

THE DUTY OF CONFIDENTIALITY WITHIN THE GLOBAL LANDSCAPE

Hong-Lin Yu*

Commercial arbitration is frequently said to be private and confidential. Confidentiality is often pointed out as one of the main advantages and reasons why the parties have chosen arbitration as the means of resolving commercial disputes.¹ This widely acknowledged characteristic has led the parties to believe that they can keep their disputes from the gaze of the outside world and potential court proceedings at the enforcement stage. As the 2010 Study on Confidentiality² demonstrated ‘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 and 12% did not know whether arbitration is confidential in these circumstances.’³

However, “keeping disputes from the gaze of the outside world” is more related to privacy which excludes third parties from accessing the arbitration proceedings. Privacy and confidentiality are two different concepts⁴ in arbitration. As Collins, Paulsson and Rawding⁵

*Dr Hong-Lin Yu, Reader in Law, University of Stirling, UK

¹ Filip De Ly, Mark Friedman, Luca Radicati Di Brozolo, International Law Association International Commercial Arbitration Committee's Report and Recommendations on ‘Confidentiality in International Commercial Arbitration’ (2012) 28(3) *Arbitration International* 355, 356; Editor’s note, Consolidation: the Second Report of the United Kingdom Departmental Advisory Committee on Arbitration Law, (1991) 7(4) *Arbitration* 389; Margaret Wang, Are Alternative Dispute Resolution Methods Superior to Litigation in Resolving Disputes in International Commerce? (2000) 16(1) *Arbitration International* 189; Reza Mohtashami and Sami Tannous, Arbitration at the Dubai International Financial Centre: a Common Law Jurisdiction in the Middle East (2009) 25(2) *Arbitration International* 173 <<https://doi-org.ezproxy-s2.stir.ac.uk/10.1093/arbitration/25.2.173>> accessed 23 July 2020; Leon E. Trakman, Confidentiality in International Commercial Arbitration (2002) 18(1) *Arbitration International* 1, 1-5 and 11, highlighting that confidentiality is key to the successful practice of international commercial arbitration.

² Paul Friedland and Loukas Mistelis, *2010 International Arbitration Survey: Choices in International Arbitration* <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf> accessed 23 July 2020.

³ *Ibid.* 3.

⁴ Michael Collins QC, Privacy and Confidentiality in Arbitration Proceedings (1995) 11(3) *Arbitration International* 321; Jan Paulsson and Nigel Rawding, The Trouble with Confidentiality (1995) 11(1) *Arbitration International* 303.

⁵ *Ibid.* Collins, 321–336; Paulsson and Rawding, 303–320.

have pointed out, some literatures confusingly used the terms inter-changeably⁶ when they make reference to the advantages of arbitration. Strictly speaking, privacy refers to access to arbitration proceedings. Confidentiality refers to the information used or stated during the proceeding which should be kept confidential and not be revealed to people who are not involved in the arbitration proceedings.

A 2012 survey⁷ of the arbitration laws or the relevant provisions of Codes of Civil Procedures of 93 jurisdictions concluded that confidentiality is not a universal characteristic of arbitration. This conclusion was drawn from the discrepancies between laws on the definition of confidential information, the differing persons subject to the duty and the various levels of confidentiality imposed. The survey concluded that twenty jurisdictions imposed an express statutory duty and five jurisdictions provided an implied duty of confidentiality. While the arbitration proceedings remain undisputedly private to outsiders, no international consensus has been reached on the issue of the duty of confidentiality. The duty of confidentiality is not provided for in the New York Convention or the United Nations Commission on International Trade Law's (UNCITRAL) Model Law. The only reference to the issue of confidentiality is the UNCITRAL Arbitration Rules. However, the provision is mainly concerning the confidentiality of awards,⁸ rather than a general duty of confidentiality in relation to the information used in the arbitration proceedings.

The ILA Report on Confidentiality published by the International Law Association in 2010 (ILA Report)⁹ also highlighted the lack of definition on confidentiality and the debates over

⁶ Ola O. Olatawura, Nigeria's Appellate Courts, Arbitration and Extra-Legal Jurisdiction: Facts, Problems, and Solutions (2012) 28(1) *Arbitration International* 63, 64 <<https://doi-org.ezproxy-s2.stir.ac.uk/10.1093/arbitration/28.1.63>> accessed 23 July 2020.

⁷ Hong-Lin Yu, Duty of Confidentiality: Myth and Reality, (2012) 31(1) *Civil Justice Quarterly* 68.

⁸ The UNCITRAL Arbitration Rules (revised in 2010), Article 34(5).

⁹ De Ly *et al* (n 1).

confidentiality in the mid-1990s.¹⁰ It reads:

[w]hile neither statutes, judicial decisions, procedural rules, treaties nor contracts precisely or comprehensively defined the contours and limits of this confidentiality, there was widespread tacit acceptance of a generalized confidentiality principle. Many have long considered confidentiality to be a desirable feature of arbitration and one that distinguishes it from court litigation. This assumption was called into question by a few highly publicized court decisions in the mid-1990s which promoted considerable commentary and debate.¹¹

Similar concerns over the assumption mentioned above were expressed by Ajibo who commented:

Confidentiality remains one of the cardinal features of international commercial arbitration and a great number of users of international commercial arbitration assume when choosing arbitration that it is inherently confidentiality. However, this assumption appears not to be the case given that many national laws and arbitral rules do not currently provide for confidential and those that do vary in their approach and scope including the persons affected, the duration and the remedies.¹²

Both the ILA Report and the 2012 survey agreed that, on the basis of party autonomy, the duty

¹⁰ *Esso Australia Resources Ltd v Plowman* [1995] H.C.A. 19; (1995) 128 A.L.R. 391; (1995) 69 A.L.J.R. 404; (1995) 183 C.L.R. 10 at [36] and [37]; *United States v Panhandle Eastern Corporation* (D. Del. 1988) 118 F.R.E. 346; *Dolling-Baker v Merret* [1990] 1 W.L.R. 1205 at 1213; *Hassneh Insurance Co of Israel v Stuart J Mew* [1993] 2 Lloyd's Rep. 243; *Ali Shipping Corp v Shipyard Trogir* [1998] 2 All E.R. 136; [1998] 1 Lloyd's Rep. 643; see the discussion in Yu (n 7) 68-88; O. Oakley-White, "Confidentiality Revisited: Is international arbitration losing one of its major benefits" (2003) 6(1) Int. A.L.R. 29, 32.

¹¹ De Ly *et al* (n 1) 356.

¹² Kenneth I. Ajibo, Confidentiality in international commercial arbitration: Assumptions of implied duty and a proposed solution (2015) 3(2) Latin American Journal of International Trade Law 337, 337; also see Constantine Partasides QC and Simon Maynard, Raising the curtain on English Arbitration (2017) 33(2) Arbitration International 197, 198, 201-202.

of confidentiality can be directly imposed by the parties' agreement or indirectly imposed by arbitration institutional rules or applicable laws. The previous survey mentioned also highlighted that the statutory or implied duty of confidentiality is not absolute. Restrictions can be imposed by consent, by law or by court orders.

Confidentiality was identified as a significant issue corporations would consider in their negotiation stance. 27% of the surveyed corporations in the White & Case /QMUL Report 2010 indicated that confidentiality is a deal-breaker which they would never be willing to concede.¹³ As the research published since 2010 has mostly chosen a small selection of jurisdictions¹⁴ or focused on the theoretical or practical side¹⁵ of this issue, it becomes essential to re-visit the landscape of confidentiality to understand whether and how the duty of confidentiality has advanced in international commercial arbitration. The aim of this report is to map out the landscape of the duty of confidentiality by extending the 2010 ILA Report and 2012 survey on confidentiality. A collection of arbitration laws and arbitration institutional rules will be examined. The data collection covers 198 jurisdictions and 293 arbitration institutions. Sub-research questions such as the scope of the duty, imposition of the duty, and opt-in or opt-out

¹³ Friedland and Mistelis (n 2) 7.

¹⁴ Michael Hwang S.C. and Nicholas Thio, A contextual approach to the obligation of confidentiality in arbitration in Singapore: An analysis of the Decision of the Singapore High Court in *AAV and Others v. AAZ* (2012) 28(2) *Arbitration International*, 225; Mohtashami and Tannous, (n 1) 178, 180 and 184; Guido Carducci, The Arbitration Reform in France: Domestic and International Arbitration Law (2012) 28(1) *Arbitration International*, 125, 150; Andrew Tweeddale, Confidentiality in arbitration and the public interest exception (2005) 21(1) *Arbitration International* 59 (on England); Ikram Ullah, English and Indian legal perspective on third-party disclosure in arbitration: it is time to assimilate third party into the family of arbitration (2015) 31 *Arbitration International* 127, 141-143; Elizabeth Gloster, Symbiosis or Sadomasochism? The relationship between the courts and arbitration (2018) 34(3) *Arbitration International* 321, 338-339 (argued for the publication of awards); Philip Clifford and Eleanor Scogings, Which law determines the confidentiality of commercial arbitration? (2019) 35(4) *Arbitration International* 391 (focused on the English perspective).

¹⁵ Joshua Karton, A conflict of interests: Seeking a way forward on publication of International Awards, (2012) 28(3) *Arbitration International*, 447, 475-477 (highlighted the inadequacy of the current practice on publishing awards.); Lucy Greenwood, A window of opportunity? Building a short period of time into arbitral rules in order for parties to explore settlement, (2011) 27(2) *Arbitration International* 199, 204; Ajibo, (n 12) 337; Stephan Pislevik, Precedent and development of law: Is it time for greater transparency in international commercial arbitration (2018) 34(2) *Arbitration International* 241 (examined whether transparency should be applied to international commercial arbitration); Partasides and Maynard, (n12); Tom Cummins, The IBA Guidelines on party representation in international arbitration – levelling the playing field? (2014) 30(3) *Arbitration International* 429 (focused on the relationship between privilege and confidentiality).

of the duty will be analysed. Though it is not disputed that the relevant applicable laws may have an ultimate say on the issue of confidentiality, the study of the data confirms a discrepancy between national laws and arbitration institutional rules. To demonstrate the discrepancy, the research will present and analyse the landscape of the duty of confidentiality in the context of national jurisdictions first. The discussion will be followed by an analysis of institutional rules. The research will be concluded with suggestions for the proposed confidentiality provision included in the anticipated amendments to the Taiwan Arbitration Act 1998.

METHODOLOGY

For this report, a constructionist method¹⁶ is applied with an engagement of a discourse analysis method in order to evaluate the “written texts” of the arbitration laws and arbitration institutional rules on the issue of confidentiality. While quantitative method is used to collect and analyse the national laws and arbitration rules, qualitative method is employed to present the analysis of how the duty of confidentiality is dealt with by different national laws and arbitration institutional rules. The research will form a basis to inform the Taiwanese Law Commission on the proposed confidentiality provision contained in the anticipated Taiwanese Arbitration Law Amendments. Doing so, the research will achieve the objectives of (a) presenting the landscape of duty of confidentiality globally, both in jurisdictions and arbitration institutions, (b) analysing the scope of the duty, (c) evaluating the opt-in and opt-out duties, and (d) suggesting the factors to be considered by the lawmakers of the Taiwanese Parliament.

¹⁶ R.A. Neimeyer and H. Levitt, Constructivism /constructivist methodology in N.J. Smelser and P.B. Baltes International Encyclopedia of the Social and Behavioral Sciences (Elsevier Science 2001), 2651, 2653.

The discourse analysis method allows the researcher to construct the data under the narrative themes, such as general duty of confidentiality, duty on arbitrators, institution, parties and third party, opt-in or opt-out of the duty; and furthermore to tackle the traditional assumption of confidentiality in commercial arbitration. The quantitative method is applied in the survey of national arbitration laws and the arbitration institutional rules. The rules are collected to present how jurisdictions deal with the duty of confidentiality globally. Expanding from the 2012 survey conducted by the researcher, the current survey covers 198 jurisdictions worldwide. The data of the surveyed results is arranged by regions to guide the readers through the variation within the region and beyond. 54 jurisdictions in Africa, 33 jurisdictions in Asia, 49 jurisdictions in Europe, 15 jurisdictions in the Middle East, 3 jurisdictions in North America, 16 jurisdictions in the Caribbean, 7 jurisdictions in Central America, 12 jurisdictions in South America and 9 jurisdictions in Oceania are surveyed. The qualitative method is used to further the examination of the discrepancy in the scope of the duty in those jurisdictions imposing such a duty. The wording of the provisions incorporated in the national arbitration laws will be analysed to present the scope of the duty and the “opt-in” or “opt out” mechanism adopted in those jurisdictions. A similar method is applied in the choice of 293 arbitration institutions and the structure of the landscape of the duty in institutional arbitration rules will be analysed and presented. The survey of 293 arbitration institutional rules covers the geographical area of Africa, Asia, Europe, the Middle East, North America, the Caribbean, Central America, South America, Oceania and international organisations. The survey includes 23 arbitration institutions located in Africa, 38 in Asia, 141 in Europe, 15 in the Middle East, 30 in North America, 3 in the Caribbean, 7 Central America, 34 in South America, 7 in Oceania, and 4 international institutions. The lists of jurisdictions and arbitration institutions are provided in appendix one and two.

GLOBAL LANDSCAPE OF THE DUTY OF CONFIDENTIALITY – NATIONAL LEGISLATION

A total of 198 jurisdictions are surveyed here and the research demonstrates that 50 (25.25%) jurisdictions globally have adopted the duty of confidentiality in their arbitration laws or case law. The current survey yields that the proportion of jurisdictions that have adopted the duty is twice as much as the number concluded in the 2012 Survey. The breakdown of the surveyed jurisdictions will be arranged by regions in this section.

AFRICA

Africa – Duty of Confidentiality

Jurisdiction	General duty of confidentiality (5/54)	Duty on institution (0/5)	Duty on arbitrators (4/5)	Duty on parties (2/5)	Duty on third parties (0/5)	Opt-out mechanism (3/5)
Ghana	v		v			v
Morocco	v		v			
South Africa	v		v	v		v
Mozambique	v					
Tanzania	v		v	v		v

v=yes

In the case of the African region, 54 jurisdictions were surveyed. An overwhelming 49 jurisdictions remain silent on this issue, including those countries which are the members of the OHADA.¹⁷ The survey indicates that the adoption of the duty of confidentiality in the national arbitration laws is limited to only five jurisdictions, namely Ghana,¹⁸ Morocco,¹⁹

¹⁷ OHADA Member States include Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, the Democratic Republic of the Congo, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Cote d'Ivoire, Mali, Niger, Senegal and Togo. All subscribe to the Uniform Act on Arbitration 1999.

¹⁸ Ghana Alternative Dispute Resolution Act, 2010 (Act 798).

¹⁹ Morocco Arbitration Law 2008.

South Africa,²⁰ Mozambique²¹ and Tanzania.²² Among them, Tanzania provides the most detailed provision on the duty of confidentiality;²³ this includes the general provisions on confidentiality, persons to be subject to the duty, the scope of the duty, types of information classified as confidential information²⁴ and the exceptions to the duty.²⁵

Section 36(A)(2) of the Tanzanian Arbitration Act 2020 deems confidentiality as part and parcel of an arbitration agreement reached between the parties. It reads: ‘[e]very arbitration agreement shall be deemed to provide that the parties and the arbitral tribunal shall not disclose confidential information.’ Section 36(A)(3) prescribes exceptions allowing parties or arbitrators to opt out the duty of confidentiality. It is within the tribunal’s discretion to allow the disclosure of the confidential information by court,²⁶ by law or by one of the parties’ referral to the tribunal.²⁷ The tribunal may allow parties or itself to disclose confidential information to a professional or other adviser of any of the parties if (a) the disclosure is necessary and reasonable to ensure that a party has a full opportunity to present the party’s case, to establish the protection of a party’s legal rights in relation to a third party; or to make an application to a court under the Arbitration Act 2020; and (b) the disclosure is made in accordance with an order made or a summons issued by a court or is authorised or required by law; or by the party or the tribunal who supplies the other party, the tribunal or both parties (where appropriate)

²⁰ South Africa International Arbitration Act 15 of 2017.

²¹ Mozambique Law n° 11.99 of 8 July 1999.

²² Tanzania Arbitration Act, 2020.

²³ Tanzania Arbitration Act, 2020, sections 3, 36(A), (B) and (C).

²⁴ Tanzania Arbitration Act, 2020, sections 3: “Confidential information (a) in relation to arbitral proceedings, means information that relates to the arbitral proceedings or to an award made in those proceedings, and includes- (i) the statement of claim, statement of defence, and all other pleadings, submissions, statements, or other information supplied to the arbitral tribunal by a party; (ii) any evidence, whether documentary or otherwise, supplied to the arbitral tribunal; (iii) any notes made by the arbitral tribunal of oral evidence or submissions given before the arbitral tribunal; (iv) any transcript of oral evidence or submissions given before the arbitral tribunal; (v) any rulings of the arbitral tribunal; or (vi) any award of the arbitral tribunal; (b) in relation to confidential information, includes publishing or communicating or otherwise supplying the confidential information”.

²⁵ Tanzania Arbitration Act, 2020, sections 36(A), (B) and (C).

²⁶ Tanzania Arbitration Act, 2020, section 36(C).

²⁷ Tanzania Arbitration Act, 2020, section 36(B)(1).

with written details of the disclosure and the reasons for the disclosure. Apart from disclosure ordered by a court under section 36(C), the tribunal, within arbitration, is defined as the gatekeeper of the required or requested disclosure under section 36(B).

In the case of South Africa, both parties and the tribunal are required to keep the award and all documents created for the arbitration which are not in the public domain confidential.²⁸ In contrast to Tanzania, the South African International Arbitration Act 2017 only allows an opt-out clause based on the requirements of a legal duty or to protect or enforce a legal right.

The Moroccan Arbitration Law 2008 provides a less detailed provision on confidential obligation than the two jurisdictions mentioned above. It only regulates the duty arbitrators have to comply with, with a reference to the provisions of the Moroccan criminal law,²⁹ without providing any further information on the “confidentiality obligation” mentioned in Article 326.³⁰ However, reading Article 326 in conjunction with Article 327.22 of the same Act seems to suggest that confidentiality is to be observed by arbitrators during the deliberation process. Consequently, it is unclear whether the confidentiality obligation required in Article 326 is related to deliberation only or to the general understanding of the duty of confidentiality regarding the information obtained in arbitration.

Mozambique sets privacy and confidentiality out as one of the founding principles³¹ of alternative dispute resolution. The specific reference to the duty of confidentiality is limited to the deliberation process.³² Ghana imposes the duty of confidentiality on the arbitrators only.

²⁸ South Africa International Arbitration Act 15 of 2017, Section 11(2).

²⁹ Morocco Law No. 05-08 Relating to Arbitration and Conventional Mediation 2008, Article 326.

³⁰ Ibid, Article 326.

³¹ Mozambique Law n° 11.99 of 8 July, Article 2(2).

³² Ibid, Article 22(2)(f). The confidential requirement of the deliberations between the arbitrators is provided in Arbitration (Foreign Awards) Instrument, 1963, (L.I. 261).

Such a duty is mandatory as the word “shall” is used in section 34 (5).³³ It reads: ‘[e]xcept as otherwise agreed by the parties or provided by law, the arbitrator shall ensure the confidentiality of the arbitration.’ Such a statutory duty can be removed by the parties’ agreement or by law. The reference to “by law” can be ambiguous for the researchers or practitioners who are not familiar with the Ghanaian civil procedural law. Furthermore, no further guidance is provided as to the scope and types of confidential information, unless a strong link could be made between section 34(5), the title of section 34 and the provisions under section 34(2)-(4) on the arbitration hearing. If so, the substance of the testimony of each witness, recording of the date, time and place of hearing and the presence of the arbitrator, the parties and their representatives, the claim, defence, counterclaim and the answer and parties’ opening statements could be interpreted as information to be kept confidential. Without further supporting evidence, such as explanatory notes or a policy of memorandum accompanying with the Bill for the promulgation, it would be hasty to make such an assumption.

ASIA

Asia – Duty of Confidentiality

Jurisdiction	General duty of confidentiality (12/33)	Duty on arbitration institution (5/12)	Duty on arbitrators (9/12)	Duty on parties (8/12)	Duty on third parties (2/12)	opt-out mechanism (10/12)
Bhutan	v	v	v	v		v
Malaysia	v			v		v
Mongolia	v	v	v	v		v
Macau	v					
India	v	v	v	v		v
Hong Kong	v	v	v	v		v
Laos	v		v	v	v	v
Kazakhstan	v		v			v
Philippines	v	v	v	v	v	v
Singapore	v		v	v		v
Tajikistan	v					
Vietnam	v		v			v

³³ Ghana Alternative Dispute Resolution Act, 2010 (Act 798).

Among thirty three Asian jurisdictions surveyed in this study, Laos³⁴ and the Philippines³⁵ are the two jurisdictions which impose a wider scope of confidentiality on the parties, arbitrators, institutions and third parties. Article 7 of the Laos Law on Resolution of Economic Disputes 2005 expressly provides that arbitrators, the parties and other participants must maintain confidentiality of all information and documents used in the resolution or arbitration and shall not disclose them to third parties. In terms of the arbitration institutions, the provision did not refer to them directly. Whether an arbitration institution can be required to observe the duty of confidentiality is subject to debates over the term “other participants” mentioned in Article 7. Supposing “other participants” refers to third parties such as experts and witnesses participating arbitration proceedings, arbitration institutions may not be subject to the duty of confidentiality. Alternatively, a wider definition of “other participants” could see arbitration institutions being covered by Article 7. Nevertheless, as the functions performed by an arbitration institution is to facilitate the arbitration proceedings, it may be over-expansive to describe its activities as “participating”. Hence, the researcher would argue that arbitration institutions are not subject to the duty of confidentiality.

