UDK 341.6 ; 343.45

*David Vučinić**

CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION – MOURNER OR A CORNERSTONE?**

The principle of confidentiality, although marked as a historic attribute of arbitration and widely recognized under its coat (especially in England), was confronted with its fundamental denial from arbitration in Australia at the very end of the 20th century. To make matters worse, that path was followed by the USA and Sweden, thus pushing confidentiality (which was, admittedly, coping with its "internal problems") to the edge of subsistence. Further development of international commercial arbitration, supplemented with recent transparency appetites of arbitral partakers, has once again shaken the throne of this, once generally accepted principle. Upon critical analyses of the views describing confidentiality as a foreign body to arbitration, the author concludes with arguments calling for confirmation and resuscitation of confidentiality as an inherent quality and feature of international commercial arbitration.

Key words: *International commercial arbitration.– General principles.– Confidentiality. – Privacy. – Transparency. – Implied obligation.*

1. INTRODUCTION

Just a brief overview over main characteristics of arbitration would lead us to its quite succinct definition: arbitration is a *private* mechanism for resolution of disputes, which is an alternative to national courts, selected and controlled by the parties, in which final and

* Author is a student of master studies at the University of Belgrade Faculty of Law, *david2396@live.com* (Republika Srbija).

** This paper has been awarded 2nd place in the competition "Gašo Knežević" for the best student work done in the field of alternative dispute resolution of trade disputes (Arbitration and Mediation) for Academic 2019/2020 year.

binding decision is to be rendered.[1] During the time, two main reasons were spotted as crucial for parties when opting for this (alternative) dispute resolution mechanism: neutrality of forum and pro-enforcement convergence of arbitration.[2] In addition to these reasons, confidentiality was accentuated as well, since parties are mostly interested to keep their procedure and the resulting award "locked between the four corners of the hearing-room".[3] However, it has also been stated that confidentiality *used to be* an inherent feature of arbitral proceedings, and that is subject to erosion.[4] Thus, this paper aims to address these confronted views and to answer the question whether confidentiality is still to be regarded as a general principle of arbitration, or just represents a diminishing glow of antiquity.

2. CONFIDENTIALITY IS(N'T) INHERENT TO ARBITRATION

Confidentiality, tied up with privacy was an integral and indisputable part of arbitration "respected almost as sacrosanct", up to the late 1980s.[5] It used to be one of the attractions of arbitration, recognized as a *spiritus movens* for parties when opting for it.[6]

1 J. Lew, L. Mistelis, S. Kröll, *Comparative International Commercial Arbitration*, Kluwer Law International, Netherlands 2003, 3. A. Tweeddale, K. Tweeddale, *Arbitration of Commercial Disputes*, Oxford University Press, New York 2007, 33–39. "Almost all definitions of arbitration include the word "private," whether in reference to the use of a private third-party neutral or in defining the process itself." L. A. Kaster, Confidentiality in U.S. Arbitration, *New York Dispute Resolution Lawyer* 1/2012, 23, *https://www.mediate.com/mediator/attachments/26226/Confidentiality%20in%20Arbitration%20DRSNewsSpr12.pdf*, last visited 25 September 2019.

2 Margaret Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge University Press, New York 2008, 3.

3 *Ibid.* See also: S. Rajoo, *Law,Practice and Procedure of Arbitration*, Lexis Nexis, Malaysia, 2017, 56.

4 Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, Oxford University Press, New York 2009[5], 33; M. Pryles, „Confidentiality", *The leading arbitrators' guide to international arbitration* (eds. L. W. Newman, R. D. Hill), New York 2014[3], 109–110.

5 H. Bagner, "Confidentiality – A Fundamental Principle in International Commercial Arbitration?", *Journal of International Arbitration* 2001, 243.

6 E. Gaillard, J. Savage, *Fouchard Gaillard Goldman On International Commercial Arbitration*, Kluwer Law International, Netherlands 1999, 773.

Thus, statistical survey of US/European users of international commercial arbitration conducted in 1992 for the LCIA by the London Business School listed confidentiality as the most important perceived benefit.[7] Later on, the empirical study of Dr. Christian Buhring Uhle,[8] completed in 1994, showed that, at that time, confidentiality was positioned on third place (out of eleven) on the list of advantages of arbitration.[9] Over 60% of the respondents considered confidentiality to be either "highly relevant" or "significant".[10] Almost two decades later, in 2010, the Queen Marry University of London conducted an International Arbitration Survey which indicated that confidentiality is still important to users of arbitration, but was not anymore the essential reason for recourse to it. Still, 62% of the respondents said confidentiality is "very important" to them.[11] The importance of confidentiality has once again been certified in the Queen Marry survey in 2015, where, for the in-house counsel subgroup, the second most frequently listed valuable characteristic was "confidentiality and privacy".[12] Thus, it could be concluded that confidentiality always was under, and never left the curds of arbitration. But, do such conclusions paint the whole picture?

2.1. Privacy v confidentiality – intimate dyad of arbitration

In the absence of international norms which would provide adequate guidance in regard of confidentiality,[13] the firm ground is to be found in arbitration's inherent feature. Since arbitration is a "private

7 H. Bagner, *op. cit.* fn. 5, 243.

8 Dr. C. Bühring-Uhle was surveying ninety-one arbitrators, attorneys, and in-house counsel from seventeen countries as to the perceived advantages of international commercial arbitration. In that regard: C. Bühring-Uhle, *Arbitration and Mediation in International Business*, Kluwer Law International 2006, 106.

