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A DIFFICULT BALANCE: OPEN JUSTICE AND THE
PROTECTION OF CONFIDENTIALITY IN
ARBITRATION RELATED COURT PROCEEDINGS

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Table of Contents

I	Introduction.....	1
II	Distinguishing Privacy and Confidentiality.....	2
III	A Legal Basis for Confidentiality in International Arbitration.....	3
	A Party Autonomy.....	3
	B National Law.....	5
	C Implied Obligation of Confidentiality	6
	D Choice of Institutional Rules	10
IV	Limitations on Confidentiality: Defining its Scope.....	12
	A Existence of the Arbitration.....	13
	B Confidentiality of the Proceedings.....	14
	C Confidentiality of the Award	14
	D Exceptions to Confidentiality	15
V	Privacy and Confidentiality in the Arbitration Related Court Proceedings.....	19
	A Open Justice and the Current New Zealand Position.....	19
	B New Zealand Case Law on Confidentiality Predating the Existing Provisions.....	23
	C A Proposal for a Presumption of Privacy in Arbitration Related Court Proceedings...	24
	D Policy behind the Current Law	25
	E Rulings on Access to Court Documents in Usual Court Proceedings	28
	F Comparative Approaches to Confidentiality in the Courts.....	31
	1 Canada.....	32
	2 Switzerland.....	32
	3 Scotland.....	33
	4 United States	33
	5 Singapore.....	34
	6 Hong Kong	34
	G A Balance of Issues: Should the Presumption Favour Private Hearings?	34
VI	Conclusion	37
VII	Appendix.....	39
VIII	Bibliography	41

Abstract

Confidentiality in International Commercial Arbitration is important to parties dealing in commercially sensitive information. Arbitrating parties have legitimate expectations of confidentiality, which is addressed to varying degrees in national laws, the courts and institutional rules. This paper assesses the irregular approach to confidentiality internationally, with a particular focus on the comprehensive codification of the obligation in New Zealand under the Arbitration Act 1996. The paper focuses in particular on confidentiality expectations in arbitration related court proceedings, which is where a careful balance must be struck between the principle of open justice and the protection of confidentiality. In assessing the application regime under the New Zealand statute, the paper explores comparative approaches and possible options for reform, concluding that an appropriate change would be to more readily allow consenting parties to have access to private court proceedings.

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I Introduction

International commercial arbitration presents an alternative method of dispute resolution for parties who voluntarily agree to the jurisdiction of an independent, nongovernmental decision-maker.¹ Unlike the public nature of litigation, it is widely considered that a fundamental purpose of parties agreeing to arbitration is to remove the resolution of disputes from the otherwise compulsory and public forum provided by the courts.² It is therefore considered by many absurd to suggest that confidentiality is not an essential core concept of international commercial arbitration.³ It is viewed as a key attraction to many participants.⁴

The value of arbitration over litigation takes many different forms for parties involved in a dispute over an international commercial contract, including greater party autonomy, greater predictability of the applicable governing law, greater efficiency in terms of both money and time, greater certainty of the forum in which the dispute will be heard and of relevant jurisdictional issues, and a greater ability to enforce the resulting decision in foreign countries.⁵

Where confidentiality is recognised as an obligation on arbitrating parties, difficulties arise when an aspect of that dispute is referred before a national court, as it is the default position that litigation, unlike arbitration, is conducted in public and on the record.⁶ A careful balance must be struck between the legitimate interests of the parties in maintaining confidentiality in relation to what are often highly commercially sensitive disputes and the duty of the courts to administer justice fairly and transparently in open court. While the New Zealand Arbitration Act 1996 does provide parties with an application process to request an order that proceedings be held in private and that judgments not contain confidential and identifying information, the application of this regime has thus far been weak. There is, perhaps, an opportunity for reform in this application process to better meet the confidentiality needs of some litigants.

This paper begins by assessing the foundations for confidentiality in international arbitrations. Part II addresses the distinction between privacy and confidentiality,

¹ Gary B Born and Peter B Rutledge *International Civil Litigation in United States Courts* (5th ed, Wolters Kluwer Law & Business, New York, 2011) at 1083.

² Adrian Briggs *Private International Law in English Courts* (Oxford University Press, Oxford, 2014) at 991.

³ Serge Lazareff “Confidentiality and Arbitration: Theoretical and Philosophical Reflections” [2009] ICC Ct Bull Supp 81 at 81.

⁴ Nigel Blackaby and others *Redfern and Hunter on International Arbitration* (6th ed, Oxford University Press, Oxford, 2015) at [1.96].

⁵ Cindy G Buys “The Tensions Between Confidentiality and Transparency in International Arbitration” (2003) 14 Am Rev Intl Arb 121 at 122.

⁶ George Burn and Alison Pearsall “Exceptions to Confidentiality in International Arbitration” [2009] ICC Ct Bull Supp 23 at 24.

commenting on how the two concepts differ and interrelate. This is followed by a detailed assessment of the legal basis for confidentiality in international arbitration in part III. The legal basis is split into the primary sources of confidentiality obligations which are generally recognised in various jurisdictions, namely party autonomy, national law, an implied duty and institutional rules. Part IV then deals with the exceptions to confidentiality, particularly focusing on those described in the New Zealand Arbitration Act 1996. This leads into a detailed discussion of the law surrounding arbitration related court proceedings, which are when a party submits an issue which arises from an arbitration to a national public court; for example, to have an award enforced or set aside. The policy behind whether the court hears such an application in private or in public is analysed to look at whether the New Zealand law strikes the correct balance, or whether it should be updated. A recent proposal from the Arbitrators' and Mediators' Association of New Zealand (AMINZ) to create a presumption of confidentiality for arbitration related court proceedings is evaluated, with the remainder of the paper examining this proposal through a comparative and policy based approach.⁷

II *Distinguishing Privacy and Confidentiality*

Confidentiality is distinct from privacy. Privacy is the expectation that parties are “entitled to assume at the least that the hearing will be conducted in private”.⁸ Only parties to the arbitration agreement, not third parties, may attend the hearing.⁹ The concept of privacy is uncontroversial and generally accepted as an integral part of arbitration.¹⁰ Privacy may be deeply established in arbitration custom, but it does not amount to confidentiality, which “implicates a legal obligation to avoid public disclosure of sensitive information”.¹¹ Confidentiality is perceived to encourage “efficient, dispassionate dispute resolution”, facilitating settlement by minimising “public posturing” and reducing or eliminating the often significant and damaging risks of disclosing commercially sensitive information to the public.¹² However, it is not an absolute, nor even necessarily an implied, obligation. Nor is it clear whether, simply because an arbitration is private, it must also be confidential.¹³ There is no uniform answer in national laws as to the extent of the duty and parties that have not expressly agreed to confidentiality cannot assume that it will be an implied obligation

⁷ See Arbitrators' and Mediators' Institute of New Zealand “Submission to the Justice and Electoral Select Committee on the Judicature Modernisation Bill 2013” [AMINZ Submission].

⁸ *Hassneh Insurance Co of Israel v Mew* [1993] 2 Lloyd's Rep 243 (QB) at 246–247.

⁹ Gary B Born *International Commercial Arbitration* (2nd ed, Kluwer Law International, Alphen aan den Rijn, 2014) at 2782.

¹⁰ Simon Greenberg, Christopher Kee and J Romesh Weeramantry *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press, New York, 2011) at 371.

¹¹ David D Caron, Lee M Caplan and Matti Pellonpää *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press, Oxford, 2006) at 33.

¹² Born, above n 9, at 2781.

¹³ L Yves Fortier “The Occasionally Unwarranted Assumption of Confidentiality” (1999) 15 Arb Intl 131 at 132.

recognised in all jurisdictions.¹⁴ To some extent, for privacy to have meaning there must be some degree of confidentiality.

Confidentiality has been considered essential to arbitration as it recognises the needs of businesses to maintain secrecy inherent in their dealings.¹⁵ The protection of business secrets is perhaps the primary purpose of a principle of confidentiality.¹⁶ This purpose is reflected in the UNIDROIT Principles of International Commercial Contracts:¹⁷

Where information is given as confidential by one party in the course of negotiations, the other party is under a duty not to disclose that information or to use it improperly for its own purposes, whether or not a contract is subsequently concluded.

This principle, although specifically for negotiations, is the affirmation of a broader principle of confidentiality and secrecy in business dealings.¹⁸ As will be seen throughout this paper, such a principle must compete against other fundamental principles of public interest and, at least where the courts become involved, open justice.

III A Legal Basis for Confidentiality in International Arbitration

Establishing a legal basis for confidentiality is important for understanding the different approaches taken internationally. Some jurisdictions maintain an absolute duty of confidentiality in all possible situations while others do not recognise a duty unless it explicitly forms part of the individual contract. This part will outline various approaches to finding a duty of confidentiality so that the scope of such a duty can be properly considered.

A Party Autonomy

It is not controversial to state that parties may agree to confidentiality as one of the terms of their arbitration agreement; party autonomy will be recognised and enforced by domestic courts.¹⁹ Under New Zealand law, the ability for parties to freely agree on the procedural rules of their arbitration is provided for under the Arbitration Act 1996.²⁰ Explicit agreement can be in the form of a provision in the arbitration agreement or as a separate legal

¹⁴ Leon E Trakman “Confidentiality in International Commercial Arbitration” (2002) 18 Arb Intl 1 at 1.

¹⁵ Lazareff, above n 3, at 82.

¹⁶ John Savage and Emmanuel Gaillard *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, Alphen aan den Rijn, 1999) at [384].

¹⁷ International Institute for the Unification of Private Law (UNIDROIT) *UNIDROIT Principles of International Commercial Contracts* (2010) [UNIDROIT Principles], art 2.1.16.

¹⁸ Lazareff, above n 3, at 82.

¹⁹ Born, above n 9, at 2787; and Edward R Leahy and Carlos J Bianchi “The Changing Face of International Arbitration” (2000) 17(4) J Intl Arb 19 at 36.

²⁰ Schedule 1, art 19(1).

agreement.²¹ The New York Convention potentially supports an implied requirement to give effect to parties' agreements with regard to confidentiality in Articles II(1) and II(3).²² Party autonomy is regarded by commentators as playing a central role in jurisdictions which contain specific rules on confidentiality and in those which do not.²³ Parties may also, of course, agree that their arbitration should be conducted in public. Such an approach can be beneficial, particularly where one party is a government entity and the arbitration tribunal has to deal with significant issues of public policy, such as in investor-state arbitrations.²⁴

The courts in most countries tend to uphold a principle of party autonomy also. In the Australian High Court, it has been held that if arbitrating parties "wished to secure the confidentiality of the materials prepared for or used in the arbitration ... they could insert a provision to that effect in their arbitration agreement".²⁵ There also tends to be a rejection of arguments that the public nature of judicial proceedings should apply to international arbitral proceedings.²⁶ The Swiss Federal Tribunal has held that it is "not possible to derive a right to a public hearing in the framework of the arbitration proceedings" as the European Convention on Human Rights and the Swiss Federal Constitution "are not applicable to voluntary arbitration proceedings according to the correct understanding of the case law".²⁷ A similar approach can be seen in the English courts, where the Court of Appeal has held:²⁸

In agreeing to [arbitrate] both parties waived their right to a hearing before the courts (except in accordance with the 1996 [Arbitration] Act). They also waived their right to a public hearing.

Party autonomy, while a fundamental principle of contract law, is not absolute. Arbitration is subject to the applicable law of the seat, including its mandatory rules and the influence of the governing law on the interpretation of contractual terms, which do not have an absolute natural meaning that can be ascertained without the context of a legal system.²⁹ Such limitations do not extend to the ability to voluntarily agree to confidentiality. Where two parties expressly agree to confidentiality, that agreement is an enforceable clause of their arbitration agreement; such recognition of party autonomy over confidentiality will generally

²¹ Ileana Smeureanu *Confidentiality in International Commercial Arbitration* (Kluwer Law International, Alphen aan den Rijn, 2011) at 9.

²² Born, above n 9, at 2783.

²³ Filip De Ly, Luca Radicati di Brozolo and Mark Friedman "International Law Association International Commercial Arbitration Committee's Report and Recommendations on 'Confidentiality in Commercial Arbitration'" (2012) 28 *Arb Intl* 355 at 359.

²⁴ See for example David A Gantz "The Evolution of the FTA Investment Provisions: From NAFTA to the United States-Chile Free Trade Agreement" (2004) 19 *Am U Intl L Rev* 679 at 748.

