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**Arbitration and Transparency –  
Relations Between a Private Environment and a  
Fundamental Requirement**

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## Abbreviations

ADR	Alternative Dispute Resolution
BIT	Bilateral Investment Treaty
ECT	Energy Charter Treaty
HAGUE CONVENTION	Hague Conventions for the Pacific Settlement of International Disputes
ICA	International Commercial Arbitration
ISA	Investor-State Arbitration
NAFTA	North American Free Trade Agreement
NEW YORK CONVENTION	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
NGO	Non-Governmental Organization
UNCITRAL RULES ON TRANSPARENCY	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
UNCITRAL MODEL LAW	UNCITRAL Model Law on International Commercial Arbitration
UNCITRAL	United Nations Commission on International Trade Law
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

## *Prelude*

### *Introduction to the research*

The research ventures into the world of international arbitration, more precisely ICA and ISA, ADR methods frequently used by the actors of the global business arena.<sup>1</sup> These methods exist as alternatives to litigation, and among other advantageous characteristics, such as enforceability and party autonomy,<sup>2</sup> their private and confidential nature<sup>3</sup> stands as a main reason why the international business community prefers them over cross-border litigation conducted before domestic courts. Private parties submitting their existing or future business-related disputes under the jurisdiction of an arbitral tribunal prefer the process to be hidden from the eyes of the public. This approach is well-founded, taking into consideration the curious press, competitors and authorities<sup>4</sup> on one side and highly valuable business secrets<sup>5</sup> and further information relating to the functioning of a multinational business venture on the other. In the technology-driven era of the twenty-first century, where companies have to rethink certain aspects related to their functioning in order to comply with the requirements set by social media platforms, the digital age in general and certain aspects of modern corporate governance,<sup>6</sup> the protection of the above-mentioned information can play an even more important role.

International arbitration is able to secure the protection of sensitive information, as it is one of the fundamental components of an arbitral process.<sup>7</sup> However, in certain situations, the private and confidential nature of these ADR mechanisms<sup>8</sup> might collide with the need for transparency / the requirement of transparent adjudication<sup>9</sup>, an increasing trend in international arbitration<sup>10</sup>. Examining where the balance stands between the private and confidential nature of ICA and ISA and the prevailing

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<sup>1</sup> Várady, T., Barcelo, J.J. III, Mehren, A. T. (1999). *International Commercial Arbitration, A Transnational Perspective*. American Casebook Series, West Group. 40-41. Furthermore, see in general Nottage, L. (2015). A Weathermap for International Arbitration: Mainly Sunny, Some Cloud, Possible Thunderstorms. *Sidney Law School Legal Studies Research Paper No. 15/62*. (Professor Nottage discusses the situation of international arbitration from several perspectives. From the observations of Professor Nottage it can be concluded that ICA and ISA are widely-used dispute resolution mechanisms). Furthermore, see Xu, D. & Shi, H. (2011). Dilemma of Confidentiality in International Commercial Arbitration. *Frontiers of Law in China, Volume 6, Issue 3*. 404-405

<sup>2</sup> Buys, C. G. (2003). The Tensions Between Confidentiality and Transparency in International Arbitration. *American Review of International Arbitration, Volume 14, No. 121*. 122-123

<sup>3</sup> Expert report of Stephen Bond Esq. in *Esso v Plowman*. (1995). *Arbitration International, Volume 11, Issue 3*. „It became apparent to me very soon after taking up my responsibilities at the ICC that the users of international commercial arbitration, i.e. the companies, governments and individuals who are parties in such cases, place the highest value upon confidentiality as a fundamental characteristic of international commercial arbitration”

<sup>4</sup> Paulsson, J. & Rawding, N. (1995). The Trouble with Confidentiality. *Arbitration International, Volume 11, Issue 3*. 48

<sup>5</sup> Argen, R. D. (2015). Ending Blind Spot Justice, Broadening the Transparency Trend in International Arbitration. *Brooklin Journal of International Law, Vol. 40, Issue 1*. 11

<sup>6</sup> Vermeulen, E. P. M. (2015). Corporate Governance in a Networked Age. *Wake Forest Law Review, 2015 Forthcoming, Lex Research Topics in Corporate Law & Economics Working Paper No. 2015-4, Tilburg Law School Research Paper No. 16/2015*. 1-2; Furthermore, see in general Kecskés, A. (2011). *Corporate Governance (Felelős Társaságirányítás)*. HVG-ORAC

<sup>7</sup> Noussia, K. (2010). *Confidentiality in International Commercial Arbitration*. Springer-Verlag Berlin Heidelberg. 1

<sup>8</sup> Weixia, G. (2015). Confidentiality Revisited: Blessing or Curse in International Commercial Arbitration. *University of Hong-Kong Faculty of Law, Research Paper No. 2015/026*. 2-5 (As Professor Weixia describes, within the context of international arbitration, distinction has to be made between the concepts of privacy and confidentiality).

<sup>9</sup> LoPucki, L. M. (2009). Court-System Transparency. *Iowa Law Review, Volume 94, Issue 2*. 535-536. Furthermore, see Argen supra at page 3

<sup>10</sup> The author's opinion is that the very existence of the UNCITRAL Rules on Transparency is a sign of the above-mentioned trend

transparency trend is a complex issue where several factors come into play<sup>11</sup>. The areas under discussion are, among others, the extent to which the public is entitled to acquire information regarding arbitrations between private parties or private parties and state-entities, where the outcome of a case can have direct or indirect effects on the everyday lives of citizens,<sup>12</sup> or where large-scale, publicly traded companies participating in an arbitration have to disclose certain information towards their shareholders<sup>13</sup>. Furthermore, the judicial enforcement of arbitral awards is a sector where the private and confidential nature of an arbitral process might be in danger, and the content of an award might be disclosed based on the order of a national court.<sup>14</sup> Such instruments have to be taken into consideration when privacy and confidentiality meet with the requirement of transparency.

According to Professor Andrea Bianchi, „*Transparency epitomizes the prevailing mores in our society and becomes a standard of (political, moral and, occasionally, legal) judgment of people’s conduct. In contrast, the opposites of transparency, such as secrecy and confidentiality, have taken on a negative connotation. Although they remain paradigmatic narratives in some areas, overall they are largely considered as manifestations of power, and, often, of its abuse.*”<sup>15</sup> Opinions such as Professor Bianchi’s indicate that the concept of transparency and its relations with privacy and confidentiality within certain aspects of international arbitration is an interesting topic to be examined in a more in-depth manner.

#### *Intent and structure of the research*

As discussed above, the research examines the concepts of privacy, confidentiality and transparency and their relations within ICA and ISA. Measuring where the balance stands between these concepts, their exact value and how they relate to each other can lead to interesting conclusions. For this purpose, Chapter I gives a historical overview of international arbitration and discusses the role of ICA and ISA in international dispute settlement in the twenty-first century, as well as presenting treaties and organizations playing a relevant role in the topic. Chapter II examines the concepts of privacy, confidentiality and transparency within the context of ICA and ISA. Furthermore, Chapter II discusses relevant case-law as well. Chapter III examines how high-profile arbitral institutions (such as the International Court of Arbitration or the London Court of International Arbitration) approach the issues of privacy and confidentiality in their arbitration rules, while Chapter IV focuses on arbitral institutions located in Central and Eastern Europe. Chapter V will draw conclusions based on the previous chapters, comparing the extent to which the institutions under examination regulate the above-mentioned concepts and measuring where the balance may stand between them.

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<sup>11</sup> Buys, *supra* at 134-138

<sup>12</sup> Brown, A. C. (2001). Presumption Meets Reality, An Exploration of the Confidentiality Obligation in International Commercial Arbitration. *American University International Law Review*, Volume 16, Issue 4. 978-981

<sup>13</sup> Brown, *supra* at 980

<sup>14</sup> Weixia, *supra* at 14

<sup>15</sup> Bianchi, A. & Peters, A. (2013). *Transparency in International Law*. Cambridge University Press. 2

## ***I. Historical overview and the role of international arbitration in the twenty-first century***

### ***I.1. Historical overview***

#### ***I.1.1. Ancient times***

Arbitration, as a method of resolving disputes, can be traced back as far as ancient times, with the first signs of arbitration-like conciliation procedures appearing in the sixth century B.C. Different cultures, ethnic groups and traditions united by the city-states of ancient Greece and the Roman Empire knew arbitration, mainly applying it to political disagreements and territorial misunderstandings. The arbitration of disputes with a commercial nature began to appear as well in ancient Greek and Roman times,<sup>16</sup> primarily as one of the consequences of the increasing international trade among states.<sup>17</sup> Naturally, these ancient cultures drew heavy influences from one another in several aspects. It is clear that – relatively – these periods in human history were among the most productive with regards to the evolution of sciences, arts and warfare, and have laid down the fundamentals for future development.<sup>18</sup> Unsurprisingly, the roots of arbitration were also formed during these periods. However, arbitration (just like mediation) was still several centuries away from indicating the first signs of its institutionalization and comprehensive regulation through multilateral treaties.

#### ***I.1.2. Medieval ages***

As we advance to the early Middle Ages, arbitration became less frequent, since until the twelfth century war was the primary tool for settling disputes. Scattered nations throughout Europe were striving forward to create individual states and feudal princes rarely chose methods of peaceful resolution over raw power. However, from the thirteenth century the use of arbitration showed an increase in certain areas of Europe. In German territories arbitration clauses were frequent in treaties through which smaller states formed alliances among each other. In the Baltics small but independent states frequently used arbitration not just as a method of interstate dispute resolution, but applied to matters between individuals as well. Arbitration was relatively well-developed in the Italian states, where arbitral clauses appeared as part of peace treaties.<sup>19</sup> Medieval Iceland, for instance, made significant use of arbitration as a way of settling disputes over land and/or trade between individuals,

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<sup>16</sup> Emerson, Frank D. (1970). History of Arbitration Practice and Law. *Cleveland State Law Review*, Vol. 19, Issue 1. 155-156. Furthermore, see in general Roebuck, D., & Fumichon, B.D. (2004). *Roman Arbitration*. Oxford: Holo Books, The Arbitration Press. (Professor Roebuck and Professor Fumichon analyzed arbitration used in the ancient Roman Empire. It can clearly be derived from their research that the arbitration of commercial matters was present in Rome and in certain cultures and states affected by Roman occupation).

<sup>17</sup> See in general Temin, P. (2013). Statistics in Ancient History. *Massachusetts Institute of Technology (MIT) Department of Economics Working Paper No. 13-06*. (In his research, Professor Temin analyzes the wheat market of the Roman Empire, which in itself is a sign of the above mentioned expansion of international trade during ancient times). Furthermore, see Calliess, G.P. (2015). *Lex Mercatoria. Zentra Working Papers in Transnational Studies No. 52/2015*. 3

<sup>18</sup> See in general Freeman, C. (2004). *Egypt, Greece and Rome: Civilizations of the Ancient Mediterranean*. 2nd Edition. Oxford University Press. (Charles Freeman, well-known historian, examined the civilizations of ancient Egypt, Greece and Rome from several aspects. It is clear from his research that these ancient civilizations contributed greatly to the development of sciences, arts and warfare and had their influence on one another).

<sup>19</sup> Fraser, H. S. (1926). A Sketch on the History of International Arbitration. *Cornell Law Review Volume 11, Issue 2*. 190-193

highlighting the early advancement of the Scandinavian court-system<sup>20</sup> and providing the basis for the heritage it left behind with regards to its legal culture.<sup>21</sup> Studies show the significant use of arbitration in England from the fourteenth century, as detailed cases indicate, among others, the resolution of territorial disputes between families in such manner<sup>22</sup> which, by its very nature, had both diplomatic and commercial aspects. With regards to French territories in the fourteenth and fifteenth centuries, the parliaments of Paris and Grenoble were chosen several times by foreign kings, princes and archdukes to decide and assist in the settlement of their territorial or commercial disagreements.<sup>23</sup> The growing power and influence of the Church and the spread of Christianity has to be noted as well as factors setting arbitration in motion in medieval Europe, with the promotion of principles advantageous for dispute resolution methods excluding the demonstration of physical power. Furthermore, it was not uncommon for Popes to act as arbitrators in certain matters.<sup>24</sup>

### 1.1.3. Early modern period

As international trade gained more and more ground in the early modern period of Europe, the arbitration of private commercial disputes emerged simultaneously. Private merchants submitted their disputes to specialized tribunals having their seat at commercial centers (such as port cities of the Mediterranean Sea) through Europe, seeking the reasonable resolution of their domestic or international business matters. The application of „*lex mercatoria*”, a set of customary laws developed and used by tradesman, set the framework for the rules of trade, including arbitration.<sup>25</sup> *Lex mercatoria* could be interpreted as „*customary commercial law, customary rules of evidence and procedure and general principles of commercial law*”.<sup>26</sup> The customary rules and practices of *lex mercatoria* were incorporated to the legal culture of emerging states and nations through Europe, ultimately providing the foundations of nowadays’ international commerce and arbitration.<sup>27</sup>

The seventeenth century saw the emergence of legal scholars such as Hugo Grotius, the „*father of international law*”, who in his immense work, *De Jure Belli et Pacis*, published in 1625, dealt with arbitration and highlighted its importance and advantages in international dispute settlement.<sup>28</sup> A few decades later, John Locke drew up the arbitration statute of England, which was accepted by the parliament and entered into force in 1698. Locke promoted the method of settling commercial disputes with the exclusion of unnecessary legal constraints and difficulties.<sup>29</sup> Great philosophers of the

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<sup>20</sup> Miller, W. I. (1984). Avoiding Legal Judgment: The Submission of Disputes to Arbitration in Medieval Iceland. *American Journal of Legal History*, Vol 28, Issue 2. 97-99

<sup>21</sup> Trakman, L. (2007). Legal Traditions and International Commercial Arbitration. *American Review of International Arbitration*, UNSW Law Research Paper No. 2007-29. 5-6

<sup>22</sup> Payling, S. J. (1992). Arbitration, Perpetual Entails and Collateral Warranties in Late-Medieval England: A Case Study. *Journal of Legal History* Volume 13, Issue 1. 32-33

<sup>23</sup> Fraser, supra at 194-196

<sup>24</sup> Twiss, T. (1896). International Arbitration in the Middle Ages. *Law Magazine and Law Review*, Volume 22, Issue 1. 6-7

<sup>25</sup> Slomanson, W. R. (2004). Historical Development of Arbitration and Adjudication. *Miskolc Journal of International Law*, Volume 1, Issue 2. 238

<sup>26</sup> Guilhem, J. (2014). Lex Magica, A Lex Mercatoria Reflection. *Thomas Jefferson Law Review*, Volume 37, Issue 1. 125-126

<sup>27</sup> Turley, I. F. (1999). Lex Mercatoria Quo Vadis. *Journal of South African Law*, Volume 1999, Issue 3. 455-456

<sup>28</sup> Fraser, supra at 182

<sup>29</sup> Oldham, J. (2013). Arbitration in America, The Early History. *Law and History Review*, Volume 31, Issue 1. 246

eighteenth century, like Kant<sup>30</sup>, Rousseau and Bentham<sup>31</sup> contributed greatly to the creation of the path towards international peace, which clearly favoured the global emergence of arbitration.

