

Chapter 2

Privacy and Confidentiality in Egyptian Arbitration—Law and Practice

Abstract This chapter addresses the question of whether arbitration in Egypt is private and confidential according to the arbitration-related law(s) currently in force. It examines the notions of privacy and confidentiality and the relevant legal duties. It starts by distinguishing between privacy and confidentiality followed by a discussion of privacy in the Egyptian, Syrian, Saudi and Yemeni arbitration laws, and the consequences of breaching the duty to privacy. The second part of the chapter focuses on the elements of confidentiality as addressed in the Egyptian Arbitration Law namely that of arbitral awards, secrecy of deliberations, and the potential effect of dissenting opinions, and resorting to state courts for enforcement or to annul the award on the confidentiality of the arbitral award. It then discusses arbitration practice and how far it conforms to the expectation of confidentiality and the legal community's views on the topic. Exploring the prevailing practice is essential for a proper understanding of arbitration and its principles, including privacy and confidentiality, because under article (2) of the Civil Code, custom is the second source of legislation in Egypt. Although arbitration has been the subject of several consecutive pieces of legislation, because of the rapid development in its practice custom enjoys special prominence in identifying its rules.

2.1 Introduction

This chapter addresses the question of whether arbitration in Egypt is private and confidential according to the current laws and practice of arbitration. First, it deals with the notion of privacy and the relevant legal duty and then it addresses the concept and legal duty of confidentiality. In this chapter I examine (1) the relevant legal provisions dealing with arbitration (if any) as interpreted and/or enunciated by courts and scholars and (2) the practice concerning both privacy and confidentiality of arbitration. Due to the novelty of the topic and the relatively limited literature available there is an unavoidable overlap, in the discussion to follow, between scholarly interpretations of legislative provisions and the current practice. Since the views presented are mainly derived from the interviews conducted for the purpose

of this research, separating practitioners' opinions from the discussion of the current practice or even their interpretation of legislative provisions would mangle the flow of ideas and conclusions. As explained in the previous chapter, the Civil Procedure Code is the general procedural law in Egypt; I shall refer to its provisions to fill in any legislative gaps in the Egyptian Law on Arbitration.

Under article (2) of the Civil Code, custom is the second source of legislation in Egypt. In arbitration, custom enjoys a special position. Although arbitration has been the subject of several consecutive pieces of legislation, its concepts and practice develop rapidly. Its development cannot possibly be captured by legislation, as quickly as it emerges.¹ Thus, exploring the prevailing practice is essential for a proper understanding of arbitration and its principles, including privacy and confidentiality.

As shown in Chap. 1, very little is found in the Arabic literature on the topic of confidentiality and privacy of arbitration. In older writings, confidentiality was described in broad terms and its components as a legal duty were not clarified. In more recent writings, it is said that there is a custom in Egypt that arbitration is private and confidential, yet not much is said about the essence of these two concepts. To fill in these gaps, I conducted field interviews, to collect empirical data on the views held by practitioners and judges on the practice of arbitration with regards to privacy and confidentiality, and their perception of the two concepts.

The chapter starts with a brief discussion of the modern distinction between privacy and confidentiality in arbitration. It, then, turns to an in depth discussion of privacy and the duty of confidentiality in arbitration as they stand today in the law and practice of Egypt. The main focus of this chapter is arbitration in Egypt, with some reference to other Arab jurisdictions as deemed appropriate.

2.2 Confidentiality v. Privacy

Until the early 1990s, literature did not much distinguish between the notion of privacy and that of confidentiality in arbitration.² Since then, the meaning of each notion developed, as more cases from the various jurisdictions addressed the topic

¹A few of my interviewees thought legislative intervention in the matter of confidentiality would be unfavourable. The law-maker should limit its intervention to setting out the basic framework within which any valid arbitration agreement can operate, without getting into the details of the arbitral process. On the one hand such intervention would constrain party autonomy which is the real basis for modern arbitration; on the other hand legislative intervention is likely to cause more problems than the ones it would resolve. It is for the best to leave the practice of arbitration to evolve in response to the needs of its users, and not burden the arbitration system with detailed legislative texts. Interview with Professor Mohamed El-Awa, Emeritus professor of comparative law, practices as attorney and arbitrator, dated 13/01/2011, Cairo, and Professor Ahmad El-Kosheri, Attorney-at-law and Arbitrator, former vice president of the ICC, interview dated 13/01/2011, Cairo.

²Lew et al. (2003, para 24-100, p. 660).

and, even more, academic thought had, and is still, being invested in analysing the relation between privacy and confidentiality and the distinction between the two.

Speaking of international commercial arbitration, Gary Born argues that such distinction is important; he formulates it as follows:

‘Privacy’ is typically used to refer to the fact that... only parties to the arbitration agreement –and not third parties – may attend arbitral hearings and otherwise participate in the arbitral proceedings... [it] serves to prevent interference by third parties in the arbitral process... as well as to protect the parties confidences against disclosure to third parties

In contrast, ‘Confidentiality’ is typically used to refer to the parties’ asserted obligations not to disclose information concerning the arbitration to third parties. Obligations of confidentiality extends not only to prohibiting third parties from attending the arbitral hearing, but also to prohibiting the disclosure to third parties of hearing transcripts, as well as written pleadings and submissions in the arbitration, evidence adduced in the arbitration, material produced during disclosure and the arbitral award(s)³

Notably, in the above quote Born refers to Confidentiality as the obligation prohibiting third parties from attending, whereas just a couple of lines earlier he attributed the same to the notion of privacy. In fact there is a common area between the two notions; for confidentiality of the information and documents revealed in arbitration would be compromised if third parties are allowed to attend the arbitral hearings. For the sake of precision, it is best to connect the issue of attending the arbitral hearings to privacy and not confidentiality. As the latter concerns disclosure by either participant of the arbitration related information to third parties, but not those third parties acquiring the said information first hand during the arbitration process.

A similar confusion of the elements of each notion is in Kyriaki Noussia explanation; she states that “... *arbitration [is] generally private in that only the parties to the arbitration agreement and other invitees may attend the proceedings. Arbitration is also private to the extent that arbitrators do not publish reasoned opinions that provide information to the public regarding arbitrated cases... to the extent that arbitration awards generally are not published*”.⁴

In addition to noting that the degree of privacy of the arbitration process depends on the parties’ agreement, their chosen *lex arbitri*, and the norms that exist in the given context or forum, she includes in her explanation of what privacy entails the duty of confidentiality imposed on arbitrators; *cannot publish opinions to the public*, and that the awards are not generally published. These two elements obviously concern the confidentiality of the information revealed and exchanged in the course of arbitration, so these should be listed as corollaries to confidentiality not privacy. This definition better be revisited to properly reflect the distinction between the two concepts.

³Born (2009, pp. 2251–2252).

⁴Noussia (2010, para 3.2.11, p. 25).

Simon Crookenden is of the opinion that:

The concepts of privacy and confidentiality in arbitration are linked. Privacy involves arbitration proceedings being private to the disputing parties and to the tribunal. English law has for a long time accepted and supported the privacy of arbitrations...the privacy of arbitration proceedings is generally recognized internationally.

Confidentiality in relation to arbitrations primarily concerns the confidentiality attaching to documents and the extent to which one party to an 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. There is much less of an international consensus on the ambit of the obligation of confidentiality.⁵

A similar distinction is drawn by Amy Schmitz, in her paper “*Untangling the Privacy Paradox in Arbitration*” in which she endorses the view that:

‘Privacy’ and ‘Confidentiality’ have varied meanings. In arbitration, privacy generally refers to arbitration’s closed and non-public process, which prevents public access to hearings or published opinions that would aid development of public law. In contrast, confidentiality in arbitration refers to secrecy of information regarding or revealed through the arbitration process. Privacy thus does not ensure confidentiality of the arbitration proceedings. Information about and learned through domestic arbitrations may become public unless the parties contractually require this information remain confidential. Arbitration therefore is not entirely secret⁶

Hence, literature, now, offers a clearer distinction between the privacy of arbitration hearings and the general duty of confidentiality in arbitration.⁷ While privacy relates to the hearings phase, confidentiality, in the most comprehensive perception, is a duty owed to each party by all those who take part in the arbitration—including the other party—to abstain from using and/or disclosing documents and information which came to their knowledge in the course of the arbitration or for its purpose, including the very fact of the existence of arbitration.⁸ It covers the arbitral award, documents prepared for the purpose of arbitration, those disclosed in its course, and documents issued by the tribunal during the arbitral process. The addressees of this duty are the parties (each owe it to the other), the arbitral tribunal, witnesses and experts, the arbitration institution, and its personnel.

This distinction between privacy and confidentiality was explicitly set out by the Supreme Court in Sweden in the case of *A.I. Trade Finance Inc v Bulgarian Foreign Trade Bank Ltd*,⁹ in which it ruled that:

One of the advantages of having a dispute decided by arbitration proceedings in comparison with judicial proceedings... is considered to be the confidentiality associated with arbitration proceedings... **However, this advantage does not mean that it is a**

⁵Crookenden (2009, p. 603).

⁶Schmitz (2006, p. 1214, at II).

⁷Redfern et al. (2004, para 1-56, p. 34).

⁸It is said that the existence of a dispute shall also be covered by the duty of confidentiality See: El-Awa (2009, para 11-8, p. 306).

⁹Case No T 6-111-98.

precondition that a duty of confidentiality prevails for the parties. The real meaning of this, compared with judicial proceedings, is instead, obviously, that the proceedings are not public....¹⁰

The terms “*not publicly*” and “*confidential*” are used interchangeably to describe arbitration hearings in Arabic literature as well. This usage resembles the classical view that did not distinguish between privacy and confidentiality in comparative jurisprudence on arbitration.¹¹ However, more recent scholarly works explain the notion of confidentiality, in the context of procedure, to be contrary to the public nature of national judicial procedure. A more precise language is used to explain that:

Contrary to court hearings, which the law requires to be held publicly, arbitration hearings are not held publicly...,¹² and

It is among the recognized principles in arbitration that the default position is the confidentiality of its hearings and not its publicity, contrary to the general principles in judicial procedure. **Confidentiality means that arbitral hearings are exclusive to the arbitral tribunal and the parties... any other persons cannot attend without the parties’ consent and the tribunal’s as well.**¹³

Thus, in light of recent scholarly interpretations, in the context of arbitration hearings, the term confidentiality is used to denote privacy. The term private or privacy, as opposed to publicity in court proceedings, is more accurate and in conformity with the international terminology on the issue. The term *confidentiality* should be abandoned in this context in favour of *privacy* or *non-publicly*. As two distinct duties, privacy and confidentiality each shall be studied in a separate consecutive sections.

2.3 Privacy of Arbitration Procedure

The following paragraphs examine the position of four legal systems in the Arab world on privacy of arbitration; namely, in Egypt where the Arbitration Law is silent on the matter, which is the major part of the following discussion, in Syria whose relatively new arbitration law stated expressly that arbitral hearings shall be held privately, the Saudi legislation which was just recently amended to abolish a provision stipulating that arbitral hearings are to be held publicly, and finally in Yemen which has two different types of arbitration, each poses a different solution to the matter of privacy.

¹⁰Quote found in: Denis-Smith (2004, p. 41).

¹¹Redfern et al. (2004, para 1-55, p. 33).

¹²Waly (2007, para 177, pp. 332 ff.).

¹³Haddad (2008, para 443, p. 300).

2.3.1 *Privacy in the Egyptian Law of Arbitration*

As for the Arbitration Law in Egypt, it is silent on the matter of privacy; none of its articles addresses this topic, including article (33) regulating arbitral hearings.¹⁴ However, article (25) allows the parties to choose the arbitral proceedings to be followed in their arbitration; absent an agreement by the parties, this power is vested in the arbitral tribunal, save if a relevant provision is found in the arbitration law itself or if the matter in question is public order related, in such case the arbitrators are bound to follow the rules set out by the law.¹⁵ Hence, if the parties do not choose arbitral proceedings that address the matter of privacy, the arbitral tribunal is, hence, at liberty to adhere to privacy in conducting the arbitral hearings.¹⁶ Some commentators interpret this legislative silence to mean that privacy is the rule in holding arbitral hearings in the Arbitration Law in Egypt.¹⁷ Because arbitration is a private law creation, and it is utterly distinct from the judicial system, some of my interviewees construed this legislative silence to signify that the original rule of privacy prevailing in private law transactions shall apply in arbitration as well.¹⁸ I cannot but agree with this interpretation.

Not many court judgements have dealt with the issue of privacy. Nonetheless, one ruling by the Alexandria Court of Appeal is of great significance in distinguishing between judges and arbitrators in terms of the procedural rules which each of them has to observe in conducting their judicial function—in particular regarding the rule of publicity of court hearings as opposed to the privacy of arbitral hearings, the Court ruled that:

It is well established that the legislator, to attain the aims of arbitration as a means of dispute resolution away from complications and formalities... **And to preserve the secrecy of [trade] transactions... it is the rule that: the arbitrator is exempted from abiding by the procedural rules, which judges are subject to...**¹⁹

This reference to procedural rules in relation to confidentiality and secrecy of trade transactions can be rightly interpreted to include the rule of publicity in court hearings.

¹⁴The same is true of its predecessor, articles (501–513) of the Law of Procedure no 13 of the year 1968.

¹⁵Waly (2014, para 199, pp. 386 ff.).

¹⁶Similar views are expressed concerning article (754) of the Libyan Civil Procedure Law. This article permits the parties to choose the arbitral procedures to be followed in their arbitration, including regarding the matter of privacy. See: Ouerfelli (2009, p. 41).

¹⁷Younis (2009, para 415, p. 346).

¹⁸Interviews: Judge Tariq Al-Beshri, former Vice President, State Council and a practising arbitrator, interview on 11/11/2010, Giza, and El-Kosheri (interview: 13/1/2011).

¹⁹Alexandria Court of Appeal, Commercial Circuit no (21), judgement on 7/7/2003, case no 1, judicial year 59.

Clearly, the Court of Appeal recognizes that in arbitration publicity is not the rule, to the contrary, the rule is: arbitration shall be conducted in a non-public fashion.²⁰

Therefore, it seems that there is consensus between academics and the courts that the public order rule of publicity in court proceedings does not apply in arbitration, instead the rule is privacy of arbitral proceedings; third parties are not allowed to attend, save for with the parties' agreement. It is even argued that privacy "*is a customary practice in arbitration binding on all parties, without a need for a provision to that effect...*"²¹. The Court of Cassation is yet to address the matter and say the final word on what is the legal basis for this practice, and whether it finds the practice of privacy to amount to a binding customary practice or otherwise.

Scholarly writings leave the reader in no doubt that privacy is one of the characteristics of arbitration. As many scholars confirm that arbitration procedures, subject to parties' agreement to the contrary, do not take place publicly.²² Authors stated that "*pronouncement of awards need not be done in a public hearing...*";²³ "*the established practice in arbitration hearings is that it is not held publicly, and it shall not be attended by anyone but the parties and their representatives*";²⁴ and "*Arbitration [serves the parties interest in secrecy] because its procedures are private...*".²⁵ Notably, and due to the lack of a law provision on the matter, these writings are more concerned with describing the actualities of arbitration practice rather than discussing law provisions.

Some writers expressed the opinion that the parties can request the arbitral tribunal to hold arbitral hearings either privately or publicly and/or that the tribunal can decide whether to hold the hearings privately or otherwise.²⁶ On the one hand, I do not think *publicly* in this context is the equivalent of publicity in court hearings (where members of the general public are anonymously permitted to attend the hearings); it rather refers to situations in which a third party requests permission to attend for educational purposes or the like. Such requests are common, particularly in institutional arbitration. On the other hand, in case of disagreement between the parties on the matter of privacy, the arbitral tribunal will have to adhere to privacy; "*in consideration of the established customary practice in modern arbitration systems to the privacy of its hearings. This custom—absent provision or agreement—is the source of the rule of privacy in arbitration hearings*".²⁷ Seemingly, privacy

²⁰Professor Ahmad Aboulwafa expressed the same opinion in his book on Compulsory and Voluntary Arbitration long before this judgement was rendered; see: Aboulwafa (1983, para 106, p. 244).

²¹Haddad (2008, para 443, p. 300).

²²El-Sharkawi (2011, para 191-4, p. 280); Saabna (2008, pp. 108 and 280), and Khalifa (2007, para 2, pp. 21–22).

²³Sharf El-Dien (2007, p. 74), and Aboulwafa (1983, para 115, p. 264).

²⁴Barakat (1996, para 332, p. 329).

²⁵El-Fazairy (1993, p. 8), and El-Awa (2002, para 275, p. 303).

²⁶Bereari (2004, para 67, p. 112), and Al-Masry (2005, p. 316).

²⁷El-Awa (2009, para 11-12, p. 309).

is the rule that an arbitral tribunal should adhere to absent the parties' agreement, for it is an unwritten rule in arbitral practice according to modern scholarly writings.

The vast majority of my interviewees said that there exists a customary practice of privacy, except if the parties agree otherwise. Four interviewees, while accepting that privacy is the practice, did not agree to describe it as a "custom". In the following paragraphs I shall discuss each of these four objections respectively.

