Confidentiality of arbitrations under English law: sufficiently sacrosanct to warrant legislative shielding? A critical analysis from a Rumian perspective.

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Thoughtless speech spills easily out of man
while the wise ones keep silent.

Rumi / Mevlânâ[1]

ABSTRACT

The great Persian scholar Rumi (also commonly known as Mevlânâ) has often preached on the virtue of keeping ones confidence. To Rumi, the less one speaks, the closer one gets to virtuousness. This paper considers whether Rumi's line of thinking could comparatively and appropriately be applied to the confidentiality of English arbitrations such that it is deserving of legislative protection, in light of the English Law Commission's current review of the English Arbitration Act 1996. The somewhat unusual philosophical approach to the topic is considered warranted given the divergence in approach in various renowned arbitration friendly jurisdictions on the issue of confidentiality (and privacy), and given the lack of uniformity and consistency in the terminology and historical foundations by members of the English judiciary. To that end, this paper considers the concepts of privacy and confidentiality of arbitrations, analyses the scope and extent of the duty of confidentiality under English law, and critically evaluates whether the confidentiality of arbitrations is deserving of legislative protection and shielding, in light of Rumian philosophical thinking. The paper concludes that the confidentiality of arbitrations should be enshrined into law to ensure uniformity, consistency of treatment and certainty of application. The Law Commission should, however, ensure that appropriate exceptions are carved into the general rule of confidentiality, largely reflecting those established in caselaw, paying particular attention to the need to protect and preserve the legitimacy and transparency of the arbitral process.

1. INTRODUCTION

It has oftentimes been stated that the popularity and attractiveness of arbitration in the resolution of international commercial disputes rests primarily or, to a not inconsiderable extent, on the privacy and confidentiality of arbitrations.[2] It was described by an eminent

[1] Full name: Jalāl al-Dīn Muḥammad Balkhī. Quote from "Rumi's Little Book of Life: The Garden of the Soul, the Heart, and the Spirit" (Amatyllis, 2021), translated into English by Maryam Mafi and Azima Melita Kolin, 28.

[2] See, e.g., Paul Friedland and Loukas Mistelis, 2010 International Arbitration Survey: Choices in International Arbitration, https://arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf, accessed on 30 July 2022 (the "QMUL & W&C Survey"); Kenneth I Ajibo, 'Confidentiality in International Commercial Arbitration: Assumptions of Implied Duty and a Proposed Solution' Latin American Journal of International Trade Law (2015) 3(2) 337, 339; 'Chapter 1 Arbitration as a Dispute Settlement Mechanism', in Julian D.M. Lew , Loukas A. Mistelis , et al., Comparative International Commercial Arbitration (Kluwer Law International, 2003) 1-15; 'Chapter 1. An Overview of International Arbitration', in Nigel Blackaby, Constantine Partasides, et al., Redfern and Hunter on International Arbitration, 6th edition (Oxford University Press, 2015) 1-70; L.Y. Fortier, 'The Occasionally Unwarranted Assumption of Confidentiality', Arbitration International (1999) 15(2), 131-140; Mo Egan and Hong-Lin Yu, 'Intersecting and dissecting confidentiality and data protection in online arbitration' Journal of Business Law (2022) 2 135-163, 139; Srishti Kumar and Raghvendra Pratap Singh, 'Transparency and Confidentiality in International Commercial Arbitration', The International Journal of Arbitration, Mediation and

English judge, speaking extra-judicially, as "*as a fundamental characteristic of the agreement to arbitrate*".[3]

However, such understanding has somewhat recently experienced earthquake-like shakes to its core, especially in the last couple of decades. For instance, Kumar and Singh note the importance afforded to transparency in recent times in respect of arbitrations and welcome the current drive towards greater transparency, arguing that the arbitral community must make the arbitral process more transparent to make international commercial arbitration the most reliable method for settlement of business disputes.[4] Furthermore, Bhatia et al. suggest that confidentiality is not the most important factor for corporate stakeholders, but that instead flexibility in the arbitral procedures and the finality of awards remain as the two most important factors in their preference for arbitration over litigation.[5] Perry concurs with that view expressed.[6] In similar vein, Bagner explains that "*[U]ntil the late 1980s [confidentiality and privacy] were almost sacrosanct and were not even debated. They were taken for granted*"[7], but that such changed with the decision of the High Court of Australia in *Esso Australia Resources*[8], which caused the "*silent world [to go up in] uproar*" in respect of confidentiality of arbitrations.[9] Zlatanska echoes on similar lines.[10]

However, there have been those who have held onto the traditional view. For instance, Nottage argues that although growing transparency around investor arbitration is to be welcomed given greater public interests involved in such cases, transparency should not be simply transposed into commercial dispute resolution through international commercial arbitration, on the basis that the two fields are overlapping but distinct. He contends that "*reducing confidentiality associated with parties choosing arbitration to resolve purely commercial cross-border disputes, risks further exacerbating longstanding and arguably increasing concerns about over–formalization (including delays and especially costs) in [international commercial arbitration]*".[11]

This article holds a close lens to the matter and seeks to critically assess the true importance of confidentiality of arbitrations to the participants of the arbitration process, addressing the issue of whether it is worthy of legislative protection, especially in light of the English Law Commission's current review of the English Arbitration Act 1996 (the "1996 Act") for the purposes of reforming the law of arbitration insofar as relating to England and Wales, with the

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Dispute Management (2020) 86(4) 463-481, 470. The QMUL & W&C Survey, a survey aimed at ascertaining the participants' choices in international arbitration run jointly by Queen Mary University's School of International Arbitration and White & Case LLP in 2010, demonstrated that 27% of the participants saw confidentiality as a deal-breaker and expressed that they would never be willing to concede it in drafting negotiations, while 52% indicated that they regard it as a key issue but may be willing to concede in limited circumstances where such is a deal breaker (7). Further, 62% of the respondents said that they regarded confidentiality to be 'very important' to them in international arbitration (29).

[3] Francis Patrick Lord Neill of Bladen, 'Confidentiality in Arbitration', Arbitration International (1996) 12(3) 287-318, 317.

[4] See, Srishti Kumar and Raghvendra Pratap Singh, 'Transparency and Confidentiality in International Commercial Arbitration', The International Journal of Arbitration, Mediation and Dispute Management (2020) 86(4) 463-481.

[5] Vijay Bhatia, Christopher N. Candlin and Rajesh Sharma, 'Confidentiality and integrity in international commercial arbitration practice' Arbitration (2009) 75(1), 2-13, 11.

[6] Graham Perry, 'Excessive Confidentiality: The Curse of Modern Arbitration', Asian Dispute Review, Hong Kong International Arbitration Centre (HKIAC) (2000) 2(1) 3-4.

[7] Hans Bagner, 'Confidentiality-A Fundamental Principle in International Commercial Arbitration?', Journal of International Arbitration (2001) 18(2) 243-249, 243.

[8] *Esso Australia Resources Ltd and Others v. Plowman (Minister for Energy and Minerals) and Others* (1995) 128 ALR 391.

[9] See, Francis Patrick Lord Neill of Bladen, 'Confidentiality in Arbitration', Arbitration International (1996) 12(3) 287-318, 289.

[10] See, Elina Zlatanska, 'To Publish, or Not To Publish Arbitral Awards: That is the Question...', The International Journal of Arbitration, Mediation and Dispute Management (2015) 81(1) 25-37.

[11] Luke Nottage, 'Confidentiality v. Transparency in International Arbitration: Asia-Pacific Tensions and Expectations', Asian International Arbitration Journal (2020) 16(1) 1-24, 22.

law concerning confidentiality (and privacy) of arbitration proceedings being something expressly identified as requiring reform attention.[12] The utility of granting legislative shielding to the confidentiality of arbitrations is explored from the philosophical Rumian angle, most notably due to the high relevance of what the great theologian, scholar and poet vocalised many centuries back in respect of the importance and vitality of keeping secrets and maintaining confidence.[13]

In the execution of the task set, this article will: (1) consider the concept of confidentiality and what it means in its basic form, explaining how it differs from privacy; (2) consider the scope of confidentiality of arbitration proceedings, i.e., whether the obligation to keep confidential (where it exists) applies merely in respect of the arbitration proceedings commenced for the resolution of disputes, or whether it also extends to awards rendered, as well as to the post-award phase, such as recognition and enforcement efforts before national courts; (3) perform a deep dive into the *status quo* as regards the treatment of confidentiality of arbitrations by the English judiciary, and also by the foremost institutional rules of arbitration; and, finally, (4) offer some thoughts on whether confidentiality is deserving of legislative protection and safeguarding and, if so, what form and shape that protection should take.

