Christopher Bathurst Prize 2017
Question

Do the benefits of confidential arbitrations always outweigh the downsides expressed by the Lord Chief Justice of England and Wales last year, when he said:

"Arbitration confidentiality perpetuates public ignorance of continuing hazards, systemic problems, or public needs . . . Such lack of openness equally denudes the ability of individuals, and lawyers apart from the few who are instructed in arbitrations, to access the law, to understand how it has been interpreted and applied. It reduces the degree of certainty in the law that comes through the provision of authoritative decisions of the court. As such it reduces individuals' ability to fully understand their rights and obligations, and to properly plan their affairs accordingly. … [A]cross many sectors of law traditionally developed in London, particularly relating to the construction industry, engineering, shipping, insurance and commodities, there is a real concern which has been expressed to me at the lack of case law on standard form contracts and on changes in commercial practice."

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Christopher Bathurst Essay Submission 2017
Kevin Elbert

Confidence in Confidentiality: An Open Defence To The Closed Nature Of Arbitration

1. It is widely accepted that confidentiality is one of the essential features of arbitration. Confidentiality generally refers to the prohibition of disclosure to third parties on the existence, nature and content of the arbitration proceedings, including documents and other evidence produced during arbitration proceedings.

2. Confidentiality as a general principle of arbitration is established in many jurisdictions by way of judicial decisions[1] and/or national arbitral legislations.[2] Its extent and scope, however, differ from jurisdiction to jurisdiction.

3. In practice, most arbitrations are institutional and most institutions provide for some form of confidentiality under their respective arbitration rules.[3] As a result, when parties choose to arbitrate under those rules, they concurrently consent to be bound by the principle of confidentiality as prescribed under the respective rules.

4. However, confidentiality recently came under attack. In his BAILII lecture last year, Lord Thomas, the Lord Chief Justice of England and Wales, criticised the principle of confidentiality, *inter alia*, for two reasons: First, the lack of openness in arbitration "denudes" the ability of individuals to understand how the law has been interpreted and applied – as such, "it reduces individual's ability to fully understand their rights and obligations, and to properly plan their affairs accordingly" (the "**First Criticism**"); and second, confidentiality in arbitration has resulted in a lack of case law, especially those relating to standard form contracts and on changes in commercial practice (the "**Second Criticism**").

5. This essay shall attempt to defend the principle of confidentiality: First, it addresses the two criticisms by Lord Thomas and argues that upon deeper analysis, these two criticisms are not as critical as they appear to be; and subsequently, this essay argues that the benefits of confidentiality outweigh the downsides identified by Lord Thomas, and that confidentiality should remain the general principle underpinning arbitration.

6. This author suggests that the solution to the downsides of arbitration is to increase transparency in arbitration and suggests initiatives to that end.

7. In this essay, this author focuses on the general principle of confidentiality in international commercial arbitration with an emphasis on common law jurisdictions.

Confidentiality of Arbitral Awards: What You Don't Know Won't Hurt You

8. Addressing the First Criticism, it is submitted that confidentiality in arbitration would not in any way reduce one's ability to understand their rights and obligations and to properly plan their affairs – this is because arbitral awards would not be binding on third party (to the

[1] For example, the Singapore High Court decision of *AAY v AAZ* [2011] 1 SLR 1093 and *AZT v AZV* [2012] 3 SLR 794; and the UK Court of Appeal decision of *Emmott v Michael Wilson & Partners* [2008] EWCA (Civ) 184.
[2] For example, the New Zealand Arbitration Act 1996 provides that an arbitral tribunal must conduct the arbitral proceedings in private (s 14A); and the Hong Kong Arbitration Ordinance restricts the reporting of proceedings otherwise than in open court (s 2E).
[3] For example, Art 30 of the LCIA Arbitration Rules 2014 and Rule 39 of the SIAC Rules 2016.

arbitral proceedings) and would not create a binding precedent for subsequent cases. It is therefore immaterial whether third party would be privy to the arbitral awards and the interpretation and application of the law contained therein. As such, confidentiality is at best be a neutral factor in respect of the First Criticism.

