

International Arbitration

Comparative and Swiss Perspectives

Fifth Edition

Prof. Dr. Daniel Girsberger, Attorney-at-law, LL.M.

Prof. Dr. Nathalie Voser, Attorney-at-law, LL.M.

with the assistance of

**Agatha Brandão de Oliveira, MLaw, and Sanela Ninković-Jakob,
Attorney-at-law, LL.M.**



Nomos

Schulthess § 2024

Contents

Authors' preface	XIII
Summary Contents	XV
Bibliography	XLI
List of Abbreviations	LXVII

Chapter 1

Introduction and Basic Principles	1
A. The concept of arbitration	3
I. The fundamental features of arbitration and the main differences from state court litigation	3
1. Definition	3
2. Arbitration as an alternative means of dispute resolution	3
3. The arbitration agreement – foundation of every arbitration	3
4. The arbitral tribunal	4
5. The parties choose the place/seat of the arbitration	6
6. The arbitration procedure is determined and controlled by the parties	7
7. The arbitral tribunal renders a final, binding and enforceable decision ..	7
8. Arbitrability	8
II. Other forms of alternative dispute resolution	8
1. What does alternative dispute resolution (ADR) mean?	8
2. Mediation and conciliation	9
3. Expert determination	13
4. Judicial conciliation in Switzerland	15
B. Types of arbitration	17
I. <i>Ad hoc</i> arbitration v. institutional arbitration	17
1. Introductory comments	17
2. <i>Ad hoc</i> arbitration	17
a) Advantages	17
b) Disadvantages	19
c) Proper drafting of the arbitration agreement in <i>ad hoc</i> arbitration ...	21
3. Institutional arbitration	22
a) Overview	22
b) Advantages	23
c) Disadvantages	24
d) Choice of the arbitral institution	25
e) Drafting the arbitration agreement in institutional arbitration	26

Contents

II. Domestic arbitration v. international arbitration	27
1. Introductory comments	27
2. International arbitration	28
a) Focus on the parties to the dispute	28
b) Focus on the nature of the dispute	29
c) A combined approach	29
3. Domestic arbitration	30
4. Difficulties resulting from the different concepts of “international” and “domestic”	30
C. Advantages and disadvantages of arbitration	31
I. Advantages of arbitration	31
1. Opportunity to choose the place of arbitration	31
2. Opportunity to choose the members of the arbitral tribunal	31
3. Arbitration leads to an enforceable arbitral award	32
4. Flexibility of arbitral proceedings	35
5. Confidentiality	35
6. Time	36
II. Disadvantages of arbitration	37
1. Costs	37
2. Limited powers of arbitrators	39
3. Conflicting awards	39
D. Regulatory framework of arbitration	40
I. Introductory comments	40
II. Regulatory framework of domestic arbitration	40
1. Comparative overview	40
2. Switzerland	40
III. Regulatory framework of international arbitration	44
1. Supranational law	44
a) The New York Convention	44
b) The Geneva Protocol and the Geneva Convention	45
2. National law	45
a) The <i>lex arbitri</i>	45
b) UNCITRAL Model Law	47
c) Chapter 12 of the SPILA	48
aa) General characteristics of Chapter 12 of the SPILA	48
bb) Conditions for the application of Chapter 12 of the SPILA	51
(i) First condition: seat of arbitration in Switzerland	51
(ii) Second condition: one of the parties has its domicile, habitual residence or corporate seat outside Switzerland	52
(iii) Third condition: no opting out	53
d) The 2020 revision of Chapter 12 of the SPILA	54

3. Non-national law: rules established by the parties or chosen arbitration rules	56
a) Introductory comments	56
b) <i>Ad hoc</i> and institutional arbitration rules	56
c) A few important and well-known institutional arbitration rules	57
aa) International Chamber of Commerce Arbitration Rules	57
bb) London Court of International Arbitration Rules	58
cc) International Centre for Dispute Resolution Procedures	60
dd) The Swiss Arbitration Centre's Swiss Rules of International Arbitration	61
ee) China International Economic and Trade Arbitration Commission Arbitration Rules	62
ff) SIAC Arbitration Rules	63
gg) Hong Kong International Arbitration Centre Rules	65
hh) SCC Arbitration Rules	65
ii) <i>Deutsche Institution für Schiedsgerichtsbarkeit e. V.</i> -Rules	66
d) Specialized arbitration institutions	67
aa) Court of Arbitration for Sport	67
bb) Convention on the Settlement of Investment Disputes between States and Nationals of other States	68
cc) World Intellectual Property Organization	69
4. Best practice standards	70