#### 1.1.4. New age

The new age of international arbitration arrived in the eighteenth century. 1794 saw the conclusion of the Jay Treaty between Great Britain and the United States, establishing an arbitral tribunal consisting of an equal number of arbitrators delegated by both parties. The aim of the Jay Treaty was to assist in the resolution of disputes emerging as a result of the American Revolutionary War, but could not be addressed in an appropriate manner by diplomatic relations between the parties.<sup>32</sup> Furthermore, in 1768, the New York Chamber of Commerce was established, promoting the use of arbitration between its members as well as providing the only civil tribunal in the United States during British occupation.<sup>33</sup> Arbitration was also promoted by chambers of commerce in New Haven and Philadelphia at the turn of the eighteenth and nineteenth centuries.<sup>34</sup> In France, the Decree of 16-24 August 1790 defined arbitrations as „*the most reasonable means of dispute resolution between citizens*”. This tendency was not new in French territories, since the decree of the Moulins of 1566 (*Ordonnance de Moulins de 1566*) already established arbitration as the primary method of resolving commercial disputes, which indicated the trust placed in ADR mechanisms rather than regular court proceedings.<sup>35</sup> France gave an unquestionable contribution to the advancement of arbitration in early modern times.

#### 1.1.5. Development in the nineteenth century

Stepping into the nineteenth century, international arbitration gained additional footholds in the global environment both assisting in diplomatic and commercial disputes. The Industrial Revolution facilitated the spread of international trade and commerce, whereby regulations and treaties started to appear on a more frequent basis in Europe as well as in the Americas. An arbitration clause was included in the 1848 Treaty of Guadalupe Hidalgo ending the Mexican War, being the first permanent arbitration clause to appear in history at that point.<sup>36</sup> As a descendant of the Jay Treaty with respect to its functions, the Treaty of Washington was signed in 1871 between Great Britain and the United States to further assist in the conciliation of disputes arising out of the Revolutionary War.<sup>37</sup> Similarly to a significant number of states around the world, we can see a clearly developed arbitral culture and regulatory system in England by the nineteenth century. The Common Law Procedure Act of 1854 placed commercial arbitral tribunals under the oversight of domestic courts, as a way to develop the judicial review of arbitral awards and the procedure itself, while the Arbitration Act of 1889 regulated commercial arbitration from several aspects, facilitating the evolution of domestic regulations in the subject matter.<sup>38</sup>

An important document in the history of international arbitration is the Hague Convention, concluded as part of the 1899 and 1907 Hague Peace Conferences. It is considered the first multilateral treaty

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<sup>30</sup> Waldron, J. (1996). Kant's Legal Positivism. *Harvard Law Review*, Volume 109, Issue 7. 1540-1541

<sup>31</sup> Birkhead, J. (1995). Making Laws More Effective, Jeremy Bentham and Jean-Jacques Rousseau on Good Citizenship. *United States Air Force Academy Journal of Legal Studies*, Volume 5, pp. 79-96. 90-93

<sup>32</sup> Newcomb, J. T. (1934). New Light on Jay's Treaty. *American Journal of International Law*, Volume 28, Issue 4. 686-689

<sup>33</sup> Mentschikoff, S. (1961). Commercial Arbitration. *Columbia Law Review*, Volume 61, Issue 5. 855

<sup>34</sup> Emerson, supra at 159

<sup>35</sup> Noussia, supra at 14

<sup>36</sup> Fraser, supra at 199-200

<sup>37</sup> Slomanson, supra at 238

<sup>38</sup> Noussia, supra at 12-13



adopted by the international community setting forth the use of arbitration between states in certain matters and establishing a system of arbitration. The Hague Convention created the Permanent Court of Arbitration, having its seat in the Peace Palace in Hague. Previously, arbitral tribunals were primarily set up in an *ad hoc* manner, thus the establishment of a permanent tribunal marked a great development.<sup>39</sup> The Hague Convention indicated the appearance of a series of multilateral treaties in the twentieth century.

#### 1.1.6. The rise of international arbitration in the twentieth century

Stepping into the twentieth century (excluding the times of World War I and II), arbitration gained worldwide recognition as an effective way of solving commercial and investment disputes. As foreign investment started to flow, the outcome of the arbitration of investment-related disputes between high-profile companies became influential on the general public and on the business environment. Thus, the conclusion of multilateral treaties, establishment of permanent tribunals and consistency became desired features in the world on international arbitration.<sup>40</sup> National and international chambers of commerce having their own set of arbitration rules, providing the possibility to select their jurisdiction to govern international commercial disputes were of key importance. Even though notable chambers of commerce already existed before the twentieth century, this was the time period when their role matured greatly.<sup>41</sup>

As a result of the afore-mentioned desire, the 1958 New York Convention was created under the aegis of the United Nations. The New York Convention sets forth, with respect to the domestic courts of signatory states, the obligation to recognize and enforce arbitral awards adopted in another signatory state (subject to certain limitations relating to procedural issues). The New York Convention is generally regarded as an instrumental element of modern times ICA, which introduced a significant degree of sought-after consistency.<sup>42</sup> In 1966, under the auspices of the World Bank Group, the ICSID was created. As Aron Brochet stated, while developing the idea of the ICSID Convention, „*the Convention would offer a means of settling directly, on the legal plane, investment disputes between the State and the foreign investor and would insulate such disputes from the realm of politics and diplomacy*”. The first multilateral agreement between states assisting in the resolution of investment disputes, a milestone for ISA.<sup>43</sup>

In 1976 the UNCITRAL created its Arbitration Rules (revised in 2010, however, it maintained its fundamental characteristics), providing a thorough set of procedural rules which the signatory states may utilize and agree upon to regulate their arbitration (both *ad hoc* and institutional) arising as a consequence of their commercial dispute.<sup>44</sup> In 1985 the UNCITRAL Model Law was created. The purpose of the UNCITRAL Model Law is to guide the member states with respect to the modernization and development of their domestic regulations regarding arbitration, and to provide a model which the

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<sup>39</sup> Hudson, M. O. (1933). The Permanent Court of Arbitration. *American Journal Of International Law*, Volume 27, Issue 3. 441-446

<sup>40</sup> Newcombe, A. & Paradell, L. (2009). Law and Practice of Investment Treaties, Standards of Treatment. *Kluwer Law International, Chapter 1, Historical Development of Investment Treaty Law*. 21-24

<sup>41</sup> Bennett, R. J. (2011). *Local Business Voice, The History of Chambers of Commerce in Britain, Ireland and Revolutionary America 1760-2011*. Oxford University Press. Chapter 2

<sup>42</sup> Movsesian, M. L. (2008). International Commercial Arbitration and International Courts. *Duke Journal of Comparative & International Law*, Volume 18, Issue 2. 5-8

<sup>43</sup> Lowenfeld, A. F. (2009). The ICSID Convention, Origins and Transformation. *Georgia Journal of International and Comparative Law*, Volume 38, Issue 1. 49-53

<sup>44</sup> Petrochilos, G. (2010). Introductory Note to the 2010 UNCITRAL Arbitration Rules. *International Legal Materials*, Volume 49, Issue 6. 1640-1643

parties might incorporate into their national law. The scope of the UNCITRAL Model Law includes all phases of the procedure, such as the jurisdiction and composition of the tribunal, the conclusion of the arbitration clause, the extent to which domestic courts are entitled to intervene and the recognition and enforcement of the award.<sup>45</sup> 1994 marked the conclusion of the UNIDROIT Principles on International Commercial Contracts (revised two times ever since), which established general rules with respect to international trade agreements, having a clearly positive impact on ICA.<sup>46</sup>

BITs, though existing since the 1960s, started to appear in vast numbers during the 1990s, further facilitating foreign investment protection and restricting the expropriation thereof. These bilateral agreements concluded between states usually set forth arbitration as a method of dispute resolution.<sup>47</sup> As of today, there are more than 3,000 BITs<sup>48</sup> in force. In 1994 the NAFTA, a trilateral agreement between the United States, Canada and Mexico, marked another step in the protection of foreign investment and the development of ISA. Chapter 11 of the NAFTA sets forth arbitration as the main method for resolving disputes arising out of foreign investor-host state relationships in signatory states.<sup>49</sup> 1994 was a fertile period with regards to ISA, as this year also saw the conclusion of the ECT. The ECT created international cooperation in the energy sector and provided a multilateral instrument, signed by more than fifty states, safeguarding foreign investment within its framework.<sup>50</sup> In Articles 26 and 27 of the ECT, arbitration is established as a desired method to settle arising disputes, with the parties having the right to chose from the arbitration rules and procedures of well-known arbitral institutions (such as the Arbitration Rules of the Stockholm Chamber of Commerce or the ICSID rules).<sup>51</sup> In 1995 the WTO came into existence, evoked by the conclusion of the Marrakesh Agreement signed by 123 states. The WTO monitors and regulates international trade among signatory states and have established a dispute resolution system bearing the characteristics of both arbitration and litigation.<sup>52</sup> International arbitration evolved significantly during the 1990s as the consequence of bi- and multilateral agreements, the activities of different international organizations and chambers of commerce, providing the grounds for future developments and fine-tuning in the twenty-first century.

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<sup>45</sup> Hunter, J. M. H. (1985). The UNCITRAL Model Law. *International Business Lawyer*, Volume 13, Issue 10. 399-401

<sup>46</sup> Garro, A. M. (1995). Contribution of the UNIDROIT Principles to the Advancement of International Commercial Arbitration. *Tulane Journal of International and Comparative Law*, Volume 3, pp. 93-128 . 94-95

<sup>47</sup> Perera, A. R. (2000). Role and Implications of Bilateral Investment Treaties. *Commonwealth Law Bulletin*, Volume 26, Issue 1. 607-608

<sup>48</sup> Statistics of United Nations Conference on Trade and Development. Accessible through: <http://www.bilaterals.org/?-bits-&lang=en>

<sup>49</sup> Legum, B. (2002). Innovation of Investor-State Arbitration under NAFTA. *Harvard International Law Journal*, Volume 43, Issue 2. 532-533

<sup>50</sup> Hober, K. (2007). The Energy Charter Treaty, An Overview. *Journal of World Investment and Trade*, Volume 8, Issue 3. 324

<sup>51</sup> Articles 26 and 27 of the Energy Charter Treaty. Accessible through: <http://www.ena.lt/pdfai/Treaty.pdf>

<sup>52</sup> Taniguchi, Y. (2010). WTO Dispute Resolution as Arbitration. *Contemporary Asia Arbitration Journal*, Volume 3, Issue 1. 3-5

## ***1.2. The role of international arbitration in the twenty-first century***

The reputation and widespread use of international arbitration grew even further in the new millennium. As a renowned legal scholar stated, „We now have (thanks to the ingenuity of the legal fraternity) a rule of law regime in which investors in foreign countries can, through the instrumentality of bilateral treaties, exercise direct rights of action against the state entity in which the investment is made even without contractual relations with that state entity”.<sup>53</sup> Apart from investment and general trade disputes, arbitration appeared in a number of sub-sectors of the global industry, including construction, insurance, shipping, securities, labor and sports arbitration.<sup>54</sup> The appearance of international arbitration in the sub-sectors of the global industry can, among others, be attributed to the emergence of international business relations throughout the world in the second half of the twentieth century, but especially in the twenty-first century, mainly as one of the consequences of rapid improvements in technology.<sup>55</sup> The fragmentation of international trade law<sup>56</sup> had its impact on the evolution of arbitration as well, since international commerce goes hand in hand with the evolution of ADR mechanisms applied within its framework.

