

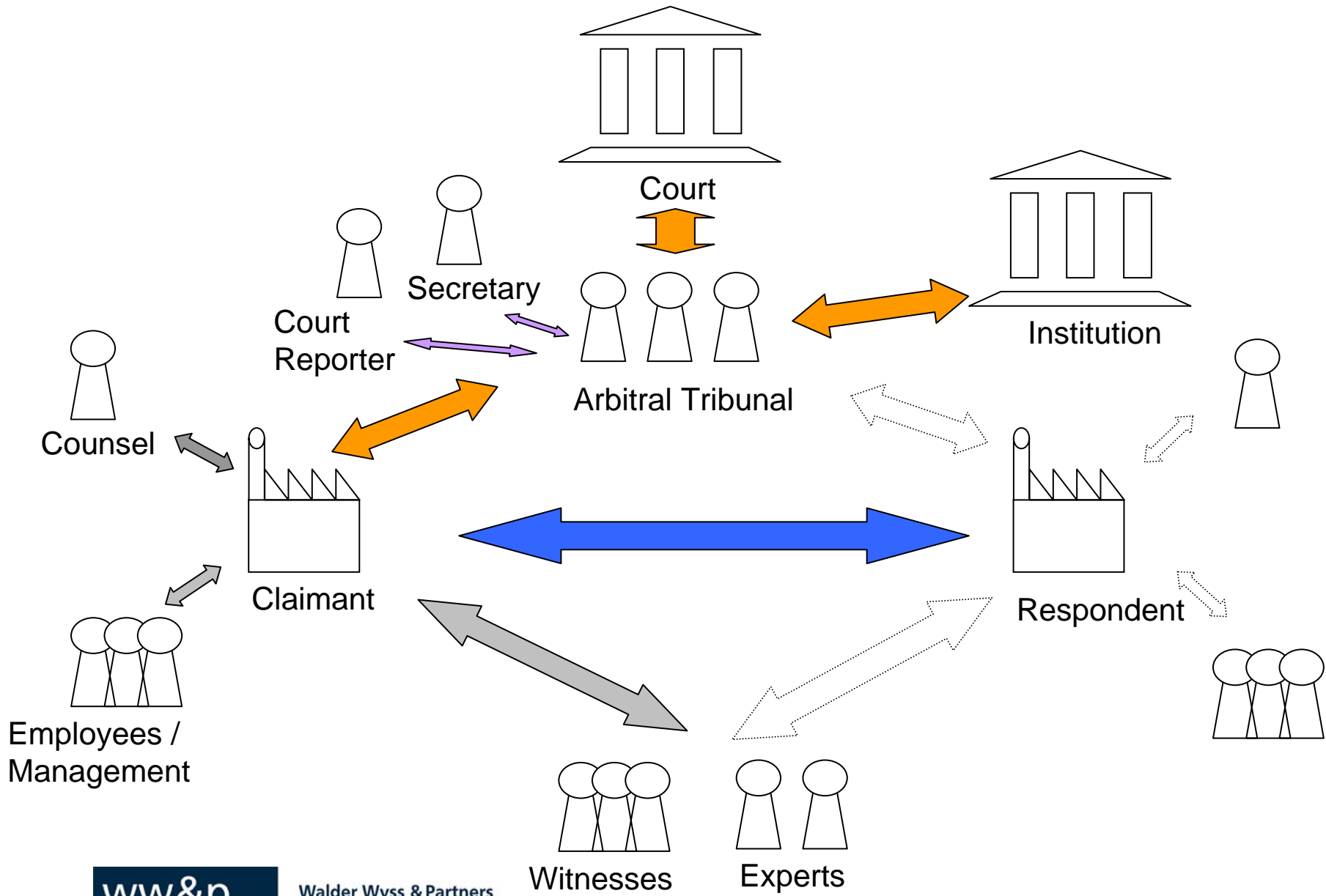
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# **ASA below 40 Seminar - Geneva 2008**

## **CONFIDENTIALITY IN INTERNATIONAL ARBITRATION**

### **“SOURCES OF CONFIDENTIALITY”**

**Michael Cartier**



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# Sources of Confidentiality Obligations

- Contractual Obligation
- Lex Arbitrii
- Arbitration Rules
- Others?

