

# MANAGING CONFIDENTIAL INFORMATION ON PETROLEUM PROJECTS IN THE CASE OF THIRD PARTIES

*Mostapha Maddahinasab, Ahmad Momenirad, Reza Tajarlou,  
Mohammadhasan Razavi*

---

## **Abstract**

In each business, certain confidentiality provisions are concluded. In the oil and gas business, information is a matter of importance. Therefore, it is routine in the petroleum industry to sign confidentiality clauses or confidentiality agreements. Also in many cases, the confidential information needs to be disclosed to certain third parties, either for completing the project or due to regulations. Hence, apparently, there would be a conflict between the confidentiality obligations and such disclosures to third parties. In this study, we analyse the risks and effects of the authorised disclosure of confidential information to third parties. The research hypothesis is that in the mentioned relations there is not enough coherence and accordance that can completely manage the safety of disclosed information. The main source of our research is Lex Petrolea (legal and contractual norms accepted internationally by governments and companies that are active in the petroleum industry).

**Keywords:** confidentiality, non-disclosure, petroleum contract, NOC, IOC, third party, transparency

## **Introduction**

The protection of confidential information is an important component of many transactions in the oil and gas industry. In this industry, all of the related information, including contractual, financial, fiscal, economic, environmental and technical information, is absolutely crucial and valuable. (Hardwicke-Brown, 1996: 356) Such data are inevitably disclosed between the parties to a petroleum contract. Therefore, they agree upon a confidentiality clause or non-disclosure agreement to bind themselves to keep the information obtained secret and not to use it in a way that is not related to the project.

Petroleum contracts are complex and usually involve different considerations which engage the third party in the project. As an example, considerations relating to the financing of the project will engage a bank or a financier with confidential information, as they need to know the characteristics of the project which they are going to invest in. (Myers, 1984: 127) Another similar case is the insurance clause. With regard to the insurance clause in a petroleum contract, the second party to the petroleum contract, presumably an international oil company (IOC), usually needs to buy insurance coverage for the risks associated with the project. When an insurance company insures the risks, it must identify and also quantify risks in the project. Thus all of the related information should be revealed to the insurance company. (Park, 1996: 131) In addition to this, some information needs to be disclosed to public authorities or, in the case of dispute resolution, the information will be disclosed to third parties involved in the relevant process. Therefore, the general challenge here is how the parties to the main contract are supposed to protect the confidential information despite disclosing it to others.

Perhaps the simplest answer is that the confidentiality clause/agreement usually has determined exceptions that allow for the revealing of certain information to certain persons such

as public organisations, subcontractors, insurance companies, etc. But what is the guarantee of the safety of information after it has been disclosed to third parties?

An international upstream contract is usually maintained between two main parties; a company or a set of companies, jointly as in a JV, which represents a host state as the first party. Since in most cases it is a National Oil Company NOC that has such a role, it is more convenient to use this term throughout this study as we recall the first party as (NOC). Although sometimes it may not be an NOC by exact definition.<sup>1</sup> The second party is a company or a set of companies, jointly as in a JV, which act as a contractor or an investor. Since it is usually an international oil company (IOC) that does this job, we use this term to refer to the second party to the contract. Although sometimes it may not be necessarily an IOC by its exact definition, we use this term because it is more convenient to use and transmits the meaning. In both cases, it would not make a significant difference to the results of our analyses if the first party wasn't exactly an NOC or the second party an IOC. The third-party would be different types of individuals and companies ranging from public persons to private persons. The main issue here is, how will the obligations be enforced and what would be the remedy especially in the case of the third parties?

It is assumed that in relation to third parties, confidentiality provisions have deficiencies that leave the risks threatening confidentiality of the information unmanaged while it has been disclosed to the third parties. Also, it should be mentioned that our analyses are general and we are not concerned with a certain type of petroleum contract in a certain region or certain period of time, as confidentiality provisions (whether as a confidentiality clause or a non-disclosure agreement) are almost the same (in essence) in different types of petroleum contracts. Nevertheless, in our analysis, we have brought examples from confidentiality clauses in different types of upstream petroleum contracts for better clarification.

