ASA Special Series No. 43

Confidential and Restricted Access Information in International Arbitration

Edited by Elliott Geisinger

Association Suisse de l'Arbitrage
Schweiz. Vereinigung für Schiedsgerichtsbarkeit
Associazione Svizzera per l'Arbitrato
Swiss Arbitration Association

TABLE OF CONTENTS

Chapter 4

Addressing the Issue of Confidentiality in Arbitration Proceedings: How Is This Done in Practice?

*Domitille Baizeau and Juliette Richard**

1. INTRODUCTION

Confidentiality of and in international arbitration has for many years been a highly debated issue,[1] and remains characterised by a high degree of uncertainty as to its precise scope and enforceability.[2] Different legal regimes usually come into play, numerous and at times conflicting legal principles tend to apply and, as a result, the participants in an international arbitration do not always share the same expectations as to what is covered by any confidentiality obligation and how it may be enforced.

However, in practice, arbitrators, counsel and parties have over the years found many ways of preserving confidentiality in international arbitration proceedings without impacting on the fairness and equality of the arbitral process. It is those practical solutions, illustrated by examples of (and extracts from) confidentiality agreements and procedural orders, that are identified and discussed in this paper.[3]

---

* Partner and Associate, International Arbitration Group, LALIVE, Geneva.

[1] In particular since the controversial decisions of the Australian court *Esso Australia Resources Ltd. v. Plowman (*High Court of Australia), Volume 11 No. 3 ARBITRATION INTERNATIONAL, p. 235 (1995) denying the existence of confidentiality in international arbitration; *see* Filip de Ly, Mark Friedman, Luca G. Radicati di Brozolo, *International Law Association International Commercial Arbitration Committee's Report and Recommendation on Confidentiality in International Commercial Arbitration*, ARBITRATION INTERNATIONAL, p. 356 (2012); Andreas Furrer, *The Duty of Confidentiality in International Arbitration*, *in* MELANGE EN L'HONNEUR DE PIERRE TERCIER, p. 802 (Schultess, 2008); Alexander Jolles, Maria Canals De Cediel, *Confidentiality, in* GABRIELLE KAUFMANN-KOHLER, BLAISE STUCKI, INTERNATIONAL ARBITRATION IN SWITZERLAND, p. 90 (Kluwer Law International, 2004).

[2] *See e.g.* GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, p. 2499 (Kluwer Law International, 2014).

[3] The authors are particularly grateful to all of the contributors to the Colloquium organised by Francarbi in Paris on 19 April 2013 on "*La confidentialité dans la procédure arbitrale*" and in particular to the co-chairs of the Colloquium, Professor Olivier Caprasse from the University of Liège, and Of Counsel with Hanotiau & van den Berg, and

Parties to an arbitration tend to face confidentiality issues at two different stages: when presenting evidence in support of their case and when being requested to produce evidence by their opponent.[4] Whilst the latter scenario is the most commonly addressed, the former also can give rise to difficulties,[5] and the practical solutions adopted tend to be the same in both cases, as the examples discussed in this paper demonstrate.[6]

In all cases, protection is typically sought with respect to documents containing trade secrets or sensitive commercial information, such as pricing information, business plans, customer lists, information on components or manufacturing know how, plans, sketches, and other corporate records. But confidentiality concerns may also be raised with respect to other types of evidence, such as industrial site visits, samples and also expert analyses of, or based on, confidential information, including for the purpose of damage assessment. Less commonly, parties may also face confidentiality issues with respect to testimonial evidence.

This paper sets out a "catalogue" of practical solutions used by arbitrators and parties and then examines some of the key features and issues that arise out of these measures.

2. THE CONFIDENTIALITY MEASURES USED IN PRACTICE

Despite the uncertainty surrounding the scope of any confidentiality obligation in international arbitration, a wide range of, at times creative and sophisticated, solutions are being adopted in practice by arbitrators and parties. The measures identified in this paper, whether as stand-alone measures or combined, all involve a balancing act between protecting confidential information and securing due process, and in particular the requirement that each party

---

Roland Ziadé from Linklaters in Paris, for their kind authorisation to refer to some of the materials submitted by the participants in this paper.

[4] *See e.g.* Yves Derains, *Evidence and Confidentiality*, Special Supplement 2009 Confidentiality in Arbitration, ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN, p. 57, para. 6 (2009).

[5] *See e.g.* TREVOR CROOK, ALEJANDRO I. GARCIA, INTERNATIONAL INTELLECTUAL PROPERTY ARBITRATION, p. 229 (Kluwer Law International, 2010). This is an area where scholarly views also differ. Some authors contend that evidence spontaneously produced should not necessarily be confidential (JEAN-FRANCOIS POUDRET, SEBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION, para. 373 (Sweet & Maxwell, 2007)), whilst others point out that it should be treated as being confidential insofar as the parties likely expect that it will be: Furrer, *op. cit.*, p. 816; Christoph Müller, *La Confidentialité en arbitrage commercial international: un trompe-l'oeil?*, Volume 23 Issue 2 ASA BULLETIN, p. 228 (2005).

[6] *See also* Derains, *op. cit.*, paras. 7-8.

be able to test the evidence it may wish to test through a true adversarial procedure.[7] The examples given are by no means all new, or exhaustive, but provide some insight into what is being done and thus can be done in practice when parties and tribunals are faced with genuine, and at times acute, confidentiality concerns whilst preserving each party's fundamental procedural rights.

The confidentiality measures found in practice and listed below can be divided into four groups: (1) redaction of confidential information; (2) restricted access to confidential information, including restricted reference in materials submitted by the parties; (3) use of third parties; and (4) specific measures arising with respect to testimonial evidence.

2.1 Redaction of Confidential Information

A common and straightforward measure is the redaction of documents, in part or in whole, or the production of selected extracts only. This is a solution on which much has been written already.[8] It is largely compatible with the principle of adversarial process when the redacted information is not only truly confidential but also immaterial to the outcome of the dispute. The main area of contention is therefore usually the true confidential nature of the redacted information and the materiality of the redacted information in view of the dispute, which by definition cannot be verified.

In practice, various mechanisms are put in place to address this issue. The most common one is to allow the tribunal to verify the redacted documents against the original ones so as to determine whether the redaction is appropriate.[9] However, this solution is only suitable if the information redacted is truly immaterial to the outcome of the dispute, which is not always easy to ascertain, and if the

---

[7] On the requirement for due process, *see e.g.* JEFF WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION, para. 11.8.1 (Kluwer Law International, 2012); Derains, *op. cit.*, paras. 5, 11, 16, 19, 27; EMMANUEL GAILLARD, JOHN SAVAGE, FOUCHARD, GAILLARD AND GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, para. 1265 (Kluwer Law International, 1999).

