

## Confidentiality and the Riddick Principle in International Commercial Arbitration

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*This paper seeks to provide a comprehensive review of the international rules of law on the obligations of confidentiality and its exceptions in international commercial arbitration, including the Riddick principle stemming from the common law jurisdiction. To this end, this article examines and analyzes developed countries' arbitration legislation including relevant case laws and the most recent leading institutional rules. Given the fact that the increasing use of discovery in international commercial arbitration and that the parties and practitioners in civil law countries are not familiar with the concept of the Riddick principle and its implied undertaking to a court, this article introduces the concept of the Riddick principle with some analysis for the recent case laws. Finally, this paper makes some suggestions to strengthen the compliance of confidentiality in international commercial arbitration by introducing new rules on confidentiality, inter alia, sanctions for breaching of the obligations of confidentiality.*

Key Words : Confidentiality, Discovery, Riddick Principle, International Commercial Arbitration

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## I . Introduction

Historically, the confidentiality of arbitral proceedings as well as arbitral awards has been considered to be one of the important merits of international arbitration,<sup>1)</sup> which also has been deemed to be fully confidential.<sup>2)</sup>

It was merely in the 1990s that the assumption was questioned, in *Esso v. Plowman n*<sup>3)</sup>, which the High Court of Australia had rejected the thought that arbitration is inherently confidential *per se*.<sup>4)</sup> Furthermore, as the increasing number of arbitration cases in which States are involved are increasing, there has recently been an inclination towards publicity, not only in international treaty-based investment arbitrations but also in international commercial arbitrations.<sup>5)</sup> In addition, as the economy and arbitration becomes globalized, the increasing demand for transparency is also beginning to undermine the untouchable principle of confidentiality in international commercial arbitration.<sup>6)</sup> The parties to an arbitration are likely to face confidentiality issues at two different stages: when submitting evidence to establish their case and when being requested or ordered to produce evidence by the other party or the the tribunal by its own discretion.<sup>7)</sup>

As regards confidentiality in relation to documents in arbitration proceedings, it is said that there are three types of documents<sup>8)</sup>, which are i ) inherently confidential

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- 1) Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter (2009), *Redfern and Hunter on International Arbitration*, 5<sup>th</sup> Ed., Oxford and New York: Oxford University Press, para. 2.145
  - 2) Stefano Azzali (2012), "Confidentiality vs. Transparency in Commercial Arbitration: A False Contradiction to Overcome", available at <https://blogs.law.nyu.edu/transnational/2012/12/confidentiality-vs-transparency-in-commercial-arbitration-a-false/> (accessed July 25, 2021).
  - 3) *Esso Australia Resources Limited v. The Honourable Sidney James Plowman and others* (1995) 193 CLR 10, High Court of Australia (holding that a requirement to conduct arbitral proceedings *in camera* does not mean that an obligation prohibiting disclosure of documents and information produced in, and used for the purpose of, the arbitration.)
  - 4) Ahn, Keon-Hyung (2019), "Main Issues and Implications of ICC's 2019 Updated Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration: A Focus on ICC's Policy on the Publication of Information Regarding Arbitral Tribunals and Awards", *Journal of Arbitration Studies*, Vol. 31, No. 3, p. 66.
  - 5) Bernardo M. Cremades and Rodrigo Cortés (2013), "The Principle of Confidentiality in Arbitration: A Necessary Crisis", *Journal of Arbitration Studies*, Vol. 23, No. 3, p. 25.
  - 6) *Id.*, p. 27.
  - 7) Domitille Baizeau and Juliette Richard (2016), "Addressing the Issue of Confidentiality in Arbitration Proceedings: How is This Done in Practice?", Edited by Elliott Geisinger in *Confidential and Restricted Access Information in International Arbitration*, ASA Special Series No. 43, p. 54.

documents, ii) documents disclosed by parties for the sake of arbitration whether voluntarily or in accordance with arbitral tribunal's order, and iii) the arbitral award.<sup>9)</sup> In this regard, it is worth noting that there is a doctrine, so-called "the Riddick Principle originated from common law jurisdiction, which means documents disclosed by the parties shall be protected and the disclosure is prohibited without the permission of the other party or the tribunal in litigation.<sup>10)</sup>

Then, a question is followed whether and to what extent that any document disclosed by the parties during the arbitral proceedings should be kept confidential.

Under these circumstances, this paper i) examines how the obligation of confidentiality is dealt with by the national legislations and arbitration institutions worldwide, ii) analyzes the feature of the Riddick principle reflected in some case laws, and iii) suggests recommendations for the Korean arbitration community.

## II. Confidentiality Duties in Developed Countries' Legislation

### 1. United Kingdom

The English Arbitration Act 1996 does not contain a provision imposing confidentiality obligation on the parties or the tribunal in the arbitral proceedings in which they are involved. Accordingly, we need to refer to cases laws to know a general principle of confidentiality in arbitration. The starting point for an analysis of the UK's position on confidentiality is the decisions of *Dolling-Baker v. Merrett*<sup>11)</sup> and other subsequent decisions including *Hassneh Insurance Co of Israel v. Stuart J. Mew*<sup>12)</sup>, *Ali Shipping Corp. v. Shipyard Trogir*<sup>13)</sup>, *Associated Electric and Gas Insurance*

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8) It includes pleadings, submissions, transcripts or witness statements (factual or expert), or arbitral awards etc.

9) Michael Hwang S.C. and Katie Chung (2009), "Defining the Indefinable: Practical Problems of Confidentiality in Arbitration", *Journal of International Arbitration*, Vol. 26, No. 5, p. 611.

10) *Id.*

11) *Dolling-Baker v. Merrett*, [1990] 1 W.L.R. 1205 (C.A.).

12) *Hassneh Insurance Co. of Israel v. Stuart J. Mew*, [1993] 2 Lloyd's Rep. 243 (Q.B. (Comm. Ct.)).

13) *Ali Shipping Corp. v. Shipyard Trogir*, [1999] 1 W.L.R. 314 (C.A.).

