Part III
Confidentiality, Privacy and Security

A Judge's Perspective: Privacy and Confidentiality in Voluntary Commercial Arbitration

Rui Torres Vouga

Table of Content

A. Confidentiality versus Transparency: Arguments For and Against Both 159
B. Confidentiality and Transparency in International Arbitration 162
I. 'Confidentiality' versus 'Privacy' 162
II. Confidentiality under National Arbitration Legislation 164
1. National Arbitration Legislation is generally silent on Confidentiality 164
2. Choice of Law Governing Confidentiality 165
3. Party Autonomy as regards Confidentiality 166
III. Confidentiality under Institutional Arbitration Rules 167
IV. Implied Confidentiality Obligations 170
V. Scope and Limits of Confidentiality Obligations 174
VI. Secrecy of the Arbitrators' Deliberations 175
VII. Privacy and Confidentiality of Arbitration Hearings 176
C. Confidentiality in the Portuguese Voluntary Arbitration Law 177
Bibliography 179

A. Confidentiality versus Transparency: Arguments For and Against Both

The **arguments** generally invoked *in favour of enshrining the rule of* ***confidentiality***, in commercial arbitration, are essentially the following:

a) The classification of arbitration as *a private and discreet form of justice of the parties*, to which confidentiality is therefore a corollary;

b) The *presumed wishes of the parties*, who will likely prefer the strife of litigation and the need to take a hard line on issues not to scupper the viability of future agreements;

c) The risk that competitors of either party might learn of the accusations traded and potentially use these against them;

d) The *confidential character of the contractual documents* that often underlie arbitral disputes (shareholders' agreements, patents, technology transfer agreements, etc.);

e) The access unavoidably authorised in certain disputes to strategic company documents, undisclosed accounts, commercial secrets, etc.;

f) The belief that justice administered out of the spotlight and shielded from external pressures may prove more rigorous, dispassionate and even-handed;

g) The greater likelihood that the award will be complied with voluntarily without circulating reports of non-compliance, and indeed to avoid making this public, given that the enforcement of arbitral awards is necessarily public (involving proceedings in state courts)[1].

Contrariwise, another set of **arguments** is marshalled *in favour of* ***transparency*** *as a rule in the arbitration system*:

a) Transparency *is a corollary of the jurisdictional character of arbitration*, and should accordingly be treated as it would in the state courts;

b) Transparency *is intrinsic to the democratic principle* and can substantially reinforce the guarantees of impartiality;

c) Transparency *is the rule in information societies*, and it is not feasible to go against this tendency;

d) Transparency *strengthens the credibility of the arbitration system*, and thereby avoids raising suspicions of a cover-up of business dealings which may be less than lawful and harmful to the general interest, to the detriment of the system;

e) Publicity *will help to improve the arbitration system*, making it possible to create systems of precedents and avoid poor quality arbitral awards against which no appeal is possible;

f) In many cases, *publicity is vital to the interest of certain parties* (e.g. when prompted to go to arbitration by a reduction in income caused by alleged contractual non-performance), *is required by regulators* (as happens with listed companies, which are obliged to disclose important developments) or *is essential for the market in question as a way of avoiding disputes or facilitating operation in others* (this is the case, for example of documents obtained in an arbitration against the owner of works, where these are

1 Júdice, 'Confidencialidade e Transparência em Arbitragens de Direito Público', in Sousa and Pinto (eds.) *Liber Amicorum Fausto de Quadros - Volume II* (2016), 87 (88-89).

essential for future litigation brought by a contractor against a subcontractor)[2].

Looking at international arbitration rules, national legislation and the rules of the main international arbitration centres, there is no standard solution to the question of enshrining the rule of confidentiality or the rule of transparency, and instead we find a wide variety of normative arrangements. There are cases where i) the legal rules and regulations *are silent on the issue of confidentiality, leaving the decision to the wishes of the parties or to a ruling of the arbitral tribunal*; ii) point towards *regarding confidentiality as the rule in arbitration proceedings, whilst admitting exceptions or leaving open the possibility of deciding otherwise*; and iii) those, in contrast, which tend to *attach value to transparency and publicity, which are deemed to be the rule, unless the parties decide otherwise*.

What are not to be found are extreme solutions admitting of **no exceptions to the rule of confidentiality** or requiring **full and absolute publicity**, without exceptions and without allowing the arrangements to be shaped in any regard by the shared wishes of the parties and the powers of the tribunal.

Consequently, when the rule of confidentiality applies, this allows for **exceptions**, such as situations where legal rules require the disclosure of information concerning disputes, when one of the parties exercises its right of appeal in the judicial courts, to comply with the requirements of legislation or of regulators or the equivalent, or if the parties determine, by mutual agreement, to do without confidentiality, in all or some regards[3].

On the other hand, even when publicity is the rule, there are some aspects which cannot be disclosed (or, at least, where the arbitral tribunal, on the request of one of the parties, so rules)[4].

So whilst the decisions vary widely, it may still be asserted that, in **commercial arbitration**, the predominant tendency is to give weight to the rule of confidentiality and, in contrast, in arbitrations to which States

2 Júdice, 'Confidencialidade e Transparência em Arbitragens de Direito Público', in Sousa and Pinto (eds.) *Liber Amicorum Fausto de Quadros - Volume II* (2016), 87 (89-90).

3 Júdice, 'Confidencialidade e Transparência em Arbitragens de Direito Público', in Sousa and Pinto (eds.) *Liber Amicorum Fausto de Quadros - Volume II* (2016), 87 (91).

4 Júdice, 'Confidencialidade e Transparência em Arbitragens de Direito Público', in Sousa and Pinto (eds.) *Liber Amicorum Fausto de Quadros - Volume II* (2016), 87.

are party, namely in **investment arbitration**, the opposite rule, in favour of publicity, prevails[5].

