In the past decades, the legal world witnessed the phenomenon known as ADR (Alternative Dispute Resolution). In essence, the ADR suggests various methods for the solution of disputes, whether by way of adjudication or amicable settlement by a way of mediation, conciliation, or other form of dispute resolution; all as alternatives to the conventional judicial proceedings.

A prominent branch of the ADR tree is the arbitration, which is a major adjudication method, alternate to the common judicial proceedings. This Article will not research the roots of ADR and the reasons related to it; rather it will concentrate on the specific issue of confidentiality concerning arbitration.

Unlike the conventional adjudication method, known as judicial proceedings held by the courts, the issue of confidentiality is not clearly defined nor addressed when it comes to arbitration.

Numerous contracts contain arbitration clauses. It seems that many times the parties (or their lawyers) incorporate a generic arbitration clause into the agreement failing to bear in mind the consequences should dispute arises in the future and arbitration proceedings will take place. It is widely thought that arbitration clauses contain an implied duty of confidentiality to be applied by the parties to the dispute. In reality, the case is not always like that, as the parties themselves (or at least one of them) wish to disclose the arbitration (whether the award, or any evidence produced for or during the process), including the fact the not all legal systems recognize such general duty of confidentiality. Hence, the issue of confidentiality is of a great importance and might affect the parties involved both in the short and long term.

This article shall provide a legal comparative analysis of the various rules (both state and institutional), approaches and opinions pertaining to the matter of confidentiality with respect to arbitration.

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1. Institutional Rules - General Support for Confidentiality

1.1 UNICTRAL
1.1.1 The UNCITRAL Arbitration Rules 1976 apply a duty of confidentiality concerning an arbitral award, by determining that “the award may be made public only with the consent of both parties”\(^2\). However, it is interesting to note that the Travaux Preparatoires of the said Rules mention that “under the national legislation of some countries, an award could be made public”.
1.1.2 The UNICTRAL Model Law on International Commercial Arbitration (1985) as a fundamental guidance relating to arbitration is however silent on the matter of confidentiality.
1.1.3 The words of the UNCITRAL Notes on Organizing Arbitral Proceedings (1996) summarize well the current legal situation of which “there is no uniform answer in national laws as to the extent to which the participants in an arbitration are under the duty to observe the confidentiality of information relating to the case”. Under the said Notes, it is advised that the arbitral tribunal shall address and clarify the issue of confidentiality at the earliest stage of the arbitration.

1.2 The WIPO (World Intellectual Property Organization) Arbitration Rules are very strict and comprehensive, dealing with the issue of confidentiality. The Rules define confidential information, applying the obligation of confidentiality as a default\(^3\), separating between the: (i) existence of arbitration (unless such disclosure is necessary for challenging the arbitration at court or enforcing the award, or subject to the principle of good faith\(^4\)); (ii) any disclosures made within the process (to include witnesses as well\(^5\)), and (iii) the award itself (except for protecting such party’s legal rights against a 3rd party or when it falls into the public domain as a result of action before a national court or other competent authority\(^6\)).

1.3 The LCIA Arbitration Rules (London Court of International Arbitration) oblige a general duty for confidentiality unless the parties expressly agree

\(^2\) Rule 52(5).
\(^3\) Rule 52.
\(^4\) Rule 73.
\(^5\) Rule 74.
\(^6\) Rule 75.
in writing otherwise, of both the award and the “materials in the proceedings created for the purpose of the arbitration, and all other documents produced by another party in the proceedings not otherwise in the public domain”. The said obligation shall be exempted in case of a “legal duty to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority”\(^7\).

The LCIA Rules emphasize once again that an award shall not be published “without the prior written consent of all parties and the Arbitral Tribunal”\(^8\).

1.4 The Arbitration Rules of the ICC (International Chamber of Commerce), which is the most established and prominent arbitration institute, allow the Arbitral Tribunal to “take measures for protecting trade secrets and confidential information”\(^9\).

