Chapter 4

Notification and Deposit, Publication, Confidentiality and Preservation of the File

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1. Introduction

The “post award” topics of notification and deposit, publication, confidentiality, and preservation of the file all address issues that are open to party autonomy, unless the applicable arbitration law at the arbitral seat provides otherwise. In other words, the parties and the arbitral tribunal may in principle, by agreement, establish rules to govern those topics.

An agreement of this kind can take two different forms: (i) it may result from the selection of the arbitral seat and its lex arbitri or a reference to a set of rules of arbitration, both of which may contain regulations to which the parties are deemed to have agreed by implied consent (agreement by reference); (ii) it may be contained in a specific “tailor-made” agreement concluded between the parties (and, to the extent necessary, the arbitral tribunal) at the beginning or in the course of the arbitral proceedings.

Accordingly, the purpose of this chapter is twofold. On the one hand, we will analyze, to the extent possible, the different solutions offered to those topics in selected arbitration statutes and arbitration rules. On the other hand, we will try to establish as to how the arbitral tribunal may want to address those issues in case there is no pre-existing rule and no subsequent agreement can be reached.

2. Notification of the Award

Is notification a “post award” issue at all? It depends. The answer is yes if the making of the award, i.e. its signing by the arbitrators, is seen as the borderline between the “pre-award” and “post award” phases of the arbitration. We would prefer, however, to draw that line only when the arbitral procedure has come to its end. And this is, in our opinion, not the case until the arbitrators have carried out their duty to communicate the award to the parties. In other words,

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notification is an essential, more precisely the final part of the proceedings before the arbitrators. Only when the award has been notified to the parties will the arbitrators be released from their duties and the arbitral tribunal defunct (functus officio). This implies, inter alia, that notification is ultimately a matter governed by the rules on the arbitral procedure set forth in the applicable arbitration law.

2.1. Purpose and Effects

The purpose of notification is to bring the arbitral tribunal’s decision including the reasons for such decision to the attention of the parties. No binding decision may come into existence without the parties having become aware of the award (or having at least had the opportunity to become aware of it).

In addition, the notification of the award to the parties usually has the following effects:

First, the notification makes the award final and binding on the parties (cf., e.g. PILS, Art. 190(1)). This “finality” of the award means that it has conclusive and preclusive effects, i.e. deploys res judicata between the same parties with respect to the same subject-matter. See, e.g. rev. NCPC, Art. 1484(1): “La sentence arbitrale a, dès qu’elle est rendue, l’autorité de la chose jugée relativement à la contestation qu’elle tranche.”

Secondly, the award is enforceable from its notification in the country of the arbitral seat, unless the applicable lex arbitri provides otherwise. See, e.g. the new Swiss CCP, Art. 387: “As from its notification, the award has the same effects as a final and enforceable judgment.” But also see rev. NCPC, Art. 1496: “Le délai pour exercer l’appel ou le recours en annulation ainsi que l’appel ou le recours exercé dans ce délai suspendent l’exécution de la sentence arbitrale à moins qu’elle soit assortie de l’exécution provisoire.” Moreover, the award may, from its notification, be recognized and enforced abroad under the New York Convention, unless the party against whom recognition and enforcement is sought furnishes proof, amongst other defences, that the award “has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made” (NYC, Art. V(1)(e)).

Thirdly, the notification of the award triggers the time-limit(s) for any remedies that may be available against it. These include, first of all, the “avenues” agreed upon by the parties, e.g. those available under

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1 As to this provision from the Swiss perspective see BGE 135 III 136 E. 3; Swiss Int’l Arb. L. Rep (2009) 259.
the applicable arbitration rules such as a request for interpretation or correction of the award, or an application for an additional award (see, e.g. UNCITRAL Arbitration Rules, Arts 37-39). In addition, the notification of the award triggers the period(s) of time within which recourse against it to a national court may be sought under the applicable lex arbitri, e.g. an application for setting aside or, as the case may be, a request for revision. Moreover, the notification may trigger a deadline within which recognition and enforcement must be sought, given that certain “rules of procedure of the territory where the award is relied upon” (NYC, Art. III) provide a time-limit for obtaining recognition and enforcement.

