DUTY OF CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION: DOES THE MODERN WORLD STILL NEED THIS CONCEPT?

Uluslararası Ticari Tahkimde Gizlilik Yükümlülüğü: Modern Dünyanın Hala Bu Konsepte İhtiyacı Var mı?

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ABSTRACT

In today's world, arbitration plays a crucial role in resolving international commercial disputes. The aforementioned significance is based on the distinguishing features of the arbitration over ordinary court litigation, and the "duty of confidentiality" stands out among the mentioned features with its essential feature. On the other hand, it is also known that the request for confidentiality in arbitration does not provide absolute confidentiality under all circumstances and the level of confidentiality differs due to the approach adopted by the arbitration centers. This situation causes the validity of the concept of the duty of confidentiality and its place in the modern world to be questioned. In this study, firstly the duty of confidentiality was examined in terms of possible definitions, different approaches and comparing with the privacy. Then, the English approach was explicated with the help of remarkable former cases and the case of *John Forster Emmott v Michael Wilson & Partners Ltd ("Emmott-MWP"),* thoroughly. After that, the other different approaches were identified by analysing the related decisions and statutory regulations. Next, the arguments against confidentiality were scrutinised. Lastly, the sustainability of duty of confidentiality in international commercial arbitration in the modern world was discussed due to the sections of this article.

Key Words: Duty of Confidentiality, International Commercial Arbitration, Privacy, English Approach, *Emmott-MWP.*

ÖZET

Günümüzde uluslararası ticari anlaşmazlıkların çözümünde tahkimin çok önemli bir rolü bulunmaktadır. Anılan önem, müessesenin olağan yargılamaya kıyasla sahip olduğu ayırt edici özelliklere dayanmakta olup, "gizlilik yükümlülüğü " bahse konu özellikler arasında temel niteliği veya çekiciliği ile öne çıkmaktadır. Öte yandan tahkimde gizlilik talebinin her şartta kesin bir gizlilik sağlamadığı ve tahkim merkezlerinin benimsediği yaklaşıma göre gizlilik seviyesinin farklılaştığı da bilinmektedir. Bu durum ise gizlilik yükümlülüğü konseptinin geçerliliği ve modern dünyadaki yerinin sorgulanmasına neden olmaktadır. Bu çalışmada, öncelikle gizlilik yükümlülüğü olası tanımlar, farklı yaklaşımlar ve mahremiyet ile karşılaştırma açısından incelenmiştir. Daha sonra, İngiliz yaklaşımı *John Forster Emmott v Michael Wilson & Partners Ltd ("Emmott-MWP")* davası ve daha önceki dikkate değer davalar yardımıyla etraflıca izah edilmiştir. Ardından ilgili

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kararlar ve yasal düzenlemelere yer verilerek diğer farklı yaklaşımlar tespit edilmiştir. Son olarak, gizliliğe karşı ileri sürülen argümanlar ve çalışmanın önceki bölümlerindeki tespitler bağlamında uluslararası ticari tahkimdeki gizlilik yükümlülüğünün modern dünyadaki sürdürülebilirliği değerlendirilmiştir.

Anahtar Kelimeler: Gizlilik Y*ükümlülüğü,* Uluslararası Ticari Tahkim, Mahremiyet, İngiliz Yaklaşımı, *Emmott-MWP.*

INTRODUCTION

In today's world, arbitration has a significant role in resolving international commercial disputes. The primary reason behind this reality is its distinctive features which creates a considerable advantage over ordinary court litigation such as the neutrality of the forum, enforcement power of the award[1], shorter process time and confidentiality.[2] Most probably, confidentiality is one of the essential or the most appealing, of rationales which parties decide to arbitrate.[3] The main reasons of demand for confidentiality could be counted as involved parties might not want to disclose their trade secrets, business plans, strategies, contracts, financial results or any other information which is related to their businesses.[4] Arbitration proceedings are not open to the public. Therefore, unlike public trial court proceedings, there is no chance to reach the documents of arbitration proceedings which are necessary for conducting proceedings. Moreover, the award itself also is protected by a duty of confidentiality.[5]

It can be widely acknowledged that England has been an arbitration-friendly jurisdiction that respects the demands of the parties in terms of confidentiality.[6] Upon the English approach is examined in detail, it will be seen that absolute confidentiality is not always provided automatically under any circumstances or any cases. For example, landmark decision of the English Court of Appeal in *John Forster Emmott v Michael Wilson & Partners Ltd ("Emmott-MWP")*[7] incorporates exceptions and limitations on the scope of the duty of maintaining confidentiality. Furthermore, it should be remembered that there are also other cases which affect the evolution of the matter before this decision is made.