Section 3 of the Philippines Alternative Dispute Resolution Act of 2004 defines confidential information as any information arising from the arbitration proceedings, such as the records, evidence and the arbitral award, such as oral or written pleadings, motions manifestations, witness statements and reports filed or submitted in an arbitration or for expert evaluation.³⁶ Any information which is expressly intended by the source not to be disclosed, or obtained under circumstances that would create a reasonable expectation on behalf of the source that the information shall not be disclosed is subject to the duty of confidentiality.³⁷ This duty is

³⁴ Laos Law on Resolution of Economic Disputes (2005).

³⁵ Philippines Alternative Dispute Resolution Act of 2004.

³⁶ Ibid, section 3(h)(3).

³⁷ Ibid, section 3(h)(3).

reinforced by section 23 of the Act requiring arbitration proceedings to be confidential.³⁸ Similar provisions can also be observed in Articles 4.41, 5.42 and 7.6(h) of the Department Circular No. 98.³⁹ It is worth noting that both sections 33 and 23 are silent on who is subjected to the duty of confidentiality; however, the literature suggests that the duty of confidentiality is imposed upon all the participants in the arbitration proceedings, including parties, arbitrators and non-party participants such as witnesses, resource persons or experts and institutions.⁴⁰

Among the twelve jurisdictions providing for the duty of confidentiality, the jurisdictions of Hong Kong and Singapore are both influenced by the English case law⁴¹ but took different approaches in dealing with this issue. Hong Kong Arbitration Ordinance (Cap. 609) 2011 stipulates a statutory duty of confidentiality. Consequently, the issue of confidentiality is governed by both case law and the statutory provision which is limited to the conduct of arbitration involving applications in the courts. Section 18 of the Ordinance⁴² provides for the duty of confidentiality for both arbitral process and awards. Parties' agreement allows for an exception to such a duty.⁴³ Without parties' agreement, the duty can also be lifted by law or a court order; for protection of a legal right or interest of the party, enforcement or challenge of the award in legal proceedings before a court or other judicial authority in or outside Hong Kong, or by law requiring the publication, disclosure or communication being made to any government body, regulatory body, court, tribunal or a professional or any other adviser of any

³⁸ Victor Lazatin and Juan Paolo F Fajardo, 'Philippines' in Michael J. Moser and John Choong (eds), *Asia Arbitration Handbook* (OUP 2011) 430 – 482, 437.

³⁹ The Department Circular No. 98, To Implementing Rules and Regulations Of The Alternative Dispute Resolution Act Of 2004.

⁴⁰ Simeon V. Marcelo, Cruz Marcelo and Tenefrancia, Arbitration procedures and practice in Philippines: Overview, para. 23, <[https://uk.practicallaw.thomsonreuters.com/0-620-2681?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/0-620-2681?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1)> accessed 23 July 2020.

⁴¹ *John Forster Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184.

⁴² Hong Kong Arbitration Ordinance (Cap. 609).

⁴³ Hong Kong Arbitration Ordinance (Cap. 609), section 18(1).

of the parties.⁴⁴ Section 17 of the same Ordinance provides court judges with the discretion to impose reporting restrictions.

On the other hand, the issue of confidentiality in Singapore is not dealt with under the Singapore Arbitration Act (Chapter 10) or the International Arbitration Act (Chapter 143A) 2012.⁴⁵ Instead, Singapore follows the English case law which confirms the imposition of the duty of confidentiality. The implied duty of confidentiality is established in *AAV v. AAZ*⁴⁶ and the English case law⁴⁷ where one sees the Singapore Supreme Court carry out a review of the common law jurisprudence on the duty of confidentiality in arbitration and the limited scope of its exceptions. As Singapore law upholds both privacy and confidentiality as the essential attributes of arbitration, confidentiality is implied into arbitration with the arbitration agreements. Accordingly, '[t]he principle of confidentiality is recognized as an essential corollary to privacy in arbitration and is a term the law will necessarily imply into the agreement.'⁴⁸ Similar opt-out grounds, such as parties' consent, an order or leave of court, party's or third party's legitimate interest or interest of justice, are also included.⁴⁹ This establishes that the duty of confidentiality in Singapore is a doctrine of arbitration law and based on the common law.⁵⁰ The courts also support ensuring that confidentiality is to be maintained over challenges in court as of right under sections 22-23 of the International

⁴⁴ Hong Kong Arbitration Ordinance (Cap. 609), section 18(2), Also see *Oxford Shipping Co. Ltd. v. Nippon Yusen Kaisha, The Eastern Saga* [1984] 3 All ER 835, *Hassneh* (n 10), *Insurance Co. v. Lloyd's Syndicate* [1995] 1 Lloyd's Rep. 272.

⁴⁵ Both Acts contain amendments as at 1 June 2012.

⁴⁶ *AAV v. AAZ* [2011] 1 SLR 1093; Also, *International Coal Pte Ltd v Kristle Trading Ltd* ("*Kristle Trading*") [2009] 1 SLR 945 where Lai Siu Chiu J rejected the defendants' contention that there would be no room for a duty to be implied in the face of an express provision in the confidentiality.

⁴⁷ *Dolling-Baker* (n 10) 1213-1214; *Hassneh* (n 10) 246; *London and Leeds Estates Ltd v Paribas Ltd (No 2)* 1 EGLR 102, 106 (QBD); *Ali Shipping* (n 10) 326.

⁴⁸ Michael Hwang, Lawrence Boo, et al., 'National Report for Singapore' in Lise Bosman (ed), *ICCA International Handbook on Commercial Arbitration* (ICCA & Kluwer Law International 2020, Supplement No. 99, June 2018) 1 – 55, 31 <<http://www.kluwerarbitration.com.ezproxy-s1.stir.ac.uk/book-toc?title=ICCA+International+Handbook+on+Commercial+Arbitration>> accessed 23 July 2020.

⁴⁹ *BBW v. BBX, BBY and BBZ* [2016] 5 SLR 755.

⁵⁰ *AAV* (n 46) [55].

Arbitration Act and sections 56-57 of the Arbitration Act. This is to reflect the legal position that arbitration in Singapore is both private and confidential.⁵¹ Reporting restrictions are further provided in section 23 of the Arbitration Act.⁵²

India requires arbitrators, parties and arbitration institutions to observe the duty of confidentiality in section 42A of the Arbitration and Conciliation (Amendment) Ordinance, 2019 (No. 33 of 2019). The only exception to the duty lies in the necessity for the purpose of implementation and enforcement of award. A similar scope of duty is noted in Bhutan,⁵³ where section 90 of the Alternative Dispute Resolution Act 2013 requires arbitrators, parties and arbitration institutions to maintain confidentiality of the information acquired from arbitration proceedings. Such information can only be disclosed before a court of law.

Although the Arbitration Act 2005 contains no provisions on confidentiality, Malaysia acknowledges the implied nature of confidentiality in terms of arbitration proceedings and award. Furthermore, like Singapore, confidentiality is recognised as one of the fundamental principles of the Malaysian Arbitration 2005 Act. The common law principles of confidentiality between the parties was confirmed by the Court of Appeal in *Petronas Penapisan (Melaka) Sdn Bhd v. Ahmani Sdn Bhd*.⁵⁴ For non-parties, the court also confirmed that the prohibition under section 41A does not extend to non-parties to an arbitration. Now, in its 2018 Amendments, section 41A of the Act introduced confidentiality and its restrictions to be imposed upon the parties. This duty cannot be opted out of by parties' agreement. However, the duty can be waived for protection or pursuance of a legal right, enforcement or challenge

⁵¹ Ibid. [56].

⁵² Also see Arbitration Act (Chapter 10), section 57.

⁵³ Bhutan Alternative Dispute Resolution Act of Bhutan 2013.

⁵⁴ *Petronas Penapisan (Melaka) Sdn Bhd v. Ahmani Sdn Bhd* [2016] 2 MLJ 697 (CA).

of awards or if the information is required by the governmental offices, a regulatory body, a court or a tribunal or professional or adviser of the parties.⁵⁵

Mongolia⁵⁶ specifies that parties, arbitrators and institution are bound by the legal duty to maintain confidentiality under article 50 of the Revised Arbitration Act 2017. Odsuren⁵⁷ and Woo and Lee⁵⁸ positively commented on the expansion of the duty to both arbitrators and parties and a further clarification on permitted disclosures. The confidential information covers all documents submitted or produced by a party in the arbitration and not otherwise in the public domain, such as all arbitral awards, orders and information exchanged during arbitral proceedings. This duty can be waived by parties' agreement or legal requirements, protection of a right or the proceeding for setting aside and enforcement of an arbitral award.

Others, such as Kazakhstan⁵⁹ and Vietnam,⁶⁰ requires arbitrators to observe the duty of confidentiality. In Vietnam,⁶¹ the arbitrator's duty to maintain confidentiality of the documents and arbitration proceedings is regulated under Article 21(5) which sets out the arbitrator's duties. Under the provision, unless the information is required by a competent State authority in accordance with law, no duty can be waived. In accordance with the Kazakhstan Arbitration Law, no disclosure can be made without parties' agreement. Arbitrators may not be interrogated as witnesses unless law requires them to do so.⁶² In the cases of Macau⁶³ and

⁵⁵ Malaysia Arbitration Act 2005, section 41(A)(2).

⁵⁶ Mongolia Arbitration Law 2017.

⁵⁷ Nominchimeg Odsuren, Country Update: Mongolia (2019) 21(1) Asian Dispute Review 31, 34-35.

⁵⁸ Jae-Hyong Woo and Min Kyu Lee, A Study on the Amended Arbitration Law of Mongolia (2017) 27 J Arb Stud 95, 100.

⁵⁹ Kazakhstan Law of the Republic of Kazakhstan On International Commercial Arbitration 2004.

⁶⁰ Vietnam Law on Commercial Arbitration 2010.

⁶¹ Ibid, 2010.

⁶² Kazakhstan Law of the Republic of Kazakhstan On International Commercial Arbitration 2004, Article 4(5).

⁶³ Macau Arbitration Act 2020, Article 5(4).

Tajikistan,⁶⁴ both mention confidentiality as one of the general principles but fail to identify the scope of the duty or who is subject to the duty.

To conclude, the majority of the twelve jurisdictions imposes a duty of confidentiality on arbitrators and the parties whereas institutions and third parties are not the focus of confidentiality. In cases where arbitrators act as mediators, arbitrators are required to observe the duty when they act as mediators, such as under the Bruneian International Arbitration Order 2009.⁶⁵ Although Kyrgyzstan⁶⁶ provides confidentiality, however, the duty of confidentiality only applies to investment arbitration which is outside of the scope of this study. It is worth noting that the recent debates on the role played by the tribunal’s secretary also witnesses an extended scope to the secretary under the Hong Kong Arbitration Ordinance (Cap. 609) 2011.

THE MIDDLE EAST

The Middle East – Duty of Confidentiality

Jurisdiction	General duty of confidentiality (3/15)	Duty on institution (0/3)	Duty on arbitrators (1/3)	Duty on parties (1/3)	Duty on third parties (0/3)	Opt-out mechanism (3/3)
Kuwait	v		v			v
Syria	v					v
UAE	v			v		v

Within this region, confidentiality is mentioned in the legislation of the UAE, Kuwait and Syria. In the UAE, awards are defined as confidential information in an onshore arbitration governed by the UAE Federal Arbitration Law 2018. Without parties’ agreement, no award can be disclosed.⁶⁷ For offshore arbitration administrated by the DIFC Arbitration system, Art. 14 of

⁶⁴ Tajikistan international commercial Arbitration Act 2015, Article 4.

⁶⁵ Brunei Laws of Brunei Chapter 173; Arbitration Order 2009.

⁶⁶ Kyrgyzstan The Law on Arbitration Courts 2002.

⁶⁷ UAE Federal Law No. 6 of 2018 Art. 48.

the Dubai International Financial Centre (“DIFC”) Arbitration Law 2008⁶⁸ provides that all information relating to the arbitral proceeding shall be kept confidential unless the parties agree to the disclosure or the disclosure is required by an order of the DIFC Court. For the arbitration administered under the Abu Dhabi Global Market (“ADGM”) Arbitration, no party can publish, disclose or communicate any confidential information relating to the arbitration proceedings and awards to any third parties.⁶⁹ This duty allows for exceptions⁷⁰ of parties’ agreement,⁷¹ a court’s order⁷² in order to protect or pursue a legal right or interest of the party; or to enforce or challenge the award referred. Disclosure can also be made if it is obliged by law, in compliance with its financial reporting obligations or the rules of any listing authority or securities exchange as well as to a professional or any other adviser of any of the parties, potential lenders or investors in connection with financing arrangements and in the interest of justice.⁷³

The confidentiality is not prescribed by the Kuwaiti Code of Civil and Commercial Procedure 1980.⁷⁴ However, under the Procedures Law or Optional Arbitration in the Code of Civil and Commercial Procedure 1980,⁷⁵ a limited duty of confidentiality is imposed on the tribunal which is not allowed to publish the award without parties’ consent. This indicates that the award is viewed as confidential information. The Syrian Arbitration Act 2008⁷⁶ (Law No. 4 of 2008) stipulates that the arbitration proceeding and deliberation⁷⁷ shall be confidential, unless

⁶⁸ UAE The DIFC Arbitration Law No. 1 of 2008.

⁶⁹ UAE ADGM Arbitration Regulations 2015, Art. 40(1).

⁷⁰ *Ibid*, Art. 40(2).

⁷¹ *Ibid*, Art. 30(3)(a).

⁷² *Ibid*, Art. 30(4).

⁷³ *Ibid*, Art. 40(2)(a)-(f).

⁷⁴ Arbitration in Kuwait is regulated by Chapter 12 (articles 173 to 188) of the Code of Civil and Commercial Procedure Law No. 38 of 1980 and Judicial Arbitration in Civil and Commercial Matters (Law No. 11 of 1995 as amended by Law No. 102 of 2013).

⁷⁵ *Ibid*.

⁷⁶ Syria The Syrian Arbitration Act, Law No. 4 of 2008.

⁷⁷ *Ibid*, Article 36(2).

the parties have agreed otherwise.⁷⁸ However, there is no further details regarding who is subject to the duty, scope of confidential information and the nature of the duty itself.

NORTH AMERICA

North America – Duty of Confidentiality

Jurisdiction	General duty of confidentiality	Duty on institution	Duty on arbitrators	Duty on parties	Duty on third parties	Opt-out mechanism
USA	Literature suggests that the duty is an accepted in practice					
Canada	Implied duty					
Mexico	silent					

Canada, the United States of America, and Mexico provides no statutory duty of confidentiality. In terms of the USA,⁷⁹ both the Federal Arbitration Act 1925 and the Uniform Arbitration Act 2001 contains no provisions on confidentiality: the National Report on USA Arbitration⁸⁰ stressed that the requirement of the duty of confidentiality is a generally accepted practice. Reuben has stated that ‘customarily, commercial arbitration is considered to be confidential, primarily because the proceedings are not conducted in public, and the disputing parties can contractually provide for the confidentiality of the proceedings.’⁸¹ It is accepted that the duty of confidentiality is typically provided for in the parties’ agreement or by the institutional arbitration rules the parties subject their arbitration to. According to section 17(e) of the Uniform Arbitration Act 2000, arbitrators may use their discretion to issue a protective order in order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could, if the

⁷⁸ *Ibid*, Art 29(3).

⁷⁹ The United States Arbitration Act (Federal Arbitration Act) 1926; Uniform Arbitration Act, 2000.

⁸⁰ Catherine M. Amirfar, Natalie L. Reid, et al., ‘National Report for the United States of America’, in Lise Bosman (ed), *ICCA International Handbook on Commercial Arbitration* (ICCA & Kluwer Law International 2020, Supplement No. 110, April 2020) 1, 35, 53 <<http://www.kluwerarbitration.com.ezproxy-s1.stir.ac.uk/book-toc?title=ICCA+International+Handbook+on+Commercial+Arbitration>> accessed 23 July 2020; Richard. C. Reuben, “Confidentiality in Arbitration: Beyond the Myth”, (2006) 54 U. Kan. L. Rev. 1255, 1259-1260.

⁸¹ *Ibid*, Reuben, 1259-1260.

controversy were the subject of a civil action in the state. According to the Canadian Federal Commercial Arbitration Act⁸² the duty of confidentiality should be secured by an agreement, not by statute. With a confidentiality agreement between the parties, arbitrators and /or non-parties, the duty of confidentiality can be opted into to stop information being disclosed. Mexico remains silent on this issue as no general rule provides for confidentiality of the arbitral proceedings and the award in Mexico.

THE CARIBBEAN

The Caribbean – Duty of Confidentiality

Jurisdiction	General Duty of confidentiality (3/16)	Duty on institution (1/3)	Duty on arbitrators (3/3)	Duty on parties (3/3)	Duty on third parties (1/3)	Opt-out mechanism (3/3)
Dominican Republic	v	v	v	v		v
Cayman Islands	v		v	v	v	v
Bermuda	v		v	v		v

Among the sixteen jurisdictions⁸³ in the Caribbean, the Dominican Republic, the Cayman Islands and Bermuda provide provisions of duty of confidentiality in their arbitration laws. The principle of confidentiality in arbitration applies to both domestic and international arbitration in Bermuda.⁸⁴ Bermuda follows the common law tradition and imposes the implied duty of confidentiality. This implied duty was elaborated in *Associated Electric & Gas Insurance Services Limited (AEGIS) v European Reinsurance Company of Zurich* (“Associated

⁸² Canada Federal Commercial Arbitration Act, R.S.C. 1985, c. 17 (2nd Supp.).

⁸³ Trinidad and Tobago, Dominica, Haiti, Dominican Republic, Cuba, Saint Vincent and the Grenadines, Barbados, Jamaica, Anguilla, Saint Lucia, Cayman Islands, Bahamas, British Virgin Islands, Grenada, Antigua and Barbuda and Bermuda.

⁸⁴ Narinder K. Hargun and Jeffrey P. Elkinson, ‘National Report for Bermuda’ in Lise Bosman (ed), *ICCA International Handbook on Commercial Arbitration*, (ICCA & Kluwer Law International 2020, Supplement No. 105, April 2019) 1, 33-34 <<http://www.kluwerarbitration.com.ezproxy-s1.stir.ac.uk/book-toc?title=ICCA+International+Handbook+on+Commercial+Arbitration>> accessed 23 July 2020.

Electric”),⁸⁵ whereas both the Dominican Republic⁸⁶ and the Cayman Islands⁸⁷ stipulate a statutory duty of confidentiality. This case followed the English case law.⁸⁸ The Court decided that the duty of confidentiality is implied into arbitration. Such an implied duty requires the proceedings and the award to remain confidential from third parties.⁸⁹ In *ACE Bermuda Insurance Limited v. Ford Motor Company*,⁹⁰ the court distinguished arbitration from commercial court litigation and confirmed that commercial arbitrations are essentially private proceedings observing the duty of confidentiality.⁹¹ The court further upheld the parties’ agreement requiring that ‘all awards and rulings issued or made in the arbitration are and shall remain strictly confidential.’ In the same agreement, the parties were also obliged to instruct their advisers to maintain the confidentiality of the information obtained from arbitration. Following Mance LJ’s ruling in *Economic Dept of City of Moscow v Bankers Trust Co*,⁹² the court ruled that arbitration proceedings in Bermuda are both private and confidential⁹³ because ‘[a]mong features long assumed to be implicit in parties’ choice to arbitrate in England are privacy and confidentiality. The Act’s silence does not detract from this.’⁹⁴ The court further agreed with the ruling of *Ali Shipping Corp v Shipyard Trogir*⁹⁵ and stated that any departure from confidentiality must be to the extent and no more than the extent than the court reasonably believes to be necessary in order to serve the ends of justice.⁹⁶

⁸⁵ *Associated Electric & Gas Insurance Services Limited (AEGIS) v European Reinsurance Company of Zurich* [2003] UKPC 11.

⁸⁶ Dominican Republic Article 22 Loi dominicaine relative à l'arbitrage commercial du 19 décembre 2008 Loi No. 489-08(1).

⁸⁷ The Cayman Islands Arbitration Law 2012.

⁸⁸ *Ali Shipping* (n 10).

⁸⁹ *Dolling-Baker* (n 10); *ABC Insurance Company v XYZ Insurance Company* [2006] Bda LR 8 per Bell J [20].

⁹⁰ *ACE Bermuda Insurance Limited v. Ford Motor Company* [2016] SC Bda 1 Civ [40].

⁹¹ *Associated Electric & Gas Insurance Services Limited (AEGIS) v European Reinsurance Company of Zurich* [2003] UKPC 11 [20], [40].

⁹² *Economic Dept of City of Moscow v Bankers Trust Co* [2005] QB 207 EWCA.

⁹³ *ACE Bermuda Insurance* (n 90) [25].

⁹⁴ *Economic Dept of City of Moscow* (n 92) [2].

⁹⁵ *Ali Shipping* (n 10) 326 C–D per Potter LJ; *ACE Bermuda Insurance* (n 90) [30].

