

Detailed Table of Contents

Contributors.....XIX

Selected Bibliography.....XXI

Abbreviations XXVII

Introduction 1

Chapter 1 - Institutional v. *ad hoc* Arbitration5

I. Introduction 5

II. *Ad hoc* arbitration5

1. *Characteristics*..... 5

2. *The advantages* 6

3. *The disadvantages* 7

4. *Drafting the arbitration agreement for ad hoc arbitration: a crucial step*..... 8

III. Institutional arbitration 10

1. *Characteristics*..... 10

2. *The advantages* 12

3. *The disadvantages* 12

4. *The criteria to select an arbitral institution*..... 13

5. *Drafting the arbitration agreement in the context of institutional arbitration*..... 13

6. *The principal arbitral institutions*..... 14

IV. Conclusion..... 14

Chapter 2 - The Arbitration Agreement.....15

I. Definition and purpose 15

II. Requirements for validity 16

1. *Formal validity* 16

2. *Substantive validity*..... 17

a) Consent..... 18

aa) *Existence*..... 18

Detailed Table of Contents

bb)	Scope	19
b)	Arbitrability	21
c)	Capacity	24
III.	Contents: ‘drafting’ the arbitration clause	24
IV.	Autonomy of the arbitration agreement.....	28
V.	‘Kompetenz-Kompetenz’	29
Chapter 3 - The Arbitral Tribunal.....		33
I.	The relationship between the members of the arbitral tribunal and the parties	33
1.	<i>The legal basis</i>	33
2.	<i>The obligations of the arbitrators</i>	33
3.	<i>The rights of the arbitrators</i>	34
4.	<i>The arbitrators’ civil liability</i>	35
II.	Composition of the arbitral tribunal	35
1.	<i>The number of arbitrators</i>	35
a)	Where the arbitration clause sets forth the number of arbitrators.....	35
b)	Where the arbitration clause is silent on the number of arbitrators	36
2.	<i>Requirements to act as an arbitrator</i>	37
III.	Constitution of the arbitral tribunal	39
1.	<i>In general</i>	39
2.	<i>Where there is no agreement among the parties</i>	39
a)	<i>Ad hoc arbitration</i>	39
b)	<i>Institutional arbitration</i>	40
aa)	<i>ICC Arbitration</i>	40
bb)	<i>The Swiss Rules</i>	41
IV.	Independence and impartiality of the arbitrators	42
1.	<i>Standard of independence of the arbitrators</i>	42
2.	<i>Case law</i>	43
3.	<i>Institutional arbitration rules</i>	44
4.	<i>Duty of disclosure</i>	45
V.	Challenge and replacement of an arbitrator	46
1.	<i>Challenge of an arbitrator</i>	46
a)	Procedure	46
b)	Time limit for challenge of an arbitrator	46
c)	Appeal against a challenge decision.....	47
2.	<i>Replacement of an arbitrator</i>	48
Chapter 4 - The Arbitral Procedure		49
I.	Article 182 of the PILA – a flexible framework for procedure	49
1.	<i>Introduction</i>	49
2.	<i>The parties’ freedom to agree upon procedure</i>	50
a)	General principles	50

Detailed Table of Contents

b)	Reference to arbitration rules	51
c)	Submission to a procedural law.....	52
3.	<i>The arbitral tribunal's power to determine the procedure in the absence of agreement</i>	52
a)	General principles	52
b)	Practice.....	54
II.	The right to be heard and the right to equal treatment.....	56
1.	<i>Right to be heard</i>	57
2.	<i>Right to equal treatment</i>	58
III.	Evidence	59
1.	<i>Introduction – Article 184 of the PILA</i>	59
2.	<i>Documentary evidence and production of documents</i>	60
3.	<i>Evidence of fact witnesses</i>	61
4.	<i>Evidence of expert witnesses</i>	63
5.	<i>Site inspections</i>	65
IV.	Written submissions	65
1.	<i>Importance of written submissions</i>	65
2.	<i>Number, order, contents and amendments</i>	65
V.	Hearings	66
1.	<i>Organization of the hearing</i>	66
2.	<i>Procedure at the hearing</i>	67
3.	<i>Post-hearing matters</i>	68
Chapter 5 - Interim Measures		69
I.	Introduction	69
II.	The authority of arbitral tribunals to order interim measures	70
III.	Interim measures available to arbitral tribunals.....	70
1.	<i>Applicable law</i>	70
2.	<i>Requirements</i>	71
3.	<i>Types of interim measures</i>	71
a)	Preliminary comment	71
b)	Measures aimed at ensuring the effectiveness of the arbitral award	72
c)	Measures aimed at regulating the conduct of and the relations between the parties during the arbitral proceedings	73
d)	Measures aimed at preserving evidence	73
e)	Measures aimed at securing the enforceability of money claims	74
f)	Anti-suit injunctions.....	74
g)	Security for the parties' legal costs	76
4.	<i>Penalties for non-compliance with measures ordered</i>	77
IV.	Procedural issues	77
1.	<i>Ex parte orders</i>	77
2.	<i>Security</i>	79
3.	<i>Form of decisions on interim measures</i>	80

