Which Law Governs Confidentiality in International Commercial Arbitration?

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Abstract

Many practitioners consider confidentiality to be one of the principal advantages of choosing arbitration as a means of dispute resolution. Accordingly, major disputes between the parties are less likely to attract public attention, thereby safeguarding their commercial interests. However, a closer examination of confidentiality in commercial arbitration raises several legal questions. If confidentiality is to be effectively protected, it is first necessary to determine the scope of the relevant obligation, the consequences of its breach and, ultimately, the law governing such matters. This gives rise to the following question: which law should govern questions of confidentiality in commercial arbitration?

This article proposes a categorisation of confidentiality issues in order to address the foregoing question. The author argues that confidentiality issues should first be distinguished between procedural and substantive matters. The author further proposes that, as a general rule, procedural issues should be governed by the lex arbitri, whereas substantive issues should be governed by the law applicable to the contract or respective agreement. To substantiate this proposition, the article will first examine the conceptual foundations of confidentiality in arbitration and, second, discuss the categorisation of confidentiality issues. Finally, the potentially applicable laws will be analysed and the appropriate governing law will be determined with respect to procedural and substantive confidentiality issues.

Annotasiya

Çox hüquqşünas düşünür ki, mübahisələrin həlli yolu olaraq arbitrajı seçməyin ən böyük üstünlüklərindən biri onun daha konfidensial olmasıdır. Beləliklə, tərəflər arasındakı böyük mübahisələr rezonans doğurmayacaq və onların kommersiya maraqları qorunacaq. Bununla belə, kommersiya arbitrajında konfidensiallığın daha yaxından araşdırılması bir sıra hüquqi məsələləri gündəmə gətirir. Belə ki, əgər əsas məqsəd konfidensiallığın qorunmasıdırsa, əvvəlcə belə bir öhdəliyin sərhədləri, pozulmasının nəticələri, yəni bunu tənzimləyən hüquq müəyyənləşdirilməlidir. Qeyd olunan məsələ isə əsas sualı gündəmə gətirir: kommersiya arbitrajında konfidensiallıq suallarına hansı qanunvericilik tətbiq olunmalıdır?

Bu məqalədə yuxarıdakı suala cavab verilməsi üçün məlumatın konfidensiallığının kateqoriyalaşdırılması təklif olunur. Beləliklə, müəllifə görə, əvvəlcə konfidensiallıq sualları prosedural və maddi olaraq süzgəcdən keçirilməlidir. Müəllif, həmçinin təklif edir ki, bir qayda olaraq prosedural məsələlərə lex arbitri, maddilərə isə müqaviləyə və ya həmin razılaşmaya tətbiq olunan hüquq tətbiq olunmalıdır. Bunun üçün məqalədə əvvəlcə arbitrajda konfidensiallığın konseptual əsasları, daha sonra konfidensiallıq məsələlərinin kateqoriyaları müzakirə olunacaqdır. Sonda isə tətbiq edilə biləcək hüquq normaları təhlil ediləcək, prosessual və maddi konfidensiallıq məsələləri baxımından hansı hüququn tətbiq edilməli olduğu müəyyən ediləcəkdir.

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Introduction

Despite its being perceived as one of the main advantages of international commercial arbitration (hereinafter ICA),[1] legal basis and governing law of the confidentiality have been uncertain. Now, with the introduction of virtual hearings and Artificial Intelligence tools, there are more risks towards the confidentiality of arbitration.[2] Therefore, legal boundaries of the confidentiality require more attention. In this regard, the law applicable to this matter in ICA should be determined, although it is not a straightforward and easy task, for the reasons below.

First, confidentiality questions are addressed by both tribunals and state courts. Considering that they are not operating under the same legal frameworks, suggesting a one-size-fits-all approach becomes particularly complex. Both state courts and the tribunal can be requested to take measures to protect the confidentiality of certain information in proceedings. Moreover, in the case of leakage of information or violation of confidentiality, relief for damages can be requested from the tribunal. The same reason can also be the basis of challenge to the award in set-aside and enforcement proceedings. Should the tribunals follow the state courts' approach?

[1] Queen Mary University of London & White & Case LLP, International Arbitration Survey: The Path Forward: Realities and Opportunities in Arbitration, 23. Available at: https://www.qmul.ac.uk/arbitration/media/arbitration/docs/White-Case-QMUL-2025-International-Arbitration-Survey-report.pdf (last visited Sep. 17, 2026); Gary Born, International Commercial Arbitration, 3044 (vol. II, 2021); Andrew Tweeddale & Masood Ahmed, Arbitration of Commercial Disputes: English and International Law and Practice, 329, § 14.01 (2nd ed. 2025).

