# Confidentiality in Arbitration: From Myth to Reality[1]

BÄR & KARRER

by Saverio Lembo and Vincent Guignet

1 Conference paper prepared for the 2015 Fall Meeting of the American Bar Association, International Section, in Montreal.

BÄR & KARRER AG
Brandschenkestrasse 90
8027 Zurich - Switzerland
T: +41 58 261 50 00
F: +41 58 261 50 01

www.baerkarrer.ch



Zurich, September 2015

# Confidentiality in Arbitration: From Myth to Reality[1]

by Saverio Lembo and Vincent Guignet

1 Conference paper prepared for the 2015 Fall Meeting of the American Bar Association, International Section, in Montreal.

## Introduction

Over the last decades, confidentiality in international business dispute resolution has become a growing concern. This can be explained by the conjunction of two factors: (1) the importance taken by immaterial assets, such as intellectual property, know-how and reputation, which, in today's interconnected world, count among the most valuable assets of the biggest multinational corporations. (2) the amount of detailed and often sensitive information that both parties are requested to exchange in the course of judicial proceedings. In this context, a dispute arising between important actors of the international business market may potentially prove to be very damageable for their immaterial assets. As a consequence of this growing need for confidentiality, one can observe a trend to favor arbitration as a dispute resolution mechanism.

Confidentiality is indeed often the first idea that comes to mind when asked to describe the advantages of arbitration. But is it really a given? Can a party truly expect a level of confidentiality equivalent to that afforded in more traditional judicial proceedings. And if so, where does confidentiality find a legal basis? What is its scope? Who exactly is bound by a confidentiality obligation? And what happens if such an obligation is breached?

The purpose of this short paper is to address these issues by analyzing the interplay between national laws, arbitration rules and agreements of the parties, in order to provide a basis for ensuring confidentiality when drafting a contract, especially when confidentiality is a primary concern for the parties involved.

We will first seek to clarify the grounds and scope of the confidentiality obligation, by providing a short overview of its application in some of the leading countries for arbitration (*infra* B). We will then analyze this issue under the most commonly used arbitration rules (*infra* C), before addressing the situation where a confidentiality obligation is breached (*infra* D). Finally, we will suggest ways to secure confidentiality in international arbitration (*infra* E), and present our conclusions (*infra* F).

## Grounds and Scope of Confidentiality – An International Overview

Confidentiality is not a defined notion in the realm of international arbitration. Its scope therefore differs depending on the jurisdiction in question. Looking for a legal basis for confidentiality is thus also a way to delineate its scope – both subjectively and objectively. Indeed, considering that an obligation of confidentiality applies, several questions arise as to the scope of this obligation.

First, as to the subjective scope of the obligation, it is incumbant to determine who are the recipients of the obligation. The following persons may potentially be subject to a confidentiality obligation:

- The parties, of course;
- The arbitrators and their staff;
- The lawyers;
- The arbitral institution and its staff (in case of an institutional arbitration);
- Finally, any third parties participating in the proceedings.

For the purpose of this paper, we will focus on the confidentiality obligation binding on the parties. The obligation binding on the arbitrators and on the lawyers is indeed largely admitted, because it follows from the mandate that they have received.

Second, as regards the objective scope of confidentiality, the question arises as to what exactly is covered by confidentiality? Is confidentiality an unlimited obligation covering even the very existence of the arbitration proceedings? Or, in the contrary, is confidentiality limited to one or more of the following:

- What is said during the hearings;
- The deliberation of the arbitrators;
- The orders and awards of the arbitral tribunal;

- The submissions exchanged by the parties, including their exhibits;
- The identity of the parties involved in the dispute.

We will attempt to define the ground and scope of the obligation of confidentiality in international arbitration by examining the way that some leading countries have dealt with the issue.

## United Kingdom

The approach to confidentiality in the United Kingdom is a reminder of the so called "*classical view*" on confidentiality, which – at an international level – remained unchallenged until the late 1980's[3]. According to this classical view, the private nature of arbitration obliges those participating in the proceedings to maintain confidentiality, without questioning its legal basis or scope[4]. In other words, the confidentiality of the arbitration proceedings is seen as an implied obligation, simply because arbitration is a private process[5].

This classical view is notably expressed in a British arbitration case dating back to 1991[6]. The rationale developed in that case is the following: If two parties agree that their dispute is be decided in private (that is, without any third party being allowed to access the hearings), then this privacy would be emptied of its purpose if the submissions of the parties, or the minutes of the hearings, were to be communicated to the public. According to this view, the confidentiality that results from the privacy of the hearings should therefore extend to the entire arbitration proceedings.