The effects of notification referred to above, in particular the last of them, require that it is ultimately for the national arbitration law applicable at the arbitral seat to determine what may be accepted as a “correct” notification. Interestingly enough, most arbitration laws are more or less silent on this matter. This means, in turn, that establishing the specificities of notification is largely a matter left to be agreed upon by the parties or, absent such agreement, to be determined by the arbitral tribunal.

2.2. Possible Patterns of Notification (Senders and Receivers)

The first question that may arise in this context is: who shall notify the award to whom?

From the perspective of the “sender”, one common pattern of notification is the direct delivery or communication of the award by the arbitrators. See, e.g. UNCITRAL Arbitration Rules, Art. 34(6): “Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal.” In similar terms also see UNCITRAL Model Law, Art. 31(4).

Another pattern, frequently seen in institutional arbitration, is delivery of the award through an arbitral institution. See, e.g. ICC Rules, Art. 28(1): “Once an Award has been made, the Secretariat shall

2 See, e.g. Art. 124(2) of the Swiss Federal Supreme Court Act, pursuant to which the revision of any decision (including an arbitral award) is subject to an absolute deadline of 10 years from the date on which the award has become final and binding, except where a criminal offence is the ground for revision.


4 See, e.g. PILS Art. 190(1) and the new Swiss CCP, Art. 387, both of which do not deal with notification in any detail. But also see Sc. 55(2) of the English Arbitration Act: If there is no agreement on the requirements as to notification of the award, it “shall be notified to the parties by service on them of copies of the award, which shall be done without delay after the award is made.”
notify to the parties the text signed by the Arbitral Tribunal, ...". See also R31 of the Code of Arbitration for Sport: “All notifications and communications that the CAS or the Panel intend for the parties shall be made through the CAS Court Office.” But it should be noted that institutional arbitration rules may also provide otherwise, e.g. in Swiss Rules, Art. 32(6): “Originals of the award signed by the arbitrators shall be communicated to the parties and to the Chambers by the arbitral tribunal.”

Sometimes, the applicable lex arbitri may even require that the award be notified to the parties through a national court at the place of arbitration. In this regard, reference can be made to the (former) Swiss Concordat on Arbitration which provided that the award be communicated to the parties through the juge d’appui at the arbitral seat.5

If notification must be made through an arbitral institution (or even a judicial authority), interesting questions may arise if the arbitrators were to bypass the institution (including its scrutiny) by making the award and directly communicating it to the parties:

- Does the award produce res judicata effects in such a case? We tend to say yes. The award has been rendered by an arbitral tribunal authorized to do so and has been notified to the parties, although not through the agreed channel. But this defect does not appear to be of any fundamental importance. It cannot be argued, in our opinion, that the award does not even exist or would present an absolute nullity (nullité de plein droit) as long as it has not been notified through the institution.

- Could this present a ground for setting the award aside? The answer obviously depends on the canon of grounds for setting aside that the applicable national arbitration law makes available. Under Art. 34(2)(iv) of the UNCITRAL Model Law, for example, an award may be set aside if the party making the application furnishes proof that “the arbitral procedure was not in accordance with the agreement of the parties”. If interpreted broadly, this provision could allow a party to argue that the award must be set aside because it was not notified in accordance with the agreed arbitral procedure. We consider, however, that such an interpretation would not comply with the idea behind this ground for setting aside

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5 See former CArb, Art. 35(4); the parties were allowed to waive this provision and to agree on direct delivery by the arbitral tribunal instead. The new Swiss CCP fully abandoned this out-dated and rarely used way of notification.
which is to ensure that the award has been rendered in compliance with due process, in particular equal treatment and the right of the parties to be heard in adversarial proceedings, or at least requires that the violation otherwise worked substantial prejudice to the complaining party. In any case, if Swiss law were to govern the arbitration, we submit that neither PILS, Art. 190(2) nor CCP, Art. 393 would provide a valid basis for a successful challenge against the award if it was directly notified by the arbitrators rather than through the institution.

- Could bypassing the institution present a ground for refusal of recognition and enforcement under the New York Convention? In the same terms as Art. 34(2)(iv) of the UNCITRAL Model Law, the New York Convention provides in Art. V(1)(d) that recognition and enforcement may be refused if the party against which it is sought supplies proof that “the arbitral procedure was not in accordance with the agreement of the parties”. As already set out above, we believe that this language should be applied restrictively, also when it comes to the recognition and enforcement of a foreign arbitral award.6 We therefore consider that a party should not be allowed to rely on NYC, Art. V(1)(d) to resist the execution of an award that was directly notified by the arbitral tribunal rather than through the arbitral institution.