Parties to an arbitration now have a vast number of institutional rules and regulations to select from to govern the procedure between them, and a wide array of arbitrators to choose from to decide on their matter. These institutional rules received influences from different jurisdictions, while arbitrators arrive from different states having different legal cultures. The differentiation between common law and civil law approaches is usual, however, the above mentioned instruments (especially with regards to the institutional rules or other regulations the parties select to govern their arbitration, i.e. the choice of law) and arbitration in general should be viewed from an international aspect.<sup>57</sup> The main reason of this is the harmonization of common law and civil law perspectives, embodied by international regulations, treaties and institutional rules governing arbitration in the twenty-first century.<sup>58</sup> As the impact of the outcome of certain arbitrations on the general public increased (derived from the increased impact they have on the global business environment as well), the relevance of an increasingly transparent approach towards arbitral procedures seemed to arise.<sup>59</sup>

In 2014 the United Nations adopted the UNCITRAL Rules on Transparency, establishing procedural rules ensuring transparency and public access to ISA. The UNCITRAL Rules on Transparency is applicable to arbitrations covered by the UNCITRAL Arbitration Rules. Since the application of the UNCITRAL Rules on Transparency is based on the UNCITRAL Arbitration Rules, the latter got revised in 2014 and received new articles. The UNCITRAL Work Group II on Arbitration and Conciliation decided to leave out BITs from the scope of the UNCITRAL Rules of Transparency which

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<sup>53</sup> Nariman, F. S. (2009). International Arbitration in the Twenty-First Century, Concepts, Instruments and Techniques. *Trade, Law and Development, Volume 1, Issue 2*. 317

<sup>54</sup> Trakman, supra at 22-24

<sup>55</sup> Subba, R. P. (2010). *International Business Environment*. Himalaya Publishing House. 4, 31-32

<sup>56</sup> Delimatsis, P. (2011). The Fragmentation of International Trade Law. *Journal of World Trade, Volume 45, Issue 1*. 10

<sup>57</sup> Born, G. B. (2014). Law Governing International Arbitration Agreements, An International Perspective. *Singapore Academy of Law Journal, Volume 26, Special Issue*. 816

<sup>58</sup> Dodson, S. & Klebba, J. M. (2011). Global Civil Procedure Trends in the Twenty-First Century. *Boston College International and Comparative Law Review, Volume 34, Issue 1*. 18

<sup>59</sup> Rogers, C. A. (2006). Transparency in International Commercial Arbitration. *University of Kansas Law Review, Volume 54, Issue 5*. 1301-1302

were concluded prior to its adoption, limiting the effectiveness thereof.<sup>60</sup> Chapter II provides additional insight in the UNCITRAL Rules on Transparency.

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<sup>60</sup> Levander, S. (2014). Resolving Dynamic Interpretation, An Empirical Analysis of the UNCITRAL Rules on Transparency. *Columbia Journal of Transnational Law*, Volume 52, Issue 2. 524-530

## ***II. Examination of privacy, confidentiality and transparency in ICA and ISA***

### ***II.1. Privacy & Confidentiality***

#### ***II.1.1. Analyzation of the concepts and their role***

Parties to a dispute choosing arbitration prefer this ADR mechanism over litigation because of several reasons. Studies conducted in the topic indicate that participants favour arbitration mainly because of its higher autonomy allowed for the parties, quick procedures, lower procedural costs, finality of the award and the possibility to select arbitrators with specialized knowledge in a given case. However, privacy and confidentiality are also marked as main advantages and usually appear besides the above mentioned characteristics.<sup>61</sup> Companies in the twenty-first century (especially in an international, technologically advanced environment) are sensitive about their trade and business secrets, know-hows etc. being disclosed to the public.<sup>62</sup>

When examining privacy and confidentiality, distinction has to be made between the two concepts. In arbitral procedures, privacy excludes third parties other than the parties to the dispute, their legal counsel, arbitrators, witnesses and administrators (as well as other participants of the procedure having access based on the mutual consent of the parties) from having access to the procedure and the documents produced within (including the award). Confidentiality, on the other hand, entitles the participants to know the content of the awards, orders, witness testimonies and further documents produced in the course of the process, furthermore to know about the existence of the process, who the parties, witnesses and the chosen arbitrators are and the matter and nature of the debate,<sup>63</sup> and most importantly, it sets forth certain restrictions regarding disclosure. As it was noted in *Esso v. Plowman*, „Privacy is concerned with the right of persons other than the arbitrators, parties and their necessary representatives and witnesses, to attend the arbitration hearing and to know about the arbitration. Confidentiality by contrast, is concerned with... information relating to the content of the proceedings, evidence and documents, addresses, transcripts of the hearings or the award”.<sup>64</sup>

#### ***II.1.2. Private environment***

The private and confidential nature of arbitration can be derived from the fact that it arises out of a private relationship, an agreement between the parties based on their mutual understanding.<sup>65</sup> However, whether an implicit duty of confidentiality exists or the parties have to set it forth expressly depends on the given jurisdiction (the particular law governing the arbitration). In *Dolling Baker v Merrett* the implied nature of confidentiality was assessed. According to the English Court of Appeal „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... be some implied obligation

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<sup>61</sup> Mistelis, L. & Baltag, C. M. (2008). Trends and Challenges in International Arbitration, Two Surveys of In-House Counsel of Major Corporations. *World Arbitration and Mediation Review*, Volume 2, Issue 5. 92-94

<sup>62</sup> Lin, T. C. W. (2012). Executive Trade Secrets. *Notre Dame Law Review*, Volume 87, Issue 3. 913

<sup>63</sup> Noussia, supra at 25-27

<sup>64</sup> Expert report of Dr. Julian D. M. Lew in *Esso v. Plowman*. (1995). *Arbitration International*, Volume 11, Issue 3. 283, 285

<sup>65</sup> Xu & Shi, supra at 408

*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”.*<sup>66</sup>

The starting point which justifies confidentiality is the consensus between the parties, the concurrence of their wills embodied by an arbitration agreement to govern their private commercial dispute instead of an ordinary court procedure.<sup>67</sup> The private manner of concluding the arbitration agreement, in most cases, serves as a sufficient basis for upholding confidentiality, since the mutual understanding of the parties with regards to the competent tribunal to decide on their matter, and confidentiality arising as a consequence, is a primary feature distinguishing arbitration from the judicial systems of states.

It is necessary to examine the information that may be subject to the obligation of confidentiality in arbitral procedures. While doing so, we can distinguish between three main categories: (a) information relating to the existence of the arbitral procedure or the legal dispute, (b) information relating to the details of the procedure (such as documents and/or evidence produced or presented in the course of the process), and (c) information relating to the award itself.<sup>68</sup> Proceedings conducted by ordinary courts are usually transparent and accessible through public domains. This means the disclosure of documents relating to the procedure and the result, i.e. the reasoned court decision itself.

Where rapid technological advancements form a great part of the business environment, preserving privacy in ordinary court proceedings is hardly possible.<sup>69</sup> In contrast, arbitral procedures are most of the time conducted with the exclusion of the public, in a private and confidential manner. Parties are provided with the possibility to evade publicity that an ordinary court procedure would most probably evoke, and which, in certain cases, would have negative effects on them. Taking into consideration the possible public opinion that might arise, the power and curiosity of the press, the insight and business advantages competitors would receive following a leakage of sensitive information in connection with the internal functioning of a given business venture, this approach seems well founded.<sup>70</sup> A prominent example is the *Aitah v. Ojeh* case, where the Paris Court of Appeal held that „*the very nature of arbitral proceedings requires that they ensure the highest degree of discretion in the resolution of private disputes, as the two parties had agreed*”. According to the decision of the Paris Court of Appeal, damages had to be paid by the losing party for the breach of confidentiality.<sup>71</sup> It is not uncommon that courts impose financial sanctions based on the breach of the confidentiality obligation (let it be contractual or arising out of domestic or international regulations).

### II.1.3. Assessment of certain limitations to privacy and confidentiality

Even though privacy and confidentiality play an important role among the distinctive features of arbitration, there are limitations with regards to the extent these concepts may apply in a given situation. Such limitations can rely on several different factors, however, in most cases they are related to requirements imposed by domestic legislation and certain international regulations.

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<sup>66</sup> *Dolling Baker v Merrett*. Accessible through <http://www.uniset.ca/lloyddata/css/19901WLR1205.html>. Furthermore see Brown, *supra* at 977

<sup>67</sup> Collins, M. (1995). Privacy and Confidentiality in Arbitration Proceedings. *Arbitration International, Volume 11, Issue 3*. 122, 126-129

<sup>68</sup> Buys, *supra* at 124

<sup>69</sup> Cremades, B. M. (2013). Principle of Confidentiality in Arbitration, A Necessary Crisis. *Journal of Arbitration Studies, Volume 23, Issue 2*. 26, 28-29, 31-33

<sup>70</sup> Rogers, *supra* at 1311-1312

<sup>71</sup> Brown, *supra* at 975-976

### a. Public interest

Arbitrations dealing with commercial disputes between private entities are primarily conducted in a confidential manner, however, the situation is slightly different in ISA, where states or state-entities appear as parties. States and state-entities fall under the scope of public laws, under which transparent functioning is considered a basic requirement, thus arbitrations in which such entities take part are subject to public access and disclosure.<sup>72</sup> Furthermore, with the adoption of the UNCITRAL Rules on Transparency, this belief was even more strengthened. Extending the scope of the transparent approach to ICA disputes is argued by legal scholars.<sup>73</sup> Through the conclusion of public contracts states use public resources, which justifies public interest as a limitation to privacy and confidentiality surrounding the arbitration of investment disputes. The development and expansion of ISA (especially since emerging markets started to enter the global scene) gave rise to tension between the private and confidential nature of the process, which had long been its fundamental attribute, and a transparent approach, providing public access in arbitral cases where the public interest demands.<sup>74</sup> As public access to different aspects of arbitration is gaining foothold, even though confidentiality is still considered as a momentous attribute, the faith placed in it seems to be slightly weakened. Discussions were evoked regarding the private and confidential nature of international arbitration and whether it forms an integral part of the procedure, thus the development of ISA had a clear impact on the whole picture.<sup>75</sup>

As described above, when public access to arbitral procedures between business undertakings becomes justified, confidentiality has to step away and make way for the greater good. A prominent example is again the famous *Esso v. Plowman* case, in which the Australian State was involved and matters regarding public utilities were under discussion. The High Court of Australia delivered a conclusion in the case, according to which "*confidentiality could not be deemed a fundamental attribute and the legitimate interest of the public in obtaining information with regard to public authority matters must prevail*".<sup>76</sup>

The approach taken by the High Court of Australia was followed by the Swedish Supreme Court in the *Bulgarian Foreign Trade Bank Ltd v. A. I. Trade Finance Inc* case.<sup>77</sup> Furthermore, cases such as the *Ali Shipping Corporation v Shipyard Trogir, Associated Electric and Gas Insurance Ltd (Aegis) v European Reinsurance Co of Zurich* and *Insurance Co v Lloyd's Syndicate* also indicated that confidentiality is not untouchable.<sup>78</sup> Additionally, in *Lawrence E. Jaffee Pension Plan v. Household International, Inc.* and *Urban Box Office Network v. Interfase Manager* (both taking place in the

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<sup>72</sup> Calamita, N. J. (2014). Dispute Settlement Transparency in Europe's Evolving Investment Treaty Policy. *Journal of World Investment and Trade, Volume 15, Issue 3-4*. 648-649

<sup>73</sup> Misra, J. & Jordans, R. (2006). Confidentiality in International Arbitration, An Introspection on the Public Interest Exception. *Journal of International Arbitration, Volume 23, Issue 1*. 48

<sup>74</sup> Reith, C. (2015). New UNCITRAL Rules on Transparency 2014, Significant Breakthrough or a Regime Full of Empty Formula. *Yearbook on International Arbitration, Volume 4, pp. 121-148*. 122-124

<sup>75</sup> Gruner, D. M. (2003). Accounting for the Public Interest in International Arbitration, The Need for Procedural and Structural Reform. *Columbia Journal of Transnational Law, Volume 41, Issue 3*. 924-925, 930-931, 956

<sup>76</sup> Cremades, supra at 30. Furthermore see *Esso v Plowman*. (1995). *Arbitration International, Volume 11, Issue 3*

<sup>77</sup> See in general Notes on *Bulgarian Foreign Trade Bank Ltd v. A. I. Trade Finance Inc*, Supreme Court 27 October 2000. *World Trade and Arbitration Materials, Volume 13, Issue 1*. Furthermore see the Swedish Supreme Court judgement. *Case no. 1881-99*. Accessible through

<http://www.arbitration.sccinstitute.com/Views/Pages/GetFile.ashx?portalId=89&cat=95788&docId=1083535&propId=1578>

<sup>78</sup> Noussia, supra at 124

United States) the courts, despite the fact that a confidentiality provision was included in the arbitration clause by the parties, required the disclosure of certain documents of the arbitration.<sup>79</sup>

Public access is a limitation to confidentiality which it may not exceed and go beyond its borders. It becomes second-rate and loses priority compared to the satisfaction of the public interest in arbitral procedures, especially applied in the context of investment disputes. States are obliged and regulated by public laws, thus it is obvious that arbitral procedures in which they take part have to be conducted in public, as the state has to ensure that its citizens are provided with sufficient information in connection with issues that might have an impact on their everyday life.<sup>80</sup>

*b. Disclosure towards public authorities*

Domestic laws may limit the extent of confidentiality, since in certain situations public authorities are entitled to require the disclosure of documents involved in the procedure. Among others, anti-money laundering laws set forth that a person suspecting that a transaction incorporates or represents elements of a crime has the obligation to disclose such information towards the competent authorities, a principle which also applies in arbitral procedures.<sup>81</sup>

*c. Judicial enforcement of arbitral awards*

Claims regarding the enforcement (or actions seeking the annulment) of an arbitral award frequently arrive to domestic courts, therefore the question arises whether the confidential nature of the arbitral procedure continues to prevail in the course of the judicial procedure<sup>82</sup>, which, obviously, will contain information presented during the arbitration and through its mechanisms details of the process will unavoidably appear in the public domain. A prominent case in the subject is *Television New Zealand v. Langley Productions*, where the High Court of New Zealand held that in case a party to an arbitration brings an arbitral award front of court requesting the judicial review thereof, the confidentiality previously applied in the procedure dissolves to a certain extent. According to Robertson J, „... proceedings in this Court are and long have been, prima facie in public. The openness of justice is a central tenet of our system. Proceedings will be open for reporting and scrutiny unless there are exceptional reasons which militate against that”.<sup>83</sup> Furthermore, as the High Court presented, “the confidentiality which the parties have adopted and embraced with regard to their dispute resolution in arbitration cannot automatically extend to processes for enforcement or challenge in the High Court”.<sup>84</sup> Thus, the fundamental criteria according to which judicial procedures have to be transparent and open to the public overrides the private and confidential nature of arbitration in situations when an award is brought before a domestic court on the basis of enforcement or annulment.

