



Of Confidentiality Orders And Confidentiality Offers

A Swiss Perspective On The Effect And Effectiveness Of Measures To Protect Confidentiality

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I. Confidentiality Expectations In International Arbitration

There appears to exist, in arbitration, a widely held expectation¹⁾ of “confidentiality”.²⁾ “Confidentiality” here refers to the protection of information, shared in the proceedings, from being used outside the arbitration or disclosed to third parties.³⁾ Expectations of confidentiality may extend to not having disclosed the very existence of the arbitration.⁴⁾ The present contribution focuses on confidentiality of information shared between the parties in arbitration proceedings.

¹⁾ See KAHLERT, VERTRAULICHKEIT IM SCHIEDSVERFAHREN 1 (2015) with references; Müller, *La confidentialité en arbitrage commercial international: un trompe-l'œil?*, ASA Bull 2005, 216 (comparative account). Both authors have a very nuanced view as to whether this expectation is warranted and under what circumstances.

²⁾ On confidentiality from a Swiss perspective see BERGER/KELLERHALS, INTERNATIONAL AND DOMESTIC ARBITRATION IN SWITZERLAND (3rd ed. 2015) §18.VII; GEISINGER (ed), CONFIDENTIALITY AND RESTRICTED ACCESS INFORMATION IN INTERNATIONAL ARBITRATION, ASA Special Series No 43 (2016); Jolles/Stark-Traber/Canals de Cediel, *Confidentiality*, in INTERNATIONAL ARBITRATION IN SWITZERLAND Ch 7 (Geisinger/Voser eds., 2nd ed. 2013); STACHER, EINFÜHRUNG IN DIE INTERNATIONALE SCHIEDSGERICHTSBARKEIT DER SCHWEIZ nos 343–344 (2015). – For an Austrian perspective, see Öhlberger, *How Confidential is Arbitration in Austria?*, in AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 2011 65 *et seq.* (2011).

³⁾ From “confidentiality” distinguish the “privacy” of the hearing (or proceedings), *i.e.* that hearing (or proceedings) are open only to the parties, see Kühn/Gantenberg, *Confidentiality in Arbitration*, in FESTSCHRIFT SCHLOSSER 461 (462–463) (2005); Perkins, *Protective Orders in International Arbitration*, ASA Bull 2015, 274.

⁴⁾ See, *e.g.*, the specific provision to that effect in Art 75 WIPO Arbitration Rules 2014.



Whether confidentiality expectations are warranted on the substance depends on the applicable rules, *i.e.* the parties' agreements (main contract or arbitration agreement), the relevant arbitration rules as part of the arbitration agreement,⁵⁾ the *lex arbitri*,⁶⁾ the law applicable to the parties' main contract (*lex causae*), and general provisions of civil law including tort law.⁷⁾ This contribution does not deal with these rules in detail,⁸⁾ but rather focuses on the effect and effectiveness of ways and means to protect the parties' interests in practice, considering that there appears to exist a further expectation that tribunals may intervene in that regard. Tribunals are often called upon to implement confidentiality expectations, which they sometimes do by way of "confidentiality orders".⁹⁾

The immediate goal of such confidentiality orders varies, some simply "ordering" the parties to keep confidential certain information exchanged during the proceedings, whereas others limit a party's very access to information known to the other side and the tribunal. Depending on the degree of "secrecy" imposed by such orders, they raise procedural concerns, namely – depending on the applicable rules – regarding the parties' right to be heard, to be treated equally, to have access to the file, to an effective defense *etc.* When making confidentiality orders, the tribunal will have to balance the parties' respective interests in having these guarantees or any confidentiality expectations protected.

From an Austrian perspective, such balancing exercise may appear particularly delicate considering that, pursuant to s 599(3) of the Austrian Code of Civil Procedure,¹⁰⁾ any information the tribunal might rely upon in its decision must be brought to both parties' attention, which appears to leave little room for any balancing of interests.¹¹⁾ Yet the present discussion is therefore of

⁵⁾ *E.g.*, Art 44 Swiss Rules 2012; Artt 75–78 WIPO Arbitration Rules 2014; Art 29 Liechtenstein Rules 2012; Art 3(13) IBA Rules on the Taking of Evidence 2010 (to the extent they are agreed to be applicable).

⁶⁾ Swiss rules on international arbitration (Ch 12 of the Swiss Private International Law Act, PILA) as well as Swiss rules on domestic arbitration (3rd Part of the Swiss Code of Civil Procedure, SCCP) are silent on obligations of confidentiality.

⁷⁾ See KAHLERT, *supra* note 1, at 244–245.

⁸⁾ An overview of the bases for and scope of confidentiality obligations in German and international arbitration provide Kühn/Gantenberg, *supra* note 3, at 461.

⁹⁾ Such orders are also called "protective orders", the two terms being used interchangeably. For an overview, see Haller, *Protection of Business Secrets by Way of Protective Orders*, SchiedsVZ 135 (2013); Perkins, *supra* note 3, at 274.

¹⁰⁾ See s 599(3) Austrian CCP: "All written submissions, documents and other communications produced to the arbitral tribunal by one of the parties shall be brought to the attention of the other party. Expert opinions and other evidence on which the arbitral tribunal might rely in its decision shall be brought to the attention of both parties."

¹¹⁾ A majority of commentators apparently considers this provision to be mandatory, prohibiting arrangements that would keep some of the relevant material



even greater importance in the context of arbitration proceedings seated in Austria, although not all of the remedies suggested – from a Swiss perspective – may be available in such proceedings.

The starting point will be an overview of potential effects of confidentiality “orders” (*infra* II), before entering into the details of the effect and effectiveness of tribunals’ pronouncements regarding existing confidentiality obligations (*infra* III) and of options available in case a protective regime needs to be created *ad hoc* (*infra* IV).

II. Confidentiality “Orders”: Implementing Confidentiality Expectations (Overview)

Provisions such as Art 22(3) ICC Rules¹²⁾ seem to confirm that the expectation of possible tribunal intervention to protect confidentiality is warranted. Yet there is often little clarity as to the precise effect of tribunals’ pronouncements in this context.

When dealing with “confidentiality”, the (i) procedural level (*verfahrensrechtlich*) and the (ii) substantive level (*materiellrechtlich*) must be distinguished.

(i) On the procedural level, the question is whether a tribunal has the *power* to issue a confidentiality order. Such power may be based on the tribunal’s general power to conduct and organize the proceedings, or it may be based on express authorizations such as Art 22(3) ICC Rules. Where such power should be lacking, the tribunal may not, from a procedural perspective, issue “orders” regarding confidentiality.

(ii) Independently of the tribunal’s procedural powers, the question arises as to the very *existence and scope of* (including possible exceptions to) *confidentiality obligations*. This concerns the substantive level. Confidentiality obligations only exist to the extent of their respective substantive (*materiellrechtlich*) source.¹³⁾

Analyzing potential combinations of procedural power and substantive obligations gives three practically relevant combinations:

from one party; *see, e.g.*, REINER, DAS NEUE ÖSTERREICHISCHE SCHIEDSRECHT § 599, no 128 (2006); RIEGLER/PETSCHER/FREMUTH-WOLF/PLATTE/LIEBSCHER, ARBITRATION LAW OF AUSTRIA 380 (2007); different, in case of justifiable reasons, FASCHING/KONECNY/HAUSMANINGER, ZIVILPROZESSGESETZE KOMMENTAR § 600, no 53 (3rd ed. 2016).

