

TABLE OF CONTENTS

Foreword	v
Table of Abbreviations	xvii
Introduction	
Fundamental Problems in International Arbitration	1
<i>Julian D.M. Lew QC</i>	
Part I: Arbitration and Policy Issues	9
Chapter 1	
<i>Mitsubishi</i> After Twenty Years: Mandatory Rules Before Courts and International Arbitrators	11
<i>Donald Francis Donovan & Alexander K.A. Greenawalt</i>	
I. Introduction	11
II. The <i>Mitsubishi</i> Doctrine	16
1. Background	16
2. The <i>Mitsubishi</i> Decision	19
3. Understanding <i>Mitsubishi</i>	24
III. The Courts' Perspective	30
1. Improper Delegation	30
2. The Waiver Argument	33
3. Arbitration of Mandatory Rules After <i>Mitsubishi</i>	38
IV. The Arbitrators' Perspective	42
1. Mandatory Rules and Arbitral Authority	46
2. Application of Mandatory Rules Which Exceed the Parties' Agreement	53

Chapter 2

Effect of International Public Policy in International Arbitration 61

Pierre Mayer

- I. Introduction 61
- II. Notion of Transnational Public Policy 62
- III. Nature of Transnational Public Policy 63
 - 1. Proposed Analysis 63
 - 2. Consequences of Proposed Analysis 66
- IV. Choice between Reliance on Transnational Public Policy and Application of Mandatory State Rules 67

Chapter 3

Determination and Application of Relevant National and International Law and Rules 71

Catherine Kessedjian

- I. Introduction 71
- II. *Etat des lieux* (Inventory) 72
- III. Hierarchy? 74
- IV. Role of Conflict of Laws 81
- V. A Special Note on the Interpretation of Contract 83
- VI. How to Ascertain the Content of the Applicable Law? 83
- VII. Evolution of Applicable Law Over Time 85
- VIII. Extent to Which a Judge May Control the Application of the Law or Rules by the Arbitral Tribunal 85

Chapter 4

The Transparency of International Arbitration: Process and Substance 89

V.V. Veeder QC

- I. Introduction: Arbitral Confidentiality in Related Court Proceedings 89
- II. Established Confidentiality 91
- III. Confidentiality and English Law 93
- IV. Conclusion 101

Chapter 5	
Time and Money: Cost Control and Effective Case Management	103
<i>Klaus Sachs</i>	
I. Introduction	103
II. Costs of Arbitration	104
1. Cost Structure of Arbitration	104
2. The Various Methods of Calculating Arbitrator's Fees	104
(a) Institutional Arbitration	105
(b) UNCITRAL Arbitration Rules 1976 and Ad Hoc Arbitration	108
(c) The Administrative Fees	109
(d) The Comparison between the Different Calculation Methods	109
(e) The Cost of Legal Representation	110
III. The Reasons for the Increasing Costs of Arbitration	112
IV. How to Control and Reduce the Cost of Arbitration	113
V. Conclusion	115
 Part II: National and International Regulation of International Arbitration	 117
 Chapter 6	
Autonomy of International Arbitration Process	119
<i>Henri Alvarez</i>	
I. Introduction	119
II. International Arbitration Procedure	120
III. Nomination and Appointment of Arbitrators	127
IV. Separability and Kompetenz-Kompetenz – Different Approaches to These Questions and Limits	131
V. Standards in Respect of Expert Evidence	138
VI. Conclusions	139
 Chapter 7	
The Procedural Soft Law of International Arbitration: Non-Governmental Instruments	141
<i>William W. Park</i>	
I. The Challenge of Soft Law	141
II. Soft Law and the Arbitral Process	143

1.	What Consumers Want: Balancing Fairness and Efficiency	143
2.	“Judicialisation”	146
3.	Institutional Rules	147
4.	Divergent Cultural Baselines	150
5.	Secondary Markets for Rules: Illustrating the Impact of Soft Law	152
	(a) Who Gets the Last Word?	153
	(b) <i>Ex Parte</i> Measures	153
III.	Soft Law and the Imperial Arbitrator	153

