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Arbitration of Post-Closing M&A Disputes and Confidentiality Obligations of Target Management As Factual Witnesses: Secrets To Keep or Secrets To Tell?

Kapanış Sonrası Birleşme ve Devralma Uyuşmazlıklarında Tahkim ve Hedef Şirket Yöneticilerinin Tanık Olarak Gizlilik Yükümlülüğü: İfşa Edilebilen Bilgilerin Kapsamı

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ARBITRATION OF POST-CLOSING M&A DISPUTES AND CONFIDENTIALITY OBLIGATIONS OF TARGET MANAGEMENT AS FACTUAL WITNESSES: SECRETS TO KEEP OR SECRETS TO TELL?*

KAPANIŞ SONRASI BİRLEŞME VE DEVRALMA UYUŞMAZLIKLARINDA TAHKİM VE HEDEF ŞİRKET YÖNETİCİLERİNİN TANIK OLARAK GİZLİLİK YÜKÜMLÜLÜĞÜ: İFŞA EDİLEBİLEN BİLGİLERİN KAPSAMI

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ABSTRACT

This article examines senior management's role in post-closing mergers and acquisitions ("M&A") arbitrations, where they testify as factual witnesses for the acquirer of the target company and have a standstill confidentiality obligation to the selling shareholders. This article will analyze this phenomenon from the viewpoints of both selling shareholders and the arbitral tribunals.

The involvement of the top management of the target in any post-closing M&A disputes would be crucial, given their first-hand knowledge of the transaction. Hence, the selling shareholders may take some ex-ante measures, by concluding a separate confidentiality agreement with these individuals, whose interests have been shifted upon closing and became more aligned with the acquirer. Once any proceeding commences, the selling shareholders may request the exclusion of the witness statement, either relying on the close relationship between the witness and the acquirer or the confidentiality obligation of the witness to the selling shareholders.

The arbitral tribunal begins by assessing whether it possesses the authority to exclude the witness based on the individual's prior confidentiality obligations. Following this determination, the arbitral tribunal evaluates whether exclusion is appropriate under the specific circumstances of the case. In reaching its decision, the arbitral tribunal may review the content of the witness's statement. If the evidence is deemed relevant and falls within the scope of the witness's confidentiality obligations, the tribunal must carefully balance the competing interests of the parties involved. To establish a coherent framework and more predictable results for both parties and their counsels, this article suggests recourse to more established rules as in work-product doctrine, under which the tribunal should evaluate in deciding the disclosure of the confidential information by the top management as factual witnesses, whether the acquirer has i) a substantial need for the confidential information to present its case and ii) whether the acquirer lacks any ability to obtain the information by other means without undue hardship.

Keywords: post-closing M&A, arbitration, confidentiality obligation, factual witness

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ÖZET

Birleşme ve devralmalarda ("M&A"), hedef şirket üst düzey yöneticilerinin kapanış sonrası ortaya çıkan tahkim uyuşmazlıklarında satıcı hissedarlara karşı gizlilik yükümlülüğü altında olmalarına karşın, tahkim yargılamasında alıcı taraf adına fiili tanık olarak yer aldıkları durumların ne tür sonuçlar doğuracağı oldukça önem arz etmektedir. Bu makale, işbu hususu hem satıcı hissedarlar hem de hakem heyetinin perspektifinden ele alıp analiz etmeyi amaçlamaktadır.

Hedef şirketin üst düzey yöneticilerinin M&A sürecine ilişkin detaylara ilk elden hakim olmaları, kapanış sonrası M&A uyuşmazlıklarına dahil olmalarını kritik hale getirmektedir. Bu bağlamda, satıcı hissedarlar, işbu yöneticilerin çıkarlarının kapanıştan sonra alıcı tarafla daha uyumlu hale gelebileceğini öngörerek, bu kişilerle işlem esnasında veya öncesinde gizlilik sözleşmesi yapmayı öngörebilmektedir. Tahkim sürecinin başlamasıyla birlikte ise satıcı hissedarlar, bu tanıkların alıcı tarafla olan yakın ilişkisine veya satıcılara karşı gizlilik yükümlülüklerine dayanarak tanık ifadelerinin hakem heyetince değerlendirilmeye alınmamasını talep edebilecektir.

Hakem heyeti, öncelikle tanığın gizlilik yükümlülükleri doğrultusunda beyanlarının hariç tutulup tutulamayacağına ilişkin karar verme yetkisini değerlendirir. Bu tespitin ardından, tanık beyanlarının hangi koşullar altında geçersiz sayılmasının uygun olacağı hususunun belirlenmesi gerekecektir. Hakem heyeti, bu hususta karar verirken tanığın ifadesini ve bu ifadenin içeriğini gözden geçirmeyi talep edebilir. Şayet sunulan delil hem konuyla doğrudan ilgili hem de tanığın gizlilik yükümlülükleri kapsamına giriyorsa, hakem heyeti, tarafların rekabet halindeki menfaatlerini dikkatlice değerlendirerek bir sonuca ulaşabilecektir.

Taraflar için daha tutarlı bir çerçeve ve öngörülebilir sonuçlar sağlamak adına, bu makale, hakem heyetinin hedef şirketin üst düzey yöneticilerinin tanık olarak dinlenmesi sırasında satıcı hissedarlara ait gizli bilgilerin açıklanmasına ilişkin bir karar verirken, "work-product doctrine" (iş-ürün doktrini) gibi yerleşik kurallara başvurmasını önermektedir. Bu bağlamda, hakem heyetinin, i) alıcının kendi davasını desteklemek için işbu açıklanması beklenen gizli bilgilere duyduğu ihtiyacın önemini ve ii) bu bilgilerin alıcı tarafından aşırı bir zorluk olmaksızın başka yollarla elde edilip edilemeyeceği hususunu değerlendirerek bir sonuca ulaşabileceği savunulmaktadır.

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Anahtar Kelimeler: kapanış, birleşme devralmalar, tahkim, gizlilik yükümlülüğü, tanık.

1. INTRODUCTION

The past years have been challenging in many ways, primarily due to the pandemic and lockdowns in different parts of the world. However, one of the world's largest banks, Morgan Stanley, reports a record year for the M&A industry worldwide.[1] According to the bank, in 2023, there was a notable rebound from the year before, with over $5 trillion in global M&A volume across all sectors, with companies in the pursuit of scaling, retaining new

[1] 'M&A to Rebound in 2024' (Morgan Stanley, 27 March 2024) <https://www.morganstanley.com/ideas/mergers-and-acquisitions-rebound-2024> accessed 4 December 2024.

capabilities, and accessing new markets.[2] The survey revealed predictions and anticipation of a highly engaged and active market with a record-setting pace. According to Deloitte, the market could witness trends that point towards the dawn of the next big M&A run, resulting in even greater deal size and volume.[3] The increase in the M&A activity would further highlight the importance of the post-acquisition integration process between two companies which raises various cultural and identity crisis, thereby, may negatively affect the expected synergies from M&A.[4] To mitigate these risks, the acquirers, usually prefer to keep the top executives of the target who would play an essential role in the integration process in both the pre- and post-closing phase of the transaction.[5]

There are many benefits in keeping the target's top management after acquisition[6]. First and foremost, if kept after closing, the incumbent management would play a pivotal role in providing a smooth transition, by easily transferring the knowledge and technology from the target to the acquirer.[7] Their existence would also foster the cultural alignment between the acquirer and the rest of the target company.[8] By leveraging their experience in running target's operation and industry expertise, they would also be capable of minimizing any disruption throughout the integration process and increase the success of the post-merger performance of the target[9]. This is particularly accurate in high-tech and knowledge intensive industries, where the management are usually the founders or patent holders. Thus, it would be wise for the acquirer to benefit from the target's human capital.