# Contractual Confidentiality Clauses

*„Licensor shall hold confidential all information related to the product and refrain from disclosing or using such information for any other purpose other than the distribution of the product“*

*„The parties shall hold this agreement and all aspects concerning this agreement as confidential“*

# Lex Arbitri (I)

Country	Arbitration Act/Case Law/Doctrine
Switzerland	<p><b>No provisions on confidentiality</b> in Chapter 12 PILS</p> <p><b>General view that:</b></p> <ul style="list-style-type: none"> <li>- <b>arbitrators are subject to confidentiality</b> by accepting mandate</li> <li>- <b>AT deliberations are private</b> (Issue mentioned in DFT 12.11.1991 (4P.61/1991) [ASA Bull. 1992, p. 264])</li> <li>- <b>mere existence of arbitral proceedings not as such subject to confidentiality</b></li> <li>- <b>documents, correspondence</b> produced for purpose of arbitration or under production order <b>should be subject to confidentiality</b></li> <li>- <b>AT must treat the award confidential,</b></li> </ul> <p><b>No prevailing opinion</b> whether <b>parties</b> are also required to treat the <b>award confidential</b> (Parties cannot waive the publication of appeal decision, merely anonymization possible in DFT 10.12.2002 (4P.207/2002) [ASA Bull. 2003, p. 585])</p>
UK	<p><b>No provisions</b> on confidentiality in Arbitration Act</p> <p><b>Prevailing case law:</b></p> <ul style="list-style-type: none"> <li>- in favour of: the <b>privacy of hearings</b> (Eastern Saga)</li> <li>- in favour of: <b>confidentiality as an implied duty</b> (Ali Shipping v. Shipyard Trogir)</li> </ul>
Australia	<p><b>No provisions</b> on confidentiality in Arbitration Act.</p> <p><b>Leading case:</b></p> <ul style="list-style-type: none"> <li>- <b>no implied confidentiality</b> since confidentiality is not an essential attribute of private arbitration (Esso v. Plowman)</li> </ul>

## Lex Arbitrii (II)

Country	Arbitration Act/Case Law/Doctrine
France	<p><b>No provisions</b> on confidentiality in Civil Code (except if parties have agreed on French law AT deliberations take place in camera).</p> <p><b>Prevailing case law:</b></p> <ul style="list-style-type: none"> <li>- <b>in favor of confidentiality</b> due to arbitration being a private procedure with a confidential nature (Aïta v. Ojeh).</li> </ul>
Sweden	<p><b>No provisions</b> on confidentiality in Arbitration Act.</p> <p><b>Leading case:</b></p> <ul style="list-style-type: none"> <li>- <b>No legal duty</b> of confidentiality flows implicitly from or is inherent in an arbitration agreement (Bulbank v. AIT).</li> <li>- <b>in favor of privacy</b> of arbitral proceedings (Bulbank v. AIT).</li> </ul>
USA	<p>No provisions on confidentiality in Federal Arbitration Act</p> <p><b>Tendency of courts:</b></p> <ul style="list-style-type: none"> <li>- <b>No implied duty</b> of confidentiality stating confidentiality must be contracted (United States v. Panhandle E. Corp.).</li> </ul>
New Zealand	<p><b>Comprehensive provisions</b> on confidentiality in Arbitration Act.</p> <ul style="list-style-type: none"> <li>- <b>general principle of confidentiality</b> in arbitration proceedings (with exceptions for disclosure)</li> <li>- general principle that court proceedings are public (with exceptions for private conduct)</li> </ul>

# Arbitration Rules (I)

<b>Institutional Rules</b>	<b>Who is subject to confidentiality obligations?</b>	<b>What is subject to confidentiality</b>	<b>Proceedings and Deliberations</b>	<b>Award</b>
<b>Swiss Rules</b>	Parties, arbitrators, tribunal-appointed experts, the secretary of the AT and the chamber [Art. 43 (1)]	Awards, orders as well as all materials submitted by another party [Art. 43 (1)]	AT deliberations are confidential [Art. 43 (2)]	Publication only upon request, anonymization and no objection of the parties [Art. 43 (3)]
<b>ICC Rules</b>	ICC Court [Art. 1 (3) Internal Rules of the Intl. Court of Arbitration]	AT may take measures for protecting trade secrets and confidential information [Art. 20 (7)]	Parties not involved in arbitration are not admitted to hearings [Art. 21 (3)], Work of the ICC Court is confidential, sessions are private [Art. 6 Statute of the Intl. Court of Arbitration; Art. 1 Internal Rules of Intl. Court of Arbitration]	ICC Court may authorize researchers to acquaint themselves with awards [Art. 1 (4 and 5) Internal Rules of Intl. Court of Arbitration]