⁹⁶ *ACE Bermuda Insurance Limited* (n 90) [17].

The Dominican Republic requires arbitration institutions, parties and arbitrators to maintain the duty of confidentiality, whereas third parties are not subject to the duty.⁹⁷ In contrast, the Cayman Islands requires parties and arbitrators to ensure the confidential nature of information arising from the arbitration proceedings. The same duty is not imposed on arbitration institutions and third parties. Under section 1 of the Cayman Islands Arbitration Law 2012, all information that relates to the arbitral proceedings or an award, the statement of claim, statement of defence, and all other pleadings, submissions, statements, other information, evidence supplied to the arbitral tribunal, any transcript of oral evidence or submissions given before the arbitral tribunal, any rulings of the arbitral tribunal and any award made by the tribunal shall remain confidential.⁹⁸ Both the tribunal and all parties are required to abide by the duty of confidentiality.⁹⁹ Any breach of such a duty is actionable.¹⁰⁰ There is also a legal duty on the tribunal to remind the parties of the duty of confidentiality they must follow.¹⁰¹ As far as third parties are concerned, both the arbitral tribunal and the parties shall take reasonable steps to prevent unauthorised disclosure of confidential information by any third party involved in the conduct of the arbitration.¹⁰² The word “shall” contained in the provision indicates that both arbitrators and parties must secure a confidentiality agreement¹⁰³ between them and any third parties. Consequently, third parties can be required to abide by the duty on the basis of a confidentiality agreement. It is only possible to opt-out of the duty with parties’ agreement, being required to assist the tribunal to conduct the arbitration, by rule of law for public functions, for protection of a party’s lawful interest, in the public interest, in the interests of justice or for protection of absolute privilege in the case of defamation.¹⁰⁴

⁹⁷ Dominican Republic Loi dominicaine relative à l'arbitrage commercial du 19 décembre 2008 Loi No. 489-08(1), Art 22(2).

⁹⁸ The Cayman Islands, Arbitration Law 2012, section 2(1)(b).

⁹⁹ *Ibid*, section 81(1).

¹⁰⁰ *Ibid*, section 81(2).

¹⁰¹ *Ibid*, section 81(4).

¹⁰² *Ibid*, section 81(3).

¹⁰³ The importance of a confidentiality agreement was highlighted in Wang (n 1) 200.

¹⁰⁴ The Cayman Islands, Arbitration Law 2012, section 81(2)(a)-(g).

CENTRAL AMERICA

Central America – Duty of Confidentiality

Jurisdiction	General duty of confidentiality (2/7)	Duty on institution (2/2)	Duty on arbitrators (1/2)	Duty on parties (0/2)	Duty on third parties (0/2)	Opt-out mechanism (0/2)
Costa Rica	v	v				
El Salvador	v	v	v			

Among the jurisdictions of Costa Rica, Nicaragua, El Salvador, Guatemala, Panama, Honduras and Belize situated in Central America, only Costa Rica and El Salvador mention the duty of confidentiality in their legislation. Costa Rica¹⁰⁵ imposes a general duty of confidentiality on the arbitration process without specifying the scope of the duty, as to who is to have the duty imposed on them or the exceptions to the duty. In Costa Rica, Article 38 of Law 8937¹⁰⁶ on international arbitration establishes the confidentiality of arbitral proceedings. When a file has to be considered by the courts, only the parties and their legal counsels are allowed to have access to the files. However, a final award is not confidential under Article 60 of the No 7727 Law on Alternative Resolution of Disputes and Promotion of Freedom from Social Unrest as one would like to think. Accordingly, a final award can only be confidential if both parties agree so.¹⁰⁷ To protect the parties, only the names of the arbitrators and the legal counsels representing the parties will be made public while the parties are identified by their initials.¹⁰⁸

More detailed duty is provided under the El Salvador Law of Mediation, Conciliation and Arbitration Law 2002 and 2003.¹⁰⁹ Article 4(3) of the Law of Mediation, Conciliation and Arbitration Law 2002 acknowledges confidentiality as one of the principles of arbitration.

¹⁰⁵ Costa Rica International Commercial Arbitration Law, Law 8937 of 2011, in effect from 25 May 2011.

¹⁰⁶ Ibid.

¹⁰⁷ Costa Rica General Regulations of the Law of Mediation, Conciliation and Arbitration 2003, Art 31.

¹⁰⁸ Costa Rica International Commercial Arbitration Law, Law 8937 of 2011, in effect from 25 May 2011, Art 38.

¹⁰⁹ El Salvador General Regulations of the Law of Mediation, Conciliation and Arbitration 2002 and 2003.

Accordingly, both arbitration institutions¹¹⁰ and arbitrators¹¹¹ have the duty of confidentiality imposed on them. Any breach is actionable. Surprisingly, the parties who have access to confidential information are not subject to the duty according to this provision.

SOUTH AMERICA

South America – Duty of Confidentiality

Jurisdiction	General duty of confidentiality (5/12)	Duty on institution (1/5)	Duty on arbitrators (4/5)	Duty on parties (1/5)	Duty on third parties (1/5)	Opt-out mechanism (1/5)
Argentina	v	By agreement	v	By agreement	By agreement	
Venezuela	v		v			
Bolivia	v					
Peru	v	v	v	v	v	v
Colombia	v		v			

Only five jurisdictions in this region¹¹² have the duty of confidentiality incorporated into their arbitration laws, namely Argentina, Venezuela, Bolivia, Peru and Colombia. Among the countries surveyed in this region, Peru provides the most comprehensive coverage of the duty of confidentiality. According to the Peruvian Arbitration Act 2008,¹¹³ all individuals who take part in or facilitate the arbitration proceedings are subject to the duty of confidentiality as to any information of which they become aware. This duty also covers the confidential nature of an award. The arbitral tribunal, the secretary of the arbitral tribunal, the arbitral institution and, when appropriate, the witnesses, experts and any others who intervene in the arbitral proceedings¹¹⁴ as well as parties and their representatives and legal advisers¹¹⁵ are all subject to the duty of confidentiality. The duty can only be lifted with parties' agreement.¹¹⁶ In the

¹¹⁰ Ibid, Article 4(c), 7(7)(e).

¹¹¹ El Salvador General Regulations of the Law of Mediation, Conciliation and Arbitration 2003, Article 29.

¹¹² Argentina, Venezuela, Uruguay, Bolivia, Brazil, Peru, Chile, Suriname, Guyana, Ecuador, Paraguay, Colombia were surveyed for this research.

¹¹³ Peru Arbitration Act 2008, Legislative Decree No. 1071 Regulating Arbitration, in effect 1 September 2008.

¹¹⁴ Ibid, Article 51(1).

¹¹⁵ Ibid, Article 51(2).

¹¹⁶ Ibid, Article 51(1).

cases where the Peruvian State intervenes as a party, the arbitral proceedings and the award shall be subject to confidentiality;¹¹⁷ nevertheless the duty to observe confidentiality ends at the termination of arbitration proceedings.

The issue of confidentiality is not dealt with in the Argentinian Law on International Commercial Arbitration¹¹⁸ but in the National Civil and Commercial Code (Unified) 2014¹¹⁹ (NCCC). Article 1658 of the NCCC provides for a foundation for party autonomy. Based on party autonomy, parties are free to agree on the seat, the language, the proceeding, the distribution of costs, the time limit and the duty of confidentiality. In other words, parties can opt-in for the duty of confidentiality and require parties or third parties to be subject to the duty. Over and above the opt-in duty of confidentiality, arbitrators are obliged to respect the confidentiality of the proceedings.¹²⁰ Therefore, in accordance with Article 1662 of the Argentinean NCCC,¹²¹ in accepting the appointment as an arbitrator, the arbitrator must enter into an agreement with each individual party to respect the confidentiality of the proceedings.¹²²

In Venezuela, the issue of confidentiality is governed by the Commercial Arbitration Law 1998 and the Code of Civil Procedure of 1987. Accordingly to Article 42 of the Commercial Arbitration Law 1998, arbitrators have a statutory duty to maintain the confidentiality of the motions of the parties, of the evidence and of everything related to the arbitral proceedings.

¹¹⁷ Ibid, Article 51(3).

¹¹⁸ Argentina Law on International Commercial Arbitration, Law 27, 449.

¹¹⁹ Argentina National Civil and Commercial Code (Unified), Chapter 29, Law No. 26.994, adopted on 1 October 2014.

¹²⁰ Ibid, section 1662 (c).

¹²¹ Ibid, sections 1649-1665.

¹²² Guido Santiago Tawil, 'National Report for Argentina (2019)' in Lise Bosman (ed), *ICCA International Handbook on Commercial Arbitration* (ICCA & Kluwer Law International 2020, Supplement No. 107, October 2019) 1, 20 <<http://www.kluwerarbitration.com.ezproxy-s1.stir.ac.uk/book-toc?title=ICCA+International+Handbook+on+Commercial+Arbitration>> accessed 23 July 2020.

Article 24 of the Code of Civil Procedure requires that all judicial acts which lead all proceedings related to the recognition or enforcement of awards in the courts shall be held in public and become matters of public record.

In the case of Bolivia, a general duty is provided¹²³ without stipulating the scope of its application. Article 8(II) of the Conciliation and Arbitration Law 2015 prescribes that all information known and provided by individuals in both conciliation and arbitration procedures shall be confidential. No further information regarding who is subject to this duty is given. Hence, ambiguity exists as to whether or not this is a blanket duty of confidentiality restricting all participants who are involved in the arbitration proceedings. The duty can be opted out of if the relevant information can be required by either the State Attorney General, tax office or court order in the cases where the interests of the State are compromised or evidence of criminal activities is noticed.¹²⁴

Colombia acknowledges the duty of confidentiality in the domestic context but not in international arbitration.¹²⁵ Art. 16 of Law 1563/12¹²⁶ stipulates that, as a person to administer justice, arbitrators sitting in domestic arbitration are subject to the same duties established under statutory law for judges. This includes the duty of abstaining from revealing confidential information. Information has to be classified as confidential information before the duty can be imposed. For international arbitration, no statutory duty of confidentiality is provided and a duty can only be imposed by the parties' agreement or the institutional rules the parties subject the arbitration to.

¹²³ Bolivia Conciliation and Arbitration Law 2015.

¹²⁴ Ibid, Article 8(II).

¹²⁵ Colombia Art. 47 of Law 1563/12.

¹²⁶ Colombia Bill No. 6 of 2019 by means of which Law 1563 of 2012, the statute of national and international arbitration, is modified.

Brazil does not provide a statutory duty of confidentiality in its arbitration law.¹²⁷ However Netto¹²⁸ suggested that the duty may be imposed during the court proceedings dealing with arbitration matters, including the enforcement of arbitral decisions. This can be done by means of an arbitration letter sent by the arbitral tribunal to the judiciary, providing that the confidentiality stipulated in the arbitration proceedings is proven before the court under Article 189 of the Brazilian Code of Civil Procedures.¹²⁹ Ecuador prescribes no statutory duty of confidentiality but allows for the application of a confidentiality agreement.¹³⁰

EUROPE

Europe – Duty of Confidentiality

Jurisdiction	General duty of confidentiality (17/49)	Duty on institution (5/17)	Duty on arbitrators (16/17)	Duty on parties (10/17)	Duty on third parties (2/17)	opt-out mechanism (10/17)
Estonia	v		v			v
Spain	v	v	v	v		
Andorra	v domestic only	v	v	v	v	v domestic only
Slovakia	v		v			v
Czech Republic	v		v			
France	v domestic only		v	v		v
England	v		v	v		v
Portugal	v	v	v	v		v
Monaco	v	v	v	v		v
Latvia	v		v	v		v
Lithuania	v					
Malta	v		v			
Moldova	v		v			
Romania	v		v			v

¹²⁷ Brazil Art. 2 Law No. 9,307, 1996; Extracts from Law No. 13.105 of 16 March 2015 (Brazilian Code of Civil Procedure; Law No. 13.129 of 26 May 2015).

¹²⁸ Carlos Nehring Netto, 'National Report for Brazil' in Lise Bosman (ed), *ICCA International Handbook on Commercial Arbitration* (ICCA & Kluwer Law International 2020, Supplement No. 106, July 2019) 1, 35 <<http://www.kluwarbitration.com.ezproxy-s1.stir.ac.uk/book-toc?title=ICCA+International+Handbook+on+Commercial+Arbitration>> accessed 23 July 2020.

¹²⁹ Brazil Law No. 13.105 of 16 March 2015 (Brazilian Code of Civil Procedure).

¹³⁰ Ecuador Arbitration and Mediation Law, Codification 14, Official Gazette 417, 14 December 2006, as amended.

Jurisdiction	General duty of confidentiality (17/49)	Duty on institution (5/17)	Duty on arbitrators (16/17)	Duty on parties (10/17)	Duty on third parties (2/17)	opt-out mechanism (10/17)
Russian Federation	v domestic only	v	v	v		
Georgia	v		v	v	v	
Scotland	v		v	v		v

In Europe, as the continent renowned for its sophistication in using arbitration as an alternative form of dispute resolution for commercial disputes, 17 jurisdictions adopt either an express statutory or an implied duty of confidentiality. They are: Estonia,¹³¹ Spain,¹³² Andorra,¹³³ Slovakia,¹³⁴ the Czech Republic,¹³⁵ France,¹³⁶ England,¹³⁷ Portugal,¹³⁸ Monaco,¹³⁹ Latvia,¹⁴⁰ Lithuania,¹⁴¹ Malta,¹⁴² Moldova,¹⁴³ Romania,¹⁴⁴ Russian Federation,¹⁴⁵ Georgia¹⁴⁶ and Scotland.¹⁴⁷

Among these jurisdictions, Georgia provides a blanket duty of confidentiality on arbitrators and any person participating in the arbitration proceeding¹⁴⁸ and prohibits them from publishing, communicating, transferring or using the documents, evidence, written or oral statements of the proceedings in another judicial or administrative proceedings. Such a

¹³¹ Estonia Code of Civil Procedure.

¹³² Spain The Consolidated Arbitration Law 60/2003 (with 2009 and 2011 amendments).

¹³³ Andorra Arbitration Act 47/2014: express agreement must be made between the parties for international arbitration.

¹³⁴ Slovakia Act 244/2002 Coll, on arbitration, as amended.

¹³⁵ Czech Republic s. 6 Act No. 216/1994 Coll., on Arbitral Proceedings and Enforcement of Arbitral Awards (The Arbitration Act).

¹³⁶ France Code of Civil procedure 2011.

¹³⁷ Implied duty of confidentiality is applied in England.

¹³⁸ Portuguese Voluntary Arbitration Law 2011 (In force since 14 March 2012).

¹³⁹ Monaco Arbitration Bill 2007.

¹⁴⁰ Latvia Arbitration Act 2015.

¹⁴¹ Lithuania Law on Commercial Arbitration of the Republic of Lithuania (2012).

¹⁴² Malta Arbitration Act 1996, as amended through 2018.

¹⁴³ Moldova Law no. 24-XVI From 02.22.08 Regarding International Commercial Arbitration.

¹⁴⁴ Romania Romanian New Civil Procedure Code 2013.

¹⁴⁵ Russian Federation Federal Law No. 382-FZ of 29 December 2015 on Arbitration in the Russian Federation.

¹⁴⁶ Georgia Law of Arbitration 2010.

¹⁴⁷ Scotland Arbitration (Scotland) Act 2010.

¹⁴⁸ Georgia Law of Arbitration 2010, Article 32(5).

complete duty can only be opted out of with the parties' agreement.¹⁴⁹ Article 32(2) of the Georgia Law of Arbitration 2010 stipulates that arbitrators and any person participating in the arbitration proceedings must ensure the confidentiality of the information available to them during the arbitration proceedings. The word "participating" indicates that third parties may not be exempted from the duty. However, an arbitration institution performing the administrative or facilitating functions, rather than in a participatory role, should not be required to maintain confidentiality. The same provision did not provide any exceptions allowing an opt-out of the duty.

Spain,¹⁵⁰ Andorra, Portugal, Monaco and the Russian Federation (domestic arbitration only) are the five jurisdictions imposing the duty of confidentiality on the institutions, arbitrators and parties. Article 24(2) of the Spanish Consolidation of Arbitration Law expressly imposes the duty of confidentiality upon the arbitrators, the parties and the arbitral institutions¹⁵¹ for any information coming to their knowledge during the course of the arbitral proceedings. The tribunal's deliberation is to be kept confidential.¹⁵² A similar provision is also observed in Article 30.5 of the Portuguese Voluntary Arbitration Law 2011¹⁵³ which reads: '[t]he arbitrators, the parties and the arbitral institutions, if such is the case, are obliged to maintain confidentiality regarding all information obtained and documents brought to their attention in the course of the arbitration proceedings.' In the same Article, exceptions to the duty can be waived by law for the protection of parties' rights and their duty to communicate or disclose procedural acts to the competent authorities. In Monaco, Article 22 of the Arbitration Law

¹⁴⁹ Ibid, Article 32(4).

¹⁵⁰ Spain The Consolidated Arbitration Law 60/2003 (with 2009 and 2011 amendments), Article 24(2).

¹⁵¹ Ibid, Article 24(2).

¹⁵² Ibid, Article 38(3).

¹⁵³ Portugal Voluntary Arbitration Law 2011 which came into force on 14 March 2012.

2007 confirms the principle of confidentiality with the same duty imposed on parties, arbitrators and arbitration institutions. Parties can opt out of the duty with an agreement.

In the context of Andorra, France and the Russian Federation, confidentiality only applies to domestic arbitration. Taking Andorra as an example, under Articles 5.2 and 39.2 of the Arbitration Act 2014, the arbitrators, the parties, the experts and the arbitration institutions are bound by the duty to maintain the information obtained during the arbitration proceedings confidential unless the parties agree otherwise. In contrast, in an international arbitration, parties must opt into the duty of confidentiality by an express confidentiality agreement before claiming any breach of such duty.¹⁵⁴

In France, the duty of confidentiality is set as one of the principles of arbitration. It is also a default rule stipulated in Article 1464 of the French Code of Civil Procedures 2011, subject to legal requirements and parties' agreement.¹⁵⁵ It reads: '[t]he arbitrators, the parties and the arbitral institutions, if such is the case, are obliged to maintain confidentiality regarding all information obtained and documents brought to their attention in the course of the arbitration proceedings, without prejudice to the right of the parties to make public procedural acts necessary to the defence of their rights and to the duty to communicate or disclose procedural acts to the competent authorities, which may be imposed by law.' Furthermore, Article 1479 requires confidentiality in the tribunal's deliberation.

In relation to the Russian Federation, the Law of the Russian Federation on International Commercial Arbitration contains no provision on confidentiality. The duty of confidentiality

¹⁵⁴ Andorra Arbitration Act 2014, Article 67.2.

¹⁵⁵ French Code of Civil Procedures 2011, Article 1464(3).

for domestic arbitration is provided in the Federal Law No. 409-FZ 2015.¹⁵⁶ It can only be opted out of by parties' agreement or by the requirements of the federal law.¹⁵⁷ According to the duty, arbitrators and the employees of the arbitration institution have to keep any information confidential.¹⁵⁸

The jurisdictions of England, Scotland and Latvia require parties and arbitrators not to disclose information related to arbitration proceedings and awards. In Scotland, rule 26 of the Scottish Arbitration Rules incorporated in the Arbitration (Scotland) Act 2010 provides a default rule on duty of confidentiality which arbitrators and parties are required to abide by.¹⁵⁹ As a default rule, parties can modify, amend or opt out of the duty with a joint agreement between the parties. Alternatively, the information can be mandatorily disclosed on the grounds of 'for the proper performance of public functions of the discloser, public body or office holder, protections of a party's lawful interests, the public interests, the interest of justice or in defamatory nature of the disclosure'.¹⁶⁰ Both the tribunal and parties must take reasonable steps to ensure confidentiality arrangements are made in relation to third parties.¹⁶¹ In Scotland, the tribunal's deliberation is not necessarily required to be confidential. The tribunal has discretion to decide whether it should be a private or confidential process.¹⁶² The details of deliberation would not need to be revealed to the parties if the tribunal prefers its confidential nature. For England, Wales and Northern Ireland, an implied duty of confidentiality is well established in *Dolling-Baker v Merret*¹⁶³ where Parker LJ maintained that confidentiality is an essential attribute of a

¹⁵⁶ The Federal Law, On Introduction of Amendments to Certain Legislative Acts of the Russian Federation and Loss of Effect of Paragraph (3)(1) of Article 6 of the Federal Law, On Self-Managing Organizations, In Connection with Adoption of the Federal Law, On Arbitration (Third-Party Tribunals) in the Russian Federation, 29 December 2015, No. 409-FZ.

¹⁵⁷ Ibid, Article 21(1).

¹⁵⁸ Ibid, Article 21(2).

¹⁵⁹ Scottish Arbitration Rules, Rules 26(1).

¹⁶⁰ Scottish Arbitration Rules, Rules 26(1)(c).

¹⁶¹ Scottish Arbitration Rules, Rules 26(2).

¹⁶² Scottish Arbitration Rules, Rules 27(1).

¹⁶³ *Dolling-Baker* (n 10).

private arbitration and confidentiality is implied into the arbitration agreement.¹⁶⁴ Parker LJ's qualification of the duty was further expanded in *Ali Shipping Corp v Shipyard Trogir*.¹⁶⁵ The exceptions provided are: (1) consent of the parties, (2) order of the court, (3) leave of the court, (4) the disclosure is reasonably necessary for the protection of the legitimate interests of an arbitrating party *vis-à-vis* a third party, (5) public interest.

