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U.S.A. VS. THE WORLD: RIGHT TO PUBLIC ACCESS OF COURT RECORDS AND CONFIDENTIALITY CONCERNS IN COMMERCIAL ARBITRATION

*By: Christopher M. Campbell, Esq.**

ABSTRACT

The United States of America, often a paragon of the rule of law, has a long-established tradition of providing legal regimes and mechanisms that are the inspiration for other legal frameworks around the world. However, even the oldest traditions sometimes require occasional contemporary modification. Such is the case in the U.S. as

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it pertains to confidentiality and privacy in commercial arbitral proceedings.

As it stands today, even if the parties to an arbitration originally contemplated having wholly confidential proceedings, should those sentiments change upon the arrival of the inevitable dispute, one party can unilaterally destroy that confidentiality by filing documents in U.S. courts in accordance with the public's right to access judicial documents.

Although noble in its intention, this vulnerability potentially injures the interest of parties opting for arbitration for no convincing reason. Instead, the U.S. should consider the approaches taken by other national jurisdictions, which offer more limited public review of court documents. Such review is usually after the judiciary has had a chance to determine the fairness and prejudicial effect of revealing the contentious documents.

This article discusses the interplay between the public's right to access court documents and the parties' right to confidentiality in commercial arbitration in the U.S. and around the world, and then offers amendments to U.S. federal and state law to address this gap in U.S. civil procedure.

I. INTRODUCTION

A cornerstone in commercial arbitration is the right of the parties to determine the openness of the proceedings.¹ The parties may elect to have a fully transparent process, or they may agree to confidential proceedings before the tribunal.² Such flexibility in

¹ Olena S. Perepelynska, *Party Autonomy vs. Mandatory Rules in International Arbitration*, UKRAINIAN J. OF BUS. LAW, 34-35 (Jan. 2012).

² See Michael Pryles, *Limits to Party Autonomy in Arbitral Procedure*, 24 J. OF INT'L ARBITRATION, 327-339 (2007).

determining the level of confidentiality in arbitral proceedings allows the participants to trust that potentially valuable or damagingly sensitive information will not fall into the possession of unintended parties.³ This principle contrasts with civil litigation in the United States legal systems, where there is a general accepted expectation of transparency in all aspects of civil court room matters.⁴ Curiously, there remain instances where, despite the parties initially agreeing to confidential and binding arbitration, one party may circumvent confidentiality by filing before certain national courts.⁵ In those cases, even if the court-filed case is dismissed in favor of an arbitration clause, the initial filing may still disclose confidential information.⁶

Some jurisdictions allow such initial filings to be disclosed under the auspices of a public right to access court proceedings.⁷ While this right is necessary for holding governments publicly accountable, it must be balanced against the needs of private parties in civil litigation to keep their sensitive business information secret.⁸ Allowing public access to proceedings when the parties presume to have confidentiality, or have explicitly agreed to confidentiality, engenders risks to party autonomy.⁹ This begs the question: how

³ See *id.*

⁴ See *The First Amendment presumption of access*, REP. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/5th-cir-open-courts-compendium/first-amendment-presumption-access> (last visited Sept. 16, 2018).

⁵ See Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255 (2006).

⁶ See S. Lembo and V. Guignet, *Confidentiality in Arbitration: From Myth to Reality*, <https://www.baerkarrer.ch/publications/Confidentiality%20in%20Arbitration%20-%20From%20Myth%20to%20Reality.pdf>.

⁷ See Avinash Poorooye & Ronán Feehily, *Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance*, 22 HARV. NEGOT. L. REV. 275 (2017).

⁸ See *Access to Court Proceedings*, REP. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/reporter's-field-guide/access-court-proceedings> (last visited Sept. 16, 2018).

⁹ See Pryles, *supra* note 2, at 328.

should courts treat filings that would otherwise be public in cases where an arbitration clause may come into operation?

First, this piece will examine common law and civil law jurisdictions and discuss how selected states address the right of public access to court proceedings and records. Next, it will analyze United States jurisdictions. From there, the discussion will cover the role of confidentiality in commercial arbitration as a dispute resolution mechanism, which will include a comparison of U.S. jurisdictions and selected international counterparts. Then, this piece will address the balance between the right of public access in civil cases and the rights of parties to expect confidentiality in arbitrations. Finally, this piece will examine and propose methodologies for improving access to confidentiality for parties in litigation while maintaining public access to certain materials.

Indeed, the primary contention in this piece is that the current U.S. legal practice of allowing public access to court documents or filings should be amended to restrict public access if there is an arbitration clause at issue in a case, *unless* the parties have mutually and explicitly expressed a desire to have non-confidential arbitral proceedings. Such a restriction should exist unless, either the arbitration clause is not applicable or that the parties intended to have an open hearing of their resolution.

For the sake of clarity, the main purpose of this paper is to highlight a gap in U.S. law that pertains to commercial arbitration—not the fact that the U.S. does not have the ability to seal documents or make court documents confidential when it comes to arbitration. In the U.S., initial filings and oral arguments, which may contain sensitive material intended to be kept confidential through arbitration clauses, can potentially be made public.¹⁰ This seems to be a different practice than what other jurisdictions allow, which

¹⁰ See REP. COMM. FOR FREEDOM OF THE PRESS, *supra* note 8.

prevents needlessly exposing sensitive information of the parties in both common law and civil cases.¹¹

II. RIGHT TO PUBLIC RECORDS

Broadly defined, a public record is "[a] record that a governmental unit is required by law to keep, such as land deeds kept at a county courthouse. Public records are generally open to view by the public."¹² In order to preserve the integrity of the courts, the right to public records has generally been upheld in rule-of-law nations around the world to extend the right to observe court proceedings.¹³

A. THE UNITED STATES OF AMERICA

The Supreme Court of the United States, the highest court in the country, has determined that the public's right to access court proceedings and records differs between criminal and civil matters.¹⁴ This paper will only examine the public right to access in civil matters.

The U.S. Supreme Court has not extended the right of the First Amendment to civil proceedings.¹⁵ However, several U.S. federal circuits have expressed that the public has a right to access civil court proceedings.¹⁶ Although not dispositive until explicitly

¹¹See, e.g., Paul Magrath, *Open Justice and the Rule of Law*, INC. COUNS. OF L. REP. (Jan. 10, 2014), <https://www.iclr.co.uk/archive/open-justice-rule-law/> (explaining the common law test in Canada).

¹² *Record, Public Record (16c)*, BLACK'S LAW DICTIONARY (10th ed. 2014).

¹³ See Magrath, *supra* note 11.

¹⁴ See REP. COMM. FOR FREEDOM OF THE PRESS, *supra* note 4.

¹⁵ See *Id.*

¹⁶ See *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1179 (6th Cir. 1983), reh'g denied, 717 F.2d 963 (6th Cir. 1983), cert. denied, 465 U.S. 1100 (1984) ("Simple showing that information would harm company's reputation is not sufficient to overcome strong common-

expressed by the Supreme Court, it appears that U.S. federal circuits lean towards the public right to access commercial or civil disputes filed within their jurisdiction.¹⁷ The way federal circuits have treated the right of public access is useful for the discussion of federal civil matters. However, for local state-by-state civil matters, it is important to consider the laws of the given state.¹⁸ This paper will analyze several relevant U.S. jurisdictions before moving to other nations' treatment of the right of public access to civil proceedings.

B. SURVEY OF U.S. JURISDICTIONS

1. California

California, a heavily populated state with high amounts of commercial activity, sheds some relevant insight on the right of public access to civil proceedings.¹⁹ Generally speaking, the public

law presumption in favor of public access to court proceedings and records"); *see also* *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (question of whether public has a First Amendment right to attend civil trials was not raised in case, but noting "that historically both civil and criminal trials have been presumptively open"); *see also* *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984) ("First Amendment secures to the public and the press a right of access to civil proceedings"); *see also* *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 533 (1st Cir. 1993) ("Open trials protect not only the rights of individuals, but also the confidence of the public that justice is being done by its courts in all matters, civil as well as criminal").

¹⁷ *See F.T.C.*, 710 F.2d at 1179; *Garden Way, Inc.*, 989 F.2d at 533.

¹⁸ *See California State Court Records*, DIGITAL MEDIA L. PROJECT, <http://www.dmlp.org/legal-guide/state-court-records> (last visited Sept. 16, 2018) (stating that some variation exists for allowing public access to court records from state to state).

