Conflict of Interests: Seeking a Way Forward on Publication of International Arbitral Awards

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I. Introduction

In recent years, the international commercial arbitration system has begun to respond to calls for greater transparency.\(^1\) In particular, the argument that more international arbitral awards should be made publicly available is by now well known, even trite.\(^2\) And yet the overwhelming majority of international arbitral awards remain unpublished, and there is no way of knowing whether the few awards that are published are representative of the whole.

This article argues that current practices with respect to publication of awards are best understood in terms of the conflicting interests of parties and of the international arbitration system. There appears to be general agreement that increased publication of awards would benefit the international arbitration system and, in turn, all parties who use international arbitration.\(^3\) However, at least one party in each arbitration will have an interest in keeping the

*I. INTRODUCTION


3 The arguments made in this article apply equally to final and partial awards and to other decisions handed down in the course of an international arbitration, aside from those made by national courts. The most important category of
award confidential. Justifiable concerns about the risk of damaging disclosures lead parties to oppose any efforts to relax confidentiality rules.

It therefore appears that party and systemic interests will necessarily conflict. International arbitration is a private, consent-based system that reveres party autonomy, so party interests will continue to trump systemic interests—even if those systemic interests align with the long-term interests of commercial parties generally. 4 States and arbitral institutions are reluctant to require greater publication of awards for fear that parties will take their business elsewhere. Unless commercial parties can be reassured that greater publication of awards will not harm their interests, systematic publication of awards cannot be achieved.

The conflict of interests not only explains why confidentiality of international arbitral awards remains the rule, it also points the way to a method of publishing awards that would serve systemic interests in publication while protecting party interests in confidentiality. Arbitral institutions should amend their rules to provide that the parties agree to limited publication of awards. The awards will be edited by the tribunal to remove proprietary business information, the identities of the parties, and any facts that might lead to their identification. The parts of awards that are of general interest will be published. Parties will be able to object to the publishable text proposed by the tribunal, but not to the fact of publication.

Part II reviews the current state of affairs with respect to the publication of awards. Part III sets out the interests of commercial parties with respect to the design of dispute resolution systems, and contrasts those interests with the interests of the system itself. It then considers how the different party and systemic interests would be affected by greater publication of awards. Part IV proposes a new method for publishing awards that will not compromise party interests.

II. THE CURRENT STATE OF AFFAIRS

Until fairly recently, total confidentiality was assumed to be a necessary attribute of international arbitrations. It ‘was a subject which was never debated and could almost be said not have existed’. 5 Since the mid-1990s, when the Esso and Bulbank cases caused an uproar, 6 a great deal has been published about confidentiality in international arbitration. All of the modern treatises include an entire chapter on it and at least three book-length treatments have been published in recent years. 7 The relevant doctrines have been meticulously catalogued elsewhere; a brief overview will suffice here.
A. Current rules pertaining to the confidentiality of awards

On the level of national statutes, there is no international consensus as to how to address confidentiality. Most arbitration statutes, including those based on the Model Law on International Commercial Arbitration promulgated by the United Nations Commission on International Trade Law (UNCITRAL Model Law), do not address confidentiality at all, and those that do so often fail to ‘delineate the nature and extent of its application’. Only four jurisdictions (New Zealand, Spain, Romania, and Hong Kong) have enacted arbitration statutes that impose broad confidentiality duties, and a few others impose confidentiality obligations only on the tribunal or require that only some aspects of the arbitration (not the award) remain confidential. Norway’s Arbitration Act, which entered into force in 2005, is unique in that it provides that, unless the parties agree otherwise, neither arbitral awards nor information disclosed during the proceedings are confidential.

Case law is similarly equivocal. The courts of some countries have ruled that confidentiality is not presumed in all arbitrations, and have enunciated various limitations on it. The most notable examples are Australia in Esso v Plowman, Sweden in Bulbank, and the

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8 See, e.g., V Bhatia et al, ‘Confidentiality and Integrity in International Commercial Arbitration Practice (2009) 75(1) Arbitration 4 (‘This general expectation of confidentiality of arbitral proceedings is absolute in some jurisdictions, and implied by laws and rules of arbitral institutions, or based on mutual agreement between the parties in others. However, we note that there is considerable variation in the scope of such an obligation.’); F Dessemontet, ‘Arbitration and Confidentiality’ (1996) 7 Am Rev Int’l Arb 299, 318 (‘There is no use in debating whether there exists a worldwide principle of confidentiality in arbitration proceedings. National traditions differ. The legal or institutional rules are scant.’).
9 Currently, 78 jurisdictions have enacted statutes based on the Model Law.
http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html. The exceptions are New Zealand and Hong Kong, whose arbitration statutes are otherwise based on the Model Law but include confidentiality provisions. See below, note 12 and accompanying text.
10 In some cases, proposed confidentiality provisions were expressly rejected in the drafting process. For example, this occurred with the UNCITRAL Model Law and with the English Arbitration Act 1996. Regarding the Model Law, see Report of the Secretary-General on Possible Features of a Model Law on International Commercial Arbitration, UN Doc. A/CONF.9/207, ¶17, XII Y.B. UNCITRAL 75, 90 (1981).
13 For example, arbitral deliberations are protected by the French New Code of Civil Procedure art 1469, and hearings are protected by the Chinese Arbitration Law art 30.
15 Esso Australia Resources Ltd v Plowman, (Australian High Court 1995) (1996) XXI YB Comm Arb 137, 151 (holding that there is no general implied obligation of confidentiality in international arbitrations with Australia as their seat because confidentiality is not an ‘essential attribute’ of Australian arbitrations or an necessary implied term of arbitration agreements governed by Australian law).
United States in *Panhandle*.\(^{17}\) In other states, such as France,\(^{18}\) Singapore,\(^{19}\) and Canada,\(^{20}\) courts have held that confidentiality is an implied term of all arbitration agreements, at minimum as a corollary of the privacy of international arbitration hearings.\(^{21}\) In most civil law jurisdictions, despite a general absence of statutory provisions, tribunals and parties have traditionally maintained the confidentiality of both the proceedings and all documents associated with them.\(^{22}\)

English courts, whose jurisprudence with respect to confidentiality ‘is much richer than that of any other important arbitration centre’,\(^{23}\) have repeatedly reaffirmed that extensive duties of confidentiality are implied in all international arbitrations.\(^{24}\) The implied duty binds the parties as well as the tribunal, and ‘extends not only to documents disclosed … but also to documents generated in the course of the arbitration … to transcripts and notes of the evidence and arguments, and also to the award’.\(^{25}\)

\(^{16}\) *Judgment of 27 October 2000, Bulgarian Foreign Trade Bank Ltd v A.I. Trade Fin. Inc.* (Swedish Supreme Court) (2001) XXVI YB Comm Arb 291, 298 (annulling an arbitral award on the ground that one party had published a prior partial award in breach of implied confidentiality obligations, but rejecting a lower court’s conclusion that ‘Confidentiality comprises a basic and fundamental rule in arbitration proceedings.’).

\(^{17}\) *United States of America v Panhandle Eastern Corp*, 118 F.R.D. 346 (C.D. Cal. 1988) (holding that the ICC Rules provide only for the confidentiality of the ICC Court of Arbitration’s proceedings, not the arbitral proceedings, but not expressly addressing whether international arbitrations generally speaking are subject to implied confidentiality obligations).


\(^{20}\) The Canadian Arbitration Act (based on the UNICTRAL Model Law) is silent on the issue of confidentiality, but at least one court has held that arbitrations are presumptively confidential. 887574 *Ontario Inc v Pizza Pizza* [1994] OJ No 3112 (holding that arbitrations are held in the ‘private confidential sector’). But see *Adesa Corp v Bob Dickenson Auction Service Ltd*, 247 D.L.R. (4tb) 730, 73 O.R. (3d) 787 (holding that, while there is a general ‘expectation of confidentiality’ in international arbitrations, confidentiality is not ‘so important as to outweigh the need … for justice if that requires … disclosure’). Ibid paras 55-56.

\(^{21}\) The privacy of commercial arbitration hearings is seldom questioned. For many commentators, it makes no sense for a hearing to be private but the resulting award public. As Fortier memorably put it, ‘the concept of privacy would have no meaning if participants were required to *arbitrate privately by day* while being free to *pontificate publicly by night*.’ LY Fortier, ‘The Occasionally Unwarranted Assumption of Confidentiality’ (1999) 15(2) Arb Int’l 131, 132 (emphasis in original).

\(^{22}\) Gu (n 2) 610.

\(^{23}\) *Emmott v Michael Wilson & Partners* [2008] EWCA Civ 184, para 66 (per Collins LJ).

\(^{24}\) See, e.g., *Dolling-Baker v Merrett* [1991] 2 All ER 890, 899 (holding that confidentiality is ‘a question of an implied obligation arising out of the nature of arbitration itself’ but declining ‘to give a precise definition of the extent of the obligation’); *Hassneh Insurance Co of Israel v Stewart J Mew* [1993] 2 Lloyd’s Rep 243, 247 (holding that ‘if it be correct that there is at least an implied term in every agreement to arbitrate that the hearing shall be held in private, the requirement of privacy must in principle extend to documents which are created for the purpose of that hearing’, but noting that the same rules need not apply to the award and to other documents produced for the arbitration); *Ali Shipping Corporation v Shipyard Trogir* [1998] 2 All ER 136, 146 (holding that confidentiality should be implied to all arbitration agreements ‘as a matter of law’, not on a case-by-case basis). This basic principle was recently reaffirmed in *Emmott* (n 23).

\(^{25}\) *Ali Shipping* (n 24) 147. But see *City of Moscow v Bankers Trust Co* [2005] 2 QB 207, where the Court of Appeal per Mance LJ observed that ‘[t]here can be no question of withholding publication of reasoned judgments on a
However, English courts have recognised a number of exceptions to the implied duty of confidentiality. In *Hassneh Insurance*, the High Court held that arbitral awards (but not other documents) may be disclosed when ‘reasonably necessary’ for the establishment of rights against a third party.\(^{26}\) Later, in *London and Leeds Estates Ltd v Paribas Ltd (No. 2)*, it was held that evidence given by an expert witness in an arbitration could be disclosed to demonstrate that the expert had given inconsistent evidence in a subsequent arbitration.\(^{27}\) Similarly, in *Associated Electric and Gas Insurance Services Ltd (AEGIS) v European Reinsurance Company of Zurich*, the Privy Council held that a party could disclose an arbitral award to demonstrate that a party took an inconsistent position in an earlier arbitration, despite the existence of an express confidentiality agreement in the first arbitration.\(^{28}\)

In *Ali Shipping*, the Court of Appeal set out a generally-applicable list of exceptions to confidentiality: consent of the parties, order or leave of the court, disclosure ‘reasonably necessary for the protection of the legitimate interests of an arbitrating party’, and disclosure in the ‘interests of justice’.\(^{29}\) In 2008, in *Emmott*, the Court of Appeal broadly endorsed the *Ali Shipping* approach,\(^{30}\) although it noted ‘The limits of [the confidentiality] obligation are still in the process of development on a case-by-case basis.’\(^{31}\)

Since the law is both varied and unsettled at the state level,\(^{32}\) most issues of confidentiality are settled by the parties’ contracts, either through express terms or—more often—institutional rules of procedure incorporated by reference.\(^{33}\)

Arbitral institutions, like states, present a mixed picture.\(^{34}\) Before *Esso* and *Bulbank*, few institutional rules of procedure contained any provisions related to the confidentiality of awards. In his 1995 expert report in *Esso*, Lew identified only seven institutions (out of 32 major institutions he analysed) whose rules imposed ‘obligations on the arbitrators and the parties to maintain confidentiality of the information produced in the arbitration hearing’.\(^{35}\) Other
institutions, such as the AAA/ICDR, imposed that obligation only on arbitrators.\textsuperscript{36}

Since the 1990s, many institutions have responded to uncertainty at the national level by amending their rules to include confidentiality provisions. The 1998 version of the International Chamber of Commerce (ICC) Rules provided simply that the tribunal ‘may take measures for protecting trade secrets and confidential information’.\textsuperscript{37} Only the workings of the ICC’s Court of International Arbitration were made subject to extensive confidentiality requirements.\textsuperscript{38} In the newly-announced revision of the ICC Rules, which took effect on 1 January 2012, the ICC once again decided against imposing a confidentiality duty on the parties. However, the new rules do permit the tribunal, upon the request of a party, to ‘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.’\textsuperscript{39} The ICC Rules do not specifically mention the possibility of publishing awards, although the ICC has for decades published sanitised summaries or extracts of some awards.

