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***“The Doctrine of Confidentiality in Arbitral Proceedings and
its Implementation to the Tanzanian Arbitration System”***

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DEDICATION

To my parents Mr. and Mrs. Borhara with wholehearted gratitude and love.

ACKNOWLEDGMENT

In Life, every human being strives to accomplish his or her own goals. Such goals cannot always be attained single handed. It is important to acknowledge our achievements to those who have been the foundation of our success.

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ABSTRACT

Confidentiality has been regarded as an essential attribute of arbitration over litigation due to its „private and confidential“ nature in arbitral proceedings. Such attribute of arbitration has been subject to debates over recent years from different scholars in the world of arbitration. Two common law jurisdictions have been the result of such debates. The United Kingdom (England) who has for decades assumed the existence of an implied obligation of confidentiality in its arbitration proceedings while Australia has rejected such an implied obligation and have held that confidentiality is not an essential attribute of arbitration.

In Tanzania, the current arbitration laws are silent with respect to confidentiality provisions and there seems to be no literature or any article written on the subject matter. This dissertation therefore aims to introduce the doctrine of confidentiality in Tanzania by examining the two common law approaches case-to-case basis and to show how a developing nation like Tanzania could implement one or combination of the different approaches into its arbitration system.

Chapter 1 introduces the doctrine of confidentiality in arbitral proceedings by examining how different scholars have interpreted the concept and by distinguishing the doctrine from privacy. This chapter also covers the nature of confidentiality in arbitral proceedings and the main actors involved in preserving the confidentiality obligation in the arbitral process. **Chapter 2** provides for an overview of the arbitration system in Tanzania as well covering the position of the doctrine in its arbitration proceedings. **Chapter 3** gives a comprehensive overview of the doctrine of confidentiality in both England and Australia and its implementation to the Tanzanian arbitration system. **Chapter 4** concludes and provides for recommendations with further research to be carried out on the doctrine of confidentiality in Tanzania in case of a future arbitration dispute arises on the subject matter.

ABBREVIATIONS

ACICA	Australian Centre for International Commercial Arbitration
ADR	Alternative Dispute Resolution
ALL ER	All England Law Reports
ALR	Australian Law Reports
BIT	Bilateral Investment Treaty
CA	Court of Appeal
CAA	Commercial Arbitration Act
CAP	Chapter of Laws
Civ	Civil Division
CJ	Chief Justice
CLR	Commonwealth Law Reports
CMA	Commission for Mediation and Arbitration
Co	Company
Comm	Commercial Division
CPC	Civil Procedure Code
CPR	Civil Procedure Rules
CSOH	Court of Session Outer House (Court of Appeal- Scotland)
Cth	Commonwealth of Australia
EAA	English Arbitration Act
EGLR	Estates Gazette Law Reports
EWCA	England and Wales Court of Appeal

EWHC	England and Wales High Court; High Court of Justice of England and Wales
<i>Ex parte</i>	in behalf of; on one side only
FLR	Federal Law Reports
IAA	International Arbitration Act 1974 (Cth)
<i>Ibid</i>	<i>(ibidem)</i> in the same place
ICA	International Commercial Arbitration
ICC	International Chambers of Commerce
ICSID	International Centre for Settlement of Investment Disputes
J	Justice
JJ	Justices
KB	Kings Bench
LCIA	London Court of International Arbitration
LJ	Lord Justice
<i>Locus Standi</i>	Place of Standing
LRCT	Law Reform Commission of Tanzania
Ltd	Limited
Misc	Miscellaneous
Mr.	Mister

NAA	New Zealand Arbitration Act
NCCA	National Construction Council Act
No.	Number
NSWLR	New South Wales Law Report
NYC	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
QB	Queens Bench
<i>Supra note</i>	Above
TAA	Tanzania Arbitration Act
TAR	Tanzania Arbitration Rules
TIA	Tanzania Institute of Arbitrators
UKPC	United Kingdom Privy Council
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
v.	Versus (Against)
WLR	Weekly Law Reports

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CHAPTER 1: THE DOCTRINE OF CONFIDENTIALITY IN ARBITRATION PROCEEDINGS

1.1 Introduction

Arbitration has been regarded as one of the fundamental mechanisms of Alternative Dispute Resolution (ADR) over the past decades. One of the frequently cited advantages of arbitration is that parties to arbitration proceedings in most situations have successfully managed to settle their disputes as opposed to the lengthy and cumbersome litigation process. An arbitration agreement is an important document which either obliges parties in an existing dispute to refer that dispute to arbitration or binds the parties to arbitrate in case a dispute arises in the future. One of the core clauses provided in an arbitration agreement is the clause on confidentiality which is the main focus of this dissertation. Theoretically, confidentiality has been regarded to as one of the important and positive attributes of arbitration over litigation due to its „private and confidential“ nature in arbitral proceedings.

The doctrine of confidentiality is not a new concept in the world of commercial arbitration. A great deal has been written about this doctrine in recent years by different scholars in the legal profession from different jurisdictions in the world expressing their views about the doctrine in the law of arbitration especially when it comes to applying the doctrine in arbitration proceedings.

The aim of this dissertation is not to cover what has already been touched on by different scholars, but to critically analyse what has already been discussed and provide an opinion and clear understanding on the nature and uncertainty of the doctrine in arbitral proceedings by introducing and implementing the doctrine in the Tanzanian arbitration system.

In writing this dissertation, I have consulted to books, case laws, articles, journals, reports, national legislations as well as some institutional rules.

The main research question of this dissertation is: *Can a developing nation like Tanzania adopt the doctrine of confidentiality in its arbitration regime?*

In practice, confidentiality is a well-accepted doctrine in the Tanzanian arbitration system. Various actors in arbitral proceedings such as the Courts, Parties, Legal Counsel, as well as the Arbitration Tribunals are bound by this doctrine,

especially when it comes to preserving the confidentiality of evidence, pleadings and the arbitral awards.

The major obstacle that the arbitration regime faces in Tanzania is that the current laws governing arbitration are outdated and do not reflect the current trend of commercial arbitration. The current arbitration laws itself do not contain any statutory provision with respect to the confidentiality doctrine in arbitral proceedings. This being said, it is also important to note that there appears to be no literature nor any article or journal with respect to this doctrine in Tanzania. As mentioned above, the researcher's main purpose is to introduce the doctrine in depth in this jurisdiction by examining the approaches used by two common law jurisdictions of this doctrine such as the United Kingdom (England) and Australia, through various case studies to show how a developing nation like Tanzania could implement one or combination of the different approaches into its arbitration system.

Finally, the researcher will conclude on the doctrine of confidentiality in arbitration proceedings and provide recommendations as to how the arbitration regime in Tanzania could incorporate the doctrine into its proposed and highly needed modernized arbitration laws in order to deal with the issue of confidentiality in its arbitration proceedings as well as to adopt with the current global trend of commercial arbitration.

1.2 Concept of Confidentiality in Arbitral Proceedings

Gary Born¹ states that:

„At the heart of the international arbitral process are the arbitration proceedings and procedures. It is the procedural conduct of international arbitration, as much as other factors, that leads parties to agree to arbitrate their disputes.“

The essence of this statement is that it is the arbitral process which determines the end result of the parties' disputes and that there are several factors in the arbitration process apart from that of procedural conduct of arbitration which attract parties to agree to arbitrate their disputes. One of those factors is the doctrine of confidentiality in arbitration proceedings.

As mentioned before, confidentiality is not a new notion in international commercial arbitration (ICA) as far as arbitral proceedings are concerned. The doctrine of confidentiality in arbitral proceedings has been referred to as one of the principal advantages of arbitration.² There is no universal definition of what the concept actually means and there have been several unsettled and on-going debates in recent years as to what extent confidentiality exists in arbitration proceedings. There have also been several leading cases which have developed jurisprudence over the years with respect to the duty of confidentiality but none of them have been able to reach a conclusion for an overall duty of confidentiality in arbitral proceedings.

The concept itself needs to be distinguished from that of privacy. Both concepts have been perceived as being „*two sides of the same coin*“.³ In actual sense this perception is wrong. The two concepts will be discussed in detail below.

¹ *International Arbitration: Law and Practice* (Kluwer Law International, The Netherlands, 2012) at 103.

² Blackaby, N., Partasides, C., Redfern H. and Hunter, M., *Redfern and Hunter on International Arbitration*, 5th Ed, Oxford University Press, 2009 at page 136.

³ *Esso Australian Resources Ltd v. Plowman* (1995) 183 CLR 10; (1995) 11 Arbitration International (No. 3), 1996 XXI Ybk Common Arbn 137-71; 128 ALR 391, 411 Per Toohey J., quoted from Tweeddale, A & Tweeddale K, *Arbitration of Commercial Disputes, International and English Law and Practice* (Oxford University Press, 2007) at page 350.

1.3 Privacy and Confidentiality in Arbitral Proceedings

Privacy and confidentiality have been presumed to be the fundamental principles of ICA.⁴ This does not mean that the two concepts are implied to be one and the same thing. There have been a quite number of distinctions made by various scholars in the legal profession as far as the concept of privacy and confidentiality in arbitration proceedings is concerned. Some of the distinction will be discussed below by referring to some literatures. Because of the vast literature on this point, it is beyond the scope of the dissertation to deal with it all; instead selected and representative points of view will be highlighted.

In some literatures⁵, it has been argued that until the late 1980's parties to a dispute had chosen arbitration as a means to resolve international disputes and therefore did not differentiate between the two concepts. Patrick Neil⁶ states that the distinction between the two concepts arose in the early 1980's in the case of *Oxford Shipping Co. Ltd v. Nippon Yusen Kaisha* (The „Eastern Saga“)⁷ where Leggatt J held that it was implicit that „strangers“ shall be excluded from hearings and conduct of the arbitration. For instance, third parties who are not bound by a particular arbitration agreement or proceedings such as witnesses, experts, or even Non-Governmental Organisations (NGO's) in investment arbitration may get involved as third parties or amicus curiae during the course of the proceedings.

After this case, the famous *Dolling-Baker* case⁸ confirmed that privacy and confidentiality were independent entities.

Amy Schmitz⁹ states that arbitration is „private but not confidential“. Schmitz clarifies the statement by arguing that arbitration is a private process in the sense that

⁴ Bagner, H „Confidentiality - A Fundamental Principle in International Commercial Arbitration?“ Journal of International Arbitration (2001) (18) (2): 243-249, Kluwer Law International, Netherlands.

⁵ Steven Kouris, Confidentiality: *Is International Arbitration Losing One of Its Major Benefits?* 22 J. Int'l. Arb. 127 (2005) seen in Smeureanu's Confidentiality in International Commercial Arbitration, Kluwer Law International BV, The Netherlands, (2011) at page 1.

⁶ Confidentiality in Arbitration, 12-3 Arb. Intl 287 (1996), found in Smeureanu's Confidentiality in International Commercial Arbitration, Kluwer Law International BV, The Netherlands, (2011) at page 1.

⁷ [1984] 2 Lloyd's Rep 373.

⁸ *Dolling-Baker v. Merrett* [1990] 1 WLR 1205.

⁹ „Untangling the Privacy Paradox in Arbitration“, 54 U. Kan. L. Rev. 1121 (2006) at page 1211. See Kyriaki Noussia's book titled Confidentiality in International Commercial Arbitration, A Comparative

it is a closed process, but being closed as such does not necessarily result in it being confidential. This is due to the fact that the information revealed during the arbitral process may become public.¹⁰ This was well illustrated in the famous landmark case of *Esso Australia Resources Ltd v. The Honourable Sidney James Plowman*¹¹ („Esso Australia“) which distinguished the two concepts.

In the court of first instance, Mark, J noted that:

„The mere fact that the parties to a dispute agree impliedly or expressly to have it [i.e., the dispute] arbitrated in private does not import any legal obligation or equitable obligation not to disclose to third parties any information at all which may be said to have been obtained by virtue of or in the course of the arbitration.“¹²

Gary Born¹³ also differentiates the two concepts. Born argues that in *privacy*, only parties to an arbitration may attend arbitral hearings and participate in the proceedings which being stipulated under any arbitration statutes and institutional rules but third parties to any arbitration proceedings are excluded from such hearings and participation. Confidentiality, on the other hand, refers to the obligation of not disclosing information concerning the arbitration to third parties. Born goes on to say that the duty of confidentiality extends not only in prohibiting third parties from attending the arbitration hearings, but also prohibiting them from disclosure of hearing transcripts, written pleadings and submissions in the arbitration, evidence adduced in the arbitration, materials produced during disclosure and as well as the arbitral awards.

Kyriaki Noussia¹⁴ argues that confidentiality goes beyond privacy as it involves an element of secrecy. This statement is expanded by Schmitz¹⁵ who writes that confidentiality basically means that parties, arbitrators, witnesses and any other actors involved in the arbitral process would have to respect and maintain whatever

Analysis of the Position under English, US, German and French Law, Springer-Verlag Berlin Heidelberg (2010) at page 24.

¹⁰ *Ibid.*

¹¹ [1995] 128 ALR 391.

¹² *Ibid* at 395.

¹³ International Arbitration: Law and Practice, Kluwer Law International, The Netherlands, (2012) at page 195.

¹⁴ Confidentiality in International Commercial Arbitration, A Comparative Analysis of the Position under English, US, German and French Law, Springer-Verlag Berlin Heidelberg (2010) at page 26.

¹⁵ „Untangling the Privacy Paradox in Arbitration“, 54 U. Kan. L. Rev. 1121 (2006).

they learnt in arbitration a secret.¹⁶ The press and the public would also lose access to not only hearings and awards but also to underlying information about the arbitrated cases. Arbitration submissions, testimonies and communications would be inadmissible in court proceedings. In reality such level of secrecy does not exist in arbitral proceedings since information at certain levels can and is disclosed to the public.¹⁷

Simon Crookenden¹⁸ states that privacy and confidentiality in arbitration are linked. Privacy involves arbitration proceedings being private to the disputing parties and to the tribunal while confidentiality concerns the confidentiality attaching to documents and the extent to which one party to arbitration is entitled to disclose to others or make use of arbitration documents for purposes other than those of the arbitration to which they relate.

1.4 The Legal Nature of the Doctrine in Arbitral Proceedings

The legal nature of the doctrine of confidentiality differs from one jurisdiction to another. The application aspect of the doctrine in arbitral proceedings has been regarded as a complex matter of discussion in recent years. There have been several debates from various scholars in the legal profession who have had their own views as far as the legal aspect of the doctrine is concerned. Some jurisdictions in the arbitral world such as United Kingdom have always believed on the implied duty of confidentiality in arbitral proceedings. While some jurisdictions like Australia after the 1995 *Eso Australia* decision¹⁹ have opposed the English approach by stating that an implied duty of confidentiality does not exist.

As far as the legal nature of confidentiality in arbitral proceedings is concerned, there are three main ways in which the doctrine can be adopted. The first one being applied through contractual provisions which could be by way of implied or express terms stipulated in the arbitration agreement, the second being adopted under the institutional arbitration rules and the third being adopted under national arbitration laws.

¹⁶ *Ibid* at page 1218.

¹⁷ *Supra* note 9 at page 26.

¹⁸ Arbitration International, *The Journal of the London Court of International Arbitration, Who Should Decide Arbitration Confidentiality Issues?*, Volume 25 No. 4, (2009) at page 603.

¹⁹ *Eso Australia Resources Ltd v. Plowmwn* [1995] 128 ALR 391.

1.4.1 Contractual Provisions of the Doctrine in the Arbitration Agreement

1.4.1.1 Implied Terms in the Arbitration Agreement

The English Courts for over the last 20 years in various cases have maintained that there is an implied duty arising out of the nature of arbitration and that both parties to the arbitral proceedings are prohibited to disclose or produce any documents prepared for and used in the arbitral process, including transcripts or notes of the evidence in the arbitration or the award, as well as not to disclose any evidence that has been given by any witness in the arbitration process.²⁰

The first significant case was *Dolling-Baker*’’*scase*.²¹ In this case the court held that the parties to arbitration were under an implied obligation not to use or disclose any documents without the consent of the other party or with the leave of the court. The court further held that this implied obligation arose from the private nature of arbitration. The next case to follow the same path was the *Hassneh Insurance* case²², where the court held that an obligation of confidentiality attaching to documents exists only because it is implied in the agreement to arbitrate.

