Fouchard, Gaillard, Goldman

On

International Commercial Arbitration

Edited by
Emmanuel Gaillard
and
John Savage
TABLE OF CONTENTS

Table of Abbreviations
Foreword
Introduction (1 to 4)

PART I
DEFINITION AND SOURCES

CHAPTER I
DEFINITION OF INTERNATIONAL COMMERCIAL ARBITRATION
(6 to 126)

Section I. – Definition of Arbitration (7 to 57) ........................................... 9
§1. – The Arbitrators’ Judicial Role (12 to 43) ........................................... 12
  A. – Arbitrators’ Decisions Are Binding (15 to 29) ............................ 12
    1° Arbitration, Conciliation and Mediation (16 to 21) .................... 12
    2° Arbitration and the Role of the Engineer in FIDIC Contracts (22 to 24) ........................................... 17
    3° Arbitration and Expert Proceedings (25 to 29) ............................ 18
  B. – Arbitrators’ Decisions Resolve Disputes (30 to 43) ..................... 22
    1° Amiable Composition (31) ........................................... 23
    2° Quality Arbitrations (32) ........................................... 23
    3° The Completion or Adaptation of Contracts (33 to 43) ............... 24
      a) In the Absence of a Hardship Clause (35 to 37) .................... 25
      b) Where the Contract Contains a Hardship Clause (38 to 43) .... 26
§2. – The Contractual Basis of Arbitration (44 to 57) ............................... 29
  A. – Party Autonomy in International Arbitration (46 to 52) ............. 31
    1° The Choice of a National Law to Govern the Procedure or the Merits of a Dispute (47 to 50) ....................... 31
    2° The Choice of Substantive Transnational Rules to Govern the Procedure or the Merits of a Dispute (51 to 52) ............. 32
  B. – The Institutionalization of International Commercial Arbitration (53 to 57) ........................................... 33

Section II. – The Meaning of “Commercial” (58 to 77) .............................. 35
§1. – Civil and Commercial Arbitration (60 to 68) ................................... 36
TABLE OF CONTENTS

A. – The UNCITRAL Model Law (61 to 63) .............................................. 36
B. – Modern Legislation (64 to 65) ............................................................ 37
C. – International Conventions on Arbitration (66 to 68) ......................... 38

§2. – Public Law Arbitration and Commercial Arbitration (69 to 77) .......... 40
A. – The Arbitration of State Contracts (70 to 74) .................................... 41
B. – Public International Law Arbitrations (75 to 77) ............................... 43

Section III. – The Meaning of “International” (78 to 126) ......................... 45

§1. – The International Nature of Arbitration and the Connection
of an Arbitration to a Specific Legal Order (81 to 97) ............................. 45
A. – National Arbitration and Foreign Arbitration (83 to 94) ................. 46
B. – National Arbitration and A-national Arbitration (95 to 97) ............... 50

§2. – The International Nature of Arbitration and the Application of
Specific Substantive Rules (98 to 126) .................................................... 51
A. – Treaty and Comparative Law (101 to 106) ....................................... 51
B. – French Law (107 to 126) ................................................................. 55
   1° Article 1492 of the New Code of Civil Procedure
       (114 to 118) ...................................................................................... 57
   2° The Application of Article 1492 by the French Courts
       (119 to 126) ...................................................................................... 58

CHAPTER II
SOURCES OF INTERNATIONAL COMMERCIAL ARBITRATION
(127 to 384)

Section I. – Public Sources (129 to 302) .................................................. 63

§1. – National Sources (130 to 189) ............................................................ 63
A. – French Law (131 to 151) ................................................................. 63
   1° The 1980-1981 Reforms (136 to 147) .............................................. 64
   2° Developments Since the 1981 Reform (148 to 151) ......................... 68
B. – Other Legal Systems (152 to 189) ..................................................... 70
   1° Analysis (155 to 174-6) ................................................................. 71
       a) Europe (156 to 167) ................................................................. 71
          i) United Kingdom (157) .......................................................... 71
          ii) Belgium (158) ................................................................. 73
          iii) The Netherlands (159) ...................................................... 74
          iv) Germany (160) ................................................................. 75
          v) Portugal (161) ................................................................. 76
          vi) Switzerland (162) .............................................................. 76
          vii) Spain (163) ................................................................. 78
          viii) Italy (164) ................................................................. 78
          ix) Sweden (164-1) ............................................................ 79
       x) Other countries of the European Union (165) ..................... 80
       xi) Central and East European countries (166) ......................... 81
<table>
<thead>
<tr>
<th>TABLE OF CONTENTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>xii) States of the former USSR (167) .................. 83</td>
</tr>
<tr>
<td>b) Other Continents (168 to 174-6) .................... 83</td>
</tr>
<tr>
<td>i) United States of America (169) ...................... 83</td>
</tr>
<tr>
<td>ii) Canada (170) ........................................ 85</td>
</tr>
<tr>
<td>iii) Latin America (171 to 172) ....................... 87</td>
</tr>
<tr>
<td>iv) Africa (173) ......................................... 88</td>
</tr>
<tr>
<td>v) The Middle East (173-1) .............................. 91</td>
</tr>
<tr>
<td>vi) Asia and the Pacific Rim (174 to 174-6) .......... 92</td>
</tr>
<tr>
<td>2° Trends (175 to 189) .................................. 96</td>
</tr>
<tr>
<td>a) Diversity of Legislative Techniques (176 to 185) ... 96</td>
</tr>
<tr>
<td>b) Convergence of Legislative Objectives (186 to 189) ... 102</td>
</tr>
<tr>
<td>§2. – International Sources (190 to 302) ................. 103</td>
</tr>
<tr>
<td>A. – Optional Instruments (193 to 205) .................. 104</td>
</tr>
<tr>
<td>1° Arbitration Rules (195 to 202) ...................... 104</td>
</tr>
<tr>
<td>2° The UNCITRAL Model Law (203 to 205) ............... 107</td>
</tr>
<tr>
<td>B. – Bilateral Agreements (206 to 238) ................. 109</td>
</tr>
<tr>
<td>1° Bilateral Agreements Concerning Arbitration Incidentally (208 to 235) .... 110</td>
</tr>
<tr>
<td>a) Bilateral Treaties Governing Economic Relations (209 to 215) .......... 110</td>
</tr>
<tr>
<td>b) Conventions on Judicial Assistance (216 to 235) ...... 112</td>
</tr>
<tr>
<td>2° Conventions Primarily Concerning Arbitration (236 to 238) ........ 114</td>
</tr>
<tr>
<td>C. – Multilateral Conventions (239 to 302) .............. 116</td>
</tr>
<tr>
<td>1° The Early Conventions (240 to 246) .................. 120</td>
</tr>
<tr>
<td>a) The Geneva Protocol of September 24, 1923 (241 to 243) .......... 120</td>
</tr>
<tr>
<td>b) The Geneva Convention of September 26, 1927 (244 to 246) .......... 121</td>
</tr>
<tr>
<td>2° The 1958 New York Convention (247 to 272) ........... 122</td>
</tr>
<tr>
<td>a) Principal Characteristics (250 to 254) ............... 124</td>
</tr>
<tr>
<td>b) The Scope of the Convention (255 to 272) ............. 125</td>
</tr>
<tr>
<td>3° Regional Conventions (273 to 300) .................... 138</td>
</tr>
<tr>
<td>a) The European Convention of April 21, 1961 (274 to 287) .... 138</td>
</tr>
<tr>
<td>b) The Paris Agreement of December 17, 1962 (288 to 289) .......... 143</td>
</tr>
<tr>
<td>c) The Strasbourg Convention of January 20, 1966 (290 to 291) .......... 144</td>
</tr>
<tr>
<td>d) The Moscow Convention of May 26, 1972 (292 to 293) .......... 145</td>
</tr>
<tr>
<td>e) Inter-American Conventions (294 to 296) .............. 146</td>
</tr>
<tr>
<td>f) Inter-Arab Conventions (297 to 299) ................... 148</td>
</tr>
<tr>
<td>g) The OHADA Treaty of October 17, 1993 (300) .......... 149</td>
</tr>
<tr>
<td>Section II. – Private Sources (303 to 384)</td>
</tr>
<tr>
<td>-----------------------------------------</td>
</tr>
<tr>
<td>§1. – Model Arbitration Agreements (307 to 320)</td>
</tr>
<tr>
<td>A. – Model Arbitration Agreements Prepared</td>
</tr>
<tr>
<td>by Individual Institutions (308 to 316)</td>
</tr>
<tr>
<td>B. – Inter-Institutional Agreements (317 to 320)</td>
</tr>
<tr>
<td>§2. – Arbitration Rules (321 to 370)</td>
</tr>
<tr>
<td>A. – The Diversity of Arbitration Rules (322 to 356)</td>
</tr>
<tr>
<td>1° Rules Prepared by Arbitral Institutions (323 to 350)</td>
</tr>
<tr>
<td>a) Classification of Arbitral Institutions (330 to 348)</td>
</tr>
<tr>
<td>b) The International Court of Arbitration of the International Chamber of Commerce (349 to 350)</td>
</tr>
<tr>
<td>2° Rules of Other Organizations (351 to 356)</td>
</tr>
<tr>
<td>a) Rules of Evidence (352 to 353)</td>
</tr>
<tr>
<td>b) Rules Governing Arbitrators' Ethics (354 to 356)</td>
</tr>
<tr>
<td>B. – The Authority of Private Arbitration Rules (357 to 370)</td>
</tr>
<tr>
<td>1° Basis of the Authority of Arbitration Rules (358 to 363)</td>
</tr>
<tr>
<td>a) The Contractual Value of Arbitration Rules (359 to 361)</td>
</tr>
<tr>
<td>b) Arbitration Rules as Usages or Principles of International Arbitration (362 to 363)</td>
</tr>
<tr>
<td>2° The Status of Private Arbitration Rules in International Arbitration Law (364 to 370)</td>
</tr>
<tr>
<td>a) Arbitration Rules Take Priority over Other Sources (365 to 368)</td>
</tr>
<tr>
<td>b) Arbitration Rules Are Generally Sufficient to Regulate the Arbitration (369 to 370)</td>
</tr>
<tr>
<td>§3. – Arbitral Awards (371 to 384)</td>
</tr>
<tr>
<td>A. – Autonomy of Arbitral Awards (375 to 378)</td>
</tr>
<tr>
<td>B. – Consistency of Arbitral Case Law (379 to 382)</td>
</tr>
<tr>
<td>C. – Publication of Arbitral Awards (383 to 384)</td>
</tr>
</tbody>
</table>

