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Issues Covered by the Principle of Confidentiality and Persons Obligated to Adhere to It in the Arbitration Process

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ABSTRACT

The principle of confidentiality is one of the most significant principles governing arbitration. In fact, the confidentiality of arbitration is a crucial positive attribute distinguishing it from judicial proceedings conducted in courts. According to this principle, access to documents and information generated during the arbitration process is limited exclusively to individuals who require such access for the purpose of arbitration, thereby preventing third parties from accessing this information. Furthermore, there are essential issues within an arbitration process that must fall under the provisions related to the principle of confidentiality. These issues include the arbitration agreement, witness testimony and expert opinions, trade secrets, minutes of meetings, consultations, and the arbitral award. On the other hand, a breach of the principle of confidentiality concerning any of these subjects may lead to the imposition of legal liabilities (both civil and criminal) on the violators of the principle, including arbitrators, parties to the arbitration, and third parties. This research examines the confidentiality of arbitration within international rules and Iranian law, the issues covered by the principle of confidentiality in arbitration, and the persons obligated to adhere to this principle during the arbitration process.

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Introduction

The principle of confidentiality has traditionally been introduced as the foundation of arbitration proceedings and, along with the principle of privacy, is considered one of the main advantages of arbitration over judicial proceedings. Numerous cases exist where individuals and well-known companies have chosen arbitration to resolve their disputes, believing that confidentiality is a vital element in managing their business. This belief stems from the fact that confidentiality allows them to control the flow of information and protects them from the damages that may arise from the publication of an adverse award. The confidentiality of the arbitration process enables the parties to engage in discussions behind closed doors, preventing public discourse about their disputes, which could harm their interests and benefit their competitors. Additionally, confidentiality implies that the existence of the arbitration process itself should not be disclosed.

One of the key topics surrounding the principle of confidentiality, which must be examined thoroughly, is the scope of issues covered by this principle. Specifically, there is a need to address the question of what subjects fall under this principle and whether it pertains solely to arbitrators or also includes other parties involved. Furthermore, it is essential to investigate who is obligated to adhere to the principle of confidentiality during the arbitration process and whether this obligation extends beyond the arbitrators and parties to the dispute. This paper aims to explore the two aforementioned questions. To this end, after discussing the concept of arbitration confidentiality in international regulations and Iranian law in the first section, the second section will address the subjects encompassed by the principle of confidentiality, and the third section will examine the individuals obligated to uphold this principle in the arbitration process.

1. Confidentiality in Arbitration under UNCITRAL and Iranian Law

At the international level, one can specifically examine the approach of the rules established by the United Nations Commission on International Trade Law (UNCITRAL). The UNCITRAL Model Law on International Commercial Arbitration, which has inspired the national arbitration laws of

many countries either fully or partially, does not contain any provisions regarding the confidentiality of arbitration and does not explicitly foresee it. However, it appears that paragraph 5 of Article 34 of the UNCITRAL Rules somewhat acknowledges the issue of arbitration confidentiality, as this provision conditions the public disclosure of an arbitral award on the consent of both parties.

Since April 2014, UNCITRAL has effectively implemented transparency rules, which stipulate that transparency in arbitration (as opposed to its confidentiality) must be given due consideration. This includes various provisions for:

1. The publication of documents and records of the proceedings (Articles 2 and 3).
2. The submission of written statements by third parties with an interest in the dispute (Articles 4 and 5).
3. Conducting hearings in public (Article 6).

Currently, the transparency rules based on UNCITRAL's approach to the non-necessity of maintaining the principle of confidentiality in international commercial arbitration appear to have replaced the older rules of this body, which emphasized the necessity of upholding this principle.[1]

On the other hand, Iranian law does not explicitly state whether arbitration is confidential or public, and therefore, there is no requirement for arbitration sessions to be held publicly. Consequently, an explicit or implicit agreement by the parties regarding the confidentiality of arbitration will be valid. Additionally, if the parties have not made a specific agreement in this regard, the arbitration authority can, at its discretion, conduct the arbitration process confidentially. However, the presence of third parties complicates the confidentiality of arbitration.

It should also be noted that according to Article 26 of the Iranian Law on International Commercial Arbitration (LICA): "If a third party claims an independent right in the arbitration matter or considers itself to be entitled to one of the parties, it may enter the arbitration as long as the proceedings have not been concluded, provided it accepts the arbitration agreement, the arbitration rules, and the arbitrator, and its entry into the arbitration is not objected to by either party." It may be argued that the result of this article, which allows third-party entry into arbitration, undermines the confidentiality of the process. In response, it can be stated that the entry of a third party under the aforementioned article is conditional upon the consent of the parties, which necessitates their agreement to provide all existing documents and information to the third party. Furthermore, with the consent of the parties for the third party's entry, the third party also becomes one of the parties to the dispute and does not differ from the main parties.

Conversely, a third party entering the arbitration, by accepting the arbitration agreement, also accepts the terms contained therein (including the confidentiality of the arbitration). Therefore, it cannot be inferred that the entry of a third party into arbitration according to the above article contradicts the confidentiality of the process. Additionally, according to Article 648 of the Islamic Penal Code (enacted in 1996), which states: "Anyone who, by virtue of their profession or occupation, becomes privy to secrets, shall be punished if they disclose those

1 Q Khadem Razavi and P Rastgou, 'The Role of Confidentiality in Investment Dispute Cases' (2020) 107-127.; R Eskini and A Khakpour, 'The Conflict Between the Principle of Transparency and Confidentiality in International Arbitration' (2019) 45-64.

secrets outside of legal exceptions," arbitrators are custodians of the information and documents entrusted to them by the parties for the arbitration. Thus, based on the above article, it appears that there is a legal obligation for arbitrators to maintain the confidentiality of arbitration, with criminal liability as a consequence.

Despite the increasing emphasis on transparency in arbitration, particularly at the level of UNCITRAL rules, certain subjects and individuals remain obligated to adhere to the principle of confidentiality and fall within the scope of this principle, which should not be overlooked. Therefore, in the second section of this research, we will examine the issues regarding this principle, and in the third section, we will discuss the individuals bound by the principle of confidentiality in arbitration.

2. Issues Covered by Confidentiality

The issues encompassed by the principle of confidentiality in an arbitration process include the arbitration agreement, witness testimonies, expert opinions, trade secrets, minutes of meetings, consultations, and the arbitral award. Each of these issues and their relationship with the principle of confidentiality, as well as the status of this principle in each case, will be discussed in detail.

2.1. Arbitration Agreement

A fundamental and critical question is whether the existence of the arbitration process itself is protected under the obligation of confidentiality. In some instances, the mere existence of an arbitration agreement is considered a secret. Numerous examples can be cited in this regard; for instance, when an individual is involved in a professional negligence claim against a lawyer, or in resolving accounting disputes among members of a shipping club, or in disputes related to an unregistered patent. Nevertheless, courts have yet to recognize a general rule concerning this issue. One author explains the reluctance of courts to establish a general rule as follows: the arbitration clause is often included because the information involved is inherently confidential. Therefore, no party to arbitration should be granted the authority to disclose the existence of the arbitration process. The interests in maintaining the confidentiality of this information are so significant that the parties do not wish to attract the court's or the public's attention on a case-by-case basis.[1]

Another practical reason cited for the lack of a confidentiality obligation regarding the arbitration agreement is that if the court intervenes for any reason, including the enforcement of an arbitral award, the existence of the arbitration agreement becomes public. Moreover, the disclosure of the arbitration agreement may be justifiable based on other legal requirements and financial considerations. For example, a company may be obliged to provide this information to its insurers, clients, and shareholders. Additionally, due to the presence of third parties who cannot be compelled to maintain confidentiality, the existence of the arbitration agreement may be jeopardized. For instance, interpreters, translators, secretaries, and employees may not be bound by confidentiality agreements between the parties.

