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Master's Thesis

Confidentiality in Commercial Arbitration

Konfidencialumas komerciniame arbitraže

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ABSTRACT AND KEY WORDS

The thesis aims to critically explore the notion of confidentiality and to assess the way it functions within the framework of commercial arbitration. In pursuing this objective, the research examines the broader legal and contractual landscape that shapes and regulates confidentiality, including national arbitration laws from different jurisdictions, relevant court practice, and the rules established by major arbitral institutions. Through this comprehensive approach, the study seeks to provide a deeper understanding of how confidentiality is applied, and protected across various legal systems and find gaps.

Key Words: commercial arbitration, privacy, confidentiality, disclosure, confidentiality agreement, implied duty.

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LIST OF ABBREVIATIONS

AAA – American Arbitration Association

BAC – Baku Arbitration Center

BCDR – Bahrain Chamber for Dispute Resolution

CEPANI – Belgian Centre for Arbitration and Mediation

DIAC – Dubai International Arbitration Centre

DIS – German Arbitration Institute

HKIAC – Hong Kong International Arbitration Centre

LCIA – London Court of International Arbitration

SIAC – Singapore International Arbitration Centre

UNCITRAL MODEL LAW – UNCITRAL Model Law on International Commercial Arbitration

UNCITRAL NOTES – UNCITRAL Notes on Organizing Arbitral Proceedings

WIPO – World Intellectual Property Organization

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
– 1958 New York Convention

INTRODUCTION

Arbitration is established as a form of private dispute resolution. This closed nature of arbitration where, unlike in court proceedings, only authorized individuals may participate, is often one of the key factors that encourages parties to resolve their disputes through arbitration. However, parties who assume that such fundamental privacy also means absolute confidentiality of the process and that the duty of confidentiality automatically binds everyone involved may be incorrect.

As it will be revealed in detail in this paper, in commercial arbitration privacy and confidentiality are distinct concepts. An agreement to arbitrate does not necessarily mean that all the information and materials of arbitration case become confidential. Also, agreeing to arbitration does not automatically mean that all the persons involved in the process are bound by the duty of confidentiality or that the extent of this duty would be the same.

Relevance of the topic: The applicable procedural law is still quite different on the issue of confidentiality in commercial arbitration. Moreover, the institutional rules that the parties tend to agree on to regulate arbitration also still have a different approach to confidentiality. Hence, in respect of confidentiality parties' expectations and the reality might differ. Because of this gap, understanding and studying how confidentiality works in commercial arbitration remain a relevant topic up to this day. It helps to clarify what information can be kept confidential, under what conditions it may be disclosed, and how parties can better protect their sensitive information during the arbitration process.

The aim of the thesis is to provide critical analysis of the concept of confidentiality and its application in commercial arbitration. Therefore, the following objectives of the thesis are distinguished:

1. To identify two main approaches towards the concept of confidentiality and to distinguish it from privacy.
2. To contrast the differing approaches to confidentiality under the various arbitration laws.
3. To define the scope of the duty of confidentiality (material and personal) under various arbitration laws and institutional arbitration rules.
4. To analyse the main exception of the duty of confidentiality – the duty of disclosure and conditions under which it might be granted.

The object of this research is the legal and contractual framework governing confidentiality: national arbitration laws of various jurisdictions, relevant court practice and

institutional arbitration rules. The research is limited to commercial arbitration and does not cover data protection issues that are considered specific object requiring a separate and dedicated study due to their unique regulatory regime.

Research methods of the topic: In this research mainly the analytical method and the linguistic method has been used. The analytical method has been used to to examine the relevant regulation and court practice on confidentiality in various jurisdictions as well as the framework provided in the arbitration rules. The linguistic method was applied to interpret the wording of the laws and arbitration rules.

Originality of the topic: The originality of this thesis lies in the fact that it examines not only well-studied jurisdictions such as England and Australia, but also jurisdictions that have received comparatively little academic attention, including Lithuania, Latvia, and several Asian countries mentioned above, all through the lens of confidentiality in commercial arbitration. Furthermore, with respect to court practice, in this thesis relevant Singaporean court practice also had been used, to the best of author's knowledge, that has not been used or referenced in any of the existing sources consulted for this research.

Sources: In this thesis, various sources have been used, including legal doctrine, national law, court practice, and institutional arbitration rules. Among the legal doctrines, the most frequently used are Gary B. Born's International Commercial Arbitration and Nigel Blackaby, Constantine Partasides, Alan Redfern, and Martin Hunter's Redfern and Hunter on International Arbitration, because these books discuss the topic extensively and from multiple perspectives. Regarding national laws, the legislation of all the countries mentioned above has been considered. For court practice, the practices of courts in England, Singapore, and Australia have been used.

I. THE BASIC IDEA OF CONFIDENTIALITY

1.1. Dual approach to confidentiality in commercial arbitration

Prior to having a discussion on the topic of confidentiality in commercial arbitration in detail, it is essential to have a fundamental understanding of the notion of confidentiality, as well as its importance and the legal nature of that matter.

Arbitration is a process in which the parties, by mutual agreement, refer their dispute to one or more arbitrators, who then issue a decision that is binding on them.¹ On the other hand when it comes to confidentiality, arbitration proceedings themselves are confidential and that the parties are bound by the consequences of this obligation from the very outset of the process.²

Detailed and comprehensive definition, explanation and role of confidentiality in international commercial arbitration has been provided by Gary Born: “Confidentiality in arbitration generally refers to the obligations assumed by the parties not to disclose information concerning the arbitration to third parties or to the public. These obligations of confidentiality is not only for preventing third parties from attending the hearings. They also encompass restrictions on the parties themselves, prohibiting them from sharing hearing transcripts, written pleadings and submissions, evidence presented during the arbitration, materials produced during disclosure, as well as arbitral awards and orders, with anyone outside the arbitration. Ensuring the confidentiality of arbitral proceedings serves to centralize the dispute within a single forum and facilitates an objective, efficient, and commercially reasonable resolution. At the same time, it protects sensitive information from being revealed to the public, the media, competitors, or any other external parties.”³

Another author also determines that confidentiality in arbitration refers to the responsibility to manage sensitive commercial documents in compliance with the rules that regulate non-disclosure of information.⁴

These explanations above make it clear that confidentiality in arbitration functions as a protective mechanism designed to safeguard sensitive and private information in arbitral

¹ WIPO/ADR Arbitration and Mediation Center (2020). *Guide to WIPO Arbitration* [online]. Geneva, Switzerland : World Intellectual Property Organization (WIPO), <https://doi.org/10.34667/tind.42701>, 8.

² RUTLEDGE, Peter B. (2013). *Arbitration and the Constitution*. [online]. New York: Cambridge University Press. <https://doi.org/10.1017/CBO9781139026246>, pp. 1

³ BORN, Gary (2021). *International Commercial Arbitration*. Third edition. Netherlands: Kluwer Law International B.V, pp. 4566.

⁴ TRAKMAN, Leon. Confidentiality, Privacy and Data Protection in International Commercial Arbitration. In: Franco Ferrari and Friedrich Rosenfeld (eds.) (2022). *Handbook of Evidence in International Commercial Arbitration: Key Issues and Concepts*. Kluwer Law International, 321.

proceedings. The purpose of this protection is to ensure that business secrets, commercial strategies, or other materials shared during the process do not become accessible to third parties or the public.

According to Queen Mary University International Arbitration Survey (2018), 97% of respondents indicate that international arbitration is their preferred method of dispute resolution⁵ and 87% of people who takes part in this voting think the most essential attributes of international commercial arbitration is confidentiality.⁶

On the other hand traditionally, arbitration has been viewed as the most well-known and commonly used alternative to taking a dispute to court.⁷ one may naturally ask: what, then, distinguishes arbitration from litigation?

If we want to answer this question it should be noted that confidentiality is a key factor that leads many parties to opt for arbitration instead of resolving their dispute in litigation.⁸ Because it frequently delivers a more discreet and personalized service to businesspeople than that provided by judges.⁹

In order to empower this argument another author says, international arbitration is often chosen because it is informal and confidential, allowing parties to resolve disputes privately and discreetly, additionally, the process can be tailored to meet the specific needs of the parties, including procedural rules, choice of arbitrators, and timelines, providing a level of flexibility that courts generally cannot offer.¹⁰

Besides that, building on this idea, it can be noted today, lawyers who represent parties in arbitration understand that international arbitration has become almost as protracted and at least as costly as court proceedings. Nevertheless, the primary reason parties continue to choose arbitration lies in the advantages such as 1) ability to select their own adjudicator; 2)

⁵ Queen Mary University of London (2018). *2018 International Arbitration Survey: The Evolution of International Arbitration* [online]. [https://www.qmul.ac.uk/arbitration/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-\(2\).PDF](https://www.qmul.ac.uk/arbitration/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF), 5.

⁶ Ibid 24.

⁷ WIPO/ADR Arbitration and Mediation Center (2020). *Guide to WIPO Arbitration* [online]. Geneva, Switzerland : World Intellectual Property Organization (WIPO), <https://doi.org/10.34667/tind.42701>, 8.

⁸ POOROOYE, Avinash and FEEHILY Ron'an, (2016). Confidentiality and transparency in international commercial arbitration: finding the right balance. *Harvard Negotiation Law Review*, 322.

⁹ THIRGOOD, Russel (2021). Appeals in Arbitration: 'To Be or Not to Be'. *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 87(3), [online]. <https://doi.org/10.54648/amdm2021028>, pp. 431.

¹⁰ WILINSKI, Piotr (2021). *Excess of Powers in International Commercial Arbitration*. Hague: Eleven International Publishing, pp. 472.

the opportunity to keep both the process and the final outcome confidential; 3) International enforceability of arbitral awards.¹¹

Based on the discussion above, it has become apparent why parties often prefer arbitration to court litigation, however when it comes the essence of confidentiality commentators arguments differ from one to another. In general, when examining the legal doctrine concerning confidentiality in commercial arbitration, two opposing lines of argument can be identified:

- 1) First group of commentators maintain that confidentiality constitutes a distinctive advantage that sets arbitration apart from other forms of dispute resolution.
- 2) Second group of commentators, however, take the opposite view, arguing that confidentiality is not, in fact, an advantage of arbitration, contrary to what is commonly believed.

For the first group of commentators, the general argument regarding confidentiality is the fundamental importance of the duty of confidentiality within the framework of international commercial arbitration.¹²

The argument that confidentiality constitutes one of the main advantages of commercial arbitration is also supported by other commentators. For example, Redfern Hunter say the confidential nature of arbitration has long been viewed as one of its key benefits. In contrast to court proceedings, where the media and the public usually have the right to attend, international arbitration does not take place in an open forum. It is conducted as a private process between the parties, which means that the details of the dispute, the evidence presented, and the outcome can, in principle, be kept out of the public eye. This private structure provides a strong basis for maintaining confidentiality throughout the proceedings.¹³

Another supporting viewpoint for this argument is “Confidentiality of the arbitral process and of documents created or disclosed in the course of the arbitration proceedings has

¹¹ HENSLER, Deborah R. (2014). The Private in public, the public in private: The blurring boundary between public and private dispute resolution. In: ZEKOLL, Joachim; BALZ, Moritz and AMELUNG, Iwo (eds.). *Formalisation and Flexibilisation in Dispute Resolution*. Leiden, Boston: Brill Nijhoff, pp. 61-62.

¹² TRAKMAN, Leon. Confidentiality, Privacy and Data Protection in International Commercial Arbitration. In: Franco Ferrari and Friedrich Rosenfeld (eds.) (2022). *Handbook of Evidence in International Commercial Arbitration: Key Issues and Concepts*. Kluwer Law International, 321.

¹³ BLACKABY, Nigel; PARTASIDES, Constantine; REDFERN, Alan et al. (2015). *Redfern and Hunter on International Arbitration*. Sixth edition. Oxford: Oxford University Press, pp. 130

long been mentioned as one of the advantages of arbitration as well as one of the reasons resorting to arbitration”¹⁴

There are too many authors to exemplify who belong to this group. For example, one of them also states that confidentiality in international commercial arbitration (ICA) proceedings serves not only as one of the main motivations for parties to choose arbitration over other dispute resolution mechanisms, but also as a widely recognized and inherently accepted element of the arbitral process itself.¹⁵

On the other hand, there are other group of commentators who belong to second group believe that confidentiality is not automatically guaranteed and reject the idea that confidentiality is one of the advantages of arbitration. The arguments which belongs to this, will be analyzed below.

For example: “Many people think that arbitration is inherently confidential, but this is not true.”¹⁶

Another author in this line determines that the international commercial arbitral process is private however it is not necessarily confidential.¹⁷

Among the commentators belong to the second group, there is one who goes even further by dividing certain commonly held beliefs about arbitration into two categories: realities and myths.¹⁸ He then subdivides these myths into favorable and unfavorable ones. Within the group of so-called “favorable myths” such as the belief that arbitration is cheaper and faster he also includes the notion of confidentiality.¹⁹ Ultimately, author concludes that confidentiality should be regarded as a favorable myth of arbitration something widely believed and accepted as true, yet not necessarily reflective of the actual nature of arbitral practice.

¹⁴ NOUSSIA, Kyriaki (2010). *Confidentiality in International Commercial Arbitration: A Comparative Analysis of the Position under English, US, German and French Law* [online]. Springer Berlin, Heidelberg. [DOI.ORG/10.1007/978-3-642-10224-0](https://doi.org/10.1007/978-3-642-10224-0), pp. 103.

¹⁵ HSÏE-LÏEN TUNG, Sherlin and LÏN Brian (2018). More Transparency in International Commercial Arbitration: To Have or Not to Have? *Contemporary Asia Arbitration Journal*, 11 (1), 37.

¹⁶ COLE, Tony and ORTOLANI, Pietro (2020). *Understanding International Arbitration* [online]. London and New York: Routledge Taylor & Francis Group, pp. 159.

¹⁷ ONYEMA, Emilia (2010). *International Commercial Arbitration and the Arbitrator's Contract* [online]. Oxon: Taylor & Francis e-Library, pp. 141-142.

¹⁸ FRIEDLAND, Paul D. (2017). *Arbitration Clauses for International Contracts*. Second edition. New York: JurisNet, LLC, pp.34.

¹⁹ Ibid 35.

Some authors who also belong this group reinforce this argument by emphasizing that, although arbitration is a private process, confidentiality is not in fact guaranteed.²⁰ They point out that the private nature of arbitration does not automatically ensure that all aspects of the proceedings or related information will remain confidential.

To conclude, it is already obvious that confidentiality is all about protecting business secrets, pleading, submission and other documents from third parties, meaning it is “Non-disclosure” element of arbitration. However when looking closely at thoughts about this legal matter in commercial arbitration, it becomes clear that opinions on this issue are divided among scholars and practitioners.

This divergence of opinion shows that, within legal doctrine, the status and unique approach of confidentiality in arbitration are far from universally agreed upon. In legal doctrine generally, the existence of two opposing arguments regarding confidentiality might impede its legal development. Because not all authors consider it to be an essential or mandatory element of arbitration. This lack of consensus and clarity may, in turn, have a negative impact on the evolution of confidentiality in arbitration, preventing it from becoming a precise and well-defined legal matter.

²⁰ CARTER, James H. and FELLAS John (eds.) (2011). *International Commercial Arbitration in New York*. New York: Oxford University Press, pp. 287.

1.2. Confidentiality vs. Privacy

The private nature of arbitration proceedings, together with the confidentiality that accompanies the process, is a major reason why companies and institutions are drawn to arbitration, especially when they find themselves involved in legal disputes, sometimes even unwillingly.²¹ However, confidentiality and privacy of international arbitration processes remain a disputed and unresolved issue.²²

After discussing the importance of confidentiality in arbitration and the existence of two opposing approaches to it in the previous subchapter, it becomes particularly valuable to turn attention to privacy. By examining privacy in detail, one can better understand the distinctions between the two legal matter as well as the ways in which they are interconnected. This analysis also helps to identify potential challenges or issues that may arise due to the overlap or similarities between confidentiality and privacy. Ultimately, such an exploration not only clarifies the subtle differences and relationships between these concepts but also provides a deeper and more nuanced appreciation of their overall significance and role within the framework of arbitration.

