Summer 2012

The Work-Product Doctrine as a Means toward a Judicially Enforceable Duty of Confidentiality in International Commercial Arbitration

Christoph Henkel

Follow this and additional works at: http://scholarship.law.unc.edu/ncilj

Recommended Citation
Available at: http://scholarship.law.unc.edu/ncilj/vol37/iss4/2

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law and Commercial Regulation by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
The Work-Product Doctrine as a Means Toward a Judicially Enforceable Duty of Confidentiality in International Commercial Arbitration

Christoph Henkel†

I. Introduction .......................................................... 1060
II. Privacy, Secrecy, and the Obligation of Confidentiality in Arbitrations ......................................................... 1063
III. The Practice of Confidentiality in International Commercial Arbitration ......................................................... 1066
   A. Implied Duty of Confidentiality ..................................... 1067
      1. England ................................................................ 1068
      2. France ................................................................ 1076
   B. Express Duty of Confidentiality ..................................... 1078
      1. Australia ................................................................ 1078
      2. Sweden ................................................................ 1079
      3. United States ......................................................... 1081
   C. Statutory Protection of Confidentiality ............................. 1086
      1. New Zealand ......................................................... 1088
      2. Bermuda ............................................................. 1089
      3. Singapore ........................................................... 1091
   D. The Lack of Absolute Protection of Confidentiality .......... 1092
IV. The Work-Product Doctrine ........................................... 1094
   A. History and Background of the Work-Product Doctrine ..................................................................................... 1096
   B. The Work-Product Doctrine as a Standard for Disclosure in Arbitration ....................................................... 1099
      1. Substantial Need ..................................................... 1099
      2. Undue Hardship ...................................................... 1100
      3. Application of the Work-Product Doctrine as a Standard in Arbitration ................................................................. 1101

†Associate Professor of Law, Mississippi College School of Law. Assessor iur., L.L.M., S.J.D., University of Wisconsin Law School. Professor Henkel is the Director of the International and Comparative Law Center at the Mississippi College School of Law and teaches Domestic and International Commercial Law, Bankruptcy and European Union Law. The author would like to acknowledge the support provided by Mississippi College School of Law on this project and thank Ms. Caroline Kunz Ivanov and Ms. Kaitlyn Roach for their outstanding research assistance. The completion of this project would not have been possible without their help and dedication.
V. Conclusion .............................................................................................................................................. 1105

I. Introduction

The private nature and presumptively confidential character of international arbitration proceedings are two of its most attractive features.\(^1\) International corporations or businesses may rely on arbitration for a “reduced likelihood of damage to ongoing business relationships”\(^2\) or because they do not wish to create precedents.\(^3\) In addition, parties may assume that confidential business information, such as intellectual property rights, may be better protected in an arbitration setting than when compared to public court proceedings.\(^4\) However, the assumption that the confidentiality feature of arbitration provides a broader level of protection from disclosure than public court proceedings can no longer be supported without any qualification.\(^5\) Indeed, an increasing number of courts around the world seem to agree that disclosure of documents and materials produced during arbitrations may be compelled regardless of any express confidentiality agreement entered into between parties.\(^6\)

---


\(^3\) See W. Mark C. Weidemaier, Arbitration and the Individuation Critique, 49 ARIZ. L. REV. 69, 103 (2007) (noting that, while arbitrators may not “follow or create precedent,” they may instead create “collective arbitral wisdom”).

\(^4\) See Baldwin, supra note 2, at 452-53.


\(^6\) See Brown, supra note 5, at 974-75. For cases addressing this issue, see generally Cour d’appel [CA] [regional court of appeal] Paris, Jan. 22, 2004, Revue de L’Arbitrage 2004, 11, 645 (Fr.) [hereinafter Nafimco v. Foster Wheeler Trading Co.];
As early as 1996, the United Nations Commission on International Trade Law (UNCITRAL) noted that while "[i]t is widely viewed that confidentiality is one of the advantageous and helpful features of arbitration . . . there is no uniform answer in national laws as to the extent to which the participants in an arbitration are under the duty to observe the confidentiality of information relating to [a] case." The UNCITRAL also stressed that "parties that have agreed on arbitration rules or other provisions that do not expressly address the issue of confidentiality cannot assume that all jurisdictions would recognize an implied commitment to confidentiality" and that the "participants in an arbitration might not have the same understanding as regards the extent of confidentiality that is expected."

Even where the parties to an arbitration agreement expressly include a detailed confidentiality clause in their agreement, confidentiality may no longer be fully protected. As a result, the duty of confidentiality may not be viewed as absolute, but instead, may need to be qualified in each instance. More importantly, business people and their lawyers may not simply assume that their confidential business information may be better protected in arbitration proceedings when compared to court proceedings. In fact, while arbitration is a private dispute resolution process driven by private ordering in which the parties negotiate the applicable rules and in which the parties select the arbitrators, court proceedings may offer a more reliable level of protection with

---


8 Id.


10 See Brown, supra note 5, at 989-1001 (discussing the different sources under which the duty of confidentiality arises, from party agreement to international law).
protective orders, settled case law, and the right to appeal.

Furthermore, as the Australian High Court noted in *Esso v Plowman*,11 "complete confidentiality of the proceedings in an arbitration cannot be achieved."12 A duty of confidentiality does not reach witnesses in arbitration proceedings, and disclosure of information to certain third parties may also be required by regulatory disclosure obligations.13

It is argued in this article that by raising the burden of proof for disclosure of information and communications produced during arbitrations, a fair balance may be struck between the essential private nature of arbitration proceedings and the duty of confidentiality. In order to maintain the benefits and attractiveness of commercial arbitrations, it is necessary to make arbitration proceedings more predictable for those who rely on them. This seems of particular importance in light of the fact that international commercial arbitration is slowly losing its ability to quickly and effectively resolve disputes as an alternative to litigation.14 In addition, "parties to arbitration agreements seem to increasingly challenge arbitration awards."15 By applying the U.S. work-product doctrine as a starting point for raising the burden of proof, the doctrine may function as a starting point for an international consensus on how to best protect confidentiality in arbitration. The work-product doctrine in the United States is a well-established principle and offers qualified protection of attorney work product based on a balancing approach.16 Specifically, the doctrine requires the weighing of the parties' interests and determines whose interest outweighs the interests of others.17 Disclosure of work product materials may be compelled by showing (1) a substantial need for the material and (2) the inability

12 Id. at 400.
13 See id. at 400-01.
14 See, e.g., Christoph Henkel, *The Evaluation of Privacy and Confidentiality in International Commercial Arbitrations by the English Court of Appeal in City of Moscow v. Bankers Trust*, 20 MEALEY'S INT'L ARB. REP. 1, 6 (2005).
15 Id.
17 See, e.g., *In re Grand Jury Subpoena Dated Nov. 8, 1979*, 622 F.2d 933, 935 (6th Cir. 1980).
to obtain the substantial equivalent of the information without undue hardship.18

This article briefly discusses the separate concepts of privacy and confidentiality in international commercial arbitration. It is argued that privacy must be understood as a procedural concept, while confidentiality refers to the duty of non-disclosure between arbitrating parties. The clear distinction between these concepts is favored. The second part of this article reviews the practice of confidentiality in international commercial arbitrations and analyzes different approaches taken by different countries. None of the jurisdictions this article analyzes afford confidentiality an absolute level of protection, and courts increasingly compel disclosure of materials and communications produced in arbitrations. This process is done without any international consensus, thereby becoming unpredictable and resulting in misconceptions about confidentiality by parties relying on arbitration. Finally, the third part of this article discusses the work-product doctrine under U.S. law. It is suggested that the Hickman v. Taylor19 exceptions to the work product protection may provide a more predictable and pragmatic alternative to the currently inconsistent practice on confidentiality in international commercial arbitration.

II. Privacy, Secrecy, and the Obligation of Confidentiality in Arbitrations

Before discussing the practice and current state of confidentiality in international commercial arbitrations it is necessary to clarify the difference between the procedural regime of privacy and the duty of confidentiality as a right of non-disclosure.20 The concept of privacy in arbitration and the obligation of confidentiality in arbitration are separate concepts.21 More specifically, the private nature of arbitrations may not be

18 See Upjohn Co., 449 U.S. at 397-402; Hickman, 329 U.S. at 510-12.  
21 See Brown, supra note 5, at 972 n.6.
generally assumed to guarantee or imply absolute confidentiality.\textsuperscript{22}

While both concepts are indisputably connected and may even overlap, the notion that they must be contemplated in tandem and cannot be viewed independently is misplaced. English\textsuperscript{23} and French\textsuperscript{24} law traditionally considered that the private nature of arbitration proceedings implies a duty of confidentiality. At the same time, many other jurisdictions such as Australia\textsuperscript{25} and the United States\textsuperscript{26} rejected this idea. More importantly, however, it seems that even English\textsuperscript{27} and French\textsuperscript{28} courts are increasingly moving toward separating privacy and confidentiality more clearly. In France, for example, the party claiming breach of the duty of confidentiality may now have the burden of proof to establish the existence of such duty.\textsuperscript{29} And in England, the disclosure of documents may be necessary in the interest of justice or for any legitimate interest of the parties participating in these arbitrations.\textsuperscript{30}

As a result, privacy only relates to each party’s right to exclude the general public from arbitration hearings and other

\textsuperscript{22} See id. at 974-75.


\textsuperscript{25} See, e.g., Esso Austl. Resources Ltd. v Plowman (1995) 128 ALR 391, 401 (Austl.) (The court stated it would not be “justified in concluding that confidentiality is an essential attribute of a private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of the arbitration.”).

\textsuperscript{26} See United States v. Panhandle E. Corp., 118 F.R.D. 346, 349-50 (D. Del. 1998) (stating the standard required for issuance of a protective order for arbitration documents where one party claims they were to be kept confidential).


\textsuperscript{29} See id.

\textsuperscript{30} See, e.g., Emmott, [2008] EWCA (Civ) 184 [7]-[77], 1 Lloyd’s Rep. at 627-28. See also Hassneh Ins. Co. of Isr. v. Steuart J. Mew [1993] 2 Lloyd’s Rep. 243, 243 (reasoning that disclosure may be “reasonably necessary for the establishment or protection of an arbitrating party’s legal rights vis-à-vis a third party.”).
proceedings. Access to hearings is limited for persons other than the arbitrators, the parties themselves, and their representatives or witnesses, and access always requires the explicit consent by each party. Arbitration continues to be a private process, and the parties to an arbitration agreement control the proceedings based on their contractual agreement. Thus, the private nature of arbitration is a procedural concept that may be compared to the procedural regime of court hearings “in chambers” or “in camera.”