In addition to these reasons, two other practical considerations suggest that the confidentiality of the arbitration agreement cannot be preserved. First, there is the possibility that a member of

1 K Noussia, *Confidentiality in International Commercial Arbitration: A Comparative Analysis of the Position under English, US, German and French Law* (Springer 2010) 73.

the arbitral tribunal may disclose to other tribunal members that a second arbitration involving one of the parties (A or B) is ongoing. This scenario is quite plausible because, before accepting a second arbitration, the question arises for the arbitrator. It is also common for an arbitrator to participate in two arbitrations involving the same party, as the world of international arbitration is relatively small and certain arbitrators are in high demand. Ethically, an arbitrator is required to disclose any awareness of potential conflicts of interest regarding one of the parties.

The second reason is that many business journals and arbitration periodicals publish recently concluded arbitrations. Although the names of the parties are usually omitted, the descriptions of significant arbitration issues typically make it possible to reveal the identities of the parties involved.

It should be added that sometimes the parties, particularly those concerned about the detrimental effects of publicity, seek to keep the existence of the arbitration agreement and the dispute between them confidential. Regarding whether this can realistically and practically remain confidential and whether the parties can be compelled to maintain such confidentiality, courts have not established any general rules to date, nor do they seem inclined to do so. There are many practical reasons suggesting that the existence of arbitration cannot and should not remain confidential. First, whenever courts intervene in an arbitration, for instance, to enforce an arbitral award, the existence of the arbitration will be made public. Consequently, efforts to maintain confidentiality will ultimately be rendered ineffective by a legal action from one of the parties.

Another practical consideration is whether a member of the arbitral tribunal addressing a dispute between parties A and B can disclose to other tribunal members the existence of another arbitration involving the same two individuals, especially if they have been invited to arbitrate on that matter as well. In the small arena of international arbitration, where the services of certain arbitrators are in high demand, this scenario does not seem far-fetched. Ethically, each arbitrator is obliged to disclose any information regarding one of the parties. Thus, in situations where the parties are repeatedly involved in arbitration, it is nearly impossible and ethically undesirable for the existence of this arbitration to remain confidential.

Another issue is that arbitrators and attorneys sometimes implicitly suggest that one of the parties is involved in another arbitration. For instance, although arbitration journals typically do not disclose the names of the parties in ongoing arbitrations or those recently concluded, the description of the subject matter may be such that it can be attributed to a specific individual.

The discussion regarding the confidentiality of arbitration agreements is also constrained by the inability to enforce third-party obligations through confidentiality agreements. While the parties may be bound by an agreement to keep the existence of the arbitration confidential, and while arbitrators are ethically committed to this obligation, the leakage of information regarding the existence of arbitration is often unavoidable. Typically, an international commercial arbitration involves dozens, if not hundreds, of participants, many of whom play ancillary roles. Numerous experts, law firm employees, party representatives, stenographers, process servers, caterers, and administrative staff do not have a duty to maintain confidentiality. Even if an arbitration is private and outsiders are prohibited from attending, there are still third parties

whose presence is essential for the proceedings. These individuals can disseminate information related to the arbitration agreement.[1]

Regarding the preservation of confidentiality in arbitration agreements, there is no consensus among national systems or court practices. Furthermore, the rules of arbitration organizations rarely mandate that parties maintain confidentiality concerning the details of the arbitration's existence. The WIPO[2] Arbitration Rules, for example, recognize this obligation for the parties.[3] Article 73 of these rules states: "a) Except to the extent that it is necessary for the purpose of a challenge to the arbitration in court or for the enforcement of the award, no information concerning the existence of the arbitration may be disclosed unilaterally by one party to third parties unless required by law or by a competent legal authority…"

Consequently, as noted, maintaining confidentiality regarding arbitration agreements is often impractical, and in many instances, the potential for information leakage exists. Although this issue can impact the financial or commercial interests of individuals and should ideally remain confidential, it is of lesser significance compared to other matters.

It should also be added that in some cases, the mere fact that an arbitration agreement has been executed and is pending in an arbitration tribunal may be considered confidential information. Many individuals, particularly those concerned about adverse public reactions, prefer to keep the fact that their disputes have been referred to arbitration confidential. Legal obligations may compel a party to disclose the existence of the arbitration process. These legal requirements and ethical commitments often result in the disregard of parties' agreements to keep all arbitration-related matters confidential. However, due to the presence of numerous skilled actors in international trade, there are principled debates against mandatory disclosure of arbitration.

Confidentiality in arbitration is limited by the inability to bind third parties. While the parties may have agreements regarding the confidentiality of the arbitration, and arbitrators may feel ethically and professionally obligated to such commitments, information leakage is unavoidable. In international commercial arbitrations, there may typically be dozens, if not hundreds, of individuals significantly involved. Most experts, specialists, institutional staff, party employees, secretaries, couriers, and managers are not bound by confidentiality agreements. While it is true that the nature of arbitration is private and this implies the possibility of excluding third parties, there are individuals who, although considered third parties, are essential for the arbitration process and must be present. It is through these individuals that arbitration information may be leaked.

It is also worth noting that in some cases, the mere fact that an arbitration agreement has been executed and is pending in an arbitration tribunal can be considered confidential information. Many individuals, particularly those concerned about adverse public reactions, prefer to keep the fact that their disputes have been referred to arbitration confidential. Legal obligations and ethical commitments often lead to the disregard of parties' agreements to maintain confidentiality regarding all matters related to arbitration. However, because many individuals are seasoned

1 A Marriott and J Tackaberry, *Bernstein's Handbook of Arbitration and Dispute Resolution Practice* (vol 1, 4th edn, Sweet & Maxwell 2003) 1001.
2 World Intellectual Property Organization
3 I Thoma, 'Confidentiality in English Arbitration Law: Myths and Realities About Its Legal Nature' (2008) 128.

players in the international trade arena, there are principled discussions against mandatory disclosure of arbitration.

2.2. Witness Testimonies and Expert Opinions

Regarding witness testimonies and expert opinions, which can serve as evidentiary support in arbitration proceedings, these are generally considered to fall under the obligation of confidentiality. However, they are less protected from disclosure compared to other types of evidence. Particularly in cases where a witness or expert provides testimony that contradicts their previous statements in another arbitration concerning the same issue, their prior testimony may be disclosed. None of the organizational rules or national laws provide specific protection for maintaining the confidentiality of this category of evidence. Even English courts, which generally favor maintaining confidentiality, have identified various practical grounds for disclosing expert testimonies. For the sake of justice and public interest, expert statements may be subjected to disclosure, use, or scrutiny long after the conclusion of an arbitration.[1]

It should be noted that even if arbitrators and the parties encourage witnesses to keep information from the arbitration confidential, they cannot legally compel them to maintain confidentiality. Given the principle of relativity of contracts, neither arbitrators nor the parties can enforce confidentiality obligations on third parties who acquire information during the arbitration process. In rare cases, such as when a witness has a specific contractual relationship with one of the parties (for example, if the witness is an employee of one of the parties), this may be possible. However, generally speaking, it is very challenging, if not impossible, to ensure the confidentiality of witness testimonies.

