

Legal Protection of Arbitration Confidentiality: Mapping the Approaches of Prominent Jurisdictions

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Abstract

In light of the challenges of bringing certainty and some sort of uniform approach over arbitration confidentiality, the present article maps the existing domestic framework relating to the same, focusing specifically, how prominent jurisdictions have treated the nuances of the concept of confidentiality in international commercial arbitration. Mapping shall take into consideration relevant legislative provision as well as judicial precedents of prominent jurisdictions belonging to both civil and common law domains. On the basis of the discussion, a holistic attempt shall be made to draw cumulative inference in connection of the developing approaches over the protection of confidentiality in arbitration proceedings.

Introduction

It is a cliché to state international arbitration has become one of the favoured mechanisms for resolving disputes in commercial world. In particular, arbitration is an indispensable feature of international contracts. In recent years, the popularity of arbitration clause has grown even more in view of tremendous growth in global trade, commerce and investment, thus naturally causing an enlargement in number of disputes. The scenario has exerted enough pressure on the market to rely more heavily on arbitration to seek an early and efficient resolution of disputes.¹⁰ In other terms, growing reliance on arbitration is primarily based on limiting exposure to litigation while expanding business interests globally. An increased use of arbitration has provided a suitable ground for countries to enact arbitration friendly legislations along with equally strong reasons for establishment of international arbitral institutions. In effect, the arbitration world has experienced an accelerated competition among a variety of arbitral institutions, both public and private, to offer innovative solutions *vide* their arbitral rules to disputing parties.

Arbitration is widely preferred over litigation as the former protects confidentiality of the proceedings. In effect, as a fundamental aspect of arbitration, confidentiality has assumed critical dimensions. Various issues underpinning arbitration confidentiality have galvanized attention of the global arbitration community. Parties often want to see strict confidentiality of arbitration proceedings. As a result, arbitral institutions now increasingly vie with each other to offer innovative or creative rules in regards to maintaining the arbitration confidentiality. It remains a case that the confidentiality is not an easy thing to define with precision. There are often larger principles or pressing issues which may work against confidentiality, possibly leading to removal of legal protection given to it. Various jurisdictions have attempted to address the question of arbitration confidentiality in their own ways.

¹⁰Kimberley Chen Nobles, *Emerging Issues and Trends in International Arbitration*, California Western International Law Journal (Vol. 43, No. 1, 2012) p. 78

The issues relating to extent, nature and scope of confidentiality has generated much debate and controversy. This is evident from the divergent views expressed by national courts of various jurisdictions, as a result, at a global scale, there are differing rules on confidentiality protection or in other terms there is no uniformity in respect of principle of confidentiality. As for instance, on several occasions, the parties either agree or do not agree to specific confidentiality provisions as part of their arbitration agreement. In these cases, national courts have often reached a variety of conclusions with regard to the confidentiality of international arbitral proceedings. On one end of the spectrum, English courts have repeatedly recognized relatively extensive obligations of confidentiality, implied from the mere existence of an agreement to arbitrate.¹¹ At the other end of spectrum, Australian courts appear to have rejected the notion of a general obligation of confidentiality of arbitral proceedings seated in Australia and governed by the Australian law.¹²

These decisions prompted several jurisdictions to incorporate specific provisions dealing with the topic in their arbitration laws, either by including a confidentiality obligation (drafted in broad terms or limited to specific aspects, or to specific participants in the proceedings) or by excluding confidentiality in the absence of a specific confidentiality agreement of the parties. Other jurisdictions left the subject to be developed on case by case basis.¹³

In light of the challenges of bringing certainty and some sort of uniform approach over arbitration confidentiality, the present article maps the existing domestic framework relating to the same, focusing specifically, how prominent jurisdictions have treated the nuances of the concept of confidentiality in international commercial arbitration. Mapping shall take into consideration relevant legislative provision as well as judicial precedents of prominent jurisdictions belonging to both civil and common law domains. On the basis of the discussion, a holistic attempt shall be made to draw cumulative inference in connection of the developing approaches over the protection of confidentiality in arbitration proceedings.

Arbitration Confidentiality in Prominent Jurisdictions

Earlier, given the problem of defining confidentiality in objective terms, domestic legislations dropped the idea of incorporating any provision on it, which added to the complexity, resulting into uncertain decisions in lawsuits. However, now, an increasing number of national legislations deal with the issue. Along with the domestic provision, the judicial precedents have helped evolve a distinct approach within a particular legal system. A perusal of the prominent jurisdictions, while revealing the nature and scope of the arbitration confidentiality, also exposes the divergent treatment of this issue within the concerned national jurisdiction. In this regard, the survey of prominent jurisdictions namely US, UK, France, Canada, Australia, India, UAE (Dubai) and Singapore will demonstrate the current trend and help locate the possible convergence or at least furnish a way of looking at the issue of arbitration confidentiality. This section will first give a snapshot of legislative provision on confidentiality protection, which will be followed with the related judicial pronouncements of eight prominent jurisdictions as named above.