9 *Ibid*, 109.

10 *Ibid.*

11 2010 International Arbitration Survey: Choices in International Arbitration, *http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf*, last visited 28 August 2019.

12 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, *http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf*, last visited 28 August 2019.

13 Maja Stanivuković, "Javnost i tajnost arbitraže", *Zbornik radova Pravnog fakulteta Novi Sad* 2/2018, 450.

mechanism for resolution of disputes", an appropriate distinction, and afterwards, an establishment of the relationship between ever-kissing characteristics of arbitration, privacy and confidentiality, should be made.

Even though that much has been written in regard of privacy and confidentiality, no such thing as a universal definition exists. Thus, on this place we will try to portray the contours of these concepts.

Privacy as a concept is concerned with the "right of persons other than the arbitrators, parties and their necessary representatives and witnesses, to attend the arbitration hearing and to know about the arbitration."[14] Confidentiality is, by contrast, concerned with "information relating to the content of the proceedings, evidence and documents, addresses, transcripts of the hearings or the award."[15] It refers to, whether parties are prohibited from disclosing the existence, nature and content of the arbitration proceedings (including documents and other evidence produced during them) to third parties, and if they are, to what extent.[16] As it can be seen, the concept of confidentiality is "more fluid", and unlike privacy, its contours are less clear.[17]

On a mere intuitive level, it can be seen that confidentiality and privacy are two different concepts, but tightly tied to each other andserving the same goal – goal of controlling the third parties' access to proceedings.[18] In that sense, even though they are two different concepts, they should not be disengaged from each other, especially in the domain in which they are overlapping – the domain of arbitral hearings.[19] Otherwise, confidentiality without privacy, and *vice versa*, would mean almost nothing. Or, to besaid in a more picturesque way:

14 G. Weixia, "Confidentiality revisited: blessing or curse in international commercial arbitration?", *American Review of International Arbitration* 2006, 608.

15 *Ibid.*

16 D. Chan, "Sealing of Court Documents Relating to an Arbitration", 27 June 2012, *http://arbitrationblog.kluwerarbitration.com/2012/06/27/sealing-of-court-documents-relating-to-an-arbitration/*, last visited 30 August 2019.

17 K. I. Ajibo, "Confidentiality in international commercial arbitration: assumptions of implied duty and a proposed solution", *Latin American Journal of International Trade Law* 2/2015, 340.

18 Gary Born, *International commercial arbitration*, Kluwer Law International, Netherlands 2009, 2282.

19 "Privacy is not related to the arbitral process as a whole, but only to the hearings phase. On the other hand, confidentiality reaches further in the proceedings, extending also to the pre- and post-hearings phases." I. M. Smeureanu,

"the concept of privacy would have no meaning if participants were required to arbitrate privately by day while being free to pontificate publicly by night."[20]

Since "the arbitration is not simply private justice" but also "justice rendered in private", by dismissing the confidentiality from arbitration,privacy, as one of the arbitrations' main supportive columns, would be in principle inevitably renounced as well.[21] Would we then be able to speak about the arbitration which we used to know, or we would speak about a semantically different notion incorporated within the same spelling?

2.2. England – cradle of confidentiality

England is well known for their lasting and durable stance when it comes to the confidentiality of arbitral proceedings. Thus, in case *Russel v. Russel,* which dates back to 1880, the route was traced, and importance of privacy and confidentiality in arbitral proceedings emphasized: "As a rule, persons enter into these contracts with the express view of keeping their quarrels from the public eyes, and of avoiding that discussion in public, which must be a painful one, and which might be an injury even to the successful party to the litigation, and most surely would be to the unsuccessful."[22]

As time passed, although that English Arbitration Act[23] used to be and still is silent on the question of confidentiality, English pro-confidentialitystance has been "crystallized" and reaffirmed in several cases. Thus, in case *John Forster Emmott v. Michael Wilson & Partners Limited*Lord Justice Lawrence Collins stated: "Documents in arbitration may, as I have said, be inherently confidential, as where they contain trade secrets. But it is clear that what has emerged from the recent

Confidentiality in International Commercial Arbitration, Kluwer Law International 2011, 6.

20 *Ibid.*

21 The author does not state that, in theory, privacy without confidentiality is not possible, but translated into practical domain such constellation would disrupt the very essence of arbitration and expectations and motives of parties which opted for arbitration. In the same sense see: G. Born, *op. cit.* fn. 18, 2282.

22 *Russel v. Russel* (1880) LR 14 Ch D 471.

23 Arbitration Act 1996, *http://www.legislation.gov.uk/ukpga/1996/23/contents*, last visited 17 September 2019.

authorities in England is that there is, separate from confidentiality in that sense, an implied obligation (arising out of the nature of arbitration itself) on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and not to disclose in any other way what evidence has been given by any witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court".[24] This stance was grounded in subsequent cases: *Dolling-Baker v Merrett*[25], *Hassneh Insurance Co of Israel v Mew*[26], *Estates Ltd v Paribas Ltd*[27], *Ali Shipping Corporation v Shipyard Trogir.*[28] Thus, Lawrence Collin perceived and separated three legal principles: privacy, the inherent confidentiality in the information contained in documents and confidentiality interrelated with privacy.[29]

Since an obligation of confidentiality has been "established", the question of nature of such an obligation arose. Firstly, in case *Hassneh Insurance Co of Israel v Mew*, implied duty of confidentiality has been characterized as "a matter of business efficacy". Later on, in *Ali Shipping Corporation v Shipyard Trogir*, the nature of implied obligation of confidentiality has been raised to a higher level – it has been qualified as a general principle implied by law, and not as previously stated – an expression of pragmatism.