[2] Mark-Silas A. Malekela, *AI and Confidentiality Protection in International Commercial Arbitration: Analysis of the Existing Legal Framework*, 5 Discovery Artificial Intelligence, 2 (2025); Nobumichi Teramura & Leon Trakman, *Confidentiality and Privacy of Arbitration in the Digital Era: Pies in the Sky?*, 40 Arbitration International 277, 278 (2024).

Second, besides the fact that confidentiality questions can be addressed in different forums, these questions are also non-homogeneous themselves. Differences in the substance of the confidentiality questions make it difficult to apply the same law to these issues. For instance, the objects of confidentiality questions can include: contents of interim and final awards, orders by the tribunal, correspondence between parties and the tribunal, evidence and documents produced, existence of a dispute, reliefs for the violation of confidentiality obligations, confidentiality obligations of non-signatories, witnesses, experts, etc. How can we determine the applicable law to each of these questions?

Third, difficulty arises from the range of such obligations as multiple roles participate in arbitration: arbitrators, parties, experts, witnesses, non-signatories and others. Therefore, confidentiality obligations demand the consideration of each role's characteristics in the proceedings. For example, while a confidentiality agreement may exist between the parties, other actors will be unlikely to be bound by this agreement.

Fourth, perplexity arises from the lack of a unilateral approach towards confidentiality in national laws and institutional rules. Not all arbitration statutes, institutional rules or case law follow the presumption that the arbitration is confidential.

This paper argues that confidentiality issues should first be characterised as procedural or substantive and this characterisation determines the applicable law. In this regard, first, conceptual foundations of confidentiality and privacy will be distinguished. Second, the characterisation of the confidentiality issues will be examined. Third, after the initial characterisation, legal sources of confidentiality will be analysed for each category and proper applicable law will be suggested.

I. Conceptual Foundations: Confidentiality and Privacy

Before answering which law applies to the confidentiality obligation, let's make it clear what confidentiality itself is. To define confidentiality, it would be proper to draw the transparent lines between that and privacy. Despite some similarities in certain jurisdictions, two notions should be differentiated.[3]

Privacy is the well-recognised feature of ICA. It means that arbitration hearings should be held behind closed doors.[4] Any visitors or guests should not be in the proceedings unless they are the participants of the arbitration or

[3] Gary Born, International Commercial Arbitration, 3045 (vol. II, 2021).

[4] Andrew Tweeddale & Masood Ahmed, Arbitration of Commercial Disputes: English and International Law and Practice, 330, § 14.03 (2nd ed. 2025).

otherwise authorized.[5] Moreover, privacy of the court-proceedings should also be taken into consideration, because of its relevance to the potential disclosure of information to the public. On the other hand, confidentiality is a much larger concept, which covers documents produced in arbitration, such as memoranda, evidence, orders, award, deliberations of the tribunal and even the existence of dispute.[6]

Privacy and confidentiality resemble two sides of the same coin. If the arbitration is open to the public, then confidentiality will be out of the discussion. If the arbitration is not confidential and every document can be disclosed, then the privacy will also not serve any efficient purpose.[7] In most jurisdictions, arbitration is understood as of private character; however, the confidentiality and the law applicable to it are still open to debate and disagreement. While it is argued that the confidentiality is an implied characteristic of arbitration stemming from the privacy, in some jurisdictions they are examined separately.[8]

Thus, privacy and confidentiality cannot be treated as completely distinct concepts. The law applicable to the privacy of arbitration or arbitration-related court hearings affects the confidentiality of arbitration itself.

II. Characterization of Confidentiality Obligations

In litigation, the application of the correct law is transformed by the characterisation of the matter as procedural or substantive. If the matter is procedural, the *lex fori* will be applicable, while substantive issues enable the application of the foreign law subject to the mandatory rules.[9]

When it comes to arbitration, while there are various discussions in favour of the categorization, in fact there is no clear rule of it.[10] Moreover, the tribunal has broader discretion and is not bound by the procedural law of a particular jurisdiction *a priori*.[11] Unless the arbitration law of a state determines

[5] Michael Pryles, *Confidentiality*, The Leading Arbitrators' Guide to International Arbitration 415, 420 (Lawrence W. Newman and Richard D. Hill eds., 2004).
[6] Born, *supra* note 3, 3036.
[7] Pryles, *supra* note 5, 427.
[8] Tweeddale & Ahmed, *supra* note 4, 349, § 14.52.
[9] Aleksander Godhe, *Characterisation of Rules in International Commercial Arbitration: Between Procedure, Substance and Party Autonomy*, 39 International Journal for the Semiotics of Law 1573, 1577 (2025).
[10] Stefan Kröll, Arbitration and Insolvency – Selected Conflict of Laws Problems, *Conflict of Laws in International Commercial Arbitration* 657, 693-695 (Franco Ferrari and Stefan Kröll eds., 2019); Friedrich Rosenfeld, The Law Applicable to Legal Privilege in International Commercial Arbitration, *Conflict of Laws in International Commercial Arbitration* 213, 223-224 (Franco Ferrari and Stefan Kröll eds., 2019).
[11] Darius Chan & Sasiy Krishnan, *Charting a Path Towards Harmonisation of Privilege Rules: A Two-Stage Uniform Choice of Law Rule for Privilege in International Arbitration*, 22 Journal of Private International Law 51, 60 (2026).