B. Confidentiality and Transparency in International Arbitration

Many advocates of international arbitration point to **confidentiality** as an important advantage of arbitral proceedings. Among other things, **confidentiality** is regarded as encouraging efficient and impartial settlement of disputes, as opposed to a more heated 'trial by media', reducing the harmful disclosure to competitors and others of commercially sensitive information and facilitating negotiation, by minimising the role of public exposure[6].

I. 'Confidentiality' versus 'Privacy'

It is important to distinguish between 'privacy' and 'confidentiality' in arbitration. 'Privacy' refers to the fact that, under practically all national arbitration laws and institutional rules, *only the parties to the arbitration agreement* – and no third parties – *may attend arbitration hearings and take*

---

5 Júdice, 'Confidencialidade e Transparência em Arbitragens de Direito Público', in Sousa and Pinto (eds.) *Liber Amicorum Fausto de Quadros - Volume II* (2016), 87 (93).

6 One of the aims of international arbitration is to offer the possibility of a dispute resolution procedure that is confidential, or at least private. Most proceedings in national judicial courts are not **confidential**. In many countries, trials and judicial pronouncements on case law are open to the public, to competitors, to the press and to regulators, and the parties are very often free to disclose their submissions and evidence to the public. Public disclosure can encourage 'trial by media' and stand in the way of settlements, causing parties to harden their positions, aggravating tensions and prompting collateral disputes.
In contrast, international arbitration is substantially *more private* and, very often, *more confidential*, than proceedings in national judicial courts. Arbitral hearings are almost always closed to the press and the public and, in practice, the parties' pleadings and the tribunal's award generally remain confidential. In many jurisdictions (although not in all), confidentiality obligations are implicit in international arbitration agreements as a matter of law and, moreover, many institutional arbitration rules expressly impose these duties. In general, most international corporations prefer actively to seek the privacy and confidentiality that arbitral proceedings provide. Confidentiality reduces the risks of aggravating the dispute between the parties, limits the collateral damage of litigation and leads parties to concentrate on an amicable and pragmatic resolution of their differences.

part in proceedings. In contrast, the term 'confidentiality' is normally used to refer to the *obligation of the parties (and arbitrators) not to disclose information concerning the arbitration to third parties*. *Confidentiality obligations* extend not only to the prohibition of third party participation in arbitral hearings, but also to disclosure by a party to third parties of the transcriptions of the hearing, or of the submissions or written pleadings presented in arbitration, the evidence produced, materials presented during the procedure and awards[7] [8].

The defenders of confidentiality in international arbitration often argue that the *privacy* of arbitral proceedings necessarily demands that the proceedings be also *confidential* (unless otherwise agreed by the parties). They contend that it would make little sense to treat hearings and other aspects of the arbitration as *private*, but then to permit the parties to disclose details of those hearings to third parties[9].

Critics of confidentiality reject this analysis, regarding the privacy of arbitral hearings as a comparatively strict concept, without necessarily entailing or requiring broader obligations of confidentiality.

7 Cfr. Born, *International Arbitration: Law and Practice* (2021), 231.

8 Whilst **confidentiality** refers to the obligation on the parties not to disclose to third parties any information or documents produced and used during the entire arbitral process, **privacy** refers to the fact that third parties are not allowed access to arbitral hearings, without the parties' prior consent, in other words, to the parties' right to conduct arbitral procedures that entirely exclude non-parties, without any intervention by unrelated third parties: cfr., for all, Pozo, 'Confidencialidad, privacidad y transparencia en el arbitraje internacional' (2021) 40 enero-junio *Revista de Derecho Privado* (Universidad Externado de Colombia), 465.

9 One commentator (Fortier, *The Occasional Unwarranted Assumption of Confidentiality* (1999) 15 Arb. Int'l, 131 (132) has described this reasoning as follows: '*the concept of privacy would have no meaning if participants were required to arbitrate privately by day while being free to pontificate publicly by night*'.

II. Confidentiality under National Arbitration Legislation

The New York Convention[10], the European Convention[11] and the Inter-American Convention[12] are all silent on the confidentiality of international arbitral proceedings. In the absence of international rules, national legal systems have historically taken different approaches to the question of *whether international arbitrations are presumably confidential*, and also as to the *reach of any implied obligations of confidentiality*.

1. National Arbitration Legislation is generally silent on Confidentiality

The UNCITRAL Model Law is representative of most arbitration legislation and is *silent on the matter of the confidentiality* of international arbitration procedures.

Other national arbitration legislation is also *silent as regards confidentiality*. This is the case in particular of the U.S. *Federal Arbitration Act (1925) (FCA)*, the Swiss *Federal Act on Private International Law*, the English *Arbitration Act*, and Japan's *Arbitration Law No. 138*, of 1 August 2003[13], the *Arbitration Law of China*[14] and other contemporary legislation.

However, on adopting the Model Law, several jurisdictions included provisions on confidentiality in arbitral proceedings: these include New

10 The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, approved by ratification by Resolution of the Assembly of the Republic 37/94, of 8 July, published in *Diário da República I-A*, 156, of 8 July.

11 The *European Convention on International Commercial Arbitration* (*European Convention on International Commercial Arbitration* [ECICA]), of 1961, which took effect on 7 January 1964, to which 16 States (Portugal not among them) are signatories.

12 The *Inter-American Convention on International Commercial Arbitration*, which was concluded in Panama City on 30 January 1975 and took effect on 16 June 1976, approved for accession by Resolution of the Assembly of the Republic 23/2002; and ratified by Decree of the President of the Republic 21/2002 (published in Diário da República I-A, 79, of 4 April). However, Portugal has not deposited the instrument of accession to this Convention.

13 In force since 2004, a full English translation can be accessed online at: http://www.japaneselawtranslation.go.jp/law/detail/?id=2784&vm=2&re=02

14 In force since 1 September 1995; the full text can be accessed online at: http://english.mofcom.gov.cn/aarticle/policyrelease/internationalpolicy/200705/20070504715852.html.

