

“International Commercial Arbitral Awards: Moving from Secrecy towards Transparency?”

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ABSTRACT

A large portion of International Commercial Arbitral Awards in different jurisdictions are unpublished. The public only has access to them when they are challenged in a judicial court. The majority of arbitration users highly value the confidentiality of the awards, but at the same time there are substantial benefits from its public disclosure.

This essay focuses on whether it would be beneficial to promote the publication of International Commercial Awards; and if it is the case, how such publication could be conducted in order to reconcile it with the user's expectations of confidentiality. When confidentiality is not specified in the arbitration agreement, its existence and scope varies in light of the different standards that may regulate it. Therefore, the essay starts by analysing the treatment given to the issue in institutional arbitration rules, domestic legislation and case law. It continues to discuss the arguments both pro and against mass publication of International Commercial Awards. And lastly, it concludes that an increase in publication of awards is desirable, but it should not be achieved through the expense of completely depriving arbitration users of their confidentiality. The author therefore proposes a compromising solution to reconcile both interests at stake, by the implementation of a mechanism that would promote publication of International Commercial Awards with minimal impact on the parties' confidentiality expectations. Publication of arbitral awards in the proposed way could bring greater transparency to the system, strengthen the fairness and quality of arbitrators, proceedings and awards, and contribute to the development and evolution of arbitration.

1. Introduction

Confidentiality is usually mentioned as one of the major advantages of arbitration compared to litigation in national courts. In this sense, a former Secretary-General of the ICC stated:

“It became apparent to me very soon after taking up my responsibilities at the ICC that the users of international commercial arbitration, *i.e.* the companies,

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governments and individuals who are parties in such cases, place the highest value upon confidentiality as a fundamental characteristic of international commercial arbitration. When enquiring as to the features of international commercial arbitration which attracted parties to it as opposed to litigation, confidentiality of the proceedings and the fact that these proceedings and the resulting award would not enter into the public domain was almost invariably mentioned.”²

Confirming that confidentiality is highly valued by the users of arbitration, a recent study shows that 62% of the participants surveyed listed confidentiality as a ‘very important’ attribute of arbitration.³

A lot has been written about privacy and confidentiality in commercial arbitration,⁴ being both different and separate concepts. While “privacy” refers to the fact that only parties to the arbitration agreement may attend arbitral hearings and participate in the arbitral proceedings; “confidentiality” refers to the obligation of the parties, the arbitrators or the institutions, not to disclose information concerning the arbitration to third parties (i.e. hearing transcripts, written pleadings, evidence or award).⁵

Some authorities argue that the rationale for the privacy of hearings extends naturally to the confidentiality of hearing transcripts and other aspects of the arbitral process.⁶ Others believe that the privacy of the hearing could be preserved while nonetheless permitting disclosures of the documents related to the arbitration.⁷

² See REDFERN, Alan and HUNTER, Martin: “Law and practice of international commercial arbitration”, ed. Sweet & Maxwell, 4th ed., (2004), 32.

³ See the 2010 International Arbitration Survey conducted by the School of International Arbitration of Queen Mary University of London (SIA 2010), available at http://www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf

However, only 35% mentioned that they would not use arbitration if it did not offer the potential for confidentiality. This suggests that while confidentiality is highly important, it is not the only reason parties use arbitration.

⁴ See MISRA, Joyiyoti and JORDANS, Roman: “Confidentiality in international arbitration. An introspection of the Public Interest Exception”, *Journal of International Arbitration*, vol. 23, N° 1, (2006), 39. PAULSSON, Jan and RAWDING, Nigel: “The trouble with confidentiality”, *Arbitration International*, vol. 11, N° 3, (1995), 303 et seq. TRAKMAN, Leon E.: “Confidentiality in international commercial arbitration”, *Arbitration International*, vol. 18, N° 1, (2002). LAZAREFF, Serge: “Confidentiality and arbitration: Theoretical and philosophical reflections”, *ICC Bulletin, Special Supplement, Confidentiality in arbitration*, 2009, 81 et seq. FORTIER, L. Yves: “The occasionally unwarranted assumption of confidentiality”, *Arbitration International*, vol. 15, N° 2, (1999), 131 et seq. BROWN, Alexis: “Presumption meets reality: An exploration of the confidentiality obligation in international commercial arbitration”, *American University International Law Review* 16, N° 4 (2001), 969 et seq.

⁵ See BORN, Gary B.: “International Commercial Arbitration”, Kluwer International, (2009), 2250-2251.

⁶ See English High Court of Justice, Queen’s Bench Division, in *re Hassneh Insurance Co. of Israel et.al. v. Stenart J. Men*, [1993] 2 Lloyd’s Rep 243, 27, where it was stated: “If it be correct that there is at least an implied term in every agreement to arbitrate that the hearing shall be held in private, the requirement of privacy must in principle extend to documents which are created for the purpose of that hearing. The most obvious example is a note or transcript of the evidence. The disclosure to a third party of such documents would be almost equivalent to opening the door of the arbitration room to that third party. Similarly, witness statements, being so closely related to the hearing, must be within the obligation of confidentiality. So also must outline submissions tendered to the arbitrator. If outline submissions, then so must pleadings be included.”

⁷ See High Court of Australia, 1995, in *re Esso/BHP v. Plowman*, [1995], 128 ALR 391.

Arguably, the reasons for the need of confidentiality are that the disclosure of the details of the arbitral proceedings to strangers “would result in a host of very real evils – “trial by press release,” distractions from the mutually-agreed, centralized dispute resolution mechanism, aggravation of the parties’ dispute and the loss of important efficiency benefits.”⁸ Thus leading to such result that would be “inconsistent with the fundamental nature of an international arbitration agreement – whereby a party commits itself to the good faith resolution of specified disputes with another party in a single, centralized, commercially-sensible forum.”⁹

However, such considerations do not necessarily apply to arbitral awards, because in most cases they are issued at the end of the dispute, thus their disclosure is unlikely to affect the proceedings which by that time would have been terminated. Nonetheless, the study referred to above has found that 69% of the participants surveyed identified the award as a key aspect that should be kept confidential.¹⁰ On the other hand, recently there have been some scholarly opinions in favour of mass publication of awards.¹¹

This essay will focus on this particular topic: whether it would be convenient to promote the publication of commercial awards; and in that case, how such publication should be conducted.

The *first* part of the essay will analyse the treatment given to the issue in institutional arbitration rules, domestic legislation and case law. The *second* part will address the argument that has been raised in favour of keeping the awards confidential. The *third* part of the essay will discuss the advantages that may derive from publishing awards. And lastly, the *fourth* part will present the author’s conclusions and proposals for future implementations.

2. Publication vs. confidentiality of awards in international commercial arbitration: overview of its treatment in legislation, case law and institutional rules

While confidentiality could be specified in the arbitration agreement, in the absence of such provision, the existence and scope of confidentiality of an award in

⁸See BORN, Gary B., *supra* note 5, 2283.

⁹See BORN, Gary B., *supra* note 5, 2283.

¹⁰See SIA 2010, *supra* note 3.

