

Confidentiality in International Arbitration:

Virtue or Vice?

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The subject-matter of my lecture has in recent years become of increasing importance. There was a time when confidentiality in arbitration was assumed both to exist as a fundamental feature of arbitration and to be a dominant reason for arbitrating rather than litigating disputes. I say “assumed”, because there was no arbitration statute anywhere in the world which provided for the confidentiality of arbitration; and publication of arbitration awards, albeit possibly in redacted and anonymised form, was not unknown, even if not widespread.

The assumption in favour of confidentiality was so widespread, however, at any rate anecdotally speaking, that in 1995, a former ICC Secretary General, Stephen Bond, giving expert evidence to the Australian Court in the famous case of *Esso v. Plowman*, was able to say this:

“It became apparent to me very soon after taking up my responsibility at the ICC that the users of international commercial arbitration...place the highest value upon confidentiality as a fundamental characteristic of international commercial arbitration...the fact that these proceedings and the resulting award would not enter into the public domain was almost invariably mentioned.”

You will immediately note that the assumption, or presumption, of confidentiality applied not only to the arbitral proceedings themselves, but also to the “resulting award”.

As for jurisprudence on the subject, there was no case, at any rate in English law, saying that, or explaining why, even in the absence of express provision, arbitration was confidential until as recently as 1990, when *Dolling-Baker v. Merrett* was decided by the English court of appeal ([1990] 1 WLR 1205). The point there arose almost as a matter of a side-wind, and the incidence of confidentiality was stated, without reference to any authority, as a matter of implied contract.

The point arose in this way: there was litigation in the courts between a reinsured and its reinsurer and its placing broker. The defence was non-disclosure entitling avoidance. A similar policy of reinsurance involving the same reinsurer and placing broker had previously been the subject-matter of arbitration, in which again the defence of non-disclosure had been in issue. Both reinsurances covered the risk of asbestosis, which at that time was causing great losses arising principally from the United States. The reinsured asked for disclosure of documents such as pleadings, witness statements, expert reports and other documents produced or disclosed in the arbitration. The judge, none other than Mr Justice Phillips, the future Lord Phillips, first President of the UK Supreme Court, had granted the application. The appeal was allowed principally on the ground that the documents were of such limited relevance and the order was so wide that the order should not have been made. One understands the possibility of that. If a party to one set of litigation could claim full disclosure from another party of documents relating to another set of litigation just because that other litigation involved a similar issue, one would never get to the end of things: and each piece of litigation would run the risk of getting involved in possibly countless other disputes.

However, there was an alternative argument raised on the basis of arbitration's confidential status. It was not that the documents were confidential in any conventional sense normally used by the courts. It rather turned on the private nature of arbitration. Parker LJ simply said this (at1213):

“As between parties to an arbitration, although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must, in my judgment, be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or notes of the evidence in the arbitration or the award, and indeed not to disclose in any other way what evidence had 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...It will be appreciated that I do not intend in the foregoing to give a precise definition of the extent of the obligation. It is unnecessary to do so in the present case...It is not a question of immunity or public interest. It is a question of an implied obligation arising out of the nature of arbitration itself.”

Now that doctrine has been upheld in subsequent cases, albeit subject to a growing list of exceptions. However, it is not the law in other common law countries. In Australia the High Court of Australia, no less, a few years later in *Esso v. Plowman* (1995) 128 ALR 391 declined (albeit by a majority) to follow *Dolling-Baker* and held that no obligation of confidentiality need be and therefore could be implied. It followed that the debate about what price would be set for gas supplies in Victoria, which was being debated in an arbitration, could be made public. The High Court did, however, accept a limited obligation of confidentiality in relation to documents compulsorily disclosed (as is found in litigation as well, at any rate until such documents are used in open court); and even so recognised that a “public interest” exception to such confidentiality might exist.

In England this decision caused consternation, so much so that Patrick Neill QC, the future or perhaps already Lord Neill, in his Bernstein Lecture that year made a coruscating attack on the Australian decision, saying that there could be no answer to something that the

distinguished arbitrator Ronald Bernstein QC had written to the effect that –

“There would be little point in excluding the public from an arbitration hearing if it were open to a party to make public, for example in the press, or on television, an account of what was said or done at the hearing. It is suggested that a party would be entitled to an injunction to restrain the other party from such publication. And the same principle must apply to the arbitration as a whole, including the pleadings or statements of case, expert reports or witness proofs that have been exchanged, as well as to evidence given orally at a hearing.”

