Hsu En Chieh, Annia

I. INTRODUCTION

1 Arbitration has long been distinguished from litigation as a process adjudicating the rights of parties in a private forum, following rules and procedures agreed on by all the parties involved, with the additional oft-touted benefit of having a blanket of privacy and confidentiality over it all.[1] The aforementioned statement is almost a standard opening explanation offered by most lawyers to any layman, but it is frequently overlooked that the obligation(s) of confidentiality are not all-encompassing as assumed at face value, and in fact may be very different across arbitrations in different jurisdictions and in different institutions.[2]

2 The benefits of confidentiality of arbitration are palpable, at least to the private sector.[3] In almost any business there is competition, and thus a need for secrecy as to where, what and how a company conducts its business to be profitable and gain an edge over its competitors. This requires it to minimise its risks of having to disclose commercially sensitive information to competitors, customers and others,[4] and reduce reputational damage associated with publicly ventilating a dispute in open court.[5]

3 In his speech at the Bailii Lecture 2016, The Right Honourable The Lord Thomas of Cwmgiedd discussed the history of, and ultimately balancing of, the relationship between the

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[1] E. Zlatanska, *To publish, or not to publish arbitral awards: that is the question…*, Arbitration 2015, 81(1), 25 at 26.

[2] See Gary B. Born, *International Commercial Arbitration* (2nd Ed) (Kluwer Law International 2014) ("**Born, *International Commercial Arbitration***"), pp 2784 to 2786: Australia, New Zealand, Hong Kong, Peru, Romania and Spain have express requirements of confidentiality in statutory provisions; Costa Rica and Norway expressly permit publication of arbitral awards and otherwise limiting the confidentiality of arbitral proceedings; Switzerland. Singapore, following the United Kingdom, has implied obligations of confidentiality at common law: *AAY and others v AAZ* [2011] 1 SLR 1093 at [55].

[3] Born, *International Commercial Arbitration*, *supra* n 2 at p 2780. *Expert Report of Stephen Bond (in* Esso/BHP v. Plowman*),* 11 Arb. Int'l 273, 273 (1995) and W. Craig *et al.* (eds.), *International Chamber of Commerce Arbitration* at ¶16.06 (3d ed. 2001) ("If polled, the users of ICC arbitration would undoubtedly list confidentiality as one of the advantages which led them to choose arbitration over other forms of dispute resolution.").

[4] Born, *International Commercial Arbitration*, *supra* n 2 at §1.02[B][8]-[9], pp 72 to 77.

[5] Jennifer Galatas, "*The Role and Attitude of the Courts in Australian in Relation to International Commercial Arbitration*" (2005) 1 The International Construction Law Review 27, at 47.

courts and arbitration. He agreed with Lord Mayor that arbitral confidentiality was "overrated"[6] and cited Professor L. K. Doré: "*Arbitration confidentiality perpetuates public ignorance of continuing hazards, systemic problems, or public needs*" and lamented that it prevented access to the law and reduced individuals' ability to fully understand their rights and obligations, and to properly plan their affairs accordingly.[7]

II. WHAT DOES CONFIDENTIALITY IN ARBITRATION ENTAIL?

4 As mentioned earlier, it is not entirely correct to say that arbitration is completely shrouded in confidentiality as there are many nuances to confidentiality obligations. It is thus important to first distinguish between *privacy* and *confidentiality*. "Privacy" refers to the fact that only parties to the arbitration agreement (as opposed to third parties) may attend arbitral hearings and otherwise participate in the arbitration proceedings.[8] "Confidentiality" typically refers to the parties' obligations not to disclose information concerning the arbitration to third parties. This includes prohibiting disclosure to third parties the transcripts, pleadings, submissions, evidence or materials adduced in arbitration and even the arbitral award(s) and order(s).[9]

5 Most countries' domestic and international arbitration laws will state that there shall be privacy in international arbitrations.[10] That much is not controversial and not the focus of the discussion here. Confidentiality in arbitrations, on the other hand, differs widely across jurisdictions, wherein some jurisdictions have strict obligations of confidentiality implied by

[6] The Right Honourable The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, *Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration*, The Bailii Lecture 2016 on 9 March 2016, at [38].
[7] L. K. Doré, *Public courts versus private justice: it's time to let some sun shine in on alternative dispute resolution*, 81 Chi-Kent L. Rev 463 (2006) at 487.
[8] Born, *International Commercial Arbitration*, *supra* n 2 at §20.01, p 2781.
[9] *Ibid*.
[10] *Supra* n 8.

statute,[11] and others have no implied or inherent duty of confidentiality obligations unless expressly contracted for.[12] The middle ground currently adopted by the United Kingdom and Singapore courts is that the obligation of confidentiality in arbitration is a doctrine developed through the common law and "*will apply as a default to arbitrations where the parties have not specified expressly the private and/or confidential nature of the arbitration*"[13] save for the four categories of exceptions:[14]

(a) Where disclosure is made with the express or implied consent of the party who originally produced the material.