¹¹See LO, Chang-fa: "On a mechanism of publishing balanced arbitral awards", *Contemporary Asia Arbitration Journal*, vol. 1, No. 2, (2008), 235 et seq.; YC ONG, Colin: "Confidentiality of Arbitral awards and the advantages for arbitral institutions to maintain a repository of awards", *Asian International Arbitration Journal*, Kluwer Law International, vol. 1, issue 2, (2005), 169 et seq., and BUYS, Cindy G., "The tensions between confidentiality and transparency in international arbitration", *The American Review of International Arbitration*, vol. 14, (2003), 121 et seq.

international commercial arbitration varies in light of the different standards that may regulate it (*i.e.* institutional arbitration rules or domestic laws).¹²

The most important international conventions on international arbitration do not include any provision as to confidentiality,¹³ probably because their purpose was to facilitate the enforcement of awards and for that end it was not necessary to focus on all the aspects of the international arbitration process.

The UNCITRAL Model Law¹⁴ cannot shed light on the situation since it is completely silent on the issue. The reasons for its silence can be found in the Report of the Secretary-General on possible features of a model law on international commercial arbitration, which laid the foundations for the work of the Commission in developing the project. The report states:

“It is doubtful whether the model law should address the question of whether the award can be made public. Although it is debatable as there are good reasons for and against such publication, the decision may be left to the agreement of the parties or the arbitration rules chosen by them.”¹⁵

The following paragraphs will briefly overview some arbitrations rules; national statutes and case law, to analyse how different jurisdictions and arbitral institutions have dealt with the issue of confidentiality vs. publicity of International Commercial Awards.

a. Institutional rules

The arbitration rules of the administering institutions differ as to the treatment of the award. Some of them (i) establish a duty to maintain the awards confidentiality as a general rule, with limited exceptions. But there are others that, while they may or may not have a provision regarding the confidentiality of the proceedings, (ii) have no express provision regarding publicity or confidentiality of the award. And lastly, there are those rules that expressly provide for the publicity of the awards (iv) only with express consent of the parties, or (v) as a general rule, unless objected by the parties.

¹² It is interesting to note that the SIA 2010 found that 50% of the participants misconceive that arbitration is confidential even where there is no specific clause to that effect in the arbitration agreement. *See* SIA 2010, *supra* note 3.

¹³ *See* Convention on Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the “New York Convention”); European Convention on International Commercial Arbitration of 1961 (the “Geneva Convention”) and Inter-American Convention on International Commercial Arbitration of 1975 (the “Panama Convention”).

¹⁴ United Nations Commission in International Trade Law (UNCITRAL) Model Law in International Arbitration (the “Model Law”), 2006.

¹⁵ Report of the Secretary-General: possible features of a model law on international commercial arbitration, document A/CN.9/207, published in Yearbook of the United Nations Commission on International Trade Law, vol. XII, 1981, 73, paragraph 101. Although some delegations proposed to include in the Model Law a rule similar to that contained in the UNCITRAL Arbitration Rules (allowing only the publication of the award with the consent of the parties), that was not the prevailing opinion: “There was general agreement [in the Working Group] that the Model Law should not deal with the question of whether the awards could be published.” Report of the Working Group on International Contract Practices on the work of its third session (New York, 16 a1 26 February 1982), document A/CN.9-216, paragraph 105.

(i) *Confidentiality of the award with limited exceptions*

The London Court of International Arbitration (LCIA) Arbitration Rules establishes that “unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their arbitration.”¹⁶

Similarly, the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce also set forth that “unless otherwise agreed by the parties, the SCC and the Arbitral Tribunal shall maintain the confidentiality of the arbitration and the award.”¹⁷

The World Intellectual Property Organization (WIPO) Arbitration Rules contain a precise provision regarding the disclosure of the award which states that parties shall treat the award as confidential and may only disclose it to third parties to the extent that: (i) the parties consent; (ii) it falls in the public domain as a result of a court action; or (iii) it must be disclosed in order to comply with a legal requirement imposed on a party or in order to establish or protect a party’s legal rights against a third party.¹⁸

The Arbitration Rules of the Milan Chamber of Commerce provide that: (i) the Chamber of Arbitration, the parties, the Arbitral Tribunal and the expert witnesses shall keep the proceedings and the arbitral awards confidential, except in case it has to be used to protect one’s rights; (ii) for purpose of research, the Chamber of Arbitration may publish the arbitral award in anonymous format, unless, during the proceedings, any of the parties objects to publication.¹⁹

The Swiss International Arbitration Rules set forth that “unless the parties expressly agree in writing to the contrary, the parties undertake to keep confidential all awards and orders as well as all materials submitted by another party in the framework of the arbitral proceedings not already in the public domain, except and to the extent that a disclosure may be required of a party by a legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a judicial authority. This undertaking also applies to the arbitrators, the tribunal-appointed experts, the secretary of the arbitral tribunal, the members of the board of directors of the Swiss Chambers’ Arbitration Institution, the members of the Court and the Secretariat, and the staff of the individual Chambers.”²⁰ However, “an award or order may be published, whether in its entirety or in the form of excerpts or a summary, only under the following conditions: (a) A request for publication is addressed to the Secretariat; (b) All references to the parties’ names are deleted; and

¹⁶ Article 30.1 LCIA Arbitration Rules (1998).

¹⁷ Article 46 SCC Arbitration Rules (2010).

¹⁸ Article 75 WIPO Arbitration Rules.

¹⁹ Article 8 Arbitration Rules of the Chamber of Commerce of Milan (2010).

²⁰ Article 44 (1) Swiss International Arbitration Rules (2012).

(c) No party objects to such publication within the time-limit fixed for that purpose by the Secretariat.”²¹

The Arbitration Rules of the International Chamber of Commerce (ICC) establish an explicit rule of confidentiality of the award over the institution, but not the parties or the arbitrators, by providing that “additional copies certified true by the Secretary General shall be made available on request and at any time to the parties, but to no one else.”²² The internal rules of the International Court of Arbitration also stress the confidentiality of their work. However, since 1985, the ICC has allowed the Secretary²³ of the Court to publish edited and redacted copies of awards, eliminating the names of the parties, as guides for the benefit of lawyers and arbitrators.

(ii) *No provision regarding the award*

An example of a set of rules that have no specific provision regarding the confidentiality of the award can be found in the China International Economic and Trade Arbitration Commission Arbitration Rules (CIETAC) Arbitration Rules, which have an express provision regarding the presumed confidentiality of the hearings,²⁴ but include no rule as to the publication of the award.

(iii) *Publicity of the award with express consent of the parties*

The UNCITRAL Arbitration Rules provide that “[a]n award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.”²⁵

The Arbitration Rules of the International Centre for Disputes resolution (ICDR)²⁶ also establish that “an award may be made public only with the consent of all parties or as required by law”.²⁷

(iv) *Publicity of the award, unless objected by the parties*

Many of the maritime arbitration rules provide that awards are published as a matter of course, unless both parties request in advance that the award not be published.²⁸

For example, the rules of procedure of the Association of Maritime Arbitrators of Canada (AMAC) in its section 28 set forth that “unless otherwise stipulated to the contrary in advance, the parties agree, by consenting to the rules that, the award

²¹ Article 44 (3) Swiss International Arbitration Rules (2012).