¹²⁾ Art 22(3) ICC Rules 2017 reads as follows: “*Upon the request of any party, the arbitral 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.*”

¹³⁾ Be that source in arbitration rules, such as Art 75 WIPO Arbitration Rules 2014 (*see supra* note 4), in the contract, or in other provisions.



First, there may be scenarios where the tribunal has no power to issue “confidentiality orders” at all. Substantive confidentiality obligations may exist, but the parties have to turn to another *forum* to enforce them. We will thus not further analyze this scenario.

Second, the tribunal may have the power to issue “confidentiality orders” and a substantive confidentiality obligation does exist. What remains to be analyzed is the form and effect of such “orders”.

In summary, with regard to these cases, we submit that “confidentiality orders”, as they are used in practice (and be they called “procedural orders” or interim or preliminary “awards”), primarily benefit from a *de facto* effect, and that they benefit from that effect primarily during the proceedings. For any such effect to extend beyond the proceedings, the tribunal’s pronouncement would have to be made by way of a final (partial) award (*infra* III).

Third, there are cases where the tribunal has the power to issue “confidentiality orders” but no substantive confidentiality obligation exists. The question is then whether the tribunal directly or only the parties have the authority to establish a protective regime *ad hoc*.

In summary, we submit that a tribunal has no authority to “create” new confidentiality obligations between the parties, as this would amount to a modification of the parties’ agreement(s), except where the tribunal was expressly authorized to do so by the parties. The parties, on the other hand, are free to set up a protective regime *ad hoc*. More pressing in this case is the need to motivate the parties to cooperate in a reasonable manner (*infra* IV).

III. Pronouncements Regarding Existing Confidentiality Obligations

If confidentiality obligations are violated, remedies may exist under the contract or the applicable law, *e.g.*, for damages.¹⁴⁾ However, such remedies, applied *ex post*, often provide little comfort, as it may be difficult to prove a breach, or damage, or a causal link between breach and damage. Penalty clauses may alleviate the evidentiary problems regarding damage and causal link,¹⁵⁾

¹⁴⁾ See, *e.g.*, BERGER/KELLERHALS, *supra* note 2, at no 1235; Lendenmann, *The Parties’ Confidentiality Obligations and their Enforcement in International Commercial Arbitration*, in SELECTED PAPERS ON INTERNATIONAL ARBITRATION Vol 3. SAA SERIES ON INTERNATIONAL ARBITRATION 123, 155 *et seq.* (2013).

¹⁵⁾ For instance, the Liechtenstein Rules 2012, in Art 29.7, contain an express penalty clause: “If a party, its representative, an expert, an arbitrator, any commissioner or one of their auxiliary persons breaches the confidentiality obligation set out in Article 29.1, that person or those persons shall pay a contractual penalty in the amount of CHF 50,000 to the injured parties, unless the parties have agreed otherwise.” The possibility to prove additional damage seems to be reserved (DASSER/REITHNER, COMMENTARY TO THE LIECHTENSTEIN RULES Art 29, no 2 [2015]).



but the underlying breach (or requirements for the penalty clause to apply) must still be proven.

A prudent party may therefore prefer to have its confidentiality interests protected *ex ante*. Where the tribunal has the power to act in that regard, it may do so by way of a procedural order (*infra A*) or a final (partial) award (*infra B*). In Switzerland, assistance may also be sought from a competent state court, the so-called *juge d'appui* (*infra C*).

A. The Effect And Effectiveness Of Arbitral Orders

Effect and effectiveness of the various options that are available in this context have to be assessed separately for the periods during (*infra 1*) and after the proceedings (*infra 2*). The following discussion is thereby unrelated to and independent of the question of whether confidentiality obligations, as to their substance, extend in time beyond the proceedings. It is assumed in the following that a confidentiality obligation exists and that the tribunal pronounces itself on such obligation, irrespective of its particular scope (with regard to substance matter, persons involved, or timeframe).

1. During The Arbitral Proceedings

The instrument that comes to mind first when the issue of implementing confidentiality obligations arises is likely to be a procedural order.¹⁶⁾ Confidentiality orders are at the very least binding upon the parties during the course of the arbitration. Under many rules, parties even expressly agree to comply with such orders.¹⁷⁾

To assess the *effect* of such confidentiality orders under Swiss law, we must distinguish two types of determinations potentially made therein. On the one hand, the tribunal will pronounce itself, at least indirectly, on the existence and extent of the substantive confidentiality obligation (or otherwise the tribunal would have no basis for ordering anything). On the other hand, the tribunal will make procedural determinations, thereby *inter alia* “protecting” existing confidentiality obligations on the basis of Art 183 PILA (provisional or conservatory measures);¹⁸⁾ *e.g.*, the tribunal may order a party to stop behavior infringing the substantive confidentiality obligation or set out the modalities of the exchange of information, time limits, persons involved *etc.*

¹⁶⁾ Baizeau/Richard, *Addressing The Issue Of Confidentiality In Arbitration Proceedings: How Is This Done in Pactice?*, in Geisinger (ed.), *supra* note 2, at Ch 4 53, accordingly focus (only) on “*agreements and procedural orders*”.

¹⁷⁾ See, *e.g.*, Art 15(7) Swiss Rules 2012; Art 22(5) ICC Rules 2017; Art 33(1)(4) Vienna Rules 2013.

¹⁸⁾ Jolles/Stark-Traber/Canals de Cediél, *supra* note 2, at 136.



In many cases, confidentiality orders have thus a hybrid nature. The effect of a confidentiality order depends on which type of determination one is looking at.

Insofar as the tribunal pronounces itself on the very existence or scope of the substantive confidentiality obligation, the pronouncement touches upon a question of “merits” (the substantive aspect of the confidentiality obligation). The pronouncement with regard to that aspect is more than a mere provisional or conservatory measure (pursuant to Art 183 PILA), even if made “only” in the form of a procedural order, as it determines an issue that is of more than merely temporary nature.

In distinction to purely provisional or conservatory measures,¹⁹⁾ the part of a confidentiality order that is of more than merely temporary nature is binding upon the tribunal during the course of the proceedings (*innerprozessuale Bindungswirkung*). Thus, the tribunal may not change its mind regarding the existence or scope of the substantive confidentiality obligation. In contrast, the tribunal may modify the purely procedural elements of the confidentiality order, e.g. modify time limits.

Yet in contrast to final (partial) awards, interim or preliminary determinations in a confidentiality order cannot be challenged separately and have no *res judicata* effect beyond the proceedings.²⁰⁾ The reason is that these pronouncements do not determine the potential entirety of a dispute regarding the existence or scope of confidentiality obligations (not the least because, in practice, there will usually not be any request for relief concerning the determination of the substantive confidentiality obligation). Or else, if they did finally determine such dispute, they would have to be characterized as a final (declaratory) award.²¹⁾

Having thus determined the effect of confidentiality orders, what remains to be analyzed is their *effectiveness* with regard to protecting confidentiality. Since we are at present dealing with the scenario of existing confidentiality obligations anyway, the additional “legal” value of a confidentiality order, whether or not it touches upon the “merits”, appears to be limited (except that it may indirectly clarify the legal situation, although without *res judicata* effect). Even where the pronouncement is to be characterized as a “decision” on the merits, a procedural order may not be enforceable in state courts,²²⁾ and even if

¹⁹⁾ No *res judicata* attaches to an arbitral tribunal’s “decision” that has only temporary effect, such as orders giving directions of procedure or orders regarding provisional or conservatory measures, see BERGER/KELLERHALS, *supra* note 2, at no 1647; ZAUGG, VERFAHRENSGLIEDERUNG IN DER INTERNATIONALEN SCHIEDSGERICHTSBARKEIT no 148 (2014).

