

Confidentiality in International Arbitration:

Brief overview of the position in Switzerland and further reading

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There is no express duty of confidentiality under Swiss law applying to the parties to an arbitration. The Swiss PIL Act is silent on the matter. However, and in spite of the absence of supporting case law, Swiss commentators have argued that there is an implied obligation, under the agreement to arbitrate, to respect the confidentiality of the arbitration.¹ Certain commentators have also expressed the view that arbitral proceedings in Switzerland are subject to a relatively high degree of confidentiality, even absent an explicit agreement to that effect.²

In order to meet the expectations of confidentiality, parties can of course enter into an explicit confidentiality agreement or agree upon institutional rules providing for confidentiality. Article 43(1) of the Swiss Rules of International Arbitration imposes a general duty of confidentiality upon the parties, arbitrators, the tribunal-appointed experts, the secretary of the arbitral tribunal and the Swiss Chambers. However, a statutory obligation to make disclosure or a party's need to preserve its legal rights (e.g. by initiating court proceedings, notably to set aside an award) will prevail.³

In Switzerland, arbitrators have an obligation to keep confidential all facts and circumstances relating to the parties and to the dispute that are not in the public domain and which become known to them in the course of the proceedings.⁴ This duty is ongoing and does not end with the conclusion of the arbitration.⁵ There is an exception where, for the purpose of performing their task, the arbitrators may divulge information to third parties such as

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¹ A. Bucher & P. Tschanz, *International Arbitration in Switzerland* (Basel: Helbing & Lichtenhahn, 1988), p. 87; Marc Blessing, *Requirements and Expectations regarding a modern place of arbitration*, in Berti et al., eds., *International Arbitration in Switzerland* (Basel: Helbing & Lichtenhahn, 2000), p. 153.

² A. Jolles & M. Canals de Cediël, *Confidentiality*, in Kaufmann-Kohler & Stucki, *International Arbitration in Switzerland: A Handbook for Practitioners* (The Hague: Kluwer Law International, 2004), p. 93.

³ M. Wirth, Art. 189, in Berti et al., eds., *International Arbitration in Switzerland* (Basel: Helbing & Lichtenhahn, 2000), p. 567; A. Jolles & M. Canals de Cediël, *Confidentiality*, in Kaufmann-Kohler & Stucki, *International Arbitration in Switzerland: A Handbook for Practitioners* (The Hague: Kluwer Law International, 2004), pp. 100-101.

⁴ H.-H. Inderkum, *Der Schiedsrichtervertrag*, Dissertation, Fakultät der Universität Freiburg (Schweiz), 1988, p. 142.

⁵ Rüede & Hadenfeldt, *Schweizerisches Schiedsgerichtsrecht*, 2nd edn, Schultess, Zurich 1993, p. 156.

tribunal-appointed experts.⁶ Swiss legal commentators derive the arbitrators' duty of confidentiality from the fiduciary relationship that arises from the contract between arbitrators and parties.⁷ Arbitrators also have an obligation to keep confidential the deliberations and votes of the arbitral tribunal.⁸

Finally, as a general rule, Swiss court proceedings, including arbitration-related proceedings, are public.⁹ Court decisions concerning arbitral awards are therefore often published, but in most cases, the anonymity of the parties and of the dispute is maintained, whilst the identity of the arbitrators is sometimes disclosed.

⁶ H.-H. Inderkum, *Der Schiedsrichtervertrag*, Dissertation, Fakultät der Universität Freiburg (Schweiz), 1988, p. 143.

⁷ A. Bucher & P. Tschanz, *International Arbitration in Switzerland* (Basel: Helbing & Lichtenhahn, 1988), p. 65.

⁸ P. Lalive, J.-F. Poudret & C. Reymond, *Le droit de l'arbitrage interne et international en Suisse*, Payot, Lausanne 1989, p. 414; A. Heini, M. Keller, K. Siehr, F. Vischer & P. Volken, *IPRG-Kommentar*, Schulthess, Zurich 1993, p. 1573; M. Wirth, Art. 189, in Berti et al., eds., *International Arbitration in Switzerland* (Basel: Helbing & Lichtenhahn, 2000), p. 545, 551; Decision of the Swiss Federal Tribunal of 12 November 1991 in [1992] ASA Bull. 265.

⁹ Decision of the Swiss Federal Tribunal of 19 June 2006, 4P.74/2006: published in [2006] ASA Bull., pp. 761-778, para. 8.1; Decision of the Swiss Federal Tribunal of 10 December 2002, 4P.207/2002: published in [2003] ASA Bull., pp. 585-595.