

Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance

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CONTENTS

I.	Introduction	276
II.	Defining Confidentiality	277
	A. Privacy vs. Confidentiality	281
III.	Defining Transparency	282
	A. Public Access and Transparency	283
	B. Disclosure and Transparency	284
	C. The Need for Transparency	285
IV.	Confidentiality in International Commercial Arbitration	286
	A. An Implied Duty of Confidentiality in International Commercial Arbitration.....	286
	1. The English Approach	286
	a. Subsequent Arbitrations	289
	2. The French Perspective	291
	B. Express Duty of Confidentiality.....	292
	1. The Australian Perspective	292
	2. The Swedish View	294
	3. The United States' Approach.....	294
	C. Statutory Protection of Confidentiality.....	295
	1. Singapore's Approach	296
	2. New Zealand's Approach	297

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V.	Issues Raised by the Confidentiality Conundrum	298
	A. Commercial Law is Going Underground	301
VI.	Transparency as a Means to Develop Commercial Arbitration	302
	A. Choice of Arbitration Seat	302
	B. Transparency as a Method of Developing Arbitral Jurisprudence	303
VII.	The Prevalence of Transparency	304
	A. Competition and Transparency	304
	B. Voluntary and Involuntary Disclosures	305
	C. Arbitral Awards	305
	D. Other Triggers of Transparency	306
VIII.	The Viability of Mandatory Transparency Reforms . . .	307
IX.	The UNCITRAL Rules on Transparency as a Roadmap for Reform	309
	A. Building a Positive Case for Transparency in International Commercial Arbitration	309
	B. Investor-State vs. Commercial Arbitration	310
	C. Purpose and Applicability of the UNCITRAL Rules on Transparency	311
	D. The Effects of Transparency in International Commercial Arbitration	312
	1. The Effect on the Public Interest	312
	2. The Effect on the Predictability and Consistency of Arbitral Proceedings	313
	3. The Effect on the Award	314
	E. The Viability of Such Reforms	315
X.	The Work-Product Doctrine	316
	A. Disclosure in Arbitration under the Work- Product Doctrine	317
	B. The Work-Product Doctrine as an Established Principle in Arbitration	318
	C. The Need for Confidentiality in Genuine Cases . . .	319
XI.	Conclusion	321

I. INTRODUCTION

Confidentiality in international commercial arbitration remains an unsettled and contentious issue. Arbitral stakeholders are seeking more transparent procedures in a process that has historically been private and confidential. This article does not seek to pitch confidentiality and transparency in an adversarial manner but rather seeks

to find an equilibrium between two seemingly opposing features of international commercial arbitration.

The absence of a cohesive approach renders the practice of confidentiality in international commercial arbitration progressively more unpredictable. This article begins by contrasting privacy and transparency and highlighting the need for transparency in international commercial arbitration. This article then examines how different jurisdictions have solved the confidentiality conundrum in commercial arbitration. While some jurisdictions have chosen to embrace an implied duty of confidentiality or have upheld an express duty of confidentiality, other have chosen to opt for a statutory means of protecting confidentiality. This article analyzes these different approaches in an attempt to find coherence ahead of any future reforms. This article then examines the issues raised by confidentiality in international commercial arbitration, and explains how transparency can be used as a means to develop commercial arbitration practice.

In doing so, this article analyzes whether mandatory transparency reforms would be a viable solution to the confidentiality conundrum. Specifically, this article analyzes the viability of the adoption of the United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency as a solution [hereinafter “UNCITRAL Rules on Transparency”]. This article also proposes to use the most salient principles from the work-product doctrine in its bid to reform commercial arbitration practice, and shows how these principles can solve the issue of disclosure in international commercial arbitration. This article also proposes to use principles derived from the World Intellectual Property Organization (WIPO) Arbitration Rules in a bid to safeguard confidentiality in cases where it is genuinely necessary.

II. DEFINING CONFIDENTIALITY

Confidentiality is one of the hallmarks¹ of arbitration and one of arbitration’s most prominent features.² The confidentiality inherent to arbitration is attractive to disputants,³ and as a result, arbitration has evolved as the primary alternative to litigation for resolving civil

1. Rodrigo Garcia Da Fonseca & André De Luiz Correia, *The Limits of Confidentiality in arbitration: A Brazilian perspective*, 3 Y.B. ON INT’L ARB. 119, 123 (2013).

2. Bernardo M. Cremades & Rodrigo Cortes, *The Principle of Confidentiality in Arbitration: A Necessary Crisis*, 23 J. OF ARB. STUD. 25, 26 (2013).

3. See BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, ¶ 1.105 (6th ed. 2015).

and commercial disputes.⁴ Although the idea that confidentiality in arbitral proceedings is absolute has eroded in recent years, confidentiality is still perceived as a vital acolyte of arbitration.⁵ Consequently, there is a need for juridical convergence with regard to traditional notions of confidentiality.

There are numerous advantages conferred by confidentiality in arbitration.⁶ For example, confidentiality reduces the possibility of damaging continuing business relations,⁷ and avoids setting adverse judicial precedents.⁸ Additionally, the process offers parties the freedom to make arguments that they would be reluctant to make in a public forum.⁹ The private nature of arbitral proceedings offers disputants a forum where they can keep their disputes away from the intrusiveness of the media and the prying eyes of their competitors.¹⁰

However, the idea that the confidentiality of arbitration affords the parties a more comprehensive shield to guard their information from disclosure than litigation must be qualified.¹¹ The confidential nature of arbitration regularly clashes with the public interest¹² and with numerous other opposing ideals, such as mandatory disclosure to insurers or shareholders, or when the arbitral award is challenged in a court of law. Challenges to arbitration awards are increasing,¹³ and many courts of different jurisdictions are beginning to require the disclosure of materials and documents produced during arbitral

4. Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255, 1256 (2006).

5. BLACKABY ET AL., *supra* note 3, ¶ 1.105.

6. Florentino P. Feiciano, *The Ordre Public Dimensions of Confidentiality and Transparency in International Arbitration: Examining Confidentiality in the Light of Governance Requirements in International Investment and Trade Arbitration*, 87 PHIL. L.J. 1, 2 (2012).

7. Charles S. Baldwin, *Protecting Confidentiality and Proprietary Commercial Information in International Arbitration*, 31 TEX. INT'L L.J. 451, 453 (1996).

8. Christoph Henkel, *The Work-Product Doctrine as a Means toward a Judicially Enforceable Duty of Confidentiality in International Commercial Arbitration*, 37 N.C. J. OF INT'L L. 1059, 1060 (2012).

9. Feiciano, *supra* note 6, at 2.

10. Cremades, *supra* note 2, at 27.

11. Michael Hwang & Katie Chung, *Defining the Indefinable: Practical Problems of Confidentiality in Arbitration*, 26 J. OF INT'L ARB. 609, 610 (2009).

12. KYRIAKI NOUSSIA, *CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION: A COMPARATIVE ANALYSIS OF THE POSITION UNDER ENGLISH, US, GERMAN AND FRENCH LAW*, 27 (1st ed. 2010).

13. Henkel, *supra* note 8, at 1062.

sessions notwithstanding express confidentiality agreements signed by the parties.¹⁴

Within the arbitral process, the responsibilities to each stakeholder differ. The arbitrators have an obligation to observe a general duty of confidentiality, while the parties' obligations often depend on a confidentiality agreement. Jurisdictions vary in their approach to this issue. The United Kingdom and France recognize an implied duty of confidentiality to varying degrees, while Australia, the United States, and New Zealand do not adopt a general presumption of confidentiality unless it is established by the mutual consent of the parties or applicable laws. In jurisdictions that do imply a general duty of confidentiality, its protection is not absolute,¹⁵ but rather is subject to various limitations or exceptions.¹⁶ Although it was traditionally viewed as almost untouchable,¹⁷ confidentiality may now be overridden through the mandatory disclosure of criminal activities to the appropriate law enforcement authorities or where the disclosure of confidential information is prescribed by law.¹⁸

Confidentiality is still regarded as a significant feature of international commercial arbitration. The private nature of arbitration stands in stark contrast to the accessibility and transparency innate to domestic courts.¹⁹ This privacy innate to commercial arbitration is the fruit of international agreements and in that respect, it is important to understand how international commercial arbitration developed in the international community.

While international commercial arbitration finds its roots in numerous international agreements, the most significant legislative instrument²⁰ is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, also known as the New York Convention, which currently has 156 signatories.²¹ The New York Convention contains no provision for confidentiality in arbitral proceedings,

14. Alexis C. Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 AM. U. INT'L L. REV. 969, 974–75 (2001).

15. Feiciano, *supra* note 6, at 4.

16. *Id.*

17. Cremades, *supra* note 2, at 27.

18. Feiciano, *supra* note 6, at 4.

19. *Id.* at 5.

20. Matthew Carmody, *Overtaking the Presumption of Confidentiality: Should the UNCITRAL Rules on Transparency be applied to International Commercial Arbitration?*, 19 INT'L TRADE & BUS. L. REV. 96, 157 (2016).

21. UNCITRAL, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NY_Convention_status.html.

but instead focuses on the enforcement and recognition of arbitral awards and agreements.²²

Introduced in 1976, the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) contained constricting confidentiality provisions, where awards and other materials or documents used in the arbitration proceeding could rarely be rendered public.²³ Examples of such restrictive provisions include Article 25(4), which provided that, “[h]earings shall be held in camera unless the parties agree otherwise,”²⁴ and Article 32(5), which stipulated that that an arbitral award could be rendered public only with the consent of the parties.²⁵ However, the rules were amended in 2010 so as to reflect the changes in arbitral practice and to enhance the efficiency of arbitral proceedings.²⁶

The UNCITRAL Arbitration Rules of 2010²⁷ replaced Article 32(5) of the UNCITRAL Arbitration Rules of 1976 with Article 34(5), which provides that “[a]n award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.”²⁸ These amendments reflect a move, albeit small, toward transparency.

In 1996, UNCITRAL noted the inconsistencies between jurisdictions concerning the level of confidentiality to which parties to an arbitration were subjected.²⁹ Because of those inconsistencies, parties that agree on arbitration rules or other provisions that do not expressly address confidentiality cannot assume that all jurisdictions will recognize an implied confidentiality commitment.³⁰ Courts in jurisdictions such as Australia have echoed this concern, suggesting that complete confidentiality of arbitration proceedings cannot be

22. Carmody, *supra* note 20, at 157.

23. Feiciano, *supra* note 6, at 6.

24. G.A. Res. 31/98, art. 25(4) (December 15, 1976).

25. *Id.* art. 32(5).

26. Feiciano, *supra* note 6, at 6.

27. See G.A. Res. 65/22 (August 15, 2010).

28. G.A. Res. 65/22, art. 34(5) (August 15, 2010).

29. See Comm’n on Int’l Trade Law, Rep. on the Work of Its Twenty-Ninth Session, § 31, U.N. Doc. A/51/17 (1996).

30. *Id.*

achieved.³¹ Hence, even parties that have drafted a detailed confidentiality agreement do not have the guarantee of being afforded absolute confidentiality.³² The duty of confidentiality should therefore not be seen as unqualified, but should instead be viewed as qualified individually, on the facts of each case.³³

A. *Privacy vs. Confidentiality*

Arbitration is a private process but not a confidential one.³⁴ Parties to arbitration often erroneously believe that their disputes will remain confidential due to the private nature of the proceeding.³⁵ The subtle differences between privacy and confidentiality have caused confusion and lead parties to mistakenly believe that their disputes are automatically confidential.³⁶ Thus, before discussing the practice of confidentiality in international commercial arbitration, it is essential to explain the contrast between the duty of confidentiality as a right of non-disclosure and the procedural system of privacy.

Privacy in arbitration refers to the inability of a third party to attend and observe the arbitration hearing if the parties or even the arbitrator have not given their consent.³⁷ The private nature of the arbitral process limits its transparency in that unauthorized third parties are not allowed to participate in or observe the proceeding.³⁸ On the other hand, confidentiality is more focused on information pertaining to the content of the process, the evidence adduced and the documents produced, the addresses to and of the tribunal, and the records of the hearings or the arbitral award rendered.³⁹

There is no consensus on the extent to which the private nature of arbitration creates a duty of confidentiality.⁴⁰ On the one hand, it can be said that, as inherent characteristics of commercial arbitration, the concepts of confidentiality and privacy should work in tandem to guarantee absolute confidentiality.⁴¹ This theory links privacy and confidentiality and treats them not as competing values,

31. *Esso Australia Resources Ltd. v. Plowman* (1995) 128 ALR 391 (Austl.).

32. *Urban Box Office Network v. Interfase Managers*, No. 01 Civ. 8854, 2004 WL 2375819 (S.D.N.Y. Oct. 21, 2004).