One of my interviewees, a law professor who acts as an arbitrator quite often, was of the opinion that *"yes, there is a practice. Its value stems from the parties' agreement to follow it. Who says this practice evolved into a custom in this context [i.e. arbitration]? There is no arbitration jurisprudence to turn the practice into custom"*.²⁸ In fact there is no need for an arbitration jurisprudence or precedence to establish the existence of such custom. This is so because any given practice evolves into a custom when both its elements are established: (1) that people constantly and unfailingly follow this practice, and (2) they feel that following this practice is obligatory. When these two elements are fulfilled there exists a custom. The role of courts is to acknowledge the existence of the said custom, not to establish or create it.

Only state courts can offer such an acknowledgment and give the custom in question its legally binding value, because among their functions is the making²⁹ and interpretation of the law. Even if arbitration jurisprudence existed, still it is not capable of recognizing custom as a source of law. This role is exclusive to courts, because the state monopolizes the designation of the sources of law and its making. In short, the existence of a custom is different than its acknowledgment; the latter can be done by state courts solely.

The second objection was proposed by Professor El-Kosheri. It is a two-fold objection. He said that *"I think that the moral element of custom is not developed enough, people talk... also, the fact that a breach of privacy is not a valid ground to annul the award makes me hesitate to say it is a custom"*.³⁰ On the one hand, it is true, the business community and arbitrators talk about what happens in arbitral hearings. While discussing what happened in arbitral hearings is not technically a breach of privacy, as no third party was allowed to witness the hearing, however, any post-hearing disclosure of the hearing particulars compromises the practical value of privacy, i.e. to deny third parties any knowledge of these particulars; this is more of a breach of confidentiality rather than privacy. On the other hand, it might

²⁸Hossam Eissa, law professor, Ain Shams University, practices as an attorney and arbitrator, interview on 01/11/2010, Cairo.

²⁹Although Egypt is a civil law country where the courts role is, mainly, to apply and interpret law provisions, yet, it has a law-making function, as minimal as it may be compared to its counterparts in common law countries, nonetheless it is quite a significant role. The importance of this function is particularly evident regarding custom, which is the second source of law in Egypt, according to article (2) of the Civil Code, and also the General Civil Circuit, General Criminal Circuit and the Two Circuits held together, all of the Court of Cassation. These circuits function to unify the application of the law each in its field.

³⁰El-Kosheri (interview: 13/1/2011).

be true that the lack of an express provision penalizing any breach of privacy, or rendering such a breach a valid ground for annulling the award, results in people taking this rule less seriously than they should. Then, this is a vicious circle: there is no custom because people talk, and people talk because there is no clear consequence to the breach, and there is no consequence because there is no custom... etc. There has to be a different approach to understanding privacy in arbitration, one that does not depend on people's attitude, rather on abstract legal principles.

This principle could be the right to privacy. As explained by Judge Al-Beshri:

We could say there is a custom. But if we say so, then it would be possible that this custom does not exist in another country. How is that possible? **Could the immunity of one's private life vary from one country to another?... These are general principles.**³¹

Judge Al-Beshri is of the opinion that one's right to the protection of their private life and private affairs is the source of the general principles of confidentiality and privacy, and the individual duties stemming therefrom.³² Confidentiality and privacy are consequences of the existence of the well-acknowledged right to private life; that is why he rejects the existence of a customary practice to privacy. In his opinion, if we accept that privacy is a custom, the very existence of which depends on the actions and behaviour of individuals, then there is a possibility that at some point this custom will cease to exist due to change in people's attitude and actions—this argument he finds to be contrary to the fundamental right to privacy, which in his opinion is the source of the rule of privacy in arbitration. This argument is an interesting one, and merits further research. It is the subject of Chap. 4 of this book.

One of the former judges of the Cairo Court of Appeal, while accepting that arbitration is conducted in privacy, resented my usage of the term custom. He said *“do not say custom, it is the nature of the arbitration system and the purpose for resorting to it ... why did I prefer arbitration? [because]... it is confidential”*.³³ Professor El-Kosheri expressed a similar opinion; *“privacy... is inherent to the nature of arbitration”*.³⁴ What is this *nature of arbitration* that connotes privacy? It is argued that arbitration is a creature of private law; it is initiated by an agreement to arbitrate. The privity of this agreement is interpreted in practice to mean that any person other than the parties to the agreement to arbitrate does not have a legitimate claim to witness the conduct of the arbitration; this is called privacy of arbitration.³⁵

³¹Al-Beshri (interview: 11/11/2010).

³²The same opinion was expressed by Professor Hossam El-Ehwany, law professor, Ain Shams University, practices as an attorney and arbitrator, interview dated 31/10/2010, Cairo.

³³Interview with a former presiding judge of the Cairo Court of Appeal, interview dated 02/11/2010, Cairo. His statement quoted above is an example of the interchangeable use of the terms “confidentiality” and “privacy”. Although the question specified “privacy” in his answer he used the term “confidentiality” in his reply.

³⁴El-Kosheri (interview: 13/1/2011).

³⁵Eissa (interview: 1/11/2010), and Denis-Smith (2004, p. 41).

As such, the reference to the *nature of arbitration* certainly refers to it being a private law contract. Its privacy dictates that third parties cannot claim to have a legitimate interest to observe its execution. Since court judgements confirm that arbitration is based, in each case, on party autonomy that creates the agreement to arbitrate, from which the arbitrator derives his authority, hence, unless duly authorized, arbitrators cannot dispense with a permission from all parties to allow a third party to witness the arbitral hearings.

Traditionally, the nature of arbitration is said to be a mixed one. It starts as a contract, namely the agreement to arbitrate, yet its subject matter is adjudicating disputes, which is, arguably, of a judicial nature and “*the rules applying to non-judicial matters cannot apply to judicial ones*”.³⁶ Yet, it would be contrary to the basic principles of private law to oblige the parties to a private law contract to publicize the execution of their arbitration agreement just because its subject matter is the adjudication of their disputes. Publicity cannot be imposed on parties to a private contract, unless there exists a legitimate interest in publicity that overrides that of the parties in privacy. One must, hence, study the principle of publicity in the judicial system to be able to appreciate its relevance and applicability in arbitration.

Evidently, these four objections to the existence of a custom of privacy are matters of legal analysis. Notwithstanding this discussion, arbitration in Egypt is private; third parties are not allowed to attend the arbitration hearing unless all parties agree. Many of my interviewees mentioned cases in which trainees requested permission to attend arbitral hearings for educational reasons. Arbitrators consulted with each other and asked the parties if they would allow it. In some cases the parties inquired about the trainees’ specialization; are they lawyers in training or are they rather interested in the subject matter of the dispute? In some cases, the parties would request that the trainees sign a confidentiality agreement to permit them to attend. At times permission was denied.³⁷

Two of my interviewees said that: “*the arbitral tribunal applies the rule [i.e. privacy] automatically without considering its legal basis...*”³⁸ and “*I did not dare allow the trainees to attend without deliberating with my colleagues and seeking the parties’ permission*”.³⁹ These statements show how deep-rooted is the belief in the binding nature of the duty of privacy in the minds of the practitioners; it goes without saying.

One academic wonders, rightly, how would the privacy of a site investigation (for example a construction site), which is definitely classified as a procedure in the

³⁶Eissa (interview: 1/11/2010).

³⁷Interviews with: Dr. Mohamed Abdel Raouf, now Director, CRCICA, dated 24/11/2010; Professor Fathi Waly, law professor, Cairo University, practices extensively as an attorney and arbitrator, interview dated 07/10/2010, Giza and Mohiedin Ismail Alamedin, legal advisor, CRCICA, dated 04/12/2010, Cairo, and Hamza Haddad, a practicing attorney and arbitrator, email dated 9/12/2010.

³⁸Eissa (interview: 1/11/2010).

³⁹Interview with Hisham Sadeq, law professor, University of Alexandria, and practicing arbitrator dated 20/12/2010, Alexandria.

arbitration process, be maintained given the unlimited number of people who could legitimately be present at the time of conducting such an investigation, the vast majority of whom are strangers to the arbitration in question?!"⁴⁰

It is correct to say that absolute privacy is not attainable. The aim of the rule on privacy is to minimize, as much as possible, access to the arbitration room and to reduce the publicity to which the content of the arbitration shall be subject.

2.3.2 *The Syrian Position as to Privacy*

In line with the above discussed literature, suggesting that privacy of arbitral hearings is a well-established customary practice, the Damascus Court of First Instance, in Syria, refused to grant execution to an arbitral award because the arbitrator conducted the hearings and issued the arbitral award in a non-private hearing in a public library.⁴¹ The court considered this conduct to be contrary to the well-established principle of confidentiality in arbitration; hence, the award is not capable of enforcement. It was rightly noted that this judgement does not affect the validity of the arbitral award or its *res judicata* effect granted for arbitral awards by article (53) of the Syrian Arbitration Law.⁴² Arguably, the parties may still rely on this arbitral award before courts to assert their rights as set therein.

Contrarily, the Syrian Court of Appeal⁴³ ruled that

Since the rule followed before courts is publicity of hearings, therefore holding arbitration hearings publicly is in accordance with the rules followed before courts, exemption from which is optional, meaning that an arbitrator acting as an amicable compositor can be so exempted – as is the arbitrator who issued the award subject-matter of this case – and holding hearings privately is compulsory when so is required expressly... The existence of juristic opinions by non-Syrian jurists, given the diversity between Arab arbitration laws in many details, does not bind the Syrian judiciary... if the Syrian legislator intention was to set a rule to the privacy of arbitration hearings, he would have stated it expressly as is the case in the law no 4 of the year 2008.... In article (29/3) thereof.⁴⁴

Initially, it must be noted that the above judgement dealt with the matter of privacy of arbitration hearings under the provisions of the predecessor⁴⁵ of the current Syrian Law of Arbitration (law no 4 of the year 2008). This judgement

⁴⁰El-Awa (2009, para 11-12, p. 309).

⁴¹Conducting the hearings and issuing the arbitral award is a breach of both privacy and confidentiality.

⁴²El-Awa (2009, para 11-13, p. 312).

⁴³It must be noted that the Syrian Court of First Instance judgement was rendered before that of the Syrian Court of Appeal, besides the latter is a higher court, thus its rulings have more value in interpreting law and custom.

⁴⁴Damascus tenth Civil Circuit, Court of Appeal, decision no 245, on 22/10/2008.

⁴⁵These are articles (506–534) of the Law of Civil Procedure of the year 1953. These articles were repealed by the new arbitration law no 4 of the year 2008. See: El-Sharkawi (2009, pp. 129 ff.).

denies any authority to the long standing practice of privacy, in so ruling it relied on article (521) of the Syrian Law of Procedure obliging arbitrators to observe and adhere to the procedural rules followed before state courts.

In addition, the judgement ruled that an arbitral award cannot be annulled for breaching the rule on either the privacy or publicity of hearings absent an express provision specifying the said matter as a base for annulment. This ruling is valid, also, under the law no 4 of the year 2008, because of the well-established principle adopted in Arab jurisprudence and judiciary: that the valid grounds for annulling arbitral awards are exclusively listed in arbitration laws. Article (50) of the Syrian Arbitration Law lists the only grounds on which an arbitral award may be challenged, and it does not include breaching privacy.

The current Egyptian Arbitration Law does not include an article corresponding to article (521) of the Syrian Civil Procedure Law. To the contrary, as mentioned earlier, article (25) therein states that absent the parties' agreement "*the arbitral tribunal may, without prejudice to the provisions of the present law, adopt the arbitration procedures it deems suitable*". Thus, the tribunal's liberty to adopt the procedures it deems appropriate is restricted by: the provisions of the Arbitration Law of 1994, whether supplementary or mandatory⁴⁶ (article 25); preserving procedural equality between the parties (article 26); and public order requirements.

Accordingly, the aforementioned Syrian decision is contrary to the judgements of Egyptian courts on the matter, and the prevailing views in the jurisprudence, which confirm that arbitrators are exempted from the duty imposed upon judges to observe the procedural rules followed in state courts, including that on publicity.

Although the new Syrian Arbitration Law (law no 8 of the year 2004), is based on the current Egyptian Arbitration Law, which is silent on the matter of privacy, the Syrian legislator chose to settle the question of privacy—perhaps as a reaction to the above discussed discrepancy between Syrian court judgements on privacy—by stating, in article (29/3), that:

The hearings held by the arbitral tribunal shall be private, unless the parties agree otherwise.

This is an opt-out provision. Unless the parties agree expressly that the hearings shall be held publicly, article (29/3) shall apply; and if they agree to privacy, their agreement, not article (29/3), is the source of the obligation of privacy. The parties' silence is the only situation in which article (29/3) is effective.

The provisions governing the issue of privacy are supplementary. If the parties agreed, or the applicable rules stipulated for the hearings to be held in a specific manner and it was not conformed with, the party interested in adhering to the agreement (whether for privacy or publicity) should raise his objection to this

⁴⁶El-Awa (2009, para 4-15, pp. 107–108). Because arbitration is based on party autonomy, it is only the parties who have the power to deviate from the supplementary provisions of the Arbitration Law. The tribunal executes the parties' agreement, and unless duly authorized to do so, they do not have the power to deviate from the arbitration law provisions, in which case, the tribunal would be upholding the parties' decision to have their arbitration governed by the rules set out in the arbitration law.

breach to the arbitral tribunal promptly, otherwise his silence will be construed to constitute an implied waiver to his right to object to this breach. This is so under article (31) of the Syrian Arbitration Law corresponding to article (8) of the Arbitration Law of 1994.

2.3.3 *The Saudi Exception*

The Saudi legislator took a peculiar position on the matter of privacy. Article (20) of the executive by-law of the previous arbitration law read as follows:

The arbitral tribunal shall adjudicate the case publicly unless the tribunal, on its own motion, decides to make the hearings private, or if one of the parties so requested, for reasons it deems appropriate.

The text of article (20) raised a few remarks. Firstly, the default position in this provision is publicity of arbitration hearings, which is contrary to the established practice of privacy. Secondly, the text leaves it to the tribunal's discretion to decide on a party's request to conduct the arbitration privately. It is unjustifiable to give arbitrators the discretion to decide on the matter of privacy as is the case with judges in state courts; it is contrary to the nature of arbitration to allow arbitrators' discretion to trump party autonomy. Finally, the text of article (20) does not deal with the case of both parties agreeing on arbitration hearings being private. Can the tribunal refuse to enforce such agreement based on its authority to decide on the matter of privacy it derives from article (20) quoted above?! Academics argued that notwithstanding the provisions of this text, the parties can still agree to privacy of the hearings, and that privacy is the default position as the nature of arbitration process leaves no room for publicity, contrary to court hearings.⁴⁷ The previous Saudi law further diminished the privacy of arbitration by requiring that even if the tribunal decided to hold the hearings in private, the award must be issued publicly.⁴⁸

Academics rightly criticized these provisions stipulating for publicity in arbitration procedures for being contrary to the long-followed practice of privacy.⁴⁹ A practice that is strongly related to the purpose of resorting to arbitration instead of state courts—to attract as little publicity as possible to the parties' confidential information and to protect the parties' reputation,⁵⁰ and that arguably stems from the very nature of arbitration as a private law matter.

⁴⁷Al-Bejad (1999, p. 32 and p.175 at A, and Aal Farian (2007, p. 75 at 2).

⁴⁸Al-Bejad (1999, p. 176). Remarkably, the Kuwaiti Law of Arbitration no 11 of the Year 1995 requires the award to be made publicly yet prevents its publication absent the parties consent, see: Mabrouk (1998, footnote 56, p. 208), and Younis (2009, footnote 2, p. 345).

⁴⁹Haddad (2008, para 445, p. 301).

⁵⁰Rashed (1984, p. 3).

The new Saudi Arbitration Law enacted in 2012 does not include an equivalent to these provisions altogether; yet, the executive by-law of the new Saudi Arbitration Law has not been issued yet. Awaiting its issuance, the law itself is silent on the matter of privacy of arbitral hearings, and article (25) thereof allows the parties to choose the procedural rules to be followed in their arbitration, and delegates this authority to the arbitral tribunal absent such an agreement by the parties, subject to the condition that any such rules would not contradict Sharia' Law. Since privacy, in this context, does not in any way contradict Sharia' Law, the parties are at liberty to include in their arbitration agreement a provision on privacy. If they do not, the arbitral tribunal would follow the well-acknowledged practice of privacy,⁵¹ or perhaps *will even have to abide* by it.

2.3.4 Tribal Arbitration in Yemen

The Yemeni Arbitration Law states that “*arbitration hearings shall be private, and anyone who is third party to the dispute shall not attend*”.⁵² However, Yemeni society recognizes a special type of arbitration called Tribal Arbitration in which the rule is publicity of arbitral proceedings. Anyone can attend the hearings, and the award is made publicly; privacy is the exception.