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1 With the help of United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("New York Convention") which has been ratified by 159 parties, the courts are under the obligation of enforcing the arbitral awards.

2 Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2008) 3-4.

3 Kyriaki Noussia, *Confidentiality in International Commercial Arbitration a Comparative Analysis of the Position Under English, US, German and French Law* (Springer-Verlag 2010) 1.

4 Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration* (Kluwer Law International BV 2011) introduction xvi.

5 Ibid (n 3) 1.

6 Ibid 94.

7 [2008] EWCA (Civ) 184.

In this essay, primarily the concept of confidentiality will be analysed. Then, the case of *Emmott-MWP* will be scrutinised and before that related cases will be assessed in terms of confidentiality. Later on, the other different approaches and the related decisions will be identified. Next, arguments against confidentiality will be examined. After that, it will be discussed that the importance level of confidentiality in international commercial arbitration in the modern world. Finally, the results of the argument will be summarised in the conclusion section.

1. THE DEFINITION OF DUTY OF CONFIDENTIALITY

First of all, before commencing to identify the concept of confidentiality, there is a need to clarify the meaning of privacy in arbitration that often confused with confidentiality. It should be highlighted that there is no guarantee that the private nature of the arbitration would always procure absolute confidentiality.[8] Therefore, these two concepts should be identified separately. The primary purpose of the privacy that provides a right to exclude strangers out of the arbitral proceedings[9] and the limits of this restriction depends on each party's consent which has to be stated expressly. Besides, some of the international organisations have established rules regarding this issue. For example, it can be seen in The London Court of International Arbitration (LCIA) Rules Art. 19.4[10]or International Chamber of Commerce (ICC) Rules of Arbitration Art. 26(3).[11]As a result, the concept of privacy fundamentally refers to conducting proceedings in private by excluding third parties out of the equation, nothing more.

Secondly, the concept of confidentiality is known as the one of the most important peculiarity of arbitral proceedings[12] and there are several advantages which have been mentioned in the introduction section. In addition, it could depress the risk of getting harmed for ongoing business operations[13]and parties

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8 Alexis C. Brown, 'Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration' (2001) 16 American University International Law Review. 969, 974-75.

9 Ibid 972.

10 "All hearings shall be held in private, unless the parties agree otherwise in writing". 'LCIA Arbitration Rules (2014)' (*Lcia.org*, 2014) <https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx> accessed 13 March 2019.

11 "Save with the approval of the arbitral tribunal and the parties, persons not involved in the proceedings shall not be admitted". 'Arbitration Rules - ICC - International Chamber Of Commerce' (*ICC - International Chamber of Commerce*, 2017) <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> accessed 13 March 2019.

12 Bernardo M. Cremades and Rodrigo Cortes, 'The Principle of Confidentiality in Arbitration: A Necessary Crisis' [2013] 23 J. Arb. Stud. 25.

13 Charles S. IV Baldwin, 'Protecting Confidential and Proprietary Commercial Information in International Arbitration' [1996] 31 Tex. Int'l L. J. 451,453.

could readily protect themselves from possible interventions stemmed from media and also their rivals.[14]

Thirdly, despite the significance of the concept, there are not lots of sources both at legislative and institutional level to define the scope of the duty of confidentiality.[15] In ICC Rules, Article 22(3) empowers the Arbitral Tribunal to "take measures for protecting trade secrets and confidential information" rather than constituting a brief definition. In UNCITRAL Rules[16], the only article about confidentiality is article 32(5) that "the award may be made public only with the consent of both parties". Another example is that The English Arbitration Act[17] does not refer to the obligation of confidentiality.[18]

