

# SOLVING THE ARBITRAL CONFIDENTIALITY CONUNDRUM IN INTERNATIONAL ARBITRATION

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## INTRODUCTION

One of the hallmarks of private arbitration is the freedom of the parties to formulate their own rules and procedures for settling disputes.<sup>1</sup> But just as the free market sometimes “fails” (by requiring limits on the freedom of market players), so too may defects in the machinery of international arbitration cry out for a bit of enlightened intervention.<sup>2</sup>

The confidentiality of international arbitration proceedings and awards is one area with a crying need for a corrective hand. At one time, most participants simply assumed that they were forbidden to disclose what went on within the walls of a private commercial arbitration. Making such an assumption would be foolhardy today, when the scope of arbitral confidentiality is “far from a settled issue.”<sup>3</sup> A series of recent

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<sup>1</sup> See Jacques Werner, *International Commercial Arbitrators: From Merchant to Academic to Skilled Professional*, 4(3) DISP. RESOL. MAG., 22 (1998) (“international commercial arbitration is a market”).

<sup>2</sup> See Oliver E. Williamson, *Dominant Firms and the Monopoly Problem: Market Failure Considerations*, 85 HARV. L. REV. 1512 (1972) (government intervention may be justified to correct market failures); ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 45-49 (1988).

<sup>3</sup> Fulvio Fracassi, *Confidentiality and NAFTA Chapter 11 Arbitrations*, 2 CHI. J. INT’L L. 213, 213 (2001). See generally Alexis C. Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 AM. U. INT’L L. REV. 969 (2001).

pronouncements from the courts of several nations has exposed a widening split on the existence of such an implied duty of confidentiality. This divergence of authority has generated considerable uncertainty about how much privacy participants in supposedly private arbitrations can expect.

Confidentiality may not be much of a problem where the contractual arbitration clause at issue includes confidentiality protections. But pre-dispute arbitration agreements are often silent on the question of confidentiality. The parties, in their haste to seal the deal, often do not think that far ahead. If they do think about the confidentiality issue, they may be unsure what their position would be in the context of a particular dispute and its arbitral resolution. Parties often incorporate one of the “generic” arbitration clauses of the type recommended by arbitral institutions, which rarely say anything about confidentiality. Once a dispute develops, parties have trouble agreeing on anything, much less on the level of confidentiality to be accorded their often contentious proceedings.

The problems posed by inconsistent confidentiality standards are significant. When resolving disputes, businesspersons often crave privacy or at least require a reliable prediction of how much or how little privacy they are likely to obtain. Continuing uncertainty in this area can breed only distrust of the arbitral process. The significant obstacles to solving this problem will not be easy to surmount. The purpose of this article is to propose a solution in the form of a default rule that most participants in the arbitral process are likely to accept.

After summarizing several countries' conflicting confidentiality standards, this article considers the role of institutional rules, the impact of the conflicting standards on contracting parties, and obstacles to overcoming the conflicts. Finally, the article proposes a uniform default rule and offers some suggestions on how to achieve it.

### **I. SOME COUNTRIES REJECT ANY IMPLIED DUTY OF CONFIDENTIALITY**

A recent decision of the Swedish Supreme Court, *Bulgarian Foreign Trade Bank Ltd. v. AI Trade Finance Inc.*,<sup>4</sup> which held that there is no implied duty of confidentiality in private arbitrations, has received widespread attention because of its dramatic circumstances. In an arbitration initiated by a finance company against a Bulgarian bank and sited in Stockholm, the bank argued that it was not bound by an arbitration clause in a contract to which it was not a party. The arbitrators' ruling that the bank was bound by the clause was published in *Mealey's International Arbitration Report*, which apparently received it from counsel for the finance company. When it learned of the publication, the finance company claimed that the award was forfeited due to the bank's violation of the duty of confidentiality under both the applicable arbitration rules of the United Nations Economic Commission for Europe (UN-ECE) and Swedish law.