The logic behind this general rule of publicity is the same as that considered by the legislator in deciding that court proceedings are public. On the one hand, publicity is the rule to allow the public to monitor arbitrators' performance and to ensure justice is being done. It also serves the purpose of protecting the arbitrators' reputation for everyone can witness their impartiality and independence. On the other hand, privacy is employed exceptionally in disputes where the tribe's reputation is at stake or when family affairs are being resolved.⁵³

Obviously, Tribal Arbitration is special to Yemen. It rather resembles the customary form of arbitration that existed before the modern state interfered to regulate and control arbitration practice. The whole system of Tribal Arbitration is exceptional and cannot be said to represent the practice of commercial arbitration Yemen. Its publicity rule is not capable of constituting a customary practice in the legal sense given that the Yemeni commercial arbitration law expressly provided for the privacy of arbitration hearings.

Other than the above listed exception to the rule of privacy, the laws of the Arab countries vary in regulating arbitration hearings in general and the matter of privacy specifically. Nonetheless, the consensus on the existence of an established practice of privacy, albeit with the exceptions discussed above, prevails.⁵⁴

⁵¹El-Awa (2013, p. 53).

⁵²Article (38).

⁵³Al-Jabaly (1996, p. 117).

⁵⁴El-Awa (2009, para 11-13, pp. 309–310).

2.4 Consequences of Breach

The obligation to maintain the privacy of arbitral hearings falls on the arbitral tribunal because it is the party in charge of managing the arbitration hearings.⁵⁵ In practice, it is inconceivable, given the private nature of arbitration, that strangers to arbitration can breach privacy contrary to the tribunal's decision to hold the hearings privately.

However, it is conceivable, albeit unreported, that the tribunal would allow strangers into the arbitration room against the will of one party. In such a case, two consequences would follow from the supplementary nature of the provision on privacy. First, the party wishing to object to breaching privacy must so do promptly; otherwise his delay would be construed to constitute a waiver of his right to object. Secondly, the only available compensation against any harm sustained is by way of damages, given that the injured party can establish elements of civil responsibility against the wrongdoer. In the case of members of the arbitral tribunal being considered the party in breach then it is likely that their liability will be contract based, while if a third party is the wrongdoer, liability will be tort based.

The majority of my interviewees are of the opinion that the result of breaching privacy is civil liability, to be determined according to the general principles.⁵⁶ A few of them argued that nullity of the arbitral award should be the consequence.⁵⁷ They considered this breach to represent a nullity in the arbitral procedure that affects the award, which is one of the grounds for challenging arbitral awards under article (53/1/g) of the Arbitration Law in Egypt. However, this opinion is not entirely correct, at least in Egypt.

Article (53/1/g) reads as follows: “1. *an action to annul the arbitral award is admissible only on the following grounds... g. If nullity occurs in the arbitral award, or if the arbitral procedures are tainted by nullity affecting the award.*” To determine the scope of this article one must define what a procedure is.

According to Professor Fathi Waly; a procedure is the legal “***act that entails by law immediate consequential procedural impact, and is part of the litigation***”.⁵⁸ The impact referred to in this definition could be to start the litigation process, develop, amend or terminate it.⁵⁹ In this sense, privacy is not a procedure, because it is not an action in itself; it is a characteristic of the manner in which arbitral

⁵⁵Saabna (2008, p. 108).

⁵⁶Professor Borham Atallah, professor of insurance and commercial law, University of Alexandria, interview dated 25/11/2010; Dr. Salah Al-Moqadam, attorney-at-law, interview dated 16/12/2010; Al-Beshri (interview: 11/11/2010), and Sadeq (interview: 20/12/2010).

⁵⁷Interviews with: professor of civil law, Ain Shams University who practices and teaches arbitration extensively, dated 24/11/2010, Cairo; Professor Reda Al-Sayed, professor of commercial law, practices arbitration both as counsel and arbitrator, dated 25/11/2010, Cairo, and Professor Ahmad Sawy, professor of procedural law, Cairo University, dated 10/11/2010.

⁵⁸Waly (1997, para 33, p. 81), and El-Awa (2009, para 3-1, p. 80). The same definition was used in the explanatory memorandum of the current Law of Procedure, the law no 13 of the year 1968.

⁵⁹Waly (1997, para 32, p. 80), and El-Awa (2009, para 3-3, p. 80).

procedure is conducted. It does not impact on the progress of the litigation process (in this context the arbitral proceeding) in the manner described herein. Furthermore, article (53/1/g) specifies that procedural breaches should affect the award in order to constitute a valid ground for annulling the award. I cannot think of a case where a breach of privacy can affect the award to the extent of annulling it. Accordingly, a breach of privacy is unlikely to constitute a valid ground for annulling the arbitral award.

Thus, I am of the opinion that the only consequence for breaching the privacy of arbitration hearings is civil liability as long as the injured party can prove its elements under the governing laws, in tort or contract, as the case maybe.

2.5 Confidentiality in the Egyptian Legal System

The duty of confidentiality is an obligation to abstain from disclosing certain information. For a legal obligation to exist, it has to be derived from a law provision, or from one of the other recognized sources of legal rules. In the Egyptian legal system, article (2) of the Egyptian Civil Code, promulgated by the law no 131 of the year 1948, sets, exclusively, the sources of the law. It reads as follows:

In absence of an applicable law provision, the judge shall decide according to custom and in absence of custom in accordance with the principles of Sharia', in absence of such principles, the principles of natural law and justice shall apply.⁶⁰

Accordingly, in any arbitration governed by Egyptian law, for any legal duty of confidentiality to exist, it must be established by reference to either a provision in a relevant legislation, custom, or principles of *Sharia*'. Also, the parties can agree to confidentiality either expressly in their arbitration agreement or impliedly by agreeing to govern their arbitration by arbitration rules that provide for the said duty.⁶¹ In either case, the duty of confidentiality would be imposed on the parties by virtue of their contract rather than a law provision; contractual confidentiality is outside the scope of this study, as explained in Chap. 1.

Also, it is validly noted that:

Arbitrator's adjudication [of disputes] is a judicial work of special nature, because it is not carried out by the judicial authority, on the one hand... On the other hand, the traditional rules of codified law may not apply therein; custom and rules of justice would rather apply [in arbitration]⁶²

⁶⁰It may be said that this provision addresses judges and is irrelevant to arbitrators; however, the Civil Code in Egypt is the general law, absent an answer to a specific matter in any other law, the arbitrator shall resort to the provisions of the Civil Code to find a relevant rule.

⁶¹El-Awa (2009, para 11-8, p. 308).

⁶²Aboulwafa (1983, para 3, p. 19).

2.6 The Arbitration Law

In this section I examine the Arbitration Law no 27 of the year 1994. Regarding confidentiality, it deals with the publication of arbitral awards,⁶³ it provides that an arbitral tribunal shall deliberate before issuing arbitral awards,⁶⁴ and it permits a dissenting arbitrator to include his reasons for dissent with the arbitral award.⁶⁵ These issues shall be discussed respectively in the following sections.

2.6.1 Confidentiality of Arbitral Awards—Article (44/2)

The only provision, in the Arbitration Law, dealing expressly with the duty of confidentiality is article (44/2). It reads as follows:

The arbitral award may not be published in whole or in part except with the approval of the parties⁶⁶

This article grants protection for a specific document, the arbitral award, and is silent in respect of all other documents used and/or produced for the purpose of arbitration. However, it does not address a specific group of people (e.g. the arbitrators). Thus, the duty established, therein, is a general one, owed by every person, whether natural or legal, to the parties to the arbitration in which an award was issued. According to the explanatory memorandum of the Arbitration Law, article (44/2) was introduced into the Arbitration Law of 1994 “*to confirm the confidentiality principle in arbitration, which is often of special importance to the parties to protect their commercial relationship*”.⁶⁷

While the Model Law, the historical source of the Egyptian Arbitration Law, does not include a corresponding provision, the arbitration laws of Syria (article (44), law no 4/2008), Jordan (article (42/B), law no 31/2001), Yemen (article (49), law no 22/1992), Morocco (section (327-27/2), law no 05/2008)⁶⁸ and Kuwait (article (7/4), law no 11/1995)⁶⁹ include similar provisions.⁷⁰ Contrary to this prevailing approach upholding the confidentiality of arbitral awards, it is reported

⁶³Article (44/2).

⁶⁴Article (40).

⁶⁵Article (43/1).

⁶⁶The English translation for the Arbitration Law 1994 used throughout this book is found on the website of Cairo Regional Centre for International Commercial Arbitration: <http://www.crcica.org.eg/law27.html#five>.

⁶⁷*The Explanatory Memorandum of the Egyptian Arbitration Law*, para 4, p. 56.

⁶⁸This law repealed and replaced the 8th book of the Moroccan law of Civil Procedure.

⁶⁹This law governs judicial arbitration in civil and commercial matters in Kuwait.

⁷⁰El-Awa (2009, para 11-20, p. 319).

that the draft arbitration bill in Libya proposes to allow publication of arbitral awards unless either of the parties objects.⁷¹

To define the exact scope of article (44/2), two concepts merit definition, i.e. “*arbitral award*” and “*published*”.

2.6.1.1 What Constitutes an Arbitral Award for the Purpose of Article (44/2)?

The Arbitration Law authorizes the arbitral tribunal to issue different types of awards: final,⁷² consent,⁷³ partial, interim,⁷⁴ default,⁷⁵ and additional⁷⁶ awards. Article (44/2) does not refer to a specific type of award. Given its generality, and that no evidence of a more specific interpretation can be deduced, the term “*arbitral award*” shall be interpreted to mean any award rendered by the arbitral tribunal. Any interpretation to the contrary shall frustrate the legislative intention to protect the parties’ confidential information that may very well be included in any arbitral award regardless of its type.

Nevertheless, the Arbitration Law does not specify what constitutes an arbitral award. It rather provides for specific requirements that must be satisfied in arbitral awards: that an award must be made in writing; it must bear the signature of the arbitrators; it must be reasoned; it must include a copy of the arbitration agreement, and include information identifying the parties and the arbitral tribunal members.⁷⁷ If the requirements set in article (43) are satisfied in a specific document produced by the arbitral tribunal, does this make it an arbitral award? Or, if one or more of the said requirements are missing, would this negate the document’s classification as an award?

When the Egyptian Court of Cassation addressed this question, it ruled that:

The text of article (43/3)... shows that the legislator aimed by requiring the inclusion of this information in the award to ascertain that the arbitral award is made within the arbitrators’ jurisdiction derived from the arbitration agreement to protect the best interest of the parties. Thus, it is material information necessary for the validity of the award; its absence frustrates the purpose for which the legislator required its inclusion in the award leading to its annulment.⁷⁸

⁷¹Ibrahim (2011, footnote 49, p. 540).

⁷²Article (48/1). It states that the final award concludes arbitration procedures.

⁷³Article (41).

⁷⁴Article (42).

⁷⁵Article (35).

⁷⁶Article (51).

⁷⁷Article (43).

⁷⁸The Egyptian Court of Cassation, judgement on 18/12/1997, case no 4623, judicial year 66. Also, its judgments on 27/2/2007, case no 10635, judicial year 76; 23/1/1990, case no 2568, judicial year 56, and 24/3/1991, case no 90, judicial year 58.

It is clear from the above text that the information the Arbitration Law requires to be included in arbitral awards relates to the validity of the arbitral award. An award which does not include any of the required information is still an arbitral award, yet it is susceptible to annulment under article (53/1/g). Would a reasoned, written and signed decision by an arbitral tribunal to appoint an expert or ordering an interim measure be classified as an arbitral award for the purpose of article (44/2)?

Academically, it is argued that “*in the absolute, the term ‘arbitral award’ means the award which ends the dispute, it is rendered by the arbitral tribunal, by which the [arbitration] procedures comes to an end; the arbitral dispute is concluded and the tribunal’s jurisdiction is exhausted*”.⁷⁹ Moreover, arbitral awards are discerned from other procedural decisions, interim measures, and orders made by the arbitral tribunal to be “*the award dealing with the subject-matter of the dispute in a manner that resolves the dispute conclusively*”.⁸⁰ Collective reading of these two definitions concludes that any decision made by the arbitral tribunal resolving an element of the subject-matter of the dispute is an arbitral award within the meaning of article (44/2). This includes interim awards, which may not settle the dispute entirely, but may settle it in part (e.g. it determines whether a certain claim fails or succeeds, while the final amount payable will be decided in the final award⁸¹). This, in my opinion, is the correct meaning of the term *arbitral award*. Other orders rendered by the tribunal in the course of the arbitration process would be covered by the general duty of confidentiality, if any, relating to all other arbitration documents.

2.6.1.2 The Prohibited Act—to Publish

Article (44/2) prohibits a specific act: to publish arbitral awards. Publishing is the positive act of disclosing the award publicly. According to the Egyptian Court of Cassation, publicity comprises two essential elements, if either one does not exist, publicity, as a legal status, does occur: firstly, the distribution of a written text to an unidentified number of people, and secondly, the intention to make public the content of the written text.⁸²

In a case to annul an arbitral award before the Cairo Court of Appeal, the plaintiff contended that the arbitral tribunal’s decision obliging him to publish an advertisement in a newspaper stating that the other party never owed him any monies is a breach of the duty of confidentiality stipulated by article (44/2), and

⁷⁹El-Awa (2009, para 5-3, p. 127).

⁸⁰Bereari (2004, p. 180), and Haddad (2008, paras 513 and 517, pp. 341 and 343).

⁸¹Haddad (2008, para 515, p. 342).

⁸²El-Awa (2009, para 11-17, p. 317). Also see the Egyptian Court of Cassation, criminal circuit, judgments on 5/4/1998, case no 12971, judicial year 60, and 12/7/1994, case no 40031, judicial year 59.

thus this arbitral award should be annulled. The court rejected this contention and ruled that:

Alleging that the award's ruling as to publishing the advertisement, set out in its operative part, breaches the provisions of article (44/2)... This allegation is incorrect, and the [matter in question] is irrelevant to the grounds for annulment listed in article (53). It is so because the publication ordered in the award does not amount to 'a publication of part of the award' in the meaning intended by the legislator for article (44). It is just a compensation for the injured party without any reference whatsoever to the dispute or its parties.⁸³

Most importantly, this judgement clarified that breaching article (44/2) does not annul the arbitral award.⁸⁴ Thus, if publication took place, without consent, the injured party cannot request the arbitral award to be annulled. One may be, then, justified in concluding that if any other duty of confidentiality proved to exist in arbitration, the breach of which would not be a valid ground for challenging the arbitral award. The injured party may still seek compensation by way of damages only, subject to successful establishment of the suffered damages resulting from a specific publication. He may, also, be entitled to request the immediate stoppage of the unlawful publication.

The Court continued to state that:

Authorizing the arbitral tribunal, in the present dispute, to act as an amicable compositor gives it [the tribunal] wider authority to choose the suitable resolution for the dispute according to the rules of justice and equity, without being restricted by the law provisions.

Traditionally, it is considered that an arbitral tribunal acting as an amicable compositor is exempted from the duty to abide by the rules of the substantive law applicable to the dispute. This judgement establishes that an amicable compositor⁸⁵ is not bound by the law, substantive as well as procedural. This would naturally include the duty of confidentiality set out in article (44/2). Thus, authorizing the tribunal to act as amicable compositor includes an implied waiver of the parties' rights under article (44/2). This exemption does not extend any further after the issuing of the final arbitral award. It does not permit any member of the tribunal to publish the arbitral award, because such act will occur after the tribunal will have already exhausted its jurisdiction and its members would have lost their capacity as arbitrators, and would, hence, be obliged, as ordinary persons, to abide by the rules of law including that of prohibiting the publication of the arbitral award without its parties' consent.

⁸³Cairo Court of Appeal, commercial circuit no (91), judgement on 27/11/2002, cases nos 11, 14 and 24, judicial year 119.

⁸⁴El-Awa (2009, para 11-19, p. 318). Contrarily, a Syrian Court of First Instance refused to grant enforcement of an arbitral award because the arbitrator rendered the award in a hearing held in a public library. See: El-Awa (2009, para 11-13, footnote 385, pp. 311 and 312).

⁸⁵Article (39/4) allows the parties to so authorize the tribunal.

2.6.2 *The Reason Why the Law Specifies Arbitral Awards*

Awards are documents of a special nature different from all other arbitration documents. First, they establish the parties' rights in a final and binding manner, and are often made, similar to court judgements, in the "*name of the people*".⁸⁶ Second, article (55) of the Arbitration Law stipulates that arbitral awards, similar to court judgements, have the *res judicata* effect, and shall be forcibly executed in state courts. Third, arbitral awards often end up in the courts' public record in the course of challenging the award or its coercive execution, which could possibly make it more available to the public. Fourth, arbitral awards are the counterparts of court judgements which are public documents.

Given these characteristics, it is possible, for arbitration users, to expect arbitral awards to enjoy the same publicity granted by the law to court judgements. Therefore, it was essential for the law maker to clear up this potential confusion by expressly providing for the confidentiality of arbitral awards, and prohibiting their publication absent the parties' consent, as stated in article (44/2) of the Arbitration Law. Other arbitration documents do not share the above listed characteristics with arbitral awards, hence only arbitral awards were specified in this article.⁸⁷

2.6.3 *Article (44/2) Is a Supplementary Provision*

The Cairo Court of Appeal rejected a plea that an arbitral award is null because it ordered the losing party to publish the arbitral award. The court founded its ruling on the fact that the parties had expressly permitted the arbitral tribunal to publish the award at the beginning of the arbitration; as such the parties left the decision concerning the publication of the award to the arbitral tribunal's discretion, and had impliedly waived their rights under article (44/2).⁸⁸ The Court of Cassation subsequently upheld this ruling.⁸⁹ Unfortunately, the court did not discuss the doctrine of confidentiality any further and limited itself to pointing out the parties' acceptance beforehand of the arbitral tribunal decision on the matter.

