

# **INTERNATIONAL ARBITRATION**

## **Law and Practice**

**Third Edition**

**Mauro Rubino-Sammartano**

(commercial, investment, online, state-individual,  
interstate, commodities, U.S.-Iran, UNCITRAL  
and sports arbitration)

**With forewords by**

**Prof. Pierre Mayer**

**and**

**The Right Hon.  
The Lord Mustill**

**JURIS**

### **Questions About This Publication**

For assistance with shipments, billing or other customer service matters,  
please call our Customer Services Department at:  
1-631-350-2100

To obtain a copy of this book, call our Sales Department:  
1-631-351-5430  
Fax: 1-631-351-5712

Toll Free Order Line:  
1-800-887-4064 (United States & Canada)  
See our web page about this book:  
[www.arbitrationlaw.com](http://www.arbitrationlaw.com)

COPYRIGHT © 2014  
by JurisNet, LLC

All rights reserved. No part of this publication may be reproduced in any form or by any electronic or mechanical means including information storage and retrieval systems without permission in writing from the publisher.

Printed in the United States of America.  
ISBN 978-1-937518-15-8  
**JurisNet, LLC**  
71 New Street  
Huntington, New York 11743  
USA  
[www.arbitrationlaw.com](http://www.arbitrationlaw.com)

Our role is that of bearer of our beliefs and ideals.  
What matters then is that those beliefs and ideals continue to be  
carried, irrespective of who the individual bearers are.  
I therefore dedicate this work to all those  
who unselfishly aspire toward the ideals of arbitration.



# SUMMARY CONTENTS

<i>Contents</i> .....	ix
<i>Foreword to the Third Edition</i> .....	xxxix
<i>Foreword to the Second Edition</i> .....	xli
<i>Preface</i> .....	xliii
<i>About the Author</i> .....	xlv

## PART I

### ARBITRATION AND OTHER ALTERNATIVE DISPUTE RESOLUTION METHODS

#### Role and Nature of Arbitration

Chapter 1: Different Types of Arbitration and Alternative Dispute Resolution Methods .....	3
Chapter 2: Characterisation of Arbitration .....	51
Chapter 3: The Sources of International Arbitration Law.....	73
Chapter 4: Nationality of Arbitration .....	97

#### International Arbitration Law

Chapter 5: International Arbitration Law.....	131
---	-----

#### Commercial (Private) Arbitration

Chapter 6: Disputes Capable of Arbitration and Arbitral Remedies .....	149
Chapter 7: The Arbitration Agreement .....	207
Chapter 8: The Choice of Law Rules to Govern the Arbitration Agreement.....	321
Chapter 9: The Parties to Arbitration – Capacity to Submit to Arbitration – Sovereign Immunity .....	349

#### Administered Arbitration

Chapter 10: The Role of Arbitral Institutions .....	409
---	-----

#### The Arbitral Tribunal

Chapter 11: The Arbitrator .....	441
----------------------------------	-----

#### The Role of State Courts

Chapter 12: The Role of State Courts in Aiding Arbitration .....	543
--	-----

**Confidentiality**

- Chapter 13: Confidentiality..... 613

**Choice of Substantive Law**

- Chapter 14: Substantive Law..... 629

***Ex Bono et Aequo***

- Chapter 15: *Ex Bono et Aequo* Decisions and  
*Amiable Compositeur* ..... 691

**Public Policy**

- Chapter 16: Arbitration and Public Policy ..... 719

**The Rules of Procedure**

- Chapter 17: Applicable Procedural Law ..... 773  
Chapter 18: Arbitration Rules..... 811

**The Venue**

- Chapter 19: The Venue of the Proceedings..... 821

**Documents-Only Arbitration**

- Chapter 20: Documents-Only Arbitration ..... 835

**Pre-Arbitral Referee**

- Chapter 21: The Pre-Arbitral Referee..... 843

**The Initial Stage**

- Chapter 22: Preliminary Issues and Initial Stage ..... 851

**Interlocutory Injunctions**

- Chapter 23: Interlocutory Injunctions ..... 931

**The Evidentiary Stage**

- Chapter 24: The Evidentiary Stage ..... 983  
Chapter 25: The Last Pleadings and Oral Argument ..... 1077  
Chapter 26: Speed and Efficiency in Arbitration ..... 1081

**Procedural Due Process**

Chapter 27:	Breach of Due Process.....	1091
-------------	----------------------------	------

**The Award**

Chapter 28:	The Award .....	1121
Chapter 29:	Costs Interest and Higher Damages .....	1235
Chapter 30:	Filing and Notification of the Award.....	1259

**Challenges of Awards**

Chapter 31:	Challenges of Awards.....	1273
Chapter 32:	Full <i>De Novo</i> Review before a New Arbitral Tribunal.....	1339

**Enforcement of Awards**

Chapter 33:	Enforcement in the State of Origin .....	1351
Chapter 34:	Enforcement and Recognition in Other States .....	1367
Chapter 35:	Recognition and Enforcement under the New York Convention .....	1417

**PART II****SPECIAL ARBITRAL PROCEEDINGS**

Chapter 36:	International Public Law Arbitration .....	1459
Chapter 37:	Arbitration, the Brussels Convention, and the Influence of the European Convention on Human Rights .....	1483
Chapter 38:	UNCITRAL Arbitration .....	1505
Chapter 39:	Investor State Arbitration (The Washington Convention).....	1545
Chapter 40:	Arbitration of Commercial Disputes between a State and a Private Party .....	1623
Chapter 41:	Arbitration under the Algiers Declarations (The Iran-U.S. Claims Tribunal) .....	1635
Chapter 42:	Commodity Arbitration .....	1677
Chapter 43:	The Sports Arbitral Tribunal.....	1683
Chapter 44:	Online Dispute Resolution.....	1717
Chapter 45:	Obstacles to Overcome .....	1749
Chapter 46:	The Continuous Search for Improvements .....	1765

**APPENDIX**

Appendix A: Articles on Arbitration.....	1799
Appendix B: Other Articles.....	1879
Appendix C: Textbooks on Arbitration.....	1881
Appendix D: Other Textbooks .....	1889
<i>Table of Awards</i> .....	1895
<i>Table of Cases</i> .....	1915
<i>Index</i> .....	2013

# CONTENTS

<i>Foreword to the Third Edition</i> .....	xxxix
<i>Foreword to the Second Edition</i> .....	xli
<i>Preface</i> .....	xliii
<i>About the Author</i> .....	xlv

## PART I

### ARBITRATION AND OTHER ALTERNATIVE DISPUTE RESOLUTION METHODS

#### ROLE AND NATURE OF ARBITRATION

<b>Chapter 1: Different Types of Arbitration and Alternative Dispute Resolution Methods.....</b>	<b>3</b>
<i>Arbitration</i> .....	3
1.1. Arbitration <i>vis-à-vis</i> Court Proceedings.....	3
1.2. From Hostility to Favour .....	4
1.3. Different Types of Arbitration.....	8
1.4. Baseball (Final Offers Arbitration) .....	11
1.5. <i>Ad Hoc</i> versus Administered Arbitration .....	14
1.6. Court-Annexed Arbitration .....	15
1.7. Compulsory (or Statutory) Arbitration .....	17
1.8. Online Arbitration .....	21
<i>Other Alternative Dispute Resolution Methods.....</i>	21
1.9. Alternative Dispute Resolution Methods.....	21
1.10. Conciliation and Mediation .....	24
1.11. Mini Trials.....	36
1.12. Technical Expertise (Valuation, <i>Schiedsgutachten</i> , <i>Bindend Advies</i> , Quality Arbitration) .....	38
1.13. Technical Expertise versus Arbitration .....	40
1.14. Med/Arb .....	42
1.15. MEDALOA .....	43
1.16. Dispute Review Board (Or DAB).....	43
1.17. Partnering .....	44
1.18. Adjudication .....	45
1.19. Adaptation of Contracts.....	47
<i>Multi-Tier Formulas</i> .....	49
1.20. Multi-Steps Sequence of ADR Mechanisms.....	49