The rules of the International Centre for Dispute Resolution of the American Arbitration Association (AAA/ICDR), in force since 1 June 2009, provide that ‘an award may be made public only with the consent of all parties or as required by law’.\textsuperscript{40} Unless the parties agree otherwise, the institution ‘may publish or otherwise make publicly available selected awards … that have been edited to conceal the names of the parties and other identifying details or that have been made publicly available in the course of enforcement or otherwise.’\textsuperscript{41}

The London Court of International Arbitration (LCIA) Rules exemplify strict confidentiality. The parties ‘undertake as a general principle to keep confidential all awards’\textsuperscript{42} and ‘The LCIA Court does not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal.’\textsuperscript{43}

The German Institute of Arbitration (DIS) Rules were last amended in 1998. They require the arbitrators, the parties, their counsel, and the institution secretariat to ‘maintain

\begin{footnotesize}
\textsuperscript{36} ibid 289.
\textsuperscript{37} art 20(7), available at http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf. The decision not to include a confidentiality requirement was made only after ‘considerable debate’. Born (n 33) 2266.
\textsuperscript{38} Statute of the International Court of Arbitration, art 6; Internal Rules of the International Court of Arbitration, arts 1 and 3(2), both available at http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf.
\textsuperscript{40} AAA/ICDR International Arbitration Rules, art 27(4), available at http://www.adr.org/sp.asp?id=33994#INTERNATIONAL%20ARBITRATION%20RULES. In addition, the rules impose on the tribunal and the institution, but not on the parties, a duty not to disclose ‘confidential information disclosed during the proceedings by the parties or by witnesses’. art 34.
\textsuperscript{41} art 27(8).
\textsuperscript{42} art 30.1.
\textsuperscript{43} art 30.3. Another set of arbitral rules that have long included strict confidentiality provisions is the Arbitration Rules of the World Intellectual Property Association. WIPO Rules art 52 classes a wide range of information as confidential and empowers the tribunal to decide under what conditions and to whom the information may be disclosed.
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confidentiality’, including with respect to all witnesses and evidentiary materials. The rules permit the DIS to publish information about individual arbitrations in compilations of statistical data, but not to publish awards or any information that might identify parties.

The current (2010) version of the Stockholm Chamber of Commerce (SCC) Rules requires the parties, the SCC, and the tribunal to keep the award confidential. The 2007 and 1997 versions of the SCC Rules had imposed this obligation only on the tribunal and the SCC itself.

Rule 35 of the Singapore International Arbitration Centre (SIAC) Rules, adopted in 2010, imposes broad obligations on parties and arbitrators to keep confidential ‘the proceedings and the award’, including ‘the existence of the proceedings, and the pleadings, evidence and other materials in the arbitration proceedings and all other documents produced by another party in the proceedings or the award arising from the proceedings’. This provision also appears in the 2007 SIAC Rules, and is an expanded version of a rule first enacted in 1997. The 1991 edition of the Rules contained no confidentiality provision.

The major Swiss chambers of commerce use the same set of arbitration rules, the Swiss Rules. Those rules provide that the parties, the arbitrators, the tribunal secretary, any tribunal-appointed experts, and the chambers must keep confidential all awards and orders and other materials submitted during the arbitration proceedings. Upon receipt of a request for publication, the chambers may publish awards, in summary or redacted form or in their entirety, so long as the parties’ names are deleted and no party objects. The rules of the Hong Kong International Arbitration Centre contain practically identical provisions.

Several other regional arbitral institutions have in the last decade adopted rules that require the institution, the parties, and the tribunal to keep the award confidential. These include

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44 German Institute of Arbitration (DIS) Rules 98, s 43.1, official English translation available at http://www.dis-arb.de/en/16/regeln/uebersicht-id0.
45 s 43.2.
55 art 43(3).
the China International Economic and Trade Arbitration Commission (adopted 2005), the Japan Commercial Arbitration Association (adopted 2008), the Dubai International Arbitration Centre (adopted 2007), the Cairo Regional Centre for International Commercial Arbitration (adopted 2011), and the Chamber of Arbitration of Milan (adopted 2010).

Investment treaty arbitrations are nominally confidential in the same manner as commercial arbitrations. However, ‘[c]onsiderations of confidentiality and privacy have not played the same role in the field of investment arbitration, as they have in international commercial arbitration … there is now a marked tendency towards transparency in treaty arbitration.’ Indeed, it is now generally assumed that investment arbitrations involving states or state entities will be more or less public.

Under the 1966 Convention on the Settlement of Investment Disputes between States and Nationals of other States (the ICSID Convention), all ICSID awards are confidential unless the parties consent to publication. Moreover, under the current ICSID Rules, which came into force in 2006, arbitrators must sign a declaration that states, ‘I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by the Tribunal.’ However, there is nothing in the ICSID Convention or Rules that prohibits a party from disclosing an award. Like the ICSID Convention, the Rules do not permit ICSID itself to publish the full award unless the parties consent; however, they require ICSID to ‘promptly include in its publications excerpts of the legal reasoning of the Tribunal’.

Some non-ICSID investment arbitrations are even less confidential. For example, investor-state arbitrations under Chapter 11 of the North American Free Trade Agreement...
(NAFTA) are intentionally public. 68 On the other hand, awards from ad hoc arbitrations under the UNCITRAL Rules may not be disclosed by either party without the consent of both parties. 69

The rules set out above are all intended to address situations where third parties seek access to arbitral awards or, more commonly, where a party attempts unilaterally to disclose information from its arbitration. In other words, they were designed for situations where at least one of the parties opposes disclosure of the award. The right of parties to agree to disclose all or part of their award is broadly recognised as an aspect of party autonomy. 70 Even the few national laws that impose a duty of confidentiality permit the parties to agree otherwise. 71

B. Current practices with respect to publication

Even as institutions have imposed new confidentiality obligations or expanded existing ones, they have moved toward transparency in other areas. For example, the LCIA Court now publishes its decisions on challenges to arbitrators, 72 press reports in trade publications increasingly publicise pending international arbitrations, 73 and more information about prospective arbitrators is easily accessible. 74 This trend toward greater transparency also extends to publication of awards. 75

Some arbitral institutions routinely publish all of their awards, although these tend to be smaller regional institutions, especially those specialised in maritime disputes. For example, the Japan Shipping Exchange promptly publishes its awards. 76

Some major generalist institutions also publish some portions of some awards. The ICC has long made extracts or summaries of awards available in its bulletin and in a set of bound

68 This was largely at the instigation of the U.S. Congress. See 9 U.S.C. § 3802(b)(3)(H)(i), (ii) (directing the U.S. President to ensure in treaty negotiations that ‘all requests for dispute settlement are promptly made public’ and that ‘all hearings are open to the public’); see also Office of U.S. Trade Representative, ‘Statement on Open Hearings in NAFTA Chapter Eleven Arbitrations’ (7 October 2003) (stating that the U.S. will consent to open NAFTA Chapter 11 hearings).
69 UNCITRAL Arbitration Rules art 32(5).
70 Born (n 33) 2255–2256.
71 See, e.g., New Zealand Arbitration Act art 14 (The confidentiality provisions apply ‘except as the parties may otherwise agree in writing (whether in the arbitration agreement or otherwise’)).
72 On the other hand, the ICC Court specifically rejected calls to publish its own decisions on challenges to arbitrators.
73 Born (n 33) 2286.
74 Perhaps the best source of such information currently available is the database of arbitrator profiles maintained on the website of the International Arbitration Institute, available at www.iaiparis.com. In addition, some institutions now publish not only the names but also the profiles of arbitrators on their rosters. See, e.g., Swiss Arbitration Association, Profiles of Members, available at www.arbitration-ch.org; DIS Online Directory of Members, available at www.dis-arb.de. An earlier effort is H Smit and V Pechota, The Roster of International Arbitrators (Juris, 1999).
75 See, e.g., Mistelis (n 63) 215 (noting that ‘In practice many awards are published without the consent of the parties and without reference to their names.’).
76 Japan Shipping Exchange Rules of Arbitration of TOMAC s 41. See generally Tashiro (n 2) 98. Other maritime arbitration association rules that permit publication of awards include: Society of Maritime Arbitrators Maritime Arbitration Rules art 1; Association of Maritime Arbitrators of Canada Procedural Rules art 28. Another specialist institution that makes most awards available is the Court of Arbitration for Sport. See the Digest of CAS Awards/Recueil des sentences du TAS, published by Kluwer.
volumes entitled *Collection of ICC Arbitral Awards/Recueil des sentences arbitrales de la ICC*. The ICC’s practice is not to publish any part of an award if either party objects. The SCC produces a multi-volume set of awards that is similar to the ICC’s *Collection*. The Swiss Arbitration Association’s bulletin publishes some awards, and the AAA/ICDR also occasionally publishes extracts of its awards. These institutions publish only sanitised awards, and only with the parties’ consent.


Investor-state arbitral awards are more readily available. Parties to ICSID arbitrations often consent to publication, but even they do not, one party frequently releases the award to publications such as *International Legal Materials* or the *Journal du Droit International*. The *ICSID Reports* are published by Cambridge University Press, which describes the *Reports* as a ‘comprehensive collection of the arbitral awards and decisions’ rendered under the auspices of ICSID, including arbitrations under the ICSID Additional Facility. Excerpts of ICSID awards that discuss the legal holding of tribunals are also available in a searchable database on ICSID’s website and are published in ICSID’s in-house journal, *ICSID Review—Foreign Investment Law Journal*. In addition, awards and other information (such as hearing transcripts) from state-state and investor-state disputes administered by the Permanent Court of Arbitration are available on the PCA’s website, but are published there only with the parties’ consent. Finally, one free website, *ITA*, and two subscription-only databases, *Investment Claims* and *Investor-State LawGuide*, make investment treaty awards and other materials available online in easily searchable formats.

Despite this flurry of activity, the proportion of international commercial arbitral awards that are published remains extremely small, and even these are available only in extract or summary form. The choice of whether to publish remains ultimately in the hands of the parties, who usually oppose publication. Moreover, the treaties, statutes, court judgments, institutional rules of procedure, and arbitral awards rarely identify the party interests privacy is intended to

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78 For example, the *Global Arbitration Review* and the annual ‘Arbitration Scorecard’ published by *The American Lawyer*.
80 http://www.cambridge.org/gb/knowledge/isbn/item1172800/?site_locale=en_GB.
82 Smureanu (n 7) 149.
83 Administered by Prof. Andrew Newcombe of the University of Victoria; available at www.italaw.com.
85 http://www.investorstatelawguide.com/
protect, nor do they attempt to reconcile parties’ interests in privacy with the arbitration community’s interests in transparency.

