Index

For	eword		XV
Part 1: Chapter I:		Complex International Contracts	
		Introduction: Complex International Contracts and Commercial Arbitration	3
 2. 	a. Envirob. Exampc. GeneraInternation		3 3 4 5
3.	Contracts a. Import b. The tre applica	antive rules applicable to Complex International cance of the question of the applicable law end for softening rules regarding determination of the able law lex International Contracts and Lex Mercatoria	8 8 10 11
Ch	apter II:	Legal Characteristics of Complex International Contracts	14
1.	a. Phenob. Problec. The ab		14 14 15 16
2.	The chara a. Impor b. Long to c. Technol. d. Probat e. Sensit f. Comp g. Numb	acteristics of Complex International Contracts tance term duration icality/volume bility of disturbance, uncertainty ivity for disturbance	18 18 19 20 20 22 23 25 25
3.	b. Partne	tions unge contracts/discrete contracts ership contracts tions of duration" ("Dauerschuldverhältnisse")	28 28 30 30

VIII Index

Cha	apter III:	The Need to Preserve Complex International Relationships	32
1.	Transaction	n specific investments	32
2.		nternational Contracts as Relational Contracts	33
3.	_	nternational Contracts between contract and firm	35
4.		Relationship, Mutual trust	36
5.	The weake a. Reason b. Forms	ning of the principle of pacta sunt servanda s and importance of appearance ory of a reduced binding force of long-term contracts	38 38 39 40
6.	Conclusion		42
Pai	rt 2:	The Law Applicable to Compex International Contracts	43
Cha	apter IV:	Determination of the Applicable Law through Conflict Rules	45
1.	Choice of	the applicable law by the parties	45
2.	Possible so by the arbi	olutions: The Choice of the applicable conflict rules trators	48
3.		ce of a lex fori according to the modern theory of al arbitration	48
4.		ip between conflict of law rules, applicable law and arbitration	50
5.	The rules applicable in ad hoc arbitrations and institutional arbitrations		53
6.	a. Modern in arbiti		54 54
7		187 Sect. 1 IPRG; Par. 1051 Sect. 2 DZPO	56
7.	a. Flexibilb. Predicta	·	60 60 61
8.	The "most	significant relationship" test of the Second Restatement	63
9.	Mandatory	character of the modern rules?	65
10.	Conclusion	1	66
Cha	apter V:	Applying Art. 187 of the Swiss IPRG	68
1.	Problem		68
2.		ines for the arbitrators applying Art. 187	68
	a Art 187	describes a result, not a specific technique	68

		IX
	b. Reference to conflict of law rules (exclusion of the	70
	"voie directe") The evolution of a formalistic approach based on statutory	70
	c. The exclusion of a formalistic approach based on statutory presumptions	70
	d. Relevance of the substantive facts of the dispute in question and the expectations of the parties	72
3.	Methods to specify the closest connection criterion	73
	a. Introduction	73
	b. Joint Application of the Conflict Rules	74
	c. Application of General Principles of Conflict of Laws	76
4.	Conclusion	78
Ch	apter VI: "Voie Directe": The "Direct Method" of	
	Determining the Applicable Law	79
1.	The direct method ("voie directe") of selecting the applicable law	79
2.	"voie directe" and Art. 187 IPRG	80
	a. The opinion of the majority	80
	b. Textual interpretation	81
	c. Legislative history	82
	d. Teleological interpretation	83
	e. Conclusion	85
3.	Marginal difference in the application?	86
4.	"voie directe" and Complex International Contracts	86
Ch	apter VII: Anational Law (Lex Mercatoria)	88
Sec	ction 1: Origin, content and limits of the lex mercatoria	88
1.	Origin	88
2.	Foundations of the lex mercatoria	89
3.	The interrelation between lex mercatoria and international	
	commercial arbitration	92
4.	Content and sources	93
5.	The skepticism about the lex mercatoria	96
Se	ction 2: Application of the lex mercatoria by arbitral tribunals	98
1.	The controversy about the application of the lex mercatoria under Art. 187 Sect. 1 IPRG	98
2.	The non-problematic cases	99
	a. Express or implicit choice of lex mercatoria by the parties	99
	b. The application of trade usages as referred to by national law	102
3.	The remaining, problematic cases	103
-	a. Conflict rules do not exclude "non-national" law	103
	b. Conflict rules do not require a "geographical localization"	106