---

<b>Chapter 2: Characterisation of Arbitration.....</b>	51
<i>Notion and Role of Arbitration .....</i>	51
2.1. The Notion of Arbitration .....	51
2.2. The Architecture and Role of Arbitration and of National State Courts.....	53
2.3. Superiority of Arbitration or Equal Alternative.....	56
2.4. The Mandate of the Arbitral Tribunal .....	58
2.5. Distinction between Arbitration and a Joint Mandate to Settle.....	59
<i>Battle of Theories.....</i>	61
2.6. The Mere Contractual Contents Doctrine.....	61
2.7. The Judicial Contents Doctrine.....	61
2.8. The Hybrid Nature.....	62
2.9. The Autonomous Nature Doctrine .....	63
2.10. The Sharp Position Taken in <i>Cinisello Balsamo</i> .....	64
2.11. Does the Award Have Jurisdictional Effects?.....	65
<i>Arbitration as a Separate Jurisdiction .....</i>	66
2.12. The Nature of Arbitration.....	66
2.13. Does Arbitration Fall within Ordinary Jurisdiction and Do Its Awards Have the Nature of Court Judgments? .....	67
<b>Chapter 3: The Sources of International Arbitration Law.....</b>	73
<i>International Conventions .....</i>	73
3.1. International Conventions.....	73
3.1.1. Multilateral Conventions .....	74
3.1.2. Bilateral Conventions .....	82
3.2. The Parties' Intention.....	83
3.3. Rules of Arbitral Institutions .....	84
3.4. Arbitrators' Alternative Ruling .....	87
3.5. National Legal Systems .....	87
3.6. Substantive Rules of International Arbitration – Mandatory Rules.....	89
<i>Precedents .....</i>	92
3.7. Precedents .....	92
3.7.1. Arbitral Precedents .....	92
3.7.2. Court Precedents .....	94
3.8. International Arbitration Moots.....	95
3.9. Arbitration Schools .....	95
3.10. Research .....	95
<b>Chapter 4: Nationality of Arbitration .....</b>	97
<i>Domestic versus Foreign Arbitration .....</i>	97
4.1. The Categories of National and Foreign Arbitration .....	97
4.2. Criteria to Identify Nationality .....	101
4.2.1. The Geographical Criterion.....	101

4.2.2. The Procedural Criterion.....	103
4.2.3. The Difference between Procedural Nationality and the Place Taken into Account for Recognition of the Award.....	112
<i>The Category of International Arbitration</i> .....	114
4.3. The Category of International Arbitration .....	114
4.3.1. Monism or Dualism .....	115
4.3.2. The Subjective Criterion.....	116
4.3.3. Reference to International Trade.....	118
4.3.4. A Combined or Alternative Criterion .....	121
4.3.5. The Procedural Criterion.....	123
<i>Transnational Arbitration</i> .....	127
4.4. Transnational Arbitration .....	127
4.5. A-national Awards .....	129
4.6. Conclusions.....	129

## INTERNATIONAL ARBITRATION LAW

<b>Chapter 5: International Arbitration Law</b> .....	131
<i>Analysis</i> .....	131
5.1. Analysis as to the Existence of an International Arbitration Law.....	131
5.2. The Two Branches of International Arbitration Law.....	132
<i>Public International Arbitration Law</i> .....	132
5.3. Public International Arbitration Law .....	132
<i>International Private Arbitration</i> .....	134
5.4. International Private Arbitration Law .....	134
5.4.1. A Fragmentary Body .....	135
5.4.2. Multilateral Conventions .....	136
5.4.3. Bilateral Conventions Dealing with Arbitration .....	138
5.4.4. Other International Conventions which Affect Arbitration .....	139
5.4.5. National Provisions Dealing with Transnational Arbitration.....	141
5.4.6. International Arbitration Rules .....	142
5.4.7. Consolidated Principles of International Commercial Arbitration .....	142
5.4.8. Substantive Rules of Private International Law .....	145
5.5. Conclusions.....	145

**COMMERCIAL (PRIVATE) ARBITRATION**

<b>Chapter 6: Disputes Capable of Arbitration and Arbitral Remedies .....</b>	149
<i>Dispute Requirements .....</i>	150
6.1. Presence of a Dispute.....	150
6.2. Disputes Capable of Settlement by Arbitration .....	150
6.3. The Law Applicable to Arbitrability .....	157
<i>Classes of Disputes .....</i>	161
6.4. Consumer Claims.....	161
6.5. Family Disputes .....	163
6.6. Competition Law Disputes .....	163
6.7. Employment Disputes.....	166
6.8. <i>In Rem</i> Actions and Real Estate Disputes .....	167
6.9. Commercial Disputes.....	168
6.10. Tort Claims.....	170
6.11. Unjust Enrichment .....	175
6.12. Intellectual Property Disputes .....	177
6.13. Insolvency Claims .....	178
<i>Mass Claims and Class Actions.....</i>	181
6.14. Mass Claims and Class Actions.....	181
6.15. The U.S. Fairness Arbitration Bill.....	185
<i>Illegal Contracts .....</i>	186
6.16. Disputes Involving Mandatory Provisions and Illegal Contracts.....	186
6.17. Violations of Human Rights .....	188
6.18. General Trend .....	189
<i>Connections between Disputes .....</i>	190
6.19. Connection between Disputes That Are and Aren't Capable of Settlement by Arbitration .....	190
<i>Arbitral Remedies .....</i>	192
6.20. Arbitral Remedies .....	192
6.21. Pre- and Post-Award Interest.....	197
6.22. Authority to Amend or Terminate a Legal Relationship .....	200
<i>Punitive and Treble Damages.....</i>	204
6.23. Punitive and Treble Damages .....	204
<b>Chapter 7: The Arbitration Agreement.....</b>	207
<i>Distinctions.....</i>	208
7.1. The Arbitration Agreement, the Contract with the Arbitrators and the Contract to Administer the Proceedings.....	208
<i>The Formation of the Agreement .....</i>	211
7.2. Unilateral and Optional Clauses.....	211
<i>The Parties.....</i>	212
7.3. Capacity of the Parties.....	212

---

<i>Form and Contents</i> .....	218
7.4.    Form Requirements .....	218
7.5.    Non Signatories.....	238
7.6.    String Contracts.....	244
7.7.    Contents .....	245
7.8.    Interpretation of the Arbitration Agreement.....	261
<i>Duty to Cooperate</i> .....	265
7.9.    Duty to Cooperate .....	265
<i>Separability</i> .....	265
7.10.    Autonomy – Separability .....	265
<i>The Applicable Law</i> .....	276
7.11.    The Applicable Law .....	276
7.12.    Validity of the Arbitration Agreement.....	283
<i>Time Limit</i> .....	289
7.13.    Time Limit to Enter into an Arbitration Agreement – Inertia of the Parties – Forum Prorogatum.....	289
<i>Effects</i> .....	292
7.14.    Positive and Negative Effects.....	292
<i>Conditions</i> .....	298
7.15.    Conditions Precedent .....	298
<i>Waiver</i> .....	301
7.16.    Waiver .....	301
<i>Termination</i> .....	306
7.17.    Expiry, Impossibility and Termination.....	306
<i>Remedies for Invalidity</i> .....	315
7.18.    Remedies for Invalidity.....	315
<i>Consummation of the Right to Arbitrate</i> .....	316
7.19.    Consummation of the Right to Arbitrate .....	316
<i>Loss of Effects</i> .....	319
7.20.    Loss of Effects if a Public Body Takes Over the Position of a Contracting Party.....	319
<b>Chapter 8: The Choice of Law Rules to Govern the Arbitration Agreement</b> .....	321
8.1.    Issue Located between the Merits of the Dispute and the Arbitral Proceedings.....	321
<i>Autonomy</i> .....	321
8.2.    Autonomy of the Arbitration Clause .....	321
<i>The Main Choice</i> .....	323
8.3.    The Parties' Choice of Law .....	323
<i>Supplementary Choice</i> .....	324
8.4.    Selection in the Absence of the Parties' Choice .....	324
<i>As to the Arbitration Agreement</i> .....	336
8.5.    Validity and Invalidity of the Arbitration Agreement .....	336
<i>As to the Arbitrability</i> .....	344
8.6.    Law Applicable to the Separate Issue of Arbitrability .....	344

---

<i>As to the Capacity of the Parties</i> .....	346
8.7.    Law Applicable to the Capacity of the Parties .....	346
8.8.    Conclusions.....	346
<b>Chapter 9: The Parties to Arbitration – Capacity to Submit to Arbitration – Sovereign Immunity</b> .....	349
<i>Classes of Parties</i> .....	350
9.1.    Private Parties, Public Administrations and Government Enterprises .....	350
9.2.    Disputes as to Being a Party to an Arbitration Agreement – Piercing the Corporate Veil – Alter Ego .....	353
9.3.    Non Signatories.....	358
<i>Sovereign Immunity</i> .....	361
9.4.    Sovereign Immunity .....	361
<i>Changes to the Original Contract</i> .....	367
9.5.    Subjective and Objective Changes to the Original Contract.....	367
<i>Connections</i> .....	368
9.6.    Participation of Several Connected Parties in the Proceedings.....	368
9.7.    Connected Agreements and Arbitration Clause in One of Them – Group of Companies .....	375
<i>Succession</i> .....	379
9.8.    Succession in the Contract .....	379
<i>Third Parties – Joinders</i> .....	387
9.9.    Third Parties and Their Joinder .....	387
9.10.    Effects of the Award <i>vis-à-vis</i> Third Parties.....	392
<i>Consolidation</i> .....	392
9.11.    Consolidation of Proceedings.....	392
<i>Multiparty Arbitration</i> .....	400
9.12.    Multiparty Arbitration.....	400
<i>Capacity of the Parties</i> .....	405
9.13.    Law Applicable to the Capacity of the Parties .....	405
<i>Changes of Status</i> .....	407
9.14.    Effects of Insolvency Proceedings on Capacity of the Insolvency .....	407
<i>Litigation Funding</i> .....	408
9.15.    Litigation Funding .....	408