Therefore, legal provisions providing for a duty of confidentiality in arbitration are supplementary, and the parties are at liberty to waive their right to confidentiality. Article (44/2) is express in envisaging that the parties can consent to the

⁸⁶The Egyptian Court of Cassation ruled that this phrase need not be mentioned in arbitral awards, judgment on 14/2/1988, case no 1640, judicial year 54, and it is no more found in recent arbitral awards. For further details on this issue see: Waly (2007, para 254, p. 435), and El-Awa (2009, paras 5-57 and 5-58, p. 154).

⁸⁷El-Awa (2013, pp. 59–60).

⁸⁸Cairo Court of Appeal, commercial circuit no (7), judgement on 8/2/1994, case no 2652, judicial year 110.

⁸⁹Court of Cassation, judgement on 10/3/2009, case no 3161, judicial year 64.

publication of the arbitral award, in whole or in part. Consent may be express (e.g. written agreement: allowing publication or waiving their rights under article (44/2))⁹⁰ or implied (e.g. not taking an action against whoever publishes the award). Legally, parties' consent is a material incident which can be proved by all means of proof.⁹¹

Also, the Egyptian Court of Appeal ruled that:

It is evident from the documents that the parties chose a permanent arbitration institution to resolve their dispute, which is the ICC International Court of Arbitration, Paris, and they consented to have their dispute resolved according to its rules. Thus, there is no room to apply the default rule of article (43/1) of the Egyptian Arbitration Law... because it does not apply except when the parties do not agree on specific procedural rules, or in case they agreed to apply the procedural rules included in the Egyptian law....⁹²

The said article (43/1) sets out the requirements for the validity of arbitral awards. Failure to satisfy any of these requirements makes the award susceptible to nullity if challenged in court. Given that the Court of Appeal ruled that the parties' agreement to institutional arbitration rules leaves no room for applying an important rule as that set in article (43/1), one that affects the validity of the award, it is not unlikely that it will follow the same line of reasoning in matters related to article (44/2). Therefore, the parties' agreement to govern their dispute by certain arbitration rules, without specifying the Egyptian Arbitration Law of 1994 as the governing arbitration law, would rule out any non-mandatory provisions of the Arbitration Law of 1994, including article (44/2).

According to the above quoted judgement, if the parties arbitrating according to Egyptian laws expect that by agreeing on a set of rules that provide for a duty of confidentiality other than that set out in article (44/2), they enhance the confidentiality of their arbitration (i.e. combine the different provisions on confidentiality and reach a more comprehensive duty of confidentiality, e.g. confidentiality would extend to both the award and pleadings, instead of the award only pursuant to the provisions of the Egyptian Arbitration Law), this expectation may very well be incorrect. According to a recent interim order issued by the head of Cairo Court of Appeal,⁹³ an arbitration agreement that specifies certain institutional arbitration rules renders inoperative all the supplementary provisions of the arbitration law applicable to that arbitration agreement, even if the parties mention both the said law and the institutional rules in their agreement expressly. In my opinion this is not entirely correct.

⁹⁰El-Awa (interview: 13/1/2011) said that in his practice as an arbitrator and at the outset of each arbitration he asks the parties to consent to publication of the award. In his experience, the vast majority of the parties accept. Nonetheless, a few have refused any sort of disclosure of their award, let alone its publication.

⁹¹Waly (2007, para 259, p. 452).

⁹²Cairo Court of Appeal, Commercial Circuit no (7), judgement on 12/3/2001, case no 49, judicial year 117.

⁹³Cairo Court of Appeal, order issued on 15/5/2013, in the order no 27, judicial year 130 arbitration orders.

One should distinguish between two different cases; the first when the parties refer in their agreement to institutional arbitration rules only and are silent as to the applicable arbitration law, in such case it is correct to interpret this agreement to mean that the arbitration should be conducted according to the institutional rules and only the mandatory provisions of the *lex arbitri* shall apply. The second case occurs when the parties mention expressly, in their agreement that their arbitration shall be governed by certain arbitration law and specific institutional rules.

In the latter case, the supplementary rules of the arbitration law are applicable, not as a matter of law, but as the rules chosen by the parties to govern their arbitration together with the institutional rules in question. The latter shall have prominence in case of conflict between provisions governing the same issue (e.g. the choice of the arbitration seat, or the manner in which the award shall be made). However, where each of the arbitration law and the institutional rules includes provisions regulating the same issue, yet they are not in conflict (e.g. the law affirms the confidentiality of the award, whereas the institutional rules stipulate for the confidentiality of the documents exchanged in the arbitration) then both articles should be given effect, as a matter of party autonomy. This interpretation, albeit in conflict with a number of the court judgements, still I find it to be worthy of consideration as it gives prominence to party autonomy which is the true foundation of the modern arbitration system.

Furthermore, according to article (8) of the Arbitration Law of 1994, a party wishing to object to the violation of a supplementary rule of arbitration, whether found in the law or the agreed upon arbitration rules, should raise his objection to the arbitral tribunal immediately, otherwise such delay shall be interpreted to constitute a waiver, on his part, of his right to object to this violation. Egyptian courts applied this principle in relation to objections to tribunal's jurisdiction,⁹⁴ composition of the arbitral tribunal,⁹⁵ notifications of arbitration hearings,⁹⁶ and time for rendering the award.⁹⁷ It is not unconceivable that courts will apply the same rule to claims based on breach of confidentiality under article (44/2).⁹⁸

⁹⁴Court of Cassation, judgement on 17/6/2001, case no 291, judicial year 70.

⁹⁵Cairo Court of Appeal, Commercial Circuit no (8), judgement on 19/1/2009, case no 41, judicial year 125.

⁹⁶*Ibid.*

⁹⁷Cairo Court of Appeal, Commercial Circuit no (91), judgement on 29/9/2003, case no 6, judicial year 120.

⁹⁸It may appear that the aforementioned article (8) is irrelevant because any publication of the award would occur after the arbitration is concluded and hence there would be no arbitral tribunal in place to address issues relating to such publication. This may be true of the final award concluding the arbitration. Nonetheless, given that the tribunal has the authority to issue different awards pending the issuance of the final one, article (8) is still of relevance regarding confidentiality of awards.

2.6.4 Dissenting Opinions

The practice of dissenting opinions is not a feature of the Egyptian judicial system. A suggestion to permit judges to dissent was discussed at the time of amending the law of procedure no 77 of the year 1949, but it was ruled out in favour of preserving the integrity of court judgements.⁹⁹

Dissent in arbitration is a well-established practice in Egypt; it existed long before the current Arbitration Law.¹⁰⁰ The Arbitration Law does not provide expressly for dissenting opinions, yet, it states that arbitral awards can be issued by majority, and if the minority did not sign the arbitral award, the reasons for that shall be stated in the award itself.¹⁰¹ The Cairo Court of Appeal ruled that: *“It does not affect the validity of the arbitral award that the plaintiff’s appointed arbitrator attached his dissenting opinion which includes the reasons of his objection to the award as long as he evidenced his dissent, in his handwriting, below his signature in the arbitral award’s document...”*¹⁰²

Thus, Egyptian Courts recognize the practice of arbitrators giving dissenting opinions as valid, and that the inclusion of dissenting opinions in arbitral awards does not affect the validity of the awards.

In the context of defining the scope of article (44/2) of the Arbitration Law, the inevitable question is: if the dissenting opinion is made separately from the arbitral award, i.e. in a separate document, would it constitute an integral part of the award or otherwise? The answer to this question shall decide whether publishing dissenting opinions, absent parties consent, would constitute a breach of article (44/2).

Cairo Court of Appeal ruled that the Arbitration Law does not require dissenting opinions to be attached to arbitral awards, and that it is enough for the reasons of dissent from the majority to be stated in the arbitral award itself.¹⁰³ Furthermore, academics stated that a dissenting opinion written on separate document is *“not considered part of the arbitral award”*.¹⁰⁴ This opinion, which is widely accepted,

⁹⁹Aboulwafa (2000, para 36, p. 81).

¹⁰⁰Aboulwafa (1983, para 11, p. 264).

¹⁰¹Articles (40) and (43/1).

¹⁰²Cairo Court of Appeal, Commercial Circuit no (91), judgement on 30/5/2007, cases nos 93 and 94, judicial year 123. The same court interpreted the parties’ agreement to submit their dispute to the rules of Cairo Regional Centre for International Commercial Arbitration, which did not specify a time frame for the arbitral process, while the Arbitration Law of 1994 sets a time frame of 12 months—to mean that the parties delegated to the arbitral tribunal the authority to decide such time frame as it deems appropriate. See: Cairo Court of Appeal, commercial circuit no (91), judgement on 30/12/2003, cases nos 91 and 96, judicial year 119.

¹⁰³Cairo Court of Appeal judgements: commercial circuit no (91), on 27/11/2002, case no 70, judicial year 119; commercial circuit no (63), judgement on 20/12/1995, and commercial circuit no (91), on 29/6/2003. The last two judgements are mentioned in: Abdelraouf (2003, pp. 141 ff.).

¹⁰⁴Haddad (2008, para 553, p. 367), and Bereari (2004, para 110, p. 183).

may be valid in relation to the requirements for the validity of arbitral awards. However, it poses a problem in the context of the protection conferred on the arbitral award by article (44/2). If the viewpoint that a dissenting opinion is not part of the arbitral award is correct, then absent a general duty of confidentiality, publication of dissenting opinions would not be prohibited, regardless of the amount of information included therein about the parties' dispute, relationship, their trade secrets and the particulars of the arbitral process. It is well known that dissenting opinions are often not limited to the legal opinion of the dissenter.¹⁰⁵ Allowing publication of dissenting opinion(s), because it is not part of the arbitral award, is almost like granting confidentiality to arbitral awards with one hand and taking it back with the other, simultaneously!

Essentially, any dissenting opinion will address some of the matters dealt with in the arbitral award. It may even contain information the parties wish to keep confidential, the least of which is the existence of the arbitration and the parties' names. Article (44/2) aims at keeping this information confidential by prohibiting publication of awards without the parties' consent. The above view, that dissenting opinions are not part of arbitral awards, defeats the purpose of article (44/2) because it leads to the conclusion that the publication of dissenting opinions is not restrained by the same prohibition set out in article (44/2) as an integral part of the arbitral award.

There needs to be a general duty of confidentiality in arbitration to prevent the publication or public use of dissenting opinions; otherwise, the law maker and the courts need to re-visit the definition of *arbitral award* for the purpose of article (44/2) to enclose dissenting opinions.

2.6.5 *The Effect of Recourse to State Courts*

Any recourse to state courts in relation to arbitral awards is *prima facie* contrary to the purpose of article (44/2), i.e. to maintain the confidentiality of the arbitral award and the information included therein. The parties' right to seek enforcement¹⁰⁶ or annulment¹⁰⁷ of arbitral awards through state courts, and their duty to deposit the award with the clerk of the court¹⁰⁸ as a pre-condition for accepting an application for enforcement, makes the arbitral award part of the official public record in court.¹⁰⁹

¹⁰⁵ Redfern (2005).

¹⁰⁶ Article (56).

¹⁰⁷ Article (52).

¹⁰⁸ Article (47).

¹⁰⁹ In my interviews, I enquired about the public's access to these court records and there seemed to be no straightforward answer to that. This issue is discussed further later in this chapter.

In case of an application for enforcement or an action for annulment, at least the arbitral award and the arbitral agreement will be deposited at the court's registry, if not the whole of the arbitration file.¹¹⁰

If one party suffers damages because the other sought enforcement or challenged the arbitral award in state courts which led to the disclosure of information which would have otherwise remained confidential, it is much doubted that there will be any room for award of compensation in such case. The right of recourse to state courts is granted to all parties equally by the Arbitration Law for the purposes of enforcement and challenging arbitral awards. To attempt to argue that this right was exercised in bad faith or was arbitrarily used is not an easy course to take.

It is important for the legislator to regulate access to the records and files of arbitration-related cases in state courts in a manner consistent with the confidentiality granted to an arbitral award in the Arbitration Law, otherwise article (44/2) would be a dead letter.¹¹¹

2.6.6 *Scholarly Interpretation of Article (44/2)*

The extent of the confidentiality granted to arbitral awards by article (44/2) was the subject of many scholarly discussions. It is said that stipulating a duty of confidentiality concerning arbitral awards prevents any kind of publication of arbitral awards or parts thereof without the parties' consent.¹¹² Scholars endorsing this interpretation criticize article (44/2) because, they argue, it hinders the development of the law by restraining publication of arbitral awards. Arbitral awards, it is said, can serve as persuasive, if not binding, precedents in future arbitrations. As such, a rather permissive interpretation of this article is advocated by a number of scholars.¹¹³ They argue that the correct interpretation of this article is to prohibit only publication of complete arbitral awards, and that publication of redacted versions of the awards, from which all information that may identify the parties of the dispute

¹¹⁰Waly (2007, para 259, p. 452), and El-Awa (2009, paras 11-21 to 11-24, pp. 320 ff.). In respect of the accessibility of public official records, we need to differentiate between two cases: (1) Judicial awards: these are, by virtue of the modern administrative regulation of the judicial system since its establishment in 1930, in the public domain, any person can obtain a copy of any court decision from the microfilm department in court. This is the practice in Egypt. (2) Case files: anyone who wants access to these files shall so request in writing from the president of the court. Article (47) of the Arbitration Law of 1994, which requires arbitral awards to be deposited with the clerk of the court, is silent on the matter of access to these arbitration awards. Given that this record is a public one, and absent an express provision to the contrary, one cannot assume that access will be restricted. Jurists writings suggest that no such restriction exists. A real-time attempt to obtain an award deposited with the court clerk would be of interest.

¹¹¹El-Awa (2009).

¹¹²Waly (2007, para 259, p. 452); Bereari (2004, para 120, p. 197), and Sawy (2012, p. 181).

¹¹³Waly (2007, para 259, p. 452), and El-Sharkawi (2011, para 331, p. 453).

was eliminated, does not breach article (44/2)¹¹⁴ and that the confidentiality conferred on the arbitral awards thereby would not be compromised by publication of redacted versions of the awards. The same is true of publishing any legal discussions or principles laid out in the awards.

However, Egypt is a civil law country, in which the value attached to state court judgements is limited. Arbitral awards are of even less persuasive value than court judgements, especially as they are often rendered by arbitral tribunals the members of which are not all legally qualified and the regulatory framework of arbitration does not permit judicial scrutiny of the tribunal's application of the law. Having said that, could it still be argued that publishing arbitral awards would contribute positively to the development of law?

I am of the opinion that publication of redacted awards contributes to scholarly discussions on the various legal matters addressed in arbitration, especially because in many fields today, arbitration is the first means sought to resolve disputes as an attractive alternative to lengthy court proceedings. Accordingly, legal discussions and analysis that occur in arbitral awards offer judges, as well as scholars, richer insight into complex specialized topics, which they may utilize in their own judgements as they deem appropriate.¹¹⁵ As such, publication of redacted awards does not formally and directly lead to development of the law; it rather makes available, for those who are directly involved in the development of the law, a wider array of intellectual and legal discussion. It is essential to note that any such redacted publication might provide an injured, or even a bitter losing party, with a valid cause of action against the person responsible for the publication, if the redaction is not done so as to eliminate all information that might lead to the identification of its parties.

2.6.7 *Deliberations—Article (40)*

Article (40) of the Arbitration Law reads as follows:

The award of an arbitral tribunal composed of more than one arbitrator shall be issued by a majority of opinions **after deliberations conducted in the manner decided by the arbitral tribunal**, unless the parties agree otherwise.

¹¹⁴El-Awa (2009, para 11-19, p. 318), and Bereari (2004, para 120, p. 198).

¹¹⁵Nonetheless, this interpretation, may find some insight in the discernment discussed by Lord Toohey, in his speech in *Esso v. Plowman*, between the award and its reasons. His Lordship reached the conclusion that the reasons should receive the same treatment as the award in relation to enforcing one party's rights against the other or against third party, given that a duty of confidentiality existed. See, Op. Cit., Chapter 1, note 4, pp. 261–262. Notably, the Egyptian Arbitration Law of 1994 entitles the parties to elect that the arbitral award be without reasons [article 43/2)], prior to which reasoning of arbitral awards was a public order requirement in making awards. See: Aboulwafa (1983, para 112, p. 257), and El-Awa (2009, para 5-38, p. 144).

Article (29) of the Model Law,¹¹⁶ corresponding to article (40) of the Arbitration Law no 27 of the year 1994, is silent on the tribunal's deliberations. Reference to deliberations, I think, was added to reflect the domestic legislative tradition in making awards: that deliberations must take place before awards are rendered.

