

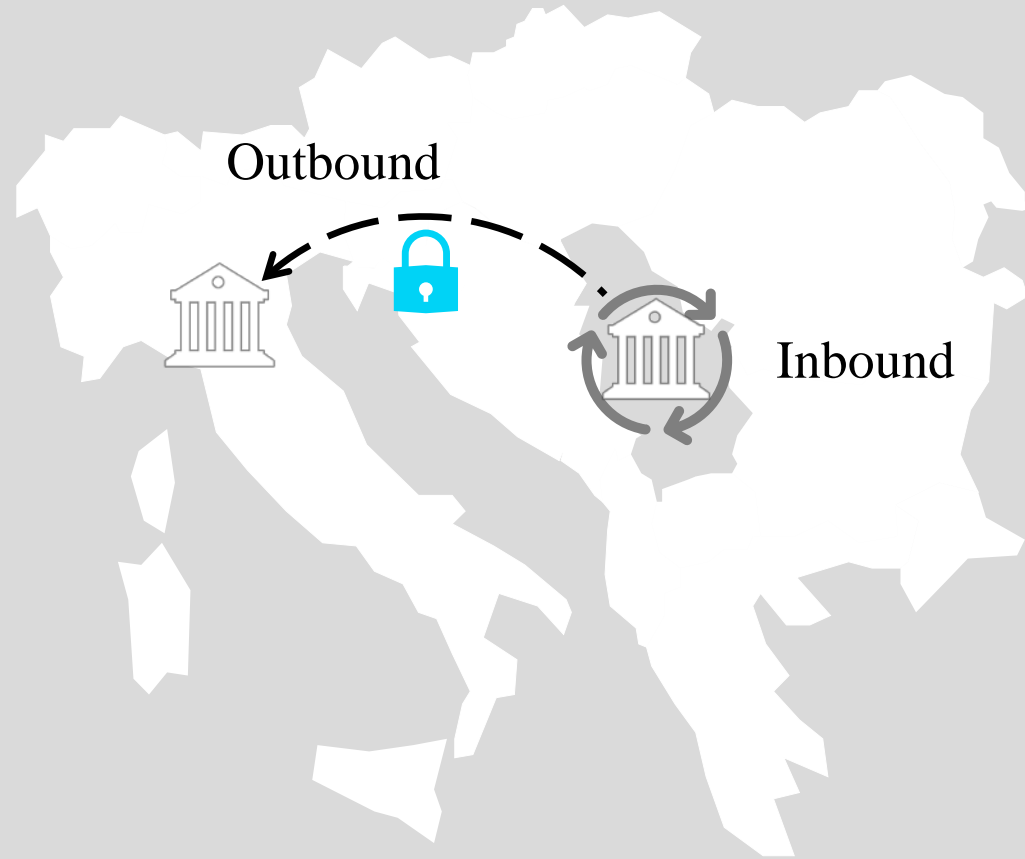
karanovic/partners

Confidentiality objection to document production

05/04/2019 / Milica Savić*

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Confidentiality in arbitration



Nature of confidentiality



Confidential
by law



Confidential
through
contract (NDA,
non-compete
clauses...),



Privilege



Confidential
nature of
information
contained in
documents



Confidential as
part of arbitral
proceedings

Raising the objection

IBA Rules on Taking of Evidence in International Arbitration

Article 9.2

The 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:

- 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.

Raising the objection

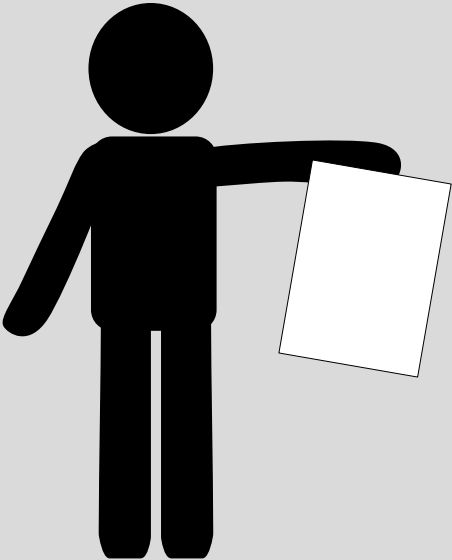
Article 9.3.