Chapter 2

The Arbitration Agreement and the Jurisdiction of the Arbitral Tribunal	73
A. Introductory comments	75
I. Definition and purpose of the arbitration agreement	75
II. Key elements of the arbitration agreement	75
B. Validity of the arbitration agreement	77
I. Comparative overview	77
1. Introductory comments	77
2. Formal validity of the arbitration agreement	78
3. Substantive validity of the arbitration agreement	80
a) Introductory comments	80
b) Consent to refer the dispute to arbitration (<i>essentialia negotii</i> 1)	81
aa) Interpretation of the parties' consent	81
bb) Degree of specificity required	82
cc) Pathological arbitration clauses	82
dd) Arbitration clauses incorporated by reference	83
ee) Asymmetrical clauses	83
ff) Arbitration clauses in unilateral legal acts and articles of association	84
c) Designation of the legal relationship (<i>essentialia negotii</i> 2)	85

Contents

4. Personal scope of the arbitration agreement	85
5. Subject matter covered by the parties' consent	89
a) Introductory comments	89
b) Counterclaim	89
c) Set-off	90
6. Arbitrability of the subject matter of the dispute	91
7. Capacity of parties to enter into an arbitration agreement	92
II. Swiss Law	94
1. General comments	94
2. Form of arbitration agreement	95
a) General comments	95
b) Requirements under Art. 178(1) SPILA	96
c) Special issues regarding the form of the arbitration agreement	98
d) Art. II(2) New York Convention	100
3. Substantive validity of the arbitration agreement	100
a) The principle of <i>favor validitatis</i> (Art. 178(2) SPILA)	101
b) Scope of Art. 178(2) SPILA	102
c) Law governing the substantive validity of the arbitration agreement	103
aa) Choice of a specific law by the parties to govern the arbitration agreement	103
bb) The law applicable to the merits of the dispute (<i>lex causae</i>)	104
cc) Swiss law	104
d) Consent of the parties with regard to the essential elements of the arbitration agreement (<i>essentialia negotii</i>)	105
aa) Consent to refer the dispute to arbitration (<i>essentialia negotii</i> 1)	105
(i) Introductory comments	105
(ii) Interpretation of the arbitration agreement with regard to consent	105
(iii) Arbitration clauses incorporated by reference	112
(iv) Corporate disputes	113
(v) Arbitration clauses in unilateral acts	116
(vi) Asymmetrical arbitration clauses	117
bb) Designation of the legal relationship (<i>essentialia negotii</i> 2)	117
4. Personal scope of the arbitration agreement	118
a) General principles	118
b) Extension as issue of substantive validity	119
c) Situations considered by the Swiss Supreme Court	120
5. Subject matter covered by the parties' consent	124
a) Introductory comments	124
b) Counterclaim	125
c) Set-off	125
6. Arbitrability of the subject matter of the dispute	128
a) Introductory comments	128
b) Special issues regarding arbitrability	130
aa) Competition and anti-trust law	130

bb)	Family and succession law matters	131
cc)	Intellectual property	132
dd)	Non-enforceable claims	132
ee)	Bankruptcy law	132
ff)	Consumer disputes	133
gg)	Employment disputes	134
hh)	Company disputes	134
7.	Capacity of the parties to enter into an arbitration agreement	135
8.	Ineffective arbitration clauses under Swiss law	137
a)	Formal deficiencies	137
b)	Invalidity due to defect in the conclusion of the arbitration agreement	138
c)	Deficiencies regarding content	139
C.	Content of an arbitration agreement	140
I.	Introductory comments	140
II.	Content of a properly drafted arbitration agreement	140
1.	<i>Ad hoc</i> or institutional arbitration	140
2.	Seat of arbitration	141
3.	Composition of the arbitral tribunal	142
4.	Applicable substantive and procedural law	142
5.	Language of the arbitration	142
6.	Agreement to exclude the right to challenge the award	142
7.	Provisions for multi-party proceedings	143
D.	Effects of the arbitration agreement	144
I.	Comparative overview	144
1.	Positive effects	144
a)	The parties' obligation to submit disputes to arbitration	144
b)	Enforcement of the obligation to arbitrate	144
c)	The arbitral tribunal has jurisdiction	145
2.	Negative effect	145
II.	Swiss law	147
1.	Enforcement of an obligation to submit to arbitration	147
2.	Review of the arbitral tribunal's jurisdiction by state courts	148
a)	Introductory comments	148
b)	Swiss Supreme Court's approach	149
c)	Arguments in favor of a limited (<i>prima facie</i>) review	152
d)	Arguments against a limited (<i>prima facie</i>) review	152
E.	Termination of the arbitration agreement	153
I.	Comparative overview	153
1.	Introductory comments	153