The drafting of this amendment was very unfortunate. In the Model Law text the phrase "*unless otherwise agreed by the parties*", followed immediately the "*majority*" requirement, meaning that the parties can, for example, insist on a unanimous award or authorize the chairman of the tribunal to make the award if a majority is unattainable. The drafter of the Arbitration Law inserted the addition as to deliberations before the phrase "*unless the parties otherwise agree*". This ill-insertion led to much confusion in interpreting article (40). Some jurists opined that the law allowed the parties to agree that award- may be rendered without deliberations¹¹⁷ or that deliberations can be done otherwise than secretly.¹¹⁸ Both interpretations are possible as a matter of mere linguistic interpretation of the text, but are *prima facie* wrong in light of the public order requirements concerning the making of awards. These two interpretations were much criticized.¹¹⁹

In Egypt, as in many other countries, deliberation is a public order requirement which stands even without a law provision so providing.¹²⁰ If the award is made without deliberations it is null for breach of the public order. If it is manifest from the award document that the tribunal members did not deliberate before making their award, the court, on its own motion, shall declare the award to be null.¹²¹ Collective interpretation of articles (53/1/H) and (53/2) of the Arbitration Law dictates this conclusion.¹²²

The Arbitration Law does not specify the manner in which deliberations should take place. The arbitration laws of Lebanon (article (788), the legislative decree no 90 of the year 1983), Saudi Arabia (article (39), the Arbitration Law of the year 2012),¹²³ Oman (article (33/1), Royal Decree no 47 of the year 1997), and Algeria (article (1052), law no 8 of the year 2009) provide that deliberations shall be conducted secretly.¹²⁴

¹¹⁶Article (29) of the Model Law reads: "*In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members...*".

¹¹⁷Beraeri (2004, para 104, footnote 1, p. 172).

¹¹⁸Sawy (2012, para 141, pp. 173-174).

¹¹⁹Waly (2007, para 248, p. 430), and El-Awa (2009, para 5-17, p. 134).

¹²⁰Haddad (2008, para 590, p. 397).

¹²¹El-Awa (2009, para 5-17, p. 134).

¹²²Article (53/1/H) reads as follows: "*If nullity occurs in the arbitral award, or if the arbitral proceedings are tainted by nullity affecting the award*", and article (53/2) states that: "*The court seized with the action for nullity shall rule on its own initiative for the annulment of the arbitral award if its content violates public policy in the Arab Republic of Egypt*".

¹²³Promulgated by the Royal Decree no M/34 of the year 1433 Hijri.

¹²⁴Haddad (2008, para 1, p. 20 and para 517/8, p. 345), and El-Awa (2009, para 11-16, pp. 315-316).

2.6.7.1 The Meaning of Secrecy in Judicial Deliberations

Because the Arbitration Law does not expressly stipulate for the secrecy of deliberations, reference to the Civil Procedure Code articles and the relevant literature is justified and is, in fact, essential to understand the duty of secrecy of deliberations in arbitration. The Cairo Court of Appeal¹²⁵ has expressly quoted the articles in the Civil Procedure Law no 13 of the year 1968, which regulate the making of court judgements in the context of arbitration. The requirement of secrecy is primarily set out in article (166) of the Civil Procedure Code, which reads as follows:

Deliberation in judgements shall be conducted secretly between judges all together.

The logic behind the rule of secrecy is to grant judges the freedom they need to express their opinions, with no witness to their conduct of their judicial duty but their own conscience; to eliminate any possible influence on the course of their deliberations and the views they endorse, and consequently on the judgement itself, by any person who is not part of the judicial tribunal deciding the case;¹²⁶ to preserve the integrity of judicial awards, and finally to enhance peoples' confidence in the judiciary.¹²⁷

Secrecy of deliberations, thus, entails three requirements. Firstly, only the judges who heard the pleadings shall take part in deliberations.¹²⁸ This principle is set out in article (167) of the Civil Procedure Code, which states that: "*Only the judges who heard the pleadings shall take part in deliberations, otherwise the judgement is null*".

Secondly, no one but the participating judges shall hear or attend the deliberations.¹²⁹ So, judges cannot deliberate in the presence of the parties, clerks or any other person who is not member of the judicial tribunal deciding the case. The very fact that the legislator was not satisfied by saying that deliberations should be confidential or be conducted in camera¹³⁰ is in line with further safeguarding the secrecy of deliberations by prohibiting even the mere observation of their conduct.

Finally, the judges shall not speak of the content of their deliberations to any person who is not member of the judicial tribunal adjudicating the dispute, especially the parties. The observation of these three requirements means that deliberation has been conducted in secrecy.

¹²⁵Cairo Court of Appeal, Commercial Circuit no (7), judgement on 5/9/2006, case no 86, judicial year 122.

¹²⁶Court of Cassation, judgement on 3/10/1998, case no 29653, judicial year 67.

¹²⁷Al-Ashmawy (1957, vol. 2, para 1074, p. 688).

¹²⁸The obligation to ensure the fulfilment of this requirement falls equally on the judges who heard the pleadings and those who did not, and who may accidentally be present at the time of deliberations.

¹²⁹Aboulwafa (2000, para 35, pp. 78 ff.).

¹³⁰The French legislator, too, requires deliberations to be conducted in secrecy. See: Redfern (2007, para 18-62, p. 386).

It must be noted that secrecy of deliberations is addressed in two different laws, each setting a different application of the principle of secrecy of deliberations. On the one hand, the Civil Procedure Code (articles 166–167) sets out the duty to conduct deliberations in secrecy; only the judges who are members of the competent tribunal shall attend the deliberations. These rules are public order requirements of the judicial function and according to the Court of Appeal, they relate to “*the proper conduct of justice, thus it is mandatory to apply them in arbitration procedure*”.¹³¹ As such, the rules set out in articles (166) and (167) of the Civil Procedure Code apply equally in both state courts and arbitration, as a matter of judicial public order and general principles of the proper conduct of justice.

On the other hand, article (74) of the Law of the Judicial Authority states that “*judges may not divulge the secrets of deliberations*”. This article sets out a free-standing obligation; **it is an administrative duty imposed on judges as members of the judicial authority** and is not particular to the conduct of deliberations in specific cases which they adjudicate. This duty aims at preserving the secrecy of deliberations in a manner different from that set out in articles (166) and (167) of the Civil Procedure Code. While the latter prevents unauthorized persons from attending each particular deliberation, hence becoming acquainted with its content, the former prohibits disclosure by those who are to take part in any deliberations, altogether.

Judges are, accordingly, under a general obligation not to divulge the secrets of deliberations whether during the course of deliberations or after the announcement of awards. This duty is two-fold: a judicial one (articles 166 and 167) and an administrative one (article 74).

2.6.7.2 Secrecy of Deliberations in Arbitration

As mentioned above, the Arbitration Law does not specify a certain manner in which deliberations should be conducted. Arbitrators are, hence, free to conduct their deliberations in the fashion they deem appropriate.¹³² Academics argue, correctly, that secrecy is a vital requirement in deliberations.¹³³ In line with this opinion, the Cairo Court of Appeal ruled that:

In arbitration, despite being a private judiciary distinct from the normal judiciary, arbitrators enjoy – as authorized by the law – the powers of judges in respect of the dispute before them, thus they shall abide by the constraints that a judge abides by in relation to the fundamental principles of adjudication, which are part of the public order in the society...

¹³¹Cairo Court of Appeal, commercial circuit no (91), judgement on 27/12/2006, cases nos 123 and 124, judicial year 121.

¹³²El-Sharkawi (2011, para 302, p. 401), and Cairo Court of Appeal, commercial circuit no (91), judgement on 22/11/2003, case no 46, judicial year 119, and commercial circuit no (7), judgement on 27/2/2005, case no 51, judicial year 121.

¹³³El-Awa (2009, para 11-14, p. 313), and El-Sharkawi (2011, para 302, p. 401).

among these rules is the necessity that their awards be made... after deliberations between all arbitrators, and that this deliberations shall be conducted secretly, as is the case in court judgements, between the arbitrators who heard the oral pleadings....¹³⁴

Accordingly, arbitrators are subject to the same duty to conduct their deliberation in secrecy. This requirement stems from the judicial public order in the society;¹³⁵ therefore, disputants have no authority to dispense with it. It is, thus, incorrect to interpret article (40) to mean that the arbitrators, or the parties, have the authority to decide that the tribunal's deliberations would be conducted other than secretly.

This judgement and the following conclusion are in my opinion justified. On the one hand, since the Arbitration Law is silent on the matter of the conduct of deliberations and the Arbitration Law is a special law for a specific type of civil procedure, then in filling this legislative gap, reference to the general law on civil procedure, i.e. the Civil Procedure Code, is inevitable. Therefore, the rules of the Civil Procedure Code in relation to the conduct of judicial deliberations, particularly concerning its secrecy, are equally applicable in arbitration.

On the other hand, it is widely agreed that arbitrators, in resolving disputes, are performing a judicial function. It is said that: "*Arbitrator's adjudication* [of disputes] *is a judicial work of special nature*"¹³⁶ and that "*arbitration, in its essence, is adjudication*".¹³⁷ Therefore, it is necessary to impose on arbitrators, in performing their judicial function, the duties essential to the performance of their judicial function. The most important duties as to the judicial function are those recognized as public order requirements, among which is preserving the secrecy of deliberations, as confirmed by the Court of appeal.¹³⁸

Conclusively, similar to judges' duty under article (166) of the Civil Procedure Code, arbitrators are under a duty to preserve the secrecy of their deliberations, by conducting them secretly, even absent an express law provision in the Arbitration Law so requiring. **This duty does not arise from the rule of confidentiality of arbitration; it rather derives from the judicial nature of arbitration, the general principles of adjudication and the public order requirements concerning the making of judicial awards, the counterpart of arbitral awards.**

It must be noted that although the function carried out by arbitrators is similar to that of judges, and this similarity imposes upon arbitrators a duty to observe some

¹³⁴Cairo Court of Appeal, commercial circuit no (63), judgement on 20/12/1995, case no 19, judicial year 1994.

¹³⁵This has been the case in the Egyptian legal system since establishment of national courts in Egypt. See: Abo Hief (1921, para 1081, p. 777), and Al-Ashmawy (1957, vol. 2, para 1074, pp. 688 ff.).

¹³⁶Aboulwafa (1983, para 3, p. 19). Also see: El-Sharkawi (2011, para 175, p. 208).

¹³⁷El-Awa (2009, para 7-1, p. 194).

¹³⁸See supra: footnotes 131 and 134 and the related text.

of the principles applicable in state courts, mostly public order principles, still the source of their jurisdiction is different, and this difference gives arbitrators more flexibility in carrying out their mandate, and permits them to dispense with many of the legal formalities that judges must abide by.

By way of example, deliberations need not be carried out in an official setting in the place where the arbitral hearings take place (as opposed to judicial deliberations taking place in judges' chambers in the court house) and arbitrators are at liberty to deliberate by other unofficial means. As the arbitrators may very well reside in different countries, for the sake of practicality and efficiency the major part of deliberations would take place over the telephone or via email. Requiring deliberations to be conducted in the official traditional manner that judges often follow, where all members of the tribunal would be present in the same room, would often prove unviable.

It is validly said that:

A rule of the confidentiality of deliberations must, if it is to be effective, apply generally to deliberation stage of a tribunal's proceedings and cannot realistically be confined to what is said in a formal meeting of all the members in the deliberation room... much of the deliberation work... is done less formally.¹³⁹

This remark is of particular value in the context of arbitration. As explained above, deliberations are not always conducted orally with all arbitrators present in the same room. Therefore, the duty of secrecy must be considered to extend to cover all communication between the arbitrators as to the dispute they are adjudicating, whether oral or written, taking place in an official or unofficial setting. Contending otherwise will defeat the legislative purpose of the rule of secrecy of deliberations in arbitration.

A rather interesting interpretation of the extent of *the secrecy of deliberations* was put forward by the Court of Appeal in its judgement of 8/2/1994,¹⁴⁰ in which the court rejected an allegation that deliberations did not take place between the arbitrators—an allegation made by the dissenting arbitrator, an allegation that was contrary to what the majority of arbitrators stated on the award document. The court ruled that since deliberations are required to take place secretly between the arbitrators, thus it is not within the court's power to question the arbitrators about the particulars of this deliberation. Apparently, the court considers the arbitrators' deliberations to be as sacred as those of judges, so that the court cannot investigate their occurrence. Thus, the arbitrators' statement that deliberations took place is to have the same conclusive value on the matter as that of judges.¹⁴¹

¹³⁹By Sir Robert Jennings, quoted in Redfern (2007, para 18-50, p. 383).

¹⁴⁰Op. Cit. note 88.

¹⁴¹Similarly, see: El-Sharkawi (2011, para 331, p. 403).

2.6.7.3 Consequences of Breaching the Secrecy of Deliberations

In the Judicial System

To determine the consequences of breaching the secrecy of deliberations **in the context of state courts** we have to differentiate between two time frames. The first is the time during which deliberations take place, which could possibly be several days or weeks given the big load of cases before each judicial tribunal, and the second is after the judgement is pronounced in open court.

The first stage is the time during which the deliberations are conducted; it starts after the conclusion of oral pleadings and ends with the oral pronouncement of the judgement in open court.¹⁴² **Maintaining secrecy during this stage is the essence of the duty of the secrecy of deliberations.** Under article (166) of the Civil Procedure Code, if the secrecy of deliberations is breached at this stage, because it concerns, as mentioned above, the proper conduct of the judicial function, the judge (s) in breach shall be subject to disciplinary as well as criminal sanctions.¹⁴³

As for the effect of such breach on the judgement, article (167) of the Civil Procedure Code reads as follows:

No one but the judges who heard the oral pleadings may take part in the deliberations, otherwise the judgement is null

This article perceives a particular breach of secrecy of deliberations that, also, annuls the judgement: when a judge who is not a member of the competent tribunal, and, as a consequence, did not hear the parties' oral pleadings, not only attends the deliberations but also takes part there in.¹⁴⁴ Although this breach is technically a breach of secrecy, I am inclined to think that nullity in this case does not arise solely from the breach of the secrecy rule; it is also concerned with the parties' right to be heard by the judge who will decide their dispute. Non-adherence to this right would inevitably compromise the principle of fair trial because:

Only the judge who hears the oral pleadings can understand its ambiguities. Any judge who is not informed of the [content of the] oral hearings – it is impossible for him to build an approach towards the right opinion that conforms to the facts of the case; what has been proven in it, and the legal considerations surrounding it.¹⁴⁵

The second time frame is indefinite. It is any time after the award is pronounced in a public hearing. Any breach of the secrecy of deliberations after the judgement is pronounced does not affect the validity or integrity of the judgement. While the main purpose of imposing this secrecy, as stated above, is to ensure that judges are

¹⁴²Pursuant to article (175) of the Law of Procedure the final draft of the judgement must be deposited with the court clerk on the same day of the oral pronouncement of the judgement, and it shall include both the reasons and the operative part of the judgement. The parties have the right to review this draft but they may not get a copy of it.

¹⁴³Sawy (1981, para 447, p. 712), and Aboulwafa (2000, p. 675).

¹⁴⁴Waly (2001, para 320, pp. 548–549, at A).

¹⁴⁵Aboulwafa (2000, para 35, p. 79)

free from any influence as they deliberate and decide the cases before them, article (74) of the Law of the Judicial Authority, imposing this duty on judges, does not set a specific time limit during which secrecy should be maintained. This duty is imposed on judges as members of the judicial authority; it is an administrative duty that upholds proper judicial behavior and the long-standing judicial custom to that effect. It complements the original duty existing during the conduct of deliberations, and the judge in breach would be subject to disciplinary sanctions.

In Arbitration

Regarding arbitration, jurists are divided. Some are of the opinion that because the duty to maintain the secrecy of deliberation is a public order requirement, thus, any breach thereof amounts to a violation of public order, and, hence, falls under articles (53/1/H) and (53/2) of the Arbitration Law. The former article allows annulment of arbitral awards if nullity occurred in any of the arbitration procedure that affected the award, and the latter permits the court to annul arbitral awards on its own motion if the award content violates the public order in Egypt.¹⁴⁶ Arguably, courts possess this authority even absent an express provision to this effect in the Arbitration Law.¹⁴⁷ Other jurists argue that breaching the secrecy of deliberations raises only the potential liability of the arbitrator who committed the breach, with no effect on the validity of the award.¹⁴⁸

Egyptian courts endorsed the latter opinion. In an action to annul the arbitral award, the claimant sought to annul the arbitral award based on the allegation that the two party-appointed arbitrators communicated with both parties, each in the absence of the other, in an attempt to reach an amicable settlement. He contended that these communications constituted a breach of the secrecy of deliberations and the requirement of impartiality on the part of the arbitrators. The Cairo Court of Appeal ruled that:

Even if it is true that the mentioned arbitrators violated the secrecy of deliberations – no nullity results from this, for it is agreed that secrecy of deliberations means that the parties should not be informed of the opinions exchanged by the arbitrators in their deliberation. The infringement of this rule raises only the arbitrator's potential responsibility for divulging the secrecy of deliberations, without any effect on the validity of the arbitral award.¹⁴⁹

The Court of Cassation agreed with the Court of Appeal's ruling in its own judgement of 9/2/2010.¹⁵⁰ This ruling is in line with the judicial principle that the

¹⁴⁶Bereari (2004, para 104, p. 173), and Sawy (2012, para 141, pp. 173–174).