Fourthly, the confidentiality of arbitration can be perceived by the parties as a universal concept in the world. However, there are several approaches adopted by different jurisdictions. For instance, while The United Kingdom and France accept an implied duty of confidentiality to various levels, on the contrary, Sweden and Australia assess the matter differently that there has to be either mutual consent of the parties or applicable laws to implement such confidentiality.[19] Thus, the English approach does not need any specific clause in the arbitration agreement which reflects parties' intention expressly for procuring confidentiality.[20]

In summary, it can be said that there is no clear definition regarding the duty of confidentiality and practices vary from country to country. Moreover, the lack of definitions indicates that the task of creating the framework was often left to the courts. Following section will be focused on the evaluation of the duty of confidentiality with respect to the English perspective.

2. THE ENGLISH APPROACH

As mentioned in the introduction section, in order to comprehend the case of Emmott-MWP completely, related previous cases should be sifted throughly. The practice and law of confidentiality in commercial arbitration is comprised of three main cases in England[21]; *Dolling-Baker v. Merrett*[22]("Dolling-Baker"),

14 Ibid (n 12) 27.

15 Michael Hwang and Katie Chung, 'Defining The Indefinable: Practical Problems of Confidentiality in Arbitration' [2009] 26 Journal of International Arbitration 609, 610.

16 'UNCITRAL Arbitration Rules' (*Uncitral.org*, 2019) <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html> accessed 13 March 2019.

17 'Arbitration Act 1996' (*Legislation.gov.uk*, 1996) <https://www.legislation.gov.uk/ukpga/1996/23/contents> accessed 13 March 2019.

18 Ibid (n 3) 9.

19 Avinash Poorooye and Ronan Feehily, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' [2017] 22 Harv. Negot. L. Rev. 275.

20 Ibid (n 2) 190.

21 Ibid (n 6) 286.

22 [1990] 1 W.L.R. 1205.

Hassneh Insurance Co of Israel v Steuart J Mew[23]("Hassneh"), *and Ali Shipping Corporation v. Shipyard Trogir*[24]("Ali Shipping").

The case of Dolling-Baker has a unique significance to demonstrate the English perspective regarding confidentiality. Because the private structure of the arbitration has never been underlined as a pivotal part of the arbitral proceedings as bright as before by the Court of Appeal. In this decision, the court determines the framework of confidentiality which points out the necessity of an implied obligation on both parties for all agreements of arbitration which composes of "not to disclose any documents, transcripts or in any other way what evidence had been given by any witness or notes of the evidence prepared for and used in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court". To eliminate the ambiguity, above sentence shall be divided into two separate sentences.[25] Moreover, it was also held that there was no correlation between the implied duty of confidentiality and the confidential nature of the materials protected. Therefore, despite the implied obligation of confidentiality, if the court decides to disclose and examine documents as a precondition for the disposal of fair action, there is a possibility of disclosure of relevant documents.[26] Lastly, it was stated that the limits of the implied obligation should be assessed on a case-by-case basis, taking into account the circumstances of each case.[27]

In Hassneh, the definition of the implied duty of confidentiality was expanded by the Commercial Court by adding arbitral awards to the previous description placed in Dolling-Baker. Also, it was noted that, even without the consent of the other party, it could be decided to limit implied duty of confidentiality in terms of awards when it was necessary to protect the interests of justice or party rights.[28]

In Ali Shipping, the Court of Appeal stated that "the obligation of confidentiality arises (whatever its precise limits) as an essential corollary of the privacy of arbitration proceedings."[29] Despite the difficulty in determining the limits of confidentiality, the court proposed an optimal way to reach the best possible solution "by formulating exceptions of broad application to be applied in individual cases, rather than by seeking to reconsider, and if necessary adapt, the general rule on each occasion in light of the particular circumstances and

23 [1993] 2 Lloyds's Rep. 243.
24 [1998] 1 Lloyd's Rep. 643
25 Ibid (n 10) 1213.
26 Ibid (n 10) 1214.
27 Christoph Henkel, 'The Work-Product Doctrine as a Means toward a Judicially Enforceable Duty of Confidentiality in International Commercial Arbitration' [2012] 37 N.C.J. Int'l L. & Com. Reg. 1059, 1068.
28 Ibid (n 11) 249.
29 Ibid (n 12) 651.