Our methodology, in its general form, is based on *Lex Petrolea*. *Lex Petrolea* comprises the international norms of oil and gas law, which are accepted and applied by the host states and multinational companies investing in this industry. This concept first appeared in the arbitration award between the government of Kuwait and American Independent Oil Co (AMINOIL) in 1982, on the issue of determining proper compensation for the expropriation of the assets by the government of Kuwait. (Talus, *et al.*, 2012: 181) Later the academics and commentators in this field generalised the doctrine of *lex Petrolea* to other areas of oil and gas law such as contracts and regulations. (Martin, 2012, Wawryk, 2015) Therefore, sources in different jurisdictions are not that divergent and *lex Petrolea* is held as the criterion which has helped countries and companies to apply an integrated approach toward different issues. Thus in our research, it is the main source. Also, according to this we provide our study with examples from different upstream contracts in different countries. Therefore, in the first section, we discuss and describe the current characteristics of the confidentiality provisions in the context of *Lex Petrolea* then based on the characteristics of such provisions in the petroleum industry, we analyse the risks threatening the confidentiality of the information while the information has been submitted to the different types of third parties. The risk elements in this concern are abusing the confidential information or disclosure of that information to unauthorised persons, which

---

<sup>1</sup> also the first party could be an authoritative body like ministry of energy of the host state. In such cases the contract would be an administrative contract and thus it would be out of our topic.

may result in severe economic loss, especially in the case when a rival that has a direct interest in such data obtains them. In the second section, we will apply a variety of risk management methods ranging from avoidance and prevention methods, retention methods and transfer methods like an indemnification clause.

### **Confidentiality provisions in petroleum projects**

Confidentiality provisions in petroleum projects could mean either a confidentiality clause within petroleum contracts or a separate confidentiality/non-disclosure agreement, or both. Essentially, there is not a significant difference between a confidentiality clause and a confidentiality agreement. In other words, both of them set the same obligations. The only possible difference perhaps is that a confidentiality agreement has more details. Therefore, in this section we describe confidentiality terms in the format of a confidentiality agreement as this will be more comprehensive, meanwhile highlighting the confidentiality strategies in petroleum contracts.

Confidentiality agreements or non-disclosure agreements are contracts entered into by two or more parties in which some or all of the parties agree that certain types of information that pass from one party to the other or that are created by one of the parties will remain confidential. (Radack, 1994: 68)

Confidentiality agreements in different industries are relatively similar. Although there may be different strategies in negotiating them and adjusting them to special characteristics and needs in each business, they all share the same general framework of clauses. (Derman, 1992) Exchanging confidential information between companies in the petroleum industry is inevitable, either to complete a project or to attract companies to work with each other in a project. (Martin, 2004a: 281) Companies usually attempt to protect their shared intellectual property by including confidentiality provisions in their contracts or relations. (Smith, 2000: 36)

#### ***Describing the information and data subject to confidentiality***

Currently, based on the obligation of the parties to transparency standards there are two major approaches toward drafting confidentiality agreements; 1) narrow interpretation of confidential information 2) wide interpretation of confidential information. In the petroleum industry, the principle is to be transparent. Thus, confidentiality has a narrow and objective realm. Nonetheless, some host states may apply a wide interpretation of confidential information due to some national interests, although this is usually due to governmental corruption. (McPherson, Charles, 2015: 60)

From the perspective of the confider and confidant to a confidentiality agreement, confidential information will tend to be divergent. Typically, the confidant tends to apply the narrow interpretation of confidential information with the clarity of exact information subject to the confidentiality agreement. On the other hand, a wide and subjective interpretation of confidential information is in favour of the confider. Therefore, in most of the petroleum contracts, both sides of the contract are obliged to hold confidentiality to maintain the balance between themselves by sharing the risks and benefits of confidential information. For example, in the eleventh section of the contract between Albanian NOC (Albpetrol) and Stream oil & gas Ltd, for Delvina block, we read that although the information obtained during the project belongs to the Albanian NOC, the contractor also has an interest in such information. Thus, both sides are

obliged to keep the confidentiality of the information before each other. There is similar content in the model gas service contract of Iraq (2009) in article 33.5. Nonetheless, in some countries, such as Iran, based on the current draft of IPC contracts (new Iranian petroleum contracts), the contractor has no right to the information obtained during the project and subsequently; it is only the contractor which is obliged to keep the confidentiality of the information.

