A Critical Analysis of The Scope of Confidentiality in International Commercial Arbitration

by

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Abstract

Arbitration has evolved over the years to be the preferred way for private organizations to settle conflicts. The presumption of confidentiality was one of the advantages that made this dispute resolution method attractive. This study evaluates how confidentiality is accepted in the international arbitration organizations and how the Courts apply exceptions to confidentiality. Also, this dissertation explores the principle of confidentiality in times of COVID-19 through online arbitration.

To show how confidentiality and its exceptions are dealt in international institutions and judicial Courts, relevant cases law from different countries was analysed, and the results showed that confidentiality, although provided by law, is not absolute, and there is a hypothesis of exceptions.

These results suggest that Courts and international arbitration institutions are likely to accept the exceptions of confidentiality when the case shows a relevant argument that cannot be put aside. On this basis, the concept of confidentiality and its exceptions should be taken into account when arbitration is chosen as alternative dispute resolution methods.

Introduction

Arbitration is an instrument to resolve disputes involving available equity rights in an extrajudicial way. Thus, it is not performed by public agents as in the Judiciary, but by an arbitrator or the Arbitral Tribunal, which is chosen by the parties themselves for having a speciality in the area under dispute. Also, for the trust that the parties have in work developed by them.

It is worth highlighting the confidentiality of information, one of the most relevant principles of arbitration, with great relevance for the business sector. The content put to arbitration, by a decision of the parties, will be kept confidential so that anyone who is not involved in the process does not have access to the companies' business and administrative information. Also, it is the ethical duty of the arbitrator and the arbitration institution not to disclose the cases in which they operate. This universal principle prevents strategic documents from being publicly exposed.

This study aims to analyse the scope of confidentiality in international commercial arbitration critically.

The first chapter will expose the research methodology and methods to explain (i) how the study will be conducted to answer the research questions; (ii) the philosophy and approach adopted; and (iii) as a qualitative dissertation, the research design and methods.

Chapter 2 is a review of the literature. Firstly, it will be present an overview of alternative dispute resolution and arbitration, mainly how arbitration is dealt with in Ireland. Also, it will be exposed and explained the principle of confidentiality and how it is applicable in different institutions of international arbitration. Also, it will be

analysed the exceptions of confidentiality and online arbitration in times of COVID-19.

The next, chapter 3, will expose the data and will show that legal research is the process of identifying, organizing, and applying information that will help support legal arguments.

Ensuing, chapter 4 brings the data analysis and findings of specifics cases law from different jurisdictions around the world, to show the strength and discipline around the confidentiality, the exceptions of it and the online arbitration.

The last chapter, number 5, will be about the discussion, specifically how the Courts and arbitral institution see the confidentiality and exceptions through the scope of international commercial arbitration.

Based on the above, this study demands a critical analysis of the scope of confidentiality and the exceptions of in the international commercial arbitrations, looking through the recent world crises, the COVID-19 pandemic, considering the innovations and evaluating values in this times.

Aim and objectives

This study aims to critically analyse the scope of confidentiality and its exceptions in international commercial arbitration while exploring the relevant law cases around the world to justify and corroborate the applicability of the principle.

For this, this dissertation intends to answer three main questions, which are: (i) How the confidentiality are accepted in the international arbitration institutions?; (ii) Does the permitted exceptions of confidentiality amount to a breach of the law and international regulations?; and (iii) How is online arbitration accepted by international institutions and courts, especially in times of COVID-19?.

Confidentiality is a primordial principle in the arbitration; however, its exceptions are as relevant as the general rule. On the grounds, this research study is based on the following objectives:

- To identify the concept of alternative dispute resolution processes and arbitration and explore how the principle of confidentiality is applicable in international commercial arbitration;

- To assess the exceptions of confidentiality among the international arbitration institutions understandings and, also, the judicial position around relevant case laws from different jurisdictions;

- To expose the implications of the confidentiality and exceptions in online arbitration processes in times of COVID-19;

1. Research Methodology and Methods

The methodology is the study of methods. The methodology is the detailed and exact explanation of every action developed in the path of the research work. It is the explanation of the type of research, the instruments used, the estimated time, the team of researchers and the division of labour, the forms of tabulation and treatment of the data, in short, everything that was used in the research work.

By recognizing and defining the right form of study, policy, theory, time horizon, methods, accompanied by correct procedures and techniques based on his or her research work, research methodology constitutes the internal setting. Besides, the methodology of the study serves as the nerve centre because it restricts fundamental research and conducts good research work. The internal and external environment has to follow the right research methodology process (Goundar, 2012).

Saunders et al. (2013) use the term methods to refer to techniques and procedures used to obtain and analyse data. Methods, therefore, include questionnaires, observations and interviews as well as methods of quantitative (statistical) and qualitative (non-statistical) analysis, and the main emphasis of this book is, as you have probably gathered from the title. The word methodology, on the other hand, refers to the philosophy of how research should be carried out. (Saunders et al., 2013, p. 3).

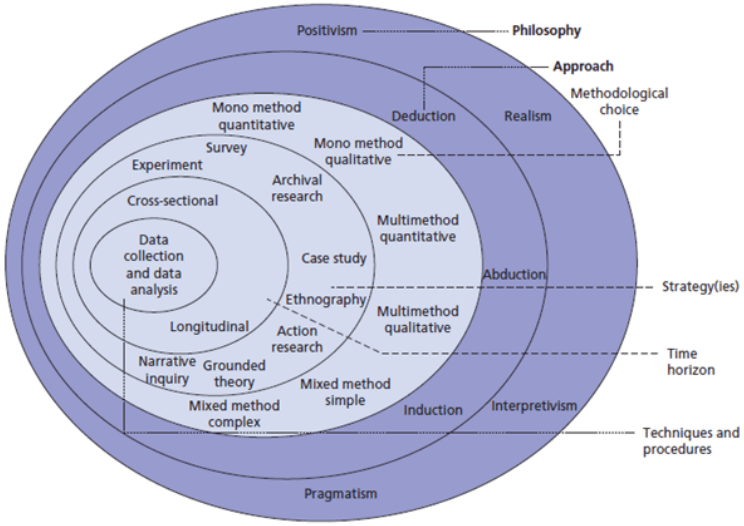
In doing so, research methods are the methods by which you research a subject or a topic. The conduct of studies, examinations, surveys and the like requires research methods. Research methodology, on the other hand, requires studying the different approaches that can be used in the conduct of research and the conduct of tests,

trials, surveys and critical studies. It is the technical difference between the two terms, namely, research methods and research methodology (Goundar, 2012).

According to S. Goundar (2012), the methodology of research is a systematic way of solving a problem. It is a review of how the analysis should be carried out. Essentially, research methodology is called the procedures by which researchers go about their work of identifying, explaining and predicting phenomena. It is also described as the analysis of techniques by which information is acquired. It is intended to include a study work schedule.

In the other hand, the different techniques, schemes, algorithms, etc. used in science are research methods. All the tools used by a researcher during a research study are known as methods of research. In essence, they are designed, science and value-neutral. These include analytical methods, experimental experiments, computational structures, approaches to statistics, etc. Research methods help us gather samples, data, and find a solution to a problem. Scientific research methods, in particular, call for hypotheses based on evidence, measurements and observations gathered and not on reasoning alone. They consider only specific theories that studies can verify. (Goundar, 2012).

As illustrated in the figure below, the Saunders Research onion illustrated the stages involved in the development of research work and was developed by Saunders et al. (2013).



In other words, a more detailed explanation of the stages of a research process is provided by the onion layers. It offers a significant development in which it is possible to design a research methodology. Its value lies in its adaptability to almost any kind of research methodology and can be used in several contexts. (Bryman, 2012).

The research onion was developed by Saunders et al. in 2007 to define the phases through which a researcher must pass while creating a realistic methodology. The researcher must have reasons and justifications for each stage of the methodological decisions for your research to have full credibility. (Stainton, 2020).

From that, it will be possible to distinguish the different branches of scientific research and thus insert it in the context of this dissertation, which is a critical analysis of the scope of confidentiality in international commercial arbitration.

1.1. Research question

Well before any research, the most important thing for the researcher is to have a good question. Saunders et al. (2013, p.20) explain that before you start your research, you need to have an idea of what you intend to do, at least. It is probably the most difficult, and yet the most important, part of your research project. Without being clear about what you are going to research, it isn't easy to plan how you are going to research it.

This dissertation is based on three main questions: (i) How the confidentiality are accepted in the international arbitration institutions?; (ii) Does the permitted exceptions of confidentiality amount to a breach of the law and international regulations?; and (iii) How is online arbitration accepted by international institutions and courts, especially in times of COVID-19?

It is because confidentiality can be considered one of the pillars of arbitration proceedings, but it is also not an absolute principle. Several international institutions discuss the exceptions to confidentiality, and there is still no consensus regarding its imperiousness.

1.2. Research philosophy and approach

The research philosophy adopted contains essential assumptions about how you view the world. These assumptions will underpin your research strategy and the methods you choose as part of that strategy (Saunders et al., 2013, p. 108).

In part, the philosophy you adopt will be influenced by practical considerations. However, the primary influence is likely to be your particular view of the relationship between awareness and the mechanism by which it is developed. The researcher who is concerned with facts, such as the resources needed in a manufacturing process, is likely to have a very different view on the way research should be conducted from the researcher concerned with the feelings and attitudes of the workers towards their managers in that same manufacturing process. Not only their strategies and methods probably differ considerably, but so their views on what is important and, perhaps more significantly, what is useful (Saunders et al., 2013, p. 108).

In this dissertation, the philosophy adopted is pragmatism. Pragmatism argues that the most critical determinant of the epistemology, ontology and axiology you adopt is the research question – one may be more appropriate than the other for answering particular questions. Moreover, suppose the research question does not suggest unambiguously that either a positivist or interpretivist philosophy is adopted. In that case, this confirms the pragmatist's view that it is entirely possible to work with variations in your epistemology, ontology and axiology (Saunders et al., 2013, p. 109).

Also, following the second layer of the research onion, this work will be based on the deductive method. In the deductive method, at the beginning of the study, the aim is to find the answer to the query you have. In response to the research question, your prime goal remains to come up with a yes or no answer. Your research questions will vary from statements to informed speculation (Research Onion – Made easy to understand and follow, 2017).

The deductive strategy begins small and grows larger. It begins with a particular theory or hypothesis that has been established based on the researcher's knowledge or trends. This hypothesis is then tested and a broader theory built from it. (Stainton, 2020).

In the process of deduction, you scan the hypotheses for the research issue. It also helps you to gather information and, eventually, confirmation or rejection of the issue. The principal may be revised. Besides, you can also start the process again. (Research Onion – Made easy to understand and follow, 2017).

In this paper, the deductive approach is applicable because the topic starts in arbitration and confidentiality, what is small, and goes to the exceptions and online discussions, what is more prominent.

1.3. Research design and methods

The next stage of the research onion is about the methodological choice, which Saunders et al. (2013) concept is the way the data will be collected, and it could be: mono-method qualitative, mono-method quantitative, multi-method quantitative, mixed methods simple and mixed methods complex.

This dissertation will be based on qualitative methodology. According to Creswell (2007), qualitative research can be defined as a course of action in which the researcher establishes an integrated point of view that offers a detailed perspective of the sources of a natural environment.

Also, qualitative research is the process of investigating a specific problem, topic or phenomenon from the point of view that cannot be rigidly coded (Corbin and Strauss, 2008, p.16).

Qualitative research will be applied to this dissertation to find an answer for the research questions, bringing the way how the institutions, parties and courts deal with the confidentiality's exceptions in international arbitration.

The research strategy for this study is case law, once will be analysed the court decisions about the exception of confidentiality in different jurisdiction around the world.

Robson (2002:178) (cited in Saunders et al., 2013, p. 145-146) defines case study as "*a strategy for doing research which involves an empirical investigation of a particular contemporary phenomenon within its real-life context using multiple sources of evidence*".

The case study strategy also has considerable ability to generate answers to the question 'why?' as well as the 'what?' and 'how?' questions, although 'what?' and 'how?' questions tend to be more the concern of the survey strategy. For this reason, the case study strategy is most often used in explanatory and exploratory research (Saunders et al., 2013, p. 146).

At last, Saunders et al., 2013, p. 155, put in a straightforward way to find the type of time horizon for research. They explained that an important question to be asked in planning your research is 'Do I want my research to be a "snapshot" taken at a particular time or do I want it to be more akin to a diary or a series of snapshots and be a representation of events over a given period?' (As always, of course, the

answer should be ‘It depends on the research question.’) The ‘snapshot’ time horizon is what we call here cross-sectional while the ‘diary’ perspective we call longitudinal.