¹⁹ *See California*, WIKIPEDIA, <https://en.wikipedia.org/wiki/California> (last visited Sept. 16, 2018) (stating California is ranked first for largest population); *see also Economy of California*, WIKIPEDIA, https://en.wikipedia.org/wiki/Economy_of_California (last visited Sept. 16,

has the right to inspect and copy most records and documents filed in California state courts.²⁰

In a civil case, a court may seal documents if it determines that (1) one or more of the parties have a legitimate interest in keeping the documents confidential and (2) that the inherent nature of the evidence outweighs the public interest in accessing the documents.²¹ Parties to a civil lawsuit may stipulate to sealing documents, but the court must still determine whether the parties' interests in confidentiality outweighs the public interest.²² There are some categories of records which are not generally open to the public in California including: (1) most juvenile court records, (2) mental evaluation records, (3) discovery records not filed in court or introduced into evidence, (4) adoption records, (5) trade secret information, and (6) grand jury transcripts that do not result in an indictment.²³

Effective January 1, 2010, Rule 10.500 of the California Rules of Court set forth comprehensive public access provisions applicable to judicial administrative records maintained by state trial and appellate courts, and the Judicial Council of California.²⁴ In short, California, by statute, recognizes the public's right to access judicial records of both proceedings and administrative records.²⁵

Thus, outside of the examples cited above, California, a prominent jurisdiction in the U.S., generally allows for public access to records of documents filed in court.²⁶ These records are available for public view and, until they are sealed by a judge, any redacted

2018) (stating that the economy of California is the largest in the United States).

²⁰ California State Court Records, *supra* note 18.

²¹ *See id.*

²² *See id.*

²³ *See id.*

²⁴ Cal. Rules of Ct. § 10.500 (West 2018).

²⁵ California State Court Records, *supra* note 18.

²⁶ *See id.*

information can be viewed by the public, potentially leading to substantial harm to the parties involved in the dispute.²⁷

2. *Delaware*

Delaware, another state with a large amount of commercial activity, also addresses the public's right to access court records in a civil case.²⁸ Delaware's courts issued Administrative Directive No. 2001-1: Policy on Public Access to the Court of Common Pleas Judicial Records to provide guidance on which records in a civil proceeding may, or may not be, disclosed.²⁹

Similar to California, Delaware lists which records are generally restricted from public access, namely: (1) personnel records, (2) applications for employment and records of employment investigative hearings, (3) trade secrets and proprietary licensed materials, (4) judicial case assignments prior to the assignment of a judge, (5) court security records, (6) records controlled by statute or common law, and (7) attorney work-product.³⁰

While Delaware goes into great specificity regarding what records shall generally be restricted, these prohibitions do not vary significantly from the standard set by other states, which reinforces the principle of broad public access to most court records in civil matters.³¹

²⁷ *See id.*

²⁸ *See Delaware*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Delaware> (last visited Sept. 16, 2018) (stating that while Delaware is ranked 45th for largest population, it is ranked 6th based on density).

²⁹ *See Admin. Dir. No. 2001-1*, Del. Ct. Com. Pl., Smalls, A.J. (Sept. 1, 2001) at 1.

³⁰ *See id.* at 1-4.

³¹ *See id.*

3. *New York*

New York, a popular jurisdiction for international and commercial activities, also uses the same trends regarding public access to records as the states discussed above. The courts of New York hold:

Like criminal proceedings, civil actions are presumptively open pursuant to the guarantees under the First Amendment. Unlike criminal actions that present constitutional considerations for criminal defendants, in civil actions the First Amendment guarantees must be measured against the public interest in requiring closure.³²

Like other states, New York has determined instances where public disclosure of certain records is inappropriate. Those instances are: (1) matters before a family court, (2) matrimonial actions, (3) adoption proceedings, (4) mental competency proceedings, and (5) confidential records.³³

New York continues the trend of the federal circuit and of California and Delaware, by allowing the general public access in civil proceedings except under few specified circumstances.³⁴

4. *Louisiana*

Louisiana, unlike other U.S. jurisdictions, is a civil law jurisdiction due to heavy French influence.³⁵ Louisiana courts

³²See Access to Court Records, N.Y. Courts (2011), <http://ww2.nycourts.gov/sites/default/files/document/files/2018-05/AccessToCourtRecords.pdf>.

³³ See *id.*

³⁴ See *id.*

³⁵ See William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, LA. L. REV. 677, 697-99 (2000).

function by using two bright-line statements regarding the public's right to access public court records.³⁶

First, the Louisiana Constitution states: "No person shall be denied the right to . . . examine public documents, except in cases established by law."³⁷ Louisiana takes this right further than other common law jurisdictions, establishing that "[a]ny person who has been denied the right to inspect [or] copy . . . a record . . . may institute proceedings for the issuance of a writ of mandamus, injunctive or declaratory relief."³⁸ Thus, Louisiana statutory law provides the public a right to access court documents and a remedy if that right has been denied.

Case law bolsters this right of access for the public. In *Keko v. Lobrano*, the Louisiana Court of Appeals found that, in light of the Public Records Act and Article 251, "there is no power in the trial court to order an entire civil case record sealed from public inspection."³⁹ Although there are certainly instances where court records may be sealed for various reasons, this case makes it abundantly clear that the public's right to access court records in Louisiana shall not be infringed.⁴⁰

5. *South Carolina*

The final state in the national analysis of the public's access rights to court records is South Carolina. As an original U.S. jurisdiction and an increasing hub for commercial transactions, South Carolina provides relevant insight concerning public access to court records. In fact, in a 1931 case, the Supreme Court of South Carolina discusses the matter openly, referencing civil proceedings and stating in relevant part:

³⁶ See LA. CONST. art. XII, § 3; see also LA. STAT. ANN. § 44:35 (2014).

³⁷ LA. CONST. art. XII, § 3.

³⁸ LA. STAT. *supra* note 36.

³⁹ *Keko v. Lobrano*, 497 So. 2d 353, 354 (La. Ct. App.), writ denied 497 So. 2d 1003 (La. 1986).

⁴⁰ See *id.*

It is the boast of our Anglo-Saxon system of jurisprudence that trials in our courts of law are conducted under established rules of procedure which insure a fair and open trial, where everything is done in the open, the jurors are drawn and sworn in open court, the witnesses are sworn and testify in open court, the judge's rulings and decisions are made in open court, and everything done is made of record. Litigants are guaranteed the right to be heard by counsel or in person at every stage of the trial and upon every phase of it.⁴¹

As a result, the principles discussed above are found in South Carolina. As with other jurisdictions, South Carolina has instances where matters may be put under seal and only opened under certain circumstances.⁴²

C. SURVEY OF NON-U.S. COMMON LAW JURISDICTIONS

1. Australia

The first non-U.S. common law legal system this paper examines is one that has implemented a legal tradition comparable to that of the U.S. Australian courts have held unambiguously that:

Whatever [the media's] motives in reporting, their opportunity to do so arises out of a principle that is fundamental to our society and method of government: except in extraordinary circumstances, the courts of the land are open to the public. This principle arises out of the belief that exposure to public scrutiny is the surest safeguard against any risk of the courts abusing their considerable powers. As few members of the public have the time, or even the inclination, to attend courts in person,

⁴¹ *Ralph v. S. Ry. Co.*, 160 S.C. 229, 158 S.E. 409, 410 (1931).

⁴² *See* Rule 41.1, SCRPC.

in a practical sense this principle demands that the media be free to report what goes on in them.⁴³

This language will seem familiar as it parallels the rights endowed by courts in the U.S. The motivation seems to be clear: the public's right to access records is tied to avoiding the potential for injustice via corruption.⁴⁴

Additionally, Rule 36.12 of the Uniform Civil Procedure Rules (UCPR), which applies to all Australian Courts, holds that a person in compliance with the relevant regulation shall be allowed to review any court record.⁴⁵

There are cases where "open justice would not be prejudiced"⁴⁶ when Australian courts have refused public access to court records. In *Eisa Ltd v. Brady*, the court did not permit public access to court records until relevant issues regarding the disclosure of the disputed information had been resolved.⁴⁷ Again, this ability of the judiciary to examine court records before they are released to the public seems to be the primary way that other common law systems attempt to avoid destroying the confidentiality interests of parties involved in an arbitration.⁴⁸ Finally, as with other jurisdictions, when Australia finds sufficient basis for the "extraordinary circumstances," the court is permitted to seal the documents from public view.⁴⁹

2. *Canada*

According to the Canadian Supreme Court:

⁴³ R v. Davis (1995) 57 FCR 512, 514 (Austl.).

⁴⁴ See *id.*

⁴⁵ See *Uniform Civil Procedure Rules 2005* (NSW) r 36.12.

⁴⁶ *Austl. Sec. and Inv. Comm'n. v Rich*, [2009] NSWSC 1229 (Austl.).

⁴⁷ *Eisa Ltd v Brady* [2000] NSWSC 926 (Austl.).