Similarly in the case of *Ali Shipping Corp v. Shipyard Trogir*²³, Potter LJ in the English Court of Appeal held that the duty of confidentiality was an implied term in the arbitration agreement. Potter LJ emphasised on the implied term from the decision of *Scally v. Southern Health Board*²⁴ where by Lord Bridge had observed and stated that a clear distinction was to be made:

„between the search for an implied term necessary to give business efficacy to a particular contract and the search, based on wider considerations, for a term which the law will necessarily imply as a necessary incident of a definable category of contractual relationship“.²⁵

²⁰ *John Forster Emmet v. Michael Wilson & Partners Ltd* [2008] EWCA Civ 184 on para 105.

²¹ *Dolling-Baker v. Merrett* [1991] 2 ALL ER 890.

²² *Hassneh Insurance Co. of Israel & Ors v. Steuart J Mew* [1993] 2 Lloyd’s Rep 243.

²³ 2 ALL E.R. 136; [1998] 1 Lloyd’s Rep 643.

²⁴ [1991] 4 All ER 563.

²⁵ *Ibid* at 571.

In a recent Scottish case of *Gray Construction Limited v Harley Haddow*²⁶ the legal nature of the implied obligation had been considered in the Outer House of the Court of Session in Scotland. Lord Hodge in his opinion stated as follows:

„The jurisprudential basis of the obligation of confidentiality in English law is that it is an implied obligation arising out of the nature of arbitration. There is no clear authority on the point in Scots law. Nonetheless, absent express contractual provisions, I see no difficulty in implying such an obligation in a contract to refer a dispute for determination by means of arbitration.“²⁷

1.4.1.2 Express Terms in the Arbitration Agreement

Parties to arbitration can agree to have an express provision inserted into their main arbitration agreement with respect to the duty of preserving confidentiality in arbitral proceedings or through a separate confidentiality agreement. Through provisions of express terms in the agreement, parties control the confidentiality process in the sense that they may prohibit the disclosure of any documents or information presented during the proceedings, or agree not to disclose any aspect of the arbitral process including waiving the right to amend or change part of the confidentiality agreement as well as returning or destroying documents used once the arbitral process has been completed. In the case of *Associated Electric and Gas Insurance Services (AEGIS) v. European Reinsurance Company of Zurich*²⁸, parties in an arbitration agreement had relied on an express confidentiality provision which stipulated that the contents of all the documents prepared and filed in the course of proceedings shall not be disclosed to a non-party.

1.4.1.3 Institutional Arbitration Rules

There are several institutional Arbitration Rules which provide for confidentiality provisions. Some of them include the Arbitration Rules of the Australian Centre for International Commercial Arbitration (2011)²⁹, Swiss Rules of International Arbitration (2012)³⁰, Arbitration Rules of the London Court of International

²⁶ *Gray Construction Limited v. Harley Haddow* LLP [2012] CSOH 92, available at <http://www.bailii.org/scot/cases/ScotCS/2012/2012CSOH92.html> [Accessed 08 September 2014].

²⁷ *Ibid* at para 5.

²⁸ [2003] 1 ALL E.R. (Comm) 253.

²⁹ Article 18.1 and 18.2 (Effective from 1 August 2011).

³⁰ Article 44 (1) and (2) (Effective from 1 June 2012).

Arbitration (2014)³¹, Arbitration Rules of the Dubai International Arbitration Centre (2007),³² World Intellectual Property Organisation Arbitration Rules (2014)³³, Stockholm Arbitration Rules (2010),³⁴ and the International Arbitration Rules of the Singapore International Arbitration Centre (2013)³⁵.

1.4.1.4 National Arbitration Laws

It is important for different arbitral jurisdictions in the world to recognise the doctrine of confidentiality in their national legislations since there are very few jurisdictions who have adopted the doctrine of confidentiality. Unfortunately, Tanzania is not one among them. To mention some jurisdictions which have successfully incorporated provisions on confidentiality in their national arbitration legislations include New Zealand³⁶, Peru,³⁷ Norway³⁸, Spain³⁹ and Scotland⁴⁰

1.5 Key Actors Involved in Preserving the Duty of Confidentiality in Arbitral Proceedings

It has been a general assumption that the parties, their legal representatives and the arbitral tribunals are the key actors bound by the duty of preserving confidentiality in arbitral proceedings. But there are also actors involved in the arbitral process who play a significant role in preserving the duty of confidentiality and they include the arbitral institutions, third parties in some situations such as witnesses and experts as well as the tribunal secretaries and interpreters during the arbitral proceedings. As far as this dissertation is concerned, I will only discuss in brief the three main actors bound by the doctrine.

³¹ Article 30.1 (The New LCIA Arbitration Rules is expected to come into force effectively from 1 October, 2014 replacing the Old LCIA Rules of 1998), available at: http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx [Accessed 08 September 2014].

³² Article 41 (1) (Effective from 7 May 2007).

³³ Articles 75 to 78 (The New WIPO Arbitration Rules came into force effectively from 1 June 2014).

³⁴ Article 46 of the Arbitration Institute of the Stockholm Chambers of Commerce (Effective from 1 January 2010).

³⁵ Rule 35.1 (5th Edition, Effective from 1 April 2013).

³⁶ Section 14B C D & E inserted on 18 October 2007 by section 6 of the New Zealand Arbitration Amendment Act No. 94 of 2007.

³⁷ Article 51 of the Peruvian Legislative Decree No. 1071 of 2008.

³⁸ Section 5 of the Norwegian Arbitration Act of 14 May 2004.

³⁹ Article 24.2 of the Spanish Arbitration Act No. 60 of 2003.

⁴⁰ Rule 26 of the Scotland Arbitration Rules falling under the first schedule of the Scotland Arbitration Act of 2010.

1.5.1 The Parties

The Parties are the backbone to any arbitration proceedings. It is the dispute of the parties which leads to an arbitration. Parties are bound by the duty of confidentiality in arbitral proceedings either impliedly or expressly. It is the parties who formulate a confidentiality clause in their arbitral agreements in order to maintain the proceedings confidential. Both parties involved in the arbitration proceedings need to make sure that they do not reveal any sort of information or documents to anyone outside the arbitral process.

1.5.2 Legal Representatives

One of the important duties of a legal counsel in the legal profession as far as ethics is concerned is for them to observe the attorney-client relationship by preserving confidentiality of their client's information or documents all the time. In practice, lawyers have the duty to treat any communication or documents received from their clients or any legal advice provided to their clients confidential.

As far as arbitral proceedings are concerned, the duty of confidentiality binding legal counsel involved in the arbitral process applies not only to information disclosed by the client, but also information and materials received from the opposing party, the tribunal, arbitral institution where applicable as well as information disclosed by experts and witnesses.

1.5.3 The Arbitral Tribunal

As a general principle in ICA, it has been an accepted norm that arbitrators owe a duty to preserve confidentiality in arbitral proceedings. As decision makers in the arbitral process, it is the duty of an arbitrator to ensure that the whole arbitral process is maintained confidential. As far as institutional arbitration is concerned, the arbitrators have the duty to ensure that the parties and the legal counsels do not breach any level of confidentiality during the whole arbitral process. Some arbitral institutional rules⁴¹ do provide for an express provision for an arbitrator to sign a declaration of confidentiality once being appointed. If express provision is not

⁴¹ Rule 6 (2) of the ICSID Arbitration Rules, 2006.

provided under the institution rules, than the parties may prepare and request the arbitrators to sign a confidentiality declaration.

1.6 Conclusion

The main focus of this chapter has been to introduce the doctrine of confidentiality in arbitral proceedings by examining how different scholars had interpreted the concept and by distinguishing the doctrine from privacy. This chapter further looked at the legal nature of the doctrine in arbitral proceedings and the main actors involved in preserving the duty of confidentiality in the arbitral process.

CHAPTER 2: OVERVIEW OF THE ARBITRATION SYSTEM IN TANZANIA AND ITS POSITION ON THE DOCTRINE OF CONFIDENTIALITY IN ARBITRATION PROCEEDINGS

2.1 Introduction

This chapter aims at providing a brief overview of the arbitration system in Tanzania. For the purpose of this dissertation, the researcher shall only focus on the arbitration regime in Tanzania Mainland and not Tanzania Zanzibar since both jurisdictions have their own separate arbitration laws. This chapter will also cover a brief overview of the current Arbitration Act, international adherence of arbitration in Tanzania, arbitral institutions, current trend of arbitration in Tanzania, the role of national courts in the arbitration process, limitations of the arbitration regime, as well as the position of the doctrine of confidentiality in Tanzania as far as arbitral proceedings are concerned.

2.2 The Legal Framework of the Arbitration System in Tanzania Mainland

The Tanzania Arbitration Act (TAA)⁴² is the principle national arbitration legislation as far as the legal frame of arbitration in Tanzania Mainland is concerned. The TAA traces back its origin from the Colonial Arbitration Ordinance, which was put into effect by official proclamation in 1957 by the British colonial government. The TAA caters for both domestic and international arbitration and it is supplemented by the Tanzania Arbitration Rules (TAR).⁴³ Apart from the principle legislation, the Civil Procedure Code (CPC)⁴⁴ is another legislation which provides for the rules and procedures in domestic arbitration.⁴⁵ Such rules and procedures only apply if during the course of the court proceedings, the parties agree that their disputes should be referred to arbitration.⁴⁶

In Tanzania, the arbitration regime provides for three main categories in which arbitration proceedings are conducted. The first one being through mandatory statutory arbitration in which some legislations require disputes to be submitted

⁴² Cap 15 [Revised Edition 2002].

⁴³ Government Notice No. 427 of 1957.

⁴⁴ Cap 33 [Revised Edition 2002].

⁴⁵ Second Schedule of the Civil Procedure (Arbitration) Rules under CPC.

⁴⁶ Rule 1 (1) of the Civil Procedure (Arbitration) Rules under CPC.

through compulsory domestic arbitration. For instance, the Employment and Labour Relations Act⁴⁷ under Part VIII Sub-Part B provides for disputes to be determined through compulsory arbitration. The body which hears arbitration-related labour disputes is referred to as the Commission for Mediation and Arbitration (the „CMA“). The CMA is an independent government department which is established under section 12 of the Labour Institutions Act.⁴⁸ The second category being through voluntary arbitration covered under the CPC which provides for arbitration in civil suits as mentioned above. The arbitration proceedings are governed by the Civil Procedure (Arbitration) Rules⁴⁹ which cater for reference to arbitration of a matter in difference between parties in a suit.⁵⁰ The rules only apply where a civil suit has already been filed in court and a matter in difference arising in that suit is referred to arbitration before the delivery of the judgment. And the third category is through an *ad hoc* arbitration which being through an arbitration agreement agreed between the Parties. In *ad hoc* arbitration, the parties freely agree to enter into an agreement in submitting present or future disputes to arbitration.

2.3 The Current Arbitration Act CAP 15 [Revised Edition 2002]

The current TAA in place traces back its origin to the colonial regime. The TAA was originally enacted in 1931 and was modelled on the English law of that time. The TAA was first amended in the year 1971 and was then revised back in 2002. As mentioned before, the TAA caters for both domestic arbitral proceedings and international arbitration specifically on the enforcement of foreign arbitral awards.

The TAA provides for arbitration of disputes but does not define the nature of disputes that could be arbitrated. But section 3 of the TAA stipulates that the TAA shall apply “*only to disputes which, if the matter submitted to arbitration formed the subject of a suit, the High Court only would be competent to try.*” This provision further confers the powers to try such disputes in a subordinate court or other class of courts. It is only the president who may with concurrence of the Chief Justice confer such powers. The TAA till to-date incorporates multilateral

⁴⁷ Act No. 6 of 2004.

⁴⁸ Act No. 7 of 2004.

⁴⁹ Under Second Schedule of the CPC [Cap 33 Revised Edition 2002].

⁵⁰ Rule 1 (1) of the Civil Procedure (Arbitration) Rules.

agreements such as the Geneva Protocol on Arbitration Clauses of 1923⁵¹ and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.⁵²

The provisions of the TAA are brief and consist of only thirty-two (32) sections with the related schedules. The TAA has four (4) parts. Part 1 provides for preliminary provisions and definitions of terms such as „court“ and „submission agreement“ as provided under section 2 of the TAA. Part II provides for general provisions relating to arbitration by consent out of court. Part III has only got a single section that caters for staying of court proceedings with specific reference to matters that require being submitted to arbitration under the Geneva Protocol on Arbitration Clauses of 1923. Part IV provides for provisions relating to the Convention on the Execution of Foreign Arbitral Awards of 1927.

As far as the Schedules under the TAA are concerned, the first schedule deals with provisions to be implied in submissions in the whole arbitral process. The second schedule provides for various forms that may be required to be submitted during the course of the arbitral proceedings. The third schedule provides for the provisions under the Geneva Protocol on Arbitration Clauses of 1923 and the fourth schedule caters for provisions under the Convention on the Execution of Foreign Arbitral Awards of 1927.

2.4 The International Adherence of Arbitration in Tanzania

Tanzania is a contracting state to the 1958 New York Convention on the Enforcement of Foreign Arbitral Awards (NYC). It ratified and acceded to the NYC on 13 October 1964 and entered into force on the 12 January 1965.⁵³ Tanzania is one of the few countries in the East African Region to be a party to the NYC. In his paper⁵⁴, Honourable Justice Robert Makaramba who is currently the Judge-in-Charge of the High Court of Tanzania (Commercial Division) stated that *“despite the fact*

⁵¹ Under Schedule 3 of the TAA.

⁵² Under Schedule 4 of the TAA.

⁵³ <http://www.newyorkconvention.org/contracting-states/list-of-contracting-states> [Accessed 08 September 2014].

⁵⁴ „Curbing Delays in Commercial Dispute Resolution: Arbitration as a Mechanism to Speed Up Delivery of Justice“, a paper presented at the Judiciary Round Table Discussion held at Dar es Salam International Conference Centre on the 20 July 2012 at page 29, available at: <http://www.comcourt.go.tz/comcourt/wp-content/uploads/2013/08/Arbitration-Mechanism-of-Alternative-Dispute-Resolution.pdf> [Accessed 08 September 2014].

that Tanzania had ratified the NYC almost fifty (50) years ago it has yet to incorporate the provisions of the NYC into its law.” The provisions of the NYC till to-date have not yet been domesticated into its TAA and the same needs to be done so in order to meet the current trend of ICA.

Tanzania is also a contracting state to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. (International Centre for Settlement of Investment Disputes (ICSID) which it entered into force on the 17 June 1992.⁵⁵ As of 1 June 2013 Tanzania has entered about seventeen (17) Bilateral Investment Treaties (BIT"s) with respect to arbitration.⁵⁶ Out of the seventeen (17) corresponding states only eight (8) have entered into force⁵⁷ while the remaining nine (9) have signed the BIT"s but have not yet come into force.⁵⁸

So far, Tanzania has been a party to four (4) Investment Arbitration cases or the so called ICSID cases. Just to mention, they include the case of *Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited*⁵⁹, *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*⁶⁰, *Standard Chartered Bank v. United Republic of Tanzania*⁶¹ and *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*.⁶²

Tanzania is not a member of the Model law.⁶³ Both the TAA and the Arbitration Rules pre-dates the 1985 Model Law. The TAA was passed after the adoption of the 1985 Model Law, and till to-date it does not reflect the same nor has any influence on it.

⁵⁵<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English> [Accessed 08 September 2014].

⁵⁶UNCTAD (2013), Tanzania: Full list of Bilateral Investment Agreements concluded, 1 June 2013, available at: http://unctad.org/Sections/dite_pcb/docs/bits_tanzania.pdf [Accessed 08 September 2014].

⁵⁷Denmark, Finland, Germany, Italy, the Netherlands, Sweden, Switzerland, and the United Kingdom.

