

Contents

1	Introduction	1
2	Sources	5
2.1	Introduction	5
2.2	Parties' Agreement	6
2.3	International Arbitration Rules	9
2.3.1	Introduction	9
2.3.2	UNCITRAL Rules	10
2.3.3	LCIA Rules	11
2.3.4	Swiss Rules	11
2.3.5	ICC Rules	12
2.3.6	WIPO Rules	13
2.3.7	Oslo Rules	15
2.3.8	Intermediary Conclusions	15
2.4	National Legislation and Case Law	16
2.4.1	National Arbitration Laws	16
2.4.2	Case Law of National Courts	19
2.4.3	Other Potentially Relevant Rules of National Law	19
2.5	Confidentiality Orders	20
2.6	Arbitral Practice	21
2.6.1	Introduction	21
2.6.2	Arbitral Jurisprudence	21
2.6.3	Lex Mercatoria	23
2.6.4	Codified Rules	24
2.7	Overlap Between the Sources	24
2.8	Intermediary Conclusions	26
3	Persons Subject to the Duty of Confidentiality	29
3.1	Introduction	29
3.2	Parties' Duty of Confidentiality	30
3.2.1	Introduction	30

3.2.2	Express Rules and Agreement on the Parties' Obligation of Confidentiality	30
3.2.3	Confidentiality As an Implied Obligation	31
3.2.3.1	Introduction	31
3.2.3.2	England	32
3.2.3.3	Singapore	34
3.2.3.4	Australia	35
3.2.3.5	United States	40
3.2.3.6	Sweden	42
3.2.3.7	France	43
3.2.3.8	Switzerland	46
3.2.3.9	Arbitral Practice and Analysis	48
3.2.4	Balance of the Interests Involved and Analysis of the Arguments for and Against Confidentiality	51
3.2.4.1	Introduction	51
3.2.4.2	Balance of the Various Interests Involved	51
3.2.4.2.1	Parties' Interests to Maintain the Privacy of the Dispute	51
3.2.4.2.2	Interests Requiring Disclosure	51
3.2.4.3	Arguments for and Against Confidentiality as an Implied Obligation	53
3.2.4.3.1	Parties' Expectations of Confidentiality and Attractiveness of Arbitration	53
3.2.4.3.2	Correlation Between Privacy of Hearings and Confidentiality	53
3.2.4.3.3	Differences in Regulation of Confidentiality	54
3.2.4.3.4	Legal Uncertainty	55
3.2.4.3.5	Myriad of Exceptions to Confidentiality	56
3.2.5	Applicable Law	56
3.2.6	Intermediary Conclusions	58
3.3	Arbitrators' Duty of Confidentiality	59
3.3.1	Introduction	59
3.3.2	Basis for the Duty of Confidentiality	60
3.3.2.1	National Legislation	60
3.3.2.1.1	National Arbitration Laws	60
3.3.2.1.2	Contract Law Provisions	61
3.3.2.1.3	Other National Law Provisions	62
3.3.2.2	International Arbitration Rules and Ethical Rules of Professional Bodies and Associations	62
3.3.2.3	Express Contractual Provisions	63
3.3.3	Scope of the Duty of Confidentiality	63