¹⁴⁷Hashem (1984, para 17, p. 23), and Al-Jabaly (1996, p. 391).

¹⁴⁸El-Sharkawi (2011, para 302, p. 402); Waly (2007, para 248, pp. 429 ff.), and El-Awa (2009, para 11-15, pp. 314 ff.).

¹⁴⁹Cairo Court of Appeal, commercial circuit no (91), judgement on 30/12/2003, case no 59, judicial year 120. Notably, the judgement makes express reference to the opinions expressed in the French edition of Fouchard, Gaillard and Goldman on Arbitration on the matter.

¹⁵⁰Court of Cassation, commercial circuit, judgement on 9/2/2010, case no 240, judicial year 74.

grounds for annulling arbitral awards are exhaustively listed in article (53) of the Arbitration Law,¹⁵¹ and this list does not include a breach of the secrecy of deliberations. This was also the case when arbitration was governed by the abolished articles (501–513) of the Civil Procedure Code enacted by the law no 13 of the year 1968.¹⁵²

The facts of above mentioned case are interesting. It is apparent from the above quote, that the two party-appointed arbitrators and the claimant himself were parties to the communications that he alleges breached the secrecy of deliberations and should have the consequence of annulling the award. If these contentions are correct, the claimant should not be permitted to benefit from his own wrong (that is being allowed to annul the arbitral award based on his own wrongful; i.e. ex-parte communication with the arbitrators during the course of the arbitration). One might be justified in inferring that the arbitrators engaged, with both parties, in an attempt to resolve the dispute amicably; upon failure of this attempt, the arbitration proceeded and the tribunal issued its award, which, according to the facts stated in the Court of Appeal's judgement, accepted some of each party's claims and rejected the others. However, the claimant, in the action for nullity, sought to use this presumably good faith attempt at amicable settlement to annul the award. The court saw these communications for what they truly were: an attempt to reach an amicable settlement that is irrelevant to the secrecy of deliberations.

Thus, the only consequence for breaching the secrecy of deliberations in arbitration is the arbitrator's potential civil liability for damages if the elements of his responsibility are established. If this is the only consequence for breaching the secrecy of deliberations during their conduct, essentially, the same applies if an arbitrator divulges to either party the content of the deliberation after its conclusion.

It must be noted that if the breach concerns the presence of a non-member of the tribunal during deliberations, it is a breach of the duties imposed by articles (166) and (167) of the Civil Procedure Code, while if the breach relates to disclosure of the secrets of deliberations by a member of the tribunal, the claim for damages would be based on the general rule in tort set out in article (163) of the Civil Code, which holds liable for compensation any person who commits a wrong causing another to suffer damages, and not article (74) mentioned above, because it addresses the members of the judicial authority only.

So far, the courts have had to address claims based on divulging the secrecy of deliberations; it would be interesting to see what the courts would decide if the

¹⁵¹Court of Cassation, judgement on 20/6/1998, case no 474, judicial year 67; judgement on 17/6/2001, case no 291, judicial year 70, and judgement on 27/2/2007, case no 10635, judicial year 76. This principle, despite its wide and constant application by Egyptian Courts was recently questioned by jurists; see: Waly (2007, para 320, pp. 571 ff.); Haddad (2008, para 631, pp. 420–421), and El-Awa (2009, para 5-59, p. 155).

¹⁵²Court of Cassation, judgement on 3/12/1986, case no 573, judicial year 51.

breach in question is that the deliberation was conducted in the presence of non-members of the arbitral tribunal. For such breach undoubtedly would violate the public order requirement of secrecy in the conduct of deliberation and any resulting award would be declared null as a matter of public order. In fact, the Court of Cassation's reluctance to annul the arbitral award based on the alleged breach of secrecy, in the judgement quoted above,¹⁵³ could be attributed to the fact that neither of the rules set out in articles (166) and (167) of the Civil Procedure Code (which set out the public order requirement in this context) was alleged to have been breached, it was rather a case of an arbitrator allegedly divulging the secrets of deliberation.

Having said all the above, it is intriguing that the most reported type of breach in relation to confidentiality is that of the secrecy of deliberations, the most fundamental duty of confidentiality (!) At least six of my interviewees mentioned cases they witnessed in which one or more of the arbitrators violated the secrecy of deliberations, and communicated to the party which appointed him parts of the deliberations or the content of the draft of the arbitral award. In some cases the other arbitrator(s) managed to issue a valid arbitral award, but it is not always the case that the arbitrators can mend such a situation and conclude the arbitration in a manner that does not deny the innocent party's right to resolve his dispute via arbitration.

I discussed this type of breach with some of my interviewees and they said that: *"Hypothetically, the arbitrator should not contact the party that appointed him during deliberations. There should be no connection between them at all. This contact is the cause of the problem"*.¹⁵⁴ An arbitrator who breaches his duty to maintain the secrecy of deliberations is not as independent as he should be under the arbitration law obliging arbitrators to disclose any circumstances that might shed doubt on their independence or impartiality and to remain so throughout the course of the arbitration.¹⁵⁵ This is a duty of transparency. Failing to adhere to it often results in another breach: that of the secrecy of deliberations. Had that failure been avoided, the breach of secrecy would not have occurred. That is why in cases of such a breach, the parties would challenge the arbitrator for not being impartial and independent, rather than for breaching his duty of confidentiality;¹⁵⁶ a course that is more likely to lead to the annulment of the arbitral award under article (53/1/E), which permits the annulment of the award if the arbitral tribunal was constituted or the arbitrators were appointed in a manner contrary to law or to the agreement between the parties.

¹⁵³See supra; footnote 150, and the relevant paragraphs.

¹⁵⁴El-Kosheri (interview: 13/1/2011).

¹⁵⁵Article (16/3) of the Arbitration Law.

¹⁵⁶El-Kosheri (interview: 13/1/2011).

2.6.7.4 Dissent

In an academic article questioning the practice of dissent, it was noted that dissenting opinions can jeopardize the secrecy of deliberations. Given the above conclusion, that the main duty of secrecy concerns the course of deliberations, and that the continuance of this duty post the conclusion of deliberations is an administrative duty imposed on judges as members of the judicial authority, also given the fact that dissenting opinions are released to the parties with or after the arbitral award—any potential effect of any dissenting opinion, no matter how detailed it is and how far it pursues the arguments exchanged in the course of deliberations, would not affect the conduct of deliberations or the arbitrators' freedom in their exchange of opinion therein.

I hesitate to endorse the view that dissenting opinions jeopardize the secrecy of the conduct of deliberation in arbitration, because the purpose of preserving this secrecy is extinguished, for the most part, by the very conclusion of the deliberation stage (i.e. to maintain the arbitrators' freedom and integrity in their exchange of opinion in the course of their deliberation) which as a matter of chronology occurs before the award, and before the dissenting opinion is handed to the parties. It cannot be said that a specific incident (dissenting opinions) would compromise a process (deliberations) that ends before the said incident can possibly take place.

In particular, the secrecy of deliberations in arbitration is based on the public order requirements set out in articles (166) and (167) regulating the conduct of deliberations and not article (74) prohibiting disclosure of its secrets. As mentioned above, any divulgence following the award would trigger the liability of the concerned arbitrator if either party suffers damages due to this breach as a matter of tort.

The Arbitration Law no 27 of the year 1994 is otherwise silent on the matter of confidentiality. If we were to say that any other legal duty of confidentiality exists, in addition to the ones discussed above, it would have to be based on the existence of a custom to that effect.

2.7 Confidentiality in Practice

The main purpose of my interviews was to acquire first-hand information from arbitration practitioners about their practice concerning confidentiality in Egypt, in particular, and Arab countries at large. My objective was to find out how they perceive confidentiality in terms of its contents, legal basis and, of course, if a custom existed to that effect.¹⁵⁷

All my interviewees agreed that arbitration is confidential. My next question was “*what does ‘confidentiality’ mean?*” Answers ranged from saying that

¹⁵⁷Given that very little literature is found on the topic of confidentiality in Arabic literature, the views expressed in these interviews are invaluable to this research.

confidentiality relates only to prohibiting the publication of awards without the parties' consent to confirming that none of the arbitration particulars or documents should be made available to third parties not taking part in the arbitration. At least five interviewees said that confidentiality meant, among other things, limiting the attendance of arbitral hearings to those taking part in the arbitration; that these hearings are not open for the public. This response reflects the traditional understanding of confidentiality that does not distinguish between privacy and confidentiality. Perhaps the modern terminological distinction between privacy and confidentiality is not yet readily present in the collective mind of the arbitration community. It is the essence of these duties that is a matter of agreement among arbitration practitioners in Egypt, rather than the terminology used to label each of them. It is said that:

All information related to arbitration shall be exclusive to the parties, their representatives and the arbitral tribunal.¹⁵⁸

And,

No one who is not directly related to [the arbitral hearing] shall attend it.¹⁵⁹

Professor Abdulhamid El-Ahdab pointed out that: “*most Arab arbitration laws [including Egypt’s] do not stipulate for confidentiality, yet local and international customs consider that **there is a minimum level of confidentiality***” which is “privacy”. When asked about the difference between “*not public*” and “*confidential*”, he said “*what is ‘not public’ is ‘confidential’*”. *Third parties are not permitted to access it*”.¹⁶⁰ This understanding is rather concerned with describing the effect of each requirement (third parties cannot have access to it) instead of its subject matter (the hearings or the documents); an approach that is more practical than theoretical. An approach that is probably devised and driven by his many years of arbitration practice.

In the legal analysis, it is correct that privacy and confidentiality are different terms, each signifying a different duty; yet, they are closely connected. In practice “*the fact that arbitral hearings are not public leads to the consequence or advantage that arbitration is confidential*”.¹⁶¹ **The requirements of privacy and confidentiality serve a common purpose: to avoid publicity, keep the details of the arbitration and its documents to the participants, and deny third parties any access to the arbitration. While performing in two different ways, the two concepts complement each other in serving the same ultimate purpose.**

Perhaps, the lack of an express law provision stipulating a general duty to confidentiality leads practitioners to consider privacy, a much less controversial

¹⁵⁸Op. Cit. note 33.

¹⁵⁹El-Awa (interview: 13/1/2011).

¹⁶⁰El-Ahdab, (interview: 28/12/2010).

¹⁶¹Al-Moqadam (interview: 16/12/2010).

concept, to be the legal concept from which one may confer a certain level of confidentiality on the arbitration process and its documents.

All my interviewees, except one, are of a legal background. They are either judges or lawyers; members of both professions are bound by a duty to professional secrecy in their own practice, independent of arbitration. I do not think a clear-cut line can be drawn to separate their perception of confidentiality in arbitration from their duty of professional secrecy. The latter, seemingly, became an integral part of their practice, whether it is arbitration or otherwise. This is not a disadvantage; it is just a factor, I think, that assisted in confirming the perception that a duty of confidentiality exists in arbitration.

Some interviewees held the view that the essential duties were: (1) privacy of the hearings, an established custom; (2) secrecy of deliberations, a public order requirement; and (3) confidentiality of the arbitral award, as provided by the arbitration law.¹⁶² Any further duty of confidentiality must be agreed upon by the parties by a special provision. They believed in the need for a special agreement because of two different sorts of experience.

On the one hand, in the Arab Centre for Arbitration, based in Cairo, there were arbitration cases with high profile parties who asked for the arbitration to be completely confidential, to the extent of requesting the arbitral award to be made without reasons to maintain absolute confidentiality of the subject matter of the dispute and its details.¹⁶³ Also, Professor El-Ahdab mentioned that, in his experience, some parties refused to have oral witness statements or the arbitral hearings voice recorded, also to maintain the highest level possible of confidentiality.¹⁶⁴

On the other hand, Professor Nayla Comair Obeid mentioned that while acting as an arbitrator in some cases, information from the arbitration file was published in a daily newspaper. She said that some parties considered such publication to constitute a successful strategy, to put pressure on the other party to accept an amicable settlement instead of continuing with the formal arbitration process. As a result, it has now become her standard procedure, once the arbitration has commenced, to include in the first procedural order, or in the terms of reference, as the case may be, a provision on the confidentiality of all the details and documents of the arbitration, to be binding on the parties, their witnesses, and experts. She would explain to the parties why she thinks agreeing to confidentiality is necessary and beneficial for their case and it was never the case, she reported, that any party rejected this suggestion.¹⁶⁵

Despite the habitually expressed opinion that arbitration is confidential, **these experiences show that not only practitioners, but also the users of arbitration,**

¹⁶²Eng. Maged Kholosy, Director, Arab Centre for Arbitration, and former Chairman of Engineers' Syndicate, Egypt (interview: 03/11/2010); Professor Nayla Comair Obeid, (interview: 28/12/2010), Beirut, and El-Ahdab (interview: 28/11/2010).

¹⁶³Kholosy (interview: 3/11/2010).

¹⁶⁴El-Ahdab (interview: 28/12/2010).

¹⁶⁵Comair Obeid (interview: 28/12/2010).

recognize a need for a special contractual provision to establish a general duty of confidentiality regarding all the material generated and exchanged in arbitration. If anything, resorting to contractual confidentiality and adopting extra measures to ensure confidentiality emphasizes the lack of clarity concerning the existence and extent of any such legal duty of confidentiality.

The need to confirm the duty of confidentiality by an agreement is, perhaps, triggered, also, by “*the tradition in the Arab countries that ... the business community expects to know [what is going on in the business world]...if there is a [real] need for confidentiality, the parties shall, then, agree to it*”.¹⁶⁶ This is so because in the Arab countries, and everywhere else, members of the business community are in a constant state of competition with each other, and knowledge of existent business disagreements or disputes is an important element of their competitiveness, so everyone seeks to gather information and knowledge about the disputes in their fields of interests, whether arbitral or judicial. It is also a cultural matter that people tend to talk and not to take the matter of confidentiality as seriously as they should; hence the need to reaffirm that there is, in fact, an operative duty of confidentiality in arbitration, via a contractual provision, that everyone needs to abide by it. Professor El-Ahdab notes that the need for confidentiality is more important in industrial countries where trade secrets are at stake; that is not the case in the Arab countries. In his opinion, this is one of the reasons why there is no express provision on confidentiality in the arbitration laws of most Arab countries.

From a legal perspective, the importance and effectiveness of the traditionally-mentioned duty of confidentiality are said to be in the decline. That is allegedly due to: (1) the possibility of challenging arbitral awards in public state courts; (2) in institutional arbitration, a relatively large number of people know of the arbitration and have access to its file, and the same applies to state contracts arbitration; and (3) the effect of the Anglo-American legal system on arbitration regarding the trend to encourage transparency, an example of which is allowing dissenting opinions, which purportedly infringes the secrecy of deliberations.¹⁶⁷

Although these reasons would appear to be valid, things are not always what they seem to be. **As for challenging arbitral awards in state courts**, it is rightly noted that “*The court is trying the arbitral award itself, any oral statement in court tries the award and does not re-open the dispute [that was resolved in arbitration]*”.¹⁶⁸ This is correct, because the public elements in the context of state courts are: first, the court judgement, which is a public document. Anyone can acquire a copy thereof. Nonetheless, recourse against arbitral awards is limited to the action for nullity, which is available on very limited grounds listed in article (53) of the Arbitration Law. These grounds are procedural not substantive. The court deciding on the request for annulment has no power to review the subject-matter of the arbitral award. Thus, no substantive review takes place in

¹⁶⁶El-Ahdab (interview: 28/12/2010).

¹⁶⁷Atallah (interview: 25/11/2010).

¹⁶⁸Abdelraouf (interview: 24/11/2010), and El-Sharkawi (2011, para 331, p. 453).

court, and naturally the court judgement would be limited to addressing the procedural grounds on which the validity of the award is challenged. When faced with a substantive plea, the courts persistently ruled that such a plea is not within the scope of the action for annulment and that it is beyond the courts' jurisdiction to address such a plea.¹⁶⁹ So any member of the public, reading the court decision, would not know much of the substantive details disclosed in the arbitration. Second, although court hearings are open to the public, however, because the oral pleadings would only cover the procedural grounds for challenging the arbitral award, members of the public attending the hearings will not hear about the substantive details of the dispute, and they will not see any of the documents used therein by either party. Finally, access to the case file is limited to the judges deciding the case as well as to attorneys holding a valid power of attorney from either party concerning the case before the court.¹⁷⁰

I am not arguing that recourse to courts does not at all affect the confidentiality of the arbitration; my point is that this recourse does not overthrow confidentiality all together; its effect is rather minimal, especially in light of the increasing awareness on judges' part of the specific features of arbitration.¹⁷¹ Most importantly, recourse to state courts is a constitutional right granted equally to all citizens; it takes priority over the concept of confidentiality; the latter shall be modified to accommodate the former, not vice versa.