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<sup>79</sup> Reuben, R. (2006). Confidentiality in Arbitration, Beyond the Myth. *University of Kansas Law Review*, Volume 55, Issue 5. 1267-1268

<sup>80</sup> Argen, supra at 3-4

<sup>81</sup> Hwang, M. & Chung, K. (2009). Defining the Indefinable, Practical Problems of Confidentiality in Arbitration. *Journal of International Arbitration*, Volume 26, Issue 5. 622

<sup>82</sup> Weixia, supra at 14

<sup>83</sup> Williams, D. (2000) Arbitration and Dispute Resolution. *New Zealand Law Review*, Volume 2000, Issue 1. 62

<sup>84</sup> Hwang & Chung, supra at 621



#### *d. Disclosure obligation of publicly traded companies*

Publicly traded companies face stricter regulations with respect to transparent functioning than their smaller counterparts not appearing on stock markets. Stricter regulations may also apply in connection with ongoing legal disputes. Naturally, even though they are considered as third persons not being involved in a given arbitral procedure, the shareholders of listed companies have a reasonable amount of interest in the outcome of an arbitration where the company in which they hold a percentage of shares is a participant, and the impact the award might have on its functioning is capable of reducing its share value. Therefore, listed companies in most jurisdictions are required to publish in their annual reports certain information in connection with arbitrations in which they are involved, a matter raising further questions regarding the extent to which the details of the process might be revealed in such situations.<sup>85</sup>

#### *e. Safeguarding the interests of an arbitrating party*

Situations might occur where documents produced in a previous arbitral process have to be disclosed in an ongoing arbitration in order to protect the legitimate interests of an arbitrating party. For instance, an arbitrating party might want to disclose the content of a previous arbitral procedure in order to present certain evidence (or a position, opinion that had been taken by that party in an earlier, but with regards to its subject, similar arbitration) strengthening its standpoint in a given matter and protecting its interests against third parties. The judicial enforcement of arbitral awards can be listed here as well, since without the disclosure of certain elements of the award, the winning party would not be able to seek the enforcement thereof, which would ultimately result in the violation of its rights and interests.<sup>86</sup> A prominent case in this issue is the *Associated Electric and Gas Insurance Services Ltd. v European Reinsurance Company of Zurich*. The court came to the conclusion that „... it becomes clear that it [the confidentiality clause] should not be construed so as to prevent one party from relying upon an award as having given him rights against the other”, and „If the winner is precluded from referring to the award, he cannot enforce it whether as a declaration of his rights or as a monetary award”.<sup>87</sup>

#### II.1.4. Potential risks and disadvantages of overemphasizing confidentiality

However, even though its importance is unquestionable, it would be rather unwise to treat confidentiality as a sacred, supreme and untouchable component of arbitration. Such approach would be risky, as arbitration (especially on an international level) cannot afford itself to let confidentiality become equivalent with secrecy. The danger that confidentiality might be considered as a tool to hide inappropriately rendered decisions (such as decisions violating the principles of the procedure) would be detrimental with respect to the reliability of arbitrators. Furthermore, as the reasoning is confidential in the majority of situations, there is a chance that arbitral awards will be seen as an unavailable instrument for scrutiny, again undermining the reliability of arbitrators and the process itself.

An additional downside of secrecy surrounding arbitral awards is that it does not contribute to the development of law at its full potential. The reasoning of arbitral awards usually contain high-quality legal opinions from renowned legal scholars and practitioners in fields of law having a strong relationship with arbitration. Thus, the excessive application of confidentiality regarding arbitral

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<sup>85</sup> Weixia, *supra* at 21-22

<sup>86</sup> Hwand & Chung, *supra* at 623-624

<sup>87</sup> *Associated Electric and Gas Insurance Services Ltd. v European Reinsurance Company of Zurich*. Accessible through <http://www.nadr.co.uk/articles/published/ArbitrationLR/Associated%20Electric%20v%20ERC%202003.pdf> paras. 11,

awards might deprive the legal literature from valuable knowledge. Furthermore, the case law of arbitral institutions can provide great benefits for the judges of ordinary courts.<sup>88</sup> As discussed above, a judicial procedure through which a party to an arbitration might seek the enforcement or annulment of an award reveals certain confidential elements, as the content of the award, though indirectly, but still appears in the public domain via the transparent nature of the judicial procedure. That, however, is not viewed as a violation of confidentiality.<sup>89</sup>

ISA became a transparent method with respect to the publication of arbitral awards, however, in ICA, where states or state-entities are not participating, the topic is more sensitive. There seems to be a desire among legal scholars according to which arbitral awards in general, unless the parties agree otherwise, should be published in the public domain, thus raising the contribution arbitration might provide to the development of certain fields of law.<sup>90</sup>

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<sup>88</sup> Cremades, *supra* at 33-36

<sup>89</sup> Noussia, *supra* at 57

<sup>90</sup> Cremades, *supra* at 35. Furthermore see Crook, J. R. (2009). Joint Study Panel on Transparency in International Commercial Arbitration. *ILSA Journal of International and Comparative Law*, Volume 12, Issue 2. 362-364

## II.2. Transparency

### II.2.1. Analyzation of the concept of transparency

The way transparency manifests in international arbitration can take several forms. Most importantly, the disclosure of arbitral awards, documents and other information relating to the procedure is what embodies transparency in practice. Furthermore, the extent to which non-disputants (*amicus curiae*) are allowed to intervene or participate reflects a certain degree of transparency as well. The arbitral tribunal of the ICSID, acting in the *Biwater Gauff v Tanzania* case, established that – among others – the amendments made to the ICSID Arbitration Rules in 2006 highlighted the emergence of an increased desire towards transparency.<sup>91</sup> As Professor Andrea Bianchi wrote, „*Transparency is not just difficult to couch in legal terms. It is also difficult to grasp in terms of content... Transparency is often associated with information and knowledge, legitimacy and accountability, participatory democracy and good governance*”.<sup>92</sup> Furthermore, according to the definition given by the United Nations Economic and Social Commission for Asia and the Pacific („UNESCAP”), which seems to be the most competent among the few definitions for this concept, „*Transparency means that decisions taken and their enforcement are done in a manner that follows rules and regulations. It also means that information is freely available and directly accessible to those who will be affected by such decisions and their enforcement. It also means that enough information is provided and that it is provided in easily understandable forms and media*”.<sup>93</sup> It could be valuable to examine whether there is a general obligation for states to ensure transparency in arbitral procedures in which they participate and let details of it known to the public. For this purpose, two main instruments have to be noted. Article 19 of the International Covenant on Civil and Political Rights („ICCPR”) has to be considered, as it sets forth the freedom of opinion and expression.<sup>94</sup> General Comment No. 34. of the Human Rights Committee declared that under Article 19 of the ICCPR states have the following obligation: „*To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information*”.<sup>95</sup> Furthermore, the European Court of Human Rights adopted a decision according to which Article 10 of the European Convention on Human Rights („ECHR”), also dealing with the freedom of expression<sup>96</sup>, is violated in case states or state entities do not provide sufficient information to the public regarding matters raising public interest.<sup>97</sup> Therefore, the very roots of the transparency requirement lie in human rights instruments,

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<sup>91</sup> Knahr, C. & Reinisch, A. (2007). Transparency Versus Confidentiality in International Arbitration, *The Biwater Gauff Compromise. Law and Practice of International Courts and Tribunals, Volume 6, Issue 1.* 97-97, 105. Furthermore see in general *Biwater Gauff v Tanzania*. Case N.o. ARB/05/22. Accessible through:

[https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1589\\_En&caSelId=C67](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1589_En&caSelId=C67)

<sup>92</sup> Bianchi & Peters, *supra* at 7-8

<sup>93</sup> United Nations Economic and Social Commission for Asia and the Pacific. What is good governance? Accessible through: <http://www.unescap.org/sites/default/files/good-governance.pdf>

<sup>94</sup> Article 19 of the International Covenant on Civil and Political Rights. Accessible through:

<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

<sup>95</sup> General Comment No. 34. of the Human Rights Committee on Article 19 of the ICCPR. Para. 19. Accessible through:

<http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

<sup>96</sup> Article 10 of the European Convention on Human Rights. Accessible through:

[http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)

<sup>97</sup> European Court of Human Rights. Case No. 37374/05. Paras 26-28, 39. Accessible through:

[http://home.broadpark.no/~wkeim/files/echr-CASE\\_OF\\_TARSASAG\\_v.\\_HUNGARY.html](http://home.broadpark.no/~wkeim/files/echr-CASE_OF_TARSASAG_v._HUNGARY.html)

since it is necessary for states to ensure the enforcement thereof in order to fulfil their international obligations.

Based on the examination of relating provisions of the ICCPR, the ECHR, the UNESCAP definition on transparency and the opinion of contemporary legal scholars, and with taking into account the existence of public stakehold (i.e. public interest), especially in ISA, it can be understood why the UNCITRAL Rules on Transparency was a desired instrument for international arbitration. It has been the subject of discussion whether arbitration is suitable for settling investment disputes with extremely large amounts in question, involving states and state entities controlled by national parliaments. The rise of ISA saw the rise of its fierce criticism as well.

It was under discussion whether the principles of the rule of law and division of powers are violated by arbitrations in investment disputes, since matters regarding public resources are assessed within an alternative mechanism where the acting arbitrators are selected from a narrow circle of individuals and the possibility of taking an arbitral award front of a domestic court on the basis of annulment is highly limited.<sup>98</sup> The secrecy surrounding this ADR mechanism was further strengthened by its private and confidential nature discussed above, contributing to the rise of increased distrust towards it.<sup>99</sup> However, according to Professor Claudia Reith, „*What alternative is left? The acceptance of another jurisdiction will hardly be an option for states, the reliance on diplomatic protection is too uncertain for foreign investors and the establishment of an international investment court is still a long way off. Hence, there is nothing left but investor-state arbitration. Despite all the criticism one has to bear in mind that investor-state arbitration ensures individuals a simple and straightforward access to impartial tribunals and therewith guarantees legal protection*”.<sup>100</sup> The straightforward analyzations of Professor Reith perfectly sum up the situation of ISA, and the UNCITRAL Rules on Transparency came as a saviour, highlighting the fact that this ADR method is capable of further developments.

However, as the UNCTIRAL Rules on Transparency is applicable to ISA only, it arises as a reasonable question that why is it required to sacrifice fundamental attributes (i.e. privacy and confidentiality) on the altar of transparency in ISA, when ICA can remain relatively untouched, while both methods are ADR mechanisms sharing the same roots as far as their evolution goes. Even though it is true that they share similarities, there is indeed a bright contrast between them. The most obvious finding is that while commercial arbitrations arise from disputes having a purely private character (i.e. the legal dispute between private parties arising from their private commercial agreement), investment arbitrations emerge from disputes arising out of activities covered by bi- or multilateral treaties ratified by states or state entities, endowing this method with a public nature.<sup>101</sup> Furthermore, as already discussed above, issues relating to the everyday lives of citizens are in question in such cases (for instance cases dealing with natural gas supply), and ultimately, the public has to pay the cost of the state being on the losing side against a foreign investor. Thus, the subject and the participants of ISA are the next features distancing it from its commercial twin.<sup>102</sup> These facts clearly underline that ISA and ICA have to be dealt with separately.

