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## Confidentiality in Arbitration: A Principled Approach

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*La confidentialité est souvent considérée comme l'un des bénéfices de l'arbitrage. Bien que les procédures arbitrales soient généralement privées, les parties seraient cependant sages de ne pas les considérer comme confidentielles en l'absence d'un accord à cet effet. Cet article examine les principes régissant la confidentialité dans d'autres juridictions, ainsi que la position adoptée par les tribunaux canadiens, et conclut en proposant une approche à la confidentialité fondée sur des principes pour l'arbitrage au Canada.*

*Confidentiality is often considered one of the benefits of arbitration. However, although arbitrations are generally private, parties would be wise not to consider them confidential, absent a confidentiality agreement. This paper examines the approaches to confidentiality in other jurisdictions, and the approach taken by Canadian courts, and concludes by proposing a principled approach to confidentiality in arbitration in Canada.*

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## I. INTRODUCTION

Confidentiality is often listed as one of the main advantages that arbitration has over litigation. While it is true that arbitration is generally private in the sense that hearings are not open to the public and decisions are not published, this benefit may be overstated. The courts and third parties, for example, are actors who are not directly involved in the arbitration process but who may nevertheless find themselves needing access to documents produced therein. Third parties, which could include competitors or the media, can usually be regulated contractually. Disclosure to the courts as part of litigation is a larger issue because it can entail public interest considerations and certain constitutional rights, and therefore documents cannot be afforded the same level of protection.

Although there are widely different approaches to understanding confidentiality in commercial arbitration, most jurisdictions ultimately recognize that what is initially confidential between parties may not be protected from disclosure or treated as confidential by the courts in further litigation. The inconsistency with regards to confidentiality arises with respect to whether arbitration documents – such as those disclosed to the opposing party as well as witness statements, pleadings, transcripts, awards and reasons – are *presumed* to be confidential. Where courts have found that such a presumption exists, parties may not disclose arbitration documents to third parties without prior consent. It may also have some bearing on a court's treatment of the documents if they do indeed become relevant in subsequent litigation.

This paper examines the varied approaches taken by different jurisdictions to confidentiality in arbitration. The paper concludes by proposing a principled approach to arbitration confidentiality in Canada.

## II. UNITED KINGDOM: A PRESUMPTION OF CONFIDENTIALITY WITH QUALIFICATIONS

One of the first cases to consider the extent to which confidentiality is implied in arbitration agreements is *Dolling-Baker v Merrett*.<sup>1</sup> The plaintiff brought an action to recover money due under a reinsurance contract, from which the defendant claimed they were exempt because of non-disclosure. The defendant had previously denied a claim for non-disclosure under a similar contract which had gone to arbitration. The plaintiff in *Dolling-Baker* sought discovery and inspection of “all pleadings, documents, witness statements, and any other relevant documents produced and/or disclosed in the arbitrations”, referencing that previous hearing.<sup>2</sup> Parker LJ reviewed the rules pertaining to the mutual discovery of documents and noted the difference between the burden under the rule for listing documents and the rule for production of documents. A party must list all relevant documents, but when it comes to producing them, the party seeking the production of such documents must show that producing them is “necessary either for disposing fairly of the cause or matter or for saving costs.”<sup>3</sup>

Parker LJ allowed the appeal on the basis that the plaintiff had not sufficiently made the case that the wide scope of documents sought from the arbitration were relevant. Further, the

<sup>1</sup> *Dolling-Baker v Merrett* (1990), [1991] 2 All ER 890 (CA), 1990 WL 753385.

<sup>2</sup> *Ibid* at 893.

<sup>3</sup> *Ibid* at 895.

court found that given the private nature of arbitration and the obligation on a party who obtains documents in discovery not to use them for any other purpose, there is an implied obligation on the part of both parties not to disclose documents prepared for or provided therein:

It is not contended on behalf of the first defendant that the fact that the documents were prepared for or used in an arbitration, or consist of transcripts or notes of evidence given, or the award, confers immunity. It could not, in my judgment, successfully be so contended. Nor is it contended that the documents constitute confidential documents in the sense that “confidentiality” and “confidential” documents have been used in the court. What is relied upon is, in effect, the essentially private nature of an arbitration, coupled with the implied obligation of a party who obtains documents on discovery not to use them for any purpose other than the dispute in which they were obtained. As between parties to an arbitration, although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must, in my judgment, be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and indeed not to disclose in any other way what evidence had been given by any witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court. That qualification is necessary, just as it is in the case of the implied obligation of secrecy between banker and customer.<sup>4</sup>

Where documents are necessary for the fair disposition of the action they must be produced. Where the documents were part of an arbitration hearing and subject to an implied obligation of confidentiality however, the court should consider whether there are other ways of obtaining the information sought that do not involve a breach of the implied undertaking.

