Part II: Confidentiality of Arbitration in Switzerland

I  INTRODUCTION

Arbitration users and practitioners frequently cite the confidentiality of arbitral proceedings as one of the core features or advantages of arbitration. According to recent international arbitration surveys (hereafter, the Queen Mary Survey), a majority of respondents consisting of users and practitioners of arbitration said that confidentiality is "very important" for them in international arbitration and one third said that confidentiality and privacy was one of the three most valuable characteristics in international arbitration. Only one per cent considers confidentiality not to be important at all. Moreover, half of the respondents assumed arbitration to be confidential even in the absence of a confidentiality agreement between the parties. Indeed, confidentiality is widely perceived as being fundamental to arbitral proceedings.

The legal basis for an inherent duty of confidentiality is nevertheless difficult to define. This is particularly so in cases where there is no explicit confidentiality obligation, either in the arbitration rules or in the arbitration agreement. Section II of this Chapter considers further the possible sources of confidentiality for arbitrations conducted in Switzerland.

Another complex feature of confidentiality in arbitration is that its scope varies depending on the circumstances and does not apply equally to all the actors involved in the arbitration. Section II considers the extent to which a duty of confidentiality applies to different participants involved in arbitration in Switzerland.

Section IV contains an overview of situations where the duty of confidentiality may arise and Section V considers potential remedies for a breach of the duty of confidentiality.


3 Sixty-two percent.


II SOURCES OF CONFIDENTIALITY OBLIGATIONS

5 If a party wishes to rely upon or allege a breach of a duty of confidentiality in arbitration, it must identify the legal basis of this duty. Like any other claim, the party alleging a breach bears the burden of proof for its assertion. The inability to point to a specific source of confidentiality has resulted in courts rejecting claims for breaches of confidentiality.7

A Confidentiality Agreement

6 The clearest possible source of a duty of confidentiality is an express confidentiality agreement between the parties. The parties can enter into an agreement outlining their respective confidentiality obligations in the arbitration agreement or in a separate instrument or request the tribunal to issue a procedural order in this respect.8 In the absence of an express agreement or order, duties of confidentiality may arise under the applicable domestic law or under the arbitration procedural rules.

B Domestic Laws

1 Determining the Applicable Law

7 Some domestic laws contain provisions regarding confidentiality. A preliminary question to be determined is therefore the applicable law to issues of confidentiality.9 This is particularly important in light of the diverse approaches to confidentiality across different jurisdictions.10

8 For arbitrations conducted in Switzerland, issues of confidentiality are not necessarily governed by Swiss law by virtue of the seat of arbitration being in Switzerland. Some Swiss authors consider that the duty of confidentiality is a substantive obligation, and is therefore governed either by the law applicable to the underlying contract, or the law with the closest connection to the arbitration, pursuant to Art. 187 PILS.11 This approach is based on the notion that the duty of confidentiality also governs

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9 Jolles/Canals de Cediel, p. 91.


the parties’ relationship outside of the scope of the arbitral procedure.\textsuperscript{12} However, the limitation to this approach is that Art. 187 PILS deals with the law governing the underlying contract, and not the arbitration agreement. Therefore, unless the duty of confidentiality arises from the underlying contract and extends to the arbitration, the law applicable to issues of confidentiality may not be determined according to Art. 187 PILS. Other Swiss authors submit that the duty of confidentiality is an accessory to the arbitration agreement\textsuperscript{13} and is thus governed by the law applicable to the arbitration agreement, unless the lex arbitri contains provisions dealing with confidentiality, in which case the latter applies.\textsuperscript{14}

Some authors propose the application of international principles, like the lex mercatoria, to decide if and to what extent the duty of confidentiality exists in the arbitral process.\textsuperscript{15} However, the merits of such an approach are questionable in the continued absence of a uniform international standard of confidentiality in arbitration.\textsuperscript{16}

\section*{The Swiss Position}

Few countries have included confidentiality rules in their arbitration legislation. This is likely because legislators are wary of forcing parties to arbitrate in confidence absent any agreement to this effect.\textsuperscript{17}

Switzerland is no exception in this regard. Neither the Swiss Arbitration Law, Chapter 12 PILS, nor the new Swiss Code of Civil Procedure (ZPO)\textsuperscript{18} addresses the question of confidentiality in arbitration.\textsuperscript{19} Nor has the Swiss Federal Supreme Court clearly defined the scope and application of confidentiality in international arbitration. The law on the duty of confidentiality in international arbitration in Switzerland, as in many other jurisdictions, remains unsettled\textsuperscript{20} and varies in its application to the various participants in the arbitration as set out in Section III below.