From the perspective of the “receiver”, most arbitration rules simply state that copies of the award “shall be communicated to the parties” (see, e.g. UNCITRAL Arbitration Rules, Art. 34(6) or ICC Rules, Art. 28(1)). If so, it is necessary to consult other provisions in the agreed rules of arbitration to find out whether this means direct delivery to each party or whether communication to a designated representative is permissible as well. Indeed, most arbitration rules provide that any notification—including that of the arbitral award— may be “made to the last address of the party or its representative” and that any such notification shall be “deemed to have been made on the day it was received by the party itself or by its representative, or would have been received if made in accordance with the preceding paragraph” (see ICC Rules, Art. 3(2) and 3(3); in similar terms

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UNCITRAL Arbitration Rules, Art. 2). Particularly clear in this respect is R45 of the AAA Commercial Arbitration Rules: “Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in the mail addressed to the parties or their representatives at the last known addresses, personal or electronic service of the award, or the filing of the award in any other manner that is permitted by law.”

In an ad hoc arbitration, where sometimes no pre-existing arbitration rules have been selected by the parties, we highly recommend that the arbitral tribunal address these issues at an early stage of the proceedings and fix them in the terms of reference or a comparable constitutional document: To whom shall the award be notified? Does communication to a legal or other representative suffice? What means of communication are admissible? When shall the award be deemed to have been notified?

With regards to notification of the award to a designated legal representative, the Swiss Federal Supreme Court applies a liberal practice which we consider deserves to be approved. It decided that, unless the parties have agreed otherwise, the arbitral tribunal may validly notify the award by communicating it to their representatives:

> “By sending a duly signed original of the award to the defendant’s counsel, who held a power of attorney and at whose offices the defendant had elected domicile, the arbitrator proceeded to a perfectly correct and valid communication and notification. It is audacious to argue that, under such circumstances, the award has not been formally notified. As the opponents pertinently observe in their submission by invoking the case law under [former] OJ, Art.32, decisions are deemed to have been validly notified to the lawyer who has constituted himself as a party’s legal representative, even if he has not yet produced a power of attorney; and it has even been decided that any direct notification to the party would be irregular in such a case (...).”

2.3. Refusal of Delivery

What happens if a party refuses to accept the delivery of the award? In such a case, it is of particular importance to have a rule in place to the effect that the award “is deemed to have been received if it is sent to the addressee’s last-known place of business, habitual

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7 BGer 4P.273/1999 E. 5b.
residence or mailing address by registered letter or any other means that provides a record of delivery or of attempted delivery” and that it “shall be deemed to have been received on the day it is delivered […] or attempted to be delivered” (see UNCITRAL Arbitration Rules, Art. 2(4) and 2(5)).

If nothing to that effect has been agreed upon by the parties or fixed by the arbitral tribunal well in advance, the arbitral tribunal may, at the request of a party, have to apply to the competent national court at the place of arbitration for assistance. Where the arbitral tribunal has its seat in Switzerland, any such application could be based upon PILS, Art. 185 or, in domestic cases, on the new Swiss CCP, Art. 375(2). If the party refusing acceptance of delivery was domiciled in Switzerland, the Swiss court at the place of arbitration would apply CCP, Arts 136–141. For service abroad, the Swiss court may, depending on the circumstances, have recourse to the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters.

2.4. Form of Notification

The form of notification is usually not specified in greater detail. For example, Art. 386(1) of the new Swiss CCP simply states that the arbitral tribunal shall serve “each party […] with a copy of the award”. PILS, Chap. 12 does not address the service of the award to the parties at all. See, however, e.g. Art. 31(4) of the UNCITRAL Model Law: “After the award is made, a copy signed by the arbitrators […] shall be delivered to each party.” Many arbitration rules provide for a similar wording (see, e.g. UNCITRAL Arbitration Rules, Art. 34(6)).

The form of notification shall in principle be made in compliance with the agreement of the parties. Where no such agreement exists, it shall be determined by the arbitral tribunal in application of its authority to determine the arbitral procedure to the extent that the parties have failed to do so (see, e.g. PILS, Art. 182(2) or CCP, Art. 373(2)).