In the petroleum industry, generally, all data obtained during operations describing the hydrocarbon, geological and geophysical data, logs and analyses, pressure trends, estimates of the reserves in place, commercial, technical information are valuable and subject to confidentiality provisions. This type of information is widely accepted to be subject to confidentiality. However, other categories of information – such as contractual clauses, legal information and rights, and obligations of parties to the contract – are not assumed to be confidential in many oil-producing contracts. (Rosenblum, Maples, 2009: 24)

Therefore, the less confidential information, the greater the advantage for the IOCs. On the other hand, for host states, it is better to impose more restrictions to make sure that all of the information obtained in their project and reservoir is safe and will not be disclosed or used against their benefits or without their permission.

### ***Obligations of the confidant***

Generally, a confidant is obliged in two types of obligations; the first main obligation is not to disclose the information. The second main obligation is not to use information in a way that is not associated with the project.

More objectively, the confidant is prohibited from the sale, trade, publishing, disclosure or reproduction of the confidential data to the third party or out of the relevant project.

In oil and gas projects, confidentiality obligations are manifested in two ways; either as a confidentiality clause within the main contract between parties to a petroleum contract, or as an independent confidentiality agreement. Although the usual practice is to apply only a confidentiality clause within petroleum contracts in a way that the confidentiality clause itself covers all the confidentiality provisions. Some jurisdictions also apply non-disclosure contracts in addition to the confidentiality clause. Iran and Libya currently use this method. In this method, the confidentiality clause sets the general frame of the confidentiality provisions whereas the non-disclosure agreement concerns such provisions in a detailed manner.

### ***Exceptions for disclosing of information in specific cases***

For some regulatory issues, and also for getting the project completed, the confidant is usually exempted from confidentiality requirements in certain relevant cases. (Martin, 2004b: 286)

Exceptions can be categorised into four types;

- Exceptions the parties agree upon. Disclosures to third parties like insurance companies and financiers are the main examples.
- Exceptions which the authority bodies impose, e.g. for auditing, fiscal, social and environmental matters (in general, transparency necessities). (Mainhardt-Gibbs, 2007)
- Exceptions imposed due to fiduciary duties in the case of JVs or JOAs. Meaning if there is another company involved in the venture or operation, it has the right to know the required information of the project which is investing in it. (Bean, 1993: 75-89)

- Exceptions due to the procedures of dispute resolution. Whether by litigation, arbitration or other ADR<sup>2</sup> methods, some necessary information which may be confidential need to be disclosed. (Brown, 2000: 971 , Hardwicke-Brown, 1996: 357)

### ***Warranties of the obligations***

A combination of a wide range of remedies can be applied in a confidentiality agreement including:

- Setting liquidated damages
- Accounting of benefits earned by the confidant by unauthorised use or disclosure of the confidential information
- Injunctive relief, either an interim or permanent injunction.
- Order for delivery up and destruction of materials that the confidant has obtained through the breach of confidence or unauthorised use. (Hardwicke-Brown, 1996: 376)

If the confidentiality agreement is silent about the remedy for the breach or the contractual remedy is insufficient, it will be provided or supplemented through common law (or the related rules of governing law to the agreement) and equitable principles. (Hardwicke-Brown, 1996: 379) Remedies provided by these means can include compensation for damages, injunctive relief, and also an order to destroy materials.

The most important issue surrounding breach of confidentiality in the petroleum industry is proving that the breach has actually occurred. This is especially true regarding the obligation not to use confidential information for other purposes. Since it is nonconcrete to prove that the confidant has used confidential information for another project, the confider faces a difficult situation in proving the breach. It seems that a good way of solving the problem in such cases is to include a clause in the confidentiality agreement which exempts the confider from having to prove such abstract and psychological cases of the confidentiality obligation being breached. Also, there may be another remedy provided not by the confidentiality agreement but the main petroleum contract itself. If the breach of confidentiality obligations is considered a ‘material breach’ under the contract or by court or arbitration verdict, the confider has the right to terminate the contract as a remedy for material breach. (Rosenblum,Maples, 2009: 29 , Stannard,Capper, 2014)

### ***Termination of the agreement***

A confidentiality agreement may provide that the confidant’s obligations will survive for a limited period. This usually depends on the nature of the deal. For example, if it is about closing a proposed acquisition transaction with the confidant, its obligations under the confidentiality agreement will terminate on the closing. (Hardwicke-Brown, 1996: 384)

The confidant typically prefers the termination to be limited and accurate while the confider might be willing to enjoy perpetual and subjective confidentiality rights. Nonetheless, if the parties have not determined when the agreement will end, it is not necessarily perpetual. In this case, it seems the relevant customs and practices known will supplement the agreement.