\section*{Procedural Rules}

Arbitrations in Switzerland may be conducted in accordance with specific procedural rules, which may be a pre-defined set of rules, such as institutional rules, that are

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\item Ritz, J.Int. Arb. 2010, p. 241.
\item Poudret/Besson, paras. 294, 369.
\item Poudret/Besson, para. 294. The lex arbitri was apparently applied to issues of confidentiality by the Swedish Supreme Court in the Bulbank Case, Judgment of 30 March 1999, A.I. Trade Finance Inc. v. Bulgarian Foreign Trade Bank, Swed Court of Appeal, Medley’s I.A.R. no. 4 1999, A-1–A-3; Judgment of 27 October 2000, A.I. Trade Finance Inc. v. Bulgarian Foreign Trade Bank, Swedish Supreme Court, Medley’s I.A.R. no. 11 2000, B-1. Although the seat of arbitration was in Sweden, neither of the parties was Swedish and the choice of law clause provided for the application of Austrian law. It appears therefore that the Swedish courts assumed that Swedish law as the lex arbitri should apply to the issue of confidentiality.
\item Ritz, J.Int. Arb. 2010, p. 229; ILA, Giovannini/Giord (footnote 10 above), p. 7; Poudret/Besson, para. 368.
\item See Young/Chapman, ASA Bull. 2009, p. 32; Giovannini/Giord (footnote 10 above), pp. 1–2.
\item This entered into force on 1 January 2011 and replaces the former Intercantonal Arbitration Convention.
\item Ritz, J.Int. Arb. 2010, p. 229; Giovannini/Giord (footnote 10 above), pp. 1–2; Furrer, p. 807; Berger/Kellerhals, para. 1231.
\item Weigand, para. 12.109; Born, p. 2779; Jolles/Canals de Cediol, p. 100.
\end{thebibliography}
adopted for the arbitration. Many of these procedural rules include confidentiality provisions, although they vary in terms of the scope of the duty.\textsuperscript{22}

13 Absent a contrary agreement of the parties, hearings are held in private according to all of the main procedural rules.\textsuperscript{23} Some rules specifically provide for confidentiality of the arbitration's existence\textsuperscript{24} and of the deliberations.\textsuperscript{25} Publication of the award is, subject to the parties' contrary agreement, usually either expressly allowed\textsuperscript{26} (sometimes under certain conditions such as the removal of the parties' names),\textsuperscript{27} or excluded.\textsuperscript{28} Other rules go as far as specifically providing for documents disclosed or created during the proceedings to be subject to confidentiality.\textsuperscript{29} Some rules expressly provide that arbitrators may make orders concerning the confidentiality of the arbitration proceedings.\textsuperscript{30}

14 As to the actors bound by duties of confidentiality, the rules differ. The rules may impose a duty of confidentiality on the arbitrators and the institution,\textsuperscript{31} the parties,\textsuperscript{32} and even sometimes on experts or witnesses.\textsuperscript{33}

\footnotesize{\textsuperscript{21} Ong, Asian International Arbitration Journal 2005, pp. 173–174; Swiss Rules, Art. 44; AAA Rules (International Arbitration), Art. 37; BANI (Indonesian National Board of Arbitration) Rules, Art. 13(2); CIETAC (China International Economic and Trade Arbitration Commission) Rules, Art. 38; CRCICA (Cairo Regional Centre for International Commercial Arbitration) Rules, Art. 40; DIAC (Dubai International Arbitration Centre) Rules, Art. 41; DIS Rules, Art. 43; LCIA Arbitration Rules, Art. 30; CAM (Chamber of Arbitration of Milan) Rules, Art. 8; SCC (Stockholm Chamber of Commerce) Arbitration Rules, Art. 3; SIAC (Singapore International Arbitration Centre) Rules, Art. 39; WIPO Rules, Arts. 75–78.

\textsuperscript{22} The WIPO rules are considered to be the most thorough regime on confidentiality in arbitration, Blessing, Chapter Twelve, para. 380. For a detailed comparison of the provisions on confidentiality in various sets of arbitration procedural rules, see Hwang/Chung, J. Int Ab. 2009, pp. 637–642 and Edwards, Int. A.L.R. 2001, pp. 94–95.

\textsuperscript{23} Swiss Rules, Art. 25(6); AAA Rules, Art. 23(6); BANI Rules, Art. 13(2); CIETAC Rules, Art. 38(1); CRCICA Rules, Art. 28(3); DIAC Rules, Art. 28(3); ICC Rules, Art. 26(3); LCIA Rules, Art. 19(4); SCC Rules Art. 32(3); SIAC Rules, Art. 24(4); UNCITRAL Rules, 28(3); VIAC (Vienna International Arbitral Centre) Rules, Art. 30(2); WIPO Rules, Art. 55(c).

\textsuperscript{24} SCC Rules, Art. 3; SIAC Rules, Art. 39(3); WIPO Rules, Art. 75.

\textsuperscript{25} Swiss Rules, Art. 44(2); AAA Rules, Art. 37; BANI Rules, Art. 13(2); CRCICA Rules, Art. 40(2); DIAC Rules, Art. 41(2); DIS Rules, Art. 43; LCIA Rules, Art. 30(2); CAM Rules, Art. 8(1); SIAC Rules, Art. 39(1).

\textsuperscript{26} AAA Rules, Art. 30(3); CAM Rules, Art. 8(2); VIAC Rules, Art. 41.

\textsuperscript{27} AAA Rules, Art. 30(3); DIS Rules, Art. 42; CAM Rules, Art. 8(2); VIAC Rules, Art. 41; CRCICA Rules, Art. 40(3).

\textsuperscript{28} Swiss Rules, Art. 44(2); CRCICA Rules, Art. 40(3); DIAC Rules, Art. 37(9); DIS Rules, Art. 42; ICSID Rules, Art. 48(4); LCIA Rules, Art. 30(3); UNCITRAL Rules, Art. 28(3).