The form of notification normally consists of sending or delivering signed copies of the award drawn up in writing to each party. Notification requires that the full text of the award be communicated to the parties, i.e. not only the holdings or rulings (the dispositive or operative part) but also the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.
Oral notification does not take place, unless the parties have so agreed. An agreement to this effect is certainly permissible in ad hoc arbitration. If, however, the parties have agreed to arbitrate under the auspices of an arbitral institution that does not provide for this possibility, they must be deemed to have agreed on those rules and cannot normally deviate from them during the arbitration.

If an advance communication of the dispositive part takes place, the question is: when is the notification effective? In particular: when will the deadline for recourse against the award start to run? We submit that, in such a case, the notification of the award may not be considered effective until the reasons upon which it is based have been communicated to the parties as well. Otherwise, the arbitral tribunal could “play games” with the parties, in that it might be tempted to communicate the reasons for its decision to them only after the period of time for recourse against the award had expired. It is therefore broadly accepted in the (Swiss) legal doctrine that the time-limit for the filing of an application for setting aside only starts to run once the parties have been notified the full text of the award.8

2.5. Means of Communication

The means of communication are normally those agreed upon by the parties or, in the absence of such agreement, those determined by the arbitral tribunal. But the arbitral tribunal is well advised to give attention to the applicable arbitration law at the arbitral seat as well. After all, it cannot be excluded that an effective notification, which triggers the time-limit for recourse against the award, pursuant to the applicable national law requires the use of a specific means of communication.

For arbitrations with their seat in Switzerland, the lex arbitri does not impose the use of any particular means of communication. For its part, the Swiss Federal Supreme Court would appear to be in favor of a liberal practice. In an obiter dictum of a recent decision, it indicated that the means of communication does not matter as long as it is in accordance with the arbitral procedure.9 The application for setting aside was directed against the award of a CAS Panel that had been communicated to the parties by facsimile:


“The appellant has received the complete copy of the award by facsimile dated 13 October 2009. She filed her recourse more than 30 days after the notification of that copy. The said recourse would thus be inadmissible, having not been filed within the non-extendable deadline fixed by Art. 100(1) of the Federal Supreme Court Act, assuming that the communication by fax did suffice to trigger that time-limit (...). But there is no need to examine this problem more closely because the present recourse is by all means inadmissible for another reason.”

In other words, in an arbitration with its seat in Switzerland, the award may in principle be communicated to the parties (or their legal representatives) by any means of communication (e.g. by personal delivery, mail, registered mail, registered mail against acknowledgment, courier service, facsimile, email, etc.). The arbitral tribunal should, however, ensure that the principle of equal treatment is respected: each party should be served with its copy of the award through the same or at least a similar channel. It would not be correct, for example, to let one party collect the award at the chairman’s office while the other receives its copy by post or courier service.

If not directly handed over to the parties at the occasion of a meeting, we recommend the arbitral tribunal to ensure by all means that it uses a channel of communication that provides it with a record of delivery (or of attempted delivery). This is normally guaranteed when the notification is made by registered mail against acknowledgment of receipt, courier service or facsimile, but not necessarily when made by email. If the award shall be notified by email, the arbitral tribunal should therefore require the parties to confirm its receipt in writing at short notice. In case the applicable arbitration rules provide for notification of the award through an arbitral institution (as, e.g. under the ICC or LCIA Rules), the arbitral tribunal should insist in the institution obtaining a record of delivery and providing the arbitrators with a copy thereof for their file.

2.6. Timing Issues

The timing of notification of the award may be a delicate issue for various reasons. In most cases there would appear to be no specific guidelines on this matter.\textsuperscript{10} We consider that, in principle, the

\textsuperscript{10} But see again Sc. 55(2) of the English Arbitration Act, providing that, unless otherwise
notification of the award should take place immediately after it has been dated and signed by all arbitrators. This is important to minimize the period of time between the date of the award and the date of its notification to the parties, since it cannot be excluded that the deadline for the unsuccessful party to have recourse against the award runs from the date of the award rather than from date of its effective communication to the parties. However, most arbitration laws fortunately provide for the contrary solution, i.e. that the date of effective notification is the relevant date from which the time-limit for recourse against the award starts to run (and, thus, that the signature date of the award has no significance). The other concept would bear the risk of creating injustice because the arbitral tribunal, here again, might be tempted to withhold the communication of the award until the deadline had lapsed and thereby deprive the parties of their right to challenge the award.