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<sup>98</sup> Reith, supra at 122

<sup>99</sup> Hafner-Burton, E. M., & Victor, D. G. (2016). Secrecy in International Investment Arbitration, An Empirical Analysis. *Journal of International Dispute Settlement, Volume 7, Issue 1.* 163

<sup>100</sup> Reith, supra at 123

<sup>101</sup> Connors, P. C. (2009). Investor-State Arbitration. *Suffolk Transnational Law Review, Volume 32, Issue 2.* 506

<sup>102</sup> Argen, supra at 2-5

## II.2.2. Transparency examined within the context of ISA

International agreements and treaties regulating the relationship of host states and foreign investors provide, as their main purpose, the determination of certain standards. Such standards have to be applied by host states towards foreign investors and their activities. These concepts are embodied by the „fair and equitable” approach to be shown, including the prohibition of granting unfair advantages to domestic investors and restrictions on the expropriation of foreign investments without fair compensation. Furthermore, an important element of the above mentioned agreements and treaties is to entitle foreign investors with the right to bring a claim against the host state in an arbitration.<sup>103</sup> Arbitral tribunals acting in ISAs appear in both ad-hoc and institutional forms. One of the most utilized forms of institutional tribunals in investment disputes is the ICSID’s tribunal.<sup>104</sup>

The characteristics of ISA (i.e. the procedural rules on which the parties have agreed in the investment agreement or treaty concluded between them) rely largely on techniques developed in ICA.<sup>105</sup> As already discussed above, ICA is a private and confidential procedure, placing obligations relating to these concepts on the parties and other participants with respect to certain aspects of the process, however, in ISA the unquestionable and extensive degree of the public’s stakehold is present.<sup>106</sup> Agreements and treaties between states relating to foreign investor-host state relationships determine standard obligations on behalf of the host state directed towards the protection of foreign investment, furthermore, they establish dispute resolution methods through which the possible violation of these standard obligations can be assessed accordingly. Violations of required standards by host states can materialize in direct or indirect negative effects exerted on the foreign investor. It depends on whether the exercise of public power by the host state is directed to a foreign investor or the negative effect exerted is embodied by a general regulation (for example via providing benefits to domestic investors acting in the same sector through legal regulations with the intention of creating an unfair competitive advantage). Investment disputes arise as a consequence of public regulations having a real or perceived impact on the foreign investor and its activity.<sup>107</sup>

Transparency is an undefined term within the meaning of ISA, however, it appears in certain parts of the procedure. Transparency has two sides when it comes to ISA, as it can mean (a) the degree and type of information shared with the public regarding the procedure, and (b) the extent to which the public might participate in a given ISA procedure.<sup>108</sup> Transparency, as developed and established by the evolving international agreements and treaties between states relating to foreign investment issues, materializes in the following approaches:

- a. Disclosure to the public regarding the existence of the investment dispute including the parties’ submissions and further documents, and the disclosure of the arbitral award and the reasoning thereof,

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<sup>103</sup> Roberts, A. (2015). Triangular Treaties, The Extent and Limits of Investment Treaty Rights. *Harvard International Law Journal*, Volume 56, Issue 2. 353-355, 381

<sup>104</sup> The ICSID Caseload Statistics. Issue 2016-1. Accessible through:  
[https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202016-1%20\(English\)%20final.pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202016-1%20(English)%20final.pdf)

<sup>105</sup> Calamita, supra at 648

<sup>106</sup> Malatesta, A. & Sali, R. (2013). *The Rise of Transparency in International Commercial Arbitration*. Jurisnet, LLC. 107-108

<sup>107</sup> Bianchi & Peters, supra at 145, 148, 170

<sup>108</sup> Lazo, R. P. (2010). International Arbitration in Times of Change, Fairness and Transparency in Investor-State Disputes. *American Society of International Law Proceedings*, Volume 104, pp. 591-596. 593-594

- b. The hearings are open to the public and the public can participate in the procedure via appearing as amicus curiae.<sup>109</sup>

### II.2.3. Reasons behind the increased desire towards transparency in ISA

Future or existing investment disputes under international investment agreements have a public characteristic, fundamentally because they incorporate claims which are directed towards host state activities in exercising their public power. However, as discussed above, investment disputes were usually handled with procedures based on the approach of ICA, where privacy and confidentiality play a massive role, thus the possibility for the public to receive information or to participate in a process was almost excluded. This constitutes an important factor behind states starting to incorporate elements in their investment agreements and treaties increasing the degree of transparency.<sup>110</sup> In order to confirm the positive effects this trend has evoked, increasing transparency can have the following advantages:

- a. *Progression and improvement of state policies in connection with the conclusion of international agreements and treaties*

Higher degree of transparency can be an important instrument in the development of states' approach towards the conclusion of inter-state agreements, since future challenges can be tackled easier with knowledge acquired from previous cases. Information relating to previous ISA procedures and the publication of rendered awards are valuable assets for states when it comes to the preparation and drafting of investment treaties. However, a lower degree of transparency deprives states from including already existing knowledge in their policies regarding the conclusion of such agreements.<sup>111</sup>

- b. *Growing public trust and confidence towards the arbitration of investment disputes*

Transparency provides solid grounds for increasing the legitimacy of ADR methods, most importantly ISA, as it has long been standing in the center of criticism based on the lack of its transparent functioning and accountability, let it be related to documents produced in the procedure, the reasoning of the award, evidences presented by the parties or the very existence of the dispute. This criticism, however, may not come across as an unlikely surprise, since as presented above, the procedure of ISA developed from the procedural elements of ICA where confidentiality and privacy play a more substantial role. Thus higher degree of transparency can be used to tackle certain criticisms directed towards ISA since its appearance.<sup>112</sup>

- c. *Strengthening the presence of the concept of good governance by the host state*

Transparency is a required element of the concept of good governance. As already discussed above, the outcome of high-profile ISA cases are able to influence the future policies of a given state. In case a disadvantageous award creates certain obligations on behalf of a state party, the state budget has to ensure that these obligations are fulfilled, thus the public purse suffers a blow after each case being lost. Furthermore, ISAs usually have, as their subject, public matters relating to environmental issues and healthcare. In such large-scale cases touching so sensitive issues, the appropriate monitoring

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<sup>109</sup> Argen, supra at 12-14

<sup>110</sup> Calamita, supra at 649-650

<sup>111</sup> Fernandez, C. G. & Puyana, D. F. (2015). Principles of Transparency and Inclusiveness as Pillars of Global Governance, The BRICS Approach to the United Nations. *BRICS Law Journal*, Volume 2, Issue 2. 15-16; Furthermore see Cornel, M. (2010). Balancing Transparency, The Value of Administrative Law and Mathews-Balancing to Investment Treaty Arbitration. *Pepperdine Dispute Resolution Law Journal*, Volume 10, Issue 2. 276, 286

<sup>112</sup> VanDuzer, J. A. (2007). Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation. *McGill Law Journal*, Volume 52, Issue 4. 684-686

through increased transparency is a desired method of ensuring that a state is reaching up to its international obligations, while protecting the well-being of its citizens, thus presenting the signs of good governance.<sup>113</sup>

*d. Compliance with international obligations relating to human rights and business*

Transparency is an important instrument in the monitoring of the activities of multinational companies. The United Nations Guiding Principles in Business and Human Rights („UN Guiding Principles”), adopted in 2011, sets forth obligations on behalf of states and business enterprises, according to which they have the duty and responsibility to protect and respect human rights in their business related activities conducted under domestic or foreign jurisdictions.<sup>114</sup> While making remarks on the UN Guiding Principles, the Special Representative of the Secretary-General pointed out that „*The responsibility to respect human rights requires that business enterprises have in place policies and processes through which they can both know and show that they respect human rights in practice. Showing involves communication, providing a measure of transparency and accountability to individuals or groups who may be impacted and to other relevant stakeholders, including investors*”.<sup>115</sup> Bearing in mind the sensitive public issues and large amounts at stake in ISA, as well as the potential impact which the outcome of such cases may have, a higher degree of transparency assists in complying with obligations set out by the UN Guiding Principles.

*e. Sense of safety for foreign investors*

Foreign investors benefit from increased transparency, since the publication of arbitral awards in investment matters provides them with valuable information regarding host states’ regulation policies. Publishing arbitral awards in investor-state matters transforms the claim raised by the investor against the host state visible and publicly accessible, thus third party investors can get an insight on challenges brought against, for instance, generally applicable statutory regulations. When assessing whether the investment-related regulations of a host state might be suitable for a particular foreign investor, knowledge acquired from previous arbitrations, where host state laws have been challenged, provides a great advantage. Furthermore, an overview of a host state’s regulatory policy increases predictability with respect to its investment-related legislation.<sup>116</sup>

II.2.4. Examination of the UNCITRAL Rules on Transparency

In the following part the UNCITRAL Rules on Transparency will be examined in a more in-depth manner, highlighting the important features and provisions it contains. Prior to its adoption, the procedural rules developed by the UNCITRAL in its Arbitration Rules lacked the degree of transparency the ICSID or NAFTA procedural rules provide. Since the UNCITRAL Rules on

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<sup>113</sup> Brabandere, E. (2015). Host States’ Due Diligence Obligation in International Investment Law. *Syracuse Journal of International Law and Commerce*, Volume 42, Issue 2. 349; Furthermore see Calamita, supra at 650; For the in-depth examination of the concept of good governance see in general Karpen, U. (2010). Good Governance. *European Journal of Law Reform*, Volume 12, Issues 1-2.

<sup>114</sup> See in general United Nations Guiding Principles on Business and Human Rights. Accessible through [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)

<sup>115</sup> Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises. John Ruggie. *Case No. A/HRC/17/31*. Commentary of Article 11. page 13; Accessible through [http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31\\_AEV.pdf](http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf)

<sup>116</sup> Calamita, supra at 652; Furthermore see in general Fiezzoni, S. K. (2012). Striking Consistency and Predictability in International Investment Law from the Perspective of Developing Countries. *Frontiers of Law in China*, Volume 7, Issue 4.

Transparency is applicable to ISAs initiated under the UNCITRAL Arbitration Rules, which is used in a vast amount of commercial arbitrations as well, this deficiency had been remedied.<sup>117</sup>

a. *Scope of the UNCITRAL Rules on Transparency*

*„The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration shall apply to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors concluded on or after 1 April 2014 unless the Parties to the treaty have agreed otherwise”.*<sup>118</sup>

This means that the UNCITRAL Rules on Transparency is not applicable to BITs concluded prior to its adoption, however it applies automatically to ISAs initiated under the UNCITRAL Arbitration Rules and arising out of investment disputes based on BITs concluded after April 1, 2014. However, in case of the mutual understanding of the parties, the UNCITRAL Rules on Transparency may be applied to BITs concluded before April 1, 2014 as well.<sup>119</sup> According to well-known legal scholars, these provisions of the UNCITRAL Rules on Transparency greatly reduce its effectiveness and excludes the possibility of its dynamic interpretation. According to the findings of Professor Julie Lee, *„a dynamic interpretation of the treaties is thus impermissible by the standards of international law, and UNCITRAL-as an intergovernmental body would overstep its authority if it retroactively applied the new standards to existing treaties. Therefore, an opt-in approach, which preserves parties' intent, should prevail with existing treaties. Otherwise, UNCITRAL could face legal challenges for violating the terms of existing treaties and for improperly applying international law”.*<sup>120</sup> This seems to be the most controversial part of the UNCITRAL Rules on Transparency.

b. *Primary topics*

Three primary topics are discussed in the UNCITRAL Rules on Transparency. The first establishes rules with respect to the publication of documents, the second sets certain standards regarding amicus curiae submissions while the third main topic deals with mandatory open hearings.

Article 3 clearly sets forth that certain documents of the arbitral procedure shall be automatically publicised. These documents are the following: *„... The notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party. A table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves. Any written submissions by the non-disputing Party (or Parties) to the treaty and by third persons, transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal”.*<sup>121</sup> However, a different standard is applied to expert reports and witness statements, where such documents are to be made public only when it is requested from the arbitral tribunal. The request to the arbitral tribunal with respect to the disclosure of expert reports and witness statements can be made by any person.<sup>122</sup> Furthermore, Article 2 sets out that certain information

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<sup>117</sup> Levander, supra at 521, 523

<sup>118</sup> Article 1, para. 1 of the UNCITRAL Rules on Transparency in Treaty-based Investor-state Arbitration. Accessible through <https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>

<sup>119</sup> UNCITRAL Rules on Transparency. Article 1, para. 2

<sup>120</sup> Lee, J. (2013). UNCITRAL's Unclear Transparency Instrument, Fashioning the Form and Application of a Legal Standard Ensuring Greater Disclosure in Investor-State Arbitrations. *Northwestern Journal of International Law and Business*, Volume 33, Issue 2. 470; Furthermore Levander, supra at 507-508

<sup>121</sup> UNCITRAL Rules on Transparency. Article 3, para. 1

<sup>122</sup> UNCITRAL Rules on Transparency. Article 3, para. 2



relating to the commencement of the procedure has to be disclosed towards the public as well, such as the identity of the disputing parties, the economic sector involved and the treaty under which the claim is being made.<sup>123</sup> Therefore, parties to an ISA concluded under the UNCITRAL Rules on Transparency are not able to hide their dispute from the public, a characteristic to which they have not been accustomed under ICA rules prior to the emergence of the transparency trend.

Articles 4 and 5 of the UNCITRAL Rules on Transparency deal with amicus curiae issues. The situation of amicus curiae submissions vary from jurisdiction to jurisdiction. However, as a universal definition, amicus curiae are non-disputant third parties (for instance certain NGOs intervening in high-volume ISAs in order to provide knowledge or expertise in a certain matter) granted with the right to participate in a given procedure through amicus curiae briefs.<sup>124</sup> Article 4 grants the right to intervene and sets a standard in this regard for non-disputing parties that are not parties to the treaty within the scope of the dispute. Article 5, however, sets different standards for non-disputing parties that are in the same time parties to the treaty within the scope of the dispute.<sup>125</sup> The main difference between the two is that in case of an amicus curiae that is a party to the treaty within the scope of the dispute, the arbitral tribunal has less discretion when it has to decide whether it allows the third party to enter the arbitration. This approach shows that *„the rights of a party to a treaty are more fundamentally implicated by an arbitration regarding that treaty than the rights of a third-party that is not a party to the treaty”*.<sup>126</sup>

Article 6 of the UNCITRAL Rules on Transparency determines regulations with regards to hearings. As a default rule, it establishes that all hearings shall be held in public, which was uncommon in international arbitration priorly, and is a clear indication towards increasing transparency. Furthermore, Article 6 determines the obligation of the tribunal to make logistical arrangements in order to ensure the public access to hearings (for instance through video links). However, the tribunal has the discretion to hold the hearings in private in case the protection of confidential information or the integrity of the arbitral process is required.<sup>127</sup> Article 7 sets out the exceptions to transparency, based on which the tribunal, if needed, orders the hearings to be held in camera.<sup>128</sup> The Working Group developing the content of the UNCITRAL Rules on Transparency had heavy debates regarding the nature of the hearings, with certain states disagreeing with open hearings as a default rule.<sup>129</sup> However, with the final decision of the Working Group, it is clearly indicated that states, in general, are directed towards a transparent approach and have understood its importance in investment-related disputes.

