-chartered and sub-sub-chartered multiple times over in both voyage and time charter parties. The large number of arbitrations that can arise over a single ship incident can and does cause serious obstacles to timely and cost-effective determination. Construction disputes involving main contractors and subcontractors are usually within the same jurisdiction and typically determined by adjudication. Shipping by its very nature is generally international in scope. The ownership or nationality of cargo, ship, technical operator, commercial operator, loading and discharging ports etc. all point towards the need for a transnational dispute resolution system, of which arbitration is overwhelmingly preferred. It is one of the reasons that so many disputes emanate from the shipping world and why London maritime arbitration - in terms of volume of international disputes – significantly exceeds those of the arbitral institutions.

Under the Arbitration Act 1950, a court's refusal to grant a stay could ensure that such multiparty disputes remained before the court. During his long judicial career, Lord Denning was involved in several multi party cases. In the Court of Appeal case of *Bruce (W) Ltd v J Strong,*[364] Bakirzis & Co. Ld., a company importing figs from Greece sold two consignments to another company, Abraham & Co., both being members of the London Dried Fruit Trade Association.

Groningen Journal of International Law 110, 123.
[364] [1951] 2 KB 447; [1951] 1 All ER 1021, CA.

The contract incorporated the rules of association which required that in the event of a dispute, it was to be settled by arbitration prior to any court proceedings being initiated. The figs were bought and resold three times. By the time that the final buyer W Bruce Ltd discovered that the figs were deficient in weight, the two months allowed under the rules of the association for commencing arbitration had expired. W Bruce Ltd sued their immediate seller J Strong for damages. Other party notices passed the claim up to Abraham & Co., who thereupon sought to bring in as fifth parties Bakirzis & Co. The last-named applied under s.4 of the Arbitration Act 1950 for an order to stay proceedings in the action. The master refused the application for a stay.

On appeal, Parker J confirmed that order and the matter reached the CA. One of the difficulties that arose for the court was the two-month time bar to bring arbitration proceedings under the association's rules. At the end of the chain the sellers were in effect arguing (a) that court proceedings should be stayed because an arbitrator's award was a condition precedent under the contract prior to the bringing of court proceedings; and simultaneously; (b) that no arbitration could be initiated because the two-month time bar had already passed.

The court noted the difficulties that could arise in chain contracts and the usefulness in such situations to have before the court the various parties involved: 'It is the last man who is landed with the goods who suffers the immediate damage'. If the contractual terms were sufficiently similar, then the claim could be passed up to the person who originally contracted to sell the goods i.e., the parties up the chain being brought in.[365] It noted: '[b]ut the answer is that the High Court has power in case of undue hardship, to extend the time for arbitration. That was the machinery provided by the Act for the very difficulty which has arisen'. [366] Neither of the expressions 'in the interest of justice' or 'in the public interest' were in vogue at the time, but they would have meshed well with Denning LJ's judicial philosophies.

The Court's support for avoiding a multiplicity of proceedings was also evident in *Taunton-Collins v Cromie and Others*[367] the claimant employer wishing to build a house, employed an architect and entered into a building contract with contractors on a standard Royal Institute of British Architects (RIBA) form which contained an arbitration clause. The claimant considered the work unsatisfactory and sued the architect claiming damages for negligence and breach of duty in respect of alleged faults in design and lack of proper supervision of the contractors. After the transfer of the action to an official referee, the claimant joined the contractors as second

[365] ibid 451 (Somerville LJ).
[366] ibid 458 (Denning LJ).
[367] [1964] 1 WLR 633.

respondents. The contractors in turn applied to the official referee to stay the proceedings under s.4 of the Arbitration Act, in reliance upon the arbitration clause. The official referee ordered that there should be no stay and the contractors appealed.

Pearson LJ viewed it as a conflict of two well-established and important principles, namely (a) that the parties should normally be held to their contractual agreements; and (b) that a multiplicity of proceedings is highly undesirable. The court considered that there were strong reasons based on the principle of avoiding a multiplicity of proceedings why the action should continue. That if there were two proceeding before different tribunals there would be delay, increased costs, procedural difficulties: 'If the two proceedings should go on independently, there might be inconsistent findings. The decision of the official referee might conflict with the decision of the arbitrator'.[368]

The court devised a creative solution to the issue of multi-party proceedings in *Abu Dhabi Gas Liquefaction Co. Ltd v Eastern Betchel Corporation,*[369] an appeal from a construction arbitration. Contracts for the erection of tanks for the purposes of liquefying gas from oil were made between the employers and the main contractors and between the main contractors and sub-contractors. The tanks were built and installed between 1973 and 1975. After a time, cracks appeared in one of them, caused by brittleness in the structure: the cost of repairs ran into millions of pounds. The question then arose as to who was responsible for the repairs. The employers claimed against the main contractors which in turn claimed against the sub-contractors. The issue before the Court was whether there should be separate arbitrations and separate arbitrators for the two contracts or whether there should be one arbitrator only for both proceedings. Bingham J held in the court of first instance that there should be two separate arbitrators in that if there was only one, the arbitrator might make an adverse finding in the first arbitration which would affect his decision in the second.

The matter came before the Court of Appeal. Recognising that it was highly desirable for the same arbitrator to be appointed in each arbitration and thereby avoided inconsistent findings, Lord Denning considered that it was equally important to ensure that neither party considered that any issue had been decided against them beforehand, nor without having an opportunity to be heard. Although the Court could not impose conditions on the appointment of an arbitrator, it had the powers under s.10 of the Arbitration Act 1950 to appoint in each arbitration the same arbitrator. The solution was to appoint the same arbitrator in both arbitrations. There would be

[368] ibid 637 (Denning MR).
[369] *Abu Dhabi Gas Liquefaction Co. Ltd v Eastern Betchel Corporation* [1982] 2 Lloyd's Rep. 425.

a pre-trial conference at an early stage with all parties, whereby the issues could be segregated into those that could be separated and decided by the arbitrator at that stage and those which could not be separated e.g., the issue of causation. Should the arbitrator consider that there was a possibility of prejudice at any point in the first arbitration he could himself excuse himself from the second arbitration.

The court viewed that the ideal solution would have been an arbitration resembling a civil action in which claimant, respondent and third parties litigate their disputes in a single hearing: 'Unhappily the parties to this vast dispute are unable to agree a procedure of that kind'.[370] The Court was unpersuaded by the argument of the risk of prejudice by having a single arbitrator for both arbitrations: the single arbitrator could separate out the issues at a preliminary stage and by so doing save time. In Fox LJ's view the general advantages of a single arbitrator outweighed the risk of prejudice. The Court's approach was well thought out, appointing an experience arbitrator (and former Lord Justice of Appeal) who was more than capable of handling the intricacies of the multiple references.[371] Whether the typical commercial arbitrator would be so well equipped to deal with such complex, high value disputes is another matter.

Concurrency and Other Commercial Practices

In maritime string disputes, such as concurrent disputes arising under both a head charter and a sub-charter of the same vessel, the accepted view was that if there were inconsistent arbitration clauses in the two charter parties e.g., with seats in different jurisdictions or if the different tribunals consisted of different arbitrators, then there was probably no way in which the two disputes could be combined. But in cases that called for three-man tribunals under say LMAA Terms, those involved in London arbitrations thought that the arbitrators could provide a remedy.

A typical example might involve a head owner (A), a head charterer (B) and a sub-charterer (C) with the two charter parties both providing for arbitration in London under LMAA Terms before three-man tribunals consisting of two party appointed arbitrators and a third arbitrator to be chosen by them. If a string dispute arose then it was unlikely that more than three (or possibly four) arbitrators would be appointed. Assume 'A' was the claimant and appointed his arbitrator 'a'. 'B' as the respondent in the head charter and the claimant in the sub-charter appoints as arbitrator 'b' for both disputes. 'C' at the end of the chain would appoint his arbitrator in the

[370] ibid 427 (Watkins LJ).
[371] The court appointed arbitrator was Sir John Megaw, a former Lord Justice of Appeal, perhaps more famously known as the last judge to pronounce a death sentence (of John Ronald Cooper) at the Old Bailey in 1964.

usual manner, which might be 'a' or a third arbitrator 'c'. In the case of the former, due to the close links in the small maritime arbitration community in London, the two party appointed arbitrators ('a' and 'b') would be likely to appoint the same person ('c') to act as third arbitrator in the two disputes. Or with three party appointed arbitrators, the two tribunals consisting of ('a' + 'b') and ('b' + 'c') might appoint the same individual 'd' as third arbitrator in both.[372] The point being, that without thus making a formal order for consolidation, the two tribunals could schedule a way for both arbitrations to be heard at the same time, hearing the evidence raised in both arbitrations together and so avoiding the risk of inconsistent findings of fact and law being reached in the two disputes.

Does this idealised scenario work in practice? Sometimes. But not always. From this writer's own experience, it can just lead to interminable delay as the following example illustrates. A chemical tanker loaded multiple grades of palm oil at the port of Kuala Tanjung on the Indonesian island of Sumatra in 2013. On completion of loading the lines were 'pigged' and 'blown through' i.e., air or nitrogen under high pressure is used to force a plastic cylinder that snugly fits inside the cargo pipeline that runs through the terminal pipeline system from the shore tank where the oil was stored to the jetty where the ship was berthed.[373] During, or perhaps shortly after the pigging phase (accounts diverge on this point) a cargo tank over-pressurised. Over-pressurisation of a ship's tank can do a little damage - or it can break a ship in two. The ship did not sink, but there was extensive damage to the vessel's internal structure. The loud explosion from the ship was reportedly heard in the small resort of Wisata Alum Datuk, 5km away.

Cargo leaked into ballast tanks and become contaminated with sea water. Sea water leaked into ruptured cargo tanks containing coconut oil and various other chemicals[374] contaminating those cargoes in the process. Cargo leaked between cargo tanks containing different cargoes, resulting in commingling and off-specification. There was no fire and no injuries to personnel, but the damage to ship and cargo would in the final tally exceed USD5 million. The ship blamed the terminal. The terminal pointed the finger of responsibility back to the vessel. A series of disputes would emerge, that would involve the terminal, the ship, several charterers, the buyers and sellers of the cargo and the various owners of the other cargo parcels on board whether they were damaged or not. Insurers for cargo, hull and the P&I Clubs became involved. So too did

[372] Or, equally as likely, cross appoint maintaining three arbitrators for both references: ('a' + 'b' + chairman c) and ('b' + 'c' + chairman a)
[373] Pigging describes the clearing a pipeline of cargo so as to reduce wastage and avoid contamination when a different cargo is subsequently pumped through the same pipeline.
[374] Even small traces of a sea water in an edible grade vegetable oil or a chloride sensitive chemical can downgrade a high value cargo to little more than its scrap value.

customs, the marine police and safety officials from the local authorities. Before long the ship was awash with surveyors, experts and representatives of the numerous parties who had an interest in the ship or its cargo.

In one of the many disputes, arbitration was initiated by the head owners (A) against the time charterers (B). The arbitration agreement incorporated English law and LMAA Terms. The time charterers (B) in turn commenced proceedings against the voyage charterers (C), which contract also incorporated English law and LMAA Terms. So far so good: the first two arbitrations were capable of an LMAA provision that permitted concurrency, with the potential for saving time and expense. The voyage charterers (C) initiated arbitration proceedings against the sub-charterers (D). However, the applicable arbitration clause here was an ad hoc arbitration subject to Singapore law, with no institutional terms or rules applying. This writer was appointed as arbitrator in the three arbitrations in 2013: by head owners (A) in the first arbitration; by voyage charterers (C) as respondents in the second arbitration; and by the same voyage charterers, now as claimants in the (ad hoc) third arbitration. Three arbitrations comprising similarly constituted panels in the two LMAA arbitrations and a differently constituted tribunal (but with one common arbitrator) in the Singapore arbitration.

Did the arrangement assist in resolving the dispute fairly and quickly? No. The parties were unable to agree consolidation or concurrency or in fact much else at all. All three disputes dragged on over the course of the next seven years, during which two party appointed arbitrators passed away and being duly replaced before the parties finally reached a mediated, though partial settlement in January 2020. The informality and closeness of the participants in say London arbitrations may work to advantage in some instances, but it is not the evergreen panacea it is sometimes promoted as being. It certainly cannot substitute for a formal approach to consolidation.[375]

It was not until *Oxford Shipping Co. v Nippon Yussen Kaisha (The Eastern Saga)*[376] that English law considered that arbitration was viewed as generally confidential as opposed to merely private; that there existed an unqualified rule that arbitrators enjoy no power to order concurrent hearings of related arbitrations. The vessel's owners had chartered the ship to NYK who in turn

[375] A resolution was finally achieved after the parties agreed to drop the three arbitrations and the matter was determined in the Singapore High Court in *Wilmar Trading Pte Ltd v Heroic Warrior Inc (The 'Bum Chin')* [2019] SGHC 143 where Belinda Ang Saw Ean J found that - pure economic loss being claimable under Singapore law - in the absence of a contract of carriage, the defendant shipowner owed the plaintiff a duty to take reasonable care of the cargo loaded on board. Wilmar's loss was caused by the shipowner's negligence as structural weaknesses were a cause of the failure of the tank which had caused leakage and contamination of the cargo.
[376] [1984] 3 All ER 835; [1984] 2 Lloyd's Rep. 373.

had sub-chartered the vessel to Sanco. A dispute arose between owners and charterers, mirrored by a dispute between charterers and sub-charterers. The same arbitrators were appointed in respect of each of the disputes. An application was made to the arbitrators for an order for concurrent hearings in each of the references. Holding that they held such powers, the tribunal made an order for concurrent hearings, a not unusual procedural order at the time. It therefore came as something of a surprise when a challenge was made to the exercise of this arbitral soft power. The owners contended that the arbitrators had no such power because either (a) they did not enjoy it by statute or at common law or, alternatively, (b) because there was an implied term in the arbitration agreement between the owners and charterers that the arbitration was private. The arbitrators, recognising perhaps that the law was unclear on the jurisdiction point, encouraged an appeal to the Courts, the tribunal welcoming 'the view from The Strand'.[377]

Leggatt J noted that the matter raised the question 'often discussed but apparently never decided by a Court' as to whether arbitrators had the power or jurisdiction to order concurrency (i.e., the concurrent hearing of two arbitrations) without the consent of the parties. It was recognised that matters which start within the privacy of an arbitration may become public e.g., when leave to appeal is granted and matters arising out of an arbitration come before the Court of Appeal. The court viewed the concept of private arbitration as deriving simply from the fact that parties have agreed to submit to arbitration disputes that arose between them and only between them. It was therefore implicit in this construction that strangers should be excluded from the arbitration hearings. Neither the tribunal nor the parties could insist that the dispute be heard or determined concurrently nor consolidated with any other another dispute, irrespective of how convenient that option may or however closely associated with each other the disputes may be.

The Court held that arbitrators enjoy no power to order concurrent hearings without the consent of the parties. The only powers that arbitrators enjoy relate to the reference in which they have been appointed. That power could not be extended merely because a similar dispute exists that was capable of being and is referred separately to arbitration under a different agreement. The court held that it was 'graven upon the heart of any commercial lawyer' that arbitrators enjoy no power to order concurrent hearings without the consent of the parties.[378]

The desirability of there being a power to order consolidation was also discussed in the CA in *Interbulk Ltd. v Aiden Shipping Co. Ltd. ("The Vimeira")*.[379] The court observed that it was

[377] ibid [374] (Leggatt J).
[378] ibid [379] (Leggatt J). See V V Veeder for a detailed analysis of the issues in *The Vimeria* in 'Multi-party disputes: Consolidation under English law *The Vimeira* – a Sad Forensic Fable (1986) 2 Arbitration International 4, 310
[379] [1984] 2 Lloyd's Rep. 66.

well known that related arbitrations can arise out of the same factual dispute: that disputes between owners and charterers on the one hand and charterers and sub-charterers on the other (with regard to damage suffered by the ship at a loading or discharging port for example) were a classic instance of such a situation. Nevertheless, English arbitration law provided no power either to arbitrators or the Courts to ensure that the same tribunal can hear both arbitrations - either by consolidation or through immediately succeeding hearings - so as to avoid the danger of inconsistent awards: 'There is … no means of ordering consolidation of two such related arbitrations'.[380]

Whilst noting that Hong Kong arbitration law had found a solution to this issue, this was not so in England. In a reference to those responsible for proposing and formulating amendments to the arbitration laws, the court expressed the hope that: '…the present case will, I trust, provide an additional impetus and urgency to the efforts now being made to fill this gap in our law'. Ackner LJ agreed: 'If ever there was a case that emphasized the need for additional powers of the arbitrators and the Court, this is such a case'.[381] In the 'Strand's view' there was a gap in the law that is still waiting to be filled.

The difficulties that consolidation of arbitration proceedings evoked was not universally recognised by the judiciary as an intractable problem in need of fixing. Compare the views conveyed by the court in *The Vimeria* with that in *World Pride Shipping v Diachi Chuo K.K. (The Golden Anne):*[382] 'The inconvenience of multiple arbitrations, though it exists, can be exaggerated'. The court considered that it was not a new problem and one that London arbitrators had evolved ways to deal with. For example, assuming a degree of co-operation between the parties, the inconvenience could be reduced and so too the risk limited of conflicting decisions, by tribunals hearing arbitrations together or sequentially, one immediately after the other. An eminently reasonable approach, but in some respects idealistic and not always workable. As practical experience and examples have shewn, parties to an arbitration tend to avoid comprise if it is viewed as strategically weak or outside their commercial interests. In arbitration, for the parties winning is all.

The views of commentators are similarly divided. Collins posed two privacy questions in relation to arbitration. Whether there was a prohibition on consolidation or the holding of concurrent hearings in the absence of agreement by the parties; and if the use of materials used in

[380] ibid [75] (Goff LJ).
[381] ibid [76] (Ackner LJ).
[382] [1984] 2 Lloyd's Rep 489, [497] (Lloyd J).

an arbitration for any purpose other than the arbitration itself, was prohibited.[383] Collins concluded that choice of law and any applicable institutional rules that may apply notwithstanding, in the case of English law the answer to both questions was likely to be a 'yes', whereas jurisdictions such as in the United States and Australia the answer was probably 'no'. In the case of English law, Collins is undoubtedly correct, consolidation is still not permitted.

Inconsistent Decisions

It was suggested in the consultation process on the 1996 Act that the arbitrators should have the very power denied to them in *The Eastern Saga,* either absolutely or unless the parties agreed to remove it from them. However, the DAC in its February 1996 Report[384] considered that consolidation was too difficult to legislate: however justifiable consolidation might be in terms of speed and efficiency, it would undermine the fundamental principle of party autonomy. The DAC therefore refrained from recommending that parties should be forced to arbitrate with those whom they had not contracted. The old common law remained. Saville LJ, responding to criticism[385] replied that arbitration institutions should prepare terms to enable such consolidated arbitration: the LMAA 2017 Terms do at least address the issue of concurrency, which a tribunal has the power to exercise under 16(b). But neither mandatory consolidation nor empowerment of the courts to order a consolidation of proceedings appear in the Arbitration Act 1996, where s.35 is restricted to a statement of principle emphasising the party's freedom to confer upon the arbitrators the power to consolidate proceedings or to hold concurrent proceedings. Thus it remains the case that one arbitral tribunal may reach a view on the interpretation of a certain term, and another tribunal may reach quite a different view: neither of those views binds the other, nor anyone else. More generally of course, no one other than the parties to a specific arbitration are likely to be even aware of a tribunal's views on any specific matter, because of the confidentiality arbitral awards invariably attract.

The English court approach that confidentiality is implied by law was exemplified and upheld in *Lincoln National Life Insurance Co v Sun Life Assurance Co of Canada and Others.*[386] The case was concerned with whether a stranger was bound by an interpretation of contract held in an arbitral decision. It was recognised that different arbitrations on closely inter-linked issues might as a result lead to different results, despite the evidence before the different tribunals being largely

[383] Michael Collins 'Privacy and Confidentiality in Arbitration Proceedings' (1995) 11 Arbitration International 321.
[384] DAC Report on the Arbitration Bill, February 1996, 177–182.
[385] Saville LJ 'Answer to Some Criticisms of the Arbitration Act 1996' (1997) Arb & Disp Res L J 156.
[386] [2004] All ER (D) 171 (Dec).

the same. Arbitrators in each arbitration are appointed to decide the disputes in that arbitration, i.e., between the particular parties to that arbitration. The privacy and confidentiality attaching to arbitration underline this: '[e]ven if they do not lead to non-parties remaining ignorant of an earlier arbitration award, they are calculated to lead to difficulties in obtaining access, and about the scope of any access, to material relating to that award'. The court considered that the inability to enforce the solutions of joinder of parties or proceedings in arbitration, or to try connected arbitrations together other than by consent, was well-recognised: '[t]hough the popularity of arbitration may indicate that this inability is not often inconvenient or that perceived advantages of arbitration, including confidentiality and privacy are seen as outweighing any inconvenience'.[387]

The court was well aware of the prospect of two arbitrators coming to inconsistent decisions based on the same set of facts: 'The sad truth is that in the absence of any third-party or consolidation procedure in arbitration, parties may be put into the position of making inconsistent cases in different proceedings'.[388] In considering the difference between litigation and arbitration, noting that whilst in litigation it is possible to make inconsistent cases in the same proceedings, and if done later, in different proceedings, it could be considered as an abuse of process, the Court considered that was not a reason to extend the law of issue estoppel in arbitration proceedings.

This reversed the same Court's reasoning some 20 years earlier in *Abu Dhabi Gas Liquefaction Co. Ltd v Eastern Betchel Corporation*.[389] Saville J's comments in the *George Moundreas and Co SA v Navimpex Centrala Navala*[390] accepting parts of an arbitration award into court as facts, objected to by the respondents on the grounds that the award only represented the opinion of the arbitrators and was thus inadmissible as evidence was summed up by Lord Mance: '[t]he conclusion that I would reach is that … the dicta of Mr. Justice Saville in *Moundreas* cannot be regarded as reflecting or as based on any general principle of law in the arbitral context to which they were directed'.[391]

Do Users Have a Say?

In addressing consolidation, the Report on the Arbitration Act 1996 asked the following question: 'Those who drafted the Act felt unable to find a satisfactory solution to the problems

[387] ibid [68] (Mance LJ).
[388] ibid [83] (Longmore LJ).
[389] [1982] 2 Lloyd's Rep. 425.
[390] [1985] 2 Lloyd's Rep 515.
[391] [2004] All ER (D) 171 (Dec), [69].

that would arise from statutory provisions for the consolidation of arbitrations, and so made none. Do you think this position should be changed?' Despite the leading nature of the question, of the 192 responses the replies were finely balanced between 43 percent who indicated that there should be no change and 42 percent who thought that there should.[392] The Committee, like the DAC before it, was not receptive to authorising consolidation in the statute, considering that the 'conceptual difficulties' could not be overcome. It echoed the conclusion of an earlier DAC Committee reporting under Sir Michael Mustill in 1991, against a provision for consolidation. The arguments included that a power to consolidate would inevitably lead to delay and extra expense whilst the consolidation is debated in the courts; the serious risk that judicially imposed consolidation may make the award unenforceable overseas; and that consolidated proceedings would inevitably take longer and cost more than one separate set of arbitration proceedings. In summary the DAC's Second Report concluded against consolidation on the grounds that: 'In our view there are formidable obstacles'.[393]

Cohen had a different interpretation of the results, noting that the respondents who expressed an opinion were nearly evenly divided about whether the 1996 Act should empower the courts to order consolidation of arbitral proceedings, that the risk of inconsistent awards where related contracts contained the same arbitration clause was a major flaw of the arbitral process. Cohen compared the English position with Holland, where the law authorises court ordered consolidation unless the parties have agreed to bar it. And also to the United States, where common law consolidation of arbitrations had been allowed for several decades, unless the parties had prohibited it in their agreement: there were few problems in practice. The most difficult issue is when a clause provides for party-appointed arbitrators because, unless the size of the arbitral tribunal is enlarged by the court (which was done, from time to time, in the United States), a party might not always be able to exercise a personal choice for one of the arbitrators.[394] Cohen was critical of the failure to address consolidation and proposed a revised wording of the statute.

In the case of some administered arbitrations an appointing authority chooses all of the members of the tribunal.[395] Even when a clause provides for party appointed arbitrators, in order to obtain consolidation a party has been known to waive its right to have a personal choice on the panel. For example, in two related agreements each of which contained an identical clause

[392] Bruce Harris, 'Report on the Arbitration Act 1996' (2007) 23 Arbitration International 437, 446.
[393] Editorial, 'Consolidation: the Second Report of the United Kingdom Departmental Advisory Committee on Arbitration Law' (1991) 7 Arbitration International 390, 391.
[394] Michael Cohen, 'A Missed Opportunity to Revise the Arbitration Act 1996' (2007) 23 Arbitration International 461, 464.
[395] e.g., LCIA Rules at Art.22.

providing for disputes to be heard by a sole arbitrator, two of the three parties could agree to accept as sole arbitrator the nominee of the person who would not voluntarily agree to consolidation. In cases involving a back-to-back charter and sub-charter, it is not unusual in the United States for a head charterer in the middle simply to waive its right to nominate an arbitrator, submitting instead to a tribunal consisting of one arbitrator appointed by each of the other two parties and the third by the two so chosen.

Unfortunately, the Committee did not satisfactorily address why the court should not have the power to order consolidation of related proceedings under identical arbitration clauses. The Commercial Court's Report as to whether there should be changes in consolidation stated: 'no one could say how to overcome the conceptual difficulties which the DAC outlined, let alone how that might be done satisfactorily'.[396] The justification was that attitudes to confidentiality were complex, with no agreement or consistent theme as to what limits or exceptions there should be, a consideration which persuaded the authors to militate strongly against any attempt to codify rules on confidentiality.[397]

Institutional Rules and Consolidation

The small number of arbitral institutions that provide a template for consolidation are discussed below under three categories: consolidation allowed by agreement; by order of the institution; and where the rules so empower the tribunal.

Institutions that Allow Consolidation by Agreement

The GMAA Rules specifically address the consolidation of arbitrations at Art.8, which upon the request of one or more parties, empowers the DIS to consolidate two or more arbitrations conducted under the Rules into a single arbitration if all parties to all of the arbitrations consent to the consolidation. Article 17 concerns multi-contract and Art.18 multi-party arbitrations. Claims arising out of or in connection with more than one contract may be decided in a single arbitration provided that all of the parties to the arbitration agree. Any dispute as to whether all of the parties have so agreed - and in particular when there is no express agreement in writing to that effect - it is for the arbitral tribunal to decide. Similarly, as per Art.17.2, claims that are made in reliance on more than one arbitration agreements may be decided in a single arbitration

[396] Bruce Harris, 'Report on the Arbitration Act 1996' (2007) 23 Arbitration International 437, 446.
[397] ibid 447.

providing the parties agree and where such arbitration agreements are compatible.

Claims made in an arbitration with multiple parties may be decided in that arbitration 'if there is an arbitration agreement that binds all of the parties to have their claims decided in a single arbitration…' Any dispute as to whether the parties have so agreed, in particular when there is no express agreement in writing to that effect, is to be decided by the arbitral tribunal. As per Art.18.2, the provisions relating to of Art.17 Multi-Contract Arbitrations apply in addition to the provisions of Art.18. This presumably relates to those provisions of Art.17 concerning agreement of the parties and the termination provisions that the DIS may exercise at Art.42.4 (ii). The difficulty with both Art.8 and Art.17 is that in both cases it requires the parties consent: '…if all parties to all of the arbitrations consent…' and '…if all parties to all of the arbitrations consent to the consolidation…' respectively.

The 2014 LCIA Rules include at Art.22.1(ix) the ability to consolidate into a single arbitration (with the approval of the LCIA Court), one or more other arbitrations into a single arbitration subject to all the parties to the arbitrations to be consolidated being in agreement. Consolidation also applies at Art.22.1(x) to arbitrations commenced under the same arbitration agreement or where the same parties are in dispute in any compatible arbitration agreement(s). The 2014 LCIA Rules suffer from the same limitation as the GMAA Rules: consolidation requires party agreement.

Institutions That Can Consolidate or Order Concurrency

The revised 2020 LCIA Rules have however addressed some of these issues. Under Art.1.2 a Claimant wishing to commence more than one arbitration under the LCIA Rules (whether against one or more Respondents and under one or more Arbitration Agreements) may serve what the LCIA refers to as a 'composite' request for arbitration in order to commence multiple arbitrations at the same time. The 2020 LCIA Rules introduce a new article, Article 22A Power to Order Consolidation/Concurrent Conduct of Arbitration. A key new provision grants a Tribunal the power with the approval of the LCIA Court to order, with caveats, consolidation (at Art.22.7(ii)) or concurrency (at Art.22.7(iii) of proceedings subject to giving all affected parties 'a reasonable opportunity to state their views'.

Singapore's SCMA Rules under Rule 33, Additional Powers of the Tribunal, permit that where two or more arbitrations appear to raise common issues of fact or law, the tribunals are empowered to direct that the two or more arbitrations may be heard concurrently. That provides

at least a potential saving of time and cost but falls short of consolidation. The SIAC Rules go slightly further, detailing the procedures that permits the Court to allow at its discretion joinder of additional parties. Rule 8 covers the detailed provisions for consolidation of two or more arbitrations under the SIAC Rules into a single arbitration. Consolidation is allowed if one of the following is met: all parties have agreed to the consolidation; or all the claims in the arbitrations are made under the same arbitration agreement; or the arbitration agreements are compatible, and the disputes arise out of the same legal relationship(s) or arise out of the same transaction or series of transactions.

Institutional Rules That Grant Consolidation or Concurrency Powers to the Tribunal

The HKIAC goes further. The Administered Arbitration Rules 2018, Art.28 provide detailed requirements with respect to consolidation. Consolidation is at the discretion of the HKIAC: it does not require agreement between the parties under Art.28.1. Article 29 deals with the related issue of a single arbitrations under multiple contracts. Article 30 provides for concurrent proceedings at the discretion of the arbitral tribunal where the same arbitral tribunal is constituted in each arbitration and there is a common question of law or fact arising in all the arbitrations.

Overseas Jurisdictions and Consolidation

Article 1046 of the Netherland's Arbitration Act 1986 gives the President of the District Court in Amsterdam a discretionary power to order the consolidation of proceedings where the subject matters are connected at the request of one of the parties. Under this article however there is a risk that one or more of the parties may lose their appointed arbitrator: if the parties cannot agree on the appointment of an uneven number of arbitrators within the period of time prescribed, the responsibility for the appointments falls on the President of the District Court.

If an arbitral tribunal exceeds its jurisdiction by inappropriately ordering consolidation, it risks having the award set aside. An example of such a pitfall that can trap an unwary arbitral tribunal came from the US Supreme Court in *Stolt-Nielsen SA v Animal Feeds International Corporation*[398] which set aside a partial interim award consolidating multiple arbitrations involving different parties against various ship-owners, involving similar arbitration agreements. The claimants sought consolidation of the multiple proceeding, an application opposed by the respondents. The tribunal considered that the necessary preconditions had been met, including common questions of law and fact among the different claims and so allowed the consolidation

[398] 27 April 2010, 559 US 662.

of the claims. The US Supreme Court vacated the award, holding that the arbitrators had exceeded their powers by imposing their own policy choice rather than in accordance with the law. In the eyes of the Court, efficiency was insufficient grounds on which to base a decision to impose upon the respondents a class or consolidated arbitration to which they had not consented. Concurrency in the USA at least is less controversial, where the 2nd Circuit decided that arbitrators have the power to order concurrent hearings of related disputes. It was sometimes viewed as a distinct advantage of a party's decision to opt for New York arbitration, where it is possible to combine different arbitrations at a single hearing, a feature particularly useful in maritime arbitrations. However, there is also a view that procedural issues caused by unwieldy hearings and problems with regard to the scheduling of hearing dates have taken the gloss off New York SMA arbitration.[399]

Chapter 5 Summary

Objections to changes to the Arbitration Act do exist: '…there is always a group that favours maintaining the status quo. As with all policy changes, there will be winners and losers'.[400] One argument is that the existence of a legislative power to order concurrent hearings would constitute a risk to the confidentiality of the arbitration process. Would this though be a case of '…elevating the subsidiary virtue of confidentiality into something of a sacred cow to treat this factor as a determinative reason for objecting to the proposed power?'[401] Another concern is that it would reintroduce the interference of the courts that was done away by the Arbitration Act 1996: 'Such a view is ... out of keeping with the current view that the parties should have complete autonomy over the constitution of the arbitral tribunal and the procedure which it is to follow'.[402] And would the existence of a compulsory power of the Court to order concurrent hearings be viewed as an unattractive element of the arbitration process? Perhaps, but probably not. The results of the Commercial Users Survey revealed that views were finely balanced.