As for the matter of institutional arbitration, two issues are of relevance. The first is maintaining the confidentiality of the arbitration and its file. The second issue is publication of the arbitral awards and using it in scholarly writings. I discussed these issues with four key personnel in two different arbitration institutes in Cairo, both of which adopted the UNCITRAL arbitration rules; however, two different approaches are followed regarding confidentiality.

The first approach is that of the Arab Centre for Arbitration, where UNCITRAL rules are adopted as is. The Centre deals with confidentiality issues on a case by case basis, as per the parties requests; otherwise no special attention is given to the matter of confidentiality. As for awards publication, they do not seek the parties' permission. Because in reality "*after the case is concluded, we do not see the parties again, we have no connection with them, except for a few who would have several cases*". So the Centre resorts to the traditional practice of removing the parties' names and any details that could lead to their identification, and then

¹⁶⁹For example: the Court of Cassation, judgements on: 22/6/2004, cases nos 4729 and 4730, judicial year 72; 24/12/2009, case no 98, judicial year 79, and 8/2/2007, case no 7307, judicial year 76.

¹⁷⁰El-Sharkawi (2011, para 331, p. 453). For example if the counsel who represented either party in the arbitration is not representing him in the action for nullity, this attorney shall have no access to the case file in court records, because his power of attorney is, presumably, limited to the arbitration and does not extend to the action of nullity.

¹⁷¹In so far as awareness campaigns are concerned, I noted from my interview with Dr Comair-Obeid (dated: 28/11/2010) that training courses are being given to judges about arbitration. Confidentiality is explained in these courses, and it is stressed that judges need to maintain a certain level of confidentiality when deciding arbitration claims in court.

publishing the award or using it in academic writings.¹⁷² My interviewees agreed that this was a valid practice. The way confidentiality is addressed in the Arab Centre reflects the modest interest in the issue of confidentiality the Arab business community holds. For when there is a case where confidentiality matters, it is well preserved, but if it is not particularly mentioned, it goes unnoticed.

The second approach was held by the late director of CRCICA, Dr. Mohamed Aboul-Enein. He believed confidentiality is a key feature of the arbitration system; thus, while adopting the UNCITRAL arbitration rules, as the arbitration rules of CRCICA, he added an article dealing with the issue of confidentiality, imposing this duty on the parties, regarding all documents produced in the arbitration including the final award. It stated that deliberations should be conducted in secrecy, and imposing a duty of confidentiality on the centre itself.¹⁷³ New rules were adopted in March 2011, and again dealt with confidentiality in a thorough manner. They extended the general duty of confidentiality, besides the parties, to the arbitrators, tribunal-appointed experts, secretary of the tribunal and the centre itself.¹⁷⁴ The secretary of the tribunal was listed because of the growing trend that the presiding arbitrator would appoint a secretary to the tribunal who is not an employee of the arbitration centre, so it was essential to extend the duty of confidentiality to that person as well. The new rules includes, also, a special provision on the retrieval and destruction of arbitration documents after the case is concluded.¹⁷⁵

Award publication is regulated via article (41) of the 2011 arbitration rules mentioned above. When an award is published, the CRCICA does not only remove the names of the parties, but also those of the arbitrators, together with any other facts that could reveal the identity of the parties or the subject-matter of the dispute.¹⁷⁶ Again, a much acclaimed practice by the arbitration community.

As for the centres' personnel, in practice, CRCICA limits access to each arbitration case files and documents to the employee selected by the centre to manage the case. After the case is concluded, the centre would not give copies of any documents to any person, except to the court deciding a challenge against the arbitral award. This policy does not only maintain the confidentiality of arbitration but also enhances arbitration-users trust in the centre, and in the arbitration system as a whole.¹⁷⁷

¹⁷²Kholosy (interview: 3/11/2010).

¹⁷³Rules of 2007: http://www.crcica.org.eg/publication/arbitration_rules/pdf/English/CRCICA_Previous_arbitration_rules_en.pdf.

¹⁷⁴Rules of 2011: http://www.crcica.org.eg/publication/arbitration_rules/pdf/English/CRCICA_arbitrationrules_en.pdf.

¹⁷⁵Dr. Nabil El-Araby, former director of CRCICA, practices as arbitrator in domestic as well as international arbitration (interview: 09/11/2010); Abdelraouf (interview: 24/11/2010), and Alamedin (interview: 4/12/2010).

¹⁷⁶Ibid.

¹⁷⁷Abdelraouf (interview: 24/11/2010), and Alamedin (interview: 4/12/2010).

The diversity in the way confidentiality is addressed in the two arbitration centres, as illustrated above, results from the difference between the type of arbitration each centre caters for. On the one hand, the Arab Centre for Arbitration deals mainly with domestic arbitration and cases from the Arab region, where confidentiality is not of crucial importance to most parties. Hence, it did not make sense to pay special attention to the matter of confidentiality and constrain the parties with an additional duty that does not serve much practical purpose. On the other hand, CRCICA arbitrations have a more international flavour; both its personnel and users are aware of the importance of confidentiality in preserving the integrity of the arbitration process and it is, for them, an added benefit attained by resorting to confidential arbitration.

Accordingly, arbitration institutions respond to the matter of confidentiality depending on the needs of the parties, in the light of which they formulate their arbitration rules as well as their internal regulations, and carefully observe its real-time application to improve the rules accordingly as is the case with the change towards stricter rules on confidentiality in CRCICA. Access to an arbitration file is as limited as possible, and publication of awards is done with special attention to concealing the parties' identity and preserving their trade secrets. In this context one must recall that confidentiality is not absolute secrecy, it just means that: *"this type of ADR is not open to those not concerned with the dispute. Its details and information should not leak out to third parties or to those who are not part of the arbitration process"*.¹⁷⁸

Indeed, the personnel of the arbitration institution are part of the arbitration process. If the parties opted for institutional arbitration, they would have made an informed decision that the institution's personnel become part of their arbitration. Certainly, opting for institutional arbitration broadens the circle of persons who know of the arbitration and perhaps its particulars, but arbitration in its essence is *a number of freedoms*¹⁷⁹ to choose, and opting for institutional arbitration is a choice exercised.

As for the influence of the Anglo-American legal system on arbitration, and speaking of dissenting opinion, as explained earlier in this chapter, the drafting committee of the Law of Procedure in Egypt was not oblivious to the concept. The integrity of court judgements was the overriding objective in favour of which the committee chose to not incorporate a provision permitting dissent in the Law of Procedure. None of those who took part in making this decision are among us today to elaborate on how this decision was reached, so we have to make an educated guess.

Different adjudication systems propose different answers to the same question. As for the question of how judgements are made, in Egypt the answer to this question varied from state courts to arbitration, because in each system priority was given to a different objective. In state courts, the necessity of preserving the integrity of courts and its judgements prevailed. The question of whether this

¹⁷⁸El-Kosheri (interview: 13/1/2011).

¹⁷⁹El-Ahdab (interview: 28/12/2010).

judicial system administered by the state is capable of making sound and integral awards must be answered in the affirmative. The court tribunal is perceived as one entity, as a whole unit, and judges are not seen as independent individuals. In the perception of the drafting committee of the Law of Civil Procedure this integrity was thought to be best served by requiring state courts to issue consensus decisions only, and prohibiting public dissent.

In this regard, arbitration is a different system altogether. It is a product of party autonomy. Arbitrators are independent from each other, independent from the parties and the arbitration institution under whose auspices they work. They need not be concerned with the integrity of the award as such; they are rather concerned for their own individual integrity. An arbitrator would, at times, find it difficult to agree to a specific award in light of his own education, background, and belief and would find that “*to clear my conscience, I write a dissenting opinion*”.¹⁸⁰

Hence, in state courts, the integrity of the court and its awards prevails over the integrity of the individual judges. In arbitration, the arbitrator’s integrity and the transparency of the arbitral process override the secrecy of deliberations. This is how I perceive the balance between dissenting opinions and confidentiality, if we accept that dissenting opinions violate confidentiality in the first place.

According to Professor El-Kosheri, transparency is a feature of arbitration as much as confidentiality is; in fact, he says, it is more important to the integrity of the arbitration process. Speaking of dissenting opinions, he says: “*It definitely contravenes the concept of secrecy because it shows the real standing of one of the participants in issuing the award, but it conforms to transparency, because it shows the real outcome of what happened in the arbitral process... that is why we allow majority awards... in my opinion it is justified*”¹⁸¹ to compromise the secrecy of deliberations in favour of a more important concept: transparency and integrity of the arbitrators.

Some of my interviewees are of a contrary opinion: that the practice of issuing dissenting opinions does not affect the secrecy of deliberations.

Whether the award is issued by majority or consensus it has nothing to do with the secrecy of deliberations, it has to do with the award itself.¹⁸²

And,

Why would it [the dissenting opinion] violate the secrecy of deliberation?! As long as all procedures are carried out in a confidential manner including the dissenting opinion itself... it is no problem, this is how awards are made in the English judiciary...¹⁸³

This disagreement on the effect of dissent on secrecy of deliberations is not unexpected. There is a universal disagreement between the Latin system and the

¹⁸⁰El-Kosheri (interview: 13/1/2011).

¹⁸¹Ibid.

¹⁸²El-Awa (interview: 13/1/2011).

¹⁸³Mahmoud Samir El-Sharqawi, law professor, Cairo University, practices as an attorney and arbitrator (interview: 07/11/2011), Cairo.

Anglo-American one on the validity of allowing dissent, its added value, and its effect on the secrecy of deliberation and integrity of awards. Arbitration is a hybrid system, it borrowed features from both schools of law; hence the disagreement on the topic of dissent found its way to the arbitration community as well. I think the overriding fact is that the arbitration law in Egypt allows for dissenting opinions. Therefore, the law permits this so called “breach of confidentiality” in favour of dissent. If the law permits it, can we still describe it as a “breach”? I do not think so; it is, hence, better viewed as one of the limitations to the duty of confidentiality.

Given the above discussion of the four factors allegedly diminishing the effectiveness and the importance of confidentiality, I think this effect is apparent, not real. It is viewed as such because of the lack of definition and clear understanding of confidentiality as a legal duty. We know it as a general concept, but it is yet to be understood as a legal duty that has its defined boundaries and limitations. This is true of Egypt where the Arbitration Law is silent on the duty of confidentiality, save for a sole provision on publication of arbitral awards. The predecessor of the current arbitration law (articles (501–513) of the Law of Procedure) was totally silent on the issue. **This legislative silence led to a state of uncertainty concerning the extent of actual reliability of the legal duty of confidentiality, and its effectiveness as means for protecting the parties’ interest in preserving the confidentiality of their arbitration.** Only a handful of court judgements touched on the matter of confidentiality, none of which went as far as discussing the legal basis of the duty or its limitations, mainly because the cases concerned either contractual provisions for confidentiality or secrecy of deliberations, as such, the courts did not have to address the doctrine of confidentiality.

Although, the existence of a duty of confidentiality seems to be a common knowledge in the arbitration community, the legal basis for saying it does exist is still unidentified. My interviewees proposed various answers to my question: **“What is the legal base for saying arbitration is confidential?”** Answers included: (1) that confidentiality is the practice, (2) it is the nature of arbitration, (3) local and international customs, (4) the text of article (44/2) prohibiting publication of awards, (5) it is a general principle of confidentiality, and (6) there needs to be a special provision stipulating it: parties’ agreement. Interestingly, a few of the interviewees were surprised by the question to the extent of questioning the legal basis for their own practice upholding confidentiality,¹⁸⁴ a practice that they adhered to unquestionably, even when their personal preference was to do otherwise. It is also notable that often the same interviewee offered more than one of the above responses in the course of discussion; this both reaffirms the ambiguity of the notion of confidentiality and shows how deeply embedded is the idea that arbitration is confidential in the perception of the arbitration community.

In the words of one of the Court of Appeal judges: **confidentiality “is not a custom. It is a practice... it is one of the characteristics of arbitration, as a concept**

¹⁸⁴Eissa (interview: 1/11/2010), and Sadeq (interview: 20/12/2010).

and as a legal system. Arbitration has been marketed by saying that confidentiality is one of its characteristics...and in any case the parties can agree on confidentiality and its extent".¹⁸⁵ Classifying confidentiality as a practice instead of a custom gives it a lower stance in the hierarchy of legal rules. That is so because custom is a source of legislation; if a certain practice amounts to a custom, then courts should hold the parties to it as binding, absent an express law provision on the matter in question. If confidentiality is merely a practice and not a customary rule, it would fall upon the party seeking to uphold it to show that it is the practice that everyone follows and that everyone believes to be binding, and that it was both parties' expectation that this custom shall be followed.

Regardless of the issues of terminology and legal definition, it is my impression from the discussions that took place in the interviews that practitioners are in no doubt that confidentiality is binding. In their practice, whenever a relevant issue arises, it is resolved in a manner consistent with the prevailing opinion and practice: that arbitration is confidential and that only its parties together can decide to dispense with this obligation. **Saying that confidentiality is a mere practice, as opposed to a binding custom, is, in my opinion, a matter of perception that is based on each of the interviewees' own experience.**

Discussing whether confidentiality is based on the nature of arbitration raised two issues of particular interest. The first is the constant reference to the judicial system in any attempt to define the characteristics of arbitration, for example "*The established traditions stemming from the nature of arbitration unlike the judiciary... [confidentiality] is an inherent feature of arbitration, a requirement of the special nature of arbitration, which is an exceptional means [for resolving disputes, which is] not of the same nature as the judiciary*",¹⁸⁶ and "*the starting point in arbitration is the absence of the judiciary's publicity...in private arbitration we are outside the boundaries of the state judiciary; nothing binds the parties to publicity*".¹⁸⁷ This reoccurring comparison between arbitration and the state judicial system is not limited to judges, but it is strongly present in the thoughts of lawyers and arbitrators. It thus calls for a thorough study of the concept of publicity in the judicial system to determine its exact meaning, scope of application and its limitations, and whether this doctrine is relevant to arbitration or otherwise.

The second issue is that my interviewees stressed that there is no legitimate interest in making arbitration public,¹⁸⁸ for it is a private law process, and the general public has no interest in scrutinizing it, an interest that arises only in relation to public function, in this context it arises in relation to the judicial function.¹⁸⁹

¹⁸⁵Interview with one of the judges of Cairo Court of Appeal, commercial division, on 9/11/2010, Cairo.

¹⁸⁶El-Kosheri (interview: 13/1/2011).

¹⁸⁷El-Ehwany (interview: 31/10/2010).

¹⁸⁸Sawy (interview: 10/11/2010), and Waly (interview: 7/10/2010).

¹⁸⁹Judge Ahmad Mekki, former Minister of justice, previously Vice President of the Egyptian Court of Cassation and practicing arbitrator (interview: 29/10/2010), Alexandria, and Waly (interview: 7/10/2010).

It appears from these views that confidentiality and non-publicity are the default in private law transactions, while publicity is, exceptionally, required in the context of public functions to give effect to the public's right to scrutinize the conduct of public officials in the state authorities, whether the judiciary or otherwise. If the presumption is that confidentiality is the default, then it would be redundant to list it as one of the advantages of arbitration, it would be unnecessary to mention it. Perhaps the strong association between the presumably public judicial system and arbitration is what necessitated the reaffirmation of confidentiality as one of the characteristics of arbitration in scholarly works on the latter. The similarity between arbitration and the judiciary (that the function of both is resolving disputes) called for emphasizing the contractual characteristics of arbitration which are absent in the judiciary, to reassure the users of arbitration that the said similarity would not deprive them of the advantages of being within the realm of contract, including that of confidentiality.

Local and international custom, was also, proposed as legal basis for confidentiality in arbitration. Professor El-Ahdab opined “*custom dictates that arbitration is confidential*”.¹⁹⁰ It was also said that “*confidentiality is a general principle in all legal systems as a matter of custom*”¹⁹¹ and “*Confidentiality is based on custom*”.¹⁹² Reliance on the existence of an international custom of confidentiality is precarious, since the higher courts of Australia, Sweden and Canada, at least, have already ruled that such custom did not exist.

Professor El-Kosheri is not convinced, either, that the duty of confidentiality is based on custom, in his own words:

Is there an established custom [requiring confidentiality] in Egypt? I cannot say so, but it is the practice. This is [how arbitration is practised] in Egypt, by which we follow similar practice in other countries from which we adopted the modern arbitration... Custom is the continued adhering to a certain rule accompanied with the belief that this rule is binding, this feeling, I think, is not developed enough in the minds of some people to the extent that would permit you to say this is a custom... this is a grey area.¹⁹³

He added that, in Egypt, some people adhere to confidentiality while they are not totally convinced they should, simply following what they saw others do. In addition, he said, as mentioned above, that some people do not take confidentiality seriously. They actually talk about what happens in arbitration with third parties. I find these observations compelling, and a few more of my interviewees have also pointed out that they have witnessed similar behavior.¹⁹⁴ However, I am not sure how far it affects the existence of a custom, because it is in the very human nature to want to break the rules, especially when it is not very clear there would be serious

¹⁹⁰El-Ahdab (interview: 28/12/2010).

¹⁹¹Comair Obeid (interview: 28/12/2010).