Detailed Table of Contents

V.	Enforcement of interim measures	80
1.	<i>Voluntary compliance</i>	80
2.	<i>Enforcement of interim measures in connection with arbitration in Switzerland</i>	81
a)	Assistance by Swiss courts	81
b)	Assistance by foreign courts	82
c)	Enforcement of the Swiss court order	82
3.	<i>Enforcement of interim measures in connection with arbitration abroad</i>	82
a)	Enforcement of interim measures issued by foreign arbitral tribunals	82
b)	Assistance of Swiss courts to foreign arbitral tribunals	82
c)	Enforcement of interim measures ordered by foreign courts	83
4.	<i>Enforcement of interim measures securing money claims</i>	83
a)	Freezing order	83
b)	Restraining order	84
VI.	The authority of courts to order interim measures	84
1.	<i>Concurrent jurisdiction of courts and agreements excluding such jurisdiction</i>	84
2.	<i>Jurisdiction of the Swiss courts to grant interim measures in the presence of an arbitration agreement</i>	85
VII.	Conflicts between arbitral tribunals and courts	86
VIII.	Challenge and appeal of interim relief granted by arbitral tribunals	86
Chapter 6 - Confidentiality		89
I.	Introduction	89
II.	The common notion of confidentiality	90
III.	The standard of confidentiality in arbitration in Switzerland	93
1.	<i>The basis for a duty of confidentiality</i>	93
2.	<i>The duty of confidentiality of arbitrators</i>	93
3.	<i>The duty of confidentiality of the parties</i>	100
4.	<i>The duty of confidentiality of third parties</i>	102
IV.	The position on confidentiality in other major venues for arbitration	103
V.	The ambit of confidentiality under institutional arbitration rules	106
VI.	Providing for confidentiality	108
VII.	Confidentiality and trade secrets in Switzerland	110
VIII.	Conclusion	112
Chapter 7 - The Law Governing the Merits of the Dispute and Awards <i>ex Aequo et Bono</i>		115
I.	Introduction	115
II.	Application of the conflict of laws rule of the <i>lex arbitri</i>	115
III.	Rules of law chosen by the parties	117
1.	<i>Preliminary comment</i>	117

Detailed Table of Contents

2.	<i>Requirements for validity</i>	118
a)	Formal validity	118
b)	Substantive validity	119
3.	<i>The effects and scope of the parties' choice</i>	121
a)	National law	121
b)	'Dépeçage', 'tronc commun', no rules?	122
c)	The choice of the <i>lex mercatoria</i>	124
4.	<i>The time of the choice</i>	126
5.	<i>The limits on the parties' freedom of choice</i>	126
a)	The scope of the law chosen by the parties	126
b)	<i>Lois de police</i> or <i>lois d'application immédiate</i>	127
c)	International public policy	128
IV.	Absence of choice by the parties – the 'closest connection' test.....	129
1.	<i>Rules of law with which the case has the closest connection</i>	129
2.	<i>The major connecting factors</i>	130
V.	The status of the applicable law	131
VI.	Awards <i>ex aequo et bono</i>	132
VII.	Sanctions for violation of Article 187 of the PILA	133
Chapter 8 - Challenge and Revision of the Award		135
I.	Challenge of the award.....	135
1.	<i>Introduction</i>	135
2.	<i>Procedural issues</i>	136
a)	Conditions for admissibility of challenges of arbitral awards	136
aa)	<i>Jurisdiction to decide the challenge</i>	136
bb)	<i>Types of awards that can be challenged</i>	137
cc)	<i>Conditions relating to the party challenging the award</i>	138
dd)	<i>Time limits</i>	138
ee)	<i>Formal requirements relating to challenge</i>	139
b)	The proceedings before the Swiss Federal Tribunal	140
aa)	<i>Main steps and overall duration of the proceedings</i>	140
bb)	<i>No stay of enforcement of the challenged award, unless otherwise ordered by the Federal Tribunal</i>	141
cc)	<i>Consequences of a successful challenge of the award</i>	142
dd)	<i>Costs</i>	142
3.	<i>Substantive issues: grounds for challenging awards</i>	143
a)	Irregular constitution of the arbitral tribunal (Article 190(2)(a) of the PILA)	143
b)	Wrong ruling on jurisdiction (Article 190(2)(b) of the PILA)	144
c)	<i>Ultra, infra</i> or <i>extra petita</i> (Article 190(2)(c) of the PILA)	145
d)	Violation of due process (Article 190(2)(d) of the PILA)	147
e)	Violation of public policy (Article 190(2)(e) of the PILA).....	149
aa)	'Substantive' public policy	149