Confidentiality, on the other hand, “is concerned with... information relating to the content of the proceedings, evidence and documents, addresses, transcripts of the hearings or the award.” In contrast to privacy, the duty of confidentiality refers to the obligation of parties in arbitration not to disclose any of the information or materials provided for and disclosed during the arbitration proceedings. The purpose of confidentiality as a right to prevent disclosure of information is therefore more closely linked to a legal privilege, such as the attorney-client privilege or the work-product doctrine, and needs to be viewed as a separate concept from privacy that may be waived by one party and cannot be considered absolute.

31 See Brown, supra note 5, at 972 n.6 (“Privacy means the right of the parties to limit or prohibit the presence of ‘strangers’ at the proceedings.”).
33 See Brown, supra note 5, at 989 (identifying the party agreement as one source, and in some cases the only source, of a duty of confidentiality).
34 See id. at 973 (“One of the advantages of arbitration is that it is a private process between the parties and the members of the arbitral tribunal; hearings are held in camera and outsiders are only present to the extent that the parties agree.”).
36 See id.; NOUSSIA, supra note 32, at 26; see also Brown, supra note 5, at 974 (“There is a general duty of confidentiality—albeit subject to limited exceptions and qualifications—that in principle a party shall not disclose any information about the arbitration.”).
37 This article takes no sides in the discussion on whether or not the work-product doctrine qualifies as a legal privilege or not.
38 This is not to argue that legal privilege and confidentiality are also distinct. Specifically, parties may rely on attorney-client privilege or the work-product doctrine during arbitration proceedings. See, e.g., American Arbitration Association,
III. The Practice of Confidentiality in International Commercial Arbitration

The focus of this article is on the practice and protection of confidentiality in international commercial arbitration. Arbitration is a private dispute resolution process defined by party autonomy and the parties’ ability to define the rules according to their needs. Indeed, arbitration effectively privatizes the settlement of legal disputes. At the same time, the confidential character of arbitration often conflicts with the public interest and with many competing values, such as public disclosure requirements to shareholders or insurers, or simply when one arbitrating party wishes to challenge the arbitral awards in court. It is these instances in which the obligation of confidentiality in commercial arbitration is challenged and becomes questionable. Discovery of materials disclosed during arbitration proceedings may specifically raise concerns, such as waiver, and carry the potential of prejudice.

INTERNATIONAL ARBITRATION RULES, art. 20(6) (2009) (“The tribunal shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and a client.”). However, one may compare the duty of confidentiality in commercial arbitration and the non-disclosure obligation related to that duty more closely to the concept of legal privilege when compared to the procedural rule of privacy. See also Weixia, supra note 20, at 609-10 (arguing that both concepts are inherently different but overlap).

39 See Weixia, supra note 20, at 607 n.1.


41 See, e.g., NOUSIA, supra note 32, at 22-23 (providing nine different examples of such conflicts: (1) Reporting requirements where the “subject matter or the existence of a dispute and/or its outcome must be publicly reported because it may be material to the financial condition of a public company”; (2) disclosure as “required by shareholders, partners, creditors or others having a legitimate business interest in the affairs of one of the parties to the dispute”; (3) a duty for disclosure in context of other commercial interests; (4) fiduciary duties and obligations; (5) disclosure for auditing and compliance reasons; (6) “duties of disclosure to insurers”; (7) enforcement of the award or appeal; (8) disclose of evidence of arbitration in another dispute; and (9) illegal or criminal conduct uncovered during the arbitration); see also W. LAURENCE CRAIG, ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 313-14 (3d ed. 2000); Valery Denoix de Saint Marc, Confidentiality of Arbitration and the Obligation to Disclose Information on Listed Companies or During Due Diligence Investigations, 20 J. INT’L ARB. 211, 211 (2003); Fourth Council Directive of 25 July 1978 Based on Article 54(3)(g) of the Treaty on the Annual Accounts of Certain Types of Companies, art. 2, 1978 O.J. (L 222) 11.
for any of the arbitrating parties. Many international courts have decided these questions inconsistently. The resulting lack of uniformity may make the practice of confidentiality in commercial arbitration increasingly unpredictable, undermining any national preference in favor of arbitration. Some commentators have even concluded that the practice of confidentiality in international commercial arbitration is "chaotic." Confirming this view, this article continues to discuss the different approaches taken in various international jurisdictions.

A. Implied Duty of Confidentiality

English and French courts recognize the implied duty of confidentiality. The implied duty of confidentiality does not clearly separate the concept of privacy and confidentiality. Instead, courts view the private nature of arbitration proceedings as the essential factor ensuring the highest level of secrecy, which in turn necessitates an implied duty of confidentiality as an inherent requirement of all arbitration agreements, regardless of any explicit confidentiality agreement between the parties. Confidentiality is thus not only considered a general necessity in arbitration but also an implicit collateral to the concept of privacy.

---

43 See generally Weixia, supra note 20, at 610-14.
44 See id. (discussing the international landscape of commercial arbitration).
48 See Weixia, supra note 20, at 610-11.
1. England

Dolling-Baker v. Merrett,51 Hassneh Insurance Co. of Israel v. Steuart J. Mew,52 and Ali Shipping v. Trogir53 remain the basis for the practice of confidentiality in commercial arbitration in England.54 However, more recent cases and a decision by the Privy Council indicate a shift from a broad and unqualified protection of confidentiality toward a more pragmatic approach on a case-by-case basis while individually considering the circumstances of each arbitration or request for disclosure.55

In Dolling-Baker, the English Court of Appeal for the first time clearly emphasized the importance of the private nature of arbitration as an essential element of arbitration and determined that, as a result, all arbitration agreements must necessarily include an implied obligation not to disclose any documents, transcripts, notes or evidence prepared for and used in arbitration.56 While the court did not provide a precise definition, it found that the implied obligation did not depend on the inherent confidentiality of the material protected.57 The court also acknowledged that despite any implied duty of confidentiality, disclosure of materials is permissible if it is necessary for the fair disposal of justice.58 Finally, the English Court of Appeal noted that it is the courts that determine the precise limit of any implied obligation on a case-by-case basis.59

Following Dolling-Baker, the English Commercial Court broadened the definition of the implied duty of confidentiality in Hassneh and established some limitations.60 The Commercial Court focused on the confidential character of arbitral awards and

51 1 W.L.R. 1205 [1990].
55 See Associated Elec. and Gas Ins. Servs. Ltd. v. European Reinsurance Co. of Zurich [2003] 1 All E.R. 253 (Eng.).
56 See Dolling-Baker, 1 W.L.R. at 1213-14.
57 See id.
58 See id.
59 See id.
noted that, in addition to documents, witness testimony, party submissions, and pleadings, the application of an implied duty of confidentiality may also extend to arbitral awards. The court further concluded that any disclosure of documents "which are created for the purpose of that hearing would be almost equivalent to opening the door of the arbitration room to [a] third party" and would destroy any private character of arbitration. The English Commercial Court also broadened the legal basis for the implied duty of confidentiality in England. The court considered the private nature of arbitration not as the only essential factor, but instead concluded that aspects of custom and business efficacy are additional important factors that may also be considered. Specifically, the court noted that there is no general bright line rule and that limitations of confidentiality may vary depending on the existing business relationship between parties and according to specific circumstances in each case. Finally, the Commercial Court held that disclosure of any arbitral award is appropriate without party consent if disclosure is reasonably necessary for the protection of the party's rights or if disclosure is in the interest of justice.

In Ali Shipping Corp. v. Shipyard Trogir, the English Court of Appeal responded to the English Commercial Court's ruling in Hassneh and reaffirmed and extended its earlier ruling in Dolling Baker. The Court of Appeal held that an implied obligation of confidentiality attaches as a matter of law and may not be based

---

61 See id. at 247.
62 See id.
63 See id. at 246.
64 See id. (citing Tournier v. Nat'l Provincial and Union Bank of Eng., [1924] 1 K.B. 461, 486 (Eng.)).
65 Hassneh, 2 Lloyd's Rep. at 249 (holding that disclosure of an arbitral award or its reasons is only allowed if sufficiently necessary to protect a party's rights against a third party); see also Ins. Co. v. Lloyd's Syndicate, [1995] 1 Lloyd's Rep 272 (Eng.) (narrowing the confidentiality standard as put forward in Hassneh). The fact that an award is simply persuasive or may assist a party in litigation vis-à-vis a third party is not sufficient to justify disclosure. Ins. Co. v. Lloyd's Rep., at 275-76.
66 [1998] 2 All E.R. 136 (Eng.).
68 [1990] 1 W.L.R. 1205 (Eng.).
merely on custom or business efficiency.\textsuperscript{69} More importantly, the court stressed the importance of the essentially private nature of arbitration proceedings and held that the corollary of privacy propounds a general obligation of confidentiality implicit to any contractual agreement to arbitrate.\textsuperscript{70} While acknowledging the difficulty in establishing the boundaries of this implied obligation, the Court of Appeal suggested that the definition of a broad set of exceptions might best solve this dilemma.\textsuperscript{71} The court particularly seemed to favor this approach over any renewed review and interpretation of the implied duty of confidentiality on a case-by-case basis and in order to prevent any further erosion of its holding.\textsuperscript{72} The court recognized five exceptions: (1) Party consent, (2) order of court, (3) leave of court, (4) protection of an arbitrating party’s legitimate interest, and (5) where disclosure is requisite to the public interest.\textsuperscript{73} In addition, the Court of Appeal noted that no exception of the duty of confidentiality should go beyond the standard of reasonable necessity.\textsuperscript{74}

