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CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION: ASSUMPTIONS OF IMPLIED DUTY AND A PROPOSED SOLUTION

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Abstract: Confidentiality remains one of the cardinal features of international commercial arbitration and a great number of users of international commercial arbitration assume when choosing arbitration that it is inherently confidential. However, this assumption appears not to be the case given that many national laws and arbitral rules do not currently provide for confidentiality and those that do vary in their approach and scope including the persons affected, the duration and the remedies. A general provision of confidentiality in a contract may not necessarily extend to the arbitration. Parties can, however, by agreement provide for confidentiality and determine the scope, extent and duration of the obligation as well as the available remedies. Typically, confidentiality obligations in both contracts and arbitral rules seek to bind the parties in the dispute and their agents as well as their representatives (including counsel). Similarly, it aims to bind the arbitrators, arbitral institutions and if applicable, secretaries to the arbitral tribunal, as well as other persons under their control.
This doctrinal research paper seeks to critically examine the general duty of confidentiality in international commercial arbitration and it further aims to question why such duty should still be regarded as a necessary feature in international arbitration community when the exceptions to this general rule have almost whittled down its significance in practice. The article posits that express incorporation of the confidentiality clause in arbitration which is detailed enough could reduce any potential disputes. Furthermore, international framework on confidentiality in form of default uniform rule is necessary to guide the parties which should start from various national legislations and arbitral rules.
Keywords: Confidentiality, International commercial arbitration, implied duty, express duty, scope, nature, commercial parties, arbitrator, arbitral rules and application.
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I. INTRODUCTION

The article posits that express incorporation of the confidentiality clause in arbitration which is detailed enough could reduce any potential disputes. It further argues that international framework on confidentiality in form of default uniform rule is necessary to guide the parties in arbitration which should start from various national legislations and arbitral rules.

Over the years, there appears to be an assumption that the duty of confidentiality exists in international commercial arbitration but this seemingly supposition has largely remained a controversial issue in the recent time as can be gleaned from *Esso Australia Resources Ltd v The Honourable Sidney James Plowman*.[1]

Views have remained strongly divided on this concept by presiding judges, commercial practitioners and notable scholars in many jurisdictions worldwide.[2] On one spectrum, the proponents argue that confidentiality as a private mechanism is an implied term in all arbitration agreements which is the main reason why businesses globally have made arbitration the forum of choice for resolution of international commercial matters.[3] This duty of confidentiality arguably distinguishes arbitration from litigation.[4]

On one hand, English courts accept the presumption of an implied duty and this has been posited in *Dolling-Baker v Merrett*.[5] Civil law countries including France, Switzerland and Germany have followed the English view, that confidentiality is an implied term in all arbitration agreements.[6] On the other hand, the opposing view is that the duty of confidentiality must be found in either the applicable arbitration rules or expressly stated in the arbitration agreement by parties. In other words, both the Australian and United States courts appear to argue in this direction by expressly abandoning the position of the English courts.[7]

The article posits that while there may not be a definite agreement in the international arbitration community, however, developing an international framework in form of a default (model) uniform

[1] [1995] 128 ALR 39 – In Australian case of *Esso*, that involved a matter between Esso and the Australian Minister for energy and minerals over information concerning the prices levied to the public. One of the parties was forced by the Australian Ministry of Energy to disclose certain information used in the arbitration. The High Court of Australia held that confidentiality was not a relevant principle of the arbitral proceedings. The court based this finding on the bases that requirement to carry out proceedings in private did not entail an implied duty preventing disclosure of material documents and information concerning the arbitral process. In addition, any possible duty of confidentiality is vulnerable to a clear "public interest" exception.

[2] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (London: Sweet & Maxwell 2004); D Edward, *Confidentiality in arbitration: fact or fiction?* (2001) 4(3) Int'l Arb Journal 94-95.

[3] See *Science Research Council v Nasse* [1980] AC 1028 HL.

[4] Ibid.

[5] [1990] 1 W.L.R. 1205 (C.A) - In *Dolling-Baker,* the English Court of Appeal held that there is an implied obligation of confidentiality arising out of the nature of arbitration itself. Although the Court did not intend to give a precise definition of the extent of the obligation, it did find, in the case before it, that the implied obligation of confidentiality applied to documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award as well as evidence which had been given by any witness in the arbitration.

[6] See *Oxford Shipping Co. Ltd v Nippon Yusen Kaisha* [1984] 2 Lloyd's rep.373 (QB.Com. Ct); G. *Aita v A. ojjeh*, C.A. Paris, February 18, 1986, 1986 Rev. Arb. 583.

[7] See Redfern and Hunter (n 2).

rule on confidentiality can guide the parties in arbitration to reduce frequent disputes by the commercial parties.

It is further argued that parties who submit their disputes to arbitration should endeavour to draft their arbitration clause with a degree of certainty and detailed enough if they wish to retain confidentiality regarding the proceedings and other materials to be disclosed in the disputes.

To achieve the purpose of this paper, it is divided into three Parts with Part I examining the arguments in favour and against the duty of confidentiality given its value in arbitral process including the realities of the arbitration practice. Part II considers the scope and other wider issues in respect of confidentiality in international arbitration. This part is important because it questions further the continued relevance of the duty of confidentiality when its exceptions have overshadowed the implied duty in practice. It further reviews the national arbitral laws and current institutional rules in international commercial arbitration. Part III concludes with some further suggestions to fully protect party autonomy, it is desirable that courts should only enforce a duty of confidentiality to the extent that the parties explicitly contract for it and how developing model (default) uniform rule as an international framework on confidentiality can guide the parties in arbitration which could start from various national legislations and arbitral rules.

II. CONFIDENTIALITY *VERSUS* PRIVACY

Confidentiality and privacy are often cited as the main advantages of international arbitration over litigation.[8] However, information and documents disclosed in international arbitral proceedings may not always be the case. There is no universal duty of confidentiality in international arbitration and national legal systems including the arbitral institutions have taken a wide range of approaches to the issue.[9]

Confidentiality and privacy are often referred to interchangeably, however, whilst they are undoubtedly connected principles, they are not the same.[10] On one hand, privacy refers to the parties'

[8] Julian Lew; Loukas Mistelis and Stefan Kroll, *Comparative International Commercial arbitration* (The Hague, Netherlands: Kluwer Law International 2003) Para 1-26.
[9] Meri Stojcevski and Bruno Zeller, *Confidentiality and Privacy Revisited*, (2012) 78 (4) Arbitration Journal 332 - 339,333.
[10] The 2013 Queen Mary/PwC survey ranks confidentiality behind neutrality and the expertise of arbitrators as a reason parties use arbitration but that ranking varies by industry. Christian Buhring-Uhle reports that the "two most significant advantages" of international arbitration are the neutrality of the forum and the ability to enforce awards under the New York Convention. See Christian Buhring, *Arbitration and Mediation in International Business* (Kluwer 1996) 136-37. His survey respondents list confidentiality as another "main advantage," but below neutrality and enforceability. See Christian Buhring, Gabriele Scherer, and Lars Kirchhoff, *The Arbitrator*

right to have arbitral proceedings heard in private with non-parties excluded from attendance.[11] The importance of privacy is widely recognised and reflected in the rules of most international arbitral institutions.[12]

On the other hand, confidentiality refers to the obligations of parties not to disclose the existence, nature, content and outcome of arbitral proceedings to third parties, including information or documents generated or disclosed during the course of the arbitration.[13] Confidentiality obligation not to divulge any information from the proceedings or any award extends to the parties, their representatives, and arbitral tribunal. But unlike privacy, the scope of confidentiality in international arbitration is less clearly established.[14]

The conclusion to be drawn from the above analysis is that while confidentiality and privacy may be related concepts in arbitration, they are not exactly the same in application.