PART II
THE ARBITRATION AGREEMENT

CHAPTER I
THE AUTONOMY OF THE ARBITRATION AGREEMENT (388 to 451)

Section I. – Autonomy of the Arbitration Agreement from the Main Contract (389 to 419) | 198 |
| §1. – Nature of the Rule (391 to 407) | 198 |
| A. – Recognition of the Principle in Leading Arbitration Rules (393 to 397) | 199 |
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section I.</th>
<th>Autonomy of the Arbitration Agreement</th>
</tr>
</thead>
<tbody>
<tr>
<td>B.</td>
<td>Recognition of the Principle in Arbitration Statutes (398 to 405) 202</td>
</tr>
<tr>
<td>C.</td>
<td>Recognition of the Principle in International Arbitral Case Law (406) 206</td>
</tr>
<tr>
<td>D.</td>
<td>Recognition of the Principle by International Courts (406-1 to 407) 209</td>
</tr>
<tr>
<td>§2.</td>
<td>Consequences of the Autonomy of the Arbitration Agreement (408 to 419) 209</td>
</tr>
<tr>
<td>A.</td>
<td>Direct Consequences of the Principle of Autonomy (409 to 414) 209</td>
</tr>
<tr>
<td>1°</td>
<td>The Status of the Main Contract Does Not Affect the Arbitration Agreement (410 to 411) 210</td>
</tr>
<tr>
<td>2°</td>
<td>The Arbitration Agreement May Be Governed by a Law Different from that Governing the Main Contract (412 to 414) 212</td>
</tr>
<tr>
<td>B.</td>
<td>Indirect Consequences of the Principle of Autonomy (415 to 419) 213</td>
</tr>
<tr>
<td>1°</td>
<td>The Principle of Autonomy and &quot;Competence-Competence&quot; (416 to 417) 213</td>
</tr>
<tr>
<td>2°</td>
<td>The Principle of Autonomy, the Principle of Validity and the Rejection of the Choice of Law Method (418 to 419) 214</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Section II.</th>
<th>Autonomy of the Arbitration Agreement from all National Laws (420 to 451) 218</th>
</tr>
</thead>
<tbody>
<tr>
<td>§1.</td>
<td>The Choice of Law Method (422 to 434) 218</td>
</tr>
<tr>
<td>A.</td>
<td>Legal Categories (423 to 425) 219</td>
</tr>
<tr>
<td>1°</td>
<td>The Arbitration Agreement and Procedure (424) 220</td>
</tr>
<tr>
<td>2°</td>
<td>The Arbitration Agreement and the Main Contract (425) 222</td>
</tr>
<tr>
<td>B.</td>
<td>Connecting Factors (426 to 434) 224</td>
</tr>
<tr>
<td>1°</td>
<td>The Place Where the Arbitration Agreement Was Concluded (427) 224</td>
</tr>
<tr>
<td>2°</td>
<td>Factors Specific to Certain Arbitration Agreements (428) 225</td>
</tr>
<tr>
<td>3°</td>
<td>The Seat of Arbitration (429 to 434) 225</td>
</tr>
<tr>
<td>§2.</td>
<td>The Substantive Rules Method (435 to 445) 228</td>
</tr>
<tr>
<td>A.</td>
<td>French Case Law Establishing the Substantive Rules Method (436 to 437) 228</td>
</tr>
<tr>
<td>B.</td>
<td>Criticism of the Substantive Rules Method (438) 230</td>
</tr>
<tr>
<td>C.</td>
<td>Scope and Merit of the Substantive Rules Method (439 to 445) 231</td>
</tr>
<tr>
<td>1°</td>
<td>Application of the Substantive Rules Method by Courts Reviewing Arbitral Awards (442) 232</td>
</tr>
<tr>
<td>2°</td>
<td>Application of the Substantive Rules Method by Arbitrators (443 to 445) 234</td>
</tr>
<tr>
<td>§3.</td>
<td>Combining In Favorum Validitatis Choice of Law Rules and Substantive Rules (446 to 451) 236</td>
</tr>
</tbody>
</table>
CHAPTER II

FORMATION OF THE ARBITRATION AGREEMENT
(452 to 623)

Section I. – Capacity and Power (453 to 470) ........................................ 242
§1. – The Choice of Law Method (455 to 462) .......................................... 243
A. – The Law Governing the Capacity to Enter into an Agreement (456 to 460) 243

1° Natural Persons (457 to 458) .................................................. 243

2° Juridical Persons (459 to 460) .................................................. 245

B. – The Law Governing Powers (461 to 462) .................................... 246

§2. – The Substantive Rules Method (463 to 470) ................................ 247
A. – The Exclusive Use of Substantive Rules (464 to 469) ....................... 248

1° Capacity (465 to 467) .......................................................... 248