While \textit{Ali Shipping}\textsuperscript{75} remains the leading precedent on establishing the implied duty of confidentiality in arbitration as a matter of law, the English Court of Appeal more recently seemed to soften its stance on a broad view of exceptions in favor of a more pragmatic case-by-case approach.\textsuperscript{76} The two cases most noteworthy in this context are \textit{Department of Economic Policy and Development of the City of Moscow and Another v. Bankers Trust Co. and Another},\textsuperscript{77} and \textit{Emmott v. Michael Wilson & Partners Ltd.}\textsuperscript{78}

\begin{itemize}
\item \textsuperscript{69} See \textit{Ali Shipping Corp. v. Shipyard Trogir}, [1998] 2 All E.R. 136, 146-47.
\item \textsuperscript{70} See id.
\item \textsuperscript{71} See id. at 147.
\item \textsuperscript{72} See id. at 146-47.
\item \textsuperscript{73} See id at 147-48.
\item \textsuperscript{74} See \textit{Ali Shipping Corp.}, [1998] 2 All E.R. 150-52.
\item \textsuperscript{75} See id.
\item \textsuperscript{76} See, e.g., Henkel, \textit{supra} note 14, at 5-6 ("While not explicitly explaining the noted relevancy, the court seems to suggest that . . . courts need to exercise discretion on a case-by-case basis in determining the question of publicity.").
\item \textsuperscript{78} [2008] EWCA (Civ) 184, \textit{available at}http://www.bailii.org/ew/cases/EWCA/Civ/2008/184.html.
\end{itemize}
The issue on appeal in *City of Moscow* involved a challenge to the validity of an arbitration award and, in particular, the question of whether the judgment dismissing this challenge should be available for publication. The dispute involved a commercial loan and the alleged default on loan payments by the City of Moscow. Moscow succeeded in the arbitration over Bankers Trust, which in turn challenged the validity of the arbitral award before the English Commercial Court. The Commercial Court dismissed Bankers Trust’s application but failed to mark its judgment as private or confidential. As a result of this failure, a legal research website obtained a copy of the judgment and made it available to its subscribers. Upon objection by Bankers Trust, the Commercial Court, in a separate judgment, ordered that the original judgment should remain private and not be available for publication. It is against this second judgment of the Commercial Court that Moscow appealed to the English Court of Appeal. The City of Moscow asserted that the original or first judgment of the Commercial Court should be made available for general publication.

In its decision, the English Court of Appeal rejected the notion of a generalized duty of confidentiality. In so doing, the court developed the theory of a spectrum in which the factors for publicity must be balanced against the need for preserving privacy and confidentiality in arbitrations. The court distinguished between considerations of publicity at the level of court hearings and those governing the publications of court judgments. It recognized that as a starting point court hearings may be

---

79 For a more detailed discussion of the decision of the English Court of Appeal in *City of Moscow*, see Henkel, *supra* note 14.
80 See *City of Moscow*, [2004] EWCA (Civ) 314 [4]-[6].
81 See *id.* [5].
82 See *id.*
83 See *id.*
84 See *id.* [4].
85 [2004] EWCA (Civ) 314 [24].
86 See *id.* [40] (“There is . . . a spectrum in relation to the nature of the proceedings. Plainly not all the arbitration claims referred to in CPR Rule 62.10(3)(b) need to be treated as confidential. And those that do will vary in the extent to which they should be so treated and the method by which to do so.”) (Morritt V-C, A., concurring) *Id.* [56].
87 [2004] EWCA (Civ) 314 [24].
conducted in private but rejected the view that this automatically equates to a blanket presumption in favor of privacy. The court held that "[t]he consideration that parties have elected to arbitrate confidentially and privately cannot dictate the position in respect of arbitration claims brought to court." In contrast to arbitration agreements, court proceedings are not consensual. Following this rationale, the court consequently also rejected the perception that confidentiality in arbitrations is the dominant factor in determining whether or not a duty of confidentiality extends to court proceedings.

In Emmott v. Michael Wilson & Partners Ltd, arbitration proceedings were commenced in England; at the same time, court proceedings were also initiated in the British Virgin Islands and New South Wales in Australia. During the arbitration proceedings in England, the claimant, Michael Wilson & Partners, withdrew allegations of fraud and conspiracy but continued to pursue them in the court proceedings in the British Virgin Islands and New South Wales against Emmott and additional defendants. Emmott sought disclosure of documents disclosed during the arbitration proceedings in England to prove that Michael Wilson & Partners tried to mislead the courts in the British Virgin Islands and Australia. The English Court of Appeal concluded that the documents sought for disclosure were in principle confidential, but subject to two exceptions. First, disclosure may be allowed if the documents are reasonably necessary for the protection of Emmott’s legitimate interest, such as defending against a claim brought in court by a third party. Second, the court held that disclosure may be appropriate if the duty of confidentiality and the

---

88 See id. [34], [42].
89 See id. [34].
90 See id.
91 See id. [10].
93 See id. [4].
94 See id. [10], [14].
95 See id. [45].
96 See id. [27].
97 Emmott, [2008] EWCA (Civ) 184.
obligation of non-disclosure is only utilized to potentially mislead foreign courts.\textsuperscript{98} While the court applied \textit{Ali Shipping} in this case and embraced the fact the duty of confidentiality is a substantive rule of arbitration law, the court also recognized that \textit{Emmott} was an unusual case that required a case-specific analysis and thus did not necessarily fit well in the broader set of exceptions.\textsuperscript{99} The court also broadened the exception of disclosure in the public interest or the interest of justice as defined in \textit{Ali Shipping}.\textsuperscript{100} The disclosure of documents produced in arbitration in the interest of justice is not limited to the interest of justice in England and may include foreign jurisdictions.

Despite some of these more recent decisions in England, the clearest criticism of a broad duty of confidentiality implied under English law came from a decision of the Privy Council\textsuperscript{101} in \textit{Associated Electric and Gas Insurance Services Ltd. v. European Reinsurance Co. of Zurich (Aegis)}.\textsuperscript{102} Due to the fact that the parties in \textit{Aegis} had explicitly entered into a rather detailed confidentiality agreement, the decision indicates that even if parties clearly intend non-disclosure they may no longer rely on an unqualified protection of confidentiality in England.

\textit{Aegis} involved the use of arbitration materials obtained in a first arbitration to be utilized to support a plea of issue estoppel in

\textsuperscript{98} See id. [28].


\textsuperscript{100} See infra Part III.A.1 ("The Court recognized five exceptions: (1) Party consent, (2) order of court, (3) leave of court, (4) to protect an arbitrating party’s legitimate interest, and (5) where disclosure is requisite to the public interest.").

\textsuperscript{101} The Privy Council is a body of advisors to the government of the United Kingdom, and is one of the oldest governmental bodies in the United Kingdom, though it has evolved with the overall structure of the government and today reflects the fact that the United Kingdom is a constitutional monarchy. \textit{See Privy Council Overview, PRIVY COUNCIL OFFICE, http://privycouncil.independent.gov.uk/privy-council} (last visited Mar. 22, 2012). The Privy Council advises institutions that are incorporated by Royal Charter, plays a role in certain statutory regulatory bodies, and through its Judicial Committee is a final Court of the Appeal for the United Kingdom’s overseas territories and Commonwealth countries. The Judicial Committee consists of both the Supreme Court Justices and some Commonwealth judges. \textit{See id.}

\textsuperscript{102} \textit{Associated Elec. and Gas Ins. Services Ltd. v. European Reinsurance Co. of Zurich, [2003] 1 All E.R. 253, available at http://www.bailii.org/uk/cases/UKPC/2003/11.html} [hereinafter \textit{Aegis}]
a second arbitration.\textsuperscript{103} Although the decision shared many similarities with the facts in \textit{Ali Shipping}, unlike the parties in \textit{Ali Shipping}, the parties in \textit{Aegis} had entered into an express confidentiality agreement.\textsuperscript{104} As a result, \textit{Ali Shipping} was not directly applicable to \textit{Aegis}, but the Privy Council referred to the holding in \textit{Ali Shipping} and commented on the ruling in dicta.\textsuperscript{105}

The Privy Council acknowledged that the confidentiality agreement between the parties was intended to be exhaustive; and that the agreement seemed to clearly prohibit any communication or disclosure of documents from the first arbitration.\textsuperscript{106} The Council clarified, however, that although the contractual agreement may provide a strong argument in favor of an absolute duty of confidentiality, it is not the only basis for the evaluation of that duty.\textsuperscript{107} In particular, the extent of the confidentiality agreement must be assessed with regard to the surrounding circumstances in which it was made and the basic principles and purpose of arbitration.\textsuperscript{108} Due to the business relationship between the parties and the fact that the arbitration included commercially sensitive materials, the Council determined that the relevant circumstances in the present case justified the use of a confidentiality agreement.\textsuperscript{109} While the Privy Council identified private dispute resolution as the essential purpose of arbitration, it noted that the enforcement of the arbitral award remains within the domain of the courts.\textsuperscript{110} The Privy Council referenced various common law and statutory remedies and emphasized the possibility to sue for failure to honor an award in form of a claim for debt, damages, or specific performance.\textsuperscript{111} Moreover, the Council acknowledged that a party may rely on an award as having conferred a right or determined a fact.\textsuperscript{112} The latter

\textsuperscript{103} \textit{See id. [1].}
\textsuperscript{105} \textit{Aegis}, [2003] 1 All E.R. 253 [19].
\textsuperscript{106} \textit{See id. [7].}
\textsuperscript{107} \textit{See id.}
\textsuperscript{108} \textit{See id.}
\textsuperscript{109} \textit{See id. [8].}
\textsuperscript{110} \textit{Aegis}, [2003] 1 All E.R. 253 [9].
\textsuperscript{111} \textit{See id.}
\textsuperscript{112} \textit{See id. [9], [20].}
conclusion is noteworthy as the Council further clarifies that the duty to perform or honor an award also includes the recognition and respect of the rights which it declares. Any interference with this right constitutes non-performance and establishes a cause of action.\textsuperscript{113}

The Privy Council thus recognized that confidentiality even under an exhaustive confidentiality agreement is only protected if disclosures of the award or parts thereof “raise the mischief against which the confidentiality agreement is directed.”\textsuperscript{114} In other words, confidentiality is only protected if any publication of arbitration materials amounts to a violation or substantial prejudice as envisioned by the confidentiality agreement between the parties.