A. IMPLIED DUTY OF CONFIDENTIALITY

First, scholars, judges, practitioners, including the arbitrators all seem to agree that parties at least can contract for some degree of confidentiality, and in many cases, a duty of confidentiality is assumed

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as a Mediator: Some Recent Empirical Insights, (2003) 20(1) Journal of International Arbitration 81-88. Christian Buhring, Lars Kirchhoff and Gabriele Scherer, *Arbitration and Mediation in International Business* (2nd edition, Kluwer 2006). A survey by Richard Naimark of the AAA (with Stephanie Keer) finds privacy as ranked seventh (out of eight) attributes of international arbitration, stating that "privacy is an often overrated attribute." See Richard Naimark and Stephanie Keer, *International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People: A Forced Rank Analysis*, (2002) 30(5) International Business Lawyer 203.

[11] Yves Fortier, *The Occasionally Unwarranted Assumption of Confidentiality*, (1999) 15 Arb Int'L 131-132.

[12] For an engaging discussion on confidentiality as a privilege in international arbitration, see Jason Fry, Without Prejudice and Confidential Communications in International Arbitration *(When Does Procedural Flexibility Erode Public Policy?)*, (1998) Int' L Arb. L. Rev. 209.

[13] According to the PricewaterhouseCoopers (PwC) and Queen Mary University of London School of International Arbitration, International Arbitration: Corporate attitudes and practices 2006 Survey, 'the top reasons for choosing international arbitration are flexibility of procedure, the enforceability of awards, the privacy afforded by the process and the ability of parties to select the arbitrator'. See http://www.pwc.co.uk/eng/publications/International_arbitration.html - pages 2 and 7) accessed on 13th February 2015. See also, Loukas Mistelis, *International Arbitration - Corporate Attitudes and Practices - 12 Perceptions Tested: Myths, Data and Analysis Research Report*, (2004) The American Review of International Arbitration 525.

[14] The concept of privacy is typically used to refer to the fact that only the parties, and not third parties, may attend arbitral hearings or otherwise participate in the arbitration proceedings. In contrast, confidentiality is used to refer to the parties' asserted obligations not to disclose information concerning the arbitration to third parties. See Alexis Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, (2001) 16 Am. U. Int'l L. Rev, pp. 969-1014. See Gary Born, *International Commercial Arbitration,* (Kluwer 2009) p. 2251 f. In the context of international commercial arbitration, and for purposes of this article, the term 'confidentiality' refers to the extent to which information relating to, or revealed within, an arbitral proceeding is protected from disclosure by parties (e.g., the general public) not involved in the arbitral proceedings. This concept is distinct from the notion of confidentiality as a privilege between counsel and client.

and preserved.[15] Even the *Esso* decision acknowledged that some degree of confidentiality might be contracted for by the parties, although, it is just not an implied attribute of arbitration.[16]

Second, it was argued in favour of the implied duty that even if the express rule of confidentiality was lacking from the arbitration agreement, the duty could still be implied.[17] The reason is because it is not necessary to define explicitly every legal duty given that the duty of confidentiality, like the duty of good faith and fair dealing, is implied in law and its benefit remains recognised and this is why commercial parties prefer arbitration to litigation.[18]

Third, it can be argued that confidentiality has the potential to make arbitral proceedings more efficient.[19] For example, even where outsiders are barred from arbitral proceedings and certain relevant documents on the hearings are not divulged to the public, it does not entail that the entire outcome of arbitration or the award remains completely secret.[20] The proponents of the duty of confidentiality argue that the conclusion of a number of arbitral proceedings may still go public even if the hearings were protected from the public and the private interest of the parties' restrictions of disclosure is maintained as an exception to the general rule.[21]

Similarly, another scenario could be where a losing party breaches its duty to satisfy the arbitration award, whereby the winning party may go to court to have the award enforced. With respect to this, the terms of the award can become a public fact to the extent that it is required for public and private interests by the courts while leaving substantial aspect of the arbitral proceedings secret.[22] Arguably, this approach is still within the purview of general duty of confidentiality which demonstrates the efficiency of the procedure.[23]

Hence, the efficacy and efficiency of this confidentiality in the proceedings would be weakened if all information in the proceedings were made public through the disclosure of documents relating to

[15] Ibid.
[16] *Esso Australia Resources Ltd v The Honourable Sidney James Plowman* [1995] 128 ALR 39.
[17] See Brown (n 14) 974.
[18] Ibid.
[19] See Fortier (n 11) 132.
[20] Ibid.
[21] Ibid; Michael Young and Simon Chapman, *Confidentiality in international arbitration: Does the exception prove the rule? Where now for the implied duty of confidentiality under English Law?* (2009) 27(1) ASA Bulletin 26–47.
[22] C Thompson and A Finn, *Confidentiality in Arbitration: A Valid Assumption? A Proposed Solution*, (2007) 62 Dispute Resolution Journal pp. 4-1.
[23] R Reuben, *Confidentiality in Arbitration: Beyond the Myth*, (2006) 54 Kansas Law Review 1271-1274.

the arbitration.[24] In other words, there would be little justification in excluding the public from an arbitration hearing if the parties were able to publish what was said and done at the hearings.[25]

Some rules must be followed as a matter of course, even if they are not included in the arbitral clause; and confidentiality is one of those rules in arbitration.[26] In the same vein, the proponents of this duty argue that privacy and confidentiality are implicit in an agreement to arbitration, which is why many English decisions including scholars support this view.[27]

Despite the Australian case of *Esso* [28] and US case of *Panhandle* [29] which do not share these views, there is a strong body in international arbitration community that posits that confidentiality of material disclosed in arbitration proceedings is a "desirable element of arbitration" and it should be maintained to the maximum extent possible, and the decision in *Dolling-Baker* [30] confirmed that view in England.[31]

It could be argued that an implied duty of confidentiality has been the custom in international commercial arbitration which seems to be the reason why the court observed that confidentiality is not dependent on the private nature of the material in question, nor is it dependent on custom, usage, or business efficacy.[32] Rather, confidentiality attaches to arbitration agreements as a matter of law.[33]

Ali Shipping is a landmark decision that gives teeth to confidentiality protection in international arbitration.[34] Similarly, in a French case of *Aita v Ojjeh* [35] where a party sought annulment in France