The extent of the implied duty of confidentiality was considered further in *Hassneh Insurance Co of Israel v Mew*.<sup>5</sup> The plaintiffs sought an injunction to restrain disclosure of arbitration documents by the defendant. The defendant was reinsured by the plaintiffs and commenced arbitration to recover under the contract. Having no success against the plaintiffs, the defendant chose to pursue their brokers, seeking to have the interim award disclosed along with the reasons used to justify their claims and explore the possibility of a settlement. The plaintiffs consented to disclosure of the award and the reasons referred to in the award, but objected to disclosure of the whole of the reasoning and any other documents, including pleadings, witness statements and transcripts. The defendant argued that although there is a duty of confidence, this was qualified such that documents could be disclosed if it was reasonable for the protection of the defendant’s own interests. Justice Colman concluded that documents such as pleadings, transcripts and witness statements are confidential as a necessary extension of the privacy of arbitration.<sup>6</sup>

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<sup>4</sup> *Ibid* at 899.

<sup>5</sup> *Hassneh Insurance Co of Israel v Stuart J Mew* (1992), [1993] 2 Lloyd’s Rep 243 (QB) [*Hassneh Insurance*].

<sup>6</sup> *Ibid* at 249.

If it be correct that there is at least an implied term in every agreement to arbitrate that the hearing shall be held in private, the requirement of privacy must in principle extend to documents which are created for the purpose of that hearing. The most obvious example is a note or transcript of the evidence. The disclosure to a third party of such documents would be almost equivalent to opening the door of the arbitration room to that third party. Similarly witness statements, being so closely related to the hearing, must be within the obligation of confidentiality. So also must outline submissions tendered to the arbitration. If outline submission, then so must pleadings be included.<sup>7</sup>

Additionally, documents disclosed by one party to the other during arbitration are covered by the implied undertaking stipulated in English rules of discovery:

In as much as the parties to an English law arbitration impliedly agree to use English discovery procedure, or at least to submit to the possibility that such procedure will apply, it must by implication be their mutual obligation to accord to documents disclosed for the purposes of the arbitration the same confidentiality which would attach to those documents if they were litigating their disputes as distinct from arbitrating them. The fact that the proceedings are in private lends weight to the necessity for that implication.<sup>8</sup>

The obligation of confidentiality attached to the award and its reasons is more complicated because the award is an identification of a party's rights and could thus become a public document for the purposes of appeal or enforcement. There are also many circumstances in which an arbitrating party is required to disclose the award to a third party for the purpose of establishing their legal rights in a separate conflict. In the judge's opinion however, "the suggestion by an officious bystander of a duty of confidentiality which precluded the use of arbitration awards for the establishment by arbitrating parties of their rights against third parties, unless the leave of a Court were first obtained, would be unlikely to be enthusiastically received by the commercial community."<sup>9</sup> Therefore, with respect to arbitration awards and reasons, there is an exception to the implied duty of confidentiality in the United Kingdom:

In my judgment a similar qualification must be implied as a matter of business efficacy in the duty of confidence arising under an agreement to arbitrate. If it is reasonably necessary for the establishment or protection of an arbitrating party's legal rights vis-à-vis a third party, in the sense which I have described, that the award should be disclosed to that third party in order to found a defence or as the basis for a cause of action, so to disclose it would not be a breach of the duty of confidence.

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Accordingly, I conclude that the exception to the duty of confidentiality which I have held to apply by implication to arbitration awards applies equally to the reasons.<sup>10</sup>

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<sup>7</sup> *Ibid* at 247.

<sup>8</sup> *Ibid*.

<sup>9</sup> *Ibid* at 248.

<sup>10</sup> *Ibid* at 249.

An exception to the duty of confidence allowing one arbitrating party to bring an award and reasons to the Court for the purpose of enforcement or appeal was also established. The court concluded that if it is reasonably necessary for the defendant's establishment of a cause of action against its broker, then the arbitration award and relevant portions of the pleadings may be disclosed.<sup>11</sup>

Finally, the court considered whether the disclosure of other arbitration documents by the defendant to its broker would breach the duty of confidentiality. It was noted that although "there is no principle in English law by which documents are protected from discovery by reason of confidentiality alone", there is still a procedure to be followed.<sup>12</sup> If documents are relevant and not privileged, they should be included in a list of documents, but production of these documents without consent from the other party or without a court order may mean that the party is in breach of the duty of confidence.

