# Table of Contents

Foreword .............................................. v
List of Abbreviations ............................... xvii
Table of Cases ........................................ xxiii

## Chapter I
Introduction: Legislative Competition for International Economic Arbitrations ........................................ 1

I. The Competitive Era ................................... 1
II. Legal Problems of Legislative Competition ................. 7
III. Analysis of Modern Arbitral Legislation: Objectives and Methods ........................................ 13
   A. Objectives ............................................. 13
   B. Course and Methods of the Study ....................... 16
      1. Party Autonomy and Efficient Enforcement of Awards 16
      2. Uniform Interpretation of Modern Arbitration Laws 18

## Chapter II

I. Arbitration Laws ....................................... 25
   A. Switzerland .......................................... 25
      1. Chapter 12 of the Federal Statute on International Private Law ........................................ 26
         a. Structure ............................................. 27
      b. Scope: Special Statute for International Arbitration ........................................ 29
      2. Federal Law on the Organization of the Federal Judiciary ........................................ 30
      3. Intercantonal Concordat on Arbitration ........................................ 31
      4. Cantonal Law of Civil Procedure ........................................ 34
      1. Structure ............................................. 35
      2. Scope: Universal Statute for Domestic and International Arbitrations ........................................ 37
   C. Germany: The Projected Adoption of the UNCITRAL Model Law ........................................ 37
      1. Structure and Genesis of the Model Law ........................................ 37
      2. General Problems of Acceptance ........................................ 41
      3. Reception in Germany ........................................ 43
         a. The ‘Small’ Arbitration Law Reform of 1986 ........................................ 44
TABLE OF CONTENTS

b. The Radical Reform .............................................. 48
II. Arbitration Rules .................................................. 53
A. International Arbitration Rules of the Zurich Chamber of Commerce ............................................. 55
B. Arbitration Rules of the Netherlands Arbitration Institute (NAI) .................................................. 56
C. International Arbitration Rules in Germany .................. 58
   1. Arbitration Rules of the German Institution of Arbitration (DIS) ............................................. 58
   2. Arbitration Rules of the Arbitration Court Berlin .......... 60
D. UNCITRAL-Arbitration Rules .................................... 62
III. Scope of the New Arbitration Laws ........................... 64
A. Subjects Covered by the New Laws ............................. 64
   1. ‘Economic’ Arbitration ......................................... 64
      a. Delimitation .................................................. 64
      b. Terminology .................................................. 67
   2. ‘International’ Arbitration .................................... 69
   3. ‘Arbitration’ .................................................... 72
      a. Arbitration, Expertise and ‘Bindend Advies’ ........... 73
      b. Determination of Constitutive Elements of the Contract .................................................. 76
      c. Modification and Adaptation of the Contract ........ 82
B. Territorial Scope of the New Arbitration Laws .............. 89
   1. Significance of the Territorial Link ........................ 91
   2. Dogmatic Foundation of the Territoriality Concept ...... 93
   3. Exceptions from the Rule .................................... 97
      a. Norms of the Lex Arbitri without Territorial Nexus ... 97
      b. ‘Opting In’ In Foreign Arbitrations? .................... 98
   4. Seat of the Arbitration as Connecting Factor ............ 100
      a. The Notion of ‘Seat’ ....................................... 100
      b. Determination of the Seat ................................ 105
      c. Court Assistance in Case of Lacking Designation of Seat .................................................. 108
C. Temporary Scope of the New Laws ............................ 110
   1. Intertemporal Procedural Law ............................... 111
   2. Transitory Norms for Substantive Law ..................... 115
   3. Transitory Conflict-of-Laws Rules ........................ 116
   4. The Special Case of Setting-Aside Procedures before Domestic Courts ......................................... 116
IV. Arbitration Agreement ............................................. 118
A. Contents .......................................................... 121
   1. Designation of the Parties and Subject Matter of the Dispute .................................................. 121
   2. Procedural Stipulations in the Arbitration Agreement ... 125
B. Formal Validity .................................................... 133
TABLE OF CONTENTS