33. Brown, *supra* note 14, at 989–1000.

34. NOUSSIA, *supra* note 12, at 24.

35. Brown, *supra* note 14, at 974–75.

36. NOUSSIA, *supra* note 12, at 24.

37. Reuben, *supra* note 4, at 1260.

38. NOUSSIA, *supra* note 12, at 25.

39. Henkel, *supra* note 8, at 1065.

40. Michael Fesler, *The Extent of Confidentiality in International Commercial Arbitration*, 78(1) ARB. 48, 49 (2012).

41. NOUSSIA, *supra* note 12, at 24–25.

but as complements.⁴² On the other hand, privacy and confidentiality are distinguishable in that privacy deals with who may or may not be present at an arbitral hearing, while confidentiality deals with the obligations of the parties not to reveal any information or materials concerning the arbitration.⁴³

The tension between these two concepts arises due to the absence of domestic and international consensus on the treatment of confidentiality and as a result, commercial arbitration is viewed as becoming more opaque instead of becoming more transparent.

III. DEFINING TRANSPARENCY

Transparency is not clearly defined in international law.⁴⁴ Synonymous to openness or accountability, transparency is often invoked but seldom defined.⁴⁵ It is an information-centric concept⁴⁶ that relies on openness and access to information, viewed as a more accountable, more democratic, and more legitimate system of global governance.⁴⁷ In the arbitral realm, it involves the disclosure of documents or other materials, open hearings, the participation of third parties in the arbitration process, and public access.⁴⁸

In recent years, there have been incessant calls for increased transparency in the international commercial arbitration system. While some advocate for a presumption of the publication of arbitral awards unless parties object,⁴⁹ others propose the formation of an international supervisory entity to supervise and oversee the publication of awards.⁵⁰ While the mandatory publication of arbitral awards is often put forward as a solution to the transparency deficit, such an approach may raise more questions than it answers.⁵¹

42. Fesler, *supra* note 40, at 49.

43. *Id.*

44. See Pedro J. Martinez-Fraga, *Juridical Convergence in International Dispute Resolution: Developing a Substantive Principle of Transparency and Transnational Evidence Gathering*, 10 LOY. U. CHI. INT'L L. REV. 37, 71 (2012).

45. Julie A. Maupin, *Transparency in International Investment Law: The Good, the Bad, and the Murky*, in TRANSPARENCY IN INTERNATIONAL LAW 142, 142 (Andrea Bianchi & Anne Peters eds., 2013).

46. *Id.* at 150.

47. Carmody, *supra* note 20, at 96.

48. *Id.*

49. Cindy G. Buys, *The Tensions between Confidentiality and Transparency in International Arbitration*, 14 AM. REV. INT'L ARB. 121, 138 (2003).

50. Dora Marta Gruner, *Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform*, 41 COLUM. J. TRANSNAT'L L. 923, 960–63 (2003).

51. Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 U. KAN. L. REV. 1301, 1302 (2006).

In order to understand why the appeal for increased transparency has emerged, it is important to understand how arbitration has operated in the past. The complexity of international commercial arbitration stems from the fact that arbitration proceedings have historically occurred in a virtual black box.⁵² Such a qualification is justified because parties submitted their disputes to arbitration in a bid to avoid resorting to a normal court of law and to keep their disputes away from the limelight of the press. In its infancy, the practice of international commercial arbitration was seen as a forum where strictly legal considerations could be set aside in the interest of achieving unanimity among the arbitrators and giving something to both parties.⁵³

Traditionally, arbitrators fashioned arbitral proceedings according to their culturally defined professional experiences and ruled based on their expert sense of what was equitable and just⁵⁴ instead of adopting prescribed and transparent rules. The current secrecy that reigns in international commercial arbitration and the importance accorded to privacy and confidentiality is likely in part the result of such practices.

Any attempt to define transparency in the context of arbitration brings together two different but interconnected concepts: public access and disclosure.⁵⁵

A. *Public Access and Transparency*

Public access refers to a citizen's individual right of access to a hearing. It enables open scrutiny of public officials and guards against misuse of power. Differentiating transparency from public access is essential in order to understand the motivation behind the appeals for enhanced transparency in international commercial arbitration.⁵⁶

Public access and transparency come together by facilitating the public's right of attending proceedings as well as enabling the scrutiny of the adjudicator's performance.⁵⁷ While it is tempting to make an amalgam of these two concepts, they are nevertheless distinct from each other in the arbitral context: public access is an individual

52. *Id.*

53. Francis A. Mann, *The Aminoil Arbitration*, 54 BRIT. Y.B. INT'L L. 213, 214 (1983).

54. Rogers, *supra* note 51, at 1312.

55. *Id.* at 1303.

56. *Id.* at 1305.

57. *Id.* at 1306.

right whereas transparency relates to the system as a whole.⁵⁸ There is a notable discrepancy in the treatment of transparency and public access in international commercial arbitration given that the former is often seen as an imperative⁵⁹ while the latter is seen as expendable.⁶⁰ This difference in treatment stems from the objectives each concept seeks to achieve. Public access is an individual right that finds its roots in *domestic* considerations of fairness and justice. As one commentator notes, it would be nonsensical to insist that a Brazilian citizen has a right to attend an Austrian hearing governed by German law involving Chinese and Russian parties.⁶¹ On the other hand, several international tribunals espouse public access in a bid to ensure transparency. Consequently, although public access is an instrument for stimulating transparency, it is not an essential characteristic of transparency.⁶² The fundamental difference between the domestic and international approach to public access lies in the fact that domestic legislators refrain from overstepping on a fundamental right in a bid to avoid a backlash of the local population and human rights activists, while in international disputes, such domestic considerations are non-existent.

B. *Disclosure and Transparency*

Disclosure obligations are focused on the release of substantive information. Disclosure is primarily aimed at satisfying a specific regulatory purpose such as easing strains in unstable labor markets, educating consumers about the products they buy, sustaining healthy financial markets, or safeguarding the public against health and safety concerns.⁶³ While transparency deals with the manner in which information should be handled, disclosure focuses on the provision of substantive information.⁶⁴ Transparency applies to a myriad of activities within an institution irrespective of the type of information involved, while disclosure deals with the specific disclosure of an identifiable piece of material.⁶⁵

Although transparency and disclosure differ in nature, these concepts can co-exist: the latter is an instrument to achieve the former. For example, arbitrators have to disclose any conflict of interest that

58. *Id.* at 1307.

59. *Id.*

60. *Id.* at 1305.

61. *Id.* at 1306.

62. *Id.*

63. *Id.* at 1310.

64. *Id.*

65. *Id.*

may sway their opinion or affect their impartiality because such disclosure allows arbitrators to be appointed in a transparent manner and limits the possibility of appeals of arbitral awards on the basis of bias.⁶⁶

The dominant aim of disclosure in general is to protect or satisfy the public interest. Any disclosure of confidential information in arbitration should always be restricted to the specific information needed in order to protect or satisfy the public interest.⁶⁷ More importantly, parties to international commercial arbitrations are often private entities aiming to resolve a commercial disagreement. In such cases, government disclosure obligations rarely arise where there is no public interest involved; when public interest issues do arise, government disclosures are limited.⁶⁸

C. *The Need for Transparency*

Transparency can lead to a higher degree of trust and acceptance of the arbitral process. Transparency increases accountability as the arbitrator, counsel, and parties to an arbitration are mindful that their behavior is likely to be scrutinized by the public.⁶⁹ Transparency also renders the decision-making process in arbitration more accurate, as arbitrators who know that their awards will be rendered public are more inclined to thoroughly research and investigate before reaching a conclusion.⁷⁰ It helps to guarantee democratic principles such as the right of access to information and also promotes fairness, the rule of law, equity, and due process.⁷¹ Furthermore, companies can fulfill their corporate social responsibility by adopting transparent dispute resolution mechanisms.⁷² The benefits of arbitral transparency include the consistency of arbitral awards, development of arbitral law, prevention of prospective disputes, better openings to develop the arbitral system, and increased efficacy in determining the expertise of an arbitrator.⁷³

66. Paula Hodges, *The Perils of Complete Transparency in International Arbitration - Should Parties Be Exposed to the Glare of Publicity?*, 3 *PARIS J. OF INT'L ARB.* 589, 596 (2012).

67. Fonseca & Correia, *supra* note 1, at 137.

68. Rogers, *supra* note 51, at 1312.

69. Claudia Reith, *Enhancing Greater Transparency in the UNCITRAL Arbitration Rules - A Futile Attempt?*, 2 *Y.B. ON INT'L ARB.* 297, 300 (2012).

70. *Id.*

71. *Id.*

72. Christina Knahr & August Reinisch, *Transparency versus Confidentiality in International Investment Arbitration - The Bewater Gauff Compromise*, 6 *THE L. AND PRAC. OF INT'L CTS. AND TRIBUNALS* 97, 110 (2007).

73. Carmody, *supra* note 20, at 168.

IV. CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION

The traditional conundrum caused by confidentiality in investor-state arbitration has given rise to a number of debates as to whether confidentiality is the best way forward in international commercial arbitration. For arbitration to become a true alternative to litigation, it is important to move away from absolute confidentiality.⁷⁴ Absolute confidentiality does more harm than good in some areas of the law; namely, commercial law. Businesses are increasingly opting for the secretive realm of commercial arbitration, effectively keeping the development and interpretation of commercial law shrouded.

A. *An Implied Duty of Confidentiality in International Commercial Arbitration*

The implied duty of confidentiality does not noticeably distinguish the concepts of confidentiality and privacy. Courts consider the privacy of the arbitral process as a crucial element in ensuring utmost secrecy, which in turn requires an implied obligation of confidentiality as a vital prerequisite of an arbitration contract, irrespective of any clear confidentiality arrangement struck between the parties.⁷⁵ Consequently, confidentiality is not only deemed necessary in arbitration, but is an implicit corollary to privacy.⁷⁶ Battle lines must be drawn between those who treat the implied right of privacy as including a duty of confidence and those who oppose this view. In an effort to glean an optimal approach in finding the appropriate balance between confidentiality and transparency, this section assesses and analyzes the diverse approaches adopted in several jurisdictions.

1. *The English Approach*

The law and practice of confidentiality in commercial arbitration in England can be garnered from three cases: *Dolling-Baker v. Merrett*,⁷⁷ *Hassneh Insurance v. Stewart J Mew*,⁷⁸ and *Ali Shipping Corp v. Shipyard Trogir*.⁷⁹

The English position on confidentiality was first enunciated in the case of *Dolling-Baker*, where the Court of Appeal highlighted the

74. Vijay Bhatia et al., *Confidentiality and Integrity in International Commercial Arbitration Practice*, 75(1) ARB. 2, 11 (2009).

75. Henkel, *supra* note 8, at 1067.

76. *Id.*

77. *Dolling-Baker v. Merrett* (1990) 1 WLR 1205 (K.B.).

78. *Hassneh Ins. V. Steuart J. Mew* (1993) 2 Lloyd's Rep. 243 (K.B.).

79. *Ali Shipping Corp. v. Shipyard Trogir* (1998) 2 All ER 136 (K.B.).

significance of the private character of arbitration as a vital component of the process and held that all arbitration contracts must inevitably contain an implied duty not to “disclose or use for any other purpose any documents prepared for and used in the arbitration save with the consent of the other party, or pursuant to an order or leave of the court.”⁸⁰ The court also found that the implied duty of confidentiality was not dependent on the confidential nature of the material protected⁸¹ and that disclosure is acceptable if the court is “satisfied that despite the implied obligation, disclosure and inspection is necessary for the fair disposal of the action.”⁸²

In *Hassneh*, the Commercial Court extended the implied duty of confidentiality to arbitral awards⁸³ and further stated that the disclosure of materials prepared in contemplation of an arbitration “would be almost equivalent to opening the door of the arbitration room to a third party,” violating the sanctity of privacy in arbitration.⁸⁴ More notably, the Commercial Court identified circumstances under which the arbitral award could be disclosed absent the consent of the parties. These included instances where disclosure was judicially required for the protection of the parties’ rights or when it was in the interest of justice.⁸⁵

Ali Shipping Corporation v. Shipyard Trogir reinforced the rulings in *Dolling-Baker* and *Hassneh* and held “that an implied obligation of confidentiality *attaches as a matter of law* and may not be based merely on custom or business efficiency.”⁸⁶ More significantly, the court noted that “the obligation of confidentiality *arises as an essential corollary of the privacy* of arbitration proceedings[.]”⁸⁷ Although the Court of Appeal acknowledged the difficulty in delineating the limits of this duty, it proposed that the best way to achieve this would be by “formulating exceptions of broad application to be applied in individual cases, rather than by seeking to reconsider, and if necessary adapt, the general rule on each occasion in the light of the particular circumstances and presumed intentions of the parties at the time of their original agreement.”⁸⁸

80. *Dolling-Baker v Merrett* (1990) 1 WLR 1205, 1213 (K.B.).

