

ADDRESSING CONFIDENTIALITY, DISCLOSURE AND CHOICE OF LAW IN ARBITRATION: REFLECTIONS ON THE LAW COMMISSION PROPOSALS

Hong-Lin Yu

INTRODUCTION

The Law Commission's (the Commission) consultations on the review of the English Arbitration Act 1996 (the Act) aim to increase "the attractiveness of England and Wales as a 'destination' for dispute resolution and the pre-eminence of English law as a choice of law"¹ and "the competitiveness of the UK as a global centre for dispute resolution".² In both consultation papers, the Commission discussed implied terms, necessity and business efficacy in the areas of confidentiality, duty of disclosure and applicable law.³ The Commission proposed to maintain the *status quo* on the implied duty of confidentiality but suggested statutory amendments on both the duty of disclosure and the governing law of arbitration agreement. Prior to the consultations, these issues were addressed by English common law rules; hence it is essential to examine these rules, the key cases and how they are reflected in the English arbitration jurisprudence, in order to determine whether the Commission's proposals would provide an added value to arbitration seated in England and Wales.

This article limits its scope to the three issues named above and examines how implication has been discussed in case law, such as Lord Neuberger's six comments on how implied terms developed through common law rules in *Marks & Spencer*,⁴ recently confirmed by *Barton v Morris*.⁵ It will be cross-referenced against arbitration cases: *Dolling-Baker*,⁶ *Hassneh Insurance Co of Israel v Stuart J Mew*,⁷ *Ali Shipping Corp v Shipyard Trogir*,⁸ *Emmott v Michael Wilson & Partners Ltd*,⁹ *Enka v Chubb*¹⁰ and *Halliburton v Chubb*¹¹ to present the common denominators and flexibility in the legal reasoning given in contractual and arbitration cases. Based on the discussion on implication, an inquisitive analysis will be conducted on the proposals put forward in the Commission Reports.

To achieve this, the researcher will focus on the relevant legal analysis addressing the questions when and how a term can be implied in such a way as to be interpreted with party

¹ Law Commission, 30 November 2021 statement, available at <<https://www.lawcom.gov.uk/law-commission-to-review-the-arbitration-act-1996/#:~:text=The%20Law%20Commission%20has%20today,forefront%20of%20international%20dispute%20resolution>> accessed on 14 June 2023.

² Law Commission. Review of the Arbitration Act 1996 - A consultation paper (2022) Appendix 1. Available at <<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2022/09/Arbitration-Consultation-Paper.pdf>> and the second consultation paper (2023) <<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2023/03/Arbitration-CP2.pdf>> accessed on 14 June 2023.

³ *Ibid.* Chapters 2, 3 and 11 (2022) and pages 4-14 (2023).

⁴ *Marks & Spencer v BNP Paribas* [2015] UKSC 72; [2015] 3 W.L.R. 1843.

⁵ *Barton v Morris* [2023] UKSC 3.

⁶ *Dolling-Baker v Merrett and Another* [1990] 1 W.L.R. 1205.

⁷ *Hassneh Insurance Co of Israel v Stuart J Mew* [1993] 2 Lloyd's Rep 243, 246.

⁸ *Ali Shipping Corp v Shipyard Trogir* [1998] 2 All ER 136, 146.

⁹ *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184, [2008] 2 All ER (Comm) 193 at [84].

¹⁰ *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 48, [2020] 1 WLR 4117.

¹¹ *Ibid.* [83].

autonomy, flexibility, and validation. In the first part of the study, readers' attention will firstly be drawn to the contractual nature of the arbitration agreement before briefly discussing how the key phrases - presumed intention, necessity, obviousness, non-absolute necessities, presumed, business efficacy and strict interpretation - are used in the English common law rules of implication. These elements of the implied term will then be analysed in the examination of the key arbitration cases listed above to ascertain whether English common law rules on implied term correspond with the legal reasoning given. This will be followed by a critical analysis of the three proposals made by the Commission as to their added value to arbitration. The research will conclude that the common law rule on implication applied by the courts contains flexibility because of its application of implication, separability and validation and, moreover, respect for party autonomy. Hence, balancing party autonomy, arbitration integrity and the flexibility required for arbitration, the researcher argues for maintaining the implied duty of confidentiality, introducing a statutory duty of disclosure to bridge the gap between ss 1, 24 33, 68 and 103, but against a statutory provision on the law governing arbitration agreement.

The Arbitration Agreement Is a Contract

With the exception of statutory arbitration, "no arbitration is possible without its very basis, the arbitration agreement".¹² The arbitration agreement is viewed as a contract between disputing parties who wish to resort to arbitration. Such a view can be observed in both contractual and hybrid theories which underpin most arbitration laws.¹³ Kellos linked parties' express intention with the essential existence of an arbitration agreement and argued that arbitration has a contractual character that originates in the parties' arbitration agreement.¹⁴ The same view was also expressed by Kitagawa, who argued that "*pacta sunt servanda*" is the source of an arbitration agreement; just like other contracts, it is subject to any state authorisation.¹⁵

Arbitration agreements have a dominating contractual nature under both English and Scots law. This is noted in various commentaries.¹⁶ Among them, Davidson wrote: "[a]part from those disputes which require by statute to be referred to arbitration, arbitration is based on an agreement between two or more parties that a particular dispute or a particular type of dispute should be arbitrated."¹⁷ Similarly, Davidson's view on agreement is also evident in

¹² Albert van der berg, *The New York Arbitration Convention of 1958* (1981) 144-145.

¹³ Hong-Lin Yu, *Explore the void - an evaluation of arbitration theories: Part 1'* (2004) 7(6) *Int. A.L.R.* 180, 185; Also see in general, Hong-Lin Yu, *'Explore the void - an evaluation of arbitration theories: Part 2'* (2005) 8(1) *Int. A.L.R.* 14, 15.

¹⁴ Frances Kellor, *Arbitration in Action*, quoted by Morris Stone in 'A Paradox in the Theory of Commercial Arbitration' (1966) 21 *Arb. J.* 156. Domke, *Commercial Arbitration* (1965), 31.

¹⁵ Tokusuke Kitagawa, 'Contractual Autonomy in International Commercial Arbitration' in *Liber Amicorum for Martin Domke* 138.

¹⁶ Manuel Penadés Fons, Pedro Tent Alonso, *60 Years of the New York Convention: Key Issues and Future Challenges* (2018 Kluwer) 11; Morten Frank, 'Where to go: the floating arbitration agreement' (2019) 35(2) *Arbitration International*, 171, 176; Boris Kasolowsky and Roopa Mathews, 'The Arbitrability of Corporate Disputes after *Fulham Football Club v. Richards*: A Decade On', (2022) 39(2) *Journal of International Arbitration* 263, 268-9; The Right Hon. Lord Justice Saville, 'The Bernstein Lecture Number L, 1996 - The Arbitration Act 1996 and its Effect on International Arbitration in England', (1997) 63(2) *The International Journal of Arbitration, Mediation and Dispute Management* 104, 107.

¹⁷ Fraser Davidson, *Arbitration* (2012 2nd edn W. Green) 5.01.

Merkin's explanation of the interaction between ss 6(1) and 7(1) of the Act referring to an agreement reflecting a distinct legal obligation between the parties who agree to submit disputes to arbitration.¹⁸ While Born describes the arbitration agreement as "the foundation of arbitration,"¹⁹ Holtzmann and Neuhaus described an agreement to arbitrate as being "the classic contractual form" expressing parties' intention.²⁰ Others have argued that "parties to a commercial transaction can agree, as part of their contract ..." ²¹ or be "bent on evading contractual obligations" in their comments on restrictions upon accessing private dispute resolution processes.²²

Returning to the common law: the arbitration agreement is a distinct type of agreement allowing the disputing parties to exclude the involvement of courts. Lord Hoffmann pointed out that an arbitration agreement must be treated as a "distinct agreement" and can be void or voidable only on grounds which relate directly to the arbitration agreement in his discussion of the principle of separability stipulated in s 7 of the Act.²³ Lord Watson used "personal contract" to describe the legal relationship between the parties on the issue of the applicable law of the arbitration proceedings.²⁴ He stated:

"When two parties living under different systems of law enter into a personal contract, which of these systems must be applied to its construction depends upon their mutual intention, either as expressed in their contract, or as derivable by fair implication from its terms. In the absence of any other clear expression of their intention, it is necessary and legitimate to take into account the circumstances attendant upon the making of the contract and the course of performing its stipulations contemplated by the parties; and amongst these considerations, the *locus contracts* and the *locus solutionis* have always been regarded as of importance, ..." ²⁵

The contractual effect of an arbitration agreement saw Lord Dunedin forcing parties' engagement with arbitration where he stated: "[i]f the parties have contracted to arbitrate, to arbitration they must go."²⁶ This attitude was also highlighted by Lord Hoffmann in *Fiona Trust*²⁷ who expressly pointed out that disputes should be decided by arbitration if the parties have intended to engage with arbitration to resolve disputes.²⁸ Lord Hoffmann emphasised the significance of parties' contractual intention, expressly or implied, in resorting to arbitration. On the issue whether the arbitration clause had been impeached by the illegality

¹⁸ Rob Merkin, *Arbitration Law* (2015 Infomra) 3.1.

¹⁹ Gary Born, *International Commercial Arbitration* (3rd ed 2021 Kluwer), §2.02-(c).

²⁰ Howard M. Holtzmann, Joseph Neuhaus, *A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, 259, 262, 271, 283 and 290.

²¹ W Michael Reisman and Brian Richardson, 'International Commercial Arbitration and National Courts: Reflections on a Complex but Indispensable Relationship' in W. M. Reisman and N. Blackaby (eds) *Arbitration Beyond Borders: Essays in Memory of Guillermo Aguilar Álvarez* (2023 Kluwer) 2.

²² Stavros Brekoulakis; Romesh Weeramantry; Lilit Nagapetyan, 'Autonomous Arbitration: Were We Dreaming?' In Stavros Brekoulakis, Romesh Weeramantry, Lilit Nagapetyan (eds) *Achieving the Arbitration Dream: Liber Amicorum for Professor Julian D.M. Lew KC* (2023 Kluwer) 12.

²³ *Fiona Trust and Holding Corporation v Privalov* [2007] Bus LR 1719 [17].