²⁵ *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 at 29.

²⁶ See Born, above n 9, at 2788.

²⁷ *Judgment of 10 February 2010* DFT 4A 612/2009 (Swiss Federal Tribunal) at [4].

²⁸ *Stretford v Football Association Ltd* [2007] EWCA Civ 238 at [66].

²⁹ Giuditta Cordero-Moss "Limitations on Party Autonomy in International Commercial Arbitration" (2014) 372 *Recueil des Cours* 129 at 143.

be recognised in all developed legal systems, being an extension of the parties' broader procedural autonomy.³⁰ It is where parties have agreed to arbitrate but have not made express mention of confidentiality obligations that the consistency of a duty of confidentiality begins to break down.

B National Law

Most arbitration statutes do not provide for a general principle of confidentiality.³¹ In this regard, New Zealand is an outlier as there is an explicit duty of privacy and of confidentiality in the Arbitration Act 1996, as follows:³²

14A Arbitral proceedings must be private

An arbitral tribunal must conduct the arbitral proceedings in private.

14B Arbitration agreements deemed to prohibit disclosure of confidential information

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

Parties to an arbitration agreement may agree not to apply the statutory provisions if they wish; party autonomy ultimately can decide this procedure.³³ Notably, express agreement is not necessary, so the term "agreed otherwise" could potentially extend to where the parties have included a confidentiality clause which varies from the position under the Act. In such a situation it is likely that the extent to which a party has contracted out will depend on the particular clause and the Act will be interpreted as applying in the case of any ambiguity but not where it is contradictory.³⁴

Australia has recently updated its legislation to include a similar obligation not to disclose confidential information in arbitrations governed by the International Arbitration Act 1974 (Cth).³⁵ These confidentiality provisions were initially introduced on an opt-in basis, requiring parties to agree to be bound by them. The law was updated through amendments in the Statute Law Revision Act (No 2) 2015 (Cth) to reverse the onus, instead requiring parties

³⁰ Born, above n 9, at 2787. The parties' broader procedural autonomy is recognised in the New York Convention; see 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], arts 2 and 5(1)(d).

³¹ 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* (JurisNet, New York, 2013) 53 at 69; see also Born, above n 9, at 2786.

³² Sections 14A–14B.

³³ Section 14.

³⁴ David AR Williams and Amokura Kawharu *Williams & Kawharu on Arbitration* (LexisNexis, Wellington, 2011) at 365.

³⁵ International Arbitration Act 1974 (Cth), ss 23C–23G.

to opt out of the provisions by agreement, just as in New Zealand. The Arbitration (Scotland) Act 2010 imposes an obligation of confidence,³⁶ as does the Hong Kong Arbitration Ordinance 2011, which is modelled on the New Zealand Arbitration Act and provides similarly for a duty of confidence with finite listed exceptions.³⁷ Other jurisdictions which take a similar approach include Peru, Romania and Spain.³⁸

Notably, despite the great importance placed on confidentiality in English courts, the Arbitration Act 1996 (UK) is silent on the matter of confidentiality. This reflects the “difficulty of reaching a statutory formulation”³⁹ and was considered to be “better left to the common law to evolve”.⁴⁰ In contrast, Norway explicitly provides that no duty of confidentiality exists unless the parties have agreed to it, although the privacy of the hearing is protected.⁴¹

C Implied Obligation of Confidentiality

Where the parties have not agreed explicitly to confidentiality and there is no statutory guidance, the courts of some jurisdictions have been willing to imply an obligation of confidentiality based on the mere existence of the arbitration.⁴² Other courts refuse to make such a finding.⁴³ The English courts have a long-standing tradition of confidentiality based on the premise of keeping “quarrels from the public eye ... which surely might be an injury even to the successful party in the litigation, and most surely would be to the unsuccessful”.⁴⁴ The English Court of Appeal in *Dolling-Baker v Merrett* indicated in obita dicta that:⁴⁵

... although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must ... be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the arbitration, or transcript or notes of evidence in the arbitration or award ... save with the consent of the other party, or pursuant to an order or leave of court.

³⁶ Schedule 1, r 26.

³⁷ Arbitration Ordinance 2011 c 609 (Hong Kong), s 18.

³⁸ See Peruvian Arbitration Act, art 51; Romanian Code of Civil Procedure, art 353; and Spanish Arbitration Act 2011, art 24(2).

³⁹ Kyriaki Noussia *Confidentiality in International Commercial Arbitration: A Comparative Analysis of the Position under English, US, German and French Law* (Springer-Verlag, Berlin, 2010) at 58.

⁴⁰ Departmental Advisory Committee on Arbitration Law *Report on the Arbitration Bill 1996* (United Kingdom, February 1996) at [10].

⁴¹ Lov om voldgift 2004 (Norwegian Arbitration Act 2004) § 5.

⁴² See Blackaby and others, above n 4, at [2.165]–[2.176].

⁴³ See generally James Hargrove “Misplaced Confidence? An Analysis of Privacy and Confidentiality in Contemporary International Arbitration” (2009) 3 *Disp Res Intl* 47.

⁴⁴ *Russell v Russell* (1880) 14 Ch D 471 (Ch) at 474.

⁴⁵ *Dolling-Baker v Merrett* [1991] 2 All ER 891 (CA) at 896.

Essentially, the English courts imply an obligation of confidentiality in the common law which derives from the private nature of arbitrations, a position which is rooted in the history of arbitration developing in England as a way for merchant guilds to resolve disputes internally, in secret, without recourse to the public courts.⁴⁶ In a later decision of the English High Court in *Hassneh Insurance Co of Israel v Mew*, the existence of an implied duty was explicitly recognised as a natural extension of privacy.⁴⁷ Where all agreements to arbitrate imply that the hearing will be held in private, then that requirement of privacy must, in the Court's view, extend to the documents which are created for the purpose of that hearing, such as a note or transcript. The disclosure of such a document would undermine the private nature of the dispute, essentially "opening the door of the arbitration room to [a] third party".⁴⁸

Subsequent cases in the English Court of Appeal have firmly entrenched confidentiality as an implied principle of English law. In *Ali Shipping Corporation v 'Shipyards Trogir'*, the principle advanced in *Hassneh* was confirmed, the Court stating that confidentiality is founded on the privacy of arbitral proceedings and that an implied term of confidentiality "arises as the nature of the contract itself implicitly requires".⁴⁹ However, it was recognised that the scope of the duty had not been fully explored yet in the common law and was yet to be fully defined.⁵⁰ Coming back to the issue again in the more recent decision of *Emmott v Michael Wilson & Partners Ltd*, the Court of Appeal held that there was a firmly established obligation of confidentiality arising from the common law, which is implied as arising out of the nature of arbitration itself.⁵¹ It can be said then that it is a well-established principle in English common law that, although there is no statutory obligation of confidentiality, it is instead implied and defined by the common law. The approach in *Ali Shipping* was also reviewed by the Privy Council in an appeal from Bermuda, which confirmed that commercial arbitrations are essentially private proceedings, meaning implied restrictions on material may have a greater impact than restrictions in litigation.⁵² However, the same did not apply to the award, as an arbitral award may need to be subject to exceptions for the purposes of pursuing legal proceedings or enforcing the rights granted in the award.⁵³

Other jurisdictions also imply an obligation of confidentiality, including civil law countries such as France, Germany and Switzerland.⁵⁴ Arbitration did not develop properly in France until the 20th Century despite a law from 1790 prohibiting any hindrance of arbitration,

⁴⁶ Lazareff, above n 3, at 81.

⁴⁷ *Hassneh Insurance Co of Israel v Mew*, above n 8.

⁴⁸ At 247.

⁴⁹ *Ali Shipping Corporation v 'Shipyards Trogir'* [1998] 1 Lloyd's Rep 643 (CA) at 651.

⁵⁰ At 651.

⁵¹ *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184 at [105].

⁵² *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Company of Zurich* [2003] UKPC 11 at [20].

⁵³ At [20].

⁵⁴ Gu Weixia "Confidentiality Revisited: Blessing or Curse in International Commercial Arbitration?" (2004) 15 *Am Rev Intl Arb* 607 at 610.

primarily because the arbitration process was abused throughout the 18th and 19th Centuries.⁵⁵ The French courts have previously recognised an inherent right to confidentiality in arbitration, notably in a case where a party applied for the annulment of an award made in London.⁵⁶ The Court held that this was done for the purpose of publicising the award, was in breach of the implied duties of confidentiality and imposed significant damages, indicating that it is the “very nature of arbitral proceedings that they ensure the highest degree of discretion in the resolution of private disputes”.⁵⁷ More recently, the French arbitration legislation has updated to include an express confidentiality obligation for domestic arbitrations, but not international arbitrations.⁵⁸ This is because the legislature did not wish to impose confidentiality on all arbitrations seated in France, with the increasing importance placed on transparency in international investment arbitrations, although it may still be arguable that the recognised implied duty continues to exist.⁵⁹

Singapore has adopted a similar approach to the English courts, recognising an obligation of confidentiality implied through the common law but subject to appropriate exceptions.⁶⁰ Justice Kan Ting held in the Singapore High Court that it is “more in keeping with the parties’ expectations to take the position that proceedings are confidential”, although with the possibility of disclosure in certain instances.⁶¹

In contrast to the English position and those jurisdictions which take a similar approach, the courts of other jurisdictions have rejected the notion of an implied obligation of confidentiality, usually in claims by third parties not covered by the arbitration agreement seeking disclosure of materials.⁶² The High Court of Australia in the *Esso Australia* case noted that complete confidentiality can never be achieved, as no obligation attaches to witnesses, there are various situations in which an arbitration award or proceedings may come before the courts and other disclosure obligations can exist, such as for insurance policies, statutory requirements for financial information reporting and stock exchange requirements.⁶³ Confidentiality was historically a mere convenience of privacy, not grounded in any legal right or obligation.⁶⁴ Ultimately the court found that confidentiality is not an essential attribute of private arbitration and does not impose any sort of implied obligation.⁶⁵

⁵⁵ Noussia, above n 39, at 63.

⁵⁶ *Aita v Ojeh* (1986) Revue de l'Arbitrage 583 (Paris Cour d'appel).

⁵⁷ At 584.

⁵⁸ French Code of Civil Procedure, arts 1464 and 1506.

⁵⁹ Born, above n 9, at 2799.

⁶⁰ See *AAY v AAZ* [2009] SGHC 142, [2011] 1 SLR 1093 at [55].

⁶¹ *Myanma Yaung Chi Oo Co Ltd v Win Win Nu* [2003] SGHC 124 at [17].

⁶² Born, above n 9, at 2795.

⁶³ *Esso Australia Resources Ltd v Plowman*, above n 25, at 28–29.

⁶⁴ At 29–30.

⁶⁵ At 30.

A similar rejection of confidentiality as an implied obligation can be seen in Swedish law,⁶⁶ where the Supreme Court has rejected a general implied duty.⁶⁷ This inconsistency across jurisdictions questions whether confidentiality really is the core principle that some make it out to be. Certainly it was the rejection of confidentiality as a core principle of arbitration in the *Esso* case which resulted in much of the uncertainty and academic discussion of the issue,⁶⁸ even described by one commentator as a “nuclear event, which sent seismic tremors throughout the arbitration community”.⁶⁹ In Australia, the rejection of confidentiality has been particularly in cases where one of the parties is the government and a confidentiality provision would not be in the public interest. In *Cockatoo Dockyard*, the ruling by an arbitrator that an obligation of confidentiality should be imposed on the proceedings was overruled by the Court, which held that such a power would prevent the disclosure of information and documents to state agencies or the public which ought to be made known.⁷⁰ Similarly in Canada the Superior Court of Ontario has held:⁷¹

The arbitration relationship generally benefits greatly from the element of confidentiality. The confidentiality of arbitration proceedings should be fostered to maintain the integrity of the arbitration process. I do not regard confidentiality as essential to the arbitration process. ... In balancing the interests served by confidentiality against the interests served in determining the truth and disposing correctly of the litigation, I do not think the confidentiality of arbitration proceedings should be elevated to the status of a privilege such as solicitor-client or spousal privilege or, on occasion, doctor-patient or spiritual adviser-penitent. I am not persuaded that the confidentiality of the arbitration process, including the need to encourage the truth of the evidence therein, is so important as to outweigh the need in this court for justice if that requires the disclosure.

