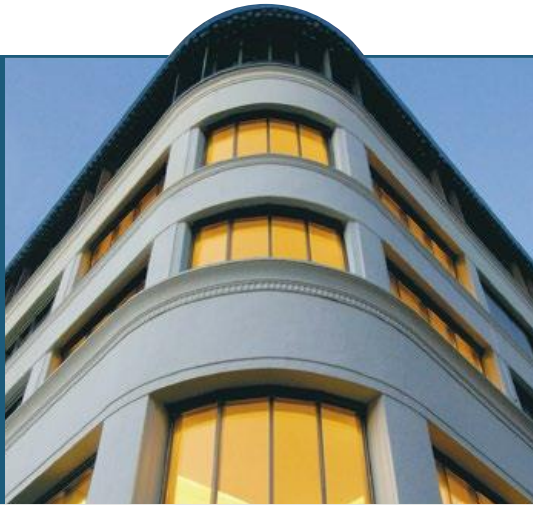


LALIVE



Confidentiality in Arbitration Study Tour in London

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London, 3 March 2017

Importance of confidentiality

Majority of respondents:
Confidentiality is
“very important”
in international
arbitration.

Half of respondents:
assumed arbitration
to be confidential
even in the absence
of a confidentiality
agreement between
the parties

One third:
Confidentiality
and privacy is
one of the three
most valuable
characteristics in
international
arbitration

Outline of presentation

1. Sources of confidentiality obligations
2. Application of confidentiality obligations to different players in the arbitration
3. Factual situations where issues of confidentiality may arise
4. Remedies

Sources of confidentiality obligations

Duties of confidentiality may arise under:

- Confidentiality agreement
- Applicable national law
- Institutional arbitration rules

Confidentiality agreement

- Express confidentiality can be agreed between the parties in:
 - ❖ An arbitration agreement
 - ❖ A separate instrument
 - ❖ A procedural order from the tribunal

National law

Which law?

- Law governing the arbitration agreement
 - Procedural law of the arbitration (law of the seat)
 - Law governing the underlying contract
-
- ✓ **Law governing the arbitration agreement**

Express confidentiality under the applicable law

- Uncommon to regulate confidentiality in national legislation, which is mostly silent:
 - ❖ UNCITRAL Model law
 - ❖ U.S. Federal Arbitration Act
 - ❖ Swiss law on Private International Law
 - ❖ English Arbitration Act
 - ❖ Swedish Arbitration Act

Express confidentiality under the applicable law

- Few jurisdictions have adopted statutory provisions dealing with confidentiality, but usually on opt-in basis:
 - ❖ Australia
 - ❖ New Zealand
 - ❖ Hong Kong
 - ❖ Spain

Implied confidentiality under the applicable law

✓ England

Dolling-Baker v Merrett [1990] 1 WLR 1205 (English Court of Appeal);
Hassneh Insurance Co of Israel v. Mew [1993] 2 Lloyd's Rep 243; *Ali Shipping Corp. v. Shipyard Trogir* [1998] 1 Lloyd's Rep 643 (CA)

✓ Singapore

AAY v. z [2009] 1 SLR 1093;
International Coal Pte Ltd. v. Kristle Trading Ltd and Another and Another Suit [2008] SGHC 182; *Myanma Yang Chi Co Ltd. v. Win Nu* [2003] 2 S.L.R. 547

✓ India (?)

X Australia

Esso Australia Resources Ltd v. Minister for Energy and Minerals et al (High Court of Australia), 7 April 1995, No. 95/014

X Sweden

Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Finance Inc. (Swedish Supreme Court), 27 Oct. 2000, Case no. T 1881-99

X United States

United States of America v. Panhandle Eastern Corp. et al (District Court of Delaware), 7 January 1988, 118 F.R.D. 346

X France

G. Aita v. A. Ojeh (Paris Court of Appeal), 18 February 1986

Different ends of the spectrum

**Broader
concept of
confidentiality:**
England and
Singapore



**Narrower
concept of
confidentiality:**
Australia, USA and
Sweden

Institutional procedural rules

Broad confidentiality provisions:

Swiss Rules
LCIA
LCIA India
SCC
HKIAC

Limited confidentiality provisions:

ICC
ICDR
UNCITRAL

Application of confidentiality obligation to different players in the arbitration

Who is in breach?