81. For a discussion of this point, see Henkel, *supra* note 8, at 1068.

82. *Dolling-Baker* (1990) 1 WLR 1205, 1214 (K.B.).

83. *Id.* at 247.

84. *Id.*

85. *Id.* at 275–76.

86. Henkel, *supra* note 8, at 1068 (citing *Ali Shipping Corp. v. Shipyard Trogir* (1998) 2 All ER 136, 146–47 (K.B.)).

87. *Ali Shipping Corp. v. Shipyard Trogir* (1998) 2 All ER 136, 146 (K.B.).

88. *Id.* at 147.

The Court of Appeal went on to formulate five exceptions to the implied duty of confidentiality: (1) the consent of the party who initially produced the material, (2) an order of the Court, (3) the leave of the Court, (4) for the protection of the legitimate interests of a party to the arbitration, and (5) where the ‘public interest’ calls for disclosure.⁸⁹

The Court of Appeal propounded a “reasonable necessity” test to be applied in determining how the above mentioned exceptions are to function.⁹⁰ The “reasonable necessity” test stipulates that it is “sufficiently necessary to disclose an arbitration award in order to enforce or protect the legal rights of a party to an arbitration agreement only if the right in question cannot be enforced or protected unless the award and reasons are disclosed to a stranger to the arbitration agreement. The making of the award must therefore be a necessary element in the establishment of the party’s legal rights against the stranger.”⁹¹

While *Ali Shipping* is viewed as the leading precedent⁹² on instituting the implied duty of confidentiality in arbitration, more recent cases appear to support a stance favoring a case-by-case approach. *City of Moscow v. Bankers Trust*⁹³ and *Emmott v. Michael Wilson & Partners Limited*⁹⁴ are two of the most notable cases in that respect.

In *City of Moscow*, the validity of an arbitral award was challenged by Bankers Trust. Although the challenge was dismissed, the Commercial Court failed to mark its judgment as confidential.⁹⁵ Owing to this omission, Lawtel, a website specializing in legal research, attained a copy of the judgment and published a summary on its website.⁹⁶ Lawtel also sent emails to its subscribers with a hyperlink to the complete judgment.⁹⁷ Bankers Trust objected to the publication of the judgment and the Commercial Court, in a separate proceeding, ruled in their favor. As a result, Lawtel removed the publication from

89. *Id.* at 147–48.

90. *Id.* at 150–51.

91. *Insurance Co. v. Lloyd’s Syndicate* [1995] 1 Lloyd’s Rep. 272, 276.

92. Henkel, *supra* note 8, at 1070.

93. Dept. of Econ. Policy & City of Moscow v. Bankers Tr. (2004) EWCA (Civ) 314 (K.B.).

94. *Emmott v. Michael Wilson & Partners Ltd.*, (2008) EWCA (Civ) 184 (K.B.).

95. *Dept. of Econ. Policy & City of Moscow v. Bankers Tr.* (2004) EWCA (Civ) 314 ¶ 5. (K.B.).

96. *Id.*

97. *Id.*

its website. The City of Moscow appealed the second judgment, arguing that the first judgment was rightfully made available for publication. The court dismissed the idea of a general obligation of confidentiality and held that the “factors militating in favor of publicity have to be weighed together with the desirability of preserving the confidentiality.”⁹⁸ In this case, given the sensitive nature of the information involved, the Court dismissed the City of Moscow’s appeal and ruled in the favor of Bankers Trust. However, the Court also rejected the idea that the private character of the arbitral process inevitably equates to a presumption supportive of privacy on “a blanket basis.”⁹⁹ The Court also noted that arbitration claims brought to court cannot be considered on the same terms that the parties have agreed to when choosing to arbitrate their disputes confidentially and privately.¹⁰⁰ The judgment in *City of Moscow* comes as a forceful reminder that confidentiality in arbitration does not provide the parties with the same confidentiality as in court proceedings. In English law, the protection of confidentiality was already more rigorous than other jurisdictions,¹⁰¹ but the outcome of this case took this rigidity to a further extreme.¹⁰²

In *Emmott v. Michael Wilson & Partners Ltd.*, the English Court of Appeal developed two exceptions to confidentiality. First, disclosure could be allowed when it is reasonably necessary to protect the legitimate interest of an arbitrating party.¹⁰³ Such a situation arises when defending a claim brought in court by a third party. Second, disclosure could be appropriate where the obligation of non-disclosure and the duty of confidentiality are being used to mislead foreign courts.¹⁰⁴ In the same vein, the Court extended disclosures required in the interest of justice to include foreign jurisdictions in addition to England.¹⁰⁵

a. *Subsequent Arbitrations*

In *Associated Electric and Gas Insurance Services Ltd. v. European Reinsurance Co. of Zurich (‘Aegis’)* the Judicial Committee of the Privy Council (hereinafter “Privy Council”) in the United Kingdom

98. *Id.* ¶ 40.

99. *Id.* ¶ 41.

100. *Id.* ¶ 34.

101. Stewart R. Shackleton, *Arbitration-Related Court Proceedings and Confidentiality*, 6(5) INT’L ARB. L. REV. N45, N45 (2003).

102. *Emmott v. Michael Wilson & Partners Ltd.*, (2008) EWCA (Civ) 184 (K.B.).

103. *Id.* ¶ 27.

104. *Id.* ¶ 28.

105. *Id.*

criticized the broad duty of confidentiality developed under English law.¹⁰⁶ In *Aegis*, the parties had a confidentiality contract in place but the court decided that even where parties had such an agreement, they may not rely on an unqualified protection of confidentiality.

At stake in *Aegis* was the availability of materials disclosed in one arbitration for use in a second arbitration. The ruling in *Ali Shipping* was not applicable in *Aegis* because here, the parties had an exhaustive confidentiality agreement that clearly precluded the disclosure of any communication or documents from the first arbitration.¹⁰⁷ Although the Privy Council accepted that the confidentiality contract tilted the balance in favor of an absolute obligation of confidentiality, it also stressed that the confidentiality agreement should not be the sole basis on which that obligation should be evaluated. Instead, the Privy Council emphasized that the confidentiality agreement must be examined in light of the conditions that required such an agreement.¹⁰⁸ Given the nature of the materials disclosed during the arbitration, and their value to individuals with interests adverse to the interests of the parties, the Privy Council concluded that it would be reasonable to preserve the confidentiality of the materials.¹⁰⁹ The Privy Council further dealt with the confidentiality of the arbitral award and held that a detailed confidentiality agreement is only safeguarded in instances where full or partial disclosure of the award raises “the mischief against which the confidentiality agreement is directed.”¹¹⁰ Thus, where the dominant aim of the confidentiality agreement is threatened, the parties can legitimately expect confidentiality to shield their interests.

In *Aegis*, the Privy Council heavily criticized the duty of confidentiality as an implied term integral to arbitration contracts. The “desirability or merit”¹¹¹ of having an implied duty of confidentiality with predefined exceptions to that duty was questioned by their Lordships inasmuch as such an approach failed to distinguish “between different types of confidentiality which attach to different types of document or to documents which have been obtained in different ways and elides privacy and confidentiality.”¹¹²

106. *Associated Elec. & Gas Ins. Servs. Ltd. v. European Reinsurance Co. of Zurich* [2003] UKPC 11, [2003] 2 C.L.C. 340.

107. *Id.* ¶ 19.

108. *Id.* ¶ 7.

109. *Id.* ¶ 8.

110. *Id.*

111. *Id.* ¶ 20.

112. *Id.*

The Privy Council also noted that *Ali Shipping* failed to adequately distinguish between the arbitral award and materials acquired during the arbitration proceeding, the former of which may inevitably be disclosed for the purposes of legal proceedings or accounting needs.¹¹³ In its concluding remarks, the Privy Council stated that “generalisations and the formulation of detailed implied terms are not appropriate.”¹¹⁴

2. *The French Perspective*

French courts also recognize that an implied duty of confidentiality is a vital element of an arbitration agreement. Indeed, French courts do not have exceptions to non-disclosure and confidentiality¹¹⁵ similar to those enunciated in *Ali Shipping* in England. The French Court of Appeal has taken the position that the confidentiality and public disclosure requests can co-exist in arbitration.¹¹⁶ An implied duty of confidentiality under French law is gleaned from court decisions and customs because there is no statutory duty of confidentiality.¹¹⁷

In *Aita v. Ojeh*, the Paris Court of Appeal was requested to invalidate an arbitral award delivered in the United Kingdom.¹¹⁸ Dismissing this claim, the court noted that annulling the award would violate the duty of confidentiality.¹¹⁹ In the course of the proceedings, the court held that the annulment proceeding was a malicious endeavor aimed at disclosing confidential materials from the arbitration, thus violating the privacy of arbitration.¹²⁰

In *Société True North et Société FCB International v. Bleustein*,¹²¹ one party, without the consent of the other party, disclosed information about the arbitration after the proceedings had commenced.¹²² Arguing breach of confidentiality, the other party pulled out of the arbitration.¹²³ In delivering the judgment, the French court held that such unwarranted and unilateral disclosures by one party

113. *Id.*

114. *Id.*

115. Brown, *supra* note 14, at 974–75.

116. Henkel, *supra* note 8, at 1070.

117. *Id.*

118. *Aita v Ojeh*, Cour d’appel [CA] [regional court of appeal] Paris, 4 REVUE DE L’ARBITRAGE 584, Feb. 18, 1986.

119. *Id.*

120. *Id.*

121. *Société True North et Société FCB International v Bleustein*, Tribunal de commerce [commercial court] Paris, 2003 REVUE DE L’ARBITRAGE 189, Sept. 17, 1999.

122. *Id.* at 191–92

123. *Id.*

undeniably breached the duty of confidentiality as originally anticipated by the parties.¹²⁴

Subsequent cases have sought to elevate the burden of proof when faced with a claim of a breach of confidentiality.¹²⁵ In *Nafimco v. Foster Wheeler Trading Company*, the French Court of Appeal held that a party alleging a breach of confidentiality has to show that there was a pre-existing duty of confidentiality owed to him and that such duty was neither objected to nor waived by the other party.¹²⁶ This case could be viewed as a rejection of an implied duty of confidentiality in France.¹²⁷ It is therefore clear that in France, absent an express confidentiality arrangement, the parties have to prove that such an implied confidentiality obligation actually existed and that to do so, they face a very high burden of proof.¹²⁸ Hence, the implied duty of confidentiality in France is significantly more restricted than in the UK.

B. *Express Duty of Confidentiality*

Unlike English and French courts, courts in Australia, Sweden, and the United States do not recognize a duty of confidentiality absent an express agreement.¹²⁹ Although these jurisdictions acknowledge the private nature of arbitration, they reject the idea that confidentiality is essential to achieving privacy in arbitration.¹³⁰

1. *The Australian Perspective*

The most fervent ally of an express duty of confidentiality in international commercial arbitration is the High Court of Australia.¹³¹ The case of *Esso Australia Resources Ltd. v. Plowman*¹³² arose as a result of the Australian Minister for Manufacturing and Industry Development taking an action against Esso Australia Petroleum and BHP. Esso Petroleum and BHP had an agreement with two state-owned utility companies in Australia for the supply of natural gas. A dispute concerning the price review clause arose and pursuant to the

124. *Id.*

125. Henkel, *supra* note 8, at 1062.

126. *Nafimco v Foster Wheeler Trading Company AG*, Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., Jan. 22, 2004.

127. Henkel, *supra* note 8, at 1078.

128. *Id.*

129. *Id.*

130. *Id.*

131. Andreas F. Lowenfeld, *Reviewed Work(s): Quo Vadis Arbitration? Sixty Years of Arbitration Practice* by Pieter Sanders, 95(3) AM. J. OF INT'L L. 728, 729 (2001).