2° Powers (468 to 469) .......................................................... 250

B. – The Corrective Use of Substantive Rules (470) ................................ 252

Section II. – Consent (471 to 531) ..................................................... 253
Subsection I. – The Existence of Consent (472 to 524) .......................... 254
§1. – Interpreting the Parties' Consent (473 to 482) ................................ 254
A. – The Principle of Interpretation in Good Faith (477) ........................ 257
B. – The Principle of Effective Interpretation (478) ............................... 258
C. – The Principle of Interpretation Contra Proferentem (479) ............... 258
D. – Rejection of the Principle of Strict Interpretation (480) ................. 260
E. – Rejection of the Principle of Interpretation In Favorem Validitatis (481 to 482) .......................................................... 261

§2. – The Degree of Certainty Required of the Parties' Consent (483 to 496) 262
A. – Pathological Clauses (484 to 486) ............................................ 262

1° Selecting an Institution Which Does Not Exist or Which Is Inadequately Defined (485) .................................................. 264

2° “Blank Clauses” (486) .......................................................... 266
B. – Combined Clauses (487 to 490) ................................................ 268

1° Option to Choose Between Arbitration and the Courts (488) ........... 268

2° The Courts as an Appeal Jurisdiction (489) .................................. 269

3° Conflict Between Arbitration and the Courts (490) ........................... 270
C. – Arbitration Clauses Incorporated by Reference (491 to 496) .......... 272
| **1° Arbitration Clauses Incorporated by Reference and the Autonomy of the Arbitration Agreement** (492) | 272 |
| **2° Arbitration Clauses Incorporated by Reference and Requirements of Form** (493 to 495-1) | 272 |
| **3° Arbitration Clauses Incorporated by Reference and the Interpretation of the Consent of the Parties** (496) | 278 |

§3. – Scope of the Parties’ Consent (497 to 524) .................................................. 280

A. – Which Parties Are Bound by the Consent to Arbitrate? (498 to 511) .................. 280

1° Groups of Companies (500 to 506) ................................................................. 282
   a) Arbitral Case Law (501) ................................................................. 284
   b) French Case Law (502 to 506) .......................................................... 286

2° States and State-Owned Entities (507 to 511) .................................................... 290
   a) Extension of an Arbitration Agreement Signed by a State-Owned Entity to the State (508 to 510) ................................................................. 292
   b) Extension of an Arbitration Agreement Signed by a State to a State-Owned Entity (511) ................................................................. 296

B. – What Subject-Matter Is Covered by the Parties’ Consent? (512 to 524) ................. 297

1° Diversity of Disputes Arising from a Single Contract (513 to 517) ......................... 298
   a) Omission of Disputes Concerning the Validity or Interpretation of the Contract (514 to 516) ................................................................. 299
   b) Submission to Arbitration of Disputes Concerning only Interpretation (517) .................... 300

2° Groups of Contracts (518 to 523) ........................................................................ 301
   a) Contracts with the Same Purpose (519 to 522) ........................................ 301
   b) Successive Contracts Between the Same Parties (523) ..................................... 305

3° Extra-Contractual Disputes (524) ........................................................................ 306

Subsection II. – Validity of the Parties’ Consent (525 to 531) ........................................ 307

§1. – Duress (529) .................................................................................................. 309
§2. – Misrepresentation (530) ................................................................................... 310
§3. – Mistake (531) .................................................................................................. 310

Section III. – Arbitrability (532 to 589-1) ................................................................... 312

§1. – Subjective Arbitrability (534 to 558) .................................................................. 313
   A. – The Choice of Law Method (536 to 540) .................................................. 315
   B. – Substantive Rules (541 to 558) .................................................................. 318
      1° French Law (542 to 546) ........................................................................... 318
      2° General Principles of International Arbitration (547 to 558) ....................... 322
         a) International Conventions (548) .......................................................... 322
         b) Comparative Law (549) ...................................................................... 323
         c) International Arbitral Case Law (550 to 556) ....................................... 325
d) Resolution of the Institute of International Law
(557 to 558) .............................................................. 329

§2. - Objective Arbitrability (559 to 589-1) ........................................ 330
A. - French Law (560 to 579) ....................................................... 330
   1° Methodology (561 to 570) ..................................................... 331
      a) Scope of Objective Non-Arbitrability (562 to 568) ............... 331
      b) Establishing Non-Arbitrability (569) ............................... 338
   2° Specific Applications (571 to 579) ........................................ 339
      a) Matters Which Do Not Involve an Economic Interest (572) .... 340
      b) Inalienable Rights (573) .............................................. 340
      b) Other Sensitive Areas (574 to 579) ................................. 342
B. - International Arbitral Case Law (580 to 589-1) ......................... 348
   1° Antitrust Law (581 to 582) ............................................... 349
   2° Intellectual Property (583) ............................................... 352
   3° Corruption (584 to 586) .................................................. 353
   4° Bankruptcy Proceedings (587) .......................................... 355
   5° Exclusive Sales Concessions (588) ..................................... 356
   6° Embargoes (589) ............................................................ 358
   7° Taxation Disputes (589-1) .............................................. 359

Section IV. - Form and Proof (590 to 623) ....................................... 360
§1. - French Law (592 to 610) ..................................................... 361
   A. - Formal Validity and Autonomy of the Arbitration Agreement (593 to 598) .............................................................. 361
      1° The Cassia Decision (594 to 595) .................................... 361
      2° The Prevailing Position in French Law (596 to 598) ............. 363
   B. - Rules Governing the Formal Validity of an Arbitration Agreement (599 to 610) .............................................................. 364
      1° The Choice of Law Method (600 to 604) ............................ 365
      2° Substantive Rules (605 to 610) ....................................... 369
§2. - International Conventions (611 to 623) ..................................... 373
   A. - The New York Convention (612 to 620) ............................... 373
      1° The Relationship Between the Requirements of Form of the New York Convention and Those of National Arbitration Laws (613 to 615) .................................................. 373
         a) Can National Laws Be More Liberal than the New York Convention? (614) .................................................. 374
         b) In Order to Rely on the New York Convention, Is It Necessary to Comply with All Its Terms? (615) ..................... 375
      2° Provisions of the New York Convention Regarding the Form of the Arbitration Agreement (616 to 620) ....................... 376
   B. - The 1961 European Convention (621 to 623) .......................... 378
CHAPTER III
EFFECTS OF THE ARBITRATION AGREEMENT
(624 to 688)

Section I. – Positive Effects of the Arbitration Agreement (625 to 660) .... 381
§1. – The Parties’ Obligation to Submit Disputes Covered by the
Arbitration Agreement to Arbitration (626 to 646) .................... 381
A. – The Principle that Parties Are Obliged to Submit Disputes Covered
by Their Arbitration Agreement to Arbitration (627 to 630) .... 382
B. – The Obligation to Submit to Arbitration Disputes
Covered by the Arbitration Agreement Is Capable
of Specific Performance (631 to 634) ................................. 384
C. – The Obligation to Submit Disputes Covered by the
Arbitration Agreement to Arbitration Prevails
over Jurisdictional Privileges and Immunities (635 to 646) .... 387
1° Jurisdictional Privileges (636 to 640) ............................... 387
2° Jurisdictional Immunities (641 to 646) ............................. 390
§2. – The Arbitral Tribunal Has Jurisdiction to Resolve Disputes
Covered by the Arbitration Agreement (647 to 660) ................. 393
A. – The Extent of the Jurisdiction of
the Arbitral Tribunal (648 to 649) ..................................... 394
B. – The Arbitral Tribunal’s Jurisdiction to Rule on Its Own
Jurisdiction (“Competence-Competence”) (650 to 660) .... 395
1° Recognition of the Principle (653 to 656) .......................... 397
2° Basis of the Principle (657 to 658) ................................. 399
3° Meaning of the Principle (659 to 660) ............................. 400

