

AIPPI Q283 – Protection Of Trade Secrets During Civil Proceedings

I. Current law and practice

Preliminary remarks

Under Swiss law there is no unified statutory definition of «trade secrets». To avoid repetition, we refer to the AIPPI Reports of the Swiss Group: «Trade secrets: overlap with restraint of trade, aspects of enforcement (Q 247)» and the «Swiss Group: Protection of trade secrets through IPR and unfair competition law (Q 215)».

There are **two ways of initiating civil proceedings** in Switzerland:

- In certain cases a lawsuit can be directly brought before the court – for example under the competence of the Swiss Federal Patent Court or the Commercial Court, or in litigation related to intellectual property rights (Art. 5 (1)(a) of the Swiss Code of Civil Procedure («CCP»));
- in other cases, conciliation proceedings must first be initiated.

Basically, a **civil court** may be approached as follows:

- via a request for preliminary measures according to Art. 261 CCP;
- a request for precautionary taking of evidence according to Art. 158 CCP; or
- by submitting a claim according to Arts. 220 et seq. CCP.

In all three cases, the court can be petitioned for protective measures according to Art. 156 CCP if the taking of evidence endangers the interests of a party or third parties worthy of protection, particularly their business secrets. Such protection can thus be requested prior to the filing of a complaint or simultaneously with it. It is also possible to request protective measures during a later stage of the proceedings. In any event, protective measures under Art. 156 CCP do not extend beyond concluded proceedings.

If **conciliation proceedings** have to be conducted ahead of the court proceedings, problems with the protection of trade secrets seldom arise. This is because the request for conciliation can be made without giving substantiation and presenting evidence.

Irrespective of the possibility to request protective measures, according to Art. 156 CCP the parties may also sign an (out-of-court) non-disclosure agreement before or after the initiation of the proceedings in order to ensure the protection of their trade secrets.

Members of the working group: Marion Consoli, Luca Dal Molin, Philipp Groz (chair), Adrienne Hennemann, Michael Liebetanz, Monika Naef, Vera Vallone

The english translation of the summary is included on Swissex and legalis only.

1.

Does your Group's current law provide for the protection of trade secrets for or during any of the following stages of civil proceedings? Please tick all that apply. Please explain.

– complaint/pleading/writ of summons initiating a proceeding

As outlined in the preliminary section, a party can request protective measures according to Art. 156 CCP to safeguard trade secrets. Such measures are generally limited to procedures for the taking of evidence. While it is generally recognised that the content of evidence and the formulation of a request for, or the offer of evidence in a complaint is amenable to protective measures, statements in the complaint itself are generally excluded from protection. The Swiss Federal Supreme Court, however, expanded the meaning of Art. 156 CCP to statements made in a complaint or in other legal documents under exceptional circumstances (e.g., the content of enclosures is quoted verbatim in extracts or is paraphrased in detail) in recent case law (Decision of 8 December 2021, 4A_58/2021, cons. 3.3.1).

– any other pleadings or submissions filed in the context of a proceeding

We refer to our first answer. As a side note, under Swiss law, the parties are generally precluded from filing (additional) submissions/pleadings outside the exchange of written briefs/pleadings ordered by the court.

– production of documents during discovery phase or court-ordered production of evidence

Under Swiss law, there is no pre-trial discovery phase. Generally, evidence must be either submitted with or requested in the pleading, at least with the second pleading/written brief. In this context, documents containing trade secrets are often initially partially redacted.

A party to the proceedings can be asked – but cannot be forced – to submit evidence (or fully unredacted evidence). If it fails to do so, the court may, however, consider this behaviour when assessing evidence (Art. 164 CCP). Therefore, a refusal seldom comes into play. Third parties are generally obliged to submit evidence ordered to be produced by the court. However, if a party or a third party is a holder of a trade secret, it may refuse to cooperate with an order of the court related to the taking of evidence if it can credibly demonstrate that the interest in maintaining secrecy outweighs the interest in establishing the truth (Arts. 163(2) and 166(2) CCP). In addition, a party or a third party can request protective measures according to Art. 156 CCP if it is ordered to submit evidence or submit an unredacted version of evidence.