For reasons of equal treatment of the parties, the arbitral tribunal should ensure that the award is notified to each party on the same date, so as to make sure that the deadline for the filing of an application for setting aside expires for each party on the same date. From the Swiss perspective, this is relatively easy to be achieved if the notification shall take place in Switzerland, which is the case when the parties are either domiciled in Switzerland or have elected domicile in this country. However, it can prove very difficult if the notification has to be effected abroad, especially when one or more parties are domiciled in a country where not even delivery by a courier service is guaranteed at short notice, i.e. within 24 or 48 hours. In such a case, the arbitral tribunal may attempt to mitigate these problems by requiring each party, well in advance, to appoint a representative, preferably located in the same country as the chairman’s office, who shall be duly authorized to receive the award on behalf and for the account of that party.

Another source of unequal treatment of the parties in relation to the expiration of the deadline for having recourse against the award may arise from the provisions on recess (vacances judiciaries). In Switzerland, for example, the time-limit for the filing of an application for setting aside is 30 days (see Art. 100(1) of the Federal Supreme Court Act). But this time-limit is subject to a “suspension” (Stillstand): within 7 days before and 7 days after Easter, between 15 July and 15

agreed by the parties, service of the award shall be “done without delay after the award is made.”

11 See the references in Section 2.1 supra.

August as well as between 18 December and 2 January (see Art. 46 of the Federal Supreme Court Act). Now, if the arbitral tribunal proceeds to the notification of the award on 12 June, and Party A (in Paris) receives the DHL or Fedex communication on 13 June while Party B (in Lagos, Nigeria) only receives it on 15 June, then the time-limit for Party A expires on 13 July (i.e. within 30 days and immediately before recess) while Party B will only have to file on 16 August at the latest and thereby benefits from a deadline of more than 60 days! In such a case, the arbitral tribunal could have easily avoided considerable injustice by withholding the notification of the award for just another couple of days.

Further issues relating to the timing of the notification of the award may arise if one or more parties to the arbitration are publicly quoted corporations. Those may be under a reporting obligation concerning potentially price-sensitive facts unknown to the public that occur in connection with their business activities, i.e. new facts that are likely to result in significant movements in the price of their securities. If so, those corporations have to ensure that all actual and potential market participants receive the relevant new information in a non-discriminatory manner so as to provide for transparency and equal treatment for all investors (*ad hoc publicity*). This usually requires that the award is not communicated to the parties (and even less to the public) during trading hours. In such a case, we consider that it is indispensable for the arbitral tribunal to consult with the parties and to fix the details of the award’s communication once it is ready to deliver it on a case-by-case basis. Practicable solutions would appear to be, for example, personal delivery to the parties or their counsel at the chairman’s office or simultaneous communication by email to the parties or their designated representatives, both after close of the stock exchange, preferably on a Friday, so as to enable the parties to examine the award and prepare their ad hoc notices and press releases outside of the trading hours. Otherwise, i.e. if the arbitral tribunal communicates the award without giving the parties an advance notice, the arbitrators risk to receive angry phone calls because it might well occur in such a case that the award has already been reported in the media by one party when the other party has not even received a copy thereof!

3. **Deposit or Registration of the Award**

The New York Convention does not require that the award be deposited or registered with a local court or similar authority at the
One of the fundamental reforms of the New York Convention precisely was to remove the requirement of “double exequatur” which—under the Geneva Convention of 1927—had required the award to be confirmed in the arbitral seat before it could be recognized and enforced abroad. Instead, the New York Convention is based on the principle that the award needs only to be binding on the parties in order for it to be enforceable abroad, and all a party applying for recognition and enforcement needs to present to the court of execution is the authenticated original award and the original arbitration agreement or certified copies thereof (cf. NYC, Art. IV(1)).