Zealand[15], Spain[16] and Hong Kong[17], which modified their versions of the Model Law to include confidentiality rules (applicable unless the parties agree otherwise). This has been the case in Portugal, since the entry into force of the *Voluntary Arbitration Law* of 2011[18].

2. *Choice of Law Governing Confidentiality*

The obligations of confidentiality to which parties are subject in international arbitration are generally defined by the law governing their **arbitration agreement**. This is incontestable in cases where *the parties' arbitration agreement expressly provides for the matter of confidentiality*: in these cases, the validity and scope of the confidentiality obligations are almost certainly governed by the **law applicable to the arbitration agreement**. On the other hand, the **parties' implied confidentiality obligations** derive from the arbitration agreement, and so *it is the law governing this agreement that defines the associated and implied confidentiality obligations*.

In many cases, the law that will govern the arbitration agreement will be that of the seat of arbitration, which is particularly appropriate with regard to confidentiality issues relating to arbitral hearings and procedures[19].

---

15 *New Zealand Arbitration Act*, Art. 14 ('an arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that the parties shall not publish, disclose, or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings').

16 Article 24 para. 2, Law 60/2003, of 23 December, on Arbitration ('Arbitrators, parties and arbitration institutions, if any, are obliged to maintain the confidentiality of the information to which they have access in the course of arbitration').

17 *Hong Kong Arbitration Ordinance*, § 18 ('Unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to (a) the arbitral proceedings under the arbitration agreement; or (b) an award made in those arbitral proceedings').

18 Cfr. Art. 30 para. 5 of the Voluntary Arbitration Law (VAL), approved by Law 63/2011, of 14 December ('Arbitrators, parties and, if applicable, entities that promote voluntary arbitrations on an institutionalised basis, are subject to the duty of secrecy concerning all information they may obtain and documents of which they may learn through the arbitration proceedings, without prejudice to the parties' right to make public the procedural acts as necessary for defence of their interests and the duty to report or disclose acts in the proceedings to the relevant authorities, as required by law').

19 Cfr. Born, *International Arbitration: Law and Practice* (2021), 233.

3. Party Autonomy as regards Confidentiality

Despite the silence of most arbitration legislation, legal systems almost uniformly recognise *party autonomy* as regards the confidentiality of international arbitration procedures. This follows from the broader procedural autonomy of the parties, which is recognised in the New York Convention and in more modern arbitration rules. However, an express or implied agreement that an arbitration is confidential is only binding on the parties to that agreement, and not on third parties.

Accordingly, in a way coherent with the general affirmation of autonomy made in the UNCITRAL Model Law, it becomes clear that *the parties' agreement with regard to confidentiality will have effect*[20]. Moreover, judicial rulings on Model Law (and other) jurisdictions likewise assert the *autonomy of the parties with regard to confidentiality in their arbitral proceedings*.

Likewise, rulings issued in jurisdictions that do not follow the Model Law have confirmed the *right of the parties to agree on the confidentiality of the arbitration procedure*.

In one of these decisions (*Esso Australia Resources Ltd v Plowman* [1995] HCA 19; 183 CLR 10; 69 ALJR 404; 128 ALR 391), the court used the following argument to reject arguments in favour of an *implied obligation of confidentiality*: 'If the parties wished to secure the confidentiality of the materials prepared for or used in the arbitration and of the transcripts and notes of evidence given, they could insert a provision to that effect in their arbitration agreement'.

Although the **clauses on confidentiality** contained in the arbitration agreement are only binding between the parties (and not in relation to third parties), even between the parties *there are circumstances where an agreement establishing confidentiality will not be enforceable*, for reasons of public policy (for example, when there are obligations to report securities).

As with other contractual provisions, express confidentiality clauses contained in arbitration agreements may take several **forms**. A representative example of a confidentiality clause related to arbitration is that presented by Gary Born[21]:

> 'The parties to any arbitration under this Article [X] shall keep the arbitration confidential and shall not disclose to any person, other than

20 V. *Report of the Secretary-General: possible features of a model law on international commercial arbitration*, XII Y.B. UNCITRAL 75, 90 (1981) (confidentiality 'may be left to the agreement of the parties or the arbitration rules chosen by the parties').

21 Born, *International Arbitration: Law and Practice* (2021), 234.

those necessary to the proceedings, the existence of the arbitration, any information submitted during the arbitration, any documents submitted in connection with it, any oral submissions or testimony, transcripts, or any award unless disclosure is required by law or is necessary for permissible court proceedings, such as proceedings to recognize or enforce an award'.

The **content** of the *confidentiality obligation* in each specific case must be '*evaluated having regard to the surrounding circumstances in which this confidentiality agreement was made and the basic principles and purpose of arbitration*'[22].

An additional question that it falls to the courts to resolve is *whether a specific confidentiality clause is intended to be* ***exhaustive****, thereby precluding the operation of the implied obligation*. According to Mark Darian-Smith and Varun Ghosh[23], the **general principles of the interpretation of contracts** apply here, and so *a detailed clause will likely be interpreted as encompassing everything*.

Although an express confidentiality clause constitutes the primary source and the scope of the respective obligation, the courts continue to be relevant in determining the content of those obligations.

What is more, confidentiality clauses may be sufficient to exclude facilitatory legislative provisions, but *the parties may not exclude mandatory legal requirements*. Indeed, it is unlikely that the parties' agreement could preclude a public interest objection[24].

III. Confidentiality under Institutional Arbitration Rules

In the same way as in **national arbitration laws**, the treatment of confidentiality in **institutional rules** is likewise diverse. The arbitration rules of many institutions contain relatively lengthy provisions on confidentiality.