Having said that, it is now quite common for parties to have a post-closing M&A dispute either arising from breaching of contractual representation and warranties or from purchase price adjustments on the target's profits or turnover.[10] The central question this article will address is whether, in such circumstances, the acquirer should be allowed to submit the witness statement of top management of the target as evidence to support his case, considering the high tendency to keep the top management after closing.

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2 ibid.

3 Adam Reilly, '2024 M&A Trends Survey' (Deloitte United States, 5 October 2020) <https://www2.deloitte.com/us/en/pages/mergers-and-acquisitions/articles/m-a-trends-report.html> accessed 4 December 2024.

4 Nancy Hubbard and John Purcell, 'Managing Employee Expectations during Acquisitions' (2001) 11(2) Human Resource Management Journal 17.

5 Athina Vasilaki, 'The Relationship Between Transformational Leadership and Postacquisition Performance' (2011) 41(3) International Studies of Management Organization 42; Marc J Epstein, "The Drivers of Success in Post-Merger Integration' (2004) 33(1) Organizational Dynamics 174; Bruce Nolop, "Rules to Acquire By' (2008) 85(9) Harvard Business Review 56.

6 Bruce T Lamont and others, 'Integration Capacity and Knowledge-based Acquisition Performance' (2018) 49(1) Organizational Management 103–114.

7 Melissa E. Graebner, 'Momentum and serendipity: How acquired leaders create value in the integration of technology firms' (2003) 25(8/9) Strategic Management Journal 751–777.

8 Riikka M. Sarala, Eero Vaara and Paulina Junni, 'Beyond Merger Syndrome and Cultural Differences: New Avenues for Research on the 'Human Side' of Global Mergers and Acquisitions (M&As)' (2019) 54(4) Journal of World Business 307–321.

9 Graebner (n 7) 751–777.

10 Alexander W. Nürk, *Drafting Purchase Price Adjustment Clauses in M&A: Guarantees, Retrospective and Future Oriented Purchase Price Adjustment Tools* (Herstellung Diplomica Verlag GmbH 2009) 11.

This article will first examine this phenomenon from the selling shareholders' perspective both before and after the dispute has been arisen, evaluate the relevant precautions to alleviate the risks stemming from such witness evidence, and, most importantly, determine whether the selling shareholders are entitled to request from the tribunal to exclude the top management from testifying before the arbitral tribunal. This will be followed by the tribunal's perspective to the matter as how they would react once they come across with such a request. The first question will be asked whether the tribunal has the power to exclude the evidence, and if so, on what ground they could do so and what could be the potential implications of this decision on the fate of the arbitral award. Thereafter, the discussion will proceed, if the tribunal review the content of the witness statement and decide not to accept it, would the tribunal be able to un-ring the bell and disregard the information disclosed by the witness while resolving the dispute?

Finally, the article will conclude that the lack of established rules in deciding on the exclusion of the witness evidence in such cases results in legal uncertainty where parties and even arbitrators would be unable to foresee which type of evidence will be admitted during the arbitral proceedings. This Article suggests applying the disclosing criteria set forth by work-product doctrine where the tribunal decides not to exclude the evidence if i) there is a substantial need for this confidential information to be disclosed during the proceedings and ii) the party requesting disclosure lacks any ability to obtain the substantial equivalent information from alternative sources and by other means without undue hardship.

2. FROM THE SELLING SHAREHOLDERS' VIEW

It is crystal clear that, the interests of the management shifts upon the closing, as they have more aligned with the acquirer than the selling shareholders. This, obviously, affects their potential witness statement. Considering the fact that they are the key persons throughout the whole process of such transaction, the selling shareholders may try to request the exclusion of the management from being a witness on behalf of the acquirer before any arbitral tribunal.

2.1. EX-ANTE MEASURES

During the transaction, the selling shareholders' primary concern would not be that of the transferring employees, including management, of the target. Therefore, most of the time they do not include any provision dealing with the management's role in post-closing M&A disputes. However, once a post-closing M&A arbitration begins, sellers may find the former management of their company listed as fact witnesses, whose interests often shift, aligning more closely with the acquirer that potentially affect the content of their testimony in ways that would not favor the sellers. To mitigate this risk, the selling shareholders and their counsel may consider taking several proactive measures during the transaction.

First and foremost, the selling shareholders may create a team to be involved in all stages of the deal, consisting of individuals that would not keep their position after closing at the

target, which may prevent the potential bias in their testimony.[11] The selling shareholders may also consider including a provision that may allow them to approach the management in cases of any post-closing disputes. Although the management team might be reluctant to testify for the selling shareholders, at least, the selling shareholders would have the right to ask them to do so. Additionally, the selling shareholders may conclude a separate confidentiality agreement with the management which includes a specific provision that prevents management team that was active at any stage of the deal from disclosing the confidential information to the acquirer or even discussing the dispute with the acquirer at all. However, sellers and their legal teams often overlook such protective provisions. This raises another question of what arguments sellers can present before an arbitral tribunal when faced with these challenges.

2.2. EX-POST ACTIONS

There could be two potential arguments that can be raised by the selling shareholders, either relying on the close relationship between the witness and the acquirer or if applicable, the confidentiality obligation of the witness owed to selling shareholders.

Under some jurisdictions, a group of individuals who have a commercial or familial relationship with the parties, are not allowed to testify as witnesses before courts or tribunals.[12] This problem was encountered during the Iran-United Stated Claims Tribunal, where the tribunal did not allow the party representatives or party witnesses to testify rather only provided "information" in relation to the case.[13] A similar issue was discussed under the decision of French Court of Appeal decision, which set aside the ICC award, where the court stated that the statement of the one of the party's vice presidents as a witness lacked any degree of credibility considering its position, though it was accepted by the tribunal.[14]

Nevertheless, over time, the arbitral rules have explicitly acknowledged that there is no such limitation in international arbitration. For instance, Article 27/2 of the UNCITRAL Arbitration Rules states that "*witnesses … may be individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party*". In UNCITRAL Working Group discussions, it was clarified that "*in any way relating to any party*" is an encompassing and non-exhaustive term that do not only cover persons acted on behalf of a party but rather refers a more extensive group of individuals, including officers, employees, shareholders, associates, partners, or legal counsels.[15] Similarly, under Article 4/2 of the IBA Rules, Article

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[11] Carsten Wendler, Eric Leikin and Stuti Gadodia, 'The Curious Case of Crossover Witnesses in Post-M&A Arbitration' (Passle, 5 December 2023) <https://blog.freshfields.us/post/102iube/the-curious-case-of-crossover-witnesses-in-post-ma-arbitration> accessed 3 December 2024.

[12] Working Group Discussions II, 47th Session, 10-14 September 2007, New York, UN Doc A/CN.9/64 para 29.

[13] David D Caron and Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd edn, Oxford University Press 2013) 612-613.

[14] Peter Ashford, *The IBA Rules on the Taking of Evidence in International Arbitration: A Guide* (Cambridge University Press 2013) 92-104.

[15] Working Group Discussions II, 50th Session, 9-13 February 2009, New York, UN Doc A/CN.9/669 para 78.

27/3 of the Swiss International Arbitration Rules and Article 20.7 of the LCIA, the party's officers, employee, owners, shareholders, or other representatives are allowed to present evidence as a witness.[16] Therefore, the argument of excluding the witnesses based on their commercial or familial relationship with the parties would not be accepted by the tribunal. However, the relevant party may seek the annulment or prevent enforcement of the award where the applicable law does not permit a group of individuals to testify before courts or tribunals and where the tribunal renders its award based on the statement provided by such individuals.