The common view in English law is therefore that arbitration comes with an implied duty of confidentiality, which encompasses in principle the existence of the arbitration proceedings itself[7]. In some cases however, English courts have accepted limited exceptions to the implied duty of confidentiality: first, in cases where a party has no choice but to submit a document obtained during the arbitration to protect its interests against third parties[8]; second, in cases where there is a legitimate reason for disclosure, such as the duty of disclosure owed by a company to its shareholders, if the dispute is likely to affect the corporate accounts[9]. As we will see, these are the usual exceptions found in most legal systems.

3 Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration*, Kluwer Law International, 2011, p. 1.
4 *Idem.*
5 Alan Redfern/Martin Hunter/Nigel Blackaby/Constantine Partasides, *Law and Practice of International Commercial Arbitration*, Sweer & Maxwell, 4th ed. 2004, p. 28.
6 *Dolling Baker v. Merrett*, (1991) 1 WLR 1205.
7 David Caron/Lee Caplan/Matti Pellonpää, *The UNCITRAL Arbitration Rules, a Commentary*, Oxford University Press, 2006, p. 34.
8 *Hassneh Insurance Co. of Israel v. Mew*, (1993) 2 Lloyd's Rep. 243.
9 *City of Moscow v. Bankers Trust Co*, (2003) EWHC 1377.

## France

In France, the issue of confidentiality in arbitration is not addressed in statutory law. The situation, however, used to be very similar as in the United Kingdom – where confidentiality is implied.

The leading case on this topic dates back to 1986[10]. In this case, the Paris Court of Appeal decided that the commencement of an appeal proceeding at the wrong forum, for the sole purpose of disclosing the award and raising a public debate, violated the principle of confidentiality. In that decision, the Court interestingly considered that confidentiality was inherent to "*the very nature of the arbitral procedure*"[11]. The idea that arbitration comes with an implied duty of confidentiality has been confirmed several times since then. In particular, the same Court found again, in 2003, that a party who decided to communicate in the press about an ongoing arbitration violated its implied obligation of confidentiality[12].

However, many French scholars have criticized this approach, leading the Paris Court of Appeal to reconsider its approach. In a case dating back to 2004, it indeed stated that the confidentiality of arbitration could not simply be assumed, but must be explained and grounded in French law[13]. The current situation, in France, as to the existence of an implied duty of confidentiality in arbitration proceedings, is therefore unclear.

## Australia

The "*classical view*" on confidentiality adopted in English common law has been radically rejected in Australia. The Australian courts decided to follow scholars who, as early as the 1990's, started to cast doubt about the interdependency of privacy and confidentiality[14] – as advocated by defenders of the classical view, who consider that confidentiality flows from privacy.

In a 1995 decision of the Australian Supreme Court[15], the notions of confidentiality and privacy were explicitly extracated from each other. The court held that:

- Privacy ensures that hearings take place behind closed doors. It must be understood as the right to exclude any foreign persons to the proceedings. Its scope is, however, limited to the hearings phase

10 Decision of Paris Court of Appeal of 18 February 1986 (*Aïta v. Ojjeh*), in Rev. Arb. 1986, p. 583.
11 *Idem.*
12 *Société True North v. Bleustein and others,* Rev. Arb. 2003, p. 189 *et seq.*
13 Decision of Paris Court of Appeal of 22 January 2004 (*Nafimco v. Foster Wheeler Trading Company*), cited in: E. Loquin, Les obligations de confidentialité dans l'arbitrage, Rev. Arb. 2006, n° 2, pp. 327-328.
14 Jan Paulsson/Nigel Rawding, *The Trouble with Confidentiality*, 11-3 Arb. Int'l 303 (1995).
15 *Esso Australia Resources Ltd. v. Sidney James Plowman*, (1995) 128 A.L.R. 391.

and does not relate to the entire arbitral process. Privacy simply sets a standard, according to which hearings are private, unless otherwise agreed upon by the parties.

- Confidentiality, on the other hand, is a much wider notion, which can be described as a state of secrecy attached to all materials created, presented and used in the context of the arbitration proceedings. Confidentiality thus reaches further in the proceedings, extending also to the pre and post hearing phases.
- Whenever the information disclosed in the context of an arbitration concerns public authorities or public services, there exists a presumption of disclosure even if the arbitration proceedings itself remains private[16].

As a consequence of that holding, Australian courts consider that the obligation of confidentiality in arbitration cannot be simply assimilated or confused with the notion of privacy – which is a much narrower obligation – and thus that such an obligation exists only through an express agreement of the parties[17].

## USA

Australian courts are not alone in rejecting the idea of an implied duty of confidentiality in arbitration. There is indeed longstanding case law in the United States that makes clear that confidentiality cannot be presumed in arbitration[18].

The leading case was rendered by the Federal Court of Delaware in 1988. In this case, the Government of the United States had requested that all documents relating to an ICC arbitration, which took place in Switzerland, to be released for use in the court proceedings[19]. The Delaware court ruled that this was possible, since neither the arbitration agreement nor the ICC Rules provided for confidentiality of the arbitration proceedings.