[8] *E.g.* WAINCYMER, *op. cit.*, para. 10.16.7; CROOK/GARCIA, *op. cit.*, para. 3.3.2; Derains, *op. cit.*, paras. 18-23; JASON FRY, SIMON GREENBERG, FRANCESCA MAZZA, THE SECRETARIAT'S GUIDE TO ICC ARBITRATION, para. 3-812 (ICC Publication, 2012); Müller, *op. cit.* p. 239; PETER ASHFORD, HANDBOOK ON INTERNATIONAL COMMERCIAL ARBITRATION, p. 102 (JurisNet, 2009); Virginia Hamilton, *Document Production in ICC Arbitration*, Special Supplement 2006 Document Production in International Arbitration, ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN, pp. 77-78 (2006).

[9] Derains, *op. cit.*, para. 18; Hamilton, *op. cit.*, p. 77.

information does not require protection from disclosure to any third party, including the tribunal.

In some cases, when the information is particularly sensitive and/or there are doubts as to the true independence of a party-appointed arbitrator and the risk of the information being divulged to the other party through that arbitrator, the presiding arbitrator may suggest to examine the documents alone or assign this task to the administrative secretary of the arbitral tribunal.[10] This was the solution adopted in an ICC arbitration, in a case involving two companies in the same industry and in which the respondent was concerned about the disclosure of certain information by the claimant outside the arbitration; the arbitral tribunal used the following language in a protective order issued by consent:

> Respondent shall disclose to Claimant's Counsel of record and the members of the Arbitral Tribunal the redacted version of each of the Confidential Documents within two business days after the date of the present Order.
>
> Respondent shall, simultaneously and on a strictly confidential basis, disclose to Ms […] only, in her capacity of Administrative Secretary of the Tribunal, a full, unredacted copy of each of the Confidential Documents. The unredacted copy of a Confidential Document, or parts thereof, will not be disclosed to Claimant without the express consent of Respondent. In the event of a dispute concerning the redaction of the Confidential Documents, the Parties will attempt to resolve such dispute among themselves, and if no resolution can be reached, either Party is at liberty to apply to the Tribunal for review of the redacted part in dispute under such conditions as the Tribunal shall determine after consultation of the Parties.
>
> Redaction in the Confidential Documents shall be limited to […]. Redaction shall be marked clearly in black.

Another solution seen in practice is to allow counsel for the other party, but no other representative of that party, to verify the redaction.[11] This solution involves counsel issuing an undertaking not to disclose the information to his or her client, with the express consent

---

[10] Derains, *op. cit.*, paras. 20-22.

[11] CROOK/GARCIA, *op. cit.*, para. 3.3.2; Derains, *op. cit.*, para. 21.

of his or her client, which may be problematic, or impossible, in some jurisdictions. It also implies a high degree of mutual trust between the parties' counsel, which does not always exist in practice.

A further alternative is for the parties to delegate the selection of those parts to be redacted to an independent third party, referred to as a "confidentiality advisor" (further discussed below, Section 2.3.1).

2.2 Restricted Access to Confidential Information

Whilst redaction of confidential information may be appropriate where the information redacted is truly immaterial to the outcome of the dispute, if the information is or may be material, *i.e.* if its content is broadly known and a dispute exists as to whether it is material, redaction of the information will usually not be the appropriate measure, but restricted access may be. Indeed, restricting access to certain information to a group of individuals is one of the most common tools used in practice, whether the confidential information is found in hard or soft copies of documents or consists in sites or samples.

2.2.1 "Confidentiality clubs"

In its simplest form, this measure involves restricting access to confidential information to selected individuals, often referred to as a "confidentiality club".[12] This is again a straightforward measure, save that the narrower the "club", the higher the risk of breach of due process.[13] In most cases, so as to avoid this risk, "confidentiality clubs" are set up by agreement of the parties.

An extreme form would be the disclosure of the confidential information to the tribunal only, which does not appear to happen in practice for obvious reasons.[14] Various other configurations are observed in practice.

The first one is to grant access only to legal counsel and the tribunal. This solution also might not be satisfactory in some cases since the lawyers alone may not be able to analyse and assess the

---

[12] BORN, *op. cit.*, p. 2388; WAINCYMER, *op. cit.*, paras. 10.16.7 and 11.8.1; CROOK/GARCIA, *op. cit.*, paras. 3.3.1 and 3.3.4-3.3.6; Derains, *op. cit.*, para. 28; ASHFORD, *op. cit.*, p. 102; Hamilton, *op. cit.*, p. 79; Müller, *op. cit.*, p. 239; GAILLARD/SAVAGE, *op. cit.*, para. 1265; François Dessemontet, *Arbitration and Confidentiality*, Volume 7 No. 1 THE AMERICAN REVIEW OF INTERNATIONAL ARBITRATION, p. 301 (1996).

[13] *See* WAINCYMER, *op. cit.*, paras. 10.16.7 and 11.8.1; CROOK/GARCIA, *op. cit.*, para. 3.3.1; Müller, *op. cit.*, p. 239; GAILLARD/SAVAGE, *op. cit.*, para. 1265.

[14] The authors were unable to locate any examples of this approach in practice. *See* also GAILLARD/SAVAGE, *op. cit.*, para. 1265.

relevance of the information, especially where it is complex and/or technical, and may require instructions from their clients.[15]

Similar issues arise when only the tribunal and the experts may access the information, which obviously renders the challenge of the experts' opinion very difficult and may thus also amount to a violation of the parties' right to be heard. In a recent energy pricing dispute in which the authors' firm was involved, the parties agreed that sensitive pricing information could be disclosed to the experts only but expressly provided for the possibility for the experts to seek permission to release certain information to counsel (upon the provision of a specific undertaking) if required.

A more common combination, when a party fears misuse of the confidential information by the other party, is indeed the disclosure of the relevant documents to the tribunal, counsel and the experts only, excluding the parties. This approach was adopted in an ICC arbitration between two companies in the telecommunications industry during the document production phase, with each legal counsel providing the following undertaking:

> [We hereby undertake that] we will not without [the disclosing party]'s prior consent:
>
> (i) disclose any Document [defined] to any person who is not a partner of the firm, including to the [requesting party] or any of its affiliates, employees or officers; or
>
> (ii) discuss the contents of any Documents with any other person.
>
> We will only share the contents of the Documents with the Respondent's financial and economic experts […].