9. It is important to reiterate that generally arbitral awards are binding only on the parties to the arbitration proceedings, and not third party. As such, how the law is interpreted and/or applied by arbitral tribunals would not directly have any legal effect on third party. Even in the absence of confidentiality in arbitration, and *arguendo*, such arbitral awards are made public, it still would not assist individuals to plan their affairs accordingly.

10. After all, arbitration is a self-contained system and that an award only disposes the present dispute; the interpretation and application of the law by an arbitral tribunal would not bind subsequent cases. Naturally, court decisions and even arbitral awards mainly refer to and cite past court decisions and/or academic writings, instead of arbitral awards.

11. Indeed, ultimately, what is material to assist individuals to understand the law and the application thereof is case law as developed by the courts – as binding precedent under the doctrine of *stare decisis* – by way of (public) written decisions. It is case law that is binding on parties who are governed by the relevant common law system – hence, case law should be the factor to be considered when individuals plan their affairs.

12. This was acknowledged by the UK House of Lords in its 1966 Practice Statement on judicial precedent:

> Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides *at least some degree of certainty upon which individuals can rely in the conduct of their affairs*, as well as a basis for orderly development of legal rules.[4] [emphasis added]

13. The Singapore Court of Appeal had also issued a practice statement to the same effect.[5]

14. Hence, it is respectfully submitted that the First Criticism may not be as critical after all. The lack of openness in arbitration is at best a neutral factor affecting individual's ability to understand the law.

15. In any event, the effect of the First Criticism is mitigated with the publication of (redacted) arbitral awards by arbitral institutions, such as the ICC and the LMAA. The published arbitral awards relate to various subject matters, including standard form contracts. For example, the 2016 ICC Dispute Resolution Bulletin features awards relating to shipbuilding and the 2015 ICC Dispute Resolution Bulletin features awards relating to FIDIC contracts.

16. Admittedly these publications are limited and cannot substitute full-reasoned public court decision. Nonetheless, they could provide *guidance and illustration* to individuals, courts and subsequent tribunals. Also, a well-reasoned decisions can be highly persuasive and

[4] *The Practice Statement* [1966] 3 All ER 77
[5] *Practice Statement (Judicial Precedent)* [1994] 2 SLR 689

have the potential to become the law when they are cited in approval and/or adopted by the courts in litigation.

17. In Singapore Court of Appeal decision of *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation*,[6] the majority of the Court of Appeal adopted the position taken in ICC Case No. 10619, an oft-cited case for the proposition that an arbitral tribunal may issue an award to enforce a decision of the dispute adjudication board under the FIDIC Red Book dispute resolution mechanism. This case demonstrates that, first, the publication of arbitral awards is especially useful to to aid and provide guidance to the courts, and to develop develop *jurisprudence constant*e in the law, including the interpretation of standard form contracts; and second, how arbitral awards have potential to be law when adopted by the courts.

18. Indeed, the above shows how such publication mitigates the concern that arbitration is creating a vacuum in relation to case law on key points of commercial law and standard form contracts that needed to be clarified, which is the thrust of Second Criticism below.

Confidentiality and the Common Law: Business As Usual

19. Responding to the Second Criticism, this author opines that Lord Thomas may have overstated the effect of confidentiality on the development of case law.

20. While referral of disputes to arbitration would definitely impact the number of cases reaching the courts, it would not cause a significant reduction of caseload of the courts that would stifle the development of the common law. As observed by Sir Bernard Eder, law reports and forewords of the major textbooks over the recent years show that the common law continues to develop at a pace with a constant stream – indeed flood – of cases over a wide area of jurisprudence.[7]

21. Disputes referred to confidential arbitration are but a small proportion of disputes (especially those involving standard form contracts) – a large proportion of commercial parties still expressly choose to have their disputes settled by courts: Dorothy Murray of KWM Europe LLP anecdotally observed that the UK Commercial Court remains busy and caseload is all-time high – booked up for example for one-week trials until late summer 2017; and that a number of banks Murray advised have English law and courts as their standard preferred options in contracts.[8] The courts therefore have ample opportunities to address, develop and mould the common law on various areas of the law, including those involving standard form contracts.