United States

United States does not recognize confidentiality as a general rule.¹⁴ The American Arbitration Association (AAA)¹⁵ specifies in its Statement of Ethical Principles¹⁶ that while arbitrators and AAA

¹¹Catherine A. Rogers, Roger P. Alford, *THE FUTURE OF INVESTMENT ARBITRATION* (OUP, 2009) p. 11

¹²*Id*

¹³Alberto Malatesta, Rinaldo Sali, *THE RISE OF TRANSPARENCY IN INTERNATIONAL ARBITRATION* (Juris Publishing, 2013) p. 124

¹⁴*United States v. Panhandle Eastern Corp.*, 118 F.R.D. 346 (D. Del. 1988). See also *Contship Containerlines, Ltd. v. PPG Industries, Inc.*, 2003 U.S. Dist. LEXIS 6857, *Derrick Walker v. Craig Kirin Gore*, 2008 U.S. Dist. LEXIS 84297

staff have a duty of confidentiality, it is neutral as to whether the parties should enter into a confidentiality agreement or agreed order pertaining to the confidentiality of the proceeding or the award. In other terms, the parties always have a right to disclose details of the proceeding, unless they have a separate confidentiality agreement.¹⁷ Where public agencies are involved as disputants, then as a matter of fact, the arbitral award routinely becomes public. Courts have also ignored the parties' agreements where public policy strongly supports disclosure.¹⁸

The US federal law on arbitration is contained in the Federal Arbitration Act (1925)¹⁹ and Uniform Arbitration Act (2000).²⁰ While the former, an Act of Congress, applies to interstate and foreign commerce, the latter is basically a model law which may be adopted by provincial states while framing their own relevant legislation on arbitration. But the aforesaid two Acts do not specifically deal with the confidentiality aspect of arbitration. Some states though have dealt with the issue in details. As for example the revised Florida Arbitration Code²¹ provides: An arbitrator may issue a protective order to prevent the disclosure of privileged information, trade secrets and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in the state of Florida.

In general, the American courts also follow the similar- if not an even stricter- position. The status of the courts in US is that unless the parties' agreement or applicable arbitration rules provide otherwise, there is no requirement under US law or the arbitration proceedings and matters transpiring within them to be treated as confidential by the parties.²² Court's view on confidentiality assumes importance since in the US neither the Federal Arbitration Act nor the Uniform Arbitration Act impose a confidentiality obligation on the parties.

The issue of confidentiality was thrown light on in the *United States v. Panhandle Eastern Corp.*²³, which involved a request by the U.S. Government for the production of documents used in ICC arbitration in Switzerland, the court said that, without an agreement between the parties, or procedural rules that explicitly guarantee confidentiality, no doctrine of confidentiality could be implied. The US federal case laws appear to be stricter on the aspect of accepting an implied duty of confidentiality in either internal arbitration rules or by the parties' general understanding that arbitration proceedings are confidential.²⁴ Whilst certain circuit courts have upheld confidentiality provisions in arbitration agreements²⁵, others have held such agreements to be unenforceable as an unconscionable term.²⁶

¹⁵American Arbitration Association or AAA, headquartered in New York, was founded in 1926. It is a globally reputed and leading ADR services provider in USA. It has crafted its own institutional rules on arbitration and mediation, which are time to time updated in order to reflect the current practices and trends in the area. More details about the organization are available at <https://www.adr.org> (last accessed March 10, 2017)

¹⁶See, AAA, *Statement of Ethical Principles 2012*, available at <https://www.adr.org/StatementofEthicalPrinciples> (last accessed March 10, 2017)

¹⁷*Id*

¹⁸*Omaha Indem. Co. v. Royal Am. Managers, Inc.* (140 F.R.D. 398, 400 (W.D. Mo. 1991); *City of Newark v. Law Dep't of the City of N.Y.* (760 N.Y.S.2d 431, 436-37) (NY App. 2003)

¹⁹United States Arbitration Act, 9 U.S.C. § (2000)

²⁰Uniform Arbitration Act was initially drafted in 1955 by National Conference of Commissioners on Uniform State Laws (NCCUSL). The Act provides a model law and expects states to transpose the same in their respective jurisdictions. It has been updated and revised in 2000. The text of the Act is available at http://www.uniformlaws.org/shared/docs/arbitration/arbitration_final_00.pdf (last accessed March 11, 2017)