2.3. Trade Secrets

For many individuals, the protection of trade secrets is the primary motivation for raising the issue of confidentiality. Consequently, confidentiality, if present, should initially focus on safeguarding these secrets. Common law, organizational rules, and statutes provide substantial support for this matter, particularly the rules of WIPO, which contain the most comprehensive provisions in this regard. Additionally, trade secrets may be protected through international conventions, national criminal laws, or domestic civil procedure laws concerning copyright and patents, many of which provide for the issuance of protective orders to safeguard trade secrets.[2] Furthermore, Article 39 of the TRIPS Agreement[3] is also noteworthy in this context: "1) In order to provide effective protection against unfair competition as referred to in Article 10 of the Paris Convention (1967), Members shall protect undisclosed information in accordance with paragraph 2 and information disclosed to governments or governmental bodies in accordance with paragraph 3. 2) Natural and legal persons shall have the means to prevent disclosure, acquisition, and use of information that is lawfully under their control by others without their consent in a manner contrary to honest commercial practices, provided that such information: a) is secret in the sense that...; b) has economic value because it is secret, and c) is subject to reasonable measures to keep it secret by

1 L E Trackman, *Confidentiality in International Commercial Arbitration* (2002) 1007.

2 T Weiler, *International Investment Law and Arbitration: Leading Cases from ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005) 1009.

3 Agreement on Trade-Related Aspects of Intellectual Property Rights

the persons lawfully in control of it. 3) Members shall protect such information against unfair commercial use. Furthermore, Members shall protect such information from disclosure, except where necessary to protect the public interest or where measures are taken to ensure protection against unfair use."

Regarding trade secrets subject to confidentiality, it should be added that the primary motivation for many individuals resorting to arbitration is the protection of trade secrets through confidentiality obligations. It may be said that if confidentiality obligations exist, they should at least encompass the protection of trade secrets. However, if the confidentiality of trade secrets is not ensured by the confidentiality obligations that may exist in arbitration, a variety of national and international rules exist that protect the confidentiality of trade secrets.

Implicitly, it can be understood that neither arbitrators nor arbitration institutions can sell or exchange this confidential information. A pertinent question arises regarding whether the parties jointly own this confidential information or whether they can individually disclose it. In a case in England, the court stated that the parties to the arbitration have mutual obligations of confidentiality and privacy concerning the reasons for the dispute.[1]

Given the international support for trade secrets, it can be stated that the first instance of their protection as a regulation at the international level was in Article 39 of the TRIPS Agreement under the World Trade Organization (WTO). This provision stipulates that a person who legally controls confidential information must take reasonable steps to maintain its confidentiality under certain conditions. Furthermore, the WIPO has comprehensive regulations regarding the confidentiality of trade secrets. Even the United States, which has adopted an anti-confidentiality stance, recognizes that trade secrets should be protected from disclosure and is supported by the American Arbitration Association's patent arbitration rules.[2]

It appears that there is now an accepted understanding of a global legal framework concerning trade secrets, which the arbitration community must consider, particularly in financial sectors where transparency is predominantly promoted. Many national, organizational, and international regulations have provided protection for trade secrets. Such secrets may be safeguarded by patent laws, copyright, conventions, national criminal laws, or national procedural laws that permit the issuance of protective orders for trade secrets. For instance, in Switzerland, the following information is considered trade secrets and is regarded as fully confidential: pricing strategies, quotations and proposals, terms and conditions of goods and services offered, discounts, pre-launch advertising campaigns, statistical data regarding transaction flows and sustainability, loans and debts, balance sheet details, tax plans, employee remuneration, technical schedules, work and technical plans, drawings and designs, software, temporary employee lists, information collection from service providers and suppliers of semi-finished products, along with their pricing structures.[3]

It may be argued that the arbitration community should also pay attention to Article 39 of the TRIPS Agreement concerning trade secrets. This article states: "In order to ensure effective protection against unfair competition as provided in Article 10 of the Paris Convention,

1 E Brunet and R Speidel, *Arbitration Law in America: A Critical Assessment* (Cambridge University Press 2006) 112.
2 MW Buehler and TH Webster, *Handbook of ICC Arbitration: Commentary, Precedents and Materials* (2nd edn, Sweet and Maxwell 2008) 139.
3 TE Carbonneau, *Cases and Materials on International Litigation and Arbitration* (Thomson West 2005) 177.

members shall protect undisclosed information as referred to in paragraph 2 and information that is registered with governments or governmental institutions as mentioned in paragraph 3. Natural and legal persons shall have the legal means to prevent disclosure of information that is under their control to third parties or for others' use, and to prevent others from acquiring this information without the consent of the person and contrary to honest commercial practices. This protection shall apply as long as the information remains confidential, meaning that it is not generally known to, or accessible by, persons who normally deal with such information, and has economic value because it is secret. Furthermore, reasonable and logical steps must be taken by the person who legally controls this information to keep it confidential. Members must protect this information against unfair commercial use. Members shall protect this information against disclosure unless such disclosure is necessary to protect the public interest or reasonable and logical steps have been taken to ensure protection against unfair commercial use."[1]

According to Article 39, "any method contrary to honest commercial practices" can include a breach of confidentiality.[2] Some authors consider this confidentiality rule to be specifically mandatory and obligatory since the structure of Article 39 was the result of a joint effort between the United States and Western European governments.[3] It should be noted that the United States is a proponent of the idea of de-secreting arbitration; however, despite this, it supports the confidentiality of trade secrets.[4]

In light of case law, organizational regulations, international conventions, and national procedural law in this context, trade secrets contain an informational element of the arbitration process that is clearly protected by the obligation of confidentiality. In a general conclusion, amidst customary law, organizational rules, national laws, international conventions, and procedural regulations, it can be said that trade secrets are among the information presented in arbitration that are necessarily and clearly subject to the rule of confidentiality.[5]

2.4. Minutes of Meetings

This issue is one of the clearest and most obvious examples of the application of the principle of confidentiality and its dominance over arbitration processes. Even Australian courts, which are typically strict in other matters, have recognized the confidential nature of hearings, meaning that outsiders are prohibited from attending these sessions. This issue is also addressed in many arbitration laws and rules.[6] However, it should be noted that this matter relates more to the privacy of arbitration than to confidentiality; nevertheless, it is included here to discuss the confidentiality of the minutes.

In the case of *Ali Shipping Corp v Shipyard Trogir*,[7] Judge Potter provided a broad interpretation of the confidentiality obligation, including the minutes of hearings within its

1 J Devolve, *French Arbitration Law and Practice* (Kluwer Law International 2003) 109.

2 J Heaps and C Taylor, 'Legal Privilege and Confidentiality in England and Wales' in M Koehnen et al (eds), *Privilege and Confidentiality: An International Handbook* (IBA 2006) 209.

