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STUDENT'S NAME: EVELYN MARINA VILLANUEVA PICOS
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DISSERTATION

A Modern Approach to Confidentiality in International Commercial Arbitration: Transparency v Secrecy

Name: Evelyn Marina Villanueva Picos

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Introduction

In the trawl of an ongoing evolution and constant development of international commerce, as new disputes arise, the dispute resolution systems must keep evolving on the same pace. As 'one of the most powerful influences on human activity is the driving force of trade'[1], it is no surprise the importance it has on the legal world, and why dispute resolution systems flourish at the pace of trade. Assuredly, arbitration has been gaining strength and popularity in the international sphere, and thus new dilemmas are being discussed for the concrete solidification of the modern system, as much as in terms of legislation, jurisprudence, and practice. And it has been, following the same pattern of trade growth, England been setting pace and tone on arbitration matters, having the the London Court of Arbitration, one of the leading international institutions for commercial dispute resolution, were for the year of 2018, 317 cases were filed[2].

'Rapidly changing global economy generates increasingly complex trade relations involving parties from different parts of the globe'.[3] Certainly, traditional litigation has fallen behind the needs of the modern world, were companies seek more flexible, faster, and cheaper solutions to solve their disputes. In contrast, traditional litigation has been stagnant in rigid and costly processes, thus a current disincline on favouring such alternative. Not only these elements have made arbitration an attractive alternative, but has also been the privacy additive that it offers. It is the flexible nature of arbitration, that fuse together common and civil law, where parties are granted the principle of autonomy (being the party autonomy the hallmark principle), and thus, find an oasis to treat disputes with parties' that are not from the same country, speak same language, culture or have the same judicial system. 'Indeed the first and foremost principle of law in commercial arbitration is that it is founded on the autonomy of the parties' will'.[4] Moreover, in a downside, it has been an escape from the scrutiny of the public eye, as the system is far more discreet and private, allowing to keep trade secrets and sensitive information to be accessed publicly as it is in court proceedings.

[1] Roy Goode, *Commercial Law* (3rd edition, Penguin Books, 2004) 3
[2] London Court of Arbitration, '2018 Annual Casework Report' (LCIA, 2018) <https://www.lcia.org/LCIA/reports.aspx> accessed 18 June 2019
[3] Zlatanzka E, 'To Publish or not to Publish: That is the Question' (2015) Intl J of Arbitration, Mediation and Dispute Management 25 <https://ssrn.com/abstract=2558743> accessed 14 August 2019 29
[4] Andrea Marco Steingruber, *Consent in International Arbitration* (Oxford University Press 2012) 12

Nevertheless, it has been this element of privacy, that has been coined as a cloak of secrecy for modern arbitrations. As companies and trade evolve and shift into a trend of openness, arbitration must follow. Similarly, arbitration has also been classified as confidential, wrongly granting the same value and protection as privacy, even when they are different items or elements to considerate from arbitration. 'Viewed from afar, there seems to exist a perception that arbitration is a confidential process; yet, upon closer inspection, few legal concepts are more indefinite in nature, dubious in scope and uncertain in existence than confidentiality'.[5]

On the other hand, amongst other demands of the modern world, open justice stemmed in transparency, impose a threat to the element of confidentiality, and have pressured its way to stir the discussion in national and international courts and forums. Admittedly, the world does not seem to agree on the matter as to where does arbitration stands on the duty of confidentiality, thus, legislation has remained silent or been rather ambiguous, and for those countries that have openly addressed the matter, different guidelines on what is the right way to follow are being presented. And the biggest issues seem to revolve around that unfortunately, the privacy and confidentiality elements of arbitration have been confused by secrecy. The opinions of judges, scholars, and even companies, have remained strongly divided.

Assuredly, various nations have taken different postures on how to address the duty of confidentiality, whilst in common law systems case law has been of major importance on guiding the course of such, as well as international and institutional guidelines. Additional uncertainties arise as there is not a uniform international code that address the matter, but it should also be borne in mind that the challenge to arbitral confidentiality may reflect a communitarian need for public debate and scrutiny of justice determination.[6] For a long time, it was commonly held that as there was privacy, confidentiality came automatically in an absolute sense, however, this is now being replaced with a new way of thinking.[7]

[5] Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration* (Kluwer Law International, 2011) 189
[6] Kyriaki Noussia, *Confidentiality in International Commercial Arbitration* (Springer-Verlag Berlin Heidelberg 2010) 134 and 139
[7] Bernardo M. Cremades and Rodrigo Cortes, 'The Principle of Confidentiality in Arbitration: A Necessary Crisis' (2013) vol.23 J of Arb Studies 25 <https://heinonline.org/HOL/Page?handle=hein.journals/jarbstu23&collection=journals&id=415&startid=415&endid=428> accessed 17 June 2019 28

The objective of this paper is to critically discuss and examine the principle of confidentiality in International Commercial Arbitration, questioning to what extent is it limited (if it is) and how it translates into practice on the modern world, thus, addressing the controversial element of transparency. The latter from a comparative perspective in the adaption of international instruments and legal precedents in England, Australia and Mexico, two common law countries but with different approaches and a civil system that is young on this matter. As for the methodology of this paper, a black letter or doctrinal approach will be followed, analysing legal precedents and engaging in a critique to existing legislation in order to conclude with the optimal approach proposal. Furthermore, an evaluation of the current practice will be addressed. After an accurate evaluation of the principle of confidentiality, this paper seeks to propose the optimal approach and pathway for emerging arbitration practices, specially taking into consideration the needs of the modern world. It will also be argued that and international confidentiality framework is very much needed. 'Confidentiality should not, in any event be synonymous with secrecy'.[8]

Such analysis will be accompanied with the examination of legislation and case law, discussing the interest in the disclosure of information. In order to stand out said concerns, the paper will be divided into chapters. The first chapter will address the conceptualisation of confidentiality, by which the nature of arbitration, the agreement to arbitrate and the advantages of said mechanism will be explored. The second chapter will address diverse approaches on the principle of confidentiality, within the scope of international regulations, such as the ICC, LCIA, ACICA, UNCITRAL and ICSID, as well as a national approach of England, Australia and Mexico. For the third chapter, having a concrete concept on said principle, its scope will be thoroughly explored, especially on its limitations or exceptions. For the fourth chapter, a major critique to the ongoing risks of confidentiality will be evaluated, in sync with the first chapter, unveiling the cloak of secrecy, followed by the current trend towards transparency and open justice. Having explored the exceptions, for chapter five arbitration as a cloak of secrecy will be explored. Derived from these appreciations, the modern approach towards transparency will be touched upon in the sixth chapter. Finally, all things considered, final remarks on the optimal approach on the

[8] Bernardo M. Cremades and Rodrigo Cortes, 'The Principle of Confidentiality in Arbitration: A Necessary Crisis' (2013) vol.23 J of Arb Studies 25 <https://heinonline.org/HOL/Page?handle=hein.journals/jarbstu23&collection=journals&id=415&startid=415&endid=428> accessed 17 June 2019 33

principle of confidentiality will be included, as a proposal for setting a pathway for the evolving international legislation, analysing the risks and benefits of a new transparency or limits. This paper proposes that even when there are different opinions on the matter, developing and international framework will ease controversies as for the duty of confidentiality.

Chapter I – Defining the indefinable: Principle of confidentiality

The main issue on matters of confidentiality is defining which elements fall under the confidentiality umbrella, from where can such duty arise, to what extent do elements remain confidential, who are subject of the duty, and what are the exceptions. It is setting this base on what is confidentiality that creates a snowball effect that leads to different approaches by diverse judges, legislations and jurisprudence. Nonetheless, in order to define confidentiality, and must importantly, its context within International Commercial Arbitration, it is important to explore the roots and principles of arbitration. In this section it is going to be discussed about arbitration in general terms, the agreement to arbitrate, the advantages of arbitration and the conceptualisation of principle of confidentiality, including a comparison with privacy.

a) Arbitration

The origins of arbitration rest in *lex mercatoria* as it set the framework for the rules of trade, thus, customary rules and practices were incorporated to the legal culture of emerging States, ultimately providing the base of the current International Commerce Arbitration.[9] Even when there is no legal definition for arbitration and national laws do not attempt to define it, as it is a dynamic dispute resolution mechanism varying according to law and international practice, it is must certain in has some advantages over traditional litigation.[10] In general terms, arbitration is a private method of settling disputes based on the agreement between parties, whereby the settlement of a question is entrusted to a person [arbitrator] who derive their powers from a private agreement, not from the authorities of a

[9] Gábor Szalay, 'Arbitration and Transparency – Relations Between a Private Environment and a Fundamental Requirement' (LLM International Business Law Master's Thesis, Tilburg University 2019) 7
[10] Andrea Marco Steingruber, *Consent in International Arbitration* (Oxford University Press 2012) 12

State, who proceed and decide the case on the basis of such agreement.[11] In spite of having origin from a private agreement, arbitration has public legal effects, hence, needs the support of the public (national) legal system.[12] 'Through a highly complex interaction, national legal systems and international conventions combine to provide the framework within which international arbitration is conducted'.[13]

'The judicial character of arbitration [arbitrators perform their judicial role by making an award] allows it to be distinguished from other mechanism, such as conciliation, mediation, settlement and expert proceedings'.[14] It is in arbitration, and through the judicial role of arbitrators, that decisions culminate on being binding on the parties, one of the main attractions to use arbitration, specially when the dispute arises between parties of different countries (meaning, different jurisdictions).[15] As a side note, disputes solved over traditional litigation may face the problem not only of the enforceability of the decision, but even to treat the dispute itself, as laws vary between countries, it is common to find barriers or legal loops that do not guarantee the protection and validation of the parties' rights. As there is not a 'supra-national judiciary with mandatory jurisdiction, arbitration enhances a relative measure of adjudicatory neutrality, which in turn promotes respect for shared ex ante expectations at the time of a contract or investment'[16].

'Globalization has contributed directly to the rapid and broad growth of international arbitration'[17], and over the years it has grown to be the preferred mechanism of dispute resolution by companies (in contrast with mediation, as well as with traditional litigation), this is why it is said commercial arbitration is a by-product of economic globalisation[18], thus, it is heavily influenced by neoliberal concepts of economic relations with a strong emphasis on markets, deregulation and free international trade and investment[19]. The value of arbitration over litigation includes a wide range of advantages, such as

[11] Emmanuel Gaillard (ed.*), Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 9 and 10
[12] Christian Bühring-Uhle, *Arbitration and Mediation in International Business* (Kluwer Law International 2006) 42
[13] ibid 42
[14] Emmanuel Gaillard (ed.*), Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 12
[15] ibid 12
[16] William W. Park, 'Arbitrators and Accuracy' (2010) vol.1 JIDS 25 <https://www.arbitration-icca.org/media/4/28144731194383/media012771033387160ww_park_accuracy_and_arbitration.pdf> accessed 24 June 2019 33
[17] Kyriaki Noussia, *Confidentiality in International Commercial Arbitration* (Springer-Verlag Berlin Heidelberg 2010) 127
[18] Emmanuel Gaillard (ed.*), Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 295
[19] Isabel Corona, 'Confidentiality at risk: The interdiscursive construction of International Commercial Arbitration' (2011) Discourse and Communication 355 <https://journals.sagepub.com/doi/abs/10.1177/1750481311418097?journalCode=dcma> accessed 30 September 2019 356

greater party autonomy, greater predictability of the applicable governing law, greater efficiency in terms of both money and time, greater certainty of the forum in which the dispute will be heard and of relevant jurisdictional issues, and a greater ability to enforce the resulting decision in foreign countries.[20] This is of ultimate importance to transnational and/or multinational companies, where there is a difference in jurisdiction, language and culture, thus, arbitration ensure their rights to be protected and validated. In light of the above, international companies have turned more and more to arbitration, and this development in the last decade may be explained by the fact that no other system for the settlement of disputes could meet so effectively the needs of parties to international contracts, and in particular, their needs for neutrality and effectiveness, two important attributes of arbitration.[21]

b) Agreement to arbitrate

In arbitration the party autonomy, or principle of freedom of contract, the primary rule that governs the law, practice and regulation of arbitration in the vast majority of national jurisdictions, allows the parties to write their own set of rules of arbitration.[22] 'At one end, it is held that party autonomy is founded on the contract and need not to be justified by any legal system'.[23] In this sense, arbitration is born (its mere possibility to exist) from an agreement to arbitrate, and it is this contract that is considered as foundation stone of International Commercial Arbitration, as it records the consent of the parties to submit to arbitration.[24] 'In commercial arbitration the contractual character of arbitration is undisputed'.[25] In other words, the arbitration agreement is the basis of any consensual arbitration, so that there cannot be an arbitral reference in the absence of a valid and enforceable arbitration agreement.[26]

The principle of party autonomy is recognised by international and national law, and for the case of English law[27], freedom of contract rests in its main core. 'Assuming *ex hypothesi* that confidentiality is not an obligatory feature of arbitration, but rather a contractual creation, the logical

[20] Hillind H, 'A Difficult Balance: Open Justice and the Protection of Confidentiality in Arbitration Related Court Proceedings' (2015) Victoria U of Wellington Legal Research Papers <http://ssrn.com/abstract=2817595> accessed 12 August 2019 1

[21] Derains Y, 'New Trends in the Practical Application of the ICC Rules of Arbitration' (1981) Nw J Intl L & Bus 39 <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1089&context=njilb> accessed 14 August 2019 40

[22] Andrea Marco Steingruber, *Consent in International Arbitration* (Oxford University Press 2012) 12

[23] Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International 2004) 163

[24] Andrea Marco Steingruber, *Consent in International Arbitration* (Oxford University Press 2012) 13

[25] ibid 81

[26] Emilia Onyema, *International Commercial Arbitration and the Arbitrator's Contract* (Routledge 2010) 8

[27] *Note*: The freedom of contract principle is of utter importance under English commercial law and as seen by case law, it provides the source for any particular case.

conclusion is that the parties may, by agreement, limit their scope of confidentiality.'[28] With this in mind, the syllogism is clear: 'if confidentiality can be agreed, then there is no presumption of confidentiality, ergo, if there is no presumption of confidentiality then it is not essential'[29], hence, following the principle of freedom of contract.