## Arbitration Rules (II)

Institutional Rules	Who is subject to confidentiality obligations?	What is subject to confidentiality	Proceedings and Deliberations	Award
<b>LCIA Rules</b>	Parties [Art. 30.2], LCIA Court [Art. 30.3]	All awards, all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party [Art. 30.1]	AT deliberations are confidential [Art. 30.2], All meeting and hearings are private unless parties agree or so directed by AT [Art. 19.4]	Publication only upon prior written consent of parties [Art. 30.3]
<b>UNCITRAL Rules</b>	-	-	Hearings shall be held in camera unless the parties agree otherwise [Art. 25 (4)]	Award may only be made public with consent of the parties [Art. 32 (5)]

# Arbitration Rules (III)

Institutional Rules	Who is subject to confidentiality obligations?	What is subject to confidentiality	Proceedings and Deliberations	Award
<b>ICSID Rules</b>	Arbitrators [Rule 6 (2)]	All information coming to the knowledge of the arbitrator in course of the proceedings and contents of any award [Rule 6 (2)]	AT deliberations are confidential and private (Rule 15), Registration of all requests for arbitration are published [Rule 22 (1) Admin. & Financial Regulation)	Full wording published only with consent of the parties [Rule 22 (2) Admin. & Financial Regulation), Absent consent excerpts of legal reasoning will be published [Rule 48 (4)]
<b>IBA Rules on Taking Evidence</b>	AT and parties [Art. 3 (12)], expert to determine relevance of documents [Art. 3 (7)]	All documents produced by a Party (or non-party) pursuant to Rules [Art. 3 (12)], AT may issue orders setting forth this obligation. [Art. 3 (12)], AT may arrange suitable confidentiality protection [Art. 9 (3)]	In exceptional circumstances documents are even confidential from the AT (special expert to review) [Art. 3 (7)]	-

# Agreement on Confidentiality (I) (e.g. TOR)

- Existence, conduct and content of the arbitral proceeding
- Confidentiality of all products of the evidentiary proceedings, e.g. witness testimony, expert testimony, inspections
- Confidentiality of all other information that were used in the proceedings or are otherwise related to the proceedings, e.g. pleading notes, protocols, TOR, correspondence with the AT, the arbitral institution and the opposing party
- Confidentiality of all orders and awards of the AT
- Confidentiality of the award