This study will use a longitudinal analysis, once the data are collected from a particular time in the past and compared with the most recent data collected. That is, the decision given in the past about the exception of confidentiality will be compared with the most recent decision about the same theme. The main strength of longitudinal research is the capacity that it has to study change and development (Saunders et al., 2013, p. 155).

2. Review of the Literature

2.1. Alternative Dispute Resolution and Arbitration: an overview.

Alternative Dispute Resolution (ADR) represents some processes that can solve disputes in an extrajudicial way. The most common processes are mediation, arbitration and conciliation. The process involves using an independent third party to assist the parties to the dispute and to resolve their issue.

The concept of ADR is not a new phenomenon. For centuries, societies have been developing informal and non-adversarial processes for resolving disputes. In the ancient civilizations of Egypt, Mesopotamia, and Assyria, archaeologists have found evidence of the use of ADR processes. (Law Reform Commission, Consultation Paper Alternative Dispute Resolution, 2008).

ADR facilitates early settlement of disputes. Early settlement can be both financially and emotionally advantageous to the disputant. It may also mean that a meaningful relationship can be repaired and maintained, something which may be at risk in adversarial litigation. While it is true that lawyers often engage in negotiation and settlement, sometimes on the steps of the court, a successful negotiation often depends on the strength of the legal rights-based arguments, which can only be fully developed following expensive and time consuming processes such as discovery. This legalistic approach often overlooks other avenues of settlement opportunity,

which may better address a client‘s underlying interests and needs (Fiadjoe, 2004, p.10).

According to the speech by Sir Anthony Clarke, Master of the Rolls —The Future of Mediation, at the Second Civil Mediation Council National Conference Birmingham, in May 2008[1], alternative dispute resolution must be seen as an essential part of any modern civil justice system. “*It must become such a well-established part of it that when considering the proper management of litigation it forms as intrinsic and as instinctive a part of our lexicon and of our thought processes, as standard considerations like what, if any, expert evidence is required.*” (Clarke, 2008).

In its turn, arbitration consists of the judgment of the dispute by an impartial third party, chosen by the parties. It is a kind of dispute resolution of conflicts, which develops through more uncomplicated and less formal procedures than the judicial process.

According to Margaret L. Moses (2017), arbitration is a method of adjudication that is private. Parties which arbitrate have agreed, without any judicial system, to settle their disputes. Arbitration requires a definitive and binding decision in most cases, creating an award that is enforceable in a national court. In general, the decision-makers (arbitrators), usually one or three, are selected by the parties. The parties also determine whether the arbitration will be conducted by an international arbitral institution, or ad hoc, meaning that no institution is involved. The rules which apply shall be those of the arbitral institution or of other rules which the parties have selected. Parties can choose the place of arbitration and the language of the arbitration, in addition to choosing the arbitrators and the rules.

[1] Speech by Sir Anthony Clarke, Master of the Rolls —The Future of Mediation‖ at the Second Civil Mediation Council National Conference Birmingham, May 2008. Available at https://www.lawreform.ie/_fileupload/consultation%20papers/cpADR.pdf [accessed in 01/09/2020]

In Ireland, one of the oldest forms of alternative dispute settlement in arbitration, and its usage has been traced back to the Brehon Rules. It is a mechanism by which parties agree to refer disputes between them to a neutral third party known as the arbitrator for a resolution. A significant benefit is that it is a private and confidential operation. (Hussey, 2015).

Also, in nearly all cases, arbitration is necessary if litigation before the courts is deemed appropriate. It is, however, particularly necessary when the parties feel that the party determining the dispute (the arbitrator) must have a thorough knowledge of the subject-matter of the dispute. It is also especially suitable in cases where the parties do not want the media to report on the conflict. (Hussey, 2015).

Arbitration in Ireland is directed by the Arbitration Act 2010[2]. Arbitration, as in other forms of dispute resolution other than litigation, is solely contingent on the parties' decision to follow it. There can be no arbitration without the consent of the parties. Most generally, the consent of the parties to refer their disputes to arbitration is contained in the form of an arbitration clause incorporated by the parties into the contract. Occasionally, the parties can nevertheless agree to refer the dispute to arbitration when a dispute occurs, and there is no arbitration provision inserted into the contract. It is often referred to as a ‘submission agreement’ (ADR Guide, The Law Society of Ireland, 2018).

The Arbitration Act 2010 adopted into Irish law by the Model Law (the 'Model Law') of the United Nations Commission on International Trade Law (UNCITRAL), replaced all previous arbitral legislation and essentially codified the law in this area into one Act of Parliament. It became law on 8 March 2010 and became enforceable on 8

[2] http://www.irishstatutebook.ie/eli/2010/act/1/enacted/en/html, [accessed in 19/09/2020].

June 2010. It refers to all arbitrations, both international and domestic, held in Ireland after the date of entry into force. (Cox, 2015).

The 2010 arbitration law replaces all three existing arbitration statutes with one comprehensive act. Significantly, it adopts the 2006 manifestation of the UNCITRAL Model Law on International Commercial Arbitration in its entirety, with minor exceptions. One exception concerns the number of arbitrators in the absence of party agreement. The UNCITRAL Model Law provides that the default is three arbitrators, while the new Irish arbitration statute takes a more economical approach by providing for one arbitrator (Reichert, 2010).

Also of great importance, the arbitration act continues to recognize the significant international arbitration conventions (specifically, the Protocol on Arbitration Clauses opened at Geneva on 24 September 1923, the Convention on the Execution of Foreign Arbitral Awards done at Geneva on 26 September 1927, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York on 10 June 1958, and the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature in Washington on 18 March 1965 (Reichert, 2010).

Regarding significant features for Klaus Reichert, 2010, the most significant feature of the 2010 Act is that all court applications prescribed under the UNCITRAL Model Law are to be handled exclusively by the High Court (by a senior judge in charge of that court or a designee). No appeal will be available to the Supreme Court. Thus, challenges to an award on the narrow grounds prescribed under Article 34 of the UNCITRAL Model Law shall be conclusively decided by the High Court. It is similar to the arbitration regime in Switzerland. Allowing only one level of court challenge

under Article 34 will significantly enhance the timely conclusion of the process (Reichert, 2010).

According to Arthur Cox, arbitration as the preferred method of binding alternative dispute resolution is commonplace in commercial contracts and is almost the exclusive method employed in the construction sector. Insurance disputes in Ireland are also frequently resolved by arbitration. Traditionally, before the complete overhaul and change of Ireland's arbitration law in 2010, arbitration was perceived as being prone to delays. However, the combination of the 2010 Act and the transformation of litigation efficiency in the Commercial List of the Irish High Court over the past number of years has completely turned around the culture among practitioners, and now the rapid resolution of cases is the focus among the Irish legal community. One of the principal advantages of arbitration arises from the highest open and international nature of the economy and the almost routine situation whereby a counterparty to a contract is from overseas. The private, independent and internationally enforceable outcome of the arbitral process is particularly appropriate for an economy such as Ireland's (Cox, 2015).

Regarding the advantages and disadvantages of arbitration, there are some advantages of international arbitration. An empirical analysis of why parties chose international arbitration to settle disputes found that the two most relevant factors were (i) the equal ability to obtain enforcement, under the New York Convention, a treaty of which at least 156 countries are parties, and (ii) the independence of the forum (that is, being able to remain out of the court of the other party)[3]. The New York Convention is known to have a pre-compliance bias, and most courts would

[3] The White and Case/Queen Mary Survey (2015), Chart 2, available at www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015_0.pdf, [accessed in 10/09/2020].

interpret the allowable grounds for no compliance very broadly, leading to the vast majority of awards being enforced. (Moses, 2017, p. 3).

The right to keep the proceedings and the resulting award private are other benefits. In specific institutional regulations, confidentiality is given and can be extended (for example, to include witnesses and experts) by consent of the parties. Many businesses want confidential procedures because they do not want the details exposed about the company and its activities or the kinds of conflicts in which it is involved, nor do they want a potentially harmful result of a conflict to become public (Moses, 2017, p. 4).

Conversely, for Margaret L. Moses (2017, p.4) many of the disadvantages of arbitration are the same as the benefits, only seen from a different viewpoint. For example, less discovery may be generally viewed as an advantage. Nonetheless, certain kinds of disputes that typically involve extensive discovery, such as antitrust disputes, are increasingly arbitrated.

Besides that, the lack of any significant right of appeal in most arbitrations may be a benefit in terms of ending the dispute. Still, if an arbitrator has given a wrong decision considering the law or the facts, it can be a clear disadvantage (Moses, 2017, p. 4).

2.2. Confidentiality and Arbitration

Arbitration has evolved over the years to be the preferred way for private organizations to settle conflicts. The presumption of confidentiality was one of the advantages that made this dispute resolution method attractive (Oglinda, 2015). That

is the confidentiality is the main reason for people who seek for commercial arbitration to set disputes.

The private and confidential essence of arbitration allows parties to use this arbitration process to bring an end to the conflict between them. They can be surprised to learn that they have no legal leverage from prying eyes to protect the secret, only the desired knowledge. One of the relevant advantages of arbitration, namely, confidentiality imposes on arbitrators and the parties, the obligation to respect the confidentiality of arbitration (Hogas, 2013). When private and confidential, the parties are free to present views and even documents that cannot be made public.

In 1992, the understanding of confidentiality in arbitration was surveyed by the London Business School. It demonstrated that the concept of confidentiality would be viewed as an undeniable advantage of this process by American and European companies that have access to arbitration (Bagner, 2001). That is, according to the survey, the parties trust the arbitration process because of its confidential nature.

This sacrosanct concept was never disputed until the end of the 1980s. However, its considerable effectiveness has now been called into question, in particular, because some of its core values have been challenged for many years. The confidentiality principle is one of them. (Lovinfosse, 2014, p. 12).

Two leading schools of thought have formed around confidentiality over the last decade.

The first dispute the existence of a confidentiality requirement and argues that, if it were, such a responsibility would have been claimed for a long time. (Oakley-White,

2003, p. 29). In other words, there is no obligation of confidentiality in arbitration proceedings, and if it existed, it should be expressed in the law.

On the other hand, the second states that the obligation of confidentiality is founded on the presumption that the personal existence of the arbitration and, therefore, the confidentiality of the proceedings is apparent to the degree that it is not appropriate to expressly affirm the principle (Muller, 2005, p. 216). According to this point of view, confidentiality is inherent to the arbitration process.

According to Leon E. Trakman (2002), it is a collateral expectation of parties to arbitration that their business and personal confidences will be kept. Despite its central importance, confidentiality cannot be assumed in all jurisdictions. It is therefore critical that arbitrators be fully informed about the legal and policy issues surrounding confidentiality to appropriately resolve disputes concerning those aspects of the arbitration that should or should not, be confidential.

So, it is crucial to the arbitrator to be informed about the legal and political issues around confidentiality to set the disputes properly.

For Richard Smellie (2013), partner at Fenwick Elliott Law Specialist, London, UK, when asked if arbitration is confidential, for him, essentially, the first statement is correct. Arbitrations are confidential in that it is unlikely for third parties who are not parties to the arbitration agreement to attend any hearing or to engage in any arbitration proceedings. The second theory, from the beginning of the 1990s, is not. Confidentiality – which is concerned with the parties' obligation to each other not to disclose information concerning the arbitration to third parties (and the arbitrator's like obligations to the parties) – does not apply to arbitration as an all-encompassing rule, and indeed in some circumstances will not apply at all.

On the face of it, the conventional presumption that arbitrations are confidential is fair, given that arbitration happens by private arrangement: it is the binding arbitration arrangement that provides the required legal basis for arbitration. It is inherently different from bringing a dispute to a local court, which is a state-provided and mandated structured dispute settlement procedure, and thus open to the public and the press to varying degrees (Smellie, 2013).

However, this conventional presumption was dealt a severe blow in the 1990s, when a closer consideration of different facets of arbitration began to take place with the increase in the use of international arbitration. The degree to which arbitrations were confidential was included in those considerations. In the mid-late 1990s, when the problem came before the courts in Australia and Sweden, the courts in those jurisdictions dismissed the principle of a general confidentiality obligation in arbitration (Smellie, 2013). From that point on, the arbitral institutions have not yet reached a consensus regarding confidentiality, whether it is implicit in the process or whether it is up to the parties to make that choice.

As referred before, there is no common sense about confidentiality in the arbitration process. Dozens of national and international arbitration institutions promulgate rules on almost every aspect of the arbitral process, but rarely on confidentiality. Even when they do, they do not make explicit its scope or extent, or they do it in an inadequate way (Brown, 2001, p. 992).

For instance, the arbitration rules of the UNCITRAL (United Nations Commission on International Trade Law), which many jurisdictions adopted this model to the local arbitration law, is not specific about confidentiality.