Section II. – Negative Effects of the Arbitration Agreement (661 to 688) .... 402
§1. – The Principle that the Courts Have No Jurisdiction (662 to 667) ...... 402
A. – International Conventions (663) .................................... 402
B. – Arbitration Legislation (664 to 667) ............................... 403
§2. – Implementation of the Principle that the Courts Have
No Jurisdiction (668 to 682) ........................................... 405
A. – The Courts Cannot Declare Ex Officio that They Have
No Jurisdiction as a Result of the Existence
of an Arbitration Agreement (669 to 670) ........................... 405
B. – When Can the Courts Review the Existence and Validity
of the Arbitration Agreement? (671 to 682) .......................... 406
1° The Position Adopted in Comparative Law (672 to 676) .... 407
2° Policy Considerations (677 to 682) ................................. 410
§3. – The Limits of the Courts’ Lack of Jurisdiction (683 to 688) ............ 413
A. – The Constitution of the Arbitral Tribunal (684) .................... 413
B. – Provisional and Conservatory Measures (685) ....................... 414
C. – Review of the Award by the Courts (686 to 688) .................... 414
## TABLE OF CONTENTS

### CHAPTER IV

**ASSIGNMENT AND EXPIRATION OF THE ARBITRATION AGREEMENT**

(689 to 741)

### Section I. – Assignment of the Arbitration Agreement (690 to 725) .............. 417

#### §1. – The Choice of Law Method (693 to 703) ............................................. 419

A. – The Law Governing Voluntary Assignments (694 to 700) ..................... 419

1° *Determining the Applicable Law* (695 to 697) ..................................... 419

a) Contractual Assignment of the Arbitration Agreement (696) .................. 419

b) Other Forms of Voluntary Assignment of the Arbitration Agreement (697) ................................................. 421

2° *Scope of the Applicable Law* (698 to 700) ..................................... 421

a) The Law Governing Formalities Aimed at Ensuring Enforceability Against the Initial Co-Contractor (699) .............. 422

b) International Mandatory Rules (700) ............................................. 422

B. – The Law Governing Statutory Assignments (701 to 703) ............. 422

1° *Determining the Applicable Law* (702) ..................................... 423

2° *Scope of the Applicable Law* (703) ..................................... 423

#### §2. – Substantive Rules (704 to 725) ............................................. 424

A. – Conditions Governing the Assignment of the Arbitration Agreement (705 to 722) ............................................. 424

1° *Enforceability Against the Assignee of the Assignment of an Arbitration Agreement* (706 to 715) .......................... 425

a) Voluntary Assignments (707 to 712) ............................................. 425

1) The Assignee Must Consent to the Assignment (708 to 710) .......... 425

2) Acceptance of the Assignment of the Main Contract Raises a Presumption of Acceptance of the Arbitration Agreement (711 to 712) ............. 427

b) Other Means of Assigning the Arbitration Agreement (713 to 715) ............. 429

1) Statutory Subrogation (714) ............................................. 429

2) Universal Succession (715) ............................................. 430

2° *Conditions Governing the Enforceability of the Assignment of the Arbitration Agreement Against the Initial Co-Contractor* (716 to 722) ............. 430

a) The Presumption that the Initial Co-Contractor Accepts the Assignability of the Arbitration Agreement (717 to 719) ............. 431

1) Contractual Assignments (718) ............................................. 431

2) Assignment by Subrogation (719) ............................................. 432

b) Situations Where Express Acceptance by the Initial Co-Contractor Is Required for the Assignment of the Arbitration Agreement (720 to 722) ............. 433
TABLE OF CONTENTS

1) *Intuitus Personae* Inferred from the Facts (721) 434
2) *Intuitus Personae* Expressly Provided for by Contract (722) 434

B. Consequences of the Assignment of the Arbitration Agreement (723 to 725) 434
1° The Obligation to Submit Disputes to Arbitration (724) 435
2° The Effect of an Assignment of the Arbitration Agreement on the Composition of the Arbitral Tribunal (725) 436

Section II. Expiration of the Arbitration Agreement (726 to 741) 437
§1. Expiration of the Arbitration Agreement as a Result of the Expiration of the Main Agreement? (727 to 733) 437
A. Performance (728) 437
B. Statute of Limitations (729) 438
C. Novation (730) 438
D. Settlement (731) 439
E. Rescission (732) 439
F. Nullity (733) 440

§2. Causes of Expiration Specific to the Arbitration Agreement (734 to 741) 440
A. Events Extinguishing the Arbitration Agreement (735 to 737) 440
1° Waiver (736) 441
2° Avoidance (737) 443
B. Events Which Extinguish Submission Agreements but Do Not Affect Arbitration Clauses (738 to 741) 443
1° The Making of a Final Award (738-1) 443
2° The Default of an Arbitrator (739) 444
3° Expiration of the Deadline for the Arbitrators’ Award (740) 445
4° The Setting Aside of an Award (741) 445

PART III
THE ARBITRAL TRIBUNAL

CHAPTER I
THE CONSTITUTION OF THE ARBITRAL TRIBUNAL (745 to 1008)

Section I. National and International Rules (748 to 950) 452
§1. The Appointment of the Arbitrators (750 to 793) 452
A. The Primacy of the Parties’ Agreement (752 to 793) 452
1° The Meaning of the Primacy of the Parties’ Agreement (753 to 774) 453
a) Identity of the Arbitrators (761 to 769) 456
b) Number of Arbitrators (770 to 771) 459
TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>c) Method of Appointing Arbitrators (772 to 774)</td>
<td>460</td>
</tr>
<tr>
<td>2° Consequences of the Primacy of the Parties' Agreement</td>
<td>461</td>
</tr>
<tr>
<td>(775 to 782)</td>
<td></td>
</tr>
<tr>
<td>3° Limits of the Primacy of the Parties' Agreement</td>
<td>464</td>
</tr>
<tr>
<td>(783 to 793)</td>
<td></td>
</tr>
<tr>
<td>B. – The Subsidiary Role of National Laws (794 to 807)</td>
<td>470</td>
</tr>
<tr>
<td>1° French Law (795 to 799)</td>
<td>470</td>
</tr>
<tr>
<td>2° Other Legal Systems and International Conventions (800 to 807)</td>
<td>473</td>
</tr>
<tr>
<td>C. – Recognition of the Role of Arbitral Institutions (808 to 827)</td>
<td>476</td>
</tr>
<tr>
<td>1° International Conventions (809 to 818)</td>
<td>476</td>
</tr>
<tr>
<td>a) The 1958 New York Convention (810 to 813)</td>
<td>477</td>
</tr>
<tr>
<td>b) The 1961 European Convention (814 to 817)</td>
<td>478</td>
</tr>
<tr>
<td>c) The 1965 Washington Convention (818)</td>
<td>480</td>
</tr>
<tr>
<td>2° Recent Arbitration Statutes (819)</td>
<td>480</td>
</tr>
<tr>
<td>3° French Law (820 to 827)</td>
<td>481</td>
</tr>
<tr>
<td>§2. – Difficulties in the Constitution of the Arbitral Tribunal (828 to 940)</td>
<td>484</td>
</tr>
<tr>
<td>A. – French Law (832 to 910)</td>
<td>485</td>
</tr>
<tr>
<td>1° Conditions Governing Judicial Intervention (836 to 855)</td>
<td>486</td>
</tr>
<tr>
<td>a) The International Jurisdiction of the French Courts (837 to 846)</td>
<td>486</td>
</tr>
<tr>
<td>b) Non-Mandatory Character of French Courts' Jurisdiction (847 to 850)</td>
<td>492</td>
</tr>
<tr>
<td>c) Validity and Content of the Arbitration Clause (851 to 855)</td>
<td>494</td>
</tr>
<tr>
<td>2° The Purpose of Judicial Intervention (856 to 884)</td>
<td>496</td>
</tr>
<tr>
<td>a) Resolving Initial Difficulties Concerning the Constitution of the Arbitral Tribunal (857 to 864)</td>
<td>497</td>
</tr>
<tr>
<td>1) Difficulties Warranting Judicial Intervention (858 to 860)</td>
<td>497</td>
</tr>
<tr>
<td>2) Difficulties Not Warranting Judicial Intervention (861 to 864)</td>
<td>498</td>
</tr>
<tr>
<td>b) Resolving Subsequent Difficulties Affecting the Constitution of the Arbitral Tribunal (865 to 884)</td>
<td>500</td>
</tr>
<tr>
<td>1) The Challenge of an Arbitrator (871 to 878)</td>
<td>502</td>
</tr>
<tr>
<td>2) The Replacement of an Arbitrator (879 to 884)</td>
<td>505</td>
</tr>
<tr>
<td>3° The Procedure for Judicial Intervention (885 to 910)</td>
<td>508</td>
</tr>
<tr>
<td>a) Relevant Jurisdiction (886 to 889)</td>
<td>508</td>
</tr>
<tr>
<td>b) Organization of the Proceedings (890 to 901)</td>
<td>510</td>
</tr>
<tr>
<td>1) Rules of Procedure (891 to 900)</td>
<td>510</td>
</tr>
<tr>
<td>2) Practice of the Court (901)</td>
<td>513</td>
</tr>
<tr>
<td>c) Finality of the Court's Decisions (902 to 910)</td>
<td>514</td>
</tr>
<tr>
<td>1) An Ordinary Appeal Is Inadmissible (903)</td>
<td>514</td>
</tr>
<tr>
<td>2) No Recourse to the Cour de cassation (904)</td>
<td>515</td>
</tr>
</tbody>
</table>
### TABLE OF CONTENTS