This Canadian position leans more towards an indication that an implied obligation of confidentiality should be encouraged, but only to the extent that it does not outweigh any public interest in disclosure. The United States have consistently been reluctant to recognise an implied duty. It is considered that as the Federal Arbitration Act⁷² and the Uniform Arbitration Act, on which states have based their arbitration provisions,⁷³ do not contain provisions for confidentiality, then it is not imposed unless the parties agree to it.⁷⁴ Such a position was taken by a United States federal district court in an application to prevent

⁶⁶ See Hans Bagner “Confidentiality—A Fundamental Principle in International Commercial Arbitration?” (2001) 18 J Intl Arb 243 at 248.

⁶⁷ *AI Trade Finance Inc v Bulgarian Foreign Trade Bank Ltd* (2000) 15 Mealey’s Intl Arb Rep A1 (Supreme Court of Sweden, 27 October 2000).

⁶⁸ Williams and Kawharu, above n 34, at 362.

⁶⁹ Patrick Neill “Confidentiality in Arbitration” (1996) 12 Arb Intl 287 at 289.

⁷⁰ *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* [1995] 36 NSWLR 662 (NSWCA) at 682.

⁷¹ *Adesa Corp v Bob Dickenson Auction Service Ltd* (2004) 73 OR (3d) 787 (ONSC) at [56].

⁷² Federal Arbitration Act 9 USC § 1.

⁷³ See for example Uniform Arbitration Act 15 South Carolina Code 48 § 10.

⁷⁴ Blackaby and others, above n 4, at [2.173].

disclosure to a third party.⁷⁵ Subsequent cases have also rejected finding a duty of confidentiality in the absence of express agreement by the parties or the adoption of institutional rules which provide for such an obligation.⁷⁶

Internationally, there is no uniformity to the question of an implied duty of confidentiality. Arbitrating parties will need to be cautious when they have not explicitly agreed to confidentiality and it is not provided for under national law.

D Choice of Institutional Rules

Most contractual confidentiality agreements tend to adopt the provisions of institutional rules and incorporate them into the arbitration clause.⁷⁷ Many institutional rules deal with confidentiality to some extent and as they are explicitly adopted by the consent of the parties, they determine the rules of the arbitration in the same way as if they were clauses of the arbitration agreement. The autonomy to agree to such rules will be recognised; it is an exercise of the principle of party autonomy, discussed previously. Even where confidentiality is not expressly mentioned, privacy is recognised in all institutional rules and it may potentially be implied as in national courts from the particular privacy terms.⁷⁸

The International Chamber of Commerce (ICC) is one of the most widely used arbitration institutions but is generally silent about a general confidentiality obligation;⁷⁹ indeed, the rules of the ICC have never contained provisions which expressly require either the parties or the arbitrators to protect the confidentiality of the arbitration.⁸⁰ The working party responsible for the ICC Rules in 1998 avoided regulating the question of confidentiality as agreeing on an appropriate formulation for a general duty with appropriate exceptions was considered too difficult.⁸¹ Rather, certain provisions of the ICC Rules of Arbitration apply to specific situations. The confidentiality of the award, for example, is expressly provided for,⁸² although the ICC has a practice of publishing redacted awards which maintain confidentiality by removing the names of the parties and any identifying material. For example:⁸³

⁷⁵ *United States v Panhandle Eastern Corp* 118 FRD 346 (D Del 1988).

⁷⁶ See for example *Contship Containerlines Ltd v PPG Industries Inc* 00 Civ 0194 RCCHBP (SD NY 2003).

⁷⁷ Born, above n 9, at 2790.

⁷⁸ Williams and Kawharu, above n 34, at 388.

⁷⁹ Antonias Dimolitsa "Institutional Rules and National Regimes Relating to the Obligation of Confidentiality on Parties in Arbitration" [2009] ICC Ct Bull Supp 5 at 8.

⁸⁰ Yves Derains and Eric A Schwartz *A Guide to the ICC Rules of Arbitration* (Kluwer Law International, Alphen aan Den Rijn, 2005) at 284.

⁸¹ Dimolitsa, above n 79, at 8.

⁸² International Chamber of Commerce *ICC Rules of Arbitration* (2012), art 34(2).

⁸³ *Final award in case no 16484* (2014) 39 Yearbook Comm Arbn 216 (ICC) at 217.

The Zambian Contractor and the Zambian Producer entered into a contract ... under which Contractor would supply and install certain equipment at Producer's site and provide related services. ... Zambian law was the governing law.

This redaction is sufficient to protect the parties' interests in confidentiality while providing enough context to give meaning to the determination on the applicable law made by the arbitrator.

The ICC Rules also provide for the privacy of the arbitral proceedings⁸⁴ and, instead of a general duty of confidentiality, instead provide the arbitral tribunal with the power to make orders concerning confidentiality and to take measures to protect trade secrets and confidential information.⁸⁵ Although there may be an implicit obligation of confidentiality under the ICC Rules,⁸⁶ ICC arbitrators often propose that the parties should include a confidentiality clause in their terms of reference where it may be of particular concern.⁸⁷

Similar concerns around a general rule of confidentiality arose for the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), which found that comments on proposed revisions were overwhelmingly against an obligation of confidentiality initially. Based on this response, it was observed that the importance of confidentiality for parties should not be exaggerated.⁸⁸ The most recent version of the SCC Arbitration Rules does impose an obligation to maintain the confidentiality of the proceedings and the award, but such an obligation is only applicable to the arbitral tribunal and the SCC, not the parties.⁸⁹

Other institutional rules tend to require confidentiality. The Australian Centre for International Commercial Arbitration (ACICA) Arbitration Rules impose a general duty of confidentiality for all matters relating to the arbitration, including the existence of the arbitration, the award, and all materials, subject to standard exceptions relating to disclosures for lawful purposes which are discussed in part IV of this paper.⁹⁰ The London Court of International Arbitration (LCIA) Arbitration Rules contains a broad confidentiality provision, as follows:⁹¹

⁸⁴ Article 26(3).

⁸⁵ Article 22(3).

⁸⁶ Williams and Kawharu, above n 34, at 388.

⁸⁷ Bagner, above n 66, at 244.

⁸⁸ See Kaj Hobér and William McKechnie "New Rules of the Arbitration Institute of the Stockholm Chamber of Commerce" (2007) 23 *Arb Intl* 261.

⁸⁹ Arbitration Institute of the Stockholm Chamber of Commerce *Arbitration Rules* (2010), art 46.

⁹⁰ Australian Centre for International Commercial Arbitration (ACICA) *ACICA Arbitration Rules incorporating the Emergency Arbitrator Provisions* (1 August 2011) [ACICA Rules], art 18(2).

⁹¹ London Court of International Arbitration *LCIA Arbitration Rules* (2014), art 30(1).

The parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority.

This provision operates alongside the privacy of the proceedings⁹² and an obligation not to publish an award, including a redacted version, without the parties' consent.⁹³ This can be contrasted with the approach of the ICC, which publishes anonymised awards without consulting the parties. The leading commentary on the LCIA Rules is critical of the position taken by the LCIA, indicating that it is depriving it is actually "doing a disservice, since some favoured arbitrators and counsel will have access to many confidential awards that are not available to less-experienced parties and their representatives".⁹⁴

IV Limitations on Confidentiality: Defining its Scope

Once an obligation of confidentiality is accepted, the next step is to define the scope of that confidentiality obligation. It is not a complete obligation and is subject to numerous exceptions, but it is also "not limited to commercially confidential information in the traditional sense."⁹⁵ In New Zealand, although a wider implied duty of confidentiality could possibly be argued based on English law, the scope of the duty of confidentiality will primarily be determined by reference to the Arbitration Act. Under s 14B, the parties to any arbitration agreement to which the Act applies and the arbitral tribunal must not disclose any confidential information. Confidential information is extensively defined in the Act as follows:⁹⁶

confidential information, in relation to arbitral proceedings,—

- (a) means information that relates to the arbitral proceedings or to an award made in those proceedings; and
- (b) includes—
 - (i) the statement of claim, statement of defence, and all other pleadings, submissions, statements, or other information supplied to the arbitral tribunal by a party;
 - (ii) any evidence (whether documentary or otherwise) supplied to the arbitral tribunal:

⁹² Article 19(4).

⁹³ Article 30(3).

⁹⁴ Peter Turner and Reza Mohtashami *A Guide to the LCIA Arbitration Rules* (Oxford University Press, Oxford, 2009) at [9.28].

⁹⁵ *Emmott v Michael Wilson & Partners Ltd*, above n 51, at [105].

⁹⁶ Section 2(1), definition of "confidential information".

- (iii) any notes made by the arbitral tribunal of oral evidence or submissions given before the arbitral tribunal:
- (iv) any transcript of oral evidence or submissions given before the arbitral tribunal:
- (v) any rulings of the arbitral tribunal:
- (vi) any award of the arbitral tribunal

This definition is inclusive and does not preclude other confidential information from being within the regime. For example, information exchanged between the parties during discovery, or provided to an expert during the proceedings, may fall within the wider definition of “information that relates to the arbitral proceedings”.⁹⁷

A *Existence of the Arbitration*

Where a party seeks to keep confidential the very existence of an arbitration, a major motivation is likely to be protecting their reputation and the value of their company. For many arbitrating parties, the very existence of an arbitration can result in massive losses as shares are devalued by a panicking market.⁹⁸ This is perhaps why the mere fact that an arbitration exists and is pending may be viewed as a secret.⁹⁹ However, in many instances, the “cover-up” may be more damaging to a party’s reputation in the long term, as reputation is not just about value but also about trustworthiness.¹⁰⁰ This can result in one party wishing to present the existence of the arbitration to the public in a controlled manner, while the other party wishes to keep the entire arbitration completely confidential to protect their share value. Resolving this disagreement is not necessarily straightforward, even where an express confidentiality agreement exists.

It is suggested that it is “unrealistic and undesirable to establish an absolute prohibition against unilateral publication of the mere existence of the arbitration”.¹⁰¹ This would in most cases go beyond what any reasonable party would consider to be confidential, without express agreement that it should be. Parties may wish to be able to disclose the existence of an arbitration for practical commercial reasons, such as to explain a change in revenue and how management should respond to this.¹⁰² For a publicly listed company for example, its affairs should not be kept confidential where shareholders or employees have rights to be

⁹⁷ Williams and Kawharu, above n 34, at 364.

⁹⁸ Margaret L Moses *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, New York, 2008) at 189.

⁹⁹ Alexis C Brown “Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration” (2001) 16 *Am U Intl L Rev* 969 at 1001; and Francois Dessemontet “Arbitration and Confidentiality” (1996) 7 *Am Rev Intl Arb* 299 at 300.

¹⁰⁰ Miloš Novovic “Loose Lips Sink Ships: Mandatory Confidential Arbitration of Employment Disputes as a Reputational Risk Management Tool” (2014) 31 *J Intl Arb* 541 at 555.

¹⁰¹ Weixia, above n 54, at 618.

¹⁰² Jan Paulsson and Nigel Rawding “The Trouble with Confidentiality” (1995) 11 *Arb Intl* 303 at 304.

informed of matters affecting their investment or employment.¹⁰³ In other instance information about the arbitration may be required to be disclosed by law, such as providing information to auditors, shareholders or public regulators such as the New Zealand Exchange Ltd.¹⁰⁴

Under s 14B of the Arbitration Act, only the disclosure of confidential information is prohibited. As discussed, this definition is an inclusive one and the existence of the arbitration could possibly be considered “information relating to the arbitral proceedings”.¹⁰⁵ However, it is not specified as confidential information and did not feature in the Law Commission’s recommendation for a broad understanding of information entitled to be protected, which included pleadings, evidence, discovered documents and the award.¹⁰⁶ It seems then that, where a party does wish to disclose the existence of the arbitration and another party challenges that, arguments can be made that it is not something which is classed as confidential information and that such a restrictive interpretation of confidential information is undesirable. This may vary on the facts of any particular arbitration; for example, where disclosure of the existence of the arbitration would have a severe economic impact on one of the parties or would result in a great injustice. In such a situation though, it is likely the onus would fall on the party wishing to restrict disclosure of the existence of the arbitration to provide evidence as to why that is necessary.

B Confidentiality of the Proceedings

The confidentiality of the proceedings, as discussed, is the least controversial aspect of any sort of duty of confidentiality. As proceedings are conducted in private, confidentiality compliments the procedure by preventing the dissemination of documents and information relating to the ongoing proceedings and protects what is “said and done”.¹⁰⁷ This protects the interests of the parties and ensures an uninterrupted and fair resolution of the dispute before the arbitral tribunal.