Nothing was said in that passage at any rate about awards themselves.

Nevertheless, despite this and other expressions of disapproval of the Australian decision in *Esso v. Plowman*, it is not only Australia which has declined to adopt the line of an implicit obligation of confidentiality. That is also the position in the USA as well: see *United States v. Panhandle Eastern Corp* (1988) 118 FRD 346, a decision of the USDC in Delaware. That was again a case where a party to litigation sought disclosure of documents relating to arbitration between the other party to the arbitration and a third party: the court refused a protective order to prevent such disclosure. The protective order was sought on the ground that the arbitration in question was governed by the ICC Rules which required confidentiality. The court, however, construed such rules as relating to the internal ICC Court and not to the parties to the arbitration or to the arbitration tribunal. Now, one might debate that interpretation, and in any event arbitration rules change and there plainly are arbitration rules or agreements which provide expressly for the confidentiality of arbitration. However, what is significant is that no one thought to suggest to that court that of course arbitration was confidential and that there was an implied term to that effect.

There is also the *Bulbank* case in the Swedish Supreme Court (2000). That was a banking dispute which was arbitrated under Austrian law,

in Stockholm, under UN rules, one of which required hearings to be held *in camera*. One of the parties published the award, which had been in its favour: and the other party went to the Swedish court to annul the award on the ground of what was alleged to be an implied obligation of confidentiality. The decision caused consternation. On appeal an expert witness, one of the draftsmen of the UN rules, said that the *in camera* provision relating to hearings was not intended to apply to awards. I do not know that the common law would have allowed such evidence, but perhaps it should be regarded as akin to evidence of *travaux préparatoires* of a statute or convention. The Swedish court of appeal reversed the trial court's decision. It held that the *in camera* provision related only to hearings and not to awards, and that Swedish law did not recognise any general implied obligation of confidentiality relating to arbitration. The court of appeal did however recognise a duty of "loyalty", which might be breached by disclosure depending on the circumstances, such as any damage caused, any acceptable reason for the publication, and any deliberate purpose of harming a party. In any event, the remedy for breach was not the vacating of the award, but damages for any proven loss.

There was a further appeal to the Swedish Supreme Court. There was disquiet about an implied duty of loyalty owed by one party of a dispute to its adversary, and the uncertain nature of its application. The Supreme Court ruled that "a party in arbitration proceedings cannot be deemed to be bound by a duty of confidentiality, unless the parties have concluded an agreement concerning this".

The Supreme Court asked itself whether there was any international consensus regarding confidentiality and concluded that there was none. It acknowledged the English law position, referring to then most recent case in English law, *Ali Shipping v. Shipyard Trogir* [1998] 2 All ER 136, but on the other side also referred to *Esso v. Plowman* in Australia, and said that in the absence of any consensus Swedish law was free to come to its own decision. It reasoned that the privacy of arbitration did not imply an obligation of confidentiality, only that there was no right in the public to have access to hearings or

documents. But this absence of a public right did not prevent the parties from public disclosure. It even considered that a weaker party, faced by unfair pressure from a stronger party could publicise the dispute as a means of trying to adjust the level of the playing-field.

Singapore, however, has followed the English law approach and has adopted a general implied obligation of confidentiality. Thus in *Myanma Yaung Chi Oo Oo Ltd v. Win Win Nu* (“*Myanma*”) (2003) ([2003] 2 SLR(R) 547 the Singapore High Court adopted the position of English law in preference to that in Australian law: and see also *International Coal v. Kristle Trading* (2009) ([2009] 1 SLR® 945.

It follows that there is no unanimity even in the common law world: England and Singapore stand on one side of the line, and the USA and Australia stand on the other; and as to the civil law world, Sweden, which is a significant player in international arbitration, since it has been the natural home for dispute resolution between Russia and the West, has again followed its own line, much closer to the USA and Australia.

