## **Contents**

1	Introduction								
2	Sources								
	2.1	Introd	luction	5					
	2.2	Parties	s' Agreement	6					
	2.3 International Arbitration Rules								
		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	Nation	nal 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							
	2.6	Arbitral Practice							
		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	Overla	ap Between the Sources	24					
	2.8		nediary Conclusions	26					
3	Perso	ons Sub	ject to the Duty of Confidentiality	29					
	3.1	Introdu	uction	29					
	3.2	Parties	s' Duty of Confidentiality	30					
		3.2.1	Introduction	30					

	3.2.2	_		Agreement on the Parties' Obligation	
					30
	3.2.3		-	an Implied Obligation	3
		3.2.3.1		on	32
		3.2.3.2	_		32
		3.2.3.3	Singapore		34
		3.2.3.4	Australia.		35
		3.2.3.5	United Sta	ates	40
		3.2.3.6	Sweden.	• • • • • • • • • • • • • • • • • • • •	42
		3.2.3.7	France		43
		3.2.3.8	Switzerlar	nd	46
		3.2.3.9		ractice and Analysis	48
	3.2.4			rests Involved and Analysis of the	
				Against Confidentiality	51
		3.2.4.1		on	51
		3.2.4.2		f the Various Interests Involved	51
		J.2.T.2	3.2.4.2.1	Parties' Interests to Maintain the	<i>J</i> ,
			3.2.4.2.1	Privacy of the Dispute	51
			3.2.4.2.2	Interests Requiring Disclosure	51
		2242			<i>J</i> 1
		3.2.4.3	_	s for and Against Confidentiality as	50
				1 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	Applica	ble Law	· · · · · · · · · · · · · · · · · · ·	56
	3.2.6	~ ~		usions	58
3.3				lentiality	59
3.3	3.3.1		•		59
	3.3.2			of Confidentiality	60
	3.3.2	3.3.2.1	•	·	60
		3.3.2.1		egislation	
			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		al Arbitration Rules and Ethical	
				rofessional Bodies	
				iations	62
		3.3.2.3		ontractual Provisions	63
	3.3.3	Scope of	f the Duty of	of Confidentiality	63

		3.3.3.1	In Genera	1	63		
		3.3.3.2		iality of Arbitrators' Deliberations	65		
	3.3.4			usions	68		
3.4				Arbitration Institutions	69		
3. <del>4</del> 3.5				ntiality	71		
3.5	3.5.1	-			71		
	3.5.2			Lawyer's Duty of Confidentiality	73		
	3.5.3	Regulat	ion of the L	awyer's Duty of Confidentiality by			
				nstruments	76		
	3.5.4			awyer's Duty of Confidentiality in			
		Domest			78		
		3.5.4.1		on	78		
		3.5.4.2	Switzerlan	ıd,	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 a	nd 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 Sta	ites	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	Comparati	ve Law Analysis	89		
	3.5.5	Regulation of the Lawyer's Duty of Confidentiality					
				itration	90		
		3.5.5.1		on	90		
		3.5.5.2		epresentatives in International			
				1	91		
		3.5.5.3	Internation	nal Arbitration Law Instruments	92		
		3.5.5.4		he Counsel's Duty of	-		
				ality	93		
		3.5.5.5		Law	94		
	3.5.6			usions	96		
3.6				infidentiality	98		
	3.6.1				98		
	3.6.2			f Confidentiality	98		
	3.6.3			ty 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 V	Vitnesses' Duty of Confidentiality	108
		3.6.5		Confidentiality of Tribunal Secretaries and	
				ibunal Auxiliaries	110
		3.6.6		Confidentiality of Counsel Auxiliaries	111
		3.6.7	•	Confidentiality of Other Third Persons	111
	3.7			onclusions	112
4			•	f Confidentiality	115
	4.1				115
	4.2			ject to the Duty of Confidentiality	116
		4.2.1		tion	116
		4.2.2	Confiden	ntiality of the Existence of the Arbitral	
			Proceedi	ngs	116
			4.2.2.1	National Arbitration Laws	117
			4.2.2.2	Arbitration Rules	117
			4.2.2.3	State Court Decisions	119
				Legal Scholars' Views	121
		4.2.3	Other Po	tentially Confidential Matters	121
		4.2.4	Intermed	liary Conclusions	123
	4.3	Confid	lentiality I	Regarding Documents Exchanged in the	
		Course	e of Arbitr	al Proceedings	123
		4.3.1	Introduct	tion	123
		4.3.2	National	Arbitration Laws	124
		4.3.3	Arbitration	on Rules	125
		4.3.4	English S	State Court Decisions	128
		4.3.5	_	holars' Views	129
		4.3.6		iary Conclusions	130
	4.4	Confid	lentiality F	Regarding Arbitral Awards and Orders	132
		4.4.1		iion	132
		4.4.2		onal Arbitration Rules	134
		4.4.3		Arbitration Laws	135
		4.4.4		urt Decisions	136
		4.4.5		Between Confidentiality and Publication	120
		.,		al Awards	137
			AT THUM	MA A A TT WORK TO	131

			4.4.5.1	Current Pu	blication 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		iblication	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	Intermed	diary Conclu	sions	148
	4.5			-	f Hearings	149
		4.5.1				149
		Practice on Confidentiality				
		4.5.2			• • • • • • • • • • • • • • • • • • • •	150
			4.5.2.1	-	Hearings	150
			4.5.2.2	_	ality of Documents and	
					Surrounding Hearings	152
		4.5.3	Correlat		Privacy of Hearings and	~~~
					rbitration	152
	4.6	Intern		-		153
5	Evan	ntions :	and I imid	ations to th	e Obligation of Confidentiality	155
J	5.1					155
	5.2				s to the Confidentiality	158
	J.2	5.2.1			or Authorised by Law or	150
		J.2.1		_		158
		5.2.2			ed by the Parties' Consent	159
		5.2.2			ary to Seek Professional	137
		5.4.5				159
		5.2.4			ady in the Public Domain	160
		J.4.7		TIES THE LAHE	and we are a proved to constanting	100

5.3	Excep	ptions 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	1.00
		Openness of Court Proceedings	163
		5.3.2.3.1 Introduction	163
		5.3.2.3.2 Swiss Law and Practice	164 167
		5.3.2.3.4 English Law and Practice	107
		States	168
		5.3.2.3.5 Intermediary Conclusions	170
	5.3.3	Disclosure in Parallel or Related Arbitral and Court	170
	0.0.0	Proceedings	170
	5.3.4	Public Interest Exception	179
5.4	Excep	otions and Limitations to the Scope of the Arbitrators'	
	-	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	Interm	nediary Conclusions	187
Rem	edies an	nd Sanctions in Case of Confidentiality Breach	189
6.1	Introd	uction	189
6.2	Remed	dies 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
	<i>c</i> 0 0	6.2.2.2 Penalty Clause or Liquidated Damages	196
	6.2.3	Termination of the Arbitration Agreement	198
6.2	6.2.4	Other Remedies	201
6.3		ators	202
6.4		lies in Case of Confidentiality Breach by Arbitration	202
U. <del>4</del>		tion	204
	шыци	WVII	207

	6.5	Remedies and Sanctions in Case of Confidentiality Breach by Counsel	205
	6.6	Remedies in Case of Confidentiality Breach by Third	203
		Persons	206
	6.7	Intermediary Conclusions	207
7	Possi	bility 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	Conc	lusions	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
Ta	ble of	Cases	223
Bil	bliogra	рру	229