132. *Esso Australia Resources Ltd. v. Plowman* (1995) 128 ALR 391 (Austl.).

arbitration clause in their contract, the dispute was submitted to an arbitral panel.¹³³ The Minister subsequently brought an action before the Court of Appeal and later on appeal to the High Court, seeking a judgment that the information provided to the two state-owned utility companies by Esso Petroleum and BHP was not subject to a confidentiality agreement.¹³⁴ In what has been characterized as a “seismic shock,”¹³⁵ the High Court of Australia in *Esso Australia Resources Ltd.* held that absent an explicit confidentiality contract, the private nature of arbitral proceedings does not on its own establish that confidentiality is an indispensable trait of the arbitration process.¹³⁶ The High Court reasoned that if confidentiality can be explicitly agreed upon by the parties, then there is no basis for a presumption of confidentiality. Therefore, if there is no presumption of confidentiality, then confidentiality cannot be indispensable.¹³⁷ The High Court highlighted the significance of privacy in arbitration as a crucial reason for its appeal and effectiveness but more importantly, held that confidentiality is merely a consequential benefit or advantage attaching to arbitration where the parties expressly agree to it.¹³⁸ Prior to this, the Australian courts followed the English perspective by recognizing an implied confidentiality obligation inherent to an arbitration agreement.¹³⁹

This decision demonstrates the willingness of Australian courts to advocate for explicit confidentiality agreements instead of protecting confidentiality on a blanket basis by recognizing an implied obligation.¹⁴⁰ Although the Australian court’s interpretation of privacy and confidentiality in *Esso Australia Resources Ltd.* significantly jostled the arbitration world,¹⁴¹ it has been suggested that the decision is ill-considered with regard to international arbitration and is based principally on domestic considerations.¹⁴²

133. Edouard Bertrand, *The Confidentiality of Arbitration: Evolution or Mutation Following Esso/BHP vs Plowman*, 2 INT’L BUS. L. J. 169 (1996).

134. *Id.*

135. Hew R. Dundas, Commentary, *Confidentiality in English Arbitration: the Final Word? Emmott v. Michael Wilson & Partners Ltd.*, 74(4) ARB. 458, 458 (2008).

136. *Esso Australia Resources Ltd. v. Plowman* (1995) 128 ALR 391, 401.

137. Cremades, *supra* note 2, at 28 (citing Jan Paulsson & Nigel Radwing, *The Trouble with Confidentiality*, 11 ARB. INT’L 303 (1995)).

138. *Esso Australia Resources Ltd. v. Plowman* (1995) 128 ALR 391, 401 (Austl.).

139. Dundas, *supra* note 135, at 458.

140. Henkel, *supra* note 8, at 1079.

141. Donggen Xu & Huiyuan Shi, *Dilemma of Confidentiality in International Commercial Arbitration*, 6(3) FRONTIERS L. CHINA 403, 410 (2011).

142. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, at 2817 (2nd ed., 2014).

2. *The Swedish View*

The Supreme Court of Sweden essentially followed the reasoning of the High Court of Australia in *Esso Australia Resources Ltd* when deciding *Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Finance Inc.*¹⁴³ The issue to be resolved in *Bulbank* was whether the publication of the arbitral award by a one of the parties gave rise to a breach of the arbitration agreement. The original arbitration agreement did not include a confidentiality agreement. The Supreme Court of Sweden held that a general starting point for assessing a duty of confidentiality is the principle that arbitration proceedings are based on a contract¹⁴⁴ and that without such a contract, the private character of arbitration cannot automatically lead to a duty of confidentiality.¹⁴⁵

In addition to following the reasoning of the High Court of Australia, the Supreme Court of Sweden also recognized that absolute confidentiality in arbitration is not achievable due to disclosure obligations in cases involving a challenge of the arbitral award or disclosure to board members of a company.¹⁴⁶ The court also stated that any question dealing with the duty of confidentiality must be answered on an individual basis.¹⁴⁷

3. *The United States' Approach*

In the United States, the precedents on the treatment of confidentiality are conflicting and ambiguous.¹⁴⁸ Some U.S. courts have likened arbitration to litigation and held that the work-product doctrine, discussed further below, is applicable.¹⁴⁹ *United States v. Panhandle Eastern Corporation* and *Contship Containerlines v. PPG Industries* are the leading authorities on confidentiality in arbitration in the USA.¹⁵⁰ Both cases dealt with international arbitrations and rejected the idea that an implied duty of confidentiality exists in cases where there is no express confidentiality agreement.¹⁵¹

143. Nytt Juridiskt Arkiv [NJA] [Supreme Court Reports] 2000 p.147 T 1881-99 (Swed.).

144. *Bulgarian Foreign Trade Bank Ltd v A.I. Trade Finance Inc.* NYH Juridiskt Arkiv [NJA] [Supreme Court] 2000 ref. T1881-99.

145. *Id.* at B-2, B-3.

146. *Id.*

147. *Id.*

148. Henkel, *supra* note 8, at 1081.

149. *Id.* at 1082 n.167.

150. *Id.* at 1084.

151. *Id.* at 1084-85.

In *Panhandle*, asserting prejudice and confidentiality, the defendant tried to avoid disclosure of materials pertaining to an arbitration held in Switzerland under the arbitration rules of the International Chamber of Commerce.¹⁵² The U.S. District Court for the District of Delaware criticized the parties for failing to implement an express confidentiality agreement¹⁵³ and dismissed the argument that the parties had a general understanding that all materials pertaining to the arbitration would remain confidential.¹⁵⁴ The defendant also argued that owing to the confidential and private nature of arbitration, all aspects of an arbitration must be kept confidential.¹⁵⁵ The court rejected that argument as well, asserting that arbitration rules are not binding on a court of law.¹⁵⁶ The court rejected the concept of an implied or general confidentiality obligation in international commercial arbitration and also highlighted the requirement of an express confidentiality contract in commercial arbitration.

A similar conclusion was reached in *Contship Containerlines Ltd v. PPG Industries Inc.*¹⁵⁷ In *Contship*, the U.S. District Court for the Southern District of New York rejected the defendant's argument that they were not obligated to provide documents produced in an earlier arbitration because those documents were safeguarded by both the work-product doctrine and English law, where an implied duty of confidentiality is recognized.¹⁵⁸ Instead, the court held that, irrespective of the implied duty that exists under English law, disclosure can be compelled in only two situations. First, where the document is relevant, and second, where disclosure is necessary for the fair disposal of the matter or for keeping costs low.¹⁵⁹ These cases demonstrate that U.S. courts preserve their supremacy over arbitral proceedings and refuse to be bound by the practices of other jurisdictions.

C. *Statutory Protection of Confidentiality*

While some jurisdictions have left the question of confidentiality to the courts, other jurisdictions have chosen statutory regulation.

152. *Id.* at 1085.

153. *United States v. Panhandle E. Corp.*, 118 F.R.D. 346, 350 (D. Del. 1988).

154. *Id.*

155. *Id.* at 349–50.

156. *Id.*

157. *Contship Containerlines, Ltd. v. PPG Indus., Inc.*, 2003 WL 1948807 (S.D.N.Y. Apr. 23, 2003).

158. *Id.* at 1.

159. *Id.* at 2.

For example, Singapore, the home of the International Court of Arbitration of the International Chamber of Commerce, adopted a unique approach to the publication of arbitral awards and is recognized as a leading arbitration hub in Asia.¹⁶⁰ On the other hand, New Zealand's law contains the most comprehensive codification of arbitration confidentiality.¹⁶¹

1. *Singapore's Approach*

While the practice of arbitration in Singapore does not afford absolute protection of confidentiality, Section 57 of the Singapore Arbitration Act offers an interesting approach to the exceptions to confidentiality. Section 57(3) of the Singaporean Arbitration Act, as revised in 2002, provides that disclosure of confidential information is only allowed with the consent of the parties or where "the court is satisfied that the information, if published . . . would not reveal any matter, including the identity of any party to the proceedings, that any party to the proceedings reasonably wishes to remain confidential."¹⁶² More notably, Section 57(4) provides that, notwithstanding Section 57(3), "where a court gives grounds of decision for a judgment in respect of proceedings . . . and considers that judgment to be of major legal interest, the court shall direct that reports of the judgment may be published in law reports and professional publications."¹⁶³

Section 57(4) demonstrates the willingness of the Singaporean legislature to contribute to the development of the law by allowing edited publication of decisions as well as its willingness to respect the private and confidential nature of arbitration by allowing the parties to request to conceal certain issues. The balance the legislators achieved can serve as a helpful reminder that confidentiality and transparency can co-exist and do not have to be seen as competing interests.¹⁶⁴ An example of an adaptive application of confidentiality and transparency can be seen in a dispute involving two private entities tangled in a commercial dispute involving the use of patented technology. In such a case, confidentiality would overshadow transparency in that the interests asserted by the entities are of a private

160. *ICC Report Confirms Singapore as a Leading Asia Arbitration Hub*, INTERNATIONAL CHAMBER OF COMMERCE, (June 6, 2016), <http://www.iccwbo.org/News/Articles/2016/ICC-report-confirms-Singapore-as-a-leading-Asia-arbitration-hub>.

161. Fesler, *supra* note 40, at 54.

162. Singapore Arbitration Act § 57(3) (July 31 2002).

163. *Id.* § 57(4) (emphasis added).

164. Santiago Dussan Laverde, *Analysis of the Principle of Transparency with Special Reference to Its Implications for the Procedure of International Investment Arbitration*, 11(1) *CRITERIO JURÍDICO* 105, 107 (2011).

nature and in such circumstances, it would be justified to afford a higher degree of confidentiality to those private entities. Furthermore, such a dispute is unlikely to involve any sort of significant public interest that would require the operation of a transparency mechanism.

Section 57(4) is subject to the consent of the parties and in instances where a party “reasonably wishes to conceal any matter, including the fact that he was such a party, the court shall give directions as to the action that shall be taken to conceal that matter in those reports”¹⁶⁵ and where such an action cannot be achieved, the court may “direct that no report shall be published until after the end of such period, not exceeding 10 years, as it considers appropriate.”¹⁶⁶ Among the jurisdictions discussed, Singapore is the only jurisdiction which has codified such a provision.

2. *New Zealand’s Approach*

The 1996 New Zealand Arbitration Act, as amended in 2007, governs the conduct of arbitration. Section 14B of New Zealand’s Arbitration Act provides that “the parties and the arbitral tribunal must not disclose confidential information”¹⁶⁷ in arbitration agreements governed by the law of New Zealand. Section 2 defines confidential information as any information relating to the arbitral proceedings or to an award made in those proceedings including, but not limited to, the statement of case, pleading, evidence, notes, and transcripts.¹⁶⁸ Similar to other jurisdictions where the duty of confidentiality is subject to exceptions, Section 14C of New Zealand’s Arbitration Act also provides for numerous exceptions, indicating that the duty of confidentiality is not absolute.¹⁶⁹ Section 14C(a) is particularly important because it provides that disclosure of confidential information to the parties’ professional or other advisers may be allowed.¹⁷⁰ The High Court of Auckland, in *Television New Zealand Ltd. v. Langley Production Ltd.* dealt with the question of whether enforcement proceedings or appeals of an arbitral award should be made in public.¹⁷¹ Much like *City of Moscow* discussed above, the court in *Langley* held

165. Singapore Arbitration Act § 57(4)(a) (July 31 2002).

166. *Id.* § 57(4)(b).

167. New Zealand Arbitration Act, § 14B (Sept. 2, 1996).

168. *Id.* § 2.

169. *Id.* § 14C.

170. *Id.* § 14C(a).

171. *Television N.Z. Ltd. v. Langley Prod. Ltd.* [2000] 2 NZLR 250 (N.Z.).

that the confidentiality the parties have espoused in arbitration “cannot automatically extend to processes for enforcement or challenge in the High Court.”¹⁷²

The foregoing jurisdictional analysis of confidentiality demonstrates that there is a clear absence of international unanimity on the question of confidentiality in arbitration.¹⁷³ As discussed, while the English courts have assumed a more pragmatic attitude in deciding disclosure issues, France has chosen to increase the burden of proof for a party alleging an abuse of the duty of confidentiality absent an express agreement. The French and English approach in acknowledging an implied duty of confidentiality is similar, but their approaches to disclosure issues differ. In the United States, Sweden, and Australia, such an implied duty is rejected and express confidentiality agreements are endorsed. Jurisdictions taking a statutory approach face challenges such as the proper judicial interpretation of the law. Furthermore, commentators have questioned whether the existence of an express confidentiality agreement actually precludes a court from ordering disclosure and the extent to which such an agreement should be upheld in court.¹⁷⁴

The lack of consensus and international convergence on the issue of confidentiality seemingly conflicts with the endorsement of arbitration as a private form of dispute resolution¹⁷⁵ which questions arbitration’s ability to maintain its appeal. The erratic treatment of confidentiality in different jurisdictions creates a controversial scenario that points to a need for increased consistency and uniformity.¹⁷⁶

V. ISSUES RAISED BY THE CONFIDENTIALITY CONUNDRUM

The tension between transparency and confidentiality is heightened when there is a significant public interest.¹⁷⁷ In such cases, the parties’ interests in preserving privacy and confidentiality unequivocally clashes with the general public interest.¹⁷⁸ Such clashes rarely occur in international commercial arbitration because the parties are private entities asserting a private right. Where there are private

172. *Id.* ¶ 38.

173. Henkel, *supra* note 8, at 1092.

174. NOUSSIA, *supra* note 12, at 26–27.

175. Henkel, *supra* note 8, at 1094.

176. Francisco Blavi, *A Case in Favour of Publicly Available Awards in International Commercial Arbitration: Transparency v Confidentiality*, 1 INT’L BUS. L. J. 83, 84 (2016).