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:

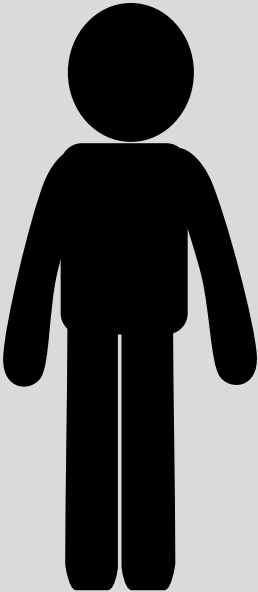
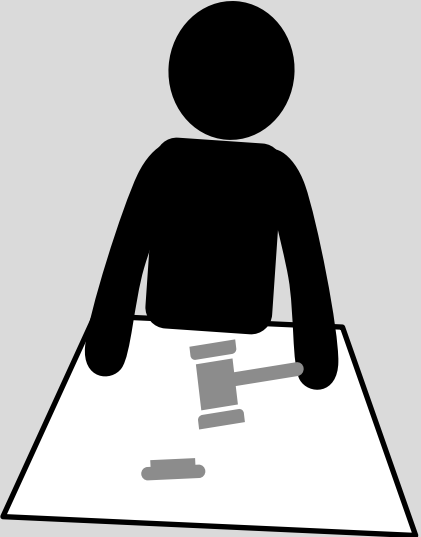
- a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice;
- b) any need to protect the confidentiality of a Document created or statement or oral communication made in connection 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.

Convincing the tribunal

Make it compelling



And... extra compelling
in investor-state disputes



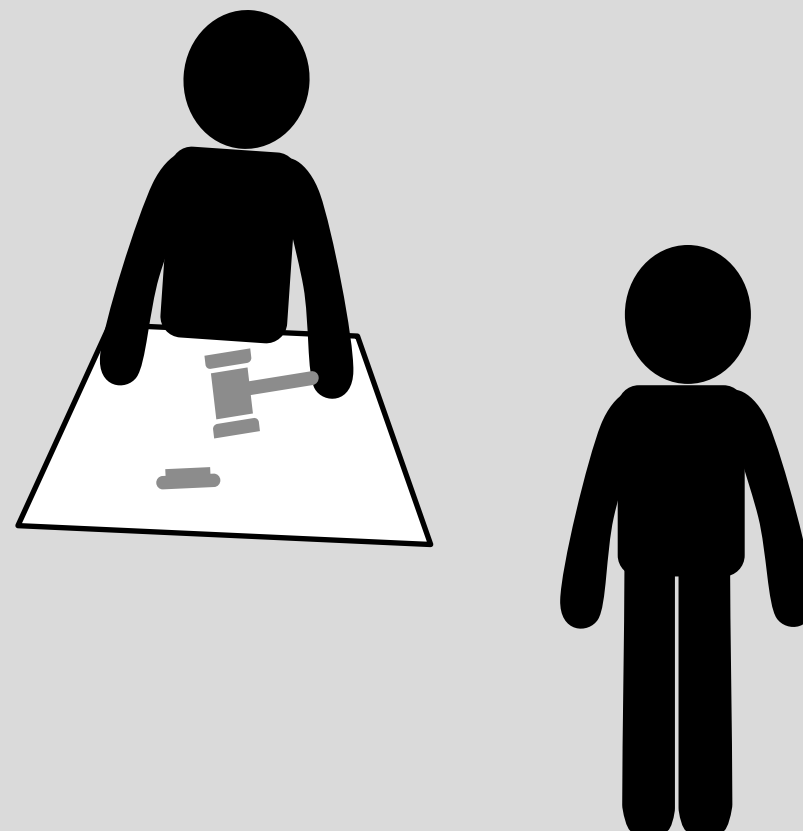
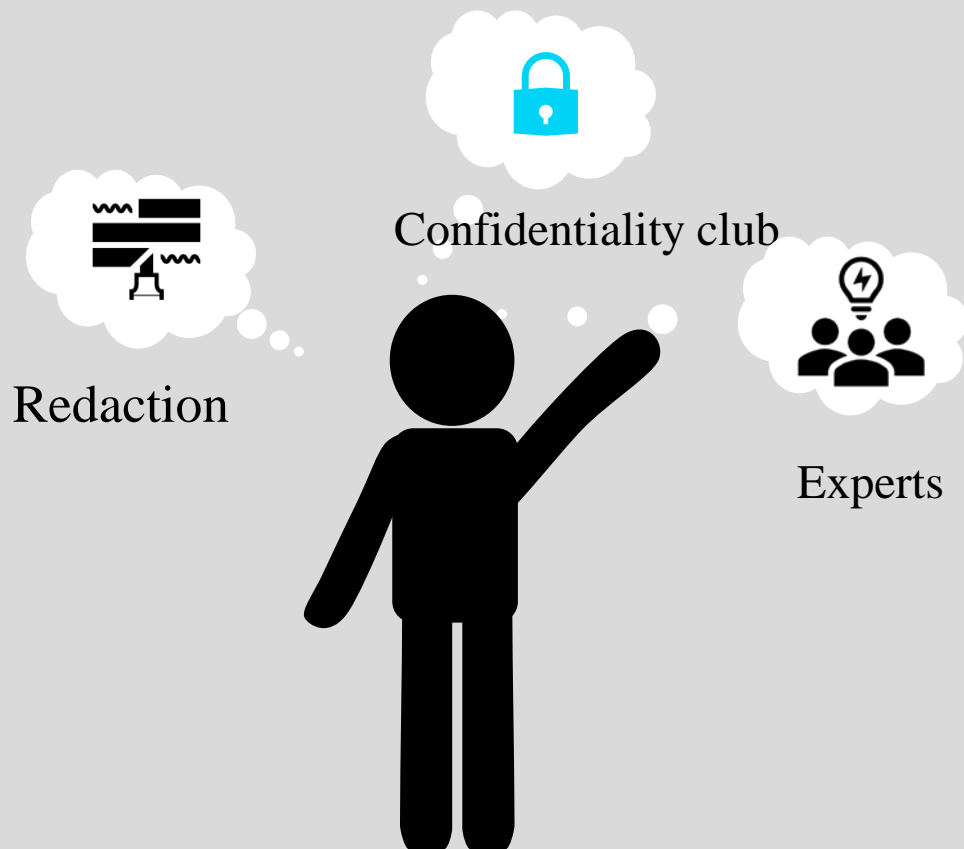
Convincing the tribunal