Contents

2.	Ways and reasons for termination	154	
a)	Mutual consent to terminate the arbitration agreement	154	
b)	Waiver	154	
c)	Unilateral termination by one of the parties	154	
d)	Purpose fulfilled by the rendering of a final award	155	
e)	Purpose becomes impossible	156	
3.	Effects of the termination of the arbitration agreement	156	
II.	Swiss law	156	
1.	Mutual consent to terminate the arbitration agreement	156	
2.	Unilateral termination by one of the parties	157	
F.	Theory of “separability”/“severability”	159	
I.	Comparative overview	159	
II.	Swiss law	160	
G.	Principle of “competence-competence”	161	
I.	Comparative overview	161	
1.	Introductory comments	161	
2.	The positive and the negative effect of “competence-competence”	161	
3.	Practical relevance of the principle of “competence-competence”	163	
4.	Combined effect of “separability” and “competence-competence”	163	
II.	Swiss law	163	
1.	Introductory comments	163	
2.	The arbitral tribunal’s ruling on its own jurisdiction	164	
3.	Jurisdiction of the arbitral tribunal and the principle of <i>lis pendens</i>	168	
H.	Complex arbitration	168	
I.	Comparative overview	168	
1.	Multi-party arbitration	168	
2.	Joinder	169	
3.	Consolidation	170	
4.	Group of contracts	171	
II.	Swiss Law	172	
 Chapter 3			
The Arbitral Tribunal			175
A.	Seat of the arbitral tribunal	177	
I.	Comparative overview	177	
1.	Definition of the seat of the arbitral tribunal	177	
2.	Legal consequences of the seat of arbitration	177	
3.	Designation of the seat of arbitration	179	
4.	Transfer of the seat of arbitration	179	

II. Swiss law	180
1. Legal consequences of the seat of arbitration	180
a) The seat determines the <i>lex arbitri</i>	180
b) The seat of arbitration and state court assistance	181
c) The seat defines the jurisdiction of local state courts to review the award	181
d) The seat determines the “nationality” of the arbitral award	182
2. Designation of the seat of arbitration	182
a) Designation of the seat by the parties	182
b) Designation of the seat by an arbitral institution or by the arbitral tribunal	183
aa) General comments	183
bb) Designation of the seat by an arbitral institution	184
cc) Designation of the seat by the arbitral tribunal	184
3. Transfer of the seat of the arbitral tribunal	185
B. Constitution of the arbitral tribunal	186
I. Comparative overview	186
1. Introductory comments	186
2. Number of arbitrators	186
3. Qualifications of the arbitrator(s)	188
4. Impartiality and independence	190
a) Introductory comments	190
b) Disclosure	192
c) IBA Guidelines on Conflicts of Interest	192
d) Violation of duty of impartiality and independence	195
5. Appointment of arbitrators	195
a) Appointing mechanism	195
b) Multi-party arbitration and the constitution of the arbitral tribunal .	197
6. Administrative secretary	199
II. Swiss law	201
1. Number of arbitrators	201
2. Qualifications of arbitrator(s)	202
3. Impartiality and independence	202
a) Art. 180(1)(c) SPILA	204
b) Duty of disclosure	204
c) Challenge/setting aside	205
d) Guidelines on conflicts of interest	206
e) Practice of the Swiss Supreme Court	206
4. Appointment of arbitrators	209
a) Autonomy of the parties to agree on the appointment of arbitrators	209
b) Appointment mechanism in general	210
c) Appointment of arbitrators by a state court in particular	210
d) The right to appeal an appointment decision	213
aa) Cantonal level	213

Contents

bb) Federal level	213
cc) Appointment decisions issued by private institutions	214
5. Administrative secretary	214
C. Challenging an arbitrator	215
I. Comparative overview	215
1. Introductory comments	215
2. Grounds for challenge	216
3. Procedure	216
4. Limitations to the right to challenge an arbitrator	217
5. Replacement of the challenged arbitrator	218
II. Swiss law	219
1. Grounds for challenge	219
a) Art. 180(1)(a) and (b) SPILA	219
b) Art. 180(1)(c) SPILA	219
2. Procedure	220
3. Limitations to the right to challenge an arbitrator	221
4. Appeal against a challenge decision	223
D. Dismissal, removal, resignation and replacement of an arbitrator	226
I. Comparative overview	226
1. Introductory comments	226
2. Dismissal of an arbitrator	226
3. Removal of an arbitrator	227
4. Resignation of an arbitrator	228
5. Replacement of an arbitrator	229
a) Replacement procedure	229
b) Truncated arbitral tribunals	229
c) Consequences of a replacement	231
II. Swiss law	232
1. Dismissal of an arbitrator	232
2. Removal of an arbitrator	233
3. Resignation of an arbitrator	234
4. Replacement of an arbitrator	236
a) Replacement procedure	236
b) Suspension of the arbitral proceedings	236
c) Consequences of a replacement	237
E. Relationship between the arbitrators and the parties	238
I. Comparative overview	238
1. The arbitral contract	238
2. Obligations and rights of an arbitrator	239
a) The obligation to render an award	239
b) The obligation to complete the mandate	239