If one turns to arbitration statutes, rather than jurisprudence, one may note that most arbitration statutes have nothing to say about confidentiality. Thus the modern English statute, the Arbitration Act 1996, was being drafted in the early 1990s when the doctrine of the implied obligation was first being propounded in cases such as *Dolling-Baker*. The draftsmen considered whether the new Act should say anything on the subject, but decided against doing so. The Departmental Advisory Committee (DAC) Reports on the bill and Act noted that privacy and confidentiality had long been assumed as general principles, but that it was only recently that the courts had been asked to examine the legal basis for such concepts and the extent of possible exceptions to them. In such circumstances prudence dictated that the less said the sooner mended, or, in the words of the committee’s report, that such issues should be resolved “on a pragmatic case-by-case basis”. However, still more recently, Scotland and Norway have both, in their statutes, felt more courageous: Scotland, in its 2010 statute, has legislated for a default discretionary

rule which provides for comprehensive confidentiality obligations but also enumerates exceptions. Norway, on the other hand, in its 2005 statute, is I think unique in enacting the other way that, unless the parties agree otherwise, neither information disclosed during the arbitration nor awards are confidential. Meanwhile, New Zealand's statutory history is interesting: in its 1996 statute by section 14 it enacted what was announced to be virtually a "complete prohibition on disclosure of information relating to arbitral proceedings and awards". Eleven years later, however, in 2007 it was forced to amend its statute in the realisation that it had not addressed the numerous necessary exceptions to an obligation of confidentiality.

Let me try next to illustrate the conceptual problem of the implied obligation of confidentiality by reference to English and Singapore jurisprudence which has had to grapple with the growing realisation that such an obligation, if accepted as the starting-point, nevertheless has necessarily to allow for numerous exceptions.

Thus in *Hassneh Insurance Co of Israel v. Mew* [1993] 2 Lloyd's Rep 243, Colman J recognised that an arbitration award may well stand in a different position from documents disclosed in arbitration: first because it resolved the parties' dispute and gave reasons for doing so and secondly because challenge in the courts was capable of rendering it a public document. He concluded that an award should be disclosed to a third party against whom a party in the arbitration was litigating on related matters, as the arbitration award would explain how it was that liability was asserted against that third party in the litigation. Although the *Hassneh* decision was confined to the award, it may be that in principle the case was a departure from *Dolling-Baker*.

A further exception was approved in *London & Leeds Estates v. Paribas* [1995] 1 EGLR 102, a decision of Mance J. There an expert witness about rent reviews gave inconsistent evidence in two arbitrations. There was therefore a legitimate basis for allowing the disclosure of his proof of evidence from one arbitration in the second.

There was a public interest sufficient to outweigh objections on grounds of privacy and confidentiality.

In *Ali Shipping v. Trogir* (1997) ([1998] 2 All ER 136), the court of appeal granted an injunction to prevent disclosure, even though the commercial judge, Longmore J, who may well have been much more familiar with arbitration than the members of the court of appeal, had refused to prevent disclosure. It was again the problem of related arbitrations. The judge had said that in the particular circumstances of the case, there was no business necessity for the implication of an obligation of confidentiality. The court of appeal, however, said that the implication was a rule of law and found that there was no necessity for making an exception by reason of regard for the legitimate interests of the party seeking disclosure. Nevertheless the court recognised five possible exceptions to the obligation of confidentiality: (i) consent; (ii) order of the court; (iii) leave of the court; (iv) where reasonably necessary for the enforcement of rights or the protection of legitimate interests; and (v) the interests of justice.

In 2003, however, came *Associated Electric and Gas v. European Reinsurance Co of Zurich* [2003] 1 WLR 1041, a decision of the Privy Council. Again there were two arbitrations, both involving the same claimant and the same reinsurer. In the first arbitration there was an express confidentiality provision. Even so, the Privy Council held that an award in the first arbitration could be disclosed in the second arbitration, so that the claimant could argue a case of issue estoppel. It reasoned that disclosure would not raise the mischief against which the confidentiality provision was directed, namely the risk of valuable information reaching third parties with interests adverse to one of the arbitrating parties; and that to prohibit any disclosure of the award would frustrate a fundamental purpose of the arbitration by preventing the winner enforcing the rights declared in its favour, as well as constituting a breach of the loser's duty to perform the award by recognising and respecting those rights. The judgment was written by Lord Hobhouse, who was an expert in arbitration. In a postscript to the judgment, he explained why the Privy Council had not been

influenced by *Ali Shipping v. Trogir*. He said that the approach of the court of appeal in that case –

“runs the risk of failing to distinguish between different kinds of confidentiality which attach to different kinds of documents or to documents which have been obtained in different ways and elides privacy and confidentiality. Commercial arbitrations are essentially private proceedings and unlike litigation in public courts do not place anything in the public domain. This may mean that the implied restrictions on the use of material obtained in arbitration proceedings may have a greater impact than those applying in litigation. But when it comes to the award, the same logic cannot be applied. An award may have to be referred to for accounting purposes or for the purpose of legal proceedings...or for the purposes of enforcing the rights which the award confers...Generalisations and the formulation of detailed implied terms are not appropriate.”