3) An Appeal on the Grounds that a Judge Has Ruled
   *Ultra Vires* Is Admissible in Exceptional
   Circumstances (905 to 906) .................................. 516

4) Finality of the Decision when the Award Is
   Subsequently Reviewed by the Courts (907 to 910) .... 517

B. – Other Legal Systems (911 to 922) .......................... 519

C. – International Conventions (923 to 940) .................. 523
   1° The 1961 European Convention (924 to 935) ............ 524
   2° The 1965 Washington Convention (936 to 940) ......... 528

§3. – Acceptance by the Arbitral Tribunal of Its Brief (941 to 950) .................. 529
   A. – Necessity for Acceptance by the Tribunal of Its Brief
      (942 to 944) .................................................. 529
   B. – Form of Acceptance (945 to 946) .......................... 530
   C. – Consequences of Acceptance (947 to 950) .............. 531

Section II. – International Practice (951 to 1008) ................. 532

  §1. – *Ad hoc* Arbitration (956 to 973) .......................... 534
     A. – Common Methods of Appointing *Ad hoc* Arbitrators
        (957 to 962) .................................................. 535
     B. – The Constitution of the Arbitral Tribunal Under the
        UNCITRAL Arbitration Rules (963 to 973) .............. 537
          1° The Appointment of the Arbitrators (967 to 971)........ 538
          2° The Challenge and Replacement of an Arbitrator
             (972 to 973) ........................................... 540

  §2. – Institutional Arbitration (974 to 1008) .................... 540
     A. – The Rules of Arbitration of the International Court of
        Arbitration of the ICC (976 to 993) ..................... 541
          1° Nature and Purpose of the International Court
             of Arbitration (977 to 981) .......................... 542
          2° The Appointment of the Arbitrators (982 to 989) ....... 544
          3° The Challenge and Replacement of an Arbitrator
             (990 to 992) ........................................... 548
          4° The Seat of the Arbitration (993) ...................... 551
     B. – Rules of Other Arbitral Institutions (994 to 1008) ..... 552
       1° The Initial Constitution of the Arbitral Tribunal
          (995 to 1005) ............................................ 552
       2° Resolving Subsequent Difficulties (1006 to 1008) ....... 554

### CHAPTER II

**THE STATUS OF THE ARBITRATORS**

(1009 to 1168)

Section I. – Arbitrators as Judges (1018 to 1100) .................. 560

  §1. – Requirements Imposed on Arbitrators (1019 to 1073) .......... 561
<table>
<thead>
<tr>
<th>A. – Nature of the Requirements (1020 to 1053)</th>
<th>561</th>
</tr>
</thead>
<tbody>
<tr>
<td>1° Independence and Impartiality (1021 to 1047)</td>
<td>561</td>
</tr>
<tr>
<td>a) Universal Acceptance of the Principle (1022 to 1027)</td>
<td>561</td>
</tr>
<tr>
<td>b) Definition of Independence and Impartiality (1028 to 1038)</td>
<td>564</td>
</tr>
<tr>
<td>c) Scope of the Requirement that Arbitrators Be Independent and Impartial (1039 to 1047)</td>
<td>571</td>
</tr>
<tr>
<td>2° Special Conditions Imposed on Arbitrators (1048 to 1052)</td>
<td>576</td>
</tr>
<tr>
<td>B. – Implementation of the Requirements (1053 to 1073)</td>
<td>577</td>
</tr>
<tr>
<td>1° Preventative Measures (1054 to 1065)</td>
<td>577</td>
</tr>
<tr>
<td>a) Duty of Disclosure (1055 to 1061)</td>
<td>577</td>
</tr>
<tr>
<td>b) Powers of the Authority Appointing the Arbitrators (1062 to 1065)</td>
<td>582</td>
</tr>
<tr>
<td>2° Punitive Measures (1066 to 1073)</td>
<td>583</td>
</tr>
<tr>
<td>a) Interrelation of the Two Procedures (1067 to 1069)</td>
<td>584</td>
</tr>
<tr>
<td>b) Challenging Arbitrators (1070 to 1071)</td>
<td>586</td>
</tr>
<tr>
<td>c) Actions to Set Aside or Prevent Enforcement of the Award (1072 to 1073)</td>
<td>587</td>
</tr>
<tr>
<td>§2. – Protection of the Arbitrators (1074 to 1100)</td>
<td>588</td>
</tr>
<tr>
<td>A. – The Principle of Immunity (1077 to 1088)</td>
<td>589</td>
</tr>
<tr>
<td>1° French Law (1078 to 1084)</td>
<td>589</td>
</tr>
<tr>
<td>2° Other Legal Systems (1085 to 1088)</td>
<td>592</td>
</tr>
<tr>
<td>B. – The Limits of Arbitrator Immunity (1089 to 1100)</td>
<td>594</td>
</tr>
<tr>
<td>1° Liability for Failure to Comply with Duty of Disclosure (1090 to 1095)</td>
<td>594</td>
</tr>
<tr>
<td>2° Liability of Arbitrators for the Wilful Violation of Their Obligations (1096 to 1100)</td>
<td>597</td>
</tr>
<tr>
<td>Section II. – Arbitrators as Service Providers (1101 to 1168)</td>
<td>599</td>
</tr>
<tr>
<td>§1. – The Contractual Nature of the Arbitrators’ Status (1102 to 1125)</td>
<td>599</td>
</tr>
<tr>
<td>A. – The Existence of a Contract Between the Arbitrators and the Parties (1103 to 1112)</td>
<td>600</td>
</tr>
<tr>
<td>B. – The Characterization of the Contract Between the Arbitrators and the Parties (1113 to 1125)</td>
<td>604</td>
</tr>
<tr>
<td>1° Agency (1115 to 1118)</td>
<td>605</td>
</tr>
<tr>
<td>2° A Contract for the Provision of Services (1119 to 1121)</td>
<td>606</td>
</tr>
<tr>
<td>3° A Sui Generis Contract (1122 to 1125)</td>
<td>607</td>
</tr>
<tr>
<td>§2. – The Arbitrators’ Contractual Rights and Obligations (1126 to 1168)</td>
<td>609</td>
</tr>
<tr>
<td>A. – The Arbitrators’ Obligations (1127 to 1156)</td>
<td>609</td>
</tr>
<tr>
<td>1° Determining the Arbitrators’ Obligations (1128 to 1132)</td>
<td>609</td>
</tr>
<tr>
<td>2° Remedies for Non-Compliance with the Arbitrators’ Obligations (1133 to 1156)</td>
<td>613</td>
</tr>
<tr>
<td>a) Termination of the Arbitrators’ Contract (1138 to 1141)</td>
<td>617</td>
</tr>
</tbody>
</table>
PART IV
THE ARBITRAL PROCEDURE