III. A Conflict of Interests

Is the state of affairs described above satisfactory? To answer this question, one must ask: satisfactory to whom? A confidentiality regime that satisfies one actor in the international arbitration arena may be of concern to another. The proper question, therefore, is whose interests the current rules serve. Broadly put, although it is generally agreed that greater publication of awards would be beneficial, the vast majority of awards remain secret because that is what the parties want.

Within all dispute resolution systems, the interests of the parties (‘party interests’) and the interests of the system as a whole (‘systemic interests’) differ and often conflict. It is important to clarify that ‘party interests’ as used here means the interests of the parties to a given dispute, rather than the interests of litigants in general. For example, a party that intends to bribe a judge has an interest in a dispute resolution system where judges accept bribes, but disputing parties collectively, including the victim of the attempted bribe, have an interest in an incorruptible judiciary. The term ‘systemic interests’ is left intentionally vague, so as to sidestep philosophical debates about the nature of justice, but is intended to encompass the factors that contribute to the ineffable quality of legitimacy.

Of course, actors other than parties to a dispute have a stake in the confidentiality of awards. Smit, for example, describes four sets of relevant interests: those of the parties, of ‘society at large’, of the arbitrators, and of the factual and expert witnesses.86 To this list, one might also add the interests of counsel and of arbitral institutions. However, all of these interests are unlikely to have had much impact on the evolution of confidentiality rules.87

With respect to publication of awards, the conflict between party and systemic interests is crucial. The existing confidentiality rules and practices do not adequately serve systemic interests, but are explicable on the basis that they serve party interests.

A. Party interests

If commercial parties could design their own dispute resolution system, it would likely advance the following interests.

86 H Smit, ‘Breach of Confidentiality as a Ground for Avoidance of the Arbitration Agreement’ (2000) 11 Am Rev Int’l Arb 567, 577-579. See also WW Park, ‘Arbitration in Autumn’ (2011) 2(2) J Int’l Dispute Settlement 287, 304 (‘The right way to do things from the arbitrator’s perspective may be the wrong way to do things from the viewpoint of the society at large. The general community often has a stake not only in the outcome of arbitration, but also in the way proceedings have been conducted.’)

87 Moreover, to the extent that confidentiality derives from the parties’ agreement to arbitrate, arbitrators, counsel, witnesses, and third parties have no legal basis assert the protections of confidentiality because they are not parties to the arbitration agreement. Ibid 579.
1. **Cost**

Parties have an interest in disputes being resolved as cheaply as possible. The bureaucracy surrounding the filing and prosecution of claims should be minimal, with few formalities and low filing fees. Disputes should be administered efficiently; for example, document production, pre-hearing motions, and hearings themselves should be limited.

2. **Speed**

Apart from the monetary value of time, commercial parties have an interest in resolving disputes quickly and with finality. All disputes are a hindrance to business. While a dispute is pending, businesses may be reluctant or unable to enter into new ventures, and resources associated with the dispute may be unusable. Accordingly, objections and appeals that may delay final resolution of the dispute should be restricted or eliminated.

3. **Predictability**

‘As a general rule, business persons dislike uncertainty because it makes it difficult to plan. Thus ... parties are likely to value certainty and predictability, including the application of known legal principles.’ If the outcomes of adjudication are predictable, legal counsel can provide sound advice to their clients and commercial parties in general know better how to act and how to price their contracts. When disputes do arise, settlements are both more likely to be reached and easier to price accurately.

4. **Privacy**

Commercial parties’ interest in privacy is often described in terms of their desire to keep private any information that shows them in a bad light, for example, that they breached a contract or manufactured a defective product. However, parties’ interest in privacy goes well beyond damaging information. Businesses gain advantage over their competitors from information that they alone hold; insider information is an advantage to be gained, protected, and exploited. Accordingly, commercial parties tend to treat all business-related information—not just self-evidently proprietary information like patents, customer lists, contracts, and research and development—as private and subject to their control.

An advantage to commercial parties from keeping information private also accrues with respect to information about the adjudication itself. For example, if a given legal rule or a given adjudicator gives significant weight to good faith, then a party who is aware of this will couch its arguments in terms of its own good faith and the opposing party’s bad faith. If the opposing party does not have the same information, it will be at a disadvantage. Privacy also removes external pressures and also encourages the parties to resolve their dispute amicably.

The dispute resolution system should therefore exclude third parties, public access, and publicity of any kind.

5. **Policy influence (‘the king’s ear’)**

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88 Except for the narrow category of businesses that derive their income primarily from their intellectual property and regularly engage in litigation in order to protect and enforce their portfolios of intellectual properties.
89 Buys (n 2) 136.
90 See, e.g., Boo (n 19) 527; Buys (n 2) 1017; Gruner (n 2) 959.
91 Born (n 33) 2279-2280 (citations omitted).
Businesses legitimately seek to influence policy-makers, including regulators and legislators, to make rules and decisions in their favour, e.g. to pass an amendment or exemption, institute a new policy, or overlook an infraction. Commercial parties also have an interest in a dispute resolution system that can be used to influence policy development, for example by suing governmental agencies in an attempt to overturn regulations that businesses see as burdensome. Systems should employ liberal rules of standing to permit such challenges.

6. Control

All businesses attempt to control the environment in which they operate. They promote their products under conditions that they control; they design products in private environments; they grant access to information as they see fit. In principle, many aspects of dispute resolution can be subject to the consensual control of the parties without detracting from the ‘fairness’ of the process or its outcome. Parties can choose the venue, the adjudicator, the governing law, the forum, the procedural rules, and even the evidence that may be adduced.

7. Fair treatment

A dispute resolution system should not only be fair in the abstract, but also employ procedural and substantive rules that are consonant with the parties’ perspectives, their course of dealing, and up-to-date business practices and customs. While the systemic interest is in legal rules of general applicability, parties prefer more particularised adjudication. (To some extent, of course, this contradicts the parties’ interest in predictability.)

Along the same lines, commercial parties are often impatient with legal formalities and technical rules. From their perspective, adjudicators should be empowered to sweep away hindrances to reaching a decision on the merits. For example, the exact words of pleadings should not prevent parties from making the arguments they want to make in the ways they want to make them.

8. Enforceability

The judgments produced by the dispute resolution system should be cheaply enforceable. Enforcement should be free of jurisdictional hurdles and immune from objections that would block or delay their implementation regardless of the location or nationality of the parties.

B. Systemic interests

Systems, like individuals, have their own interests, perspectives, priorities, and histories, and those interests are not necessarily identical to those of individuals. The major interests of systems can be summed up with one word: legitimacy. Consistency, coherence, efficiency, fairness, and transparency are all aspects of legitimacy.

92 See, e.g., Y Dezalay and BG Garth, Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order (U Chicago P, 1996)117 (arguing that commercial parties prefer adjudication by experts specialised in particular types of commercial contracts); AH Hermann Judges, Law and Businessmen (Kluwer, 1983) (arguing that, in accordance with the preference of parties, arbitrators should ‘solve disputes according to commercial practice and common sense, arriving at a result considered fair in a particular business community’).
1. **Consistency**

As Ridgeway writes, ‘Much of the value of the doctrine of the rule of law lies in consistency…. Social and economic stability, as well as respect for the law, require that parties have the ability to know the likely legal consequences of what they do in advance, at the time they act.’ Consistency also promotes acceptance of the system because it promotes understanding of the system by the parties.

Like cases should produce like outcomes. Any changes in the law must be orderly, considered, and incremental. Therefore, the general perspective of the law must be backward-looking. The legal principles applied today must be based on existing statute or past cases; reliance on convention or custom must be restricted to long-established and proven usage; adjudicators must consider the facts of individual cases in terms of established patterns and categories (e.g., classes of contracts); the kinds of evidence submitted by the parties must be restricted to ensure consistent application of the law; and some form of centralised review or appeal must be available to police inconsistencies and promote orderly development of the law.

2. **Coherence**

‘Coherence’ means the internal consistency of the rules of law, as opposed to the way those rules are applied by adjudicators. Clarity and simplicity reduce the kinds of inconsistencies and apparently nonsensical rules that breed cynicism and distrust. Therefore, the law must be founded on a few overarching, coherent, universally-applicable principles with clearly defined and circumscribed exceptions. This is the ‘majestic equality’ (with apologies to Anatole France) on which respect for the law is founded.

3. **Efficiency**

State judicial systems are accountable to the taxpayer, so their rules may be set up to save judicial resources and clear dockets, even if these rules impose greater costs on the parties. By contrast, private dispute resolution systems are accountable to their clients: the parties. The cost, speed, and complexity of dispute resolution are not a primary concern of state systems, but are a central preoccupation of private systems.

4. **Fairness**

Fairness requires that the applicable substantive and procedural rules pre-exist the individual dispute and be universally applied. Adjudicators should be chosen in a manner that is neutral as between the parties. Adjudicators should be both impartial (i.e., free from bias) and independent (i.e., without any stake in the outcome of the dispute). They should not be subject to removal on any grounds except mental incapacity or lack of impartiality.

5. **Transparency**

Ridgeway also notes, however, that ‘the cure [of publishing arbitral awards] may be worse than the disease’. Ibid.

Buys (n 2) 136.

In national legal systems, in particular the common law systems, this is achieved in part by limiting recognition of new legal principles to appellate courts. In civil law systems, prevailing norms inhibit judges from straying too far from the plain language of the applicable codes.

The parol evidence rule is a classic example.
Since dispute resolution systems have an interest in being perceived as fair in both process and outcome, they must be as transparent as possible, including by making known (at least to the parties) the reasons for judgments. Exceptions to the maxim ‘justice must be seen to be done’ should be limited because transparency is the most important means by which a system can demonstrate its legitimacy. Not all transparent systems are legitimate, but opaque systems are necessarily suspect.

C. The conflict of interests and confidentiality

Debates over the existence and scope of a confidentiality duty tend to concern whether the duty is ‘intrinsic’ or ‘inherent’ in all international arbitrations, or is instead a product of the parties’ agreement. This argument has important practical ramifications, but does little to explain the existing state of affairs. Even those jurisdictions whose courts hold confidentiality to be an inherent property of arbitrations recognise a variety of exceptions to the duty, and even those jurisdictions whose courts see confidentiality as arising from the parties’ agreement have recognised that some aspects of international arbitrations must remain confidential notwithstanding that the parties have not specifically so agreed. Similarly, the various arbitration institutions’ rules of procedure have not been drafted in order to conform to any philosophical conception of the confidentiality duty; rather, they were drafted to serve the interests of the institution’s clients.

1. Publication of awards and systemic interests

The systemic interests line up almost entirely on the side of greater publication of awards. In 1965, when international arbitration was beginning to coalesce as a distinct field of law, Martin Domke called ‘predictability of result’ the ‘principal challenge’ facing arbitration. In many ways, this remains the case. Publication of international arbitral awards would promote the systemic interest of consistency, especially since in international arbitration lacks the harmonizing benefits of appellate courts and universally-applicable laws. When awards are not published, it is difficult to analyse how the law was applied.