2. CONFIDENTIALITY, AND ITS DIFFERENCE FROM PRIVACY

Although privacy and confidentiality are closely linked terms, conceptually speaking they mean different things, especially in the context of an arbitration. As one eminent commentator put it:

> "Privacy" is typically used to refer to the fact that, under virtually all national arbitration statutes and institutional arbitration rules, only parties to the arbitration – and not third parties or the public – may attend arbitral hearings and otherwise participate in the arbitral proceedings…[it] serves to prevent interference by third parties in the arbitral process (for example, by making submissions in the arbitration or by seeking to participate in the arbitral hearing), as well as to protect the parties' confidences from disclosure to third parties… In contrast, "confidentiality" is typically used to refer to the parties' asserted obligations not to disclose information concerning the arbitration to third parties or the public.[14]

The former is therefore principally concerned with the arbitral process and seeks to prevent unwanted outside interference with the process of arbitration, whereas the latter concerns itself with the restrictions imposed on the participants in arbitral proceedings as regards the disclosure of non-public information pertaining to the arbitration to those who are external to the process. On that point, Kumar and Singh explain that "*[P]rivacy means the right of the parties to forbid or disallow strangers from taking part in the arbitral proceedings. On the contrary, confidentiality is a narrower concept. It puts an obligation on the person to not disclose freely 'any information about the arbitration, any information learned through the arbitral proceedings and any award or decision rendered by the arbitral tribunal'.*"[15]

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[12] See: https://www.lawcom.gov.uk/law-commission-to-review-the-arbitration-act-1996/, accessed on 30 July 2022.
[13] See section 5.A. below.
[14] 'Chapter 20: Confidentiality in International Arbitration', in Gary B. Born, International Commercial Arbitration, 3rd edition (Kluwer Law International, 2021) 3001-3062, 3004-3005. See also, Kenneth I Ajibo, 'Confidentiality in International Commercial Arbitration: Assumptions of Implied Duty and a Proposed Solution' Latin American Journal of International Trade Law (2015) 3(2) 337, 339; Ileana M Smeureanu, Confidentiality in International Commercial Arbitration (Kluwer Law International, 2011), 1-7; Michelle Stojcevski and Bruno Zeller, 'Confidentiality and Privacy Revisited', The International Journal of Arbitration, Mediation and Dispute Management (2012) 78(4) 332-339, 333; Michael Fesler, 'The Extent of Confidentiality in International Commercial Arbitration', The International Journal of Arbitration, Mediation and Dispute Management (2012) 78(1) 48-58, 49.
[15] See, Srishti Kumar and Raghvendra Pratap Singh, 'Transparency and Confidentiality in International Commercial Arbitration', The International Journal of Arbitration, Mediation and Dispute Management (2020) 86(4) 463-481, 466.

The term confidentiality has not been affixed a special meaning in law; it therefore carries its ordinary, dictionary meaning. The Oxford Dictionary defines the term as "*[T]he process of and obligation to keep a transaction, documents, etc., private and secret…*"[16] Mirroring that, the Cambridge Dictionary explains that the terms means as follows: "*the fact of private information being kept secret…*"[17] It can be adduced from the above that, at its simplest, where one is under an obligation of confidentiality, one is obliged not to divulge the relevant information or documents to third parties, unless authorised to do so. The said information or document must be kept private and secret as between the intended parties. The confidentiality obligation may be express or implied, by law and/or contract.[18] Note that, in *Bankers Trust*, Mance LJ (with whom Carnwath LJ concurred) had explained that "[*P]arty autonomy is fundamental in modern arbitration law… Among features long assumed to be implicit in parties' choice to arbitrate in England are privacy and confidentiality. The Act's silence does not detract from this.*"[19] The same rule was reiterated by Lawrence Collins LJ (with whom both Carnwath and Thomas LJJ concurred) in *Emmott*, where he said: "*[P]arties who arbitrate in England expect that the hearing will be in private, and that is an important advantage for commercial people as compared with litigation in court…*"[20]

An obligation of confidentiality is not usually, however, unqualified. The qualification could be by virtue of party agreement and/or by operation of law. As to the former, it is not unusual for general or arbitration specific confidentiality clauses contained in commercial contracts to expressly carve out certain instances wherein the obligation to keep confidential would not bite.[21] In such cases, the party concerned would be at liberty to divulge the information disclosed to it to third persons. For instance, it is usual practice to include carve-outs that permit disclosure to group entities, legal and other advisors and regulatory and other authorities. Also, to state the obvious, disclosure could be consented to by the counter-party(ies) at any stage of the process, unless a mandatory rule of law is triggered and obstacles the disclosure. As to the latter, certain laws and regulations may mandatorily require the disclosure of various information and documents. For instance, publicly listed companies are generally required to disclose, *inter alia*, their relevant financial and other information on an ongoing basis.[22] The nature and scope of the obligation to disclose differs from jurisdiction to jurisdiction, and may even differ depending on the nature of business the company is engaged in.[23]

3. SCOPE OF DUTY OF CONFIDENTIALITY

Having explored the meaning and scope of applicability of a duty of confidentiality in the general sense, as well as the limitations imposed thereon, this section will turn its focus towards confidentiality in the arbitration setting. It was noted above that the term confidentiality has not been affixed a special meaning in law, and that it carries its ordinary, dictionary meaning. The same is true in respect of arbitrations. Where an arbitrating party is under an obligation of confidentiality, it is prevented from revealing to third parties secrets entrusted to it as part of the arbitration process, whether voluntarily or not.

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[16] See: https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095631575, accessed on 30 July 2022.
[17] See: https://dictionary.cambridge.org/dictionary/english/confidentiality, accessed on 30 July 2022.
[18] See section 4 below.
[19] *Economic Department of City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314, [2005] QB 207, [1]-[2].
[20] *John Forster Emmott v Michael Wilson & Partners Limited* [2008] EWCA Civ 184, [62].
[21] See, Leon E. Trakman, 'Confidentiality in International Commercial Arbitration', Arbitration International (2002) 18(1) 1-18.
[22] See, Valéry Denoix de Saint Marc, 'Confidentiality of Arbitration and the Obligation to Disclose Information on Listed Companies or During Due Diligence Investigations', Journal of International Arbitration, (2003) 20(2) 211-216.
[23] Ibid, 211-212.

Note that it is not only the arbitrating parties who are under an obligation of confidentiality. The obligation generally, often by virtue of an express rule, extends to the other participants of the arbitration process. For instance, Article 30 the LCIA Rules (see section 4.A.(3) below) expressly stipulate that "*[T]he parties shall seek the same undertaking of confidentiality from all those that it involves in the arbitration, including but not limited to any authorised representative, witness of fact, expert or service provider…[and that such obligation] shall also apply, with necessary changes, to the Arbitral Tribunal, any tribunal secretary and any expert to the Arbitral Tribunal*".[24]

The confidentiality obligation can be said to arise in respect of various phases of an arbitration, depending on the parties' express agreement on the subject-matter, if any. For instance, a party may be precluded from disclosing the existence of an arbitration agreement between the parties, i.e., the arbitration agreement or arbitration clause contained in a commercial contract providing that in the event of disputes arising, such disputes are to be resolved by way of arbitration.[25] This could be realised by virtue of express wording in the arbitration agreement or clause or, alternatively, as an express and general confidentiality provision contained in the commercial contract containing the arbitration clause. It may also be implied as a matter of law under certain legal systems.[26]

The confidentiality obligation could further or alternatively attach to the existence and/or actions engaged as part of the arbitral proceedings. For instance, Kumar and Singh, whilst stating that English law requires that the entire process of arbitration, including the fact of the existence of a dispute to remain confidential, note that in practice such is rarely the case, with case details often been publicised on Global Arbitration Review and Investment Arbitration Reporter, or the likes of them.[27] It could prevent an arbitrating party from disclosing to third persons that arbitration proceedings have been commenced between the various parties, as well as the nature of the dispute that has arisen, possibly extending to claims asserted and defences raised. Radjai agrees, expressing that the disclosure of the existence of an arbitration whilst it is in progress or after its conclusion can be damaging to either or both parties, though acknowledging that confidentiality may necessarily need to be side-stepped in circumstances where annulment or enforcement proceedings commence.[28] Though that consequence of annulment or enforcement proceedings may be inevitable, courts often find pragmatic and reasonable solutions to ensuring that only the essential facts are made public.[29]

Further, or alternatively, a party may be prohibited from sharing with third parties the various actions taken as part of the arbitral proceedings, such as sharing copies of pleadings filed, with or without the supporting (factual and/or expert) evidence, transcripts or notes of any case management conferences or hearings, and any procedural or substantive interim or final

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[24] Relatedly, for the challenges of electronic document storage, trial presentation, extraterritoriality and data transfers and cybersecurity and data protection in connection with virtual arbitration proceedings, see Mo Egan and Hong-Lin Yu, 'Intersecting and dissecting confidentiality and data protection in online arbitration' Journal of Business Law (2022) 2 135-163.