It is now 30 years since the LMAA put forward proposals to the DTI Departmental Committee on Arbitration law in June 1990.[403] The LMAA did not suggest new legislation for the Courts to be given power to order the consolidation of two or more arbitrations, but instead

[399] Keith W Heard, 'Consolidation' in John Kimball & David Martowski (eds) *Navigating Maritime Arbitration* (Juris Publishing 2019).
[400] 'Britain Has Changed Forever', *The Atlantic* (Washington 7 February 2020). *https://www.theatlantic.com/international/archive/2020/02/britain-brexit-rejoin-eu-boris-johnson/606190/* accessed 25 February 2020.
[401] Anthony Diamond, 'Multi-Party Arbitrations A Plea for a Pragmatic Piecemeal Solution' (1991) 7 Arbitration International 408.
[402] Stuart Boyde, *Mustill and Boyd: Commercial Arbitration* (2nd edn 1989), 145.
[403] In a letter of 1 June 1990 addressed by the President of the LMAA to the Department of Trade and Industry.

the exercise of a discretion that would allow for the limited relaxation of the rules of arbitral confidentiality, where, and only where, such relaxation was necessary in order to avoid the risk of inconsistent decisions. As summarized by Diamond, these suggestions were: (1) courts would be vested with a discretion to order the concurrent hearings of two or more arbitrations where necessary to avoid inconsistent conclusions of fact or law; (2) that where such discretion is exercised, the Court could order that documents disclosable in one arbitration be disclosed to one or more parties to the other arbitration(s); (3) the court would not replace arbitrators appointed by the parties; (4) the court would be required to balance the risk of any loss of confidentiality against the risks of inconsistent findings inherent in refusing to make the order; and (5) the Court's power would apply to ad hoc arbitrations only: it would not extend to situations where the arbitration agreement provided that an arbitral institution was charged with the administration of the arbitration.[404] These proposals were not taken up, but nevertheless form a useful basis for a statutory codification.

The DAC considered that it 'would amount to a negation of the principle of party autonomy' to allow court ordered consolidation. This is to my mind is not a persuasive or sustainable viewpoint. Reform is strongly suggested on the grounds of practicality, cost, time and not least by being supported by an overwhelmingly majority of the judiciary who have considered the matter. One solution could simply be the reversal of the existing default rule prohibiting consolidation, replacing it with a rule authorising consolidation. This would be subject to s.4(2), under which the parties have the option to prevent consolidation by positively excluding as a contractual term in the arbitration clause. Whilst the ability to order consolidation has advantages, it would have to satisfy at least the following conditions: (a) The arbitrations have the same seat; (b) the same law governs the related disputes; and (c) the procedural rules of the related disputes are the same.

I therefore suggest the following amendment:

> Consolidation
> (a) The court may on an application by one of the parties order either consolidation or concurrency of related arbitral proceedings under multiple arbitration agreements which are substantially similar, provided no party is deprived of its right to appoint its own nominee as an arbitrator.
> (b) The court shall not order consolidation where an arbitration is being conducted under the supervision of an arbitral institution.
> (c) Where consolidation or concurrency is ordered under this section, the Court may order that documents disclosable in one arbitration be disclosed to one or more parties to the

[404] Anthony Diamond, 'Multi-Party Arbitrations: A Plea for a Pragmatic Piecemeal Solution' (1991) 7 Arbitration International 407.

other arbitration(s).
(d) The court shall balance the risk of any loss of confidentiality against the risks of inconsistent findings inherent in refusing to make the order.

By addressing the issue of party autonomy and not depriving a party of its choice of arbitrator, a potential issue of how to deal with two or more differently composed tribunals is addressed. In such circumstances concurrency of proceedings may be more appropriate.

Chapter 6: Third Party Funding

'Parties shall not by their countenance aid the prosecution of suits of any kind; every person must bring his suit upon his own bottom and at his own expense'[405]

- *Wallis v Duke of Portland*

Introduction to Third Party Funding (TPF)

According to the CIArb's 'Costs of International Arbitration Survey 2011' a typical claimant spends approximately £1,580,000, while respondents spent an average of £1,413,000.[406] These are significant figures. The small sample size and the low number of arbitrations the statistics are derived from - a survey of 254 international commercial arbitrations conducted between 1991 and 2010 - suggest the survey captured a disproportionate number of large and expensive claims that exaggerate the true cost of a typical arbitration. At one end of the scale will be a typical LMAA arbitration dispute involving a modest, five-figure demurrage claim. In an LCIA arbitration by contrast the average sum in dispute in 2017 and 2018 was over USD 50 million. As these sums highlight, pursuing a claim through arbitration for some disputants can be prohibitively expensive without external financing. This chapter deals with one of the newest additions to that category, third party funding. Hereafter both third party funding and the organisation who supply the money, third party funders, will be collectively abbreviated to TPF.

Whilst the term third party funding can be considered misleading, having entered into the lexicography and become synonymous with litigation funding, the adoption of an alternative phraseology would likely result in confusion. TPF is conceptually similar to ATE insurance. There is no internationally agreed definition of TPF, but it is generally accepted as a type of investment, granted by means of a contractual agreement between party to an arbitration (more commonly the claimant than the respondent) and a funder unrelated to the proceedings. TPF is thus the provision by a third party of capital to fund the costs of pursuing a claim in the expectation of a return to the funder of any recovery in arbitration. Or as Peysner described it: 'In principle Third Party Funding (TPF) is just the same as borrowing money from the bank to finance a party's litigation'.[407] Although of course banks do not traditionally take a cut in the form of a percentage from the proceeds of the litigation. Before proceeding further, despite the inherent difficulties noted by a number of institutions, a definition for a TPF is called for. The following is proposed:

[405] *Wallis v Duke of Portland* (1797) 30 ER 1123.
[406] CIArb. 'Costs of International Arbitration Survey 2011' (2011) 13.
[407] John Peysner J (2013) 'Tail Wags Dog: Contingency Fees (and Part 36 and Third Party Funding)' 32(2) C.J.Q. 231.

> Definition of Third Party Funding
> Third party funding is the provision of funds for the purposes of making or defending a claim in an arbitration by a person or entity that is not a party to the dispute in return for remuneration or reimbursement wholly or partially dependent on the outcome of the proceeding.

This definition has the virtue of differentiating it from financial support from an insurer who does not directly benefit - nor has a stake - in the outcome of the dispute.

Issues Relating to Third Party Funding

A TPF will by definition be a third party to the arbitration with consequently no right to participate in the arbitration proceedings and would be relying on the funded party or their legal representatives for information about those proceedings. The degree to which a funder is involved in the management of the claim varies. Whilst solicitors acting on behalf of a party would generally be aware of the existence and identity of the funder, that is not always the case. It is also not uncommon for funders to be involved in the selection of solicitors as well as payment of their fees. As a consequence the solicitors may well be directly accountable to the funder for the conduct of the arbitration.

The first issue in connection with a funded arbitration therefore relates to disclosure. Specifically, whether the arbitral tribunal and opposing party should be informed about the funding. Unless the funded party voluntarily discloses the existence of such funding, it is unlikely that either the tribunal or the other party will become aware of it. There is currently no obligation under the Arbitration Act 1996 to disclose that a party to an arbitration is being funded by a third party. Furthermore, there is no consensus as to whether and if so to what extent disclosure should be made. Those in support of a general obligation to disclose TPF argue that such an obligation is required to tackle the potential imbalances and other problems TPF creates. Opponents of disclosure argue that imposing a general duty to disclose TPF is unworkable and unnecessary; that existing general disclosure rules and international arbitration practices sufficiently address the twin issues of transparency and disclosure.

The starting point therefore is whether an (a) an arbitral tribunal should require the party to state if they are being funded and if so, (b) to disclose details of that funding. Whilst TPF is arguably not so radically different to other existing forms of litigation finance, in circumstances where the involvement of a TPF is not known either to the opposing party or the tribunal, it raises discrete issues of confidentiality, potential conflicts of interest and enforceability of costs orders and awards. These issues will be discussed by turn in the following sections. The need for

statutory regulation of TPF will be explored and a suggested form of what a proposed amendment to the Arbitration Act could embrace. Although TPF also touches on transparency, for the purposes of continuity the subject will be dealt with here rather than in Chapter 9.

Champerty & Maintenance

In many common law jurisdictions this was and remains illegal, contravening the doctrine of champerty and the related concept of maintenance.[408] According to Hodges, Peysner and Nurse, they arose in order to retain the purity of the litigation process, thereby preventing speculation in litigation by those who 'had no interest in the legal process or the pursuit of justice, and whose activities might amount to an abuse of process'.[409] *Chitty on Contracts* defines champerty as: 'the person maintaining another stipulates for a share in the proceeds of the action or suit or other contentious proceeds where property is in dispute'[410] and of maintenance: 'if he supports litigation in which he has no legitimate concern without just cause or excuse'.[411] The traditional eighteenth century viewpoint was exemplified by the Lord Chancellor Loughborough in *Wallis v Duke of Portland*[412] that 'maintenance is not *malum prohibitum*, but *malum in se'.*[413] By the time of Lord Denning's comment that: 'Maintenance is a very ancient offence. It was a crime, and also a civil wrong, officiously to intermeddle in another man's lawsuit,'[414] the strict application of the rules of maintenance and champerty had largely fallen away. There were exceptions, but these never were clearly defined. Referring to the earlier case of *Oram v Hutt,*[415] Lord Denning commented: '[t]he modern law is not to be rested on those old notions'.[416]

In Ireland, the funding of litigation by a TPF with no interest in the proceedings who enters into a form of profit-sharing agreement was regarded as likely falling foul of the offences and torts of maintenance and champerty. The issue arose in *Persona Digital Telephony Ltd v Minister for Public Enterprise*[417] where the Supreme Court concluded by a four to one majority that a professional TPF arrangement does come within the scope of maintenance and champerty:

> It may be true that such third party funding can enhance access to justice and foster

[408] Both maintenance and champerty are still crimes and torts in the Cayman Islands for example. See *A Company v A Funde*r [2017] CIGC J1123-1.
[409] Hodges, Peysner and Nurse, *Litigation Funding: Status and Issues* (2012), 10.
[410] Hugh Beale (Ed) *Chitty on Contracts*, 32nd Ed (London: Sweet & Maxwell, 2017), Vol 1, para 16-063.
[411] ibid para 16-059.
[412] *Wallis v Duke of Portland* (1797) 30 ER 1123, [1127].
[413] *Malum in se:* inherently wrong by nature, as opposed to *malum prohibitum*: wrong only because it is prohibited.
[414] *Hill v Archbold* [1968] 1 QB 686, [693] (Lord Denning MR).
[415] [1914] 1 Ch. 98; 30 TLR 55, CA.
[416] *Hill v Archbold* [1968] 1 QB 686, [694].
[417] [2017] IESC 27 (Sup Ct (Irl)).

> development of the law but there are, also other consequences… One of the historical objections to maintenance and champerty was the risk of the perversion of justice.[418]

The minority judgement expressed unease that a case of significant public importance could not be litigated due to the rules on champerty and maintenance with its negative implications in undermining access to justice.[419] In light of the diversity of opinion expressed in the Court's judgement Biehler's comments that in light of the of '…the difficulties posed by the increasing complexity and cost of litigation' that it is a matter that needs addressing sooner rather than later is likely correct.[420]

A Concept Rooted in Antiquity

The origins of third-party support for disputing litigants can trace its roots to the oldest and earliest forms of maritime insurance, general average ("GA"). GA possesses a pedigree dating back to antiquity: '…it is as old as seafaring and it was known certainly to the Greeks, probably to the Phoenicians'.[421] It was born out of a viewpoint that all parties who partook or had an interest in a voyage would share in any voluntary sacrifice of cargo or damage to the ship occasioned or necessitated by some misfortune in order for that maritime adventure to continue. As the centre of maritime commerce migrated from its medieval insurance roots of Greece and Rome, London appeared in the seventeenth century as the new global trading hub. With it new forms of marine insurance developed, our traditions associating their beginnings in Edward Lloyd's coffee shop of the 1680's. Initially it was hull insurance that covered the loss of the vessel. In time this expanded with the formation of small protection and indemnity associations (now commonly known as P&I Clubs) to provide third party insurance to cover those claims unrecoverable from the hull (and later hull and machinery) underwriters, such as loss or damage to cargo, personal injury and collision liability cover.

P&I Clubs did not initially provide assistance in covering the cost of fighting an owner's legal battles with cargo owners or charterers. As trade expanded, with it came an increase in claims and disputes between owners and charterers, leading to the creation of specialised insurance that fell outside of traditional mutual club cover. That support was provided by the P&I Clubs (and some speciality Defence Clubs) as "Freight, Demurrage and Defence" insurance, more commonly known as "FD&D" or just "Defence". Amongst the largest are the UK Defence Club,

[418] ibid [7] (Macmenamin J).
[419] ibid [51] (McKechnie J).
[420] Hilary Biehler, 'Maintenance and Champerty and Access to Justice - the Saga Continues' (2018) Irish Jurist 59, 130.
[421] Lord Chorley and O.C. Giles, *Shipping Law* (6th ed Pitman 1970) 197 Traceable to the 800's BCE.

incorporated in England in 1888 and the Nordisk Skibsrederforening (the Nordisk Defence Club in English) in Oslo in 1889.

FD&D provides cover for legal costs and claims handling assistance in relation to disputes involving an entered vessel that are outside the scope of the standard P&I or H&M insurance e.g., the costs of pursuing or defending claims and disputes in relation to charter parties, bills of lading, shipbuilding or sale and purchase of vessels. FD&D cover was and generally still is, a discretionary legal costs insurance.[422] It protects members' interests and assets by supporting them to recover claims for uninsured losses and/or to defend and resist any actions brought against them, that fall within the remit of a P&I or Defence Club's rules.[423] To some eyes, FD&D is merely another form of TPF that has through historical accident evaded regulation. We will return to that theme later in the chapter.

Modern Litigation Finance

Beyond the narrow confines of the shipping industry, the two most common forms of litigation insurance are before-the-event (BTE) or after-the-event (ATE) legal protection insurance. BTE provides cover against possible future claims, being purchased before any legal dispute has arisen. It typically includes legal advice, representation and the costs and expense of legal proceedings. Nevertheless, according to the 2013 PWC survey, BTE insurance remains relatively uncommon with 6 percent of respondents reportedly having made use of it in an arbitration.[424]

The Access to Justice Act 1999 aimed to reduce the amount spent on Legal Aid and provide an alternative to traditional litigation finance. It replaced the Legal Aid Board with the Legal Services Commission. Two new schemes were created: the Community Legal Service to fund civil and family cases and the Criminal Defence Service for criminal cases. The Act introduced the use of 'Conditional Fee Agreements' ('No Win No Fee') in most civil court cases and After the Event Insurance ('ATE'). ATE policies, as their name implies, provide insurance cover for an existing dispute. Proceedings will generally not have started nor significant legal costs incurred. Cover tends to be available only where the insurer assesses that there is a high prospect of success. Should the case fail, ATE insurance would protect the insured against the risk of

[422] See Stephen J Hazelwood & David Semark *P&I Clubs Law and Practice* (4th edn Informa 2010) chap 3.1.
[423] P&I Clubs are for the most part 'mutual' insurers and as such its ship owners (and charterers) are designated 'members' of the Club, thus differing from the traditional commercial or fixed premium insurers.
[424] PriceWaterhouseCoopers & QMU (2013) 'Corporate choices in International Arbitration Industry Perspectives' 5

having to pay their own expenses and adverse costs.

The Jackson Reforms

The recoverability of ATE insurance premiums as part of the legal costs were frequently challenged.[425] The Legal Aid, Sentencing and Punishment of Offenders Act 2012 implemented the reforms of Jackson LJ. Changes in relation to the funding of civil litigation included that the premium had to be paid by the insured out of any damages received. The Jackson Reforms also led to the introduction of damages-based agreements (DBA's). Envisaged as an important litigation funding tool by Sir Jackson in his 2009 report 'Review of Civil Litigation Costs', DBA's are not dissimilar to the contingency fee agreement concept found in the United States. If successful, the solicitor's fees are calculated as a percentage of the financial benefit obtained: in commercial cases they are capped at 50 percent. If unsuccessful, the solicitor receives no fee. Their use however is infrequent. Lord Jackson viewed this as due to a combination of three reasons. The first was poorly drafted DBA Regulations. Secondly, that due to the indemnity principle, one side could advance technical arguments of the kind that gained popularity during the 'Costs War' over CFAs.[426] And in larger cases, whilst solicitors and clients might wish to enter 'no win – low fee' DBAs, there was a concern that these would fall outside the existing DBA Regulations.[427] CFA arrangements are in themselves not above criticism. They are for example banned in Singapore, although The Law Ministry sought public feedback in 2019 on its proposal to legalise CFA's for prescribed categories of proceedings.[428]

Why TPF?

Numerous articles in the past ten years endeavour to paint TPF as a radically new form of litigation finance. And undoubtedly TPF does raise new issues. The ICCA - Queen Mary Task Force was set up to examine and investigate the impact of TPF on the process of international commercial arbitration; to provide a forum to discuss and debate TPF issues. It envisioned that parties, counsel and arbitrators would reference or 'invoke the Principles and analysis … to

[425] See for example *Sarwar v Alam* [2001] EWCA Civ 1401; *Callery v Gray* [2001] EWCA Civ 1117; *Sharratt v London Central Bus Company* [2005] 12 WLUK 721 *(The Accident Group Test Cases*); *Avril v Boultby* [2008] 5 WLUK 324.
[426] Disputes concerning cost shifting issues with respect to the enforceability of CFA's generated significant litigation. See Jackson LJ, 'Review of Civil Litigation Costs: Preliminary Report' (2009) Vol 1, para 5.1
[427]Jackson LJ (2014) 'Commercial Litigation: the Post Jackson World'. Keynote speech at the Law Society Conference on https://www.judiciary.uk/wp-content/uploads/2014/10/litigation-post-jackson-world.pdf accessed 12 February 2020.
[428] https://www.mlaw.gov.sg/news/public-consultations/public-consultation-on-conditional-fee-agreements-in-singapore accessed 15 April 2020.

address issues that arise in the course of an arbitration, in entering into a funding agreement, and in continued discussions and debates regarding third-party funding'.[429] However it may be dressed up, at its heart TPF is just another business model for which investors seek returns.

In return for providing the capital to fund the costs of legal representation, expert's fees, fees of the arbitral institution and tribunal as required, the TPF shares in the proceeds if the litigant wins the case or a settlement is reached. If the claim is unsuccessful, the funder receives nothing. Depending on the provisions of the contract, the TPF may be obliged to cover the costs of the proceedings, including those of the prevailing party: '…non-recourse financing, where repayment is contingent on the client's success in the dispute, is the quintessential scenario for third-party funding in international arbitration'.[430] TPF is to be distinguished from a contingency fee arrangement. Whilst the extent of such funding of arbitration in England is unknown, it has existed for several years in litigation as evidenced in the law reports. A survey of English cases indicates that there were two cases involving TPF in 2000. In 2010 this rose to 7, to 19 in 2015 and reached a peak in 2018 when there were 23 TPF cases before the English courts.[431] TPF is also increasingly used in investment arbitrations. As ICSID has noted in its 2018 Report: '…there has been increased resort to third-party funding (TPF) in domestic and international litigation, including in Investor-State Dispute Settlement (ISDS). TPF is obtained mainly by claimants, but has also been used by respondents, including States'.[432]

What are the criteria TPF rely on to determine whether or not to fund a dispute? The strength and the value of the claim and the probability of winning, or at least reaching a settlement, are primary considerations. A typical TPF will not consider a case unless the claim exceeds USD 1 million, for some the threshold is USD 2 million. The expected length of the arbitration proceedings counts: the general view is that TPF's tend to avoid protected disputes i.e., lasting more than two years. The financial strength of the opponent is important, as a win against an impecunious party may be meaningless. Jurisdictional factors come into play. The seat of the arbitration, any applicable arbitral institutional rules and the country of any award enforcement are all relevant. Peripheral issues such as the experience of the legal team and the quality of the evidence and witness evidence may be considered.

When the ICCA-Queen Mary Task Force published its final report in April 2018 there were

[429] ICCA-Queen Mary Task Force (2018) 'Report of the ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration', 13.
[430] Lisa Bench Nieuwveld and Victoria Shannon *Third-Party Funding in International Arbitration* (2nd edn Kluwer Law International, 2017).
[431] Statistics compiled from searches in Westlaw and Bailii.
[432] ICSID Secretariat (2018) 'Proposals for Amendment of the ICSID Rules - Working Paper' vol 3 para 237.

extensive disclaimers, recognising that in such industries such as maritime, forms of TPF had long-existed.[433] The report however did not attempt to address dispute funding in the maritime arbitration context, considering maritime arbitration as outside its recommendations because of its 'distinctive features, in particular the fact that mutual funding by P&I Clubs is well established and already subject to a set of existing practices and internal norms'.[434] Rather, it considered the maritime insurance context as a useful reference point when discussing TPF as a whole.

One of the reasons for this was that the Report recognised that maritime arbitrations typically involve a specialized pool of independent, full-time arbitrators and a well-regulated industry of mutual funding by P&I and Defence Clubs within an established and transparent regime. Awareness of the identity of an insurer of a ship is rarely an issue in the maritime context. It is not a compulsory form of insurance in the same manner as say that required under the Wreck Removal Convention, CLC or CLC Bunkers for wreck removal,[435] oil spill[436] or bunker spills[437] respectively. For all practical purposes a sea going vessel is not capable of international trading without being entered with a recognised P&I Club[438], the name of which can easily be determined in a variety of commercial and public databases such as Equasis,[439] OCIMF SIRE,[440] CDI Marine[441] and Q.88.[442] The position of any ship in the world can be obtained for free through the vessel's automatic identification system (AIS) combined with ownership, insurer and charterer details offered by a commercial service such as MarineTraffic.[443]

This high level of openness, developed over many decades and well known within the maritime industry, ensures that there is substantial transparency as to the identity of a ship's insurer, how his support funding works and its impact on matters such as disclosure, conflicts, and security for costs. In a nod to the established practices of the London commodity markets the QMU Report also considered that in addition to maritime arbitration, its recommendations:

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[433] ibid 1.
[434] ibid 9.
[435] Required under the Nairobi International Convention on the Removal of Wrecks, 2007.
[436] All tankers transporting 2,000 tons or more are required to carry a CLC certificate, which confirms insurance or any other guarantee covering civil liability for oil pollution damages from ships.
[437] The Bunker Convention imposes the requirement to arrange compulsory insurance or financial security on the registered owner of a ship of more than 1000 GT.
[438] A periodic source of contention. Not all P&I Clubs are members of the IG of P&I Clubs, an association of the 13 largest Clubs which provide liability cover for approximately 90 percent of the world's ocean-going tonnage. Chartering opportunities of ship owners entered with the smaller (and financially weaker) Clubs are more limited.
[439] Equasis collates and provides through the internet safety-related information on ships. https://www.equasis.org/EquasisWeb/public/HomePage
[440] https://www.ocimf.org/sire (private, subscription only access restricted to members).
[441] https://www.cdim.org/psp/cdim.wp_home (private, subscription only access restricted to members).
[442] https://corp.q88.com
[443] https://www.marinetraffic.com/en/ais/

'may also be inapposite for other forms of ad hoc and trade association arbitration'.[444] The report also made a tacit recognition that criticism had been levelled at the Queen Mary survey results for not taking sufficient account of practices in maritime arbitration sector.[445]

The Challenges TPF Pose to Confidentiality

When one party is funded by a third party, an issue of confidentiality arises throughout the arbitration. In order to decide whether to invest, the funder will need information about the dispute and will want to review the progress of the arbitration in order to decide whether to continue contributing to the costs. That review is likely to include a consideration of the documents disclosed in the arbitration, as well as witness evidence of the opposing party. Unless the existence of the funder is disclosed to the opposing party and an agreement reached, the funded party may breach its duty of confidentiality by providing this information to the funder. A typical concern is that disclosure by a party that it is funded may influence an arbitral tribunals' decision on costs allocation and security for costs applications.

The prevailing consensus is that a party obtaining funding should disclose this fact to its opponent and the tribunal at the earliest opportunity. As for the disclosure of the content of the funding agreement, von Goeler argued that there should be a differentiation between an obligation to disclose the presence and identity of a TPF and that of disclosing the specifics of a TPF agreement: that since no specific disclosure practices exist, a funding agreement should be treated as any other.[446]

Lack off Regulation & Oversight

TPF in England and Wales is self-regulated by the Association of Litigation Funders (ALF). The ALF's voluntary code of conduct for litigation funders developed by a Ministry of Justice working group on TPF was first published in November 2011, having been set up in response to a recommendation by Jackson LJ in his review of civil litigation costs. Covering funder's capital adequacy requirements and rights to terminate or control proceedings, the Code applies only to its own members. At the time of writing that numbered 15, thus leaving a significant proportion of the market unregulated.[447] In the view of the ICCA-QMU Report No 4: 'This poses real

[444] ICCA-Queen Mary Task Force (2018) 'Report of the ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration' 9.
[445] ibid 4.
[446] Jonas Von Goeler, *Third-Party Funding in International Arbitration and Its Impact on Procedure* (Wolters Kluwer 2016) 140.
[447] https://www.associationoflitigationfunders.com/membership/membership-directory/ accessed 15 April 2020.

questions over the viability of self-regulation'. The current (2018) 'Code of Practice for Litigation Funders' requires that a funder observe the confidentiality of all information and documentation relating to the dispute to the extent that the law permits. Funded parties are also bound by confidentiality and non-disclosure clauses contained within the funding agreements between the funder and the funded party.[448] These are good intentions, but does a voluntary code of conduct really go far enough? I would argue it does not, especially since the publication of the 2018 Code. Firstly the Code is voluntary and therefore does not apply many TPF's who operate outside the voluntary system of self-regulation.[449] The exact number of TPF's operating in the UK is unknown, but Ells believes that far greater in number than those who are members of the ALF.[450] More importantly however the ALF made a change to their Code of Conduct with the consequence that agreements to fund arbitration and other methods of alternative dispute resolution were no longer within the scope of the regulatory regime.

The 2011 Code clearly envisaged that a funder may meet the costs of a dispute which was to be resolved by means other than litigation: 'A Funder has access to funds immediately within its control or acts as the exclusive investment advisor to an investment fund… to enable a Litigant to meet the costs of resolving disputes by litigation or arbitration…'.[451] The 2016 Code expanded this to include other forms of ADR such as mediation: '…to enable a party to a dispute … to meet the costs (including pre-action costs) of resolving disputes by litigation, arbitration or other dispute resolution procedures'.[452] The 2018 Code however reads: 'This code … sets out standards of practice and behaviour to be observed by Funders… in respect of funding the resolution of Relevant Disputes'. The Code defines 'Relevant Disputes' as being: 'disputes whose resolution is to be achieved principally through litigation,' making no reference to arbitration or ADR. The intention of the ALF appears to have been to restrict the scope of the regulatory regime for TPF.

The regulatory regime for TPF in England and Wales has thus widened as arbitration is excluded entirely, of which Baldock warned: 'The perils of unregulated TPF should not be overlooked and recent decisions in common law jurisdictions have reminded us about the importance of taking this issue seriously'.[453] The 2018 Code which specifically removed the requirement to disclose TPF involvement in an arbitration is a retrograde step, one more than any

[448] 'Code of Practice for Litigation Funders' (2018) para 7.
[449] TPF Observatory for example provides a list of 39 third party funders involved in international litigation and/or arbitration http://third-party-funding.org/list-of-funders/ accessed 15 April 2020.
[450] See Philip Ells, (2018) 'Third Party Funding: Self-Regulation in the UK' New Vistas 5(2) https://www.uwl.ac.uk/sites/default/files/new_vistas_p16-20_third_party_ells.pdf. accessed 30 March 2020.
[451] 'Code of Conduct for Litigation Funders' (2011) para 2.
[452] Code of Conduct for Litigation Funders (2016) para 2.4.
[453] Mark Baldock, 'The Current Scope of the Regulatory Regime of the Association of Litigation Funders - What is in and what is Out in Light of Recent Changes' (2019) 38(3) Civil Justice Quarterly 4.

other that calls for a change in the law to address TPF in arbitration.

There are a number of reasons why funders like confidentiality. Neither a funder nor a funded party have an incentive to disclose their funding arrangement unless required to do so, such as where the funder is a listed company and there exist disclosure requirements. Although disclosure may be strategically beneficial - e.g., where the funded party wants its opponent to be aware that it has the necessary resources to pursue the arbitration though to its conclusion, providing leverage with respect to subsequent negotiations and potential settlement - the converse can also be true. A funder may desire to keep the funding relationship confidential, as knowing that professional funders support one side may affect their opponents position on settlement or other aspects of the arbitration. If an impecunious claimant's opponents become aware that the TPF agreement excludes the TPF's liability for any adverse costs award, an application for security for costs is much more likely. Where disclosure of a TPF has been made, it is not uncommon for the other party to the arbitration to ask the tribunal to require the funder to enter into an undertaking to respect the confidentiality of the arbitration. The tribunal may also be asked to place some limit on the funder's access to certain sensitive documents and to exclude the funder from the evidentiary hearing, for example, where the funder is involved in a related dispute.

Conflicts of Interest.

The requirement of an impartial and independent arbitral tribunal is one of the fundamental principles of arbitration, found in most arbitration laws and rules. Various factors can contribute to the perception of partiality: the close relationship between major law firms and leading arbitrators; the steady increase already noted in the number of cases dealing with TPF; and the highly concentrated segment of the funding industry. However, does TPF have the potential to create material economic relationships and connections which might affect arbitrator's impartiality and independence of a degree that requires amendment to the Arbitration Act? Is s.1(a) 'the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal' and s.33 (1)(a) requiring the tribunal to: 'act fairly and impartially as between the parties' sufficiently robust?

If the name of the funder is revealed, it would be certainly be appropriate that each member of the tribunal disclose any relationship with the funder, as failure to disclose the existence of such a relationship between an arbitrator and a funder of one of the parties may result in a successful challenge being made to the appointment of that arbitrator on the grounds of a lack of independence. A conflict of interest may arise in the situation where whilst it may be in the

parties' commercial interest to settle the arbitration, the funder prefers the arbitration to continue in order to recover a share in any award of damages. A conflict could also arise in the following scenario. A TPF is actively involved in two arbitrations, *A v B* and *C v D*, in each of which it exerts its right to influence the funded parties with respect to the appointment of the law firms and the selection of arbitrators. Suppose the TPF selected arbitrator in *A v B* is also the legal counsel to a party in *C v D,* i.e., these are unrelated arbitrations, but the arbitrator has regular and frequent contact with the TPF as a counsel to the funded party. This could raise justifiable doubts as to the degree of independence and impartiality. Or a conflict of interest could occur because of the involvement of partners of an arbitrator's law firm in an unrelated case involving the same TPF. Repeat appointments of one arbitrator by the same TPF also create a potential for conflict of interest: the perception and/or concern being that an arbitrator could decide in favour of the funded party in view of prospective future appointments by that TPF.

These and similar issues of transparency and ethics are of course not new and are discussed in more detail in Chapter 9. At its heart however is the issue that the international commercial arbitration world is drawn from a relatively small pool of professionals: many arbitrators are practicing solicitors or barristers. This has coincided with a trend away from part-time arbitrators drawn from a primarily technical and commercial background to full time arbitrators coming from the legal field. As Clay phrased it:

> Arbitration is not . . . a job; it is a mission, a temporary function, not a profession. All those who act as arbitrators have, in principle, another job, a principal occupation providing them with a steady income. Arbitration is their side activity.[454]

Gaillard considers this emerging class of professional arbitrators as a distinct social group: 'Until recently, the function of arbitrating was viewed as occasional by nature. This is no longer the case today. Being an arbitrator has become a social-professional category of its own'.[455] It does however raise the intriguing scenario of prohibiting practicing lawyers and barristers from acting as arbitrators, similar to the existing practice in many commodity associations. No doubt it would be an unwelcome development from those in the legal profession who view being an arbitrator as an ideal professional sideline. But it would at a stroke resolve many conflict scenarios and issues.