²⁰⁾ See BERGER/KELLERHALS, *supra* note 2, at no 1645, on the *res judicata* effect.

²¹⁾ See on declaratory awards *infra* Section III.B.

²²⁾ Regarding the position under Swiss law see *infra* Section III.B. The Swiss judge may be approached to assist with the enforcement of protective measures issued by tribunals.



the order gave rise to an independent obligation, namely to comply with the order,²³⁾ this obligation would still have to be “enforced”, potentially in further proceedings (unless the prayers for relief can still be amended by adding a prayer on the issue of confidentiality).

More important appears to be, during the course of the arbitration, the *de facto* effect of confidentiality orders. If non-compliant with a confidentiality order, a party risks procedural consequences.²⁴⁾ For instance, a party may be afraid to antagonize the tribunal if it were to disregard a tribunal’s order or to lose overall credibility in case it were to violate a confidentiality obligation it had agreed to *vis-à-vis* the other side. Where the prospect of such (adverse) consequences is enough to motivate a party to comply with the confidentiality order, such order may still be a reasonable and effective tool to protect confidentiality expectations.

2. After The End Of The Arbitral Proceedings

Once the tribunal is *functus officio* and can no longer be addressed, a *de facto* effect of its procedural orders is unlikely, for neither party has to fear any adverse procedural consequences any more.

In this scenario, a legal effect extending beyond the proceedings would be even more important. Such legal effect exists where the decision has a *res judicata* effect, *i.e.* the decision “binds”²⁵⁾ the parties as well as subsequent decision makers, and is therefore also likely to be respected by the parties independently of subsequent proceedings. Yet under Swiss law, a *res judicata* effect of a tribunal’s pronouncement is reserved for final (partial) awards.

Confidentiality orders, in their usual form, therefore have neither a *de facto* nor a legal effect beyond the proceedings. They appear to be unsuited,

²³⁾ On this potential effect of “transposing” procedural obligations through the operation of arbitration rules *see infra* Section III.A.2. For the avoidance of doubt, a tribunal would not “create” additional *confidentiality* obligations by way of such “transposition”. Rather, “transposition” would follow from the order as such, irrespective of its content (of, in this case, enforcing a confidentiality obligation). The order would, together with the parties’ promise to comply with it, create an additional obligation.

²⁴⁾ KAHLERT, *supra* note 1, at 390–391.

²⁵⁾ The “binding” effect can mean that a second court or tribunal is barred from re-deciding the issue (*ne bis in idem*, prohibition to repeat, negative binding effect of *res judicata*), or it can mean that the decision of a second court or tribunal is (partially) pre-determined by the first decision (conclusive effect, prohibition to render a contradictory decision, positive binding effect of *res judicata*); on this distinction *see* LANDBRECHT, TEIL-SACHENTSCHEIDUNGEN 35–38 (2012). In addition, awards or judgments have a “preclusive” effect (*Präklusion*), in the context of both their negative and positive binding effect, with regard to issues that were not decided but could have been raised (*id.*, 291). For the *res judicata* effect attached to Swiss arbitral awards *see* BERGER/KELLERHALS, *supra* note 2, at nos 1657–1664.



thus lacking effectiveness, to protect confidentiality expectations beyond the period during which the tribunal is constituted.

On the other hand, as already mentioned,²⁶⁾ the parties, by agreeing on certain arbitration rules, often undertake to comply with orders issued by the tribunal.²⁷⁾ One could argue that the tribunal's order, by operation of the parties' undertaking to comply with it, becomes "transposed" into a separate obligation.²⁸⁾ Whether this obligation to comply is characterized as substantive²⁹⁾ or procedural,³⁰⁾ Swiss legal doctrine seems to agree that it can be enforced.

A tribunal's confidentiality order would thus, e.g. via Art 15(7) Swiss Rules, be transposed into an obligation on the part of the parties and could, even after the tribunal having become *functus officio*, be enforced (in new proceedings). Most likely, such obligation would fall under the scope of the initial arbitration agreement if the latter relates to any "dispute, controversy, or claim arising out of, or in relation to"³¹⁾ a particular contract. Furthermore, the obligation should be governed by the law of the original contract as the (indirect) source of the parties' obligation to comply with the order.³²⁾

As this overview demonstrates, a confidentiality order "protecting" confidentiality expectations will have itself little value beyond the arbitral proceedings, but the obligation to comply on the part of the parties, created indirectly by such order, may still be enforceable in pending or subsequent proceedings.

²⁶⁾ See *supra* note 17.

²⁷⁾ Art 15(7)(2) Swiss Rules 2012, e.g., reads: "The parties undertake to comply with any award or order made by the arbitral tribunal or emergency arbitrator without delay."

²⁸⁾ Legal doctrine distinguishes agreements that oblige the parties to do (or omit) something (*Verpflichtungsverträge*) and agreements that have an immediate impact on the parties' rights or on a legal relationship (*Verfügungsverträge*), see WAGNER, PROZESSVERTRÄGE 35–38 (1998). In the present context, the parties, by promising to comply with a procedural order, have agreed in general to do something, i.e. they have concluded a *Verpflichtungsvertrag*. The precise content of their obligation is determined by a subsequent decision of a third party, here the tribunal.

²⁹⁾ See, e.g., Gabriel, *Damages for Breach of Arbitration Agreements*, in ARBITRATION IN SWITZERLAND Ch 13 Part XII, no 12 (Arroyo ed., 2013); Girsberger/Gabriel, *Die Rechtsnatur der Schiedsvereinbarung im schweizerischen Recht*, in MÉLANGES EN L'HONNEUR DE PIERRE TERCIER 819 (832) (2008).

³⁰⁾ STACHER, DIE RECHTSNATUR DER SCHIEDSVEREINBARUNG no 414(i), in particular no 58 (2007): a procedural contract may have the effect of obliging a party to do something; on the distinction of *Verpflichtungsverträge* and *Verfügungsverträge* see already *supra* note 28.

³¹⁾ See the wording of the Model Arbitration Clause proposed in the Swiss Rules.

³²⁾ For a similar position on the effect of Art 22(5) ICC Rules 2017 ("The parties undertake to comply with any order made by the arbitral tribunal."), the wording of which is similar to that of Art 15(7)(2) Swiss Rules 2012 (*supra* note 27), see NEDDEN/HERZBERG/HALLER, PRAXISKOMMENTAR Art 22 ICC-SchO, no 15 (2014).