⁵⁸Egypt, Jordan, Republic of Korea, Mauritius, Oman, South Africa, Turkey, Zimbabwe and Canada which signed the BIT last year on 17 May 2013.

⁵⁹ICSID Case No. ARB/98/8) (Award rendered on 12 July 2001).

⁶⁰ICSID Case No. ARB/05/22) (Award rendered on 24 July 2008).

⁶¹ICSID Case No. ARB/10/12) (Case Pending).

⁶²ICSID Case No. ARB/10/20) (Case Pending).

⁶³ 1985 and 2006 UNCITRAL Model Law on ICA.

2.5 Arbitration Institutions

In Tanzania, the Tanzania Institute of Arbitrators (TIA) and the National Construction Council of Tanzania (NCC) are referred to as the two major arbitration bodies which govern both domestic and international arbitration having their own set of arbitration rules and procedure.⁶⁴ The TIA is governed by the TIA Arbitration Rules of 2008. While the NCC on the other hand is a statutory body established through an Act of Parliament.⁶⁵ The NCC in 2001⁶⁶ adopted a set of arbitration rules which aimed to resolve disputes arising from the construction industry. The NCC is not an arbitration institution as such but because arbitration in Tanzania is underdeveloped, the NCC assists parties to agree to be bound by the NCC Arbitration Rules regardless of the subject matter of the dispute. Parties to a dispute who agree or wish to have their disputes referred to arbitration under these rules are advised to have an arbitration clause in their arbitration agreements or contracts providing for such disputes to be resolved or referred through either of these rules. It is also important to note that some of the provisions of the NCC Arbitration Rules of 2001 are based on the UNCITRAL Model Law.

2.6 The Role of National Courts in the Arbitration Proceedings in Tanzania

Arbitration has been referred to as ‘*a private and confidential process*’ without the interference of national courts. This in matter of fact is true, but various readings have revealed that national courts play a significant role during all stages of the arbitral process. One of those readings includes from an Article⁶⁷, whereby Professor Julian Lew states that “*national court involvement in international arbitration is a fact of life as prevalent as the weather.*” Professor Lew suggests four main stages of how a national court could be involved in the arbitration process. The first one being

⁶⁴ Wegen, G and Wilske S., the Contributing Editors in *Getting the Deal Through*, Arbitration in 49 Jurisdictions World Wide, Tanzania (2014) at page 407 written by Kapinga, W., Tetteh-Kujorjie, O. and Kapinga, K from Mkono and Co. Advocates, Dar Es Salaam, Tanzania, published by Law Business Research Limited, London, United Kingdom, available at: <http://www.mkono.com/pdf/A2014%20Tanzania.pdf> [Accessed 08 September 2014].

⁶⁵ The National Construction Council Act (NCCA), Act No. 20 of 1979. The NCCA became operational in 1981 through Government Notice No. 95 of 1981. The NCCA was revised in 2002 referred to as Cap 162 [Revised Edition 2002] and the same was again amended back in 2008.

⁶⁶ The NCC Arbitration Rules.

⁶⁷ Julian D M Lew., *Does National Court Involvement Undermine the International Arbitration Processes?*, (2009), Volume 24, Issue No. 3, Article 3, American University International Law Review at page 496.

prior to the establishment of a tribunal, second being at the commencement of the arbitration, third being during the arbitration process and the fourth being during the enforcement stage that is after the award has been rendered and the courts involvement here can take two forms, the first being at the place of arbitration and the second being at the place of enforcement.

The national courts in Tanzania do also play a significant and similar role in the arbitral process just as Professor Lew suggests in his Article.⁶⁸ Most of the provisions under the TAA deal with powers of the court with respect to arbitral disputes. The High Court of Tanzania has jurisdiction over arbitration-related court proceedings as far as arbitration in suits is concerned.⁶⁹ The TAA⁷⁰ and the Civil Procedure (Arbitration) Rules⁷¹ gives the national courts the power to make orders for stay of court proceedings pending arbitration in circumstances where the court is satisfied that there is a valid arbitration agreement in place between the parties.

With reference to case law, the national courts in Tanzania do also have the power to make interim orders before and during the arbitral proceedings.⁷² The national courts in Tanzania may also intervene in assisting with the appointment of and challenges to arbitrators. In Tanzania, the national courts have the power to set aside or challenge an award due to misconduct committed by an arbitrator or umpire or for improperly procuring an arbitration or award.⁷³ The courts may also remove an arbitrator or umpire from on-going arbitral proceedings on the grounds of misconduct.⁷⁴ Once again the national courts in Tanzania do also have the power to deal with matters with respect to enforcement of domestic and foreign arbitral awards in which a successful party may seek recognition and enforcement of the award from the courts.

Other powers of the national courts in Tanzania with respect to arbitral proceedings under the TAA include the power to extend time for commencing

⁶⁸ *Ibid.*

⁶⁹ Section 3 of the TAA.

⁷⁰ Under Section 6.

⁷¹ Rule 18.

⁷² *Kobil Tanzania Limited v. Mariam Kisangi*, Misc. Commercial Application No. 12 of 2007 and *Hodi (Hotel Management) Company Ltd v. Jandu Plumbers Ltd*, Misc. Commercial Application No. 15 of 2009 respectively.

⁷³ Section 16.

⁷⁴ Section 18.

arbitral proceedings⁷⁵, the power to extend time limit for making an award⁷⁶, the power to remit an award to the reconsideration of the arbitrators or umpire⁷⁷, the power to appoint an arbitrator, umpire or third arbitrator in certain cases⁷⁸, as well as the power of setting aside an appointment of a sole arbitrator in certain circumstances.⁷⁹

2.7 The Current Trend of Arbitration in Tanzania

As far as the recent development of arbitration in Tanzania is concerned, the arbitration laws in place do not meet the modern trend of ICA. The current provisions of the TAA have been referred to as inadequate and insufficient when it came to implementing the provisions which do not reflect the current trend of international arbitration. In an article from a newspaper⁸⁰ titled ‘*Tanzania Arbitration Laws Outdated, New Statutes a Must*’ it was reported that the government of Tanzania had been requested to review and replace the current arbitration laws which were colonial oriented hence failing to keep pace in the local business environment.

In the same Article⁸¹, Honourable Justice Robert Makaramba, the Judge-in-Charge of the High Court of Tanzania (Commercial Division) during an opening of a workshop on ‘*International Arbitration Practice for Tanzania Government Lawyers*’ which was held at the Law School of Tanzania, aiming at training and equipping Tanzanian government lawyers with the necessary legal skills on business negotiations and international arbitration, argued and emphasized that there was a need of having modern arbitration laws in the country’s arbitration system since the current TAA and Arbitration Rules were colonial-oriented and would not be useful in resolving present or future contractual disputes. The Judge-in-Charge also put emphasis on the fact that the current TAA presents significant challenges for any practicing arbitration lawyer in Tanzania especially when it comes to resisting the

⁷⁵ Section 7 (1).

⁷⁶ Section 14.

⁷⁷ Section 15.

⁷⁸ Section 8.

⁷⁹ Section 10 (2).

⁸⁰The Citizen-Business News dated 30 April 2013 reported by a Citizen Reporter Alex Bitekeye, Dar es Salaam, Tanzania, available at: <http://africa.widmi.com/index.php/tanzania/the-citizen/business-news/47-tz-arbitration-laws-outdated-new-statutes-a-must> [Accessed 08 September 2014].

⁸¹*Ibid.*

enforcement of an arbitral award in courts of law. The TAA had also created a state of confusion among arbitrators when it came to filing of arbitral awards in courts with respect to registration and enforcement.⁸²

The Judge-in-Charge further observed that arbitrators have been facing various difficulties in conducting arbitration proceedings due to lack of appropriate rules in conducting arbitral proceedings in Tanzania. The outcome of this has forced the arbitration system in Tanzania to rely either on the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules (as revised in 2010) or the Arbitration Rules of the International Chambers of Commerce (ICC), 2012 and when disputes arise in the construction industry, the arbitration rules of the NCC has been significantly relied upon in resolving such disputes.⁸³

The Law Reform Commission of Tanzania (LRCT) on May, 2013 presented a report⁸⁴ to the Minister for Justice and Constitutional Affairs on the Comprehensive Review of the Civil Justice System in Tanzania with respect to the need of reviewing some important areas of law which need attention. One of those laws for review was the Current TAA⁸⁵. In that report, the LRCT argued that the current provisions of the TAA do not incorporate the recent developments in the law of arbitration. The LRCT proposed a newly comprehensive TAA that would incorporate and cater for the new developments in both domestic and international arbitration hence repealing and replacing the outdated provisions under the current TAA which do not cater for the recent trends of ICA. The LRCT also argued that the new TAA would make provisions for arbitrations cases which are currently not covered under the current TAA as well as remove the present state of confusion on the applicability of the provisions of section 64 of the CPC and the 2nd Schedule to the CPC with respect to arbitration by repealing the arbitration proceedings from the CPC. According to LRCT, the new TAA will be better implemented by the new rules of arbitration to replace the current outdated 1958 Arbitration Rules.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ Available at: <http://www.lrct.go.tz/wp-content/uploads/2013/05/FINAL%20REPORT.pdf> [Accessed 08 September 2014].

⁸⁵ Cap 15 [Revised Edition 2002].

2.8 The Limitations of the Arbitration Regime in Tanzania

The major setback that the arbitration regime in Tanzania currently faces is that the current arbitration laws in place are outdated hence do not meet the modern trend of ICA. When referring to arbitration laws, the researcher refers to the TAA and the Arbitration Rules. The setback of having outdated arbitration laws is in itself a major limitation since the current TAA has neither domesticated the provisions of the NYC nor the provisions of the 1985 or 2006 UNCITRAL Model Law unlike other countries which have done so in their national laws. The current TAA mainly focuses on provisions with respect to arbitration by consent out of court and that it is highly based on the enforcement of foreign arbitral awards.

There are many limitations under the current arbitration laws in Tanzania which need to be addressed under new comprehensive TAA and Arbitration Rules. Some of these limitations are that the current TAA⁸⁶ limits arbitration to matters only triable by the High Court of Tanzania, meaning that if a matter falls below the pecuniary jurisdiction of the High Court, then those matters may not be arbitrable under the TAA. The TAA does not define nor have a provision on arbitration agreement; no provision on the composition of an arbitral tribunal, no provision on the conduct of arbitral proceedings; no provision on the seat of arbitration or language to be used during the whole arbitral proceedings, no provision on the applicable law to be referred to, as well as no provision on interim measures.

The TAA provides for only two grounds for challenging or setting aside arbitration awards namely, misconduct by an arbitrator and an arbitration or award being improperly procured. These grounds are not exhaustive and need to be expanded to cater for domestic and foreign arbitral awards. Furthermore, neither the TAA nor the Arbitration rules have any provisions with respect to the arbitral process on issues relating to request for arbitration, document exchange, witness statements, expert evidence, opening submissions, hearing of arbitral proceedings, closing submissions, duties of parties in arbitral proceedings, general powers of the arbitral tribunal, cost of arbitration, default awards and many other important issues such as the issue of confidentiality in arbitral proceedings which is the focus of this dissertation. There is

⁸⁶ Under Section 3.

no express provision on confidentiality under the current TAA. Confidentiality is one of the main reasons why parties in disputes resort to arbitration unlike court litigation and the researcher in Chapter Three aims to examine the doctrine of confidentiality in depth with reference to foreign jurisdictions and suggests ways of implementing the doctrine in the Tanzanian arbitration regime.

2.9 The Position of the Doctrine of Confidentiality in Arbitral Proceedings in Tanzania

Neither the TAA⁸⁷ nor the TAR⁸⁸ provide for an express provision on confidentiality in arbitral proceedings. As previously discussed in the introductory chapter, the doctrine of confidentiality in practice is well-accepted in the Tanzanian Arbitration system and various actors involved in the arbitral process accept that they are bound by the doctrine, especially when it comes to preserving the confidentiality of evidence, pleadings and the arbitral awards. The duty of confidentiality in Tanzania is based on the implied term in arbitral proceedings as the approach adopted by England. Once again, in practice, parties to arbitral proceedings are advised to incorporate an express provision into their arbitration agreements in order to assure that confidentiality in the arbitration process is protected.

As highlighted in the previous chapter, that there appears to be no literature nor any article or journal with respect to this doctrine in Tanzania. In Lise Bosman's book⁸⁹, Karel Daele had written a chapter on Tanzania (Chapter 3.9) summarising the arbitration system in the country, pointing out that there are not enough publications available to identify the current trends of arbitration especially in cases which involve confidentiality of arbitral proceedings. There also appears to be no decided national cases on the confidentiality doctrine as far as arbitration proceedings in Tanzania are concerned.

Though the need for having a provision on confidentiality in arbitral proceedings under the new TAA was articulated when the LRCT Report of May 2013 was put forward to the Minister for Justice and Constitutional Affairs. One of

⁸⁷ Cap 15 [Revised Edition 2002].

⁸⁸ Government Notice No. 427 of 1957.

⁸⁹ *Arbitration in Africa: A Practitioner's Guide*, Kluwer Law International, The Netherlands (2013) at page 242.

the recommendations in that report was that the new TAA should provide a more elaborative process on the issue of confidentiality and as to when a party may be able to disclose. If such a clause is stipulated under the newly modernised TAA, then the other step would be to have a detailed provision on confidentiality which could stipulate as to when a party may or may not disclose confidential information or what documents need to be confidential and what documents would require disclosure as well as and many other similar provisions which would require protecting the confidentiality process.

The researcher has also noted that there appears to be agreements prepared in Tanzania having a clause on confidentiality protecting the interests of the parties. Unfortunately the researcher could not get access to actual arbitration agreements prepared in Tanzania providing for a confidentiality clause in arbitral proceedings but was able to get access to contractual agreements which provide for a confidentiality clause. The researcher is of the view that if those agreements have a provision on confidentiality agreed between the parties, it basically means that the confidentiality process is a well-accepted doctrine not only in practice but also in written agreements. That being the case, it is important for the doctrine of confidentiality to be acknowledged under the arbitrations laws of the country by having a detailed provision addressing confidentiality aspect in arbitral proceedings.

Despite there being no decided domestic cases in Tanzania on the confidentiality doctrine, there has been international precedent which has discussed the confidentiality requirement in which Tanzania had been a party to the arbitral proceedings. In an ICSID case between *Biwater Gauff (Tanzania) (BGT) v. United Republic of Tanzania (URT)* (the „Biwater Gauff Case“)⁹⁰, the arbitral tribunal issued Procedural Order No. 3 by imposing certain confidentiality requirements on the parties. In this case the Claimant, BGT, filed a request for arbitration with respect to a dispute with the Respondent, URT, arising out of a series of alleged breaches by URT of its obligations under both international and domestic law concerning foreign

⁹⁰ ICSID Case No ARB/05/22.

investment which, according to BGT, were said to have caused loss to BGT in the region of US\$ 20 - 25 million.⁹¹

As far as the issue of confidentiality of arbitral proceedings in this case was concerned, BGT submitted a request for provisional measures on confidentiality, seeking to ensure that the confidentiality of these and other documents in the proceedings had been protected, since URT had posted on an internet website the minutes of first session of the arbitral tribunal dated 23 March 2006 as well as the Procedural Order No. 2 dated 24 May 2006 which dealt with the parties' requests for production of documents.

BGT was concerned that the parties' pleadings as well as documents produced in disclosure procedures and correspondence in the case could be disclosed to third parties. In support of its claim, BGT had relied on Article 47 of the ICSID Convention and on Rule 39(1) of the ICSID Arbitration Rules of 2006 which dealt with provisional measures for the preservation of parties' rights, but the tribunal did not consider those provisions.

BGT had requested the arbitral tribunal to grant them several orders which included that, for the duration of the arbitration proceedings, the parties refrain from taking any steps which might undermine the procedural integrity, or the orderly working, of the arbitral process or which might aggravate or exacerbate the dispute, and in particular that (a) the parties undertake to discuss on a case by case basis the publication of all decisions other than the award made in the course of the proceedings, with the object of achieving mutual agreement, and if agreement cannot be reached, the parties refer the matter to the Tribunal for decision; (b) the parties refrain from disclosing to third parties any of the Pleadings; (c) the parties refrain from disclosing to third parties any of the documents produced in the respect of the First Round Disclosure and the Second Round Disclosure; and (d) the parties refrain from disclosing to third parties any correspondence between the parties or the Tribunal exchanged in respect of the arbitral proceedings.