Accordingly, many arbitration laws, following the example of the UNCITRAL Model Law, do not require that the award be filed, registered or deposited with a judicial authority at the arbitral seat. In Swiss arbitration law, deposit of the award is offered to the parties as an optional feature. There is no need for the arbitral tribunal to register the award with a local court, and even less may the parties require the tribunal to do so. Instead, deposit of the award may be directly sought and obtained by the parties, without having to obtain the consent of the arbitral tribunal: “Each party may at its own expense deposit a copy of the award with the Swiss court at the seat of the arbitral tribunal” (see PILS, Art. 193(1) and CCP, Art. 386(2)). Deposit in accordance with those provisions does not have any legal significance, but merely intends to make sure that the award is kept safe and does not get lost. In particular, it has no impact whatsoever on the finality and enforceability of the award. In our experience, the optional deposit of an award as provided by Swiss law is very rarely used in practice.

Some national laws, however, require that arbitral awards be filed or registered with a court or similar authority. Those laws differ with respect to the type of award to which the requirement applies (to all awards or only to awards not rendered under the auspices of an arbitral institution), the periods of time for filing or registering the award, and the consequences for failing to comply with the

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15 See, e.g. Belgium Judicial Code, Art. 1702(1): “The president of the arbitral tribunal shall deposit the original of the award with the registry of the court having jurisdiction; he shall notify the parties of the deposit.” However, non-compliance with this formality does not appear to give rise to a challenge against the award (see the list of grounds for challenge in BJC, Art. 1704). A similar requirement for registration may be found in the Netherlands Code of Civil Procedure, Art. 1085.
NOTIFICATION AND DEPOSIT OF THE AWARD

requirement (which might be, for example, invalidity of the award or inability to enforce it in a particular manner).

If the requirement of registration or deposit is mandatory under the arbitration law applicable at the place of arbitration, there may even remain an element of “double exequatur” under the New York Convention. This may be the case if the national law under which the award has been rendered determines that the award is not binding on the parties until it has been registered or deposited with the competent local judicial authority. If so, the foreign court before which recognition and enforcement is sought might be tempted to admit the objection that “the award has not yet become binding” on the parties under the law of the country in which it was made (NYC, Art. V(1)(e)) and, as a result, either refuse the execution of the award or at least adjourn the decision on its recognition and enforcement (NYC, Art. VI).

Therefore, if the requirement of deposit or registration is mandatory under the arbitration law at the arbitral seat, the arbitrators should by all means comply with it in order to protect the award’s validity and to prevent that a party might have a valid objection under NYC, Art. V(1)(e). If the requirement exists, it is useful for the arbitral tribunal to plan in advance how to comply with it and to determine, in consultation with the parties, who should bear the costs of the deposit or registration.

4. Publication of Awards

In investment arbitration, namely in those conducted under the auspices of ICSID, it has become common practice that awards are publicly available in full text or at least in the form of excerpts of the legal reasoning of the arbitral tribunal, enabling the international community to establish a growing body of arbitral precedent. In commercial arbitration, by contrast, the desire for publication of awards in the interests of transparency, consistency and predictability still contrasts with the inherent confidentiality of the arbitration process.

Indeed, confidentiality of the arbitral proceedings and its results is still today seen as one of the “value drivers” in favor of commercial arbitration. Therefore, the general expectation of the parties that their

17 See, e.g. ICSID Arbitration Rule 48 and ICSID Administrative and Financial Regulation 22.
18 Cf. the PWC Report on ‘International Arbitration: Corporate attitudes and practices
dispute be kept private would appear to imply that an award may not be made public, unless the parties have agreed otherwise.

Nevertheless, there is obviously no uniform answer in national laws as to the extent to which the participants in an arbitration (arbitrators, parties, legal representatives, witnesses, experts, court reporters, other assistants to the parties or the tribunal) are under a duty to keep information relating to the case confidential. Instead, parties from different legal and cultural backgrounds might not have the same understanding as regards the extent of confidentiality that is expected. Therefore, it is advisable for the arbitral tribunal to discuss these issues with the parties at the beginning of the arbitration and, if considered appropriate, record any agreed principles of confidentiality.19

In any event, however, the parties should never forget that any award is at least potentially a “public document” for the purposes of judicial control through the national courts of the country where it was made or those of the country where recognition and enforcement is sought. Moreover, a party may be under a statutory or regulatory reporting obligation vis-à-vis its existing or potential investors, requiring it to make the award public— if not the entire text of the award, then at least the essential elements of its content (ad hoc publicity).20

In line with these considerations, some arbitration rules contain a provision similar to the one contained in Art. 34(5) of the UNCITRAL Arbitration Rules: “An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.”