Besides establishing the very duty of confidentiality, English practice has also recognizedseveral of its exceptions. In that regard, in case *John Forster Emmott v. Michael Wilson & Partners Limited*, a rather completive review has been made, thus recognizing theexception when the order or leave of the court exists, the exception in regard of public interest/interests of justice[30], theexception when a protection

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

25 *Dolling-Baker v Merrett* [1990] 1 W.L.R. 1205, 21 March 1990.

26 *Hassneh Insurance Co of Israel v Stuart J Mew* [1993] 2 Lloyd's Rep 243.

27 *London and Leeds Estates Ltd v Paribas Ltd (No 2),* [1995] 2 EG 134.

28 *Ali Shipping Corp v Shipyard Trogir* [1999] 1 W.L.R. 314, 19 December 1997.

29 H. R. Dundas, "Confidentiality in English Arbitration: The Final Word? Emmott v Michael Wilson & Partners Ltd", *Arbitration – the international journal of arbitration, mediation and dispute management* 4/2008, 466.

30 It has been said that exception of public interest/interest of justice should serve a reminder for litigants, and that they "must carefully consider what they are

of an arbitrating party's legal rights is required andthe exception when theparty who produced the document expressly or impliedly consented to disclosure.

In the end, it will be interesting to follow the (d)evolution of the English approach towards confidentiality in the future, after the Bailii Lecture in 2016. Namely, Lord Chief Justice of England and Wales – The Right Honorable The Lord Thomas of Cwmgiedd (CJ from 2013 to 2017), made a (provocative) statement that arbitration is impeding the development of common law, since it is attracting cases at the expense of national courts, allowing commercial claims to be decided behind closed doors, missing out the possibility of appealing on the law and thus disabling higher judicial supervision.[31] In that regard, he stated: "Quite apart from this major issue, there are other issues which arise from the resolution of disputes firmly behind closed doors – retarding public understanding of the law, and public debate over its application." A series of decisions in the courts may expose issues that call for Parliamentary scrutiny and legislative revision. A series of similar decisions in arbitral proceedings will not do so, and those issues may then carry on being taken account of in future arbitrations. As has been put: "Arbitration confidentiality perpetuates public ignorance of continuing hazards, systemic problems, or public needs".[32] How this statement will echo in England, and how will it reflect on court practice and English stance about confidentiality, only time will show.[33]

---

disclosing not only in Court proceedings, but also in arbitral proceeding – on the basis that there must always be a theoretical risk that the 'interests of justice' should compel disclosure of those documents", M. Kemp, "The Confidentiality Of Commercial Arbitration: A Key Exception", 18. July 2017, *http://www.conventuslaw.com/report/the-confidentiality-of-commercial-arbitration-a/*, last visited 24 September 2019.

31 H. Bor, "Comments on Lord Chief Justice Thomas' 2016 Bailii Lecture which promotes a greater role for the courts in international arbitration", 11 April 2016, *http://arbitrationblog.kluwerarbitration.com/2016/04/11/comments-on-lord-chief-justice-thomas-2016-bailii-lecture-which-promotes-a-greater-role-for-the-courts-in-international-arbitration/*, last visited 25 September 2019.

32 The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, "Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration", The Bailii Lecture 2016, *https://www.bailii.org/bailii/lecture/04.pdf*, 25.9.2016, last visited 26. September 2019.

33 In regard of abandoning existing "confidential approach" and introducing an opt-in confidentiality system, see S. Maynard, "Should the Arbitration Act be

2.3. Some adherents of the English example

English-like treatment of confidentiality can be seen under the Singapore law as well. In *Myanma Yang Chi Oo Ltd v. Win Win Nu*, court held that an implied obligation of confidentiality exists between the parties in arbitration, which of course, reasonably, is subject to several exceptions.[34] Furthermore, the Singapore High Court in *AAY v AAZ*crowned the confidentiality in arbitration as a "general principle or doctrine of arbitration law developed through the common law".[35] In addition to that, Singapore law has recognized the importance of confidentiality in arbitration, by allowing a party to apply for court proceedings concerning arbitration to be heard otherwise than in open court (Section 22 of the Singapore International Arbitration Act (IAA)).[36] Afterwards, Section 23 of IAA restricts the reporting of information relating to the proceedings heard otherwise than in open court.

That the implied obligation of confidentiality is not grounded only in common law countries is proven by the French example (or at least it used to be). French doctrinal stance on subject matterwas that confidentiality is considered as supplementary law, while in practice, it was translated in its automatic application of confidentiality if no particular rule existed, or if parties agreed otherwise.[37] Thus Paris *Cour d'appel* in case *Aita v. Ojjeh*[38] *in* 1986 reasoned: "by cause a public debate of facts that should essentially remain confidential (...) the very nature of arbitral proceedings [requires] that they ensure the highest degree of discretion in the resolution of private disputes, as the two parties had agreed".[39] Also, in case *Société True North et Société FCB*

amended to reverse the presumption of confidentiality?", 08. February 2018, *https://lawofnationsblog.com/2018/02/08/arbitration-act-amended-reverse-presumption-confidentiality/*, last visited 26. September 2019.