⁹¹The *Biwater Gauff Case* (Procedural Order No.3), available at: <http://www.italaw.com/sites/default/files/case-documents/ita0089.pdf> [Accessed 08 September 2014].

On the side of the respondent, URT argued that BGT had failed to show that the rights to procedural integrity and non-aggravation of the dispute were threatened. It argued that truthful information to the public was not capable of causing harm to a party's protected rights under the ICSID Convention and Arbitration Rules.

The Biwater Gauff Tribunal made the following orders, which included:

- (a) All parties refrain from disclosing to third parties: (i) the minutes or record of any hearings; (ii) any of the documents produced in the arbitral proceedings by the opposing party, whether pursuant to a disclosure exercise or otherwise; (iii) any of the Pleadings or Written Memorials (and any attached witness statements or expert reports); and (iv) any correspondence between the parties and/or the Arbitral Tribunal exchanged in respect of the arbitral proceedings;
- (b) All parties are at liberty to apply to the Arbitral Tribunal in justified cases for the lifting or variation of these restrictions on a case-by-case basis;
- (c) Any disclosure to third parties of decisions, orders or directions of the Arbitral Tribunal (other than awards) shall be subject to prior permission by the Arbitral Tribunal;
- (d) For the avoidance of doubt, the parties may engage in general discussion about the case in public, provided that any such public discussion is restricted to what is necessary, and is not used as an instrument to antagonize the parties, exacerbate their differences, unduly pressure one of them, or render the resolution of the dispute potentially more difficult, or circumvent the terms of this Procedural Order and;
- (e) All parties refrain from taking any steps which might undermine the procedural integrity, or the orderly working, of the arbitral process or which might aggravate or exacerbate the dispute.

The Arbitral Tribunal had held that the Procedural Order No. 3 was subject to no confidentiality restrictions and that it may be freely disclosed to third parties. This case is a good example of a situation in which the tribunal had allowed access to confidential information to third parties, with Tanzania being a party in the confidential arbitral proceedings.

2.10 Conclusion

This chapter aimed at providing a brief overview of the arbitration regime in Tanzania mainland, focusing on the TAA which currently is outdated and does not meet the modern trends of ICA in Tanzania. This chapter also went further to look at the current trend of arbitration in Tanzania and the limitations the arbitration regime faces in the country. The chapter ended up by looking at the current position of the doctrine of confidentiality in the country's arbitral proceedings by providing an example of an international precedent in which Tanzania was part of the confidentiality proceedings. The researcher in the next chapter aims to suggest ways of how the doctrine of confidentiality can be implemented into the country's arbitration system by making reference to two foreign jurisdictions which have adopted the doctrine in their arbitral proceedings.

CHAPTER 3: COMPREHENSIVE OVERVIEW OF THE DOCTRINE OF CONFIDENTIALITY IN ENGLAND AND AUSTRALIA AND ITS IMPLEMENTATION TO THE TANZANIAN ARBITRATION SYSTEM

3.1 Introduction

This chapter examines in depth the doctrine of confidentiality in the United Kingdom (England) and Australia as the approach in these two jurisdictions has been a source of debate in recent years due to the different approaches being adopted on the doctrine. This chapter will also look at the applicable laws in both jurisdictions which cater for confidentiality provisions in their arbitral proceedings. Furthermore, this chapter will explore how the two arbitration regimes have interpreted the doctrine on a case-by-case basis in their arbitral proceedings and finally the chapter will end by critically analysing the possibilities for the doctrine to be adopted in a developing jurisdiction like Tanzania in its arbitration regime.

3.2 Brief Overview of Arbitration in the United Kingdom

In brief, the United Kingdom has been a contracting state to the NYC since 24 September 1975.⁹² The state is also a member of the ICSID Convention with respect to investment arbitration which it entered into force on the 18 January 1967.⁹³ As of 1 June 2013, the United Kingdom had entered into 104 BIT's with other member states.⁹⁴ The main arbitration institution in the United Kingdom is the London Court of International Arbitration (LCIA) which is based in England that deals with ICA. Among other arbitration institutions include the Chartered Institute of Arbitrators and the London Maritime Arbitrator's Association.

⁹² <http://www.newyorkconvention.org/contracting-states/list-of-contracting-states> [Accessed 08 September 2014].

⁹³ <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English> [Accessed 08 September 2014].

⁹⁴ http://unctad.org/Sections/dite_pceb/docs/bits_uk.pdf [Accessed 08 September 2014].

3.3 The English Arbitration Act (EAA)

The EAA⁹⁵ which is the foundational law on arbitration in the United Kingdom governs all arbitration matters seated in England, Wales, and the Northern Ireland⁹⁶ covering both domestic and international arbitration proceedings. Most parts of the EAA are based on the principles set out from the UNCITRAL Model Law of 1985 though not the model law itself and do differ from the model law in other important areas.⁹⁷ The EAA has also not been amended to include changes from the amended UNCITRAL Model Law of 2006.⁹⁸ As far as the structure of the EAA is concerned, the EAA contains four parts which include Part 1, which covers arbitration pursuant to an arbitration agreement as well as covering key provisions to be followed in relation to arbitration proceedings. Schedule 1 of the EAA provides for a list of mandatory provisions of Part 1 with respect to arbitral proceedings, Part 2 of the EAA covers other provisions relating to arbitration including domestic arbitration agreements, consumer arbitration agreements as well as small claims arbitration in the county court, Part 3 of the EAA contains provisions on recognition and enforcement of certain foreign awards which include recognition and enforcement of awards under the 1958 NYC⁹⁹ and Part 4 of the EAA contains general provisions on the allocation of proceedings between the courts, crown applications, the extent of the application of the EAA as well as the commencement of the EAA.

3.4 Confidentiality Provisions under the English Arbitration Laws

The EAA does not provide for any express provisions on confidentiality in arbitration proceedings. However, the English Law has well-developed LCIA Arbitration Rules (2014)¹⁰⁰ which provide for confidentiality provisions under Article 30.1 to 30.3. Article 30.1 provides for an implied obligation to be observed

⁹⁵ Of 1996 [Chapter 23] which came into force on 31 January 1997.

⁹⁶ Section 2 (1) of the EAA.

⁹⁷ Carter, J.H., Editor in *The International Arbitration Review*, England and Wales, Chapter 15, Fourth Edition (July 2013), written by Speller D., and Howitt C. at page 188. See Wegen, G and Wilske S., the Contributing Editors in *Getting the Deal Through*, Arbitration in 55 Jurisdictions Worldwide, England and Wales (2013), written by Wessel, J, Stockford, C, and Alrashid, M. N from Crowell and Moring at page 189.

⁹⁸ *Ibid.*

⁹⁹ Articles III to VI.

¹⁰⁰ The New LCIA Rules are expected to come into effect from 1 October 2014. (The confidentiality provisions under the new rules remain the same with no changes).

by the parties in the course of the arbitral proceedings. On the other hand, parties to arbitral proceedings can make reference to the English Civil Procedure Rules (CPR) of 1998¹⁰¹ which under part 31 of the rules provide for disclosure and inspection of documents. Furthermore, the English courts in civil proceedings under rule 62.10 (1) of the CPR¹⁰² have the powers to make orders for arbitration claims to be heard either in public or private in which rule 62.10 (3) distinguishes the nature of hearing whereby it stipulates that subject to the orders made under rule 62.10 (1), the determination of a preliminary point of law under section 45 of the EAA or an appeal under section 69 of the EAA on a question of law arising out of an award will be held in public while all other arbitration claims will be held in private.

3.5 The English Approach to Confidentiality in Arbitral Proceedings

Although the EAA has no express provisions on confidentiality, the English courts have assumed the existence of an implied duty of confidentiality in arbitral proceedings. As I previously discussed in Chapter One, the English Courts over two decades have preserved an implied duty of confidentiality arising out of the nature of arbitration and that both parties to the arbitral proceedings are prohibited from disclosing or producing any documents prepared for and used in the arbitral process.¹⁰³ This being said, the doctrine of confidentiality has been subject to various exceptions and limitations resulting to confusion and inconsistency of the doctrine, which I shall examine on a case-by-case basis.

¹⁰¹As amended from time to time. Available at: <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part62> [Accessed 08 September 2014].

¹⁰²The Civil Procedure (Amendment No. 5) Rules 2001.

¹⁰³*John Forster Emmott v. Michael Wilson & Partners Ltd* [2008] EWCA Civ 184 at para 105.

3.6 English Case Laws on Confidentiality in Arbitral Proceedings

In one of the English case laws on confidentiality in arbitral proceeding¹⁰⁴s the court observed:

„In the last 20 years or so the English courts have had to consider the consequences of the privacy of the arbitral process and the scope of the obligations of confidentiality in several different contexts. It is apparent that the English jurisprudence on this subject (as distinct from the confidentiality of awards, which is much discussed in other countries) is much richer than that of any other important arbitration centre, and that it constitutes a major contribution to the development of the law of international arbitration.“¹⁰⁴

3.6.1 *Dolling-Baker v. Merrett and Another* (the „*Dolling-Baker*“ Case)

The *Dolling-Baker* case¹⁰⁵ has been the foundation and starting point of discussion on the doctrine of confidentiality in arbitral proceedings in the English Courts. It has also been pointed out that this case established the general principles of confidentiality in arbitration.¹⁰⁶ The principles on confidentiality in this particular case have also been applied in some other English cases which will also be discussed.

3.6.1.1 The Facts of the Case

In this case the plaintiff Mr. Derek Charles Dolling-Baker brought an action against the defendants claiming money which was due under a reinsurance policy. The first defendant was the reinsurer under a reinsurance policy made with the plaintiff and the second defendants were the brokers who had placed the policy with the first defendant.

The plaintiff applied for specific discovery, production and inspection of all the relevant documents in the possession of both the defendants in relation to arbitration.

The judge granted the plaintiff discovery of the documents on the grounds that the documents were relevant and not protected from discovery but had refused the application for production of the documents. The reinsurer responded by

¹⁰⁴ *John Forster Emmott v. Michael Wilson & Partners Ltd* [2008] EWCA Civ 184 at para 66.

¹⁰⁵ *Dolling-Baker v. Merrett and Another* [1991] 2 ALL ER 890; [1990] 1 W.L.R. 1205.

¹⁰⁶ Blackaby, N., Partasides, C., Redfern H. and Hunter, M., *Redfern and Hunter on International Arbitration* (5th Ed, Oxford University Press, 2009) at page 137.

applying for an injunction restraining the broker from disclosing those documents to the plaintiff.

The Judge refused the application and the reinsurer appealed against both orders, contending that the test for discovery was not the relevance of the document but whether discovery was necessary for disposing the proceedings fairly. The decision was then appealed in the Court of Appeal.

3.6.1.2 The Decision of the Court of Appeal

The Court of Appeal had, firstly, to determine whether the documents were necessary for the fair disposal of the action. Second, whether the court should acknowledge an implied obligation arising out of the private nature of arbitration imposed on both sides not to disclose or use for any other purpose documents relating to the arbitration; and lastly whether the information could be obtained in a way which would not involve a breach of that implied obligation.¹⁰⁷

Lord Justice Parker, who delivered the landmark judgment, was of the opinion that although the proceedings as between the parties to an arbitration are consensual, their very nature is that there must be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award and indeed not to disclose in any other way what evidence had been given by any witness in the arbitration save with the consent of the other party, or pursuant to an order or leave of the court.¹⁰⁸

Parker LJ had clearly expressed that he had no intention of providing a precise definition of the extent of the confidential obligation as it was unnecessary to do so in the present case. The Lord Justice emphasised an existence of an implied obligation of confidentiality in arbitration proceedings. He stated and I quote:

„It must be perfectly apparent that, for example, the fact that a document is used in an arbitration does not confer on it any confidentiality or privilege which can be availed in the subsequent proceedings. If it is a relevant document, its relevance remains. But that the obligation exists in some form appears to me to be abundantly apparent. It is not a

¹⁰⁷ *Dolling-Baker* at 891.

¹⁰⁸ *Ibid* at 899.

question of immunity or public interest. It is a question of an implied obligation arising out of an arbitration itself.”¹⁰⁹

Furthermore, Parker LJ was of the view that when the question as to the production of documents or either the discovery of documents arises, the courts must have regard to the existence of an implied obligation whatever its precise limits or exceptions may be. If a court is satisfied that despite the implied obligation, disclosure and inspection is necessary for the fair disposal of the action, that consideration must prevail. Thus the court must be cautious when reaching such a conclusion by considering whether there could be alternatives and less costly ways of obtaining the required information without causing any breach of an implied duty of confidentiality.¹¹⁰

In my opinion Parker, LJ emphasised the existence of an implied duty of confidentiality on arbitral documents and avoided further discussion on the limitations or exceptions of the doctrine. He did this because it would be meaningless having an implied obligation with specific exceptions such as disclosure of the confidential information to third parties. The *Dolling-Baker* case till to date has been regarded to as the leading case on confidentiality of arbitral proceedings in England, confirming the implied obligation of confidential information without considering any exceptions to the doctrine. Other English cases have followed this precedent but went further, considering exceptions to the doctrine.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

3.6.2 *Hassneh Insurance Co. of Israel and Others v. Stuart J. Mew* (the „*Hassneh Insurance*“ Case)

3.6.2.1 The Facts of the Case

The *Hassneh Insurance* case¹¹¹ involved a claim for an injunction to restrain disclosure by the defendants of certain documents engendered in the course of an arbitration between the plaintiffs and the defendants. The defendant was reinsured by the plaintiffs under various reinsurance contracts entered in the course of the period from 1979 to 1984. The defendants commenced arbitration proceedings claiming to recover under the reinsurance policies. During the course of the proceedings, documents such as arbitration pleadings were exchanged including substantial discovery of documents as well as the exchange of witness statements and transcripts of the hearings.

An interim award including the reasons were made in which the reassured was unsuccessful against the reinsurers hence decided to proceed against the placing brokers C. E. Heath and Co., on the grounds of negligence and breach of duty. The reassured wished to disclose to the placing brokers the interim award and the reasons for it. The Plaintiff *Hassneh Insurance* agreed with the disclosure of the award but objected to the disclosure of other documents such as pleadings, transcripts witness statements which the defendant wished to disclose at later stage of the proceedings.

The Plaintiff claimed for an injunction to restrain disclosure of these documents on the grounds of breach of confidence caused by the defendant. The defendant counterclaimed for leave of the court to allow disclosure of the other documents. The defendant although admitting that there was some duty of confidence on the other documents contended that it is a qualified duty to the effect that the documents can be disclosed to a third party if to do so was required or was reasonable and proper or reasonably necessary for the protection of the defendants own interest.

¹¹¹ *Hassneh Insurance Co. of Israel and Others v. Stuart J. Mew* [1993] 2 Lloyds Rep 243.

3.6.2.2 The Decision of the Court

Colman, J when rendering his decision relied upon the *Dolling-Baker* case.¹¹² Justice Colman emphasised and provided a broad understanding on the existence of an implied duty of confidentiality in arbitration proceedings.