## Agreement on Confidentiality (II) (e.g. TOR)

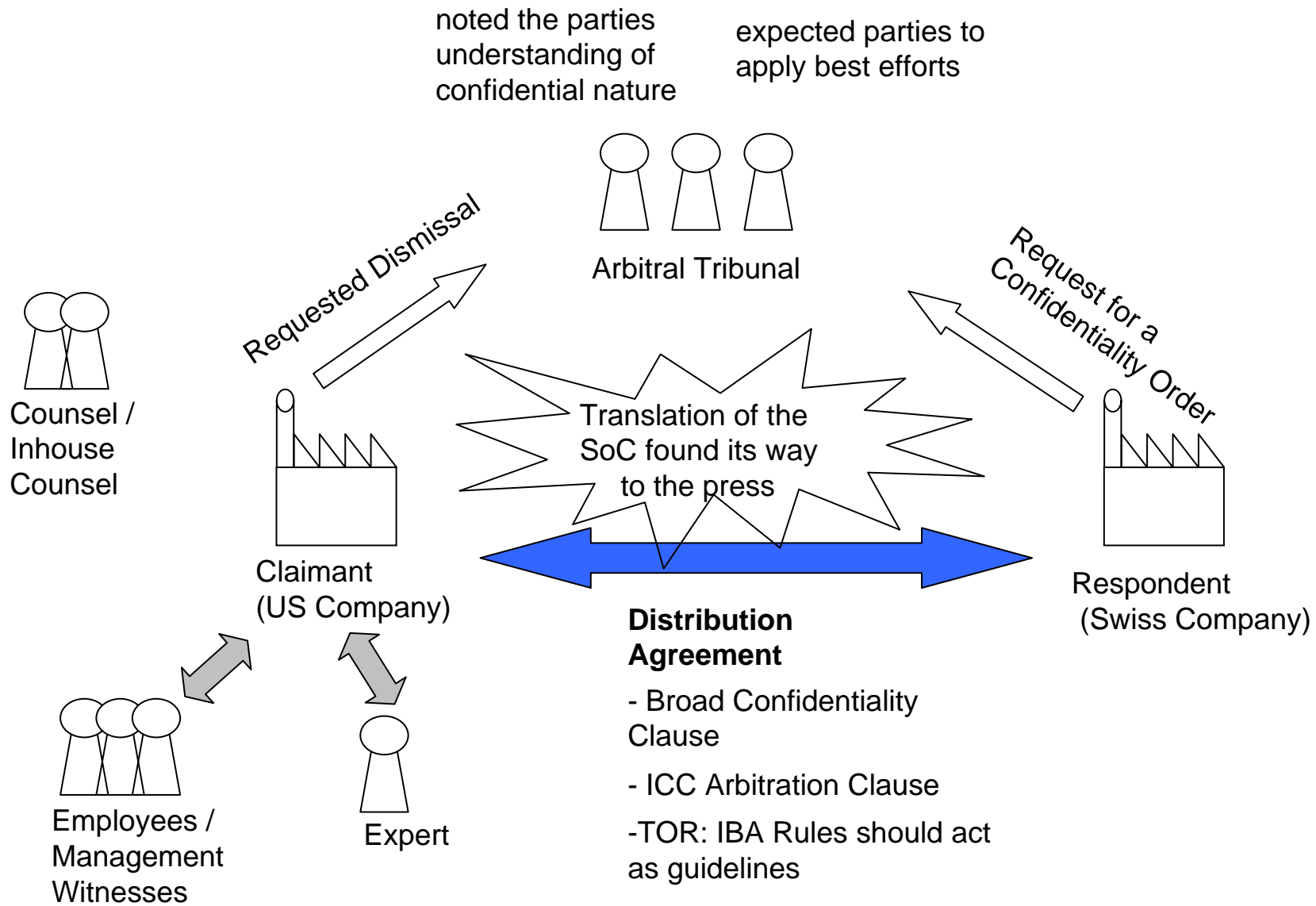
- Prohibition of the publication of the award or the publication only in anonymized form
- Listing of the exceptions of the confidentiality obligation
- Security measures to ensure the confidentiality of e-mail correspondence and/or hearing rooms etc.
- Potentially an agreement on a contractual penalty in case of a breach
- Jurisdiction of the AT to adjudicate breaches of confidentiality both during and after completion of the arbitration proceedings
- Choice of law for confidentiality obligations

## Can the AT order Confidentiality?

- Some Arbitration Rules allow the AT to order measures (ICC, IBA Rules)
- Other competence?

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# Practical Example



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## Additional Material

- List of Literature
- Examples/Comparison of Institutional Confidentiality Rules (Swiss Rules/ICC Rules/LCIA Rules)
- Example of Lex Arbitrii specifying Confidentiality Obligations (NZ Arbitration Act)

# Literature on Confidentiality

- **Müller**, La confidentialité en arbitrage commercial internationale: un trompe-l'œil?, ASA Bull. 2005 p. 216-240
- **Thomson/Finn**, Confidentiality in Arbitration: A Valid Assumption? A Proposed Solution, Dispute Resolution Journal 2007, vol. 62, no. 2
- **Dessemontet**, Arbitration and Confidentiality. *The American Review of International Arbitration* vol. 7, nos 3-4, pp. 299-318, 1996
- **Ritz**, Die Geheimhaltung im Schiedsverfahren nach schweizerischem Recht, Berne 2007
- **Neill**, Confidentiality in Arbitration, *Arbitration International* 1996, vol. 12, pp. 287-317
- **Rogers/Miller**, Non-Confidential Arbitration Proceedings, *Arbitration International* 1996, vol. 12, pp. 319-345