34 M. Hwang, A. Chin, "Discovery in Court and Document Production in International Commercial Arbitration", *ICC International Court of Arbitration Bulletin*2006, 39.

35 D. Chan, *op. cit.* fn. 16.

36 The statutes of the Republic of Singapore – International Arbitration Act, *http://www.siac.org.sg/images/stories/articles/rules/IAA/IAA%20Aug2016.pdf*, last visited 13 September 2019.

37 H. Sikirić, "Confidentiality in Arbitral Proceedings", *Croatian Arbitration Yearbook*, Zagreb 2006, 132.

38 *G. Aita v. A. Ojjeh* (Paris Court of Appeal), 18 February 1986.

39 S. Ramani Garimella, Revisiting Arbitration's Confidentiality Feature, *https://www.researchgate.net/profile/Sai_Ramani_Garimella/publication/323905438_Re-*

International v. Bleustein et al[40], after withdrawing from arbitration of a party who breached the obligation of confidentiality, French court stated and held that no disclosure of information can be made unless there is obligation for such a disclosure; otherwise such disclosure represents a violation of duty of confidentiality under the arbitration agreement.[41] Yet, in 2004 in case *Nafimco v. Foster Wheeler Trading Company AG*[42], the Court of Appeal made a deviation from hitherto stance and practice, by claiming: "the party seeking compensation for the breach of confidentiality in arbitral proceedings was obliged to make a statement on the existence and reasons for the principle of confidentiality in French arbitration law, in the particular case, on the parties waiving this principles when taking into account the law the parties chose".[43] In that way, the court imposed burden of proving that confidentiality exists upon a party which is claiming that a breach of confidentiality occurred, and that such duty was neither waived nor objected by the other party.[44] Today, in the newly adopted French Code of Civil Procedure (CCP), in Art. 1464(4), confidentiality is reserved only for domestic arbitration, while, when it comes to the international arbitration, the CCP is silent.[45] Out of that silence some have derived conclusion that confidentiality has left the curds of arbitration in France, unless explicitly contracted.[46] One of them is Emmanuel Gaillard, who

visiting_Arbitration's_Confidentiality_Feature/links/5ab1d8cb458515ecebecf45e/Revisiting-Arbitrations-Confidentiality-Feature.pdf, last visited 14 September 2019.

40 *Bleustein et al v. Société True North et Société FCB International* (Commercial Court of Paris), 22 February 1999.

41 C. Henkel, "The Work-Product Doctrine as a Means toward a Judicially Enforceable Duty of Confidentiality in International Commercial Arbitration", *North Carolina Journal of International Law and Commercial Regulation* 4/2012, 1077.

42 *NAFIMCO v. Société Foster Wheeler Trading Company AG*, Paris Court of Appeal, 22 January 2004.

43 H. Sikirić, *op. cit.* fn. 37,134.

44 C. Henkel, *op. cit.* fn. 41, 1077.

45 Book IV – Arbitration, *https://sccinstitute.com/media/37105/french_law_on_arbitration.pdf,* last visited16 September 2019.

46 "When parties agree to a French seat for their arbitral proceedings and want to ensure confidentiality, they can enter into a confidentiality agreement. Parties can also submit the arbitration proceedings to institutional rules providing for an express confidentiality agreement." T. Naud, A. Grisolle, "France: International Arbitration 2019", ICLG to: International Arbitration Laws and Regulations, *https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/france*, last visited 16 September 2019. In same sense: A. Khaled Qtaishat,

stated: "This provision (meaning Art. 1464(4)) has no equivalent in international matters, which means that French law (unlike English law, for example) has made the choice to assume as a matter of principle that international arbitration is not confidential as far as the parties are concerned. (...) This reversal of the traditional confidentiality presumption as regards the arbitral process, which would apply in all international matters, commercial or otherwise, constitutes a significant change in the context of the increasing demand for transparency, in particular in investment arbitration."[47]

In light of aforementioned, we may conclude that confidentiality has its place in arbitration either through the concept of privacy which it complements, or through an implied obligation derived out of arbitration agreement. In any way, presence and necessity of confidentiality in arbitration are self-evident, or, at least, they should be.

2.4. Australia – dire 1995

Even though confidentiality has been recognized as an advantage of arbitration and one of the main motives why parties choose it for their resolution of disputes, and even though it has been perceived as a supplement to one of the main characteristics of arbitration and proclaimed as arbitrations' general principle, for Australian courts, that simply was not enough. In 1995, Australian court was about to fire a legal-reasoning-missile which would heavily wound the concept of confidentiality, in which its existence would be reduced to a contractual creation through express agreement of parties.[48] Case *Esso Australia Resources Ltd. v. Sidney James Plowman*[49] would later be called "the fiercest denial of the implied duty of confidentiality in arbitration".

Esso Australia Resources Ltd and BHP Petroleum Pty Ltd, as suppliers of natural gas, were parties to an agreement with the Gas and

"Legal Protection of Arbitration Confidentiality: Mapping the Approaches of Prominent Jurisdictions", *European Journal of Scientific Research*3/2017, 362.

47 "France Adopts New Law On Arbitration", *http://www.shearman.com/~/media/Files/NewsInsights/Publications/2011/01/France-Adopts-New-Law-On-Arbitration/Files/View-full-article-France-Adopts-New-Law-On-Arbit__/FileAttachment/IA012411FranceAdoptsNewLawOnArbitrationegaillard.pdf,* last visited 9 September 2019.