Colman J stated:

„If it be correct that there is at least an implied term in every agreement to arbitrate that the hearing shall be held in private; the requirement of privacy must in principle extend to documents which are created for the purpose of that hearing. The disclosure of documents to a third party such as transcript of the evidence would be almost equivalent to opening the door of the arbitration room to that third party. Similarly, witness statements, being so closely related to the hearing, must be within the obligation of confidentiality. So also must outline submissions tendered to the arbitrator. If outline submissions, then so must pleadings be included.“¹¹³

Colman J pointed out the exception to the doctrine of confidentiality by stating that if it was reasonably necessary for the establishment or protection of an arbitrating party’s legal rights vis-à-vis a third party that the award should be disclosed to that third party in order to found a defence or as the basis for a cause of action, so to disclose it including its reasons would not be a breach of the duty of confidence.¹¹⁴

Justice Colman pointed out two important characteristics in which an award is not associated with other documents. First, an award is an identification of the parties’ respective rights and obligations and, second, an award is at least a potential public document for the purposes of the supervision of the courts or enforcement in them.¹¹⁵

Colman, J further stated that it was to be implied as a matter of business efficacy in the agreement to arbitrate that, if it was reasonably necessary in order to run off the contracts to have access to the award including the reasons then the defendant would be entitled to disclose that document to the placing brokers.¹¹⁶

An important point that Justice Colman made was that the documents such as pleadings, witness statements, disclosed documents in the arbitration and transcripts

¹¹² *Dolling-Baker v. Merrett and Another* [1991] 2 ALL ER 890; [1990] 1 W.L.R. 1205.

¹¹³ *Hassneh Insurance* at 247.

¹¹⁴ *Ibid* at 249.

¹¹⁵ *Ibid* at 247.

¹¹⁶ *Ibid.* at 250.

were subject to a duty of confidence; they were merely the materials which were used to give rise to the award which defined the rights and obligations of the parties to the arbitration. Accordingly the qualification to the duty of confidentiality based on the reasonable necessity for the protection of the arbitrating party's rights against a third party could not be expected to apply to them; it was the final determination of rights expressed in the award which was pertinent as against third parties, not the raw materials for that determination.¹¹⁷

3.6.3 *Insurance Co. v. Lloyd's Syndicate* (the „*Insurance Co.*“Case)

3.6.3.1 The Facts of the Case

The *Insurance Co.* case¹¹⁸ was also an insurance claim in which an arbitral tribunal had granted an interim award in favour of the defendant reassured who had intended to disclose the award to reinsurers. The plaintiffs applied for an *ex parte* injunction restraining the defendants from disclosing the award to the reinsurers. The plaintiffs then decided to bring the action to court as to whether the injunction should be permanent.

3.6.3.2 The Decision of the Court

The judgment in this case was once again delivered by Colman, J. in which emphasis was placed on the existence of an implied duty of confidentiality in arbitration and the judge made reference to his previous decision on *Hassneh Insurance*¹¹⁹ by laying down the exception of the doctrine in arbitration proceedings as far as the issue of disclosure of arbitral awards are concerned.

Colman, J stated that there is to be an implied obligation in the agreement to arbitrate between both the plaintiffs and the defendants, a duty of confidence in respect of the award and further stated that the scope of the qualification to the duty of confidence is implied as a matter of business efficacy.¹²⁰

Colman, J. laid down the limitation of the doctrine of confidentiality by stating that for the purposes of coming within the qualification to the duty of

¹¹⁷ *Ibid.*

¹¹⁸ *Insurance Co. v. Lloyd's Syndicate* [1995] 1 Lloyd's Rep 272.

¹¹⁹ *Hassneh Insurance Co. of Israel and Others v. Steuart J. Mew* [1993] 2 Lloyds Rep 243.

¹²⁰ *Ibid* at 275.

confidence which attaches to an arbitration award, it is sufficiently necessary to disclose an arbitration award in order 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. This is the furthest boundary to the qualification which business efficacy will support.¹²¹

Colman J also stated that the defendant reassured would be in breach of an implied duty of confidence if they were to disclose the award to the reinsurers.¹²² The Judge granted injunction to the plaintiffs but was of the opinion that it had not been established based on the facts and the evidence adduced, that the plaintiffs would suffer any specific damage or commercial detriment to their trading interests if the defendants had disclosed the award and that the granting of the injunction would not be so prejudicial to the defendant so as to cause him hardship.¹²³

3.6.4 London and Leeds Estates Ltd v. Paribas Ltd (No.2) (the „London and Leeds Estates“Case)

3.6.4.1 Brief Summary

The *London and Leeds Estates* case¹²⁴ was based on a rent review arbitration between the landlord (plaintiff) and the tenant (defendant) in which a subpoena application was made in order to obtain certain expert witness proofs used in previous arbitration proceedings. This case established and recognised the „*public interest*“ or „*interest of justice*“ exception which required disclosure of expert witness proof contrary to the established exceptions based on „*reasonable necessity*“ which were recognised in *Hassneh Insurance*¹²⁵ and *Insurance Co.*¹²⁶

Furthermore, this case was based on an expert opinion in which the issue before the court was whether the parties in arbitration proceedings owed any duty of confidentiality to an expert witness in situations where the witness was found to have

¹²¹ *Ibid* at 276.

¹²² *Ibid.*

¹²³ *Ibid* at 277-278.

¹²⁴ *London and Leeds Estates Ltd v. Paribas Ltd (No.2)* [1995] 1 E.G.L.R. 102 (QB).

¹²⁵ *Hassneh Insurance Co. of Israel and Others v. Steuart J. Mew* [1993] 2 Lloyd's Rep 243.

¹²⁶ *Insurance Co. v. Lloyd's Syndicate* [1995] 1 Lloyd's Rep 272.

given evidence which was inconsistent with the evidence provided in previous arbitration.

3.6.4.2 The Decision of the Court

Mance, J. who had delivered the judgment was of the view that the parties to an arbitration owed each other a duty of confidence and privacy in respect of the arbitration and the evidence adduced during the whole arbitral process.¹²⁷ The Judge was also of the opinion that the expert witness had *locus standi* to object to the subpoenas as he was owed a duty of confidentiality by the parties to the arbitration with respect to his evidence.¹²⁸

Mance J also held that, if a witness was proved to have expressed himself in a materially different sense when acting for different sides that would be a factor which should be brought out in the interests of individual litigants involved and in the public interest.¹²⁹

3.6.5 *Ali Shipping Corp v. Shipyard Trogir* (the „*Ali Shipping Corp*“ Case)

The *Ali Shipping Corp* case¹³⁰ has been regarded as the leading precedent on confidentiality of arbitral proceedings in which the Court of Appeal established several exceptions on the doctrine. Alexis Brown¹³¹ states that this case has “*given teeth to confidentiality protection in international arbitration*”. The *Ali Shipping Corp* case had brought back life to the doctrine of confidentiality in England after damage that had been caused from the *Esso Australia case*¹³² which shall be discussed in the part covering arbitration in Australia.

3.6.5.1 The Facts of the Case

The present case involved two arbitrations arising out of a ship-building contract. In the first arbitration the dispute arose between the plaintiffs and the defendants in which an arbitration award was made in favour of the plaintiffs. In the

¹²⁷ *London and Leeds Estates Ltd* at 106.

¹²⁸ *Ibid.*

¹²⁹ *London and Leeds Estates Ltd* at 109.

¹³⁰ *Ali Shipping Corp v. Shipyard Trogir* [1998] 2 ALL ER 136.

¹³¹ „*Presumption Meets Reality*”: An Exploration of the Confidentiality Obligation in International Commercial Arbitration.” *Am. U. Int'l L. Rev.* 16 (2000): 969 at page 985.

¹³² *Esso Australia Resources Ltd and Others v. Plowman (Minister for Energy and Minerals) and Others* [1995] 128 ALR 391.

second arbitration, the dispute arose between the defendants and three other companies in which the defendants Shipyard Trogir (who were involved in both arbitrations) wished to rely in the second arbitration on certain materials generated in the course of the first arbitration in support of a plea of issue estoppel. The plaintiffs, Ali Shipping Corp, had applied and successfully obtained an *ex parte* injunction restraining the defendants from disclosing those materials since the use of those materials would amount to breach of the defendants implied obligation of confidentiality in respect of the first arbitration.

The Judge held that a term of confidentiality was not to be implied into an arbitration contract and that it was not necessary to imply such a term into the first arbitration agreement since both negotiation and contracts were closely bound up together and that all the companies were effectively in the same beneficial ownership hence the judge dismissed the plaintiffs claim and discharged the injunction. The plaintiffs appealed in the Court of Appeal.

3.6.5.2 The Decision of the Court of Appeal

Lord Justice Potter when delivering his decision relied upon previous court decisions.¹³³ Potter LJ also considered confidentiality as an implied term not on the grounds of business efficacy but on the merits of the law. He stated:

„I consider that the implied term ought properly to be regarded as attaching as a matter of law. It seems to me that, in holding as a matter of principle that the obligation of confidentiality (whatever its precise limits) arises as an essential corollary of the privacy of arbitration proceedings the court is propounding a term which arises as the nature of the contract itself implicitly requires.“¹³⁴

Potter LJ was of the view that an arbitration clause is a good example of the latter type of an implied term.¹³⁵ The Lord Justice recognised and established four exceptions in the English law with respect to the broad rule of confidentiality in arbitration proceedings.¹³⁶ They include the following:-

- i. *Consent* to disclosure made either expressly or impliedly the party who originally produced the material;

¹³³ *Dolling-Baker, Hassneh Insurance, and Insurance Co.*

¹³⁴ *Ali Shipping Corp* at 146.

¹³⁵ *Ibid* at 147.

¹³⁶ *Ibid.*

- ii. *Order of the Court* to grant leave for disclosure of documents generated by an arbitration for the purposes of a later court action;
- iii. *Leave of the court* which is the practical scope of this exception and the grounds on which such leave will be granted; and
- iv. *Disclosure* when, and to the extent to which, it is reasonably necessary for the protection of the legitimate interests of an arbitrating party.

Potter LJ had further made an important observation. He stated that:

„I observe by way of preliminary that, to date, the confidentiality rule has been founded fairly and squarely on the ground that the privacy of arbitration proceedings necessarily involves an obligation not to make use of material generated in the course of the arbitration outside the four walls of the arbitration, even when required for use in other proceedings.“¹³⁷

3.6.6 *Associated Electric & Gas Insurance Services Ltd v. European Reinsurance Company of Zurich* (the „*AEGIS*“ Case)

The *AEGIS* case¹³⁸ concerned the construction of an express confidentiality agreement in one arbitration and the issue of whether the later use of the award from an earlier arbitration to support a plea of issue estoppel in the later arbitration comes within the scope of enforcement.¹³⁹

Despite the fact that the Privy Council in rendering its decisions had recognised the existence of confidentiality in arbitral proceedings in *Ali Shipping Corp*, the present case was distinguished from the latter on the fact that in one of the arbitrations an agreement between the parties had involved a detailed confidentiality clause contrary to the general one in *Ali Shipping Corp*.¹⁴⁰

The Privy Council was of the view that the general statements concerning the privacy of arbitration proceedings and the duty of one party to respect the confidentiality of the other are of less assistance and relevance in the present case.

¹³⁷ *Ibid* at 149.

¹³⁸ *Associated Electric & Gas Insurance Services Ltd v. European Reinsurance Company of Zurich* [2003] UKPC 11, [2003] 1 ALL ER (Comm), Privy Council Appeal No. 93 of 2001.

¹³⁹ *AEGIS* at para 20.

¹⁴⁰ Bhatia, V.K., Candlin, C.N., Engberg, J., (eds.), *Legal Discourse across Cultures and Systems*, Chapter Four, Confidentiality in Arbitration, Contributed by Christopher, To., Vol 1 Hong Kong University Press (2008) at page 86-87.

The Privy Council made extensive reference to the judgment in *Ali Shipping Corp*, but chose not to refer to it in the main part of its decision.¹⁴¹

Lord Hobhouse of Woodborough who delivered the judgment was of the opinion that the approach adopted by Potter, LJ in *Ali Shipping Corp* with respect to the duty of confidentiality as an implied term with the formulated exceptions had failed to distinguish between different types of confidentiality which attach to different types of document or to documents which have been obtained in different ways and elides privacy and confidentiality and as a result the Privy Council had to make reservations about the merit of adopting this approach.¹⁴² The Privy Council recognised the importance of an implied duty on the use of materials obtained in the arbitral proceedings but contested that the same logic would not be applicable to the award.¹⁴³ An award may have to be referred for accounting purposes, legal proceedings or for the purposes of enforcing the rights which the award confers.¹⁴⁴

3.6.7 *John Forster Emmott v. Michael Wilson & Partners Ltd* (the „Emmott“ Case)

The *Emmott* case¹⁴⁵ recognised the existence of an implied duty of confidentiality in arbitration proceedings both at national and international level. The Court of Appeal when rendering its decision in the present case made an in-depth survey on the issue of privacy and confidentiality with reference made to previous court decisions. The appellate court covered all the important spheres of the doctrine such as the obligation, the limits, as well as the exceptions of the doctrine of confidentiality all of which were established in previous precedents which I have already covered.

3.6.7.1 Brief Summary

The case was an appeal from the High Court against the judgment of Flaux J who authorised the disclosure, for the purposes of proceedings in New South Wales and in the British Virgin Islands, of documents generated in an English arbitration. Flaux J considered disclosure to be in the interests of justice so that the foreign courts

¹⁴¹ *AEGIS* at para 19.

¹⁴² *Ibid* at para 20.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *John Forster Emmott v. Michael Wilson & Partners Ltd* [2008] EWCA Civ 184.

would not be misled where the cases that were being advanced in the various proceedings were essentially raising the same or similar allegations.

The Judge applied the principles formulated in *Ali Shipping Corp*¹⁴⁶ in which he agreed that the material was in principle confidential, but the confidentiality was subject to two possible exceptions „reasonably necessary“¹⁴⁷ and „public interest“.¹⁴⁸

Flaux J had observed that the interests of justice required the English court to ensure that parties to London arbitrations do not seek to use the cloak of confidentiality with a view to misleading or potentially misleading foreign courts, *a fortiori* where the cases which were being presented in the foreign courts were essentially raising either the same or similar allegations and are proceeding in parallel. The High Court allowed the documents to be used in foreign proceedings.

3.6.7.2 The Decision of the Court

Lawrence Collins LJ., (as he was then) who delivered the leading judgement, was of the view that it is not always easy to distinguish „*confidentiality and privacy*“ and that it was important to bear in mind that the context of the decision may raise important questions because quite different rules may apply in different contexts.¹⁴⁹ The Lord Justice took into consideration four important issues which include the following:-

- i. That a party to litigation in the courts may seek discovery or disclosure of documents generated in an arbitration. Confidentiality of documents is, of course, not in itself a reason for withholding disclosure, but the court will compel disclosure only if it considers it necessary for the fair disposal of the case¹⁵⁰;
- ii. That confidentiality is not an absolute bar where a party to an arbitration may seek the assistance of the court to obtain through a witness summons material deployed in another arbitration¹⁵¹;

¹⁴⁶ *Ali Shipping Corp v. Shipyard Trogir* [1998] 2 ALL ER 136.

¹⁴⁷ *Hassneh Insurance Co of Israel v Mew* [1993] 2 Lloyd's Rep. 243.

¹⁴⁸ *London & Leeds Estates v Paribas* (No.2) [1995] 1 E.G.L.R. 102.

¹⁴⁹ *Emmott* at para 71.

¹⁵⁰ *Dolling-Baker v. Merrett* [1991] 2 ALL ER 890.

¹⁵¹ *London and Leeds Estates Ltd v. Paribas Ltd* (No 2) [1995] 1 EGLR 102.

- iii. That the disclosure of documents on the court files relating to an arbitration¹⁵² or the judgment of the court given in relation to an arbitration should be published¹⁵³; and
- iv. That a party to an arbitration may have an interest (commercial or otherwise) in disclosing documents generated in an arbitration (including the award itself) to third parties¹⁵⁴ or in another arbitration¹⁵⁵ and the other party to the arbitration may seek to restrain disclosure by injunction.

Lawrence Collins LJ identified three legal concepts as far as the obligation of confidentiality in arbitration proceedings is concerned and they include *privacy*; *inherent confidentiality in the information in documents* and *confidentiality in the sense of an implied agreement* that documents disclosed or generated in arbitration could only be used for the purposes of the arbitration.¹⁵⁶

Lawrence Collins LJ when formulating the broad exceptions on the doctrine of confidentiality noted that such exceptions had been adopted as a result of strongly influenced principles on banking confidentiality which had first been referred in the *Tournier case*.¹⁵⁷ Similarly, in *Ali Shipping Corp* a number of exceptions were established closely related to the *Tournier Principles*.¹⁵⁸

Lawrence Collins LJ, before laying out the exceptions under which disclosure of confidential information could be permitted, gave recognition of the fact that the doctrine of confidentiality in England through precedent had well established the existence of an obligation implied by law arising out of the nature of arbitration requiring both parties not to disclose any documents in the course of the arbitration¹⁵⁹

¹⁵² *Glidepath BV v. Thompson* [2005] EWHC 818 (Comm), [2005] 2 Lloyd's Rep 549.