3.3.3.1	In General	63
3.3.3.2	Confidentiality of Arbitrators' Deliberations	65
3.3.4	Intermediary Conclusions	68
3.4	Duty of Confidentiality of Arbitration Institutions	69
3.5	Counsel's Duty of Confidentiality	71
3.5.1	Introduction	71
3.5.2	Legal Privilege and Lawyer's Duty of Confidentiality	73
3.5.3	Regulation of the Lawyer's Duty of Confidentiality by International Law Instruments	76
3.5.4	Regulation of the Lawyer's Duty of Confidentiality in Domestic Laws	78
3.5.4.1	Introduction	78
3.5.4.2	Switzerland	79
3.5.4.2.1	Legal Basis of the Lawyer's Professional Secrecy	79
3.5.4.2.2	Ratione Materiae Scope of the Lawyer's Professional Secrecy	81
3.5.4.2.3	Lawyers Bound by the Lawyer's Professional Secrecy	82
3.5.4.3	England and Wales	84
3.5.4.3.1	Legal Basis and Scope	84
3.5.4.3.2	Lawyers Bound by the Confidentiality Duty and Entitled to Legal Privilege	85
3.5.4.4	United States	87
3.5.4.4.1	Legal Basis and Scope	87
3.5.4.4.2	Lawyers Entitled to the Attorney-Client Privilege and Bound by the Confidentiality Duty	88
3.5.4.5	Comparative Law Analysis	89
3.5.5	Regulation of the Lawyer's Duty of Confidentiality in International Arbitration	90
3.5.5.1	Introduction	90
3.5.5.2	Parties' Representatives in International Arbitration	91
3.5.5.3	International Arbitration Law Instruments	92
3.5.5.4	Scope of the Counsel's Duty of Confidentiality	93
3.5.5.5	Applicable Law	94
3.5.6	Intermediary Conclusions	96
3.6	Third Persons' Duty of Confidentiality	98
3.6.1	Introduction	98
3.6.2	Basis of the Duty of Confidentiality	98
3.6.3	Fact Witnesses' Duty of Confidentiality	100

3.6.3.1	Introduction	100
3.6.3.2	Legal Qualification of the Party-Witness Relationship	100
3.6.3.2.1	Qualification Under Swiss Law	102
3.6.3.3	Basis of the Witnesses' Duty of Confidentiality	104
3.6.3.3.1	Party-Witness Contract	104
3.6.3.3.2	Employment Relationship	105
3.6.3.3.3	Institutional Arbitration Rules	105
3.6.3.4	Intermediary Conclusions	107
3.6.4	Expert Witnesses' Duty of Confidentiality	108
3.6.5	Duty of Confidentiality of Tribunal Secretaries and Other Tribunal Auxiliaries	110
3.6.6	Duty of Confidentiality of Counsel Auxiliaries	111
3.6.7	Duty of Confidentiality of Other Third Persons	111
3.7	Intermediary Conclusions	112
4	Content of the Duty of Confidentiality	115
4.1	Introduction	115
4.2	Information Subject to the Duty of Confidentiality	116
4.2.1	Introduction	116
4.2.2	Confidentiality of the Existence of the Arbitral Proceedings	116
4.2.2.1	National Arbitration Laws	117
4.2.2.2	Arbitration Rules	117
4.2.2.3	State Court Decisions	119
4.2.2.4	Legal Scholars' Views	121
4.2.3	Other Potentially Confidential Matters	121
4.2.4	Intermediary Conclusions	123
4.3	Confidentiality Regarding Documents Exchanged in the Course of Arbitral Proceedings	123
4.3.1	Introduction	123
4.3.2	National Arbitration Laws	124
4.3.3	Arbitration Rules	125
4.3.4	English State Court Decisions	128
4.3.5	Legal Scholars' Views	129
4.3.6	Intermediary Conclusions	130
4.4	Confidentiality Regarding Arbitral Awards and Orders	132
4.4.1	Introduction	132
4.4.2	International Arbitration Rules	134
4.4.3	National Arbitration Laws	135
4.4.4	State Court Decisions	136
4.4.5	Tensions Between Confidentiality and Publication of Arbitral Awards	137

Contents	xiii
4.4.5.1	Current Publication Practices 137
4.4.5.2	Systematic Publication of Arbitral Awards? 140
4.4.5.2.1	Consistent Arbitral Case Law 140
4.4.5.2.2	Enhancing Transparency of the Arbitration 141
4.4.5.2.3	Improving the Quality of Arbitral Awards 141
4.4.5.2.4	Promotion of Arbitration as a Dispute Resolution Method 141
4.4.5.2.5	Making Arbitrations More Accessible for Users 142
4.4.5.2.6	Ad hoc v. Institutional Arbitrations and Choice of the Arbitration Institution 142
4.4.5.2.7	Appointing Arbitrators 142
4.4.5.2.8	Execution of Arbitral Awards 143
4.4.5.2.9	Privacy of the Parties 143
4.4.5.2.10	Additional Costs 143
4.4.5.2.11	Intermediary Conclusions 144
4.4.5.3	Form of Publication 145
4.4.5.3.1	Identification of the Parties 146
4.4.5.3.2	Names of the Arbitrators 147
4.4.5.3.3	Dissemination of Published Awards 148
4.4.6	Intermediary Conclusions 148
4.5	Confidentiality in Respect of Hearings 149
4.5.1	Introduction 149
4.5.2	Arbitration Law and Practice on Confidentiality of Hearings 150
4.5.2.1	Privacy of Hearings 150
4.5.2.2	Confidentiality of Documents and Information Surrounding Hearings 152
4.5.3	Correlation Between Privacy of Hearings and Confidentiality of Arbitration 152
4.6	Intermediary Conclusions 153
5	Exceptions and Limitations to the Obligation of Confidentiality 155
5.1	Introduction 155
5.2	General Cases of Exceptions to the Confidentiality 158
5.2.1	Disclosure Required or Authorised by Law or Regulation 158
5.2.2	Disclosure Is Allowed by the Parties' Consent 159
5.2.3	Disclosure Is Necessary to Seek Professional Advice 159
5.2.4	Documents Are Already in the Public Domain 160