c) The obligations after rendering the award	240
d) The obligation to remain independent and impartial and the obligation to disclose possible conflicts of interest	240
e) The duty of confidentiality	241
f) The arbitrator's civil liability	241
g) The arbitrator's fees	242
3. Beginning and end of the legal relationship between the arbitrators and the parties	244
II. Swiss law	244
1. The arbitral contract	244
2. Obligations and rights of an arbitrator	245
Chapter 4	
The Arbitral Procedure	247
A. Commencement of arbitration	249
I. Comparative overview	249
1. Introductory comments	249
2. Legal consequences of the commencement of arbitral proceedings	249
3. Date of commencement	250
4. Initiating documents	251
II. Swiss law	252
1. Pendency of the arbitration proceedings	252
a) Arbitrators named in the arbitration agreement	253
b) Arbitrators not named in the arbitration agreement	253
c) Exact date of the pendency of the arbitration	254
2. Legal consequences of the pendency of the arbitral proceedings	255
a) Inadmissibility of other proceedings	255
b) Compliance with time limits under Swiss law	256
B. Determining the arbitral procedure	257
I. Comparative overview	257
1. The parties' freedom to agree on the procedure	257
2. The arbitral tribunal's power to determine the procedure in the absence of an agreement by the parties	258
3. Limitations to the procedure adopted: compliance with the parties' right to equal treatment and right to be heard	259
a) Introductory comments	259
b) Right to equal treatment	260
c) Right to be heard	260
II. Swiss law	261
1. The parties' freedom to agree on the procedure	261
2. The arbitral tribunal's power to determine the procedure in the absence of an agreement of the parties	262

Contents

3. Limitations to the procedure adopted: compliance with the parties' right to be heard and their right to equal treatment	262
a) Right to be heard	263
b) Right to equal treatment	265
C. Organization of the arbitral procedure	266
I. Comparative overview	266
1. Procedural rules established by the arbitral tribunal	266
2. Timing	266
3. Preliminary meetings and case management conference	267
4. Content of the procedural rules	268
5. Form of procedural rules	269
6. Terms of reference and terms of appointment	270
7. Language of the arbitration	271
8. Representation of the parties	271
9. Deposit of costs	274
10. Procedural timetable	274
11. Multitude of approaches	274
II. Swiss law	275
1. Procedural rules established by the arbitral tribunal	275
2. Selected issues	276
D. Written submissions	277
I. Comparative overview	277
1. Introductory comments	277
2. Exchange of written submissions	277
3. Content of written submissions	278
II. Swiss law	279
E. Taking of evidence	279
I. Comparative overview	279
1. Introductory comments	279
2. Determination of the rules relating to the taking of evidence	281
3. Admissibility and probative value	282
4. Burden of proof	284
5. Evidentiary means	284
a) Production of documents	284
b) Witness testimony	289
c) Expert witness testimony	291
aa) Party-appointed experts	291
bb) Tribunal-appointed experts	292
d) Inspection	293
6. Assistance of state courts in relation to the taking of evidence	293

II. Swiss law	295
1. Introductory comments	295
2. Admissibility and probative value	296
3. Burden of proof	297
4. Evidentiary means	297
a) Witness testimony	297
b) Expert witness testimony	298
5. Assistance of the Swiss state courts in relation to taking of evidence	299
F. Hearings	302
I. Comparative overview	302
1. Introductory comments	302
2. Organization of hearings	303
3. <i>Ex parte</i> hearings and default proceedings in general	307
4. Procedure after the hearing	308
II. Swiss law	309
G. Interim measures	309
I. Comparative overview	309
1. Introductory comments	309
2. Jurisdiction of the arbitral tribunal to order interim measures	310
3. Jurisdiction of the state courts to order interim measures	311
4. Relationship between the state court's jurisdiction and the jurisdiction of the arbitral tribunal	312
5. Conditions for ordering interim measures	315
a) General comments	315
b) <i>Ex parte</i> measures	317
6. Content of interim measures	318
7. Form of orders for interim measures	320
8. Recognition and enforcement of interim measures ordered by arbitral tribunals	321
a) Introductory comments	321
b) Penalties for non-compliance with interim measures ordered by the arbitral tribunal	321
c) Enforcement of interim measures by state courts or with the assistance of state courts	322
9. Liability for unjustified measures	323
10. Emergency arbitrator	324
II. Swiss law	326
1. Jurisdiction of the arbitral tribunal to order interim measures	326
2. Jurisdiction of the state courts to order interim measures	327
a) Concurrent jurisdiction	327
b) The risk of conflicts and the prohibition on using parallel jurisdiction in the absence of any change in the circumstances	328