As for the international legislation, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (herein after referred to as the New York Convention) recalls in its Article II(1) that each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration.[30] Likewise, said Convention also mentions under its Article V(1)(a) that recognition and enforcement of the award may be refused, if the parties to the agreement, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it.[31] Here, the importance of written agreements is highlighted, an they serve as source for the proceeding to be held; this will come in handy when addressing the duty of confidentiality. Above all, it is important to clarify that the Convention is the most significant legislative instrument for treaty-based arbitration, although its rules are also present on International Commercial Arbitration.[32] Then as well, said Convention contains no provision for confidentiality in arbitral proceedings, but instead focuses on the enforcement and recognition of arbitral awards and agreements.[33] Although, it may 'potentially support an implied requirement to give effect to parties' agreements with regard to confidentiality in Articles II(1) and II(3)'[34].

Similarly, the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (Model Law) states under its first article that the scope of said legislation applies to agreements between States, followed by a definition of an arbitration agreement

[28] Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration* (Kluwer Law International, 2011) 112
[29] Bernardo M. Cremades and Rodrigo Cortes, 'The Principle of Confidentiality in Arbitration: A Necessary Crisis' (2013) vol.23 J of Arb Studies 25 <https://heinonline.org/HOL/Page?handle=hein.journals/jarbstu23&collection=journals&id=415&startid=415&endid=428> accessed 17 June 2019 28
[30] New York Convention Article II(1)
[31] ibid Article V(1)(a)
[32] Avinash Poorooye and Ronán Feehily, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' (2017) Harvard Negotiation L Rev 275 <https://heinonline.org/HOL/LandingPage?handle=hein.journals/haneg22&div=12&id=&page> accessed 30 September 2019 279
[33] ibid 280
[34] Henry Hillind, 'A Difficult Balance: Open Justice and the Protection of Confidentiality in Arbitration Related Court Proceedings' (2015) Victoria U of Wellington Legal Research Papers <http://ssrn.com/abstract=2817595> accessed 12 August 2019 4

which is one by the parties to submit to arbitration all or certain disputes which have arisen or which may arise, including that it may be in the form of an arbitration clause in a contract or in the form of a separate agreement.[35] Additionally, it states under its Article 36(1)(a)(i) that the recognition or enforcement may be refused if the arbitration agreement is void.[36] It is then clear the importance of an agreement to arbitrate and how it may be manifested, whether an arbitration clause contracted in another contract before a dispute or as a submission agreement after a dispute has arisen.[37] 'The fact that the basis of arbitration is contractual is not disputed: an arbitrator's power to resolve a dispute is founded upon the common intention of the parties to that dispute'.[38] In essence, the agreement to arbitration holds a lot of power to set the course for how the arbitration is going to be developed. And it its by this contractual nature of arbitration, that the terms, whether implied or express, are of vital importance when it comes to the duty of confidentiality.

c) Advantages of arbitration

Assuredly, there are benefits from arbitration over traditional litigation, and in order to understand the duties imposed by arbitration proceedings, it is valuable to evaluate the reason that lead to take this alternate dispute resolution. On a first instance, its neutrality, meaning that when parties being from different countries, would not need to face the issue of foreign law, and more importantly, are given an opportunity to participate in the selection of the tribunal, and it is important to keep in mind (as well, as y following common sense), parties will prefer an arbitrator (or arbitrators) with sufficient experience and expertise, although within a strict scope of confidentiality, parties may lack to have the background or predictability of a certain arbitration. Secondly, the enforcement, as the decision issued as an award is binding.[39] These, make arbitration an attractive and cheaper dispute resolution system, offering flexibility as it may be tailored to meet the specific requirements of the dispute.[40] If a survey was to be conducted results would include advantages of speed and flexibility of the process; lower cost; greater

[35] UNCITRAL Model Law Article 7(1)
[36] ibid Article 36(1)(a)(i)
[37] Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (5th edition, Oxford University Press, 2009) 15
[38] Emmanuel Gaillard (ed.*), Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 29
[39] Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (5th edition, Oxford University Press, 2009) 32
[40] ibid 33

guarantee of settlement due to the specialisation of the arbitrators (as opposed to civil judges); and the possibility of continuity of the commercial relationship between the disputing parties.[41]

Furthermore, arbitration offers confidentiality as a form of privacy in the arbitral proceedings, and it 'is a powerful attraction to companies and institutions that may become involved (often against their will) in legal proceedings'[42], as they may be protected from disclosing their trade secrets or to generate a bad image for the company that may put at risk its performance. 'The thought that confidentiality is an innate attribute, seems to be an attractiveness considered to choose international commercial arbitration to settle disputes'[43], thus it is preferred over other dispute settlements. Nonetheless, the "innate attribute" has been questioned, creating broad spectrums of what is to be expected from arbitration and confidentiality.

Moreover, Queen Mary University of London made in 2010 their International Arbitration Survey: Choices in International Arbitration, which brought up important opinions of corporations, concluding as the hallmark attribution to choose arbitration to be flexibility. As for the lack of confidentiality in State court litigation, 62% of the corporate counsels interviewed denied this was a principal reason for choosing arbitration, although confidentiality is not seen as essential, it was declared very important, must specifically regarding the amount (monetary terms) of the arbitration.[44] However, it is noteworthy that corporations are often obliged to report to shareholders, make disclosures in their annual accounts and reports and otherwise announce significant information to the market (in the case of publicly listed companies).[45] 'Corporate counsel accept that this can make confidentiality 'porous', but a number said that often commercial arbitration matters are not of great interest to outsiders and do not involve

[41] Bernardo M. Cremades and Rodrigo Cortes, 'The Principle of Confidentiality in Arbitration: A Necessary Crisis' (2013) vol.23 J of Arb Studies 25 <https://heinonline.org/HOL/Page?handle=hein.journals/jarbstu23&collection=journals&id=415&startid=415&endid=428> accessed 17 June 2019 26

[42] Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (5th edition, Oxford University Press, 2009) 33

[43] Marlon Meza Salas, "Confidentiality in International Commercial Arbitration: Truth or Fiction?" (Wolters Kluwer, 23 September 2018) <http://arbitrationblog.kluwerarbitration.com/2018/09/23/confidentiality-in-international-commercial-arbitration-truth-or-fiction/>

[44] White & Case, '2010 International Arbitration Survey: Choices in International Arbitration' (Queen Mary University of London, 2010) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf> accessed 17 June 2019

[45] Alberto Malatesta and Rinaldo Sali, *The Rise of Transparency in International* Arbitration (Juris 2013) and White & Case, '2010 International Arbitration Survey: Choices in International Arbitration' (Queen Mary University of London, 2010) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf> accessed 17 June 2019

sensitive commercial information'.[46] Consequently, a full and strict confidentiality is not viable for the modern corporate governance. Following these findings, the Survey presented the corporations the scenario if they would still use arbitration if it did not offer the potential for confidentiality, the results were that 38% said they would still use it, 35% said they would not, and 26% don't know.[47] It then may be concluded from this study that confidentiality is highly important but not the only reason parties use arbitration, and specially, that said attribute is not an absolute one.

In like manner, but most recent, the Queen Mary University of London 2018 International Arbitration Survey: The Evolution of International Arbitration, identified confidentiality is not at the top priority, following the open justice tendency of companies (followed in fifth place by "confidentiality and privacy" with 35%).[48] Albeit, both surveys included that 50% of respondents erroneously believe that arbitration is confidential even where there is no specific clause to that effect in the arbitration rules adopted or the arbitration agreement, whilst only 30% do not consider it confidential.[49] Additionally, 'a decisive majority of 74% of the respondent group believed that confidentiality should be an opt-out feature while only 26% thought that confidentiality should not be presumed by default'.[50] Recalling the contractual nature of arbitration, rested in party autonomy, it is not out of line to consider an "opt-out, opt-in" mechanism. In essence, the surveys from Queen Mary University of London reflect that confidentiality is not the single biggest driver behind the choice of arbitration by the parties who use it.[51] Similarly, although not as recent, but it is a change that has been happening on this millennium, a 2008 study from PricewaterhouseCoopers reveals that confidentiality ranks low as the most important attribute of arbitration, so it is once again the enforceability of the awards, flexibility of procedures and expertise of arbitrators that are seen as the major advantages of arbitration.[52]

[46] White & Case, '2010 International Arbitration Survey: Choices in International Arbitration' (Queen Mary University of London, 2010) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf> accessed 17 June 2019

[47] ibid

[48] White & Case, '2018 International Arbitration Survey: The Evolution of International Arbitration' (Queen Mary University of London, 2018) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf> accessed 17 June 2019

[49] ibid

[50] ibid

[51] ibid

[52] Emmanuel Gaillard (ed.*), Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 284

d) Conceptualisation of confidentiality

The issue revolves around the idea that confidentiality is traditionally considered almost part and parcel of arbitration, thus, it will be expected that arbitral regulation, in national laws and international institutional regulation, to be quite clear in this regard, however, that is far from reality.[53] Even if unwritten, there was an assumption that the private nature of the arbitral proceedings obliged to maintain confidentiality.[54] This comes as a result of the transformation of the notion of confidentiality, a debate that stirs up even more in the modern and present era. 'Until the 1990s there was a belief that arbitration proceeding were both private and confidential, and that the duty of confidentiality arose from the very nature of arbitration'.[55] However, there were a number of cases and new trend in international policies, as well as a demand from a new generation of practitioners, that stated to question this duality of privacy and confidentiality, thus, diverse criteria (and quite opposite) were formed.

Two main approaches are to be found: while in England the approach has been of an implied duty of confidentiality, the Australian approach has been on the contrary quite reluctant to an implied, thus take the approach on an express duty of confidentiality.[56] 'The existence and scope of confidentiality in arbitration spawn debate first before national courts, when parties sought to reveal and rely on arbitration materials in subsequent proceedings'[57]. Taken for granted for many years, the English courts who assumed that arbitrations were private and confidential[58], took notice of the current controversy around privacy and confidentiality, which became visible in 1984 with the case of *Oxford Shipping v Nippon Yusen Kaisha [1984]*, as it was in this case that it was questioned whether arbitrators could order concurrent hearings in parallel arbitrations before the same arbitrators[59], followed by other cases such as the *Dolling-Baker v Merrett [1990].* And it was by the case of *Esso Australia Resources Ltd v The Honourable Sidney James Plowman [1995]* that originates the modern view of a distinction between

[53] Bernardo M. Cremades and Rodrigo Cortes, 'The Principle of Confidentiality in Arbitration: A Necessary Crisis' (2013) vol.23 J of Arb Studies 25 <https://heinonline.org/HOL/Page?handle=hein.journals/jarbstu23&collection=journals&id=415&startid=415&endid=428> accessed 17 June 2019 31
[54] ibid 28
[55] Discourse and Practice in International Commercial Arbitration (Ashgate Publishing, 2012) 283
[56] ibid 283
[57] Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration* (Kluwer Law International, 2011) 27
[58] ibid 32
[59] ibid 1

privacy and confidentiality, as it bravely recognised that privacy of hearings and confidentiality could go on separate ways, as independent elements or items.[60]

First things first, it important to define what is confidentiality in International Commercial Arbitration. In broad terms and a generic etymological definition, it 'refers to non-disclosure of specific information in public'[61]. It is important to make the difference between the "private character" and "confidentiality" in international arbitration, where confidentiality acts as a more restrictive notion, referring to the disclosure of certain documents, information or evidence to third parties in connection to the arbitral proceeding.[62] As to what elements fall under the confidentiality umbrella, 'confidentiality is concerned with information relating to the content of the proceedings, evidence and documents, addresses, transcripts of the hearing or the award'[63]. It is then that confidentiality bifurcate into different items or instances to be protected.