Under the second argument, the selling shareholders' counsel should first inquire to whether the management concluded a confidentiality agreement before or at the time of the transaction. The subject of this confidentiality agreement shall include the management's obligation to keep the sensitive information of the selling shareholders' that they have gathered before or during the transaction confidential and not to disclose to the acquirer or any other third party. Without an explicit agreement, one may think for a second to rely on the employment agreement of the management that most of the time includes a confidentiality obligation, and even if not, the doctrine and court decisions have already verified the inherent nature of this "confidentiality" that is embedded in the employment agreements.

However, the "party" who signed the employment agreement with the top management is most of the time "the target" itself, not the selling shareholders. Therefore, it is the target not the selling shareholders that is entitled to enforce such obligation against the management. The selling shareholder would not be entitled to ask the management to not to disclose any information relevant to the target or the transaction. However, if the selling shareholders concluded a separate confidentiality agreement, then they may invoke the management's obligation to keep the information in relation to the selling shareholder and the transaction confidential for a period of time, preferably, indefinitely. By raising this argument, the selling shareholders may request the arbitral tribunal to exclude this witness from the proceedings.

In articulating and presenting their arguments, the applicable evidentiary rules would be much of importance for parties. The parties have the freedom, subject to mandatory overriding rules, to agree on the applicable evidentiary rules. However, the parties to an arbitration agreement rarely do so.[17] Most of the time *lex arbitri* and the institutional rules governing the arbitration have had to be examined in relation to their relevant provision

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[16] Article 4/2 of the IBA Rules: "*Any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative*"; Article 27/3 of the Swiss International Arbitration Rules: "*Any person may be a witness in the arbitration. It is not improper for a party, its officers, employees, legal advisors, or counsel to interview witnesses or potential witnesses*"; Article 20.7 of the LCIA: "*Subject to any order by the Arbitral Tribunal otherwise, any individual intending to testify to the Arbitral Tribunal may be treated as a witness notwithstanding that the individual is a party to the arbitration or was, remains or has become an officer, employee, owner or shareholder of any party or is otherwise identified with any party*".

[17] Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International BV 2014) 1650; Jeffrey Maurice Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International BV 2012) 192.

for disclosing of confidential information as evidence before the tribunal. For example, if *lex arbitri* is English law, there are relevant precedents that the tribunal may recourse. In *Porton Capital Technology Funds v 3M UK Holdings Limited*, the court decided that as long as the witness is subject to a confidentiality obligation owed to the opposing party, then the witness's evidence can only be presented at the hearing.[18] This means that the counsels relying on the witness's statement can never be sure what their witness would testify during the proceedings. Considering the golden rule of the advocacy where the counsels should not ask a witness a question that they are not confident about the answer to, the appeal of nominating the incumbent managers as a witness against the previous shareholders in post-closing M&A disputes would significantly diminish in the eyes of the acquirer.

Institutional rules may also provide some insights and grounds for selling shareholders' counsel to rely on, though many of them do not include an explicit provision. Under Article 22/3 of the ICC 2021 Rules and Article 21 of the ISTAC Rules, the tribunal is empowered to take any orders to protect trade secrets and confidential information.[19] By raising the confidentiality agreement concluded with the witness, the selling shareholder may request the tribunal to exclude the witness from the proceedings without submitting his/her statement, highlighting how the information that will be disclosed by the management would inflict irreparable harm to their business and commercial standing. Moreover, as will be detailed below, the tribunal's discretion to exclude evidence is not absolute. The tribunal is bound by an obligation to act fairly and impartially, ensuring that all parties are granted a reasonable opportunity to present their cases. Any deviation from these principles may render the award susceptible to challenge. As such, the selling shareholder should also highlight that the witness-gating would not prejudice the acquirer's rights to present its case, by referring to the acquirer's opportunity to nominate different witnesses or request a document production from the selling shareholder, where applicable.

3. FROM THE OTHER SIDE OF THE BENCH: HOW SHOULD THE ARBITRAL TRIBUNAL PROCEED?

The tribunal's response to these potential two arguments shall also need to be discussed. Concerning the first argument, where the selling shareholder requests the tribunal to exclude the evidence based on the relationship between the witness and the acquirer, it would probably not be accepted considering the explicit rules that allows those individuals to testify before tribunals. However, one of the fundamental duties of the tribunal is to render

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[18] Porton Capital Technology Funds v 3M UK Holdings Ltd [2011] EWHC 2895 (Comm) (07 November 2011).

[19] Article 22/3 of the ICC Rules: *"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*".

Article 21 of the ISTAC Rules: "*Unless otherwise agreed by the parties, the arbitral proceedings are confidential. At the request of one of the parties, the Sole Arbitrator or Arbitral Tribunal may give any order concerning the confidentiality of the arbitration and the proceedings, and may take necessary measures to protect trade secrets, along with other confidential information".*

an enforceable award that finally settles the disputes between the parties.[20] If, under the *lex arbitri*, there are mandatory overriding rules that prevents certain group of individuals from being witnesses and testifying before courts, then the tribunal may also prefer not to go down that road to save the award.[21]

The second argument, where the witness is under confidentiality obligation to the selling shareholders, would deserve a more delicate assessment. The first problem that needs to be discussed in relation to this argument would be whether the tribunal has the power to exclude the evidence based on the prior confidentiality obligation. The second problem with this issue is that in order to proceed, the arbitral tribunal may be required to examine the content of the witness evidence to decide its admissibility. In the end, if the tribunal decides to exclude the evidence, is the arbitral tribunal truly capable of disregarding the content of the witness statement? Finally, the tribunal's power to decide the admissibility of the evidence that contains confidential and sensitive commercial information will be discussed.

3.1. DOES THE TRIBUNAL HAVE THE POWER TO EXCLUDE THE EVIDENCE?

Many of the other arbitration rules also confer broad discretion to decide on admissibility of the evidence.[22] For instance, according to UNCITRAL Model Law Article 19/2 "*the power conferred upon the arbitral tribunal includes the power to determine the admissibility (…) of any evidence*".[23] A similar provision has been incorporated into many prominent arbitra-

[20] See, e.g., ISTAC Rules Article 34 ("*The Sole Arbitrator or Arbitral Tribunal must make every effort necessary to render an enforceable award");* ICC Rules, Art. 42 *('the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law*'); LCIA Rules, Art. 32.2 (*providing that the tribunal 'shall make every reasonable effort to ensure that any award is legally recognised and enforceable at the arbitral seat*'); SIAC Rules, Art. 41.2 *(providing that the tribunal 'shall make every reasonable effort to ensure the fair, expeditious and economical conclusion of the arbitration and the enforceability of any Award*'); WIPO Rules Arbitration Rules, Art. 64.e (*providing that the 'Tribunal may consult the Center with regard to matters of form, particularly to ensure the enforceability of the award*'); Günther Horvarth, 'The Duty of the Tribunal to Render an Enforceable Award' (2001) 18 Journal of International Arbitration 135.

[21] Michal Kocur, 'Witness Statements in International Commercial Arbitration', in Beata Gessel and Kalinowska vel Kalisz (eds.), *The Challenges and the Future of Commercial and Investment Arbitration* (Court of Arbitration Lewiatan 2015) 173.