5.3	Exceptions to the Parties' Obligation of Confidentiality	160
5.3.1	Introduction	160
5.3.2	Recognition, Enforcement or Challenge of the Arbitral Award	161
5.3.2.1	In General	161
5.3.2.2	No Frivolous Claims	162
5.3.2.3	Permissible Leaks of Information Because of Openness of Court Proceedings	163
5.3.2.3.1	Introduction	163
5.3.2.3.2	Swiss Law and Practice	164
5.3.2.3.3	English Law and Practice	167
5.3.2.3.4	Law and Practice of the United States	168
5.3.2.3.5	Intermediary Conclusions	170
5.3.3	Disclosure in Parallel or Related Arbitral and Court Proceedings	170
5.3.4	Public Interest Exception	179
5.4	Exceptions and Limitations to the Scope of the Arbitrators' Duty of Confidentiality	181
5.4.1	Introduction	181
5.4.2	Conflict Between the Arbitrators' Duty of Confidentiality and the Duty to Testify	182
5.4.3	Exceptions to the Confidentiality of Deliberations?	184
5.4.4	Conflict Between the Arbitrators' Duty of Confidentiality and the Duty of Disclosure in Cases of Serious Criminality	186
5.5	Intermediary Conclusions	187
6	Remedies and Sanctions in Case of Confidentiality Breach	189
6.1	Introduction	189
6.2	Remedies in Case of Confidentiality Breach by the Parties	189
6.2.1	Confidentiality Orders	189
6.2.1.1	Competence of Arbitral Tribunals and State Courts to Issue a Confidentiality Order	190
6.2.1.2	Cases in Which State Court and Arbitral Tribunal Issued Confidentiality Orders	191
6.2.2	Damages	192
6.2.2.1	In General	192
6.2.2.2	Penalty Clause or Liquidated Damages	196
6.2.3	Termination of the Arbitration Agreement	198
6.2.4	Other Remedies	201
6.3	Remedies and Sanctions in Case of Confidentiality Breach by Arbitrators	202
6.4	Remedies in Case of Confidentiality Breach by Arbitration Institution	204

Contents	xv
6.5 Remedies and Sanctions in Case of Confidentiality Breach by Counsel	205
6.6 Remedies in Case of Confidentiality Breach by Third Persons	206
6.7 Intermediary Conclusions	207
7 Possibility of Uniform Rules on Confidentiality	209
7.1 Introduction	209
7.2 Consensus on Confidentiality Is Possible	209
7.2.1 Parties' Implied Duty of Confidentiality and the Myriad of Exceptions	209
7.2.2 Confidentiality Is Not an Obstacle to Publication of Arbitral Awards	211
7.3 Towards a Uniform Approach Through Harmonization of National Arbitration Laws	212
7.4 Proposed Text for the Rules on Confidentiality	214
8 Conclusions	217
8.1 Persons Bound by a Duty of Confidentiality	217
8.2 Content of the Duty of Confidentiality	218
8.3 Handling Exceptions to the Duty of Confidentiality	219
8.4 Remedies and Sanctions for Breach of the Duty of Confidentiality	220
8.5 Final Conclusions	221
Table of Cases	223
Bibliography	229