*Services Ltd. (AEGIS) v. European Reinsurance Co. of Zurich*<sup>14)</sup>, *Emmott v. Michael Wilson & Partners*<sup>15)</sup> were followed.<sup>16)</sup> These decisions has recognized to provide some protection for the confidentiality of documents produced in the arbitral proceedings not otherwise in the public domain.<sup>17)</sup> In *Dolling-Baker v. Merrett*, Parker L.J., has admitted the existence of an implied duty of confidentiality in commercial arbitration:

*“As between parties to an arbitration, although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must, in my judgment, be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and indeed not to disclose in any other way what evidence had been given by any witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court. That qualification is necessary, just as it is in the case of the implied obligation of secrecy between banker and customer.”*<sup>18)</sup>

In *Hassneh Insurance Co. of Israel v. Stuart J. Mew*, Colman, J. also recognized an implied duty of confidentiality as if the privacy of the arbitral hearing should be deemed to be naturally extended in commercial arbitration,<sup>19)</sup> and hold 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. The most obvious example is a note or transcript of the evidence. The*

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14) *Associated Electric and Gas Insurance Services Ltd. (AEGIS) v. European Reinsurance Co. of Zurich*, [2003] 1 W.L.R. 1041 (P.C.).

15) *Emmott v. Michael Wilson & Partners*, [2008] EWCA (Civ) 184 (C.A.).

16) Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter (2009), *op. cit.*, para. 2.149; Michael Hwang S.C. and Katie Chung (2009), *op. cit.*, p. 611.

17) Michael Hwang S.C. and Katie Chung (2009), *op. cit.*, p. 611.

18) *Dolling-Baker v. Merrett*, [1990] 1 W.L.R. 1205 (C.A.), at 17.

19) Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter (2009), *op. cit.*, para. 2.149.

*disclosure to a third party of such documents would be almost equivalent to opening the door of the arbitration room to that third party. Similarly witness statements, being so closely related to the hearing, must be within the obligation of confidentiality. So also must outline submissions tendered to the arbitrator. If outline submissions, then so must pleadings be included.*"<sup>20)</sup>

While other subsequent decisions such as *Ali Shipping Corp.*<sup>21)</sup>, *AEGIS*<sup>22)</sup> and *Emmott*<sup>23)</sup> also re-acknowledged the traditional position of the implied duty of confidentiality, the courts admitted that arbitration-related documents may be disclosed as an exception to the obligation of confidentiality i) where there is a public interest, ii) where the dispute is brought to a domestic court, iii) where there is a consent between the disputed parties, iv) where there would be an order or a leave of court as an exception to the confidentiality obligation,<sup>24)</sup> v) where disclosure is necessary for legitimate interests of a party to the arbitration,<sup>25)</sup> vi) where the interest of justice or the public interest require it,<sup>26)</sup> and (vii) where corporations have an obligation of

20) *Hassneh Insurance Co. of Israel v. Steuart J. Mew*, [1993] 2 Lloyd's Rep. 243 (Q.B. (Comm. Ct.)), at 247; Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter (2009), *op. cit.*, para. 2,149.

21) *Ali Shipping Corp. v. Shipyard Trogir*, [1999] 1 W.L.R. 314 (C.A.).

22) *Associated Electric and Gas Insurance Services Ltd. (AEGIS) v. European Reinsurance Co. of Zurich*, [2003] 1 W.L.R. 1041 (P.C.).

23) *Emmott v. Michael Wilson & Partners*, [2008] EWCA (Civ) 184 (C.A.), at paras. 105-107 ("case law over the last 20 years has established that there is an obligation, implied by law and arising out of the nature of arbitration, on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the awards, and not to disclose in any other way what limited to commercially confidential information in the traditional sense [...] The content of the obligation may depend on the context in which it arises and on the nature of the information or documents at issue."); Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter (2009), *op. cit.*, para. 2,151.

24) *Ali Shipping Corp. v. Shipyard Trogir*, [1999] 1 W.L.R. 314 (C.A.), at 327; *Emmott v. Michael Wilson & Partners*, [2008] EWCA (Civ) 184 (C.A.), para. 107.

25) *Ali Shipping Corp. v. Shipyard Trogir*, [1999] 1 W.L.R. 314 (C.A.) (Potter, L.J. stated "disclosure when, and to the extent to which, it is reasonably necessary for the protection of the legitimate interests of an arbitrating party. In this context, that means reasonably necessary for the establishment of an arbitrating party's legal rights vis-à-vis a third party in order to found a cause of action against that third party or to defend a claim, or counterclaim, brought by the third party.")

26) *Emmott v. Michael Wilson & Partners*, [2008] EWCA (Civ) 184 (C.A.), at para. 132 (Collins, L.J. hold that "where it is reasonably necessary for the protection of the legitimate interests of an

disclosure to their stakeholders<sup>27)</sup> and so on.<sup>28)</sup>

In conclusion, it can be said that there are three rules, which are i) Arbitral proceedings should be held *in camera*, ii) an implied duty of confidentiality should be applied in every arbitration, and iii) there are exceptions to the obligation of confidentiality such as court order, parties' consent, public interest and reasonable necessity from English case laws on confidentiality.<sup>29)</sup>

## 2. Hong Kong

A new Arbitration Ordinance (Cap. 609) (hereinafter 'the Ordinance') unifying the separate regimes of domestic and international arbitrations entered into force in June 2011. With regard to confidentiality, there were some noteworthy changes in this amendment, *inter alia*, the Ordinance enhanced the obligation of confidentiality in international arbitration, stipulating that i) court proceedings in relation to arbitration are not to be heard in open court in principle,<sup>30)</sup> ii) disclosure, publication or communication of any information or documents regarding arbitral proceedings including awards are prohibited unless both parties otherwise agree or under any other exceptions exist in the Ordinance<sup>31)</sup>.<sup>32)</sup>

## 3. Singapore

The Singapore International Arbitration Act (Cap. 143A) (hereinafter 'IAA') shows a remarkable similarity to the Hong Kong Arbitration Ordinance regarding the confidentiality issues, by providing i) proceedings are generally used to be heard

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*arbitrating party.*"

27) For example, corporations may be forced to report their annual accounts including potentially confidential information to their shareholders or any regulatory authority; Stegano Azzali, *op. cit.*

28) Michael Hwang S.C. and Katie Chung (2009), *op. cit.*, pp. 617-626.