In *Insurance Co v Lloyd's Syndicate*,<sup>13</sup> Justice Colman elaborated on *how* necessary disclosure must be for the establishment of a party's legal right before it is justified. The plaintiff, a leading underwriter, sought an injunction prohibiting the reinsured defendant from disclosing the arbitration award to five other reinsurers. The court found that disclosure of the award might have a persuasive effect on the following reinsurers, but they would not be bound by it.<sup>14</sup> If the duty of confidence is implied as a matter of business efficacy, the exception to the duty "cannot possibly extend to purposes which are merely helpful, as distinct from necessary".<sup>15</sup> It is only sufficiently necessary to disclose the award if the right in question cannot be enforced unless the award and reasons are disclosed. The fact that the plaintiff may suffer no harm from the disclosure is immaterial. Negative covenants are to be enforced without proof of damage, although there could be exceptional cases where the granting of an injunction would be so prejudicial to the defendant that it would be unconscionable to grant the injunction without proof of damage.<sup>16</sup>

In *London & Leeds Estates Ltd v Paribas Ltd* (No. 2),<sup>17</sup> the court articulated another exception to the duty of confidentiality – the public interest. The plaintiff sought a witness report from a previous arbitration where it appeared that the views expressed by an expert witness in the court proceeding at hand were at odds with those they expressed in a previous arbitration. The court ruled that an exception to the duty of confidentiality exists with respect to pleadings, transcripts and witness statements from an arbitration where disclosure is necessary in the interest of justice.<sup>18</sup>

In *Ali Shipping Corporation v Shipyard Torgir*,<sup>19</sup> the court of appeal confirmed that the exception to the duty of confidentiality for the purpose of establishing rights against third parties applies not only to the award and reasons, but also to other arbitration documents such

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<sup>11</sup> *Ibid* at 250.

<sup>12</sup> *Ibid*.

<sup>13</sup> *Insurance Co v Lloyd's Syndicate* (1994), [1995] 1 Lloyd's Rep 272 (QB Comm Ct).

<sup>14</sup> *Ibid* at 272.

<sup>15</sup> *Ibid* at 275.

<sup>16</sup> *Ibid* at 276.

<sup>17</sup> *London & Leeds Estates Ltd v Paribas Ltd* (No 2) (1994), [1995] 1 EGLR 102, [1995] 02 EG 134.

<sup>18</sup> *Ibid* at 102–103.

<sup>19</sup> *Ali Shipping Corporation v Shipyard Trogir* [1998] 2 All ER 136 (CA), [1999] 1 WLR 314.

as pleadings, transcripts and witness statements. The court also held that the exception is not as narrow as articulated in *Lloyd's Syndicate*: disclosure is justified where “reasonably necessary for the protection of legitimate interests of an arbitrating party”.<sup>20</sup>

The court considered whether the implied duty of confidentiality applies where a defendant seeks to rely on materials from a previous arbitration involving companies owned by the plaintiff. The court implied that a duty of confidentiality exists with respect to arbitration documents, and prejudice will be presumed whether or not there is a beneficial relationship between the parties to the arbitration and subsequent litigation.<sup>21</sup> Furthermore, although arbitration documents may provide some efficiency because the witnesses will be the same, convenience and good sense are not enough to satisfy the test of reasonable necessity.<sup>22</sup> The evidence was available from the witnesses in the proceeding at hand, and the prior testimony would only become relevant to the extent that it might be used to impeach the testimony in the current case. Until that point, disclosure would be a breach of the implied duty of confidence. Lord Justice Potter did opine that it might become necessary for an English court to consider some further exception to the general rule of confidentiality “based on wider considerations of public interest”, but it was not necessary to do so in that case.<sup>23</sup>

In the more recent case of *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Company of Zurich*,<sup>24</sup> a party to a previous arbitration sought to disclose the award in a subsequent arbitration with the same party for the purpose of raising issue estoppel. They relied on an explicit provision in the agreed procedural directions rather than an implied duty. The court declined to follow the decision in *Ali Shipping* because, in this case, the parties were the same in both arbitrations and the issue estoppel is a form of enforcement of rights provided by the award. The parties could not have intended to preclude disclosure of the award for the purpose of enforcement because that would be inconsistent with and frustrate the purpose of arbitration.<sup>25</sup> The court also expressed some reservation about the duty of confidentiality as an implied term:

...Potter LJ, who delivered the leading judgment, having followed *Dolling-Baker v Merrett* [1991] 2 All ER 890, [1990] 1 WLR 1205 affirming the privacy of arbitration proceedings, went on to characterise a duty of confidentiality as an implied term ([1998] 2 All ER 136 at 146-147, [1999] 1 WLR 314 at 326) and then to formulate exceptions to which it would be subject ([1998] 2 All ER 136 at 147, [1999] 1 WLR 314 at 326-327). Their Lordships have reservations about the desirability or merit of adopting this approach. It runs the risk of failing to distinguish between different types of confidentiality which attach to different types of document or to documents which have been obtained in different ways and elides privacy and confidentiality. Commercial arbitrations are essentially private proceedings and unlike litigation in public courts do not place anything in the public domain. This may mean that the

<sup>20</sup> *Ibid* at 136.