²² Article 34.2 ICC Arbitration Rules (2012).

²³ In 1985 the Secretary of the ICC was IVES DERAÏNS.

²⁴ Article 36 CIETAC Arbitration Rules (2012).

²⁵ Article 34.5 UNCITRAL Arbitration Rules (2010).

²⁶ International branch of the American Arbitration Association (AAA).

²⁷ Article 27.4 ICDR Arbitration Rules.

²⁸ See Arbitration Rules of the German Maritime Arbitration Association; Arbitration Rules of the Society of Maritime Arbitrators (SMA), Rules of Procedure of the AMAC, JSE Rules of Maritime Arbitration.

issued in consequence thereof, shall be remitted to the AMAC for filing and publication”. Similarly, the Japan Shipping Exchange (JSE) rules of maritime arbitration provide in Section 36 that “the award given by the Tribunal may be published unless both parties beforehand communicate their objection”.

b. Domestic laws

Domestic laws have given different treatment to the duty of confidentiality in international commercial arbitration.²⁹ They may be divided into three groups: (i) the large majority that do not contain any rule as to a duty of confidentiality in arbitration;³⁰ (ii) some that just enunciate confidentiality as a general principle, or offer a fragmentary regulation;³¹ and (iii) a few that contain provisions governing confidentiality more completely.³²

Based on a compilation of over 50 national arbitration laws,³³ the author has found only five jurisdictions whose legislation deal expressly with the confidentiality or publicity of the arbitral award (*i.e.* Morocco, Philippines, Peru, Scotland and Norway).

The Moroccan law establishes that the publication of the award or extracts may be made, only with the permission of the parties.³⁴

Similarly, the Philippine Alternative Dispute Resolution Act of 2004 provides that the arbitration proceeding, including files, testing, and the award should be considered confidential and will not be published, except with the consent of the parties. However, it incorporates another exemption: the publication is permitted for the limited purpose of disclosing to a court the relevant documents in cases where resorting to the court is allowed from therein. Provided, however, that the court in which the action or the appeal is pending may issue a protective order to prevent or prohibit disclosure of documents or information containing secret processes, developments, research and other information where it is shown that the applicant shall be materially prejudiced by an authorized disclosure thereof.³⁵

The Arbitration Law of Peru of 2008 states that unless otherwise agreed, the arbitral tribunal, the arbitral institution, the parties, their representatives and legal advisors,

²⁹ See CAIVANO, Roque J. "Una Mirada comparativa sobre la confiabilidad en el arbitraje comercial." *Revista de Derecho Comercial y de las Obligaciones*, No. 244, (2010), 609 et seq.

³⁰ This is the case with the arbitration laws of Germany, Argentina, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, Colombia, Korea, Denmark, Egypt, Slovenia, USA, Russian Federation, Finland, Great Britain, Guatemala, Holland, Honduras, Ireland, Italy, Japan, Mauritania, Mexico, Nigeria, Panama, Paraguay, Poland, Portugal, Sweden, Switzerland, Tunisia and Uruguay.

³¹ Such is the case of the laws of Bolivia, Costa Rica, Croatia, Dominican Republic, El Salvador, Spain, France, Philippines, Nicaragua, Morocco, India, Norway, Czech Republic, Venezuela, Hong Kong, Bermuda, Singapore, Taiwan and Zambia. The scope of the duty of confidentiality has two aspects: (i) an objective one (*ratione materiae*) which deals with which aspects of arbitration are confidential; and a subjective one (*ratione personae*) that refers to who are the parties that are required to maintain confidentiality. By fragmentary regulation the author refers to laws that may address the objective part but not the subjective or vice-versa.

³² See Recent legislation of New Zealand, Peru and Scotland.

³³ See CAIVANO, Roque J., *supra* note 29, 609 et seq.

³⁴ Article 327-27 of the Moroccan Code of Civil Procedural, Law No. 08-05, 2007.

³⁵ Section 23 of the Philippine Alternative Dispute Resolution Act of 2004, Law No. 9285, 2004.

witnesses, experts and anyone else involved in the arbitration proceedings are required to maintain the confidentiality of the award unless (i) legal requirement necessary to publish the proceedings, (ii) the decision to protect or enforce any right or to bring the action for annulment or enforce the award in court; or (iii) if it is an arbitration where the Peruvian government intervenes as a party.³⁶

The Scottish Arbitration Act of 2010 contains a detailed regulation of the confidentiality regime, although it also makes clear that such provisions are defaulted rules and not mandatory rules. Rule 26 provides that disclosure of confidential information relating to the arbitration (including awards) is to be actionable as a breach of an obligation of confidence unless the disclosure: (a) is authorized, expressly or impliedly, by the parties (or can reasonably be considered as having been so authorized), (b) is required by the tribunal or is otherwise made to assist or enable the tribunal to conduct the arbitration, (c) is required (i) in order to comply with any enactment or rule of law, (ii) for the proper performance of the discloser's public functions, or (iii) in order to enable any public body or office-holder to perform public functions properly, (d) can reasonably be considered as being needed to protect a party's lawful interests, (e) is in the public interest, (f) is necessary in the interests of justice, or (g) is made in circumstances in which the discloser would have absolute privilege had the disclosed information been defamatory.³⁷

Lastly, the Norwegian Arbitration Act of 2004, is contrary to all other domestic norms that expressly deals with the issue. It establishes the general principle of advertising, "unless otherwise agreed by the parties, the arbitral proceedings and decisions taken by the arbitral tribunal are not subject to duty of confidentiality."³⁸

c. Case Law

Some domestic courts have understood that there is a duty of confidentiality within arbitral awards; and others have found completely the opposite.

(i) *Courts that found an obligation of confidentiality of the award*

Courts from England, France and Singapore have held that there is an implied duty of confidentiality in arbitration,³⁹ which applies to documents related to the arbitration, including the award.⁴⁰

³⁶ Article 51 of the Arbitration Law of Peru, Legislative Decree No. 1071, 2008.

³⁷ Rule 26 of the Scottish Arbitration Rules, Arbitration (Scotland) Act, 2010.

³⁸ Section 5 of the Arbitration Act of Norway, No. 25/02, May 14, 2004.

³⁹ See English Court of Appeals in re *Oxford Shipping Co. Ltd. V. Nippon Yusen Kaisha* (the "Eastern Saga"), [1984] 2 Lloyd's Rep. 373; English Court of Appeals in re *Ali Shipping Corp. v. Shipyard Trogir*, [1998] 2 All ER 136 Lloyd's Rep. 643; English High Court of Justice, Queen's Division in re *Department of Economics Policy & Development of the City of Moscow v. Bankers Trust Company, International Industrial Bank* ("Bankers"), [2003] 1 WLR 2885; English Court of Appeal in re *Dolling-Baker v. Merret* ("Dolling-Baker"), [1991] 2 All ER 890, 899. English High Court of Justice, Queen's Bench Division, in re *Hassneh Insurance Co. of Israel et.al. v. Stenart J. Mew* ("Hassneh"), [1993] 2 Lloyd's Rep 243, 249. Paris Court of Appeals in re *Aita v. Ojeh*, [1986] Rev. Arb. 583. Singapore High Court in re *Myanma Yaung Chi Oo Co. v. Win Win Nu*, [2003] S.L.R. 547.