[24] Ibid.
[25] A Tweeddle, *Confidentiality in Arbitration and the Public Interest Exception*, (2001) 21 Arb. Int'l, 63-64; See Philip Rothman, *Pssst, Please Keep It Confidential: Arbitration Makes It Possible* (1994) 49-Sep Disp. Resol. J. 69; Michael Fesler, *The Extent of Confidentiality in International Commercial Arbitration*, (2012) 78(1) Arbitration Journal 48-58 48-49.
[26] Robert Smit & Nicholas Shaw, *The Center for Public Resources Rules for Non-Administered Arbitration of International Disputes: A Critical and Comparative Commentary*, (1997) 8 Am. Rev. Int' L Arb. 275, 316 (recognizing confidentiality as a key factor for selecting arbitration); Michael Pryles, *Assessing Dispute Resolution Procedures*, (1996) 7 Am. Rev. Int' L Arb. 267 (identifying the maintenance of relationships due to confidentiality in arbitration as an advantage over litigation).
[27] Exceptions would be for example, where a public company may need to disclose to shareholders that arbitration is taking place, and the results of it. In essence, these are not controversial cases, but the important thing is the presumption of confidentiality. See generally Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (London: Sweet & Maxwell 2004); D. Edward, *Confidentiality in arbitration: fact or fiction?,* (2001) 4 (3) Int Arb Journal pp. 94-95.
[28] [1995] 128 ALR 39.
[29] *USA v. Panhandle Eastern Corp, et al*, (1988) 118 F.R.D. 346 (D.Del.).
[30] [1990] 1 W.L.R. 1205 C.A.
[31] Ibid.
[32] *Ali Shipping* (1998) 1Lloyd's Rep. 643.
[33] Ibid.
[34] Ibid.
[35] (1986) C.A. Paris, February 18, 1986; see *NAFIMCO v Forster Wheele* (2004) CA Paris, Jan 22, 2004.

with respect to an arbitral award rendered in London, the Paris Court of Appeal ruled against the party, holding that the annulment proceedings violated the principle of confidentiality and the Court further ordered the losing party to pay a penalty (fine) to the winning party for the breach of confidentiality.[36]

The implications of the above decisions remain that there seem to be a stringent protection of an implied duty of confidentiality. In practice, however, the bottom line remains that parties' expectations about the privacy and confidentiality of their arbitral proceedings are often disappointed or even negated by the courts with respect to implied duty because of the need to satisfy the public interest demand.[37]

B. ISSUES WITH IMPLIED DUTY

While implied duty may generally be acknowledged as a positive aspect of arbitration that enables the proceedings to remain private to outsiders, in practice, no international consensus has been reached with respect to this general duty.[38] Worst still, the duty is not even provided for in important international documents in relation to international commercial arbitration.[39]

The only reference to the issue of confidentiality is in the UNCITRAL Arbitration Rules.[40] Even in these rules, the relevant provisions there mainly concern the confidentiality of awards, rather than a

[36] Ibid.
[37] See for instance *NAFIMCO v Forster Wheele* (2004) CA Paris, Jan 22, 2004, where the Paris Court of Appeal rejected a claim for damages for violation of confidentiality, because the claimant could not establish the existence of the duty.
[38] Brown (n 14) 990.
[39] Ibid; three major conventions govern international commercial arbitration: the New York Convention, the Geneva Convention and the Panama Convention. These conventions, which are usually codified and given legal meaning by individual nations, do not ensure a duty of confidentiality. This is not surprising for two reasons. First, individual nations are hesitant to codify a duty of confidentiality and it is less likely that groups of nations could come to an agreement on the issue either. Second, the aim of these conventions is to facilitate enforcement of international arbitral awards and given this ends-focused -perspective, they are not intended to focus on the details of the arbitral process itself. While these international conventions provide the force for the finality of international arbitral awards, they do not provide a source for an obligation of confidentiality. *See Treaties & Conventions,*< http://www.internationaladr.com/tc.htm> (last accessed, December 2014) (Listing various treaties and conventions). Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, <http://www.un.or.at/uncitral> accessed December 2014. See European Convention on International Commercial Arbitration of 1961 <http://www.asser.nl/ica/eur.htm.> accessed December 2014.See Inter-American Convention on Arbitration of 1975 <http://www.asser.nl/ica/iaci.htm> accessed December 2014. The Panama Convention is particularly significant because it takes precedence over the New York Convention in cases where the majority of parties to the arbitration agreement are citizens of countries that are signatories to the Panama Convention. *See* International ADR: Treaties and Conventions <http://www.internationaladr.com/yc.htm > accessed on December 2014.
[40] UNCITRAL Arbitration Rules, art 28.3.

general duty of confidentiality in relation to the information used in the arbitration proceedings.[41] Since the courts have not stated a duty imposed on parties in arbitration, there seems to be no such duty.[42] A case in reality is the Mason CJ's view that takes the lack of authority as evidence that the duty does not exist.[43] In his decision in *Esso,* Mason CJ relied on an absence of authority before *Dolling-Baker* to hold that no such duty exists.[44]

Second, Professor Julian Lew criticised the idea of a duty of confidentiality based on his wealth of experience in international commercial arbitration.[45] Even though this eminent scholar could see the advantages of confidentiality, he saw no binding rule that an arbitration proceeding is confidential.[46] Lew's argument is based on the fact that the fundamental basis of arbitration is the arbitration agreement itself.[47]

The parties have mutually agreed to submit certain disputes to arbitration and the autonomy of the parties has always been an essential hallmark in arbitrable issue, which demonstrates that the parties determine the arbitrators' power, authority, the applicable arbitration rules, and the underlying law including the conduct of the arbitration.[48]

A natural consequence of this would be that the extent, to which the contents and other aspects of the arbitration remain confidential, is a matter of agreements between the parties and if the parties are silent concerning some issues of the arbitration, it is according to the *lex arbitri.* [49] In absence of agreement and statutes, there may be a general practice that allows the arbitrator to determine how

[41] UNCITRAL Arbitration Rules, art 34.5.
[42] However, in some instances there may be some exception, for example, in a partnership matter, where the arbitrators affirm the expulsion of a delinquent partner, only the relevant section is told to the public, that is, for instance, "Mr A is no longer a member of the partnership." Detailed charges against him are not and should not be disclosed to public domain. See Julian Lew, 'Expert Report in *Esso/BHP v. Plowman'* (1995) 11 (8) Arbitration International 283-284.
[43] Ibid.
[44] Patrick Neil, *Confidentiality in Arbitration*, (1996) 12 Arb Int' L 287 -190.
[45] See particularly Julian Lew, *Expert Report in Esso/BHP v. Plowman,* (1995) 11(8) Arbitration International 283-289. Professor Julian Lew is a UK member of the International Court of Arbitration of the International Chamber of Commerce (ICC), and a member of the ICC Commission and International Arbitration and the Council of the ICC Institute of World Business <http://www.transnational-dispute-management.com> accessed on January 2015. See Hans Bagner, *Confidentiality: A Fundamental Principle in International Commercial Arbitration?*, (2001) 18(2) Journal of International Arbitration 243–249.
[46] Neil (n 44).
[47] Lew (n 42).
[48] Ibid 239.
[49] The law that governs the seat of arbitration will regulate these issues.

particular issues should be dealt with.[50] Moreover, parties can of course expressly state in the agreement that a certain level of confidentiality shall apply.