– **evidence seizure**

Seizures of infringing products are provided for, *inter alia*, in proceedings concerning the infringement of intellectual property rights (see, e.g., Art. 77 of the Swiss Patent Act). The Swiss Patent Act (Arts. 68 and 77(3)) specifically refers to the protection of trade secrets of a claimant or defendant in civil proceedings. Preliminary measures to seize evidence are also stipulated in Art. 59 of the Swiss Trademark Protection Act and Art. 38 of the Swiss Design Act.

More generally, seizures in the format of securing evidence can be requested under the CCP prior to or during court proceedings if the evidence is at risk of being destroyed or lost, or if the applicant demonstrates a legitimate interest. In such cases, measures to protect trade secrets according to Art. 156 CCP can be requested.

– **prepared-for-litigation technical description/declaration or any other exhibits**

The CCP does not provide for a prepared-for-litigation technical description. Under Art. 77 of the Swiss Patent Act, however, such a prepared-for-litigation technical description can be requested in relation to allegedly infringing processes used and allegedly infringing manufactured products, as well as the means to manufacture them. If the opposing party argues that the description involves trade secrets, the court must implement the necessary measures to protect them. According to its practice, the Swiss Federal Patent Court applies an «attorney's eyes only» procedure according to which only the requesting party's attorney (but not the party itself) has full access to the description. The counterparty may then request protective measures (e.g., redaction of the description to avoid the disclosure of trade secrets). Only after the court has decided on these requests will the requesting party itself obtain access to the (potentially redacted) description, while the requesting party's attorney remains bound not to disclose any additional information obtained through the initial description.

– **oral hearing**

Oral hearings take place within the framework of the main hearing and are usually open to the public. Such a main hearing is mandatory unless both parties waive their right to an oral hearing. The threshold for a potential exclusion of the public (as foreseen in Art. 54(3) CCP) is high and only conceivable if required by the public interest or the interest worthy of protection of a person involved (such as trade secrets). The public may be excluded in whole or in part.

Regarding oral hearings of witnesses as part of the taking of evidence, protective measures according to Art. 156 CCP are possible.

– **hearing transcripts**

Protective measures pursuant to Art. 156 CCP may also extend to hearing transcripts. Hearing transcripts are part of the court files. Parties are generally allowed to access the court files. Such access to files may be refused according to Art. 53(2) CCP if this is justified by overriding public or private interests (e.g., business secrets).

As a rule, the right to access files exists only during pending proceedings. After the conclusion of the proceedings, the parties or third parties may access files only if an interest worthy of protection can be asserted.

Third-party access and the parties' access to files after the proceedings have ended is governed by cantonal law and thus may differ within Switzerland. Generally, third parties cannot access court files of pending proceedings. If proceedings have ended they may be granted access to files under special circumstances (e.g., for scientific reasons) provided this does not conflict with any overriding public or private interests (such as trade secrets).

– **witness statements made out of court and on the record for use in litigation (e.g., deposition)**

Under Swiss law, witnesses are orally examined by the court in a hearing, generally after the proceedings have been initiated (in the case of precautionary taking of evidence even before the initiation of a lawsuit or before the second exchange of briefs has been completed – see Preliminary Remarks to Art. 158 CCP). There is no practice of witness deposition or filing written witness statements. However, it is generally possible to submit witness statements. While the evidentiary value, if any, of such written statements is limited, protective measures according to Art. 156 CCP are possible.

– **court decision**

Under Swiss law, it lies in the discretion of the court to decide whether it renders the judgment in the main hearing or afterwards. Typically, the second approach prevails, and the judgment is handed down in writing. Under Art. 54(1) CCP, court decisions are generally made available to the public, at least at the court to the interested public. Exceptions to the principle of public pronouncement of the judgment are limited and permissible only under exceptional circumstances (Art. 54(3) CCP), such as due to personal privacy, data protection or confidentiality reasons (e.g., trade secrets). The publication of judgments in an anonymised form generally prevails. However, mere anonymisation of the judgment does not guarantee the protection of trade secrets.