Since then, US case law appears stable in its reluctance to grant orders protecting confidentiality in arbitration, and persists in rejecting arguments that confidentiality may be considered as an implied obligation[20].

16 *Idem.*
17 Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration*, Kluwer Law International, 2011, p. 38.
18 Christophe Müller, *La confidentialité en arbitrage commercial international: un trompe-l'oeil?, in*: ASA Bulletin, Vol. 23 No. 2 (2005), pp. 218-219.
19 *United States v. Panhandle Eastern Corp.*, 118 F.R.D. 346 (D. Del 1988).
20 *Contship Containerslines Ltd v. PPG Industries Inc.* (SDNY, 23 April 2003); *Lawrence E. Jaffee Pension Plan v. Household International Inc.* (D Colo, 13 August 2004).

There is even a doubt as to the very admissibility of confidentiality agreements, within an arbitration clause: certain US courts have indeed held such agreements to be unenforceable as contrary to the public interest[21]. These cases often concern disputes where one of the parties is considered as a "*regular player*" of arbitration: this is typically the case in employment law disputes, where the employment contract contains an arbitration clause. The employer will always face the same sort of issues in front of arbitral tribunals, and thus acquire a knowledge that each single employee could never access if the arbitration case law were to remain confidential. For this reason, certain US courts have found that confidentiality of the arbitration would be contrary to the public interest.

## Norway

Norway is one of the rare country where statutory law makes clear that unless the parties have agreed otherwise, the arbitration proceedings are not subject to a duty of confidentiality. Article 5 of the Norwegian Arbitration Act of 14 May 2004 indeed provides the following:

> *"(1) Unless the parties have agreed otherwise, the arbitration proceedings and the decisions reached by the arbitration tribunal are not subject to a duty of confidentiality. (2) Third parties may only be present during arbitral proceedings when and to the extent that follows from the agreement between the parties"*[22].

This is a rare example of a legal system where arbitration proceedings are deemed non-confidential, save for an express agreement of the parties.

## Switzerland

Swiss law addresses arbitration under two different acts: whereas international arbitration is governed by the Chapter 12 of the Swiss Private International Law Act ("**PILA**"), domestic arbitration is governed by the Swiss Civil Procedural Code ("**CPC**"). Yet, neither the PILA nor the CPC contains any specific provision dealing with confidentiality.

21 *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 9th Cir. 2007; *Ting v. AT & T*, 319 F.3d 1126, 9th Cir. 2003.
22 Norwegian Arbitration Act of 14 May 2004, Article 5.

This being said, the silence of Swiss statutory law is not sufficient to conclude that no confidentiality regime applies to arbitration taking place in Switzerland. Chapter 12 PILA is indeed voluntarily silent on various issues regarding arbitration, because the Swiss legislator was willing to adopt a very flexible mechanism preserving the contractual nature of arbitration. Therefore, one cannot conclude that confidentiality is not an essential element of arbitration, simply because it is not mentioned in statutory law.

Swiss case law is of little help to clarify this issue. To date the Swiss Federal Tribunal (*i.e.* the Swiss Supreme Court) has not clarified whether, in the absence of an explicit agreement, the parties to an arbitration agreement are bound by an implied duty of confidentiality. The sole decisions that the Federal Tribunal has rendered in connection with this topic regard either the issues that arise when a confidential award is subject to an appeal[23], or the question of the confidentiality of the deliberations among arbitrators[24]. The first set of decisions is interesting because it raises the question of the limits of confidentiality in appeals. Swiss case law indeed considers that the confidentiality of arbitration proceedings cannot prevent the publication of the judgments rendered in an appeal[25]. This means that the parties cannot rely on the confidentiality of the arbitration when the case is with the Federal Tribunal. They can, however, request that their names be removed from the public version of the judgment or that the most sensitive parts of the judgment be redacted. The second set of decisions clarify that the deliberations of the arbitrators are confidential, although said confidentiality is limited to the construction of the majority and does not encompass the award rendered[26].

Absent any clarification from the Federal Tribunal on the implied or express obligation of confidentiality under Swiss law, it is necessary to rely on the position taken by Swiss scholars. Yet, Swiss scholars do not agree on the issue.

For a vast majority though, the parties to an arbitration agreement have an implied obligation to respect the confidentiality of the arbitration[27]. Some scholars base this implied obligation on the principle of good faith[28], whereas some others maintain that it flows from a common expectation of the parties that the proceedings will be confidential[29]. The idea behind this reasoning is that confidentiality must be regarded as an essential element of arbitration, which cannot be treated separately from the agreement of the parties to arbitrate[30].

Yet, this very assumption has been criticized in more recent publications.