CHAPTER I
THE LAW GOVERNING THE PROCEDURE
(1171 to 1208)

Section I. — Autonomy of the Law Governing the Arbitral Procedure
(1172 to 1195) ......................................................... 633
§1. — The Law Governing the Procedure and the Law
Governing the Merits (1173 to 1177) ................................ 634
§2. — The Procedural Law and the Law of the Seat (1178 to 1192) ...................... 635
A. — National Legislation (1179 to 1181) .................................. 636
B. — International Conventions (1182 to 1185) .................................. 638
C. — Arbitration Rules (1186 to 1189) .......................................... 641
D. — Arbitral Case Law (1190 to 1192) .......................................... 642
§3. — Procedural Law and the Law of the Country Where the Award
Is Subject to Court Review (1193 to 1195) .................................. 644

Section II. — Determining the Law Governing the Arbitral Procedure
(1196 to 1208) .......................................................... 646
§1. — Is It Necessary or Appropriate to Determine the Procedural Law
in Advance? (1197 to 1198) ............................................ 647
§2. — Criteria for Determining the Law Applicable
to the Arbitral Procedure (1199 to 1204) .............................. 648
A. — Choice Made by the Parties (1200 to 1202) .............................. 648
B. — Choice Made by the Arbitrators (1203 to 1204) ......................... 649
§3. — The Consequences of the Determination of the Law
Governing the Arbitral Procedure (1205 to 1208) ......................... 651
TABLE OF CONTENTS

CHAPTER II
THE ARBITRAL PROCEEDINGS
(1209 to 1301)

Section I. – Commencement of the Arbitral Proceedings
(1210 to 1224) ........................................ 655
§1. – Adversarial Proceedings (1211 to 1223) ........................................ 656
  A. – The Request for Arbitration (1212 to 1220) ........................................ 656
    1° Form and Content of the Request (1213) ........................................ 656
    2° Time Limits (1214 to 1216) ........................................ 657
    3° Receipt (1217) ........................................................................... 658
    4° Amending the Request (1218) ........................................ 659
    5° Who is the Claimant? (1219 to 1220) ........................................ 659
  B. – The Answer to the Request for Arbitration (1221 to 1223) ........................................ 660
§2. – Default Proceedings (1224) ........................................ 662

Section II. – Organization of the Arbitral Proceedings (1225 to 1256) ........................................ 664
§1. – Terms of Reference (1228 to 1237) ........................................ 665
  A. – Utility of Terms of Reference (1229 to 1234) ........................................ 666
  B. – Nature of the Terms of Reference (1235 to 1237) ........................................ 672
§2. – Issues Relating to the Organization of the Proceedings (1238 to 1256) ........................................ 674
  A. – Seat of the Arbitration (1239 to 1240) ........................................ 674
  B. – Representation of the Parties (1241 to 1242) ........................................ 677
  C. – Communications (1243) ........................................ 678
  D. – Language of the Arbitration (1244 to 1245) ........................................ 678
  E. – Deadlines (1246 to 1248) ........................................ 680
  F. – Powers of the Chairman of the Arbitral Tribunal (1249) ........................................ 682
  G. – Secretary of the Arbitral Tribunal (1250) ........................................ 683
  H. – Taking of Evidence (1251) ........................................ 684
  I. – Partial Awards (1252) ........................................ 684
  J. – Costs of the Arbitration (1253 to 1256) ........................................ 684

Section III. – Pleadings and Evidence (1257 to 1301) ........................................ 688
§1. – The Submission of Memorials and Evidence (1261 to 1276) ........................................ 691
  A. – Evidence to Be Submitted (1262 to 1266) ........................................ 691
  B. – Method of Presenting Evidence (1267 to 1271) ........................................ 694
  C. – Powers of the Arbitrators (1272 to 1276) ........................................ 696
§2. – Witness Testimony (1277 to 1289) ........................................ 698
  A. – The Decision to Allow Witness Testimony (1277 to 1289) ........................................ 698
  B. – Who Can Be a Witness? (1280 to 1282) ........................................ 699
  C. – The Procedure for Hearing Witness Evidence (1283 to 1289) ........................................ 701
§3. – Expert Evidence and Site Inspections (1290 to 1295) ........................................ 703
§4. – Hearings (1296 to 1301) ........................................ 706
# TABLE OF CONTENTS

## CHAPTER III
**PROVISIONAL AND CONSERVATORY MEASURES IN THE COURSE OF THE ARBITRATION PROCEEDINGS**
(1302 to 1345)

### Section I. – Jurisdiction of the Arbitral Tribunal and the Courts
(1305 to 1324) ............................................................... 710

§1. – The Principle of Concurrent Jurisdiction (1306 to 1317) ........ 711
   A. – Jurisdiction of the Courts (1307 to 1309) ................ 711
   B. – No Waiver of the Arbitration Agreement (1310 to 1313) .... 715
   C. – Jurisdiction of the Arbitrators (1314 to 1317) .......... 716

§2. – Limits to Concurrent Jurisdiction (1318 to 1324) ................. 718
   A. – Agreement Between the Parties (1319 to 1322) .......... 718
   B. – The Courts Have Exclusive Jurisdiction in Matters of Enforcement (1323 to 1324) ......................... 720

### Section II. – Different Types of Provisional or Conservatory Measures
(1325 to 1345) ............................................................... 721

§1. – Conservatory Measures (1326 to 1335) .......................... 721
   A. – Conservatory Measures Intended to Prevent Irreparable Harm (1327 to 1330) .......................... 721
   B. – Conservatory Measures to Preserve Evidence (1331 to 1333) .......................... 724
   C. – Conservatory Measures Designed to Facilitate the Enforcement of the Award (1334 to 1335) ........ 726

§2. – Measures Designed to Facilitate the Production of Evidence
(1336 to 1338) ............................................................... 727

§3. – The Référe-Provision Procedure (1339 to 1345) ................. 728
   A. – The Principle (1340 to 1342) ................................. 729
   B. – Conditions for the Implementation of the Référe-Provision
       (1343 to 1345) .......................................................... 731
       1° *The Arbitral Tribunal Must Not Be Constituted* (1344) .... 731
       2° *Urgency* (1345) .................................................. 732

## CHAPTER IV
**THE ARBITRAL AWARD**
(1346 to 1419)

### Section I. – Concept and Classification of Arbitral Awards
(1348 to 1366) ............................................................... 735

