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# Confidentiality and Legitimacy of International Arbitration: Are They Mutually Exclusive?

**Dr Can Eken**

Assistant Professor in Commercial Law  
Durham University

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# Presentation Structure

- What is confidentiality?
- Is international arbitration automatically confidential?
- Does confidentiality affect the legitimacy of international arbitration?  
When can it affect such legitimacy?
- More details under English law
- Concluding remarks

# Confidentiality

(If) confidential ... (it) shall not be made available to the public

(UNCITRAL Arbitration Rules (2021) Article 7/1)



# Confidentiality under the UNCITRAL Model Law

No provision



# Is International Arbitration Automatically Confidential?

- Presumption: yes
- In practice, not necessarily always
- Party Autonomy
- And even if it is confidential, how to enforce it?

# ICC Arbitration Rules

## Article 22: Conduct of the Arbitration

(3) Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.

# ICC Arbitration Rules

## Article 8: Confidentiality

The work of the Court is of a confidential nature which must be respected by everyone who participates in that work in whatever capacity. The Court lays down the rules regarding the persons who can attend the meetings of the Court and its Committees and who are entitled to have access to materials related to the work of the Court and its Secretariat.

# LCIA Rules

## Article 30: Confidentiality

30.1 The parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority. The parties shall seek the same undertaking of confidentiality from all those that it involves in the arbitration, including but not limited to any authorised representative, witness of fact, expert or service provider.



# LCIA Rules

## Article 30: Confidentiality

30.2 Article 30.1 of the LCIA Rules shall also apply, with necessary changes, to the Arbitral Tribunal, any tribunal secretary and any expert to the Arbitral Tribunal. Notwithstanding any other provision of the LCIA Rules, the deliberations of the Arbitral Tribunal shall remain confidential to its members and if appropriate any tribunal secretary, save as required by any applicable law and to the extent that disclosure of an arbitrator's refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under Articles 10, 12, 26.6 and 27.5.

# HKIAC – 2018 Administered Arbitration Rules

## Article 45 – Confidentiality

45.1 Unless otherwise agreed by the parties, no party or party representative may publish, disclose or communicate any information relating to:

- (a) the arbitration under the arbitration agreement; or
- (b) an award or Emergency Decision made in the arbitration.

# HKIAC – 2018 Administered Arbitration Rules

## Article 45 – Confidentiality

45.2 Article 45.1 also applies to the arbitral tribunal, any emergency arbitrator, expert, witness, tribunal secretary and HKIAC.

45.3 Article 45.1 does not prevent the publication, disclosure or communication of information referred to in Article 45.1 by a party or party representative:

(a) (i) to protect or pursue a legal right or interest of the party; or

...

and so on

# SIAC Rules 2016

## Rule 39 – Confidentiality

39.1 Unless otherwise agreed by the parties, a party and any arbitrator, including any Emergency Arbitrator, and any person appointed by the Tribunal, including any administrative secretary and any expert, shall at all times treat all matters relating to the proceedings and the Award as confidential. The discussions and deliberations of the Tribunal shall be confidential.

# SIAC Rules 2016

## Rule 39 – Confidentiality

39.2 Unless otherwise agreed by the parties, a party or any arbitrator, including any Emergency Arbitrator, and any person appointed by the Tribunal, including any administrative secretary and any expert, shall not, without the prior written consent of the parties, disclose to a third party any such matter except:

- a. for the purpose of making an application to any competent court of any State to enforce or challenge the Award;
- ... and so on (a-f)

# Status Quo under English Law

Ali Shipping Corp v Shipyard Trogir [1997] EWCA (Civ) 3054  
LORD JUSTICE POTTER wrote and  
LORD JUSTICE BROOKE and LORD JUSTICE BELDAM agreed

## **Implied duty of confidentiality attaches as a matter of law**

‘as a matter of principle that the obligation of confidentiality (whatever its precise limits) arises as an essential corollary of the privacy of arbitration proceedings’, para. 33

# Ali Shipping Corp v Shipyard Trogir [1997]

## EWCA (Civ) 3054, para. 36

- the consent of the party who originally produced the material
- an order of the Court
- the leave of the Court for the protection of the legitimate interests of an arbitrating party, and
- reasonably necessary for the protection of the legitimate interests of an arbitrating party
- where the 'public interest' requires disclosure (citing to London & Leeds Estates Ltd-v-Paribas (No.2) [1995] 2)

# English Privy Council

Associated Electric and Gas Insurance Services Limited v  
European Reinsurance Company of Zurich [2003] UKPC 11

Generalisations and the formulation of detailed implied  
terms are not appropriate.



# Confidentiality is Breached, Now What?

What are the consequences?



# Confidentiality and Legitimacy

- Would confidentiality affect the legitimacy of arbitration?
- When?
- Yes and No
- How to deal issues such as corruption

# Confidentiality and Legitimacy

Issues:

- Corruption
- Bribery
- Others?

# Concluding Remarks

- Arbitration is not automatically confidential
- Implied duty of confidentiality is not universal
- Parties should carefully check the applicable law and arbitration rules
- Parties should agree on the degree of confidentiality and the consequences of potential breaches of the confidentiality in their arbitration agreement
- Arbitration cannot facilitate illegitimate deals

# Question and Answer

Can Eken

can.eken@durham.ac.uk