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**NECESSARY AND PRACTICAL:
A NATIONAL LAW OBLIGATION TO PUBLISH INTERNATIONAL
COMMERCIAL ARBITRAL AWARDS**

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2016

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Word count

The text of this paper (excluding table of contents, abstract, bibliographical footnotes, and bibliography) comprises approximately 15,565 words.

Abstract

The confidentiality attaching to arbitral proceedings and awards remains of uncertain scope globally. The weight of current opinion appears, however, to be in favour of greater transparency, and as part of this, a number of scholars and commentators have made a strong case for the sanitised publication of arbitral awards by arbitral institutions. This paper goes a step further, and makes the case for a national law obligation to publish awards. It does so on the basis that there are significant public interests in the making available of certain information contained within arbitral awards; interests for which institutions have little or no incentive to provide. The paper uses New Zealand as an example, considering both the desirability of publication at the national level, and to the extent publication is desirable, how a mechanism to facilitate publication should be designed. It suggests a “statement of arbitral jurisprudence”, to be published annually by the Ministry of Justice, as the most appropriate way forward.

I INTRODUCTION

The issue of the confidentiality of arbitral proceedings and awards, and the limits of that confidentiality, remains a thorn in the side of international commercial arbitration. There is no consistent approach to parties’ rights and obligations across either national laws or the rules of arbitral institutions, which leads to considerable uncertainty. At the heart of the issue, a debate continues to rage over whether or not arbitrations should be presumptively confidential.¹ This paper does not seek to delve into that debate. Instead, it makes the case that there is a clear public interest in some degree of publication of arbitral awards, and that a necessary way to meet this public interest is by the inclusion of a publication requirement in national legislation in relation to arbitrations seated in that jurisdiction. In doing so, the paper looks to New Zealand as a hypothetical example – a state on the fringes of the international arbitration sphere, and seeking to increase its role within that sphere.

This paper begins by noting the wide range of approaches taken across national laws and institutional rules to the publication (or not) of arbitral awards. It then canvasses the various arguments for and against publication, focussing in on the public interest in the publication of awards, before explaining why it is desirable that national laws address this issue (as opposed to leaving it to arbitral institutions). It then considers the implementation of such a requirement in New Zealand as a hypothetical example: asking whether such a

¹ See generally Gary B Born *International Commercial Arbitration* (2nd ed, Kluwer Law International, Alphen aan den Rijn, 2014) at ch 20.

requirement would be desirable in the New Zealand context, and to the extent it can be justified, the form the requirement should take.

II THE CURRENT STATE OF AFFAIRS

Born has written that the treatment of the issue of confidentiality in arbitration, in its broadest sense,² “is currently unsatisfactory”.³ He notes that the lack of consistency in the treatment of confidentiality both across institutions and national laws undermines the core purposes of international commercial arbitration, fostering uncertainty and compromising the efficiency of arbitration as a form of dispute resolution. It leads, for instance, to ancillary disputes regarding the confidentiality of various aspects of the proceedings, which prolongs the proceedings and increases their cost. Born argues that the “arbitral process would be strengthened if national legislatures and arbitral institutions were to develop more certain, predictable standards for confidentiality for the guidance of parties and tribunals”.⁴

It is clear that the problem identified by Born applies in relation to the publication of arbitral awards specifically. There is varying practice across both arbitral institutions and national laws.⁵ At the institution level, the rules of many institutions do not deal specifically with the publication of awards, or information contained within awards. For instance, the only provision relating to confidentiality in the International Chamber of Commerce (ICC) *Arbitration Rules*, provides that the tribunal:⁶

... 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.

This provision does not provide that arbitration proceedings and the award are confidential, instead leaving this as a “matter for the parties, arbitrators and, as necessary, local courts to deal with”.⁷ By contrast, a number of institutions have broad confidentiality rules either

² That is, confidentiality not only in relation to the publication of awards, but also in relation to, for example, the existence of the dispute and material disclosed within the proceedings.

³ Born, above n 1, at 2784.

⁴ At 2784.

⁵ At 2802; and Committee on International Commercial Disputes *Publication of International Arbitration Awards and Decisions* (New York City Bar, February 2014) at 8.

⁶ International Chamber of Commerce *Arbitration Rules* (1 January 2012), art 22.3.

⁷ Eric A Schwartz and Yves Derains *A Guide to the ICC Rules of Arbitration* (2nd ed, Kluwer Law International, Alphen aan den Rijn, 2005) at 284, discussing the equivalent provision in an earlier iteration of the rules. The later clause is, for all intents and purposes, the same. See explanation of the current iteration of

explicitly prohibiting, or facilitating, publication (generally subject to party autonomy).⁸ Still other institutions permit the publication of compilations of statistical data by the institution, so long as this does not risk the identification of parties to arbitrations administered by that institution.⁹

Equally, there are varying requirements in relation to the confidentiality of awards across national laws. First, the drafters of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Arbitration, upon which many national arbitration statutes are based, has refused to deal with the confidentiality of either arbitral awards or hearings, noting:¹⁰

the Rules in David AR Williams and Amokura Kawharu (eds) *Williams & Kawharu on Arbitration* (LexisNexis, Wellington, 2011) at [13.10.1].

⁸ See, for example, the Swiss Chambers' Arbitration Institution *Swiss Rules of International Arbitration* (June 2012), art 44, which provides:

1. Unless the parties expressly agree in writing to the contrary, the parties undertake to keep confidential all awards and orders as well as all materials submitted by another party in the framework of the arbitral proceedings not already in the public domain, except and to the extent that a disclosure may be required of a party by a legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a judicial authority.
2. ...
3. An award or order may be published, whether in its entirety or in the form of excerpts or a summary, only under the following conditions:
 - a. A request for publication is addressed to the Secretariat;
 - b. All references to the parties' names are deleted; and
 - c. No party objects to such publication within the time-limit fixed for that purpose by the Secretariat."

Karton notes that the rules of the Hong Kong International Arbitration Centre "contain practically identical provisions": Joshua Karton "A Conflict of Interests: Seeking a Way Forward on Publication of International Arbitration Awards" (2012) 28 *Arbitration Int* 447 at 454. Compare with the Camera Arbitrale Milano *Arbitration Rules* (2010), art 8, which provides:

1. The Chamber of Arbitration, the parties, the Arbitral Tribunal and the expert witnesses shall keep the proceedings and the arbitral award confidential, except in the case it has to be used to protect one's rights.
2. For purposes of research, the Chamber of Arbitration may publish the arbitral award in anonymous format, unless, during the proceedings, any of the parties objects to publication."

See generally Born, above n 1, at 2805–2806; and Benedetta Coppo "Confidentiality in the Arbitral Rules of the Milan Chamber" in Alberto Malatesta and Rinaldo Sali (eds) *The Rise of Transparency in International Arbitration: The Case For the Anonymous Publication of Arbitral Awards* (Juris, Huntington, 2013) 137.

⁹ See for example German Institution of Arbitration (DIS) *DIS-Arbitration Rules 98* (1 July 1998), r 43.2. See also Karl-Heinz Böckstiegel, Stefan Michael Kröll and Patricia Nacimiento *Arbitration in Germany: The Model Law in Practice* (2nd ed, Kluwer Law International, Alphen aan den Rijn, 2014) at 722–723.

¹⁰ United Nations Commission on International Trade Law *Report of the Secretary-General: possible features of a model law on international commercial arbitration A/CN.9/207* (1981) at [101]. The *Report* does, however, go on to say: "If, nevertheless, a provision were to be included, probably an acceptable compromise could be that the award may be made public only with the express consent of the parties."

It may be doubted whether the model law should deal with the question whether an award may be published. Although it is controversial, since there are good reasons for and against such publication, the decision may be left to the agreement of the parties or the arbitration rules chosen by them.

In line with the UNCITRAL approach, many countries' arbitration statutes are either entirely, or almost entirely, silent on confidentiality.¹¹ Others are more detailed in relation to confidentiality, including explicit provision that the award is considered presumptively confidential (with certain minor exceptions relating, for instance, to enforcement).¹² Finally, a few countries, most notably Costa Rica and Norway, have statutes expressly providing for the publication of arbitral awards.¹³

III THE CASE FOR THE SYSTEMATIC PUBLICATION OF AWARDS IN INTERNATIONAL COMMERCIAL ARBITRATION

This lack of consistency across institutional rules and national laws leaves open the question as to the most desirable approach looking forward. There is a strong case to be made for the systematic publication of arbitral awards. Indeed the case has been made convincingly in relation to investor-state arbitrations and a clear practice has emerged of greater availability of investor-state arbitration awards.¹⁴

¹¹ For example, the United States (Federal Arbitration Act 9 USC §§ 1–16) and England and Wales (Arbitration Act 1996 (UK)), neither of which contain any reference to confidentiality. See Born, above n 1, at 2785–2786 and n 26.

¹² For example, New Zealand (Arbitration Act 1996, ss 14–14I, and definition of “confidential information” in s 2, which includes at 2(b)(vi), “any award of the tribunal”), Australia (International Arbitration Act 1974 (Cth), ss23C–23G) and Scotland (Scottish Arbitration Rules, r 26, contained in Arbitration (Scotland) Act 2010, sch 1). See Born, above n 1, at 2786 and n 28, 29 and 30.

¹³ Article 38 of the Arbitration Law 2011 (Costa Rica) provides “The arbitration proceedings will be confidential. Absent agreement to the contrary, the award will be made public once it is final.” Section 5(1) of Norway’s Arbitration Act provides “Unless the parties have agreed otherwise, the arbitration proceedings and the decisions reached by the arbitral tribunal are not subject to a duty of confidentiality”: Lov om voldgift 14 mai 2004 nr 25 (translation: Arbitration Act 2004). As Nisja notes, under s 5, neither the content of the proceedings, i.e. information disclosed during the proceedings, nor the award is confidential unless agreed by the parties”: Ola O Nisja “Confidentiality and Public Access in Arbitration – The Norwegian Approach” [2008] Int ALR 187 at 190. Further, in s 36(5), the Act requires that the tribunal “send one signed copy of the award to the local District Court to be filed in the archives of the court”. See also Born, above n 1, at 2786 and n 31. Villaggi also cites Morocco, the Philippines, Peru and Scotland as “jurisdictions whose legislation deal expressly with the confidentiality or publicity of the arbitral award” (M Florencia Villaggi “International Commercial Arbitral Awards: Moving from Secrecy towards Transparency?” (unpublished paper, 2013) at 7–8), however none of these facilitate or require publication from a public interest perspective. In this, they are similar to New Zealand’s Arbitration Act 1996, ss 14–14I.

¹⁴ See for example Cindy G Buys “The Tensions Between Confidentiality and Transparency in International Arbitration” (2003) 14 Am Rev Int’l Arb 121.

The case for transparency may not appear as immediately convincing in relation to private international commercial arbitration. There are a number of key areas in which the public has an interest in investment arbitration than tend not to arise in ordinary commercial arbitration. Not only is the state one of the parties in investor-state arbitrations,¹⁵ but the public is also more likely to be affected by the subject of the arbitration. As Knahr and Reinisch note:¹⁶

... the subject-matter of investment disputes regularly concerns government measures. This often transforms investment arbitration into a functional equivalent of judicial review of governmental measures which would otherwise be reserved to the national courts. In cases where, for instance, the legality of environmental or health measures and/or their potential qualification as expropriatory acts is at issue, the public will show a greater interest in the outcome of proceedings which may limit the future legislative and/or administrative freedom of maneuver.

By contrast, international commercial arbitration awards will in most cases be of less interest to the public at large in this regard. This is because the subject matter is unlikely to directly affect public policy, and it is similarly less likely that an award will deplete public funds. However, there remains a strong case for a greater degree of transparency in relation to private international commercial arbitration as will be made clear in the following sections.

The publication of international commercial arbitral awards is not a novel concept. The case was first made comprehensively in 1982 in an essay by Julian DM Lew – “The case for the publication of arbitral awards”.¹⁷ Various commentators have continued to make the case since.¹⁸ Joshua Karton has made one of the more compelling contributions to this scholarship in recent years, forcefully arguing for a more systematic publication of arbitral awards to be led by arbitral institutions. In doing so, however, he argues against any

¹⁵ As it may also be in international commercial arbitrations, however this is not routine as it is in investor-state arbitrations. See further the discussion in Part III, B: *Public Interests in the Publication of International Commercial Arbitral Awards*. It is also important to note that in both, but more frequently in investor-state arbitrations, “enterprises providing public services are also involved”: Christina Knahr and August Reinisch “Transparency versus Confidentiality in International Investment Arbitration – The *Biwater Gauff* Compromise” (2007) 6 LPICT 97 at 113 [footnotes omitted].