177. Feiciano, *supra* note 6, at 11.

178. *Id.*

business parties involved, there is little basis for presuming that confidentiality was meant to be waived.¹⁷⁹ This difference in the degree of confidentiality afforded to a dispute is best demonstrated by cases involving transgressions by government officials or by executives of multinational organizations.¹⁸⁰ In investor-state arbitrations, for example, the state and other public bodies are often parties. In such cases, governmental procedures are subject to greater scrutiny because there is a high level of public interest at stake. The outcome of these types of arbitrations can also affect public policies. When public interest issues arise, there is a need for “compelled openness, not for burgeoning secrecy.”¹⁸¹

While there tends to be increased transparency in investor-state arbitration, secrecy and confidentiality largely prevail in commercial arbitration and transparency reforms have stalled. Some scholars have suggested that this situation is untenable and that major changes in international commercial arbitration are required.¹⁸² It is understandable that businesses reject publicity in a bid to keep some matters that might prejudice the reputation and image of the company¹⁸³ away from the intrusive inquisitiveness¹⁸⁴ of the media. The realm of international commercial arbitration as a whole does not favor publicity, although publicity is regarded as a basic pillar of justice¹⁸⁵ and an important means of quality control.¹⁸⁶ In the words of Jeremy Bentham, “[p]ublicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.”¹⁸⁷

Although confidentiality is seen as one of the main benefits of arbitration, the inherent lack of transparency has limited the lure of arbitration outside of the First World.¹⁸⁸ Arbitration’s secrecy tends to adversely affect parties’ confidence in the arbitral process.¹⁸⁹ This is supported by the contention that confidentiality is a self-serving

179. *Id.* at 12.

180. *Id.*

181. Paul Finn, *Confidentiality and the “Public Interest”*, 58 AUSTL. L. J. 497, 505 (1984) (quoting *Esso Australia Resources Ltd. v. Plowman*, 128 ALR 391, ¶ 40 (1995)).

182. Juan Fernandez-Armesto, *Salient Issues of International Arbitration*, 27 AM. U. INT’L L. R. 721, 722 (2012).

183. Bazil Oglinda, *The Principle of Confidentiality in Arbitration: Application And Limitations Of The Principle*, 4 PERSPS. OF BUS. L, J. 57, 59 (2015).

184. Xu and Shi, *supra* note 141, at 406.

185. Fernandez-Armesto, *supra* note 182, at 722.

186. *Id.* at 722–23.

187. JEREMY BENTHAM, *THE WORKS OF JEREMY BENTHAM* 316 (Vol. 4 1843).

188. Fernandez-Armesto, *supra* note 182, at 723.

189. *Id.*

myth¹⁹⁰ designed to protect arbitrators and counsel in their bid to evade public scrutiny. Confidentiality is also perceived as a way to mask arbitrators' incorrect or unethical decisions.¹⁹¹ Transparency would allow arbitral circles to assess the professionalism and competence of arbitrators.¹⁹² It would also prevent the exploitation of the system as a safe haven in which to hide evidence¹⁹³ that might otherwise assist the court or a party. Furthermore, given the inherent secrecy in arbitration, courts should not allow confidentiality to asphyxiate the ability to expose any unlawful activity that might have transpired during the arbitral proceedings.¹⁹⁴

Alternatively, Gary Born believes that confidentiality in international commercial arbitration is perceived as encouraging efficient, dispassionate dispute resolution, as distinct from emotive "trial by press release" or efforts to gain extraneous leverage. This in turn reduces the risks of damaging disclosure of commercially-sensitive information to competitors, customers, and others, and facilitates settlement by minimizing public posturing.¹⁹⁵ While the weight placed on confidentiality in arbitration and the varying approaches are apparent, the role and scope of confidentiality remains contentious.¹⁹⁶

It is a central aspect of international commercial arbitration that hearings are held privately and that third parties are precluded from attending these hearings.¹⁹⁷ The privacy of arbitration hearings colludes with the presumption of confidentiality where parties expect privacy to equate to confidentiality.¹⁹⁸ Both privacy of arbitration and duty of confidentiality emanate from the same objectives and expectations that the parties anticipate from the arbitral process.¹⁹⁹ In light of such an observation, allowing hearings to remain private but conducting the proceedings in a non-confidential fashion would undermine essential characteristics of a private arbitral hearing and run contrary to the expectations and agreements of the parties.²⁰⁰

190. *Id.*

191. Cremades, *supra* note 2, at 33–34.

192. Oglinda, *supra* note 183, at 60.

193. Reuben, *supra* note 4, at 1257.

194. See DAVID ST JOHN SUTTON ET AL., RUSSELL ON ARBITRATION (24th ed., 2015).

195. BORN, *supra* note 145, at 2780.

196. DIMITRIJ EULER ET AL., TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION: A GUIDE TO THE UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION, at 87 (1st ed., 2015)

197. BORN, *supra* note 142, at 2815–16.

198. Carmody, *supra* note 20, at 164

199. BORN, *supra* note 142, at 2816.

200. *Id.*

Indeed, the problem arises because parties prefer to avoid uncertainties raised by the dissimilar treatment of confidentiality in different jurisdictions.²⁰¹ In a bid to harmonize the diverse attitudes to confidentiality in numerous jurisdictions, the International Law Association Committee proposed that the best way to attempt to ensure confidentiality (or non-confidentiality) across many jurisdictions would be to provide for it by express agreement at some point prior to or during the arbitration.²⁰² However, in the absence of international consensus, the parties remain at the mercy of the approach the court chooses to adopt in interpreting such provisions. This can vary significantly across jurisdictions.

A. *Commercial Law is Going Underground*

The absence of transparency and the difficulty involved in obtaining precedence in arbitration means that there is a lack of information on the development of commercial law and the performance of the arbitrator within arbitral tribunals. The impossibility of or difficulty in obtaining these jurisprudential deliberations means that commercial law is effectively going underground.²⁰³ International commercial disputants are increasingly opting for arbitration instead of litigation and as a result, legal practitioners are unable to track jurisprudential developments in the commercial law sector.²⁰⁴ This secrecy surrounding the development of commercial law inevitably damages public interests. Legal practitioners are unaware of developments in crucial areas of the law, and parties disputing similar issues are required to reinvent the wheel.²⁰⁵

The present situation also means that only the big international law firms with a large practice in international commercial arbitration are able to review the latest developments in commercial law within the arbitral system, while other practitioners are left to operate relatively in the dark. The certainty and predictability which the law strives for is essentially restricted to a number of privileged insiders, with relevant information effectively being monopolized by a small elite.²⁰⁶ The result of the perpetuation of such practices is that

201. Blavi, *supra* note 176, at 86.

202. 74 INT'L L. ASS'N REP. CONF. 1, 1 (2010).

203. Sir Bernard Rix, Speech at Singapore Management University: Confidentiality in International Arbitration: Virtue or Vice? (Mar. 12, 2015), http://law.smu.edu.sg/sites/default/files/law/CEBCLA/Notes_Confidentiality_in_International_Arbitration.pdf.

204. *Id.*

205. *Id.*

206. *Id.*

the development of commercial law within the courts has been hampered and ultimately privatized within the arbitral system.

VI. TRANSPARENCY AS A MEANS TO DEVELOP COMMERCIAL ARBITRATION

With the exponential growth of commercial disputes, transparency has become the buzzword *du jour*, but it should not be viewed as a panacea.²⁰⁷ This section will analyze the various ways in which transparency can help the development of international commercial arbitration.

A. Choice of Arbitration Seat

Multinational corporations invest considerable amounts of money and time in devising arbitration clauses that best safeguard the confidentiality and proprietary nature of the technology and intellectual property they share with foreign business partners.²⁰⁸ The choice of the arbitral seat is often a significant issue. Such a decision is influenced mainly by the choice of law, the convenience afforded to the parties, and the arbitral rules adopted by the seat.²⁰⁹ Businesses dissatisfied with the service delivery of their arbitral panel have appealed for increased transparency regarding the past performances of arbitrators,²¹⁰ which would permit prospective parties to review the past performance of an arbitrator before choosing to appoint him/her. As arbitration is better suited to resolve complex scientific or technical disputes due to the dearth of relevant expert decision makers in litigation,²¹¹ it is important that parties are effectively able to assess the expertise of the arbitrator before making an appointment.

Consequently, arbitration institutions, predominantly regional ones with a less renowned pool of arbitrators, have found a niche to exploit by reassessing their administrative procedures and rules with a view to address the need for greater transparency.²¹² Further

207. *Id.*

208. Kimberley Chen Nobles, *Emerging Issues and Trends in International Arbitration*, 43 CAL. W. INT'L L.J. 77, 77 (2012).

209. *Id.* at 80.

210. *Id.* at 82.

211. Raymond G. Bender, *Arbitration – An Ideal Way to Resolve High-Tech Industry Disputes*, 65 DISP. RESOL. J. 44, 45 (2010).

212. Peter Ashford, *Rule Changes Affecting the International Arbitration Community*, 22 AM. REV. INT'L ARB. 87, 115 (2011).

transparency pertaining to the management of arbitration institutions gives parties the edge while selecting arbitration institutions and arbitrators from a bigger pool.²¹³

B. *Transparency as a Method of Developing Arbitral Jurisprudence*

Absolute confidentiality in international commercial arbitration hinders the development of arbitral jurisprudence. Arbitral decisions that go unreported frequently possess valuable juridical content²¹⁴ and permitting such important doctrinal reflections²¹⁵ to be archived is a waste of the intellectual effort put in by arbitrators in writing their awards. Keeping such reasoned awards out of the reach of potential disputants not only deprives them of valuable intellectual resources but also omits important reasoning from arbitral jurisprudence. Furthermore, because as a jurisdictional decision an arbitral award may be of public interest, there is consequently at least an argument that such decisions should not be kept private.²¹⁶ While the publication of arbitral awards would provide consistency and convenience to arbitrators and lawyers, businesses would not be as welcoming of such changes as they would essentially be asked to contribute to the development of the law at their own expense.²¹⁷ In this context, a reasonable approach would require arbitral decisions to be published unless the parties object to such publication. This approach would also satisfy transparency needs in that the decision of the arbitrators would be subject to scrutiny by academics, practitioners, and the public as a whole.

There is a need for a collection of arbitral awards which the public can peruse. The benefit of having a compendium of arbitral awards is that it would constitute a valuable educational model for arbitrators and serve the higher purpose of developing arbitral jurisprudence and arbitral practice in addition to encouraging consistency in the arbitral process.²¹⁸ Such a compendium would not only benefit the parties in the preparation of their case, but would also create a forum for arbitrators to share their knowledge and experience and offer constructive criticism of arbitral awards.²¹⁹

213. Nobles, *supra* note 208, at 82.

214. Cremades, *supra* note 2, at 35.

215. *Id.*

216. Blavi, *supra* note 176, at 86.

217. BLACKABY, *supra* note 3, ¶ 1.117.

218. Colin Ong, *Confidentiality of Arbitral Awards and the Advantage for Arbitral Institutions to Maintain a Repository of Awards*, 1 ASIAN INT'L ARB. J. 169, 169 (2005)

219. Bhatia, *supra* note 74, at 11.

VII. THE PREVALENCE OF TRANSPARENCY

Transparency finds its way into international commercial arbitration in numerous ways.

A. *Competition and Transparency*

In a more connected world, multinational companies are spawning and international commercial contracts are blooming. There is increased competition between arbitral institutions, arbitrators, and lawyers, and this fierce competition has also led to increased cooperation in a bid to improve the arbitration system.

Arbitral institutions have been adding precision and detail to attract more business parties to arbitration in an effort to gain market share.²²⁰ Such evolution has led to pronounced arbitral rules that disfavor subjective interpretations and allow for objective approaches.²²¹ Although objectivity is replacing subjectivity, such changes are, in practice, merely ambiguous qualitative requirements, because the rules are open to interpretation and the manner in which they are applied is often concealed from the parties.²²² In order to achieve procedural fairness and transparency, it is not enough that arbitrators work to ensure that justice is achieved; the parties and the public must see and believe that justice is being sought.²²³

In the past decade, transparency in international commercial arbitration has been significantly enhanced.²²⁴ Less established arbitral institutions have innovated the arbitration scene. These institutions have adopted detailed and unambiguous codes of conduct as well as more transparent procedures.²²⁵ This new wave of arbitrators is more pragmatic in its approach as opposed to invoking “grand principles of law” or “vague notions of equity”²²⁶ that were relied upon by predecessors. The technocracy with which these new arbitrators approach their subject is more appealing to modern businessmen, who attempt to draft all-encompassing contracts which should instead be approached with dexterity and precision.²²⁷ The result of

220. Rogers, *supra* note 51, at 1314.

221. *Id.*

222. *Id.*

223. Blavi, *supra* note 176, at 87.

224. *Id.* at 86.