\textsuperscript{29} Swiss Rules, Art. 44(1); BANI Rules, Art. 13(2); CRCICA Rules, Art. 40(1); DIAC Rules, Art. 41(1); DIS Rules, Art. 43(1); LCIA Rules, Art. 30(1); SIAC Rules, Art. 39(1); WIPO Rules, Art. 76; IBA Rules on Evidence, Art. 3.13.

\textsuperscript{30} ICC Rules, Art. 22(3); IBA Rules on Evidence, Art. 3.13.

\textsuperscript{31} Swiss Rules, Art. 44(1); AAA Rules, Art. 37(1); BANI Rules, Art. 13(2); CIETAC Rules, Art. 38; CRCICA Rules, Art. 40(1); DIS Rules, Art. 43(1); CAM Rules, Art. 8(1); SCC Rules, Art. 3; VIAC Rules, Arts. 2(4), 4(4), 16(2); WIPO Rules, Art. 78.

\textsuperscript{32} Swiss Rules, Art. 44(1); BANI Rules, Art. 13(2); CIETAC Rules, Art. 38(2); DIS Rules, Art. 43(1); LCIA Rules, Art. 30(1); CAM Rules, Art. 8(1); SIAC Rules, Art. 39; WIPO Rules, Art. 75.

\textsuperscript{33} CIETAC Rules, Art. 38(2); CRCICA Rules, Art. 40(1); CAM Rules, Art. 8(1); DIS Rules, Art. 43(1); WIPO Rules, Art. 76(b). In 2010, the Chamber of Arbitration of Milan amended its arbitration rules to explicitly extend the duty of confidentiality to the parties, whereas in the previous rules the duty only extended to the Chamber itself, the arbitral tribunal, as well as expert witnesses. See Arts. 8(1) of the 2004 and the 2010 Rules of Arbitration of the Chamber of Arbitration of Milan.
The fact that Swiss legislation is silent as to confidentiality in arbitration, coupled with the generally regarded perception that confidentiality is an inherent concept of international arbitration in Switzerland, led the Swiss Chambers of Commerce to introduce a provision on confidentiality in their Rules. They include a provision that all awards, orders, materials submitted by another party, and the hearings are confidential. The confidentiality duty applies to the parties, the arbitrators, the chamber (including the members of the board of directors and the staff of the individual Chambers) and the secretary of the arbitral tribunal, as well as the experts appointed by the tribunal. However, under the Swiss Rules, witnesses and party-appointed experts are not bound by the duty of confidentiality and are therefore a potential source of unwanted disclosure of confidential information. To resolve this, the parties could enter into specific confidentiality agreements with these third parties.

Other Switzerland-based arbitration institutions also provide for the confidentiality principle in their rules, such as the Court of Arbitration for Sport (CAS) and the Swiss-American Chamber of Commerce (AmCham).

Most arbitral institution rules, like the Swiss Rules, do not provide for blanket rules on confidentiality, but contain certain exceptions, such as disclosure when the information is already in the public domain, if there is a legal duty to disclose, in order to protect or pursue one's rights, or in the course of enforcement or challenge proceedings.

34 See above, paras. 10 and 11.
35 See below, paras. 22 and 23.
37 Art. 44 Swiss Rules.
38 Art. 44(1) Swiss Rules. Art. 44(1) of the Swiss Rules is not mandatory and the parties can therefore waive it. Giovannini/Giroud (footnote 10 above), pp. 4–7.
40 Rule 43 of the CAS Rules of Arbitration reads as follows: "Proceedings under these Procedural Rules are confidential. The parties, the arbitrators and the CAS undertake not to disclose to any third party any facts or other information relating to the dispute or the proceedings without the permission of the CAS. Awards shall not be made public unless all parties agree or the Division President so decides." On this provision, see the above commentary of Noth (Chapter 15).
41 Art. 8(5) of the AmCham Arbitration Rules reads as follows: "The arbitration proceedings are confidential. All parties to the proceedings, the parties representing the arbitrators etc. are bound to keep secret all aspects of the arbitration proceedings, in particular the nature and contents of any party statements as well as opinions expressed by the Arbitral Tribunal."
42 Swiss Rules, Art. 44(1).
44 Swiss Rules, Art. 44(1); CRCICA Rules, Art. 40(1); DIAC Rules, Art. 41(1); LCIA Rules, Art. 30(1); SIAC Rules, Art. 39(3); WIPO Rules, Art. 76.
45 Swiss Rules, Art. 44(1); BANI Rules, Art. 13(2); CRCICA Rules, Art. 40(1); DIAC Rules, Art. 41(1); LCIA Rules, Art. 30(1); SIAC Rules, Art. 39(2).
46 Swiss Rules, Art. 44(1); CRCICA Rules, Art. 40(1); DIAC Rules, Art. 41(1); LCIA Rules, Art. 30(1); CAM Rules, Art. 8(1); SIAC Rules, Art. 39(2); UNCITRAL Rules, Art. 34(5); WIPO Rules, Arts. 75 and 77(3).
47 Swiss Rules, Art. 44(1); CRCICA Rules, Art. 40(1); LCIA Rules, Art. 30(1); SIAC Rules, Art. 39(2); UNCITRAL Rules, Art. 34(5); WIPO Rules, Art. 75.
III APPLICATION OF CONFIDENTIALITY OBLIGATIONS TO DIFFERENT
PLAYERS IN THE ARBITRATION