⁴⁰ See *Dolling-Baker*, *supra* note 39.

However, the English High Court of Justice have also stated that there could be some exemptions to the confidentiality duty, one of which being the possibility to disclose arbitral awards so long as it could be proven that such a disclosure is reasonable necessary for the establishment or protection of a party's rights vis-à-vis third parties.⁴¹

(ii) *Courts that found no obligation of confidentiality of the award*

Much on the contrary, the High Court of Australia have ruled that confidentiality was neither an essential attribute of a private arbitration, nor an implied term of the arbitration contract imposing an obligation on each party not to disclose the proceedings, documents or information provided in and for the arbitration.⁴²

The Supreme Court of Sweden has taken a similar approach, deciding that there was no inherent obligation of confidentiality in arbitrations in Sweden.⁴³

The Federal District Court of the United States of America also failed to recognize a principle of confidentiality in arbitration.⁴⁴

3. Arguments favouring confidentiality of awards

Part of the arbitration community understands that International Commercial Awards should be kept confidential.

Some scholars maintain that the benefits that may derive from the diffusion of awards do not justify denying arbitration of one of its most fundamental characteristics, *i.e.* confidentiality. In the words of Sir Patrick Neill QC “it would be difficult to conceive of any greater threat to the success of English arbitration than the remove of the general principle of confidentiality and privacy”.⁴⁵

Another argument that has been raised is that sometimes the confidentiality of the award is justified to keep sensitive commercial information secret. That would be the case when the award discusses issues such as pricing policies and costs, trade secrets, information about customers or suppliers, know-how, and the like.

Other authorities argue that the duty of confidentiality of awards derives from party autonomy. Party autonomy is the hallmark of arbitration, and it should be strongly respected. Therefore, the will of the parties to enjoy confidentiality as regards how

⁴¹ See Hassneh, *supra* note 39.

⁴² See High Court of Australia, 1995, in re *Esso/BHP v. Plowman*, [1995], 128 ALR 391. See also 11 Arb. Int. (1995) for expert reports by Bond and Law, 273 and 283, respectively.

⁴³ See Swedish Supreme Court in re *Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Finance Inc.*, [2000], Yearbook of Commercial Arbitration, vol. XXVI, 2001, 291 et. seq.

⁴⁴ See United States Court of Appeal Third Circuit in re *United States v. Panhandle Eastern Corp.*, [1998], 842 F.2d 685

⁴⁵ See Departmental Advisory Report cited in Bankers, *supra* note [39], 36.

their dispute is settled should prevail over the general interest in the development of arbitration.⁴⁶

In this sense, it has been said that, “although efficiency and public policy concerns may support an open and public arbitral process, the primary justification for confidentiality in international arbitration is party autonomy. If parties value privacy and confidentiality above financial efficiency, they should be able to resolve their disputes in a manner that respect their priorities.”⁴⁷ In that line, it has been suggested that the award constitutes, by extension, an agreement between the parties.⁴⁸

As a response to such argument, scholars have argued that the award is a judgment and not a transaction, and therefore, it could not be concluded that from the conventional origin of arbitrators’ jurisdiction it follows that the award is also a contract.⁴⁹ In this sense, it has been said that “[p]ositing that arbitration is *la chose des parties* and that the award belongs to the litigants is clearly not sufficient to prevent its publication. An award is not only the ultimate product of the parties’ arbitration agreement. It is not solely a private document. It is also a jurisdictional decision which may, to a certain extent, affect the public, and in which the business community at large has an interest.”⁵⁰

4. Arguments favouring publication of awards

Some commentators have urged that awards be subject to publication in order to (i) develop consistent rules through persuasive precedents; (ii) improve arbitrator’s integrity and quality of awards; and (iv) obtain several other advantages.

a. Development of consistent rules through persuasive precedents

In Investment Arbitration for instance, anyone can surf ICSID⁵¹ or ITA⁵² web sites⁵³ and access almost all the awards issued by arbitral tribunals or decisions from the annulment committees. Therefore, it is fairly simple to keep track of investment

⁴⁶ See DAVID, René: *Arbitration in international trade*, ed. Kluwer and Taxation Publishers, Deventer, Boston, (1985), 353 et. seq.

⁴⁷ See BROWN, Alexis, *supra* note 4, 1019.

⁴⁸ See TAHYAR, Benjamin H.: “Confidentiality in ICSID arbitration after *Amco Asia Corp. v. Indonesia*: watchword or white elephant?”, *Fordham International Law Journal*, vol. 10, (1986), 93 et seq.

⁴⁹ See TRAZEGNIES GRANDA, Fernando: “¿Confidencialidad o Publicidad en el arbitraje? Conference given at the Pontificia Universidad Católica del Perú. *New peruvian arbitration law 2008*, (2009).

⁵⁰ MOURRE, Alexis and VAGENHEIM, Alexandre “arbitral jurisprudence in international commercial arbitration: The case for a systematic publication of arbitral awards in 10 questions...”, available at <http://kluwerarbitrationblog.com/blog/2009/05/28/arbitral-jurisprudence-in-international-commercial-arbitration-the-case-for-a-systematic-publication-of-arbitral-awards-in-10-questions%E2%80%A6/>

⁵¹ International Centre for Settlement of Investment Disputes.

⁵² International Treaty Arbitration.

⁵³ See <http://www.italaw.com>, and

<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=Main&actionVal=OnlineAward>

arbitration decisions on any specific point of law and of the awards rendered by any arbitrator.⁵⁴

The publicity of ICSID awards has led to passionate debates about the consistency - or rather lack of it - of awards dealing with some legal –and sometimes factual- issues.⁵⁵ Scholars and practitioners have identified conflicting decision in legal issues such as: (i) the concept of “investment”;⁵⁶ (ii) whether the MFN clause can be applied to dispute resolution provisions;⁵⁷ (iii) whether contract violations can be

⁵⁴ It has been stated that “arbitration is schizophrenic. In investment arbitration, openness is now the norm... In commercial arbitration, however, the status quo is unmovable. Total secrecy is the rule.” FERNÁNDEZ-ARMESTO, Juan: “Different Systems for the Annulment of Investment Awards”, ICSID Review, vol. 26, No. 1, (2011), 128. Such alleged “schizophrenic” pathology could be explained by the different nature of both systems. In investment arbitration, the trend to elevate the levels of transparency, by having public access to the records; making arbitration hearings open to the public; granting intervention of amicus curiae; and/or providing for the publication of awards is justified by the public interest concerned in those disputes. While in contrast, in commercial arbitration generally there are not such public interests at stake; the parties prefer to conduct the process in private and confidence.