- Party (most common scenario and focus of this presentation)
- Arbitral tribunal
- Arbitral institution
- Third party e.g. expert, fact witness, court reporter

The parties

Under most arbitral rules:

Swiss Rules Art. 44(1); BANI Rules Art. 13(2); CIETAC Rules Art. 38(2); DIS Rules Art. 43(1); LCIA Rules Art. 30(1); CAM Rules Art. 8(1); SIAC Rules Art. 39; WIPO Rules Art. 75



Duty to maintain confidentiality of:



Information disclosed in the arbitration



Content of the award



Even the very existence of the arbitration (sometimes)

The arbitrators

Under most arbitral rules:

Swiss Rules Art. 44(1); AAA Rules Art. 37(1); BANI Rules Art. 13(2); CIETAC Rules Art. 38; CRCICA Rules Art. 40(1); DIS Rules Art. 43(1); CAM Rules Art. 8(1); SCC Rules Art. 46; VIAC Rules Arts. 2(4), 4(4), 16(2); WIPO Rules Art. 78.



-  Generally accepted that arbitrators owe a duty of confidentiality in international arbitration.
-  Arbitrators' duty of confidentiality arises from their ethical obligations as decision-maker or judge.
-  Confidentiality obligation also has a contractual nature, arising from the arbitration agreement or the arbitration rules chosen by the parties

Third parties



Not usually subject to confidentiality



Caveat: Tribunal appointed experts, tribunal secretaries, translators and court reporters

E.g. CIETAC Rules Art. 38(2); CRCICA Rules Art. 40(1); CAM Rules Art. 8(1); DIS Rules Art. 43(1); WIPO Rules Art. 76(b). In 2010, the Chamber of Arbitration of Milan amended its arbitration rules to explicitly extend the duty of confidentiality to the parties, whereas in the previous rules the duty only extended to the Chamber itself, the arbitral tribunal, as well as expert witnesses. See Arts. 8(1) of the 2004 and the 2010 Rules of Arbitration of the Chamber of Arbitration of Milan.

Factual situations where issues of confidentiality may arise

Disclosure of existence of the arbitration and amount in dispute

54%: the very existence of the arbitration should not be disclosed

76%: the amount in dispute was one of the key elements to be kept confidential

Queen Mary 2010 International Arbitration Survey: Choices in International Arbitration, p. 3, available at: www.arbitration.qmul.ac.uk/docs/123290.pdf p. 31

Disclosure of existence of the arbitration and amount in dispute - reality

- ✓ Some rules provide for confidentiality of arbitration's existence


*(e.g. SCC Rules Art. 3;
SIAC Rules Art. 39(3);
WIPO Rules Art. 75.)*

- ✗ Absolute confidentiality over fact of arbitration may be difficult

(enforcement, provisional measures etc.)

Department of Economics Policy & Development of the City of Moscow v. Bankers Trust Company (English High Court), 5 June 2003, [2003] EWHC 1377 (“[t]here can [...] be no breach of duty in disclosing the fact of commencement of arbitration, the existence of an arbitration or the result of that arbitration where there is any legitimate reason not to do so.”)

Disclosure of documents created or submitted in the arbitration – expectations



72%: documents created or submitted during the arbitration proceedings are covered by a duty of confidentiality.