Additionally, the Rules prescribe that any “parties, persons not involved in the proceedings shall not be admitted” at the hearings\(^10\). The Rules, however, unlike most other laws and institutional rules, are silent on the matter of confidentiality of the award itself, and do not specifically deal with the material produced during the arbitration proceedings.

Perhaps a wider duty of confidentiality can be found at Rule 6 of the Statutes of the International Court of Arbitration of the ICC, which determines that the work of the Court is of confidential nature to be “respected” by all the participants in the work. It also states that the Court lays down the rules regarding the persons “who are entitled to have access to the materials submitted to the Court and its Secretariat”, although I opine that such wordings are not specifically related to the parties of the arbitration process itself and are vague than appropriate.

1.5 The China International Economic and Trade Arbitration Commission (CIETAC)\(^11\), determines that “hearings shall be held in camera”. Unlike other arbitration rules, the CIETA Rules place the discretion whether to disclose the hearing to the public upon the arbitral tribunal, rather than the parties themselves\(^12\).

\(^7\) Rule 30.1.  
\(^8\) Rule 30.3.  
\(^9\) Rule 20.7.  
\(^10\) Rule 21.3.  
\(^11\) Effective as from May 1, 2005.  
\(^12\) Rule 33.1.
Furthermore, the said Rules contain a detailed list of all parties involved in the arbitration process, prohibiting these from disclosing “to any outsiders any substantive or procedural matters of the case”\(^{13}\).

1.6 The Arbitration Rules of the Arbitration Institute of the **Stockholm** Chamber of Commerce use clear wording of which the Institute and the Arbitral Tribunal “shall maintain confidentiality of the arbitration and the award”\(^{14}\). Article 9 of the Organization of the SCC Institute repeats the same concept.

1.7 The International Arbitration Rules - **Milan** Chamber of Commerce (2004) require keeping “all inconstitution relating to the proceedings confidential”. Such requirement is, however, attributed merely to the Chamber, Arbitral Tribunal and expert witnesses\(^{15}\). The Rules apply the same concept of confidentiality to the award as well, by subjecting its publication to the parties’ prior written consent\(^{16}\).

2. **English Law - From a General Rule of Confidentiality to a Higher Extent of Disclosure**

2.1 Although the English Arbitration Act 1996 does not contain any express provision concerning confidentiality, it is widely believed that the basic point of view under the English law, as was implemented by the courts, is that the parties to arbitration are subject to an **implied duty of confidentiality**. Such was the decision of the Court of Appeal in the leading case of Ali Shipping Corporation v. Shipyard Trogir\(^{17}\), which stated that confidentiality should be kept with respect to the arbitration proceedings and documents and other information produced during the process. The duty of confidentiality is nevertheless not definite, as the Court determined five exceptions to such duty: i) consent of the party who originally produced the material; ii) an order of the court for disclosure; iii) leave of the court; iv) disclosure when it is reasonably necessary for the protection of the legitimate interests of an arbitrating party;(v) interests of justice. This approach was also taken (with a narrow interpretation concerning the said exemptions) in the Dolling-Baker

\(^{13}\) Rule 33.2.  
\(^{14}\) Rule 46.  
\(^{15}\) Rule 8(1).  
\(^{16}\) Rule 8(2).  
case. In the Dolling-Baker case, a disclosure for the reasons of necessity “for disposing fairly of the cause or matter or for saving costs” was rejected by the Court.

2.2 However, this stricter approach concerning confidentiality has been recently questioned in the case of Associated Electric & Gas Insurance Services Ltd. v. European Reinsurance Company of Zurich, where the Privacy Council expressed its reservations from the English High Court’s ruling in the Dolling-Baker case, stating that a sharper and clearer distinction should be made between different types of documents and information concerning the arbitration, which shall attract different degrees of confidentiality; Basically, a disclosure of an award shall be made in a wider manner than disclosure of evidence and other documents presented and produced in the proceedings. In this regard, the Privacy Council held that an arbitral award should be disclosed in the event a party aims to enforce its rights as granted under the award (meaning, that a party should not be prevented from a legitimate reliance on legal rights granted to it by the arbitral award).