²⁴ *Hamlyn & Co v Talisker Distillery* [1894] AC 202, Lord Watson at 212, 214.

²⁵ *Ibid.* 212.

²⁶ *Sanderson v Armour & Co* 1922 SC (HL) 117, at 126.

²⁷ *Fiona Trust and Holding Corporation v Privalov* [2007] Bus LR 1719.

²⁸ *Ibid.* [8].

of the contract, he said “the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal.”²⁹ This can also be seen in Lord Braid’s decision in *Bogside Investments Limited v Shute* stressing the non-controversial practice allowing parties to enter into an arbitration agreement and exclude the merits of a dispute from consideration by the court.³⁰

IMPLIED TERM IN COMMON LAW RULES

With an arbitration agreement being defined as a distinct type of contract, it is not surprising to find that the issues concerning the validity and the interpretation of the arbitration agreement, such as separability and implication, are addressed under common law rules. It has been highlighted that common law is more receptive towards “the implication of terms by reason of the nature of the contract or by reason of special circumstances of a particular contract.”³¹ In English law, a term can be implied into a contract by rules of law, by implication, or by interpretation from the express terms of the contract, or with a purpose of business efficacy.³² Accordingly, as discussed by Baroness Hale of Richmond in *Geys* and cited by Lady Rose in *Barton*:

“there are two types of contractual implied term. The first is a term which is implied into a particular contract, in the light of the express terms, commercial common sense, and the facts known to both parties at the time the contract was made. The second type of implied terms arises because, unless such a term is expressly excluded, the law (sometimes by statute, sometimes through the common law) effectively imposes certain terms into certain classes of relationship.”³³

Objective Party Autonomy: Objectiveness and Necessity

Accordingly, implied terms have been developed through non-contradiction, mutual benefit, necessity, objective presumed intention, obviousness and business efficacy. The cardinal principle of implication is non-contradiction against the express terms of the contract in dispute. Lord Neuberger pointed out that the express terms are firstly considered against the whole contract before a term can be contemplated for implication³⁴ as the court is not to make a new contract but tries to fulfil the original contractual commitments³⁵ by searching for an integral part of the parties’ intention.³⁶ In other words, implication is only given when

²⁹ *Ibid.* [13].

³⁰ *Bogside Investments Limited v Shute* [2023] CSOH 25 [6].

³¹ The Hon. Mr Justice Steyn, ‘The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy?’ (1991) *The Denning Law Journal* 131, 133.

³² *Birmingham and District Land Company v. London and North Western Railway Company*, (1886) 34 Ch.D. 261, 274; Chris Nicoll, ‘Does termination of a franchise of indefinite duration require “judicial legislation”? The New Zealand Approach’ (1995) *JBL* 472, 474.

³³ *Geys v Société Générale* [2013] 1 AC 523, para 55, as per Lady Hale; *Marks and Spencer* (n4) [15] as per Lord Neuberger; *Barton* (n5) [49] as per Lady Rose.

³⁴ *Marks & Spencer* (n4) [28]; *Barton* (n5) [23-25].

³⁵ *Hillas & Co. Ltd v. Arcos Ltd* (1932) 38 Com. as 23 at 29, per Lord Tomlin.

³⁶ *Associated Japanese Bank v. Credit du Nord* [1989] 1 W.L.R. 255 at 268, per Steyn J as he was. See R.E. Megarry, *Miscellany-at-Law--A Diversion for Lawyers and Others* (1 st edn 1955, 2006 Reprint Simmonds & Hill Publishing Ltd) 210.

it is impossible to carry the contract into effect.³⁷ This point was affirmed by Bowen LJ who famously ruled that: “an implied warranty, ... is in all cases founded on the presumed intention of the parties, and upon reason. ..., the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; ...”³⁸ Citing Lord Wright’s ruling,³⁹ Lord Steyn stated that an intention imputed to the parties from their actual circumstances “is not critically dependent on proof of an actual intention of the parties”.⁴⁰ This was agreed by Lord Neuberger who highlighted that fairness⁴¹ and the finding that parties’ “would have agreed” or a necessary term are sufficient for implying a term into a commercial contract.⁴²

The presumed intention ruled on in *The Moorcock*⁴³ is subject to an objective examination.⁴⁴ Its objectivity lies in the “necessary implication to fulfil the parties’ intention to avoid a futile result”.⁴⁵ Peel commented on the essence of “Bowen LJ’s “obviously”, “presumed intention” and the “object of giving efficacy”⁴⁶ as a requirement of assessing objectively and by reference to the contract as a whole.⁴⁷ Such a view was also expressed by MacKinnon LJ who took the view that implication must be “... so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common ‘Oh, of course!’”⁴⁸

However, both presumed intention and obviousness cannot be read alone but must be consulted against necessity. The context of necessity⁴⁹ in implication is related to the prevention of a failing contract and obviousness. Lord Esher MR stated that a reasonable thing alone is not sufficient to imply terms into a contract. It must be a “necessary implication” and *prima facie*,⁵⁰ and “the parties must have intended that the suggested stipulation should exist.”⁵¹ This view was supported in *BP Refinery*,⁵² where Lord Hoffmann focused on one

³⁷ *Anderson v Commercial Union Assurance Co Plc (No.1)* 1988 S.C. 197, 204, per Lord Roger.

³⁸ *The Moorcock* (1888) 13 P.D. 64, 68; *Hamlyn & Co. v Wood & Co.* [1891] 2 QB 488, 491; Barton (n5) [32].

³⁹ *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, 137.

⁴⁰ *Equitable Life Assurance Society v Hyman* [2002] 1 A.C. 408 HL, 459; *Marks & Spencer* (n4) [21].

⁴¹ *The Moorcock* (n38) 68; *Cummings v. Charles Connell & Co. (Shipbuilders) Ltd.*, 1969 S.L.T. 31; *North American and Continental Sales Inc v Bepi (Electronics)* Court of Session (Outer House) 1982 S.L.T. 47, 49 per Templeman LJ.

⁴² *Marks & Spencer* (n4) [21].

⁴³ *The Moorcock* (n38) 159.

⁴⁴ Andrew Phang, ‘Implied terms, business efficacy and the officious bystander - a modern history’ (1998) JBL 1, 6; Barton (n5) [12].

⁴⁵ *Hamlyn* (n24) 491; *Lamb v. Evans* [1893] 1 Ch. 218; *Thomson v Thomas Muir (Waste Management) Ltd* 1995 S.L.T. 403, 406.

⁴⁶ *The Moorcock* (n38) 68; *Hamlyn* (n24) 491.

⁴⁷ Edwin Peel, ‘Terms implied in fact’ (2016) 132 L.Q.R. 531, 533.

⁴⁸ *Shirlaw v. Southern Foundries (1926) Ltd* [1939] 2 K.B. 206, 227; Barton (n5) [21,24].

⁴⁹ Lord Edmund-Davies spoke of the touchstone being always *necessity* and not merely *reasonableness* in *Liverpool City Council v. Irwin* [1977] A.C. 239, 266, *Allan Bates v Post Office Ltd (No.3: Common Issues)* [2019] EWHC 606 (QB), 691, 695.

⁵⁰ *Shirlaw* (n48) 727; Barton (n5) [22,45]

⁵¹ *Hamlyn* (n24) 491.

⁵² *BP Refinery (Westernport) Pty. Ltd. v. Shire of Hastings* (1977) 180 C.L.R. 266, 283, per Lord Simon of Glaisdale; see discussion in *Jardine Engineering Corp. Ltd. & Ors v. Shimizu Corp.* [1992] 2 HKC 271; HCCT 1/1992 (10

question: what an “instrument, read as a whole against the relevant background, would reasonably be understood to mean?”⁵³ The words “reasonably be understood” can be linked with the “relevant background knowledge” available to a reasonable person and parties as mentioned in *Chartbrook*⁵⁴ as well as Lord Hoffmann’s objective approach in his own interpretation of the contractual document in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*,⁵⁵ where he explained: “The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax.”⁵⁶ He agreed⁵⁷ with Lord Diplock that one badly drafted clause defeating the purpose of the contract must yield to business common sense.⁵⁸

As explained in *JN Hipwell & Son v Szurek*,⁵⁹ the Court of Appeal ruled that: “it is necessary to give business efficacy to the contract in question. In such a context, the touchstone is always necessity and not merely reasonableness”.⁶⁰ This is because a contract lacking business efficacy must, if possible, be supplemented to cure the defect to address “dirty trick making the contract worthless”.⁶¹ Implication should happen only if the courts find that a term is necessary to give business efficacy to the contract and the parties must have intended that term to form part of their contract.⁶² This approach was also taken up by Lord Neuberger who highlighted the need to exercise judgment with “utmost care” to provide coherence⁶³ in addressing “business necessity and obviousness” and the “vital” nature of implication in the instance of “the parties not having fully stated the terms” in *Marks & Spencer v BNP Paribas*.⁶⁴

Lord Neuberger was clear about not invoking commercial common sense and surrounding circumstances to lessen parties’ responsibility in the importance of the language of the

March 1993), in Hong Kong International Arbitration Centre (ed), *International Arbitration: Issues, Perspectives and Practice: Liber Amicorum Neil Kaplan*, (Kluwer Law International 2018) 381, 414.

⁵³ *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10; [2009] 1 W.L.R. 1988; [2009] 3 WLUK 455 (PC (Bze)), [21].

⁵⁴ *Chartbrook Limited v. Persimmon Homes Limited* [2009] UKHL 38, [2009] 1 A.C. 1101 [14]; R. Buxton, ‘Construction’ and Rectification after *Chartbrook* [2010] C.L.J. 253.

⁵⁵ *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* [1998] 1 W.L.R. 896, 912; *Spencer v Secretary of State for Defence* [2012] EWHC 120 (Ch)Vos J. [22]; Chris Peters, ‘The implication of terms in fact’ (2009) 68(3) C.L.J. 513, 514.

⁵⁶ *Ibid.* *Investors* (n55) 913; *Cosmetic Warriors Ltd v Gerrie*, Chancery Division [2015] EWHC 3718 (Ch) 18 Dec 2015 [9]; *Jones v Owen*[2018] EWCA Civ 1895; Chancery Division [2017] EWHC 1647 (Ch) 28 Jun 2017 [67-69].