Initially, the subjects that are held to the duty of confidentiality. In essence, the actors that have the potential obligation to compel to said duty are the parties involved, the representatives of the parties (external attorneys or in-house lawyers), the arbitral tribunal, more specifically the arbitrator, the arbitral institutions, and third parties participating in the proceedings, such as witnesses.[64] Nonetheless, from these categories, it may be extracted that only 'the arbitrators and the legal counsel representing the parties before the arbitral tribunal have, as part of their deontological duties[65], an obligation to maintain confidentiality regarding the information circulated in the process of dispute resolution'[66]. Indeed, confidentiality is more regulated in terms of internal administration, as arbitrators and staff of the arbitration centre follow rules from the codes of ethics, even when they do not include a section for the

[60] Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration* (Kluwer Law International, 2011) 2
[61] Marlon Meza Salas, "Confidentiality in International Commercial Arbitration: Truth or Fiction?" (Wolters Kluwer, 23 September 2018) <http://arbitrationblog.kluwerarbitration.com/2018/09/23/confidentiality-in-international-commercial-arbitration-truth-or-fiction/>
[62] Bazil Oglinda, 'The Principle of Confidentiality in Arbitration – Application and Limitations of the Principle' (2015) vol.4 Perspectives of Business LJ 57 <https://heinonline.org/HOL/Page?handle=hein.journals/perbularna4&collection=journals&id=57&startid=&endid=64> accessed 17 June 2019 57
[63] Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration* (Kluwer Law International, 2011) 5
[64] ibid 134
[65] *Note*: It may be added as well as part of their ethical duties, and in some case legal. Although the regulation of professional secrecy is limited and incomplete, it is of general notion that it is an obligation to keep such secrecy in the performance of the profession, and it is more generally regulated in bars and law societies
[66] Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration* (Kluwer Law International, 2011) 134

parties[67]. The LCIA Rules include under its Article 30(2) that the deliberations of the Arbitral Tribunal shall remain confidential to its members, to the extent that arbitrators may not disclose details from their cases.[68] The problem falls within the duty from the parties themselves, but it is not only if they have such duty or not, it is important to comprehend what elements falls under the veil of confidentiality.

Furthermore, similar to the banker's confidentiality[69], arbitrators are also subject to some exceptions that allow (or even more, request) disclosure of information. Such circumstances include money laundering, fraud, tax evasion (and tax havens), bribery, corruption and other offences. As an illustration, under English law, regarding money laundering, the Proceeds of Crime Act 2002 states on its Section 328 that 'a person [the arbitrator] commits an offence if he becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person'[70]. Thankfully, Section 327(2) provides relief as it allows the to disclose information if has an appropriate consent (from the parties) or has a reasonable excuse.[71] It is fair to say that there has been no precedent on the matter and it is definitely not included on the relevant legislation. Nevertheless, it is once more appreciated the importance of the terms agreed in the contract, as an expressed authorization (as in a clause speculating a possible event) will be sufficient to act and follow the compulsion of law.

In this sense, the main controversy on the matter is regarding the confidentiality of the documents presented and/or produced in the hearings. 'Analysed *in abstracto*, unlike privacy, confidentiality is a state of secrecy attached to the materials created, presented and used in the context of the arbitral process'.[72]

Also, it is important to draw a comparison with privacy. Privacy and confidentiality shall be appraised as two different elements, as privacy does not equal confidentiality, being such not an essential element

[67] Marlon Meza Salas, "Confidentiality in International Commercial Arbitration: Truth or Fiction?" (Wolters Kluwer, 23 September 2018) <http://arbitrationblog.kluwerarbitration.com/2018/09/23/confidentiality-in-international-commercial-arbitration-truth-or-fiction/>
[68] LCIA Rules Article 30(2)
[69] *Note*: Recalling the similarities of *Tournier v National Provincial and Union Bank of England* and *John Forster Emmott v Michael Wilson & Partners Ltd* as landmarks on confidentiality and exploring the exceptions to such duty
[70] Proceeds of Crime Act 2002 Section 328
[71] ibid Section 327(2)
[72] Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration* (Kluwer Law International, 2011) 5

to arbitration. Notably, there is a difference then with privacy and confidentiality. Where the first remains exclusive to the hearings (as for the third parties that may have access and observe the proceedings, which are private not public), and in opposition, confidentiality is linked to the possibility to disclose documents and information used or related to the arbitration, as well as the award or existence of arbitration itself.[73] Privacy 'confers the power to exclude others form arbitration, whereas confidentiality may impose an obligation to prevent the disclosure of information about the arbitration and documents created or produced in the arbitration'[74]. Also, privacy does not relate to the arbitral process as a whole but only to the hearings phase.[75] In contrast, confidentiality bifurcates into "items" protected or capable of protection, reaching further in the proceedings, extending also to the pre and post hearing phases.[76] Furthermore, 'it serves to centralise the parties dispute in a single forum and to facilitate an objective, efficient and commercially-sensible resolution of the dispute'[77]. Privacy and confidentiality may overlap in the context of hearings, but this does not necessarily mean that all information disclosed at the stage is confidential; at best, the information disclosed in the hearings is only presumptively confidential.

It is then that arbitration is private but not confidential, a paradox that it is seemingly contradictory, but not correct to assume that information revealed in arbitration is automatically confidential.[78] Then again, a comparison must be drawn between both concepts. Privacy does not relate to the arbitral process as a whole, but only to the hearings phase, and it is common that the general rules is that hearings are private unless otherwise agreed upon by the parties.[79] Finally, the publication of the awards is another element to be considered to be prospect under the veil of confidentiality and that has generated an uproar in international regulations. Although, this will be fully addressed in subsequent sections. As for the mere existence of an arbitration, as it will be explained in detail in the next section, it is widely accepted, specially when institutional arbitration is the way to go.

[73] Kyriaki Noussia, *Confidentiality in International Commercial Arbitration* (Springer-Verlag Berlin Heidelberg 2010) 1
[74] Julian D.M. Lew et al., *Arbitration in England* (Kluwer Law, 2013) 442
[75] Ileana M. Smeureanu, Confidentiality in International Commercial Arbitration (Kluwer Law International, 2011) 4
[76] ibid 6
[77] Gary B. Born, International Commercial Arbitration (2nd edition, Kluwer Law International, 2014)
[78] ibid 24
[79] Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration* (Kluwer Law International, 2011 4

e) Final remarks

In essence, it is true there is a difference between confidentiality and privacy, although there was a common misconception that they were synonyms or that the private character or hearings meant an absolute confidentiality or prohibition to disclose documents from such proceeding. Nonetheless, even when there are different elements fall under the confidentiality umbrella, it may be concluded that they stem from the same origin: the contractual nature of arbitration. Notwithstanding the latter, as it will be seen, there are some exceptions that lift the veil, and it is this criterion that has been slowly forming, conceptualising the scope and limits to confidentiality.

Chapter II – Approach on the principle of confidentiality

As it was previously mentioned, there are diverse approaches on confidentiality, as much as in international rules and national laws. Most international rules say very little about the extent to which arbitral proceedings are confidential, while national laws and national courts have taken varying stances on the matter and new developments, such as the rise of investor-state arbitration where public interest has brought pressure for greater transparency, are having a transformative influence on traditional thinking about confidentiality.[80] In other words, arbitration statutes and rules of commercial arbitration do not include provisions establishing confidentiality requirements.[81] For this section, a review of the most relevant international rules will be addressed, followed by national legislation resting in case law law, specifically of England and Australia, and finalising with an approach from an emerging legislation on arbitration, Mexico.

[80] Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration* (Kluwer Law International, 2011) x

[81] Daniel R. Bennett and Madelaine A. Hodgson, 'Confidentiality in Arbitration: A Principled Approach' (2013) vol.3 McGill J of Dispute Resolution 98 <https://heinonline.org/HOL/Page?handle=hein.journals/mgjdp3&collection=journals&id=100&startid=&endid=114> accessed 17 June 2019 104 111

a) International regulations

'In the absence of any international state court, arbitration has become the dominant means for solving the disputes of international trade.'[82] Consequently, the number of cases submitted to arbitration is increasing dramatically, specially during the most recent years.[83] It is noteworthy that the more complicated a dispute is, the more challenging is going to find the right case management tools.[84] Granted that, arbitration institutions must adapt themselves to the modern needs and to successfully meet the demands of the number of cases filed. With the growing popularity of arbitration, it is becoming increasingly rare for the parties to choose their arbitrators and organize their procedure directly, even when the freedom of contract is the rule. 'Instead, permanent arbitral institutions have been set up throughout the world and now handle the vast majority of ICA'.[85] The institutionalisation of arbitration seeks for stability and a uniform practice and regulations. 'Perhaps the most important advantage of institutional arbitration is a certain measure of convenience, security and administrative effectiveness'.[86]

Equally important, institutional arbitration has the advantage of the prestige and the track record that strengthen the credibility of awards, therefore, facilitates both voluntary compliance and enforcement.[87] 'In a more connected world, multinational companies are spawning and international commercial contracts are blooming'.[88] Notably, there is increased competition between arbitral institutions, arbitrators, and lawyers derived from the increasing popularity and pressures for homogenous rules, but thankfully, this fierce competition has also led to increased cooperation in a bid to improve the arbitration system, following the demands of the modern world and trade system, highly motivated by transparency, as it is going to be deepened in coming sections.[89] However, problems arise as there with the constantly growing number of arbitral institutions, each of which has different rules

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[82] Derains Y, 'The Future of ICC Arbitration' (1980) 14 J Intl L & Econ 437 <https://heinonline.org/HOL/LandingPage?handle=hein.journals/gwilr14&div=30&id=&page=> accessed 15 August 442

[83] ibid 442

[84] William W. Park, 'Arbitrators and Accuracy' (2010) vol.1 JIDS 25 <https://www.arbitration-icca.org/media/4/28144731194383/media012771033387160ww_park_accuracy_and_arbitration.pdf> accessed 24 June 2019 40

[85] Emmanuel Gaillard (ed.*), Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 33

[86] Christian Bühring-Uhle, *Arbitration and Mediation in International Business* (Kluwer Law International 2006) 36

[87] ibid 36

[88] Avinash Poorooye and Ronán Feehily, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' (2017) Harvard Negotiation L Rev 275 <https://heinonline.org/HOL/LandingPage?handle=hein.journals/haneg22&div=12&id=&page> accessed 30 September 2019 304

[89] ibid 304

and processes, which will be a potential risk, specially taking into consideration the publication of awards and that companies turn to smaller arbitration institutions that do not follow transparency policies.[90] With this in mind, it is important to evaluate the rules of the major arbitration institutions and international rules.

a.1) International Court of Arbitration

Firstly, the International Court of Arbitration (herein after referred to as ICC) is the arbitral body attached to the International Chamber of Commerce that was established in 1919, and it is considered to be the leading international arbitral institution in terms of volume of cases and the significance of disputes heard[91], as well as it is considered 'one of the must venerable arbitral institutions'[92]. The ICC 'is by far the most preferred arbitral institution — in particular for high-value, complex, international disputes – due to its unique track record, global reach and signature quality control'.[93] Notably, since 2016, the ICC has shifted into a more transparent direction, welcoming policies to further improve efficiency, diversity and transparency. As said by Alexander Fressas, the Secretary General of the ICC: 'We are pleased to see increased participation from arbitrators in growing economic regions'.[94]

Since 2016, the ICC has adopted a new and modern approach enhancing the efficiency and transparency of arbitration proceedings, thus, it has implemented new policies for such purpose. Such decisions were unanimously adopted at the Bureau of the Court and announced at the Court's Plenary session on December 17, 2015.[95] Following this new approach, the ICC has now been publishing since 2016 on its website the names of the arbitrators sitting in cases, including their nationalities, as for the case itself, the name of the parties will not be disclosed; nonetheless, parties may opt out of this limited

[90] Jeremy Bentham, *The Works of Jeremy Bentham* (Edinburgh, William Tait, 1843) 35
[91] Practical Law Arbitration, 'Which institution and why: a comparison of major international arbitration institutions' (Thomson Reuters, 2019) <https://uk.practicallaw.thomsonreuters.com/9-204-3989> accessed 04 October 2019
[92] Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration* (Kluwer Law International, 2011) 74
[93] International Chamber of Commerce, 'More efficiency, transparency and diversity in ICC Arbitration' (ICC, Abu Dhabi, 2019) <https://iccwbo.org/media-wall/news-speeches/icc-court-announces-new-policies-to-foster-transparency-and-ensure-greater-efficiency/> accessed 27 September 2019
[94] International Chamber of Commerce, 'ICC Arbitration Figures Reveal New Record Cases Awards 2018' (ICC, Paris, 201) <https://iccwbo.org/media-wall/news-speeches/icc-arbitration-figures-reveal-new-record-cases-awards-2018/> accessed 27 September 2019
[95] International Chamber of Commerce, 'ICC Court Announces New Policies to Foster Transparency and Ensure Greater Efficiency' (ICC, Paris, 2016) < https://iccwbo.org/media-wall/news-speeches/more-efficiency-transparency-and-diversity-in-icc-arbitration/> accessed 27 September 2019

disclosure by mutual agreement, or may request the Court to publish additional information about a particular case. As for 2019, the ICC has continued on its efforts to promote transparency policies and enhance efficiency. In this sense, following the previous policies of 2016, the ICC has updated their Note to Parties and Arbitral Tribunals on the Conduct of Arbitration under the ICC Rules of Arbitration (the Note), entering into effect on January 01, 2019. The Note, used as reference and practical guidance for the conduct of arbitrators and parties in the Court, has implemented five major amendments towards more efficiency and transparency.[96]