1. Coexistence of Domestic and Uniform Treaty Law 133
2. Legal Nature of the Formal Validity Requirements of Domestic Law 135
3. Formal Validity Requirements of Arbitration Agreements 137
   a. Both Parties Have Agreed in Writing 137
   b. Only One Party Has Agreed in Writing 142
   c. Oral Arbitration Agreement 147
   d. Arbitration Agreement by Reference 149
C. Substantive Validity 156
   1. Applicable Law 156
      a. Applicable Domestic Law 156
      b. Application of Principles of Transnational Law: The 'Group Concept' 159
      c. Scope of Applicable Law 175
   2. Participation of State Parties 179
      a. States as Parties to Arbitration Agreements 180
      b. Arbitrability and Capacity to Arbitrate 183
      c. Plea of Immunity 185
      d. Identification of the State Party 188
   3. Arbitrability of the Subject Matter 189
V. Summary 197

Chapter III
The Arbitral Tribunal: Constitution and Competence 201
I. Constitution of the Arbitral Tribunal 201
   A. Appointment of Arbitrators 204
      1. Number of Arbitrators 204
      2. Qualifications of Arbitrators 207
         a. Lawyer versus Engineer 207
         b. Judges as Arbitrators 209
         c. Nationality of Arbitrators 210
      3. Procedure 211
         a. Appointment Procedure under the New Laws 211
         b. Appointment by the Parties 212
         c. Appointment by the Court 228
         d. Substitutional Appointment by the Court 231
   B. Contract between Arbitrator and Parties 232
      1. Conclusion and Contents 232
      2. Arbitrator’s Immunity from Liability 236
      3. Arbitrator’s Remuneration 239
   C. Privileged Position of One Party in Appointing the Arbitrators 241
II. Challenge and Replacement of Arbitrators 243
   A. Grounds for Challenge 243
      1. Justifiable Doubts as to the Arbitrator’s Independence or Impartiality 243
# TABLE OF CONTENTS

2. Challenge of Party-Appointed Arbitrators ....................... 252  
3. Other Grounds for Challenge ..................................... 257  
4. Challenge of Secretaries ........................................... 258  

B. Disclosure and Preclusion ........................................... 260  
1. Arbitrator's Duty to Disclose ..................................... 260  
2. Preclusion ........................................................... 266  
   a. Prerequisites and Effects During the Arbitration .......... 266  
   b. Preclusion Before the Court ................................. 270  

C. Challenge Procedure ................................................ 272  
1. Time-Limits for Challenge ......................................... 272  
2. Court Control ....................................................... 274  
   a. Right to Apply for Court Control and Time-Limits .... 275  
   b. Mandatory Court Control? .................................. 279  
   c. The Parties' Right of Appeal ............................... 284  
   d. Suspension of the Proceedings During Challenge .... 284  

D. Replacement of Arbitrator .......................................... 287  

E. Termination of Mandate and Release from Mandate ............. 289  

III. Multi-Party Arbitration .......................................... 294  
A. Involvement of Third Parties ..................................... 299  
   1. Court-Ordered Consolidation ............................... 299  
   2. Consolidation under the ZuArbR ........................... 307  
   3. Joinder of Third Parties .................................... 311  
B. Composition of the Tribunal in Multi-Party Arbitration .... 314  

IV. Jurisdiction of the Arbitral Tribunal ............................ 321  
A. Enforcement of the Arbitration Agreement ..................... 322  
   1. Prerequisites .................................................. 322  
   2. Applicable Law ............................................... 324  
   3. Effect ........................................................ 327  
   4. Means of Appeal .............................................. 328  
   5. Relationship between Court and Arbitral Control of  
       Competence .................................................. 328  
B. Interim Measures of Protection ................................... 331  
   1. Legal Basis .................................................... 331  
   2. Prerequisites .................................................. 335  
   3. Scope .......................................................... 338  
   4. Enforceability .................................................. 342  
   5. Provisional Relief Ordered by the Courts ................. 347  
C. 'Kompetenz-Kompetenz' of the Arbitral Tribunal ............... 351  
   1. Ex Officio Examination and Preclusion ..................... 352  
      a. Preclusion as to Pleas Concerning the Validity of the  
         Arbitration Agreement .................................... 353  
      b. Preclusion as to Pleas Concerning the Composition of  
         the Tribunal and Other Pleas .......................... 357  
   2. Court Control .................................................. 358  
      a. Tribunal's Negative Ruling on Jurisdiction .......... 360
TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>b. Tribunal's Positive Ruling on Jurisdiction</td>
<td>363</td>
</tr>
<tr>
<td>V. Summary</td>
<td>367</td>
</tr>
</tbody>
</table>

Chapter IV
Introduction and Course of the Proceedings .................................. 371