¹⁵³ *Department of Economics, Policy and Development of the City of Moscow and Another v. Bankers Trust Co. and Another* [2004] EWCA Civ 314.

¹⁵⁴ *Hassneh Insurance Co of Israel v. Mew* [1993] 2 Lloyd's Rep 243; *Insurance Co v. Lloyd's Syndicate* [1995] 1 Lloyd's Law Rep 272.

¹⁵⁵ *Ali Shipping Corporation v. Shipyard Trogir* [1998] 2 ALL ER 136; *Associated Electric and Gas Insurance Services Ltd v. European Reinsurance Co of Zurich* [2003] UKPC 11, [2003] 1 ALL ER (Comm).

¹⁵⁶ *Emmott* at para 79.

¹⁵⁷ *Tournier v. National Provincial and Union Bank of England* [1924] 1 KB 461 (CA).

¹⁵⁸ (i) Where disclosure is under compulsion by law; (ii) where there is a duty to the public to disclose; (iii) where the interests of the bank require disclosure; and (iv) where the disclosure is made by the express or implied consent of the customer.

¹⁵⁹ *Emmott* at para 105.

and that the limits of that implied obligation was in the process of development case-by-case basis.¹⁶⁰

In the light of the above paragraph, the exceptions in *Emmott* (also referred to as the *Emmott's Principles*) may permit disclosure of confidential information in arbitration proceedings under the following circumstances:-

- i. Where the parties to the arbitration expressly or impliedly consent;
- ii. Where a court permits disclosure by order or leave;
- iii. Where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; and
- iv. Where the interests of justice require disclosure and also (perhaps) where the public interest requires disclosure.

Lord Justice Lawrence Collins gave a conclusive opinion:

*„that the interests of justice require disclosure; the interests of justice are not confined to the interests of justice in England. The international dimension of the present case demands a broader view.“*¹⁶¹

In dismissing the appeal, the appellate court further concluded that the limits of confidentiality in arbitration should not obscure the fact that the overwhelming majority of arbitrations in England are conducted in private and with complete confidentiality.¹⁶²

In his concurrent judgment Thomas, LJ agreed with the decision of Lawrence Collins LJ and provided for various principles established on a case-by-case basis on the issues arising in the present case in relation to the use of the documents generated in the course of an arbitration for the conduct of that arbitration. These principles have also been referred as the „Thomas Nine“.¹⁶³

¹⁶⁰ *Ibid* at para 107.

¹⁶¹ *Ibid* at para 111.

¹⁶² *Ibid* at para 114.

¹⁶³ *Ibid* at para 129; See Dundas H., *Confidentiality in English Arbitration: The Final Word? Emmott v Michael Wilson & Partners Ltd.* Reprinted from (2008) 74 *Arbitration* 458-466 Sweet & Maxwell at page 465.

3.6.8 *Westwood Shipping Lines Inc and Another v. Universal Schiffahrtsgesellschaft MBH and Another* (the „Westwood“ Case)

3.6.8.1 Brief Summary

The *Westwood* case¹⁶⁴ is one of the recent English cases with respect to disclosure of confidential information. In this case, the claimants Westwood Shipping Lines made an application to the court to be allowed to disclose and rely upon certain materials in the arbitration proceedings. The present case does not talk through the confidentiality obligation in arbitration but rather makes an application of the exceptions of an implied term in confidentiality which had been formulated from the *Emmotts case*.¹⁶⁵

The High Court relied upon two of the four *Emmott*“sexceptions which include the exception on the establishment or protection of an arbitrating parties legal rights as well as the exception on interest of justice or public interest where disclosure was required for the interest of both.

3.6.8.2 The Decision of the Court

Flaux J, who delivered the judgment, made reference to the *City of Moscow case*¹⁶⁶ in which Mance LJ had observed that even though the hearing may have been in private, the court should, when preparing and giving judgment, bear in mind that any judgment should be given in public, where this can be done without disclosing significant confidential information.¹⁶⁷

Based on the observation in *City of Moscow*, Flaux J had held that the judgment should be held in public and that claimant representative should be entitled to disclose the judgment to the third parties against whom his clients have the claim and that the judgment should generally be in public, essentially because there is no confidential information that is going to be disclosed hence entitled to use the documents from the arbitration.¹⁶⁸ Flaux J also further took into consideration that

¹⁶⁴ *Westwood Shipping Lines Inc and Another v. Universal Schiffahrtsgesellschaft MBH and Another* [2012] EWHC 3837 (Comm).

¹⁶⁵ *John Forster Emmott v. Michael Wilson & Partners Ltd* [2008] EWCA Civ 184.

¹⁶⁶ *Department of Economics, Policy and Development of the City of Moscow and Another v. Bankers Trust Co. and Another* [2004] EWCA Civ 314.

¹⁶⁷ *Ibid* at para 39.

¹⁶⁸ *Westwoods* at para 18.

for the interests of justice the judgment should be ventilated in public and not to be kept private.¹⁶⁹

¹⁶⁹ *Ibid* at para 19.

3.7 Brief Overview of Arbitration in Australia

Australia is a member state of the NYC since 24 June 1975.¹⁷⁰ The country is also a contracting state to the ICSID Convention since 1 June 1991.¹⁷¹ Also since 1 June 2013 Australia has entered into 23 BIT's with other member states.¹⁷² The Australian Centre for International Commercial Arbitration (ACICA) is Australia's major international arbitral institution.¹⁷³ The ACICA is seated in Sydney, New South Wales and also has registries in Victoria and Western Australia.¹⁷⁴ The ACICA has also its own set of arbitration rules known as the ACICA Arbitration Rules of 2011.¹⁷⁵ The rules are based on the UNCITRAL Model Law with an arbitration clause catering for both domestic and international arbitration.¹⁷⁶ Other arbitration institutions include the Australia Centre for International Commercial Arbitration, the Australian National Committee of the International Chamber of Commerce as well as the Australian Chapter of the Charter Institute of Arbitrators.¹⁷⁷

3.8 The Arbitration Regime in Australia

Unlike England, Australia has a federal system of government with two separate arbitration legislations (Dualist Arbitration Regime) which are in force in the Commonwealth (as a federal entity) as well as in each state and territory.¹⁷⁸ The legislation for the Commonwealth of Australia caters for international arbitration which is federal-based while the legislation for different individual state and territories caters for domestic arbitration which is state-based in which individual state and territories have their own arbitration laws covering arbitration within their

¹⁷⁰ <http://www.newyorkconvention.org/contracting-states/list-of-contracting-states> [Accessed 08 September 2014].

¹⁷¹ <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English> [Accessed 08 September 2014].

¹⁷² http://unctad.org/Sections/dite_pcbp/docs/bits_australia.pdf [Accessed 08 September 2014].

¹⁷³ Wegen, G and Wilske S., the Contributing Editors in *Getting the Deal Through*, Arbitration in 49 Jurisdictions Worldwide, Australia (2014), written by Johnson, T, and Winter, H from Johnson Winter & Slattery at page 80.

¹⁷⁴ *Ibid.*

¹⁷⁵ On 1st August 2011, the ACICA Arbitration Rules of 2005 were revised incorporating provisions on Emergency Arbitrator.

¹⁷⁶ *Supra* note 173 at page 80.

¹⁷⁷ *Ibid.*

¹⁷⁸ Carter, J.H., Editor in *The International Arbitration Review*, Australia, Chapter 4, Fifth Edition (June 2014), written by Whittaker J, Lockhart C, Ooi, J and Bunker T., from Corrs Chambers Westgarth at page 48.

jurisdictions.¹⁷⁹ Both legislations will be discussed in brief covering only the confidentiality aspect in arbitration.

3.8.1 The International Arbitration Act (IAA)

The IAA of 1974¹⁸⁰, also referred to as the Australian Arbitration Act, caters for the recognition and enforcement of foreign arbitral awards as well as the conduct of international commercial arbitration in Australia. The IAA of 1974 (Cth) had adopted the 1985 UNCITRAL Model Law and in 2010, the IAA was amended¹⁸¹ to adopt the 2006 version of the model law which has the force of law in Australia under section 16.¹⁸² The current IAA as amended¹⁸³ is comprised of five parts. Part 1 provides for preliminary provisions in relation to the IAA. Part 2 provides for enforcement of foreign awards. Part 3 provides for international commercial arbitration which is divided into four divisions which include the preliminary part, provisions on model law, additional provisions including provisions on disclosure of confidential information as well as miscellaneous provisions. Part 4 of the IAA provides for Application of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States which have also been divided into three divisions which include the preliminary part, the part on investment convention as well as a provision on miscellaneous matters. Part 5 of the IAA provides for general matters. The IAA is further comprised of three annexed schedules which have adopted and incorporated the international Conventions and regulatory instruments which include the NYC, the UNCITRAL Model as revised in 2006 and the ICSID Convention.

¹⁷⁹ *Ibid.*

¹⁸⁰ Act No. 136 of 1974 (Cth) as amended up to Act No. 5 of 2011.

¹⁸¹ International Arbitration Amendment Act, Act No. 97 of 2010.

¹⁸² Of Act No. 136 of 1974 (Cth) as amended up to Act No. 5 of 2011.

¹⁸³ *Ibid.*

3.8.1.1 Confidentiality Provisions under the IAA

The IAA¹⁸⁴ allows the parties on an „*optin*“ basis to refer to the provisions of confidentiality. Section 23C of the IAA provides for provision on disclosure of confidential information restricting the parties and the arbitral tribunal not to disclose confidential information unless permitted to do so; section 23D of the IAA provides for circumstances in which confidential information may be disclosed; section 23E of the IAA provides that an arbitral tribunal may allow disclosure of confidential information in certain circumstances; section 23F of the IAA provides that a court may in certain circumstances prohibit disclosure of confidential information; and section 23G of the IAA in which the court may under allow disclosure of confidential information in certain circumstances.

3.8.2 The Commercial Arbitration Act (CAA)

The CAA governs domestic Arbitration in Australia. In 2010, a model commercial arbitration bill was drafted aiming to modernise and harmonise domestic arbitration in Australia¹⁸⁵. After the approval of the bill, the CAA was then enacted in different individual states and territories which fall within their jurisdictions. These include New South Wales¹⁸⁶, South Australia¹⁸⁷, Victoria¹⁸⁸, Northern Territory¹⁸⁹ Tasmania¹⁹⁰, Western Australia¹⁹¹ and Queensland¹⁹². The Bill has yet to be introduced in the parliament for Australian Capital Territory.

3.8.2.1 Confidentiality Provisions under the CAA's

Each individual states and territories which have entered into force the CAA's in their respective jurisdictions have a uniform confidentiality provision based on an „*optout*“ basis. The CAA of New South Wales under sections 27E to 27I; the CAA of South Australia under sections 27E to 27I; the CAA of Victoria under sections 27E to 27I; the CAA of Northern Territory under sections 27E to 27I; the CAA of

¹⁸⁴ *Ibid.*

¹⁸⁵ *Supra* note 173 at page 79.

¹⁸⁶ Commercial Arbitration Act 2010, commenced on 1 October 2010.

¹⁸⁷ Commercial Arbitration Act 2011, commenced on 1 January 2012.

¹⁸⁸ Commercial Arbitration Act 2011, commenced on 17 November 2011.

¹⁸⁹ Commercial Arbitration (National Uniform Legislation) Act 2011, commenced on 1 August 2012.

¹⁹⁰ Commercial Arbitration Act, Act No. 13 of 2011, commenced on 1 October 2012.

¹⁹¹ Commercial Arbitration Act, Act No. 23 of 2012, commenced on 7 August 2013.

¹⁹² Commercial Arbitration Act, Act No. 8 of 2013, commenced on 17 May 2013.

Western Australia under sections 27E to 27I; the CAA of Tasmania under sections 27E to 27I and the CAA of Queensland under sections 27E to 27I. In all the CAA's, section 27E provides for disclosure of confidential information restricting the parties and the arbitral tribunal not to disclose confidential information unless allowed to do so; section 27F provides for circumstances in which confidential information may be disclosed; section 27G provides for provisions in which an arbitral tribunal may allow disclosure of confidential information in certain circumstances; section 27H provides for provisions in which a court may prohibit disclosure of confidential information in certain circumstances; and section 27I provides for provisions in which a court may allow disclosure of confidential information in certain circumstances.

3.8 The Australian Approach to Confidentiality in Arbitral Proceedings

The Australian courts oppose the English view on the doctrine by rejecting the existence of an implied duty of confidentiality in arbitral proceedings. As a result there have been different on-going debates from various legal scholars and practitioners in the arbitration world on this doctrine. In *Esso Australia's Case*¹⁹³ the High Court of Australia had held that:

„Confidentiality was not an essential attribute of a private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of the arbitration“.¹⁹⁴

In connection to that the court further held that: „*An agreement to arbitrate contained no implied term that each party will not disclose information provided in and for the purposes of the arbitration*“.¹⁹⁵

3.9 Australian Case Laws on Confidentiality in Arbitration Proceedings

*The Esso Australia case*¹⁹⁶ caused a major controversy in ICA with respect to the doctrine of confidentiality in arbitration proceedings. The High Court of Australia blew the world of arbitration upside down by rejecting the notion of an overall duty of confidentiality in international arbitration. The decision of the *Esso Australia case*

¹⁹³ *Esso Australia Resources Ltd and Others v. Plowman (Minister for Energy and Minerals) and Others* [1995] 128 ALR 391.

¹⁹⁴ *Ibid* at 392.

¹⁹⁵ *Ibid* at 392.

¹⁹⁶ *Ibid* at 391.

was in similar fashion observed in the *Cockatoo Dockyard* case.¹⁹⁷ Both cases shall be discussed in detail below.

3.9.1 *Esso Australia Resources Ltd and Others v. The Honourable Sidney James Plowman (Minister for Energy and Minerals) and Others (the „Esso Australia“ Case)*

The *Esso Australia case*¹⁹⁸ also referred to as the „*Public Interest exception*“ case was an appeal from the judgment of the Appeal Division of the Supreme Court of Victoria in which the High Court raised an important question as to whether an arbitrating party was under an obligation of confidence in relation to documents and information disclosed in and for the purposes of a private arbitration.

3.9.1.1 The Facts of the Case

The present case involved two Australian public energy utilities in the state of Victoria, the Gas and Fuel Corporation of Victoria ("the GFC") and the State Electricity Commission of Victoria (the "SEC") which entered into two sale agreements with two companies Esso Australia Resources Ltd (the "Esso") and BHP Petroleum (the "BHP") for the supply of natural gas. The sale agreements contained a clause whereby the price payable for the gas sold was to be adjusted by taking into account the changes made by the Australian government which introduced a new tax system in relation to royalties and taxes attributable to the production or supply of gas.

Esso/BHP, (the appellants in this case) sought from the two utilities an increase in the price of gas supplied to them taking into consideration the changes which were made. The public utilities refused to make payments hence the appellants referred the dispute to arbitration pursuant to an arbitration clause in both sale agreements.

The Minister of Energy and Minerals responsible for the public authorities (the respondents in this case) applied to the Victoria Supreme Court for declarations that the authorities were not barred from disclosing to the Minister and third parties

¹⁹⁷ *Commonwealth of Australia v. Cockatoo Dockyards Pty Ltd* [1995] 36 NSWLR 662.

¹⁹⁸ *Esso Australia Resources Ltd and Others v. The Honourable Sidney James Plowman (Minister for Energy and Minerals) and Others* [1995] 128 ALR 391.

information revealed by them in the arbitral proceedings. Esso/BHP contested that some of the information should not be disclosed due to its private, confidential, and commercially sensitive nature and therefore should be protected from disclosure.