In another ICC arbitration, in which the core subject of the dispute between two competitors in the technology industry was precisely the alleged misuse of proprietary information, the tribunal issued a very exhaustive protective order, limiting the disclosure of specifically defined confidential information to the parties' external counsel, the experts and consultants, the factual witnesses, the court reporters and the arbitral tribunal, in the following terms:

> Outside counsel of the Requesting Party shall receive, on the Requesting Party's behalf, all Sensitive and Particularly Sensitive Material pursuant to this Order. Outside Counsel

[15] *See* WAINCYMER, *op. cit.*, para. 11.8.1; CROOK/GARCIA, *op. cit.*, para. 3.3.6.

> shall not show, make available, distribute or otherwise disseminate or communicate any Particularly Sensitive Material or the contents thereof to, or discuss the content thereof with anyone other than:
>
> (a) Employees of Outside Counsel who are engaged in assisting Outside Counsel in this Arbitration;
>
> (b) Outside consultants and experts (including translators) consulted or retained by Outside Counsel for the purpose of assisting in this arbitration, if Outside Counsel in good faith believes that any Particularly Sensitive Material given or communicated to such persons is necessary or appropriate for the performance of the functions for which they were retained or consulted, provided that such persons shall not be employees of or current or regular consultants for the Requesting Party (other than in connection with this arbitration or the related arbitration in […]) or employees of any other enterprise engaged directly or indirectly in the manufacture or sale of […] or components of such […], or of any affiliate of such enterprise. The Requesting Party shall not employ or retain any such outside consultant or expert for any purpose for a period of two years following the termination of this proceedings;
>
> (c) Witnesses giving testimony under the circumstances set forth in paragraph 8;
>
> (d) Stenographic reporters and their employees in this arbitration; or
>
> (e) The Arbitral Tribunal and its staff, including any consultants or experts retained by the Tribunal.[16]

Depending on the nature of the dispute, allowing only for cooperation between the parties' counsel and the parties' experts may not suffice; both may need to take instructions from party representatives or seek clarifications on specific facts known by the parties alone. Key party representatives may thus need to be included in the "confidentiality club", such as in-house counsel, or specialists within the party company, named individually or described generically.[17]

---

[16] Confidentiality Order of 12 July 1994 in ICC Case No. 7893, No. 1 JOURNAL DU DROIT INTERNATIONAL, pp. 1069-1076 (1998).

[17] Derains, *op. cit.*, para. 28.

This measure was implemented in an investor-state dispute, where a party's counsel had to sign a confidentiality undertaking providing that confidential information would only be disclosed to its signatories and to certain named party employees and other counsel if required, upon their signing a similar undertaking:

> [Counsel for Party X] also undertakes that it will share such information or documentation only with members of [Party X]'s counsel team (constituted by all the undersigned) and with directors, managers or employees of [Party X] [named], or additional members of the counsel team, who have a need to know such information (each the "authorized Recipient") [named] who will […] cause each such Authorized Recipient, whose names will be disclosed to [counsel for the other party] 5 days in advance, to provide undertakings identical in substance to those above as a condition to provision of access to such information or documentation.

In another case, an ICC arbitration in the telecommunications industry, the parties agreed to grant access to the confidential documents to "employees who are specifically required to review them for the purpose of assisting the Respondent in the arbitration", including for the time being certain specifically named individuals.

A further approach is to grant access to confidential information to a group of individuals only generically defined. Such definition will rarely be an issue for factual witnesses, experts and external legal counsel in a specific case, but may be more delicate for the parties' relevant employees. In an ICC arbitration in the pharmaceutical industry, the claimant agreed to grant access to the confidential information to "employees or officers of the Respondent" defined as follows: "who are actively engaged in, or who are responsible for decision-making in connection with the present arbitration" without their being named.

2.2.2 Return or destruction of documents

Another common practical measure, typically in addition to restricted access, is the requirement that the documents and other support containing the confidential information, and any copy made (including photographs and films), whether submitted as evidence or simply disclosed, be returned or destroyed.[18] The main issue that arises

[18] *See* Derains, *op. cit.*, para. 19; GAILLARD/SAVAGE, *op. cit.*, para. 1265.

in this context is that of the timing of the return or destruction, *i.e.* the balancing act required between, on the one hand, the need to destroy or return documents as soon as possible to preserve confidentiality, and, on the other, the need to retain documents that may be required for potential enforcement or challenge proceedings.

The solutions adopted in practice appear to vary greatly, as to their clarity and as to the timing itself.

A good illustration of a clearly identified need (for possible access to the information for challenge or enforcement proceedings), albeit implemented through potentially unclear language, can be found in the following undertaking by the parties' counsel in an ICC arbitration in the telecommunications industry:

> Upon completion of the arbitration, we will cease to use the Documents and confirm to you their destruction, except to the extent such material may be relevant to any court proceedings for the challenge or enforcement of any award rendered in this arbitration.

When the obligation is expressed in such broad terms, one difficulty for the parties is to determine until when the documents may be retained. This difficulty arose in an UNCITRAL investor-state arbitration when the parties sought to agree a specific date by which the investor should destroy its two copies of the raw footage of a film about the alleged wrongful actions of the investor, relied upon by the state in the arbitration. At the request of the film maker, who was a third party to the proceedings, the state requested that the copies be destroyed "at the end of the arbitration or at the latest at the end of any setting aside or enforcement proceedings relating to an award issued upon the completion of the Arbitration". The investor contended that this undertaking was overly broad since it was impossible to determine when enforcement proceedings would take place. The tribunal agreed and did not order any destruction.[19] In another case, however, a tribunal simply ordered the return or destruction of the confidential documents upon "the Final Award being fully enforced".

It appears more frequent in practice for parties to agree on, or tribunals to order, specific time limits by which documents (and copies

[19] Other factors in this case would have influenced the tribunal, in particular the fact that only two copies were held by counsel, at their premises, subject to an undertaking providing in particular that no further copies could be made and that the footage could only be viewed by certain named persons at the counsel's premises (as to which *see* also Sections 2.2.1 and 2.2.3 below).

where copies have been permitted) must be returned or destroyed, by reference to the award, ranging from "immediately after issuance of the award", to a few weeks or a few years later.