## ADMINISTERED ARBITRATION

<b>Chapter 10: The Role of Arbitral Institutions</b> .....	409
<i>Distinctions amongst Arbitrations</i> .....	409
10.1. <i>Ad Hoc</i> or Administered Arbitration.....	409
<i>Relationships between the Various Parties</i> .....	413
10.2.    Relationship between the Parties and the Arbitral Institution.....	413

---

10.3.	Relationship between the Arbitral Institution and the Arbitrator .....	417
10.4.	Relationship between the Arbitrator and the Parties .....	418
10.5.	The Arbitral Institution, the Arbitration Agreement and the Award.....	419
	<i>Litigation and Immunity</i> .....	421
10.6.	Arguable Exclusion of Parties by Arbitral Institution .....	421
10.7.	Litigation against Arbitral Institutions .....	427
10.8.	Immunity .....	433
	<i>Anti-Suit Injunctions</i> .....	434
10.9.	Anti-Suit Injunctions .....	434

## THE ARBITRAL TRIBUNAL

<b>Chapter 11:</b>	<b>The Arbitrator</b> .....	441
	<i>Contract to Arbitrate</i> .....	442
11.1.	Relationship between the Parties and the Arbitrator.....	442
	<i>Number of Arbitrators</i> .....	449
11.2.	A Sole Arbitrator or an Arbitral Tribunal – Even or Odd Number – The Umpire .....	449
	<i>Appointment of the Arbitrator</i> .....	458
11.3.	Criteria for Choosing the Arbitrator .....	458
11.4.	Direct or Indirect Appointment – <i>Intuitus Personae</i> .....	463
11.5.	Appointment – Acceptance – Lack of Designation .....	465
11.6.	Capacity of the Arbitrator – Sex and Nationality .....	469
11.7.	Physical Person or Legal Entity .....	472
11.8.	Substitute Arbitrators .....	473
	<i>Choice of Law</i> .....	474
11.9.	Choice of Law Issues.....	474
	<i>Training</i> .....	475
11.10.	Training of Arbitrators .....	475
	<i>Impartiality</i> .....	476
11.11.	Impartiality – Independence – Bias – Misconduct – Challenge .....	476
	<i>Role of the Arbitrator</i> .....	504
11.12.	The Role of the Arbitrator .....	504
11.13.	Parties' Control of Arbitration.....	505
11.14.	Arbitrator's Duty to Encourage Settlement.....	506
11.15.	Imposition of a Peace Treaty .....	507
	<i>Rights and Duties of the Arbitrator</i> .....	508
11.16.	The Duty of Disclosure.....	508
11.17.	The Duties of the Arbitrator: The Rules of Conduct .....	512
11.18.	Remuneration.....	518
11.19.	Right to the Parties' Cooperation .....	518
	<i>Liability–Immunity</i> .....	519
11.20.	Liability–Immunity .....	519

---

<i>Termination</i> .....	523
11.21. Termination by Expiry of Term of Office and on Other Grounds – Replacement – Truncated Arbitration – Effects.....	523
<i>Removal</i> .....	532
11.22. Removal, Resignation and Challenge .....	532
<i>Secretary to the Arbitral Tribunal</i> .....	536
11.23. Possibility of Appointing a Secretary to the Arbitral Tribunal .....	536
<i>Arbitrator's Involvement before State Courts</i> .....	538
11.24. Arbitrator's Subsequent Involvement before State Courts .....	538
11.25. The Arbitrator as a Witness .....	541
11.26. The Arbitrator as a Party .....	541

## THE ROLE OF STATE COURTS

<b>Chapter 12: The Role of State Courts in Aiding Arbitration</b> .....	543
<i>Primary and Secondary Jurisdiction</i> .....	544
12.1. Primary and Secondary Jurisdiction.....	544
12.2. State Court Subject Matter Jurisdiction and Personal Jurisdiction .....	546
<i>Forum Non Conveniens</i> .....	551
12.3. Forum Non Conveniens .....	551
<i>Forum Necessitatis</i> .....	555
12.4. Forum Necessitatis .....	555
<i>Comity of Nations</i> .....	556
12.5. Comity of Nations .....	556
<i>The “Juge d'Appui”</i> .....	557
12.6. The “Juge d'Appui” (State Courts Statutory Intervention to Solve Problems during Arbitration) .....	557
<i>Appointment and Challenges of Arbitrators</i> .....	558
12.7. Appointment of Arbitrators .....	558
12.8. Challenge and Removal of Arbitrators.....	566
<i>Motion to Compel Arbitration</i> .....	572
12.9. Motion to Compel Submission of the Dispute to Arbitration .....	572
<i>Anti-suit Injunctions</i> .....	573
12.10. Anti-suit and Anti-arbitration Injunction.....	573
<i>As to Arbitration Agreements</i> .....	576
12.11. Rulings by State Court or Arbitrators on the Arbitration Agreement .....	576
<i>As to Evidence</i> .....	584
12.12. Intervention during Evidence.....	584
<i>Consolidation</i> .....	589
12.13. Consolidation of Proceedings.....	589
<i>As to Time Limits</i> .....	589
12.14. Extension of Contractual Time Limits.....	589

---

<i>Filing of the Award</i> .....	590
12.15. Filing of the Award .....	590
<i>Nature of the Award</i> .....	592
12.16. Final or Binding Nature of the Award.....	592
<i>Interlocutory Injunctions</i> .....	595
12.17. Interlocutory Injunctions .....	595
<i>Aid Not Interference</i> .....	597
12.18. Aid Not Interference .....	597
<i>The Various Motions</i> .....	599
12.19. Contempt of Court.....	599
12.20. Motions .....	599
<i>As to a Review of the Merits</i> .....	600
12.21. Whether to Review the Merits of the Award .....	600
<i>As to Security of Costs</i> .....	607
12.22. Orders in Respect of Security for Costs .....	607
<i>Coordination of Proceedings</i> .....	611
12.23. Coordination of Court and Arbitral Proceedings.....	611

## CONFIDENTIALITY

<b>Chapter 13: Confidentiality</b> .....	613
<i>Source of Confidentiality</i> .....	613
13.1. Express or Implied Confidentiality .....	613
<i>Applicable Law</i> .....	617
13.2. The Applicable Law .....	617
<i>Ambit of Confidentiality</i> .....	618
13.3. Transparency .....	618
13.4. Subjective and Objective Ambit of Confidentiality.....	619
13.5. The Very Existence of Arbitral Proceedings .....	621
13.6. Documentary Evidence .....	621
13.7. Oral Evidence.....	624
13.8. The Proceedings .....	624
13.9. The Award and Its Publication .....	624
<i>Breaches and Sanctions</i> .....	626
13.10. Breaches of Confidentiality .....	626
13.11. Sanctions for Breach .....	627

## CHOICE OF SUBSTANTIVE LAW

<b>Chapter 14: Substantive Law</b> .....	629
<i>The Merits</i> .....	630
14.1. The Merits .....	630
<i>Choice Made by the Parties</i> .....	632
14.2. The Parties' Choice .....	632

<i>Choice Made by the Arbitrator</i> .....	642
14.3. Deviation from the Parties' Choice.....	642
14.4. The Choice Made by the Arbitrators .....	643
<i>Trade Usages</i> .....	659
14.5. Trade Usages.....	659
<i>International Principles</i> .....	660
14.6. The UNIDROIT Principles .....	660
14.7. International Principles of Law.....	664
<i>Lex Mercatoria</i> .....	664
14.8. <i>Lex Mercatoria</i> .....	664
<i>The Trunc Commun</i> .....	673
14.9. <i>The Trunc Commun</i> .....	673
<i>Jura Novit Curia</i> .....	684
14.10. <i>Jura Novit Curia</i> .....	684
14.11. The Shari'ah.....	685
<i>Proof of Foreign Law</i> .....	685
14.12. Proof of the Foreign Substantive Law.....	685
<i>Interpretation of the Law</i> .....	688
14.13. Interpretation of the Law .....	688
<i>Abuse of Rights</i> .....	689
14.14. Abuse of a Right .....	689

### *EX BONO ET AEQUO*

<b>Chapter 15: <i>Ex Bono et Aequo Decisions and Amiable Compositeur</i>.....</b>	<b>691</b>
<i>Ex Bono et Aequo</i> .....	691
15.1. <i>Ex Bono et Aequo</i> .....	691
15.1.1. Common Law Hostility .....	691
15.1.2 . <i>Aequitas</i> in Roman Law.....	696
15.1.3. Equity in England under Norman Kings.....	697
15.1.4. Similarities between the Two Notions .....	698
15.1.5. Actual Application of <i>Ex Bono et Aequo</i> .....	698
15.1.6. <i>Ex Bono et Aequo</i> and Modern Legal Systems.....	699
15.1.7. <i>Aequitas</i> in International Arbitration and Public Policy .....	704
15.1.8. Limits to Discretionary Authority under <i>Aequitas</i> .....	705
15.1.9. Equitable Assessment of Damages .....	707
15.1.10. Equitable Tolling .....	708
15.1.11. Equitable Estoppel.....	708
15.1.12. Conclusions .....	710
<i>Amiable Compositeurs</i> .....	710
15.2. <i>Amiables Compositeurs</i> .....	710
15.2.1. Original Notion .....	710
15.2.2. Authority as <i>Amiable Compositeur</i> .....	711
15.2.3. The French Notion .....	712