⁴⁸ See *id.*

⁴⁹ See Judicial Comm'n. of N.S.W., "Closed Court," in *Civil Trials Bench Book* [1-0450] (2007), https://www.judcom.nsw.gov.au/wp-content/uploads/2016/07/Civil_Trials_Bench_Book.pdf.

Openness of court proceedings is one of the cornerstones of [the Canadian] justice system and . . . includes access to all aspects of the court process. The open court principle fosters confidence in the justice system as well as the public's understanding of the legal process.⁵⁰ With that said, sometimes full access to court proceedings or court records is restricted, when the restriction is necessary to protect other social values of superordinate importance.⁵¹

The Canadian Courts do not divert from the other examples and provide the important qualification that there are times when the public's right to know must be abridged in favor of the interest of justice.⁵² It is easy to see how challenging the confidentiality provisions of an arbitration clause could provide the basis for a court to exercise its discretion in what materials will be released to the public or sealed in the interest of justice.

A general trend in these examples is that the judiciary reviews and delays public access until after it is deemed appropriate, which is the inverse of the U.S. approach.

3. *United Kingdom*

Perhaps unsurprisingly similar to the U.S., the United Kingdom ("U.K.") also maintains a robust system of allowing the public access to civil court records. Indeed, the Public Records Office, established in 1938, was charged with the responsibility of maintaining government records as well as records of court proceedings in both a criminal and civil capacity.⁵³ Now titled the National Archives, the sheer volume of maintained information

⁵⁰ See Beverly McLachlin, Chief Justice of Canada, Remarks at the Annual Int'l Rule of Law Lecture: Openness and the Rule of Law (Jan. 8, 2014).

⁵¹ See *id.*

⁵² See *id.*

⁵³ See *Our History, THE NATIONAL ARCHIVES*, <http://www.nationalarchives.gov.uk/about/our-role/what-we-do/our-history/> (Last visited SEPT. 16, 2018).

covers everything from “Shakespeare’s will to tweets from Downing Street.”⁵⁴

Notably, the U.K. treats public access differently from the U.S. in that they give the public substantially *less* access to the litigants’ documents.⁵⁵ The parties themselves have a right to the majority of relevant case documents.⁵⁶ However, a non-party to the proceedings may:

. . . obtain from the court records a copy of—(a) a statement of case, but not any documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it;⁵⁷ . . .

(1B) No document –

(a) relating to an application under rule 78.24(1) for a mediation settlement enforcement order;

(b) annexed to a mediation settlement enforcement order made under rule 78.24(5);

(c) relating to an application under rule 78.26(1) or otherwise for disclosure or inspection of mediation evidence; or

(d) annexed to an order for disclosure or inspection made under rule 78.26 or otherwise, may be inspected without the

⁵⁴*What We Do*, THE NATIONAL ARCHIVES, <http://www.nationalarchives.gov.uk/about/our-role/what-we-do/> (Last visited May 7, 2017).

⁵⁵ *See id.*

⁵⁶ *See* U.K. R. CIV. P. 5.4B(1).

⁵⁷ *Id.* at 5.4C(1)(a).

court's permission .

(2) A non-party may, if the court gives permission, obtain from the records of the court a copy of any other document filed by a party, or communication between the court and a party or another person.”⁵⁸

While these restrictions on the public's right to access court records carry a different complexion than those of the U.S., perhaps they serve a more functionally practical purpose. As highlighted above in the U.S., the public, as a non-party, does not need to request access to court records; the records are there plainly to be examined.⁵⁹ The opposite appears to be true in the U.K., where a non-party, even without the records being sealed, needs to petition the court for the right to examine court records and relies on court discretion to be able to do so.⁶⁰

This fundamental difference, one that will be discussed further, may resolve the issue discussed at the outset. Namely, if the parties have an arbitration clause that compels confidentiality, is it proper that a party may unilaterally disclose confidential information in court proceedings? Under the U.K. system this question appears moot, since it is necessary to gain court approval before the court records are made available to the public.⁶¹

III. COMMON LAW JURISDICTIONAL SUMMARY

Having analyzed the approach of several prominent common law jurisdictions, it is apparent that there is a consensus that generally court proceedings should be open to the public and

⁵⁸ *Id.* at 5.4C(1B)(a)-(d), 5.4C(2).

⁵⁹ *See* *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1177, 1179 (6th Cir. 1983), *supra* note 16.

⁶⁰ *See* U.K. R. Civ. P. at 5.4C(1)(a), 5.4C(1B)(a)-(d), 5.4C(2).

⁶¹ *See id.*

restricted only in certain instances. However, the U.S. seems to take a unique approach in not restricting access to the records from the outset, unlike other countries that require judicial scrutiny before granting an allowance to observe records filed in civil court proceedings.⁶²

A. SURVEY OF CIVIL LAW JURISDICTIONS

I. China

The tradition of open governmental information in the People's Republic of China can be traced to the "open village affairs" at the village level in the early 1980s.⁶³ This was a result of the government attempting to create greater transparency among Chinese societal organs.⁶⁴

In the modern day, China is a developing economic and political superpower and its approach seems to be in-line with international norms. As China continues its commitment to rule of law,⁶⁵ the country has been quick to implement many laws, but struggles with the practical implementations of such laws.⁶⁶ It is important to understand that the codified law in China may be mitigated by extra-legal effects, which will be discussed below.

According to the Constitution of the People's Republic of China, "[e]xcept in special circumstances as specified by law, all cases in the people's courts are heard in public. The accused has the

⁶² See *id.*

⁶³ See Megan Carter & Lv Yanbin, *Access to Government Information in Europe and China: What Lessons to Be Learned?* EU-CHINA INFORMATION SOCIETY PROJECT 11-13 (Nov. 2007).

⁶⁴ See *id.*

⁶⁵ See Rogier Creemers, *China's Rule of Law Plan is for Real*, EAST ASIA FORUM (May 10, 2015), <http://www.eastasiaforum.org/2015/05/10/chinas-rule-of-law-plan-is-for-real/>.

⁶⁶ See *id.*

right to defense [sic].”⁶⁷ Pursuant to this rule, assuming the letter of the law is enforced, all court proceedings, records, and administrative materials are available to the general public—at least this appears to be the case for Chinese nationals.⁶⁸

Mr. Joshua Rosenzweig, a foreign practitioner in China, wrote: “There appears to be widespread confusion about what the proper procedure is for allowing foreigners access to court proceedings and a great deal of anxiety about the possible consequences if proper procedure is not followed exactly.”⁶⁹ Although anecdotal, this view point may indicate that despite the codified law, discrepancies may exist when discussing foreigners access to public court hearings in China.

However, even aside from the issues faced by foreigners, Chinese nationals are required to register and be specifically approved by the government before being permitted to attend court proceedings.⁷⁰ This sort of scrutiny may serve as a deterrent for those wanting to observe them.⁷¹ Additionally, in some cases where courts adopt a less transparent system than the sealing processes, they may use their sole discretion to prohibit public access for any reason from parties’ desire to “trade secrets.”⁷²

While certainly this is an improvement from the early days of the Chinese judicial system, these policies provide a striking look at how one civil law country treats the public’s access to court records. More relevant to the present discussion of arbitration, what are the implications if a foreign company may or may not have pertinent

⁶⁷ XIANFA art. 125 (2004) (China).

⁶⁸ *See id.*

⁶⁹ Joshua D. Rosenzweig, *Public Access and the Right to a Fair Trial in China*, DUI HUA (Feb. 2009), https://duihua.org/wp/?page_id=2542#10body.

⁷⁰ *See id.*

⁷¹ *See id.*

⁷² *See id.*

documents disclosed in open court while enforcement of an arbitration clause is pending at a Chinese court's discretion?

2. *France*

Perhaps more in-line with the traditions articulated with common law countries is the French system. French law is well established in both codification and practice, and sets the jurisdictional model for many developing rule of law countries.⁷³ The relevant articles regarding public access among the French Rules of Civil Procedure are Articles 22 and 29, which provide:

Article 22—Oral arguments are held in public hearings, save where the law requires or allows that they be held in the judge's council chamber.⁷⁴

Article 29—A third party may be granted leave by the judge to consult the file of a case and to have copies thereof delivered to him where he shows cause of a legitimate interest in the same.⁷⁵

As with the previous examples, this right to access is not unlimited.⁷⁶ Either party may request a confidential hearing if they believe that their right to privacy is at issue.⁷⁷ Article 435 and 1016 of the French Rules of Civil Procedure counterbalance the publicity of potential confidential information and provide:

Article 435—The judge may decide that the hearings will take place or shall continue in the judge's council chamber where their publicity

⁷³ See CODE DE PROCÉDURE CIVILE [C.P.C.] (Fr.).