⁵⁷ *Investors* (n55) 913.

⁵⁸ *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.* [1985] A.C. 191, 201.

⁵⁹ *JN Hipwell & Son v Szurek* [2018] EWCA Civ 674, [26-41, 52-53].

⁶⁰ *Ibid.*[25]; *Liverpool City Council* (n41) 266; *McWhirter v. Longmuir* (1948) SC 577, 589 as per Lord Jamieson; *Crawford v Bruce*, *Court of Session* (Inner House, First Division) 1992 S.L.T. 524 12 Feb 1992.

⁶¹ *Alpha Trading Ltd v Dunnshaw-Patten Ltd* Court of Appeal (Civil Division) [1981] Q.B. 290, 306, per Templeman LJ; *Barton* (n5) [31].

⁶² *Trollope & Colls Ltd v North-West Metropolitan Regional Hospital Board* [1973] 1 W.L.R. 601, 609, 9 BLR 60 per Lord Pearson (agreed by Lord Guest and Lord Diplock); 2012]; *Spencer* (n50) [19] per Vos J.

⁶³ *Marks & Spencer* (n4) [20].

⁶⁴ *Marks & Spencer* (n4) [21, 23]; *Associated Japanese Bank* (n36) 263 (where “comparatively rare” was used); Yihan Goh, ‘Terms implied in fact clarified in Singapore’ (2013) JBL 237, 246–247.

provision.⁶⁵ The UK Supreme Court (UKSC) affirmed that it is not the court's function to relieve a party from an absurd clause caused by the consequences of imprudence or poor advice. As some commentators pointed out, reflecting Lord Steyn's view,⁶⁶ courts should not re-write the contacts because "[n]either Parliament nor the court is a party to a contract and it is therefore not for the court to intermeddle in the terms the parties have agreed."⁶⁷ Further confirmation was given by Lord Kitchin in *Wells v Devani*,⁶⁸ addressing a balance between the competing policy goals of parties' intention, flexibility, certainty.⁶⁹

To conclude, the English courts are more willing to imply terms into a contract.⁷⁰ Lord Neuberger ruled that necessity must be judged by reference to business efficacy, commercial considerations, and practical coherence,⁷¹ as well as reading the relevant background as a whole when the court is asked to answer the question as to what the meaning of instrument would reasonably be understood to mean.⁷² In implication, business efficacy is mentioned as reflecting "a practical expedient founded on and dictated by the experience of businessmen"⁷³ by Lord Lowry and "the least onerous term needed" by Lady Rose.⁷⁴

IMPLICATION IN ARBITRATION

In arbitration, implication is used by the English courts in their interpretation of the duty of confidentiality, the governing law of the arbitration agreement and the arbitrator's duty of disclosure. Similar words related to implication as those mentioned in the section above can also be seen in arbitration cases and the consultation papers. On these three issues, the Commission reviewed these issues, (1) maintain the *status quo* of an implied duty of confidentiality, (2) impose a continuing statutory duty to disclose any circumstances which might reasonably give rise to justifiable doubts as to their impartiality,⁷⁵ and (3) introduce a statutory provision to the effect that the governing law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself.⁷⁶ With the Commission proposing to maintain the *status quo* on the duty of confidentiality but suggesting statutory amendments on both the duty of disclosure and

⁶⁵ *Arnold v Britton and others* [2015] A.C. 1619 [17]; *Ali v Petroleum Co of Trinidad and Tobago* [2017] UKPC 2 at [7], per Lord Hoffmann; Reto Marghitola, *Document Production in International Arbitration*, International Arbitration Law Library, 33 (1995) 129, 143.

⁶⁶ *Associated Japanese* (n36) 268, per Steyn J (as he was).

⁶⁷ Richard Austen-Baker, *Implied Terms in English Contract Law*, (2017 2nd edn. Elgar) para 1.03 https://www.elgaronline.com/display/9781785365270/06_contents.xhtml; Marghitola (n65) 129; John McCaughran, 'Implied terms: the journey of the man on the Clapham omnibus' (2011) 70(3) CLJ 607, 607; Adam Kramer, 'Implication in fact as an instance of contractual interpretation' (2004 63(2) CLJ 384, 384.

⁶⁸ *Wells v Devani* [2019] 2 W.L.R. 617.

⁶⁹ Ji Lian Yap, 'Balancing competing policy goals in the implication of terms for the completion of contracts' (2020) 31(2) I.C.C.L.R. 81, 85, 86, 88.

⁷⁰ M. Jefferson, 'Implied terms in United Kingdom employment law: recent authorities' (1992) JBL J 433, 433.

⁷¹ The term "practical coherence" was also supported in *SPI North Limited v Swiss Post International (UK) Limited, Asendia UK Limited* [2019] EWHC 2004 (Ch) [30]; *Barton* (n5) [46].

⁷² *Marks & Spencer* (n4) [22] per Lord Neuberger; *Belize* (n53) [21] per Lord Hoffmann.

⁷³ *Bunge Corp. v. Tradax S.A.* [1981] 1 W.L.R. 711, 719.

⁷⁴ *Barton* (n5) [32].

⁷⁵ Consultation (2022) (n2) Question 3.51, page 26.

⁷⁶ Consultation (2023) (n2) Question 2.78, page 17.

governing law of the arbitration agreement, and reaching a different view from the UKSC on the latter, it is essential to examine the relevance of implication as opposed to the proposals in this section.

Implied Duty of Confidentiality

Mance LJ pointed out that privacy and confidentiality have long been implicit assumptions in parties' choice of London as a venue.⁷⁷ The frequent reference to the duty of confidentiality developed in the English case law sees England hold the reputation as the jurisdiction establishing the jurisprudence underpinning the implied duty of confidentiality in arbitration. This is evidenced by the fact that most international literature commenting on implication in arbitration has mainly followed the discussion of the implied duty of confidentiality, with frequent mentioning of *Dolling-Baker*,⁷⁸ *Hassneh*,⁷⁹ *Ali Shipping*⁸⁰ and *Michael Wilson*;⁸¹ that is, Park LJ's emphasis on the private nature of arbitration, Justice Colman's use of business efficacy to develop confidentiality as an extension of privacy and Potter and Lawrence Collins LJs' rulings on implication by law; viewing the arbitration agreement as a defined category of contractual relationship.

Objective Party Autonomy: Objectiveness and Necessity

In *Dolling-Baker*, Parker LJ directly confirmed the existence of the implied duty of confidentiality. He made no attempt to ascertain the actual intention of the parties and ruled that the obviousness was not drawn from parties' views, but from the judge's legal reasoning linking with the private nature of arbitration. This corresponds with the rulings made by Bowen LJ in *The Moorcock* and Lord Steyn in *Equitable Life* as discussed above. The main focus of *Dolling-Baker* was "necessity and a fair disposal of the cause or matter"⁸² with Parker LJ's analysis of the ultimate test discussed in *Nasse*.⁸³ In implying a term on confidentiality into the arbitration agreement based on the nature of arbitration, the argument in favour of disclosure failed at the hurdle of necessities⁸⁴ because the alternative interrogation was available under R.S.C. Order 26; therefore, "the least necessary for disposing fairly of the issues in action."⁸⁵

Linking the issue of document disclosure with implied terms, the courts effectively spoke of the essentially private nature of arbitration. Because of its private nature, obviously, implied obligation requires that "a party who obtains documents on discovery [is] not to use them for any purpose other than the dispute in which they were obtained."⁸⁶ Parker LJ was adamant that there be no need for a precise definition of the extent of the obligation and ruled that an

⁷⁷ *Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314; [2005] QB 207, per Mance LJ [2,30]. Consultation (2022) (n2) [1.1, 1.21-1.24, 2.7].

⁷⁸ *Dolling-Baker* (n6).

⁷⁹ *Hassneh* (n7).

⁸⁰ *Ali Shipping* (n8).

⁸¹ *Michael Wilson* (n9); *Halliburton v Chubb* [2020] UKSC 48 [83].

⁸² *Dolling-Baker* (n6) [1209].

⁸³ *Science Research Council v Nasse* [1980] AC 1028, 1029.

⁸⁴ *Dolling-Baker* (n6) 1214.

⁸⁵ *Dolling-Baker* (n6) 1214.

⁸⁶ *Dolling-Baker* (n6) 1213; *Michael Wilson* (n9) [73].

implied obligation arose out of the nature of arbitration itself.⁸⁷ Such a view was also reflected in Lord Mustill's speech against the delineation from confidentiality, who calls for "a much more wide-ranging survey of the law and practice."⁸⁸

The analysis of business efficacy in implication was discussed in *Hassneh*. Despite direct citations of *The Eastern Saga*⁸⁹ and *Dolling-Baker*,⁹⁰ Mr Justice Colman was critical of Parker LJ's lack of a precise definition of implication. Without privacy being mentioned in arbitration acts,⁹¹ the emphasis on the customs and practice in implication under common law rules was made, linking to the historical operation of privacy in arbitration and viewing confidentiality as an obvious further extension of privacy. In his criticisms, he made a clear link between common law rules on implication and business efficacy and spoke of the arbitration practice and how privacy represents "an essential ingredient of arbitration". He stated that, from the historical practice of arbitration in London, privacy is so essential that the denial of it by an officious bystander would lead to both parties' objection.⁹² Because such an essential ingredient exists in the practice of arbitration, privacy must in principle extend to documents (the raw materials led to the determination)⁹³ which are created for the purpose of that hearing.⁹⁴ Therefore an extended implied obligation of confidentiality is said to be rooted in the arbitration agreement between the parties which provides the reasons for such an extension. This implication must be capable of reasonably precise definition based on custom or business efficacy in order to accommodate the practice of arbitration.⁹⁵ So, "it must by implication be their mutual obligation to accord to documents disclosed for the purpose of the arbitration the same confidentiality ... the proceedings are in private leads weight to the necessity for that implication."⁹⁶

The comments made on utmost care and non-absolute implication in *Marks & Spencer* were also addressed in *Hassneh* where the judge stated that "reasonable necessity" applied only to disclosure where it was "unavoidably necessary". Similar comments were made in *Insurance Co v Lloyd's Syndicate*⁹⁷ where Mr Justice Colman ruled that the removal of confidentiality for the reasons of business efficacy could not overcome necessity in the protection of legal rights. He stated:

"[I]t is sufficiently necessary to disclose an arbitration award in order to enforce or protect the legal rights of a party to an arbitration agreement only if the right in question cannot be enforced or protected unless the award and reasons are disclosed to a stranger to the arbitration agreement. The making of the award must therefore be a necessary element in the establishment of the party's legal right against the

⁸⁷ *Dolling-Baker* (n6) 1213.