¹⁶ At 113 [footnotes omitted]. See also Buys, above n 14, at 135; and United Nations Commission on International Trade Law *Report of the Working Group on Arbitration and Conciliation on the work of its forty-eighth session (New York, 4–8 February 2008)* A/CN.9/646 (2008) at [57]–[68].

¹⁷ Julian DM Lew “The case for the publication of arbitration awards” in Jan C Schultsz and Albert Jan van den Berg (eds) *The Art of Arbitration: Essays on International Arbitration Liber Amicorum Pieter Sanders 12 September 1912–1982* (Kluwer Law and Taxation Publishers, Deventer, 1982) 223.

¹⁸ See among others Alberto Malatesta and Rinaldo Sali (eds) *The Rise of Transparency in International Arbitration: The Case For the Anonymous Publication of Arbitral Awards* (Juris, Huntington, 2013); Karton, above n 8; and Chang-fa Lo “On a Balanced Mechanism for Publishing Arbitral Awards” (2008) 1 *Contemp Asia Arb J* 235.

publication requirement at the national level, noting that “the imposition of transparency on the parties through ... national laws ... [may] be seen as a greater-than-necessary infringement on party autonomy and, in any event, ... not practical”.¹⁹ In part, this paper seeks to challenge that statement by making the case that there is, in fact, a strong case to be made in favour of national arbitration laws including a requirement to publish awards rendered in arbitrations seated in the state in question. At the most fundamental level, this is because there are rule of law implications, which states, rather than arbitral institutions, have a duty to uphold and protect. Furthermore, certain sectors of the public – for example, businesses and legal practitioners – have an interest in the publication of awards, and with certain of these interests it is the state that holds the incentives in seeing their fulfilment.

The following sections will elaborate on the public interest in the publication of arbitral awards, before the next part of the paper makes clear the important role a national law requirement to publish would play.

A *The Nature of Arbitration and the Arbitral Award*

The idea that “the public interest” has some application in relation to arbitral awards requires an acceptance that arbitration, or at least the award, is not exclusively private. It has been argued, however, that there is no public interest in international commercial arbitration; that it is the product of an agreement between two contracting parties that is of concern to them, and only them.²⁰ Conversely, other commentators argue that although arbitration is based in contract, it is fundamentally a rule-based “system for rendering justice”.²¹

¹⁹ Karton, above n 8, at 478. A number of other commentators have also supported the notion that there may be some publication of awards by institutions. See for example Thomas E Carbonneau “Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions” (1985) 23 Colum J Transnat’l L 579 at 608; and Patrick Neill “Confidentiality in Arbitration” (1996) 12 Arbitration Int 287 at 301–302.

²⁰ In New Zealand, Cooke P doubted whether “parties freely contracting should be obliged by public policy to make a compulsory contribution to the worthy cause of the coherent evolution of commercial law”: *CBI NZ Ltd v Badger Chiyoda* [1989] 2 NZLR 669 (CA) at 677. See also, Daniel Barstow Magraw Jr and Niranjali Manel Amerasinghe “Transparency and Public Participation in Investor–State Arbitration” (2009) 15 ILSA J Int’l & Comp L 337 at 340, where the authors argue that, in comparison to investor–state arbitration, in which important public issues are resolved “with wide-ranging domestic impacts”, international commercial arbitrations tend to involve “more-or-less standard commercial and contract issues [where] the primary impacts [are] limited to two commercial parties”.

²¹ Stefano Azzali “Introduction: Balancing Confidentiality and Transparency” in Alberto Malatesta and Rinaldo Sali (eds) *The Rise of Transparency in International Arbitration: The Case For the Anonymous Publication of Arbitral Awards* (Juris, Huntington, 2013) xix at xxix. See also Catherine Rogers “The Vocation of the International Arbitrator” (2005) 20 Am U Int’l L Rev 957 at 986–989; and Catherine Rogers “Transparency in International Commercial Arbitration” (2006) 54 Kansas L Rev 1301 at 1337.

It is true that international commercial arbitration's core characteristics – based on an agreement between parties, and subject to a significant degree of party autonomy – define it as a private mechanism for the resolution of disputes. Essentially, parties agree to opt out of the right to have their dispute determined by the courts of a given state or states, and instead the parties make an alternative decision as to how any disputes will be resolved, and before whom. The parties have the right to make this decision, and, subject to any mandatory procedural rules of the chosen seat of the arbitration, the parties have the right to determine the parameters of the arbitration (providing, of course, that is their chosen method of alternative dispute resolution). The confidentiality of arbitral awards may be said to derive from this party autonomy: the will of the parties ought to be respected, and if the parties have provided that the award be kept confidential, or this intention is presumed, as it is in many jurisdictions,²² parties' autonomy should prevail over countervailing public interests.

Indeed, arbitration can be contrasted with litigation before national courts and this supports the position that arbitration is purely private. The authority of national courts does not rely on the consent of parties arriving before them as arbitration does, but rather on state power. That is, the jurisdiction of the court “is exercised over the parties, not on the basis of their consent, but by virtue of the power of the court as an emanation of the relevant state”.²³ As a result of the basis of this jurisdiction, it is important that the operation and decisions of the courts be transparent, to allow the public at large to observe the proper exercise of that power.²⁴ This is fundamental to the proper functioning of a democratic society under the rule of law. Furthermore, it is notable that a court decision is, in most cases, subject to review by a higher court on appeal – another fundamental aspect of ensuring the rule of law is upheld.

At the other extreme, however, the process of decision making in arbitration means it can be contrasted against a purely private process such as settlement. Whereas settlement is a product of compromise between parties, based purely in shared self-interest and occurring “irrespective of what the outcome would or should be through formal adjudication”, arbitration is closer to a formal judicial decision-making process, whereby an independent

²² See generally Born, above n 1, ch 20.

²³ Kyriaki Noussia *Confidentiality in International Commercial Arbitration: A Comparative Analysis of the Position under English, US, German and French Law* (Springer, Berlin, 2010) at 179.

²⁴ At 179.

and impartial tribunal makes a decision on the dispute by applying established rules to a set of facts, in much the same way as a national court.²⁵ So:²⁶

... in contrast to settlement's consensual compromise premised on subjective self-interest, modern international arbitration requires the objective application of rules to facts and the exercise of bounded discretion ... to ensure that the final outcome is justified.

Therefore, arbitration is also grounded in the rule of law, and must therefore also be governed by, and consistent with, the rule of law. As such, even though parties are subject to arbitration by consent, at the very least the public has an interest in seeing that arbitration operates as a legitimate system for dispute resolution; that it does in fact conform to the rule of law. The public at large has an interest in seeing, for instance, that rules are applied consistently, that the system operates with some coherence, and that the system is fair. Allowing for this to be observed requires some degree of transparency.²⁷ This need for transparency is further bolstered by the fact that arbitral decisions are generally not subject to review by a higher court or tribunal. This key difference between arbitral tribunals and national courts in ensuring the rule of law is upheld means that the case for transparency is arguably even stronger in relation to arbitration.²⁸ It is clear, therefore, that states have a duty to ensure a degree of transparency in arbitrations seated in that state, as part of the state's duty to uphold the rule of law.

B Public Interests in the Publication of International Commercial Arbitral Awards

In addition to high-level rule of law interests, there are a number of public interest factors that would be satisfied by the making available of information contained within awards deriving from specific arbitrations.

First, it is important to note that the clearest example where the public at large might be interested in a specific arbitration is in circumstances where the government is involved as a party in some form.²⁹ As opposed to arbitrations involving purely private parties, in

²⁵ Rogers "The Vocation of the International Arbitrator", above n 21, at 986–987.

²⁶ At 989.

²⁷ Rogers "Transparency in International Commercial Arbitration", above n 21, at 1337.

²⁸ Villaggi, above n 13, at 14–15.

²⁹ See for example *Esso Australia Resources Ltd v Plowman* (1985) 183 CLR 10 (HCA) [*Esso*], which concerned whether a third party – a Government Minister – could compel one of the parties to a private arbitration – a state-owned utility – to disclose to the Minister information disclosed to it by the adverse party.

circumstances where the state is involved as a party the reasoning behind requiring and enforcing strict confidentiality really begins to break down. This is because such arbitrations concern, or at least have an impact upon, the public in general and it follows that it is reasonable to impose obligations on the state to disclose certain information to the public.³⁰ In these situations, the public has not only an indirect interest in the publication of an award, for the systemic reasons that will be explained below,³¹ but it also has a direct interest in the subject of the individual arbitration for much the same reason as investor-state arbitrations are of interest to the public at large. The public is likely to be directly affected by the outcome of the arbitration in some way. A greater degree of transparency in relation to these arbitrations would therefore “promote democratic principles” because the public can “observe and evaluate the outcome”.³² This paper is less focused, however, on individual arbitrations, or this small subset of arbitrations. Instead, it is focused on the more *systemic* public interest features of arbitration awards – certain specific aspects of most, or all, arbitration awards in which there is a public interest in the information within. The following section details those features.

1 *The precedential potential of arbitral awards*

The precedential potential of arbitral awards constitutes a public good. Even though awards are not subject to a formal system of *stare decisis*, the decisions of arbitral tribunals may provide a substantial and important contribution to commercial jurisprudence, guiding future tribunals and national courts when similar disputes come before them.³³ As Cremades and Cortes argue: “the role of the arbitrator is [generally] undertaken by highly qualified

³⁰ Noussia, above n 23, at 103–104.

³¹ For instance, the public interest in having an arbitral tribunal’s considered interpretation and application of provisions of New Zealand law. See below, at Part III, B, 1, (a): Forms of precedent.

³² At 136.

³³ See Born, above n 1, at 3824–3825. This is seen most clearly in investor–state arbitrations, in which “the outcomes of investor–state cases are being used as a type of precedent, so that a body of international investment law is evolving from these cases”: Magraw and Amerasinghe, above n 20, at 339. As Knahr and Reinisch note, “[p]ractice has shown that most ICSID tribunals do in fact take into consideration the reasoning and finding of previous tribunals. Although they are not bound by the decisions of earlier tribunals, the influence earlier tribunals frequently have on subsequent tribunals cannot be denied”: Knahr and Reinisch, above n 15, at 111–115, especially 113. Fisher has made the point in the context of the use of arbitration to resolve relationship property disputes in New Zealand, noting:

It is often pointed out that only court judgments contribute to the development of the law. Arbitration awards are confidential. It is unquestionably in the interests of the public at large that a court be chosen as the forum. Only then will judgments be published for the edification of all.

Robert Fisher “Relationship Property Arbitration” (2014) 8 NZFLJ 15 at 21.

jurists with experience in the matters under consideration”, and thus arbitral awards “constitute, in many cases, highly noteworthy juridical works and keeping them private deprives the [law] of the opportunity to benefit from their content”.³⁴ Furthermore, even the precedential value of awards generally – that is, the weight placed on earlier awards – may increase with systematic publication: if arbitrators and practitioners cite to arbitral awards with greater and greater regularity prior arbitral awards, as a matter of practice the precedential value of awards may increase, if not formally.³⁵

(a) Forms of precedent

Arbitral awards are of precedential value most obviously in relation to issues of: (1) arbitral jurisdiction; (2) procedure; or (3) applicable law.³⁶ Awards are particularly important in these contexts because arbitral tribunals are generally the first to adjudicate on these issues.³⁷ However, precedent may also be of value in relation to issues of substantive law.³⁸ Where a jurisdiction’s law is found to apply, for instance because the parties contract includes a choice-of-law clause, a particular legal issue that the tribunal must determine may not yet have been settled within that jurisdiction. That may be because the issue has not been dealt with in that jurisdiction at all,³⁹ or it may be that because arbitration is the dispute resolution method of choice for businesses, certain statutory provisions of that jurisdiction’s commercial law may not have been subject to interpretation by the national courts, but only

³⁴ Bernado M Cremades and Rodrigo Cortes “The Principle of Confidentiality in Arbitration: A Necessary Crisis” (2013) 23 J Arb Stud 25 at 35.

³⁵ Committee on International Commercial Disputes, above n 5, at 2. Carbonneau makes a similar argument in relation to requiring awards to be accompanied by detailed reasoning (which brings with it an assumption of access of some kind); that “awards accompanied by written opinions based on law, are an appropriate and useful instrument for fulfilling the normative potential of transnational arbitration”: Carbonneau, above n 19, at 581.

³⁶ Alexis Mourre “The Case for the Publication of Arbitration Awards” in Alberto Malatesta and Rinaldo Sali (eds) *The Rise of Transparency in International Arbitration: The Case For the Anonymous Publication of Arbitral Awards* (Juris, Huntington, 2013) 53 at 57.