mandatory rules, the tribunal enjoys the discretion to select the conflict of law test or rules as it considers appropriate to the questions of governing law.[12]

This paper suggests that although confidentiality is not homogenous, its characteristics allow them to be grouped into procedural and substantive. Thus, confidentiality matters can be considered as both substantive and procedural depending on the character of information.[13] Such a categorization will make it easier to determine the appropriate law governing the confidentiality. In this regard, two ways of differentiating procedural and substantive confidentiality are suggested below.

First, procedural and substantive confidentiality cover different kinds of information. Procedural confidentiality covers information related to the dispute resolution procedure. It can include the existence of dispute, documents produced in arbitration, deliberations of arbitrators, the contents of awards, content of the orders of the tribunal and any other information related to the resolution of disputes. On the other hand, substantive confidentiality covers information which is related to the execution of the contract and can act as an accessory to it. Therefore, if the confidentiality relates to the information exchanged for the contractual purposes within the parties' defined legal relationship, it should be a substantive one. Substantive confidentiality obligations can include patents, trade, state secrets, know-how and other confidentially sensitive information defined in national law or in international conventions.

Second, the other differentiating element is the time when the specific information becomes significant and requires legal consideration. Procedural confidentiality becomes relevant only when the dispute occurs and related proceedings are initiated. For example, the disclosure of the contents of interim measures becomes relevant to the question of applicable law only after the interim measures have been ordered. This temporal distinction also links the information in question to the commencement of procedural steps in the dispute resolution process.

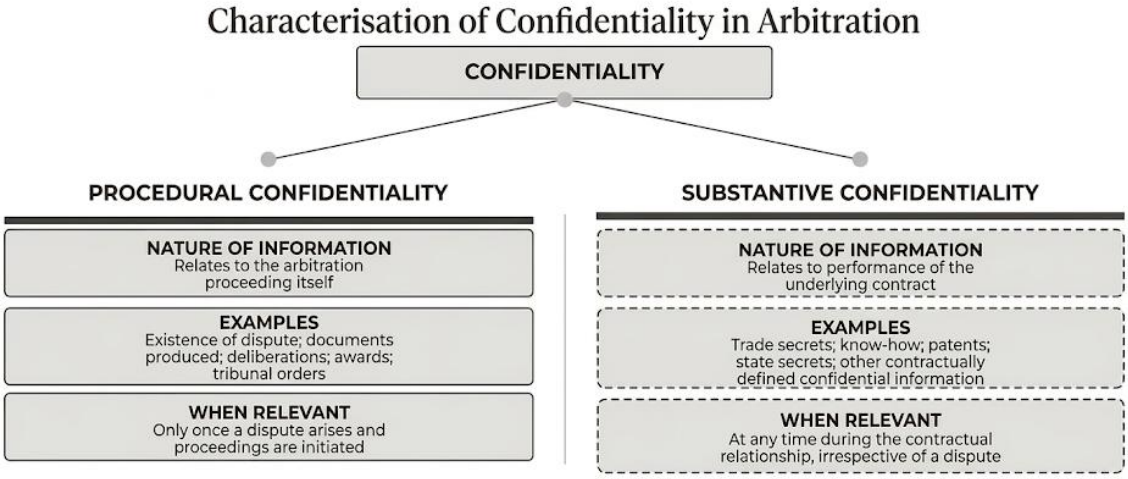
On the other hand, information related to substantive confidentiality is relevant regardless of the initiation of arbitration and the dispute. For example, know-how can be an essential part of the execution of the contract and the potential illegal disclosure can be any time. However, information related to the procedural confidentiality is strongly linked to the procedural steps taken in the arbitration proceedings.

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[12] International Chamber of Commerce, ICC Arbitration Rules, art. 20, 22 (2026). For example, in ICC Rules Articles 20 and 22, tribunal is entitled to apply the rules or rules of law it determines to be appropriate in the absence of parties' agreement.

[13] *Supra* note 3, 3041; Maxi Scherer et al., *The English Approach to the Law Governing Confidentiality in International Arbitration*, Kluwer Arbitration Blog (Aug. 18, 2022), https://legalblogs.wolterskluwer.com/arbitration-blog/the-english-approach-to-the-law-governing-confidentiality-in-international-arbitration/ (last visited Sep. 17, 2026).