I. Introduction of the Arbitration .................................................. 375
   A. *Lis Pendens* .................................................................................. 375
   B. Request for Arbitration .................................................................. 380
      1. Regular Procedure ..................................................................... 380
         a. Contents .................................................................................. 380
         b. Administration Fee ................................................................. 383
      2. Procedure in Urgent Cases ......................................................... 384

II. Preparatory Measures ......................................................................... 386
   A. Advance for Costs .......................................................................... 386
   B. Representation of the Parties ....................................................... 391
   C. Language ......................................................................................... 396
   D. Preparatory Procedural Management ............................................. 398
      1. ‘Decree for Directions’/‘Terms of Reference’ ............................... 398
      2. Pre-Hearing Conference .............................................................. 406
      3. Pre-Arbitration Mediation or Conciliation .................................. 409

III. Written Submissions .......................................................................... 414
   A. Structure ......................................................................................... 414
   B. Deadlines ....................................................................................... 417

IV. Hearing ............................................................................................... 420
   A. Hearing Versus ‘Documents-Only’ Procedure .................................... 420
   B. Structuring the Hearing ................................................................... 422
   C. Taking Minutes of the Hearing ....................................................... 425

V. Taking of Evidence ............................................................................... 427
   A. Documents ....................................................................................... 428
   B. Expert Evidence ............................................................................. 435
   C. Witnesses ......................................................................................... 439
   D. Site Inspection ................................................................................ 443
   E. Evaluation of Evidence by the Arbitrators ....................................... 443
      1. The Parties’ Offers of Evidence and their Right to be Heard .......... 443
      2. General Principles Concerning the Parties’ Burden of Proof ........... 444
      3. Settlement Negotiations and the Evaluation of Evidence ............... 450

VI. Court Assistance in the Taking of Evidence .................................... 452
   A. Information on Foreign Law ............................................................. 452
   B. Request for a Preliminary Ruling under Art. 177 EC-Treaty ............... 453
   C. Other Assisitory Functions of the Courts relating to the Taking of Evidence .................................................. 457
   D. Further Measures of Judicial Assistance? ....................................... 460
TABLE OF CONTENTS

VII. Counterclaim, Set-Off, Amendment of Claims and Submissions after Closure of Hearing .................................................. 462
A. Counterclaim .............................................................. 462
B. Set-Off ................................................................. 465
C. Amendment of Claim .................................................. 467
D. Late Submissions after Closure of Hearing ......................... 469

VIII. Default ........................................................................ 470
A. Default of the Claimant ................................................ 471
B. Default of the Respondent ............................................. 471

IX. Summary ...................................................................... 474

Chapter V
Applicable Law ................................................................ 477

I. Procedural Law .............................................................. 478
A. Inclusion by Reference of Foreign Arbitration Law ................. 478
B. Transnational Arbitral Procedure? ...................................... 480
C. Arbitration Rules as ‘Contractual Norms’ .............................. 485

II. Substantive Law ............................................................. 490
A. Choice of Law by the Parties ........................................... 490
B. Determination of the Applicable Law by the Arbitrators ......... 496
1. The Different Approaches ............................................. 496
2. Convergence of the Different Approaches ......................... 499
   a. The Conflict of Laws Problem in International Economic Arbitration .............................................. 499
   b. Uniform Approach to Conflict of Laws ......................... 501
C. Interpretation and Application of Substantive Law by International Arbitrators .................................................. 509
1. Practical Relevance: Applicable Law and Case Law ............... 509
2. The Effect of Precedents in Civil and Common Law ............. 511
3. The International Arbitrator’s Application of Court Precedents ................................................................. 514
4. The International Arbitrator’s Application of Arbitral Precedents ................................................................. 522

III. Choice and Application of Transnational Law ..................... 525
A. Basic Considerations ..................................................... 525
B. Contents of the Lex Mercatoria: A Primer on General Principles of International Economic Law ......................... 541
C. Position Taken by the New Arbitration Laws ....................... 556
1. Choice of Lex Mercatoria by the Parties ............................ 556
2. Designation of Lex Mercatoria by the Arbitrators ............... 558