3 Herbert Smith Newsletter, 'Confidentiality in Arbitration: An Update' (No 71, London 2008) 166.

4 M Henry, 'The Contribution of Arbitral Case Law and National Laws' in E Gaillard, AV Schlaepfer, P Pinsolle and L Degos (eds), *Towards a Uniform International Arbitration Law?* (International Arbitration Institute Series on International Arbitration No 3, Juris 2005) 292.

5 G H Addink, 'The Transparency Principle in the Framework of the WTO' (2009) 1010.

6 C Bown, 'Participation in WTO Dispute Settlement: Complainants, Interested Parties and Free Riders' (The Brookings Institution & Brandeis University, January 2005) 307.

7 *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314 (CA) (19 December 1997).

scope. Although this interpretation has faced some opposition,[1] it can generally be stated that the overarching approach aligns with that mentioned in the case. All English courts have affirmed that the privacy of arbitration, which has even been considered axiomatic by Australian courts, would be meaningless without the preservation of its confidentiality. Ultimately, if the minutes of hearings are made public, the parties may also invite outsiders to attend the arbitration personally. Therefore, the theory of confidentiality concerning arbitration minutes is entirely justifiable.

The *Ali Shipping* case serves as a prominent example. The judge provided a broad interpretation of confidentiality and clearly stated that this obligation includes the minutes of hearings.[2] One researcher noted in 1996 that according to English case law, it seemed that the confidentiality obligation did not encompass the minutes of hearings.[3] However, recent case law indicates otherwise. Following the Dalling Baker case, where the court emphasized the privacy of arbitration, other courts, including Australian courts, accepted that this privacy would be meaningless if the confidentiality of arbitration were not upheld.[4] Furthermore, if the minutes of hearings become public and accessible to all, the parties to the arbitration may be able to invite third parties to directly observe the arbitration. For this reason, the assumption that the minutes of hearings are subject to the obligation of confidentiality is generally justifiable.

Additionally, it should be noted that documents created in the context of arbitration (whether during the arbitration process or afterward), such as requests for arbitration, copies of oral testimonies, written statements, hearing summaries, and written requests, are subject to confidentiality obligations.[5] In one case, the court established an interesting rule and differentiated between two categories of documents.[6] The first category consists of documents created solely for the purpose of arbitration, such as notices of submission to arbitration, copies, evidence-related writings, various reports, including witness testimonies and awards issued. The second category includes documents that existed prior to the arbitration process and were created during inquiries and investigations.

In comparison to documents in the first category, the mere existence of the second category in arbitration does not suffice to grant them immunity from disclosure. Moreover, these documents are not confidential by their nature.[7] However, the court suggests that to determine the confidential nature of a document, one should refer to the inherent confidentiality of arbitration and the implicit obligation of the party obtaining a document during inquiry not to use it for any purpose other than arbitration. Based on this reasoning, the court emphasizes that the nature of arbitration implies that parties should be bound by an implicit obligation not to disclose documents prepared for or created during arbitration. If we accept this argument, it becomes clear that any document used in arbitration does not escape the confidentiality obligations.

1 T Collins-Williams and R Wolfe, 'Transparency as a Trade Policy Tool: The WTO's Cloudy Windows' (2010) 1005.
2 Herbert Smith Newsletter, 'Confidentiality in Arbitration: An Update' (No 71, London 2008) 134.
3 D Hochstrasser, 'Public and Mandatory Law in International Arbitration' in E Gaillard, AV Schlaepfer, P Pinsolle and L Degos (eds), *Towards a Uniform International Arbitration Law?* (International Arbitration Institute Series on International Arbitration No 3, Juris 2005) 112.
4 S Kouris, 'Confidentiality: Is International Arbitration Losing One of Its Major Benefits?' (2005) 129.
5 J D M Lew and L Mistellis (eds), *Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration* (International Arbitration Law Library Series No 16, Kluwer Law International 2007) 182.
6 Lord Mance, 'Lecture on Confidentiality of Arbitrations' in *Proceedings of the 2nd Conference on Dispute Resolution, India* (13 Sept 2003) 58.
7 MJ Lord Mustill, 'The History of International Commercial Arbitration – A Sketch' in L Newman and RD Hill (eds), *The Leading Arbitrator's Guide to International Arbitration* (2nd edn, Juris 2008) 177.

When the question arises as to whether previous arbitration documents can be utilized, the court must consider the existence of this implicit obligation and possibly its limitations. If the disclosure of these documents and inquiries into them seem to be fair actions contrary to this implicit obligation, this perspective should be taken into account and acted upon. However, the court must also consider whether there are less costly ways for a person to access the requested information without violating the implicit confidentiality obligation.[1]

If the copies of testimonies and the minutes of hearings are not protected by confidentiality, the privacy of arbitration would be rendered meaningless. If these documents become public, the parties to the arbitration may invite third parties to assist them in the arbitration.[2] In the above-mentioned *Ali Shipping* case, the court stated that the obligation of confidentiality extends beyond the arbitral award and explicitly includes arbitral records as well.[3] However, the parties to the arbitration should be aware that under exceptional circumstances, disclosure of this information may be permitted.[4]

In general, documents created during or prior to arbitration with the intention of arbitration are protected by the obligation of confidentiality.[5] In the *Ali Shipping* case, the most recent ruling indicated that both the physical form of the documents and the information they contain are protected by confidentiality obligations, which encompass all parties involved in the arbitration, including the parties, arbitrators, witnesses, and third parties. Notably, the obligation for third parties does not arise from a contractual basis; rather, it is attributed to an implicit legal obligation, as this obligation is a necessary part of the private nature of arbitration.[6]

The rule established in the *Ali Shipping* case is in stark contrast to the rule derived from the *Esso* case in Australia.[7] In that case, the court stated that documents or other evidence presented during arbitration are very unlikely to be protected by confidentiality obligations unless the parties explicitly agree on the specific matter.[8] Possible exceptions that may be drawn from the *Ali Shipping* and *Esso* cases specifically pertain to documents and evidence. First, the parties may consent to the disclosure of certain documents or evidence.[9] Second, the court may issue an order allowing a party to obtain documents from a previous arbitration.[10] Third, a person may disclose a document when necessary for protecting that person's legal rights.[11]

2.5. Deliberations of Arbitrators

Some have argued that arbitrators are bound by four obligations: first, they must act fairly and impartially; second, they must act within the legal and contractual timeframes; third, they must pursue their actions until a decision is reached; and fourth, they must keep all arbitration matters

1 J Misra and R Jordans, 'Confidentiality in International Arbitration: An Introspection of the Public Interest Exception' (2006) 39.
2 L Newman and RD Hill (eds), *The Leading Arbitrator's Guide to International Arbitration* (2nd edn, Juris 2008) 177.
3 CYC Ong, 'Confidentiality of Arbitral Awards and the Advantage for Arbitral Institutions to Maintain a Repository of Awards' (2005) 169.
4 G Petrochilos, *Procedural Law in International Arbitration* (Oxford Private International Law Series, Oxford University Press 2005) 139.
5 M Pryles, 'Confidentiality' in L Newman and RD Hill (eds), *The Leading Arbitrator's Guide to International Arbitration* (2nd edn, Juris 2008) 147.
6 A Redfern and M Hunter, *International Commercial Arbitration* (4th edn, Oxford University Press 2004) 177.
7 *Shell Co of Australia Ltd v Esso Standard Oil (Australia) Ltd* [1963] HCA 66.
8 M Christ, 'Legal Privilege and Confidentiality in Germany' in M Koehnen, M Russenberger and E Cowling (eds), *Privilege and Confidentiality: An International Handbook* (International Bar Association 2006) 167.
9 QL Sze and EL Peng Khoon, 'Confidentiality in Arbitration: How Far Does It Extend?' (Academy, Singapore 2007) 281.
10 Thoma, *Confidentiality in English Arbitration Law: Myths and Realities About Its Legal Nature* (2008) 299.
11 Trackman, *Confidentiality in International Commercial Arbitration* (2002) 13.