Department of Economics, Policy and Development of the City of Moscow v. Bankers Trust (2004) ([2005] QB 207, another court of appeal decision, considered the problem which arises when an award is taken to the court under some form of challenge, in this case on the ground of serious irregularity in the arbitral proceedings. I should explain that when this happens, rules of court prescribe that the challenge should be heard in private, ie *in camera*, unless the challenge is an appeal on a point of law, and unless the judge decides that his judgment should be published. The challenge in this case was not an appeal on a point of law but a due process challenge, and it failed, but a summary of the judge’s judgment was innocently published by a legal publisher while the question of whether it could be published had been reserved by the judge for further argument.

In these circumstances The City of Moscow asked for permission to publish the award as a whole, in order to demonstrate that the arbitrators’ decision that it had not defaulted on its loan had received

careful scrutiny by the court. The judge held that there should be no publication of the judge's judgment, and the court of appeal agreed. In a detailed judgment, Mance LJ considered the long standing judicial view in favour of public justice (see *Scott v. Scott* [1913] AC 417 in the House of Lords), but nevertheless concluded that the question of publicity given to arbitration was a matter of judicial discretion on which the judge's decision could not be faulted. In balancing the private interests in favour of arbitral confidentiality and the public interests in favour of open justice, Mance LJ stressed that the court had to take into account both those aspects; that a court judgment might be more readily disclosed than the underlying proceedings especially where a judgment could be given without disclosing significant confidential information; and that the public interest in ensuring appropriate standards in arbitration might favour publication. The court of appeal nevertheless disagreed with the judge's decision not to allow any further publication of the publisher's summary. It was brief and factually neutral and did not disclose any sensitive or confidential material at all. In any event, the summary existed and had been published in good faith. In sum, it might be said that the court's judgment has given a fair measure of support for the publication of neutral accounts of arbitral disputes which come to the court.

Finally, in this brief survey of the English authorities, I will end with *Emmott v. Michael Wilson & Partners* (2008) ([2008] 2 All ER (Comm) 193), another case in the court of appeal, where the disclosure of documents in an arbitration was allowed in the not untypical case where the same parties were involved in arbitration and litigation in more than one jurisdiction. The judgment of Lawrence Collins LJ contains a full and scholarly account of the subject-matter. He summarised the matter as follows [at 214/215]. The privacy in which arbitration is conducted does not mean that the arbitration is private for all purposes. In the past the special case procedure allowed under prior English arbitration acts meant that the award and details of an arbitration often became public when the special case went to the court. Nowadays, however, there was an increasing trend for the

privacy of arbitrations to be protected, but this policy may have to give way to the public interest. In any event, details of an award might well become public on a challenge to the courts, or in the course of enforcement proceedings. Collins LJ also said that the obligation of confidentiality was “really a rule of substantive law masquerading as an implied term”: but that as long as it was represented as an implied term it ought to mean that disputes about it could be resolved by arbitrators under the arbitration agreement, even if in general it had been brought to the courts. Thomas LJ in a separate judgment thought that the matter was primarily for the arbitrators rather than the courts.

Let me now revert to Singapore to mention two recent cases which come towards the end of the English jurisprudence I have just reviewed.

In the first of them, *AAY v. AAZ* (2009) ([2011] 1 SLR 1093), the public interest exception was exercised to vindicate the disclosure which had taken place and to reject the plaintiffs’ claim that the arbitration agreement had been discharged and its award should be set aside. The award had found the plaintiffs liable for fraudulent misrepresentation and conspiracy. The disclosure was a report by the defendants to the Singapore authorities of documents relating to the arbitration. The court reasoned as follows. First, the applicable arbitration rules were not the SIAC rules, which included an express provision for confidentiality, but the Uncitral rules which were silent on the subject. Secondly, in such circumstances the default rule was the implied obligation of confidentiality which was a rule of law rather than of contract, and involved exceptions including that of public interest. Thirdly, the public interest exception allowed disclosure to relevant authorities of matters involving a reasonable suspicion of criminal conduct: it was for a party who wished to prevent such disclosure to show that the public interest exception did not apply; where however such matters were disclosed to the general public, the burden was on the discloser to prove a public interest defence. Fourthly, in the instant case the public interest exception protected the defendants and there was no breach. Fifthly, even if

there had been a breach, it was not fundamental and would not have discharged the arbitration. Sixthly, the plaintiffs had waived confidentiality by taking out an application to set aside the award without applying at the same time, as they could have, to have the hearing held in camera.