15.2.4	Distinction between <i>Amiable Composition</i> and <i>Ex Bono et Aequo</i> .....	713
15.2.5	Situations Where the <i>Amiable Compositeur</i> Is Instructed to Decide.....	716

**PUBLIC POLICY**

<b>Chapter 16:</b>	<b>Arbitration and Public Policy</b> .....	719
<i>Role</i> .....	719	
16.1. The Role of Public Policy .....	719	
<i>Distinctions within Public Policy</i> .....	726	
16.2. Public Policy and <i>Normes d'Application Immediate</i> .....	726	
16.3. Public Policy, <i>Fraude à la Loi</i> and Procedural Fraud.....	728	
16.4. Domestic Public Policy and International Public Policy – Transnational Public Policy.....	730	
16.5. Foreign Public Law .....	734	
16.6. Substantive Public Policy .....	735	
16.7. Procedural Public Policy .....	752	
16.8. Human Rights and Other International Conventions .....	765	
16.9. Time to Establish Public Policy.....	766	
16.10. Conclusions.....	766	

**THE RULES OF PROCEDURE**

<b>Chapter 17:</b>	<b>Applicable Procedural Law</b> .....	773
<i>Internal and External Procedural Issues</i> .....	773	
17.1. Internal and External Procedural Issues.....	773	
<i>Choice Made by the Parties</i> .....	775	
17.2. The Parties' Freedom of Choice.....	775	
<i>Applicable Law</i> .....	780	
17.3. Possibility of Applying a Procedural Law Different from That of the Place of Arbitration.....	780	
17.4. Denationalization of Arbitral Proceedings.....	788	
17.5. Nationless <i>vis-à-vis</i> International Arbitration .....	789	
17.6. No Absolute Need for a National Procedural Law .....	791	
17.7. Supranationality of Arbitration Rules .....	792	
<i>Selection of the Procedural Law – Effects</i> .....	793	
17.8. Different Possible Selections of the Procedural Law.....	793	
17.9. Several Procedural Laws and a Procedural <i>Tronc Commun</i> .....	804	
17.10. Rationale and Effects of the Choice of a Procedural Law Different from the Law of the Place of Arbitration .....	805	
<i>Procedural Public Policy</i> .....	807	
17.11. Procedural Public Policy .....	807	
17.12. Conclusions.....	808	

---

<b>Chapter 18: Arbitration Rules.....</b>	811
<i>Various Arbitration Rules.....</i>	811
18.1. A Large Number of Arbitration Rules.....	811
<i>Administered versus Ad Hoc Arbitration .....</i>	815
18.2. Advantages of Administered Arbitration versus <i>Ad Hoc</i> Arbitration.....	815
18.3. Disadvantages of Administered Arbitration versus <i>Ad Hoc</i> Arbitration.....	816
<i>Effects of How the Rules Are Applied .....</i>	817
18.4. The Way the Rules Are Applied .....	817
<i>Differences amongst Rules .....</i>	818
18.5. Differences amongst the Various Rules .....	818

## THE VENUE

<b>Chapter 19: The Venue of the Proceedings.....</b>	821
<i>Notion of the Venue .....</i>	821
19.1. Notion of the Venue .....	821
<i>Criteria for Selecting the Venue.....</i>	823
19.2. Criteria for the Choice of the Venue .....	823
19.3. The Parties' Delegation of the Choice of the Venue .....	825
<i>Effects .....</i>	826
19.4. Effects of the Choice of the Venue.....	826
19.5. Lack of Choice of Venue and Lack of Designation of Authority .....	829
19.6. Holding Part of the Proceedings Elsewhere .....	830
19.7. Effects of Non-Compliance with the Venue. ....	831
19.8. The Venue and <i>Forum Non Conveniens</i> .....	832
<i>Change of Venue.....</i>	832
19.9. Change of Venue .....	832

## DOCUMENTS-ONLY ARBITRATION

<b>Chapter 20: Documents-Only Arbitration .....</b>	835
<i>Middle-Size and Small Claims.....</i>	835
20.1. Specific Problems of Middle-Size and Small Claims .....	835
<i>Consumer Arbitration .....</i>	836
20.2. Consumer Arbitration.....	836
<i>The Proceedings.....</i>	838
20.3. Documents-Only Arbitration.....	838
20.4. Documents-Only Arbitration and Due Process.....	838

---

**PRE-ARBITRAL REFEREE**

<b>Chapter 21: The Pre-Arbitral Referee .....</b>	843
<i>Context .....</i>	843
21.1. Context .....	843
<i>The ICC Proceedings .....</i>	845
21.2. The ICC Pre-Arbitral Referee Proceedings.....	845
<i>The Order of the Referee.....</i>	849
21.3. Characterisation of the Order of the Referee.....	849

**THE INITIAL STAGE**

<b>Chapter 22: Preliminary Issues and Initial Stage .....</b>	851
<i>The Premise .....</i>	852
22.1. Basic Premise of Arbitral Proceedings.....	852
<i>Conditions Precedent.....</i>	853
22.2. Effects of Lack of Recourse to Earlier Mediation or of Lack of Referral of the Dispute to the Engineer.....	853
22.3. Legal Representation .....	855
22.4. Arbitral Advocacy.....	861
22.5. Privilege.....	861
22.6. Overlawyering – A Full Armour.....	861
<i>Formation of the Arbitral Tribunal.....</i>	862
22.7. Formation of the Arbitral Tribunal.....	862
<i>Commencement of the Proceedings .....</i>	864
22.8. Commencement of the Proceedings.....	864
<i>Language of the Proceedings.....</i>	865
22.9. Language of the Proceedings .....	865
<i>Preliminary Issues.....</i>	867
22.10. Preliminary Issues – Bifurcation .....	867
<i>Kompetenz-Kompetenz .....</i>	875
22.11. Decision on Arbitral Jurisdiction: <i>Kompetenz- Kompetenz .....</i>	875
22.12. Connection to Nonarbitrable Disputes.....	882
22.13. Defenses Based on Another Relationship – Set Offs .....	884
22.14. Duty of Good Faith and Loyalty .....	885
22.15. Counterclaims .....	887
22.16. <i>Lis Pendens</i> between Arbitral and Court Proceedings .....	891
22.17. Multifora Disputes .....	901
22.18. Dilatory Tactics .....	904
<i>Terms of Reference.....</i>	905
22.19. Nature and Limits of the Terms of Reference .....	905
<i>Case Management .....</i>	913
22.20. Pre-Trial Conference versus Order for Directions – Case Management.....	913

---

<i>Timetable of the Proceedings</i> .....	915
22.21. Timetable of the Proceedings. ....	915
<i>The Role of the Arbitrator</i> .....	917
22.22. The Arbitrator's Duty to Assist .....	917
22.23. The Role of the Arbitral Tribunal Chairman.....	919
22.24. Decision on <i>Ex-Officio</i> Issues.....	919
22.25. Meeting Minutes .....	920
<i>Progress of the Proceedings</i> .....	922
22.26. Exchange of Pleadings .....	922
22.27. Deadlines .....	923
22.28. Amended Claims and New Claims.....	924
22.29. Issue Estoppel .....	928
22.30. Promissory Estoppel .....	929

## INTERLOCUTORY INJUNCTIONS

<b>Chapter 23: Interlocutory Injunctions</b> .....	931
<i>Domestic Arbitration</i> .....	932
23.1. In Domestic Arbitration.....	932
23.1.1. Authority of the Arbitrator.....	932
23.1.2. Authority Reserved to State Courts or Concurrent Authority of the Arbitrator and of State Courts .....	936
23.2. Authority under the Applicable Procedural Law.....	941
<i>International Arbitration</i> .....	945
23.3. In International Arbitration.....	945
<i>Distinctions</i> .....	952
23.4. Distinctions between Holding Measures and Interlocutory Injunctions .....	952
23.5. Interlocutory Injunctions in the Form of Awards.....	955
23.6. Judicial and Arbitral Precedents .....	956
<i>Standards</i> .....	967
23.7. Standards for the Issue of Interlocutory Injunctions .....	967
<i>Enforcement</i> .....	970
23.8. Court Enforcement of Arbitral Injunctions.....	970
<i>Anti-Suit Injunctions</i> .....	971
23.9. Anti-Suit Injunctions .....	971
<i>Interference</i> .....	974
23.10. Interference of Court Proceedings with Arbitral Interim Injunctions.....	974
23.11. Arbitrator's Authority to Vacate Injunction Granted by State Court .....	976
<i>Pre-Arbitral Referee</i> .....	976
23.12. Pre-Arbitral Referee.....	976
<i>Wrongful Injunctions</i> .....	977
23.13. Damages for Wrongful Injunction .....	977