29) Mayank Samuel (2017), "Confidentiality in International Commercial Arbitration: Bedrock or Window-Dressing?", Kluwer Arbitration Blog, *available at* <http://arbitrationblog.kluwerarbitration.com/2017/02/21/confidentiality-international-commercial-arbitration-bedrock-window-dressing/> (accessed July 25, 2021).

30) Section 16 of the Hong Kong Arbitration Ordinance (Cap. 609).

31) Section 18 of the Hong Kong Arbitration Ordinance (Cap. 609).

32) Hong Kong Department of Justice's website, *available at* [https://www.doj.gov.hk/en/legal\\_dispute/arbitration.html](https://www.doj.gov.hk/en/legal_dispute/arbitration.html) (accessed July 26, 2021).

otherwise in open court (Section 22), and ii) restrictions on reporting of court proceedings to be heard otherwise in open court (Section 23)<sup>33</sup>). Unlike Hong Kong, however, the Singapore IIA does not seem to require the parties of the arbitral tribunal to keep confidentiality in arbitral proceedings while the Section 18 of the Hong Kong Arbitration Ordinance provides to do so.

#### 4. New Zealand

As regards confidentiality obligation in arbitration, it is regarded that the New Zealand Arbitration Act 1996 (hereinafter ‘the Act’)<sup>34</sup>) has the most comprehensive provisions including exceptions to the obligation of confidentiality.

The Act provides that arbitral proceeding, in principle, must be conducted *in camera* (Art. 14A) and arbitration agreements are considered to prohibit disclosure of confidential information (Art. 14B). What’s the most notable provision of the Act, the author considers, is that Article 14C stipulates specific limits on prevention on disclosure of confidential information. Pursuant to this Article, a party or a tribunal may disclose confidential information to its professional or other advisers of the parties concerned(Art. 14C(a)). Furthermore, Article 14C(b) specifically set forth the situations where a party or a tribunal can disclose confidential information as follows:

“(b) if both of the following matters apply:

(i) the disclosure is necessary—

(A) to ensure that a party has a full opportunity to present the party’s case, as required under Article 18 of Schedule 1 [Model Law];<sup>35</sup>) or

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33) Section 23 of the Singapore IIA (Cap. 143A): “Restrictions on reporting of proceedings heard otherwise than in open court  
[...]

(3) A court shall not give a direction under subsection (2) permitting information to be published unless —

(a) all parties to the proceedings agree that such information may be published; or

(b) the court is satisfied that the information, if published in accordance with such directions as it may give, would not reveal any matter, including the identity of any party to the proceedings, that any party to the proceedings reasonably wishes to remain confidential.  
[...]

34) The Act was revised and entered into force from 18 October 2007.

35) Art. 18 of Schedule 1 to the New Zealand Arbitration Act 1996: “The parties shall be treated with

- (B) for the establishment or protection of a party's legal rights in relation to a third party; or
  - (C) for the making and prosecution of an application to a court under this Act; and
- (ii) the disclosure is no more than what is reasonably required to serve any of the purposes referred to in subparagraph (i)(A) to (C); or [Emphasis added]"

The Act also provides that the tribunal may permit disclosure of confidential information in certain situations, *inter alia*, "the arbitral tribunal, after giving each of the parties an opportunity to be heard, may make or refuse to make an order allowing all or any of the parties to disclose confidential information." [Emphasis added].<sup>36)</sup>

In the cases where arbitral proceedings are terminated or an party to the arbitration lodges an appeal, the Act designates the High Court as a competent jurisdiction to hear and decide this matter (Art. 14E), and the proceedings must be taken place in public except in certain situations (Art. 14F). The Act also provides what an applicant must include in the application (e.g. nature and reasons etc.) to seek for an order to conduct court proceedings *in camera* (Art. 14G).

In addition, Art. 14H specifically stipulates 5 criteria which the court must take into consideration to determine for an order seeking court proceedings in private, which are "(a) the open justice principle, (b) the privacy and confidentiality of arbitral proceedings, (c) any other public interest considerations, (d) the terms of any arbitration agreement between the parties to the proceedings, and (e) the reasons stated by the applicant under section 14G(b)" of the Act (Art. 14H).

Finally, the Act sets forth the effect of order to carry out court proceedings in camera (Art. 14I(1)) and the period in force for the order to conduct court proceedings in private (Art. 14I(2)).

In conclusion, it seems that the New Zealand Arbitration Act 1996 is the most comprehensive and detailed codification containing provisions on the obligation of confidentiality in international commercial arbitration, but it would be still desirable to

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equality and each party shall be given a full opportunity of presenting his case." This article is exactly same as that of the Art. 18 of the UNCITRAL Model Law 2006.

36) Article 14D(2) of the New Zealand Arbitration Act 1996 (revised and came into force on 18 October 2007).



provide a room for the arbitral tribunal or the prospective competent court to decide the matters in relation to the confidential obligation and its exceptions.

## 5. France

On 1 May 2011, the French Civil Procedure Code containing domestic and international arbitration decrees was revised and entered into force. It was evaluated that the revised code has introduced a number of innovative provisions. Among others, it was amended that the confidentiality obligation does not automatically applied to international arbitration unlike domestic arbitration. Pursuant to Article 1464(3) of the Code, it is provided that “[...] Subject to legal requirements, and unless otherwise agreed by the parties, arbitral proceedings shall be confidential.” while Article 1506 provides “Unless the parties have agreed otherwise, and subject to the provisions of the present Title, the following Articles shall apply to international arbitration: [...] (3) 1462, 1463 (paragraph 2), *1464 (paragraph 3)*, 1465 through 1470 and 1472 regarding arbitral proceedings [...]” *[emphasis added]*. It is said that the reason to remove confidentiality obligation in international arbitration was that France should offer a proper environment for international investment arbitrations.<sup>37)</sup>

## 6. Republic of Korea

The Korean Arbitration Act 2016 does not contain any provision on confidentiality at all. However, in a case concerning an ICSID arbitration case in which the Korean government was involved, a non-governmental organization made an application for disclosure of information against a Korean government authority relating to the ICSID case, citing the relevant provisions of the Official Information Disclosure Act<sup>38)</sup> and the Framework Act on National Taxes<sup>39)</sup>.