The privacy of arbitration helps protect the process from third-party interference by restricting the submission of materials during the proceedings.²³ Meaning, privacy in arbitration ensures that hearings are limited to the parties involved, and third parties are generally not allowed to attend the proceedings.²⁴ In order to get deeper understanding, privacy refers to whether uninvited third parties such as former spouses, business partners or the media can access the hearings, observe what happens, and possibly disclose what they have learned, without the consent of the disputing parties and sometimes even without the arbitrator's consent.²⁵

²¹ BLACKABY, Nigel; PARTASIDES, Constantine; REDFERN, Alan et al. (2015). *Redfern and Hunter on International Arbitration*. Sixth edition. Oxford: Oxford University Press, pp 33.

²² BORN, Gary (2021). *International Commercial Arbitration*. Third edition. Netherlands: Kluwer Law International B.V, pp. 4565.

²³ COZAC, Sofia (2021). *Limits of confidentiality in international commercial arbitration* [online]. <https://lawyersweek.net/18875/limits-of-confidentiality-in-international-commercial-arbitration.html>.

²⁴ KAUSHAL, Ajit (2014). The Issue of Confidentiality in International Commercial Arbitration, [online]. <http://dx.doi.org/10.2139/ssrn.2379975>, 6.

²⁵ GURU, Arpit and PATEL, Asmita (2013). Confidentiality under Arbitration Proceeding: A Valid Argument? A Proposed Solution!, *Social Science Research Network*, [online]. <http://dx.doi.org/10.2139/ssrn.2303687>, 3.

Obligation of confidentiality in arbitration has traditionally been seen as a natural consequence of the private character of the proceedings.²⁶ However, this idea is subject to debate because it does not clearly differentiate between confidentiality and privacy. Regrettably, modern literature on arbitration laws and institutional rules offers only brief discussions regarding the precise legal meaning of confidentiality and how it differs from the closely related concept of privacy.²⁷

In order to make the distinction between privacy and confidentiality clearer and easier to understand, it is useful to look at the explanation provided by Tony Cole and Pietro Ortolani in their book namely *Understanding International Arbitration*. In this work, the authors present the difference in a very simple and accessible way by using an everyday example of a birthday party. They determined privacy however, is not the same as confidentiality. A very simple example can help to explain this difference. Imagine that you are organizing a birthday party. You may decide who can attend, and you can prevent people who are not invited from entering the party. This situation illustrates the idea of privacy, because it is about controlling access and deciding who can or cannot be present. Confidentiality, on the other hand, deals with something different. Even if you successfully limit attendance to only the invited guests, you cannot automatically prevent those who did attend from later telling others about what happened at the party. This second question whether and how information is shared with outsiders represents the meaning of confidentiality in arbitration. It refers to the rules that determine when, and in what ways, details about the arbitration process may be communicated to individuals or entities that are not directly involved in the proceedings.²⁸

The importance of privacy in commercial arbitration can be clearly illustrated in English court practice namely *Oxford Shipping Co. Ltd. v. Nippon Yusen Kaisha (The "Eastern Saga")* from 1984.²⁹ In this case, the parties involved were the owners, charterers, and sub-charterers. The owners had chartered the ship named *Eastern Saga* to the charterers, who in turn sub-chartered it to a company called *Sanco*. A dispute arose between the owners and

²⁶ GU, Weixia (2015). Confidentiality revisited: Blessing or curse in international commercial arbitration? *University of Hong Kong Faculty of Law Research Paper*, 2015(26), [online]. Social Science Research Network, 2.

²⁷ Ibid.

²⁸ COLE, Tony and ORTOLANI, Pietro (2020). *Understanding International Arbitration* [online]. London and New York: Routledge Taylor & Francis Group, pp. 160.

²⁹ Queen's Bench Division (Commercial Court). 26 June 1984 in commercial case No. [1984] 2 Lloyd's Rep 373.

the charterers, and the related dispute between the charterers and Sanco was considered a mirror image of the first.

According to the contract between the owners and the charterers, any arbitration disputes were to be resolved in London by a panel of three arbitrators. The central issue arose when the disputes were referred to arbitration, and the same arbitrators were appointed to handle both disputes. The claimant, however, did not agree to this arrangement, so the matter was brought before the court.

The defendant argued that holding concurrent hearings for the two cases would be more efficient, faster, and less costly. Nevertheless, the claimant maintained that, unless the parties explicitly agreed, the arbitrators had no authority to conduct concurrent hearings, and such authority could not be derived from common law either.

The court, in its judgment, upheld the claimant's position. It emphasized that private arbitration exists precisely because the parties have agreed to submit only their specific disputes to arbitration. This means that third parties are excluded from the arbitration process, and neither the tribunal nor the parties can require the arbitration to be conducted simultaneously or in a coordinated manner with another dispute, no matter how convenient or related it may seem. The arbitrators' authority is strictly limited to the arbitration to which they were appointed. This authority cannot be extended simply because a similar dispute exists, even if that dispute arises under a separate contract and is submitted to arbitration. In this way, the court reinforced that privacy holds a superior position in commercial arbitration.³⁰

In order to gain a better understanding privacy and confidentiality, it is also useful to refer to one of the most comprehensive national arbitration statutes, namely New Zealand's arbitration act of 1996. The act explicitly provides that arbitration proceedings must be conducted in private.³¹ However, when it comes to confidentiality, the statute does not impose the same absolute requirement. Instead, it recognizes arbitration agreements as being "deemed to prohibit disclosure of confidential information."³² Meaning, arbitration will be confidential when parties' have arbitration agreement.

In conclusion, it can be observed that confidentiality, unlike privacy, is not simply a matter of procedural organization but rather functions as a substantive obligation that is

³⁰ Judgement of Queen's Bench Division (Commercial Court). 26 June 1984 in commercial case No. [1984] 2 Lloyd's Rep 373.

³¹ Article 14A of Arbitration Act of New Zealand, 02 September 1996, No99.

³² Article 14B of Arbitration Act of New Zealand, 02 September 1996, No99.

primarily imposed on the parties themselves. However, privacy is procedural. Both serve the important purpose of safeguarding the integrity, security, and trust of arbitral proceedings, but they operate in different ways.

On one hand, abovementioned analyzing leads to overall that when comparing privacy and confidentiality, both legal matters might lose their legal significance without each other. To illustrate, if we consider the privacy of hearings, this principle expects limited people can attend to process and in relation to this information presented, discussed, or observed during the hearings is kept confidential and is not disclosed to unauthorized persons. However, if the parties attending the hearings were to share or reveal such information with third parties, which is supposed to remain confidential, then privacy would lose its significance entirely. Because if the parties participating in the arbitration do not have an obligation not to disclose the information they obtain to third parties, then what would be the point of allowing only a limited number of people to participate in the arbitration?

On the other hand, with regard to confidentiality, it is important to note that, similar to privacy, confidentiality also might lose its essence when exists entirely on its own, independently. To illustrate this point, if any party could participate in an arbitration in which they are not involved, meaning an unlimited number of people could attend, then what would be the point of imposing an obligation on them to keep the information they learn during the process confidential? If anyone can easily attend another party's arbitration, the existence or absence of their confidentiality obligations would have no legal significance.

However, the most important problem might stem from their similarity. People who do not have a solid understanding of the distinctions between them may easily confuse the two. This confusion could arise in jurisdictions where confidentiality is not recognized inherently (will be discussed in forthcoming chapters). In such systems, if the parties have not expressly agreed on confidentiality, they may still assume that, since commercial arbitration proceedings are conducted in private, the information disclosed during the dispute will also remain protected from disclosure. However, this assumption is misleading.

In reality, the party expecting confidentiality later can notice that sensitive business information is not legally protected and may be exposed or shared by another party or third parties. This can result in the unintended disclosure of trade secrets or other commercially valuable information.

Given that both privacy and confidentiality are crucial pillars of commercial arbitration, it is essential to distinguish between them clearly before the dispute begins.

II NATIONAL LAWS ON CONFIDENTIALITY

2.1. UNCITRAL Model Law as a core for national laws

It is widely known that the UNCITRAL Model Law on International Commercial Arbitration was originally adopted in 1985 as a comprehensive framework designed to harmonize and modernize national arbitration legislation. The Model Law provides guidance for states wishing to establish or reform their domestic arbitration systems in line with international best practices. It was subsequently amended in 2006 to reflect modern developments in arbitration. According to the information provided on the official website of UNCITRAL, legislation based on or influenced by the Model Law on International Commercial Arbitration has been adopted in 93 States, covering a total of 127 jurisdictions. This reflects the wide acceptance and influence of the Model Law in shaping modern arbitration frameworks around the world.³³

As noted above, the UNCITRAL Model Law functions merely as a default framework. Furthermore, its flexibility is clearly emphasized in the disclaimer section of the official UNCITRAL website, which states: “A model law is created as a suggested pattern for lawmakers to consider adopting as part of their domestic legislation. Since States enacting legislation based upon a model law have the flexibility to depart from the text, the above list is only indicative of the enactments that were made known to the UNCITRAL Secretariat. The legislation of each State should be considered in order to identify the exact nature of any possible deviation from the model in the legislative text that was adopted.”³⁴

From this, it can also be concluded that the UNCITRAL Model Law serves as a default framework for the countries and jurisdictions that have adopted or been influenced by it. However, an interesting point is that the Model Law does not contain a single provision expressly addressing or regulating confidentiality in arbitration. Despite its comprehensive nature and wide international application, the issue of confidentiality is left entirely unregulated within the text of the Model Law.

³³ United Nations, (n.d.). *Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006* [online].

https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.

³⁴ Ibid.

2.2. Different approaches to confidentiality in national law framework

The approach to confidentiality in arbitration differs significantly from one jurisdiction to another. Some jurisdictions recognise an inherent duty of confidentiality in arbitral proceedings, whereas others consider arbitration non-confidential unless the parties expressly agree to it through a confidentiality agreement. Therefore, when confidentiality is important, it is essential to understand the confidentiality rules under the law of the seat of the arbitration.³⁵

In general, within the context of national legislation, the issue of confidentiality in arbitration is either regulated by the relevant arbitration acts, court practice of different countries or left unregulated. In addition to statutory provisions, confidentiality may also be shaped by court practice, as is the cases in countries like Australia, Sweden, England and Singapore. This subchapter will examine how various jurisdictions address the issue of confidentiality in arbitration, to what extent it is regulated, and will provide a comparative analysis of their approaches.

Confidentiality in arbitration may arise in different forms in some cases as an implicit obligation derived from the nature of the arbitration agreement, and in others as an express obligation clearly stipulated by the parties or institutional rules.³⁶

If we take the approaches to confidentiality in commercial arbitration as a criteria, the countries can be divided into two groups when it comes to their court practice.

1. England and Singapore are very good examples, where courts have generally treated confidentiality as inherent to arbitration, meaning an implied duty even in the absence of explicit statutory provisions.

2. Unlike England and Singapore, Australia and Sweden has adopted a completely opposing position when it comes to court practice. These two countries require an additional, express agreement to recognize confidentiality in commercial arbitration, meaning they do not treat confidentiality as an inherent feature of commercial arbitration.

When it comes to first group, beginning with England, the Arbitration Act 1996 of England remains silent on the issue of confidentiality it neither defines it nor sets out its scope or limits. However, despite this modernisation, the 2025 amendments also remain silent on the

³⁵ Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs (2014). *Legal Instruments and Practice of Arbitration in the EU* [online]. [https://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU\(2015\)509988_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf), 29-30.

³⁶ S. KURKELA, Matti; TURUNEN, Santtu and Conflict Management Institute (COMI) (2010). *Due Process in International Commercial Arbitration*. Second edition, New York: Oxford University Press, pp. 136.

issue of confidentiality. No new provisions were introduced to codify or expressly regulate the confidentiality of arbitral proceedings, nor was there any attempt to define its scope or exceptions. This continued legislative silence suggests that the UK legislature has deliberately chosen to leave the regulation of confidentiality to the common law, allowing courts and arbitral practice to determine its content and limits through interpretation and precedent. However, this absence of statutory regulation has not left the matter unresolved. Instead, the English legal system has filled this gap through the development of common law principles.

The issue of confidentiality in arbitration has been addressed by English courts while staying in the same path in several well-known cases.

Beginning with the case namely *Dolling-Baker v. Merrett*³⁷, *Dolling-Baker* acted as the claimant, while *Merrett* represented the defendant side. The dispute between the parties originated from a reinsurance agreement, which eventually gave rise to legal proceedings. Before this case reached the court, the parties had already been involved in arbitration concerning the same or related issues.

When the question of whether the documents from those earlier arbitration proceedings could be disclosed in the current case was raised, the judge provided an important opinion on the matter as:

“The obligation exists in some form appears to me to be abundantly apparent. It is not a question of immunity or public interest. It is a question of an implied obligation arising out of the nature of arbitration itself. When a question arises as to production of documents or indeed discovery by list or affidavit, the court must, it appears to me, have regard to the existence of the implied obligation, whatever its precise limits may be.”³⁸

This case, decided in 1990, is significant because it established that confidentiality in arbitration is considered an implied duty. In other words, even if the arbitration agreement does not expressly mention confidentiality, it is understood to be an inherent and automatic obligation arising from the nature of arbitration itself.

Under English court practice, the path regarding confidentiality in arbitration established by *Dolling-Baker v Merrett* was subsequently followed and reinforced several years later by *Ali Shipping Corporation v. Shipyard Trogir*³⁹ which continued to uphold the same position on the issue.

³⁷ Court of Appeal of England. 21 March 1990 in commercial case No. [1990] 1 W.L.R. 1205.

³⁸ Judgement of the Court of Appeal of England. 21 March 1990 in commercial case No. [1990] 1 W.L.R. 1205.

³⁹ Court of Appeal of England. 19 December 1997 in commercial case No. [1999] 1 W.L.R. 314.

The case of *Ali Shipping Corporation v. Shipyard Trogir* arose from a contract between Ali Shipping Corporation (“Ali”) and Shipyard Trogir (“the Yard”) for the construction of a vessel known as Hull 202. According to the terms of the agreement, the Yard undertook the obligation to build the vessel for Ali. However, a dispute later emerged between the parties, leading Ali to bring a claim against the Yard.

In this case, the central issue regarding confidentiality in arbitration was that, in addition to Hull 202, there were two other shipbuilding contracts Hull 204 and Hull 206. Separate arbitration proceedings had also taken place concerning those vessels.

The defendant sought to use materials and documents from the earlier arbitrations involving Hull 204 and Hull 206 in the current arbitration related to Hull 202. However, this raised the question of whether such materials could be disclosed or relied upon, given the implied duty of confidentiality that generally applies to arbitration proceedings.

In this case, the key questions before the tribunal were:

- 1) Whether there is an implied obligation of confidentiality in arbitration proceedings arising as a matter of law or based on business efficacy, and
- 2) Whether this obligation of confidentiality prevents the disclosure of materials from earlier arbitrations.

The claimant, Ali Shipping Corporation, argued that there exists an implied obligation of confidentiality in arbitration proceedings as a matter of law, and that the defendant was therefore bound by this duty not to disclose confidential information or documents obtained in the previous arbitrations.

The defendant accepted that such an implied duty of confidentiality exists but contended that its scope should be limited.

Ultimately, the judge held that the duty of confidentiality in arbitration is implied as a matter of law, and that this duty protects the disclosure of evidence and documents generated during arbitration from being revealed outside the arbitral process.⁴⁰ This judgment reinforced that, confidentiality is a fundamental and inherent aspect of arbitration proceedings.

When examining the *Ali Shipping Corporation v. Shipyard Trogir* case, it becomes clear that the court followed the same path established earlier in *Dolling-Baker v. Merrett*. The reasoning and approach adopted in *Ali Shipping* were consistent with the principles set out in

⁴⁰ Judgement of Court of Appeal of England. 19 December 1997 in commercial case No. [1999] 1 W.L.R. 314.

