



The Right to Confidentiality as a Limit to Arbitrator's Discretion to Order Document Production

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Supervised by Petya Ilieva

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1. INTRODUCTION

1.1. Background

Arbitration is a preferred dispute resolution system over litigation because of the rapid, flexible, and confidential process which provides a neutral forum and party autonomy without strict rules. Moreover, arbitral awards have a high amount of enforcement owing to NY Convention which is ratified more than 130 countries.¹ Disputes under international commercial arbitration, which are between companies and private individuals without a state involvement, derive from business relationships and private trade contracts. As companies have trade secrets, formulas, and know-hows, they wish to keep these kinds of information confidential as long as possible, and they tend to protect the privacy of their commercial relationships and their reputation. Therefore, they choose to resolve their disputes through arbitration. Confidentiality can be accepted as a significant advantage for international commercial arbitration because of its contribution to the worldwide acceptance of international arbitration and confidence in arbitration as an effective dispute resolution method.² Major arbitration rules such as UNCITRAL Arbitration Rules, or ICSID Rules mention confidentiality in the scope of publishing the award rather than the pre-award proceedings. Unfortunately, a lack of mandatory rules for the protection of confidentiality in document production phase has been observed during this academic research. Although IBA Rules are being used as guidelines, these rules are not binding and causing ambiguity. Because of the rationale behind confidentiality, which is party autonomy, the only binding rules and the extent of the protection for confidentiality are the provisions that the parties have agreed in their agreement to arbitrate.

Arbitrators have broad power to order document production during the arbitral procedure, and they are entitled to take appropriate measures in the document production stage. Even though the arbitral discretion may be a cure for ambiguity when there is a gap in the regulation, the question of ‘What if the arbitrator cannot use his experience and expertise properly?’ remains unanswered. This study focuses on the ability of confidentiality to limit arbitrators’ broad power during the document production phase. Despite a lack of uniform national laws and arbitration rules, it can be said that the only current tool to limit arbitral discretion to order document

¹ John Fellas, ‘A Fair and Efficient International Arbitration Process’ (2004) 59(1) *Dispute Resolution Journal*

² Gu Weixia, ‘Confidentiality Revisited: Blessing or Curse in International Commercial Arbitration?’ (2004) 15 *The American Review of International Arbitration*

production is the parties' agreement and provisions about confidentiality. Document production is a critical stage of international arbitration because of the assessment of crucial evidence which contributes to the dispute resolution process. Unlike litigation, under common law system, in international arbitration, parties are not bound by discovery, which includes any relevant document, but instead, they are required to disclose specified documents which are material and relevant to the outcome of their case under the scope of document production.³ Arbitrators have wide discretion to order document production; they are entitled to assess the admissibility of the evidence and to fill the gaps in the absence of guiding rules. However, while they are exercising their powers, they should treat each party equally and give them a chance to present their cases. Parties are entitled to determine the framework of the arbitral discretion by their agreement to arbitrate and the applicable law that they have chosen for their dispute in order to prevent arbitrators to use their power arbitrarily.⁴ Presently, even if confidentiality can be protected as far as possible by binding uniform rules and parties' strict, well-organized provisions, or even by limiting the arbitrator's authority to a certain degree in document production, it seems like when there is a necessity for a disclosure or an enforcement of another right, the protection of confidentiality cannot be absolute.

The purpose of this dissertation is to give some thoughts on the gaps and necessary regulations in order to protect confidentiality and to investigate the potential risk of unfettered arbitral discretion in document production. For that reason, after determining the scope of the dissertation through research questions and objectives and giving the background of the topic, the scope of the right to confidentiality with its exceptions will be examined in order to understand the definition of confidentiality in international commercial arbitration. Secondly, document production stage in arbitral proceedings will be clarified with the reasons for rejecting the disclosure of evidence for specified reasons related to confidentiality. Thirdly, the framework of the arbitrator's discretion in document production process and its limits will be examined, and the important exceptions to their broad powers will be underlined. Fourthly, arbitrators' ethical obligation to keep the balance between the parties' rights during the conduct of the arbitral proceedings for a fair procedure will be analysed in the scope of the right to confidentiality and the parties' right to present their cases. Finally, in Chapter 6, which is the

³ Dominique D'Allaire and Rolf Trittman, 'Disclosure Requests in International Commercial Arbitration: Finding A Balance Not Only Between Legal Traditions but Also Between the Parties' Rights' (2011) 22 *American Review of International Arbitration*

⁴ *Ibid.*

final chapter of this dissertation, a summary of the underlined points and answers to the research questions will be attempted to give including analyses and conclusions with recommendations for possible solutions and improvements that can be made.

1.2. Research Questions

The following are the questions that will be examined in this dissertation:

1. What is the importance of the necessity to establish binding, specific arbitration rules and national protective laws about the duty of confidentiality that arbitrators and the parties can follow?
2. How to limit arbitrator's broad discretion to order document production through confidentiality?
3. To what extent confidentiality should be protected while trying to achieve the right balance between the parties' right to present their cases?

1.3. Research Objectives

1. There has been a lack of uniform and binding principles of confidentiality in arbitration rules including pre-award proceedings. Therefore, every jurisdiction adopts confidentiality differently. While the UK system is accepting implied duty of confidentiality, French, Swiss, US, and Australian courts claim that there should be an express agreement of parties provide for confidentiality. However, in order to be able to protect confidentiality, the source of the duty of confidentiality should be possible to determine through certain rules including the document production process other than guiding IBA Rules for the parties and arbitrators to follow. Under the scope of this research, confidentiality during document production phase means parties' obligation to each other not to disclose information and the arbitrators' and the tribunal's duty of respect to the parties' right to confidentiality. Therefore, expressed and implied duty of confidentiality will be examined in the light of *Ali Shipping v. Shipyard Trogir* case. The first objective of this research is to emphasise the importance of establishing certain, binding, and uniform arbitration rules in order to ensure the protection of the right to

confidentiality rather than waiting for the parties to draft their confidentiality clause with detailed and strict provisions.

2. The second goal of this dissertation is to investigate whether mitigating the possibility of violating confidentiality by abuse of arbitral power in document production phase can be a protection for the right to confidentiality. Also, possible precautions that parties can take will be attempted to define for the protection of confidentiality from wide arbitral discretion. Specifically, Chapter 4 of this academic study aims to examine the arbitrator's authority and the limits of this power in the document production process. At that point, the importance of the necessity for certain, binding, and uniform rules strikes again. Because of that lack of rules, arbitrators have broad discretion in conducting the arbitral proceedings which gives them an opportunity to fill the gaps in existing arbitration rules, and to decide the solution or behaviour whichever they see appropriate for the situation. The expertise of the arbitrators on interpreting the rules can be useful though in solving the crisis which can be seen in *Himpurna California Energy Ltd v Indonesia* case. On the other hand, there are consequences if an arbitrator exceeds its powers and violates a party's right to present its case. In that occasion, the losing party may seek to challenge the award which was rendered with gross unfairness by an arbitrator. Therefore, it can be said that there are limits to the arbitrator's authority such as parties' expectations and confidentiality. That means arbitrators may have broad discretion but they have not a limitless power and as stated in *Abaclat and others v. the Argentine Republic* case, arbitrators should comply with the parties' agreement.
3. Confidentiality is one of the core elements which helps parties to choose arbitration in order to protect their trade secrets and reputation. However, confidentiality has priority to the extent the violation of another party's legit rights. This study aims to investigate the possible standards for a preferred balance between the parties' rights when there is a legal right requiring priority protection and to find the extent of the protection for confidentiality. During document production phase, rejecting a document may cause a violation of a party's right to present its case, but in order to give that party an opportunity to present its arguments, confidential documents cannot be disclosed. Therefore, that issue will be tackled in Chapter 5, which will examine the right to present one's case in arbitral proceedings and try to achieve to find the right balance between the right to confidentiality and a party's present its case in order to provide a fair

procedure. Moreover, some suggestions for arbitrators such as limiting the time of oral hearings or dividing the days of hearings into sets will be examined to provide a fair procedure for the parties without violating the confidentiality.