The moment at which an arbitrator becomes aware of a potential conflict of interest will

[454] Thomas Clay, 'Qui sont les arbitres internationaux: Approche sociologique' (2005) in *Les Arbitres Internationaux* J Rosell (ed), Societe de Legislation Comparee, 13, 31.
[455]Emmanuel Gaillard, 'Sociology of International Arbitration' (2015) Arbitration International 31.

dictate how the issues should be addressed. If an arbitrator is aware of a potential conflict of interest at the appointment stage, the question becomes whether the appointment should be accepted at all. In part that answer depends on whether the circumstances could justify a successful challenge to the arbitrator. A different situation exists if the existence of a TPF is revealed during the arbitral proceedings, e.g., this could occur in connection with an application for security for costs. If the involvement of a TPF is revealed after an award has been rendered it may result in its non-enforcement under Article V(d) of the NY Convention.[456]

An arbitrator who is unaware that a party is involved with a TPF may not be able to disclose the relationship with that funder e.g., shareholdings in the TPF, his law firm's involvement in cases funded by such corporations or his employment by that funder as an advisor: many TPF's have employed full time arbitrators for just this role. There is an argument that if an arbitrator is unaware of the presence of a TPF there can be no conflict of interest. But by what mechanism can it be ensured that the arbitrator was truly unaware of the TPF relationship? There currently is none. The opposing party can still argue that the arbitrator was in breach of their duty to search for that conflict of interest. If such conflicts emerge during the arbitration, the arbitrator may have to be replaced thereby increasing both the time and cost of the proceedings.

Some institutions have endeavoured to address TPF disclosure issues. In 2016 CIETAC HK issued a consultation paper named 'Guidelines for Third Party Funding in Arbitration'. These disclosure obligations however lack teeth. Clause 2.9 requires the funded party to promptly disclose its funding when the funding 'might give rise to any possible issues of conflict of interest', i.e., there is no general duty: it is left to the discretion of the funder and funded party to determine whether such conflicts of interest exist. Such a view is reinforced by the provision in Clause 3.1 that: 'Where the tribunal considers it appropriate, it may invite, or in certain cases direct, any Funded party to disclose its Funding' confirms that no general duty of disclosure exists. In my view Clause 3.1 does not go far enough. Neither the TPF nor the funded party have any incentive to disclose their relationship. Combined with the general inaccessibility of such evidence, the likelihood is that funding would remain discreetly veiled in secrecy. Clause 3.1 would only take practical effect when there is some evidence available to the tribunal or the opposing party to indicate the existence of funding. TPF creates new potential for conflicts of interest to arise that justify a disclosure clause to be added to the Arbitration Act.

[456] Article V(9d) states: 'The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place'.

Security for Costs

In general terms, the costs of an action - whether litigation or arbitration - are proportional to its complexity. They do not always correlate, but as a guide the larger the claim, the larger the volume of documents, the more witnesses, experts, lawyers and barristers involved and disbursements made, the expense of which contributes to the overall cost of a dispute.[457] International commercial arbitration not uncommonly involves complex legal issues, necessitating significant resources being allocated to fighting the dispute and consequentially higher costs. The losing party to a dispute will, in English law, be liable for both his own and his opponents' costs: "costs following the event", also known as "cost shifting". Those costs may be awarded to the winning party in the final arbitration award dealing with the merits and or as a separate award.

Whilst used sparingly, tribunals being traditionally reluctant in granting such an order in commercial arbitration, the Arbitration Act 1996 s.38 does expressly confer the authority on a tribunal to order security for costs. In practice a respondent would make an application for an interim order for security for costs to the arbitral tribunal on the grounds that a claimant was financially weak and unable to honour any adverse cost award. If an impecunious claimant had a weak case and lost, it might escape the financial consequences of losing, leaving the respondent to have won a phyric victory: succeeding on the merits but financially out of pocket.

A detailed analysis of security for costs applications falls outside the scope of this paper, suffice it to say that it generates significant discussion, particularly in relation to arguments concerning access to justice. A respondent's application for security for costs may reflect genuine concerns that the claimant has a weak case and/or there would be issues in securing reimbursement for costs should the respondent prevail e.g., factors such as the jurisdiction in which the respondents assets were based and indeed the ownership structure could all play a part. This writer dealt with such an application in an LMAA arbitration concerning a mega yacht charter party dispute. It was granted with one of the relevant factors being that the location and structure of the claimant's assets were so opaque that an adverse costs award in favour of the respondent risked not being enforceable.[458]

[457] Some jurisdictions can get quite prescriptive in this regard. The Singapore Law Society's 2018/2019 Guidance Notes Practice Directions for example, specify how much a solicitor may charge a client for photocopying. It is currently S$0.10 (for black & white) and S$1.00 (for colour) per page.

[458] Other examples abound. A more complicated scenario involved an impecunious ship owner whose 30-year old vessel had grounded and subsequently sunk, in dispute with a bankrupt hull insurer that had rejected the claim for total loss.

But it is also the case that a security for costs application might have the effect of dissuading a claimant from proceeding with the arbitration if it lacks the financial resources to deposit money to the arbitral tribunal or provide some other form of security before being allowed to proceed. A security for costs application can also be seen as form of interim measure filed during the proceedings by a party responding to a claim (or counter-claim) who wants to ensure that the claimant will be able to pay a potential adverse costs award rendered against it.[459] In the view of the ICC, an order for security for costs can be a 'useful weapon as well as a prudent practical safeguard, but the court will be keen to ensure that it is not used merely to hinder a genuine claim'.[460]

Security for costs gets into particularly controversial territory in investment arbitration, where it has been estimated that 40 percent of investment treaty arbitrations are funded.[461] The typical example is of a respondent State seeking security for defending a claim with which it has in effect almost limitless (i.e. taxpayers') resources. Its opponent may well be a claimant who risks being denied access to justice because of being financially unable to put up security for costs. The unclear standards as to when an award for the security of costs is appropriate further complicates matters. Having a TPF added to the mix compounds the challenges a tribunal faces.

To a respondent, the existence of a TPF supported claimant may give rise to several concerns, such as the creation of an imbalance in the arbitration equation because of the possibility of an 'arbitral hit and run'[462] or the risk that the claimant's poor financial situation might impact its ability to pay an award for costs. That presupposes that only the financially weak look to TPF to fund an arbitration, a perception that is not always valid. As highlighted in this chapter's introduction, the potentially high costs of international arbitration may attract companies to seek financing of a perfectly meritorious claim through a TPF so as to maintain cash flow to continue normal business activities during the arbitral proceedings. A corporation may simply aim to share the inherent risk of arbitration with a third party: 'For the most part, the industry [of TPF] currently serves financially distressed holders of meritorious claims . . . But is also steadily growing to serve claimants that can afford the prosecution but prefer to offload the risk and cash

[459] Jonas Von Goeler, *Third-Party Funding in International Arbitration and Its Impact on Procedure* (Wolters Kluwer 2016) 13–14.
[460] ICC Case No.7544 (2000) 11(1) ICC Bulletin 56.
[461] Stavros Brekoulakis, 'The Impact of Third Party Funding on Allocation for Costs and Security for Costs Applications: The ICCA-Queen Mary Task Force Report' (2016) Kluwer Arbitration Blog http://arbitrationblog.kluwerarbitration.com/2016/02/18/the-impact-of-third-party-funding-on-allocation-for-costs-and-security-for-costs-applications-the-icca-queen-mary-task-force-report/ accessed 30 March 2020.
[462] Nadia Darwazeh and Adrien Leleu, 'Disclosure and Security for Costs or How to Address Imbalances Created by Third-Party Funding' (2016) 33 Journal of International Arbitration 2.

drain'.[463]

TPF may well affect orders and awards made by the tribunal in respect of costs. In deciding on an application for security for costs, the tribunal will have to consider whether the existence of TPF should be taken into account e.g., whether the funding amounts to a change of circumstance. Where the tribunal is requested by the funded party to make an award of costs against the other party and it becomes apparent that a TPF has paid all of that party's costs, an issue may arise as to who has incurred the costs - the party or the funder. Although the tribunal has a discretion, the Arbitration Act 1996 provides a basis for assessing what costs are recoverable, which involves determining the costs reasonably incurred.

Anukaran puts forward two arguments as to why tribunals should more readily award security for costs in TPF cases. One is that the respondent is better protected from frivolous claims on the grounds that if the claimant or its funder is asked to put up security for costs, the odds of a funder still supporting a worthless claim are reduced.[464] I am unpersuaded that this analysis is correct. TPF's are profit-centred businesses: investors aiming to obtain the highest returns on their capital investment. A reputable prospective funder would normally be expected to carry out a full and rigorous due diligence analysis of the facts and merits of the claim: that takes time and resources. Such factors would include the value of and probability of success in pursing the claim, the law and jurisdiction of the dispute and the rules or terms of the applicable institute or association involved.

Frignati expands this to include ten key factors analysed by a TPF in determining whether to fund litigation.[465] Put simply, if a TPF is unconvinced of the merits of a case it will decline to fund it. Sherer, Goldsmith and Flechet suggest that funders do not fund low value cases i.e., below $1 million. And TPF's are prudent, typically only investing in cases where they assess that there is a greater than 70 percent probability of success and an expected duration of the dispute of less than two and a half years.[466]

In summary, TPF's analyse the strengths and weaknesses of the claim in order to assess the

[463] Selvyn Seidel and Sandra Sherman, '"Corporate Governance" Rules are Coming to Third-Party Financing of International Arbitration (and in General)' in *Third Party Funding in International Arbitration - Institute Dossier X* (ICC Publication No 752E 2013: 2013).
[464] Sai Anukaran, 'Security for Costs in International Commercial Arbitration: Mandate, Exercise of Mandate, Standards and Third Party Funding' (2018) Arbitration 84 77.
[465]Valentina Frignati, 'Ethical Implications of Third-party Funding in International Arbitration' (2016) 32 Arbitration International 505, 509.
[466]Maxi Sherer, Aren Goldsmith and Camille Flechet, 'Third Party Funding in International Arbitration in Europe: Funders' Perspectives' (2012) 2 RDAI 207, 212–13.

attractiveness of the investment. Ultimately (in theory) they only fund strong cases. Since 'no serious corporation would finance a claim without being convinced…that it has a good chance of success'.[467] Far from being a sign of having a weak claim, the presence of a TPF can be considered as a weeding mechanism that eliminates weaker claims as Nieuwveld and Shannon argue.[468]

The second argument Anukarn puts forward is more persuasive and relevant, namely, to avoid the situation where a respondent suffers when an impecunious claimant cannot meet an adverse costs award and is funded by a TPF who has no liability to meet such costs. Rather than a blanket requirement for a claimant being funded to put up security for costs, a more nuanced approach would be to require the funded party to disclose whether or not the TPF agreement includes a contingency to meet any adverse costs order. Such knowledge would enable the tribunal to make an informed decision on the necessity or appropriateness to order security for costs. This approach is taken by the SIAC investment arbitration rules at Art.24(l). Probably the gold standard with respect to TPF disclosure, they confer on the tribunal the power to order the disclosure of the existence and identity of a party's TPF arrangement, and where appropriate, details of the TPF's interest in the outcome of the proceedings and liability for any adverse costs order.[469]

Chapter 6 Summary

At the time of the Jackson Report into litigation costs was published in 2009 the general, although not universal view, was that there should be some form of restriction upon the activities of third-party funders: 'The central issue which emerged was whether a voluntary code would suffice or whether there should be statutory regulation'. The Report recorded the Law Society's view that whilst TPF could assist access to justice, proper regulation was required and highlighted two concerns. Firstly, in a situation where the litigation funding agreement allowed the funder to withdraw funding contrary to the client's interests or was unreasonable. Secondly, the potential negative impact where a funder became insolvent.[470] No statutory legislation was introduced, the Report contemplating that: 'In the future … if the use of third party funding expands, then full statutory regulation may well be required'.[471] Industry sentiments appear to have moved in the

[467] Yves Derains, (2013) *Third Party Funding in International Arbitration – Institute Dossier X* (ICC Publication No 752E 2013: 2013) 5.
[468] Lisa Bench Nieuwveld and Victoria Shannon, *Third-Party Funding in International Arbitration* (2nd edn Kluwer Law International, 2017).
[469] SIAC Investment Arbitration Rules 2017 Art.24(l).
[470] Jackson LJ, 'Review of Civil Litigation Costs: Final Report' (The Stationary Office: 2009) 118.
[471] ibid 119.

direction of regulation: QMU's 2015 International Arbitration Survey reported that a significant majority of respondents (71 percent) thought that TPF required regulation.[472]

The 2014 ICCA - Queen Mary Task Force Report contains the principles regarding disclosure and conflict of interest; privilege and professional secrecy; and final award allocation of costs.[473] The disclosure principle at A.1 is the most pertinent. It requires that a party should disclose the existence and identity of a TPF to the tribunal/arbitral institution or appointing authority (if any), at an early stage of the arbitral proceedings e.g., at the first appearance or submission or as soon as practicable after funding has been agreed. This addresses one of the two key issues, namely the voluntary disclosure to the opposing party and tribunal that a TPF is involved. To my mind however it does not go far enough. 'Should' is not the same as 'must'. Nor is the second key issue covered, i.e., the TPF's liability for any adverse costs award.

TPF has still not been addressed under English law (despite having one of the largest funding markets alongside the USA, Australia and Germany) overseas, in international conventions or in the rules of most arbitration institutions. Whilst the TPF market has so far operated adequately within voluntary guidelines, the globalisation of the industry, the increasing number of funders and funded cases all point towards the need for legislation. The question then becomes to what extent should TPF be regulated. Only two jurisdictions having positively addressed TPF and a review of their approach is therefore helpful.

Hong Kong adopted its Arbitration Ordinance with respect to Third Party Funding in 2017, summarising proposals by the Hong Kong Law Reform Commission that steps should be taken to amend the Hong Kong Arbitration Ordinance to permit and regulate TPF of arbitrations. Article 44 of the HKIAC (Administered Arbitration Rules 2018) requires that if a funding agreement is made, the funded party shall inform HKIAC, the parties and the arbitrators in writing the fact that a funding agreement exists and the name of the TPF. If the funding agreement is in place on or before the commencement of the arbitration, this information must be provided in the initial communications i.e., to HKIAC, the Notice of Arbitration, or Answer to the Notice of Arbitration. Where the funding agreement was made after the commencement of the arbitration, the information should be provided as soon as practicable thereafter. It is an ongoing obligation that requires any changes to the funding arrangements to be disclosed.

Singapore's passing of the Civil Law (Amendment) Act (CLA) and the Civil Law (Third-

[472] 'International Arbitration Survey: Improvements and Innovations in International Arbitration' (2015) 3.
[473] ibid Appendix Summary.

Party Funding) Regulations 2017 (CLA Regulations) facilitates third party funding of Singapore seated international arbitrations (in addition to related court or mediation proceedings) by eliminating the common law torts of maintenance and champerty.[474] In response, the Singapore Institute of Arbitrators (the SIArb.) published TPF guidelines and related guidance notes for TPF's the same year with the aim of promoting best practices among funders who provide funding to parties in Singapore-seated international arbitrations. The guidelines include a requirement that the funder authorises the disclosure of the funder's identity, its address and 'the existence of the funding to the other parties, legal practitioners and court or arbitral tribunal in the funded proceedings'.[475] The funder is also required to cooperate with the funded party and its legal practitioner regarding the disclosure to an arbitral tribunal or court of any information concerning the funding if any applicable rules or order of arbitral tribunal or court so require.[476] A key issue not specifically addressed is the requirement for the funder to disclose whether the funding agreement includes a provision to fund as adverse costs award. At the time of writing 12 litigation funders had signed up to the code of practice.[477]

A combination of the first principle identified in the ICCA-QMU appendix, the ICSID Working Paper and the SIAC Investment Arbitration Rules would appear to provide a good working solution to a TPF provision in the Arbitration Act. I therefore propose the following new provision to address TPF disclosure.

> Third Party Funding: Disclosure
> (a) A party being funded is required to disclose the existence of a third party funding arrangement and the identity of the funder to the opposing party in the arbitration, the arbitrators and the arbitral institution or appointing authority (if any), either as part of a first appearance or submission, or as soon as practicable after funding is provided or an arrangement to provide funding for the arbitration is entered into.
> (b) A party being funded is required to disclose details of the third-party funder's interest in the outcome of the proceedings, and/or whether or not the third-party funder has committed to undertake adverse costs liability.

There are two conflicting, yet legitimate interests, uneasily coexistent: the right of access to arbitral justice and the right to recover awarded costs. Someone though must bear the risk of the impecunious claimant. I view it as necessary that although the identity of the funder should be disclosed, the content of the funding agreement would be disclosed only if the normal evidentiary burden has been fulfilled. Arbitral tribunals should consider all the relevant circumstances of the

[474] Although contracts affected by maintenance and champerty may still be held unenforceable if they are contrary to public policy or illegal, unless they fall within certain permitted categories.
[475] 'Guidelines for Third Party Funders' (2017) SIArb. Art.3.1.5.
[476] ibid Art.8.1.
[477] https://www.siarb.org.sg/resources/third-party-funding accessed 20 February 2020.

dispute when considering applications for security for costs. The mere existence of funding relationship should not lead to an automatic order for security for costs.

The Arbitration Act 1996 s.38(3) currently provides that a tribunal may order a claimant to provide security for the costs of the arbitration, but that power should not be exercised on the grounds that the claimant resides (or if a company) is based outside the UK. I propose a third sub section to s.38(3) with the aim of clarifying but also discouraging spurious security for costs applications i.e.,

> 38(3) The tribunal may order a claimant to provide security for the costs of the arbitration. This power shall not be exercised on the ground that the claimant is—
> …
> (c) in receipt of third party funding for the purpose of prosecuting the arbitration.

Chapter 7: The Public Interest Exception

'"When I use a word", Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean – neither more nor less". "The question is", said Alice, "whether you can make words mean different things – that's all". "The question is", said Humpty Dumpty, "which is to be master - that's all."'[478]

\- *Lewis Carroll*

Introduction

The subtext to Humpty Dumpty's question was 'profound and complex' according to Westacott,[479]in essence asking are we to master language or is language to master us? Similarly, the concept of what is 'in the public interest' rather depends on which side of the argument you find yourself. Counsel are equally adept in arguing either side of the debate: such are the strategies of legal practitioners. What this Chapter fundamentally argues however is that there is a public interest exception to arbitral confidentiality and that it should be codified. If that premise is correct, the corollary questions are: can it be described with the precision necessary in order to draft an amendment? If so, in what form?

If in English law the concept of what constitutes a public interest is at best hazy, with respect to arbitral confidentiality it is a proverbial 'pea-souper,' despite the clarity of objectives of the Arbitration Act 1996 being set out. Section 1(b) provides that: 'the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest'. Nowhere else however is 'public interest' referred to. Nor is it defined. It has thus been left to the courts to determine both its nature and scope. Public interest is sometimes used interchangeably with 'in the interests of justice' i.e., in the sense of the importance of reaching a judicial decision on the basis of truthful and accurate evidence from witnesses. Is it a political concept? The phrase appears regularly in the media, typically juxtaposed with such other eminently desirable democratic principles such as transparency and accountability. And as with them, the challenge is to provide a meaningfully precise interpretation. There is a reasonable argument that, far from being a deficiency in the law, that lack of specificity demonstrates an underlying strength: namely the ability of the law to adapt and change in step with society. In a discussion on what constituted public interest arising out of the Leveson Enquiry,[480] Elliot quoted

[478] Lewis Carroll (Charles L. Dodgson), *Through the Looking-Glass* (1934, first published in 1872) 205.
[479] Emrys Westacott, 'Humpty Dumpty's Philosophy of Language' (2020) https://www.thoughtco.com/humpty-dumpty-philosopher-of-language-2670315 accessed 30 March 2020.
[480] Leveson LJ chaired a judicial public inquiry into the press following the News International phone hacking scandal.

Andrew Sparrow, a Guardian Newspaper blogger:

> 50 years ago it was assumed that there was a public interest in knowing that an MP was gay, but little or no public interest in whether he drove home drunk, hit his wife or furnished his house using wood from non-sustainable sources. Now … it's the other way round.[481]

Elliott argued that we should therefore perhaps be wary about attempts to define or pin down the concept of 'in the public interest', on the grounds that it could end up being restrictive and because what the public interest entails changes over time. It is a persuasive viewpoint. But so was the counterpoint, eloquently enunciated by Lord Hoffman some 25 years earlier in the CA decision of *R (Mrs) v Central Independent Television plc*.[482] The claimant argued that a television report into a criminal investigation should not include images of a man convicted of child sex offences some years earlier, on the grounds that the offender's identification would cause distress to his ex-wife and child. Rejecting the argument, the court held that it had no power to restrain publication. The opening to Hoffmann LJ's judgment is a powerful restatement of the principles of free speech in England that still resonate:

> Freedom means the right to publish things which government and Judges, however well motivated, think should not be published. It means the right to say things which 'right-thinking people' regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute.[483]

Both arguments are valid. How to resolve the dilemma, what might constitute a public interest exception? Thoma considered the legal nature of the duty of confidentiality in English Law by assessing whether confidentiality is or should be an implied term in fact, in law or by custom, contending that it was a determination to maintain England as a seat of arbitration that drove public policy on confidentiality.[484] That even if confidentiality was not the most 'decisive reason' for choosing arbitration, the threat of competition from for example, France and Switzerland could severely threaten London if England took a more progressive approach towards arbitral confidentiality. That concern has come to the fore following the United Kingdom's departure from the European Union on 31st January 2020. The multitude of seminars, webinars,

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[481] Chris Elliot, 'The readers' editor on … how should we define 'in the public interest,''quoting the blogger Andrew Sparrow in *The Guardian Newspaper* (20 May 2012) https://www.theguardian.com/commentisfree/2012/may/20/open-door-definition-public-interest accessed 15 April 2020.
[482] [1994] Fam 192.
[483] ibid [202] - [203].
[484] Dr Ionna Thoma, 'Confidentiality in English Arbitration Law: Myths and Realities about its Legal Nature' (2008) 25(3) Journal of International Arbitration 299.

talks, and discussions focusing on the impact - or rather lack of it from many UK user's perspective - of Brexit on London's place in international commercial arbitration testify to its perceived importance. Dessemontet discussed the methodology to define the requirement of confidentiality versus the public interest and the scope and limits of the information to be protected by that confidentiality, recognising that:

> Even the proponents of a strict confidentiality of the arbitral proceedings accept that the courts can put it aside in appropriate circumstances. Although the public interest may sometimes dictate a higher confidentiality, it may in some other instances preclude confidentiality.[485]

Thus allowing for the prospect that it is perhaps a remit best left to the courts to determine. An understandable, though commercially centric standpoint. But does that adequately balance or take into account the wider needs of society as a whole? Arguably not. Surely there must be a higher foundation for our system of laws than mercantile convenience?

Commentaries regarding transparency and the public interest debate in arbitration have resurfaced. Jaconelli explored an essential feature of most democratic societies i.e., the administration of justice in the full view of the public,[486] describing the privacy and confidentiality arrangement of arbitration, but drawing back from enunciating his own opinion as to its desirability.[487] Commentators have also considered the situation of arbitrations between states, arguing that whilst confidentiality remained important, it could be dispensed with in certain situations: that a public interest exception could be equally applicable to arbitrations between non-state actors as it could to arbitrations involving public entities. What then can be garnered from the English court's attitudes to what constitutes a public interest exception?

As Misra and Jordans noted, the Courts are now formulating several exceptions to that principle.[488] Not just exceptions. Some overseas jurisdictions have distanced themselves from the position under English law, some treating privacy and confidentiality as distinct and separate; others completely rejecting the notion of confidentiality.

A Very English Approach: Pragmatic & Piecemeal

[485] Francois Dessemontet, 'Arbitration and Confidentiality' (1996) 7 Am. Rev. Int'l Arb. 299, 311.
[486] Joseph Jaconelli, *Open Justice: A Critique of the Public Trial* (Oxford University Press 2002).
[487] *Esso/BHP v Plowman* is surprisingly relegated to a footnote, despite the impact of direct political intervention by the responsible minister.
[488] Joyiyoti Misra and Roman Jordans, 'Confidentiality in International Arbitration: An Introspection of the Public Interest' (2006) 23(1) Journal of International Arbitration, 39-48. The article appeared before the judgement in *Emmott v Michael Wilson & Partners Ltd* was handed down.

Various English cases over the last quarter century or so have touched on arbitral confidentiality and what might constitute a public interest exception. *London & Leeds Estates Ltd v Paribas Ltd (No 2)*[489] involved a dispute between a landlord and tenant. In arbitration proceedings, the claimant landlord's expert witness gave testimony which allegedly contradicted expert evidence provided in two other cases. The respondent subpoenaed the evidence given in the other proceedings, which the claimant sought to set aside. The Court found that disclosure was not only in the interest of the litigants, but importantly it was also in the public interest: where a witness denies a prior inconsistent statement, evidence of such previous expression can be used in evidence.

Potter LJ noted in *Ali Shipping Corporation v Shipyard Trogir* (*"Ali Shipping"*)[490] that the concept of reasonable necessity was flexible and the court ought not to require the party seeking disclosure 'to prove necessity regardless of difficulty or expense'.[491] Instead, the court was to take a rounded view. The judge also considered that there was no need to deal with the wider implications of public interest. Referring to *Esso/BHP v Plowman*, Potter LJ considered that only the dissenting judgment of Toohey J appeared to treat the law of privacy and confidentiality in relation to arbitration proceedings in accordance with English law and that:

> While it may well fall to the English court at a future time to consider some further exception to the general rule of confidentiality based on wider considerations of public interest, it is not necessary to do so in this case.[492]

By recognising the exception under a heading of 'interests of justice' rather than one of 'public interest' it avoided the suggestion that it extended to the public interest aspects of *Esso/BHP v Plowman*. This effectively made this category of exception quite narrow, stressing the importance of judicial decisions being based upon truthful and accurate evidence of witnesses, thus following the rationale in *London and Leeds Estates Ltd v Paribas Ltd (No 2).* In *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [2000] QB 288 (*Westacre Investments*) involving consultancy services for the sale of military equipment to Kuwait, the Court of Appeal enforced an award of an ICC tribunal, rejecting an argument that such a contract was contrary to public policy. The Court noted that the tribunal had considered the position and as the object of the contract was not contrary to English public policy the award would be enforced.

Judgement publication was the core issue in *Department of Economics, Policy and*

[489] [1995] 1 EGLR 102; [1995] 02 EG 134.
[490] [1998] 2 All ER 136; [1999] 1 WLR 314
[491] ibid [327].
[492] ibid [328].

Development of the City of Moscow v Bankers Trust Co. ("City of Moscow").[493] Bankers Trust succeeded in an arbitration claim against International Investment Bank, but not against two other parties, the government and a department of the City of Moscow. Bankers Trust and the International Investment Bank challenged the arbitration award on the ground of serious irregularity under s.68 of the Arbitration Act. At the end of the hearing, the question over publication of the award being adjourned for further argument. Lawtel in good faith summarized the judgment on its website. City of Moscow sought publication of the judgment or Lawtel's summary in order to demonstrate to the international financial community that the arbitration award holding that it had not committed any financial default had been upheld by the court.

Cooke J considered that in an arbitration dispute where the material is both politically and commercially highly sensitive, the fact that all of the hearing involved confidential information is a dominant factor. The judge held that the earlier judgment should remain private and that neither it nor Lawtel's summary should be available for publication.

> Everything raised in relation to it was confidential. If publicity would damage that confidentiality, then the court may rightly consider privacy both for the hearing and for the judgment to be necessary in the interests of justice.[494]

The City of Moscow appealed the ruling. The leading speech in the Court of Appeal was given by Mance LJ who viewed the courts supervisory role as:

> [a]cting in the public interest to facilitate the fairness and well-being of a consensual method of dispute resolution, and both the Rule Committee and the courts can still take into account the parties' expectations regarding privacy and confidentiality when agreeing to arbitrate.[495]

Mance LJ held that there could not be a blanket rule of non-publication in all cases. The Court of Appeal upheld the first instance judge's decision not to permit full publication of the judgment. Publication of a summary was however permitted, it already being in the public domain having been published by the legal research website was unobjectionable. Carnwath LJ elaborated, referring to the spectrum analogy previously used by Mance LJ regarding the strictness of the test for confidentiality: 'Plainly not all the arbitration claims … need to be treated as confidential. And those that do will vary in the extent to which they should be so treated and the method by which to do so'.[496] It is clear from *City of Moscow* that confidentiality may have

[493] [2003] EWHC 1377 (Comm); [2003] 1 WLR 2885.
[494] ibid [41].
[495] [2004] EWCA Civ 314, [34].
[496] ibid [56] referring to CPR Rule 62.10(3)(b).

to give way to the public interest demand for transparency, as a result of which there will still be cases where the details of an arbitral dispute may become public. These include where enforcement of an award is resisted on grounds of public policy as in *Westacre Investments;* where a court deals with a challenge to an award for serious irregularity such as *Lesotho Highlands Development Authority v Impregilo SpA and Others*[497] or where a party seeks an injunction to restrain court proceedings brought in breach of an arbitration agreement as in *West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA* (*The Front Comor*).[498]

Finch was critical of Cooke J in the *City of Moscow* on the grounds that the identities of the parties involved in arbitration is often common knowledge within an industry '… the degree to which confidentiality in fact exists is overrated'.[499] The point that Finch was making was that confidentiality can be preserved by the use of 'private hearings' on appeals to the court or by reporting of cases in a manner similar to that used in Lloyd's Maritime Law Newsletter i.e., report arbitrations using a number, redacting the names of parties and ships. I would treat that criticism with caution. Whilst it is accurate to say that what could be described as a "knowledge leak" concerning the outcomes of arbitrations exists unofficially, including the names of the parties - there is after all only a limited pool of specialist arbitrators, P&I Clubs and law firms, even in an arbitration centre such as London - that cannot be used as a justification for weakening the basis of confidentiality.

The scope of the fourth exception discussed in *Ali Shipping* with respect to 'disclosure when, and to the extent to which, it is reasonably necessary for the protection of legitimate interest of an arbitrating party' was also explored in *Dadourian Group International Inc v Simms ("Dadourian").*[500] Dadourian Group International ("DGI") entered into an agreement with Charlton whereby it granted Charlton an option (which it subsequently exercised) to acquire various assets and know-how. The agreement required Charlton to open a letter of credit, which it did not do. DGI treated the contract as having been repudiated. Charlton initially commenced proceedings in New York which were stayed in favour of a London arbitration clause. DGI counterclaimed for breach of contract and misrepresentation. DGI was successful in the arbitration and was awarded $5 million. Charlton's claim was dismissed. The award was not honoured. DGI applied for and obtained worldwide freezing orders. Simms challenged the injunction on the basis that the judge was not entitled to have regard to the arbitrator's award

[497] [2002] EWHC 2435 (Comm); [2003] 1 All ER (Comm) 22 [2005] UKHL 43.
[498] [2007] UKHL 4.
[499] Robert Finch, 'London: Still the Cornerstone of International Commercial Arbitration and Commercial Law?' (2004) 70 Arbitration 256, 263.
[500] [2004] EWCA Civ 686.

because (a) it was inadmissible in the current proceedings and (b) the award was not binding on him and the other respondents in the instant case as the arbitration was confidential to the parties. Simms argued that not being a party to the arbitration, the arbitration award and all the documents in the arbitration could not be used against him. Dyson LJ rejected the arguments: '[b]eing satisfied that the judge was correct in saying that there is a good arguable case that Mr Simms, in the very unusual circumstances of this case, together with the other three defendants, was privy to the arbitration'.[501]

The Court posed, almost as an aside, a penetrating question that goes to the heart of the arbitral confidentiality debate: '[w]hat amounts to being "privy to an arbitration" if one is not an actual party to the arbitration, it seems to me, is one of some considerable difficulty…It seems to me that this is a difficult area of the law in which there is some uncertainty'.[502] This concept was not expanded upon, leaving open the possibility that it could be explored further in the future.