Dolling-Baker, particularly regarding the recognition of confidentiality in arbitration as an implied obligation arising as a matter of law.

Under English court practice, the traditional approach to confidentiality in arbitration was further reinforced in *Wilson & Partners v. Emmott* case.⁴¹

This case, heard in England, dealt with issues of confidentiality in arbitration and its relationship to related court proceedings in multiple jurisdictions. The claimant was the company's founder, referred to as A, while the defendant was the company's former partner.

The defendant applied to the English Commercial Court, seeking permission to disclose documents from an arbitration in connection with foreign court proceedings. The court ultimately granted permission for such disclosure.

Although the main focus of the case was on the exceptions to the duty of confidentiality, the court nevertheless reaffirmed the general principle that confidentiality remains a fundamental feature of arbitration. It emphasized that confidentiality is an implicit term of the arbitration agreement, arising naturally from the private nature of arbitral proceedings.⁴²

Except for the first two court practices analyzed above in this case, English courts once again followed their traditional approach regarding confidentiality in arbitration. It reaffirmed that confidentiality is an inherent feature of the arbitral process and constitutes an implied duty.

In practical terms, this means that when parties agree to arbitrate, they are also implicitly agreeing that the proceedings, evidence, and related documents will be treated as confidential, unless the parties expressly decide otherwise. The rationale behind this approach lies in the traditional understanding of arbitration as a private dispute resolution mechanism, designed to allow parties to settle their disputes away from public scrutiny.

The implied nature of confidentiality in arbitration is not characteristic of English courts alone. Singapore, like England, follows the same approach and recognizes confidentiality in arbitration as being implied.

For instance, the case of *AAY and others v. AAZ* was heard in 2009 by the Singapore High Court, and it stands as one of the most important decisions addressing the implied duty of confidentiality in arbitration under Singapore law.⁴³

⁴¹ Court of Appeal of England and Wales. 14 August 2006 in commercial arbitration No. [2008] EWCA 184.

⁴² Judgement of the Court of Appeal of England and Wales. 14 August 2006 in commercial arbitration No. [2008] EWCA 184.

⁴³ High Court of Singapore. 02 December 2010 in commercial case No. [2010] SGHC 350.

In this case, the respondent was a U.S. corporation that had previously operated a branch in Singapore. The three claimants had joined this Singapore branch in different years, and over time, the branch evolved into an independent company first called BBZ, later CCZ, and eventually renamed DDZ. Each of the claimants held senior executive positions in the company.

The dispute arose out of a Sale and Purchase Agreement (SPA) concluded between the parties. According to Clause 18 of the SPA, any disputes arising from the agreement were to be referred to arbitration, and the arbitral award would be final and binding. Following disagreements concerning the execution of the SPA, arbitration proceedings were initiated.

During the arbitration, the tribunal and later the court examined a wide range of legal doctrines and comparative practices from other jurisdictions, including English and Australian authorities. The central issue was whether confidentiality in arbitration exists as an implied legal duty, even when it is not expressly stated in the arbitration agreement.

In its reasoning, the Singapore High Court conducted a detailed analysis of international arbitration law and emphasized the importance of confidentiality as a core feature of the arbitral process. Drawing on English precedents such as *Dolling-Baker v. Merrett* and *Ali Shipping Corporation v. Shipyard Trogir*, the court concluded that Singapore should adopt a similar approach.

In its final judgment, the court stated:

“I find that there was an obligation of confidentiality as a substantive doctrine of arbitration law as developed in the English jurisprudence and accepted in Singapore.”⁴⁴

This decision firmly established that, under Singaporean law, confidentiality in arbitration is an implied obligation.

The position of England, followed closely by Singapore, can be described as an opt-out approach to confidentiality in arbitration meaning that confidentiality is implied by default unless the parties agree otherwise.

However, it should not be assumed that all countries recognize confidentiality as an implied term. When it comes to second group of countries, for instance, in Australian court practice, there is a case namely *Eso Australia Resources v. Gas and Fuel Corporation of Victoria and State Electricity Commission of Victoria* that takes a completely opposite position

⁴⁴ Judgement of High Court of Singapore. 02 December 2010 in commercial case No. [2010] SGHC 350.

compared to the English and Singapore court practices analyzed above.⁴⁵ In that case, the court did not accept confidentiality as an implied obligation arising from the arbitration agreement. After comprehensive analysis, there is statement in this court practice that:

“An obligation not to disclose may arise from an express contractual provision. If the parties wished to secure the confidentiality of the materials prepared for or used in the arbitration and of the transcripts and notes of evidence given, they could insert a provision to that effect in their arbitration agreement.”⁴⁶

Another country which belongs to second group is Sweden and it represents a position that stands in contrast to the approaches taken by England and Singapore, while being more closely aligned with the stance adopted in Australia. A clear illustration of this position can be found in the case of *A.I. Trade Finance v. Bulgarian Foreign Trade Bank*.⁴⁷

Examining the parties involved and the nature of the dispute, Bulbank was a Bulgarian bank and the respondent in the proceedings, whereas A.I. Trade Finance (AIT) acted as the claimant. The background to the dispute was that AIT had initiated arbitration proceedings against Bulbank, relying on an arbitration clause contained in a loan agreement between Bulbank and an Austrian creditor. During the arbitration, Bulbank objected, arguing that the arbitration clause did not bind it in relation to AIT.

The arbitration proceeded, and the resulting award was published in Mealy's International Arbitration Report. Following this, Bulbank promptly sent a formal notice, asserting that the arbitration clause had been breached in the context of the agreement between Bulbank and AIT, and sought to have the award annulled on the grounds that the published decision contained sensitive information. Although Bulbank could have invoked confidentiality as a matter of concern in its dispute with AIT, the contractual agreement between the parties did not contain any clause providing for such confidentiality.

Moreover, the court also mentioned that the Swedish Arbitration Act of 1929, which governed arbitration at the time, did not impose any confidentiality obligations on the parties. This absence of statutory confidentiality obligations continued under the subsequent Swedish Arbitration Act, which replaced the 1929 legislation, as it also contained no provisions addressing the issue of confidentiality.

⁴⁵ High Court of Australia. 07 April 1995 in commercial case No. [1995] HCA 19

⁴⁶ Judgement of the High Court of Australia. 07 April 1995 in commercial case No. [1995] HCA 19

⁴⁷ Supreme Court of Sweden. 27 October 2000 in commercial case No. T 1881-99 (2000)

In its final judgment, the Swedish Supreme Court upheld the decision of the court of appeal and confirmed that:

“A party to arbitration proceedings cannot be deemed bound by a confidentiality undertaking unless the parties have specifically agreed to such an obligation. As a result, the court concluded that AIT had not committed any breach of contract by allowing the decision rendered by the arbitrators during the arbitration proceedings to be published. Accordingly, Bulbank had no legitimate grounds to terminate the arbitration clause, and its claim seeking to have the arbitral award annulled or set aside was dismissed.”⁴⁸

In the end after having both understanding about opt-in and opt-out confidentiality, it should be noted that according to Queen Mary University’s International Survey, the majority of people favor the opt-out model (74%),⁴⁹ recognizing confidentiality as a default feature of arbitration that automatically applies unless the parties decide to exclude it. This reflects a broader international trend toward treating confidentiality as an inherent and standard element of the arbitral process.

In commercial arbitration, the distinction such as opt-in and opt-out confidentiality can be observed not only in court practices but also in the national arbitration laws also. A common feature can be observed in their respective national arbitration laws: these legal systems generally require an express agreement between the parties to ensure confidentiality in arbitration. In other words, confidentiality is not presumed to exist automatically; rather, it becomes effective only if the parties explicitly agree to it.

For instance, the Norwegian Arbitration Act clearly reflects this approach. It provides that: “The arbitral proceedings and the award are not deemed to be confidential unless otherwise agreed between the parties for each arbitration.”⁵⁰ This formulation indicates that, under Norwegian law, confidentiality is not an inherent or implied characteristic of arbitration. Instead, it is treated as a contractual matter, dependent entirely on the will and agreement of the parties involved.

Such wording demonstrates a neutral legislative stance toward confidentiality the law neither prohibits nor promotes it but instead leaves the question open to the parties’ discretion.

⁴⁸ Judgement of Supreme Court of Sweden. 27 October 2000 in commercial case No. T 1881-99 (2000).

⁴⁹ Queen Mary University of London (2018). *2018 International Arbitration Survey: The Evolution of International Arbitration* [online]. [https://www.qmul.ac.uk/arbitration/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-\(2\).PDF](https://www.qmul.ac.uk/arbitration/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF), 28.

⁵⁰ Section 5 of Arbitration Act of Norway, 14 May 2004, No25.

Other countries for example, Finland, Denmark, Belgium, Ireland, and Italy laws on arbitration do not contain any provisions regarding confidentiality in arbitration, meaning that at the level of national legislation, these countries remain silent on this issue.

With regard to Azerbaijan's national legislation on arbitration, it should be noted that neither the 1999 Arbitration Law nor the 2024 Arbitration Law addresses the issue of confidentiality in arbitration. The legislation does not contain any specific provision regulating confidentiality, and the matter is not treated as a distinct or separate legal requirement within the framework of national arbitration law. It means that, in Azerbaijan, confidentiality in arbitration is not statutorily recognized, meaning that any protection of confidential information must rely entirely on party agreements, institutional rules rather than on explicit statutory provisions.

On the other hand, it would be incorrect to assume that confidentiality does not exist in these countries simply because they remain silent on the issue in arbitration. Each of the countries which's legislations are silent are the members of 1958 New York Convention⁵¹, which affirms the primacy of the parties' agreement regarding the composition of the tribunal and the arbitral procedure. Meaning, the 1958 New York Convention provides that each Contracting State shall recognize a written agreement by which the parties undertake to submit to arbitration any or all disputes that have arisen or may arise between them in connection with a defined legal relationship, whether contractual or non-contractual, as long as the subject matter is capable of being resolved through arbitration.⁵²

“Arbitrations are governed by the law of the seat of arbitration, often referred to as the *lex arbitri*. The seat is the place where the arbitration is legally considered to occur, even if the hearings or other parts of the process take place in a different location. Parties are generally free to choose the law that will apply to their dispute, and the most effective way to do this is by including a choice of law clause in their contract. They may also agree to have their dispute resolved according to rules that do not belong to any national or regional legal system, such as custom or *lex mercatoria*.”⁵³

⁵¹ New York Convention (n.d.). *Contracting States* [online]. <https://www.newyorkconvention.org/contracting-states>

⁵² Article 2 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, United Nations (1958). 330 UNTS 3.

⁵³ COLE, Tony and ORTOLANI, Pietro (2020). *Understanding International Arbitration* [online]. London and New York: Routledge Taylor & Francis Group, pp 46-47.

As discussed above when parties are not sufficient the provision of confidentiality in the law of the seat they can agree on confidentiality agreement. There in order to have robust confidentiality in their arbitration proceedings, UNCITRAL Notes determines the cases where parties should pay extra attention:

a) The material or information that is to be kept confidential (for example, the fact that the arbitration is taking place, the identity of the parties and the arbitrators, pieces of evidence, written and oral submissions, the content of the award);

b) Measures for maintaining the confidentiality of such information 18 and of the hearings and the duration of the obligation on confidentiality;

c) Circumstances in which confidential information may be disclosed in whole or in part to the extent necessary to protect a legal right;

d) Other circumstances in which such disclosure might be permissible (for example, information in the public domain, or disclosures required by law or a regulatory body)⁵⁴

However even when the parties have inserted a choice of law clause into their contract, the doctrine of separability means that this chosen law may not automatically extend to the arbitration clause contained within the same contract. The arbitration agreement is treated as a separate and independent agreement, and as a result, there is no single, universally accepted method for determining which law should govern it. Different jurisdictions apply different tests, which makes the issue complex and often dependent on the specific circumstances of the case.⁵⁵

In conclusion when these different approaches are compared, it becomes evident that there is no single, standardized global model for the protection of confidentiality in arbitration in national law framework. Even among leading arbitration jurisdictions, the level of protection differs considerably. For example, English and Singaporean courts have long recognized confidentiality as an implied obligation arising from the arbitration agreement, treating it as an integral part of the arbitral process. On the other hand, Australian and Swedish courts have rejected the notion that confidentiality is implied by law, adopting a more distinct approach.

Therefore, while the importance of confidentiality in arbitration is widely acknowledged, its legal foundation, scope, and enforceability remain inconsistent across

⁵⁴ UNCITRAL (2016). *Notes on Organising Arbitration Proceedings* [online]. <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-notes-2016-e.pdf>, 17-18.

⁵⁵ COLE, Tony and ORTOLANI, Pietro (2020). *Understanding International Arbitration* [online]. London and New York: Routledge Taylor & Francis Group, pp 46-47.

jurisdictions. This diversity highlights the absence of a uniform standard and underlines the need for greater clarity and harmonization if confidentiality is to continue serving as one of the defining and trusted features of international arbitration.

It is clear that, having standard approach to confidentiality in commercial arbitration would be create a great clarity to the parties in their dispute.

As mentioned in this subchapter above, the approach to confidentiality in arbitration is determined by the law of the seat, also known as the *lex arbitri*. Therefore, I would recommend that when parties enter into an arbitration agreement to resolve a dispute, they should carefully examine how the law of the seat governs confidentiality in arbitration proceedings. This is crucial because different jurisdictions may have varying rules and interpretations regarding what information must remain confidential and the extent of the parties' obligations.

As noted earlier in this research, there may be parties in commercial arbitration who cannot distinguish between privacy and confidentiality. Considering the two opposite approaches to confidentiality in commercial arbitration across different countries, it can be said that if a party expects confidentiality to arise from the private nature of arbitration but there is no additional confidentiality agreement between the parties, and the law of the seat requires an express agreement for confidentiality to apply, then that party's expectation of confidentiality may be frustrated. In that case the party may face undesirable consequences from the disclosure of information that they wanted to keep confidential.

III. SCOPE OF CONFIDENTIALITY

3.1. Material scope of confidentiality

3.1.1. Confidential materials in national law

From the previous subchapter, it also became clear to us that the confidentiality is governed by the law of the seat of arbitration. That's why when analyzing the confidentiality of the arbitration process, also when specifically considering the material scope relevant to this subchapter, the first step should be to examine the national arbitration laws of different countries. This is important because each of these national laws has the potential to serve as the law of the seat, meaning that they may directly influence how confidentiality is regulated and enforced in a given arbitration. A clear understanding of these laws is therefore essential to determine which information is confidential?

This subchapter will pay attention to national arbitration laws that have previously been little studied or, in some cases, not examined at all. These laws will be analyzed through the prism of the material scope, providing a deeper and more comprehensive understanding of how they regulate aspects relevant to the confidentiality.

If we now examine the arbitration laws of various countries, it is possible to categorize them into two groups based on the level at which they regulate confidentiality in arbitration:

1. Countries with strong national laws for example, in Central Asia: Kazakhstan, Uzbekistan, Mongolia; in Europe: Portugal, Spain, Norway; Prince Edward Island; in the Middle East: DIFC; in Latin America: Peru, in the Southern Hemisphere: Australia and New Zealand. These jurisdictions have well-developed legal frameworks that provide clear rules on confidentiality in arbitration.
2. Countries with weak regulatory frameworks for instance, Georgia, Lithuania and Latvia. In these jurisdictions, national laws provide minimal guidance on confidentiality.

From the perspective of material scope, the national legislation of the Republic of Kazakhstan takes a general and broad approach, referring to “information that has become known during an arbitration.”⁵⁶ This indicates that the law considers confidential the documents involved in the process, such as pleadings, statements of claim, statements of defense, and similar materials. In other words, it establishes that these types of documents and information generated or disclosed during arbitration are to be treated as confidential.

⁵⁶ Article 4 (5) of the Law of the Republic of Kazakhstan On International Commercial Arbitration, 28 December 2004, No. 23-III ZRK.