The Minister brought an action against the appellants and the two utilities seeking a declaration "that any and all information disclosed to GFC and SEC in the course of its arbitration with Esso/BHP is not subject to any obligation of confidence" in the course of its arbitration.

The appellants by way of counterclaim, sought declarations based on implied terms, that each arbitration is to be conducted in private and that any documents or information supplied by any of the parties to any other party thereto in or for the purpose thereof are to be treated in confidence as between each such party and the arbitrators and umpire except for the purpose of the arbitration. Both GFC and SEC counter-claimed against the appellants seeking declarations in the same terms as the declarations sought by the Minister.

The present case was heard both at primary and appellate stage before the appeal arrived to the High Court of Australia.

3.9.1.2 The Decision of the Court

The leading judgment was delivered by Mason CJ whose decision was concurred by the majority of the Justices on the bench in which Brennan, J provided his separate concurring decision, with an exception of one dissenting decision from Toohey J. Dawson and McHugh, JJ concurred with the decision of the Chief Justice but they did not provide their independent opinions.

3.9.1.2.1 Decision of Chief Justice Mance

Mance CJ, who delivered the leading judgment, addressed the question of privacy and confidentiality in arbitration proceedings separately in reference to the present case. With respect to issue on the private nature of arbitration, Chief Justice Mance was of the view that the question of privacy was not disputed in arbitration proceedings in the sense that when parties submit their dispute to a private arbitral tribunal of their own choice, in the absence of some manifestation of a contrary

intention, they confer upon that tribunal a discretion as to the procedure to be adopted in reaching its decision.¹⁹⁹ But Mance CJ preferred to describe the private character of the hearing as something that inheres in the subject-matter of the agreement to submit disputes to arbitration rather than attribute that character to an implied term.²⁰⁰

When it came to the issue of the confidentiality, the chief justice referred the view that the efficacy of a private arbitration will be damaged, even defeated, if proceedings in the arbitration are made public by the disclosure of documents relating to the arbitration.²⁰¹ Because of those reasons, the Court of Appeal in *Dolling-Baker*²⁰² restrained a party to an arbitration from disclosing on discovery in a subsequent action documents relating to the arbitration.²⁰³

Mance, CJ also observed that before the decision of *Dolling-Baker*, there was no any other decision suggesting that an arbitration hearing was confidential as distinct from private. Mance CJ gave an example of jurisdictions such as Australia and the United States which had no support in decided case laws on the existence of an obligation of confidence.²⁰⁴ On this basis the Chief Justice was of the view that complete confidentiality of the proceedings in an arbitration cannot be achieved for three different reasons :-

- (i) That it is a common ground between the parties that no obligation of confidence attaches to witnesses who are therefore at liberty to disclose to third parties what they know of the proceedings;
- (ii) That there are various circumstances in which an award made in an arbitration, or the proceedings in an arbitration, may come before a court involving disclosure to the court by a party to the arbitration and publication of the court proceedings; and

¹⁹⁹ *Ibid* at 398.

²⁰⁰ *Ibid* at 398.

²⁰¹ *Ibid* at 399.

²⁰² *Dolling-Baker v. Merrett and Another* [1991] 2 ALL ER 890.

²⁰³ *Esso Australia* at 400.

²⁰⁴ *Ibid*.

- (iii) That there are other circumstances in which an arbitrating party must be entitled to disclose to a third party the existence and details of the proceedings and the award.²⁰⁵

Mance, CJ, also disagreed that an implied term is required for parties not to disclose confidentiality information in arbitration proceedings but rather considered an express obligation of confidence. Mance, CJ stated that an obligation not to disclose may arise from an express contractual provision. If the parties wished to secure the confidentiality of the materials prepared for or used in the arbitration and of the transcripts and notes of evidence given, they could insert a provision to that effect in their arbitration agreement. He noted that such provisions would bind the parties and the arbitrator, but not others such as witnesses who are under no obligation of confidentiality.²⁰⁶

While the United Kingdom in the case of *Dolling-Baker and Hassneh Insurance* has viewed confidentiality as an essential attribute of private arbitration making it a characteristic that inheres in arbitration, Mance, CJ disagreed and had an opposite view. He stated:

„I do not consider that, in Australia, having regard to the various matters to which I have referred, we are justified in concluding that confidentiality is an essential attribute of a private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of the arbitration.“²⁰⁷

In connection to the above statement, the Chief Justice also rejected the existence of an implied term in confidential arbitral proceedings.²⁰⁸ Mance, J was of the view that once it is accepted that confidentiality is not a characteristic that inheres in arbitration, then there can be no basis for implication as a matter of necessity hence rejected Colman, J view in *Hassneh Insurance* that „the implication of the term must be based on custom or business efficacy.“²⁰⁹

Mance, CJ did not take into consideration the difficulties in defining the exceptions to any implied term in prohibiting disclosure as such difficulties were

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid* at 401.

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid* at 402.

²⁰⁹ *Ibid.*

recognised in *Dolling-Baker* and *Hassneh Insurance*. Colman J in *Hassneh Insurance* thought that a qualification could be formulated along the lines of the exceptions to a bank's duty of confidentiality as seen in *Tournier case*.²¹⁰ Colman, J formulated the qualification in the following manner:-

„If it was reasonably necessary for the establishment or protection of an arbitrating party's legal rights vis-à-vis a third party that the award should be disclosed to that third party in order to found a defence or as the basis for a cause of action, so to disclose it including its reasons would not be a breach of the duty of confidence.“²¹¹

Mance, CJ in his part was of the opinion that if an obligation of confidence had this statement of qualification implied it would be unduly narrow. The statement of qualification does not recognize that there may be circumstances in which third parties and the public have a legitimate interest in knowing what has transpired in an arbitration, which would give rise to a „public interest“ exception; the precise scope of this exception however remains unclear.²¹²

Mance, CJ emphasised that obligation of confidentiality attaches only in relation to documents which are produced by a party compulsorily pursuant to a direction by the arbitrator. And such obligation is necessarily subject to the public's legitimate interest in obtaining information about the affairs of public authorities. Hence Mance, J concluded that the existence of this obligation does not provide a basis for the wide ranging obligation of confidentiality for which the appellants seek to apply to all documents and information provided in and for the purposes of arbitration.²¹³

3.9.1.2.2 Concurrent Decision of Justice Brennan

Brennan, J had also concurred with Chief Justice Mance with some of his issues with respect to disclosure of confidential documents²¹⁴ but reflected his decision differently from Mance CJ.

Brennan, J was of the view that some obligation of confidentiality could be implied simply from the fact that, when a party claims the production of documents

²¹⁰ *Tournier v. National Provincial and Union Bank of England* [1924] 1 KB 461 (CA).

²¹¹ *Hassneh Insurance* at 249.

²¹² *Esso Australia* at 402.

²¹³ *Ibid* at 404.

²¹⁴ *Ibid*.

or the disclosure of information under an arbitration agreement for the purposes of the arbitration, the production or disclosure is given solely for that purpose. A duty to produce a document or to disclose information to another party, whether pursuant to an express stipulation or pursuant to the arbitrator's power to order discovery or production is a duty imposed for the purposes of the arbitration.²¹⁵

Brennan, J also stated that in order to provide business efficacy to the limited purpose of production or disclosure, an undertaking of confidentiality must be implied. But it does not follow that an undertaking of absolute confidentiality is to be implied. At the time when the arbitration agreement was entered into, the party who is to receive the documents or information may have been in such a situation that it would be unreasonable to predicate of that party an intention to keep absolutely confidential the documents produced or the information disclosed. To the extent that a party would not have agreed to keep documents or information confidential, the implied obligation of confidentiality must be qualified.²¹⁶

Brennan, J had agreed with Colman J in *Hassneh Insurance* with respect to qualification of the obligation of confidentiality and hold that, in an arbitration agreement under which one party is bound to produce documents or disclose information to the other for the purposes of the arbitration and in which no other provision for confidentiality is made, a term should be implied that the other party will keep the documents produced and the information disclosed confidential except in circumstances where (a) disclosure of the otherwise confidential material is under compulsion by law; (b) there is a duty, albeit not a legal duty, to the public to disclose; (c) disclosure of the material is fairly required for the protection of the party's legitimate interests; and (d) disclosure is made with the express or implied consent of the party producing the material.²¹⁷

Brennan, J had also of the opinion that the duty to convey information to the public may not operate uniformly upon each document or piece of information which is given for the purpose of the particular arbitration. Performance of the duty to the public is unlikely to require the revelation of every document or piece of

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*

²¹⁷ *Ibid* at 406.

information. It may be possible to respect the commercial sensitivity of information contained in particular documents while discharging the duty to the public and, where that is possible, the general obligation of confidentiality must be respected.²¹⁸

3.9.1.2.3 Dissenting Decision of Justice Toohey

Toohey, J acknowledged that it is not possible to state that every aspect of an arbitration is confidential in every circumstance since no sharp distinction can be drawn between privacy and confidentiality. Thus they are, to a considerable extent, two sides of the same coin. The privacy of an arbitration hearing is not an end in itself; surely it exists only in order to maintain the confidentiality of the dispute which the parties have agreed to submit to arbitration.²¹⁹

Toohey, J was of the view that there is no reason in principle why an implied obligation should not attach to documents produced at the instance of an arbitrator given the private nature of the arbitration hearing; there is every reason why the obligation should be attached as it was observed in *Hassneh Insurance*.²²⁰ Toohey, J gave an example in conventional litigation, whereby documents which are disclosed and produced by one party to another pursuant to the rules of court relating to discovery of documents are subject to an implied undertaking that they will not be used for any purpose other than in relation to the litigation itself.²²¹

Toohey, J also made an important point that there is nevertheless some obligation of confidentiality attaching to the documents and information resulting from an arbitration. Toohey, J seemed to find such an obligation to be a term implied as a matter of law in commercial arbitration agreements. The term is implied from the entry by the parties into a form of dispute resolution which they choose because of the privacy they expect to result. If this is said to confuse privacy and confidentiality, the answer is that they are not distinct characteristics.²²² Colman, J in *Hassneh Insurance* stated that "*the disclosure to a third party of (a note or transcript*

²¹⁸ *Ibid* at 407-408.

²¹⁹ *Ibid* at 411.

²²⁰ *Hassneh Insurance Co. of Israel and Others v. Stuart J. Mew* [1993] 2 Lloyd's Rep at 247.

²²¹ *Esso Australia* at 414.

²²² *Ibid* at 415.

*of the evidence) would be almost equivalent to opening the door of the arbitration room to that third party.*²²³

Toohey, J though agreeing with the Mance, CJ that there is a „*public interest*“ exception to the principle of confidentiality did not see the importance of discussing the boundaries of such exception. Justice Toohey further held that the reasons which have led to a broad principle of confidentiality have answered the question of documents discovered by one party to another in the course of the arbitration but whether or not there is such a principle, confidentiality clearly attaches to this category of information.²²⁴

3.9.2 Commonwealth of Australia v. Cockatoo Dockyards Pty Ltd (the „Cockatoo Dockyard“ Case)

3.9.2.1 The Facts of the Case

The *Cockatoo Dockyard* case²²⁵ was an arbitration between the Commonwealth of Australia (the appellant) and Cockatoo Dockyard Pty Ltd (the respondent). The appellant sued the respondent claiming that it had breached covenants of a lease granted to it for maintenance of the Cockatoo Island which was used as a naval dockyard. Pursuant to the agreement between the parties, their disputes were referred to arbitration. A sole arbitrator was appointed to hear the proceedings.

The Respondent applied to the arbitrator for directions to secure the confidentiality of documents relevant to the arbitration. The appellant resisted the application by the respondent. It challenged the power of the arbitrator to make the directions sought. The arbitrator clarified the direction which he had made in which the appellant applied to the arbitrator to set aside his rulings on the ground of a lack of power to sustain them. The arbitrator rejected the appellant’s application, hence summons followed, bringing the matter before the trial judge who dismissed the same. The court of appeal granted the appellant leave to appeal against the dismissal order.

²²³ *Hassneh Insurance Co. of Israel and Others v. Steuart J. Mew* [1993] 2 Lloyd’s Rep at 247.

²²⁴ *Esso Australia*. at 416.

²²⁵ *Commonwealth of Australia v. Cockatoo Dockyards Pty Ltd* 120 FLR 171; [1995] 36 NSWLR 662.

The orders of the arbitrator involved:

„directing neither party to the proceedings disclose or grant access to any documents or other material prepared for the purposes of this arbitration; any documents or other material, whether prepared for the purposes of this arbitration or not, which reveal the contents of any document or other material which was prepared for the purposes of this arbitration; any documents or material produced for inspection on discovery by the other party for the purposes of these proceedings; and any documents or material filed in evidence in these proceedings.“²²⁶

3.9.2.2 The Decision of the Court

Kirby P who delivered the majority decision, was of the opinion that where an arbitrator, in the course of giving a procedural direction, goes beyond the establishment of procedures necessary for the commercial arbitration between the parties and makes orders which impinge upon the public's legitimate interests, the arbitrator goes outside the arbitration.²²⁷

Kirby P made reference to the „*public interest exception*“ which was established in *Esso Australia* by observing that the courts are aware of the importance and urgency that a material needs to be made available for the protection of public health and the restoration of the environment to the relevant authorities or even to the public in general.²²⁸

Kirby P made another important observation with respect to public interest exception by stating that:

„Whilst private arbitration will often have the advantage of securing for parties a high level of confidentiality for their dealing, where one of those parties is a government, or an organ of government, neither the arbitral agreement nor the general procedural powers of the arbitrator will extend so far as to stamp on the governmental litigant a regime of confidentiality or secrecy which effectively destroys or limits the general governmental duty to pursue the public interest.“²²⁹

However, in the light of the above statement and with reference to the present case, Kirby P was of the opinion that if the public interest required the appellant to disclose documents or other materials to the public authorities, it cannot be accepted that the private arbitral agreement or the general statutory powers of the arbitrator

²²⁶ *Cockatoo Dockyard* at 177.

²²⁷ *Ibid* at 187.

²²⁸ *Ibid* at 188.

²²⁹ *Ibid* at 189-190.

over procedure could destroy or limit the appellants duty to pursue that public interest.²³⁰

Kirby P concluded by stating that, save for the direction relating to disclosure or the grant of access to documents or material produced for inspection on discovery, the directions given by the arbitrator purportedly limiting disclosure or the grant of access to documents and materials was beyond power.²³¹

3.10 General Observation of the Doctrine in England and Australia

Several observations have been made by different scholars in recent years through expert reports and articles on the doctrine as it continues to be debated in the world of arbitration. Such expert reports and articles have either supported or criticised the approach adopted in both jurisdictions.²³²

However, in my opinion it is important to note some general observations of the doctrine covering both jurisdictions. As we have seen in the English approach, the courts in the United Kingdom have assumed an implied duty of confidentiality arising out of a private nature of arbitration starting with *Dolling-Baker*.²³³ But such an implied duty has been subject to various exceptions which were formulated on a case-by-case basis after *Dolling-Baker*. Such exceptions on the implied duty have been questioned in *Ali Shipping Corp*²³⁴ where the Privy Council in *AEGIS*²³⁵ was of the view that broad rules of confidentiality failed to distinguish between different types of confidentiality attaching to different types of document which had been obtained in different ways and elides privacy and confidentiality.²³⁶

²³⁰ *Ibid.*

²³¹ *Ibid* at 190.

²³² 'Expert Report of Stewart Boyd QC (in *Esso/BHP v. Plowman*)' (1995) 11 *Arbitration International*, Issue 3, at page 265-271; 'Expert Report of Stephen Bond Esq (in *Esso/BHP v. Plowman*)' (1995) 11 *Arbitration International*, Issue 3, at page 273-281; 'Expert Report of Dr. Julian D.M. Lew (in *Esso/BHP v. Plowman*)' (1995) 11 *Arbitration International*, Issue 3, at page 283-295; 'Expert Report of Professor Hans Smit (in *Esso/BHP v. Plowman*)' (1995) 11 *Arbitration International*, Issue 3, at page 297-298; and Young, M., & Chapman, S., (2009) Confidentiality in International Arbitration. Does the exception prove the rule? Where now for the Implied Duty of Confidentiality under English Law?, at page 36-39.