⁸⁸ *Re D* (Adoption Reports: Confidentiality), [1995] 3 W.L.R. 483, 496 (H.L.).

⁸⁹ [1984] 2 Lloyd's Rep 373.

⁹⁰ *Dolling-Baker* (n6).

⁹¹ Arbitration Acts 1950 or 1979.

⁹² *Hassneh* (n7) 247.

⁹³ *Hassneh* (n7) 250.

⁹⁴ *Hassneh* (n7) 246.

⁹⁵ *Hassneh* (n7) 246.

⁹⁶ *Hassneh* (n7) 247-248; Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration* (Kluwer Law International 2011) 68-69.

⁹⁷ [1995] 1 Lloyd's Rep 272, 276; *Ibid.* Smeureanu (n96) 124-125.

stranger. This is the furthest boundary to the qualification which business efficacy will support.”⁹⁸

Potter LJ also spoke of the parties’ presumed intention in *Ali Shipping*.⁹⁹ He also ruled that the duty of confidentiality arose as an essential corollary of the privacy of arbitration proceedings as it is required, implicitly, by the nature of the contract, i.e., the arbitration agreement.¹⁰⁰ Citing the common law rules discussed in *Scally*,¹⁰¹ he highlighted the importance of “business” in the court’s consideration of implication. He demanded a careful examination of the circumstances existing at the time of the arbitration agreement in his articulation of the officious bystander test.¹⁰² This evidently echoed Lord Neuberger’s necessity for business for commercial, utmost care or practical coherence regarding Potter LJ’s well referenced exceptions to the duty of confidentiality.¹⁰³

Disagreeing with Colman J’s view that “the implication of the terms must be based on custom or business efficacy” in *Hassneh*,¹⁰⁴ Potter LJ considered that the implied term should be regarded as a matter of law¹⁰⁵ and attributed by the courts, and stated: “That is because considerations of business efficacy, particularly when based notionally upon the ‘officious bystander’ test, are likely to involve a detailed examination of the circumstances existing at the time of the relevant contract, in this case the original agreement to arbitrate, whereas the parties have indicated their presumed intention simply by entering into a contract to which the court attributes particular characteristics.”¹⁰⁶

This view was supported by Lawrence Collins LJ, who ruled that the court must focus on “the terms of confidentiality to be implied as an incident of an arbitral agreement (a defined category of contractual relationship) and not as terms implied by custom or business efficacy.”¹⁰⁷ He viewed the duty as “in reality a substantive rule of arbitration law reached through the device of an implied term”¹⁰⁸ and not as terms implied by custom or business efficacy: therefore it should “depend on the context in which it arises on the nature of the information or documents at issue.”¹⁰⁹ His view was supported by Thomas LJ who stated that since the duty is an implied term related to the interpretation of the arbitration agreement,¹¹⁰ the existence of the duty must be consulted against the expressed term¹¹¹ and identify with precision the issue involved before it can uphold the duty of confidentiality.¹¹² Reflecting his choice of words of “an incident of an arbitral agreement” against Lady Rose’s expression,

⁹⁸ [1995] 1 Lloyd’s Rep 272, 276.

⁹⁹ *Ali Shipping* (n8) 651.

¹⁰⁰ *Ibid*.

¹⁰¹ *Scally v. Southern Health and Social Services Board* [1992] 1 A.C. 294; [1991] 3 W.L.R. 778; [1991] 4 All E.R. 563, H.L.(N.I.).

¹⁰² *Ali Shipping* (n8) 651.

¹⁰³ *Ali Shipping* (n8) 651-652.

¹⁰⁴ *Hassneh* (n7) 246.

¹⁰⁵ *Ali Shipping* (n8) 326.

¹⁰⁶ *Ali Shipping* (n8) 326.

¹⁰⁷ *Michael Wilson* (n9) [118].

¹⁰⁸ *Michael Wilson* (n9) [106].

¹⁰⁹ *Michael Wilson* (n9) [107].

¹¹⁰ *Michael Wilson* (n9) [119] Thomas LJ.

¹¹¹ *Michael Wilson* (n9) [119] Thomas LJ.

¹¹² *Michael Wilson* (n9) [126] Thomas LJ.

“implied the term as a necessary incident of the relationship concerned, unless the parties have expressly excluded” in *Barton*,¹¹³ the court’s ruling on the implied duty of confidentiality is consistent with implication by law as in those discussed in *Lister*,¹¹⁴ *Liverpool City Council*.¹¹⁵

Implied duty of confidentiality has also been commented on in international literature.¹¹⁶ Thoma and Kouris spoke in their articles of a contractual obligation¹¹⁷ and the way the duty of confidentiality arises. Levelling the implied duty of confidentiality as an implied term of the contract, Thoma noted “the need to give business efficacy to a transaction” in order to reflect “the obvious, unexpressed intention of the parties”.¹¹⁸ Thoma noted that the term business efficacy was the key reason for Colman J’s decision on the implied duty of confidentiality¹¹⁹ in *Hassneh*¹²⁰ and concluded that “[b]usiness efficacy was, hence, equally applied as a criterion for defining the scope of the duty and allowing the disclosure of the arbitral award and its reasons.”¹²¹

Kouris furthered his argument that the sources of such an implication can arise from privacy, arbitral custom or business efficacy though the operation of law¹²² as established in the English case law. While doing so, he used the non-committal approach held in *Associated Electric and Gas Insurance Services Ltd. v European Reinsurance Company of Zurich* (“*Associated Electric*”)¹²³ to caution readers that the doctrine of confidentiality advocated requires an absolute clarity at international level. *Associated Electric*’s decision suggesting “that confidentiality should be evaluated on its own terms as opposed to artificial privacy or business efficacy considerations” may not be desirable on the international level.¹²⁴ The argument in favour of the implication by law was also noted by Jones who spoke of “obliging cooperation or non-hindrance” in the nature of implication of terms; requiring the parties “to take steps to facilitate the fulfilment of the contract or to not prevent

¹¹³ *Barton* (n5) [49]; *Geys* (n33) [45].

¹¹⁴ *Lister v. Romford Ice and Cold Storage Co. Ltd.* [1957] A.C. 555, 576, 579.

¹¹⁵ *Liverpool City Council* (n49).

¹¹⁶ Steven Kouris, 'Confidentiality: Is International Arbitration Losing One of Its Major Benefits?' (2005) 22(2) *Journal of International Arbitration* 127, 139; Douglas S. Jones, 'The Legal Landscape of Cooperation: A Close Study of the Jardine Decision', in Hong Kong International Arbitration Centre (ed), *International Arbitration: Issues, Perspectives and Practice: Liber Amicorum Neil Kaplan*, (Kluwer Law International 2018) 367–380; Ioanna Thoma, 'Confidentiality in English Arbitration Law: Myths and Realities About its Legal Nature' (2008) 25(3) *Journal of International* 299, 300-311.

¹¹⁷ Ioanna Thoma, 'Confidentiality in English Arbitration Law: Myths and Realities About its Legal Nature' (2008) 25(3) *Journal of International* 299, 302.

¹¹⁸ *Ibid.* 305.

¹¹⁹ *Ibid.* 305.

¹²⁰ [1993] 2 *Lloyd's Rep.* 243 (Com. Ct.) Thoma (n116) 306.

¹²¹ *Ibid.* 306.

¹²² Steven Kouris, 'Confidentiality: Is International Arbitration Losing One of Its Major Benefits?' (2005) 22(2) *Journal of International Arbitration* 127, 129.

¹²³ *Associated Electric and Gas Insurance Services Ltd. v. European Reinsurance Company of Zurich* [2003] U.K.P.C. 11, 20.

¹²⁴ Steven Kouris, 'Confidentiality: Is International Arbitration Losing One of Its Major Benefits?' (2005) 22(2) *Journal of International Arbitration* 127, 131; Leon E. Trackman, *Confidentiality in International Arbitration*, (2002) 18 *Arb. Int'l* 1, 8; This point was also observed in Marghitola (n19) 143.

its operation.”¹²⁵ Jones raised concerns over “confidentiality being left as an open question for all those participating in the arbitration proceedings without being bound by the arbitration agreement”.¹²⁶

Maintaining common law-based duty of confidentiality

The issue of duty of confidentiality and its need for further development were noted by the Commission which considered whether a statutory duty was needed in the reform but decided against it in the consultation.¹²⁷ Implication of confidentiality is said to be based on the arbitration agreement and the operation of arbitration, rather than a duty to be implied by a case-by-case approach. Reflecting implication by a substantive rule of arbitration law as set out by Potter LJ in *Ali Shipping* and Lawrence Collins LJ in *Michael Wilson*,¹²⁸ the courts ruled that the implied duty of confidentiality is an implication of law and contributed by the courts.¹²⁹ The decision on not introducing a statutory duty of confidentiality is based on the concerns over the continuous development of this issue. This view can be seen in Thomas LJ’s speech stating that it will “depend on the context in which it arises.”

The non-absoluteness of the exceptions was commented on by the Commission, which saw this as evidence that this area of law is still developing. Such a view was further strengthened by the Commission’s concerns over the non-exhaustive nature and generality of the exceptions discussed in the case law.¹³⁰ For codification, the Commission stressed the needs for detailed, robust, comprehensive and future-proofed rules relating to confidentiality.¹³¹ Consequently, the Commission proposed not to codify the law of confidentiality in the forthcoming amendment¹³² because “[a]ny provision in the Arbitration Act 1996 would provide little guidance to the courts in that regard.”¹³³ The advice given by the Commission to those parties who wish to protect information was to choose arbitral rules which provide a scheme of confidentiality or require the tribunal to address confidentiality, or express “referral of disputes to private and confidential proceedings.”¹³⁴

The researcher agrees with the Commission’s proposal not to codify the duty of confidentiality to maintain the flexibility of the common law rule derived from implication, with further reasons added; to maintain common law rules, objective party autonomy and flexibility. The researcher holds the view that the current common law rules on implication are sufficient to address the issue of confidentiality as examined above. Applying implication allows for this flexibility as well as the party autonomy required for arbitration. Firstly, it is

¹²⁵ Douglas S. Jones, ‘The Legal Landscape of Cooperation: A Close Study of the Jardine Decision’, in Hong Kong International Arbitration Centre (ed), *International Arbitration: Issues, Perspectives and Practice: Liber Amicorum Neil Kaplan*, (Kluwer Law International 2018) 367-368.