– **potential for future misuse of trade secret information gained from claimant or defendant during the proceeding**

Generally, parties and third parties are allowed to use all information gained during proceedings. However, under recent case law (Decision of the Federal Supreme Court of 8 December 2021, 4A_58/2021 cons. 3.3.2), the party to whom sensitive information is disclosed can be obliged under threat of punishment in case of a violation to not disclose gained information to third parties as a measure according to Art. 156 CCP. However, the Swiss Federal Supreme Court held that such an obligation ends with the conclusion of the proceedings (see Preliminary Remarks).

– **other, namely _____**
n/a

2.

Under your Group’s current law, is there a requirement:

a) for specificity in the pleadings (e.g., the trade secret allegedly misappropriated is required in written documents provided to the court); and/or

Generally, a party in civil court litigation must sufficiently specify its factual allegations. According to Art. 150(1) CCP, the court only takes evidence on legally relevant and disputed facts. When initiating proceedings, it is generally sufficient for a claimant to paraphrase the trade secret without going into every detail. However, if these assertions are disputed, the claimant may need to reveal further details in its oral pleadings or its second written brief. If the defendant also disputes such further details, evidence offerings become relevant. Such evidence can be provided by various means such as through witnesses, expert opinions, visual inspections, but also by written documents. Generally, the probative value of documents and expert opinions is significantly higher than that of witnesses. If trade secrets are contained in written documents, the content of such documents must be disclosed to the extent necessary for the court to establish the relevant facts and for the defendant to properly defend against a charge of misappropriation of a trade secret.

b) that knowledge of the trade secret details be known by more than defendant’s outside counsel (e.g., General Counsel, Managing Director, or other types of representatives), so that a defendant can properly defend against a charge of misappropriation of a trade secret? If YES, please explain.

The claimant can request protective measures according to Art. 156 CCP to protect its trade secrets. However, in cases where the trade secret itself is the main subject of the dispute (which is the case if trade secrets were allegedly misappropriated), Art. 156 CCP is applied reluctantly by the courts. The reason for this is that the right of the other party to a proper defence must be preserved and that, as a rule, all information disclosed to the court and relied upon by a party should also be made available to the other party. The court is free to decide what protective measures should be taken. Possible measures range from the exclusion of the public and the restriction of access to evidence to the outside counsel of a party, to the complete exclusion of access by one or both parties to all or part of the evidence (e.g., by redaction). However, there is very limited case law on the implementation of such measures, particularly regarding the admissibility of a complete exclusion of one party (including or excluding its outside counsel) from evidence to which the court has access.

Evidence obtained under protective measures continues to be treated confidentially by the court. If the protective measure involves the exclusion of a party from the taking of evidence or from the right to access the files, the court may base its judgment on the evidence in question only

if it has informed the excluded party of the essential content of the evidence and given them the opportunity to comment and present counter-evidence. Therefore, in cases where the trade secret itself is the main subject of the dispute, full exclusion of the parties and their outside counsels without any information on the content is hardly conceivable. It is thus also unlikely that a court would only allow disclosure of relevant facts to a defendant’s outside counsel while excluding the defendant’s access to such facts. This is because the defendant itself may have better knowledge of the facts and potential defence arguments, and the defendant’s ability to defend itself may be hampered if it does not have direct access to relevant facts in the litigation. Therefore, as a rule, the right to be heard is likely to prevail and relevant information must also be disclosed to the defendant itself (e.g., to identified directors and officers), at least in a summarised form.

3.

Under your Group’s current law, do any remedies exist for the holder of the trade secret to «re-establish» or «re-gain» the status of a trade secret exposed during a Disclosure action, or more generally during civil proceedings? That is, can a trade secret exposed during a civil proceeding effectively be made or held «secret» so as to still be considered a trade secret? If YES, please explain.

When a trade secret becomes public knowledge, it no longer constitutes a secret and loses its legal protection as a trade secret. However, disclosure of a secret in a lawsuit (even if no measures according to Art. 156 CCP were requested or granted) does not by itself cause the secret to fall into the public domain.