IV. Amiable Compositeur and Trade Usages ............................ 564
A. International Arbitrators Acting as Amiable Compositeurs ....... 564
1. Powers of Amiables Compositeurs .................................... 566
2. Limits of the Amiable Compositeur’s Powers ....................... 572
   a. Will of the Parties .................................................... 572
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>b. Ordre Public</strong></td>
<td>574</td>
</tr>
<tr>
<td>B. The International Arbitrator's Consideration of Applicable Trade Usages</td>
<td>575</td>
</tr>
<tr>
<td>V. Summary</td>
<td>577</td>
</tr>
<tr>
<td>Chapter VI</td>
<td></td>
</tr>
<tr>
<td>Termination of the Arbitration</td>
<td>581</td>
</tr>
<tr>
<td>I. Award on Agreed Terms</td>
<td>581</td>
</tr>
<tr>
<td>A. Preconditions</td>
<td>582</td>
</tr>
<tr>
<td>B. Effects</td>
<td>586</td>
</tr>
<tr>
<td>II. Arbitral Award</td>
<td>588</td>
</tr>
<tr>
<td>A. A Uniform Concept of Final Awards, Interim Awards and Procedural Orders</td>
<td>588</td>
</tr>
<tr>
<td>B. Rendering of the Award</td>
<td>594</td>
</tr>
<tr>
<td>1. Deliberations</td>
<td>594</td>
</tr>
<tr>
<td>2. Voting</td>
<td>599</td>
</tr>
<tr>
<td>3. Signature</td>
<td>601</td>
</tr>
<tr>
<td>4. Deadline</td>
<td>603</td>
</tr>
<tr>
<td>5. Communication to the Parties and Publication</td>
<td>604</td>
</tr>
<tr>
<td>C. Form and Contents</td>
<td>607</td>
</tr>
<tr>
<td>1. Written Form</td>
<td>607</td>
</tr>
<tr>
<td>2. Contents</td>
<td>607</td>
</tr>
<tr>
<td>3. Dissenting Opinions</td>
<td>610</td>
</tr>
<tr>
<td>D. Effects of the Award</td>
<td>613</td>
</tr>
<tr>
<td>E. Decision on Costs</td>
<td>615</td>
</tr>
<tr>
<td>1. Costs of the Arbitration</td>
<td>617</td>
</tr>
<tr>
<td>2. Costs for Legal Representation and Assistance of the Parties</td>
<td>617</td>
</tr>
<tr>
<td>F. Interest</td>
<td>621</td>
</tr>
<tr>
<td>1. Applicable Law</td>
<td>623</td>
</tr>
<tr>
<td>2. General Principles Relating to Interest</td>
<td>624</td>
</tr>
<tr>
<td>a. Simple Interest</td>
<td>624</td>
</tr>
<tr>
<td>b. Compound Interest</td>
<td>630</td>
</tr>
<tr>
<td>3. Particularities in Case of English Law as <em>Lex Causae</em></td>
<td>632</td>
</tr>
<tr>
<td>4. Scrutiny of Awarded Interest by Domestic Courts?</td>
<td>633</td>
</tr>
<tr>
<td>III. Termination of the Arbitral Procedure without Award</td>
<td>633</td>
</tr>
<tr>
<td>A. Withdrawal of Claim</td>
<td>633</td>
</tr>
<tr>
<td>B. Other Reasons for Termination of the Arbitration</td>
<td>635</td>
</tr>
<tr>
<td>IV. Correction, Interpretation and Supplementation of the Award</td>
<td>636</td>
</tr>
<tr>
<td>A. Correction</td>
<td>637</td>
</tr>
<tr>
<td>B. Interpretation</td>
<td>640</td>
</tr>
<tr>
<td>C. Additional Award</td>
<td>644</td>
</tr>
<tr>
<td>V. Summary</td>
<td>646</td>
</tr>
</tbody>
</table>
### Chapter VII
### Awards before Domestic Courts: Setting Aside and Enforcement

#### I. Judicial Control of Awards at the Seat of the Arbitration

- **A. Significance of Court Control of Arbitral Awards at the Seat of the Arbitration**
  - Extraterritorial Effect of Setting Aside Decisions
  - Quality and Intensity of Court Control

- **B. Awards Subject to Setting Aside**
  - The Principle
  - Exceptions for Awards on Jurisdiction, Challenges of Arbitrators and Partial Awards under Swiss Law

- **C. Grounds for Setting Aside**
  - Procedural Irregularities
  - Errors Relating to Substantive Law
    - Violations of *Ordre Public*
    - Errors in the Application of Substantive Law
    - Application of the 'Wrong' Law
    - *Ex Aequo et Bono* Decisions Without Authorization from the Parties
    - Application of the *Lex Mercatoria*
    - Violation of Mandatory Norms
  - Revocation of the Award