[22] Jurgis Bartkus 'The Admissibility of Evidence in International Commercial Arbitration', Doctoral Dissertation, Vilnius 2023; Jason Fry et al., The Secretariat's Guide to ICC Arbitration. Paris: International Chamber of Commerce, (International Chamber of Commerce 2012) 268; Thomas H. Webster, Michael Bűhler, Handbook of ICC Arbitration: Commentary, Precedents, Materials (4th edn, Sweet & Maxwell 2021) 443; Ilias Bantekas and others, UNCITRAL Model Law on International Commercial Arbitration: A Commentary (Cambridge University Press 2020) 547.

[23] The UNCITRAL Secretariat stated that this Article 19 of the Model Law is one of the provisions which constitute the "Magna Carta of Arbitral Proceedings" thus might be regarded as "the most important provisions" of the Model Law. See also Howard Holtzmann and Joseph Neuhaus*, A Guide to the UNCITRAL Model Law on International Commercial Arbitration. Legislative History and Commentary* (Kluwer Law International 1989) 564.

tion rules, including LCIA[24] and SIAC[25]. A distinct formulation has been adopted under ISTAC Rules Article 29, which states as follows: "*The Sole Arbitrator or Arbitral Tribunal shall consult all means it deems to be appropriate in order to establish the facts of the case*".

In the same vein, under Article 9/1 of the IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules"), the tribunal is empowered to determine the admissibility, relevance, materiality, and weight of the evidence.[26] Under Article 9/2 of the IBA Rules, the arbitral tribunal has been granted a discretion to exclude evidence on one or more of the grounds (a)-(g). As it is seen these Articles presume that the evidence is "admissible" unless excluded, otherwise, if it had been to "include" evidence that was relevant or material, it would put a large burden on the arbitral tribunal to assess each piece of evidence for potential inclusion.[27]

Furthermore, unlike the others, IBA Rules contain a specific provision in relation to confidentiality, whereby the tribunal would have discretion to exclude evidence on the grounds of commercial or technical confidentiality that the tribunal determines to be compelling. Although this Article does not specify the types of confidential information, the information that top management will reveal as a factual witness may include sensitive details in relation to the selling shareholder's business at the time of the transaction. However, the tribunal is not obligated to render the evidence inadmissible, unless they are "compelling", as "ordinary" confidentiality would be insufficient.[28] This issue was handled by English courts, in *Science Research Council v Nasse*, where the court stated

> "*there is no reason why, in the exercise of its discretion to order discovery, the tribunal should not have regard to the fact that documents are confidential, and that to order disclosure would involve a breach of confidence… the tribunal may have regard to the sensitivity of particular types of confidential information, to the extent to which the interests of third parties… may be affected by disclosure, to the interest is preserving the confidentiality of personal reports, and to the wider interest which may be seen to exist in preserving confidentiality.*"[29]

Grounded on these relevant articles and case law, the tribunals, usually take a liberal

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[24] Article 22/vi of the LCIA: "*The Arbitral Tribunal shall have the power (…) to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any issue of fact or expert opinion; and to decide the time, manner and form in which such material should be exchanged between the parties and presented to the Arbitral Tribunal."*

[25] Article 19.2 of the SIAC: *"The Tribunal shall determine the relevance, materiality, and admissibility of all evidence. The Tribunal is not required to apply the rules of evidence of any applicable law in making such determination."*

[26] Article 9/1 of the IBA Rules: "*The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.*"

[27] Ashford (n 14) 146.

[28] ibid 165.

[29] Science Research Council v. Nasse [1980] AC 1028.

stance towards the admissibility of the evidence.[30] Practice has shown that arbitral tribunals admit almost any evidence submitted to them in support of parties' position, as they retain significant discretion in assessing and weighing the evidence.[31] Scholars also supported this approach by observing that "*tribunals nearly always adopt a flexible approach to admissibility of evidence; it is unlikely that a party will be prevented from submitting evidence that may genuinely assist the tribunal in establishing the facts.*"[32] This is because the tribunal does not apply the strict rules of evidence of the *lex arbitri.* Rather, they rely on the discretion granted by the various institutional rules to determine the admissibility of the evidence. The exclusion of the evidence is narrowly confined in that the evidence submitted by the parties, provided it is relevant, is generally be admitted, with concern regarding its probative force going to weight rather than its admissibility.[33] By doing so, the arbitral tribunals safeguard their awards from being challenged as they would not run the risk of failing to establishing the truth. Thus, once the tribunal come across with a request by the selling shareholders requesting the exclusion of the top management to testify as a factual witness, the tribunal would have a broad discretionary power in deciding to accept or refuse this evidence and ultimately to exclude the witness from the proceeding. One step further, even the relevant institutional rules do not provide any explicit provisions on the discretionary power of the tribunal to exclude the evidence, in particular, witness or experts from the proceedings, there are arbitral awards where the tribunal decided to do so.

Such a situation happened in *Flughafen v Venezuela* where there was a conflict between an expert and a party, wherein the Claimant alleged that the expert appointed by the Respondent had relied on confidential information it had received from its previous relationship with the Claimant.[34] Although the tribunal acknowledged that it had power to exclude the expert by extending the scope of Article 34/1 of the ICSID rules,[35] it did not decide to do so due to the Claimant's failure to specify the confidential nature of the information it had shared with the expert. However, what matter here is that, even though there is not any explicit provision in ICSID rules, the tribunal evaluated to exclude the expert based on its confidentiality obligation to the opposing party under the admissibility of the evidence by

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30 W. Michael Reisman and Eric E. Freedman, 'The Plaintiff's Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication' (1982) 76 (4) The American Journal of International Law 783; Siyuan Chen, 'Re-assessing the Evidentiary Regime of the International Court of Justice: A Case for Codifying its Discretion to Exclude Evidence' (2015) 13(1) International Commentary on Evidence 39; Julian Lew, Loukas Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 561.

31 Lew et al (n 31) 561.

32 Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn, Oxford: Oxford University Press 2015) 378; Waincymer (n 17) 793; Born (n 17) 1123-1126.

33 Laird C. Kirkpatrick,'Scholarly and Institutional Challenges to the Law of Evidence: From Bentham to the ADR Movement' (1992) 25(3) Loyola of Los Angeles Law Review 847.

34 Flughafen Zürich A.G. and Gestión e Ingenería IDC S.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/19, Decision on Claimants' proposal for disqualification of one of Respondent's expert witnesses, and request for inadmissibility of evidence, 29 August 2012.

35 Article 34/1 of the ICSID Rules: "*The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.*"

stating that "*there can be no doubt that the Tribunal has competence to accept or exclude any evidence submitted by one of the parties.*"[36]

That being said, the arbitral tribunal has the power to decide on the exclusion of the witness evidence that would be provided by the management, who owed a confidentiality obligation to the selling shareholders. The rest of the article will deal with how the tribunal exercises its authority in determining the exclusion of the witness evidence and if the evidence is deemed inadmissible, would the tribunal be able to un-ring the bell and disregard the information disclosed by the witness while resolving the dispute?

3.2. CAN THE TRIBUNAL DELIBERATELY DISREGARD THE CONTENT OF THE EVIDENCE?

A special situation presents itself when the tribunal is asked to review documents to determine their confidential nature. If the determination cannot be made without a review of the documents and a demand is made for such a review, should the tribunal perform that task itself knowing that it may be influenced by what it sees?