Under Swiss law, there are no remedies for the holder of a (publicly disclosed) trade secret to «re-establish» or «re-gain» its secrecy and its legal status as a trade secret. However, in such a case the trade secret owner may assert claims for damages and, depending on the circumstances, also criminal charges against the disclosing party.

II. Policy considerations and proposals for improvements of your Group’s current law

4.

Could your Group’s current law or practice relating to the protection of tradese­cret(s) during civil proceedings be improved? Please explain

Swiss courts may assess the appropriate measures to be taken according to 156 CCP on a case-by-case basis (see Preliminary Remarks).

Against this background, the Swiss Group has discussed the following improvements to the current legal situation:

– As trade secrets are protected under different laws depending on the violation committed (i.e. intellectual property,

labour, unfair competition, or criminal law), the competent authority that orders the protective measure may vary based on the subject matter (i.e. the Federal Patent Court, a civil or criminal court, in some cantons the local Commercial Court, etc.). The different jurisdictions and the variety of information that falls under the scope of trade secret protection, as well as the case-by-case practice may lead to a lack of harmonisation within Switzerland. Therefore, the Swiss Group is of the opinion that a best practice guide including the use of trade secrets measures based on the relevant cantonal and federal case law would be helpful.

- Further, the Swiss Group discussed the implementation of a non-exhaustive list of measures in the CCP, which reflects a weighing of the gravity of interference with procedural rights of the defendant (e.g., limiting access to evidence is less interfering than waiving the right of evidence). Moreover, the list should be accompanied by a general guidance within Art. 156 CPP prior or after the list of measures that will implement the obligation of the court to take the necessary and appropriate measures to balance parties' interests as a legal standard.
- The Swiss Group has further discussed the implementation of a legal basis for extending the application of Art. 156 CCP to further stages of proceedings. As an example, in Swiss law there is no clarity on whether Art. 156 CCP may be applicable to conciliation proceedings (to the extent trade secrets are disclosed at all already at that stage, see Preliminary Remarks). Against this background, the Swiss Group discussed whether such measures would be necessary at this stage. In conciliation proceedings, confidentiality is provided pursuant to Art. 205 CPP, which states that (i) hearings are not open to the public; (ii) declarations from both parties will not be reflected in the minutes of the proceedings; and (iii) information acquired from both the hearing and the minutes may not be disclosed during the following main court proceeding and thus, Art. 205 CPP is narrower than Art. 156 CCP.
- According to Art. 77 Swiss Patent Act any person requesting preliminary measures may request that the court orders measures to secure the evidence. In the event the opposing party claims that trade secrets are involved, the court applies the attorney's eyes-only mechanism. Only then does the court prevent the applicant from accessing trade secrets (especially if a description is requested under Art. 77(1)(b) Swiss Patent Act). The Swiss Group notes that although an attorney's eyes-only mechanism is a practical instrument to prevent disclosure of trade secrets, it is not a common practice outside the field of patent law. Therefore, the Swiss Group has discussed the reasons why this mechanism could not be used more often by way of analogy in disputes directly related to trade secrets. The point was raised that although the attorney's eyes-only mechanism seems reasonable, it is not always a valuable option because trade secrets often include complex technical information, and the attorney may lack the relevant technical expertise. In that regard, it should be noted

that a neutral technical specialist is not a valid option either, as the understanding of the trade secret information often requires in-depth knowledge of the industry and business-related information of the trade secret holder that lies within its employees (who, however, do not qualify as a neutral specialist).

- The Swiss Group has also discussed whether a civil court may order confidentiality measures which go beyond the proceedings, something that is not possible under current law (see Preliminary Remarks). For the time period after the proceedings, it is up to the party requesting protective measures to enforce such measures by means of an action based on substantive law provisions (Decision of the Federal Supreme Court of 8 December 2021, 4A_58/2021, cons. 3.2.4). Against this background, the Swiss Group has considered the possibility to implement in Art. 156 CCP the option for the court to order an obligation of confidentiality that extends beyond the end of proceedings. Such a statutory option would need to be limited in terms of possible measures (i.e. an exhaustive list of the measures that may be ordered *after* the end of a proceeding) and the length of time those measures are enforceable.