23 Decision of the Federal Tribunal 4P.207/2002, 10.12.2002, para. 1.2; Decision of the Federal Tribunal 4P.74/2006, 19.06.2006, para. 8.1.
24 Decision of the Federal Tribunal 4P.154/2005, 10.11.2005, para. 6.2.
25 Decision of the Federal Tribunal 4P.207/2002, 10.12.2002, para. 1.2; Decision of the Federal Tribunal 4P.74/2006, 19.06.2006, para. 8.1.
26 Decision of the Federal Tribunal 4P.154/2005, 10.11.2005, para. 6.2.
27 Andrea Bucher/Pierre-Yves Tschanz, *International Arbitration in Switzerland*, Basel 1989, pp. 87-88; Jean-François Poudret/Sébastien Besson, *Comparative Law of International Arbitration*, Zurich 2002, p. 315-317; Bernhard Berger/Franz Kellerhals, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz*, Bern 2010, pp. 318-319.
28 Andrea Bucher/Pierre-Yves Tschanz, *International Arbitration in Switzerland*, Basel 1989, p. 88.
29 Jean-François Poudret/Sébastien Besson, *Comparative Law of International Arbitration*, Zurich 2002, p. 317; Bernhard Berger/Franz Kellerhals, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz*, Bern 2010, p. 319; Daniel Hochstrasser/Marc Blessing, *Basler Kommentar zum Internationalen Privatrecht*, Basel 2007, N 146 ad Intro to Chapter 12, p. 1475.
30 Alexander Jolles/Sonja Stark-Traber/Maria Canals de Cediel, Chapter 7 – Confidentiality, in: *International Arbitration in Switzerland – A Handbook for Practitioners*, The Hague/Zurich 2013, p. 135.

Some scholars indeed argue that it may not be assumed that the parties have tacitly reached a mutual understanding on confidentiality, simply because they did not address the issue when drafting their contract[31]. The ground for this argument is that confidentiality is not fundamentally necessary for the conduct of arbitral proceedings[32]. Indeed, if one accepts that confidentiality is not an essential characteristic of arbitration, then it may not be assumed that the parties, in signing an arbitration contract, intended to agree on a duty of confidentiality.

If a majority of scholars agrees on the principle of an implied obligation of confidentiality, there is no clear agreement as to the exact scope of this obligation[33]. In particular, there is no consensus as to whether confidentiality extents to the very existence of the arbitration, or should be limited to the hearings, the materials exchanged during the proceedings or the Orders and Awards. This obviously brings some uncertainty, even if it were established that confidentiality is an implied obligation.

## Intermediate Conclusion

To summarize, it is interesting to note that there is no consensus at the international level on the question of confidentiality: some jurisdictions, like England or France and, to a lesser extent, Switzerland, still consider that confidentiality must be assumed in arbitration proceedings. Some other jurisdictions, like the United States, Australia or Norway, reject this idea and consider that confidentiality exists only as a contractual creation, through the express agreement of the parties.

However, the existing debate on confidentiality as well as the fact that the situation is generally not clarified by case law leaves much uncertainty.

Therefore, parties who wish to secure the confidential character of their arbitration proceedings have to act proactively, as soon as they begin to draft. They have different options: (1) they can either select a set of arbitration rules with an explicit confidentiality provision, or (2) they may reach an express agreement on confidentiality, when drafting the arbitration agreement, or (3) they can agree on the principle and scope of confidentiality in the Terms of Reference – once the dispute has arisen (which may prove difficult, especially if the relationship between the parties has been damaged).

31 Marco Stacher, *Die Rechtsnatur des Schiedsvereinbarung*, Zurich 2007, N 391, pp. 172 *et seq*.; Philipp Ritz, *Privacy and Confidentiality Obligation on Parties in Arbitration under Swiss Law,* Journal of International Arbitration 17, 2010, pp. 238 *et seq*.

32 Marco Stacher, *Die Rechtsnatur des Schiedsvereinbarung*, Zurich 2007, N 391, p. 172; Philipp Ritz, *Privacy and Confidentiality Obligation on Parties in Arbitration under Swiss Law*, Journal of International Arbitration 17, 2010, p. 238.

33 Alexander Jolles/Sonja Stark-Traber/Maria Canals de Cediel, Chapter 7 – Confidentiality, in: *International Arbitration in Switzerland – A Hand-book for Practitioners*, The Hague/Zurich 2013, p. 135.

## The Situation under the most Frequently used Arbitration Rules

After having reviewed the way confidentiality is addressed in some of the leading countries for arbitration, we will now analyze the solution provided in the most commonly used arbitration rules. These are the UNCITRAL Arbitration Rules, the ICC Rules, the LCIA Rules and the Swiss Rules. As will be shown below, some of them legitimize the existence of an obligation of confidentiality through an express provision, whereas some others do not at all cover confidentiality.

### UNCITRAL

The UNCITRAL rules often serve as a reference in *ad hoc* arbitration. They are, however, very laconic on confidentiality.