In relation to Latvia, information concerning arbitration proceedings shall not be published without parties' agreement. An arbitral tribunal is imposed with such a duty.¹⁶⁶ Lejinš suggests that there is an implied duty imposed on the parties to maintain confidentiality of the information.¹⁶⁷ Such a duty corresponds with Article 11(3) of the Latvian Civil Procedure Law which requires protection of confidentiality of correspondence.

Section 6 of the Czech Republic Arbitration Act No. 216/1994 imposes on arbitrators an obligation to observe the duty of confidentiality. Such an obligation can only be relieved by the parties to the dispute or by the court. In the case of a court-ordered disclosure, the relief order will be made by the Chairman of the District Court of the arbitrator's residence if the arbitrator has a permanent address in the Czech Republic. Otherwise, it will be made by the Chairman of the District Court of the competent authority if the arbitrator does not have permanent residence in the Czech Republic. Moldova also has a similar provision that imposes liability on the arbitrators for failing to respect the confidential character of the arbitration by publishing or disclosing data of which they become aware as arbitrators without the parties'

¹⁶⁴ Ibid, 1213.

¹⁶⁵ *Ali Shipping* (n 10).

¹⁶⁶ Latvia The Law of the Republic of Latvia, The Arbitration Law, in effect from 1 January 2015, as amended, Article 23(1)-(2).

¹⁶⁷ Girts Lejins and Eva Kalnina, 'National Report for Latvia' in Lise Bosman (ed), *ICCA International Handbook on Commercial Arbitration* (ICCA & Kluwer Law International 2020, Supplement No. 110, April 2020) 1, 26 <<http://www.kluwerarbitration.com.ezproxy-s1.stir.ac.uk/book-toc?title=ICCA+International+Handbook+on+Commercial+Arbitration>> accessed 23 July 2020.

authorisation.¹⁶⁸ Similar provisions requiring arbitrators not to reveal, publish or communicate confidential information can be seen in the cases of Estonia,¹⁶⁹ Slovakia,¹⁷⁰ Malta,¹⁷¹ Moldova¹⁷² and Romania.¹⁷³ Lithuania stipulates confidentiality as a general principle of arbitration in Article 8(3)¹⁷⁴ but fails to define its scope and coverage.

It is worth highlighting that all seventeen jurisdictions restrict arbitrators from disclosing any information provided for them during the arbitration proceedings. A total of 16 jurisdiction provide a statutory provision, with England upholding an implied duty through case law. Over and above, applying the concept of Contract Law to confidentiality agreements is the preferred practice in Europe. For instance, in the case of Switzerland, though no express statutory duty exists under Chapter 12 of the Federal Act on Private International Law¹⁷⁵ and the law of domestic arbitration, Patocchi has pointed out that '[c]onfidentiality obligations may, however, be imported into the arbitration agreement by reference to arbitration rules that impose a

¹⁶⁸ Moldova Law No 24-XVI 2008 Regarding International Commercial Arbitration, Article 15.

¹⁶⁹ Estonia Code of Civil Procedure 2005, Article 741. It reads: 'Confidentiality requirement Unless the parties have agreed otherwise, an arbitrator is required to maintain the confidentiality of information which became known to him or her in the course of performance of his or her duties and which the parties have a legitimate interest in keeping confidential.' The reference to deliberation is only made to court judges and the relevant people present at the deliberation in court under Article 21.

¹⁷⁰ Slovakia Act 244/2002 Coll, on arbitration, as amended Pursuant to the Arbitration Act, an arbitrator must keep confidential all facts of which he or she becomes aware during or in connection with the arbitration, even after the end of his or her mandate. The arbitrator may be relieved of this obligation only by the parties, by court or by law enforcement.

¹⁷¹ Malta Arbitration Act 1996, as amended through 2018, Article 15. This provision does not apply to mandatory arbitration without parties' opt-in agreement. Article 70(5) requires the court to preserve the confidentiality of the arbitration and shall only reveal such facts as may be necessary to make the same intelligible and enforceable by the parties.

¹⁷² Moldova Law no. 24-XVI 2008 Regarding International Commercial Arbitration, Articles 4 and 15. Article 4(g) sets out the general principle on confidentiality. Article 15 stipulates that arbitrators are liable for damage if failing to respect the confidential character of the arbitration, publishing or disclosing data of which become aware as an arbitrator without the authorization of the parties.

¹⁷³ Romania Book IV, Romanian New Civil Procedure Code 2010, Article 56G provides that arbitrators are liable for the damage caused by not observing the confidential nature of the arbitration, by either publishing or disclosing information acquired in their capacity as arbitrators without the parties' approval. Article 45 requires arbitrators' deliberation to be confidential.

¹⁷⁴ Lithuania Law on Commercial Arbitration.

¹⁷⁵ Switzerland Chapter 12 of the Federal Act on Private International Law of 18 December 1987, and selected Articles (Arts. 176 to 194).

confidentiality obligation.”¹⁷⁶ Citing ASA Bulletins¹⁷⁷ he suggested that any arbitrators sitting in Switzerland have a duty to treat arbitration as a confidential matter. Arbitrators may exercise discretion to order a party to enter into a confidentiality agreement with a third party.¹⁷⁸

OCEANIA

Oceania – Duty of Confidentiality

Jurisdiction	General duty of confidentiality (4/9)	Duty on institution (0/4)	Duty on arbitrators (3/4)	Duty on parties (4/4)	Duty on third parties (0/4)	Opt-out mechanism (4/4)
Australia	v		v	v		v
New Zealand	v		v	v		v
Cook Islands	v		v	v		v
Fiji	v			v		v

Among the nine jurisdictions surveyed for the region of Oceania, Australia,¹⁷⁹ Fiji,¹⁸⁰ Cook Islands¹⁸¹ and New Zealand¹⁸² provide express statutory duty of confidentiality. Contrasting with the judgment of Justice Mason’s decision in *Esso v. Plowman*¹⁸³ rejecting confidentiality being an attribute of arbitration, Section 23C of the International Arbitration Act 1974¹⁸⁴ imposes a statutory duty of confidentiality on both the parties¹⁸⁵ and arbitrators.¹⁸⁶ Their duty can only be opted out with the consent of all of the parties to the arbitral proceedings,¹⁸⁷ by law or court or if the disclosure is required by a professional or other adviser of any of the parties

¹⁷⁶ Paolo Michele Patocchi, ‘National Report for Switzerland’ in Lise Bosman (ed), *ICCA International Handbook on Commercial Arbitration* (ICCA & Kluwer Law International 2020, Supplement No. 104, February 2019) 1, 58 <<http://www.kluwerarbitration.com.ezproxy-s1.stir.ac.uk/book-toc?title=ICCA+International+Handbook+on+Commercial+Arbitration>> accessed 23 July 2020.

¹⁷⁷ ASA Bull. (1994) 148, 160.

¹⁷⁸ Patocchi (n 176) 41.

¹⁷⁹ Australia International Arbitration Act 1974 amended in 2016.

¹⁸⁰ Fiji International Arbitration Act No.44 of 2017.

¹⁸¹ Cook Island Arbitration Act 2009.

¹⁸² New Zealand Arbitration Act 1996, in force 1 July 1997 (as amended 2019).

¹⁸³ *Esso Australia Resources v Plowman* (1995) 183 CLR 10.

¹⁸⁴ Australia International Arbitration Act 1974 (Cth), Act No. 136 of 1974 as amended in 2016, Section 23C.

¹⁸⁵ *Ibid*, Section 23C(1).

¹⁸⁶ *Ibid*, Section 23C(2).

¹⁸⁷ *Ibid*, Section 23D(2).

to the arbitral proceedings.¹⁸⁸ Both Section 14B of New Zealand Arbitration Act 1996¹⁸⁹ and Section 2 of the Cook Islands Arbitration Act 2009 stipulate that the arbitration agreement itself is deemed as a prohibition of disclosure of confidential information. In other words, every arbitration agreement is deemed to provide the legal basis for confidentiality. All four jurisdictions require the parties to observe the duty of confidentiality, whereas no provision imposing the duty on third parties or institutions. For arbitrators, the duty is imposed by Australia, New Zealand and the Cook Islands.

Both the Australian¹⁹⁰ and the New Zealand Arbitration Acts contain a statutory duty of confidentiality. Both Acts provide a detailed definition of confidential information including any information which relates to the proceedings or an award made in the proceedings. This includes the statements, pleadings, submissions, evidence, transcript of oral evidence or submission, and any notes, ruling, and awards made by the tribunal.¹⁹¹ In the case of New Zealand, the existence of a valid arbitration agreement is a *prima facie* evidence of a duty of confidentiality where both parties and arbitrators are bound by it.¹⁹² Both parties¹⁹³ and arbitrators¹⁹⁴ are required to perform such a duty unless the disclosure is allowed as a statutory limitation on the prohibition of disclosure of confidential information; for instance with the joint consent of all parties, court orders, a required disclosure for professional or other advisers

¹⁸⁸ Ibid, Section 23D(3).

¹⁸⁹ New Zealand Arbitration Act 1996 (came in force 1 July 1997 (as amended in 2007 and 2019); Amokura Kawharu, New Zealand's arbitration law receives a tune up (2008) 24(3) *Arbitration International* 405.

¹⁹⁰ The issue of confidentiality arising from investment arbitration is regulated under the Civil Law and Justice Amendment Act 2018 (Cth). Accordingly, Legis-Sections 23C to 23G of the International Arbitration Act 1974 (Cth) do not apply to arbitral proceedings to which the Transparency Rules apply, whether those Rules apply because of the operation of the Convention on Transparency or otherwise. The area of investment arbitration is outside of the scope of this research.

¹⁹¹ Australia International Arbitration Act 1974, Act No. 136 of 1974 as amended in 2016, section 15(1)(a)-(f); New Zealand s. 4(1) Arbitration Amendment Act 2007.

¹⁹² New Zealand, Arbitration Act 1996, in force 1 July 1997 (as amended 2019), section 14B(1). The provision is subject to the application of section 14C of the same Act.

¹⁹³ Australia International Arbitration Act 1974, Act No. 136 of 1974 as amended in 2016, section 23C(1).

¹⁹⁴ Ibid, section 23C(2).

of the parties, due process, protection of legal rights *vis-à-vis* a third party, enforcement of award, being required by law or regulatory bodies,¹⁹⁵ under an order made by the tribunal¹⁹⁶ or a court in the public interest.¹⁹⁷ However, if the court is of the view that the interest in preserving the confidentiality of arbitral proceedings outweighs the public interest or the request for disclosure does not amount to reasonable means, it may prohibit the disclosure of information.¹⁹⁸

Section 45 of the Fiji International Arbitration Act¹⁹⁹ provides for the duty of confidentiality on awards and the information arising from the arbitration proceedings. It stipulates that, subject to parties' agreement, all documents and matters relating to the arbitration shall be treated as confidential and no party may publish, disclose or communicate information relating to any awards and the arbitration proceedings to non-parties.²⁰⁰ The usual exceptions to the duty of confidentiality are provided in the events of parties' agreement, protection of legal right, recognition or enforcement of the award, to the public authority, to an order made by the tribunal following parties' request or to the professional or any other advisers of the parties.²⁰¹

In the case of the Cook Islands, the confidential information covered by section 2 of the Arbitration Act 2009 is comprehensive. It includes any information that relates to the arbitral proceeding or to an award made in those proceedings, any evidence or any transcript of oral evidence or submissions supplied to the tribunal, any notes made by the tribunal, and any

¹⁹⁵ Ibid, sections 23C(1)(a) and 23C(2)(a) and 23D(1)-(9); New Zealand Arbitration Act 1996, section 14C(a)-(e).

¹⁹⁶ Australia International Arbitration Act 1974, Act No. 136 of 1974 as amended in 2016, sections 23C(1)(b)-(c) and 23C(2)(b)-(c), 23E; New Zealand Arbitration Act 1996, section 14D.

¹⁹⁷ Australia International Arbitration Act 1974, Act No. 136 of 1974 as amended in 2016, sections 23C(1)(b)-(c) and 23C(2)(b)-(c), 23G; New Zealand Arbitration Act 1996, section 14E(1)-(2).

¹⁹⁸ Australia International Arbitration Act 1974, Act No. 136 of 1974 as amended in 2016, sections 23F(1)(a); New Zealand Arbitration Act 1996, section 14E(3).

¹⁹⁹ Fiji International Arbitration Act No.44 of 2017.

²⁰⁰ Fiji International Arbitration Act No.44 of 2017, Article 45(1)(a)-(b).

²⁰¹ Ibid, Article 45(2)(a)-(e).

rulings or award made by the tribunal. To avoid ambiguity, section 2 also defines the party subject to the duty of confidentiality as a party to the arbitration. An arbitration agreement between the parties is deemed as *prima facie* evidence of parties' duty of confidentiality.²⁰² Although the provision does not expressly specify who is subject to the duty, the phrases "party to the arbitration" and "a party or an arbitral tribunal" used in section 14C of the Act give an indication that both parties and tribunal are required to observe the duty. In terms of opt-out, a party or an arbitral tribunal may disclose the confidential information to a professional or other adviser if the disclosure is necessary and as a reasonable measure for due process, under court order, if required by law, or by the tribunal.²⁰³ An arbitral tribunal has the discretion to allow the disclosure of confidential information as to the question of whether the information should be disclosed, if referred by a party.²⁰⁴

GLOBAL LANDSCAPE OF THE DUTY OF CONFIDENTIALITY – ARBITRATION INSTITUTIONAL RULES

It is essential to point out that, under party autonomy, the parties whose arbitration is subject to a national arbitration law or arbitration institutional rules remaining silent on the duty of confidentiality can always contract for a duty of confidentiality as an opt-in. Public policy and mandatory rules are the usual restrictions on confidentiality agreement between the parties. Based on the principle of party autonomy, the duty of confidentiality can be directly imposed by the parties' agreement or indirectly imposed by arbitration institutional rules governing the parties' submission. In principle, the parties can reach an agreement to impose the duty of confidentiality if they do not wish to have the documents or evidence submitted to the

²⁰² Cook Islands, the Arbitration Act 2009, Section 14(B).

²⁰³ Ibid, Section 14(C).

²⁰⁴ Ibid, Section 14(D).

arbitration to be revealed to non-parties or to be used in other dispute resolution proceedings. The duty can be contractually imposed upon the parties themselves, the members of the tribunal, third parties taking part in the arbitration proceedings, or even the employee or agents of the arbitrators. Alternatively, the parties can choose to implicitly impose the duty of confidentiality by submitting their disputes to an arbitration institution which contains rules on the duty of confidentiality.

Nevertheless, like everything else in international commercial arbitration, the parties' agreement is subject to the restrictions of mandatory rules and public policy of the applicable laws. Therefore, it does not matter whether it is an express or implicit duty of confidentiality: the parties' confidentiality agreement can be mandatorily waived by the legal exceptions; losing its functions as a result. The relevant applicable laws which may affect the parties' consent on the duty of confidentiality include the law applicable where the arbitration is held, the law applicable where the tortious acts (breach of duty of confidentiality) were carried out, the law governing the arbitration and/or confidentiality agreements, and the law of the country where recognition and enforcement of an arbitral award is sought.

At this juncture, it is important to highlight that not all arbitration institutional rules impose confidentiality. The survey carried out in this research reveals that 144 out of 293 (49.14%) arbitration institutions subscribe to the duty of confidentiality whereas 150 arbitration institutions do not have rules on confidentiality. This figure is significantly higher than the figure for national legislation (25.25%). This indicates that arbitration institutions are more prepared to offer the duty of confidentiality to ensure confidential information remains within arbitration. The breakdown of the 144 institutions is as follows: 12 institutions based in Africa, 24 institutions in Asia, 60 institutions in Europe, 8 institutions in the Middle East, 11

institutions in North America, 2 institutions in the Caribbean, 5 institutions in Central America, 15 institutions in South America, 4 institutions in Oceania and 4 International Institutions. Among them, the scope of the duty varies.

The data gathered to structure the global landscape of arbitration institutional rules on the duty of confidentiality indicates that 144 institutions offer various degrees of express duty of confidentiality to the people who have access to information. The emphasis is placed on arbitrators with 112 institutions requiring arbitrators not to disclose information obtained during arbitration proceedings. This is followed by parties' duty of confidentiality where 90 institutions surveyed impose the duty on the parties. 84 arbitration institutions, their employees and administrative staff are required to abide by the duty of confidentiality. For third parties, the analysis of the words used in the arbitration institutional rules shows that witnesses require fewer restrictions on the duty of confidentiality than experts. Less emphasis is placed on both witness and experts, with 39 institutions requiring it for witnesses and 53 institutions imposing an express duty of confidentiality on the experts. Some require parties or arbitrators to ensure a confidentiality agreement is in place before experts can access the information.

However, upholding party autonomy, these institutional provisions usually offer the parties the opportunity to opt-out. As a result, the parties can exclude the application of the implicit duty of confidentiality imposed when they sign up for an institutional arbitration. For instance, the phrases “unless the parties agree otherwise”,²⁰⁵ “unless otherwise agreed by the parties”,²⁰⁶ “unless all parties and the tribunal agree otherwise”,²⁰⁷ “unless there is a contrary agreement

²⁰⁵ CAAI Arbitration Rules 2017, Article 1; CAM Arbitration Rules 2009, Article 48

²⁰⁶ Article 12 of OSLO CII Arbitration Rules 2005; SCC Arbitration Rules 2017; AoA Rules for the Conduct of Arbitrations 2009, Article 4; LCCI Arbitration Rules 2009, Article 7; CCIR Arbitration Rules 2018, Article 4, CPR Rules for Administered Arbitration of International Disputes 2019, Rule 20

²⁰⁷ Article 24, CEFAREA_CMAP Arbitration Rules 2007

between the parties”,²⁰⁸ “unless otherwise agreed in writing by the parties”²⁰⁹, “unless the parties in writing notify the Secretariat otherwise”²¹⁰ or “unless the parties expressly agree in writing to the contrary”²¹¹ are noted. Similarly, parties’ express or implicit incorporation of a confidentiality clause can also be superseded by the applicable law in an institutional arbitration when a reference to applicable law is made in arbitration institutional rules. For instance, “required by applicable law”²¹² “unless otherwise required by applicable law”,²¹³ “or the applicable law says otherwise”²¹⁴ or “the applicable law provides otherwise”.²¹⁵

Breakdown of the duty of confidentiality –Arbitration institutional rules

Area	Express duty of Confidentiality	Institution	Arbitrator	Parties	Witness	Expert	Complete duty of confidentiality
Worldwide	144/ 293	84/144	112/144	90/144	39/144	53/144	28
Africa	12	5	6	7	1	3	1
Asia	24	17	24	16	10	11	7
Middle East	8	6	6	7	2	6	1
North America	11	5	7	6	1	1	1
Caribbean	2	0	2	1	0	1	0
Central America	5	1	3	3	0	0	0
South America	15	7	11	9	5	5	3
Europe	60	39	46	34	19	25	14
Oceania	4	1	3	4	0	0	0
International institutions	4	3	4	3	1	1	1

AFRICA

Arbitration Institutional Rules – Duty of Confidentiality

²⁰⁸ CCB Arbitration Rules 2005 Article 8 (1)

²⁰⁹ AoA Rules for the Conduct of Arbitrations 2009, Article 40

²¹⁰ Article 21.2.2 AFSA Commercial Arbitration Rules 2009

²¹¹ CEDRAC Arbitration Rules 2012, Rule 43; QICCA Rules of Conciliation and Arbitration 2012, Article 41; RCICAL Arbitration Rules 2008, Article 4(1)

²¹² AoA Rules for the Conduct of Arbitrations 2009, Article 40; CACIC Arbitration Rules 2017, Article 36; CCB Arbitration Rules 2005 Article 8 (1); BCDR Rules for Arbitration 2017, Article 40.1; SCCA Arbitration Rules 2016, Article 38

²¹³ Independent Claims Resolution Foundation Rules, Article 36; BCCI Arbitration Rules 2008, Article 37

²¹⁴ CCB Arbitration Rules 2005 Article 8(1);

²¹⁵ ICAC International Commercial Arbitration Rules 2017, Article 46(1); MAC Arbitration Rules 2017, Article 42(2)

Institution	Duty of Confidentiality (11/23)	Institution (5/11)	Arbitrators (6/11)	Parties (7/11)	Witness (1/11)	Expert (3/11)
Addis Ababa Chamber of Commerce and Sectorial Association Arbitration Institute (AACCSA) ²¹⁶	v		v			
Arbitration Foundation of Southern Africa (AFSA) South Africa ²¹⁷	v	v				
Association of Arbitrators (Southern Africa) South Africa ²¹⁸	v					
Cairo Regional Center For International Commercial Arbitration (CRCICA) Egypt ²¹⁹	v	v	v	v		v
Centre d'arbitrage du Groupement interpatronal du Cameroun (CAG), Cameroon ²²⁰	v	v	v	v	v	v
Cour Atlantique d'Arbitrage International près la Chambre de Commerce d'Industrie et de services d'Agadir (CAAI) , Morocco ²²¹	v			v		
Cour d'Arbitrage de Côte d'Ivoire de la Chambre de Commerce et d'Industrie de Côte d'Ivoire (CACI), Ivory Coast ²²²	v	v	v	v		
Kigali International Arbitration Centre (KIAC) Rwanda ²²³	v		v	v		
Nairobi Centre for International Arbitration (NCIA) ²²⁴	v			v		
Regional Centre for International Commercial Arbitration - Lagos (RCICAL) ²²⁵	v	v	v	v		v
Tokiso Dispute Settlement, South Africa ²²⁶	v only applies to award					

The current survey shows that 11 out of 23 arbitration institutional rules located in Africa contain provisions on duty of confidentiality. The relevant institutions are: the Addis Ababa Chamber of Commerce and Sectorial Association Arbitration Institute (AACCSA), the Arbitration Foundation of Southern Africa (AFSA, South Africa), the Association of

²¹⁶ AACCSA Current Adjudication Rules 2008, Article 21.7.