If awards were published, tribunals and parties would have the benefit of being able to draw on a broad corpus of previous awards. Although arbitral awards are binding only on the parties to the arbitration, ‘well-written and reasoned awards can and do have persuasive value and can coalesce into a collective arbitral wisdom that may be drawn upon by future parties and arbitrators.’ More generally, arbitrators might ‘welcome guidance as to how other disputes

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97 Harold Potter, *The Quest of Justice* (Sweet & Maxwell, 1951) 13 (‘If there is any truth in the aphorism that justice must not only be done but seen to be done, then a decision without reason given must always be regarded as … suspect since it may be arbitrary.’)
98 See above, notes 13-26 and accompanying text.
101 Buys (n 2) 136. See also MP Daly, ‘Come One, Come All: The New and Developing World of Nonsignatory Arbitration and Class Arbitration’ (2007) 62 U Miami L R 95, 125 fn 221.
with similar facts and in similar circumstances have been resolved'. When the available awards are collected and digested in user-friendly databases, as has been done with national law case reporters and, to some extent, with investor-state arbitral awards, ‘... this can only assist in assuring … consistent and harmonious application and development of international commercial law and practice.'

Experience with the current limited publication of awards confirms this intuition. As Gaillard and Savage note, ‘On reading the ICC awards and their commentaries, one significant phenomenon becomes clear: the more recent awards are based on earlier decisions, and the decisions reached are generally consistent. The publication of awards thus enhances their homogeneity.’ Increased publication of awards would also assist scholars in writing the kinds of informed commentaries that have done a great deal to improve legal coherence in domestic contexts. For these reasons, Raymond describes the continued confidentiality of arbitral awards as short-sighted: ‘it removes the availability of relevant precedent that can benefit both the judiciary and the business community…. [T]he confidential nature of arbitration is slowing the building of [precedent] and in fact, it may be eroding it.’

The foregoing is not mere conjecture. In the context of investment treaty arbitration, prompt publication of awards has been cited as a means of ensuring the development of the substantive international law of foreign investment. As Egonu writes, the ‘international law on foreign investment as we know it has grown despite the alleged air of confidentiality surrounding investor-state arbitration. Such growth … can be attributed to those awards, decisions, etc. which were made publicly available…. ’

Many arbitrators have promoted the development of an autonomous transnational commercial law, under such labels as lex mercatoria. As Gaillard and Savage note, ‘Arbitral awards have now become a private source carrying considerable weight and have undoubtedly helped to create the arbitral component of lex mercatoria.’ Accordingly, publication of awards would help both to create and to legitimise transnational commercial law by making it more

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103 Ong (n 2) 176.
105 Mistelis (n 63) 212-213; see also Buys (n 2) 137.
106 Raymond (n 2) 501.
109 Transnational law’, ‘general principles of law’, and ‘international business usages’ are all analogous concepts.
110 E Gaillard and J Savage (n 104) 189.
coherent and accessible, and less open to the criticism that it is arbitrary.\textsuperscript{111} Currently, \textit{lex mercatoria} ‘is kept secret from the very analysis required to make it consistent and legitimate’.\textsuperscript{112}

It may be argued that the above effects are minimal, since most international arbitrations involve neither international investment law nor transnational commercial law. In the majority of international arbitrations, the law applicable to the merits is the law of a state, so it might be supposed that publication of awards could not achieve more than publication of national court judgments already achieves in terms of encouraging the development of coherent substantive law. However, it is also possible—without greater publication of awards, it is impossible to tell—that international arbitrators apply national laws differently from the way that national courts do,\textsuperscript{113} just as international arbitration may be developing a distinct, coherent set of standard procedures.\textsuperscript{114}

Confidentiality of awards also makes it impossible to prevent inconsistencies. Complex international transactions are often accomplished through multiple contracts, each with its own arbitration clause. Consequently, multiple arbitrations might arise out of the same circumstances and, if each is kept confidential, may be resolved in inconsistent ways.\textsuperscript{115}

Inconsistent judgments are probably rare, but when they do occur they raise doubts about the reliability and authority of the entire arbitral system.\textsuperscript{116} The prestige of arbitral institutions, too, ‘risks severe erosion if such inconsistencies occur’.\textsuperscript{117} There is at least one major example of inconsistent awards, the \textit{CME} and \textit{Lauder} arbitrations.\textsuperscript{118} Whether international arbitral awards can or do have any \textit{res judicata} effects is a matter of debate,\textsuperscript{119} but publication of awards would

\begin{itemize}
\item \textsuperscript{111} WW Park, ‘National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration’ (1989) 63 Tulane L Rev 647, 673-674. Cf Lord Bingham, ‘Reasons and Reasons for Reasons’ (1988) 4(2) Arb Int’l 141, 142 (citing a number of rationales for giving reasoned judgments, including ‘as a safeguard against arbitrariness’).
\item Norris and Metzidakis (n 100) 61.
\item There is some evidence to support the proposition that arbitrators do not always apply national law in the same manner as national courts. See, e.g., J Karton ‘International Commercial Arbitrators’ Approaches to Contractual Interpretation’ 28(2) Int’l Bus LJ (forthcoming 2012).
\item Brown (n 2) 1017. Confidentiality also makes it possible for parties to adduce different—even inconsistent—evidence in different proceedings without fear of consequence.
\item N Blackaby, ‘Public Interest and Investment Treaty Arbitration’ (March 2003) Oil, Gas & Energy Law Intelligence.
reduce the likelihood of different tribunals reaching inconsistent outcomes in related disputes.  

Publication of awards will promote consistency in the application of the law by making arbitrators more accountable for the quality of their awards. As Rogers notes, the public interest lies not just in bringing to light the parties’ business practices, but also the decisions issued by arbitrators. High quality decision-making by arbitrators is in turn necessary for the continued success of arbitration as a voluntary dispute resolution process. Park observes that, ‘If arbitration loses its moorings as a truth-seeking process, nostalgia for a golden age of simplicity will yield to a clarion call for reinvention of an adjudicatory process aimed at discovering what happened, finding relevant legal norms and properly construing contractual language.’  

Publication of awards is also likely to promote efficiency through increased consistency and coherence. Notes Brown:  

> Whereas in litigation, participants can refer to common law precedent for instruction, participants in the international arbitration process have little such guidance. This can result in duplicative effort on the part of parties, lawyers, witnesses, and arbitrators, and thus greater expense.

Confidentiality of awards precludes the accretive case-by-case lawmaking that has been claimed as the foundation of the common law’s efficiency. Moreover, when outcomes in arbitration become more predictable, parties will be less likely to bring unmeritorious suits and more likely to settle their disputes or to agree to submit narrower sets of issues to tribunals. Finally, public access to awards would help arbitral institutions, regulatory bodies, and state legislatures to keep abreast of developments in business practice, which Raymond argues would improve the efficiency of the rules that they promulgate.  

Publication of awards is likely to advance the systemic interest in fairness in a number of indirect ways. A reduction in inconsistent judgments and an improvement in the coherence of the applicable law might be said to make arbitral decision-making more fair. It would, moreover,
prevent parties from making inconsistent arguments in separate arbitrations that relate to the same set of facts.

Publication of awards would make it more difficult to cover up anticompetitive practices and corruption in the procurement of contracts. It might also reduce the phenomenon of governments colluding with foreign companies to defeat domestic opponents. Norris and Metzidakis give the example of the Metalclad arbitration, where Metalclad claimed that the Mexican government had urged it to initiate ‘private’ arbitration before ICSID (instead of a Mexican court) in order to ‘force’ the government to open a waste disposal plant that had been opposed by environmental groups. One NGO argued that the Metalclad arbitration ‘raises the disturbing possibility that investors can use their rights to collude with governments to force unpopular or even dangerous investments on unwilling populations.’

Finally, and perhaps most obviously, publication of awards would permit insight into how the arbitration community deals with the resolution of disputes. As Ong writes, it will ‘allow the public and future arbitration users to be given the perception and confidence that international commercial arbitration as a dispute resolution process is fair.”

2. Publication of awards and party interests

Not all of the party interests outlined above are affected by confidentiality, but all parties are concerned that publication of awards may affect their interests. Confidentiality is undeniably an important reason why parties choose to arbitrate their disputes. Former ICC Secretary-General Stephen Bond wrote:

… the users of international commercial arbitration … place the highest value upon confidentiality as a fundamental characteristic of international commercial arbitration…. the fact that these proceedings and the resulting award would not enter into the public domain was almost invariably mentioned.
This anecdote is supported by empirical evidence; in a 2010 study, 62% of commercial parties surveyed described confidentiality as ‘very important’ to them, and a further 24% described it as ‘quite important’.  

Publication of three different types of information in arbitral awards could adversely impact parties’ privacy: information that would harm the party’s reputation if it were disclosed, information about the party’s business that it would prefer to keep secret, and information about the arbitration process.

First, parties have a legitimate interest in keeping confidential the existence, substance, and outcome of disputes when disclosure might harm their reputations or hinder their operations.  

Writes Cremades, ‘... arbitration [offers] the possibility of ... protection from collateral damage in the forms of adverse publicity, disclosure of sensitive information, and loss of flexibility in repairing relationships with the other party.’ Even a mere allegation, if disclosed to a party’s customers, competitors, or contractual partners, may be sufficient to cause harm, especially if the allegation involves such matters as bad faith, misrepresentation, technical or managerial incompetence, or lack of adequate capitalization. If the allegation is proven, parties may want the adverse decision to remain private. Parties may also want to take positions privately that would be publicly unpopular, or, if the arbitration were made public, may feel forced to take positions they would not otherwise take in order to satisfy various stakeholders.

The risk to parties presented by the threat of negative publicity is exemplified by the experience of the engineering conglomerate Bechtel in the Aguas del Tunari arbitration, an investor-state dispute involving a water concession in Bolivia. After the tribunal’s decision upholding its jurisdiction was published, protesters targeted offices of Bechtel and some of its business partners, and even the homes of Bechtel executives. Following protests in San Francisco, the city’s Board of Supervisors cancelled a management contract with Bechtel worth US$45,000,000. Facing such negative publicity, Bechtel decided to withdraw its claim against

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138 Ong (n 2) 169; Gruner (n 2) 959, citing H Sikiric, ‘Publication of Arbitral Awards’ (1997) 4 Croat Arb Ybk 175, 175.
139 Cremades (n 32) 46.
140 Buys (n 2) 137.
142 Gu (n 2) 630.
143 Buys (n 2) 123 (citations omitted).
144 Aguas del Tunari, SA v Republic of Bolivia, ICSID Case No. ARB/02/3.
147 ibid.
the Bolivian government.\footnote{ibid. Note, however, that Bechtel maintains that it withdrew its claim because ‘In January 2006, the international shareholders of Aguas del Tunari reached a satisfactory settlement with the Bolivian government.’ See ‘Bechtel Perspective on the Aguas del Tunari Water Concession in Cochabamba, Bolivia’ (16 March 2005), http://www.bechtel.com/2005-03-16_38.html.}

Leaving aside damage to reputation, parties also have an interest in preventing admissions made in the course of an arbitration from being exposed to the public, especially if the party is embroiled in other cases involving similar claims or defences.\footnote{Norris and Metzidakis (n 100) 57.} With respect to this first category of information, the party interest lies entirely against publication.\footnote{Note, however, that confidentiality may also prevent parties from publicizing their successes. Raymond (n 2) 503-504.}

Nevertheless, commercial parties do have a countervailing interest in gaining business information about other parties. Published awards would be a rich source of useful information. For example, it would be useful to know before signing a contract if the other party has breached similar contracts in the past. Since confidentiality helps parties to shield their past dealings from future business partners, it increases counterparty risk and may chill contracting.\footnote{Raymond (n 2) 504.}

The second category of information is proprietary business information of the parties. The contracts underlying many arbitrations involve transfers of technical data and know-how.\footnote{G Delaume, ‘ICSIID Arbitration: Practical Considerations’ (1984) 1 J Int'l Arb 101, 119.} If non-parties obtain access to unredacted awards, this might lead to public disclosure of secret technical data and expertise.\footnote{BH Tahyar, ‘Confidentiality in ICSID Arbitration after Amco Asia Corp. v. Indonesia: Watchword or White Elephant?’ (1986) 10 Fordham Int'l L J 93, 115.} For example, in the Aguas del Tunari arbitration, the investor ‘refused to disclose the financial model behind its price [increases] on the grounds that the model itself was a commercial secret.’\footnote{E Lobina and D Hall, ‘Problems with Private Water Concessions: A Review of Experiences in Latin America and Other Regions, in Water Pricing and Public-Private Partnership in the Americas’ (2003), available at http://www.iadb.org/sds/doc/Water_Pricing_and_Pub-Pri_Partnership-2.pdf.} In some cases, even the existence of the dispute could be regarded as sensitive.\footnote{Ong gives the example of a dispute between a licensor and licensee in an information technology dispute. Ong (n 2) 171.} Published awards must protect such proprietary information.

