

CHAPTER 11

Protecting Confidentiality Within Arbitral Proceedings

Anna-Maria Tamminen & Viktor Saavola

Disputes being resolved in international commercial arbitration often involve confidential information such as trade secrets, know-how, price calculations, sources of supply or intellectual property rights. Situations where a party would need to present material containing confidential information that requires increased protection may arise in various situations during an arbitration. The desire to protect confidentiality is on the other hand in conflict with general principles of due process, including the equal treatment of the parties and the right to be heard. The chapter presents established measures with the function of protecting confidential information within arbitral proceedings, and which have been employed by practitioners in practice and reported in preceding legal literature. Further, the chapter provides an analysis of how these measures conform to the general due process requirements of international arbitration, especially under the Swedish Arbitration Act. In addition to presenting measures which the parties may agree to and the arbitral tribunal may assist in implementing, e.g., by issuing confidentiality orders, the chapter argues that arbitrators have the authority to restrict access to sensitive material presented in the arbitration upon the application of one of the parties. While no precedent confirming such authority under Swedish law yet exists, it is the view of the authors that a tribunal may restrict access within the limits set by Article 24 of the Swedish Arbitration Act when a legitimate need to protect confidential information exists and the procedural rights of the other party are upheld as far as possible.

§11.01 INTRODUCTION

One of the decisive reasons for parties to choose arbitration over domestic court proceedings is the confidentiality provided by arbitral proceedings.¹ Disputes being resolved in international commercial arbitration often revolve around or, at least, involve confidential information such as trade secrets, know-how, price calculations, sources of supply or intellectual property rights. The significance of confidential information and the measures available to protect it are both increasingly prevalent in arbitration, due to not only the growing amount of regulation to which companies are subject but also the number of possible participants involved in an arbitration. Arbitrators, parties, and their counsel are expected to be aware of the ever-increasing mandatory rules and regulation regarding, e.g., competition law, intellectual property law, data protection, market abuse and business secrets in general, while simultaneously being conscious of the amount of participants an arbitration may include, especially in a cross-border arbitration: the parties themselves (especially in a multi-party arbitration), their counsel (with possible additional local counsel), the members of the tribunal as well as possible third parties, such as third-party funders, insurers, translators, and so on.

Situations where one party would need to present material containing confidential information that requires increased protection may arise on various occasions during an arbitration. For example, such confidentiality concerns may arise when a party presents evidence in support of its case, as either claimant or respondent, or when a party is requested to produce such documentation during document production. Parties to arbitration have legitimate expectations to be able to effectively present their cases without compromising sensitive information.

The desire to protect confidentiality is on the other hand in conflict with general principles of due process, including the equal treatment of the parties and the right to be heard. These principles require that the opposing party has an opportunity to review and comment on all material submitted to the arbitral tribunal. In Sweden, these principles are expressly enshrined in section 24 of the Swedish Arbitration Act (SAA), which is based on the Model Law on International Commercial Arbitration drafted by the United Nations Commission On International Trade Law (UNCITRAL Model Law).

The present chapter intends to present measures which arbitrators can use to protect confidential information within arbitration proceedings, and provide an analysis of how these measures conform to the general due process requirements of international arbitration, especially in proceedings governed by the SAA.

However, the above-mentioned rules and guidelines do not provide practical guidance on how to protect the confidentiality of sensitive material in a way that would

1. See, e.g., *Queen Mary, University of London, 2018 International Arbitration Survey: The Evolution of International Arbitration*, 7: '87 % of respondents believe that confidentiality in international commercial arbitration is of importance. Most respondents think that confidentiality should be an opt-out, rather than an opt-in, feature.' Further, according to the survey, 'confidentiality and privacy' was selected among one of the most valuable characteristics of arbitration, and more so emphasized by in-house counsel respondents (pp. 7 and 27).

not infringe the right to access the case file. This chapter seeks to present alternatives for protective measures to which parties can agree or which an arbitral tribunal could order to ensure due protection of confidential information while respecting the other party's right to access the case file. In doing so, the chapter also examines the interplay between the parties' right to confidentiality and due process during arbitral proceedings. The focus is on a Swedish perspective on these issues, coupled with some comparative research.

§11.02 DUE PROCESS IN INTERNATIONAL ARBITRATION UNDER THE SAA

Due process is an essential principle and a fundamental requirement in both court litigation and arbitration. In brief, and in somewhat simplified terms, due process requires that judges and arbitrators act fairly and impartially and treat the parties equally during the proceedings. Due process entails *inter alia* that a judge or an arbitrator must ensure that each party has a reasonable opportunity to present its case, i.e., a right to be heard. Equal treatment is a prerequisite for the parties to properly exercise their right to be heard.²

The right to be heard and to present one's case include the right to access to file. A party must have the right to access and review the material, which has been submitted to the arbitral tribunal and which relates to the dispute at hand, as well as the right to present its arguments and comments on the submitted material.

Section 24 of the SAA sets out the requirements of due process for an arbitration conducted under Swedish law:

The arbitrators shall afford the parties, to the extent necessary, an opportunity to present their respective cases in writing or orally. Where a party so requests, and provided that the parties have not otherwise agreed, an oral hearing shall be held prior to the determination of an issue referred to the arbitrators for resolution.

A party shall be given an opportunity to review all documents and all other materials pertaining to the dispute which are supplied to the arbitrators by the opposing party or another person.³

According to section 24(1) SAA, no party should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence presented against them (*the contradictory principle*). Section 24(2) sets out the requirement for access to file (*the principle of communication, kommunikationsprincipen*), whereby a party must be granted access to any material pertaining to the dispute that is presented to the arbitral tribunal, including all documentation submitted by the opposing party, reports submitted by experts and any other material. The principle of communication is built upon the premise of two opposing parties presenting evidence to an impartial

2. See, e.g., Fouchard Gaillard Goldman on International Commercial Arbitration 1999, 609.

3. Unofficial translation of the Swedish Code of Statutes (SFS) 1999:116 as updated per SFS 2018:1954, provided by the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), available at <https://sccinstitute.com/about-the-scc/digital-library/legislation/>.

arbitral tribunal. Together, sections 24(1) and (2) of the SAA set out the framework for ensuring a due process for the parties.⁴ If a party is not provided with the opportunity to access and comment upon, e.g., a submission or written evidence, both rules are breached. In such a situation, the injured party can have the arbitral award set aside according to section 34(1) of the SAA if the error most likely affected the outcome of the case.