1.4. Research Methodology

This dissertation will tackle the issue of confidentiality under common law, during document production stage in international commercial arbitration; therefore, publication of the award and confidentiality in other stages of the arbitration are outside of the scope of this study. Although French, Swiss, Australian, and US jurisdictions have been examined for the understanding of the topic in Chapter 2, this academic research will focus on English jurisdiction with an analytical approach. Although the focus of this study is common law, unlike implied duty of confidentiality as accepted under English law, expressed duty of confidentiality will be taken as a basis because of the possible difficulties of defining the scope of confidentiality in the absence of an express agreement and terms ‘privacy’ and ‘confidentiality’ are going to be accepted as separate under the expressed duty of confidentiality principle instead of harmonised. Therefore, confidentiality clause in the arbitration agreement or a separate confidentiality agreement will be supported and suggested in order to secure confidentiality.

In this study, secondary research data is used, and the method of data collection is the study of documents for a great comprehension of the framework and the content of the topic. The sources used in this study are English articles, books, websites and thesis which support the arguments determined in primary sources. Primary sources used in this dissertation in order to examine the regulation about confidentiality includes legislation such as English Arbitration Act, Federal Arbitration Act, IBA Rules, ICC Rules, ICSID Convention, LCIA Arbitration Rules, NY Convention, UNCITRAL Arbitration Rules, UNCITRAL Model Law. Moreover, it has benefited from the cases to give an example in the scope of related topics namely; *Emmott v. Michael Wilson & Partners Lawrence* [2008], *Ali Shipping v. Shipyard Trogir* [1998], *Bulgarian Foreign Trade Bank Ltd. v. AI Trade Finance Inc.* (2000), *Hassneh Insurance Co. of Israel and others v. Mew* [1993], *Commonwealth of Australia v. Cockatoo Dockyard Pty. Ltd* [1995], *Abaclat and others v. the Argentine Republic* (2011), *Himpurna California Energy Ltd v Indonesia* (1999), *Australian Postal Commission v. Hayes* (1989) respectively.

2. THE RIGHT TO CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION

International arbitration is a preferred dispute resolution system over litigation in commercial disputes because of some characteristics such as time and cost effectiveness, flexibility, and confidentiality. One of the most important reasons for the parties to international commercial arbitration, who usually are companies, to choose arbitration over litigation is to protect their reputation, trade secrets, or know-how.⁵ In this dissertation, the right to confidentiality will be examined with its scope, protective measures, and its ability to limit the arbitrator's discretion during the document production phase. To provide confidentiality, and determine the behaviours which would cause a breach, the extent of the right to confidentiality should be examined and evaluated.

Confidentiality is being determined by the law of the seat of arbitration, by institutional rules and contractual rules agreed by the parties.⁶ UNCITRAL Arbitration Rules mentioned confidentiality in the scope of ability to publish an award without the consent of the parties.⁷ Likewise, Article 48(5) of ICSID states the same rule and prohibits publishing the award without the parties' agreement.⁸ Under ICC Rules, however, confidentiality is mentioned from a perspective other than publishing the award. Hence, Appendix I Article 6 ICC Rules states that the work of ICC Court is confidential and it should be kept confidential by the parties to arbitrate.⁹ Briefly, it can be said that most of these arbitration rules are focused on publishing the award in the scope of confidentiality rather than the arbitral proceedings. The perspective of that focus leads to a lack of certain, binding, and uniform rules for parties who seek to obtain and protect their right to confidentiality during the arbitral proceedings and document production phase.

⁵ Christina Knahr and August Reinisch, 'Transparency versus Confidentiality in International Investment Arbitration – The Biwater Gauff Compromise' (2007) 6 *The Law and Practice of International Courts and Tribunals* 97-118

⁶ Isabel Corona, 'Confidentiality at risk: The Interdiscursive Construction of International Commercial Arbitration' (2011) 5(4) *Discourse & Communication* 355-374

⁷ Art 34(5) UNCITRAL

⁸ Art 48(5) ICSID

⁹ Appendix I Art 6 ICC Rules

Because of the privacy of the procedure in arbitration, parties may be mistaken that confidentiality will be provided instinctively. However, unlike common knowledge, terms ‘privacy’ and ‘confidentiality’ are not same, and they should be separated. While privacy is about preventing the interference of the public and press during the arbitral proceedings, confidentiality means parties’ obligations to each other and prohibition of disclosure of confidential documents about the process unless there are exceptions.¹⁰ If one of the parties disclose private information without the other party’s consent, that would be a breach of the duty of confidentiality. The obligation of confidentiality is not just undertaken by the parties. Instead, it extends to the arbitrator and the arbitral tribunal. For this reason, in the scope of their obligation, arbitrators should not discuss the case with the third parties, and they should keep private documents confidential.

Although, confidentiality is an accepted principle of arbitration, because of the lack of a uniform and express rule about the duty of confidentiality during the arbitral proceedings, due to the involvement of different jurisdictions and multinational characteristic of international commercial arbitration, there are different approaches about the derivation of the duty of confidentiality. Those different approaches create an ambiguity in deciding whether the source of the duty of confidentiality is an implied obligation or the parties should make a separate agreement in order to ensure confidentiality.¹¹

2.1. Implied Duty of Confidentiality

Arbitral proceedings in international arbitration are between the parties and the arbitrator which results in the exclusion of the third parties. Regarding the privacy of the proceedings and the lack of precise definition of the implied duty of confidentiality in arbitration rules, it can be assumed that confidentiality in arbitration is implied by the parties’ agreement to arbitrate because of their unwillingness to disclose information to third parties. Under this principle, unless the parties indicate expressly, they are obligated not to disclose confidential information to each other and third parties.¹²

¹⁰ Supra no 5

¹¹ Donggen Xu, Huiyuan Shi, ‘Dilemma of Confidentiality in International Commercial Arbitration’ (2011) 6(3) Front. Law China 403-417

¹² Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration*, International Arbitration Law Library, Kluwer Law International 2011 Ch 2 9-25