As previously indicated, the Privy Council referred to \textit{Ali Shipping} only at the end of its judgment and in comments made in dicta.\textsuperscript{115} In these comments, the Privy Council criticized the characterization of the duty of confidentiality as an implied term inherent to arbitration agreements. It noted that an implied duty of confidentiality “elides privacy and confidentiality” in that it fails to distinguish between different kinds of confidentiality, which may attach to different types of documents or documents that were obtained in different ways.\textsuperscript{116} The Privy Council also observed that the English Court of Appeal in \textit{Ali Shipping} did not sufficiently consider the existing differences between materials obtained during arbitration proceedings and the arbitration award,\textsuperscript{117} the latter of which may automatically be subject to disclosure when used for accounting purpose or purposes of enforcement.\textsuperscript{118} The Privy Council thus concluded that “[g]eneralizations and the formulation of detailed implied terms are not appropriate.”\textsuperscript{119}

\textsuperscript{113} See id. [10].

\textsuperscript{114} See id. [8].

\textsuperscript{115} [2003] 1 All E.R. 253 [19].

\textsuperscript{116} See id. [20].

\textsuperscript{117} See id.

\textsuperscript{118} See id.

\textsuperscript{119} See id.
2. France

French courts also recognize the existence of an implied duty of confidentiality as an essential part of any agreement to arbitrate. In contrast to English law, however, the protection of confidentiality under French law seems somewhat broader. Unlike the English Court of Appeal in *Ali Shipping*, French courts generally do not permit any exceptions to confidentiality and non-disclosure. In fact, the French Court of Appeal seems to opine that public disclosure requirements may not conflict, but rather co-exist with the strict enforcement of confidentiality in arbitrations.

While France is a civil law jurisdiction, French statutes do not provide any explicit provision defining the duty of confidentiality in arbitrations. The practice and recognition of an implied duty of confidentiality in France is thus primarily based on various court rulings and custom.

In *Aita v. Ojjeh*, the Paris Court of Appeal was petitioned to annul an arbitration award issued in England. Petitioner Aita

---


122 See Brown, supra note 5, at 975-76.

123 See, e.g., True North & FCB Int'l v. Bleustein et autres, (Sep. 17, 1999), Revue de l'Arbitrage 2003, 189 (Fr.).

124 See, e.g., CODE CIVIL [C. CIV.] art. 2059 et seq. (Fr.); NOUVEAU, CODE DE PROCEDURE CIVILE [N.C.P.C.] art. 1442 (Fr.).


128 See id. at 584.
argued that the parties did not enter into a valid arbitration agreement, that the arbitration essentially violated his right to a fair trial, and that the award issued in England violated French public policy. The Court of Appeal rejected all of these claims, arguing that the annulment proceedings instead violated the duty of confidentiality. The court held that the sole purpose of the annulment proceeding was an attempt to disclose confidential information from the arbitration. It further noted that the annulment, as a result, would also violate the very nature of arbitration proceedings as a private dispute settlement procedure chosen by the parties to maintain confidentiality and prevent publication.

*Société True North et Société FCB International v. Bleustein et al* addressed the issue of confidentiality in a different context. After the commencement of an arbitration, one party disclosed information about the proceeding without the other party's consent. Arguing breach of the duty of confidentiality, the other party withdrew from the arbitration. The French court agreed and held that without a specific legal obligation to disclose information, the disclosure of such information violates the duty of confidentiality under the arbitration agreement.

However, even among French courts, the attitude towards an unqualified protection of confidentiality in arbitration seems to change. The more recent case of *Nafimco v. Foster Wheeler Trading Company AG* serves as an example. The Court of Appeal increased the burden of proof, holding that any party claiming breach of confidentiality not only has the burden of proving that a duty of confidentiality actually existed, but also that the duty was neither waived nor objected to by the other party.

---

129 *See id.*
130 *See id.*
131 *See id.*
133 *See id.* at 191-92.
134 *See id.*
135 *See id.*
137 *See id.*
This, of course, essentially amounts to a rejection of an implied duty of confidentiality. While custom and business efficacy as well as the parties’ prior business relationship may be factors to be considered in this context, without an express confidentiality agreement, the burden of proving the existence of such an implied duty will most certainly require a very high standard of evidence.

B. Express Duty of Confidentiality

Courts in Australia, Sweden, and the United States do not recognize a duty of confidentiality inherent to arbitration agreements, unless the parties explicitly agreed to such a duty and contracted for it. Whilst acknowledging the private character of arbitration hearings, these jurisdictions reject the notion that confidentiality is a necessary prerequisite of the private nature of arbitration in general, and clearly distinguish the concept of privacy and confidentiality.

1. Australia

The High Court of Australia is considered the most adamant proponent of an express duty of confidentiality in international commercial arbitration. In its 1995 decision Esso v. Plowman, the High Court provided the clearest distinction between privacy and confidentiality to date.

The Minister for Manufacturing and Industry Development brought an action against two producers of natural gas—Esso and BHP Petroleum—and two utility companies. The Minister sought declarations concerning whether information disclosed by Esso and BHP in the course of their respective arbitrations with the two utilities was subject to an obligation of confidence. Underlying this action were issues concerning third party access to documents

---

138 See supra note 142.
139 See infra note 155.
140 See infra note 172.
141 See infra Parts III.B.1, III.B.2, III.B.3.
144 See id. at 391.
in connection with price settings and related antitrust concerns.\textsuperscript{145}

While the Australian High Court emphasized the importance of privacy in arbitration as an essential reason for its attractiveness and efficiency, it clarified that confidentiality is only a "consequential benefit... attach[ed] to arbitrations."\textsuperscript{146} The Australian High Court reasoned that absent an express contractual provision, the private character of arbitration hearings alone does not justify the conclusion that confidentiality is an essential attribute of a private arbitration.\textsuperscript{147} The court also noted that complete confidentiality of arbitration proceedings is simply impossible in today’s business environment.\textsuperscript{148} For example, the obligation of confidentiality does not attach to witnesses. Those witnesses are then at liberty to disclose information to third parties. Moreover, arbitration awards may become subject to court review and arbitrating parties may be entitled to disclose information to insurance carriers and shareholders.\textsuperscript{149} Among others, it seems that one of the rationales of the Australian High Court is based on the conclusion that absolute confidentiality in arbitrations is unachievable and that arbitration agreements simply cannot imply or guarantee that at least some information of the arbitration will not be disclosed to the public.

2. Sweden

The Swedish Supreme Court in \textit{Bulgarian Foreign Trade Bank Ltd. v. A. I. Trade Finance Inc} (hereinafter \textit{Bulbank})\textsuperscript{150} essentially followed the Australian High Court’s reasoning in \textit{Esso}, with

\begin{itemize}
\item \textsuperscript{145} See id.
\item \textsuperscript{146} See id. at 401.
\item \textsuperscript{147} See id.; see also \textit{Alliance Petroleum Aust. NL v. Australian Gas Light Co.}, (1983) 34 SASR 215, 229-32.
\item \textsuperscript{149} Id.
\end{itemize}
some distinctions.\textsuperscript{151} At issue in \textit{Bulbank} was whether the publication of an arbitral award initiated by one of the parties constituted a breach of contract, which in turn would invalidate the arbitration agreement and the award that was issued.\textsuperscript{152} The arbitration agreement did not include an express confidentiality agreement.\textsuperscript{153} Furthermore, Swedish arbitration law did not address the issue of confidentiality.\textsuperscript{154}

As with the Australian High Court, the Swedish Supreme Court rejected the argument that the private nature of arbitration automatically gives rise to a general duty of confidentiality.\textsuperscript{155} The Swedish Court focused on the contractual agreement between the parties and concluded that "a general starting point for assessing the issue of the duty of confidentiality is that the arbitration proceedings are based on a contract."\textsuperscript{156} The court noted that parties' interests alone do not amount to a legal obligation to observe confidentiality on pain of sanctions.\textsuperscript{157} It is also the prevailing view among attorneys and arbitrators that a duty of confidentiality does not apply without a separate and explicit agreement by the parties.\textsuperscript{158} According to the court, the advantage of privacy does not mean that it is a precondition that a duty of confidentiality prevails for the parties. The real meaning of this, compared with judicial proceedings, is instead... that the proceeding are not public, i.e., that the public does not have any

\textsuperscript{151} Bulgarian Foreign Trade Bank Ltd. v. A. I. Trade Fin. Inc., NYH Juridiskt Arkiv [NJA] [Supreme Court] 2000 ref. T1881-99 (Swed).
\textsuperscript{152} See \textit{id.} at B-1.
\textsuperscript{153} See \textit{id.} at B-2.
\textsuperscript{154} See \textit{id.} ("It is undisputed between the parties that the arbitration agreement does not govern [the issue of confidentiality] explicitly. Nor are there any provisions concerning a duty of confidentiality in the applicable Arbitration Act of 1929. It may be added that the issue is not governed by the new Arbitration Act, which now has replaced the 1929 Act.").
\textsuperscript{155} See \textit{id.} at B-2, B-3.
\textsuperscript{156} Bulgarian Foreign Trade Bank Ltd. v. A. I. Trade Fin. Inc., NYH Juridiskt Arkiv [NJA] [Supreme Court] 2000 ref. T1881-99 (Swed).
\textsuperscript{157} \textit{Id.} at B-3.
\textsuperscript{158} \textit{Id.} at B-3.
right of insight by being in attendance at the hearing. . . .  159

In a further similarity to the Australian High Court, the Swedish Supreme Court also recognized that confidentiality in arbitration may never be observed in absolute terms, as parties may be obliged to inform third parties about pending arbitration or challenge an award in court without impediment. 160 The court also noted that the information dealt with in arbitration often differs to a great extent and that, as a result, any disclosure by arbitrating parties may require different considerations without any general assumptions and depending on the nature of the information in question. 161 In that, the Swedish Supreme Court seems to underscore that there cannot be any bright-line rule in determining confidentiality, but instead that any finding of a duty of confidentiality must be made on a case-by-case basis.