Indeed, despite a strong commitment to protect the privacy of the hearings, in Article 28, paragraph 3, the only reference to confidentiality in the UNCITRAL Rules relates to the publicity of the award, at Article 34, paragraph 5, which provides that "*An award may be made public with the consent of all parties*". This clause does not explicitly mentions confidentiality. It however acknowledges that the award itself is confidential, since its publication necessitates the consent of all parties.

Apart from these two dispositions, the UNCITRAL Rules do not provide for a general obligation of confidentiality binding on the parties: in particular, nothing is said about the confidentiality of the proceeding itself, the confidentiality of the materials exchanged by the parties, the minutes of the hearings, etc.

It is therefore very difficult to ground an obligation of confidentiality binding on the parties when arbitration proceedings are governed by the UNCITRAL Rules. This is something that parties and counsel must certainly bear in mind when opting for these Rules.

## ICC

The ICC Rules, in their 2012 edition, are even less clear than the UNCITRAL Rules on confidentiality. They indeed do not deal at all with the confidentiality of the arbitration or the confidentiality of the award. The only provision that contains a reference to confidentiality is Article 22, paragraph 3. This clause provides that the arbitral tribunal may take measures for protecting confidential information. The ICC Rules however do not define what is understood by "*confidential information*", nor do they impose an obligation of nondisclosure on the parties. They simply mandate the Arbitral Tribunal to consider it as an option.

Concretely, Article 22 ICC Rules therefore does not create any duty of confidentiality in the arbitration; rather, any party who requests the arbitral tribunal to issue a confidentiality order must be able to rely on an autonomous legal basis for confidentiality[34]. Such legal basis may be found in a contract or in the *lex arbitri*, but not in the ICC Rules themselves.

Therefore, when choosing arbitration rules, it is worth bearing in mind that for the parties, the ICC Rules do not provide any legal basis for an obligation of confidentiality.

## LCIA

Unlike the two previous sets of Rules, the LCIA Rules offer a good frame for confidentiality. In particular, Article 30, paragraph 1 LCIA Rules provides for the confidentiality of all awards and all materials created for the purpose of the arbitration, unless the parties have agreed to the contrary. This broad obligation of confidentiality is tempered by the usual exceptions allowing disclosure, notably (1) if a party is under a legal duty to do so, (2) if disclosure is necessary to protect or pursue a legal right, or (3) to enforce or challenge an award in *bone fide* legal proceedings.

Besides, the LCIA Institution does not publish awards unless both the parties and the arbitral tribunal consent (Art. 30 para. 3 LCIA Rules).

34 Alexander Jolles/Sonja Stark-Traber/Maria Canals de Cediel, Chapter 7 – Confidentiality, in: *International Arbitration in Switzerland – A Handbook for Practitioners*, The Hague/Zurich 2013, p. 147; Nathalie Voser, *Overview of the Most Important Changes in the Revised ICC Arbitration Rules*, *In*: ASA Bull. 783, pp. 802-803.

The LCIA Rules thus constitute an option to be considered by parties willing to protect the confidentiality of a potential arbitration.

## Swiss Rules

The Swiss Rules, in their 2012 edition, provide for an implied obligation of confidentiality binding on the parties, which is comparable to the LCIA Rules: the relevant disposition, Article 44 Swiss Rules, makes clear that unless the parties expressly agree to the contrary, they undertake to keep confidential all awards and orders, as well as all materials submitted in the framework of the arbitral proceedings. The provision goes on with the usual exceptions to confidentiality, which are disclosure in case of a legal duty to do so or disclosure to protect a legal right.

This means that the scope of the confidentiality obligation under the Swiss Rules reaches quite far and encompasses everything that relates to the arbitration – although not the existence of the arbitration itself.

The same obligation applies to the arbitrators and their staff, the experts appointed by the tribunal, and all members of the Court and of the individual Chamber. Missing from this list are notably the party appointed experts or witnesses, who may therefore be invited to sign a confidentiality agreement when entering the proceedings.

As regards publication of the award, it is possible only if both the parties and the arbitral tribunal consent.

For all these reasons, the Swiss Rules are generally considered as the best option to protect confidentiality in arbitration[35]. However, even there, if confidentiality is really an important concern for the parties, only an express agreement concluded between them will result in a reliable duty of confidentiality corresponding to the parties' expectations and needs.

35 Alexander Jolles/Sonja Stark-Traber/Maria Canals de Cediel, Chapter 7 – Confidentiality, in: *International Arbitration in Switzerland – A Handbook for Practitioners*, The Hague/Zurich 2013, p. 147.

## Violation of Confidentiality

The violation of confidentiality and its consequences is not covered at all by any of the Arbitration Rules discussed above. The violation of a confidentiality obligation, in an arbitration taking place in Switzerland, may lead to different scenarios.