Firstly, the publication of the arbitrator's details has expanded on including the industry sector involved and the counsel representing the parties in the case.[97] Regarding the publication of awards, publicising and disseminating information about arbitration has been one of ICC's commitments since its creation and an instrumental factor in facilitating the development of trade worldwide[98], thus, the ICC has now implemented that parties and arbitrators accept that awards made as from 1 January 2019 may be published in its entirety no less than two years after the parties were notified of a final award.[99] Nonetheless, parties remain with an option to object that publication, requesting that any award be in all or part anonymised or pseudonymised, and in case of a confidentiality agreement covering certain aspects of the arbitration or of the award, publication will be subject to the parties' specific consent.[100] Once again, we find the importance of the principle of confidentiality on the agreement prior to the proceeding. Similar to the previous amendment, the Note includes about arbitrator's disclosures regarding non-parties, were the Secretariat will aid in assessing whether a disclosure should be made.[101]

Additionally, it is noteworthy to recall on the foreword of the ICC Arbitration Rules 2017 that state that the Rules are a structured, institutional framework intended to ensure transparency, efficiency and fairness in the dispute resolution process while allowing parties to exercise their choice over many aspects of procedure, and expressly stating the new policy trend to be followed as ICC arbitrations will

[96] Markus Altenkirch and Malika Boussihmad, 'ICC – More efficiency and transparency in 2019' (Baker McKenzie, Global Arbitration News, 2019) <https://globalarbitrationnews.com/icc-more-efficiency-and-transparency-in-2019/> accessed 28 September 2019
[97] Note to Parties and Arbitral Tribunals on the Conduct of Arbitration under the ICC Rules of Arbitration Article 36
[98] ibid Article 40
[99] ibid Articles 41 and 42
[100] ibid Articles 44, 45 and 46
[101] ibid Article 24

become even more transparent, for the Court will now provide reasons for a wide range of important decisions, if requested by one of the parties, therefore, Article 11(4) has been amended to that effect.[102]

Moreover, even when there has been a to tendency to transparency by the ICC through the publication of awards, it still remains silent on the core matter of the principle of confidentiality. Even when the ICC Rules establish on its Article 6 that the work of the Court is of a confidential nature[103], it is by its Appendix II – International Rules of the International Court of Arbitration, on its Article 1(4), that a confidential character is given to the documents submitted to the Court, or drawn up by it or the Secretariat in the course of the Court's proceedings, are communicated only to the members of the Court and to the Secretariat and to persons authorized by the President to attend Court sessions[104], and in its Article 1(5), it establishes that the President or the Secretary General of the Court may authorize researchers undertaking work of an academic nature to acquaint themselves with awards and other documents of general interest, with the exception of memoranda, notes, statements and documents remitted by the parties within the framework of arbitration proceedings.[105]

a.2) London Court of International Arbitration

The London Court of International Arbitration (herein after referred to as LCIA) is one of the oldest international arbitral institutions being established in 1892, this, it is a highly respected organisation; it follows its own Rules, as well as the UNCITRAL Rules.[106] In 2006, it became the first leading arbitral body to adopt a rule requiring arbitrators to provide reasons for its decisions[107], thus consolidating a similarity with traditional litigation in common law, establishing a concrete stare decisis, hence, a precedent. It most definitely has been a dramatic and important development.[108] Under the LCIA Arbitration Rules 2014, quite contrary to the direction taken by the ICC, it is established on its Article

[102] ICC Arbitration Rules 2017 Foreword
[103] ibid Article 6
[104] ibid Appendix II Article 1(4)
[105] ibid Appendix II Article 1(5)
[106] Practical Law Arbitration, 'Which institution and why: a comparison of major international arbitration institutions' (Thomson Reuters, 2019) <https://uk.practicallaw.thomsonreuters.com/9-204-3989> accessed 04 October 2019
[107] Daniel Schimmel, 'Transparency in Arbitration' (Thomas Reuters, 2018) <https://foleyhoag.com/-/media/files/foley%20hoag/publications/articles/2018/transparency%20in%20arbitration_practical%20law_mar2018.ashx> accessed 04 October 2019
[108] Rogers C, 'Transparency in International Commercial Arbitration' (2006) U Kan L Rev 1301 <https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1233&context=fac_works> accessed 15 August 2019 1315

30(1) that 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.[109] However, it includes a brief exception for such confidentiality, up 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.[110] Remarkably, the LCIA do not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal.[111] Regarding the privacy of the hearings, they are on first instance private, unless the parties agree otherwise in writing[112], meaning that the arbitration will follow what it is stipulated in the agreement to arbitrate.

a.3) Australian Centre for International Commercial Arbitration

The Australian Centre for International Commercial Arbitration (herein after referred to as ACICA) was established in 1985, having its first general Rules released in 2005, and presents its most recent edition in 2016.[113] Chiefly, the ACICA Arbitration Rules 2016 do not distinguish between domestic and international arbitration but are designed for the latter, and ACICA in fact only administers international arbitrations.[114] In the same fashion as the LCIA Rules, under its Article 22(1) the ACICA Arbitration Rules state that unless the parties agree otherwise in writing, all hearings shall take place in private.[115] Following the posture of requiring an express term of confidentiality, the award, materials and documents of the proceeding shall be treated as confidential and not to be disclosed, but the existence of arbitration is not under the umbrella of confidentiality.[116] It also presents exceptions that allow to disclose documents, (a) for the purpose of making an application to any competent court; (b) for the purpose of making an application to the courts of any State to enforce the award; (c) pursuant to the order of a court of competent jurisdiction; (d) if required by the law of any State which is binding on the

[109] LCIA Rules 2014 Article 30(1)
[110] ibid Article 30(1)
[111] LCIA Rules 2014 Article 30(3)
[112] ibid Article 19(4)
[113] Luke Nottage and James Morrison, 'Accessing and Assessing Australia's International Arbitration Act' (2017) J Intl Arb 963 972
[114] ibid 972
[115] ACICA Arbitration Rules 2016 Article 22(1)
[116] ibid Article 22(2)

party making the disclosure; or (e) if required to do so by any regulatory body.[117] In contrast to the LCIA Rules it is more open in the circumstances by which the veil of confidentiality may be risen, presented in clear scenarios.

a.4) United Nations Commission on International Trade Law

In like manner, the United Nations Commission on International Trade Law (herein after referred to as UNCITRAL) has its own set of rules, the UNCITRAL Arbitration Rules 2010, which were revised in 2010 to meet the needs of modern businesses; although the modification consisted in improvements to procedural efficiency, the inclusion of provisions on multi-party arbitrations and the development of rules on interim measures.[118] It is not until 2013 that the UNCITRAL addressed a minor revision on transparency policies as it will be seen in further sections, although they apply to investment arbitrations based on treaties.

Chiefly, the UNCITRAL Arbitration Rules disregard any matters on confidentiality and privacy, even when addressing the hearings. Although, in a brink of modernity, they allow a witnesses to be examined by means of telecommunication or videoconference.[119] As seen in the previous section, the UNCITRAL also has its Model Law on International Commercial Arbitration. Nonetheless, it also lacks on addressing matters of confidentiality and privacy in a concrete and clear manner. The only relevant disposition besides the previous discussed, and once again in matters of the agreement to arbitrate, is that a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause, thus, permitting arbitration, to recognise or enforce the resulting award.[120] Moreover, in Part Two of said Model Law, regarding the explanatory note by the UNCITRAL Secretariat, it is stated the purpose of such text, that it 'constitutes a sound basis for the desired harmonization and improvement of national laws; (…) and reflects a worldwide consensus on the principles and important issues of international arbitration practice.'[121] Furthermore, it encompasses the

[117] ibid Article 22(2)
[118] Aceris Law LLC, 'UNCITRAL Arbitration Rules' (Aceris Law International Arbitration Law Firm, 2018) <https://www.acerislaw.com/uncitral-arbitration-rules/> accessed 04 October 2019
[119] Even if not for purposes of the present document, it will be interesting to explore the effects of introducing technology into International Commercial Arbitration, and how it will address matters of privacy and confidentiality.
[120] UNCITRAL Model Law Articles 16(1) and 35
[121] UNCITRAL Model Law on International Commercial Arbitration 2006 Part Two

objective of Model Law, that should be appreciated not only proper to said law, but as the ultimate goal of international regulation, saying in that sense that 'the form of a model law was chosen as the vehicle for harmonization and modernization in view of the flexibility it gives to States in preparing new arbitration laws; (…) States are encouraged to make as few changes as possible when incorporating the Model Law into their legal systems'[122]. However, even when it praises to meet the needs of international commercial arbitration and provide a standard based on solutions acceptable to parties from different legal systems and attack problems that arise from the absence of specific legislation governing arbitration[123], it clearly lacks to address a current problem that is very important on the international (and even national) arena, not mentioning by any degree a posture on confidentiality. 'Since confidentiality has not been on the agenda of the revised UNCITRAL Model Law, it is unlikely that the enacting countries will depart from its letter and spirit'.[124]

Albeit the UNCITRAL Arbitration Rules disregard confidentiality, the UNCITRAL Notes on Organizing Arbitral Proceedings 2016, a nonbinding instrument containing a model of an agreement on confidentiality, provides on its Note 6 that there is an inherent requirement of confidentiality in commercial arbitration and that confidentiality is an advantageous and helpful feature of international commercial arbitration; nevertheless, there is no uniform approach in domestic laws or arbitration rules regarding the extent to which the participants in an arbitration are under a duty to maintain the confidentiality of information relating to the arbitral proceedings.[125]

a.5) International Centre for Settlement of Investment Disputes

The International Centre for Settlement of Investment Disputes (herein after referred to as ICSID) provides facilities for investment disputes and has its own set of rules, the Rules of Procedure for Arbitration Proceedings, which state on its Rule 15 that deliberations of the Tribunal shall take place in private and remain secret.[126] Even when the ICSID attends to Investor State Arbitration, it serves to reflect the international posture, and ironically, although relevant to investor-state, perceives to be a

[122] ibid
[123] ibid
[124] Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration* (Kluwer Law International 2011) 25
[125] UNCITRAL Notes on Organizing Arbitral Proceedings 2016 Note 6
[126] ICSID Rules of Procedure for Arbitration Proceedings Rule 15

closed and conceived under secrecy. It is noteworthy the wording for the previous rule, as “secret” may derive into an abuse of confidentiality, even when in cases of public interest.

b) Trade secrets

In other matters, but still relevant to the principle of confidentiality, is one of the reasons why companies praise for an absolute confidentiality: trade or business secrets. Notably, a trade or business secret is a piece of information treated as confidential because its particular features and limited access lead a competitive advantage, as a result, it may be almost any information that has economic value and provides the holder with an advantage over competitors, ‘[t]hese include different types of technical information (e.g. designs, drawings, architectural plans, blueprints and maps, algorithms, instructional methods, manufacturing or repair processes, techniques and know- how, document tracking processes, formulas for producing products) as well as business information (sales and distribution methods, lists of suppliers and clients and consumer profiles, business and advertising strategies, marketing plans, financial information)’.[127]

‘The protection of business secrets is perhaps the primary purpose of a principle of confidentiality’.[128] For this effects, the United Nations International Institute for the Unification of Private Law (herein after referred to as UNIDROIT), included in its Principles of International Commercial Contracts under its Article 2.1.16 regarding the duty of confidentiality that ‘where information is given as confidential by one party in the course of negotiations, the other party is under a duty not to disclose that information or to use it improperly for its own purposes, whether or not a contract is subsequently concluded’[129]. ‘A careful balance must be struck between the legitimate interests of the parties in maintaining confidentiality in relation to what are often highly commercially sensitive disputes and the duty of the courts to administer justice fairly and transparently in open court’.[130]

[127] International Chamber of Commerce, ‘Protecting Trade Secrets — Recent EU and US Reforms’ (ICC, Publication number: 450/1081-9E, 2019) <https://iccwbo.org/content/uploads/sites/3/2019/04/final-icc-report-protecting-trade-secrets.pdf> accessed 27 September 2019 7

[128] Henry Hillind, ‘A Difficult Balance: Open Justice and the Protection of Confidentiality in Arbitration Related Court Proceedings’ (2015) Victoria U of Wellington Legal Research Papers <http://ssrn.com/abstract=2817595> accessed 12 August 2019 3

[129] UNIDROIT Principles of International Commercial Contracts Article 2.1.16

[130] Henry Hillind, ‘A Difficult Balance: Open Justice and the Protection of Confidentiality in Arbitration Related Court Proceedings’ (2015) Victoria U of Wellington Legal Research Papers <http://ssrn.com/abstract=2817595> accessed 12 August 2019 1

Moreover, the Agreement on Trade-Related Aspects of Intellectual Property Rights of 1994 (TRIPS Agreement 1994), that was included in Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization in 1994, addresses the protection of intellectual property rights, in this case, trade secrets or undisclosed information, as it establishes in its Article 39, Section 2 the requirements for preventing from being disclosed to, acquired by, or used by others without consent as long as such information is secret in the sense that it is not generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; has commercial value because it is secret; and has been subject to reasonable steps under the circumstances to keep it secret.[131] In essence, even when discussing confidentiality in the documents used or produced by arbitration, international regulations are able to secure the protection of sensitive information, even when it might collide with the need for transparency.[132] Therefore, arguments against unravelling confidentiality in fear of disclosing sensitive business information (secrets) are not viable, as they are protected by Intellectual Property rights.