¹²⁶ Douglas S. Jones, ‘The Legal Landscape of Cooperation: A Close Study of the Jardine Decision’, in Hong Kong International Arbitration Centre (ed), *International Arbitration: Issues, Perspectives and Practice: Liber Amicorum Neil Kaplan*, (Kluwer Law International 2018) 367-368.

¹²⁷ Consultation (2022) (n2) Chapter 2.

¹²⁸ *Michael Wilson* (n9) [106].

¹²⁹ *Ali Shipping* (n8) 326; *Michael Wilson* (n9) [118].

¹³⁰ Consultation (2022) (n2) 2.41 and 2.42.

¹³¹ Consultation (2022) (n2) 2.44, 2.45.

¹³² Consultation (2022) (n2) 2.44.

¹³³ Consultation (2022) (n2) 2.42

¹³⁴ Consultation (2022) (n2) 2.46

important to note that legal provisions can never provide an exclusive list of exceptions as the consultation sought for codification. Exceptions should be aided by the court's interpretation in order to maintain flexibility in the development of arbitration. Hence generality should not be viewed as the key reason for non-codification of the duty. Secondly, the Commission's search for detailed, robust, comprehensive and future proofed rules relating to confidentiality can be found in the coherent and flexible interpretations of implication under the common law rules. The rule of implication examined above provides detailed analysis of the origin of confidentiality and how both confidentiality and privacy interact with the rules on implication. Thirdly, a balance between party autonomy and the integrity of justice as a whole must be struck; that is, a balance between using the contractual framework to illustrate the origin of the duty based in the arbitration agreement and the exceptions of the duty based on consent and the integrity of justice, public interest and public functions. Taking rule 26 of the Scottish Arbitration Rules¹³⁵ as an example, the duty of confidentiality is brought into the Scottish Arbitration Act 2010. It stipulates that information used or generated in arbitration is to be confidential and breach of such duty is actionable against the parties and the arbitrators, with exceptions listed.¹³⁶ However, this rule is defined as a default rule which has a non-mandatory nature,¹³⁷ allowing parties to use agreement to modify or disapply all or any part of rule 26.¹³⁸ This approach provides space for party autonomy, their express or implied intention and the interests of justice and public as a whole. Finally, England has always been a jurisdiction famous for implied duty of confidentiality as can be seen in the debates over opt-in/opt-out/statutory/non-statutory duty of confidentiality and its clarity as discussed above: therefore, it is not essential for the codification of the duty.

Arbitrator's Implied Duty of Disclosure

Differing from the approach refusing generality of the duty of confidentiality, interestingly, the Commission did not opt for prescriptive details but proposed the codification of a general principle on the issue of the duty of disclosure.¹³⁹ This proposal reflects its intention to provide a principle which is "in one place, and easily accessible to users"¹⁴⁰ in order to plug the gap in the Act.¹⁴¹ The issue of duty of disclosure addressing procedural integrity was dealt with in *Halliburton v Chubb*,¹⁴² where the UKSC delivered a judgment confirming the arbitrator's implied duty of disclosure in the appointment procedures. Lord Hodge determined that the duty of disclosure should be implied into the contract between the arbitrators and the parties in order to "plug the gap"¹⁴³ in the application of sections 24 and 33 stipulating the removal of the arbitrator and the arbitrator's duty to act fairly and

¹³⁵ Schedule one, Arbitration (Scotland) Act 2010.

¹³⁶ Rule 26(1), Scottish Arbitration Rules.

¹³⁷ Arbitration (Scotland) Act 2010, s 9(1).

¹³⁸ Arbitration (Scotland) Act 2010, s 9(2).

¹³⁹ Consultation (2022) (n2) 3.47, page 26.

¹⁴⁰ Consultation (2022) (n2) 3.46, page 26.

¹⁴¹ Goh (n64) 244, *JN Hipwell* (n59) [32-33]; *Marks & Spencer* (n4).

¹⁴² *Halliburton* (n81).

¹⁴³ Goh (n64) 244, *JN Hipwell* (n59) [32-33]; *Marks & Spencer* (n4).

impartially under the Act.¹⁴⁴ The court ruled that parties' awareness of matters which could give rise to justifiable doubt over an arbitrator's impartiality is necessary in the public interest to allow them to make an informed decision regarding appointment, removal or challenge of an disputed arbitrator and seek remedies under section 24 of the Act.

In *Halliburton*, the implied duty should neither refute the law nor contradict the expressed arbitration agreement, unless there is an express or implicit waiver or prior knowledge of the matter.¹⁴⁵ This ruling mirrors the discussion on Lady Hale and Lady Rose's speech on implication by law unless a term is expressly excluded in *Geys* and *Barton*. Essentially, disclosure is viewed as a legal obligation "encompassed within the statutory duty of fairness stipulated in section 1 of the Act"¹⁴⁶ as well as "an essential corollary" of the statutory duty of impartiality;¹⁴⁷ similar words to those noted in *Ali Shipping*.¹⁴⁸ Consequently, "[t]hose statutory duties give rise to an implied term in the contract between the arbitrator and the parties that the arbitrator will so act."¹⁴⁹

Similar to the exceptions to the non-absolute duty discussed above, Lord Hodge ruled that the duty of disclosure does not impose on the arbitrator an absolute duty to disclose information to aid parties' pre-appointment considerations. However, to decide whether disclosure can only be made with parties' consent, one must "recognise the realities of accepted commercial and arbitral practice as a guide both in the formulation of legal rules and in the interpretation of the parties' contracts when the practice operates in the public interest."¹⁵⁰ This is because the court is to give effect to the parties' transaction and not to frustrate them while upholding the integrity of arbitration;¹⁵¹ similar words are found in the previous discussion on implied terms. The UKSC further highlighted the significance of custom and practice between parties' implicit consent and their choice of arbitration institution whose terms and practice are governed by the duties of privacy and confidentiality.¹⁵² Similarly, subject to the *ad hoc* or institutional rules requiring disclosure, parties' arbitration agreement or parties' choice of arbitration institution rules will provide a basis for implicit and indirect consent to disclosure respectively.¹⁵³

Viewing the arbitration agreement as a defined category of contractual agreement, confirming the implication by law, the duty of disclosure can be argued as implication from the application of sections 1, 24 and 33 of the Act. Lord Hodge's mentioning of the possibilities of express or inferred consent "from the arbitration agreement itself in the context of the custom and practice in the relevant field"¹⁵⁴ further supported pre-appointment disclosure as a good practice which was said to be essential for the smooth operation of arbitration. This

¹⁴⁴ *Halliburton* (n81) [76, 168] as per Lady Arden who used the approach of rooting the duty of disclosure in both s33 and the appointment contract.

¹⁴⁵ *Halliburton* (n81) [78], *Marks & Spencer* (n4) [28]; *Barton* (n5) [23-25].

¹⁴⁶ *Halliburton* (n81) [78] and [166] per Lady Arden.

¹⁴⁷ *Ibid.* [78].

¹⁴⁸ *Ali Shipping* (n8) 651.

¹⁴⁹ *Halliburton* (n81) [76].

¹⁵⁰ *Ibid.* [103], *Insurance Co v Lloyd's Syndicate* [1995] 1 Lloyd's Rep. 272 [276].

¹⁵¹ *Halliburton* (n81) [103], *JN Hipwell* (n59) [32-33]; *Marks & Spencer* (n4).

¹⁵² *Ibid.* [89].

¹⁵³ *Ibid.* [90, 92].

¹⁵⁴ *Ibid.* [88, 104].

point was argued favourably by ICC, LCIA and CIArb, which included the duty of disclosure in the respective institutional rules aiming to underpin the integrity and reputation of English seated arbitration.¹⁵⁵ This point corresponds with how the duty of confidentiality was implied in *Hassneh* when the court considered “the historical practice of arbitration in London.”¹⁵⁶

“Unclear boundaries”¹⁵⁷ of the arbitrator’s obligation of confidentiality and duty of disclosure were criticised as causing uncertainty in terms of arbitration seated in England as discussed above; in particular in Lawrence Collins LJ’s speech in which he stated that it “depend[s] on the context in which it arises and on the nature of the information or documents at issue” and on a “case by case basis”.¹⁵⁸ In *Halliburton*, Lord Hodge also searched for the extent to which the parties have implicitly consented to the duty of disclosure. An examination of the facts and practice of Bermuda Arbitration led to the conclusion that a breach of an essential pre-appointment disclosure duty on multiple appointments could lead to ambiguity in dealing with competing implied duties. While the court pointed out that the best practice is for the arbitrator being approached to decline the later appointment or secure parties’ consent, difficulty in balancing pre-appointment disclosure and the implied duty of confidentiality still exists. Placing the conflicting duty of confidentiality and duty of disclosure on the contractual framework does not add clarity but express / statutory duty of disclosure may.

Linking objective party autonomy with the party’s right to know for integrity

The Commission did not forcefully draw a line to clarify such unclear boundaries. Instead, it proposes to codify the common law and provide a statutory duty of disclosure requiring an arbitrator to disclose circumstances or connections which might reasonably give rise to justifiable doubts as to their impartiality.¹⁵⁹ The researcher argues in favour of the Commission’s proposal based on parties’ right to know and the link between impartiality and the integrity of arbitration and award. Different from the duty of confidentiality, the value of the common law duty of disclosure concerns more the integrity of arbitration and less towards parties’ agreement. Its importance is reflected in the grounds listed for refusal of an arbitral award in s 68(2)(a) and (i) and s 103(2)(c) or 103(3) of the Act and Article V(1)(b) or V(2)(b) of the New York Convention where “due process” is required. To protect parties from injustice caused by a lack of information held exclusive by arbitrators, implied duty of disclosure is an obvious and essential tool to bridge the gap among ss 1, 24, 33 67, 68 and 103 of the Act, hence codification.