A first issue regards the very nature of the arbitration agreement encompassing the confidentiality obligation: traditionally, Swiss scholars tend to consider that an arbitration agreement is of a procedural nature exclusively[36]. Accordingly, any breach of the arbitration agreement is governed by procedural law (*i.e.* the *lex arbitri*)[37]. Swiss procedural law does not provide for compensation for damages as a remedy for breach of procedural duties[38]. Thus, based on this theory, some scholars consider that no compensation for damages may be awarded further to a violation of confidentiality[39].

Other scholars, highlighting the fact that the legal nature of the agreement is controversial, share the view that nothing prevents a party who has suffered damages because of a violation of an arbitration agreement to claim compensation[40]. In such a case – and if the existence of an obligation of confidentiality is not doubtful, be it as a result of an agreement between the parties or from a reference to a comprehensive set of Arbitration Rules – then the violation of such an obligation may be treated as a breach of contract, pursuant to Article 97 (and following) of the Swiss Code of Obligations (applicable as the *lex arbitri*).

Under this theory, a party victim of a breach of confidentiality could request either an interim order deterring further disclosure, or monetary damages as a compensation, or both. Practically, this however proves to be very difficult[41].

### Interim Measures

If we consider a request for interim measures aiming at deterring imminent disclosure, through a Confidentiality Order, the first question that arises is jurisdiction.

36 Gerhard Walter/Wolfgang Bösch/Jürgen Brönnimann, *Internationale Schiedsgerichtsbarkeit in der Schweiz, Kommentar zu Kapitel 12 des IPRG-Gesetzes*, Bern 1991, pp. 66-67; see also SFT (Decision of the Swiss Federal Tribunal) 116 Ia 56, para. 3 and SFT 101 II 168, para. 1, with reference to the pertinent precedents.

37 Simon Gabriel, *Damages for Breach of Arbitration Agreements*, in: *Arbitration in Switzerland, The Practitioner's Guide*, Part XII, Wolters Kluwer Law & Business 2013, para. 7.

38 Thomas Rüede/Reimer Hadenfeldt, *Schweizerisches Schiedsgerichtsrecht nach Konkordat und IPRG*, 2th ed., Zurich 1999, pp. 80-81; Daniel Girsberger/Simon Gabriel, *Die Rechtsnatur der Schiedsvereinbarung*, in: Mélanges en l'honneur de Pierre Tercier, Zurich 2008, p. 826; Max Guldener, *Schweizerisches Zivilprozessrecht*, 3rd ed., Zurich 1979, p. 263.

39 Thomas Rüede/Reimer Hadenfeldt, *Schweizerisches Schiedsgerichtsrecht nach Konkordat und IPRG*, 2th ed., Zurich 1999, p. 81.

40 Jean-François Poudret/Sébastien Besson, *Comparative Law of International Arbitration*, Zurich 2002, p. 321; Werner Wenger, *Kommentar zum schweizerischen Privatrecht, Internationales Privatrecht*, Basel 1996, N 69 ad Art. 178, pp. 1463-1464; Bernhard Berger/Franz Kellerhals, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz*, Bern 2010, pp. 319.

41 Christophe Müller, *La confidentialité en arbitrage commercial international: un trompe-l'oeil?*, *in*: ASA Bulletin, Vol. 23 No. 2 (2005), p. 232.

In arbitration proceedings taking place in Switzerland, both courts and arbitral tribunals have jurisdiction to order interim measures (Art. 183 para. 1 and 2 PILA). However, a party who really wants to secure confidentiality will want to avoid state court proceedings, since such proceedings would not be confidential[42]. It is thus advisable that such party requests interim measures from the arbitral tribunal itself[43].

The next issue is to identify the source of unwanted disclosures, in order to enable the arbitrators to direct their orders at specific entities[44]. Since the arbitrators' authority is limited against parties to the dispute, it should be contemplated that any third party accessing confidential information – such as an expert witness – enters into a separate confidentiality agreement providing for the jurisdiction of the same arbitral tribunal in case of a dispute[45].

In the end, it is worth reminding that no matter how precisely a Confidentiality Order is drafted, it will show its limits if a party refuses to comply with it. Indeed, arbitrators lack *imperium* and the only consequence that a violation of a confidentiality order may have is a negative inference on the final Award[46].

## Claim for Damages

Another option is to act subsequently to the occurrence of a breach of the confidentiality obligation, by filing a claim for damages. Unfortunately, this scenario proves difficult as well.

First, as far as jurisdiction is concerned, the arbitral tribunal empowered by the parties to rule on confidentiality will have jurisdiction as long as a breach of confidentiality occurs during the proceedings, *i.e.* at a stage where the parties can still modify or amplify their prayers for reliefs[47]. But what if such a breach arises *after* the award has been rendered?