³⁷ At 57.

³⁸ It is not universally accepted that commercial arbitral awards hold any value as precedent. Kaufmann-Kohler, for example, has argued:

In commercial arbitration, there is no need for developing consistent rules through arbitral awards because the disputes are most often fact-or contract-driven. The outcome revolves around a unique set of facts and upon the interpretation of a unique contract that was negotiated between private actors to fit their specific needs.

See Gabrielle Kaufmann-Kohler “Arbitral Precedent: Dream, Necessity or Excuse?” (2007) 23 Arbitration Int 357 at 376. However, this view is not widely shared. Born, reflecting the consensus of opinion, has noted: “where arbitral awards have addressed substantive issues of commercial law, they have and should have precedential weight, just as they have precedential weight on matters of jurisdiction, applicable law procedure and the like.”: Born, above n 1, 3825.

³⁹ Mourre, above n 36, at 58–59. Mourre uses the example of hardship clauses, force majeure provisions and clauses excluding or limiting liability, the application of which are unsettled, if not unknown, in many jurisdictions.

by arbitral tribunals. The lack of a systematic publication of arbitral awards then means that other businesses, and the public at large, are being deprived of an arbitral tribunal's considered interpretation and application of that provision. Similarly, arbitral awards are likely to be rich sources in relation to the interpretation of international conventions, particularly in relation to instruments such as the Convention on Contracts for the International Sale of Goods (CISG), which requires interpretation taking account of its "international character", and is therefore isolated to a degree from any national law relating to the sale of goods.⁴⁰

Equally, where there is no clear choice of law, it may be that the arbitral tribunal applies non-national rules of law such as the *lex mercatoria*.⁴¹ The *lex mercatoria* is a "set of general principles, and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to a particular national system of laws".⁴² International commercial arbitration is one of the primary means of dispute resolution for international trade disputes, and arbitral awards are therefore a key source of jurisprudence on the application of the *lex mercatoria*.⁴³ Arbitral awards are not only important as a source of information for parties, however. The very development of the *lex mercatoria* would be also be greatly enhanced by a more systematic publication of awards in international commercial arbitrations.⁴⁴ Because the *lex mercatoria* is developed on the basis of customs and usages developed in international commerce, the dearth of published awards causes difficulties for its continued development.⁴⁵ Consequently, the *lex mercatoria* risks suffering as a result information deficiencies, which retards its capacity to adapt, causing it to "lag behind the practice of merchants".⁴⁶ Further, in addition to assisting in the development of the *lex mercatoria*, publication would also increase accessibility to it and enhance its status.⁴⁷

⁴⁰ At 59, citing art 7 of the United Nations Convention on Contracts for the International Sale of Goods 1489 UNTS 58 (opened for signature 11 April 1980, entered into force 1 January 1988), which provides: "(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade." See further Petra Butler "CISG and International Arbitration – A Fruitful Marriage?" (2014) 17 Int'l Trade & Bus L Rev 322.

⁴¹ See Rogers "The Vocation of the International Arbitrator", above n 21, at 1002–1004.

⁴² Lord Mustill "The New Lex Mercatoria: The First Twenty-Five Years" (1988) 4 Arbitration Int 86 at 87.

⁴³ Mourre, above n 36, at 58.

⁴⁴ See Born, above n 1, at 3826–3827.

⁴⁵ See Carbonneau, above n 19, at 600.

⁴⁶ Noussia, above n 23, at 171. See also Carbonneau, above n 19, at 603–605, in making the case for "reasoned awards", which implies publication of those reasoned awards, making the point that international commerce would benefit from the degree of "substantive predictability" that a well-developed *lex mercatoria* would engender.

⁴⁷ Lew, above n 17, at 231; and Lo, above n 18, at 242–243.

(b) Certainty

The use of arbitral awards as precedent would also engender a degree of certainty for businesses. Confidentiality obligations in relation to arbitral awards prevent businesses from being able to assess the risk they may face in filing a suit. If arbitral decisions were published, however, there is a chance that the issue or analogous issues facing a business may have previously been adjudicated upon, and the business could then “balance the cost of pursuing a claim against the actual loss suffered”.⁴⁸ Similarly, there are efficiency gains to be had for businesses in the publication of awards. If there was access to a comprehensive body of published awards, this would reduce the resources parties may currently need to apply to “tracking down precedents or reacting to untimely discovery of precedents”.⁴⁹ Further, if a more systematic publication were to occur, depending on the degree of sanitisation required, businesses may also benefit in having the chance to assess the reputation of potential partners who have previously been party to arbitrations before contracting with them. This may be either in terms of whether they choose to contract with that party, or the level of risk they are prepared to accept in so contracting.⁵⁰ As Karton notes:⁵¹

If the outcomes of adjudication are predictable, legal counsel can provide sound advice to their clients and commercial parties in general know better how to act and how to price their contracts. When disputes do arise, settlements are both more likely to be reached and easier to price accurately.

(c) Consistency in decision making

Finally in relation to precedent, the publication of arbitral awards and their use as precedent in some form would also help to ensure a consistency in decision making across arbitral tribunals. This would enhance the legitimacy of arbitration. The problem is highlighted particularly in circumstances where businesses have a number of different contracts with different parties, which leads to multiple arbitrations in relation to the same issue or issues. In the absence of any publication, there is a distinct risk that the different tribunals may produce conflicting outcomes, which undermines the reliability and thereby the

⁴⁸ Noussia, above n 23, at 170. See also Buys, above n 14, at 136.

⁴⁹ Rogers “Transparency in International Commercial Arbitration”, above n 21, at 1335.

⁵⁰ Noussia, above n 23, at 170.

⁵¹ Karton, above n 8, at 458.

legitimacy and desirability of arbitration as means by which businesses choose to resolve disputes.⁵² As noted above, the resolution of disputes by arbitration is based in the application of rules to certain sets of facts,⁵³ and as Ridgway notes:⁵⁴

Social and economic stability, as well as respect for the law, require that parties have the ability to know the likely legal consequences of what they do in advance, at the time they act.

Publication of arbitral awards would help to ensure that like cases are treated alike.⁵⁵

2 *Factors related to arbitrators*

(a) Selection of arbitrators

There are also a number of factors related to arbitrators specifically in which there is a public interest in the publication of awards. Most importantly, because arbitrators (unlike judges in national courts) are chosen by the parties, systematic publication of awards would create an important information source, which would assist parties choosing an arbitrator, particularly as it would allow parties to assess the arbitrator's performance in prior cases and their expertise in a particular area of dispute.⁵⁶ As McIlwrath and Schroeder have pointed out, we live in an era of unprecedented access to information, however:⁵⁷

... when it comes to obtaining information about the actual performance of arbitrators, the quality of their awards or how they conduct proceedings, little useful information is publicly available ... As a result, parties inevitably resort to the same method that is as old as mankind – word of mouth.

This creates both a significant barrier to entry for new arbitrators, who may find it difficult to establish themselves within this market, and significant information asymmetries among parties.⁵⁸

⁵² Elina Zlatanska “To Publish, or Not To Publish Arbitral Awards: That is the Question ...” (2015) 81 *Arbitration* 25 at 29.

⁵³ In contrast, for instance, to private settlement. See above at Part III, A: *The Nature of Arbitration and the Arbitral Awards*.

⁵⁴ DA Ridgway “International Arbitration: The Next Growth Industry” (1999) 54 *Disp Resol J* 50 at 52, cited in Karton, above n 8, at 461.

⁵⁵ See Karton, above n 8, at 461.

⁵⁶ See Buys, above n 14, at 137.

⁵⁷ Michael McIlwrath and Roland Schroeder “Users Need More Transparency in International Arbitration” in Alberto Malatesta and Rinaldo Sali (eds) *The Rise of Transparency in International Arbitration: The Case For the Anonymous Publication of Arbitral Awards* (Juris, Huntington, 2013) 87 at 98. See also Michael McIlwrath “Selecting Arbitrators for Commercial Oil & Gas Arbitrations” in James M Gaitis (ed) *The Leading Practitioners’ Guide to International Oil & Gas Arbitration* (Juris, Huntington, 2015) 901 at 918.

⁵⁸ Rogers “The Vocation of the International Arbitrator”, above n 21, at 968–969.

The current lack of transparency in arbitration confers a distinct advantage on lawyers or firms with substantial arbitration practices.⁵⁹ These lawyers or firms build an institutional knowledge of arbitrators, institutions and procedural customs not available to other lawyers, smaller firms or firms with less-developed international arbitration practices.⁶⁰ The lack of availability of awards therefore prevents the “market for arbitrator services from being fully competitive”.⁶¹ The systematic publication of arbitral awards could assist in levelling the playing field in this respect, by reducing these information asymmetries. Of course, this would also require that access to this information not be prohibitive, for instance, as a result of substantial subscription fees or awards being too heavily redacted to be of significant value.⁶² The systematic nature of publication is also fundamental in this respect: “publication of only limited numbers of redacted awards may make little difference in this imbalance”.⁶³

Outside of these private libraries, arbitration practitioners may currently decide to employ an arbitrator based on the recommendation of colleagues. This too has its limits. First, a practitioner may not have any colleagues who have had significant and meaningful experience with arbitrators, or a broad enough experience to give a good recommendation. Secondly, the experience any colleagues may have had, may have been several years earlier, and may well be out of date given the fast-moving pace of international trade and the increasing complexity of international commercial arrangements. Similarly, the arbitrator may now be less focused on the practice of arbitration, or commercial arbitrations specifically, so may not be as up-to-speed as they once were. Equally, their practice may have been domestically focused, and the arbitrator may therefore actually lack the distinct skills needed to arbitrate an international dispute. Finally, it may simply be that any recommendation is coloured by the specific experience that colleague had, and may not be representative of any trend in the arbitrator’s work, good or bad.⁶⁴

⁵⁹ *The Arbitrator Intelligence* project has been set up in part to ensure fairness in the selection of international arbitrators in response to this issue. See Arbitrator Intelligence <www.arbitratorintelligence.org> and the further explanation below, at Part VII, B, 1: *The importance of a focus on precedent*.

⁶⁰ Committee on International Commercial Disputes, above n 5, at 2.

⁶¹ Rogers “The Vocation of the International Arbitrator”, above n 21, at 968–969.

⁶² Committee on International Commercial Disputes, above n 5, at 2.

⁶³ At 2.

⁶⁴ McIlwrath, above n 57, at 919.

Another related problem is that, particularly because of the barriers to entry to the arbitrator-services market, there is a clear lack of diversity in arbitrators.⁶⁵ Publication would help to expand the pool of arbitrators by allowing new arbitrators to create a track record for themselves as seen in their published awards.⁶⁶

(b) Education

There is also an educative outcome in publication. International trade disputes are often highly complex, requiring “highly skilled arbitrators who can solve disputes in an expeditious and efficient manner”.⁶⁷ If there was systematic publication of awards, this would provide material with which to train new arbitrators and arbitration practitioners (in much the same way as law schools illustrate legal method through judicial case law), as well as developing further the skills of current arbitrators and arbitration practitioners.⁶⁸ This is particularly important given that the special expertise of arbitrators is often held out as one of arbitration’s key benefits (as opposed to litigation in national courts, in which cases are usually heard by generalist judges).⁶⁹

(c) Quality of awards

The publication of arbitral awards could also encourage arbitrators to make an extra effort in their role in the knowledge that their decisions would be available publically.⁷⁰ This may have a positive impact on the quality of the award, encouraging arbitrators to “articulate coherent legal and factual bases for their findings”.⁷¹ It may also encourage arbitrators to develop more novel and creative legal solutions.⁷² On the other hand, it is arguable that a publication requirement would have a detrimental impact on the quality of awards. It has been argued that arbitrators writing with a public audience in mind, “may tend to write awards that are longer and that are driven by considerations beyond those necessary to

⁶⁵ See generally Ricardo Dalmaso Marques “‘To Diversify or Not to Diversify’: Report on the Session Who are the Arbitrators” in Albert Jan van den Berg (ed) *Legitimacy: Myths, Realities, Challenges – ICCA Congress Series No 18* (Kluwer Law International, Alphen aan den Rijn, 2015) 579; Christophen Seraglini “Who are the Arbitrators? Myths, Realities and Challenges” in Albert Jan van den Berg (ed) *Legitimacy: Myths, Realities, Challenges – ICCA Congress Series No 18* (Kluwer Law International, Alphen aan den Rijn, 2015) 589; and Adriana Braghetta “Diversity and Regionalism in International Commercial Arbitration” (2015) 46 VUWLR 1245.