A The Parties

18 In Switzerland, the parties’ duty to keep the information concerning the arbitration
and related matters confidential is sometimes said to flow from the concluded
arbitration agreement, or as an “accessory obligation”.48 Some authors consider
that the arbitration agreement itself imposes a duty of confidentiality on the parties
based on the principle of good faith.49 This view is, however, not uniform, as others
contest the existence of such a duty absent an express agreement deducted from
the actions of the parties in a particular case.50

19 Another similar approach constructs a contractual duty of confidentiality based
on the parties’ intentions. The arbitration agreement is subject to interpretation
based on the provisions of the Swiss Code of Obligations,51 which provides that the
interpretation of a contract must primarily take into account the true intentions of
the parties.52 The expression of intent may be express or implied.53 As Swiss legal
literature supports the idea that the parties expect the proceedings to be confidential,54
it is argued that by entering into the arbitration agreement, the parties impliedly
agree to confidentiality.55 Under Swiss law, implied declarations can be inferred
from silence or tacit declarations, the latter being determined on the basis of active
behavior. However, in both cases, the conduct of the party must show an intention
to be bound.56 Proving this behavior in a standard arbitration could prove to be
challenging in practice as there may be paucity of evidence relating to the parties’
expectations of confidentiality.57

20 Another principle of contractual interpretation under Swiss law is amendment of
the agreement by the judge or arbitrator whenever the agreement is silent on an
essential matter that the parties should have addressed,58 or “gap-filling”. However,
as confidentiality is not deemed to be a compulsory element of arbitration,
the absence of an express provision on confidentiality cannot be considered as a lacuna
that has to be interpreted into the agreement.59

48 Poudre/Besson, para. 369; Kaufmann-Kohler/Rigozzi, 2015, para. 3.34; Radjai, ASA Bull. 2009,
p. 48; Giovannini/Giroud (footnote 10 above), pp. 1–2. See also Jolles/Canals de Cediel, p.100;
see also para. 8 above.
49 Bucher/Tschanz, para. 169; Bucher, para. 205; Ritz, J.Int.Arb. 2010, pp. 238–239.
50 Furrer, p. 810; Ritz, J.Int.Arb. 2010, p. 238; Ritz, pp. 94, 95.
51 Art. 18 CO.
52 Art. 18 CO; Ritz, J.Int.Arb. 2010, p. 237.
53 Art. 1(2) CO.
54 Jolles/Canals de Cediel, pp. 89, 93, 100; Furrer, pp. 807, 808; Blessing, Chapter Twelve, para.
380; Berger/Kellerhals, para. 1231.
55 Jolles/Canals de Cediel, pp. 93, 100, 112; Poudre/Besson, para. 369; Wirth, International
56 However, although this principle of contractual interpretation is similar to that in the German
Civil Code, some German authors have rejected a confidentiality obligation in the absence of
an explicit term to that effect (Kühn/Ganshagen, pp. 463–464).
58 Wiegand, paras. 85–86 at Art. 18; Stacher, Schiedsspruchbarung, para. 389.
59 Ritz, J.Int.Arb. 2010, p. 238; Ritz, p. 94.
In light of the debate around confidentiality in international arbitration in Switzerland, relying on an implied duty of confidentiality between the parties may not be sufficient. An express agreement on confidentiality, either in the arbitration agreement itself or through the institutional rules, such as the Swiss Rules, offers a more reliable basis for a duty of confidentiality.60

B The Arbitrators

The agreement concluded between the parties and the arbitrators can give rise to a duty of confidentiality.61 Swiss law characterizes the relationship between arbitrator and party as a mandate, to which Arts. 394–406 CO apply.62 Although no provision is made specifically for the duty of confidentiality in the statutory provisions governing the mandate, a duty of confidentiality may form part of the general standard of care required pursuant to Art. 398(2) CO.

In Switzerland, arbitrators therefore arguably undertake implicitly to keep the arbitration confidential when they accept their appointment by the parties or the arbitral institution.63 Indeed, many authors consider that in Switzerland the duty of confidentiality is an accessory duty to the main duties of the arbitrator.64 Specifically, it is said that, absent any agreement to the contrary, awards, orders, and materials submitted by the parties are required to be kept confidential by the arbitrators.65 There are, however, exceptions to this duty, such as a legal obligation requiring the disclosure of information concerning the arbitration.66

C Third Persons

Third parties are usually not subject to a duty of confidentiality in arbitration proceedings67 and Swiss law is no exception in this regard.68 In the event that the parties wish to establish a duty of confidentiality for witnesses and party-appointed experts, they are required to conclude separate agreements with them to this effect.69 Failing this, witnesses cannot be prevented from disclosing information to which they have access in the course of their involvement in the arbitration.70 Conversely, however, tribunal appointed experts, tribunal secretaries, translators and court