48 G. Born, *International Arbitration: Law and practice*, Kluwer Law International, Netherlands 2012, 198.

49 *Esso Australia Resources LTD and Others v The Honourable Sidney James Plowman and Others*(1995) 128 ALR 391.

Fuel Corporation of Victoria (GFC) made in 1975, and to an agreement with the State Electricity Commission of Victoria (SEC) made in 1981. Later on, suppliers from those two contracts (Esso and BHP) requested an adaptation of price under the agreements. GFC and SEC refused to increase the price, and case was brought to arbitration. The Minister for Manufacturing and Industry Development, Sidney James Plowman, soughtfor a declaration from the Supreme Court of Victoria that all information disclosed to GFC and SEC was not subject to any obligation of confidence. By counterclaim, Esso/BHP sought declarations, based on implied terms, that each arbitration "is to be conducted in private and that any documents or information supplied by any of the parties to any other party thereto in or for the purpose thereof are to be treated in confidence as between each such party and the arbitrators and umpire except for the purpose of the arbitration".

Reasoning of Chief Justice Mason which will follow will establish rigid dichotomy between privacy and confidentiality. In that regard, Chief Justice Mason stated: "Despite the view taken in Dolling-Baker and subsequently by Colman J in Hassneh Insurance, I do not consider that, in Australia, having regard to the various matters to which I have referred, we are justified in concluding that confidentiality is an essential attribute of a private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of the arbitration." One of the reasons on which CJ Mason grounded his rationale is that complete confidentiality of the proceedings in an arbitration cannot be achieved, emphasizing that no obligation of confidence attaches to witnesses or stating that various circumstances exist in which an award made in an arbitration, or the proceedings in an arbitration, may come before a court involving disclosure to the court by a party to the arbitration and publication of the court proceedings.

Australian view on confidentiality has echoed around the globe, and has found its shelter in Sweden and USA as well.[50]

50 M. Hwang, K. Chung, S. Cheng Lim, W. Hui Min, "Defining the Indefinable: Practical Problems of Confidentiality in Arbitration", *International Arbitration: Issues, Perspectives and Practice: Liber Amicorum Neil Kaplan*, Hong Kong 2018, 56.

2.5. Some confidants of the Australian example

USA and Sweden could be portrayed as prominent examples of countries in which confidentiality has not been interconnected with arbitration. Thus, speaking of confidentiality in arbitration in USA, one could not start its exposure without stating that both Federal Arbitration Act[51] and Uniform Arbitration Act[52] are silent on that topic. Additionally, USA case law, as opposed to English one, cannot be lauded for the same conclusion derived from silence of Arbitration Act(s) – there is no case law which is establishing general duty of confidentiality in arbitral proceedings.[53] But, opposite examples do exist.

In case *USA v. Panhandle Eastern Corp, et al.*[54], Court, although not expressly declaring itself in regard of confidentiality, rejected the argument that pleadings and documents related to arbitration are confidential. Judge held that the party "failed to point to any actual agreement of confidentiality, documented or otherwise". For the Judge, it simply was not enough to give the opinion that "general understanding (between the parties) existed". Thus, court claimed that without an agreement, or procedural rules that explicitly run for confidentiality, no doctrine of confidentiality could be implied. Some authors even perceive this decision as a negation of general principle of confidentiality.[55]

Similar approach has been taken in case *Contship Containerlines, Ltd. v. PPG Industries, Inc.*[56], possibly even more sharp-cut, thus mak-

51 The Federal Arbitration Act (USA), *https://sccinstitute.com/media/37104/the-federal-arbitration-act-usa.pdf*, last visited 24 September 2019.

52 Uniform Arbitration Act, *https://arbitrationlaw.com/sites/default/files/free_pdfs/US%20UAA.pdf*, last visited 24 September 2019.

53 J. J. Buckley, J. M. Landy, "USA: International Arbitration 2019", ICLG to: International Arbitration Laws and Regulations, *https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/usa,* last visited 25 September 2019. M. W. Friedman F. Lavaud, Arbitration Guide – IBA Arbitration Committee – United States, *https://www.ibanet.org/Document/Default.aspx?DocumentUid=939CE0D4–8D8A-4350–81D7-B7FEFE923C11*, last visited 25 September 2019.

54 *USA v. Panhandle Eastern Corp*, 118 F.R.D. 346, (D. Del. 1988).

55 M. Meza-Salas, "Confidentiality in International Commercial Arbitration: Truth or Fiction?", 23 September 2018, *http://arbitrationblog.kluwerarbitration.com/2018/09/23/confidentiality-in-international-commercial-arbitration-truth-or-fiction/*, last visited 25 September 2019.

56 *Contship Containerlines, Ltd. v. PPG Industries, Inc.*, 00 Civ. 0194 (RCC) (HBP), 99 Civ. 10545 (RCC) (HBP) (S.D.N.Y. Apr. 17, 2003).

ing a clear deviation from English approach towards confidentiality. In that sense it has been stated: "The origin of the alleged confidentiality (...) is not entirely clear. Neither has cited any contractual provision between them giving rise to an obligation of confidentiality, nor do they cite a regulation of any arbitral body as the source of confidentiality. Rather, they claim that, under English law, an obligation of confidentiality is implied in law as part of their agreement to arbitrate. (...)Even if I assume that plaintiffs' contention as to the state of English law is correct, it does not preclude the disclosure sought here."

