



**CONFIDENTIALITY IN THE  
PROCEEDINGS –  
HOW IS IT DEALT WITH IN PRACTICE?  
SELECTED EXAMPLES AND ISSUES**

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# INTRODUCTION

- **Focus: what happens in practice?**
- **When does the issue arise?**
  - Presentation of evidence in support of one's case
  - Answer to request for document / sample production or site visit
- **What are we talking about?**
  - Documents containing trade secrets / sensitive commercial information
  - Industrial site / samples
  - Expert analysis of (or based on) confidential information
  - Testimony evidence

# 1. WHICH SOLUTIONS IN PRACTICE?

- Redaction of confidential information / selection of extracts
  - Common
  - Issue: verification  
(E.g. 6 )

# 1. WHICH SOLUTIONS IN PRACTICE?

- **Restricted access to confidential information (1)**
  - **“Confidentiality clubs”**
    - Very common
    - Diverse practice:
      - AT only
      - Counsel / AT
      - Counsel / AT / expert (E.g. 4, 5, 8)
      - Counsel / AT / expert / selected party representative (E.g. 9, 12-16)
      - Counsel / expert (E.g. 17)

# 1. WHICH SOLUTIONS IN PRACTICE?

- **Restricted access to confidential information (2)**
  - **Destruction / return of documents**
    - Issue: timing
    - Diverse practice  
(E.g. 5, 6, 9, 12-15, 3)

# 1. WHICH SOLUTIONS IN PRACTICE?

- **Restricted access to confidential information (3)**
  - **Visual inspection, restricted copying / number of copies**
    - Limited number of hard copies
    - Visual inspection, no copying
    - Electronic dataroom, read-only documents  
(E.g 1, 3, 10, 19)

# 1. WHICH SOLUTIONS IN PRACTICE?

- **Restricted access to confidential information (4)**
  - **Restricted reference to confidential information**
    - Separate exhibits and submissions
    - Unredacted / redacted versions  
(E.g. 5, 7)
  - **Restrictions during site visits**

# 1. WHICH SOLUTIONS IN PRACTICE?

## ■ Confidentiality advisor

➤ Issue: scope of powers:

- Art. 3(8) IBA Rules : “*to review any such Document and to report on the objection.*”
- Art. 52(d) WIPO Rules: to “*determine whether the information is to be so classified, and, if so, decide under which conditions and to whom it may in part or in whole be disclosed.*”

(E.g. 18 Guyana v Suriname)



# 1. WHICH SOLUTIONS IN PRACTICE?

## ■ Expert (third party neutral)

- Art. 52(e) WIPO Rules: *“as an expert ...in order to report to it, on the basis of the confidential information, on specific issues designated by the Tribunal.”*

(Tab 13, Doc. 3; E.g. 17: PO No 2 and Third Party Neutral Procedural Rules)

# 1. WHICH SOLUTIONS IN PRACTICE?

- **Restrictions on testimony evidence (1)**
  - **Witness examination on confidential information (E.g. 8)**
    - Limited attendance at hearing
    - Restrictions on transcription
  - **Confidential testimony evidence (E.g. 3)**
    - Redaction of name
    - Confidentiality club / undertakings
    - Restrictions on transcription

## 2. KEY FEATURES – SELECTED ISSUES

### ■ When ?

- Issue: ensuring level playing field / avoid disruption to the proceedings

### ■ How?

- Confidentiality agreement / protective order / undertaking

### ■ Who?

- Third parties (E.g. 2, 15, 21)
- Counsel – if no order (E.g. 3)
- AT? (E.g. Tab 13 Doc. 4)

## 2. KEY FEATURES – SELECTED ISSUES

### ■ What?

- Basics: use for arbitration and practical arrangements for protection
- Jurisdiction of AT / courts in case of violation (E.g. 15, 6, 7, 16, 4, 5, 14)
- Remedies / sanctions (E.g. 15, 16)
- Exceptions

### ■ For how long?

- Diverse practice  
(E.g. 7, 8, 14, 15)

# Some sources

- E.g. from arbitration practitioners including materials made available at the Francarbi workshop organised on 19 April 2013 in Paris on “*La confidentialité dans la procédure arbitrale*”
- Y. DERAÏNS, “Evidence and Confidentiality”, in *Confidentiality in Arbitration*, ICC International Court of Arbitration Bulletin – 2009 Special Supplement 2009, p. 57
- V. HAMILTON, “Document Production in ICC Arbitration”, in *Document Production in International Arbitration*, ICC International Court of Arbitration Bulletin – 2006 Special Supplement, p. 63
- H. VAN HOUTTE, “The document Production Master and the Experts’ Facilitator: Two Possible Aides for an Efficient Arbitration”, in M. A. Fernández-Ballesteros, D. Arias, *Liber Amicorum Bernardo Cremades*, La Ley 2010, pp. 1147-1159

**THANK YOU**

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