Detailed Table of Contents

	i)	General definition and remarks.....	149
	ii)	<i>Pacta sunt servanda</i> (sanctity of contract).....	150
	iii)	Observance of good faith.....	151
	iv)	Prohibition of confiscation and spoliation	152
	bb)	<i>'Procedural' public policy</i>	152
4.		<i>Agreements to exclude challenges of awards</i>	153
5.		<i>Planned legislative changes regarding proceedings before the Swiss Federal Tribunal</i>	153
II.		Revision of the award.....	154
1.		<i>Legal basis and grounds for 'revision' of international arbitral awards: general overview</i>	154
2.		<i>Procedural issues</i>	156
	a)	General conditions for admissibility of applications for revision.....	156
	aa)	<i>Jurisdiction to decide the application for revision</i>	156
	bb)	<i>The award is a decision capable of revision</i>	157
	cc)	<i>The party seeking revision was party to the arbitral proceedings</i>	157
	dd)	<i>Time limits</i>	157
	ee)	<i>Formal requirements relating to the application for revision</i>	158
	b)	Conditions of admissibility that are specific to Article 137(a) of the JOA (award obtained or influenced by a criminal offence)	159
	c)	Conditions of admissibility that are specific to Article 137(b) of the JOA (important new facts or evidence).....	160
	d)	The proceedings before the Swiss Federal Tribunal	160
	aa)	<i>Main steps and overall duration of the proceedings</i>	160
	bb)	<i>No stay of enforcement of the award under revision, unless ordered otherwise by the Federal Tribunal</i>	161
	cc)	<i>Costs</i>	162
3.		<i>Substantive issues</i>	162
	a)	Substantive conditions for revision based on a criminal offence (Article 137(a) of the JOA)	162
	b)	Substantive conditions for revision based on new and important facts or evidence (Article 137(b) of the JOA)	163
4.		<i>Consequences of a successful application for revision</i>	164
5.		<i>Planned legislative changes regarding proceedings before the Swiss Federal Tribunal</i>	165
Chapter 9 - Recognition and Enforcement of Foreign Arbitral Awards			167
I.		Introduction	167
1.		<i>Article 194 of the PILA and the NY Convention</i>	167
2.		<i>Bilateral treaties</i>	168
3.		<i>The recognition and enforcement of ICSID awards</i>	168
4.		<i>The notion of 'foreign arbitral award' for purposes of recognition and enforcement</i>	168

Detailed Table of Contents

a)	Arbitral awards.....	168
b)	Foreign arbitral awards.....	169
5.	<i>Recognition and enforcement</i>	169
II.	Enforcement proceedings	170
1.	<i>Awards of a sum of money</i>	170
a)	Commencement of debt collection.....	170
b)	Opposition and summary court proceedings	171
c)	Continuation of debt-collection proceedings.....	172
2.	<i>Non-monetary awards</i>	172
3.	<i>Proceedings limited to the question of exequatur</i>	172
4.	<i>Protective measures</i>	173
III.	Requirements for recognition and enforcement (Article IV of the NY Convention).....	174
IV.	Grounds for refusing recognition and enforcement (Article V of the NY Convention)	175
1.	<i>Overview</i>	175
2.	<i>Article V(1) of the NY Convention</i>	176
a)	Article V(1)(a): incapacity of one party/invalidity of the arbitration agreement	176
b)	Article V(1)(b): breach of due process	177
c)	Article V(1)(c): relief granted on matters beyond the scope of the arbitration agreement	177
d)	Article V(1)(d): constitution of the arbitral tribunal and arbitral procedure	177
e)	Article V(1)(e): award not yet binding	178
3.	<i>Article V(2) of the NY Convention</i>	178
a)	Lack of arbitrability.....	178
b)	Violation of Swiss international public policy	178
Chapter 10 - Swiss and Swiss-based Arbitration Institutions.....		181
I.	Commercial arbitration.....	181
1.	<i>The Swiss Rules</i>	181
a)	Overview	181
aa)	<i>History</i>	181
bb)	<i>General features</i>	181
b)	Institutional structures	182
c)	Application of the Swiss Rules and seat of the arbitration.....	182
d)	Main steps in the arbitral proceedings under the Swiss Rules.....	183
aa)	<i>Bringing arbitral proceedings under the Swiss Rules</i>	183
bb)	<i>Constitution and composition of the arbitral tribunal</i>	184
cc)	<i>Proceedings before the arbitral tribunal and the award</i>	185
dd)	<i>Expedited procedure</i>	186
e)	Costs	187