In addition, the World Intellectual Property (herein after referred to as the WIPO) ahs its own set of Arbitration Rules. Within the WIPO Arbitration Rules 2014, on its Article 75 that information of the existence of arbitration may only be disclosed by a court challenge or an action for enforcement of an award, as long as required by law or competent regulatory body, but allows an exception, allowing to disclose the names of the parties by the purpose of satisfying any obligation of good faith or candor owed to a third party.[133] As for the confidentiality of the documents of the proceedings, the WIPO states they are not to be disclosed, unless there is a consent from the parties or order of a court having jurisdiction.[134] The awards receive similar treatment, confidential unless the parties consent or in case of an action before a national court or competent authority., with the purpose to comply with a legal requirement or to protect a party's legal rights against a third party.[135]

[131] TRIPS Agreement 1994 Article 39, Section 2
[132] Gábor Szalay, 'Arbitration and Transparency – Relations Between a Private Environment and a Fundamental Requirement' (LLM International Business Law Master's Thesis, Tilburg University 2019) 1
[133] WIPO Arbitration Rules 2014 Article 75
[134] ibid Article 76
[135] WIPO Arbitration Rules 2014 Article 77

c) National legislation

Up until now, it may be appreciated from these rules that principles of arbitration, specifically privacy (of hearings) and confidentiality (of documents) are flexible and include a strong sense in favour of party autonomy, as always leaving up to the parties to agree on confidential and private matters, hence, arbitration rests upon a complete and strong freedom of contract. In essence, confidentiality has been seen as a mere convenience of privacy, not grounded in any legal right or obligation.[136] Equally important, it may be deducted that international regulation, even that from institutions, do not effectively tackle the problem of the current debate. In this sense, it is important to look into the landmark cases and national law that have in some way or another, been the basis and precedent for the two main opinions whether the duty of confidentiality is an implied duty or express one. In general terms, English jurisprudence recognises the implicit obligation of maintaining confidentiality regarding the procedures and documents in connection with an arbitral proceeding, whilst Australia, adopted a different tendency, denying the existence of an implicit obligation of maintaining the confidentiality.[137]

c.1) England

As for England, going in the same direction and presence it has had in international trade, as Roy Goode states that it is no small feature that London can now fairly claim to be the world's leading financial centre[138], it has been setting course in matters of arbitration, starting by the creation of the Arbitration Act of 1698, under the guidance of John Locke, was accepted by the parliament and entered into force, under a method of exclusion of unnecessary legal constraints and difficulties.[139] As any other legislation, it has gone through reforms in order to adapt to the needs of the community, thus, the current version is the Arbitration Act of 1996. Nonetheless said Act, as well as the majority of other national legislations, does not contain provisions on the private nature of arbitration nor on confidentiality.[140]

[136] Hillind H, 'A Difficult Balance: Open Justice and the Protection of Confidentiality in Arbitration Related Court Proceedings' (2015) Victoria U of Wellington Legal Research Papers <http://ssrn.com/abstract=2817595> accessed 12 August 2019 8

[137] Bazil Oglinda, 'The Principle of Confidentiality in Arbitration – Application and Limitations of the Principle' (2015) vol.4 Perspectives of Business LJ 57 <https://heinonline.org/HOL/Page?handle=hein.journals/perbularna4&collection=journals&id=57&startid=&endid=64> accessed 17 June 2019 59

[138] Roy Goode, *The Shaping of Commercial Law* (Sweet & Maxwell 1998) 3

[139] James Oldham and Sun Jin Kim, 'Arbitration in America, The Early History' (2013) LHR 246 <https://www.jstor.org/stable/23489456?seq=1/subjects> accessed 28 September 2019

[140] Andrea Marco Steingruber, *Consent in International Arbitration* (Oxford University Press 2012) 117

Said Act not only remains silent on the matter, but also is that so by a deliberate manner as the conception at the time (and still up-to-date) was that confidentiality and privacy were unsettled and will be better left evolve with common law.[141] The omission was discussed in the Department Advisory Committee, which concluded that the courts should be left to continue to works out its implications on a pragmatic case by case basis.[142]

Therefore, the main source of law rests in case law. 'Case law shows that questions of privilege and confidentiality can be a legal minefield in contentious proceedings at national level and even more so in international proceedings'.[143] The English vision on confidentiality lays on the principle that 'disputes that arise under private contracts are private matters'[144], and on the privacy element, as parties 'enter into these contracts [arbitration agreement] with the express view of keeping their quarrels from the public eyes, and of avoiding that discussion in public'[145], thus, highlighting consideration of privacy the same as confidentiality. 'Commercial arbitrations that take place in London are automatically concealed behind a curtain of secrecy'.[146] Accordingly, the Civil Procedure Rules state on its Rule 62.10(3)(b) that hearings will be heard in private, meaning that third parties are not entitled to attend to such, as it has been agreed only to be discussed between the involved.[147] Rather than to be codified, English law relays on common law. The case *Hassneh Insurance Co of Israel v Stuart J Mew I [1993]* mentioned that 'if the parties to an English law contract refer their disputes to arbitration they are entitled to assume at the least the hearing will be conducted in private, (…) it is an advantage of arbitration, (…) it is an essential ingredient of arbitration'[148], which as we now of the posture of England, it was extended to refer all documents as private. However, this same case held that confidentiality was not absolute.

Then again, the English posture is on an implied confidentiality, and 'unless parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards, together with all materials in the arbitration created for the purpose of the arbitration and all other

[141] *John Forster Emmott v Michael Wilson & Partners Ltd [2008*] *EWCA Civ 184*
[142] Kyriaki Noussia, *Confidentiality in International Commercial Arbitration* (Springer-Verlag Berlin Heidelberg 2010) 9
[143] Kyriaki Noussia, *Confidentiality in International Commercial Arbitration* (Springer-Verlag Berlin Heidelberg 2010) 134
[144] Julian D.M. Lew et al., *Arbitration in England* (Kluwer Law, 2013) 441
[145] *Russel v Russel [1880] LR 14 Ch D 471*
[146] Constantine Partasides QC and Simon Maynard, 'Raising the Curtain on English Arbitration' (2017) LCIA Arb Intl 197 <https://doi.org/10.1093/arbint/aix008> accessed 25 September 2019 197
[147] Civil Procedure Rules Rule 62.10(3)(b)
[148] *Hassneh Insurance Co of Israel v Stuart J Mew [1993] 2 Lloyd's Rep 243*

documents produced by another party in the proceedings'[149]. It recognises only the exception to disclose if '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'.[150]

Notwithstanding the above, it has become more evident in recent cases that English law is starting to break its rigid mould on the posture of absolute confidentiality, precisely as seen in *John Forster Emmott v Michael Wilson & Partners Ltd [2008]*, as some documents from the arbitration procedure may be disclosed. The issue that is now presented, is the extent by which confidentiality exists and functions. 'The current trend in international arbitration is to diminish, or at least question, the confidentiality of arbitral proceedings as a whole'.[151] Correspondingly, the current position in English law was pronounced by the Court of Appeal in *John Forster Emmott v Michael Wilson & Partners Ltd [2008]*, revolutionising the course of arbitration, allowing exceptions to confidentiality, placing limits and not as an absolute. There are a range of circumstances in which a party may wish to disclose, or is compelled to disclose information or documents that were created or produced as part of an arbitration, such as other arbitration or litigation proceedings, for corporate or regulatory purposes, to interested groups, or for public interest.[152] This case took as precedent the *Ali Shipping Corporation v Shipyard Trogir [1999]*, where it was mentioned that confidentiality was subject to the exceptions of disclosure for the protection of the legitimate interests of an arbitrating party or to defend a claim or counterclaim brought by the third party.[153] Even when such case was not as progressive in defining confidentiality, as it still made the assumption it was derived from privacy hearings. 'Ali Shipping confirmed the old English confidentiality but introduced a clear set of exceptions, applicable to all types of materials created, used or produced in arbitration'.[154] The exceptions presented consisted in consent by the parties, court order, leave of the court, and for the protection of legitimate interests of the parties.[155]

It is noteworthy that the cases aforementioned presented an analogy with the case *Tournier v National Provincial and Union Bank of England [1924]*, whose approach was a landmark in the banker's

[149] LCIA Article 30(1)
[150] ibid Article 30(1)
[151] Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (5th edition, Oxford University Press, 2009) 138
[152] Julian D.M. Lew et al., *Arbitration in England* (Kluwer Law, 2013) 450
[153] *Ali Shipping Corporation v Shipyard Trogir* [1999] 1 WLR 314
[154] Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration* (Kluwer Law International 2011) 48
[155] *Ali Shipping Corporation v Shipyard Trogir* [1999] 1 WLR 314

duty of confidentiality, declaring said duty not as an absolute for as a subject of exception, enlisting the four principal scenarios when a bank can legally disclose information about its customer: compulsion of law, public interest, interest of the bank, and consent from the customer.[156] Applied into confidentiality in arbitration, disclosure is to be allowed when, apart from where the parties consent, there is an order, it is reasonably necessary for the protection of the legitimate interest of an arbitrating party, where the interests of justice require disclosure, and/or where the public interest so requires.[157]

As for the *Emmott* case, the exception to be applied is in the interest of justice 'so the foreign courts would not be misled or potentially misled where the cases that were being advanced in the various proceedings were essentially raising the same or similar allegations, (…) the interests of justice exception arises not as an exception to the implied duty, but as the basis for a court hearing a subsequent dispute to order that information be disclosed notwithstanding confidence'.[158] Nevertheless, it was declared that the documents requested to be disclosed were not commercially sensible. Moreover, Lord Justice Lawrence Collins mentioned an important point that recalls once more to *Tournier*, regarding how confidentiality is confused or dignified by secrecy, as he emphasizes the usage of the duty as a cloak, ensuring it shall not be used for those objectives in misleading. This is important to keep at mind, as it is this sense of "cloak of confidentiality" or "secrecy" that have a negative connotation, misleading, and posing a threat for transparency and open justice. Equally important, it was held that the interests of justice were not confined to the interests of justice in England.[159]

In summary, *Emmott* declared a difference on the concepts of confidentiality and privacy, and marked confidentiality in documents only when in cases of containing trade secrets. Above all, it placed the exceptions to confidentiality are as follows: (a) disclosure by consent, (b) by public interest or (c) in the interest of justice.

Attending the heart of English law, the freedom of contract, it is important to mention that if the parties expressly agree on the arbitration agreement, including a clause for non-disclosure, in case of a breach (of contract/of confidentiality), there will be rights for damages. Nevertheless, courts have not

[156] *Tournier vs. National Provincial and Union Bank of England [1924] 1 KB 461*
[157] Julian D.M. Lew et al., *Arbitration in England* (Kluwer Law, 2013) 451
[158] *John Forster Emmott v Michael Wilson & Partners Ltd [2008*] *EWCA Civ 184*
[159] Ileana M. Smeureanu, Confidentiality in International Commercial Arbitration (Kluwer Law International, 2011) 134

yet ventured to treat breach of confidentiality in arbitration, and neither has legislation concretely addressed the situation.[160],[161] Ultimately, 'there is very little case law addressing the issue of sanctions for breach of a confidentiality duty'[162].