The second case, *AZT v. AZV* (2012) ([2012] 3 SLR 794), concerned a Singapore arbitration award which had decided that both AZT and AZV were liable in damages to the claimant in the arbitration but had not apportioned liability. AZT settled with the claimant in full and claimed a contribution from AZV in court proceedings. The question which then arose was whether the court documents should be sealed, in order to preserve the confidentiality of the arbitration. The Singapore court held that the documents should be sealed, this being an application of the discretion referred to in the *Moscow* case, and an example of where the private interest in confidentiality was preferred to the public interest in open justice.

Having set out the jurisprudence in England and Singapore on the implied obligation of confidentiality, let me next say something about what light if any institutional arbitration rules shed on the subject. Such rules are of course tantamount to a matter of express contract between parties who engage in arbitration subject to such rules. I have already indicated that the SIAC rules contain an express provision for confidentiality, whereas the Uncitral Model Law rules are silent as to a general duty. However, both provide for the confidentiality of the award. The LCIA rules cover both the confidentiality of disclosed materials and of the award, as do the Hong Kong rules of HKIAC. The ICC rules, however, are more limited, as the American *Panhandle* case indicated. Moreover, the ICC does publish selected awards in an abbreviated and anonymised form.

As for publication of awards, there is some publication not only by the ICC, but also by the LMAA (the London Maritime Arbitrators Association), by the AAA (the American Arbitration Association), by the Society of Maritime Arbitrators of New York, and in investment treaty arbitrations. But on the whole, especially in international

commercial arbitration outside investment treaty arbitrations, there is little publication, and what there is has been criticised as being too much in the power of the secretariat of institutions, who have too much of their own interests, and their own likes and dislikes at stake to make for an outside, objective, editorial approach to publication such as exists, to a very high standard, in the publication of judgments.

I would also mention a 2010 survey conducted by QMUL and White & Case called “Choices in International Arbitration”, which has canvassed the views of users of international commercial arbitration. This survey reveals that 62% of respondents said confidentiality was “very important” to them, and a further 24% said it was “quite important”; that 50% consider that arbitration is confidential even in the absence of an express agreement to that effect, but 30% considered that it was not; and that 38% said that they would still use arbitration even if it did not offer the potential for confidentiality, but 35% said they would not, and 26% did not know. These statistics suggest that confidentiality is important, or thought to be important, by the users of arbitration, but that there are other factors at work. It is generally believed that the opportunity to select one’s own tribunal, the avoidance of state courts, and the enhanced process for enforcement of international arbitral awards pursuant to the New York Convention are even more important. Moreover, the survey records that attitudes to confidentiality can be quite nuanced. Thus it is accepted that reporting requirements particularly of listed companies can provide significant information to the market about disputes; and that often commercial arbitration disputes are not of great interest to outsiders and do not involve sensitive commercial information. It is not difficult to believe that, if offered confidentiality, no disputant would reject it: but perhaps the most significant figure is that of 35% who would not arbitrate without confidentiality. Such a figure is both a materially large minority, but remains a minority of only just over one third.

Having set out this material, including the developed jurisprudence of England and Singapore and conflicting jurisprudence from elsewhere in the world, it is time to take stock and to try to come to some conclusions about whether the confidentiality of arbitrations, their documentation and hearings, and in particular their awards, is desirable or not.

What are the benefits or drawbacks involved, and what are the interests, public or private, which confidentiality serves? Should arbitral institutions encourage confidentiality of arbitrations and/or awards, by including terms requiring such confidentiality in their rules, or should their rules be more nuanced, or neutral, or permit parties to choose for themselves from a menu of possibilities? In particular where awards are concerned, should the default position be in favour of confidentiality unless in a particular case the parties choose to consent to publication? Or should the default position be in favour of publication, or at any rate an anonymised form of publication, unless the parties choose to prevent it? And is English and Singapore law correct or wise to have adopted an analysis in favour of an implied obligation of confidentiality, as a rule of law, when many other national legal systems do not?