In the petroleum industry, there is no standard time when a confidentiality agreement ends. It may be different ranging from termination of the main petroleum contract to perpetuity

---

<sup>2</sup> Alternative Dispute Resolution

of the confidentiality obligations. In the model gas service contract of Iraq, Article 33.3 determines that the confidentiality obligations end three years after the termination of the main contract. In Cambodia's production sharing contract (PSC) model, the term for the confidentiality obligation is two years after the termination of the main contract. And in the Kurdistan region's PSC model, confidentiality obligations end at the same time that the main contract reaches the termination point. In Pakistan's concession model, article 11.2, confidentiality obligations are perpetual. The same provision has been applied in Kuwait's model of technical assistant contracts.

The time variations might reflect a difference in the competitiveness of a country's petroleum industry, different philosophies about the disclosure of information, or some other variables. (Rosenblum,Maples, 2009: 25). Nonetheless, it is reasonable that the information stays confidential during the operation of the oilfield and information concerning the project and reservoir still matters.

### **Analysing confidentiality regarding third parties**

As has been explained in the previous sections, disclosure of confidential information is authorised in exceptional cases. According to the exceptions, there will be three different categories of third parties:

- Third parties who are involved in a petroleum project and receive information based on the parties' agreement.
- Public third parties who receive information based on regulations.
- Third parties who receive information during the dispute resolution process.

Based on the rule of privity of contracts (Rosenblum,Maples, 2009),(Stone, Devenney, 2017: 158) the confidentiality agreement does not impose any obligation on third parties. Therefore, it is crucial to research the risks threatening the confidentiality of the information and legal and contractual tools to secure the information while at the disposal of third parties. In this section, we are going to analyse this issue accordingly.

#### ***Private third parties***

Third parties under this category share three characteristics. Firstly, all of them receive information based on the agreement between the confider and confidant. Secondly, it is necessary for the completion of the project to share certain information with them. Thirdly, their relationship with either confider or confidant is based on private law or commercial law tools such as a contract. Insurance companies, financiers, subcontractors or companies participating in the operation or venture are examples of this category.

Although these third parties are not directly obligated under the confidentiality agreement between the NOC and IOC, they are obliged to keep the received information confidential generally due to either a separate confidentiality agreement/clause or regulations and customs derived by the principle of good faith. (Fontaine, De Ly, 2006: 179) For example, insurance companies are obliged to maintain client confidentiality, based on their own internal statutory or consumer rights regulations. (Merkin, Steele, 2013: 77) Moreover, in each case, there is also a confidentiality clause embedded in their contract, which forms their own private/commercial relationship with either the IOC or NOC. Hence, such third parties take the duty of confidentiality, but originating from laws and customs it is very general and needs circumstances to be

proved before a dispute resolution body, which will be harder than the situation when there is a direct contractual relationship between the main confider and the third party. It is usually the IOC that deals directly with the third parties and contractual confidentiality leverages are at its disposal. Thus if the third parties disclose or use the confider's information in an unauthorised way, the NOC has no direct contractual leverage against the third party. This is the main confidentiality risk an NOC takes in this category of third parties.

In the case of the first risk, the best way to manage the risk is to share it with the IOC. For that purpose, an NOC should share the ownership of the confidential rights with the IOC or give it benefits such as the right to use the knowledge obtained in other projects (with the NOC's permission). Thus, the IOC will maintain the confidentiality of the information more carefully, as its own benefits are involved. If an NOC does not prefer this method, it can manage the risk by including an indemnification clause in the confidentiality agreement between the first confider (here an NOC) and the confidant (an IOC) where the risk will be managed. Since the indemnification clause passes the burden of loss and risk to the indemnifier (Hutchens, 1992: 269), in this case, the confidant will be responsible for violation of information confidentiality by third parties. The confidant's responsibility will be to stop the violation of the confidentiality and pay the relevant damages to the confider.

The confidant can also pass the risk to the third party. However, it should be noticed that some third parties, such as insurance companies, do not accept indirect losses. In such cases good faith and fair dealing obligations can help, at least, to make the third party do its best to secure the confidentiality of the information. (Adler, Mann, 1994: 33), (ICC, 2006: 12)

The other risk is that the confidentiality clause between the confidant and the third party may have lower standards and recognise different definitions than the confidentiality terms between the NOC and IOC. Hence, it will not cover the confider's information properly. If the two sets of the confidentiality terms have different standards, this may result in some risks. For example, if the definition of the confidential information in the second confidentiality agreement/clause does not overlap with the first confidentiality agreement, it will leave some information unprotected. Or, if the term of the agreements is different, there will be a problem. Meaning that if the second agreement terminates before the first, the third party is no longer to keep the information confidential, while the first confidentiality agreement still holds confidentiality.