Chapter 8

The Role of National Courts and *Lex Fori* in International Commercial Arbitration 155

Wang Shengchang and Cao Lijun

I.	<i>Lex Fori</i> and Laws to be Applied to an Arbitration	156
1.	Three Laws Distinguished	156
2.	The Applicable Laws Referred to in the New York Convention	157
3.	Arbitration Agreement v. <i>Lex Arbitri</i>	158
II.	The Judicial Role with Regard to Arbitration Agreement	159
1.	The New York Convention and National Legislations	159
2.	Stay of the Court Action and Anti-Suit Injunctions in England and the United States	160
3.	Upon the Request of a Party?	162
4.	Null and Void, Inoperative or Incapable of Being Performed	163
	(a) Meaning of the Terms	163
	(b) Which Law to Decide “Null and Void, Inoperative or Incapable of Being Performed”?	163
	(c) The Judicial Review of the Existence, Validity, and Scope of the Arbitration Agreement	164
III.	The Judicial Role in the Composition of the Tribunal	165
1.	Equal Treatment Concern	166
2.	Arbitration Agreement and <i>Lex Fori</i> Regarding the Composition of the Tribunal	166
3.	The Court’s Role in the Constitution and Reconstitution of the Tribunal	167
IV.	The Judicial Role with Regard to Interim Measures of Protection	168
1.	Which Organ to Order Interim Measures, the Court or the Tribunal?	169
	(a) Necessity of Court-Ordered Measures	169

(b) Three Approaches	170
2. Whether Ordering Interim Measures Is in Violation of the Agreement to Arbitrate?	173
3. Judicial Enforcement of Interim Measures in Support of International Commercial Arbitration	174
(a) Enforcement of Tribunal-Ordered Measures	174
(b) Enforcement of Court-Ordered Measures by the Court of Another Jurisdiction	177
V. Court Review of Arbitral Awards	177
1. Two Types of Review and Applicable Laws	177
2. Grounds for Refusing Recognition and Enforcement and Grounds for Setting Aside	178
3. Delocalized Awards	179
4. Enforcement Despite the Existence of a Ground for Refusal	180
(a) Enforcement of an Award In Spite of its Being Set Aside	181
(b) Enforcement Despite Procedural Irregularities	181
VI. Conclusion	183

Chapter 9

Provisional Measures

185

Ali Yesilirmak

I. Introduction	185
II. Arbitral Provisional Measures	187
1. Jurisdiction of Arbitrators	188
2. Standards, Principles and Procedures	188
III. Complementary Mechanisms	192
1. Emergency Measures from a Head or Organ of an Arbitral Institution	194
2. Emergency Arbitral Provisional Measures Procedures	194
IV. Enforcement of Arbitral Provisional Measures	196
V. Conclusion	200

Chapter 10

Reflections on the Use of Anti-Suit Injunctions in International Arbitration

201

Emmanuel Gaillard

I. Introduction	201
II. The Varied Use of Anti-Suit Injunctions in International Arbitration	202
III. The Inadequacy of Anti-Suit Injunctions in International Arbitration	208

Part III: International Arbitration and State Parties **215**

Chapter 11

**Investment Arbitration and Commercial Arbitration
(or the Tale of the Dolphin and the Shark)**

217

Nigel Blackaby

I.	Introduction	217
II.	The Differences	218
	1. Source of the Consent to Arbitrate	218
	2. The Amicable Negotiation Period	220
	3. Nature of Issues	222
	4. Applicable Law	222
	5. State Participation	225
	6. Transparency	226
	7. Publicity of Decisions	227
	8. Importance of <i>Lex Arbitri</i>	229
	9. International Legal Effect	230
III.	Similarities	232
IV.	Conclusion	233

Chapter 12

**Jurisdiction Challenges in BIT Arbitrations – Do You Read a BIT
by Reading a BIT or by Reading into a BIT?**

235

Matthew Weiniger

I.	Overview	235
II.	Substance v. Appearance in ICSID Arbitrations	237
III.	CMS v. Argentina	240
IV.	SGS v. Pakistan	244
V.	SGS v. Philippines	247
VI.	Tokios Tokelés v. Ukraine	250
VII.	Conclusion	254