In such an hypothesis – when the final award was rendered and communicated to the parties – the arbitral tribunal can no longer adjudicate on confidentiality. A new mandate from the parties would thus be needed to rule on this newly arisen issue[48] – which is a bit illusory, since the party in breach would certainly not accept to restart arbitration and would object to the jurisdiction of the tribunal. Yet, going to

42 Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration*, Kluwer Law International, 2011, p. 169.
43 Christophe Müller, *La confidentialité en arbitrage commercial international: un trompe-l'oeil?, in*: ASA Bulletin, Vol. 23 No. 2 (2005), p. 237.
44 *Ibid*., at p. 175.
45 Alexander Jolles/Sonja Stark-Traber/Maria Canals de Cediel, Chapter 7 – Confidentiality, in: *International Arbitration in Switzerland – A Hand-book for Practitioners*, The Hague/Zurich 2013, p. 148.
46 Thomas H. Webster/Michael Buhler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials*, London 2014, p. 345.
47 Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration*, Kluwer Law International, 2011, p. 168.
48 Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration*, Kluwer Law International, 2011, p. 169.

court may not be an option, since court proceedings would not be confidential. To avoid this situation, the parties should think about it when drafting the arbitration and confidentiality agreement: indeed, it would be sufficient to add an explicit provision, in the confidentiality agreement, that the arbitral tribunal retains the power to decide questions of confidentiality *after* the issuance of the final award[49].

With regards to the merits of a claim for damages, the victim of the breach should be in a position to notably evidence (i) proof of actual injury, which should be calculable in money, and (ii) causation. In practice, it is very hard, if not impossible, to argue that losses caused by a breach of confidentiality can be calculated against a market value – although much depends on the circumstances of the case. But even if losses can be precisely calculated (for instance by showing a decrease in share price following disclosure of the dispute), the causation link between the breach of confidentiality and the losses will be difficult to prove (indeed, many factors might contribute to a drop in the share price).

Therefore, considering the difficulty to establish and prove damages arising from the violation of a duty of confidentiality, parties may want to consider drafting a penalty clause setting forth a definite amount due in case of breach[50] (pursuant to Articles 160 and following of the Swiss Code of Obligations).

## Contractual Clauses to Secure Confidentiality

### Issues to Consider

In view of the above, parties who really want to secure the confidentiality of their dispute should consider adding a confidentiality provision next to the arbitration clause and make sure that they address the following issues[51]:

- The identity of the parties bound by the confidentiality agreement;
- The exact scope of the confidentiality obligations, which could be restrictive or extensive;
- The confidentiality obligations that third parties allowed to the arbitration would have to agree upon;
- The sanctions for breaching the agreement (which may include payment of a penalty);

49 Alexander Jolles/Sonja Stark-Traber/Maria Canals de Cediel, Chapter 7 – Confidentiality, in: *International Arbitration in Switzerland – A Hand-book for Practitioners*, The Hague/Zurich 2013, p. 148; Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration*, Kluwer Law International, 2011, p. 169.

50 Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration*, Kluwer Law International, 2011, p. 183.

51 Leon E. Trakman, *Confidentiality in International Commercial Arbitration*, in Arbitration International, n° 18 (2002), pp. 11-14; Christophe Müller, *La confidentialité en arbitrage commercial international: un trompe-l'oeil?, in*: ASA Bulletin, Vol. 23 No. 2 (2005), p. 236.

- The authority having jurisdiction to rule on a breach of confidentiality (which may be the same arbitral tribunal if parties want to avoid state courts, in order to preserve confidentiality);
- And finally, the possibility to waive the right to appeal the award (pursuant to Art. 192 para. 1 IPRG), which is possible when the arbitration takes place in Switzerland if both parties are non-Swiss and want to avoid the publicity of appeal proceedings.

### Limitations

When drafting such a clause, it is obviously important to define the degree of confidentiality that is expected in a specific case. Indeed, absolute confidentiality is most of the time impossible to provide and must come with legitimate exceptions[52]. In particular, it is necessary to consider carefully whether the parties are under any legal obligations to make disclosure – which may be the case if a party has to disclose the existence of the arbitration/the award in due diligence, or to banks, creditors, shareholders, regulatory authorities, etc. If such is the case, then it is important to provide that the parties would be entitled to disclose the award in such a situation.

## Conclusions

This brief analysis shows that, although arbitration is commonly seen as a confidential process, this is not always the case and may vary significantly from a country to another, or from a set of institutional rules to another. Therefore, one should not assume that there is a uniform standard of confidentiality in international arbitration. The view that the parties' duty of confidentiality is implied, or that it arises from the arbitration agreement, is indeed contradicted by case law in certain countries and called into question in recent publications.

For international arbitration taking place in Switzerland, this uncertainty is reinforced by the fact that neither the Federal Tribunal nor any Swiss court has yet had the opportunity to rule on this issue.