[25] See, Mark Darian-Smith and Varun Ghosh, 'The Fruit of the Arbitration Tree: Confidentiality in International Arbitration', The International Journal of Arbitration, Mediation and Dispute Management (2015) 81(4) 360-366, 361.

[26] See, Kenneth I Ajibo, 'Confidentiality in International Commercial Arbitration: Assumptions of Implied Duty and a Proposed Solution' Latin American Journal of International Trade Law (2015) 3(2) 337; Ileana M. Smeureanu, Confidentiality in International Commercial Arbitration (Kluwer Law International, 2011).

[27] See, Srishti Kumar and Raghvendra Pratap Singh, 'Transparency and Confidentiality in International Commercial Arbitration', The International Journal of Arbitration, Mediation and Dispute Management (2020) 86(4) 463-481, 475.

[28] Noradèle Radjai, 'Chapter 18, Part II: Confidentiality of Arbitration in Switzerland', in Manuel Arroyo (ed), Arbitration in Switzerland: The Practitioner's Guide, 2nd edition (Kluwer Law International, 2018) 2527-2541, 2534.

[29] See, ibid, 2538, in respect of the position adopted by the Swiss Federal Supreme Court. See also, Nikki O'Sullivan, 'Keeping it under wraps: the limits on confidentiality in arbitration' (Practical Law Arbitration Blog, 28 April 2017) http://arbitrationblog.practicallaw.com/keeping-it-under-wraps-the-limits-on-confidentiality-in-arbitration/, accessed on 30 July 2022.

orders or awards of the tribunal. For instance, the IBA Rules on the Taking of Evidence in International Arbitration (2020) ("IBA Rules")[30] make express stipulation to preserve the confidentiality of documents produced during arbitral proceedings, and specify that such documents can only be utilised in connection with the arbitration proceedings as part of which they were produced.[31] The rule does not apply, however, where disclosure is required to adhere to a legal duty, protect or pursue a legal right, or enforce or challenge an award in *bona fide* legal proceedings before a state court or other judicial authority.[32] The arbitrators are entrusted with the task of setting the boundaries of the confidentiality duty that arises by virtue of the IBA Rules. On that point, Crookenden contends that the arbitrators should be entrusted with the task of resolving matters concerning confidentiality of the proceedings, unless where third party rights are involved, in which case the more appropriate forum may be the state courts. It is (rightly) reasoned that where third persons are involved and the subject-matter concerns their various rights, the arbitral tribunal may lack the requisite jurisdiction.[33]

It is noteworthy that the results of the QMUL & W&C Survey[34] demonstrates that participants identified the following key aspects of the arbitration which they consider should be kept confidential: the amount in dispute: 76%; the pleadings and documents submitted in the case: 72%; the full award: 69%; the details in the award that allow identification of the parties: 58%; the very existence of the dispute: 54%; and the legal question to be decided: 54%.[35] This implies that at least half of the arbitration community consider and desire that information relating to the existence of the dispute and the arguments run, as well as information that could identify the parties involved, be kept confidential.

It must be noted that, at least in respect of the publication of arbitral awards, some scholars strongly advocate the publication of awards together with their reasoning. For instance, Zlatanska contends that to promote international commercial arbitration as an efficient and reliable method for settling business disputes, information needs to be made available to everyone who has an interest in it, and that the most effective way of doing that would be for the arbitral institutions to amend their rules to include express provisions as to the publication of awards with reasons, and also provide model clauses dealing with confidentiality before and after the award is rendered.[36] Bhatia et al. similarly argue that the publication of "sanitised" awards assist in ensuring transparency of the arbitration process, educate the future arbitrators, development of the law and consistency of decision making, which would all collectively improve arbitration as a workable and reliable dispute resolution system.[37] Perry concurs.[38]

Finally, the confidentiality obligation may, further or alternatively, attach to the various steps taken to recognise and/or enforce or annul an order or award via the assistance of the

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[30] See here: https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b, accessed on 30 July 2022.
[31] Ibid, Article 3(13).
[32] Note that the exceptions largely mirror those enumerated by the English Court of Appeal in *Ali Shipping Corp v Shipyard Trogir* [1999] 1 W.L.R. 314. See, Nicholas Craig, 'Arbitration confidentiality and the IBA Rules on the Taking of Evidence in International Arbitration', International Arbitration Law Review (2010) 13(5), 169-170.
[33] Simon Crookenden, 'Who Should Decide Arbitration Confidentiality Issues?', Arbitration International (2009) 25(4) 603-613.
[34] See, e.g., the QMUL & W&C Survey.
[35] Ibid, 31. The survey report does note, however, that a number of interviewees said that they would be pragmatic about what is released, with many expressing that it would not be particularly problematic if information that is not of a commercially sensitive nature (e.g., intellectual property or trade secrets) is released.
[36] Elina Zlatanska, 'To Publish, or Not To Publish Arbitral Awards: That is the Question...', The International Journal of Arbitration, Mediation and Dispute Management (2015) 81(1) 25-37, 36-37.
[37] Vijay Bhatia, Christopher N. Candlin and Rajesh Sharma, 'Confidentiality and integrity in international commercial arbitration practice' Arbitration (2009) 75(1), 2-13, 11.
[38] Graham Perry, 'Excessive Confidentiality: The Curse of Modern Arbitration', Asian Dispute Review, Hong Kong International Arbitration Centre (HKIAC) (2000) 2(1) 3-4.

domestic courts in the relevant jurisdiction(s), most likely the jurisdiction where the arbitration is seated or where the assets against which enforcement of the award is to be secured are located.[39] This could concern the application made to the court for relief. It could further extend to encapsulate the supporting evidence filed in support of the request for relief, which may include the order or award rendered, as well as the evidence submitted in the arbitration and on which the order or award has been based. Submissions (written and/or oral) made to the court by the parties could also fall within the ambit of the confidentiality obligation. Although party agreement or the arbitral tribunal's relevant rulings on the matter would likely be relevant insofar as determining whether and to what extent the confidentiality obligation applies to the post-award phase, the issue is more likely to be judged in light of the relevant civil / court procedure rules.[40]

As a side-note, it has been observed that there are at least three categories or concepts of confidentiality insofar as relating to arbitration proceedings.[41] The first concerns the obligation of confidentiality arising from the private nature of arbitration. It dictates that since arbitration is private, that privacy would be violated by the publication or dissemination of documents deployed in the arbitration. The second is the obligation to keep confidential documents and/or information that are in and of themselves inherently confidential, such as trade secrets and commercially sensitive information. Finally, the obligation to keep confidential could attach in circumstances where it is to be implied that documents disclosed or generated in arbitration are only to be used for the purposes of the arbitration. To the extent English law is concerned, as it stands, the third category applies, i.e., the obligation of confidentiality applies irrespective of whether actually confidential (e.g., trade secrets) information is concerned (i.e., the second category) and it does not arise by virtue of the arbitration being private (i.e., the first category).[42]

The above demonstrates that any sweeping statement as to what confidentiality in arbitration encompasses will, in most likelihood, be deeply flawed. There are many components to arbitration proceedings, as well as pre- and post-proceedings, that could be advocated to benefit from and be subjected to confidentiality. Whether each different phase or component should be granted the shield of confidentiality and protected from the public eye will depend on various and often differing considerations. The next step in the enquiry, having somewhat laid bare the possible variance of the confidentiality obligation in arbitration proceedings, is to consider the current treatment under English law of the phases or components of arbitration insofar as confidentiality is concerned.