⁶⁶ Zlatanska, above n 52, at 31; and Seraglini, above n 65, at 608.

⁶⁷ Zlatanska, above n 52, at 29.

⁶⁸ At 29.

⁶⁹ Knahr and Reinisch, above n 15, at 111.

⁷⁰ See Cremades and Cortes, above n 34, at 35. See also Zlatanska, above n 52, at 30.

⁷¹ Committee on International Commercial Disputes, above n 5, at 2. See also Lo, above n 18, at 243.

⁷² Zlatanska, above n 52, at 30.

resolve the particular dispute”.⁷³ This may have negative impacts for the parties: the awards may be less accessible to a commercial (non-legal) audience, and the cost associated with the time it takes to write an award with more comprehensive, intellectually rigorous reasoning, will be passed on to the parties.

(d) External scrutiny of decision making

Finally in relation to arbitrators, international arbitration disputes may:⁷⁴

... involve claims based on public and mandatory law, such as antitrust, securities fraud, and intellectual property, as well as certain mandatory contract law rules that reflect commitments to public interests. These claims are unmistakably imbued with a “public” essence.

Because the arbitrator is contracted by the parties to decide the dispute in the best interests of those parties, there is an incentive and associated risk that tribunals may not enforce the law properly. This undermines the rule of law. Societal interests expressed in the law may also be significantly undermined if the law is misapplied (or ignored) by the tribunal.⁷⁵ For instance, the “regulatory function” of national contract laws is undermined “if national law is obviated through international arbitration”.⁷⁶ Similarly, it may be that areas of national economic regulation are “systematically avoided” in spite of the (otherwise) applicable law.⁷⁷ This risk arises as a result of the lack of judicial review or appeal routes from arbitral decisions in which any misapplication of the law would be rectified. This risk is particularly germane in countries such as the United States and New Zealand, where courts have placed great emphasis on party autonomy, and have therefore taken an especially deferential approach to the decisions of tribunals.⁷⁸ To ameliorate this risk, publication of arbitral awards may, if published with the arbitrator’s name, “allow some kind of external scrutiny and control over the arbitrator’s decision making”.⁷⁹ At the very least, it will allow scholars,

⁷³ Committee on International Commercial Disputes, above n 5, at 2–3.

⁷⁴ Rogers “The Vocation of the International Arbitrator”, above n 21, at 995–996 [footnotes omitted].

⁷⁵ William W Park “Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration” (1986) 12 Brooklyn J Int’l L 629 at 665–666.

⁷⁶ Rogers “Transparency in International Commercial Arbitration”, above n 21, at 1332–1333.

⁷⁷ At 1333.

⁷⁸ In relation to the United States, see Rogers “Transparency in International Commercial Arbitration”, above n 21, at 1333. In relation to New Zealand, see Arbitrators’ and Mediators’ Institute of New Zealand “Submission to the Justice and Electoral Select Committee on the Judicature Modernisation Bill 2013” at 3. This can be compared with the less deferential approach of European courts and legislatures. See Thomas E Carbonneau and Francois Janson “Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability” (1994) 2 Tul J Int’l & Comp L 193 at 194, cited in Rogers “Transparency in International Commercial Arbitration”, above n 21, at 1333.

⁷⁹ Zlatanska, above n 52, at 31.

policy-makers and future tribunals to assess the earlier decision, and then clarify the proper interpretation or application of the law in question.⁸⁰

3 *Other public interest factors*

(a) Study of arbitration and policy making

The publication of awards would assist scholars when analysing the law and policy makers seeking to legislate in areas previously considered only (or primarily) by arbitral tribunals.⁸¹ Given the relative popularity of arbitration, confidentiality of arbitral awards imposes limits on policy makers. Through a lack of information about disputes, policy makers may be unable to regulate commerce in a manner that is truly reflective of, and responsive to, current business practice. This risks a negative effect on business as “the policies and regulations developed may become a hindrance to business, as they do not reflect current business practices”.⁸²

(b) Legitimacy

Legitimacy is a concept effectively underpinning many of the public interest factors already outlined, but it also stands alone as a public interest factor. There is a public interest – particularly to the business community – in the legitimisation of arbitration as a form of dispute resolution. As Buys notes, “increasing transparency would likely increase knowledge and understanding of the arbitral process, thereby increasing the legitimacy of the use of international arbitration more generally”.⁸³ If it can be demonstrated, by a coherent body of published awards, that arbitration in a credible and reliable means of resolving disputes, potential users of arbitration will be encouraged to resolve disputes using arbitration, and current users will be satisfied and will prefer arbitration in the future.⁸⁴ That is, it will create a clear alternative method for the resolution of disputes in which the public will have confidence. On the other hand, if arbitration remains a non-transparent, there is a risk that

⁸⁰ On the importance of assessing how well arbitrators are upholding the policy underlying legislation, see Philip J McConnaughay “The Risks and Virtues of Lawlessness: A ‘Second Look’ at International Commercial Arbitration” (1999) 93 Nw U L Rev 453 at 461; and Catherine Rogers “Transparency in International Commercial Arbitration”, above n 21, at 1332–1333.

⁸¹ See generally Rogers “The Vocation of the International Arbitrator”, above n 21, at 999–1000, 1002 and 1005. See also Buys, above n 14, at 137.

⁸² Noussia, above n 23, at 170–171 .

⁸³ Buys, above n 14, at 135. See also Karton, above n 8, at 461.

⁸⁴ Zlatanska, above n 52, at 29.

those unfamiliar with arbitration may be discouraged from using it to resolve disputes. As Lew has written:⁸⁵

Failure to enable parties to review past arbitration awards, could induce those not conversant with arbitration to believe there to be some sinister or other reason, e.g., the unreliability and irrational nature of the arbitrators decisions, why awards are so carefully and strictly kept from view.

C Factors against the case for publishing in the public interest

There are, of course, important reasons why parties may be interested in having their dispute (including the award) kept confidential, and why the confidentiality of proceedings has been emphasised as a key reason for businesses opting to refer disputes to arbitration.⁸⁶ Perhaps most importantly, parties may simply not want their dispute to be publicised for various reasons. Parties may not want certain allegations to be made public, particularly where those allegations may have an impact on a business's reputation.⁸⁷ Equally, a party may not want it to be publicised that it has lost an arbitration, especially when there is the risk that this may act as an incentive for third parties to bring proceedings against the unsuccessful party. Thirdly, it may be that parties wish to take a certain position in the arbitration that they would not take in public proceedings. This may be, for instance, where particular constituencies are promoting the party taking a position that is not in its strategic interest in the arbitration. Fourthly, at a systemic level, whereas the publicising of a dispute risks "exacerbating the dispute", confidentiality helps to "enable the parties to preserve a working relationship".⁸⁸ These concerns about having disputes publicised may extend beyond the duration of the arbitration and its immediate aftermath.⁸⁹

Similarly, parties may not want certain information disclosed as part of the dispute to become public: for instance, a party may be concerned to protect business secrets. There may be certain sensitive information relevant to a dispute – including intellectual property, trade

⁸⁵ Lew, above n 17, at 227.

⁸⁶ See L Yves Fortier "The Occasionally Unwarranted Assumption of Confidentiality" (1999) 15 *Arbitration Int* 131; and Departmental Advisory Committee on Arbitration Law "1996 Report on the Arbitration Bill" (1997) *Arbitration Int* 275 at [12].

⁸⁷ Hrvoje Sikiric "Publication of Arbitral Awards" (1997) 4 *Croatian Arbitration Yearbook* 175 at 185–186; and Buys, above n 14, at 137. Of course, as Buys points out, "this result may not be bad if the allegations prove to be true":

⁸⁸ Williams and Kawharu, above n 7, at [13.8.1].

⁸⁹ Jan Paulsson and Nigel Rawding "The Trouble With Confidentiality" (1995) 11 *Arbitration Int* 303 at 305–306.

secrets and client lists – which businesses have a strong interest in keeping out of the public eye.⁹⁰

There is also a real concern that it will take extra time to prepare an award for publication which may undermine the perceived efficiency of arbitration as well as raising costs for the parties. These costs will extend not only to the arbitrator, but if a mechanism provides for redaction, the costs will also potentially extend to counsel who will be involved in ensuring the award is satisfactorily redacted to protect his or her party's interests.⁹¹ This is in addition to the concern highlighted above, that arbitrators may write unnecessarily long awards because the award is being released into the public domain and the arbitrator's reasoning thereby being opened to critique, and the arbitrator's changing behaviour in light of transparency may therefore bring an attendant extra cost.⁹²

More concerning is the impact on parties' decision to arbitrate in the first place. Given that party autonomy is a fundamental characteristic of arbitration, if parties have contracted for their arbitration to remain confidentiality in all aspects, and that choice is overridden by a mandatory publication rule, this risks undermining the attraction of arbitration as a system to resolve commercial disputes.⁹³ The same can be said in terms of confidentiality being a "distinctive feature" of arbitration. Although the value placed on it varies from party to party, and from dispute to dispute, it is trite that confidentiality is a fundamental attribute of arbitration, and if this is lost, the attraction of arbitration may take another hit.⁹⁴ This must be borne in mind in making inroads into the presumption of confidentiality.

IV A NATIONAL LAW OBLIGATION TO PUBLISH

⁹⁰ Zlatanska, above n 52, at 32. See also Buys, above n 14, at 123; and Karton, above n 8, at 459.

⁹¹ Zlatanska, above n 52, at 33; and Karton, above n 8, at 483.

⁹² See above at Part III, B, 2, (c): Quality of awards.

⁹³ Buys, above n 14, at 138.

⁹⁴ At 138; and Zlatanska, above n 52, at 32. Although, it has been questioned whether confidentiality is, in fact, considered such a fundamental characteristic of arbitration by users: Law Commission *Improving the Arbitration Act 1996* (NZLC R83, 2003) at [22]. The relative unimportance of privacy and confidentiality has been borne out in some empirical studies. Although results are inconsistent across studies, so it is not clear the extent to which arbitration is considered a fundamental attribute of arbitration. On this, see Nisja, above n 13, at 188–189.

As noted above, the case has previously been made for a requirement to publish being included in the rules of arbitral institutions.⁹⁵ In the context of international commercial arbitration, this is immediately attractive, particularly given that arbitral institutions have traditionally been “the main policy makers of the international commercial arbitration system, and have channeled many of the major transparency innovations in the field”.⁹⁶ It is also consistent with minimisation of national interference with international arbitrations. As Rogers notes, national “legislatures’ support for international arbitration has traditionally taken the form of policies of non-interference”⁹⁷ and, accordingly, international arbitration has traditionally been regulated by arbitral institutions. Institutional treatment of a requirement to publish also reflects the way in which parties may be accustomed to treating confidentiality. Although some parties include confidentiality provisions in their arbitration agreements (or broader commercial contracts), “most confidentiality agreements take the form of provisions of institutional rules, incorporated into the parties’ arbitration clause”.⁹⁸ Finally, given the rules of arbitral institutions may apply to arbitrations seated in different jurisdictions, institutions are more likely to be able to gather together material relating to various different jurisdictions, providing a more extensive library of information for parties.

However, dealing with publication at national law does not obviate the need to deal with publication in institutional rules (or, of course, in the parties’ contract). Beyond the core requirements of national law, depending on what these are, institutions could provide for a higher degree of transparency different to the national law requirements. It may also be that institutions hold an incentive to provide a broader set of publications relating to institution-specific issues, for instance, interpretations of the institution’s rules.

Moreover, of the benefits of publication canvassed above, there are a number of public interests in publication that both states and institutions have an incentive in pursuing. These generally relate to the legitimacy of arbitration and encouragement of its use. From an institution’s point of view, the success or failure of the institution relies inextricably on parties choosing arbitration to resolve disputes. In contrast, from a national law perspective, a

⁹⁵ See for example Karton, above n 8.

⁹⁶ Villaggi, above n 13, at 9.

⁹⁷ Rogers “The Vocation of the International Arbitrator”, above n 21, at 970–971.

⁹⁸ Born, above n 1, at 2790.

number of states specifically promote the use of arbitration,⁹⁹ particularly for the resolution of international disputes, on the basis that it provides a desirable alternative to international litigation for businesses in that state,¹⁰⁰ and more generally on the basis that:¹⁰¹

... it reinforces the desirability of disputing parties resolving their differences by methods chosen by them ... [and] by having this disputes resolved privately, the burden on courts provided by the State and funded by taxpayers to resolved civil disputes is lessened.