Per the *travaux préparatoires* of the SAA, the right to access to file is limited to the material that is submitted to the arbitral tribunal from an 'external source' and does not apply to material that is directly related to the arbitral tribunal's own deliberations, e.g., internal legal memoranda and enquiries as well as drafts of the award.⁵ Further, issues caused by an absent respondent in this regard were also considered during the drafting of the SAA. All submissions and other written procedural material submitted to the arbitral tribunal should be provided to the respondent to ensure that a passive respondent would not be given the opportunity of challenging the award.⁶ However, the Arbitration Commission tasked with preparing a proposal for a new arbitration act proposed a rule whereby materials presented at the hearing would not need to be transmitted to the absent party.⁷ The Swedish government opted for a less absolute approach and rejected the proposed provision. Instead, the legislator found that the arbitrators should decide to what extent the communication principle should be applied and whether material presented at the hearing would need to be transmitted to an absent party. According to the SAA, this should be decided on a case-by-case basis.⁸

While the general rule is that any documents submitted to the arbitral tribunal in relation to the dispute should be sent to the opposing party as well, it is worth noting that the *travaux préparatoires* for the SAA also mention that section 24(2) of the SAA does not require that 'bulky material' is sent to the opposing party. Instead, it is sufficient that such bulky material is only made available for review at, e.g., the

4. See, e.g., Lars Heuman, *Arbitration Law of Sweden: Practice and Procedure* (Juris Publishing, 2003), 385-386; Bengt Lindell, *Alternativ tvistlösning: särskilt medling och skiljeförfarande* (Iustus Förlag, 2000), 188.

5. Statens offentliga utredningar (SOU) 1994:81, 279; Government Proposition ('Gov. Prop') 1998/99:35, 225. See also Lindell, *supra* n. 4, 188. Lindell notes that limiting the right to access to file to material submitted by external parties to the arbitral tribunals is closely related to the principle that arbitral tribunals are allowed to take generally known facts into consideration. In borderline cases, where there is doubt whether a fact is generally known or not, the arbitral tribunal should give the parties an opportunity to be heard before rendering an award based on the application of said generally known fact. Lindell also opines that the same applies when the arbitral tribunal is considering whether to apply a different legal rule than what the parties themselves have invoked in the proceedings. The underlying rationale is that both parties would otherwise be subject to an unexpected judgment in the matter. See also Heuman, *supra* n. 4, 386-387, who notes that if the arbitrators are contemplating an extensive interpretation of a certain claim after the end of the final hearing, and nothing in the opposing party's pleadings or in the evidence produced by the parties supports that interpretation, the opposing party's right to defend his case speaks strongly in favour of rejecting the extensive interpretation.

6. Heuman, *supra* n. 4, 388.

7. SOU 1994:81 p. 28.

8. Gov. Prop. 1998/99:35, 111-112.

presiding arbitrator's office. Per the wording of the *travaux préparatoires*, the requirement set by section 24(2) of the SAA is that the submitted documents must be shared with the opposing party.⁹

The aforementioned exceptions to a party's right to review all of the material submitted to the arbitral tribunal are the only exceptions addressed in the *travaux préparatoires*. The *travaux préparatoires* of the SAA do not address whether the right to review material could be limited in order to safeguard confidential material. Thus, the clear starting point is the principal rule that the parties must have the same access to all the material as the arbitral tribunal whether it includes confidential information or not.

§11.03 CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION

[A] Does Arbitration Entail an Implied Obligation of Confidentiality?

Although the focus of this chapter is on the treatment and protection of confidential information when it cannot be disclosed to the opposing party in an arbitration (i.e., absolute confidentiality),¹⁰ a brief overview of the opinions expressed regarding the confidentiality of arbitration in general is due in order to give context to the role confidentiality plays in arbitration.

In legal literature and case law, discussion regarding 'confidentiality' in the context of arbitration typically refers to whether the parties are obligated not to disclose information concerning the arbitration to third parties or the public, i.e., relative confidentiality.¹¹ Obligations of confidentiality extend to prohibiting third parties from attending arbitral hearings as well as to prohibiting the parties to an arbitration from disclosing any of the material related to the arbitration proceedings to third parties.¹² The confidentiality of the proceedings serves to centralize the parties' dispute in a

9. Gov. Prop. 1998/99:35, 225; SOU 1994:81, 279: 'Det förutsätts att alla handlingar skall komma motparten till del, om de kan sägas röra själva tvisten. Som regel bör handlingen sändas till motparten. Något krav på delgivning finns inte. Bestämmelsen utesluter inte att skrymmande material hålls tillgängligt t.ex. hos skiljenämndens ordförande och att parten i fråga underrättas om detta.'

10. This article adopts the terminology used by, e.g., Yves Derains, *Evidence and Confidentiality*, Special Supplement 2009 Confidentiality in Arbitration, ICC International Court of Arbitration Bulletin, paras 14-16, where *relative confidentiality* refers to any information regarding the arbitration being confidential in relation to any third parties not involved in the arbitration, and *absolute confidentiality* refers to such confidential information that the party holding the information does not wish to disclose to the opposing party in the arbitration.

11. See, e.g., Gary Born, *International Commercial Arbitration* (3rd ed., Wolters Kluwer, 2021), Chapter 20.

12. Material related to the arbitral proceedings includes, e.g., hearing transcripts, written pleadings and submissions, submitted evidence, materials produced during disclosure and the arbitral awards and orders.

single forum and to provide an objective, efficient and commercially sensible resolution of the dispute, while limiting disclosure of the parties' confidences to the press, public, competitors and others.¹³

Despite the general characterization of arbitration as an alternative form of dispute resolution perfectly suitable for discreet resolution of commercial disputes, it would be misleading to state that the confidential character of arbitration is a given. Rather, the confidentiality of arbitration remains debated, and this also applies to confidentiality within arbitration vis-à-vis the parties.¹⁴ Until the mid-1990s, there was little discussion about confidentiality in arbitration as the widespread assumption was that arbitration was a private process excluding any third parties, and that any documents related to the arbitration were protected from disclosure to third parties not involved in the arbitration. Judgments rendered by Australian and Swedish courts changed the situation as the courts rejected the idea of a general duty or obligation of confidentiality in relation to the parties to an arbitration. In the cases *Esso Australia Resources Ltd v. Plowman* ('*Esso v. Plowman*') and *Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Finance Inc.* ('*Bulbank*'), the courts found that there is no authority providing for an implied obligation of confidentiality in arbitration, which would prevent the parties from disclosing information regarding the arbitration to third parties. The courts held that an express intent of the parties is required to keep the arbitration confidential. The cases drew attention to confidentiality in arbitration and prompted discussion regarding the issue. This discussion drove some states to legislative action by leading them to incorporate confidentiality obligations into their laws or to enact laws providing for a default rule of non-confidentiality. Some states left the matter to be developed by case law. Certain arbitral institutions also addressed the issue by including provisions regarding confidentiality in their rules. As a result, the laws of international arbitration vary significantly when it comes to the existence and extent of an obligation of confidentiality. The most common feature is arguably that legislation leaves a lot of room for party autonomy.¹⁵

