

31 March 2022

UNCITRAL Colloquium on possible future work on dispute settlement

	INSTITUTE
OF	STATE
AND	LAW

Centre for Climate Law  
and Sustainability Studies  
(CLASS)

# Technology-related disputes: Draft provisions on confidentiality

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# Importance of confidentiality

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**87% of  
respondents:**

**confidentiality in  
international  
commercial  
arbitration is of  
importance**

**Most  
respondents:**

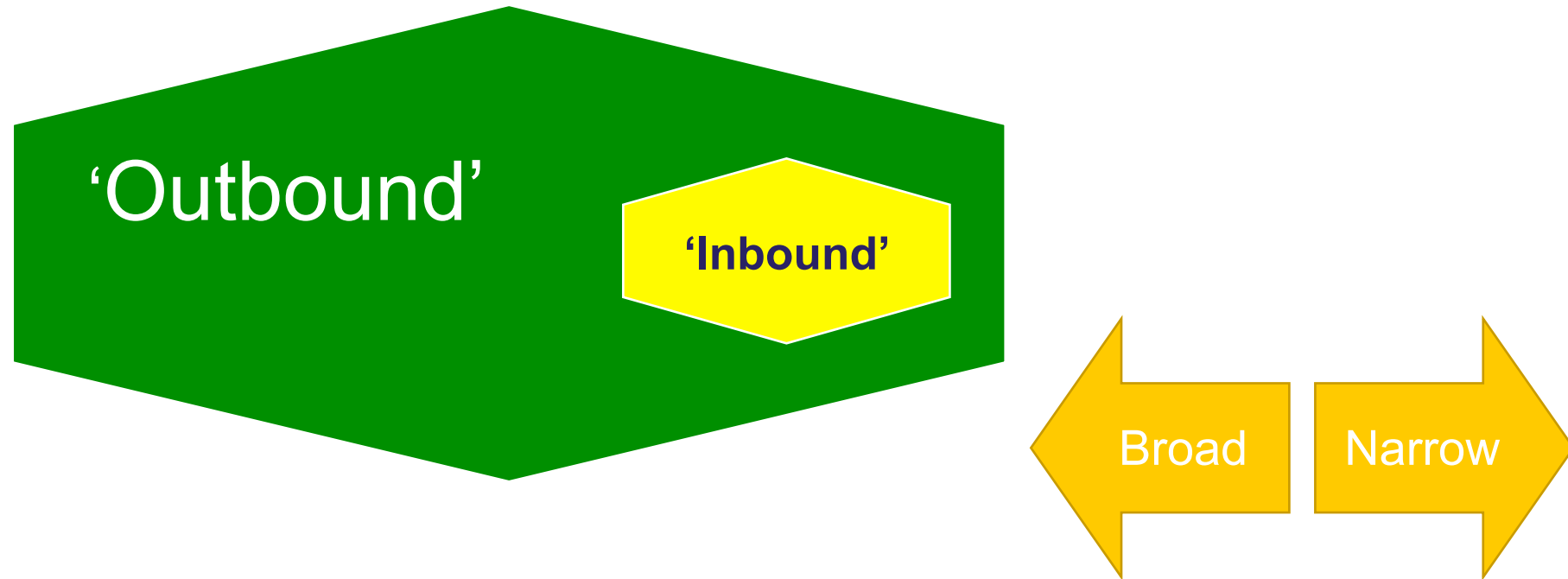
**confidentiality  
should be an opt-  
out, rather than an  
opt-in, feature**

**27%  
of respondents:**

**cybersecurity  
measures were  
used in more than  
50% of their cases  
over past 3 yrs**

2018 International Arbitration Survey: The Evolution of International Arbitration (Queen Mary, White & Case)  
2021 International Arbitration Survey: Adapting Arbitration to a Changing World (Queen Mary, White & Case)

# Confidentiality obligation



- Party
- Arbitral tribunal
- Third party (expert, witness)
- (Arbitral Institution)

- Applicable national law
- Arbitration Rules
- Confidentiality Agreement
- Order of the tribunal, protocol

# 'Outbound' confidentiality

## Draft provision 6

1. Unless expressly agreed otherwise, the parties undertake to keep confidential all awards and orders in the arbitration, together with the existence of the arbitration, all materials produced in and/or generated during the proceedings which are not otherwise in public domain, including materials created for the purpose of the arbitration and all other documents or evidence given by a party, witness, or expert, except and to the extent that a disclosure may be required:

- (a) to enforce or challenge an award in legal proceedings before a judicial authority or to pursue a legal right;
- (b) to comply with the provisions of the laws of any state, which are binding on the party making the disclosure;
- (c) to any government body, regulatory body, court a tribunal where the party is obliged by the law to disclose the above-mentioned information; or
- (d) to a professional or any other adviser of any of the parties, including any potential witness or expert.

2. The undertaking in paragraph 1 also applies to the arbitrators, and any person appointed by the arbitral tribunal, including any expert, and any administrative secretary to the arbitral tribunal. The parties shall seek the same undertaking of confidentiality from all those that it involves in the arbitration, including but not limited to any authorized representative, witness of fact, expert, or service provider.

3. The deliberations of the arbitral tribunal shall be confidential. The parties shall acknowledge this confidentiality and undertake to protect it.

4. The arbitral tribunal may take appropriate measures and sanction a party through an order or an award if a party breaches the duties in this draft provision.

5. A party intending to make disclosure in accordance with paragraph 1 must within a reasonable time prior to the intended disclosure notify the arbitral tribunal and the other parties (if during the proceeding) or the other parties (if the disclosure is after the conclusion of the proceeding) and furnish details of the disclosure including the reasons for the disclosure.

4. The duties in this draft provision shall survive the termination of the proceedings.

5. The arbitral tribunal may, in consultation with the parties, adopt any measure:

- (a) to protect any physical and electronic information shared in the arbitration; and
- (b) to ensure any personal data produced or exchanged in the arbitration is processed and/or stored in light of any applicable law.

# 'Inbound' confidentiality

## Draft provision 7

1. For the purposes of this draft provision, confidential information means any information, regardless of the medium in which it is expressed, which is:
  - (a) in the possession of a party;
  - (b) not accessible to the public;
  - (c) of commercial and/or scientific and/or technical sensitivity; and
  - (d) treated as confidential by the party possessing it.
2. A party invoking the confidentiality of any information it wishes or is required to submit during the proceeding, including to an expert appointed by the tribunal, shall request the arbitral tribunal to have the information classified as confidential with a copy to the other parties. Without disclosing the substance of the information, the party shall give the reasons for which it considers the information confidential. The other parties shall be given a reasonable opportunity to state its views. Upon receipt of any such request, the arbitral tribunal may invite the relevant parties to consult with each other with regard to the request.
3. If the other parties do not agree with the request, the arbitral tribunal shall determine whether the information is to be classified as confidential and of such a nature that absent special protection measures it would likely cause serious harm to the party making the request. If the arbitral tribunal so determines, it shall decide under which conditions and to whom the confidential information may in part or in whole be disclosed and shall require any person to whom the confidential information is to be disclosed to sign a confidentiality undertaking.
4. In exceptional circumstances, the arbitral tribunal may, at the request of a party or on its own motion and after consultation with the parties, designate an advisor to make the determination in accordance with paragraph 3.
5. The arbitral tribunal may also, at the request of a party or on its own motion and after consultation with the parties, appoint a person as an expert in accordance with article 29 of the UNCITRAL Arbitration Rules to report to it on the basis of the confidential information on specific issues designated by the arbitral tribunal without disclosing the confidential information either to the party from whom the confidential information does not originate or to the arbitral tribunal.