English Court of Appeal in *Emmott v. Michael Wilson & Partners* Lawrence Collins, L.J. defined the implied obligation of confidentiality as not disclosing documents, information, and evidence used in the arbitral proceedings and not using them beyond their purpose.^{13 14} In this case, the court held that the duty of confidentiality was implied by the law under a contractual relationship.¹⁵ Therefore, if the parties choose English law as an applicable law to their dispute, implied duty of confidentiality would be accepted, the framework of confidentiality principle would be determined, and the rules about confidentiality would be applied under English law. Under ‘implied duty’ approach, privacy and confidentiality are not completely separate instead, harmonised.¹⁶ This harmonisation can be seen in the main precedent case of this principle namely *Ali Shipping v. Shipyard Trogir*. According to that decision, under the implied duty of confidentiality, it is not possible to “*distinguish between different kinds of confidentiality which may attach to different types of documents or documents that were obtained different ways.*”¹⁷ After that decision instead of adopting a fixed general rule, exceptions to confidentiality are established which will be discussed below sections.¹⁸

Adopting the implied duty of confidentiality might cause difficulties, in determining the scope of the obligation and the extent of confidential documents that will not be disclosed. For example, without an express provision in the agreement, arbitrators may have an opportunity to decide on which documents are going to be confidential and that has the risk of expanding the arbitrators’ power and breaching the confidentiality. Some jurisdictions do not accept the duty of confidentiality is implied by parties’ agreement to arbitrate. Rather, under these jurisdictions, it is claimed that if the parties want to protect their confidential documents from disclosure, they should show their wish by adding a confidentiality clause in their agreement.

¹³ Michael Hwang S.C. and Katie Chung, ‘Defining the Indefinable: Practical Problems of Confidentiality in Arbitration’ (2009) 26(5) *Journal of International Arbitration*

¹⁴ *Emmott v. Michael Wilson & Partners*, [2008] EWCA (Civ) 184 (C.A.)

¹⁵ *Ali Shipping Corp v Shipyard Trogir* [1998] 2 All ER 136, [1999] 1 WLR 314, [1998] 1 Lloyd’s Rep 711

¹⁶ Christoph Henkel, ‘The Work-Product Doctrine as a Means Toward a Judicially Enforceable Duty of Confidentiality in International Commercial Arbitration’ (2012) 37(4) *North Carolina Journal of International Law and Commercial Regulation*

¹⁷ *Supra* no 15

¹⁸ ‘The Confidentiality of Arbitration Proceedings’ (*Lawgazette.com.sg*, 2017) <http://www.lawgazette.com.sg/2003-9/Sep03-feature.htm> accessed 9 June 2017

2.2. Expressed Duty of Confidentiality Through Parties' Confidentiality Agreement

International arbitration proceedings are based on party autonomy and flexibility which give an advantage to arbitration over litigation. Therefore, parties can decide the rules, and the applicable law to the dispute and parties' agreement always has the priority in international commercial arbitration. Presuming private nature of arbitration will also provide confidentiality would be a wrong assumption because of separate meanings of privacy and confidentiality. Parties might agree on which information will be treated as confidential, decide on appropriate remedies when there is a breach of confidentiality, and the situations when the confidential documents can be disclosed through inserting a confidentiality clause in their agreement.¹⁹ Unlike implied duty principle, which claims duty of confidentiality is implied in the agreement to arbitrate, under expressed duty principle, parties should make a separate confidentiality agreement or put a clause in their agreement to arbitrate to ensure the non-disclosure of their private documents. Otherwise, their right to confidentiality would not be protected because of a lack of explicit indication.

While English legal system is adopting the implied duty of confidentiality, French jurisdiction recognises expressed duty of confidentiality. Moreover, the US and Australian courts accept the private nature of confidentiality even if they reject implied duty principle and claim that there should be a separate confidentiality agreement.²⁰ For example, under Swiss law, which is one of the countries that accept expressed duty of confidentiality, parties should make an agreement, or they should adopt arbitration rules expressly provide confidentiality to keep their documents and the proceedings confidential.²¹ The Swedish Supreme Court's decision in *Bulgarian Foreign Trade Bank Ltd. v. AI Trade Finance Inc.* is a proof of a necessity for an express undertaking for a valid obligation, which held that disclosure is not forbidden and arbitral proceedings are not secret unless parties contract for secrecy.^{22 23}

¹⁹ Supra no 2

²⁰ Klaudia Fábíán, 'Confidentiality in International Commercial Arbitration to Whom Does the Duty of Confidentiality Extend in Arbitration?' (2011, Central European University)

²¹ Supra no 13

²² *Bulgarian Foreign Trade Bank Ltd. v. AI Trade Finance Inc.* Case No: T 1881-99 (Swedish Sup. Ct. 27 Oct. 2000)

²³ Jeffrey W. Sarles, 'Solving the Arbitral Confidentiality Conundrum in International Arbitration' (2008) *18th edn* American Arbitration Association's Annual Volume, ADR & the Law, New York

Under this principle, in order to impose confidentiality on the arbitrator, the arbitral tribunal, and to each other, the parties should show their intention expressly to ensure that their secret documents will be kept confidential. Parties can determine the scope, extent, and duration of the obligation by an agreement provide for confidentiality.²⁴ According to Privy Council in *Aegis*, the purpose behind the duty of confidentiality is solving disputes without disclosing documents to the party with opposing interests to the other.²⁵ ²⁶ Ensuring the right to confidentiality prevents a violation of a party's right through disclosure of documents.²⁷ However, absolute confidentiality is hard to obtain in any jurisdiction because firstly, witnesses have not a contractual duty of confidentiality under the parties' agreement, and they may disclose information to third parties unless the parties agreed otherwise. Secondly, despite the party autonomy, if an award is challenged by a party, a court may involve in the process and request disclosure for a review but disclosed information cannot be published unless the parties agreed.²⁸ In order to obtain absolute confidentiality, the scope of the disclosure should be limited, ex parte examinations by the tribunal and access to party representatives should be restricted which would aggravate the process of solving the dispute.²⁹

Even if it is more reasonable to make an agreement about confidentiality because of a necessity for a binding and uniform rule about confidentiality, some problems may arise. Expressed duty principle gives parties broad autonomy to decide the scope of the disclosure of documents. Therefore, the parties can specifically indicate which documents will not be disclosed with the time and the scope of confidentiality which also can prevent any possibility of the abuse of arbitral discretion, However, usually parties make an agreement to arbitrate before the dispute arises and at that point, they may not know which document will be confidential, or more important, or whether the national court will give priority to confidentiality rather than exceptions namely public policy during recognition and enforcement of the award. Therefore, the provisions about confidentiality may not be adequately detailed and organised without gaps.³⁰ Consequently, even if the applicable law to the dispute requires either implied duty or

²⁴ Kenneth I. Ajibo, 'Confidentiality in International Commercial Arbitration: Assumptions of Implied Duty and a Proposed Solution' (2015) 3(2) Latin American Journal of International Trade Law

²⁵ *Associated Electric and Gas Insurance Services Ltd. v European Reinsurance Co. of Zurich* [2003] 1 WLR 1041

²⁶ 'Confidentiality Arbitration UK Law' (*Bird & Bird*, 2017) <https://www.twobirds.com/en/news/articles/2006/confidentiality-arbitration-uk-law> accessed 13 June 2017

²⁷ *Supra* no 16

²⁸ *Ibid.*

²⁹ *Supra* no 12

³⁰ *Supra* no 24

expressed duty, the right to confidentiality cannot be absolute because of its nature and overriding exceptions. Despite the hard effort of the parties to indicate a clause to their agreement specifying confidentiality or categorise confidential information in a detailed way, there are exceptions where confidentiality may not be protected because of a motive that is more beneficial to protect.

