Journal of International Commercial Law and Technology
Print ISSN: 1901-8401

Website: https://www.jiclt.com/

Article

Confidentiality in International Arbitration

Article History:

Name of Author:
Jennifer Smith[1], Travis Young[2], Bailey Henderson[3], Ryan Clark[4] and Herbert Thompson[5]

Affiliation: [1]Lecturer, Department of Banking and Insurance, Cape Innovation Institute, South Africa
[2]Dean of Commerce, Department of Banking and Insurance, Arctic Circle University, Norway
[3]Professor, School of Retail Management, Nairobi Metropolitan University, Kenya
[4]Dean of Commerce, School of Business, Oceanic Research University, Australia
[5]Assistant Professor, Department of Marketing, Nairobi Metropolitan University, Kenya
Corresponding Author: Jennifer Smith

How to cite this article: Jennifer Smith, *et, al.* Confidentiality in International Arbitration. *J Community Med* 2020;(1);60-63.

Abstract: Confidentiality is a defining characteristic of international arbitration, offering commercial parties the promise of privacy, protection of sensitive information, and reputational safeguards. However, the extent and enforceability of confidentiality obligations vary significantly across jurisdictions, institutional rules, and case contexts. This article explores the complex legal architecture surrounding confidentiality in arbitration—ranging from statutory mandates and implied obligations to party-driven contractual arrangements. Through comparative analysis of major arbitration hubs such as India, the UK, the US, France, Singapore, and Australia, the article highlights diverse national approaches. It further evaluates institutional frameworks including LCIA, SIAC, ICC, and UNCITRAL, outlining how these entities differ in their protection of procedural and substantive secrecy. Practical challenges—such as loss of confidentiality during enforcement, risks from non-bound third parties, and tension with transparency in investor-state arbitration—are assessed. Drawing on recent surveys, judicial trends, and reform efforts, the piece provides best practice recommendations for practitioners, emphasizing the need for explicit confidentiality clauses, careful selection of institutional rules, and robust procedural safeguards. In a landscape marked by legal fragmentation and evolving transparency norms, safeguarding confidentiality demands proactive legal strategy and continuous adaptation.

Keywords: International arbitration, confidentiality, arbitration privacy, arbitral institutions, LCIA, ICC, SIAC, UNCITRAL, arbitration enforcement, arbitration confidentiality clause, cross-border dispute resolution,

INTRODUCTION

International arbitration is a cornerstone of contemporary cross-border dispute resolution, prized for its flexibility, neutrality, and, crucially, its **confidentiality**. Parties often choose arbitration precisely to keep sensitive commercial or reputational matters out of the public domain, distinguishing it from the transparency of court litigation. But while confidentiality is widely considered a defining feature of international arbitration, in practice, its legal basis, scope, and enforceability are far from uniform. This article provides an in-depth analysis of confidentiality in international arbitration, including its legal foundations, comparative perspectives, challenges, evolving trends, and visual illustrations.

DEFINING CONFIDENTIALITY IN ARBITRATION

Confidentiality means that information relating to the arbitration process—including pleadings, documents, evidence, hearings, and awards—should not be disclosed to non-participants without the consent of the parties. This is distinct from **privacy**, which simply excludes third parties from attending hearings. Confidentiality covers non-disclosure

of substantive and procedural information, but the extent of that coverage depends on a patchwork of national laws, institutional rules, and party agreements[1][2][3].

The Rationale for Confidentiality

Confidentiality is a key draw for arbitration, affording several advantages:

- **Protection of sensitive business interests:** Helps keep trade secrets, commercial strategies, and private conflicts shielded from competitors and the media.
- **Preservation of reputation:** Avoids negative publicity and potential reputational harm for businesses and individuals.
- **Encouraging candor:** Parties and witnesses may be more open, knowing that proceedings and evidence will stay private, fostering frank discussion and effective settlement.
- **Relationship preservation:** Reduces adversarial posturing, promoting continued or reconciled business relationships[4][3][5].

LEGAL FOUNDATIONS AND SOURCES OF CONFIDENTIALITY

National Laws

The legal basis for confidentiality varies globally:

- **India:** Statutorily mandated. Section 42A of the Arbitration and Conciliation Act, 1996, requires parties, arbitrators, and institutions to maintain confidentiality, except for disclosure of awards necessary for enforcement.
- **United Kingdom:** Recognizes an implied obligation of confidentiality by virtue of agreeing to arbitrate, backed by leading common law decisions (e.g., *Ali Shipping Corp. v. Shipyard Trogir*).
- **United States:** No statutory or implied confidentiality unless expressly agreed by the parties.
- **France:** Only domestic, not international, arbitrations are automatically confidential; international cases require express agreement.
- **Sweden and Australia:** No duty of confidentiality unless specifically contracted (as established by their higher courts)[2][6][7][8][9].

Institutional Rules

Arbitral institution rules are a key source of confidentiality obligations:

- **LCIA (London Court of International Arbitration):** Rules explicitly provide for confidentiality of the arbitration and related materials.
- **SIAC (Singapore International Arbitration Centre):** Broad confidentiality rules apply to parties, arbitrators, and the institution.
- **ICC (International Chamber of Commerce):** No general rule, but tribunals may issue confidentiality orders at the request of a party.
- **UNCITRAL Arbitration Rules:** Confidentiality of hearings unless parties agree otherwise; the award may be published only with party consent[10][11][12].