For example, Article 39 para. 1 of the 2016 Rules of the Singapore International Arbitration Centre (SIAC) lays down that:

---

22 Cf. *Associated Electric and Gas Insurance Services* [2003] UKPC 11; [2003] 1 W.L.R. 1041 at [7], per Lord Hobhouse.

23 Darian-Smith and Ghosh 'The Fruit of the Arbitration Tree: Confidentiality in International Arbitration' (2015) 81-4 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 360 (361).

24 Darian-Smith and Ghosh 'The Fruit of the Arbitration Tree: Confidentiality in International Arbitration' (2015) 81-4 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 360.

> Unless otherwise agreed by the parties, a party and any arbitrator, including any Emergency Arbitrator, and any person appointed by the Tribunal, including any administrative secretary and any expert, shall at all times treat all matters relating to the proceedings and the Award as confidential. The discussions and deliberations of the Tribunal shall be confidential.
>
> Unless the parties expressly agree in writing to the contrary, the parties undertake to keep confidential all awards and orders as well as all materials submitted by another party in the framework of the arbitral proceedings not already in the public domain, except and to the extent that a disclosure may be required of a party by a legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a judicial authority… .

Other institutional rules, in particular those of the London Court of International Arbitration (LCIA)[25], the Stockholm Chamber of Commerce Arbitration (SCC)[26] and the Japan Commercial Arbitration Association (JCAA)[27], contain similar provisions, prohibiting the parties (or arbitrators) from disclosing materials from the arbitration to third parties.

The 2020 Arbitration Rules of the World Intellectual Property Organization (WIPO)[28] contain one of the most extensive sets of such confiden-

---

25 Cf. Art. 30 para. 1 of the 2020 *LCIA Rules*: 'The parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority. The parties shall seek the same undertaking of confidentiality from all those that it involves in the arbitration, including but not limited to any authorised representative, witness of fact, expert or service provider'.

26 Cf. Art. 3 of the 2017 *SCC Rules*: 'Unless otherwise agreed by the parties, the SCC, the Arbitral Tribunal and any administrative secretary of the Arbitral Tribunal shall maintain the confidentiality of the arbitration and the award'.

27 Cf. Rule 42 para. 2 of the 2019 *JCAA Rules*: 'The arbitrators, the JCAA (including its directors, officers, employees, and other staff), the Parties, their counsel and assistants, and other persons involved in the arbitral proceedings shall not disclose facts related to or learned through the arbitral proceedings and shall not express any views as to such facts, except where disclosure is required by law or in court proceedings, or based on any other justifiable grounds'.

28 Can be accessed online at: https://www.wipo.int/amc/en/arbitration/rules/index.html.

tiality rules: Articles 75 to 78 were tailored to *intellectual property disputes*, where confidentiality concerns are particularly acute.

Some sets of institutional rules contain very limited confidentiality clauses, applicable only to *specific aspects of the arbitration proceedings*.

The UNCITRAL Rules *exclude from the hearings anyone who is not a party, unless otherwise agreed*[29], and *prohibit the disclosure of awards, in the absence of agreement to the contrary*[30], although they leave other aspects of confidentiality unregulated.

In contrast, the 2021 version of the *ICC Arbitration Rules* takes a rather different approach, addressing the general topic of confidentiality and *authorising ICC arbitral tribunals to issue confidentiality orders tailored to the circumstances of specific cases*[31] [32]. Despite the limited scope of the confidentiality provisions in the ICC Rules, courts general conclude that *ICC arbitrations are implicitly confidential*.

The *IBA Rules on the Taking of Evidence* (2020 version) contain a limited confidentiality clause, requiring that the documents presented by a Party or non-Party in the arbitration to be 'kept secret by the Arbitral Tribunal and by the other Parties, and shall be used only in connection with the arbitration'[33].

---

29 Cf. Art. 28(3): 'Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses, including expert witnesses, during the testimony of such other witnesses, except that a witness, including an expert witness, who is a party to the arbitration shall not, in principle, be asked to retire.'

30 Cf. Art. 34 para. 5: 'An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.'

31 Art. 22 para. 3 of the *ICC Arbitration Rules* (2010 version) lays down that: 'Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.'

32 If the parties fail to reach agreement on the confidentiality of the arbitration, a party may request the arbitral tribunal to issue a **procedural order** to protect information it deems confidential. A party may have legitimate and comprehensible reasons for keeping information disclosed during an arbitration out of third party hands, especially if that information relates to commercial secrets. Article 22 para. 3 of the *ICC Arbitration Rules* confers on the arbitral tribunal the freedom to order measures to protect commercial secrets and other confidential information. The arbitral tribunal may seek, as far as possible, to obtain unanimous agreement.

33 Cfr. Art. 3 para. 13: 'Any Document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confi-

In contrast, the more recent *Prague Rules on the Efficient Conduct of Proceedings in International Arbitration* contain a comparatively broader confidentiality clause[34].

In addition, in certain specialised market sectors (such as in shipping and sport), the institutional rules provide for the publication of arbitral awards, unless the parties have agreed otherwise[35] [36]. Such publication is intended to confer on awards the authority of a precedent, serving as guidance for future disputes.

IV. Implied Confidentiality Obligations

In many cases, the parties do not include **express confidentiality clauses** in their arbitration agreement. In these cases, national courts have reached different conclusions, as regards the confidentiality (or privacy) of international commercial arbitrations.

Particularly in recent years, most courts, especially in the main centres of arbitration, have recognised relatively far-reaching *implied obligations of confidentiality* in the mere existence of an arbitration agreement.

Like *express confidentiality agreements*, *implied confidentiality obligations*are binding only on the parties to the arbitration agreement.

---

dential by the Arbitral Tribunal and the other Parties, and shall be used only in connection with the arbitration. This requirement shall apply except and to the extent that disclosure may be required of a Party to fulfil a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority. The Arbitral Tribunal may issue orders to set forth the terms of this confidentiality. This requirement shall be without prejudice to all other obligations of confidentiality in the arbitration.'