Queen Mary 2010 International Arbitration Survey: Choices in International Arbitration, p. 3, available at: www.arbitration.qmul.ac.uk/docs/123290.pdf p. 31

Implied confidentiality under the applicable law

- ✓ Some rules provide for confidentiality of documents created or submitted in the arbitration
(*Swiss Rules Art. 44(1); BANI Rules Art. 13(2); CRCICA Rules Art. 40(1); DIAC Rules Art. 41(1); DIS Rules Art. 43(1); LCIA Rules Art. 30(1); SIAC Rules Art. 39(3); WIPO Rules Art. 76; IBA Rules on Evidence, Art. 3.13.*)
- ✓ Some national laws provide for confidentiality of documents created or submitted in the arbitration
(e.g. English law)
- x Other national laws and rules do not
(e.g. Australia, Sweden, UNCITRAL Model Law, ICC Rules, UNCITRAL Rules)

Confidentiality of the hearing

- ✓ Most rules provide for confidentiality of the hearing

(e.g. Swiss Rules Art. 25(6); AAA Rules Art. 23(6); BANI Rules Art. 13(2); CIETAC Rules Art. 38(1); CRCICA Rules Art. 28(3); DIAC Rules Art. 28(3); ICC Rules Art. 26(3); LCIA Rules Art. 19(4); SCC Rules Art. 32(3); SIAC Rules Art. 24(4); UNCITRAL Rules 28(3); VIAC (Vienna International Arbitral Centre) Rules Art. 30(2); WIPO Rules Art. 55(c)).

Confidentiality of the deliberations

- ✓ Most rules and national laws provide for confidentiality of the tribunal deliberation


(e.g. Swiss Rules Art. 44(2); AAA Rules Art. 37; BANI Rules Art. 13(2); CRCICA Rules Art. 40(2); DIAC Rules Art. 41(2); DIS Rules Art. 43; LCIA Rules Art. 30(2); CAM Rules Art. 8(1); SIAC Rules Art. 39(1))



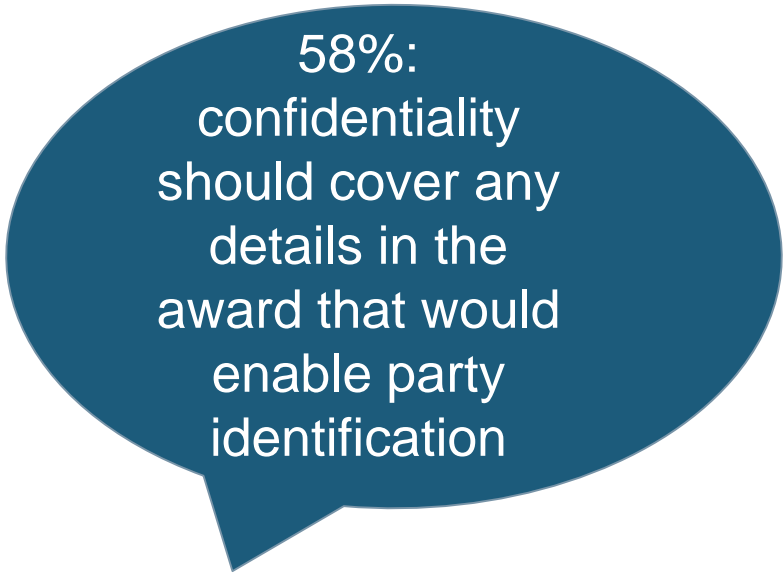
Caveat: The disclosure of the result of the deliberations may not be a breach of the confidentiality principle

(Swiss supreme court: BGer. 4P_61/1991)