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37) Emmanuel Gaillard (1987), “Le principe de confidentialité de l’arbitrage commercial international”, Dalloz, Chron. 153; Jean-Pierre Harb, Christophe Lobier, “New Arbitration Law in France: The Decree of January 13, 2011,” *Mealey’s Int’l Arb. Rep.*, vol. 26, #3 March 2011, p. 3.

38) The Official Information Disclosure Act [Enforcement Date 26. Jul, 2017.] [Act No.14839, 26 July 2017, Amendment by Other Act], Art. 9.1, subparagraph 1, 2, 4, 7.

39) Framework Act on National Taxes [Enforcement Date 01. Jan, 2018.] [Act No.15220, 19 December 2017, Partial Amendment] Art. 81-13(1).

Firstly, with regard to Art. 9(1)(4) of the Official Information Disclosure Act providing “*All information kept and managed by public institutions shall be subject to disclosure to the public: Provided, that any of the following information may not be disclosed: Information pertaining to a trial in progress [...] [Emphasis added]*”, the court suggested that the purpose of prohibiting the disclosure of any information regarding a trial in progress is to secure a fair and smooth trial. More specifically, any disclosure of any information relating to a trial in progress may i) cause a fatal damage to the personal and property interests of the parties to the trial, and ii) cause problems in the independence and reliability of the trial, if the records of the trial are disclosed and a third party would discuss it before the judgment is made. Further, the parties to the trial would not submit evidence for fear that it could be disclosed to a third party, however, the court held that the scope of information regarding a trial in progress must be confined to information only about the trial itself and to information which can affect the ongoing court hearing or the outcome of the trial if the information is disclosed, and not to be disclosed all the information of the trial in progress.<sup>40)</sup>

Furthermore, the court held that the arbitration proceedings should be conducted in private unless otherwise provided for, and the parties to the arbitration, in principle, has the obligation of confidentiality about information relating to the arbitration. It also held that the arbitral proceedings cannot be considered to be in public like court proceedings, and it further ruled that the plaintiff failed to provide its allegation that the disclosure about any proceedings or information about the arbitration became an international practice.<sup>41)</sup>

## 7. Other Legislations

In case of the United States, both the Federal Arbitration Act (‘FAA’) and the Uniform Arbitration Act (‘UAA’) do not require the parties and the tribunal to keep confidential in the arbitral proceedings. The U.S. Courts, however, have rejected the thought that an implied duty of confidentiality exists if there would be no express confidentiality agreement in *United States v. Panhandle Eastern Corporation*<sup>42)</sup> and *Contship*

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40) The Administrative Court of Korea Decision No 2016GuHap50143 rendered on 27 October 2016, at 7-8.

41) *Id.*, at 8.

*Containerlines v. PPG Industries Inc*<sup>43)</sup>, which are the leading precedents on confidentiality in arbitration in the U.S.<sup>44)</sup>

The Swedish Supreme Court held that the arbitral award could be published by a party if there would be no agreement for confidentiality.<sup>45)</sup>

## 8. Sub-conclusion

As discussed above, most arbitration laws in many jurisdictions are silent or lack detail in addressing the obligation of confidentiality and its exceptions in international commercial arbitration. Furthermore, there is no uniform law or international convention to a rule on those matters.

While the English courts recognized an implied duty of confidentiality in arbitration, other jurisdictions such as the US and Australia expressly rejected any implied confidentiality<sup>46)</sup> and France is also considered to deny an implied confidentiality.<sup>47)</sup> To be more specific, New Zealand and Hong Kong provide statutory confidentiality protection and privacy in court proceedings over the arbitral awards. England and Singapore provide for an implied confidentiality in arbitral proceedings.<sup>48)</sup> On the other hand, the US, Sweden and Korea do not impose any legal obligation of confidentiality in arbitral proceedings.<sup>49)</sup>

Accordingly, the parties are required i) to choose applicable arbitration rules

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42) *United States v. Panhandle Eastern Corp.*, 681 F. Supp. 229 (D. Del. 1988).

43) *Contship Containerlines v. PPG Industries, Inc.*, No. 00 Civ. 0194 RCCH BP, 2003 WL 1948807 (S.D.N.Y. Apr. 23, 2003).

44) Avinash Poorooye and Ronán Feehily (2017), "Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balancing", *Harvard Negotiation Law Review*, Vol. 22:275, p. 294; Christoph Henkel (2012), *The Work-Product Doctrine as a Means toward a Judicially Enforceable Duty of Confidentiality in International Commercial Arbitration*, 37 *N.C. J. OF INT'L L.* pp. 1084-1085.

45) See Swedish Supreme Court, 27 October 2000, *Bulgarian Foreign Trade Bank Ltd. v. AI Trade Finance Inc*, 51(11) Mealey's IAR, B 1; Julien D M Lew QC, Loukas A Mistelis and Stefan Kröll (2003), *Comparative International Commercial Arbitration*, The Hague/London/New York: Kluwer Law International, p. 177, 283.

46) Mayank Samuel (2017), *op. cit.*

47) *Nafimco v Foster Wheeler Trading Company AG*, Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., Jan. 22, 2004; Poorooye and Feehily (2017), *op. cit.*, p. 292.

48) Mayank Samuel (2017), *op. cit.*

49) *Id.*

providing a set of confidentiality rules, or ii) to include a confidentiality clause in their commercial transaction contracts or, iii) to conclude a separate confidentiality agreement in cases where maintaining confidentiality is particularly essential.

### III. Confidentiality Duties in Major Institutional Arbitration Rules

#### 1. Introduction

While most of arbitration laws in major jurisdictions are silent on confidentiality, most of major institutional arbitration rules provide some protection of confidentiality. In this regards, Hwang and Ling (2005)<sup>50</sup> divided into types of protected confidentiality as six ones as follows:

- “(a) whether the rules provided for general confidentiality;*
- (b) whether the rules provided for non-disclosure of existence of arbitration;*
- (c) whether the rules provided for confidentiality to extend to documents used or generated in the arbitration;*
- (d) whether the tribunal was bound by confidentiality;*
- (e) whether witnesses were bound by confidentiality; and*
- (f) whether confidentiality extended to the award.”<sup>51</sup> [Emphasis added]*

As regards documents used or generated in the arbitration, the serious problem of confidentiality particularly occurs in cases where any party or participant does not wish to disclose certain document, but the other party wants to make a disclosure or actually discloses the document, whether voluntarily or involuntarily. The key issue here is whether the disclosure may constitute of a cause of action.<sup>52</sup>

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50) Michael Hwang S.C. and Lee May Ling (2005), “Confidentiality in Arbitration: The Criteria Adopted by Institutions”, *Singapore Institute of Arbitrators Newsletter*, No. 2, pp. 3-7.