confidential. Regarding the fourth obligation, it has been stated that regardless of how vague or cautious the organizational rules are, it is clear that this rule applies to arbitrators, who are merely service providers and have no personal interest in the matter. They must ensure that the dispute remains confidential as requested by the parties.[1] This confidentiality obligation protects not only the arbitrators but also their deliberations from disclosure, which cannot be revealed to anyone, including the parties themselves. However, it can be noted that the final outcome is reached either unanimously or by majority opinion.

2.6. Arbitral Award

In principle, the arbitral award as part of the arbitration process should not be disclosed. However, there is significant pressure on arbitration institutions to publish their awards in full or in a redacted form or to allow access to them. One author argues that the redaction of arbitral awards for publication guarantees the confidentiality of arbitration, but acknowledges that while establishing a legal framework arising from arbitration is commendable, there is no necessity to create a doctrine of arbitral precedent.[2] Some arbitration institutional rules state that the publication of arbitral awards is possible only with the consent of the parties involved.[3] Despite such prohibitions, arbitral awards are often published through media or third parties. As mentioned, although arbitration journals and publications often release awards without naming the parties, this method is ineffective in maintaining the confidentiality of the parties' identities. In fact, researchers interested in a specific arbitration may be able to identify the parties based on the details published. Often, it is the parties themselves who facilitate the disclosure of the arbitral award, for instance, when seeking enforcement of the award in national courts.[4]

In an English court, this issue was discussed and it appeared that the court was questioning the principle of confidentiality of arbitral awards. Specifically, the dispute revolved around whether it was permissible to use an arbitral award from a second arbitration between the same parties, despite a clear confidentiality agreement prohibiting the disclosure of the award. The confidentiality agreement stipulated that the results of the arbitration could not be disclosed at any time to any person or entity not involved in the arbitration, either in whole or in part. The English court concluded that this agreement could not create an absolute prohibition on the disclosure of the arbitral award, as this would result in an award that could not be enforced by the court. Overall, the legal use of a prior arbitral award in a subsequent arbitration involving the same parties does not constitute a breach of the confidentiality agreement.

Similarly, in the case of *the insurance dispute*, the judge opined that wherever it is reasonable to support one party's rights against third parties, disclosure of the award may be warranted, allowing the party to use the award as a defense to protect their rights. This disclosure can occur without court permission and without violating confidentiality. The judge provided three reasons for this conclusion: first, the award clarifies the rights of the parties concerning the issues decided and creates an independent contractual obligation regarding the enforcement

1 M Perez Esteve, 'WTO Rules and Practices for Transparency and Engagement with Civil Society Organizations' (2011) 155.
2 A Mourre and L Radicati Di Brozolo, 'Towards Finality of Arbitral Awards: Two Steps Forward and One Step Back' (2006) 112.
3 M Margret Moses, 'Party Agreement to Expand Judicial Review of Arbitral Awards' (2003) 138.
4 F M Maniruzzaman, 'The Relevance of Public International Law in Arbitrations Concerning International Economic Development Agreements: An Appraisal of Some Fundamental Aspects' (2005) 209.

of the arbitral award. Second, the award is subject to judicial oversight by the court. Third, the award is enforceable in English courts, whether through summary proceedings or claims regarding the award. In all three instances, the award may be presented in court, thereby entering the realm of public ownership.[1]

The publication of arbitral awards undermines the parties' request for resolving disputes in a confidential environment. Some authors consider this characteristic to be one of the benefits of publishing arbitral awards.[2] In fact, a significant movement regarding the publication of arbitral awards has begun, particularly in France, where the International Chamber of Commerce decided to publish arbitral awards annually starting in 1974, and similarly, ICSID initiated this practice in 1986. A close examination of recent arbitral awards reveals that they are often based on prior awards, and the decisions taken generally align with one another. It may be agreeable to those who believe that publishing arbitral awards without disclosing the parties' names does not violate confidentiality. Such publication would serve the public interest in businesses and legal practices.[3]

However, it may not be entirely accurate to assert that arbitration participants and practitioners can legitimately and lawfully access the rules and decisions made by arbitrators. Nonetheless, it can be concluded that individuals opting for arbitration as a private and confidential means of dispute resolution, rather than litigation, should be aware that no rules or practices exist to ensure access to prior arbitrators' decisions. Nevertheless, it cannot be denied that disclosing arbitral awards positively and effectively contributes to the predictability of future decisions made by arbitrators and aids in the development of arbitration applications.

It is important to note that while arbitral awards may enter the public domain during the enforcement stage or in the event of an appeal, most arbitration organizations explicitly provide regulations regarding the confidentiality of awards, stating that arbitral awards may only be published with the consent of the parties. Article 28(2) of the ICC Rules clearly states that the copy of the award will be made available to the parties only, and no one else. Similarly, Article 48(5) of the ICSID Convention specifies that the center should not publish the award without the consent of the parties. Articles 30(3) of the London Court of International Arbitration Rules,[4] 27(4) of the American Arbitration Association Rules,[5] and 32(5) of the UNCITRAL Arbitration Rules[6] contain similar provisions.[7]

Despite these regulations, and while arbitral awards are generally considered confidential and cannot be published without the parties' consent, in practice, arbitral awards are often published in the media and before third parties. Commercial journals and arbitration reports usually publish awards without identifying the parties, but this approach is not very effective in maintaining the anonymity of the parties. Furthermore, the existence of arbitration itself does

1 P Muchlinski et al., *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 110.
2 E Gaillard, *Anti-Suit Injunctions in International Arbitration* (Juris Publishing, Inc. and International Arbitration Institute 2005) 108.
3 R Dolzer and Ch Schreuer, *Principles of International Investment Law* (Oxford University Press 2008) 142.
4 Article 30(3): "The LCIA tribunal shall not publish any award or part of an award without the written consent of the parties and the arbitration tribunal."
5 Article 27(4): "An award shall be made public only with the consent of all parties or where required by law."
6 Article 32(5): "An award shall be made public only with the consent of both parties."
7 A Smunty and K Young, 'Confidentiality in Relation to States' (2009) 77.

not remain confidential, so when the public is aware of the arbitration between two parties, it becomes relatively easy to match the parties with the published award.[1]

It should be noted that the publication of the reasons for an award, without mentioning names, is not considered a breach of confidentiality. Such publication serves the public interest in business and legal practice, and it is appropriate for lawyers and users of arbitration to have access to applicable rules and decisions made. Additionally, there are many other reasons that have led to a significant limitation in the enforcement of confidentiality in practice. In many areas, arbitral awards are published without the parties' names, including in maritime arbitration, institutional arbitrations in formerly socialist Eastern European countries, and some commercial arbitrations. On a global scale, the disclosure of awards is regarded as a means of enhancing predictability of outcomes, and the regulation of procedures by specialized organizations often results from the publication of these decisions.