The third category of information affected by publication of awards is information about the arbitration process itself. It includes information about the practices of tribunals, the expertise and perspectives of individual arbitrators, and the legal rules applied in previous disputes.\footnote{See, e.g., Norris and Metzidakis (n 100) 60 (arguing that ‘Lack of transparency in arbitral proceedings protects arbitrators and their efforts from public scrutiny. As such, parties may lack important information when choosing an arbitrator.’).} In national court litigation, the legal principles are well known and closely followed, and the proclivities of individual judges can be determined from publicly available records. By contrast, in arbitration, the parties frequently choose the governing law, and the arbitrators are not bound to interpret that law consistently with that state’s courts or other arbitrators.\footnote{It is widely assumed that arbitrators interpret national laws that apply to the merits of the case consistently with the courts of the national law in question. However, this assumption remains untested, and there is some reason to believe that arbitrators approach determinations on the merits differently from the way national courts do, even if}
tribunal adopts a new rule of law or interprets an existing rule in an unusual way, the parties to the arbitration and their counsel gain an advantage over others in future arbitrations, but only so long as that decision remains private.

This problem is particularly acute in the appointment of arbitrators. As Rogers notes, the market for arbitration services is plagued by severe information asymmetries. 158 Due to the confidentiality of awards, professional reputations and word-of-mouth recommendations play a significant role. 159 According to a 2010 survey, even with the advice of counsel, 25% of parties felt that they did not have enough information to make an informed choice of arbitrator. 160

Published awards, even in sanitised form, will enable parties to ‘learn from mistakes of other parties’ 161 and to assess whether a particular arbitrator would be appropriate for a given dispute. 162 Writes Raymond, parties’ emphasis on confidentiality is probably shortsighted in that it removes from the spectrum of general knowledge not only the establishment of precedent but also impacts the gathering of information, the elimination of which could negatively impact the judiciary and the business community. 163

Parties that are frequent users of the international arbitration system—or, perhaps more accurately, their counsel—may consider such knowledge of arbitrators and arbitration to constitute proprietary information deserving of protection. The ability to obtain and preserve such competitive intelligence is of great value. 164 This advantage accrues disproportionately to insiders:

… the ‘haves’ continue to come out ahead precisely because they are repeat players…. repeat performance allows the individual to structure transactions based on knowledge, form continuing relationships with arbitrators and experts, and develop long-term strategies. However … [confidentiality] has prohibited others from acquiring the knowledge that previously was available in an open judicial process. This is most troubling regarding ‘one-shotters’... 

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they are applying the same law. These issues are explored in a recent report of the International Law Association International Commercial Arbitration Committee, ‘Report and Recommendations on “Ascertaining the Contents of the Applicable Law in International Commercial Arbitration” published at (2010) 26(2) Arb Int’l 193. See also Mayer (n 128) 235. In any event, without access to more international arbitral awards, it is impossible to determine whether arbitrators do in fact apply national laws consistently with the approaches of the corresponding national courts.


160 Friedland and Mistelis (n 137) 27. Without the advice of outside counsel, the percentage of parties who reported that they lacked sufficient information rose to 68%. The survey authors comment that these numbers are rather low ‘considering the importance of making a good appointment’. Ibid.

161 Buys (n 2) 136.


163 Raymond (n 2) 509.

164 ibid 500.
who are now completely shut out of the information and learning process.¹⁶⁵

Publication of awards will therefore benefit occasional users of international arbitration and will reduce the advantage of repeat players.

With respect to cost and speed, commentators generally agree that confidentiality, including confidentiality of the final award, serves to expedite arbitrations.¹⁶⁶ As Born notes, the parties’ commitment to confidential arbitration prevents them from conducting ‘trials by press release’.¹⁶⁷ Parties might feel unwilling to admit certain facts or take certain positions because of fear of public reaction, making settlements less likely.¹⁶⁸ (However, the opposite may well be argued; the threat of a final award becoming public may encourage parties to settle before an award is rendered or even before arbitration is initiated.) Alternatively, parties might feel pressure to make certain (possibly weaker) arguments than they otherwise would make in order to satisfy outside constituencies.¹⁶⁹

In any case, the argument that confidentiality promotes efficiency applies more to the privacy of the proceedings than to the confidentiality of the award.¹⁷⁰ After the arbitration is concluded, third parties have nothing to gain by interfering and the parties no longer have any incentive to delay. Even Born, who maintains that greater transparency would ‘be contrary to the expectations and purposes of the arbitral process to which the parties have agreed’,¹⁷¹ acknowledges that ‘expectations of confidentiality are materially lower with regard to arbitral awards’.¹⁷² Moreover, the scrutiny that comes with publication of awards may exert pressure on arbitrators to write and implement their awards quickly.¹⁷³

For the same reasons that publication of awards advances systemic interests in consistency and coherence, it also advances party interests in predictability and efficiency. Parties are able to utilise precedents to make contract formation more efficient; without knowledge of how gaps in their contracts will be filled, parties must negotiate detailed contracts anew for each transaction.¹⁷⁴ When disputes arise, parties are better able to determine before

¹⁶⁶ Gruner (n 2) 959.
¹⁶⁷ Born (n 33) 2283. This problem may be particularly acute when state entities are involved in the arbitration, given the heightened public interest in the dispute. Ibid 2277-2278. See also Egonu (n 108) 486 (arguing that ‘Public involvement in the arbitral process may result in a delay in the proceedings. This may in turn mean that the cost of the arbitration would increase beyond that estimated by the parties.’).
¹⁶⁸ Buys (n 2) 138.
¹⁶⁹ ibid.
¹⁷⁰ Young and Chapman (n 30) 27-28.
¹⁷¹ Born (n 33) 2281.
¹⁷² ibid 2283. He argues that the efficiency benefits of confidentiality may preserved so long as the parties are prevented, during the course of the arbitration, from disclosing witness statements, written submissions and materials produced in response to disclosure requests. Ibid 2281.
¹⁷³ Ong (n 2) 178. This may be a foolish hope. Widespread publication does not seem to have led to investment arbitration awards being issued with all the speed one would hope for.
¹⁷⁴ Raymond (n 2) 504.
initiating arbitration whether a suit is likely to succeed and are more likely to settle if the outcomes in arbitration are more certain.\textsuperscript{175} Once an arbitration is launched, parties and arbitrators would be able to avoid duplicating prior efforts if they had better access to precedents. Writes Ong, allowing parties “to look at any repository of awards … will allow [them] a little more certainty and more consistent predictability as to the likely outcome of their own case.”\textsuperscript{176} The biggest efficiency benefits would come from publication of awards that concern specialised fields of contracting where arbitration is frequently the dispute resolution mechanism of choice,\textsuperscript{177} the investment climates in different countries,\textsuperscript{178} and aspects of procedural arbitration law, such as challenges to the jurisdiction of tribunals or to individual arbitrators.\textsuperscript{179}

Greater publication of awards is also likely to reduce arbitrariness and encourage arbitrators to articulate their reasoning clearly, which in turn will improve perceptions of the fairness of international arbitral justice.\textsuperscript{180} Writes Nisja, “Publicity could ... ensure that arbitrators reach fair, thorough and correct decisions, since they will be subject to the scrutiny of both the parties and the public.”\textsuperscript{181} Along the same lines, greater publication would make it easier to train new advocates and arbitrators, further increasing the quality of decision-making.\textsuperscript{182}

Publication of awards would also help arbitrators to keep up with prevailing commercial practices. As Raymond notes, confidentiality of awards diminishes the rate at which the law can adapt to changing environmental and commercial practices.\textsuperscript{183}

Finally, greater publication of awards is likely to increase popular acceptance of the legitimacy of international arbitration, which could well increase both the use of arbitration and the voluntary implementation of awards.\textsuperscript{184} Commercial parties surveyed by Young & Chapman “expressed considerable interest in the publication of awards, largely on the basis that this would help to “demystify” the process.”\textsuperscript{185}

3. How the conflict of interests explains current publication practices

\textsuperscript{175} Norris and Metzidakis (n 100) 61.
\textsuperscript{176} Ong (n 2) 176. See also Gu (n 2) 630-631. (“As confidentiality prevents the dissemination of details of reasons and rulings, it may have a negative impact on the development of standardisation of commercial practices. Without such precedents or legal principles in place, and without the certainty and consistency they bring, legal counsel may find it difficult to advise their clients properly.”
\textsuperscript{177} For example, construction contracts and petroleum concessions. Nisja (n 14) 191-192. As Michael McIlwraith of GE Oil & Gas recently lamented, ‘It’s an unfortunate thing that arbitration awards are not published, because it is likely there would be today a vast body of jurisprudence on the application of the CISG to transnational commerce. The body of case law from courts applying the CISG in most countries is not exactly robust… ’ M McIlwraith, ‘Anti-Arbitration: Answers to the Summer Quiz’ Kluwer Arbitration Blog 22 July 2011, available at http://kluwerarbitrationblog.com/blog/2011/07/22/anti-arbitration-answers-to-the-summer-quiz/.
\textsuperscript{178} Norris and Metzidakis (n 100) 62.
\textsuperscript{179} Rogers (n 1) 1335-1336.
\textsuperscript{181} Nisja (n 14) 192.
\textsuperscript{182} Norris and Metzidakis (n 100) 61. In particular, publication of awards would benefit the various arbitration training and accreditation programs, which now depend on hypotheticals. Just as law students benefit from studying real cases, trainee counsel and arbitrators would benefit from being able to study more real awards.
\textsuperscript{183} Raymond (n 2) 505-506.
\textsuperscript{184} Buys (n 2) 136; Norris and Metzidakis (n 100) 60.
\textsuperscript{185} Young and Chapman (n 30) 45.
The differences between the interests of the parties to a dispute and of dispute resolution systems are significant, legitimate, and in some ways intractable. The transparency cherished by legal systems seems irreconcilable with the privacy that businesses go to great lengths to protect. Unconstrained party autonomy seems philosophically incompatible with the supremacy of law.