Contents

3. Conditions for obtaining interim measures from an arbitral tribunal	329
4. Content of interim measures	330
5. Recognition and enforcement of interim measures ordered by arbitral tribunals	332
a) General comments	332
b) Penalties for non-compliance with interim measures ordered by the arbitral tribunal	332
c) State court assistance pursuant to Art. 183(2) SPILA	332
d) Other issues concerning the enforcement of decisions on interim measures	334
aa) Interim measures ordered by an arbitral tribunal	334
bb) Interim measures ordered by state courts	335
6. Emergency arbitrator	336
H. State court support for arbitration proceedings	338
I. Comparative overview	338
II. Swiss law	338
I. Termination of the arbitration proceedings	340
I. Comparative overview	340
II. Swiss law	341
Chapter 5	
Conditions of Admissibility	343
A. Introductory comments	345
B. (Positive) conditions of admissibility	346
I. Valid arbitration agreement	346
II. Legal interest worthy of protection	346
1. Introductory comments	346
2. Comparative overview	346
3. Swiss law	347
III. Arbitrability <i>ratione materiae</i>	349
1. Introductory comments	349
2. Comparative overview	349
3. Swiss law	349
IV. Capacity of the parties to initiate and conduct arbitral proceedings	351
1. Introductory comments	351
2. Comparative overview	352
3. Swiss law	353
a) Different aspects of capacity	353
b) Capacity to initiate and conduct arbitration proceedings	354

V. Proper constitution of the arbitral tribunal	356
1. Comparative overview	356
2. Swiss law	357
VI. Payment of advance(s) on costs	358
1. Introductory comments	358
2. Comparative overview	358
3. Swiss law	358
VII. Meeting of time limits regarding the mandate of arbitrators, cooling-off period and pre-arbitral steps	360
1. Introductory comments	360
2. Comparative overview	361
a) Time limits regarding initiation of arbitration proceedings or the mandate of the arbitral tribunal	361
b) Cooling-off period and pre-arbitral steps	362
3. Swiss law	362
a) Time limits regarding initiation of arbitration proceedings	362
b) Cooling-off period and pre-arbitral steps	362
c) Time limits regarding mandate of the arbitral tribunal	363
VIII. Expert determination or pre-arbitral dispute adjudication boards as a prerequisite for arbitration	364
1. Comparative overview	364
2. Swiss law	364
C. Negative conditions of admissibility	364
I. <i>Res judicata</i>	365
1. Introductory comments	365
2. Comparative overview	366
a) Applicable law	366
b) Recognition (or enforceability) of the prior decision	369
c) Identity of the dispute	370
3. Swiss law	371
a) Introductory comments	371
b) Applicable law	372
c) Types of awards with <i>res judicata</i> effects	372
d) Scope and limits of the effect of <i>res judicata</i>	373
e) Awards rendered in Switzerland	374
f) Prerequisites for the <i>res judicata</i> effect of a foreign judgment or award	374
aa) Recognition or enforceability of the prior decision	374
bb) Identity of the dispute	377
g) Conclusion	378
II. <i>Lis pendens</i>	379
1. Introductory comments	379
2. Comparative overview	380

Contents

a) <i>Lis pendens</i> between state courts and arbitral tribunals and vice versa	380
b) <i>Lis pendens</i> between arbitral tribunals	381
c) <i>Lis pendens</i> with regard to interim or provisional measures	382
3. Swiss Law	383
a) Overview of the situation in Switzerland	383
b) Arbitration commenced prior to state court or other arbitral proceedings	383
c) State court proceedings commenced prior to arbitration	383
d) Arbitration commenced after the commencement of another arbitration	386
III. Insolvency of a party	388
1. Introductory comments	388
2. Comparative overview	388
3. Swiss law	390
IV. Anti-arbitration injunctions	391
1. Introductory comments	391
2. Comparative overview	392
3. Swiss law	393
Chapter 6	
The Law Applicable to the Merits of the Case	395
A. Choice of law by the parties	397
I. Comparative overview	397
1. Introductory comments	397
2. Application of the conflict of laws rule of the <i>lex arbitri</i> or of arbitration rules	397
3. Party autonomy as the most prominent and widely accepted international conflict of laws rule	397
4. Choice of a national law	400
5. Choice of non-national rules of law as governing law	403
6. Timing of the choice of law by the parties	405
7. Limitations on party autonomy regarding choice of law	405
a) “ <i>Lois de police</i> ” or “ <i>lois d’application immédiate</i> ”	405
b) International public policy	407
II. Swiss law	409
1. Introductory comments	409
2. Party autonomy	409
a) General comments	409
b) Limitations on party autonomy regarding choice of law	412