Besides USA, Sweden as well does not recognize the infusion of confidentiality in international commercial arbitration. Thus, in this Nordic country appeared something what will later be called the "Swedish Roller Coster".[57] Namely, following the already paved route of *Esso Australia Resources Ltd. v. Sidney James Plowman,* the existence of confidentiality within the arbitration will be proscribed from Sweden. In that regard, firstly, Stockholm city court recognized that an arbitration agreement encompasses implied obligation of confidentiality, and considered confidentiality as a fundamental principle in arbitration.[58] Later on, after appeal, in front ofthe Swedish Court of Appeal[59] it was recognized that the parties in arbitration have a duty not to make information from the proceedings public. This duty was named "duty of loyalty", and it was interrelated with the sort of information which was made public – difference was made between "information touching on the operations of one of the parties or its explanation of the action in the arbitration dispute" (recognized as more worthy of protection) and between "information that an arbitration dispute between the parties is in progress or information that concerns purely procedural issues of a general nature". Court as well added that the reasons why the information was publicized and (non)-existence of malicious intention should be taken into account. In the end, on 27th October 2000, the Supreme Court of Sweden[60] rendered final decision in which, after perceiving that neither Swedish Arbitration Act nor the applicable institutional rules were imposing a duty of confidentiality, and that in the ether no monolithic stance in regard of confidentiality in arbitration exists,

57 H. Bagner, *op. cit.* fn. 5, 245.

58 Stockholm District Court, 1998–09–10, Case T 6–111–98.

59 The Svea Court of Appeal, 1999–03–30, Case T 1092–98.

60 Swedish Supreme Court, 2000–10–27, Case T 1881–99.

concluded – duty of confidentiality does not exist unless the parties specifically agree to it. In that way, what was heavily wounded in Australia has in the end been laid to rest in Sweden.

2.6. Transparency – new shadow over confidentiality

As arbitration has grown into a world-wide coordinated system and a generally accepted phenomenon, thus the curiosity of private entities and general public interest in regard to arbitration started to germinate. Besides that, a rising number of investor-State arbitrations demanded a more opened approach towards arbitration as well.[61] On the tide of such advents transparency found its place within confines of international commercial arbitration, thus opting to stand side by side with confidentiality.[62] In that regard, in the last few years it could be seen that institutions were keen to promote transparency of arbitral proceedings.[63]

When it comes of transparency, once again it is worth mentioning the Queen Mary Survey conducted in 2015[64], which showed that the "recurring theme throughout the interviews was users' discontent with the lack of insight provided into institutions' efficiency and

61 When it comes to the investment arbitration, it should be briefly noted that different interests, and thus the different logic (compared to international commercial arbitration) lies beyond it. Citizen, as the tax payers, have every legitimate right to know how their money is being spent. Such knowledge can be accessible to them only if investor-state arbitration is transparent. In that regard, UNCITRAL has presented its Rules on Transparency in Treaty-based Investor-State Arbitration in 2014, *https://uncitral.un.org/en/texts/arbitration/contractualtexts/transparency,* last visited 14 September 2019.

62 S. Hsie-lien, T. Brian Lin, "More transparency in international commercial arbitration: to have or not to have?", *Contemporary Asia Arbitration Journal* 1/2018, 23. In the same sense: M. Stanivuković (2018), *op. cit.* fn.13, 451.

"Already we have seen the outcry against investment arbitration that finds its loudest voice in complaints about a lack of transparency. It would be naïve to presume that such complaints are not affecting the world of commercial arbitration (...)". S. Maynard (2018), *op. cit.* fn. 33.

63 More about steps which were made by institutions: Increased transparency in international commercial arbitration, see: R. Bassi and J. Newman, "Increased transparency in international commercial arbitration", 2016, *https://www.financierworldwide.com/increased-transparency-in-international-commercial-arbitration#.XX_hTCgzZPY*, last visited 13 September 2019.

64 See fn. 12.

arbitrator performance, and the lack of transparency in institutional decision making in relation to the appointment of, and challenges to, arbitrators". In addition to that: "respondents generally consider that increased transparency in institutional decision making would be a positive development. In particular, they would appreciate the publication of reasoned decisions on arbitrator challenges and more insight into the drivers behind arbitrator selection by institutions. Interviewees suggested that institutions could inform parties of the selection criteria they used when selecting an arbitrator". That these "prayers" had an echo in international commercial arbitration and that they have been heard, for example, is proven by the ICC. Thus, on the trace of "providing greater confidence in the arbitration process" on one side and "helping in protection of arbitration against inaccurate or ill-informed criticism" on the other, the ICC made a big and firm step towards transparency: for arbitrations registered as from 1 January 2016, unless otherwise agreed by the parties, the Court will publish on the ICC website following information: (i) the names of the arbitrators, (ii) their nationality, (iii) their role within a tribunal, (iv) the method of their appointment, and (v) whether the arbitration is pending or closed. For arbitrations registered as from 1 July 2019, the Court will also publish on the ICC website the following additional information: (vi) the sector of industry involved and (vii) counsel representing the parties in the case.[65]

On this place, one could legitimately ask a question, where are the demands of parties and compromises of institutions going to stop on this potentially (very) slippery slope, and how much of an impact will that have on confidentiality in international commercial arbitration?