To avoid an arbitrator being challenged or an award being set aside, the Commission is correcting in linking the arbitrator’s disclosure with justice as well as stating that “it is vital to ensuring that justice be seen to be done.”¹⁶⁰ The need for the duty was highlighted in *Halliburton* where the court stated that “such disclosure enabled parties to consider the disclosure and decide whether there was no legitimate problem or to make submissions to

¹⁵⁵ *Ibid.* [79, 80, 81].

¹⁵⁶ *Hassneh* (n7) 247.

¹⁵⁷ *Halliburton* (n81) [85].

¹⁵⁸ *Michael Wilson* (n9) [107]; Lady Arden saw that disclosure can be made without a high-level disclosure breaching the duty of confidentiality [185-186].

¹⁵⁹ Consultation (2022) (n2) 3.3, page 19, 3.20 page 21, 3.51 [26].

¹⁶⁰ Consultation (2022) (n2) 3.45, page 26.

the judge or to address the potential problem by waiver.”¹⁶¹ Without the duty of disclosure, the justice and impartiality required under ss 1 and 33 of the Arbitration Act 1996 will not be achieved. Consequently, parties would be steps behind the to-be-appointed/appointed arbitrator or unable to make an informed choice in terms of an appointment, let alone have the ability to seek the remedies made available to the parties under s 24.

While it is important to clarify the legal duty of disclosure to protect the parties from uninformed choice or a lack of integrity of the process and award, it is equally important to protect the appointed arbitrators so that they are free from vexatious claims against them personally and professionally and to avoid delaying tactics to ensure speed and the finality of the award. Hence, the intertwined issues of generality and standard of the duty need further clarification from the Commission. Following the language adopted in s 33 of the Act, one may see an insertion of the general requirement of “duty to disclose matters giving rise to justifiable doubts” in the provision. Although the words “justifiable doubts” mentioned by the Commission and the Act correspond with the burden of proof imposed upon a party if they wish to instigate the removing proceedings at the courts under s 24(1)(a) and (d) and the opt-in natured the IBA Guidelines,¹⁶² it is different from the key terms “a real danger of bias” used in the case law.

“A real danger of bias” as spoken of by Lord Woolf at *AT & T Corp v Saudi Cable Co.*,¹⁶³ and “a real possibility of bias” as stated by Lord Hodge in *Halliburton*¹⁶⁴ have been ruled upon in those cases.¹⁶⁵ In the former, Lord Woolf clearly stated that, in the absence of a real danger of bias, no removal of an arbitrator would be ordered by the court.¹⁶⁶ This highlighted the English courts’ interpretation of “justifiable doubts” as actually “a real danger of bias” as literature has shown.¹⁶⁷ Consequently, one may question whether the use of the general wording of “justifiable doubts” intends to reflect a higher threshold of “the real danger of bias” or a lower threshold of “justifiable doubts”. If the Commission views these two terms as the same standard, a proper analysis should be made of the debates over Lord Woolf’s reasoning on “a lower threshold to apply to courts of law than applies to a private tribunal whose ‘judges’ are selected by the parties. After all, there is an overriding public interest in the integrity of the administration of justice in the courts.”¹⁶⁸ Further explanation should also be given regarding the queries over the standard that applies to the removal of an arbitrator when “private justice affords fewer appellate protections, and public policy promotes and

¹⁶¹ *Halliburton* (n81) [37, 70].

¹⁶² IBA Guidelines on Conflicts of Interest in International Arbitration (2014).

¹⁶³ *AT & T Corp v Saudi Cable Co.* [2000] 2 All ER 625 (Comm).

¹⁶⁴ *Halliburton* (n81) [37].

¹⁶⁵ *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 [21] [a real possibility of bias]; *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357, para 103, “real possibility that the tribunal was biased”; *Glencot Development and Design Co Ltd v Ben Barrett & Son (Contractors) Limited* [2001] 2 WLUK 352 [60-69]; *Helow v Secretary of State for the Home Department* [2008] UKHL 62; [2008] 1 WLR 2416 [1-3] “real possibility test”.

¹⁶⁶ *AT & T* (n163) 638.

¹⁶⁷ See generally, Hong-Lin Yu and Laurence Shore, Independence, impartiality and immunity of arbitrators - US and English perspectives (2003) 52(4) ICLQ 935, 940.

¹⁶⁸ *AT & T* (n163) 638. This issue was discussed extensively in Hong-Lin Yu and Laurence Shore, Independence, impartiality and immunity of arbitrators - US and English perspectives (2003) 52(4) ICLQ 935, 940; Similar comments were made in *Halliburton* (n81) [68].

recognises private justice as justice, private ‘judges’ should be removable on the basis of a lesser showing.”¹⁶⁹ A clear definition of the legal duty of disclosure should be accessible to the users. With the gist of the case law being to rule out the vexatious actions brought against arbitrators by a dissatisfied party, the researcher would suggest the use of “a real danger of bias” to achieve clarity, discourage the unnecessary lawsuits and achieve a one-stop shop.

The Law Governing Arbitration Agreement

On the issue of the governing law of the arbitration agreement in the absence of parties’ choice, the UKSC ruled that the governing law should be the law governing the main contract. However, in the event of invalidity of an arbitration agreement caused by the law governing the main contract, the combination of separability and validation, together with English choice of law rules under common law is sufficient to rescue the parties’ agreement to arbitrate. Nevertheless, with the background of a 3:2 split decision, calls for clarification were made in the response to the first consultation. In the second consultation, the Commission delivered an opposite proposal from *Enka*’s ruling to the effect that, subject to parties’ express agreement, the law governing the interpretation of the arbitration agreement is the law of the seat.¹⁷⁰ On this issue, the Commission acknowledged the importance of contract in resolving contractual disputes.¹⁷¹ However, its emphasis was placed on the importance of the seat, stressing its curial role in “supervising” arbitration with its mandatory provisions,¹⁷² the issue of neutrality,¹⁷³ the limited application of separability,¹⁷⁴ and the application of the mandatory provisions under s 4(5),¹⁷⁵ with further criticism over the UKSC’s failure in supplying sufficient reason for subjecting the arbitration agreement to a different governing law.¹⁷⁶ Accordingly, without an express chosen law, the Commission simplified the UKSC’s decision¹⁷⁷ and highlighted that parties’ choice of a neutral seat can be seen as a choice of law of the arbitration agreement.¹⁷⁸ In this section, discussion will focus on the application of common law principle in *Enka* and the relevant concerns expressed by the Commission.

Choice of law and the presumption of validation under common law

Well before the significance of the choice of seat through the implied test¹⁷⁹ or the closest and most connected test¹⁸⁰ discussed in *Enka v Chubb*, the choice of arbitral seat in England carried implied significance in Mance LJ’s ruling in relation to an implicit assumption in parties’

¹⁶⁹ J Kendall, “Barristers, Independence and Disclosure Revisited” 16 *Arbitration International* (2000) 343 at 348-9.

¹⁷⁰ Consultation (2023) (n2) 2.6, 2.76.

¹⁷¹ Consultation (2023) (n2) 2.7.

¹⁷² Consultation (2023) (n2) 2.9.

¹⁷³ Consultation (2023) (n2) 2.25-2.26.

¹⁷⁴ Consultation (2023) (n2) 2.29-2.31.

¹⁷⁵ Consultation (2023) (n2) 2.32-2.36.

¹⁷⁶ Consultation (2023) (n2) 2.17, 2.28.

¹⁷⁷ Consultation (2023) (n2) 2.14.

¹⁷⁸ *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Co Ltd* [2013] EWHC 4071 (Comm), [2014] 1 Lloyd’s Rep 479.

¹⁷⁹ *Enka Insaat ve Sanayi AS v OOO Insurance Co Chubb* [2020] EWCA Civ 574.

¹⁸⁰ *Enka* (n10)

choice of London.¹⁸¹ Similarly, the impliedly significant role played in the parties' choice of arbitral seat was re-emphasised by the UKSC ruling on the closest and most connected choice in the appeal, and certain elements of implication, such as the validation principle and serving business community and rational businessmen, were also raised in the decision delivered by Lord Hamblen and Lord Leggatt.

The emphasis on implication and parties' intention can be observed in Lord Hoffmann's decision on parties' assumption being the starting point of the construction of an arbitration clause in *Fiona Trust*¹⁸² and *West Tanker*.¹⁸³ He expressed the opinion that the choice of London as the seat of an arbitration may offer advantages or restrictions, depends on the parties' intention. Importantly, Lord Hoffmann spoke of the courts being there to "serve the business community rather than the other way round."¹⁸⁴ The mentioning of "serv[ing] the business community" can also be observed in Lord Popplewell LJ's emphasis on the lack of one voice in this matter in the Court of Appeal in *Enka*,¹⁸⁵ where one sees courts serving the business community in choosing the law governing the arbitration agreement with the application of the implied choice test¹⁸⁶ or the closest and most connected test¹⁸⁷ as a necessary step to identify the law for rational businessmen.

However, this assumption, based on the wider approach, is not the parties' actual intention, but an assumption of rational businessmen who have a pro-arbitration approach and have their disputes decided by the tribunal.¹⁸⁸ To this effect, Lord Hamblen and Lord Leggatt further elaborated:

"To the extent that a putative applicable law fails to recognise this presumption that arbitration has been chosen as a one-stop method of dispute resolution, it is inherently less likely that reasonable commercial parties would have intended that law to determine the validity and scope of their agreement to arbitrate (rather than litigate) disputes."¹⁸⁹

However, this wider approach held by the majority was questioned by the dissenting Lords who were "reluctant to place weight on the idea that these parties would have intended a wider rather than a narrower interpretation of their arbitration agreement."¹⁹⁰ Looking from the opposite side, they stated that rational businessmen would not want to be held to have agreed something which is outside their agreement, hence doubts were cast on the wider approach taken by the majority. This dissenting view corresponds with the caution expressed

¹⁸¹ *Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314; [2005] QB 207, per Mance LJ [2, 30].

¹⁸² *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40; [2007] Bus LR 1719 [13].

¹⁸³ *West Tankers Inc v RAS Riunione Adriatica di Sicurtà SpA (The Front Comor)* [2007] UKHL 4; [2007] 1 Lloyd's Rep 391.