The Swedish Supreme Court held that the UN-ECE rules do not forbid disclosure of the outcome of an arbitration proceeding and that Swedish law does not make arbitration proceedings secret unless the parties contract for secrecy (and not even then if

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<sup>4</sup> Case No. T 1881-99 (Swedish Sup. Ct. 27 Oct. 2000).

a party seeking to enforce an award is legally required to produce a copy of it).<sup>5</sup> Accordingly, there are only two ways to ensure the confidentiality of arbitration proceedings under Swedish law – expressly contract for it or adopt arbitration rules that expressly provide for it.

Sweden was not the first country to deny any implied duty of confidentiality. In a decision that “crashed like a giant wave – a veritable Australian tsunami – on the shores of jurisdictions around the world,”<sup>6</sup> the High Court of Australia held in *Esso Australia Res. Ltd. v. Plowman*<sup>7</sup> that confidentiality, unlike privacy, is not “an essential attribute” of commercial arbitration. The Court therefore ruled that the Minister for Energy and Minerals, who was not a party to the arbitration, was entitled to discovery of arbitration documents and information.<sup>8</sup>

In the United States, where no federal court above the district court level has ruled on this issue, the handful of district court decisions reject any implied duty of confidentiality. In the leading case, *United States v. Panhandle E. Corp.*,<sup>9</sup> the federal government sought to have Panhandle, a U.S. company, produce documents from an International Chamber of Commerce (ICC) arbitration between Panhandle’s subsidiary and the Algerian state oil company. Panhandle sought to block discovery, arguing that

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<sup>5</sup> *Id.*

<sup>6</sup> L. Yves Fortier, *The Occasionally Unwarranted Assumption of Confidentiality*, 15 ARB. INT’L 131, 134 (1999).

<sup>7</sup> (1995) 128 A.L.R 391, 183 C.L.R. 10 (Austl.).

<sup>8</sup> *Id.*

<sup>9</sup> 118 F.R.D. 346 (D. Del. 1988).

arbitration is confidential in nature and that disclosure would frustrate the parties' expectations. The court held that there is no inherent duty of confidentiality unless the parties contract for it, and that the ICC Rules place no obligation of confidentiality on arbitrating parties. It therefore granted the government's request to compel production of the documents.<sup>10</sup>

## II. SOME COUNTRIES RECOGNIZE AN IMPLIED DUTY OF CONFIDENTIALITY

English law holds that arbitral parties are subject to an implied duty of confidentiality, a position made particularly significant by London's role as a situs of many international arbitrations. In the leading case of *Ali Shipping Corp. v. Shipyard Trogir*,<sup>11</sup> an English court held that such an obligation is implied in every arbitration agreement as "an essential corollary of the privacy of arbitration proceedings."<sup>12</sup> That obligation applies not only to the outcome, but to all "pleadings, written submissions, and the proofs of witnesses as well as transcripts and notes of the evidence given in the arbitration."<sup>13</sup>

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<sup>10</sup> *Id.* at 349-50; *see* American Cent. E. Tex. Gas Co. v. Union Pac. Res. Group, 2000 WL 33176064, at \*1 (E.D. Tex. July 27, 2000) (denying preliminary injunction to seal an arbitration award in which the movant was found liable for antitrust violations because "the public has a strong countervailing interest in knowing the results of arbitration proceedings that involve allegations of anticompetitive and monopolistic conduct"); *Caringal v. Karteria Shipping, Ltd.*, 2001 WL 874705, at \*1 (E.D. La. Jan. 24, 2001) (ordering production of documents from a London arbitration).

<sup>11</sup> 2 All E.R., 1 Lloyd's Rep. 643 (Eng. Ct. App. 1998).

<sup>12</sup> *Id.* at 651.

<sup>13</sup> *Id.*; *see* MICHAEL MUSTILL & STEPHEN BOYD, *THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND* 303-04 (2d ed. 1989) (it is "implicit in the nature of private arbitrations that the proceedings are confidential, and that strangers shall be excluded from the hearing.").