2.3. Exceptions to Confidentiality

The right to confidentiality is a major factor for the parties, who want to protect their reputations and their business secrets, to choose international commercial arbitration as a dispute resolution system. However, while solving the dispute, there might be priority principles that should be considered such as parties' agreement and rules that they have consented, their legal rights, and ethical standards that arbitrators should comply with. These primary rules and principles constitute the limits to the right to confidentiality. After the decision of *Ali Shipping v. Shipyard Trogir*, four exceptions to confidentiality was accepted under English law. Under these exceptions, the disclosure of confidential documents is justified. The necessity of disclosure arises when parties are agreed to disclose information, if there is a court order which requires disclosure, in order to protect or to enforce a party's legal right, and because of public interest.³¹ Under these circumstances, disclosing secret information during the arbitral proceedings is not a breach of confidentiality agreement.

2.3.1. Parties' Consent

International commercial arbitration is based on party autonomy, as the parties commence arbitration proceedings with an agreement to arbitrate, which is the primary source in deciding the scope of confidentiality. Parties usually choose arbitration over litigation because of flexibility, which permits them to lead the proceedings whichever direction they want. For that reason, most of the arbitration rules state 'unless the parties agreed otherwise.' Therefore, as the parties can make a confidentiality agreement, and they can decide which information is going to be treated as confidential, they can also waive this confidentiality and agree to disclose confidential information. Ultimately, parties will decide which information is confidential or

³¹ Supra no 11

not and which document will be released, and they can determine sanctions in the breach of confidentiality. The arbitrator and the tribunal should respect the parties' intentions. Naturally, there might be a reasonable necessity where a judicative authority gets involved, and parties cannot conduct the proceedings in a way that they agreed. This situation mostly occurs when a party seeks to challenge the award and the national court requests documents used in arbitration for a review.

2.3.2. Court Order

Unless the parties agreed otherwise, the principle of confidentiality of arbitration prevents disclosure of documents both to the public and to any third party. However, other than their consent to disclose confidential information, a losing party's will to challenge the award or attempt to prevent recognition and enforcement may result in court involvement by requesting the disclosure of confidential documents related to the case for a review. Other than that, the court should not grant documents in the court file to a stranger who is not a party to the arbitration unless there is an overriding reason under the exceptions to confidentiality.³² Without a reasonable justification, courts should respect party autonomy in protecting confidential documents from disclosure and comply with the duties arising from confidentiality that parties and national and international rules imposed them.³³

2.3.3. A Party's Legal Right

The duty of confidentiality is valid to the extent where a party's legal rights are being violated. Therefore, there should be a balance between the parties' legal rights and the right to confidentiality while deciding whether the documents will be disclosed or not. Disclosure of protected documents is acceptable only if the necessity of accessing the documents outweighs the importance of keeping confidentiality.³⁴ In *Ali Shipping Corp. v. Shipyard Trogir case*, Potter, L.J. stated that; "*disclosure when, and to the extent to which, it is reasonably necessary for the protection of the legitimate interests of an arbitrating party.*"³⁵ Which means in order

³²Confidentiality Arbitration UK Law' (Bird & Bird, 2017) <https://www.twobirds.com/en/news/articles/2006/confidentiality-arbitration-uk-law> accessed 13 June 2017

³³ Alexis C. Brown, 'Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration' (2001) 16 American University International Law Review

³⁴ Supra no 16

³⁵ Supra no 13

to disclose a document, there should be a reasonable assumption that a party's rights are being violated. Additionally, in *Hassneh Insurance Co. of Israel and others v. Mew* case, it was argued that whether the parties may disclose the award to a third party in order to prove their claim to the third party in another court proceeding. The court held that the award could be disclosed despite the duty of confidentiality when there is a reasonable necessity for disclosure in order to protect a party's legal rights.³⁶ Regarding these two cases, it can be assumed that although the right to confidentiality should be protected from disclosure, a necessary and justified disclosure is not considered as a breach of confidentiality. Nevertheless, while protecting one party's legal rights, the other party should not be ignored, and there should be a balance between their rights. In some occasions, disclosure might be necessary not just for protecting or enforcing a party's right but for the public's right to know about the confidential content of the arbitration.

2.3.4. Public Interest

Third party access to confidential documents cannot be permissible unless the parties agreed or there was a reason for the public policy, which overrides the right to confidentiality.³⁷ In some occasions, the public might have a legitimate interest in knowing the substance of an arbitral conflict because of possible effects on public such as shareholders, or consumers. These occasions provide a basis for public interest exception which may arise when there is a legal or moral duty to give information to the public.³⁸

In order to require parties to disclose information under public interest exception, there should be a reasonable necessity and a balance between parties' agreement and public interest.³⁹ Public interest changes from country to country because of different jurisdictions and deciding which issue is under public interest is under the national court's discretion. For example, in the *Commonwealth of Australia v. Cockatoo Dockyard Pty. Ltd* case, a journalist required disclosure of information under the Freedom of Information Act, because of concerns about environmental issues in Cockatoo Island. Australia denied disclosing information because of

³⁶ *Hassneh Insurance Co. of Israel and others v. Mew* [1993] 2 Lloyd's Rep 243

³⁷ 'Confidentiality Arbitration UK Law' (*Bird & Bird*, 2017) <https://www.twobirds.com/en/news/articles/2006/confidentiality-arbitration-uk-law> accessed 13 June 2017

³⁸ Supra no 2

³⁹ Supra no 13

possible adverse impacts on governmental powers. Finally, according to Kirby J. in the Court of Appeals, protection of public health and environment is accepted as a part of public interest.⁴⁰

⁴¹ Therefore, it was held that the material and essential information should be accessible for the protection of these elements under public interest exception because of a reasonable necessity during the assessment of an overriding reason to disclose confidential information.

Consequently, the rationale behind the right to confidentiality in arbitration is private parties' will to resolve their disputes in a private forum only between each other without publication of information about their dispute and media attention.⁴² However, even if the parties want to ensure confidentiality by especially indicating a clause in their main agreement, confidentiality cannot be protected entirely because of various exceptions. These exceptions are public interest considerations, the involvement of national court for enforcement of the awards, involvement of third parties as witnesses, obligation to disclose information either for informing the shareholders in a company or for protecting a party's legal rights.^{43 44} The reason that parties are inserting confidentiality clause in their agreement is their willingness to keep some of their documents confidential during the stages of document production and publication of the award. As the publication of the award is not in this study's scope, criteria of assessing the documents and evidence for a fair document production process will be examined in the next chapter before analysing the powers of the arbitrator during that process.