⁵⁵ See KIM, Dohyun: “The annulment committee’s role in multiplying inconsistency in ICSID arbitration: the need to move away from an annulment-based system”, NYU Law Review, Vol. 86, N° 1, (2011); ALVAREZ AVILA, Gabriela: “ICSID Annulment Procedure: a balancing exercise between correctness and finality” in VAN DEN BERG, Albert J., Arbitration Advocacy in changing times, ICCA congress series, 2010 Rio Col. 26, Kluwer Law International, (2011), 289 et. seq.; JOHNSON, Lise: “Annulment of ICSID awards: recent developments, IV annual forum or developing country investment negotiators background papers, New Delhi, International Institute for Sustainable Development, (2010); PAULSSON, Jan: “Avoiding unintended consequences” in SAUVANT, Karl P. with CHISWICK-PATTERSON, Michael: “Appeals mechanism in International Investment Disputes”, Oxford University Press, (2008), 241 et seq. KAUFMANN-KOHLER, Gabrielle: “Is consistency a myth?”, in Precedent in International Arbitration (GAILLARD, E and BANIFATEMI, Y, eds., (2008), 137 et seq. SCHREUER, Christoph and WEIGNER, Matthew: “Conversations across cases – is there a doctrine of precedents in investment”, (2007).

⁵⁶ Many BITs in their consent clauses contain phrases referring to “disputes concerning investments”. The Convention, however, does not define what constitutes “investment,” and defining this term is by no means straightforward. As a result, ICSID arbitral tribunals have split in articulating a test for defining “investment” between the “subjective test” and the “objective test,” In *Salini* (Salini Construttori S.p.A. v. Morocco) the tribunal fleshed out the objective test. It stated that the existence of an investment depended on four criteria: “(1) contributions [by the investor] in cash, in-kind, or labor; (2) certain duration of performance; (3) investor participation in the risks of the transaction; and (4) investor contribution to the economic development of the host state.” Some ICSID tribunals have adopted the entire “Salini test”, and others have adopted modified versions of it. Yet, tribunals have disagreed over whether the economic development criterion should be part of the test. On the other side of the spectrum, some tribunals have stuck with the subjective test for defining investment, arguing against the adoption of a bright-line rule and suggesting instead that tribunals should fully rely on the parties’ intent as manifested in the treaty providing the definition of investment. Thus, the test for defining an investment for ICSID jurisdiction purposes is still an unsettled area of investment law jurisprudence. See KIM, Dohyun, *supra* note 55.

⁵⁷ Most investment treaties have most favored nation (MFN) clauses. ICSID tribunals have taken contradictory positions on whether MFN clauses should apply to dispute resolution clauses. While the Tribunals in *Gas Natural*, *Suez*, *Camuzzi*, *Siemens*, *National Grid* and *Hochtief* allowed claims against Argentina to proceed on this basis, the Tribunal in *Wintershall* refused to do so. It is worth mentioning that *Siemens*, *Wintershall* and *Hochtief* cases applied the same BIT (Germany-Argentina) and ruled in completely different ways. While in the first case (*Simmens*) the Tribunal ruled in 2004 in favor of the possibility of overriding the 18 month period via the application of the MFN clause, four years later the Tribunal in the second case (*Wintershall*) reached the opposite conclusion. To renew the controversy the Tribunal of the third case (*Hochtief*) in 2011 ruled that the claim could proceed despite the failure to observe the 18 months waiting period by application of the MFN clause.

upgraded to treaty violations under an umbrella clause;⁵⁸ and (iv) the standard required to apply the defence of “state of necessity”.⁵⁹

The controversy has led to proposals for the promotion of greater coherence in investor-state arbitration through (i) the implementation of an appeal system;⁶⁰ (ii) permitting tribunals to reconsider their awards through a motion by either party after the award is rendered;⁶¹ (iii) the circulation of a draft award to the parties for comment before finalization;⁶² (iv) the institution of a system of preliminary rulings along the lines of Article 234 of the EC Treaty;⁶³ etc. Unfortunately, most of these proposals, though brought forth with good intentions, fall far from being a realistic solution.⁶⁴ Furthermore, it has been said that such structural cures would harm the good cause by overreaching, like surgeons operating on someone who has the flu.⁶⁵

Nonetheless, the debate is healthy and stimulating since it is well known that the first step towards solving a problem is to identify if there is one in the first place. In International Commercial Arbitration, on the contrary, it is not possible to identify if there is any kind of systemic problem, like the lack of consistency over the same legal issue, simply because there is no access to the great majority of awards.

It has been argued that contrary to what happens in Investment Arbitration, in Commercial Arbitration there is no need for developing consistent rules because (i) the disputes are most often fact and contract-driven, thus, the outcome revolves around the interpretation of a unique set of facts and contract; and (ii) arbitrators

⁵⁸ In this area, the original discrepancy resided between decisions that deemed the umbrella clause to elevate contract claims to treaty claims, and others that denied such effect. Looking at more recent cases, the problem appears to have shifted somewhat towards the question of whether the umbrella clause encompasses only obligations entered into by the state in a sovereign capacity or whether it also covers commercial obligations. See KAUFMANN-KOHLER, Gabrielle, *supra* note 55.

⁵⁹ The defense of state of necessity has arisen in the Argentinean cases, the question being whether Argentina was entitled to take the measures it took during the 2001 economic crisis on the grounds of necessity. The major issue for the tribunals was to establish in which circumstances the ‘state of necessity’ doctrine is deemed applicable to a certain situation, which implied looking at the legal grounding of such derogation. Exceptional measures tend to be justified on two grounds. One is the generally accepted principle that customary international law (CIL) exempts states from liability in circumstances of necessity or force majeure according to Article 25 of the ILC Draft Articles on State Responsibility. Alternatively, the state of necessity can be considered in the light of specific treaty provisions – also known as ‘non-precluded measures’ (NPM) clauses – which ensure that the investment treaty protections ‘shall not preclude [...] the application of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests’. *LG&E* is the only one case in which the role and value of the treaty NPM provision was recognized. Other tribunals such as *CMS*, *Sempra*, or *Enron* have rather considered that necessity should primarily be considered according to customary international law principles. These decisions however have been the object of annulment procedures which have questioned their reasoning, and annulled the awards in the latter two cases.

⁶⁰ See KIM, Dohyun, *supra* note 55.

⁶¹ See TAI-HENG, Cheng: “Reconsidering ICSID Awards”, 2011, available at <http://kluwerarbitrationblog.com/blog/2011/05/11/reconsidering-icsid-awards/>.

⁶² See PAULSSON, Jan, *supra* note 55.

⁶³ See SCHEURER, Christoph and WEIGNER, Matthew: “Conversations across cases – is there a doctrine of precedents in investment?”, (2007). KAUFMAN-KOHLER, Gabrielle, “Arbitral precedent: Dream, Necessity or excuse?” *Arbitration International*, vol. 23, No. 3, (2007), 357 et seq.