Therefore, if in a particular case, parties are concerned with confidentiality, they should make sure that they either:

52 Alexander Jolles/Sonja Stark-Traber/Maria Canals de Cediel, Chapter 7 – Confidentiality, in: *International Arbitration in Switzerland – A Hand-book for Practitioners*, The Hague/Zurich 2013, p. 147.

- Introduce confidentiality clauses in the arbitration agreement and define the exact scope and extent of confidentiality; or
- Choose Arbitration Rules that provide for a strict duty of confidentiality, such as the Swiss Rules;
- They can also draw up separate confidentiality agreements for third-party participants;
- And finally, they can insert a penalty clause in the arbitration contract or in the Terms of Reference, in case of violation of the obligation of confidentiality.

This being said, it is also worth bearing in mind that confidentiality cannot be absolute and will always be limited by the classical exceptions, which are legal duties of disclosure, appeal or enforcement proceedings.

## Bibliography


1) Bernhard Berger/Franz Kellerhals, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz*, Bern 2010.
2) Andrea Bucher/Pierre-Yves Tschanz, *International Arbitration in Switzerland*, Basel 1989.
3) David Caron/Lee Caplan/Matti Pellonpää, *The UNCITRAL Arbitration Rules, a Commentary*, Oxford University Press, 2006.
4) Laurence Craig/William Rusty Park/Jan Paulsson, *International Chamber of Commerce Arbitration*, 2000.
5) Francois Dessemontet, *Arbitration and Confidentiality,* The American Review of International Arbitration, Vol. 7, nos. 3-4, 1996.
6) Alexander Jolles/Sonja Stark-Traber/Maria Canals de Cediel, Chapter 7 – *Confidentiality*, in: *International Arbitration in Switzerland – A Handbook for Practitioners*, The Hague/Zurich 2013.
7) Simon Gabriel, *Damages for Breach of Arbitration Agreements*, in: *Arbitration in Switzerland, The Practitioner's Guide*, Part XII, Wolters Kluwer Law & Business 2013.
8) Daniel Girsberger/Simon Gabriel, *Die Rechtsnatur der Schiedsvereinbarung*, in: Mélanges en l'honneur de Pierre Tercier, Zurich 2008.
9) Max Guldener, *Schweizerisches Zivilprozessrecht*, 3rd ed., Zurich 1979.
10) Daniel Hochstrasser/Marc Blessing, *Basler Kommentar zum Internationalen Privatrecht*, Basel 2007.
11) Pierre Lalive/Jean-François Poudret/Claude Reymond, *Le droit de l'arbitrage interne et international en Suisse*, Lausanne 1989.
12) Eric Loquin, *Les obligations de confidentialité dans l'arbitrage*, Rev. Arb. 2006, n° 2.
13) Christophe Müller, *La confidentialité en arbitrage commercial international: un trompe-l'oeil?*, in: ASA Bulletin, Vol. 23 No. 2 (2005).
14) Jan Paulsson/Nigel Rawding, *The Trouble with Confidentiality*, 11-3 Arb. Int'l 303 (1995).
15) Jean-François Poudret/Sébastien Besson, *Comparative Law of International Arbitration*, Zurich 2002.
16) Noradèle Radjai, *Confidentiality in International Arbitration*, ASA Bulletin 1/2009, pp. 48-49.
17) Alan Redfern/Martin Hunter/Nigel Blackaby/Constantine Partasides, *Law and Practice of International Commercial Arbitration*, Sweer & Maxwell, 4th ed. 2004.
18) Philipp Ritz, *Privacy and Confidentiality Obligation on Parties in Arbitration under Swiss Law*, Journal of International Arbitration 17, 2010.

19) Thomas Rüede/Reimer Hadenfeldt, *Schweizerisches Schiedsgerichtsrecht nach Konkordat und IPRG*, 2th ed., Zurich 1999.
20) Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration*, Kluwer Law International, 2011.
21) Marco Stacher, *Die Rechtsnatur des Schiedsvereinbarung*, Zurich 2007.
22) Leon E. Trakman, *Confidentiality in International Commercial Arbitration*, in Arbitration International, n° 18 (2002).
23) Pierre-Yves Tschanz, *Confidentiality of Swiss Supreme Court Review of Arbitral Awards*, Geneva 2006.
24) Nathalie Voser, *Overview of the Most Important Changes in the Revised ICC Arbitration Rules, In:* ASA Bull. 783.
25) Gerhard Walter/Wolfgang Bösch/Jürgen Brönnimann, *Internationale Schiedsgerichtsbarkeit in der Schweiz, Kommentar zu Kapitel 12 des IPRG-Gesetzes*, Bern 1991.
26) Thomas H. Webster/Michael Buhler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials*, London 2014.
27) Werner Wenger, *Kommentar zum schweizerischen Privatrecht, Internationales Privatrecht*, Basel 1996.