The UNCITRAL Rules apply a duty of confidentiality concerning the arbitral award, by determining that "*the award may be made public only with the consent of both parties*"[4], without referring to a more general principle of confidentiality (Lovinfosse, 2014, p. 20). Moreover, the reform of the UNCITRAL rules in 2010 regulates certain aspects of confidentiality, such as the privacy of the hearings and the disclosure of the award. Still, it does not include any general clause concerning the confidentiality of the arbitration proceedings. (Reymond-Eniaeva, 2019, p. 36).

The article 38(3)[5] says "*Hearings shall be held in camera unless the parties agree otherwise. …*" and the Article 34(5)[6] expresses that "*An award may be made public with the consent of all parties or where and to the extent disclosure is required of the party by legal duty, to protect or pursue a legal right or about legal proceedings before a court or other competent authority.*"

Therefore, for UNCITRAL, there is no specific rule for confidentiality; however, there are rules on privacy of the hearings and publication of the award.

Regarding the ICC (International Chamber of Commerce), surprisingly, the rules do not mention any general rule of confidentiality (Lovinfosse, 2014, p. 22). The reason for this silence is probably that the drafters could not reach a consensus on the issue, given that the ICC Rules are intended to apply in numerous States and, also, it was due to the problem of agreeing on exceptions and the lack of sanctions available (Hwang & Chung, 2009).

Elza Reymond-Eniaeva (2019) explains that the drafters of the 1998 ICC Rules couldn't reach consensus on this issue, which explains the lack of rules on

[4] UNCITRAL Model Law, Rule 52(5)
[5] UNCITRAL Model Law, Rule 38(3)
[6] UNCITRAL Model Law, Rule 34(5)

confidentiality obligations (Derains & Schwartz, 2005). When the ICC Rules of 2012 were debated, the issue of confidentiality was tackled again. However, the debates were not in favour of the implementation of a general confidentiality duty. Instead, it was proposed that, depending on the specific circumstances of the case, the parties involved should discuss the issue of confidentiality and the arbitral tribunal. (Reymond-Eniaeva, 2019, p. 46). More simply, the decision as to whether the arbitration is confidential or not will be up to the parties and the arbitrators.

The rules of the ICC make the hearings private and the ICC Court's activities confidential. Still, otherwise, they provide for arbitrators to make orders concerning confidentiality on the application of one of the parties. In anticipation of the new rules that came into effect in 2011, much discussion and deliberation occurred. The relevant Article reads as follows: *"Article 22(3) – Upon the request of any party, the Arbitral Tribunal may make orders concerning the confidentiality of the arbitration proceedings or any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information."* (Smellie, 2013).

In contrast, the Rules of the LCIA (London Court of International Arbitration) provide an extensive duty of confidentiality. Article 30.1[7] of the 2014 LCIA Rules stipulates that "*The parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for 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*

[7] Arbitration Rules of the London Court of International Arbitration of 2014, art. 30.1, available at http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Article%2031 [accessed in 29/09/2020]

award in legal proceedings before a state court or other legal authority" (Lovinfosse, 2014, p. 24).

The art. 30.1 of the LCIA Rules provides that, as a general principle, all materials in the proceedings produced for arbitration and all other documents produced by another party in the proceedings shall be kept confidential by the parties, provided that they are not in the public domain. Art. 30.1 also contains several exceptions to the general principle of confidentiality (Reymond-Eniaeva, 2019, 38).

Article 30.2[8] goes further in stating that *"the deliberations of the Arbitral Tribunal shall remain confidential to its members…"*. Besides, Article 30.3[9] indicates that *"the LCIA does not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal"* (Lovinfosse, 2014, p. 24).

Therefore, according to Art. 30.2 of the LCIA Rules, members of the arbitral tribunal must keep their deliberations confidential from any person outside of the arbitral tribunal, including the LCIA and the parties themselves (Nesbitt & Darowski, 2015, p. 558). The only exceptions are when an arbitrator's refusal or inability to participate in deliberations hinders the tribunal's work and therefore needs to be disclosed and if the applicable law requires the disclosure. Last, following Art. 30.3, the LCIA will only publish the award with the prior written consent of all the parties and the arbitral tribunal (Reymond-Eniaeva, 2019, 39).

For the WIPO (World Intellectual Property Organization), a specialized agency of the United Nations charged with developing an international intellectual property system and which specializes in managing international commercial disputes involving intellectual property, the arbitration rules provide detailed provisions on the

[8] Ibid., art. 30.2.
[9] Ibid., art. 30.3.

protection of confidential information disclosed by the parties (Lovinfosse, 2014, p. 21).

The WIPO Rules are perhaps the most detailed and full confidentiality laws relative to other arbitration rules (Smeureanu, 2011, p. 17).

Article 73[10] of the WIPO Arbitration Rules stipulates that "*no information concerning the existence of arbitration may be unilaterally disclosed by a party to any third party, unless it is required to do so by law or by a competent regulatory body, and then only: (i) by disclosing no more than what is legally required; and (ii) by furnishing to the Tribunal and the other party, if the disclosure takes place during the arbitration, or to the other party alone if the disclosure takes place after the termination of the arbitration, details of the disclosure and an explanation of the reasons for it*".

Also, Articles 74 and 75 of the WIPO Arbitration Rules provide specific conditions for disclosures made during the arbitration procedure and for the disclosure of the arbitral award. When reviewing these rules, it seems clear that confidentiality is the rule and disclosure of the exception (Lovinfosse, 2014, p. 21).

The WIPO is the institution with the strictest clear rules regarding confidentiality.

Given the above, there is no unanimity among international arbitration institutions regarding confidentiality. Each institution has its own rules regarding privacy and confidentiality in arbitration proceedings.

[10] WIPO Arbitration Rules, Art. 73-76, available at http://www.wipo.int/amc/en/arbitration/rules/#conf2 (effective since 2002) [accessed in 29/09/2020].

2.3. The exceptions to the rule in confidentiality

Even though confidentiality is part of the arbitration processes, by law or by choice of the parties, sometimes it's not absolute. The analysis of the judicial perspectives of confidentiality brings us to the conclusion that a party may have the right – in certain circumstances – to disclose confidential information (Lovinfosse, 2014, p. 53). That is, the principle of confidentiality in arbitration, in certain situations, can be put aside by the parties involved in the process.

Regarding the non-absolute nature of the duty of confidentiality, legal scholars recognize exceptions and limitations: consent of the parties; necessary disclosure for the protection of the third party's rights; or a court order made it permissible (Rajoo, 2003).

Following L. Trakman (2002), the exceptions to requirements of confidentiality are variously justified. They arise by agreement between the parties, through party practice and trade usage, or on account of express or implied legal duties. Exceptions may also be warranted for public policy reasons. For example, confidentiality ought not to be used to disguise evidence of a crime. An exemption from confidentiality may also be justified in the face of economic coercion, for example, when it is being used to drive a participant at an arbitration into insolvency.

According to Reymond-Eniaeva, E. (2019), although it will be impossible to formulate all exceptions to the rule of confidentiality, a limited number of exceptions can be identified. These can be the most common cases of exceptions described above: (1) disclosure is authorised or required by the law; (2) the parties have consented to the disclosure; (3) disclosure is necessary to seek professional advice; (4) the

documents are no longer confidential as they are already in the public domain; (5) disclosure is necessary to pursue the parties' legitimate rights; the public interest justifies (6) disclosure is justified by the interests of justice. As to the implementation of these rules, each case will be resolved depending on the applicable law and in light of the specific circumstances.

Considering the protection of interest of the third party, for example, when an arbitral procedure has been launched between parties A and B, and the final award affects the position of party C, which is not part of the dispute. The latter may have a legitimate interest in obtaining information regarding the arbitration between parties A and B. However, this exception should be limited to the award and its reasons (Muller, 2005, p. 230-231).

Regarding the exception of the public interest, as mentioned before, those who do not want discussion in open court consider the personal character of arbitration as a considerable advantage. Indeed, the possibility to keep a low profile on disputes that may have the potential to tarnish a company's public image or reputation could be an important factor weighing in favour of confidentiality and against disclosure under the public interest exception (Pongracic-Speier, 2002, p. 258).

However, when weighed against a state's moral or legal obligation to inform its citizens of the progress or outcome of arbitration, the power of the private party's image rationale starts to fade (Pongracic-Speier, 2002, p. 258).

Public interest in international commercial arbitration must be distinguished from individual interests. The arbitrator's obligations are directed towards the parties to arbitration, and thus towards the protection of their interests. Public interests refer to

those interests that go beyond those of the parties to the dispute (Drličková, 2018, p. 58).

As an example, the rationale for a public interest exception to the confidentiality obligation has been considered by the courts in Australia. In *Esso Australia Resources v. Plowman*[11], Mason CJ referred to a legitimate expectation that the public may have in knowing what transpired in an arbitration. He referred to this as the 'public interest exception'. He then stated that different criteria applied when considering governmental secrets rather than personal secrets and that the courts had to consider governmental secret 'through different spectacles' (Tweeddale, 2005, p. 61).

In other words, the Australian Court considered that the obligation of confidentiality should be set aside when necessary for the public's legitimate interest in obtaining information about the affairs of public authorities (Lovinfosse, 2014, p. 53-54).

The arbitration concerned a dispute over a proposed increase in the price of natural gas supplied by the appellant vendors (Esso/BHP) to two public utilities, the Gas and Fuel Corporation of Victoria (GFC) and the State Electricity Commission of Victoria (SEC) allegedly due to the imposition of a new gas tax. GFC and SEC had entered into separate sales agreements with the appellants. Both the GFC sales agreement and SEC sales agreement contained a provision which required the appellants to provide GFC and SEC as buyers of the gas with details of the calculations based on which an increase or decrease in the price of gas was derived. The appellants did not provide the details of the calculations to GFC and SEC. The appellants later commenced arbitrations under the arbitration clauses in the GFC and SEC sales

[11] 7 April 1995, no 95/014, (1996) XXI Yearbook Commercial Arbitration 137.

agreements, respectively. Subsequently, the Minister for Energy and Minerals brought an action against the appellants, as well as GFC and SEC, seeking a declaration that any information disclosed in the arbitration was not subject to any duty of confidentiality. By way of counterclaim, the appellants sought declarations, based on implied terms, that each arbitration was to be conducted in private and the documents or information supplied in the arbitration were subject to a duty of confidentiality. Both GFC and SEC brought a crossclaim against the appellants seeking declarations in the same terms as the declarations sought by the minister. The confidentiality claims arose from the appellants' response to requests by the minister, GFC and SEC for details of the calculations on which the appellants' claims for price increases were based. If GFC and SEC entered into agreements that they would not reveal the information to anyone else, including the Minister, the Executive Government and the citizens of Victoria, the appellants refused to provide specifics. (Hwang & Chung, 2009, p. 617-618).

The aspect of public interest is vital in any arbitration brought by an investor against a government, especially if the claim is for a large sum of damages. It explains why it is commonplace for investment arbitrations to be relatively freely reported; awards are rarely secret, and inevitably, they find their way into the public domain. Similarly, in commercial arbitration, the exception of public interest is mostly invoked in cases where public authorities are involved (Hwang & Chung, 2009, p. 618).

Another case related with the public interest and arbitration happened in New Jersey, the appeals court held on May 9, 2006, that an arbitration confidentiality agreement alone is insufficient to uphold a protective order sealing documents filed

in court. In *Lederman v. Prudential Life Insurance Co.*[12], the court expressly stated that the public policy favouring arbitration does not trump the bedrock principles of open court proceedings and access to records. The court also cited the inability of defendants to show that serious harm would come to them if the contents of the filings were made public, a prerequisite to sealing what would typically be a public record (Stedrak, 2020).

In the common-law tradition, the public interest exception has been endorsed, in particular in the US and Australia. It appears that the exception would apply equally in situations where the state itself is a party to the arbitration and to those where a public corporation is a participant (Lovinfosse, 2014, p. 55).

Therefore, after the decision made in Australia, the so-called exception for public interest was created. That is, when the object of arbitration interferes with the common good of society or when the state is part of the arbitration process, confidentiality cannot be absolute.

According to P. Neill QC (1996, p. 301), one has to accept that statement as to the common perception in the State of Victoria regarding the absence of a duty of confidentiality. He said: *"But, for my part, if I had to express my opinion as to the common perception of English lawyers and other professionals practising in English arbitrations and, speaking more broadly, about the common perception of those practising in the field of international commercial arbitration, I would say that the common understanding has always been that not only are arbitrations to be held in private but that all information concerning them and what transpires in the arbitration room is to be treated as strictly confidential. I am aware of a school of thought which*

[12] 897 A.2d 362

favours the publication of sanitized versions of awards. I see no objection to this if it is done with the consent of the parties or possibly, absent consent if the publication is by an Arbitral Institution and the language used makes it impossible for even the skilled addressee to deduce who the parties were and who won and who lost. But I am not aware of any school of thought in the field of English or international arbitrations of a commercial or private character which considers it proper for a party or a witness at the end of die day's hearing in the arbitration room to go on" (Neill, 1996, p. 301).