⁶⁴ See International Centre for Settlement of Investment Disputes: “Suggested Changes to the ICSID Rules and Regulations, Working Paper of the ICSID Secretariat”, (2005).

⁶⁵ See PAULSSON, Jan, *supra* note 55.

usually apply a domestic law which is sufficiently developed to be predictable, so arbitrators' role does not involve developing rules belonging to this domestic law.⁶⁶

However, these two arguments are not completely accurate.

First, in the absence of determination by the parties, arbitral tribunals can generally determine the application of the procedural and the substantive laws they find most appropriate. This may be done without necessarily referring to any particular domestic law⁶⁷, allowing consideration to previous practices or usages.

The publication of the awards could shed some light into how the arbitral tribunals select the law they find most appropriate, and whether arbitrators show preference for certain bodies of law. It could also foster consistency in the application by arbitral tribunals of international law, or regulations of soft law such as the UNIDROIT Principles. Furthermore, it has been argued that public access to arbitral awards could make the content of *lex mercatoria* more accessible,⁶⁸ enhance its status,⁶⁹ and contribute significantly to the development of the law in the international commercial area.⁷⁰

Second, even in cases where arbitral tribunals apply domestic law, the publication of International Commercial Awards could help to improve consistency and provide guidance on two other points: (i) with regards to substantive issues, when a particular legal issue has not yet been settled in the particular applicable body of law;⁷¹ and (ii) how to resolve procedural issues not covered by regulations.⁷² This latter assertion is confirmed by a survey conducted on International Commercial Awards quoting previous decisions, where most of the citations were made with regard to matters of jurisdiction, procedure, and the determination of the governing law.⁷³

In summary, consistency in the application of rules is as desirable in international commercial disputes as in any other field.

It is uncontested that a system of binding precedent does not exist in international commercial arbitration. However, it is equally true that there is a tendency to accept

⁶⁶ See KAUFMAN-KOHLER, Gabrielle, *supra* note 55.

⁶⁷ Although most arbitration rules give arbitrators' a great discretion when choosing the applicable law, other regulations, like the UNCITRAL Model Law are not as flexible, and mandate a *renvoi* to a necessarily domestic legislation.

⁶⁸ See PARK, William W., "National law and commercial justice: safeguarding procedural integrity in international arbitration", 63 TUL. L. REV. 647, 673-74 n.92 (1989).

⁶⁹ See YC ONG, Colin, *supra* note 11.

⁷⁰ See HANS, Smith: "The future of international commercial arbitration: a single transnational institution?", 25 Colum J. Transnat'l, (1986), 31 et. seq.

⁷¹ See MOURRE, Alexis and VAGGENHEIM, Alexandre, *supra* note 50. For example, in commercial arbitration a body of law that is usually applied is the United Nations Convention for the International Sales of Goods (CISG). There are extensive data-bases of court decisions of different jurisdictions regarding the interpretation of the CISG provision, which is incredible useful in order to enhance a consistent interpretation of the treaty. However, due to the lack of massive publication of arbitral awards only a few awards can be recall in this area.

⁷² See LO, Chang-fa, *supra* note 11.

⁷³ See KAUFMAN-KOHLER, Gabrielle, *supra* note 55.

the consistent decisions of other arbitrators within a significant number of previous cases.⁷⁴

There are definitely psychological factors that give certain authority to previous arbitration awards, since “faced with a problem, people want to know what others have decided in similar situations, and tend to imitate”⁷⁵. Such phenomenon has been labelled by scholars as “persuasive precedent”.⁷⁶

In order for past awards to foster predictability, there needs to be an accumulation of identical or similar solutions that are able to generate a phenomenon of imitation. According to a survey report, out of the 190 ICC awards reviewed, only about 15 per cent cited other arbitral decisions. The reason for such a short number could be exactly the lack of publication of International Commercial Awards.⁷⁷ As stated by A. Mourre: “how can an arbitral tribunal ever conclude that consistent past arbitration awards express a rule of law or a trade usage when the overwhelming majority of arbitration awards are unknown?”⁷⁸

In that sense, it has been argued that if awards were known and accessible in sufficient quantity, predictability of the results of arbitration proceedings could certainly increase. If this is true, not only will it contribute to the stability of the international arbitration system, but would also “help the parties manage their businesses, control the possible risks, evaluate their disputes, and avoid future disputes to some extent.”⁷⁹

b. Improvement of arbitrator’s integrity and quality of awards

In justice adjudication the control of the judges’ prerogatives to avoid potential abuses of power comes in two ways: review⁸⁰ and transparency⁸¹ of their actions.⁸²

⁷⁴ See KAUFMAN-KOHLER, Gabrielle, *supra* note 55. BERGER, Klaus Peter, “The international arbitrators’ application of precedents”, *Journal of International Arbitration*, vol. 9, No. 4, (1992), 5 et seq.

⁷⁵ See LANDO, Ole: “Conflict-of-law rules for arbitrators” in Bernstein, Herbert, Drobnig, Ulrich and Kötz, Hein (eds.): *Festschrift für Zweigert Konrad*, ed. Mohr Siebeck, Tübingen, (1981), 157 et seq.

⁷⁶ “Persuasive precedent”, rather than precedent in the meaning of the doctrine of *stare decisis*, is the concept that can be applied to arbitration. Persuasive precedent can be defined as the *de facto* tendency for an international arbitrator to accept what has been consistently decided in a significant number of past arbitral decisions. See MOURRE, Alexis and VAGGENHEIM, Alexandre, *supra* note 50.

⁷⁷ “The fundamental importance of the publication of arbitration awards derives from the fact that, absent of a doctrine of *stare decisis* in arbitration, arbitral precedent will only operate in presence of a repetition of identical solutions in a number of different cases. Precedent in arbitration is, from that perspective, a rule-making mechanism comparable to that of trade usages. For that rule-making mechanism to operate, it is necessary that arbitration awards be available in sufficient quantity to permit the emergence of trends and the distinction of lines of identical or similar solutions. In other words, in order for past awards to be perceived as binding, there needs to be something close to what has been defined as path dependency for state courts, i.e. the accumulation of identical or similar solutions able to generate a phenomenon of imitation. The persuasiveness, which supposes an exemplary value and, as a consequence, a judgment on the value of a particular decision, often needs to be combined with quantity. Precedential value could only be given to a consistent line of decisions. The same applies to arbitral awards.” MOURRE, Alexis and VAGENHEIM, Alexandre, *supra* note 50.

⁷⁸ See MOURRE, Alexis and VAGENHEIM, Alexandre, *supra* note 50.

⁷⁹ See LO, Chang-fa, *supra* note 11.

⁸⁰ With review referral to the possibility of taking the adjudicator’s decision to another person with the authority to correct, overturned, or annul it.

