

# Confidentiality in International Arbitration: Breaches and Remedies

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Whether there has been a  
**breach** and, if so, what  
**remedies** are available  
depends upon law  
applicable to source of  
confidentiality obligation

# Which law applies?

- Law of the contract from which duty of confidentiality arises
- Procedural law governing issues of evidence
- Liability in tort governed by applicable law

# Outline

- Breach or No Breach?
- Remedies

# Who is in breach?

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

# Breach or No Breach? (1)

Publication of existence of dispute, of arbitration and amount of the claim

## Breach

- *Bleustein et al v. Société True North et Société FCB International* (Commercial Court of Paris), 22 February 1999  
(but overturned on appeal on procedural grounds)

# Breach or No Breach? (2)

Publication of full award by one of the parties

## No breach

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

# Breach or No Breach? (3)

Disclosure of award or documents created in the arbitration to a third party in subsequent arbitration or court proceedings

## **Breach**

- *Ali Shipping Corp. v. Shipyard Trogir* [1998] 1 Lloyd's Rep 643 (CA);  
*Insurance Co. v. Lloyd's Syndicate* [1995] 1 Lloyd's Rep 272 (QB);  
*Dolling-Baker v Merrett* [1990] 1 WLR 1205 (English Court of Appeal)

**No breach: Disclosure reasonably necessary for arbitrating party to establish or defend a right vis-à-vis a third party**

- *Emmott v. Michael Wilson & Partners Ltd* [2008] EWCA Civ 184 (CA);  
*Hassneh Insurance Co of Israel v. Mew* [1993] 2 Lloyd's Rep 243



# Breach or No Breach? (4)

Disclosure of award in subsequent arbitration with the same party

**No breach: To prohibit disclosure of award would frustrate fundamental purpose of arbitration by preventing enforcement of award**

- *Associated Electric and Gas Insurance Services Ltd v. European Reinsurance Co of Zurich* (Privy Council) [2003] 1 WLR 1041

# Breach or No Breach? (5)

Disclosure of documents produced in arbitration to a third party

## No breach

- *Esso Australia Resources Ltd v. Minister for Energy and Minerals et al* (High Court of Australia), 7 April 1995, No. 95/014
- *Commonwealth of Australia v. Cockatoo Dockyard Pty Limited* (Supreme Court of New South Wales), 24 October 1995, [1995] NSWSC 97
- *United States of America v. Panhandle Eastern Corp. et al* (District Court of Delaware), 7 January 1988, 118 F.R.D. 346

# Breach or No Breach? (6)

Bringing challenge proceedings to set aside award in wrong jurisdiction

## Breach

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

# Breach or No Breach? (7)

Publication of court judgment rendered in challenge proceedings to set aside award

## Breach

- *Department of Economics Policy & Development of the City of Moscow v. Bankers Trust Company* (English High Court), 5 June 2003, [2003] EWHC 1377 (held that summary can be published)

# Breach: Summary

- Publication of existence of dispute, of arbitration and amount of the claim ([France](#))
- Disclosure of award to a third party in subsequent proceedings – but note exception next slide ([England](#))
- Disclosure of documents created in the arbitration to a third party in subsequent proceedings – but note exception next slide ([England](#))
- Bringing challenge proceedings to set aside award in wrong jurisdiction ([France](#))
- Publication of court judgment rendered in challenge proceedings to set aside award ([England](#))

# No breach: Summary

- Disclosure pursuant to a **court order** or **parties' consent**
- Disclosure of award to a third party where this is reasonably necessary for an arbitrating party **to establish or defend a right** vis-à-vis a third party ([England](#))
- Disclosure of documents created in the arbitration to a third party where this is reasonably necessary for an arbitrating party to establish or defend a right vis-à-vis a third party ([England](#))
- Disclosure of award for purposes related to **enforcement** ([England](#))
- Disclosure of documents produced in arbitration to a third party where **public interest** requires this ([US and Australia](#))
- **Legal obligation** of disclosure ([France](#); [England](#))
- Publication of full award by one of the parties ([Sweden](#))

# Which remedy?

Remedies in contract:

- Injunction
- Damages
- Award annulment?

Remedies in tort:

- May arise where breach by fact or expert witness or court reporter
- Remedy will depend on applicable law

# Injunction – most common

- *Insurance Co* (England)
- *Ali Shipping* (England)
- *Dolling-Baker* (England)
- *Associated Electric* (Privy Council - subsequently overturned)
- *True North* (France – subsequently overturned)



# Damages – less common

- *Aita* (France)
- *True North* (France – subsequently overturned)
- Bulbank (Sweden – mentioned as a possibility)
- Practical difficulties of proving and quantifying damage

# Award annulment?

- Granted only once and subsequently overturned (**Sweden**)
- Only a fundamental breach of arbitration agreement (i.e. not just a breach of confidentiality) could negate arbitration agreement and award of their effect

# Conclusions

- 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 French and English case law.
- 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 disclosure.
- Damages are also available in principle but difficult to prove.

# Thank You

For further information, please contact

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