B. Determination of the applicable law by the arbitrators	416
I. Comparative overview	416
1. Arbitrators choose the conflict of laws rules they deem appropriate	416
2. Specific conflict of laws rule provided for by the <i>lex arbitri</i> itself	418
3. “ <i>Voie directe</i> ”	418
4. National law or non-national rules?	419
II. Swiss law	419
1. Art. 187(1) SPILA	419
2. The closest-connection test	420
C. Proof of the applicable law	421
I. Comparative overview	421
II. Swiss law	421
D. Arbitration <i>ex aequo et bono</i> and “<i>amiable compositeur</i>”	423
I. Comparative overview	423
1. Arbitration <i>ex aequo et bono</i>	423
2. “ <i>Amiable compositeur</i> ”	423
II. Swiss law	424
E. Sanctions for violation of the rules regarding the applicable law	425
I. Comparative overview	425
II. Swiss law	425

Chapter 7

The Award

A. Types of awards	429
I. Comparative overview	429
1. Introductory comments	429
2. Distinction between preliminary awards and procedural orders	429
3. Types of awards	430
a) Final award	430
b) Partial award	430
c) Preliminary award	431
d) Default award	432
e) Award on agreed terms (consent award)	432
f) Additional award	434
II. Swiss law	434
1. Final award	434
2. Partial award	434
3. Preliminary award	435
4. Default award	436

Contents

- 5. Consent award 436
- 6. Additional award 436
- B. Rendering an award 437**
 - I. Comparative overview 437**
 - 1. The arbitrators' deliberations 437
 - a) Introductory comments 437
 - b) Form of the deliberations 437
 - c) Confidentiality of the deliberations and voting 438
 - 2. Voting: unanimous or majority decisions 438
 - 3. Failure or refusal of an arbitrator to participate in the deliberations and/or voting 439
 - 4. Time limits for rendering an award 440
 - 5. Dissenting and concurring opinions 441
 - II. Swiss law 442**
 - 1. Party autonomy 442
 - 2. The arbitrators' deliberations 442
 - a) Introductory comments 442
 - b) Form of the deliberations 443
 - c) Confidentiality of the deliberations and voting 443
 - 3. Voting: unanimous or majority decisions 443
 - 4. Failure or refusal of an arbitrator to participate in the deliberations and/or voting 444
 - 5. Time limit for rendering the award 444
 - 6. Dissenting opinions 445
 - 7. Deposit of the award and certification by the arbitral tribunal 445
- C. Form, content and notification of the award 446**
 - I. Comparative overview 446**
 - 1. Written form requirement 446
 - 2. Typical elements of the award 446
 - a) Introductory comments 446
 - b) Signature 447
 - c) Place and date 447
 - d) Reasoning 448
 - e) Costs 449
 - f) Operative Part 451
 - 3. Notification of the award 451
 - II. Swiss law 451**
 - 1. Written form requirement 451
 - 2. Typical elements of the award 452
 - a) Signature 452
 - b) Date of the award 453
 - c) Reasoning 453

d) Costs	455
e) Operative (or “dispositive”) part	456
3. Communication of the award	457
D. Correction and interpretation of the award and rendering of an additional award	458
I. Comparative overview	458
1. Introductory comments	458
2. Correction	458
3. Interpretation	459
4. Additional awards	459
II. Swiss law	460
1. Introductory comments	460
2. Correction and explanation	461
3. Supplementary awards	462
E. Confidentiality and publication of awards	462
I. Comparative overview	462
II. Swiss law	463
F. Challenging an award	464
I. Comparative overview	464
1. Introductory comments	464
2. Jurisdiction of the state court at the seat of arbitration	464
3. Time limits	465
4. Decisions which can be challenged	465
5. Grounds for challenge	465
6. Effects of a successful challenge	467
7. Exclusion and waiver of the right to challenge	468
a) Exclusion	468
b) Waiver	469
8. Appeal against the award before a second instance arbitral tribunal	471
II. Swiss law	472
1. Jurisdiction of the Swiss Supreme Court	472
2. Time limit	473
3. General requirements of an application to challenge an award	474
4. Effect of challenge on enforceability	479
5. Decisions that can be challenged	480
6. Procedure before the Swiss Supreme Court	483
7. Effects of a challenge	487
a) Successful challenge	487
b) Unsuccessful challenge	489
8. Grounds for challenge pursuant to Art. 190(2) of the SPILA	490