The 'public interest' exception in arbitration considered in *Emmott v Michael Wilson & Partners*[503] highlights one of the possible exceptions that have yet to be fully addressed by the English courts, Collins LJ considering that it was an 'uncontroversial starting point' that the parties' wish for confidentiality and privacy outweighs the public interest in a public hearing.[504] As per Carnwath LJ: 'I prefer to treat this case as falling under 'interests of justice' exception, clearly recognized in Ali Shipping, and to leave for another occasion exploration of the boundaries of a possible 'public interest' criterion'.[505] Noting that some of the authorities draw a distinction between privacy and confidentiality, and quoting Potter LJ in *Ali Shipping*: 'the obligation of confidentiality… arises as an essential corollary of the privacy of arbitration proceedings'.[506] In applying *Ali Shipping* the court accepted that the confidentiality of material was subject to two possibly relevant exceptions, one of which being that of public interest. The court held that the interests of justice required that the English court should, so far as possible, ensure that parties to London arbitrations should not seek to use the cloak of confidentiality with a view to misleading or potentially misleading foreign courts.

In *Symbion Power LLC v Venco Imtiaz Construction Company*[507] the English courts returned to the issue. Having lost an arbitration Symbion Power LLC challenged an ICC award under

[501] ibid [16]. The somewhat unusual circumstances of the case being findings of fraudulent misrepresentation in the arbitration.
[502] ibid [13].
[503] *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184; [2008] 1 Lloyd's Rep 616.
[504] ibid [625].
[505] ibid [638].
[506] [1999] 1 WLR 314 [326].
[507] [2017] EWHC 348 (TCC) [90] (Jefford J).

s.68(2) of the Arbitration Act 1996, alleging serious irregularity. Rejecting Symbion's request for the judgment to be anonymised, drawing a distinction between a private hearing and the publication of a judgment, the Court considered the factors to consider when determining whether to maintain the confidentiality of arbitration claims and related judgments. Of importance was the strong public interest in the publication of judgments and so ensuring appropriate standards in the conduct of arbitrations. That was however to be weighed against the parties' legitimate expectation that arbitral proceedings and awards will be kept confidential. The court went on to review the principles regarding the confidentiality of judgments, considering primarily the interest of the parties in the litigation. The judge was clearly aware of (and unmoved by) the implied adverse commercial implications to English arbitration when the judge said that there can be: '[no] question of withholding publication of reasoned judgments on a blanket basis of a generalised, and in my view unfounded, concern that their publication would upset the confidence of the business community in English arbitration.'[508]

The court gave greater weight to the public interest in having access to judgments on arbitration matters, concluding that anonymising the judgment was unjustified. The case reinforces the view that applicants must demonstrate strong, justifiable grounds in order to persuade a court not to publish arbitration related judgements. This approach was partially successfully in *Teekay Tankers Ltd v STX Offshore and Shipbuilding Co Ltd.*[509] The case concerned an allegation that a party made reference to arbitral awards and arbitrators' reasons in its Defence and Counter Claim that breached the confidentiality provisions of the contract and which should have remained confidential. The court was somewhat critical at the parties attempt for the hearings to be held in private and for having failed to take the necessary steps themselves to protect the confidentiality of materials prior to the matter coming to court: '[p]roceedings in this court are, in the absence of good reason to the contrary, conducted in public. …The appropriate course was not to propose a default provision that the trial would be in private'.[510] The court subsequently permitted closing submissions to be heard in private and for non-parties to obtain only redacted versions of the materials.

What the English authorities reveal is a pragmatic but piecemeal approach to what constitutes a public interest exception, effectively having declined - when the opportunities so arose - to formulate coherent exceptions. Perhaps that is as it should be. There is a strongly held (though far from universal) view that it is not for the courts to create the law, its function being interpretive

[508] ibid [90] (Jefford J).
[509] [2017] 1 Lloyd's Rep. 387.
[510] ibid [394] (Walker J).

of the intentions of the legislature. And the legislature, having declined to set out guidelines or principles of what might constitute a pubic interest exception itself, has therefore left a void which the courts appear disinclined to fill. Understandable perhaps, but Lord Hoffman's words still linger: '… a freedom which is restricted to what Judges think to be responsible or in the public interest is no freedom'. An appropriate point therefore to consider how modern, democratic jurisdictions overseas address the conundrum.

Lines in the Sand: Overseas Approaches

Australia, Canada, New Zealand and the United States offer the most developed jurisprudence with respect to what constitutes public interest in connection with arbitration. The most significant case dealing with confidentiality in Australia was *Esso Australia Resources Ltd v The Hon Sydney James Plowman & Others* ("Esso/*BHP v Plowman"*)[511] an appeal that concerned the important issue as to whether an arbitrating party was under an obligation of confidence in relation to documents and information disclosed in, and for the purposes of, a private arbitration. The case was politically sensitive and attracted significant media attention. It would merit study on those grounds alone. Of particular relevance however, is that it is probably the most important case in modern times dealing with the public interest exception.

Esso and BHP ("Esso/BHP") supplied natural gas to two utility companies in Victoria, Australia, namely GFC and SEC. SEC was fully State owned, GFC largely so i.e., they were both partially or fully state-owned utility companies. The pricing mechanisms took into account royalties and taxes, any changes to which the sellers were obliged to provide details of to the buyers. A new federal tax, the "Petroleum Resource Rent Tax" was imposed. Esso/BHP sought to pass on the cost increases to GFC and SEC, although they omitted to pass on details of the tax changes. GFC and SEC refused to accept the increased rates and the matter was referred to arbitration. The responsible Victoria State minister concerned (Mr Plowman) brought an action against Esso, BHP, GFC and SEC seeking a declaration that the information concerning royalties and tax changes was not confidential and could be disclosed to the Minister and third parties. Esso/BHP refused on grounds of commercially sensitivity, unless GFC and SEC entered into confidentiality agreements prohibiting disclosure, including to the Minister or the State Government. The State of Victoria demanded access to the information, considering that if such information was provided to GFC and SEC, the two State owned utilities were under a statutory

[511] [1995] HCA 19.

duty to pass it on.

The court of first instance ordered that Esso/BHP furnish the details of the increases sought to GFC and SEC. Turning its attention to the privacy and confidentiality of arbitration, the Court asked three questions: whether strangers could attend the arbitration hearings without the consent of the parties; whether a party was at liberty to disclose information imparted to it in the course of the arbitration; and whether GFC and SEC were at liberty to disclose information provided pursuant to the sale agreements. The Court held that there was no general legal or equitable obligation precluding a party from using information obtained in the course of an arbitration. Esso/BHP's appeal to the Supreme Court of Victoria failed. The matter went to the High Court of Australia.

The leading judgment was given by Mason CJ. Whilst noting that the authorities referred to privacy as an implied term, the court considered that an arbitration held pursuant to the agreement was private in the sense that it was not open to the public: i.e., the private character of the hearing was inherent in the agreement to submit disputes to arbitration.[512] Mason CJ rejected the view however that there was a duty of confidentiality imposed upon the parties as an implied term of the arbitration agreement: it was not an 'essential characteristic' of a private arbitration. That there might exist various circumstances in which both third parties and the public had a legitimate interest in the outcome of an arbitration that would give rise to a 'public interest' exception: the precise scope of such an exception was however unclear.[513] Whilst recognising the privacy of the arbitration process and accepting that documents produced under compulsion were subject to a duty to be used solely for the purposes of the arbitration,[514] all other aspects of confidentiality were rejected. The interest to be defended need not be strictly a legal one. It may embrace a moral, political or strongly held philosophical viewpoint, such as freedom of information and the right to have access to materials and documents of legitimate public interest.[515]

The Court's findings that there were no legal grounds to support confidentiality in commercial arbitration was contrary to the view in most other jurisdictions. Nevertheless, Esso/*BHP v Plowman* makes a rare and valuable contribution to the authorities in its dealing of an arbitration appeal containing a significant public interest element. Some commentators were persuaded that as a result of *Esso/BHP v Plowman,* codification of the relevant English legal principles in the draft Arbitration Bill was increasingly necessary. The implied term as the

[512] ibid [26] (Mason CJ).
[513] ibid [38].
[514] ibid [5] - [6] (Brennan J).
[515] ibid [6]-[8] (Brennan J).

contractual basis for such principles was not in doubt under English law, and the English Courts were not being shy to uphold those principles. But the *Esso/BHP v Plowman* decision had the effect of making this contractual approach as regards confidentiality unsustainable so far as Australian law was concerned. The DAC would note Sir Patrick Neill QC's subsequent 1995 Bernstein Lecture in the wake of *Esso/BHP v Plowman* when he said: 'it would be difficult to conceive of any greater threat to the success of English arbitration than the removal of the general principles of confidentiality and privacy'.

The pubic interest issue again came before the court the following year in *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd (Cockatoo Dockyard*)[516] where as per Kirby J: 'Can it be seriously suggested that the parties private agreement can, endorsed by a procedural direction of an arbitrator, exclude from the public domain matters of legitimate concern'.[517] Thus emphasising that the public interest may also demand transparency as an exception to confidentiality. The Court of Appeal of New South Wales decided by a majority that an arbitrator had no power to impose an obligation of confidentiality which would have had the effect of preventing the government (a party to the arbitration) from disclosing to a state agency, or to the public, information and documents generated in the course of the arbitration which ought to be made known to that authority or to the public, because public health and environmental issues were involved.

In *Telesat Canada v Boeing Satellite Systems International Inc*[518] the Ontario court was of the view that there was a general public interest in preserving the confidentiality of materials filed in court in pending arbitration. The difficulties of doing so when the arbitrators are functus and the arbitration is over were highlighted in *2249492 Ontario Inc. v Donato*.[519] Donato was the unsuccessful party in an arbitration and served notice of appeal from the arbitral award and said it would seek confidentiality of the award from the court. As Ontario Inc. intended to file a motion to enforce the award, Donato made an urgent application to the arbitrator, obtaining a declaration that the arbitration award was confidential.

The court rejected Donato's application to seal the arbitral award so that it would not form part of the public record. The grounds given were that applications for confidentiality should be decided on a case-by-case basis: indiscriminately granting confidentiality to all arbitration-related cases would diminish public confidence in the administration of justice. Donato were hampered

[516] (1995) 36 NSWSC 97.
[517] ibid [53] (Kirby J).
[518] 2010 ONSC 22 (Ont Sup Ct) [14], [25], [27].
[519] 2249492 2017 ONSC 4975.

by the fact that the arbitration was no longer on-going: the arbitrator was functus having issued his award; and that Donato were neither able to point to any specifically confidential information nor explain why the public interest favoured confidentiality over publication. Whilst the Ontario court's approach in the *Donato* case tilts against the spirit of Lord Hoffman, it was a pragmatic and ultimately workable solution.

In New Zealand, Court proceedings relating to an arbitration must be conducted in public under s.14F subject to certain exceptions, such as if the court is satisfied that the interests of a party to have the proceedings held in private outweigh the public interest in having them conducted in public. The factors that a court would consider in such an application must include all of the following: the open justice principle; the privacy and confidentiality of the arbitral proceedings; other public interest considerations; the terms of any arbitration agreement; and the applicant's reasons for holding them in private. The 'open justice principle' set out at s.14F(2) is an example of New Zealand's approach to judicial transparency. An example is 'Media Guide for Reporting the Courts and Tribunals'[520] which provides that open justice is a fundamental principle of the New Zealand justice system and court proceedings are generally open to the public. However, control over conduct in the court room, including decisions relating to in-court media coverage remains at the discretion of the judge.[521]

Rule 26 and Rule 27 of the Arbitration (Scotland) Act 2010 detail confidentiality and privacy. There are a number of exceptions to the general rule on confidentiality, including the 'public interest' and 'necessary in the interest of justice'. There is no definition provided of what constitutes either exception however. In *United States v Panhandle E Corp.*[522] the Federal Government viewed disclosure was in the public interest. A Group Federal District Court ruled in *American Central Eastern Texas Gas Co. v Union Pacific Resources Group*[523] that the principle of confidentiality is inferior to the public interest: 'the public has a strong countervailing interest in knowing the results of arbitration proceedings that involve allegations of anti-competitive and monopolistic conduct'.

The overseas jurisdictions discussed in this chapter, particularly with respect to Australia, Canada and New Zealand, have demonstrated a greater willingness to address the philosophical concerns of a public interest exception to confidentiality in arbitration and to embrace more

[520] An electronic version is available at http://www.justice.govt.nz/about/news-and-media/media centre/mediainformation/media-guide/ accessed 30 March 2020.
[521] ibid 4.
[522] 118 FRD 346 [D Del, 1988].
[523] US Dist LEXIS 18536.2000- 2 Trade Cases (CCH) P72,997 (District Court, Texas, 9 August 2000).

transparent approaches. These are approaches and solutions from which English law could usefully apply Lee Kuan Yew's dictum: 'I do not work on a theory. Instead I ask: what will make this work?''[524]

Is Confidentiality in Arbitration a Human Rights Issue?

The Human Rights Act 1998 (HRA) incorporates the European Convention on Human Rights (ECHR) into UK law. The impact on arbitration of the Human Rights Act does not feature significantly in the literature. Ambrose considered the effect of the HRA on commercial arbitration, arguing that arbitrators applying English law will have to interpret legislation compatibly with European Convention rights.[525] McBride & Bagshaw considered the development of confidentiality in the context of the right to privacy contained in Art.8 of the ECHR, it is unclear from limited body of case law that it is an area of concern.[526] Periodic attempts to invoke Art.6 of the HRA within the area of arbitration have not generally faired well. In *Premium Nafta Products Limited (20th Defendant) and others v Fili Shipping Company Limited (14th Claimant) and others*,[527] an appeal concerning the scope and effect of arbitration clauses various charter parties where it was alleged by the owners that the charters were procured by the bribery, the House of Lords despatched with suitable firmness an argument by the shipowners that the CA's approach infringed the owners' right of access to a court for the resolution of their civil disputes, contrary to Art.6 of the European Convention on Human Rights:

> The European Convention was not intended to destroy arbitration. Arbitration is based upon agreement and the parties can by agreement waive the right to a court. If it appears upon a fair construction of the charter that they have agreed to the arbitration of a particular dispute, there is no infringement of their Convention right.[528]

It is unlikely that the HRA would affect confidentiality and procedural flexibility in arbitration as by electing to arbitrate, the parties have waived procedural rights under Art.6 of the ECHR.[529] This view would appear to be confirmed by Cooke J, in rejecting the argument that Art.6 ECHR required public pronouncements of judgment in arbitration claims.[530] That view is

[524] Tom Plate, *Conversations with Lee Kuan Yew, Citizen Singapore: How to Build a Nation* (Marshall Cavendish, 2010).
[525] Clare Ambrose, 'Arbitration and the Human Rights Act' (2000) LMCLQ 468.
[526] Nicholas McBride & Roderick Bagshaw, *Tort Law* (6th edn Pearson Education Limited 2018).
[527] [2007] UKHL 40.
[528] ibid [20] (Lord Hoffman).
[529] David Altaras, 'Arbitration in England and Wales and the European Convention on Human Rights: Should Arbitrators be Afraid?' (2007) 73 Arbitration 262.
[530] See also Hew R Dundas, 'Confidentiality in Arbitration: the Court of Appeal Decides: *Department of Economic Policy & Development, City of Moscow v (1) Bankers Trust Co and (2) International Industrial* Bank' (2004) 70 Arbitration 229.

broadly shared by the ECJ, although it has noted that is not an unfettered right, and there may be occasions - not currently brought before it - where the ECHR could impact on arbitration proceedings. The ECHR's 'Guide on Article 6 of the European Convention on Human Rights' makes clear that there is a distinction to be made between voluntary and compulsory arbitration. 'In principle, no issue is raised under Article 6 in the case of voluntary arbitration since it is entered into freely'.[531] Whilst arbitrators applying English law will have to interpret legislation compatibly with European Convention rights, it would appear unlikely that the HRA will affect confidentiality and procedural flexibility in arbitration.

Chapter 7 Summary

That balancing of evolving public policy, mercantile will and the increasing demands of transparency in jurisprudence, reflect the ebb and flow of intellectual debate in the English legal system. England has not yet had its *Esso/BHP v Plowman*, and no English arbitration has had to contend with the full glare of publicity and political interference as experienced in that Australian High Court case where disclosure was considered as being in the public interest. There is a view however (see Derrington *et al*) that the distinctions between the Australian and English positions are illusory, that *Esso/BHP v Plowman* was a one-off case involving public interest and political considerations that are unlikely to be repeated in England. One of the difficulties that may arise is if a tribunal is asked to consider a public interest exception to the obligation of confidentiality, not only because of the residual uncertainty about the exception's existence, but also because it is doubtful whether a tribunal would be properly equipped or mandated to assess what is or is not within the public interest. Or in respect of the narrower and acknowledged exception for the interests of justice, particularly when, as in *Emmott v Michael Wilson & Partners*, disclosure of confidential information is sought by a party essentially for the benefit of a non-party. Should the tribunal really be trusted to get it right? If it is wrong, there are limited avenues for recourse against its decision.

And yet the issues are not new. They have echoes in *Scott v Scott*,[532]a rare English case to consider confidentiality, where the House of Lords contained a staunch defender of judicial transparency in Lord Shaw. Borrowing freely from Jeremy Bentham, the recognised founder of Utilitarianism, a judicial philosophy whose adherents believe that law must be made to conform

[531] 'Guide on Article 6 of the European Convention on Human Rights' (Council of Europe, updated 31 August 2019) https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf, para 122 accessed 15 April 2020.
[532] [1913] AC 417.

to its most socially useful purpose:

> Publicity is the very soul of justice ... It keeps the judge himself while trying under trial. To remit the maintenance of a constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand.[533]

These mid nineteenth century sentiments reveal a long-standing English suspicion of justice hidden from public view, echoing what Professor Meiklejohn considered as being the 'lingering historical resentment of the Stuart Kings' use of the Court of the Star Chamber to try political dissenters in secret.[534] By the time when the Star Chambers were abolished by an Act of Parliament in 1641, arbitration awards were generally public.[535] Somewhere in the past three centuries since, the law arguably took a wrong turn. But there is optimistic evidence to suggest that the judiciary, praised by Osborne for their 'robustness and attachment to principle' may adopt an open and flexible approach.[536] These sentiments appear to dwell undiminished in the hearts of the modern judiciary. As Lord Bingham explained in a Guardian Newspaper interview: 'I regard liberty, which is one of the important values protected by the convention [on human rights], as of immense importance'.[537]

In international arbitration, the confidentiality of arbitration awards is being slowly eroded by the public law aspect of many proceedings. The reporting of ICSID, NCAA and Nafta awards for example, and the decisions of the Iran-US Claims Tribunal illustrate cases which have recognised that the interest in the arbitration lies in the public, rather than the private domain. In those contexts at least, where arbitration becomes recognised increasingly as a matter of public law, the public interest exception will be further developed. It therefore becomes necessary to evaluate and balance the protection of the public interest in the transparency and accountability of public administration against legitimate commercial interests, confidentiality and the privacy of their commercial dealings.

Kirby J's decision in *Cockatoo Shipyard* was not well received by the DAC, being viewed with concern, particularly as it related to government or statutory corporations: '…it would be extremely harmful to English arbitration if any statutory statement of general principles in this

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[533] ibid [477] (Lord Shaw).
[534] Professor John M D Meiklejohn, *History of Great Britain and England* (13th edn Alfred M. Holden 1899).
[535] The Star Chamber was abolished in 1641 by the Long Parliament led by John Pym with The Habeus Corpus Act 1640.
[536] Peter Osborne *The Triumph of the Political Class (* Simon & Schuster 2007) 175.
[537] 'Cry Freedom' Interview with Stephen Moss in *The Guardian Newspaper* (31st May 2005); See also Gillian Triggs, 'Lord Bingham: Of Swallows and International Law' (3 October 2008). Sydney Law School Research Paper No. 08/116 at https://ssrn.com/abstract=1277642 accessed 30 March 2020.

area impeded the commercial good-sense of current practices in English arbitration.[538]' But to my mind the philosophical basis for the decisions contained within both *Esso/BHP v Plowman* and *Cockatoo Dockyard* are all square with the fundamental tenets found in the English authorities relating to the transparency of justice and the openness of the courts in a free, democratic society. If there was to be any one exception to arbitral confidentiality, that relating to the public interest and involving government entities, organisations, statutory or regulatory bodies would surely take precedence. And not far behind that would be the cases involving a genuine public interest, a citizen's 'right to know'.

How should courts approach appeals to arbitrations which contain confidential information, whether on commercially sensitive grounds or for other reasons? The English authorities point towards the adoption of an ad hoc approach by the courts i.e., they are matters best determined by the relevant court on the facts and merits of each individual case. That may well be the most effective approach and the following is proposed:

> Court proceedings under the Act being conducted in public
> (a) A court must conduct proceedings under this Act in public unless the court orders that the whole or any part of the proceedings are to be conducted in private.
> (b) A court may make an order under subsection (1) above -
> (i) on the application of one of the parties to the proceedings; and
> (ii) only where the court is satisfied that the interests of the party in having the whole or any part of the proceedings conducted in private outweigh the public interest in having those proceedings conducted in public.

Unanimity of approach on how to deal with confidentiality in a public interest context is absent. It remains unclear as to the court's approach if faced with public interest issues such as those addressed in overseas jurisdictions such as *Esso/BHP v Plowman*, or the American *Methanex* or *Panhandle* cases.

The Australian position, both from statute and from their authorities, have set the clearest unequivocal example on how to approach a public interest exception. The complexity of formulating a precise definition should not be underestimated. Therefore, whilst recognising such an exception should be recognised in law, its precise ambit could practically be devolved to the courts on a case-by-case basis. For this reason, the following wording is proposed:

> Public Interest Exception
> (a) Notwithstanding the provisions with respect to arbitral confidentiality and

[538] 'Departmental Advisory Committee on Arbitration Law 1996 Report on the Arbitration Bill' (1997) 13 Arbitration International 275, 279.

confidential material as provided for in this Act, a court may order disclosure of any confidential materials, including an award, if it determines that to do so is in the public interest or if the interests of justice so require.

(b) No central or local government department, authority, agency, or statutory body shall be bound by any provisions of confidentiality required by this Act.

Chapter 8: Development of the Law

'For English Arbitration, the exceptions to confidentiality are manifestly legion and unsettled in part: and equally, there are important exceptions to privacy'.[539]

- *DAC Report 1996*

Introduction

The effectiveness and fairness of the law preoccupied the minds of medieval politicians, to a greater extent perhaps than it does their modern counterparts. Concerns over legal reforms occupied the early part of Edward I's reign. Robert Burnell, the King's friend and confident and Chancellor from 1272 until his death in 1292, was a member of the commission appointed to enquire into the various complaints into abuses of the administration of justice in the Kingdom that resulted in the wholesale purge of the bench: draining the swamp, thirteenth century style.[540] Burnell was a famed arbitrator in a period when disputes were routinely and voluntarily referred to arbitration, the results of which were quite public. Given that Burnell was active in the arbitration between the claimants to the Scotch throne, this could by definition have been described as a matter that fell within the public interest.[541]

Has international commercial arbitration stifled the development of the common law? So Lord Thomas, the then Lord Chief Justice of England and Wales, argued in 2016 when presenting a paper at the 4th Bailii Lecture.[542] Noting the prevalence of arbitration as a dispute resolution mechanism in international commercial disputes, Lord Thomas considered the resulting transfer of the development of commercial and legal norms from national courts to private tribunals. This was in Lord Thomas's opinion a grave, negative influence on the development of the common law: views reflective of a judicial philosophy of which Edmund Burke, one of England's most prolific writers, philosopher and arguably greatest jurists, would have approved. In summarising his enquiry into the House of Lords impeachment of Warren Hastings, Burke reported to the House of Commons in 1794: 'To give judgment privately is to put an end to reports; and to put

[539] 'Departmental Advisory Committee on Arbitration Law 1996 Report on the Arbitration Bill' (1997) 13 Arbitration International 275, para 16.

[540] The expression did not originate with then Presidential Candidate Donald Trump in 2017. Whilst it alludes to the historical draining of swamps to keep mosquito populations low as a means of combatting malaria, the earliest record of its use as metaphor was in a 1903 letter to the Daily Northwestern. Winfield R. Gaylord, state organizer of the Socialist Party in Wisconsin, wrote 'Socialists are not satisfied with killing a few of the mosquitoes which come from the capittalist (sic) swamp; they want to drain the swamp'. (Chicago Sun Times, 1 March 2018) https://chicago.suntimes.com/2018/3/1/18348753/the-undrained-washington-swamp accessed 31 March 2020.

[541] Burnell died at 53 before that decision was handed down.

[542] Lord Thomas, 'Developing Commercial Law Through the Courts: Rebalancing the Relationship Between the Courts and Arbitration' (2016) The Bailii Lecture 2016, 9 March 2016. https://www.bailii.org/bailii/lecture/04.pdf accessed 31 March 2020.

an end to reports is to put an end to the law of England'.[543] Burke was very firmly in the judicial transparency camp.

Lord Thomas's speech raised important, interrelated issues concerning the confidentiality of the arbitral process. The most important was the view that the general non-publication of commercial arbitral awards risks leading to ossification of the law. The English legal system maintains a connection with the law courts more closely than any other: a long and uninterrupted development shaped by the decisions of the courts. The Courts of Admiralty, Courts of the Merchants and the King's Council, Courts of Common Law and Equity and Ecclesiastical Courts may no longer exist. But their contribution to the law's development; and the application of the principles upon which those decisions were based by the courts that succeeded them, is recognised. The contemporary arguments over the desirability of award publication can be encapsulated no better perhaps than by turning again to Burke, whose sentiments from more than two centuries ago retain a powerful and persuasive resonance:

> The English jurisprudence hath not any other sure foundation … but in the maxims, rules and principles, and judicial traditionary line of decisions contained in the notes taken, and from time to time published (mostly under the sanction of the judges) called Reports.[544]

What is the benefit to publishing arbitral awards? Who benefits and are there losers? Can an analytic jurisprudential view that publication is beneficial to the development of the law be weighed against a purely commercial stance of its potential impact on London as an arbitration centre? It is well recognised that arbitral institutions are reluctant to require greater publication of awards due to a concern that a high degree of transparency could drive users away as parties take their business elsewhere. Beyond this commercial approach there are practical issues to consider. To what extent should published awards be redacted i.e., should identifying information such as the names of parties, owners, charterers, ships or arbitrators be removed? On whom would fall the time and cost of redaction? If a poorly redacted award allowed one of the aforementioned category of users being identified, would it create a tort of breach of confidentiality? And if so, how would damages be quantified? And not least, who would publish the awards?

[543] Edmund Burke, Report from the Committee of the House of Commons Appointed To Inspect The Lords' Journals In Relation To Their Proceedings on The Trial of Warren Hastings, Esquire on 30th April 1794 *The Works of the Right Honourable Edmund Burke, Vol. XI*. http://www.gutenberg.org/files/18218/18218-h/18218-h.htm#FNanchor_30_30 accessed 31 March 2020.
[544] Arthur Lyon Cross 'A Recent History of English Law' (1910) 9(1) Michigan Law Review 1.

In *Lawal (Appellant) v Northern Spirit Limited*[545] Lord Steyn expressed the view that the arcane practices of the Tribunals (e.g., Employment Appeals Tribunals) were coming under the spotlight of increasing public sensitivity and scrutiny, that the days of opaque practices and secrecy in a legal context were perhaps numbered, beginning, perhaps inevitably, to look inadequate:

> What the public was content to accept many years ago is not necessarily acceptable in the world today. The indispensable requirement of public confidence in the administration of justice requires higher standards today than was the case even a decade or two ago.[546]

This chapter will address two interlinked issues: (a) the limited rights of appeals of an arbitration award to the courts; and (b) the non-publication of arbitration awards. Whether and to what extent do these features of arbitration hinder the development of the common law?

Arrested Development: Arbitration Appeals

Has the Arbitration Act 1996 adversely affected the development of English commercial law? More than 20 years after the Act came into force this subject remains controversial, actively debated amongst commentators. The arguments generally focus on two points: the restricted ability to appeal an award to the courts and the lack of publication of awards. The appeal of awards can and does impact indirectly on the confidentiality of the arbitral process as we have seen in English cases such as *City of Moscow*. Did the framers of the Arbitration Act find the right balance with respect to the appeal of arbitration awards? As Lord Mance noted: '…arbitration awards have become even less likely to be scrutinised in court or publicly known since the Arbitration Act 1996'. [547] Touching on insurance and reinsurance arbitration, he recognised - somewhat apologetically the problems that: '…the lack of binding authority on important principles or standard wording' caused the market in general.[548]

In the two years covering 2018 and 2019 there were just 54 applications for permission to appeal under s.69 of the Arbitration Act.[549] These statistics suggest the hurdles involved are a strong deterrent. Are these numbers unacceptable or do they reflect a reasonable balance between user expectations and the needs of the law? Was Lord Thomas correct? In most national

[545] [2003] UKHL 35.
[546] ibid [22] (Lord Steyn).
[547] Lord Mance, 'In the Beginning is the Market, in the End it is the Law' (Association internationale de Droit des Assurances, Copenhagen 15 June 2015), 7.
[548] ibid 24. Lord Mance's view of the benefits of insurance and reinsurance arbitration awards being more widely available echoed those from the US. See for example Veach (2000).
[549] Based on a review of appeals cases identified in the on-line libraries contained in Westlaw and Bailii.

arbitration systems awards cannot be appealed either on the merits, or by reference to findings of fact or points of law. English law however is different. Whilst the scope remains limited, there are nonetheless three ways in which such an appeal can be brought under the Arbitration Act.

Under s.67: a challenge to the tribunal's substantive jurisdiction.

Section 67 deals with the consequences of lack of jurisdiction. It was new to English legislation in 1996 having been derived from Art.34(2) of the Model Law. It permits a challenge to an award which is allegedly made without jurisdiction.

Under s.68: a challenge on the ground of serious irregularity.

The Arbitration Act 1996 removed the word 'misconduct' and replaced it with the phrase 'serious irregularity'. The word 'misconduct' was introduced by the Arbitration Act 1889, replacing the original formulation 'undue means'. Its meaning was meant no more than to indicate that something had gone seriously wrong with the procedure. However, despite the best efforts of the courts, the word 'misconduct' came to be regarded by arbitrators as implying impropriety. Under the Arbitration Act 1950, where the arbitrator had misconducted himself or the proceedings, the court had power to set aside or remit the award and also to remove the arbitrators. The term 'serious irregularity' was an implementation of a recommendation of the DAC 1978 Report, then chaired by Lord Donaldson.

Under s.69: an appeal on a point of law.

Appeals under s.69 go to the heart of the issue concerning the law's development: should the right to appeal from an arbitral award on a point of law be made broader and more flexible? The principal part of s.69(1) reads as follows:

> Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.

The main effect of the change to the Arbitration Act 1979 was to abolish the wide-ranging judicial review by an error of law on the face of the award. By the 1979 Act and as interpreted by the House of Lords in *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* (No 2) [1982] AC 724, the effect was to limit the review by means of an appeal on a point of law only. This radical change in philosophy was essentially a compromise between two conflicting policy objectives:

the desirability to promote party autonomy and the finality in awards, balanced against the need to preserve and develop English commercial law.