To be sure, English law recognizes a number of exceptions to the general duty of confidentiality, which led the drafters of the English Arbitration Act of 1996 to omit any express reference to confidentiality in the new statute. Disclosure is permitted not only by the consent of the parties, but also in confirmation and enforcement proceedings, by court order in a later action, by leave of court where “reasonably necessary” to protect or pursue a legal right, and where disclosure would be “in the interests of justice.”<sup>14</sup> English courts construe these exceptions narrowly. For example, although “the interests of justice” may appear sufficiently open-ended to swallow the general prohibition, courts limit it to situations where the need is pressing, such as where an expert witness takes a position completely opposed to the expert’s position in a prior arbitration. Thus, parties to arbitrations governed by English arbitration law take a considerable risk by public disclosure of information about the arbitration. Many commentators opposed to the erosion of arbitral confidentiality rallied around the *Ali Shipping* decision.<sup>15</sup>

French law appears to provide even more stringent protection for the confidentiality of arbitral proceedings and awards. In *Aita v. Ojeh*,<sup>16</sup> a French court dismissed an action to annul an arbitral award rendered in London, penalizing the party bringing the annulment action for thereby breaching the principle that arbitral

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<sup>14</sup> *Ali Shipping Corp.*, 2 All E.R., 1 Lloyd’s Rep. 643 at 651.

<sup>15</sup> E.g., Sean Upson, *Arbitrations – How Confidential are They?*, DISP. RES. NEWSL. (Baker McKenzie, London), July 1998.

<sup>16</sup> 1986 REVUE DE L’ARBITRAGE 583 (Cour d’Appel de Paris, Feb. 18, 1986).

proceedings are confidential.<sup>17</sup> The decision does not even appear to allow for the narrow exceptions recognized by English law.

One country has actually codified a duty of arbitral confidentiality. Section 14 of New Zealand's Arbitration Act of 1996 states that, unless the parties agree otherwise, "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."<sup>18</sup> New Zealand enacted the provision to prevent the Australian *Esso* decision from serving as a precedent in New Zealand's courts.<sup>19</sup>

These national differences generate uncertainty. For example, one cannot simply assume that an arbitration held in London will be universally subject to English confidentiality standards, because a confidentiality dispute will not necessarily be heard in the national courts of the arbitration situs. It might be raised in a pending enforcement action elsewhere or in the country where the information is disclosed. Our world has not evolved to the point where a supranational court is available to resolve these national differences. Moreover, as discussed below, relying on institutional rules will not solve the problem.

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<sup>17</sup> See Jan Paulsson & Nigel Rawding, *The Trouble with Confidentiality*, 11 ARB. INT'L 303, 312 (1995); see also ICC Award No. 6263 of 1992, 20 Y.B. COM. ARB. 58 (1995) (exemplifying the confidentiality of the arbitration, the parties' disclosures, and the arbitrators' award under French standards).

<sup>18</sup> New Zealand Arbitration Act, § 14 (1996), <http://rangi.knowledge-basket.co.nz/gpacts/public/text/1996/se/099se14.html> (last visited Mar. 25, 2002).

<sup>19</sup> David Williams, *New Zealand: The New Arbitration Act*, 1 INT'L ARB. L. REV. 214, 216 (1998).

### III. INSTITUTIONAL RULES

Simply incorporating the rules of an arbitral institution is not likely to resolve uncertainties about confidentiality. Institutional rules commonly provide that the *arbitrators* shall maintain the confidentiality of the proceedings.<sup>20</sup> However, few prohibit disclosure by the *parties*. For example, Article 25(4) of the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) provides that hearings shall be held “in camera.”<sup>21</sup> But it does not say what the parties may or may not reveal outside the hearing. The rules of the ICC, the largest international arbitration institution, simply exclude from hearings “persons not involved in the proceedings”<sup>22</sup> and permit the arbitral tribunal to “take measures for protecting trade secrets or confidential information.”<sup>23</sup> However, the ICC Rules are silent on the confidentiality of awards and of materials produced and information divulged in the proceeding.<sup>24</sup>

Some arbitral institutions provide greater protection. Consistent with English law, the rules of LCIA Arbitration International<sup>25</sup> recognize that

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<sup>20</sup> See, e.g., American Arbitration Association, International Arbitration Rules, art. 34 (effective 1 November 2001), [http://www.adr.org/index2.1.jspJSPssid=13777&JSPsrc=upload\LIVE\\_SITE\Rules\\_Procedures\National\\_International\.\.\focusArea\international\AAA175-1000.htm](http://www.adr.org/index2.1.jspJSPssid=13777&JSPsrc=upload\LIVE_SITE\Rules_Procedures\National_International\.\.\focusArea\international\AAA175-1000.htm) (last visited Mar. 25, 2002).