²¹⁷ AFSA Commercial Arbitration Rules 2009, Article 21.2.2.

²¹⁸ AoA Rules for the Conduct of Arbitrations (6th edition) 2009, Rule 4, 4.

²¹⁹ CRCICA Arbitration Rules 2011, Article 40.

²²⁰ GICAM Arbitration Rules 1998, Article 19.

²²¹ CAAI Arbitration Rules 2017, Article 13(4).

²²² CACI Arbitration Rules 2004, Article 3.

²²³ KIAC Arbitration Rules 2012, Article 48.

²²⁴ NCIA Arbitration Rules 2016, Rule 34.

²²⁵ RCICAL Current arbitration Rules 2008, Article 4.

²²⁶ Tokiso Arbitration Rules 2010, Article 4.

Arbitrators (Southern Africa), the Cairo Regional Center for International Commercial Arbitration (CRCICA), the Centre d'arbitrage du Groupement interpatronal du Cameroun (CAG, Cameroon), the Cour Atlantique d'Arbitrage International près la Chambre de Commerce d'Industrie et de services d'Agadir (CAAI, Morocco), the Cour d'Arbitrage de Côte d'Ivoire de la Chambre de Commerce et d'Industrie de Côte d'Ivoire (CACI, Ivory Coast), the Kigali International Arbitration Centre (KIAC) Rwanda, the Nairobi Centre for International Arbitration (NCIA), the Regional Centre for International Commercial Arbitration - Lagos (RCICAL) and Toksio Dispute Settlement, in South Africa.

However, the scope of application of the duty varies from institution to institution. The Centre d'arbitrage du Groupement interpatronal du Cameroun (CAG) located in Cameroon is the only institution requiring the duty of confidentiality to be observed by the institution, arbitrators, parties, experts and witnesses. Article 19 of the GICAM Arbitration Rules 1998 includes the parties, their counsel, arbitrators, experts, and all persons associated with the arbitration proceedings. They are all bound by professional secrecy and respect for the confidentiality of information.

The Arbitration Foundation of Southern Africa (AFSA), the Cairo Regional Center for International Commercial Arbitration (CRCICA), the Cour d'Arbitrage de Côte d'Ivoire de la Chambre de Commerce et d'Industrie de Côte d'Ivoire (CACI), and the Regional Centre for International Commercial Arbitration - Lagos (RCICAL) joined CAG to impose the duty of confidentiality on the arbitration institutions.

While 7 institutions impose an express parties' duty of confidentiality, they all allow parties to use an agreement to opt out or modify the scope of the duty. In the case of the South African

Toksio Dispute Settlement and the Tunis Center for Conciliation and Arbitration (CCAT), the prescribed duty of confidentiality is only limited to awards whereas others provide a more general duty of confidentiality.

In this region, the focus of the duty is placed more on parties. Seven institutions impose the duty on the parties to arbitration whereas arbitrators are required to observe the duty by 6 institutions. For third parties involved in arbitration in the capacities of experts or witnesses, the Centre d'arbitrage du Groupement interpatronal du Cameroun (CAG) requires both experts and witnesses to follow the duty of confidentiality. Any experts giving expert witness statements during the arbitration proceedings administered by the Cairo Regional Center for International Commercial Arbitration (CRCICA) and the Regional Centre for International Commercial Arbitration - Lagos (RCICAL) have to observe the duty of confidentiality upon the experts.

ASIA

Arbitration Institutional Rules – Duty of Confidentiality

Institution	Duty of Confidentiality (24/38)	Institution (17/24)	Arbitrators (24/24)	Parties (16/24)	Witness (10/24)	Expert (11/24)
Arbitration Association of the Republic of China (CAA) ²²⁷	v	v	v			
Arbitration Development Center of the Chamber of Commerce and Industry of Uzbekistan (CCIU) Uzbekistan ²²⁸	v		v			
Asian International Arbitration Centre (AIAC) Malaysia ²²⁹	v	v	v	v	v	v
Bangladesh Council for Arbitration of the Federation of Bangladesh Chambers of Commerce and Industry (BCA) Bangladesh ²³⁰	v	v	v	v	v	v

²²⁷ CAA Arbitration Rules 2002, Article 6.

²²⁸ CCIU Arbitration Courts Law 2006, Article 28.

²²⁹ Arbitration Rules of The Asian International Arbitration Centre (Malaysia) (AIAC), Rule 16.

²³⁰ BCA Arbitration Rules 2004, Rule 41.1.

Institution	Duty of Confidentiality (24/38)	Institution (17/24)	Arbitrators (24/24)	Parties (16/24)	Witness (10/24)	Expert (11/24)
Beijing Arbitration Commission (BAC), China ²³¹	v		v	v	v	v
China International Economic and Trade Arbitration Commission (CIETAC), China ²³²	v		v	v	v	v
Chinese Arbitration Association, International (CAAI), Hong Kong ²³³	v	v	v	v	v	v
Hong Kong International Arbitration Centre (HKIAC) Hong Kong ²³⁴	v	v	v	v	v	v
Indian Council of Arbitration (ICA) India ²³⁵	v		v			
Indian Institute of Arbitration and Mediation (IIAM) India ²³⁶	v	v	v	v		
Indonesian National Board of Arbitration (BANI), Indonesia ²³⁷	v	v	v	v		
Institute for the Development of Commercial Law and Practice Arbitration Centre (ICLP) Sir Lanark ²³⁸	v	v	v			
International Arbitration Centre of the Astana International Financial Centre (AIFC-IAC) Kazakhstan ²³⁹	v	v	v			
Japan Commercial Arbitration Association (JCAA) Japan ²⁴⁰	v	v	v	v	v	v
Japan Intellectual Property Arbitration Center (JIPAC) Japan ²⁴¹	v	v	v	v		
Kazakhstani International Arbitrage (KIA) Kazakhstan ²⁴²	v	v	v			
Korean Commercial Arbitration Board (KCAB), Korea ²⁴³	v	v	v			
Kuala Lumpur Regional Centre for Arbitration (KLRCA) Malaysia ²⁴⁴	v	v	v	v		
Mumbai Centre for International Arbitration (MCIA) ²⁴⁵	v		v	v	v	v
National Commercial Arbitration Center (NCAC) Cambodia ²⁴⁶	v		v			

²³¹ BAC Arbitration Rules 2019 Article 26 (2).

²³² CIETAC Arbitration Rules 2015, Article 38(2).

²³³ CAAI Arbitration Rules 2017, Article 39(1).

²³⁴ HKIAC Arbitration Rules 2018, Article 45.

²³⁵ ICA Maritime Arbitration Rules 2004, Article 2.2.1.3.

²³⁶ IIAM Arbitration Rules 2009, Rule 7.

²³⁷ BANI Arbitration Rules 2003 English, Article 13(2).

²³⁸ ICLP Expedited Arbitration Rules 2006, Article 7.

²³⁹ AIFC Arbitration and Mediation Rules 2018, Article 2.3.

²⁴⁰ JCAA Commercial Arbitration Rules 2019, Article 42.

²⁴¹ JIPAC Arbitration Rules 2006, Article 4

²⁴² KIA Arbitration Rules 2005, Article 7.

²⁴³ KCAB International Arbitration Rules 2016, Article 57(2).

²⁴⁴ KLRCA Arbitration Rules 2017, Rule 16.

²⁴⁵ MCIA Rules 2017, Article 35.1.

²⁴⁶ NCAC Arbitration Rules 2014, Rule 49.

Institution	Duty of Confidentiality (24/38)	Institution (17/24)	Arbitrators (24/24)	Parties (16/24)	Witness (10/24)	Expert (11/24)
Shanghai International Arbitration Center (SHIAC) ²⁴⁷	v	v	v	v	v	v
Shenzhen Court of International Arbitration (SCIA) ²⁴⁸	v	v	v	v	v	v
Singapore International Arbitration Centre (SIAC) ²⁴⁹	v		v	v		v
Thai Arbitration Institute (TAI) ²⁵⁰	v	v	v	v		

Compared to Africa, twenty-four out of thirty-eight Asian arbitration institutions provide for the duty of confidentiality when parties sign up for arbitration, with eleven of them failing to incorporate such a duty into their institutional rules. They include the Arbitration Association of the Republic of China (CAA, Taiwan) which mentions CAA in Article 6 of the CAA Arbitration Rules. The SHIAC requires “the relevant staff-members of the Secretariat” to observe the duty of confidentiality. The JCAA expressly provides more detailed description of personnel, including ‘the JCAA (including its directors, officers, employees, and other staff)’ as subject to the duty.

Similarly, the disparity among institutions is also noted in this region. Among the twenty-seven arbitration institutions that provide an express duty of confidentiality, seven institutions impose the duty on all parties, including the institutions, parties, arbitrators, experts and witnesses, involved in arbitration to observe the duty of confidentiality. Others offer different degrees of duty.

In terms of the duty imposed on institutions, a total of seventeen arbitration institutions, such as the Arbitration Association of the Republic of China (CAA), the Kazakhstani International

²⁴⁷ SHIAC Arbitration Rules 2015, Article 34(2).

²⁴⁸ SCIA Arbitration Rules 2016, Article 65.

²⁴⁹ SIAC Rules 2016, Article 39.1.

²⁵⁰ TAI Arbitration Rules 2017, Article 36.

Arbitrage (KIA), the Korean Commercial Arbitration Board (KCAB Korea), the Kuala Lumpur Regional Centre for Arbitration (KLRCA), the Mumbai Centre for International Arbitration (MCIA), the Shanghai International Arbitration Center (SHIAC), the Shenzhen Court of International Arbitration (SCIA), the Singapore Institute of Arbitrators (SIArb), the Indian Institute of Arbitration and Mediation (IIAM), the Institute for the Development of Commercial Law and Practice Arbitration Centre (ICLP), the Japan Commercial Arbitration Association (JCAA), the Japan Intellectual Property Arbitration Center (JIPAC) and the Thai Arbitration Institute (TAI) require the institution as an administrative body to abide by the duty of confidentiality regarding all information, documents and awards it becomes aware of during the arbitration proceedings.

More institutions' rules, twenty-four to be precise, require arbitrators to respect the duty of confidentiality during the proceedings; namely the Arbitration Association of the Republic of China (CAA), the Kazakhstani International Arbitrage (KIA), the Korean Commercial Arbitration Board (KCAB), the Kuala Lumpur Regional Centre for Arbitration (KLRCA), the Mumbai Centre for International Arbitration (MCIA), the National Commercial Arbitration Center (NCAC), the Shanghai International Arbitration Center (SHIAC), the Shenzhen Court of International Arbitration (SCIA), the Singapore Institute of Arbitrators (SIArb), the Singapore International Arbitration Centre (SIAC), the Arbitration Development Center of the Chamber of Commerce and Industry of Uzbekistan (CCIU), the Bangladesh Council for Arbitration of the Federation of Bangladesh Chambers of Commerce and Industry (BCA), the Beijing Arbitration Commission (BAC), the China International Economic and Trade Arbitration Commission (CIETAC), the Chinese Arbitration Association, the International (CAAI), the Indian Council of Arbitration (ICA), the Indian Institute of Arbitration and Mediation (IIAM), the International Arbitration Centre of the Astana International Financial

Centre (AIFC-IAC), the Japan Commercial Arbitration Association (JCAA), the Japan Intellectual Property Arbitration Center (JIPAC) and the Thai Arbitration Institute (TAI).

The survey reveals a similar number of arbitration institutions imposing the duty of confidentiality on both arbitrators and parties. Sixteen arbitration institutions require the parties involved in institutional arbitrations in this region to comply with the duty of confidentiality; such as the Kuala Lumpur Regional Centre for Arbitration (KLRCA), the Mumbai Centre for International Arbitration (MCIA), the Shanghai International Arbitration Center (SHIAC), the Shenzhen Court of International Arbitration (SCIA), the Singapore Institute of Arbitrators (SIArb), ... and so on.

For third parties, namely experts and witnesses, ten arbitration institutions including the Mumbai Centre for International Arbitration (MCIA), the Shanghai International Arbitration Center (SHIAC), the Shenzhen Court of International Arbitration (SCIA), the Asian International Arbitration Centre (AIAC), the Beijing Arbitration Commission (BAC), the Chinese Arbitration Association, the International (CAAI) and Japan Commercial Arbitration Association (JCAA), the Hong Kong International Arbitration Centre (HKIAC) Hong Kong, the China International Economic and Trade Arbitration Commission (CIETAC) and the Bangladesh Council for Arbitration of the Federation of Bangladesh Chambers of Commerce and Industry (BCA) require both to follow the duty of confidentiality.

MIDDLE EAST

Arbitration Institutional Rules – Duty of Confidentiality

Institution	Duty of Confidentiality (8/15)	Institution (6/8)	Arbitrators (6/8)	Parties (7/8)	Witness (2/8)	Expert (6/8)
Bahrain Chamber for Dispute Resolution (BCDR-AAA) ²⁵¹	v	v	v	v	v	v
Dubai International Arbitration Centre (DIAC), UAE ²⁵²	v			v		v
Dubai International Financial Centre Arbitration Centre (DIFC-LCIA), UAE ²⁵³	v			v		
Emirates Maritime Arbitration Centre (EMAC) UAE ²⁵⁴	v	v	v	v		v
Qatar International Arbitration and Conciliation Center (QICCA) ²⁵⁵	v	v	v	v		v
Saudi Center for Commercial Arbitration (SCCA) ²⁵⁶	v	v	v			
Tehran Regional Arbitration Centre (TRAC) , Iran ²⁵⁷	v	v	v	v		v
Yemen Center for Conciliation and Arbitration (YCCA) ²⁵⁸	v	v	v	v	v	v

Over fifty percent of the surveyed arbitration institutional rules in the Middle East adopt the duty of confidentiality. Among them, the Bahrain Chamber for Dispute Resolution (BCDR-AAA) and the Yemen Center for Conciliation and Arbitration (YCCA) are the arbitration institutions imposing a much more comprehensive duty of confidentiality on institutions, arbitrators, parties, witness and experts, than other institutions based in this region. Both the Qatar International Arbitration and Conciliation Center (QICCA) and the Tehran Regional Arbitration Centre (TRAC) require institutions, arbitrators, parties and experts to follow the duty of confidentiality.

Apart from the four arbitration institutions mentioned above, the Saudi Center for Commercial Arbitration (SCCA) joins them and requires both arbitrators and the institution to abide by the

²⁵¹ BCDR Rules of Arbitration 2017, Article 40.

²⁵² DIAC Arbitration Rules 2007, Articles 30 and 41.

²⁵³ DIFC-LCIA Arbitration Rules 2016, Article 30.

²⁵⁴ EMAC Arbitration Rules 2016, Article 43.

²⁵⁵ QICCA Rules of Conciliation and Arbitration 2012, Article 41.1.

²⁵⁶ SCCA Arbitration Rules 2016, Article 38.

²⁵⁷ TRAC Arbitration Rules 2005, Article 4.

²⁵⁸ YCCA Arbitration Rules 1999, Article 32.

duty of confidentiality. Interestingly, SCCA Rules do not require parties and any third party to observe the duty. All the others have the duty of confidentiality extended to parties. For third parties, the same trend as other parts of the world is noted in this region. Less emphasis is placed on witnesses but experts are required to follow the duty by more institutions.

NORTH AMERICA

Arbitration Institutional Rules – Duty of Confidentiality

Institution	Confidentiality (11/29)	Institution (5/11)	Arbitrators (7/11)	Parties (6/11)	Witness (1/11)	Expert (1/11)
ADR Institute of Canada (ADR Canada) ²⁵⁹	v	v	v	v	v	v
ADR Services Inc. ²⁶⁰	v		v	v		
American Arbitration Association (AAA) ²⁶¹	v					
American Dispute Resolution Center, Inc. (ADR Center) ²⁶²	v					
Arbitration Centre of Mexico (CAM)	v			v		
British Columbia International Commercial Arbitration Centre (BCICAC), Canada ²⁶³	v	v	v	v		
Commercial Arbitration and Mediation Center for the Americas (CAMCA) USA ²⁶⁴	v	v	v			
Commercial Mediation and Arbitration Commission of the Mexico City National Chamber of Commerce (CANACO), Mexico ²⁶⁵	v					
CPR International Institute for Conflict Prevention and Resolution (CPR) USA ²⁶⁶	v	v	v	v		
International Centre for Dispute Resolution (ICDR) USA ²⁶⁷	v	v	v			
Mona International Centre for Arbitration and Mediation (MICAM) USA ²⁶⁸	v		v	v		

²⁵⁹ ADIC Arbitration Rules 2016, Article 4.18.

²⁶⁰ ADR Services Arbitration Rules 2020, Article 35.

²⁶¹ The duty is not provided in AAA Commercial Arbitration Rules 2007 but in ICDR Guidelines for Arbitrators Concerning Exchanges of Information 2008.

²⁶² American Dispute Resolution Center, Inc. Rules Of Commercial Arbitration 2011, Articles 1 and 24.

²⁶³ BCICAC International Arbitration Rules 2000, Article 18(3).

²⁶⁴ CAMCA Arbitration Rules 1996, Article 36.

²⁶⁵ CANACO Arbitration Rules 2008, Article 5.

²⁶⁶ CPR Rules for Administered Arbitration of International Disputes 2019, Rule 20.

²⁶⁷ ICDR International Arbitration Rules English 2009, Article 34.

²⁶⁸ MICAM Fast Track Arbitration Rules 2016, Article 18.

Institution	Confidentiality (11/29)	Institution (5/11)	Arbitrators (7/11)	Parties (6/11)	Witness (1/11)	Expert (1/11)
National Arbitration Forum (FORUM) USA ²⁶⁹	v					

Compared with the survey on jurisdictions in North America, arbitration institutions based in North America are more willing to impose an express duty of confidentiality. 11 out of 29 arbitration institutions prescribe the duty of confidentiality. Among them, the ADR Institute of Canada (ADR Canada) is the only arbitration institution which imposes a comprehensive duty of confidentiality on all parties participating and non-parties involved in arbitration proceedings. The British Columbia International Commercial Arbitration Centre (BCICAC), the Commercial Arbitration and Mediation Center for the Americas (CAMCA), the CPR International Institute for Conflict Prevention and Resolution (CPR) USA and the International Centre for Dispute Resolution (ICDR) are the other four organisations extending the duty to the arbitration institutions. More arbitration institutions in North America impose the duty of confidentiality on the arbitrators and parties. Arbitrators are required by seven institutions not to disclose information and parties are required by six institutions to observe the duty, as the table shows.

THE CARIBBEAN

Arbitration Institutional Rules – Duty of Confidentiality

Institution	Duty of Confidentiality (2/4)	Institution (0/2)	Arbitrators (2/2)	Parties (1/2)	Witness (0/2)	Expert (1/2)
Centro de Resolución Alternativa de Controversias de la Cámara de Comercio y Producción de Santo Domingo (CRC) , Dominic Rep ²⁷⁰	v		v			

²⁶⁹ FORUM Arbitration Rules 2008, Rule 4.

²⁷⁰ CRC Arbitration Rules, Article 1.10 and 25.4.

Institution	Duty of Confidentiality (2/4)	Institution (0/2)	Arbitrators (2/2)	Parties (1/2)	Witness (0/2)	Expert (1/2)
British Virgin Islands International Arbitration Centre (BVI IAC) ²⁷¹	v		v	v		v

In this region, four arbitration institutions are surveyed. Both the CRC and the BVI IAC prescribe the general duty of confidentiality and specify that arbitrators are bound by the duty with the BVI IAC extending the duty to both parties and experts.

CENTRAL AMERICA

Arbitration Institutional Rules – Duty of Confidentiality

Institution	Confidentiality (5/7)	Institution (1/5)	Arbitrators (3/5)	Parties (3/5)	Witness (0/5)	Expert (0/5)
Centro de Conciliación y Arbitraje de la Cámara de Comercio de Costa Rica (CCA), Costa Rica ²⁷²	v	v	v			
Centro de Conciliación y Arbitraje de la Cámara de Comercio e Industria de Tegucigalpa (CCIT), Honduras ²⁷³	v		v	v		
Centro de Conciliación y Arbitraje de la Cámara de Comercio e Industrias de Cortés, Nicaragua ²⁷⁴	v			v		
Centro de Mediación y Arbitraje “Antonio Leiva Pérez” de la Cámara de Comercio de Nicaragua (CACONIC), Nicaragua ²⁷⁵	v			v		
Centro Internacional de Conciliación y Arbitraje de la Cámara Costarricense-Norteamericana de Comercio de Costa Rica (CICA), Costa Rica ²⁷⁶	v		v			

The landscape of the duty of confidentiality in Central America is rather sketchy. Five out of six institutions provide the general duty of confidentiality requiring the parties not to reveal,

²⁷¹ BVI IAC Arbitration Rules 2016, Article 17 (6).