¹⁹²El-Awa (interview: 13/1/2011).

¹⁹³El-Kosheri (interview: 13/1/2011).

¹⁹⁴Kholosy (interview: 3/11/2010) and Comair Obeid (interview: 28/12/2010), and Abdelraouf (interview: 24/11/2010).

consequences for the breach. **So, this observation that people do not abide by the duty of confidentiality, might be, either evidence that no such duty exists, or a manifestation of the human tendency to break what they think is the rule to be followed.**

Given the ambiguity of the rule of confidentiality and the relative mildness of the consequences of breach (compensation based on tort) as opposed to the most serious one of annulling the award, as well as the practical difficulty of attributing a certain breach to a specific person and establishing causation in a court of law, it is not surprising that some practitioners would take confidentiality lightly, in particular absent a contractual agreement to confidentiality. I think we could possibly interpret these observations to indicate that there is a certain level of recklessness regarding confidentiality in Egypt, but not as conclusive evidence as to the absence of a custom imposing a duty of confidentiality. The final word on whether confidentiality in arbitration is a general usage and practice or an established custom would be for the courts when they have the chance to address this question.

Considering article (44/2) of the arbitration law to be the legal basis for the general duty of confidentiality was a recurring theme among my interviewees. This argument, I find, is inaccurate; as discussed earlier in this chapter, this article prohibits a specific act relating to a certain document. It is true that the incorporation of article (44/2) in the arbitration law indicates that the law maker acknowledged the existence of the doctrine of confidentiality; nonetheless, it also reflects a choice to limit its application to arbitral awards. This choice by the law maker could be interpreted in either of two ways: on the one hand, it could mean that the law maker intended to limit the application of the doctrine of confidentiality to arbitral awards only, thus no general duty of confidentiality would be deducible from this article or be based on its existence. On the other hand, it could be that this specific mention of arbitral awards is intended due to the particular status of arbitral awards explained earlier, and that the wider duty of confidentiality is left, as the vast majority of the aspects of arbitration, for the parties to decide it as would best serve their interests.

While the explanatory memorandum of the Arbitration Law states that this article was introduced “*to confirm the confidentiality principle in arbitration...*”;¹⁹⁵ the value of an explanatory memorandum is persuasive, and limited to the context of understanding articles which were actually enacted in the law and interpreting the duties set therein. An explanatory memorandum is not a legislative document; it merely assists in understanding the promulgated law. Therefore, it cannot be relied upon to impose new duties or expand the existing ones beyond their actual scope. Accordingly, and notwithstanding the above quotation, article (44/2) dealt with a specific class of documents i.e. arbitral awards, and it cannot possibly be relied upon on its own to confer similar protection on other documents.

¹⁹⁵The Explanatory Memorandum of the Egyptian Arbitration Law of 1994, para 4, p. 56.

As such, I find that article (44/2) is both insufficient and inconclusive, on its own, to serve as basis for a general duty of confidentiality concerning all documents and information produced and exchanged in arbitration.

Save for article (44/2) dealing with award publication, the Arbitration Law is silent on the matter of confidentiality. As demonstrated above, the concept of confidentiality is deeply rooted in the arbitration community in Egypt, so **why did not the law maker impose a general duty of confidentiality on the parties?** Neither of my other interviewees was able to provide a satisfactory answer to this question.

The opinions discussed above lead to the inevitable conclusion that confidentiality is the practice in arbitration in the Arab world, and Egypt, in particular. As for the legal basis of this duty, the detailed discussion and views my interviewees expressed revolve around one main reason: **the nature of the arbitration agreement.** “*It is commonplace to say arbitration is consensual*”.¹⁹⁶ The agreement to arbitrate is a private law contract. Naturally it excludes third parties, who cannot claim an interest in a private contract save for in exceptional circumstances, as stipulated by the law. This is called *Privity of Contract*. Consequently, third parties cannot contend to have the right to access the arbitration file absent the parties’ agreement or law provision granting such right.¹⁹⁷ “*Fundamentally, arbitration is confidential... Confidentiality is the default in human relationships.*”¹⁹⁸

Based on the undisputed notion of privity, a general principle of confidentiality developed, and is one of the characteristics of arbitration as a private contract:

Privity is the fundamental principle; confidentiality is a result.¹⁹⁹

In my opinion, while privity of contract is a clear cut principle that denies third parties access to arbitration, it is less obvious which legal principle imposes a duty of confidentiality on the parties themselves.

As for the details of the practice concerning confidentiality, a few of my interviewees confirmed that in their practice of arbitration they take certain measures based on their belief that confidentiality is a binding duty. These measures are systematic in institutional arbitration, where the institution itself would ensure confidentiality of its files, for example, in CRCICA²⁰⁰ when an arbitral tribunal employee is a secretary/assistant who is not an employee of that institution, CRCICA would request the said secretary/assistant to sign a unilateral undertaking to confidentiality.

¹⁹⁶Paulsson (1995, p. 232).

¹⁹⁷Eissa (interview: 1/11/2010), and Sadeq (interview: 20/12/2010).

¹⁹⁸Mekki (interview: 29/10/2010).

¹⁹⁹Al-Beshri (interview: 11/11/2010).

²⁰⁰This measure was standard procedure for CRCICA before their 2011 arbitration rules came into force. These rules expressly impose a duty of confidentiality on any secretary or assistant employed by arbitral tribunals regardless of this person’s affiliation with CRCICA.

Professor El-Sharkawi said that after arbitration is concluded he would contact the parties to inform them that he would dispose of the arbitration file in case they wish to retrieve certain documents or the whole file, otherwise he would request the parties to send him a letter confirming that he is free to dispose of the arbitration documents.²⁰¹ When asked if the parties refer to the issue of confidentiality in arbitral hearings, he said “*no, because nothing happens that would breach it, the parties can see for themselves that we, the arbitrators, observe the requirement of confidentiality*”.²⁰²

Professor El-Awa proposed a different answer to the same question; he said that “*I have witnessed it at least three times, that one party, in the oral pleadings would say ‘... it is agreed that arbitration is confidential...’ and then would proceed with their pleadings*”.²⁰³ In this last case, the parties did not request to enter into an agreement to confidentiality concerning their arbitration; they meant to reconfirm what they believe to be the binding rule in arbitration: that it is confidential. Practitioners said that they adhere to this rule automatically and unquestionably:

We work assuming that everyone is bound by the duty of confidentiality.²⁰⁴

And,

I have practiced arbitration in Egypt since 1982; I have never had a case that involved a breach of confidentiality.²⁰⁵

Apparently, it is the practice in Egypt that arbitration is confidential; documents are available exclusively to the parties, their representatives, the tribunal and others who participate in the arbitral process as necessary for each party to have an equal opportunity to present their case. Both the arbitrators and the parties expect that no one would speak outside the arbitration room about what happened or what was said in the hearings. **Every person who takes part in the arbitration is perceived as obliged to maintain the confidentiality of the documents and information that come to their knowledge in the course of and for the purpose of arbitration.**

Would courts recognize this practice as a legally binding duty? A retired judge of the Court of Cassation²⁰⁶ expressed the opinion that judges would acknowledge this principle, that arbitration is confidential, and shall apply it in state courts even absent a law provision to that effect, as long as it is not in conflict with an existing law. In his own words: “*It is true there is no law provision, but we say that*

²⁰¹El-Sharkawi (interview: 7/11/2010).

²⁰²El-Sharkawi (interview: 7/11/2010).

²⁰³El-Awa (interview: 13/1/2011).

²⁰⁴Eissa (interview: 1/11/2010).

²⁰⁵Samiha El-Qaliobe, law professor, Cairo University, practices as an attorney and arbitrator, (personal communication: 30/11/2010).

²⁰⁶Former Vice President, Egyptian Court of Cassation (interview: 29/11/2010), Cairo.

arbitration principles are not exclusive to law provisions, there is a group of principles surpassing law provisions, which should be followed even absent a provision to that effect".²⁰⁷ Still, until the courts have had the chance to address the matter of confidentiality; the parties are better off including in their arbitration agreement a clause on confidentiality.

My interviewees held various views as to **which documents are subject to the duty of confidentiality**, and whether confidentiality attaches equally to all documents produced and exchanges in arbitration. First, Professor El-Ahdab is of the opinion that *"confidentiality covers all documents. We do not know which order the tribunal issued, or which document the parties produced"*.²⁰⁸ would cause harm if disclosed to third parties or published. That is the broadest perception for the scope of confidentiality. Second, Professor El-Awa said that *"yes, confidentiality is stricter in relation to documents the parties produced, but all documents are equally confidential in the essence, including procedural or administrative orders issued by the tribunal"*.²⁰⁹ The narrowest suggested scope of confidentiality is that it covers only the **knowhow and trade secrets** of the parties.²¹⁰

While the first approach is too broad, since it could be the case that a document used in arbitration is already in the public domain, for example a sale contract registered in the records of the real estate registration office. These records are public and any person can request to see its documents. It is not clear how such a document would be considered confidential just because it was submitted in arbitration while it is already in the public domain.²¹¹

The third interpretation is too narrow. On the one hand, there could be documents or information other than those containing trade secrets, the disclosure of which may cause harm and would trigger legal liability. By way of example, some documents could include a political statement that could harm one of the parties if put out to the public or some lawyers' statements would amount to libel if published or distributed among the public. On the other hand, endorsing this interpretation would mean that absent this type of information, i.e. knowhow and trade secrets, confidentiality does not exist in arbitration. That would change the nature of the duty of confidentiality from a general principle and a practice characterizing the arbitration system at large to a feature relevant only to specific type of arbitration in which the subject matter of the dispute necessitates the disclosure of trade secrets in the course of the arbitration. Besides, if trade secrets and knowhow are present in a case, it is more likely that a provision conferring confidentiality on this particular type of information would exist in the main contract, and it would be redundant to

²⁰⁷Ibid.

²⁰⁸El-Ahdab (28/12/2010).

²⁰⁹El-Awa (13/1/2011).

²¹⁰Op. Cit., note 205 (interview: 29/11/2010), and Sawy (interview: 10/11/2010).

²¹¹El-Sayed (interview: 25/11/2010).

say arbitration is confidential only to protect trade secrets which are already safeguarded by an agreement to confidentiality in the main contract.²¹² Had this been true, there would be no need for confidentiality in arbitration.

I think the second approach is most reasonable, especially given the variety of documents included in the arbitral process and the lack of a law provision stating otherwise. In civil law, as opposed to penal law, compensation is awarded only if damages are suffered, and the amount of compensation awarded is proportionate to the level of damages suffered. Therefore, conferring a certain level of confidentiality on a specific type of documents should, logically, be based on the level of harm expected from its disclosure. It is not possible to arbitrarily standardize the level of damage caused by disclosing all types of arbitration documents, or that resulting from different types of revelation (e.g. the discussion of legal principles set out in an arbitral award in an academic article or book causes perhaps less damage than the publication of sensitive business information in a widely distributed daily newspaper).

Given the above discussion, the practice regarding confidentiality in Egypt can be summed up as follows: arbitration practitioners and users agree that arbitration is confidential. This is a matter of consensus with regard to arbitral awards, deliberations, and trade secrets. While confidentiality is widely acknowledged as a duty attaching to all arbitration documents and particulars, the extent to which a duty of confidentiality attaches to the various arbitration documents, other than the award, is less ascertained. There is a general trend to adhering to confidentiality: it is not uncommon for parties to refer to it in the course of arbitration, by way of re-confirmation, and some practitioners mentioned that they adopt special measures to maintain confidentiality, or to acquire the parties' waiver of their corresponding rights. Nonetheless, practitioners note that at times it is not taken as seriously as it should be. Most reported breaches concern secrecy of deliberation and less often there were incidents in which information about the arbitration leaked to the press, whether during the arbitration or post its conclusion.²¹³ Ironically, such leakage is often the doing of one of the parties, who are supposed to be the primary beneficiaries of the existence of this duty.

Such breaches, it is argued, indicate that this practice has not, yet, acquired the stance of custom, because, it appears, people do not perceive confidentiality as legally binding. Since courts did not get the chance to address the issue of confidentiality in enough detail to clear its present ambiguity, the exact components of this duty remain unclear. Identifying the legal aspect(s) of the duty of confidentiality would much assist in resolving this uncertainty.

²¹²Trade secrets and knowhow information are often protected by law provisions as well, as is the case with the Law of Copyright in Egypt. Further reference to the relevant law provisions will occur later in Chap. 4.

²¹³Comair Obeid (interview: 28/12/2010), and Alamedin (interview: 4/12/2010).

2.8 Conclusion

As for privacy, while the Arbitration Law currently in force in Egypt is silent on the matter, the legal community agrees that arbitration in Egypt is private as a matter of practice. Comparative writings suggest that the same is also true in other Arab countries. Egyptian court judgements, scholarly writings and the reported practice show that there is no question about privacy being the rule in arbitral hearings. However, the legal basis for this rule is debatable. According to article (25) of the Arbitration Law, the parties can agree on privacy either expressly or impliedly by reference to institutional arbitration rules that include an express provision on the matter. Absent any such agreement the arbitral tribunal shall adhere to privacy.

Practitioners mostly argue that the practice of privacy amounts to a customary practice. Accordingly, should an argument to that effect be advanced in court, it would be accepted and the court would acknowledge the binding effect of this practice as a custom. One strong argument against this presumption is proposed by Judge Tariq Al-Bishri. He argues that privacy stems from the right to privacy. While the existence of a custom is dependent on human behaviour and attitude, which are variable matters, the right to private life is so fundamental that it cannot be said to depend on the behaviour of people. As such, it is not acceptable to say, in his opinion, that the legal duty of privacy is based on custom; it should rather be perceived as stemming from legal principles the existence of which is independent from changing human behaviour.

Another compelling argument is that privacy is inherent in the nature of arbitration. This is so because arbitration is a creation of a private law contract (i.e. the arbitration agreement), thus this contract excludes third parties. The principle of privity of contract stipulates that any third party has no legitimate interest in intervening or witnessing the conduct of a contract he is not party to. Accordingly, privity of contract entitles the parties to the arbitration agreement to privacy in the conduct of their arbitration. It is the parties' prerogative to permit others to attend arbitral hearings.

Traditionally, it is said that the nature of arbitration is a hybrid one; it comprises contractual features as well as judicial ones. It starts as a contract, but its subject matter is a judicial function, particularly in arbitral hearings, the counterparts of court hearings. This viewpoint sheds doubt on the adequacy of the rule of privacy for arbitral hearings, and necessitates further study of the principle of publicity in state courts to determine its suitability to apply in arbitration or otherwise.

Regarding confidentiality, the law of arbitration in Egypt is silent on the matter of confidentiality save for article (44/2) by virtue of which the Arbitration Law of 1994 prohibits publications of awards absent parties' consent [article (44/2)]. Scholars agree this prohibition is limited to such publication that would lead to the identification of the parties of the dispute, otherwise the publication of a redacted version of the award or the use of its legal principles in scholarly and academic writing does not breach article (44/2). The law specified arbitral awards because of

their special status as the counterpart of court judgements, in which the parties' rights are decided in a final and binding manner.

Like judges, arbitrators are under a duty to preserve the secrecy of deliberations. The Courts of Egypt ruled that it is a public order requirement in arbitration derived from the judicial nature of the arbitrators' mandate. However, the breach of this duty does not affect the validity of the arbitral award, and only raises the potential civil liability of the arbitrator who committed the breach. Despite the academic controversy on the effect of dissenting opinions on the secrecy of deliberations, the Arbitration Law allows dissent and, further, it requires that if the award is made by majority and the minority declined to sign the award, that the reasons for such decline be mentioned in the award document itself.

The arbitration community agrees that there is a general duty of confidentiality in Egypt, constantly observed in practice. There is much diversity in the detailed perception of this duty between practitioners. Its core elements are thought to be: (1) secrecy of deliberations, (2) privacy of the hearings, and (3) confidentiality of arbitral award. The constant reference to privacy of hearings as an element of confidentiality reflects that the classical view which did not distinguish between privacy and confidentiality is still present in the arbitration community in Egypt. The level of confidentiality attaching to other arbitration documents would vary depending on the nature of the document itself and the potential harm that may result from its disclosure to third parties. Given the variety of documents produced and exchanged in any given arbitration, I think it would prove a very difficult exercise, and possibly not a very fruitful one either, to try to determine beforehand the level of confidentiality attaching to each and every class of documents. There is, also, a general understanding that confidentiality is subject to exceptions imposed by the law, the clearest of which is the parties' right to resort to state courts to request enforcement of the award or to challenge it, an action that would significantly compromise the confidentiality of the arbitration, particularly the award in question.

Confidentiality stems from the general principle of privity, at least partially, which prevents third parties from claiming to have a legitimate interest in the arbitration or to demand access to its file. However, privity does not impose a duty of confidentiality on the arbitration parties themselves. Presumably, the parties' duty of confidentiality towards one another stems from each one's right to privacy; this argument is further discussed in Chap. 4 of this book.

Finally, understanding the interrelation between transparency and confidentiality, as features of the arbitration system, would definitely assist in formulating the limitations to the duty of confidentiality.

Confidentiality in Arbitration

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