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Simon Crookenden QC

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Kluwer Law International
250 Waterloo Road
London SE1 8RD
United Kingdom
www.kluwerlaw.com

LCIA
70 Fleet Street
London EC4Y 1EU
telephone: +44 (0) 20 7936 7007
fax: +44 (0) 20 7936 7008
e-mail: lcia@lcia.org
www.lcia.org

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Arbitration International
c/o LCIA
70 Fleet Street
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Who Should Decide Arbitration Confidentiality Issues?

by SIMON CROOKENDEN QC*

ABSTRACT

Confidentiality of documents produced or created in the course of an arbitration is recognised by many systems of law but the right to confidentiality is not absolute. Can issues as to arbitration confidentiality be resolved by arbitral tribunals themselves, or must recourse be had to the courts? It is suggested that these issues should be resolved by arbitral tribunals unless third party rights are involved, in which case court assistance will normally be required.

I. PRIVACY AND CONFIDENTIALITY IN ARBITRATIONS

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.[1] Thus, in the absence of the agreement of all parties, a common tribunal in linked English arbitrations cannot order the two arbitrations to be heard together, however close the links between the issues and the parties to the two arbitrations[2] The privacy of arbitration proceedings is generally recognised internationally.[3]

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.

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* Barrister and Arbitrator, Essex Court Chambers, London.

1 In *Russell* v. *Russell* (1880) 14 Ch. D 471 at 474, Sir George Jessel MR referred to one reason why parties agree arbitration to be for 'keeping their quarrel out of the public eyes'.

2 *The Eastern Saga* [1984] 2 Lloyd's Rep. 373.

3 *See* UNCITRAL Rules, art. 25(a) and the rules of many arbitration institutions such as the ICC (art. 21(3)) and the LCIA (art. 19(4)).

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In England, an implied duty of confidentiality[4] is recognised extending to documents disclosed in or brought into existence for the purposes of an arbitration,[5] but the High Court of Australia has recognised a duty of confidentiality only in respect of documents produced compulsorily pursuant to an order of the tribunal.[6] There is no clear consensus in national laws as to the obligations of parties to an arbitration to keep arbitration documentation confidential.[7] While the parties are free to agree their own rules as to confidentiality,[8] arbitral tribunals do not have jurisdiction to lay down rules as to confidentiality that are to apply to the particular arbitration.[9]

II. LIMITS TO THE DUTY OF CONFIDENTIALITY OF ARBITRATION DOCUMENTS UNDER ENGLISH LAW

The limits to the duty of confidentiality in relation to arbitration documents were recognised in the 1996 Report on what became the English Arbitration Act 1996 to be 'manifestly legion and unsettled in part'.[10] The decision was taken not to seek to codify the law of England on privacy and confidentiality in the Act but to allow the law to be developed on a case-by-case basis.[11] A summary of the limits to the duty of confidentiality as recognised by the English courts to date is as follows:

(1) Disclosure of arbitration documents can be made with the express or implied consent of the party to the arbitration who originally produced the material.[12]
(2) Disclosure can be made in accordance with an order or leave of the court.[13] It is questionable whether this is to be regarded as a true exception rather than a means of determining whether one of the other exceptions applies. There is no general discretion in the court to overrule the confidentiality obligation.[14] Where, however, a court rules in favour of a third party that he has a right to disclosure of documents from an arbitration to which he is not a party, the party ordered to make disclosure

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4 The obligation of confidentiality covers all documents disclosed or generated in the arbitration and is not limited to documents that are confidential in the sense of containing trade secrets or commercially sensitive information.
5 *Dolling-Baker* v. *Merrett* [1990] 1 WLR 1205; *Ali Shipping Corp.* v. *Shipyard Trogir* [1998] 1 Lloyd's Rep. 643; *Emmott* v. *Michael Wilson & Partners* [2008] 1 Lloyd's Rep. 616.
6 *Esso Australia Resources Ltd* v. *Plowman* (1995) 128 ALR 391.
7 A. Redfern and M. Hunter, *International Commercial Arbitration* (4th edn, 2004), App. D para. 3.
8 As was done in *AEGIS Ltd* v. *European Re* [2003] 1 WLR 1041.
9 Such at least is the position in Australia: *Commonwealth of Australia* v. *Cockatoo Dockyard Pty Ltd* (1995) 36 NSWLR 662.
10 Report on the Arbitration Bill (1996), para. 16.
11 *Ibid.* para. 17. In Scotland, however, it is proposed to codify the confidentiality obligation (*see* Arbitration (Scotland) Bill, Sch., rule 25).
12 *Ali Shipping* v. *Shipyard Trogir*, *supra* n. 5 at 651.
13 *Ibid.*
14 *Emmott* v. *Michael Wilson & Partners*, *supra* n. 5 at para. 107.

would not be in breach of contract by making such disclosure, though he would no doubt have a duty to inform the court of the existence of the confidentiality obligation and give notice of the disclosure application to the other arbitrating party. It is perhaps useful, therefore, to include this as one of the exceptions.