(b) Where there is an order of court for the disclosure.

(c) Where there is leave of court for the disclosure.

(d) Disclosure when, and to the extent to which, it is reasonably necessary for the protection of the legitimate interests of an arbitrating party, which means reasonably necessary for the establishment or protection of an arbitrating party's legal rights vis-à-vis a third party in order to found a cause of action against that third party or to defend a claim, or counterclaim, brought by the third party.

6 While this article is not a discourse or review of the implied confidentiality obligations of various jurisdictions, it is nevertheless useful to remember that any discussion or debate on the issue of confidentiality as opposed to the importance of access to and development of law

[11] Born, *International Commercial Arbitration*, *supra* n 2 at p 2785; Jeffrey W. Sarles, *Solving the Arbitral Confidentiality Conundrum in International Arbitration* ("**Sarles, *Solving the Arbitral Confidentiality Conundrum***"), at p 6 <https://m.mayerbrown.com/Files/Publication/cc689d95-b8ba-4179-b72f-08b83ec47ad1/Presentation/PublicationAttachment/917049de-2412-4695-894d-09fc7f42c303/Confidentiality.pdf> (accessed 30 July 2017).
[12] *Ibid*.
[13] *AAY and others v AAZ* [2011] 1 SLR 1093 at [55].
[14] *Id*, at [59].

should be considered in the context of that particular jurisdiction, given that the scope of confidentiality may differ.

7 In order to make a meaningful analysis on the question of whether the benefits of confidential arbitrations always outweigh the downsides expressed by The Right Honourable The Lord Thomas of Cwmgiedd captured in paragraph 3 above, reference to "confidential arbitrations" refers specifically to the confidentiality of arbitral awards.

III. DO THE BENEFITS OF CONFIDENTIAL ARBITRATIONS ALWAYS OUTWEIGH THE IMPORTANCE OF ACCESS TO THE LAW AS DEVELOPED AND INTERPRETED BY ARBITRAL TRIBUNALS?

8 The short answer must be "no". This is inherent in the nature of law. The analysis of when and how the benefits of confidentiality in arbitrations outweigh or do not outweigh the countervailing tension of the need for access and understanding of the law will usually depend on the context of the situation taken as a whole.[15]

(A) What are the benefits of confidentiality in arbitrations?

9 The benefits of confidentiality are not always easy to quantify. To look at it from the opposite side of the coin – courts have sometimes found it difficult to enforce confidentiality obligations (whether based at law or in contract), partly because damages are often non-existent or difficult to prove.[16] Indeed, the usual recourse for breach of confidentiality obligations would be by way of an injunction, which would be granted on the basis that *inter alia* damages would be an inadequate remedy.

[15] Similar to how most legal tests in commercial disputes are held of standards of reasonableness, and not determined in a strict mathematical zero-sum game.
[16] Sarles, *Solving the Arbitral Confidentiality Conundrum*, *supra* n 11 at p 10.

10 Nevertheless, empirical and anecdotal evidence show that confidentiality ranks high on the list of reasons why commercial parties opt for arbitration. In a 2015 International Arbitration Survey conducted by the School of International Arbitration at Queen Mary, University of London, it was found that confidentiality was the fifth most valuable characteristic of international arbitration while for the in-house counsel sub-group, confidentiality was the second most frequently listed valuable characteristic of international arbitration.[17] The following are oft-cited reasons for commercial parties' concerns with confidentiality:[18]

(a) Confidentiality may be perceived as encouraging efficient and dispassionate dispute resolution, thereby minimizing either party from adopting public posturing strategies to gain some sort of advantage over the other party.

(b) Prevents disclosure of commercially sensitive information.

(c) Avoidance of having to deal with negative press and/or rumours in connection with the arbitration.

11 Successful businesses are often built on a combination of trade secrets in reducing costs or superior innovation and quality, increasing their market share and customer base, and a certain level of goodwill or reputation among their suppliers and buyers. Each company best knows its strengths and weaknesses and ultimately, what factor(s) are vital to its continual success. However, when there are parties involved with conflicting or differing interests to protect, disputes inevitably arise. In the circumstances, most companies want a quick and just resolution, so that it may go back to the core of its business, as protracted disputes take up time,

[17] At p 6 <http://www.arbitration.qmul.ac.uk/docs/164761.pdf> (accessed on 30 July 2017).
[18] *Supra* n 3.

effort and money unrelated to the pursuit of profits. Confidentiality in arbitrations meets exactly that hard-to-quantify demand.

(B) What are the benefits of giving the public access to law as developed and interpreted by arbitral tribunals?