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<sup>123</sup> UNCITRAL Rules on Transparency. Article 2

<sup>124</sup> Levine, E. (2011). Amicus Curiae in International Investment Arbitration, The Implication of an Increase in Third-Party Participation. *Berkeley Journal of International Law*, Volume 29, Issue 1. 200-201

<sup>125</sup> UNCITRAL Rules on Transparency. Articles 4-5

<sup>126</sup> Levander, supra at 526

<sup>127</sup> UNCITRAL Rules on Transparency. Article 6, paras. 1-3

<sup>128</sup> UNCITRAL Rules on Transparency. Article 7

<sup>129</sup> Levander, supra at 526-527

### **III. Examination of the arbitration rules of certain high-profile arbitral institutions with regards to privacy, confidentiality and transparency**

#### World Intellectual Property Organization („WIPO“)

Among the leading institutions providing ADR services, the WIPO determines regulations with regards to confidentiality in the most detailed and prudent manner. With taking into account the highly sensitive nature of matters and disputes relating to intellectual property, this approach can be considered as definitely reasonable. The following provisions dealing with confidentiality can be found in the WIPO arbitration rules:

*„Except to the extent necessary in connection with a court challenge to the arbitration or an action for enforcement of an award, no information concerning the existence of an arbitration may be unilaterally disclosed by a party to any third party unless it is required to do so by law or by a competent regulatory body, and then only:*

*(i) by disclosing no more than what is legally required; and*

*(ii) by furnishing to the Tribunal and to the other party, if the disclosure takes place during the arbitration, or to the other party alone, if the disclosure takes place after the termination of the arbitration, details of the disclosure and an explanation of the reason for it.*

*(b) Notwithstanding paragraph (a), a party may disclose to a third party the names of the parties to the arbitration and the relief requested for the purpose of satisfying any obligation of good faith or candor owed to that third party.”<sup>130</sup>*

*„In addition to any specific measures that may be available under Article 54, any documentary or other evidence given by a party or a witness in the arbitration shall be treated as confidential and, to the extent that such evidence describes information that is not in the public domain, shall not be used or disclosed to any third party by a party whose access to that information arises exclusively as a result of its participation in the arbitration for any purpose without the consent of the parties or order of a court having jurisdiction.”<sup>131</sup>*

*„The award shall be treated as confidential by the parties and may only be disclosed to a third party if and to the extent that:*

*(i) the parties consent; or*

*(ii) it falls into the public domain as a result of an action before a national court or other competent authority; or*

*(iii) it must be disclosed in order to comply with a legal requirement imposed on a party or in order to establish or protect a party's legal rights against a third party.”<sup>132</sup>*

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<sup>130</sup> WIPO arbitration rules. Article 75. Accessible through <http://www.wipo.int/amc/en/arbitration/rules/#conf2>

<sup>131</sup> WIPO arbitration rules. Article 76

<sup>132</sup> WIPO arbitration rules. Article 77

### Singapore International Arbitration Centre („SIAC”)

The SIAC has been functioning since 1991, residing in one of the fastest-growing economic areas in the world. The arbitration rules of the SIAC mainly rely on the UNCITRAL Model Law and Singapore is a party to the New York Convention as well.<sup>133</sup> The SIAC mainly handles cases relating to the energy and construction sector, banking, joint ventures and financial as well as insurance matters.<sup>134</sup> The arbitration rules of the SIAC establish fairly detailed rules in connection with confidentiality:

*„The parties and the Tribunal shall at all times treat all matters relating to the proceedings and the award as confidential.*

*A party or any arbitrator shall not, without the prior written consent of all the parties, disclose to a third party any such matter except:*

- 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 provision of the laws of any State which are binding on the party making the disclosure;*
- e. in compliance with the request or requirement of any regulatory body or other authority; or*
- f. pursuant to an order by the Tribunal on application by a party with proper notice to the other parties.”<sup>135</sup>*

### London Court of International Arbitration („LCIA”)

The LCIA was established in 1892, and is among the leading and most utilized arbitral institutions, primarily providing grounds for commercial disputes. With regards to the influences incorporated in the arbitration rules of the LCIA, it primarily follows common law aspects.<sup>136</sup> The LCIA arbitration rules, just like the ICC arbitration rules, contain detailed provisions regarding confidentiality:

*„The parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party by legal duty to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority. The deliberations of the Arbitral Tribunal shall remain confidential to its members, save as required by any applicable law and to the extent that disclosure of an arbitrator’s refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under Articles 10, 12, 26 and 27. The LCIA does not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal.”<sup>137</sup>*

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<sup>133</sup> Overview of certain regulations governing arbitration in Singapore. Accessible through <http://www.siac.org.sg/2014-11-03-13-33-43/why-siac/arbitration-in-singapore>

<sup>134</sup> Born, G. B. (2014). *International Commercial Arbitration*. Second Edition. Wolters Kluwer. 174-199

<sup>135</sup> Rule 35 of the SIAC Rules. Accessible through <http://siac.org.sg/our-rules/rules/siac-rules-2013>

<sup>136</sup> History of the LCIA. Accessible through <http://lcia.org/LCIA/history.aspx>

<sup>137</sup> Article 30 of the LCIA arbitration rules. Accessible through [http://www.lcia.org/Dispute\\_Resolution\\_Services/lcia-arbitration-rules-2014.aspx#Article 30](http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Article 30)

### International Chamber of Commerce International Court of Arbitration („ICC”)

The ICC started its functioning in 1923 and is located in Paris, France. It has a strong international character, dealing mainly with commercial cases.<sup>138</sup>

In Appendix I of the arbitration rules of the ICC a general determination of the private nature of the dispute resolution method can be found:

*„The work of the Court is of a confidential nature which must be respected by everyone who participates in that work in whatever capacity. The Court lays down the rules regarding the persons who can attend the meetings of the Court and its Committees and who are entitled to have access to materials related to the work of the Court and its Secretariat.”<sup>139</sup>*

However, in its Appendix II, the ICC rules lays down detailed rules on confidentiality:

*„For the purposes of this Appendix, members of the Court include the President and Vice-Presidents of the Court. The sessions of the Court, whether plenary or those of a Committee of the Court, are open only to its members and to the Secretariat. However, in exceptional circumstances, the President of the Court may invite other persons to attend. Such persons must respect the confidential nature of the work of the Court. The documents submitted to the Court, or drawn up by it or the Secretariat in the course of the Court's proceedings, are communicated only to the members of the Court and to the Secretariat and to persons authorized by the President to attend Court sessions.”<sup>140</sup>*

### Association Française d'Arbitrage („AFA”)

The AFA, holding a prominent role in French arbitration, was established in 1975 and mainly deals with the resolution of domestic and international commercial disputes.<sup>141</sup> There is a general rule determined with regards to the private and confidential nature of the arbitral procedure under AFA rules:

*„The arbitral procedure and the award are confidential.”<sup>142</sup>*

### Swiss Chamber's Arbitration Institution („SCAI”)

The SCAI is a relatively new arbitral tribunal, established in 2004, nonetheless it plays a prominent role in the European region as an often-used dispute resolution platform.<sup>143</sup> In its arbitration rules the provisions in connection with privacy and confidentiality are detailed, however they still remain clear:

*„Unless the parties expressly agree in writing to the contrary, the parties undertake to keep confidential all awards and orders as well as all materials submitted by another party in the framework of the arbitral proceedings not already in the public domain, except and to the extent that a disclosure may be required of a party by a legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a judicial authority. This undertaking also applies to the*

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<sup>138</sup> History of the ICC Court of Arbitration. Accessible through <http://www.iccwbo.org/about-icc/history/the-merchants-of-peace/>

<sup>139</sup> Appendix I, Article 6 of the ICC arbitration rules. Accessible through <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/>

<sup>140</sup> Appendix II, Article 1 of the ICC arbitration rules

<sup>141</sup> History of the AFA. Accessible through <http://www.afa-arbitrage.com/en/about-afa/who-we-are/>

<sup>142</sup> Article 16 of the AFA arbitration rules. Accessible through <http://www.afa-arbitrage.com/en/rules/arbitration-rules/>

<sup>143</sup> Favre-Bulle, X. (2013). Swiss Rules of International Arbitration (Swiss Rules), From 2004 to the (Light) 2012 Revision. *International Business Law Journal*, Volume 2013, Issue 1. 23-25. Furthermore see information relating to the SCAI. Accessible through <https://www.swissarbitration.org/About-us>

*arbitrators, the tribunal-appointed experts, the secretary of the arbitral tribunal, the members of the board of directors of the Swiss Chambers' Arbitration Institution, the members of the Court and the Secretariat, and the staff of the individual Chambers.*

*The deliberations of the arbitral tribunal are confidential.*

*An award or order may be published, whether in its entirety or in the form of excerpts or a summary, only under the following conditions: (a) A request for publication is addressed to the Secretariat; (b) All references to the parties' names are deleted; and Swiss Rules englisch NEU.indd 31 13.06.12 13:20 32 (c) No party objects to such publication within the time-limit fixed for that purpose by the Secretariat.*"<sup>144</sup>

#### American Arbitration Association and International Center for Dispute Resolution („AAA")

The AAA was established in the first half of the twentieth century with the amalgamation of two arbitral institutions located in New York. The AAA is one of the prime arbitral institutions in the United States dealing with most of the high-profile cases brought before an arbitral tribunal in the U.S. As we can see below, the AAA provides thorough determination of rules with regards to confidentiality:<sup>145</sup>

*„Subject to applicable law or the parties' agreement, confidential information disclosed to a mediator by the parties or by other participants (witnesses) in the course of the mediation shall not be divulged by the mediator. The mediator shall maintain the confidentiality of all information obtained in the mediation, and all records, reports, or other documents received by a mediator while serving in that capacity shall be confidential. The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.*

*The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding the following, unless agreed to by the parties or required by applicable law:*

- (i) Views expressed or suggestions made by a party or other participant with respect to a possible settlement of the dispute;*
- (ii) Admissions made by a party or other participant in the course of the mediation proceedings;*
- (iii) Proposals made or views expressed by the mediator; or*
- (iv) The fact that a party had or had not indicated willingness to accept a proposal for settlement made by the mediator.*"<sup>146</sup>

#### Permanent Court of Arbitration („PCA")

The PCA, located in the Hague, was established by the Convention for the Pacific Settlement of International Disputes in 1899. It stands among the few arbitral institutions coming to existence as early as the nineteenth century. The PCA mainly deals with international disputes arising between

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<sup>144</sup> Article 44 of the Swiss Rules of International Arbitration. Accessible through [https://www.swissarbitration.org/files/33/Swiss-Rules/SRIA\\_english\\_2012.pdf](https://www.swissarbitration.org/files/33/Swiss-Rules/SRIA_english_2012.pdf)

<sup>145</sup> History of the AAA. Accessible through: [https://www.adr.org/aaa/faces/s/about?\\_afLoop=135310559441175&\\_afWindowMode=0&\\_afWindowId=14dbuevmpr11#%40%3F\\_afWindowId%3D14dbuevmpr1%26\\_afLoop%3D135310559441175%26\\_afWindowMode%3D0%26\\_adf.ctrl-state%3D14dbuevmpr\\_55](https://www.adr.org/aaa/faces/s/about?_afLoop=135310559441175&_afWindowMode=0&_afWindowId=14dbuevmpr11#%40%3F_afWindowId%3D14dbuevmpr1%26_afLoop%3D135310559441175%26_afWindowMode%3D0%26_adf.ctrl-state%3D14dbuevmpr_55)

<sup>146</sup> M-10 'Confidentiality' of the Rules and Mediation Procedures of the AAA. Accessible through: [https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG\\_004103&revision=latestreleased](https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103&revision=latestreleased)

states or state-entities.<sup>147</sup> Interestingly, the arbitration rules of the PCA do not contain separate provisions for confidentiality. The only reference to its private functioning can be found in Article 28:

*„Hearings shall be held in camera unless the parties agree otherwise”.*<sup>148</sup>

#### Hong Kong International Arbitration Centre („HKIAC”)

Founded in 1985, the HKIAC stands among the most prominent and often-used arbitral tribunals in the Asia-Pacific region. According to a 2015 survey, it is ranked as the third most preferred institution worldwide with respect to the resolution of commercial disputes, however, ISAs are conducted in significant numbers as well.<sup>149</sup> In its arbitration rules, the HKIAC determines only one provision relating to privacy and confidentiality:

*„Subject to the provisions of Section 18 of the Ordinance and these Rules, no information relating to the arbitration shall be disclosed by any person without the written consent of each and every party to the arbitration.”*<sup>150</sup>

#### Stockholm Chamber of Commerce Arbitration Institute („SCCAI”)

Established in 1917 in Stockholm, the SCCAI provides the parties with the possibility of arbitration and mediation procedures within its institutional framework. Today the SCCAI is one of the main global dispute resolution platforms sought out by parties to decide on issues regarding east-west relationships.<sup>151</sup>