<i>Payment Orders</i> .....	978
23.14. Payment Orders during the Proceedings .....	978
23.15. Conclusions.....	979
 <b>THE EVIDENTIARY STAGE</b>	
<b>Chapter 24: The Evidentiary Stage</b> .....	983
<i>The Burden of Proof</i> .....	984
24.1. The Burden and Standard of Proof.....	984
<i>Admissibility of Evidence</i> .....	988
24.2. Admissibility of Evidence – Substantive or Procedural Issue.....	988
<i>Need for a Leave</i> .....	992
24.3. Leave to Call Oral Evidence .....	992
<i>The Taking of Evidence</i> .....	1002
24.4. The Taking of Evidence .....	1002
24.5. Pretrial Evidence (Depositions and Interrogatories).....	1004
24.6. Publicity of Hearings .....	1005
24.7. Recording of Hearings.....	1006
<i>Documentary Evidence</i> .....	1008
24.8. Discovery of Documentary Evidence.....	1008
24.9. E-Discovery .....	1022
24.10. Assistance of Foreign and International Tribunals in Obtaining Evidence .....	1022
<i>Oral Evidence</i> .....	1023
24.11. Witness Evidence .....	1023
24.12. Witness Statements / Affidavits.....	1036
24.13. Consequences of False Testimony .....	1037
24.14. Tandem Witness Examination .....	1038
24.15. Evidence Given by the Parties .....	1041
24.16. Applications to the Courts for Assistance in the Taking of Evidence.....	1044
24.17. Rules of Conduct .....	1046
24.18. Sanctions .....	1047
24.19. Witness Coaching.....	1048
<i>Experts</i> .....	1049
24.20. Experts .....	1049
24.21. The Arbitrator's Duty to Assist the Process .....	1058
<i>Presumptions</i> .....	1059
24.22. Presumptions .....	1059
24.23. Personal Knowledge of the Arbitrator and Judicial Notice.....	1062
<i>Site Visits</i> .....	1064
24.24. Site Visits .....	1064
<i>Demonstrative Evidence</i> .....	1064
24.25. Demonstrative Evidence.....	1064

---

<i>Time Bars and Non-Mandatory Terms</i> .....	1064
24.26. Time Bars and Non-Mandatory Terms .....	1064
<i>Sanctions</i> .....	1067
24.27. Adverse Inferences .....	1067
24.28. Other Sanctions .....	1067
<i>Fresh Evidence</i> .....	1068
24.29. Fresh Evidence .....	1068
<i>Closing the Evidentiary Stage</i> .....	1069
24.30. Closing of the Evidentiary Stage .....	1069
<i>No Strict Rules of Evidence</i> .....	1070
24.31. Arbitrators Dispensed with Compliance with Strict Rules of Evidence .....	1070
<i>Need for Standard Rules of Evidence</i> .....	1074
24.32. Need for International Standard Rules of Evidence .....	1074
<b>Chapter 25: The Last Pleadings and Oral Argument</b> .....	1077
<i>Appreciation of the Evidence</i> .....	1077
25.1. Appreciation of the Evidence and Amendments to Claims and Defences .....	1077
<i>Final Addresses</i> .....	1078
25.2. The Final Addresses .....	1078
25.3. The Post Evidentiary Brief and the Rebuttal .....	1078
25.4. The Last Word .....	1079
<i>The Tribunal's Review – Possible Reopening of the Case</i> .....	1079
25.5. Tribunal's Review of the Status of the Proceedings – Reopening of the Case .....	1079
<b>Chapter 26: Speed and Efficiency in Arbitration</b> .....	1081
<i>Delays</i> .....	1081
26.1. Delays during the Proceedings .....	1081
<i>Speed and Quality</i> .....	1083
26.2. Speed and Quality .....	1083
26.3. Due Speed .....	1083
26.4. Accelerated Arbitration .....	1085
26.5. Fast-Track Arbitration .....	1085
26.6. The Miracle: Two Weeks .....	1087
26.7. Truly Fast-Track Arbitration .....	1089
26.8. Emergency Arbitration .....	1089
<i>Arbitration Online</i> .....	1089
26.9. Arbitration Online .....	1089
<i>Adjudication</i> .....	1090
26.10. Adjudication .....	1090

---

## PROCEDURAL DUE PROCESS

<b>Chapter 27: Breach of Due Process .....</b>	1091
<i>Notion of Due Process.....</i>	1091
27.1. Notion of Due Process .....	1091
27.2. Due Process and Contempt of Court .....	1095
<i>Various Breaches.....</i>	1097
27.3. Equal Treatment in regard to the Appointment of Arbitrators.....	1097
27.4. Bias or Lack of Independence.....	1098
27.5. Term to Appear .....	1100
27.6. Time Limits to File Pleadings .....	1101
27.7. Disclosure of Documents.....	1102
27.8. Right to Call and to Examine Witnesses .....	1103
27.9. Reasonable Opportunity to Present One's Case and to Oppose the Case of the Opposite Party: "L'égalité des Armes" ....	1107
27.10. Right to Comment on the Arbitrator's Possible New Approach to the Dispute.....	1113
27.11. Parties' Right to Representation by Counsel.....	1114
27.12. Other Breaches of Due Process .....	1115
27.13. Due Process in Default Proceedings.....	1116
<i>Public Policy.....</i>	1117
27.14. Breach of Public Policy .....	1117
27.15. Public Policy, Human Rights and Due Process .....	1118
<i>The Concealed Enemies.....</i>	1119
27.16. The Concealed Enemies of Due Process .....	1119
<i>Denial of Justice.....</i>	1120
27.17. Denial of Justice.....	1120

## THE AWARD

<b>Chapter 28: The Award.....</b>	1121
<i>Final, Partial and Interim Awards .....</i>	1122
28.1. Possibility of Interim Awards – Provisional Remedies .....	1122
28.2. Interim Awards and Orders .....	1128
28.3. Final Award.....	1130
28.4. Finality of Interim Awards.....	1132
28.5. Award by the Parties' Consent .....	1132
<i>Duty to Decide .....</i>	1134
28.6. Duty to Decide.....	1134
28.7. Arbitrators' Delegation of Their Authority to Decide.....	1138
28.8. Rendering Substantial Justice and Not "Splitting the Baby" ....	1140
28.9. Questions and Propositions on Which the Award Does Not Have to Decide .....	1141
28.10. Lack of All the Arbitrators' Signatures.....	1141
28.11. Discussion and Decision .....	1142

---

28.12. Truncated Tribunal.....	1144
28.13. Decision by a Majority or Casting Vote.....	1149
28.14. Judicial Discretion .....	1152
28.15. Decision on Issues Not Argued by the Parties.....	1153
28.16. Remittal to the Arbitrator .....	1154
28.17. Dissenting Opinions.....	1155
28.18. Inertia of the Parties.....	1161
<i>Content of the Award</i> .....	1164
28.19. Content of the Award.....	1164
28.20. The Award's Reasons .....	1169
28.21. <i>Obiter Dicta</i> .....	1176
<i>Available Remedies</i> .....	1176
28.22. Available Relief (Monetary, Declaratory, Injunctive, Specific Performance, Penalties) .....	1176
28.23. Other Sanctions.....	1178
<i>Sanctity of Deliberation Chambers</i> .....	1179
28.24. Sanctity of Deliberation Chambers or Power of State Courts to Invade Them .....	1179
<i>Place Where the Award Is Made</i> .....	1181
28.25. Place Where the Award Is Made .....	1181
28.26. Confidentiality in Arbitration .....	1183
28.27. The Arbitral Institution's Scrutiny of the Draft Award .....	1192
<i>Effects of the Award</i> .....	1194
28.28. Effects of the Award – <i>Res Judicata</i> .....	1194
<i>Time Limit to Decide</i> .....	1206
28.29. Time Limit for the Award.....	1206
28.30. Binding Effect of Precedents – <i>Stare Decisis</i> .....	1213
<i>Publication of the Award</i> .....	1219
28.31. Publication of the Award .....	1219
<i>Post-Award Arbitral Proceedings</i> .....	1221
28.32. Post-Award Arbitral Proceedings: Correct Interpretation and Additional Award versus Post-Award Court Proceedings.....	1221
28.33. The Five Basic Post-Award Avenues .....	1234
<b>Chapter 29: Costs Interest and Higher Damages</b> .....	1235
<i>Costs of the Proceedings</i> .....	1235
29.1. Costs of the Proceedings .....	1235
29.1.1. Arbitrators' Fees .....	1238
29.1.2. The Arbitrator's Expenses.....	1238
29.1.3. The Parties' Joint Liability .....	1239
29.1.4. Advances .....	1239
29.1.5. Other Expenses of the Arbitral Proceedings .....	1241
29.1.6. Administrative Dues of the Arbitral Institution .....	1241
29.1.7. Witnesses' Expenses and <i>Per Diem</i> .....	1242
29.1.8. The Costs and Fees of the Victorious Party.....	1242
29.1.9. Security for Costs.....	1242
29.1.10. Costs Follow the Event.....	1245