To manage this risk, two methods are possible. One is to make sure that the confidential information in the main confidentiality agreement is recognised as confidential between the confidant and the third party too. This can be actualised by dropping a line in the confidentiality clause between the confidant and the third party that they agree to also recognise all the confidential information between the first confider and confidant as confidential too. Another way is to oblige the confidant in the main confidentiality agreement to keep the same margins of confidentiality with the third party. This method is currently more common in most petroleum contracts. For example, in Iraq's gas service contract model, article 33.1, it has been determined that confidential information can be disclosed to third parties (in authorised cases) provided that they adhere to the same confidentiality provisions as this contract.

### ***Public third parties***

In each petroleum project, there is some information that needs to be disclosed to the authorities, public entities, or even non-governmental organisations (NGOs). The challenge in this phase is how this information is going to be safe. Do the public entities have a duty of maintaining the confidentiality of such information? To know the answer, one should first analyse the relationship between confidentiality obligations and transparency necessities. In other words, we need to know which is the principle and which is the exception from the principle. Considering each of these concepts as the principle and the other as an exception to the principle is relative and depends on the main philosophical background and theories shaping a legal regime. Transparency regulations originate in the area of public law, while confidentiality obligations are based on the theory of contract and thus come from private law. Legal theories which give superiority to public law will recognise transparency as the principle and confidentiality as the exception to the principle of transparency. On the other hand, legal theories prioritising private law will act vice versa. (Maddahinasab, 2018) Hence, depending on the background in each legal regime, the answer varies. Nonetheless, we can consider solely the petroleum industry and the trends within this business or so-called *lex petrolea*, to see how the issue has been dealt with.

Being a natural resource that creates high revenue flows, the petroleum industry has made a proper atmosphere for corruption for both governments and private corporations. Challenges like fair and efficient systems for licensing, contracting, revenue collection, auditing, local content, and public spending, as well as the environmental and social impacts of the industry, are also causes which have given rise to a common conclusion that transparency is a necessary factor in this industry. (Short, 2014: 8) Thus it can be said that the trends in the petroleum industry are inclined toward considering transparency as the principle and confidentiality as the exception to the principle. (McPherson, Charles P, 2014),(Gault, 2014) In recent years, implementation of the Extractive Industries Transparency Initiative (EITI) standards by many countries in their petroleum industries has fortified the role of transparency more than before. According to the EITI's standards, members are encouraged to report information concerning the revenues from the sale of natural resources and make such information publicly accessible. (Poretti, 2015) In addition to these non-mandatory standards, in many countries there are mandatory requirements and regulations which promote transparency, such as the USA's Freedom of Information Act. Under these standards and regulations, not only do public entities not have any obligation to maintain the confidentiality of the information which companies report to them, but rather they must make such information publicly accessible. Therefore, the type of information which needs to be reported to the public entities cannot be confidential. Thus, if the parties have agreed to keep such information confidential, it will be an invalid agreement due to being against these regulations or public order. However, it should be noticed that freedom of information acts usually determine which kind of information is not subject to transparency. For example, in the USA's freedom of information act, trade secrets and technical information are excepted from being disclosed. (McCARTHY, Kornmeier, 1980: 58) In other words, the type of information which is private can be confidential and subsequently there is no need for it to be disclosed to the authorities. The problem emerges, however, when the regulations are not comprehensive in recognising this kind of information. And since



such information is considered as exceptions to the principle of transparency, it is construed narrowly. Hence, only the information which has been stipulated in the regulations is entitled to be confidential and the remainder is subject to transparency regardless of being inherently private or not.

Therefore, the main risk in this section would be the probability of deficiency in the regulations and standards concerning transparency norms. The parties to the contract can manage this risk, to some extent, by opting for a governing law which is more effective for them. Usually, however, they must adhere to the host state's legal system. Since NOCs are related to host governments, in this case, it can be said that the IOCs' information is at risk. Considering this, in the case that the regulations are not efficient enough, the parties to the confidentiality agreement/clause can negotiate to provide a remedy for the IOC's loss, in the event in which its confidential information of a private and privileged nature has been made public due to such regulations. In order to manage this risk properly, they should identify exactly the type of information that has not been recognised in the transparency regulations and they also need to determine, in the contract, under which circumstances the IOC is entitled to compensation.

