

Overview

Preface	V
List of Abbreviations	XIX
List of Authors.....	XXVII
Part 1: Introduction	1
A. International Commercial Arbitration: Comparative Reflections on the UNCITRAL Model Law (<i>Balthasar</i>)	1
Part 2: International Conventions and Treaties	71
B. The New York Convention (<i>Solomon</i>)	71
C. Investment Treaty Arbitration (<i>Wehland</i>).....	197
Part 3: Country Reports	231
D. International Arbitration in Austria (<i>Nueber/Zeiler</i>)	231
E. International Arbitration in Belgium (<i>Piers/Vanleenhove/De Meulemeester/Ongenaë</i>).....	260
F. International Arbitration in Brazil (<i>Lousa/Silva</i>).....	294
G. International Arbitration in China (People's Republic) (<i>Wiegand/Ye</i>).....	320
H. International Arbitration in England and Wales (<i>Illmer</i>).....	358
I. International Arbitration in France (<i>Balthasar/Ziadé</i>)	415
J. International Arbitration in Germany (<i>Balthasar</i>)	449
K. International Arbitration in Hong Kong (<i>Leung/Lo</i>).....	489
L. International Arbitration in India (<i>Steinbrück</i>).....	534
M. International Arbitration in the Netherlands (<i>Fasfalis/Krestin</i>)	567
N. International Arbitration in the Russian Federation (<i>Yuryev</i>).....	606
O. International Arbitration in Singapore (<i>Selvaraj/Tan</i>)	635
P. International Arbitration in Spain (<i>Duncker</i>).....	667
Q. International Arbitration in Sweden (<i>Widjeskog</i>)	697
R. International Arbitration in Switzerland (<i>Richers/Magliana</i>).....	727
S. International Arbitration in the U.S. (<i>Niedermaier</i>).....	766
Table of Cases.....	803
Index	903

Table of Contents

Preface	V
List of Abbreviations.....	XIX
List of Authors.....	XXVII

PART 1 INTRODUCTION

A. International Commercial Arbitration: Comparative Reflections on the UNCITRAL Model Law	1
I. Introduction.....	5
II. The principles of international commercial arbitration.....	8
1. International commercial arbitration: a definition.....	8
2. The legal framework.....	9
3. The territoriality principle and the place of arbitration.....	10
4. <i>Ad hoc</i> and institutional arbitration.....	11
5. Advantages and disadvantages of arbitration as a dispute resolution mechanism.....	12
III. The arbitration agreement.....	15
1. The doctrine of separability.....	16
2. The law governing the arbitration agreement.....	17
3. The validity of the arbitration agreement.....	19
4. The interpretation and the scope of the arbitration agreement.....	24
5. The effect of the arbitration agreement.....	29
6. Drafting arbitration clauses: a checklist.....	34
IV. The arbitral tribunal and the conduct of arbitral proceedings.....	34
1. The arbitral tribunal.....	35
2. The conduct of the arbitral proceedings.....	37
3. The decision of the arbitral tribunal.....	44
4. Interim relief and emergency arbitration.....	49
5. Multi-party and multi-contract arbitration.....	51
V. The review and the enforcement of arbitral awards.....	52
1. Finality of arbitral awards and <i>res judicata</i> effects.....	52
2. Correction and interpretation of arbitral awards.....	53
3. Review of arbitral awards before the state courts.....	53
4. Recognition and enforcement of arbitral awards.....	64
VI. Conclusion.....	70

PART 2 INTERNATIONAL CONVENTIONS AND TREATIES

B. The New York Convention	71
I. General.....	76
1. General purpose and scope of the New York Convention.....	76
2. History of the Convention.....	77
3. Status and implementation of the Convention into the national law of the Contracting States.....	78
4. Interpretation of the Convention.....	78
5. Relationship to other sources of law.....	79
II. Scope of application of the Convention.....	80
1. General.....	80
2. Temporal applicability.....	80
3. Applicability to the recognition and enforcement of arbitral awards.....	81
4. Applicability to the recognition of arbitration agreements.....	101