As described by Chris Guthrie, arbitrators are subject to informational blinders, where they may not be able to disregard the highly relevant though inadmissible evidence under evidentiary rules.[37] This was proved by an experiment conducted by Andrew Wistrich, Jeffrey Rachlinski and Chris Gutherie; even though the judges themselves ruled that the information was privileged and therefore inadmissible, the information protected by the privilege appears to have had a substantial impact on their assessment of liability.[38]

There are a couple of psychological explanations for such a result. For example, in accordance with the ironic process theory, once people suppress information, they must keep the forbidden thought available so that they can compare it to their existing mental state and confirm that they are not thinking of the forbidden thought.[39] Thus, thought suppression is an ironic process that creates the opposite of what is wanted.[40] Secondly, as to the mental contamination theory, new information comes with new stimuli that facilitates new beliefs that might persist, even if the information is discredited.[41] Thus, the arbitrators who are exposed to inadmissible evidence might not even realize how this information has affected their judgment. To insulate their deliberation and decision-making process from inadmis-

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[36] Flughafen Zürich A.G. and Gestión e Ingenería IDC S.A. v. Bolivarian Republic of Venezuela at para 11-13; para 37.

[37] Chris Guthrie, 'Misjudging' (2007) 7(420) Nevada Law Journal 435.

[38] Chris Guthrie and Jeffrey J Rachlinski, 'Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding' (2005) 153 (1) University of Pennsylvania Law Review 1279-81; See also Stephan Landsman & Richard F. Rakos, 'A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation' (1994) 12(2) Behavioral Sciences and The Law 113.

[39] Daniel M. Wegner, 'Ironic Processes of Mental Control.' (1994) 101(1) Psychological Review 34.

[40] Daneil M. Wegner and Ralph Erber, 'The Hyper-accessibility of Suppressed Thoughts.' (1992) 63 (6) Journal of Personality and Social Psychology 908.

[41] Thomas Gilovich, Dale Griffin and Daniel Kahneman, *Heuristics and Biases: The Psychology of Intuitive Judgment* (Cambridge University Press 2002) 180

sible evidence, they need to prevent this information from influencing how the subsequent information is processed, which is quite challenging, as each new information changes how they think and leads to belief perseverance.[42] Thereby, there are potential psychological underpinnings proving that inadmissibility can affect how arbitrators would interpret the evidence presented later by contaminating their decision-making process. Although the arbitrators cannot incorporate the inadmissible evidence into their reasoning, they may have tendency to use it to assess the credibility of other evidence.

To ensure that the arbitrators are protected from the informational blinders and not affected by the content of the witness statement of the top management, Article 3(8) of the IBA Rules may provide a leeway.[43] In accordance with this Article, in exceptional circumstances, the tribunal may, after consultation with the parties, appoint an independent and impartial expert to conduct the review. While the appointment of such an independent expert may cost time and money, in light of the danger of prejudice, if a party asks for such an independent review, careful consideration should be given to all of the relevant factors before deciding on the tribunal's response.[44]

3.3. HOW CAN THE TRIBUNAL EXERCISE THEIR POWER TO EXCLUDE?

3.3.1. Reconciling the competing interests of the Parties

There is no black and white to the answer of how an arbitral tribunal can or should exercise its authority to exclude the witness statement. Rather the tribunal shall need to balance and reconcile the competing interests of the parties. On one hand, one party has a legitimate expectation with respect to its confidential information to be protected by the witness appointed by the other party. On the other hand, the other party desires to present its case by including the target's management as a witness to their case and benefit from the rights accorded to it, namely, right to a fair hearing, that includes, right to be heard and equality of arms.

To start with the right to be heard, the fundamental procedural right protected by the various arbitration rules and national laws, any violation of this right by the tribunals may end their award being annulled or not enforced in accordance with New York Convention[45]. The scope of right to be heard is wide enough that covers right to present and adduce evi-

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[42] Lee Ross, Mark R. Lepper and Michael Hubbard, 'Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm.' (1975) 32(5) Journal of Personality and Social Psychology 880.

[43] See, e.g., National Labor Relations Board v Jackson Hospital Corp., 257 F.R.D. 302, 307; Edna Sussman, 'Arbitrator Decision-Making: Unconscious Psychological Influences and What You Can Do About Them' (2014) 24(3) The American Review of International Arbitration 494.

[44] ibid 49.

[45] Maxi Scherer, 'New York Convention: Violation of Due Process, Article V(1)(b)' (2012) Queen Mary School of Law Legal Studies Research Paper No. 163/20138 47.

dence and responding to the evidence presented by the opposing party.[46] However, this right is not without limit, as such, the tribunal has a discretion to accept or reject the evidence submitted by the parties, without being violated their right to be heard.[47] This is acknowledged explicitly by the various national laws and arbitral institutional rules where the parties shall need to be granted "reasonable" opportunities to present their cases by submitting relevant documentary evidence in support of their claims. The "reasonableness" would be assessed by the tribunal given the circumstances of each case and their decision, as suggested by *Klaus Berger* and *Ole Jensen*, shall be protected by "procedural judgement rule".[48] This is formulated as the reflection of "business judgement rule" in due process assessment where the arbitrator shall be entitled to take procedural management decisions after filtering the specifics of the case through their reasonable discretion. Thus, while deciding on the admissibility of the witness statement by top management, the tribunal shall carefully examine whether excluding such evidence would deprive the acquirer of a "reasonable" opportunity to present its case. The tribunal shall also conduct the arbitral proceeding by respecting the equal treatment of the parties which means that the tribunal shall treat all parties in the same manner without any distinction or discrimination.[49]

Thus, in terms of taking evidence, the principle affords both parties adequate opportunities to present themselves on the matter before tribunal[50]. This is explicitly acknowledged by the New York Convention Article 5/1/b where the enforcement of an arbitral award may be refused if the parties were not able to present their cases adequately and by IBA Rules Article 9/2/g where the tribunal is empowered to exclude evidence on the basis of concerns of fairness or equality of the parties.

Upholding a claim of confidentiality prevents a party from having access to otherwise relevant material that may enable it to support its claim. This would create a sort of imbalance between parties where one party may freely adduce evidence and the other may stuck up with the witness's confidentiality obligation that may shed light to the matter.[51] The imbalance may not be resolved by simply extending the same attitude to the claimant as it may not necessarily be relevant to a claimants' evidence and may not be matched by confi-

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[46] Emmanuel Gaillard and George Bermann, *Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (Brill 2017) 172; Hakan Pekcanıtez, 'Hukuki Dinlenilme Hakkı' (2000) İzmir Dokuz Eylül Üniversitesi Hukuk Fakültesi, 753.

[47] Bilgehan Yeşilova, 'Yargılama Diyalektiği ve Silahların Eşitliği' (2009) 86 (1) TBB Dergisi 54.

[48] Klaus Peter Berger and J Ole Jensen, 'Due Process Paranoia and the Procedural Judgment Rule: A Safe Harbour for Procedural Management Decisions by International Arbitrators' (2016) 32(3) Arbitration International 419-420.

[49] Ilias Bantekas, 'Equal Treatment of Parties in International Commercial Arbitration, (2020) 69(4) International and Comparative Law Quarterly 994; Müslüm Akıncı, 'İdari Yargılama Hukukunda Savunmada Fırsat Eşitliği' (2010) 1 (2) Türkiye Adalet Akademisi Dergisi 37; Güney Dinç, "Avrupa İnsan Hakları Sözleşmesi'ne Göre Silahların Eşitliği' (2005) 57 TBB Dergisi 253-306.

[50] Gökçen Topuz and Belkıs Konan, "Geçmişten Günümüze Türk Hukukunda Hâkimin Tarafsızlığı İlkesi" (2017) 66(4) Ankara Üni. Hukuk Fakültesi Dergisi 777; Emel Hanağası, *Medeni Yargılama Hukukunda Silahların Eşitliği* (Yetkin Yayınları 2016) 43.