51) Michael Hwang and Katie Chung (2009), *op. cit.*, p. 637.

52) Robert Wachter, Grace Yoon and Han Ah Lee (2021), “Confidentiality in International IP Arbitration”, available at <https://www.iam-media.com/confidentiality-in-international-ip-arbitration> (accessed July

Accordingly, if a party wishes the arbitral proceedings to be kept confidential, in particular, regarding documents used or produced in the arbitration, then the party is required to choose one of the above-mentioned options, among others, by selecting an institutional arbitration rules containing relevant provisions to the rule on the obligation of confidentiality.

Under these circumstances, this paper makes a brief examination of some major institutional arbitration rules to review common features and differences in confidentiality, in particular, focusing on documents used or produced in the arbitration.

## 2. International Chamber of Commerce (ICC)

The 2021 revised ICC Arbitration Rules only provides a minimum of rules on the obligation of confidentiality without providing further details. The ICC delegates to the arbitral tribunal to make orders regarding the confidentiality of the arbitration proceedings or of any other matters in relation to the arbitration and to take measures for protecting trade secrets and confidential information.<sup>53)</sup>

In addition, the ICC expressly impose the obligation of confidentiality on members of the Court, not to a party or the arbitral tribunal.<sup>54)</sup> In this regard, as discussed above, it is noteworthy to mention that the 2011 Revised French International Arbitration Act removed the obligation of confidentiality unlike its Domestic Arbitration Act.

## 3. American Arbitration Association – International Center for Dispute Resolution (ICDR)

The 2021 revised ICDR International Arbitration Rules prohibit arbitrator(s) or staff of the ICDR Secretariat to disclose any confidential information in the course of arbitration by the parties or by witnesses. Furthermore, arbitrator(s) or staff of the ICDR

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27, 2021).

53) ICC Arbitration Rules, Art. 22(3).

54) ICC Arbitration Rules, Appendix I - Statutes of the International Court of Arbitration, Art. 8, Appendix II - Internal Rules of the International Court of Arbitration, Art. 1.

Secretariat are required to maintain confidentiality on all matters regarding the arbitration or award, as exceptions to the obligation of confidentiality, unless otherwise agreed between the parties or by applicable law.<sup>55)</sup>

The ICDR also defers the arbitral tribunal to make orders regarding the confidentiality of the arbitration or any matters in relation to the arbitration and take measures for protecting trade secrets and confidential information,<sup>56)</sup> like the ICC Rules provided in Art. 22(3).

#### 4. LCIA

Unlike the ICC and the ICDR, the 2020 Revised LCIA Arbitration Rules provides a substantially comprehensive and powerful protection for the obligation of confidentiality. The LCIA Rules, as a general principle, requires the parties to maintain confidentiality on all arbitral awards as well as all materials in the arbitration which were created for the purpose of the arbitration and other documents produced by another party in the arbitral proceedings not otherwise in the public domain.<sup>57)</sup>

As exceptions to this general principle of the confidentiality, those materials or documents may be disclosed by a party i) by legal duty, ii) to protect or seek a legal right, or iii) to enforce or challenge an award in legal proceedings before a national court or other regulatory authority. In addition, the Rules also provides the parties shall seek the same undertaking of confidentiality from all other participants to the arbitration, such as any authorized representative, witness of fact, expert or service providers,<sup>58)</sup> and the duty of confidentiality also shall extend to the arbitral tribunal, any tribunal secretary and any expert to the arbitration tribunal, with necessary changes.<sup>59)</sup>

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55) ICDR Arbitration Rules, Art. 40(1); The ICDR Rules also does not impose legal duty of confidentiality on parties or other participants like the ICC.

56) ICDR Arbitration Rules, Art. 40(2).

57) LCIA Arbitration Rules, Art. 30(1).

58) *Id.*

59) *Id.*, Art. 30(2).

## 5. Singapore International Arbitration Centre (SIAC)

The 2016 revised SIAC Arbitration Rules also provide for considerably comprehensive provisions in relation to the duty of confidentiality protections and its exceptions in its Rules. The SIAC Rules provides that all meetings and hearings shall be *in camera*, and any recordings, transcripts, or documents used regarding the arbitral proceedings shall remain confidential unless otherwise agreed by the parties.<sup>60)</sup>

The SIAC Rules impose the confidentiality duty to all the participants including the parties, any arbitrator, Emergency Arbitrator, any person appointed by the arbitral tribunal including any administrative secretary and any expert on all matters in relation to the proceedings and the Awards. The obligation of confidentiality extends to discussions and deliberation of the arbitral tribunal.<sup>61)</sup>

The SIAC Rules also admits exceptions to the obligation duties by stating that all the parties and participants to the arbitration may disclose matters regarding the proceedings and awards to a third party only with the prior written consent of the parties, except in cases where provided in Rule 39.2 of its Rules.<sup>62)</sup>

In addition, the SIAC Rules clarified “matters relating to the proceedings” in Rule 39.1 as the existence of arbitration itself, and the pleadings, evidence and other materials in the proceedings and all other documents produced by another party in the arbitral proceedings or all kinds of the Award issued from the proceedings, but expressly exclude any matter that is otherwise in the public domain.<sup>63)</sup>

The most unique feature relating to confidentiality of the SIAC Rules provides the tribunal with the power to take appropriate measures, including rendering an order or Award for sanctions or costs in cases where a party breaches this rule.<sup>64)</sup> In this

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<sup>60)</sup> SIAC Arbitration Rules, Rule 24.4.

<sup>61)</sup> *Id.*, Rule 39.1.