Article 9.4.

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

Convincing the tribunal

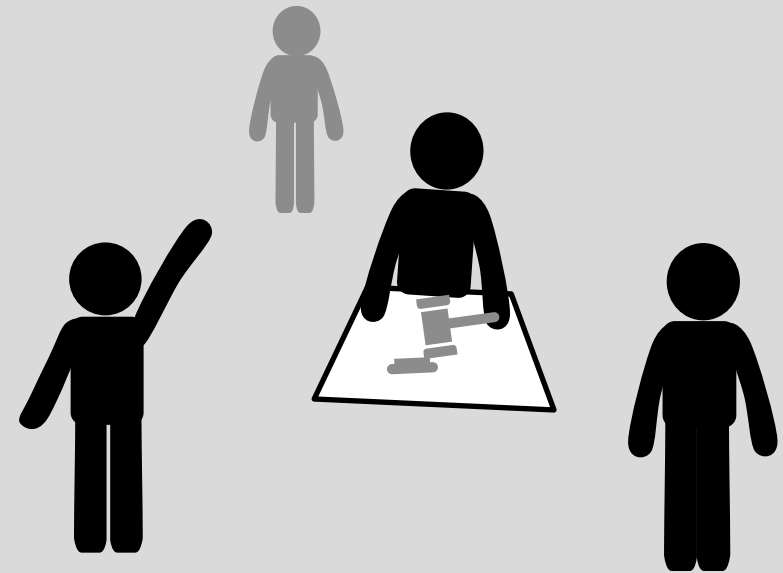
Create alternatives when opposing the objection:



Convincing the tribunal

Article 3.8

In exceptional circumstances, if the propriety of an objection can be determined only by review of the Document, the Arbitral Tribunal may determine that it should not review the Document. In that event, the Arbitral Tribunal may, after consultation with the Parties, appoint an independent and impartial expert, bound to confidentiality, to review any such Document and to report on the objection. To the extent that the objection is upheld by the Arbitral Tribunal, the expert shall not disclose to the Arbitral Tribunal and to the other Parties the contents of the Document reviewed.



Being mindful of adverse inference

Article 9.5

If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the *Arbitral Tribunal*, the *Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.*



Thinking ahead

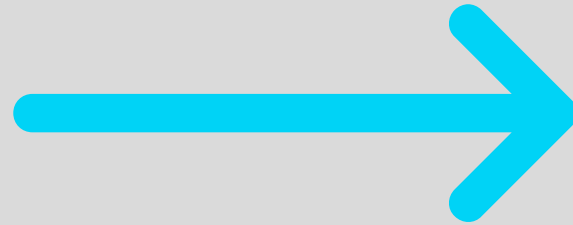
Gramercy vs Peru

3.4 “O4”: TECHNICAL OR COMMERCIAL CONFIDENTIALITY

31. A Party may request that a Document should not be produced, alleging compelling grounds of technical or commercial confidentiality.
32. In case an objection under O4 is raised, the requested Party must (at the time it delivers the non-contested Documents) choose between one of the following options:
 - to deliver to the requesting Party a Privilege Log, drafted in accordance with Annex II, identifying the Documents affected, or
 - to deliver to the counterparty the requested Documents with the confidential information redacted, or
 - to request a reasonable confidentiality undertaking from the counterparty.
33. Any discussion regarding the extent and appropriateness of the Privilege Log, of the redaction or of the confidentiality undertaking will be settled by the Tribunal.

Final remarks

Procedural fairness
strengthens the award



Factual impropriety
may lead to challenge

karanovic/partners

Thank you!