Authorities have recently asserted that the limited review of arbitral awards⁸³ reinforces the importance of greater transparency to facilitate the public monitoring of arbitrators.⁸⁴

Transparency is of crucial importance in preventing misconduct or other problems related to the arbitrators' integrity. To put it in Bentham's words: "Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial."⁸⁵

Some scholars have argued that the public monitoring of arbitrators would prevent irregularities or deviations, increasing the integrity of the arbitrators.⁸⁶ Other commentators have argued that public scrutiny will give the general public a real insight of the arbitrators' legal reasoning, level of expertise, and the fairness of the decisions, which will help to assess future appointments.⁸⁷

⁸¹ In this essay transparency of the adjudicatory system refers to the availability of information about the decisional process.

⁸² FERNÁNDEZ-ARMESTO, Juan, *supra* note 52.

⁸³ In international commercial arbitration the review of the arbitrators' decisions is quite limited. Arbitrators have the last word as to the merits of a given dispute and such decision is not generally subject to the control of any superior court, except for the possibility of an annulment in cases of serious violations of due process. In this sense, the grounds for challenging arbitral awards are strictly limited. For example, under the Model Law it is not possible to appeal the decision of the arbitrators, the scope of review by the court of the seat of arbitration is narrowly confined to set aside the award on the following grounds: "(a) the party making the application furnishes proof that: (i) a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or (b) the court finds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or (ii) the award is in conflict with the public policy of this State." The same grounds are provided for in the New York Convention to deny enforcement of the award. In the same line, most of the arbitral institutional rules also restrict the possibility of reviewing the merits of a case by a second instance of control, providing that the award would be final, and the parties shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made (for example the ICC Arbitration Rules (2012), UNCITRAL Arbitration Rules (2010), and LCIA Arbitration Rules (1998). Although there are still a few jurisdictions which national law provides for appeal mechanisms to review *de novo* the merits of the arbitral awards (such as Argentina), the parties usually waive their right to resort to courts for revision of the substance of the decision in their arbitration agreements.

⁸⁴ FERNÁNDEZ-ARMESTO, Juan, *supra* note 52, 129.

⁸⁵ BENTHAM, Jeremy: "The Works of Jeremy Bentham", published under the superintendence of his executor, John Bowring, Edinburgh: Tait, Simpkin, Marchall, & Co. London, Vol. IV, (1843), 316.

⁸⁶ See LO, Chang-fa, *supra* note 11.

⁸⁷ It has been said that "if arbitral awards are not published, it would be more difficult to form a decision by disputing parties of later cases to decide whether the potential arbitrator is qualified, based on the awards the potential arbitrators rendered in the past. The publication of arbitral awards would allow the disputing parties and the general public to review and evaluate the decisions of arbitrators. This should be useful for the parties in "the winnowing out of arbitrators who make unprincipled awards" and for their future selection of arbitrators." LO, Chang-fa, *supra* note 11; See also YC ONG, Colin *supra* note 11, and BUYS, Cindy G., *supra* note 11.

Furthermore, without access to previous awards issued by a potential arbitrator, appointments may not be made through an informed decision. Of course most arbitrators are very knowledgeable, experienced and fair, but there are also some cases in which poorly qualified arbitrators end up being appointed just out of ignorance of the appointer, who bases such decision on the “marketing” that the arbitrator has done in the “arbitration small world”. In this respect, it is interesting to notice that from a survey conducted in 2010 arises that 52% of arbitration users select their arbitrators based on his/her reputation.⁸⁸ The study also shows that 50% of the arbitration users surveyed have been disappointed with arbitrator performance and that corporations want greater transparency about arbitrator skills and experience.⁸⁹

The publicity of awards could facilitate public scrutiny of arbitrators’ work. While such scrutiny will not change the result of the award, it could in the long term increase the quality of awards, since it may strengthen the sense of responsibility on arbitrators, who will be even more accountable knowing that whatever they rule will be reviewed by the arbitration community as a whole. With more eyes looking their way, arbitrators will take greater care when drafting their awards, which would increase their quality.⁹⁰ This is explained by J. Paulsson as follows:

“[T]he diligence of arbitrators is improved by the awareness that their work is being observed by others. When arbitration is confidential, bad work may be immune from criticism because the winner will in any event praise it, while the loser’s complaints are dismissed as sour grapes. To be observed—to have their decisions dissected and criticized—may annoy some arbitrators. It may increase their workload to have to be more punctilious about matters of form, more thoughtful about matters of substance, more painstaking about their drafting in a foreign language, more careful in the accounts they give of the parties’ arguments and their own analysis of the law.”⁹¹

It could be argued that such transparency could lead to another matter of concern: that the elections of arbitrators could be exclusively based in the perception that he or she has a position regarding an issue which could be inferred from his or her previous awards. In this respect, it has been stated recently that in investment arbitration, some arbitrators have repeatedly been appointed by the same party (investor or host state) that they have favoured before, being arbitrators known as “pro state” or “pro investor”. However, since contrary to investment arbitration, in commercial arbitration the issues and parties are so many, it appears difficult that it could constitute a major problem.

c. Other advantages

⁸⁸ See SIA 2010, *supra* note 3.

⁸⁹ See SIA 2010, *supra* note 3.

⁹⁰ See LO, Chang-fa, *supra* note 11.

⁹¹ PAULSSON, Jan, *supra* note 55.

Commentators have also found that the publication of awards in international commercial arbitration could bring several other benefits such as (i) improvement of “arbitration” by its pedagogic effect; (ii) possibility to assess if arbitration is really a neutral forum; (iii) increase of users; and (iv) possibility to assess arbitration institutions.

(i) *Pedagogic effect*

It has been said that the publication of awards would allow arbitrators, arbitration institutions, practitioners, scholars and law students to understand and promote coherent solutions to procedural issues, choice of governing law, and even substantive matters.⁹² And that the intellectual effort demanded from arbitrators to resolve a case deserves an adequate theoretical impact for the benefit of the whole society.⁹³

(ii) *Neutrality*

It has also been suggested that the publicity of awards could serve to assess if international arbitration really serves the need for neutrality, which is perceived as probably the greatest advantage of the system. In this respect it has been stated that in national settings “the preference for confidentiality may be decisive in the choice between local courts and local arbitrators. The applicable law is neutral, and the question of national discrimination does not arise. So when two parties of the same nationality choose arbitration, they may indeed be seeking confidentiality. When they are of different nationality, on the other hand, they seek neutrality above all.”⁹⁴ Therefore, since in the international field neutrality prevails above all, the reasonable question that has been put forward is: “how can we be satisfied about neutrality, unless we can observe this law in action?”⁹⁵

(iii) *Increase of international commercial arbitration users*

It has been argued that the systematic publication of awards would contribute to create an “arbitral jurisprudence” that will allow the parties to have a greater understanding of the process which will translate in more people willing to use it.⁹⁶

(iv) *Reduction of disputes*

It has also been said that publication of awards would help avoid future disputes by allowing parties to learn from the mistakes of others.⁹⁷

(v) *Assessment of arbitral institutions*

⁹² See YC ONG, Colin, *supra* note 11, LO, Chang-fa, *supra* note 11.

⁹³ See MISTELIS, Loukas and LEW, Julian D. M.: “Pervasive problems in international arbitration”, Kluwer Law International, 2006, 101-102.

⁹⁴ PAULSSON, Jan, *supra* note 55.