(3) Disclosure can be made if it is reasonably necessary for the enforcement of the legal rights or protection of the legitimate interests of an arbitrating party.[15]

(4) Disclosure can be made where the interests of justice or (perhaps) public interest require such disclosure.[16]

Doubts have been expressed as to the desirability of characterising the duty of confidentiality as an implied term and then formulating exceptions to it.[17] An alternative approach is to consider the different types of document involved in arbitrations and the reasons for confidentiality in relation to such documents. The principal categories of document involved are as follows:

(1) Disclosed documents. Such documents have a confidentiality quite apart from the fact that they are disclosed in an arbitration.[18] Although regard must be had to the obligation of confidentiality in the arbitration proceedings, the prime consideration in deciding whether such documents should be disclosed in other proceedings is whether it is necessary for the fair disposal of those other proceedings.[19]

(2) Pleadings or submissions. The confidentiality of these documents follows from the privacy of arbitrations. There will be few circumstances in which such documents will be needed or relevant for any other purpose. Circumstances can arise, however, where disclosure in other proceedings is required in the interests of justice.[20]

(3) Evidence of witnesses in the form of statements or transcript of oral evidence. The rights to confidentiality of the witness may also be involved in relation to the confidentiality of the evidence of a witness.[21] It should rarely be necessary for such documents to be used or disclosed outside the arbitration. If the witness is willing, he can provide a statement or oral evidence for other proceedings. If he is not, it will be rare that his evidence

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15 *Ali Shipping* v. *Shipyard Trogir*, *supra* n. 5 at 651.

16 *Emmott* v. *Michael Wilson & Partners*, *supra* n. 5 at para. 107.

17 Per Lord Hobhouse in *AEGIS Ltd* v. *European Re*, *supra* n. 8 at para. 20.

18 Documents disclosed in English court proceedings may only be used for the purposes of those proceedings unless the documents are referred to in a public hearing, the parties agree or the court gives leave (CPR rule 31.22).

19 *Dolling-Baker* v. *Merrett*, *supra* n. 5 at 1213.

20 As in the case of *Emmott* v. *Michael Wilson & Partners*, *supra* n. 5, in which leave to disclose arbitration pleadings was sought to avoid the other party misleading a foreign court in which it was alleged that an inconsistent case was being put forward.

21 That a witness in an arbitration has a right of confidentiality was recognised in *London & Leeds Estates Ltd* v. *Paribas (No. 2)* [1995] 1 EGLR 134.

is admissible in other proceedings. Interests of justice may, in some cases, justify disclosure in other proceedings; for example, when it is alleged that a witness is giving inconsistent evidence in two sets of proceedings.[22]

(4) The award. The confidentiality of awards also follows from the privacy of arbitrations but, being the intended product of the arbitration process and determinative of the parties' rights, any obligations of confidentiality cannot prevent the use of the award for enforcing those rights.[23]

III. WHO DECIDES ISSUES OF CONFIDENTIALITY?

Are issues of confidentiality to be determined by an arbitration tribunal or by a court having jurisdiction over the parties in respect of the dispute? If the former, is it the tribunal in the reference in which the documents in issue were produced or generated that has jurisdiction, or could either party insist on the dispute being referred to another tribunal? In the past, such issues have generally been determined by the court but the view has been expressed in the English Court of Appeal that, at least as long as there is an existing tribunal in a pending arbitration, issues of confidentiality should be determined by the tribunal in the reference in which the documents in issue have been produced or generated.[24]

The conclusion that it is the tribunal in the pending arbitration that has jurisdiction over issues of confidentiality has practical benefits in that the tribunal is in place and aware of the background giving rise to the confidentiality issue. The conclusion is also in accordance with one of the objects of the 1996 Arbitration Act, which was to give arbitral tribunals the necessary powers to control references and to restrict intervention by the court. This conclusion does, however, raise certain theoretical and practical difficulties. What is the source of the tribunal's jurisdiction? Is the confidentiality issue within the tribunal's procedural jurisdiction or is it a substantive issue that needs to be referred? What happens if the tribunal is *functus officio*? Does its jurisdiction revive to deal with confidentiality issues that concern documents that were disclosed or generated in the concluded arbitration? If the issue is procedural, how does a court have jurisdiction even if neither party seeks a stay of court proceedings? How are any third party rights to be taken into account?