Contents

- a) Introductory comments 490
- b) Irregular constitution of the arbitral tribunal (Art. 190(2)(a) SPILA) 493
- c) Wrong ruling on jurisdiction (Art. 190(2)(b) SPILA) 496
- d) *Ultra, infra* or *extra petita* (Art. 190(2)(c) SPILA) 498
- e) Violation of right to be heard and equal treatment
(Art. 190(2)(d) SPILA) 501
 - aa) Right to be heard 501
 - bb) Right to equal treatment 510
- f) Violation of public policy (Art. 190(2)(e) SPILA) 511
 - aa) Introductory comments 511
 - bb) Substantive public policy 513
 - cc) Procedural public policy 519
- 9. Likelihood of success 521
- 10. Exclusion of the right to challenge pursuant to Art. 192 SPILA 522
 - a) Introductory comments 522
 - b) Requirements of a valid exclusion 523
 - c) Effects of a valid exclusion 525
- G. Revision of the award 527**
 - I. Comparative overview 527**
 - II. Swiss law 527**
 - 1. Grounds for revision 527
 - 2. Jurisdiction of the Swiss Supreme Court 533
 - 3. Revisable decisions 534
 - 4. Time limits 534
 - 5. General requirements for a request for revision 537
 - 6. Consequences of a successful revision 537
 - 7. Exclusion of the right to request a revision 538

Chapter 8
Recognition and Enforcement of Arbitral Awards 541

- A. Introduction 543**
- B. The New York Convention of 1958 545**
 - I. Scope of application of the New York Convention 545**
 - 1. Existence of an “arbitral award” 545
 - 2. Existence of a “foreign” or “non-domestic” arbitral award 548
 - 3. Existence of an arbitral award “arising out of differences between persons, whether physical or legal” 550
 - II. Formal requirements 551**
 - III. Grounds for refusing recognition and enforcement under the New York Convention 553**
 - 1. Introductory comments 553

2.	Grounds which must be invoked by a party	555
a)	Art. V(1)(a) New York Convention: incapacity and invalidity of the arbitration agreement	555
aa)	Incapacity of a party to the arbitration agreement	555
bb)	Formal and substantive invalidity	556
cc)	Subject matter arbitrability	558
b)	Art. V(1)(b) New York Convention: violation of due process	559
c)	Art. V(1)(c) New York Convention: award dealing with a difference not contemplated or not falling within the scope of the arbitration agreement	561
d)	Art. V(1)(d) New York Convention: arbitral tribunal not properly constituted or arbitral procedure not in accordance with the arbitration agreement	563
e)	Art. V(1)(e) New York Convention: award not yet binding, set aside or suspended	565
3.	Grounds which the state court considers on its own motion	570
a)	Introductory comments	570
b)	Art. V(2)(a) New York Convention: lack of subject matter arbitrability	570
c)	Art. V(2)(b) New York Convention: violation of public policy	571
C.	Recognition and enforcement of arbitral awards in Switzerland	572
I.	Introductory comments	572
1.	Foreign awards	572
2.	Swiss awards	573
II.	Recognition and enforcement of foreign arbitral awards	574
1.	Application of New York Convention	574
2.	Particularities of Swiss law and Swiss case law	575
a)	Art. I(2) New York Convention: existence of arbitral award	575
b)	Art. V(1)(a) and Art. II New York Convention: incapacity and invalidity of the arbitration agreement	575
c)	Art. V(1)(b) New York Convention: violation of due process	576
d)	Art. V(1)(d) of the New York Convention: arbitral tribunal not properly constituted or arbitral procedure not in accordance with the arbitration agreement	578
e)	Art. V(1)(e) New York Convention: arbitral award not yet binding, set aside or suspended	578
f)	Further conditions necessary for the recognition of a foreign arbitral award	579
g)	Stay of enforcement proceedings	580
h)	Art. V(2)(a) New York Convention: lack of subject matter arbitrability	581
i)	Art. V(2)(b) New York Convention: violation of public policy	582
3.	Discrepancies between the grounds for setting aside under the SPILA and the grounds for refusal of recognition under the New York Convention	583