Detailed Table of Contents

2.	<i>ICC Arbitration</i>	188
II.	<i>IP/IT arbitration</i>	188
1.	<i>WIPO Domain Name Dispute Resolution (Uniform Domain Name Dispute Resolution Policy)</i>	188
a)	<i>Overview</i>	188
aa)	<i>Definitions</i>	188
bb)	<i>The genesis of the UDRP and the UDRP Rules</i>	189
b)	<i>Salient procedural features</i>	190
aa)	<i>Applicable rules</i>	190
bb)	<i>Commencing the proceedings</i>	190
cc)	<i>The panelists</i>	191
dd)	<i>The procedure</i>	192
ee)	<i>The Panel's decision</i>	192
ff)	<i>Implementation of the Panel's decision</i>	192
gg)	<i>Effect of court proceedings before, during or after mandatory administrative proceedings</i>	193
2.	<i>WIPO Arbitration Center (WIPO Arbitration Rules and WIPO Expedited Arbitration Rules)</i>	193
a)	<i>Overview</i>	193
b)	<i>Salient procedural features</i>	194
aa)	<i>Application of the WIPO Rules</i>	194
bb)	<i>Commencing the arbitration</i>	194
cc)	<i>The arbitral tribunal</i>	195
dd)	<i>Interim measures and security for the claim, counterclaim and costs</i>	196
ee)	<i>Protection of confidential information</i>	196
ff)	<i>The law applicable to the merits and the arbitration law</i>	197
gg)	<i>Fees and costs</i>	197
hh)	<i>The WIPO Emergency Relief Rules</i>	198
III.	<i>The Court of Arbitration for Sports</i>	198
1.	<i>Overview</i>	198
a)	<i>The purpose of the Court of Arbitration for Sport</i>	198
b)	<i>The nature of the CAS awards</i>	198
c)	<i>The ad hoc Division of the CAS at the 1996 Atlanta Olympic Games and thereafter</i>	199
d)	<i>The CAS and anti-doping</i>	200
aa)	<i>The World Anti-Doping Code</i>	200
bb)	<i>The USADA Protocol for Olympic Movement Testing</i>	201
2.	<i>Salient procedural features</i>	202
a)	<i>Introductory remark</i>	202
b)	<i>Applicable rules</i>	202
c)	<i>Admissibility</i>	203
d)	<i>Time-limit to file the Statement of Appeal</i>	203

Detailed Table of Contents

e)	Application to stay the enforcement of a decision under appeal and application for provisional and conservatory measures	203
f)	Constitution of the Panel	203
g)	Applicable substantive law.....	204
h)	Waiver of the right to challenge the award before the Swiss Federal Tribunal.....	204
IV.	Arbitration between states	204
1.	<i>WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)</i>	204
a)	Overview	204
aa)	<i>Dispute settlement procedure under the GATT</i>	204
bb)	<i>Dispute settlement under the WTO</i>	205
b)	Salient procedural features of the DSU	206
aa)	<i>Scope of application</i>	206
bb)	<i>The DSB</i>	206
cc)	<i>The consultation period</i>	206
dd)	<i>Establishment of the Panels</i>	207
ee)	<i>Composition of the Panels</i>	207
ff)	<i>Terms of Reference</i>	207
gg)	<i>Written submissions</i>	207
hh)	<i>Interim reports</i>	207
ii)	<i>Final report</i>	208
jj)	<i>Adoption of the final report</i>	208
kk)	<i>The Appellate Body</i>	208
ll)	<i>Appeal</i>	208
mm)	<i>Scope of review</i>	208
nn)	<i>Adoption of the Appellate Body report</i>	208
2.	<i>OSCE Court of Conciliation and Arbitration (Rules of the Court of Conciliation and Arbitration within the OSCE)</i>	209
a)	Overview	209
b)	Salient procedural features	209
aa)	<i>The seat of the Court and the arbitral tribunals</i>	209
bb)	<i>The request for arbitration</i>	210
cc)	<i>The arbitral tribunal</i>	210
dd)	<i>Interim measures</i>	210
ee)	<i>The award</i>	210
ff)	<i>Revision of the award</i>	210
V.	Other institutions	211
1.	<i>UNCC Provisional Rules for Claims Procedure</i>	211
a)	Overview	211
aa)	<i>Genesis of the UNCC</i>	211
bb)	<i>The UNCC's structure</i>	211
b)	Salient procedural features	212