However, there is no basis on which one can automatically imply confidentiality, as the English judges have suggested.[51] Although, as in all contracts, there may be an implied term in agreement that can, if it is clear what the parties would have intended, provide for confidentiality.[52]

Third, it appears that a duty of confidentiality involving third parties or several parties may be difficult to reconcile and unworkable in practice.[53] This is because it would seemingly be unfeasible that the same arbitration clause (implied duty of confidentiality) could be binding to all parties, given that in multi-party arbitration, arbitrable matters may include different disputes between different parties.[54]

The fact that arbitrators and counsel in many cases could be made to observe confidentiality does not necessarily entail the parties' obligations.[55] Similarly, even the non-public character of proceedings offers little help and the fact that one or both parties do not want the proceedings to be made public does not in itself constitute a legal obligation to observe confidentiality by all parties in multilateral transactions.[56]

A further argument against any implied duty is the need for the public to have access to court records which could ensure some level of trustworthiness in the judicial proceedings and perhaps reduce abuses in judicial system. In essence, this public access to judicial documents has the potential to offer the public a better appreciation of the workings of the arbitral process along with the perception of its fairness.[57]

However, the argument in favour of access to public record has been criticised when it involves relevant facts that contain critical business information that could jeopardise a party's competitive position.[58] For instance, there seems to be a stronger argument for the protection of recognised trade secrets as against the public access to such documents in the judicial records.[59]

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[50] Lew (n 42).
[51] Ibid 239.
[52] Ibid.
[53] R Shackleton, *Global Warming: Milder Still in England*, (1999) 2 (4) Int'l Arb. L. Rev 117 -125.
[54] Ibid.
[55] Ibid.
[56] Ibid.
[57] Han Smit, *Case-note on Esso/ BHP v Plowman,* (1995) 11 Arbitration International 299-300.
[58] See the US case of *SEC v Van Waeyenberghe*, [1993], 990 F.2d 84, 849 (5th Cir.).
[59] See *Std. Inv. Chtd, Inc v Nas, No 07 CV* [2012] U.S. Dist - Lexis 4617, 17.

In practice, the court is usually not in the habit of sealing an entire record when the demand for public disclosure is required because of its implication to public policy.[60] This does not mean that the court may not respect the autonomy or agreement of the parties. Rather, the courts try to strike a substantial balance between parties' agreement and the greater demand for public policy concerns.[61]

Similarly, there is still a further argument against maintaining the secrecy of the arbitral awards and the submissions in proceedings as this has the potential to whittle down the reliance on the award as worthy precedent in the subsequent arbitral cases by the arbitrators.[62] Precedents can be seen if parties authorise the disclosure of their hearings as well as their written submissions and awards for subsequent references.[63]

The certainty including the predictability of the conclusions of the arbitration has its support by relying on the similar arbitral cases already settled as precedent which encourages parties to choose arbitration and save expense and time. Perhaps, it could even reduce the amount of cases going to litigation from arbitration when the arbitral outcome can fairly be predicted and certain.[64]

While these worthy precedents are not binding (but a persuasive authority) on subsequent cases, nevertheless, they could still provide predictable, and even clearer direction for later parties in arbitration.[65] Apart from its assistance to parties, future arbitral tribunal, judges and perhaps scholars can learn from the disputes already decided which have the potential to advance and further deepen the understanding of international commercial arbitration.[66] Arguably, this would seemingly remain impracticable if there were strict adherence to implied duty.

Similarly, insisting on this duty does not appreciate the fact that the court could order the publication or disclosure of the award or arbitral submissions if it is challenged on ground of public interests or based on enforcement of foreign award.[67] With respect to foreign judgement, it can be

[60] Ibid.
[61] See *Green Mt. Chrysler Plymouth Dodge Jeep v Crombie*, [2007] No 205CV302, [2007] U.S. Dist (LEXIS 22095 at 20-24.
[62] B Kwiatkowska, *The Australian and New Zealand v Japan Southern Bluefin Tuna Jurisdiction and Admissibility Award of the First Law of the Sea Convention Annex VII Arbitral Tribunal*, (2001) 16(13) International Journal for Marine and Coastal Law 293-261.
[63] Ibid 239-261.
[64] Ibid.
[65] See *Lederman v Prudential Life Ins. Ins. Co. of Am.*, [2006] 897 A 2d, (N.J. Super. Ct. App. Div).
[66] Ibid.
[67] For instance, public interests could require disclosure of certain records that are needed for purposes of companies' operations in compliance with the incorporation and securities laws. Furthermore, it could involve the nature of the matter and the surrounding issues that are required for company stakeholders in stock exchanges – such as potential shareholders, creditors, partners, depositors or anybody that has a recognised

argued that the presentation of an arbitral award and agreement to the enforcing court can amount to a breach of principle of confidentiality or disclosure.[68]

However, this may not necessarily be a breach of confidentiality given that without the disclosure of an arbitral award and agreement, there will not be an enforcement.[69] The reason is because the arbitral award contains the decision of the arbitrator that the award-holder is relying upon as a right that needs to be performed by the award-loser.[70]

Thus, if the award-holder is precluded from submitting the award on grounds of principle of confidentiality, the arbitral award will not be enforced.[71] In essence, this could fundamentally frustrate the objective of achieving the binding effect of an award by preventing the award-holder from enforcing an award made in his favour. Also the duty imposed on the award-loser for performance of award will be relieved.[72]

In other words, the confidentiality feature accorded to arbitration and its awards is relieved and disclosed to the foreign court when the issue of recognition and enforcement of an arbitral award is determined for establishment of claim or defense.[73] Given the above, this paper argues that the non-disclosure of an arbitration agreement and award is implied by arbitration law but it is subject to exception at the instance of the recognition and enforcement of award in the interest of justice.

III. CONFIDENTIALITY OBLIGATION

This part of the paper discusses specifically the scope and sources of implied duty and institutional rules in many jurisdictions to further analyse other wider issues affecting confidentiality in practice. The absence of explicit confidentiality rules may be viewed by some as an indication of an implied duty in law, however, the approach on *Esso* and *Panhandle Eastern* court suggests the opposite.

This is because a duty of confidentiality may only arise when specifically contracted for by the parties, thus making the source of the obligation the party's arbitration agreement; and if parties fail to

legitimate interest in keeping with one of the parties in disputes. See F Dessemontet, *Arbitration and Confidentiality*, (1996) 7 Am .Rev. Int'l Arb 303-3.

[68] D Ridgeway, *International Arbitration: The Next Growth Industry*, (1999) 54 Feb Disp. Resol. J, 50-52.

[69] Ibid.

[70] Ibid.

[71] See *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184; *U.S v Panhandle Eastern Corp. et al* (District Court of Delaware) 1988, 118 F.R.D.346.

[72] Ibid; *U.S v Panhandle Eastern Corp. et al (District Court of Delaware)* 1988, 118 F.R.D.346.