A useful approach, adopted in several cases, is to fix different periods of time for different recipients of the confidential information and in particular to allow for longer periods of time for the parties' counsel. Hence, in the ICC arbitration mentioned above, in which the verification of the redaction was carried out by the tribunal's administrative secretary, the tribunal issued a rather detailed order for the destruction of certain confidential documents, differentiating between the claimant's counsel and everyone else (parties, experts, witnesses, arbitral tribunal, *etc.*):

> Within 30 days after the final arbitral award or so much earlier as determined by the Tribunal, and if requested by Respondent, Claimant's Counsel of record shall certify in writing to Respondent that all copies of the Confidential Documents that have been made available by Respondent to Claimant's Counsel of record, as well as any Confidential Information, in whatever form, have been destroyed, and that no person authorized pursuant to the provisions of paragraphs 7 and 8 of the present Order remains in possession of such document or information. Claimant shall ensure that Confidential Documents or Confidential Information in the possession of Claimant or in the possession of any other person Claimant has control over is destroyed within the stipulated period of time. The Tribunal and the Administrative Secretary shall destroy such documents and information within the same period of time. Claimant's Counsel of record may keep Confidential Documents and Confidential Information for a period of three years after the final arbitral award or so much earlier as determined by the Tribunal.

The same solution was adopted in another ICC arbitration in the telecommunications industry: all confidential documents were ordered to be destroyed "upon termination of the proceedings", but counsel were entitled to retain the confidential documents for ten years.

One issue that must be borne in mind when drafting agreements or orders providing for the destruction or return of confidential documents by a certain date after the issuance of the award, is the possibility of a settlement prior to the issuance of the award, as

illustrated by the following extract of the procedural order issued in an ICC arbitration:

> Within 60 days after the final arbitral award or a final settlement of the dispute, Counsel for the Respondent shall certify in writing to the Claimant's Counsel that the Confidential Documents and any copies thereof, as well as any information derived therefrom, in whatever form, have been either (a) returned to the Claimant or its Counsel or (b) destroyed, and that no person authorized under para. 14(iv)(b),(c) and (d) of the present Order remains in possession of such documents or information.

2.2.3 Restricted inspection of confidential information

Another form of restricted access is to avoid the release of the confidential information and allow instead for its restricted visual inspection in a single location, with no or only a limited right to take notes, make copies or take photographs or videos.[20] This solution is usually combined with the use of confidentiality clubs and adopted when the primary goal is to prevent any risk of dissemination of the information.

In practice there are again various options and combinations used. The inspection may be conducted only in a "neutral" place, such as the presiding arbitrator's office, or at one of the counsel's office or even at the premises of one of the parties or its experts, with adequate safety measures.

In a dispute involving the review of industrial designs, the tribunal ordered the setting up of an entire data room for inspection of the relevant information under the supervision of an expert.

In another ICC case, in which the main concern was to avoid any dissemination of the information outside the arbitration, the inspection of the hard copy data in one location only was combined with secured access to an electronic data room, because the parties and their counsel were in different and distant locations. The order provided as follows:

> Respondent will set up, on or before 20 … at 11.59 pm, an electronic data room where the documents, which have been ordered to be produced by Respondent pursuant to Procedural Order n° 2, will be accessible to Claimant's counsel and representatives authorized by the Arbitral

[20] Derains, *op. cit.*, para. 21; BORN, *op. cit.*, p. 2388.

> Tribunal as referred to under item 8, provided that (i) the documents shall only be accessible as "read only" (no hard or electronic copies, and no snapshots can be made), (ii) the data room shall remain open until the end of the oral hearings, (iii) a copy of the data room will be saved by the service provider who set up the data room, (iv) the data room shall be exclusively accessible from Claimant's offices and from its counsel's offices and (v) each access to the data room shall be tracked by the service provider. The Arbitral Tribunal reserves its right, at any time, to request from Respondent to access the data room.

In that case, the inspecting party had a very short period of time within which to inspect the documents prior to the filing of its submission. The tribunal therefore also ordered that if the electronic data room was not made fully operational by a certain date by the disclosing party, delivery of hard copies of certain documents to the inspecting party's counsel would be required immediately.

2.2.4 Restricted references in written materials submitted in the arbitration

Where the rationale for the need for a confidentiality measure is a party's fear that its business secrets or other sensitive information will be used by the other party, all of the above may prove pointless if, eventually, the information is referred to and cited in the parties' submissions, witness statements and/or expert reports. These measures are therefore often combined with an order for restricted reference in any of the materials to be filed by the parties.

There are various ways in which this can be implemented in practice. One approach adopted in two ICC arbitrations was to allow for references to the confidential documents in the written submissions and witness statements in general terms only, but require the submission of separate documents marked "confidential" for those sections in which it was necessary to quote or otherwise refer substantively to the confidential information. The procedural order in one of these cases provided as follows:

> If any party files with the Tribunal any pleading, memorial, brief or other Document constituting, containing, summarizing, excerpting, or otherwise embodying Particularly Sensitive Material [previously defined] or the contents

> thereof, such portion of the pleading, memorial, brief, or Document constituting, containing, summarizing, excerpting, or otherwise embodying such Particularly Sensitive Material shall be enclosed within brackets and the pages on which such Particularly Sensitive Material appears shall be marked "CONFIDENTIAL" and shall be treated in all respects as Particularly Sensitive Material.[21]

Another approach, observed in practice, is to file two different versions of the submissions: a redacted and a non-redacted version, the latter being made available only to the "confidentiality club" determined by the parties. A similar solution can be agreed with respect to the final award itself, as seen in one ICC case.[22]

2.3 Involving Third Parties: "Confidentiality Advisors" and "Third Party Neutrals"

Most of the measures discussed so far involve actual disclosure of confidential information to at least a small circle of individuals closely connected to the dispute. They may therefore be inefficient where the concern is to avoid any of the members of the tribunal or of the parties' team, including the legal team having access to very sensitive information, or where the parties' dispute relates to the confidential nature of the information. Such situations obviously raise serious due process concerns and therefore call for more daring – and preferably agreed — solutions, such as the involvement of third parties to review the confidential information and, as the case may be, determine certain issues based on such information.

2.3.1 The "confidentiality advisor"

The term "confidentiality advisor" can be found in Article 54 of the WIPO Arbitration Rules (the "WIPO Rules"),[23] which deals with the "conduct of the proceedings":

---

[21] Confidentiality Order of 12 July 1994 in ICC Case No. 7893, No. 1 JOURNAL DU DROIT INTERNATIONAL, pp. 1069-1076 (1998).

[22] Martin Bernet, Benjamin Gottlieb, *Confidential and Restricted Date in the Award: How Do Arbitrators Draft Awards without Breaching Confidentiality or Restrictions?*, at p. 79 of the present volume.