225. Rogers, *supra* note 51, at 1314.

226. *Id.*

227. Yassin EI-Ayouty, *Challenges Facing Inter-Governmental Political Negotiations Which Are Common to International Business Negotiators: An Analysis of Shared Concerns*, 3 ILSA J. INT'L & COMP. L. 829, 832 (1997).

such subtle changes is that the previously opaque, compromise-oriented outcomes²²⁸ have been replaced with thoroughly reasoned and more detail-oriented awards. To keep up with these new players, established arbitral institutions adopted more transparent rules as well.²²⁹ These changes have made international commercial arbitration significantly more transparent.²³⁰

B. *Voluntary and Involuntary Disclosures*

Transparency has also been enhanced by voluntary and involuntary disclosures. While one party may have strategic reasons to maintain confidentiality, another party may, for tactical reasons, want the disclosure of confidential materials.²³¹ Details about an arbitration can be revealed when one party starts enforcement proceedings in court. Enforcement of arbitral awards has increasingly been used by parties as a strategic tool to bypass confidentiality. Courts and arbitrators should tread cautiously when one party attempts to use voluntary or involuntary disclosures as a pressure tactic to intimidate the other party into an early settlement or to derive any other benefit.²³² Although such calculated disclosures may border on breach of confidence or raise ethical concerns, they also provide an opportunity to peek through the inner system of arbitration, which in turn contributes to transparency.²³³ While made for reasons other than to enhance transparency, voluntary and involuntary disclosures offer a better understanding of the inner functionalities of the arbitral process in addition to enlightening the general public on specific cases.²³⁴

C. *Arbitral Awards*

The widespread publication of arbitral awards can create an objective yardstick with which to assess arbitrators²³⁵ as well as accommodate the public interest in the evaluation of arbitration proceedings.²³⁶ Increased publication of arbitral awards is a considerable transparency breakthrough.²³⁷ Although arbitration differs from

228. Rogers, *supra* note 51, at 1318.

229. *Id.* at 1316.

230. Bhatia, *supra* note 74, at 10.

231. Rogers, *supra* note 51, at 1316.

232. Bhatia, *supra* note 74, at 12.

233. Rogers, *supra* note 51 at 1319.

234. Bhatia, *supra* note 74, at 10.

235. Fonseca & Correia, *supra* note 1, at 125.

236. Bhatia, *supra* note 74, at 10.

237. Rogers, *supra* note 51, at 1319.

traditional jurisprudence in that arbitrators are not bound by previous decisions of an arbitral tribunal, in order to maintain a sense of continuity and rationality,²³⁸ arbitrators increasingly consult past decisions of arbitral tribunals. This could indicate that arbitral institutions are pushing for a presumption in favor of redacted awards in the absence of party objection.²³⁹

The publication of arbitral awards is set to continue. Although not binding, arbitral awards have a genuine precedential value²⁴⁰ and can be highly persuasive²⁴¹ in international commercial arbitration. The precedential value of arbitral awards is set to bring more clarity and predictability in the way arbitration operates and inspire more confidence in the arbitral process.²⁴² To preserve the appeal of commercial arbitrations, it is essential that arbitration is rendered more predictable for those who choose to utilize it.²⁴³ The publication of arbitral awards will also allow parties to anticipate their chances of success as well as be in a better position to evaluate the fairness of the arbitrator by examining former decisions with similar facts.²⁴⁴ Such practices bring a hint of transparency to the award without encroaching on the confidentiality principle.²⁴⁵

D. *Other Triggers of Transparency*

Another significant catalyst of transparency in international commercial arbitration is the tremendous amount of academic and empirical research that educates parties, practitioners, and the public on how several features of commercial arbitration operate.²⁴⁶ There is a wealth of literature available for interested parties to learn about the inner functionalities of arbitration. Moreover, cooperative efforts between arbitral institutions have also contributed to increased transparency in arbitration.²⁴⁷ Such auspicious inter-institutional cooperation is paving the way for future transparency reforms. Arbitration also benefits from the views of scholars and practitioners

238. *Id.*

239. *Id.* at 1320.

240. Klaus Peter Berger, *International Arbitration Practice and the Unidroit Principles of International Commercial Contracts*, 46 AM. J. COMP. L. 129, 149 (1998).

241. Rogers, *supra* note 51, at 1320.

242. Blavi, *supra* note 176, at 86.

243. Henkel, *supra* note 8, at 1062

244. Oglinda, *supra* note 183, at 60.

245. Fonseca & Correia, *supra* note 1, at 125.

246. Rogers, *supra* note 51, at 1324.

247. *Id.* at 1323.

who have worked, or continue to work, within the system²⁴⁸ and as a result offer valuable insights and informed observations. Their commentary proposes improvements for the system with a fair-minded assessment of its current state,²⁴⁹ and any criticism of the system is viewed as loyal opposition from within, rather than speculation from external detractors.²⁵⁰

VIII. THE VIABILITY OF MANDATORY TRANSPARENCY REFORMS

Irrespective of the positive strides toward increased transparency, international commercial arbitration is still not a transparent system. There is a need to forge a middle path²⁵¹ between confidentiality and transparency. The system still values privacy and confidentiality and the inherent lack of transparency has caused some to question whether insiders benefit from unfair advantages in a system marked by secrecy.²⁵²

Arguments in support of mandatory transparency reforms are founded on the idea that transparency is the only means of ensuring that information from the system reaches the public.²⁵³ Supporters of such a view recognize that mandatory transparency reforms unduly strain the budgets of the parties and interfere with the parties' expectation of confidentiality.²⁵⁴ However, they assert that the public has the right to know if a company engages in unsavory corporate practices, such as child labor or poor environmental protection policies,²⁵⁵ before deciding whether to invest in the company or purchase the products of the company. To them, the need to expose such practices outweighs the costs involved in exposing them.²⁵⁶

Mandatory transparency reforms are not without risks. On the one hand, compulsory transparency reforms would need to be precise. If not, their application would be too broad and the subset of cases to which they apply would not be easily identifiable.²⁵⁷ Such reforms

248. *Id.* at 1324.

249. William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 649 (1989)

250. Rogers, *supra* note 51, at 1324.

251. Reuben, *supra* note 4, at 1257.

252. Rogers, *supra* note 51, at 1324.

253. Buys, *supra* note 49, at 136.

254. *Id.* at 137–38.

255. *Id.* at 135.

256. *Id.* at 138.

257. Rogers, *supra* note 51, at 1327.

would also need to be adopted internationally, not just in a few jurisdictions. In the absence of an international consensus, parties seeking to avoid mandatory transparency reforms would resort to *ad hoc* institutions where they would not be obliged to follow such mandatory reforms.²⁵⁸ This situation would give rise to a grey market.²⁵⁹ To counter this concern, the courts could be required to refuse to enforce awards originating from such institutions. However, such refusal would raise concerns of its own and require a substantial restructuring of international treaties.²⁶⁰ Thus, while greater transparency is a well-intentioned objective that would improve the image of arbitration as a fair and equitable dispute resolution mechanism,²⁶¹ it would be difficult to garner the type of political support that would be needed for such a sweeping international reform.²⁶²

Although transparency should not be seen as a panacea, transparency reform has nevertheless been characterized as the cure for genuine inequities, perceptions of inequity, or inaccurate claims of inequity.²⁶³ Whether the balance ultimately tips in favor of enhanced transparency or increased confidentiality,²⁶⁴ it is nevertheless true that greater transparency will add to the legitimacy of arbitration and will help fight the inefficiencies, imprecision, and possible inequities²⁶⁵ created by the opacity of a system that deals with crucial issues that may be important matters of public interest.

Although the principle of party autonomy poses the greatest challenge to enhanced transparency,²⁶⁶ any compulsory transparency reform is bound to have compliance challenges since parties will devise new ways to evade such obligations. However, the need for predictability in international commercial arbitration will naturally lead parties toward greater transparency, because transparency is integral to the rule of law.²⁶⁷

258. *Id.*

259. *Id.*

260. *Id.*

261. Ong, *supra* note 218, at 178.

262. Rogers, *supra* note 51, at 1328.

263. *Id.* at 1335.

264. Blavi, *supra* note 176, at 87.

265. Rogers, *supra* note 51, at 1335; *see also* Feiciano, *supra* note 6, at 20.

266. Blavi, *supra* note 176, at 89.

267. Rogers, *supra* note 51, at 1337.

IX. THE UNCITRAL RULES ON TRANSPARENCY AS A
ROADMAP FOR REFORM

In 2014, the arrival of the UNCITRAL Rules on Transparency signaled a new era of international cooperation in the promotion of transparency in investor-state arbitrations, and was viewed as a symbolic step forward on the path to transparency in international arbitration.²⁶⁸ The scope of the UNCITRAL Rules on Transparency is restricted to investor-state arbitration, but its impact has led to appeals for greater transparency in international commercial arbitration.

An overhaul of the approach to confidentiality in international commercial arbitration requires re-examining deep-rooted practices in the area of privacy and confidentiality. The UNCITRAL Rules on Transparency represent an important starting point for such an overhaul. Investor-state arbitrations may create pressure or at least inspiration for greater transparency²⁶⁹ in international commercial arbitration.

A. *Building a Positive Case for Transparency in International Commercial Arbitration*

In investor-state arbitration, transparency allows the public to scrutinize state activities.²⁷⁰ Since the outcome of investor-state arbitrations can affect the decision-making and finances of a state, these arbitrations must be held under the critical eye of the public and remain open to scrutiny.²⁷¹ Although the advance of transparency has been less sweeping²⁷² in international commercial arbitration, within the past decade,²⁷³ numerous positive developments have occurred in a bid to increase transparency in international commercial arbitration.²⁷⁴

These positive developments have taken several forms. Arbitral institutions have moved away from nonpublication of arbitral decisions and have started to publish redacted versions of arbitral awards or even complete versions where the parties have consented.²⁷⁵ Legal news websites have increasingly started to comment

268. Carmody, *supra* note 20, at 96.

269. Rogers, *supra* note 51, at 1334.

270. EULER, *supra* note 196, at 42.

271. Buys, *supra* note 49, at 134.

272. MAUPIN, *supra* note 45, at 9.

273. Carmody, *supra* note 20, at 168.

274. Rogers, *supra* note 51, at 1301.

275. BORN, *supra* note 142, at 2820.

on international disputes²⁷⁶ and, as discussed above, numerous jurisdictions have started to move from conservatism to pragmatism, indicating a shift in their approaches to the questions of confidentiality and transparency. Although these developments have been positive for transparency, confidentiality persists. For example, even when arbitral awards are published, they only give the outside world a glimpse of the final product without ever divulging the inner workings of the proceeding.

B. *Investor-State vs. Commercial Arbitration*

The most important difference between international commercial arbitration and investor-state arbitration concerns the identity of the parties.²⁷⁷ In international commercial arbitration, private parties from different countries submit their disputes to an impartial arbitrator²⁷⁸ and are handed a final and binding arbitral award that can be enforced in a court of law.²⁷⁹ In comparison, investor-state arbitration involve States or State-run bodies and private investors. International commercial arbitration and investor-state arbitrations involve different stakeholders and it soon became apparent that the manner in which both arbitrations were conducted had to change. Historically, international commercial arbitration and investor-state arbitrations possessed the same inherent lack of transparency. However, increased transparency is now seen as necessary in investor-state arbitration because it involves disputes where the state is involved and any outcome can affect public interest or policies.²⁸⁰ While there is an emerging trend favoring transparency in international commercial arbitration,²⁸¹ there is presently very limited literature that addresses the desirability and feasibility of the application of the UNCITRAL Rules on Transparency to international commercial arbitration.

276. *Id.*

277. Robert D. Argen, *Ending Blind Spot Justice: Broadening the Transparency Trend in International Arbitration*, 40 *BROOK. J. INT'L L.* 207, 207 (2014).

278. GARY B. BORN, *INTERNATIONAL ARBITRATION: LAW AND PRACTICE*, at 5 (1st ed., 2012)

279. *Id.*

280. Carmody, *supra* note 20, at 105.

281. Samuel Levander, *Resolving "Dynamic Interpretation": An Empirical Analysis of the UNCITRAL Rules on Transparency*, 52(2) *COLUM. J. TRANSNAT'L L.* 506, 517 (2014).