In state legal systems, systemic interests prevail over party interests. Judicial decisions are published in their entirety, with narrow exceptions. In international arbitration, on the other hand, confidentiality remains the rule and publication the exception. This difference is explained by philosophical differences between litigation and international arbitration. State legal systems are concerned with much more than merely ‘justice between the parties’. State laws must protect the weak from the strong, the naïve from the sophisticated; they must consider very different kinds of contractual relationships: buyers and sellers, consumers and manufacturers, ongoing contracts and one-offs, master-servant and independent contractors, landlords and tenants; they must consider the interests of the state as well as the interests of the parties; they must ensure that the law develops in a coherent manner. By contrast, international arbitration is rarely concerned with any of these issues: the parties are savvy and more or less equal (at least in terms of their ability to assess and protect their interests) and tribunals’ duties are largely those which they owe to the parties.

For all the differences between state adjudication systems (including administrative tribunals) and international arbitration, their raison d’être is the same; they are both mechanisms for imposing a resolution on parties to a dispute. Critical questions under both systems include: what should be the right of disinterested parties to know the particulars of any dispute, or the kinds of evidence adduced, or the substantive and procedural principles adopted or rejected by the adjudicators? Are these the concern of anyone other than the parties?

State legal systems unambiguously answer these questions in the affirmative, although the details differ. In common law jurisdictions, judges must describe the evidence adduced, their view of that evidence, and the legal principles upon which they have relied. In civil law jurisdictions, a detailed code provides most of the legal requirements, but that code is public and must be referred to by judges. The points of emphasis may vary, but national legal systems assume that the world has a right to know what they do and how they do it.

International arbitration is built upon a different foundation. Although commentators differ as to the nature and sources of international arbitral authority, the centrality of party autonomy to international arbitration is universally acknowledged. Therefore, although systemic interests would be advanced by greater publication of awards, publication will normally harm the interests—in a direct and concrete way—of at least one of the parties to any given dispute. The rules that apply to publication of awards, which are found primarily in the parties’ contracts and the procedural rules promulgated by arbitral institutions, invariably leave the final


say to the parties. They are specifically designed to preserve the parties’ ability to keep their dispute confidential, regardless of any benefits that might accrue from publication. In the conflict between party and systemic interests, international arbitration sides with the immediate interests of the parties in each dispute.

**IV. OVERCOMING THE CONFLICT OF INTERESTS**

It may appear that the interests of the parties and the interests of the system unavoidably conflict with respect to confidentiality. However, of the eight party interests listed above, three would likely be advanced if awards were published (predictability, fair treatment, cost), three are neutral or equivocal (enforceability, control, speed), and two might be adversely affected (privacy and policy influence). Of the last two, policy influence is not properly a factor that a dispute resolution system should consider, leaving only the privacy interest. Nevertheless, policies that limit confidentiality should not be undertaken lightly.

The desire of businesses to keep private the existence, content, and outcomes of arbitrations is legitimate; there are sound business reasons for privacy and the international arbitration system ought to protect it. Yet it is also legitimate to ask what interests such privacy protects and whether those interests can be protected even if awards are disseminated publicly. Fortunately, the publication of arbitral awards can, for the most part, be reconciled with notions of confidentiality.

A party has a strong interest in confidentiality of the award if the award discloses proprietary business information or if the tribunal finds that the party acted improperly, or merely that it breached the contract. However, such findings of fact have little or no precedential value and disseminating them would serve no systemic interest. Although purity of legal dogma and the curiosity of others suggest that all awards ought to be available in their entirety, the privacy interests of the parties outweigh the systemic interests. This principle underlies the existing practice of sanitising awards for publication.

However, the parts of arbitral awards that deal with such issues as how to interpret ambiguous contractual terms, the standard according to which a business custom must be proved, how to choose or apply the governing law, and the ambit of a treaty provision are of significant interest to present and future participants in international arbitrations and in international commerce generally. The only significant interest of the parties in keeping confidential these parts of awards is their ability to build profiles of arbitrators and to use awards in future arbitrations as precedents of which other parties are unaware.

Such advantages may be significant and it is legitimate for parties to make use of them. However, they are not business advantages; they are tactical advantages within the arbitration process itself. It may be argued that all knowledge is power and all private knowledge is a

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188 See above, part II.B.
189 Buys (n 2) 138. See also FO Vicuña, ‘Arbitration in a New International Alternative Dispute Resolution System’, *News from ICSID*, Fall 2001, 1 (arguing that limiting confidentiality would be ‘fat al for the role of arbitration’ because arbitration ‘would become more closely related to ordinary public court proceedings’).
190 Ibid.

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business advantage, but even if this is so, it is proper to weigh the relative importance of dissemination to all participants in international arbitration against the tactical interests of arbitration insiders.\textsuperscript{191} Therefore, with respect to those parts of awards that deal with issues of general application, it is fair to conclude that systemic interests in coherence, consistency, fairness, and transparency (and the benefits all parties would gain from the advancement of such systemic interests) outweigh the interests of commercial parties and their counsel to gain tactical advantages in future arbitrations.

A. The inadequacy of current publication practices

The fact that so many varying national and institutional rules exist itself makes the system unsatisfactory. The complexity and uncertainty of the existing state of affairs benefits only the lawyers. However, leaving aside this unwarranted complexity, universal—or even merely increased—publication of awards is arguably unnecessary to serve the systemic interests discussed above. The international arbitration market continues to grow and prosper, in part because it is adapting to increased demands for transparency;\textsuperscript{192} there are no widespread allegations that international commercial arbitrators are adjudicating commercial disputes in an arbitrary or unfair manner.\textsuperscript{193} However, existing means of dissemination are inadequate to serve the interests of the international arbitration system.

Information about unpublished awards is often disseminated by informal means. Arbitrators, counsel, expert witnesses, and commentators are frequently the same people. They often exchange roles, see each other in both formal and informal settings, give speeches at conferences, and publish articles in academic journals. Indeed, the top tier of international arbitration practitioners define themselves largely \textquoteleft through writing, conferences, and meetings of the community of experts in international commercial arbitration'.\textsuperscript{194} There are now thousands of treatises, guidebooks, articles, and conference papers on such topics as the drafting of arbitration agreements, the selection of arbitrators, and effective advocacy in arbitration. Both in writing and at professional and academic symposia, experiences are shared and war stories traded.

Of course, such dissemination is mostly confined to insiders and is skewed to the interests and biases of the participants in those settings. There is nothing nefarious in arbitrators and counsel sharing experiences or advancing their individual agendas, but empiricists attempting to study international arbitration have lamented the dependence of international arbitration scholarship on such anecdotal evidence:

Much of our understanding of what happens in arbitration proceedings is based on anecdotal sources of information, such as reported court cases, the few published arbitral awards, and attorney \textquoteleft war stories’. The problem with anecdotes, of course, is

\textsuperscript{191} As noted above, such tactical advantages accrue disproportionately to repeat players.
\textsuperscript{192} Rogers (n 1) 1313. See also Gruner (n 2) 960 (\textquoteleft The availability of even selected awards … is a step toward providing a modicum of transparency to the system.’); Mistelis (n 63) 215.
\textsuperscript{193} There is, however, the so-called \textquoteleft crisis in investment arbitration’ to be accounted for. See generally M Waibel et al (eds), \textit{The Backlash Against Investment Arbitration} (Kluwer, 2010).
\textsuperscript{194} Dezalay and Garth (n 92) 31 fn 9.
that it is difficult to evaluate whether the event described is typical or atypical, frequent or infrequent, ordinary or extreme.\(^{195}\)

As with informal dissemination of awards, current publication practices do not adequately serve systemic interests. Some arbitral institutions publish extracts of a small percentage of the awards from arbitrations they administer. Others may appear in journals or bulletins or become public knowledge as a result of related actions in national courts.\(^{196}\) Such awards are frequently discussed in the academic literature and are often cited as persuasive in other awards.\(^{197}\)

Researchers have noted that they cannot determine whether the sample of published awards is representative of the whole.\(^{198}\) However, it is in fact certain that this sample is biased. The arbitral institutions, which publish the majority of available awards, first choose which awards to publish and then seek the permission of the parties. This engenders the inescapable sensation that institutions are cherry-picking those awards that apply legal principles of which they approve, regardless of whether the weight of decisions rejects those principles.

An example may help. International arbitral awards that rely on \textit{lex mercatoria} or amiable composition are rare in practice.\(^{199}\) Their use was never internationally significant and is diminishing.\(^{200}\) Nevertheless, from the published awards, such decisions seem to be common. This is a result of a deliberate policy in favour of publishing such awards. A former Secretary-General of the ICC Court of International Arbitration observed of the ICC’s own collection of published awards: ‘Only those awards in which arbitrators have felt least constrained to apply

\begin{thebibliography}{99}
\bibitem{196} See above, part II.B.
\bibitem{199} For example, the ICC reported that ‘In 79.8\% of the contracts giving rise to disputes referred to ICC arbitration in 2007, the parties had specified the law applicable to the merits. They opted for State laws in all but three contracts.’ ICC Statistical Report 2007, 12. The three exceptions called, respectively, for the application of the UNIDROIT Principles, the CISG, and the rules of the Organization for the Harmonization of Business Law in Africa (OHADA). Ibid. Thus, in no dispute filed with the ICC in 2007 did the parties call for the direct application of ‘general principles’ or ‘\textit{lex mercatoria}’. Ibid. In a study of the arbitration clauses of disputes filed with the ICC over roughly the second half of the twentieth century, Dasser found that only 0.3\% referred to \textit{‘lex mercatoria’} or ‘general principles’. F Dasser, ‘Mouse or Monster? Some facts and figures on the \textit{lex mercatoria}’ in R Zimmermann (ed), \textit{Globalisierung und Entstaatlichung des Rechts} (Mohr Siebeck, 2008) 140. As for amiable composition, 81\% of corporations surveyed in 2010 reported that they never use \textit{ex aequo et bono} or amiable composition adjudication. Only 2\% often concluded contracts that contain \textit{ex aequo et bono} or amiable composition clauses. Friedland and Mistelis (n 137) 15.
\bibitem{200} With respect to \textit{lex mercatoria}, there is some evidence that both parties and tribunals are calling for its application less frequently than in the past; from 2003 to 2007, the percentage of arbitration clauses in ICC disputes that called for the application of transnational rules of law declined from 1.2\% to 0.5\%. CR Drahozal ‘Private Ordering and International Commercial Arbitration’ (2009) 113 Penn St L R 1031, 1039. With respect to amiable composition, a search of published ICC awards turned up fifteen awards involving contracts that conferred amiable composition powers upon the tribunal; only two were issued in the 1990s and none since 2000.
\end{thebibliography}
national law have been published.\textsuperscript{201}

Of course, not all court judgments are published in reporter series, so it may be argued that it is not necessary to publish all—or even most—arbitral awards. The analogy is misplaced. First, all court judgments are public and anyone can obtain a copy from the appropriate court registry for a small fee. Moreover, online legal databases such as those operated by West and Lexis/Nexis now make the full text all court decisions from many jurisdictions available to their subscribers. Second, the persons who choose which judgments to publish are disinterested observers: private companies in the business of publishing selected judgments. One may disagree with the choice made to include or exclude a decision from a reporter series, but it cannot be argued that the reporter or publishing company chooses which cases to publish based on a perspective or legal agenda it wishes to promote.

Finally, the international arbitral awards that are now published are routinely presented in sanitised form. Award sanitisation is a proper and beneficial step, but it is currently performed unevenly and haphazardly and depends on the consent of the parties. Although the publication of sanitised awards represents an improvement over blanket confidentiality, it exemplifies the weaknesses of the current system of publication.

In sum, the published corpus of arbitral awards at best may not yield an accurate picture of overall trends in international arbitration and at worst is misleading. The status quo with respect to publication is inadequate to serve systemic interests of consistency, coherence, efficiency, fairness, and transparency.