[23] Article 54(d) of the WIPO Arbitration Rules effective from 1 June 2014 is the same as Article 52(d) in the 2002 WIPO Arbitration Rules.

> (d) In exceptional circumstances, in lieu of itself determining whether the information is to be classified as confidential and of such nature that the absence of special measures of protection in the proceedings would be likely to cause serious harm to the party invoking its confidentiality, the Tribunal may, at the request of a party or on its own motion and after consultation with the parties, designate a confidentiality advisor who will determine whether the information is to be so classified, and, if so, decide under which conditions and to whom it may in part or in whole be disclosed. Any such confidentiality advisor shall be required to sign an appropriate confidentiality undertaking.

A similar option is provided for in Article 3(8) of the IBA Rules on the Taking of Evidence in International Arbitration of 2010 (the "IBA Rules"), in the context of document production requests:

> In exceptional circumstances, if the propriety of an objection can be determined only by review of the Document, the Arbitral Tribunal may determine that it should not review the Document. In that event, the Arbitral Tribunal may, after consultation with the Parties, appoint an independent and impartial expert, bound to confidentiality, to review any such Document and to report on the objection. To the extent that the objection is upheld by the Arbitral Tribunal, the expert shall not disclose to the Arbitral Tribunal and to the other Parties the contents of the Document reviewed.

The issue of confidentiality indeed routinely arises during the document production phase: when a party's confidentiality objection becomes a bone of contention that cannot be resolved by simply allowing the tribunal to review the document so as to determine whether the objection is valid or not, for fear that the tribunal will be influenced by the content of the document, even if the objection is upheld, without the parties having been able to make any submission on it. In such situations, the preferred solution may be the appointment of a third party to review the contentious documents. The advisor can then report on the alleged confidentiality and, in the event that it is upheld, even propose measures to protect it during the proceedings.

This approach is now widely recognized and has been discussed by numerous commentators.[24] It presents several advantages. For

[24] *See e.g.* Hans van Houtte, *The Document Production Master and the Experts' Facilitator: Two Possible Aides for an Efficient Arbitration*, *in* MIGUEL ANGEL FERNADEZ-BALLESTROS,

technical matters, the confidentiality advisor, specifically selected for this purpose, may be better equipped than the tribunal to determine whether the confidentiality concern is genuine; she or he may also have more time to do so.[25] More generally, deferring to a third party will prove particularly useful when the relevance of the document, or information contained in it, and/or its confidential character, are not obvious, and when the level and type of protection warranted and the implementation of the solution adopted are at issue. The confidentiality advisor can even advise on the appropriate solution, supervise the redaction process, monitor the disclosure or inspection, *etc*.[26]

However, aside from the cost issue, this approach is potentially problematic as it risks resulting into a significant decision-making power being placed with the confidentiality advisor, whose status, under the IBA Rules at least, is not even that of a tribunal-appointed expert subject to cross examination.[27]

Indeed both the IBA Rules and the WIPO Rules refer to this measure as called for only in "exceptional circumstances". The IBA Rules further provide that the third party is to assist the tribunal who decides, as confirmed in the commentary of the IBA Working Party: "the arbitral tribunal is to make the final ruling as to [the] validity [of the confidentiality objection]".[28] Article 54(d) of the WIPO rules however is wider.

Even if it is accepted that the confidentiality advisor should generally have no decision making power,[29] the line is not always easy to draw. In some cases, the process of identifying the confidential information which lies at the heart of the parties' dispute will inevitably entail a decision making process, *e.g.* if the dispute relates to the allegedly wrongful use of confidential know-how in the manufacturing of goods by one party. To avoid any uncertainty, the

---

DAVID ARIAS, LIBER AMICORUM BERNARDO CREMADES, pp. 1147-1159 (La Ley, 2010); Waincymer, *op. cit.*, para. 11.8.1; Derains, *op. cit.*, paras. 25-26 and 30-31; CROOK/GARCIA, *op. cit.*, paras. 3.2.2.1 and 3.3.3; ASHFORD, *op. cit.*, p. 102; Jolles/Canals De Cediel, *op. cit.*, p. 112; IBA Working Party, *Commentary on the New IBA Rules of Evidence in International Commercial Arbitration*, Issue 2 INTERNATIONAL BAR ASSOCIATION, p. 23 (2000); Jan Paulsson, *The Conduct of Arbitral Proceedings Under the Rules of Arbitration Institutions; The WIPO Arbitration Rules in a Comparative Perspective*, in *Conference for Institutional Arbitration and Mediation*, Geneva, 20 January 1995 published on the WIPO website.

[25] *See* Paulsson, *op. cit.*; Derains, *op. cit.*, para. 26.

[26] *See* van Houtte, *op. cit.*, para. 9, pp. 1149-1150.

[27] *See* van Houtte, *op. cit.*, para. 15, p. 1154; WAINCYMER, *op. cit.*, para. 11.8.1. *See also* the IBA Working Party's Commentary: "[t]he expert would not necessarily need to be appointed pursuant to the terms of Article 6 of the IBA Rules of Evidence" (IBA Working Party, *op. cit.*, p. 23).

[28] IBA Working Party, *op. cit.*, p. 23.

[29] *See* WAINCYMER, *op. cit.*, para. 11.8.1.

advisor's mission and power should be determined in advance in detailed terms of reference, as should the role of the tribunal. Furthermore, it is advisable for both parties to expressly agree to the advisor's nomination, although depending on the applicable law and rules, the parties' agreement may not be mandatory.[30] If no agreement can be secured, the mission of the third party appointed by the tribunal needs to be particularly well-framed.

The usefulness of the confidentiality advisor is well illustrated by the PCA case of *Guyana v. Suriname*, regarding a maritime boundary dispute, discussed in an article by Professor Hans van Houtte.[31] In that case, the independent expert was appointed by the tribunal to assist with the discovery process (including redaction) involving confidential documents held in the archives of the Dutch foreign affairs ministry to which Suriname had access but not Guyana, and which were very sensitive in terms of Suriname's national security. The process was set out in detail: the expert would review Suriname's proposal to remove or redact parts of some document which production was sought by Guyana and would seek clarifications on the reasons. Guyana would then comment on the reasons invoked. After having analysed the parties' arguments, the expert would present his conclusions to the arbitral tribunal, who would ultimately approve (or not) the redaction or non-production of the documents. The scope of the expert's role, which is not entirely clear from the first procedural order issued by the arbitral tribunal, was set out as follows in the expert's terms of reference:

> 2.3. In accordance with paragraphs 2, 3 and 5 of the Order, where a Party has invoked paragraph 5 of the Order, and produced a file or document, but proposed removal or redaction of it for the reasons set forth in sub-paragraph (c) of the last preambular paragraph of the Order, the Party proposing removal or redaction shall produce the entire un-redacted file or document for the Expert's inspection. After having satisfied himself that the file or document before him is complete, the Expert may invite the Party seeking to redact or remove the files or documents, to set out, and/or elaborate on reasons already given, why those documents or files (or parts thereof) should be removed or redacted.