Uzbekistan is also among the countries that place a strong emphasis on confidentiality in commercial arbitration. Unlike Kazakhstan, Uzbekistan takes a more detailed approach, explicitly defining confidential materials in its national legislation as encompassing all documents prepared for the arbitration as well as those generated during the arbitration process.⁵⁷ This broader interpretation ensures that a wide range of materials related to the proceedings is covered under confidentiality protections.

Mongolia is also one of the countries whose national legislation provides robust protection for confidentiality in arbitration. Under its legal framework, confidential materials are defined to include not only all documents submitted or produced by a party during the arbitration but also all decisions and orders issued in the course of the proceedings.⁵⁸ This broader approach clearly distinguishes Mongolia from Kazakhstan and Uzbekistan, as it explicitly encompasses the arbitral award itself within the scope of confidential materials, thereby offering a more comprehensive protection of sensitive information generated throughout the arbitration process.

Among European countries, Portugal stands out for providing statutory protection of confidentiality in commercial arbitration. At the national law level, Portuguese legislation adopts a broad approach, defining confidential materials to encompass all information obtained during the arbitration as well as all documents submitted, disclosed, or otherwise brought to the parties' or tribunal's attention throughout the course of the proceedings.⁵⁹ This ensures that both procedural communications and evidentiary materials are covered under confidentiality. However, like Uzbekistan and Kazakhstan jurisdictions, Portuguese law does not explicitly extend this protection to the arbitral award itself, leaving the treatment of the award's confidentiality to the discretion of the parties or the applicable arbitration rules.

The arbitration act of Prince Edward Island addresses the issue of confidentiality by defining confidential materials in a comprehensive manner. Specifically, it includes not only the arbitral proceedings themselves but also all evidence presented and all information connected with the arbitration.⁶⁰ This broad definition ensures that the full range of procedural and substantive materials, ranging from submissions and testimonies to documents and other

⁵⁷ Article 53 of Law of The Republic of Uzbekistan on International Commercial Arbitration, 16 February 2021, No. ZRU-674.

⁵⁸ Article 50 of Arbitration Law of Mongolia, 26 January 2017.

⁵⁹ Article 30 (5) of the Voluntary Portuguese Arbitration Law, 14 March 2012, No63/2011.

⁶⁰ Article 70 of the Prince Edward Island Arbitration Act, 01 March 2024.

information exchanged during the arbitration, is protected under confidentiality, providing parties with a clear legal basis to maintain the confidentiality of the arbitration process.

In Norway's national arbitration law, confidentiality applies only with respect to the arbitral proceedings and the award.⁶¹ It should be emphasized again that Norway applies this only when there is an express agreement on confidentiality.

The DIFC Arbitration Law adopts a broad approach to confidentiality by defining confidential materials simply as all information relating to the arbitral proceedings.⁶² The law does not provide a detailed or specific list of what constitutes confidential materials, leaving the definition intentionally general. Therefore, material scope of confidentiality can encompass a wide range of information, including procedural communications, evidence, documents submitted by the parties, and other materials arising in connection with the arbitration.

In the same line with DIFC, Peru's national arbitration law, the material scope of confidentiality is defined as the award and any information obtained through the arbitration process.⁶³

In Spain, the national legislation does not provide a specific list of confidential materials. Instead, it defines confidentiality more broadly as information received on the occasion of arbitration, leaving the scope of protected information general and inclusive of any material obtained in connection with the arbitration proceedings.⁶⁴

The Australian International Arbitration Act 1974 pays particular attention to the issue of confidentiality. It initially defines confidential information as information that relates to the proceedings or to an award made in the proceedings. It then specifically identifies the types of information as:

- a) the statement of claim, statement of defence, and all other pleadings, submissions, statements, or other information supplied to the arbitral tribunal by a party to the proceedings;
- b) any evidence (whether documentary or other) supplied to the arbitral tribunal;
- c) any notes made by the arbitral tribunal of oral evidence or submissions given before the arbitral tribunal;
- d) any transcript of oral evidence or submissions given before the arbitral tribunal;

⁶¹ Section 5 of Arbitration Act of Norway, 14 May 2004, No25

⁶² Article 14 of Arbitration Law DIFC Law, 01 September 2008, No1 of 2008.

⁶³ Article 51 of Peruvian Legislative Decree, 1 September 2008, No1071.

⁶⁴ Article 24 (2) of Act 60/2003 of Spain on Arbitration, 23 December, 2003, No60/2003.

- e) any rulings of the arbitral tribunal;
- f) any award of the arbitral tribunal.⁶⁵

This detailed enumeration demonstrates that the Australian legislation takes a comprehensive approach, explicitly covering procedural documents, evidence, tribunal notes, rulings, and the award itself, thereby providing one of the most robust statutory protections for confidentiality in arbitration.

When it comes to second group as noted at the beginning of this subchapter, Georgia is among the countries that provide weak regulation of confidentiality in arbitration. While its Law on Arbitration states that confidential information must not be disclosed,⁶⁶ it does not specify what constitutes confidential information or which materials in commercial arbitration are to be treated as confidential.

Lithuania generally provides that the arbitration process is confidential,⁶⁷ adopting a broad approach without specifying particular types of materials or information that fall under this protection.

Latvia, on the other hand, not only recognizes the overall confidentiality of the arbitration process but also explicitly extends this protection to information concerning the arbitration proceedings.⁶⁸ By doing so, Latvian law clarifies that confidentiality applies not only to the procedural aspects of the arbitration but also to any information generated, disclosed, or received in connection with the proceedings, providing a somewhat more detailed scope of protection compared to Lithuania.

New Zealand's Arbitration Act does not specify which information is subject to confidentiality.

Apart from statutory provisions, if we examine which materials are considered confidential through court practice, we would refer to English court practices in this context. As noted in the previous sections, the English Arbitration Act 1996 does not contain any provisions specifically addressing confidentiality, and the amendments made in 2025 also did not introduce any statutory confidentiality rules. Nevertheless, English law has developed a framework for addressing the scope of confidential materials through court practice.

⁶⁵ Section 15 of International Arbitration Act 1974 of Australia, 1974, No136.

⁶⁶ Article 32(5) of Law of Georgia on Arbitration, 19 June 2009, No1280-IS.

⁶⁷ Article 8(3) of Republic of Lithuania Law on Commercial Arbitration, 21 June 2012, No I-1274. TAR, 2012, 2089.

⁶⁸ Article 23(1) of Arbitration Law of Latvia, 11 September 2014, No2014/194.1.

In *Dolling Baker* case, the court provided a clear definition of what constitutes confidential materials in the context of arbitration. The judge held that confidential materials include 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.⁶⁹ This interpretation ensures that a wide range of procedural and substantive materials are treated as confidential, covering not only documents and evidence but also records of testimony and the arbitral award itself.

Subsequently, in *Ali Shipping*, the court reaffirmed and applied the principles established in *Dolling Baker* when addressing the issue of confidential materials.⁷⁰ By relying on this precedent, English courts have created a practical and detailed framework for determining the scope of confidentiality in arbitration, effectively filling the gap left by the silence of the Arbitration Act 1996. This approach demonstrates how English law relies on judicial interpretation and established court practice to regulate confidentiality, rather than codifying detailed provisions within the statute itself.

In conclusion, this subchapter examined the national jurisdictions and court practices of the countries mentioned at the beginning of the research from the perspective of the material scope of confidentiality in commercial arbitration. By summarizing the sources that were studied, it can be said that these jurisdictions differ significantly from one another. In my opinion, such differences may not create a serious problem in common law countries like England, because as we saw in the two English court cases, even though statutory law is silent on confidentiality, a later case followed and relied on the reasoning of an earlier one. However, this situation may create difficulties for civil law countries. If the parties have no confidentiality agreement and have not agreed on which materials should remain confidential, determining the material scope of confidentiality becomes more complicated. This is because in such cases there is no confidentiality agreement, no statutory provision, and no court practice to rely on.

On the other hand national laws often provide guidance on the confidentiality of submissions, pleadings, and testimonies, but there are relatively few laws that address the confidentiality of the award itself. The parties should reach an agreement in advance regarding whether the award, that is, the final arbitral act, will remain confidential.

⁶⁹ Court of Appeal of England. 21 March 1990 in commercial case No. [1990] 1 W.L.R. 1205.

⁷⁰ Court of Appeal of England. 19 December 1997 in commercial case No. [1999] 1 W.L.R. 314.

3.1.2. Confidential materials in Institutional Arbitration Rules

Besides the national law (Arbitration acts and court practices) arbitral institutions commonly incorporate detailed provisions within their arbitration rules to ensure confidentiality. This framework provides an additional layer of protection, ensuring that sensitive information is not disclosed, even in jurisdictions where the law of the seat does not explicitly recognize or guarantee confidentiality.⁷¹

For a deeper analysis, it would be useful to conduct a comparison of institutional arbitration rules in terms of confidentiality criteria when it comes to the question “What is confidential?”

LCIA addresses this matter from a general perspective. Specifically, the rules define confidential information as materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings.⁷² This means that the LCIA does not provide an exhaustive list of what constitutes confidential information; instead, it regulates the matter in a broad and generalized manner, leaving room for interpretation depending on the context of each case.

Unlike the arbitral institutional rule mentioned above, SIAC provides a far more detailed and structured approach to the issue of confidentiality in arbitration. Specifically, SIAC begins by defining confidential information in broad terms as “matters relating to the proceedings.”⁷³ It then elaborates on this definition by expressly enumerating the types of information covered. According to the rule, confidentiality extends to the existence of the arbitration, the deliberations of the tribunal, the pleadings, evidence, submissions, and all other materials and written communications produced and submitted by the parties in the arbitration, and any decision, ruling, order, or award.⁷⁴

This formulation demonstrates that SIAC not only recognizes confidentiality as a core procedural principle but also seeks to define its scope with precision listing the exact categories

⁷¹ Directorate General for Internal Policies Policy Department C: Citizen’s Rights and Constitutional Affairs (2014). Legal Instruments and Practice of Arbitration in the EU [online]. [https://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU\(2015\)509988_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf), 30.

⁷² Article 30 of London Court of International Arbitration, Arbitration Rules 2020. https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx.

⁷³ Article 59(3) of Singapore International Arbitration Center, Arbitration Rules 2025. <https://siac.org.sg/siac-rules-2025>.

⁷⁴ Article 59 (4) of Singapore International Arbitration Center, Arbitration Rules 2025. <https://siac.org.sg/siac-rules-2025>.

of protected information while acknowledging limited exceptions where disclosure may be justified.

SIAC, unlike many other arbitral institutions, has made the scope of confidentiality exceptionally clear, straightforward, and accessible for parties who choose to apply its rules to their arbitration proceedings. By specifying what constitutes confidential information within different sub-paragraphs of the same provision, SIAC provides a well-structured framework. SIAC's approach enhances clarity in understanding confidentiality obligations. This balance makes SIAC rules not only legally precise but also accessible and predictable.

When it comes to defining what falls under confidentiality, HKIAC takes a clear and focused stance. It specifies that confidentiality applies to the arbitration under the arbitration agreement.⁷⁵

In other words, HKIAC extends confidentiality both to the arbitral process itself meaning everything that occurs under the arbitration agreement and to the final outcomes, such as awards. Although it does not provide an exhaustive list of all confidential materials (for instance, pleadings, submissions, or evidence), its concise wording effectively encompasses the core elements of the arbitration.

In middle east rules, BCDR and the DIAC address the issue of confidentiality in a generally similar manner. The BCDR Rules define confidentiality broadly, covering all matters relating to the arbitration and the award.⁷⁶ In contrast, DIAC provides a slightly more detailed formulation, extending confidentiality to all awards and orders in the arbitration, together with all materials created for the purpose of the arbitration and all other documents produced by another party in the arbitration.⁷⁷

However, an important distinction lies in the BCDR's additional provision, which states that unless the parties have agreed otherwise in writing the tribunal may make orders concerning the confidentiality of the arbitration.⁷⁸ While the BCDR Rules do not specify in

⁷⁵ Article 45(1) of Hong Kong International Arbitration Center, Administered Arbitration Rules 2024. https://www.hkiac.org/sites/default/files/ck_filebrowser/2024%20HKIAC%20ADMINISTERED%20ARBITRATION%20RULES%20-%20English.pdf.

⁷⁶ Article 40(1) of Bahrain Chamber for Dispute Resolution, Rules of Arbitration 2022. <https://bcdr.org/2022-rules-of-arbitration/>.

⁷⁷ Article 38 of Dubai International Arbitration Center, Arbitration Rules 2022. https://www.diac.com/wp-content/uploads/2024/04/DIAC-Arbitration-Rules-2022_EN.pdf.

⁷⁸ Article 40(3) of Bahrain Chamber for Dispute Resolution, Rules of Arbitration 2022. <https://bcdr.org/2022-rules-of-arbitration/>.

detail which materials are deemed confidential, this clause grants the arbitral tribunal discretionary authority to issue confidentiality orders.

This means that, the tribunal has the power to determine which materials or aspects of the proceedings will remain confidential. In this way, the BCDR framework provides a flexible and case-specific mechanism for safeguarding confidentiality, enabling the tribunal to adapt the level of protection to the particular needs of each arbitration.

The AAA approaches the question of what constitutes confidential information by first defining it broadly as all matters relating to the arbitration or the award.⁷⁹ At first glance, this may seem like a general and unspecific formulation; however, a closer look reveals that the AAA framework goes beyond a merely abstract definition.

In particular, the AAA in this terms has similarity with BCDR. AAA Rules expressly provide that upon the agreement of the parties or the request of any party, the arbitrator may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.⁸⁰

This formulation demonstrates that the AAA like BCDR not only recognizes a general duty of confidentiality but also empowers the arbitral tribunal to extend the scope of confidentiality dynamically. Thus, the tribunal either upon mutual party agreement or the request of a single party can classify additional information as confidential or adopt specific protective measures for safeguarding sensitive materials such as trade secrets or proprietary data.

By doing so, DIS goes beyond the general formulations commonly found in other institutional rules and provides a clear, itemized list of what should be treated as confidential.⁸¹ This approach is advantageous because it leaves less room for ambiguity and ensures that all participants in the proceedings parties, counsel, and arbitrators have a precise understanding of the scope of confidentiality.

Unlike other arbitral institutions such as, DIAC, and BCDR, but in a manner similar to SIAC, DIS adopts a more detailed and structured approach to defining what constitutes

⁷⁹ Article 45a of American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures 2022. https://www.adr.org/media/qielmf0g/2025_commercialrules_web.pdf.

⁸⁰ Article 45b of American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures 2022. https://www.adr.org/media/qielmf0g/2025_commercialrules_web.pdf.

⁸¹ Article 44(1) of German Arbitration Institute (DIS), Arbitration Rules 2018. [file:///C:/Users/Admin5/Downloads/2018_DIS-Arbitration-Rules_012023%20\(2\).pdf](file:///C:/Users/Admin5/Downloads/2018_DIS-Arbitration-Rules_012023%20(2).pdf).

confidential information in arbitration. In its confidentiality provision, DIS initially refers broadly to “any information concerning the arbitration”, and then proceeds to specify in detail what this encompasses.

It explicitly lists as confidential: “the existence of the arbitration, the names of the parties, the nature of the claims, the names of any witnesses or experts, any procedural orders or awards, and any evidence that is not publicly available.”⁸²

In contrast to institutions that rely on broad, interpretive clauses, DIS’s explicit enumeration enhances clarity in application while maintaining strict confidentiality, striking a practical balance between clarity and protection.

Like most other arbitral institutions (with certain exceptions such as SIAC and a few others), CEPANI follows a rather traditional approach in defining what constitutes confidential information in arbitration. It identifies confidential materials as all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party.

This formulation reflects a conventional and concise understanding of confidentiality, focusing primarily on documents and materials directly related to the arbitration process. Unlike more detailed frameworks such as SIAC’s, CEPANI’s provision does not elaborate the exact list of documents that regarded as confidential information.