presumed intentions of the parties at the time of their original agreement."[30] After that, five exceptions were structured regarding implied obligation of confidentiality: "(i) express or implied consent of the party who originally produced the material; (ii) order of the Court; (iii) the leave of the Court; (iv) it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; (v) where the "public interest" requires disclosure."[31] Nevertheless, an objective rule was necessary to apply the relevant exceptions. Thus, the court noted that those exceptions will not be activated, unless passing the test of reasonable necessity that "it is sufficiently necessary to disclose an arbitration award to enforce or protect the legal rights of a party to an arbitration agreement only if the right in question cannot be enforced or protected unless the award and reasons are disclosed to a stranger to the arbitration agreement. The making of the award must, therefore, be a necessary element in the establishment of the party's legal rights against the stranger."[32]

From what has been discussed in this section, it can be concluded that the concept of confidentiality is considered as an implied obligation under the English approach. That is to say; confidentiality is an integral part of the arbitration agreement, even if it is not explicitly requested. However, after chronologically analysing the relevant cases, it appears that the first two cases have adopted a case-by-case approach, while the last case focuses on constituting a framework that propounding the exceptions of confidentiality, besides the resolution of its case. Thus, it can be argued that the perspective of examining confidentiality-based cases in England is shifted from the case-by-case basis to the institutional framework. Despite the general tendency, there is one more substantial case that supports the case-by-case approach. This case will be examined in detail in the next section.

3. JOHN FORSTER EMMOTT V MICHAEL WILSON & PARTNERS LTD [33] *("EMMOTT-MWP")*

3.1 FACTS, ISSUE AND COURT'S HOLDING

Michael Wilson and Partners Ltd ("MWP") is a law company that to procure legal services in Kazakhstan[34] and John Forster Emmott ("Emmott") had been a partner and also a shareholder of the company from 2001 to 2006. After that, Emmott practised through Temujin International Ltd ("TIL") with two former employees (David Slater and Robert Nicholls) of MWP.[35] Later on, MWP initiated proceedings in various countries against different persons/

30 Ibid.
31 Ibid 652.
32 Ibid 648.
33 [2008] EWCA (Civ) 184.
34 Ibıd para 2.
35 Ibıd para 3.

entities, and the allegations were related to scheme to transfer MWP's business portfolio to TIL in breach of contract and trust. There were several conducting proceedings in different countries: Arbitration proceedings against Emmott in London; litigation proceedings against Slater and Nicolls ("SN") in New South Wales ("NSW"); related proceedings in the British Virgin Islands ("BVI"), Bahamas, Colorado and Jersey.[36]

In the London arbitration, at first MWP made accusations regarding conspiracy and fraud against Emmott, but after a while, the allegations were withdrawn by MWP.[37] On the other hand, NSW proceedings, at first did not incorporate the allegation of conspiracy and fraud, but later on, amended MWP's accusations broadened to include them. Broadly, this situation created an inconsistency among proceedings. Furthermore, while MWP is presenting to the NSW court, they claimed that the same allegations were still in progress in both London and BVI. Although Emmott was not a party in NSW, he still made an application for disclosure of the documents which was produced in the London arbitration proceedings in order to prevent the misleading of justice with the help of false information supplied by MWP. As a result, the application was accepted by the English High Court. After that, MWP appealed. Lastly, the English Court of Appeal held that Emmott could disclose the related documents.

3.2 OBSERVATIONS OF THE COURT OF APPEAL AND SIGNIFICANCE OF THE DECISION

While reaching the aforementioned decision, the English Court of Appeal made the following observations: Firstly, The Court of Appeal scrutinised the confidentiality matter with the light of previous cases. While performing this revision, they indicated the difference between the obligations of confidentiality derived from the nature of the documents themselves and the nature of arbitration itself which means an implied obligation that "the obligation is not limited to documents which contain confidential material, such as trade secrets. The obligation arises, not as a matter of business efficacy, but is implied as a matter of law". After that the limits of the implied obligation was underlined that "there is an obligation, implied by law and arising out of the nature of arbitration, on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and not to disclose in any other way what evidence has been given by any witness in the arbitration save with the consent of the other party, or pursuant to an order or leave of the court".[38]

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36 Ibıd para 4.
37 Ibıd para 10.
38 Ibid para 81.