22. Indeed, the persistent demand for court adjudication is one of the reasons for the establishment of the Singapore International Commercial Court, that is to address the demand of international commercial parties who prefer litigation forum to avoid the

[6] [2015] 4 SLR 364
[7] Sir Bernard Eder, "Does Arbitration stifle development of the law? Should s.69 be revitalised", AGM Keynote Address – Chartered Institute of Arbitrators (London Branch), 28 April 2016
[8] Dorothy Murray, "Are arbitration clauses killing development of domestic law?", Commercial Dispute Resolution, 29 November 2016 (https://www.cdr-news.com/categories/arbitration-and-adr/6887-are-arbitration-clauses-killing-development-of-domestic-law; last accessed: 16 July 2017)

weaknesses of arbitration, such as where the New York Convention may not be fully effective for enforcement in some countries.[9]

23. On a grander scheme of things, this author opines that the Second Criticism should not even be a concern at all. After all, it is trite that commercial parties have the utmost and absolute autonomy to agree on the dispute resolution mechanism they so desire. If commercial parties elect to have their dispute be resolved by way of private and confidential arbitration, such agreement must be honoured – parties should not be made to litigate in the court for the mere purpose of developing the common law. The sole function of arbitration is to decide disputes and the development of the common law is not a factor.

24. Otherwise, it may as well be argued that other form of dispute resolution mechanisms, such as mediation or amicable settlement, should be discouraged as it would inhibit the opportunities for the courts to develop the common law. The absurdity of such concern was raised in 1979 by Lord Devlin who said:

> So there must be an annual tribute of disputants to feed the minotaur. *The next step would, I suppose, be a prohibition placed on the settlement of cases concerning interesting points of law.*[10] [emphasis added]

25. It would definitely be baffling if one advocates for a litigious society simply to feed the development of the common law.

26. In this respect, this author echoes the view of Sir Bernard Eder that as a matter of principle parties to arbitrations should not be forced to finance the development of the common law.[11] After all, the ultimate end of adjudication, including court litigation, is the finality and resolution of dispute, and not the development of the common law – the development of the common law is merely a mean to an end.

The Benefits of Confidentiality: Risks, Trade Secrets and Autonomy

27. It is submitted that there are at least three benefits to confidentiality in arbitration: First, it assists parties to minimise their exposure to various risks; second, it protects trade secrets and other confidential information from public access; and third, confidentiality is a benefit in itself as it advances party autonomy and gives effect to parties' legitimate expectation.

28. First, confidentiality assists parties to minimise their exposure to a number of risks associated or arising from the publicity of a dispute. This author suggests that there are at least three types of (inter-related) risk that confidentiality could minimise by having their disputes resolved behind closed door:

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[9] Report of Singapore International Commercial Court Committee, (https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annex%20A%20-%20SICC%20Committee%20Report.pdf; last accessed: 16 July 2017)
[10] As referred to in Mark Saville, "Reforms will threaten London's place as a world arbitration centre", The Times, 28 April 2016 (https://www.thetimes.co.uk/article/reforms-will-threaten-londons-place-as-a-world-arbitration-centre-02t50mgrd; last accessed: 16 July 2017).
[11] Sir Bernard Eder, *supra* note 8

a. Reputational risks: by keeping the arbitration private and confidential, parties could keep minimal any risk of reputational harm to the parties, especially when the dispute arises out of situations which may cause embarrassment or otherwise lowers party's reputation, e.g. negligence or cyber-attack.

b. Legal risks: confidentiality could also assist parties in keeping things under wrap from third parties, who may have certain rights under certain contracts in the event of disputes, e.g. termination rights, or other form of legal risks.

c. Commercial risks: the existence of a dispute may be a disadvantage when one wishes to negotiate or conclude a deal as it may give the counterparty an upper hand in the negotiation (e.g. the counterparty may attempt to push price lower citing the existence of a dispute). Confidentiality could minimise this risk.