60 Radjai, ASA Bull. 2009, p. 48; Jolles/Canals de Cediel, pp. 108–109; Ritz, pp. 94.
61 For the nature of this agreement in general, see: Hofler, pp. 213–221; Ritter, p. 811. See also Born, p. 2786–2787; Feuchard/Galliard/Savage, para. 1132.
62 Berger/Kellerhals, para. 963; Kaufmann-Kohler/Rigozzi, 2015, para. 4.167; Poudre/Besson, para. 437; Furrer, p. 811. See also Giovannini/Giroud (footnote 10 above), pp. 6–7; Jolles/Canals de Cediel, p. 94.
63 Berger/Kellerhals, para. 1232; Jolles/Canals de Cediel, pp. 94–95; Poudre/Besson, para. 374; Born, p. 2794.
64 Inderkum, pp. 142–144; Jolles/Canals de Cediel, p. 94; Wirth, International Arbitration, para. 66 at Art. 189.
65 Berger/Kellerhals, paras. 993, 1233; Jolles/Canals de Cediel, p. 96; Wirth, International Arbitration, para. 66 at Art. 189.
66 Berger/Kellerhals, paras. 993–994.
68 Jolles/Canals de Cediel, p. 102; Furrer, p. 812; Müller, ASA Bull. 2005, pp. 228, 239; Berger/Kellerhals, para. 1230.
69 Müller, ASA Bull. 2005, p. 239.
70 La Spada, para. 9 at Art. 44; Berger/Kellerhals, para. 1232.
reporters are deemed to be bound by the tribunal’s obligation of confidentiality because they work as assistants to the arbitrators and are therefore subject to the same obligations as the tribunal, including those of confidentiality.\textsuperscript{71}

\section*{IV FACTUAL CIRCUMSTANCES WHERE ISSUES OF CONFIDENTIALITY MAY ARISE}

25 There are different situations where issues of confidentiality may arise. This Section considers the application of confidentiality with regards to the disclosure of the existence of an arbitration and of the amount in dispute, to documents created or submitted in the arbitration, to the confidentiality of the arbitral hearing, of the deliberations, of the award and of court proceedings relating to an arbitration.

\subsection*{A Disclosure of Existence of the Arbitration and Amount in Dispute}

26 In the 2010 Queen Mary Survey, 54 percent of the survey respondents considered that the very existence of the arbitration should not be disclosed and 76 percent answered that the amount in dispute was one of the key elements to be kept confidential.\textsuperscript{72}

27 The disclosure of the existence of an arbitration, either while it is on-going or after the proceedings have finished, can be damaging to both or one of the parties and, in other jurisdictions, has been held to contravene the understanding that arbitration is a private proceeding.\textsuperscript{73}

28 In Switzerland, there is no known case that has dealt with this issue. Views have been expressed by Swiss authors to the effect that the arbitration itself does not need to be kept confidential in principle,\textsuperscript{74} while other scholars find confidentiality of the existence of arbitration to be an implied term of the arbitration agreement.\textsuperscript{75}

29 In practice, it may not be feasible to require the existence of the arbitration to remain absolutely confidential.\textsuperscript{76} Parties may have valid reasons to divulge the existence of the arbitration to state courts for instance in annulment or enforcement proceedings (in Switzerland and elsewhere) or to seek provisional measures of protection. Many national courts adhere to the principle of public hearings, necessarily entailing the disclosure of, at the very least, the existence of the arbitration. This is why

\begin{itemize}
\item \textsuperscript{71} Furrer, p. 812; Poudret/Besson, para. 374; Berger/Kellerhals, para. 1233121; La Spada, paras. 7–8 at Art. 44.
\item \textsuperscript{72} School of International Arbitration, 2010 International Arbitration Survey, p. 31.
\item \textsuperscript{74} Berger/Kellerhals, para. 1233; Müller, ASA Bull. 2005, pp. 226–227; Furrer, pp. 812–813; Giovannini/Giroud (footnote 10 above), p. 1.
\item \textsuperscript{76} Furrer, p. 813; Hwang/Chung, J. Int. Arb. 2009, pp. 622–626; Dimolitsa, pp. 255–258.
\end{itemize}
Confidentiality of Arbitration in Switzerland – Radfai

B Disclosure of Documents Created or Submitted in the Arbitration

The question of confidentiality may arise in respect of documents created or submitted in the arbitration, such as briefs, submissions, witness statements and transcripts. In the 2010 Queen Mary Survey, 72 percent of the survey respondents considered that documents created or submitted during the arbitration proceedings are covered by a duty of confidentiality.79

Swiss authors consider the submissions filed in an arbitration to be confidential.80 based on an implied duty of confidentiality.81 The confidentiality of the submissions is viewed as indispensable for the integrity of the arbitral proceedings.82 It is considered that the fear of disclosure of submissions to third parties would hamper the principle of due process and undermine the purpose of arbitration.83 Documents submitted in the arbitration, according to these authors, are also subject to a presumption of confidentiality if that information cannot be obtained through other sources.84 Depending on the circumstances, such disclosure could also violate copyright laws85 or constitute a tort action.86

The Swiss Rules86 and IBA Rules on Evidence87 also provide for confidentiality of all materials submitted by the parties.