In contrast to the *Esso v. Plowman* and *Bulbank* cases, there are English and Singaporean cases, which are often cited in support of the existence of an implied obligation of confidentiality in arbitration. In the latter cases, the courts expressed the general sentiment that an implied obligation of confidentiality that binds the parties arises from the very nature of arbitration, while certain acceptable circumstances allow for disclosure of material or information relevant to an arbitral proceeding. Such acceptable circumstances include, most notably, the consent of the parties, which can be either express or implied, and the reasonable necessity of disclosure for the

13. Born, *supra* n. 11, Chapter 20.01. In contrast, the 'privacy' of the proceedings refers only to the arbitral hearings being closed off for any third parties and to the public.

14. Domitille Baizeau & Juliette Richard, *Addressing the Issue of Confidentiality in Arbitration Proceedings: How Is This Done in Practice?*, 43 ASA Special Series, 53, 53 (2016).

15. The Committee on International Commercial Arbitration of the International Law Association, *Report on The Hague Conference: Confidentiality in International Commercial Arbitration* (2010), pp. 4-5 and 8-9.

protection of legitimate interests of a party.¹⁶ The Singaporean High Court considered in *Myanma Yaung Chi Oo Co. Ltd v. Win Nu and Another* [2003] SGHC the argument for an implied obligation of confidentiality to be more convincing with emphasis on the parties' expectations. According to the court, parties who opt for arbitration rather than litigation are likely to be aware of, and be influenced by, the fact that the former are private hearings while the latter are open hearings. Therefore, the court concluded that rather than to say that there is nothing inherently confidential in the arbitration process, it is more in keeping with the parties' expectations to take the position that the proceedings are confidential, and that disclosures can only be made under acceptable circumstances, e.g., with the consent of both parties or when disclosure is necessary to protect legitimate interests of a party.

Given the above, there are clearly differing opinions on whether arbitration entails an implied obligation of confidentiality. Therefore, the exact scope of confidentiality in arbitration and the enforceability of any confidentiality orders¹⁷ is uncertain. Considering the diverse international backgrounds that come into play in international arbitration, the proceedings are often subject to several different legal regimes, which at times include conflicting legal principles. As a consequence, the participants do not always share the same expectations as to whether a confidentiality obligation exists, what is covered by such a confidentiality obligation and how it may be enforced.¹⁸

There is no uniform definition or concept of confidentiality in international arbitration. There is no international convention that defines the concept of confidential information, or generally provides for a right, or an obligation to confidentiality. There is also no uniform definition of the term 'confidentiality' or 'business secrets'.¹⁹ In the absence of an internationally binding definition, the content and scope of a right to confidentiality could be found in the parties' agreement, including the arbitration clause,²⁰ arbitration rules, statutory national law, or case law.²¹ However, no uniform

16. *Dolling-Baker v. Merrett & Another* [1990] 1 WLR 1205, *Hassneh Insurance Co of Israel v. Mew* [1993] 2 LI LR 243, *Ali Shipping Corporation v. Shipyard Trogir* [1999] 1 WLR 314, and *Myanma Yaung Chi Oo Co. Ltd v. Win Nu and Another* [2003] SGHC 124.

17. That is, orders issued by the arbitral tribunal regarding the treatment of confidential information outside of and/or within the arbitral proceedings.

18. See, e.g., Baizeau & Richard, *supra* n. 14; Born, *supra* n. 11, Chapter 20.02.

19. Lukas F. Wyss, *How to Protect Business Secrets in International Commercial Arbitration*, 6/2009 Int. A.L.R. 158, 158-159 (2009); Karl Pörnbacher & Inken Knief, *Protection of Confidentiality in International Arbitration* in *Arbitraż i Mediacja: Księga Jubileuszowa Dedykowana Doktorowi Andrzejowi Tynelowi* (ed. Maciej Łaszczuk et al., Sąd Arbitrażowy przy Krajowej Izbie Gospodarczej w Warszawie, 2012), p. 466.

20. Many contractual agreements contain extensive and detailed confidentiality clauses specifying the term 'confidentiality' or 'confidential information' that should, in the opinion of the parties, be confidential information and business secrets. With a carefully drafted confidentiality clause, the parties lay the grounds for the restricted use of whatever information is defined as 'confidential' in a potential arbitration (see Wyss, *supra* n. 19, 160). However, even where confidentiality is addressed by the agreement or a similar instrument, the need may arise to identify the law which governs that instrument's validity, effects or interpretation (ILA Report, *supra* n. 15, 11).

21. Wyss, *supra* n. 19, 160. Relatively few national arbitration statutes contain provisions prescribing general standards of confidentiality in international arbitration, though (Born, *supra* n. 11, Chapter 20.03).

standard for confidentiality obligations in arbitration can be derived from national arbitration laws, either.²²

Following the *Bulbank* judgment, the starting point in Swedish arbitration law is that there is no implied duty or obligation of confidentiality in arbitration. In an arbitration conducted under Swedish law, any obligation of confidentiality must thus be derived from the parties' agreement. The Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the 'SCC') do not provide for the confidentiality of the proceedings either.²³ As such, the parties would expressly have to agree on the confidentiality of the proceedings in order for there to be a relative confidentiality obligation binding the parties themselves. In the absence of such a provision, it would be advisable for the arbitrators to draw the attention of the parties to the confidentiality of the proceedings at the outset.²⁴

[B] The Right to Confidentiality Within Arbitral Proceedings

The principles of due process do not apply unrestrictedly. It is generally accepted that the rights to be heard, to equal treatment, and to be able to present one's case are subject to limitations. Especially, requirements of conducting the proceedings expeditiously and cost-effectively set certain limitations that require due process considerations to be balanced. The tribunal may, for example, limit the number of submissions, restrict the examination of witnesses to a certain extent or set deadlines for introducing new factual allegations or evidence (provided that the parties do not agree otherwise) in order to conduct the proceedings efficiently.²⁵ This limitation of due process is also reflected in the wording of Article 24(1) of the SAA, which provides that 'the arbitrators shall afford the parties, *to the extent necessary*, an opportunity to present their respective cases in writing or orally' (emphasis added). In contrast to the UNCITRAL Model Law, which the SAA was inspired by on several points, the SAA does not require that the parties be given a *full opportunity* to present their case. Article 24(1) of the SAA thus recognizes that there are certain limits to the procedural rights of the parties, such as the aforementioned limitations.²⁶

22. Pörnbacher & Knief, *supra* n. 19, 457-458. One of the reasons given as to why certain legislators (and even arbitral institutions) have abstained from adopting rules on the confidentiality of arbitration is the difficulty in defining the exceptions to confidentiality (ILA Report, *supra* n. 15, 16).