29. Second, confidentiality protects parties' trade secrets and other confidential information from public access. It is not uncommon that commercial disputes may involve confidential information, such as pricing, intellectual property or other trade secrets. Confidentiality is therefore crucial to keep these information out of public scrutiny. Further, even when the ancillary proceedings to the arbitration is brought to the court, e.g. an application to set aside arbitral awards, it is likely that sealing order of the court documents would be granted to protect the confidentiality of the arbitration proceedings.[12]

30. This is as opposed to court litigation, which is *prima facie* public, where the court documents are accessible by the public – in which case, the onus would be on a litigant to satisfy the court that an exception to the principle of open justice applies and that there is a need for confidentiality.[13]

31. Third, confidentiality is conceptually a benefit in itself as it is a manifestation of party autonomy, and it gives effect to parties' legitimate expectation. It is assumed that that the furtherance of party autonomy in arbitration is a public good – for without party autonomy, arbitration as a forum for dispute resolution would be diminished.

32. Arbitration is confidential because parties agree – expressly or impliedly – to have their dispute adjudicated out of public scrutiny. Parties could expressly agree to confidentiality directly by providing for confidentiality directly under the arbitration agreement or indirectly by electing institutional rules that provide for confidentiality rules.

33. Alternatively, in the absence of an express agreement, it has been held that by choosing arbitration, parties have impliedly agreed to confidentiality in arbitration on the basis of custom or business efficacy,[14] or otherwise as matter of law – that confidentiality is inherent in arbitration as being a private method of dispute resolution.[15]

34. Further, confidentiality gives effect to parties' legitimate expectation for confidentiality in arbitration. Confidentiality as parties' legitimate expectation is supported by empirical

[12] See for example, *AZT v AZV*, *supra* note 1
[13] *ibid*
[14] For example, *Hassneh Insurance Co v Mew* [1993] 2 Lloyd's Rep 243
[15] For example, *Ali Shipping Corporation v Shipyard Trogir* [1999] 1WLR 314

results. In a 2010 survey conducted by the Queen Mary University, London and White & Case on "Choices in International Arbitration",[16] it was found that 62% of respondents consider confidentiality to be “very important” to them, and a further 24% said it was “quite important”. In the same survey, it was also found that only 38% of the respondents said that they would still use arbitration even if it does not offer potential for confidentiality and 35% of the respondents indicated that they would not use arbitration if it does not offer confidentiality. These figures suggest that confidentiality is undoubtedly important in the mind of arbitration users.

35. More recently, in the 2015 rendition of the survey entitled "Improvements and Innovations in International Arbitration", it was found that "confidentiality and privacy" is the second most frequently listed valuable characteristics in arbitration by in-house counsel.[17]

36. Admittedly, there are very few jurisdictions that do not recognise a general duty of confidentiality in arbitration. An example of such jurisdiction would be Australia – the High Court of Australia in *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* ("***Esso Australia***") had rejected the existence of a general duty of confidence in arbitration.[18]

37. Notably, despite rejecting the general duty of confidence, Mason CJ did acknowledge that confidentiality is an essential attribute that is inherent in arbitration:

> That confidentiality, though it was not grounded initially in any legal right or obligation, was a consequential benefit or advantage attaching to arbitration which made it an attractive mode of dispute resolution. There is, accordingly, a case for saying that, in the course of evolution, *the private arbitration has advanced to the stage where confidentiality has become one of its essential attributes so that confidentiality is a characteristic or quality that inheres in arbitration*.[19] [emphasis added]

38. The view as expressed by *Esso Australia* is certainly the minority and has been criticised – and hence should not be representative of the legal position on confidentiality. Recently, the Singapore High Court in *AAY v AAZ* expressed disagreement with *Esso Australia* and opined that:

> Bearing in mind also that Esso Australia was decided in 1995, I think the more recent English cases have shown that *private arbitration has reached that stage where confidentiality has undoubtedly become an essential attribute*.[20] [emphasis added]

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[16] Queen Mary University, London and White & Case, "2010 International Arbitration Survey: Choices in International Arbitration" (http://www.arbitration.qmul.ac.uk/docs/123290.pdf; last accessed: 16 July 2017)
[17] Queen Mary University, London and White & Case, " 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration" (http://www.arbitration.qmul.ac.uk/docs/164761.pdf; last accessed: 16 July 2017)
[18] [1995] ALR 391
[19] *ibid*, at 401
[20] *AAY v AAZ, supra* note 1, at [44]

Conclusion: Transparency As A Solution

39. In conclusion, it is submitted that the benefits of confidentiality in arbitration do outweigh its downsides as identified by Lord Thomas.

40. Nonetheless, with the concern that arbitration is effectively dispensing justice behind closed door and that the commercial law is going 'underground', this author would like to suggest one solution: transparency – but not the expense of confidentiality.

41. This author recognises there are merits in promoting transparency, and encourages and calls for a better transparency in arbitration – it furthers not only fairness and accountability, but also the legitimacy of international commercial arbitration. Transparency will bolster parties' confidence in the process and clarity as to how their cases are likely to be managed and decided as transparency would make the work of arbitrators more visible and accountable – even if arbitrators do not make decisions arbitrarily, the potential for abuse may cast doubt on the legitimacy of arbitration.

42. To this end, it is suggested that there are at least two initiatives that can be undertaken by various stakeholders in arbitration.

43. First, a more wide spread publication of (redacted) arbitral awards – not only on substantive issues but also on procedural issues. This is especially useful to inform arbitration users on how arbitrators interpret and apply specific institutional rules, issues of jurisdiction and the manner and extent to which the tribunal exercises its powers.

44. Such publication would mean that the responsibility is great on arbitral institutions as the parties curating awards to be published. Arbitral institutions have to exercise this power judiciously and with greater responsibility – among other things, institutions have to be mindful of the clarification that the arbitration community needs; and institutions should publish awards relating to wider areas of law, including its interpretation and/or application, and various industries.

45. Second, a greater disclosure and publication on information on arbitrators. This would be useful to assist parties in making decisions on whom to appoint. Helpful information includes their past and current appointments and decisions in previous cases. Such information is currently limited, albeit increasingly available.

46. It is encouraging that that arbitral institutions have taken the first steps by providing more information in this respect. The ICC has started publishing information in relation to cases registered as of 1 January 2016, including the names of arbitrators and their nationality, and their method of appointment; and the HKIAC has been operating an evaluation system since 2015, which allows parties to give feedback on arbitrators. More of such initiatives are definitely welcomed.

47. Additionally, organisations such as Arbitrator Intelligence ("**AI**") have been active in promoting transparency, fairness and accountability in the selection of arbitrators by providing access to key information about arbitrators and their decision-making.

48. It is reassuring to see that such initiative has been gaining support from arbitral institutions. Recently, SIAC had signed a cooperation agreement with AI – whereby, at the end of each case, SIAC will assist AI to invite parties to provide objective information and professional assessments of arbitrators' case management and decision making, which will then be made available via through the AI Reports.[21]

49. Transparency is crucial to the development of arbitration. This author has suggested two initiatives that can be undertaken to further improve transparency in international commercial arbitration – and would definitely welcome and encourage more initiatives and greater participations from various stakeholders in the arbitration community.

50. This author is hopeful.

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[21] Arbitrator Intelligence, " AI Launches AIQ and Signs Historic Agreement with SIAC", 8 June 2017 (http://www.arbitratorintelligence.org/ai-launches-aiq-signs-historic-agreement-siac/; last accessed: 16 July 2017)