IV. SOURCE OF THE CONFIDENTIALITY OBLIGATION

To consider these difficulties, it is first necessary to identify the source of the confidentiality obligation. English law treats the obligation of confidentiality as

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[22] As was alleged to be the case in *London & Leeds Estates Ltd v. Paribas (No. 2)*, *supra* n. 21.

[23] Despite a comprehensive express confidentiality agreement that does not provide for any disclosure of the award (*see AEGIS Ltd* v. *European Re*, *supra* n. 8).

[24] *Emmott* v. *Michael Wilson & Partners*, *supra* n. 5, per Thomas LJ at para. 123. The views expressed are clearly *obiter* and the other members of the Court of Appeal declined to express a view on the point (at paras. 110 and 134).

being an implied contractual obligation arising out of the nature of arbitration itself.[25] There are, however, different sets of contractual obligations involved and correct identification of the set of obligations under which the obligation of confidentiality arises may affect who has jurisdiction over confidentiality issues. It is well established that an agreement to refer incorporated into a principal contract has an existence distinct from that of the principal contract.[26] It is also clear that the set of contractual relations that arise on a particular reference to arbitration has an existence that is distinct from the agreement to refer itself.[27] Thomas LJ in the *Emmott* case distinguished between the principal contract and the agreement to refer but not between the agreement to refer and the particular reference. Had he needed to do so, it is unclear whether he would have regarded the obligation of confidentiality as arising under the agreement to refer or under the particular reference to arbitration.[28] It is suggested that the better view is that the confidentiality obligation arises under the particular reference to arbitration rather than under the agreement to refer. No obligation of confidentiality can arise unless and until there is a reference to arbitration. There is, therefore, no need to imply a confidentiality obligation into an agreement to refer. Further, the confidentiality obligation extends to the members of the tribunal who are not, of course, parties to the agreement to refer.

Thomas LJ reasoned that it followed from the fact that the confidentiality obligation arose under an agreement that is distinct from the principal contract 'that the decision on the ambit of the obligations as between the parties to the arbitration agreement should ordinarily, during the currency of the arbitration, primarily be one for the arbitral tribunal'.[29] This reasoning needs to be looked at in a little more detail.

The mere fact that the dispute concerns the ambit of the obligations of the parties to the arbitration agreement does not of itself necessarily mean that the issue is one for the tribunal. There are obligations of the parties as parties to the arbitration agreement that are not within the jurisdiction of the tribunal. For instance, one of the basic obligations of the parties under a reference to arbitration is to perform the award,[30] yet the tribunal is *functus officio* by the time the award is to be performed and enforcement of the award is a matter for the courts. Even if the issue is a matter for the tribunal, it is necessary to distinguish between the substantive jurisdiction of the tribunal (to determine disputes referred) and its procedural jurisdiction (to determine procedural and evidential

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25 *Ali Shipping* v. *Shipyard Trogir*, *supra* n. 5, per Potter LJ at 651; *Emmott* v. *Michael Wilson & Partners*, *supra* n. 5, per Lawrence Collins LJ at para. 84 where the confidentiality obligation is referred to as 'really a rule of substantive law masquerading as an implied term'.

26 *Lesotho Highlands Development Authority* v. *Impreglio SpA* [2006] 1 AC 221 at para. 21.

27 *See Black Clawson* v. *Papierwerke* [1981] 2 Lloyd's Rep. 446, per Mustill J at 454–455.

28 There are passages in his judgment that support both conclusions. He states that a dispute as to the confidentiality obligation 'relates to the interpretation of the terms of the arbitration agreement' but compares the obligation as being equivalent to 'an express term incorporated for example through an institutional rule' (*see Emmott* v. *Michael Wilson & Partners*, *supra* n. 5 at para. 119).

29 *Ibid*.

30 *AEGIS Ltd* v. *European Re*, *supra* n. 8 at para. 9.

issues arising in the reference). The tribunal's substantive jurisdiction is limited to disputes referred, whereas the procedural jurisdiction extends to all matters in connection with the reference which, in accordance with the applicable curial law, are within the powers of the tribunal to determine.