4. STATUS QUO OF CONFIDENTIALITY OF ARBITRATIONS

A. Position under English law

English law has adopted the doctrine of implied confidentiality in respect of arbitrations.[43] It is noteworthy that Lawrence Collins LJ commented in Emmott that what is referred to as an

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[39] See, generally, Nikki O'Sullivan, 'Keeping it under wraps: the limits on confidentiality in arbitration' (Practical Law Arbitration Blog, 28 April 2017) http://arbitrationblog.practicallaw.com/keeping-it-under-wraps-the-limits-on-confidentiality-in-arbitration/, accessed on 30 July 2022; Noradèle Radjai, 'Chapter 18, Part II: Confidentiality of Arbitration in Switzerland', in Manuel Arroyo (ed), Arbitration in Switzerland: The Practitioner's Guide, 2nd edition (Kluwer Law International, 2018) 2527-2541, 2534. See also, Joyiyoti Misra and Roman Jordans, 'Confidentiality in International Arbitration', Journal of International Arbitration, (2006) 23(1) 39-48, where the authors see exception to the confidentiality rule to enable enforcement efforts before local courts as an obvious and necessary exception.

[40] See section 4 below.

[41] See, *Economic Department of City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314, [2005] QB 207, [79].

[42] Ibid, [79]-[80].

[43] See, *John Forster Emmott v Michael Wilson & Partners Limited* [2008] EWCA Civ 184. See also, *Economic Department of City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314, [2005] QB 207; *Ali Shipping Corporation v Shipyard Trogir* [1999] 1 W.L.R. 314; *Symbion Power LLC v Venco Imtiaz Construction Co* [2017] EWHC 348 (TCC). It should be noted that, in respect of the applicable law insofar as confidentiality in arbitration is concerned,

implied duty / agreement is actually "*a rule of substantive law masquerading as an implied term*".[44] It is further noteworthy that the protection comes from case-law, and not the 1996 Act itself, with the latter remaining silent on the matter.[45]

Born explains whilst Singaporean and (arguably) Swiss courts take a similar approach to that taken by English law and safeguard the confidentiality of arbitrations, Swedish and Australian courts have taken a divergent approach and refused to imply a term of confidentiality into arbitration agreements. The latter camp of courts have reasoned that the parties' express agreement is required for an arbitration to be deemed confidential; have rejected the idea that the choice of arbitration necessarily implies that the parties intended their dispute to remain hidden from public eyes.[46]

Accordingly, absent express agreement to the contrary, an English law governed arbitration is likely to benefit from the shield of confidentiality by default. This stems from the understanding that by submitting their disputes to arbitration, as opposed to the courts of the land, the parties intend for their disputes to remain private and, by natural extension, confidential. Put differently, the parties choose arbitration principally to avoid the publicity that comes with court litigation. This line of thinking and acceptance of the doctrine of implied confidentiality can be traced as far back as 1800 where Jessel MR explained in *Russell v Russell*[47] that:

> "As a rule, persons enter into [contracts containing arbitration clauses] 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."

That was a dispute between two brothers and partners in business, concerning the management and dissolution of their partnership, involving accusations of fraud. Although some may consider that the rule enunciated by Jessel MR should therefore be confined to the particular facts of the case, i.e., where a quarrel involves siblings or family members raising accusations against one another involving matters of fraud, it is clear from the judgment that such was not intended and that his Lordship had intended to establish a generally applicable rule of law. This is evident in his statement that follows the rule established via the quoted text above; his Lordship noted that "*[I]f ever I could imagine a case to which that observation would emphatically apply it is the case before me.*"[48] It is clear, therefore, that the observation was

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such may not necessarily be the seat of the arbitration, and may instead be the law applicable to the underlying agreement containing the arbitration clause, if different and where English law is concerned: see, e.g., English Supreme Court's decision in *Enka Insaat ve Sanayi A.S. v OOO Insurance Company Chubb* [2020] UKSC 38. See also, Mark Darian-Smith and Varun Ghosh, 'The Fruit of the Arbitration Tree: Confidentiality in International Arbitration', The International Journal of Arbitration, Mediation and Dispute Management (2015) 81(4) 360-366, 365.

[44] *John Forster Emmott v Michael Wilson & Partners Limited* [2008] EWCA Civ 184, [84].

[45] See, *Economic Department of City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314, [2] per Mance LJ. Relevantly, Born notes that "The UNCITRAL Model Law is representative of most national arbitration legislation, being entirely silent on the subject of the confidentiality of the international arbitral process.": 'Chapter 20: Confidentiality in International Arbitration', in Gary B. Born, International Commercial Arbitration, 3rd edition (Kluwer Law International, 2021) 3001-3062, 3009.

[46] 'Chapter 20: Confidentiality in International Arbitration', in Gary B. Born, International Commercial Arbitration, 3rd edition (Kluwer Law International, 2021) 3001-3062, 3014 et seq. See also, Kenneth I Ajibo, 'Confidentiality in International Commercial Arbitration: Assumptions of Implied Duty and a Proposed Solution' Latin American Journal of International Trade Law (2015) 3(2) 337, 338; Carlos de Los Santos Lago and Margarita iSoto Moya, 'Confidentiality under the new French arbitration law: a step forward?', Spain Arbitration Review (2011) Vol 11, 79-94, 82; Michael Young and Simon Chapman, 'Confidentiality in International Arbitration: Does the exception prove the rule? Where now for the implied duty of confidentiality under English law?', ASA Bulletin (2009) 27(1) 26-47, 39 et seq.

[47] (1880) 14 Ch. D. 471.

[48] Id.

of a general character, but one that carried a particular force on the facts of the case. Note that although the point seems to have been accepted by the English judiciary in principle over a century ago, at least one commentator has remarked that "*[I]t was not until the 1990s that two significant English cases recognised an implied obligation of confidentiality.*"[49]

Case-law has since confirmed and reinforced the doctrine of implied confidentiality and its validity as far as English law is concerned. For instance, in *Bankers Trust*[50], Mance LJ (with whom Carnwath LJ concurred) explained that "*[A]mong features long assumed to be implicit in parties' choice to arbitrate in England are privacy and confidentiality. The Act's silence does not detract from this.*" That was a case concerning whether a court judgment handed down following a section 68[51] challenge under the 1996 Act against a London seated arbitration award on the basis of alleged serious irregularity could be made public, in circumstances where the hearing had taken place in private.[52] Upholding the lower court's judgment and dismissing the appeal, the Court of Appeal held that the CPR requires such arbitration claims to be held in private; the starting position is that arbitration related claims before the English courts must similarly be kept private and confidential, unless one of the limited number of exceptions operate to lift the cloak of confidentiality. However, the Court was comfortable with allowing the publication of the summary of the judgment as such would not, it considered, result in the disclosure of any sensitive or confidential information and, further, there were no other grounds for precluding its publication. It must be noted that the arbitration was subject to the United Nations Commission on International Trade Law ("UNCITRAL") arbitration rules[53], which provided that hearings were to be in private and the award to be made public only with the consent of both parties.[54]

The following remarks made are noteworthy insofar as concerning the implied confidentiality and privacy of English arbitrations:

> "The [CPR] rule changes [introduced] … rest clearly on the philosophy of party autonomy in modern arbitration law, combined with the assumption that parties value English arbitration for its privacy and confidentiality. Party autonomy requires the court so far as possible to respect the parties' choice of arbitration. Their choice of private arbitration constitutes an election for an alternative system of dispute resolution to that provided by the public courts… The rule makers clearly deduced from the principles of the Arbitration Act 1996 that any court hearing should take place, so far as possible,

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[49] See, Michelle Stojcevski and Bruno Zeller, 'Confidentiality and Privacy Revisited', The International Journal of Arbitration, Mediation and Dispute Management (2012) 78(4) 332-339, 334.

[50] *Economic Department of City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314, [2005] QB 207, [1]-[2].