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78 Some examples are Art. 44(1) Swiss Rules, Art. 8(1) Milan Chamber of Arbitration Rules, Arts. 35(2) and 39(3) SIAC Rules, Arts. 75, 76, 77 and 78 WIPO Rules, and Art. 42(3) HKIAC Rules.
79 School of International Arbitration, 2010 International Arbitration Survey, p. 31.
80 Furrer, pp. 813, 814; Müller, ASA Bull. 2005, p. 227; Poudret/Besson, para. 373.
81 Furrer, p. 814.
82 Furrer, p. 814.
83 Furrer, p. 816; Poudret/Besson, para. 373; La Spada, paras. 10, 12 at Art. 44; Berger/Kellerhals, para. 994; Dimolitsa, pp. 253 - 254.
84 Furrer, p. 814. See also Schneider/Scherer, ASA Bull. 1993, pp. 294–298 considering that for reasons of copyright, arbitrators should also have their identity disclosed.
85 Furrer, p. 814.
86 Art. 44(1) Swiss Rules: “Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards and orders as well as all materials submitted by another party in the framework of the arbitral proceedings not otherwise in the public domain, except to the extent that a disclosure may be required of a party by a legal duty, to protect or pursue a legal right or to enforce or challenge an award in legal proceedings before a judicial authority. This undertaking also applies to the arbitrators, the tribunal appointed experts, the secretary of the arbitral tribunal, the members of the board of directors of ‘Swiss arbitration’, the members of the Swiss Chambers’ Court and the staff of the individual Chambers.” On this provision, see the above commentary of Jenny (at Chapter 3).
87 Art. 3.13 IBA Rules.
C Confidentiality of the Hearing

33 In Switzerland, the arbitration hearing is widely regarded as an *inter partes* matter.88 As arbitration is based on the consent of the parties and the proceedings are shaped in accordance with their will, other persons can be present at the hearing only when the parties mutually agree.89 This approach is also reflected in the Swiss Rules, which expressly provide for the hearing to be held in camera, unless the parties otherwise agree.90

34 Some legal authors are of the opinion that the tribunal has the authority to decide whether third parties, i.e., spectators, may attend the hearing in the event that the parties do not object.91 Swiss authors reject this approach, either on the basis that arbitrators might not always be as impartial as they should be,92 or on the basis that the parties implicitly agreed to keep their arbitration confidential.93

D Confidentiality of the Deliberations

35 Swiss legal authors are widely of the opinion that the deliberations of the arbitral tribunal should be kept confidential94 and should take place in the absence of any persons other than the arbitrators.95 Such an approach is considered to be required for the integrity of the arbitral process, to ensure that the making of the decisions is not submitted to a public debate.96

36 The Swiss Federal Supreme Court has affirmed the principle of confidentiality of the deliberations of the arbitrators. In a decision rendered in 1992, it held that third parties could not take part in the deliberations of the arbitral tribunal.97

37 The secrecy of deliberations has also been considered by the Swiss Federal Supreme Court in a case where one of the arbitrators communicated the result to one of the parties before the official notification of the award.98 The Supreme Court decided that the leaking of this information was regrettable, but fell short of violating the general confidentiality principle because the deliberations themselves were not revealed, but merely the result. Thus, the jurisprudence in Switzerland supports the secrecy of arbitral deliberations, but the disclosure of the result of the deliberations is not a breach of the confidentiality principle.99

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88 Poudret/Besson, para. 372; Girsberger/Voser, 2016, para. 147; Furrer, pp. 814–815; Jolles/Canals de Cediel, p. 93.
89 Berger/Kellerhals, para. 1230; Giovannini/Giroud (footnote 10 above), p. 8; Girsberger/Voser, 2016, para. 146.
90 Art. 25(6), first sentence, of the 2012 Swiss Rules of Arbitration: “Hearings shall be held in camera unless the parties agree otherwise.”
91 Gelben, p. 21.
93 Bucher, Unabhängigkeit, p. 611.
94 Furrer, p. 814; Girsberger/Voser, 2016, para. 1469; La Spada, paras. 20–23 at Art. 44; Dimolitsa, pp. 250–252.
95 Wirth, International Arbitration, para. 20 at Art. 189; Furrer, p. 814; See also Loquin, Rev.Arb. 2006, p. 331.
96 Furrer, pp. 814, 815; Radjai, ASA Bull. 2009, p. 49.
99 See also Born, pp. 2808–2809.
E Confidentiality of Awards

In the 2010 Queen Mary Survey, 69 percent of the parties responding said the award should be kept confidential and 58 percent considered that confidentiality should cover any details in the award that would enable party identification. In practice, there are two principal situations where confidentiality may arise in connection with an award: publication of the award and disclosure of the award in subsequent arbitration proceedings.

1 Publication of the Award

a By One of the Parties

A scenario where breach of confidentiality has been alleged before the courts of other jurisdictions is the unilateral publication of the award by one of the parties. The Swiss Federal Supreme Court has yet to pronounce itself on this situation. In the related commentary of Swiss practitioners, two arguments in favor of publication are advanced. On the one hand, there is the interest of the international arbitration community to have awards published in order to develop the field in a uniform manner. On the other hand, there is the interest of the parties to disclose the award, for example when enforcing or challenging an award, raising a plea of issue estoppel, or generally to preserve a party’s legal rights. The unilateral disclosure of the award in the absence of such circumstances, however, is generally regarded as a breach of the duty of confidentiality.

b By the Arbitrator

The issue of confidentiality in connection with the publication of the award can also arise with regards to its publication by the arbitrator. As arbitrators are bound by a duty of confidentiality based on their duty of loyalty and care, they are in principle precluded from disclosing the award to third parties in the absence of the parties’ consent. Thus, whereas the Swiss Rules specify that absent an explicit objection from the parties the arbitrators may publish awards or orders, some