3. United States

In the United States, the case law on the issue of confidentiality in arbitrations is inconsistent and unclear. Only a few published court decisions directly address the issue of privacy and confidentiality in commercial arbitration. 162 Instead, when considering the issue of confidentiality, most U.S. cases deal with health or employment law. 163 For example, in Rosenberg v. Merrill Lynch, 164 a federal district court had to consider an Age Discrimination in Employment Act claim. The court determined that, although arbitration is a system that traditionally makes decisions in private and "is dedicated to the resolution of

159 Id.
160 Id.
161 Id.
individual, private disputes,"¹⁶⁵ this does not articulate a "public norm."¹⁶⁶

Other U.S. courts have compared arbitration proceedings with litigation and concluded that the attorney-client privilege and the work-product doctrine are applicable.¹⁶⁷ In *Milone v. General Motors Corp.*,¹⁶⁸ the court reversed a lower court's holding that files in an arbitration were protected by the work-product doctrine and could not be disclosed during court proceedings.¹⁶⁹ As part of a products liability action arising from a car accident, General Motors sought production of the plaintiff's insurer's claim file, including transcripts of testimony given by the plaintiff in an arbitration hearing involving the same accident.¹⁷⁰ The court reversed the lower court's decision that the file was protected under the work-product doctrine.¹⁷¹ The court reasoned that the insurer did not prepare the materials for the file in connection with the plaintiff's liability for damages, the insurer's duty under the policy, or the defense of claims against the plaintiff.¹⁷² Instead, the court ruled the material from the arbitration was relevant and material in the court proceedings and ordered disclosure.¹⁷³

In *Samuels v. Mitchell*,¹⁷⁴ the defendants contended that the arbitration documents were protected by both the attorney-client privilege and the work-product doctrine.¹⁷⁵ The court reasoned that, because the defendant made the documents available to her accountant but not to her attorneys, the attorney-client privilege did not protect the documents.¹⁷⁶ With regard to the work-product doctrine, the court reasoned that, because of the adversarial nature

¹⁶⁵ Id. at 198.
¹⁶⁶ Id.
¹⁶⁹ Id. at 922.
¹⁷⁰ Id. at 921.
¹⁷¹ Id. at 922.
¹⁷² Id. at 921.
¹⁷⁵ Id. at 197.
¹⁷⁶ Id. at 199.
of arbitration, documents prepared for arbitration should be protected by the work-product doctrine.\textsuperscript{177} The court also examined whether the disclosure of arbitration documents to the accountant acted as a waiver of the work product privilege.\textsuperscript{178} It concluded that the waiver is only effective if the disclosure to a third party "substantially increases the opportunity for potential adversaries to obtain the information," which it denied in the current case.\textsuperscript{179}

In \textit{Industrotech Constructors, Inc. v. Duke University}, the court also addressed the issue of waiver.\textsuperscript{180} The defendant appealed from an order directing it to produce arbitration proceeding transcripts between the defendant contractor and another contractor,\textsuperscript{181} arguing that the parties had stipulated to keep the arbitration record confidential.\textsuperscript{182} However, the defendant produced no evidence of such a stipulation.\textsuperscript{183} The defendant further argued that, even without the stipulated confidentiality, public policy should require that the arbitration remain confidential.\textsuperscript{184} In dismissing these contentions, the court noted that neither the Construction Industry Arbitration Rules, under which the arbitration occurred, nor the state's statutes required "strict confidentiality."\textsuperscript{185} Further, the court noted that the defendant itself had already disclosed the transcripts to a non-party, thus waiving any privilege it may have claimed.\textsuperscript{186} Lastly, the court dismissed the defendant's argument that the transcripts were "prepared in anticipation of litigation."\textsuperscript{187} The court reasoned that the record contained no indication of what litigation may have been anticipated when the transcripts were prepared; in fact, the

\textsuperscript{177} \textit{Id.} at 200.

\textsuperscript{178} \textit{Id.}


\textsuperscript{181} \textit{Id.} at 273-74.

\textsuperscript{182} \textit{Id.} at 274.

\textsuperscript{183} \textit{Id.}

\textsuperscript{184} \textit{Id.}

\textsuperscript{185} \textit{Industrotech Constructors, Inc.}, 314 S.E. 2d at 274.

\textsuperscript{186} \textit{Id.}

\textsuperscript{187} \textit{Id.} at 275.
court noted that "the law favors arbitration as a means of avoiding litigation." Thus, the court affirmed the order directing the production of the transcripts, but noted that the defendant had the right to excise portions that were work product.

More recently, the U.S. District Court for the Southern District of New York in Urban Box Office Network, Inc. v. Interfase Managers, L.P. went even further and held that waiver of privilege may even render any confidentiality agreement "irrelevant." The defendants asserted that, even if they had waived their attorney-client privilege, disclosure of any documents from arbitration was still prohibited under the parties' confidentiality agreement. The court disagreed and held that the defendants had waived their privilege with the simultaneous effect of making the confidentiality agreement "irrelevant." The court did acknowledge, however, that the confidentiality agreement entered into between the parties may have applied, if waiver of privilege would not have applied and the defendants could have provided evidence of invoking the agreement, such as by at least marking the documents as confidential.

The two leading cases on confidentiality in the United States are United States v. Panhandle Eastern Corp. and Contship Containerlines, LTD v. PPG Industries, Inc. Both decisions involved international arbitrations and reject the view that the lack of any express agreement between the parties somehow implies a duty of confidentiality in arbitration agreements. In Panhandle, the United States brought action against Panhandle Eastern Corporation to protect a security interest. Claiming confidentiality and prejudice, the defendant attempted to prevent

188 Id.
189 Id.
191 Id. at *1.
192 Id. at *5.
193 Id.
196 Id.; Panhandle, 118 F.R.D. at 351.
197 See Panhandle, 118 F.R.D. at 350.
disclosure of documents relating to an arbitration conducted in Geneva, Switzerland, under the rules of the International Chamber of Commerce (ICC). The Federal District Court of Delaware rejected that view and dismissed the defendant’s contention that the parties had a “general understanding . . . that the pleadings and related documents in the [a]rbitration would be kept confidential.” The court particularly criticized that the parties failed to enter into an “actual agreement of confidentiality, documented or otherwise.” It also rejected the defendant’s view that the “confidential character” of the arbitration procedure must be respected by everyone who participates in that work in whatever capacity. Instead, the court reasoned that the rules governing the internal functioning of the arbitration proceeding are not binding on the court. The court in Panhandle therefore failed to recognize any general or implied duty of confidentiality in international arbitrations and further underlined the need of an express confidentiality agreement in arbitrations. The U.S. District Court for the Southern District of New York came to a similar conclusion in Contship Containerlines, LTD v. PPG Industries, Inc. In this case, the defendants refused to provide discovery of materials they provided in arbitration and asserted that the documents were protected by both the English Law, which implied confidentiality in arbitration, and the work-product doctrine. The court noted that due to the lack of any confidentially agreement, and regardless of any implied duty, discovery could be compelled if: “(1) [T]he documents are relevant and (2) ‘disclosure is necessary for disposing fairly of the cause or matter or for saving costs.’” The court also briefly

198 Id.
199 Id.
200 Id.
201 Id. The defendant claimed that “the applicable Rules of the Court of Arbitration of the International Chamber of Commerce (‘ICC Rules’) require the . . . [a]rbitration documents to be kept confidential.” Id. at 349.
202 Panhandle, 118 F.R.D. at 350.
203 Id.
205 Id. at *1.
206 Id. at *2; see also Lawrence E. Jaffe Pension Plan v. Household Int’l, Inc., 59
discussed work product, but determined that the work-product doctrine was waived because the documents were disclosed to both parties during arbitration.\footnote{207}

C. Statutory Protection of Confidentiality

In addition to precedent, the approach taken in some jurisdictions is that of statutory regulation. The article discusses three different examples.\footnote{208} New Zealand is chosen due to the fact

Fed.R.Serv.3d 473 (Dist. Ct. D.Colo. Aug. 13, 2004). In this case, the plaintiff sought document production of material from a pending arbitration. \textit{Id.} at 1. The court found that the parties had made an express "agreement" that all documents in the arbitration would be "treated as confidential," and the arbitrator agreed. \textit{Id.} The court, however, acknowledged that it has the authority to modify protective orders and confidentiality agreements if to do so "avoid[s] duplicative discovery in collateral litigation [and] policy considerations favoring the efficient resolution of disputes." \textit{Id.} at 2. The defendant argued that the court should uphold confidentiality because the plaintiff did not prove a "compelling need" for those documents, and they would reveal confidential business information. \textit{Id.} at 3. The court denied defendant's motion to quash the document production subpoena, but decided to stay compliance with the subpoena until the arbitrator determined if document production would violate the confidentiality agreement. \textit{Id.} For a different outcome, see ITT Educational Services, Inc. v. Arce, 533 F.3d 342 (5th Cir. 2008). Several students commenced an arbitration proceeding against ITT Educational Services. \textit{Id.} In his award, the arbitrator made a finding in favor of the students. \textit{Id.} at 344. In a second arbitration proceeding against ITT, the same plaintiff's attorney sought to publicly file the arbitrator's findings in the first proceeding. \textit{Id.} ITT argued that this was a violation of the express confidentiality agreement in the arbitration clause of the contract between the parties. \textit{Id.} Further, ITT argued that confidentiality is "separable" from the contract and can therefore still be enforced even if there is a finding of fraudulent inducement. \textit{Id.} at 345. The United States Court of Appeals for the Fifth Circuit agreed with ITT's arguments and issued a permanent injunction preventing the release of the arbitration documents. \textit{Id.} at 344.

\footnote{207} See Contship Containerlines Ltd., 2003 WL 1948807.

\footnote{208} In the United States, statutory provisions addressing non-disclosure and confidentiality in context of arbitrations are rare. See, e.g., N.C. GEN. STAT. § 1-569.17(e) (2011) ("An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in this State."); ARK. CODE ANN. § 16-7-206:

Confidentiality of communications in dispute resolution procedures. (a) Except as provided by subsection (c) of this section, a communication relating to the subject matter of any civil or criminal dispute made by a participant in a dispute resolution process, whether before or after the institution of formal judicial proceedings, is confidential and is not subject to disclosure and may not be used as evidence against a participant in any judicial or administrative proceeding.
that it was one of the first jurisdictions to implement a broad statutory provision explicitly addressing the issue of privacy and confidentiality in arbitrations. Bermuda and Singapore are relevant as two jurisdictions hosting a significant amount of arbitrations.

(b) Any record or writing made at a dispute resolution process is confidential, and the participants or third party or parties facilitating the process shall not be required to testify in any proceedings related to or arising out of the matter in dispute or be subject to process requiring disclosure or production of information or data relating to or arising out of the matter in dispute. (c) If this section conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine in camera whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure.