²³³ *Dolling-Baker v. Merrett and Another* [1991] 2 ALL ER 890; [1990] 1 W.L.R. 1205.

²³⁴ *Ali Shipping Corp v. Shipyard Trogir* [1998] 2 ALL ER 136.

²³⁵ *Associated Electric & Gas Insurance Services Ltd v. European Reinsurance Company of Zurich* [2003] UKPC 11, [2003] 1 ALL ER (Comm), Privy Council Appeal No. 93 of 2001.

²³⁶ *AEGIS* at para 20.

In the Australian approach, the courts in Australia have rejected the presence of an implied duty of confidentiality in arbitration proceedings.²³⁷ The Australian courts in *Esso Australia*²³⁸ established the principle of „*public interest*“ which required disclosure of confidential information to the public in which the high court had held that third parties and the public have a duty (legitimate interest) in knowing what had transpired in an arbitration. Such a decision has been criticised by various scholars including Monique Pongracic-Speier²³⁹ where one of his main criticisms was that the public will not know for certain whether a contract for confidentiality entered into with a public actor will hold up once the arbitration has begun and confidential information is put on the table.

In my view both approaches have created uncertainty and irregularities with respect to the doctrine of confidentiality in arbitration proceedings. However, the United Kingdom has well established through precedent the doctrine of confidentiality in arbitration but such precedents have failed to maintain the consistency of the implied duty due to various established exceptions that limits its scope. In the case of Australia, I do not agree with the decision in *Esso Australia* that an implied duty of confidentiality in arbitration does not exist. Confidentiality is an essential attribute of arbitration and that confidential obligation must in due respect be observed.

However, I do partially agree that for the interest of the public, circumstances may arise where by the general public may have a legitimate interest to know what transpired in the arbitration process but that does not mean removing the general duty of confidentiality which has been preserved in England for many years. Brennan, J in *Esso Australia* had a similar view where he stated that:

„Performance of the duty to the public is unlikely to require the revelation of every document or piece of information. It may be possible to respect the commercial sensitivity of information contained in particular documents while discharging the duty to the public and, where that is possible, the general obligation of confidentiality must be respected.“²⁴⁰

²³⁷ *Esso Australia Resources Ltd and Others v. The Honourable Sidney James Plowman (Minister for Energy and Minerals) and Others* [1995] 128 ALR 391.

²³⁸ *Ibid.*

²³⁹ „*Confidentiality and the Public Interest Exception-Considerations for Mixed International Arbitration.*“ (2008).

²⁴⁰ Refer to footnote 218.

3.11 Implementation of the Doctrine of Confidentiality in the Tanzanian Arbitration System

Until now I have given an overview and observation of the doctrine of confidentiality in England and Australia by examining the different approaches on a case-by-case basis in which the two jurisdictions have adopted the doctrine in their arbitration regimes. The research question now emerges: *Can a developing nation like Tanzania adopt the doctrine of confidentiality in its arbitration regime?*

In my previous chapter, I had given a highlight of the arbitration regime in Tanzania and covered the position of the doctrine of confidentiality in Tanzania mainland; I mentioned that the current arbitration laws in the country are silent as far as domestic arbitration in Tanzania is concerned.

However, I also mentioned that the duty of confidentiality in Tanzania is based on an implied term in arbitral proceedings as the approach adopted by England. In practice, the general assumption of the doctrine in Tanzania is that various actors involved in the arbitral process are bound by the doctrine, especially when it comes to preserving the confidentiality of evidence, pleadings and the arbitral awards. However, there seems to be no established precedent to support such an assumption.

Based on the two approaches that I have discussed so far, there are two possible ways in which the doctrine of confidentiality could be applied in Tanzania's arbitration regime. The first way is through adopting modern arbitration laws which provide, among other issues, a detailed confidentiality clause in arbitration proceedings and the second being through application of common law approaches which have established the doctrine on a case-by-case basis both in England and Australia.

3.11.1 Modernised Arbitration Laws

The current TAA²⁴¹ and TAR²⁴², as discussed before, are colonial based and outdated and do not cater for the recent trends in ICA. Both arbitration laws need to be repealed and replaced with a new comprehensive Arbitration Act and Arbitration Rules to incorporate the current developments in ICA both at domestic and international level. The new arbitration laws should be in form of the Model Law²⁴³ in order to be up-to-date with the current trend of international arbitration. Thereafter both arbitration laws should among other issues consider providing for detailed provisions on confidentiality in arbitration proceedings.

3.11.1.1 The New Tanzania Arbitration Act (New TAA)

The new TAA should cater for both domestic and international arbitration. This can be done by having a single piece of legislation which caters for arbitration at both levels or can be done by following Australia's example. As discussed earlier, Australia has two separate arbitration laws, the IAA of 2010 which caters for international arbitration, and the CAA which caters for domestic arbitration for each state and territories of Australia.

Both the IAA and the CAA in Australia provide for confidentiality provisions based on opt-in and opt-out basis respectively. If Tanzania decides to have dual arbitration laws, then each law should have a provision on confidentiality in arbitration which would secure the interest of the parties at both levels.

Whether or not Tanzania decides to adopt a single piece of legislation or dual legislation, the issue of confidentiality must be stipulated under the new TAA in order to protect the parties' confidentiality obligations. The confidentiality provisions under the new TAA should be detailed and ensure that all important aspects of the doctrine are covered in order to avoid future disputes in arbitration.

The parliament in its discussion on the draft bill may consider making reference to confidentiality provisions under the Australian arbitration legislations

²⁴¹ Cap 15 [Revised Edition 2002].

²⁴² Government Notice No. 427 of 1957.

²⁴³ UNCITRAL Model Law on ICA (as revised in 2006).

(both the IAA and the CAA). The draft bill may provide a detailed confidentiality clause to include the following:-

- (i) A provision on disclosure of confidential information which may *restrict* the parties and the arbitral tribunal from disclosing confidential information unless permitted to do so;
- (ii) Circumstances under which confidential information may be *disclosed* by a party or an arbitral tribunal;
- (iii) Circumstances under which an arbitral tribunal may *allow* disclosure of confidential information;
- (iv) Circumstances under which a court may *prohibit* disclosure of confidential information; and
- (v) Circumstances under which a court may *allow* disclosure of confidential information.

3.11.1.2 The New Tanzania Arbitration Rules (New TAR)

The new TAR should also cater for both domestic and international arbitration. The new rules must provide for comprehensive procedures on the practice and conduct of arbitration proceedings which should be applicable for both domestic and foreign arbitration and should be in form of a Model law.²⁴⁴ The new TAR should be independent and should not be attached to form part of other laws as evidenced under the current CPC.

The new TAR should address among other issues, the aspect of confidentiality in arbitration proceedings. Tanzania may follow the footsteps of other jurisdictions which have well developed arbitration rules in their arbitration system including England²⁴⁵ and Australia.²⁴⁶ For instance, the English LCIA Rules under Article 30.1 provides for an implied obligation of confidentiality to be observed by the parties to all relevant documents in arbitration proceedings but subject to exceptions which may require disclosure for the purpose of protecting the legitimate

²⁴⁴ UNCITRAL Model Law on ICA (as revised in 2006).

²⁴⁵ The New LCIA Arbitration Rules of 2014 [to come into effect on 1 October 2014].

²⁴⁶ ACICA Arbitration Rules of 2011.

interest of the parties or for the purpose of challenging an award before a relevant legal authority.

Similarly under the Australian ACICA Arbitration Rules under Rule 18.1 require all hearings to take place in private unless agreed by the parties in writing. Furthermore under Rule 18.2 require the parties, the Arbitral Tribunal and the ACICA to treat all matters relating to the arbitration confidential hence not to disclose to a third party without prior written consent from the parties. Tanzania should consider adopting similar provisions under its new TAR in order to safeguard the confidentiality process in the course of the arbitration proceedings.

3.11.2 The Application of Common Law Approaches

Application of the doctrine of confidentiality in Tanzania through established common law precedent is easier said than done. However, Tanzania may set an example like other jurisdictions that have either supported the English approach or the Australian approach as to the general obligation of confidentiality in arbitration proceedings. Nevertheless, I am of a different view and would consider Tanzania approaching a combination of the approaches if an issue of confidentiality in an arbitration rises in domestic courts in the future.

To start with, the doctrine of confidentiality in Tanzania is based on an assumption of an implied obligation which makes the country more favourable to adopt the English Approach. Though, such an assumption should be supported by relevant precedents that have backed up the doctrine. As we have seen in England through different established cases, the doctrine of confidentiality restricts parties from disclosing any documents prepared and produced in the course of the arbitration proceedings.²⁴⁷ Nevertheless, such an implied obligation has been subject to various exceptions which require parties to disclose confidential information as it has been established in cases such as *Hassneh Insurance, Insurance Co, London and Leeds Estate, Ali Shipping Corp* and *Emmott*.

The Australian courts on the other hand, rejected the existence of the general obligation of confidentiality in arbitration and established the *public interest*

²⁴⁷ *Dolling-Baker* at 899.

exception” in which the court was of the view that confidential obligation attaches only in relation to documents which are produced by a party compulsorily pursuant to a direction of the arbitrator and hence such an obligation is subject to the public's legitimate interest in obtaining information about the affairs of public authorities.²⁴⁸

Despite the uncertainty and inconsistency of the doctrine in England with rejection of the general obligation of confidentiality in Australia, Tanzania may consider applying a combination of both approaches in its arbitration regime depending on the nature of the dispute. In my opinion, the Tanzanian courts when addressing the issue of confidentiality in arbitration proceedings, must respect the implied obligation of the doctrine. However the court may in its discretion allow disclosure of confidential information in circumstances where protection of legitimate interest of the public is required as it was observed by Brennan, J in *Esso Australia*.²⁴⁹

Furthermore, the Tanzanian courts when addressing the issue of confidentiality may consider making reference to both approaches in order determine two main issues, first, whether parties to arbitral proceedings have an obligation to maintain confidentiality of the documents and second, whether leave of the court may be required to waive the duty of confidentiality and allow disclosure of the documents to protect the legitimate interest of the public.

3.12 Conclusion

This chapter gave a comprehensive overview on the doctrine of confidentiality in both England and Australia and its implementation to the Tanzanian Arbitration Regime. Through analysis of the doctrine in both jurisdictions case-by-case basis and through observations which have been made, the issue of confidentiality is far from settled. Despite the uncertainty of the implied obligation of the doctrine in England, the English approach has been supported by few jurisdictions through case laws in Singapore and France. The rejection of the Australian approach to an implied duty of confidentiality has been also supported through case laws in Sweden and in the United States. On the other hand, there is no single approach that Tanzania could

²⁴⁸ *Esso Australia* at 404.

²⁴⁹ Refer to *footnote* 218.

adopt the doctrine but rather a combination of both approaches. In my next chapter, I will conclude on the doctrine of confidentiality in arbitration proceedings and provide recommendations for Tanzania to a way forward in approaching the issue of confidentiality in its arbitration regime.

CHAPTER 4: CONCLUSION AND RECOMMENDATIONS FOR TANZANIA WITH FURTHER RESEARCH

4.1 Conclusion

The above study was about the doctrine of confidentiality in arbitration proceedings and its implementation to the Tanzanian arbitration system. The study shows that confidentiality is still an important attribute of international commercial arbitration. However, this attribute is no longer absolute since it is subject to various exceptions and limitations.

The focus of the study was to introduce the doctrine of confidentiality in Tanzania's arbitration system since there appears to be no literature or any form of research done with respect to this doctrine in the country. Having done that, the study examined the two common law jurisdictions (England and Australia) which have established the doctrine in their respective arbitration regimes. The study reveals that the general obligation of confidentiality adopted in the English courts have been subject to various exceptions established case-by-case basis and that such obligation had been rejected by the Australian courts.

The study then went further by applying the two common law approaches in the Tanzanian arbitration regime. The study provided two possible ways in which the doctrine could be implemented in Tanzania that is, through modernised arbitration laws and through application of the common law approaches. The conclusion was that Tanzania could adopt a combination of both approaches in its arbitration regime.

However, the study concludes that there is no general consensus in the world of arbitration as to how the doctrine of confidentiality could be best protected. The study shows that different attempts have been made through common law precedents to protect the general obligation of confidentiality in arbitration proceedings but such attempts have seemed to be impractical since the doctrine has encountered difficulties in defining the scope of the exceptions of such general obligation.

4.2 Recommendations for Tanzania with Further Research

Based on the above findings together with the proposed ways on the possibilities for the doctrine of confidentiality to be implemented in Tanzania's arbitration regime as discussed in the third chapter, the following are some of the recommendations with further research to be made as to how Tanzania could approach the issue of confidentiality in its arbitration regime in case a future arbitration dispute arises either in an arbitral tribunal or in the courts of Tanzania.

- (a) Tanzania should first consider repealing and replacing the outdated arbitration laws in its arbitration system in order to meet with the current trend of International Commercial Arbitration. The need for newly modernised arbitration laws which cater for both domestic and international arbitration is a must.
- (b) Prior to paragraph (a), the new arbitration laws (the New TAA and the New TAR) should have detailed confidentiality provisions which cover important aspects of the confidentiality such as the scope of the confidentiality obligation, duration, extent as well as the exceptions of such obligation in arbitration proceedings.
- (c) The government of Tanzania, in this case the parliament should make efforts in bringing the New TAA into force and among other issues of concern in arbitration, should consider addressing the confidentiality aspect and to cater the important issues as described under paragraph (b).
- (d) Tanzania may consider setting an example by considering making reference to common law approaches which have adopted the doctrine if a future arbitration claim on the issue of confidentiality arises either in the Arbitral Tribunal or in the courts. In doing so such forums specifically the courts must carefully examine the scope as well as the exceptions of the confidentiality obligation before rendering its decision.
- (e) Tanzania may also consider referring to the New Zealand Arbitration Act (NAA)²⁵⁰ which provides for detailed provisions on confidentiality. The provisions under the NAA can be considered as long term solutions in

²⁵⁰ As amended by Act No. 94 of 2007.

approaching the issue of confidentiality in Tanzania's arbitration proceedings. For instance, the courts in New Zealand may allow or prohibit disclosure of confidential in arbitration proceedings and may consider such proceedings to be either held in private or in public under various exceptions.

- (f) In the absence of new arbitration laws and in the interest of the parties, it is advisable as a practical solution that parties to arbitration proceedings in Tanzania draft a detailed confidentiality clause in their confidentiality agreement or in the arbitration agreement stipulating the relevant provisions. The parties may stipulate in their agreement that all documents such as pleadings, evidence, transcript of oral evidence, ruling or awards must be kept confidential and that third parties shall be excluded from such confidential proceedings. However, parties may also stipulate in their agreement that if disclosure of confidential information is required for the purpose of enforcing the legitimate interest, then such disclosure shall be allowed prior to notifying the other party with its intention to disclose. The confidentiality clause in the agreement must comply with the applicable law in the arbitration proceedings.
- (g) Further research should be carried out on this area in Tanzania by looking into how the doctrine of confidentiality can be better dealt with in arbitration proceedings and the arbitration regime in general. Some of the ways in which this can be done is through a series of debates and contributions from experts in this field of arbitration in the country such as Lawyers and Judges. Such contributions should also involve other relevant bodies which deal with arbitration issues such as the TIA and the Judiciary.
- (h) Furthermore, extensive research should be made in finding out as to how different actors involved in the arbitral proceedings such as parties, the legal representatives as well as the arbitral tribunal could address the issue of confidentiality in the context of public interest especially in circumstances where there has been breach of confidential information during the arbitration process by one of the parties and what remedies could be available for such breach to an aggrieved party.

- (i) In addition to paragraph (h), research should also be conducted in order to identify the challenges encountered in preserving confidentiality of party's information as well as maintenance of court records in order to avoid abuse of such confidential information for future arbitration proceedings.

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