When the Courts were called upon to determine these issues it was frequently emphasised that the question must be a question of law, not fact, and the question must be a question of English law and must arise out of an award. An analysis of how to tackle the question of whether an award is wrong in law was set down by Mustill J in *Finelvet A.g. v Vinava Shipping Co Ltd (The Chrysalis)*[550] who considered the answer lay in dividing the arbitrator's process of reasoning into three stages: (a) the arbitrator ascertains the facts. This includes the making of findings on any facts that are in dispute; (b) the arbitrator ascertains the law. This process comprises the identification of all material rules of statute and common law; the identification and interpretation of the relevant parts of the contract; and the identification of those facts which are relevant and must be taken into account in reaching the decision. (c) having ascertained the facts and the law the arbitrator reaches his decision.[551]

In *Guangzhou Dockyards Co Ltd v E.N.E. Aegiali I*[552] there was an appeal to the court against the arbitrators' findings of fact. This was not an attempt to dress up questions of fact as questions of law: 'These are questions of fact dressed up as questions of fact' described by the court as a novel appeal 'unknown in modern times'.[553] Blair J considered it was 'very doubtful' whether the courts had any inherent jurisdiction to hear an appeal from arbitrators on questions of fact.[554] Likewise the Courts have criticised attempts to dress up questions of fact as questions of law.[555] Arbitral decisions concerning the application of the law to the facts are not 'questions of law' with respect to s.69.[556] And if the tribunal has reached a conclusion of mixed fact and law, the Court will not interfere with that conclusion just because it would not have reached the same conclusion itself.[557] A s.69 appeal can only be brought if the parties agree to do so i.e., a 'consensual appeal' or if the court grants leave to appeal under s.69(2). Under s.69(3) the applicant has to satisfy the court that: (a) that the determination of the question of law 'will' substantially affect the rights of one or more parties; (b) that the question of law is one which the tribunal was asked to determine; and (c) that, on the basis of the findings of fact in the award the

[550] [1983] 1 WLR 1469.
[551] ibid [1475].
[552] [2010] EWHC 2826 (Comm).
[553] ibid [12] (Blair J).
[554] ibid [30]. See also the dicta of Mustill J in *The Chrysalis* [1983] 1 WLR 1469.
[555] ibid [13]. See also *ST Shipping and Transport Pte Ltd v Space Shipping Ltd* [2016] EWHC 880 (Comm); [2017] EWHC 2808 (Comm).
[556] *Mr Martin Dawes v Treasure and Son Ltd* [2009] EWHC 1932 (TCC) (unreported).
[557] *MRI Trading AG v Erdenet Mining Corp LLC* [2012] EWHC 1988 (Comm); *John Sisk & Son Ltd v Carmel Building Services Ltd (In Administration)* [2016] EWHC 806 (TCC).

decision of the tribunal on the question of law is obviously wrong or the question is one of general public importance and the decision of the tribunal is at least open to serious doubt.

The greatest difficulties tend to arise with respect to what constitutes both 'general public importance' and 'open to serious doubt'. If the question is one of general public importance, the threshold for leave to appeal is lower: the tribunal's decision only requires to be 'open to serious doubt'. If there is no public importance then the higher hurdle of 'obviously wrong' applies. But what does 'obviously wrong' mean? Is it - as Colman J memorably described it:

> Is the obviousness something which one arrives at, as I say, on the first reading over a good bottle of Chablis and some pleasant smoked salmon or is 'obviously wrong' the conclusion one reaches at the twelfth reading of the clauses and with great difficulty where it is finely balanced.

Whilst Colman J thought it obviously not the latter, it highlights that there still exists a significantly wide scope for interpretation amongst even the most experienced of commercial judges.[558] It is not clear what defines a question of general public importance. Colman J, highlighting that the key words of 'general' and 'public' in 'general public importance' considered that they had to have a wider application than the confines of a relatively small trade sector or association.

When it came to considering whether the right of appeal on a point of law should be abolished entirely, the DAC rejected the approach, taking the view that a limited right of appeal was not inconsistent with an agreement to arbitrate. But not all commentators agree. Knull and Robins discussed the implied duty of confidentiality and proposed widening the scope for appeal.[559] They made the point that although the extent of an implied duty of confidentiality in arbitration varies significantly from country to country and is rarely absolute, under normal circumstances information disclosed in arbitration is less likely to find a public outlet than in litigation. Closer to home, the Lord Mayor of London, Alderman Robert Finch echoed the views of Knull and Rubins, when he stated that there should be more appeals from arbitrations to the court, not less: that the present restrictions on appeals under the Arbitration Act 1996 is 'stultifying …and unhealthy' and asked whether the 'pendulum' in relation to appeals from London arbitration had swung too far.[560]

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[558] Colman J, 'Arbitrations and Judges – how much interference should we tolerate?' (Master's Lecture 14 March 2006) 5 https://www.arbitratorscompany.org/wp-content/uploads/lecture2006.pdf accessed 31 March 2020.
[559] William H. Knull III & and Noah D. Rubins, 'Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?' (2000) 11 Am. Rev. Int'l Arb. 531.
[560] Robert Finch, 'London: Still the Cornerstone of International Commercial Arbitration and Commercial Law?'

Not long after that 2004 Cedric Barclay Lecture, came the Report of the Commercial Court and Admiralty Court for 2004 - 2005.[561] In response to concerns as to whether the strict requirements imposed under the Arbitration Act for leave to appeal to the Commercial Court was impeding the development of the law (particularly in the field of shipping, insurance and reinsurance) the Committee set up a working group. Chaired by Mr Bruce Harris, it was tasked with considering how the Arbitration Act 1996 had worked in practice since being introduced. It carried out a detailed survey of arbitration users, reporting that more than 500 respondents answered the questionnaire in full with over 700 individual contributions. As the working group's final report relates, it had gone into the exercise with the prior expectation that there would be pressure for change: 'that the mesh of the net was too small… [that] there was no longer a satisfactory flow of cases which would enable the courts to continue developing commercial law as they have done in the past', particularly with regards to the tests for obtaining leave to appeal under s.69.[562]

In fact, the report shewed that overall 60 percent of respondents considered that the basis for appeals under s.69 should be unchanged, whilst 15 percent thought that it should be abolished and 20 percent that the basis for appealing on a point of law should be changed. Of interest are some of the suggestions that the 20 percent who wanted to see change proposed. These included: the wording 'obviously wrong' in subsection (3)(c)(i) should become 'open to serious doubt' and so aligning the test with that in subsection (3)(c)(ii); that the court should be more ready to grant leave when there is no case law on the point in question or where a tribunal specifically seeks guidance or says that the matter is one of general importance to the industry concerned; and that it should be easier for the court to hear cases which are in the common interest to help development of the law.

When asked about whether the tests for obtaining leave should be changed, 57 percent of respondents thought there should be none. The report concluded however on the issue of s.69 appeals that the existing tests were working satisfactorily. Any need for a 'slightly more liberal approach' could be met by 'pragmatism on the part of the court'.[563] The committee concluded that changes to the Arbitration Act 1996 were neither necessary nor desirable. However, it was not the unanimous view of the committee. The report in its conclusions included a footnote with

(2004) 70 Arbitration 256. Originally The Sixth Cedric Barclay Lecture (delivered 27th April 2004) by the Rt. Hon. the Lord Mayor of London, Alderman Robert Finch.

[561]Report of the Commercial Court and Admiralty Court 2005, https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/annual_report_comm_admiralty_ct_0405.pdf accessed 31 March 2020.

[562] Bruce Harris, The Arbitration Act 1996 - 10 Years On: Preliminary Observations of a Major Survey of Users' Views on the Act (2007) 23 Arbitration International 437.

[563] ibid para 75.

the following dissenting opinion:

> The quality of the Common Law underpins the success of this jurisdiction… the Act is too restrictive of the timely development of the Common Law… Some updating of the Act therefore continues to be of paramount importance.[564]

Cohen was critical of the Committee's recommendation against a change in the law solely because it saw a 'virtual impossibility of legislating satisfactorily' in the absence of a consensus about what the statute should provide.[565]

The Overseas Perspective

In the USA s.10 of the Federal Arbitration Act provides that the federal district court may only vacate an arbitral award in four very limited circumstances which the Supreme Court has described as 'egregious departures from the parties' agreed-upon arbitration'.[566] These are: (1) where the award was procured by corruption, fraud or undue means; (2) where there was evident partiality or corruption in the arbitrators; (3) where the arbitrators were guilty of misconduct or misbehaviour that prejudiced the rights of any party; or (4) where the arbitrators exceeded their powers.[567] Professor Davies made the point that as a consequence of almost all charter party disputes going to arbitration rather than litigation through the courts, the development of US maritime law had almost completely atrophied due to the narrowness of the grounds for setting aside of an arbitral award.[568]

Davies however was not being critical of this restriction, considering the difficulty in getting judicial review of arbitral awards in the United States as an advantage, 'because there is less law to argue about and fewer opportunities for post-award legal argument'.[569] Concerns have been expressed by senior members of the English judiciary. Sir Bernard Rix stated that: 'as more and more international commercial cases go to arbitration rather than the courts, we are more and more losing sight of the basic feedstock of our commercial law'.[570] Lord Thomas's 2016 speech where he expressed his concern that as a consequence of arbitration's rise in popularity, the

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[564] ibid para 95. The dissenting opinion was that of Mr Paul Arditti at 452.
[565] Michael Cohen, 'A Missed Opportunity to Revise the Arbitration Act 1996' (2007) 23 Arbitration International 461.
[566] *Hall Street Associates LLC v Mattel Inc (Hall Street)* (2008) 552 US 576, 586; 128 S Ct 1396, 1404 (SCUS).
[567] 9 U.S. Code § 10.
[568] Martin Davies, 'More Lawyers but Less Law: Maritime Arbitration in the 21st Century' AMTAC Annual Address 2009 (2 July 2009).
[569] Martin Davies, 'The US perspective on Charter Party Disputes' (2017) 23 The Journal of International Maritime Law 468.
[570] Sir Bernard Rix, 'Confidentiality in International Arbitration: Virtue or Vice?' (2015) Jones Day Professorship in Commercial Law Lecture (12 March 2015).

prevalence of private, confidential and final arbitrations was stifling the development of the commercial common law. There was a risk of the common law being transformed 'from a living instrument into … an 'ossuary''. That as a consequence, there was a real danger of the frameworks underpinning international markets, trade and commerce being eroded. Are those views valid?

Menon CJ[571] reflected on whether in the Singapore context parties to an arbitration should have a limited right of appeal on a point of law. Singapore legislation, like many jurisdictions (but unlike England) provides no such right of appeal. Menon CJ was of the view that a case could be made for Singapore to provide a limited right of appeal and so facilitate the development of 'a robust body of maritime jurisprudence'. That authoritative court rulings on specific points of law arising from arbitral disputes would constitute a 'legal commodity' that would benefit the commercial markets as a whole. The CJ noted with approval Lord Diplock's judicial interpretation of the Arbitration Act 1979 in *The Nema* in formulating guidelines for the statutory appeal mechanism, (guidelines which were later enshrined in s.69 of the Arbitration Act 1996) and quoted Lord Diplock: 'it is only if parties to commercial contracts can rely upon a uniform construction being given to standard terms that they can prudently incorporate them in their contracts without the need for detailed negotiation or discussion'.[572]

The Singapore courts treat an arbitrating party's rights to privacy and confidentiality more strictly than most jurisdictions. A review of Singapore arbitration award appeals[573] indicates that it is not only the party's names that are anonymised. Vinodh Coomaraswamy J in *BRQ v BRS*[574] created a fictitious country 'Lemuria'[575] to assist in disguising the identities of the litigants, a singularly creative approach. There is certainly a strong argument for cracking open the door a little in the Lion State to let in a little more light, as the Chief Justice's speech alludes. That there are Model Law jurisdictions rethinking the lack of appeals incorporated into their statutes shows a growing international awareness that s.69 type appeals on a point of law may indeed confer a benefit on the development of the law. Confidentiality has its downside too. The key question therefore is whether English law has found the right balance, the proper degree of flexibility in allowing arbitration appeals.

In his Bar Conference speech in November 2013, Lord Thomas, the then Lord Chief Justice

[571] Menon CJ, 'The Race to Relevance' (2019) SCMA 10th Anniversary Keynote Address, 4 October 2019.
[572] *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* (No 2) [1982] AC 724, [737F]–[737G].
[573] Available at https://www.singaporelawwatch.sg accessed 31 March 2020.
[574] [2019] SGHC 260.
[575] ibid [4].

of England & Wales, in a forerunner to his 2016 Bailii Lecture criticised the way English law had developed with respect to arbitration over the preceding 40 years.[576] The 2016 speech argued that there was a need to address the deficiencies and so restore the means whereby the courts can continue to develop the law that underpins the United Kingdom's trade, financial system and prosperity: the threat of ossification of the law as a consequence of the limited right of appeal concerned him greatly.[577] That by statute in 1979 and through judicial interpretation of that statute in 1981 - the blame being directed squarely at Lords Denning and Diplock in that regard - the relationship between the courts and arbitration was changed on the perceived basis that it was damaging the attractiveness of London as a centre for dispute resolution through arbitration. What some commentators saw as a pragmatic compromise was condemned for the unintended consequence that fewer developments of the law are taking place in areas where the dispute began in arbitration: 'there has been a serious impediment to the development of the common law by the courts in the UK'.[578] Was this just a reactionary response to the ascendency of the views of Lords Denning, Saville and others or is there an underlying case to be made for reform? Whilst not the first to draw attention to these issues, Lord Thomas was perhaps the most senior member of the English judiciary to develop this theme in such a public forum.

The speech attracted strong criticism from other members of the judiciary. Lord Saville, who was largely responsible for the introduction of the Arbitration Act 1996 strongly disagreed in a Times interview, expressing the view that the suggestion that English courts be permitted to interfere in the arbitral process by: 'substituting their decisions for those of the tribunal chosen by the parties is regarded with little short of astonishment' on the grounds that parties had expressly agreed to use arbitration as their method of resolving the dispute: 'What the English court would have decided is irrelevant' Lord Saville considered that reviewing the expansion of the right of appeal to be backwards step: '…people use arbitration to resolve their disputes, not to add to the body of English commercial law'.[579] That rather than helping to develop English law, it would drive international commercial arbitration away from London. Sir Bernard Eder made a similar point: that it was not for private litigants to be forced to finance the development

[576] Lord Thomas, 'Bar Conference Speech' (2013) Given on 2 November 2013. https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/lcj-bar-conference-02112013.pdf accessed 31 March 2020.
[577] Lord Thomas, 'Developing commercial law through the courts; rebalancing the relationship between the courts and arbitration' (2016) Bailii Lecture 2016 delivered 9 March 2016, paras 32 – 34.
[578] ibid para 5.
[579] Marc Saville, 'Reforms Will Threaten London's Place as a World Arbitration Centre' *The Times* (28 April 2016) https://www.thetimes.co.uk/article/reforms-will-threaten-londons-place-as-a-world-arbitration-centre-02t50mgrd accessed 31 March 2020.

of the common law by pursuing appeals to the courts.[580]

Blair J struck a more conciliatory tone at a speech to the Commercial Litigation and Arbitration Forum at the end of 2016. He was at pains to point out that in his view it was neither accurate nor sensible to see arbitration and litigation as 'in some kind of arms race'. That it should be recognized that they were 'mutually supportive parts' of a developing system of international commercial dispute resolution.[581] It is nonetheless clear that there is a fundamental tension between the views of the users of arbitration and those of the Bench. With Lord Thomas's retirement as Lord Chief Justice in October 2017, it is unclear to what extent his successor, Lord Burnett of Maldon, shares the same enthusiasm for arbitral reform.[582]

Is there a need for more s.69 appeals to go before the courts? I would conclude that on balance, probably not. To a large extent it is in the hands of the judiciary. Taking a more flexible and liberal interpretation of the provisions and meanings of the Arbitration Act 1996 with respect to 'general public importance', 'open to serious doubt' and 'obviously wrong' could go a long way to setting the balance right, restoring that perceived 'pendulum'. When Singapore's most senior judicial office holder, Menon CJ proposed[583] that their arbitration statutes should provide for a greater degree of judicial intervention in line with the English position, it is a good indicator that the Arbitration Act 1996, with respect to appeals at least, has weathered well and does indeed possess that appropriate balance.[584]

Publish and be Damned

The Publication of Awards

The English legal system is generally looked at from overseas with admiration for its independence and professionalism. To that might be added that it has been the essential underpinning of a democratic way of life and general prosperity for centuries. It was such eminent judges as the Earl of Mansfield and Lord Blackburn who were in a large part responsible for the

[580] Sir Bernard Eder, 'Does arbitration stifle development of the law? Should s. 69 be revitalised?' (2016) CIArb. (London Branch) AGM Keynote Address (28 April 2016).
[581] Blair J 'Commercial Dispute Resolution – Current Developments in the Commercial Court' (2016) speech to the Commercial Litigation and Arbitration Forum 3rd November 2016.
[582] But reform minded Lord Burnett appears to be, judging by his embrace of technology in the courts and his recent speeches: see for example Lord Burnett 'English Law on the World Stage' (London International Disputes Week, London 8 May 2019) and Lord Burnett 'Keynote Speech' (International Forum on Online Courts: The Cutting Edge of Digital Reform, London 3 December 2018).
[583] Singapore's post of Chief Justice is a political appointment, persuasively suggestive that the views expressed had tacit government support.
[584] The 2020 amendments to the Singapore Arbitration Act (CAP 143A) scheduled to come into force on 6 October 2020 do not address appeals on points of law: those potential reforms remain under review.

creation of English mercantile law. The system they helped create evolved and adapted to serve the needs of industry and commerce, overwhelmingly viewed as an essentiality to the maintenance of the Kingdom's economy and prosperity. Burke was of the fervent opinion that '…nothing better could be devised by human wisdom than argued judgments publicly delivered for preserving unbroken the great traditionary body of the law'.[585]

Does that confidentiality that arbitration awards currently possess, the tightly controlled distribution and highly limited audience - the 'private judgement' Burke so strongly objected to - risk undermining English law? For those on the outside, knowledge of what happens in arbitration proceedings is restricted to the occasional reported court case, sporadically published arbitral awards and attorney 'war stories''. Drahozal was clearly not a fan of the secrecy inherent in modern-day arbitration, going on to note that the problem with anecdotes is working out whether the events described are 'typical or atypical, frequent or infrequent, ordinary or extreme'.[586] It was not always thus. Actions for Slander and Arbitrements, written by John March and published in 1674, was a seventeenth century text book for law students. It discussed the merits of arbitration awards dealing with land and debt. It is one of the world's earliest compilations of arbitral awards '…Being a Collection, …Shewing what Arbitrements are Good in Law, and what Not, … Very Useful for All Students in the Law'. That a modern counterpart, a volume of English arbitration awards could not exist today because of the strict laws of confidentiality surrounding arbitration awards is arguably a sad indictment of the direction in which English law has developed over the intervening centuries. I would argue that as with the informal dissemination of awards, current publication practices do not adequately serve the needs of the modern legal, commercial nor arbitral communities.

Although the Commercial Court's 2005 Report Committee recommended that no attempt be made to change the law in respect of confidentiality, most users who completed the questionnaire were in favour of releasing at least some part of the award to the public. Recognising this, Cohen considered that the publication of awards was in the public interest. Expressing disappointment in the CCC, noting that in addition to its failure to address consolidation, there were: 'residual pockets of belief about the development of English contract law being stunted because so few awards can be appealed on the merits under the 1996 Act'.[587] The benefits of making more

[585] Burke was oft quoted in the 2019 UK general election. Outgoing Parliamentarians invoked him to justify voting against Brexit: 'Your representative owes you, not his industry only, but his judgment; and he betrays instead of serving you if he sacrifices it to your opinion'. Sentiments not necessarily shared by Burke's constituents, who voted him out of his Bristol seat. Burke was on stronger ground expounding on and defending the rule of law.
[586] Christopher Drahozal, 'Of Rabbits and Rhinoceri: A Survey of Empirical Research on International Commercial Arbitration' (2003) 20 J. Int'l Arb. 23.
[587] Michael Cohen, 'A Missed Opportunity to Revise the Arbitration Act 1996' (2007) 23 Arbitration International

decisions available and publishing awards from 'lawyers and lay experts familiar with those issues' and thereby providing guidance about how technical issues should be resolved was inescapably obvious. Cohen was overall critical of the CCC's report, viewing the CCC's conclusions following its investigation into the workings of the Arbitration Act 1996 disappointing: 'There were over 500 responses to the questionnaire. In the end the Report represents a missed opportunity'. Cohen's analysis is cogent. The CCC's report did indeed show a majority of commercial (especially shipping) users in support of progressive change, even if only to the extent of partial award publication.

If the argument that arbitral awards should be more widely distributed and the emphasis on publication rather than confidentiality, how best might this be achieved? Various practitioners and academics have put forward proposals. Karton's criticism of the current system stemmed from the fact that inherent conflict of interests explains why the confidentiality of international arbitral party interests in keeping awards confidential was likely to override any academic or philosophical interests in publishing them.[588] He considered how the different party and systemic interests would be affected by greater publication of awards and set out his proposals on a new method for publishing awards that would avoid compromising party interests. Towers noted the desirability of amending the Arbitration Act 1996 to allow the publication of anonymised arbitration awards by default, subject to an opt-out provision.[589]

Who Publishes Awards?

The extent and scope or published arbitral awards remains small and selective. The AAA/ICDR's 'Awards and Commentaries' is a compilation of eight ICDR arbitration awards as well as summaries of court decisions concerning ICDR cases in the United States and enforcement of ICDR awards outside the United States.[590] The Stockholm Chamber of Commerce (SCC) publishes selected awards or decisions with the parties' consent. The redacted awards do not include the names of the parties, arbitrators or the solicitors involved.

When the ICC started publishing a number of their awards in extract form in the *Journal du droit international* in 1974 (and in a set of bound volumes entitled *Collection of ICC Arbitral Awards/Recueil des sentences arbitrales de la CCI)* it became increasingly common in

461, 464.
[588] Joshua Karton, 'A Conflict of Interests: Seeking a Way Forward on Publication of International Arbitral Awards' (2012) 28 Arbitration International 447, 448.
[589] Nicholas Towers, 'Expanding Horizons in Commercial Arbitration: The Case for the Default Publication of Awards' (2015) 81 Arbitration 131.
[590] Grant Hanessian, *ICDR Awards and Commentaries* (Juris 2012).

international arbitrations for parties to cite published ICC awards. The ICC's traditional position was that they would not publish if either party objected. Publication was obviously thought sufficiently important that in December 2018 the ICC published an updated "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration". Amongst the most significant of the changes was a new opt-out approach: ICC awards made from 1st January 2019 may be published. Although publication is the default position, this new approach provides parties with an opt-out mechanism. Where any party objects to publication, the award will simply not be published – or anonymised if preferred. The ICC Digital library currently contains 800 awards.[591]

It was Nicholas and Partasides' article favouring publication that started the LCIA down that path, with respect to challenges to arbitrators at least.[592] In the light of increasing challenge to arbitrators, Nicholas and Partasides identified a concern amongst the arbitral community that users had no access to jurisprudence on arbitrator conflicts of interest and challenges to arbitrators. They gave a number of reasons for user dissatisfaction: the increasing number of challenges of arbitrators in international arbitration; its impact on the legitimacy and efficacy of the arbitral process; the increasing number and cultural variety of participants in the arbitral process had heightened demands for independence, impartiality, predictability and transparency in the manner of their application; and the increasingly complex conflicts of interest situations that have arisen for parties, arbitrators, institutions and courts.

As the authors explained: 'The traditional ambiguity in the meaning and application of these standards that handed to the arbitral elite a broad discretion… is increasingly viewed as inadequate'.[593] The authors argued for the LCIA to publish the LCIA Court's challenge decisions. Drawing on cases, the 'IBA Guidelines on Conflicts of Interest in International Arbitration,' other institutional approaches and not least the basic relationship between fairness and the communication of reasons and the underpinning of the principles that lay behind them. Quoting Sir Patrick Neil:

> The interests of fairness will very generally be found to require that a person affected by a decision should both be aware of the material in the hands of the decision-maker which may be used as a basis for the decision and, secondly, that he should know the reasons underlying the ultimate decision.[594]

[591] https://library.iccwbo.org/dr.htm?AGENT=ICC_HQ&AGENT=ICC_HQ accessed on 31 March 2020.
[592] Geoff Nicholas and Constantine Partasides, 'LCIA Court Decisions on Challenges to Arbitrators: A Proposal to Publish' (2007) 23 Arbitration International 1.
[593] ibid 2.
[594] Sir Patrick Neal QC, 'The Duty to Give Reasons: the Openness of Decision-Making' in Christopher Forsyth and Ivan Hare (Eds) *The Golden Metwand and the Crooked Cord: Essays in Honour of Sir William Wade QC* (Oxford

Following the presentation of Nicholas and Pastasides' report to a joint meeting of the LCIA Court and Board at Tylney Hall in 2006, the LCIA voted to publish in the form of abstracts all the LCIA Court's decisions on challenges to arbitrators.

Brice on Salvage[595] is relevant in the narrow area of confidentiality applicable to salvage awards under an LOF arbitration. It analyses the *St John*,[596] where the court held that promoting uniformity and consistency within the LOF system of arbitration overrode the duty of confidentiality.

The Society of Maritime Arbitrators (the SMA) publishes all awards unredacted. Has this contributed to a drop off in the number of SMA maritime arbitrations? Between the mid 1980's to mid 1990's there were on average 108 arbitrations a year.[597] It now takes two to three years to generate that number of published awards. In 2017 the SMA published 84 awards, the following year 57. In 2019 that had fallen to 27.[598] There is however an alternative view, namely that the fall off in SMA arbitrations was caused by an exodus of foreign shipowners away from New York.[599] The SMA is not alone amongst maritime arbitral centres in publishing. The SCMA's position that publication of summaries of awards is important for the development of arbitration law and practice (and arbitration in Singapore as an arbitral centre in general) was echoed by Chong J. Noting that the scope of publication under Rule 35.9 is limited, being dependant on the SCMA's assessment of the merits of the particular decision, Chong J suggested that the SCMA: '…go one step further and institute a default rule that all awards are subject to publication unless the parties object'.[600]

Currently both the LMAA and SCMA allow selected awards - with parties consent - to be published in Lloyd's Maritime Law Newsletter (LMLN). It has been noted that these are periodically referenced in submissions to arbitration. The Association of Maritime Arbitrators of Canada also publishes. The Japan Shipping Exchange (TOMAC) does; and (in a different industry) the Court of Arbitration for Sport make most awards available through Kluwer. Unless commercial parties can be reassured that the publication of awards will not effect their interests,

University Press 1998).
[595] John Reeder, *Brice on Maritime Law of Salvage* (4th edn Sweet & Maxwell 2003) 598 – 599.
[596] Owners of the Hamtun v Owners of the St John [1999] 1 Lloyd's Rep. 883, [889]-[890].
[597] Award No 2100 dated 24 May 1984, Award No 3100 dated 1 Sep 1994, i.e., 1000 awards over a 9.25 year period.
[598] SMA awards accessible through Westlaw. Last accessed 1 April 2020.
[599] If that analysis is correct, it does not bode well for London, which has experienced its own substantial loss of resident shipowners in recent years, particularly from Greece, a widely reported consequence of the UK's tougher stance on non-tax residency.
[600] Chong J, 'Making Waves in Arbitration – The Singapore Experience' (2014) SCMA Distinguished Speaker Series 10 November 2014.

it is doubtful that the systematic publication of awards can be achieved.

Other publications independent of arbitral institutions that publish awards include the International Council for Commercial Arbitration's (ICCA) 'Yearbook Commercial Arbitration'. The Yearbook provides an annual update on developments with respect to institutional and ad hoc arbitral awards, developments in arbitration law and practice and investment treaty awards. Mealey's 'International Arbitration Report', 'World Arbitration Reporter', 'World Trade and Arbitration Materials', the 'Journal du Droit International (Clunet)', 'Revue de I'Arbitrage' also publish summaries. Trade journals such as the LCIA's 'Arbitration International' and the Chartered Institute of Arbitrator's 'Journal of Arbitration' publish summaries of some awards, but do not publish the actual awards. A similar situation exists with the 'Global Arbitration Review' and the annual 'Arbitration Scorecard' published by The American Lawyer. Awards and other information from state/state and investor/state disputes administered by the Permanent Court of Arbitration are available on the PCA's website, subject to the parties' consent.

Leading arbitral institutions such as HKIAC continue to maintain that awards should not be published in any form. The Swiss Arbitration Association's bulletin publishes some awards. Investor-state arbitral awards are somewhat easier to access as ICSID maintains an on-line database containing names of the parties, the decision, names of the arbitrators and the awards. Parties will often consent to publication, but even without such permission it is not uncommon to see one party releases the award to publications such as 'International Legal Materials or the Journal du Droit International'.

Compared to the number of arbitration proceedings wordwide - the LMAA alone estimates that more than 500 awards are handed down under the LMAA's Terms each year of which about 10 percent appear in LMLN in a redacted form - the extent to which awards are published is small.

Erosion of Judge Made Commercial Law?

An early commentator to address this issue, Buys remarked:

> When the [arbitration] process has consistency and predictability, its legitimacy is enhanced because parties know what to expect. They have a greater understanding of the process, leading to greater satisfaction with it, and are therefore more likely to use it again.[601]

[601]Cindy Buys, 'The Tensions between Confidentiality and Transparency in International Arbitration' (2003) 14 Am. Rev. Int'l Arb. 121, 136.

Weidenmaier's raised the point that widespread arbitration could gradually erode judge-created law. He reflected on common concerns that arbitrators neither follow nor make precedent and the potential negative consequences that could arise as a result. These include the possibility that, 'over time, widespread use of arbitration will result in the decay or destruction of the law itself'. He was also conducting a tentative comparison between the citation practices of judges and arbitrators.

Not an easy task, and Weidenmaier was at pains to point out the problem is a fundamental one: process differences between arbitration and litigation make any comparison imperfect at best.[602] In his view the evidence suggested that there was little difference in the approaches arbitrators and judges made in decision-making or opinion-writing. Why arbitrators use somewhat less precedent than judges and that they appear to use precedent in in slightly different ways was unclear from his analysis. But even if there was a difference, ultimately it wasn't an important one. Of particular concern was that: 'widespread arbitration would gradually erode government-created law. If arbitration awards have no value as precedent, but most disputes in a particular area are arbitrated, then the law may ossify'. His solution was that this pointed to an increasing need for meaningful dialogue between courts and arbitrators.

Raymond took a different perspective, evaluating the benefits to business and society, viewing the typical aspects of confidentiality in arbitration implied by the English courts as being counterproductive, contending that confidential awards erode the fundamental concepts of international commercial law.[603] In effect Raymond was arguing that it was in the public interest to publish awards. In a similar vein, Chong J outlined the potential virtues of publishing awards as a means of fulfilling the wider public interest in the transparency of arbitral proceedings, considering that the gradual accretion of published awards would serve as an educational bank for the training of aspiring arbitrators. It would also encourage future arbitrators to achieve consistency in the reasoning of their awards and place legal practitioners in a more informed position to advise their clients on the principles applied and approaches adopted by arbitrators. Not least - in what appeared to be no more than a casual throw away afterthought - it would serve as a vehicle to promote the SCMA and Singapore as a centre for maritime arbitration disputes. Chong J's thoughtful speech was however at odds with Singapore's traditional view of strict arbitral privacy and confidentiality. The view that publication of awards is necessarily an

[602] W. C. Mark Weidenmaier 'Judging-Lite: How Arbitrators Use and Create Precedent' (2012) 90 N.C. L. Rev. 1091.
[603] Anjanette H. Raymond, A 'Confidentiality in a Forum of Last Resort: Is the Use of Confidential Arbitration a Good Idea for Business and Society' (2005) 16 Am. Rev. Int'l Arb. 479.

important vehicle in the world of arbitration, is a significant development. The speech clearly served as a restatement of the Singapore government's aim of promoting Singapore arbitration.

The Need for Trust and Transparency

Glover highlighted the three-fold impact and threat of arbitral privacy and confidentiality, by diminishing public law and the transparency and mechanisms of law-making.[604] Disputes resolved by court litigation provided a check against potential unfairness that might exist behind closed doors, citing the potential risks of corrupt attorneys, judicial officers, and litigants. Private dispute resolution risked undermining judicial institutions by decreasing public and private investment in the court system. Lastly that privatisation undermines public awareness and understanding of the law, how particular laws are interpreted, and how claims are pursued. Viewed perhaps from an American perspective these arguments may carry weight: in the English context less so. The Courts in England and Wales are perennially under financial pressure from a perceived lack of government funding: the judiciary generally welcome all forms of ADR, including arbitration, as a means to reduce the work load of the courts. The doors may be closed and the hearings private, but there is a sufficiently large number of actors involved - the tribunals, institutions, lawyers and the parties - in the arbitral process to guarantee its overall transparency.