3. DOMESTIC PREVIEW – CONFIDENTIALITY AND TRANSPARENCY IN SERBIA

Arbitration in Serbia has a long lasting tradition, counting almost a century of its existence. Before adopting one comprehensive

65 Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, *https://iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf,* last visited 16 September 2019.

arbitration law, arbitration rules in Serbian legislation were dispersed around in several different acts.[66] Thus, in 2006, Serbia passed its monolithic Law on Arbitration,[67] under which, ever since then, vivid practice has been conducted.

When it comes to the institutional organization of arbitration, Serbia has two permanent Arbitral institutions which are administering domestic and foreign disputes – Belgrade Arbitration Center (BAC) and The Permanent Arbitration at the Chamber of Commerce and Industry of Serbia (PA). It is worth noting that both of mentioned institutions have their own arbitration rules.

Serbian Law on Arbitration belongs to the family of UNCITRAL Model Law-alike acts.[68] Therefore Serbia stands as one out of 80 states which has its legislation based on the Model Law.[69] Since the Model Law is silent on the issue of confidentiality (neither affirms it nor it denies), Serbian Law on Arbitration is quite on the subject matter as well.

When it comes to the BAC and PA rules, different approaches are to be found. PA rules do not have provision in regard of confidentiality.[70] Regardless of that, in cases under the Foreign Trade Court of Arbitration (today PA) Rules, importance of confidentiality has been recognized and emphasized: "The confidentiality of the arbitral proceedings is one of the most important reasons why business people opt for resolution of their disputes before arbitration courts. (...) Third parties cannot be given an opportunity to attend the arbitral proceedings especially if one of the parties objects, as is the case here."[71]

---

66 M. Stanivuković, *Međunarodna Arbitraža*, Službeni glasnik 2016, 55–56.

67 Zakon o arbitraži, *Official Gazette of the Republic of Serbia,* No. 46/2006.

68 G. Knežević, V. Pavić*, Arbitraža i ADR*, Pravni fakultet Univerziteta u Beogradu, Beograd 2009, 40.

69 Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, *https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status*, 15 September 2016.

70 Rules of the Permanent Arbitration, *http://www.stalnaarbitraza.rs/uploads/regulations/2017Rules%20of%20the%20Permanent%20Arbitration%20in%20%20English_%20Pravilnik%20o%20Stalnoj%20arbitraz%CC%8Ci-ENG.pdf*, last visited 15 September 2019.

71 FTCA Award No. T-26/97 of 11 October 1998, in V. Pavić, M. Đorđević, "Resolution of international commercial disputes before Serbian Arbitral Institutions – certain salient features of the new institutional rules", *Liber Amicorum*

On the other hand, when it comes to the BAC rules,[72] they contain an express confidentiality provision in Art. 9: "The BAC, the parties to the proceedings, arbitrators, witnesses and experts are required to keep the proceedings and the arbitral awards confidential to the extent this is not inconsistent with the applicable mandatory rules or the need to protect one's personal rights."

Different approaches in BAC and PA rules can be seen in the domain of transparency as well. PA rules, in Art.48(3) went in the direction of opt-in basis, meaning that a full text of the award may be published only with consent of the parties. In any way, the Chairman is authorized to allow publication of the award in periodicals of professional and doctrinal character without disclosing the names of the parties or information that may be detrimental to the interests of the parties.

On the contrary, BAC Rules set up and opt-out basis. In Art. 9(2) – authorization of publication is considered as given unless it is requested by party, in writing, for the award not to be published, within 60 days from the day the very award is received. If the award is published, it could be done in full or in a summary, with restraint to data that might enable the identification of the parties to the proceedings.

Out of abovementioned, conclusion can be derived that Serbia is pro-confidentiality orientated arbitration country, which recognizes confidentiality as an inherent future of arbitration, while letting the transparency to step in next to it, in that way giving contribution to the general development of arbitration.

4. CONCLUSION

Since arbitration is defined as a "*private* mechanism for resolution of disputes (...) selected and controlled by the parties (...)" it can be concluded that parties, just by choosing an arbitration as a dispute resolution mechanism, opt for private and thus confidential dispute settlement. This conclusion is fortified by the results of the above

Gaso Knezevic (eds. T. Varady, D. Mitrovic, D. Hiber, V. Pavic, M. Đorđevic, M. Jovanovic), Belgrade 2016, 329 fn. 99.

72 Rules of the Belgrade Arbitration Center (Belgrade Rules), *https://www.arbitrationassociation.org/wp-content/uploads/2015/02/RULES-OF-BAC.pdf,* 15.9.2015, last visited 15 September 2019.

mentioned surveys, past and more recent, in which majority of responders recognized the importance of confidentiality in arbitration, and perceived arbitration as a confidential mechanism. Thus, already on intuitive level, parties count with confidentiality within arbitration.

Some arbitration laws and rules explicitly confirm such expectations of the parties, other are silent on the matter. But in any event, it would not be too far-fetched to state that every arbitration agreement may be treated as an agreement which implicitly contains confidentiality obligation.