It would be erroneous to assert that the confidentiality of information during arbitration proceedings is always of a procedural nature. The reason is that substantive confidentiality will be likely to extend to the arbitration as well. For example, if the parties have an agreement on the confidentiality of the know-how, then the arbitration tribunal shall also apply the law governing the main contract to the confidentiality of this information in arbitration proceedings.



It should also be noted that the adaptation of this categorisation is not always easy and straightforward. For instance, issues such as legal privilege are situated between the procedural and substantive realms, leading to controversial discussions in the academy.[14] Although this article only aims to present the general pathways applicable to confidentiality issues, the issue of legal privilege should also be discussed. Leaving this issue unaddressed when discussing the law governing confidentiality would, in a sense, leave the "elephant in the room" unacknowledged.

Depending on the jurisdiction, legal privilege may encompass different aspects of the lawyer-client relationship, including the protection of confidential communications and legal advice from disclosure.[15] If we apply the two criteria mentioned above, legal privilege would generally fall within the procedural realm of confidentiality.[16] The reason is that, according to the first criterion, we should look at whether the information acts as an accessory

[14] Chan & Krishnan, *supra* note 11, 59-60; *See* IBA Arbitration Committee Task Force on Privilege in International Arbitration, Report on Uniform Guidelines on Privilege in International Arbitration, Available at: https://www.ibanet.org/document?id=Report-on-Uniform-Guidelines-on-Privilege-in-International-Arbitration (last visited Sep. 18, 2026).
[15] Friedrich Rosenfeld, The Law Applicable to Legal Privilege in International Commercial Arbitration, *Conflict of Laws in International Commercial Arbitration* 213, 217 (Franco Ferrari and Stefan Kröll eds., 2019).
[16] Cf. *id*, 226-227; Cf. *supra* note 11, 59-61.

to the execution of the contract. In the case of legal privilege, the relevant information cannot really be considered an "accessory" to the execution of the contract, as legal privilege is not related to the implementation of the obligations under the contract. Rather, it is concerned with protecting certain communications or information from disclosure in the context of arbitration proceedings.

Thus, the characterisation of the confidentiality should be regarded as first step in order to define the applicable legal source. To determine whether the issue at hand is procedural or substantive, the character of the information and the timing of its relevance can be considered.

III. Which Law Applies to the Procedural Confidentiality?

A. Legal Sources

Procedural confidentiality can be linked to multiple legal sources, including *lex arbitri*, parties' confidentiality agreement, lex fori, institutional rules, law governing the arbitration agreement, overriding mandatory rules and etc. In this part, each of these legal sources and their potential application to confidentiality questions will be discussed.

1. Lex Arbitri (Law of the Seat)

Since *lex arbitri* governs the conduct of arbitration, it should be the first legal source to look at the confidentiality provisions and relevant conflict of law rules. However, there is no unilateral consensus on confidentiality in different jurisdictions.[17] While most national arbitration laws are silent on this issue, the case law of most countries falls into two forms: those which recognize the implied confidentiality and others which do not. UNCITRAL Model Law includes clauses for neither confidentiality nor the privacy of arbitration.[18] To demonstrate the different approaches the UK, Australian and Swedish perspectives of the confidentiality in ICA will be discussed below.

England

The English Arbitration Act does not include any rules regarding the confidentiality of arbitration. Even after the new amendment to the Act, additions on this issue were not introduced, because the policymakers could not agree on it and left it to the case law.[19] However, the English Court of Appeal in the famous case of *Ali Shipping v. Shipyard Trogir*, recognised the

[17] Kyriaki Noussia, Confidentiality in International Commercial Arbitration, 67 (2010).

[18] *Supra* note 3, 3008.

[19] *Id.*, § 20.03; Maxi Scherer et al., *The English Approach to the Law Governing Confidentiality in International Arbitration*, Kluwer Arbitration Blog (Aug. 18, 2022), https://legalblogs.wolterskluwer.com/arbitration-blog/the-english-approach-to-the-law-governing-confidentiality-in-international-arbitration/ (last visited Sep. 17, 2026).

implied confidentiality in arbitration.[20] The court reasoned that the implied confidentiality comes from the privacy of the arbitration.[21] However, exceptions exist such as "*parties' express or implied consent, order of the court for the purposes of a later court action, leave of the court and when it is reasonably necessary for the protection of the legitimate interests of an arbitrating party*".[22]

Australia

The Australian courts have taken a different approach. In 1995, in the *Esso/BHP etc. v. Plowman* case, the Court expressed a contrasting approach.[23] According to this case, the arbitration is considered private, however, confidentiality does not come from the privacy and they are independent of each other. Thus, the Australian High Court rejected the English law approach of implied confidentiality in arbitration.[24]