---

<i>Interest</i> .....	1248
29.2. Interest .....	1248
29.2.1 Pre-Award and Post-Award Interest .....	1249
<i>Further Damages</i> .....	1254
29.3. Further Damages .....	1254
29.4. Punitive Damages – Treble Damages .....	1255
29.4.1. Punitive Damages.....	1255
29.4.2 . Treble Damages .....	1256
<i>Extra Costs</i> .....	1256
29.5. Extra Costs for Inappropriate Conduct .....	1256
<b>Chapter 30: Filing and Notification of the Award</b> .....	1259
<i>Filing</i> .....	1259
30.1. Filing with the Arbitral Institution and Delivery of the Award .....	1259
30.2. Filing of the Award with a State Court or Governmental Agency.....	1264
30.3. Notification of the Award to the Parties .....	1268
30.4. Prohibition of the Arbitrators' Direct Delivery of the Award to the Parties .....	1268
<i>Non Filing</i> .....	1269
30.5. Effects of a Refusal to File .....	1269

## CHALLENGES OF AWARDS

<b>Chapter 31: Challenges of Awards</b> .....	1273
<i>General Framework</i> .....	1274
31.1. General Framework .....	1274
<i>Classes of Challenges</i> .....	1275
31.2. Classes of Challenges.....	1275
31.3. Challenge of an Award Made <i>Ex Bono et Aequo</i> or as an <i>Amiable Compositeur</i> .....	1281
31.4. Challenges in the International Conventions.....	1282
<i>Grounds for Challenges</i> .....	1285
31.5. Grounds for Challenges .....	1285
31.6. Frivolous Claims or Defences .....	1299
<i>Extension by Contract of Judicial Review</i> .....	1300
31.7. Extension by Contract of Judicial Review .....	1300
<i>Waiver to Challenges</i> .....	1303
31.8. Prior Waiver to Challenges – Effects .....	1303
31.9. Waiver by Conduct during Arbitral Proceedings.....	1305
<i>Jurisdiction on Challenges</i> .....	1307
31.10. Jurisdiction on Challenges .....	1307
31.11. Challenges outside the State of Origin .....	1318
31.12. Challenges against the First Instance Award (While the Appellate Arbitral Proceedings Are Pending) .....	1322

---

31.13. Anti-suit Injunctions against Actions to Vacate.....	1323
31.14. Review of Decisions Made by the State Courts on the Challenge of an Award.....	1323
<i>Law Applicable to Challenges</i> .....	1324
31.15. Law Applicable to Challenges .....	1324
<i>Remedies</i> .....	1325
31.16. Remedies Available before National Courts .....	1325
31.17. Challenges before Another Arbitrator .....	1331
31.18. Correction and Interpretation of Awards.....	1332
31.19. Court Precedents.....	1332
31.20. No Setting Aside if Arbitrator Has Chosen amongst Available Remedies .....	1337
31.21. Setting Aside for <i>Dénaturation</i> (Manifest Disregard) of Contractual Documents .....	1337
<b>Chapter 32: Full <i>de Novo</i> Review before a New Arbitral Tribunal</b> .....	1339
<i>The Various Views</i> .....	1339
32.1. Hostility to Any Review of the Merits .....	1339
32.2. Weakness of This Position .....	1340
32.3. Challenges before State Courts or before a Second Degree Arbitrator ? .....	1341
<i>The Washington Convention</i> .....	1341
32.4. The Washington Convention – <i>Ad Hoc</i> Committee .....	1341
<i>Commodities Arbitration</i> .....	1342
32.5. Commodities Arbitration .....	1342
32.6. Full <i>de Novo</i> Reconsideration .....	1342
<i>The European Court of Arbitration</i> .....	1344
32.7. The European Court of Arbitration Solution.....	1344
32.8. Condition for Leave to Appeal .....	1344
<i>The CPR Rules</i> .....	1345
32.9. The CPR Rules .....	1345
<i>Sports Arbitration</i> .....	1345
32.10. Sports Arbitration .....	1345
<i>The Arbitration Chamber of Paris</i> .....	1346
32.11. The Arbitration Chamber of Paris .....	1346
<i>Coordination between the Various Challenges</i> .....	1346
32.12. Coordination between the Various Challenges to State Courts against the First Instance Award, Appellate Arbitral Proceedings and Challenges against the Latter .....	1346
<i>Other Supervising Bodies?</i> .....	1347
32.13. ICSID and the European Court of Human Rights as Supervising Bodies .....	1347

**ENFORCEMENT OF AWARDS**

<b>Chapter 33: Enforcement in the State of Origin .....</b>	1351
<i>An Enforceable Instrument .....</i>	1351
33.1. Obtaining the Effects of an Enforceable Instrument .....	1352
<i>Enforcement Proceedings .....</i>	1359
33.2. Enforcement Proceedings .....	1359
33.3. Does Rejection of Claims to Set Aside Equal Leave to Enforce? .....	1360
33.4. Partial Enforcement.....	1360
33.5. Stay of Enforcement.....	1361
<i>Time Bar .....</i>	1362
33.6. Time Bar for Starting Enforcement Proceedings .....	1362
<i>Oppositions to Enforcement .....</i>	1363
33.7. Oppositions to Enforcement .....	1363
33.8. State Immunity from Enforcement .....	1365
33.9. Refusal of Leave to Enforce Local Award for Non-compliance with Municipal Procedural Law.....	1365
<b>Chapter 34: Enforcement and Recognition in Other States .....</b>	1367
<i>Pro-Enforcement Tendency .....</i>	1368
34.1 Pro-Enforcement Tendency .....	1368
34.2. No Uniform Procedural Rules for the Enforcement of Awards in the Various Jurisdictions.....	1368
34.3. Nature of the Enforcement Order: A Step of the Enforcement Proceedings? .....	1371
<i>Forum Shopping.....</i>	1373
34.4. Forum Shopping.....	1373
34.5. Forum Selection .....	1375
34.6. Enforcement in the Absence of International Conventions .....	1375
34.7. Enforcement under International Conventions.....	1380
34.8. Enforcement Not Sought under International Conventions.....	1385
34.9. Enforcement in Various States.....	1386
<i>Distinction between Recognition and Enforcement .....</i>	1387
34.10. Distinction between Recognition and Enforcement.....	1387
<i>Enforcement.....</i>	1389
34.11. Enforcement of the Interim Award .....	1389
34.12. Enforcement of Part of the Award.....	1389
34.13. Enforcement of Conflicting Decisions .....	1390
34.14. Enforcement of Judgment Entered on an Award .....	1391
34.15. Counterclaims and Set Offs in Recognition Proceedings .....	1393
34.16. Time Bar for Enforcement .....	1394
34.17. Time Limit to Enforce the Award.....	1394
<i>Opposition to Enforcement.....</i>	1395
34.18. Opposition to Enforcement .....	1395
34.19. Stay of Enforcement.....	1398

---

<i>Recognition Proceedings</i> .....	1401
34.20. Recognition as a Counterclaim or as a Defence.....	1401
<i>Preventive Proceedings</i> .....	1402
34.21. Preventive Independent Proceedings to Establish That a Foreign Award May Not Be Recognised.....	1402
<i>Enforcement of an Award That Was Set Aside</i> .....	1403
34.22. Independence of Enforcement Proceedings from Setting Aside Proceedings .....	1403
34.23. Enforcement of an Award That Was Set Aside .....	1406
<i>State Immunity</i> .....	1414
34.24. State Immunity from Enforcement.....	1414
<b>Chapter 35: Recognition and Enforcement under the New York Convention</b> .....	1417
<i>Field of Application</i> .....	1419
35.1. Field of Application .....	1419
35.1.1. Relationship with Domestic Law and Other International Conventions.....	1420
35.1.2. The More Favourable Right Provision .....	1420
35.1.3. Foreign versus International and Domestic Awards.....	1422
35.1.4. Universality and the Two Reservations.....	1424
35.1.5. Need for Domestic Implementation .....	1426
35.2. Deference Paid to the Arbitration Agreement.....	1426
35.2.1. Special Meaning of Recognition .....	1427
<i>Form Requirements</i> .....	1428
35.2.2. Agreement in Writing .....	1428
<i>Contents of the Arbitration Agreement</i> .....	1430
35.2.3. Contents of the Arbitration Agreement .....	1430
<i>State Court Referral</i> .....	1431
35.2.4. State Court Referral of Dispute to Arbitration .....	1431
35.3. Interim Awards .....	1432
<i>Recognition and Enforcement of Awards</i> .....	1433
35.4. Recognition and Enforcement of Awards .....	1433
35.4.1. Documents to Be Filed When Applying for Leave to Enforce .....	1434
35.4.2. Enforcement Only in Part .....	1439
<i>Grounds for Refusal to Enforce</i> .....	1440
35.5. Grounds for Refusal to Enforce .....	1440
35.5.1. Grounds to Be Raised by the Opposite Party .....	1440
35.5.2. Grounds for Refusal on the Court's Motion .....	1450
<i>Stay of Enforcement</i> .....	1453
35.6. Stay of Enforcement.....	1453
<i>Enforcement Procedure</i> .....	1454
35.7. Enforcement Procedure .....	1454

