

# Table of Contents

<b>Foreword</b>	<b>ix</b>
<b>Preface</b>	<b>xi</b>
<b>Acknowledgments</b>	<b>xiii</b>
<b>Introduction</b>	<b>xv</b>
<b>Chapter 1</b>	
<b>Distinguishing Confidentiality from Privacy: A Possible Definition</b>	<b>1</b>
1. A Brief Glance at History	1
2. Distinguishing Confidentiality from Privacy: A Possible Definition	3
3. A Proposed Classification	6
<b>Chapter 2</b>	
<b>The Legal Basis of Confidentiality</b>	<b>9</b>
1. The Express Agreement on Confidentiality	9
2. Confidentiality as an Implied Term in the Agreement to Arbitrate	14
3. The Rules of International Arbitral Institutions	17
4. National Arbitration Laws	21
<b>Chapter 3</b>	
<b>The Scope of the Duty to Maintain Confidentiality</b>	<b>27</b>
1. Arbitral Confidentiality in Comparative Court Practice	27
1.1. Confidentiality Surrounding the Existence of Arbitral Proceedings	29



## Table of Contents

1.2.	Confidentiality in the Course of Arbitral Proceedings	31
1.2.1.	The Age of Innocence: From <i>Oxford Shipping</i> to <i>Dolling Baker</i> and beyond	32
1.2.2.	Tsunami over the Shores: <i>Esso Australia Resources Ltd. v. Sidney James Plowman</i>	37
1.2.3.	An American View in the Midst of the British-Australian Debate	40
1.2.4.	After the Storm in the Pacific: <i>Ali Shipping v. Shipyard Trogir, Myanma Yaung v. Win Win Nu</i> and beyond	43
1.3.	Heads or Tails: Confidentiality or Disclosure of Awards in Different Contexts	49
1.3.1.	The Making of the Award: Secrecy of Deliberations	49
1.3.2.	The Time for Challenges: Confidentiality <i>Ad (in)Finitum?</i>	51
1.3.2.1.	A French View: <i>G. Aïta v. A. Ojje</i>	52
1.3.2.2.	The English Approach: <i>City of Moscow v. Bankers Trust</i>	53
1.3.2.2.1.	The Proceedings before the High Court	54
1.3.2.2.2.	The Proceedings before the Court of Appeals	58
1.3.2.3.	The Position on Confidentiality in New Zealand	60
1.3.2.4.	The Swiss Solution	62
1.3.3.	Use of Prior Awards in Subsequent Proceedings	64
1.3.3.1.	Disclosure of Awards to Establish a Defense or a Cause of Action: <i>Hassneh Insurance</i> and <i>Ali Shipping</i>	65
1.3.3.2.	Disclosure of Awards for the Enforcement of Rights: <i>Lloyd's Syndicate</i> and <i>Aegis v. European Re</i>	68
2.	The Scope of the Duty to Maintain Confidentiality in the Rules of International Arbitration Institutions	73
2.1.	The Duty of Confidentiality in Various Arbitration Rules: A Comparative Analysis	73
2.1.1.	The Duty to Maintain Confidentiality over the Existence of Arbitral Proceedings	75
2.1.2.	The Duty to Maintain Confidentiality over Unfolding Arbitral Proceedings	76
2.1.3.	Confidentiality in the Making of and after the Issuance of the Award	80
2.1.3.1.	Confidentiality of Deliberations	80
2.1.3.2.	Confidentiality and Arbitral Awards	82



2.2.	Two Particular Views upon the Duty to Maintain Confidentiality in International Arbitration	87
2.2.1.	The Duty to Maintain Confidentiality under the Framework of the WIPO Arbitration Rules	88
2.2.1.1.	Acquiring the Character of Confidential Information under Article 52	89
2.2.1.2.	The Duty to Maintain Confidentiality in the Course of Arbitral Proceedings	90
2.2.1.2.1.	The Duty to Maintain Confidentiality over the Existence of Arbitral Process	90
2.2.1.2.2.	The Duty to Maintain Confidentiality during the Arbitral Proceedings	91
2.2.1.2.3.	The Confidentiality of the Award under Articles 75 and 76	92
2.2.2.	An End to Confidentiality? The Recent Trends towards Greater Transparency in ICSID Arbitration	93
2.2.2.1.	Dealing with Confidentiality in ICSID Arbitrations	94
2.2.2.2.	A Case Law Perspective on Confidentiality in ICSID Arbitration: From Amco Asia to Biwater Gauff and Beyond	97
3.	Typology of Limitations to the Scope of Confidentiality	108
3.1.	Proposing a Classification	109
3.2.	Disclosure by Consent	112
3.2.1.	Express Consent	112
3.2.2.	Consent to Disclose Implied as a Matter of Conduct	113
3.3.	Disclosure in the Public Interest	114
3.4.	Disclosure in the Interests of Justice	122
3.5.	Statutory Obligations of Disclosure	126
<b>Chapter 4</b>		
<b>Actors Bound by the Duty to Maintain Confidentiality</b>		<b>133</b>
1.	Parties	134
2.	Legal Counsel	139
3.	The Arbitral Tribunal	142
4.	Arbitral Institutions	148
5.	Third Parties	150
5.1.	Witnesses	151
5.2.	Experts	153
5.3.	Confidentiality Advisors	156
5.4.	Researchers in Arbitral Institutions	157
5.5.	Other Actors	158