3. DOCUMENT PRODUCTION IN ARBITRATION

In order to evaluate the limits of arbitrator's discretion to order document production, the scope and standards of document production in arbitration should be examined. Under common law, parties are required to disclose all the helpful and harmful documents during the arbitral proceedings. However, full disclosure might be time-consuming, disproportionate, and costly. On the other hand, in civil law jurisdictions, there is a limited disclosure process, which tends to be cheaper and quicker when it is compared to full disclosure. However, parties may abuse that limited disclosure by concealing harmful evidence, and they may cause an unfair process,

⁴⁰ Joyiyoti Misra and Roman Jordans, 'Confidentiality in International Arbitration. An Inspection of the Public Interest Exception' (2006) 23(1) *Journal of International Arbitration*

⁴¹ *Commonwealth of Australia v. Cockatoo Dockyard Pty. Ltd* [1995] 36 NSWLR 662

⁴² Monique Pongracic-Speier, 'Confidentiality and the Public Interest Exception Considerations for Mixed International Arbitration' (2002) 3(2) *The Journal of World Investment & Trade*

⁴³ *Supra* no 40

⁴⁴ *Ibid.*

which is against the primary purpose of the conduct of arbitral proceedings.⁴⁵ In that occasion, an arbitrator cannot evaluate a crucial element of the case and cannot render a fair award. Additionally, if a party conceals an important document, this can lead to a challenge to the award on the ground of fraud. Consequently, it can be said that party autonomy, which is one of the major advantages of arbitration, can negatively affect the award.⁴⁶

There are two stages of arbitral proceedings namely, fact-finding and application of the law. Findings of the fact are essential in order to apply the law fairly.⁴⁷ In order to achieve the second stage, the first stage is essential which can be obtained through production, collection, and evaluation of evidence. In international arbitration, the first stage of the fact-finding process is document production, which is the subject of this academic study. Arbitrators collect evidence by requesting parties to disclose relevant and material information and by calling witnesses. Moreover, independent and individual experts evaluate the evidence in order to reach a fair conclusion before the arbitrator applies the law. Document production can rely on a party request for supporting the case, or documents may be claimed by the arbitral tribunal.⁴⁸ During the arbitral proceedings, most of the confidential documents can confront with disclosure as evidence to support the case. If the parties have not specific provisions indicating confidential information which cannot be disclosed, they may have a fear of that the more they produce documents, the less confidentiality is being protected. In order to both contribute the resolution of the dispute by valuable documents and keep the secrecy of confidential information, arbitrators should respect technical or commercial confidentiality in document production.

During the document production procedure, IBA Rules are being acted as guidelines rather than being formally adopted as uniform rules.⁴⁹ Document production provisions under IBA Rules are likely to unite different rules of various jurisdictions, promote fair, time and cost-effective

⁴⁵Raffin C, 'Disclosure and Production in Arbitration: Finding The Right Framework' (*Hardwicke*, 2017) <http://www.hardwicke.co.uk/insights/articles/disclosure-and-production-in-arbitration-finding-the-right-framework> accessed 18 June 2017

⁴⁶ He Tiantian, 'Commentary on Award on Jurisdiction and Admissibility of the Philippines-instituted Arbitration under Annex VII to the UNCLOS: A Discussion on Fact-Finding and Evidence' (2016) 2 *The Chinese Journal of Global Governance* 96-128

⁴⁷ *Ibid.*

⁴⁸ Reto Marghitola, *Document Production in International Arbitration*, International Arbitration Law Library, Kluwer Law International 2015

⁴⁹ Nathan D. O'Malley, 'The Procedural Rules Governing the Production of Documentary Evidence in International Arbitration - As Applied in Practice' (2009) 8 *The Law and Practice of International Courts and Tribunals* 27-90

dispute resolution process. However, these rules are not binding, and they do not determine the limits of arbitral discretion to order document production. To protect evidence from being denied, there should be limitations on arbitrators' discretion in assessing the evidence, and parties should not be obliged to produce lost, destroyed, privileged and confidential document.⁵⁰ In order to protect sensitive information such as trade secrets, a formula of a company's main product or other confidential information about the business, the tribunal may take procedural measures by setting binding rules of confidentiality.⁵¹

3.1. Requirements for Admissibility of the Evidence

Another point that should be mentioned under the scope of document production is the admissibility of the evidence. If the evidence is inadmissible, the arbitrator cannot accept the production of that material. That means the arbitrator cannot order parties to produce confidential documents, which is one of the admissibility standards. In this dissertation, the main argument is whether the confidentiality is a limit for arbitral discretion during the document production stage. Under the requirements for admissibility of the evidence, technical and commercial confidentiality is a ground for rejecting the production of the requested material. Therefore, it can be assumed that if arbitrators cannot require the production of a confidential material because of acceptability, admissibility of evidence can be defined as an inherent limitation on the arbitrator's discretion to order document production because of the confidentiality factor.

Even if the parties are obliged to produce all the documents which are related to the case either they are harmful or useful to their claim, there are some limitations to the document production regarding the right to confidentiality. A party is not entitled to produce all the records in its custody unless they are material and relevant to the case. Hence, while assessing the document production request, tribunals should take some criteria into account, which may result in inadmissibility of the material and exclusion of the documents from the proceedings which may lead to a violation of a party's right to present its case if those criteria have not been implemented accurately. Requested documents should be explicitly described by the requesting party with an explanation of their purpose of usage and relevance to the case to prevent delays, excessive

⁵⁰ Art 9(2) IBA Guidelines

⁵¹ Supra no 49

costs, and fishing expeditions in civil law jurisdictions.⁵² A party cannot seek production of certain documents such as, already in its custody, correspondence, public records which everyone can access, and if accessing the document is not an unreasonable burden for the requesting party.⁵³ Furthermore, there should be reasonable assumption that these documents are in possession of the requested party, or there should be a possibility of unreasonable burden to produce documents for the requesting party.

Some of the required documents might be privileged which cannot be subject to document production. The arbitral tribunal should respect the privileged documents and confidential communications. Privileged documents allow parties to refuse disclosure of information even though it is relevant to the case.⁵⁴ For example, under attorney-client privilege, some documents and communications between a party and its representative are confidential and privileged. An attorney has a professional obligation to keep those records confidential and not to disclose them as long as he represents the party.⁵⁵ The most common approach while defining the applicable law to privileges is to choose the law which has the closest connection with the privileged documents. (i.e. the place of communication between the attorney and client, the law of the place where the document exists, or the law of the home jurisdiction of the party claims the documents are privileged.)⁵⁶

The arbitrator must prevent parties to use procedural rules in an abusive way and to protect the integrity of the tribunal. Therefore, under equality of arms principle, both parties should be able to present their case and to receive legal advice and assistance. In the scope of equality of arms principle, tribunals might take appropriate precautions in order to prevent parties to benefit from evidence illegally or unethically.⁵⁷ If a party obtains evidence illegally, this will cause a disadvantage for the other party, and it is against the equality of arms principle. Further, the production of that evidence will be subject to a rejection under Article 9(2)(c) IBA Rules, if it causes an unreasonable, non-proportional burden, or it is against fairness and equality.⁵⁸ Each

⁵² Art 21(4) ICDR Arbitration Rules

⁵³ Supra no 48

⁵⁴ Konstantin Pilkov, 'Evidence in International Arbitration: Criteria for Admission and Evaluation' (2014) 80(2) Arbitration available at <http://arbitration-blog.eu/evidence-international-arbitration-criteria-admission/> accessed 11 July 2017

⁵⁵ Art 22 ICDR Arbitration Rules

⁵⁶ Supra no 49

⁵⁷ Ibid.

⁵⁸ Art 9(2)(c) IBA Rules

party should be equally treated which means they should have the same procedural standards and opportunities.⁵⁹ However, this does not mean that the parties should have exactly the same rights. For example, gathering information and evidence by using political influence is against this principle and violates the other party's right to have a fair procedure. In order to prevent this violation, the evidence which was collected unfairly should be excluded from the proceedings.