Nonetheless, after strong criticism in 2010, an opt-in mechanism of confidentiality was included in the Australian Arbitration Act.[25] Moreover, after 5 years, the mechanism turned into an opt-out one, which strengthened the confidentiality in arbitration in Australia except in circumstances, where the parties agree otherwise.[26] Now, Section 23D of the Australian International Arbitration Act indicates broad exceptions to the confidentiality. The confidentiality conditions under the Act applies only to Australia-seated arbitration. For foreign-seated arbitration, non-recognition of the implied confidentiality application continues.[27]

Sweden

Swedish law takes a different approach from that of England and similar to the Australian approach, in that it does not recognise the implied

[20] *Id.*, 3015; Elza Reymond-Eniaeva, Towards a Uniform Approach to Confidentiality of International Commercial Arbitration, 33, § 120 (2019); *supra* note 4, 333, § 14.11. Singapore follows a similar track as English law. In cases such as *Myanma Yaung Chi Oo Co. Ltd v Win Win Nu and Another and AAY and others v AAZ*, Singapore Courts recognized and upheld the English approach of implied confidentiality of arbitration, unless parties agree otherwise. However, differently, Section 12, 12A of Singapore International Arbitration Act indicate that both the tribunal and the courts in Singapore have the power to issue an interim measure to enforce any obligation of confidentiality. Such an obligation can be agreed through three ways: parties' agreement whether it is in arbitration clause or another document, under any written law or rule of law or institutional rules. *supra* note 3, 3018; Reymond-Eniaeva, Towards a Uniform Approach, 34, § 123.

[21] *Supra* note 5, 432.

[22] *Ibid.*

[23] Elza Reymond-Eniaeva, Towards a Uniform Approach to Confidentiality of International Commercial Arbitration, 38, § 140 (2019).

[24] *Supra* note 5, 420-421.

[25] Reymond-Eniaeva, *supra* note 23, 40, § 148.

[26] *Ibid.*

[27] *Supra* note 3, 3021.

confidentiality in arbitration.[28] This approach is found in the judicial decisions as the local arbitration act does not regulate the matter.[29]

In the famous case of *Bulbank*, one of the parties disclosed the partial award to an international arbitration report. The respondent claimed in the local courts that the claimant undertook an implied confidentiality obligation by agreeing to arbitration.[30] Therefore, disclosure of the partial award should be a reason for revoking the arbitration agreement and making the award invalid. Nonetheless, the Supreme Court of Sweden rejected this argument and refused to acknowledge the implied confidentiality obligation in arbitration by stating:[31]

"*Against the background of that stated, the Supreme Court considers that a party to arbitration proceedings cannot be deemed to be bound by a duty of confidentiality, unless the parties have concluded an agreement concerning this*".

Analysis of arbitration laws and case laws of different jurisdictions[32] suffices to say that the confidentiality in arbitration is not ubiquitous.[33] In fact, absent parties' agreement on confidentiality, the selection of the law of the seat matters importantly for the protection of information regarding the dispute.[34]

2. Parties' Confidentiality Agreement

Thus, *lex arbitri* only provides the default confidentiality regulations, which are subject to parties' subsequent agreement. They are usually not mandatory or left to the parties to decide. Parties can agree on a general non-disclosure or confidentiality agreement in the main contract or specifically under the arbitration clause.[35]

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[28] *Id.*, 3022.

[29] *Supra* note 23, 43, § 162.

[30] *Id.*, 42, § 159.

[31] *Id.*, 43, § 161.

[32] Regarding other jurisdictions, while French domestic arbitration law considers arbitration confidential, there is no similar provision for the international arbitration. However, In the *G. Aïta v. A. Ojjeh* case, Paris Court of Appeal confirmed implied confidentiality as a concept finding its origins in the nature of arbitration. However, in the latter case of *Nafimco v. Forster Wheeler Trading Company*, court did not recognize the previous approach to the implied confidentiality. IBA Arbitration Committee, Arbitration Guide: France, 11 (2024). Available at: https://www.ibanet.org/document?id=France-country-guides-arbitration (last visited Sep. 19, 2026); *supra* note 3, 3022; *supra* note 23, 44, § 166, 45, § 171; *supra* note 4, 349, § 14.54 (In addition, The US federal arbitration act also does not comment on the confidentiality of arbitration. However, in the case of *United States v. Panhandle Eastern Corp* the Court did not recognize confidentiality of arbitration since the respondent failed to show any document or agreement on confidentiality); *supra* note 3, 3023; *supra* note 23, 40, § 149, 41, § 154.

[33] Malekela, *supra* note 2, 9.

[34] *Supra* note 4, 349, § 14.53.

[35] *Supra* note 23, 57, §§ 220, 223; Noussia, *supra* note 17, 21; Ileana M. Smeureanu, Confidentiality in International Commercial Arbitration, 9 (2011).