[73]See NYC 1958, article V (1) (a) – VI.

contract for that, no such duty exists.[74] But, this approach on the protection of confidentiality respects parties' autonomy given that arbitration is a consensual mechanism in nature.[75]

Under the party autonomy principle, the parties themselves can provide an express, detailed confidentiality clause satisfying their requirements, however, where the agreement fails to indicate the degree of confidentiality, then regard must be had to the applicable law governing the parties' agreement along with the law of the seat of arbitration to determine if there is an implied duty.[76]

The duty can be contractually imposed upon the parties themselves, the members of the tribunal and third parties taking part in the arbitration proceedings including the employees or agents of the arbitrators.[77] Alternatively, the parties can choose to indirectly impose the duty by submitting their disputes to an arbitration institution that has rules containing provisions on duty of confidentiality.[78]

However, like everything in international commercial arbitration, the parties' agreement is subject to the restrictions of mandatory rules and public policy of the relevant jurisdictions.[79] It does not matter whether it is directly or indirectly agreed duty of confidentiality, the parties' agreement can be further complicated and may lose its functions if the relevant applicable laws impose restrictions or allow exceptions to such an agreement.[80]

The relevant applicable laws that may affect the parties consent on the duty of confidentiality include the law where the arbitration will be held, the law where the tortious acts (breach of duty of confidentiality) were carried out, the laws governing the confidentiality agreement, and the laws of the country where the arbitral awards are to be recognised and enforced.[81]

A. STATUTORY DUTY OF CONFIDENTIALITY

Apart from the consensual duty of confidentiality, the Report of International Law Association (IBA) in 2010 shows that Austria, Ecuador, England, Singapore and Venezuela are some of the jurisdictions

[74] *Esso Australia Resources Ltd v The Honourable Sidney James Plowman* (Minister of Energy and Minerals [1995] 128 ALR.
[75] Ibid.
[76] Ibid.
[77] Ibid.
[78] J Thompson, *Confidentiality in English Arbitration Law: Myths and Realities About its Legal Nature*, (2008) 25 Journal of International Arbitration 299 – 314.
[79] Ibid.
[80] H Yu, *Duty of confidentiality: myth and reality*, (2012) 30(1) Civil Justice quarterly 1-8.
[81] Ibid.

whose arbitration laws are silent on this issue but rely on their case laws for the general duty.[82] For instance, in England, owing to the absence of statutory guidance addressing the issue in Arbitration Act 1996, clarification as regards the implied duty can only be sought in the plethora of case laws.[83]

Similarly, while France used to be one of the jurisdictions that provided implied duty of confidentiality, however, the country has now joined the jurisdictions offering express duty of confidentiality in 2011.[84] In the same vein, section 14 of the New Zealand Arbitration Act 1996 states that the publication of information relating to arbitral process is permissible subject to restricted number of exceptions which may be where arbitration agreement provides for publication.[85]

In some jurisdictions, the duty of confidentiality is imposed on a default basis. For example, in Venezuela, the default position is that arbitrators are under an obligation to keep confidential the actions of the parties, the evidence and all that is contained in arbitration proceedings.[86] In other jurisdictions, the power to ensure that the duty of confidentiality is observed may be given to the court official. For instance, the Zambian Arbitration Act 2000 empowers the Chief Justice to make rules for

[82] For example, in Austria**,** since the adoption of the Arbitration Act 2006 Section 616(2) of the Code of Civil Procedure lays down an exception to the general principle of publicity of proceedings in State courts for proceedings for the setting-aside or the declaration of existence or non-existence of an arbitral award. Section 612(2) provides that at the request of the parties such proceedings may be kept private by excluding the public, if a legitimate interest can be shown. Similarly, in Ecuador, Article 34 of the Law on Arbitration and Mediation of 1997 does not provide for confidentiality of the process unless agreed upon by the parties. In England, where the Arbitration Act 1996 has been silent on confidentiality, is the country where the courts have been the most eloquent in articulating the existence of a broad duty of confidentiality, starting from a decision of *Russel v. Russel* (1880) 14 Ch. D. 471, 474. Similarly, in *Ali Shipping Corporation v Shipyard 'Trogir'* (CA) [1998] 2 All ER 136, the implied duty of confidentiality including a limited number of exceptions has since been confirmed by the English courts on several occasions, most recently in *Emmott v Michael Wilson & Partners* [2008] EWCA Civ 184 (*per* Collins J) where it was held that the exception to confidentiality in the "interests of justice" is not limited to the interests of justice in England but may relate to a foreign jurisdiction where the dispute is of an international nature. The approach of the English courts is followed in Singapore where the High Court accepted that the parties to an arbitration are under an implied duty to keep documents confidential but that disclosure is permitted when *"reasonably necessary"*, even without the leave of the court. See *Myanma Yaung Chi Oo Co Ltd v Win Win Nu* [2003] 2 SLR 547, that largely followed the English decision in *Dolling- Baker v Merrett*. Likewise, in Venezuela, Article 42 of the Law on Commercial Arbitration of 1998 only refers to the arbitrators' duty to *"observe the confidentiality of the parties' participation, of evidence and all the contents relating to the arbitral proceedings.*

[83] *Dolling Baker v Merrett* [1991] 2 All ER 890; *Hassneh Insurance Co and Others v. Steuart Mew*, [1993] 2 Lloyd's Rep. 243 (Q.B Com Ct.); *Oxford Shipping Co. LTD. v. Nippon Yusen Kaisha,* [1984] 2 Lloyd's rep. 373 (Q.B.Com.Ct.); *Insurance Co. v. Lloyd's Syndicate* [1995] 1 Lloyd's Rep. 272 (Q.B. Com. Ct.). *London & Leeds Estates Ltd. v. Paribas Ltd*, [1995] 1E.G.L.R 102 (Q.B.); *Ali Shipping Corporation v. Shipyard Trogir*, [1998] 2 All. E.R. 136, 146-147 (C.A. Civ. Div.); *Scally v. Southern Health and Social Services Board*, [1992] 1 A.C. 294.

[84] This came as a result of the promulgation of Art. 1464 of the new French Arbitration Law in 2011. However, the Paris Court of Appeal established that any implied duty of confidentiality should be based on the protection of legitimate interest. See CA Paris Jan 22 (2004); *National Company for Fishing and Marketing 'Nafirmco' v Foster Wheeler Trading Company*, 2004 REV. ARB 647, 656-57.

[85] New Zealand Arbitration Act 1996, s.14.

[86] See art.42 of the Venezuelan Commercial Arbitration Act 1998. However, this default position can be modified or made inapplicable by parties' agreement.

the maintenance of confidentiality with respect to the recognition and enforcement of New York Convention awards.[87]

B. DEFINING CONFIDENTIAL INFORMATION

The possible information that can fall into the scope of confidentiality includes information pertaining to the arbitral process itself and the documents and other materials which are part of the arbitration, the documents and information which were used, introduced and disclosed in arbitration proceedings from external source and award.

In defining this concept, the Norwegian law addresses the issue by explicitly ruling out confidentiality. Chapter 1, section 5 of the General Provisions of the Arbitration Act of 2004 lays down as a default rule the principle that, failing a contrary agreement of the parties, "confidentiality does not apply to arbitration", and specifically to the arbitration proceedings and the decisions reached by the arbitration tribunal.[88]

However, different legal definitions are provided by different jurisdictions. Some jurisdictions provide very detailed definitions, including Scotland, Australia and New Zealand, while others provide for the duty of confidentiality in more general terms.[89] For instance, the Latvian Civil Procedure Law states that information concerning arbitral proceedings is subject to the duty of confidentiality.[90]

Similarly, the UAE Arbitration Law provides that, "all information relating to the arbitral proceedings shall be kept confidential, except where disclosure is required by an order of the DIFC

[87] See s.32 (d) of the Zambian Arbitration Act 2000.
[88] Chapter 1, section 5 of the Norwegian General Provisions of the Arbitration Act of 2004.
[89] Rule 26(2) of the Scottish Arbitration Act 2010 requires the tribunal and the parties to take "*reasonable steps*" to prevent unauthorized disclosure of confidential information by third parties involved in the arbitration. Similarly, Rule 26(3) of the Act requires that the tribunal inform the parties of the confidentiality obligations at the outset of the proceedings. In Australia the International Arbitration Act 1974 as amended in 2010 addresses the issue in a detailed fashion, in the style of the New Zealand Arbitration Act. The Act introduces Sections 23C-G as a series of "opt in" provisions, meaning that the parties must expressly provide for them to apply (Section 22(3)). This approach was adopted on the consideration that the parties should expressly turn their minds to the issue of confidentiality, rather than have rules unknowingly imposed on them. In New Zealand, the Arbitration Act 1996 as amended in 2007 provides that arbitral proceedings must be conducted in private (Section 14A) and implies into every arbitration agreement a term that neither the parties nor the arbitral tribunal shall disclose confidential information (Section 14B), subject to the limited exceptions set out in section 14C.
[90] See art.512 (2) of Latvian Civil Procedure Law, Part D 1999.