<sup>21</sup> United Nations Commission on International Trade Law (UNCITRAL), Arbitration Rules, art. 25(4) (adopted 15 December 1976), <http://www.uncitral.org/en-index.htm> (last visited Mar. 25, 2002).

<sup>22</sup> International Chamber of Commerce (ICC), Rules of Arbitration, art. 21.3 (effective 1 January 1998), <http://www.iccwbo.org/court/english/arbitration/rules.asp> (last visited Mar. 25, 2002).

<sup>23</sup> *Id.* art. 20.7.

<sup>24</sup> *See id.*

<sup>25</sup> LCIA Arbitration International is the new name of the London Court of International Arbitration (LCIA). The new LCIA Rules, which replaced the rules that had been in force since 1985, entered into

the parties undertake as a general principle to keep confidential all awards in their arbitration, together with all materials in the proceedings 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 *bona fide* legal proceedings before a state court or other judicial authority.<sup>26</sup>

Similarly, Article 37 of the China International Economic and Trade Arbitration Commission (CIETAC) rules forbids parties and all persons involved in the arbitration from disclosing “the substantive or procedural matters of the case” to “outsiders.”<sup>27</sup> In addition, the arbitration rules of the World Intellectual Property Organization (WIPO) have quite rigorous confidentiality protections, reflecting the focus of WIPO proceedings on intellectual property and trade secrets.<sup>28</sup>

#### IV. THE IMPACT ON CONTRACTING PARTIES

This division among the national courts and arbitral institutions on the existence and scope of a duty of confidentiality fosters uncertainty—the bane of international business transactions.<sup>29</sup> Businesses have many reasons not to divulge the substance of

force on January 1, 1998.

<sup>26</sup> LCIA, Arbitration Rules, art. 30.1 (effective 1 January 1998), <http://www.lcia-arbitration.com/lcia/rulecost/english.htm> (last visited Mar. 25, 2002). The LCIA also does not publish its awards unless the parties and the tribunal consent. *See id.* art. 30.3. That policy contrasts with that of the ICC, which does publish its decisions, albeit with identifying information deleted.

<sup>27</sup> China International Economic and Trade Arbitration Commission (CIETAC), Arbitration Rules, art. 37 (effective 10 May 1998), <http://www.cietac-sz.org.cn/cietac/index-e.htm> (last visited Mar. 25, 2002).

<sup>28</sup> World International Property Organization (WIPO), Arbitration Rules, arts. 52, 73-75, <http://arbiter.wipo.int/arbitration/arbitration-rules/index.html> (last visited Mar. 25, 2002).

<sup>29</sup> *See* Constantine Partasides, *Bulbank – The Final Act*, 15 MEALEY’S INT’L ARB. REP. 44 (Dec. 2000).

arbitral proceedings and awards, including the impact on relationships with other contracting partners and customers.

It is no answer to say that parties should do their homework. Companies should not have to perform “due diligence” into multifarious confidentiality standards before entering into a contract or agreeing to arbitrate. Businesspersons and even their lawyers cannot be expected to keep up with judicial developments on this issue in countries all over the world. The “balkanization of the rules” over such issues as confidentiality requires businesspersons “to hire guides to explain the little differences,” leading to enormous and wasteful expense.<sup>30</sup> And “even expert international lawyers lack perfect information about all available alternatives.”<sup>31</sup>

## V. OBSTACLES TO SOLVING THE PROBLEM

A ready solution to the problem of dueling confidentiality laws and rules is not at hand—not from the courts, the arbitral institutions, or arbitration participants.

A solution is not likely to come from the courts, which are often bound by prior decisions and face competing incentives. On the one hand, upholding an implied duty of confidentiality may attract arbitrations and the business they bring to the host country.<sup>32</sup>

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<sup>30</sup> Cymie Payne, *Are International Institutions Doing Their Job?*, *International Arbitration*, 90 AM. SOC'Y INT'L L. PROC. 244, 247 (1996) (remarks of Howard Holtzmann); *see id.* at 249 (remarks of Charles Brower) (“I’m tired of having to hire lawyers in Switzerland to tell me about the Swiss statute and lawyers in England to tell me about the English act . . .”).