Correspondingly, Lord Justice Gross, from the Court of Appeal, expressed his opinions regarding the Courts and London arbitration, stating that they both are complementary and mutually reinforcing, as it has been seen, case law is of ultimate importance and acts as the main source of law[163].[164] 'Conceptually, arbitration is respected and thrives in this jurisdiction as a matter of party autonomy and choice, within a tolerant and light touch statutory supervisory regime, stemming from the Arbitration Act 1996, (…) [in summary, it follows a principle of] "Maximum support. Minimum interference"'.[165] Even when the Arbitral Act of 1996 remains silent on matters of confidentiality, it establishes on its Section 69 regarding an appeals on point of law, where unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.[166] This brings up the question on the posture of England regarding the principle of confidentiality, even when it is prised on the aforementioned cases a duty of implied confidentiality (implied term), it has an answer for the appeal of awards, an instance that calls upon disclosure and the unravelling of secrecy. This posture is ad-hoc to the way English law has its root on case law, always having the Courts as a superior, even when in arbitration, recalling its innovative essence from the beginning of the evolution of commerce, English law is one step ahead and imposing. Nonetheless, it obviously has its own limits, requesting the agreement of all the other parties to the proceedings, once it has exhausted any available arbitral process of appeal or review, or with the leave of the court, within the 28 days of the date of the award or of notification of the result of arbitral appeal or review.[167] Regarding the leave to appeal, it is reserved for when the determination of

[160] Ileana M. Smeureanu, Confidentiality in International Commercial Arbitration (Kluwer Law International, 2011) 161

[161] *Note*: We may dare to say breach of confidentiality will be treated in the same manner as in *Tournier*, or as indicated by the UNIDROIT Principles in Article 2.1.16, the remedy for breach may include compensation bases on the benefit received by the other party

[162] Alexis C. Brown, 'Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration' (2001) vol.16 Am U Intl L Rev 969 <https://digitalcommons.wcl.american.edu/auilr/?utm_source=digitalcommons.wcl.american.edu%2Fauilr%2Fvol16%2Fiss4%2F2&utm_medium=PDF&utm_campaign=PDFCoverPages> accessed 17 July 2019 1014

[163] *Note:* It is important to acknowledge that judges have shaped the law in England, through a strong sense of precedents

[164] Lord Justice Gross, 'Court and Arbitration - The Jonathan Hirst QC Commercial Law Lecture' (Judiciary of England and Wales, London, May 2018) <https://www.judiciary.uk/wp-content/uploads/2018/05/speech-by-lj-gross-hirst-lecture-distribution-may-2018.pdf> accessed 28 September 2019 1

[165] ibid 2

[166] Arbitration Act Section 69

[167] Arbitration Act Section Sections 69, 70(2) and 70(3)

the question will substantially affect the rights of one or more of the parties, the question was to be determined by the tribunal, thus, the decision of the tribunal is obviously wrong, or the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.[168] Additionally, we may observe the exceptions that are commented on the *Emmott* case, regarding public interest, besides the compulsion of law.

In other matters, the same Arbitration Act even challenges the privacy of the hearings on its Section 21, where it allows an umpire to attend the proceedings if agreed by the parties; in a full flourishing of party autonomy, and a concrete posture of English law ruled by the freedom of contract, all above other international rules.[169] In light of the above, it is noteworthy to state that even if the Act itself remains silent on confidentiality, in one way or another, allows exceptions for such. Similar to the Arbitration Act, the ACICA Arbitration Rules 2016 allow a joinder upon request by a party or third party.[170] Granted that, 'a flow of important commercial cases continues to find their way to the courts via appeals from arbitration proceedings'[171].

As a side note, Lord Justice Gross said that there has been uniform construction of standard largely through decisions of the courts upon special cases stated by arbitrators, resulting in a comprehensive and certain English commercial law.[172] Notwithstanding the latter, as seen by the discussion of the recent cases, there is still no uniformity in the approach to the principle of confidentiality. In summary, the English approach has been, albeit some exceptions, that 'all documents created for or in the arbitration or disclosed for the purpose of the arbitration are presumptively subject to an obligation of confidentiality'[173]. It has been said the the English approach to confidentiality has met with little

[168] ibid Section 69
[169] ibid Section 21
[170] ACICA Arbitration Rules 2016 Article 15.1
[171] Lord Justice Gross, 'Court and Arbitration - The Jonathan Hirst QC Commercial Law Lecture' (Judiciary of England and Wales, London, May 2018) <https://www.judiciary.uk/wp-content/uploads/2018/05/speech-by-lj-gross-hirst-lecture-distribution-may-2018.pdf> accessed 28 September 2019 6

[172] Lord Justice Gross, 'Court and Arbitration - The Jonathan Hirst QC Commercial Law Lecture' (Judiciary of England and Wales, London, May 2018) <https://www.judiciary.uk/wp-content/uploads/2018/05/speech-by-lj-gross-hirst-lecture-distribution-may-2018.pdf> accessed 28 September 2019 3
[173] Daniel R. Bennett and Madelaine A. Hodgson, 'Confidentiality in Arbitration: A Principled Approach' (2013) vol.3 McGill J of Dispute Resolution 98
<https://heinonline.org/HOL/Page?handle=hein.journals/mgjdp3&collection=journals&id=100&startid=&endid=114> accessed 17 June 2019 104

sympathy elsewhere, therefore, it has been argued that parties should attain to express, rather than implied, obligations of confidentiality.[174]

c.2) Australia

By contrast, Australia do not follow the concept of implied confidentiality, rather follows a posture that requires an express duty within the agreement to arbitrate, hence apprising confidentiality and privacy as two different elements. In essence, even when national legislation does not tackle confidentiality, the High Court of Australia through case law has declared that there is no general rule of confidentiality except that there is a rule of privacy in arbitration hearings.[175] The case that gave its essence to this posture, the *Esso Australia Resources Ltd v The Honorable Sidney James Plowman [1955],* it is said it 'crashed like a giant wave-a veritable Australian tsunami-on the shores of jurisdictions around the world'[176].

But not only has been case law that addressed the matter, but Australia has recently updated its International Arbitration Act 1974, which adopts the UNCITRAL Model Law on International Commercial Arbitration and the New York Convention 1954, introducing an opt-in basis, requiring parties to agree to be bound to the obligation not to disclose information.[177] In other words, the Act follows the case law criterion to require an express duty of confidentiality within the agreement to arbitrate. Notwithstanding the above, in 2015 the Statute Law Revision Act (No.2) 2015 'reversed the onus, instead requiring parties to opt out of the provisions by agreement'[178]. However, the idea that there must be an express agreement to decide over said duty. The most recent amendment was compiled and entered into force on 26 October 2018. Moreover, the International Arbitration Act 1974,

[174] Andrea Marco Steingruber, *Consent in International Arbitration* (Oxford University Press 2012) 118
[175] Michael Hwang and Katie Chung, 'Defining the Indefinable: Practical Problems of Confidentiality in Arbitration' (2009) vol.26 J Intl Arb 609 <https://www.arbitration-icca.org/media/4/47002284538882/media012641379548970defining.pdf> accessed 17 July 2019 636
[176] Bazil Oglinda, 'The Principle of Confidentiality in Arbitration – Application and Limitations of the Principle' (2015) vol.4 Perspectives of Business LJ 57
<https://heinonline.org/HOL/Page?handle=hein.journals/perbularna4&collection=journals&id=57&startid=&endid=64> accessed 17 June 2019 978
[177] Henry Hillind, 'A Difficult Balance: Open Justice and the Protection of Confidentiality in Arbitration Related Court Proceedings' (2015) Victoria U of Wellington Legal Research Papers <http://ssrn.com/abstract=2817595> accessed 12 August 2019 4
[178] ibid 4

clearly includes the circumstances by which confidential information may be disclosed. On its Section 23D it states that the information may be disclosed with the consent of all of the parties involved and automatically (with previous consent) to a professional or other adviser of any of the parties[179].

Furthermore, it includes the following scenarios to disclose information necessary: (a) to ensure that a party has a full opportunity to present the party's case, (b) for the establishment or protection of the legal rights of a party in relation to a third party, (c) for the purpose of enforcing an arbitral award, (d) exercising a power under Article 35 of the Model Law, as in force under subsection 16(1) of this Act, to recognise or enforce an arbitral award, (e) if the disclosure is in accordance with an order made or a subpoena issued by a court, (f) if the disclosure is authorised or required by another relevant law, or required by a competent regulatory body, as long ad there is a written details given to the parties with an explanation of reasons for the disclosure.[180] In addition, the Tribunal may also allow disclosure when upon request of one of the parties after giving each of the parties the opportunity to be heard.[181] However, a Court may prohibit disclosure if satisfied in the circumstances of the particular case that the public interest in preserving the confidentiality of arbitral proceedings is not outweighed by other considerations that render it desirable in the public interest for the information to be disclosed, or if the disclosure is more than is reasonable for that purpose.[182]

c.3) Mexico

As a consequence of an increasing popularity in the use of arbitration, a number of countries 'from traditionally "difficult" areas for arbitration such as Latin America and the Arab World have ratified the New York Convention and taken a more positive approach to international commercial arbitration'[183].

[179] International Arbitration Act 1974 Section 23D
[180] ibid 23D
[181] ibid 23E
[182] ibid 23F
[183] Karl-Heinz Böckstiegel, *The Internationalisation of International Arbitration: Looking Ahead to the Next Ten Years* (London Court of International Arbitration 1995) 73

'Latin American countries, traditionally hostile to arbitration are now embarking on a process of legislative modernization'.[184] Therefore, there has been a tendency to a further diversity and a development of harmonising the international arbitration environment.[185]

In Mexico, being a civil law jurisdiction, has its source law of commercial arbitration codified mainly in the Code of Commerce, but it was not up until 1989 that a special title on the matter was included, by the Decree by which diverse dispositions of the Code of Commerce are reformed[186], added and derogated issued by the Congress of the Union (legislative branch) in January 04, 1989, and followed by another reform in 1993, containing provisions based on the UNCITRAL Model Law and ICC Arbitration Rules, with the aim of bringing the country's law more into line with that of Mexico's trade partners.[187] In this sense, it is interesting to take notice on the economic nature of Mexico, which main economic activity consists on exportation. Notably, the introduction to arbitral proceedings came quite late into Mexican legislation, and even when the introduction came afterwards the beginning of the debate on confidentiality, Mexican legislation has ever since remained silent on the matter.

On an interesting note, legislation in Mexico places arbitration very close to the courts, as it establishes on its Article 1424 of the Code of Commerce that: the judge to whom a dispute is submitted on an issue that is the subject of an arbitration agreement shall refer the parties to arbitration at the time any of them requests it, unless it is verified that said agreement is null, ineffective or impossible to execute[188]. Nonetheless, it does not include any scenarios by which and arbitral proceeding or award would result in a state court. And in its Article 1425 establishes that even if there is an arbitration agreement, the parties may, prior to the arbitration proceedings or during its course, request to a judge to adopt precautionary measures provisional.[189] Moreover, for the enforcement of arbitral awards, it disposes that by writing request to the state judge, it will be enforced. Most importantly, it does not include any provision on the duty of confidentiality, but it may be reflected that for matters of compulsion

[184] Emmanuel Gaillard (ed.*), Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 87
[185] Karl-Heinz Böckstiegel, *The Internationalisation of International Arbitration: Looking Ahead to the Next Ten Years* (London Court of International Arbitration 1995) 73
[186] *Decreto por el que se refoma, adiciona y deroga diversas disposiciones del Código de Comercio*
[187] Sergio Bermudes and Carlos Lins, *The Internationalisation of International Arbitration: The Future for Arbitration on Brazil and in Latin America* (London Court of International Arbitration 1995) 135
[188] Code of Commerce Article 1424
[189] ibid 1425

of law it tis none existent. As for other rules from Mexican origin, the Arbitration Center of Mexico[190] provides its own rules, the CAM[191] Rules of Arbitration 2009. In matters of confidentiality, the CAM Rules of Arbitration 2009 establishes on its Article 5 that under no circumstances shall the divulgation of the writings, notes, communications and other documents presented by the parties during the arbitration proceedings be authorized, and it even goes to the extreme to declare that documents may be destroyed in a time limit of one year counting since the ending of the proceeding.[192] This last disposition is quite alarming, and it also goes in line with some of the risks of confidentiality, specially in a country like Mexico, were there is a tendency to corruption. As it is going to be discussed in further sections, bribery and corruption are a side effet to the cloak of secrecy. There is a general sense that authorities are not honest, and are very likely to accept money to rule in favour of party. With this in mind, investor-state arbitration is not a viable option to solve disputes.

Chiefly, Mexico is young on adopting commercial arbitration, thus, lacks of a concrete framework. Nonetheless, being a young legislation may have its advantage, specially in this times of shifting criteria, were Mexico could easily adopt the new tendency towards transparency, and most importantly, have a single and uniform codification. This will also strengthen Mexico as a a new prospect for international commercial arbitration and popularise as a place to engage to solve disputes. Elevate Mexico to the international standards and tacking the modern needs of traders, an important step that will fortify its economy directed to foreign investment and exportation.

d) Final remarks

In essence, regulations both international and national are rather ambiguous on matters of confidentiality. Nonetheless, it may be concluded that they almost all recognise privacy within the scope of hearings only, and the confusion and different postures star when talking about the duty of confidentiality. England and Australia, bot common law jurisdictions, have opposing postures, the former being in favour of an implied duty, whilst the latter requests an express term. Most definitely, Australia is the most advanced on listing concrete exceptions to confidentiality, as well, as quite

[190] Centro de Arbitraje en México
[191] By its acronym in Spanish
[192] CAM Rules of Arbitration 2009 Article 5

permissive and in a direction to protect the parties' rights. Nonetheless, it is evident from recent case law, that England is shifting its posture and allowing exceptions to the duty in question. And as for Mexico, the problems of not having a uniform set of rules is evident, and most importantly, the risks of confidentiality that lead to secrecy, therefore, bribery and corruption. Notwithstanding this, there have also been case that shed light into the confidentiality issue on disclosing documents, and it is slowly shifting a posture to allowing certain limits or exceptions to said duty.