²¹Florida Arbitration Code (Revised), 2013, Section 682.08

²²*Giacobazzi Grandi Vini S.p.a. v. Renfield Corp.* (1987) US Dist. Lexis 1783

²³118 F.R.D 346 (D. Del. 1988)

²⁴*Lawrence E. Jaffee Pension Plan v. Household International, Inc* [2004 WL 1821968 (D Colo Aug 13, 2004)]

²⁵*ITT Education Services v. Arce*, 2008 WL 2553998 (5th cir); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005)

²⁶*Davis v. O'Melveny & Myers*, 485 F.3d 1066 (9th Cir. 2007)

United Kingdom

England is the only country which has been vocal in emphasizing the existence of a broad duty of confidentiality. But surprisingly, its Arbitration Act, of 1996 is silent on the provisions of confidentiality.²⁷ This omission though was no indication that confidentiality was not regarded as important. It was the difficulty of reaching a statutory formulation due to myriad exceptions and qualifications to confidentiality that led the drafters to conclude that the courts should be left to continue to work out its implications on a pragmatic case by case basis.²⁸

Thus legislative vacuum in UK has not deterred the courts to come up with judicial decisions on the nature and scope of confidentiality. It started with *Oxford Shipping Co. Ltd. v. Nippon Yusen Kaisha (The Eastern Saga)*²⁹ wherein it was held that the arbitration proceedings are held in private and therefore parties were prohibited to disclose their details to the strangers.

Over a period of time, the English courts have formulated three clear rules by way of judicial pronouncements, the essential characteristics of which are briefly provided below:

First Rule: The first rule states that the arbitration proceedings are held in private which implies that in the absence of the parties' consent arbitrators have no power to order the concurrent hearing of two arbitrations in which the arbitrators but not the parties were identical and the disputes closely associated.³⁰

Second Rule: It is considered to be a restatement of traditional view, and was formulated by the Court of Appeal in 1990 whereby it was propounded that there exists an implied duty of confidentiality arising out of the very nature of arbitration, and which is binding upon parties.³¹

The application of the above two rules were manifest in *Hassneh Insurance Co of Israel and Others v Stuart J Mew*³², wherein Justice Coleman emphasized that even if the implied duty to maintain confidentiality existed as a "matter of business efficacy," this duty is not absolute and must necessarily be removed when disclosure was "an essential element" (as opposed to "strongly persuasive") for the establishment or protection of an arbitrating party's rights vis-à-vis third parties to develop a cause of action, or in order to raise a defense. However, the theory propounded by Coleman J. was partly overruled in *Ali Shipping Corporation v Shipyard 'Trogir'*³³, wherein the court held that the implied confidentiality was neither dependent on the private nature of the materials, presented in the arbitration, nor on custom, usage or business efficacy, but it arose as a matter of law.

In recent times, the English courts have continued to accept the duty of confidentiality but have, on occasion, been prepared in limited circumstances to recognize certain limits. In 2009, in the case of *Emmott v. Michael Wilson & Partners*³⁴, the issue before the Court of Appeal was whether a party to arbitration could disclose documents generated in that arbitration in a foreign litigation. The Court of Appeal identified different circumstances in which questions of confidentiality may arise including (1) where a party to litigation seeks disclosure of documents generated in an arbitration, (2) where a party to litigation wishes to disclose the court judgement or other documents on the court file which relate to an arbitration (for example where the court decides an appeal of an arbitration award), (3) where a

²⁷LC No CB (2) 1620/09 – 10(02), Department of Justice, UK (May 2010)

²⁸Adam Robb, *Confidentiality and Arbitration*, presentation given at 39 Essex Chamber, London (May 5, 2004) available at: www.39essex.co.uk/docs/articles/ARO_Confidentiality_and_arbitration_talk_050504.pdf (last accessed March 14, 2017)

²⁹[1984] 2 Lloyd's Rep. 373 (In the case Leggatt J observed: "The concept of private arbitration derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only between them. It is implicit in this that strangers shall be excluded from the hearing and conduct of the arbitration and that neither the tribunal nor any of the parties can insist that the dispute shall be heard or determined concurrently with or even in consonance with another dispute, however convenient that course maybe to the parties seeking it and however closely associated with each other the disputes in question may be.)