²⁷² CCA International Commercial Arbitration Rules 2012, Article 44.

²⁷³ CCIT Arbitration Rules 2002, Article 3.

²⁷⁴ CCIC Arbitration & Conciliation Rules 2005, Article 5.

²⁷⁵ CACONIC Arbitration and Mediation Arbitration Rules 2008, Article 6.

²⁷⁶ CICA Arbitration Rules 2009, Article 29.

communicate or publish the information obtained during the arbitration proceedings. While three institutions require arbitrators to ensure the confidentiality of the information they obtained in their roles as arbitrators, Article 29 of the CICA Arbitration Rules 2009 allows the tribunal to exercise its discretion to safeguard the confidential information.

SOUTH AMERICA

Arbitration Institutional Rules – Duty of Confidentiality

Institution	Duty of Confidentiality (15/32)	Institution (7/15)	Arbitrator (11/15)	Parties (9/15)	Witness (5/15)	Expert (5/15)
Arbitration Center of the American Chamber of Commerce Sao Paulo (AMCHAM) Brazil ²⁷⁷	v	v	v	v	v	v
Camara de Arbitragem Empresarial Brasil (CAMARB), Brazil ²⁷⁸	v	v	v	v		
Câmara de Arbitragem Empresarial de São Paulo (SP Arbitral), Brazil ²⁷⁹	v	v	v	v	v	v
Câmara de Comércio Brasil – Canadá (CCBC), Brazil ²⁸⁰	v	v	v	v	v	v
Câmara de Mediação e Arbitragem de São Paulo (CMA-SP), Brazil ²⁸¹	v	v	v	v		
Centro de Arbitraje y Conciliación de la Cámara de Comercio de Bogotá (CCB) ²⁸²	v		v	v	v	v
Centro de Arbitraje de la Cámara de Comercio de Industria y Servicios de Caracas (CACC), Venezuela ²⁸³	v	v	v			
Centro de Arbitraje de la Cámara de Comercio de Lima (CCL), Peru ²⁸⁴	v		v	v	v	v
Centro de Arbitraje y Mediación de la Cámara de Comercio de Santiago (CAM), Chile ²⁸⁵	V Only award					
Centro de Arbitraje y Mediación de la Cámara Nacional de Comercio y Servicios de Paraguay (CAMP), Paraguay ²⁸⁶	V Only award			v		
Centro de Conciliación y Arbitraje Comercial de la Cámara de Industria, Comercio, Servicios	v		v	v		

²⁷⁷ AMCHAM Statute, Arbitration Rules and Mediation Rules 2014, Article 10.

²⁷⁸ CAMARB Arbitration Rules 2004, Article 7.3.

²⁷⁹ SP Arbitral Arbitration Rules 2003, Article 11.2.

²⁸⁰ CCBC Arbitration Rules 2012, Article 14.2.

²⁸¹ Sao Paulo Arbitration Mediation Rules 1998, Article 17.4.

²⁸² CCB Arbitration Rules 2007, Article 35.

²⁸³ CACC Arbitration Mediation Rules 2005, Article 8.

²⁸⁴ CCL Arbitration Rules 2017, Article 43.

²⁸⁵ CAM Santiago Arbitration Rules 2006, Article 33(8).

²⁸⁶ Paraguay Arbitration Rules 1997, Article 64.

Institution	Duty of Confidentiality (15/32)	Institution (7/15)	Arbitrator (11/15)	Parties (9/15)	Witness (5/15)	Expert (5/15)
y Turismo de Santa Cruz (CAINCO), Bolivia ²⁸⁷						
Centro de Mediación y Arbitraje Comercial de la Cámara Argentina de Comercio (CEMARC), Argentina ²⁸⁸	v	v	v			
Centro Empresarial de Conciliación y Arbitraje (CEDCA), Venezuela ²⁸⁹	v		v			
Tribunal Arbitral del Ilustre Colegio de Abogados de Lima (CAL) ²⁹⁰	v					
Tribunal de Arbitraje General de la Bolsa de Comercio de Buenos Aires (BCBA), Argentina ²⁹¹	v					

Although 15 out of 34 institutions rules acknowledging the duty of confidentiality, the scope of confidentiality provided by the Centro de Arbitraje y Mediación de la Cámara de Comercio de Santiago (CAM), and the Centro de Arbitraje y Mediación de la Cámara Nacional de Comercio y Servicios de Paraguay (CAMP) is only limited to the publication of awards. The Arbitration Center of the American Chamber of Commerce Sao Paulo (AMCHAM), the Câmara de Arbitragem Empresarial de São Paulo (SP Arbitral) and the Câmara de Comércio Brasil – Canadá (CCBC) are the three arbitration institutions which require anyone who has access to arbitration proceedings to observe the duty of confidentiality.

Most of the emphasis is on the access to confidential information by both parties and arbitrators. Again, third parties' duty of confidentiality is only required by five of the institutions listed above. Among them, the Centro de Arbitraje de la Cámara de Comercio de Industria y Servicios de Caracas (CACC), the Centro de Mediación y Arbitraje Comercial de la Cámara Argentina de Comercio (CEMARC) and the Centro Empresarial de Conciliación y Arbitraje (CEDCA) do not impose the duty on the parties but instead place their focus on arbitrators.

²⁸⁷ CAINCO Arbitration Rules 2006, Article 34.

²⁸⁸ CEMARC Arbitration Rules 2009, Article 16.

²⁸⁹ CEDCA Code of Ethics, Chapter VI.

²⁹⁰ CAL Arbitration Rules 2003, Article 56.

²⁹¹ BCBA Arbitration Rules 1993, Article 72.

EUROPE

Arbitration Institutional Rules – Duty of Confidentiality

Institution	Confidentiality (60/134)	Institution (39/60)	Arbitrators (46/60)	Parties (34/60)	Witness (19/60)	Expert (25/60)
ADR Centre ²⁹²	v	v	v			
Albanian Commercial Mediation and Arbitration Center ²⁹³	v			v		
Arbitral Tribunal of the European Committee of RUCIP ²⁹⁴	v	v	v			v
Arbitration Center at the Institute of Modern Arbitration (ISA) Russia ²⁹⁵	v	v	v	v	v	v
Arbitration Institute of the Stockholm Chamber of Commerce (SCC) Sweden ²⁹⁶	v	v	v			
Association Française de l'Arbitrage (AFA) France ²⁹⁷	v					
Belgrade Arbitration Center (BAC), Serbia	v	v	v	v	v	v
Bucharest International Arbitration Court (BIAC) Romania ²⁹⁸	v		v	v	v	v
Centre belge d'arbitrage et de médiation (CEPANI), Belgium ²⁹⁹	v		v	v		
Centre d'arbitrage et de médiation commerciale de la Chambre de commerce, d'industrie et des services de Genève (CCIG), Switzerland ³⁰⁰	v	v	v	v		
Centre Français d'Arbitrage de Réassurance et d'Assurance (CEFAREA) ³⁰¹	v Only award					
Centre Interprofessionnel de Médiation et d'Arbitrage (CIMA) France ³⁰²	v		v	v	v	v

²⁹² ADR Centre, ADR Italy Arbitration Rules 2009, Article 45.

²⁹³ MEDART Arbitration Rules 2002, Article 3.

²⁹⁴ RUCIP Rules 2012, Article 1.13.

²⁹⁵ ISA Arbitration Rules 2017, Article 24.4.

²⁹⁶ SCC Arbitration Rules 2017, Article 3.

²⁹⁷ AFA Arbitration Rules 2013, Article 14-4.

²⁹⁸ BIAC Rules of Arbitration 2016, Article 13(5).

²⁹⁹ Arbitration Rules of CEPANI 2020, Article 26.

³⁰⁰ CCIG Arbitration Rules 2000, Article 4.

³⁰¹ CEFAREA-CMAP Arbitration Rules 2007, Article 24.

³⁰² CIMA Arbitration Rules 2011, Article 1-3.

Institution	Confidentiality (60/134)	Institution (39/60)	Arbitrators (46/60)	Parties (34/60)	Witness (19/60)	Expert (25/60)
Chambre Arbitrale Internationale pour les Fruits et Légumes (CAIFL), France ³⁰³	v Only award					
Arbitration Court of the Bulgarian Chamber of Commerce and Industry (BCCI) ³⁰⁴	v	v	v	v	v	v
Arbitration Institute of the Finland Chamber of Commerce (FAI) Finland ³⁰⁵	v	v	v	v		v
Chamber of Arbitration of Milan (CAM), Italy ³⁰⁶	v	v	v	v		v
Chartered Institute of Arbitrators (CI Arb) ³⁰⁷	v					
Chisinau International Court of Commercial Arbitration (CACIC), Moldova ³⁰⁸	v	v	v	v	v	v
Corte Civil y Mercantil de Arbitraje (CIMA), Spain ³⁰⁹	v	v	v	v		
Corte de Arbitraje de la Cámara Oficial de Comercio e Industria de Madrid (CAM), Spain ³¹⁰	v	v	v			
Corte de Arbitral de la Cámara de Comercio de Bilbao (CCB), Spain ³¹¹	v	v	v	v	v	v
Council of Arbitration of the Latvian Chamber of Commerce and Industry (LCCI), Latvia ³¹²	v	v				
Cour Européenne d'Arbitrage (CEA), France ³¹³	v		v	v		
Court of Arbitration at the Polish Chamber of Commerce in Warsaw (PCA), Poland ³¹⁴	v	v	v			
Court of Arbitration attached to the Hungarian Chamber of	v		v	v	v	v

³⁰³ CCFA Arbitration Rules 2010, Article 29.

³⁰⁴ BCCI Arbitration Rules 2008 Article 3.

³⁰⁵ FCCC Arbitration Rules 2013, Article 49.

³⁰⁶ CAM Arbitration Rules 2019, Article 8.

³⁰⁷ CI Arb Arbitration Rules 2015, Article 12.

³⁰⁸ CACIC Arbitration Rules 2017, Article 2(3).

³⁰⁹ CIMA Arbitration Rules 2015, Article 62.

³¹⁰ CAM Arbitration Rules 2009, Article 48.

³¹¹ CCB Arbitration Rules 2005, Article 12.

³¹² LCCI Arbitration Rules 2009, Article 4.

³¹³ CEA Arbitration Rules 2011, Article 17.

³¹⁴ PCC Arbitration Rules 2015, Article 8.

Institution	Confidentiality (60/134)	Institution (39/60)	Arbitrators (46/60)	Parties (34/60)	Witness (19/60)	Expert (25/60)
Commerce and Industry (HCCI), Hungary ³¹⁵						
Court of Arbitration for Sport (CAS), Switzerland ³¹⁶	v	v	v	v		
Court of Arbitration of the Iceland Chamber of Commerce, Iceland ³¹⁷	v	v				
Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania (CCIR) Romania ³¹⁸	v	v		v		
Cyprus Eurasia Dispute Resolution and Arbitration Center (CEDRAC), Cyprus ³¹⁹	v	v	v	v		v
Danish Institute of Arbitration (DIA), Denmark ³²⁰	v	v	v			
Arbitration Rules of the German Institution of Arbitration (DIS), 2018 ³²¹	v	v	v			
German Maritime Arbitration Association (GMAA) Germany ³²²	v		v			
German Media Arbitral Tribunal (DMS) Germany ³²³	v		v	v		
Grain and Feed Trade Association (GAFTA) ³²⁴	v		v			
International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC) Russia ³²⁵	v	v	v	v	v	v

³¹⁵ HCCI Rules of Proceedings of the Arbitration Court 2018, Article 49.

³¹⁶ CAS Arbitration Procedural Rules Rule 43.

³¹⁷ Arbitration Rules 2005, Articles 17 and 20.

³¹⁸ CCIR Arbitration Rules 2018, Articles 3(3) and 4.

³¹⁹ CEDRAC Arbitration Rules 2012, Article 43.

³²⁰ DIA Arbitration Rules 2013, Article 34.

³²¹ Article 44 Confidentiality, Article 44.1.

³²² GMAA Arbitration Rules 2013, Article 5.

³²³ DMS Arbitration Rules, Article 9 and Article 17 imposes the duty of confidentiality on arbitrators. Articles 36(4) and Article 38(3) imposes the duty on parties

³²⁴ GAFTA Arbitration Rules 5.

³²⁵ ICAC International Commercial Arbitration Rules 2017, Article 46.

Institution	Confidentiality (60/134)	Institution (39/60)	Arbitrators (46/60)	Parties (34/60)	Witness (19/60)	Expert (25/60)
Insurance and Reinsurance Arbitration Society (ARIAS (UK)) UK ³²⁶	v			v		
International Arbitration Court of the Belarusian Chamber of Commerce and Industry (BCCI) Belarus ³²⁷	v	v	v	v	v	v
International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (ICAC) Ukraine ³²⁸	v	v	v			
International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Republic of Moldova (CCIRM) Moldova ³²⁹	v		v			
Internationales Schiedsgericht der Wirtschaftskammer Österreich (VIAC) Austria ³³⁰	v	v	v			
Istanbul Arbitration Centre (ISTAC) Turkey ³³¹	v	v				
Istanbul Chamber of Commerce Arbitration Center (ICOC / ITOTAM) Turkey ³³²	v	v	v	v	v	v
Italian Arbitration Association (AIA) Italy ³³³	v			v	v	v
JAMS International (JAMS) UK ³³⁴	v	v	v			
London Court of International Arbitration (LCIA), UK ³³⁵	v			v		
Malta Arbitration Centre (MAC), Malta ³³⁶	v	v	v	v	v	v
Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation (MAC), Russia ³³⁷	v	v	v	v	v	v

³²⁶ ARIAS Arbitration Rules Second Edition 1997, Article 11.5.

³²⁷ BCCI Arbitration Rules 2008, Article 16(3).

³²⁸ ICAC Arbitration Rules 2007, Article 12.

³²⁹ MOLDOVA (CCIRM) Arbitration Rules 2008, Article 4(d).

³³⁰ VIAC Arbitration Rules 2013, Article 3(4).

³³¹ ISTAC Arbitration Rules Article 8(4).

³³² ICOC ITOTAM Rules of Arbitration 2015.

³³³ AIA Rules of Arbitration 2016, Article 33.

³³⁴ JAMS International Arbitration Rules & Procedures 2016, Article 17.

³³⁵ LCIA Arbitration Rules 2014, Article 30 Confidentiality, Article 30.

³³⁶ MAC MALTA Arbitration Rules 2004, Article 47.

³³⁷ MAC Arbitration Rules, Article 42 (2).

Institution	Confidentiality (60/134)	Institution (39/60)	Arbitrators (46/60)	Parties (34/60)	Witness (19/60)	Expert (25/60)
Paris Arbitration ³³⁸	v		v			
Paris Chamber of Arbitration (CAP) ³³⁹	v				v	v
Piraeus Association for Maritime Arbitration (PAMA) ³⁴⁰	v only applied to awards					
Schiedsgericht der Handelskammer Hamburg ³⁴¹	v	v	v	v	v	v
Schiedsgericht des Deutschen Kaffeeverbands an der Handelskammer Hamburg ³⁴²	v	v	v	v	v	v
Schiedskommission der Handelskammer beider Basel (HKBB) ³⁴³	v	v	v	v	v	v
Schiedszentrums der Deutsch- Französischen Industrie- und Handelskammer (CFACI) ³⁴⁴	v	v	v			
Spanish Court of Arbitration (CEA) ³⁴⁵	v	v	v	v		
Swiss Chamber of Commerce in Italy (CCSI) ³⁴⁶	v	v	v	v	v	v
Swiss Chambers' Arbitration Institution (SCAI), Swiss ³⁴⁷	v	v	v	v		v
Tribunal Arbitral de Barcelona (TAB), Spain	v	v	v			
Venice Chamber of National and International Arbitration (VENCA), Italy ³⁴⁸	v	v	v	v		v
Vilnius Court of Commercial Arbitration (VCCA) ³⁴⁹	v					

Europe's reputation for its sophisticated arbitration systems can be seen from a total number of 141 arbitration institutions registered in this region. This figure out-numbers other regions of the world. However, the survey results on these arbitration institutions yields an interesting

³³⁸ Paris Arbitration Rules, Article 1.5.

³³⁹ CAP Arbitration Rules, Article 28.

³⁴⁰ P AMA Maritime Arbitration Rules 2007, Article 29.

³⁴¹ Schiedsgericht der Handelskammer Hamburg Arbitration Rules 2004, Article 5.

³⁴² Schiedsgericht des Deutschen Kaffeeverbands an der Handelskammer Hamburg Arbitration Rules 2006, Article 12 (3).

³⁴³ HKBB Arbitration Rules 1996, Article 52.

³⁴⁴ CFACI Rules 2012, Article 3.5.

³⁴⁵ CEA Arbitration Rules 2010, Article 10.

³⁴⁶ CCSI Arbitration and Conciliation Rules 1999, Article 14.

³⁴⁷ SCAI Swiss Chambers Rules of International Arbitration 2012, Article 44.

³⁴⁸ VENCA Arbitration Rules 2008, Article 9.

³⁴⁹ VCCA Arbitration Rules 2008, Article 6.

reading. According to the survey, 60 arbitration institutions based in Europe adopt the duty of confidentiality in their arbitration rules. Similarly, the scope of the duty varies. This is less than half of the organisations based in this region.

Among the European based arbitration institutions, the focus of the duty of confidentiality is on parties, arbitrators and institutions. As demonstrated in the list above, a total of 39 arbitration institutions based in Europe subject themselves to the duty of confidentiality. A higher number of 46 arbitration institutional rules require arbitrators to be bound by the duty. A similar reading of 44 institutions indicates that they require parties not to disclose confidentiality information.

Although the third party is relatively less of a focus in terms of the duty of confidentiality in this region, compared to other regions, 18.65% of the institutions registered in this region require third parties, such as witnesses or experts, to abide by the duty of confidentiality. According to the data, witnesses cannot disclose confidential information if they participate in institutional arbitration proceedings administered by nineteen arbitration institutions. A further six more institutions distinguish witnesses from experts appointed by the parties or the tribunal, and subject them to the duty of confidentiality.

OCEANIA

Arbitration Institutional Rules – Duty of Confidentiality

Institution	Confidentiality (4/7)	Institution (1/7)	Arbitrator (3/7)	Parties (4/7)	Witness (0/7)	Expert (0/7)
Arbitrators and Mediators Institute of New Zealand (AMINZ) New Zealand ³⁵⁰	v		v	v		
Australian Centre for International	v	v	v	v		

³⁵⁰ AMINZ Arbitration Rules 2017, Article 2 -22 and 10 -102.

Institution	Confidentiality (4/7)	Institution (1/7)	Arbitrator (3/7)	Parties (4/7)	Witness (0/7)	Expert (0/7)
Commercial Arbitration (ACICA)Australia ³⁵¹						
The 31st America's Cup Arbitration Panel (ACAP 31) ³⁵²	v Parties' request		v	v		
Australian Commercial Disputes Centre (ADC), Australia ³⁵³	v Domestic only			v		

In this region, the Arbitrators and Mediators Institute of New Zealand (AMINZ) and the Australian Centre for International Commercial Arbitration (ACICA) are the two arbitration institutions providing detailed restrictions on the disclosure of information obtained during the arbitration proceedings. Corresponding with the provision in the Australian Arbitration Law 1976, the ACICA requires institution, arbitrators and parties to ensure confidentiality of the information they become aware of during arbitration. For third parties, it is parties' duty to secure a confidentiality agreement between themselves and the parties before any duty can be imposed upon them. In the case of the Arbitrators and Mediators Institute of New Zealand (AMINZ), only arbitrators, the tribunal's secretary,³⁵⁴ and parties³⁵⁵ are required to observe the duty of confidentiality. Among them, the duty required by the Australian Commercial Disputes Centre (ADC) can only cover domestic arbitration. It is worth noting that the duty of confidentiality can only be imposed with parties' application to the tribunal in an arbitration administered by the 31st America's Cup Arbitration Panel.

INTERNATIONAL INSTITUTIONS

Arbitration Institutional Rules – Duty of Confidentiality

³⁵¹ ACICA Arbitration Rules 2016 Article 22.

³⁵² ACAP 31 Arbitration Panel Rules 2001, Article 9.

³⁵³ ADC Rules for Domestic Arbitration 2019, Article 8(a).

³⁵⁴ Arbitrators' and Mediators' Institute of New Zealand Arbitration Rules 2017, Article 2 (22.4).

³⁵⁵ Ibid, Article 10 (102).