12 This discussion is almost unnecessary, given that it is fairly clear what the public interests are in ensuring that individuals and companies alike are able to receive clear and unambiguous advice from their lawyers to guide their personal and business decisions. The effect of certainty and clarity of the law goes towards reducing disputes, which is the ultimate goal of most courts.

(C) When do the benefits of confidential arbitrations outweigh the access to law as developed and interpreted by arbitral tribunals?

13 When the law is fairly settled and the decision depends largely on the facts of the case, such as the case of claim consultants analyzing the causes of delay and the party responsible in construction matters, it is arguable that the benefits of confidential arbitrations prevail over giving the public access to the arbitral award, when there is no new finding of law needed. In fact, for disputes that focus primarily on the facts, they are in the first place so different from one case to the next that it is almost impossible to find two cases with same factual scenarios. Accordingly, the precedential value of such arbitral awards is not high.

14 Not all arbitrators are lawyers or legally trained. The common qualities required of an arbitrator include being independent and impartial, having integrity, competence, and adequate skills or knowledge agreed by the parties as being necessary, but not a legal background.[19] In

[19] See for example SIAC Practice Note on Administered Cases (2 January 2014) at para 5; SIAC Code of Ethics for an Arbitrator (2009), para 1.1.

fact, part of the reasons why commercial parties want to refer a dispute to arbitration instead of litigation is because they are able to appoint an arbitral tribunal with relevant expertise to the parties' industry. Therefore, in addition to the point made at paragraph 13 above, the precedential value of an arbitral award may be diminished where the award does not have a complete and sound legal analysis of the facts before the arbitral tribunal.

15 Further, without the confidentiality provisions in place for international arbitration, parties may, for practical and commercial reasons, frequently choose not to pursue the resolution of a dispute simply for the avoidance of the troubles listed above at paragraph 10. Commercial parties are less inclined to pursue to the end for a neutral third party to give a decision on a dispute, unlike private individuals who may do it on pure principle and personal agenda without regard to economic cost-benefit analysis. If so, I would dare go a step further to argue that the removal of confidentiality in arbitrations may result in less developments in law due to the lack of disputes that are fully ventilated and adjudicated.

(D) When do the importance of access to law and its developments outweigh the benefits of confidential arbitrations?

16 It is simple math that if a dispute is referred to arbitration, the courts would not have the chance to hear and decide on that dispute. It is not uncommon for commercial parties to face similar issues in the course of their business, especially for parties in the same industry governed by the same rules and customs. Any opportunity to clarify a legal problem or think through the legal issues arising from each dispute ought to be treasured, as it could be the answer to someone else's problem in the future. Arbitrations as a form of dispute resolution may stunt the development of both the civil and common law by the courts. This is aptly captured in

Chief Justice McLachlin's common law tree analogy in the context of the recent developments of construction law:[20]

> "*The Construction Law tree looks different than it used to. It may not be dead, but new branches are not appearing as often as they once did. And old branches that need pruning are often neglected.*"

17 Therefore, access to arbitral awards for law as developed and interpreted by arbitral tribunals gives a party a better chance of finding an answer to its question, as the pool of facts and law and the decisions upon them is enlarged. Furthermore, there may be situations where it would be appropriate to revisit an old settled law for its applicability in the fast-paced and modernizing world. If the bulk of the disputes are referred to arbitration, that greatly reduces the chances of courts coming across a suitable case to conduct such review and development of the law.

18 Separate from the development of substantive law, the development on the procedural laws in arbitration are equally important, if not more, given that arbitration is a relatively new field,[21] and the scope and extent of the powers of arbitration institutions and arbitral tribunals are yet to be completely settled. The need to develop the procedural laws of arbitration outweighs the confidentiality in arbitrations as there is no better or other ways to clarify and interpret procedural laws of arbitrations than to have the arbitral tribunals consider the same. In fact, the

[20] The Right Honourable Beverly McLachlin, "*Judging the 'vanishing trial' in the construction industry*" (June 2010) 5(2) Construction Law International 9, 10.

[21] While the learned author of *International Commercial Arbitration* traces the origins of arbitration back to ancient mythology (§1.01[A]), the UNCITRAL Model Law on International Commercial Arbitration in 1985 truly marked the acceptance of arbitration by jurisdictions around the world, as opposed to the courts, which is the traditional source of law and authority for the interpretation of law.

available treatises on arbitration and arbitral awards show that arbitral awards have been instrumental in developing fundamental aspects of the international arbitration process.[22]

19 It is clear from the above analysis that there are considerations on both sides of the argument that benefit the users of law. However, that does not necessarily mean that one cannot exist while the other persists. The more important question may be this: Has confidentiality in arbitrations really prevented access to the law and impeded its development?