Karton seeks to remedy current inadequacies by the universal publication of awards whilst the power of veto over publication should be removed from the parties armoury.[605] To protect legitimate concerns over confidentiality the published awards should include only those parts necessary to serve what he described as 'systemic interests'. Whilst 'systemic interests' are not defined, it appears to mean the larger mosaic of arbitral users – practitioners, lawyers, arbitrators, as well as the wider public as a whole. That awards should be edited to remove the parts where party interests in confidentiality must be protected but sufficiently that the reader can determine the bases on which tribunals arrived at their decisions. The suggestion that there should be standardised award sanitisation away from the arbitral institutions concerned has merit that I will return too.

The further suggestion that awards be drafted in confidential and publishable parts is not entirely new. Although how exactly instructing (or demanding) arbitrators' should write their awards, in such a way that aspects of the decision that deal with evidence or that would enable

[604] J Maria Glover, 'Disappearing Claims and the Erosion of Substantive Law' (2015) 124 Yale L.J. 3052, 3056-3058.
[605]Karton J, 'A Conflict of Interests: Seeking a Way Forward on Publication of International Arbitral Awards' (2012) 28 Arbitration International 447, 475

identification of the parties be separated from (say) legal issues may be more of a challenge. Karton proposed a rigid formula whereby the award begin with a recitation of the evidence and the facts; a separate section dealing with applicable legal and procedural matters; a third section dealing with the application of the law to the facts and the allocation of costs. With respect to publication, Karton considered that the first section would remain confidential whilst the second section would be published: the third section would require redaction to preserve anonymity and proprietary information.[606] The idea has merit. But I have strong doubts that it is either practical or desirable to expect that a large community of arbitrators from so many different fields of human activity, varied cultures and differing backgrounds could be corralled into writing awards in such a single, regimented fashion.

A further weakness in this approach is the mistaken view that institutional arbitration accounts for approximately 85 percent of all international commercial arbitrations, '…so publication of institutional awards would mean publication of a significant majority of all awards'. This is not a supported statistic as any active practitioner in (say) the maritime sector can attest and as demonstrated by the statistics compiled in Table 1. In 2019 the LMAA estimated receiving 1756 new references, and issued 529 awards, far exceeding the number of any other international arbitral institution.[607] Karton is on stronger ground by suggesting that initial change is more likely to occur through amendments to the rules of the arbitral institutions. Publication could not be imposed on parties to ad hoc arbitrations without legislative intervention and the difficulties the imposition of transparency on the parties through amendments to national laws with the resulting infringement on party autonomy that would entail are evident. It would be exceedingly difficult - if not impossible - to achieve an international consensus on publication rules, whether in the form of a treaty or an amendment to the Model Law. That does not rule out however a reform of the law in England, where a large majority of international commercial arbitrations are currently held.

Pislevik raises the questions of transparency and asks whether confidentiality should be the default expectation in arbitration. In his view, the increasing tendency to automatically associate confidentiality with arbitration is an unfavourable development: and whether international commercial arbitration is the right vehicle for the development of commercial law is open to question. One of his concerns is that the 'substantial shift' of commercial disputes from court to

[606] ibid 476.
[607] LMAA statistics are published at http://www.lmaa.org.uk/event.aspx?pkNe[wsEventID=208da443-7800-4720-84b3-7f4f3f5fc9ce accessed 31 March 2020. The number of domestic arbitrations in China however are significantly higher.

private arbitration has provided convenience and efficiency at the expense of transparency'.[608] Whilst Pislevik views a greater balance is needed between confidentiality and transparency, one that could be attained through greater publication, he recognises that widespread award publication is dependant on an uncertain and doubtful level of political support for reform. In that regard is probably correct: the likelihood of a greater consensus in international trade has diminished in recent years.

Do Awards have Precedential Value?

A principal argument for publication is the view that publishing awards would provide greater certainty and predictability for international businesses as parties may be able to predict more accurately the outcomes in future arbitrations based on similar scenarios in previously published awards. It is a tempting view and on the surface the argument is plausible. Consider the many disputed shipbuilding contract cancellations since the economic crisis of 2008. The collapse in asset values and chartering revenues forced buyers to reassess their order books whilst shipyards sought to hold reluctant buyers to their contracts. But because many of the arbitration clauses called for English arbitration (typically under LMAA Terms) the details of the disputes remained largely confidential. Huge amounts of management time, energy and money could have been saved, so runs the argument, if the numerous awards arising out of (it is assumed) similar sets of facts had been publicly available. Perhaps: but there is no way of knowing whether all the contracts were indeed identical and the subject matter in the range of disputes was in any case a very narrow one. A similar situation occurred with the collapse of OW Bunkers in 2014 where the court's had to consider an essential problem arising from the insolvency of the OW Bunker Group: would vessel owners be exposed to paying twice over, once to their insolvent immediate bunker supply group and again to the ultimate source of the bunkers under a maritime lien? It resulted in hundreds of maritime arbitrations under the LMAA Terms and significant English and international litigation. Lord Mance introduced it memorably thus in the Supreme Court's judgement in *PST Energy 7 Shipping LLC and another v O W Bunker Malta Limited and another*[609]:

> Despite the significance of her name in Cartesian philosophy, the vessel "Res Cogitans" depends on bunkers. The parties' submissions have in compensation lent a degree of metaphysical complexity to commonplace facts. We are told that many similar cases

[608] Stefan Pislevik, 'Precedent and Development of Law: Is it time for Greater Transparency in International Commercial Arbitration? (2018) Arbitration International 241.
[609] [2016] UKSC 23, 2016 WL 02641881.

worldwide await our decision with interest.[610]

The absence of an arbitral *stare decisis* i.e., the legal principle of determining points in litigation according to precedent, is typically a criticism that emanates from the legal profession used to relying on court judgements, rather than the men and women who are involved in the everyday business of commerce. Without precedent to guide them, where multiple approaches on any given point of law may simultaneously exist, parties may be uncertain as to how best to proceed or argue their case. The resolution of legal ambiguities might be dependant on the constitution of the specific tribunal. One line of reasoning therefore is that publication will make available a greater range of claims or defences that a party or its council might otherwise not have been familiar with. Another is that arbitrators may find other arbitrators reasoning or findings persuasive when confronted by the same or a similar issue. Paulsson and Rawding warned that publication of an award risked further litigation or result in significant commercial prejudice.[611]

There is however a key difference between court judgements which have the status of binding precedents and arbitral awards which do not. Whilst a compilation of awards may be helpful, it is unclear to what extent awards would contribute to the development of common law. And if arbitral awards and decisions have no precedential value, either as to procedural decisions or interpretations of law, it is relevant to ask what impact or benefit will increased publication provide? The individual factual matrix of any given arbitration notwithstanding, if experienced and respected arbitrators hold a specific view or lean towards a particular analysis on matters pertaining to a given technical or specialist field, there is a widespread view that knowledge would be of benefit to those within the industry as a whole. But it is not an approach universally accepted. One American perspective is that some parties and arbitrators are concerned that publication of awards will create a 'precedent system' which will constrain arbitrators. Then-Associate Justice Rehnquist of the US Supreme Court argued that a 'less frequently realised advantage of arbitration . . . is that its process usually need not produce a body of decisional law which will guide lawyers and clients as to what their future conduct ought to be'.[612]

It is not easy to state with any certainty to what extent practitioners and arbitrators are citing and making use of prior decisions and whether that will accelerate with greater publication.[613]

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[610] ibid [1].
[611] Jan Paulsson and Nigel Rawding, 'The Trouble with Confidentiality' (1995) 11 Arbitration International 303, 306.
[612] William Rehnquist, 'A Jurist's View of Arbitration' (1977) 32 Arb. J. 1, 5.
[613] From an [arbitration] practitioner's perspective, this writer regularly receives copies of awards submitted by a party to bolster its case. Whilst some applicable principles may overlap, the facts rarely do so with sufficiently stature to make them any more than interesting reference points. In not one case has the party submitting the award in evidence appeared to have considered the confidentiality implications and sought permission from the counter party in the earlier arbitration.

One of the few studies into this specific area concerned domestic arbitration practice in the United States, rather than international or commercial arbitration. Weidenmaier analysed the published arbitration awards from four U.S. regimes.[614] His findings suggested that:

> …outside of securities and (to some extent) labor arbitration, the arbitrators in the sample routinely wrote lengthy awards that were substantially devoted to legal analysis and that made extensive use of precedent. The vast majority of cited precedent, moreover, came from published judicial opinions.

In other words, arbitrators in general tended to primarily cite legal precedent. In those instances where they did fall back on past arbitration awards, it was to fill in the gaps in the law where no jurisprudence was available.[615]

Level Playing Field

Solicitors or companies with large international arbitration practices are in a position to develop inside knowledge about the arbitrators and institutions that may not be available to those at smaller organisations or those with less exposure to commercial or international arbitration. Knowledge of prior awards of specific arbitrators can give a competitive edge when it comes to both arbitral appointments and the framing of submissions for example. The increased publication of arbitral decisions decreases the potential advantage that may lie with a relatively small group of firms and lawyers and so level the playing field by providing useful information about an arbitrator's or potential arbitrator's views on particular issues likely to arise in an arbitration. That could of course also be a disadvantage: it opens up the possibility of more challenges to arbitrators on the grounds of potential bias by virtue of prior published views on similar issues. Such challenges are becoming increasingly commonplace in investment treaty arbitrations: with increased publication of awards with arbitrators' names it would be likely that such trends would spill over into commercial arbitrations.

Making that information publicly available however may not be straightforward and in part will depend on the cost of access to publications and the degree to which published decisions are redacted. Sole practitioners and small law firms may not have the economies of scale to justify the potentially high subscription rates charged by arbitration institutions, or those of the specialist news services. It does not address of course who pays for the additional time and expense of

[614] The BNA Labor Arbitration Reporter database; the AAA employment arbitration awards database; the FINRA arbitration awards database; and the docket of class arbitrations administered by the AAA.
[615] W. C. Mark Weidenmaier 'Judging-Lite: How Arbitrators Use and Create Precedent' (2012) 90 N.C. L. Rev. 1091.

redaction. Nor of the bigger issue perhaps, that ad hoc arbitrations far exceed in numbers those of the administered institutional arbitration centres.

Should Users Have to Pay to Develop the Law?

The most singular objection to publication comes from the perspective of why commercial parties, who chose a private mechanism to resolve their disputes, should be involved at all in the law's development.[616] Whilst it may well be true that: 'the development, uniformity and certainty of the commercial law is promoted if the courts can retain an ultimate supervision of decisions … and promulgate the result'. As Cook J in the New Zealand case of *CBI NZ Ltd v Badger Chiyoda*,[617] remarked: '[i]t does not explain why parties freely contracting should be obliged by public policy to make a compulsory contribution to the worthy cause of the coherent evolution of commercial law'. Lord Saville's very point in his Times Newspaper interview article: it is probably the most difficult one to reconcile. Considering the widely reported financial constraints facing the English court system, would they welcome part of their budget being set aside to collate and redact arbitral awards - how many: 2000, 3000 or more a year? It is unlikely.

But the 'why should I pay approach?' strikes me as being a little too mercenary. At a more philosophical level, society needs to grow, adapt and develop. At some point we all – whether individuals, corporations, or nations – must accept that there are costs involved in progress and each in our own way take a share of that burden. Would insurance law have developed if Lord Mansfield's weaving together of legal analysis and principle with a commercial understanding gained from experts and close connections with the City had come with the proviso: 'whose footing the bill'?[618]

Chapter 8 Summary

It should be uncontroversial that the Courts contribute to the development of commercial trade law: directly in decided cases and indirectly through review of arbitration awards that go to appeal. As enacted, the Arbitration Act 1996 provides a strictly limited right of appeal from an arbitral award on points of law. Whilst the arguments overall support the view that the current

[616] See for example Marc Saville, 'Reforms Will Threaten London's Place as a World Arbitration Centre' *The Times* (28 April 2016) https://www.thetimes.co.uk/article/reforms-will-threaten-londons-place-as-a-world-arbitration-centre-02t50mgrd accessed 31 March 2020; and Sir Bernard Eder, 'Does arbitration stifle development of the law? Should s. 69 be revitalised?' (2016) CIArb (London Branch) AGM Keynote Address (28 April 2016).
[617] [1989] 2 NZLR 669.
[618] It was Lord Mansfield who encapsulate the fundamental principle of good faith in *Carter v Boehm* (1766) 3 Burr 1905.

regime lacks balance, that there is a perceived advantage in facilitating to a greater degree at least the development of a body of commercial law, it is less obvious that this needs to be done through statutory reform. Encouraging judicial flexibility in determining matters of 'general public importance' may prove a more effective approach. Colman J's proposal with respect to 'open to serious doubt', namely that the test should apply to '…any non one-off issue of law which is likely to be encountered in future disputes affecting a particular trade, industry or profession' is certainly worthy of consideration.

Whilst there has been a move to increase the publication of arbitral awards, the proportion of international commercial arbitration awards that do become available is very small and typically only available as a summary. The choice of whether to publish primarily rests with the parties, who usually oppose, or at least have no incentive, to agree to publication. As business and commercial practices continually evolve, two key – almost diametrically opposed - arguments that awards should be published are that as the majority of arbitral awards unpublished, it remains unclear that (a) arbitrators and arbitration practice has kept abreast of those developments and (b) those users less experienced in arbitration and dispute resolution may not be familiar with current views or findings on the matters that are in contention (Galanter's 'one-shotters').

Would publication make an arbitrator draft an award differently? Perhaps is the only available answer at present. There is no empiric evidence one way or another, although it is reasonable to assume that an arbitrator who knows that his or her decision is likely to be placed in the public domain may err towards caution. It could be that publication may result in longer, more legalistic awards; alternatively that the knowledge that their awards will be published will impose greater self-discipline on arbitrators in terms of accuracy, content and legal reasoning. The importance of articulate, coherent legal and factual bases for their findings cannot be denied.

When the Norwegian government underwent the lengthy consultation process that finally led to the 2004 Arbitration Act, it was argued that arbitration practice needed more openness; that there would be a benefit from publishing and making available for reference more awards. The arguments have by now become familiar: greater transparency would equate to an increase in knowledge and understanding of the arbitral process; as more awards were published, the easier it would be for parties to predict the how tribunals would approach similar matters and so the likely result proceedings. And lastly, the enhanced public scrutiny should help to ensure that arbitrators reached objective, reasoned and fair decisions. However, in practice what happened is that the business community responded by inserting confidentiality clauses into standard form

contracts, such as the Norwegian offshore construction contracts.[619] In practice it was the market that dictated the extent of change.

Comrie-Thomson noted the movement towards greater transparency and the increasingly loud calls for arbitral institutions to publish sanitized awards, goes further, proposing that national laws should require arbitral awards be published. Whilst the argument that there is significant public interest is not disputed, the suggestion for a 'statement of arbitral jurisprudence – an annual publication by a state of the purely legal elements of decisions of arbitral tribunals seated in that state' is interesting if not idealistic.[620] I would favour the publication of most awards, but consider the extraction of legal elements and principles be best delegated to the private sector. On balance the benefits of allowing greater access to arbitral awards outweighs the potential negatives. In my view publication is in the public interest and favour the Norwegian approach of requiring every arbitration award to be deposited with the courts.

The least intrusive and simplest expedient would be to reverse the existing presumption in favour of confidentiality unless all parties agreed to public disclosure. Instead, substitute it with a presumption in favour of publication of awards unless all parties required confidentiality i.e., an opt-out regime such as operates in the USA and elsewhere. Publication would provide numerous benefits. Whilst the creation of a body of arbitral knowledge through a comprehensive library or arbitral awards would not have the effect of binding precedent, its contribution to the state of knowledge would be invaluable: the publication of decisions would provide important guidance on the resolution of legal and technical matters, from the commercial men and lawyers familiar with those issues. It would finally allow for accurate and detailed statistics to be complied on the extent of arbitration in England. There would likely be an improvement in the quality of arbitration awards and ultimately the enhancement of the reputation of England as an arbitral seat. The following amendment of the Arbitration Act 1996 is proposed:

> The Publication of Awards
> (a) A copy of each arbitration award shall be deposited with the High Court within 90 days after it has been published.
> …
> (c) Unless otherwise agreed by the parties, the award may be published in a redacted form so as to preserve the anonymity of the parties, their representatives, witnesses of fact and expert and the members of the tribunal, subject to –
> (i) The Award is not subject to an appeal before the Courts;
> (ii) The costs of the arbitration have been paid;

[619] e.g., (EPC) NTK 05 and NTK 05 Mod.
[620] P. Comrie-Thomson, 'A Statement of Arbitral Jurisprudence: The Case for a National Law Obligation to Publish International Commercial Arbitral Awards' (2017) 34 Journal of International Arbitration 275.

(iii) Neither party has objected in writing to the publication of the Award within 90 days of it being published.

The courts could take responsibility for collating and publishing on an annual basis a summary of statistics of all arbitrations in England and Wales which will contain the names of the parties and arbitrators.

The publication of the awards should be the easiest matter to address. Redaction of awards can be time consuming and difficult if the aim is to effectively shield the names of the parties involved. Proposals have included standardising award formats, placing the onus on, variously, the arbitral institution, the tribunal or even the parties themselves. It is not obvious however that any of these redaction suggestions would be easy to implement in practice. The global nature of arbitration with its choices of seat, law, rules, terms, ad hoc or institutional - make a single proscribed solution difficult to envisage. A more commercial approach might be in order. Various specialist organisations that already cater to the legal services market - Informa, Westlaw, LexisNexis and Kluwer to name some of the better known - promulgate cases and case commentaries as part of a subscription service. Granting such organisations access to arbitral awards on the undertaking to comply with the necessary degree of redaction as may be required by law, would allow for the widespread publication of awards whilst allowing the market to determine the price of access. A further significant benefit of award publication is the enhancement of ethical transparency: the nature and extent of the obligations of disclosure i.e., the extent to which the protection of confidentiality applies to arbitrators is discussed in the following chapter.

Chapter 9: Follow the Money

Kerana nila setitik rosak susu sebelanga[621]
- *a drop of ink taints the whole pot of milk (Malay proverb)*

Introduction

The chapter title may not at first blush be one that sits in easy juxtaposition when contemplating the abstract, philosophical nature of arbitration law.[622] It points however to what should be one of the first questions in any discussion concerning ethics and transparency: who appoints and pays for arbitrators? Solicitors and commercial entities such as traders and charterers of course. Less obviously perhaps, it also includes P&I and FD&D Clubs, H&M underwriters, TPF's, trade associations, liquidators, banks, guilds and the courts. To what extent should the protection of confidentiality apply to the disclosure obligations incumbent on an arbitrator? Should an arbitrator's prior appointments be disclosed? If so, by whom? The appointing parties? Shipping disputes routinely involve a ship owner (typically of a single ship) and a charterer. Many ships may go through their entire operational lives without being involved in a commercial dispute. But the beneficial owner of a ship (and thus the corporate entity ultimately deciding on the appointment of an arbitrator) may in reality control a substantial fleet, and thus the potential for many arbitral appointments. That information is seldom apparent. Perhaps the identifies of the appointing solicitors is the relevant metric? Or both? How far the protection of confidentiality extends in these circumstances is, relatively speaking, unexplored territory.

The necessity for an arbitrator to be independent, honest and free from bias is something most observers would consider to be self evident. These are hardly just modern concepts of fairness. The desire to ensure arbitrators were not corrupt or otherwise influenced was provided for in first English arbitration statute of 1698:

> II. Arbitration unduly procured, void.

[621] Malay proverb – 'a drop of ink taints the whole pot of milk'.
[622] There is undoubtedly a generation for whom this chapter's title is synonymous with the troubled political culture of 1970's America and senate hearings into the Watergate scandal. Yet the phrase has a much older pedigree. It was used by Lord Alverstone CJ in *Tagart, Beaton & Co. v James Fisher & Sons v West Hartlepool Steam Navigation Company, Limited, Third Parties* [1903] 1 KB 391, [395] when he remarked '…[s]uch a lien does not confer the right to follow the money paid for freight into the pockets of the person receiving it simply because that money has been received in respect of a debt which was due for freight'.; and yet earlier still, as the 1750 debtor case of *Lord Townshend v Windham* [1558-1774] All ER Rep 428, [433] (Lord Hardwicke LC) shews: 'If, indeed, he bought them before he was in receipt of her estate, it would not do certainly. I cannot follow the money to be sure. She is not entitled to retain these jewels'.

> …That any Arbitration or Umpirage procured by Corruption or undue Means shall be judged and esteemed void and of none Effect and accordingly be sett aside by any Court of Law or Equity…

One of the principal arguments in Chapter 8 in support of the publication of awards was to promote transparency. There is a perception that solicitors and parties have a tendency to frequently use the same small group of arbitrators. If the names of arbitrators are disclosed in published decisions, that notion could be dispelled if it were shewn not to be the case, i.e. that there was sufficient diversity in the arbitration pool. Conversely, if the selection of arbitrators was considered too concentrated, parties would see this fact and be in a better position so as to make more informed decisions. This raises two immediate considerations (a) apparent or real biases among specific arbitrators would be quickly revealed and (b) close correlations between appointing parties and specific arbitrators would give greater scope for a party to appeal their opponent's appointment of arbitrator.

Whilst the former might well be welcomed, the latter could lead to a significant increase in appeals to remove arbitrators under s.24. A party may challenge an arbitrator in the courts if circumstances give rise to justifiable doubts as to his/her impartiality under s.24(1)(a). The test applied by the courts is whether a fair-minded and informed observer would conclude that there was a real possibility of bias and to the extent that arbitrators' names are published, the publication of awards may lead to more challenges to arbitrators on the basis of partiality.[623] Conversely, might publishing awards have the opposite effect, by increasing the visibility of an arbitrators' work to existing and potential users? In which case the result might be to strengthen the legitimacy of the arbitration system and demonstrate its effectiveness in dispute resolution.

As Lord Woolfe viewed it in *Taylor and Another v Lawrence and Another (Taylor v Lawrence),*[624] 'While before the Pinochet litigation an allegation of bias in the court was a rare event, such complaints are now becoming increasingly prevalent'. Whilst *Taylor v Lawrence* dealt with an appeal concerning alleged judicial bias, the general principles of transparency are very applicable to this discussion: '[i]f the situation is one where a fair-minded and informed person might regard the judge as biased, it is important that disclosure should be made. If the position is borderline, disclosure should be made'.[625]

Almost three centuries on, the courts in England and Wales have yet to fully settle the nature

[623] *A & Ors v B & Anor* [2011] EWHC 2345 (Comm).
[624] [2003] QB 528 [60] (Lord Woolfe).
[625] ibid [64].

and extent of the obligation of arbitrators not to be 'corrupt … or otherwise influenced'. This chapter addresses the ethical transparency of arbitrators. It traces how the concept of impartiality has been shaped by statute and case law, developed against the backdrop of traditional industry practices and institutional rules. It questions the existing adequacy the law provides to users of arbitration and argues that change is not only justified, but essential to maintain the integrity of the arbitral process.

Impartiality, Independence and Bias

The court considered that 'Impartiality [be] the watchword of all tribunals, including arbitrators' in *Amec Civil Engineering Ltd v Secretary of State for Transport*.[626] So why is the law unsettled as to what constitutes independence and freedom from bias? English law focuses on the importance of impartiality, addressing these requirements in the Arbitration Act 1996. Section 24 provides that the court may on application remove an arbitrator when there are circumstances that give rise to justifiable doubts as to impartiality. Section 33 requires a tribunal to act fairly and impartially.

Kendall highlighted the difficulties that can arise when English barristers from the same chambers adopt the roles of arbitrator and advocate in the same arbitration.[627] How barristers' chambers work is not considered to be an issue in England, although: '[f]oreign parties…may not understand as well as an indigenous party the way the legal professions in England are organised or their conventions and rules of conduct'.[628] This writer has sat on more than one arbitration panel where the tribunal chairman and both claimant and respondent QC's all practiced from the same Fleet Street address.

The language of s.24(1)(a) is not derived from the common law test for apparent bias, but based upon Art.12 of the UNCITRAL Model Law i.e. 'When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence'. And certainly, there is no provision for disclosure under English law (as opposed to arbitration rules) equivalent to the first paragraph of Art.12. The DAC's 1996 Report however makes it clear that this distinction was deliberate: 'no-one has persuaded us that, in consensual arbitrations, this is either required or desirable'.[629] The DAC considered the matter and took the view that the lack of

[626] [2005] 1 WLR 2339, [73] (Rix LJ).
[627] John Kendall, 'Barristers Independence and Disclosure' (1992) 8 Arbitration International 287.
[628] *ASM Shipping Ltd of India v TTMI Ltd of England* [2005] EWHC 2238 (Comm) [39] (Morison J).
[629] The DAC Report 1996, paras 100-106.

independence, unless it gave rise to justifiable doubts about the impartiality of the arbitrator, was of no significance. That if lack of independence were to be included, it could only be justified if there were cases where the lack on independence did not give rise to justifiable doubts about impartiality. For, by logical extension, there would otherwise be no point including lack of independence as a separate ground. The inclusion on independence would, in the DAC's view, give rise to endless arguments. The Report used Sweden and the United States as examples whereby almost any connection (however remote) had been used as grounds to challenge an arbitrator's independence:

> It is often the case that one member of a barristers' Chambers appears as counsel before an arbitrator who comes from the same Chambers. Is that to be regarded, without more, as a lack of independence justifying the removal of the arbitrator? We are quite certain that this would not be the case in English law.[630]

The DAC noted that even the oath taken by those appointed to the High Court and the International Court of Justice referred only to impartiality. The greater importance that parties attach to having arbitrators familiar with specific fields or industry (rather than being entirely independent) was also noted. In summary, the DAC considered that there was no intention to lose anything of significance by omitting reference to independence: 'Lack of this quality may well give rise to justifiable doubts about impartiality, which is covered, but if it does not, then we cannot at present see anything of significance that we have omitted by not using this term'.[631]

What are justifiable doubts as to impartiality? The test under s.24 of the Arbitration Act 1996 is an objective one. Circumstances must exist, and those circumstances must justify doubts as to impartiality. In *Laker Airways Incorporated v FLS Aerospace Limited*[632] the issue concerned arbitrators being appointed from the same set of barrister's chambers. The court identified three principles: (a) actual bias always disqualifies; (b) the importance of public confidence is such that even the appearance of bias will disqualify; and (c) disqualification will follow if there is a real danger of bias. The judge considered that whilst s.24 of the Arbitration Act 1996 reflected the previous case law, in his view all three principles applied to arbitration.[633]

What is the test for apparent bias? Determination of bias is rarely straightforward. A person may in good faith believe that he was acting impartially, but his mind may unconsciously be

[630] ibid para 102.
[631] ibid para 103.
[632] *Laker Airways Incorporated v FLS Aerospace Limited; FLS Aerospace Limited v Laker Airways Incorporated* [1999] 2 Lloyd's Rep. 45.
[633] ibid [48]-[49] (Rix J).

affected by a bias: 'Bias is or may be an unconscious thing' according to Delvin LJ in *Regina v Barnsley Licensing Justices, Ex parte Barnsley and District Licensed Victuallers' Association*.[634] The common law test as formulated in *R v Gough*[635] is to look at the matter through the eyes of a reasonable man; the test being in terms of real danger (rather than likelihood) to ensure: '[t]hat the court is thinking in terms of possibility rather than probability of bias'.[636] The court in *Porter v Magill*[637] proposed a minor change, substituting 'a real possibility' for 'real danger'. The CA in *Locabail (UK) v Bayfield Properties*[638] held that the common law test for apparent bias is reflected in s.24 of the Arbitration Act 1996.

In *A & Ors v B & Anor*[639] Flaux J emphasised three points regarding that common law test. Firstly, that it is neither necessary nor appropriate to draw a distinction as to whether a foreign party is involved.[640] The second aspect is that the test assumes that the impartial observer is 'fair-minded' and 'informed', i.e., in possession of all the facts which bear on the question. Citing Lord Hope in *Helow v Secretary of State for the Home Department (Helow)*[641] as to what constituted 'fair-minded' and 'informed:'

> The fair-minded and informed observer is a relative newcomer among the select group of personalities who inhabit our legal village … Like the reasonable man … the fair-minded observer is a creature of fiction. The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument.[642]

The court considered that a fair-minded and informed observer is 'neither complacent nor unduly sensitive or suspicious' in *Johnson v Johnson*[643] an approach approved in *Gillies v Secretary of State for Work and Pensions*[644] To be informed involves taking the trouble to be informed on all matters that are relevant.[645] Although the fair-minded and informed observer does not need to be a lawyer, they are expected to be aware of the way in which the English legal

[634] [1960] 2 QB 167.
[635] [1993] AC 646 [1993] 5 WLUK 194 (HL)
[636] ibid [670] (Lord Goff).
[637] [2002] 2 AC 357, [494] (Lord Hope).
[638] [2000] QB 451.
[639] [2011] EWHC 2345 (Comm) [23].
[640] ibid [24], citing *ASM Shipping Ltd of India v TTMI Ltd of England* [2005] EWHC 2238 (Comm); [2006] 2 All ER (Comm) 122 at [39] (Morison J).
[641] [2008] UKHL 62; [2008] 1 WLR 2416.
[642] ibid [1]-[3].
[643] (2000) 201 CLR 488 [53] (Kirby J).
[644] [2006] 1 WLR 781 [17] [39] (Lord Hope, Baroness Hale).
[645] *A & Ors v B & Anor* [2011] EWHC 2345 (Comm) [26] (Flaux J) quoting Lord Hope in *Helow*, [2008] UKHL 62; [2008] 1 WLR 2416 at [1] to [3] of his speech.

profession operates in practice, Flaux J's third aspect of the common law test.[646]

Some commentators have suggested that the test for apparent bias in arbitration should be different from that in the litigation, arguing that arbitration differs in a number of important respects different from litigation; that the position of an arbitrator is very different from that of a judge. Rogers for example argued that the differences between arbitration and litigation require 'a new understanding of the term 'impartiality', defined specifically for the international arbitration context and independent from national judicial standards'.[647]

One line of reasoning is that as arbitrators are typically appointed by a party who has an interest (obviously not expressed in direct terms) in appointing an arbitrator who it believes is likely to be inclined to find in its favour. In the context of the shipping market there are some arbitrators who have a reputation for being "pro-charterer", and indeed others who have the opposite reputation, considered to be "pro-owner". Judges by contrast are typically allocated to cases without any reference to the preferences of the parties. Arbitrators have a direct financial interest in being nominated by parties and so an incentive to conduct themselves in a way which will attract more appointments, including by reaching decisions which are favourable to a particular party i.e. they have an incentive not to bite the hand that feeds them.

Paulsson noted that there was no link between a judge's remuneration and the decisions reached. He also referred to the fact that dissenting opinions are invariably written by the arbitrator nominated by the losing party in some SMA arbitrations.[648] Even if correct, that should not be considered however as being a detraction from the SMA as an institution. The practice of arbitrators arguing their party's cases in certain circumstances is an old one within, for example, commodity trade associations. FOSFA for example, notwithstanding the provisions of the Arbitration Act 1996, allowed as late as its 2005 Rules that where the party appointed arbitrators could not agree, they would appoint an umpire. Once an umpire was appointed, then the process changed, the umpire taking over the whole of the case:

> whereupon the arbitrators cease to have the power to act as arbitrators… they may then assume the role of advocate/agent for their respective parties within the evidence/argument supplied and in that capacity make written submissions to the umpire or argue their cases before him…[649].

[646] ibid [28], citing the CA decision in *Taylor v Lawrence* [2003] QB 528, [61] - [65] (Lord Woolf).
[647] Catherine A. Rogers, 'Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct' (2005) 41 Stan. J. Int'l L. 53.
[648] Jan Paulsson, *The Idea of Arbitration*, (Oxford University Press 2013) 163.
[649] FOSFA, 'Guide to Arbitration and Appeals' (2005) para 3.

Those provisions were dropped in the 2015 version of FOSFA's Rules and they no longer make mention of the arbitrators acting as advocates in front of an umpire.