[51] ibid.

dentiality considerations on the part of the claimant's part.[52] The situation would be further exacerbated if the acquirer were not in a position to provide alternative admissible evidence that has similar evidentiary value from the content-wise to the witness statement of the top management of the target.

These two important rights, the right to be heard and the right to equal treatment, are in clash with the right of the selling shareholder's expectations from the potential witness to keep its confidential information safe. In particular, in relation to its state of mind during the transaction or any other commercially sensitive information. From the broader context, the tribunal may consider the positive effect of the "privacy" of the arbitral proceedings to settle the clashes of interests. Under most jurisdictions and arbitral rules, it is acknowledged that the proceedings would be held in private, where each party is entitled to exclude the public from arbitration hearings and other proceedings.[53] In addition to that, the parties are under obligation not to disclose any of the information or materials provided for and disclosed during the proceedings.[54] Considering this double protection, the disclosure of confidential information by the management may not be that much harmful to the selling shareholders, but instead would shed light on the tribunal to reach the truth and justice. However, any confidentiality may be lost if the award is subject to the judicial challenge, particularly if the award contains confidential information disclosed by the witness.

3.3.2. The Paranoia of Non-Recognition and Non-Enforcement

In accordance with Article V/1/b of the New York Convention

> "*Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was unable to present his case*".

Suppose that the tribunal decides to exclude the witness evidence attempted to be submitted by the top management of the target company, as in our case, thereby, the acquirer contemplates challenging the award based on Article V/1/b of the New York Convention. In that situation, the national court would first determine the scope of the due process right contained in this clause where the New York Convention does not provide any lead. From the outset, this defense covers a range of circumstances where one party was "*unable to present his cases*" that, for instance, right to submit evidence, make legal and factual submissions

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[52] ibid.

[53] François Dessemontet, 'Arbitration and Confidentiality' (1996) 7(3) American Review of International Law 8; Loukas Mistelis, 'Confidentiality and Third-Party Participation' (2005) Vol 21 (2) Arbitration International 205; Ziya Akıncı, Milletlerarası Tahkim (2nd edn, Vedat Kitapçılık 2021) 354.

[54] Ileana Smeureanu, *Confidentiality in International Commercial Arbitration* (Wolters Kluwer 2011) 118.

to the tribunal and comment on evidence and submissions in the case file.[55] However, the exact delineation needs to be based on either i) the national law of the recognition forum, ii) the national law of the arbitral seat, iii) the national law standard, which is developed specifically for international arbitration, or iv) internationally uniform standard which is derived from New York Convention.[56]

Once the court contends that the due process right includes the party's right to adduce evidence before the tribunal, it may decide whether there should be any causal link between the breach of such right and the outcome of the arbitral proceedings. Although some scholars believe the enforcement of the award can only be refused if it has an impact on the decisions of the tribunal,[57] the majority view does not look for further causal link or damages due to the breach of due process.[58] The Convention itself also does not require any link, as the breach of due process per se, is considered to be sufficiently important to justify the non-enforcement without the need for the party invoking it to establish actual damage any causal link.[59] This means that even if the witness statement of the top management may not have any influence on the decision of the tribunal, the acquirer may still challenge the award.

In practice, despite such a broad scope of Article V/1/b, the rate of non-recognition and non-enforcement of arbitral awards is quite rare.[60] However, this may be the result of the liberal approach of the arbitral tribunals and their utmost effort to respect the procedural rights of the parties. The arbitral tribunals, dedicated to ensuring that all parties have a full and fair opportunity to present their case, and cognizant of the time and costs involved in applying formal rules of evidence, often exercise discretion to admit evidence that may not strictly comply with the traditional admissibility standards. The survey conducted on the ability of judges to disregard inadmissible evidence has revealed that 33% of the arbitrators never excluded evidence and 55% excluded evidence only about 25% of the time.[61] Thus 88% of arbitrators admit evidence even though it is inadmissible under evidentiary standards at least 75% of the time.[62] Only 1% of the arbitrators always exclude such evidence[63].

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55 Berger and Jensen (n 48) 419-420; Reinmar Wolff et al., *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 1958. A Commentary* (2nd edn, Bloomsbury Publishing 2019) 291.

56 Born (n 17) 3828.

57 Wolff et al. (n 55) 311.

58 Born (n 17) 3828.

59 Philippe Fouchard, Berthold Goldman and Emmanuel Gaillard, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Wolters Kluwer Law & Business 1999) 987.

60 Roger P. Alford, 'Empirical Analysis of National Courts Vacatur and Enforcement of International Commercial Arbitration Awards' (2022) 299(1) Journal of International Arbitration 301 (describing itself as "the most comprehensive empirical study of national court enforcement of international commercial awards ever published").

61 Guthrie and Rachlinski (n 38) 1279-1281; S Landsman and RF Rakos, 'A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation' (1994) 12(1) Behavioral Sciences Camp 113.

62 Guthrie and Rachlinski (n 38) 1281.

63 ibid.

Moreover, research indicates that parties are more likely to accept and comply with an arbitral award when they perceive the process to be fair. The inclusion of evidence they present and the acknowledgment of their "voice" during the tribunal's proceedings significantly contribute to their sense of procedural justice, even if the submitted evidence ultimately proves to be non-determinative.[64] Given the increasing proclivity of parties to challenge awards, arbitrators' practice of generally admitting evidence serves essential objectives. Therefore, there is a chicken-and-egg situation where the national courts reluctance to decide non-enforcement may result from the tribunal's flexible attitude in following the procedural matters raised by the parties. The problem examined under this article would not be an exception to this. The tribunal may prefer not to risk their award being challenged by the acquirer based on the exclusion of the witness statement by the top management of the target. Otherwise, the acquirer may successfully claim that it has not had an opportunity to present its case.

From the selling shareholders' view, if the tribunal takes a liberal stance and admits the witness evidence, can they rely on Article V of New York Convention for non-enforcement? Once everything is in order in terms of Article V/I, the selling shareholders' last resort could be Article V/II, which allows parties to challenge the award based on its potential violation of the public policy before the enforcement courts. Thus, the question would be whether the favorable decision on the admissibility of the confidential information as a witness statement could run the risk of infringing "public policy" of the relevant national law, another ground in Article V/2 of the New York Convention. If this confidential information has been obtained "*illegally*", the selling shareholders would have a strong argument, as this may be found by national courts against their public policy. Thereby, the award may be declared not to be enforced or recognized.[65]

4. POSSIBLE FRAMEWORK TO ASSESS THE ADMISSIBILITY OF THE TOP MANAGEMENT'S WITNESS EVIDENCE

4.1. THE CURRENT LEGAL LANDSCAPE

Thus, in terms of confidentiality, the tribunal would have to consider the kind of confidentiality involved in the facts of the matter and then decide whether the confidentiality involved would outweigh the needs for a just arbitral award at the expense of the opposing parties' right to be heard and right to equal treatment. While doing so, the tribunal, as explained above, has a broad discretionary power to decide on the admissibility of such

[64] ibid.

[65] AM Kubalczyk, 'Evidentiary Rules in International Arbitration – A Comparative Analysis of Approaches and the Need for Regulation' (2015) 3(1) Groningen Journal of International Law 85; See also Reisman and Freedman (n 30) 737.

evidence.[66] The problem here is that there are no *ex-ante* rules that arbitrators could rely on, instead, they act more like "*I know it when I see it*" approach.[67] As such, the decisions of the tribunal on the admissibility of the evidence will not be based on the specific rules, but instead, on its own discretion. A natural result of this is legal uncertainty, where parties and even arbitrators would be unable to foresee which type of evidence will be admitted during the arbitral proceedings.