Secondly, the court stressed that "the limits of that obligation are still in the process of development on a case−by−case basis"[39] and after that they noted that the principal exceptions were as follows: "where there is consent, express or implied; where there is an order, or leave of the court (but that does not mean that the court has a general discretion to lift the obligation of confidentiality); where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; where the interests of justice require disclosure; (perhaps) where the public interest requires disclosure".[40]

Finally, they brought additional exceptions considering the unique peculiarities of the case. They stated that the documents required for disclosure were in principle confidential, but the confidentiality was subject to two possible exceptions in the present case. First, the disclosure might be permissible if the documents were indispensable for the protection of the legitimate interests of an arbitrating party such as to found a cause of action against a third party, or to defend a claim or counterclaim brought by the third party.[41] Second, the disclosure could be convenient if the party had an aim to use the cloak of confidentiality as a misleading instrument by precluding the facts from foreign courts to mislead them.[42]

After having explicated the decision, it can be reached that the methodology of analysing is well-organised and contemplated. Accordingly, it can be defined as a summary of English approach that creates an opportunity to comprehend the evolution of the duty of confidentiality. As it has been mentioned in English Approach, despite the *Ali Shipping* set a framework about exceptions, The Court of Appeal extended these exceptions and stated that the case-by-case approach has to be taken. Thus, they assessed the interest of justice as a boundless matter by accepting its international nature rather than confined to the inherent interest of justice in England. As a result, the case of *Emmott-MWP* made a crucial contribution to the duty of confidentiality concept by summarising the previous authorities' principals, demonstrating the importance of the implied obligation in English approach and emphasising the necessity of the case-by-case perspective.

4. IS THE DUTY OF CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION A MUST IN MODERN WORLD CONDITIONS?

After having identified the approach taken in the decision of *Emmott-MWP* which represents English perspective, the next step will be the assessment of

39 Ibid para 107.
40 Ibid.
41 Ibid para 27.
42 Ibid para 28.

the sustainability of the duty of confidentiality under the circumstances of the modern world. This section will be divided into three sub-sections. Firstly, the position of other countries will be analysed in order to contemplate the perspective of other jurisdictions with respect to related cases and provisions. Later on, views of anti-confidentiality will be identified. Finally, the matter of maintaining the duty of confidentiality will be discussed in the last sub-section concerning previous findings in this article.

4.1 THE PERSPECTIVE OF OTHER JURISDICTIONS

As it has mentioned before that the English approach adopts an implied duty of confidentiality and the approach has been taken by France is also attributed to the same ecole. However, the tendency for constituting exceptions regarding the duty of confidentiality is different in France which does not incorporate any exclusions expressly in the decisions.[43] Therefore, it can be said that there is a room for demanding both public disclosure and confidentiality at the same time in arbitration proceedings.[44]

Unlike implied duty of confidentiality, there are other jurisdictions that have adopted the notion of express duty of confidentiality such as Australia and Sweden. In Australia, the case of *Esso Australia Resources Ltd. v. The Honourable Sydney James Plowman*[45]*("Esso")* has a high importance level. Because, before this decision, they were following the discipline of the implied duty of confidentiality school.[46] *Esso* demonstrates the new notion of Australian courts that they prefer to express confidentiality agreements rather than procuring the confidentiality with the help of an invisible cloak as English approach did.[47] Besides, the court underlined that a fundamental reason for arbitration's appeal and efficiency is stemmed from the privacy, not confidentiality and they defined confidentiality as a consequential benefit.[48] In Sweden, they share a similar view with Australian's *Esso* in terms of duty of confidentiality as it can be seen in the reasoning of *Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Finance Inc.*[49]*("Bulbank")* that there is no reason to engage the duty of confidentiality without a contract which has to refer a duty of confidentiality.