## Examples/Comparison of Institutional Confidentiality Rules

Swiss Rules of International Arbitration	LCIA Rules of Arbitration	ICC Rules of Arbitration
<p><i>Confidentiality of the Arbitration</i>  <b>Art. 43 (1):</b>                      Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards and orders as well as all materials submitted by another party in the framework of the arbitral proceedings not otherwise in the public domain, save and to the extent that a disclosure may be required of a party by a legal duty, to protect or pursue a legal right or to enforce or challenge an award in legal proceedings before a judicial authority. This undertaking also applies to the arbitrators, the tribunal-appointed experts, the secretary of the arbitral tribunal and the Chambers.</p>	<p><i>Confidentiality of the Arbitration</i>  <b>Art. 30 (1):</b>                      Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain - save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority.</p>	<p><i>Confidentiality of the Arbitration</i>  <b>Art. 20 (7):</b>                      The Arbitral Tribunal may take measures for protecting trade secrets and confidential information.</p> <p><b>Appendix I: Statutes of the ICC Court Article 6:</b>                      The work of the Court is of a confidential nature which must be respected by everyone who participates in that work in whatever capacity. The Court lays down the rules regarding the persons who can attend the meetings of the Court and its Committees and who are entitled to have access to the materials submitted to the Court and its Secretariat.</p>
<p><i>Confidentiality of the Deliberations</i>  <b>Art. 43 (2):</b>                      The deliberations of the arbitral tribunal are confidential.</p>	<p><i>Confidentiality of the Deliberations</i>  <b>Art. 30 (2):</b>                      The deliberations of the Arbitral Tribunal are likewise confidential to its members, save and to the extent that disclosure of an arbitrator's refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under Articles 10, 12 and 26.</p>	<p><i>Confidentiality of the Deliberations</i>  <b>Art. 21 (3):</b>                      The Arbitral Tribunal shall be in full charge of the hearings, at which all the parties shall be entitled to be present. Save with the approval of the Arbitral Tribunal and the parties, persons not involved in the proceedings shall not be admitted.</p> <p><b>Appendix II: Internal Rules of ICC Court Article 1 (1)</b> The sessions of the Court, whether plenary or those of a Committee of the Court, are open only to its members and to the Secretariat.</p>
<p><i>Publication of the Award</i>  <b>Art. 43 (3):</b>                      An award may be published, whether in its entirety or in the form of excerpts or a summary, only under the following conditions:                      (a) A request for publication is addressed to the Chambers;                      (b) All references to the parties' names are deleted; and                      (c) No party objects to such publication within the time-limit fixed for that purpose by the Chambers.</p>	<p><i>Publication of the Award</i>  <b>Art. 30 (3):</b>                      The LCIA Court does not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal.</p>	<p><i>Publication of the Award</i>  <b>Appendix II: Internal Rules of the ICC Court Article 1</b>  <b>(4)</b> The Chairman or the Secretary General of the Court may authorize researchers undertaking work of a scientific nature [...] acquaint themselves with Awards and other documents [...]  <b>(5)</b> Such authorization shall not be given unless the beneficiary has undertaken to respect the confidential character of the documents made available and to refrain from any publication in their respect without having previously submitted the text for approval to the Secretary General of the Court.</p>

## Example of Lex Arbitrii specifying Confidentiality Obligations (I)

### New Zealand Arbitration Act 1996 No 99 (as at 18 October 2007), Public Act

#### **14A Arbitral proceedings must be private**

An arbitral tribunal must conduct the arbitral proceedings in private.

#### **14B Arbitration agreements deemed to prohibit disclosure of confidential information**

(1) Every arbitration agreement to which this section applies is deemed to provide that the parties and the arbitral tribunal must not disclose confidential information.

(2) Subsection (1) is subject to section 14C.

#### **14C Limits on prohibition on disclosure of confidential information in section 14B**

A party or an arbitral tribunal may disclose confidential information—

(a) to a professional or other adviser of any of the parties; or

(b) if both of the following matters apply:

(i) the disclosure is necessary—

(A) to ensure that a party has a full opportunity to present the party's case, as required under article 18 of Schedule 1; or

(B) for the establishment or protection of a party's legal rights in relation to a third party; or

(C) for the making and prosecution of an application to a court under this Act; and

(ii) the disclosure is no more than what is reasonably required to serve any of the purposes referred to in subparagraph

(i)(A) to (C); or

(c) if the disclosure is in accordance with an order made, or a subpoena issued, by a court; or

(d) if both of the following matters apply:

(i) the disclosure is authorised or required by law (except this Act) or required by a competent regulatory body (including New Zealand Exchange Limited); and

(ii) the party who, or the arbitral tribunal that, makes the disclosure provides to the other party and the arbitral tribunal or, as the case may be, the parties, written details of the disclosure (including an explanation of the reasons for the disclosure); or

(e) if the disclosure is in accordance with an order made by—

(i) an arbitral tribunal under section 14D; or

(ii) the High Court under section 14E.