B. The Effect And Effectiveness Of Arbitral Awards

Alternatively, since obligations of confidentiality have a substantive law dimension (*materiellrechtlich*), the tribunal could pronounce itself on the existence and scope of such obligation by way of an arbitral award. This requires a dispute in that regard and a corresponding request for relief.³³⁾

On the one hand, the tribunal could pronounce itself directly on the existence or scope of the obligation by declaring, in a final manner, binding beyond the proceedings,³⁴⁾ that an obligation exists. Declaratory relief (*Feststellungs-Schiedsspruch*) is available under Swiss law.³⁵⁾ It would conclusively determine the existence or scope of the obligation. Declaratory awards are final (partial) awards imbued, under Swiss law, with a *res judicata* effect to the extent of their determination.³⁶⁾

On the other hand, the tribunal could pronounce itself indirectly (*inzident*) on the existence or scope of confidentiality obligations when ordering injunctive relief (*Unterlassungs-Schiedsspruch*), which is also available under Swiss law in principle.³⁷⁾ In this case, the award would have, subject to a separate declaration upon a corresponding request for relief, no *res judicata* effect with regard to the determination of the existence or scope of the confidentiality obligation, as the tribunal would pronounce itself on the underlying obligation only indirectly.³⁸⁾

The downside, as with all awards, is that both types of award require separate enforcement proceedings in state courts. Yet their distinct advantage over mere provisional or conservatory measures would be their legal effect beyond the proceedings. Having obtained such declaration or injunction may, already during the proceedings, reinforce the other side's awareness of, and thus compliance with the obligation.

³³⁾ Otherwise the tribunal would merely render a procedural order, *see* Section III.A.

³⁴⁾ Mabillard *in* BASLER KOMMENTAR INTERNATIONALES PRIVATRECHT Art 183, no 10 (3rd ed. 2013), states that provisional measures do not have legal finality and may therefore never be issued as awards. This is distinct, however, from the present scenario, in which case the tribunal would determine, with legal finality, the existence or scope of a legal obligation, namely the parties' confidentiality obligation, beyond "protecting" the performance of this obligation during the course of the proceedings.

³⁵⁾ *See* Leimgruber, *Declaratory Relief in International Commercial Arbitration*, ASA Bull 2014, 467. On declaratory relief as one variant of non-monetary relief in general *see* Schneider, *Non-Monetary Relief in International Arbitration, in PERFORMANCE AS A REMEDY*, ASA Special Series No 30 Ch 1, 3 (10–12) (Schneider/Knoll eds., 2011).

³⁶⁾ This is presupposed, *e.g.*, by Leimgruber, *supra* note 35, at 467 (485).

³⁷⁾ Habegger *in* BASLER KOMMENTAR SCHWEIZERISCHE ZPO (2nd ed. 2013) Art 374, nos 1, 10.

³⁸⁾ *See* ZAUGG, *supra* note 19, at no 56: the request for relief determines the scope of the matter in dispute (*Streitgegenstand*), which, in turn, determines the scope of the *res judicata* effect.

C. Recourse To The Swiss *juge d'appui* (Art 183 PILA)

Finally, under Swiss law, an arbitral tribunal or party (with leave of the tribunal) may seek assistance from the *juge d'appui* with regard to the enforcement of its orders, since the tribunal itself has no coercive power.³⁹⁾ The Swiss court may further seek assistance from foreign courts.⁴⁰⁾ Recourse against a Swiss court's decision on the implementation of a tribunal's order is limited.⁴¹⁾

The main concern regarding the implementation of confidentiality orders through the Swiss *juge d'appui* appears to be one of effectiveness. It is uncertain whether the tribunal may include in its order a threat of penalties,⁴²⁾ except, most likely, where there is an express authorization to do so in the parties' agreement.⁴³⁾ Without such authorization, the threat has to be issued by the *juge d'appui*, which adds a further step until effective implementation of the confidentiality obligation.

In any event, in terms of effectiveness of the protection, it would have to be taken into account that the breach of a confidentiality obligation may be a one-off event, and that an irreparable harm may have occurred already, in which case the concern is no longer the enforcement of the confidentiality obligation but the recovery of any damage caused.

This problem could be mitigated by waiting with the disclosure of confidential information in the arbitration until the *juge d'appui* has issued the threat – in which case any non-compliance by the other side could immediately be sanctioned by the *juge d'appui*. Yet this will at the very least add to the duration of the proceedings and might give the other side an opportunity to cause delay.

IV. *Ad hoc* Creation Of A Protective Regime

The discussion so far was limited to scenarios where a substantive confidentiality obligation already existed (even though disputed as to its existence or scope). But there may also be cases in which no such substantive obligation exists but a party nevertheless requires protection. For instance, a party may have unilateral secrecy obligations not to disclose certain information

³⁹⁾ FURRER/GIRSBERGER/AMBAUEN, *HANDKOMMENTAR ZUM SCHWEIZER PRIVATRECHT* CHK IPRG 182–186, no 18 (3rd ed. 2016).

⁴⁰⁾ CHK IPRG 182–186, *supra* note 39, at no 20.

⁴¹⁾ See CHK IPRG 182–186, *supra* note 39, at no 20a: no recourse (*Beschwerde in Zivilsachen*) against decisions concerning interim measures by the arbitral tribunal.

⁴²⁾ See CHK IPRG 182–186, *supra* note 39, at no 18 with further references.

⁴³⁾ As, e.g., in the Liechtenstein Rules, *see supra* note 15.



on the basis of, *e.g.*, criminal, data privacy, or weapon control law.⁴⁴) Furthermore, the disclosure of information may require, although a rudimentary confidentiality obligation exists between the parties, a more elaborate protective regime, *e.g.* because the sharing of business data directly with a competitor would raise competition or antitrust concerns.

The question then arises whether the tribunal (*infra* A) or the parties (*infra* B) may “create” *ad hoc* a new, more extensive, or more detailed protective regime.

A. By The Tribunal?

Asking the tribunal to “create” *ad hoc* a protective regime involving “new” confidentiality obligations is unlikely to yield a positive result (*infra* 1), except where the tribunal was granted the express authority to do so (*infra* 2).

1. General Principles

As already explained,⁴⁵) the parties’ confidentiality obligations have a substantive law dimension. As far as the relationship between the parties is concerned, the basis of these obligations is the parties’ agreement (in conjunction with, if applicable, arbitration rules or domestic law rules referred to in the agreement). Only the parties privy to this agreement may modify it.

The tribunal’s general powers to organize the proceedings, under relevant arbitration rules, are at least insufficient to create “new” substantive confidentiality obligations under Swiss law.⁴⁶)

For instance, the above-mentioned provision in Art 22(3) ICC Rules 2017⁴⁷) authorizes the tribunal to “*make orders concerning the confidentiality of the arbitration proceedings*” and to “*take measures for protecting trade secrets and confidential information*”. However, on the face of it, the provision does not seem to authorize the tribunal to determine what “confidentiality” entails on a substantive level or to classify any information as trade secret or confidential. The wording of Art 22(3) ICC Rules 2017 appears to be too vague to be considered an authorization of the tribunal to modify the parties (substantive) agreement, in particular when compared to the very precise authorization stipulated in Art 54 WIPO Rules 2014.⁴⁸) Therefore, whether information falls

⁴⁴) For an overview of relevant areas of law see KAHLERT, *supra* note 1, at Ch 2.

⁴⁵) See *supra* Section II.

⁴⁶) Otherwise, if the tribunal’s authorization to “shape” the parties’ substantive agreement were not specific enough, there would be a risk of violating Art 27 of the Swiss Civil Code that prohibits agreements whereby a person renounces its capacity, see in detail the subsequent Section IV.A.2.

⁴⁷) See *supra* note 12.