<sup>21</sup> *Ibid* at 149.

<sup>22</sup> *Ibid* at 152.

<sup>23</sup> *Ibid* at 148.

<sup>24</sup> *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Company of Zurich* (2003), [2003] UKPC 11, [2003] 1 All ER (Comm) 253 at 253.

<sup>25</sup> *Ibid*.

implied restrictions on the use of material obtained in arbitration proceedings may have a greater impact than those applying in litigation. But when it comes to the award, the same logic cannot be applied. An award may have to be referred to for accounting purposes or for the purpose of legal proceedings (as Aegis referred to it for the purposes of the present injunction proceedings) or for the purposes of enforcing the rights which the award confers (as European Re seek to do in the Rowe arbitration). Generalisations and the formulation of detailed implied terms are not appropriate. But in any event, the *Ali Shipping* case provides no assistance for either argument of Aegis. It is interesting to note that the reasoning in the above referred to passages of the judgment of Potter LJ seem to have been strongly influenced by the description of the duty of confidentiality a banker owes to his customer given in *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461, [1923] All ER Rep 550 both in the implied term and the exceptions to the duty. The *Tournier* case was not cited or expressly referred to in the *Ali Shipping* case. But the use of parallel reasoning in both cases shows that the court in the *Ali Shipping* case was not considering what rights an award gave rise to nor any question of what is involved in the enforcement of an award.<sup>26</sup>

[Emphasis added].

In summary, courts in the United Kingdom have taken the position that, with some exceptions, all documents created for or in the arbitration or disclosed for the purpose of the arbitration are presumptively subject to an obligation of confidentiality. Documents disclosed for the purpose of discovery in arbitration are subject to an obligation of confidentiality because they are covered by the same implied undertaking that exists elsewhere in conventional litigation. The obligation of confidentiality arises with respect to pleadings, transcripts, witness statements, and arguments. Permitting disclosure of these documents to third parties would therefore defeat the purpose of private arbitrations. Awards and reasons are also subject to confidentiality with the caveat that they may be disclosed to a court for the purpose of enforcement or appeal. An exception to confidentiality arises with respect to awards and reasons as well as pleadings, transcripts, witness statements and arguments where disclosure is reasonably necessary for the protection of legitimate interests of an arbitrating party or to establish rights vis-à-vis third parties. Finally, the obligation of confidentiality does not create a privilege with respect to document production. If any arbitration documents are necessary for fairly disposing of a matter then they must be disclosed. An exception also exists for the purpose of impeaching the testimony of a witness in a subsequent proceeding.

Given the most recent treatment of awards and reasons by the Privy Counsel, it is difficult to say what the implied duty of confidentiality means in relation to awards.<sup>27</sup>

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<sup>26</sup> *Ibid* at 282.

<sup>27</sup> Claude R Thomson & Annie MK Finn, "Confidentiality in Arbitration: A Valid Assumption? A Proposed Solution!" (2007) 62:2 *Disp Resol J* 75 at 77.

### III. AUSTRALIA AND THE UNITED STATES: NO PRESUMPTION OF CONFIDENTIALITY

In contrast to the position taken in the U.K., Australia and the United States have no concept of implied confidentiality pertaining to arbitration documents. In *Esso Australia Resources Ltd v Plowman*,<sup>28</sup> the High Court of Australia held that confidentiality, unlike privacy, is not an essential attribute of commercial arbitration. Commercial natural gas vendors sought to increase the price payable under sales agreements with two public utility corporations. When the parties could not agree on a price increase, the dispute went to arbitration pursuant to the sales agreements. Before any documents were disclosed in arbitration, the Minister for Energy and Minerals sought a declaration from the court that pleadings, transcripts and any documents disclosed in the course of the arbitration, were not subject to any obligation of confidence. By way of counterclaim, the commercial vendors sought a declaration based on implied terms that the arbitration hearings were private and any documents disclosed were to be treated as confidential.<sup>29</sup>

The court confirmed that arbitrations are private, either through an implied term in the arbitration agreement or as an incidence of the private nature of the dispute — between private parties involving a private agreement. As part of statute and practice, parties are free to exclude the public from the arbitration proceedings.<sup>30</sup>

In addition, the court noted that complete confidentiality in arbitration cannot be achieved.<sup>31</sup> First, no obligation of confidence extends to witnesses. Secondly, there are various circumstances under which an award or the proceeding in arbitration may come before the court. Third, a party may be entitled to disclose the details of the proceeding or the award to a third party to protect its own interests or comply with statutory requirements. Confidentiality was determined to be a consequential benefit of the private nature of the proceedings, but not essential to them. Therefore, an obligation of confidentiality cannot be implied as a matter of law or necessity.<sup>32</sup> The court also reflected on the problem of defining exceptions to a duty of confidentiality and noted that English jurisprudence does not take into consideration an exception whereby third parties and the public have a legitimate interest in knowing what has transpired in arbitration, which would give rise to a ‘public interest’ exception.<sup>33</sup> Finally, the court considered the existence of an implied undertaking not to disclose documents made available in arbitration for any purpose other than that for which it is disclosed, as is the case in conventional litigation.<sup>34</sup> They accepted that such an obligation is present, but only to the extent that the documents had been ordered to be produced by the arbitrator, rather than voluntarily disclosed:

But, consistently with the principle as it applies in court proceedings, the obligation of confidentiality attaches only in relation to documents which are produced by a party compulsorily pursuant to a direction by the arbitrator. And the obligation is necessarily subject to the public's legitimate interest in

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<sup>28</sup> *Esso Australia Resources Ltd v Plowman*, [1995] HCA 19, 183 CLR 10 [*Esso Australia*].

<sup>29</sup> *Ibid* at para 22.

<sup>30</sup> *Ibid*.

<sup>31</sup> *Ibid* at para 31.

<sup>32</sup> *Ibid* at para 32.

<sup>33</sup> *Ibid* at para 38.

<sup>34</sup> *Ibid* at paras 41-43.

obtaining information about the affairs of public authorities. The existence of this obligation does not provide a basis for the wide-ranging obligation of confidentiality which the appellants seek to apply to all documents and information provided in and for the purposes of an arbitration. If the judgments in *Dolling-Baker* and *Hassneh Insurance* are to be taken as expressing a contrary view, I do not accept them.<sup>35</sup>

Decisions in the United States are also inconsistent with the proposition that confidentiality is an implied term of an arbitration agreement. In *United States v Panhandle E Corp*,<sup>36</sup> the defendant “sought a protective order to prevent disclosure” of documents created for or provided in the course of an arbitration hearing with a third party to the plaintiff.<sup>37</sup> The defendant argued that production of these documents would prejudice its ongoing business relationship with the third party and sought a protective order covering these documents. The Delaware District Court found that the defendant had failed to meet the test for a protective order however, because they failed to provide specific examples of the harm that would be suffered. The held that the rules of arbitration requiring confidentiality applied to the governing members of the court of arbitration, but not to the parties. Any supporting evidence did not back up the vague assertion that there was a general understanding of between the parties to the arbitration that the documents would be kept confidential. Even assuming an understanding as to confidentiality existed, there were not specific examples of harm that would occur from disclosure, and broad allegations of economic injury were insufficient.<sup>38</sup>

#### IV. THE POSITION IN CANADA

Canadian courts have not yet decided whether an obligation of confidentiality is implied in commercial arbitration. The courts are clear that any obligation of confidentiality regarding arbitration does not rise to the level of a privilege if arbitration documents are required in subsequent litigation. However, case law does not directly address whether there is any obligation incumbent on the parties to an arbitration hearing to refrain from disclosing documents such as pleadings, transcripts, witness statements, documents disclosed by the other party and the award and reasons, to third parties.

Many of the Canadian decisions consider whether arbitration documents should be subject to a confidentiality order in subsequent litigation, a consideration which engages the open court principle in our judicial system, as well as freedom of speech. In *Sierra Club of Canada v Canada (Minister of Finance)*,<sup>39</sup> the Supreme Court of Canada set out the test for determining whether confidentiality and sealing orders should be granted for documents produced in litigation. The case dealt with an environmental group seeking the production of documents subject to a confidentiality agreement with a foreign government. Justice Iacobucci stressed the importance of the ‘open court’ principle, both in the proceedings and relevant material, which allows the public to assess and criticise judicial practices and procedures. It also concerns freedom of

<sup>35</sup> *Ibid* at para 38.

<sup>36</sup> *United States v Panhandle E Corp*, 118 FRD 346, 1988 US Dist LEXIS 1177 (D Del 1988).

<sup>37</sup> *Ibid* at 1177.

<sup>38</sup> *Ibid*.

<sup>39</sup> *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522.

expression, and will only yield where “public interest in confidentiality outweighs the public interest in openness”.<sup>40</sup> The court ruled that in commercial litigation a confidentiality order should only be granted when:

1. such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
2. the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.<sup>41</sup>

In addition, the risk to a litigant must be real and substantial, grounded in evidence, and pose a serious threat to the commercial interest in question.<sup>42</sup> An important commercial interest is not one that is merely specific to the party requesting the order – it must be one expressed in terms of a general public interest in confidentiality. The court accepted that there is a public interest in preserving confidentiality of information subject to a confidentiality agreement.<sup>43</sup> Therefore, unless arbitration documents are subject to either an express or implied obligation of confidentiality, any documents relevant to subsequent litigation will not be subject to a confidentiality order.