Since the *Esso/BHP v. Plowman* case, there has been another reported case in Australia on the duty of confidence in arbitrations. It is *Commonwealth of Australia v. Cockatoo Dockyard Pty Ltd.*[13]. In that case, the Court of Appeal of New South Wales decided (by a majority) that an arbitrator had no power to include procedural guidance imposing a confidentiality duty which would have the effect of prohibiting the government (which was a party to the arbitration) from revealing information and documents to a state agency or the public. (Neill, 1996, p. 310).

The leading judgment of the majority was that of Kirby P. The gist of his decision is contained in the following passage: "*While private arbitration will often have the advantage of securing for parties a high level of confidentiality for their dealing, where one of those parties is a government or an organ of government, neither the arbitral agreement nor the general procedural powers of the arbitrator will extend so far as to stamp on the government litigant a regime of confidentiality or secrecy*

[13] (199.5) 36 NSWLR 662. A fuller background to the case can be found in a decision of Rolfe J adjudicating on an earlier skirmish between the parties - (1994) 3,5 NSWLR 704. Rolfe J had to deal with the case again when he decided, adversely to the Commonwealth, the issue which went up to the Court of Appeal of New South Wales. His judgment on that occasion is unreported. It was adopted by Meagher J, the dissenting judge in the Court of Appeal.

which effectively destroys or limits the general governmental duty to pursue the public interest[14]".

For Neill QC (1996, p. 301), in an article[15] written by the Hon. Andrew Rogers QC and Duncan Miller, several concerns have been expressed as to the implications of the two Australian cases. A more fundamental criticism which the authors make is that the public interest in the dissemination of information is given priority over all other competing interests, such as the natural desire of a commercial entity (which has contracted explicitly for dispute resolution through arbitration) to restrict to the privacy of the arbitration room material such as price-sensitive data and untested allegations made by government witnesses. A new weapon has thus been placed in the hands of the Commonwealth, the states, state entities and public utilities as participants in arbitrations. Indeed the list of beneficiaries is not so easily confined. Any party to an arbitration is now enabled to run up the flag labelled 'public interest' and to claim the right (or to assert the duty) to communicate to the public at massive confidential disclosures obtained as a result of the arbitral process and testimony which has been or is to be advanced in the arbitration by the publicizing party or his opponent.

Moving from public interest exceptions to the judicial exceptions and also moving from the international regulation to the Irish law, the legislation that must be applicated on the arbitration process and the Irish Arbitration Act, provides some exceptions for confidentiality, especially in the criminal field.

The first exception is related to the Criminal Justice Act 2011[16], section 19:

[14] Ibid. at 682
[15] Andrew Rogers QC and Duncan Miller 'Non-confidential Arbitration Proceedings', pp. 317-343.
[16] http://www.irishstatutebook.ie/eli/2011/act/22/enacted/en/pdf [accessed in 29/09/2020]

19.— (1) A person shall be guilty of an offence if he or she has information which he or she knows or believes might be of material assistance in — (a) preventing the commission by any other person of a relevant offence, or (b) securing the apprehension, prosecution or conviction of any other person for a relevant offence, and fails without reasonable excuse to disclose that information as soon as it is practicable to do so to a member of the Garda Síochána. (2) A person guilty of an offence under this section shall be liable — (a) on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months or both, or (b) on conviction on indictment, to a fine or imprisonment for a term not exceeding five years or both.

According to this section, is mandatory reporting of criminal behaviour, like money laundering, theft, etc., even if the information is covered by confidentiality in arbitration section.

2.4. Confidentiality in Online Arbitration

Online arbitration or E-arbitration is an arbitration procedure conducted, in whole or in part, through electronic means related to the advances of the Internet. It can be used to resolve conflicts arising from relationships originated by the Internet or by traditional face-to-face hiring. That is, it is not the origin of the dispute that determines whether an arbitration proceeding is online, but instead how it is conducted. This procedure allows a neutral third party to provide a decision for the dispute, using online technologies to assist its development.

E-arbitration is an essential aspect of online dispute resolution ('ODR') in which the parties can resolve any dispute resulting from the online contractual arrangement. E-

arbitration is used mostly for the settlement of cross-border business-to-business ('B2B') e-commerce disputes, and partly for the settlement of cross-border commercial legal disputes (Amro, 2019).

Electronic commerce's rapid growth places a premium on the time-and cost-effective settlement of conflicts resulting from such transactions. Parties doing business online can be expected to want to resolve their conflicts in the same way.

Regarding the process, in online arbitration, the e-arbitral process, including the hearing, is entirely conducted online. For such a procedure, the online service provider generates and administers an e-file for each e-commerce dispute. All notices and correspondence between the parties and the arbitrator(s) as well as the documents provided by the parties are included in this e-file. Similarly, in conventional arbitration, parties can consent to hold online hearings to the degree allowed, either by national legislation or by the rules of the arbitral institution (Amro, 2019).

The award is rendered online in E-arbitration. Unless otherwise decided by the parties before the commencement of the arbitration, an e-arbitral award should be binding. In the case of non-binding arbitration, the parties retain the right to refer the dispute to a court or to arbitrate in a binding manner. The arbitrator(s) shall communicate an arbitral award to the parties by digitally signed e-mail to the e-mail addresses of the parties. The arbitrator(s) shall also give notice of an e-award to the online arbitral institution. The organization will close the e-file until an e-award is notified and will order the parties to comply with the e-award. The institution can also publish on its website an e-award. Once an e-award has been rendered and notified, the losing party must comply with the award voluntarily or seek to set it aside. In

contrast, the winning party may seek to have the award recognised and enforced, like any other traditional arbitral award (Amro, 2019).

Respecting the confidentiality in E-arbitration, as mentioned before, contrary to the understanding of some, arbitration is not inherently a confidential process. Recently, concerns about privacy and confidentiality in arbitration have been heightened due to data protection problems and remote arbitration problems (Singer, 2020).

For some time, international arbitration has been moving online, and the influence of COVID-19 has massively helped accelerate this transition. Parties are gradually interacting mainly online, electronically filing and sharing information, file backup of documents, conducting interlocutory hearings via telephone or video conference and now digitally conducting full hearings (Wood and McKenzie, 2020).

While there are several positive aspects of this fast change, it raises cybersecurity concerns. This risk is increased when parties and courts use systems that are new to them and operate on unsecured networks from home. In the current environment, cybersecurity threats are amplified as hackers use COVID-19 as a "bait" to conduct cyberattacks on new and insecure remote working facilities and hijack video conference calls (Wood and McKenzie, 2020).

With this in mind, parties and their counsel should consult with each other early in the arbitration process to address any cybersecurity concerns. As part of such consultation, the essence of the information to be exchanged during the arbitration should be assessed; the effect of a cybersecurity breach on the business of a party personally or a party; and proportionate protective steps that could be taken to ensure better sensitive personal data and confidential business data (Singer, 2020).

That is, in international arbitration, cybersecurity breaches can impact both the credibility of the arbitral process and to disclose confidential and commercially sensitive details. The arbitral group must also be involved in cybersecurity at all levels of the arbitral phase (Wood and McKenzie, 2020).

For this reason, guidance on data privacy and cybersecurity has been released by the arbitration group. The most notable is the latest protocol issued by the International Council for Commercial Arbitration, the Bar Association of New York City and the International Conflict Prevention Institute: the ICCA-NYC Bar-CPR Protocol on International Arbitration Cybersecurity (2020)[17] (Wood and McKenzie, 2020).

There are two purposes of the ICCA-NYC Bar-CPR Cybersecurity Protocol for International Arbitration (the 'Protocol on Cybersecurity' or the 'Protocol'). First, the object of the Protocol is to provide a mechanism for the determination of appropriate information security measures for individual arbitration issues. This framework provides procedural and functional guidelines for the evaluation of safety hazards and for the identification of available interventions which may be implemented. Second, in international arbitration, the Protocol is meant to increase understanding of information security. It includes awareness of (i) information security risks in the arbitral process, which include both cybersecurity and physical security risks; (ii) the importance of information security to maintaining user confidence in the overall arbitral regime; (iii) the essential role played by individuals involved in the arbitration in effective risk mitigation; and (iv) some of the readily accessible information

[17] https://www.arbitration-icca.org/media/14/76788479244143/icca-nyc_bar-cpr_cybersecurity_protocol_for_international_arbitration_-_print_version.pdf, [accessed in 29/09/2020]

security measures available to improve everyday security practices (ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration, 2020, p. V).

For David C. Singer (2020), the Covid-19 pandemic has resulted in the increased use of arbitration technologies, such as the remote conduct of parts of the arbitration process, leading up to and including the hearing of facts. In this context, privacy and confidentiality concerns arise, and the parties, their lawyers and the arbitrator must be aware of different concerns: (i) Secure Internet Connections: Secure Internet access should be available to each participant. No one should attend the hearing from a public place or from which the hearings may be viewed, seen or otherwise accessed by a non-participant. (ii) Invitations and Access: Entry to the evidentiary hearing should be restricted to parties decided by the parties, their lawyers and the arbitrator. The authority to invite participants to the hearing may be granted to the arbitrator, the case manager of an arbitration service provider or other designated parties. Such power can be restricted to one person. You will provide password safe access to the hearing. Participants should be advised not to forward the invitation to others and not to share with anyone the listening connection or password. Participants must provide the arbitrator or other appointed official, in advance of the hearing, with the name, email address and telephone number of each official who will participate, attend or listen to any portion of the hearing to be able to send the invitation. It can include any person who is providing the remote hearing with technical assistance. (iii) Those present at a hearing: The arbitrator can check who is attending the hearing at the beginning of each hearing session. If someone is in the room with her or him, each participant should report and confirm whether no one else is present. Attendance at the hearing should be continuously tracked throughout the entire hearing. The witness should confirm at the beginning of a witness's

testimony that no one is with her or him in the session. Virtual backgrounds should not be allowed, which could hide the presence of others in the room. The arbitrator will ask the witness at any moment to provide a 360-degree survey of the space in which the witness is situated. The witness should be advised to turn off any mobile phone or another device that would cause the witness to connect with others during the presentation of the testimony. (iv) Exchanges and Use of Exhibits: Hard copies of the exhibits, or a flash drive containing the exhibits, should be supplied in advance of the hearing to the opposing counsel. Exhibits should also be issued in advance of the hearing to the arbitrators; this is in contrast to in-person hearings where, for the first time at the beginning of the hearing, the arbitrators usually obtain copies of the exhibits. Efforts must be made to ensure the secure delivery of the paper, as well as protection of the contents of any flash drive. (v) Recording the hearing: Confidentiality problems can arise concerning how stenographic transcription, audio recording or video recording records the evidentiary hearing. Where the hearing is recorded on the electronic platform used for the hearing, there may be fears that the recording may be disseminated to third parties. However, procedures can be introduced to reduce such risk by properly preserving the record and safeguarding access to it. The parties may accept that they will not electronically record the hearing or authorize anyone else to do so. Taking screenshots may include it. And there is no reason why the parties should not accept that a court stenographer would document the hearing in an old-fashioned way. (Singer, 2020).

3. Presentation of the data

Legal research is the process of identifying, organizing, and applying information that will help support legal arguments. All legal research begins with an analysis of a particular problem (usually as part of a legal case), the current legal opinions and rulings on that issue, and ends with the process of seeing how that information overlaps with the particular matter.

For researchers, the importance of the law can vary with the issue being investigated. Obviously, for many researchers (e.g., most neuro-scientists), the law is an irrelevant body of unrelated information. But for many others, it can enrich the scientific process (Morris, Sales & Shuman, 1997, p. 1).

In many other cases, finding the law can be essential for researchers. For example, studies that attempt to be directly relevant to a wide variety of societal issues often require the researcher to understand the law so to design a valid study of the phenomena. It can be the case for psycho-legal, socio-legal, or political academics, as well as for academics researching social problems from a broad range of fields (e.g., anthropology, economics, linguistics, political science, psychology, and sociology) with studies on sexual assault, privacy, or practically any subject of interest (Morris, Sales & Shuman, 1997, p. 1).

In this paper, data will be presented from primary and secondary sources.

Legal or primary sources because it is typically centre around case law, official communications from legislative bodies, and any rulings from administrative

agencies. These are considered primary because they come directly from the source, and as a result contain a high level of authority. The advantages of primary data are apparent: they tend to be unique and highly reliable. However, it can take time to research and find primary data properly. (Thomson Reuters Legal, 2019).