In addition to this, as any other consensus, confidentiality agreements can also be implied. This paper advocates that not only an expressed arbitration-related confidentiality agreement, but also parties' implied intention regarding the confidentiality should be weighed heavily.[36] The tribunal should examine the parties' conduct towards arbitration and assess how they treated the confidentiality of their relationship both before and after the dispute arose. For example, if the parties wanted all the exchanged information to be confidential in the contract, it can also be assumed that they also wanted the arbitration to be of that kind.[37]

Overall, in theory, the mystery of which law applies to the confidentiality obligation in arbitration can be ended right here. However, paradoxically parties' confidentiality agreements do not ensure the confidentiality of the arbitration, since they are not binding on the non-signatories or other participants of the arbitration such as witnesses or experts.[38] Thus, mentioned agreements only regulate the confidentiality obligation of parties to the agreement and to the arbitration. Therefore, law application to the confidentiality obligation of third parties remains unanswered. In addition to this, even considering the parties agree on the confidentiality of arbitration, the scope of exceptions still needs to be determined.

Furthermore, there are limitations to the parties' confidentiality agreements. There can be cases, regarding the public policy of the state, where the arbitration takes place, where information, for the purposes of public interest or the interests of justice, can be required to be disclosed.[39] For example, it can involve reporting requirements placed on publicly-held corporations by national stock market or securities laws, as well as investigative authority given to governmental organizations.[40]

***3. Lex fori*[41]**

Confidentiality during arbitration proceedings is not enough; arbitration-related court proceedings must also be taken into consideration. The reason is that if the court seized holds the hearings in public, then basically confidentiality obligations during arbitration will be in vain. In this regard,

[36] Benjamin Hayward, *Conflict of Laws and Arbitral Discretion: The Closest Connection Test*, 118, §§ 3.57-3.58 (2017).

[37] *Supra* note 3, 3012.

[38] *Supra* note 5, 421; *supra* note 3, 3013; Margaret L. Moses, The Principles and Practice of International Commercial Arbitration, 57 (2024).

[39] *Supra* note 4, 340, § 14.27; 342, § 14.33.

[40] *Supra* note 4, 3014.

[41] Legal Information Institute, *Lex Fori*, Wex (July 2024), https://www.law.cornell.edu/wex/lex_fori (last visited Aug. 28, 2026) ("Lex fori is a Latin phrase meaning 'law of the forum', and refers to the laws of the jurisdiction of the court where the action was brought").

since it is clear that the transparency of the court proceedings is purely procedural matter, the court seized shall apply its own procedural law.[42]

Possible situations include requesting an order from the court or setting aside or enforcement proceedings.[43] Questions may arise whether the court proceedings should also be in private to protect the confidentiality of the arbitration. While some arbitration acts, such as acts of Singapore, require default private hearings in court regarding arbitration, most countries either do not set an exception to the principle of transparency in court proceedings or only applies private hearings on case-by-case basis.[44]

The application of *lex fori* can accompany some legal difficult questions. To showcase this issue an example given by *Michael Pryes* can be cited:[45]

"Thus if an arbitration were held in Singapore and documents obtained in the course of that arbitration were sought to be produced in court proceedings or in an arbitration in Australia, the choice of law applicable to confidentiality would lie between that of Singapore (as the seat of the arbitration and the lex arbitri) and that of Australia (the lex fori). In this writer's opinion the lex arbitri should apply. Thus an Australian court or arbitrator should test the confidentiality of the documents sought to be produced in accordance with the law of Singapore".

While it may be true that confidentiality of documents likely to be governed by the Singapore law, however, the law applicable to the privacy of proceedings still needs to be determined. If the court proceedings are going to be held openly in Australia, the search for the confidentiality of arbitration will be in vain. In author's opinion the privacy of the court proceedings involves public interest and this is general principle under most national procedural rules.[46] Courts seized are likely to apply their own procedural rules, rather than the law of the seat chosen by the parties, when determining the privacy of hearings. The application of the *lex fori* illustrates how privacy and confidentiality are intertwined.

4. Institutional Rules

Provided that there is no confidentiality agreement between the parties, institutional rules should be referred. While thereotically institutional rules still constitute the parties' agreement regarding arbitration, it is still worth examining institutional rules separately in this part.

Similar to the *lex arbitri*, institutional rules fall into two categories: those that contain confidentiality provisions and those that do not regulate confidentiality. For example, the first category includes Singapore

[42] Godhe, *supra* note 9, 5.

[43] *Supra* note 23, 57, § 224.

[44] Margaret L. Moses, *supra* note 38, 112.

[45] *Supra* note 5, 450-451.

[46] *Supra* note 23, 52, § 201; Daniel R. Bennett & Madeleine A. Hodgson, *Confidentiality in Arbitration: A Principled Approach*, 3 McGill Journal of Dispute Resolution 98, 108 (2016-2017); *AAY v. AAZ*, Singapure High Court No. 142, § 111 (2009).