On the other hand, in the context of public contracts, ICSID arbitrations, case-by-case arbitrations arising from public contracts, and the awards issued in significant and renowned arbitrations are published along with commentary and are considered part of judicial practice. Generally, there is a public movement toward the publication of arbitral awards. In France, the "International Law Review" has provided an annual overview of ICC awards since 1974 and ICSID awards since 1986.[2] In practice, it has been observed that most ICSID tribunals consider the reasoning of previous tribunals in their decision-making. Although they are not obliged to adhere to these awards, the influence of prior awards on new decisions is undeniable. Not only do arbitral tribunals benefit from access to arbitral awards, but the parties themselves also gain from the ability to reference other parties' disputes and the conclusions reached by tribunals, thereby enhancing their chances of success by utilizing previous cases with similar conditions. Furthermore, access to arbitral awards and the review of previous decisions assist parties in selecting arbitrators.

Another positive aspect of the publication of awards is its contribution to scholarly discussions. Legal scholars' theories are often cited in the reasoning of many arbitral tribunals. Evaluating arbitral awards by these scholars is only possible through the publication of the awards. Consequently, the disclosure of awards significantly aids in the substantive development and progress of arbitration.

In English law, although an arbitral award is considered confidential, there is a possibility of disclosure if it is necessary to protect one party's legal rights against a third party. It should be noted that this criterion does not apply to individuals involved in the original arbitration (in which the award in question was issued). Two applicable criteria in this context are: first, relevance; and second, the necessity of disclosure for the fair conduct of the dispute. On the other hand, one of the parties might disclose the award in light of the supervisory role of the courts or for enforcement purposes. Additionally, disclosure of the award may occur by law, court order, or with the consent of the other party.[3]

1 A Spencer, 'Transparency Provisions in the TBT Agreement: Overview' (Canadian Enquiry Point, CATRTA Workshop, Rio de Janeiro, Brazil, 29 October 2012) 1013.

2 A Thorvaldson and R Wolfe, 'Improving Transparency as a Tool for the Implementation of the WTO Agreement on Agriculture' (September 2012) 188.

3 Marriott and Tackaberry, *Bernstein's Handbook of Arbitration and Dispute Resolution Practice* (2003) 314.

In summary, although some arbitration rules prohibit the disclosure of awards, in practice, arbitral awards are disclosed and published in various ways. Sometimes, the parties themselves are responsible for this disclosure, as in cases where they seek to challenge or enforce the award in court, while other times, public interest issues serve as the basis for such actions.

At the conclusion of this discussion, it is worth noting that despite the existence of organizational regulations preventing the unauthorized publication of the final award[1] and the general presumption that the arbitral award is confidential,[2] in reality, the final award often makes its way to the media and third parties.[3] Although arbitration journals and reporters remove the names and identities of individuals before publication, this method is not effective in preserving the anonymity of the parties.[4] As mentioned earlier, the ability to keep the arbitration process confidential is weak. Therefore, when the public is aware of the existence of arbitration between parties and is awaiting the issuance and publication of the award, matching an award with the names of the parties becomes relatively easy.

In addition to the above discussions, the publication of arbitral awards disregards the parties' desire to choose arbitration for its confidentiality, even though there are public benefits to disclosing arbitral awards. Some researchers have commented on the strong tendency toward the publication of arbitral awards, particularly in public contracts, ICSID awards, awards related to disputes arising from public contracts, and awards in significant and recognized cases, which are often published with explanations and serve as usable precedents. Overall, there is a widespread movement toward the publication of arbitral awards. In France, ICC awards have been published annually since 1974, and ICSID awards since 1986. Additionally, various publications, including the annual "International Commercial Arbitration Yearbook," contribute to this effort.

A study of ICC awards and their explanations reveals a clear point: recent arbitral awards are issued based on prior awards, and the decisions taken are generally consistent with one another. Thus, the publication of awards has led to increased coherence among them. Whether in arbitration law or international commercial law, arbitral awards have become a significant private source, undoubtedly contributing to the establishment of an arbitration element in transnational commercial law.

Additionally, researchers argue how the publication of arbitral awards can be significant and beneficial. In every case, it is important to note that the publication of arbitral awards, based on the preservation of identity and the removal of the parties' names, does not violate confidentiality. This publication meets the public expectations of businesses and legal practices, as it is a legitimate expectation for users of arbitration and practitioners in the field to have access to the rules applied by arbitrators and the decisions they make.

Arbitral awards are published in many areas, and in most cases, the names of the parties are removed. On a global scale, it is accepted that the disclosure of arbitral awards enhances the predictability of arbitration outcomes, and the regulation of the use and applications of

1 C Ambrose, 'When Can a Third Party Enforce an Arbitration Clause?' (2001) 415.
2 P Fouchard et al., *Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 117.
3 G Kaufmann-Kohler et al., *International Arbitration: Law and Practice in Switzerland* (Oxford University Press 2013) 112.
4 A Karapanco, *Assignment of Arbitration Agreement: Perspectives of Leading Jurisdictions* (Central European University 2015) 145.

arbitration, by professional organizations, often occurs through the publication of arbitration results.[1]

In general, there are institutions and organizations whose rules prevent the publication of arbitral awards without the consent of the parties. However, even in these cases, arbitral awards become public through other means. Often, the parties themselves are responsible for this disclosure, particularly when they seek to challenge or enforce the award in national courts.[2]

Following the discussion of issues related to the principle of confidentiality in arbitration, we will address and examine in the next section the individuals who are obligated to adhere to this principle during the arbitration process.

3. Individuals Obligated to Maintain Confidentiality

After examining what may be considered confidential, it is time to identify the individuals who are likely bound by confidentiality obligations. Generally, the obligation to maintain confidentiality can be considered in relation to three groups of individuals associated with an arbitration. Due to ambiguities in this area, as in many other discussions about confidentiality, some believe that the scope of this obligation should not be determined solely based on the individuals who are parties to the arbitration, but also on the nature of the information in question and the circumstances under which the individual receives this information. Thus, a person who accidentally encounters a document labeled "confidential" on the street is never bound to maintain its confidentiality. However, a witness who becomes aware of confidential information during an arbitration, such as pleadings and statements from the parties, will be obligated to keep that information confidential. The individuals bound by the principle of confidentiality in the arbitration process can be identified as follows: arbitrators, parties to arbitration, and third parties. Each will be examined in turn.

3.1. Arbitrators

It is generally accepted that arbitrators have a moral obligation to maintain confidentiality. Few countries explicitly establish such an obligation for arbitrators in their national laws; however, many legal systems indirectly recognize the duty of arbitrators to maintain confidentiality based on the contractual relationship between the parties and the arbitrators. This issue is more systematically addressed in the regulations of arbitration organizations, the majority of which require arbitrators to maintain confidentiality.[3]

One country with relatively comprehensive regulations regarding the obligation of arbitrators to maintain confidentiality is Switzerland. In this country's laws, arbitrators have a strict obligation to confidentiality based on their contractual relationship with the parties. Accordingly, they are required to remain silent about all matters concerning the parties and the dispute. Additionally, due to the special relationship of trust and confidence between the parties and the arbitrators, many believe that arbitrators may refuse to testify concerning the arbitration. In cases of breach of this obligation, Swiss law generally holds arbitrators liable in

1 B Stucki and S Wittmer, 'Extension of Arbitration Agreements to Non-Signatories' (2006) 12.

2 E Ho Ming Tang, 'Methods to Extend the Scope of an Arbitration Agreement to Third Party Non-Signatories' (LW 4635, research paper 2009) 35.