If confidentiality issues are to be regarded as within the substantive jurisdiction of the tribunal, then the issue needs to be referred. The tribunal in the pending proceedings will not have jurisdiction (in the absence of the agreement of the parties) unless the original reference to arbitration was wide enough to encompass the confidentiality issues (unlikely since the issues would only have arisen in the course of the arbitration) or there is some agreed mechanism to permit the confidentiality issues to be added to the issues referred.

If confidentiality issues are to be regarded as within the procedural jurisdiction of the tribunal, then there is no need for there to be a specific reference of the confidentiality issue to arbitration, but it is still necessary to identify the source of the jurisdiction of the tribunal in the pending arbitration. The tribunal has power (subject to any specific agreement of the parties) to decide all procedural and evidential matters.[31] It could be argued that the apparent width of the tribunal's powers must be limited to procedural and evidential matters for the purpose of the pending reference. Since confidentiality issues are likely to arise when it is sought to use arbitration documents for purposes *other than* those of the pending arbitration, it could be argued that such issues do not fall within the procedural powers of the tribunal in the pending reference.

Resort to the court as a fall-back position does not provide an easy way out of the above problems. If the confidentiality issue is a substantive arbitrable issue subject to the agreement to refer, then either party could apply for a stay of any court proceedings. If it is a procedural issue, then the court has the difficulty of the prohibition against court intervention otherwise than in accordance with the Act imposed by Arbitration Act 1996, section 1(c). Although the Court of Appeal was satisfied in the *Emmott* case that the court had jurisdiction to resolve the confidentiality issue, this was based on the fact that neither party had applied for a stay.[32]

An alternative analysis is that, even if the confidentiality obligations arise only under the particular reference to arbitration, breach of such obligations gives rise to a substantive right to claim damages or other relief (such as a declaration) irrespective of whether any procedural remedy is available from the tribunal or from the courts. The existence of such a substantive right for breach of a procedural obligation is seldom if ever asserted since it is not usually necessary to do so. Either a procedural remedy is available from the tribunal or a supervisory court, or the breach cannot be shown to have caused damage. There is, however, some support for the existence of such a substantive right.[33] It is pointed out that

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[31] The power is statutory under Arbitration Act 1996, s.34, as it was under Arbitration Act 1950, s.21(1).

[32] *Emmott* v. *Michael Wilson & Partners*, *supra* n. 5 at paras. 38 and 123.

[33] *See* Lord Mustill and S.C. Boyd QC, *Commercial Arbitration* (2nd edn, 1989), pp. 461 and 524, and *2001 Companion Volume*, pp. 316–318.

a breach of an agreement to refer by bringing court proceedings can give rise to an arbitrable claim for damages, at least where the court proceedings were brought in a jurisdiction where the remedy of a stay was not available.[34] The view has been expressed that there is no reason in principle why a contractual remedy (such as damages or a declaration) should not be available for breach of procedural obligations.[35]

It is suggested that, despite the lack of examples in the case law, the obligation of confidentiality is best regarded as an implied obligation of the particular reference to arbitration that gives rise to a substantive and not merely a procedural contractual right which, if breached, can give rise to a claim for damages and, in an appropriate case, can found a claim for a declaration or an injunction. Such a claim would, it is suggested, be within the scope of most common form agreements to refer. Breach of an agreement to refer that forms part of but has an existence independent of the principal contract are usually within the scope of the agreement to refer.[36] In the same way, breaches of the contractual obligations that arise on a particular reference, which arise out of but have an existence independent of the agreement to refer, would, it is suggested, be within the scope of agreements to refer all disputes 'arising out of' or 'in connection with' the principal contract containing the agreement to refer.

V. DOES A TRIBUNAL IN A PENDING ARBITRATION AUTOMATICALLY HAVE JURISDICTION?

It remains to consider whether it is the tribunal in the pending reference or some other tribunal that would have jurisdiction to determine the confidentiality issues. The tribunal in the pending reference would have jurisdiction if the parties to the arbitration agreed. That tribunal could also have jurisdiction if the original reference was wide enough to cover confidentiality disputes arising in the course of the reference or pursuant to applicable procedural rules that permitted new disputes to be added to the reference.[37] In the normal case where only specific disputes have been referred and there is no appropriate procedural rule, however, it is suggested that the better view is that a confidentiality dispute arising in the course of a pending reference is an arbitrable dispute which needs to be referred to arbitration before any tribunal has jurisdiction to deal with the dispute.