⁴⁸) On which see further *infra* Section IV.A.2.



under the category of “trade secrets and confidential information” according to Art 22(3) ICC Rules 2017 has to be determined by and in accordance with (substantive) rules outside the ICC Rules.⁴⁹⁾

Furthermore, the tribunal has also no State law authorization of its own to issue such measures (contrary to a State court judge that might find such basis in the *lex fori*).⁵⁰⁾

Finally, the arbitration rules potentially transposing procedural orders⁵¹⁾ do most probably not authorize the tribunal to create entirely new confidentiality obligations that were never intended by the parties. These “transposing” provisions only mean that, once the tribunal has issued a particular order concerning an existing confidentiality obligation (the basis of which must be found elsewhere), the parties are obliged, on a separate level, to comply with this order. They do not, however, render a procedural order effective on a substantive level that was unrelated to an existing confidentiality obligation, as the tribunal would have acted *ultra vires* (from the substantive law perspective) when making such order.

It is submitted that this position appears to be in line with the general expectations of arbitration users. An interpretation of “transposing” provisions in arbitration rules to the effect that any procedural order, and any pronouncement made in such order, would be automatically transposed into substantive obligations, irrespective of whether the tribunal acted within the confines of its procedural powers and with due regard to the scope of its authorization to “create” new (substantive) obligations, is unlikely, in our view, to be covered by the parties’ consent.

On the other hand, the tribunal may have wider authority to deal with situations where a rudimentary confidentiality obligation exists but a more elaborate protective regime is required (e.g. due to antitrust issues). This scenario will be dealt with in context *infra*.⁵²⁾

⁴⁹⁾ See, in the same vein, Haller, *supra* note 9, at 137: “Article 22 (3) of the ICC Rules, however, does not itself provide for the basis for confidentiality regarding the produced documents. In fact, confidentiality has to be agreed on by the parties in their contract or it has to arise from the *lex arbitri*.”

⁵⁰⁾ This is disputed but appears to be the opinion of the large majority of commentators, see KAHLERT, *supra* note 1, at 292–294, with further references. Kahlert points out, in the context of German law, that s 1042(4) of the German Code of Civil Procedure provides the tribunal with discretion as to the conduct of the proceedings but does not provide a basis for “creating” substantive confidentiality obligations.

⁵¹⁾ See *supra* note 17 and Section III.A.2.

⁵²⁾ See *infra* Section IV.B.4.d.



2. Express Authorization To “Create” Confidentiality Obligations

Notwithstanding the above, the parties may authorize the tribunal to “create” new confidentiality obligations on the substantive level.⁵³⁾ The parties thereby authorize a third party (the tribunal) to create obligations as between themselves, a possibility that is, e.g., foreseen in s 317 German Civil Code (“*Bestimmung der Leistung durch einen Dritten*”⁵⁴⁾).

Swiss law has no similar provision, but the respective arrangement would be equally valid on the basis of the general principle of freedom of contract.⁵⁵⁾ Limits to such arrangement would be set only by Art 27 Swiss Civil Code prohibiting agreements whereby a person renounces, wholly or in part, its legal capacity or capacity to act.⁵⁶⁾ As long as the tribunal’s authority to create “new” confidentiality obligations is clearly defined, and as long as the tribunal stays within this authority, there is little concern that Art 27 Swiss Civil Code would be violated.

Express authorization for such measures can also be found in arbitration rules. For instance, Art 54(c) WIPO Rules 2014 authorizes the tribunal to classify, upon request of a party, certain information as confidential. The notion of “confidential information”, in this particular provision, is a unilateral concept, as the requirement for information to be “confidential” is, *inter alia*, that it is “*treated as confidential by the party possessing it*” (Art 54(a)(iv) WIPO Rules 2014) – irrespective of the other party’s position on or awareness of confidentiality. But, under the WIPO Rules, this unilateral understanding of confidentiality does not necessarily translate into a bilateral confidentiality obligation – unless the information is classified as confidential by the tribunal. This provision, in essence, authorizes the tribunal to impose, upon request of one party, and in view of this party’s unilateral confidentiality understanding, a bilateral confidentiality obligation on both parties. Considering that the other side has agreed to the WIPO Rules and thus accepted this mechanism, this construct raises no concerns.

⁵³⁾ See KAHLERT, *supra* note 1, at 291–292.

⁵⁴⁾ See s 317(1) German Civil Code (“*Specification of performance by a third party*”): “*Where specification of performance is left to a third party, then in case of doubt it is to be assumed that the specification is to be made at the reasonably exercised discretion of the third party.*” (source of the translation: www.gesetze-im-internet.de/englisch_bgb/).

⁵⁵⁾ See Art 19(1) Swiss Code of Obligations: “*The terms of a contract may be freely determined within the limits of the law.*” (source of the translation: Kut in *HANDKOMMENTAR ZUM SCHWEIZER PRIVATRECHT* CHK OR 19–20 [3rd ed. 2016]).

⁵⁶⁾ The provision protects individuals as well as legal entities, see Aebi-Müller in *HANDKOMMENTAR ZUM SCHWEIZER PRIVATRECHT* CHK ZGB 27, no 3 (3rd ed. 2016).



B. By The Parties

Whereas the tribunal has no authority *per se* to create new confidentiality obligations, the parties, within the confines of mandatory law (*infra* 1), are free to do so. *Ad hoc* confidentiality agreements could be initiated by “confidentiality offers” (*infra* 2). How these offers are structured, and how they should be dealt with in practice, will depend on which party wishes to rely on the information: the party requesting access to information that is in the possession of the other side (*infra* 3), or the party already in possession wishing to rely on its own information (*infra* 4). Ultimately, the most challenging issue will be motivating a reluctant party to cooperate, if this appears necessary and justified in the particular case.

1. Statutory Limits Regarding Protective Regimes?

Under Swiss law, there are virtually no limits to the parties creating a confidentiality arrangement. In particular, parties may limit to a certain extent their right to be heard in the “Austrian” sense of full access to all the information on which the tribunal bases its decision (access to the file),⁵⁷⁾ for instance in cases where the parties agree that only a “confidentiality advisor” (for instance an independent expert) will review the information, and the confidentiality advisor will make available to the tribunal and the parties only a summary of his or her findings with regard to the confidential information (potentially limited to a confirmation whether or not a party’s allegation is factually correct).⁵⁸⁾

This may seem a technical issue of implementing confidentiality concerns, but it has important implications: insofar as mandatory law limits the parties’ leeway to agree *ad hoc* on a protective regime, it also restricts the extent to which confidentiality concerns can be worked into the arbitration procedure. Even if a party offers an elaborate and sophisticated protective regime, the other side cannot be obliged to cooperate to the extent that such regime would infringe mandatory procedural guarantees and thus put the award in jeopardy. Which party ultimately suffers from this situation will depend on the procedural situation, *i.e.* which of the parties has access to the information and which party has the burden of substantiating and proving certain factual allegations.

⁵⁷⁾ See BERGER/KELLERHALS, *supra* note 2, at no 1128: irrespective of the mandatory nature of the fundamental procedural guarantees enshrined in Art 182(3) PILA, parties may waive, to a limited extent, their procedural rights *ex ante* “insofar as they concern a specifically defined situation or procedural step”.

⁵⁸⁾ For a comparative account, see Pörnbacher/Baur, *Confidentiality and Fundamental Rights of Due Process and Access to the File*, in Geisinger (ed.), *supra* note 2, at Ch 2.



2. On Confidentiality “Offers”

This Section summarily deals with how an *ad hoc* confidentiality arrangement could be worked out in practice between the parties.