Other rules of arbitration are somewhat less restrictive. See, for example, Art. 27(8) of the ICDR Rules: “Unless otherwise agreed by the parties, the administrator may publish or otherwise make publicly available selected awards, decisions and rulings that have been edited to conceal the names of the parties and other identifying details or that have been made publicly available in the course of enforcement or otherwise.” A similar approach, but even less restrictive with regards to the protection of the parties’ identity, applies under R43 of the Code.

2006 “Privacy, perhaps unsurprisingly, was also ranked highly. International arbitration is considered by many as an effective way to keep business practices, trade secrets, industrial processes, intellectual property, as well as proceedings with possible negative impact to the brand, private.”

19 See, e.g. para. 31 of the UNCITRAL Notes on Organizing Arbitral Proceedings of 1996.

20 See on this issue also supra, Section 2.5 in fine.
of Arbitration for Sport: “Awards shall not be made public unless all parties agree or the Division President so decides.”

Last but not least, it is a (somewhat surprising) fact that—despite all the concerns about confidentiality and privacy—numerous arbitral awards nevertheless make their “unofficial” ways into the public domain. Frequently, it must be assumed, that happens, e.g. through “mouth-to-mouth propaganda” of awards or their contents between practitioners and academics active in the field, their exchange in social or professional networks, or the like. Whether this is always in the interests of the parties as the “users” of arbitration is another question. After all, it should be noted that any unauthorized disclosure of an award in its entirety or in the form of excerpts or a summary may result in that party or arbitrator being liable for damages.21

All this is not to say that it would not be helpful, sometimes even desirable, for an arbitrator to have a comprehensive, systematic and reliable body of arbitral jurisprudence at his or her disposal when having to decide a case. The possibility to refer to, and rely on, a number of “arbitral precedents” that have consistently and repeatedly applied identical or similar solutions in a number of different cases would often not only enhance the persuasiveness of the award, but would also improve the consistency and predictability of the arbitration process as a whole.22

5. Post Award Duty of Confidentiality

As mentioned above, it is widely accepted among legal scholars and practitioners that an arbitrator, by accepting the mandate, undertakes to keep all awards and orders confidential as well as all materials submitted by the parties in the framework of the arbitral proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of an arbitrator by a legal duty, or to protect or pursue a legal right.23

But it is likewise broadly accepted in legal doctrine that once the arbitral proceedings have been terminated, whether by a final award or otherwise, the arbitral tribunal is functus officio,24 which means that

21 See in relation to the arbitrators, e.g. Berger & Kellerhals, op. cit., N 1383 and N 907-909.
22 See on these issues the recent blog by Mourre & Vagenheim on http://kluwerarbitrationblog.com entitled “Arbitral Jurisprudence in International Commercial Arbitration: The Case For A Systematic Publication Of Arbitral Awards In 10 Questions...”.
23 See for this wording, e.g. Art. 30(1) of the LCIA Arbitration Rules.
the legal relationship between the parties and the arbitrators has come to an end. See, e.g. Art. 32(3) of the UNCITRAL Model Law: “The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, [...]”

Against this background, the question about the legal nature of the arbitrator’s “post award” duty of confidentiality may arise: where is the legal basis of such duty if the relationship between the arbitrator and the parties or—as the UNCITRAL Model Law puts it—the mandate of the arbitrator has been terminated?

In the (Swiss) legal doctrine, the dominant view is that the legal relationship between the parties and the arbitrator rests on a contractual basis, a so-called receptum arbitri (contrat d’ arbitre, Schiedsrichtervertrag). This contract is said to be governed by the provisions of mandate, i.e. its defining features are determined by private law, unless the mutual rights and obligations directly arise from the arbitration agreement or the applicable arbitration law (lex arbitri).

In the legal doctrine on general contract law, it is widely accepted today that there is often still at least some “life” after the termination of a contract. The termination of a contract normally entails that the parties’ main obligations (Hauptpflichten) expire, i.e. in the instant case: the arbitrator’s duty to render an award and the parties’ duty to pay for the tribunal’s services. But termination does not mean that ancillary duties (Nebenpflichten) arising from the same contract such as, e.g. warranty obligations and other “post-contractual” duties are coterminous with the parties’ main obligations. Instead, those duties usually outlive the termination of the contract and form the content of a terminated, but not yet fully extinguished, contractual relationship.