Let me begin with the benefits of confidentiality. It seems to me that they could be represented as follows. First, if it is what the parties both want, then it reflects the autonomy of the parties which is of the essence of arbitration as a whole. Secondly, if parties would not agree to arbitration in the absence of confidentiality, then the opportunity to obtain confidentiality is plainly a good, and what is more a public good, since it follows that arbitration would be diminished without it. For these purposes I assume that arbitration for the purposes of settling international commercial disputes is a good in itself. Moreover, since it takes two to tango, it also follows that if only one of the parties to a contract would not agree an arbitration clause without the opportunity for confidentiality, then arbitration in general would lose out in the absence of a confidentiality regime being at least possible. As for the reasons why parties might choose

confidentiality as being beneficial for them: it is easy to see that privacy is attractive in itself; and that parties might wish to preserve secrecy over sensitive commercial information or poor behaviour.

What other private or public interests might confidentiality promote? If and to the extent that parties seek to find in arbitration speed, efficiency, economy, the ability to select their own tribunal, flexibility of procedure, freedom from the supervision or interference of national courts, and the enforceability of awards: then it is not clear to me that confidentiality promotes any of these things. It is perhaps arguable that confidentiality just about promotes speed and economy in a sense, on the basis that a confidential arbitral system makes it harder for third parties to interfere in the process: but I am not convinced about that, since the consensual nature of arbitration means that there is in any event little room for outside influences to have effect. Arbitration, after all is essentially insulated from outside interference by the fact that its only participants can be those who have agreed to arbitrate with one another. The only exception is that some arbitration rules contemplate the possible joinder of arbitrations; or of parties who are in any event parties to the same arbitration agreement.

Are there any drawbacks, however, either for the parties or for the public, in the confidentiality regime?

I believe that there are, or may be. Let me explain. In litigation generally, outside arbitration, there are two philosophical strands which run side by side where matters of confidentiality and transparency are concerned. There is essentially complete confidentiality where discussions between parties and their own lawyers are concerned; also for documents which are supplied to the other side under the compulsion of the process of disclosure; and also for the deliberations of the judges. Moreover, when matters of real commercial secrecy, ie what are called “trade secrets” (or national security) are in issue, there are available procedures for preserving that secrecy, even when matters move into court. But on the other hand, with that last exception, and one other that I will mention, there is essentially complete transparency for what goes on in open court

and for the judgments of the court. The basis of that transparency is that it is only in the open that one can have confidence in the workings of justice and that secrecy is inimical to justice. The exception that I have just mentioned is that *prima facie* the rule for *interlocutory hearings* is that they take place in private rather than in public. The reason for this, I think, is that disputing parties should have the opportunity of preparing for trial but at the same time preparing for possible settlement without their every move being subject to public scrutiny. Even in this context, however, judges have the discretion to publish their judgments in interlocutory matters if they consider that it may be of public utility to do so, and many such interlocutory decisions are published, otherwise the law of procedure would find it hard to develop. And appeals are always in public. Nevertheless, there are also rules about the reporting of what goes on in court. Reports must be fair and accurate, and there is the possibility of committing a contempt of court if they are not.

I should perhaps add that there are further exceptions that may have to be acknowledged. For instance, much family justice concerning children takes place or has taken place in private and remains unreportable: but there is strong controversy about this and moves to make such work more accessible.

In other words, although the basic philosophy is that of open justice, a complete survey of the field of litigation reveals many areas where, despite that basic philosophy, for various reasons all of which are ultimately founded in what is considered to be the public interest, confidentiality prevails.

In arbitration, however, the position is almost entirely reversed. The basic philosophy is that of confidentiality, and it is only in exceptional circumstances, albeit again founded in public interest (or of course in the consent of the parties) that confidentiality is lifted. Nevertheless it is well established, even in English law which is very favourable to the concept of confidentiality, that the public interest may permit or require exceptional disclosure, although before that can occur there

has to be a balancing of the private interest in favour of confidentiality and the public interest in favour of transparency.

So let us examine why the position should be reversed in litigation and arbitration. On the assumption that ultimately such rules, even when founded in contract, are within the power of the law, and in this connection you will have noted that English (and Singapore) law's implied obligation of confidentiality is ultimately a rule of law rather than of contract, why should the public interest move in one direction in the context of litigation and in another in the context of arbitration?