Although the WIPO Arbitration Rules do not explicitly list which materials are to be considered confidential, they approach the issue from a more logical and criteria-based perspective. Specifically, WIPO identifies certain characteristics that determine whether information qualifies as confidential. Under these criteria, information will be regarded as confidential if it is:

- in the possession of a party,
- not accessible to the public,
- of commercial, financial, or industrial significance, and
- treated as confidential by the party possessing it.⁸³

Under the WIPO Arbitration Rules, any party has the right to request that certain information be treated as confidential. WIPO has established a well-structured and precise

⁸² Article 44(1) of German Arbitration Institute (DIS), Arbitration Rules 2018. [file:///C:/Users/Admin5/Downloads/2018_DIS-Arbitration-Rules_012023%20\(2\).pdf](file:///C:/Users/Admin5/Downloads/2018_DIS-Arbitration-Rules_012023%20(2).pdf).

⁸³ Article 54(a) of World Intellectual Property Organisation, Arbitration Rules 2021. <https://www.wipo.int/amc/en/arbitration/rules/index.html>.

procedure for this purpose. According to the rules party that wishes to rely on the confidentiality of any information it intends or is required to submit in the arbitration, including material provided to an expert appointed by the Tribunal, must apply to the Tribunal to have that information formally classified as confidential. The party must send a notice to the Tribunal and provide a copy to the other party. Without revealing the actual content of the information, the party must set out in the notice the reasons why it considers the information to be confidential.⁸⁴ After that The Tribunal will decide whether the information should be treated as confidential and whether it is of a kind that, without special protective measures during the proceedings, could likely cause serious harm to the party claiming confidentiality.⁸⁵ Apart from tribunal confidentiality advisor caan do this too. In exceptional situations, instead of deciding on its own whether certain information should be treated as confidential and whether the lack of special protective measures would likely cause serious harm to the party requesting confidentiality, the Tribunal may appoint a confidentiality advisor. This can be done either at the request of a party or on the Tribunal's own initiative, after consulting the parties. The confidentiality advisor will then determine whether the information should be classified as confidential and, if so, establish the conditions under which it may be disclosed and identify the individuals to whom the information may be revealed, either fully or partially.⁸⁶

This provision achieves a balanced procedural mechanism. On one hand, it ensures that the requesting party does not have to reveal the substance of the sensitive information while seeking protection; on the other hand, it keeps the opposing party informed that such a confidentiality request has been made and on what grounds.

The fact that the WIPO Arbitration Rules allow parties to apply for any information to be classified as confidential and in certain cases, even provide for the appointment of a confidentiality advisor to assess such information represents a remarkable level of procedural sophistication. In this procedure, the confidential information may remain undisclosed not only to the opposing party (if it is not the source of the information) but even to the arbitral tribunal itself, ensuring that sensitive content remains completely protected.

⁸⁴ Article 54(b) of World Intellectual Property Organisation, Arbitration Rules 2021. <https://www.wipo.int/amc/en/arbitration/rules/index.html>.

⁸⁵ Article 54(c) of World Intellectual Property Organisation, Arbitration Rules 2021. <https://www.wipo.int/amc/en/arbitration/rules/index.html>.

⁸⁶ Article 54(d) of World Intellectual Property Organisation, Arbitration Rules 2021. <https://www.wipo.int/amc/en/arbitration/rules/index.html>.

Such a nuanced and well-defined mechanism for dealing with confidentiality is unique to WIPO; no other arbitral institution has included such a refined procedural safeguard within its confidentiality provisions.

The Baku Arbitration Center (BAC) Arbitration Rules which came into force in 18 October 2025, address the issue of confidentiality across three distinct provisions, each reflecting a different aspect of the arbitral process:

1. Expedited Arbitration Rules:

Under these rules, confidentiality is explicitly guaranteed through the provision stating that all proceedings under the Expedited Procedure Rules shall be confidential, including filings, hearings, and awards.⁸⁷

This means that every stage of an expedited arbitration from the submission of documents to the issuance of the award is covered by an automatic duty of confidentiality. The wording demonstrates a comprehensive approach that applies uniformly, without requiring additional consent or agreement from the parties.

2. General Arbitration Proceedings:

In a broader sense, the BAC Rules also affirm that arbitral proceedings are confidential.⁸⁸ This general clause reinforces the principle of confidentiality as a core procedural standard applicable to all arbitrations administered by the BAC, not just expedited ones.

3. Data Protection:

The third provision touches upon confidentiality from a data protection perspective, which goes beyond the discussion and recognizing that personal and sensitive information shared during arbitration must be processed and safeguarded in compliance with data protection norms.⁸⁹

Although the BAC initially approaches the issue of confidentiality from a general perspective merely stating that arbitral proceedings are confidential⁹⁰ it later follows a more

⁸⁷ Article 8(1) of Baku Arbitration Center, Arbitration Rules 2025. <https://baku-arbitration-centre.b-cdn.net/Baku%20Arbitration%20Centre%20Arbitration%20Rules.pdf>.

⁸⁸ Article 55 of Baku Arbitration Center, Arbitration Rules 2025. <https://baku-arbitration-centre.b-cdn.net/Baku%20Arbitration%20Centre%20Arbitration%20Rules.pdf>.

⁸⁹ Article 58 of Baku Arbitration Center, Arbitration Rules 2025. <https://baku-arbitration-centre.b-cdn.net/Baku%20Arbitration%20Centre%20Arbitration%20Rules.pdf>.

⁹⁰ Article 55(1) of Baku Arbitration Center, Arbitration Rules 2025. <https://baku-arbitration-centre.b-cdn.net/Baku%20Arbitration%20Centre%20Arbitration%20Rules.pdf>.

structured and detailed approach, by explicitly clarifying what types of information fall within the scope of confidentiality.

Specifically, the BAC Rules define confidential information as the existence of the arbitration, pleadings, evidence, submissions, and all other materials and written communications submitted by the parties in the arbitration, as well as any award, ruling, decision, or order.⁹¹

As a conclusion to this subchapter, it should be noted that although arbitral institutional rules regulate this issue in more detail than national laws, they do not provide a fixed list for the material scope of confidentiality. While these rules serve as contractual instruments to fill gaps in national laws, each of them regulates the issue differently. Considering that arbitral institutional rules only govern the arbitration when the parties have chosen to submit to them, it is important for the parties to agree in advance on what information they wish to keep confidential and to select a rule that fits their dispute. The challenge, however, is that examining, searching for, and identifying the appropriate rules and verifying whether they are suitable for the dispute, as well as reaching an agreement with the other party, can be very time-consuming.

⁹¹ Article 55(2) of Baku Arbitration Center, Arbitration Rules 2025. <https://baku-arbitration-centre.b-cdn.net/Baku%20Arbitration%20Centre%20Arbitration%20Rules.pdf>.

3.2. PERSONAL SCOPE OF CONFIDENTIALITY

3.2.1. Confidentiality subjects in national law and legal doctrine

After understanding that confidentiality plays a crucial role in the functioning of arbitration, it would be important to determine who is bound by this obligation and the extent to which it applies within the arbitral process. Identifying the scope of individuals that confidentiality applies whether it covers only the parties, or also extends to arbitrators, witnesses, experts, and other participants would help to form a clearer picture of how confidentiality operates in practice. Therefore, examining the reach and limits of this obligation when it comes to personal scope would be an essential step toward fully comprehending the legal significance and practical function of confidentiality in arbitration.

Arbitration is a private method of dispute resolution; therefore, as a general rule, third parties are not allowed to participate in the hearing. Most often (in contrast to state courts), arbitrators permit the experts and witnesses of each party to be present during the hearing. Usually, before the hearing begins, the identities of all persons present in the room are verified.⁹²

Confidentiality in arbitration imposes a duty or obligation specifically on arbitrators, whereas for the parties, confidentiality depends solely on the arbitration agreement.⁹³ In other words, while arbitrators are bound by confidentiality as part of their professional and ethical duties inherent in their role, the parties' obligation to maintain confidentiality arises only if they have expressly agreed to it, either in their arbitration clause or through a separate agreement.

At the ILA report, the issue of confidentiality in arbitration was addressed with a hierarchical approach, ranking the subjects of the confidentiality obligation from most to least clearly bound. According to this approach, first and foremost, the arbitral tribunal or a sole arbitrator, regardless of their number or composition is considered bound by the duty of confidentiality.⁹⁴ Importantly, this obligation exists even in the absence of a specific rule in the applicable arbitration law or institutional rules expressly imposing such a duty. In other words,

⁹² KARABELNIKOV, Boris Romanovich (2013). *International Commercial Arbitration*. Second edition. Moscow: Moscow School of Social and Economic Sciences, Faculty of Law, pp. 242.

⁹³ POOROOYE, Avinash and FEEHILY Ron´an, (2016). Confidentiality and transparency in international commercial arbitration: finding the right balance. *Harvard Negotiation Law Review*, 279.

⁹⁴ The Hague Conference (2010). *International Commercial Arbitration*. Brazil: International Law Association [online]. https://www.josemigueljudice-arbitration.com/xms/files/02_TEXTOS_ARBITRAGEM/01_Doutrina_ScolarsTexts/confidentiality/DraftReport_Intl_Comm_Arbitration_confidentiality.pdf, 14-15.

whether there is a formal confidentiality provision or not, the duty inheres in the role of the arbitrators. More clearly, the confidentiality obligation of arbitrators is viewed as an inherent and implied duty arising from the very nature of their role. Arbitrators, as neutral and independent decision-makers, are entrusted with sensitive information and documents that belong to the parties. Therefore, they are expected to maintain confidentiality as a fundamental element of arbitral ethics. This establishes that arbitrators whether acting individually or as a panel carry an inherent responsibility to maintain the confidentiality of the arbitration process and any information they receive during the proceedings.⁹⁵ This principle reflects a consensus that arbitrators, by virtue of their position and function, are automatically subject to confidentiality obligations, ensuring the confidentiality and integrity of the arbitration regardless of the express wording of applicable rules or laws.

In the second tier of the pyramid meaning “The parties”, who are the central participants in the arbitral process. Regarding the parties, the Report emphasizes that in the absence of an explicit confidentiality obligation whether arising from the applicable law, the arbitration rules, the arbitration agreement, or another similar source such as the terms of reference the parties cannot be considered bound by confidentiality.⁹⁶ This means that confidentiality is not presumed for the parties; it must be expressly established through one of the recognized legal or contractual mechanisms. Without such a provision, the parties remain free to disclose information related to the arbitration, including pleadings, evidence, or the final award, without violating any legal or procedural duty.

Therefore, the Report draws a clear distinction between arbitrators, whose duty of confidentiality is implied and inherent in their role, and the parties, whose duty must be explicitly agreed upon or derived from an applicable rule. This distinction underscores that while arbitrators carry an automatic responsibility to maintain confidentiality, the parties’ obligations are contingent on formal agreements or rules that specifically impose such duties.

Moving to the third tier of the pyramid, which concerns the confidentiality obligations of third parties, ILA report provides a more defined perspective. The Report emphasizes that the duty of confidentiality for third parties is less certain compared to that of the arbitral tribunal or, in some cases, the parties. Specifically, the Report notes that, in principle, none of

⁹⁵ The Hague Conference (2010). International Commercial Arbitration. Brazil: International Law Association [online]. https://www.josemigueljudice-arbitration.com/xms/files/02_TEXTOS_ARBITRAGEM/01_Doutrina_ScolarsTexts/confidentiality/DraftReport_Intl_Comm_Arbitration_confidentiality.pdf, 15.

⁹⁶ Ibid.

these third parties are automatically bound by the arbitration rules or by the arbitration agreement itself. This means that individuals such as experts, translators, or witnesses, when not directly covered by the parties' agreements or applicable rules, do not inherently owe a duty of confidentiality.⁹⁷

However, the Report also highlights that, in certain circumstances, it may be assumed that the parties have an obligation to ensure that any third persons they involve in the arbitration are held to confidentiality. This reflects a practical approach: while third parties are not automatically bound, the responsibility of the parties can extend to requiring confidentiality from those they engage. In effect, this creates a limited but enforceable duty for third parties in practice, dependent on the arrangements made by the parties themselves. Thus, the third tier of the pyramid recognizes the conditional nature of third party confidentiality, distinguishing it from the inherent obligations of arbitrators and the potentially explicit obligations of the parties.

The statement of ILA report related to "Confidentiality Obligation of Third Parties" can be empowered by an author who adopts more nuanced position regarding third parties, particularly in relation to fact witnesses. Determining that with the exception of fact witnesses who are employees of one of the parties, fact witnesses are generally not bound by a duty of confidentiality.⁹⁸ In other words, independent fact witnesses those who are not contractually connected to either party do not fall under a confidentiality obligation by default.

This interpretation goes even further by emphasizing that even if the arbitral tribunal or the parties attempt to impose a confidentiality duty on such witnesses, that obligation may not be fully effective or enforceable in practice. The rationale is that if a fact witness gives testimony in one arbitration and later provides materially different testimony in a subsequent arbitration or judicial proceeding, their earlier testimony from the first arbitration may legitimately be disclosed in the later proceedings.⁹⁹ Author determines the same situation for experts also.¹⁰⁰

⁹⁷ The Hague Conference (2010). International Commercial Arbitration. Brazil: International Law Association [online]. https://www.josemigueljudice-arbitration.com/xms/files/02_TEXTOS_ARBITRAGEM/01_Doutrina_ScolarsTexts/confidentiality/DraftReport_Intl_Comm_Arbitration_confidentiality.pdf , 15.

⁹⁸ STOKES, Alexis Brown (2001). Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration. *American University International Law Review*, 16(4), 1006.

⁹⁹ Ibid 1006.

¹⁰⁰ Ibid.

Similar to ILA report, Gu Weixia in her article addressing the topic, offers a detailed and systematic approach to understanding which participants are subject to confidentiality obligations in arbitration. According to her analysis, these participants can be divided into three distinct groups:¹⁰¹

a) The first group consists of arbitrators, who are directly involved in conducting the proceedings and rendering decisions, and whose actions and deliberations must remain confidential to preserve the integrity and impartiality of the process.

b) The second group includes third parties, such as witnesses, legal representatives, experts, and other individuals who may provide testimony, evidence, or support during the proceedings.

c) The third group comprises the parties themselves, who are the core center of arbitration process.

By organizing the participants in this manner, Gu Weixia provides a structured framework for understanding the scope and application of confidentiality in international arbitration.

Gu Weixia emphasizes that, with regard to the first group of participants, namely the arbitrators, confidentiality constitutes a duty, meaning that they are bound by an obligation and cannot be released from this duty without the consent of the parties. Regarding the second group, which includes third parties such as experts, legal representatives, witnesses, and others, she notes that these individuals are generally not subject to confidentiality obligations. Concerning the parties themselves, who are the primary actors in the arbitration process, she explains that their confidentiality obligations are largely determined by the existence of an express confidentiality agreement between the parties. If such an agreement exists, the parties can ensure that information is kept confidential to the extent they desire. In the absence of an agreement, the scope of confidentiality for the parties depends on several factors, including the arbitral tribunal's discretion, the applicable law and procedural rules, and the nature of the information involved.¹⁰² Sometimes parties' lawyers are also considered as confidentiality obligation subjects.¹⁰³

Taking into account that, as discussed in other parts of this research, the applicable law in arbitration will be the law of the seat in the absence of an arbitration agreement, it would be

¹⁰¹ GU, Weixia (2015). Confidentiality revisited: Blessing or curse in international commercial arbitration? *THE American Review of International Arbitration*, 15 [online]. Social Science Research Network, 9.

¹⁰² Ibid 10.

¹⁰³ LEMBO, Saverio and GUIGNET, Vincent (2015). *Confidentiality in Arbitration: From Myth to Reality*. Zurich: Bar & Karrer, pp. 3.

more logical in this subchapter to begin by examining the national laws already discussed in the previous chapter.

The Law of the Republic of Kazakhstan identifies arbitrators in arbitration proceedings as the subjects bound by confidentiality.¹⁰⁴ In other words, it does not distinguish between parties and third persons in a detailed manner but instead refers broadly to participants in addition to the arbitrators. This creates a general and inclusive category of individuals who are obligated to maintain confidentiality during the arbitration process.