Several considerations have been listed in the doctrine and national courts' decisions as i) the evidentiary value of the confidential information, ii) the sensitivity of the confidential information, iii) the interest in preserving the confidentiality of the private communications iv) the extent to which the disclosure of such evidence may affect the interest of the third parties, v) the broader interest that may be deemed to exist in preserving the confidentiality information.[68] Therefore, confidentiality obligation of the witness, by itself, may not be a sufficient reason to refuse to disclose the relevant information or document. This is also confirmed by Article 9.2 IBA Rules, where the tribunal is not obligated to render the evidence inadmissible, unless they are "*compelling*". However, the tribunal may deem it appropriate to take some measures to preserve the confidentiality of the information as much as it can, by, for example, allowing the witness to testify before the tribunal without the acquirer being present in the courtroom.[69]

Although arbitrators have some guiding principles as to the criteria, there are still a lot of unanswered questions as to whether the tribunal considers all the criteria as cited above, or should give more weight to the sensitivity of the confidential information? More importantly, how can the parties foresee which criteria the tribunal would rely on? This complexity leads to various conflicting decisions regarding the admissibility of the confidential information as evidence. When the issue was about the evidence containing confidential information that was requested from the relevant party, the tribunal may reject to order to disclose such information. For instance, the tribunal rejected the request of a credit company with regards to the disclosure of the credit card security systems provided by another company, who was the respondent of the case, where the tribunal found it highly confidential for the service provider.[70] In another instance, the tribunal assessed the relevance of the information at hand and its financial importance and value,[71] and did not directly reject the disclosure request.

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66 Franco Ferrari and Friedrich Rosenfeld, *Handbook of Evidence in International Commercial Arbitration: Key Issues and Concepts* (Wolters Kluwer 2022) 255; Bartkus (n 22) 68; Fry et al (n 22) 268; Webster, Bűhler (n 22) 443; Bantekas (n 22) 547.

67 *William Park, Arbitration's Discontents: Of Elephants and Pornography (eds.) Foundations and Perspectives of International Trade Law (London: Sweet and Maxwell 2001) 258–268.*

68 Ashford (n 14), 165; Nathan O'Malley, *Rules of Evidence in International Arbitration An Annotated Guide* (Routledge 2019) 315.

69 Ashford (n 14) 145.

70 As cited in R Marghitola, *Document Production in International Arbitration* (Kluwer Law International 2015) 93.

71 Euroflon Tekniska Produkter AB v Flexiboys i Motala AB. (2012) Swedish Supreme Court, No. 1590-11

For disputes that include the confidentiality obligation owed to or owed by the third parties, the tribunals were much more straightforward by deciding affirmatively on the admissibility of the confidential information. For instance, in ICC case No.19299/MCP, one of the witnesses owed a confidentiality obligation to the claimant who requested the tribunal to exclude his statement as evidence, where the tribunal ruled that

> *"(…) it would not be appropriate to exclude evidence on the basis of a contractual confidentiality obligation that is external to the dispute before the Tribunal, especially, when the evidence in question appears to be relevant. The Tribunal does not believe it to be correct to exclude the evidence at this stage of the proceedings. (…) the Claimants are free to challenge the evidence in whatever manner they deem fit, whether at the forthcoming hearing and/or through their post-hearing briefs. What weight (if any) is to be given to the evidence will be determined by the Tribunal in light of all the relevant circumstances at a later stage."*[72]

However, there are conflicting decisions concerning this issue. As in one of the UNCITRAL case, the tribunal found the confidentiality obligation of a third party as a sufficient ground to refuse the admissibility of the document by stating that

> "*the parties have refused the production of a number of documents on the ground of them containing confidential commercial information. To the extent that some such refusals are based on the nature of the transaction or information contained in the pertinent documents, particularly if it relates to intra-company information or business transactions involving third parties, a refusal might be well justified on these grounds."*[73]

To reconcile these interests, the arbitrators "weigh" the interests, as described by Hans Kelsen- not as a solution, but merely as a formulation of the problem.[74] This is mainly because there are no explicit guidelines on balancing different criteria in reconciling these clashing interests, in other words, they do not specify which of the balancing criteria should be considered more important in the matter at hand. Therefore, the tribunal would assess the admissibility based on its subjective views and experience. As such, while engaging in this balancing exercise, the arbitral tribunal should follow a set of rules within a well-established framework to establish predictability and coherence. This article suggests that in deciding on the disclosure of confidential information through the witness statement of the management, the tribunal may recourse to the parameters in determining the exception to privileges, in particular the work-product doctrine that protects the communications created for the use in contemplated or existing litigation, but with a lower threshold.

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[72] Gujarat State Petroleum Corporation Limited, Alkor Petroo Limited, and Western Drilling Constructors Private Limited v. The Republic of Yemen and the Yemen Ministry of Oil and Minerals, ICC Case No. 19299/MCP, 25 February 2013.

[73] Merrill & Ring Forestry L.P. v. The Government of Canada, ICSID Case No. UNCT/07/1

[74] Hans Kelsen, *Pure Theory of Law* (The Lawbook Exchange Ltd. 2005) 352.

4.2. WORK-PRODUCT DOCTRINE AND DISCLOSURE OF CONFIDENTIAL INFORMATION BY FACTUAL WITNESSES

The work-product doctrine allows the attorneys to keep the information derived from their clients or third parties in the preparation of the litigation confidential where it allows the attorneys to refuse to testify or submit any evidence under any circumstances, subject to showing i) a substantial need for this confidential information to be disclosed during the proceedings and ii) that the party requesting disclosure lacks any ability to obtain such information by other means without undue hardship.[75] The "*substantial need*" has been defined by the US Supreme Court as "where the relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparations of one's case."[76] This was followed by the definition of "*undue hardship*" that refers to the availability of alternative means in securing the evidence where there are "*no longer available or can be reached only with difficulty.*"[77]

Amongst legal scholars, there are various suggestions for applying work-product doctrine to the exceptions to the duty of confidentiality in arbitration. Confidentiality, in this context, *"is concerned with information relation to the content of the proceedings, evidence and documents, addresses, transcripts of the hearings or the award"*[78] which the parties to the arbitration are not allowed to disclose to third parties. In this sense, it resembles to the central question of this article, where the witness has a confidentiality obligation to the selling shareholders not to disclose the relevant information during arbitral proceedings. This confidentiality duty in arbitration is not absolute, as even when the parties to an arbitration agreement expressly include a detailed confidentiality clause in their agreement, confidentiality may be no longer protected.[79]

The emerging view amongst courts from different jurisdictions seem to be that disclosure of arbitration communications and materials may be compelled.[80] However, there is no consensus on when and on what grounds the disclosure can be ordered, which makes the

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[75] Christoph Henkel, 'The Work Product Doctrine as a Means Toward a Judicially Enforceable Duty of Confidentiality in International Commercial Arbitration' (2011) 37 (1) North Carolina Journal of International Law 1094; *See also* E Thornburg, 'Rethinking Work Product' (1991) 77(1) Virginia Law Review 1524-50.

[76] Hickman v. Taylor, 329 U.S. 495, 511-12 (1947); Associated Elec. and Gas Ins. Services Ltd. v. European Reinsurance Co. Of Zurich [2003] 1 All E.R. 253 (Eng.); United States v. Amerada Hess, Corp., 619 F.2d 980, 980 (3d Cir. 1980).