³⁰*Id*

³¹*Dolling-Baker v. Merrett* (CA 1990) [1991] 2 All ER 890, per Parker LJ

³²[1993] 2 Lloyd's Rep 246-47

³³(CA) [1998] 2 All ER 136

³⁴[2009] 1 Lloyd's Rep 233

party to an arbitration seeks the assistance of the court through a witness summons to obtain material from another arbitration and (4) where a party to an arbitration wishes to disclose arbitration documents (including the award) to third parties. After analyzing these situations the Court of Appeal stated the circumstances in which the general rule may be waived and documents arising from arbitration may be disclosed: Such circumstances will include: (1) leave of the court, (2) interests of justice or in public interest, (3) reasonably necessary in order to protect the legitimate rights of an arbitrating party, (4) with the express or implied consent of the party who produced the document. In relation to the term, “interests of justice”, Collins J concluded that the exception to confidentiality in the name of the same is not limited to the “interests of justice” in England but may relate to a foreign jurisdiction where the dispute is of an international nature.

Third Rule: It is basically an application of the implied duty of confidentiality. In the case of *Milsum and OrsvAblyazov*³⁵, the court accepted the principles laid down in *Emmott v. Michael Wilson & Partners*³⁶ and concluded that implied duty of confidentiality extends to documents also. It was noted that an implied duty of confidentiality is not absolute and can be overridden in various circumstances.

In short, it may be said, that UK court in the first place goes by the assumption that arbitration matter is confidential recognising further such a prima facie obligation gives rise to an obligation not to disclose or use documents gathered in arbitration. Apart from this aspect, arbitral awards are also treated confidential, subject to the exception where disclosure is required for reason to protect legal rights in other legal proceedings.

France

France is considered as one of the most popular destinations for international arbitration. International Chamber of Commerce or ICC³⁷ is based in Paris, which is globally known as a credible institution rendering arbitration services to parties from all around the world. The relevant legislative on confidentiality is captured in Article 1469 of the Code of Civil Procedure, 1981, which lays down a legal duty of confidentiality by simply stating that “the deliberations of arbitrators are secret”.³⁸

However recently in 2011, France adopted a new law on arbitration³⁹ whereby several changes were introduced in the existing laws. Under the modified law, there is no automatic assumption of confidentiality of international arbitration unless an explicit agreement to this end is inserted in the arbitration agreement. However, for domestic arbitration, a duty of confidentiality exists ipso facto.⁴⁰ Hence, now if the parties wish to avail the benefit from under the French confidentiality regime, they must enter into an agreement for it in advance. The reversal of the traditional confidentiality presumption as regards the arbitral process, applicable in all international matters, commercial or otherwise, constitutes a significant change in the context of the increasing demand for transparency, in particular in investment arbitration.⁴¹

³⁵[2011] EWHC 995 (Ch)

³⁶*Supra* n. 25

³⁷International Chamber of Commerce or ICC has three main functions: rule creation, dispute resolution and policy advocacy. It has a long serving International Court of Arbitration which is a leading arbitral institution of the world. Most importantly, it has crafted ICC Rules on Arbitration which is commonly incorporated in the international arbitration agreement. More details are available at <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> (last accessed March 14, 2017)

³⁸Code of Civil Procedure, France, 1981 available at: <http://www.jus.uio.no/lm/france.arbitration.code.of.civil.procedure.1981/doc.html#87> (last accessed March 14, 2017)

³⁹Decree No. 2011-48 of Jan. 13, 2011. The new law, which will be embodied in Articles 1442 through 1527 of the French Code of Civil Procedure, 1981 governs both domestic and international arbitration.

⁴⁰*Supra* n. 29, Article 1464(4)

⁴¹*See generally*, Emmanuel Gaillard, *France Adopts New Law on Arbitration*, New York Law Journal (Vol. 245, No. 15, 2011)

In France the position of the courts is considered not harsh. French courts have invariably held that there existed an implied duty of confidentiality and no exceptions were permitted. The principle of confidentiality in arbitration was upheld in more general terms by the Tribunal de Commerce of Paris which ruled that “arbitration is a private procedure of a confidential nature; recourse to arbitration accepted by the parties should avoid all publicity of the dispute between them and of its possible consequences; subject to a legal duty of information any breach of such confidentiality by a party to the proceedings is a breach of an obligation”.⁴²

Although, the doctrine of confidentiality in arbitration has always retained a strong and dominant position under the French Legal System, some latest cases such as *Nafimcov. Foster Wheeler Trading Company AG*,⁴³ exemplifies the possible shift in the approach of the French judiciary. In this case it was stated that the party claiming breach of confidentiality agreement, need to prove the existence of such a duty to observe confidentiality in arbitration under French law, since the parties, may have not chosen to renounce such an obligation.