23. The SCC Rules do, however, rule that the arbitral tribunal, any administrative secretary of the tribunal and the SCC shall maintain the confidentiality of the arbitration and the award (Article 3 and Article 9).

24. ILA Report, *supra* n. 15, 20. For further discussion regarding the drafting of a procedural order regarding confidentiality at the outset of the proceedings, see Michael Hwang & Nicholas Thio, *A Proposed Model Procedural Order on International Arbitration: A Comprehensive and Self-Governing Code*, 29/2 J. Int. Arbitr. 137 (2012).

25. See, e.g., Karl Pörnbacher & Sebastian Baur, *Confidentiality and Fundamental Rights of Due Process and Access to the File: A Comparative Overview*, 43 ASA Special Series 21, 28 (2016).

26. Heuman, *supra* n. 4, 385. As examples of this limitation, Heuman mentions for the example cutting off the exchange of submissions in the name of procedural efficiency and reduction of costs as well as an apportion of time available to the parties to present their cases at the hearing.

It has also been generally considered that the right to confidentiality may conflict with the rights of equal treatment and of access to the file to a certain extent. A party is entitled to keep their business secrets and internal documents confidential and may be obliged to do so in cases where the file involves, e.g., information regulated by competition law, other important public policy considerations or contractual obligations.²⁷

While Sweden is not a Model Law country, the SAA is inspired by the UNCITRAL Model Law. In matters concerning the recognition and enforcement of arbitral awards under the SAA, the Swedish Supreme Court has looked to international case law and the underlying principles of the UNCITRAL Model Law.²⁸ The same should apply when assessing the application of section 24(2) SAA as the statute is based on Article 24(3) of the UNCITRAL Model Law. When drafting Article 24(3) of the UNCITRAL Model Law, the Working Group tasked with drafting the Model Law discussed its underlying principles. The Working Group concluded that parties generally must be given an opportunity to study all documents upon which the arbitral tribunal might rely in making its decision. However, it also raised the point of protecting professional secrecy. As stated by the Working Group's United States representative, the concerned party should together with the arbitral tribunal find some means of permitting professional secrecy to be respected.²⁹

However, the scope and extent of the right to protection of confidentiality can be quite unclear. Even in situations where the parties have agreed on a relative confidentiality obligation, the parties have seldom agreed on anything regarding the protection

27. See, e.g., the judgment C-450/06 *Varec SA / Belgium* of the Court of Justice of the European Union (which predates the Trade Secrets Directive) and the case law referred therein (paras 47-49 and 52): 'The adversarial principle means, as a rule, that the parties have a right to a process of inspecting and commenting on the evidence and observations submitted to the court. However, in some cases it may be necessary for certain information to be withheld from the parties in order to preserve the fundamental rights of a third party or to safeguard an important public interest ... One of the fundamental rights capable of being protected in this way is the right to respect for private life, enshrined in Article 8 of the ECHR ... The Court of Justice has, moreover, acknowledged that the protection of business secrets is a general principle. ... The principle of the protection of confidential information and of business secrets must be observed in such a way as to reconcile it with the requirements of effective legal protection and the rights of defence of the parties to the dispute.' See also *Pörnbacher & Baur*, *supra* n. 25, 28-30.

28. See, e.g., Swedish Supreme Court cases NJA 2018 p. 504 (para. 16) and NJA 2018 p. 291 (para 16).

29. Summary record of the 324th meeting, held at Vienna International Centre, Vienna, on Thursday, 14 June 1985: United Nations Commission on International Trade Law, 18th session, A/CN.9/SR.324, paras 12-13 and 15 regarding discussions of the formulation of Article 24(4):

12. Mr. VOLKEN (Observer for Switzerland) inquired whether, if the words "or other document" were deleted, a party would be able to provide the arbitral tribunal with documents which contained professional secrets which it did not wish the other party to see.

13. Mr. HOLTZMANN (United States of America) said that under the first sentence, all documents supplied to the arbitral tribunal by one party must be communicated to the other party. It was up to the party concerned and the arbitral tribunal to find some means of permitting professional secrecy to be respected. The deletion of the second sentence would not affect the preservation of professional secrecy, however.

of confidential information, such as business secrets, between themselves in any potential arbitral proceedings.³⁰ In the absence of explicit provisions, guidance may be found from other parts of the parties' agreement, e.g., the arbitration clause and confidentiality clauses. Guidance on confidentiality, disclosure and protection of business secrets may be derived from the applicable substantive law as well. Within the EU, the Trade Secrets Directive³¹ provides for a harmonized definition of 'trade secrets'³² and sets out rules for Member States regarding the protection against unlawful acquisition, use and disclosure of trade secrets.³³

Any protective measures taken must, however, be proportional and take into account the fair and equal treatment of the parties.³⁴ In choosing and formulating the appropriate measure for the sake of protecting confidentiality, proportionality is key. The legitimate interest of a party to protect its business secrets must be respected to the extent possible, while at the same time the principle of the right to be heard requires that parties must be given the possibility to comment on all items on the record.

[C] The Arbitral Tribunal's Discretion to Issue Confidentiality Orders

As a starting point, parties may empower the arbitral tribunal, either in the terms of reference or ad hoc, to order measures to protect the parties' business secrets. Documents such as the terms of reference or first procedural orders are binding upon the tribunal and therefore define the boundaries for the taking of evidence and the treatment of business secrets within the arbitration. In some cases, the parties have included in their arbitration agreement a reference to specific arbitration rules that expressly empower the arbitral tribunal to take or order protective measures with regard to business secrets.³⁵ This is the case for, e.g., the Arbitration Rules of the International Chamber of Commerce (ICC Rules) (Article 22(3)) and the Arbitration Rules of the World Intellectual Property Organization (WIPO Arbitration Rules) (Article 54).

30. Pörnbacher & Knief, *supra* n. 19, 466.

31. Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

32. According to Article 2 of the Directive, 'trade secret' means information which meets all of the following requirements: (a) it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (b) it has commercial value because it is secret; (c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

33. Article 1 of the Trade Secrets Directive.

34. Pörnbacher & Baur, *supra* n. 25, 43; Roman Khodykin & Carol Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration* (Oxford University Press, 2019), para. 12.328.