The secondary source is understood as narrative-based or evaluative information sources collected from other actors (Wisker, 2019, p. XVII). Secondary data include both raw data and published summaries. Most organisations collect and store a variety of data to support their operations: for example, payroll details, copies of letters, minutes of meetings and accounts of sales of goods or services. Quality daily newspapers contain a wealth of data, including reports about takeover bids and companies' share prices. Government departments undertake surveys and publish official statistics covering social, demographic and economic topics. Consumer research organisations collect data that are used subsequently by different clients. Trade organisations collect data from their members on topics such as sales that are subsequently aggregated and published (Saunders et al., 2013, p. 256).

In doing so, legal cases, statutes, administrative rules, regulations, decisions, and executive documents are legally authoritative and as such, are known as primary sources. Everything else, including treatises, legal encyclopaedias, and legal periodicals (e.g., law reviews), are known as secondary source material. Primary sources are the law itself; secondary sources provide indexes, summaries of the law, and comments on the law. Although secondary sources may discuss the law or direct the researcher to primary sources, they are not statements of authoritative law and should not be cited as a reference to the law. For instance, never cite a law review article as the source of the law but rather cite the direct primary source—be it a court's opinion, statute, administrative rule or regulation, or executive order.

Secondary sources, however, can be cited for their interpretative commentary on the law and their persuasive value (Morris, Sales & Shuman, 1997, p. 7).

In addition to that, the data collected in a qualitative study includes more than words; attitudes, feelings, vocal and facial expressions, and other behaviours are also involved. Throughout the report, three processes are mixed: compilation, coding and review of data (Glaser & Strauss, 1967). This approach facilitates the kind of versatility that is so valuable to the qualitative researcher who can modify a line of inquiry and move in new directions as more knowledge is gathered and a clearer understanding of what data is appropriate (Blumer, 1999).

The examination of legal institutions, legal doctrine, and jurisprudence serves as the root of most scholarly research in legal communication. Historically, traditionalist legal scholars have relied on the available decisions of courts, rule-makings by administrative bodies, and statutory constructions to guide their intellectual endeavours and research within the context of providing a content-based framework for future research (Allen, 2017, p. 859).

In this paper, the analysis of the data will be about at least two law cases from distinct jurisdictions, about three different topics: (i) how courts deal with confidentiality, in general; (ii) how courts deal with the exception of confidentiality; and (iii) how courts deal with confidentiality in online arbitration.

4. Data Analysis/Findings

This dissertation seeks the strengths of qualitative research, based on primary and secondary data, to answer the three main questions: (i) How the confidentiality are accepted in the international arbitration institutions?; (ii) Does the permitted exceptions of confidentiality amount to a breach of the law and international regulations?; and (iii) How is online arbitration accepted by international institutions and courts?.

To do so, the analysis of specifics cases law will be primordial. The idea is to bring relevant cases from different jurisdictions around the world, showing the strength and discipline around the confidentiality, the exceptions of it and the online arbitration.

4.1. Confidentiality and Arbitration

4.1.1. Bulgarian Foreign Trade Bank Ltd. v A.I. Trade Finance Inc.

The problem of confidentiality was placed before the courts of Sweden in the Bulbank[18] case. In this situation, the Bulgarian Foreign Trade Bank (Bulbank) signed a credit facility agreement with an Austrian bank containing an arbitration clause. This bank then entered into another arrangement with Al Trade Finance Inc. (AIT), a financing firm. AIT guaranteed periodic payments owed by Bulbank under the Credit

[18] https://www.arbitration.sccinstitute.com/views/pages/getfile.ashx?portalId=89&docId=1083535&propId=1578 [accessed in 08/10/2020]

Facility Agreement. In the face of financial difficulties in Bulgaria, the Austrian bank delegated to AIT all of its rights and responsibilities secured and paid by AIT and told Bulbank thereof. Under the terms of the Agreement on the Credit Facility, arbitration was instituted. Still, Bulbank opposed the proceedings based on the separability of the arbitration provision, alleging that AIT had not signed the original agreement. A favourable partial award that was later released without the permission of Bulbank was then awarded to AIT. Bulbank claimed that this was a violation of confidentiality and that Bulbank was entitled to stop the arbitration agreement as a whole. It was taken into consideration by the Stockholm City Court, which ruled in favour of Bulbank, to state that confidentiality is a cardinal law. The Stockholm City Court then found the arbitration agreement void and the arbitral award was null. (Lous, 2014).

About a year later, the Svea Court of Appeal reversed the decision, denying the principle that an implicit obligation of confidentiality exists. The Svea Court of Appeal established that a judgment in favour of Bulbank would be possible only if the company had been bound by an obligation to adhere to confidentiality in the agreement. Subsequently, it found that there was no such responsibility. The court argued instead for a ‘duty of loyalty’ between the parties to an arbitration. Bulbank appealed this ruling to the Swedish Supreme Court. The Court tried an international agreement on the issue of confidentiality in its decision but found none. The Supreme Court upheld the decision of the Svea Court of Appeal, stating that, under Swedish law, a duty of confidentiality is not an implicit arbitration feature. If the parties want confidentiality, they must specifically contract to do so (Lous, 2014).

Likewise, Makarenko I., 2016, explains that In the case of Foreign Trade Bank Ltd. of Bulgaria, v A.I. Trade Finance Inc. The Supreme Court of Sweden has upheld the Court of Appeal's decision on the award challenge. The issues raised in the

judgment concerning the validity of the arbitration clause and whether a confidentiality obligation bound the parties. The arbitration clause itself did not, in this case, envisage a confidentiality requirement. Such an obligation is not provided for by the Swedish Arbitration Act of 1929, which was established as the law applicable. A.I. based. Trade Finance Inc. to be bound by confidentiality obligations The Bulgarian Foreign Trade Bank Ltd. has referred to the Arbitration Rules of the Economic Commission for Europe of the United Nations, specifying that 'the dispute will be heard with the doors open only if demanded by all parties' (Art. 29). Bulgarian Foreign Trade Bank Ltd. argued that this meaning applies to the whole process, while the literal wording applies only to oral hearing (Makarenko, 2016).

For Thomson, B. and Finn, A., 2007, the Swedish Court of Appeal held that there is no implied in law duty of confidentiality in arbitration. Instead, the court substituted a duty of loyalty and good faith, which would restrict disclosure of individual information about the arbitration, depending on the circumstances of the case (Thomson and Finn, 2007).

The case mentioned above essentially held that confidential information in the arbitration is only protected when exceptional circumstances warrant a finding that the parties intended to keep specific information private. Most of the decided cases are based on unusual factual situations that make general principles challenging to discern (Thomson and Finn, 2007).

For its turn, Reymond-Eniaeva, E., 2019, clarify that the Stockholm City Court agreed with this reasoning and declared the arbitration agreement invalid, and consequently the final award as well. In the Esso/ BHP etc. v. Plowman case, this ruling was almost as ground-breaking as the High Court of Australia 's decision, but

for the opposite reason. It meant that all parties were bound by a confidentiality obligation except in the absence of an express legal clause or express agreement and that a breach of this confidentiality duty may be grounds for making an arbitration agreement void. (Reymond-Eniaeva, 2019).

The decision of the Stockholm City Court was, however, overturned by the Svea Court of Appeal and by the Supreme Court of Sweden. The latter court concluded that there was no clear and well-founded view on the duty of confidentiality either in Sweden or elsewhere. It upheld the final judgment of the Svea Court of Appeal declaring the arbitral award valid: "*Against the background of that stated, the Supreme Court considers that a party to arbitration proceedings cannot be deemed to be bound by a duty of confidentiality unless the parties have agreed to this. It consequently follows that AIT has not committed a breach of contract by allowing the publication of the decision that the arbitration panel issue during the proceedings. Therefore, Bulbank did not have grounds for revoking the arbitration agreement and Bulbank's application for a declaration of invalidity of revocation of the arbitral award can, therefore not be granted*"[19] (Reymond-Eniaeva, 2019).

As a consequence of this decision, and since there is no provision on the obligation of confidentiality in the Swedish Arbitration Act, Swedish authors generally admit that, under Swedish law, parties to arbitral proceedings are not bound by a duty of confidentiality unless they have expressly agreed on such a duty (Reymond-Eniaeva, 2019).

In doing so, Hwang S.C., M. Chung, K., 2009, point out that In Bulgarian Foreign Trade Bank Ltd. v. AI Trade Finance Inc., better known as the "Bulbank case," the

[19] Judgment of the Supreme Court of Sweden rendered in 2000 in Case N T 1881-99: The Bulbank Case, in: Stockholm Arbitration Report, Volume 2, 2000, p. 147.

Swedish Supreme Court held that there is no implied duty of confidentiality in private arbitrations. Accordingly, there are only two ways to safeguard the confidentiality of arbitration proceedings under Swedish law: (i) expressly contract for confidentiality; or (ii) adopt arbitration rules that expressly provide for confidentiality (Hwang and Chung, 2009).

4.1.2. Myanma Yaung Chi Oo Co Ltd v Win Win Nu

Moving from Swedish considerations to Singapore context, In Myanma Yaung Chi Oo Co Ltd v Win Win Nu [2003] SGHC 124, the Singapore High Court's ruling on the confidentiality of arbitration proceedings and documents revealed in those proceedings was discussed by Justice Kan Ting Chiu (Gordon and Smith, 2003).

In this case, the first defendant entered a joint venture to create the complainant's joint venture company with Myanmar Foodstuff Industries ('MFI'), an entity owned by the Myanmar government. The plaintiff was eventually injured. The second defendant launched arbitration proceedings against the Myanmar government. Then the second defendant in Myanmar was sued by the plaintiff and MFI. The plaintiff also sued the defendants in Singapore (Teck, n.d.).

Pending the arbitration, the defendants applied to strike out the action or stay the action in the alternative. In their application, the first defendant submitted affidavits about the arbitration proceedings, along with records relating to those proceedings. The defendant claimed that it was appropriate to reveal that the Singapore action was vexatious, unconstitutional and an abuse of the court process as the same charges of misconduct was made against the first defendant in two pending

proceedings before the Myanmar courts, as well as the arbitration proceedings (Teck, n.d.).

On appeal to the High Court, the questions were (i) whether the parties to the arbitration proceedings were required to protect the confidentiality of the documents and (ii) whether a party was required to reveal certain documents by leave of court and, if so, whether leave could be granted retrospectively (Gordon and Smith, 2003).

The court started by considering the critical English cases, including *Hassneh Insurance Co of Israel v Mew* [1993] 2 Ll LR 243 and *Ali Shipping Company v Shipyard Trogir* [1999] 1 WLR 314, [1998] 2 All ER 136. The English High Court held in Hassneh that it was not a violation of the obligation of trust for an arbitrator to reveal the award of an arbitration award if it was reasonably appropriate for the party to do so to create or secure its legal rights against a third party. The court acknowledged, however, that it drew a line for the determination against the disclosure of the raw materials, such as proof notes, witness statements, outline submissions and pleadings. It also noted that the English Court of Appeal took a broader view in Ali Shipping and held that the implied term should properly be treated as an attachment as a matter of law. In that case, it was held that disclosure is appropriate where it is reasonably required, among other things, to protect the legitimate interest of "of an arbitrating party" (Gordon and Smith, 2003).

By comparison, the High Court noted that in *Esso Australia Resources Ltd v Plowman* [1995] 128 ALR 391, the Australian High Court refused to comply with Hassneh and did not find that a duty of trust was implied and put on the parties. (Gordon and Smith, 2003).

The Singapore High Court followed the English view on the matter of whether there was a confidentiality obligation, expressly opposing the Australian approach and upholding the confidentiality of arbitral records (Teck, n.d.). That is, the Singapore High Court maintain the confidentiality of arbitration documents.

It is necessary to remember that the court followed the strategy of an implicit term emerging from the expectations of the parties when ruling in favour of a duty of confidentiality, stating: "*Parties who opt for arbitration rather than litigation are likely to be aware of and be influenced by the fact that the former is private hearings while the latter are open hearings. Rather than to say that there is nothing inherently confidential in the arbitration process, it is more in keeping with the parties' expectations to take the position that the proceedings are confidential and that disclosures can be made in the accepted circumstances*" (Teck, n.d.).

Concerning the question as to whether the disclosure requires a leave of court, the court preferred to hold that: "*The reasonable necessity exception is grounded on the implied agreement that when it is reasonably necessary to disclose the duty of confidentiality is lifted. If the duty does not apply leave of court is not required for disclosure*". The court seems to have dismissed the broader approach in Ali Shipping Corp v Shipyard Trogir, without expressly saying so (Teck, n.d.).

The court then held that there was no fair need to appeal to the arbitral papers as the arbitration proceedings had been terminated; any injustice resulting from the arbitration proceedings had been brought to an end upon its termination. However, notably, the court also noted that the assistant register should have authorized the disclosure of records, as disclosure would have been relatively appropriate at that point of the proceedings (Teck, n.d.).