MO. REV. STAT. § 435.014 (2011):

2. Arbitration, conciliation and mediation proceedings shall be regarded as settlement negotiations. Any communication relating to the subject matter of such disputes made during the resolution process by any participant, mediator, conciliator, arbitrator or any other person present at the dispute resolution shall be a confidential communication. No admission, representation, statement or other confidential communication made in setting up or conducting such proceedings not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery.

TEX. BUS. CORP. ACT ANN. art. § 154.073 (b) (2011):

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.


1. New Zealand

New Zealand’s Arbitration Act provides that arbitration agreements are “deemed to provide that the parties and the arbitral tribunal must not disclose confidential information.”\(^\text{211}\) Confidential information is defined as “information that relates to the arbitral proceedings or to an award”\(^\text{212}\) made in those proceedings.\(^\text{213}\) However, the New Zealand Arbitration Act also contains a number of exceptions allowing publication and disclosure.\(^\text{214}\) For example, the Act allows disclosure to a professional or other advisor of any of the parties or if the disclosure is necessary.\(^\text{215}\) Furthermore, the Act provides that an


\(^{212}\) Id. § 2.

\(^{213}\) The September 3, 2007 Act was even more explicit. It provided that “an arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that the parties shall not publish, disclose, or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings.” Arbitration Act 1996 No. 99 (as of 03 Sep. 2007 (N.Z.), available at http://www.legislation.govt.nz/act/public/1996/0099/1.0/DLM405820.html. The author is referencing a different Act in this footnote than that of fn#213.


\(^{215}\) Id. § 14C. Section 14C states:

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 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
arbitral tribunal may allow disclosure of confidential information after giving each party an "opportunity to be heard" if "at least [one] of the parties agrees to refer that question to the arbitral tribunal concerned."\textsuperscript{216} Lastly, the High Court may either allow or prohibit disclosure if the proceedings have been terminated or one of the parties raises an appeal concerning confidentiality.\textsuperscript{217} In the case of \textit{Television New Zealand Ltd. v Langley Production Ltd.}\textsuperscript{218} the High Court of Auckland, New Zealand also addressed the issue of disclosure. Specifically, the court dealt with the question of whether court proceedings regarding the appeal and enforcement of a confidential arbitration award should be subject to public process.\textsuperscript{219} The court held that "as a matter of principle, the confidentiality which the parties have adopted and embraced with regard to their dispute resolution in arbitration cannot automatically extend to processes for enforcement or challenge in the High Court."\textsuperscript{220} The court concluded that disclosure of otherwise confidential information is appropriate if the nature of the conflict is of "serious and public interest."\textsuperscript{221}

2. \textit{Bermuda}

\textcolor{red}{The Bermuda International Conciliation and Arbitration Act}\textsuperscript{222}

\begin{quote}
Exchange Limited); and
\begin{itemize}
\item[(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
\item[(e)] if the disclosure is in accordance with an order made by—
\begin{itemize}
\item[(i)] an arbitral tribunal under section 14D; or
\item[(ii)] the High Court under section 14E.
\end{itemize}
\end{itemize}
\end{quote}

\textit{Id.}\textsuperscript{216} \textit{Id.} \textsuperscript{\textsuperscript{§} 14D}. \textsuperscript{217} \textit{Id.} \textsuperscript{\textsuperscript{§} 14E}. \textsuperscript{218} \textit{Television N.Z. Ltd. v Langley Prod. Ltd. [2000] 2 NZLR 250 (N.Z.)}. \textsuperscript{219} \textit{Id.} \textsuperscript{220} \textit{Id.} \textsuperscript{\textsuperscript{¶} 38}. \textsuperscript{221} \textit{Id.} \textsuperscript{\textsuperscript{¶} 42}. \textsuperscript{222} \textit{Bermuda International Conciliation and Arbitration Act 1993, available at http://www.ciarb.bm/arbitration-act-1993.}
seems to establish a broader protection of confidentiality by limiting the exceptions for disclosure and establishing various safeguards, including the requirement of party consent and in exceptional cases prohibiting publication for up to ten years.\textsuperscript{223} The Act provides that "[t]he conciliator and the parties must keep confidential all matters relating to the conciliation proceedings. Confidentiality extends to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement."\textsuperscript{224} The Act also empowers courts to hear cases regarding arbitration disputes "other[ ] than in open court"\textsuperscript{225} and further restricts publication under these circumstances as follows:

\begin{enumerate}
  \item A court in which proceedings to which this section applies are being heard shall, on the application of any party to the proceedings, give directions as to what information, if any, relating to the proceedings may be published.
  \item A court shall not give a direction under subsection (2) permitting information to be published unless—
    \begin{enumerate}
      \item all parties to the proceedings agree that such information may be published; or
      \item 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.
    \end{enumerate}
  \item Notwithstanding subsection (3), where a court gives a judgment in respect of proceedings to which this section applies and considers that judgment to be of major legal interest, it may 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
    \begin{enumerate}
      \item give directions as to the action that shall be taken to conceal that matter in the law reports and the professional
\end{enumerate}
\end{enumerate}

\textsuperscript{223} Id. § 46.
\textsuperscript{224} Id. § 10.
\textsuperscript{225} Id. § 45 ("Subject to the Constitution, proceedings in any court under this Act shall on the application of any party to the proceedings be heard otherwise than in open court.").
publications; 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 law report or professional
publication shall be published until after the end of such
period, not exceeding ten years, as it considers
appropriate.\textsuperscript{226}

Despite the broad protection of confidentiality under the
Bermuda International Conciliation and Arbitration Act, the Privy
Council in \textit{Associated Electric and Gas Insurance Services Ltd. v.}
\textit{European Reinsurance Company of Zurich}\textsuperscript{227} rejected any
generalizations in the formulation of a duty of confidentiality in
arbitrations under Bermuda Law and advocated a case-by-case
approach.\textsuperscript{228} More specifically, the Privy Council recognized that
confidentiality, even under an exhaustive confidentiality
agreement, is only protected if publication "raise[s] the mischief
against which the confidentiality agreement is
directed."\textsuperscript{229} In
other words, even under Bermuda law, confidentiality may only be
protected if publication amounts to a violation or substantial
prejudice as envisioned in the confidentiality agreement between
the parties.\textsuperscript{230}

3. **Singapore**

Singapore’s Arbitration Act mirrors Bermuda’s. As in
Bermuda, proceedings relating to arbitration may also be heard
other than in open court and are considered confidential.\textsuperscript{231} The
Arbitration Act provides that the court shall not allow information
relating to arbitration proceedings to be published unless:

\textsuperscript{226} \textit{Id.} § 46.

\textsuperscript{227} \textit{Associated Elec. and Gas Ins. Services Ltd. v. European Reinsurance Co. of}

\textsuperscript{228} \textit{Id.} ¶¶ 8, 11; \textit{see also} John P. Gaffney, \textit{Confidentiality in International
Arbitration: A Recent Decision of the Privy Council}, \textit{18 Mealey's Int'l Arb. Rep.} 18,

\textsuperscript{229} \textit{Associated Elec. and Gas Ins. Services Ltd. v. European Reinsurance Co. of}

\textsuperscript{230} \textit{See also} Henkel, \textit{supra} note 14, at 6.

\textsuperscript{231} \textit{See, e.g.}, Tjong Very Sumito v. Antig Investments Pte Ltd., [2010] 2 All E.R.
366 (Eng.).
(a) [A]ll 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.  

Singapore’s act further provides that “notwithstanding [the above provision], where a court ... 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.”  

It further provides that “if any party to the proceedings reasonably wishes to conceal any matter,” the court shall direct action to “be taken to conceal the matter in the reports.” If the court determines that, even with action taken to conceal, a report would reveal the confidential information, the court shall not allow publication “until after the end of such period, not exceeding [ten] years, as it considers appropriate.”

Similar to the Bermuda International Conciliation and Arbitration Act, Singapore’s Arbitration Act also provides for a public interest exception. While the statutory provisions in Singapore provide for some protection of confidentiality as they relate to publication, the protection remains limited by a public interest exception and is not absolute.

D. The Lack of Absolute Protection of Confidentiality

When comparing the different jurisdictional approaches on protecting confidentiality in international commercial arbitrations, a lack of any clear international consensus is apparent. Indeed, the

---


233 Id.

234 Id.

235 Id.

236 Id.
emerging view among courts seems to be that disclosure of arbitration communications and materials may be compelled. While the English Court of Appeal in *Ali Shipping v. Shipyard Trogir* held that the corollary of privacy propounds a general implied obligation of confidentiality, the same court in *City of Moscow* and *Emmott v. Michael Wilson & Partners Ltd.* seems to move toward a more pragmatic approach when it comes to disclosure of arbitration materials. The same seems to be true in France. In *Nafimco v. Foster Wheeler Trading Company AG* the Paris Court of Appeal increased the burden of proof for the party claiming a violation of confidentiality. While English and French courts share the fact of traditionally enforcing confidentiality in arbitrations more strictly, the courts’ approaches towards allowing disclosure are clearly different. The English court is focusing on a public interest exception, while the French court simply increased the burden of proof.

In *Esso v. Plowman*, the High Court of Australia rejected any implied duty of confidentiality and stressed the need of an expressed confidentiality agreement to ensure non-disclosure. Courts in Sweden and the United States follow a similar approach by separating the concept of privacy and confidentiality in arbitrations. Yet, in the United States, the case law and reasoning for granting disclosure of documents produced during arbitrations may be the most inconsistent among all jurisdictions.

Finally, even in jurisdictions opting for a broader statutory protection of confidentiality in arbitrations, such as New Zealand, Bermuda, and Singapore, a limited form of disclosure of information is permitted. In New Zealand specifically, and despite a statute explicitly addressing the issue of privacy and

---

238 City of Moscow v. Bankers Trust Co. [2004] All E.R. 193 (Eng.).
239 Emmott v. Michael Wilson & Partners Ltd. [2008] EWCA (Civ) 184 (Eng.).
240 Cour d’appel [CA] [regional court of appeal] Paris, Jan. 22, 2004, note Bureau (Fr.).
241 Id.
243 Id.
244 NYH Juridiskt Arkiv [NJA] [Supreme Court] 2000-10-27, 7 T1881-99 (Swed.).
confidentiality in arbitrations, the High Court of Auckland in *Television New Zealand* held that confidentiality in arbitrations cannot automatically extend to processes for enforcement of challenges in court.

