Kluwer Arbitration Blog

New White Paper Now Available: Checking the Boxes: Confidentiality and Data Protection in International Arbitration

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In the era of 'big data,' a term that undoubtedly describes the large and complex datasets that businesses generate and exchange, it is increasingly complex for international businesses to navigate the challenge of storing, processing, and analysing their data. Indeed, today's businesses generate and exchange greater and greater volumes and varieties of data at an ever-increasing velocity. In international arbitrations, parties, their counsel, and even arbitrators and arbitral institutions, face amplified risks of exposing data either unnecessarily or in violation of confidentiality or data protection obligations.

For law firms, in particular, which are often tasked with handling, managing, and processing large amounts of client data, this challenge is amplified by emerging technologies and newer methods of working. Indeed, earlier this year, a rather troubling example was reported in the press: law firms and legal tech companies that had signed onto Microsoft's Azure OpenAI Service, which gives users access to OpenAI's generative artificial intelligence models via the Azure Cloud, may have inadvertently exposed confidential and/or attorney-client privileged information to third-party review by missing a terms-of-use loophole.

Against this backdrop, the new white paper, *Checking the Boxes: Confidentiality and Data Protection in International Arbitration*, edited by Kiran Nasir Gore and Joshua Karton, serves as a comprehensive guide for arbitration practitioners who are increasingly exposed to and handling large volumes of client data. It focuses on the specific challenges of confidentiality and data protection in the context of international arbitration, providing key insights and practical solutions.

Confidentiality in International Arbitration: Duties and Considerations

What is the duty of confidentiality in international arbitration? The obligation of confidentiality in arbitration is, broadly, an obligation imposed on participants in an arbitration not to disclose to non-participants any matters arising from or disclosed during an arbitration, sometimes including the mere existence of the dispute. Confidentiality obligations may encompass some or all of the parties, the arbitrators, tribunal secretaries, witnesses, and members of the secretariat of an administering institution.

As Katie Chung (Norton Rose Fulbright, Singapore) explains, participants in an arbitration often assume that the arbitration is both private and confidential, but this may not necessarily be the case. Arbitral proceedings are inherently private, in the sense that they are not open to the public. However, privacy and confidentiality are not the same thing; it cannot be assumed that, because arbitrations are private, a blanket or uniform obligation of confidentiality exists. Even where a confidentiality duty does apply, the duty is not absolute; a number of exceptions have been codified or otherwise recognised.

The scope of the obligation and its exceptions vary. The obligation of confidentiality may be imposed by the parties' agreement, the applicable procedural rules, and/or the law of the seat of arbitration. If the contract, arbitral rules, and law of the seat are all silent on confidentiality, then the starting point is that no obligation of confidentiality applies to the arbitration.

In arbitration circles, confidentiality is often discussed as if all arbitrating parties desire maximum confidentiality in all cases. However, some parties prefer transparency, or at least place a lower priority on protecting the confidentiality of the arbitration and any associated information. Parties should consider the extent to which confidentiality is important to them, both at the contract-drafting stage and after any dispute subject to an arbitration agreement arises.

Data Protection in International Arbitration: Protocols and Procedures to Protect Digital Information

Confidentiality considerations in international arbitration frequently dovetail with emerging concerns regarding data protection, an umbrella term for rules and practices that seek to protect digital information from loss, destruction, and illegal access.

How can data protection best practices be integrated into international arbitration? A multi-jurisdictional team at Linklaters, including Richard Hansen, Juan M. Sanchez Pueyo, Katrien Baetens, Clara Tung, and Kimberley Pardailhe-Galabrun, assesses data protection concerns and provides sound advice on introducing sound data protection protocols in international arbitrations, especially as these proceedings (and the evidence and data exchanged during them) become increasingly digitised. Robust and early attention to the development of confidentiality and data protection protocols and procedures can help ensure that party expectations about confidentiality are respected before, during, and after arbitral proceedings.

A single arbitration may include participants from multiple jurisdictions (arbitrators, counsel, party representatives, witnesses, and institutional and administrative support staff), all producing and exchanging digital documents and participating in online conferences and hearings. Moreover, recent years have been marked by rapidly evolving technology, including the rise of artificial intelligence, new cyber threats, and changing laws and regulations (including data protection and specific cybersecurity regulations). Technological and organisational measures sufficient to ensure the security of data today may not be of use tomorrow.

Further complicating matters, various data protection laws may be relevant to international arbitration proceedings depending on where participants store and access data. National laws applicable in each jurisdiction where the information is stored or sent can apply, as can supranational laws such as the European General Data Protection Regulation (GDPR), which is spotlighted in a dedicated section. The *ICCA–IBA Joint Task Force on Data Protection in*

International Arbitration: Roadmap to Data Protection in International Arbitration is also particularly useful.

Key Jurisdictions and Arbitral Institutions in the Spotlight

Throughout, the white paper highlights key jurisdictions and arbitral institutions, including Belgium, France, Germany, Italy, the Netherlands, and the United Kingdom; as well as the Belgian Centre for Arbitration and Mediation (CEPANI), the German Arbitration Institute (DIS), the International Court of Arbitration of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and the Netherlands Arbitration Institute (NAI).

This guidance is supplemented by views from local experts, including Niek Peters (Legaltree, Amsterdam), Nadia Darwazeh (Clyde & Co., Paris), Maria Beatrice Deli (DeliSasson, Rome), Daniel Harrison (Osborne Clarke LLP, London), James McKenzie (Eversheds Sutherland, London), Jan Heiner Nedden (HANEFELD, Hamburg/Paris), all of whom bring their extensive experience and knowledge to enrich the discussion.

Concluding Thoughts

Data protection risks are likely to increase as technology continues to develop and corporate and personal information increasingly exist primarily, perhaps exclusively, in digital form. The challenges will likely multiply as automated data-gathering, such as to inform generative artificial intelligence models, continues to spread. It is more crucial now than ever for parties, their counsel, arbitrators, and arbitral institutions to inform themselves and establish robust systems to navigate the challenges presented by confidentiality and data protection obligations that stem from the parties' agreements, applicable procedural rules, and/or applicable national and supranational laws.

The white paper draws on content available in Kluwer Arbitration's Practical Insights by Topic tool. Practical Insights provides practical guidance for nearly 50 distinct topics on the challenges and choices faced by practitioners at every stage of the arbitral process. It offers a comparative view of the approaches adopted by different national jurisdictions and arbitral institutions, helping users increase their research efficiency and providing quick links to suggested reading to explore further, mitigate risk, and optimise case strategy. The white paper offers only a glimpse into the practical tools available in Kluwer Arbitration to guide all the most critical decision points in international arbitrations, including arbitrator selection and conflict checking.

Fill out the form to download the white paper and gain additional insights.

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