On the other hand, there is another approach that implements statutory regulation to deal with the matter. Singapore is one of the representatives of

43 Ibid (n 19) 291.
44 Ibid (n 27) 1076.
45 [1995] 128 ALR 391.
46 Hew R. Dundas, 'Confidentiality in English Arbitration: The Final Word? Emmott V Michael Wilson & Partners Ltd.' [2008] 74(4) Arbitration 458, 458.
47 Ibid (n 27) 1079.
48 Ibid (n 45) 401.
49 NYH Juridiskt Arkiv [NJA] [Supreme Court] 2000 ref. T1881-99.

this thought. In Singapore, the Arbitration Act[50] takes an unusual approach to the fore regarding disclosure of the information in Section 57(3) that is allowed either with the consent of the parties or "the court is satisfied that the information, if published (…), would not reveal any matter, including the identity of any party to the proceedings, that any party to the proceedings reasonably wishes to remain confidential". Also, Section 57(4) also has remarkable peculiarity to mention that indicates the Singaporean legislation has a purpose of making contributions to the development of law by allowing to publish decisions in law reports and professional publications with paying regard to the parties confidentiality.

4.2 ANTI-CONFIDENTIALITY

Although confidentiality in arbitration has been widely acknowledged as an affirmative determinant, there are also some views that call attention to the side effects of it.

Firstly, the parties of international commercial arbitrations are usually composed of private companies; however, there is always a possibility that one of the parties might be a State, a State entity or a State instrumentality.[51]These type of cases might appeal the public interest because the outcome of the decision has the power to influence the entire community. Therefore, public curiosity through the decision-making process such as reasoning and ruling would be expected behaviour from rational individuals.[52]Furthermore, unlawful activities such as money laundering, bribery, corruption are also within the range of international commercial arbitration, and public officers or officials of foreign transnational corporations might involve these issues that arouse the interest of the public.[53]

Secondly, since confidentiality hinders the flow of information such as details of reasons and rulings, it might have a detrimental influence on the progress of standardisation of commercial practices.[54]It means that legal advisers have to deal with the lack of resources to offer decent service to their clients.

Thirdly, publication of reasoned awards would make a contribution to procure consistency in the arbitral system. More broadly, the published awards

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50 'Arbitration Act - Singapore Statutes Online' (*Sso.agc.gov.sg*, 2002) <https://sso.agc.gov.sg/Act/AA2001?ProvIds=P1X-#pr57-> accessed 15 March 2019.

51 Gabriele Ruscalla, 'Transparency in International Arbitration: Any (Concrete) Need to Codify the Standard?' [2015] 3(1) GRONINGEN J. NT'L L. 1,8.

52 Ibid.

53 Sherlin Hsie-lien Tung and Brian Lin, 'More Transparency in International Commercial Arbitration: To Have or Not to Have' [2018] 11 Contemp. Asia Arb. J. 21, 27.

54 Gu Weixia, 'Confidentiality Revisited: Blessing or Curse in International Commercial Arbitration?' [2006] 15 American Review of International Arbitration 607,629.

could 'coalesce into a collective arbitral wisdom' that may be used by future arbitrators and parties.[55]Indeed, it can be accepted that it may reduce the multi-headed approaches on the same subjects. Also, it might also depress possible future disputes and create an opportunity in terms of parties to select eligible arbitrators.[56]

Finally, confidentiality limits the accountability, because if there is no self-regulation mechanism[57] on the parties in arbitration, there is a possibility to encounter inconvenient actions. The more or less same situation is also valid for arbitral tribunals that without public scrutiny, arbitrators might conduct proceedings imprecisely and it might affect the accuracy of award not surprisingly.[58]

4.3 DISCUSSION: IS THERE A PLACE FOR DUTY OF CONFIDENTIALITY IN MODERN WORLD?

There are three different perspectives with respect to the duty of confidentiality that has been examined thus far. However, none of them offers a perfect balance regarding the degree of confidentiality. For this reason, questions may naturally arise about whether there is such an equilibrium point or not? Alternatively, whether the modern world needs such duty or not at first place?

It can be thought that with the help of privacy, third parties would not be allowed to access the knowledge produced in arbitration proceedings, and the confidentiality of proceedings are accepted as automatically procured, but there is no obstacle to disseminate information in terms of parties of the arbitration. Because of this, there is a need for establishing a mechanism or a term which explicates the matter such as the concept of confidentiality.