<sup>31</sup> Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT'L L. 79, 107 (2000) [hereinafter Drahozal].

<sup>32</sup> *See* KLAUS PETER BERGER, *INTERNATIONAL ECONOMIC ARBITRATION* 6 n.55 (Studies in Transnational Economic Law, Series No. 9, 1993) (noting that legislatures have been enacting new arbitration laws as “marketing strategies”).

On the other hand, courts may view the confidentiality of arbitral materials as interfering with the search for truth in judicial proceedings. In addition, courts cannot easily enforce confidentiality duties or agreements, in part because damages are often nonexistent or difficult to prove. Nor can one count on national governments to step in and resolve their differences on this issue. Given the difficulties in getting the necessary consensus for even “modest treaties,”<sup>33</sup> amending existing arbitral enforcement treaties like the New York Convention or entering into a new treaty is far from likely.

Nor is a solution likely to arise from the arbitral institutions themselves. Their differences reflect competition for the lucrative arbitration business.<sup>34</sup> Those incentives explain why there has been so little response to Hans Smit’s plea (rendered fifteen years ago) for “a single international arbitration institution.”<sup>35</sup> Moreover, we all benefit from the competition between arbitral institutions as they seek to attract arbitrations.<sup>36</sup> But, as discussed above, competing on the basis of differing confidentiality rules may so undermine the desirability of arbitration as to call for a brake on at least this aspect of institutional marketing.

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<sup>33</sup> See William W. Park, *Illusion and Reality in International Forum Selection*, 30 TEX. INT’L L.J. 135, 199 (1995).

<sup>34</sup> See Drahozal, *supra* note 31, at 100 (detailing how the growing number of “institutions compete fiercely in seeking to attract arbitration business”).

<sup>35</sup> Hans Smit, *The Future of International Commercial Arbitration: A Single Transnational Institution*, 25 COLUM. J. TRANSNAT’L L. 9, 29 (1986).

<sup>36</sup> See Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 747 (1999) (discussing that competitive “market in default rules” benefit the arbitral process).

One might think that the parties themselves hold the key to a solution because they may include a provision in their agreement expressly specifying whether and to what extent the arbitral proceeding and award are to be kept confidential. That may help, but it does not provide any certainty. First, disputes subject to arbitration often arise years after the contract was negotiated. It is difficult to predict so far in advance where one's interest will lie on the confidentiality spectrum. Second, a clause that would cover all contingencies would have to be quite detailed and lengthy, raising the transactional costs of entering into the agreement at a time when the parties prefer not to focus on contingent future disputes. Finally, it is not clear that a particular national court would respect the entirety of the parties' agreement, especially those aspects that may conflict with the public policy of the forum country.

Similarly, the parties cannot obviate the difficulties by simply incorporating the rules of an arbitral institution with strong confidentiality protections into their agreement. None of these rules specify what recourse a party would have if confidentiality is breached after the arbitration is concluded. Presumably, a party would have to go to court, where the vagaries of national law would come into play. Would a court in New Zealand or the United States hold that the parties' incorporation of the rules of the LCIA Arbitration International or CIETAC represents a binding agreement to keep proceedings confidential? Perhaps, but the dearth of authority on this issue makes reliance on such an outcome hazardous.

## VI. A PROPOSED UNIFORM RULE

The confidentiality problem appears so pressing and intractable as to demand some sort of joint resolution, if only to prevent discontent with the arbitral process from becoming endemic. Because no one can be sure of the scope of confidentiality protections today, there is an urgent need for a uniform rule.<sup>37</sup> What should it look like and how can it be achieved?

What is needed is a universally accepted default rule; that is, a rule that is binding in the absence of mutual assent otherwise.<sup>38</sup> Default rules reduce costs by obviating the need for detailed negotiations or at least by providing a baseline to encourage efficient negotiations.<sup>39</sup> This article proposes the following default rule:

In all arbitrations, the arbitrators shall require at the threshold that the parties agree on the scope of confidentiality, failing which the arbitrators shall enter a protective order on the scope of confidentiality. The parties shall by rule be deemed to have agreed to the terms of that order. Any claim asserting a violation of the parties' confidentiality agreement or protective order accruing during the course of the proceeding shall be resolved by the arbitrators. Any violation of the parties' confidentiality agreement or protective order accruing after the proceeding is terminated shall be resolved by arbitration according to the terms set forth in the parties' arbitration agreement. Arbitrators may impose appropriate damages and penalties on parties found to have breached the confidentiality agreement or protective order.