§1. – The Concept of Arbitral Award (1349 to 1357) ................. 735

§2. – Different Categories of Award (1358 to 1366) .................. 740
   A. – Final Awards and Interim Awards (1359) ..................... 740
   B. – Partial Awards and Global Awards (1360 to 1362) .......... 741
C. – Default Awards (1363) .................................................. 744
D. – Consent Awards (1364 to 1366) ........................................ 744

Section II. – The Making of the Award (1367 to 1412) ................. 746
§1. – Role of the Arbitrators (1368 to 1374) .................................. 746
A. – The Decision-Making Process (1371) ................................. 747
B. – Methods of Communication Between the Arbitrators (1372) ...... 749
C. – Refusal of an Arbitrator to Participate in the Deliberations (1373) ................................................................. 749
D. – Secrecy of Deliberations (1374) .......................................... 750
§2. – Role of the Arbitral Institution (1375 to 1378) ....................... 751
§3. – Time-Limits for Making the Award (1379 to 1388) ................. 753
A. – Where the Parties Have Specified No Time-Limit (1380 to 1384) ................................................................. 753
1° Where the Parties Have Chosen a Mechanism for Fixing a Deadline (1381 to 1383) ................................................................. 753
2° Where the Parties Have Not Chosen a Mechanism For Fixing a Deadline (1384) ................................................................. 753
B. – Where the Parties Have Specified a Time-Limit (1385 to 1388) ... 756
1° Extending the Deadline Fixed by the Parties (1387) .................. 757
2° Breach of the Time-Limit Fixed by the Parties (1388) ................. 759

Section III. – Form of the Award (1389 to 1412) ......................... 760
§1. – Language of the Award (1391) .......................................... 760
§2. – Reasons for the Award (1392 to 1395) ................................ 761
§3. – Dissenting Opinions (1396 to 1405) .................................... 764
A. – Admissibility of Dissenting Opinions (1397 to 1398) ............. 764
B. – Usefulness of Dissenting Opinions (1399 to 1402) .................. 766
C. – The Legal Regime Governing Dissenting Opinions (1403 to 1405) ................................................................. 768
§4. – Information Which Must Appear in the Award (1406 to 1410) .... 769
A. – Date of the Award (1408) ................................................. 771
B. – Signature of the Arbitrators (1409) ...................................... 771
C. – Place Where the Award is Made (1410) ................................. 772
§5. – Recipients of the Award (1411 to 1412) ................................. 773

Section IV. – Immediate Effects of the Award (1413 to 1419) ............ 775
§1. – Termination of the Arbitrators’ Jurisdiction (1414 to 1429) .......... 775
A. – Interpretation of the Award (1415) ...................................... 776
B. – Correcting Clerical Errors (1416) ....................................... 777
C. – Additional Awards (1417) ............................................... 778
D. – Withdrawal of an Award Obtained by Fraud (1418) ................. 779
§2. – Res Judicata (1419) .......................................................... 779
PART V
THE LAW APPLICABLE TO THE MERITS OF THE DISPUTE

CHAPTER I
APPLICABLE LAW CHOSEN BY THE PARTIES
(1421 to 1536)

Section I. – Formulation and Timing of the Parties’ Choice of Law
(1427 to 1430) 787
§1. – Formulation of the Parties’ Choice of Law (1427 to 1429) 787
§2. – The Timing of the Parties’ Choice of Law (1430) 790

Section II. – The Subject Matter of the Parties’ Choice (1431 to 1508) 791
§1. – National Laws (1432 to 1442) 791
A. – Choice of a Neutral Law (1435) 792
B. – Choice of Several Laws (Dépeçage) (1436) 794
C. – Choice of a Stabilized Law (1437) 795
D. – Choice of a Law Which Renders the Contract Void (1439) 797
E. – Contracts with No Governing Law (1440 to 1442) 799
§2. – Transnational Rules (1443 to 1499) 801
A. – Validity of the Choice of Transnational Rules as Governing Law (1444 to 1448) 802
B. – Critical Analysis of Transnational Rules (1449 to 1454) 808
1° Conceptual Criticism (1450) 808
2° Ideological Criticism (1451 to 1453) 809
3° Practical Criticism (1454) 811
C. – Method and Content of Transnational Rules (1455 to 1499) 813
1° Method (1456 to 1458) 813
2° Content (1459 to 1499) 818
a) Principles Relating to the Validity of Contracts (1464 to 1468) 821
b) Principles Relating to the Interpretation of Contracts (1469 to 1477) 824
c) Principles Relating to the Performance of Contracts (1478 to 1499) 828
§3. – Amiable Composition (1500 to 1508) 835

Section III. – Limits on the Effectiveness of the Parties’ Choice of Law
(1509 to 1536) 841
§1. – Unsatisfactory Restrictions of the Effectiveness of the Parties’ Choice of Governing Law (1511 to 1528) 842
A. – The Theory of the Incompleteness of the Law Chosen by the Parties (1512) 842
B. – The Extensive Interpretation of International Trade Usages (1513 to 1514) 844
C. — The Theory of International Mandatory Rules (Lois de Police)
   (1515 to 1528) .......................................................... 847

§2. — Legitimate Restrictions of the Effectiveness of the Parties' Choice of Governing Law (1529 to 1536) ............................................. 859
A. — Scope of the Law Chosen by the Parties (1530 to 1532) .......... 859
B. — International Public Policy (1533 to 1536) ............................ 860

CHAPTER II
APPLICABLE LAW CHOSEN BY THE ARBITRATORS
(1537 to 1557)

Section I. — The Method Used by Arbitrators in Selecting the Applicable Law
   (1538 to 1553) .......................................................... 865
§1. — Is a Method Imposed on the Arbitrators? (1540 to 1544) ............ 867
A. — Ordinary Choice of Law Rules of the Seat of the Arbitration (1541 to 1543) .................................................. 867
B. — Choice of Law Rules of the Seat of the Arbitration Specifically Designed for International Arbitration (1544) ......................... 869
§2. — The Different Methods Used by Arbitrators to Choose the Applicable Law (1545 to 1553) ............................................. 871
A. — Application of a Choice of Law Rule (1546 to 1551) ................. 871
   1° The Cumulative Method (1547) ....................................... 872
   2° General Principles of Private International Law
      (1548 to 1549) ......................................................... 873
   3° The Free Selection of a Choice of Law Rule (1550 to 1551) ........ 875
B. — Direct Choice Method (1552 to 1553) .................................. 876

Section II. — The Subject Matter of the Arbitrators' Choice
   (1554 to 1556) .......................................................... 878

Section III. — Limits on the Effectiveness of the Arbitrators' Choice (1557) .... 881

PART VI
COURT REVIEW OF ARBITRAL AWARDS

CHAPTER I
FRENCH LAW
(1560 to 1662)

