Comparative Law of International Arbitration

SECOND EDITION
UPDATED AND REVIEWED
By

JEAN-FRANÇOIS POUDERET
Doctor in Law, Dr. h.c. mult.,
Attorney at Law and
Honorary Professor of
the University of Lausanne

SÉBASTIEN BESSON
Doctor in Law, L.L.M.
(Columbia),
Attorney at Law, Partner,
Python & Peter, Geneva

Translated by

STEPHEN V. BERTI
Ordinary Professor at the
University of
Lucerne, Titular Professor
at the University
of Fribourg

ANNETTE PONTI
Attorney at Law,
Python & Peter, Geneva

THOMSON SWEET & MAXWELL
Schulthess
CONTENTS

Preface ................................................................. v
Contents ............................................................... vii
Table of Cases ......................................................... xi
Table of Abbreviations .............................................. xxxv

Chapter 1. Definition and Sources of International Arbitration

1.1 Definition of arbitration ........................................ 1
1.2 Distinctions between arbitration and related institutions .... 12
1.3 The international character of arbitration ....................... 22
1.4 Sources ................................................................ 41

Chapter 2. The Law Governing the Arbitration ("lex arbitrii") and
the Role of the Seat of the Arbitral Tribunal

2.1 The concept of "lex arbitrii" ........................................ 112
2.2 The role of the seat ................................................. 115
2.3 Delocalised arbitration ............................................. 120
2.4 The concept of the seat ............................................ 134
2.5 Subsidiary or alternative connecting factors .................... 136
2.6 Determining and transferring the seat ........................... 143
2.7 The arbitrators and the "lex arbitrii" of the seat ............... 145
2.8 Practical criteria for choosing the seat of the arbitration ...... 148

Chapter 3. Definition and Essential Elements

3.1 Definition and essential elements ................................. 149
3.2 The separability of the arbitration clause ....................... 162
3.3 The form of the arbitration agreement .......................... 183
3.4 The parties to the arbitration ..................................... 227
3.5 The law applicable to the arbitration agreement ............. 291
## Contents

3.6 Interpretation and the scope of the arbitration agreement ................. 304
3.7 Arbitrability ................................................................................. 326
3.8 The effects of the arbitration agreement ........................................ 367
3.9 Extinguishment of the arbitration agreement .................................... 377

### Chapter 4. The Arbitral Tribunal

4.1 Composition of the arbitral tribunal ............................................. 387
4.2 Appointment of the arbitrators ..................................................... 391
4.3 Independence and challenge ....................................................... 413
4.4 Replacement of an arbitrator ...................................................... 430
4.5 The status of the arbitrator ........................................................ 437
4.6 The arbitrator’s mission .............................................................. 450

### Chapter 5. Control of the Arbitral Tribunal’s Jurisdiction

5.1 The arbitral tribunal’s control of its own jurisdiction ....................... 457
5.2 Control by the courts at the seat of the arbitration ......................... 478
5.3 Direct control by the ordinary courts .......................................... 483
5.4 Indirect control by a court seized with the merits: priority of the arbitral tribunal or *lis pendens*? .................................................. 488

### Chapter 6. The Arbitral Procedure

6.1 The rules applicable to the arbitral procedure ................................ 522
6.2 The conduct of the arbitral procedure ......................................... 559
6.3 Provisional measures ................................................................... 604
6.4 Evidence ..................................................................................... 642

### Chapter 7. The Law Applicable to the Merits of the Dispute

7.1 The problem ................................................................................ 676
7.2 The private international law specific to international arbitration.......... 679
7.3 Rules of law, general principles, trade usages, alias *lex mercatoria* .... 690
7.4 The limits of choice of the parties and arbitrators ........................... 705
7.5 *Amicable composition, ex aequo et bono* arbitration and equity clauses ................................................................................. 709

### Chapter 8. The Award

8.1 The various types of awards ....................................................... 721
8.2 Arbitrators’ deliberations and vote .............................................. 732
8.3 The form and contents of the award ............................................. 744
8.4 Rectification, interpretation and additional awards .......................... 760
Contents

Chapter 9. The Judicial Control of the Award by the Court of the Seat of the Arbitration

9.1 Challenges and recognition ....................................................... 767
9.2 Jurisdiction ............................................................................. 770
9.3 Decisions which can be challenged ........................................... 773
9.4 Time-limit for challenging an award and effect on the enforcement ... 779
9.5 Grounds for challenge .............................................................. 785
9.6 The effects of a successful challenge ......................................... 833
9.7 Waiver of the challenges .......................................................... 838
9.8 Revocation of the award ........................................................... 843

Chapter 10. Recognition and Enforcement of Arbtrital Awards

10.1 Introduction ............................................................................ 849
10.2 The recognition and enforcement of awards in the state of the seat of the arbitration (domestic recognition) ........................................ 858
10.3 Recognition and enforcement of foreign awards ......................... 877
10.4 Procedure ............................................................................... 949

Chapter 11. General Conclusions

11.1 Similarities and differences: an assessment ................................ 956
11.2 Some doubts to dissipate, gaps to fill and defects to correct ........ 992
11.3 The necessity of harmonising relations between state jurisdictions in international arbitration matters .............................................. 1008

Table of Legal Sources .................................................................. 927
Bibliography ................................................................................. 929
Index ........................................................................................... 939