The lack of any consensus and international convergence stands in stark contrast to endorsing arbitration as a private form of dispute resolution and an effective alternative to litigation. Moreover, the resulting uncertainty clearly undermines a policy in favor of arbitration and challenges the fundamental notion of party autonomy in arbitrations. Even when express confidentiality agreements are negotiated or institutional rules require that arbitration remains confidential, it is questionable whether these agreements hold up in courts.

**IV. The Work-Product Doctrine**

Not unlike the assumption that the protection of the attorney work product is necessary to prevent prejudice to the administration of justice, this article argues that a fair balance between confidentiality in arbitration and intersecting public interests in disclosure may be achieved by applying the U.S. concept of the work-product doctrine. This view is based on the

---

248 *Id.* ¶ 38.
250 See generally Kevin M. Clermont, *Surveying Work Product*, 68 CORNELL L. REV. 755 (1983); Fred C. Zacharias, *Who Owns Work Product?*, 2006 U. ILL. L. REV. 127, 129-32 (2006) (“Work-product doctrine is designed to balance the ability of lawyers to prepare their cases free from prying eyes and the ability of parties in litigation to obtain properly discoverable information.”) This author also suggests that case law has provided various justifications for the work-product doctrine: (1) Lawyers will be most effective when “guaranteed a measure of professional confidentiality”; and (2) allowing discovery of work product would “create incentives for lawyers not to produce work product, on the one hand, and to rely on the adversary’s production of work, on the other.”) *Id.* at 131-32. See also Special Project, *The Work Product Doctrine*, 68 CORNELL L. REV. 760 (1983); Elizabeth Thornburg, *Rethinking Work Product*, 77 VA. L. REV. 1515, 1524-50 (1991) (discussing the theoretical justifications for work product privilege).
251 See, e.g., Samuels v. Mitchel, 155 F.R.D. 195 (N.D. Cal. 1994) (arguing that since arbitrations are adversarial in nature, documents prepared for use in arbitrations are accorded work product protection); see also *supra* Part II.D.
acknowledgment that confidentiality in arbitrations is an essential factor—without it and without a level of predictability of when disclosure can be compelled, arbitration is no longer an alternative to, but simply another form of litigation. Parties will no longer have any incentive to be more forthcoming with information during arbitrations in favor of a more efficient and speedy resolution of their disputes. At the same time and in light of the many interests competing with confidentiality, the absolute protection of confidentiality in arbitrations seems unachievable and unrealistic.

The approach advocated in this article favors raising the burden of proof for the admission of evidence sought from arbitration proceedings. It is true that this approach may not address every challenge to confidentiality; it may, however, at a minimum serve as a more pragmatic approach, making the law and practice of confidentiality in international commercial arbitrations more predictable. The qualification of confidentiality in arbitration through the work-product doctrine may therefore allow for a more reliable risk benefit analysis in favor of arbitration when compared with litigation.

To be clear, this article does not argue that the attorney work product cannot be waived during arbitration proceedings as it relates to the preparation and production of work product in anticipation of these proceedings. Instead, the work-product doctrine and the propositions of *Hickman v. Taylor* may simply be utilized as a practical and well-established standard to allow disclosure where “production of those facts is essential” for the administration of justice. In this function, the standards used for determining disclosure of work product in the United States may not only provide a workable basis for greater predictability in practice, viewed from the perspective of a comparative analysis,

252 For example, regulatory disclosure requirements for publicly held corporations or the fact that parties to arbitration agreements increasingly seem to challenge arbitration awards in court.


255 *Id.* Please note that the issue of waivers under the work-product doctrine in arbitrations is not the focus of this article.

256 329 U.S. 495 (1947).

257 *Id.*
but may also serve as a starting point for an international consensus on the issue of confidentiality in arbitrations.

A. History and Background of the Work-Product Doctrine

The application of the work-product doctrine as a standard in international commercial arbitrations requires a brief discussion of the doctrine's history and background.\(^{258}\)

The work-product doctrine is always considered in context of the attorney-client privilege. While the focus of the latter is to encourage uninhibited attorney-client communications,\(^{259}\) the primary purpose of the work-product doctrine is to allow for diligent and thorough preparation by the attorney in anticipation of litigation or arbitration.\(^{260}\) As a result, the work-product doctrine involves much that is outside the parameters of actual attorney-client communications. Furthermore, the protection of work product is not absolute, as compared to attorney-client privilege, and is limited to that created in preparation for or in anticipation of litigation or arbitration.\(^{261}\) At the same time, the work-product doctrine is considered broader in scope and reach than the attorney-client privilege.\(^{262}\)

While today codified in Federal Rule of Civil Procedure 26(b)(3)\(^{263}\) and Federal Rule of Criminal Procedure 16(b)(2),\(^{264}\) the

\(^{258}\) This article takes no sides in the discussion of whether the work-product doctrine is a privilege or not. Rather, it is acknowledged that the term "doctrine" is increasingly being replaced by the term "protection." See, e.g., Hickman, 329 U.S. at 509-10; United States v. Nobles, 422 U.S. 225, 242-54 (1975); Railroad Salvage of Conn., Inc. v. Japan Freight Consolidators (U.S.A.) Inc., 97 F.R.D. 37, 39-40 (E.D.N.Y. 1983).

\(^{259}\) See, e.g., Trammel v. United States, 445 U.S. 40, 51 (1980) ("The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.").

\(^{260}\) Hickman, 329 U.S. at 511 ("[I]t is essential that a lawyer work with a certain degree of privacy ... Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference."); see also Thomas D. Sawaya, The Work-Product Privilege in a Nutshell, FlA. B.J., July-Aug. 1993, at 32, 34 (describing work product as "documents and tangible things ... prepared in anticipation of litigation or for trial").

\(^{261}\) FED. R. CIV. P. 26(b)(3).

\(^{262}\) See, e.g., In re Grand Jury Investigation (Sun Co.), 599 F.2d 1224, 1232 (3d Cir. 1979).

\(^{263}\) FED. R. CIV. P. 26(b)(3).
work-product doctrine is a judicially created rule established by the United States Supreme Court in *Hickman v. Taylor*.\(^\text{265}\)

The decision in *Hickman* arose from a wrongful death suit of a seaman against two owners of a tugboat that sank on the Delaware River at Philadelphia.\(^\text{266}\) In anticipation of litigation, the defendant tugboat owners' attorney privately interviewed survivors and took statements concerning the accident. Following some interviews, the attorney also drafted memoranda of what the interviewees said.\(^\text{267}\) When litigation commenced, the plaintiff's attorneys filed interrogatories directed to the tugboat owners, asking for exact copies of written statements made by survivors or witnesses, including any oral statements, records, reports, or other memoranda made concerning the accident. The tugboat owners refused to provide some of the requested documents that they acknowledged existed, arguing that the documents were privileged material obtained in anticipation of, and in preparation for, litigation.\(^\text{268}\)

The *Hickman* Court recognized that the information sought by the plaintiff was outside the scope of the attorney-client privilege since the information was not obtained from clients.\(^\text{269}\) However, the Court found that the statements were the work product of the attorney and policy required that it be protected.\(^\text{270}\) The Court recognized that if the attorney were required to turn over the interrogatories he would essentially be turning over his strategy, opinions, and plans.\(^\text{271}\) In addition, the Court reasoned that to not protect work product would encourage attorneys to not write things down for fear that disclosure may be compelled by opposing counsel.\(^\text{272}\) The protection articulated by the court was not absolute, a point made clear when the Court noted that "[w]e do not mean to say that all written materials obtained or prepared

\(^{264}\) Fed. R. Crim. P. 16(b)(2).
\(^{266}\) Id. at 498.
\(^{267}\) Id.
\(^{268}\) Id. at 499.
\(^{269}\) Id. at 508.
\(^{270}\) Hickman, 329 U.S. at 511.
\(^{271}\) Id. at 510.
\(^{272}\) Id. at 511.
by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases."®\textsuperscript{273} Specifically, the Court held that the work product protection could be overcome through a showing of adequate reason or necessity for obtaining the information with the burden of proof on the party requesting disclosure.\textsuperscript{274} In instances where a party shows necessity or that denial of production would "unduly prejudice the preparation . . . or cause him undue hardship or injustice," protection of the work product may be waived.\textsuperscript{275} In Hickman, the plaintiff's attorney admitted he sought discovery of the statements merely to help him prepare.\textsuperscript{276} The Court held this an insufficient reason, noting that it was only a naked general demand without any showing of necessity for the production of the materials.\textsuperscript{277}

Hickman is credited with establishing two levels of protection for work product, also commonly referred to as opinion work product and ordinary work product.\textsuperscript{278} Opinion work product, which includes an attorney's mental impressions, is given the highest level of protection and is considered almost absolutely shielded from disclosure because privacy is viewed as essential for an attorney's thinking and preparation for litigation.\textsuperscript{279} In contrast, ordinary work product does not enjoy the same level of protection.

\textsuperscript{273} Id.
\textsuperscript{274} Id. at 512.
\textsuperscript{275} Id. at 509.
\textsuperscript{276} Hickman, 329 U.S. at 513.
\textsuperscript{277} Id.
\textsuperscript{278} FED. R. CIV. P. 26(b)(3); In re Murphy, 560 F.2d 326, 336 (8th Cir. 1977) ("[i]n our view opinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances."); Garnier v. Illinois Tool Works, Inc., 2006 U.S. Dist. LEXIS 28370 (E.D.N.Y. May 4, 2006).
\textsuperscript{279} Hickman, 329 U.S. at 510-513; Upjohn Co. v. United States, 449 U.S. 383, 400-02 (1981) ("While we are not prepared at this juncture to say that such material is always protected by the work product rule, we think a far stronger showing of necessity and unavailability by other means . . . would be necessary to compel disclosure."); see also FED. R. CIV. P. 26(b)(3); Advisory Committee's Explanatory Statement Concerning Amendments of the Discovery Rules, 48 F.R.D. 487, 502 (1970). Note, however, that if an attorney's mental process is put at issue in litigation, the protection of work product is waived. See, e.g., Truck Ins. Exch. v. St. Paul Fire & Marine Ins. Co., 66 F.R.D. 129, 133-36 (E.D. Pa. 1975). See generally Protection of Opinion Work Product Under the Federal Rules of Civil Procedure, 64 VA. L. REV. 333 (1978) (discussing the strong judicial protection accorded to opinion work product).
and may be discovered upon a showing of need and hardship.\textsuperscript{280} Neither level of work product is absolutely protected and the qualified work product will be disclosed if the threshold for the burden of proof is met. In each case, the proponent or party relying on the protection has the initial burden of proof to show that the materials requested qualify for protection.\textsuperscript{281} Upon a prima facie showing that the documents or materials are work product, the burden of proof shifts to the party requesting to compel disclosure.\textsuperscript{282} To meet this burden of proof, the discovering party must affirmatively show both a substantial need for the material and that there is no ability to obtain the material by other less intrusive means without undue hardship.\textsuperscript{283}

\textit{B. The Work-Product Doctrine as a Standard for Disclosure in Arbitration}

For the purposes of this article, the focus is on the standard of showing (1) a substantial need for the material produced during arbitration proceedings, and (2) that the party requesting disclosure lacks any ability to obtain the material by other means without undue hardship.\textsuperscript{284}

\textit{1. Substantial Need}

Neither the Federal Rules of Civil Procedure nor any of the courts applying the work-product doctrine have conclusively defined the parameters or minimum requirements of "substantial need."\textsuperscript{285} For example, in \textit{Hickman} the Supreme Court noted that:

\textsuperscript{280} See FED. R. CIV. P. 26(b)(3).