Finally, as regards the disclosure process, the court observed that if one party agreed that disclosure was reasonably necessary and made the disclosure if the other party challenged this, it could appeal for the disclosure to be expunged. The court would then determine if it was reasonably necessary and, if not, make an order to expunge it. Notably, the approach of the court seems to support a single-stage approach; all questions related to the primary issue of 'reasonable necessity' (Teck, n.d.).

Because of the above in the analysis of the cases, it can be seen that Swedish jurisprudence on this subject has no uniformity concerning privacy and confidentiality. At the same time, Singapore was clear about the reasonably necessary to disclose the duty of confidentiality.

4.2. The exceptions to the rule in confidentiality

4.2.1. Emmott v Michael Wilson & Partners Ltd

The United Kingdom is known for its strong concerning international arbitration. For that reason, the first case sob analysis will be *Emmott v Michael Wilson & Partners Ltd*, tried by the English court. This appeal poses issues of great practical significance, in exceptional situations, concerning confidentiality in national and international arbitration. It is an appeal from orders given by Flaux J on 23 November and 4 December 2007 authorizing the disclosure, in proceedings in New South Wales and the British Virgin Islands, of documents obtained in the course of an English arbitration procedure (Berger, n.d.).

That litigation ("bitter and hard-fought") arose out of a dispute between Mr Michael Wilson (MW), an English-qualified solicitor, and JE. They in 2001 had joined MW in Michael Wilson & Partners Ltd (MWP), incorporated in the BVI, which provided legal services in Kazakhstan. JE left MWP in June 2006 and after that practised, along with two other former MWP employees, through two BVI companies. MWP claimed that all of this was part of a scheme by JE to divert MWP's business in breach of contract and breach of trust. It led to arbitration in London and court proceedings by MWP in England, NSW, BVI, Jersey and Colorado. JE's case was that the NSW and BVI litigation was part of the same dispute as to the London arbitration. Further, JE believed that MW was running a litigation campaign to outspend him and to prevent him from carrying on his business (R. Dundas, 2008).

Under the terms of an agreement dated 7 December 2001, Mr Emmott joined MWP as director and senior attorney at MWP and was allowed to hold 33% of its shares, with Mr Wilson holding the remainder. Mr Emmott left MWP in June 2006 and then worked together with two other former MWP staff, Robert Nicholls and David Slater (both Australian citizens), through Temujin International Ltd ('TIL'), and Temujin Services Ltd, a related service company ('TSL'), which is incorporated in the British Virgin Islands (Berger, n.d.).

MWP argues that all of this was part of Mr Emmott's plan to divert MWP 's company in breach of contract and breach of confidence. It contributed to arbitration in London and MWP court cases in England (for search orders and freezing warrants in favour of arbitration) and in New South Wales ('NSW'), Jersey and Colorado, the British Virgin Islands ('BVI'). The case of Mr Emmott is that the NSW and BVI court cases and the London arbitration are part of the same conflict. It is because MWP states that Messrs Nicholls, Slater and Emmott, along with TIL, have been implicated in

mutual misconduct in the BVI and NSW proceedings and that Messrs Nicholls and Slater and TIL have secondary/additional responsibility for participation in the suspected primary violations of the duty of Mr Emmott (Berger, n.d.).

The JE/MWP agreement incorporated a London arbitration clause and MWP served notice of arbitration in August 2006. A tribunal was eventually constituted, but points of claim were not served until July 2007. In the course of satellite litigation, MW alleged that JE had been guilty of "*a substantial fraud on MWP", or "dishonest conduct" or a "serious fraud" or "fraud … massive in scale*" and these allegations were substantially repeated in the points of claim. JE asked the court to strike out the arguments of MWP because they alleged that they claimed fraud without any proper specification, that MWP made prejudicial allegations that did not form the basis of the argument, and that they were otherwise embarrassingly ambiguous. The court gave MWP the option to have its claim thrown out or re-plead its case. Amended points of claim were served in October 2007, among other things pleading that JE had diverted work, commercial opportunities and clients or potential clients of MWP and had dishonestly received secret profits; the claims of conspiracy and fraud against JE were withdrawn. That pleading was next to the subject of an application by JE to the tribunal to strike out various aspects of it. The multiple satellite litigation commenced in 2006/07 (R. Dundas, 2008).

Under the authorization given by Tomlinson J. in July 2007, the original points of argument in the London arbitration were shown to the BVI court. JE was concerned that allegations of fraud continued to be made against him in NSW and the BVI notwithstanding that they had been withdrawn from the London arbitration. In November 2007, he applied to the Commercial Court for an order that he be free to reveal to the claimants in the BVI, NSW and Bahamas case the records in the

London arbitration and their lawyers so that they could be revealed to the courts in those jurisdictions, because: (a) The case of the MWP in the arbitration was significantly inconsistent with that of the BVI and NSW proceedings, and (b) MWP was giving a false or inaccurate image to those courts. The disclosure was said to be in the interests of justice and relatively appropriate to allow JE to protect its legitimate rights and to do no harm to MWP (R. Dundas, 2008).

Flaux J considered disclosure to be in the interests of justice in order not to deceive or possibly deceive the international courts if the claims advanced in the separate proceedings were the same or similar charges. The judge found that any order would be premature in the Bahamas event, as the cases had just reached the point of challenging jurisdiction (Berger, n.d.).

The judge also agreed, applying Ali Shipping Company v Shipyard Trogir [1999] 1 WLR 314, to which I shall revert, that the information was confidential in principle. Still, the confidentiality was subject to two possible exceptions in the present case. The first was where a disclosure was reasonably necessary for the security of the legitimate interests of the arbitrating party, including where it was reasonably necessary for the establishment or security of the legal rights of the arbitrating party about a third party to bring an action against a third party or to defend an action or counterclaim brought by a third party: *Hassneh Insurance Co. of Israel v Mew [1993] 2 Lloyd's Rep 243*. The application of that exception to the NSW and BVI proceedings was not morally justified on the basis that Mr Emmott did not require the amended points of claim or his defence to establish or secure his legal rights for a third party to establish a cause of action against that third party or to defend a claim or counterclaim brought by that third party. In these jurisdictions, he was not a party to the proceedings. Nor was a claim brought against him by a third party, by

definition, and even if he were a party, it would be MWP and not a third party bringing the case (Berger, n.d.).

The second significant exception was the public interest exception relied on by the judge in respect of *London & Leeds Estates v Paribas* (No 2) [1995] 1 EGLR 102. The judge claimed that the initial Points of Claim in the London arbitration had been disclosed in NSW, but no disclosure had been made of the revised Points of Claim. The NSW court may have been deceived by the presumption that allegations made against, explicitly, Mr Nicholls and Mr Slater in the NSW proceedings effectively represented allegations made in the London arbitration against Mr Emmott. The interests of justice required the English court to ensure, to the extent practicable, that the parties to London arbitrations did not seek to use the duty of confidentiality to mislead or possibly mislead foreign courts, a fortiori, where the cases submitted to foreign courts pose the same or similar arguments and are proc (Berger, n.d.).

Regarding the law and the decision, per Lawrence Collins L.J., the uncontroversial starting point was that, in English law, arbitration was a private process, e.g. in *Russell v Russell*[20] Sir George Jessel M.R. had said: "*As a rule, persons enter into [arbitration] contracts with the express view of keeping their quarrels from the public eyes, and of avoiding that discussion in public, which must be a painful one, and which might be an injury even to the successful party to the litigation, and most surely would be to the unsuccessful.*" Parties arbitrating in England expect the hearing to be held in private, and this is an essential benefit for business people compared to litigation[21]. CPR r.62.10(3)(b) underlines the privacy of arbitration,

[20] Russell v Russell (1880) 14 Ch D. 471 at 474.
[21] In the 2006 and 2008 Queen Mary University of London/PriceWaterhouseCoopers studies of the attitudes of commercial users to arbitration, confidentiality ranked second to enforceability as the principal reason to choosing arbitration. See Hassneh Insurance Co of Israel v Mew [1993] 2 Lloyd's Rep. 243 at 246-247; Department of

which provides that, subject to the authority of the court to order that an arbitration claim can be heard in public or in private, all arbitration claims shall be heard in private except for proceedings under s.45 or s.69, where the reverse applies. The default position is that the parties' desire for confidentiality and privacy outweighs the public interest in a public hearing: *Department of Economic Policy and Development of the City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314 Furthermore, CPR PD62.5.1 provides that an arbitration application may be inspected only with the permission of the court[22]. The privacy of arbitration is almost universally recognised by institutional rules[23] , as is the confidentiality of the award[24] (R. Dundas, 2008).

Lawrence Collins L.J. continued by saying that in the last 20 years or so the English courts have had to consider, in several different contexts, the implications of the arbitral process' secrecy and the extent of the confidentiality obligations. That is the English jurisprudence on this topic (other than the confidentiality of awards, which is commonly debated in other countries) is much richer than that of any other major arbitration centre, and that it is a significant contribution to the growth of international arbitration law. (R. Dundas, 2008).

However, he noted that only a minority of the major arbitration centres had rules dealing expressly with the confidentiality of material generated in arbitrations. In reviewing the authorities, he noted that it was not always easy to distinguish confidentiality from privacy and that it was also essential to bear in mind the context of the decisions because quite different considerations might apply in different contexts (R. Dundas, 2008).

Economic Policy and Development of the City of Moscow v Bankers Trust Co [2004] EWCA Civ 314; [2005] QB 207; also Mason C.J. in Esso v Plowman (1995) 128 A.L.R. 391 at 398.

[22] Glidepath BV v Thompson [2005] EWHC 818 (Comm); [2005] 2 Lloyd's Rep 549, per Colman J.

[23] Including LCIA Art.19(4); ICC Art.21(3); WIPO Art.53(c); UNCITRAL Rules Art.25(4).

[24] LCIA Art.30(1) and 30(3); ICC Art.28(2); WIPO Art.75; UNCITRAL Rules Art.32(5).

4.2.2. Commonwealth of Australia v. Cockatoo Dockyard Pty. Ltd

Commonwealth of Australia v. Cockatoo Dockyard Pty. Ltd[25]*.* is a relevant case from Australia. The arbitration in question in Cockatoo Dockyard was between the Commonwealth of Australia and Cockatoo Dockyard Pty. Ltd. ('the Codock'). On Cockatoo Island, near Sydney, it was concerned with environmental conditions. The island was leased between 1857 and 1991 by Australia to Codock for the service of a naval dockyard. On its return in the 1990s, Australia was unhappy with the state of the Island, and the question of whether Codock had violated those lease agreements with Australia went to arbitration (Pongracic-Speier, n.d.).

The arbitration proceedings between the Commonwealth and Codock concerned a naval dockyard on Cockatoo Island. The Codock operated the Dockyard under a series of Lease and Trading Agreements until its decommissioning in 1991. At that time, the final Trade and Lease Agreement had not expired. What is relevant here is the pollution dispute in the arbitration proceedings, which was concerned by the allegations of the Commonwealth, that when Codock yielded the Island, they would leave behind industrial substances, which was in breach of the Lease Agreement (Nordström, 2001).

The specific issue before the New South Wales Court of Appeal was a challenge by the Commonwealth as to whether a series of directions made by one of the arbitrators concerning the confidentiality of documents, was beyond the power of the arbitrator to make. The confidentiality concerned both documents prepared for the arbitration, plus those produced by each party for inspection and discovery (Nordström, 2001).

[25] Commonwealth of Australia v. Cockatoo Dockyard Pty Ltd., (1995) 36 NSWLR 662.

At some stage in the arbitration, under Australia's Freedom of Information Act 1982, a journalist made a request for information on toxic waste on Cockatoo Island. Codock appealed to the sole arbitrator for directives to ensure that information related to the arbitration remain confidential. Australia opposed Codock 's demands from the outset, on the ground that limitations on the publication of Cockatoo Island records would impede the free flow of information in society and impact governmental powers (Pongracic-Speier, n.d.).

The Arbitrator's decision was made in response to the Commonwealth, who wished to disclose a series of expert reports that had been prepared for the arbitration. The relevant directions of the arbitrator were as follows: *"Direct that neither party to the proceedings disclose or grant access to (a) any documents or other material prepared for this arbitration; (b) any documents or other material, whether prepared for this arbitration or not, which reveal the contents of any document or other material which was prepared for this arbitration; (c) any document or material produced for inspection on a discovery by the other party for these proceedings; (d) any document or material filed in evidence in these proceedings"*[26]. A provision was added, permitting disclosure to legal advisers and agents (Nordström, 2001).

Australia claimed, at the request of the Supreme Court of New South Wales, that the arbitrator had abused his authority and had purported to intervene unreasonably and inconveniently with government rights and duties. The Supreme Court has refused Australia relief. Australia appealed and, at the Court of Appeal, the ruling was reversed 2 to 1. The vote of the majority was written by Kirby P. (Pongracic-Speier, n.d.).