court".[91] A general duty of confidentiality over arbitral proceedings, award and any information of which they become aware through the proceedings, can also be seen in the case of Peruvian Law.[92]

Other jurisdictions provide more specific or detailed of definition of confidential information. Taking Morocco as an example, the law relating to Arbitration and Mediation Agreements, specifies that the deliberation between the arbitrators is confidential.[93] The Czech Republic Law stipulates that the duty of confidentiality covers facts revealed to the arbitrators while performing the role of arbitrator.[94]

This paper opines that there is no uniformity with respect to the general or specific meaning of confidential information given that different national laws apply different criteria to suit their applications and this is why international framework is necessary in this regard.

C. INSTITUTIONAL RULE

Many international arbitration associations promulgate rules on almost every aspect of the arbitral process, including confidentiality. Unfortunately, as the following survey of model rules including major international institutional rules illustrates, most of these institutional rules either do not explicitly protect confidentiality at all, or do so inadequately.[95]

Arbitration institutions that bar the publication of the arbitration process and related submissions are very few and may extend only to the arbitrator (s) but do not apply to the parties in practice.[96] But

[91] See art.14 of the UAE Arbitration Law 2008 DIFC Law No.1 of 2008.
[92] In Peru, Article 51 of the Legislative Decree No. 1071 of 2008 imposes a duty of confidentiality on *"the parties, the arbitral tribunal, the secretary, the arbitral institution"* and every person participating in the arbitral proceedings, including witnesses and parties' counsel, and covers *"the proceedings, including the award and any other information revealed in the proceedings"*. It also lays down two exceptions, one for information that is legally required to be made public to protect a right or to challenge or enforce the award and another for awards rendered in arbitrations to which the Peruvian State is a party. See art.51 of the Peruvian Legislative Decree regulating Arbitration 2008 No.1071.
[93] See art.326 of the new Moroccan Law relating to Arbitration and Mediation Agreements 2008.
[94] See s. 6(1) of the Czech Republic Arbitration Act 1995.
[95]See eg American Arbitration Association, International Arbitration Rules, art 34 (Effective June, 1, 2009) <http://www.adr.org/sp.asp?id=33994> accessed 10 December 2014; see Singaporean International Arbitration Centre, International Rules (SIAC) art 34.6 1997; ICC Rules, art 20.
[96] Ibid.

some arbitral rules are wide enough to include the parties.[97] That notwithstanding, most rules provide that disclosure of awards should be by the consent of the parties.[98]

Similarly, many arbitral institutions do not require the consent in writing but a notable exception to this is provided in LCIA Rules, Art 30.3 which mandates the parties' written consent before any disclosure of an arbitral award.[99] The UNCITRAL Rules Art 28 (3) stipulates that arbitral hearing shall be in private but it fails to clearly specify the degree and extent of confidentiality. Thus, while privacy is protected; confidentiality is not and these rules are particularly influential given that a number of countries pattern their local rules on the UNCITRAL Arbitration Rules.[100]

Furthermore, while the ICC rules are silent on the confidentiality of awards and other submissions in the proceedings along with the exclusions from the hearing "persons not involved in the proceedings," it allows the arbitral process to "take measures for protecting trade secrets or confidential information,"[101] However, this general provision does not impose a duty on the parties or other participants.[102]

Nevertheless, LCIA Rule provides for a position that is in line with the English case laws, recognising the concept of confidentiality, but it allows publication when it mandates a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award or in *bonafide* legal proceedings.[103] Although intended as a response to lack of confidentiality protection in the 1996 English Arbitration Act, these confidentiality provisions that came into effect in 1998 are regarded as controversial by arbitration practitioners and academics in London.[104]

The World Intellectual Property Organization ("WIPO") also includes a comprehensive confidentiality provision in its arbitration rules and given WIPO's interest in protecting intellectual property and trade secrets, it is not surprising that these institutional arbitration rules are so cautious with respect to confidentiality.[105]

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[97] China International Economic and Trade Arbitration Commission Arbitration Rules (CIETEC) 2000, art 37; Arbitration Institute of the Stockholm Chamber of Commerce (SCC), art 46; International Arbitrations Rules of Milan Chambers (CAM) Rules , arts 8(1), 8(2) 2010; WIPO Arbitration Rules, art 52 (a).
[98] See UNCITRAL Rules, articles 32(5); ICDR Rules, articles 27(4) and 34; LCIA Rules, article 30.3; see also ICSID Document, article 6 (2).
[99] LCIA Rules, art 30.3.
[100] UNCITRAL Arbitration Rules 2010 (Revised), art 28 (3).
[101] The ICC publishes awards after three years. For more see ICC Rules, articles 20 (7) and 21(3).
[102] Ibid.
[103] LCIA Rules, articles 30.1, 30.2. 30.3.
[104] Yu (n 80).
[105] WIPO Arbitration Rules, art 52 (a).

The International Centre for Settlement of Investment Disputes ("ICSID") Arbitration Rules provide for privacy of the proceedings and for a confidentiality obligation on the part of the arbitral tribunal.[106] The Rules of Procedure of the Inter-American Commercial Arbitration Commission ("IACAC") do not explicitly address a duty of confidentiality.[107]

Thus, it is the submission of this paper that while arbitration institutions may help to foster the common presumption that confidentiality is an advantage of arbitration by including confidentiality provisions in their rules, these rules do not provide *ipso facto* protection of confidentiality in practice.

IV. INCORPORATING EXPRESS TERMS IN CONFIDENTIALITY CLAUSE

Given the inadequacies of institutional rules regarding implied duty, parties may wish to draft in a duty of confidentiality into their arbitration agreements to reduce disputes. Arguably, an express confidentiality term in an arbitration agreement could ensure confidentiality, however, even an express term may not entirely be a fool proof solution if confidentiality clause is not well drafted. While express term may help, it does not provide much certainty or definite solution for some reasons.

First, disputes subject to arbitration often arise years after the contract was negotiated and it is difficult to predict so far in advance where one's interest will lie on the confidentiality spectrum.[108] Second, a clause that would cover all potential contingencies would have to be quite detailed and lengthy, raising the transactional costs of entering into the agreement at a time when the parties prefer not to focus on contingent future disputes.[109] Third, it is doubtful whether a particular national court would respect the whole of the parties' agreement, especially those aspects that may conflict with the public policy of the forum country.[110]

Similarly, the parties cannot obviate the difficulties by simply incorporating the rules of an arbitral institution with strong confidentiality protections into their agreement.[111] None of these rules specifies what recourse a party would take if confidentiality appears to be breached after the arbitration is concluded. Presumably, a party would have to go to court, where the vagaries of domestic law would be in issue.