The answer must be that a contractual regime in favour of confidentiality will be recognised by the courts and given effect to; and that the public interest in favour of transparency is not sufficient by itself to supplant the autonomous contractual choice of the parties, in the absence of course of some mandatory provision of law, as might, but does not, exist in a national arbitration statute such as the England's Arbitration Act 1996. However, where there is no *express* provision in favour of confidentiality, but only what has been called an *implied obligation* or what has also come to be recognised as a rule of law rather than of contract, then, it seems to me that the law is free to mould the contours of that obligation for itself. The shaping of these contours has become increasingly apparent as time has gone by: from which it is becoming clear that the implied obligation is not so much an all-embracing requirement of confidentiality, so much as an accommodation of private and public interests with a line to be drawn, wherever possible, in favour of *both* privacy where that matters *and also* transparency where that matters. In this context, such great arbitration experts as Lord Hobhouse in the Privy Council and Lord Justice Mance in the Court of Appeal, now Lord Mance of the Supreme Court, have recognised that the case in favour of publication of awards might well stand in a different and better position than the possibility of disclosure generally.

So now I would like to concentrate if I may on the matter of awards. These can of course well come in different shapes and sizes. There are awards on issues of jurisdiction which can be rendered by arbitral

tribunals under their *competence competence* jurisdiction to decide their own jurisdiction. In days gone by such questions of the jurisdiction of arbitrators would nearly always be decided in court: but now that the doctrine of *competence competence* is so widespread and has been recognised in England's 1996 Act, it is quite as likely that any disputes as to jurisdiction will be decided by the arbitrators and may not be taken to the court by way of jurisdictional challenge – although of course they may still be. Then there are awards regarding the important matter of interim remedies: such as freezing orders, rights under on demand or other forms of guarantees, possibly difficult points of disclosure or privilege. Finally there are of course final awards, which run the gamut of issues. Some may be purely on the facts. Others may concern matters of interpretation of one off contracts. Still others may concern the construction of standard form contracts and problems which repeatedly arise. Still others may involve the application of important statutes or conventions, such as statutes concerning insurance, or sale of goods, or international rules such as the Hague-Visby Rules. Others may involve significant issues of the common law.

At present it is extremely difficult to get any such awards into the public domain. The loss of awards merely as to facts, and awards on the interpretation of truly one-off contracts may not perhaps disturb us greatly. But even in such cases, the absence of transparency means that we simply do not know how arbitrators perform the role of fact-finders, or the role of contract interpreters. One might think that those who have to select arbitrators are entitled to know how they perform in these basic tasks. Once however we come to awards which are concerned with standard forms of contracts, or jurisdictional issues, or principles of law, or important forms of interim relief, the lack of publication, the lack of transparency, the difficulty or impossibility of getting such awards into the public domain, a fortiori in the light of institutional rules which bar any challenge or appeal to the courts whatsoever, mean that our commercial law is going *underground*. As more and more international commercial cases go to arbitration rather

than the courts, we are more and more losing sight of the basic feedstock of our commercial law.

In such circumstances, it is in my opinion inevitable that the public interest is being and will increasingly be damaged as more and more decisions on areas of commercial law become inaccessible to the public arena. There are already whole areas of our commercial law to which this is happening. Nearly every charterparty contains an arbitration clause and, with rare exceptions when a shipping arbitration award is permitted to go to appeal in the English courts, charterparty law, which in a very real sense was where English commercial law was made in the past, no longer figures in English jurisprudence. It is even arguable that when it does, the answers given have become highly controversial: I can think of two decisions in the House of Lords in recent years arising out of charterparty disputes, both on the question of damages, *The Golden Victory* and *The Achilleas*, which have certainly raised controversy. Insurance is another highly important area of our commercial law which, at any rate in London, used to be the frequent subject-matter of disputes in the Commercial Court, and now, because of the prevalence of arbitration clauses, has become a rare visitor.

This movement underground, into arbitration, means that the certainty, predictability, but also the helpful analysis, development and even creativity of the common law in these areas is in danger of being stultified. There, in arbitration, the best counsel and also distinguished and experienced arbitrators are working out problems, but we know increasingly little of their solutions, good or bad. In ignorance of decisions already made, disputants are having to reinvent the wheel time and time again. And if, perchance, it is not good law and good decisions which are being created in secret and of which we are being deprived, but bad law or bad decisions, then we are equally ignorant of that.

Now to a large extent these are public goods and the public interest which are being damaged. But equally, the damage to the public interest is also, both in the immediate present but also increasingly in

the long-run future, a material damage to the private interests of those who use arbitration. They, as much as anyone, wish to know and are entitled to know something about the performance of arbitrators. At present only very large international law firms with a significant practice in international commercial arbitration see something across the field of work of the numerous arbitrations with which they are concerned. But even such firms have only a limited vision of the field as a whole. Everyone else works comparatively in the dark, and information about how arbitration works is essentially anecdotal. The predictability and certainty which the law seeks to provide, especially the common law with its doctrine of precedent, but also the civil law in its own way, are lost. Moreover, our judges in our courts, for whom commercial law was once meat and drink, are becoming less practised in it, at any rate when once they leave the bar.