However, with respect to confidentiality, the only particular provision in its arbitration rules is the following: *„Unless otherwise agreed by the parties, the SCCAI... shall maintain the confidentiality of the arbitration and the award”.*<sup>152</sup>

#### Cairo Regional Centre for International Commercial Arbitration („CRCICA”)

The CRCICA was established in 1979 and is located in Cairo, Egypt. It stands as an independent non-profit organization and it is widely-used by participants from the African and Asia-Pacific regions. The services provided by CRCICA are both available for the resolution of commercial and investor-state disputes.<sup>153</sup> In its arbitration rules the CRCICA determines detailed rules with regards to privacy and confidentiality, matched only by the WIPO rules presented above:

*„Unless otherwise required by law or the parties expressly agree in writing to the contrary, the parties shall keep confidential all awards in their arbitration, together with all materials and all other documents, expert reports, witnesses testimonies in the proceedings and all other procedures produced in the arbitration proceedings.*

*The deliberations of the arbitral tribunal are likewise confidential to its members, except what is permitted by the applicable law or rules for the dissenting arbitrator.*

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<sup>147</sup> History of the PCA. Accessible through: <https://pca-cpa.org/en/about/introduction/history/>

<sup>148</sup> Article 28 para. 3. of the PCA arbitration rules. Accessible through: <https://pca-cpa.org/wp-content/uploads/sites/175/2015/11/PCA-Arbitration-Rules-2012.pdf>

<sup>149</sup> Description of the HKIAC. Accessible through <http://www.hkiac.org/arbitration/why-choose-hkiac>

<sup>150</sup> Article 26 of the Domestic Arbitration Rules of the HKIAC. Accessible through [http://cn.cietac.org/rules/rule\\_E.pdf](http://cn.cietac.org/rules/rule_E.pdf)

<sup>151</sup> Historical overview of the SCCAI. Accessible through <http://www.sccinstitute.com/dispute-resolution/>

<sup>152</sup> Article 46 of the SCCAI arbitration rules. Accessible through [http://www.sccinstitute.com/media/40120/arbitrationrules\\_eng\\_webbversion.pdf](http://www.sccinstitute.com/media/40120/arbitrationrules_eng_webbversion.pdf)

<sup>153</sup> History of the CRCICA. Accessible through <http://cricica.org.eg/history.html>

*The Centre undertakes not to publish any decision or arbitral award or any part of an award that may refer to the identity of any of the parties without the prior written consent of all parties.*

*Any documents, communications or correspondences submitted by the parties or the arbitrators to the Centre and vice versa, may be destroyed after the period of 6 months as from the date of issuing the award, unless a party requests in writing the retrieval of such documents, or any other documents related to the challenge or the enforcement of the award. In case original copies of documents or contracts were submitted by either of the parties, the concerned party shall request in writing the retrieval of such documents and contracts within one month as from the date of issuing the award. The Centre shall not be liable for any of such documents after the said date.”<sup>154</sup>*

#### Vienna International Arbitral Centre („VIAC”)

The VIAC, located in Vienna, was founded in 1975 and provides arbitration and mediation services utilized by a significant number of multinationals and other business ventures in the region.<sup>155</sup> However, the arbitration rules of the VIAC do not establish a separate section for privacy and confidentiality. The only reference to such contexts in its arbitration rules is the following:

*„The arbitrators shall perform their mandate independently of the parties and impartially, to the best of their knowledge and ability and shall not be bound to act upon any instruction. They have the duty to keep confidential all information acquired in the course of their duties.”<sup>156</sup>*

#### Chinese International Economic and Trade Arbitration Centre („CIETAC”)

The CIETAC, located in Beijing, was founded in 1956 by the China Council for the Promotion of International Trade, thus the Chinese government. It is the oldest standing arbitral institution in the Asia-Pacific region dealing mainly with disputes relating to Chinese interests.<sup>157</sup> It is apparent that the CIETAC has a strong relationship with the Chinese government, therefore, from the perspective of non-Chinese participants, the question may arise whether it is safe to solve disputes front of the CIETAC in which a Chinese entity is a party. The arbitration rules of the CIETAC regulate privacy and confidentiality in a moderate manner:

*„Hearings shall be held in camera. Where both parties request an open hearing, the arbitral tribunal shall make a decision.*

*For cases heard in camera, the parties and their representatives, the arbitrators, the witnesses, the interpreters, the experts consulted by the arbitral tribunal, the appraisers appointed by the arbitral tribunal and other relevant persons shall not disclose to any outsider any substantive or procedural matters relating to the case.”<sup>158</sup>*

#### Beijing International Arbitration Center („BIAC”)

The BIAC was established in 1995 and together with the CIETAC represents the leading arbitral institutions in China. The BIAC combines arbitration and mediation services, furthermore it takes an

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<sup>154</sup> Article 37 of the Arbitration Rules of the CRCICA. Accessible through [http://www.crcica.org/English\\_Rules.pdf](http://www.crcica.org/English_Rules.pdf)

<sup>155</sup> History of the VIAC. Accessible through <http://www.viac.eu/en/>

<sup>156</sup> Article 16 Section 2 of the Vienna Rules of Arbitration. Accessible through <http://www.viac.eu/en/arbitration/arbitration-rules-vienna/93-schiedsverfahren/wiener-regeln/144-new-vienna-rules-2013>

<sup>157</sup> History of the CIETAC. Accessible through <http://www.cietac.org/index.php?m=Page&a=index&id=34&l=en>

<sup>158</sup> Article 38 of the CIETAC Arbitration Rules. Accessible through <http://www.cietac.org/index.php?m=Page&a=index&id=106&l=en>

important role in the promotion and development of ADR mechanisms in China.<sup>159</sup> The BIAC arbitration rules determine detailed rules regarding privacy and confidentiality:

*„All arbitration hearings shall be conducted in private. If the parties agree on a public hearing, the arbitration hearing may proceed in public, except where the case involves state secrets, any third party’s commercial secrets, or any relevant circumstances in which the Arbitral Tribunal considers that a public hearing is inappropriate.*

*Where an arbitration is conducted in private, neither the parties, nor their authorised representatives, nor any witnesses, arbitrators, experts consulted by the Arbitral Tribunal and appraisers appointed by the Arbitral Tribunal, nor the staff of the BAC shall disclose to third parties any information concerning the arbitration, whether substantive or procedural.*”<sup>160</sup>

#### Court of Arbitration for Sport („CAS”)

The CAS was established by the International Olympic Committee in 1984 and is located in Lausanne, Switzerland. In its first era of functioning the CAS was available for settling disputes relating to the Olympic Games only, however, since then its doors opened up for non-Olympic sports as well. The Swiss Federal Tribunal exercises the supervision of the CAS.<sup>161</sup> Despite the strict regulations with regards to procedures conducted by the CAS, its arbitration rules do not provide the most thorough determination of privacy and confidentiality. However, the following provision contains basic elements of these concepts and serves sufficient protection for the parties:

*„Proceedings under these Procedural Rules are confidential. The parties, the arbitrators and CAS undertake not to disclose to any third party any facts or other information relating to the dispute or the proceedings without the permission of CAS. Awards shall not be made public unless all parties agree or the Division President so decides.*”<sup>162</sup>

#### Australian Centre for International Commercial Arbitration („ACICA”)

The ACICA was founded in 1985 and is located in Sydney as the only international arbitral tribunal in Australia. It is often used in disputes arising in the Asia-Pacific region.<sup>163</sup> The ACICA is the third among the arbitral institutions taken into account in Section III of the present research which provide a thorough and detailed determination of privacy and confidentiality:

*„Unless the parties agree otherwise in writing, all hearings shall take place in private.*

*The parties, the Arbitral Tribunal and ACICA shall treat as confidential and shall not disclose to a third party without prior written consent from the parties all matters relating to the arbitration (including the existence of the arbitration), the award, materials created for the purpose of the arbitration and documents produced by another party in the proceedings and not in the public domain except:*

*(a) for the purpose of making an application to any competent court;*

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<sup>159</sup> History of the BIAC. Accessible through [http://www.bjac.org.cn/english/page/gymbh/introduce\\_index.html](http://www.bjac.org.cn/english/page/gymbh/introduce_index.html)

<sup>160</sup> Article 25 of the BIAC arbitration rules. Accessible through [http://www.bjac.org.cn/english/page/zc/guize\\_en.html](http://www.bjac.org.cn/english/page/zc/guize_en.html)

<sup>161</sup> Reilly, L. (2012). An Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes. *Journal of Dispute Resolution*, Volume 2012, Issue 1.79-80

<sup>162</sup> R43 of the Code of Sports-related Arbitration. Accessible through [http://www.tas-cas.org/fileadmin/user\\_upload/Code\\_2016\\_final\\_en.pdf](http://www.tas-cas.org/fileadmin/user_upload/Code_2016_final_en.pdf)

<sup>163</sup> History of the ACICA. Accessible through <http://acica.org.au/assets/media/Services/2016-ACICA-Services.pdf>



- (b) for the purpose of making an application to the courts of any State to enforce the award;
- (c) pursuant to the order of a court of competent jurisdiction;
- (d) if required by the law of any State which is binding on the party making the disclosure; or
- (e) if required to do so by any regulatory body.

Any party planning to make disclosure under Article 18.2 must within a reasonable time prior to the intended disclosure notify the Arbitral Tribunal, ACICA and the other parties (if during the arbitration) or ACICA and the other parties (if the disclosure takes place after the conclusion of the arbitration) and furnish details of the disclosure and an explanation of the reason for it.

To the extent that a witness is given access to evidence or other information obtained in the arbitration, the party calling such witness is responsible for the maintenance by the witness of the same degree of confidentiality as that required of the party.<sup>164</sup>

#### German Institution of Arbitration („DIS“)

The DIS, having its seat in Berlin, was first founded in the beginning of the twentieth century, however, in 1992 it merged with the German Arbitration Committee in order to provide ADR services for the whole territory of Germany.<sup>165</sup> The arbitration rules of the DIS provide clear regulations with regards to the private and confidential nature of the process:

*„The parties, the arbitrators and the persons at the DIS Secretariat involved in the administration of the arbitral proceedings shall maintain confidentiality towards all persons regarding the conduct of arbitral proceedings, and in particular regarding the parties involved, the witnesses, the experts and other evidentiary materials. Persons acting on behalf of any person involved in the arbitral proceedings shall be obligated to maintain confidentiality.*

*The DIS may publish information on arbitral proceedings in compilations of statistical data, provided such information excludes identification of the persons involved.*<sup>166</sup>

#### JAMS International

JAMS International was established in 2011 with the merger of JAMS in the United States and the ADR center from Italy. It is located in London and provides arbitration and mediation services especially used by business actors from the United States and Europe, with hundreds of cross-border disputes settled annually.<sup>167</sup> In its arbitration rules the JAMS International provides the following regulations with respect to privacy and confidentiality:

*„Unless otherwise required by law, the Tribunal, the Administrator and the JIAC, if applicable, will maintain the confidentiality of the arbitration.*

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<sup>164</sup> Article 18 of the ACICA arbitration rules. Accessible through <http://acica.org.au/acica-services/acica-arbitration-rules>

<sup>165</sup> History of the DIS. Accessible through <http://www.dis-arb.de/em/57/content/about-the-dis-id46>

<sup>166</sup> Section 43 of the DIS arbitration rules. Accessible through <http://www.dis-arb.de/de/16/rules/dis-arbitration-rules-98-id10>

<sup>167</sup> History of JAMS International. Accessible through <http://www.jamsinternational.com/> and [http://www.jamsadr.com/aboutus\\_overview/](http://www.jamsadr.com/aboutus_overview/)

*Unless otherwise required by law, an award will remain confidential unless all of the parties consent to its publication.*<sup>168</sup>

#### Kuala Lumpur Regional Centre for Arbitration („KLRCA”)

The KLRCA was founded in 1978 under the Asian-African Legal Consultative Organisation. It handles the resolution of disputes arising mainly in the Asia-Pacific region.<sup>169</sup> The KLRCA has a thorough determination of privacy and confidentiality in its arbitration rules:

*„The arbitral tribunal, the parties, all experts, all witnesses and the KLRCA shall keep confidential all matters relating to the arbitral proceedings including any award except where disclosure is necessary for purposes of implementation and enforcement or to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to challenge an award in bona fide legal proceedings before a state court or other judicial authority.*

*In this Rule, “matters relating to the proceedings” means the existence of the proceedings, and the pleadings, evidence and other materials in the arbitration proceedings and all other documents produced by another party in the proceedings or the award arising from the proceedings, but excludes any matter that is otherwise in the public domain.*<sup>170</sup>

#### Japanese Commercial Arbitration Association („JCAA”)

The JCAA was established in 1950 within the frameworks of the Japan Chamber of Commerce and Industry. It mostly serves as a tribunal for the settlement of commercial disputes arising in the Asia-Pacific region.<sup>171</sup> With regards to privacy and confidentiality, the following provision can be found in the arbitration rules of the JCAA:

*„Arbitral proceedings shall be held in private, and all records thereof shall be closed to the public. The arbitrators, the JCAA (including its directors, officers, employees, and other staff), the Parties, their counsel and assistants, and other persons involved in the arbitral proceedings shall not disclose facts related to or learned through the arbitral proceedings except where disclosure is required by law or in court proceedings, or based on any other justifiable grounds.”<sup>172</sup>*

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<sup>168</sup> Article 16 of the JAMS arbitration rules. Accessible through <http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS-International-Arbitration-Rules.pdf>

<sup>169</sup> History of the KLRCA. Accessible through <http://klrca.org/about/>

<sup>170</sup> Rule 15 of the KLRCA arbitration rules. Accessible through [http://klrca.org/rules/arbitration/#KLRCAArbitrationRules\(Revised2013\)](http://klrca.org/rules/arbitration/#KLRCAArbitrationRules(Revised2013))

<sup>171</sup> History of the JCAA. Accessible through <http://www.jcaa.or.jp/e/jcaa/history.html>

<sup>172</sup> Rule 38 of the JCAA arbitration rules. Accessible through [http://www.jcaa.or.jp/e/arbitration/docs/Arbitration\\_Rules\\_2014e.pdf](http://www.jcaa.or.jp/e/arbitration/docs/Arbitration_Rules_2014e.pdf)

#### ***IV. Examination of the arbitration rules of certain arbitral institutions located in Central and Eastern Europe with regards to privacy, confidentiality and transparency***

##### *Arbitration Court attached to the Hungarian Chamber of Commerce and Industry („ACH”)*

The ACH, having its seat in Budapest, is functioning in cooperation with the Hungarian Chamber of Commerce and Industry, established in the end of the nineteenth century, however, it gained its recent form in 1999 with the adoption of a new act regulating the legal status of certain chambers in Hungary.<sup>173</sup>

Article 48 of the arbitration rules of the ACH determines a general principle with regards to the private nature of the process, while Article 15 sets forth detailed provisions regarding the extent of confidentiality to be applied.