[26] 3 Cited by Kirby P, in Commonwealth of Australia v. Cockatoo Dockyard Pty Ltd., (1995) 36 NSWLR 662 at 669.

In short, the majority found (i) that the Court has jurisdiction to interfere in the arbitration to correct a mistake in an arbitral award, and (ii) that where a government is a party to an arbitration, the arbitrator does not have the power to make procedural orders imposing on the government an obligation of secrecy, to limit the government's obligation to public accountability or to pursue the public interest (Pongracic-Speier, n.d.).

The Court needed to review the scope of the arbitrator's power to make directions about the confidentiality of information produced for the arbitration. The leading judgement for the majority was that of Mr Justice Kirby. He held that the arbitrator's directions were impermissibly comprehensive. They would prevent the Commonwealth from legitimate disclosure of arbitration documents. The directions "properly characterised went outside the concerns of the Arbitration" (Nordström, 2001).

Kirby P relied upon the public interest exception suggested by Mason CJ in Esso. He held that the set of confidentiality directions, extended to documents the Commonwealth wished to give to State Authorities. While this information was necessary for the public, it was urgent for public health and restoration agencies. Kirby P argued that there should not be a duty of confidentiality to a party's documents prepared for arbitration if they have a broader public interest [27] (Nordström, 2001).

Mr Justice Kirby concluded: "*Whilst private arbitration will often have the advantage of securing for parties a high level of confidentiality for their dealing, where one of those parties is a government or an organ of government, neither the arbitral*

[27] Commonwealth of Australia v. Cockatoo Dockyard Pty Ltd., (1995) 36 NSWLR 662 at 680.

agreement nor the general procedure powers of the arbitrator will extend so far as to stamp on the government litigant a regime of confidentiality or secrecy which effectively destroys or limits the general governmental duty to pursue the public interest." He, therefore, would not accept that a private arbitration agreement could destroy or limit the Commonwealth's duty to pursue the public's interest [28] (Nordström, 2001).

The Australian decisions thus show that there would always exist a public interest exception to confidentiality whenever public actors are involved in arbitration and that when there is a statutory requirement that information under consideration in arbitration be revealed, no confidentiality principle operates to abrogate that statute (Misra and Jordans, 2006).

It can be inferred, with this in mind, that the English court considers the exception of confidentiality for reasons of public interest, more specifically about interests of justice, just as the Australian court considers that when the government is part of the arbitration, it applies if the exception of confidentiality due to the public interest.

4.3. Confidentiality in Online Arbitration

The international arbitration group is not alone in needing to learn new methods of functioning quickly, as the COVID-19 pandemic has shut down corporations, locked down societies and closed borders. The challenge presented by COVID-19 to international arbitration is acute for a cross-border conflict resolution mechanism that often includes participants from numerous countries. However, it is well-positioned to

[28] Commonwealth of Australia v. Cockatoo Dockyard Pty Ltd., (1995) 36 NSWLR 662 at 682.

respond quickly to these challenges, provided that arbitration is a versatile and consensual procedure. Indeed, the international arbitration community, led by the major arbitral institutions, has reacted dramatically and collaboratively within a short period to find ways to preserve access to justice in a timely and efficient manner (Battisson et al., 2020).

However, the increased usage of online channels and digitization has correlated with the rising incidence of cyber-attacks and sophistication. By 2021, an organization will reportedly fall victim to cyber-attacks every 11 seconds[29]. These platforms must also have secure digital environments where it is possible to share communications, store evidence and files and hold virtual hearings remotely and safely. The value of online dispute resolution (ODR) systems has been made clear by the need to provide conveniently accessible systems suitable for addressing complex disputes (Lozano, Masumy, Pollard and El-Kady, 2020).

Arbitral institutions are at the forefront of the reaction to COVID-19 by the international arbitration community. Commendably, although incorporating remote working practices and virtual hearings, many institutions have primarily remained entirely operational. In April 2020, 13 arbitral institutions issued a joint statement[30] calling for solidarity, cooperation and collaboration in response to COVID-19. The statement emphasised the joint ambition of the institutions to "*support international arbitration's ability to contribute to stability and foreseeability in a highly unstable environment, including by ensuring that pending cases may continue and that parties may have their cases heard without undue delay*" (Battisson et al., 2020).

[29] https://www.herjavecgroup.com/wp-content/uploads/2018/12/CV-HG-2019-Official-Annual-Cybercrime-Report.pdf [accessed in 10/10/2020]
[30] https://iccwbo.org/content/uploads/sites/3/2020/04/covid19-joint-statement.pdf [accessed in 10/10/2020]

The Joint Statement requests arbitral tribunals and parties to minimize, to the fullest extent practicable, the consequences of any impediments while maintaining the fairness and efficacy of arbitral proceedings. The ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic[31] ("ICC Note") enables tribunals to follow different approaches in appropriate circumstances, in so far as they exercise their power to create procedures appropriate to the specific circumstances of each arbitration and to fulfil their overriding duty to conduct the arbitration expeditiously. The Delos Checklist on Holding Arbitration and Mediation Hearings in Times of COVID-19 ('Delos Checklist') indicates that tribunals should decide each case in the light of the terms of the dispute resolution agreement, the particular characteristics of the case, and conditions at the seat of arbitration, rather than an automatic suspension of the proceedings or of time limits due to COVID-19 (Fan, 2020).

Some institutional rules and practice guidelines have progressively acknowledged the possibility of virtual hearings. For instance, 2017 Rules of the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation[32] ("ICAC") allows a party to request the arbitral tribunal to "participate in the hearing using video conferencing" (article 30(6)). Article 25(2) of the ICC Rules of Arbitration 2017[33] also does not preclude a hearing taking place "in person" by virtual means if the circumstances so warrant, as indicated by the ICC Note (Fan, 2020).

[31] https://iccwbo.org/publication/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic/ [accessed in 11/10/2020]
[32] https://mkas.tpprf.ru/en/documents/ [accessed in 11/10/2020]
[33] https://iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf [accessed in 11/10/2020]

Interestingly, in the case of *Capic v Ford Motor Company of Australia Limited (Adjournment)*[34] [2020] FCA 486, The Federal Court of Australia rejected the motion for an adjournment of the trial by the respondent and determined that the trial must continue as planned in the virtual model. His Honour agreed that certain aspects of a virtual trial were burdensome and undesirable, but claimed that such challenges were not insurmountable and that the trial would not be unjust or unjust. Mentioning the fact that "*public institutions such as the Court must do all they can to facilitate the continuation of the economy and essential services of government, including the administration of justice*", his Honour decided that, since the adjournment of matters indefinitely did not serve the public interest, a virtual trial was to proceed. The above decision can give arbitrators some comfort if, considering the objections of the parties, they decide to proceed with virtual hearings. (Fan, 2020).

Regarding confidentiality and data security, detailed manuals or guidelines for simulated hearings and draft procedural orders have been provided by arbitral bodies such as the American Arbitration Association (AAA) (in collaboration with the International Centre for Dispute Resolution (ICDR)), the Africa Arbitration Academy, the Chartered Institute of Arbitration (CIArb), the International Institute of Conflict Prevention and Resolution (CPR Institute) and the International Commercial Court (ICC). Through the technical criteria and considerations required to ensure an excellent virtual hearing, these materials take sides. A recurring theme is how parties and tribunals should guarantee the confidentiality of the proceedings and protect electronically exchanged or registered data (Battisson et al., 2020).

[34] https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2020/2020fca0486 [accessed in 11/10/2020]

Typical recommendations include: (i) Using platforms that are password protected and generate unique, automatically generated meeting IDs for each virtual hearing; (ii) Only using secure internet connections; (iii) Nominating a "host" to monitor participant entry and to send a list of participants to the host before the hearing; (iv) Avoid using information that would disclose the identity of the parties in the meeting description; (v) Knowledge of the terms of service applicable to the recording functionality of the platform and either disabling or formalizing the terms in which sessions are documented; (vi) Use encrypted file sharing sites or cloud storage while sharing recordings (with a password-protected connection to the file that must be accessed within a couple of days after the cloud recording is deleted); and (vii) Prohibiting any audio, video or screenshot recording of the hearing other than the official record (Battisson et al., 2020).

So, therefore, an unavoidable development is the more generous and better use of technology in the administration of justice, and the current pandemic may have moved the digitalization process dramatically forward, contributing in the future to more e-mediation, e-arbitration, online courts and the use of AI. Inventing is the only way to predict the future. Arbitrators, judges, lawyers, parties, arbitration bodies and courts should brace themselves for this trend and make the utmost effort to promote the fair settlement of disputes as quickly, cheaply and effectively as possible. (Fan, 2020).

5. Discussion

As already pointed out and analysed before, confidentiality is a principle that still raises many questions in the legal sphere regarding its applicability or the exceptions of that same principle.

The contentious question of how to handle confidentiality in international commercial arbitration has been discussed by the courts of many countries, as parties routinely attempt to disclose and rely on details about arbitration in subsequent judicial proceedings. The positions taken vary widely, but three distinct views stand out: confidentiality can still be imposed on the parties in the English legal system as an implicit element of arbitration, and confidentiality of the procedure itself is well known. However, the content of this duty can depend on the context, and its scope is not clearly defined (Lous, 2014).

In the first case exposed, *Bulgarian Foreign Trade Bank (Bulbank) v A.I. Trade Finance Inc.*, The Supreme Court upheld the decision of the Svea Court of Appeal, stating that, under Swedish law, the obligation of confidentiality is not an implicit

arbitration feature. If the parties want confidentiality, they must specifically contract to do so (Lous, 2014).

In Sweden, there are no confidentiality-provisions that limit the parties' ability to publish information regarding the arbitration. Although the "duty of loyalty" could place such limitations on the parties, national legislation might provide some, but unreliable, protection for parties seeking confidentiality of the proceedings (Lous, 2014).

According to the Court of Justice in the Bulbank Case, the point of departure for addressing the confidentiality problem is that arbitration proceedings are focused on the agreement. It is governed by law, even though arbitration is private. In this case, the Court found out that the arbitration proceedings can be open to the public based on the provisions laid down in the arbitration law, or when the arbitration proceedings are brought before state courts, or when the arbitration proceedings are lodged with remedies, the documentation of actual data or the appeal to judicial proceedings. The Supreme Court of Sweden believes that the obligation of confidentiality may not bound the party to the arbitration unless the parties agreed on it (Makarenko, 2016).

In doing so, as a consequence of this decision, and since there is no provision on the obligation of confidentiality in the Swedish Arbitration Act, Swedish authors generally admit that, under Swedish law, parties to arbitral proceedings are not bound by a duty of confidentiality unless they have expressly agreed on such a duty (Reymond-Eniaeva, 2019).

Therefore, the conclusion reached is that in the position of Sweden the principle of confidentiality depends on the agreement between the parties, considering that the legislation under arbitration does not provide for confidentiality as an absolute

principle. As stated, courts bring the term "duty of loyalty" when referring to the inherent principle of arbitration, since confidentiality arises from an agreement between the parties and the arbitrator.

The following case analysed was *Myanma Yaung Chi Oo Co Ltd v Win Win Nu*, where de Singapore Court had decided it is possible that parties who opt for arbitration rather than litigation will be mindful of and motivated by the fact that private hearings are the former, whereas open hearings are the latter. Rather than claiming that the arbitration process has nothing inherently confidential, it is more in line with the interests of the parties to take the view that the proceedings are confidential and that disclosures may be made in agreed circumstances. (Teck, n.d.).

In the case above mentioned, The High Court of Singapore determined that it was not appropriate to leave the court to reveal information that was legitimately necessary to protect the legitimate interests of a party (Georgiou, Howlett and Wang, 2012).

However, as arbitration-related cases are brought before the courts, the Singapore International Arbitration Act (the "SIAA") specifies that cases under the SIAA, on the application of any party to the proceedings, shall not be heard in open court. Furthermore, if they are heard in a closed court if all the parties consent on disclosure or the court is satisfied that the information does not expose any matter that a party reasonably wishes to remain confidential, the court may offer instructions as to whether information relating to the proceedings may be released. Besides that, if a court finds that its decision relating to arbitration is of considerable legal interest, it shall require that the records of the judgment must be issued in the form of legal records and professional publications. The court may offer instructions to do so if any

party to the proceedings reasonably wishes to conceal any matter. (Georgiou, Howlett and Wang, 2012).