If, as suggested, confidentiality disputes are separately referable arbitrable disputes, that resolves some of the difficulties mentioned above. It does not matter whether there is a constituted tribunal in a pending arbitration or if the tribunal is *functus officio*. There is no question of a tribunal that is *functus* being given renewed life just because a confidentiality issue arises in respect of documents that were disclosed or generated in a completed arbitration unless the parties to the

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[34] *Mantovani* v. *Carapelli* SpA [1980] 1 Lloyd's Rep. 375.
[35] Mustill and Boyd, *supra* n. 33 at p. 524.
[36] *See Mantovani* v. *Carapelli SpA*, *supra* n. 34.
[37] As *e.g.* art. 19 of the ICC Rules of Arbitration (1998) and art. 10 of the LMAA Terms (2006).

reference agree to refer the confidentiality dispute to that tribunal. There is no problem also as to whether it is the tribunal in the pending arbitration or a supervisory court that has jurisdiction, as there would be if the breach is treated only as a procedural breach. There is also no problem with a court accepting jurisdiction to determine the confidentiality issue if neither party seeks a stay of the court proceedings.

It is suggested, therefore, that, at least if no third party rights are involved, confidentiality disputes arising in relation to documentation produced or generated in the course of an arbitration will usually (subject to the terms of the agreement to refer) be arbitrable disputes that either party to the agreement to refer can insist on having determined by arbitration.[38] If the arbitration is still pending then it will normally be most convenient for the issue to be determined by the existing tribunal. It is suggested, however, that, unless the original reference is sufficiently widely worded or there is a procedural power in the tribunal to add to the issues referred, it would be open to either party to insist on the confidentiality issues being referred to a new tribunal.[39]

VI. WHO DECIDES ISSUES OF CONFIDENTIALITY IF THIRD PARTY RIGHTS ARE INVOLVED?

While third parties often have an *interest* in arbitration confidentiality issues it is less often that third party *rights* are involved. Where an unsuccessful party in an arbitration seeks to use an award to prove a loss in respect of which he seeks to make a third party liable, that third party has an interest in whether the award can be used for that purpose despite confidentiality obligations owed to the successful party, but in determining the confidentiality issue it is only the rights of the parties to the arbitration that need to be taken into account. Similarly, if a party seeks to deploy in one arbitration documents disclosed to him in another, the confidentiality issue concerns only the rights of the parties to the arbitration in which the documents were originally disclosed.

Third party rights can, however, be involved if, in the disclosure example given above, it is the other party who is not a party to the arbitration in which the documents were disclosed that seeks disclosure of those documents. There is a conflict between the rights to confidentiality of the party who originally gave disclosure of the documents and the rights of the party seeking disclosure to have disclosed to him relevant documents that are in the possession of the party against whom he is arbitrating. Who is to decide between these competing rights? The tribunal in the reference in which disclosure is sought, the tribunal in the reference in which the original disclosure was given, some other tribunal or a court?

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[38] For the contrary view that, in the absence of a pending arbitration, only the court has jurisdiction, *see* Professor R.M. Merkin, *Arbitration Law* (2008), para. 17.28.

[39] Where there is a pending arbitration, Merkin adopts the view expressed by Thomas LJ in *Emmot* that it is the tribunal in the pending arbitration that has jurisdiction: Merkin, *supra* n. 38 at para. 17.28.

The issue is likely to arise in the reference in which disclosure is sought and the tribunal in that reference will normally be the one first asked to consider the issue. Although that tribunal will have no jurisdiction over the party who originally gave disclosure of the documents in the other arbitration, it will need to take account of that party's rights of confidentiality and it may be appropriate to seek the views of that party. This was the course adopted by the author in one such case. The original disclosing party whose rights of confidentiality were in issue was invited to make submission as to why its rights to confidentiality should prevail over another party's right to obtain disclosure of documents. In the event no order was required since the three parties involved agreed that the documents disclosed in each arbitration should also be disclosed in the other.