In *Boeing Satellite Systems International Inc v Telesat Canada*,<sup>44</sup> parties sought a ruling from the Ontario Supreme Court on whether their dispute could proceed to arbitration. Both parties also sought the imposition of a confidentiality order on documents filed with the court on the basis of a contractual obligation of confidentiality. The court invited the media to make submissions regarding a sealing order on documents in a “significant commercial dispute between two public companies”.<sup>45</sup> After hearing submissions, the court refused to grant a sealing order, stating that:

It is not sufficient that the parties have agreed between themselves to keep the particulars of their contractual and business relationship confidential in the absence of cogent evidence of potential serious harm resulting from public access to the information. In my opinion, outside the realm of confidential technical, scientific or financial information, it will be the rare case where a confidentiality order is justified in a commercial dispute. This is not such a case.<sup>46</sup>

The arbitration proceedings went ahead, but the companies came before the courts again when one party applied to have a procedural order by the arbitral tribunal set aside. One party sought a sealing order over the materials the other party filed with the court on the basis that they

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<sup>40</sup> *Ibid* at 523.

<sup>41</sup> *Ibid*.

<sup>42</sup> *Ibid*.

<sup>43</sup> *Ibid* at 525.

<sup>44</sup> *Boeing Satellite Systems International Inc v Telesat Canada* (2007), 62 Admin LR (4th) 236, 155 ACWS (3d) 1225 (Ont Sup Ct).

<sup>45</sup> *Ibid* at para 15.

<sup>46</sup> *Ibid* at para 17.

were materials from the arbitration and subject to a written confidentiality agreement.<sup>47</sup> The court applied the *Sierra Club* test for a confidentiality order and found that disclosure of documents would undermine public policy in Ontario because it would discourage arbitrations by defeating their reasonable expectation of privacy in an ongoing arbitration.<sup>48</sup>

In my opinion a properly limited confidentiality order would promote the use of private commercial arbitration and would thereby promote the modern approach to the autonomy of the arbitral process. It would run contrary to the public interest in favour of encouraging private dispute resolution if a party seeking procedural review under the *Arbitration Act*, for issues such as alleged bias or unfair treatment, could defeat the confidentiality of an on-going arbitration and thereby undo one of the critical advantages of the arbitration process.<sup>49</sup>

In *Gea Group AG v Ventra Group Co*,<sup>50</sup> the plaintiff sought an order from a German arbitral tribunal giving effect to an award. In considering whether a sealing order should be granted over the order itself, the court held that “there is merit to the position of a confidentiality obligation as inherent to a private arbitration. The Ontario position may well be close to that of Germany and England.”<sup>51</sup> However, the court disagreed that the obligation of confidentiality carries over to a court proceeding and found the defendants had not provided any reason for granting a sealing order other than the “inherent privacy and confidentiality of the arbitration process”,<sup>52</sup> which was not sufficient:

FNG and VGC argue, in effect, that given there is an obligation of confidentiality that adheres to an arbitration proceeding with its expectation of privacy, then the aspect of privacy automatically carries over to a court proceeding and continues with the determination by the court of the issues in that court proceeding. I disagree. Court decisions are normally publicly released for the reasons of public policy referred to above.<sup>53</sup>

*McHenry Software Inc v ARAS 360 Incorporated* involved a dispute over a software agreement that had been involved in arbitration in British Columbia as well as court proceedings in the United States.<sup>54</sup> On appeal from the arbitration award, the court found that the appealing party did not establish that a sealing order over the award was necessary to prevent a real and substantial risk to an important commercial interest. This was despite British Columbia domestic rules of commercial arbitration that required confidentiality.<sup>55</sup> The court found that the facts of the dispute were already in the public domain after the U.S. court proceeding, and the arbitration

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47 *Telesat Canada v Boeing Satellite Systems International Inc*, 2010 ONSC 22 at para 1.

48 *Ibid* at para 10.

49 *Ibid* at para 27.

50 *Gea Group AG v Ventra Group Co* (2009) 307 DLR (4th) 329, 66 CPC (6th) 37 (Ont Sup Ct).

51 *Ibid* at para 15.

52 *Ibid* at para 19.

53 *Ibid* at para 18.

54 *McHenry Software Inc v ARAS 360 Incorporated*, 2014 BCSC 1485.

55 *Ibid* at para 32; The British Columbia International Commercial Arbitration Centre, *Domestic Commercial Arbitration Rules of Procedure*, Vancouver: 2016, s 25.

award itself did not disclose any trade secrets.