The Law of Georgia on Arbitration addresses confidentiality like Kazakhstan, establishing a general framework for its application in arbitration. However according to this law, the duty of confidentiality applies to the arbitrators and any person participating in the arbitration proceedings.¹⁰⁵

By structuring the rule in this concise yet comprehensive manner, the law ensures that confidentiality is not limited solely to the members of the arbitral tribunal but extends to all individuals who may be involved in the proceedings. This might include, for example, the parties, their legal representatives, experts, witnesses, and any administrative or technical personnel assisting in the conduct of the arbitration. The Georgian approach can be seen as a balanced and inclusive one. On the one hand, it avoids an overly detailed enumeration of subjects, thereby granting flexibility to cover all potential participants; on the other hand, it provides sufficient clarity to ensure that the duty to protect sensitive information is universally recognized within the arbitral process.

The Law on Arbitration of Mongolia provides a clearer and more structured formulation of who is bound by confidentiality in arbitration. It specifies that confidentiality obligations apply to other parties, the arbitration tribunal and the arbitration institution.¹⁰⁶ By expressly identifying these three categories, the legislation ensures that all principal actors involved in the arbitral process are covered.

The Portuguese Voluntary Arbitration Law is essentially similar in nature to the Mongolian in its approach to confidentiality. According to the Portuguese law, the subjects of the confidentiality obligation in arbitration are also limited to the arbitrators, the parties, and the arbitral institutions.¹⁰⁷

¹⁰⁴ Article 4 (5) of Law of the Republic of Kazakhstan On International Commercial Arbitration, 28 December 2004, No. 23-III ZRK.

¹⁰⁵ Article 32 (5) of the Law of Georgia on Arbitration, 19 June 2009, No1280-IS.

¹⁰⁶ Article 50(1) of Arbitration Law of Mongolia, 26 January 2017.

¹⁰⁷ Article 30 (5) of Voluntary Portuguese Arbitration Law, 14 March 2012, No63/2011.

Like Mongolia, Portugal adopts a general and simplified framework, avoiding a detailed enumeration of other participants such as party representatives, witnesses, experts, or tribunal staff. This narrower scope focuses the duty of confidentiality on the main actors directly involved in the arbitration process, ensuring that the core participants are responsible for protecting sensitive information.

The Spanish Arbitration Act takes a general approach like similar to Mongolia and Portuguese in defining the subjects of the confidentiality obligation, without providing a detailed classification of specific participants. According to the Act, confidentiality in arbitration applies only to the arbitrators, the parties, and the arbitral institutions.¹⁰⁸

Compared to the laws of other countries that enumerate a broader range of participants such as party representatives, witnesses, experts, tribunal secretaries, or institutional staff the Spanish approach establishes a relatively narrower scope. By focusing solely on the core actors involved in the arbitration process, the Act creates a more limited circle of subjects bound by confidentiality. This general framework simplifies the application of the duty, while still ensuring that the main contributors to the proceedings are responsible for confidentiality.

In the DIFC Arbitration Law the article dealing with confidentiality does not focus on identifying who is bound by the duty of confidentiality.¹⁰⁹

In the New Zealand Arbitration Act, there is no separate article that explicitly lists the individuals or entities bound by the obligation of confidentiality. However, an analysis of the article regulating the “Limits on prohibition on disclosure of confidential information” indicates that the confidentiality obligation applies primarily to the parties and the arbitral tribunal.¹¹⁰

From this provision, it can be inferred that these two groups: the parties to the arbitration and the tribunal are the main subjects responsible for upholding confidentiality under New Zealand law. Although the Act does not provide an exhaustive list, the context of this article makes it clear that the duty to maintain the confidentiality of arbitration-related information is centered on those directly involved in the presentation and adjudication of the dispute.

The Law of the Republic of Uzbekistan on International Commercial Arbitration addresses the issue of confidentiality without specifying the subjects to whom the obligation

¹⁰⁸ Art 24 (2) of Act 60/2003 of Spain on Arbitration, 23 December, 2003, No60/2003.

¹⁰⁹ Article 14 of Arbitration Law DIFC Law, 01 September 2008, No1 of 2008.

¹¹⁰ Article 14c of Arbitration Act of New Zealand, 02 September 1996, No99.

applies. The law generally establishes that the arbitration process is to be treated as confidential and outlines certain exceptions to this rule.¹¹¹

The Norwegian Act related to arbitration and Australia's International Arbitration Act 1974 likewise Uzbekistan do not contain any provisions identifying which individuals or bodies are bound by confidentiality in commercial arbitration. Both statutes remain completely silent on this issue.

The legislation of Lithuania and Latvia adopts a largely similar approach regarding the personal scope of confidentiality in arbitration in the line of Uzbekistan, Norway, Australian IAA. In Lithuania, the law does not provide any specific list of individuals or entities who are bound by confidentiality, leaving the obligation broadly undefined and without clear guidance on who must adhere to it. Latvia takes a slightly more specific stance but still remains limited, stipulating only that the arbitration panel is prohibited from disclosing information. The Latvian legislation does not extend confidentiality obligations to other participants, such as the parties, witnesses, or experts, which means that, beyond the tribunal itself, there is little statutory clarity on who is responsible for maintaining the confidentiality of arbitration-related information.

In the Prince Edward Island Arbitration Act, like in Uzbekistan, Norway and Australian the article specifically addressing "Confidentiality" does not identify or define the subjects bound by the duty of confidentiality. However, when examining another provision of the same Act, it becomes evident that the arbitral tribunal has the authority to impose sanctions on parties in situations where confidentiality has been breached.¹¹² This implies that, under the structure of the Act, the primary subjects of the confidentiality obligation might be parties themselves, since the tribunal's power to sanction would only apply to those who are directly responsible for maintaining confidentiality within the arbitration process.

Among all the national laws discussed in this subchapter regarding the personal scope of confidentiality in arbitration, the Peruvian Legislative Decree governing arbitration is particularly noteworthy for its clarity, precision, and level of detail. Unlike many other jurisdictions, it explicitly establishes who is bound by confidentiality obligations, providing a comprehensive framework that leaves little room for ambiguity. The decree applies these obligations to the parties, their representatives, and legal advisors, as well as to the arbitration

¹¹¹ Article 53 of Law of The Republic of Uzbekistan on International Commercial Arbitration, 16 February 2021, No. ZRU-674.

¹¹² Article 2 (j) of Prince Edward Island Arbitration Act, 01 March 2024.

tribunal, the secretary, and the arbitration institution. In addition, where applicable, confidentiality extends to witnesses, experts, and any other individuals participating in the arbitration process.¹¹³ By including such a wide range of participants, the Peruvian legislation not only ensures that all key actors involved in the proceedings are covered but also provides a clearer and more structured understanding of the personal scope of confidentiality. This makes it one of the most detailed and thorough statutory approaches to personal scope in arbitration among the national laws examined in this subchapter.

Peru, Kazakhstan and Georgia stand out for their clear and inclusive regulation of this issue. The relevant provisions in these jurisdictions explicitly determine the persons bound by confidentiality covering not only the arbitrators and parties but also other individuals involved in the arbitration process. This reflects a broader and more precise legislative approach compared to many other national laws, which often address confidentiality only in general terms without specifying its subjects.

In conclusion when the national arbitration laws of various jurisdictions are analysed in depth, the extent to which they differ from one another becomes even more striking. If we accept the widely recognised principle that, in the absence of an agreement between the parties, the law of the seat will automatically govern the proceedings, it becomes easier to appreciate why understanding the domestic law of the seat is so important for determining the personal scope of confidentiality. Once the law of the seat applies, the parties become bound by whatever confidentiality framework exists within that national system, regardless of whether that system is clear, incomplete, or entirely silent on the matter.

On the other hand it has already been established that arbitrators' duties of confidentiality arise directly from their official functions and responsibilities in the arbitral process. As for the parties themselves, their confidentiality obligations originate at the very least in the worst-case scenario where national law does not impose such duties from a specific agreement concluded between them. However, when it comes to third parties, the situation is far less clear. As shown above, only a limited number of national laws expressly regulate confidentiality obligations for third parties involved in or connected to the arbitration. Moreover, legal doctrine also notes that third parties cannot be considered bound by the parties' confidentiality agreement alone, since such an agreement does not automatically impose contractual duties on individuals or entities that are not signatories.

¹¹³ Article 51 of Peruvian Legislative Decree, 1 September 2008, No1071.

For this reason, a party who seeks confidentiality in commercial arbitration must be fully informed about the confidentiality standards provided by the law of the seat before any dispute occurs. If the party reviews the national law and concludes that the protection offered is insufficient, the logical next step is to negotiate with the counterparty to apply a set of institutional arbitration rules that regulate confidentiality more thoroughly. Such rules often specify, in much clearer terms, which individuals and entities are bound, thereby reducing uncertainty. Yet this solution depends entirely on mutual agreement. Without the consent of both parties, institutional rules cannot be imposed.

3.2.2. Personal scope of confidentiality in Institutional Arbitration Rules

In the previous subchapter, the national jurisdictions governing arbitration in various countries around the world were analyzed, and it was concluded that these laws are not fully adequate when it comes to defining the subjects who are bound by confidentiality. In many cases, the legislation either provides minimal guidance, leaves key aspects undefined, or focuses only on certain participants, creating ambiguity regarding who must maintain confidentiality during the arbitration process.

To address to fix this uncertainty and to reinforce the protection of confidentiality in arbitration, parties may, as discussed in the earlier sections, enter into an agreement among themselves to apply the rules of a relevant institutional arbitration to their proceedings. By doing so, they can supplement the statutory framework, clarify who is bound by confidentiality, and establish more comprehensive obligations that extend beyond what national legislation provides.

In this subchapter, the same institutional rules that were used in the analysis of the material scope of confidentiality will be examined from the perspective of personal scope.

In the relevant article of the LCIA Rules governing confidentiality in arbitration, it is clearly stated that the duty of confidentiality is not limited to the parties involved in the arbitration proceedings. This obligation also extends to third parties who may become involved in the process, including party representatives, witnesses of fact, experts, and service providers.¹¹⁴ By doing so, the LCIA ensures that all individuals who have access to any information related to the arbitration are bound by the same standard of confidentiality, thereby protecting the confidentiality and of the proceedings seem vital for LCIA.

In comparison with LCIA, WIPO Arbitration Rules limit the subjects of the confidentiality obligation primarily to the parties to the arbitration. Additionally, during the stage related to disclosures made in the course of the arbitration, this duty is also extended to witnesses.¹¹⁵ On the other hand, under WIPO rules, a witness summoned by one of the parties to the dispute is not classified as a third party.¹¹⁶ When experts are engaged, however, WIPO

¹¹⁴ Article 30 of London Court of International Arbitration, Arbitration Rules 2020.
https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx

¹¹⁵ Article 75 of World Intellectual Property Organisation, Arbitration Rules 2021.
<https://www.wipo.int/amc/en/arbitration/rules/index.html>.

¹¹⁶ 76b of World Intellectual Property Organisation, Arbitration Rules 2021.
<https://www.wipo.int/amc/en/arbitration/rules/index.html>.

requires that they also sign a confidentiality undertaking, ensuring that they are bound to maintain the confidentiality of the information and materials they handle during the arbitration process.¹¹⁷

Regarding the subjects of the confidentiality obligation under the DIAC Rules, it is established that the primary responsibility for maintaining confidentiality rests with the parties to the arbitration and the members of the Arbitral Tribunal.¹¹⁸ In addition, it should be noted that under the DIAC Arbitration Rules, the Tribunal has the authority to appoint an independent expert to clarify any matter after consulting with the parties. Before involving the expert in the proceedings, like WIPO, DIAC Rules require that the expert must sign an appropriate confidentiality undertaking.¹¹⁹ This ensures that the expert, once engaged, is bound by the same standards of confidentiality as the parties and the Tribunal, thereby protecting sensitive information throughout the arbitration process.

The relevant article of the HKIAC Rules regulating confidentiality establishes a comprehensive framework for protecting sensitive information in arbitration. It provides that, the obligation of confidentiality applies broadly to multiple participants in the proceedings. Specifically, it covers the parties themselves, their representatives, the members of the Arbitral Tribunal, any emergency arbitrator appointed, experts, witnesses, the tribunal secretary, and the HKIAC institution as a whole.¹²⁰

By including all these actors, the HKIAC Rules ensure that confidentiality is maintained at every stage of the arbitration and across all levels of participation. It emphasizes that all individuals and entities who may come into contact with confidential materials are bound by the same duty, thereby creating a cohesive and consistent framework for confidentiality that minimizes the risk of the breach of this matter.

The SIAC Rules establish a detailed framework for the subjects of the confidentiality obligation in arbitration. According to these Rules, confidentiality applies to the parties themselves and extends to any party representatives involved in the proceedings. It also covers

¹¹⁷ 57 of World Intellectual Property Organisation, Arbitration Rules 2021.

<https://www.wipo.int/amc/en/arbitration/rules/index.html>.

¹¹⁸ Art 45 of Dubai International Arbitration Center, Arbitration Rules 2022.

https://www.diac.com/wp-content/uploads/2024/04/DIAC-Arbitration-Rules-2022_EN.pdf.

¹¹⁹ Art 28 of Dubai International Arbitration Center, Arbitration Rules 2022.

https://www.diac.com/wp-content/uploads/2024/04/DIAC-Arbitration-Rules-2022_EN.pdf.

¹²⁰ Art 45 of Hong Kong International Arbitration Center, Administered Arbitration Rules 2024.

https://www.hkiac.org/sites/default/files/ck_filebrowser/2024%20HKIAC%20ADMINISTERED%20ARBITRATION%20RULES%20-%20English.pdf.

witnesses and experts who provide evidence or opinions to the Tribunal, as well as third-party funders who may be financially supporting a party's case. In addition, the obligation includes all members of any Tribunal, any Emergency Arbitrator appointed to address urgent matters, and any person appointed by the tribunal for the purposes of the proceedings.¹²¹ By specifying these categories, the SIAC Rules create a comprehensive and precise list of all individuals and entities that are bound to maintain the confidentiality of information disclosed or obtained during the arbitration process, ensuring consistent protection of sensitive information throughout the proceedings.

The BCDR Rules clearly define the scope of the confidentiality obligation by specifying the individuals and entities to whom it applies.¹²² According to these Rules, confidentiality extends to the parties, any arbitrator, any emergency arbitrator, any expert appointed to the arbitral tribunal, any secretary of the arbitral tribunal, and the Chamber itself, including its officers and employees.

One of the main distinctions of the BCDR Rules compared to other institutional arbitration rules is their explicit and detailed enumeration of the subjects of confidentiality, similar to the LCIA approach. By doing so, the Rules leave little ambiguity regarding who is bound to maintain confidentiality, covering not only the primary participants in the arbitration but also institutional personnel who may have access to sensitive information. This approach ensures that confidentiality is consistently upheld across all levels of the arbitral process, thereby safeguarding confidentiality of the parties involved and proceedings itself.

AAA Rules take a relatively narrow approach when defining the subjects of the confidentiality obligation. According to the Rules, this duty applies specifically to the AAA as the administering institution and to the arbitrator appointed to conduct the proceedings.¹²³ By identifying these two actors, the Rules make it clear that the responsibility for ensuring confidentiality primarily rests with those directly managing and overseeing the arbitration process.

¹²¹ Art 59 of Singapore International Arbitration Center, Arbitration Rules 2025.
<https://siac.org.sg/siac-rules-2025>.

¹²² ART 40 of Bahrain Chamber for Dispute Resolution, Rules of Arbitration 2022.
<https://bcdr.org/2022-rules-of-arbitration/>.

¹²³ Article R-45 of American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures 2022.
https://www.adr.org/media/qielmf0g/2025_commercialrules_web.pdf.