⁷⁴ *Id.* at art. 22.

⁷⁵ *Id.* at art. 29.

⁷⁶ See Rosenzweig, *supra* note 69.

⁷⁷ See Alexandre Bailly & Xavier Haranger, *Litigation and Enforcement in France: Overview*, DISP. RESOL. GLOBAL GUIDE (2018), [https://uk.practicallaw.thomsonreuters.com/9-502-0121?_lrTS=20181108014750530&transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/9-502-0121?_lrTS=20181108014750530&transitionType=Default&contextData=(sc.Default)).

might adversely affect individual privacy or, if all the parties so request, or if disturbances arise that may disrupt the atmosphere of the proceeding.⁷⁸

Article 1016—In accordance with Articles 11-1 and 11-2 of the Act n°. 72-626 of 5 July 1972 as amended, the oral arguments are held in public. The court may nevertheless decide that the oral arguments will take place or continue in the judge's council chamber if their advertising leads to an invasion of privacy, or if all parties so request, or a disorder occurs and disturbs the serenity of justice (administration).⁷⁹

It seems that, prior to appearance before public scrutiny, parties are able to articulate why the subject matter at hand should be confidential or not, giving discretion to the court.⁸⁰ This logic encompasses the enforcement of a potential arbitration clause, which may determine that the matter should not be in court at all and instead should be resolved privately before an arbitral tribunal.

3. *Germany*

Rounding out the civil law jurisdictional analysis is another well-established legal regime, Germany. Generally, unlike the other countries discussed in this piece, in Germany the public is not able to observe or inspect court proceedings without petitioning the court with a specific interest in the case.⁸¹ When asked about public access to civil proceedings in Germany, one German practitioner observed:

Civil court filings are not generally open to the public. Instead, in order to be allowed to inspect a court file, a specific legal interest in the inspection must be

⁷⁸ See CODE DE PROCÉDURE CIVILE [C.P.C.] art. 435 (Fr.).

⁷⁹ *Id.* at art. 1016.

⁸⁰ See Alexandre Bailly & Xavier Haranger, *supra* note 77.

⁸¹ See Richland Kreindler, Johannes Schmidt, & Thomas Kopp, *Litigation: German*, GLOBAL ARB. REV. (June 29, 2017), <https://globalarbitrationreview.com/jurisdiction/1000215/germany>.

demonstrated. By contrast, oral hearings are generally open to the public, except for certain situations, for example, to protect privacy or business secrets. However, given the strong emphasis on detailed and substantiated written submissions, cases are often not discussed in detail during an oral hearing. Specifically, there is no comprehensive oral presentation of the case as is common in the Anglo-American procedural tradition. TV cameras and the taking of pictures or the use of recording devices is not allowed. The operative parts of the judgments are pronounced in open courtroom.⁸²

Aside from this general observation, the sentiments seem to be echoed upon analysis of relevant German law. Unlike the other examples provided, there is no mention of a right to public access or of open court hearings in either the Constitution of the Federal Republic of Germany or in its Rules of Civil Procedure.⁸³ Instead, the German Rules of Civil Procedure discuss when and how a third-party may obtain access to the hearings or evidentiary materials *if* they have legal interest in the case at hand.⁸⁴

Applied to the confidentiality of arbitral proceedings, there is little risk that the public would gain access to materials covered by an arbitration clause via court proceedings. A third-party would need to meet the necessary burden before the courts to gain any access to the proceeding at all.⁸⁵

B. SUMMARY

After completing an examination of a handful of common law and civil law jurisdictions around the world and their varying treatment of the public's right to access court proceedings and records, this discussion turns to a review of the balancing factors between confidentiality and arbitration in a broader sense.

⁸² *Id.*

⁸³ See ZIVILPROZESSORDNUNG [ZPO] [Civil Code] (Ger.).

⁸⁴ *Id.* at §§ 63-77.

⁸⁵ *Id.*

The key question that remains after examining the different approaches to public access to court proceedings is determining which is preferable: A U.S. style system that favors the right of public access from the beginning without initial regard for confidentiality rights, or a more centrist approach which restricts public access until it is determined that it is either necessary, or that the confidentiality portion of an arbitration clause does not apply?

IV. CONFIDENTIALITY AND ARBITRATION

A. GENERALLY

“Most parties to arbitration assume that the private nature of the process will ensure that the evidence, the proceedings[,] and the award will be kept private and confidential and that sensitive or embarrassing records and activities will not be subjected to public view.”⁸⁶ This presumption of confidentiality is a driving force for many parties who select arbitration as an alternative to dispute resolution in more open judicial forums.⁸⁷ Thus, it is worth considering briefly how the matter of confidentiality has been treated in various jurisdictions.

B. U.S. FEDERAL AND STATE LAW

There is no specific requirement under the U.S. Federal Arbitration Act that provides for the confidentiality of arbitral materials.⁸⁸ Absent federal guidance, it is up to state jurisdictions to determine the issue of confidentiality among its courts. Notably, the Revised Uniform Arbitration Act (RUAA), which seventeen

⁸⁶ Claude R. Thompson & Annie M. K. Finn, *Confidentiality in Arbitration: A Valid Assumption? A Proposed Solution!*, 62 DISP. RESOL. J. (2007).

⁸⁷ See *id.*

⁸⁸ See Federal Arbitration Act, 9 U.S.C. (2012).

states and the District of Columbia have adopted,⁸⁹ provides: “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.”⁹⁰

This move towards greater confidentiality by those jurisdictions is taken a step further by some states. For example, Missouri law holds:

Arbitration . . . proceedings shall be regarded as settlement negotiations. Any communications 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.⁹¹

Section 75 of New York’s C.P.L.R. makes no provision of confidentiality in arbitration—that said, the New York Supreme Court held in *City of Newark v. Law Department of City of New York* that “orders issued by arbitration panels should be accorded the same deference and have the same force of law as judicial officers . . . an arbitrator is a judicial officer, invested with judicial functions, and

⁸⁹ States include: Alaska, Arizona, Arkansas, Colorado, District of Columbia, Florida, Hawaii, Michigan, Minnesota, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, Washington State, and West Virginia.

⁹⁰ UNIF. ARBITRATION ACT § 17(e) (revised 2000).

⁹¹ MO. ANN. STAT. § 435.014 (West 2008).

acting in a quasi-judicial capacity.”⁹² While this statement might raise questions of the judicial immunity of arbitrators, it seems to suggest that, in New York, confidentiality requests issued by arbitrators should protect the confidentiality of the parties.⁹³ Alternatively, the courts of South Carolina, via the South Carolina Uniform Arbitration Act, have no express provisions for confidentiality in arbitrations and have not provided guidance as to the deference given to arbitrators.⁹⁴

Based on the wide variety of ways U.S. jurisdictions may address the topic of confidentiality, it seems that best practices to ensure total private confidentiality would be to provide such language in the arbitration agreement.⁹⁵ Practitioners can achieve this by explicitly stating that the dispute shall be resolved in arbitration in a confidential manner.⁹⁶

C. INTERNATIONAL COMPARISON

Australia: The Australian Commercial Arbitration Act, 1984, does not contain any express reference to confidentiality.⁹⁷

In *Esso Australia Resources Limited and Others v. Plowman (Ministry for Energy and Minerals) and Others*, the court was tasked with determining whether confidentiality was an essential attribute of arbitrations. The court determined that confidentiality was not

⁹² *City of Newark v. Law Dep't of N.Y.*, 194 Misc. 2d 246, 246 (Sup. Ct. 2002) *aff'd as modified and remanded*, 305 A.D.2d 28 (N.Y. App. Div. 2003).

⁹³ *See id.*

⁹⁴ *See* S.C Code Ann. §§ 15-48-10-240 (2009).

⁹⁵ *See* Thomas N. Pieper, *Drafting Arbitration Clauses*, ABA-NYSBA INT'L PRACTICE BOOT CAMP 2014, (Apr. 1, 2014), https://www.americanbar.org/content/dam/aba/events/international_law/2014/04/aba-nysba-international-boot-camp/CrossBorder11.authcheckdam.pdf.