[51] Section 68 allows a challenge to be made against an arbitral award "on the ground of serious irregularity affecting the tribunal, the proceedings or the award". Sub-section (2) explains that "Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant— (a)failure by the tribunal to comply with section 33 (general duty of tribunal); (b)the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67); (c)failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties; (d)failure by the tribunal to deal with all the issues that were put to it; (e)any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers; (f)uncertainty or ambiguity as to the effect of the award; (g)the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy; (h)failure to comply with the requirements as to the form of the award; or (i)any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award."

[52] Note that the English Civil Procedure Rules ("CPR") provide that, subject to certain exceptions, arbitration hearings before the courts will be heard in private. CPR r.62.10 provides as follows: "(3) Subject to any order made under paragraph (1) –(a) the determination of – (i) a preliminary point of law under section 45 of the 1996 Act; or (ii) an appeal under section 69 of the 1996 Act on a question of law arising out of an award, will be heard in public; and (b) all other arbitration claims will be heard in private."

[53] See: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf, accessed on 30 July 2022.

[54] *Economic Department of City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314, [2005] QB 207, [4].

> without undermining the reasons of, inter alia, privacy and confidentiality for which parties choose to arbitrate in England."[55]

The same rule was reiterated by Lawrence Collins LJ (with whom both Carnwath and Thomas LJJ concurred) in *Emmott* where he had stated that "*Parties who arbitrate in England expect that the hearing will be in private, and that is an important advantage for commercial people as compared with litigation in court.*"[56]

The above notwithstanding, it was recognised that arbitration claims made to courts call for a different perspective and approach. There is a weaker case for confidentiality and privacy in respect of matters before the state courts. Mance LJ explained this as follows:

> "The consideration that parties have elected to arbitrate confidentially and privately cannot dictate the position in respect of arbitration claims brought to court… Such proceedings are no longer consensual. The possibility of pursuing them exists in the public interest. The courts, when called upon to exercise the supervisory role assigned to them under the Arbitration Act 1996, are acting as a branch of the state, not as a mere extension of the consensual arbitral process. Nevertheless, they are acting in the public interest to facilitate the fairness and well-being of a consensual method of dispute resolution, and … the courts can still take into account the parties' expectations regarding privacy and confidentiality when agreeing to arbitrate."[57]

As such, the implied duty of confidentiality only forcefully applies in respect of the arbitration procedure itself; it does not extend with the same force to claims before state courts, in respect of which the courts possess a discretion as to whether privacy and confidentiality is necessary, *inter alia*, in the public interest[58].

Furthermore, certain arbitration claims before the courts are less deserving of the protection afforded by the cloak of confidentiality than others; those deserving are generally claims that involve the disclosure of sensitive or confidential factual information. Mance LJ explained the point in *Bankers Trust* as follows:

> "[T]he range of arbitration claims within the definition in rule 62.10 is very wide. Adapting words of Dame Elizabeth Butler-Sloss P in Clibbery v Allan [2002] Fam 261, 288, there "cannot properly be a blanket protection of non-publication in all cases" which fall initially to be heard in private under rule 62.10. It may be possible to some extent to group cases arising out of the same type of circumstances. I find it difficult, as at present advised, to see why a judgment determining that there was no valid or applicable arbitration agreement or, probably, that arbitrators issued an award without jurisdiction, or dismissing an application for a stay of current proceedings in favour of arbitration should be private. There are arbitrations about factual circumstances and issues which appear unlikely to involve any significant confidential information at all".[59]

That said, caution must be exercised in respect of the nature and extent of disclosure permitted on the basis that the dispute venue has changed to the public court setting. The *raison d'être* of the obligation of confidentiality would be questionable if upon a court action

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[55] Ibid [30], [32], per Mance LJ (as he then was).
[56] *Forster Emmott v Michael Wilson & Partners Limited* [2008] EWCA Civ 184, [62].
[57] *Economic Department of City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314, [2005] QB 207, [34] per Mance LJ (as he then was).
[58] Ibid [39]. See also, *John Forster Emmott v Michael Wilson & Partners Limited* [2008] EWCA Civ 184, [28], [63].
[59] ibid [38].

the whole secret could be unravelled.[60] If such course of action were to be permitted, tactical and manipulative court actions would substantially increase in number.

It is worth noting that the doctrine of implied confidentiality under English law applies as a blanket protection in respect of almost all phases of an arbitration. Everything disclosed by one party to another as part of the arbitration process must be kept confidential, and that includes and extends to pleadings submitted and the exhibits thereto, such as fact and expert witness statements and factual evidence, transcripts of hearings held, and interim and final orders and awards rendered. This was neatly explained by Lawrence Collins LJ in *Bankers Trust* as follows:

> "…it is clear that what has emerged from the recent authorities in England is that there is…an implied obligation (arising out of the nature of arbitration itself) on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and not to disclose in any other way what evidence has been given by any witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court…The obligation is not limited to documents which contain material which is confidential, such as trade secrets. The obligation arises, not as a matter of business efficacy, but is implied as a matter of law…"[61]

The confidentiality in respect of the existence of an arbitration agreement must, however, be caveated. The doctrine of implied confidentiality extends to what is disclosed during arbitral proceedings.[62] It would therefore unlikely extend to apply to pre-proceedings matters. This is, of course, subject to any general confidentiality obligation that may be (and usually is) found in commercial contracts, requiring the parties not to disclose its existence and/or terms to third persons. The caveat may also be worthy of extension in the post-proceedings phase, depending on the civil procedural rules that apply. For instance, although English courts' practice has been to generally anonymise arbitration related cases, that requirement is recently more and more dispensed with and party names, as well as arbitrator names[63], are made public.[64]

In any event, even in circumstances where the implied duty of confidentiality is triggered, various limits thereto may activate to neutralise its impact and applicability. As an eminent name pointed out almost three decades ago, the "*duty of confidence is not absolute and is subject to limited qualifications or exceptions*".[65] Although, as it has been judicially remarked, the limits to the obligation of confidentiality "*are still in the process of development on a case-by-case basis*"[66], certain limits have been established in case-law as acceptable grounds for overriding the implied duty. Lawrence Collins LJ in *Emmott* listed those grounds as follows:

> "On the authorities as they now stand, the principal cases in which disclosure will be permissible are these: the first is where there is consent, express or implied; second,

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[60] See, Kenneth I Ajibo, 'Confidentiality in International Commercial Arbitration: Assumptions of Implied Duty and a Proposed Solution' Latin American Journal of International Trade Law (2015) 3(2) 337, 342; Andrew Tweeddale, 'Confidentiality in Arbitration and the Public Interest Exception', Arbitration International (2004) 20(4) 59-69, 63.
[61] *Economic Department of City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314, [2005] QB 207, [81].
[62] Ibid.
[63] See, e.g., *Halliburton Company v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd)* [2020] UKSC 48.
[64] See, Nikki O'Sullivan, 'Keeping it under wraps: the limits on confidentiality in arbitration' (Practical Law Arbitration Blog, 28 April 2017) http://arbitrationblog.practicallaw.com/keeping-it-under-wraps-the-limits-on-confidentiality-in-arbitration/, accessed on 30 July 2022.
[65] Francis Patrick Lord Neill of Bladen, 'Confidentiality in Arbitration', Arbitration International (1996) 12(3) 287-318, 290.
[66] *John Forster Emmott v Michael Wilson & Partners Limited* [2008] EWCA Civ 184, [107] per Lawrence Collins LJ.

where there is an order, or leave of the court (but that does not mean that the court has a general discretion to lift the obligation of confidentiality); third, where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; fourth, where the interests of justice require disclosure, and also (perhaps) where the public interest requires disclosure."[67]

As will be observed, the limits are narrow and seemingly to be exceptionally applied. It will therefore be only in the rarest occasions would the courts allow the disclosure of material relating to an arbitration. Persuasive reasons would need to exist for the courts to be persuaded to depart from a term implied by law so willingly and consistently by the judges.

B. Relevance of arbitral institutions' rules

One cannot wrap-up the present discussion without considering how the foremost arbitral institutions treat the matter of confidentiality in their arbitration rules, given how widely they are adopted into arbitration clauses or agreements by way of incorporation by reference.[68] As alluded to above, almost all notable and arbitration friendly jurisdictions respect the parties' expressed desires as to the confidentiality of their arbitration(s), and the incorporation by reference of such arbitral rules will almost always satisfy the requisite express agreement.