Other concerns expressed relate to arbitration being conducted in private and that the awards are generally confidential: arbitrators often remain anonymous even when their decisions are challenged. By contrast litigation is generally conducted in public and precisely because of that transparency, the risk of problems such as bias are diminished. The safeguards that flow from the public scrutiny built into the system of litigation does not apply in arbitration. As per Toulson LJ in a nod to Jeremy Bentham: 'Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or worse'.[650] Arbitration awards are subject to much more limited powers of review than are judgments of Courts. The Arbitration Act 1996 permits appeals under limited circumstance as per s.67, s.68 and s.69 i.e., in cases where arbitrators have exceeded their jurisdiction, committed a serious procedural irregularity, or in certain limited circumstances have made an error of law. Being a non-mandatory provision however, the parties to an arbitration can (and do) contract out of the right of appeal on a point of law. Finally, arbitrators come from a wide variety of legal and cultural backgrounds.

The view has been expressed (including in arguments before the Supreme Court in *Halliburton*) that as many arbitrators have no legal training, they may possess quite different attitudes to questions of impartiality than a judge would have. That to my mind however reveals a troubling hint of xenophobia with its implied suggestion that foreign non-lawyers acting as arbitrators, not steeped in English traditions, would somehow struggle with the concepts of impartiality and independence. Born was on firmer ground when he alluded to the: 'fundamental analytical difficulty in equating the impartiality standards applicable to national court judges and international arbitrators'.[651]

Conflict of Interest

Does the fact of (or potential for) multiple overlapping appointments with only one or some common parties concerning the same or overlapping subject matter, depending on the circumstances, give rise to reasonable doubts as to an arbitrator's impartiality? And if so, what is the duty of disclosure, and the consequences of a failure to fulfil it? In one of the earliest published studies from 1972, Galanter put forward his legal theories based upon party access to the judicial system, dividing judicial actors into two categories, repeat players and 'one-

[650] *Guardian News & Media Ltd v Westminster Magistrates' Court* [2013] QB 618 [1].
[651] Gary Born, *International Commercial Arbitration*, 2nd edn (Wolters Kluwer 2014), 1791.

shotters'.[652] Galanter considered that confidentiality conferred upon repeat players who regularly litigate or arbitrate a distinct advantage over those who do not. It was not specifically expressed, but by implication that view would suggest that parties might use that knowledge of how arbitrators might decide or view certain issues and regularly appoint those arbitrators more likely to find for them.[653]

The concern is that the arbitrator should not be the sole judge of his own appearance of impartiality in circumstances where there is an inequality arising from multiple appointments. Park considered that: 'It has long been common coin of conflicts analysis that arbitrators must disclose significant relationships that might call into question their independence'.[654] Commentator attitudes have recently turned more negative in relation to perceptions of arbitrators' independence and integrity. Paulsson wrote: 'Many persons serving as arbitrator seem to have no compunction about quietly assisting 'their' party; they apparently view the modern international consensus that all arbitrators own a duty to maintain an equal distance to both sides as little more than pretty words…'[655] Or as McKendrick described it: 'No longer can arbitrators be described as a 'small cluster of professionals' who have 'shared understandings' about what it means 'to act honourably and behave ethically''.[656]

Impartiality and Independence

Any concern regarding impartiality, whether perceived, wrongful or otherwise, can be addressed and eliminated at an early stage of the proceedings. As per Lord Davidson, referring to preventing arbitral challenges in *Scott Davidson v Scottish Ministers (No. 2)*:[657]

> The best safeguard … lies in the opportunity of making a disclosure before the hearing starts. That is the proper time for testing the tribunal's impartiality. Fairness requires that the quality of impartiality is there from the beginning, and a proper disclosure at the beginning is in itself a badge of impartiality.

Craig, Park and Paulsson considered that the first, if not primary, duty of an arbitrator to the parties is that of disclosure. Noting that the majority of international arbitral centres contemplate

[652] Marc Galanter, 'Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law & Society Review 95.
[653] See for example Paul Stanley, (2018) 'Halliburton Company v Chubb Bermuda Insurance Ltd' https://essexcourt.com/wp-content/uploads/2018/05/hburton.pdf accessed 15 April 2020.
[654] William Park, 'Arbitrator Bias' (2015) Transnational Dispute Management 15, 29.
[655] Jan Paulsson, *The Idea of Arbitration* (Oxford University Press 2013) 160.
[656] Ewan McKendrick, 'Arbitrations, Multiple References and Apparent Bias: A Case Study of Halliburton Co v Chubb Bermuda Insurance Ltd (2018)' in Axel Calissendorff and Patrik Scholdstrom (eds), *Stockholm Arbitration Yearbook 2019* (Kluwer Law International 2019).
[657] [2004] UKHL 34; 2005 1 SC (HL) 7 [54].

the duty of disclosure is an essential obligation falling on an arbitrator.[658] The arbitrator's duty to inform the parties and as appropriate the appointing authority or arbitral institution of all circumstances which might be liable to affect his or her independence or impartiality is one 'universally recognized'[659] according to Gaillard and Savage: 'The international arbitrator's duty to disclose is entirely undisputed. Irrespective of the applicable procedural rules, it is an obligation which constitutes a general principle of international arbitration'.[660] Poudret and Besson take a similar view: 'The duty to disclose all facts which might lead to challenge as provided by several laws and arbitration rules is an undisputed principle of international arbitration'[661]

The Views of Commodity Arbitrators

Commodity arbitrators and their associations tend to take a more pragmatic approach to these issues. In some sectors it is common for arbitrators to be appointed in overlapping references with only one common party, e.g., in shipping, trade and commodities arbitrations. There are a number of reasons for this. It is a feature of these disputes that a single set of facts often gives rise to a number of related claims which are the subject of different arbitrations e.g., parallel claims brought under head and sub-charterparties, or under a string of sale contracts. There also tends to be a relatively small pool of potential arbitrators to choose from, such that it is inherently more likely that a single arbitrator will be appointed in multiple arbitrations involving the same or similar subject matter. Whilst the principal reason for this is that such arbitrations tend to require specialised knowledge and experience which only a small number of arbitrators have, in some ways that is a rather circuitous argument: it suggests that those organisations have insufficiently encouraged, developed and promoted a greater number of suitably qualified arbitrators from within their industry. Another argument assumes that parties themselves often want and expect related arbitrations to be dealt with by common arbitrators, in order to reduce costs and increase efficiency. Such situations being specifically provided for in the relevant rules, expressly giving powers to arbitrators to order that related arbitrations be heard concurrently; for documents disclosed in one arbitration to be made available in the other. e.g., the LMAA Terms and GAFTA Rules. The relatively lower value of the disputes in commodity and ad hoc maritime

[658] Lawrence Craig, William Park and Jan Paulsson, *International Chamber of Commerce Arbitration* (3rd edn Oceana Publications, 2000) 215.
[659] Emmanuel Gaillard & John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 1055.
[660] ibid 1058.
[661] Professor Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (2nd edn Sweet & Maxwell, 2007) 361.

arbitrations (compared say to those of the institutional arbitration centres discussed earlier) place greater emphasis on the speed and efficiency of the arbitral process.

Practical Considerations

The mere fact that an arbitrator has accepted an appointment in multiple related arbitrations with only one common party is unlikely to give rise to an inference of bias in favour of that common party. To the extent that there is a power to order concurrency of the hearings and the sharing of documents, the acceptance of the appointment may not give the common party any procedural advantage. The relevant information would be accessible to both parties, such that there would be no issue of 'inside knowledge', a point sometimes raised in objection. In such cases, therefore, there would be no grounds for concluding that the acceptance of the overlapping appointment gave rise to an inference of bias in favour of the common party.

Even assuming that the acceptance of an overlapping appointment gave rise to some procedural advantage, the parties would be aware of the factors highlighted and would take them into account in assessing the question of apparent bias. In such circumstances, it is more likely to be assumed that it was an inevitable feature of such arbitrations rather than giving rise to an inference of bias. As per Moore-Bick J in *Rustal Trading Ltd. v Gill & Duffus S.A.*[662] '[w]hen judging a matter of this kind one has to take into account the complainant's knowledge and experience of the trade in question and the manner in which disputes are habitually resolved'.[663]

It should also be noted that shipping and commodity arbitrations probably do justify special treatment. The IBA Guidelines specifically refer to the practice in maritime, sports or commodities arbitrations, to draw arbitrators from a specialist pool: 'If … it is the custom and practice for parties to frequently appoint the same arbitrators on different cases, no disclosure of this fact is required, where all parties in the arbitration should be familiar with such custom and practice'.[664] It is always open to particular arbitral associations to make express provision for this point in their rules, e.g., by making it clear that the fact that an arbitrator has been appointed in an overlapping reference involving one common party will not be a matter giving rise to any concern about the impartiality of the arbitrator.

Does Self-Policing Work?

[662] [2000] 1 Lloyd's Rep 14.
[663] ibid [18]-[19].
[664] IBA Guidelines, para 3.1.3.

The duty of disclosure is, by definition, self-policing. Accordingly, any arbitrator or prospective appointee will almost always be the only gatekeeper to his or her candour. It is commonly accepted that there will be matters which are unquestionably to be disclosed (e.g., a financial relationship with one of the parties), matters which are unquestionably not required to be disclosed (e.g., a single lunch with counsel for one of the parties 10 years ago), and (the vast majority, almost certainly) matters which fall into the grey area of doubt where a judgment call has to be made by the arbitrator. Into this last category must fall innumerable circumstances covering an unlimited variety of relationships that the arbitrator may have with the parties, their counsel, their witnesses, the subject matter of the dispute or the issues in the case. At a very minimum, it must be the arbitrator's duty to embark upon that enquiry and form a view as to whether the circumstances should or should not be disclosed. Whether that test is by reference to 'might' or are 'likely' to give rise to justifiable doubts is still a matter before the courts. And so therefore, also unresolved, as to the moment an arbitrator or prospective appointee should disclose.

A common supporting argument for greater disclosure is that such a position will reinforce the imperative of disclosure and will not result in any undue prejudice for the users of arbitration e.g., the users of specialist arbitral institutions, such as the LMAA or FOSFA. That the only burden created would be the obligation on arbitrators to keep track of their past and present appointments so as to be able to make such disclosures where warranted. Most would view this as neither a substantial nor unreasonable burden. I would suggest that it is good practice. In any event, any perceived burden is outweighed by the benefits of disclosure, namely reinforcing confidence in the integrity of the arbitral process and appointing an independent and impartial arbitrator.

This writer had on two occasions to deal with apparent conflict in the proceeding 12 months. In one, having given an expert opinion to one party in a chemical tanker tank over-pressurisation dispute[665] it was rather straight forward matter to decline the position of 3rd arbitrator when invited by the party's appointed arbitrators the following year. The objection - and there surely would have been - would have come from the party who would have considered that having given an expert opinion, the prospective tribunal chairman would have suffered from bias, having prejudged the dispute at an early stage of the proceedings. The second instance was a challenge on the grounds of having communicated with one of the party's witnesses during [the witnesses's] previous employment. As the 'communication' amounted to no more than a single courtesy email

[665] A different reference to the example given in Chapter 5, an indication of the regrettable commonness of such incidents.

20 years previously, it was rejected as a somewhat frivolous argument for declining the appointment. The examples highlight not only the need for thoroughness and transparency by arbitrators in accepting appointments, but also of the potential for unwarranted and time wasting challenges.

Arbitral Challenges

The risk of failing to adequately declare a conflict of interest or ignoring the issue altogether is that of a challenge either of the award or of the impartiality of the arbitrator, discussed for example by del Rosa Carmona: 'It is generally accepted that arbitrators have a duty to disclose any potential conflict of interest'.[666] In *Croatia v MOL Hungarian Oil and Gas PLC* the Swiss Federal Supreme Court dealt with the impartiality of an arbitrator.[667] Croatia privatized the state-owned energy company Industrija Nafte ("INA") in 1990, the government remaining a major shareholder. In 2003, the oil company MOL Hungarian Oil and Gas PLC ("MOL") became a shareholder. Croatia subsequently reduced its own shareholding. MOL increased its stake and became the largest shareholder in INA in 2008. A new government took power, and in 2011 following an investigation alleged that MOL obtained the approval of Croatia for the contracts only by bribing the former Prime Minister. Croatia's initiated arbitration proceedings under the UNCITRAL Arbitration Rules against MOL. The seat of the arbitration was Geneva.

The arbitral tribunal dismissed Croatia's claim on the grounds that the bribery allegations had not been established. Croatia applied to set aside the arbitral award: alternatively, that the award be revised, alleging partiality of its own appointed arbitrator. Croatia argued that in January 2017 it discovered that its proposed arbitrator ("JB") had been already appointed as arbitrator in 2013 by INA (already under the control of MOL) in another UNCITRAL arbitration and that therefore there was a conflict of interest. Croatia's ground for appeal was that JB neither disclosed this information to the parties, nor recused himself from the proceedings; that there were reasonable doubts as to his independence and impartiality as an arbitrator. MOL argued that Croatia´s petition was groundless. Annulment should not be granted and the request for revision should be dismissed since the parties had waived all rights to appeal in accordance with Art.192 of the Swiss PILA: 'Awards rendered in any arbitration hereunder shall be final and conclusive …There shall be no appeal to any court from awards rendered hereunder'.

[666] Rafael Carlos del Rosa Carmona, 'Lack of Impartiality as Grounds to Deny Enforcement under the New York Convention' in Fach Gomez and Lopez Rodriguez (eds), *60 Years of the New York Convention: Key Issues and Challenges* (Kluwer Law International 2019).
[667] The decision rendered on October 27, 2017.

The Supreme Court agreed with MOL, held that the parties had waived the right to challenge the award in advance and dismissed Croatia's application, thus highlighting that contractually limiting or excluding judicial review can come with a cost where new facts come to light that might render the arbitral award invalid or unenforceable. The question as to whether a party can obtain a revision due to discovery of possible lack of independence and impartiality of an arbitrator was not explored by the court and so left unanswered.

In *Brescia Calcio SpA v West Ham United Plc48*[668] the International Court of Arbitration for Sport tribunal disqualified an arbitrator because he was in the same chambers as one of the advocates. Coates J, the Australian president of ICAS, held that there were 'legitimate doubts' over the arbitrator's independence within the meaning of CAS Rule 34, applying the Swiss Federal Code. As noted earlier, the DAC specifically opposed disqualification on such grounds and it is unlikely that an English court would have made the same finding.

Institutional Approaches to Transparency

Most institutional rules provide that arbitrators must be impartial and independent. For the HKIAC it is at Article 11.4. The LMAA provides advice based on the IBA's 'Guidelines on Conflicts of Interest in International Arbitration'.[669] An arbitrator's duty of disclosure is undoubtedly regarded by most of the world's jurisdictions as a fundamental tenet of arbitration, a duty recognised virtually everywhere. Indeed, the IBA Guidelines assume rather than impose a duty of disclosure; they simply attempt to circumscribe its scope. There are of course potentially different approaches as to the extent of the duty, i.e., whether it is to disclose such facts and matters as 'could' or 'might' give rise to justifiable doubts, or such as would be 'likely' to do so. The following examples reflect the different approaches of arbitral institutions.

Swiss Arbitration Association (ASA)

Around a third of the Swiss Arbitration Association (ASA) 1200 plus members are involved in arbitration, either as practitioners or academics. The ASA publishes Position Papers, one of which in 2017 commented on the draft amendments to Switzerland's arbitration law.[670] The ASA welcomed the incorporation of a provision on the duty of disclosure, noting that it was almost universally recognised in arbitration, not least having being addressed in the UNCITRAL Model

[668] (2012) ISLR, SLR-40.
[669]http://www.lmaa.org.uk/uploads/documents/Advice%20on%20Ethics%20-%20Updated%20Sep%202016.pdf. accessed 1 April 2020.
[670] https://www.arbitration-ch.org/en/publications/asa-position-papers/index.html accessed 1 April 2020.

Law (at Art.12(1)) and the IBA Guidelines (at Art.3(a))'.[671] It was also of the view that it would help to avoid situations in which potential grounds for challenge of which the arbitrator is aware only come to light during the proceedings or after their conclusion. The formulation for the duty of disclosure suggested in Art.179 para. 4 of the PILA preliminary draft draws from the wording in Art.363 CCP. The latter is based on the wording in Art.12(1) of the UNCITRAL Model Law: 'When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence'.

The ICC Approach

The ICC's public position as to transparency was characterised in a speech given by the ICC Court's President, Alexis Mourre, promoting the view that disclosure is to be favoured so that parties are put in a position to determine for themselves whether or not to raise a challenge: 'This is their decision and the parties cannot be deprived of that decision. The arbitrator is not the judge of his or her own independence and impartiality'.[672] The ICC's revised guidance extended the existing disclosure obligations of arbitrators and prospective arbitrators to 'non-parties having an interest in the outcome of the arbitration'. Therefore, arbitrators now must consider relationships with interested non-parties which may give rise to doubts as to impartiality.

The ICC Court also decides on challenges made against arbitrators based on allegations of a lack of independence and impartiality. Article 11 emphasises the obligations of independence required by an arbitrator, including signing a statement of impartiality and independence before appointment or confirmation and the disclosure of any facts or circumstances that call into question the arbitrator's independence in the eyes of the parties. In assessing whether disclosure should be made, prospective or appointed arbitrators are instructed by the ICC to 'consider all potentially relevant circumstances' including, but not limited to, the following circumstances: (a) the arbitrator or prospective arbitrator acts or has acted as arbitrator in a case involving one of the parties, or one of its affiliates; (b) the arbitrator or prospective arbitrator has in the past been appointed as arbitrator by one of the parties or one of its affiliates; and (c) the arbitrator or prospective arbitrator acts or has acted as arbitrator in a related case.[673] In their ICC commentary, Craig, Park and Paulsson expressed the view that the failure of an arbitrator to disclose relevant and material facts about a relationship to a party was sufficient grounds for

[671] Article 179 para 4 of the PILA preliminary draft (duty of disclosure).
[672] Alexis Mourre, Keynote Speech, Helsinki International Arbitration Day, 18 May 2017, 5
[673] ICC Note to the Parties and Arbitral Tribunals on the Conduct of Arbitration, 1 January 2019, para 23.

challenge, regardless of whether the ICC Court would itself have found those facts justification for qualification: 'Such failure of disclosure may be said to constitute evidence of partiality'.[674]

The IBA Conflict Guidelines

The Arbitration Committee of the American Bar Association's Section of International Law produced a special 54-page publication in 2013 dedicated to the subject of the appointment of arbitrators expressing the full range of views on 'The Debate: Unilateral Party Appointment of Arbitrators'.[675]

The General Standards (GS) contained in the IBA's Conflict Guidelines (2014*)* provide that any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure: 'Every arbitrator shall be impartial and independent' (GS1). If the arbitrator has doubts as to their ability to be impartial and independent, they are required to decline the appointment (GS2) or if there are facts or circumstances which may give rise to doubts as to an arbitrator's impartiality or independence, they must be disclosed (GS3). Despite their undoubted value, the IBA Guidelines are nevertheless a voluntary code with no force of law. In the majority of arbitrations held in England and Wales their provisions are not mandatory.[676]

In *W Ltd v M Sdn Bhd*[677] the court examined the Conflict Guidelines para.1.4 and the non-waivable conflict of interest provisions. Whilst recognising the commendable objective of the guidelines[678] the court found that in 'treating compendiously the arbitrator and … firm' was a weaknesses in the Guidelines, as was doing so without reference to the particular facts: 'There was a tension between some of the 'general standards' dealing with independence and impartiality, and inconsistency between the situations included or not included in the non-waivable list'.[679]

ICSID

The ICSID arbitration rules apply a materially different and higher test for removal of an arbitrator than that under s.24 of the Arbitration Act 1996: a challenger must show that an

[674] International Chamber of Commerce Arbitration (3rd ed Oceana Publications, 2000) 215.
[675] American Bar Association, Section of International Law, International Arbitration Committee 1 (2013).
[676] The IBA Guidelines on Conflict of Interest are not referred to in the LMAA Terms nor cited in any charter party dispute resolution clause sighted by this writer.
[677] [2016] 1 Lloyd's Rep. 552.
[678] ibid [33].
[679] ibid [34]-[39] (Knowles J).

arbitrator has a 'manifest lack' of 'independent judgment'.[680] Such challenges are decided in the first instance by the other members of the tribunal.[681] In *Caratube International Oil Company LLP & Mr Devincci Salah Hourani v Republic of Kazakhstan (Caratube)*[682] an arbitrator was successfully challenged for previously sitting in an arbitration that arose from 'broadly the same factual context' and in which the claimants made essentially the same factual allegations on the basis of the same evidence, and which were also potentially relevant to determining the legal issues in the *Caratube* arbitration. Having considered the particular circumstances of the degree of actual and legal overlap, the challenge was upheld on the basis that 'in this situation, the arbitrator cannot reasonably be asked to maintain a 'Chinese wall' in his own mind: his understanding of the situation may well be affected by information acquired in the other arbitration'. This is another case which on the facts would appear likely to have been decided differently under English law. Compare with Popplewell J's decision in *H v L and others*,[683] the Commercial Court expressing a very different view to arbitrator's abilities not to be distracted by matters raised in different but related arbitrations. 'In such cases it is common for those with relevant expertise as arbitrators to sit in different arbitrations arising out of the same factual circumstances or subject matter ... It is desirable that they should be able to do so'.[684]

Overseas Philosophy

The Ontario Superior Court of Justice in Canada made it clear in *Ridout & Maybee LLP v Johnston*[685] that the 'inquiry to determine whether there is a reasonable apprehension of bias is 'highly fact specific''. In France, an arbitrator appointed in concurrent arbitrations concerning the same construction project by the common party, Creighton, survived a challenge in *Gouvernement de l'etat du Qatar v Creighton Ltd, Cour d'appel de Paris*[686] because the disputes in the related arbitrations raised distinct issues. The first arbitration concerned a dispute between Creighton and its sub-contractor over the termination of the subcontractor's agreement, whereas the second arbitration concerned a distinct dispute over the termination of the construction agreement between Creighton and the Government of Qatar. In Switzerland, the Federal Supreme Court of Switzerland rejected such a challenge in Decision in 4A_458/2009, where the related

[680] ICSID Convention, Art.57 and 14.
[681] ibid Art.58.
[682] ICSID Case No ARB/13/13, Decision on the Proposal for Disqualification of Mr Bruno Boesch (20 March 2014) [75]-[77], [88], [93].
[683] [2017] EWHC 137 (Comm).
[684] ibid [21]-[22].
[685] [2005] OJ No 118, [31]-[32].
[686] *Gouvernement de l'etat du Qatar v Creighton Ltd, Cour d'appel de Paris* (1Ch. C), 12 January 1996 (Comité Français de l'Arbitage, Volume 1996 Issue 3).

arbitrations engaged the same parties on both sides, and therefore did not give rise to any issue of information inequality.[687]

The English Courts Approach to Impartiality

In light of the pending Supreme Court decision on this issue, for brevity only the most recent English cases are described here as an indication of the current (and evolving) status of the debate.

The potential implications of conflicts on the appointment of an arbitrator was considered in *Eurocom v Siemens.*[688] Eurocom had applied to the RICS to nominate an adjudicator, but Eurocom's advisor listed a large number of individuals who were said to be conflicted from deciding the dispute. The adjudicator who was ultimately appointed found in favour of Eurocom. Eurocom's advisor later admitted at the enforcement stage that none of the individuals listed were conflicted: Eurocom simply did not want them determining the dispute. The judge held that there had been a fraudulent misrepresentation and nullified the award.

Popplewell J in *Sierra Fishing Co v Farran* (*Sierra Fishing*)[689] provided a restatement of the duty of disclosure by an arbitrator. *Sierra Fishing* was an ad hoc arbitration seated in London, where the sole arbitrator's duty to disclose his connections with one of the parties was under the spotlight. The court held: '…it was [the sole arbitrator's] duty to make voluntary disclosure to the parties of connections which were known to him which might justify doubts as to his impartiality, a duty recognised in…the IBA Guidelines'.[690] In *Cofely Ltd v Bingham*[691] Hamblen J directed that an arbitrator be removed for apparent bias on five grounds. One of those was that the arbitrator had received 25 appointments from the same person in the preceding three years: statistically 18 percent of his appointments and 25 percent of his income deriving from that one source. It was immaterial that most of those appointments were made through a claim's consultant, nor that the appointments were formally made by the arbitral body rather than the same actual party.

Concerns over an arbitrator being influenced by prior knowledge in a related arbitration arose in *Beumer Group UK Ltd v Vinci Construction UK Ltd*[692] where the CA considered the potential unfairness that might ensue, either (a) by reason of information and knowledge that could be

[687] Decision in 4A_458/2009, Federal Supreme Court of Switzerland (1st Civil Law Chamber), 10 June 2010 [3.3.3.1].
[688] [2014] EWHC 3710 (TCC).
[689] *Sierra Fishing Co v Farran* [2015] 1 Lloyd's Rep 514.
[690] ibid [60].
[691] [2016] EWHC 240 (Comm).
[692] [2017] BLR 53.

acquired by the common party, or (b) by reason of its ability to test submissions or arguments or indeed put forward evidence before one tribunal containing the common arbitrator without the party in the other reference having any knowledge that one arbitrator might already have formed a view from what he had heard or seen in the first reference. In the Malaysian case of *MMC Engineering Group Bhd & Anor v Wayss & Freytag (M) Sdn Bhd & Anor*[693] the High Court held that circumstances which will raise issues as to impartiality and independence include a personal, business or professional relationship with one party to a dispute or an interest in the outcome of the dispute. The duty to disclose any circumstances likely to give rise to justifiable doubts as to impartiality being an on-going one under s.14(1) of the Act.

The distinction between (apparently purely subjective) 'legitimate concerns' and (objective) 'justifiable doubts' was drawn by the Court of Appeal following its analysis of the decision in *Guidant LLC v Swiss Re International SE*.[694] Leggatt J declined to endorse one party's choice as third arbitrator of an individual who had already been appointed to three arbitrations linked by a common party. The appointment of a common arbitrator might reduce costs, delay and the risk of inconsistent decisions: had the court been considering litigation rather than arbitration it would almost certainly have ordered the claims to be managed and tried together. Nevertheless, the court considered that there was a legitimate concern that the arguments and evidence in the first arbitration might prejudice the arbitrator's decision-making in the subsequent tribunals, highlighting the difficulty of an arbitrator putting entirely out of his or her mind in one reference submissions or evidence received in another related reference. The court considered that there was no inconsistency with the decision in *Abu Dhabi Gas Liquefaction Co v Eastern Bechtel Corp*[695] and raised the interesting point that the safeguards against the possibility of prejudice such as a common pre-trial hearing to decide whether certain issues should be decided separately, were not available in the post-1996 Act era.

The Court found in *Chartered Institute of Arbitrators v B, C, D*[696] that it was in the interests of justice for the CIArb. to be granted access to documents in relation to the appointment of an arbitrator, a hearing within the arbitration to consider as to whether he had a conflict of interest, and subsequent court proceedings seeking his removal as arbitrator. Whilst this was for the purpose of disciplinary proceedings against the arbitrator, the court considered that arbitral confidentiality can be overridden where disclosure is in the public interest.

[693] [2015] MLJU 477.
[694] [2016] 1 CLC 767.
[695] [1982] 2 Lloyd's Rep. 425; [1982] 6 WLUK 160.
[696] [2019] EWHC 460 (Comm).

Which brings us to the most important case to have reached the Supreme Court in relation to an arbitrator's duty of disclosure, *Halliburton Company v Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817 (*Halliburton v Chubb*).

Halliburton v Chubb

The factual backdrop is the BP oil spill in the Gulf of Mexico. Transocean was the owner of the *Deepwater Horizon* oil rig. Halliburton was engaged to provide cementing and other services in relation to the abandonment of the well. Both settled claims against it arising from the oil spill. Halliburton made a claim on its insurance policy with Chubb, who refused to pay. Halliburton commenced an arbitration against Chubb in London under the insurance policy. Both parties appointed an arbitrator but, unable to agree on the chairman, the English High Court appointed 'M' as chairman. Subsequent to his appointment, M accepted appointments as an arbitrator in two other references arising out of the oil spill. First, a claim by Transocean against Chubb in relation to the settlement of its claims; secondly, a claim by Transocean against another insurer. In the first reference, M was appointed by Chubb. In the second reference, M was appointed as chairman by agreement of the parties. M failed to disclose these appointments to Halliburton.

When Halliburton learned of the appointments and challenged M's impartiality, M said that it had not occurred to him that he had a duty to disclose the appointments but offered to resign if Chubb agreed. Chubb did not agree so Halliburton sought to have M removed as an arbitrator under s.24(1)(a) of the Arbitration Act 1996 which provides that a party may apply to the court to remove an arbitrator if 'circumstances exist that give rise to justifiable doubts as to his impartiality'. The application was founded on a submission that M's conduct (in accepting and not disclosing the appointments, and then not resigning) gave rise to an appearance of bias.

In the Commercial Court, Popplewell J said that whether circumstances exist which give rise to justifiable doubts as to an arbitrator's impartiality is determined by applying the common law test for 'apparent bias'. The test is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a 'real possibility' that the tribunal was biased. Popplewell J concluded that there was nothing in M's acceptance of the appointments which gave rise to an appearance of bias. Popplewell J considered that experienced arbitrators should be able to sit in different arbitrations which arise out of the same factual circumstances or subject matter. Party autonomy, which underpins arbitration, dictates that parties should be free to appoint their chosen arbitrator and, as part of that freedom, parties want their tribunal to have particular knowledge and expertise:

> [i]t is undesirable that parties should be unnecessarily constrained in their ability to draw on this pool [of talent] if there are multiple arbitrations arising out of a single event or overlapping circumstances.[697]

Popplewell J reasoned that arbitrators are able to put out of their minds material they may have encountered in another reference if it is not introduced as material in the case they are deciding. He concluded that the informed and fair-minded observer would not regard M as being unable to act impartially because 'his experience and reputation for integrity' would enable him to approach the evidence and argument with an open mind. Having found that M's acceptance of the appointments did not give rise to any justifiable concerns over his independence, it followed, Popplewell J said, that he was under no obligation to disclose the appointments. One of the defences raised in *Haliburton v Chubb* was that the test for impartiality under s.24 of the Act is identical to the common law standard of bias in a judicial or quasi-judicial context. The majority of cases in which the common law test of bias as applied to judges has been defined have involved alleged non-disclosure, including the decisions of the House of Lords in *R v Gough*[698] (juror not disclosing that she lived next door to the brother of one of the defendants); *R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No 2) (Pinochet)*[699] (judge not disclosing wife's connection with Amnesty International) and, more recently, the Privy Council's decision in *Almazeedi v Penner*[700] (judge not disclosing a connection to one party in the court proceedings).

The Court of Appeal upheld the judgment. The Court agreed that the mere fact that an arbitrator accepts appointments in multiple references concerning the overlapping subject matter with only one common party does not, of itself, give rise to an appearance of bias. As to whether M should have made the disclosure to Halliburton of the appointments, the Court concluded that, as a matter of good practice and as a matter of law, the arbitrator ought to have made disclosure. The Court referred to the 'IBA Guidelines on Conflicts of Interest in International Arbitration 2014', Orange List 3.1.5, which calls for disclosure where an arbitrator serves in an arbitration on a related issue involving one of the parties.

Under English law, disclosure is required of facts and circumstances known to the arbitrator which might give rise to justifiable doubts as to his impartiality (i.e., facts or circumstances which might lead the fair-minded and informed observer to conclude that there was a real possibility the

[697] *H v L and others* [2017] EWHC 137 (Comm) [23] (Popplewell J).
[698] [1993] AC 646.
[699] [2000] 1 AC 119.
[700] [2018] UKPC 3.

arbitrator was biased). Whether disclosure should be made depends on the prevailing circumstances at that time. Notwithstanding that M ought to have made the disclosure, the Court concluded the non-disclosure alone would not have led the fair-minded and informed observer to conclude that there was a real possibility that M was biased. The non-disclosed appointment was not deliberate and did not justify an inference of apparent bias. There was in any case a limited degree of overlap between the arbitrations. The Court stressed that although in the eyes of a party an appointment in related references may be a cause for concern, it did not signify a lack of impartiality. The arbitrator should be trusted to decide the case solely on the evidence or other material produced in the proceedings. As *Haliburton v Chubb* currently stands, arbitrators can accept more than one appointment in arbitrations with overlapping subject matters, without necessarily giving rise to doubts about their impartiality.