5.

In order to limit disclosure of a trade secret, should there be more specific requirements regarding access by a party to a trade secret during a civil proceeding? Please explain.

To limit disclosure, the civil court may choose from a range of non-exhaustive protective measures provided in Art. 156 CCP. Based on the interests of both parties and the overall circumstances the court may choose a reasonable measure. As the measure taken highly depends on a case-by-case basis, the Swiss Group is of the opinion that no further default requirements should be implemented without regard to the case-specific circumstances.

6.

Should remedies to re-establish or regain a trade secret be available to the trade secret holder:

- a. if the disclosure of the trade secret during the proceeding occurred intentionally due to a legal requirement (e.g., a legal requirement to specify the basis of a claim, or in response to a court order/interrogatories, etc.);
- b. if the disclosure of the trade secret occurred intentionally before exhaustion of all available legal protections, (e.g., protection order, redaction of transcripts, etc.);
- c. if the disclosure of the trade secret occurred unintentionally before exhaustion of all available legal protections;
- d. other, namely _____

Under Swiss law, once a trade secret has been publicly disclosed there is no possibility to re-establish its secrecy. However, when trade secrets are disclosed during civil pro-

ceedings intentionally due to a legal measure, it is not considered as a disclosure. Thus, the question refers to the substantive law, which defines «disclosure» as opposed to the procedural possibilities of re-establishing the secrecy. The Swiss Group has discussed the possibility to state in Art. 156 CCP that disclosure under a protective measure within proceedings is not equivalent to a disclosure of trade secrets, and whether it was necessary to clarify this point.

The court may order the opposing party not to disclose trade secrets to third parties or to use the acquired knowledge during the proceedings under the threat of a penalty fine pursuant to Art. 292 Swiss Criminal Code (see also Art. 343(1)(a) CCP). However, this measure must be suitable, necessary and appropriate. According to the Federal Supreme Court, in most cases an obligation to maintain secrecy under threat of a monetary penalty will not be considered as the mildest measure, particularly when a redaction of sensitive data may also be sufficient (Federal Supreme Court Decision dated 8 December 2021, 4A_58/2021, cons. 3.2.3).

7.

Are there any other policy considerations and/or proposals for improvement to your Group's current law falling within the scope of this Study Question?

n/a

III. Proposals for harmonisation

8.

Does your Group believe that there should be harmonisation in relation to the protection of trade secrets during civil proceedings? Please answer YES or NO

YES (see Question 4). However, the Group believes that such harmonisation is likely to be challenging and potentially needs to be limited to certain areas, given that the underlying mechanisms, stages and procedural rules applicable in civil proceedings differ significantly from one jurisdiction to another.

9.

Does your Group believe that there should be protection of trade secrets for or during any of the following stages of civil proceedings? Please tick all that apply. Please explain.

- complain/pleading/writ of summons initiating a proceeding
- any other pleadings or submissions filed in the context of a proceeding
- production of documents during discovery phase or court-ordered production of evidence
(Note that the concept of a discovery phase is not known to the civil procedure system in Switzerland.)
- evidence seizure

- prepared-for-litigation technical description/declaration or any other exhibits
- oral hearing
- hearing transcripts
- witness statements made out of court and on the record for use in litigation (e.g., deposition)
- court decision
- potential for future misuse of trade secret information gained from claimant or defendant during the proceeding
- other, namely _____

For explanation, please refer to Questions 1 and 4.

10.

During a proceeding, what limits and/or restrictions should there be on Disclosure actions and/or procedures (such as a saisie contrefaçon or other seizure) to limit the unnecessary production of trade secrets, thereby reducing the risk of unnecessary disclosure to those involved in the proceeding and leakage into the public domain?

Pre-trial discovery is not a concept known under Swiss law. However, the CCP provides for a request-based claim to obtain evidence, subject to exceptions (see Question 1). The disclosure request will be assessed by the court on a case-by-case basis and on the grounds of the basic principle of balancing the interests of the trade secret holder as well as guaranteeing due process at the same time. This procedure will, for example, ensure the limitation and/or restriction of extensive requests of evidence. Moreover, a court-ordered disclosure can be combined with a confidentiality order.