¹⁸⁴ *Ibid.* [22].

¹⁸⁵ *Enka* (n179) [84].

¹⁸⁶ *XL Insurance Ltd v Owens Corning* [2001] 1 All ER (Comm) 530, 543b; *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638; [2013] 1 WLR 102, [11, 24, 26] as per Moore-Bick LJ substantive law.

¹⁸⁷ *C v D* [2007] EWCA Civ 1282; [2008] Bus LR 843 [25-26].

¹⁸⁸ *Enka* (n10) [107], *Equitable Life* (n40) 459.

¹⁸⁹ *Enka* (n10) [108].

¹⁹⁰ *Enka* (n10) [199].

by Sir Thomas Bingham MR who strongly discouraged a casual approach in filling the gap when it can in fact be an oversight, disagreement or intentional omission.¹⁹¹ This concern addressed in implication was also expressed in the dissenting opinions led by Lord Burrow, who showed reluctance to make a quick assumption of parties' intention for a wider interpretation of the arbitration agreement without solid empirical evidence about what rational businessmen would be likely to have intended.¹⁹² He said: "And one cannot say that, just because English law may adopt a wider rather than a narrower approach to interpretation of an arbitration agreement than Russian law, that will ensure the correct interpretation of the arbitration agreement."¹⁹³ He even cited the argument raised by the Russian party that:

"The argument is simply that English law should be taken to apply because it construes AAs [i.e., arbitration agreements] more liberally. That point only has to be articulated to reveal its parochialism. It is impossible to say that just because Russian law takes a narrower view of AAs than English law does ... that the parties must have intended English law to apply. That is results-based reasoning that ignores the fact that there are legitimate reasons for adopting a narrower approach (such as, in this very case, that a broad interpretation of AAs can lead to an undesirable fragmentation of disputes and proceedings where many different parties are involved)." ¹⁹⁴

Objective choice supported by presumed intention, separability and validation

Both majority and dissenting opinions agreed on the issue of implication in choice of governing law. The only disagreement is whether the UKSC should remedy the fault. Accordingly, a presumed intention is necessary: the UKSC stated: "it was necessary to identify the system of law with which the arbitration agreement was most closely connected."¹⁹⁵ In order to include the non-mandatory substantive provisions under section 4(5) of the Act, English law is determined as being the applicable law which "has its closest and most real connection with the law of the place where the arbitration is to be held and which will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective."¹⁹⁶ The same view was also upheld in *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)*.¹⁹⁷

Following common law rules, the UKSC's emphasis on the "commercial purpose of an arbitration clause"¹⁹⁸ in its reasoning contributes to its decision on the choice of English law as the law governing the arbitration agreement. Because of its commercial purpose, the court expressed the need to give effect to, not defeat, the aim or purpose of the parties when they agree to arbitration. This corresponds with Lord Hoffmann's "assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship

¹⁹¹ *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472, 481-2

¹⁹² *Enka* (n10) [199]. A similar call as the one made by Lord Mustill in *Re D* (n88) 496.

¹⁹³ *Enka* (n10) [199].

¹⁹⁴ *Enka* (n10) [199].

¹⁹⁵ *Enka* (n10) [104]; *Geys* (n33) [55], per Lady Hale; *Marks and Spencer* (n4) [15] per Lord Neuberger; Barton (n5) [49] per Lady Rose.

¹⁹⁶ *Enka* (n10) [104].

¹⁹⁷ *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48.

¹⁹⁸ *Enka* (n10) [106-109] [142-143].

into which they have entered or purported to enter to be decided by the same tribunal.”¹⁹⁹ Furthermore, the degree of impairment to the commercial purpose of an arbitration agreement which would negate Lord Hoffmann’s assumption will depend on the review of “the particular words used in the contract and the surrounding circumstances, as well as the nature and extent of the risk that the purpose of the arbitration agreement would be undermined if its validity and scope were governed by the relevant system of law.”²⁰⁰ Lord Hamblen pointed out that such a pro-arbitration assumption was applied by the German, Australian and US courts.²⁰¹ Consequently, a putative applicable law would be a less likely choice that reasonable commercial parties would have intended. Such an approach will deliver the reasonable expectations of the contracting parties choosing arbitration to be held in a specified place and have the law of the seat to govern the validation of the arbitration agreement in the absence of the choice of law.²⁰²

The Court of Appeal in *Enka* spoke of it being “natural to regard” a choice of seat as an implied choice of the law governing the arbitration agreement,²⁰³ whereas the UKSC commented that given “the severable character of an arbitration agreement, invalidity of the agreement may negate an inference that the law generally applicable to the contract was intended to apply to the arbitration clause.”²⁰⁴ Regardless of different applications, parties’ actual intention was overwritten by the “strong presumption” in their application of the implied test²⁰⁵ or the “validation principle” when it is linked to the closest and most real connection test.²⁰⁶

Validation can be seen in the common law rules,²⁰⁷ where the principle was linked to the effectiveness of the contract. For instance, Staughton LJ’s ruling regarding “valid rather than ineffective” in *Lancashire County Council v Municipal Mutual Insurance Ltd*²⁰⁸ and “the law which would make the contract valid in all particulars was the law [intended] to regulate the conduct of the parties”²⁰⁹ in Fry LJ’s words.

The interpretation of separability under section 7 of the Act “treating the arbitration clause as potentially governed by a different law from the rest of the contract”²¹⁰ provides room for validation. Hence, the court dismissed the possibility that the parties may have the actual intention to invalidate the arbitration agreement or have an “absolutely null and void”²¹¹ arbitration agreement as the parties’ intention. Consequently, “it is not reasonable to

¹⁹⁹ *Fiona Trust* (n23) [13].

²⁰⁰ *Enka* (n10) [109].

²⁰¹ *Ibid.* [107].

²⁰² *Ibid.* [142].

²⁰³ *Enka* (n179) [101].

²⁰⁴ *Enka* (n10) [95 -97].

²⁰⁵ *Enka* (n179) [101,105].

²⁰⁶ *Enka* (n10) [73].

²⁰⁷ *JN Hipwell* (n59) [27].

²⁰⁸ *Lancashire County Council v Municipal Mutual Insurance Ltd* [1997] QB 897, 910; *Hamlyn* (n24).

²⁰⁹ *In re Missouri Steamship Co* (1889) 42 Ch D 321, 341.

²¹⁰ *Enka* (n10) [100]; *Hamlyn* (n24) 208 as per Lord Herschell; *Marks & Spencer* (n4) [22] as per Lord Neuberger; *Belize* (n53) [21] as per Lord Hoffmann; *Barton* (n5) [46].

²¹¹ *Enka* (n10) [100]; *Hamlyn* (n24) 208.

attribute that intention to them if the contract may be otherwise construed”;²¹² let alone destroying the full efficacy of the arbitration agreement.²¹³

For separability, the Commission expressed concerns over whether s 7 could be trumped by the parties’ choice of foreign law which may not provide the principle of separability.²¹⁴ Regardless of what amendment the Commission intends to introduce, it is important to highlight that a fine balance must be struck between the principle of party autonomy and interference with the principle by means of mandatory rules and the measures taken by the courts. Although courts are allowed to supervise the arbitration process, the power is only limited to those stipulated in the Act.²¹⁵ Arbitration agreement is a contract under English common law as examined above, hence the principle of party autonomy stipulated in s 1(b) and (c) of the 1996 Act must be observed; meaning mandatory rules interfering with the party’s express or implied choice of law governing arbitration agreement or threatening England as an international arbitration hub should be kept to a minimum. In the case where the parties’ chosen governing law does not contain separability, the law of the seat can supplement the gap arising. Therefore, concerns over “trump” are unwarranted.

This is because, besides the infrastructure and legal profession, an international renowned arbitration hub must have judicial support with a pro-arbitration attitude. The English courts’ efforts in creating a friendly arbitration jurisdiction have been commented upon favourably, in particular, its flexibility in interpreting an arbitration agreement on the basis of the common law rules. *Enka* is the best example to serve an international arbitration seated in London where the UKSC used its own rules to provide support for arbitration.²¹⁶ Respecting party autonomy can also be seen in *Halliburton*, applying implication to prevent the failing of the arbitration agreement agreed:²¹⁷ the law of the seat not only was chosen because of the closest and most connected choice, but also because of the principles of separability and validation principle under implication.

Regarding parties’ choice of a foreign law, the Commission also expressed concerns over the complexity arising from the application of s 4(5)²¹⁸ and parties’ chosen foreign law leading to potential disapplication of separability,²¹⁹ arbitrability,²²⁰ scope,²²¹ confidentiality.²²² This issue was already answered in *Enka* whose legal reasoning can be observed in its acknowledgement of the intertwined relationship between section 4(5) and other provisions of the Arbitration Act 1996. The court applied the validation principle based on business

²¹² *Hamlyn* (n24) 208, 215.

²¹³ *Ibid.* 215 as per Lord Ashbourne; *Enka* (n10) [106].

²¹⁴ Consultation (2023) (n2) 2.47.

²¹⁵ s 1(c) of the Act.

²¹⁶ See Hong-Lin Yu, ‘Going Local for perfection: How do the English courts give defective arbitration agreements the maximum effect?’ *Journal of Business Law* (2023) *Journal of Business Law* 63-85 for a detailed discussion.

²¹⁷ Consultation (2023) (n2) 2.22-2.23.

²¹⁸ *Ibid.* 2.34, 2.52-2.53.

²¹⁹ *Ibid.* 2.54-2.56

²²⁰ *Ibid.* (n2) 2.57-2.58

²²¹ *Ibid.* (n2) 2.59

²²² *Ibid.* (n2) 2.60.

efficacy with its ruling on the closely connected test²²³ and ruled that the design of non-mandatory and mandatory provision in the Act “specifically provides for a situation in which the arbitration agreement will be governed by a foreign law even though English law governs the arbitration process, no necessary inference can be drawn that, by choosing an English seat and with it English law as the curial law, parties are also impliedly choosing English law to govern their arbitration agreement.”²²⁴ Upholding the validation principle, the UKSC prevented the arbitration agreement from failing.