<sup>62)</sup> Those exceptional cases include “a. for the purpose of making an application to any competent court of any State to enforce or challenge the Award; b. pursuant to the order of or a subpoena issued by a court of competent jurisdiction; c. for the purpose of pursuing or enforcing a legal right or claim; d. in compliance with the provisions of the laws of any State which are binding on the party making the disclosure or the request or requirement of any regulatory body or other authority; e. pursuant to an order by the Tribunal on application by a party with proper notice to the other parties; or f. for the purpose of any application under Rule 7 or Rule 8 of these Rules.”

<sup>63)</sup> SIAC Arbitration Rules, Rule 39.3.

<sup>64)</sup> SIAC Arbitration Rules, Rule 39.4.

regard, it is quite curious whether this rule was effective enough to curb sanctions breaking and how often this rule was invoked. It was reported that the SIAC is scheduled to release a new version of its Rules in late 2021, dealing with this unique matter regarding a party's breach of confidentiality duties and the tribunal's power to impose sanctions or costs.<sup>65)</sup>

## 6. Hong Kong International Arbitration Centre (HKIAC)

Alining with Section 18 of the Hong Kong Ordinance, the 2018 revised HKIAC Administered Arbitration Rules ('the AA Rules') expressly provides that any information in relation to the arbitration arising from the arbitration agreement and an Award under the arbitration is confidential.<sup>66)</sup>

The AA Rules also defer the confidentiality duties to the tribunal including any emergency arbitrator, expert, witness, tribunal secretary and the HKIAC.<sup>67)</sup>

As the exceptions to the confidentiality rule, the AA Rules stipulates that any party may, publish, disclose or communicate information regarding the arbitration in the arbitration agreement and an Award in situations provided in Art. 45.3 of its AA Rules.<sup>68)</sup> In this regard, unique to the AA Rules is the express inclusion of exceptions to disclose by a party or party representative to a person with a view to having, or seeking, third party funding of arbitration.

## 7. Korean Commercial Arbitration Board (KCAB)

The KCAB International Arbitration Rules (hereinafter 'the KCAB Rules') briefly

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65) Wachter, Yoon and Lee (2021), *op. cit.*

66) HKIAC Administered Arbitration Rules, Art. 45.1.

67) *Id.*, Art. 45.2.

68) These situations include "(a) (i) to protect or pursue a legal right or interest of the party; or (ii) to enforce or challenge the award or Emergency Decision referred to in Article 45.1; in legal proceedings before a court or other authority; or (b) to any government body, regulatory body, court or tribunal where the party is obliged by law to make the publication, disclosure or communication; or (c) to a professional or any other adviser of any of the parties, including any actual or potential witness or expert; or (d) to any party or additional party and any confirmed or appointed arbitrator for the purposes of Articles 27, 28, 29 or 30; or (e) to a person for the purposes of having, or seeking, third party funding of arbitration."



declares that arbitral proceedings and records thereof shall be *in camera*.<sup>69)</sup> It further stipulates that the confidential duties extend to all the participants such as the parties, and their representatives and assistants, the tribunal including emergency arbitrators on the matters relating to the arbitration or information learned through the arbitral proceedings, except only three situations where i ) there is consent of the parties, ii ) it is required by law, or iii) it is required in court proceedings.<sup>70)</sup>

## 8. Sub-conclusion

The results of reviewing the contents of provisions on the confidentiality of the 6 institutional Arbitration Rules are as follows:

First, all of the 6 Arbitration Rules affirm the general principle that any information relating to the arbitral proceedings as well as an Award should be kept in confidential. But the some institutions including the ICC do not provide any detailed provisions on the scope of any legally binding confidentiality duties, particularly as to documents used or produced under the arbitration, and thus appear to defer a power to order for confidentiality to the tribunal.

Second, the obligation of confidentiality generally applies to the key players in the arbitration such as the parties and the tribunal, and mostly extends to other participants including any party's representatives, emergency arbitrator, witness of fact, expert, arbitral institution and its secretariat, and tribunal secretary. However, the ICC Rules impose the confidentiality duties only to the members of the Court, and in case of ICDR International Rules, only to arbitrator(s) and the arbitral institution.

Third, as regards exceptions to confidentiality protections, most of the Rules recognize exceptions to the confidentiality where disclosure is, *inter alia*, i ) consented by the parties, ii ) required by statute, and iii) required in legal proceedings before any national court or regulatory authority, for example, in order to enforce or challenge any Award, or to protect or pursue a legal right. Furthermore, other additional situations are provided as exceptions to confidentiality protection, for example, i ) in case of any application relating to consolidation or joinder under the arbitration,<sup>71)</sup> or

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69) KCAB International Arbitration Rules, Art. 57(1).

70) *Id.*, Art. 57(2).

71) SIAC Arbitration Rules, Section 39.2(e).

ii) for the purposes of having, or seeking third party funding of arbitration.<sup>72)</sup>

Fourth, most of the Rules do not provide any legal remedy for any breach of confidentiality duties except the SIAC Rules. Section 39.4 of its Rules provides the tribunal to render an order or Award for sanctions or costs in cases where a party breaches its confidentiality duties.<sup>73)</sup>

## IV. Overview of the Riddick Principle

### 1. Introduction

Most of leading arbitration legislations<sup>74)</sup> and institutional rules<sup>75)</sup> almost universally allow arbitral tribunals to order the parties to the arbitration to make disclosure of materials and documents as part of the evidence-taking procedures.<sup>76)</sup>

Document production is one of the most significant and controversial topics in international commercial arbitration. While common law practitioners consider the document production as an integral part of the arbitral process, civil law practitioners see it as merely a waste of time and money.<sup>77)</sup>

In civil law jurisdiction, judges examine the facts with the help and cooperation of the parties and the parties only submit documents they want to rely on, not documents that may be detrimental to their case.<sup>78)</sup>

On the contrary, the discovery of documents requires that a party to the arbitration

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72) HKIAC Arbitration Rules, Art. 45.3(e).