The party wishing to obtain or wishing to rely on confidential information could make the other party a specific “offer” regarding such confidentiality arrangement, what we call here a “confidentiality offer”, detailing (i) the factual allegation to be proven by relying on such information; (ii) the information concerned; and (iii) the protective regime requested.⁵⁹⁾

The tribunal’s role, at this initial stage, is limited to facilitating the parties’ discussions.

The other party may then accept the “confidentiality offer”, in which case there is an *ad hoc* confidentiality arrangement, or it may reject it.

Only if no agreement can be reached, the tribunal will have a crucial role to play. While the tribunal cannot force a confidentiality regime upon the parties, it may be in a position to draw conclusions from their failure to reach such an agreement and deal in the arbitration with the procedural consequences thereof. Procedural consequences relate to issues such as the substantiation of a party’s case, the burden of proof, as well as adverse inferences to be drawn from a party’s lack of reasonable cooperation (as *ultima ratio*).

While the underlying legal principles are largely similar, from a practical point of view, two scenarios have to be distinguished: the case where the party with the confidentiality concerns is the one that is asked to produce documents to the other side (*infra* 3); and the case where the party with the confidentiality concerns wishes itself to rely on information in its own possession but feels that it cannot do so without additional protection (*infra* 4).

3. Protecting A Party That Is Requested To Produce Information

If no confidentiality obligation exists, the parties can try to find a solution (*infra* a). If that is impossible, the tribunal can intervene (*infra* b).

a) The Parties’ Responsibilities

If asked to produce certain documents in the context of a document production request, the responding party may object to the very request to produce, or it may agree in principle that production could be warranted but object to the production in the particular case due to confidentiality concerns.⁶⁰⁾ The responsibilities of the parties are distributed as follows.

⁵⁹⁾ This may or may not be part of a more general request for document production.

⁶⁰⁾ See MARGHITOLA, DOCUMENT PRODUCTION IN INTERNATIONAL ARBITRATION §5.11 (2015).



At the outset, the requesting party must demonstrate that it is entitled to receive the information according to the applicable rules,⁶¹⁾ which may include at least (i) a detailed description of the information sought and (ii) an explanation regarding the materiality of the information with respect to the outcome of the case.⁶²⁾ If a party fails to do so, and the requested party does not produce the information of its own accord, no production may be ordered. Confidentiality concerns do not arise.

However, if it is determined that production of information should take place, but the requested party has raised confidentiality concerns, it is incumbent upon the requested party to detail these concerns and potentially indicate solutions that might alleviate its concerns. It then falls again upon the requesting party to “offer” a solution.

b) The Tribunal’s Role

If the parties are unable to find a solution (which will typically be the case), the tribunal comes into play. It will, first and foremost, have to determine whether the confidentiality concerns of the requested party are legitimate as to their substance, or whether they are pretexts.⁶³⁾ This will depend on the circumstances of the case.

If the *concerns are not legitimate*, the tribunal will order the production of documents outright. There may then be no protection of the requested party’s confidentiality interests, but since there is no substantive level confidentiality obligation (or, *e.g.*, no justified antitrust concerns) to begin with, this is the requested party’s risk. If the requested party does not comply with the order, the tribunal may be allowed to draw adverse inferences from the non-compliance according to the general rules applicable in the respective arbitration,⁶⁴⁾ up to and including accepting the allegation made by the requesting party as proven (as *ultima ratio*).⁶⁵⁾ This is ultimately a matter of properly assessing the evidence on record, which is the tribunal’s task.

⁶¹⁾ The rules governing document production depend on the circumstances of the case; *see, e.g.*, the IBA Rules on the Taking of Evidence 2010 that apply (only) if the parties have agreed upon them. Those rules are referred to here for illustration purposes only.

⁶²⁾ *See, e.g.*, the criteria in Art 3(3) IBA Rules on the Taking of Evidence 2010. These criteria have no binding authority on any tribunal *per se* but are often relevant in practice considering that parties frequently agree upon the IBA Rules.

⁶³⁾ Examples include cases where the requested party is subject to defense secrets legislation and would face criminal sanctions in case of a disclosure of the information, for instance outside a specific jurisdiction.

⁶⁴⁾ *See, e.g.*, Art 9(5) IBA Rules on the Taking of Evidence 2010.

⁶⁵⁾ In certain circumstances, this power also belongs to State courts, *see, e.g.*, s 427, 2nd sentence, of the German Code of Civil Procedure: the court may accept the respective fact as proven if the party in possession of the document does not produce it despite being ordered to do so.



More delicate is the situation where the tribunal determines that the requested party's *confidentiality concerns* (or, e.g., potential antitrust concerns) are *legitimate*, as the tribunal will then have to balance the parties' respective interests.⁶⁶⁾

In the context of this *balancing exercise*, the tribunal has to take into account, on the one hand, all the potentially applicable fundamental procedural guarantees (right to be heard, right to access to the file, equal treatment of the parties, right to effective defense etc.), i.e. all the principles a violation of which might lead to the annulment of the award. On the other hand, the tribunal has to take into account legitimate confidentiality interests.⁶⁷⁾

If the *balance is in favor of the requested party*, i.e. the confidentiality interests (or, e.g., antitrust concerns) prevail, the tribunal may simply reject the request. There will then be no production of documents, no confidentiality concerns arise, and the requesting party has to bear the procedural consequences, which appears to be justified as the requesting party could have agreed to a protective regime *ad hoc*.

Where, however, the *balance is in favor of the requesting party*, i.e. where its interests based on the fundamental procedural guarantees prevail, the situation appears less straightforward. Four scenarios come to mind:

(i) While the tribunal could order production without any protective measures, this seems unsatisfactory, as the tribunal has already accepted, at that stage of the analysis, that the confidentiality concerns of the requested party, as to their substance, are legitimate (and, in the context of antitrust concerns, such order might expose everyone involved to possible liability).

(ii) On the other hand, the tribunal could deny production altogether but directly draw (adverse) inferences. Whether this solution is justified will depend to a large degree on the parties' respective behavior, and whether the tribunal, in light of this behavior, can draw any conclusion in the context of its assessment of the evidence. For instance, where the requested party has rejected, without satisfactory explanation, an elaborate confidentiality offer made by the requesting party, the tribunal may draw the conclusion that this behavior indicates that the information requested is adverse to the requested party's position. Yet such adverse inferences should be the exception.

Or, the tribunal could order production subject to confidentiality measures. The tribunal then has two further choices:

(iii) The tribunal can order the production of information subject to the confidentiality measures offered by the requesting party (if any), or subject to

⁶⁶⁾ Similarly ("balancing exercise"), from a slightly different starting point, Pörnbacher/Baur, *supra* note 58, at 41–43 (discussing possible limitations of the right to be heard without a party's consent).

⁶⁷⁾ Similar Art 9(3) IBA Rules on the Taking of Evidence 2010, that also requires the tribunal to make a balancing exercise in view of confidentiality concerns.



the requesting party accepting further confidentiality measures. This requires a further finding that these measures (either proposed by the requesting party, or proposed by the tribunal and accepted by the requesting party) are satisfactory, in the view of the tribunal, to alleviate the requested party's (legitimate) concerns. To the extent that this would "create" a new substantive confidentiality obligation, such obligation would not arise from the tribunal's order (which it usually cannot⁶⁸), but could be based on the requesting party's "offer" (either its initial "offer" or its "offer" as amended per the tribunal's request, and accepted by the requesting party) – an offer that the requested party always remains free to accept and can usually be deemed to have tacitly accepted once it produces information subject to the offered (and then ordered) protective regime.