Confidentiality of awards - expectations



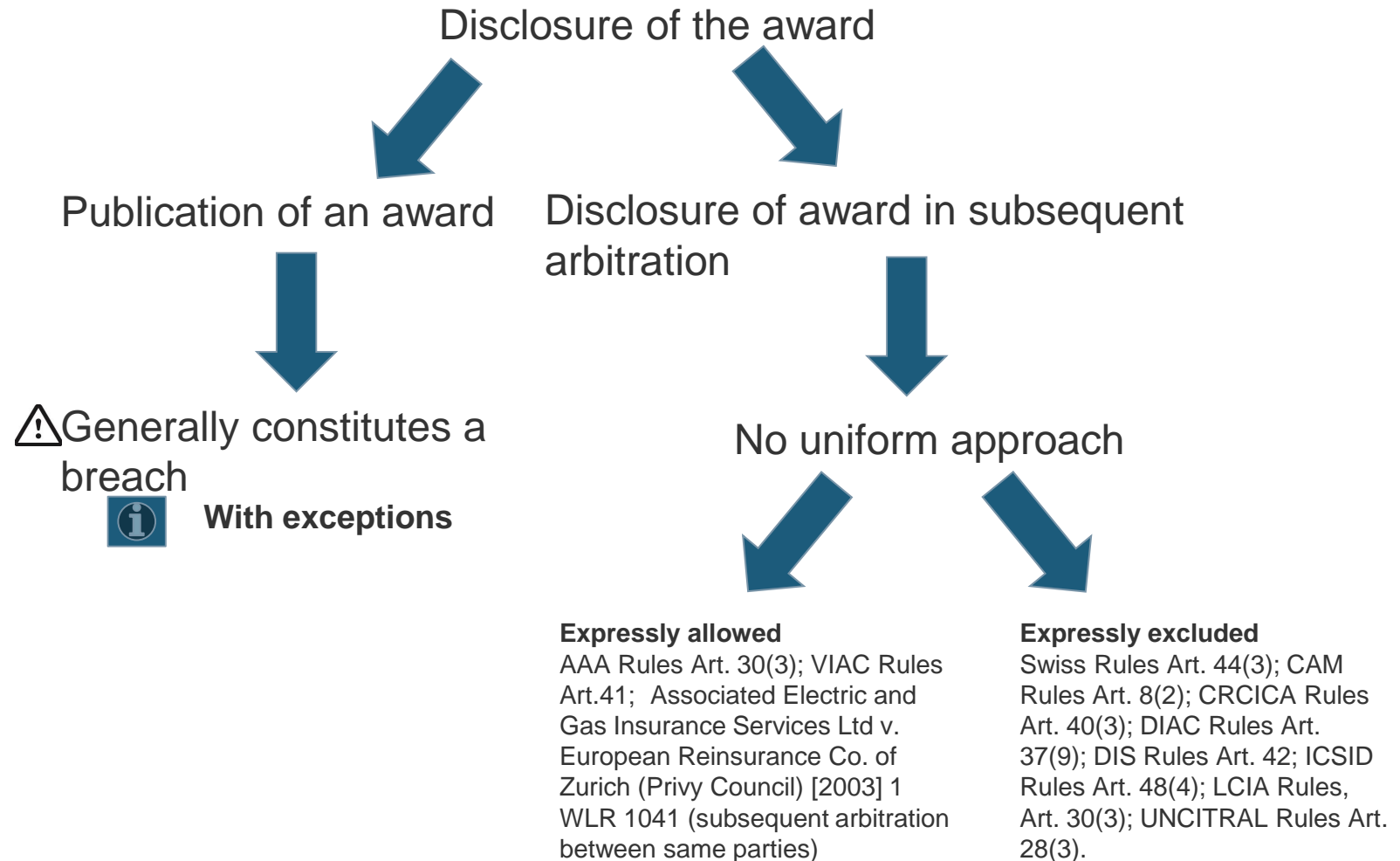
69%: award
should be
kept
confidential



58%:
confidentiality
should cover any
details in the
award that would
enable party
identification

Queen Mary 2010 International Arbitration Survey: Choices in International Arbitration, p. 3, available at: www.arbitration.qmul.ac.uk/docs/123290.pdf p.