Given the importance that the open court principle plays in the Canadian judicial system it is not surprising that the courts are unwilling to grant sealing orders over documents absent an intention evidenced by the parties of keeping the documents confidential. In a sense this position is neither inconsistent nor consistent with an implied term of confidentiality in arbitration. It may be that there is an implied obligation between the parties not to share arbitration documents with third parties, but if any documents become relevant in subsequent litigation the parties are at the mercy of the courts regarding a confidentiality order. They must show actual prejudice to keep documents confidential. However, the fact that none of these decisions even considered whether an implied obligation of confidentiality might exist and constitute an important commercial interest suggests that such an obligation will not generally be implied.

There are only a small body of cases that consider the disclosure of arbitration documents to third parties or for litigation with a party that is not part of the arbitration. The cases that do suggest that documents that are relevant to subsequent litigation will not be protected from disclosure simply because they are documents from an arbitration involving a third party.

In *Adesa Corp v Bob Dickenson Auction Service Ltd*, the plaintiff had been involved in arbitration with a former employee where confidentiality of the arbitration was contemplated by both sides.<sup>56</sup> To this effect the arbitrator made an order that no transcripts from the arbitration were to be made available to third parties. Some of the issues from that arbitration then became relevant in the case at hand however, and the defendant applied to the courts for those transcripts to be procured. The court determined that although there was an expectation of confidentiality between the parties in the arbitration, it was not essential to the arbitration process, and should not be raised to the status of a privilege:

I am satisfied that there was an expectation of confidentiality in the Arbitration. The arbitration relationship generally benefits greatly from the element of confidentiality. The confidentiality of arbitration proceedings should be fostered to maintain the integrity of the arbitration process. I do not regard confidentiality as essential to the arbitration process.<sup>57</sup>

The court modified the arbitrator's order to permit disclosure of the transcripts, stating that "[t]he plaintiffs, who were party to the Arbitration, placed the confidentiality at risk by commencing this action against the defendants", suggesting that the plaintiffs had waived confidentiality.<sup>58</sup> The court also stated that "disclosure to a witness of his or her own prior evidence will not breach the spirit of the confidentiality order", suggesting that the motive for the confidentiality order was somehow important.<sup>59</sup> Furthermore, the court stated that the memories of witnesses will have faded and production will probably save time at trial by reducing the time needed for cross-examination.

In *Hi-Seas Marine Ltd v Boelman*,<sup>60</sup> the plaintiff was first successful in arbitration against

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<sup>56</sup> *Adesa Corp v Bob Dickenson Auction Service Ltd* (2004), 73 OR (3d) 787, 247 DLR (4th) 730 (Ont Sup Ct).

<sup>57</sup> *Ibid* at para 56.

<sup>58</sup> *Ibid* at para 57.

<sup>59</sup> *Ibid* at para 58.

<sup>60</sup> *Hi-Seas Marine Ltd v Boelman*, 2006 BCSC 48, aff'd 2007 BCCA 137.

the defendant, and then brought proceedings to the British Columbia Supreme Court to establish that the director was *alter ego* for the corporation and therefore also liable to pay into the arbitration award. The director argued that the transcript and arbitration award were inadmissible documents. The court considered English jurisprudence and contrasted it with the decision in *Esso Australia*.<sup>61</sup> It determined the award and transcript were not admissible for the purpose of a summary trial application for reasons unrelated to confidentiality. It was both reasonable and necessary for the transcript and the award to be relied on in the summary dismissal application for reasons of cost, efficiency and evidentiary value. However, the court explicitly stated that its reasons were unrelated to the argument of implied confidentiality, and that it was unnecessary “to adopt the broad approach against confidentiality taken in *Esso Australia*.”<sup>62</sup> This left it unclear whether the documents were indeed subject to an obligation of confidentiality.

In *Trans-Send Freight Systems Ltd v Markel Insurance Company of Canada*,<sup>63</sup> the defendants brought a motion seeking the production of documents listed in the plaintiff’s affidavit over which it claimed arbitration privilege. In its decision, the court cited *Adesa*, reasoning that there is no privilege attached to arbitration in Canada:

There is no evidence before me that an order was made in the arbitration that the documents produced were to be kept confidential by the parties nor was there any evidence before me that Georgia law requires the documents to be kept confidential. I also note that the courts of appeal in the various jurisdictions cited—England, Hong Kong and Australia—do not agree that documents produced in arbitrations are confidential. Nor do I find that the deemed undertaking rule applies to prevent the disclosure of relevant documents produced for dispute resolution proceedings in a foreign jurisdiction.<sup>64</sup>

These cases leave it uncertain as to whether an implied obligation of confidentiality in arbitration exists at all. What is clear is that what the parties intend may be entirely irrelevant to a court when documents gain importance in subsequent litigation.