35. Wyss, *supra* n. 19, 162. However, Wyss notes that rules which explicitly empower the arbitral tribunal to order protective measures to protect confidentiality are rarely included in the terms of reference or in procedural orders.

The parties seldom include express provisions in their confidentiality clause dealing with the disclosure of confidential information in a dispute between themselves.³⁶ Thus, it is unlikely that the parties will have included any provisions for the handling of confidential information within the proceedings. However, if the subject matter of an arisen dispute or the industry sector in which the parties operate is one where sensitive or highly valuable commercial information is likely to be generated, there may be good reason to anticipate issues of confidentiality. In such a situation, the arbitral tribunal may, for example, issue a confidentiality order included in its first procedural order. However, it is impossible to foresee all possible issues related to confidentiality that may arise during arbitral proceedings. In such situations, it may be necessary for the arbitral tribunal to react by ordering protective measures to ensure the protection of confidential information even when the parties cannot agree on an arrangement for the taking of evidence that includes confidential material.

As mentioned above, issues related to confidentiality tend to arise in two distinct situations within arbitration: first, when a party is requested to produce documents by the opposing party, and second, when a party wishes to submit evidence in support of their case. While the differences in said scenarios should not be exaggerated,³⁷ certain considerations should still be given to whether the confidential information is being submitted as evidence at the initiative of the party in possession of the material or at the request of the other party.³⁸ The bottom line is, however, that the arbitral tribunal must decide whether to depart from ordinary procedure by adopting special measures to protect the confidential information and, if so, what measures should be adopted.³⁹

The IBA Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules) are frequently relied on as a guideline by arbitrators in matters of taking of evidence. This is the case even in disputes where the parties have not agreed to the application of the rules.

Under Article 3.5 and Article 9.2(e) of the IBA Rules, a party may object to a request for production on the grounds of commercial or technical confidentiality. Where it finds that there are compelling grounds to do so, the tribunal is permitted to exclude that evidence or production altogether. In cases where the tribunal deems that the threshold has not been met, the tribunal may still find, either on its own motion or upon the application by the relevant party, that measures should be implemented to protect the confidentiality of the relevant evidence.

Article 9.5 of the IBA Rules allows a tribunal to arrange matters so that evidence of a confidential nature may be introduced into the arbitration subject to protections designed to prevent unnecessary disclosure or dissemination. The discretion granted to the tribunal is a wide one. The tribunal may make such arrangements where it considers it 'appropriate' to do so. The provision does not specify the nature of the arrangements either with the only requirements being that they be 'necessary' to

36. *Ibid.*, *supra* n. 19, 160.

37. Yves Derains, *Evidence and Confidentiality*, Special Supplement 2009 Confidentiality in Arbitration, ICC International Court of Arbitration Bulletin, paras 7-8 (2009).

38. These considerations will be discussed further for each specific measure below.

39. Derains, *supra* n. 37, para. 8.

permit the evidence to be used. It is also noteworthy that the power given to the tribunal under Article 9.5 is not limited to situations where confidentiality concerns have been raised as part of document production under Article 9.2.⁴⁰ The tribunal may propose or agree to confidentiality safeguards whenever it considers it appropriate to do so. Such safeguards may be issued in relation to documents produced by a party, taking of witness evidence (written and/or oral), proprietary materials used or relied on by experts in preparing their evidence, or premises and technology inspected during the course of the proceedings. The application of any protective measures such as the ones that may be arranged under Article 9.5 of the IBA Rules must be considered in tandem with any eventual arrangements regarding confidentiality that the parties have already agreed to or orders the arbitral tribunal has already ordered.⁴¹

As examples of measures that the arbitral tribunal may take, the IBA Task Force for the revision of the IBA Rules mentions prohibiting further disclosure of the evidence (a confidentiality order) or directing the parties to enter into a non-disclosure agreement. Further, when a party's legitimate interests call for non-disclosure of confidential information, an arbitral tribunal may order production of documents in redacted form. It may also, where permitted by applicable laws and rules, order that the documents should be exchanged between counsel only, without granting the parties access to them. Finally, the arbitral tribunal can appoint an independent and impartial expert to review the document concerned in order to report to the arbitral tribunal and the parties about the non-confidential content (*see also* Article 3.8 of the IBA Rules about the appointment of the expert).⁴² These measures, in addition to certain others, and their application under the SAA will be analysed in the following.

§11.04 POSSIBLE CONFIDENTIALITY MEASURES UNDER THE SWEDISH ARBITRATION ACT

[A] Redaction

Redaction of documents is a straightforward means of protecting confidential material and its use is commonplace in arbitration. The confidential parts of a document are simply excised from the copy of the document produced. An obvious example is minutes of board meetings containing confidential material on different topics, only one of which is relevant to the arbitration.

40. This distinction has been made more explicit in the most recently revised version of the rules, which state that the 'Arbitral Tribunal may, where appropriate, make necessary arrangements to permit *Documents to be produced, and evidence to be presented or considered, subject to suitable confidentiality protection*' (the emphasized part has been added in the most recent revision of the rules).

41. Roman Khodykin & Carol Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration* 2019, p. 488.

42. IBA Task Force for the Revision of the IBA Rules on the Taking of Evidence in International Arbitration, *Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration* (January 2021), 30.

When the parties agree that the redacted information is irrelevant or immaterial to the outcome of the dispute, such redaction should not raise any concerns regarding the principle of due process. However, in situations where a disagreement exists, redaction may not be appropriate, as that could give rise to issues regarding a party's possibility to present its case. Such a disagreement could be settled by having the proposed redactions reviewed against the originals in order to assess whether the redaction was appropriate. Such review could be performed by, e.g., the opposing party's counsel only or by a confidentiality expert.⁴³ In such case, the comparative analysis must take into account the same due process considerations that had applied if the relevant material would be submitted for 'counsel only' review or for review by a confidentiality expert.⁴⁴

Another solution would be to allow the tribunal to verify the redacted documents against the original ones. Such solutions are not suitable if the redacted information requires protection from disclosure to any third parties, including the tribunal.⁴⁵ Some authors have raised the point that there might be doubts about the true independence of a party-appointed arbitrator, which in turn leads to the risk of the arbitrator divulging the confidential information to the other party.⁴⁶ As a solution, it has been suggested that the presiding arbitrator alone may examine the documents or assign the task to the administrative secretary of the tribunal. This solution was applied by an arbitral tribunal in an ICC arbitration in which the respondent was concerned that the claimant might disclose certain information outside of the arbitration.⁴⁷ This approach would, however, per a strict interpretation of Article 24(2) of SAA, be in breach of the SAA without the approval of the party not in possession of the unredacted documentation. This is because of the risk that tribunal or presiding arbitrator may be influenced by the redacted parts of the material which would not be available to both parties.⁴⁸