\textsuperscript{283} See FED. R. CIV. P. 26(b)(3).

\textsuperscript{284} The focus on the substantial needs test is based on the premise that a prima facie showing of work product is not necessary in the context of the protection of confidentiality in arbitrations.

\textsuperscript{285} See FED. R. CIV. P. 26(b)(3).
Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparations of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration.286

Regardless, a significant body of case law is available in which, with sufficient frequency, courts have approved circumstances that justify the finding of substantial need. For example, names and addresses of witnesses are discoverable.287 Other well-established examples are if witnesses are unavailable,288 such as if a witness is deceased289 or, more importantly in context of international commercial arbitrations, if a witness is beyond the court's reach and subpoena power.290 At the same time, substantial need cannot be proved because of a lack of financial resources.291 However, witnesses who claim privilege may be considered unavailable and statements given by them to an adversary party in preparation for litigation may be discovered.292

2. Undue Hardship

The additional requirement of undue hardship refers to the availability of alternative means in securing evidence. In

Hickman, the Supreme Court addressed this issue by stating:

[P]roduction might be justified where the witnesses are no longer available or can be reached only with difficulty. Were production of written statements and documents to be precluded under such circumstances the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning.293

Similar to the requirement of substantial need, the principle of alternative availability applies to witness statements294 as well as to any document prepared by the opposing party.295 Specifically, the latter is important if disclosure might be helpful in the context of allowing for a more efficient resolution of discovery proceedings.296 As with consideration of substantial need, lack of financial means or cost alone are not sufficient to prove undue hardship.297 Some courts do, however, take the relative resources of the parties into consideration298 and conclude there is undue hardship if obtaining the equivalent is cost inhibitive.299

3. Application of the Work-Product Doctrine as a Standard in Arbitration

Indeed, confidentiality in international commercial arbitrations has become an uncertain concept. While arbitration remains a private dispute resolution mechanism and is determined by party

296 See, e.g., United States v. Amerada Hess, Corp., 619 F.2d 980, 980 (3d Cir. 1980) (noting the federal government’s need to avoid time and effort in obtaining the information elsewhere was sufficient to defeat the effects of the doctrine precluding disclosure).
autonomy, it seems that courts are increasingly becoming involved because more parties are appealing any arbitral award not in their favor. In addition, public disclosure requirements may also require parties to provide information about arbitrations otherwise considered confidential. It is in these instances that the traditional notion of confidentiality in arbitrations is challenged and courts seem more willing to compel disclosure of arbitration materials than before.

There is no doubt that arbitration will continue to be an essential part of international commercial life and will remain the dispute resolution mechanism of choice in international business transactions. As long as this is the case, and as long as privacy and confidentiality continue to be considered a fundamental advantage of arbitration, the development of a coherent international standard for a duty of confidentiality will continue to be important. Yet, no such standard has emerged internationally. Rather, many jurisdictions not only define the duty of confidentiality differently, but also seem unwilling to develop any coherent and generally acceptable or internationally applicable standard for the protection of confidentiality in arbitrations. The attitudes are shifting in even those countries, such as England and France, which have taken traditionally broader views, comparatively, on protecting confidentiality.

In light of these trends, the best way forward is to rely on already established legal principles and case law to develop a coherent international standard for confidentiality and establish a more predictable approach business people may rely on when choosing arbitration. The U.S. work-product doctrine is such a principle, as it is established by case law and codified in the Federal Rules of Civil and Criminal Procedure. As with the duty of confidentiality in arbitration, the purpose of the work-product doctrine in litigation is to ensure non-disclosure in the administration of justice while at the same time allowing for

300 See Henkel, supra note 14, at 6.
301 See, e.g., NOUSSIA, supra note 32, at 22-23.
302 See, e.g., id.
303 See SZE & KHOON, supra note 45, at v.
304 See FED. R. CIV. P. 26(b)(3); FED. R. CRIM. P. 16(a)(2).
disclosure when necessary.\textsuperscript{305} The balancing of the parties’ interests in each case is an inherent component of the work-product doctrine and may be similarly employed in commercial arbitrations.\textsuperscript{306} If the need of one party to gain access to protected documents outweighs the interest of the other party in protecting its work product from disclosure, the documents will be disclosed.\textsuperscript{307} The sufficient showing of need is based on the presence of two concurrent factors: Substantial need and the inability to obtain the material without undue hardship.\textsuperscript{308} In making their decisions, the courts further determine the availability of alternative sources for the information sought, the need to protect the expectation that confidentiality would be preserved, and the relative resources of the parties involved.\textsuperscript{309}

The Privy Council in \textit{Aegis}\textsuperscript{310} has recognized a balancing approach similar to that under the work-product doctrine by noting that confidentiality is only protected if disclosures “raise the mischief against which... confidentiality... is directed.”\textsuperscript{311} Specifically, the expectation of confidentiality in international commercial arbitrations may be balanced by requiring any party seeking disclosure of communications and documents from arbitrations to prove (1) a substantial need for the materials, and (2) the inability to obtain the substantial equivalent of the information from the materials without undue hardship.

Applying the work-product doctrine may also avoid the shortcomings of broad exceptions to the duty of confidentiality, such as those established by the English Court of Appeal in \textit{Ali}
Shipping. The requirement of showing substantial need and undue hardship may provide a pragmatic standard to fill the terms of “legitimate [interest] of an arbitrating party” or “public interest” with meaning and prevent the unlimited extension of exceptions at the same time. To be sure, it seems that the inability to define the exceptions to confidentiality in general terms is one of the reasons why the English Court of Appeal is now moving toward a more pragmatic approach based on a spectrum. In Ali Shipping, the court refused to review exceptions of confidentiality on a case-by-case basis. Yet, in City of Moscow, the court seemed to have changed its attitude towards this more pragmatic view.

In Nafimco v. Foster Wheeler Trading Company AG the Paris Court of Appeal increased the burden of proof required and held that any party claiming a breach of confidentiality has the burden of proving that a duty of confidentiality actually existed. The Paris Court of Appeal, however, does not seem to define the parameters of the burden of proof it requires. The work-product doctrine may fill this void under French law by requiring the proof of a substantial need and undue hardship.

The work-product doctrine may further establish a narrower and more predictable standard in jurisdictions that follow the concept of an express duty of confidentiality and traditionally focus on the importance of parties executing an express confidentiality agreement. Even if arbitrating parties enter into an explicit confidentiality agreement, courts in Australia, Sweden, or the United States may compel disclosure. Just as

313 Id.
314 Id.
315 See, e.g., Henkel, supra note 14, at 15-19.
316 Dep’t of Econ. Policy and Dev. of the City of Moscow & Another v. Bankers Trust Co. and Another, [2004] All E.R. 193 (Eng.).
317 See, e.g., Henkel, supra note 14, at 15-19.
319 Id.
321 See, e.g., A.I. Trade Award Upheld Swedish Supreme Court Affirms Court of Appeal, 15 MEALEY’S INT’L. ARB. REP. (11), 3 (Nov. 2000).
under English and French law, however, courts do not apply any clear or uniform standards under which circumstances this should be permitted. Courts in Australia, Sweden or the United States may rely on the public interest to limit the protection of confidentiality, while at the same time failing to define a uniform starting point or limit of this exception. The same is true in countries with statutory provisions that protect confidentiality.\textsuperscript{323} Courts in these jurisdictions may also compel disclosure if it is found to be in the public interest.\textsuperscript{324} The work-product doctrine may be utilized in this context as a means toward a judicially enforceable duty of confidentiality in international commercial arbitrations.

V. Conclusion

The law and practice of confidentiality in international commercial arbitration has become unpredictable due to a lack of any clear international consensus on how to best protect confidentiality. The duty of confidentiality is not absolute in any international jurisdiction. Business people may no longer assume that the private character of arbitrations automatically ensures confidentiality. Even if parties have agreed on explicit terms of a confidentiality agreement, courts are increasingly endorsing the view that disclosure may be compelled regardless of the expressed intent of the parties. This in turn not only challenges the fundamental notion of party autonomy in arbitrations, it also ultimately undermines any policy in favor of arbitration. Maintaining the importance of arbitration as a viable alternative to litigation may therefore depend on agreeing on an international consensus on confidentiality and its limits in commercial arbitration. No international jurisdiction seems to challenge the view that the protection of confidentiality should be limited. At the same time there has been no suggestion on how to create a uniform standard on an international level. This article argues that applying the U.S. work-product doctrine may offer a starting point


\textsuperscript{323} See, e.g., Television N.Z. Ltd. v Langley Production Ltd. [2000] 2 NZLR 250 (N.Z.); Singapore Arbitration Act, supra note 232, at ch. 10 § 57.

\textsuperscript{324} See, e.g., Television N.Z., 2 NZLR at 250.
for this discussion. The balancing approach of the work-product doctrine as well as the standard of substantial need and undue hardship is a well-established rule in U.S. law and may aid in defining uniform limits for otherwise undefined or very broadly defined exceptions to confidentiality in international commercial arbitrations.