[106] ICSID Document, Article 6 (2).
[107] IACAC Rules, art 1.
[108] S Walt, *Novelty and the Risks of Uniform Sales Law*, (1999) 39 Va. J. Int'l L. 671-673.
[109] Ibid.
[110] Yu 2012 (n 80).
[111] Walt (n 108) 671.

But the question remains: would a court in France or Canada or Mexico hold that the parties' incorporation of the rules of the LCIA Arbitration International or CIETAC [112] represent a binding agreement to keep proceedings confidential? Perhaps, but one can argue that the dearth of authority on this issue makes reliance on such an outcome a bit hazardous.

A. SUGGESTED WAYS FORWARD

Given that the national courts and arbitral institutions including the statutory provisions foster uncertainty regarding the existence and scope of a duty of confidentiality, it is argued that there is need for an urgent coherent rule in international arbitration community. In this paper, it is proposed that a sort of universally accepted "default uniform rule" that could be binding internationally is urgently needed.

This proposed model rule could start from both national legislations and arbitral institutions in view of lack of agreement with respect to duty of confidentiality. It is argued that this "default model rule" has the potential to reduce transactional costs by obviating the need for detailed negotiations or at least by providing a baseline to encourage efficient negotiations.

While the commentaries and recommendations of the IBA in Netherland (Hague, 2010), remain commendable for providing model rules in confidentiality in international commercial arbitration, it can be argued that it is too broad and falls short to empower the arbitrator(s) to effect some protective order where there is potential for violation of agreement by one of the parties.[113]

Given the deficits above, couple with the need to further deepen confidentiality in international commercial arbitration, it is submitted that in all international commercial arbitrations, the proposed default rule should empower the arbitrator(s) to set a threshold that the parties agree on the scope of confidentiality, failing which the arbitrators shall enter a protective order on the scope of confidentiality.

This default rule should provide that any violation of the parties' confidentiality agreement or protective order accruing after the proceeding if terminated, shall be resolved by arbitration according

[112] China International Economic and Trade Arbitration Commission Arbitration Rules (CIETEC).

[113] Model arbitration non-confidentiality clause (Hague 2010) states that: 'Save to the extent required by any applicable law and by any other obligations to which a party may otherwise be bound, the parties shall have no obligation to keep confidential the existence of the arbitration or any information or document relating thereto'. See Report for the Biennial Conference in The Hague, Aug. 2010. Filip De Ly, Chairman. Mark W. Friedman and Luca G. Radicati di Brozolo, Rapporteurs. See generally Filip DeLy, Mark Friedman and Luca Radicati Di Brozolo, *International Law Association: International Commercial Arbitration Committee's Report and Recommendations on 'Confidentiality in International Commercial Arbitration'*, (2012) 28 (3) Arbitration International (LCIA).

to the terms set forth in the parties' arbitration agreement and arbitrators could impose appropriate damages and penalties on parties found to have breached the confidentiality agreement or protective order.[114]

The paper posits that one of the advantages of this proposed model rule could be that it would not require a decision on confidentiality terms at the time of contracting, when most contracting parties prefer to leave this issue open (as evidenced by the fact that most contracts are silent on this issue).

The second advantage of this rule is that it could result in an agreement by the parties that courts - including those in countries not currently recognizing an implied duty of confidentiality-likely would enforce it.[115] However, courts may be avoided altogether in most circumstances given the requirement that disputes about confidentiality be arbitrated.[116] Nonetheless, this would have the additional advantage of keeping private what is meant to be a private dispute resolution process.[117] Moreover, the provision for penalties in the event of a breach of the confidentiality agreement would serve to deter breaches where damages from a breach may be non-existent or minimal.[118]

In order to encourage the parties to agree on confidentiality terms and avoid the need to impose a protective order, the arbitrators should have available several "prefabricated" confidentiality clauses, reflecting varying levels of confidentiality protection, from which the parties may choose. But failing agreement, what should the protective order provide?

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[114] In a legal theory, a 'default rule' is a rule of law that can be overridden by a contract, trust, will, or other legally enforceable agreement. Contract law, for example, can be divided into two kinds of rules: *default rules* and *mandatory rules.* Whereas the *default rules* can be modified by agreement of the parties, *mandatory rules* will be enforced, even if the parties to a contract attempt to override or modify them. One of the most important debates in contract theory concerns the proper role or purpose of default rules. On one hand, the idea of a default rule in contract law is sometimes connected to the notion of a complete contract. In contract theory, a complete contract fully specifies the rights and duties of the parties to the contract for all possible future states of the world. On the other hand, an incomplete contract, therefore, contains gaps. Most contract theorists find that default rules fill in the gaps in what would otherwise be incomplete contracts. This is often stated pragmatically as whether a court will imply terms so as to save a contract from uncertainty. Similarly, it is argued that this sort of a default rule has the potential to perform the gap filling role so as to protect the parties from disclosing confidential information given the uncertainties surrounding confidentiality in international commercial arbitration.

[115] See Randy Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, (1992) 78 Va. L.Rev. 821, 825.

[116] Jeffrey Sarles, *Solving the arbitral confidentiality conundrum in international arbitration*, (2008) 18 American Arbitration Association'*s'* <http://www appellate net/articles/confidentiality.pdf> Accessed on 23 December 2014.

[117] Ibid.

[118] See Steven Walt, *Novelty and the Risks of Uniform Sales Law*, (1999) 39 Va. J. INT'L L. 671, 671 (noting that "subject[ing] a transnational commercial transaction to a single set of rules" generally reduces transaction and legal costs).

While the arbitrators should try to tailor the order to a particular case before them, generally the order should impose a duty of confidentiality with exceptions of the type recognized under English law. Indeed, such provision is the rule that most private parties probably would choose and is consistent with both long-standing practice and the traditional expectation that private arbitrations are to remain private.[119]

B. CONTENT OF PROPOSED DEFAULT RULE

It is the submission of this paper that an agreement or protective order of the type proposed should detail permissive and forbidden disclosures. In essence, it should clearly and specifically provide for the duty to be included for disclosures by the parties including the third parties in the arbitral proceedings. On one hand, duties that are unfeasible to attain in confidentiality agreement should be circumvented.

For example, divulging the occurrence of the arbitration to insurers, auditors, shareholders, bankers and courts often is mandatory. On the other hand, it may be desirable to restrict disclosure beyond such mandates to prevent a claimant from disclosing information about the respondent's potential liabilities to the respondent's customers, shareholders, creditors and contracting partners.[120] Also, it may be unworkable to prevent the prevailing party from leaking to the world, "I won." But the terms of the award, including the amount of any damages, should be forbidden from disclosure.

The arbitrators' reasons for the award, if any, also should be kept confidential, however great it might seem to be, although, it is hard to imagine that any party would agree, in the event that it comes out on the losing end, to disclose the reasons for its defeat. The same is true of documents, oral testimony and arguments offered in the arbitral proceeding.

Transcripts may already be protected by institutional rules that make hearings private, but there is no downside to specifying their confidential status in the arbitration agreement to avoid any ambiguity.[121]

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[119] This is not one of those situations where a 'penalty' default rule - one set at what the parties do not want in order to encourage negotiations and disclosure of all relevant information - would be more appropriate than a 'market-mimicking' default rule. See Ian Ayres and Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, (1989) 99 YALE L.J. 87, 92. Here, the problem to be solved is not the strategic withholding of information or insufficient bargaining, but rather the costliness and often the futility of obtaining reliable information about the enforceability of confidentiality provisions.