The foremost arbitration institutions whose arbitration rules are widely popular and adopted, and therefore worthy of consideration for the present purposes, are the following (in no particular order): the International Chamber of Commerce's International Court of Arbitration (ICC), the American Arbitration Association (AAA), the London Court of International Arbitration (LCIA), the Singapore International Arbitration Centre (SIAC), and the Hong Kong International Arbitration Centre (HKIAC).

(1) ICC

The ICC's Rules of Arbitration (2021) ("ICC Rules")[69] do not stipulate for an express obligation of confidentiality. However, the rules are not entirely silent on the matter. Article 22(3) of the ICC Rules, concerning the conduct of the arbitration, states:

"Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information."

Accordingly, the matter is reserved for party agreement. Where the ICC Rules apply, the arbitration will not automatically benefit from confidentiality, and a party may be at liberty to disclose certain matters to non-participants, depending of course on the terms of the applicable contract and the applicable laws. That said, however, the arbitral tribunal is granted the discretion to intervene, upon a party's request, and cloth the arbitration with the cloak of confidentiality, most likely in circumstances where it is satisfied that such would be appropriate

[67] Ibid.
[68] See, generally, Keneth I Ajibo, 'Confidentiality in International Commercial Arbitration: Assumptions of Implied Duty and a Proposed Solution' Latin American Journal of International Trade Law (2015) 3(2) 337, 351 et seq. See also, Srishti Kumar and Raghvendra Pratap Singh, 'Transparency and Confidentiality in International Commercial Arbitration', The International Journal of Arbitration, Mediation and Dispute Management (2020) 86(4) 463-481, 467-468.
[69] See here: https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/, accessed on 27 July 2022.

and achieve justice as between the parties. It is therefore rightly stated that the ICC procedure provides for an opt-in mechanism in respect of the confidentiality of arbitrations.[70]

Accordingly, the ICC Rules falls short of the protection provided by an express rule of confidentiality, and leaves the parties at the whim of the arbitrators, and in some cases that assistance may come belatedly, even if granted. This is not the ideal position one would desire to be in given that certain arbitrators may be hesitant to grant the protection desired, especially in circumstances where the applicable law refuses to recognise arbitrations as confidential and where it is feared that an order of confidentiality will be challenged before the courts. If there is one thing the arbitrators fear more than getting the decision wrong, it is getting a decision of theirs successfully challenged.[71]

For completeness, the ICC Rules do, however, provide for the privacy of hearings. Article 26(3) explains that "*[S]ave with the approval of the arbitral tribunal and the parties, persons not involved in the proceedings shall not be admitted [to hearings]*".[72] Hearings held under the ICC Rules are therefore private and inaccessible to non-parties.

(2) AAA

The AAA's Commercial Arbitration Rules and Mediation Procedures ("AAA Rules")[73] do not impose any express obligation on the parties as to the confidentiality of the arbitration. However, the arbitral tribunal is granted the discretion in appropriate circumstances to preserve and protect confidential information and documents. For example, Rule 23, somewhat indirectly, specifies that when exercising any of its enforcement powers concerning the establishment of the procedure of the arbitration and document production during the arbitral process, the arbitral tribunal may "*condition[] any exchange or production of confidential documents and information, and the admission of confidential evidence at the hearing, on appropriate orders to preserve such confidentiality*". Furthermore, Rule 51 explains that the AAA will, if requested, provide copies of documents in its possession to the requesting party, provided that such is "*not determined by the AAA to be privileged or confidential*". The stance taken by the AAA Rules is therefore akin to that contained in the ICC Rules.

(3) LCIA

The LCIA has taken a wholly divergent approach to the issue of confidentiality of arbitrations as compared with that of the ICC and the AAA. It provides for an express duty on the parties to keep the arbitration and everything relating thereto confidential. It is therefore a default rule, which the parties are able to opt-out of.[74] The LCIA's Arbitration Rules (2020) ("LCIA Rules")[75] contains the following detailed and extremely prescriptive provision as regards confidentiality:

> "**Article 30 Confidentiality**
> 30.1 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 purpose of the arbitration and all other documents produced by another party in the proceedings

[70] Mo Egan and Hong-Lin Yu, 'Intersecting and dissecting confidentiality and data protection in online arbitration' Journal of Business Law (2022) 2 135-163, 155-157.
[71] See, e.g., Remy Gerbay, 'Due Process Paranoi' (Kluwer Arbitration Blog, 6 June 2016), http://arbitrationblog.kluwerarbitration.com/2016/06/06/due-process-paranoia/, accessed on 30 July 2022.
[72] Mo Egan and Hong-Lin Yu, 'Intersecting and dissecting confidentiality and data protection in online arbitration' Journal of Business Law (2022) 2 135-163, 154.
[73] See here: https://adr.org/sites/default/files/Commercial%20Rules.pdf, accessed on 30 July 2022.
[74] See, Mo Egan and Hong-Lin Yu, 'Intersecting and dissecting confidentiality and data protection in online arbitration' Journal of Business Law (2022) 2 135-163, 155-157.
[75] See here: https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx, accessed on 30 July 2022.

not otherwise in the public domain, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority. The parties shall seek the same undertaking of confidentiality from all those that it involves in the arbitration, including but not limited to any authorised representative, witness of fact, expert or service provider."

As is evident from the above, the LCIA Rules impose an extremely extensive confidentiality obligation on the parties. The duty encompasses everything created for the purposes of the arbitration, as well as documents disclosed to the other party(ies) during a document production exercise, even if not utilised in the arbitration. However, there are certain listed exceptions to that duty, which are not unusual and often found in the confidentiality related provisions of commercial contracts, and which mirror those established under English law. It is noteworthy that the confidentiality obligation found in Article 30.1 applies also in respect of awards rendered by the arbitral tribunal; this, by necessity and also by implication, extends to interim or final orders made by the tribunal. Finally, Article 30 also explains that the arbitral tribunal's deliberations are, as a matter of principle, to remain confidential.

(4) SIAC

The Arbitration Rules (2016) of SIAC ("SIAC Rules")[76] also contain express provisions dictating the privacy and confidentiality of arbitrations. Rule 39 is a very prescriptive provision regulating the matter. It requires, subject to contrary party agreement, the parties and arbitrators to keep confidential "*all matters relating to the proceedings and the Award*". Rule 39.2 specifies that, again subject to contrary party agreement, prior written consent of the other party is required before a disclosure can be made to a third person. Rule 39 further provides the discussions and deliberations of the arbitral tribunal must be kept confidential.

In line with the approach taken in the LCIA Rules, the SIAC Rules also legislate for certain exceptions to the rule around the confidentiality of arbitrations. Rule 39.2 provides that the confidentiality rule may be by-passed where disclosure is necessary: (i) to make an application to a competent court to challenge or enforce an award or order; (ii) to comply with a court order; (iii) to pursue or enforce a legal right or claim; (iv) to comply with relevant laws or regulations; (v) to comply with an order of the arbitral tribunal made upon request by a party; and (vi) in connection with any application made concerning joinder of parties or consolidation of proceedings. It is noteworthy that the SIAC Rules expressly state that, again subject to contrary party agreement, "*all meetings and hearings shall be in private, and any recordings, transcripts, or documents used in relation to the arbitral proceedings shall remain confidential*" (Rule 24.4).

(5) HKIAC

The HKIAC's Administered Arbitration Rules (2018) ("HKIAC Rules")[77] also lay down an express obligation of confidentiality on the arbitrating parties. Article 45.1 states that, subject to party agreement, parties must not "*publish, disclose or communicate any information relating to…the arbitration under the arbitration agreement*." Furthermore, the HKIAC similarly caveat the rule with certain exceptions (Article 45.3), which exceptions largely mirror those set out in the SIAC Rules. In respect of the publication of awards by the HKIAC, in its entirety or in the form of excerpts or summary, Article 45.5 explains that such will only be done where party and other identifying information are deleted or anonymised and no party objects to the publication within the time limit fixed.

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[76] See here: https://www.siac.org.sg/our-rules/rules/siac-rules-2016, accessed on 30 July 2022.
[77] See here: https://www.hkiac.org/arbitration/rules-practice-notes/hkiac-administered-2018, accessed on 30 July 2022.