3 A Brown, 'Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration' (2001) 126.

tort. It is believed that the liability of arbitrators is similar to that of agents. Thus, if arbitrators violate their obligations, they will face civil liability for failing to perform their duties with the necessary care and diligence, allowing the parties to sue them for damages. In cases with multiple arbitrators, they will be jointly liable.[1]

In the legal system of many countries (including China), the obligation of arbitrators to maintain confidentiality is complemented by ethical regulations for arbitrators. These regulations specify that arbitrators must strictly maintain the confidentiality of what they learn during the arbitration process. This information includes substantive information and proceedings related to the arbitration, such as details of the dispute, the conduct of hearings, information related to the tribunal's private meetings, and the personal opinions of the arbitrators.[2]

In Germany, it is generally accepted that arbitrators are obliged to maintain confidentiality, similar to judges, but the extent of this obligation is not clearly defined. The Federal Supreme Court of Germany considers this obligation to arise from the contract with the arbitrator. In cases of breach of this obligation, legal scholars in Germany do not envision criminal liability for arbitrators (unlike judges). Similar grounds exist in French law regarding the obligation of arbitrators to maintain confidentiality. French scholars believe this obligation stems from the contract between the parties and the arbitrator or from the confidentiality of the arbitrators' deliberations. In English law, such an obligation exists for arbitrators in relation to both the parties and even witnesses. In Sweden, although the obligation of confidentiality for parties is not recognized, there is consensus regarding the existence of such an obligation for arbitrators. However, the position in the United States differs. In the absence of organizational regulations, applicable law, or explicit agreement between the parties, U.S. courts do not recognize a general obligation for arbitrators not to disclose their deliberative processes or discussions. Nevertheless, it should be noted that arbitration organizations in the U.S., including the American Arbitration Association, require arbitrators to refrain from disclosing any information presented during the proceedings by the parties or witnesses.[3]

Most other organizational regulations also contain provisions related to the obligation of arbitrators to maintain confidentiality. The most significant include Article 76 of WIPO,[4] the ICSID regulations in Articles 6(2)[5] and 15(2), all of which require arbitrators to maintain confidentiality. Furthermore, Article 31(2)[6] of the London Court of International Arbitration Rules states that an arbitrator should not undertake any obligation to disclose what occurred in the arbitration to any person. Regarding arbitration organizations and their employees, national

1 G Kauffman-Kohler, *International Arbitration in Switzerland: A Handbook of Practitioners* (Kluwer Law International 2004) 196.

2 J Tao, *Arbitration Law and Practice in China* (2nd edn, Kluwer Law International 2008) 153.

3 C Buys, 'The Tensions Between Confidentiality and Transparency in International Arbitration' (2003) 468.

4 Article 76: "1. Unless otherwise agreed by the parties, the center and the arbitrators shall maintain the confidentiality of the arbitration, the award, and, to the extent that it pertains to information that is not in the public domain, any documents or evidence presented during the arbitration, except to the extent necessary for the court to act in relation to the award or for other legal obligations."

5 Article 6(2): "2. Before or at the first meeting of the tribunal, each arbitrator shall sign a declaration in the following form: ... I will keep confidential all information that I become aware of as a result of my participation in the arbitration, as well as the contents of the award issued by the tribunal..."

6 Article 31(2): "After the award has been issued and the time for its correction or completion under Article 27 has expired, neither the LCIA nor its tribunal (including the Chair, Vice-Chair, and the ordinary members), nor the Secretary, nor any arbitrators or experts of the tribunal shall assume any legal obligation to disclose any issues related to the arbitration, nor shall any party summon any of these individuals as witnesses in any judicial or other proceedings arising from the arbitration."

laws do not impose specific confidentiality obligations on them. However, these organizations have taken on such obligations in their regulations (as seen in Article 31 of the London Court of International Arbitration Rules and the rules of the American Arbitration Association).

3.2. Parties to Arbitration

The obligation of confidentiality for parties in arbitration presents a complex situation. In the absence of an explicit agreement regarding confidentiality, their duty to maintain confidentiality will vary depending on the tribunal, governing law, proceedings, the type of information in question, and how that information may be used. This is why most challenging discussions about confidentiality relate to the obligations of the parties.[1] Nonetheless, parties can establish such a duty by explicitly agreeing to confidentiality or by choosing organizational rules that recognize this obligation. In the absence of such agreements, the primary basis for confidentiality can be considered an implied condition, with confidentiality as a legally implied term appearing to be the most appropriate foundation. If the obligation to maintain confidentiality is recognized, certain exceptions may still exist, allowing parties to disclose confidential information when necessary.[2]

3.3. Third Parties

Generally, arbitration consists of two parties as the primary poles (sometimes with more than one person on one side) and a third party who is neutral and has no interest in the outcome of the case. Individuals who are not bound by an arbitration agreement and will not be affected by the arbitration are referred to as third parties. Regarding third parties who appear as witnesses in arbitration, except for those employed by one of the parties, other witnesses are generally not obligated to maintain confidentiality. Although the tribunal and the parties may encourage these witnesses to keep confidential what occurred during the arbitration, they cannot be legally bound to do so. Furthermore, if a witness provides testimony that contradicts previous statements made during the arbitration, their prior testimony may be disclosed in the current arbitration. Thus, the obligation for witnesses to maintain confidentiality is weak, as they are not bound by the arbitration agreement, and ensuring the confidentiality of their testimony is not very practical.[3]

A similar analysis can be applied to experts. The arbitration agreement is only binding on the signing parties; therefore, third parties, including witnesses and experts, cannot be bound by it, and thus no obligation can be imposed on them. It may be argued that experts should respect the confidentiality of the arbitration not only for the party that requested their presence but also for the benefit of the other party. However, if such an obligation exists, it cannot be derived from the terms of the arbitration agreement between the parties, which is only binding on them under legal principles. Consequently, any obligation for experts or other third parties to maintain confidentiality should be considered as arising from an implied legal duty, as a fundamental aspect of the arbitration process.[4]

On the other hand, since experts are typically engaged by one of the parties, there is an

1 P Van den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge University Press, New York 2007, 6th printing) 151.
2 C Dommen, 'Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies' (2009) 159.
3 H J Jackson, *The World Trading System: Law and Policy of International Economic Relations* (2nd edn, MIT Press 2010) 155.
4 H Nikbakht Fini, 'Identification and Enforcement of International Commercial Arbitration Awards in Iran' (Institute for Trade Studies and Research 2006) 85.

opportunity to require them to sign a confidentiality agreement on behalf of the parties. Thus, while an expert cannot be bound to maintain confidentiality through the arbitration agreement, they can be obligated to confidentiality through separate agreements involving at least one of the parties to the arbitration.[1]

A confidentiality agreement is indeed binding for the parties to the arbitration who sign it, but third parties, such as experts, are generally not obligated to maintain confidentiality. It could be argued that experts are obliged to maintain confidentiality not only to the party that engaged them but also to the other party to respect the confidentiality of the arbitration process. If we accept that such an obligation exists, it would not stem from a contractual basis because, under contract law, a third party cannot be bound by a contract made between two other persons. Therefore, any obligation we wish to impose on third parties, including experts, should be considered as arising from an implied legal duty, reflecting the essential characteristics of arbitration.