IV. THE REALITY: HAS CONFIDENTIALITY IN ARBITRATIONS PREVENTED ACCESS TO THE LAW AND IMPEDED ITS DEVELOPMENT?

20 I do not agree with The Right Honourable The Lord Thomas of Cwmgiedd when he said in his speech that "across many sectors of law traditionally developed in London, particularly relating to the construction industry, engineering, shipping, insurance and commodities, there is a real concern which has been expressed to me at the lack of case law on standard form contracts and on changes in commercial practice". In fact, for a lot of arbitrations in specialised market sectors, institutional rules provide for the publication of arbitral awards *unless* the parties have agreed to the contrary. Article 28 of the Asset Management Association of China, Rule 59 of the 2017 Procedural Rules of the Court of Arbitration for Sport, Article 28 of the London Maritime Arbitrators Association, Article 1 of the Maritime Arbitration Rules of the Society of Maritime Arbitrators, Article 16.4 of the Basketball Arbitral Tribunal Arbitration Rules are just some of the examples where institutions have not allowed confidentiality of arbitration to prevent the development of law and precedents.

21 These institutional rules exist specifically for the purpose of providing precedential authority and guidance for future disputes. In fact, certain specialised industries like maritime

[22] Born, *International Commercial Arbitration*, §27.04[B] at p 3823.

and international constructions arbitrations have arbitral awards that are not just followed but published in industry circles. The rationale is that if an international community of merchants aspires to give itself an autonomous system of law, this law has to be made known to all those who have an interest in it.[23]

22 The problem of confidentiality of arbitral awards has already been identified, and in the midst of being addressed. From the analysis above, if the interest of a private party in confidentiality lies in protecting its reputation, or preventing release of its trade secrets, there is naturally no objections to the publication of an arbitral award if all the sensitive information and identification of parties are redacted. This strikes a balance between maintaining confidentiality in arbitrations and the development and interpretation of the law by arbitral tribunals. To ensure the quality of arbitral awards, some commentaries even go so far as to state that the name(s) of the arbitrators should not be redacted from the award to incentivise arbitrators to produce well-reasoned awards, while at the same time enabling future appointers of arbitrators to assess the ability and suitability of the arbitrator.[24]

23 There has been an increase in publication of arbitral awards internationally. For example, the International Chamber of Commerce and International Court of Arbitration and International Centre for the Settlement of Investment Disputes ("**ICSID**") publish redacted decisions, with names and other identifying information removed. ICSID requires the publication of excerpts of the tribunal's reasoning in each arbitration, and most ICSID awards are also published, with the parties' consent, in print and even online.[25] The Swiss Federal Tribunal has adopted specialized

[23] P. Fouchard, *L'arbitrage commercial international* ¶451 (1965).
[24] Andrew Stephenson & Astrid Andersson, *Arbitration: Can it assist in the development of the common law – an Australian point of view* [2016] ICLR 413 at Section 6.
[25] Lucy Reed, Jan Paulsson, Nigel Blackaby, "*Guide to ICSID Arbitration*" (2010) Kluwer Law International; Kluwer Law International 2010, 14-15.

procedures for releasing, in either a redacted or delayed form, its decisions on annulment applications.[26]

24 Back home in Singapore, the Singapore International Arbitration Centre ("**SIAC**") has an agreement with LexisNexis since 2012 to publish SIAC awards. The SIAC remains alert and aware that the utility of SIAC jurisprudence must not undermine the parties' and tribunal's obligations of confidentiality.[27]

V. CONCLUSION

25 In conclusion, I am of the view that the benefits of confidentiality in arbitrations are not necessarily at odds with the access to the law and its developments. There is in fact, no tension between the two, as the commercial party's concerns are about protecting its trade secrets, reputation and goodwill, all of which are not jeopardised by the publication of arbitral awards with parties' names and trade sensitive information redacted. As shown above, this is already in practice.

26 As with all *laissez-faire* systems, the question of how courts and arbitrations should interplay or bolster each other will eventually find its equilibrium.[28] In fact, the solution has arguably already been found in the form of the under-utilised Section 45 of UK's 1996 Arbitration Act[29] (and the same section in Singapore's Arbitration Act): where parties themselves (and in the future, arbitrators, subject to parties' consent and sufficient protection of parties'

[26] Tschanz, *Confidentiality of Swiss Supreme Court Review of Arbitral Awards*, Mondaq Business Briefing (28 September 2006).
[27] SIAC Practice Note for Administered Cases (2 January 2014), para 32.
[28] There is no better example of the search for this equilibrium than what has happened in the United Kingdom, where before the 1970s, the courts were wary and dismissive of arbitrations, to the 2000s where courts largely limited their influence over arbitrations and to now, where the judges and scholars are taking back more control of the dispute resolution processes and the development of the law.
[29] *Secretary of State for Defence v Turner Estate Solutions Limited* [2015] EWHC 1150 (TCC).

interests?) can refer points of law to the courts which arise after the commencement of an arbitration but before the arbitral decision.