11.

Should a trade secret be able to «re-gain» its trade secret status after a disclosure action during a civil proceeding? What conditions should there be to allow the recovery, e.g., trade secret was appropriately marked as «confidential» and/or «trade secret»?

Once a trade secret has been disclosed, there is no possibility to re-establish its secrecy (see Question 6). Further, Swiss law is not familiar with the concept of «disclosure actions» (see Question 1). Should the court order the production of evidence, the trade secret holder may request protective measures and oppose the decision if necessary (see Question 6).

However, the Swiss Group is of the opinion that a re-defined and harmonised term of «disclosure» would be helpful and meet the interests of trade secret holders also with regards to the publication of the final judgment which should not include secret information (see Question 4). In general, there is no legal obligation of either party to keep information gained during court proceedings secret. Thus, a legal basis regarding the definition of «disclosure» may hinder an opposing party from sharing the outcome of a proceeding to the public (e.g., via online platforms or on their website).

Under Swiss Law, marking a document as «confidential» or «trade secret» is not sufficient to protect the information contained within it. It is not within the court's tasks to conduct a seizure of evidence by virtue of the document being labelled as a trade secret. It is the claimant's obligation to show that any information qualifies as a trade secret. In any case, a document marked as «confidential» and/or «trade secret» will not suffice to qualify a document as a trade secret. The document may be outdated and/or the information may have already been disclosed after the marking of the document, in which case the marking has no relevance.

12.

Which, if any, of the following should be required or encouraged in any civil litigation in order to maintain a balance between protecting the allegedly misappropriated trade secret and allowing a defendant to defend against a misappropriation charge? Please tick all that apply.

– limit access to the trade secret details to defendant's outside counsels only

While limiting the access to the defendant's outside counsel may be reasonable in some cases, it is not an appropriate tool in every case for maintaining the balance between protecting trade secrets and making sure the defendant is able to defend itself. In proceedings relating to highly complex technical subject matter, it is questionable whether the outside counsel is knowledgeable enough to be able to properly represent the client without appointing a technical expert, who will also need access to the protected information (see Question 4)

– limit access to the trade secret details to a limited number and type of defendant's inhouse representatives (e.g., General Counsel, Managing Director, Chief Technology Officer, etc.) and outside counsel

As stated above, restraining the access to a limited number of representatives may be a valid option for maintaining secrecy – subject to the specifics of the respective case – to find a balance between the interests of the parties.

– limit access to the trade secret details to hired third party expert(s) to view and provide directed findings regarding the trade secret details (e.g., court-ordered expert or defendant's hired expert and plaintiff's hired expert meet separate from the parties to compare the plaintiff's trade secret details with the defendant's information); and/or

The concept of a so-called «confidentiality master» is not known to the civil procedure system in Switzerland. However, in appropriate cases, this mechanism may be a suitable option, provided the directions to the third-party expert are clear and the work of the expert is limited to a comparison of specific factual information, and does not extend to an assessment of such facts on which the parties would then be unable to comment.

– allow the defendant to challenge the confidentiality or trade secret status of a document/material during the proceeding

This should be allowed to guarantee the defendant's ability to defend itself properly.

13.

Should there be a requirement in trade secret misappropriation cases such that in response to a first identification of a trade secret, there is an immediate redaction of all specific trade secret details from the hearing transcripts, court decisions, or other written document before publication?

While an immediate redaction of all specific trade secret details in court documents (transcripts, decisions, or others) should not be a general requirement, in certain circumstances and upon request of the trade secrets holder it may be an adequate response to ensure its rights.

14.

How can one, since injunctions naturally are limited in geographical scope, adequately protect trade secrets obtained during the course of a proceeding against misuse in a different jurisdiction?

This will depend on the procedure as well as enforcement laws of each country. Harmonising those provisions may lead to an adequate protection of trade secrets obtained in a different jurisdiction, so that disclosure in a civil claim will not affect the trade secret outside Switzerland. Harmonisation may also help to maintain Switzerland's attractiveness for conducting trade secrets litigation.