100 School of International Arbitration, 2010 International Arbitration Survey, p. 31.
101 See, for example, the Babkhanzadeh case before the Swedish courts. Sweden: Svea Court of Appeal, 30 March 1999, Mealey’s I.A.R. no. 4 1999, A–A–A; Swedish Supreme Court, 27 October 2000, Mealey’s I.A.R. no. II 2000, B–1. The Swedish Supreme Court held that there was no implied duty of confidentiality relating to the award: 27 October 2000, Mealey’s I.A.R. no. II 2000, B–1.
102 Furrer, p. 816; Wirth, para. 78 at Art. 189; Jolles/Canals de Cediel, p. 100; La Spada, paras. 24–30 at Art. 44; Berger/Kellerhals, para. 1510.
104 Furrer, p. 816; Jolles/Canals de Cediel, p. 100; Tschanz/Fehr, Rev. Arb., 2007, p. 868.
105 Dimolitsa, footnote 18 on p. 255; Rawding/Seeger, Arb. Int. 2003, p. 487; Gaffney, Mealey’s I.A.R. no. 5 2003, p. 3.
106 Wirth, International Arbitration, para. 67 at Art. 189.
107 Furrer, pp. 816–817.
108 See para. 25 above.
109 Berger/Kellerhals, para. 1509.
110 Art. 44(3) Swiss Rules.
Swiss authors consider that publication should only be permitted where the parties expressly consent thereto. In practice, many awards are published and as long as “sanitization” of the award allows parties to remain anonymous, this is generally condoned.

2 Disclosure of Award in Subsequent Arbitration

Although this situation has not arisen in any known case in Switzerland, it has arisen in other jurisdictions. English case law has established that at least when a subsequent arbitration concerns the same parties, no breach of confidentiality can be said to have occurred with the disclosure of the original award in subsequent arbitration proceedings. Disclosure can also of course be agreed, for example in parallel arbitrations, and recorded in a tribunal order.

F Court Proceedings Relating to an Arbitration

When parties pursue proceedings before state courts in order to challenge or enforce arbitral awards, they exercise a right established by law. However, information about their arbitration is likely to be dissipated at this stage because of the principle of accessibility of court proceedings to the public. Thus, any perceived privacy of arbitration is overridden by the principle of transparency of court proceedings prevalent in most jurisdictions, including Switzerland.

Issues regarding confidentiality can also arise with regard to the publication of a court judgment relating to an arbitration. In 2002, the Swiss Federal Supreme Court considered a request, based on assertions of confidentiality, for non-publication of a court judgment. In this case, which involved challenge proceedings, the applicant requested that the judgment be kept confidential in order to prevent disclosure of information relating to the arbitration. The Supreme Court dismissed this request and stated that judgments are to be published due to the utility of the information to the wider public and that the requesting party can only ask for the “sanitization” of the decision, i.e., redaction of the parties’ names and any details that could lead to their identification. In practice, the names of parties are indeed removed from judgments that are published in connection with arbitration proceedings.

The Swiss Federal Supreme Court has also addressed the issue more generally in relation to the publication of court records relating to arbitration. The Federal Supreme Court has held that not only its decisions but also its records are public and

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11 See Wirth, International Arbitration, para. 66 at Art. 189.
12 Wirth, International Arbitration, para. 66 at Art. 189. See also Poudret/Besson, para. 372.
13 Associated Electric and Gas Insurance Services Ltd v. European Reinsurance Co. of Zurich, UKPC 11, 2003 1 WLR 1041; Gaffney, Medley’s I.A.R. no. 5 2003, pp. 1-5.
15 Art. 30 of the Federal Constitution of the Swiss Confederation (FC; SR 101); ECHR Art. 6. See also Giovannini/Cirou (footnote 10 above), p. 10; Müller, ASA Bull. 2005, p. 233.
could only be kept confidential in exceptional cases and on the basis of compelling reasons established by the parties.\textsuperscript{120}

Therefore, in Switzerland, the principle of judicial transparency, requiring the publication of court decisions and access to court records, prevails over the principle of confidentiality of arbitration proceedings.

V \textbf{REMEDIES}

In the event that a breach of confidentiality is established, the principal remedies that have been considered in practice are an injunction preventing the breach or further breaches,\textsuperscript{121} damages,\textsuperscript{122} and the annulment of the award.\textsuperscript{123} Although one author has also suggested that avoidance of the arbitration clause is possible in extreme cases of breach of confidentiality.\textsuperscript{124}

A \textbf{Injunction}

A party to the arbitration that asserts a breach of confidentiality during or after the proceedings may request an injunction.\textsuperscript{125} An injunction as a remedy is more frequent in common law legal systems, but a similar remedy exists in civil law systems. In Switzerland, injunctions (Unterlassungsklage in German; \textit{action en cessation préventive} in French) are generally available as a remedy. The possibility of such a provisional measure to protect confidentiality, absent contrary agreement of the parties, is contemplated by Swiss authorities to be granted either by a state judge or an arbitrator under Art. 183 PILS.\textsuperscript{126} A distinguished Swiss practitioner reports

\begin{itemize}
  \item \textsuperscript{120} BGer 4P. 74/2006 para. 8.1, ASA Bull. 2006, pp. 761–778.
  \item \textsuperscript{125} Müller, ASA Bull. 2005, p. 238; Wirth, ASA Bull. 2000, p. 32. Giovannini/Giroud (footnote 10 above), p. 5.
\end{itemize}
of such a case, where an injunction was rendered due to a specific confidentiality obligation that had been inserted in the relevant contract.\textsuperscript{127}

