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”


THANK YOU

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