In conclusion, even if arbitrators' discretion during the conduct of the proceedings is broad, there are limitations to their power in order to ensure a party's legal rights, confidentiality principle, and to increase the chance of rendering a fair award which will not be subject to an annulment. Arbitrators should use their discretion in document production wisely without ignoring the right to confidentiality. For example, if a party holds a confidential document that he does not wish to produce as evidence, he may request the arbitrator to exclude the evidence. However, if the arbitrator excludes the evidence without a reason when a party is under a burden of proof for its claim or defence, and he could not achieve this because of the exclusion of evidence, then the arbitrator would have exceeded his discretion.⁶⁰ Thus, while assessing the evidence, exceptions to confidentiality, reasons for the exclusion of evidence, the law of the seat, the applicable law and international arbitration rules should be considered in harmonisation by the arbitrators to prevent any gaps in deciding which rule is more accurate for the situation.

4. ARBITRATOR'S AUTHORITY AND LIMITS

Arbitral discretion in document production can be used for determining the appropriate measures in the absence of a certain rule, under the arbitrator's experience and expertise. The ability of the arbitrators to tailor the appropriate measures to the situation by their broad discretion in document production can fulfil the parties' expectations to obtain an efficient platform for their disputes. However, unfettered arbitral discretion carries a risk for a failure in the conduct of a fair procedure without exceeding the arbitrator's power. The possibility of an abuse of power may cause misvaluation of the evidence or oversight of an important document which leads to a violation of the right to present one's case. In another case, if the arbitrator

⁵⁹ Supra no 49

⁶⁰ Peter Wahlgren, *Procedural Law* (Stockholm Institute for Scandinavian Law 2007) Patricia Shaughnessy, 'Dealing with Privileges in International Commercial Arbitration'

exceeds its power by breaching the parties' agreement, and orders a document which is determined as confidential by the parties, arbitral discretion cannot be as beneficial as it was expected to be. The primary research objective of this dissertation is to find an answer to the questions whether the right to confidentiality can be one of the limitations of the arbitrator's discretion and limiting arbitrator's authority is a method for protection of confidentiality in the latter case.

While judges take their powers from the law, arbitrators take their powers from parties, and they are bound both by the parties' agreement, by the laws and jurisdiction which parties have chosen by their consent. Parties' expectations when they select the arbitrator is to obtain a neutral and fair adjudicative dispute resolution process with an independent legal analysis in order to improve the legitimacy of international arbitration.⁶¹ Therefore, arbitrators' main limit to their power is parties' arbitration agreement because of the party autonomy principle, and if the parties indicated a confidentiality clause in their agreement, arbitrators should comply with it.

Arbitrators have two functions namely, adjudicative and administrative functions. Under adjudication function, arbitrators decide by evaluating evidence produced by the parties. Under administrative role, while applying the law to the fact and using their discretion, arbitrators should manage the dispute resolution equally and efficiently.⁶² Arbitral discretion can be determined as an inherent power to protect the integrity of the proceedings and to conduct them expeditiously and efficiently. During document production process, arbitrators have broad discretion about the appropriate procedural measures.⁶³ Arbitrators' powers derive from parties' agreement to arbitrate, and that agreement acts as a barrier to their discretion. When there is no choice of applicable law to the dispute is determined by the agreement, or matter is not covered by the arbitration rules, an arbitrator is entitled to make an interpretation and fill the gap according to the situation. Further, he is free to follow a procedure whichever he sees appropriate because of the lack of uniform rules determining the framework of his discretion.⁶⁴

⁶¹ Susan D. Franck, 'The Role of International Arbitrators', (2006) 12 ILSA Journal of International & Comparative Law

⁶² Ibid.

⁶³ Section 34(1) Arbitration Act

⁶⁴ Julian D. M Lew, *Contemporary Problems in International Arbitration* (M Nijhoff 1987) Ch 6: Sigvard Jarvin, 'The sources and limits of the arbitrators' power'

The rationale behind the arbitral discretion is effective case management.⁶⁵ The impact of discretion on effective case management can be seen in the *Himpurna California Energy Ltd v Indonesia*. In that case, Republic of Indonesia kept a co-arbitrator at the airport in Amsterdam in order to prevent him from participating in arbitral proceedings. The other arbitrators then, decided that a ‘truncated tribunal’ can render an award by interpreting the UNCITRAL Arbitration Rules owing to their discretion.⁶⁶ However, while modifying and interpreting the arbitration rules under its discretion, the arbitrator should consider parties’ agreement and comply with the minimum standards of a fair procedure which is also supported by the decision in *Abaclat and others v. the Argentine Republic*.⁶⁷

In order to fulfil their responsibilities, arbitrators should respect parties’ demands while conducting the proceedings through their independent legal judgement, should treat parties equally and give them a chance to present their case. Otherwise, the award can confront with annulment based on a serious departure from a fundamental rule of procedure.⁶⁸ As the source of arbitrators’ power is the parties’ agreement, the limit of this power is also parties’ agreement. Determining the scope of that limitation by specific provisions about document production phase and evidentiary issues is in the parties’ hands. Arbitrators primary duty is to consider parties’ expectations. These expectations include confidentiality which can be accepted one of the limits of arbitrators’ powers.

4.1. Confidentiality as a Limit

While drawing a framework for the arbitral discretion in document production process, confidentiality might be a tool. For that purpose, the scope of confidentiality must be determined. However, there is a lack of certain, uniform, and binding laws and arbitration rules about protection of the right to confidentiality. A certain rule is essential to determine the difference between the terms confidentiality and privacy because parties may assume that the private nature of arbitration, provides confidentiality automatically for their secret information. Even their choice of law adopts implied duty of confidentiality, in order to secure the

⁶⁵ Morales E and others, ‘Annulment Archives – Kluwer Arbitration Blog’ (*Kluwer Arbitration Blog*, 2017) <http://kluwerarbitrationblog.com/category/annulment/> accessed 20 June 2017

⁶⁶ *Himpurna California Energy Ltd v Republic of Indonesia* (1999)

⁶⁷ *Abaclat and others v. the Argentine Republic*, ICSID Case No: ARB/07/05 2011

⁶⁸ Christoph H. Schreuer and others, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009)

confidential information from the risk of disclosure, it is advisable to have a confidentiality agreement specifying disclosure standards or categorizing confidential documents.

Arbitrators have duties to treat the parties equitably and impartially and to protect confidential information relevant to the case.⁶⁹ Under Article 9(2) (e) of IBA Rules, document production can be limited due to technical or commercial confidentiality.⁷⁰ To be able to limit document production, the confidential document must be so important that it cannot be expected to be disclosed and the tribunal can take appropriate measures to protect the confidentiality of the documents from disclosure.⁷¹ If arbitrators do not comply with the principle of confidentiality, and they cause damage because of non-compliance, they could be held liable. Therefore, it can be said that arbitrators can use their discretion to the extent the violation of the right to confidentiality. Nevertheless, the duty of confidentiality is to both parties and arbitral authorities. Therefore, if a party breaches the duty of confidentiality during the document production phase, arbitrators have the authority to issue protective orders upon party request in order to limit disclosure and protect confidentiality. Also, during the arbitral proceedings, parties may authorize the arbitrator to take interim measures if there is an actual or potential damage because of a disclosure.⁷² On the other hand, strict protection of confidentiality may cause complications where there are several parties and arbitrations related to each other. Keeping information secret from each party through separate confidentiality clauses would be difficult for time-effectiveness of the dispute resolution process and would create inconsistent results.⁷³

To conclude, in order to limit arbitrator's discretion, parties should not leave a gap about confidentiality to prevent the arbitrator to find an opportunity to interpret; however, there is no guarantee of an exception would occur. If there is an exception to confidentiality such as public interest, parties will not be able to protect their right to confidentiality and preclude the overriding necessity for disclosure. However, with strict precautions and confidentiality agreements with detailed provisions would help to prevent the possibility of the violation of confidentiality through abuse of power in document production phase.