⁹⁵ PAULSSON, Jan, *supra* note 55.

⁹⁶ See BUYS, Cindy G., *supra* note 11.

⁹⁷ See BUYS, Cindy G., *supra* note 11.

Finally, it has been sustained that the publication of awards would allow arbitral institutions to show their expertise and professionalism in handling cases, and would provide some assessment of their effectiveness.⁹⁸

5. Conclusion

A very large number of arbitral awards in different jurisdictions are unpublished, and the public has access to them mainly only if they are challenged in a judicial court. While the concerns that have been raised by those who consider that awards should remain confidential are very worthy of serious attention, the advantages of the diffusion of International Commercial Awards are also incontestable.

The question is whether it is possible to find a balance between both interests at stake. It is the opinion of the author that the answer should rely on a comprised solution. It will be desirable to implement mechanisms to promote publication of International Commercial Awards without totally depriving the parties of what has always been perceived as one of the major advantages of arbitration: confidentiality.

To effectively achieve such goal, there are several more questions that need to be answered.

First, should there be exceptions to the publication of the award in full? Certainly, if the will of any of the parties is to keep the dispute and its result confidential, then the name of such party and any identification feature should be deleted from the award before its publication. Furthermore, there are some situations in which secrecy is justified, as to protect trade secrets, know-how, etc., so such sensitive confidential information could also be erased from the award upon any request of a party. This would be a workable compromise, which would remove the fears of parties who are concerned with the loss of confidentiality, while keeping the advantages of advertising.⁹⁹

⁹⁸ See LO, Chang-fa, *supra* note 11.

⁹⁹ The ICC International Court of arbitration has a practice of realizing sanitized awards that have been redacted to remove identifying information for publication. Although the majority agrees with such practice, it has been subject to some criticism. It has been stated that some of the published awards have been sanitized to such extent that it becomes unclear as to how the arbitrators arrive to the decision. (CRAIG, Lawrence, PAULSSON, Jan, and PARK, William: "International Chamber of Commerce Arbitration", 3rd ed., Oceana, (2000), 170). It has also been stated that even with the deletion of the name of the parties it is easy to figure out from the context who are the parties involved (TRAZEGNIES GRANDA, Fernando, *supra* note 49). That downside could be avoided by changing other information which may help to identify the parties. For example if there are only few companies in such region that operates in the certain industry, in the award the countries and the activity could be deleted or changed. For example if the case deals with a contractual claim arising out of a contract for the sale of helicopters in Peru, it could be changed for a contract for the sale of computers in Italy, with the caveat that some facts have been altered for publication. Regarding the omission made by the "sanitation" of awards PAULSSON and RADWING assert that: "we have no quarrel with the institutional publication of illustrative awards, sanitized to protect the parties' anonymity. We have over the years recognized a number of our own cases among the extracts published in the ICCA Yearbook or Clunet; while the omission of incidental aspects of the awards may detract from a full understanding of the case, we have not perceived any breach of confidentiality" (PAULSSON, Jan and

Second, who should be in charge of promoting the change? Arbitral institutions would probably be the best suited to undertake that change. They are the main policy makers of the international commercial arbitration system, and have channelled many of the major transparency innovations in the field. Thus, the author proposes a modification of institutional arbitrations rules to expressly provide for the publication of awards.¹⁰⁰

Third, should the rules provide that awards will be published only upon agreement of the parties? No. Requesting authorization of the parties may be not the most effective manner to achieve massive publication.¹⁰¹ The default rule should be the publication of the award.

Fourth, who should be in charge of preparing these redacted versions of the awards? The proposal is that the arbitral tribunals perform such task,¹⁰² as part of their mission and, therefore, included in its remuneration.

Fifth, who should be in charge of the publication? Arbitral institutions should be entrusted with that.¹⁰³ The best way to guarantee massive access is that the awards were uploaded to the institutions' web-pages.¹⁰⁴

RAWDING, *supra* note 4). In the author's opinion the rule of the ICC has an enormous value in providing a guide to future practice and arbitrators facing similar legal issues. The rule could be improved in two ways: (i) the published edited award should definitely include the name of the arbitrators; and (ii) the parties and the arbitral tribunal should be the ones determining which parts of the award should be deleted and not the arbitral institution.

¹⁰⁰ While it might be urge that publishing awards would entail some costs, they will be completely overweight by the increase of users that the institutions would gain, since the publication of the awards would allow arbitral institutions to show their expertise and professionalism in handling cases, providing assessment of the its effectiveness.

¹⁰¹ The Taiwan Construction Arbitration Association has the practice of asking the parties to decide whether to agree to the publication of the arbitral awards. The results have been that, after many years of practicing the mechanism, no parties to any arbitration procedure have agreed the publication of their awards. LO, Chang-fa, *supra* note 11.

¹⁰² An author has provided for a similar solution proposing a mechanism where the parties identify confidential parts of their submissions and the arbitrators should prepare confidential and non-confidential editions of the arbitral award accordingly. LO, Chang-fa, *supra* note 11.

¹⁰³ There are many *ad hoc* arbitrations, which awards will still not be subject to publicity. However, the advantages of institutional proceedings overweight the possible interest of the parties to keep the award in total confidentiality. Thus, the author does not anticipate a major migration towards *ad hoc* arbitration.

¹⁰⁴ An example of this practice is ICSID webpage where almost all awards are posted for public access: <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=Main&actionVal=OnlineAward>. It has also been suggested that an international body should be created to oversee the publications. See GRUNER, Dora Marta, "Accounting for the public interest in international arbitration: The need for procedural and structural reform", Columbia Journal of Transnational Law, vol. 41, N° 3, (2003, 923 et seq. Another proposal was that UNCITRAL could be responsible for collecting, systematizing and publishing the awards in a database that could follow the example of the compilation it makes of case law on UNCITRAL texts (CLOUT). See MOURRE, Alexis and VAGENHEIM, Alexandre, *supra* note 55.

It will be welcomed that an institution such as UNCITRAL, or any other, should be in charge of collecting and systematizing the awards. In investment cases for example the web-page of Investment Treaty Arbitration (<http://italaw.com/>) provides access to all publicly available investment treaty awards. But it still will be up to the institutions that administered the arbitrations to make the awards available for such compilation. There have been some authors that have argue that the implementation of a publication system would entail incremental costs for the arbitral institutions. The author disagrees, the cost of keeping electronic copies of the awards and upload them to their web page is not considerable, and there should not

Sixth, when should the awards be published? The publication should occur after the proceedings have terminated. Furthermore, it would be prudent to wait for a certain period of time after the award has been rendered, not less than a year.¹⁰⁵

Publication of arbitral awards in the proposed way could bring greater transparency to the system, strengthen the fairness and quality of arbitrators, proceedings and awards, and contribute to the development and evolution of arbitration.

hire any additional staff to prepare the “sanitized” versions of the awards since it would be up to the arbitral tribunal to do it.

¹⁰⁵ The ICC practice is to wait for at least three years after the termination of proceedings before publishing an edited version of an award.