⁹⁶ *See id.*

⁹⁷ *See Esso Austl. Res. Ltd. v Plowman*, [1995] 128 ALR 391 (Austl.).

essential, and thus must be explicitly contemplated by the parties to enforce it.⁹⁸

Canada: Arbitration is generally confidential, if the parties so elect. In the federal context, the restrictions on divulging information and the requirement to disclose information pursuant to the *Privacy Act* and the *Access to Information Act* must be complied with.⁹⁹

Though typically, the grounds for asserting confidentiality should be found in the above cited actions rather than a provision in the arbitration clause.¹⁰⁰

United Kingdom: England's Arbitration Act of 1996 does not contain any provisions addressing confidentiality in arbitrations.¹⁰¹ However, the courts have determined that an implied undertaking of confidentiality applies to arbitration proceedings.¹⁰²

In *John Forster Emmott v. Michael Wilson and Partners Limited*, the court recognized that there was a general obligation of confidentiality in arbitration agreements.¹⁰³ The court found that if the parties explicitly desired to disclose documents then it would honor that desire.¹⁰⁴

China: Article 40 of the Arbitration Law of the People's Republic of China states that when there is an arbitration tribunal, the tribunal may not hear a case in open session unless otherwise agreed upon by the parties to the tribunal.¹⁰⁵ However, the details

⁹⁸ *See id.*

⁹⁹ *See Privacy Act*, R.S.C. 1985, c. P-21; *Access to Information Act* R.S.C. 1985, c. A-1.

¹⁰⁰ *See id.*

¹⁰¹ *See John Forster Emmott v. Michael Wilson & Partners Ltd.*, [2008] EWCA (Civ) 184 (Eng.).

¹⁰² *See id.* at 73.

¹⁰³ *See id.* at 80.

¹⁰⁴ *See id.* at 184.

¹⁰⁵ *See Peter J. Wang, Confidentiality in Asia-Based Int'l Arbitrations*, JONES DAY COMMENTARY (2012)

of the duty of confidentiality are left to the arbitration institutions, such as the Chinese International Economic and Trade Arbitration Commission (CIETAC), Beijing Arbitration Commission (BAC), and China Maritime Arbitration Commission (CMAC).¹⁰⁶

France: Article 1464(4) of the French Codes of Civil Procedure provides, in relation to domestic arbitration, that "subject to legal requirements and unless otherwise agreed by the parties, arbitral proceedings shall be confidential."¹⁰⁷ Curiously, this provision has no equivalents for international matters, and thus, the parties must explicitly agree to confidentiality among the proceedings.¹⁰⁸

Germany: Generally, German law does not provide for an explicit confidentiality obligation.¹⁰⁹ Section 43 of the German Institution of Arbitration (DIS) Rules contains a broad confidentiality compulsion obligating all parties involved not to disclose information regarding the proceedings.¹¹⁰

Again, it appears that various national jurisdictions are split between a presumption of confidentiality and a necessity that the parties explicitly agree to the confidentiality of the proceedings. Until there is a clearer rule or presumption across jurisdictions, it appears that best practices would suggest to unambiguously stipulate for confidentiality in the arbitration agreement to ensure the highest protection of sensitive information.¹¹¹

https://www.jonesday.com/Confidentiality_in_Asia-Based_International_Arbitrations/.

¹⁰⁶ *Id.*

¹⁰⁷ CODE DE PROCÉDURE CIVILE [C.P.C.] art. 1464(4) (Fr.).

¹⁰⁸ See Garry B. Brown, INT'L ARBITRATION: DOCUMENTARY SUPPLEMENT, 146 (2nd ed. 2015).

¹⁰⁹ See Francis Bellen, A GUIDE TO INTERNATIONAL ARBITRATION, 50 (2018), <https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2017>.

¹¹⁰ See *id.*

¹¹¹ See *id.* (statistical data or general information may be published, but parties and arbitration may not be identifiable).

D. SUMMARY

To underscore the point of how critical confidentiality is in the practice of commercial arbitration, one scholar observed:

The issue of confidentiality is key to the successful practice of international commercial arbitration. The confidentiality of arbitration proceedings is a reason for resorting to arbitration, as distinct from litigation. It is a collateral expectation of parties to an arbitration that their business and personal confidences will be kept.¹¹²

This right must be protected even when balanced against the right to public interest.

V. RIGHT OF PUBLIC ACCESS AND RIGHT TO CONFIDENTIALITY

Now, with an understanding of public interest and confidentiality in the U.S. and other jurisdictions around the world, it seems productive to examine the balance between a right to public interest and the right to confidentiality. There are instances where freedom to contract should be paramount; however, the pendulum often swings the other direction regarding legitimate public interest in dispute and its resolution at hand.

A. FREEDOM TO CONTRACT

“The first principle of a civilized state is that power is legitimate only when it is under contract.”¹¹³ The right of the freedom to contract—the ability to enter into whatever type of legally binding agreement one wishes with no legal limitations other than being of

¹¹² Leon E. Trakman, *Confidentiality in International Commercial Arbitration*, 18 ARBITRATION INT’L 1, (2002).

¹¹³ Walter Lippmann, *ESSAYS IN THE PUBLIC PHILOSOPHY*, 167 (Transaction Publishers, 1955).

legal age and capacity to do so—is virtually a universal concept in jurisdictions around the globe.¹¹⁴ Without this freedom, the rights of the parties to provide the contemplated goods and services are greatly diminished.¹¹⁵

Legal regimes that permit for a circumvention of the parties' wishes jeopardize party autonomy to decide when and how to contract.¹¹⁶ Given the analysis of the jurisdictions provided above, it is easy to imagine a scenario where a party in the U.S. could ignore the contractual duty of confidentiality, even if overtly stated, and file an initial complaint with confidential documents attached that would be public record, with no recourse afforded to the non-disclosing party.¹¹⁷ This attribute is one unique to the U.S., and one that seems to be absent in other countries where there is greater scrutiny before allowing public access to potentially damaging records.¹¹⁸ Again, the primary concern is that this sort of invasive disclosure can exist regardless of express consent of the parties to maintain confidentiality throughout the resolution of the dispute.¹¹⁹

B. *PRIVACY VS. CONFIDENTIALITY*

"Privacy" means that no third party can attend arbitral conferences and hearings, "confidentiality" refers to non-disclosure of specific information in public. Private hearings do not

¹¹⁴ See *Freedom of Contract*, BLACK'S LAW DICTIONARY (10th ed. 2014).

¹¹⁵ See *id.*

¹¹⁶ See Mayank Samuel, *Confidentiality in International Commercial Arbitration: Bedrock or Window-Dressing?* KLUWER ARBITRATION BLOG (2017), <http://kluwerarbitrationblog.com/2017/02/21/confidentiality-international-commercial-arbitration-bedrock-window-dressing/> (choosing a governmental arbitral law to ensure confidentiality protection is preferred).

¹¹⁷ See *id.* ("Parties have the autonomy to decide if they wish to disclose details of arbitration and award. Confidentiality is frequently violated by parties and witnesses in the US.").

¹¹⁸ See *id.*

¹¹⁹ See *id.*

necessarily attach confidentiality obligations to the parties to arbitration.”¹²⁰ This point of delineation maintains parallels to the open court systems that many jurisdictions permit. In a courtroom, a party may be permitted to sit and observe proceedings in open court, and they may be provided access to review evidence and other court documents. However, there are instances where attending the hearing may be prohibited, but access to case documents would be permitted. This would be a situation of privacy without confidentiality.¹²¹ Conversely, in arbitrations, the proceedings are rarely, if ever, open to the public, and the documents involved are likely not available for third-party scrutiny.¹²² This scenario is one of both privacy and confidentiality. Proponents on either side of this discussion may agree at different points as to what should be private, what should be confidential, and what should fall somewhere in between.¹²³

C. *INVESTOR STATE ARBITRATION*

I. *Overview*

This piece generally contemplates commercial arbitral disputes, wherein the parties are two private actors that have contracted together and seek confidentiality in the dispute’s resolution. However, the question becomes appreciably more complex when one of those parties is not a private actor and is instead a State government with assets and resources that are not solely the purview of the State and the other contracting parties, but also of public interest. Considering this, the questions begin to multiply—Is there a right to confidentiality when there are public assets and interest involved? Who makes the determination as to whether confidentiality should be maintained or not? Can the right to confidentiality be modified within the context of disclosing some,

¹²⁰ *Id.*

¹²¹ *See id.*

¹²² *See id.*

¹²³ *See id.*

but not *all* materials? —the questions go on and on. Therefore, it is necessary to consider the change in circumstances regarding Investor State Dispute Settlement (ISDS).¹²⁴

ISDS is a system through which individuals or organizations can sue countries for alleged discriminatory and injurious practices.¹²⁵ One of the seminal cases highlighting the practice was *Phillip Morris v. Uruguay*, where a tobacco company sued Uruguay—which had recently enacted strict laws aimed at promoting public health—because of perceived damage to its brand and reputation.¹²⁶ Specifically, ISDS is a mechanism of public international law and provisions are contained in a number of bilateral treaties such as NAFTA,¹²⁷ CETA,¹²⁸ and perhaps most relevantly, the Energy Charter Treaty.¹²⁹ In summation, ISDS is a relevant mechanism for resolving complex disputes on behalf of private entities with perceived grievances against State actors.¹³⁰

¹²⁴ See Christopher M. Campbell, *If You Build it They Will Come: China's OBOR Cements the Future of Investor State Dispute Resolution*, CHINA DAILY (June 5, 2017, 10:37 AM), http://www.chinadaily.com.cn/opinion/2017beltandroad/2017-06/05/content_29618550.html.