Between this and that, according to Teck, L., n.d., drawing from *Myanma Yaung Chi Oo Co Ltd v Win Win Nu*, the following tentative propositions can be assayed: (i) Arbitral proceedings and documents arising from that position shall be considered as confidential proceedings. This duty is an implicit concept that emerges from the expectations of the arbitration agreement of the parties. (ii) This duty of confidentiality would then bound the parties to the arbitration. (iii) It is unclear if the arbitration will equally bound witnesses and whether the parties to the arbitration will owe the witnesses a duty of confidentiality. Based on the principle of a term implied in the arbitration agreement based on the expectations of the parties, it is difficult to see how the concept of privacy can be applied to include arbitration witnesses in such a way that reciprocal duties of trust are owed. An issue like that is not merely academic. If the principle of confidentiality is expanded to include witnesses, it would not be necessary for the counterparty to agree if parties to an agreement attempt to reveal witness statements based on agree. The witness's permission must also be obtained. (iv) The 'reasonable necessity' test would likely allow arbitral awards to be revealed as long as it can be demonstrated that such disclosure is required to enforce the rights of a party embodied in such an award. Even if the arbitration agreement or rules of arbitration specifically provide for confidentiality obligations, this is likely to be the case. It should be remembered, in this respect, that many of the traditional arbitral rules do so. Remember, however, that the Model Law is silent on this in the International Arbitration Act. (v) The disclosure of the award is unlikely to fall under the exemption of 'reasonable necessity' for reasons of commercial convenience. (vi) Likewise, for purposes of commercial or procedural convenience,

disclosure of other arbitral documents is unlikely to fall under this exception. (vii) Whether or not the disclosure of a document is reasonably necessary depends on the moment that the request is made and whether the factual matrix remains at that moment. (viii) A single-stage approach would seem to decide the issue of disclosure, as once the Singapore High Court found that disclosure of the records was not reasonably required, it did not continue to decide whether disclosure could still be ordered despite the confidentiality requirement (although it is highly doubtful, given the factual matrix, that it would have ordered it). Nevertheless, it is proposed that in any subsequent case it is still open to our courts to take a two-stage test, that is, by first deciding if a document was confidential or not (the 'reasonable necessity' test that applies at this stage) and then deciding if, despite the confidentiality, the disclosure should still be required if appropriate to do so under the principles applicable for the relevant application being made to the court. It is suggested that such an approach would bring confidential arbitral documents in line with the approach towards all other confidential documents (Teck, n.d.).

Thus, the conclusion is that in the arbitrations in Singapore, the procedures are confidential, and the disclosures can be made in the accepted circumstances. The Singapore High Court, in the case mentioned above, decided that court authorization was not necessary to disclose information that was reasonably necessary for the protection of a party's legitimate interests.

The third case analysed is from the English Court: *Emmott v Michael Wilson & Partners Ltd*., have settled the juridical basis for the duty of confidentiality. Emmott has laid down the following principles: (a) The obligation of confidentiality in the arbitration is implied by law and arises out of the nature of the arbitration. (b) This obligation is a substantive rule of law masquerading as an implied term. (c) It

requires both parties not to reveal or use for any other reason any documents prepared for and used in the arbitration, or revealed or generated in the course of the arbitration, or transcripts or notes of proof in the arbitration or award, and not to reveal in any other manner what any witness in the arbitration has shown. (d) The substance of the obligation can depend on the context in which it occurs and on the nature of the information or documents at issue; the limitations of the obligation are still, on a case-by-case basis, in the phase of creation (Hwang and Chung, 2009, p. 612).

Also, the principal cases in which disclosure will be permissible are where: (i) there is consent (express or implied) of the parties; (ii) there is an order or leave of the court; (iii) it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; and (iv) the public interest or the interests of justice require disclosure (Hwang and Chung, 2009, p. 612).

For Reymond-Eniaeva, E. (2019), regarding disclosure of documents generated in or for arbitration proceedings, she affirms that several courts have had to deal with the issue of disclosure of arbitration materials from one proceeding in another proceeding, and we provide summaries of their decisions. The decisions are essential to understanding the state courts have effectively recognized exceptions to the confidentiality requirement of the parties. Nevertheless, it must be borne in mind that, even in the presence of established rules and principles, each situation, depending on the particular factual circumstances, is discussed in its context. (Reymond-Eniaeva, 2019, p. 172).

As an example, she mentioned what the English Court of Appeal ruled in the Emmott case[35]: "*The second point to be stressed is that it is particularly important that what has been said about the possible exceptions to confidentiality must-read in context. I take two examples. First, suppose a court decides in the context of a summons (as it did in London and Leeds Estates Ltd v Paribas Ltd (No 2)) that the 'public interest' may outweigh the confidentiality of arbitration documents. In that case, it does not necessarily follow that a party may voluntarily disclose documents to third parties on the ground that it is in the 'public interest.' Second, it does not follow from the fact that a court refers to the possibility of an exception for the order of the court or leave of the court in a case where it has the power to make the order or give leave (as in Dolling-Baker v Merrett or Glidepath BV v Thompson) the court has a general and unlimited jurisdiction to consider whether an exception to confidentiality exists and applies*". Thus, in the Emmott case, the English Court of Appeal emphasized the importance of the context and broad discretionary power of the Court (Reymond-Eniaeva, 2019, p. 172-173).

Of that matter, Fabian, K. (2011) says that In England, the implicit existence of confidentiality was explained by case law in the absence of a legislative clause addressing confidentiality in the Arbitration Act of 1996. Although, this duty is not absolute and subject to exceptions, in the Emmott case confidentiality is recognized as "*an obligation, implied by law arising out of the nature of arbitration, on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration [...]*" (Fabian, 2011).

[35] Emmott v. Wilson & Partners Limited [2008] EWCA Civ 184.

Therefore, under English law, parties to the arbitration have an implied duty to maintain the confidentiality of the proceedings. It extends to the hearing, the documents and submissions generated (and disclosed) in the dispute, and the award ultimately rendered by the tribunal. Although there are several exceptions to this obligation as mentioned above, in practice, it means that arbitrations seated in London attract a presumption of confidentiality (Toit, 2017).

Switch from the English court decisions to the Australian perspective about the exceptions of confidentiality in arbitration proceedings, in the case evaluated above *Commonwealth of Australia v. Cockatoo Dockyard Pty. Ltd*, in this case, the Court of Appeal of New South Wales held that an arbitrator has no power to include procedural guidance enforcing a confidentiality duty which would have the effect of prohibiting the government from revealing information and records to a state agency or to the public which should be made known to that power or the public. (Nordström, 2001).

In doing so, Neill, P. (1996), citing Hon. Andrew Rogers QC and Duncan Miller[36], refer that several concerns have been expressed as to the implications of the two Australian cases[37]. One criticism is that the decisions appear to encourage applications to the court at the interlocutory stage of arbitrations. It causes delay and expense and flies in the face of legislative policy, as embodied (for example) in die New South Wales Commercial Arbitration Act 1984, which aims to exclude court intervention at least until the award is made (Neill, 1996, p. 311).

In addition to that, a more fundamental criticism which the authors make is that the public interest in the dissemination of information is given priority over all other

[36] Rogers and Miller, 'Non-confidential Arbitration Proceedings', pp. 317-343.
[37] *Esso/BHP v. Plowman* and *Commonwealth of Australia v. Cockatoo Dockyard Pty Ltd.*

competing interests, such as the natural desire of a commercial entity (which has contracted explicitly for dispute resolution through arbitration) to restrict to the privacy of the arbitration room material such as price-sensitive data and untested allegations made by government witnesses. A new weapon has thus been placed in the hands of the Commonwealth, the states, state entities and public utilities as participants in arbitrations. Indeed the list of beneficiaries is not so easily confined. Any party to an arbitration is now enabled to run up the flag labelled 'public interest' and to claim the right (or to assert the duty) to communicate to the public extensive confidential disclosure obtained as a result of the arbitral process and testimony which has been or is to be advanced in the arbitration by the publicizing party or his opponent. Rogers and Miller consider that in the two Australian cases under review the High Court and the New South Wales Court of Appeal '*elected not to enquire into the real motivations underlying the decision in each case of a public entity participant to seek to make disclosure*' and they fear lest the threat of publication could be used for tactical purposes in connection with the arbitration itself (Neill, 1996, p. 311).

Likewise, there are a few observations that can be taken from Australian decisions. First, in arbitration, where public actors are participating in arbitral proceedings, there is a public interest exception from any confidentiality standards may exist. The exemption would tend to extend similarly to cases in which the State itself is a party to the arbitration and in which a public corporation is a member of the arbitration (Pongracic-Speier, n.d.).

Second, when there is a statutory provision that information under review in arbitration be disclosed, the statutory provisions would not be overridden by any obligation of confidentiality, whether implied or contractual. This stance usually tends to be consistent with a scholarly view on the matter (Pongracic-Speier, n.d.).

Third, there does not appear to be a consensus as to why information to be published should be made public, other than under a constitutional requirement. Is it that such information is 'governmental' in nature; because it is in the public's legitimate interest; or because an arbitrator has committed a procedural mistake to shield it from release and has gone beyond the limits of his arbitral powers? For the reasons given above, it is argued that the second view is the better one (Pongracic-Speier, n.d.).

Lastly, there is still no certainty for private parties to mixed international commercial arbitrations in terms of knowing when a confidentiality contract is likely to be upheld, or when it is likely to be overridden by public interest considerations. It revives a bugaboo that has been all too prevalent in mixed arbitration in previous decades, sovereign immunity. Still, in a new way: now the problem is not so much about arbitration immunity as immunity from whatever degree and way of confidentiality may exist. (Pongracic-Speier, n.d.).

Thus, as can be seen from the above, Australia recognizes the exception of confidentiality in the case of public interest especially when the government is part of the arbitration process, which is justified since the government is for the people.

Last but not least, the final discussion is about confidentiality in online arbitration and the COVID-19 impact on the international and commercial proceedings. As more arbitration proceedings migrate into digitized systems in this new age of COVID-19, the need to recognize instances of security violations is becoming apparent. For consumers of international arbitration, in particular, whose primary concerns are to protect their trade secrets and confidential information when settling their disputes expeditiously and cost-effectively (Lozano, Masumy, Pollard and El-Kady, 2020).

Thereby, most arbitration stakeholders, especially arbitral institutions, are responsible for recognizing the threat and exploring the existence of cybersecurity because a cyber threat may compromise the credibility of arbitration. In doing so, stakeholders will take constructive action to implement automated, tailor-made safeguard tools that provide critical safety measures. Effectively, the creation of an ODR platform that would integrate the required features, such as multi-tiered authentication, encryption, safe collection and storage, and the management of incidents of a breach to reduce the likelihood of a security breach during online proceedings (Lozano, Masumy, Pollard and El-Kady, 2020).

An unavoidable development is the more generous and better use of technology in the administration of justice, and the current pandemic may have moved the digitalization process far ahead, contributing in the future to more e-mediation, e-arbitration, online courts and the use of AI. Arbitrators, judges, lawyers, parties, arbitration bodies and courts should brace themselves for this trend and make the utmost effort to promote the fair settlement of disputes as quickly, cheaply and effectively as possible. (Fan, 2020).

Conclusion

By analysing the rules of confidentiality and its exceptions in the arbitral institutions' regulations and the most relevant cases law from the past few years, this dissertation has shown how the interpretation of the law can be different institution by institution, jurisdiction by jurisdiction. However, both follow two main directions: confidentiality is implied, or it is not implied, and there are a few exceptions.

Answering the research questions, firstly, under Swedish law, parties to arbitral proceedings are not bound by a duty of confidentiality unless they have expressly agreed on such a duty. The court expresses about the duty of loyalty and good faith when it refers to an agreement between parties. Thus, in Sweden, confidentiality is not implied in arbitration proceedings. In the same way, the Australian court finds

that the exception to confidentiality due to the public interest applies when the government is part of the arbitration, so, in this case, there is also no confidentiality applicable in arbitration proceedings.

On the other hand, the English position, one of the most strong in the world because of its tradition, is that materials produced in arbitration are confidential. Still, there are two main exceptions to that: (i) reasonably necessity and (ii) the public interest. The first exception was also used in Singapore when the Court maintained the confidentiality and accepted the disclosure only in case of reasonable necessity. Notably, the Singapore court's approach seems to endorse a single-stage approach.

Thus, considering the above, it is concluded that the principle of confidentiality is one of the most relevant principles of arbitration and, at the same time, there is no consensus on its applicability. What can be noticed is that whenever possible, confidentiality must be established contractually, making it bounding and thus preventing future discussions about its disclosure.

Reflection

Reflecting on everything that happened this past year, I can say that I am proud of what I have achieved. Completing a master's degree, in a different language than my mother tongue, with a complex dissertation at the end, in times as difficult as what we are experiencing, during a pandemic caused by COVID-19, was not at all easy.

Despite all the challenges, I believe that this research was fundamental to the development of my knowledge and expertise in the field of alternative dispute resolution.

The theme developed for this study, confidentiality in arbitration proceedings, reflects my legal background from my country, Brazil. There I graduated and specialized as a lawyer in the commercial and business area.

Overall, the experience of writing and developing a dissertation in a foreign language and on such a relevant topic was incredibly rewarding.

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