At the same time, the same article of AAA Rules include an important provision emphasizing the arbitrator's authority to take additional protective measures regarding sensitive information. With the consent of the parties, or at the request of one of them, the arbitrator may adopt appropriate steps to protect trade secrets or any other confidential information disclosed during the arbitration. Such measures may include restricting access to documents, limiting participation in certain hearings, or issuing confidentiality orders.

This structure reflects the AAA's intention to maintain a balance between procedural efficiency and the protection of confidential business information, ensuring that commercially sensitive data remains secure throughout the arbitral process.

CEPANI Rules of Arbitration expressly stated that the arbitrator must observe strict confidentiality in every case referred to him or her by CEPANI.¹²⁴ In other words, the Rules impose a clear and unequivocal duty on the arbitrator to maintain the confidentiality of all information, documents, and materials related to the arbitration proceedings.

This provision highlights that confidentiality is regarded as a fundamental ethical and procedural obligation within CEPANI administered arbitrations. By formulating the rule in such precise terms, CEPANI underlines the importance of confidentiality as a cornerstone of arbitral trust, ensuring that parties can present their cases freely and securely without fear of sensitive information being revealed.

DIS Arbitration Rules, defines the scope of the confidentiality obligation to include not only the parties and their outside counsel, the arbitrators, and the employees of the DIS, but also adopts a broader perspective by extending this duty to "any other persons associated with the DIS who are involved in the arbitration."¹²⁵

Through this formulation, the DIS ensures that confidentiality is maintained not only by the direct participants in the proceedings but also by any individuals who, through their professional or administrative connection with the institution, may gain access to information related to the arbitration.

¹²⁴ Rules of good conduct for proceedings organised by CEPANI clause 8 of The Belgian Centre for Arbitration and Mediation, Arbitration Rules 2023.

https://cepani.be/files/publications_documents/documents/rules/en/arbitration/cepani_arbitrage_en---annexes---code-hd.pdf.

¹²⁵ Article 44(1) of German Arbitration Institute (DIS), Arbitration Rules 2018.

[file:///C:/Users/Admin5/Downloads/2018_DIS-Arbitration-Rules_012023%20\(2\).pdf](file:///C:/Users/Admin5/Downloads/2018_DIS-Arbitration-Rules_012023%20(2).pdf).

The relevant provision of the BAC rules governing confidentiality does not specify to whom the confidentiality obligations in arbitration apply.

In conclusion, similar to the material scope, arbitral institutions demonstrate a wide range of approaches in regulating the personal scope of confidentiality. Some institutions adopt a highly protective and detailed framework, ensuring that many categories of individuals are explicitly bound by confidentiality obligations. Others, however, provide only minimal guidance, leaving significant gaps regarding who is actually required to maintain confidentiality during and after the proceedings. This inconsistency creates uncertainty for parties. Because as noted earlier one of the reasons to arbitrate is keeping sensitive information confidential.

Another important factor is that institutional rules apply only if the parties expressly agree to them. Confidentiality, however, is only one specific element of arbitration. Therefore, it might be unrealistic to expect from parties to scrutinise or compare how each set of rules distributes confidentiality obligations among arbitrators, institutions, parties, witnesses, and experts. Such a detailed examination would not only be burdensome but would also lead to unnecessary delays at the contract-drafting stage.

The findings of this subchapter show that, in practice, the most pressing concern relates to witnesses and experts. These individuals might gain access to confidential facts, documents, or trade secrets, yet many institutional rules do not explicitly require them to maintain confidentiality. The WIPO rules stand as an exception by making experts sign a confidentiality undertaking, but such practice is far from universal.

On the other hand, to my opinion the real challenge lies in ensuring the confidentiality of non-party participants such as technical workers who may not otherwise be captured by statutory law or institutional rules.

IV. LIMITS AND BREACH OF CONFIDENTIALITY

4.1. Disclosure prevails confidentiality

4.1.1. Disclosure under national laws

In the earlier parts of this thesis, confidentiality in commercial arbitration was mainly examined as a non disclosure obligation. It was shown that, in practice, confidentiality often works to prevent the sharing of information created during the arbitration and for the arbitration.

However, this raises an important question. Is confidentiality always absolute in arbitration, or can it be relative? In other words, are there situations where confidentiality can be lawfully limited?

This subchapter will focus on these questions. It will explore whether confidentiality in commercial arbitration is a strict rule that must always be followed or a more flexible principle that allows exceptions. The analysis will look at how different countries approach confidentiality, and it will also consider situations where legal requirements, or practical needs might make disclosure necessary.

Arbitration can not provide parties with 100% privacy and confidentiality.¹²⁶ Empowering this argument Gary Born notes, confidentiality in arbitration is not an absolute, having confidentiality clauses in an arbitration agreement does not automatically protect the arbitration from situations where the law requires information to be disclosed to third parties.¹²⁷

Another author classifies the situations in which disclosure may be necessary into public and private interest categories.¹²⁸ Public interest, in turn, can be divided into several subcategories.

First, disclosure may be required by law. This includes situations such as when a court orders the release of documents from a previous arbitration, for example, to be used in a subsequent court case, or when regulatory authorities, such as tax or financial institutions, have a legal right to access certain information.¹²⁹

Second, disclosure may be permitted with the authorization of a court, for instance during the review or enforcement of an arbitral award.¹³⁰

¹²⁶ THIRGOOD, Russel (2021). Appeals in Arbitration: 'To Be or Not to Be'. *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 87(3), [online]. <https://doi.org/10.54648/amdm2021028>, 432.

¹²⁷ BORN, Gary (2021). *International Commercial Arbitration*. Third edition. Netherlands: Kluwer Law International B.V, pp.4605.

¹²⁸ GU, Weixia (2015). Confidentiality revisited: Blessing or curse in international commercial arbitration? *The American Review of International Arbitration*, 15 [online]. Social Science Research Network, 14.

¹²⁹ Ibid.

¹³⁰ Ibid.

Third, disclosure may be required when the state or a state authority is a party to the arbitration.¹³¹

With regard to private interest, disclosure is considered necessary when it is essential to protect the legitimate legal interests of one of the parties.¹³² Generally if the need of one party to gain access to protected documents outweighs the interest of the other party in protecting its work product from disclosure, the documents will be disclosed.¹³³

Redfern and Hunter approaches this issue in a detailed manner and says the boundaries of this confidentiality obligation are still gradually being shaped on a case by case basis.¹³⁴ Based on current legal examples, the main situations in which disclosure may be permitted are as follows:

- a) First, with the consent of the parties, either explicitly or implicitly.
- b) Second, by order or permission of a court, although this does not mean that the court has the general authority to remove confidentiality obligations entirely.
- c) Third, when it is reasonable and necessary to protect the legitimate interests of a party to the arbitration.
- d) Fourth, when disclosure is required to ensure the proper administration of justice.
- e) Fifth, in certain circumstances, when disclosure is necessary for reasons of public interest.¹³⁵

Confidentiality in arbitration generally arises in two main contexts: the confidentiality of the proceedings before the award is issued, and the confidentiality of the award itself once it has been rendered.¹³⁶

Gary Born makes abovementioned argument clear and says different aspects of the arbitration process are subject to varying levels of confidentiality. Both domestic court decisions and institutional rules indicate that the most confidential elements are the deliberations of the arbitrators and the arbitration hearings themselves. On the other hand, the level of confidentiality expected in relation to arbitral awards is significantly lower. One reason

¹³¹ GU, Weixia (2015). Confidentiality revisited: Blessing or curse in international commercial arbitration? *THE American Review of International Arbitration*, 15 [online]. Social Science Research Network, 14.

¹³² Ibid.

¹³³ HENKEL, Christoph (2012). The Work-Product Doctrine as a Means toward a Judicially Enforceable Duty of Confidentiality in International Commercial Arbitration. *North Carolina Journal of International Law and Commercial Regulation*, 37(4), 1103.

¹³⁴ BLACKABY, Nigel; PARTASIDES, Constantine; REDFERN, Alan et al. (2015). *Redfern and Hunter on International Arbitration*. Sixth edition. Oxford: Oxford University Press, pp. 132.

¹³⁵ Ibid.

¹³⁶ WAUTELET, Patrick R (2008). Confidentiality and Third Parties in International Commercial Arbitration: Some Preliminary Reflections, Social Science Research Network, [online]. <http://dx.doi.org/10.2139/ssrn.1339863>, 83.

for this is that awards are usually issued at the end of the dispute, and their disclosure by one of the parties does not affect the procedural course of the arbitration, as the proceedings have typically already concluded.¹³⁷

Except that another author classifies the conditions when confidentiality in arbitration, specifically regarding documents submitted during the proceedings can be disclosed:

a) Substantial need-this means that a party must show a real and important need for the material. The party has to demonstrate that the documents from the arbitration or court process are genuinely necessary for preparing its case. Without access to those documents, the party would not be able to properly present or defend its position.

b) Undue hardship-this means that the requesting party must show that it cannot obtain the same material in any other reasonable or practical way. If getting the documents through alternative methods would be extremely difficult, costly, or impossible, then this criterion is met.¹³⁸

Arbitration laws of countries usually do not address the issue of disclosure directly. Only in national laws of Uzbekistan, Mongolia, Prince Edward Island, DIFC limits confidentiality in statutory level under certain conditions. Thus, analyzing of their national law goes from weaker to more robust ones below.

In DIFC, disclosure is allowed where it is required by an order of the DIFC Court.¹³⁹

Uzbekistan allows disclosure of information in cases where it is required by a party's statutory duty, aimed at the protection or exercise of the rights and legitimate interests of third parties, or necessary for the enforcement or challenge of an arbitral award in court.¹⁴⁰

Mongolia allows disclosure in cases where there is a legal duty to protect or pursue a legal right and to enforce or challenge an arbitral award in legal proceedings before a state court.¹⁴¹

In Prince Edward Island, according to the arbitration law, disclosure is allowed in cases where it is required by law, authorized by the agreement of the parties, authorized by a court

¹³⁷ BORN, Gary (2021). *International Commercial Arbitration*. Third edition. Netherlands: Kluwer Law International B.V, pp. 4602-4605.

¹³⁸ HENKEL, Christoph (2012). The Work-Product Doctrine as a Means toward a Judicially Enforceable Duty of Confidentiality in International Commercial Arbitration. *North Carolina Journal of International Law and Commercial Regulation*, 37(4), 1099

¹³⁹ Article 14 of Arbitration Law DIFC Law, 01 September 2008, No1 of 2008.

¹⁴⁰ Article 53 (1,2,3) of Law of The Republic of Uzbekistan on International Commercial Arbitration, 16 February 2021, No. ZRU-674.

¹⁴¹ Articles 50.1.1.; 50.1.2.; 50.1.3 of Arbitration Law of Mongolia, 26 January 2017.

of competent jurisdiction, or necessary for the purposes of preparing and presenting a claim or defence in the arbitral proceeding, or for enforcing a right under the Act, and is not prohibited by the agreement of the parties.¹⁴²

Redfern Hunter in his book analysis the court practice of Hassneh Insurance Co Of Israel and says when it comes to court practice disclosing of award in the case of Hassneh Insurance Co of Israel v Mew judge concluded that an arbitral award and the reasons contained in it are different in nature from other parts of the arbitration process. Materials such as evidence records, transcripts, witness statements, written submissions, and pleadings were considered to fall within the principle of confidentiality because arbitration hearings are held in private. The judge explained that an arbitral award can potentially be viewed as a public document, since it is intended to be supervised or enforced by the courts. For this reason, an award may be disclosed without the consent of the other party or without needing the court's permission. However, this is allowed only under one condition: the party wishing to disclose the award must do so for the purpose of advancing or protecting its legal rights in relation to a third party.¹⁴³

It should also be noted that when a party challenges an arbitral award or applies to have it by a court, this does not automatically mean that all details of the arbitration will become public.¹⁴⁴

One of the less frequently examined court practice concerning disclosure in arbitration is Bankers Trust Company v. Department of Economic Policy and Development of the City of Moscow¹⁴⁵, The Government of Moscow, and International Industrial Bank. In this particular case, the City of Moscow acted as the appellant, whereas Bankers Trust Company and the International Industrial Bank (IIB) were the respondents.

The dispute arose from financial arrangements entered into by Bankers Trust and IIB with the City of Moscow under a loan agreement dated 24 October 1997. A disagreement subsequently developed, giving rise to arbitration proceedings which were conducted in London under the UNCITRAL Rules. As a result of these proceedings, Bankers Trust

¹⁴² Article 70 (a,b,c,d clauses) of Prince Edward Island Arbitration Act, 01 March 2024.

¹⁴³ BLACKABY, Nigel; PARTASIDES, Constantine; REDFERN, Alan et al. (2015). *Redfern and Hunter on International Arbitration*. Sixth edition. Oxford: Oxford University Press, pp.134.

¹⁴⁴ WAUTELET, Patrick R (2008). Confidentiality and Third Parties in International Commercial Arbitration: Some Preliminary Reflections, *Social Science Research Network*, [online].
<http://dx.doi.org/10.2139/ssrn.1339863>, 88-89.

¹⁴⁵ Court of Appeal of England and Wales. 25 March 2004 in commercial case No. [2004] EWCA 314.

succeeded in its claim against IIB, but it was unsuccessful in its claim against the Moscow government.

The primary legal issue brought before the court concerned the conditions under which an arbitral award could be disclosed. In this court practice, the documents reveal that the disclosure carried different implications for each party: for the City of Moscow, disclosure had a political dimension, as the city sought to demonstrate that a claim against it had no enforceable effect; whereas for Bankers Trust, the matter concerned the commercial context of the dispute. In this context, Moscow requested the publication of the arbitral award, or at the very least, the publication of a summary of the award, as an alternative to full disclosure.

Ultimately, the Court of Appeal issued a judgment that carefully sought to balance the competing interests of both parties. The court dismissed Moscow's appeal insofar as it related to Cooke J's order for the general publication of the full judgment, acknowledging that such a general release would be inappropriate due to the presence of sensitive information within the decision. However, the court allowed the appeal with respect to the order permitting the general publication of the Lawtel summary¹⁴⁶ of the award, thereby providing a limited disclosure that addressed Moscow's interests without compromising the confidentiality of sensitive material.¹⁴⁷

This case demonstrates the careful approach courts may take when determining the extent to which arbitration awards can be disclosed, reflecting a balancing of commercial, political, and confidentiality considerations

One of the court practices that stands in contrast to the previously mentioned examples, and which, in a sense, encourages disclosure, is *Myanmar Yaung Chi Oo Co. Ltd v Win Win Nu and Another*.¹⁴⁸ The proceedings arose from a joint venture between the first defendant and Myanmar Foodstuff Industries (MFI), a government-controlled organization, which ultimately resulted in the establishment of the plaintiff company.

Before issuing its decision, the High Court conducted an analysis of how England and Australia approach confidentiality in arbitration, ultimately favoring the English position. Notably, the court emphasized that nothing in arbitration is inherently confidential. This means

¹⁴⁶ Lawtel is website and Lawtel summary provides only a short and neutral overview of the legal issues considered by the judge and sets out the final decision. It does not reveal any sensitive details or confidential information.

¹⁴⁷ Judgement of the Court of Appeal of England and Wales. 25 March 2004 in commercial case No. [2004] EWCA 314.

¹⁴⁸ High Court of Singapore. 06 June 2003 in commercial case No. [2003] SGHC 124.

that, depending on the circumstances, disclosure can be considered lawful. The court specifically identified the principle of “reasonable necessity” as a situation in which disclosure may be justified.

In this case, the defendants argued that disclosure was essential because it was necessary to demonstrate that a case brought in Singapore was vexatious, oppressive, and constituted an abuse of the court process.

Ultimately, the court permitted disclosure, explicitly linking it to the “reasonable necessity” and thereby confirming that, under certain circumstances, the disclosure of arbitration-related information is legally permissible.¹⁴⁹

Another approach to the limitations of arbitration was provided in the case *AZT and Others v AZV*, which was considered by the Singapore High Court.¹⁵⁰ The dispute arose from a shareholders’ agreement, with AZT and others as the claimants and AZV as the defendant. The central issue was the claim brought by AZT seeking to have the court documents including the awards, transcripts of the arbitration hearing, written submissions, and other related materials sealed.