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<sup>37</sup> See Steven Walt, *Novelty and the Risks of Uniform Sales Law*, 39 VA. J. INT'L L. 671, 671 (1999) (noting that "subject[ing] a transnational commercial transaction to a single set of rules" generally reduces transaction and legal costs).

<sup>38</sup> See Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 825 (1992).

<sup>39</sup> See Michael Whincop & Mary Keyes, *Putting the "Private" Back into Private International Law: Default Rules and the Proper Law of the Contract*, 21 MELB. U. L. REV. 515, 523 (1997) ("The parties will bargain around initial allocations, subject to transaction costs").

One advantage of this proposed rule is that it would not require a decision on confidentiality terms at the time of contracting, when most contracting parties prefer to leave this issue open (as evidenced by the fact that most contracts are silent on this issue).<sup>40</sup> It also would result in an *agreement* by the parties that courts—including those in countries not recognizing an implied duty of confidentiality—likely would enforce. But courts would be avoided altogether in most circumstances given the requirement that disputes about confidentiality be arbitrated. This would have the additional advantage of keeping private what is meant to be a private dispute resolution process.<sup>41</sup> Moreover, the provision for *penalties* in the event of a breach of the confidentiality agreement would serve to deter breaches where *damages* from a breach may be nonexistent or minimal.

In order to encourage the parties to agree on confidentiality terms and avoid the need to impose a protective order, the arbitrators should have available several “pre-fabricated” confidentiality clauses, reflecting varying levels of confidentiality protection, from which the parties may choose. But failing agreement, what should the protective order provide? While the arbitrators should try to tailor the order to the particular case before them, generally the order should impose a duty of confidentiality with exceptions of the type recognized under English law. Indeed, that is the rule that most private parties

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<sup>40</sup> See *id.* at 541 (endorsing “floating law clauses” to reflect the fact that parties often “value open terms in contracts”).

<sup>41</sup> See Llewellyn Joseph Gibbons, *Private Law, Public “Justice”*: Another Look at Privacy, Arbitration, and Global E-Commerce, 15 OHIO ST. J. ON DISP. RESOL. 769, 777 (2000) (noting that breach of confidentiality provision in arbitration agreement “may be relitigated before the same arbitrator as a continuation of the earlier dispute or incidental to the effectuation of the remedy [or] they may be the source of future arbitrations”).

probably would choose<sup>42</sup> and is consistent with both long-standing practice and the traditional expectation that private arbitrations are to remain private.<sup>43</sup>

## VII. CONTENT OF THE CONFIDENTIALITY AGREEMENT OR ORDER

An agreement or protective order of the type proposed should detail permitted and forbidden disclosures. Duties that are impractical to satisfy should be avoided. For example, disclosing the occurrence of the arbitration to insurers, auditors, bankers and courts often is mandatory. On the other hand, it may be desirable to restrict disclosure beyond such mandates to prevent a claimant from leaking information about the respondent's potential liabilities to the respondent's customers, creditors and contracting partners.<sup>44</sup>

It also may be impractical to prevent the prevailing party from announcing to the world, "I won." But the terms of the award, including the amount of any damages, should be proscribed from disclosure. The arbitrators' reasons for the award, if any, also should be kept confidential, however great the "educating" function of publication. It is hard to imagine that any party would agree, in the event that it came out on the losing

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<sup>42</sup> This is not one of those situations where a "penalty" default rule—one set at what the parties do not want in order to encourage negotiations and disclosure of all relevant information—would be more appropriate than a "market-mimicking" default rule. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 92 (1989). Here, the problem to be solved is not the strategic withholding of information or insufficient bargaining, but rather the costliness and often the futility of obtaining reliable information about the enforceability of confidentiality provisions.

<sup>43</sup> See Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1755-56 (1997) (noting that default rules that deviate from trade usages tend to increase need for negotiations and thus transaction costs).