### ***Dispute resolution process***

In the case of dispute resolution, there are two options for the parties to petroleum contracts; litigation or arbitration (and alternative dispute resolutions). In each case, they may need to disclose some confidential information, which is required for the judges or arbitrators to settle the dispute. If they choose litigation, it is interpreted that they have withdrawn from their confidentiality rights, as the courts are public and disclosing confidential information to them is the same as the parties making the information public themselves. So obviously it is better to choose arbitration if they want to keep the confidentiality of the information. But is the arbitration mechanism enough to secure the confidentiality of the information?

Confidentiality has been stated as a key feature of why businesses choose arbitration rather than litigation. In a survey of US/European users of international commercial arbitration conducted in 1992 for the LCIA by the London Business School, confidentiality was listed as the most important benefit of arbitration. (Bagner, 2001) In another survey conducted by the School of international arbitration at Queen Mary University in London, 84 percent of those surveyed admitted to choosing arbitration at least in part because of its confidentiality. (Gerbay, 2012) But is confidentiality actually a feature of arbitration?

The reason that arbitration looks confidential is its private nature. As mentioned before, litigation is a public dispute resolution method. Hence using litigation is concomitant with the withdrawal of confidentiality rights. On the other hand, arbitration is private and, by using it, parties do not put confidential information in the public domain. Thus, it sounds like the arbitration method features confidentiality. However, this does not necessarily mean that arbitration is actually confidential. In past decades, the privacy of arbitration had the same meaning as being confidential. (Bagner, 2001: 243) But recently these two notions, despite being correlated, have been distinguished from each other and have been defined separately. Current development defines the privacy of arbitration as being self-contained between the parties to the dispute, but this does not necessarily mean that it is confidential. (Noussia, 2010: 25) In many jurisdictions, the arbitration mechanism does not guarantee the secrecy of any disclosed information. Thus, third party participants in the arbitration process who have not agreed to any

confidentiality agreement or rules remain free from confidentiality obligations. (Schmitz, 2005: 1211) Third parties in an international arbitration process include arbitrators, witnesses, and experts. With respect to arbitrators, it is accepted that arbitrators have an ethical duty to maintain confidentiality, and that the remainder of the third parties are not bound by any such duty. In other words, in both cases, there is no legal guarantee for safeguarding confidential information which has been disclosed to them. (Buys, 2003: 124)

Although it is still possible in some jurisdictions<sup>3</sup> or arbitration centres<sup>4</sup> that third participants involved in the arbitration process (or other ADR mechanisms) be obliged to keep confidentiality of information (Reuben, 2005: 1261, Trakman, 2014: 6-8), it is safer to have them agree to confidentiality in order to manage the risks in this case. The parties to arbitration may provide for confidentiality and non-disclosure by incorporating a confidentiality clause into their arbitration agreement, or through a distinct confidentiality agreement. (Trakman, 2014: 3) In this way, the parties can turn the arbitrators' ethical duty into a binding legal duty to maintain confidentiality. In the case of other third parties involved in the process of dispute settlement, such as experts and witnesses, having them sign a confidentiality agreement in each case will cause inconveniences in the process of dispute resolution. Therefore, for the sake of having an efficiently fast process of dispute settlement, it is better to distinguish between those who receive more important information and those who receive less. And then the parties can agree on only having a confidentiality agreement with those who have received crucial confidential information. Hence, if signing a confidentiality agreement with each third party would cause inconvenience in the dispute resolution process, they can skip those who have access to less important information which will not form a serious risk.

Regarding other dispute resolution methods known as alternative dispute resolution (ADR), the confidentiality risks regarding third parties and the relevant solution are the same as in the case of arbitration. However, in the case of mediation, the duty of confidentiality has been more accepted, and it is usual in mediation agreements to provide confidentiality obligations. (Trakman, 2014: 8)

## **Conclusion**

In the relationship between an NOC and an IOC and third parties, it is usually the NOC which is more exposed to the risk of disclosure of their confidential information. This is because the NOC must disclose more information, such as geographical information, information on the reservoir's hydrocarbon characteristics, and so forth. Also most of the time, the NOC is recognised as the owner of the information obtained during the petroleum project. However, the IOC also must disclose some important information. For example, in the case of transferring technologies to the host state. Or in some cases, such as concession information obtained during the project belonging to the IOC, the NOC or owner will become aware of such information due to inspections or reporting duties from the IOC. On the other hand, exceptionally, to facilitate project completion or to comply with relevant regulations, the confidential information must be

---

<sup>3</sup> For example under the laws of the United Kingdom, parties to arbitration are forced to rely on confidential rules that are implied into their agreement by operation of the common law. Although these implied rules are grounded in conceptions of privilege and privacy, not confidentiality.