34 Cfr. Art. 4 para. 8: 'Any document submitted or produced by a party in the arbitration and not otherwise in the public domain shall be kept confidential by the arbitral tribunal and the other party, and may only be used in connection with that arbitration, save where and to the extent that disclosure may be required of a party by the applicable law.'

35 Cfr. para. 3 Section I *SMA* (*Society of Maritime Arbitrators*) *Arbitration Rules*: 'Unless stipulated in advance to the contrary, the parties, by consenting to these Rules, agree that the Award issued may be published by the Society of Maritime Arbitrators, Inc. and/or its correspondents.'

36 Cfr. Rule 59 CAS (*Court of Arbitration for Sport*) Rules: 'The award, a summary and/or a press release setting forth the results of the proceedings shall be made public by CAS, unless both parties agree that they should remain confidential. In any event, the other elements of the case record shall remain confidential.'

The **English courts** have repeatedly found that *arbitration agreements impose implied confidentiality obligations on the parties*[37].

For its part, it is understood that *the privacy of arbitral proceedings entails the confidentiality of that which is disclosed in that procedure to third parties*, as an implied obligation of the arbitration agreement.

Subsequent English rulings have asserted this *implied obligation of confidentiality*, justifying it as *a general principle implied by law in all arbitration agreements*, although they set out standards concerning the nature of confidentiality obligations for specific categories of materials. In those rulings, the English courts laid stress on the confidentiality of non-public materials presented in arbitral proceedings (such as summaries, applications) or produced in the procedure (such as documents presented in disclosure), whilst at the same time permitting freer disclosure of arbitral awards in order to protect the legal rights of a party[38].

The **French courts** have also ruled that *an implied confidentiality obligation exists in relation to arbitral procedures and awards*.

A French court has ruled that *the filing, by a party, of an action for annulment of an award rendered in London, for the purposes of disclosure of the decision, was a breach of the parties' implied duties of confidentiality*. In this case the court noted that it is 'inherent in the very nature of arbitral proceedings that they guarantee the highest degree of discretion in the resolution of private disputes, as the two parties agreed'[39]. This decision appears not even to permit the limited exceptions recognised by English law.

Implied confidentiality obligations are generally subject to various **exceptions** under national legislation. These include: *i)* exceptions for the use of material connected with the arbitration *in order to enforce or protect a*

---

37 In *Hassneh Insurance Co of Israel v. Stuart J Mew*, [1993], *Insurance Co v. Lloyd's Syndicate* [1995] and *Ali Shipping Corporation v. Shipyard Trogir* [1998] the courts reasserted the existence of an **implied confidentiality obligation**, but recognised that it was subject to **exceptions**. In *Hassneh Insurance Co. of Israel v. Stuart J Mew* [1993], the English High Court ruled that *the award is presumed to be confidential*, but is also 'potentially a public document for the purposes of oversight by the courts or enforcement therein' and may therefore be disclosed, if reasonably necessary to protect the legal rights of a party; the statements, pleadings and evidence are presumed confidential.

38 Cfr. the awards rendered in *Hassneh Insurance Co of Israel v. Stuart J Mew*, [1993], *Insurance Co v. Lloyd' s Syndicate* [1995] and *Ali Shipping Corporation v. Shipyard Trogir* [1998].

39 Cf. Paris *Cour d'Appel*, 18 February 1986, *Aïta v. Ojjeh* (in *Revue de l'Arbitrage*, 1986-4, 583 – 584).

legal right (for instance, to seek annulment, confirmation or recognition of an arbitral award); *ii)* exceptions for *materials that have already entered the public domain*; and also *iii)* exceptions *in order to comply with disclosure obligations imposed by mandatory laws* (for example, reporting requirements in relation to securities).

The least controversial **exception** to the obligation of confidentiality is **consent**: if the parties to the original arbitration consent to disclosure, it is of course permitted.

In addition, courts have ruled that *if the parties to the previous arbitration and in the subsequent arbitration are the same*, the use of materials from the previous arbitration does not conflict with the obligation of confidentiality[40]. In those cases, confidentiality is maintained because the parties are the same and the proceedings are private. However, this exception does not apply to subsequent proceedings involving a company controlled by a party or that controls a party, because these are distinct legal entities[41].

There are **three important categories of exceptions** that apply to the use of materials in subsequent proceedings: *i)* if the disclosure is made *in accordance with a court order or mandatory legal proceeding*, it is permitted; *ii)* if the use of the materials *is reasonable necessary for the exercise of legal rights*[42], then it will not collide with the confidentiality obligation; *iii)* its use will be permitted *if in the public interest or the interest of justice*[43] [44] [45].

---

40 Cf. *Associated Electric and Gas Insurance Services* [2003] UKPC 11; [2003] 1 W.L.R. 1041 at [8], [11], per Lord Hobhouse.

41 Cfr. *Ali Shipping Corp [1999] 1 W.L.R. 314* at 328–329, per Potter LJ.

42 Although, at first sight, this exception appears rather broad and flexible, the courts have adopted a narrow interpretation of the 'reasonably necessary' requirement. The materials must be 'unavoidably necessary for protection of the rights of the parties', and not 'merely helpful', in order to comply with the requirement: cfr. *Insurance Co v Lloyd's Syndicate* [1994] C.L.C. 1303 (1307), per Colman J.

43 Darian-Smith and Ghosh 'The Fruit of the Arbitration Tree: Confidentiality in International Arbitration' (2015) 81-4 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 360 (362).