International Arbitration Centre (hereinafter SIAC), World Intellectual Property Organization (hereinafter WIPO) Arbitration Rules, Australian Centre for International Commercial Arbitration, London Court of International Arbitration (hereinafter LCIA), on the other hand, most institutional rules do not provide for the confidentiality of arbitration.

The SIAC Rules provide broad regulation of confidentiality in arbitration. Rule 59.1 indicates that arbitrators, parties, third party funders, experts and witnesses are under a continuing obligation to treat all matters regarding arbitration as confidential. This rule is subject to exceptions in Rule 59.3. Moreover, according to Rule 59.5, "*in accordance with the applicable law or pursuant to the parties' agreement and may issue an order or award for* sanctions*, damages or costs and take measures to protect trade secrets"*. However, it is not clear whether the applicable law here is meant to be the law specifically applicable to confidentiality of arbitration or generally the law governing the procedure of arbitration. In addition to this, the SIAC Rules is silent on what law decides whether the information is confidential or not. Similarly, WIPO Arbitration Rules follow the same approach, Section 7 provides probably the broadest clause regarding the confidentiality of arbitration.[47]

Article 30 of the LCIA Arbitration Rules provides that the principle of keeping all material regarding arbitration confidential is an obligation of the parties, the tribunal, tribunal secretary and expert of the tribunal.[48] However, as different to the SIAC Rules, the LCIA Rules recognise the obligation of witnesses of facts, representatives and experts as the extension of the confidentiality obligation of parties as it is stated as "*The parties shall seek the same undertaking of confidentiality from all those that it involves in the arbitration*". Confidentiality is also subject to exceptions such as legal duty, protection or pursuit of legal rights and enforcement and challenge proceedings in front of court.

On the other hand, the 2021 version of the International Chamber of Commerce (hereinafter ICC) Rules was silent on the confidentiality of arbitration and only provided confidentiality regarding the work of the ICC Court.[49] In addition, similar to the SIAC Arbitration Rules, Article 22(3) recognised the tribunal's power to take measures to protect trade secrets and confidential information upon the parties' request. However, Rules did not define "confidential information" itself.[50]

Latest version, namely the 2026 version of the ICC Rules introduces new regulation on this topic. Article 12.8 states as follows:

[47] *Supra* note 5, 459.

[48] *Supra* note 4, 350, § 14.55.

[49] *Supra* note 5, 455-456.

[50] Smeureanu, *supra* note 35, 3519.

"*Arbitrators shall keep confidential all matters relating to the arbitration unless otherwise in the public domain, agreed by the parties, required by applicable law or necessary to protect a legal right or comply with disclosure obligations*".

Interestingly, 2026 ICC Rules now impose confidentiality obligation solely on the arbitrators alongside the ICC Court and Tribunal Secretariat. There is still no general confidentiality obligation imposed on the parties or third parties. According to the ICC, absence of default confidentiality mechanism is because of the "*the diversity of approaches taken by parties in ICC arbitrations, including disputes involving States, State entities or matters of public interest, where blanket confidentiality may be unsuitable*".[51] Thus, the ICC Rules leave it to the parties to establish confidentiality arrangements tailored to the specific needs of their contract or dispute.

However, it remains an interesting question whether Article 12(8) empowers arbitrators to take proactive measures to safeguard the confidentiality of the arbitration without a specific request from the parties. This appears doubtful, particularly in light of Article 23(3), under which the tribunal's power to take such measures remains contingent upon a request by the parties.

5. Law Governing the Arbitration Agreement

It is also argued that the law governing the arbitration agreement applies to the confidentiality of arbitration.[52] However, author strongly disagrees with such an approach. It is established that the mentioned law generally applies to the validity of the arbitration agreement.[53] Thus, both the substantial and the procedural confidentiality would be out of scope of the law governing the arbitration agreement.[54]

B. Determination of the Law Applicable to Procedural Confidentiality

This paper suggests that, the law of the seat should be applied to the procedural confidentiality questions.[55] It is well accepted that law of the seat serves to the function of governing the procedure of arbitration. Considering that the confidentiality of arbitration is also an element of the procedure,[56]

[51] International Chamber of Commerce, Unveiling the 2026 ICC Arbitration Rules, Part 6: Written Communications, Time Limits for Awards and Confidentiality (May 29, 2026), https://iccwbo.org/news-publications/news/unveiling-the-2026-icc-arbitration-rules-part-6-written-communications-time-limits-for-awards-and-confidentiality/ (last visited Sep. 10, 2026).

[52] *Supra* note 3, 3040.

[53] *Supra* note 5, 450.

[54] *Ibid.*

[55] *Supra* note 3, 3040; *supra* note 4, 349, § 14.53; Philipp Ritz, *Privacy and Confidentiality Obligation on Parties in Arbitration under Swiss Law*, 27 Journal of International Arbitration 221, 240 (2010).