[B] Synopsis or Summary

An option quite similar to redaction would be to provide a synopsis of the key elements of the content of a document. In one ICC arbitration, the claimant requested production of contracts that the respondent had concluded directly or indirectly with designated customers. The contracts formed the basis of the claimant's claim for commission from the respondent. The respondent objected to production on grounds that 'disclosure as requested ... would violate confidentiality of Respondent's contracts with third parties

43. See, e.g., Khodykin & Mulcahy, *supra* n. 41, 492; Baizeau & Richard, *supra* n. 14, 55.

44. See Chapters 4.3.1.2 and 4.3.1.3 *infra*.

45. Baizeau & Richard, *supra* n. 14, 55-56.

46. Derains, *supra* n. 37, paras 20-22; Baizeau & Richard, *supra* n. 14, 56.

47. See Baizeau & Richard, *supra* n. 14, 56.

48. Cf. Derains, *supra* n. 37, para. 19. Derains notes that any knowledge the arbitral tribunal has of the redacted information remains outside of the proceedings as the tribunal cannot make any use of such details in their final award. Still, Derains states that the arbitrators should be asked to return the non-redacted documents after checking them to ensure that the knowledge of the information therein remains 'fleeting'.

and legitimate interest of Respondent for “non-disclosure and secrecy” of its commercial and contractual practices’. In order to protect the respondent’s concerns regarding confidentiality, the tribunal decided not to compel the respondent to produce copies of the contracts, but only a list containing the date of each contract, the subject matter of the contract, the original contract price (and any variation), payments received, and payments pending or anticipated.⁴⁹

It should be without question that an arbitral tribunal should be able to give a similar order in an arbitration conducted under Swedish law and the SAA. As long as the synopsis is provided to both the arbitral tribunal and the opposing party, and no other documentation is submitted to the arbitral tribunal as material related to the dispute, there should be no risk of the proceedings being in breach of Article 24(2) of the SAA.

[C] **Restricted Access to Some Individuals**

The redaction of certain confidential information may not be appropriate if the information proposed to be redacted is material to the outcome of the dispute. If the arbitral tribunal finds, either *prima facie* or after having compared the proposed redactions to the original documentation, that the confidential information is more likely than not material to the dispute, but still in need of protection for the sake of confidentiality, the arbitral tribunal could, instead of redacting, resort to restricting the access to certain information to a designated group of individuals. As noted by Baizeau and Richard, this is one of the most common tools used in practice.⁵⁰

[1] **‘Confidentiality Clubs’**

The simplest form of restricted access to the confidential information consists of limiting access to it to selected individuals, often referred to as a ‘confidentiality club’. Restricted access limited to selected individuals has been described as a straightforward measure for protecting confidentiality. Of course, plenty of consideration needs to be given to the number of people included in the ‘club’. The narrower the circle of people, the higher the risk of breach of due process. On the other hand, the wider the circle, the weaker the protection of confidentiality.⁵¹ To avoid this risk, the clubs are in most cases set up by agreement of the parties.⁵²

49. Final award in ICC Case 15583 (Extract), 1 ICC Dispute Resolution Bulletin 139, paras 273-274 (2016).

50. Baizeau & Richard, *supra* n. 14, 57.

51. Khodykin & Mulcahy, *supra* n. 41, para. 12.340. See also Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012), 799 and 877; Trevor Cook & Alejandro I. Garcia, *International Intellectual Property Arbitration* (Kluwer Law International, 2010), Chapters 3.3.1 and 3.3.4-3.3.6; Derains, *supra* n. 37, para. 28; Baizeau & Richard, *supra* n. 14, 57.

52. Baizeau & Richard, *supra* n. 14, 57.

[a] In Camera, or Tribunal-Only Review

The most extreme form of restricted access would be review of the confidential information only by the arbitral tribunal (so-called *in camera* or *ex parte* proceedings). This approach is uncommon, but not unheard of in practice.⁵³ The method raises obvious due process concerns as both the tribunal and the party producing or submitting the confidential information would have the opportunity to review the material while the other party would be denied access to the material. The other party would not be able to challenge or test the evidence and present any challenges or arguments regarding the material to the tribunal.

There is a general opposition against the admissibility of *in camera* proceedings in international arbitration expressed by legal authors as such proceedings would violate the right to be heard.⁵⁴ However, some authors have noted that *in camera* proceedings could be viable where the party bearing the burden of proof has requested a confidential document from the other side and the document would otherwise not be submitted due to, e.g., a successful objection during the document production phase, citing the confidentiality of the material. In such a situation, the party requesting the documentation may prefer to waive the right to be heard (i.e., review and comment on the documentation) in order to have the arbitral tribunal review the document *in camera* if the only other alternative is that the documentation is not submitted to the proceedings at all.⁵⁵

However, tribunal-only review without the agreement of both parties would be in violation of SAA 24(2) and the principle of due process expressed therein. Tribunal-only review could thus not be ordered by an arbitral tribunal in an arbitration conducted under Swedish law in a situation where the parties cannot agree on the measures for the protection of the confidential material. An award rendered after such proceedings could be subjected to a challenge by the aggrieved party.

[b] Counsel-Only Review

The arbitral tribunal could also order the confidential material to be made available only for review by counsel to the party not in possession of the confidential documentation. The potential advantage of this approach over simple redaction is that the relevant material can be included in complete form in the development of a case strategy. The disadvantage is, however, that in many cases the material in question

53. As reported in Khodykin & Mulcahy, *supra* n. 41, para 12.347, who refer to a BCLP Survey on the use of the IBA Rules where respondents from Spain and Argentina reported orders by an arbitral tribunal permitting tribunal-only review of documents.

54. See, e.g., Baizeau & Richard, *supra* n. 14, 57; Khodykin & Mulcahy, *supra* n. 41, para. 12.341; Cook & Garcia, *supra* n. 51, 263. Cook & Garcia cite the use of *ex parte* disclosure in certain arbitral proceedings where the tribunal accepted that detailed blueprints were submitted to the tribunal, while more general blueprints were submitted to the opposing party. Similar approaches have reportedly also been taken with, for example, contracts entered into with third parties used to substantiate damage claims for breach of contract.