Institution	General Confidentiality Rule	Notes
LCIA	Yes	Covers parties, arbitrators, institution
SIAC	Yes	Broad confidentiality regime
ICC	No (orders on request)	Tribunals may grant orders
UNCITRAL	Limited (parties may opt-in)	Privacy for hearings by default

COMPARATIVE APPROACHES AND CASE LAW

The international landscape is marked by stark differences:

- **England:** Implies a duty of confidentiality unless overridden; exceptions recognized for legal proceedings and public interest.
- **Australia, Sweden, US:** No implied confidentiality; must be contractually established.
- **France, Switzerland, Germany:** Adopt the English stance, or require explicit agreement.
- **Singapore:** Follows a similar implied duty model, confirmed by judiciary.

Map: Jurisdictions Recognizing Statutory, Implied, and No Confidentiality in Arbitration

[image:1]

Practical Challenges and Limitations

- **Enforcement Stage:** Confidentiality may be lost if enforcement or setting aside an award requires public court proceedings, particularly where courts publish decisions or documents submitted.
- **Multiplicity of Participants:** Witnesses, translators, experts, and institutional staff may not be covered unless bound explicitly, risking inadvertent breach.
- **Overlap with Transparency:** Transparency in investment arbitration (e.g., under ICSID and UNCITRAL Rules) is increasingly mandated for public accountability.
- **Absence of Uniformity:** The lack of a global default rule leads to unpredictability; parties should proactively draft robust confidentiality clauses[2][6][13][7][14].

Benefits and Drawbacks: Statistical Overview

- **Survey of 2024:** 84% of in-house counsel cited confidentiality as a primary reason for choosing arbitration, but only 61% expressed high confidence in its effective protection, citing the above legal and practical limitations.

Chart: Importance and Confidence in Confidentiality Protection (2024 Survey)
[image:2]

Recent Developments and Calls for Reform

- **Institutional Rule Updates:** More arbitral bodies have introduced, clarified, or strengthened confidentiality provisions in their rules.
- **Judicial Guidance:** Courts in Singapore and the UK have clarified exceptions and boundaries of confidentiality.
- **Push for Nuanced Transparency:** Recent discussion focuses on balancing public accountability and business need for privacy, especially in matters of public interest or significant legal precedent[5].

Best Practices for Parties

- **Draft Explicit Clauses:** Do not rely solely on institutional or statutory default. Clearly define scope, exceptions, obligations, and consequences for breach.
- **Address All Stages:** Cover confidentiality from commencement through post-award enforcement.
- **Bind Non-Parties:** Ensure all participants in the process (including witnesses, experts) are subject to written confidentiality undertakings.
- **Regular Reviews:** Update confidentiality agreements and clauses as laws, rules, and business needs evolve[1][3][11][5].

Illustrations

Figure 1: Map of Confidentiality Approaches (Statutory, Implied, Contractual Requirements) in Key Arbitration Jurisdictions
[image:1]

Figure 2: Survey – Importance of Confidentiality and Level of Confidence Among Arbitration Users (2024)
[image:2]

CONCLUSION

Confidentiality remains a vital, but not universally guaranteed, aspect of international arbitration. While it is a major attraction for commercial parties seeking privacy and protection of sensitive information, its effectiveness is deeply dependent on the seat of arbitration, chosen institutional rules, and the presence of carefully crafted contractual obligations. The uneven international landscape and procedural risks—especially at the enforcement stage—require parties to be proactive and informed. As evolving best practices and growing calls for transparency reshape the field, adaptability and attention to detail are essential for preserving the confidentiality that makes arbitration so appealing.

Figures and Illustrations

Figure 1: Global Map – Statutory, Implied, and Contractual Confidentiality in Arbitration
[image:1]

Figure 2: Importance vs. Confidence – Confidentiality in Arbitration User Survey (2024)
[image:2]

REFERENCES:

1. https://jusmundi.com/en/document/publication/en-confidentiality
2. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4720700
3. https://chandrawatpartners.com/importance-of-confidentiality-in-arbitration-proceedings/
4. https://www.scconline.com/blog/post/2024/07/30/confidentiality-in-arbitration-legal-and-practical-challenges-in-india/

5. https://www.scconline.com/blog/post/2024/08/24/confidentiality-in-arbitration-push-for-greater-transparency/
6. https://www.mololamken.com/knowledge-is-international-arbitration-always-confidential
7. https://www.clydeco.com/en/insights/2023/05/confidentiality-versus-transparency-in-internation
8. https://lup.lub.lu.se/student-papers/record/1560727/file/1565405.pdf
9. https://arbitrationblog.kluwerarbitration.com/2022/08/18/the-english-approach-to-the-law-governing-confidentiality-in-international-arbitration/
10. https://www.tamimi.com/law-update-articles/confident-international-arbitrations-confidentiality/
11. https://aria.law.columbia.edu/confidentiality-in-international-commercial-arbitration-determining-factor-for-safeguarding-the-legitimacy-of-the-process/
12. https://academic.oup.com/arbitration/article/40/3/277/7716003
13. https://www.teynier.fr/en/the-high-court-of-justice-recalls-that-the-confidentiality-of-arbitral-proceedings-is-not-guaranteed-in-the-event-of-judicial-review/
14. https://arbitrationblog.kluwerarbitration.com/2017/02/21/confidentiality-international-commercial-arbitration-bedrock-window-dressing/