C Confidentiality of the Award

Where parties disagree on the confidentiality of an award separate from the proceedings, the objection by one party to the publication of the award may be sufficient to create a duty not to

¹⁰³ Williams and Kawharu, above n 34, at 348. See *Cullen Investments Ltd v Lancaster* HC Auckland M908-IM01, 27 September 2002 at [123] (“Affairs relating to public companies should not be hidden and become the subject of gossip”).

¹⁰⁴ At 304; see Arbitration Act 1996, s 14C(d).

¹⁰⁵ Section 2(1), definition of “confidential information”.

¹⁰⁶ Law Commission *Improving the Arbitration Act 1996* (NZLC R83, 2003) at [53].

¹⁰⁷ Michael Fesler “The Extent of Confidentiality in International Commercial Arbitration” (2012) 78 Arb 48 at 49.

publish it.¹⁰⁸ The award forms part of the arbitral proceedings and can be considered to be covered by an agreement of confidentiality. An objecting party may need to show that they did not intend for the agreement to cover the award for publication to be allowed. This does not prevent publication in redacted form. It has been considered in the Court of Appeal that contracting parties should not be obliged by public policy to “make a compulsory contribution to the worthy cause of coherent evolution of commercial law”.¹⁰⁹

D Exceptions to Confidentiality

A difficulty in applying a duty of confidentiality is determining what legitimate exceptions apply to it.¹¹⁰ Under English law, as the duty is implied by the common law, it has been left to the courts to define the scope of the duty and to determine exceptions. It is observed that this theme of confidentiality is always qualified by the ability for the courts to determine limitations on a case-by-case basis, rendering the duty uncomfortably uncertain for parties in circumstances that have not been litigated before.¹¹¹ General guidance has been given in the English Court of Appeal:¹¹²

... the principle cases in which disclosure will be permissible are these: the first is where there consent, express or implied; the second, where there is an order, or leave of the court (but that does not mean that the court has a general discretion to lift the obligation of confidentiality); third, where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; fourth, where the interests of justice require disclosure, and also (perhaps) where the public interest requires disclosure.

An example of a public interest which would require disclosure according to the courts of Singapore is where there is reasonable cause to suspect criminal conduct.¹¹³ In Singapore, the existence of an implied duty is accepted, but will only be imposed “to the extent that it is reasonable to do so”.¹¹⁴

The New Zealand Arbitration Act provides for certain statutory exceptions to confidentiality. These are detailed in s 14C, which provides:

¹⁰⁸ Julian D Lew, Loukas A Mistelis and Stefan Michael Kröll *Comparative International Commercial Arbitration* (Kluwer Law International, Alphen aan den Rijn) at [24-99].

¹⁰⁹ *CBI NZ Ltd v Badger Chiyoda* [1989] 2 NZLR 669 (CA) at 677 per Cooke P.

¹¹⁰ Abigail Fransen “Legislating for Confidentiality: Defining the Ambit of Confidentiality in International Commercial Arbitration” (LLM Research Paper, Victoria University of Wellington, 2011) at 52.

¹¹¹ Blackaby and others, above n 4, at [2.169]. See for example *Milson v Ablyazov* [2011] EWHC 955 (Ch); and *Westwood Shipping Lines Inc v Universal Schiffahrtsgesellschaft mbH* [2012] EWHC 3837 (Comm).

¹¹² *Emmott v Michael Wilson & Partners Ltd*, above n 51, at [107].

¹¹³ *AAZ v AAZ*, above n 60, at 1131.

¹¹⁴ At 1120.

- A party or an arbitral tribunal may disclose confidential information—
- (a) to a professional or other adviser of any of the parties; or
 - (b) if both of the following matters apply:
 - (i) the disclosure is necessary—
 - (A) to ensure that a party has a full opportunity to present the party's case, as required under article 18 of Schedule 1; or
 - (B) for the establishment or protection of a party's legal rights in relation to a third party; or
 - (C) for the making and prosecution of an application to a court under this Act; and
 - (ii) the disclosure is no more than what is reasonably required to serve any of the purposes referred to in subparagraph (i)(A) to (C); or
 - (c) if the disclosure is in accordance with an order made, or a subpoena issued, by a court; or
 - (d) if both of the following matters apply:
 - (i) the disclosure is authorised or required by law (except this Act) or required by a competent regulatory body (including New Zealand Exchange Limited); and
 - (ii) the party who, or the arbitral tribunal that, makes the disclosure provides to the other party and the arbitral tribunal or, as the case may be, the parties, written details of the disclosure (including an explanation of the reasons for the disclosure); or
 - (e) if the disclosure is in accordance with an order made by—
 - (i) an arbitral tribunal under section 14D; or
 - (ii) the High Court under section 14E.

The list of exceptions draws on those that have been developed in the common law in both New Zealand and England,¹¹⁵ for example covering the guidance of the English Court of Appeal outlined above.¹¹⁶ The first exception is an obvious one, allowing parties to obtain legal advice.¹¹⁷ This is not limited to advisers that will attend the arbitration, but maintains confidentiality generally as professional advisers are bound by a fiduciary duty with their clients.

The second exception relates to where a party requires disclosure in order to enforce a legal right. The first of these relates to presenting the party's case at the actual arbitration, and would extend to disclosures made to witnesses.¹¹⁸ Whether a witness to an arbitration can be bound by confidentiality is a contentious issue. Part of the criticism of confidentiality expressed in the *Esso* case was that any implied duty arising from the contract does not

¹¹⁵ Williams and Kawharu, above n 34, at 368.

¹¹⁶ *Emmott v Michael Wilson & Partners Ltd*, above n 51, at [107].

¹¹⁷ Law Commission, above n 106, at [49].

¹¹⁸ Williams and Kawharu, above n 34, at 369.

extend to witnesses, as witnesses are not parties to the agreement.¹¹⁹ Therefore the duty would not extend to witnesses or advisers.¹²⁰ In New Zealand, because confidentiality is imposed by the Arbitration Act, there is a statutory basis for requiring non-parties who are involved in the arbitration to be bound by a duty of confidentiality. The High Court has held under the previous iteration of the confidentiality provision that, where any person comes into possession of an arbitral award (in this instance as a witness), there is an obligation to investigate any confidentiality that may attach to it before making use of the document.¹²¹ Some institutional rules address this issue by requiring the party calling the witness to ensure the witness maintains the same degree of confidentiality as is required of the party.¹²²

Disclosure to establish or protect an arbitrating party's legal rights in relation to a third party relates to the complexity of multiparty disputes.¹²³ This is when the result of an arbitral proceeding will affect another party, such as in *Hassneh Insurance* where the unsuccessful arbitrating party commenced litigation in the alternative against the broker that prepared its insurance contracts, claiming negligence.¹²⁴ In order to make that claim, the arbitral award between the litigant and the insurance company needed to be disclosed. The court held that this was necessary, but all other documents relating to the arbitration were to remain confidential.¹²⁵ A similar approach has been taken in New Zealand, the "just cause" approach, which is reflected in this exception.¹²⁶ The Court in *Pot Hole People* allowed the disclosure of an award on liability so that the applicant could defend itself against a statutory demand from a creditor. The award ruled on liability and showed that the applicant was expecting a substantial award of damages from ongoing arbitration.

The ability to breach confidentiality for the purposes of "the making and prosecution of an application to a court" is an important exception and will be the focus of the next part of this paper.¹²⁷ This exception is universally recognised, as there are many instances in which parties may need to apply to the courts for an order relating to an arbitration. Such instances would include applications under sch 1 of the Act for: a stay of proceedings, court-ordered interim measures, the appointment of arbitrators, challenging arbitrators, termination of an arbitrator's mandate, decisions on the mandate of the arbitral tribunal, assistance in taking

¹¹⁹ *Eso Australia Resources Ltd v Plowman*, above n 25, at 28–29.

¹²⁰ Hong-Lin Yu *Commercial Arbitration: The Scottish and International Perspectives* (Dundee University Press, Dundee, 2011) at 20.

¹²¹ *Beattie v Attorney-General* HC Auckland CIV-2003-404-3166, 11 June 2004 at [18]–[23].

¹²² ACICA Rules, above n 90, art 18(4).

¹²³ See Michael Collins "Privacy and Confidentiality in Arbitration Proceedings" (1995) 11 *Arb Intl* 321 at 323; for additional reading on interactions with third parties see also Loukas A Mistelis "Confidentiality and Third Party Participation: *UPS v Canada* and *Methanex Corporation v United States*" (2005) 21 *Arb Intl* 211.

¹²⁴ *Hassneh Insurance Co of Israel v Mew*, above n 8.

¹²⁵ At 248.

¹²⁶ *Pot Hole People Ltd v Fulton Hogan Ltd* (2003) 16 PRNZ 1023 (HC) at [29].

¹²⁷ Arbitration Act 1996, s 14C(b)(i)(C).

evidence, setting aside the award and enforcing the award.¹²⁸ Under sch 2 of the Act it would include applications for: consolidation of the arbitral proceedings, determination of preliminary points of law, appeals on questions of law, determinations on the reasonableness of costs and decisions regarding the extension of time.¹²⁹ However, these applications create problems for confidentiality, as court judgments will be considered in the public domain unless access is restricted by the court. Documents submitted before the court may also be accessible.

The third exception is primarily to allow disclosure in accordance with a court order where the arbitral award or documents are necessary to “enable justice to be done between other parties”.¹³⁰ It essentially establishes an “interests of justice” exception as was discussed in *Beattie*, where the interests of justice necessitate the production of the documents “notwithstanding the *prima facie* confidence attaching to [them]”.¹³¹ This is particularly important for non-parties who may need to rely on what would otherwise be a confidential arbitration award in order to enforce their legal rights.

Disclosures authorised by law under the fourth exception extend wider than the previous exceptions and covers many instances in which an interested third party may wish to receive confidential information. This includes complying with a company’s reporting requirements such as under the Listing Rules and fulfilling the statutory duties of public bodies including official information requests.¹³² Often it is a prerequisite for a company to participate in a financial market that it discloses to the public “timely, reliable and complete information” to ensure the transparency of the market.¹³³ For official information requests, documents may be withheld under the Official Information Act 1982 for reasons of confidentiality, such as protecting trade secrets and commercial interests, but that is subject to a balancing assessment with other public interest considerations.¹³⁴ This exception is generally recognised as parties are not able to contract out of mandatory national laws; see for example the ICDR Arbitration Rules, which indicate an award will only be made public with the consent of the parties or “as required by law”.¹³⁵

The exceptions provided under s 14C are not an exhaustive list, which raises the issue of who has the jurisdiction to decide issues of confidentiality.¹³⁶ This is answered under the New

¹²⁸ Schedule 1, arts 8–9, 11, 13–14, 16, 27, and 34–35.

¹²⁹ Schedule 2, cls 2–7.

¹³⁰ Law Commission, above n 106, at [46].

¹³¹ *Beattie v Attorney-General*, above n 121, at [30].

¹³² Williams and Kawharu, above n 34, at 373.

¹³³ Valéry Denoix de Saint Marc “Confidentiality of Arbitration and the Obligation to Disclose Information on Listed Companies or During Due Diligence Investigations” (2003) 20 J Intl Arb 211 at 214.

¹³⁴ Official Information Act 1982, s 9.

¹³⁵ International Centre for Dispute Resolution *ICDR Arbitration Rules* (2014), art 30(3).

¹³⁶ See Simon Crookenden “Who Should Decide Arbitration Confidentiality Issues?” (2009) 25 Arb Intl 603 at 606.

Zealand statute through the inclusion of an application regime for other instances of disclosure not covered by the listed exceptions. In accordance with the fifth exception, a party may apply under s 14D to the arbitral tribunal for an order allowing disclosure for any purpose not covered by s 14C. As the arbitral tribunal has a wide discretion, an order must be given in fairness to both parties and should be guided by reasonableness.¹³⁷ Such an order may also be appealed to the High Court under s 14E, with stricter requirements. The Court must be satisfied:¹³⁸

- (a) it is satisfied, in the circumstances of the particular case, that the public interest in preserving the confidentiality of arbitral proceedings is outweighed by other considerations that render it desirable in the public interest for the confidential information to be disclosed; and
- (b) the disclosure is no more than what is reasonably required to serve the other considerations referred to in paragraph (a).