---

[30] Van Houtte, *op. cit.*, para. 13, pp. 1153; Derains, *op. cit.*, para. 25.

[31] Guyana v. Suriname, Procedural Order No. 1 dated 18 July 2005; Guyana v. Suriname, Award of the Arbitral Tribunal dated 17 September 2007, para. 62; van Houtte, *op. cit.*, paras. 9-10, p. 1149-1150.

> Where the Expert so invites the Party seeking to redact or remove files or documents, he shall thereafter invite the Party seeking access to the documents or files, to comment on the reasons given by the Party seeking to withhold the documents or files.
>
> 2.4. The Expert shall produce a report on his findings, preserving to the fullest extent possible the confidential nature of the files or documents at issue, and setting out the reasons for his conclusions. The report shall be communicated to the Parties and the Tribunal. The Tribunal will consider the report and determine whether redaction or removal is appropriate.[32]

2.3.2 "Third party neutral" or expert

In some cases, the role of the third party may need to be broader: to gather evidence and information which may only be drawn from the confidential information, in lieu of the arbitral tribunal and the parties, and to prepare a report answering specific questions put by the parties and the tribunal.[33] This exceptional measure is specifically provided for in Article 54(e) of the WIPO Rules:

> The Tribunal may also, at the request of a party or on its own motion, appoint the confidentiality advisor as an expert in accordance with Article 57 in order to report to it, on the basis of the confidential information, on specific issues designated by the Tribunal without disclosing the confidential information either to the party from whom the confidential information does not originate or to the Tribunal.[34]

The third party is then arguably no longer acting simply as an "advisor". The role of a third party has been referred to in a recent ICC arbitration, in which this mechanism was used, as a "third party neutral". The dispute in that case related to a technology license agreement in the defence and security industry and involved reliance on extremely sensitive evidence by both parties, which each party refused to disclose to the opposing party. The solution proposed by

---

[32] *Guyana v. Suriname*, Award of the Arbitral Tribunal dated 17 September 2007, para. 62.
[33] Jolles/Canals De Cediel, *op. cit.*, p. 112.
[34] Article 54(e) of the 2014 WIPO Arbitration Rules is the same as Article 52(e) in the 2002 WIPO Arbitration Rules.

the arbitrator, and accepted by the parties, consisted in appointing a third party to collect the evidence, review the sensitive information and answer the factual and technical questions deemed relevant by each party, and which could be supplemented by the arbitrator, pursuant to detailed "Third-Party Neutral Procedural Rules". Like for a tribunal-appointed expert, the parties (and the arbitrator) had the opportunity to comment on the third party neutral's report but, with respect to any dispute over his access to sensitive documents and information, he was required to revert to the arbitrator for a decision.

2.4 Testimonial Evidence

Last but not least, issues that may arise regarding the testimony of witnesses; the first and most common one is that of witnesses (factual and expert) testifying on or in relation to confidential evidence and another one is that of witnesses requiring that their identity and testimony be kept confidential.

2.4.1 Examination of factual and expert witnesses on confidential evidence

An obvious risk to be avoided is that of the inadvertent (or not) disclosure of confidential evidence that has been protected as such throughout the proceedings, through the examination of a factual or expert witness at the hearing.

In practice, this issue can be addressed by restricting the individuals present during the examination (*i.e.* identifying a confidentiality club), by consent of the parties or order of the tribunal, and issuing two versions of the transcript, with the non-redacted version being accessible only to the confidentiality club or available only for inspection at the presiding arbitrator's office (with supervised note taking).

In an ICC arbitration a tribunal dealt with the issue by ordering the following:

> Whenever any Particularly Sensitive Material [previously defined] or the information contained therein is to be used in connection with the giving of testimony before the Tribunal, (a) only persons who are authorized under paragraph 3 of this Order to have access to Particularly Sensitive Material shall be in attendance, and (b) no witness shall be permitted to review the portions of any transcripts or Documents

> containing Particularly Sensitive Material without first executing a copy of Exhibit A. If the Requesting Party wishes to disclose portions of Particularly Sensitive Material that do not satisfy the definition in paragraph 1 (d) to persons listed in paragraph 4 (who are not listed in paragraph 3), it shall first redact such portions enclosed with brackets […].[35]

2.4.2 Confidential witness testimony

Special measures may also be required when it is the identity of a witness, as well as the content of his or her testimony, which should be kept confidential, for instance when there is a real risk that the other party may apply pressure on the witness or simply when the witness' safety or reputation may be at risk through third parties discovering his or her role as a witness in the arbitration.

This situation is common in criminal proceedings but rather uncommon in the context of international commercial disputes and few examples are available.

In a recent investor-state arbitration, conducted under the UNCITRAL Arbitration Rules, one of the witnesses (formerly employed by the investor) agreed to testify, largely against the investor, only if his identity and the fact that he had agreed to testify in the arbitration remained confidential. Despite the investor's objection, the tribunal ordered that the witness's identity and his evidence be kept confidential in view of the "possible reprisal and/or undue pressure from his or her testimony". The information could be disclosed only to an agreed "confidentiality club", namely the tribunal, the PCA, the investor's arbitration counsel, and the investor's key party representatives who were also witnesses of fact, upon individual undertakings being provided by the later. In addition, the witness's identity and other personal information were redacted from his written witness statement and from the parts of the brief that referred to it. The tribunal also ordered that the investor "refrain from approaching or addressing [the witness] during or after the arbitration proceedings, except during the hearing for the purpose of oral examination", but authorized the investor "to disclose the witness' name to third parties for the purpose of investigating his credibility and the reliability of his testimony, but without disclosing the fact that he had submitted evidence in the arbitration".

---

[35] Confidentiality Order of 12 July 1994 in ICC Case No. 7893, No. 1 JOURNAL DU DROIT INTERNATIONAL, pp. 1069-1076 (1998).