55. Pörnbacher & Knief, *supra* n. 19, 472.

could be of technical character. As a result, counsel may be unable to assess the material without input from the client or a client-appointed expert, thereby hindering an effective presentation of that party's case.⁵⁶

In addition, this solution would require counsel to issue an undertaking not to disclose to the client the confidential information made available. However, such an undertaking without the client's express consent could be problematic, or even impossible, in certain jurisdictions.⁵⁷ In any event, the proper execution of this protective measure would require that the client gives counsel express consent to take part of the documentation without disclosing it to the client. The arbitral tribunal could not compel the client to do so. Therefore, to be able to rely on counsel-only review, the consent of the party not in possession of the confidential information is ultimately necessary in order to be put into practice. Such a measure could thus not be relied on in a situation where the parties are unable to reach an agreement on the protective measures.

[c] Expert-Only Review

As an alternative to counsel-only review, the confidential information could be shared solely with the experts for each of the parties. Similar complications as those that arise when only sharing the material with opposing counsel may, however, become apparent with this approach as well. The experts may have the necessary knowledge to assess the technical evidence but, on the other hand, the effective use of that assessment is weakened if the expert is unable to consult with counsel in order to facilitate arguments against or on the basis of the evidence presented containing confidential information. This in turn may infringe a party's right to be heard.⁵⁸ The practical solution to this problem, which affects both counsel- and expert-only review, is to grant both counsel and expert the opportunity to review the evidence, thereby giving them the opportunity to consult with each other regarding the confidential information, and to build an effective case.⁵⁹

However, the same issue as with counsel-only review remains. If the party not in possession of the confidential agreement does not agree to such an approach, they have not, in fact, been given an opportunity to review the material that would be submitted into evidence if the arbitral tribunal were to order such a measure without consent. Neither counsel nor an independent expert can by any stretch of imagination be identified with the party itself within the meaning of section 24(2) of the SAA. Such a measure could thus not be ordered without the consent of both parties.

56. See, e.g., Khodykin & Mulcahy, *supra* n. 41, 492, Waincymer, *supra* n. 51, 877-879, Baizeau & Richard, *supra* n. 14, 57-58.

57. See Pörnbacher & Knief, *supra* n. 19, 477. Pörnbacher & Knief note, e.g., that the German Constitutional Court has emphasized the client's right vis-à-vis its counsel to obtain full access and to comment in detail on the content of legal submissions; see also Baizeau & Richard, *supra* n. 14, 56-57.

58. Khodykin & Mulcahy, *supra* n. 41, paras 12.342-12.344.

59. See, e.g., Baizeau & Richard, *supra* n. 14, 58 and the ICC arbitration reported therein.

[d] *Designated Party Representatives*

One further possibility is to extend the ‘confidentiality club’ to designated party representatives. Such representatives could include, e.g., in-house counsel, employees with the relevant technical knowledge, or employees with first-hand knowledge of the facts of the dispute (i.e., usually the same people that would be heard as fact witnesses in the matter).⁶⁰

In certain disputes, it may not be sufficient to allow only counsel and experts to have access to and work with the confidential information. They may need instructions from party representatives or to be able to seek clarifications on specific facts known by the parties alone. Therefore, it may be necessary to include key party representatives in the ‘confidentiality club’. 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.⁶¹

This approach would undoubtedly be in line with section 24(2) of the SAA as both parties would de facto be able to review any material submitted in evidence to the arbitral tribunal.

[2] *Other Practical Arrangements to Restrict Access to the Material*

The arbitral tribunal could also order the parties to undertake certain practical measures or arrange restricted access to the confidential information. Such measures could be, for example, imposing a requirement that the documents containing the confidential information (as well as any copies) are to be returned or destroyed,⁶² or restricting the visual inspection of the confidential information, e.g., to a single location, with no (or limited) right to take notes, make copies or take photographs or

60. See, e.g., Khodykin & Mulcahy, *supra* n. 41, para. 12.345.

61. Baizeau & Richard, *supra* n. 14, 60.

62. See, e.g., Derains, *supra* n. 37, para. 19; see also Bazieau & Richard, *supra* n. 14, 60-61, who see the issue with this method is the balancing act needed between, on 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.

videos.⁶³ Such arrangements are often used in combination with ‘confidentiality clubs’.⁶⁴

Regarding the requirement to destroy or return documents with confidential information, the solutions adopted in practice appear to vary greatly. The procedural orders given, and the undertakings made by the parties, differ significantly both in clarity and extent. A frequent issue is the timing of the return or destruction of the confidential documents. Thus, it appears to be common practice either to agree, or for the tribunal to order, a specific time limit by which documents and any possible copies must be returned or destroyed, by referring to the issuance of the award (or settlement of the dispute), i.e., that the documents should be destroyed or returned, e.g., ‘immediately after issuance of the award’ or a few weeks or a few years later. The time limits may also vary for different recipients, in particular allowing counsel longer possession.⁶⁵

In a further effort to prevent the release and dissemination of confidential information, the visual inspection of confidential material may be restricted, either physically or virtually, to a single location. When the inspection of the confidential material is restricted to a single location, usually the right to take notes, make copies or take photographs or videos is also prohibited, or at least restricted. The inspection could be conducted at a ‘neutral’ place, such as at the office of the presiding arbitrator, or, alternatively, at the office of counsel. If the material is comprehensive, this approach could entail the setting up of an entire data room. However, in the context of international arbitration, where the parties are located in different countries, the most practical and effective approach would in most cases be to set up a virtual data room.⁶⁶ This, of course, requires that the data room is adequately secured.⁶⁷

63. Derains, *supra* n. 37, para. 21.

64. Baizeau & Richard, *supra* n. 14, 60 and 64.

65. See Baizeau & Richard, *supra* n. 14, 61-63 for examples of procedural orders and undertakings. Baizeau and Richard refer to an UNCITRAL investor-state arbitration where 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, which the state had submitted 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. Notably, however, only two copies were held by counsel at their premises subject to an undertaking that no further copies could be made, and that the footage could only be viewed by certain named persons at the premises.

66. See Baizeau & Richard, *supra* n. 14, 63-64 for an example of a protective order limiting access to confidential material to an electronic data room.

67. The party gaining access through a virtual data room would, in any event, be able to take notes, and even if the software used in conjunction with the data room would prevent the copying of the material and the taking of ‘print-screens’ or ‘snapshots’ of the material, the party would also have the possibility to take pictures of the computer screen with a camera. Therefore, adopting this approach necessitates at least some level of trust between the parties.

