Contents

1 Introduction ............................................................... 1
  1.1 General ................................................................. 1
  1.2 Aims, Outline and Scope .............................................. 3
    1.2.1 General .......................................................... 3
    1.2.2 Aims ............................................................ 4
    1.2.3 Background Justification ........................................ 5
    1.2.4 Research Purpose ............................................... 6
    1.2.5 General Outline ............................................... 6
    1.2.6 Detailed Outline ................................................ 7
  1.3 Arbitration, as Opposed to Other Means of Alternative
    Dispute Resolution, and Confidentiality Within It ................ 8

2 The History, Importance and Modern Use of Arbitration .......... 11
  2.1 The History of Arbitration ............................................ 11
    2.1.1 England ........................................................ 11
    2.1.2 USA ............................................................ 13
    2.1.3 France .......................................................... 14
    2.1.4 Germany ....................................................... 14
  2.2 The Importance and Modern Use of Arbitration ................. 15
    2.2.1 The Eminence of Arbitration Over Other Means
      of Alternative Dispute Resolution ............................. 15
  2.3 Tentative Observations ............................................. 17

3 Problems and Questions Encountered in Relation
   to Confidentiality in Arbitration .................................... 19
  3.1 The Main Problems and Questions on Confidentiality
    in Arbitration ......................................................... 19
    3.1.1 General .......................................................... 19
3.1.2 The Advantages and Disadvantages of Arbitration as Opposed to State Court Litigation and the Interplay with Confidentiality ............................................ 20

3.2 Factors and Standards Affecting the Level of Protection of the Duty of Confidentiality in Arbitration .............................. 24
3.2.1 The Distinction Between Privacy and Confidentiality in Arbitration as Opposed to State Court Proceedings ........ 24
3.2.2 The Judicial Attitude .............................................. 27
3.2.3 The Scope and Limits for the Observance of the Duty to Confidentiality in Arbitration ............................... 29
3.2.4 Confidentiality and Its Correlation with the European: Global Context of Arbitration .................................... 35

3.3 The Way Forward? ................................................... 35

4 The Present Status of Confidentiality in International Commercial Arbitration in the Various Jurisdictions ................ 37
4.1 Setting the Scene ..................................................... 37
4.1.1 General Observations on Confidentiality in International Commercial Arbitration ...................................... 37
4.1.2 Arbitration and Human Rights ................................ 41
4.1.3 Legal Privilege, Arbitration and the Issue of Confidentiality .......................................................... 50
4.1.4 The Legal Nature of Confidentiality in Arbitration ........ 53
4.2 The Legal Framework of Arbitration and the Position in Relation to Confidentiality in the Various Jurisdictions .......... 57
4.2.1 England ........................................................ 57
4.2.2 USA ............................................................ 59
4.2.3 France .......................................................... 62
4.2.4 Germany ....................................................... 64
4.3 The Case Law on Confidentiality in the Various Jurisdictions ........................................................... 67
4.3.1 General ........................................................ 67
4.3.2 Confidentiality in Arbitration Proceedings in Relation to the Proceedings Themselves ..................... 68
4.3.3 Confidentiality in Arbitration Proceedings in Relation to Discovery (Disclosure) of Documents and Other Evidence During the Arbitral Process ............ 77
4.3.4 Confidentiality in Arbitration Proceedings in Relation to the Award ................................................. 101
4.4 The Treatment of Confidentiality by ICC Rules .......... 121
4.5 Conclusions ......................................................... 122

5 Critical Analysis, Overall Assessment and Discussion ............ 127
5.1 Overall Analysis of Arbitration and Confidentiality Within It .... 127
5.1.1 Critical Assessment and Analysis of the Purpose of Arbitration and Its Interplay with Confidentiality ........ 127
5.2 Critical Analysis on the Basis of the Examined Case Law in the Chosen Jurisdictions ............................................. 129
  5.2.1 The Current Position ............................................. 129
  5.2.2 Critical Assessment, Analysis and Justification of the Interplay of Arbitration and Confidentiality .......... 133
  5.2.3 Critical Assessment, Analysis and Justification of the Desired Level of Confidentiality to Be Preserved .... 136
  5.2.4 Possible Solutions as to the Way Forward .................... 137
  5.2.5 Tentative Conclusion ............................................ 143

6 Transnational Law and Arbitration ................................ 145
  6.1 The Need for Transnational Law ................................ 145
    6.1.1 In Relation to International Commercial Law .......... 145
    6.1.2 In Relation to Arbitration .................................. 147
  6.2 Transnational Law and Arbitration ......................... 148
    6.2.1 Public and Mandatory Rules Functioning as Transnational Law Applied to Arbitration .......... 148
    6.2.2 Arbitral Case Law, International Legal Instruments and National Laws Functioning as Transnational Law Applied to Arbitration ............................... 150
  6.3 Transnational Arbitral Law and Its Interplay with Confidentiality ............................................. 151
  6.4 The Notion of a Uniform Arbitral Law ...................... 153

7 Towards a Uniform Arbitration Law? ............................. 155
  7.1 The Uniformity Debate ........................................ 155
    7.1.1 The Process of Internationalisation of Arbitration: A Newly Emerging Lex Mercatoria .................... 155
    7.1.2 The Debate Over the Emerging New Lex Mercatoria .... 158
  7.2 A Uniform Law? ................................................ 158
  7.3 A Uniform Rule on Confidentiality in Arbitration .......... 159

8 Conclusions ............................................................ 161
  8.1 A General Critique ............................................. 161
    8.1.1 An Overview .............................................. 161
    8.1.2 Tentative Conclusions ..................................... 165
  8.2 Ways to Safeguard Confidentiality ................................. 166
  8.3 Policy Means and Considerations ................................ 167
    8.3.1 Contractual Creation? .................................... 167
    8.3.2 Incorporation Through Institutional Arbitration Rules .... 168
    8.3.3 Legislative Regulations ................................. 168
### Contents

8.3.4 Considerations with Regards to the Publication and Enforcement of Awards .................................. 169  
8.4 Arguments Against Confidentiality ................................. 170  
8.5 Other Relevant Factors: Legal Cultures and Traditions ........ 171  
8.6 Future Prospects and Suggested Routes ............................. 177  
8.7 A Final Thought ............................................................. 179  

**Bibliography** ................................................................. 183  
**Table of Cases** ............................................................... 191  
**Table of Statutes** ............................................................. 197  
**Index** ............................................................................. 199
Confidentiality in International Commercial Arbitration
A Comparative Analysis of the Position under English, US, German and French Law
Noussia, K.
2010, XIII, 200 p., Hardcover
ISBN: 978-3-642-10223-3