C. *Purpose and Applicability of the UNCITRAL Rules on Transparency*

On April 1, 2014, the UNCITRAL Rules on Transparency were adopted, providing a set of procedural rules aimed at increasing transparency and public accessibility of treaty-based investor-state arbitrations.²⁸² The UNCITRAL Rules on Transparency reflect a global trend toward acknowledging the significance of transparency as a means of promoting and ensuring effective democratic participation, good governance, accountability, predictability, and the rule of law.²⁸³ The UNCITRAL Rules on Transparency provide a level of transparency and public accessibility to arbitrated disputes that previously did not exist.²⁸⁴ They also signify an important shift away from the status quo of arbitrations being held in private and offer a coherent set of rules to make sure that transparent procedures are applied in a clear and consistent manner.²⁸⁵ However, although the UNCITRAL Rules on Transparency are a major step toward increased transparency, Article 1 of the UNCITRAL Rules on Transparency limits their application to investment treaty arbitrations only. Commentators have called for widening the scope of the UNCITRAL Rules on Transparency to cover international commercial arbitration.²⁸⁶

Such a widespread overhaul of the system is a complex task,²⁸⁷ and a more nuanced approach to confidentiality in arbitration may preserve the values of arbitration while simultaneously enhancing the competing values to be gained by greater transparency.²⁸⁸ The duty of confidentiality should not be an absolute one; it must be nuanced and allow for important exceptions.²⁸⁹

282. Carmody, *supra* note 20, at 119.

283. *Id.* at 120 (citing Delivering Justice: Programme of action to strengthen the rule of law at the national and international levels: Report of the Secretary-General, UN GAOR, 66th session, Agenda Item 83, UN Doc A/66/749 (16 March 2012)).

284. Laurence Boisson de Chazournes & Rukia Baruti, *Transparency in Investor-State Arbitration: An Incremental Approach*, 2 BCDR INT'L ARB. REV. 58, 68 (2015).

285. Carmody, *supra* note 20, at 128.

286. Argen, *supra* note 277, at 208.

287. Carmody, *supra* note 20, at 155.

288. Buys, *supra* note 49, at 121.

289. BORN, *supra* note 142, at 2817.

D. *The Effects of Transparency in International Commercial Arbitration*

Before extending the scope of the UNCITRAL Rules on Transparency to international commercial arbitration, advantages of enhanced transparency must be balanced against countervailing considerations²⁹⁰ such as the public interest, the effect on the predictability and consistency of arbitral proceedings, and the effect on the arbitral awards.

1. *The Effect on the Public Interest*

The disparity in transparency requirements between investor-state arbitration and international commercial arbitration is due to the fact that the public is a significant stakeholder²⁹¹ in the affairs of a state. Such a disparity is justified on the basis of this public interest,²⁹² which mandates higher transparency in investor-state arbitration as compared to international commercial arbitration. Many scholars believe that increased transparency is therefore tolerable²⁹³ in international commercial arbitration, while others believe that international commercial arbitration between private actors also has the potential to affect the public interest, and thus that the disparity is not justified.²⁹⁴

Similarly, commercial arbitrations can also affect the policy making of a state on issues such as power generation, water, or infrastructure²⁹⁵ because private companies often play a major role in the provision of such facilities. Environmental protection, public health and safety, and market competition²⁹⁶ may also be added to the list of issues that can potentially raise public interest concerns. Pharmaceutical disputes that result in a spike in the price of vital drugs also affect the public interest. The global financial crisis of 2007 and 2008 exemplifies the impact that private multinational corporations can have on policymaking and public finances, as well as on individuals

290. Carmody, *supra* note 20, at 169.

291. Argen, *supra* note 277, at 209.

292. *Id.* at 210.

293. *Id.* at 211.

294. Carmody, *supra* note 20, at 169 (citing EULER, *supra* note 196, at 44).

295. *Id.* (citing BORN, *supra* note 142, at 2828).

296. Argen, *supra* note 277, at 235.

and communities.²⁹⁷ Enforcement proceedings of international commercial arbitration awards in national courts also raise a public interest concern.²⁹⁸ However, even avid transparency supporters have accepted that transparency should not be claimed on a blanket basis because not all disputes are matters of public interest.²⁹⁹

While the parties involved in a commercial arbitration can voluntarily disclose that their disputes involve public interest concerns, such voluntarism is rarely seen in practice because parties prefer to keep their disputes private.³⁰⁰ It is reasonable that private disputants be given the choice of a private forum to settle their disputes. However, it is undesirable to allow multinational corporations to shroud their corporate practices, some of which may possibly affect millions of people, behind a confidentiality clause.³⁰¹ The present system in operation means that most commercial disputes that may potentially affect public policies are being resolved *in camera*, away from critical review.

2. *The Effect on the Predictability and Consistency of Arbitral Proceedings*

Numerous commentators have espoused the benefits of the publication of reasoned arbitral awards.³⁰² Higher consistency and better predictability in arbitral jurisprudence may be achieved by creating a precedential pool similar, but not identical, to the *stare decisis* doctrine.

Furthermore, although arbitral awards are exclusively binding only on the parties involved, a compendium of authorities readily available could have persuasive value³⁰³ in substantially similar cases. The publication of arbitral awards would undoubtedly provide a degree of predictability and contribute to arbitral jurisprudence,³⁰⁴ which could in turn help parties to understand the inner workings of arbitration, make informed decisions as to their chances of winning,

297. EULER, *supra* note 196, at 44.

298. Anjanette H. Raymond, *Confidentiality in a Forum of Last Resort: Is the Use of Confidential Arbitration a Good Idea for Business and Society?*, 16 AM. REV. INT'L ARB. 479, 486 (2005).

299. Rogers, *supra* note 51, at 1309.

300. Argen, *supra* note 277, at 210.

301. Andrew Tweeddale, *Confidentiality in Arbitration and the Public Interest Exception*, 21 ARB. INT'L 59, 69 (2014).

302. BORN, *supra* note 142, at 2821.

303. Carmody, *supra* note 20, at 172.

304. Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1085 (2000).

and avoid unnecessary disputes.³⁰⁵ Academics and practitioners are also set to benefit from the publication of arbitral awards in that they will have the opportunity to understand, analyze, critique, and improve the dispute resolution system.³⁰⁶

A searchable database of arbitral awards would increase the perception of legitimacy and integrity within the arbitration process thus satisfying a significant democratic purpose.³⁰⁷ Satisfying a democratic purpose emanates from the democratic deficit principle which encompasses information which is public in principle but which can only be accessed through difficult or cumbersome procedures,³⁰⁸ giving rise to an illusion of translucency. The publication of arbitral awards can provide rationality and transparency to an otherwise arbitrary process.³⁰⁹ Additionally, considering that the awards would be subject to public scrutiny, arbitrators will have an added incentive to conduct arbitral proceedings efficiently and expeditiously.

While proponents of transparency laud its benefits, critics respond that consistency and predictability are a mirage and that they are not essential to the development of international commercial arbitration.³¹⁰ However, international commercial arbitration would benefit from increased transparency because it would improve the predictability and consistency of arbitral proceedings, aiding the parties, arbitrators, the international community, and international arbitral jurisprudence.

3. *The Effect on the Award*

Another positive effect of increased transparency on international commercial arbitration is that arbitrators would have greater incentives to render defensible, persuasive, and carefully drafted decisions.³¹¹

The effect of enhanced transparency on arbitral awards is twofold. First, arbitrators would be aware that their decisions would be dissected by academics and professionals. Second, because the public, the parties, and other stakeholders would be able to see the reasoning of the arbitral panel, the arbitral process will benefit from greater

305. Buys, *supra* note 49, at 136.

306. Carmody, *supra* note 20, at 172.

307. *Id.*

308. MAUPIN, *supra* note 45, at 11.

309. Reuben, *supra* note 304, at 1085.

310. Gabrielle Kauffman-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?* 23 *ARB. INT'L.* 357, 375-76 (2007).

311. Carmody, *supra* note 20, at 196 (citing BORN, *supra* note 154, at 2821).

public confidence and parties would face greater pressure to abide by their awards.³¹²

Although greater transparency could slow down the arbitral process³¹³ and unduly compel arbitrators to contribute to the development of arbitral jurisprudence and demonstrate their aptitudes,³¹⁴ on balance, the possibility that higher transparency can improve the prominence of international commercial arbitration and positively contribute to the decision-making process makes any effect on the speed of the process worthwhile.

E. *The Viability of Such Reforms*

While the opacity of international arbitration is lamented, as noted above, there have been calls for courts to decline enforcement proceedings of arbitral awards that are not compliant with transparency obligations.³¹⁵ Such a solution should be resisted as it is too radical and would be detrimental to the idea of arbitration as a preferred dispute resolution mechanism. The solution therefore should come from an established set of rules already in place. However, extending the UNCITRAL Rules on Transparency to international commercial arbitration should not be viewed as a universal remedy to the erratic application of confidentiality principles in the system. Similar to its application in investor-state arbitration, the rules would be presumed to apply, save where the parties explicitly “opt out” of their application.³¹⁶ Indeed, in a system where privacy and confidentiality are considered as pivotal protections, an “opt out clause” in its application is imperative. Such opt out clauses may take the form of partial withdrawal, where only specific issues are left out, or complete withdrawal, where confidentiality is absolute.

While such an approach would assist in fulfilling transparency obligations and respect the private nature of international commercial arbitration, an unqualified “opt out clause” would undermine the effectiveness of such a framework if all the parties privy to the dispute decide to opt out. Consequently, adapting the UNCITRAL Rules on Transparency to international commercial arbitration would require a well-defined set of rules which addresses any apprehensions

312. Buys, *supra* note 49, at 136.

313. Carmody, *supra* note 20, at 174.

314. Hodges, *supra* note 66, at 596.

315. Lynn M. LoPucki, *Court-System Transparency*, 94 IOWA L. REV. 481, 536 (2009)

316. Levander, *supra* note 281, at 534–35.

that parties may have about safeguarding their goodwill and protecting sensitive data such as intellectual property, patents, and trade secrets. Considering the likelihood of opposition to mandatory transparency reforms and the additional costs on the parties' budgets, it will be essential to devise a system that ensures compliance.³¹⁷

Arbitration has been a success but it must develop, change, and adapt to the realities of the ever-changing world in order to stay relevant and thrive as the favored alternative form of dispute resolution for businesses and states.³¹⁸ The success that arbitration has enjoyed "should not mask the tensions that are apparent with respect to it."³¹⁹ The UNCITRAL Rules on Transparency would offer a platform to build international commercial arbitration into a more transparent system by adapting the provisions of the Rules on Transparency into operative provisions to cater for commercial arbitrations.

X. THE WORK-PRODUCT DOCTRINE

The work-product doctrine could be used as a standard to develop an international consensus on the best approach to protect confidentiality in arbitration.³²⁰ The work-product doctrine is a deep-rooted principle in the United States and provides qualified protection of legal representatives' work product.³²¹ Under the work-product doctrine, courts balance whether the probative value of the disclosure sought overshadows its potential for prejudice.³²² The disclosure of materials can be compelled by, first, demonstrating a significant necessity for the material, and second, showing an inability to acquire such information without undue hardship.³²³ These two conditions can be referred to as the "substantial need principle" and the "undue hardship principle." These two conditions from the work product doctrine, which were articulated in *Hickman v. Taylor*,³²⁴ could provide for a more pragmatic alternative to the currently unpredictable practice of confidentiality in international commercial arbitrations. The work-product doctrine is a means to strike a fair

317. Rogers, *supra* note 51, at 1302.

318. Fernandez-Armesto, *supra* note 182, at 721.

319. THOMAS H. WEBSTER, HANDBOOK OF UNCITRAL ARBITRATION ¶ 0-76 (2nd ed., 2014)

320. Henkel, *supra* note 8, at 1062.

321. *Id.*

322. Reuben, *supra* note 4, at 1294.

323. Henkel, *supra* note 8, at 1062-63.

324. *Hickman v. Taylor*, 329 U.S. 495 (1947).

balance between confidentiality in arbitration and the public interest in the disclosure of evidence.³²⁵

In finding this fair balance it is important to bear in mind that without some degree of confidentiality, arbitration can no longer prosper as an alternative to litigation and parties will be deterred from choosing arbitration as a dispute resolution mechanism.³²⁶ The work-product doctrine would impose a higher standard of proof in order to allow disclosure. Raising the burden of proof would not answer all the challenges faced by confidentiality in arbitration, but it could render the law and practice of confidentiality in international commercial arbitration more predictable and more reflective of judicial realism.³²⁷ The adoption of the work-product doctrine and the reasoning of *Hickman v. Taylor* within the arbitral system when determining the protection to be afforded evidence would offer a more consistent risk-benefit analysis in support of the arbitral process.³²⁸ The well-established norms of the work-product doctrine would not only set the scene for increased predictability in the way the disclosure of confidential materials in arbitration functions, but, given the lack of uniformity in many jurisdictions around the world, they could also serve as the foundation to achieve international consensus on confidentiality in commercial arbitration.³²⁹

A. *Disclosure in Arbitration under the Work-Product Doctrine*

The use of the work-product doctrine as a basis for disclosure of confidential materials would entail two main conditions: First, “*a substantial need for the material produced during arbitration proceedings*”³³⁰ and second, “*that the party requesting disclosure lacks any ability to obtain the material by other means without undue hardship.*”³³¹ While the courts applying this test have not defined substantial need, the U.S. Supreme Court has held that “*where relevant and non-privileged facts remain hidden in an attorney’s file and where production of those facts is essential to the preparations of one’s case, discovery may properly be had.*”³³² With respect to undue hardship, the Supreme Court stated that, “*production might be justified where the witnesses are no longer available or can be reached only*

325. Henkel, *supra* note 8, at 1094.

326. *Id.* at 1095.