*„The confidential nature of the proceedings shall be respected by every person who is involved in it in whatever capacity. Information on the proceedings to third persons can only be given upon agreement of the parties and the conciliator-mediator.”<sup>174</sup>*

*„Confidential Treatment of the Decisions of the Arbitration Court*

*The Arbitration Court may not give any information on pending proceedings and on its decisions rendered, or on the contents thereof.*

*The decision of the Arbitration Court may be published in legal journals or special publications only upon the permission of the President of the Arbitration Court and only in such a way that the interests of the parties will not suffer any harm; furthermore, the names of the parties, their countries of residence, the nature and counter-value of the services rendered, or any one of these particulars can only be included in a publication with the express consent of both parties.*

*By stipulating the jurisdiction of the Arbitration Court the parties undertake that they shall comply with the provisions of this paragraph both on their part, and get also others to do so.”<sup>175</sup>*

##### *The Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania („CICAR”)*

The CICAR was established in 1953 in order to facilitate the resolution of international commercial disputes in Romania.<sup>176</sup> The arbitration rules of the CICAR provide clear rules on the private and confidential nature of the procedure:

*„The file of the dispute is confidential. No person, with the exception of those directly involved in the resolution of that particular dispute, shall have access to the file without the written agreement of the parties.*

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<sup>173</sup> History of the ACH. Accessible through <http://www.mkik.hu/en/magyar-kereskedelmi-es-iparkamara/history-8824>

<sup>174</sup> Article 48 of the ACH arbitration rules. Accessible through <http://www.mkik.hu/en/magyar-kereskedelmi-es-iparkamara/rules-of-proceedings-2072>

<sup>175</sup> Article 15 of the ACH arbitration rules

<sup>176</sup> History of the CICAR. Accessible through <http://arbitration.ccir.ro/engleza/>

*The Court of Arbitration, the arbitral tribunal as well as the personnel of the Chamber of Commerce and Industry of Romania shall be bound to ensure confidentiality of arbitration, refraining from publishing or disclosing, without the consent of the parties, the data they took knowledge while fulfilling their duties.*<sup>177</sup>

*Foreign Trade Court of Arbitration of the Chamber of Commerce and Industry of Serbia („FTCA”)*

The FTCA, having its seat in Belgrade, was established in 1947 and since then it functions as the main arbitral tribunal for the settlement of international business disputes. Next to the Belgrade Arbitration Center and the Permanent Court of Arbitration at the Chamber of Commerce and Industry of Serbia, the FTCA is one of the three main arbitral institutions functioning in Serbia.<sup>178</sup> With regards to privacy and confidentiality, the FTCA arbitration rules establish the basic requirement for the procedure to be held in private and the award to be sanitized in case of publication.<sup>179</sup>

*Court of Arbitration at the Polish Chamber of Commerce („CAPCC”)*

The CAPCC is functioning since 1950 and is located in Warsaw. It has one of the largest caseloads with regards to the arbitral institutions in the Central and Eastern European region, with approximately 400-500 cases handled annually.<sup>180</sup> With regards to the private and confidential nature of the procedure, the arbitration rules of the CAPCC provide the following requirement:

*„Unless otherwise provided by the parties, the arbitrators and the Court of Arbitration and its staff and the members of its authorities are required to maintain the confidentiality of all information concerning the proceeding.”*<sup>181</sup>

*The Ljubljana Arbitration Centre at the Chamber of Commerce and Industry of Slovenia („LAC”)*

The LAC was established in 1928 and stands as the primary arbitral tribunal in Slovenia, providing arbitration and mediation services for the settlement of business-related disputes.<sup>182</sup> The arbitration rules of the LAC provide the most thorough determination of privacy and confidentiality among the arbitral institutions of the Central and Eastern European region:

*„Unless otherwise expressly agreed by the parties, the LAC, the arbitrators and the emergency arbitrator shall maintain the confidentiality of the proceedings, the award, orders and other decisions of the Arbitral Tribunal. This obligation also applies to any expert appointed by the Arbitral Tribunal as well as to the members of the Board and the Secretariat.*

*Unless otherwise expressly agreed by the parties, the parties undertake to keep confidential all awards, orders and other decisions of the Arbitral Tribunal and all documents submitted in the proceedings by a party, which are not already publicly available, except where and to the extent that disclosure is*

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<sup>177</sup> Article 7 of the CICAR arbitration rules. Accessible through [http://arbitration.ccir.ro/engleza/Rules\\_of\\_arbitration\\_2014.pdf](http://arbitration.ccir.ro/engleza/Rules_of_arbitration_2014.pdf)

<sup>178</sup> Description of the status of the FTCA and further arbitral tribunals in Serbia. Accessible through <http://www.arbitrationassociation.org/en/arbitration-in-serbia/foreign-trade-court-of-arbitration/>

<sup>179</sup> Karollus-Bruner, D. & Velisavljevic, N. *CMS Guide to Arbitration in Serbia*. 732. Accessible through [https://eguides.cmslegal.com/pdf/arbitration\\_volume\\_I/CMS%20GtA\\_Vol%20I\\_SERBIA.pdf](https://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_SERBIA.pdf)

<sup>180</sup> History of the CAPCC. <https://www.sakig.pl/en/about-court/general-information>

<sup>181</sup> Article 8 of the arbitration rules of the CAPCC. Accessible through [https://www.sakig.pl/uploads/pdf/regulaminy/arbitration\\_rules.pdf](https://www.sakig.pl/uploads/pdf/regulaminy/arbitration_rules.pdf)

<sup>182</sup> History of the LAC. Accessible through <http://www.sloarbitration.eu/en/>

*required of a party by a legal duty or to protect or pursue its legal rights or to enforce or challenge an award before a judicial authority.*

*The deliberations of the Arbitral Tribunal are confidential.*

*The LAC may publish the award, orders and other decisions of the Arbitral Tribunal in an anonymous form that does not enable identification of the parties or other persons unless a party objects in writing to the publication within 60 days from the day of making the decision.*<sup>183</sup>

#### *Arbitration Court attached to the Economic Chamber of the Czech Republic („ACCR”)*

The ACCR was founded in 1949 and is located Prague. By being authorized by the European Commission in 2005 to arbitrate European Union („EU”) domain disputes, it stands out among the rest of the arbitral institutions examined in Chapter IV of the present research. Since 2005 the ACCR settled more than 1,000 domain disputes.<sup>184</sup> Interestingly, the arbitration rules of the ACCR leave the issues of privacy and confidentiality untouched, lacking any provisions regulating such matters.<sup>185</sup>

#### *International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry („ICAC”)*

The ICAC was established in 1992 and resides in Kiev. Even though Ukraine ratified the New York Convention in 1960, due to political circumstances slightly more than thirty years had to pass before an individual arbitral tribunal settling international business disputes could be founded. The ICAC, being second in this regard among the examined arbitral institutions in the Central and Eastern European region, handles approximately 350 cases annually.<sup>186</sup> The only provisions relating to privacy and confidentiality in the arbitration rules of the ICAC is the following:

*„The President and Vice Presidents of the ICAC, arbitrators and the ICAC Secretariat shall refrain from disclosing information about disputes settled by the ICAC, which they become aware.”<sup>187</sup>*

#### *Arbitration Court at the Bulgarian Chamber of Commerce and Industry („ACB”)*

The ACB, located in Sofia, was established in end of the nineteenth century as a conciliation court, however, 1989 marked the beginning of the functioning of the arbitration court in compliance with the prevailing international standards and requirements, thus endowed with the capability to settle international business disputes in an independent manner.<sup>188</sup> With regards to confidentiality and privacy in its proceedings, the arbitration rules of the ACB set forth the following:

*„The hearing on the case shall be closed to the public. Persons not involved in the proceedings may attend with the permission of the Arbitral Tribunal and by consent of the parties.*

*All proceedings of the CA at the BCCI are confidential. Any documents pertaining to a proceeding shall be presented only to a party, his/her legal representative or his/her procedural representative.”<sup>189</sup>*

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<sup>183</sup> Article 50 of the LAC arbitration rules. Accessible through <http://www.sloarbitration.eu/en/Arbitration/Arbitration-Rules/English#50>

<sup>184</sup> History of the ACCR. Accessible through <http://en.soud.cz/arbitration-court>

<sup>185</sup> Arbitration rules of the ACCR. Accessible through <http://en.soud.cz/rules/rules-consolidated-text-1st-october-2015>

<sup>186</sup> History of the ICAC. Accessible through <http://arb.ucci.org.ua/icac/en/history.html>

<sup>187</sup> Article 12 of the ICAC arbitration rules. Accessible through <http://arb.ucci.org.ua/icac/en/rules.html>

<sup>188</sup> History of the ACB. Accessible through <http://www.bcci.bg/arbitration/introduction.htm>

<sup>189</sup> Article 24 of the ACB arbitration rules. Accessible through <http://www.bcci.bg/arbitration/rulesort.htm>

*Permanent Court of Arbitration attached to the Economic Chamber of Macedonia („MPCA”)*

The MPCA, residing in Skopje, was established in 1993 and since then it functions with the authority to settle both domestic and international business disputes. The arbitration rules of the MPCA do not contain provisions on privacy or confidentiality, however, the law governing arbitration in Macedonia is largely based on the UNCITRAL Model Law, thus provides sufficient protection for the business secrets of the participating parties.<sup>190</sup>

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<sup>190</sup> History and functioning of the MPCA. Accessible through <http://globalarbitrationreview.com/reviews/76/sections/289/chapters/3110/macedonia/>

## V. *Conclusions*

As discussed above, the concepts of privacy and confidentiality are important elements of arbitration. However, the private nature of the process does not necessarily ensure that information presented or documents produced in an arbitration can remain fully confidential in every situation, especially in ISA procedures since the adoption of the UNCITRAL Rules on Transparency. When it comes to ICA, however, different jurisdictions have different approaches with regards to the extent of confidentiality and whether it functions as an implied term or the parties have to set it forth expressly.<sup>191</sup> There are two main aspects that domestic laws and international regulations follow in this matter. Either they leave the issue of confidentiality untouched and do not consider it as an inherent part of the procedure, unless the parties have agreed on it, or apply it as an implied term, however, frequently lacking the necessary degree of definiteness with respect to its object, thus allowing grounds for uncertainties.

The arbitral institutions examined in Chapter III and IV show certain similarities. Both the high-profile international arbitral institutions and the ones located in Central and Eastern Europe approach the issue of privacy and confidentiality in a similar manner, since we are able to find among them ones establishing thorough procedural rules in connection with these concepts, and there are ones leaving them nearly untouched in their arbitration rules. However, most of the institutions under examination established at least a basic standard regarding the private nature of the process. Without doubt, the regulations established by the WIPO are the most in-depth among the ones examined in the research.

Prominent legal scholars suggest that the harmonization of differing aspects and taking an „in-between” approach should be appropriate to increase certainty in connection with these matters.<sup>192</sup> However, in order to avoid unnecessary difficulties, parties are often advised to draft and include in their arbitration clause certain provisions establishing the desired amount of confidentiality suitable for their procedure, rather than relying on the applicable domestic or international regulations.<sup>193</sup>

Despite the transparency trend strengthened further by the UNCITRAL Rules on Transparency, ICA procedures can still remain relatively confidential, and with the mutual consent of the parties, the extent of confidentiality, thus the private nature of the procedure can be further increased. However, with the transparency trend prevailing in ISA, it is a matter of time before the requirement of increased transparency in arbitral procedures reach ICA as well, since the outcome of ICA cases where multinational business enterprises are participating, even though state entities do not appear in such disputes, are still able to affect the everyday lives of citizens in certain ways. Even though the public stakehold in ISA is more apparent than in ICA, if we look behind the curtains we can see high-volume cases in ICA as well that would deserve at least the degree of transparency that is required in ISA.

Sacrificing portions of privacy and confidentiality in international arbitration for the benefit of transparency seems to be unavoidable in order to maintain, or even increase public trust placed in this ADR mechanism, which, ultimately, is necessary for its efficient functioning and its ability to remain a reasonable alternative to litigation.

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<sup>191</sup> Noussia, *supra* at 161-162, 165

<sup>192</sup> Weixia, *supra* at 27

<sup>193</sup> Brown, *supra* at 1020

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