73) Wachter, Yoon and Lee (2021), *op. cit.*

74) UNCITRAL Model Law, Art. 19(2); Swiss Law on Private International Law, Arts. 182-184; German ZPO, §1042; US FAA, 9 U.S.C. §7; English Arbitration Act 1996, §34(2)(a)

75) Some Rules provides the tribunal's express authority to order discovery or disclosure by the parties, for example in Art. 22(1) of the LCIA Rules, whereas other leading arbitration Rules implicitly authorizes the tribunal to order discovery or disclosure, like in Art. 25(1) and 25(4) of the ICC Rules and Art. 22(5) of the ICDR International Rules.

76) Gary Born (2009), *International Commercial Arbitration*, The Netherlands: Kluwer Law International, p. 1892.

77) Pelin Baysal, Bilge Kağan Çevik (2018), "Document Production in International Arbitration: The Good or the Evil?", Kluwer Arbitration Blog, *available at* <http://arbitrationblog.kluwerarbitration.com/2018/12/09/document-production-in-international-arbitration-the-good-or-the-evil/> (accessed July 28, 2021).

78) *Id.*

must produce documents in favor of itself, but also documents against it in common law jurisdiction.<sup>79)</sup>

Therefore, the task of international commercial arbitration is to meet both expectations that documents should be disclosed at a reasonable cost and burden when their disclosure is critical to the outcome of the case.

Under these circumstances, this paper examines the Riddick principle in the discovery of documents in international commercial arbitration.

## 2. The Riddick Principle and Case Laws

### 1) Concept of the Riddick Principle

The Riddick Principle derives from the UK's case law, *Riddick v. Thames Board Mills Ltd.*<sup>80)</sup> According to the Riddick principle, when one party to a litigation is successful in obtaining the discovery of document, the party owes an implied undertaking not to use the submitted documents other than in the litigation, and not for a collateral or ulterior purpose.<sup>81)</sup>

The rationale of the Riddick principle is that the public interest require full and complete disclosure for justice. However, production of documents by court order can be considered as an invasion of privacy. This principle strikes a balance interests between doing justice and protecting a privacy. The court may also release the Riddick undertaking for cogent and persuasive reasons.<sup>82)</sup>

### 2) Case Laws on the Riddick Principle

As regards the Riddick principle, a question can arise whether the principle continues to apply after the documents has been used in an open court proceedings, or whether any party to the dispute may subsequently use the document for other

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79) *Id.*

80) *Riddick v. Thames Board Mills Ltd* [1977] QB 881.

81) Lee shih and Nicole Phung (2020), "Case Update: Singapore Court of Appeal Rules on the Riddick Undertaking for Disclosed Documents", *available at* <https://themalaysianlawyer.com/2020/10/12/case-update-singapore-court-of-appeal-rules-on-the-riddick-undertaking-for-disclosed-documents/> (accessed July 29, 2021).

82) *Id.*

purposes. This issue was reviewed for the first time by the Singapore High Court in the case of *Foo Jong Long Dennis v Ang Yee Lim and another*<sup>83)</sup>.<sup>84)</sup> The Singapore High Court has ruled that the Riddick principle did not apply any longer once the document has been used in open court. However, the party disclosing the document or the party in possession of the document may apply to the court to ensure that the implied undertakings continues. In this regard, it is important to note that such application must be made before the document is used in the open court hearing in order to prevent the party in possession of the document from using of such documents for any collateral or ulterior purpose.<sup>85)</sup>

Another question in relation to the Riddick principle is what if the plaintiff finds any clue from the documents suggesting the defendant's serious criminal activity? Could the plaintiff provide these documents or the information therein to any regulatory authorities so that the authorities can conduct an investigation into a potential crime?<sup>86)</sup> Furthermore, it is in doubt whether a party can disclose to the authorities documents obtained by way of a search order (known as “*Anton Piller order*”) for the purpose of a criminal investigation under what circumstances. An additional question can be raised whether a party to the court proceedings can obtain a retroactive leave from the courts to disclose, given that the party had already disclosed some documents until the court’s leave.<sup>87)</sup> This issue was considered by the Singapore Court of Appeal in *Lim Suk Ling Priscilla and another v Amber Compounding Pharmacy Pte Ltd and another*<sup>88)</sup> The Court of Appeal held that the conjunctive two-step test in *Beckett*<sup>89)</sup> conditions

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83) *Foo Jong Long Dennis v Ang Yee Lim and another* [2015] SGHC 23.

84) Chan Leng Sun, SC et al (2015), “Singapore High Court holds that the Riddick principle ceases to apply once a document has been used in open court”, available at [https://www.bakermckenzie.com/-/media/files/insight/publications/2015/02/singapore-high-court-holds-that-the-riddick-prin\\_/files/read-publication/fileattachment/al\\_singapore\\_riddickprinciple\\_feb14.pdf](https://www.bakermckenzie.com/-/media/files/insight/publications/2015/02/singapore-high-court-holds-that-the-riddick-prin_/files/read-publication/fileattachment/al_singapore_riddickprinciple_feb14.pdf) (accessed July 30, 2021).

85) *Id.*

86) *Amber Compounding Pharmacy Pte Ltd & Anor v Priscilla Lim Suk Ling & Ors* [2019] SGHC 269; Wendle Wong and Paras Lalwani (2020), “The applicability of the Riddick undertaking where the discovered documents allude to serious criminal wrongdoing – An update on *Amber Compounding Pharmacy Pte Ltd & Anor v Priscilla Lim Suk Ling & Ors* [2019] SGHC 269”, available at <https://www.drewnapier.com/publications/The-applicability-of-the-Riddick-undertaking-where> (accessed July 30, 2021).

87) Lee shih and Nicole Phung (2020), *op. cit.*

88) *Lim Suk Ling Priscilla and another v Amber Compounding Pharmacy Pte Ltd and another* [2020] SGCA 76.