Institution	Confidentiality (4/4)	Institution (3/4)	Arbitrators (4/4)	Parties (3/4)	Witness (1/4)	Expert (1/4)
International Centre for Settlement of Investment Disputes (ICSID) USA	v Investment dispute only	v	v			
World eSports Association (WESA)	v		v	v		
World Intellectual Property Organization Arbitration and Mediation Center (WIPO) ³⁵⁶	v	v	v	v	v	v
World Trade Organization (WTO) ³⁵⁷	v	v	v	v		

Among the four international institutions listed above, the World Intellectual Property Organization Arbitration and Mediation Center (WIPO) requires all parties taking part in or administering arbitration proceedings to abide by the duty of confidentiality. The World Trade Organization (WTO) imposes the duty on the institution, arbitrators and parties, not third parties, whereas the World eSports Association (WESA) only includes arbitrators and parties within the scope of the duty. The ICSID deals with investment disputes which is outside of the scope of the current research. However, it is worthwhile noting that, at the current stage, the ICSID Convention and Arbitration Rules do not expressly provide a general presumption of confidentiality or transparency applicable to the parties.³⁵⁸ The parties can incorporate the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules into their arbitration agreement. The ICSID cannot publish any awards without parties' consent. Without parties' consent, the Centre can only publish excerpts of the legal reasoning of the Tribunal.³⁵⁹ The tribunal is required to keep all information obtained during the proceedings, awards and the contents of awards confidential.³⁶⁰

³⁵⁶ WIPO Arbitration Rules 2014. Articles 54, 57, 75, 76 and 77.

³⁵⁷ Article 14 of the Understanding on Rules and Procedures Governing the Settlement of Disputes

³⁵⁸ ICSID is currently undergoing through ISCID Rules and Regulation Amendment Process. <<https://icsid.worldbank.org/en/amendments>> accessed on 23 July 2020.

³⁵⁹ The ICSID Convention; Arbitration Rule 48(4).

³⁶⁰ Ibid, Arbitration Rules, Rule 6(2)) and the deliberations is governed by Arbitration Rules, Rule 15.

CONCLUSION

The current survey indicates that the increase in the number of jurisdictions adopting the duty of confidentiality is two-fold. Although most of the jurisdictions do not contain any provisions on the duty of confidentiality, the countries which are renowned as the regional arbitration centres have adopted the duty of confidentiality, either as an implied duty or an express statutory duty. The more recent provisions contain more detailed information on the scope of the duty, who is subject to the duty, and the statutory limitations of the duty. This finding combined with the White & Case / QMUL 2010 Report mentioned in the introduction makes a strong case for an insertion of a provision on confidentiality in the Amendments of the Taiwanese Arbitration Act 1998. Currently, the Act is silent on the issue of confidentiality. To modernize arbitration and strengthen the private nature of arbitration, proper details on the scope and definition of confidentiality covering information, documents, evidence and awards arising from arbitration proceedings must be given in the proposed amendments.

Responding to the increasing appreciation of the importance of confidentiality,³⁶¹ the CAA includes a confidentiality provision (in Chinese, appendix three) in the proposed amendments in 2020. This proposed provision combines privacy in paragraph 1 and confidentiality in the remaining paragraphs. Paragraph 1 of the proposed provision is related to the private nature of arbitration. Neither the current Arbitration Act 1998 nor The Taiwan Code of Civil Procedure (amended in 2018)³⁶² contain any provision on privacy of arbitration. In the proposed paragraph, it reads: “With parties’ agreement, a third party may attend the arbitration proceedings.” As privacy is not currently stipulated in the draft, it would be a good idea to add

³⁶¹ Wang (n 1), 200; Trakman (n 1) 1-5 and 11.

³⁶² <<https://law.moj.gov.tw/LawClass/LawAll.aspx?pcode=B0010001>> accessed 23 July 2020 (Chinese); <<https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=B0010001>> accessed 23 July 2020 (English) accessed 23 July 2020.

the principle of privacy of arbitration to the same paragraph and expressly include a third party's participation as an exception³⁶³ to the private nature of arbitration. The researcher suggests: "Arbitration is a private dispute resolution process between parties. With parties' agreement, third party may attend the arbitration proceedings."³⁶⁴

Paragraph 2 of the proposed provision focuses on the duty of confidentiality. In line with the more recent arbitration laws amended or promulgated post 2010, the draft provision imposes the duty of confidentiality on arbitrators, the arbitration institution and a third party participating in arbitration proceedings. Accordingly, such a default position can only be changed by parties' joint agreement or by law. Surprisingly, parties are not subject to the same duty. Taking the survey into consideration, most of the jurisdictions that have subscribed to the duty of confidentiality place the emphasis of the duty on both arbitrators and parties. To offer arbitration a complete confidentiality feature in the amendments, the draft provision should include the parties within the scope of the duty of confidentiality. The provision can be amended to: 'Unless required by law or agreed by the parties' agreement, parties, arbitrators, arbitration institution and third parties shall not disclose any information that relates to the arbitration proceedings.' Regarding "confidential information", Paragraph 2 should be read in conjunction with paragraph 4 to define the information subject to the duty of confidentiality. According to paragraph 4, confidential information is defined as the submission to arbitration, the identity of arbitrators, and any information that relates to the arbitration proceedings and awards. This draft provision requiring the confidential nature of an award corresponds with the White & Case / QMUL 2010 study where 62% of corporations surveyed viewed confidentiality

³⁶³ The issue of third party participation in arbitration was discussed in Loukas A. Mistelis, Confidentiality and third party participation, (2005) 21(2) *Arbitration International* 211, 212-220.

³⁶⁴ Ullah (n 14) 138, 141-143.

as a “very important” factor in their choice of arbitration with a further 24% responding with “quite important” and 12% with “somewhat important” on this issue.³⁶⁵

Confidentiality in the tribunal’s deliberation which can be seen in a number of national arbitration laws is provided in the third paragraph. Confidentiality in the tribunal’s deliberation is commented on as the key to the impartiality of the party-appointed arbitrator by Goldstein.³⁶⁶ He commented that the communications between arbitrators are understood to be strictly confidential under rules of arbitrator ethics, national laws and institutional governing arbitrators.³⁶⁷ According to paragraph 8, the excerpts, summary or a full award may only be disclosed with an application to the arbitration institution and if the parties do not object to the application during the time limit imposed by the arbitration institution. Furthermore, any information which can identify the parties must be removed before the disclosure can be made.

The circumstances allowing the parties to disclose confidential information are listed in paragraph 5 and are similar to those stipulated in other national arbitration laws discussed above. The grounds are similar to those stipulated in the arbitration laws of Australia, New Zealand, Hong Kong and Scotland. They are: (1) the information may be disclosed if it is necessary to establish or protect the legal rights of a party to the arbitral proceedings in relation to a third party and the disclosure is no more than is reasonable for that purpose, (2) the information may be disclosed if the disclosure is authorised or required by another relevant law, or required by a competent regulatory body, (3) the information may be disclosed to a professional or other adviser of any of the parties to the arbitral proceedings, (4) the information

³⁶⁵ Friedland and Mistelis (n 2) 29.

³⁶⁶ Marc J. Goldstein, *Living (or not) with the partisan arbitrator: are there limits to deliberations secrecy?* (2016) 32(4) *Arbitration International* 589.

³⁶⁷ *Ibid*, 592.

may be disclosed to a party to a consolidated arbitration or a party who is asked to join the arbitration and (5) the information may be disclosed on the grounds of justice or public interest.

An arbitral tribunal has the discretion to make an order allowing a party to arbitral proceedings to disclose confidential information in relation to the proceedings and take steps to ensure confidentiality under paragraph 5. In the case of a breach of the duty of confidentiality by a party, the arbitral tribunal may make a costs order and require the party at fault to be liable to more costs. The consequences of breach provided in paragraph 6 are different from section 81(2) of the Cayman Islands Arbitration Law 2012 and rule 26 of the Scottish Arbitration Rules where any breach of the duty is actionable against institution, party, arbitrators or third parties under legal requirements or a confidentiality agreement. As the unauthorized disclosure can happen during arbitration and post arbitration, a safeguard for the post arbitration stage can be added to paragraph 5 for completeness.

Overall, the draft provision reflects the modern arbitration which makes no presumption of confidentiality in commercial arbitration. The provision however indicates the understanding of the importance of confidentiality in arbitration proceedings and the potential court proceedings related to arbitration. Compared with the ambiguity in the terminologies witnessed in the national legislation of Morocco³⁶⁸ (“confidentiality obligation”), Ghana (“by law”),³⁶⁹ Laos (“other participants”),³⁷⁰ Bolivia (“scope of application”)³⁷¹ and Latvia (implied duty

³⁶⁸ Morocco Law No. 05-08 Relating to Arbitration and Conventional mediation 2008.

³⁶⁹ Ghana Alternative Dispute Resolution Act, 2010 (Act 798), sections 34(5), 34(2)-(4) and the title of section 34.

³⁷⁰ Laos Law on Resolution of Economic Disputes 2005, Article 7.

³⁷¹ Bolivia Conciliation and Arbitration Law 2015, Article 8(II).

extended to parties),³⁷² the draft provision on confidentiality covering most aspects of this issue will ensure the delivery of a modern arbitration framework meeting the users' needs.

³⁷² Latvia The Law of the Republic of Latvia, The Arbitration Law, in effect from 1 January 2015, as amended, Article 23(1)-(2) and Lejins and Kalnina (n 167) 26.

APPENDIX ONE - JURISDICTIONS SURVEYED

AFRICA

Algeria
Angola
Benin
Botswana
Burkina Faso
Burundi
Cameroon
Cape Verde Islands
Central African Republic
Chad
Comoros
Congo, Republic of
Democratic Republic of the Congo
Djibouti
Egypt
Equatorial Guinea
Eritrea
Ethiopia
Gabon
Gambia
Ghana
Guinea
Guinea Bissau
Ivory Coast
Kenya
Lesotho
Liberia
Libya
Madagascar
Malawi
Mali
Mauritania
Mauritius
Morocco
Mozambique
Namibia
Niger
Nigeria
Rwanda
Sao Tome and Principe
Senegal
Seychelles
Sierra Leone
Somalia
South Africa
Sudan
Swaziland

Tanzania
Togo
Tunisia
Uganda
Zambia
Zimbabwe
Zimbabwe

ASIA

Afghanistan
Armenia
Azerbaijan
Bangladesh
Bhutan
Brunei
Cambodia
China
East Timor
Hong Kong
India
Indonesia
Japan
Kazakhstan
Kyrgyzstan
Laos
Macau
Malaysia
Mongolia
Myanmar
Nepal
North Korea
Pakistan
Philippines
Singapore
South Korea
Sri Lanka
Taiwan
Tajikistan
Thailand
Turkmenistan
Uzbekistan
Vietnam

MIDDLE EAST

Bahrain
Gaza Strip
Iran
Iraq
Israel
Jordan

Kuwait
Lebanon
Oman
Palestinian territories
Qatar
Saudi Arabia
Syria
United Arab Emirates
Yemen

NORTH AMERICA

Canada
Mexico
United States of America

CARIBBEAN

Anguilla
Antigua and Barbuda
Bahamas
Barbados
Bermuda
British Virgin Islands
Cayman Islands
Cuba
Dominica
Dominican Republic
Grenada
Haiti
Jamaica
Saint Lucia
Saint Vincent and the Grenadines
Trinidad and Tobago

CENTRAL AMERICA

Belize
Costa Rica
El Salvador
Guatemala
Honduras
Nicaragua
Panama

SOUTH AMERICA

Argentina
Bolivia
Brazil
Chile
Colombia
Ecuador
Guyana

Paraguay
Peru
Suriname
Uruguay
Venezuela

EUROPE

Albania
Andorra
Austria
Belarus
Belgium
Bosnia and Herzegovina
Bulgaria
Croatia
Cyprus
Czech Republic
Denmark
England
Estonia
Finland
France
Georgia
Germany
Gibraltar
Greece
Hungary
Iceland
Ireland
Italy
Kosovo
Latvia
Liechtenstein
Lithuania
Luxembourg
Malta
Moldova
Monaco
Montenegro
Netherlands
North Macedonia
Norway
Poland
Portugal
Romania
Russian Federation
San Marino
Scotland
Serbia
Slovakia

Slovenia
Spain
Sweden
Switzerland
Turkey
Ukraine

OCEANIA

Australia
Cook Islands
Fiji
Marshall Islands
Nauru
New Zealand
Papua New Guinea
Tonga
Vanuatu

APPENDIX TWO – ARBITRATION INSTITUTIONS SURVEYED

Africa (23)

Addis Ababa Chamber of Commerce and Sectorial Association Arbitration Institute (AACCSA), Ethiopia
Africa Alternative Dispute Resolution (Africa ADR)
Arbitration Foundation of Southern Africa (AFSA), South Africa
Association of Arbitrators (Southern Africa), South Africa
Cairo Regional Center for International Commercial Arbitration (CRCICA), Egypt
Centre d'arbitrage du Groupement interpatronal du Cameroun (CAG), Cameroon
Centre International de Médiation et d'Arbitrage de Rabat (CIMAR), Morocco
Centre national d'arbitrage conciliation et médiation (CENACOM), Congo
Centro de Arbitragem, Conciliação e Mediação (CACM) Moçambique, Mozambique
Commission for Conciliation, Mediation and Arbitration (CCMA), South Africa
Cour Atlantique d'Arbitrage International près la Chambre de Commerce d'Industrie et de services d'Agadir (CAAI), Morocco
Cour Commune de Justice et d'Arbitrage de l'Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA), Cameroon
Cour d'Arbitrage de Côte d'Ivoire de la Chambre de Commerce et d'Industrie de Côte d'Ivoire (CACI), Ivory Coast
Ghana Arbitration Centre (GAC), Ghana
Kigali International Arbitration Centre (KIAC), Rwanda
Lagos Chamber of International Arbitration Centre (LACIAC), Nigeria
Lagos Court of Arbitration (LCA), Nigeria
Mauritius Chamber of Commerce and Industry Permanent Court of Arbitration (MCCI), Mauritius
Nairobi Centre for International Arbitration (NCIA), Kenya
Regional Centre for International Commercial Arbitration - Lagos (RCICAL), Nigeria
Toksio Dispute Settlement, South Africa,
Tunis Center for Conciliation and Arbitration (CCAT), Tunisia
Tunisian National Committee of Arbitration for Sport, Tunisia

Asia (38)

Arbitration Association of the Republic of China (CAA), Taiwan
Arbitration Development Center of the Chamber of Commerce and Industry of Uzbekistan (CCIU), Uzbekistan
Asian Domain Name Dispute Resolution Centre (ADNDRC), Malaysia
Asian International Arbitration Centre (AIAC), Malaysia
Bangladesh Council for Arbitration of the Federation of Bangladesh Chambers of Commerce and Industry (BCA), Bangladesh
Beijing Arbitration Commission (BAC), China
China International Economic and Trade Arbitration Commission (CIETAC), China
China Maritime Arbitration Commission (CMAC), China
Chinese Arbitration Association, International (CAAI), Hong Kong
Chinese European Arbitration Centre (CEAC), China
Council for National and International Commercial Arbitration (CNICA), India
Delhi High Court Arbitration Centre (DAC), India
Federation of Indian Chambers of Commerce and Industry Arbitration and Conciliation Tribunal (FACT), India

Hong Kong International Arbitration Centre (HKIAC), Hong Kong
Indian Council of Arbitration (ICA), India
Indian Institute of Arbitration and Mediation (IIAM), India
Indonesian National Board of Arbitration (BANI), Indonesia
Institute for the Development of Commercial Law and Practice Arbitration Centre (ICLP), Sir
Lanark
International Arbitration Centre of the Astana International Financial Centre (AIFC-IAC),
Kazakhstan
International Arbitration Court (IUS), Kazakhstan
International Centre for Alternative Dispute Resolution (ICADR), India
Japan Commercial Arbitration Association (JCAA), Japan
Japan Intellectual Property Arbitration Center (JIPAC), Japan
Japan Sports Arbitration Agency (JSAA), Japan
Kazakhstani International Arbitrage (KIA), Kazakhstan
Korean Commercial Arbitration Board (KCAB), Korea
Kuala Lumpur Regional Centre for Arbitration (KLRC), Malaysia
London Court of International Arbitration India (LCIA India), India
Mumbai Centre for International Arbitration (MCIA), India
National Commercial Arbitration Center (NCAC), Cambodia
Philippine Dispute Resolution Center, Inc. (PDRCI), Philippines
Shanghai International Arbitration Center (SHIAC), Singapore
Shenzhen Court of International Arbitration (SCIA), Singapore
Singapore Institute of Arbitrators (SIArb), Singapore
Singapore International Arbitration Centre (SIAC), Singapore
Thai Arbitration Institute (TAI), Thailand
Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange (TOMAC), Japan
Vietnam International Arbitration Centre at the Vietnam Chamber of Commerce and Industry
(VIAC), Vietnam

The Caribbean (4)

British Virgin Islands International Arbitration Centre (BVI IAC), British Virgin Islands
Centro de Resolución Alternativa de Controversias de la Cámara de Comercio y Producción
de Santo Domingo (CRC), Dominican Rep
Consejo de Conciliación y Arbitraje de de la Cámara de Comercio y Producción de Santo
Domingo (CCPSD), Dominican Rep
Cuban Court of International Commercial Arbitration (CCACI), Cuba

Central America (7)

Centro de Arbitraje Agrario, Ambiental y Agroindustrial de la Cámara Nacional de Agricultura
y Agroindustria (CNAA), Costa Rica
Centro de Conciliación y Arbitraje de la Cámara de Comercio de Costa Rica (CCA), Costa
Rica
Centro de Conciliación y Arbitraje de la Cámara de Comercio e Industria de Tegucigalpa
(CCIT), Honduras
Centro de Conciliación y Arbitraje de la Cámara de Comercio e Industrias de Cortés, Nicaragua
Centro de Mediación y Arbitraje “Antonio Leiva Pérez” de la Cámara de Comercio de
Nicaragua (CACONIC), Nicaragua
Centro de Mediación y Arbitraje de la Cámara de Comercio e Industria de El Salvador (CCIES),
El Salvador

Centro Internacional de Conciliación y Arbitraje de la Cámara Costarricense-Norteamericana de Comercio de Costa Rica (CICA), Costa Rica

Europe (134)

ADR Centre

Albanian Commercial Mediation and Arbitration Center (MEDART), Albanian

Arbitral Tribunal of the European Committee of RUCIP (RUCIP)

Arbitration and Dispute Resolution Institute of the Oslo Chamber of Commerce (OCC), Norway

Arbitration and Mediation Centre of Paris (CMAP), France

Arbitration Center at the Institute of Modern Arbitration (ISA), Russia

Arbitration Centre of the Portuguese Chamber of Commerce and Industry (CAC), Portugal

Arbitration Court Attached to the Chamber of Foreign Trade, Berlin, Germany

Arbitration Court attached to the Economic Chamber of the Czech Republic and to the Agricultural Chamber of the Czech Republic (CAC), the Czech Rep

Arbitration Court of the Bulgarian Chamber of Commerce and Industry (BCCI), Bulgaria

Arbitration Court of the Estonian Chamber of Commerce and Industry (ECCI), Estonian

Arbitration Court of the Slovak Chamber of Commerce and Industry (SCCI), Slovakia

Arbitration for Advanced Techniques (ATA), France

Arbitration Institute of the Finland Chamber of Commerce (FAI), Finland

Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Sweden

Arbitration Service of the Cyprus Chamber of Commerce and Industry (CCCI), Cyprus

Association Française de l'Arbitrage (AFA), France

Athens Chamber of Commerce and Industry Department of Arbitration (ACCI), Greece

Belgrade Arbitration Center (BAC), Serbia

Bucharest International Arbitration Court (BIAC), Romania

Centre belge d'arbitrage et de médiation (CEPANI), Belgium

Centre belge d'arbitrage et de médiation (CEPANI), Belgium

Centre d'Arbitrage de la Chambre de Commerce du Grand-Duché de Luxembourg (CC), Luxembourg

Centre d'arbitrage et de médiation commerciale de la Chambre de commerce, d'industrie et des services de Genève (CCIG), Switzerland

Centre for Effective Dispute Resolution (CEDR), UK

Centre Français d'Arbitrage de Réassurance et d'Assurance (CEFAREA)

Centre Interprofessionnel de Médiation et d'Arbitrage (CIMA) France

Chamber of Arbitration of Milan (CAM), Italy

Chamber of Commerce, Industry, Crafts and Agriculture of Bolzano, Italy

Chamber of Economy of Montenegro, Montenegro

Chambers Ireland - ICC Ireland, Ireland

Chambers of Commerce of the CMEA Countries (CMEA), CMEA

Chambre Arbitrale Internationale pour les Fruits et Légumes (CAIFL), France

Chambre de Commerce Franco-Arabe (CCFA), France

Chartered Institute of Arbitrators (CIArb), UK

Chisinau International Court of Commercial Arbitration (CACIC), Moldova

Claims Resolution Foundation (CRT), Switzerland

Corte Civil y Mercantil de Arbitraje (CIMA), Spain

Corte de Arbitraje de la Cámara Oficial de Comercio e Industria de Madrid (CAM), Spain

Corte de Arbitral de la Cámara de Comercio de Bilbao (CCB), Spain

Council of Arbitration of the Latvian Chamber of Commerce and Industry (LCCI), Latvia