[77] Hickman v. Taylor (n 76).

[78] Expert Report of Dr. Julian D. M. Lew in Esso/BHP v Plowman, (1995) (Special Issue) Arbitration International 283.

[79] Henkel (n 75) 1112.

[80] For the UK see Ali Shipping v. Shipyard Trogir [1998] 2 All E.R. 136 (Eng.); For the France see Nafimco v. Foster Wheeler Trading Company AG Cour d'appel [CA] Paris, Jan. 22, 2004, note Bureau (Fr.); For Australia see Esso Austl. Res. Ltd. v Plowman (1995) 128 ALR 391; For the US see United States v. Panhandle E. Corp. 118 F.R.D. 346 (D. Del. 1998).

confidentiality in international commercial arbitration an uncertain concept.[81] To establish a more predictable approach, the scholars suggest that the work-product doctrine and propositions of the exceptions may simply be utilized as a practical and well-established standard to allow disclosure where "*production of those facts is essential*" for the administration of justice.

In both scenarios, the decision-maker is expected to balance the competing interests of the parties that if the need of one party to gain access to protected documents outweighs the interests of the other party in protecting its confidential information from disclosure, the documents will be disclosed.[82] In doing so, the work-product doctrine looks for two concurrent factors: substantial need and inability to obtain the substantial equivalent of the information by other means without undue hardship.[83]

This article goes one step further and suggests applying the well-established principle in deciding the disclosure in the context of the work-product doctrine to the case where the tribunal is evaluating the exclusion of witness evidence based on the confidentiality obligation of the witness to the opposing party. Here again, the tribunal shall need to reconcile the competing interest, on the one hand, the legitimate expectation of the selling shareholders with respect to its confidential information to be protected by the witness, and on the other hand, the acquirer's right to be heard and present its case. While doing this, the tribunal would first assess whether the acquirer (new shareholders) of the target is in substantial need of presenting the statement of the management as evidence to the tribunal. The "substantial need" is defined as "*where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparations of one's case, discovery may properly be had.*"[84] Therefore, the test requires a showing that the discovering party needs the materials to prove his case. This would also require "substantial equivalent test" where a party is not entitled to discover a document merely because he cannot get the same information from the same person if the substantial equivalent is available from an alternative source.[85] This means that the acquirer must prove that the information the witness will disclose would be quite important to present his case that without the witness being testify before the tribunal, the acquirer could not obtain similar information without hardship. However, the facts of the case would be the deciding criteria for the tribunal, where for example, there are multiple actors took part in the transaction who are not bound by confidentiality obligation and the statement of the proposed witness would not be the only source for acquirer to present its case, then tribunal may not allow the disclosure of the confidential information

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[81] Kyriaki Noussia, *Confidentiality in International Commercial Arbitration: A Comparative Analysis of the Position under English, US, German and French Law* (Springer Science & Business Media 2010) 157; Alexis C. Brown, 'Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration' (2001) 16(4) American University International Law Review 970-976; Katie Chung and Michael Hwang, 'Defining the Indefinable: Practical Problems of Confidentiality in Arbitration' (2009) 26(1) Journal of International Arbitration 610.

[82] Carolyn J McFatridge, 'The Work Product Doctrine Revisited' (1987) 23 (1) Tulsa Law Review 118.

[83] Henkel (n 75) 1063.

[84] Hickman v. Taylor (n 76).

[85] Henkel (n 75) 1063; McFatridge (n 83) 108.

by that witness.

The acquirer should also fulfill the second limb of the test where he should prove that he will be unable to obtain the substantial equivalent information disclosed by the witness without going to great lengths; or lack of knowledge of where else to obtain the information; or show that the information is entirely unavailable elsewhere.[86] For example, the acquirer may claim that it is the proposed witness who negotiated the deal on behalf of the selling shareholders or that the witness prepared and reviewed the transaction documents and attended all the internal meetings of selling shareholders where they discuss the specific details of transaction, and where the witness would be able to verify the inside of the selling shareholders' mind. That is precisely why the acquirer might be unable to find substantial equivalent evidence apart from what the proposed witness would testify before the tribunal. However, the tribunal's final decision of the tribunal would depend upon the circumstances of each case. Thus, the tribunal and the parties shall need to assess the specific details with utmost attention.

5. CONCLUSION

The statistics and forecasts have proven a global appetite for M&A transactions. The drastic increase in such deals comes with an increase in the M&A disputes, mostly stemming from the breaches of representation and warranties or purchase price adjustments on target's profits or turnover. In these circumstances the role of top management of the target company, who are kept by the acquirer after closing, could be very crucial in the decision of the arbitral tribunal.

Upon the completion of the deal, the interests of the top management have been shifted, and a natural consequence of such shift would be that they may be asked to testify for the acquirer in the case of a post-closing M&A disputes. In the event of such a situation, the seller may take some precautions beforehand, by for example, creating a team to be involved in all stages of the deal, consisting of individuals that would not keep their position after closing at the target, or including a provision in the transaction documents that may allow them to approach management in cases of any post-closing disputes. More importantly, the selling shareholders may conclude a separate confidentiality agreement with the management, which includes a specific provision that prevents the management team that were active at any stage of the deal from disclosing the confidential information to the acquirer or even discussing the dispute with the acquirer at all. After the arbitral proceedings have commenced the selling shareholders may raise two fundamental arguments and request exclusion of the witness evidence provided by the top management of the target by relying on i) the close relationship between the witness and the acquirer or ii) if applicable, the confidentiality obligation of the witness to selling shareholders.

Upon such requests, the tribunal would first examine whether it has a power to do so and if so, on what grounds the tribunal may decide on not to accept the witness evidence. The institutional rules and national laws grant the arbitrators a broad discretionary power

[86] Henkel (n 75) 1101.

to evaluate the admissibility of the evidence. Most of the time, the tribunals take a liberal stance and admit almost any evidence submitted them in support of parties' position, as they retain significant discretion in assessing and weighing the evidence. However, they still need to evaluate the fate of the witness evidence of the top management of the target who has a confidentiality obligation to the selling shareholders. While doing so, the tribunal tries to balance and reconcile the competing interests of the parties.

On the one hand, one party has a legitimate expectation with respect to its confidential information to be protected by the witness appointed by the other party. On the other hand, the other party desires to present its case and benefit from the rights accorded to it, namely, right to a fair hearing, which includes the right to be heard and equality of arms. The first problem with this matter is that if the tribunal needs to see the content of the witness statement and then even if the tribunal decides not to accept it as evidence, could they be able to disregard the information they have learned from the top management who most of the time plays a crucial role at each stage of the transaction. As a solution to this problem, this article suggests, that the tribunals, after consultation with the parties, may appoint an independent and impartial expert to review the content of the witness statement and make the preliminary decision on whether the witness statement include confidential information, thereby, breaches the confidentiality agreement concluded with the selling shareholders.

Another problem would be that in accordance with which criteria the tribunal would decide on to whose interests it will give priority. Although some rules have been developed by national courts, they are not as helpful as they seem, because they lack any guidance to which criteria the tribunal attaches more weight to while reconciling different interests. This leads tribunals to render inconsistent decisions that work against the fundamental principle of legal certainty. To establish a coherent framework and more predictable results for both parties and their counsels, this article suggests recourse to more established rules as in the work-product doctrine where the tribunals decide on disclosure of confidential information if the relevant party proves i) a substantial need for this confidential information to be disclosed during the proceedings and ii) that the party requesting disclosure lacks any ability to obtain such information by other means without undue hardship.

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