This provision addresses the issue noted in the United Kingdom that it is difficult to draft a statutory list which covers all possible scenarios where disclosure will be appropriate.¹³⁹ Although complete codification was recognised as an issue by the Law Commission,¹⁴⁰ ultimately the New Zealand provisions provide one of the most comprehensive codifications of confidentiality.¹⁴¹ The regime recognises the need for flexibility while still giving statutory guidance to the key exceptions that have been outlined in this section.¹⁴²

V Privacy and Confidentiality in the Arbitration Related Court Proceedings

This part will consider the current position of privacy and confidentiality of court proceedings related to an arbitration under the Arbitration Act 1996 and whether it strikes the right balance between expectations of confidentiality in arbitration and the principle of open justice in public courts.

A Open Justice and the Current New Zealand Position

In opposition to a proposed principle of privacy and confidentiality in the courts for arbitration disputes is the fundamental and broad principle of open justice, that the courts

¹³⁷ Pierre Heitzmann “Confidentiality and Privileges in Cross-Border Legal Practice: The Need for A Global Standard?” (2008) 26 ASA Bulletin 205 at 226.

¹³⁸ Section 14E(2).

¹³⁹ Noussia, above n 39, at 58.

¹⁴⁰ Law Commission, above n 106, at [5].

¹⁴¹ Michael Hwang and Katie Chung “Protecting Confidentiality—The Way Forward?” [2009] ICC Ct Bull Supp 39 at 44.

¹⁴² Williams and Kawharu, above n 34, at 374.

must “administer justice in public”.¹⁴³ Exceptions to this fundamental rule typically arise from the application of a “yet more fundamental principle ... that the ‘chief object of Courts of justice must be to secure that justice is done’”.¹⁴⁴ In situations where justice is arguably better served in private, the classical formulation from *Scott* indicates that:¹⁴⁵

... the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration.

This formulation is essentially the law as it currently stands under the Arbitration Act in relation to procedure in the courts for any litigation relating to an arbitration. Section 14F(1) requires the court to conduct proceedings in public unless an order is made for the whole or any part of the proceedings to be conducted in private. Such an order is made on the application of any party to the proceedings¹⁴⁶ and is only granted where the court is satisfied that:¹⁴⁷

... the public interest in having the proceedings conducted in public is outweighed by the interests of any party to the proceedings in having the whole or any part of the proceedings conducted in private.

The proceedings such an order can relate to include all matters brought before the court under the Arbitration Act, for example, challenging or enforcing an arbitral award.¹⁴⁸ In determining an application for private proceedings, the court has a mandatory statutory requirement to consider the following matters:¹⁴⁹

- the open justice principle;
- the privacy and confidentiality of the arbitral proceedings giving rise to the litigation;
- any other public interest considerations;
- the terms of any arbitration agreement between the parties to the proceedings; and
- the reasons given by the applicant for seeking an order for the proceedings to be conducted in private.

If an order for private proceedings is granted, it has two additional implications, set out in s 14I(1):

¹⁴³ *Scott v Scott* [1913] AC 417 (HL) at 434.

¹⁴⁴ *Lyttelton v R* [2015] NZCA 279, quoting *Scott v Scott*, above n 143.

¹⁴⁵ *Scott*, above n 143, at 437.

¹⁴⁶ Section 14F(2)(a).

¹⁴⁷ Section 14F(2)(b).

¹⁴⁸ Section 14F(4), definition of “proceedings”.

¹⁴⁹ Section 14H.

- (a) no person may search, inspect, or copy any file or any documents on a file in any office of the court relating to the proceedings for which the order was made; and
- (b) the court must not include in the court's decision on the proceedings any particulars that could identify the parties to those proceedings.

There is only one instance of a publicly available decision under this application regime. In *Telstraclear Ltd v Kordia Ltd*, Brewer J considered an application for the proceedings to be kept private in an application by Telstraclear to challenge an arbitral award relating to a contract to jointly establish a fibre optic cable transmission network.¹⁵⁰ The application for leave to appeal on questions of law was declined, but more interesting is Brewer J's analysis of the private proceedings threshold test. The proceedings had already been conducted which brought into question whether an order could be made, but in case of doubt, the Court exercised its inherent jurisdiction to regulate the proceedings and did so in accordance with the criteria of the Arbitration Act.¹⁵¹

The starting point for the Court was that Parliament intended proceedings under the Act to be conducted in public, unless the privacy concerns outweighed that interest.¹⁵² In regards to the open justice principle, this was simply stated as being that excessive secrecy "undermines public confidence in the justice system".¹⁵³ Justice Brewer noted that the parties had agreed to a private process, although he mentions that the Agreement makes no specific mention of confidentiality in the arbitration award.¹⁵⁴ As confidentiality is protected by statute, this of course is not necessary. The applicant's reasons, although they mentioned that the existence of the dispute was itself commercially sensitive, predominantly focused on the commercial sensitivity of the detail contained in the arbitral awards, the affidavits filed in the Court and in counsel's submissions.¹⁵⁵ It was the detail of the optic cable transmission network and its association to Telstraclear's wider commercial interests which were, in the judge's view, the primary concerns of the application for private proceedings. When weighed against the public interest in cases concerning national fibre optic transmission networks and the difficulty of conferring anonymity on the parties through redaction only given the nature of their industry, the ultimate judgment granted a partial privacy order.¹⁵⁶ The judgment itself was held to be left open to public scrutiny, but all other material in the Court file was to remain private.¹⁵⁷ This essentially granted the restrictions in s 14I(a) but not in s 14I(b).

¹⁵⁰ *Telstraclear Ltd v Kordia Ltd* HC Auckland CIV-2010-404-1168, 28 September 2010.

¹⁵¹ At [48].

¹⁵² At [49].

¹⁵³ At [51].

¹⁵⁴ At [52].

¹⁵⁵ At [53].

¹⁵⁶ At [54]–[55].

¹⁵⁷ At [56].

The most significant point that comes from this case is that an order for private proceedings does not necessarily preserve the confidentiality of the parties. *Telstraclear* was concerned about the confidentiality of the very existence of the arbitration, which was in its opinion commercially sensitive. There was an expectation from the applicant that, if the court granted an order for the proceedings to be held in private, then this confidentiality would be maintained. What the case showed was that a court may grant only one of the two additional implications of an order under s 14I(1). Whether this is an accurate interpretation of the statute is questionable. Section 14I(1) stipulates that, “if an order is made under section 14F”, then it has the effect of both protecting the documents in the court file *and* requiring the court to sanitise its judgment of any identifying information. Those two requirements stem from the granting of an order that the proceedings be conducted in private; they do not, on this interpretation, form optional parts of the order. Speaking at the third reading of the Arbitration Amendment Bill,¹⁵⁸ Nicky Wagner stated that the Bill “details under what conditions the court can make an order for confidential proceedings and the effects of any such order”.¹⁵⁹ The language indicates that the two additional effects of an order apply to *any* such order, which may indicate they are not optional effects.

However, the above interpretation may not recognise the correct meaning in light of the purpose of these provisions.¹⁶⁰ Section 14F of the Arbitration Act indicates that an order may be given directing that “the whole or any part” of the proceedings should be conducted in private. Taking this into account, the effects under s 14I(1) can be considered part of the overall procedure, and a direction for only part of the proceedings to be conducted in private could exclude the judgment or even the confidentiality of the court documents. The order can also have a time limit imposed or can be revoked on the application of any party to the proceedings.¹⁶¹ It is worth noting that Brewer J was potentially not even making an order under s 14F but was rather exercising his inherent jurisdiction to rule on procedure, as the proceedings had already been conducted so an order for private proceedings would have no effect.¹⁶² If any other decision has been made which applies the statutory regime, it is likely that the entire judgment has been redacted, rather than only parts of it, which makes it difficult to assess how it may be applied in future. This creates uncertainty for potential litigants considering litigating under the Act, which is one of the issues often raised with confidentiality provisions in arbitration generally.¹⁶³

What is interesting to note is that no redacted judgment has been delivered in accordance with the provisions of s 14I either. However, hundreds of cases related to arbitration have

¹⁵⁸ Arbitration Amendment Bill 2006 (72-2).

¹⁵⁹ (12 June 2007) 639 NZPD 9779.

¹⁶⁰ Interpretation Act 1999, s 5(1).

¹⁶¹ Arbitration Act, s 14I(2).

¹⁶² See *Telstraclear Ltd v Kordia Ltd*, above n 150, at [48].

¹⁶³ See generally Mourre, above n 31.

been brought before the courts since the provisions were enacted, including 46 reported judgments in 2015. The lack of applications for proceedings to be heard in private certainly undermines any assertion that in general arbitrating parties are particularly concerned about confidentiality in the courts.

It is also worth considering the application of the provisions in ss 14F–14I. Under s 14 of the Act, those sections apply “[e]xcept as the parties may otherwise agree in writing”. It is suggested that this provision should be read narrowly and apply only to the parties’ autonomy over the arbitral proceedings, it could not be intended that the parties could contract out of the presumption of open justice in court hearings under the Act.¹⁶⁴ However, that would not be the situation, as if the parties were to agree that the provisions in ss 14F–14I did not apply, then the default position would instead apply, which is a presumption of open justice. Contracting out of the provisions would actually make it harder for the parties to secure confidentiality in arbitration related court proceedings, as reliance would need to be placed on regular court practice rather than the rules developed specifically for arbitration related proceedings.

B New Zealand Case Law on Confidentiality Predating the Existing Provisions

The issue of confidentiality in arbitration related court procedures has arisen in other situations under the earlier iteration of the confidentiality duty prior to the 2007 amendments, particularly in relation to applications challenging the enforceability of an arbitration clause. The most cited case which pre-dates the current statutory rules but still has relevance is *Television New Zealand Ltd v Langley Productions*, a case between a public news reporter, his production company and the public television company.¹⁶⁵ Initially the parties were at odds over whether to litigate or arbitrate, with the reporter wishing to resolve the dispute in court to preserve his reputation. After the parties agreed to arbitrate and an award was given in the news reporter’s favour, the parties reversed their views on confidentiality, the public television company wanting to challenge the decision in open court. Robertson J held that the open justice principle should prevail in this situation, as there was a public interest in the remuneration of those reading the news and the parties had been inconsistent on their expectations of confidentiality.¹⁶⁶ As one of the parties to this case was a state-owned enterprise, this case illustrates the delicate balance that must be struck between the public interest in the confidentiality of commercial arbitrations and the competing public interest in the open and transparent spending of public money.¹⁶⁷

¹⁶⁴ Williams and Kawharu, above n 34, at 365.

¹⁶⁵ *Television New Zealand Ltd v Langley Productions* [2000] 2 NZLR 250 (HC).

¹⁶⁶ At 256.

¹⁶⁷ Williams and Kawharu, above n 34, at 363.

Public policy interests are generally not considered by the courts to negate the confidentiality of an arbitration, or to require an arbitration to be transferred to the courts. In *Sure Care Services v At Your Request Franchise Group*, the High Court held that public policy grounds may be sufficient to resist enforcement but are not sufficient to require parties to litigate in the courts where they have agreed to an arbitration under the contract.¹⁶⁸

C A Proposal for a Presumption of Privacy in Arbitration Related Court Proceedings

It has recently been proposed that New Zealand should again revise its laws on confidentiality in arbitration related court proceedings. The AMINZ submission on the Judicature Modernisation Bill 2013, submitted to the Justice and Electoral Select Committee,¹⁶⁹ essentially sought to implement provisions in New Zealand similar to those seen in Hong Kong and Singapore.¹⁷⁰ Such an approach creates a rebuttable presumption of privacy and confidentiality,¹⁷¹ while allowing for the redacted publication of judicial decisions which are of major legal interest.¹⁷² The proposed amendment to replace s 14F (and presumably ss 14G–14I also) is as follows:¹⁷³

- (1) A Court must, on the application of any party, make a direction as to what information, if any, relating to the proceedings may be published.
- (2) A Court must not make direction permitting information to be published unless –
 - (a) all parties agree that the information may be published;
 - (b) the court is satisfied that the information if published would not reveal any matter (including the identity of any party) that any party reasonably wishes to remain confidential.
- (3) If the Court considers that such a judgement is of major legal interest –
 - (a) the Court must direct that reports of the judgement may be published in law reports and professional publications;
 - (b) if any party reasonably wishes to conceal any matter in those reports (including the fact that the party was such a party),
the Court must, on the application of the party make a direction as to the action to be taken to conceal that matter in those reports, and may direct that report may not be published until after the end of period (not more than 10 years) that the court may direct.