[3] *Restricted References in Written Submissions and the Award*

In cases where the arbitral tribunal orders measures to protect sensitive information, such as redaction or restricted access, the measures taken would prove pointless if the information is referred to and cited in the parties' submissions, witness statements, experts reports, etc. Therefore, such measures are often combined with an order for restricted reference in future submissions.

This approach can be implemented through various means. One approach is to only allow for references to the confidential documents to be made in general terms only, while sections that necessitate quotes or more substantive references to the sensitive information would have to be submitted separately, marked as 'confidential', and these documents would be treated as other documentation with sensitive information. Another approach is to file a redacted and a non-redacted version of the same submission, the non-redacted version only available to the 'confidentiality club'.⁶⁸

[D] *A Confidentiality Advisor or a Third-Party Expert*

In certain cases, the disclosure of the confidential information to any individuals connected to the dispute, i.e., the members of the tribunal, the parties and counsel, may need to be avoided due to its particularly sensitive nature. The parties' dispute may also concern the confidential nature of the material itself, e.g., in connection with document production. In such situations, the tribunal and parties may have to resort to more drastic measures involving third parties to review the confidential information and determine any dispute regarding the confidentiality of the material. As such measures may raise serious due process concerns, any such arrangements must be formulated with care in order to avoid any challenges based on the arbitral having improperly delegated its powers. Any such measures would preferably only be taken after reaching an agreement between the parties on the arrangements to be put in place.⁶⁹

Article 54 of the WIPO Arbitration Rules, which regulates the conduct of the proceedings, refers to a confidentiality advisor:

(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 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.

68. Baizeau & Richard, *supra* n. 14, 64-65.

69. Khodykin & Mulcahy, *supra* n. 41, para. 12.348, Baizeau & Richard, *supra* n. 14, 65.

Article 3(8) of the IBA Rules also provides for a similar measure:

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 rationale of such provisions and the role of the confidentiality advisor's role are in practice limited to determining whether a confidentiality objection presented by a party during the document production phase of the arbitral proceedings holds true. When a confidentiality objection against the production of specified documentation becomes contested, the tribunal may rather than review the documents itself (and therefore also possibly becoming influenced by the contents of the documents) have a third party review the disputed documentation.⁷⁰ The confidentiality advisor can then report on the alleged confidentiality and even propose measures to protect the confidentiality during the proceedings.⁷¹ Notably, both the WIPO Arbitration Rules and the IBA Rules provide that the appointment of a confidentiality advisor should only be resorted to under 'exceptional circumstances'. While the confidentiality advisor should generally and formally speaking have no decision-making power,⁷² the line is not always easy to draw, as the process of identifying the nature of the alleged confidential information inevitably entails a decision-making process. Thus, it is important to set out the detailed terms of reference of the advisor's mission and power to avoid uncertainty. It is also advisable for both parties to expressly agree to the advisor's nomination, although the consensus in legal writing appears to be that such an appointment of a confidentiality advisor would be admissible even without the parties' consent, depending on the applicable law and rules.⁷³ A lack of agreement, however, further emphasizes the importance of a well-formulated and detailed appointment by the tribunal.⁷⁴

The role of the third-party expert may also need to be broader, in the sense that the expert may, in lieu of the arbitral tribunal and the party not in possession of the

70. See, e.g., Pörnbacher & Knief, *supra* n. 19, 479; Hans van Houtte, *The Document Production Master and the Experts' Facilitator: Two Possible Aides for an Efficient Arbitration in Liber Amicorum Bernardo Cremades* (eds Miguel Angel Fernandez-Ballester and David Arias Lozano, Wolters Kluwer España, 2010), p. 1149.

71. See, e.g., Waincymer, *supra* n. 51 para. 11.8.1, Derains, *supra* n. 37 paras 25-26 and 30-31, Khodykin & Mulcahy, *supra* n. 41 para. 12.348.

72. Waincymer, *supra* n. 51, Chapter 11.8.1. See also IBA Working Party's Commentary, *supra* n. 42, 12: 'The expert, who need not necessarily be appointed pursuant to the terms of Article 6 of the IBA Rules of Evidence, would provide a report on the objection, but the arbitral tribunal is to make the final ruling as to its validity.'

73. Pörnbacher & Knief, *supra* n. 19, 479-480; Baizeau & Richard, *supra* n. 14, 67-68; van Houtte, *supra* n. 70, 1152-1153; Derains *supra* n. 37, 25.

74. Baizeau & Richard, *supra* n. 14, 68.

documentation, review the documentation containing sensitive information and prepare a report answering specific questions put by the parties and the tribunal. Such an exceptional measure is specifically referred to in Article 54(e) of the WIPO Arbitration Rules and has reportedly also been adopted in practice in an ICC arbitration. The dispute in that case related to a technology licence 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 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’. Just like a tribunal-appointed expert, the parties (and the arbitrator) had the opportunity to comment on the third-party neutral’s report. However, any requests for access to sensitive information had to be presented to the tribunal for a decision.⁷⁵

§11.05 CONCLUSIONS

International business disputes involve an increasing amount of confidential information that requires protection as between the parties within an arbitration. When the parties to a dispute can agree on the handling of such confidential information, the arbitral tribunal can assist the parties by issuing, e.g., confidentiality orders confirming the parties’ agreement.

If the parties are unable to agree on the treatment of confidential information within the arbitral proceedings, the arbitral tribunal will have to decide whether to order measures to protect the sensitive information upon application by one party. An arbitral tribunal can order the protection of confidential information, e.g., by allowing for redaction of parts of the sensitive material or by restricting access to the sensitive material. While an arbitral tribunal should be cautious when limiting one party’s access to documentation presented by the other party, in the view of the authors, an arbitral tribunal has the required authority to restrict access to sensitive material if so requested. While there is not yet any precedent under Swedish law that would confirm the arbitral tribunal’s authority to order the restriction of access to confidential information, an arbitral tribunal can do so within the limits set by Article 24 SAA. While any arbitral tribunal is likely to strive to have the parties reach an agreement on the subject of confidentiality, an arbitral tribunal should not deny a requesting party a confidentiality order if the request for confidentiality is based on a legitimate need and if the procedural rights of the other party are upheld as far as possible.

An arbitral tribunal’s efforts in this regard are much aided by advance party agreement on, e.g., the application of the IBA Rules on the Taking of Evidence to the

75. Baizeau & Richard, *supra* n. 14, 69-70.

given dispute. The authors thus recommend that parties anticipating the need for increased confidentiality measures within the arbitration proceedings also seek to agree upon the application of the IBA Rules on the Taking of Evidence at the outset of a dispute.