Most significantly, now French law officially recognises that the jurisdiction of French courts acting in aid of arbitration extends not only to the traditional situations where the parties have opted France as the place of the arbitration, French law as the law applicable to the procedure or the French courts as the courts having jurisdiction in these matters, but also to situations in which a party is “exposed to a risk of denial of justice” even when the case at hands has no connection whatsoever with France.⁴⁴ This was essentially held to be the position in *State of Israel v. NIOC*.⁴⁵

Canada

In Canada the issues relating to confidentiality have not been expressly covered under the relevant legislation. In addition, the courts have not bothered to look at these issues due to legislative vacuum. Consequently, in the first place, the issue does not seem to be settled. But some superior judges of the Ontario judiciary have accepted⁴⁶ that confidentiality has well-accepted benefits, and is a critical component of commercial arbitration, and therefore parties have reasonable and legitimate expectations of confidentiality in arbitration. In practice, normally over such issues, the court will weigh the public interest in disclosure against the importance of commercial interest in preserving confidentiality. Canada, thus presents an example where public interest is viewed as carrying more weightage in matter of deciding confidentiality issues.

Australia

The use of arbitration in resolving commercial disputes has tremendously increased in Australia in recent years. Until 2010, there was no domestic legislative provision on confidentiality in Australia. The International Arbitration Act 1974⁴⁷ as amended in 2010 introduced Sections 23C-G as a series of “opt in” provisions, whereby the parties must expressly provide for confidentiality in their arbitration agreement to apply the law. In other terms, express agreement for confidentiality is a pre-condition before the law could be invoked. The general principle is contained in Section 23C which requires the parties and the arbitral tribunal not to disclose confidential information subject to a detailed set of

⁴²*Bleustein et autres v. Société True North et Société FCB International*, 2003 Revue de l'Arbitrage 1 (Feb. 22, 1999)

⁴³Court de' Appel de Paris, Rev Arb 143 (2003)

⁴⁴*Supra* n. 29, Article 1505(4); also *Supra* n. 32

⁴⁵Court of Cassation, Revue De L' Arbitrage 693 (Feb. 1, 2005)

⁴⁶Ontario Superior Court of Justice, *Telesatv Boeing*, ONSC 22 (2010) See further in *Sierra Club of Canada v. Canada (Minister of Finance)* 2 S.C.R. 522 (2002) where the court ordered a sealing order protecting the document to be disclosed in a court proceeding.

⁴⁷International Arbitration Act 1974 (Australia) available at http://www.austlii.edu.au/au/legis/cth/consol_act/iaa1974276/ (last accessed March 24, 2017)

exceptions governed by the subsequent sections 23D to 23E. “Confidential information” is defined in the interpretation clause (Section 15) to mean “information that relates to the proceedings or to an award made in the proceedings”, including (a) all pleadings, submissions, statements, or other information supplied by a party to the arbitral tribunal; (b) any evidence supplied to the tribunal; (c) any notes made by the tribunal of evidence or submission; (d) any transcript; (e) any rulings of the tribunal; and (f) any award.

Recently in 2015 the Parliament of Australia has passed Civil Law and Justice (Omnibus Amendments) Bill 2015, which, *inter alia*, brings further amendment in the International Arbitration Act of 1974. It has incorporated that arbitrations seated in Australia will be confidential by default, unless the parties to the arbitration agreement have opted out of the existing confidentiality provisions provided in the Act.⁴⁸ This amendment will reverse the effect of the decision of the High Court of Australia in *Esso Australia Resources Ltd v Plowman (Ministry for Energy & Minerals) & Others*⁴⁹, wherein the Court, while disapproving confidentiality being an essential and fundamental characteristic of private dispute settlement, denied the existence of an automatic an implied duty of confidentiality in contract. Therein the Court had stated that confidentiality cannot be implied simply by treating it “as matter of business efficacy” or “as a matter of law”.⁵⁰ The High Court although agreed that the obligation of confidentiality in arbitration could exist through an express agreement of the parties. It recognized a duty of confidentiality only in respect of documents produced compulsorily pursuant to an order of the tribunal. However, with the new amendments of 2010, effect of the decision has been reversed. The issue is now addressed by the opt-in provisions which means that arbitration in Australia is confidential unless the parties opt out of it. The new default position will apply to arbitration agreements entered into after the amendments become a full-fledged law. This new opt-out provisions make it more likely that international commercial arbitrations seated in Australia will be conducted on a confidential basis.

