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Legal impediment or privilege –
Sensitivity and confidentiality as grounds
for exclusion of evidence in international arbitration

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Case Study #1

- ❑ Criminal investigation pending in State A against X and 50 other suspects of money-laundering
- ❑ X is a national of State B and institutes investment treaty arbitration, claiming i.a. abuse of criminal investigation as a measure impairing his investment
- ❑ X claims that the investigation has no merit and is a just a vehicle to freeze and confiscate his assets by way of criminal sanctions
- ❑ In arbitration, X requests from State A production of the entire criminal file in the course of arbitral proceedings, which is otherwise inaccessible to him

Case Study #2

- ❑ X is a multinational producing widgets and selling them through its own distribution chain in most countries
- ❑ Y is the exclusive distributor of widgets in States A and B, where it created a pool of customers for the products
- ❑ X is not present in States A nor B
- ❑ X declares it immediately withdraws from the distribution agreement with Y and stops to supply products
- ❑ X announces it is going to open its own distribution chains in States A and B
- ❑ Y sues X in arbitration for damages resulting i.a. from loss of clients and lost profits
- ❑ X requests from Y production of i.a. lists of clients, details of clients' accounts and current business plans for purposes of loss quantification analysis

Case study # 3

- X is from State A; Y is from State B
- X and Y have an ongoing commercial arbitration in State C, over an alleged contractual breach
- X is represented by counsel from State D
- Y is represented by counsel from State E
- X requests from Y production of certain legal analyses prepared by X's transactional counsel from State A
- X claims that the documents are privileged by operation of laws and ethical standards of State A
- Y claims the standards and laws of State A do not operate in State C, where attorney-client privilege does not extend so far

Few fundamental questions:

- ❖ Should the arbitrators see only as far as the limits of the case before them, or should they take into account a broader picture?
- ❖ Is the arbitrators' duty to consider all facts and evidence relevant to the case superior to any other interest of litigants or third parties?
- ❖ Should arbitrators take into account that arbitration may be used instrumentally as a tool to elicit sensitive data/information?
- ❖ How to deal with conflict of laws issues?

IBA Rules on Evidence 2010

9.2. *The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons:*

- (a) lack of sufficient relevance to the case or materiality to its outcome;*
- (b) **legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;***
- (e) **grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;***
- (f) **grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling.***

IBA Rules on Evidence 2010

- 9.3. *In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account:*
- (a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice;*
 - (b) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations;*
 - (c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen;*
 - (d) any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise; and*
 - (e) the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules.*

IBA Rules on Evidence 2010

9.4. The Arbitral Tribunal may, where appropriate, make necessary arrangements to permit evidence to be presented or considered subject to suitable confidentiality protection.

Some techniques developed to address the confidentiality/privilege issues:

- Confidentiality undertakings
- Privilege logs
- Restricted access to evidence by experts/Tribunal/third neutral (Master Referee, Special Master)

Three provocative observations :

1. The Gordian knot:

Materiality and relevance as convenient thresholds to address most abusive production requests

2. Better have than ask for:

Once placed on the record, evidence difficult to be removed

3. The cake / Heisenberg principle:

Arbitration cannot be fair & truly confidential at the same time



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