44 The 'interest of justice' exception is intended to ensure that parties to the arbitration cannot 'seek to use the cloak of confidentiality with a view to misleading or potentially misleading foreign courts' (cf. *Emmott [2008] EWCA Civ 184; [2008] Bus. L.R. 1361 at [28], per Lawrence Collins LJ*). In such circumstances, disclosure in the subsequent proceedings cures the damage. Whilst there are authorities that suggest that this exception is limited to witnesses that provide inconsistent evidence in different proceedings, there is no reason in principle for this exception not to apply to situations where confidentiality is used for improper ends (cfr., to this effect, Darian-Smith and Ghosh 'The Fruit of the Arbitration Tree: Confi-

In contrast, rulings in certain jurisdictions have rejected invocation of *implied confidentiality obligations*. For example, in a widely discussed judgment of 1995[46], an Australian court ruled that arbitration proceedings in Australia were 'private', but that this did not mean they were 'confidential'. The court also ruled that, if the parties wished their arbitrations to be confidential, they were free to agree on *express confidentiality obligations* (and that such agreement would in principle be respected). However, subsequent Australian legislation overruled this decision, establishing a confidentiality obligation in international arbitrations seated in Australia (unless otherwise agreed)[47].

In the **United States of America**, some lower courts have also been reluctant to accept arguments that *arbitral proceedings are implicitly confidential*, although they consider that express confidentiality agreements are binding and effective. For example, a US court rejected the objections of a party concerning the submission of the pleadings, documentary evidence and transcriptions of an ICC arbitration disclosed on the request

---

dentiality in International Arbitration' (2015) 81-4 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 360 (363).

45 The *public interest* exception is broader, but less clearly defined. Although the core element of the exception refers to matters of public importance that entail the exercise of public power or the activities of regulatory authorities, it was extended to situations where disclosure is necessary for the court or subsequent court to reach an adequate understanding of the issue (cfr. *Emmott [2008] EWCA Civ 184; [2008] Bus. L.R. 1361 at [130], 1393 at [132], per Thomas LJ*). Although the public interest exception is potentially very broad, it will probably be difficult to establish in practice, except in cases that involve the government, statutory corporations or matters of truly significant public interest: (cfr., to this effect, Darian-Smith and Ghosh 'The Fruit of the Arbitration Tree: Confidentiality in International Arbitration' (2015) 81-4 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 360 (363)).

46 This is the Judgment of the Australian High Court in *Esso Australia Res. Ltd v. Plowman*, [1995] HCA 19, ¶35, which refused to recognise the existence of an implied confidentiality obligation, on the grounds that *confidentiality was not an 'essential attribute' of arbitrations seated in Australia*.

47 Since this ruling in the *Esso Australia* case, legislation has been adopted in Australian on confidentiality, both in domestic arbitration (for instance, *Australian Civil Law and Justice* (*Omnibus Amendments*) *Act*, 2015) and in international arbitration (for example, *2011 Amendment to the Australian International Arbitration Act*). In 2015, the Australian International Arbitration Act was once again amended, to establish that the previous confidentiality provisions in the Act would be applied by 'default', applying automatically to international arbitrations seated in Australia, unless the parties affirmatively agree to exclude them.

of the other party in litigation in the US[48]. Other US court rulings have rejected claims of implied confidentiality obligations in connection with arbitration proceedings, normally in cases where third parties sought the disclosure of materials connected with arbitration[49].

In contrast, more recent decisions by US courts have reached the opposite conclusion, recognising the *presumably confidential character of arbitration proceedings*, even in the absence of express confidentiality clauses[50].

As with express confidentiality agreements, *implied confidentiality obligationsare binding only on the parties* to the arbitration agreement.

V. Scope and Limits of Confidentiality Obligations

Both **express** and **implied** confidentiality obligations are *binding on the parties to arbitration agreements*, but generally *not on third parties*.

It is presumed that the Parties subject to confidentiality obligations are not permitted to disclose materials related to the arbitration to third parties or the public, unless an exception to the confidentiality obligation applies (for example, if disclosure is necessary to enforce or protect a legal right).

However, confidentiality obligations are not, in principle, binding on third parties. As a consequence, third parties not involved in the arbitration agreement may seek disclosure of materials related to arbitration and, normally, they will not be prevented from obtaining access to those

48 Cf. *United States District Court for the District of Delaware · Civ. A. No. 87-190-JLL*, 118 F.R.D., 7 January 1988 346, in *United States v. Panhandle Eastern Corp*., 118 F.R.D. 346 (1988).

49 Cf., for example, *Contship ContainerLines, Ltd v. PPG Indus., Inc*., 2003 WL 1948807 (S.D.N.Y.) (granting the requested disclosure for document used in the arbitration based in London; recognising the confidentiality existing under English law, but concluding that disclosure would be permitted under English law); *Caringal v. Karteria Shipping, Ltd*, 2001 WL 874705 (E.D. La.).

50 Cf. *Del. Coal. for Open Gov't, Inc. v. Strine - 733 F.3d 510 (3d Cir. 2013)*. In this case, the court ruled that the confidentiality of arbitration proceedings under the aegis of the government of the State of Delaware violated the right of public access under the First Amendment because both the venue and the proceedings of arbitrations under the aegis of the government of Delaware were historically open to the press and the general public, the benefits of access were significant, as it would ensure accountability and permit the public to retain its faith in Delaware's judicial system, and the drawbacks of openness were relatively small.

materials by confidentiality obligations existing between the parties to arbitration agreements.

Careful review of court rulings that express reluctance as to the existence of implied confidentiality obligations shows that nearly all these decisions involve disclosure requests from third parties, not bound by the arbitration agreement; the comments set out in these decisions on the absence of implied confidentiality obligations are therefore typically *obiter dicta*, and not essential to the courts' decisions. There may be circumstances where the applicable rules on disclosure and immunity protect materials related to the arbitration from disclosure to third parties, but in order to establish that privilege, this must be demonstrated separately (which is often difficult)[51].

VI. Secrecy of the Arbitrators' Deliberations

Under the laws of most countries and institutional rules, the **deliberations** of the arbitral tribunal are treated as *confidential*[52].

The same confidentiality obligations are imposed by **ethical standards and professional guidelines** for international arbitrators. Unlike most other types of confidentiality obligations in international arbitration, *the deliberations of the arbitrators are generally secret*, and third parties are barred from obtaining disclosure of these materials in keeping with the disclosure rules generally applicable[53].