Such an approach aims to eliminate the caution and worry parties are perceived to have towards bringing arbitral awards before domestic courts in order to set them aside or have

¹⁶⁸ *Sure Care Services v At Your Request Franchise Group* HC Auckland CIV-2008-404-5112, 31 July 2009.

¹⁶⁹ AMINZ Submission, above n 7, at [2.11].

¹⁷⁰ International Arbitration Act 1994 c 143A (Singapore), ss 22–23; and Arbitration Ordinance 2011 c 609 (Hong Kong), ss 16–17. Refer to the Appendix for these provisions.

¹⁷¹ AMINZ Submission, above n 7, at [2.6].

¹⁷² At [2.9] and [2.11].

¹⁷³ At [2.11].

them recognised and enforced.¹⁷⁴ However, such an approach highlights the conflicting policy approaches: protecting confidentiality versus the principle of open justice and other legitimate public interests in particular cases. To assess whether law reform in this area is desirable, the following sections will discuss the application of the current law and underlying policy reasons for different approaches, using comparative examples.

D Policy behind the Current Law

Justice Brewer’s starting point in *Telstraclear* was that “Parliament intended that proceedings under the Arbitration Act 1996 be conducted in public”.¹⁷⁵ On a plain reading of s 14F(1) this is correct; unless the court makes an order which satisfies the matters in s 14H, the starting point is that all proceedings in a public court under the Act will not be subject to the privacy and confidentiality requirements of the arbitration proceedings. This works with s 14C(a)(i)(C), which indicates that the “making and prosecution of an application to a court under [the] Act” is a situation in which a party may disclose confidential information. If the court makes an order under s 14F(1) that the court proceedings be conducted in private, this maintains confidentiality as disclosure for any reason other than pursuing the application to the court is still prohibited by s 14B.

Some light is shed on Parliament’s intention by the speech of Christopher Finlayson during the third reading of the Arbitration Amendment Bill. In relation to the new provisions providing for private proceedings in the courts, he said:¹⁷⁶

It is important to note new section 14F, because it comes back to the original point that I made, concerning the fact that court proceedings under the Act must be conducted in public, except in certain circumstances. I do not think there will be many circumstances at all where the courts will proceed to deal with matters privately or, as they say, in camera.

The kinds of circumstances where the court can make an order that a matter be heard in private are set out in subsection (2), and can be seen, for example, in paragraph (b), which states that a matter can be heard in private “only if the Court is satisfied that the public interest in having the proceedings conducted in public is outweighed by the interests of any party to the proceedings in having the whole or any part of the proceedings conducted in private.” An example could well be when two corporate entities are in a complex commercial arbitration—over a patent, for example. If highly sensitive information is disclosed concerning, say, the plaintiff’s patent, there could well be very sound reasons why that kind of information would not be aired in open court.

¹⁷⁴ Smeureanu, above n 21, at 63.

¹⁷⁵ *Telstraclear Ltd v Kordia Ltd*, above n 150, at [49].

¹⁷⁶ (12 June 2007) 639 NZPD 9781.

This speech from Hansard would confirm Brewer J’s starting point that the open justice principle was intended to define the default position. This builds on the Law Commission’s initial recommendations for reform when reporting on improvements that could be made to the treatment of confidentiality by the Arbitration Act. In their 2003 report, the Law Commission advised:¹⁷⁷

When a party has resort to the coercive powers of the public justice system, the need and desirability for transparency of process and accountability of judges must prevail over private interests.

This raises two cornerstone principles of the common law judicial system; transparency and accountability. These interact closely with the fundamental principle of open justice, which can be seen in the often-cited statement of that principle by Lord Hewart CJ, “that justice should not only be done, but should manifestly and undoubtedly be seen to be done”.¹⁷⁸ This principle gives rise to a “judicial duty” to give public reasons.¹⁷⁹ Such a duty has been characterised by the English courts as including that judicial proceedings must be conducted with open public access;¹⁸⁰ that evidence is presented and communicated in full view of those attending the court proceedings;¹⁸¹ and that the fair and accurate reporting of judicial proceedings and decisions by the media should not be hindered.¹⁸² Of those three characteristics, Lord Diplock in *Attorney-General v Leveller Magazine Ltd* noted that the presentation of evidence being in full view of those attending applied in “criminal cases, at any rate”, which raises some doubt over whether this is necessary in civil cases.¹⁸³ As will be discussed, the Court has particular rules around access to court documents.

Lord Diplock stated further that:¹⁸⁴

If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice.

These further reasons from Lord Diplock perhaps define some of the policy behind the public interest in having proceedings conducted in public, as mentioned by Christopher Finlayson. It is not purely a matter of public interest in the particular details of any one case that comes

¹⁷⁷ Law Commission, above n 106, at [100].

¹⁷⁸ *R v Sussex Justices; Ex parte McCarthy* [1924] KB 256 (KB) at 259.

¹⁷⁹ See Jason Bosland and Jonathan Gill *The Principle of Open Justice and the Judicial Duty to give Public Reasons* [2014] MULR 482.

¹⁸⁰ *Scott v Scott*, above n 143, at 434–435.

¹⁸¹ *Attorney-General v Leveller Magazine Ltd* [1979] 1 All ER 745 (HL) at 750 per Lord Diplock.

¹⁸² At 750; see also *Hogan v Hinch* (2011) 243 CLR 506 at [22] per French CJ.

¹⁸³ At 750.

¹⁸⁴ At 750.

before the court. Rather, there is also an underlying public interest in the transparency and accountability of the justice system as a whole. Carving out an entire category of cases, those brought under the Arbitration Act, and creating a presumption that they be conducted in private, runs counter to this underlying principle of transparency. Therefore, there is a significant threshold to meet in order to justify such a change in the presumption of open justice, as opposed to considering a balance of factors on a case by case basis. Although the court proceedings may be seen as a continuation of the arbitration, which has been deemed confidential by party consent, once the public courts become involved the entire arrangement is subject to the public interest. That is not to say that the courts must in every situation conduct proceedings in public and give full reasons for their judgments; as has been discussed, there are exceptions to every rule. Any sort of duty to give reasons is not an "inflexible rule of universal application".¹⁸⁵

The tension between open justice and party autonomy was first discussed in the 1991 Law Commission report *Arbitration*.¹⁸⁶ In that report, the Law Commission advised against imposing confidentiality on arbitration related court proceedings despite the choice by parties to arbitrate rather than litigate because of the confidentiality it affords. The Commission instead favoured the traditional reasons for open courts and public decisions.¹⁸⁷

The principle of open justice ties into the right to freedom of expression granted under the New Zealand Bill of Rights Act 1990, which applies to any act done by a branch of government.¹⁸⁸ Freedom of expression includes "the freedom to seek, receive, and impart information and opinions of any kind in any form".¹⁸⁹ This includes the freedom to seek, receive and impart court decisions and court documents. However, it is not a limitless right and has some restrictions in relation to certain court documents, particularly when other factors need to be considered, such as confidentiality concerns. The fundamental right of freedom of expression undoubtedly overlaps with the principle of open justice¹⁹⁰ and both have been examined by the courts when dealing with requests to copy and view court documents.¹⁹¹ Asher J in the High Court has observed, citing leading authority in Australia,¹⁹² that "open justice is a principle, not a freestanding right" and is not the paramount consideration in the access regime,¹⁹³ a view which has been upheld in the Court of Appeal.¹⁹⁴

¹⁸⁵ *R v Awatere* [1982] 1 NZLR 644 (CA) at 649.

¹⁸⁶ Law Commission *Arbitration* (NZLC R20, 1991).

¹⁸⁷ At [360].

¹⁸⁸ See New Zealand Bill of Rights Act 1990, s 3.

¹⁸⁹ Section 14.

¹⁹⁰ *Schenker AG v Commerce Commission* [2013] NZCA 114 at [36].

¹⁹¹ See for example *Mafart v Television New Zealand* [2006] NZSC 33, [2006] 3 NZLR 18 at [7] and [39].

¹⁹² *John Fairfax Publications Pty Ltd v Ryde Local Court* [2005] NSWCA 101, (2005) 62 NSWLR 512 at [29], affirmed in *Seven Network Ltd v News Ltd (No 9)* [2005] FCA 1394, (2005) 225 ALR 256 at [23].

¹⁹³ *Commerce Commission v Air New Zealand Ltd* [2012] NZHC 271 at [29].

¹⁹⁴ *Schenker AG v Commerce Commission*, above n 190, at [36].

E Rulings on Access to Court Documents in Usual Court Proceedings

When considering how the courts approach the confidentiality of arbitration related proceedings, it is worth comparing the approach for access to documents in normal court proceedings. Although there is a presumption of open justice, it is apparent this this is in no way an absolute principle applying to all aspects of court procedure.

Access to court documents is managed under the High Court Rules. Under r 3.12, a person may not access a document, court file or any judgment or order that relates to a proceeding brought under the Arbitration Act (and some other Acts) unless the person is a party or the court permits that person to do so. Subject to that rule, there is a general right of access to the formal court record kept in the registry of the court.¹⁹⁵ The formal court record is defined as follows:¹⁹⁶

formal court record means any of the following kept in a registry of the court:

- (a) a register or index;
- (b) any published list that gives notice of a hearing;
- (c) a document that—
 - (i) may be accessed under an enactment other than these rules; or
 - (ii) constitutes notice of its contents to the public;
- (d) a judgment, order, or minute of the court, including any record of the reasons given by the Judge;
- (e) the rolls of barristers and solicitors kept under section 56 of the Lawyers and Conveyancers Act 2006 or any former corresponding enactment.

This provides for a general right of access to, in particular, judgments of the court, although a Judge may direct that any judgment may not be accessed without the permission of the court.¹⁹⁷ Other documents are contained in the court file, which is the collection of documents held in the custody or control of the court that relates to a proceeding, including any interlocutory application associated with the proceeding.¹⁹⁸ The parties to a proceeding have the right to access the court file or any related document, but such a general right does not exist for non-parties.¹⁹⁹ During the substantive hearing, any person may access pleadings and evidence unless a judge has directed otherwise.²⁰⁰ Where a party objects to access, the Judge may determine a request in “any matter the Judge considers just”.²⁰¹ Such an objection

¹⁹⁵ Rule 3.7.

¹⁹⁶ Rule 3.5, definition of “formal court record”.

¹⁹⁷ Rule 3.7(3).

¹⁹⁸ Rule 3.5, definition of “court file”.

¹⁹⁹ Rule 3.8.

²⁰⁰ Rule 3.9(2)–(3).

²⁰¹ Rule 3.9(5)(c) and (6).

needs to be “seen in the light of the open justice approach”; it must be justified, such as the information sought being highly sensitive personal information or confidential data.²⁰² Commentary indicates that even in such cases, the Court is likely to order the provision of a redacted version of the document rather than completely restricting its disclosure.²⁰³

Where a person is not eligible to access a document under the above provisions (such as a non-party accessing documents in arbitration-related court proceedings), that person may apply to access the documents with the permission of the court at any time.²⁰⁴ Applying for the permission of the court is more formal, requiring an applicant to identify the relevant documents and give reasons.²⁰⁵ In determining the application, the judge must “consider the nature of, and the reasons for, the application or request” and in doing so consider the following prescribed factors:²⁰⁶

- (a) the orderly and fair administration of justice:
- (b) the protection of confidentiality, privacy interests (including those of children and other vulnerable members of the community), and any privilege held by, or available to, any person:
- (c) the principle of open justice, namely, encouraging fair and accurate reporting of, and comment on, court hearings and decisions:
- (d) the freedom to seek, receive, and impart information:
- (e) whether a document to which the application or request relates is subject to any restriction under rule 3.12:
- (f) any other matter that the Judge or Registrar thinks just.

It should be noted that the application of this regime applies for as long as the Court has custody and control of the documents. Once documents are transferred to Archives New Zealand, which is mandatory after 25 years, access will be determined by the Public Records Act 2005.²⁰⁷

The appropriate way to apply the r 3.16 factors has recently been considered in the Court of Appeal in *Schenker*.²⁰⁸ *Schenker AG and Shenker (NZ) Ltd* sought access to court documents as non-parties to a proceeding initiated by the Commerce Commission against various airlines on allegations of anti-competitive behaviour through the price-fixing of air cargo services.²⁰⁹ The Court of Appeal were asked to rule on whether Asher J in the High Court had appropriately ruled against disclosing the documents.

²⁰² Andrew Beck and others *McGechan on Procedure* (online looseleaf ed, Brookers) at [HR3.9.03].