X Index

	c. Are lex mercatoria rules "legal rules"?d. Conclusion: The applicability of the lex mercatoria in the	106
	remaining cases	112
Sec	Lex Mercatoria and Complex International Contracts	117
1.	When has the lex mercatoria a close connection to the dispute; when are the rules of lex mercatoria "appropriate"?	117
	a. Problemb. Negative Indication: The conflict rules do not give a definite result	117 117
	c. Positive Indication: Denationalized, international business contracts	120
2.	Case law	122
3.	The risks of the application of the lex mercatoria	125
4.	Conclusion	129
Ch	apter VIII: Remedy Against the Arbitrators' Choice of Law?	130
1.	Applicable rules	130
	a. "Primary Control" of arbitral awards in the arbitration forumb. "Secondary Control" in the enforcement forum (Art. V of the	130
	New York Convention of 1958)	131
	c. Comparison	131
2.	Excès de pouvoir (Excess of Power)	132
3.	Violation of the ordre public	134
	a. In general	134
	b. Ordre public and application of the lex mercatoria	137
4.	Case law	139
5.	Conclusion	141
Pa	rt 3: Adjustment of Contracts	143
Ch	apter IX: The Desire for Contract Adaption	145
1.	The need for adaptation and the absence of adaptation clauses	145
2.	Pacta sunt servanda as fundamental principle	145
3.	Adaptation and gap-filling	146
4.	Agreement vs. gap model?	147
5.	The relative notion of contractual gaps	149
6.	The concept of facilitated adaptation of Complex	
	International Contracts	150

Index	XI

7.	Economic Aspects of the effects of facilitated adjustment of	
	Complex International Contracts	152
	a. Bad policy?	154 156
	b. Expectations of the parties	150
	c. Good faith requires cooperation	160
	d. Efficiency argument not convincing	163
	e. Superior risk bearer f. Adjustment and specific performance	165
	f. Adjustment and specific performance g. Rational Planning	166
Ch	apter X: Contractual Adapation Clauses	168
1.	Classification	168
	a. Introduction	168
	b. Open contracts	169
	c. Flexible contracts	170
2.	The most common adaptation clauses	171
	a. Definitions	171
	b. Variation and Change Orders by one of the parties	171
	c. Automatic adaptation clauses	172
	d. Stabilization Clauses (negative adaptation clauses)	174
	e. General Review and Renegotiation Clauses	175
3.	Relief from and Changes in Contractual Liability: Force Majeure,	177
	Hardship, and Special Risk Clauses	177 177
	a. Introduction	177
	b. Description of the Triggering Eventsc. Unforeseen or Unforeseeable Events	179
	d. Events Beyond the Control of a Party	179
	e. The legal effects of Force majeure and hardship clauses	179
4.	Conclusion	181
т.	Conclusion	
Ch	napter XI: Renegotiation Duty?	182
1.	Definition	182
2.	The cases of a duty to renegotiate	182
3.	Renegotiation duty based on the relational character of the contract?	184
4.	Components of duty to renegotiate	185
	Sanction for breach of a renegotiation duty	186
5.		188
6.	Rebuttal of a duty to renegotiate	100
Cl	hapter XII: The Power of Arbitrators to Adjust Contracts	190
1.	Problem	190
2.	The Scepticism about contract adaptation by third parties	19