⁶⁹ Supra no 33

⁷⁰ Art 9(2)(e) IBA Guidelines

⁷¹ Art 9(4) IBA Guidelines

⁷² Supra no 12

⁷³ Supra no 33

4.2. Parties' Expectations as a Limit

One of the determinants to choose arbitration for the parties is that experienced arbitrators, who can tailor the rules to the situation, will render a decision in favour of them and ensure enforcing their rights within a neutral and efficient platform.^{74 75} Parties can determine the rules in proceedings, applicable rules and the law of the arbitration through their agreement to arbitrate.⁷⁶ Thus, while arbitrators are fulfilling their duty in arbitral proceedings, they must respect to parties' expectations because of party autonomy and freedom of contract principles in international arbitration.

Arbitrators should ensure the balance between requirements of the parties and the demands of justice. The primary duty of arbitrators during the conduct of the proceedings applying the procedural rules with using their discretion without being negligent to the parties' agreement and standards established by them, their legal rights, and due process. The reputation of international arbitration depends on qualified and experienced arbitrators.⁷⁷ If the arbitrators exceed their power and abuse their broad discretion without respecting parties' expectations, they can confront with an annulment of the award which is another limitation of their authority.

4.3. Challenging the Award Based on Arbitrator's Wide Discretion to Order Document Production

Unless the parties have agreed otherwise, arbitrator's discretion is limited by party autonomy and the right to a fair hearing. If the arbitrator excludes evidence without a reasonable justification through abusing his power, fails to satisfy the expectations of the parties under their agreement, or exceeds his discretion by not complying with the parties' agreement while applying the rules, the award can be set aside or can be confronted with non-enforcement under NY Convention. Arbitrators are bound by ethical duties, arbitration rules, and parties' agreements which may contain confidentiality clauses. Arbitrators should respect the right to confidentiality of parties, but this does not mean that the parties are free to conceal or not to

⁷⁴ L. Yves Fortier, 'The Minimum Requirements of Due Process in Taking Measures Against Dilatory Tactics: Arbitral Discretion in International Commercial Arbitration – "A Few Plain Rules and a Few Strong Instincts"' (1999) Kluwer Law International ICCA Congress Series no. 9 396-409

⁷⁵ Art 17(1) UNCITRAL

⁷⁶ Supra no 48

⁷⁷ Supra no 74

produce essential evidence for the case without a solid proof of confidential document.⁷⁸ If arbitrators violate their contractual duty to provide confidentiality, they could be held liable, and if the parties make agreements about procedural rules in order to limit the arbitrator's authority, non-compliance with these provisions will result in the challenge of the award.⁷⁹⁸⁰ Moreover, during enforcement proceedings under Article V of NY Convention, if the arbitrator is in the breach of parties' agreement, parties might try to prevent recognition of the award on the ground of arbitrator's misconduct.⁸¹

In order to prevent the potential for failure to use discretion appropriately, the importance of professional reputation in the arbitration marketplace can have a significant impact. Furthermore, the possibility to be held personally responsible for damages related to a failure to conduct the proceedings under the required standards may guarantee proper behaviour. Additionally, specific institutional rules can be established to guide arbitrators for appropriate conduct.⁸² In the end, in order to prevent rejection of recognition and enforcement of the award under Art V (1)(b) NY Convention, arbitrators should ensure that each party is being treated equally and they have the chance to present their case by counsel to an impartial and neutral tribunal.

5. THE RIGHT TO CONFIDENTIALITY AND PRESENTING ONE'S CASE

As discussed in previous Chapters, in international arbitration, arbitrators should use their discretion wisely and remain respectful to the parties' agreement and their confidentiality clause with harmonisation of the applicable law that parties' have chosen, the national legislation, and common arbitration rules such as UNCITRAL Arbitration Rules or NY Convention. Because of the broad discretion that arbitrators have, they have a difficult task to protect a party's rights and fulfil its expectations without violating the other one's rights.

⁷⁸ Supra no 60

⁷⁹ Elliott Geisinger, *Confidential and Restricted Access Information in International Arbitration* (JurisNet 2016) Ch 5: Martin Bernet and Benjamin Gottlieb, 'Confidential and Restricted Data in the Award: How Do Arbitrators Draft Awards without Breaching Confidentiality or Restrictions?'

⁸⁰ Supra no 60

⁸¹ Art V(1)(d) NY Convention

⁸² Supra no 61

While the arbitrator is using his discretion in conducting the proceedings, he should guarantee due process, equal treatment, and fairness by giving a reasonable opportunity to each party to present their case in order to prevent delays.⁸³ ⁸⁴ Equal treatment does not mean that all the parties should have the same rights, but it means while protecting one party's legal rights, not to ignore the other one's rights and not to give an advantage to one party over another. If the parties have not made any agreement about the procedural rules, the arbitrators will have to decide the admissibility of the evidence and which document will be produced without violating a party's right to present its case and right to have equal treatment. For example, protecting one party's right to confidentiality by rejecting document production request may violate the other party's right to present its defence or claim if those documents are essential to support the case which constitutes a ground for a challenge to the award under common law.⁸⁵ Moreover, that behaviour may give an unfair advantage to one party over another party and cause unfairness because access to information can be accepted in the scope of the right to present one's case. If one party has absolute confidentiality, that would be against the equal treatment principle. Nonetheless, even if the parties have the freedom to present their case under Article 19(2) of UNCITRAL Model Law and access to information can be accepted as the right to present one's case, this does not mean that the extent of document production request will be limitless and every request will be accepted. On the contrary, if a production of a specific document will cause a procedural unfairness, the arbitrator may limit the access to that document even if the material is a crucial evidence for the decision.⁸⁶ Consequently, in that situation, confidentiality is overridden by the duty of arbitrator to ensure a fair procedure. Therefore, arbitrators should be able to keep the right balance between the interests of the parties in order to preserve efficiency and fairness.

If the arbitrator could not conduct the arbitral proceedings in compliance with the parties' agreement, the losing party may seek for annulment of the award on the ground for violation of the right to equal treatment, or violation of procedure upon by parties. For example, if the exclusion of evidence, which was against the parties' intentions, has caused a party to lose its case because of inability to present its defence/claim, this is a ground for annulment of the

⁸³ Supra no 74

⁸⁴ Art 17(1) UNCITRAL

⁸⁵ Elvis C. Stephens, 'Why Courts Overrule Arbitrators' Awards' (1985) Labor Law Journal

⁸⁶ *Australian Postal Commission v. Hayes* (1989) 87 ALR 283 available at <https://jade.io/t/home> accessed 11 July 2017

award.^{87 88} Furthermore, under NY Convention, enforcement of the award can be rejected if the arbitral procedure did not comply with minimum standards of due process.