Detailed Table of Contents

aa)	<i>Decision on the quantum</i>	212
bb)	<i>Filing of claims</i>	212
cc)	<i>Preliminary assessment of the claims</i>	212
dd)	<i>Categories of claims</i>	212
ee)	<i>Appointment of the Commissioners</i>	213
ff)	<i>Privileges and immunities</i>	214
gg)	<i>Applicable law</i>	214
hh)	<i>The Governing Council's approval</i>	214
ii)	<i>Waiver of appeal</i>	214
2.	<i>The CRT Rules of Procedure for the Claims Resolution Process</i>	214
a)	<i>Overview</i>	214
aa)	<i>The CRT 1</i>	214
bb)	<i>The CRT 2</i>	215
b)	<i>Salient procedural features</i>	215
aa)	<i>Scope of application</i>	215
bb)	<i>Filing of claims</i>	216
cc)	<i>Number and appointment of arbitrators</i>	216
dd)	<i>Initial screenings of the claims</i>	216
ee)	<i>Fast track procedure</i>	217
ff)	<i>Ordinary procedure</i>	217
gg)	<i>Applicable substantive law</i>	217
hh)	<i>Applicable procedural rules</i>	218
ii)	<i>Evidence</i>	218
jj)	<i>The award</i>	218
kk)	<i>The seat of the CRT</i>	218
3.	<i>The German Forced Labour Compensation Program</i>	218
a)	<i>Overview</i>	218
b)	<i>Salient procedural features</i>	219
aa)	<i>Eligibility to file a claim</i>	219
bb)	<i>Costs</i>	219
cc)	<i>Waiver of claims against German enterprises and against Germany</i>	220
dd)	<i>Filing of claims</i>	220
ee)	<i>The statement of claim</i>	220
ff)	<i>Evidence</i>	220
gg)	<i>The PCC</i>	221
hh)	<i>Decision of the PCC</i>	221
ii)	<i>Appeal process</i>	221
Chapter 11 - Mediation		223
I.	<i>Introduction</i>	223
II.	<i>What is mediation?</i>	223
1.	<i>Definition</i>	223

Detailed Table of Contents

a)	Essential features.....	223
b)	The aim of mediation	224
2.	<i>Mediation distinguished from arbitration and conciliation</i>	224
3.	<i>Mediation's field of application</i>	225
a)	Commercial mediation	225
b)	Other field of application	226
4.	<i>When is mediation inappropriate?</i>	226
III.	Role and duties of the participants	227
1.	<i>Role and duties of the parties</i>	227
2.	<i>Role of the law and the lawyer</i>	227
3.	<i>Role and duties of the mediator</i>	228
IV.	The mediation procedure	229
1.	<i>The procedural steps</i>	229
a)	Preparation phase: the mediation agreement between the parties and the contract with the mediator.....	229
b)	Scope of mediation.....	230
c)	Understanding the conflict and developing solutions.....	230
d)	Agreement and end of the mediation process.....	232
2.	<i>Termination of the mediation procedure</i>	232
3.	<i>Costs and duration of mediation</i>	232
a)	Costs of mediation.....	232
b)	Duration of mediation	233
V.	Selected legal issues	233
1.	<i>The enforceability of the mediation clause</i>	233
2.	<i>Confidentiality</i>	234
3.	<i>Statute of limitation</i>	235
VI.	Mediation organisations and training institutes	236
1.	<i>Swiss mediation organisations</i>	236
2.	<i>Training possibilities</i>	236
Appendix 1 - Checklist for Drafting Arbitration Clauses		239
Appendix 2 - Swiss Rules of International Arbitration		242
Appendix 3 - Translation of Chapter 12 of the Swiss Private International Law Act		275
Appendix 4 - Translations of Select Provisions from the Swiss Judicial Organization Act		281
Index		287