¹²⁵ *FACT SHEET: Investor-State Dispute Settlement (ISDS)*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds> (accessed October 5, 2018).

¹²⁶ See *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decisions on Rectification (2016).

¹²⁷ North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289.

¹²⁸ Comprehensive Economic and Trade Agreement, EU-Can., §§ 3-4, Sept. 21, 2017.

¹²⁹ Energy Charter Treaty, December 17, 1994 (1998) OJ L 69.

¹³⁰ See The Basics, STOP INVESTOR-STATE DISPUTE SETTLEMENT, <https://isds.bilaterals.org/?-the-basics-> (last visited Sept. 17, 2018).

2. Confidentiality Concerns in ISDS

In contrast to most other types of arbitration, transparency is universally held to be a positive thing as it pertains to State matters.¹³¹ In fact, there is the obvious concern that arbitrations in such context are carried out by trade lawyers who face neither public scrutiny nor accountability for decisions that may affect national economies¹³² or other important human rights concerns.¹³³

While it is true that the World Bank's International Centre for Settlement of Investment Disputes (ICSID) publishes, with party consent, a large number of awards that would otherwise be confidential; there are still a substantial number of cases that are *not* public.¹³⁴ In an effort to address public demands for insights into these disputes brought before the tribunals, ICSID, even without party consent, publishes excerpts of the award in order to satiate the public's demand.¹³⁵

¹³¹ See Calamita, Jansen N., *The Changing Landscape of Transparency in Investor-State Arbitration: The UNCITRAL Transparency Rules and Mauritius Convention*, AUSTRIAN YEARBOOK ON INT'L ARBITRATION (2016),

https://www.researchgate.net/publication/316641559_The_Changing_Landscape_of_Transparency_in_Investor-State_Arbitration_The UNCITRAL_Transparency_Rules_and_Mauritius_Convention.

¹³² See Gus Van Harten, *OECD Document Discusses Investor State Dispute Settlement*, NETWORK FOR JUST. IN GLOBAL INV. (May 2011) <http://justinvestment.org/2011/05/oecd-document-discusses-investor-state-dispute-settlement/>.

¹³³ See *id.*

¹³⁴ See *Tables of Decisions in ICSID Cases*, ICID, <https://icsid.worldbank.org/en/Pages/resources/Tables-of-ICSID-Decisions.aspx>; *Special Update on Investor-State Dispute Settlement: Facts and Figures*, INT'L INV. AGREEMENTS (2017), https://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf.

¹³⁵ See *Award - ICSID Convention Arbitration*, ISCD, <https://icsid.worldbank.org/en/Pages/process/Award-Convention-Arbitration.aspx> (last visited May 05, 2017).

Taking a more extreme position, the International Chamber of Commerce (ICC) requires that all aspects of an ISDS arbitration be confidential.¹³⁶ Although this is not an explicit necessity, the ICC issued statements advising parties on how to increase confidentiality in favor of making proceedings less observable.¹³⁷

There has been contentious debate regarding increasing confidentiality and the public's right to observe these sorts of disputes.¹³⁸ One academic writes:

High-profile environmental disputes have led the public to question how governments are handling matters of public interest—issues concerning human rights, public health and safety, and labor and environmental standards—in the context of private arbitration. They have also invited inquiry into whether or not such processes undermine a sovereign's regulatory authority and pose a threat to democratic governance.¹³⁹

¹³⁶ See Catherine Yannaca-Small, *Transparency and Third-Party Participation in Investor-State Dispute Settlement Procedures*, WORKING PAPERS ON INT'L INVESTMENT (2005), https://www.oecd.org/daf/inv/investment-policy/WP-2005_1.pdf.

¹³⁷ See States, State Entities and ICC Arbitration, ICC COMMISSION REPORT, 3 (2014), <https://cdn.iccwbo.org/content/uploads/sites/3/2015/10/ICC-Arbitration-Commission-Report-on-Arbitration-Involving-States-and-State-Entities-under-the-ICC-Rules-of-Arbitration-2012.pdf>.

¹³⁸ See *A Response to Criticism Against ISDS*, European Federation of Investment Law and Arbitration (2015); Nurnaningsih Amriani and P.L. Rija Fatimah, *Confidentiality versus Transparency of ICSID Arbitration Award: Sustainability of The Quality Practice for Good Governance and Investor to Support Public Accountability*, 2 INT'L J. OF ADVANCED STUD. IN HUMAN. & SOC. SCI. 223-231 (2014).

¹³⁹ Valerie Li, *Protecting Confidentiality in Investor-State Arbitration*, INT'L ARBITRATION L. (2017), http://internationalarbitrationlaw.com/blog/protecting-confidentiality-in-investor-state-arbitration/#_ftn2.

Discussion and analysis of the merits of ISDS are of a complex and vast nature and are indeed beyond the pale of the purposes of this piece. They are articulated here as a brief counter-example of a substantial topic wherein it is debatable if there should be an unfettered right to confidentiality even in scenarios where the parties desire as much.

D. INSTITUTIONAL ARBITRATION RULE COMPARISON

This discussion would be remiss if it did not consider the primary mechanisms that facilitate resolution of arbitral disputes—the arbitral institutions. While this piece discusses the laws regarding confidentiality in national court jurisdictions, it is pertinent to consider the rules of the various regional arbitral institutions as well. While there are far too many institutions to consider them all, a handful of some of the more prominent and regularly utilized organizations are considered below.

1. American Arbitration Association (AAA)

The AAA, a popular institution across the Americas and across the globe, does not explicitly provide for the confidentiality of arbitral materials and records.¹⁴⁰ Instead, the rules provide for a passive approach: explicitly mandated privacy, but only the *allowance* for an order of confidentiality from an arbitrator.¹⁴¹ Rule 25 provides that the arbitrator “shall maintain the privacy of the hearings unless the law provides to the contrary.”¹⁴² With regard to confidentiality given arbitrator discretion, Rule 23 states “[t]he arbitrator shall have the authority to issue any orders necessary to enforce the provisions of rules R-21 and R-22 and to otherwise achieve a fair, efficient, and economical resolution of the case.”¹⁴³

For the same reasons articulated earlier, discretionary and reactionary confidentiality create exposure to parties that could

¹⁴⁰ See Commercial Arbitration Rules and Mediation Procedures including Procedures for Large, Complex Commercial Disputes, 2017 WL 7791572 at 28 (Oct. 1, 2017).

¹⁴¹ See *id.* at 12.

¹⁴² *Id.*

¹⁴³ *Id.*

potentially allow one party to exploit another by breaking the proceeding's confidentiality.

2. *Hong Kong International Arbitration Center (HKIAC)*

On the other hand, Rule 42.1 of the HKIAC explicitly provides for confidentiality by stating: “[u]nless otherwise agreed by the parties, no party may publish, disclose[,] or communicate any information relating to: the arbitration under the arbitration agreement(s); or an award or Emergency Decision made in the arbitration.”¹⁴⁴ This unambiguous statement allows for total protection of each party's sensitive materials during and after the arbitration proceedings.¹⁴⁵ However, the parties have the ability to waive confidentiality, or a party can provide a sufficient reason for the arbitrator or judicial system to lift confidentiality.¹⁴⁶

3. *International Chamber of Commerce (ICC)*

The ICC Rules make hearings private and the workings of the ICC Court confidential¹⁴⁷, but otherwise allow arbitrators to make orders in relation to confidentiality upon the application of one of the parties.¹⁴⁸ In relevant part, the ICC Rules hold: “[u]pon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.”¹⁴⁹

It is the stance of this paper that the AAA rules are too permissive because they leave the decision to request confidentiality to the parties or the arbitrator. Instead, the AAA should require confidentiality from the outset but allow the parties to remove the veil of confidentiality at a later point if they so choose.

¹⁴⁴ HKIAC Arbitration Rules, art. 42.1 (2013).

¹⁴⁵ *See id.*

¹⁴⁶ *See id.*

¹⁴⁷ *See* ICC Arbitration Rules, art. 26.3 (2013).

¹⁴⁸ *See id.* at art. 22.3.