India

India enacted its Arbitration and Conciliation Act in 1996⁵¹, which has been recently drastically amended in 2015.⁵² Both the original and amended version do not deal with confidentiality in arbitration proceedings. However, confidentiality of conciliation⁵³ is provided for in the Act of 1996. Both arbitration and conciliation are substantially and procedure-wise different from each other. Hence, the confidentiality for conciliation proceedings cannot be ipso facto applied over arbitration proceedings. As things stand, under the Act there is no express or implied obligation to treat an arbitration agreement, any proceedings arising from it, or the award as confidential. To some extent, confidentiality is dealt with under the Indian Evidence Act, 1872 which provides that no barrister, attorney or pleader shall be permitted to disclose any communication, advice or contents of a document made available in the course and for the purpose of employment, unless with the client’s express consent.⁵⁴ Despite such statutory provisions, it is arguable that a duty of confidentiality in arbitration would be implied, as one Indian judgment⁵⁵ found that such a duty was implied only into mediation

⁴⁸“Parliament passes changes to international arbitration laws”, Ahurst Australia Publications, 2015, available at: https://www.ahurst.com/doc.aspx?id_Content=12327, (last visited on May 10, 2017).

⁴⁹1995 (128) ALR 391

⁵⁰Steven Kouris, Confidentiality: *Is International Arbitration Losing one of its Major Benefits?*, Journal of International Arbitration (Vol. 22, 2005) pp. 127-139

⁵¹The Arbitration and Conciliation Act, Act No. 26 of 1996

⁵²Dipen Sabharwal et al, India Overhauls its Arbitration Regime, White & Case (Nov. 9, 2015) available at <https://www.whitecase.com/publications/alert/india-overhauls-its-arbitration-regime> (last accessed March 28, 2017)

⁵³*Id.*, Section 75 (Conciliation is treated as synonymous with mediation, even though there are subtle theoretical differences between the two.)

⁵⁴See Indian Evidence Act, 1872, Section 126

⁵⁵*Moti Ram (D) Tr. LRs. v. Ashok Kumar*[2010] 14 (ADDL.) SCR 809

proceedings.⁵⁶ Mediation can be allowed during the arbitration process if parties so choose.⁵⁷ The Court in the instant case attempted to relate arbitration confidentiality by reading the same into the mediation confidentiality. But, this line of reasoning in absence of clear provision is hardly legally tenable among the arbitration community in India. In view of current lack of confidentiality protection, it may be said that the Indian arbitration regime has basically followed a line of approach whereby the legal system leaves such issues to be decided by the court on case to case basis.

United Arab Emirates (Dubai)

In order to promote business and investment friendly climate, UAE in 2004 established a large special economic zone, namely Dubai International Financial Centre (DIFC), which is governed by a common law framework distinguished from the federal legal system of UAE. It is characterised, *inter alia*, by its own independent judicial framework or court system⁵⁸. As a result, Dubai, a global financial hub, has become one of the leading centres for arbitration.

The 1992 federal Civil Procedure Code of UAE⁵⁹ has incorporated provisions on arbitration⁶⁰, but the confidentiality issues are not addressed within the Code. However, in a case of 2009, Dubai Court of Cassation affirmed that unless the parties agree otherwise, arbitration is regarded as a private process to be conducted in secret.⁶¹ The decision appears to confirm that arbitration is treated as confidential even under the federal law of UAE.

Direct and clear exposition about arbitration confidentiality is found in the DIFC Arbitration Law of 2008⁶², which is based on the UNCITRAL Model Law on Arbitration.⁶³ Article 14 of the law of 2008 specifically provides that “unless otherwise agreed by the parties, all information relating to the arbitral proceedings shall be kept confidential except where disclosure is required by the order of a DIFC Court.” In addition the institutional rules framed by Dubai International Arbitration Centre (DIAC)⁶⁴ also clearly sets forth that unless all parties agree in writing, as a general principle all awards and orders in their arbitration, together with all materials and documents used in the proceedings (not otherwise in the public domain) will remain confidential, except to the extent that disclosure may be required in case of legal duty to protect or pursue a legal right or to enforce or challenge an award in bonafide legal proceedings before a state court or other judicial authority.⁶⁵ Further DIAC also lays down that an award may be made public only with the consent of the parties.⁶⁶

⁵⁶See, Peter J. Wang, Confidentiality in Asia-Based International Arbitrations Jones Day Publication (Feb. 2012) available at http://www.jonesday.com/confidentiality_in_asia-based_international_arbitrations/ (last accessed April 2, 2017)

⁵⁷The Arbitration & Conciliation Act, 1996, section 30: Settlement- (1) It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.