These two concepts necessarily do not have to be perceived as opposed, but in the authors' eyes, rather as complementary – since the parties have chosen *per se* private and confidential dispute resolution mechanism, they implicitly agreed on confidence fidelity.[73]

With this being said, the author does not negate the possibility of parties havinga public and dis-confidential arbitration – such mechanism could be established by the virtue of party autonomy. Nevertheless, the principle of confidentiality should be a starting point, whilst the parties are free to modify it (either to additionally fortify it or to lower its threshold) through their arbitration agreement, or by the choosing adequate arbitration rules or through *lex arbitri*.[74] That means that confidentiality should be set on an opt-out basis for parties – arbitration is confidential unless parties agree differently.[75]

Believing in words of Mark Twain that "too much of anything is never a good thing" (we can skip that whiskey part on this place), the author finds that increased transparency at the expense of confidentiality can be sanative for some of the arbitration wounds. On the other hand, since the author finds confidentiality as a more supportive starting point for parties, thus the scope of transparency of particular proceedings should be decided on voluntary basis, leaving the parties to decide which amount of cure are they ready to give to arbitration.

Statement of CJ Mason in *Esso Australia Resources Ltd. v. Sidney James Plowman* that "complete confidentiality of the proceedings in an

73 In the same sense: C. Henkel, *op. cit.* fn. 41, 1067.

74 In the same sense: V. Pernt, "Just how confidential is arbitration?", *https://www.schoenherr.eu/publications/publication-detail/just-how-confidential-is-arbitration/*, last visited 15 September 2019.

75 For potential consequences when the breach of confidentiality occurs, see: V. Pavić, "Disciplinary Powers of the Tribunal", *Austrian Yearbook on International Arbitration* 2014, 172–176.

arbitration cannot be achieved", and that because of such inability confidentiality should be disregarded as a basis of arbitration, can be qualified as naive. Author is of stance that it should not be withdrawn from such fundamental and important principle of arbitration only because its exceptions exist, but that it should be thought of mechanisms which would protect the principle endangered by exceptions. After all, it has been noted that Singapore has, through legislative mechanism, overcame the problem of arbitral awards which are coming before a court.

In addition to that, proponents of non-existence of inherent confidentiality in arbitration state that the parties themselves can, by the virtue of party autonomy principle, provide an express, detailed confidentiality clause satisfying their requirements, either through clause of main contract or as a part of arbitration agreement.[76] What they oversee with such an argument is that parties "may not want to talk about the funeral while negotiating the terms of the marriage."[77] In addition to that, given that arbitration clauses are often described as "midnight clauses", it is unlikely to expect that the parties would put special emphases on confidentiality obligations stemming from their arbitration clauses, when insufficient drafting attention is being placed on arbitration clause itself. Even if the parties would decide to enter in such venture, it has been stressed that, while drafting and appropriate arbitration agreement to meet their requirements, they could "fall afoul of overzealous drafting".[78]

Out of aforementioned reasons, the path of denial of confidentiality as one of arbitration's essential principles should not be followed.

76 For example: "potential litigants will have to determine well in advance what needs they have with regard to confidentiality, and to include appropriate and express agreements in the arbitration clause, or at least in the terms of reference set up at the beginning of the arbitral proceedings. Without express agreements of that sort, confidentiality is certainly not a feature which parties should rely on when choosing arbitration as a dispute resolution mechanism." S. Balthasar, "Kingsbridge Capital Advisors v. AlixPartners: What Confidentiality in Arbitration?", 3 February 2012, *http://arbitrationblog.kluwerarbitration.com/2012/02/03/kingsbridge-capital-advisors-v-alixpartners-what-confidentiality-in-arbitration/?_ga=2.21150265.343776035.1569355234–2037161568.1536698819*, last visited 25 September 2019.

77 A. C. Brown, "Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration", *American University International Law Review* 4/2001, 990.

78 S. Rajoo, *op. cit.* fn. 3, 62.

Although in crisis, confidentiality should be reaffirmed as an inherent feature to arbitration, tightly connected with privacy, and should not be grafted on arbitration's still soft tissue in form of an explicit contractual creation.

David Vučinić
Student master studija na Pravnom fakultetu Univerziteta u Beogradu

(NE)POSTOJANJE NAČELA POVERLJIVOSTI U MEĐUNARODNOJ TRGOVAČKOJ ARBITRAŽI

Rezime

Načelo poverljivosti arbitražnog rešavanja trgovačkih sporova, iako označeno kao jedan od istorijskih atributa arbitraže, široko prihvaćeno pod njenim skutama (posebno u Engleskoj), krajem 20. veka suočilo se sa brojnim izazovima koji su doveli u pitanje i njegovu egzistenciju. Takav konfrontirajuci stav, odlučno zauzet najpre u Australiji, ubrzo je prihvaćen i u Sjedinjenim Američkim Državama i u Švedskoj. Na taj način, domet načela poverljivosti u arbitraži je u toj meri relativizovan da je ono gurnuto gotovo na samu ivicu sopstvenog postojanja. Dalji razvoj međunarodne trgovačke arbitraže, dodatno osnažen nedavnim zahtevima učesnika arbitražnog postupka u pogledu njene transparentnosti, još jednom će „uzdrmati tron" ovog, nekada generalno prihvaćenog načela. Nakon kritičkog osvrta na stavove u teoriji i praksi koji idu u smeru relativizacije načela poverljivosti arbitražnog postupka, autor iznosi razloge koji govore u prilog „oživljavanju" i potvrdi načela poverljivosti kao kvaliteta svojstvenog međunarodnoj trgovačkoj arbitraži.

Ključne reči: *Međunarodna trgovačka arbitraža. – Opšta načela. – Poverljivost. – Tajnost. – Transparentnost. – Prećutna obaveza*.