15.

Should evidence involving trade secrets be preserved by the court after the proceeding has concluded? Please explain

The Swiss Group does not see a legitimate interest for either party to allow evidence involving trade secrets to be preserved by the court, but this may depend on access to such documents pursuant to local law and court practice.

In Swiss court practice, evidence is generally returned to the parties after proceedings have concluded. Hence, access by third parties is unlikely.

16.

Please comment on any additional issues concerning the protection of trade secrets in civil proceedings that you consider relevant to this Study Question

All issues are based on the underlying principle of balancing the defendant's interest to defend itself (and to guarantee such a defence by the court during the proceedings) and the legitimate interest of the trade secrets holder to maintain secrecy during the proceedings. For the court to achieve such a balance legislation needs to provide for a variety of protective measures as well as the flexibility of the court to choose the most reasonable measure for the specific case.

17.

Please indicate which industry/cultural sector views provided by in-house counsel are included in your Group's answers to Part III

n/a

Zusammenfassung

Im schweizerischen Recht gibt es keine einheitliche Definition für den Begriff «Geschäftsgeheimnis». Generell ermöglicht das schweizerische Recht den Schutz von Geschäftsgeheimnissen während allen Phasen eines Zivilprozesses. Das Gericht kann Schutzmassnahmen anordnen, wenn die Beweisabnahme Geschäftsgeheimnisse gefährdet. Um die Offenlegung zu begrenzen, kann das Gericht aus einer Reihe von Schutzmassnahmen auswählen. Ist das Geschäftsgeheimnis selbst ein Schlüsselement für die Beurteilung des klägerischen Anspruchs, werden Schutzmassnahmen von den Gerichten aber mit Rücksicht auf das Recht des Beklagten auf Gewährung des rechtlichen Gehörs nur zurückhaltend angeordnet.

In Anbetracht des Mangels an Leitlinien in Gesetz und Rechtsprechung ist die Schweizer Gruppe der Ansicht, dass eine gesetzliche (nicht abschliessende) Liste möglicher Schutzmassnahmen wünschenswert wäre. Die Schweizer Gruppe schlägt zudem vor, den Gerichten die Möglichkeit einzuräumen, eine Geheimhaltungspflicht anzuordnen, die über das Ende des Gerichtsverfahrens hinausgeht.

Die Schweizer Gruppe ist der Ansicht, dass eine internationale Harmonisierung in diesem Bereich wünschenswert ist, gleichzeitig aber schwierig zu erreichen sein dürfte. Das liegt daran, dass sich die in Zivilverfahren anwendbaren Mechanismen, Phasen und Verfahrensregeln von einer Rechtsordnung zur anderen erheblich unterscheiden.

Résumé

Il n'existe pas de définition légale unifiée des «secrets d'affaires» en droit suisse. Le droit suisse permet généralement la protection des secrets d'affaires à tous les stades de la procédure civile. Des mesures de protection peuvent être ordonnées par le tribunal si l'obtention de preuves met en danger les secrets d'affaires. Pour limiter la divulgation, le tribunal peut choisir parmi une série de mesures de protection non exhaustives. Dans les cas où le secret d'affaires lui-même est un élément clé pour le jugement de la demande d'un plaignant, les mesures de protection sont appliquées avec réticence par les tribunaux, compte tenu du droit du défendeur à être entendu.

Vu le manque d'orientation par la législation et la pratique des tribunaux, le Groupe Suisse est d'avis qu'une liste légale (non exhaustive) de mesures de protection potentielles pourrait être souhaitable. Le Groupe Suisse propose en outre d'instituer une option permettant aux tribunaux d'ordonner une obligation de confidentialité qui s'étend au-delà de la fin de la procédure judiciaire.

Le Groupe Suisse estime qu'une harmonisation internationale dans ce domaine est souhaitable, mais pourrait poser des difficultés, compte tenu que les mécanismes sous-jacents, les étapes et les règles de procédure applicables aux procédures civiles diffèrent considérablement d'une juridiction à l'autre.