- **D. Procedure**
  - Time Limit
  - Competent Court and Stages of Appeal
  - Suspension of Enforcement
  - Effects of Setting Aside

- **E. Exclusion of Recourse**
  - Waiver of Recourse after Receipt of the Award by the Parties
  - Exclusion Agreements in the Pre-Award Stage
    - Effects in Case of Award Granting the Relief Sought
    - Effects in Case of Award Denying the Relief Sought
  - Conclusion

#### II. Recognition and Enforcement of Awards

- **A. Enforcement of Domestic Awards**
- **B. Enforcement of Foreign Awards**

#### III. Summary

### Chapter VIII
### Conclusion

- **I. Monistic or Dualistic Legislative Approach?**
- **II. Comprehensiveness of Modern Arbitral Legislation**
  - Regulatory Minimalism *versus* Legislative Perfectionism

---

**xiv**
<table>
<thead>
<tr>
<th>Section</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>B. Expectations of Parties, Counsel, Arbitrators and Arbitral Institutions</td>
<td>750</td>
</tr>
<tr>
<td>C. Advantages of Legislative Arbitration Rules</td>
<td>752</td>
</tr>
<tr>
<td>D. Amendments of the Model Law?</td>
<td>753</td>
</tr>
<tr>
<td>III. Quintessence</td>
<td>755</td>
</tr>
<tr>
<td>Bibliography</td>
<td>757</td>
</tr>
<tr>
<td>Annex 1: Addresses of Arbitral Institutions</td>
<td>805</td>
</tr>
<tr>
<td>German Institution of Arbitration (DIS)</td>
<td></td>
</tr>
<tr>
<td>Arbitration Court Berlin</td>
<td></td>
</tr>
<tr>
<td>Netherlands Arbitration Institute (NAI)</td>
<td></td>
</tr>
<tr>
<td>Zurich Chamber of Commerce</td>
<td></td>
</tr>
<tr>
<td>Secretary-General of the Permanent Court of Arbitration</td>
<td></td>
</tr>
<tr>
<td>Annex 2: Model Arbitration Clauses</td>
<td>807</td>
</tr>
<tr>
<td>German Institution of Arbitration (DIS)</td>
<td></td>
</tr>
<tr>
<td>Arbitration Court Berlin</td>
<td></td>
</tr>
<tr>
<td>Netherlands Arbitration Institute (NAI)</td>
<td></td>
</tr>
<tr>
<td>Zurich Chamber of Commerce</td>
<td></td>
</tr>
<tr>
<td>UNCITRAL Arbitration Rules</td>
<td></td>
</tr>
<tr>
<td>Ad Hoc Arbitration Clause</td>
<td></td>
</tr>
<tr>
<td>Annex 3: Arbitration Rules</td>
<td>813</td>
</tr>
<tr>
<td>German Institution of Arbitration (DIS) Arbitration Rules</td>
<td></td>
</tr>
<tr>
<td>Arbitration Court Berlin Arbitration Rules</td>
<td></td>
</tr>
<tr>
<td>Netherlands Arbitration Institute (NAI) Arbitration Rules</td>
<td></td>
</tr>
<tr>
<td>International Arbitration Rules of Zurich Chamber of Commerce</td>
<td></td>
</tr>
<tr>
<td>UNCITRAL Arbitration Rules</td>
<td></td>
</tr>
<tr>
<td>Annex 4: Arbitration Laws</td>
<td>875</td>
</tr>
<tr>
<td>UNCITRAL Model Law on International Commercial Arbitration (as amended by the Working Group of the German Institute of Arbitration)</td>
<td></td>
</tr>
<tr>
<td>Netherlands Arbitration Act 1986</td>
<td></td>
</tr>
<tr>
<td>Swiss Federal Statute on Private International Law</td>
<td></td>
</tr>
<tr>
<td>a) Chapter 12 – International Arbitration</td>
<td></td>
</tr>
<tr>
<td>b) Chapter 13 – Transitory Provisions (Excerpts)</td>
<td></td>
</tr>
<tr>
<td>c) Chapter 1 – General Provisions (Excerpts)</td>
<td></td>
</tr>
<tr>
<td>Swiss Law on the Organization of Federal Justice (Excerpts)</td>
<td></td>
</tr>
<tr>
<td>Annex 6: Ratifications of the New York Convention</td>
<td>925</td>
</tr>
<tr>
<td>Index</td>
<td>929</td>
</tr>
</tbody>
</table>