¹⁴⁹ *Id.*

4. *London Court of International Arbitration (LCIA)*

The LCIA Rules are undoubtedly pro-confidentiality and explicitly dictate:

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

The deliberations of the Arbitral Tribunal shall remain confidential to its members, save as required by any applicable law and to the extent that disclosure of an arbitrator's refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under Articles 10, 12, 26[,] and 27.¹⁵⁰

Unambiguously, the LCIA rules protect the confidentiality of the parties explicitly through black letter provisions.¹⁵¹

5. *United Nations Commission on International Trade Law (UNCITRAL)*

The UNCITRAL Rules vary from the other rules cited; in that, the UNCITRAL does not administer and facilitate the resolution of arbitral disputes.¹⁵² However, it seems to fall somewhere in the

¹⁵⁰ London Court of International Arbitration Rules, art. 30 (2014).

¹⁵¹ *See id.*

¹⁵² *See* FAQ - UNCITRAL and Priv. Disp./Litig. (2018), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration_faq.html (UNCITRAL does not participate in the actual arbitration).

middle on the spectrum of passivity and explicit protection of confidentiality.¹⁵³ The UNCITRAL Rules provide:

Hearings shall be held in camera unless the parties agree otherwise¹⁵⁴

. . . .

An award may be made public with the consent of all parties or where and to the extent disclosure is required of the party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.¹⁵⁵

Here the awards are made private but not necessarily confidential.¹⁵⁶ Practitioners utilizing these rules should ensure that their arbitration provisions explicitly provide for confidentiality of all aspects of the arbitral proceedings.¹⁵⁷

6. *Singapore International Arbitration Center (SIAC)*

The SIAC has the most exhaustive and protective set of rules with regards to confidentiality. Therefore, the entirety of the SIAC Rules has been provided below as the model of what this piece considers best practices regarding institutional rules for protecting party confidentiality.

Unless otherwise agreed by the parties, a party and any arbitrator, including any Emergency Arbitrator, and any person appointed by the Tribunal, including any administrative secretary and any expert, shall at all times treat all matters relating to the proceedings and the Award as

¹⁵³ *See id.*

¹⁵⁴ UNCITRAL Arb. Rules art. 38, para. 3, G.A. Res. 68/109, U.N. Doc. A/RES/68/109 (Apr. 1, 2014).

¹⁵⁵ *Id.* art. 34, para. 5.

¹⁵⁶ *See id.*

¹⁵⁷ *See id.*

confidential. The discussions and deliberations of the Tribunal shall be confidential.

Unless otherwise agreed by the parties, a party or any arbitrator, including any Emergency Arbitrator, and any person appointed by the Tribunal, including any administrative secretary and any expert, shall not, without the prior written consent of the parties, disclose to a third party any such matter except:

- a. for the purpose of making an application to any competent court of any State to enforce or challenge the Award;
- b. pursuant to the order of or a subpoena issued by a court of competent jurisdiction;
- c. for the purpose of pursuing or enforcing a legal right or claim;
- d. in compliance with the provisions of the laws of any State which are binding on the party making the disclosure or the request or requirement of any regulatory body or other authority;
- e. pursuant to an order by the Tribunal on application by a party with proper notice to the other parties; or
- f. for the purpose of any application under Rule 7 or Rule 8 of these Rules.¹⁵⁸

The rules from the SIAC go through great effort to ensure that users of the rules are clear as to what material is protected and that no party related to a dispute should break confidentiality without agreed written consent.¹⁵⁹ So thorough are the SIAC rules that they

¹⁵⁸ Singapore Int'l Arb. Ctr. Rules, art. 39 (2016).

¹⁵⁹ *See id.*

also provide for specific instances wherein confidentiality may be breached. The SIAC rules balance the right of the public to access records in some instances while simultaneously protecting the confidentiality of the parties.¹⁶⁰ This standard should be adopted by other institutions to protect private discussions between commercial actors; instead, institutions allow gaps in confidentiality protection.¹⁶¹

E. SUMMARY

As shown in this analysis, institutional arbitral organizations around the globe approach confidentiality in a number of ways. These institutions are constantly in competition with one another to attract new users. Therefore, their rules must provide an adequate balance between cost, efficiency, timeliness, and protection. This consideration of protection encompasses confidentiality, and it is reasonable to conclude that institutions which offer explicit protections will gain an advantage against more passive institutions.

VI. PROPOSALS FOR U.S. ARBITRATION LAW REFORM

Transparency in both substance and procedure are cornerstones of the rule of law¹⁶² that allow citizens to not only understand the law, but also observe the law in order to ensure its equitable enforcement. Definitively, there is merit to the U.S. system of allowing public access to nearly every manner of record filed in public court.¹⁶³ This approach makes sense when a party is seeking justice from the government. However, in a private transaction

¹⁶⁰ *See id.*

¹⁶¹ *See id.*

¹⁶² *See What is the Rule of Law?*, WORLD JUSTICE PROJECT, (last visited May, 6 2017), <https://worldjusticeproject.org/about-us/overview/what-rule-law> (uses the “Four Universal Principles” to show the importance of transparency).

¹⁶³ *See generally* Federal Arbitration Act, 9 U.S.C. (2012) (speaking generally about the U.S. system of arbitration according to the Federal Arbitration Act).

between parties who have agreed prior to any dispute arising that they will resolve their conflicts in a confidential manner, the U.S. approach seems to fall short.¹⁶⁴

The proposed scenario, that a party with U.S. jurisdiction and a party to a confidential contract could circumvent the confidentiality provision of certain materials by filing certain documents in open court, means that even if a party is compelled to go to arbitration and their case is dismissed, the documentation is still a matter of public record. This notion is not merely fantasy but has in fact already occurred.

Consider the case of media personality Tomi Lahren. Ms. Lahren, an employee of TheBlaze, had a dispute with her employer, and decided to file suit.¹⁶⁵ In her lawsuit, Ms. Lahren was able to file sensitive documents, despite there being an arbitration clause that precluded the dispute from being resolved in open court.¹⁶⁶

Further, one may consider the recent controversy involving United States President Donald J. Trump and Ms. Stephanie Clifford, also known as adult-film actress Stormy Daniels.¹⁶⁷ Ms. Clifford and then-candidate Trump entered into a non-disclosure agreement that included an arbitration clause requiring “binding

¹⁶⁴ See generally *id.* (speaking generally about the U.S. system of arbitration).

¹⁶⁵ See Samantha Schmidt, *Tomi Lahren Sues Glenn Beck, Claims the Blaze Retaliated Against Her for Views on Abortion*, THE WASHINGTON POST, (Apr. 10, 2017) (Tomi Lahren claimed publicly that she was terminated from her position because of her personal views on abortion rights).

¹⁶⁶ See Complaint, *Tomi Lauren v. Glenn Beck and The Blaze, Inc.*, No. DC-17-04087 (Dist. Ct. Tex. Apr. 7, 2017) (Lahren filed this complaint with a detailed record of what she believed led to her termination from her employment with The Blaze).

¹⁶⁷ See Dylan Matthews, *Stormy Daniels' Legal Battle Against Donald Trump, Explained*, VOX (Mar. 13, 2018), <https://www.vox.com/policy-and-politics/2018/3/13/17109656/stormy-daniels-donald-trump-lawsuit-affair-porn-adult-arbitration-michael-cohen-payoff> (referencing the general story between POTUS and Stormy Daniels).

confidential arbitration of all disputes which may arise between them.”¹⁶⁸ While arguably a bit too broad, this clause should have protected then-candidate Trump from having to fight this dispute in the public domain.¹⁶⁹ Furthermore, had there been presumptive confidentiality, which the parties to the agreement contemplated, this matter may never have seen the light of day.¹⁷⁰

Another potentially dangerous opportunity for disclosure of materials in U.S. courts appears at the conclusion of the arbitral proceeding.¹⁷¹ Upon submission of a positive decision from the tribunal, the victorious party will likely seek enforcement of the arbitral award from the courts of the relevant jurisdictions, potentially a U.S. federal or state court.¹⁷² The risk is that the victorious party in their enforcement filings may disclose details from the arbitral proceedings that are not presumptively or explicitly protected by specific statute or regulation.¹⁷³ One practitioner cautions, “[b]ut such a filing provides the winning party an opportunity to perform a public end-zone dance and publicize the verdict reached and often the underlying allegations—exactly what most corporate clients sought to avoid through arbitration.”¹⁷⁴ Again, this is likely not what either party anticipated when crafting and agreeing to the arbitration agreement.

¹⁶⁸ See generally Complaint for Declaratory Relief, Stephanie Clifford a.k.a. Stormy Daniels a.k.a. Peggy Peterson, an individual, v. Donald J. Trump a.k.a. David Dennison, an individual, Essential Consultants, LLC, a Delaware Limited Liability Company, and Does 1 through 10, inclusive, BC696568 (March 6, 2018) (references the complaint filed by Stormy Daniels against Donald Trump).

