XIII.5.1 - Confidentiality

(a) The parties to arbitration proceedings, whether institutional or ad hoc, are under an obligation to keep confidential all awards and orders produced by the arbitral tribunal in the arbitration, together with all materials in the proceedings created for the purpose of the arbitration, as well as all materials submitted by another party in the framework of the arbitral proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party

i) by a legal duty vis-à-vis a third party, especially an official authority of a state ("public interest exception"),
ii) to protect or pursue a legal right,
iii) to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority; or
iv) by an express or implied consent of the party who produced the document during the arbitration.

(b) This undertaking also applies to the arbitrators, the tribunal-appointed experts, the secretary of the arbitral tribunal and, in case of institutional arbitration, the arbitral institution.

Commentary:

1 Given the significance of the confidentiality issue for international commercial arbitration as a whole, it is surprising that most arbitration laws, including the UNCITRAL Model Law, do not contain provisions on the confidentiality of the proceedings. While some arbitration rules do contain confidentiality undertakings, others, such as the ICC Arbitration Rules, do not. It is therefore of utmost significance to determine whether a general principle related to the confidentiality of the proceedings exists in international arbitration law.

2 The English and Welsh Court of Appeal in Emmott v. Michael Wilson & Partners Ltd, not only emphasized the nature of the confidentiality principle as a substantive rule of arbitration law, but at the same time made it clear that there are intrinsic limits to this principle which are 'still in the process of development on a case-by-case basis'. The Court listed as principal cases in which disclosure will be permissible by one party to the arbitration, i.e. in which an exception to the duty of confidentiality applies:

- express or implied consent of the other party;
- order, or leave of the court;
- disclosure is 'reasonably necessary' for the protection of the legitimate interests of one of the parties; and
- the 'interest of justice' or the 'public interest' requires disclosure.

3 The problem with this list of exceptions is that their precise delineation is far from clear. While the case of an express or implied consent of the other party is undisputed, the Court did not make it clear under what circumstances an order, or leave of the court could or should be granted. Also, the precise scope of the 'interest of justice' and 'public interest' exception remains unclear. It goes without saying that a mere 'general' public interest, e.g. one expressed in the media or the political arena, can never justify an exception to the principle of confidentiality. Only where the public interest is manifested in a statutory duty of disclosure vis-à-vis a third party, e.g. a public authority (tax, antitrust, public prosecutor, etc.) does that public interest prevail over the parties' implied contractual duty of confidentiality. This limit to the parties' duty of confidentiality is to be found in some arbitration rules.