5. WORTHINESS OF CONFIDENTIALITY OF LEGISLATIVE SAFEGUARDING

A. Philosophical desirability of confidentiality

Whilst it is clear from the above that English law has consistently safeguarded the confidentiality of arbitrations, it is evident that such approach has not been unanimously adopted by all major arbitral jurisdictions.[78] Further, the courts of certain noteworthy jurisdictions have questioned the accuracy of the understanding that by opting to arbitrate the parties are to be accepted as having expressed a desire to keep their disputes out of the public eye.[79] It is nothing short of a herculean mission, and arguably impossible, for one to attempt to ascertain why it is exactly that the parties prefer to arbitrate rather than litigate in each given scenario. Perhaps, which is more likely than not, there is no common understanding and the reason(s) for the parties' preference in favour of arbitration vary from case to case. The fact that parties continue to arbitrate in jurisdictions where the implication of confidentiality as a term is rejected is somewhat supportive of that line of thinking. With that being said, some consider that even if one were to accept that confidentiality is not the most decisive reason for having recourse to arbitration, arbitration practice in London would be severely threatened by a much laxer approach towards it.[80]

However, one thing that is almost universally accepted is that arbitration is a private affair, and hearings are ordinarily held behind closed doors, in private venues inaccessible to the public.[81] This, by necessity, requires a different level of treatment of arbitration as compared with litigation. How is that differing level of treatment to be determined? It is suggested that, absent a fully comprehensive empirical and persuasive analysis into why parties choose to arbitrate, which is likely to be impossible to realise, the answer lies in philosophical thoughts. In particular, it is considered that the works of the 'Master' Rumi[82] are helpful in justifying when and why what is intended as private must remain as such.

Rumi has been a great advocate of peace and love, and his many writings and poems reflect his devotion to those two subject-matters. Doubtless, by necessity flowing from his two most favourite topics, Rumi devotes not an inconsiderable time and space in his writings to the matter of silence. Barks, a devotee of Rumi's works and the cause of Rumi's late-arriving fame in the Western world, notes that "*Rumi devotes a lot of attention to silence*" and that "*[N]o other poet pays such homage to silence*".[83] The following lines from one of Rumi's poems are demonstrative of Barks' observations concerning the great poet and philosopher:

> Talking, no matter how humble-seeming,
> is really a kind of bragging.
> Let silence be the art
> you practice.[84]

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[78] See, Kenneth I Ajibo, 'Confidentiality in International Commercial Arbitration: Assumptions of Implied Duty and a Proposed Solution' Latin American Journal of International Trade Law (2015) 3(2) 337.
[79] Ibid. See also, Hans Bagner, 'Confidentiality-A Fundamental Principle in International Commercial Arbitration?', Journal of International Arbitration (2001) 18(2) 243-249.
[80] See, e.g., Ioanna Thoma, 'Confidentiality in English Arbitration Law: Myths and Realities About its Legal Nature', Journal of International Arbitration (2008) 25(3) 299-314, 314.
[81] Ibid.
[82] See, generally, Ibrahim Gamard, 'The Popularity of Mawlānā Rūmī and the Mawlawī Tradition' Mawlana Rumi Review 2010(1) 109–21.
[83] Coleman Barks, Rumi – Bridge to the Soul (Harper Collins publishers, 2007), 8.
[84] Coleman Barks, Rumi – Bridge to the Soul (Harper Collins publishers, 2007), 97, "I see the face".

Mirroring the above, Rumi advised that "*[T]houghtless speech spills easily out of man, while the wise ones keep silent.*"[85]

It is clear that to Rumi silence in itself is a virtue; a virtuous person does not talk unnecessarily. Only when one is called to answer or must answer by necessity must one respond with words.

On similar lines to the above, Rumi had the following to say about silence:

> I want these words to stop.
> Calm the chattering mind, my soul.
> No more camel's milk.
> I want silent water to drink,
> and the majesty of a clear thinking.[86]

Critics or passive observants may be disinclined to follow the logic suggested above premised on an understanding that Rumi's works predominantly concern love (albeit in various shapes and forms, and not only in the traditional sense) and that his thinking therefore cannot be applied with ease to a situation underpinned by commercial transactions. However, it is contended that such would be an inaccurate understanding of the philosophy and thinking of the great scholar. His thinking was directed at addressing the issues penetrating to the essence of life and everything and anything that concerned it. His work cannot therefore be constrained and reserved only for the matters on which he on surface seemingly put pen to paper. This is most evident in his following poem:

> Lovers find secret places
> inside this violent world
> where they make transactions
> with beauty.
> (…)
> Reason sets up a market
> and begins doing business.
> Love has more hidden work.

The above passage, though it is about love and reason and the segregation of one from the other, could be utilised as a metaphor for keeping secret what must be kept secret.[87] It is the lover's obvious desire to transact with love in secret that affords the secrecy to their transactions in beauty, much like the arbitrating parties' desire to arbitrate with privacy. It would be wrong for a lover to divulge secrets entrusted to it to other persons without the express consent of the other, as it would be for an arbitrating party to disclose the details of the arbitration[88]. To do so in both cases would be an obvious misuse of trust, which must not be sanctioned. The author therefore agrees with the view expressed that the concept of privacy

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[85] "Rumi's Little Book of Life: The Garden of the Soul, the Heart, and the Spirit" (Amatyllis, 2021), translated into English by Maryam Mafi and Azima Melita Kolin, 28.

[86] Coleman Barks, Rumi – Bridge to the Soul (Harper Collins publishers, 2007), 122-123, "I ask one more thing".

[87] It should perhaps be clarified that it is not the author's love of arbitration that explains the comparison between love and arbitration. It is simply the fact that Rumi's poem designates the lover's love as the secret which must be kept hidden from the public, which correlates with the desire of arbitrating parties to keep their arbitration private and, by necessary extension, confidential.

[88] See, contra, Srishti Kumar and Raghvendra Pratap Singh, 'Transparency and Confidentiality in International Commercial Arbitration', The International Journal of Arbitration, Mediation and Dispute Management (2020) 86(4) 463-481, 466, for an explanation of the fact that some question whether confidentiality necessarily follows from privacy. See also, Michael Young and Simon Chapman, 'Confidentiality in International Arbitration: Does the exception prove the rule? Where now for the implied duty of confidentiality under English law?', ASA Bulletin (2009) 27(1) 26-47, 37.

would be meaningless if participants were "*required to arbitrate privately by day while being free to pontificate publicly by night*".[89]

Rumi's thoughts therefore provide a clear and sufficient basis for a contention that what is said in private must be kept confidential. It is that "*common understanding*"[90] between the arbitrating parties that, it is considered, has persuaded the English courts to imply, and justifies the implication of, a term as to confidentiality of arbitrations.[91]

It is not suggested, however, that silence is an absolute virtue. There are times when one is permitted and, in fact, positively required to break the silence to utter the necessary words. On this precise point, Rumi uttered the following:

> The roses open their shirts.
> It is not right to stay closed
> when the time of divulging comes.[92]

Accordingly, in circumstances where the confidentiality of an arbitration would operate to bar what must be, it can and should be side-stepped. This would cater for and explain the various exceptions accepted by law and/or arbitral rules to the confidentiality of arbitrations.[93]

B. Worthiness for legislative shielding

The above analysis suggests, it is submitted, that, at least insofar as English law is concerned, confidentiality is deserving of legislative protection and safeguarding. The private and, unsurprisingly, resultant confidential nature of arbitration has been acknowledged and certified into the law for some centuries, with each case adding a further block and strengthening the wall that exists between the participants of arbitration proceedings and the public at large.[94] Although some cases have caveated the principles of privacy and confidentiality with certain exceptions, such should not be seen as weakening the wall, but rather as necessary "loopholes" to allow the law to observe and intervene when necessary and appropriate. In other words, it assists avoid circumstances where the confidentiality cloak could be used to create injustice or an unwanted façade. Surveys and scholarly writings consistently demonstrate that confidentiality is highly valued by its participants, with a not insubstantial portion considering it a deal breaker, and many operating under the assumption that it is applicable despite the absence of an express agreement on the matter.[95] On that basis, this paper goes as further to say that confidentiality is deserving of legislative protection and safeguarding not only in England and Wales, but globally.[96] Adopting the spirit of the great

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[89] See, Louis Yves Fortier, 'The Occasionally Unwarranted Assumption of Confidentiality', Arbitration International (1999) 15(2) 131-140, 132.