Even in the absence of express provisions in institutional rules (and in national legislation), *the confidentiality of the arbitral tribunal's deliberations is an implied obligation, imposed as much on arbitrators as on the other participants in the arbitration proceedings*[54].

The confidentiality of arbitral deliberations is fundamental to ensure the jurisdictional character and integrity of the arbitration proceedings. This confidentiality is intended to ensure that each arbitrator may exercise

---

51 Cfr. Born, *International Arbitration: Law and Practice* (2021), 239.

52 See, for example, Art. 1479, French Civil Code; *Cour d'Appel de Paris*, 9 October 2008, in *SAS Merial v. Klocke*, published in *Revue de l'Arbitrage*, Volume 2009, 352; *English Court of Appeal* in *AT&T Corp. v. Saudi Cable Co.* [2000] 2 Lloyd's Rep. 127, 137. See also Art. 30 para. 2 LCIA (*London Court of International Arbitration*) Rules 2020; Art. 44 para. 2 *Swiss Rules of International Arbitration* (*Swiss Rules*), 2012 version.

53 Cfr. Born, *International Arbitration: Law and Practice* (2021), 239.

54 Cfr. Born, *International Commercial Arbitration*, (2021), 3037.

his or her independent judgment in a collegial setting. free from any external influence[55].

The confidentiality of the deliberations of the arbitral tribunal has features that differ from the confidentiality of the arbitration proceedings. Whilst the latter confidentiality obligations are addressed principally to the parties to the arbitration and normally have limited consequences for those parties, *the confidentiality of the deliberations of the arbitral tribunal is addressed principally tothe arbitrators*, but also has consequences for both parties to the arbitration and non-parties: not only are the arbitrators prohibited from disclosing their deliberations to persons outside the tribunal but both parties and non-parties to the arbitration are prevented from obtaining access to the deliberations. Accordingly, *neither parties nor non-parties may obtain the disclosure of information on the tribunal's deliberations*, including in relation to proceedings to have the award set aside or recognised. 'The deliberations of the arbitrators are sacrosanct'[56].

Although this question is rarely expressly contemplated in the applicable institutional rules or legislation, it is understood that the confidentiality of the arbitrators' deliberations extends to *drafts of the award*, *internal communications concerning the resolution of the case* or *comments on draft awards* and *the content of oral deliberations*[57].

VII. Privacy and Confidentiality of Arbitration Hearings

Most institutional arbitration rules also expressly provide for the *presumed privacy of arbitration hearings*, in international commercial arbitrations. The 2013 UNCITRAL Rules are representative of this general tendency, establishing that '[hearings] shall be held in camera unless the parties agree otherwise'[58].

These provisions generally require the exclusion of third parties from arbitral hearings (in other words, for the 'privacy' of hearings), but do not expressly provide for the confidentiality of hearings.

---

55 Cfr. Born, *International Commercial Arbitration*, *ibidem*.
56 Cfr. Born, *International Commercial Arbitration*, *ibidem*.
57 Cfr. Born, *International Commercial Arbitration*, p. 3038.
58 Cfr. Art. 28 para. 3: 'Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses, including expert witnesses, during the testimony of such other witnesses, except that a witness, including an expert witness, who is a party to the arbitration shall not, in principle, be asked to retire.'

In contrast, the laws of most countries are *silent on the presence of third parties at arbitral hearings*.

For example, the UNCITRAL Model Law, the Swiss *Federal Act on Private International Law* and the US *Federal Arbitration Act (1925)* (FAA) *make no provision on the confidentiality of arbitral hearings*. On the other hand, some national arbitration laws provide for the confidentiality of judicial proceedings related to arbitration proceedings.

In practice, it is unknown for third parties, let alone the public or the press, to be present at hearings in international commercial arbitrations. This stands in contrast to the treatment of hearings in some investor-State and State-State settings, where the hearings may be open to the public and, in some cases, even broadcast live to the public, online.

C. *Confidentiality in the Portuguese Voluntary Arbitration Law*

In Portugal, the Voluntary Arbitration Law (VAL), of 14 December 2011, enshrines (Art. 30 para. 5) the existence of a ***duty of secrecy*** 'concerning all information they obtain and documents of which they learn in the course of the arbitration procedure', which **applies to** *the arbitrators*, *the parties* and *organisations that promote arbitration on an institutional basis*, 'without prejudice to the right of the parties to make public the procedural acts necessary for the defence of their interests and of the duty to communicate or disclose procedural acts to the competent authorities, as may be required by law'.

In terms of those **subject to this duty**, António Menezes Cordeiro[59] advocates a broad interpretation of this rule, imposing the duty of secrecy on 'all agents who have contact with an arbitral procedure, including legal counsel and their auxiliary staff, the secretary, experts, translators, sound technicians, supporting personnel and the witnesses themselves', on pain of allowing chinks in the protective armour through which secrecy could be breached[60].

---

59 Cordeiro, *Tratado da Arbitragem* (2016), 307.

60 Oliveira (coord.), *Lei da Arbitragem Voluntária Comentada* (2013), 388, expresses surprise at the fact that the VAL restricts the subjective scope of the duty of secrecy to the arbitrators, parties and organisation promoting voluntary arbitrations on an institutionalised basis 'and fails, without apparent justification, to include the administrative personnel assisting the tribunal and some of the other characters in the arbitral story, such as experts (not to mention witnesses), although these

As regards the **object** of this duty of secrecy, although the letter of the law circumscribes it to the *information* and *documents* of which knowledge is acquired in the course of the arbitration procedure, António Menezes Cordeiro[61] likewise maintains that it should be broadened so as to include *the actual existence of proceedings*, the *basic facts concerning it*, *all evidence*, any *procedural issues* raised during proceedings and the *final award*, in order to prevent the possibility of disclosure of 'incidental' matters from which knowledge of essential matters may be gleaned.