<sup>4</sup> For example, London Court of International Arbitration (LCIA) in article 30.1 of its governing rules, American Arbitration Association (AAA) in its amended rules have provided specifically for confidentiality.

disclosed to specific organs or bodies such as the tax bureau, social and environmental organs, subcontractors and financiers, or any other persons who participate in the project. Therefore, in the confidentiality agreement, such disclosures are exceptionally authorised.

When the NOC/IOC discloses the information in the authorised cases (e.g. to an insurance company), some confidentiality provisions should be provided to protect the safety and proper use of the information. Hence, some specific confidentiality agreements or clauses may occur between the IOC and the private third parties. In this study, we analysed the relationships between these two sets of confidentiality provisions and concluded that if the confidentiality provisions between the NOC/IOC and the third parties are general in nature and have less strict provisions and lighter obligations on the third party than the main confidentiality provisions between NOC and IOC, the third parties will be less bound to confidentiality obligations, which is recognised by the NOC and IOC. Therefore, the subsequent confidentiality provisions should conform and overlap with the original confidentiality provisions between the NOC and IOC. If there is not enough harmony between these two sets of confidentiality provisions, some of the confidential information may be exposed to the risk of disclosure or used against the benefits of the confider. The elementary method to manage this risk is that the NOC and IOC oblige themselves to set the same confidentiality standards with the third parties. This method is currently used in some petroleum contracts. Also, we concluded that using an indemnification clause as a method of transferring risk management can guarantee the main confider's confidentiality rights in the case in which the third party is only related to the confidant.

In the case of public third parties, we concluded that transparency in the context of petroleum law is superior, and that applying confidentiality to information is exceptional. Therefore, confidentiality rights are construed narrowly and this may be risky, specifically, when the parties to the contract have no choice other than to adhere to a specific legal system which is deficient in regard to recognising the type of information which is exempted from transparency regulations. In this case, the IOC would be more vulnerable. Thus, considering the circumstances in the confidentiality agreement which provide compensation for the IOC's loss, in this case, the risk can be managed.

Regarding the third parties who are involved in an arbitration process and receive confidential information, we concluded that they are not necessarily obliged to keep confidentiality duties unless they have agreed to a confidentiality agreement. Thus, the best method to manage this risk is avoidance, by binding any receiver of the confidential information, including arbitrators, experts, witnesses, and lawyers, to proper confidentiality provisions.

### **Bibliography**

1. Adler R. S. and Mann R. A., *Good Faith: A New Look at an Old Doctrine*, „Akron L. Rev.", 28, (1994)
2. Bagner H., *Confidentiality—A Fundamental Principle in International Commercial Arbitration?*, „Journal of International Arbitration", 2, 18, (2001)
3. Bean G. M., *Duties of Disclosure and Confidentiality in JOAs*, „Journal of Energy & Natural Resources Law", 2, 11, (1993)
4. Brown A. C., *Presumption meets reality: an exploration of the confidentiality obligation in international commercial arbitration*, „Am. U. Int'l L. Rev.", 16, (2000)