## Example of Lex Arbitri specifying Confidentiality Obligations (II)

### New Zealand Arbitration Act 1996 No 99 (as at 18 October 2007), Public Act

#### **14D Arbitral tribunal may allow disclosure of confidential information in certain circumstances**

(1) This section applies if—

(a) a question arises in any arbitral proceedings as to whether confidential information should be disclosed other than as authorised under section 14C(a) to (d)); and

(b) at least 1 of the parties agrees to refer that question to the arbitral tribunal concerned.

(2) The arbitral tribunal, after giving each of the parties an opportunity to be heard, may make or refuse to make an order allowing all or any of the parties to disclose confidential information.

High Court may allow or prohibit disclosure of confidential information if arbitral proceedings have been terminated or party lodges appeal concerning confidentiality(1) The High Court may make an order allowing a party to disclose any confidential information—

(a) on the application of that party, which application may be made only if the mandate of the arbitral tribunal has been terminated in accordance with article 32 of Schedule 1; or

(b) on an appeal by that party, after an order under section 14D(2) allowing that party to disclose the confidential information has been refused by an arbitral tribunal.

(2) The High Court may make an order under subsection (1) only if—

(a) it is satisfied, in the circumstances of the particular case, that the public interest in preserving the confidentiality of arbitral proceedings is outweighed by other considerations that render it desirable in the public interest for the confidential information to be disclosed; and

(b) the disclosure is no more than what is reasonably required to serve the other considerations referred to in paragraph (a).

(3) The High Court may make an order prohibiting a party (party A) from disclosing confidential information on an appeal by another party (party B) who unsuccessfully opposed an application by party A for an order under section 14D(2) allowing party A to disclose confidential information.

(4) The High Court may make an order under this section only if it has given each of the parties an opportunity to be heard.

(5) The High Court may make an order under this section—

(a) unconditionally; or

(b) subject to any conditions it thinks fit.

(6) To avoid doubt, the High Court may, in imposing any conditions under subsection (5)(b), include a condition that the order ceases to have effect at a specified stage of the appeal proceedings.

(7) The decision of the High Court under this section is final.

## Example of Lex Arbitrii specifying Confidentiality Obligations (III)

### New Zealand Arbitration Act 1996 No 99 (as at 18 October 2007), Public Act

#### **14F Court proceedings under Act must be conducted in public except in certain circumstances**

(1) A court must conduct proceedings under this Act in public unless the Court makes an order that the whole or any part of the proceedings must be conducted in private.

(2) A court may make an order under subsection (1)—

(a) on the application of any party to the proceedings; and

(b) only if the Court is satisfied that the public interest in having the proceedings conducted in public is outweighed by the interests of any party to the proceedings in having the whole or any part of the proceedings conducted in private.

(3) If an application is made for an order under subsection (1), the fact that the application had been made, and the contents of the application, must not be made public until the application is determined.

(4) In this section and sections 14G to 14I,—

Court—

(a) means any court that has jurisdiction in regard to the matter in question; and

(b) includes the High Court and the Court of Appeal; but

(c) does not include an arbitral tribunal proceedings includes all matters brought before the Court under this Act (for example, an application to enforce an arbitral award).

#### **14G Applicant must state nature of, and reasons for seeking, order to conduct Court proceedings in private**

An applicant for an order under section 14F must state in the application—

(a) whether the applicant is seeking an order for the whole or part of the proceedings to be conducted in private; and

(b) the applicant's reasons for seeking the order.

## Example of Lex Arbitrii specifying Confidentiality Obligations (IV)

### New Zealand Arbitration Act 1996 No 99 (as at 18 October 2007), Public Act

#### **14H Matters that Court must consider in determining application for order to conduct Court proceedings in private**

In determining an application for an order under section 14F, the Court must consider all of the following matters:

- (a) the open justice principle; and
- (b) the privacy and confidentiality of arbitral proceedings; and
- (c) any other public interest considerations; and
- (d) the terms of any arbitration agreement between the parties to the proceedings; and
- (e) the reasons stated by the applicant under section 14G(b).

#### **14I Effect of order to conduct Court proceedings in private**

(1) If an order is made under section 14F,—

- (a) no person may search, inspect, or copy any file or any documents on a file in any office of the Court relating to the proceedings for which the order was made; and
  - (b) the Court must not include in the Court's decision on the proceedings any particulars that could identify the parties to those proceedings.
- (2) An order remains in force for the period specified in the order or until it is sooner revoked by the Court on the further application of any party to the proceedings.