In its most conservative form, the scope of confidentiality concept provides full protection not to disclose any information. Notwithstanding, there is no such absolute confidentiality in reality. The approach taken by the United Kingdom and France can be accepted as the representatives of conservatism because they adopt the perspective of an implied duty of confidentiality which means that there is no need to determine confidential provisions in the contract as there has already been an invisible cloak to deal with the matter. However, as it can be seen in the landmark case of *Emmott-MWP* that despite the presence

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55 Richard C. Reuben, 'Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice' [2000] 47 UCLA L. Rev. 949, 1085.

56 Matthew Carmody, 'Overturning The Presumption of Confidentiality: Should the UNCITRAL Rules on Transparency Be Applied to International Commercial Arbitration' [2016] 19 Int'l Trade & Bus. L. Rev. 96, 169.

57 "Public scrutiny"

58 Claudia Reith, 'Enhancing Greater Transparency In The UNCITRAL Arbitration Rules - A Futile Attempt' [2012] 2 Y.B. on Int'l Arb. 297, 300.

of the implied duty in England, it includes lots of exceptions such as public interest, parties consent, the order of the court, the interest of the justice that limits such an implied obligation with respect to reasonable necessity test. In addition, although the French approach does not incorporate any exceptions, they have a position that public disclosure and confidentiality requests can co-exist in arbitration. Another thing is that there is a direct result of this approach which is the erosion of the party's autonomy. Although parties have an advantage by not dealing with the set of terms regarding confidentiality in contract, it should not be forgotten that the party's autonomy is one of the essential elements of arbitration.

On the other hand, there is another approach which is attributed to express duty of confidentiality. The main difference of this approach is in terms of supporting the party's autonomy. Otherwise, the exceptions placed in *Emmott-MWP* case are not valid just in England; they represent the possible conditions that any jurisdiction may face. Therefore, the duty of confidentiality cannot isolate itself from the actual conditions whether it is implied or expressly structured. That is to say, if exceptions and other arguments against the duty of confidentiality are always there, why would the modern world have to deal with such duty instead of creating a new system?

After examining the Singaporean Act, it can be reached that there are logical ways to satisfy both parties and public at the same time by publishing awards with extracting related information about parties and essential points of the case which should be kept confidential. Also, the idea of publishing awards in law reports or professional journals is brilliant, when considering to make a contribution to the development of arbitral law, accountability of the future awards and the satisfaction of the public interest which are the severe criticisms against the duty of confidentiality.

As a result, there is no doubt that confidentiality is an essential part of the arbitration proceedings; however, the current framework does not respond to the needs of the modern world and creates uncertainty. Because of that, optimal satisfaction of all parties cannot be provided under existing circumstances. Therefore, constructive ideas such as Singaporean Arbitration Act provided or different assessment systems should be generated while implementing the duty of confidentiality.

CONCLUSION

In this article, firstly the duty of confidentiality was examined in terms of possible definitions, different approaches and comparing with the privacy. Then, the English approach was explicated with the help of remarkable former cases in order to contemplate the case of *Emmott-MWP,* thoroughly. Later on, *Emmott-MWP* decision was investigated by emphasising the significant

points such as facts, holdings and observations. After that, the other different approaches were identified by analysing the related decisions and statutory regulations. Next, the arguments against confidentiality were scrutinised. Lastly, the sustainability of duty of confidentiality in international commercial arbitration in the modern world was discussed due to the sections of this article.

As it has been seen in the related sections, the case of *Emmott-MWP* has a paramount spot in English approach in terms of confidentiality. Because the entire perspective of implied obligation was compounded by this case and they underlined that while assessing the matters case by case approach should be implemented. Besides, it can be said that the significance of this case is not just about repeating or summarising the previous cases; the boundlessness feature of justice was also added in the concept by them. On the other hand, the necessity of the duty of confidentiality should be accepted as a complicated concept in the modern world. The previous sections have demonstrated that confidentiality is a vital part of the arbitration; however, it brings uncertainty because of the current structure. As a result, there is a need to define the limits for duty of confidentiality clearly concerning current exceptions as well as anti-confidentiality arguments in order to have a stable place in the modern world for this concept.

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