327. *Id.*

328. Henkel, *supra* note 8, at 1095.

329. *Id.* at 1096.

330. *Id.* at 1099 (emphasis added).

331. *Id.* (emphasis added).

332. *Hickman v. Taylor* 329 U.S. 495, 511 (1947) (emphasis added).

with difficulty.”³³³ A lack of financial resources will not suffice to prove the existence of a “substantial need” or an “undue hardship,” although some courts have taken inhibitive costs into consideration when dealing with the “undue hardship” prong.³³⁴

B. *The Work-Product Doctrine as an Established Principle in Arbitration*

The role of the work-product doctrine is to ensure that confidential materials are disclosed only after a coherent test is applied and it is determined that disclosure is necessary. The work-product doctrine balances the parties’ interests in determining whether disclosure is necessary and the same approach can be applied in commercial arbitrations.³³⁵ Where disclosure is sought by one party and that party’s interests prevail over the interests of the other party seeking to protect confidential materials, the work-product doctrine will weigh in favor of the party seeking disclosure.³³⁶

The work-product doctrine can be used to cure ambiguities in the law, such as those enunciated in *Ali Shipping*, where the court stated that one of the exceptions to the implied duty of confidentiality is the protection of “the legitimate interests of an arbitrating party.”³³⁷ Such an exception is vague and can be replaced by the “substantial need” and “undue hardship” tests.³³⁸ Furthermore, the French Court of Appeal in *Nafimco* raised the burden of proof for parties alleging a breach of confidentiality and put the burden on the party alleging a breach to prove the existence of such a duty. Although the Court failed to define the extent of that burden of proof, “requiring the proof of a substantial need and undue hardship” could be used to fill that gap, giving meaning to the rather loose term “legitimate interest.”³³⁹ Raising the burden of proof to that of the work-product doctrine could also be used to curb the widespread practice of compelling disclosure even where there is an express confidentiality agreement between the parties.

333. *Id.* at 511–12.

334. Henkel, *supra* note 8, at 1100–01.

335. *Id.* at 1103.

336. *Id.*

337. *Ali Shipping Corp. v. Shipyard Trogir* [1998] 2 All ER 136, at 147–148.

338. Henkel, *supra* note 8, at 1104.

339. *Id.*

C. *The Need for Confidentiality in Genuine Cases*

Although the idea of complete transparency is alluring, the system should not neglect the cases where confidentiality should genuinely be considered ahead of transparency and mandatory disclosures.³⁴⁰ In order to address these issues, the work-product doctrine may be applied to achieve a “judicially enforceable duty of confidentiality”³⁴¹ which would balance the interests of all parties before deciding disclosure issues, and would also allow for cases where confidentiality must be maintained and enforced.

Cases where confidentiality must often take precedence typically involve sensitive intellectual properties. Intellectual property and technology disputants increasingly favor arbitration over litigation.³⁴² This trend is due to the extremely delicate and highly confidential business or technical data involved. In such cases, a proper framework for confidentiality is crucial. In intellectual property disputes, a party may be obliged to divulge confidential and sensitive data to the other party, to the experts and witnesses, and to the tribunal, risking a commercial leak through deliberate or inadvertent distribution of such data.³⁴³ Disputes involving joint ventures, commercial partnerships, shareholder disputes, employment disputes, disputes involving licensing and intellectual property, and disputes regarded as “commercial in confidence” are those which are more likely to attract a higher level of confidentiality.³⁴⁴ Furthermore, confidentiality is particularly important in disputes involving professional practice where goodwill is at stake and where disclosure would have an adverse impact.³⁴⁵

With respect to intellectual property disputes, the WIPO Arbitration Rules provide structured guidelines to help parties understand how confidentiality operates. Mistaken presumptions of confidentiality are especially problematic for parties involved in intellectual property disputes and in a bid to remedy such uncertainties, the WIPO Arbitration Rules offer provisions that are “particularly extensive both in their substantive scope and in their substantive reach.”³⁴⁶

340. Fonseca & Correia, *supra* note 1, at 120.

341. Henkel, *supra* note 8, at 1105.

342. Christopher Boog & James Menz, *Arbitrating IPO Disputes: The 2014 WIPO Arbitration Rules*, 24 J. ARB. STUD. 105, 105 (2014).

343. *Id.* at 111.

344. David H. Denton & Michael D.G. Heaton, *Commercial Arbitration - Does it Really Have a Future?*, 4 VICTORIA U. L. & JUST. J. 117, 120 (2014).

345. *Id.*

346. *Id.*

Article 76(b) of the WIPO Arbitration Rules provides that “. . . the party calling such witness shall be responsible for the maintenance by the witness of the same degree of confidentiality as that required of the party.”³⁴⁷ The WIPO Arbitration Rules also provide for the confidentiality of all evidence submitted throughout the proceedings, the existence of the arbitration, and the arbitral award. Any exceptions to these provisions are often limited to legally-mandated disclosure.³⁴⁸ The existence of the arbitration can be revealed only where disclosure is mandatory by law³⁴⁹ or where an “obligation of good faith or candor”³⁵⁰ is owed to a party. The arbitral award can only be disclosed in order to comply with a legal requirement imposed on a party or in order to establish or protect a party’s legal rights against a third party.³⁵¹

Pursuant to Article 54, the parties can request the arbitral tribunal to classify certain information as confidential and to take appropriate steps to safeguard the confidentiality of such information.³⁵² The tribunal can also designate, under exceptional circumstance, a confidentiality advisor who will determine whether the information is to be classified as confidential and the conditions under which it may be disclosed.³⁵³

As the WIPO Arbitration Rules are among the most comprehensive and restrictive institutional arbitral confidentiality rules,³⁵⁴ they provide a strong basis for dealing with cases where confidentiality is genuinely important. They could be expanded to cover all types of cases where confidentiality is a genuine commercial or legal concern so as not to limit its application to intellectual property disputes. Along with the work-product doctrine, the WIPO Arbitration Rules can be adapted and integrated into a comprehensive set of provisions that form part of a revised UNCITRAL Rules on Transparency focusing on the commercial side of arbitration and incorporating the most salient aspects of these instruments. The work-product doctrine principles would provide a foundation for disclosure of materials. The principles from the WIPO Arbitration rules would clarify what can or cannot be disclosed in a bid to ensure that materials involving intellectual property are adequately protected. These potential reforms

347. WIPO Arbitration Rules, art. 76(b).

348. Boog & Menz, *supra* note 342, at 111.

349. WIPO Arbitration Rules, art. 75(a).

350. *Id.* art. 75(b).

351. *Id.* art. 77(iii).

352. *Id.* art. 54.

353. *Id.* art. 54(d).

354. Boog & Menz, *supra* note 342, at 113.

have to be combined within a single instrument with a new appellation in order to obtain a novel set of rules for commercial arbitration practice where confidentiality and transparency find their equilibrium.

XI. CONCLUSION

Confidentiality and transparency have a strenuous relationship within the arbitration realm. There is a need to develop a balance between the guarantees that attract commercial parties to arbitration and the concurrent need for equity and justice.³⁵⁵ Although confidentiality and transparency have been described as competing values, they can coexist in practice.³⁵⁶ Confidentiality encourages a comprehensive investigation of the issues without the invasion of privacy but it also provides the parties with their best chance to save the underlying business relationship.³⁵⁷

The disparity in the jurisdictional treatment of confidentiality should be managed in order to increase predictability. As discussed, while some jurisdictions recognize an implied duty of confidentiality, other jurisdictions reject such an approach and advocate for express confidentiality agreements. This kind of practice results in inconsistency and unpredictability. Considering the legal and jurisprudential variances between jurisdictions, moving toward a more uniform treatment of confidentiality in international commercial arbitration would require an unprecedented level of interjurisdictional cooperation as well as elaborate amendments to international arbitration rules.

In seeking to achieve the appropriate balance, international commercial arbitration stands to gain from both transparency and confidentiality and these principles should not be viewed as necessarily conflicting. This article proposed the adoption of an adapted version of the UNCITRAL Rules on Transparency to deal with the need for greater transparency in international commercial arbitration. The UNCITRAL Rules on Transparency, as an established and accepted authority in investor-state arbitration, have the potential to signal a new era of translucency in international commercial arbitration. A jurisdictional analysis of the practice of privacy and confidentiality in arbitration around the world has demonstrated that not only is such

355. Nana Japaridze, *Fair Enough - Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration*, 36 HOFSTRA L. REV. 1415, 1419 (2008).

356. Feiciano, *supra* note 6, at 11.

357. Xu and Shi, *supra* note 141, at 405.

an international transparency norm late in coming, but also that most jurisdictions seem reluctant to venture into the development of such a norm. Faced with such reluctance, the adoption and integration of the work-product doctrine within the rules to increase predictability in international commercial arbitration would be a sensible approach.³⁵⁸ The work-product doctrine would assist in defining uniform limits for otherwise undefined or very broadly defined exceptions to confidentiality in international commercial arbitration.³⁵⁹ It also has the potential to render arbitral practices more predictable and to cure many shortcomings of the arbitral process. The substantial need and undue hardship tests have proven their worth in protecting work product in litigation and have the potential to significantly improve transparency in international commercial arbitration. Rules similar to the WIPO Arbitration Rules should also form part of this initiative to deal with cases where confidentiality is a genuine commercial or legal concern.

Confidentiality is one of the major reasons that disputants choose arbitration instead of litigation. There are areas in which the publication of certain materials or information can have adverse ramifications on the reputation or business activity of a disputant. Thus, there cannot be a general level of transparency applied uniformly to all cases and there is a need for case-by-case application.³⁶⁰ Complete confidentiality and complete transparency are neither prudent nor realistically possible.³⁶¹ Confidentiality is still desired and expected by disputants.³⁶² Radically changing the character of arbitration under the aegis of public policy, justice, fairness, or predictability presents the risk of compelling judicial standards within arbitration to such a degree that the very process that attracted commercial parties for decades will no longer exist.³⁶³

It is desirable to forsake some characteristic elements of arbitration for the benefit of transparency. Whether the system should be allowed to develop and evolve in response to the requirements of arbitral stakeholders, or whether the system should cave to the pressure of the transparency proponents and espouse grand principles of transparency, depends on the desirability of arbitration maintaining its appeal as a private dispute resolution mechanism that provides

358. Henkel, *supra* note 8, at 1102.

359. *Id.* at 1106.

360. Knahr & Reinisch, *supra* note 72, at 116.

361. Laverde, *supra* note 164, at 124.

362. Japaridze, *supra* note 355, at 1423.

363. *Id.*

finality to the commercial disputes of parties. Irrespective of the next move of the international commercial arbitration system in the pursuance of transparency in the arbitral process, there will always be a need to find the delicate balance between confidentiality and transparency. Any balance found today would need to be under constant review because of the ever-shifting nature of the commercial world. The balance has to be constantly tipped one way or the other to provide for a proactive system that accounts for both judicial realism, and changes in the law and practice of international commercial arbitration.

With the concept of good governance on the rise,³⁶⁴ the need for transparency is more relevant than ever. There is a general movement toward transparency in international commercial arbitration with commentators challenging the notion that all parts of international arbitration should always be subject to confidentiality.³⁶⁵

There is no need to find the perfect balance between transparency and confidentiality. Indeed a quest to achieve this, if possible, would be short lived as the line of actual contact and equilibrium between the two principles is a moving one.³⁶⁶ Both principles must respond as active principles based on the context and the kind of proceedings before the arbitral tribunal, the subject matter at issue, and the relevant facts inherent to the relevant proceeding. The adoption of the UNCITRAL Rules on Transparency, incorporating the work-product doctrine principle to deal with issues of disclosure as well as an adapted version of the WIPO Arbitration Rules to deal with cases where confidentiality is a genuine need, would serve as an organic instrument in seeking to find the appropriate balance as the needs of parties, lawyers, and the process evolve.

364. Mabel I. Egonu, *Investor-State Arbitration under ICSID: A Case for Presumption against Confidentiality*, 24 J. INT'L ARB. 479, 487 (2007).

365. Feiciano, *supra* note 6, at 10.

366. *Id.* at 11.