**PART II****SPECIAL ARBITRAL PROCEEDINGS**

<b>Chapter 36: International Public Law Arbitration .....</b>	1459
<i>Main Features .....</i>	1459
36.1. Arbitration and International Public Law Disputes .....	1459
36.2. Historical Development of International Public Law Arbitration.....	1462
<i>Permanent Court of Arbitration .....</i>	1464
36.3. The Permanent Court of Arbitration .....	1464
36.4. A New Role for the Permanent Court of Arbitration.....	1467
<i>International Court of Justice .....</i>	1467
36.5. The International Court of Justice.....	1467
<i>Tribunal for the Law of the Sea.....</i>	1472
36.6. The International Tribunal for the Law of the Sea .....	1472
<i>The GATT.....</i>	1473
36.7. Settlement of International Trade Disputes (GATT and World Trade Organisation) .....	1473
36.8. Main Features of International Public Law Arbitration.....	1475
<i>Arbitration between States and Individuals .....</i>	1478
36.9. Arbitration between States and Individuals .....	1478
<i>Other Public International Disputes .....</i>	1481
36.10. Settlement of Other Public International Disputes .....	1481
<b>Chapter 37: Arbitration, the Brussels Convention and the Influence of the European Convention on Human Rights .....</b>	1483
<i>The Brussels Convention.....</i>	1484
37.1. The Brussels Convention.....	1484
37.1.1. The Exclusion of Arbitration from the Brussels Rules.....	1484
<i>The Ambit of the Arbitration Exception .....</i>	1484
37.1.2. Arbitrator Referral of Preliminary Issues to the European Court of Justice.....	1489
37.1.3. The European Court of Justice as Arbitrator.....	1490
<i>EC Competition Law and Arbitration .....</i>	1490
37.2. EC Competition Law and Arbitration.....	1490
37.2.1. Disputes Capable of Arbitration .....	1491
37.2.2. Foreign Applicable Substantive Law and EU Competition Law.....	1491
37.2.3. The Strict Approach.....	1492
37.2.4. A More Recent Approach.....	1492
37.2.5. Public Policy Nature of Articles 85-86 Rome Treaty.....	1496
37.2.6. Determination of the Applicability of EC Law by the Arbitral Tribunal on Its Own Initiative .....	1497

---

37.2.7. Arbitral Precedents .....	1497
37.2.8. Court Precedents .....	1498
<i>Consumer Protection</i> .....	1499
37.3. Directive 93 /13 EC, Consumer Protection and Arbitration .....	1499
<i>The Convention on Human Rights</i> .....	1500
37.4. The Influence of the European Convention on Human Rights .....	1500
<b>Chapter 38: UNCITRAL Arbitration</b> .....	1505
<i>UNCITRAL's Achievements</i> .....	1505
38.1. UNCITRAL'S Achievements in the Field of Arbitration.....	1505
<i>The New York Convention</i> .....	1507
38.2. The New York Convention.....	1507
<i>The UNCITRAL Arbitration Rules</i> .....	1507
38.3. The UNCITRAL Arbitration Rules .....	1507
<i>The UNCITRAL Model Law</i> .....	1514
38.4. The UNCITRAL Model Law .....	1514
<i>The UNCITRAL Guidelines</i> .....	1540
38.5. The UNCITRAL "Notes on Organizing Arbitral Proceedings"....	1540
<b>Chapter 39: Investor-State Arbitration</b> <b>(The Washington Convention)</b> .....	1545
I. INTRODUCTION.....	1547
<i>Investment Arbitration Distinguished from Commercial Arbitration</i> .....	1547
39.1. Difference between Investment and Commercial Arbitration .....	1547
39.2. Mutual Advantages and Justified Concerns .....	1549
39.3. A Variety of Barriers .....	1549
39.4. Previous Formulae.....	1550
39.5. Earlier Investment Conventions.....	1550
39.6. Modern Foreign Investment Law .....	1551
39.7. The Role of Investment Arbitration.....	1551
<i>ICSID Arbitration</i> .....	1552
II. ICSID ARBITRATION.....	1552
<i>Procedural Law</i> .....	1552
II.1 PROCEDURAL LAW .....	1552
<i>Applicable Law</i> .....	1552
39.8. Disputes Governed Only by the Domestic Investment Law of the Host State .....	1552
39.9. Disputes under a BIT .....	1552
39.10. ICSID Arbitration.....	1553
<i>The ICSID Additional Facility Rules</i> .....	1556
39.11. The ICSID Additional Facility Rules.....	1556
<i>Consent</i> .....	1556
39.12. Consent to Arbitration.....	1556
<i>Notion of Investment</i> .....	1561

---

39.13. The Notion of Investment.....	1561
<i>Nationality of the Investor</i> .....	1565
39.14. Nationality of the Investor .....	1565
39.15. Shareholders behind the Investment Vehicle .....	1567
39.16. Previous Exhaustion of Local Remedies.....	1570
39.17. Alternative or Exclusive <i>Fora</i> .....	1571
<i>The Fork in the Road</i> .....	1571
39.18. The Fork in the Road.....	1571
39.19. The Waiver.....	1571
<i>Treaty Claims and Contract Claims</i> .....	1572
39.20. Treaty Claims and Contract Claims .....	1572
39.21. Consolidation of Proceedings .....	1575
39.22. Interim Measures .....	1576
<i>Procedural Rules</i> .....	1577
39.23. Procedural Rules and Evidence .....	1577
<i>Substantive Law</i> .....	1580
<b>II.2 SUBSTANTIVE LAW</b> .....	1580
39.24. Disputes under a BIT .....	1580
39.25. Contract Terms and Rules of Law .....	1581
39.26. The Investment Treaty.....	1581
39.27. The Law of the Host State.....	1583
39.28. Public International Law .....	1584
39.29. The Relationships between Host State Law and Public International Law .....	1584
<i>Foreign Investors' Substantive Rights</i> .....	1586
<b>II.3 FOREIGN INVESTORS' SUBSTANTIVE RIGHTS</b> .....	1586
<i>No Discrimination</i> .....	1586
39.30. No Discrimination .....	1586
39.31. National Treatment.....	1586
<i>No Less Favourable Treatment</i> .....	1588
39.32. No Less Favourable Treatment .....	1588
39.33. Discriminatory Intent.....	1588
<i>Most Favoured Nation</i> .....	1588
39.34. Most Favoured Nation.....	1588
39.35. Substantive and Procedural Rights .....	1589
39.36. Arbitrary or Discriminatory Measures.....	1590
<i>Protection against Expropriation</i> .....	1590
39.37. Protection against Expropriation.....	1590
39.38. Indirect Expropriations.....	1593
39.39. Breach by the Host State of Its Representations .....	1595
39.40. Effects of the Duration of the Measure.....	1595
39.41. Transfer of the Property .....	1595
<i>Fair and Equitable Treatment</i> .....	1595
39.42. Fair and Equitable Treatment.....	1595
39.43. Protection and Security .....	1598
<i>Umbrella Clauses</i> .....	1599
39.44. Umbrella Clauses .....	1599

---

<i>Available Remedies</i> .....	1603
II.4 AVAILABLE REMEDIES.....	1603
<i>Setting Aside Proceedings</i> .....	1604
II.5 SETTING ASIDE PROCEEDINGS.....	1604
39.45. Setting Aside of Investment Awards .....	1606
39.46. ICSID Awards.....	1606
39.47. Other Investment Awards.....	1609
39.48. Substantial Non-compliance with Rules of Procedure – Excess of Authority .....	1610
39.49. Public Policy.....	1612
<i>Errors of Law and Errors of Fact</i> .....	1612
39.50. Errors of Law and Errors of Fact.....	1612
39.51. Exclusions and Extensions of the Grounds for Challenge .....	1613
<i>Enforcement</i> .....	1613
II.6 ENFORCEMENT OF INVESTMENT AWARDS .....	1613
39.52. The <i>Exequatur</i> .....	1613
39.53 Immunity from Enforcement .....	1614
39.54. Stay of Enforcement of the First Instance Award.....	1614
<i>Investment under Other Multilateral Treaties</i> .....	1615
III. INVESTMENT UNDER OTHER MULTILATERAL TREATIES ....	1615
<i>NAFTA</i> .....	1615
39.55. The North American Free Trade Agreement (NAFTA) .....	1615
<i>The Lomé Conventions</i> .....	1615
39.56. The Lomé Conventions .....	1615
<i>Mercosur</i> .....	1616
39.57. Mercosur .....	1616
<i>ASEAN Investment Agreement</i> .....	1616
39.58. The ASEAN Investment Agreement.....	1616
<i>Energy Charter Treaty</i> .....	1616
39.59. Energy Charter Treaty .....	1616
<i>DR-CAFTA Free Trade Agreement</i> .....	1616
39.60. The DR-CAFTA Free Trade Agreement .....	1616
<i>World Trade Organisation</i> .....	1617
39.61. World Trade Organisation .....	1617
<i>European Development Fund Rules</i> .....	1617
39.62. European Development Fund Rules .....	1617
<i>Prospects on the Future of Investment Arbitration</i> .....	1618
IV. PROSPECTS ON THE FUTURE OF INVESTMENT ARBITRATION .....	1618
39.63. To Rationalize the Need for Consent .....	1618
39.64. No More than Two Degrees.....	1618
39.65. A Full <i>de Novo</i> Review.....	1619
39.66. Treaty Claims and Contract Claims .....	1619
39.67. How to Reduce the Risk of Opposite Construction of Treaties .....	1619
39.68. A Shorter Duration.....	1621