Cour Européenne d'Arbitrage (CEA), France

Court of Arbitration at the Polish Chamber of Commerce in Warsaw (PCA), Poland
Court of Arbitration attached to the Hungarian Chamber of Commerce and Industry (HCCI), Hungary
Court of Arbitration for Sport (CAS), Switzerland
Court of Arbitration of the Iceland Chamber of Commerce, Iceland
Court of Conciliation and Arbitration of the Organization for Security and Co-operation in Europe (OSCE), Sweden
Court of Innovative Arbitration (COIA), Germany
Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania (CCIR), Romania
Cyprus Arbitration and Mediation Centre (CAMC), Cyprus
Cyprus Eurasia Dispute Resolution and Arbitration Center (CEDRAC), Cyprus
Danish Chamber of Commerce (DCC), Denmark
Danish Court of Arbitration for the Building and Construction Industry, Denmark
Danish Institute of Arbitration (DIA), Denmark
Deutsche Institution für Schiedsgerichtsbarkeit (DIS), Germany
Dispute Settlement Centre of the International Energy Agency (IEA), Holland
Dutch Securities Institute (DSI), Holland
Euro-American Court of Arbitration (EACA), France
Euro-Arab Chambers of Commerce (ABCC), UK
Federation of Oils, Seeds & Fats Associations (FOSFA), UK
Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce (FTCA-SCC), Serbia
Frankfurt International Arbitration Centre (FIAC), Germany
German Association of Wholesale Traders in Oils, Fats and Oil Raw Materials (GROFOR), Germany
German Maritime Arbitration Association (GMAA), Germany
German Media Arbitral Tribunal (DMS), Germany
Grain and Feed Trade Association (GAFTA), UK
Hamburger Freundschaftlichen Arbitrage, Germany
Handelskammer Deutschland Schweiz (HDKS), Germany
Industrie- und Handelskammer Zentralschweiz (IHZ), Switzerland
Institution of Civil Engineers (ICE), UK
Insurance and Reinsurance Arbitration Society (ARIAS (UK)), UK
International Arbitration Court of the Belarusian Chamber of Commerce and Industry (BCCI), Belarus
International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC), Russia
International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (ICAC), Ukraine
International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Republic of Moldova (CCIRM), Moldova
International Cotton Association (ICA), UK
International Court of Arbitration for Marine and Inland Navigation, Poland
International Court of Arbitration of the International Chamber of Commerce (ICC), France
International Federation of Consulting Engineers (FIDIC)
Internationales Schiedsgericht der Wirtschaftskammer Österreich (VIAC), Austria
Iran-US Claims Tribunal (Ir-US), Holland
Istanbul Arbitration Centre (ISTAC), Turkey
Istanbul Chamber of Commerce Arbitration Center (ICOC / ITOTAM), Turkey
Italian Arbitration Association (AIA), Italy

JAMS International (JAMS) UK
Koninklijke Nederlandse Vereniging voor de Koffiehandel (KNVK), Holland
Koninklijke Vereniging Het Comité van Graanhandelaren (CVG), Holland
Ljubljana Arbitration Centre (LAC), Solvenia
Logistik Schiedsgericht an der Handelskammer Hamburg, Germany
London Court of International Arbitration (LCIA), UK
London Maritime Arbitrators Association (LMAA), UK
London Metal Exchange (LME), UK
Malta Arbitration Centre (MAC), Malta
Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation (MAC), Russia
Monaco Maritime Arbitration Association (CAMM)
Nederlands Arbitrage Instituut (NAI)
Nederlands Mediation Instituut (NMI)
Nederlandse Vereniging voor de handel in Gedroogde Vruchten, Specerijen en Aanverwante Artikelen (NZV)
Netherlands Hides- and Leather Arbitration Association (NHLAA)
Netherlands Oils, Fats and Oilseeds Trade Association (NOFOTA)
Nordic Offshore and Maritime Arbitration Association (NOMA)
Paris Arbitration
Paris Bar Association
Paris Chamber of Arbitration (CAP)
Paris Maritime Arbitration Chamber (CAMP)
Permanent Arbitration Court at the Croatian Chamber of Commerce (CCC)
Permanent Court of Arbitration (PCA)
Permanent Court of Arbitration attached to the Chamber of Commerce and Industry of Slovenia (CCIS)
Permanent Court of Arbitration attached to the Economic Chamber of Macedonia (ECM)
Perth Centre for Energy and Resources Arbitration (PCERA)
Piraeus Association for Maritime Arbitration (PAMA)
PRIME Finance , The Netherlands
Raad van Arbitrage voor de Bouw (RvA)
Scheidsgerecht Gezondheidszorg (SG)
Scheidsgerecht voor de Grafische Industrie
Schiedsgericht der Handelskammer Hamburg
Schiedsgericht der Zürcher Handelskammer (ZHK), Siwtzerland
Schiedsgericht des Deutschen Kaffeeverbands an der Handelskammer Hamburg
Schiedskommission der Handelskammer beider Basel (HKBB)
Schiedszentrums der Deutsch-Französischen Industrie- und Handelskammer (CFACI)
Spanish Court of Arbitration (CEA)
St. Petersburg International Commercial Arbitration Court (SPICAC)
Stichting Geschillenoplossing Automatisering (SGOA)
Stichting Raad van Arbitrage voor Metaalnijverheid en -Handel (SRAMH)
Stichting Transport and Maritime Arbitration Rotterdam Amsterdam (TAMARA)
Swiss Chamber of Commerce in Italy (CCSI)
Swiss Chambers' Arbitration Institution (SCAI), Switzerland
Swiss Society of Engineers and Architects (SIA)
Tribunal Arbitral de Barcelona (TAB), Spain
Tribunal Arbitral do Desporto (TAD)

Union of Chambers and Commodity Exchanges of Turkey Arbitration Council (UCCET), Turkey
Venice Chamber of National and International Arbitration (VENCA), Italy,
Vilnius Court of Commercial Arbitration (VCCA)
Waren-Verein der Hamburger Börse, Germany

International (4)

International Centre for Settlement of Investment Disputes (ICSID) USA
World eSports Association (WESA)
World Intellectual Property Organization Arbitration and Mediation Center (WIPO)
World Trade Organization (WTO)

Middle East (15)

Abu Dhabi Commercial Conciliation and Arbitration Center of the Abu Dhabi Chamber of Commerce & Industry (ADCCAC)
Arab Investment Court (AIC)
Bahrain Chamber for Dispute Resolution (BCDR-AAA)
Dubai International Arbitration Centre (DIAC), UAE
Dubai International Financial Centre Arbitration Centre (DIFC-LCIA), UAE
Emirates Maritime Arbitration Centre (EMAC), UAE
GCC Commercial Arbitration Centre (GCC), Bahrain
Israel Diamond Exchange (IDE), Israel
Jerusalem Arbitration Centre (JAC), Israel
Lebanese Arbitration Centre (LAC), Lebanon
National Patent Authority (GCC)
Qatar International Arbitration and Conciliation Center (QICCA)
Saudi Center for Commercial Arbitration (SCCA)
Tehran Regional Arbitration Centre (TRAC), Iran
Yemen Center for Conciliation and Arbitration (YCCA)

North America (29)

ADR Institute of Canada (ADR Canada)
ADR Services, Inc.
American Arbitration Association (AAA), USA
American Dispute Resolution Center, Inc. (ADR Center)
Arbitration Centre of Mexico (CAM), Mexico
Association of Food Industries (AFI), USA
British Columbia International Commercial Arbitration Centre (BCICAC), Canada
Centre canadien d'arbitrage commercial (CCAC), Canada
Chicago International Dispute Resolution Association (CIDRA), USA
Cocoa Merchants Association of America (CMAA), USA
Commercial Arbitration and Mediation Center for the Americas (CAMCA), USA
Commercial Mediation and Arbitration Commission of the Mexico City National Chamber of Commerce (CANACO), Mexico
CPR International Institute for Conflict Prevention and Resolution (CPR), USA
Financial Industry Regulatory Authority (FINRA), USA
Green Coffee Association (GCA), USA
Henning Mediation & Arbitration Service, Inc. (Henning), USA
Houston Maritime Arbitrators Association (HMAA), USA
Independent Film and Television Alliance (IFTA), USA

Institut de médiation et d'arbitrage du Québec (IMAQ), Canada
International Centre for Dispute Resolution (ICDR), USA
Internet Corporation for Assigned Names and Numbers (ICANN), USA
Judicate West (JW), USA
Maritime Arbitration Association of the United States (MAA), USA
Mona International Centre for Arbitration and Mediation (MICAM), USA
Multilateral Investment Guarantee Agency (MIGA), USA
National Arbitration Forum (FORUM), USA
National Futures Association (NFA), USA
Society of Maritime Arbitrators (SMA), USA
Vancouver Maritime Arbitrators Association (VMAA), Canada

Oceania (7)

Arbitrators and Mediators Institute of New Zealand (AMINZ), New Zealand
Australian Centre for International Commercial Arbitration (ACICA), Australia
Australian Commercial Disputes Centre (ADC), Australia
Institute of Arbitrators and Mediators Australia (IAMA), Australia
Institute of International Law (IIL), Australia
Leading Edge Alternative Dispute Resolvers (LEADR), New Zealand
The 31st America's Cup Arbitration Panel (ACAP 31), Australia

South America (32)

Arbitration Center of the American Chamber of Commerce Sao Paulo (AMCHAM), Brazil
Cámara Arbitral de la Bolsa de Cereales (CABC), Argentina
Camara de Arbitragem Empresarial Brasil (CAMARB), Brazil
Câmara de Arbitragem Empresarial de São Paulo (SP Arbitral), Brazil
Câmara de Comércio Brasil – Canadá (CCBC), Brazil
Câmara de Conciliação, Mediação e Arbitragem CIESP / FIESP (CIESP), Brazil
Câmara de Mediação e Arbitragem da Associação Comercial do Paraná – ARBITAC (ARBITRAC), Brazil
Câmara de Mediação e Arbitragem de São Paulo (CMA-SP), Brazil
Câmara Fundação Getulio Vargas de Mediação e Arbitragem (FGV), Brazil
Centro de Arbitraje y Conciliación de la Cámara de Comercio de Bogotá (CCB)
Centro de Arbitraje de la Cámara de Comercio Americana Peru (AMCHAM Peru), Peru
Centro de Arbitraje de la Cámara de Comercio de Industria y Servicios de Caracas (CACC), Venezuela
Centro de Arbitraje de la Cámara de Comercio de Lima (CCL), Peru
Centro de Arbitraje y conciliación de la Cámara de Comercio de Cartagena (CACC), Columbia
Centro de Arbitraje y Conciliación de la Cámara de Comercio de Guayaquil (CCG), Columbia
Centro de Arbitraje y Mediación de la Cámara de Comercio de Santiago (CAM), Chile
Centro de Arbitraje y Mediación de la Cámara de Comercio Ecuatoriano Americana (AMCHAM Ecuador), Ecuador
Centro de Arbitraje y Mediación de la Cámara Nacional de Comercio y Servicios de Paraguay (CAMP), Paraguay
Centro de Arbitraje y Mediación de la Cámara Regional del Comercio y la Producción Valparaíso (CAM V Región), Chile
Centro de Conciliação e Arbitragem da Câmara de Comercio Argentino-Brasileiro de Sao Paulo, Brazil
Centro de Conciliación y Arbitraje Comercial de la Cámara de Industria, Comercio, Servicios y Turismo de Santa Cruz (CAINCO), Bolivia

Centro de Conciliación y Arbitraje Comercial de la Cámara Nacional de Comercio de Bolivia (CAC), Bolivia

Centro de Conciliación y Arbitraje de la Bolsa de Comercio del Uruguay, Uruguay

Centro de Conciliación y Arbitraje de la Cámara de Comercio de Barranquilla, Columbia

Centro de Mediación y Arbitraje Comercial de la Cámara Argentina de Comercio (CEMARC), Argentina

Centro Empresarial de Conciliación y Arbitraje (CEDCA), Venezuela

Inter-American Commercial Arbitration Commission (IACAC)

Inter-Mediação (MEDIAR), Brazil

Permanent Review Tribunal of Mercosur (Tribunal Permanente de Revisión del Mercosur)

Tribunal Arbitral del Ilustre Colegio de Abogados de Lima (CAL), Peru

Tribunal de Arbitraje General de la Bolsa de Comercio de Buenos Aires (BCBA), Argentina

Tribunal de Arbitraje General de la Bolsa de Comercio de Rosario (BCR), Argentina

APPENDIX THREE

修正條文	說明
<p>第 條 (仲裁隱密)</p> <p>於取得當事人合意下，第三人得參與仲裁程序。</p> <p>非依法律規定或經當事人合意，仲裁人、仲裁機構及參加仲裁程序之第三人，不得揭露經由仲裁程序得知之任何資訊。</p> <p>仲裁庭之評議，不得公開。</p> <p>除另有約定外，當事人不得揭露下列非公開資訊：</p> <p>一、 仲裁之存在。</p> <p>二、 仲裁人之身分。</p> <p>三、 仲裁程序所產生之任何紀錄、手稿或文件。</p> <p>四、 仲裁判斷。</p> <p>當事人就下列各款目的所列對象之揭露，不受前項之限制：</p> <p>一、 為保護當事人合法利益，或為執行判斷之任何法院或其他主管機關。</p>	<p>本條共八項，分項說明如下：</p> <p>一、 仲裁隱私屬仲裁當事人的基本權，第三人能否參與會議或開庭，應由其行使同意權。</p> <p>二、 明定參與仲裁程序之人或機構之保密規定，以法律另有規定或經當事人合意，始得揭露仲裁資訊。</p> <p>三、 仲裁庭的評議包括對程序及判斷的評議，均納入不得公開的範圍。</p> <p>四、 明定仲裁當事人應予保密的範圍，惟容許當事人「選擇退出」(opt-out)，透過約定方式達到不受本項規範之目的。</p> <p>五、 仲裁保密之例外態樣不勝枚舉，茲以訂有仲裁保密條文不同國家立法例及文獻探討內容，舉其要者予以納入。</p> <p>六、 為避免當事人於仲裁程序進行</p>

<p>二、依法律規定有義務對之揭露之任何政府機關、法院或其他機構。</p> <p>三、當事人之專業或其他顧問、實際或可能之證人或專家。</p> <p>四、被聲請參加仲裁之人或合併仲裁之第三人。</p> <p>五、其他基於正義或公共利益所為之揭露。</p> <p>經當事人聲請，仲裁庭得就仲裁保密作出裁斷，並得採取任何保護秘密之措施。</p> <p>當事人違反前項裁斷或保密措施，仲裁庭得視其情節，對其作出加重仲裁費用負擔之裁斷或判斷。</p> <p>機構仲裁判斷之全文、節錄或摘要，得於符合下列情況下公開：</p> <p>一、經向仲裁機構提出聲請。</p> <p>二、當事人之姓名或名稱及其他識別資訊已刪除。</p> <p>三、當事人未在仲裁機構所定期限內，就判斷之公開提出異議。</p>	<p>期間洩露應保守的仲裁秘密而肇致他方當事人的不利益，規定予仲裁庭得採取任何保護秘密的措施。</p> <p>七、針對當事人違反仲裁庭保密措施，賦與仲裁庭有給予加重費用負擔的權限。</p> <p>八、於當事人未有合意公開機構仲裁判斷情形，為利建制利用仲裁判斷進行專業研究，似有必要在仲裁保密與公開間取得折衷，於符合聲請程序、去識別化及取得當事人同意的三個要件下，就仲裁判斷內容作適度的利用。</p>
--	---

BIBLIOGRAPHY

Books and Journals

- Ajibo K.I., Confidentiality in international commercial arbitration: Assumptions of implied duty and a proposed solution (2015) 3(2) *Latin American Journal of International Trade Law* 337
- Carducci G., The Arbitration Reform in France: Domestic and International Arbitration Law (2012) 28(1) *Arbitration International*, 125
- Clifford P. and Scogings E., Which law determines the confidentiality of commercial arbitration? (2019) 35(4) *Arbitration International* 391
- Collins M., Privacy and Confidentiality in Arbitration Proceedings (1995) 11(3) *Arbitration International* 321
- Cummins T., The IBA Guidelines on party representation in international arbitration – levelling the playing field? (2014) 30(3) *Arbitration International* 429 (focused on the relationship between privilege and confidentiality)
- De Ly F., Friedman M. and Di Brozolo L.R., International Law Association International Commercial Arbitration Committee's Report and Recommendations on 'Confidentiality in International Commercial Arbitration' (2012) 28(3) *Arbitration International* 355
- Editor's note, Consolidation: the Second Report of the United Kingdom Departmental Advisory Committee on Arbitration Law, (1991) 7(4) *Arbitration* 389
- Friedland P. and Mistelis L., *2010 International Arbitration Survey: Choices in International Arbitration* 3
- Gloster E., Symbiosis or Sadomasochism? The relationship between the courts and arbitration (2018) 34(3) *Arbitration International* 321
- Goldstein M.J., Living (or not) with the partisan arbitrator: are there limits to deliberations secrecy? (2016) 32(4) *Arbitration International* 589
- Greenwood L., A window of opportunity? Building a short period of time into arbitral rules in order for parties to explore settlement, (2011) 27(2) *Arbitration International* 199
- Hargun N.K. and Elkinson J.P., 'National Report for Bermuda' in Lise Bosman (ed), *ICCA International Handbook on Commercial Arbitration*, (ICCA & Kluwer Law International 2020)
- Hwang M.S.C. and Thio N., A contextual approach to the obligation of confidentiality in arbitration in Singapore: An analysis of the Decision of the Singapore High Court in *AAY and Others v. AAZ*" (2012) 28(2) *Arbitration International*, 225
- Karton J., A conflict of interests: Seeking a way forward on publication of International Awards, (2012) 28(3) *Arbitration International*, 447
- Lazatin V. and Fajardo J.P.F., Philippines in Michael J. Moser and John Choong (eds), *Asia Arbitration Handbook* (University Press 2011)
- Lise Bosman (ed), *ICCA International Handbook on Commercial Arbitration* (ICCA & Kluwer Law International 2020)
- Marcelo S.V. and Marcelo C., Arbitration procedures and practice in Philippines, Practical law, Thomson Reuters
- Mohtashami R. and Tannous S., Arbitration at the Dubai International Financial Centre: a Common Law Jurisdiction in the Middle East (2009) 25(2) *Arbitration International* 173
- Netto C.N., 'National Report for Brazil' in Lise Bosman (ed), *ICCA International Handbook on Commercial Arbitration* (ICCA & Kluwer Law International 2020)
- Neill P., Confidentiality in arbitration, (1996) 12(3) *Arbitration International* 287
- Oakley-White O., "Confidentiality Revisited: Is international arbitration losing one of its major benefits" (2003) 6(1) *Int. A.L.R.* 29
- Odsuren N., Country Update: Mongolia (2019) 21(1) *Asian Dispute Review* 31
- Olatawura O. O., Nigeria's Appellate Courts, Arbitration and Extra-Legal Jurisdiction: Facts, Problems, and Solutions (2012) 28(1) *Arbitration International* 63

Partasides C., and Maynard S., Raising the curtain on English Arbitration (2017) 33(2) *Arbitration International* 197, 198
Paulsson J., Rawding N., The Trouble with Confidentiality (1995) 11(1) *Arbitration International* 303
Pislevik S., Precedent and development of law: Is it time for greater transparency in international commercial arbitration (2018) 34(2) *Arbitration International* 241
Reuben R.C., “Confidentiality in Arbitration: Beyond the Myth”, (2006) 54 *U. Kan. L. Rev.* 1255
Trakman L.E., Confidentiality in International Commercial Arbitration (2002) 18(1) *Arbitration International* 1
Tweeddale A., Confidentiality in arbitration and the public interest exception (2005) 21(1) *Arbitration International* 59
Ullah I., English and Indian legal perspective on third –party disclosure in arbitration: it is time to assimilate third party into the family of arbitration (2015) 31 *Arbitration International* 127
Wang M., Are Alternative Dispute Resolution Methods Superior to Litigation in Resolving Disputes in International Commerce? (2000) 16(1) *Arbitration International* 189
Woo J.H. and Lee M.K., A Study on the Amended Arbitration Law of Mongolia (2017) 27 *J Arb Stud* 95
Yu H., Duty of Confidentiality: Myth and Reality, (2012) 31(1) *Civil Justice Quarterly* 68

Cases

Australia

Esso Australia Resources Ltd v Plowman [1995] H.C.A. 19; (1995) 128 A.L.R. 391; (1995) 69 A.L.J.R. 404; (1995) 183 C.L.R. 10

Bermuda

ACE Bermuda Insurance Limited v. Ford Motor Company [2016] SC Bda 1 Civ [40]
Associated Electric & Gas Insurance Services Limited (AEGIS) v European Reinsurance Company of Zurich [2003] UKPC 11

England

Ali Shipping Corp v Shipyard Trogir [1998] 2 All E.R. 136; [1998] 1 Lloyd's Rep. 643
Dolling-Baker v Merret [1990] 1 W.L.R. 1205
Hassneh Insurance Co of Israel v Steuart J Mew [1993] 2 Lloyd's Rep. 243
Insurance Co. v. Lloyd's Syndicate [1995] 1 Lloyd's Rep. 272
John Forster Emmott v Michael Wilson & Partners Ltd [2008] EWCA Civ 184
Oxford Shipping Co. Ltd. v. Nippon Yusen Kaisha, The Eastern Saga [1984] 3 All ER 835

Malaysia

Petronas Penapisan (Melaka) Sdn Bhd v. Ahmani Sdn Bhd [2016] 2 MLJ 697 (CA)

Singapore

AAV v. AAZ [2011] 1 SLR 1093;
BBW v. BBX, BBY and BBZ [2016] 5 SLR 755
International Coal Pte Ltd v Kristle Trading Ltd (“Kristle Trading”) [2009] 1 SLR 945
London and Leeds Estates Ltd v Paribas Ltd (No 2) 1 EGLR 102, 106 (QBD);

USA

United States v Panhandle Eastern Corporation (D. Del. 1988) 118 F.R.E. 346