So despite the differing bases for encouraging its use, both institutions and states have an interest in ensuring the legitimacy of the arbitral system. There are a number of public interest factors outlined above, which feed into this, including: creating certainty for businesses, particularly in relation to accessibility of the law relating to arbitral procedure; consistency in arbitral decision making; a levelling of the playing field in relation to the appointment of arbitrators; and ensuring that policy making bodies (including within institutions) have sufficient information to allow the law and rules relating to arbitration to be developed. Thus, it may be that the facilitation of the publication of awards needs to occur *both* at the national level and the institutional level.

However, there are strong justifications for a baseline publication requirement at national law specifically, regardless of what may also develop at the institutional level. This is both because there are certain national interests engaged, for which institutions may not have an interest in providing, as well as there being certain advantages to including a requirement to publish at national law.

In terms of the national interests engaged, as highlighted above, at a fundamental level there are democratic and rule of law considerations: the state has an interest in seeing that arbitration as a system for rendering justice operates transparently and with legitimacy. States also have an interest in seeing that their laws are applied as intended despite commercial parties' potentially conflicting interests. Additionally, many of the specific benefits of publication highlighted above engage national interests. For instance, to the

⁹⁹ For instance, a purpose of New Zealand's Arbitration Act 1996 is "to encourage the use of arbitration as an agreed method of resolving commercial and other disputes" (s 5(a)).

¹⁰⁰ For instance, an object of the Australia's International Arbitration Act 1974 (Cth) is "to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes" (s 2D(a)).

¹⁰¹ Law Commission, above n 94, at [2], citing Lord Cooke "Party Autonomy" (1999) 30 VUWLR 257 at 258–259, where His Lordship noted that "the pressures of judicial workloads have led the courts to entertain towards arbitrators a sense of gratitude rather than rivalry, of respect rather than content".

extent that a state seeks to promote itself as an arbitral seat, the precedent value in published awards would ensure a degree of predictability in relation to the state's national rules of arbitral procedure.¹⁰² The state also has a broad interest in arbitral precedent in that it may help to provide valuable interpretations of otherwise untested statutory provisions, which is of value to the public of the state specifically. An ancillary interest is in the ensuring of high quality decision making in the interpretation of these laws.

There are also a number of reasons why a requirement to publish at national law is advantageous to having this requirement dealt with by arbitral institutions. First, cost and speed are oft-cited reasons why parties favour arbitration to resolve their disputes, however editing awards for publication can incur significant costs.¹⁰³ Furthermore, the process of selecting awards for publication can be significantly costly for institutions, who are funded by private party arbitrations, and thus the costs are naturally passed on to the parties. States, by contrast, have far more room to potentially absorb both costs on the basis that the costs are necessary in meeting the public interest in making available the information contained within awards, and therefore can be borne by the taxpayer. This is particularly justified given the relief to courts, in terms of caseloads, that increased use of arbitration ensures.¹⁰⁴

Secondly, while institutions may cover a broader set of arbitrations than any national law, any ad hoc arbitrations will not be covered by institutional rules (even if the rules across institutions become somewhat harmonised). So, even though a national law requirement would only capture arbitrations seated in the state in question, every single one of those arbitrations would be subject to the publication rule. Therefore, there would at least exist a comprehensive set of awards of a certain type (ie arbitration seated in State X).¹⁰⁵

Finally, there is also some disagreement about the proper private international law analysis to the question of the law applicable to the duty of confidentiality. There is some debate over whether the applicable law is that governing the arbitration agreement, or is the

¹⁰² See Knahr and Reinisch, above n 15, at 111.

¹⁰³ Committee on International Commercial Disputes, above n 5, at 3.

¹⁰⁴ See above at n 101, and accompanying text.

¹⁰⁵ Additionally, although this paper is focused on international commercial arbitrations, domestic arbitrations, and public international arbitrations seated in a country with such a requirement would presumably also be captured, further broadening the benefits gained by publication at the national level.

law of the seat of the arbitration.¹⁰⁶ Although the predominance of opinion is in favour of the former as the current position,¹⁰⁷ a mandatory requirement that awards are published in relation to any arbitration that has its seat in the state in question provides some certainty in relation to the confidentiality of the award, at the very least. This may be valued by parties who will have some clarity about the extent of the confidentiality of the arbitration, particularly given the current variance in approaches across national laws and institutional rules.

IV A HYPOTHETICAL EXAMPLE: NEW ZEALAND

International arbitration is steadily increasing globally, and the Asia-Pacific is now “a major user of international arbitration” with upwards of 500 international arbitrations taking place in the region annually.¹⁰⁸ Despite the obvious geographical hurdles,¹⁰⁹ there is much about New Zealand that makes it attractive as a potential seat for international arbitrations, particularly in relation to the Asia-Pacific region, even though that vision has yet to be realised.¹¹⁰ There is a disproportionately high degree of expertise among New Zealand practitioners in international arbitration, both in New Zealand and around the world.¹¹¹ Furthermore, New Zealand has a good record in relation to independence and lack of corruption, and New Zealand courts “have adopted a strong pro-arbitration stance when arbitration issue have come before them”.¹¹² As Walton has argued:¹¹³

New Zealand's absence from the international arbitration scene as an arbitral centre is noteworthy and surprising, particularly given [New Zealand's] traditional strengths and reputation in this area ... New Zealand has the potential to fit a niche now – to provide high quality, independent and cost effective dispute resolution services with a

¹⁰⁶ See Alberto Malatesta “Confidentiality in International Commercial Arbitration” in Alberto Malatesta and Rinaldo Sali (eds) *The Rise of Transparency in International Arbitration: The Case For the Anonymous Publication of Arbitral Awards* (Juris, Huntington, 2013) 39 at 42–44.

¹⁰⁷ See at 42, citing among others Jean-Francois Poudret and Sebastien Besson *Comparative Law of International Arbitration* (2nd ed, Sweet & Maxwell, London, 2007) at 317 and following.

¹⁰⁸ Williams and Kawharu, above n 7, at [1.1.5].

¹⁰⁹ Not that this need be an insurmountable hurdle, given the advances in information and communication technology.

¹¹⁰ See generally Georgina Bond “New Zealand seen as global ‘fix-it’ hub” *The National Business Review* (online ed, New Zealand, 13 November 2012) (“New Zealand has the perfect conditions to become a seat for international commercial arbitration”); John G Walton “International Arbitration: Are we a seat or are we just sitting” (paper presented to the AMINZ Conference, Queenstown, New Zealand, 2014); and Catherine Rogers “A Window into the Soul of International Arbitration: Arbitrator Selection, Transparency and Stakeholder Interests” (2015) 46 VUWLR 1179 at 1188–1190.

¹¹¹ Walton, above n 110, at 3–4. See also Arbitrators' and Mediators' Institute of New Zealand, above n 78, at 3.

¹¹² Arbitrators' and Mediators' Institute of New Zealand, above n 78, at 3.

¹¹³ Walton, above n 110, at 3. See also Rogers, above n 110, at 1188–1190.

regional, Australian and South Pacific focus, but also with a wider international basis, which would complement rather than compete with the existing preferred centres.

As a jurisdiction which has not yet managed to establish itself as an international arbitration “hub”, but a jurisdiction that is in a good position to attract arbitrations, New Zealand provides a good case study to review the potential benefits and downsides of imposing a requirement to publish in its Arbitration Act 1996.

A *The Current Position under New Zealand Law*

New Zealand’s Arbitration Act 1996 (1996 Act) – broadly based on the UNCITRAL Model Law¹¹⁴ – provides a detailed framework on confidentiality, and is considered by some commentators to be a leading statute in this regard.¹¹⁵ It was initially more straightforward. Following the controversial decision of the High Court of Australia in *Esso Australia Resources Ltd v Plowman (Esso)*,¹¹⁶ which rejected the presumption of confidentiality in arbitration under Australian law, the New Zealand legislature went the other way, inserting a presumption of confidentiality into the 1996 Act.¹¹⁷ Section 14 was shown to be deficient, however, particularly in “its failure to address obvious exceptions to the general rule of confidentiality”.¹¹⁸ Following a number of recommendations by the New Zealand Law Commission,¹¹⁹ the 1996 Act was then amended in 2007 to provide a comprehensive set of rules relating to privacy and confidentiality.¹²⁰

In terms of the confidentiality of awards under the 1996 Act, s 14 provides that the subsequent provisions on confidentiality (ss 14A–14I) “apply to every arbitration for which

¹¹⁴ See David Williams “Arbitration and Dispute Resolution” [2002] NZ L Rev 49 at 49. One of the purposes of the Arbitration Act 1996 is “to promote international consistency of arbitral regimes based on the Model Law on International Commercial Arbitration” (s 5(b)).

¹¹⁵ For instance, Hwang and Chung have described the confidentiality provisions in the 1996 Act as “the most promising attempt to establish a complete code of confidentiality”, although the authors note that “it is still an imperfect code”: Michael Hwang and Katie Chung “Defining the Indefinable – Practical Problems of Confidentiality in Arbitration” (2009) 26 J Int’l Arb 609 at 642.

¹¹⁶ *Esso*, above n 29.

¹¹⁷ Arbitration Act 1996, s 14 (since amended), which originally provided “an arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that the parties shall not publish, disclose, or communicate any information relating to the arbitral proceedings under the agreement or to an award made in those proceedings” unless disclosure was contemplated under the Act, or the disclosure was to “a professional or other adviser of any of the parties”. See Williams and Kawharu, above n 7, at [13.1].

¹¹⁸ Williams and Kawharu, above n 7, at [13.1].

¹¹⁹ In Law Commission, above n 94, especially at [46]–[52].

¹²⁰ Contained in ss 14–14I of the Arbitration Act 1996.

the place of the arbitration is, or would be, New Zealand”. Therefore, international arbitrations seated in New Zealand are expressly covered by the scheme.¹²¹ Section 14B(1) implies an obligation of confidentiality into the parties’ arbitration agreement, requiring that “the parties and the arbitral tribunal must not disclose confidential information”. “Confidential information” is defined in the Act to include the award.¹²² There are a number of exceptions contained in s 14C–14E, but there is nothing to permit the kind of systematic publication of awards in the public interest as proposed in this paper.¹²³ Therefore, even if parties to an arbitration have not agreed that their arbitration and the resulting award is to be treated in confidence, the 1996 Act deems such an agreement to be in force. However, it is important to note that the confidentiality scheme contained within the 1996 Act is subject to party autonomy,¹²⁴ so parties may, in writing, agree to contract out of most of ss 14A–14I.¹²⁵ The key point is that there is nothing in the Act that currently facilitates the systematic publication of awards in the public interest, and, in fact, the Act effectively militates against this.

B The Problem with Legislating for Transparency in International Arbitration

A major hurdle in the proposal to require publication of arbitral awards is that on its face it risks conflicting with the goal of making New Zealand a centre for international arbitrations. Indeed, rather than promoting greater transparency, the Arbitrators' and Mediators' Institute of New Zealand (AMINZ) – New Zealand's largest dispute resolution organisation – has

¹²¹ See Williams and Kawharu, above n 7, at [20.3.1] and ch 10.

¹²² Section 2 of the 1996 Act defines “confidential information”, for the purposes of arbitral proceedings, as “(a) ... information that relates to the arbitral proceedings or to an award made in those proceedings; and (b) includes– ... (vi) any award of the arbitral tribunal”.

¹²³ There is some very limited scope for narrower case-by-case public interest disclosures, for instance, in relation to arbitrations involving government bodies. See Williams and Kawharu, above n 7, at [13.6.8].

¹²⁴ Section 14.

¹²⁵ As Williams and Kawharu, above n 7, note, at [13.4.3]:

It seems unlikely ... that s 14 is intended to allow parties to completely contract out of all of ss 14A–14I. Section 14F establishes a presumption of open justice in court hearings under the Act, and s 14H prescribes the criteria for courts to apply when deciding whether to rebut this presumption and other private hearings. These provisions reflect a careful policy balance between the desirability of confidentiality in arbitrations, on the one hand, and the public interest in having court proceedings conducted openly on the other. It would be inconsistent with the balance struck by these provisions to enable disputants to override them in their agreement, and indeed it would be remarkable if parties were allowed this degree of control over court hearings. For this reason, the reference in s 14 to “every arbitration” may be read narrowly to refer to the arbitral proceedings only, and not the court proceedings that relate to them.

See also Amokura Kawharu “New Zealand’s Arbitration Law Received a Tune-Up: A Review of Recent Amendments to the New Zealand Arbitration Act 1996” (2008) 24 *Arbitration Int* 405 at 407.

argued in favour of greater confidentiality than the 1996 Act currently provides. This is put forward on the basis that:¹²⁶

Confidentiality is one of the most important reasons that parties select arbitration and must be considered a legislative priority if New Zealand is to be seen as having a supportive legislative framework for international arbitration.