²⁰³ At [HR3.9.03].

²⁰⁴ Rule 3.11.

²⁰⁵ Rule 3.13.

²⁰⁶ Rule 3.16.

²⁰⁷ Public Records Act 2005, s 21.

²⁰⁸ *Schenker AG v Commerce Commission*, above n 190.

²⁰⁹ At [3].

Schenker's interest in the court documents was simply stated as being that it may have "suffered loss as a result of the alleged conduct".²¹⁰ Schenker essentially sought all of the documents in the court file, possibly for contemplated parallel litigation.²¹¹ As the parties objected to disclosure, access under r 3.9 was not possible and a direction from a Judge was necessary, taking account of the factors under r 3.16. Importantly, Asher J held that none of the factors were to take primacy over another.²¹² The structure of the rules provides an "unambiguously non-hierarchical" list of terms which are to be balanced and weighed against each other.²¹³ It is important to remember that open justice is a principle, not a "freestanding right"; it is just one of the matters to be taken into account and there is no presumption in favour of disclosure.²¹⁴ Asher J based his approach on that of Mallon J in *Chapman v P*, who assessed r 3.16 on the basis that none of the factors had special primacy over any other, and so a balancing exercise is required.²¹⁵ This non-hierarchical approach was met with approval in the Court of Appeal, which agreed that the recommendation by the Law Commission that justice and freedom of information should be cornerstones of rules covering access to court records had been rejected by the Rules Committee in favour of six matters of equal weighting which should form the background against which a request is considered.²¹⁶ In the particular case, the reasons advanced to justify access were too broad and vague to overcome the confidentiality interests of the parties.²¹⁷

The mandatory considerations under r 3.16, although worded differently, direct the court to consider similar policy issues as the requirements under s 14H of the Arbitration Act. Even if a direction is not made under s 14F for arbitration related court proceedings to be conducted in private, with the effect of preventing all access to court documents, any person other than the parties will still need to satisfy the court that they should have access to the documents, with no favour given to the open justice principle. It is simply one consideration and the confidential nature of documents relating to an arbitration will be equally considered. Katz J has recently held in the High Court that, at least under the Arbitration Act prior to amendment, confidentiality does impact on whether a non-party disclosure will be made:²¹⁸

I note that I was not persuaded that s 14 of the Act (as at 2005), correctly interpreted, deprives this court of the jurisdiction to order non-party discovery of an arbitral award in an appropriate case. In terms of policy factors, however, the fact that the

²¹⁰ At [6].

²¹¹ At [7]–[8].

²¹² *Commerce Commission v Air New Zealand Ltd*, above n 193, at [27].

²¹³ At [28].

²¹⁴ At [29].

²¹⁵ *Chapman v P* (2009) 20 PRNZ 330 (HC) at [31].

²¹⁶ *Schenker AG v Commerce Commission*, above n 190, at [22]–[23].

²¹⁷ At [33].

²¹⁸ *Infratil Infrastructure Property Ltd v Viaduct Harbour Holdings Ltd* [2015] NZHC 2533 at [31].

arbitration process is intended to be confidential to the parties is a matter that would clearly need to be weighed in the overall exercise of the court's discretion.

In this way, there is a strong likelihood that the courts will favour protecting documents from disclosure which are confidential in nature (r 3.16(b)) and which relate to a proceeding brought under the Arbitration Act (r 3.16(e)), unless there is a strong public interest. However, where an interested non-party is conducting parallel litigation and has a legitimate request for disclosure, confidentiality is not so certain. The reasoning in *Schenker* did not rule out disclosure had Schenker been able to sufficiently establish a need for it. In that instance, if the documents were from an arbitration related proceeding, a ruling under s 14F of the Arbitration Act preventing all disclosures would provide the parties with much greater certainty that their privacy will be protected. Once such an order is in place, s 14I prohibits the disclosure of court documents, as was granted in *Telstraclear Ltd v Kordia Ltd*.

Looking to how the court treats applications for document disclosure normally, it seems likely that a court considering an application under s 14F to hold arbitration related court proceedings in private would take a similar approach. The court is required to consider the matters under s 14H, which form a list quite similar to r 3.16. The open justice principle has explicit mention, but must be weighed alongside the privacy and confidentiality of the arbitral proceedings giving rise to the litigation and the terms of the arbitration agreement itself. An agreement between the parties that, if arbitration related court proceedings are necessary, they will both support an application for a private hearing, would potentially have a bearing on the decision under this limb. Party autonomy is a fundamental concept of arbitration and the court will consider such an agreement as part of its assessment. The reasons of the applicant also form a part of the consideration, allowing the one or both parties to provide additional information regarding why confidentiality is necessary. Alongside the open justice principle, the court will also consider any other public interest considerations. In *Telstraclear*, Brewer J considered it relevant that the parties were owners of a national fibre optic transmission network and that redaction of a judgment may cast doubt on the business relations of other transmitters.²¹⁹ He also considered that there was a public interest in the decision as it related to national fibre optic transmission networks, although it is unclear how much weight this factor was given.²²⁰

F Comparative Approaches to Confidentiality in the Courts

It is often useful when considering law reform to look to the practices of comparative jurisdictions and their application of similar principles. The following subsections will outline

²¹⁹ *Telstraclear Ltd v Kordia Ltd*, above n 150, at [54].

²²⁰ At [55].

a selection of comparative approaches to the balancing of open justice and confidentiality in the courts.

1 *Canada*

The open justice principle has been addressed in the Ontario Court of Justice, where an application for confidentiality over documents which arose from an arbitral process was declined as the “philosophy of the court system is openness”.²²¹ Although the Court had the power to order a document to be treated as confidential,²²² Farley J held that the circumstances did not fit within any of the exceptions to the general rule of public justice.²²³ These exceptions were discussed in *AJ v Canada Life Assurance Co* and include actions involving infants, mentally ill people and “matters of secrecy”.²²⁴

2 *Switzerland*

Consistent with the lack of an express duty of confidentiality under Swiss law and the tenuous position of an implied duty,²²⁵ the Swiss courts are generally in favour of publishing arbitration related court decisions, but do so often in redacted or anonymised form.²²⁶ A leading example of this is a Swiss Supreme Court decision in which both parties sought to have a confidential arbitration award set aside.²²⁷ The award related to a license arrangement and contained “highly confidential technology, business and manufacturing secrets” which both parties and the arbitral tribunal wished to protect through a private hearing and withholding publication of the judgment.²²⁸ The court held that, although this could serve as a ground for non-dissemination of information on the technology (restricting access to the confidential information), it was not sufficient to restrict publication of the judgment. The Court stated that it is never appropriate to completely bar publication of a judgment, given the public interest in the publicity of judgments. Rather, the names of the parties and confidential information could be redacted where appropriate.

²²¹ 887574 *Ontario Inc v Pizza Pizza Ltd* (1994) BLR (2d) 239 (ONCJ),

²²² Courts of Justice Act RSO 1990 c C43, s 137(2).

²²³ 887574 *Ontario Inc v Pizza Pizza Ltd*, above n 221, at 244.

²²⁴ *AJ v Canada Life Assurance Co* (1989) 70 OR (2d) 27 (ONHC).

²²⁵ Noradèle Radjai “Confidentiality in International Arbitration: Brief Overview of the Position in Switzerland and Further Reading” (2009) 27 ASA Bulletin 48 at 48.

²²⁶ Smeureanu, above n 21, at 62.

²²⁷ *Judgment of 16 June 2006* DFT 4P 74/2006 (Swiss Federal Tribunal).

²²⁸ Pierre-Yves Tschanz “Switzerland: Confidentiality Of Swiss Supreme Court Review Of Arbitral Awards” (28 September 2006) Mondaq <www.mondaq.com>.

3 *Scotland*

In Scotland, there is a statutory procedure under the Arbitration (Scotland) Act which allows a party to apply for anonymity in civil proceedings relating to an arbitration.²²⁹ Importantly this does not apply to proceedings for the enforcement of an arbitral award brought under s 12. The court is required to grant an anonymity request unless disclosure is required for the performance of public functions, can reasonably be considered necessary to protect a party's lawful interests, would be in the public interest or would be necessary in the interests of justice.²³⁰ The provision for anonymity seems to have the effect of redacting all identifying information, which should in most cases redact all confidential information also, leaving only the legal judgment. For example, in a recent decision which applied the provision, Lord Woolman simply held:²³¹

The parties have sought anonymity in terms of section 15 of the Arbitration (Scotland) Act 2010. This opinion therefore does not include any details that might lead to their identification.

The judgment does not provide any details regarding whether this application was considered or automatic, but it is likely it was dealt with separately. Alternatively, perhaps reasons were not necessary as the principle of open justice is not a required factor. A Judge need only give reasons then where one of the exclusions requiring disclosure is triggered.

4 *United States*

To preserve confidentiality, some State courts will seal court files which relate to arbitral proceedings.²³² Where no public interest exists, it was held in New York that litigants should not be "subjected to public revelation of embarrassing material".²³³ Typically in the United States, an order to seal a court document will only be granted where an applicant's privacy interest outweighs any public interest in disclosure, or where the court wishes to encourage parties to settle out of court.²³⁴

²²⁹ Arbitration (Scotland) Act 2010, s 15.

²³⁰ Section 15(2).

²³¹ *Arbitration Application 1 of 2013* [2014] CSOH 83 at [2].

²³² Law Commission, above n 106, at [60]; see also James Veach "The Law and Practices on the Confidentiality of Reinsurance Arbitration Awards – How Courts View Applications to Seal" [2000] *Insurance Advocate* 22.

²³³ *Feffer v Goodkind* 152 Misc 2d 812 (NY Sup Ct 1991) at 817.

²³⁴ Law Commission, above n 106, at [61].

5 *Singapore*

The International Arbitration Act 1994 c 143A (Singapore)²³⁵ provides that on the application of any party to arbitration related court proceedings, the proceedings under the Act are to be held “otherwise than in open court”.²³⁶ This position creates a presumption of open justice, but this presumption is automatically overturned where one party applies for a private hearing. The court has no discretion under the Act to refuse to make an order. There are also restrictions on what information relating to the proceedings may be disclosed. The court is to make a direction for publication only where both parties agree or where publication will not reveal any matter which a party reasonably wishes to keep confidential, including the identity of any party.²³⁷

6 *Hong Kong*

The approach in Hong Kong is similar to Singapore in form and construction, but different in quite a significant way.²³⁸ There is a presumption that proceedings will be held in private, with the ability for the court to rule that it should be held in open court on the application of a party or where the court “is satisfied that those proceedings ought to be heard in open court”.²³⁹ Despite the lack of direction on how a court should apply this provision, the Hong Kong Department of Justice indicated in 2007, when this provision was drafted, that the principle of open justice was at the basis for the amendments, indicating that:²⁴⁰

... it is necessary to balance the need to protect the confidentiality of arbitral proceedings as a consensual method of dispute resolution on the one hand, and the public interest in having transparency of process and public accountability of the judicial system on the other.

With that in mind, it should be observed that the purpose of introducing the confidentiality provision was because it is viewed in Hong Kong as one of the main reasons parties choose to settle disputes by arbitration.²⁴¹

G A Balance of Issues: Should the Presumption Favour Private Hearings?

Of the comparative jurisdictions mentioned, the almost identical approaches in Singapore and Hong Kong are of the form which AMINZ proposes New Zealand should adopt.²⁴² These

²³⁵ Refer to Appendix.

²³⁶ International Arbitration Act 1994 c 143A (Singapore), s 22.

²³⁷ Section 23(3).

²³⁸ Refer to Appendix.

²³⁹ Arbitration Ordinance 2011 c 609 (Hong Kong), s 16.

²⁴⁰ Hong Kong Department of Justice *Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill* (Consultation Paper, December 2007) at [2.29].