¹⁶⁹ See *id.*

¹⁷⁰ Matthews, *supra* note 167.

¹⁷¹ See John C. C. Sanders, *So You Think That Your Arbitration is Confidential Better Think Again*, LEXOLOGY (April 18, 2014), <https://www.lexology.com/library/detail.aspx?g=57a1e87c-bb91-4885-bd74-18de7f1a98ee>.

¹⁷² See *id.*

¹⁷³ See *id.*

¹⁷⁴ See *id.*

The U.S. need not go as far as Germany—essentially only permitting access to court records upon valid interest in the case at hand at the court's discretion—to achieve a result that would be more equitable to the parties to the arbitration agreement.¹⁷⁵ Instead, the U.S. could take an approach that would allow courts to review the alleged confidentiality provisions of an arbitration clause prior to allowing access to the public. In the case that the confidentiality, if any, does not apply, then there is no issue and the documents can be released to the public. In the inverse, the parties would not have to be concerned with dissemination of sensitive confidential information that they presumed would be protected by their arbitration clause. Below are proposed solutions that the U.S. could implement at both the federal and state levels to ensure the interest of the parties are satisfied.

A. STATUTORY CHANGES

Although there are two tiers of the American legal system, federal and state, the approach should be similar between the two. As mentioned earlier, the Federal Arbitration Act does not explicitly address the issue of confidentiality.¹⁷⁶ As the primary piece of legislation regarding arbitration in the U.S., an amendment to the act should resolve this issue. Such an amendment could read:

1. Amendment 1

When a cause of action, where an arbitration clause may be enforced, is brought before a federal court, it shall be presumed to be confidential and a non-party shall not have the right to view such documents unless one of the following scenarios applies:

- a. Express finding by a federal judge that, in the interest of justice to the parties or sufficient public interest, there is a

¹⁷⁵ See Kreindler, *supra* note 81.

¹⁷⁶ See Federal Arbitration Act, 9 U.S.C. (2012).

reason in the interest of justice to not keep the proceedings confidential,

- b. Order by federal judge pursuant to an alleged breach of confidentiality by one of the parties or relevant entities to an arbitration, or
- c. Express consent in writing by the parties to the arbitration to waive confidentiality.

2. *Amendment 2*

Any and all filings pertaining to a matter which has already been submitted to or may be subject to filing in an arbitral proceeding shall be sealed and prohibited from non-party scrutiny *unless* a federal judge finds sufficient reason, in the interest of justice, to remove said seal.

While it is noted that confidentiality in arbitration typically arises from the explicit intention of the parties, these two relatively short amendments would be paradigm shifts: changes in position in jurisprudence that would offer better protection for parties to arbitration and increase the competition of the U.S. as a potential arbitral seat.¹⁷⁷ Indeed, foreign parties who wish to include arbitration agreements would appreciate the assurance that their confidential information shall remain obscured by public view unless one of the stated exceptions is met.¹⁷⁸ The proposed amendments to the Federal Arbitration Act seen above would likely resolve the issues of confidentiality at the federal level.

B. IMPLEMENTATION

Bringing similar changes and amendments to state jurisdictions is more of a complex and lengthy endeavor. While the language

¹⁷⁷ See Latham & Watkins, GUIDE TO INT'L ARBITRATION (2014) (the location of the seat of an arbitration also provides the default law).

¹⁷⁸ See *id.*

should remain relatively the same, substituting references to federal judges in favor of state-level district court judges would have the same practical effect. The difficulty arises in getting each individual state to accept these amendments. Thus, there appears to be at least several options for recruiting states.

First, consider adding these amendments to the Uniform Arbitration Act, which has already been adopted. By getting states that have already adopted this act to agree to amend the statute, the starting point would be with eighteen states rather than zero.

Second, teach the bar associations of each state about the benefits of the amendments and allow them to become advocates for amending the current state arbitration bill. This activity is particularly important since local bar associations are more likely to be attuned to any localized dispute resolution rules. Additionally, this would be the most practical and effective means of amending said rules.

Third, target state chambers of commerce and business or industry groups. Arbitration is, by its nature, a function of the demands of the clients. If they can be shown that they are potentially vulnerable under the current system, and begin requesting greater confidentiality language, this will put combined pressure on legal advocates and eventually the legislature to amend the state arbitration act.

Fourth, engage the American Bar Association about the benefits to practitioners and clients of increased confidentiality.

Fifth and finally, solicit statements from institutional arbitration organizations that already have confidentiality rules. Organizations like the American Arbitration Association (AAA) and Judicial Arbitration and Mediation Services (JAMS) are two ideal potential champions for the suggested amendments. This shows desire from the legal community and provides for a wide audience in the support of great confidentiality language.

The list of strategies to elicit state approval could go on, however, it is not the intention of this piece to become a discussion of how to effectively lobby for state statutory state amendments. It is sufficient to say that the shine of these proposed amendments is their ability to allow greater choice, and perhaps more importantly, provide more protection to the parties to commercial arbitration.

There is a risk in this instance that a presumption of confidentiality, given these proposed amendments, is now forced upon the parties when that may not have been their intention. However, perhaps equally plain, if the parties do not want confidentiality or do not care one way or another, they are free to waive that right and allow public access to the matter at hand. These amendments instead make the right to public access reactive to the resolution of private matters instead of open forum observation.

C. *NON-U.S. JURISDICTIONS*

There is no unifying body of international law as it pertains to commercial arbitration.¹⁷⁹ Thus, the same tactics described above would not be useful. However, given the fact that many arbitral institutions already have rules concerning confidentiality,¹⁸⁰ the best recommendation is to encourage parties to explicitly spell out the level of desired confidentiality when crafting their arbitration clause. This way there is no ambiguity or confusion as to how the tribunal and the court should treat potentially sensitive matters, if and when disputes arise.

D. *MISCELLANEOUS*

Although not directly on point, is a recent action taken by the Supreme Court of South Carolina. That action is the amendment to Rule 8 of the South Carolina Court-Annexed Alternative Dispute Resolution Rules.¹⁸¹ The court's amendment specifically applies to mediation, but the author firmly believes that it should be extended to apply to arbitration.¹⁸² The beginning of the amendment reads:

¹⁷⁹ See Latham, *supra* note 177 (there are many different bodies of international commercial arbitration law).

¹⁸⁰ See generally, LCIA Rules, *supra* note 150; China Int'l Econ. and Trade Arb. Comm'n Arb. Rules (January 1, 2015); World Intellectual Property Organization Rules (June 1, 2014). (Referencing a few of the many different arbitral institutions that already have rules concerning confidentiality in place).

¹⁸¹ See *Amendments to South Carolina Appellate Court Rules*, THE SUPREME COURT OF SOUTH CAROLINA 8 (January 31, 2018).

¹⁸² See *id.*

(a) Confidentiality. Any mediation communication disclosed during a mediation, including, but not limited to, oral, documentary, or electronic information, shall be confidential, and shall not be divulged by anyone in attendance at the mediation or participating in the mediation, except as permitted under this rule or by statute. Additionally, the parties, their attorneys and any other person present or participating in the mediation must execute an Agreement to Mediate that protects the confidentiality of the process. The parties and any other person present or participating shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding, any mediation communication disclosed in the course of a mediation, which shall include, but not be limited to...¹⁸³

This amendment demonstrates a concern by the South Carolina judiciary to affirmatively protect the confidentiality of the parties.¹⁸⁴

With the above anecdote and this recent amendment in mind, one can see that the author of this piece is not alone in considering vulnerabilities in the U.S. legal system and its approach to confidentiality in arbitration.

VII. CONCLUSION

Ultimately, commercial arbitration is about party autonomy.¹⁸⁵ The parties to an arbitration opt for arbitration particularly because they seek an alternative to the relevant judicial court systems.¹⁸⁶

¹⁸³ *Id.*

¹⁸⁴ *See id.*

¹⁸⁵ *See generally* Perepelynska, *supra* note 1 (party autonomy has always been important in commercial arbitration).

¹⁸⁶ *See id.*

Commercial parties certainly have information that they likely do not want to be widely distributed or available to the public, so they expect confidentiality in the proceedings (which is afforded to them by many arbitral institutions).¹⁸⁷ To allow for a scenario where a party could unilaterally destroy confidentiality seems to violate the very spirit of arbitration.

The United States should follow the examples set by other national legal systems, and the arbitral institutions themselves, and amend its laws to afford an inherent confidentiality and privacy to actions involving an arbitration clause. This right of public access should be balanced against party confidentiality. In the U.S., this effect could be achieved either with the recommended course of action in this piece or some similar procedure and amendment language, which would ultimately allow for greater justice for parties who have chosen commercial arbitration.

¹⁸⁷ *See id.*