There is some evidence for this position too. It has been argued, for example, that the desirability of Australia as a seat for international arbitrations has significantly decreased following the decision against a presumption of confidentiality in the *Esso* case.¹²⁷

It might, therefore, be argued that national legislation is not the proper context for this issue to be addressed; that it is better that national legislation simply recognises an implied duty of confidentiality subject to both parties consenting to publication.¹²⁸ It could then be left to institutional rules to require publication; the parties' consent to publication deriving from their adopting the institution's arbitration rules.¹²⁹ On the other hand, however, it can be argued that when it comes to matters in the public interest, as has been shown, this is precisely the kind of issue national legislation should be addressing.

Further, it is arguable that, while confidentiality is broadly valued by parties to arbitrations, “expectations of confidentiality are materially lower with regard to arbitral awards”.¹³⁰ This is in large part because awards are usually issued at the end of the proceedings and will not therefore impact the procedural conduct of the arbitration.¹³¹ Moreover, the degree to which a publication requirement might serve to discourage parties from choosing New Zealand as the seat for their arbitration depends on the degree of

¹²⁶ Arbitrators' and Mediators' Institute of New Zealand, above n 78, at [2.4]. This submission was made in relation to the presumption of open court proceedings in s 14F, and argued that the New Zealand approach in this regard “is inconsistent with the confidentiality normally afforded to arbitral proceedings and inconsistent with other international legislative approaches that seek to preserve such confidentiality”. AMINZ recommended that the presumption in s 14F should be flipped in favour of privacy. See at [2.1]–[2.11]. Although AMINZ was unsuccessful (so far) in its submission to the Judicature Modernisation Bill 2013 (178-2), a Member’s Bill in the name of Tim McIndoe MP seeks, in part, to achieve the change: Arbitration Amendment Member’s Bill (Tim McIndoe MP, 11 November 2015). See also Walton, above n 110, at 2.

¹²⁷ Andrew Rogers and Duncan Miller “Non-Confidential Arbitration Proceedings” (1996) 12 *Arbitration Int* 319 at 344. *Esso*, of course, was not about the publication of awards specifically, but about the lack of a presumption of confidentiality to Australia-based arbitral proceedings: *Esso*, above n 29. However, it is likely that an overly transparent publication requirement could have the same effect in New Zealand.

¹²⁸ This is the effect of s 14 and 14B of the Arbitration Act 1996.

¹²⁹ This is the likely current effect of s 14: see Williams and Kawharu, above n 7, at [13.4.3].

¹³⁰ Born, above n 1, at 2820 (emphasis added).

¹³¹ At 2820. Compare, however, to the comments of Paulsson and Rawding: “While time heals many wounds, an unfavourable award may remain an irritant for a very long time”: Paulsson and Rawding, above n 89, at 305–306.

sanitisation that is applied to the published awards. As noted earlier, there are a number of reasons why parties favour confidentiality, including reputational issues, the risk of a proliferation of suits against an unsuccessful party and fears about the publication of trade secrets. To the extent that a mechanism for publication can guarantee the anonymity of the parties and their dispute, the concerns around publication are likely to fade.

Cost remains a fundamental issue. As both Born, and Williams and Kawharu note, cost is often held up as a benefit of arbitration over traditional litigation. Arbitrations can often be less expensive when proceedings are conducted in “a speedy and efficient manner”. However, the scale and complexity of disputes often means that the cost difference is negligible, if not reversed.¹³² Any difference in cost across jurisdictions, however, is likely to act as a significant incentive. If New Zealand were to require awards to be published, there is a real risk that arbitrators would spend more time preparing awards, which would lead to higher costs for the parties. This could act as a significant incentive to choose an alternative seat for the arbitration. As such, any requirement would have to be designed to mitigate the risk of increased costs for parties.

There are further arguments that may undercut the assumption that an express requirement of confidentiality would undermine the desirability of New Zealand a seat for international arbitrations. Given the increasing agreement as to the desirability of this sort of transparency, even within the international commercial community,¹³³ New Zealand would be presenting itself as at the forefront of developments of arbitration internationally, illustrating a willingness to react to international developments.

Additionally, and perhaps more importantly, there are tangible benefits for commercial parties. As Born makes clear, certainty and predictability are fundamental attributes of any system of dispute resolution.¹³⁴ There are two key ways in which certainty and predictability are achieved through requiring publication under statute. First, creating a statutory requirement to publish, and guidelines around the degree of "sanitisation" that will be permitted, puts the parties on notice as to what will and will not be made public. This can be contrasted with the English approach, for example, under which there is a presumption of

¹³² See Born, above n 1, at 86–89; and Williams and Kawharu, above n 7, at [1.1.5(g)].

¹³³ See Rogers "Transparency in International Commercial Arbitration", above n 21.

¹³⁴ Among other references, see Born, above n 1, at 473.

confidentiality, but with the acknowledged necessity of exceptions, which have been left to be determined by judges.¹³⁵ The New Zealand position under the Arbitration Act 1996 is arguably much clearer, and would become even more so.

Secondly, for parties that choose New Zealand law to govern their arbitration agreement, the publication of arbitration awards will assist significantly in developing an understanding of the operation of New Zealand's arbitration law – particularly, the interpretation to be given to provisions of the Arbitration Act. This, at the very least, will help counsel to prepare more effectively for arbitrations subject to New Zealand law, and may encourage choice of New Zealand law for the arbitration agreement, and as the seat.¹³⁶

As can be seen, therefore, while there are arguments running both ways, there is a case to be made that a statutory requirement of publication would actually be to New Zealand's benefit in advertising itself as a seat for international arbitrations. What is crucial is to ensure that the mechanism for publication of awards is designed in such a way as to mitigate the risk that it will turn parties away from New Zealand.

V PREVIOUSLY SUGGESTED AND EXISTING MECHANISMS FOR THE PUBLICATION OF ARBITRAL AWARDS

This leaves the question as to the form and enforcement of a requirement to publish should it be adopted. A number of options outside of, or not specific to, a national publication requirement have been previously suggested: (1) party-driven sanitisation; (2) a uniform structure for awards; (3) a transnational oversight body for arbitration; and (4) an online database or databases.¹³⁷ This Part describes and analyses those various suggestions, as well as the approach currently taken in Norwegian legislation. The next Part then proposes two further options for a publication mechanism designed specifically for the New Zealand context.

A Current Suggestions for Publication Outside of the National Context

1 Party-driven sanitisation

¹³⁵ See Neill, above n 19, at 293 and 316; and *Dolling-Baker v Merrett* [1990] 1 WLR 1205 (CA).

¹³⁶ Very often, it will be implied that the parties intended the law of the seat to apply to the arbitration agreement in the absence of an express choice of law. See the discussion in Born, above n 1, at ch 4. For more on the benefits of certainty and predictability, see Zlatanska, above n 52, at 28. See further on the predictability benefits of publication, Knahr and Reinisch, above n 15, at 111.

¹³⁷ These options have been helpfully collated in Zlatanska, above n 52, at 34–36.

One option is to require the parties to an arbitration to identify any confidential information that should not be published. From there, the arbitrator would be required to publish two awards. The first would be the full award, and the second, a sanitised award, omitting the information the parties have agreed to remove. The second award would be published.¹³⁸

There are two key benefits to this approach. First, it involves the parties' consent in regards to what is included and what is excluded. It is therefore consistent, to a high degree, with the principle of party autonomy. Secondly, it is the arbitrator who is required to remove the confidential material, rather than a third person in an arbitral institution set up for the purpose.¹³⁹ This is important, because it is the arbitrator who has an in-depth knowledge of the case, and the parties' interests and sensitivities.

Of course, this mechanism would be costly, in terms of the extra time it will take to finalise both versions of the award, and correspondingly, financially. Further, from a financial point-of-view, it raises the question of who will pay the extra cost. Finally, it may also be difficult to get the parties to agree on what is genuinely confidential information, particularly in the thick of a dispute when it is unlikely the parties will see eye-to-eye.

2 *Uniform structure for awards*

A second option is to require all arbitral awards to be published following a uniform structure. All arbitral awards would be required to "be divided into three parts: (1) description of the facts; (2) procedural issues; and (3) the reasons for the decision".¹⁴⁰ Arguably, compliance with this structure would cut down on the time it would take to sanitise the award for publication, which is a problematic feature of the first option. Parties would also have the opportunity to raise objections to any of the material, either ahead of the writing of the award, or prior to publication.¹⁴¹

There are likely to be some difficulties, however, in the parties' having an opportunity to raise objections unless this was to be circumscribed in some way to ensure only truly sensitive information was being removed. Furthermore, as Zlatanska outlines, "it seems very

¹³⁸ At 35, citing Lo, above n 18, at 247–248.

¹³⁹ Zlatanska, above n 52, at 35; and Lo, above n 18, at 247–248.

¹⁴⁰ Zlatanska, above n 52, at 35.

¹⁴¹ At 35, citing Karton, above n 8, at 476 and 479–480.

implausible to impose such a template on [all] arbitrators ... who [may] have very different writing styles”.¹⁴²

Both of the above models also raise questions about where these awards are published. The obvious answer may be the arbitral institutions or a national register (depending on whether it is dealt with in arbitral rules or by national law), but this then raises further questions as to the cost of maintaining the database.

3 *A transnational oversight body for arbitration*

Gruner has raised the possibility of a transnational public body created either by a new treaty, or by amendment to the New York Convention,¹⁴³ and charged with the oversight and regulation of arbitral institutions. This would include responsibility for maintaining a repository of arbitral awards, as well as other information about arbitrations (including statistics related, for example, to the duration of cases).¹⁴⁴ Although a noble idea, such a body would be difficult to establish. It would be a drawn-out process, and incredibly difficult to achieve the ideal of getting all signatories to the New York Convention to negotiate a new treaty or an amendment to the New York Convention. The difficulties do not stop there either. As Zlatanska points out:¹⁴⁵

[T]he creation of an international arbitral institution raises more questions than it solves. Which country will host such a permanent body? Who will be in charge of it? Who will pay for its constitution? Who will pay the staff who will work there?

4 *Online database*

A final existing suggestion is for an online database along the lines of the Case Law on UNCITRAL Texts (CLOUT) database maintained by the United Nations Commission on Trade Law (UNCITRAL).¹⁴⁶ The CLOUT database collects and disseminates “information

¹⁴² Zlatanska, above n 52, at 35.

¹⁴³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards 330 UNTS 3 (opened for signature 10 June 1958, entered into force 7 June 1959) [New York Convention].

¹⁴⁴ Dora Marta Gruner “Accounting for the Public Interest in International Arbitration” (2003) 41 Colum J Trans L 959 at 961–963. See Zlatanska, above n 52, at 35.

¹⁴⁵ Zlatanska, above n 52, at 35.

¹⁴⁶ United Nations Commission on International Trade Law “Case Law on UNCITRAL Texts (CLOUT)” <www.uncitral.org>.

on court decisions and arbitral awards relating to conventions and model laws that have emanated from the work of the Commission”.¹⁴⁷

While a centralised electronic database for international arbitral awards would undoubtedly make maintenance and access easier, it still raises questions as to which body would maintain such a database, and how any costs would be dealt with. It is possible databases could be set up on an institution-by-institution basis, but the fragmentation associated with this would be little better than fragmentation across databases maintained by states. Furthermore, this would leave no place for the publication of ad hoc arbitration awards. Finally, as a proposal, this says nothing about the parameters of the requirement to publish. For instance, what degree of sanitisation would be permitted?

B The Facilitation of Publication in Norway

Norway is one of the few countries that currently requires publication of awards.¹⁴⁸ Section 5 of the Lov om voldgift (Norwegian Arbitration Act 2004) provides: “The arbitral proceedings and the arbitral award shall not be subject to a duty of confidentiality unless otherwise agreed by the parties with respect to each arbitration.” As such, in the absence of agreement between the parties, either party is permitted to disclose the award (or information related the proceedings generally). The publication of award is still, however, subject to party autonomy, albeit the legislation requires the parties actively to agree not to publish.

It is not clear the extent to which publication has in fact taken place since the Norwegian Act was enacted, however it is reasonable to assume that a fairly significant number of arbitrations would involve an agreement not to publish. This can be extrapolated from the submissions of the Confederation of Norwegian Enterprise, the Norwegian Financial Services Association and the Federation of Norwegian Coastal Shipping, all of whom are “important representatives of the [Norwegian] business community”, and all of whom “stressed that discretion and confidentiality was often a decisive reason for parties to

¹⁴⁷ United Nations Commission on International Trade Law *Case Law on UNCITRAL Texts (CLOUT) User Guide* A/CN.9/SER.C/GUIDE/1/Rev.2 (2010) at [1]. On the establishment of an online database, see Emmanuel Jolivet “Access to Information and Awards” (2006) *Arbitration Int* 271; Alexis Mourre “Arbitral Jurisprudence in International Commercial Arbitration: The Case For A Systematic Publication of Arbitral Awards in 10 Questions ...” (28 May 2009) *Kluwer Arbitration Blog* <www.kluwerarbitrationblog.com>; and Zlatanska, above n 52, at 35.