For the hearing, it was agreed that only one designated party representative could remain in the hearing room with counsel during his examination and that the witness's name could not be mentioned during the examination (so as to ensure that it would not be recorded in the transcript). To confirm the witness's identity at the start of his examination, but avoid it being recorded, the president wrote the witness's name on a sheet of paper, signed by both counsel, explained on the record that he had done so and asked the witness to confirm that it was his name written on the sheet of paper, without reading it out loud. Finally, so as to limit the risk of dissemination of the witness's testimony, separate electronic copies of the transcript containing his evidence were prepared and provided only to the tribunal and counsel, with an order that the CD-Rom be returned for destruction after the issuance of the award.

3. KEY FEATURES AND SELECTED ISSUES

In all of the cases where a specific measure may be required to protect confidential information, certain issues should be considered at the outset: What form should it take and for whom? What should it address? For how long should it be in force?

As a preliminary question, however: when should confidentiality measures be addressed, *i.e.* requested or suggested and implemented? The answer to this question obviously depends on the facts of each case. What appears essential is to ensure a level playing field, taking into account the parties' genuine expectations, and to seek to avoid disruption to the proceedings by addressing the question earlier rather than later.

Tribunals tend to avoid raising the issue of their own motion, in particular if the issue is not addressed in the parties' arbitration agreement (or underlying contract) and very first submissions. Yet, in some cases it may be appropriate for the tribunal to do so, for instance when agreeing the terms of reference or terms of appointment and the rules applicable to the conduct of the proceedings and the timetable, at least in general terms. This will be the case for instance where the tribunal can see that, given the industry, the nature of the dispute or claims made, the issue will inevitably arise, but the parties' expectations are likely to be so different that some disruption to the proceedings at a later stage seems inevitable.

3.1 What Form Should Confidentiality Measures Take?

In practice, as observed from the examples discussed in this paper, confidentiality measures take essentially three forms: confidentiality agreements entered into by the parties, protective orders issued by the arbitral tribunal and unilateral undertakings signed by specific individuals.

Given a certain lack of clarity on both the determination[36] and the scope of the legal framework applicable to the issue of confidentiality in international arbitration, including as to the scope of the tribunal's powers, the best option is undoubtedly the confidentiality agreement between the parties. Such agreements also can provide a better platform for truly tailor-made solutions in term of scope, extent, duration of the confidentiality obligation and available remedies in case of breach—at least when both parties have a strong interest in protecting the confidentiality of certain information.

Alternatively, when no agreement can be reached or when a party wishes to "reinforce"—by being able to enforce remedies in case of breach—an agreement or an undertaking already obtained from the other party, the tribunal can issue a procedural order, often referred to as a "protective order".[37] This will typically be the case when strong protection is required for particularly sensitive information involving third parties to which one of the parties owes an obligation of confidentiality.

Certain arbitration rules expressly recognize the tribunal's power to order measures to protect confidential information. This is the case of the ICC Rules[38] and the WIPO Rules.[39] The IBA Rules also provide

---

[36] On the difficulties to determine the applicable legal framework to confidentiality issues, *see* Luca Radicati di Brozolo, Flavio Ponzano, *Confidentiality within Arbitration*, at p. 1 of the present volume.

[37] *See* BORN, *op. cit.*, p. 2388; WAINCYMER, *op. cit.*, para. 11.8.1; Jolles/Canals De Cediel, *op. cit.*, p. 111.

[38] Article 22(3) of the 2012 ICC Rules provides that the tribunal "may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information". Former Art. 20 para. 7 of the 1998 ICC Rules provided that "[t]he Arbitral Tribunal may take measures for protecting trade secrets and confidential information." *See* CROOK/GARCIA, *op. cit.*, para. 3.2.2.2; DERAINS/SCHWARZ, A GUIDE TO THE ICC RULES OF ARBITRATION, p. 286 (Kluwer Law International, 2005).

[39] Article 54(c) of the WIPO Rules provides more detailed guidance: "The Tribunal shall determine whether the information is to be classified as confidential and of such a nature that the absence of special measures of protection in the proceedings would be likely to cause serious harm to the party invoking its confidentiality. If the Tribunal so determines, it shall decide under which conditions and to whom the confidential information may in part or in whole be disclosed and shall require any person to whom

that the tribunal "may, where appropriate, make necessary arrangements to permit evidence to be presented or considered subject to suitable confidentiality protection" (Article 9(4)).

In practice, both confidentiality agreements and protective orders are usually combined with unilateral confidentiality undertakings.[40]

Protective orders indeed typically suffice to cover the "obvious" protagonists: the parties, their counsel, the arbitrators, arbitral secretaries and arbitration institutions, but not third parties such as specific individuals, employees or agents of the parties, factual and expert witnesses, court reporters or interpreters. Confidentiality agreements and protective orders therefore often provide that the parties should cause separate confidentiality undertakings to be signed by the relevant third parties. This is a rather obvious step but one that should not be omitted when the information to be protected is particularly sensitive.

This approach was followed in a recent ICC arbitration: the confidentiality agreement signed by the parties provided that in-house counsel, external legal experts and external technical consultants in order to access the (defined) confidential information were each required to sign a confidentiality undertaking attached to the confidentiality agreement, a step that was not required of the parties' legal representatives and the arbitrators.

In another case (discussed above), involving a dispute over the performance of a high technology design and supply contract in the defence and security industry and involving reliance on extremely sensitive information, the arbitrator himself was required to sign a separate undertaking, which included an obligation to take the necessary organisational measures to guarantee the confidentiality of the proceedings, in particular when engaging third parties to assist on the case, or when drafting the award, and to return the documents, as well as a fairly drastic clause of liability for damages in case of breach.

3.2 What Issues Should Specifically Be Included as Part of the Confidentiality Measures?

Obviously, the specific terms of each confidentiality measure, agreed or ordered, depends on the facts of the case. However, certain basic features should be included such as a clear definition of the documents or information covered, a statement to the effect that the

---

the confidential information is to be disclosed to sign an appropriate confidentiality undertaking".

[40] *See e.g.* FRY/GREENBERG/MAZZA, *op. cit.*, para. 3-811.

confidential documents or information obtained should be used for the arbitration only, or that confidential documents or information once held by the authorised persons should be well protected, even specifying if necessary the measures required to that effect.

Other features may be more delicate but should nonetheless be considered.