89) *Beckett Pte Ltd v Deutsche Bank AG* [2005] 3 SLR(R) 555.

should not be applied in deciding whether a party to the proceedings should be released from its Riddick undertakings.<sup>90)</sup> The Court has also ruled that “search orders should be targeted and specific in their reach”,<sup>91)</sup> and “the breadth of the search order is carefully calibrated to meet the needs of the discovering party only, and no further.”<sup>92)</sup> The court also provided guidance on four requirements which must be met before a search order would be granted as follows:

- “(i) the applicant must have an extremely strong prima facie case against the respondent;
- (ii) the damage that the applicant would suffer would be very serious;
- (iii) there is a real possibility that the respondent would destroy the relevant documents; and
- (iv) the effect of the search order would not be out of proportion to the legitimate object of the order (“the proportionality requirement”).<sup>93)</sup>

Finally, it is necessary to review some practical matters regarding the sanctions for breach of the Riddick undertaking. A breach of the implied undertakings causes serious consequences for the violating party because the implied undertaking is owed to the court. Therefore, any breach of the implied undertakings can amount to a contempt of court and can be sanctioned accordingly.<sup>94)</sup> In this regard, it is difficult to formalize sanctions against breach of confidentiality including the Riddick principle in international arbitration. For the past breaches of confidentiality, if the confidentiality obligation is considered as a contractual right, a claim for damages for breach may be possible, but damages for breach of confidentiality is not easy to prove.<sup>95)</sup> To tackle the conundrum, the parties may provide any liquidated damages clause in their contract to avoid unnecessarily fierce contentions.<sup>96)</sup> They may make an application for

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90) *Lim Suk Ling Priscilla and another v Amber Compounding Pharmacy Pte Ltd and another* [2020] SGCA 76, at [60]-[72].

91) *Id.*, at [120].

92) *Id.*, at [123].

93) *Id.*, at [123]; *Asian Corporate Services (SEA) Pte Ltd v Eastwest Management Ltd (Singapore Branch)* [2006] 1 SLR(R) 901 at [14].

94) Wendle Wong and Paras Lalwani (2020), *op. cit.*

95) Hwang and Chung (2009), *op. cit.*, p. 641.

96) *Id.*

an injunction against future breaches of confidentiality to an arbitral tribunal,<sup>97)</sup> or refer to an institutional rules containing provisions on sanctions for breach of confidentiality, like in Rule 39. 4 of the SIAC Arbitration Rules. It expressly provides the tribunal with the power to take any appropriate measures, including an order or Award for sanctions or costs against a party's breach of the confidentiality. For any future breach of confidentiality, a party may make an application for an injunction to prevent any prospective breaches, depending on a relevant applicable law.

### 3) Sub-conclusion

With regard to the Riddick principle, we found four lessons and guidance from some recent case laws.

First, the Riddick principle does not apply any longer where a document has been used in open court. Second, such an application must be made before the document is used in the open court hearing in order to prevent the party in possession of the document from using it for a collateral or ulterior purpose. Third, there are four requirements which must be met before a search order would be granted by a court as provided above in *Asian Corporate Services (SEA) Pte Ltd v Eastwest Management Ltd (Singapore Branch)*. Lastly, but not least, other examples of elements to be considered in activating the Riddick principle are i) countervailing legislative policy, ii) support of related proceedings, iii) investigation and prosecution of criminal offences, iv) public safety concerns, and v) international comity.<sup>98)</sup> On the other hand, other elements tending to deactivate the Riddick principle could be i) unfairness or prejudice to the disclosing party, ii) inappropriate purpose for which a leave was sought, and iii) timely assertion of the privileged document or information against self-incrimination by the disclosing party.<sup>99)</sup> Fourth, breaches of the Riddick principle, which is the implied undertakings to a court, can amount to a contempt of court and can be sanctioned by the court accordingly.

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97) *Id.*

98) Lee shih and Nicole Phung (2020), *op. cit.*

99) *Id.*

## IV. Conclusion

Most arbitration laws in different jurisdictions are silent or lack detail in addressing the obligation of confidentiality and its exceptions in international commercial arbitration. Furthermore, there is no uniform law or international convention to the rule on those matters.

This is also the case in Korea such that the Korean Arbitration Act 2016 does not contain any provision on this matter at all. In addition, the KCAB International Rules also affirms the general principle that any information regarding the arbitral proceedings as well as an Award should be maintained in confidential. It further sets out only three exceptions to the confidentiality duty in cases where i) there is consent of the parties, ii) it is required by law, or iii) it is required in court proceedings.

However, these provisions do not appear to be sufficient for the parties to the arbitration in order to strictly comply with the confidentiality obligations in international commercial arbitration, in particular, without effective and strong sanctions for breaches of the confidentiality duties.

Under these circumstances, the author would like to make some suggestions for more effective compliance of the obligations of confidentiality as follows:

First, it is necessary to consider whether to adopt the provisions on orders to maintain confidentiality, and breaches of orders to maintain confidentiality and its criminal punishment, among others, referring to Art. 224-3 and Art. 229-2 of the Patent Act of Korea<sup>100)</sup> and Art. 112 and Art. 127 of the Monopoly Regulation and Fair Trade Act<sup>101)</sup> into the Arbitration Act in Korea, especially in case where a party to the arbitration would seriously breach its confidentiality duty, such as obtaining an evidence by way of computer hacking.

Second, it is necessary to expressly provide a tribunal with a power to make orders regarding the confidentiality of the arbitration proceedings or of any other matters in relation to the arbitration and to take measures for protecting trade secrets and

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100) Patent Act [Enforcement Date 11. Mar, 2020.] [Act No.16804, 10 December 2019. Partial Amendment].

101) Monopoly Regulation and Fair Trade Act [Enforcement Date 30 December 2022] [Act No.14137, 29 March 2016, Partial Amendment].

confidential information, referring to Art. 22(3) of the ICC Rules and Art. 40(1) of the ICDR International Rules.

Third, it is necessary to consider whether to introduce a provision which empowers a tribunal to take any proper measures including an order or Award for sanctions or costs against a party's breach of the confidentiality in the KCAB International Rules, which is provided in Rule 39.4 of the SIAC Arbitration Rules.

Last but not least, the parties are also required i) to choose applicable arbitration rules providing a set of confidentiality rules, or ii) to include a confidentiality clause in their commercial transaction contracts or, iii) to conclude a separate confidentiality agreement in cases where maintaining confidentiality is particularly essential. Given the growing use of discovery or disclosure proceedings in international commercial arbitration, the parties and the practitioners in civil law jurisdictions are required to pay attention to the trends in case laws related to the Riddick principle stemming from the common law jurisdiction and its legal effect of the implied undertakings.



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