B Damages

48 As Swiss law characterizes the relationship between arbitrator and party as a mandate, some scholars are of the opinion that where the arbitrators breach their confidentiality duty, the parties are entitled to compensation,\textsuperscript{128} based on a claim against the arbitrators for failure to perform their mandate with the required degree of care pursuant to Art. 398 CO.\textsuperscript{129}

49 With regard to a duty of confidentiality between the parties, if confidentiality is a result of an agreement between the parties, either as an express or implied term (for instance of the arbitration agreement), any breach of confidentiality would qualify as a breach of the contract. As a result, some Swiss authors consider that parties can claim compensation for a breach of confidentiality on the basis that this is a material obligation under the arbitration agreement.\textsuperscript{130} Equally, if the parties to an arbitration conducted under the Swiss Rules violate their duty of confidentiality under those Rules, they also incur liability based on a breach of contract.\textsuperscript{131} In either case, it would therefore be possible for a party to claim the resulting damages based on the provisions of the domestic law of contracts. In Switzerland, such a claim would be made on the basis of Art. 97(1) CO.

50 In practice, proving the damages resulting from a breach of confidentiality may be difficult.\textsuperscript{132} To address this potential obstacle, parties may consider inserting a penalty clause into any confidentiality agreement to pre-determine the amount of damages payable in case of a breach.\textsuperscript{133} Such a clause is in principle valid under Swiss law within certain limits.\textsuperscript{134}

C Award Annulment

51 In Switzerland, no cases have dealt with the issue of award annulment for a breach of confidentiality. In practice, this remedy is unlikely to be granted for breach of confidentiality in Switzerland both because of the severe nature of the remedy as well as the traditionally non-interventionist Swiss courts.\textsuperscript{135} It has even been suggested that award annulment should not be a remedy for breach of confidentiality in Switzerland because parties could seek to take advantage of such a radical sanction if they are faced with an unfavorable decision.\textsuperscript{136}

\textsuperscript{127} Wirth, ASA Bull. 2000, p. 37.
\textsuperscript{128} Jolles/Canals de Cediel, p. 98; Berger/Kellerhals, paras. 995–996, 1235.
\textsuperscript{129} Jolles/Canals de Cediel, p. 98; Berger/Kellerhals, paras. 993–994.
\textsuperscript{130} Poudret/Besson, para. 376.
\textsuperscript{131} La Spada, para. 19 at Art. 44; Jolles/Canals de Cediel, p. 98.
\textsuperscript{133} Müller, ASA Bull. 2005, p. 233.
\textsuperscript{134} Art. 160 CO.
\textsuperscript{135} Berger/Kellerhals, footnote 189 on p. 431.
VI CONCLUSION

There is no express duty of confidentiality under Swiss law applying to the parties to arbitration. Neither the Swiss Arbitration Law, Chapter 12 PILS, nor the ZPO, addresses the question of confidentiality in arbitration and the Swiss Federal Supreme Court has not clearly defined the scope and application of confidentiality in international arbitration. The law on the duty of confidentiality in international arbitration in Switzerland therefore remains unsettled.

Notwithstanding the absence of supporting legislation, many Swiss commentators nonetheless consider that there is an implied obligation, under the agreement to arbitrate, to respect confidentiality. However, this view is not uniform and there are other commentators that deny an implied, general duty of confidentiality in Swiss arbitration. Absolute confidentiality in arbitration can also have its disadvantages. For instance, a blanket rule imposing confidentiality in arbitration could prevent a party from establishing or protecting rights against third parties, or hinder parallel actions between the same or different parties.

Nonetheless, some guiding principles emerge from the legal authorities and scholarly writings in Switzerland. At least hearings and tribunal deliberations are generally considered to be confidential and many Swiss authors consider the submissions filed in an arbitration to be confidential, based on an implied duty of confidentiality. The unilateral disclosure of the award in the absence of a legitimate interest of the party to disclose the award is also generally regarded as a breach of the duty of confidentiality. Similarly, arbitrators are bound by a duty of confidentiality based on their duty of loyalty and care and are in principle precluded from disclosing the award to third parties in the absence of the parties' consent.

However, in light of the debate around confidentiality in international arbitration in Switzerland and the difficulty of proving damages in case of a breach, relying on an implied duty of confidentiality between the parties may be problematic. An express agreement on confidentiality, either in the arbitration agreement itself or through the institutional rules, such as the Swiss Rules, offers a more reliable basis for a duty of confidentiality. Such an express agreement enables the parties to determine the precise scope of their obligations in line with their stated expectations.

137 Weigand, para. 12.109; Born, p. 2779; Jolles/Canals de Cediel, pp. 100.
138 See, for example, Jolles/Canals de Cediel, pp. 89, 93, 100; Berger/Kellerhals, para. 1230.
141 Paulsson/Rawding, ArbHt. 1995, pp. 315-316.
143 Furrer, pp. 813, 814; Müller, ASA Bull. 2005, p. 227; Pouderet/Besson, para. 373.
144 Furrer, pp. 816-817.
145 Radjai, ASA Bull. 2009, p. 48; Jolles/Canals de Cediel, pp. 108-109; Ritz, pp. 94; Ritz, J.Int. Arb. 2010, p. 239.