Chapter 13

**Interpretation of Treaties: How Do Arbitral Tribunals Interpret
Dispute Settlement Provisions Embodied in Investment Treaties?**

257

Gabrielle Kaufmann-Kohler

I.	The Question: How to Approach It and Why It Is Relevant	257
II.	A Reminder: Basics of Treaty Interpretation	258
	1. The Vienna Convention	258

2. A Comparison with Contract Interpretation	260
III. The Application of Treaty Interpretation Rules to Dispute Settlement Provisions in Investment Treaties	262
1. Treaty v. Contract Claims	262
2. "Disputes with Respect to Investments"	265
3. Umbrella Clause	267
4. Most Favoured Nation Clause	269
IV. The Answer: Consistent and Other Solutions, and Possible Remedies	271
1. Consistent Solutions	272
2. Divergent Solutions due to Different Treaty Provisions	272
3. Remaining Inconsistencies and Remedies	273
 Part IV: International Arbitration and Third Parties	 277
 Chapter 14	
Groups of Companies in International Arbitration	279
<i>Bernard Hanotiau</i>	
I. Introduction	279
II. Leading Cases	282
III. Tentative Conclusions	285
IV. Peterson Farms	288
 Chapter 15	
The Impact of Third Parties on International Arbitration – Issues of Assignment	291
<i>Stephen Jagusch and Anthony Sinclair</i>	
I. Introductory Remarks	291
1. Kompetenz-Kompetenz	292
2. The Importance (and Problem) of Consent	292
3. Particular ICSID and Other Investor-State Issues	295
II. Contractual Permissions and Restrictions	298
III. Relevant Laws	300
IV. Pending Arbitrations	311
V. Assignment and the Burden of an Arbitration Agreement	313
VI. Conclusion	318

Chapter 16

The Amicus Role in International Arbitration

321

Paul Friedland

- I. *Amicus Curiae* Fringe or Mainstream 321
 - 1. Methanex v. United States 322
 - 2. UPS v. Canada 324
 - 3. NAFTA and ICSID 324
- II. Differential Impact on the Arbitrating Parties 328

Chapter 17

Parallel Proceedings, *Res Judicata* and *Lis Pendens*: Problems and Possible Solutions

329

Norah Gallagher

- I. Introduction 329
- II. Parallel Proceedings 331
 - 1. Introductory Remarks 331
 - 2. The Czech Republic Arbitrations 333
- III. The Principles of *Res Judicata* and *Lis Pendens* 334
 - 1. *Res Judicata* 335
 - 2. *Lis Pendens* 338
- IV. Application of Doctrines in Recent International Cases 340
- V. Possible Solution to the Current Problems 347
- VI. Conclusion 355

Chapter 18

Arbitration and Insolvency Proceedings – Selected Problems

357

Stefan M. Kröll

- I. Introduction 357
- II. Overview of the Basic Principles and Features of Insolvency Law 359
- III. Possible Areas of Conflict 360
- IV. The Binding Force of Insolvency Provisions for Courts and Tribunals 361
- V. Effects of the Exclusive Jurisdiction and Mandatory Stay Provisions on Arbitration 363
 - 1. The Effects on Objective Arbitrability 363
 - (a) The American View 364
 - (b) Arbitrability According to the European Views 367

2.	Other Restrictions Imposed in Connections with the “Collective Procedure Principles”	368
	(a) Filing Requirements and Temporary Stays	368
	(b) Limitations on the Remedies Available	369
VI.	Effects of “Divestment and Substitution” Provisions on Arbitration	370
1.	Effects on the Tribunal’s Jurisdiction: The Personal Scope of the Agreement	370
	(a) Debtor Derived Claims	370
	(b) Non Debtor Derived Claims	371
2.	Effects on Arbitration Proceedings	372
VII.	Effects of Trustee’s Statutory Powers to Avoid Executory Contracts on Arbitration	373
VIII.	Arbitration Practice	374
IX.	Conclusion	376
	Subject Index	377