The provision in question introduces two important **exceptions** to the duty of secrecy: i) *procedural acts necessary for defence of the parties' rights*; ii) *communication or disclosure to the competent authorities of procedural acts, when the law requires they be reported.*

In relation to the **first exception**, it does not extent to arbitrators and arbitration institutions: only the **parties**, on the terms described, enjoy the possibility of not complying with the duty of confidentiality. Arbitrators and arbitration institutions must always comply with the duty of confidentiality[62] [63].

Even so, António Menezes Cordeiro criticises the formulation used in the legal text, because the wording of this exception to the duty of secrecy, permitting the parties *to make public the procedural acts necessary for defence of their rights*, leaves it to the discretion of the parties to define what they understand as 'their rights' and to establish how they see fit to defend them. This author therefore considers that a **narrow interpretation** is needed of the two **exceptions** established in the legal text to the duty of confidentiality, because 'secrecy must be taken seriously and can only be lifted on the precise terms of the law'[64] [65].

The **second exception** to the duty of secrecy envisaged in Article 30, para. 5 VAL is to allow for legal obligations to report or disclose procedural acts in connection with the fight against corruption or money laundering.

---

categories of persons are encompassed by the laws concerning the protection of secrets'.

61 *Ibidem*.

62 Cfr., expressly to this effect, Barrocas, *Lei da Arbitragem Comentada* (2013), 123.

63 Cfr., also to the effect that 'non-parties may not avail themselves of this exception', Cordeiro *Tratado da Arbitragem* (2016), 307.

64 Cordeiro *Tratado da Arbitragem* (2016), 307-308.

65 This **narrow interpretation** of the first of the exceptions to the duty of confidentiality established in the 2nd part of para. 5 of Art. 30 VAL, advocated by António Menezes Cordeiro, draws applause from Monteiro et al., *Manual de Arbitragem* (2019), 295, fn. 1301.

By operation of the provisions of para. 6 of Article 30 VAL, **publication of the award** and other rulings of the arbitral tribunal does not breach the duty of confidentiality enshrined in para. 5, provided details identifying the parties are redacted.

Even so, either of the parties may object to such publication, without needing to state any grounds.

The purpose of publication of arbitral awards is academic: it is to allow them to be examined and commented on by scholars, in order to form and build up a body of 'arbitral case law' that is as coherent as possible[66].

Consequences of breach of the duty of secrecy

The VAL does not regulate the consequences of breach of the duty of secrecy, meaning that the solution to this issue must be sought in the general law[67].

A consensus view exists that breach of the duty of confidentiality results in an *obligation to pay compensation* under the general terms of the law, both by the arbitrators to the parties and by the latter to another or other parties[68] [69] [70].

Bibliography

Manuel Barrocas, *Lei da Arbitragem Comentada* (Almedina, Coimbra, 2013).

Gary Born, *International Arbitration: Law and Practice* (3rd edn, Kluwer Law International, The Hague, 2021).

66 Mendes, *Lei da Arbitragem Voluntária Anotada* (2019), 115.

67 Cfr., to this effect, Oliveira (coord.), *Lei da Arbitragem Voluntária Comentada* (2013), 389.

68 Barrocas, *Lei da Arbitragem Comentada* (2013), 123.

69 Cfr., to the effect that 'breach of the duty of secrecy imposed on the various persons involved in arbitrations by Art. 30 para. 5 VAL is the source not only of tortious civil liability (which constitutes a more expeditious means of penalising the breach of that duty than that which would result from its being provided for in the arbitration agreement) but also of criminal liability for some of those persons, by operation of Articles 195, 196, 383 and 386 para. 1, c), of the Penal Code', Caramelo, 'Da Condução do Processo Arbitral / Comentário aos arts. 30.º a 38.º da Lei da Arbitragem Voluntária' (2013) Ano 73-II/III *Revista da Ordem dos Advogados*, 669.

70 Cfr., also to the effect that *unauthorised disclosure of procedural acts and information/documents relating to the arbitration may give rise to compensation for damages suffered as a result of disclosure of confidential information/documents*, Oliveira (coord.), *Lei da Arbitragem Voluntária Comentada* (2013), 389.

Gary Born, *International Commercial Arbitration*, (3rd edn, Kluwer Law International, The Hague, 2021).

António Caramelo, 'Da Condução do Processo Arbitral / Comentário aos arts. 30.º a 38.º da Lei da Arbitragem Voluntária' (2013) Ano 73-II/III *Revista da Ordem dos Advogados*, 669.

António Cordeiro, *Tratado da Arbitragem*, (Almedina, Coimbra, 2016).

Mark Darian-Smith and Varun Ghosh, 'The Fruit of the Arbitration Tree: Confidentiality in International Arbitration' (2015) 81-4 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 360.

Yves Fortier, 'The Occasional Unwarranted Assumption of Confidentiality' (1999) 15 *Arb. Int'l*, 131.

José Júdice, 'Confidencialidade e Transparência em Arbitragens de Direito Público', in Marcelo de Sousa and Eduardo Pinto (eds.), *Liber Amicorum Fausto de Quadros - Volume II*, (Almedina, Coimbra, 20169, 87.

Armindo Mendes, *Lei da Arbitragem Voluntária Anotada* (4th edn, Almedina, Coimbra, 2019).

António Monteiro, Artur da Silva and Daniela Mirante, *Manual de Arbitragem* (Almedina, Coimbra, 2019).

Mário Oliveira (coord.), *Lei da Arbitragem Voluntária Comentada* (Almedina, Coimbra, 2013).

Nayiber Pozo, 'Confidencialidad, privacidad y transparencia en el arbitraje internacional' (2021) 40 enero-junio *Revista de Derecho Privado* (Universidad Externado de Colombia), 465.

UNCITRAL, *Report of the Secretary-General: possible features of a model law on international commercial arbitration* (XII Y.B. UNCITRAL, 1981), 75 (90).