<sup>44</sup> See generally Francois Dessemontet, *Arbitration and Confidentiality*, 7 AM. REV. INT'L ARB. 299, 300 (1996).

end, to broadcast the reasons for its defeat. The same is true of documents, oral testimony and arguments offered in the arbitral proceeding. Transcripts may already be protected by institutional rules that make hearings private, but there is no downside to specifying their confidential status in the agreement to avoid any ambiguity.<sup>45</sup> Similarly, although courts generally uphold the confidentiality of trade secrets, it makes sense to agree to specific confidentiality provisions for them.<sup>46</sup>

An agreement or protective order may not in itself bind everyone gaining access to the proceeding, such as non party fact and expert witnesses. Requiring all witnesses to agree to confidentiality terms similar to those governing the parties should be effective in most instances. Although expert testimony may be subject to disclosure in later proceedings in which the expert testifies,<sup>47</sup> such confidentiality agreements and protective orders at least reduce the risk of undue disclosure.

This proposal does not overthrow the desirability of contractual confidentiality provisions. There is no conflict between instituting the proposed uniform default rule and including confidentiality provisions in predispute arbitration agreements. Such provisions may provide a level of comfort on the confidentiality issue from the beginning of the contractual relationship, and they can always be modified at the time of arbitration.

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<sup>45</sup> See Michael Collins, *Privacy and Confidentiality in Arbitration Proceedings*, 30 TEX. INT'L L.J. 121, 127 (1995) (distinguishing the award from the raw materials of the arbitration itself, including the transcript, witness statements, expert reports, documents and briefs).

<sup>46</sup> See generally Charles S. Baldwin, *Protecting Confidential and Proprietary Commercial Information in International Arbitration*, 31 TEX. INT'L L.J. 451 (1996).

<sup>47</sup> See *London and Leeds Estates v. Paribas*, 1 EGLR 102 (1995).

But where the parties' desire for confidentiality is inchoate when the contract is negotiated, it may be preferable to have the contract *generally* bar disclosure, absent consent of the parties, and then *specify* the terms if and when there is the need to resort to arbitration.

### VIII. HOW TO ACHIEVE A UNIFORM RULE

The purpose of this proposal is not only to resolve a conflict over the duty of confidentiality in international arbitration but also to foster stability and predictability—two paramount requirements of most participants in international transactions.<sup>48</sup> However, that desire in itself is insufficient to overcome the policy and institutional constraints preventing courts, countries or arbitral institutions from independently achieving uniformity.

The most promising avenue to a uniform confidentiality rule would be a conference on that subject composed of delegates from the leading arbitral institutions. The goal would be to develop a uniform default rule—perhaps mimicking the one proposed in this article—that could gain legitimacy even beyond the enacting institutions and come to be respected by the courts (like the American Law Institute Restatements in the United States).

The call for such a conference could come from the International Federation of Commercial Arbitration Institutions (IFCAI), which was founded in 1985 to establish and maintain permanent relations between commercial arbitration institutions and to facilitate

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<sup>48</sup> See Catherine Pedamon, *How is Convergence Best Achieved in International Project Finance?*, 24 FORDHAM INT'L L.J. 1272, 1274 (2001) (noting that international investors “prefer to deal with one set of legal rules and principles”).

the exchange and distribution of information about their services. It comprises about eighty arbitral organizations in forty-six countries and holds periodic General Assemblies of the member institutions as well as international dispute resolution conferences. Another possibility would be an *ad hoc* meeting organized by at least the major international arbitral institutions and UNCITRAL. In any event, one or more major players must take the initiative if the crisis in confidentiality standards is to be resolved.

### CONCLUSION

Many have shaken their heads in dismay at the chaotic morass of confidentiality standards now plaguing international arbitration; but dismay can be dispelled with creative thought and a unified approach. As the Black Panthers (who were not proponents of arbitrating conflicts) used to say, “if you’re not part of the solution, you’re part of the problem.”<sup>49</sup> It is time for those committed to international arbitration to put their heads together and solve the confidentiality crisis.

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<sup>49</sup> See RANDOM HOUSE DICTIONARY OF POPULAR PROVERBS AND SAYINGS 159 (Gregory Y. Titelman 2d ed., 2000).