Disclosure of the award: reality



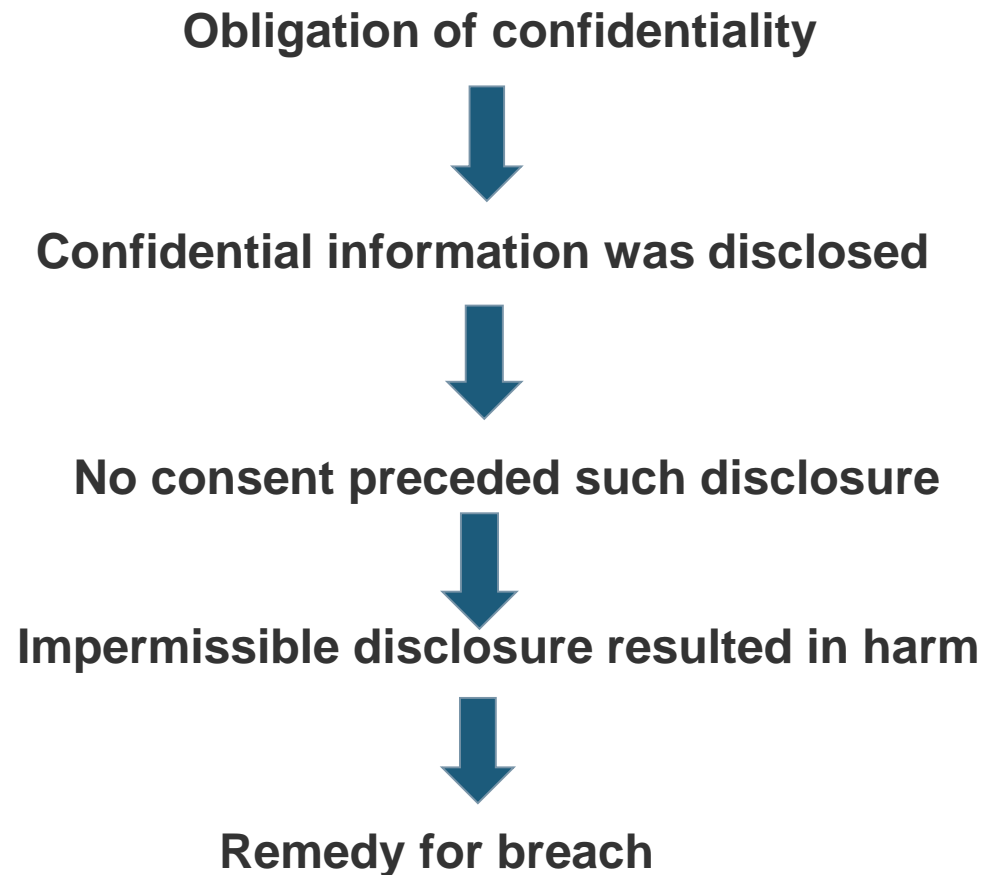
Exceptions to duty of confidentiality

- ✓ information already in public domain
- ✓ legal duty to disclose
- ✓ to protect or pursue one's rights
- ✓ enforce or challenge proceedings

Swiss Rules Art. 44(1); BANI Rules Art. 13(2); CRCICA Rules Art. 40(1); DIAC Art. 41(1); LCIA Rules Art. 30(1); SIAC Rules Art. 39(2).

Remedies

Remedies: burden of proof



Possible remedies

➤ Injunction

- ❖ Most likely remedy
- ❖ Common law and Civil law

➤ Damages

- ❖ Available in principle
- ❖ Difficult to prove in practice
- ❖ Consider: penalty clauses

In summary

- **No uniform concept** of the scope of confidentiality in arbitration
- Therefore, no uniform concept of what constitutes a breach
- Important to **determine the law applicable** to the duty of confidentiality to determine its scope and what remedies may be available
- **Breaches** of confidentiality are established **most frequently in England**.
- **Australia, Sweden and the US are reluctant** to find a duty of confidentiality preventing disclosure
- Most **likely remedy** available in case of breach is **injunction** preventing (further) disclosure.
- **Damages** are also available in principle but **difficult to prove**.

Thank you

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