(iv) In the alternative, the tribunal could be inclined to unilaterally impose its own confidentiality measures where it considers that the requesting party has not offered (or would not accept) sufficient protection. This is the most problematic option and should be avoided. Where there is no substantive confidentiality obligation, the tribunal usually has no power to impose one. The requesting party would then still be in its right to request outright production, whereas the requested party could point to the fact that it had raised – also in the eyes of the tribunal – legitimate confidentiality concerns, and that it would not be protected at all in case of production, the requesting party not having "accepted" the "new" protective regime. The only viable solution appears to be for the tribunal to treat this fourth scenario like scenario (ii) above, *i.e.* deny production but draw its conclusions when assessing the evidence – taking into account again the parties' respective behavior. Insofar as the requesting party suffers, this appears to be justified as it could have accepted an amendment of its confidentiality offer as per the tribunal's proposal (scenario (iii) above).

In summary, in case of production requests for information with regard to which the requested party raises *legitimate* confidentiality (or, *e.g.*, antitrust) concerns, the requesting party bears the risk of the parties agreeing on, or at least the requesting party offering, a viable solution to alleviate these confidentiality concerns.

For practical purposes, the tribunal might have to take a more active role in the process of trying to reach an agreement on an *ad hoc* protective regime and indicate to the parties, from time to time, whether or not it considers certain offers as viable or not, or at least provide somewhat abstract but still detailed guidance to the parties.

⁶⁸) See *supra* Section IV.A.



4. Protecting A Party That Needs To Rely On Information In Its Possession

Although probably less frequent, the situation needs to be discussed separately where the party raising the confidentiality concerns with regard to information in its possession itself wishes to rely on this information. This situation is expressly addressed only by some rules.⁶⁹⁾ Following a description of a typical factual scenario (*infra a*), the parties' responsibilities will again be dealt with (*infra b*), followed by an analysis of the tribunal's options to resolve the situation (*infra c*). An additional issue is whether the imposition of (new) substantive confidentiality obligations and, on the other hand, mechanisms to (merely) implement secrecy concerns (despite of no existing confidentiality obligation) need to be distinguished (*infra d*).

a) Factual Scenario

One might be tempted to say that a party that has to prove a certain allegation and is in a position to do so with the help of information in its possession should make use of this information, and that if it does not wish to do so, the party should be deemed to have failed to discharge its burden of substantiating and ultimately proving its case. However, this approach is not always justified.⁷⁰⁾

For instance, in the energy business, in the context of long-term delivery agreements, the parties usually agree on a mechanism to adjust the price, or other contract terms, to changing circumstances on the market (beyond the rather limited concepts of *force majeure* or *clausula rebus sic stantibus*). Comparative criteria to determine these circumstances on the market can be, e.g., other purchase prices of the buyer, or other sales prices of the seller. For instance, if all of the buyer's other purchase prices decline, the buyer may have the right to request a downward price revision from the seller; where the buyer's other purchase prices increase, the seller may have the right to request an upward price revision from the buyer.

The buyer has all the data regarding its various purchase prices, but these purchase prices are highly confidential.⁷¹⁾ There may be in addition important

⁶⁹⁾ See, e.g., Art 54(b) WIPO Rules 2014: "A party invoking the confidentiality of any information it wishes or is required to submit ...".

⁷⁰⁾ Similar Pörnbacher/Baur, *supra* note 58, at 41–42: the principle "lose your secret or lose your case", applied in some state court proceedings, would not comply with the requirements of due process in international arbitration.

⁷¹⁾ In general, the problem in the cases discussed in this Section is that one of the parties has obligations of secrecy or other unilateral confidentiality concerns, e.g. confidentiality obligations *vis-à-vis* third parties, State agencies *etc.*, but that there is no adapted bilateral protective regime for the purposes of the arbitration. One example, already mentioned (*supra* note 63), would be the case where certain information containing defense secrets may not leave a certain jurisdiction. If there is any request to use the information outside the jurisdiction, e.g., because the other party's experts or



antitrust concerns that would render the sharing of price data with the other side extremely risky.

If the seller requests an upward price revision (for instance in view of general market intelligence or conclusions drawn from the movement of other prices), and if the seller then requests some sort of access to the price data of the buyer (in order to prove the seller's "suspicion" for the purposes of the arbitration), the steps described in the previous Section IV.B.3 in the regular document production scenario would apply. The seller could get "access" to the information subject to an appropriate protective regime.

If, on the other hand, it is the buyer that requests a (downward) price revision, the confidentiality (or, *e.g.*, antitrust) concerns are identical, irrespective of the fact that the buyer is already in possession of the data. Refusing confidentiality protection to the buyer in this case could be seen as unequal against one party – as the seller could push through an upward price revision, whereas the buyer could never prove its case regarding a downward price revision. Thus, a solution should be found also for this second scenario so that the party in possession of the data is not at a disadvantage in case it wishes itself to initiate proceedings.

b) The Parties' Responsibilities

The initiative must, in this case, come from the party wishing to rely on its own data but requesting the protective regime. In this situation, it will most likely, depending on the applicable rules, have to detail (i) the allegation it wishes to prove; (ii) what type of information it wishes to rely on; (iii) why it considers that the information is necessary to prove the respective allegation (materiality for the outcome of the case); and (iv) why the information cannot be directly shared with the other side. The claimant should further make a "confidentiality offer" proposing a mechanism to make use of the confidential information in the arbitration yet keep it protected. If the other party does not accept such offer, the tribunal comes into play.

c) The Tribunal's Role

If no agreement can be reached, the tribunal will have to determine whether the confidentiality (or, *e.g.*, antitrust) concerns, raised in this case by the claimant, are legitimate as to their substance.⁷²⁾ If they are not, the procedural consequence is that the claimant has failed to substantiate its allegation and there is no further need for confidentiality measures. Ultimately, the tribunal would simply dismiss the claim, if relevant evidence is missing.

counsel or the members of the tribunal are outside this jurisdiction, substantive confidentiality obligations would not suffice. Rather, the party bound by secrecy would require the other side's cooperation.

⁷²⁾ Besson, *Confidential and Restricted Data: Impact on Burden of Proof?*, in Geisinger (ed.), *supra* note 2, at 48.



However, if the *confidentiality* (or, e.g., antitrust) *concerns are legitimate*, the question again arises of balancing the party's interests.⁷³⁾

If the *balance is in favor of the respondent*, i.e. if the tribunal ultimately finds that the claimant's concerns do not justify additional protection, the tribunal can conclude that the claimant has failed to substantiate or prove its case. If the claimant wishes to rely on information to prove its case, but is not willing to share the information with the other side in the usual manner, the claimant bears the risk of having its allegation rejected for being not proven.

The tribunal needs to be more careful where it considers that the *balance is in favor of the claimant*, i.e. the tribunal determines that the claimant's concerns justify a more elaborate protective regime. In this case, the other party's right to be heard, right to a defense, equal treatment *etc.* could still be in jeopardy if the tribunal simply accepted the information under the protective regime proposed by the claimant, potentially without giving the respondent full access.

d) Differentiating Substantive Confidentiality Obligations And Mechanisms To (Merely) Implement Confidentiality Concerns?