3. Thailand - Semi-Protection of Confidentiality

3.1 In Thailand, the Thai Arbitration Act B.E. 2545 (2002), recently enacted and replacing the former Act of 1987, is mostly based on the UNICTRAL Model Law (1985). The Thai Act is silent on the issue of confidentiality.

3.2 However, the Arbitration Rules of the Arbitration Institute which was established (also) pursuant to the Arbitration Act, prescribe that “the arbitrator, Director and the Institute shall not disclose the award to the public unless with the consent of the parties”. Although this provision was not drafted as a general prohibition, I believe that its spirit aims to prohibit any party involved in the arbitration process from disclosing the award. The said privilege belongs to the parties themselves, which upon their consent may disclose the award.

3.3 The Code of Ethics for Arbitrators under the Thai Institute of Arbitration requires the arbitrator to keep any secret acquired from his approach as an

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20 Rule 30.
arbitrator, in confidence, including not making any benefits out of such information.

4. **New Zealand - Full Recognition of an Implied Duty of Confidentiality**

New Zealand is a unique example of a country that codified an express duty of arbitration confidentiality. According to section 14(1) of New Zealand's Arbitration Act (1996) there is a presumption (unless agreed otherwise by the parties) that: "the parties shall not publish, disclose, or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings". Section 14(2) provides two minor exemptions of which such a disclosure is "contemplated by this Act"; or when a disclosure is made "to a professional or other advisor of any of the parties".

5. **Sweden, Australia and the U.S.A. - Towards Rejection of an Implied Duty of Confidentiality**

5.1 Despite many supportive approaches of an implied duty of confidentiality as mentioned-above, the Supreme Court of Sweden surprisingly ruled in the case of Bulgarian Foreign Trade Bank Ltd. v. Al Trade Finance Inc.\(^\text{21}\) that there is no implied duty of confidentiality in private arbitrations. The Swedish Supreme Court ruled that according to Swedish law, the arbitration proceedings are not confidential unless the parties themselves specifically agree to such obligation, or when arbitration set of rules which apply confidentiality has been adopted (the Court also ruled that the rules of the United Nations Economic Commission for Europe do not prohibit disclosing the result of an arbitration process).

5.2 Another unexpected ruling of the same nature, rejecting an implied duty of confidentiality, was held by the High Court of Australia in the case of Esso Australia Res. V. Plowman\(^\text{22}\) which ruled that a 3rd party, that was not a part of the arbitration proceedings, is allowed to discovery of information and documents concerning the said arbitration.

5.3 In the U.S.A., the highest instances ruled with respect to the issue of confidentiality in arbitration were the Federal District Courts. The tendency, as being expressed in numerous rulings, is the one rejecting an implied duty of confidentiality concerning arbitration.

In the case of United States v. Panhandle E Corp.\(^\text{23}\) the Federal government asked Panhandle to provide it with certain documents from ICC arbitration process which Panhandle was part of, and Panhandle raised the issue of confidentiality. The court rejected Panhandle's claim, ruling that there is no implied duty of confidentiality, and that confidentiality must be expressly agreed (contracted) by the parties. The court also ruled that the ICC Rules do not apply such duty of confidentiality and further mentioned the necessity for such disclosure due to the public interest.

In the case of American Cent E Tex Gas Co. v. Union Pac. Res. Group\(^\text{24}\), the Federal District Court ruled that the principle of confidentiality is inferior to the public interest. The Court stated that "the public has a strong countervailing interest in knowing the results of arbitration proceedings that involve allegations of anti-competitive and monopolistic conduct".