



LOST IN CONFIDENTIALITY:

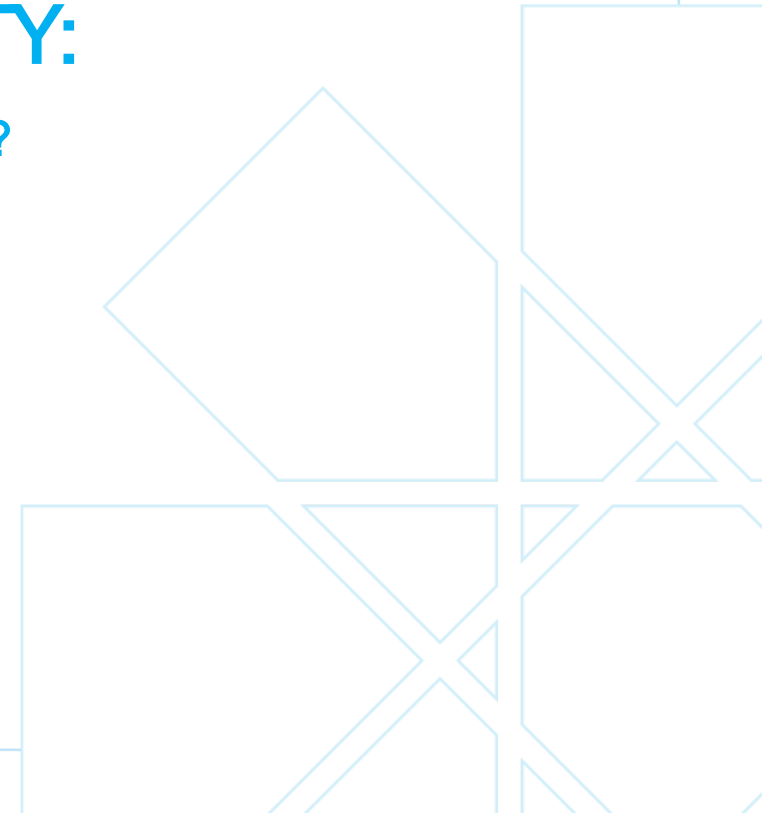
How much can you keep under the carpet?

Kyiv Arbitration Days 2017: Think Big!

Kyiv, 3 November 2017

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What all the confidentiality is about?



- Privacy vs confidentiality
- Who is obliged to maintain confidentiality?
- Technical and commercial confidentiality of documents and information
- Confidentiality vs documents production



Confidentiality is typically used to refer to the parties' asserted obligations not to disclose information concerning the arbitration to third parties. Obligation of confidentiality extends not only to prohibiting third parties from attending the arbitral hearing [privacy], but also to prohibiting the disclosure to third parties of hearing transcripts, as well as written pleadings and submissions in the arbitration, evidence adduced in the arbitration, material produced during disclosure and the arbitral award(s)

Gary Born, International Commercial Arbitration, Volume II, Wolters Kluwer, 2009, page 2252



ANYTHING
~~DO WE REALLY NEED~~
CONFIDENTIALITY?
BE TAKEN DOWN
AND USED AS
EVIDENCE

Confidentiality is a privilege making arbitration attractive to parties

Advantages of Arbitration

- Choice of a Neutral and Competent Decision maker
- Speed
- Lower-Cost
- **Confidentiality**
- Ability to Select Place and Language of the Arbitration
- Less Formality and Flexibility of Process
- Limited Discovery
- Finality / Absence of Appeal
- Enforceability

Whereabouts is the confidentiality?

- **Confidentiality (Arbitration) Clause / Agreement**
- **Arbitration Rules**
- **Applicable National Law:**
 - *Law governing a contract*
 - *Law governing an arbitration agreement*
 - *Lex loci arbitri*

National Laws on Confidentiality of International Arbitration

National Laws on Confidentiality of International Arbitration

Implied Obligation of Confidentiality



England

Hassneh Insurance Co of Israel v. Stuart J Mew, [1993]

Ali Shipping Corp. v. Shipyard Trogir [1998]

1 Lloyd's Rep 643 (CA)



Singapore

AAY v. z [2009] 1 SLR 1093

International Coal PteLtd. v. KristleTrading Ltd and Another and Another Suit [2008] SGHC 182

MyanmaYaungChi Coo Ltd. v. Win Nu [2003] 2 S.L.R. 547



Sweden

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



Australia

Esso Australia Resources Ltd v Plowman,
XXI Y.B. Com. Arb. 137 [1996]



USA

United States v. Panhandle Eastern Corp.,
118 F.R.D. 346 (D. Del. 1988)



France

Aita v. Ojeh, Cour d'Appel de Paris, Feb. 18, 1986, *Bluestein v Societe True North et Societe FCB International*, Paris Tribunal de Commerce, Feb 22, 1999

Arbitration Rules

Rules	Parties' obligation of confidentiality	Arbitrator's obligation of confidentiality	Institution's obligation of confidentiality
2017 ICAC Ukraine	Yes	Yes	Yes
2014 LCIA	Yes	Yes	Yes
2012 Swiss	Yes	Yes	Yes
2017 SCC	No	Yes	Yes
2013 VIAC	No	Yes	Yes
2007 ICAC Ukraine	No	Yes	Yes
2017 ICC	No	No	Yes
2010 UNCITRAL	No	No	No



Your fate is in your hands

- **Confidentiality / Arbitration Agreement**
- **Procedural Orders**
- **IBA Rules on the Taking of Evidence in International Arbitration (2010)**
 - *Level of confidentiality protection, Art. 2.3 (b)*
 - *Any document in the arbitration shall be kept confidential by the Arbitral Tribunal and the other Parties, and shall be used only in connection with the arbitration Art. 3.13*
 - *Admissibility of evidence, Article 9.1*
- **Limits of confidentiality**
 - *Court order / leave*
 - *Parties' consent*
 - *Public interest or reasonable necessity*



Hot-Button Issues of Confidentiality

- **Transparency / Publication of Awards**
 - *Art. 71 ICAC Ukraine Rules (2017)*
 - *Art. 41 VIAC Rules (2013)*
 - *Art. 34 UNCITRAL Rules (2010)*
 - *Art. 48 (5) ICSID Convention*
 - **What should be kept confidential?**
 - *Arbitral Award*
 - *Amount of Dispute*
 - *Parties*
 - *Existence of the Dispute*
 - *Pleadings*
 - *Legal Issues Decided*
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Hot-Button Issues of Confidentiality

- **Privacy of arbitration-related proceedings in national courts**
 - *14E (2) New Zealand Arbitration Act*
 - *US District Court for the District of Columbia, Case 1:17-cv-00582-CKK (PAO Tatneft v Ukraine)*
 - *Kyiv Court of Appeals, Case № 22-22616/10 (RosUkrEnergo v Naftogaz)*
 - *Sec 616 (2) Austrian Code of Civil Procedure*
 - **Confidentiality as a tool for resisting documents production**
 - *Galleon Syndicate Corp. v Pan Atlantic Group Inc., 223 A.D.2d 510 (1996)*
 - **Confidentiality and disclosure of Third-Party Funding**
 - **Can an award issues or information disclosed in one arbitration proceeding be referred to and/or relied on in subsequent proceedings?**
 - **Legal remedies for breach of confidentiality**
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CONFIDENTIAL

AEQUO 

Thank you!

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