Chapter III – Exceptions to the principle of confidentiality

As explored within the national and international legislations, although slow and not uniform, there has been building criteria as to what is the scope of the duty of confidentiality, meaning their limitations and/or exceptions. On the initial debate, it was questioned whether confidentiality was a implied or express term within the agreement to arbitrate (which has been defined as the angular stone of arbitration). But it has been through practice, specifically case law, that exceptions have been marked, which have permed into some regulations. This, motivated by the confusion of confidentiality as secrecy, which as many scholars have agreed, poses more dangers than benefits to parties involved, and ever more in this modern times, with and agenda to move towards transparency and openness. Nonetheless, the exceptions have their origin in practical measures, and most importantly, in the protection of the rights of the parties involved in the arbitration. For purposes of this section, said exceptions will be explored.

Albeit there are widely different approaches to understanding confidentiality in commercial arbitration, most jurisdictions ultimately recognize that what is initially confidential between parties may not be protected from disclosure or treated as confidential by the courts in further litigation.[193]

Recalling the *Emmot* case, disclosure in the interest of justice may include' avoiding contradictory evidence, such as when witnesses appear to give materially different testimony in court than they did

[193] Daniel R. Bennett and Madelaine A. Hodgson, 'Confidentiality in Arbitration: A Principled Approach' (2013) vol.3 McGill J of Dispute Resolution 98 <https://heinonline.org/HOL/Page?handle=hein.journals/mgjdp3&collection=journals&id=100&startid=&endid=114> accessed 17 June 2019 99

in prior proceedings'[194]. Additionally, as there is tendency to disclosure resulted from exceptions, confidentiality is more difficult to preserve when one of the parties seeks to raise challenges or enforce the arbitral award.[195]

Markedly, there are other exceptions that require the lifting of the veil of secrecy, even when not concretely implied as to attempt against confidentiality. As previously discusses, companies are often obliged to report to shareholders, make disclosures in their annual accounts and reports and otherwise announce significant information to the market, specially in the case of publicly listed companies, with the objective to ensure financial integrity. 'Listed companies are subject to disclosure obligations which arise from a combination of rules and regulations enshrined in legislation or issued by regulatory authorities, as well as guidelines issued by such regulatory authorities as to the interpretation of such binding obligations'.[196]

Additionally, there exists within business practice a disclosure between companies with auditors, banks, insurance companies, shareholders, and investors, even to an extent to report the amount in the dispute.[197] Nonetheless, this has not been part of the revolving issue, as it is generally accepted that this are reasons to disclose about arbitration, but anyways, reflects that modern times cannot function under a veil or cloak of secrecy.

Chapter IV – Arbitration under a cloak of secrecy

As almost everything in life, the dose makes the poison, thus, an excessive confidentiality has its own risks. Currently, arbitration is generally designed to offer the promise of secrecy, 'under the large umbrella of the party autonomy principle, the power to control who may have knowledge'[198]. In accordance with the Latin saying *aliud est tacere, aliud celare*, that means to conceal is one thing, to

[194] Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration* (Kluwer Law International 2011) 123
[195] ibid 126
[196] Gu Weixa, 'Confidentiality Revisited: Blessing or Curse In International Commercial Arbitration?' (2006) Am Rev Intl Arb 601 <http://hdl.handle.net/10722/74721> accessed on 30 September 2019 22
[197] Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration* (Kluwer Law International 2011) 129
[198] Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration* (Kluwer Law International 2011) xvi

be silent another,[199] it acquires important relevance in arbitration were confidentiality is often presumed as secrecy. For this section, the risks that emanate from too much confidentiality, or for effects of better understanding, secrecy, will be addressed. Indeed, the principle of confidentiality has given arbitration a sense of a curtain or cloak of secrecy. And regarding the publication of awards, since they 'remain non-public, international commercial arbitration assumes the everyday risk of having to deal with diverse decisions rendered for similar conflicts'[200]. If confidentiality is treated as a barrier, more illustrative as a cloak, there are various effects, not only for the parties involved, but to the system as a whole and the very arbitrators.

As for the effects for the system as a whole, the most important risk is that arbitral decisions may not contribute to jurisprudence. This is often compared to the the publication of legal settlements which constitutes a fundamental part of Law, such as jurisprudence, and brings up the question as to why is it not the same case with arbitral decisions and why prevent jurisprudence benefiting from the awards.[201] 'To condemn arbitral decisions to oblivion (very often of great juridical content) would imply leaving important doctrinal reflections that would shed great light on future cases in limbo'.[202] Moreover, the principle of confidentiality may produce inconsistent resolutions of disputes arising out of the same transaction as complex international business transactions often produce multiple disputes involving several parties, and since they are not all bound by the same arbitration clause, two or more arbitrations may arise out of the same facts, resulting in the same dispute may be resolved in inconsistent ways.[203]

'Under conditions of increased globalization, corruption appears as a source of disruption if the natural laws of free trade, the medium for greater liberal expansion'.[204] As previously discuses in the Mexican case, corruption and bribery is a true and real problem that is faced by arbitration. However,

[199] Bernardo M. Cremades and Rodrigo Cortes, 'The Principle of Confidentiality in Arbitration: A Necessary Crisis' (2013) vol.23 J of Arb Studies 16

[200] Francisco Blavi, "A Case in Favour of Publicly Available Awards in International Commercial Arbitration: Transparency v. Confidentiality" 2016 Int'l Bus. L.J. 83 <https://0-heinonline-org.serlib0.essex.ac.uk/HOL/Page?handle=hein.journals/ibuslj2016&div=9> 83

[201] Bernardo M. Cremades and Rodrigo Cortes, 'The Principle of Confidentiality in Arbitration: A Necessary Crisis' (2013) vol.23 J of Arb Studies 35

[202] ibid 35

[203] Alexis C. Brown, 'Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration' (2001) vol.16 Am U Intl L Rev 969 <https://digitalcommons.wcl.american.edu/auilr/?utm_source=digitalcommons.wcl.american.edu%2Fauilr%2Fvol16%2Fiss4%2F2&utm_medium=PDF&utm_campaign=PDFCoverPages> accessed 17 July 2019 1017

[204] Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International 2004) 13

even when the agreement to arbitrate has the principle of *turpitudo omnia corrumpit*, meaning that contracts like this cannot be entered into in the expectation that they are legally valid and can be enforced by legal process.[205] 'Bribery (…)has become almost synonymous with international transparency efforts'.[206] 'Unlike pollution or human rights abuses, which are separately verifiable and relatively public, bribery is a secret offense and a re-occurring problem in large international commercial contract settings'.[207] On the other hand, there are cases were corporate counsel receive bad advice and 'may be tempted to use arbitration as a way to justify their own mistakes or delay the moment when those mistakes will come to light'[208], clearly recurring to arbitration as a cloak of secrecy.

Not only there exists a risk within parties of the secrecy or arbitration, taking into consideration that they lack of sufficient knowledge to choose their arbitrator (and impose a risk in the challenge of such), but there is also a risk within the arbitration itself in regards with the performance of their functions. As an illustration, there is a risk of seeing confidentiality as an instrument to mask incorrect or unethical decisions, 'arming the arbitrators with a shield that has the effect of making it impossible to review the merits of the award'.[209] As for practitioners (the lawyers themselves) this could also lead to extra-legal activities, such as tax fraud and agreements contravening free competition.[210]

Chapter V – Shifting into transparency: A modern approach

As it has been discussed in previous sections, as commerce evolves, companies and enterprises have new and modern needs that must be satisfied by the International Commercial Arbitration system. In this millennium, new challenges come from new ways of doing business, and with a new wave of practitioners and scholars, the arbitration system is in much need for reform, actualisation and modernisation. This section seeks to explore the modern approach that is shifting into transparency, highlighting its need.

[205] Ugo Draetta, *Behind the Science in International Arbitration* (Juris 2011) 9
[206] Catherine A. Rogers, 'Transparency in International Commercial Arbitration' (2006) U Kan L Rev 1301 <https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1233&context=fac_works> accessed 15 August 2019 1331
[207] ibid 1331
[208] ibid 10
[209] Bernardo M. Cremades and Rodrigo Cortes, 'The Principle of Confidentiality in Arbitration: A Necessary Crisis' (2013) vol.23 J of Arb Studies 34
[210] ibid 34

Previously, the private character of arbitration regarding hearings, was permed into confidentiality, creating an environment were abuse led to a cloak of secrecy. Now, as the veil is being lifted, and in accordance with the new global challenges, there is widespread conception of two different elements in arbitration, privacy and confidentiality, were the former is no longer a threat and has its own limitations, thus, the system is shifting into transparency. It is true that the pressure is increasing as the world turns into an open justice system hailed by transparency. Not only that, but there is an 'increasing number of voluntary and involuntary disclosures that invite to consider transparency reforms, to make information available and the process more transparent for the benefit of the arbitral community as a whole'[211]. 'The global demand for information and the new media technologies have reached arbitration, and, in information-rich times, the processes are becoming more and more accessible and hence less difficult to keep confidential'.[212] The policies towards transparency lead to the acceptance and understanding of the arbitration system as a whole.

Transparency allows an openness and access of information, and as seen in national judicial systems, 'justice must not just be done, but has to be seen to be done'[213]. 'Commercial law has evolved from the needs and practices of the mercantile community'[214], thus new legal principles have arose. 'The global demand for information and the new media technologies have reached arbitration'[215], and, in information-rich times, the processes are becoming more and more accessible and hence less difficult to keep confidential.

With this in mind, the courts and arbitration centres have had to engage with new criteria to overcome the *litis* that arise from new mercantile ways. Moreover, 'the global demand for information and the new media technologies have reached arbitration and have brought in a new perspective, which have caused (…) a disconnect between the presumption of confidentiality and the frequent realities of disclosure and publicity'[216]. Furthermore, this global demand also finds its origin in the recent

[211] Discourse and Practice in International Commercial Arbitration (Ashgate Publishing, 2012) 284
[212] ibid 295
[213] Francisco Blavi, 'A Case in Favour of Publicly Available Awards in International Commercial Arbitration: Transparency v. Confidentiality' 2016 Int'l Bus. L.J. 83 <https://0-heinonline-org.serlib0.essex.ac.uk/HOL/Page?handle=hein.journals/ibuslj2016&div=9> accessed 15 August 2019 86
[214] Roy Goode, *The Shaping of Commercial Law* (Sweet & Maxwell 1998) 3
[215] Discourse and Practice in International Commercial Arbitration (Ashgate Publishing, 2012) 295
[216] ibid 284

development in international practice of 'self-governing duty of good faith, binding upon potential sellers and buyers of shares at pre contractual stage'.[217] In other words, potential trade partners often offer complete disclosure as part of the due diligence procedures needed for the negotiations for a purchase.

As for England, in words of Lord Justice Gross, 'in keeping with the well-deserved reputation of the Commercial Court for reform of its own procedures, the Business and Property Courts [derived from a structural reform based on innovation and specialisation of judges] are grappling with the problems of disclosure in a digital age and are, in my view rightly, pursuing cultural change, in keeping with market demand'[218]. In this sense, England is questioning if the posture of implied confidentiality and the sense of cloak of secrecy is still acceptable in a modern world in which transparency is prised as and end in itself.[219]

Consequently, the Law Commission of England and Wales is contemplating to include on its Thirteenth Law Reform Programme to reform the Arbitration Act 1996, as it currently fails to address the issue of the principle of confidentiality.[220] The Commission is motivated to make this reform as they have the objective to preserve United Kingdom's position as international dispute resolution centre.[221] 'The preparedness and ability to embrace technological change (a necessary part of the Reform programme) will likewise keep the courts up to speed, as new ideas such as "blockchain" and "fintech" introduce the potential for major changes in various markets'.[222]

Correspondingly, the publication of the award has also been part of the debate of confidentiality, and thus, find the greatest acceptance within institutional arbitration. This goes in line whit the recent calls for transparency, and it has been said that the publication of awards is one of the most significant

[217] Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration* (Kluwer Law International 2011) 130

[218] Lord Justice Gross, 'Court and Arbitration - The Jonathan Hirst QC Commercial Law Lecture' (Judiciary of England and Wales, London, May 2018) <https://www.judiciary.uk/wp-content/uploads/2018/05/speech-by-lj-gross-hirst-lecture-distribution-may-2018.pdf> accessed 28 September 2019 8

[219] Constantine Partasides QC and Simon Maynard, 'Raising the Curtain on English Arbitration' (2017) LCIA Arb Intl 197 <https://doi.org/10.1093/arbint/aix008> accessed 25 September 2019 197

[220] Law Commission, 'Reforming the Law - Arbitration' (UK Law Commission, 2016) <https://www.lawcom.gov.uk/arbitration/> accessed 30 September 2019

[221] Law Commission, 'Reforming the Law - Arbitration' (UK Law Commission, 2016) <https://www.lawcom.gov.uk/arbitration/> accessed 30 September 2019