On the issue of arbitrability raised by the Commission, it praised the generosity of English law but expressed concerns over the potentially fewer types of disputes to be arbitrated under foreign laws.²²⁵ In doing so, it stressed the importance of certainty in parties’ intention in pursuing arbitration.²²⁶ Despite the concerns over the parties losing both the ability to arbitrate,²²⁷ the Commission seems to ignore the risk of potential parallel proceedings between England and a foreign jurisdiction during arbitration for an anti-suit injunction and the significant role played by an enforcing court post-arbitration; including its power to refuse recognition or enforcement of arbitral awards on the grounds of arbitrability and public policy under Article V(2)(a) and (b) of the New York Convention.²²⁸ In particular, the enforcing court could take the initiative to refuse the recognition or enforcement due to inarbitrability of disputes, regardless of the wider scope of arbitrability in England and Wales. The same argument would also apply to the concerns over the variable scope of submission allowed under English law and foreign law²²⁹ and the issue of confidentiality.²³⁰

More importantly, if one places party autonomy in the centre of the debates, a question the Commission must answer is whether parties’ choice of law with a limited scope of arbitrable disputes, a restricted scope of submission or limited or no confidentiality should be replaced unilaterally by English law by ignoring party autonomy in this matter.²³¹ Could this be rescued by the validation principle? Would aligning the law of the main contract with the law of the arbitration agreement as ruled upon in *Enka*²³² or by presenting foreign law as evidence in front of the courts be unable to confirm party’s intention and provide certainty?²³³ More importantly, the Commission’s concerns were expressed in a sweeping statement without being supported by any empirical evidence demonstrating whether foreign laws in general are more restrictive in the areas of separability,²³⁴ arbitrability, scope and confidentiality.²³⁵ Furthermore, what is wrong with parties’ choice of foreign law with a juridical seat in England and Wales? Does it have to be English law when two international parties choose its juridical

²²³ *Enka* (n10) *Ibid.* [73].

²²⁴ *Enka* (n10) *Ibid.* [73], [93].

²²⁵ Consultation (2023) (n2) 2.57.

²²⁶ *Ibid.* (n2) 2.58.

²²⁷ *Ibid.* (n2) 2.58.

²²⁸ *Ibid.* (n2) 2.72.

²²⁹ *Ibid.* (n2) 2.59

²³⁰ *Ibid.* (n2) 2.60.

²³¹ *Ibid.* (n2) 2.65.

²³² *Ibid.* (n2) 2.66.

²³³ *Ibid.* (n2) 2.67.

²³⁴ *Ibid.* (n2) 2.71.

²³⁵ Hong-Lin Yu, ‘CAA Report on The Duty of Confidentiality Within The Global Landscape’ (2021) CAA. Available at <http://caa-epaper.arbitration.org.tw/paper_detail.aspx?ID=d73c25a2-c3bc-41eb-9a50-55be3cfe6af0> accessed on 14 June 2023.

seat for its neutrality? Is such an Anglo-centric approach what one wants for an international hub? Would the proposal to the effect that the law of the arbitration agreement is the law of the seat deliver consistency in a jurisdiction where this issue has been interpreted by party autonomy and common law rules? With the UKSC taking different factors into consideration to reflect express or implied party autonomy, and delivering a decision with flexibility in line with the principles of separability and validation, would it be wiser to abandon or maintain the well-established common law rules in implication and the determination of the proper law governing the arbitration agreement? With s 4(5) set to stay in its current form, parties' choice of foreign law in respect of the mandatory rules contained in Part One of the Act, these English mandatory rules would trump the parties' choice to ensure integrity with no grounds for setting aside, non-binding or suspension of award under ss 67-69 of the Act. This applies to both expressed and implied choice according to the second paragraph of s 4(5).

The Commission questioned whether the approach under s 6 of the Scottish approach could be considered as the approach for the proposed change, and considered whether the phrase "unless the parties otherwise agree" is wide enough to include the implied choice of law to govern an arbitration agreement.²³⁶ The answer should be negative. First of all, the Scottish approach is a statutory exclusion ousting²³⁷ the common law rules; hence a direct application it should be, whereas the basis of *Enka* is implication under the common law rules. The language of s 6 expressly deals with a situation where, without parties' agreement otherwise, the agreement is to be governed by Scots law, providing the juridical seat being in Scotland and parties failing to specify the governing law of arbitration agreement. Ousting common law rules under s 6, the researcher argues that this should be interpreted as a two-step choice of law rules; i.e., expressed choice and Scots law in the absence of parties' choice. This should not cover implied choice on the ground on the basis that allowing implied choice of on this point as well as various other default rules²³⁸ covered by the phrase "agreed otherwise" would open the floodgate of court actions for delaying tactics. This would defeat the design of arbitration as a speedy dispute resolution. Furthermore, the Commission acknowledged that those consultees who raised this point also think that the parties' chosen arbitral rules would trump the Commission's concerns over this issue.²³⁹

On the proposed codification, the researcher would argue against the proposal and holds the view that the current common law rules, the link between business sense and implication, validation principles and importance of the seat, confirmed by the UKSC, are sufficient in dealing with this issue. With a 3:2 split, the powerful dissenting opinion expressed by Lord Burrows and Lord Sales may not see the end of discussion on this. With the Commission preferring robustness and certainty before codification, the proposed codification would go against the current jurisprudence and remove the flexibility required to allow room for further development on this issue.

CONCLUSION

²³⁶ Consultation (2023) (n2) 2.43.

²³⁷ *Ibid.* 2.21.

²³⁸ ss 6, 7, 12 (5), 36(8), rr 7(1)(2) 47(2)(b), 82(1) and the default rules.

²³⁹ Consultation (2023) (n2) 2.47 and footnote 67.

Party autonomy as stipulated in s 1(b) of the Act²⁴⁰ is acknowledged by the Commission²⁴¹ as well as endorsed and commented on by various scholars,²⁴² who have highlighted party autonomy “[a]s the overriding principle in international arbitration.”²⁴³ Reflecting the legal reasoning on the implication in common law, “judicial observations so far considered represent a clear, consistent and principled approach” in implied terms.²⁴⁴ This is based on the court’s searching for a presumed intention,²⁴⁵ without making a new contract,²⁴⁶ but gap-filling the original contractual obligations with an integral part of the parties’ intention.²⁴⁷ The objective of the gap-filling is to prevent a failure in contract²⁴⁸ if it is necessary²⁴⁹ and *prima facie*²⁵⁰ to avoid a futile result²⁵¹ as well as its need to yield to the business common sense,²⁵² business efficacy for commercial and practical coherence.²⁵³

The Commission considered the possibility of statutory codification of the issues with robustness and certainty with added value. With common law rules providing sound narrative on implication for confidentiality and the governing law of the arbitration agreement, introducing mandatory provisions covered by both common law and institutional rules would not provide the added value the Commission sought.²⁵⁴ Arbitration is a fast moving area of law which requires flexibility in further development with rules guiding the users.²⁵⁵ Given the anticipation of future court interpretation over the issues, the questions for the Commission and the stakeholders to consider is whether mandatory rules would have negative impacts on party autonomy, the contractual element of arbitration agreement and, indeed, the reputation of London as a favoured seat of arbitration. On the issue of confidentiality, the researcher agrees with the Commission’s proposal to leave this matter to the current development under common law. This view is not based on the Commission’s concerns over a lack of exclusive list of exceptions or non-presumption of duty of confidentiality, but is based on the contractual nature of the arbitration agreement acknowledged in the rule of implication under common law. For the implied duty of disclosure, the discussion here has demonstrated the required duty in order to provide the parties with a “right to know” and maintain integrity in order to close the gap between ss 24 and 33 of the

²⁴⁰ Arbitration (Scotland) Act 2010, s 1(b).

²⁴¹ Consultation (2022) (n2) 1.13, 5.17, 6.23.

²⁴² Born(n19) §1.02.B.6; Stefan M. Kröll, *National Report for Germany* (2007 through 2023) (2020) 3; Klaus Peter Berger, ‘The Need for Speed in International Arbitration’ (2008) 25(5) *Journal of International Arbitration* 595,597; Klaus Peter Berger, *‘Institutional Arbitration: Harmony, Disharmony and the ‘Party Autonomy Paradox’*, 34 *Arb. Int’l* 473 (2018); Mia Louise Livingstone, ‘Party Autonomy, in International Commercial Arbitration: Popular Fallacy or Proven Fact’ (2008) 25(5) *Journal of International Arbitration* 529, 529-530.

²⁴³ M. Scherer, L.M. Richman and R. Gerbay, *‘Arbitrating under the 2014 LCIA Rules. A User’s Guide’* (2018) *Arbitraje: Revista de Arbitraje Comercial y de Inversiones* 335, 348-349.

²⁴⁴ *Marks & Spencer* (n4) [21].

²⁴⁵ *Equitable Life* (n40) 459; *Marks & Spencer* (n4) [21].

²⁴⁶ *Hillas* (n35) 29, *per* Lord Tomlin.

²⁴⁷ *Associated Japanese Bank* (n36) 268.

²⁴⁸ *The Moorcock* (n38).

²⁴⁹ *Shirlaw* (n48) 727.

²⁵⁰ *Ibid.*

²⁵¹ *Hamlyn* (n24) 491; *Thomson* (n45) 406.

²⁵² *Antaios* (n58) 201.

²⁵³ *SPI* (n71) [30]; *JN Hipwell* (n59) [25]; *Marks & Spencer* (n4) [21].

²⁵⁴ Consultation (2022) (n2) 2.36.

²⁵⁵ *Ibid.* 2.35.

Act. Therefore, a confirmation of implied duty of disclosure in the amendment is necessary. On the issue of governing law, the researcher argues against codification as the common law rules-based choice of law rules are sufficient to provide flexibility and guidance to the international users to ensure their intention of using arbitration is respected. The legal reasoning in implication provides flexibility. Its flexibility operates well within the boundaries of implication by law in both common law rules and arbitration cases. The combined effects of implication and the application of the validation principle, mitigating parties' defective intention, delivers both flexibility and certainty where parties' intention is absent. While implication based on common law rules can achieve the same result due to its flexibility and certainty as brought about by recent UKSC decisions on these matters, the researcher would argue that the Commission's proposal in a statutory provision imposing English law is not essential.²⁵⁶

²⁵⁶ Consultation (2023) (n2) 2.76.