The first one is the forum in case of violation or alleged violation of the measure. In the case of a protective order, the tribunal will likely have jurisdiction during the arbitration in case of breach of its order, but appropriate judicial recourse may be required, and thus best addressed at the outset, in particular given the risk of violation of the measure after the arbitration has been completed and the tribunal has become *functus officio* (*e.g.* violation of an ongoing obligation of non-disclosure and obligation of destruction within a period of time after the award is issued).[41]

In practice, the solutions adopted vary: the issue is either specifically addressed, or only vaguely mentioned—*e.g.* with a mere reference to "the right to bring a claim before the competent tribunal or court"—or simply avoided.

When the issue is specifically addressed, the approaches vary: (a) express references to the jurisdiction of the tribunal, as the case may be with the right to apply to national courts for interim relief or enforcement of the tribunal's order; coupled with (b) stand-alone dispute resolution clauses for any dispute once the arbitration is completed, providing for a new arbitration before the same tribunal or a new tribunal or recourse to the competent state courts; or (c) jurisdiction of specific national courts at the outset.

By way of illustration, the following language was found in two confidentiality agreements (ICC arbitration cases):

> All disputes arising out of or in connection with this Agreement shall be finally settled by the Arbitral Tribunal constituted to decide the Arbitration, or, should the Arbitral Tribunal be no longer constituted, by a single arbitrator appointed in accordance with the Rules of Arbitration of the International Chamber of Commerce, it being understood that the latter case the seat of the arbitration will be […] and the language of the proceedings English.

---

[41] DERAINS/SCHWARTZ, *op. cit.*, p. 286; FRY/GREENBERG/MAZZA, *op. cit.*, para. 3-809; de Ly/Friedman/Radicati di Brozolo, *op. cit.*, pp. 375-376.

> Any action, suit or proceeding to enforce the terms of the Confidentiality Agreement, each party irrevocably submits to the jurisdiction of the Arbitral Tribunal (each Party being free to produce a copy of this Confidentiality Agreement to the Tribunal) and, once such jurisdiction extinguishes, of French courts or any other court of competent jurisdiction, as the case may be.

By contrast, another order, issued also in the context of an ICC arbitration, left the issue somewhat vague as to when a separate arbitration would have to be commenced:

> Any claim asserting a violation of this Order during or after the arbitration and any dispute arising out or in connection with any obligation imposed upon Claimant by this Order will be referred to arbitration with accordance with the arbitration clause as contained in [the contract subject to the pending arbitration].

Whichever approach is adopted, the relevant language should be included not only in the confidentiality agreement and tribunal's order but also, directly or by reference, in the confidentiality undertakings signed by third parties.

A second related matter, which should be considered at the outset, is that of possible remedies and sanctions in case of breach. That question does not appear to be often addressed, as it will usually fall on the competent tribunal or court to decide on the matter.

In practice, given the likely difficulty in establishing not only the source of the disclosure (as a first hurdle), but also the loss suffered and the relevant causation, an award of damages will rarely be an appropriate remedy. One solution seen is the import of a provision routinely found in non-disclosure agreements entered into in the context of contractual negotiations, whereby the parties agree that any violation of the confidentiality agreement, or protective order, will cause "immediate and irreparable harm for the purpose of seeking injunctive relief from the competent court or tribunal". An alternative is to insert a penalty clause.[42]

Thirdly, and although not always done in practice, it may be prudent to identify specifically possible exceptions to the obligation of confidentiality: enforcement and challenge of the award, pursuit of a legal right, compliance with a competing legal obligation (such as an

[42] *See e.g.* Müller, *op. cit.*, pp. 233.

order from governmental or regulatory bodies or disclosure requirement under stock exchange regulations, including obligations towards investors and lenders).[43]

Last but not least, when drafting procedural orders or confidentiality agreements, it is advisable to consider their enforceability after the completion of the arbitration, as already discussed above in the specific context of orders for the destruction of documents.[44] In practice, again, a wide variety of solutions are adopted, ranging from the very vague to the very detailed.

Hence, in one ICC arbitration, the parties simply agreed that the obligations contained in the confidentiality agreement "remain in full force and effect even after the conclusion of the arbitral proceedings".

In another ICC case, the confidentiality agreement provided that it would expire ten years after the destruction of confidential documents, itself to take place thirty days after the latest of (i) the date upon which the final award was notified or (ii) the date upon which the final award was fully enforced.

In a further ICC arbitration, the tribunal ordered that its protective order shall remain in full force and effect:

> (a) as to the Requesting Party, for five years after the issuance of a final award or until the certification by the Requesting Party of the return to the Producing Party of all copies of Particularly Sensitive Material as described in paragraph 10, whichever period is longer, subject to change if the Tribunal later determines a longer or shorter period to be appropriate in view of information and evidence received and considered by the Tribunal at a later time, and
>
> (b) as to persons who are neither the Requesting Party nor Producing Party, for a period of five years after the issuance of a final award.

---

[43] *See e.g.* de Ly/Friedman/Radicati di Brozolo, *op. cit.*, pp. 375-376; Michael Hwang and Katie Chung, *Defining the Indefinable: Practical Problems of Confidentiality in Arbitration*, Volume 26 Issue 5 JOURNAL OF INTERNATIONAL ARBITRATION, pp. 617-626 (2009); Georges Burn, Alison Pearsall, *Exceptions to Confidentiality in International Arbitration*, Special Supplement 2009 Confidentiality in Arbitration, ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN, pp. 23-37 (2009); Leon E. Trackman, *Confidentiality in International Commercial Arbitration*, Volume 18 Issue 1 ARBITRATION INTERNATIONAL, pp. 1-18 Section IX (2002).

[44] *See e.g.* FRY/GREENBERG/MAZZA, *op. cit.*, para. 3-809; de Ly/Friedman/Radicati di Brozolo, *op. cit.*, pp. 377-378.

4. CONCLUSION

How to allow, but also protect, confidential evidence is not an easy task, and the perfect solution rarely exists but the examples discussed in this paper show that there is a lot of room for creativity, possibly more than one may think and that tailor-made solutions are what parties and tribunals should aim for.[45]

Beyond the obvious considerations of due process, relevance (and genuine confidentiality) of the information sought to be protected, there are two elements that appear essential to ensure that the right measures can be devised for each case and be effective in practice: a degree of trust between the parties and their counsel and a real engagement in the process on the part of the arbitral tribunal.

[45] As pointed out by the Secretariat of the ICC, Article 22(3) of the 2012 ICC Rules, which allows the arbitral tribunal to issue orders to protect confidentiality, "places no limit on the arbitral tribunal's creativity in making protective orders" (FRY/GREENBERG/MAZZA, *op. cit.*, para. 3-812).