<b>Chapter 40: Arbitration of Commercial Disputes between a State and a Private Party .....</b>	1623
<i>Different Classes of Disputes.....</i>	1623
40.1. Different Classes of Disputes .....	1623
<i>Different National Regimes.....</i>	1624
40.2. Different National Regimes.....	1624
40.3. Arbitration Involving States and State Entities .....	1626
<i>Criticism of the Role of International Arbitral Tribunals .....</i>	1626
40.4. International Arbitral Tribunals Alleged to Be Instruments of a Western Policy Detimental to Developing Countries .....	1626
40.5. A Response .....	1630
40.6. Temptations to Be Resisted .....	1633
<b>Chapter 41: Arbitration under the Algiers Declarations (The Iran-U.S. Claims Tribunal).....</b>	1635
<i>Origin.....</i>	1635
41.1. Origin of the Declarations – Contents .....	1635
41.2. Form of the Declarations .....	1638
<i>Nature of the Tribunal .....</i>	1639
41.3. Arbitral or Non-Arbitral Nature of the Tribunal.....	1639
<i>The Two Roles of the Tribunal.....</i>	1646
41.4. The Two Roles of the Tribunal .....	1646
<i>Jurisdiction .....</i>	1647
41.5. Jurisdiction of the Tribunal.....	1647
<i>Substantive and Procedural Laws.....</i>	1648
41.6. Applicable Substantive and Procedural Laws .....	1648
<b>Chapter 42: Commodity Arbitration.....</b>	1677
<i>The Origin .....</i>	1677
42.1. The Origin of Commodity Arbitration.....	1677
<i>The Rules .....</i>	1678
42.2. The Commodity Arbitration Rules .....	1678
<b>Chapter 43: The Sports Arbitral Tribunal.....</b>	1683
43.1. The Practice of Sport.....	1683
43.2. Sports Organisations .....	1684
43.3. The International Olympic Committee .....	1684
43.4. The Relationship between the Athlete and a Sports Organisation.....	1685
43.5. The Freedom to Join an Association .....	1685
43.6. The Licence.....	1685
43.7. Is There a Sports Legal Order? .....	1686
43.8. Sports Disputes and Disputes Related to Sport .....	1686
43.9. The Settlement of Sports Disputes .....	1687

---

43.10. Available Arbitration Bodies .....	1688
43.11. Consent as the Basis of Arbitration .....	1689
43.12. Law Applicable to Form and Consent .....	1690
43.13. Form Requirements .....	1690
43.14. Consent to Arbitration .....	1691
43.15. Implications of the Athlete's Claim to an Arbitral Tribunal....	1691
43.16. Arbitrability .....	1691
43.17. Public Policy .....	1692
43.18. The Court of Arbitration for Sport (CAS) .....	1692
43.18.1. IOC, ICAS and CAS .....	1692
43.18.2. The Decisive Effects of CAS's Registered Offices .....	1694
43.18.3. The Role of ICAS .....	1697
43.18.4. The Structure of the CAS .....	1698
43.18.5. The CAS Procedural Rules .....	1698
43.18.6. Recognition and Enforcement of CAS Awards.....	1709
43.19. The Basketball Arbitral Tribunal (BAT) .....	1710
<b>Chapter 44: Online Dispute Resolution .....</b>	<b>1717</b>
<i>The Internet – The Dramatic Change.....</i>	<i>1718</i>
44.1. Dramatic Changes in Information Technology.....	1718
44.2. Old World and New (Virtual) World Arbitration.....	1719
44.3. The Use of the Internet.....	1720
<i>Predominantly Technology-Assisted Dispute Resolution.....</i>	<i>1720</i>
44.4. Predominantly Technology-Assisted Dispute Resolution .....	1720
<i>Fully Technology-Based Dispute Resolution .....</i>	<i>1721</i>
44.5. Fully Technology-Based Online Dispute Resolution .....	1721
<i>Online Dispute Prevention .....</i>	<i>1722</i>
44.6. Online Dispute Prevention .....	1722
<i>Online Arbitration Providers .....</i>	<i>1723</i>
44.7. Online Arbitration Providers.....	1723
44.8. Internet Websites.....	1724
44.9. Various Online Dispute Resolution Mechanisms .....	1724
<i>Retail E-Commerce Online Arbitration .....</i>	<i>1725</i>
44.10. Retail E-Commerce Online Arbitration .....	1725
<i>The Legal Obstacles .....</i>	<i>1728</i>
44.11. The Legal Obstacles to Online Arbitration .....	1728
<i>Place Where Online Contracts Are Made.....</i>	<i>1735</i>
44.12. Where Contracts on the Internet Are Made .....	1735
<i>Another Difference between Domestic and International Online Arbitration? .....</i>	<i>1737</i>
44.13. Another Difference between Domestic and International Online Arbitration?.....	1737
<i>The Proceedings.....</i>	<i>1737</i>
44.14. The Proceedings in Technology-Assisted Online Arbitration.....	1737
<i>E-Discovery .....</i>	<i>1738</i>
44.15. E-Discovery .....	1738

<i>The Uniform Domain Name Dispute Resolution Process .....</i>	1746
44.16. The Uniform Domain Name Dispute Resolution Process .....	1746
<i>Balancing the Human Factor against the Use of Electronic Documents .....</i>	1748
44.17. Balancing the Human Factor against the Use of Electronic Documents .....	1748
<b>Chapter 45: Obstacles to Overcome .....</b>	1749
<i>A Panel or a Sole Arbitration.....</i>	1749
45.1. A Panel Instead of a Sole Arbitrator .....	1749
<i>The Tronc Commun versus Conflicts Rules .....</i>	1750
45.2. Artificial Conflicts Rules to Be Replaced by the <i>Tronc Commun</i> .....	1750
<i>Lack of Rules of Evidence before Submission to Arbitration .....</i>	1751
45.3. Lack of Rules of Evidence before Submission to Arbitration .....	1751
<i>Court Interference.....</i>	1752
45.4. Court Interference .....	1752
<i>Lack of a Constructive Dialogue .....</i>	1754
45.5. Lack of a Constructive Dialogue.....	1754
<i>Too Many Special Arbitration Laws.....</i>	1757
45.6. Too Many Special Arbitration Laws.....	1757
<i>Favor et Sfavor Arbitratus .....</i>	1757
45.7. Favor et Sfavor Arbitratus .....	1757
<i>Insufficient Use of Documents-Only and of Online Arbitration .....</i>	1758
45.8. Insufficient Use of Documents-Only and of Online Arbitration .....	1758
<i>More Care in Awarding Costs in Arbitration.....</i>	1758
45.9. More Care in Awarding Costs in Arbitration .....	1758
<i>Prejudging .....</i>	1759
45.10. Prejudging .....	1759
<i>Formal versus Absolute Truth .....</i>	1762
45.11. Formal versus Absolute Truth .....	1762
<b>Chapter 46: The Continuous Search for Improvements .....</b>	1765
<i>Lessons from the Past and the Present .....</i>	1766
46.1. Lessons from the Past and the Present .....	1766
<i>No Luxury Clinic.....</i>	1773
46.2. No Luxury Clinic.....	1773
<i>Excessive Formalism .....</i>	1774
46.3. Excessive Formalism .....	1774
<i>What Justice Does an Honest Man Expect from the Arbitrator? .....</i>	1776
46.4. What Justice Does an Honest Man Expect from the Arbitrator ? .....	1776
<i>The Mission of the Arbitrator.....</i>	1778

---

46.5. The Mission of the Arbitrator.....	1778
<i>Reduction of Challenges</i> .....	1778
46.6. Reduction of Challenges .....	1778
<i>A Sole Arbitrator and Not a Panel</i> .....	1779
46.7. A Sole Arbitrator and Not a Panel .....	1779
<i>A Much Shorter Duration</i> .....	1780
46.8. A Much Shorter Duration to the Proceedings.....	1780
<i>Full de Novo Review by an Appellate Arbitration Panel</i> .....	1781
46.9. Full de Novo Review by an Appellate Arbitration Panel .....	1781
<i>One Supra-National Court of Arbitration</i> .....	1788
46.10. One Supra-National Court of Arbitration and an Immediately Enforceable Appellate Transnational Award .....	1788
<i>Basic Choices in the Arbitration Agreement</i> .....	1792
46.11. Basic Choices in the Arbitration Agreement .....	1792
<i>Third Generation Arbitration</i> .....	1793
46.12. Third Generation Arbitration.....	1793
<i>Arbitration to Be Different and Better Than Court Proceedings</i> .....	1794
46.13. Arbitration to Be Different and Better Than Court Proceedings.....	1794
<i>Continuous Search for Improvements</i> .....	1795
46.14. Continuous Search for Improvements .....	1795

## Appendix

Appendix A: Articles on Arbitration.....	1799
Appendix B: Other Articles.....	1879
Appendix C: Textbooks on Arbitration.....	1881
Appendix D: Other Textbooks .....	1889
<b><i>Table of Awards</i></b> .....	1895
<b><i>Table of Cases</i></b> .....	1915
<b><i>Index</i></b> .....	2013