Contents

4. Formal requirements	584
5. Enforcement	585
a) Enforcement of foreign monetary arbitral awards	585
b) Enforcement of foreign non-monetary arbitral awards in Switzerland	589
III. Recognition and enforcement of Swiss arbitral awards	590
1. Certificate of enforceability	590
2. Monetary arbitral awards	592
3. Non-monetary arbitral awards	593
Chapter 9	
Treaty-based Investment Arbitration	595
A. Introduction	597
I. General purpose of investment treaties	597
II. Definition and main characteristics	597
B. Background, development and particularities	599
I. Good offices, diplomatic protection and international disputes	599
II. Investment treaties	599
III. Arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)	601
IV. Influence of civil society	602
V. New developments and investment state dispute settlement reforms	603
VI. Intra-European Union investment treaty arbitration	605
1. Context	605
2. The <i>Achmea</i> Judgment	606
3. The consequences of <i>Achmea</i> for intra-EU arbitrations seated in the EU	606
C. Arbitration clause and jurisdiction	609
I. Definition, purpose and form	609
II. Validity, form and standard of interpretation and sources of international law	610
III. Consent to refer the dispute to arbitration (<i>essentialia negotii</i> 1)	611
IV. Designation of the legal relationship (<i>essentialia negotii</i> 2)	613
1. Treaty breaches by the host state	613
2. Disputes in connection with investments	613
3. Standards of protection	615
4. Disputes under an umbrella clause	616
V. Additional requirements for an arbitral tribunal's jurisdiction	616
VI. Subject matter covered by the parties' consent	617

VII. The constitution of the arbitral tribunal	617
1. Introductory comments	617
2. In ICSID arbitration	618
VIII. Designation of the seat	619
D. Arbitral procedure	620
I. Introductory comments	620
II. Confidentiality and transparency	620
1. Basic principles	620
2. Access to information	620
III. Third-party submissions	622
E. Applicable law	623
I. Introductory comments	623
II. Choice of law by the parties	623
III. Choice of law in the absence of the parties' agreement	624
F. The arbitral award	624
I. Annulment of the award	624
II. Recognition and enforcement of investment awards	625
G. Treaty-based investment arbitration and Switzerland	626
1. Legal framework	627
2. Review of the main decisions rendered by the Swiss Supreme Court in investment treaty arbitrations	628
a) Only one award partially set aside in twenty years	628
b) Conditions for a valid waiver of the right to seek annulment of an award (Art. 192(1) SPILA)	629
c) Jurisdiction (Art. 190(2)(b) SPILA)	630
d) Equal treatment and right to be heard (Art. 190(2)(d) SPILA)	633
e) Public policy (Art. 190(2)(e) SPILA)	634
f) Enforcement of treaty-based awards	634
3. Effects of <i>Achmea</i> on intra-EU BIT arbitrations seated in Switzerland ..	635
Chapter 10	
Sports Arbitration	637
A. Introduction	639
I. Characteristics	639
II. Background	639
III. The importance of Switzerland in sports arbitration	640
IV. The role of the EU and the case law of the European Court of Justice and the European Court of Human Rights in the development of sports law ..	641
V. Sports-related disputes	645

Contents

- VI. **Arbitration in sport** 646
 - 1. Sport dispute resolution organizations 646
 - 2. Internal dispute resolution of sport organizations 647
 - a) The need for internal mechanisms 647
 - b) Special internal dispute mechanisms 649
- B. **The Court of Arbitration for Sport** 650
 - I. **Background** 650
 - II. **Organization** 652
 - III. **CAS case law** 654
 - IV. **The CAS Code and the CAS ADD Rules** 654
 - 1. Overview of the CAS Code 654
 - 2. Overview of the CAS ADD Rules 657
 - 3. Agreement to arbitrate 658
 - a) Application of the CAS Code and the CAS ADD Rules 658
 - b) Consent 659
 - c) Separability 661
 - d) Competence-competence 662
 - 4. Arbitral tribunal 662
 - a) Seat 662
 - b) Constitution 663
 - aa) Formation of the panel 663
 - bb) Challenge 664
 - c) Impartiality and independence 665
 - 5. Arbitral procedure 668
 - a) Ordinary Arbitration 668
 - b) CAS ADD arbitration 668
 - aa) Direct reference to the CAS ADD 669
 - bb) Commencing the arbitration 669
 - cc) Procedure before the panel 669
 - dd) Award 670
 - c) Appeals arbitration 670
 - aa) Direct reference to the CAS 671
 - bb) Appeal against a decision or award 671
 - cc) Exhaustion of internal remedies 671
 - dd) Statement of appeal 672
 - ee) Time limits 672
 - ff) Other procedural issues 672
 - d) Standing in CAS appeals 673
 - e) Scope of review 674
 - f) Hearings 675
 - 6. Costs 675

7. Law applicable to the merits	676
a) Choice of applicable law	676
b) Evidence	677
8. The arbitral award	678
V. Setting aside	678
1. Admissibility	679
2. Grounds for setting aside an award	683
a) Improper constitution	683
b) Wrong acceptance or denial of jurisdiction	683
c) Decision beyond claims submitted or failure to decide	684
d) Violation of equal treatment/right to be heard	685
aa) Equal treatment	685
bb) Right to be heard	685
e) Public policy	687
3. Revision	691
VI. Enforcement	692
 Table of Cases	 695
Swiss Supreme Court Decisions	695
Arbitral Awards	725
Court Decisions	735
 Index	 745