¹⁴⁸ Costa Rica is the other example. As noted above at n 13, art 38 of the Arbitration Law 2011 (Costa Rica) provides “The arbitration proceedings will be confidential ... Absent agreement to the contrary, the award will be made public once it is final”. See Born, above n 1, at 2786 and n 31.

choose arbitration”.¹⁴⁹ In light of these submissions, it is highly likely that the business community exercises its right to opt against the publication of awards. This, of course, undermines the ability to achieve the benefits of a more systematic publication requirement.

The Norwegian Act does, however, also include a requirement that tribunals submit *all* awards, whether confidential or not, to the public archives. Section 36(5) provides: “The arbitral tribunal shall send one signed copy of the award to the local District Court to be filed in the archives of the court.” However, as Nisja explains:

... the fact that the local District Courts keep such archives does not imply that the awards are available to the public. The *ratio legis* is statistical purposes and obtaining notoriety. When following this obligation, tribunals should inform the District Court on whether and to what extent there is a confidentiality agreement when sending the copy of the award. If a district court is uncertain as to whether or not such an agreement exists, the award should not be disclosed.

Therefore, despite the submission requirement in s 36(5), the Norwegian approach still fails to achieve the benefits that the systematic publication of, and public access to, awards could achieve.

VI TWO PROPOSALS FOR A NEW ZEALAND PUBLICATION MECHANISM

None of the options outlined in the previous Part are appropriate as a means of facilitating the systematic publication of arbitral awards at the national level. The first four suggestions are either set outside, or are not specific to, the national context. For publication mechanisms designed to operate outside the national context, while this may provide useful in conjunction with national publication, as illustrated in Part IV a purely national requirement to publish is warranted whether or not mechanisms for publication exist outside the national law context. The options are also light on detail in relation to the allocation of costs, or they allocate costs in such a way as to disincentivise the use of arbitration. The approach in Norway is inappropriate primarily because the ability to opt out of the submission of awards undermines the systematic nature of publication required to fully realise the benefits that publication seeks. This Part outlines two New Zealand-specific approaches for a more systematic publication of awards at the national level.

A A New Zealand-based Register of Published Arbitral Awards

¹⁴⁹ Nisja, above n 13, at 190.

The first option is relatively straightforward and follows to some degree the existing publication (albeit not systematically) of sanitised awards by some institutions.¹⁵⁰ The requirement to publish contained in statute would be relatively brief – indicating an obligation to publish a version of every award rendered in an arbitration – whether domestic or international – omitting any sensitive information or other information from which it would be possible to identify the parties.¹⁵¹ The obligation would be on the arbitrators, as those best acquainted with the material contained within the award, to prepare the sanitised version of the award. In assisting the arbitrators in this task, the legislation would require an independent body – such as AMINZ – to develop guidelines in consultation with the Ministry of Justice. These would guide arbitrators on what could and could not be excluded from the award. The statute could also give AMINZ a role in sanitising the award if the parties and arbitrators agreed this was more appropriate. This award would then be submitted to a national register maintained by the Ministry of Justice. From here it would be available to the public, and most likely picked up by the online legal databases.

The legislation would also provide for two oversight mechanisms to ensure that the requirements were not being flouted: first, an independent body would be required to check random awards against the full version of the award. Secondly, there would be a power to challenge the published version of the award if it were suspected that the award was overly sanitised.

In terms of cost under this scheme, it would fall on the arbitrator to sanitise the award appropriately. The parties could be consulted in this process, but the arbitrator would be under a statutory obligation to ensure that the sanitisation did not go beyond what was prescribed in the guidelines. From there, the New Zealand Government – via the Ministry of Justice – would be responsible for maintaining the database. This is appropriate given the aim is to achieve a *public* interest benefit.

An approach such as this would keep the identity of the parties anonymous, and would allow for the redacting of any sensitive information in accordance with the guidelines. At the same time, it would facilitate the greatest degree of information, meeting most of the

¹⁵⁰ See, for example, Swiss Chambers' Arbitration Institution *Swiss Rules of International Arbitration* (June 2012), art 44; and Camera Arbitrale Milano *Arbitration Rules* (2010), art 8. For more detail, see above at n 8.

¹⁵¹ In some cases, it may be that nothing but a short abstract covering the finding on certain legal points, and the name of the arbitrator or arbitrators could be published.

benefits to be gained by publication. Put briefly, it would give businesses greater certainty in relation to the law by creating an information source relating to how previous arbitral tribunals have decided cases. It would also benefit the general business community, and to an extent the broader public, by publicising information in regards to the legal solutions arbitral tribunals have found in response to factual circumstances and the interpretation of laws not dealt with, or rarely dealt with, in the New Zealand courts. This would also facilitate greater consistency in decision making across tribunals, which would help in legitimising arbitration as a form of dispute resolution, and facilitating its use. Parties would also have more information about arbitrators, which could assist both parties in making decisions about which arbitrator to employ, as well as helping to increase and diversify the arbitrator-services market. The only specific benefit published awards would be unlikely to provide under this mechanism (because of the degree of sanitisation that must be accepted to make this a palatable proposal), is the making available of reputational information about potential business partners that have previously been subject to arbitration.¹⁵²

Perhaps more importantly, this mechanism would serve the rule of law interests of the broader public. It allows parties to see arbitration operating as a legitimate system for the resolution of disputes according to law, which is particularly important given the relative absence of appeal or review options from decisions of arbitral tribunals. Relatedly, it also allows for an assessment to be made of the performance of arbitral tribunals: that is, whether or not tribunals are being true in their interpretations of national law and the policies that underlie it. This all again bolsters the legitimacy of arbitration as a system of dispute resolution, encouraging its use, and thereby meeting the objectives of the New Zealand Act.¹⁵³

There are some significant downsides to this proposal, however. First and foremost, it fails to respond to the hurdle posed by cost. It is important to keep in mind that parties to an international arbitration have a choice as to the seat of their arbitration, and if an arbitration seated in a particular jurisdiction is likely to involve significant extra cost, this will act as a serious disincentive for parties to choosing that jurisdiction as the seat. Under this proposal, although the maintenance of the database of registered awards would be absorbed

¹⁵² For a more detailed discussion of the specific benefits of publication, see above at Part III, B: *Public Interests in the Publication of International Commercial Arbitral Awards*.

¹⁵³ Arbitration Act 1996, s 5(a).

by the New Zealand Government, the preparation of any award would fall to the arbitral tribunal. Given that the tribunal is employed by the parties, the cost associated with the extra time it would take to prepare a sanitised award would then fall to the parties. The guidelines do ameliorate this to some extent by providing parameters according to which the arbitrators can redact information from the full award, thereby making the task easier. However, there is still likely to be a significant degree of back-and-forth both between parties, and between parties and arbitrators, as to what can and cannot be published. There will inevitably be a cost involved, both financially and in terms of time, thus undermining the potential efficiency and cost benefits of arbitration. The result is that parties will be discouraged from choosing New Zealand as the seat for their arbitration.

The second problem is that this proposal may not be seen as adequately mitigating the risk that businesses could suffer negative reputational consequences, or that trade secrets or other sensitive business information could be publicised. Although the proposal allows for a significant degree of sanitisation, the compulsory nature of the publication requirement may mean that businesses have real concerns that such information may be included in the published versions of awards, particularly if the guidelines are too narrow to preclude parties from redacting certain information that they strongly feel must remain confidential. This risk is likely to prompt lawyers to opt for alternative jurisdictions when naming the seat in that arbitration agreement.¹⁵⁴

B A New Zealand Statement of Arbitral Decisions

As has been shown, the first of these two proposals faces some substantial hurdles and may not ultimately be practical for those reasons. As will also be clear, that proposal is focused on maximising the amount of information to be made available under the requirement to meet as many of the public interests as possible in the publication of awards. In doing so, it encroaches perhaps further than is desirable on the current confidentiality of awards and on party autonomy, ultimately leading to the impracticality of that proposal.

It may be that a middle ground can be found in a focus on publicising the precedential aspects of arbitral awards, while keeping other information relating, for example, to the arbitrators, confidential. This section will first describe why the precedential value of awards

¹⁵⁴ See in regards to both problems the comments of the New York City Bar Committee on International Commercial Disputes: Committee on International Commercial Disputes, above n 5, at 1.

is the most important public interest to pursue, before detailing a proposal for a mechanism that would limit the publication of information to important legal findings by tribunals, and mitigate the remaining risks and disincentives in the first New Zealand-based proposal.

1 The importance of a focus on precedent

The precedential effect of the publication of arbitral awards is arguably of most import from a national perspective. The legal findings of tribunals are central to the rule of law considerations, which is of the widest public interest at the national level. As noted earlier, the state has an interest in seeing that arbitration as a system for rendering justice operates with legitimacy. This involves ensuring a degree of transparency, and crucially important in this is ensuring transparency in relation to the application of the law by arbitral tribunals. Transparency in this regard helps to ensure, for instance, that parties are being treated fairly according to the law, and that the law is being applied honestly and in accordance with the public policy underlying it.¹⁵⁵

In relation to the legitimacy of arbitration, the publication of legal findings of tribunals helps also to create coherence in decision making across tribunals, as well as engender certainty for parties and potential parties to arbitration. This, to repeat, has flow-on benefits in encouraging the use of arbitration in accordance with one of the underlying purposes of the New Zealand Arbitration Act.¹⁵⁶ Furthermore, the certainty created by the publication of arbitration decisions is likely to extend to the interpretation of certain provisions of New Zealand law, which tend to be tested in arbitration rather than litigation, for instance, because of the commercial nature of those provisions. That involves a benefit for the public, or at least the New Zealand business community, not just those involved in arbitrations. It also helps national policy-making institutions to better develop the law by giving those institutions a greater range of information when making policy decisions.

The other benefits gained by a broader publication of awards are arguably not so important to achieve, at least from a national perspective. Unlike many of the benefits outlined above – for instance, the rule of law considerations, and clarification of

¹⁵⁵ To be sure, each of these points – and correspondingly the rule of law interest generally – could perhaps be even better achieved by publication of the award in full. However, there is a balance to be achieved. To the extent that the alternative is to discourage arbitrations from being held in New Zealand, this proposal with its focus on precedent manages a balance whereby an important element of arbitral awards is publicised, thereby achieving a careful balance which achieves rule of law interests to a considerable extent.

¹⁵⁶ Arbitration Act 1996, s 5(a).

interpretations of national statutes¹⁵⁷ – issues such as the availability of information relating to arbitrators and the diversity of arbitrators, for instance, may be sufficiently addressed outside of national institutions.¹⁵⁸ Arbitral institutions may see the benefit in publicising this information in their own bids to encourage the use of arbitration. Equally, other non-institutional measures may be undertaken, and indeed are being undertaken, to create these information sources. The *Arbitrator Intelligence* project is one such project, which:¹⁵⁹

... aims to promote transparency, fairness, and accountability in the selection of international arbitrators by increasing and equalizing access to critical information about arbitrators and their decision making.

The pilot phase of the project specifically focused on collecting international arbitration awards as a means to assist it in creating an information source about arbitrators.¹⁶⁰

With this in mind, the following proposal seeks to achieve a middle ground; a “best of both worlds” between adhering as much as possible to the principle of party autonomy in relation to confidentiality, and facilitating the systematic publication of awards. In doing so, it seeks to achieve a balance that alleviates the concerns of parties enough so that they are not discouraged from choosing New Zealand as an arbitral seat, while achieving an information source in relation to the most important national interests to be derived from arbitral awards.

2 *A New Zealand statement of arbitral decisions*

Instead of requiring all awards to be published – even with identifying features of the awards redacted – the precedential benefits can be obtained by creating a body whose responsibility it is to review all arbitral awards from arbitrations seated in New Zealand, and then summarise the law reflected in those awards. This would provide for the systematic consideration of all awards, and a comprehensive publication of important and novel legal findings by tribunals. A New Zealand “statement of arbitral decisions” could achieve this.

¹⁵⁷ For a more detailed explanation of the uniquely national interests in publication, see above Part IV: *A National Obligation to Publish*.

¹⁵⁸ For a more detailed explanation of the shared national and institutional interests in publication, again see Part IV: *A National Obligation to Publish*.