5. Buys C. G., *The tensions between confidentiality and transparency in international arbitration*, „American Review of International Arbitration", 121, 14, (2003)
6. Derman A. B., *International oil and gas joint ventures: a discussion with associated form agreements*, Section of Natural Resources, Energy, and Environmental Law, American Bar Association, 1992
7. Fontaine M. and De Ly F., *Drafting International Contracts*, BRILL, New York, 2006
8. Gault J., *Introduction to the special issue on fiscal transparency*, „Journal of World Energy Law and Business", 1, 7, (2014)
9. Gerbay R., *Confidentiality vs Transparency in International Arbitration: The English Perspective*, „Transnational Dispute Management (TDM)", 3, 9, (2012)
10. Hardwicke-Brown M., *Confidentiality and dispositions in the oil and gas industry*, „Alta. L. Rev.", 35, (1996)
11. Hutchens P. E., *Risk reduction through indemnification contract clauses*, „Journal of Management in Engineering", 3, 8, (1992)
12. ICC, *ICC Model Confidentiality Agreement* ICC Services Publications Department Paris, 2006
13. Maddahinasab M., *Legal and philosophical analysis of ownership and sovereignty over hydrocarbon resources in concern with issues on internationally shared hydrocarbon reservoirs*, 2018
14. Mainhardt-Gibbs H., *Transparency of extractive industry contracts: The case for public disclosure*, „BIC-Issue Brief", (2007)
15. Martin A. T., *Lex Petrolea in the International Oil and Gas Industry*, dispute resolution in energy sector, R. King, Globe law and business, 2012
16. Martin A. T., *Model Contracts: a Survey of the Global Petroleum Industry*, „Journal of Energy & Natural Resources Law", 3, 22, (2004a)
17. Martin A. T., *Model Contracts: a Survey of the Global Petroleum Industry*, „Journal of Energy & Natural Resources Law", 3, 22, (2004b)
18. McCARThY K. R. and Kornmeier J. W., *Maintaining the Confidentiality of Confidential Business Information Submitted to the Federal Government*, „The Business Lawyer", (1980)
19. McPherson C., *Ethics, fairness and anti-corruption in petroleum projects: how far have we come? \**, „The Journal of World Energy Law & Business", 1, 9, (2015)
20. McPherson C. P., *Necessary but not sufficient: anti-corruption and transparency legislation*, Oxford University Press, 2014
21. Merkin R. and Steele J., *Insurance and the law of obligations*, Oxford University Press, Oxford, 2013
22. Myers S., *Finance theory and financial strategy*, „Interfaces", 1, 14, (1984)
23. Noussia K., *Confidentiality in international commercial arbitration: a comparative analysis of the position under English, US, German and French law*, Springer Science & Business Media, Hamburg, 2010
24. Park S., *The duty of disclosure in insurance contract law*, Dartmouth, 1996
25. Poretti P., *Transparency of government revenues from the sale of natural resources: pursuing the international course through EITI*, „The Journal of World Energy Law & Business", 3, 8, (2015)

26. Radack D. V., *Understanding confidentiality agreements*, „JOM", 5, 46, (1994)
27. Reuben R. C., *Confidentiality in arbitration: beyond the myth*, „U. Kan. L. Rev.", 54, (2005)
28. Rosenblum P. and Maples S., *Contracts confidential: Ending secret deals in the extractive industries*, Revenue Watch Institute, 2009
29. Schmitz A. J., *Untangling the privacy paradox in arbitration*, „U. Kan. L. Rev.", 54, (2005)
30. Short C., *The development of the extractive industries transparency initiative*, „Journal of World Energy Law and Business", 1, 7, (2014)
31. Smith E., *International Petroleum Transactions*, Rocky Mountain Mineral Law Foundation, Denver, 2000
32. Stannard J. E. and Capper D., *Termination for Breach of Contract*, Oxford University Press, 2014
33. Stone R. and Devenney J., *The modern law of contract*, Routledge, 2017
34. Talus K., Looper S. and Otilar S., *Lex Petrolea and the internationalization of petroleum agreements: focus on Host Government Contracts*, „The Journal of World Energy Law & Business", 3, 5, (2012)
35. Trakman L. E., *Confidentiality in international commercial arbitration*, „Arbitration International", 1, 18, (2014)
36. Wawryk A., *Petroleum regulation in an international context: The universality of petroleum regulation and the concept of lex petrolea*, Regulation of the Upstream Petroleum Sector, Edward Elgar Publishing, 2015

**Mostapha Maddahinasab - ORCID: 0000-0002-0598-4980**

Mostapha Maddahinasab – Ph.D. student of Oil and Gas Law at the University of Tehran.

**Ahmad Momenirad - ORCID: 0000-0002-8032-9011**

Ahmad Momenirad, PhD – assistant professor of public international law at the University of Tehran, Faculty of Law and Political Sciences.

**Reza Tajarlou - ORCID: 0000-0002-4745-4427**

Reza Tajarlou, PhD – assistant professor of public law at the University of Tehran, Faculty of Law and Political Sciences.

**Seyed Mohamad Hassan Razavi - ORCID: 0000-0001-6134-653X**

Seyed Mohamad Hassan Razavi, PhD – assistant professor of public law at the University of Tehran, Faculty of Law and Political Sciences.