However, the parties to arbitration can require an expert to sign a confidentiality agreement before selecting them. For example, if Person A identifies potential engineers from whom they can choose an expert, Person A could make it a condition of the expert's engagement that they sign a confidentiality agreement. While a third party, including an expert, cannot be bound by the arbitration agreement between the parties, they can be required to maintain confidentiality through a separate agreement with at least one of the parties to the arbitration.

Another question that arises is whether the statements made by experts are protected under confidentiality. Experts are not bound by confidentiality agreements governing the arbitration process. For example, if an expert provides a favorable opinion for Party A in one arbitration and then offers a contradictory opinion for Party B in a subsequent arbitration, Party C, opposing Party B, can reference the expert's earlier opinion to challenge their stance in the second arbitration. In summary, the expert opinion expressed during an arbitration is not protected by confidentiality. No organizational or national law has provided such protection concerning experts.

Another important point concerns third parties other than witnesses and experts. It has been previously stated that based on the principle of confidentiality in arbitration, third parties are prohibited from attending arbitration sessions. However, regarding investment arbitration, there is considerable interest, particularly from non-governmental organizations, in increasing transparency in arbitration. These activities indicate their intent to participate in arbitration and potentially provide their opinions during the proceedings. If such participation (limited to investment arbitration) is accepted, the question arises as to whether these third parties can be considered experts. The primary difference between these third parties and experts is that the former are not neutral and may show bias toward one of the parties.[2]

The discussion regarding these third parties is quite complex, and since it pertains solely to investment arbitration, it is not suitable for this paper. Mentioning it serves merely to introduce the existence of such an issue, which could be explored and analyzed in further research.

1 A Brown, *Law of Arbitration* (Oxford University Press 2009) 1006.

2 A Mourre, 'Are Amici Curiae the Proper Response to the Public's Concerns on Transparency in Investment Arbitration?' (2006) 270.

Ultimately, it should be noted that legally, none of the third parties involved in arbitration can be considered obligated merely due to an explicit or implicit confidentiality obligation in the parties' arbitration agreement.

It is also worth adding that the opinions of experts or specialists made during the arbitration process are definitely not protected against disclosure and public exposure. This issue was raised in one case, where an English judge stated that one of the parties has the right to cite the expert's opinions from a previous arbitration as evidence, especially when those opinions differ from the expert's current testimony in the ongoing court proceedings.

Perhaps this is why some legal experts in the field of arbitration advise experts by stating: "… those of you who act as specialists or experts should know that you are always at risk of being challenged by the opposing or aggrieved party, particularly if you, your partner, or your colleague in your organization have expressed different opinions on a similar subject that may not seem consistent with your current opinion".

Conclusion

In this paper, we have examined two main topics. Firstly, we discussed the issues covered by the principle of confidentiality in arbitration. The aim was to identify the subjects and matters governed by confidentiality, which is one of the most important and fundamental principles of arbitration. These subjects include the arbitration agreement, witness testimonies and expert opinions, trade secrets, minutes of meetings, deliberations, and the arbitral award. The findings regarding the application of the confidentiality principle to each of these matters can be summarized as follows:

1. **Arbitration Agreement**: Although there is an emphasis on maintaining the confidentiality of arbitration agreements, in practice, the contents of these agreements are often disclosed, especially when their nature relates to public interests. Consequently, there is no common basis or position identifiable among national legal systems regarding the confidentiality of arbitration agreements, except in specific cases. However, the principle remains valid for other instances.
2. **Witness Testimonies and Expert Opinions**: These are generally considered to be subject to confidentiality obligations. However, they are less protected from disclosure than other evidentiary materials. Particularly in cases where a witness or expert provides contradictory testimony in different arbitrations, previous statements may be disclosed. There is no shared position among national laws on this matter.
3. **Trade Secrets**: Many individuals resort to arbitration primarily to protect trade secrets through confidentiality obligations. Among common law, organizational rules, national laws, international conventions, and procedural laws, trade secrets are clearly subject to the confidentiality rule in arbitration.
4. **Minutes of Meetings**: Generally, documents created in the context of arbitration (whether during or after the process) such as arbitration requests, transcripts of oral testimony, written testimonies, hearing summaries, and written requests are subject to confidentiality obligations. This is one of the clearest manifestations of the confidentiality principle in arbitration processes.

5. **Deliberations**: One of the primary responsibilities of arbitrators is to keep all arbitration matters confidential. This rule applies to arbitrators, who are service providers with no personal interests, and they must ensure that the disputes remain confidential as desired by the parties. Consequently, deliberations among arbitrators are protected from disclosure, and their content cannot be revealed to anyone, including the parties involved.
6. **Arbitral Award**: Although the general principle is that the arbitral award remains confidential and undisclosed, in practice, it has often been seen that awards are disclosed and published in media or by the parties themselves. Some advantages of this disclosure have been noted, with public scrutiny of an award being a significant benefit. However, in instances where awards are published against the wishes of the parties, it undermines their intent to resolve disputes in a confidential setting. It is important to note that the publication of the rationale for an award, without naming the parties, does not constitute a breach of confidentiality. Such publication serves the public interest in business and legal practices, and it is appropriate for lawyers and arbitration users to have access to applicable rules and decisions.

The second topic discussed in this paper concerns individuals who are obligated to adhere to the confidentiality principle during the arbitration process. Generally, the obligation to maintain confidentiality can be analyzed concerning three groups of individuals involved in an arbitration: arbitrators, parties to arbitration, and third parties.

Regarding arbitrators, it is widely accepted that there is an ethical obligation to maintain confidentiality. In many national legal systems, this obligation is recognized as a fundamental duty of arbitrators, and its breach may lead to civil, criminal, or disciplinary liability for the offending arbitrators.

However, the situation regarding the obligation of parties to arbitration to maintain confidentiality is complex. In the absence of an explicit agreement on confidentiality, their duty to maintain confidentiality varies depending on the tribunal, governing law, proceedings, and the nature of the information in question. This complexity is the reason most discussions about confidentiality issues center around the obligations of the parties. Nonetheless, parties can establish such duties through explicit agreements or by choosing organizational rules that recognize these obligations. If no such agreement exists, the primary basis for confidentiality can be considered an implied condition, indicating the parties' intent to keep disputes confidential merely by entering into arbitration, although parties may sometimes seek to disclose information, which does not negate their intent.

Finally, regarding third parties, it can be concluded that confidentiality agreements are indeed binding for the parties to the arbitration who sign them, but third parties, such as experts, are generally not obligated to maintain confidentiality. Any obligation imposed on third parties, including experts, should be considered as arising from an implied legal duty, reflecting the fundamental characteristics of arbitration. Nevertheless, the parties to arbitration can require an expert to sign a confidentiality agreement before selection. However, when the third parties in question are not arbitration experts, there is no doubt about the applicability of the confidentiality principle to them.

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