Section I. — Procedure for the Review by the Courts
   (1564 to 1600) .......................................................... 888
§1. — Recognition and Enforcement (1566 to 1585) ......................... 889
A. — Recognition of Arbitral Awards (1567) .................................. 889
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>B.</td>
<td>Enforcement of Arbitral Awards (1568 to 1579)</td>
<td>891</td>
</tr>
<tr>
<td></td>
<td>1° Jurisdiction (1569 to 1571)</td>
<td>892</td>
</tr>
<tr>
<td></td>
<td>a) Subject-Matter Jurisdiction (1570)</td>
<td>892</td>
</tr>
<tr>
<td></td>
<td>b) Territorial Jurisdiction (1571)</td>
<td>893</td>
</tr>
<tr>
<td></td>
<td>2° Procedure (1572 to 1574)</td>
<td>894</td>
</tr>
<tr>
<td></td>
<td>3° Extent of the Review by the Court (1575 to 1579)</td>
<td>896</td>
</tr>
<tr>
<td>C.</td>
<td>Recourse Against an Order Refusing or Granting Recognition or</td>
<td>899</td>
</tr>
<tr>
<td></td>
<td>Enforcement (1580 to 1585)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1° Appeal Against a Decision Refusing Recognition</td>
<td>899</td>
</tr>
<tr>
<td></td>
<td>or Enforcement (1581 to 1582)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>2° Appeal Against a Decision Granting Recognition</td>
<td>901</td>
</tr>
<tr>
<td></td>
<td>or Enforcement (1583 to 1585)</td>
<td></td>
</tr>
<tr>
<td>§2.</td>
<td>Actions to Set Aside (1586 to 1595)</td>
<td>902</td>
</tr>
<tr>
<td>A.</td>
<td>Actions Before the French Courts to Set Awards Aside</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(1587 to 1591)</td>
<td>902</td>
</tr>
<tr>
<td></td>
<td>1° Awards Which Can Be the Subject of an Action to Set Aside in</td>
<td>902</td>
</tr>
<tr>
<td></td>
<td>France (1588 to 1590)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>2° Procedure Before the Court of Appeals (1591)</td>
<td>906</td>
</tr>
<tr>
<td>B.</td>
<td>The Effect of Proceedings Pending Outside France to Set Aside</td>
<td>908</td>
</tr>
<tr>
<td></td>
<td>an Award or of a Decision Setting Its Aside (1592 to 1595)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1° Jurisdiction of Courts Outside France</td>
<td>908</td>
</tr>
<tr>
<td></td>
<td>to Set Aside Awards (1593)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>2° Grounds on Which an Award May Be Set Aside</td>
<td>910</td>
</tr>
<tr>
<td></td>
<td>Outside France (1594)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>3° Consequences In France of a Foreign Judgment Setting</td>
<td>913</td>
</tr>
<tr>
<td></td>
<td>Aside an Arbitral Award (1595)</td>
<td></td>
</tr>
<tr>
<td>§3.</td>
<td>Exclusivity of Recourse Against Arbitral Awards (1596 to 1600)</td>
<td>916</td>
</tr>
<tr>
<td>A.</td>
<td>No Appeal (1597)</td>
<td>917</td>
</tr>
<tr>
<td>B.</td>
<td>No Third Party Action (1598)</td>
<td>918</td>
</tr>
<tr>
<td>C.</td>
<td>No Action to Revise the Award for Fraud (1599)</td>
<td>919</td>
</tr>
<tr>
<td>D.</td>
<td>No Action to Have the Award Declared Non-Binding (1600)</td>
<td>921</td>
</tr>
</tbody>
</table>

Section II. – The Extent of the Review by the Courts (1601 to 1662) 922

§1. – Where the Arbitrators Have Reached Their Decision in the Absence of an Arbitration Agreement or on the Basis of an Agreement Which Is Void or Has Expired (1608 to 1619) 930

A. – Method (1609 to 1611) 931

B. – Substance (1612 to 1619) 932

1° Absence of an Arbitration Agreement (1613 to 1615) 933

2° Where the Arbitration Agreement Is Void (1616 to 1618) 934

3° Where the Arbitration Agreement Has Expired (1619) 935

§2. – Irregular Composition of the Arbitral Tribunal (1620 to 1625) 935

§3. – Where the Arbitrators Have Failed to Comply with Their Brief (1626 to 1637) 937
TABLE OF CONTENTS

A. – Failure to Observe the Limits of the Parties’ Claims
   (1627 to 1631) ................................................. 938
   1° Infra Petita (1628 to 1630) ................................. 938
   2° Ultra Petita (1631) ........................................... 941

B. – Where the Arbitrators Have Failed to Act in Accordance with the
    Powers Conferred on Them by the Parties (1632 to 1637) ......... 942
   1° Procedure (1633) ............................................ 942
   2° Merits (1634 to 1637) ...................................... 943

§4. – Breach of Due Process (1638 to 1644) ........................................ 947

§5. – Where Recognition or Enforcement Would Be Contrary to
    International Public Policy (1645 to 1662) ............................ 953
A. – Method (1646 to 1650) ........................................ 953
   1° The International Nature of Public Policy (1647 to 1648) ....... 953
   2° The Application In Concreto of Public Policy (1649) ............. 955
   3° The Evolving Character of Public Policy (1650) ................... 956
B. – Content (1651 to 1662) ........................................ 957
   1° Public Policy Requirements Concerning the Arbitral
      Procedure (1652 to 1660) ................................... 957
   2° Public Policy Requirements Concerning the Merits
      of the Dispute (1661 to 1662) ................................ 960

CHAPTER III
INTERNATIONAL CONVENTIONS
(1663 to 1716)

Section 1. – The 1958 New York Convention (1666 to 1713) ............. 966

§1. – Procedure for Recognition and Enforcement of Foreign Arbitral
      Awards Under the New York Convention (1670 to 1692) ........... 967
A. – Procedure in the Host Country (1671 to 1675) ...................... 967
B. – Interaction of Proceedings in the Host Country with
      Proceedings in the Country of Origin (1676 to 1692) ............. 971
   1° Optional Nature of Proceedings in the Country of Origin
      (1677 to 1684) .................................................. 971
   2° Possible Implications in the Host Country of Proceedings in the
      Country of Origin (1685 to 1692) ................................ 977
      a) Effect in the Host Country of a Decision Setting Aside or
          Suspending an Award in the Country of Origin
             (1686 to 1690) ............................................. 978
            1) Effect of a Decision to Set Aside (1687 to 1689) ....... 978
            2) Effect of a Suspension (1690) .......................... 980
      b) Effect, in the Host Country, of Proceedings to Set Aside or
          Suspend the Award Pending in the Country of Origin
             (1691 to 1692) ............................................. 981
§2. - Substantive Conditions Governing Recognition and Enforcement of Foreign Arbitral Awards Under the New York Convention

(1693 to 1713) ................................................................. 983

A. - Grounds Which Must Be Raised by the Party Resisting Recognition or Enforcement (1694 to 1703) ................................................................. 983

1° Invalid Arbitration Agreements (1695) ................................................................. 984

2° Breach of Due Process (1696 to 1699) ................................................................. 985

3° Non-Compliance with the Terms of the Arbitration Agreement (1700) ................................................................. 987

4° Irregularities Affecting the Composition of the Arbitral Tribunal or the Arbitral Proceedings (1701 to 1703) ................................................................. 989

B. - Grounds Which Can Be Raised by the Courts on Their Own Motion

(1704 to 1713) ................................................................. 993

1° Non-Arbitrability of the Dispute (1705 to 1709) ................................................................. 994

2° Awards Contravening International Public Policy

(1710 to 1713) ................................................................. 996

Section II. - The 1961 European Convention

(1714 to 1716) ................................................................. 998

ANNEXES

Annex I - France ................................................................. 1005
Annex II - Switzerland ................................................................. 1021
Annex III - UNCITRAL Model Law ................................................................. 1027
Annex IV - 1958 New York Convention ................................................................. 1039
Annex V - 1961 European Convention ................................................................. 1049
Annex VI - 1975 Panama Convention ................................................................. 1061
Annex VII - AAA International Arbitration Rules ................................................................. 1067
Annex VIII - ICC Rules of Arbitration ................................................................. 1081
Annex IX - LCIA Rules ................................................................. 1105
Annex X - UNCITRAL Arbitration Rules ................................................................. 1129

Bibliography ................................................................. 1145

Table of Arbitral Awards ................................................................. 1159
Table of Arbitration Rules ................................................................. 1173
Table of International Instruments ................................................................. 1181
Table of Judicial Decisions ................................................................. 1187
Table of Legislation ................................................................. 1227

Alphabetical Index ................................................................. 1245