The first question the tribunal will have to answer is whether the "creation" of a new confidentiality obligation would be required and whether "creating" such new obligation, or otherwise taking into account the claimant's (legitimate) concerns, is justified in the first place. One could argue that a party is not worthy of protection if, while operating in an environment where it is subject to secrecy obligations, it fails to include confidentiality protection into the parties' agreement: *casum sentit dominus*. If such party then needs to rely, in the arbitration, on certain information in its possession, it must either produce it or lose the case. Put simply: this is a business decision for the claimant.

Whether this solution is appropriate will depend on the circumstances of the individual case – and there will be scenarios where a confidentiality obligation had been agreed upon but the protective regime needs to be more elaborate for procedural purposes through no-one's fault.

It may be relevant, for instance, whether a party's unilateral secrecy obligation arises only after the initial agreement had been signed, e.g. due to a change in legislation, due to the fact that initially "harmless" products (e.g. pipes) later become re-classified as dual-use (for civilian and military use) goods (then subjected to more extensive secrecy obligations), or because embargos or other public law measures restrict a party's freedom to operate subsequent to the signing of the agreement.

There may also be cases where the existence of substantive confidentiality obligations is entirely irrelevant and the parties would never be allowed to share information, e.g. due to antitrust concerns.

In practice, it may often be less problematic to find that a confidentiality obligation exists at all, but rather to reach an agreement on the implementation

⁷³⁾ See already *supra* Section IV.B.3.b.



of a protective regime for the purposes of the proceedings – regardless of the underlying confidentiality obligation.⁷⁴⁾

For instance, a party may be allowed, under the applicable secrecy rules, to use the information for the purposes of litigation or arbitration, but not outside a specific (“safe”) jurisdiction. Irrespective of whether the parties have agreed on a substantive confidentiality obligation, such party could not rely thereon if the other side insists on having the information transferred outside the “safe” jurisdiction. Most likely, a solution should be found according to which the sensitive information is reviewed in the “safe” jurisdiction only – but this can involve travel and costs and a recalcitrant respondent might use this situation to cause delay to the proceedings or try to derail them.

If the tribunal determines that it would be unfair to punish the claimant outright, it is submitted that the tribunal should, at the outset, “accept” the claimant’s solution for a protective regime. In this scenario, no issue of “creating” a new confidentiality obligation arises as the other side, in fact, gets no (or limited) access to the respective information. For the same reason, the tribunal could even order different measures from the ones proposed by the claimant (for instance, if feasible, widen the circle of persons that are allowed to review the information in the “safe” jurisdiction, or order that certain costs caused by the claimant’s confidentiality requirements be borne by the claimant). The claimant is at liberty to comply with these measures or else risk that it is unable to prove its case. Since it is the claimant that wishes to keep information from the other side, it is justified that the claimant bears this burden.

Where cooperation from the other side is required, and where the other party refuses to cooperate (e.g. having its experts travel to the “safe” jurisdiction to review sensitive information), the tribunal may draw adverse inferences. It is submitted that, depending on the circumstances of the case, the tribunal may ultimately also conclude that the point alleged by the claimant is established,⁷⁵⁾ on the basis of the argument that the other party has not denied the claimant’s allegation in a substantiated manner (*nicht-substantiiertes Bestreiten*), which can be treated, in essence, as an admission of the fact. This would not amount

⁷⁴⁾ To some extent, the discussion in this Section overlaps with the scenarios discussed under Part III *supra* (where it was assumed that a confidentiality obligation exists).

⁷⁵⁾ E.g., in a case that raises antitrust concerns (so that it is of little relevance whether a substantive confidentiality obligation exists – the parties not being allowed to share information in any event): if the claimant alleges that the average of its purchase prices is X, and proposes a mechanism for the other side to verify or have verified this average without disclosing the price data, and where the other party then refuses to cooperate for no valid reason, the tribunal might come to the conclusion that the average is indeed X, in particular where the tribunal can, in addition to the claimant’s allegation, rely on other evidence, such as public data or expert testimony as to the likelihood of X being correct, or even the testimony of the claimant’s experts that have – independently of the claimant – verified the calculation of X.



to a shift in the (substantive) burden of proof, but it would be part of the assessment of the evidence.⁷⁶⁾

V. Summary

In conclusion, we submit the following:

- With regard to handling confidentiality issues in arbitration, the procedural and the substantive level of confidentiality obligations and their implementation have to be strictly distinguished.
- While the tribunal usually has the power to deal with the procedural aspects of existing confidentiality obligations, it has no authority to create new confidentiality obligations on the substantive level – unless the parties have expressly authorized the tribunal to do so, in which scenario the tribunal modifies, or particularizes, the parties' agreement.
- With regard to existing confidentiality obligations, the tribunal may issue procedural orders or final (partial) awards (injunctions or declarations). However, where legal effectiveness is required *post* arbitration, final (partial) awards (declaratory relief) should be used.
- Finally, where no confidentiality obligation exists, or where no information may be exchanged irrespective of confidentiality protection, the parties can still agree on an *ad hoc* protective regime.
- The tribunal may want to act as a facilitator of the arrangement of an *ad hoc* protective regime, but the potential success of such facilitation depends on the distribution of the procedural roles: (i) In the frequent case of document production, and assuming that confidentiality concerns are justified, the straightforward solution will often be that the tribunal order production under the “condition” that the requesting party sign a confidentiality undertaking (leaving aside the scenario where a more elaborate protective regime is required, *e.g.*, due to antitrust concerns): such undertaking could then be considered “accepted” by the requested party upon production of the documents so that there is a parties’ “agreement” on a protective regime.⁷⁷⁾ (ii) Yet if the parties fail to reach an agreement in situations where a party is justified in requesting confidentiality protection for its own information that it wishes to rely upon, the tribunal’s room for maneuver is limited.

⁷⁶⁾ The Swiss Federal Tribunal has developed a similar approach in the context of State court proceedings and difficulties of a claimant to prove its case in the context of a state of evidentiary necessity (“*état de la nécessité en matière de preuve*”, “*Beweisnot(stand)*”), *see* Besson, *supra* note 72, at 49–50. Besson considers this approach also to be “*useful guidance to arbitrators*”.

⁷⁷⁾ *See supra* Section IV.B.3.b, scenario (iii).





It will ultimately be restricted to implementing the procedural consequences of the parties failing to agree on a reasonable protective regime but has no means to (indirectly) “impose” such regime on the opposing party.⁷⁸⁾

- From a practical point of view, the key advice would be for a party potentially having confidentiality concerns to address these concerns in the parties’ agreement (to the extent possible), or, at the very latest, raise them at the outset of the proceedings.⁷⁹⁾ If a claim to assess substantive confidentiality obligations needs to be made, it might be necessary to make the claim as early as possible, and where the parties need to agree on an *ad hoc* protective regime they may be more willing to reach an agreement – or outline the basic content of such an agreement – at the beginning of the proceedings. At the very least, a party raising (again) confidentiality concerns later will not risk being accused of delay tactics.

⁷⁸⁾ See *supra* Section IV.B.4.d.

⁷⁹⁾ This is in line with the spirit of the IBA Rules on the Taking of Evidence 2010, obliging the tribunal to consult the parties “*at the earliest appropriate time of the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence*” (Art 2[1]), whereby the consultation on evidentiary issues may include, *inter alia*, “*the level of confidentiality protection to be afforded to evidence in the arbitration*” (Art 2[2][d]).