¹⁵⁹ Arbitrator Intelligence “About” <www.arbitratorintelligence.org>.

¹⁶⁰ Catherine Rogers “‘Arbitrator Intelligence’ Is Here!” (21 September 2014) Kluwer Arbitration Blog <www.kluwerarbitrationblog.com>. For more on *Arbitrator Intelligence*, see Arbitrator Intelligence <www.arbitratorintelligence.org>; Catherine Rogers and Alexander Wiker “Arbitrator Intelligence: The Pilot Project and Beyond” (20 January 2015) Kluwer Arbitration Blog <www.kluwerarbitrationblog.com>; and Rogers, above n 110.

Under this approach, an arbitral tribunal would be required to submit an unsanitised award to a unit within the Ministry of Justice. This unit would be bound by the strictest of confidentiality requirements, akin to legal privilege, in respect of that award. It would be able to use the award only for the purpose of creating an annual “statement of arbitral decisions” – this summary of important legal findings of arbitral tribunals. Such a statement may be in the following form:

[*One/Two/Three/Many*] tribunal[s] have held that the proper interpretation of [*insert provision*] of [*insert statute*] is the following: [*summarise the tribunal’s legal reasoning*]. However, in a dissent, one member of a tribunal commented: [*summarise dissent*].

As this illustrates, the statement is intended to give only information about the legal finding, devoid of any factual context. In this way, it seeks to impart important information that may be of value to future tribunals and courts, but at the same time, is designed to minimise the inclusion of any identifying features of the award. The annual statements would then gradually build a picture of arbitral jurisprudence: year upon year adding and updating the previous year’s statement.¹⁶¹

This approach should mitigate concerns about this degree of transparency of awards in New Zealand, and therefore the risk that parties may choose a different seat on that basis. This approach would absolutely minimise the risk of sensitive information in awards being released and therefore parties’ genuine confidentiality preferences being infringed upon. Therefore, even though it infringes somewhat on party autonomy in that parties will be required to submit the award to the Ministry of Justice for its assessment as to the legal

¹⁶¹ What is proposed is somewhat analogous to the American Law Institute’s Restatements. Like the Restatements, this “statement of arbitral jurisprudence” would seek to summarise and clarify the law, identifying trends, and effectively restating the decisions of arbitral tribunals “into a series of principles or rules” (using the language of the Harvard Law School guide to the Restatements: Harvard Law School Library “Intro to Restatements” (8 December 2015) <library.harvard.edu>). The Restatements, however, provide an imperfect analogy in that they also “occasionally ... recommend what a rule of law should be”. This would be beyond the scope of the proposed “statement of arbitral jurisprudence”. On the Restatements, see, in addition to the Harvard guide cited above, American Law Institute “Restatements of the Law” <www.ali.org>; Kristen David Adams “The Folly of Uniformity? Lessons from the Restatement Movement” (2004) 33 Hofstra L Rev 423; Kristin David Adams “Blaming the Mirror: The Restatements and the Common Law” (2007) 40 Ind L Rev 205; and Charles W Wolfram “Bismarck’s Sausages and the ALI’s Restatements” (1998) 26 Hofstra L Rev 817. In some ways, what is proposed is similar to r 48(4) of the International Centre for Settlement of Investment Disputes (ICSID) *Rules of Procedure for Arbitration Proceedings* (in the investor-state arbitration context), which provides: “The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications *excerpts of the legal reasoning of the Tribunal*.” International Centre for Settlement of Investment Disputes *ICSID Convention, Regulations and Rules* (ICSID/15, April 2006), r 48(4) (emphasis added). The author has been unable to find any analysis on the use (or not) of this rule. On the ICSID Convention and Rules relating to confidentiality, see Knahr and Reinisch, above n 15, at 100.

importance of the award and the possible publication of any legal developments, the infringement would be minimal as the award would be kept strictly confidential within the unit and the parts publicised would be done in such a way as to reduce the risk, almost to zero, that the parties could be identified.

If the risk to parties is minimised to the extent claimed, this begs the question: why infringe upon party autonomy at all? This is a particularly salient question given the fact that it is fairly rare for parties to agree on confidentiality expressly in their arbitration agreement. Is there really a risk that parties will decide at the dispute stage to refuse to submit of the award to the Ministry of Justice? The experience of the Taiwan Construction Arbitration Association provides some clues as to the likely outcome. As Lo reports:¹⁶²

The Taiwan Construction Arbitration Association has the practice of asking the parties to decide whether to agree to the publication of arbitral awards. The results have been that, after many years of practicing the mechanism, no parties to any arbitration procedure have agreed [to] the publication of their awards.

It may be that the very, very low risk of identifying information being publicised under the proposed mechanism for New Zealand would mean that the results would diverge, but the likely outcome, if parties could choose to submit the award or not to the Ministry of Justice, is that parties would take a risk-averse approach and decide not to publish. There is simply no immediate incentive for them to decide otherwise. This would then undermine the comprehensiveness of the statement, which would undermine its legitimacy and utility (and which could, ultimately, make it an expensive and unproductive exercise).¹⁶³ As such, it makes sense to require submission of all arbitral awards, but to ensure any concerns are alleviated, as this approach does. Ultimately, there must be a careful policy balance between the desirability of protecting the principle of party autonomy in arbitration on the one hand, and meaningfully facilitating access to information in the public interest, a balance which this proposal achieves.¹⁶⁴

¹⁶² Lo, above n 18, at 249, citing to Taiwan Construction Arbitration Association <www.tcaa.org.tw>.

¹⁶³ See the comments of Carbonneau in a slightly different context: Carbonneau, above n 19, at 599–600.

¹⁶⁴ Born, above n 1, makes this point using different examples, at 2788–2789:

There are important limitations on the parties' autonomy to agree upon the confidentiality of arbitral proceedings. ... [E]ven as between the parties to arbitral proceedings, there may be circumstances where an agreement regarding confidentiality will be unenforceable on public policy or mandatory law grounds. Examples include reporting obligations imposed by national securities regulations or disclosure and investigatory powers granted to governmental agencies. Thus, a confidentiality agreement may be unenforceable where it requires a party to violate securities disclosure requirements or competition law provisions.

There would, however, need be some scope for parties to apply to a court (in private) to release the tribunal from its obligation to submit the award to the Ministry of Justice. There are certain circumstances in which it may simply not be easy to publish any information from the award without the parties being identified. For instance, it may be that the statute in question relates to an industry in which there are only one or two parties, and it would be possible to extrapolate from any publication of legal information that those parties had been involved in a dispute, and which party the outcome had favoured. The court would only exercise this power in rare circumstances.

Another benefit, particularly as compared to the alternative approaches suggested above, is that the approach requires no extra effort on the part of the tribunal in terms of preparing the award for publication, and therefore no attendant extra costs for parties. Rather, under this proposal, the Ministry of Justice would be responsible for the summary, and would absorb the costs involved in preparing the summary. Because the arbitrators name would not be included in the statement of arbitral jurisprudence, it also lessens the risk that arbitrators will spend significantly more time preparing awards. The statement would not be an information source by which arbitrators would be assessed, so there is little incentive for them to spend any more time than they ordinarily would in preparing their awards.

There is some question over how useful this would be to courts and tribunals, as well as practitioners preparing for proceedings. This is particularly so in a common law system where case law is developed by analogising or distinguishing the facts of the case before the court with the factual matrices in earlier cases, and applying or developing case law accordingly.¹⁶⁵ It might be argued that a statement of the law without the factual context within which a tribunal made its decision is of little value. However, while it may be culturally unfamiliar, this approach is not an insurmountable hurdle. In Civil Code jurisdictions, for instance, judicial precedent does not play the same “leading role” as it does in the Common Law. Rather case law plays only a “supporting role”;¹⁶⁶ it is a secondary,

¹⁶⁵ Levi puts it more eloquently. The doctrine of common law precedent is “a process ... in which a proposition descriptive of the first case is made into a rule of law and then applied to a ... similar situation”: Edward H Levi *An Introduction to Legal Reasoning* (University of Chicago Press, Chicago, 1951) at 1, cited in James L Dennis “Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent” (1993) 54 *La L Rev* 1 at 4, which elaborates on Levi’s description. See also Richard Scragg *New Zealand’s Legal System: The Principles of Legal Method* (Oxford University Press, Melbourne, 2005) at 12–13 and ch 2 generally.

¹⁶⁶ Dennis, above n 165, at 3.

rather than primary, source of law.¹⁶⁷ What judges in Civil Code jurisdictions are seeking to do is discover the values or principles underpinning the law written in the Code and decide any case in accordance with those values. Case law is used to assist judges to discover those values, but is not relied on according to the strict doctrine of *stare decisis* that binds common law courts.¹⁶⁸ So, although judges in Civil Code jurisdictions do rely on prior case law, the value placed on it is of far less weight. In terms of how this applies to the proposed statement of arbitral jurisprudence, future tribunals or courts would use the statement merely as a guide to assist them in discovering the purpose of the law in responding to a new situation. So, if the issue on which a tribunal has adjudicated concerns an issue that has not been legislated for, the purely legal elements of the tribunal's reasoning will give some guidance to later tribunals and courts as to what that tribunal thought the solution should be. Equally, if the first tribunal's decision concerned the interpretation of a statute, this will give future tribunals and courts some guidance in determining the mischief to which the provision was directed. The statement would operate with the persuasive effect of a legal text, for instance. Finally, however, the statement may also have the capacity to be of heightened persuasive authority in regards to points that have been followed by a number of tribunals – having the same effect as the doctrine of *jurisprudence constante*.¹⁶⁹ The statement would indicate this consistency of approach as it developed through its annual iterations thus according the legal point greater value.

The final concern is that because the statement is prepared by a unit within the Ministry of Justice, who would be bound by the strictest confidentiality requirements, the information is, to some extent, “second hand”, and this may undermine the value that future courts or tribunals place on the statement. While this may somewhat undermine its potential in becoming, via practice, a more formal source of precedent, followed as a matter of course, it is submitted that courts and tribunals would not dismiss it out of hand. Providing that the unit within the Ministry of Justice was well-funded, its work would be likely be given similar

¹⁶⁷ Mary Ann Glendon, Paolo G Carozza and Colin B Picker *Comparative Legal Traditions* (3rd ed, Thomson West Publishing, St Paul, 2008) at 127.

¹⁶⁸ See Dennis, above n 165, at 3, 5 and 10–13.

¹⁶⁹ *Black's Law Dictionary* defines the doctrine of *jurisprudence constante* in the following terms:

The doctrine that a court should give great weight to a rule of law that is accepted and applied in a long line of cases, and should not overrule or modify its own decisions unless clear error is shown and injustice will arise from continuation of a particular rule of law.

Bryan A Garner (ed) *Black's Law Dictionary* (9th ed, Thomson Reuters, St Paul, 2009) at 933. See also Dennis, above n 165, at 14–15.

weight to that of many legal textbooks: a persuasive guide as to how a tribunal and court should interpret the law.

V CONCLUSION

In the inexorable advance towards achieving greater transparency in international commercial arbitration, the focus has so far been on non-national mechanisms. As this paper has illustrated, however, a national requirement for some form of publication of arbitration awards is fundamental to meeting a range of public interests for which arbitral institutions have little or no incentive to provide. These range from high-level rule of law considerations of central interest to the public of a democratic state, to specific information to be derived from arbitral awards that would serve the interests of particular sectors of the national (and, to an extent, international) public, whether that be the public at large, the business community, practitioners in and aspirants to the legal services market, or otherwise.

The mechanism to be adopted in facilitating access to such information requires a careful balance though. Meeting the public interests must be achieved in a way that is cognisant of the competing interests of parties to arbitrations: fundamentally, relating to the confidentiality of sensitive reputational or business information, and the cost and efficiency of arbitration as a method of dispute resolution. If this balance is incorrectly struck, parties will choose an alternative seat for their arbitration or may be turned off arbitration altogether. This is particularly important for a country like New Zealand, when looking to establish itself as an international arbitration venue.

This paper argues that the best way to achieve this balance is through a “statement of arbitral jurisprudence” to be published by the New Zealand Ministry of Justice annually, which would create an information source of the legal rulings of arbitral tribunals where the arbitration has New Zealand as its seat. Rather than acting as a non-practical, “greater-than-necessary infringement on party autonomy”,¹⁷⁰ such a mechanism would provide a practical means of facilitating access to information that meets key *national* interests, unlikely to otherwise be met, without discouraging parties from using arbitration or from choosing New Zealand (or any other country to adopt the mechanism) as the seat for their arbitration.

¹⁷⁰ Karton, above n 8, at 478. See above at n 19, and accompanying text.

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