3.	Interrelation between lex arbitri and substantive law	193
4.	Broad power of the arbitrators if not excluded by the lex arbitri	194
5.	"Schiedsgutachten"	198
6.	No Adaptation ipso iure	200
CI	hapter XIII: Substantive Law on Adaptation to Changed Circumstances in the Absence of Adaptation Clauses	201
1.	Adaptation of Contracts under Swiss and German law: Same theories, different notions	201
2.	The doctrines of "Wegfall der Geschäftsgrundlage"/"Clausula rebus sic stantibus" in the present German and Swiss Law a. The subjective theories b. The objective theories c. The theories of "good faith and fair dealing" ("Treu und Glauben")	201 201 203
3.	Position of the Swiss Supreme Court a. Positive requirements b. Three negative conditions c. Legal effects of the Clausula rebus sic stantibus	204 205 205 207 207
4.	Position of the German Supreme Court	208
5.	Relevance of the nature of the contract	210
6.	Other legal systems a. French Law: force majeure and imprévision b. British common law: Frustration c. Italian Law: Excessiva onerosità	212 212 214 217
Ch	apter XIV: Facilitated Adaptation of Complex International Contracts under a Rule of Lex Marcatoria?	210
1		219
1.	Introduction	219
2.	Public law treaties, uniform principles, adaptation clauses	219
3.	Arbitration case law regarding contact adaptation a. ICC Case No. 2291 b. ICC Case No. 1990 c. S.E.E.E arbitration d ICC Case No. 2291 e. ICC Case No. 3189	220 220 220 221 221 222
4.	Conclusions	223

	Index	XIII
Par	t 4: Special Tools of Arbitration of Complex International Contracts	227
Cha	pter XV: Multi-Party Arbitration	229
1.	Introduction	229
2.	Definition and origin	229
3.	Advantages	230
<i>3</i> . 4.	The problems of multi-party arbitration	231
4.	a. Overview	231
	b. The right to appoint an arbitrator and multi-party arbitrationc. Efficiency	233235
5.	Availability of multi-party Arbitration	236
	a. Forced conciliation?	236
	b. Interpretation of different arbitral clauses as referring to	238
	one tribunal c. Appointment of same arbitrators for separate proceedings	238
	d. Express multi-party arbitration clauses	239
Cha	apter XVI: Fast Track Arbitration	242
1.	Idea	242
2.	Definition	243
3.	Origin	243
4.	Examples of FTA proceedings	244
	a. The first FTA case under ICC Rules	244
	b. FTA under AAA Rules to determine the fair stock market value	
5.	Advantages	247
6.	The limits of FTA	248
	a. Advantages for the claimant	248
	b. The potential for obstruction	249
	c. Unsolved questions about enforcement	249 250
	d. The price paid for speede. Quality of the awards	251
7.	The requirement of an express stipulation of FTA by the parties	252
8.	When should long-term contracts provide for FTA?	253
0.	a. FTA as appropriate dispute resolution mechanism for	233
	long-term contracts	253
	b. Limited dispute	253
	c. Minimal cooperation of the parties can be expected	254
	d. Availability of arbitrators and other involved persons	255
9.	The procedural rules of FTA	256
10.	Separate institutional rules for FTA?	257
11.	FTA and ex aequo et bono decisions	259

XIV Index

12.	The sception	cism about FTA	259
		ks for international arbitration	259
	b. Excess	de pouvoir	260
	c. Due pro	ocess concerns	261
13.	Conclusion	1 .	261
Pai	t 5:	Evaluation of the new trends	263
Section 1:		Introduction	265
Sec	tion 2:	Context of the trend to allow arbitrators to adjust contracts	265
1.	Growing A	Acceptance of arbitration in the 20th century	265
2.		pt of contract adaptation	267
		•	207
3.		of contracts contributes to overcome the static of traditional arbitration	268
		ary character of modern "judicialized" arbitration	268
		and duration: traditional arbitration comes ex post	269
	1 .	ychology of the setting	270
	_	tion power as tool to overcome the static character	0.51
	of tradi	tional arbitration	271
Sec	tion 3:	Flexible determination of the applicable law and	
		the delocalization of arbitration	272
1.	Introduction	on	272
2.	Definition	and objective	272
3.	"Delocaliz	cation" or "a-nationality" in the context of the lex arbitri	273
4.	"Delocaliz	ation" or "a-nationality" in the context of judicial	
	control/en	forcement	273
5.	"Delocaliz	cation" or "a-nationality" in the context of the	
	applicable	substantive law	275
6.	Argument	s and counterarguments	276
7.	Conclusio	ns	278
	a. Introdu		278
		elgium and Swiss failure to comply with the system	279
		stions for a universal system of international	283
	d. Final re	ercial arbitration?	285
	u. Fillal I	Zilidi Kə	200
Sui	nmary		287