[56] *Supra* note 2, 2; *supra* note 4, 349, § 14.53.

parties would have intended to also govern the confidentiality issues by the law of the seat. Default consideration of law of the seat will also serve to the efficiency of arbitration since it will increase the predictability and consistency. Application of the *lex arbitri* will also cover all actors of the arbitration proceedings. If any of the participants violates the confidentiality, it will result in the violation of the law.

In addition to this, procedural compliance with the law of the seat will also diminish the risk of successful challenges of the award. The reason is that Article V(1)(d) of the New York Convention indicates that the arbitration procedure shall be in compliance with the law of the seat absent the parties agreement. Another supporting reason for the application of law of the seat would be to avoid the inconsistency when the matter is of ordering interim measures by the state courts and tribunal.[57]

More specifically, it should be applied in two situations: first, to determine whether an implied duty of confidentiality exists; and second, the scope of exceptions to the implied confidentiality (even where the parties agree on the confidentiality of arbitration, the scope of the exceptions may remain uncertain). In the former case, where there is no express or implied intention on the part of the parties concerned regarding the confidentiality of arbitration, the law of the seat shall provide clarification on the recognition of the implied confidentiality in ICA. In the event that the law of the seat in question does not recognise such an obligation, the tribunal should be permitted to presume that the proceedings are not confidential. In the latter scenario, despite the existence of an agreement on the matter, the exceptions to confidentiality may still require the application of the law of the seat, particularly when the confidentiality agreement is insufficiently comprehensive in addressing these issues.

IV. Which Law Applies to the Substantive Confidentiality?

As discussed above, some institutional rules and in some jurisdictions arbitral tribunals have the power to take measures to enforce confidentiality obligations.[58] However, how shall the tribunal decide whether the information at hand is considered confidential or not?[59] This paper proceeds on the premise that confidentiality is intrinsically linked to the subject matter to which it relates, namely, the information itself. As established above, substantive confidentiality is closely connected to the performance and

[57] Darius Chan et al., *Law and Theory of International Commercial Arbitration in Singapore*, 266, § 6.32 (2022).

[58] *Supra* note 3, 3035.

[59] It can also include a case where one of the parties refuse to disclose the allegedly sensitive document in document production stage.

execution of the contract. Thus, the tribunal should apply the law governing the contract to the subjective confidentiality.[60]

Such an approach is also consistent with the commercial intent of the parties. It would be proper to expect that the parties also intended the law governing the contract to apply to the information regarding the execution of the contract. The application of the law governing the contract is also consistent with the nature of the substantive confidentiality obligations. Confidential information, such as trade secrets, technical know-how and commercial data, usually arises from the performance of the contractual relationship between the parties. The duty to protect this information usually arises from the parties' respective agreement or legal regimes protecting commercial secrets. Since this information exists independently from the arbitral procedures, law governing the contract provides the most appropriate legal framework to determine whether the information is confidential and what level of protection should be afforded to it. Applying the law governing the contract therefore preserves parties' legitimate expectation.

However, tribunal can also apply the law not chosen by the parties.[61] The law applicable to substantive confidentiality is also subject to overriding mandatory rules. Certain information may violate the public policy of a state if disclosed even to the other party. When the arbitration involves state secrets or information related to national security, confidentiality obligation regarding this type of information in arbitration shall be governed by the law under which the information is considered as secret. This national law is likely to be the law of the state, where the party (which is authorized to work with this kind of information) is incorporated and can be different from the law governing the contract. Disregarding the confidentiality regime of such highly sensitive information can cause the award to be set aside or refused to be enforced, since it can be infringing the state public policy.

Conclusion

Confidentiality is widely recognised as an important feature of international commercial arbitration. However, as demonstrated in this article, there is no uniform approach to its existence and scope. The main difficulty arises because confidentiality may relate either to the arbitral proceedings themselves or to information arising from the underlying contractual relationship. Therefore, the applicable law should be determined by first characterising the confidentiality issue as procedural or substantive.

Where confidentiality is procedural and concerns the arbitration proceedings, the law of the seat (*lex arbitri*) should generally apply. Where confidentiality is substantive and concerns information arising from the

[60] *Supra* note 3, 3041; Ritz, *supra* note 55, 227, 239.

[61] George A. Bermann, Mandatory Rules of Law in International Arbitration, *Conflict of Laws in International Commercial Arbitration* 521, 522 (2019).

performance or execution of the underlying contract, the law governing that contract should generally apply. This approach does not eliminate the relevance of parties' agreements, institutional rules or overriding mandatory rules, but provides a starting point for determining the applicable legal framework. Ultimately, rather than treating confidentiality as a single and uniform obligation, its applicable law should be determined according to the nature of the information and the legal relationship from which the confidentiality obligation arises.