[120] See generally Francois Dessemontet, *Arbitration and Confidentiality*, (1996) 7 Am. Rev. Int'L Arb.299, 300.

[121] See Michael Collins, *Privacy and Confidentiality in Arbitration Proceedings*, (1995) 30 Tex. Int'l L.J. 121, 127 (distinguishing the award from the raw materials of the arbitration itself, including the transcript, witness statements, expert reports, documents and briefs).

Similarly, although courts generally uphold the confidentiality of trade secrets, it makes sense to agree to specific confidentiality provisions for them.[122] An agreement or protective order of this nature may not in itself bind everyone gaining access to the proceeding, such as non-party fact and expert witnesses. However, requiring all witnesses to agree to confidentiality terms similar to those governing the parties should be effective in most instances. Although expert testimony may be subject to disclosure in later proceedings in which the expert testifies.[123] It is posited that such confidentiality agreements and protective order at least could reduce the risk of undue disclosure.

It is further argued that this proposal does not remove the desirability of contractual confidentiality provisions given that there is no conflict between instituting the proposed uniform default rule and including confidentiality provisions in "predispute" arbitration agreements.[124] Such provisions may provide a level of comfort to the confidentiality issue from the beginning of the contractual relationship, and they can always be modified at the time of arbitration. But where the parties' desire for confidentiality is inchoate when the contract is negotiated, it may be preferable to have the contract generally bar disclosure, absent consent of the parties, and then specify the terms if and when there is the need to resort to arbitration.

The purpose of this proposal is not only to resolve a conflict over the duty of confidentiality in international arbitration but also to foster stability and predictability - two paramount requirements of most participants in international transactions. However, this desire can be criticised given that it is insufficient to overcome the policy and institutional constraints preventing courts, countries or arbitral institutions from independently achieving uniformity.[125]

This paper posits further that the most promising platform to discuss a uniform confidentiality default rule would be a conference composed of delegates from the leading arbitral institutions and representatives from national level that cut across the two opposing views on duty of confidentiality globally. Their goal would be to develop a model (uniform) default rule - that could gain legitimacy even beyond the enacting institutions and come to be respected by the courts internationally.[126] The

[122] See generally Charles Baldwin, *Protecting Confidential and Proprietary Commercial Information in International Arbitration*, (1996) 31 Tex. Int'l L.J. 451.
[123] See *London and Leeds Estates v. Paribas*, 1 EGLR 102 (1995).
[124] Hans Smit, *Confidentiality Report Art.73-76*, (1998) 9 Am. Rev. Int'l Arb pp. 233 -237.
[125] See Catherine Pedamon, *How is Convergence Best Achieved in International Project Finance?*, (2001) 24 Fordham Int'l L.J. 1272, 1274 (noting that international investors 'prefer to deal with one set of legal rules and principles).
[126] Given the prevailing national ego as a sovereign state, the law of the seat of the chosen place of arbitration might clash with the proposed uniform default rule. While this paper admits that there is no easier way in reconciling this, it is suggested that the arbitrators should only resort to the *lex loci arbitri* where no such guide is covered in the propose default rule.

call for such a conference could come from the International Federation of Commercial Arbitration Institutions (IFCAI).[127]

V. CONCLUSION

Given the lack of universal consensus that implied duty of confidentiality exists in international commercial arbitration, it has not weakened the legitimacy arbitration enjoys as a dispute resolution process in international fora. The article posits that confidentiality seems to be a desirable feature of arbitration which is why the doctrine of arbitration may still be the choice of commercial men for the resolutions of their commercial disputes and can be distinguished from litigation.

While arbitration remains a consensual procedure, perhaps, parties may be surprised to see that confidentiality may not be the most essential feature of arbitration because most national laws and judicial decisions including the institutional rules lack uniformity on duty of confidentiality. Indeed, there are two aspects of interpreting the obligation of confidentiality and one is by accepting an implied and general duty as binding on all parties and may extend to all participants.

On one hand, English courts and some other civil law countries adopt this general implied concept of confidentiality.[128] On the other hand, countries such as Czech Republic, Scotland, Hong Kong, US, Sweden, Australia and New Zealand allow the duty of confidentiality to be waived by parties' agreement and judicial consideration.[129] The paper proposes that these two divergent views should be harmonised to provide a greater certainty and a more coherent background for arbitration process that has the potential to satisfy the expectation of the parties in international commercial arbitration.

It is argued that in order to protect parties' communications and awards from undesirable publication, parties are advised to expressly incorporate confidentiality clause which should be clear and detailed enough for easy arbitration. The positive aspect of this is that even if courts ultimately justify disclosure of information on the basis of public policy or on other grounds, a well-drafted confidentiality provision can mitigate the damage to the affected parties.[130]

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[127] The International Federation of Commercial Arbitration Institutions (IFCAI) was founded in 1985 to establish and maintain permanent relations between commercial arbitration institutions and to facilitate the exchange and distribution of information about their services. It comprises about eighty arbitral organizations in forty-six countries and holds periodic General Assemblies of the member institutions as well as international dispute resolution conferences.

[128] Yu (n 81).

[129] Ibid 14.

[130] R Reuben, *Confidentiality in Arbitration: Beyond the Myth*, (2006) 54 Kansas Law Review pp. 1271-1274; G Weixia, *Confidentiality Revisited: Blessing or Curse in International Commercial Arbitration?*, (2004) 15 Am. Rev. Int'l Arb 608-609.

Second, parties should consider confidentiality concerns when drafting other sections of their arbitration agreements. For example, owing to many considerations in choice of laws, parties should consider the degree to which a particular country's law protects confidentiality. Additionally, parties can limit information they produce in the arbitration (and thus limit the potential information that may go public) by carefully defining the issues that will be subject to arbitration-the more narrow the scope of the arbitration, the more narrow the scope of disclosure.[131] Moreover, parties should consider obtaining a provisional measure to protect confidential information.[132] Typically in the form of injunctions, provisional measures are allowed under most institutional rules.[133]

Furthermore, as previously discussed, there is need to develop an international framework to guide parties with respect to confidentiality issues (default uniform rule) which should start from various domestic arbitrations laws and institutional rules. It is submitted that without an internationally accepted framework on confidentiality or general consensus on this issue, it seems rather inappropriate to advertise confidentiality as one of the main characteristics of international commercial arbitration.

This paper has further argued that given the successful experience in dealing with and promoting the awareness of the issue of arbitrator's independence and impartiality, it is necessary to introduce an internationally accepted guideline on consensual duty of confidentiality among the parties and arbitrators including the relevant third parties in order to reflect the widely accepted view that confidentiality is one of the advantages when choosing arbitration as a private means of dispute resolution process.

[131] At the Biennial Conference in Rio de Janeiro, Brazil, the Committee on International Commercial Arbitration was mandated to study the topic of confidentiality in international commercial arbitration and to report on it at the Biennial Conference in The Hague in August 2010: Confidentiality in International Commercial Arbitration- ILA –ICA Committee Report The Hague 2010. See generally Filip Dely, Mark and Friedman and Luca Di Brozola, 'International Law Association: International Commercial Arbitration Committee's Report and Recommendations on Confidentiality in International Commercial arbitrations' (2012) 28(3) Arbitration International 355-396.
[132] Ibid.
[133] Ibid.