It can be said that arbitral process is quicker than the court proceedings in litigation. However, in order to resolve the dispute quickly, the arbitrators should not neglect fairness and justice while conducting the proceedings and they should not limit or prevent the opportunity for the parties to present their cases. For example, same opportunities should be given to each parties' witnesses, and parties should be informed about all the points discussed in the hearings. In *Australian Postal Commission v. Hayes*, it was claimed that in the scope of the right to present one's case, the parties should be able to access all the documents during the document production stage and they should be able to inspect the opposing party's documents through cross-examination.⁸⁹ At that point, while trying to give the parties an opportunity to present their case, confidentiality should not be ignored and violated through disclosure of all documents without considering the parties consent to the extent of document production procedure.

In order to ensure parties' fair opportunity to present their case, dividing the consecutive days of the hearings into sets can be a solution instead of waiting for the parties to get prepared for the long hours of hearings which would be a high burden. Furthermore, time limits for oral hearings and exclusion of irrelevant evidence in order to avoid waste of time give both parties equal opportunities to present their cases.⁹⁰ Establishing binding and strict rules is not beneficial at that point because facts are different in every case and arbitrators should tailor the situation in order to keep the right balance between the rights and interests of the parties. In order to provide a balance between these rights, the parties have no choice other than trusting in the arbitrator's experience and that he is going to use his discretion appropriately and equitably with acknowledging the vital importance in providing a reasonable opportunity to be heard and present one's case.⁹¹

⁸⁷ Supra no 48

⁸⁸ Article 34(2) of UNCITRAL Model Law

⁸⁹ *Australian Postal Commission v. Hayes* (1989) 87 ALR 283

⁹⁰ Supra no 1

⁹¹ Ibid.

6. CONCLUSION

From the Chapters above cited, some conclusions should be addressed regarding the research questions. As it was mentioned in Introduction, the main point of that study is to find whether arbitrators' discretion in document production stage can be limited by confidentiality. In order to achieve that goal, firstly, the source and the scope of confidentiality was carefully determined. However, while examining the regulation, it was seen that there is a lack of binding, specific arbitration rules and national protective laws about the duty of confidentiality that the arbitrators and the parties can follow. Even if the arbitral proceedings are primarily conducted by the parties' agreement, parties may not always have the expertise to indicate and determine the scope of the duty, and that may cause ambiguity. Although there are common rules such as UNCITRAL Arbitration Rules and Model Law, if the parties have not chosen an applicable law for their dispute, filling the gaps through the law of the seat and arbitrator's discretion can damage the party autonomy and the right to confidentiality. As it was discussed in Chapter 2, there are different jurisdictions which accept the source of confidentiality differently, namely, either express or implied. Because of these differences between various jurisdictions, the issue of whether confidentiality is implied or expressed should be determined by certain rules in order to prevent possible confusion in distinguishing the private nature of the arbitral proceedings from confidentiality. Nevertheless, the establishment of necessary and defining rules should not preclude the flexibility of international arbitration, and destroy the confidence in the appropriate measures for protecting confidentiality.

After the importance of establishment of defining rules about confidentiality was emphasised in Chapter 2, it was essential to evaluate the borders of the arbitrator's discretion in document production phase in Chapter 4. Even if the arbitrator's wide authority may contribute to the dispute resolution process in the case of a crisis such as in *Himpurna California Energy Ltd v Indonesia*, if the arbitrator does not use that power properly and in compliance with the parties' agreement, a fair procedure cannot be obtained and this may damage the arbitral process and the final decision. Because of the lack of uniform rules including confidentiality and arbitral discretion during the document production process, drawing the framework of the arbitrator's power is also not simple. Arbitration agreement and national laws of arbitrator's jurisdiction can be accepted as the major frameworks of the arbitrator's discretion. Therefore, if the parties indicated confidentiality clause in their agreement, arbitrators should comply with it. Under this duty of compliance, which was stated in Section 3.1., requirements for the admissibility of the

evidence can be considered as an indirect limit to the arbitral discretion, especially because of producing a confidential document is the reason for a rejection of the evidence. The arbitrators neither can reject evidence without a justifiable reason nor order production of a confidential document by breaching the parties' will to ensure confidentiality. In the scope of confidentiality as a limit to arbitral discretion throughout Section 4.1., it was argued that in order to limit arbitrator's discretion, confidentiality provisions must be precise and should indicate which documents will be subject to document production to determine the exact limits of the arbitrator's powers. Moreover, parties should not leave a gap about confidentiality that arbitrators can interpret, however, there is no guarantee of an exception would occur. If there is an exception to confidentiality such as public interest, parties may not be able to protect their right to confidentiality. Despite everything, with the help of strict precautions and confidentiality agreements with detailed provisions, the possibility of violating confidentiality by abuse of arbitral power in document production phase can be prevented.

Under the scope of this dissertation, answering the question 'To what extent confidentiality should be protected?' was controversial. One of the exceptions to confidentiality, which is protecting a party's legal rights that includes the right to present one's case, was examined in Chapter 2. That exception has the potential to override confidentiality and make the disclosure of confidential information legit. In the scope of the right to present one's case, in Chapter 5, it was argued that rejection of a document production request by an arbitrator means also preventing the opportunity for a party to present its case. However, if the arbitrator accepts disclosure of a confidential document in order to grant the opportunity to present one's case, the other party's right to confidentiality will be violated. What if a party abuses that exception to confidentiality in order to win the case by claiming that he could not present his case because of the confidential material that has not been disclosed? How should this exception be applied while deciding whether the right to confidentiality or the right to present one's case is more important? In that occasion, even if one party's right to confidentiality can be protected to the extent the other party's rights are being violated, confidentiality should not be automatically overridden. In order to obtain a fair and efficient arbitral process, all the elements of the condition should be considered, and the good faith of the claimant should be investigated before deciding which party's right will override the other's. According to the argument discussed in Chapter 5, the arbitrator should redress the right balance between the parties' rights and that requires expertise and experience which the reputation of international arbitration depends on as it has stated at the end of Section 4.2. While trying to achieve that balance, arbitrators should

consider relevant provisions in the parties' agreement, applicable law, national legislation, common arbitration rules, and ethical rules which are determined as arbitrators' duty in Section 4.3.

In conclusion, regarding the arguments and thoughts are given in this dissertation, confidentiality can be protected by establishing binding, uniform, certain rules, by limiting the unfettered arbitral discretion to a certain degree, and by balancing the rights of the parties without violating their right to confidentiality. Nevertheless, in the end, as it was supported in Section 2.2., it is a known fact that the right to confidentiality cannot be absolute under any circumstance, and during the recognition and enforcement process or in the attempt of a challenge of the award, the right to confidentiality might be undermined by public policy.⁹² However, even if there are exceptions that require court involvement, and justified disclosure of confidential documents, as it was explained in Section 4.1. in detail, if parties have drafted their confidentiality provisions carefully, have decided to the extent of the protection of confidentiality and the law of a country which will be applied for the protection, the possibility of damage is more likely to be mitigated.⁹³

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⁹³ Supra no 33

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