[222] Lord Justice Gross, 'Court and Arbitration - The Jonathan Hirst QC Commercial Law Lecture' (Judiciary of England and Wales, London, May 2018) <https://www.judiciary.uk/wp-content/uploads/2018/05/speech-by-lj-gross-hirst-lecture-distribution-may-2018.pdf> accessed 28 September 2019 8

ways to achieve this.[223] In this sense, some arguments in favour of the publication of the award are the development of law, certainty and predictability, consistency, legitimacy, and neutrality. 'It appears therefore that the current trend is to allow more transparency for arbitral awards, albeit without revealing the identity of the parties or other identifying details'.[224] 'It is important to underline that confidentiality is not breached by the publication of the reasons for an award on an anonymous basis'.[225] Rather, the publication of awards lead arbitration users and practitioners have access to the rules applied and the decisions reached in order to promote the understanding on the system and help build certainty.[226] Therefore, the "lifting of the veil" contributes to the predictability of results, and the codification of usages by a professional organization will very often be the result of the publication of such decisions.[227]

Indeed, as seen in the previous section, leaving awards to oblivion affect the building of valuable content and precedent. The insight of arbitrators is extremely valuable and even sometimes creates procedural and substantive rules, just as in judges in case law, producing a precedent to be followed in the future. [228] 'The publication of arbitral awards can therefore contribute to the uniform and autonomous development of international arbitration law, as well as the *lex mercatoria*'.[229]

Most notably, awards are binding, similar to the principle applicable to decisions of court, *in personam*, which inly operates as estoppel in favour of or against parties and those claiming through them, but not in favour or against third parties or strangers.[230] In this sense, it is clear how the publication of awards will help concrete the certainty and predictability element in arbitration, ad moreover, will conduce to an effective enforcement of awards. As there is an increase in foreseeability of outcomes, it will also help the parties decide beforehand if arbitration is the best course they should follow, as well, as get to know the expectations of the proceeding and the arbitrator itself.[231]

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[223] Elina Zlatanzka, 'To Publish or not to Publish: That is the Question' (2015) Intl J of Arbitration, Mediation and Dispute Management. 25 < https://ssrn.com/abstract=2558743> accessed 14 August 2019 25

[224] Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration* (Kluwer Law International 2011) 94

[225] Emmanuel Gaillard (ed*.), Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 188

[226] ibid 188

[227] ibid 188

[228] Elina Zlatanzka, 'To Publish or not to Publish: That is the Question' (2015) Intl J of Arbitration, Mediation and Dispute Management. 25 < https://ssrn.com/abstract=2558743> accessed 14 August 2019 27

[229] ibid 28

[230] Kyriaki Noussia, *Confidentiality in International Commercial Arbitration* (Springer-Verlag Berlin Heidelberg 2010) 114

[231] Elina Zlatanzka, 'To Publish or not to Publish: That is the Question' (2015) Intl J of Arbitration, Mediation and Dispute Management. 25 < https://ssrn.com/abstract=2558743> accessed 14 August 2019 29

Transparency policies shift the system into openness, granting 'access to a database of arbitral jurisprudence that can generate predictability and consistency, (…) to have the certainty that their arbitral proceeding was a fair one, even in loosing cases'[232]. Not only that, but it be useful for the purpose of training current and future arbitrators and practitioners, enhancing the system and being closer to a true uniform mechanism.

Likewise, the UNCITRAL created a system for collecting and disseminating information regarding court decisions and arbitral awards related to their works, such as their Model Laws, specifically relevant to this paper, the Model Law on International Commercial Arbitration; such system is called Case Law on UNCITRAL texts, or referred to as CLOUT[233].

As it is indicated on the CLOUT User Guide 2010, the purpose of the system is to promote international awareness of legal texts, to enable judges, arbitrators, lawyers, parties to commercial transactions and other interested persons to take decisions and awards relating to those texts into account in dealing with matters within their responsibilities and to promote the uniform interpretation and application of those texts.[234] The system is fed by national correspondents from States that have enacted legislation based on a Model Law, whom will collect arbitral awards and prepare abstract of such and are then published by the UNCITRAL Secretariat.[235] On Article 11 of the CLOUT User Guide, it is stated that 'the complete court decision or arbitral award, in its original language, should be forwarded to the Secretariat, [i]n exceptional cases, however, a certain portion of a decision or arbitral award may be omitted for reasons, for example, of confidentiality (in such cases an abridged decision or arbitral award might be provided to the Secretariat) or because the portion omitted is not relevant to an UNCITRAL text, or because the portion is not available to the national correspondent'[236].

[232] Oglinda B, 'The Principle of Confidentiality in Arbitration – Application and Limitations of the Principle' (2015) vol.4 Perspectives of Business LJ 57 <https://heinonline.org/HOL/Page?handle=hein.journals/perbularna4&collection=journals&id=57&startid=&endid=64> accessed 17 June 2019 60

[233] United Nations General Assembly, 'Case Law on UNCITRAL Texts User Guide A/CN.9/SER.C/GUIDE/1/Rev.2' (UNCITRAL, 2010) <https://undocs.org/A/CN.9/SER.C/GUIDE/1/Rev.2> accessed 17 August 2019

[234] CLOUT User Guide 2010 Article 2

[235] CLOUT User Guide 2010 Articles 4 and 5

[236] ibid Article 11

Notwithstanding the above, there are still some groups that believe the publication of the awards, and in general, tend towards transparency, will give way to the erosion of arbitration, a threat to business secrets and impact negatively on the parties' reputation. [237] First of all, as seen on the first section of the present paper, confidentiality is no longer the top priority for companies engaging in arbitration, also, there are multiple benefits, not only for the parties but for the system, to allow the publication of awards. As for the business and trade secrets, lifting the veil of confidentiality poses no threat to them, as it is not the purpose, but rather protect and validate the rights of the parties and result in an effective enforcement of the arbitral decision. There is still protection to this sensible information as part of the intellectual property rights. And lastly, the impact on parties' reputation is not a viable argument on the debate of transparency. Currently, companies are trying to meet the demands of an ever more challenging sector of consumers, whom ask for openness, besides, not only consumers motivate this openness, but also the growth of trade itself, as new trade partners and auditors ask form disclosure fro proper due diligence, and banks do as well when companies are trying to find funding and finance options. As for the parties' reputation, in an ever more mediatic world, companies shall not conceal their activities.

Furthermore, policies towards transparency include the possibility of evaluation of the arbitrators and arbitral institutions, in order to secure competence and professionalism.[238] This is of fair importance, specially taking into consideration the previous risk discussed regarding bribery to the arbitrators and corruption.

On the other hand, and even if not in scope within the present paper, Investor-State Arbitration has found the demands of increased transparency based on public interest in a more proactive manner, and thus, have initiated and applied more transparency policies. Nonetheless, in this modern times, commercial arbitration is assimilating the same transition. Also, 'given the vigor of pressures for increased transparency in investment arbitration, it seems doubtful that they will stop at the blurred boundary between the two systems'[239].

[237] Elina Zlatanzka, 'To Publish or not to Publish: That is the Question' (2015) Intl J of Arbitration, Mediation and Dispute Management. 25 < https://ssrn.com/abstract=2558743> accessed 14 August 2019 30
[238] ibid 60
[239] Catherine A. Rogers, 'Transparency in International Commercial Arbitration' (2006) U Kan L Rev 1301 <https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1233&context=fac_works> accessed 15 August 1335

In light of the above, the UNCITRAL has been pushing on policies towards transparency, even considering whether hearings should be opened to the public, clearly rebelling against the hallmark principle of arbitration: privacy of the hearings, thus in 2014 it introduced its Rules on Transparency, and although they are directed to Investor-State Arbitration, its impact has led to appeals for greater transparency in international commercial arbitration.[240] It is argued that since commercial arbitrations can also affect the policy making of a state on issues such as power generation, water, or infrastructure since companies play a major role in the provision of such facilities, sooner or later, these rules will also be applicable to commercial arbitrations, and even more so, in cases of arbitrations of pharmaceutical companies.[241] Highlighting the importance of companies, it was reflected by the global financial crisis of 2008 as multinational corporations had an impact on policy making and public finances.[242]

Furthermore, the UNCITRAL Working Group II on Arbitration and Conciliation have discussed the possible content of a legal standard to be prepared on transparency with a general agreement that the substantive issues will be publicity regarding the initiation of arbitral proceedings; documents to be published (such as pleadings, procedural orders, supporting evidence); submissions by third parties ("amicus curiae") in proceedings; public hearings; publication of arbitral awards; possible exceptions to the transparency rules; and repository of published information.[243] In light of the above, the UNCITRAL Rules on Transparency 2014 includes a listing of the documents to be made public and that hearings shall be public.[244]

Chapter VI – Conclusion

Indeed, there is an increasing popularity to use arbitration amongst companies, and understanding the international complexity of transactions, it it of no surprise that they choose this dispute settlement

[240] Avinash Poorooye and Ronán Feehily, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' (2017) Harvard Negotiation L Rev 309
[241] ibid 312
[242] ibid 313
[243] UNCITRAL Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-third session A/CN9/712
[244] UNCITRAL Rules on Transparency 2014 Articles 3 and 6

mechanism as it meets the needs of neutrality and effectiveness when it comes to disputes between parties from different jurisdictions, and hence, secure the binding and enforcement of the award.

All things considered, the contractual nature of arbitration, following the principles of freedom of contract and party autonomy, are of ultimate importance to understand the duties that are going to derive from such agreement, as they set the base as how confidentiality is going to be addressed. As it was seen, there were two main postures regarding this duty within the agreement: as an implied term or express one.

Historically speaking, confidentiality was used as a synonym of privacy, concealing under what is know as the cloak or veil of secrecy any information and/or document, even the mere existence of an arbitral proceeding, in other words, the tradition was that the duty of confidentiality was an implied term. Nonetheless, this secrecy poses risks to the arbitration system itself, and tampering into misleading proceedings. Equally important, the difference of privacy and confidentiality shall be recognised and portrayed in the relevant regulations.

By consequence, an approach directed into transparency, as reflected by recent case law and reforms in national and international regulations. In essence, publicity is the very soul of justice as it is the keenest spur to exertion, and the surest of all guards against improbity.[245]

It also important to keep in mind that this demands are to be growing more and more as the role of private companies are more than ever present on public matters, as their actions have a vigorous impact on consumers, under a banner of good corporate governance. As an illustration, pharmaceutical companies. This also goes in hand with the even more active demands from Investor-State Arbitration, which have a more direct impact on public interest. Nonetheless, there is a point where this demands will converge into only one and thus reform will be over arbitration as a whole. This pressure and change in doing business has been motivated by the increased used of technology and media, were openness and information are staples.

[245] Jeremy Bentham (ed.), The Works of Jeremy Bentham, Vol.IV (Edinburgh, William Tait, 1843) 316

In general terms, there are three main instances that may touch upon a duty of confidentiality. Firstly, hearings, although it has been concluded that this element is solely particular to the hearings of the proceedings, and do not perm into the documents produced, the award, or any instance that occurs afterwards the proceeding. Whilst confidentiality is present in the process of disclosure of the documents afterwards the proceeding and in the publication of the awards. The confidential status of the documents, as explored on the present paper are quite a turmoil in the current debates. Shifting from an absolute veil of secrecy, were all was presumed confidential, is shifting into allowing exceptions. In essence, there is a limit to the principle of confidentiality and these limitations are making its way into regulations and apply in practice.

Markedly, derived from the debate on what is actually confidentiality within arbitration, slowly but surely, a set of concrete exceptions that delimit the scope of said duty have been recognised. In essence these exceptions are as as follows: (a) disclosure by consent, (b) by public interest or (c) in the interest of justice. Furthermore, there are other case were there is a generally accepted disclosure: to comply with obligations with shareholders, auditors, banks and/or trade partners, basically due diligences. As for awards, institutional arbitration has been the main proposer on the matter, gaining a general acceptance.

As for England, it is evident that the decision made in Emmott mark the new direction of a more progressive English law on matter of confidentiality, following the trend in case law since 1993, more directed into the Australian point of view. Whilst Australia's regulations and centre of arbitration are the most advanced on enlisting the concrete exceptions, or when it is allowed to disclose information and/or documents. Definitely, nations that used to be perceived as hostile for arbitration, still have a lot to learn from the current shift into transparency. Specially a country like Mexico which even goes into an extreme on the CAM Arbitration Rules to allow destruction of documents. When nations like England and Australia, which are major centres of arbitration, find ingrained postures on the matter, it is time to look to the younger nations (arbitration-wise) to seek a true change in the system. This is why, the most optimal approach to this matter, is that firstly, international regulations (as they have been doing) speak out load about the duty of confidentiality, no more ambiguity. From there, taking into consideration the modern needs of the world, the best approach will be to follow Australia's guidance on having clear and

concrete exceptions listed, always in favour to protect the parties' rights. Finally, form companies, it is advised to review their arbitration agreements and verify their confidentiality clause. It is noteworthy that trade secrets are to be protected by intellectual property rights, so there shall be no fear from companies to adapt into the transparency policies, and for authorities to limit the scope of confidentiality.

Certainly, this is a matter of balance. As seen as proposed solutions, a point where confidentiality and transparency are met halfway. Confidentiality cannot be completely disposed, at it may risk the parties, but keeping this secrecy, also has negative effects. These elements are not meant to be absolutes, but to find a comprehensive functioning under the demands of the new world.

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