⁵⁸Gordon Blanke & Khalil Mecantaf, *United Arab Emirates*, in Lawrence W. Newma & Colin Ong (eds) INTERIM MEASURES IN INTERNATIONAL ARBITRATION (Juris Publishing, 2014) p. 795

⁵⁹UAE Federal Law No. 11 of 1992

⁶⁰*Id, see*, Articles 203-218

⁶¹Robert Karrar Lewsley, *The Confidentiality of Arbitration in the UAE*, Al Tamimi & Co. (Sept. 2012) available at <http://www.tamimi.com/en/magazine/law-update/section-6/september-2/the-confidentiality-of-arbitrations-in-the-uae.html> (last accessed April 2, 2017)

⁶²Arbitration Law, Dubai International Financial Centre (DIFC) Law No. 1 of 2008, available at https://www.difc.ae/files/9014/5449/8249/DIFC_Arbitration_Law_2008_0_1.pdf (last accessed April 2, 2017)

⁶³However, it remains a case that in contrast to DIFC Arbitration Law of 2008, UNCITRAL Model Law on Arbitration is silent on confidentiality.

⁶⁴Dubai International Arbitration Rules, 2007, available at https://eguides.cmslegal.com/pdf/arbitration_volume_II/CMS%20GtA_Vol%20II_3_4_DIAC.pdf (last accessed April 4, 2017)

⁶⁵*Id*, Article 41.1

⁶⁶*Id*, Article 37.9

Presently, there is no reported case on arbitration confidentiality emerging out of the DIFC Court, so the precise limits and scope of it are yet to be explored.⁶⁷ But, in view of explicit legislative formulations, an approach favouring confidentiality of arbitration proceedings seems to have gained ground within the Dubai region.

Jordan

The Hashemite Kingdom of Jordan, considered a liberal country in the middle-east, is governed by a limited constitutional monarchy. It became a full-fledged member of the WTO in 2000, following which it was obliged to liberalize its economy as well as its domestic laws. It ushered a new law on arbitration in 2001⁶⁸ to reflect and sync with the modern principles and practices of international commercial arbitration. The Act of 2001 was a major improvement over the previous relevant enactments. It is primarily based on the Egyptian Arbitration Act⁶⁹, which in turn, is based on the UNCITRAL model law of 1985. The Jordanian Act on arbitration, however, does not make any reference to UNCITRAL.

As is the case with most of the Arabian countries, the domestic arbitration law of Jordan does not explicitly cover the issues of confidentiality. The Act of 2001, though, indirectly refers to arbitration confidentiality by laying down that “arbitral award may not be published in whole or in part except with the approval of the two parties to arbitration.”⁷⁰

The aforesaid provision is the only guidance for any confidentiality issue arising in the course of cases of international arbitration in Jordan. The interesting feature of the provision is that it starts with non-obstante clause by emphasizing that arbitral “award may not be published” in the first place. In other terms, it may be argued, the provision creates a possible assumption in favour of privacy of arbitral award unless the parties agree to go public. But, there is little clarity on this aspect, as judicial rulings in the country have yet to throw light on the confidentiality issues. Since the legal system of Jordan commonly fills in the existing legislative gaps by allowing reference to other Arabian jurisdictions such as Egypt, some light may be gathered in this regard from the relevant ruling of an Egyptian court, wherein the Court of Appeal in Cairo held that arbitral award cannot be deemed to be ‘annulled’ simply because publication of award is caused without the consent of a party.⁷¹ The Court had reasoned that in such situation of breach of confidentiality the proper remedy would be to seek damages instead of annulment of the whole award.⁷² While this sort of interpretation implicitly calls for preserving confidentiality, nevertheless, it also essentially weighs confidentiality issue principally in terms of monetary compensation.

Jordan is a member of New York Convention, namely the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. It ratified the Convention in 1979. In relation to the enforcement of foreign arbitral awards in Jordan, such proceedings are deemed ‘public’. However, the documents filed in legal proceedings do not *ipso facto* form part of the public record. One can obtain access to such documents with prior legal authorization, as for example, through power of attorney.⁷³ In such situation, the parties to arbitration have little control to stop the publication of arbitral award or contents thereof.

⁶⁷ *Supra* n. 52

⁶⁸ Arbitration Law No. 31 of 2001

⁶⁹ Egyptian Arbitration Act No. 27 of 1994

⁷⁰ *Supra* n. 59, Article 42(b)

⁷¹ The relevant Egyptian case was quoted in Mariam M. El-Awa, CONFIDENTIALITY IN ARBITRATION: THE CASE OF EGYPT (Springer, 2016) p. 62

⁷² *Id*

⁷³ See, International Chamber of Commerce Digital Library, Guide to National Procedures for Recognition and Enforcements of Awards under the New York Convention, available at http://library.iccwbo.org/content/dr/COUNTRY_ANSWERS/CA_SUPP_0029_38.htm?l1=Country+Answers&l2=Jordan#TOC_BKL1_7 (last accessed April 4, 2017)

In view of the aforesaid discussion on arbitration confidentiality in Jordan, it may be said that the country has basically adopted a cautious approach in matter of confidentiality of international arbitration. By not covering the issue in explicit manner, it essentially demonstrates a trend to decide the confidentiality issues on case to case basis.