Given that the jurisprudence is not helpful in this regard, it is worth examining one case that considers the issue tangentially. In *Rhéaume c Société d’investissements l’Excellence inc*,<sup>65</sup> the Quebec Court of Appeal considered whether Quebec arbitrators are subject to an implicit obligation of confidentiality. Given that the status of implicit confidentiality in the arbitration process is uncertain worldwide, absent specific agreements, it found that the best approach is to rely on the parties to the arbitration themselves to contract for confidentiality:

In my view, allowing the parties to frame in advance whatever confidentiality agreement suits them rather than attempting to imply the existence of one after the fact is entirely consistent with the extensive freedom of contract the legislature gives parties to arbitration ...<sup>66</sup>

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<sup>61</sup> *Ibid* at paras 62–64.

<sup>62</sup> *Ibid* at para 67.

<sup>63</sup> *Trans-Send Freight Systems Ltd v Markel Insurance Company of Canada* (2009), 74 CPC (6th) 272, 71 CCLI (4th) 132 (Ont Sup Ct), aff’d (2009), 76 CCLI (4th) 296, 179 ACWS (3d) 1066 (Ont Sup Ct).

<sup>64</sup> *Ibid* at para 10.

<sup>65</sup> *Rhéaume c Société d’investissements l’Excellence inc*, 2010 QCCA 2269.

<sup>66</sup> *Ibid* at para 80.

The court refused to read in an obligation of confidentiality where the parties did not stipulate such an obligation in their agreement, or submit their arbitration case to a jurisdiction that recognised an obligation of confidentiality. While not determinative, this appellate court decision is instructive when considering how other courts might treat implicit obligations of confidentiality.

## V. A PRINCIPLED APPROACH

The current position of Canadian courts is not entirely inconsistent with an implied obligation of confidentiality in arbitration. The Canadian jurisprudence illustrates that any confidentiality attached to arbitration documents does not rise to the level of a privilege. If arbitration documents are relevant to subsequent litigation between the same parties or with third parties they must be disclosed. Whether or not the documents will be subject to a confidentiality and sealing order by the court ultimately depends on the facts of the case and whether there is an important commercial interest in maintaining confidentiality.

Arguably, this position is not inconsistent with the position taken by English Courts. Nevertheless, no Canadian court has ruled in favour of an implied obligation of confidentiality in arbitration, and the trend appears to lean the other way. Parties would therefore be unwise to rely on an implied duty to protect documents they do not want made public.

Most arbitration statutes do not include provisions establishing confidentiality requirements, nor do most rules of commercial arbitration.<sup>67</sup> Provisions often require arbitrators and administrators to keep the information provided during arbitration confidential, but this does not bind the parties themselves. Absent a confidentiality agreement between parties, there should be no presumption of confidentiality with respect to witness statements, pleadings, transcripts, awards and reasons. Further, even with an agreement *a priori*, parties have little control over these documents – agreements between the parties will not bind witnesses, for instance. If either party appeals the decision, or goes to court to enforce the award, these previously disclosed documents would become relevant for the court proceedings and will likely be made public. Parties may also have pre-existing obligations to report awards to third parties.

These are merely a few examples of why parties cannot presume confidentiality with respect to these documents and why, therefore, it ought not to be implied.

The one exception to this rule pertains to documents disclosed by one party to the other for the purpose of the arbitration. In litigation, there is an implied undertaking by the parties not to use documents disclosed by the other side for purposes other than the dispute at hand. This expectation should – and in some jurisdictions does – apply equally to documents disclosed in arbitration proceedings. This is the case in both the U.K. and in Australia, for instance.<sup>68</sup>

To the extent that parties agree, by implication or contract, to the discovery rules in their chosen jurisdiction, Canadian courts should also allow the parties to expect at least the same level

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<sup>67</sup> Scott D Marrs & Martin D Beirne, “International Perspectives on Arbitration Confidentiality” (2015) 82:1 *Def Couns J* 76 at 76; The British Columbia International Commercial Arbitration Centre, *Domestic Commercial Arbitration Rules of Procedure*, Vancouver: 2016, s 27 (clarifying the scope of confidentiality of arbitration proceedings and arising from the production of documents).

<sup>68</sup> *Hassneh Insurance*, *supra* note 5 at 247; *Esso Australia*, *supra* note 28 at paras 41–43.

of confidentiality they would have enjoyed had they chosen litigation as opposed to arbitration. While not a presumption of confidentiality per se, the acceptance of an implied undertaking principle means that parties may not disclose documents that they have obtained from an opposing party to third parties absent a court order modifying agreement.<sup>69</sup> This should provide some peace of mind to parties who do not enter into a confidentiality agreement in arbitration, giving them the assurance that the documents they provide to the other side will be protected from public disclosure. While the principled approach should provide some comfort to those engaged in arbitration hearings in Canada, it is clear that parties wanting the maximum amount of confidentiality available should set out those obligations in an explicit agreement before proceedings commence.

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<sup>69</sup> See generally *Juman v Doucette*, 2008 SCC 8, [2008] 1 SCR 157.