[90] Trakman refers to this as the parties' "collateral expectation": Leon E. Trakman, 'Confidentiality in International Commercial Arbitration', Arbitration International (2002) 18(1) 1-18.

[91] See, *John Forster Emmott v Michael Wilson & Partners Limited* [2008] EWCA Civ 184; *Economic Department of City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314, [2005] QB 207; *Dolling-Baker v Merrett* [1991] 2 All ER 890; *Ali Shipping Corporation v Shipyard Trogir* [1999] 1 W.L.R. 314; *Symbion Power LLC v Venco Imtiaz Construction Co* [2017] EWHC 348 (TCC).

[92] Coleman Barks, Rumi – Bridge to the Soul (Harper Collins publishers, 2007), 38-39, "The time of divulging". See also, to the same effect and meaning, Rumi's poem headed "Avalanche", wherein he says: "Poet, rake the strings. Strike fire. Staying quiet is not for now. Be generous.": Coleman Barks, Rumi – Bridge to the Soul (Harper Collins publishers, 2007), 68.

[93] See section 4 above.

[94] See section 4(A) above.

[95] See fn 2 above. See also, Hans Bagner, 'Confidentiality-A Fundamental Principle in International Commercial Arbitration?', Journal of International Arbitration (2001) 18(2) 243-249, 248-249.

[96] It is unfortunate that the New York Convention (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958) does not deal with the issue expressly, and leaves the matter to be decided under local laws: see, 'Chapter 20: Confidentiality in International Arbitration', in Gary B. Born, International Commercial Arbitration, 3rd edition (Kluwer Law International, 2021) 3001-3062, 3006.

scholar Rumi's writings, laws should ensure that participants of arbitration practice the art of silence; such is their unspoken intentions when agreeing to arbitrate.[97] Needless to mention, the rule should be a default one, allowing the parties to deviate away by clear words or conduct, in fitting with the parties' near complete autonomy in respect of arbitration.

One may query why legislative shielding of confidentiality is necessary in England and Wales given the judiciary's unwavering support to date. One's response to that would be to point to the lack of clarity and certainty around the rule, its nature and the various exceptions to the rule. Ajibo puts across the view that "[*G]iven that the national courts and arbitral institutions including the statutory provisions foster uncertainty regarding the existence and scope of a duty of confidentiality, it is argued that there is need for an urgent coherent rule in international arbitration community.*"[98] Although Ajibo's preference is for a universal rule applied across jurisdictions, such is extremely unlikely to come to fruition anytime in the near future, especially given the divergent approaches adopted by various arbitration friendly jurisdiction, and thus a local solution is suggested as being the most appropriate and likely to be impactful in the circumstances. Fesler speaks in support, noting that "*[T]o expect common law and civil law jurisdictions to harmonise an approach [as regards confidentiality] is therefore probably unreasonable"*.[99]

A review of the relevant English caselaw will, it is considered, demonstrate that judges speak in different tones and terminology, even in the same case, as to the nature, origins and effect of the rule of confidentiality and its exceptions. Young and Chapman concur and elaborate as follows: "*[H]aving grappled with the issue of confidentiality for over 20 years, the courts of England – one of the few jurisdictions to have given legal effect to the alleged obligation – have failed to devise a sufficiently clear rule (together with exceptions) which can be readily applied in all cases… Not only do the boundaries of the obligation under English law remain unclear, but the future of the rule appears uncertain. Moreover, some of the most senior judges in England have already expressed their "reservations about the desirability or merit" of the approach adopted by the courts to date*." [100] This is undesirable in an area of such importance and criticality, making it inappropriate to leave it in the hands of the judges. Perhaps some at the Law Commission are likeminded and have hence included the matter as one area of arbitration law to consult the participants on and consider reforming.

The legislative enshrinement of the rule on confidentiality is needed to provide certainty and clarity to the participants of the arbitration process, and answer their legitimate expectations. Until then, it would be unwise for the arbitration users not to heed the advice of eminent scholars and legal practitioners and keep their arbitration agreements silent on the matter of confidentiality. They should either select the arbitral rules that expressly provide for the confidentiality of arbitrations or regulate the said matter in their arbitration agreements or clauses.[101] The advice should be heeded even for arbitrations governed by English law given

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[97] See fn 83 above.

[98] Kenneth I Ajibo, 'Confidentiality in International Commercial Arbitration: Assumptions of Implied Duty and a Proposed Solution' Latin American Journal of International Trade Law (2015) 3(2) 337 and 354.

[99] Michael Fesler, 'The Extent of Confidentiality in International Commercial Arbitration', The International Journal of Arbitration, Mediation and Dispute Management (2012) 78(1) 48-58, 49.

[100] Michael Young and Simon Chapman, 'Confidentiality in International Arbitration: Does the exception prove the rule? Where now for the implied duty of confidentiality under English law?', ASA Bulletin (2009) 27(1) 26-47.

[101] See, e.g., Kenneth I Ajibo, 'Confidentiality in International Commercial Arbitration: Assumptions of Implied Duty and a Proposed Solution' Latin American Journal of International Trade Law (2015) 3(2) 337. That said, Ajibo rightly makes the point that at the time of contracting parties do not generally know whether confidentiality would suit their commercial interests and thus refrain from legislating in their contracts and, even if done, would probably not regulate it with needed detail (353). See, further, Michelle Stojcevski and Bruno Zeller, 'Confidentiality and Privacy Revisited', The International Journal of Arbitration, Mediation and Dispute Management (2012) 78(4) 332-339, 339; L.Y. Fortier, 'The Occasionally Unwarranted Assumption of Confidentiality', Arbitration International (1999) 15(2), 131-140, 138-139; Hans Bagner, 'Confidentiality-A Fundamental Principle in International Commercial Arbitration?', Journal of International Arbitration (2001) 18(2) 243-249, 248-249; and Michael Fesler, 'The Extent of

the various uncertainties and lack of clarity around the rule and its exceptions, and the risk that -though unlikely- the rule may be modified or made obsolete by the Supreme Court should the point be litigated before it. On the point of drafting, the following guidance and directions issued by Bagner is likely to prove of assistance:

> It should be noted that a contract containing a general confidentiality clause which makes no particular reference to arbitration may not be sufficient for these purposes. What is needed is a clause which states expressly not only that the arbitral proceedings will be private but also that all documents, evidence, the award and possibly the very existence of the arbitration shall be treated as confidential. Any disclosure will only be made if required by law or by a competent regulatory body. To avoid such a drastic consequence as repudiation of the arbitration agreement … the clause would also need to address the sanctions to follow in case of breach.[102]

The confidentiality of arbitrations should not, however, be considered as wholly and absolutely sacrosanct. It is not in and of itself a virtue to be promoted. Rumian philosophical thought concurs.[103] There have been legitimate calls for certain aspects of the arbitration process to be made public for the greater good, such generally being the transparency of the process and its outcome and facilitation of the development of the law via precedential utility of arbitral awards.[104] This would, of course, be subject to and capable of being trumped by party agreement to the contrary. It is therefore suggested that, when considering the appropriateness of the various exceptions created against the rule of confidentiality by the English judiciary and whether and which ones should be codified into the amended statute, the Law Commission should also consider further possible exceptions that could be introduced to legitimise commercial arbitration, afford it greater transparency and enable the further and continued development of the law, whilst protecting the general confidentiality of arbitrations. Admittedly, that is a delicate balance to maintain.

Confidentiality in International Commercial Arbitration', The International Journal of Arbitration, Mediation and Dispute Management (2012) 78(1) 48-58, 49.

[102] Hans Bagner, 'Confidentiality-A Fundamental Principle in International Commercial Arbitration?', Journal of International Arbitration (2001) 18(2) 243-249, 248-249.

[103] See fn 91 above.

[104] See, e.g., Luke Nottage, 'Confidentiality v. Transparency in International Arbitration: Asia-Pacific Tensions and Expectations', Asian International Arbitration Journal (2020) 16(1) 1-24, 22; Carlos de Los Santos Lago and Margarita iSoto Moya, 'Confidentiality under the new French arbitration law: a step forward?', Spain Arbitration Review (2011) Vol 11, 79-94, 94.