\textbf{B. How to publish awards}

To remedy current inadequacies, publication of awards must be widespread and systematic. The parties must not have control over whether a specific award will be published. To protect legitimate party interests in confidentiality, the published versions of awards must include only those parts of awards the publication of which serves systemic interests.

While some argue for the imposition of transparency on the parties through treaties or national laws, this could be seen as a greater-than-necessary infringement on party autonomy and, in any event, is not practical.\textsuperscript{202} Party autonomy implies that parties should be cut out of the equation entirely. Indeed, most commentators who argue for greater publication of awards nevertheless maintain that the final decision as to whether an award may be published ought to remain with the parties. For example, Tashiro argues that awards should be presumptively publishable unless the parties expressly object after the award is issued (but before it is published).\textsuperscript{203} However, if decisions on publications of awards are made by the parties on a case-by-case basis, the immediate interest of the parties in keeping that award confidential will usually override the systemic interests in publication.

\begin{footnotesize}
\textsuperscript{201} Quoted in Craig, Park, and Paulsson (n 77) 639 fn 39.
\textsuperscript{202} It would be exceedingly difficult to achieve an international consensus on publication rules, whether in the form of a treaty or a model law. Even if such consensus could be achieved, it would take many years for laws to be implemented in a sufficient number of states. See Rogers (n 1) 1326-1327.
\textsuperscript{203} Tashiro (n 2) 103. Buys proposes a similar practice. Buys (n 2).
\end{footnotesize}
In practice, any change is most likely to occur through amendments to the rules of the arbitral institutions; publication could not be imposed on parties to ad hoc arbitrations without legislative intervention.\textsuperscript{204} Nevertheless, institutional arbitration accounts for approximately 85\% of all international commercial arbitrations, so publication of institutional awards would mean publication of a significant majority of all awards. Moreover, the popularity of institutional arbitration demonstrates that most parties are willing to give up some autonomy in return for the benefits of administered arbitration, so long as their essential interests are not harmed.

Arbitral institutions should therefore make clear that, as a condition of having the institution administer their dispute, the parties agree to waive any implied limits on publication of their award. This could be achieved by adding a provision to arbitral rules of procedure to the effect that, notwithstanding any contrary term in the parties’ arbitration agreement, the parties consent to limited publication of their award. (As will be discussed below, this proposal is most likely to succeed if the important institutions do this in a relatively coordinated manner.\textsuperscript{205}) To ensure that publication is controlled and the parties protected, this rule change should be accompanied by rules that require the parties and their counsel to maintain confidentiality.\textsuperscript{206}

By ‘limited publication’, I mean that awards should be edited to remove the parts where party interests in confidentiality must be protected. It is true that some institutions currently publish awards in such sanitised form. However, they have been criticised on the ground that their process sanitises awards to such an extent that the reader cannot determine the bases on which tribunals arrived at their decisions.\textsuperscript{207} Award sanitisation should be regularised and should no longer be performed by arbitral institutions.

The best way to approach sanitisation is to draft awards in confidential and publishable parts. Arbitrators should be instructed to write awards in such a way that aspects of the decision that deal with weighing evidence or that would enable identification of the parties are separated from legal issues of general application. For example, an award can begin with a recitation of the evidence and the facts found by the tribunal; a separate section can deal with applicable legal and procedural issues; a third section can deal with the application of the law to the facts and such matters as the allocation of costs. For publication, the first section would normally remain confidential in its entirety, the second would normally be published in its entirety, and the third would be edited to remove or paraphrase passages that would reveal the parties’ identities or any proprietary information.

Arbitrators may not be accustomed to writing their awards in such a manner, and may balk at being given any specific format to which their awards must adhere. However, the division

\textsuperscript{204} Tashiro came to the same conclusion. Tashiro (n 2) 102. Note, however, that some ad hoc awards are currently published. For example, for many arbitrations conducted under the auspices of the Permanent Court of Arbitration, a great deal of information, not just the final awards, is published on the PCA’s website. See http://www.pca-cpa.org/showpage.asp?pag_id=1146. However, such publication is contingent on the parties’ consent.

\textsuperscript{205} See below, notes 236-239 and accompanying text.

\textsuperscript{206} As has been noted, ‘lawyers … have without doubt far more often been the true causes of the unilateral publication of information about awards than their clients. Indiscreet lawyers typically justify themselves by referring to a wish to contribute to the body of international trade law, but somehow the reader cannot keep the word “self-aggrandisement” from creeping into his mind.’ J Paulsson and N Rawding, ‘The Trouble with Confidentiality’ (1999) 11(3) Arb Int’l 303, 316.

\textsuperscript{207} Ong (n 2) 174.
of awards into three sections is simple and intuitive; it would not take much additional time or
effort for arbitrators to develop a practice of dividing their awards in this way. If anything, this
template may help to encourage arbitrators to write clear and comprehensive awards. There may
be some cases in which such neat divisions are difficult to achieve, but they will be few in
number, and even then awards can be drafted in such a way that the privacy of the parties is
preserved. The division of the award into publishable and confidential sections would greatly
streamline the process of sanitizing awards for publication. In those cases where no significant
legal issue arises, the tribunal can so state and no part of its award need be published.208

Prior to publication, the administering institution will provide to the parties the text to be
published. Parties will have the right to object to the proposed text and will have to provide
grounds for removing objectionable details from the publishable version of the award. For
example, the identities of the members of the tribunal will normally be published. However, a
party may object that disclosure of the name of a party-appointed arbitrator may lead to the
identification of the party that appointed her, (e.g., if the arbitrator and party come from the same
small country).

In other cases, the parties’ identities could be protected by paraphrasing or summarising
portions of an award, rather than redacting them. In these situations, tribunals should err on the
side of publishing less, not more, of the original text. Tribunals will be permitted to restrain
publication entirely only in one narrow circumstance: where a party demonstrates that
publication of even a sanitised award will inevitably harm its interests, for example when the
industry is small enough that the parties can be identified and disclosure of the mere existence of
the dispute would harm the party.

Parties may also request a delay in publication of up to one year after approval of the
publishable text of the award. Arbitrators will be empowered to order such a delay if the
objecting party provides evidence that immediate publication would cause it irreparable harm.

The tribunal that issued the award (which has been directly or indirectly chosen by the
parties and presumably has their respect) will adjudicate any disputes regarding the published
version of the award. It is important that the tribunal, not the institution, have the final say as to
the publishable text. As Paulsson and Rawding note, ‘As for the ICC Court and its Secretariat,
we can only say that in our experience they occasionally go too far in over-secrecy … but never
fail in the other direction.’209

The interests of arbitrators align with the systemic ones better than those of institutions.
Arbitrators have an incentive to see their work product publicised for promotional reasons or to
demonstrate that they have ‘nothing to hide’.210 If they can be given a way to publish without

208 As Lord Bingham notes, ‘There are some arbitrations, those of the “look-sniff” variety in particular, where there
is really no room for the giving of reasons: tapioca pellets either are, in the experienced judgment of a trade
arbitrator, of fair average quality or they are not; whichever way his opinion goes there is probably not much that he
can usefully add by way of exegesis.’ Bingham, 145.
209 Paulsson and Rawding (n 206) 316. See also Born, who observes that ‘…it is no coincidence … that most recent
revisions of institutional arbitration rules have enhanced the confidentiality obligations on both parties and
arbitrators.’ Born (n 33) 2280.
210 Cf Norris and Metzidakis (n 100) 62; Tahyar (n 153) 116-117.
infringing on party autonomy, they are likely to take advantage of it.\textsuperscript{211}

Arbitral tribunals have jurisdiction over disputes regarding confidentiality, at least until the final award is rendered, and arguably even after this point.\textsuperscript{212} As Crookenden notes, ‘an issue as to the confidentiality of documents produced or generated in the course of an arbitration will normally be an arbitrable issue’.\textsuperscript{213} Tribunals are best placed to determine whether an award contains any legally significant conclusions that would warrant publication and which parts of an award ought to be published.

The awards will most likely be disseminated by publishing companies in print and/or online databases of the kind currently maintained by LexisNexis, West, and Kluwer. Freely accessible databases run by universities\textsuperscript{214} or international organizations\textsuperscript{215} could also publish awards, but they may not have the resources to process such large quantities of data. Of course, the publishers would not have access to the full awards, only to the sanitised versions approved by tribunals. Dissemination through organizations that already maintain well-used databases would most effectively increase access to awards both inside and outside the international arbitration community.

In short, publication will become the rule rather than the exception, with arbitrators directed to identify which, if any, portions of the award should be published and empowered to adjudicate disputes over the publishable text. Publishing companies or other institutions will disseminate the sanitised awards in their print and online databases.

C. Potential impediments to the proposed publication plan

Publication of awards along the lines proposed above would serve both systemic interests and the interests of parties in the aggregate, but it is not without risks. In this section, three potential objections to this system of publication are addressed: that it may drive some parties away from arbitration, that it suffers from a collective action problem, and that it may hinder tribunals from providing the kind of justice that commercial parties desire from arbitration.

1. The risk of a flight from arbitration

Even if confidentiality is not an inherent characteristic of international arbitrations,\textsuperscript{216} it is indisputable that commercial parties currently expect international arbitral proceedings and awards to be confidential. This proposition is supported by both statistical and anecdotal

\textsuperscript{211} On the other hand, some less competent or scrupulous arbitrators and counsel may want awards kept secret to prevent oversight of their work or to avoid antagonizing parties who may hire them in the future. Smit (n 86), 578.


\textsuperscript{213} ibid 612.


\textsuperscript{216} See above, notes 16-26 and accompanying text.
Confidentiality has been described as a ‘general assumption’\textsuperscript{217} and ‘key expectation’\textsuperscript{218} of parties, something they are ‘accustomed to’.\textsuperscript{219} Parties are said to prefer arbitration because of the ‘perceived advantage’ of confidentiality\textsuperscript{220} and enter into arbitration with the ‘express view of keeping their quarrels from public eyes’.\textsuperscript{221} Fortier cites the following dictum from an ICC tribunal as expressing a typical sentiment: ‘While the confidentiality of ICC proceedings is not mentioned in the ICC Rules … as a matter of principle, arbitration proceedings have a confidential character which must be respected by everyone who participates in such proceedings.’\textsuperscript{222}

Some commentators have predicted dire results if arbitral institutions or national courts limit or abandon the principle of confidentiality. Neill put the matter in stark terms:

> If some Machiavelli were to ask me to advise on the best method of driving international commercial arbitration away from England…. The second best method … would be … be to announce that English law no longer regarded the privacy and confidentiality of arbitration proceedings … as a fundamental characteristic of the agreement to arbitrate…. there would be a flight of arbitrations … to more hospitable climes.\textsuperscript{223}

Others are not so apocalyptic, but subscribe to essentially the same view. Writes Thoma: ‘it cannot be disputed that the arbitration practice in London would be severely threatened by a much laxer approach’ toward confidentiality.\textsuperscript{224} In the wake of the Esso decision, notes Gu, ‘there have been significant concerns with regard to Australia’s standing as a preferred venue for international arbitration’.\textsuperscript{225}

These warnings appear to be unfounded. Although confidentiality is indisputably an important reason why parties opt for arbitration, it is just as indisputably not the primary reason. Surveys show enforceability of the award and neutrality of the forum to be the most important factors.\textsuperscript{226} In one survey, commercial parties were evenly divided as to whether they would

\begin{footnotes}
\item[217] Smit (n 86) 573-574.
\item[218] VD de Saint Marc, ‘Confidentiality of Arbitration and the Obligation to Disclose Information on Listed Companies or During Due Diligence Investigations’ (2003) 20(2) J Int’l Arb 211. See also Trakman (n 11) I(calling it a ‘collateral expectation’ of the parties that ‘their business and personal confidences will be kept’).
\item[219] Cremades (n 32) 47.
\item[221] Russell v Russell (1880) 14 Ch. D. 471, 474-5.
\item[222] Fortier (n 21) 132-133.
\item[223] Neill (n 5) 315-316. (For Neill, the ‘best way’ to ‘would be to reintroduce the two types of case stated and all the court interference that was swept away by the 1979 Act.’ Ibid.)
\item[224] Thoma (n 31) 313.
\item[225] Gu (n 2) 630.
\end{footnotes}
continue to use arbitration if it were as public as national court litigation. In another, unscientific survey, ‘only a handful’ of respondents ‘suggested that confidentiality was of critical importance in all cases’.