There can be no doubt, in our view, that the arbitrator’s duty of confidentiality, once the tribunal is functus officio, belongs to the different types of post-contractual duties, given that it consists of a duty arising from the arbitrators’ general duties of loyalty and care. Therefore, it is clear and also legally on solid grounds that the arbitrator—even after the termination of the mandate—continues to be obliged to keep all awards and orders as well as all submissions and


26 If Swiss substantive law were to apply, Arts 394–406 of the Code of Obligations would thus govern the receptum arbitri.

27 See on these issues, from the Swiss perspective, e.g. Gauch, Schluep et al., Schweizerisches Obligationenrecht, Allgemeiner Teil, 8th edn 2008, N 3102.
exhibits produced by the parties during the arbitration process confidential.

6. Preservation of the File

Preservation of the file is a matter that is rarely discussed, let alone analyzed, in greater detail. We are not aware of any arbitration law or arbitration rules which address this issue, save for some provisions stating that the arbitral institution under the auspices of which the case was conducted shall retain a copy of the award (see, e.g. Swiss Rules, Art. 32(6) or ICC Rules, Art. 28(4)).

If a lawyer who is admitted to the bar has acted as an arbitrator, he or she is arguably under a professional statutory duty to preserve the file set forth in the applicable bar rules. But what applies to all those who are not admitted to the bar and do not have to comply with the rules of a profession? Here, the only way to impose a duty on the arbitrator would appear to consist of assuming—just as with the duty of confidentiality—that the arbitrator has a post-contractual obligation to preserve the file over a reasonable period of time (as a particular aspect of his or her general duty to act with due care).

In practice, the difficult question is: for how long should the file be preserved? We recommend that arbitrators preserve the file at the very least until such time as it is evident that the deadline for an application for setting aside has expired without a party having challenged the award. If a party had recourse against the award to a national court, the arbitrators should obviously preserve the file until the judicial authority has decided on the challenge; after all, the arbitral tribunal cannot exclude that its award might be set aside, entailing that it has to re-open the proceedings and decide the case anew. But a diligent arbitral tribunal should keep in mind that its award might be set aside many years after it has been rendered and notified to the parties, or that it might be asked to produce information from its file in the course of subsequent proceedings for the recognition and enforcement of the award. Arbitrators should be aware that a careless disposal or destruction of the file might well give rise to a liability for damages. All in all, however, we submit that by preserving the file for a period of ten years, the arbitrator should normally be on the save side.

28 See, e.g. Art. 11 of the Statute on Attorneys at Law of the Canton of Berne: “Attorneys at Law have to preserve the file over a period of time of ten years.”

29 See, e.g. BGer 4A_596/2008; Swiss Int’l Arb. L. Rep. (2009) 401, where the Swiss Federal Supreme Court, by a decision dated 6 October 2009, granted a request for revision and annulled an arbitral award that had been rendered under the auspices of the ICC more than thirteen years ago, namely on 31 July 1996 (!).
Preservation of the file may also cause practical problems. Sometimes, the file’s size may consist of dozens of running meters, entailing the long-term preservation of the file not only a spatial absurdity, but also rendering it a considerably expensive exercise. In such a case, it is advisable for the arbitral tribunal to discuss the issue of preservation with the parties at an early stage of the proceedings and, as the case may be, record any agreed principles of preservation. In particular, the arbitral tribunal should ensure in such a case that the parties, if they insist that a large file be preserved in its entirety, pay the costs for such preservation.

Another “elegant” way to anticipate the appearance of preservation problems would be to include, in an order of constitution or in a set of specific procedural rules, a provision to the effect that the arbitrators may destroy any materials submitted by the parties in physical form after twelve months from the date of notification of the award, save and to the extent that a party requests that the materials submitted by it be returned to it at its own cost and expense.\textsuperscript{30} We consider that this is an acceptable way of dealing with preservation. If the file has been destroyed with the permission of the parties, the duty to preserve the file no longer applies and the arbitrator has been released from his post-contractual obligations in this respect.

\textsuperscript{30} In similar terms cf. the provision on “destruction du dossier” suggested by Kaufmann-Kohler and Rigozzi, op. cit., p. 322.