If the tribunal in the reference in which disclosure is sought considers that the documents should be disclosed notwithstanding the confidentiality obligations, but the original disclosing party does not accept that ruling, what happens next? The tribunal in the reference in which disclosure is sought does not have any jurisdiction over the original disclosing party and cannot, therefore, affect that party's rights to confidentiality.[40] The above analysis of who has such jurisdiction would suggest that the issue of confidentiality should be resolved by arbitration between the original disclosing party and the party from whom disclosure is now sought. Not only would this procedure be cumbersome, especially if the tribunal in the reference in which the documents were originally disclosed is *functus officio* or one of the parties insisted on the issue being referred to a new tribunal, it would not necessarily resolve the issue of the conflicting rights involved. If the two tribunals both reached the same conclusion there would be no problem, but if one decided that the right to disclosure of relevant documents should prevail and the other that the right to confidentiality should prevail, the conflict would not have been resolved.

VII. CIRCUMSTANCES IN WHICH RESORT TO THE COURTS IS REQUIRED

Since the problem of the conflicting rights cannot be solved by arbitration processes alone, recourse to the courts will be required. How this can best be achieved will vary depending upon the seat of the two arbitrations involved, the applicable curial law and rules of court, and possibly other factors such as the jurisdiction in which the parties reside. Even in the case of two arbitrations with their seat in and being conducted in England, the way in which the assistance of the court can be invoked is not clear:

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[40] Note, however, that it is suggested by C. Ambrose and K. Maxwell with A. Parry, *London Maritime Arbitration* (3rd edn, 2009), para. 13.3, that compliance with an arbitrator's order for disclosure in a second arbitration would not be likely to be a breach of an obligation of confidentiality arising in a previous arbitration in which the documents had first been disclosed.

(1) Under the Arbitration Act 1996, the English court no longer has the power it had under the 1950 Act to order discovery of documents in support of an arbitration.[41]
(2) Although court procedures can be used to secure the attendance of witnesses and the production of documents, this only applies if the witness or person in control of the documents is in the United Kingdom and the procedures can only be used to obtain the disclosure of specific documents.[42]
(3) The court has power to enforce a peremptory order of the tribunal.[43] The author is not aware of this section having been used where the arbitrating party against whom the order has been made is willing to comply but is constrained from doing so by the alleged rights of a third party.
(4) An application by the party seeking disclosure for a declaration naming both the original disclosing party and the intermediate party as defendants would not be liable to be stayed since there would be no agreement to refer as between the party seeking disclosure and the original disclosing party. Depending on the countries of residence of the various parties there may be difficulties in establishing jurisdiction.
(5) When disclosure of documents is sought in legal proceedings from a non-party resident out of the jurisdiction, it is possible to seek assistance by means of letters of request issued by the English court to the judicial authorities in the country in which the party in control of the documents resides.[44] These procedures are not, however, available in support of an arbitration.[45]

It is suggested that the appropriate way in which the court's assistance should be obtained in an English arbitration is by an application under Arbitration Act 1996, section 42 to enforce a peremptory order of the tribunal. Although, as mentioned above, the author is not aware of the section being used for this purpose, it is suggested that it would be an appropriate use of the section. The legislative purpose behind this section is to assist the proper functioning of arbitrations where the court has a power that the arbitrators do not.[46] It is suggested that a situation where a court can make an order for disclosure of documents with which a party can safely comply notwithstanding an alleged contractual duty of confidentiality to a third party, but an arbitration tribunal cannot, is just the sort of situation that should be within the power of the court to resolve under this section.

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41 Arbitration Act 1996, s.44.
42 *Ibid.* s.43.
43 *Ibid.* s.2.
44 CPR Part 34.8.
45 Since Arbitration Act 1996, s.43 is limited to obtaining evidence from a witness who is in the United Kingdom.
46 *See* DAC *Report on the Arbitration Bill* (February 1996), para. 212.

VIII. CONCLUSION

If the above analysis is correct, then an issue as to the confidentiality of documents produced or generated in the course of an arbitration will normally be an arbitrable issue that either party to the arbitration can insist on being determined by arbitration rather than by a court. Further, unless the original reference to arbitration was sufficiently wide or there are applicable procedural rules permitting the confidentiality issue to be included within the pending reference, either party should be able to insist on the confidentiality issue being referred to a new tribunal. Arbitration tribunals should be encouraged by the views expressed by Thomas LJ in *Emmott* to deal with any confidentiality issues that arise in the course of a reference rather than leaving the parties to any court remedy they may have. Caution should, however, be exercised to ensure that the tribunal has jurisdiction. It will often be sensible to seek express confirmation from the parties that the tribunal's jurisdiction to rule on the confidentiality issue is accepted. Where, however, there is a conflict between rights to confidentiality arising in one arbitration and the rights of a non-party to that arbitration, resort will normally be necessary to court procedures.