

**INTERNATIONAL ECONOMIC
ARBITRATION**

BY

Klaus Peter Berger

1993

**KLUWER LAW AND TAXATION PUBLISHERS
DEVENTER · BOSTON**

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	
Procedural Framework: Arbitration Law, Arbitration Rules and Arbitration Agreement	25
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
B. The Netherlands: New Book Four of the Code of Civil Procedure	35
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
4. Scope: Special Statute for International Arbitration	50
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 ' <i>Bindend Advies</i> '	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 <i>Lex Arbitri</i> 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

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. <i>Ex Officio</i> 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

b. Tribunal's Positive Ruling on Jurisdiction	363
V. Summary	367
 Chapter IV	
Introduction and Course of the Proceedings	371
I. Introduction of the Arbitration	375
A. <i>Lis Pendens</i>	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 Assistory 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 <i>Lex Mercatoria</i> : A Primer on General Principles of International Economic Law	541
C. Position Taken by the New Arbitration Laws	556
1. Choice of <i>Lex Mercatoria</i> by the Parties	556
2. Designation of <i>Lex Mercatoria</i> 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

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

TABLE OF CONTENTS

Chapter VII	
Awards before Domestic Courts: Setting Aside and Enforcement	647
I. Judicial Control of Awards at the Seat of the Arbitration	647
A. Significance of Court Control of Arbitral Awards at the Seat of the Arbitration	651
1. Extraterritorial Effect of Setting Aside Decisions	651
2. Quality and Intensity of Court Control	654
B. Awards Subject to Setting Aside	658
1. The Principle	658
2. Exceptions for Awards on Jurisdiction, Challenges of Arbitrators and Partial Awards under Swiss Law	659
C. Grounds for Setting Aside	662
1. Procedural Irregularities	663
2. Errors Relating to Substantive Law	670
a. Violations of <i>Ordre Public</i>	670
b. Errors in the Application of Substantive Law	678
c. Application of the 'Wrong' Law	681
d. <i>Ex Aequo et Bono</i> Decisions Without Authorization from the Parties	683
e. Application of the <i>Lex Mercatoria</i>	685
f. Violation of Mandatory Norms	688
3. Revocation of the Award	694
D. Procedure	697
1. Time Limit	697
2. Competent Court and Stages of Appeal	699
3. Suspension of Enforcement	703
4. Effects of Setting Aside	705
E. Exclusion of Recourse	709
1. Waiver of Recourse after Receipt of the Award by the Parties	709
2. Exclusion Agreements in the Pre-Award Stage	709
a. Effects in Case of Award Granting the Relief Sought	712
b. Effects in Case of Award Denying the Relief Sought	720
3. Conclusion	720
II. Recognition and Enforcement of Awards	726
A. Enforcement of Domestic Awards	728
B. Enforcement of Foreign Awards	736
III. Summary	740
Chapter VIII	
Conclusion	743
I. Monistic or Dualistic Legislative Approach?	746
II. Comprehensiveness of Modern Arbitral Legislation	749
A. Regulatory Minimalism <i>versus</i> Legislative Perfectionism	749

B.	Expectations of Parties, Counsel, Arbitrators and Arbitral Institutions	750
C.	Advantages of Legislative Arbitration Rules	752
D.	Amendments of the Model Law?	753
III.	Quintessence	755
	Bibliography	757
Annex 1	Addresses of Arbitral Institutions	805
	German Institution of Arbitration (DIS)	
	Arbitration Court Berlin	
	Netherlands Arbitration Institute (NAI)	
	Zurich Chamber of Commerce	
	Secretary-General of the Permanent Court of Arbitration	
Annex 2	Model Arbitration Clauses	807
	German Institution of Arbitration (DIS)	
	Arbitration Court Berlin	
	Netherlands Arbitration Institute (NAI)	
	Zurich Chamber of Commerce	
	UNCITRAL Arbitration Rules	
	<i>Ad Hoc</i> Arbitration Clause	
Annex 3	Arbitration Rules	813
	German Institution of Arbitration (DIS) Arbitration Rules	
	Arbitration Court Berlin Arbitration Rules	
	Netherlands Arbitration Institute (NAI) Arbitration Rules	
	International Arbitration Rules of Zurich Chamber of Commerce	
	UNCITRAL Arbitration Rules	
Annex 4	Arbitration Laws	875
	UNCITRAL Model Law on International Commercial Arbitration (as amended by the Working Group of the German Institute of Arbitration)	
	Netherlands Arbitration Act 1986	
	Swiss Federal Statute on Private International Law	
	a) Chapter 12 – International Arbitration	
	b) Chapter 13 – Transitory Provisions (Excerpts)	
	c) Chapter 1 – General Provisions (Excerpts)	
	Swiss Law on the Organization of Federal Justice (Excerpts)	
Annex 5	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards	919
Annex 6	Ratifications of the New York Convention	925
	Index	929