Singapore

Singapore has experienced a phenomenal growth in the international arbitration activities. The city-state enacted Singapore International Arbitration Act in 2002.⁷⁴ The rule on confidentiality is not quite specific, but some impressions may be gathered by looking at Sections 22 and 23 of the Act. Section 22 lays down a general principle and states that upon the application of party, court proceedings under the Act shall be heard otherwise than in open court. In the next Section 23, certain restrictions are imposed on the reporting of proceedings in such cases.

Singapore judiciary in several cases has followed the approach of the English courts. High Court in *MyanmaYaung Chi Oo Co Ltd v Win Win Nu*,⁷⁵ accepted that the parties to arbitration are under an implied duty to keep documents confidential but disclosure even without the leave of the court may be permitted in case of reasonable necessity. The court adopted the approach of an implied term arising from parties' expectations to keep the proceedings as confidential. The court also held that the assessment of whether disclosure is "reasonably necessary" can change over time in the course of the same case.

Further, in *AAY and others v. AAZ (AAY)*⁷⁶, the High Court while accepting that there exists an implied duty of confidentiality held that the disclosure of certain documents relating to arbitration did not violate the implied duty of confidentiality in arbitration. The Court in the instant case endorsed the approach taken by the English Court of Appeal in *Emmott v. Michael Wilson & Partners Ltd (Emmott)*⁷⁷, indicating that ratios of the case should form basis for future development in this branch of law. In addition, the Court expressly announced two of the established exceptions to confidentiality by stating that disclosure of matters may be allowed (i) where the public interest so requires; and (ii) with the consent of all the parties to the arbitration.

AAY case is the first decision in Singapore which has comprehensively considered the common law jurisprudence on the implied obligation of confidentiality in arbitration.⁷⁸ The said decision has been welcomed by the arbitration community as it attempts to remove ambiguity in the Singapore's approach to arbitration confidentiality.

Concluding Remarks

Confidentiality constitutes an essential attribute of arbitration proceedings. It is not an exaggeration to state that parties who rely on arbitration are often motivated to do so as they believe that proceedings would be confidential. Therefore, to reiterate, the issue of confidentiality has acquired critical significance in the realm of arbitral laws. In the initial phase of development of laws on arbitration, confidentiality was not addressed, but in view of the centrality of the issue, now an increasing number of legislations of various countries have given legislative space to this issue. In addition, the rules framed by arbitral institutions have also dealt with the nuances of confidentiality. The recent

⁷⁴Robert Merkin, Johanna Hjalmarsson, SINGAPORE ARBITRATION LEGISLATION: ANNOTATED (CRC Press, 2016) pp. 187, 188

⁷⁵[2003] 2 SLR 547

⁷⁶[2011] 1 SLR 1093

⁷⁷[2009] 1 Lloyd's Rep 233

⁷⁸See generally, Michael Hwang & Nicholas Thio, *A Contextual Approach to the Obligation of Confidentiality in Arbitration in Singapore: An Analysis of the Decision of the Singapore High Court in AAY and Others v. AAZ*, Journal of International Arbitration (Vol. 28, 2012) pp. 225-242

global trends as perused in the article demonstrate, however, that rules governing extent of confidentiality protection are not uniform. Views on this issue have remained divergent. There is no guarantee that the law of the seat of arbitration will necessarily back or recognize the confidentiality of the arbitration proceedings.

Although many jurisdictions attach significance to arbitration confidentiality, yet some jurisdictions such as England do not treat confidentiality as an inherent aspect of arbitration. Moreover, even in jurisdictions which evolved arbitration long back, the extent of the obligation to maintain confidentiality is often not clearly stipulated (for example, USA). In effect, though, a trend has emerged to extend confidentiality to proceedings, materials and documents prepared or used and the award rendered in the arbitration. It remains obvious that in absence of clear exposition in law and arbitration agreement, parties should not assume the existence of confidentiality. In other terms, both law of the jurisdiction as well as the arbitration agreement must expressly incorporate confidentiality in order to cast aside the current uncertainty in terms of legal outcome in any possible confidentiality-related- litigations. Lastly, in view of differing notions and approaches of various jurisdictions, this seems to be the surest way of affording legal protection and a degree of predictability to arbitration confidentiality.