The court carefully examined the case, taking into account public interest considerations and reviewing several key authorities, including *Aay Aaz* and the *Bankers Trust* cases. Ultimately, the decision concluded that there was no legitimate public interest in this particular dispute. The court emphasized that the dispute was commercial in nature, and as such, the documents used in the arbitration should remain sealed. In other words, because the matter was essentially commercial, the materials generated and submitted during the arbitration retained their confidential status and were not subject to public disclosure.¹⁵¹

Another illustrative example of how courts have addressed the limitations of confidentiality in arbitration is the case *Wilson & Partners v. Emmott (2008)*.¹⁵² The dispute arose between Mr. Michael Wilson, an English-qualified solicitor, and Mr. John Emmott, who had joined Mr. Wilson in his company, which was originally established to provide legal services in Kazakhstan. Within the company, Mr. Emmott held positions as both director and senior lawyer before eventually leaving and subsequently practicing through Temujin International Ltd.

¹⁴⁹ Judgement of the High Court of Singapore. 06 June 2003 in commercial case No. [2003] SGHC 124.

¹⁵⁰ High Court of Singapore. 24 May 2012 in commercial case No. [2012] SGHC 116.

¹⁵¹ Judgement of the High Court of Singapore. 24 May 2012 in commercial case No. [2012] SGHC 116.

¹⁵² Court of Appeal of England and Wales. 14 August 2006 in commercial arbitration No. [2008] EWCA 184.

MWP alleged that Mr. Emmott's actions were part of breaching of contract and a breach of trust. Mr. Emmott was also accused of fraud, although these allegations were ultimately dismissed. Following the dismissal of the fraud claims, MWP amended its claim, alleging that Mr. Emmott had breached confidentiality obligations.

In response, Mr. Emmott sought permission to have documents relating to the dismissal of the fraud claims in the London arbitration disclosed in other jurisdictions. He argued that such disclosure was justified in the interests of justice and was reasonably necessary. The Commercial Court considered the matter in detail and determined that disclosure under these circumstances was lawful, granting permission for the release of the relevant documents.

On appeal, the Court of Appeal of England and Wales confirmed and upheld the decision of Flaux J, emphasizing that confidentiality in arbitration is not absolute. The Court clarified that, under specific conditions such as the interests of justice and reasonable necessity, disclosure of arbitration-related documents may be permitted.¹⁵³

As a favor to publishing or disclosing awards Tiago Andreotti says in respect of decisions of arbitration that if dispute resolution decisions are kept secret, it can hinder the development of law, as others cannot learn from these decisions or form clear expectations.¹⁵⁴ Nevertheless, it should be noted that because of confidentiality it is difficult to obtain arbitral decisions as a court practice.¹⁵⁵

In conclusion, it can be said that different countries define the issue of disclosure in various ways. To determine whether an arbitral award is subject to disclosure, it is essential to have a deep understanding of the relevant case itself.

In other words, whether an award can be disclosed may be considered a matter for discussion. If a party knows in advance that the arbitral award will eventually be published or disclosed, it raises the question of why they would choose arbitration in the first place? On the other hand, as mentioned above, maintaining confidentiality of the award can also have a negative impact on the development of arbitration as a field.

On the contrary it is also known that court practice regarding confidentiality in arbitration is very limited. From this perspective, it could be suggested that, even if national

¹⁵³ Judgement of the Court of Appeal of England and Wales. 14 August 2006 in commercial arbitration No. [2008] EWCA 184

¹⁵⁴ ANDREOTTI, Tiago (2017). *Dispute Resolution in Transnational Securities Transactions* [online]. Oxford and Portland Oregon: Hart Publishing. Bloomsbury, pp.157-158.

¹⁵⁵ FERRARI, Franko; KRÖLL Stefan (2011). *Conflict of Laws in International Commercial Arbitration*. Munich: Sellier European Law Publishers, pp.343.

laws do not explicitly provide for it or the parties have not agreed in advance, tribunals can offer the publication of awards and case information (without disclosing business secrets) for research purposes under certain conditions at the end of the process. It would help improvement of arbitration also.

4.1.2. Institutional Arbitration Rules on disclosure

As seen from the previous subchapter, national laws regulate the issue of disclosure in different ways, and some do not address it at all. For this reason, it becomes necessary to examine the arbitration institutional rules, which serve as contractual tools, once again.

LCIA, BAC, HKIAC, DIS, DIAC and CEPANI allow the disclosure of confidential information in almost identical circumstances, namely where a party has a legal duty to disclose, where disclosure is necessary to protect or pursue a legal right, or where it is required for the enforcement, challenge or annulment of an award. WIPO, in addition to these grounds, also permits disclosure when the parties consent to it.

BCDR limits confidentiality to situations where it is required by applicable law or parties consent by the tribunal.¹⁵⁶

AAA, in the relevant provision regulating confidentiality, does not specify the circumstances in which information may be disclosed.

Among institutional arbitration rules, SIAC regulates this issue in the most detailed manner. In addition to the circumstances identified by most of the rules mentioned above, SIAC also permits disclosure pursuant to an order or subpoena issued by a court of competent jurisdiction, in compliance with the laws of any jurisdiction binding upon the disclosing party, upon the request or requirement of any regulatory body or authority, and for the purpose of any application made under the SIAC Rules.¹⁵⁷

In conclusion for this subchapter, it becomes clear that information regarded as confidential might be disclosed in certain circumstances. At least, the exceptions commonly found across most institutional rules, such as a party's legal duty to disclose or disclosure required by law, illustrate that confidentiality in commercial arbitration is not absolute. These mandatory obligations may override both institutional rules and the parties' own contractual arrangements, thereby demonstrating the practical limits of confidentiality in arbitration. Another problem is that, obviously institutional arbitration rules operate as contractual tools, this leads to the conclusion that even where the parties have entered into a confidentiality agreement, such an agreement does not guarantee that the protected information will remain confidential in every situation. In other words, disclosure requirements may prevail over the

¹⁵⁶ Article 40(2) of Bahrain Chamber for Dispute Resolution, Rules of Arbitration 2022.
<https://bcdr.org/2022-rules-of-arbitration/>.

¹⁵⁷ Article 59(3) of Singapore International Arbitration Center, Arbitration Rules 2025.
<https://siac.org.sg/siac-rules-2025>.

parties' confidentiality expectations. Meaning, the circumstances under which confidential information may be disclosed, as stated in the institutional arbitration rules, will apply even if the parties conclude a separate and very comprehensive confidentiality agreement between themselves. The parties' agreement cannot exclude or override those situations in which disclosure is required under mandatory provisions of law. Therefore even the strongest contractual confidentiality arrangements remain subject to the disclosure exceptions set out in the legal framework governing the arbitration.

4.2. Breach of confidentiality

In the earlier parts of this research, confidentiality in commercial arbitration was examined from different angles. The legal meaning of confidentiality was discussed, and attention was given to what types of information are covered by confidentiality as well as which individuals are bound by it.

In this subchapter, the focus will shift to another important aspect of the topic. Here, the situations in which the duty of confidentiality may be breached will be explained, along with the possible legal consequences that may arise from such breaches. In addition, this section will discuss what practical steps can be taken by the parties or by the arbitral tribunal to prevent breaches of confidentiality.

In legal doctrine, the issue of breaches of confidentiality in arbitration has been examined most comprehensively by Ileana M. Smeureanu. In analysis of this topic, author notes that modern practice reveals two major difficulties. The first challenge is to clearly define what constitutes a breach of confidentiality in arbitration. The second challenge concerns the types of sanctions that may be imposed in response to such breaches, including both monetary (material) and non-monetary remedies.¹⁵⁸

Assessing whether confidentiality has been breached is not straightforward. According to Ileana M. Smeureanu, the difficulty lies in the fact that when a duty of confidentiality exists and a party discloses information without authorisation, the aggrieved party must prove the source of the disclosure, the damage suffered, and the causal link between the act of disclosure and the damage incurred. It is only after these elements are established that a breach can be properly assessed.¹⁵⁹

Another author reinforces this point by referring to the French case *Nafimco v. Foster Wheeler Trading Company AG*. In that case, the Court of Appeal increased the burden of proof, holding that any party alleging a breach of confidentiality must not only prove that a duty of confidentiality existed, but also that this duty was neither waived nor contested by the other party.¹⁶⁰

¹⁵⁸ SMEUREANU, Ileana M. (2011). *Confidentiality in International Commercial Arbitration*. The Netherlands: Kluwer Law International, pp.161.

¹⁵⁹ Ibid 162.

¹⁶⁰ HENKEL, Christoph (2012). The Work-Product Doctrine as a Means toward a Judicially Enforceable Duty of Confidentiality in International Commercial Arbitration. *North Carolina Journal of International Law and Commercial Regulation*, 37(4), 1077

When examining breaches of confidentiality, Ileana M. Smeureanu also addresses the issue of sanctions. She classifies the possible sanctions into three main categories: an order to stop further disclosures, the award of damages, or a combination of both.¹⁶¹ The word “Sanction” derives from latin and carries the meanings of “punishment” and “measure.” A sanction is applied when an obligation is not fulfilled. In other words, it is a form of liability imposed on a person when they fail to comply with, or act contrary to, their obligation.¹⁶²Therefore, tribunal should take competinig interests into consideration while imposing sanctions.¹⁶³

Regarding breaches of confidentiality in arbitration and the related issue of sanctions, analyzed institutional rules and national laws remain largely silent on this matter in the context of commercial arbitration. However, with respect to the first type of sanction classified by Ileana M. Smeureanu, namely an order to stop further disclosures, some of the countries examined in this research provide for such measures at the national law level.

For example, under the Mongolian National Arbitration Law, the arbitral tribunal may implement interim measures aimed at preventing or refraining from actions likely to cause current or imminent harm or prejudice to the arbitration process itself.¹⁶⁴ Such measures are applied where harm not adequately reparable by an award of damages is likely to occur if the measure is not ordered, and where this potential harm substantially outweighs the harm that may result to the party against whom the measure is directed.¹⁶⁵

Similarly, under the Prince Edward Island Arbitration Act, the arbitral tribunal may make orders regarding the confidentiality of arbitral proceedings including pleadings, evidence, transcripts, orders, awards, and the fact of the arbitration, and may provide sanctions against parties for failing to observe confidentiality requirements.¹⁶⁶

Although Scottish arbitration act was not a primary focus of this thesis, it is worth noting that the Scottish arbitration act (in Schedule 1) provides one of the clearest illustrations.

¹⁶¹ SMEUREANU, Ileana M. (2011). *Confidentiality in International Commercial Arbitration*. The Netherlands: Kluwer Law International, pp. 169.

¹⁶² MEHDİYEV, Fuad; QULIYEV, Emin (2017). *Theory of Law*. Baku: Gənclik Publishers, pp. 61-62

¹⁶³ SMIT, Hans (2000). Breach of Confidentiality as a Ground for Avoidance of the International Agreement. *The American Review of International Arbitration (ARIA)*, 11(4), JurisNet LLC, 17.

¹⁶⁴ Article 19.2 of Arbitration Law of Mongolia, 26 January 2017

¹⁶⁵ Article 20.1.1. of Arbitration Law of Mongolia, 26 January 2017

¹⁶⁶ Article 35(2)j of Prince Edward Island Arbitration Act, 01 March 2024.

This Act lists specific situations in which disclosure is permitted; all other instances where confidentiality is violated are considered breaches.¹⁶⁷

In conclusion, even national laws do not regulate breaches of confidentiality very well. Looking at national laws, it can be observed that the issue of breaches is one of the weakest regulated aspects. As discussed, three types of sanctions have been identified to prevent breaches. I consider that the main question should focus on how confidentiality is protected after the arbitral award has been issued. As noted earlier, once the award is issued, the tribunal's function is completed. Therefore, I believe that the parties themselves should determine material liability as a sanction in their agreements. On the other hand, the material liability imposed for a breach of confidentiality should not be absurd. For example, even if the actual damage amounts to a few hundred thousand dollars, it would violate fundamental principles of law if the parties had agreed in advance that the breaching party must pay one million dollars to the injured party. The liability must be reasonable and proportionate to the actual harm suffered.

However, the difficulty arises from the fact that it is hard for parties in advance to answer the question, "How much damage will I suffer if the confidentiality obligation is breached?" If the award is published or disclosed to third parties, it is impossible to know in advance the extent of the harm. Even if harm occurs, the potential benefit that the injured party could have obtained might also be lost as a result of the breach of the confidentiality obligation.

¹⁶⁷ Article 26d of the 1st Schedule of Scotland Arbitration Act, 05 January 2010.

CONCLUSIONS

1. There is a common understanding that privacy and confidentiality are two different concepts. However, at the same time the distinction of two main approaches, i.e., that confidentiality should always follow the agreement to arbitration and, on the opposite, that it should not, shows that there is a strong connection between the concepts: the approach advocating confidentiality as an inherent feature of arbitration stems mainly from the private nature of arbitration.
2. Despite of the strong doctrinal support that the duty of confidentiality should be considered as an inherent feature of arbitration the analysis of the legal regulations revealed that a duty of confidentiality is not a universally recognized default rule in commercial arbitration. The laws remain fragmented on the issue. Hence, it might cause a serious misalignment between the expectations of the parties and the reality, especially in cross-border disputes where the parties come from jurisdictions with divergent established practices.
3. When examining both the material scope and the personal scope of confidentiality, it becomes evident that different countries' laws adopt varying approaches. Based on the research materials, it can be concluded that the least clearly regulated aspects are, in terms of material scope, the arbitral award itself, and, in terms of personal scope, third parties who may become involved in the arbitration process. These areas therefore require particular attention, as the lack of clear rules can create uncertainty for the parties and potentially undermine the intended confidentiality.
In this context, the most practical and effective approach appears to be for the parties themselves to address confidentiality explicitly through contractual arrangements. By including clear provisions in their arbitration agreement or in a separate confidentiality agreement, the parties can define both the scope of confidential information and the obligations of all participants, including third parties.
4. The analysis of the final chapter also shows that achieving absolute confidentiality in commercial arbitration is not possible. In certain situations, disclosure obligations may override confidentiality duties. However, the specific circumstances under which disclosure is permitted have not been uniformly or fixedly established in international arbitration practice. On the other hand having confidentiality agreement between parties will not insure the parties from disclosure (when required by law and etc.). The

issue of disclosure is similar to the question of sanctions for breach of confidentiality because, in both cases, contractual regulation alone may not be fully effective. It is often impossible to determine in advance the exact extent of harm that may result. In both matters, attention must be paid to the details of each individual case, as the practical application depends heavily on the specific facts and context.

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SUMMARY

Confidentiality in Commercial Arbitration

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The aim of the thesis was to provide a critical analysis of the concept of confidentiality and its application in commercial arbitration. The research examined the differences between privacy and confidentiality, the problems arising from their similarity, the two opposing approaches to confidentiality in commercial arbitration, the material and personal scopes of confidentiality and how they vary across jurisdictions, and disclosure as one of the main expectations related to confidentiality in commercial arbitration.

Based on the analysis of the questions that revealed in introduction, the thesis concluded that confidentiality in commercial arbitration is not absolute. In commercial arbitration, it is not possible to establish full confidentiality without exceptions, whether in terms of its material scope, personal scope, or the existence of exceptions.

The confidentiality expectations of parties who choose commercial arbitration may sometimes fail. Although confidentiality is linked to the private nature of arbitration, it is not protected at the same level in every country. If the parties in a commercial arbitration want strong confidentiality, it would be advisable for them to conclude a separate confidentiality agreement.

Another conclusion is that, in addition to parties signing a confidentiality agreement, a strong level of confidentiality in commercial arbitration can also be supported through the development of national arbitration laws. Strengthening and modernizing the confidentiality provisions in these laws can provide clearer guidance, reduce uncertainty, and ensure more consistent protection across jurisdictions. This would help parties better predict how their confidential information will be treated and increase their confidence in the arbitral process.