And I also ask: how is the *lex mercatoria*, that international commercial law not necessarily rooted in any one country, about which proponents of international commercial arbitration write, to be created or known, unless awards are available in the public arena? It is not possible or wise to have law known only to certain insiders.

If therefore there is a growing danger to both public and private interests in these considerations, what might be the solution?

I would respectfully and diffidently suggest the following proposals.

First, we should think carefully and constructively about those areas of arbitration where confidentiality is really important to the users of arbitration, and those areas, and in particular awards, where there are much wider considerations to be taken into account. Fortunately, there is a growing body of literature in which the suggestion is being made that awards should be capable of being published, at any rate in some form or other. It is readily understandable that parties to arbitration would not want their disclosed documents, or their hearings, or their pleadings, arguments and submissions, to become public during the course of the arbitration: especially as public knowledge of the disputes and arguments being arbitrated, at the time they are being

arbitrated, could be used by the parties or their competitors to affect the actual course of or tactics in the arbitration itself. But once the arbitration is over, and the award has been made, there is much less room for objection.

Secondly, English and Singapore common law should consider carefully the extent to which it does want to say that the so-called implied obligation of confidentiality, really a rule of law which the common law has itself the power to shape, extends too widely, or extends to cover awards.

Thirdly, those arbitral institutions whose rules at present impose confidentiality on awards should consider whether this is a desirable rule to impose. It may be that there will need to be constructive debate and hopefully agreement about such matters between the institutions. In the meantime, I raise the possibility that the default rule should be that awards may be published in anonymised form, as proposed by the arbitrators, unless the parties object: and that if only one party objects, the question whether that objection should be sustained is itself a matter for the arbitrators to decide.

In this connection I observe that an argument can nearly always be raised that, even with anonymisation, it might be possible, especially for members of the same industry, or for anyone with an interest in investigation, to discover who the parties in the arbitration are. I would suggest that, in the ordinary case, this possibility should not be a sufficient objection. Otherwise, a voluntary system of award publication might ultimately not be possible.

Fourthly, I raise the possibility that there should be a default rule that after a certain period of time, such as 6 months or a year, but that question is as flexible as a piece of string, an award might be publishable in anonymised form (or even unanonymised form) without possibility of objection.

Fifthly, allowances would of course continue to be made for any information in the form of properly confidential trade secrets: these would always be maintained in confidence.

Sixthly, the arbitration world should consider what even the nature and extent of an express agreement of confidentiality should be. At present, my understanding is that even an express agreement can be overborne where one party, and it only has to be one party, succeeds in challenging an award in the courts, either on its merits by way of appeal, or as a matter of a failure of due process, or in the course enforcement proceedings. This is because once the jurisdiction of the courts has been invoked, where that can lawfully be done, the ultimate discretion and decision on publicity becomes a matter of public interest to be determined by the court in accordance with the procedural law of the land. Subject, however, to the lawful invocation of the jurisdiction of the courts, I am not sure that there is any remedy for an express agreement of confidentiality which covers publication of an award – other than a subsequent agreement by the parties waiving confidentiality or consenting to publication in some form or other. Therefore, in the ultimate interest of arbitration and its users, I submit that parties and their legal advisers should be wary of agreeing confidentiality clauses which seek to cast a blanket prohibition over the publication of awards. And I would submit that, in the absence of any such express prohibition relating to awards, confidentiality clauses should not readily be construed as extending to awards. That is perhaps the basis of the decision of the Privy Council in the *Associated Electric & Gas* case.

Seventhly, these modest proposals may be seen, as I would diffidently intend them to be seen, as in the interest, certainly the ultimate and general interest, of arbitration and its users. They would I think make the selection of arbitrators easier and more transparent, and everyone agrees that such selection is one of the greatest assets of arbitration. They would encourage good procedure. They would promote the highest standards of arbitral decision-making and reasoning. They would maintain and enhance the cutting edge of international and national commercial law. They would promote certainty, predictability and consistency. They would thereby diminish unnecessary and futile wrangling. And they would help to create a *lex*

mercatoria which the exponents of arbitration have long talked about but which is increasingly difficult to discern.

And there I should leave my subject, for wiser heads than mine to develop or repudiate this subject.

Thank you very much.