Whilst the court held that the arbitrator ought to have made disclosure at the time of his appointments, both as a matter of good practice in international commercial arbitration and as a matter of law, a fair-minded and informed observer would not conclude that there was a real possibility that he was biased: that the omission to disclose was accidental rather than deliberate.

Appeal to the Supreme Court

In November 2019 the UK Supreme Court heard the appeal from *Halliburton v Chubb*[701] on whether an arbitrator may accept appointments in multiple references concerning the overlapping subject matter with only one common party, without giving rise to an appearance of bias and without disclosure. The Supreme Court will have to decide the following two agreed issues taken to appeal: (a) whether and to what extent an arbitrator may accept appointments in multiple references concerning the same or overlapping subject matter with only one common party without thereby giving rise to an appearance of bias; and (b) whether and to what extent he may do so without disclosure.

The case has attracted significant attention. Five parties, in accordance with the Supreme Court's amended Order of 21 August 2019, submitted written submissions in support of intervention.[702] Arbitral institutions clearly considered that their interests lay in greater transparency and the submissions made on behalf of the ICC, LCIA and CIArb supported the view that the SC should find for expanding the current rules on disclosure. Practitioners leant

[701] *Halliburton Co v Chubb Bermuda Insurance Ltd (formerly Known as Ace Bermuda Insurance Ltd)* UKSC 2018/0100.
[702] The ICC, LCIA, LMAA, GAFTA and the CIArb.

towards a more conservative approach, opposing further disclosure beyond that already required by law: the submissions on behalf of the LMAA and GAFTA were in opposition to any changes and in support of the CA's findings. The London maritime arbitration sector in particular is a relatively small group in terms of numbers of insurers, practitioners and specialised law firms. Their concern is that the court may hand down limits on the number of appointments that an arbitrator can accept at any one time - along the lines imposed by arbitral associations for example – thus stifling (in their view) party autonomy and the freedom of parties to choose their own arbitrator.

The decision - expected to be handed down in late 2020 - may have a significant impact on the disclosure requirements with respect to arbitral appointments and indirectly on arbitral confidentiality. It has provoked intense debate over an arbitrator's duty of disclosure with the potential to seriously impact London's place in the arbitration world. As Sir Rupert Jackson noted: 'the Supreme Court's decision may have a massive impact on London as a centre for international arbitration'.[703] Regardless of whether the Supreme Court agrees with its lower courts and finds that, on the facts, the circumstances do not give rise to justifiable doubts as to M's impartiality justifying removal, it provides an opportunity to provide guidance on the duties and obligations of disclosure applicable to arbitrators in general.

Whilst the CA decision is to be welcomed, the Supreme Court should nevertheless take the opportunity to clarify disclosure obligations, particularly disclosure of related arbitrator appointments, irrespective of the extent of factual overlap between the cases. It may then fall to arbitral institutions to pick up and incorporate this extension into their rules. It is important that the Supreme Court provides this guidance since it is not currently obvious whether such disclosure must be made. Notwithstanding the IBA Guidelines Orange List 3.1.5, M, an experienced arbitrator, said that 'it had not occurred to him' to disclose the appointments. The Court of Appeal said M ought to have disclosed the appointments as a matter of good practice and as a matter of law. Yet, Popplewell J said M was under no such obligation. And it is equally important that the Supreme Court offers guidance because where arbitrators fail to abide by the requisite standards, often unintentionally, it can potentially impose significant costs on the parties. Proceedings on challenging arbitrator appointments or on the annulment of arbitral awards can leave the parties with the prospect of having to start proceedings afresh. A failure to abide by requisite standards also undermines public confidence in arbitration. To maintain its legitimacy, international

[703] Sir Rupert Jackson, 'The Interplay Between Judges and Arbitrators' Keynote lecture, 17th Annual Review of the Arbitration Act 1996 (26 March 2019) para 3.5.

arbitration must ensure that its decision makers are and are perceived to be impartial.

The outcome of the appeal will impact the elements critical to preserving the legitimacy and integrity of the arbitral process – arbitrators' trustworthiness and reliability. Ideally, the Supreme Court should confirm that arbitrators are required to disclose, at any stage of the proceedings, related arbitrator appointments, irrespective of the extent of the relation.

Chapter 9 Summary

The French arbitration scholar Clay summarised it well: 'Ultimately, it appears that the obligation of disclosure must be precise, exhaustive, and impervious to anything that can diminish it (reputation, seniority, commonality)'.[704] The extent of the duty of disclosure encumbant on an arbitrator should be limited in the following key respect so as to avoid an undue burden on prospective appointees. The limitation may best be described in terms of a duty to take reasonable steps to enquire into such matters as are readily accessible to the arbitrator or prospective appointee. For example, while a full conflict search will normally be conducted prior to receiving the appointment, later conflict searches may only be required in circumstances where e.g., the arbitrator learns of a new party or receives material indicating a prior connection with a witness.

If an arbitrator takes an appointment in one reference, and later takes further appointments in one or more related references, without making full disclosure of such later appointments (or insisting that its appointing party or its counsel make full disclosure) to the parties in the earlier reference(s) are there justifiable doubts as to impartiality might thereby arise, particularly where there is a common party? I don't believe so in most commodity or shipping arbitrations, but can see how such doubts may exist where a common counsel is able to exploit any tactical advantage caused by the common appointment in the overlapping references. This danger is particularly apparent in large value arbitrations, where the private and confidential aspects of the process may well serve to shield the errant party from any criticism arising out of its unfair exploitation of a non-level playing field.

The current approach to ethics and transparency in arbitration is a befuddled confusion in almost every institution and jurisdiction that has had to consider the issue. The limited resources available to courts and institutions that have been devoted to grappling with the problem is wasteful to an incalculable degree. The only group that has probably benefited are the legal

[704] Thomas Clay, 'L'arbitre' (2001) para 392 'En définitive, il apparaît que l'obligation de révélation doit être précise, exhaustive, et imperméable à tout ce qui pourrait l'atténuer (notoriété, ancienneté et banalité)'.

professionals employed to argue cases in front of tribunals and the courts, including the Supreme Court itself.

Fundamentally however, what is the real issue? A party to an arbitration requires complete confidence that the process is transparent. That the private judges (the tribunal) to whom he has agreed be appointed in a dispute shall be impartial and fair. With the limited degree of disclosure that currently exists and the current approach of self regulation being of dubious protection in the eyes of many, that is an imperfect and ultimately unsustainable approach. But as the submissions in *Halliburton v Chubb* have clearly shewn, there is a complete absence of consensus amongst practitioners, institutions and jurisdictions. Finding a path towards arbitral transparency and ethics that satisfies all the vested interests is likely to prove as impossible as the task set by ancient geometers to square a circle. It took mathematicians two millennia to demonstrate that impossibility of that challenge.[705] The answer in my view however, is not to identify a set of rules acceptable to all stakeholders. It is radically different. And simpler.

In Chapter 8, I proposed that a copy of all arbitral awards be deposited with the High Court as part of a move towards the default publication of awards. As part of that process, information regarding the parties and arbitrators should be provided in the following manner:

> The Publication of Awards
> b) When an award is lodged with the court the following information must be furnished:
> (i) The names of the parties;
> (ii) The names of each party appointed arbitrator;
> (iii) When appointed, the name and manner of appointment of the third arbitrator or umpire.

Making available summary details of every arbitration in England and Wales a matter of public record, will in the main obviate the need for the courts to deal with appeals as to impartiality. Any party to a dispute will be able to search on a government website database a potential or prospective arbitrator's past connections with any party. Any concerns as to conflicts of interest will be a matter of public record and can be addressed at an early stage of proceedings.

[705]The problem of squaring the circle dates to antiquity, the challenge being to construct a square with the same area as a given circle. It wasn't until 1882 that the task was proven to be impossible as a consequence of the Lindemann–Weierstrass theorem which proves that pi (π) is a transcendental.

Chapter 10: Summary & Conclusions

'Lawsuits generally originate with the obstinate and the ignorant, but they do not end with them; and that lawyer was right who left all his money to the support of an asylum for fools and lunatics, saying that from such he got it, and to such he would bequeath it'.[706]

- *Jeremy Bentham*

Chapter Summaries

Chapter 1 Summary

Confidentiality in arbitration can be approached from various perspectives: commercial and business needs; public policy; legal efficacy; natural justice and not least, the development of mercantile and commercial law. It is argued that the principal tensions result where the needs of the commercial world come up against those of public policy. Ultimately these contradictory positions prompt the question: is there a case for reform of the Arbitration Act 1996? Some commentators have proposed that the default position should be publication of an award i.e. an opt-out regime such as operates in the USA and elsewhere.[707] The areas for which reform is required include: awards and their publication; consolidation; materials; privacy; its application to parties, witnesses, legal counsel & tribunals; third party funding; potential exceptions, such as protecting a legal right or the public interest and finally ethics and transparency. When formulating confidentiality, the drafters of the Arbitration Act 1996 found the challenge 'controversial and difficult'. The 'myriad of exceptions' and 'qualifications that had to follow' proved in their mind's insurmountable obstacles. Support for change is identifiable within the 1996 DAC Report itself, which concluded the confidentiality section: 'In due course, if the whole matter were ever to become judicially resolved, it would remain possible to add a statutory provision by way of amendment to the Bill'.[708] The law is sufficiently resolved to permit the codification of statutory provisions for the less uncontroversial areas of the Arbitration Act 1996.

Chapter 2 Summary

As a means of dispute resolution, arbitration is global. That interconnectedness compels an understanding of how the issues of privacy and confidentiality are addressed in different jurisdictions. The varied approaches towards arbitral confidentiality within and between common

[706] Jeremy Bentham (1843).
[707] 'A Missed Opportunity to Revise the Arbitration Act 1996', Arbitration International, 2007, Volume 23, Issue No 3, Pages 461 – 465.
[708] ibid para 17.

and civil law jurisdictions is significant. There are countries whose statutes have no confidentiality provisions. Others such as Australia and New Zealand have detailed, prescriptive requirements. England primarily relies upon case law. The unsurprising result is that international law does not lend itself to clarity of legal interpretation. Whilst the U.S., Scandinavia and Australia, have weakened or diminished the concept of confidentiality in arbitration, England, New Zealand and Singapore by contrast, have further entrenched it. Confidentiality in arbitration has developed outside England with different statutory approaches and judicial interpretations. A comparative analysis suggests that there are practical lessons to be learnt, particularly from the commonwealth countries of Australia, Canada, New Zealand and Singapore, and from the civil law jurisdictions of Norway and Sweden. The following Chapter looks at how the absence or otherwise of statutory regimes dealing with confidentiality has encouraged institutions to step in and provide a parallel framework of 'soft law'.

Chapter 3 Summary

Arbitral institutions account for a significant proportion of international commercial and maritime arbitrations conducted globally. The preservation of confidentiality of documents produced, materials created and the award itself is confined to just four arbitral institutions: LCIA, SIAC, WIPO and CIETAC. Some important arbitral rules are silent on confidentiality, such as the UNCITRAL Rules and those of the ICC. The rules of the AAA and UNCITRAL provide for confidentiality of the award. This incomplete and contradictory patchwork of rules addressing confidentiality mirrors the divided sentiments that exist in both common and civil law jurisdictions. The most useful of the institutional rules from the perspective of any potential English reform are those of the HKIAC and SIAC, between them addressing not just confidentiality provisions, but also a sanction mechanism for their breach. Whilst many institutions have addressed the need to disclose circumstance that are likely to, or might give rise to justifiable doubts as to an arbitrators impartiality or independence, none provide (the IBA Rules excepting) a definition or examples of what constitutes 'justifiable doubts'.

Chapter 4 Summary

This chapter addressed the confidentiality of arbitral materials and awards and the extent to which they can be used, both in relation to the arbitration proceedings for which they were handed down and externally, in non-related proceedings e.g., a different arbitration. The examples from overseas jurisdictions on the use of materials and awards is sparser than that for the arbitral institutions. The richer jurisprudence in England and Wales with respect to the use of materials

prepared for or used in an arbitration and awards after the arbitration is concluded is well developed and articulate, receiving support in both the High Court and Court of Appeal. The views of the Privy Council as to the distinction between the confidentiality attached to materials and awards and their disagreement as to whether confidentiality should be considered an implied term is a judicial tension between the courts that is yet to be resolved. Nonetheless, there is sufficient support within the decided cases to provide a firm foundation on which to craft a suitable amendment of the Arbitration Act 1996.

Chapter 5 Summary

Objections to changes to the Arbitration Act 1996 do exist: '…there is always a group that favours maintaining the status quo. As with all policy changes, there will be winners and losers'.[709] It is now 30 years since the LMAA put forward proposals to the DTI Departmental Committee on Arbitration law in June 1990.[710] The LMAA did not suggest new legislation for the Courts to be given power to order the consolidation of two or more arbitrations, but instead the exercise of a discretion that would allow for the limited relaxation of the rules of arbitral confidentiality, where, and only where, such relaxation was necessary in order to avoid the risk of inconsistent decisions. These proposals were not taken up, but nevertheless form a useful basis for a statutory codification. Reform is strongly suggested on the grounds of practicality, cost, time and not least by being supported by an overwhelmingly majority of the judiciary who have considered the matter. One solution could simply be the reversal of the existing default rule prohibiting consolidation, replacing it with a rule authorising consolidation. This would be subject to s.4(2), under which the parties have the option to prevent consolidation by positively excluding as a contractual term in the arbitration clause.

Chapter 6 Summary

At the time of the Jackson Report into litigation costs was published in 2009 the general, although not universal view, was that there should be some form of restriction upon the activities of third party funders: 'The central issue which emerged was whether a voluntary code would suffice or whether there should be statutory regulation'. The Report recorded the Law Society's view that whilst TPF could assist access to justice, proper regulation was required. No statutory legislation was introduced, the Report contemplating that: 'In the future … if the use of third party

[709] 'Britain Has Changed Forever', *The Atlantic* (Washington 7 February 2020). *https://www.theatlantic.com/international/archive/2020/02/britain-brexit-rejoin-eu-boris-johnson/606190/* accessed 25 February 2020.
[710] In a letter of 1 June 1990 addressed by the President of the LMAA to the Department of Trade and Industry.

funding expands, then full statutory regulation may well be required'.[711] Industry sentiments appear to have moved in the direction of regulation: QMU's 2015 International Arbitration Survey reported that a significant majority of respondents (71 percent) thought that TPF required regulation.[712] TPF has still not been addressed under English law (despite having one of the largest funding markets alongside the USA, Australia and Germany) overseas, in international conventions or in the rules of most arbitration institutions. Whilst the TPF market has so far operated adequately within voluntary guidelines, the globalisation of the industry, the increasing number of funders and funded cases all point towards the need for legislation. A combination of the first principle identified in the ICCA-QMU appendix, the ICSID Working Paper and the SIAC Investment Arbitration Rules provide a good working solution to a TPF provision in the Arbitration Act 1996.

Chapter 7 Summary

That balancing of evolving public policy, mercantile will and the increasing demands of transparency in jurisprudence, reflect the ebb and flow of intellectual debate in the English legal system. England has not yet had its *Esso/BHP v Plowman,* and no English arbitration has had to contend with the full glare of publicity and political interference as experienced in that Australian High Court case where disclosure was viewed to be in the public interest. There is a view however (see Derrington *et al*) that the distinctions between the Australian and English positions are illusory, that *Esso/BHP v Plowman* was a one-off case involving public interest and political considerations that are unlikely to be repeated in England. One of the difficulties that may arise is if a tribunal is asked to consider a public interest exception to the obligation of confidentiality, not only because of the residual uncertainty about the exception's existence, but also because it is doubtful whether a tribunal would be properly equipped or mandated to assess what is or is not within the public interest. In international arbitration, the confidentiality of arbitration awards is being slowly eroded by the public law aspect of many proceedings. The reporting of ICSID, NCAA and Nafta awards for example, and the decisions of the Iran-US Claims Tribunal illustrate cases which have recognised that the interest in the arbitration lies in the public, rather than the private domain. If there was to be any one exception to arbitral confidentiality, that relating to the public interest and involving government entities, organisations, statutory or regulatory bodies would surely take precedence. And not far behind that would be the cases involving a genuine public interest, a citizen's 'right to know'.

[711] ibid 119.
[712] 'International Arbitration Survey: Improvements and Innovations in International Arbitration' (2015) 3.

Chapter 8 Summary

It should be uncontroversial that the courts contribute to the development of commercial trade law: directly by means of decided cases and indirectly through review of arbitration awards that go to appeal. As enacted, the Arbitration Act 1996 provides a strictly limited right of appeal from an arbitral award on points of law. Whilst the arguments overall support the view that the current regime lacks balance, that there is a perceived advantage in facilitating to a greater degree at least the development of a body of commercial law, it is less obvious that this needs to be done through statutory reform. Encouraging judicial flexibility in determining matters of 'general public importance' may prove a more effective approach. Colman J's proposal with respect to 'open to serious doubt,' namely that the test should apply to 'any non one-off issue of law which is likely to be encountered in future disputes affecting a particular trade, industry or profession' is worthy of serious consideration. Whilst there has been a move to increase the publication of arbitral awards, the proportion of international commercial arbitration awards that do become available is very small and typically only available as a summary.

On balance the benefits of allowing greater access to arbitral awards outweighs the potential negatives. Publication is in the public interest. Requiring arbitration awards to be deposited with the courts is a practical means of achieving that aim, whilst delegating the extraction of legal elements and principles to the private sector. The least intrusive and simplest expedient would be to reverse the existing presumption in favour of confidentiality unless all parties agreed to public disclosure. Instead, substitute it with a presumption in favour of publication of awards unless all parties required confidentiality i.e. an opt-out regime such as operates in the USA and elsewhere. It would finally allow for accurate and detailed statistics to be complied on the extent of arbitration in England. The courts could take responsibility for collating and publishing on an annual basis a summary of statistics of all arbitrations in England and Wales which will contain the names of the parties and arbitrators.

Chapter 9 Summary

The extent of the duty of disclosure incumbent on an arbitrator may best be described in terms of a duty to take reasonable steps to enquire into such matters as are readily accessible to the arbitrator or prospective appointee. The current approach to ethics and transparency in arbitration is however a befuddled confusion in almost every institution and jurisdiction that has had to consider the issue. A party to an arbitration requires complete confidence that the process is transparent. That the private judges (the tribunal) to whom he has agreed be appointed in a

dispute shall be impartial and fair. With the limited degree of disclosure that currently exists and the current approach of self-regulation being of dubious protection in the eyes of many, that is an imperfect and unsustainable approach. But as the submissions in *Halliburton v Chubb* shewed, there is a complete absence of consensus amongst practitioners, institutions and jurisdictions. The answer in this writer's view is not to identify a set of rules acceptable to all stakeholders. Simpler and more effective in approach would be to make details of the parties and arbitrators a matter of public record for every published arbitration award in England and Wales. One benefit of such transparency would be the likely obviation for the courts to hear appeals as to an arbitrator's impartiality. A prospective arbitrator's past connections with any one party would be quickly revealed by a search on a government website database, allowing any concerns as to a potential conflict of interest to be addressed at an early stage of the proceedings.

Conclusions

We see in cases such as *Ali Shipping, Emmott v Michael Wilson & Partners and Halliburton v Chubb* the judiciary making and developing the law. It is more than a generation ago that English law regularly saw significant judicial activism in the form of Lord Denning. But the black letter law attitudes still linger on in places. Scalia J, giving the last of the series of public lectures at the University of Edinburgh in 2007, commemorating the 300th anniversary of the creation of the Professorship of Law at that academic institution, criticized the proponents of a 'living constitution' and the negative consequences of judges pursuing a policy of 'updating' the law to fit the needs of society.[713]

So how and in which direction will English law develop? Those areas of the Arbitration Act 1996 most closely identified as being in need of potential reform have been identified and discussed in the light of the historical narrative and the criticisms levelled against them. Taking into account the needs of the users of arbitration, those of society and with the benefit of comparisons from other jurisdictions and institutional systems, I have set out proposed revisions to the Arbitration Act 1996, taking what I trust will be viewed as a pragmatic approach to the issues. Borrowing as a philosophy of problem solving from that great statesman, Lee Kuan Yew, who was prepared to look at the problem and say, 'all right, what is the best way to solve it that will produce the maximum happiness and well-being for the maximum number of people'.[714]

[713] Scalia J, 'Justice Scalia Tercentenary Lecture' (Edinburgh. Edinburgh Law School 4 November 2008). http://www.law.ed.ac.uk/file_download/series/46_justicescaliatercentenarylecture.mp3.
[714] Han Fook Kwang, Warren Fernandez & Sumiko Tan 'Lee Kuan Yew: The Man and His Ideas' (Times 1998) page 130

Lee's view was straight forward: when a system need fixing, look at solutions that had been developed elsewhere. It didn't matter from where on the political spectrum they came: only whether they worked.

There is also certainly scope for change at an arbitral institutional level. It is undoubtedly correct that practising associations of arbitrators such as the LMAA are well experienced in adapting to the needs of commercial users. Nevertheless, change however is ultimately more likely to be effective with amendments to the Arbitration Act 1996. There is an increasing trend for the privacy of arbitrations to be protected. This is illustrated by the rules in CPR Part 62 and the Practice Direction allowing arbitration claims to be heard in private and restricting (but not prohibiting) access to the court file by strangers to the arbitration. It is implicit in the agreement to arbitrate that the conduct of arbitrations is private. But it does not mean that the arbitration is private for all purposes.

Case law over the last 20 years has established that there is an obligation, implied by law and arising out of the nature of arbitration, on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and not to disclose in any other way what evidence has been given by any witness in the arbitration. In *Emmott v Michael Wilson & Partners* Thomas LJ and Collins LJ viewed the difficulties that have arisen in approaching the issue of confidentiality may in part be due to an over-reliance on the analogy with banking principles in *Tournier* and because the obligations of privacy and confidentiality may differ.[715] Thomas LJ stated: [t]he law relating to arbitrations may need to parallel the distinction in the general law where the law relating to privacy and confidentiality are distinct'. That the court's judgment: '[m]ay ultimately turn on balancing the obligations of privacy and confidentiality between the parties to the arbitration as against the public interest of disclosure of documents in litigation'.[716]

An unintended consequence of confidentiality is that for frequent users, the experience, relationship-building and database profiling can provide significant advantages. The knowledge previously available in an open judicial process is lost to those excluded by the private nature of arbitration. The costs and benefits of confidentiality need to be carefully assessed against the needs of transparency. The advantages to be gained by taking a more nuanced approach to confidentiality and allowing a greater degree of transparency where appropriate are considerable.

[715] 1 Lloyd's Rep 616.
[716] ibid [126]-[127].

Publishing the arbitration award – an approach already adopted by a number of institutions - would benefit the international arbitration community as a whole.

Has confidentiality in arbitration been undermined as some commentators contend? Probably not in England: the extent and exceptions to confidentiality are generally well defined. For arbitrations that fall outside the reach of the Arbitration Act 1996, it will depend on the law of the seat of the arbitration and (where applicable) that of the arbitral institution. If confidentiality is a desired quality, then it will be in the interests of those institutions to develop and promote their own confidentiality rules, to restore the status quo back to before *Esso/BHP v Plowman* and *Bulbank*. Arbitration cannot however be viewed in isolation from the larger legal framework within which it operates.

There is a growing backlash against litigants claims to 'confidentiality' within the court system. Holman J recently expressed the view that public, open court hearings and the freedom of the press: '[a]re the absolute underpinning of the democratic freedom of us all…The public are entitled to know what goes on in the family courts, whether we are dealing with the very rich, or the very poor, or the people in between'.[717] Similarly, the BBC won a challenge to identify a London mansion at the centre of an Unexplained Wealth Order (UWO).[718] These are but two skirmishes in a wider philosophical battle between openness and confidentiality. They are indicative perhaps of the court's current sentiments, reflecting the overall societal view of greater judicial transparency.

Despite the varied approaches and nuances, the literature is generally united in its view that change to confidentiality provisions are called for, not just in English arbitration law but globally. There is also a sense that many commentators recognise the uphill battle they face to see those changes realised. Entrenched positions, diverse laws, conflicting legal sentiments and competing arbitral institutions combine to create what might appear as an impenetrable morass, resistant to all attempts to change. Nevertheless, reform has been accomplished in some jurisdictions and highlights that a way forward is accessible.

One aspect of the reforms proposed that would make the English position on registering awards more effective globally would be a new international convention or an amendment to the New York Convention 1958. There are countries that would probably support such a position -

[717] Holman J, 'Judge condemns 'abomination' of secrecy surrounding family courts,' *The Daily Telegraph* (London 13 March 2020) https://www.telegraph.co.uk/news/2020/03/13/judge-condemns-abomination-secrecy-surrounding-family-courts/ accessed 23 March 2020.
[718] Case pending, unreported. https://www.bbc.com/news/uk-51809718. Last accessed 1 April 2020.

Sweden, Norway and Australia probably amongst them - although it has to be recognised that internationally trade is becoming more subject to tariffs (e.g., between USA and China), embargoes (e.g., between USA/Europe with Iran and North Korea) and consumer/state boycotts (e.g., between Japan and South Korea & Chinese consumers against US manufacturers). Overall, there is probably a shortage of the collective goodwill necessary in the international arena that greater legal harmonisation on trade and dispute resolution rules would require.

Quoting Henry Hallam in *Scott v Scott*[719] Lord Shaw of Dunfirmline said:

> Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances… he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security.[720]

Are there signs of a fundamental shift in policy, one that may see a major reappraisal of the current law on arbitration? The Lord Chief Justice's recent speeches not only highlight perceived drawbacks to the current arbitration regime but are also strongly in favour of the development of international commercial courts such as in Dubai and Singapore. In the current domestic political climate, with the focus of law makers on the exigencies of Brexit and the global pandemic involving Covid-19, substantial changes to the law of arbitration are unlikely to receive any serious parliamentary time or scrutiny soon. Longer term however, and on the assumption that the UK fully withdraws from Europe's legal structures at the end of the transitional arrangements, the desire for judicial reform of arbitration law is foreseeable. If so, and depending on the determination of those who drive the reforms, English arbitration could be fundamentally altered, not just with respect to its provisions on confidentiality.

In the second reading of the Arbitration Bill in the House of Lord Roskill was moved to comment that the Bill contained an extremely serious omission i.e., the issue of confidentiality with respect to the arbitration and awards, urging that it would be better to add to the statements of general principle, 'a general statement of principle that, unless the parties otherwise agree, the principles of confidentiality as long understood in English arbitration, should apply to all arbitrations to which this Act applies'.[721] Lord Denning, long retired and a week shy of his 97th birthday at the time of that debate, was recognised in his active judicial career as having nailed

[719] [1913] AC 417 HL, 477 Quoting Henry Hallam from *The Constitutional History of England* in Three Volumes (1857).
[720] ibid [477] Quoting Henry Hallam from *The Constitutional History of England* in Three Volumes (1857).
[721] HL Deb 18 January 1996, vol 568, cc760-94.

his banner to the mast of legal reform. One cannot imagine him staying silent. As a manifest legal reformer, one of his older cases resonates:

> What is the argument on the other side? On this, that no case has been found in which it has ever been done before. That argument does not appeal to me in the least. If we never do anything that has not been done before, we shall never get anywhere. The law will stand still while the rest of the world goes on; and that would be bad for both.[722]

This writer believes, and has argued, whilst recognising that case law deservedly has a central role in the context of the English constitution, there are certain facets of the law that require the active intervention of parliament in order to protect, maintain and allow commercial practice to thrive and develop. The protection of confidentiality in arbitration is one of those areas.

[722] *Packer v Packer* [1953] 3 WLR 33; [1954] P 15, [22] (Denning LJ).

Summary of Proposed Amendments to the Arbitration Act 1996

New definitions

Arbitral Tribunal
An arbitral tribunal means a sole arbitrator, a panel of arbitrators, or an arbitral institution.

Materials
For the purposes of this Act, materials are defined as all documents generated in the course of an arbitration, whether generated e.g., by the tribunal, an arbitral institution, the parties or third parties, or legal representation, including but not limited to affidavits, pleadings, submissions, witness statements of fact or expert, transcripts of evidence, directions or other documents ancillary to the arbitral process.

Third Party Funding
Third party funding is the provision of funds for the purposes of making or defending a claim in an arbitration by a person or entity that is not a party to the dispute in return for remuneration or reimbursement wholly or partially dependent on the outcome of the proceeding.

Awards
An arbitration award encompasses any award issued by a tribunal, including interim, partial and final awards, as well any Reasons thereto.

Confidential Information
Confidential information includes materials and awards.

New provisions:

Privacy
Unless otherwise agreed by the parties, all meetings and hearings shall be in private.

Competence of arbitral tribunal to rule on the confidentiality of documents
In consultation with the parties, the arbitral tribunal may rule on the issue of confidentiality of any materials pertaining to the arbitration.

Prohibition of disclosure of confidential information
Every arbitration agreement to which this section applies is deemed to provide that the arbitral tribunal, parties, legal counsel and witness must not disclose confidential information, except:-
(a) to a professional adviser; or
(b) to the extent necessary for the establishment or protection of a party's legal rights; or
(c) for the making and prosecution of an application to a court under this Act; or
(d) if the disclosure is in accordance with a court order; or
(e) the disclosure is authorised or required by law; or
(f) for the purposes of obtaining litigation funding.

Court proceedings under the Act being conducted in public
(a) A court must conduct proceedings under this Act in public unless the court orders that

the whole or any part of the proceedings are to be conducted in private.
(b) A court may make an order under subsection (1) above -

(i) on the application of one of the parties to the proceedings; and

(ii) only where the court is satisfied that the interests of the party in having the whole or any part of the proceedings conducted in private outweigh the public interest in having those proceedings conducted in public.

Consolidation

(a) The court may on an application by one of the parties order either consolidation or concurrency of related arbitral proceedings under multiple arbitration agreements which are substantially similar, provided no party is deprived of its right to appoint its own nominee as an arbitrator.
(b) The court shall not order consolidation where an arbitration is being conducted under the supervision of an arbitral institution.
(c) Where consolidation or concurrency is ordered under this section, the Court may order that documents disclosable in one arbitration be disclosed to one or more parties to the other arbitration(s).
(d) The court shall balance the risk of any loss of confidentiality against the risks of inconsistent findings inherent in refusing to make the order.

Third Party Funding

(a) A party being funded is required to disclose the existence of a third party funding arrangement and the identity of the funder to the opposing party in the arbitration, the arbitrators and the arbitral institution or appointing authority (if any), either as part of a first appearance or submission, or as soon as practicable after funding is provided or an arrangement to provide funding for the arbitration is entered into.
(b) A party being funded is required to disclose details of the third-party funder's interest in the outcome of the proceedings, and/or whether or not the third-party funder has committed to undertake adverse costs liability.

Public Interest Exception

(a) Notwithstanding the provisions with respect to arbitral confidentiality and confidential material as provided for in this Act, a court may order disclosure of any confidential materials, including an award, if it determines that to do so is in the public interest or if the interests of justice so require.
(b) No central or local government department, authority, agency, or statutory body shall be bound by any provisions of confidentiality required by this Act

The Publication of Awards

(a) A copy of each arbitration award shall be deposited with the High Court within 90 days after it has been published.
(b) When an award is lodged with the court the following information must also be furnished:

(i) The names of the parties;

(ii) The names of each party appointed arbitrator;

(iii) When appointed, the name and manner of appointment of the third arbitrator or umpire.

(c) Unless otherwise agreed by the parties, the award may be published in a redacted form so as to preserve the anonymity of the parties, their representatives, witnesses of fact and expert and the members of the tribunal, subject to -

(i) The Award is not subject to an appeal before the Courts;

(ii) The costs of the arbitration have been paid;

(iii) Neither party has objected in writing to the publication of the Award within 90 days of it being published.

Breach of Confidentiality
The Tribunal has the power to take appropriate measures, including issuing an order or Award for sanctions or costs, if a Party breaches any of the confidentiality provisions of this Act.

Amendments to existing Sections

38(3) The tribunal may order a claimant to provide security for the costs of the arbitration. This power shall not be exercised on the ground that the claimant is -
…
(c) in receipt of third party funding for the purpose of prosecuting the arbitration.

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