There is some empirical evidence that confidentiality is not crucial. Australia and Sweden suffered no appreciable drop in the number of arbitrations after the Esso and Bulbank decisions. ‘There was no exodus of arbitrations from Sweden to more hospitable climes … the [SCC] has announced that 2007 and 2008 were the best years in its history.’ The experience of ICSID also demonstrates that many investors are willing to arbitrate even when the award will be published—and indeed, even when third parties may be allowed to make submissions and otherwise participate in the arbitral process.

In other words, the parties’ greatest concerns pertain to the confidentiality of the arbitral process; as Born notes, ‘expectations of confidentiality are materially lower with regard to ... awards.’ This is particularly so when the awards would be sanitised prior to publication.

Another concern is the potential for increased costs to the parties from widespread publication of awards. These can be broken down into additional costs related to the preparation of awards for publication and additional costs related to objections over the prepared text. The preparation of a publishable text of awards will be performed primarily by arbitrators, all at their high hourly rates. However, if the awards are drafted using the division proposed above, the additional time required to redact the award for publication is likely to be minimal. In addition, if awards from multiple institutions are to be collected, they must be indexed and digested, or accessing them will be difficult and time-consuming. These processes all take time, and the costs will in the end be borne by the parties, in the form of higher fees charged by institutions or subscription fees for access to awards databases. Here, too, however, the increase in costs is not likely to be significant.

Costs related to disputes over the publishable text may be greater. Parties will have to be provided with the full text of awards along with the tribunal’s proposed publishable text. Counsel will have to scrutinise the proposed publishable text for details that should be kept confidential, and will have to formulate objections and reply to opposing parties’ objections. Tribunals will

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227 Friedland and Mistelis (n 137) 30. According to the survey, 38% of corporations would continue to use arbitration even if it did not offer the potential for confidentiality, 35% would cease to use arbitration, and 26% did not know.
228 Young and Chapman (n 30) 29-30. I know of no survey that has asked parties if they would as a general matter object to publication of sanitised awards.
229 Ritz (n 212) 228.
230 Young and Chapman (n 30) 29.
231 Born (n 33) 2283. Born nevertheless concludes that ‘there appears to be little legitimate reason for unrestricted publication of arbitral awards, even at the conclusion of arbitral proceedings: this may entail the publication of commercial confidences and may, albeit only indirectly and occasionally, affect the prior conduct of the arbitral proceedings.’ Ibid.
232 Note, however, that some parties do object (to the ICC, for example) to the publication of their awards even in sanitised form.
233 Of course, I believe that the additional costs are worth the benefits. Cf Park (n 122) (arguing that recent calls for a return to quicker, cheaper arbitration processes misses the price of trade-offs between low costs and high quality).
234 As Ong notes, the costs of generating and maintaining a repository of awards would be greater the larger the institution, as more extensive indexing and digesting of awards would become necessary. Ong (n 2) 179.
235 Making the databases online-only would be one way to reduce costs. Ibid.
have to consider and rule on the objections, and then possibly reformulate the publishable award. There need not be any time cost for the winning party arising out of delays in payment of awards due to objections over the publishable text; the award is enforceable as soon as it becomes effective, regardless of whether it has been published.

In the context of the total fees payable to counsel and arbitrators, these costs, too, are unlikely to be significant (and, if the arbitrators or counsel are paid by an ad valorem or flat fee, they are likely to be negligible). In any event, additional costs related to the process of redacting awards for publication are likely to be more than offset by the savings in certainty and efficiency that publication of awards will bring.

2. **Collective action problems**

Even if parties would not abandon international arbitration if awards came to be published, they might move their disputes to an institution that does not publish awards. Parties may worry that sanitised awards will still include enough elements to allow a third party to identify them. This kind of situation presents what is called a collective action problem. Institutions that take the lead in publishing awards may suffer a loss of market share to institutions that do not. Accordingly, while publication is likely to benefit all institutions, no institution is likely to take this step alone. Therefore, it may be necessary for several institutions to agree on a common protocol.

These concerns are probably more apparent than real. There is no evidence that the ICC lost any market share because it publishes some awards in sanitised form. Similarly, effective 1 January 2010, the Milan Chamber of Commerce amended its rules so that parties agree in advance that awards may be published ‘for purposes of research’. It is too soon to be certain, but there is nothing in the recent literature to suggest that parties or counsel are avoiding the Milan Chamber as a result. The decision of the LCIA to publish its own decisions on challenges to arbitrators, announced in 2007, has been generally applauded and does not appear to have led to a decrease in LCIA arbitrations.

It would be best if several of the leading institutions took the step of publishing their awards together but, even if they do not, a regional or up-and-coming institution could benefit greatly from adopting a publication policy like the one proposed above. Publishing its awards would generate publicity and increase the influence of the awards coming from the institution. An institution that publishes its awards will raise its profile over the medium term, as both the policy change and the awards rendered are discussed in trade and academic publications and are cited in subsequent awards.

3. **Publication and stare decisis**

Some parties and arbitrators are concerned that publication of awards will create a

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236 Gruner (n 2) 957. See also Ong (n 2) 178.
237 ibid.
238 Ibid.
239 F Slaoui, ‘The Rising Issue of “Repeat Arbitrators”: A Call for Clarification’ (2009) 25(1) Arb Int’l 103, 104 (calling the LCIA’s decision ‘an important and revolutionary step’); G Nicholas and C Partasides, ‘LCIA Court Decisions on Challenges to Arbitrators: A Proposal to Publish’ (2007) 23(1) Arb Int’l 1 (describing the documents to be released as a ‘treasure trove’).
‘precedent system’ under which arbitrators will be constrained from doing justice between the parties by ever-increasing, ever-rigidifying rules of law and procedure. For example, then-Associate Justice Rehnquist of the US Supreme Court argued that a ‘less frequently realised advantage of arbitration ... is that its process usually need not produce a body of decisional law which will guide lawyers and clients as to what their future conduct ought to be’.240 Similarly,

Some commentators contend that parties opt for arbitration ... specifically because they want ‘rough justice’, a decision in equity. Indeed, some commentators argue that one inherent advantage of international arbitration ... is the freedom it gives an arbitrator to do justice even where strict application of the law might require another result.241

This concern is merely apparent. ‘Precedent’ means no more than: ‘prior in time, order, or arrangement; an earlier occurrence of something similar.’242 It does not connote any requirement that what has happened before must, or even should, happen thereafter. *Stare decisis* is a subset of precedent; it is the kind of precedent that, once created, must be followed by others (by whom and under what circumstances is a separate matter). In recent years, the Latin *stare decisis* has been anglicised to ‘legal precedent’. This is a stylistic change and not a change in meaning, however, it has led to considerable confusion and misunderstanding.

The exclusion of *stare decisis* from arbitration is decisively established. No arbitral tribunal is required to follow the legal conclusions reached by a different tribunal. This state of affairs is buttressed by the preference of parties and their counsel, by arbitrators, and by the civil law traditions from which arbitration has adopted much. Indeed, some argue that arbitral awards are not intended to create precedents, not even merely persuasive ones:

... the process of arbitration is arguably not designed to influence the outcome of disputes beyond the instant case. Unlike an international court or other tribunal, arbitral decisions are limited only to the circumstances of the parties resorting to such a method purposefully in lieu of a court decision.243

Publication of arbitral awards does not threaten to introduce *stare decisis* into arbitration any more than permitting parol evidence of the meaning of a written contract removes the ability of adjudicators to rely on the plain language of the document.244

Moreover, *stare decisis* applies only to legal principles, and the result in the great majority of cases is determined by the facts and the terms of the contract. Even in common law

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241 Ridgway (n 93) 52. See also McConnaughay (n 128) 502 (arguing that ‘elastic rules of decision’ are of great value to commercial parties).
243 Norris and Metzidakis (n 100) 62 (citation omitted).
244 Born (n 33) 2286. (“Even if one does not accept that arbitral awards should constitute strict precedent in later arbitrations, there would be material benefits in efficiency, consistency of results and predictability from publication of arbitral awards: previous decisions could provide guidance to subsequent tribunals, in the same manner that judicial decisions provide guidance to courts and parties involved in subsequent litigations.”)
jurisdictions, nothing in the doctrine prevents a court from considering the facts of each case, and one court’s interpretation of a phrase in a contract does not bind another court to interpret the same words in a different contract in the same way. In any event, judges commonly distinguish prior court pronouncements on the facts and scope of the *ratio decidendi*, dismissing other judicial pronouncements as mere *obiter dictum*. Arbitrators are capable of the same subtleties.

The establishment of a repository of published awards would achieve some of the advantages of a precedent system—promotion of consistency and coherence—without the potentially stultifying effects of *stare decisis*.

V. CONCLUSION

Currently, few awards are published; some information about awards is disseminated informally and some institutions publish a small portion of their awards, mostly in sanitised form. This state of affairs does not serve any systemic interests, and its effect on party interests is not entirely salutary.

Some party interests are entirely unaffected by confidentiality of awards (enforceability, control, and speed). Moreover, many of the advantages that parties do derive from confidentiality accrue disproportionately to insiders (or those who are represented by insider counsel). Publication of awards would actually benefit the bulk of the commercial parties who use arbitration by serving their interests in predictability, fair treatment, and lower cost. The only legitimate party interest that is equally shared by all types of disputing parties and would be harmed by publication lies in keeping private any information that would be damaging to parties’ business interests. However, publication of awards is entirely compatible with privacy, so long as the parties’ identities are not disclosed.

The proposed method of publishing awards would serve systemic interests while protecting the parties from disclosures that would harm their interests. In particular, it is compatible with strict restrictions on unilateral disclosures by parties, and publication according to the proposed method would include only those parts of the award that would not disclose the identities of the parties or their proprietary business information.245 There is therefore reason to hope that parties will overcome their understandable reluctance to accept any limitations on confidentiality. If the proposed method of publishing awards is adopted, parties will come see that their individual interests in confidentiality have not been compromised, while systemic interests in transparency—which also benefit all commercial parties—have been advanced.

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245 Paulsson and Rawding contrast unilateral disclosures of facts from an arbitration with relatively harmless institutional publication of sanitised awards. If unilateral disclosures are permitted, parties may be tempted to ‘disclose selective or erroneous information in the knowledge that it is putting unfair pressure on its adversary …. Nor is such disclosure of value to the legal community; information produced unilaterally in the context of arbitration cannot be verified and is therefore of little, if any, scientific value. (On the other hand, we have no quarrel with the *institutional* publication of illustrative awards, sanitised to protect the parties’ anonymity.)’ Paulsson and Rawding (n 206) 315.