²⁴¹ Kun Fan “The New Arbitration Ordinance in Hong Kong” (2012) 29 J Intl Arb 715 at 718.

provide for a presumption of confidentiality in different ways; in Singapore, a party must make an application, after which private proceedings are automatically granted. In Hong Kong, it is the opposite; there is a presumption of private proceedings, but an order may be made for the proceedings to be heard in open court on the application of a party or where the court is satisfied that it ought to be conducted in public. According to the AMINZ proposal, these rules take this form because East Asian parties “place considerable importance on confidentiality in arbitral proceedings and place a premium on ‘saving face’ above all”.²⁴³

One issue is whether such restrictive confidentiality provisions are necessary to protect the interests of most parties. While some arbitrating parties do have legitimate confidentiality expectations even in the courts because of the nature of the contract being arbitrated, arbitration is becoming such a widely used alternative dispute resolution method that many parties do not have these expectations, nor are concerned about them. As has been mentioned, the lack of cases seeking declarations under s 14F of the Arbitration Act compared to the quantity of arbitration related court proceedings that have arisen just in the last few years indicates that either parties do not generally see confidentiality in the courts as an issue, or do not value it highly enough to go through the procedure of applying for a private hearing. As a recent example, a dispute between four high country farms and the University of Canterbury was referred to arbitration to determine a disagreement on rent.²⁴⁴ No application for a private hearing was made, perhaps because the parties were not concerned about the public being aware of the existence of the arbitration, and because the documents relating to the proceeding are sufficiently protected by the High Court Rules on access to court documents. Confidentiality was, if anything, ancillary to the issue and would likely not have had any meaning to the parties. Private proceedings are in this case not a necessity. If they are not a necessity, then there is no justification for overriding the principle of open justice without reason.

Many commentators note the importance of confidentiality to international businesses in particular,²⁴⁵ indicating they have strong preferences in favour of confidentiality and with a majority saying it is very important to them.²⁴⁶ With the increasing lack of uniformity internationally, businesses will be attracted to arbitrate in seats which explicitly provide for procedural privacy and confidentiality.²⁴⁷ However, it has also been argued that it is not so clear cut as this, as information has varying degrees of confidentiality and a business is not

²⁴² AMINZ Submission, above n 7.

²⁴³ At [2.7].

²⁴⁴ *Flock Hill Holdings v University of Canterbury* [2015] NZHC 3169.

²⁴⁵ Born, above n 9, at 2781.

²⁴⁶ Queen Mary College 2010 *International Arbitration Survey: Choices in International Arbitration* (University of London, 2010) at 5 and 29; and Bagner, above n 66, at 243.

²⁴⁷ Steven Kouris “Confidentiality: Is International Arbitration Losing One of Its Main Benefits?” (2005) 22 J Intl Arb 127 at 128.

always going to be concerned about every situation.²⁴⁸ Indeed, prompt disclosure of facts and the existence of a dispute can be beneficial to a business' reputation in both the business and public communities.²⁴⁹ Where confidentiality is not of great importance to a party, often a more open approach is to be preferred; perhaps this is why so few of the proceedings brought in the past decade in New Zealand have also applied to have their proceedings heard in private. Where parties insist on confidentiality, even where they obtain a favourable award, it is likely that beneficial publicity will be lost.²⁵⁰

The current regime is designed to protect privacy and confidentiality where privacy and confidentiality are actually of importance to the parties. A blanket presumption in favour of confidentiality goes far beyond what is necessary, imposing confidentiality even where it is not necessary. Where parties have reason to come before a court, privacy and confidentiality should not be the norm; rather it should be an option where it is deemed appropriate. If the parties do decide that privacy is in their best interests, meeting the threshold is not arduous. An application needs to be made before proceedings commence so that a Judge can make a proper ruling and apply it to the proceedings. The situation in *Telstraclear* is not a good example as the Judge was required to exercise his inherent jurisdiction after the hearing had already concluded.²⁵¹

Based on the above analysis, if reform is to be considered, the AMINZ proposal goes one step too far. Imposing a presumption of confidentiality in all cases related to arbitrations, including a private judgment, where the parties are at odds over whether that duty should even apply goes too far away from the fundamental principle of open justice and in many cases is unnecessary, particularly where the scope of international arbitration is changing and more often involves competing public and private interests.²⁵² That is not to say that a middle ground could be considered which tweaks the current law to favour confidentiality more where the parties are in agreement and desire confidentiality. Fundamentally, arbitration is by agreement and any sort of confidentiality in the courts must either have strong policy reasons which outweigh a presumption of open justice, or must be by the agreement of the parties where no conflicting public policy reason would justify disclosure. On that basis, the author proposes that a subsection (3A) should be inserted into s 14F which reads:

Where an application is made for an order under subsection (1) and both parties are in agreement that the whole or any part of the proceedings should be conducted in

²⁴⁸ Anjanette H Raymond "Confidentiality in A Forum of Last Resort? Is the Use of Confidential Arbitration A Good Idea for Business and Society?" (2005) 16 Am Rev Intl Arb 479 at 510–511.

²⁴⁹ At 512.

²⁵⁰ Vijay K Bhatia, Christopher N Candlin and Rajesh Sharma "Confidentiality and Integrity in International Commercial Arbitration Practice" (2009) 75 Arb I at 12.

²⁵¹ *Telstraclear Ltd v Kordia Ltd*, above n 150, at [48].

²⁵² Dora Marta Gruner "Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform" (2003) 41 Colum J Transnatl L 923 at 946.

private, this will be sufficient for the court to grant an order, subject only to any substantial public interest consideration other than the open justice principle.

This approach focuses on the agreement of the parties as being the source of arbitration itself. Where the parties are in agreement that the court proceeding should be conducted in private, there is a lesser likelihood of an unfair and unjust trial being conducted behind closed doors which favours one party. Explicit agreement in an arbitration agreement would satisfy this criteria, although a party is always capable of challenging the validity of the clause if confidentiality in the courts was not intended. The proposed subsection also preserves the court's discretion to deny an order where substantial public interest concerns would render a private hearing unjust. This does not include the open justice principle, but rather looks to other public policy considerations that may be relevant on the particular facts, such as where a party is a government entity and the result will have substantial implications on public spending, similar to *Langley*.²⁵³ Allowing this discretion is important as often the nature of an arbitration will give rise to a legitimate public interest which should not be hidden by the courts.²⁵⁴

As well as the above proposal, a further adaption would be to adjust s 14I(1)(b) to be an optional effect of an order under s 14F which may be waived at the court's discretion if a substantial public interest consideration justifies that, as was considered the case in *Telstraclear*. The court's judgment will typically avoid referring to the specifics of any confidential information presented when rendering a judgment on an arbitration related matter. Confidential information is protected by s 14I(1)(a). Therefore, anonymity is only an issue where there is a legitimate concern about any information regarding the existence of the arbitration being known, such as where the proceedings are brought while the arbitration is still ongoing, or where the subject matter is of a particularly sensitive nature.

VI Conclusion

When parties need to have recourse to the courts in order to resolve their dispute, it is no longer a private issue. Even in civil litigation, there is an overriding public interest in seeing that justice is done correctly and having the ability to publicly scrutinise judicial decisions. As this paper has discussed, the existence and scope of a duty of confidentiality varies widely throughout the globe, with some jurisdictions giving statutory or implied obligations, while others entirely reject any such implied obligation, even going so far as to reject it in their legislation, subject to the parties' agreement.

²⁵³ *Television New Zealand Ltd v Langley Productions*, above n 165.

²⁵⁴ Michael Hwang and Katie Chung "Defining the Indefinable: Practical Problems of Confidentiality in Arbitration" (2009) 26 J Intl Arb 609 at 617; see also Andrew Tweeddale "Confidentiality in Arbitration and the Public Interest Exception" (2005) 21 Arb Intl 59.

What this paper has shown is that there is no one correct approach to the question of confidentiality in international commercial arbitrations. This applies to its very existence in some instances, but perhaps more importantly, to its scope. Under New Zealand law, the scope of confidentiality is in most situations covered by the comprehensive provisions of the Arbitration Act 1996. For some matters, such as whether disclosure of the existence of the arbitration is allowable, some ambiguity remains. The most controversial aspect of New Zealand's regime is the process for obtaining a private court hearing and protecting any arbitration related documents submitted before the Court. Although some documents would already be likely to be protected under the High Court Rules, parties which are concerned about confidentiality would be much more comfortable with a ruling under s 14F of the Arbitration Act, providing for private proceedings, restricted access to documents and a redacted judgment. While this may be the preferred outcome, as was seen in *Telstraclear*, the court may not always be willing to grant complete privacy and confidentiality.²⁵⁵ It is for this reason that AMINZ proposed a reversal of the presumption of open justice to instead favour a presumption of privacy in arbitration related court proceedings, similar the approaches in countries such as Hong Kong and Singapore. However, after a detailed analysis of the complex policy behind the open justice principle, the ability to consider other public policy concerns and the approaches taken in comparative jurisdictions, it is the conclusion of this paper that such an approach goes one step too far. That is not to say that reform is not an option. As was discussed at the end of part V, some tweaks to the current regime could be made to better facilitate arbitration related court proceedings for parties that are concerned about privacy and whom are in agreement that privacy and confidentiality would be in their interests in court proceedings. In such an instance, it would be fair for the court to exercise its discretion and grant an order, unless some substantial public policy consideration requires otherwise. Where the parties are in agreement, the concerns surrounding the fundamental principle of open justice and accountability of the courts may give way to confidentiality concerns without opening the floodgates for unnecessarily imposing private hearings on proceedings which do not require them. Where the parties are in disagreement over whether proceedings should be heard in private, this is exactly the situation where the court should make a full and considered assessment of the interests, with the concept of open justice as one consideration, as parties who were not expecting to be bound by confidentiality in the courts would have reasonable expectations of open and transparent delivery of justice.

²⁵⁵ See *Telstraclear Ltd v Kordia Ltd*, above n 150.

VII Appendix

International Arbitration Act 1994 c 143A (Singapore)

22. Proceedings to be heard otherwise than in open court

Proceedings under this Act in any court shall, on the application of any party to the proceedings, be heard otherwise than in open court.

23. Restrictions on reporting of proceedings heard otherwise than in open court

- (1) This section shall apply to proceedings under this Act in any court heard otherwise than in open court.
- (2) A court hearing any proceedings to which this section applies shall, on the application of any party to the proceedings, give directions as to whether any and, if so, what information relating to the proceedings may be published.
- (3) A court shall not give a direction under subsection (2) permitting information to be published unless—
 - (a) all parties to the proceedings agree that such information may be published; or
 - (b) the court is satisfied that the information, if published in accordance with such directions as it may give, would not reveal any matter, including the identity of any party to the proceedings, that any party to the proceedings reasonably wishes to remain confidential.
- (4) Notwithstanding subsection (3), where a court gives grounds of decision for a judgment in respect of proceedings to which this section applies and considers that judgment to be of major legal interest, the court shall direct that reports of the judgment may be published in law reports and professional publications but, if any party to the proceedings reasonably wishes to conceal any matter, including the fact that he was such a party, the court shall—
 - (a) give directions as to the action that shall be taken to conceal that matter in those reports; and
 - (b) if it considers that a report published in accordance with directions given under paragraph (a) would be likely to reveal that matter, direct that no report shall be published until after the end of such period, not exceeding 10 years, as it considers appropriate.

Arbitration Ordinance 2011 c 609 (Hong Kong)

16. Proceedings to be heard otherwise than in open court

- (1) Subject to subsection (2), proceedings under this Ordinance in the court are to be heard otherwise than in open court.
- (2) The court may order those proceedings to be heard in open court—
 - (a) on the application of any party; or
 - (b) if, in any particular case, the court is satisfied that those proceedings ought to be heard in open court.

(3) An order of the court under subsection (2) is not subject to appeal.

17. Restrictions on reporting of procedures heard otherwise than in open court

- (1) This section applies to proceedings under this Ordinance in the court heard otherwise than in open court (“closed court proceedings”).
- (2) A court in which closed court proceedings are being heard must, on the application of any party, make a direction as to what information, if any, relating to the proceedings may be published.
- (3) A court must not make a direction permitting information to be published unless—
 - (a) all parties agree that the information may be published; or
 - (b) the court is satisfied that the information, if published, would not reveal any matter (including the identity of any party) that any party reasonably wishes to remain confidential.
- (4) Despite subsection (3), if—
 - (a) a court gives a judgment in respect of closed court proceedings; and
 - (b) the court considers that judgment to be of major legal interest, the court must direct that reports of the judgment may be published in law reports and professional publications.
- (5) If a court directs under subsection (4) that reports of a judgment may be published, but any party reasonably wishes to conceal any matter in those reports (including the fact that the party was such a party), the court must, on the application of the party—
 - (a) make a direction as to the action to be taken to conceal that matter in those reports; and
 - (b) if the court considers that a report published in accordance with the direction made under paragraph (a) would still be likely to reveal that matter, direct that the report may not be published until after the end of a period, not exceeding 10 years, that the court may direct.
- (6) A direction of the court under this section is not subject to appeal.

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