III. Recognition of Arbitration Agreements.....	103
1. General.....	103
2. Validity of the arbitration agreement.....	106
3. Determination of the scope of the arbitration agreement.....	121
4. Other objections to the recognition of arbitration agreements, in particular: good faith and arbitration agreements “incapable of being performed”	123
5. Cure of defective arbitration agreements, preclusion with regard to the defence of invalidity of the arbitration agreement	124
6. Referral to arbitration	126
7. More favourable law.....	128
IV. Recognition and Enforcement of Arbitral Awards.....	129
1. The obligation to recognize and enforce foreign arbitral awards, article III NYC.....	129
2. Formal requirements for recognition and enforcement, article IV NYC	130
3. Grounds for refusal of recognition and enforcement of arbitral awards, article V NYC	134
4. Adjournment in view of setting-aside proceedings, article VI NYC	190
5. Enforcement procedure for arbitral awards.....	191
6. Alternative means of enforcement.....	196
C. Investment Treaty Arbitration	197
I. Introduction.....	198
II. The general requirements for the protection of investors under IIAs.....	201
1. The nationality of investors.....	201
2. The existence of an investment	202
III. Investor-State arbitration under treaty dispute resolution mechanisms	209
1. Jurisdiction <i>ratione personae</i>	210
2. Jurisdiction <i>ratione materiae</i>	210
3. Jurisdiction <i>ratione temporis</i>	211
4. Additional requirements for the reliance of an investor on the dispute resolution clause in an IIA	212
5. Ex-ante consolidation and proceedings involving multiple claimants	214
IV. Substantive protection standards under IIAs.....	215
1. Protection in the event of an expropriation	216
2. Fair and equitable treatment	218
3. Full protection and security.....	222
4. National treatment.....	223
5. Most-Favoured-Nation treatment	224
6. Prohibition of unreasonable or discriminatory measures.....	225
7. Umbrella clauses.....	226
V. Conclusion	227

PART 3
COUNTRY REPORTS

D. International Arbitration in Austria	231
I. Introduction.....	233
1. The legal framework.....	233
2. The guiding principles of Austrian arbitration law	236
II. The arbitration agreement.....	237
1. The doctrine of separability.....	239
2. The law applicable to the arbitration agreement.....	239
3. The validity of the arbitration agreement (capacity, arbitrability, form).....	240
4. The scope and the interpretation of the arbitration agreement.....	242
5. The effect of the arbitration agreement and <i>Kompetenz-Kompetenz</i>	245
III. The arbitral tribunal and the conduct of the arbitral proceedings.....	246
1. The arbitral tribunal, impartiality and independence of the arbitrator.....	247
2. The arbitral proceedings.....	249
3. Evidence, discovery, disclosure	252
4. The law governing the dispute and <i>lois de police</i>	253
5. Interim relief in arbitration.....	254

6. Multi-party and multi-contract arbitration.....	255
IV. The control and the enforcement of arbitral awards.....	256
1. Correction and amendment of arbitral awards.....	256
2. Review of arbitral awards before state courts.....	256
3. Enforcing arbitral awards.....	258
4. Preclusion of grounds for challenge and defences to enforcement.....	259
E. International Arbitration in Belgium.....	260
I. Introduction.....	262
1. Legal framework.....	262
2. The guiding principles of arbitration law.....	265
II. The arbitration agreement.....	265
1. The doctrine of separability.....	266
2. The applicable law.....	266
3. The validity of the arbitration agreement (capacity, arbitrability, form).....	266
4. The scope and the interpretation of the arbitration agreement.....	271
5. The effect of the arbitration agreement and <i>Kompetenz-Kompetenz</i>	272
III. The arbitral tribunal and the conduct of the arbitral proceedings.....	274
1. The arbitral tribunal, impartiality and independence of the arbitrator.....	275
2. The arbitral proceedings.....	276
3. Evidence, discovery, disclosure.....	282
4. The law governing the dispute and <i>lois de police</i>	283
5. Interim relief in arbitration.....	284
6. Multi-party arbitration.....	286
IV. The control and the enforcement of arbitral awards.....	286
1. Correction and amendment of arbitral awards.....	286
2. Review of arbitral awards before the state courts.....	287
3. Third party opposition against arbitral awards.....	291
4. Enforcing arbitral awards.....	291
5. Preclusion of grounds for challenge and defences to enforcement.....	293
F. International Arbitration in Brazil.....	294
I. Introduction.....	296
1. Legal framework.....	296
2. Guiding principles of Brazilian arbitration law.....	299
II. The arbitration agreement.....	299
1. The doctrine of separability.....	300
2. The law applicable to the arbitration agreement.....	300
3. The validity of the arbitration agreement (capacity, arbitrability, form).....	301
4. The scope and interpretation of the arbitration agreement.....	303
5. The effect of the arbitration agreement and <i>Kompetenz-Kompetenz</i>	305
III. The arbitral tribunal and the conduct of the arbitral proceedings.....	306
1. The arbitral tribunal, impartiality and independence of the arbitrator.....	306
2. Arbitral proceedings.....	308
3. Evidence, discovery, disclosure.....	310
4. The law governing the dispute and <i>lois de police</i>	311
5. Interim relief in the arbitration.....	311
6. Multi-party arbitration.....	311
IV. Control and enforcement of arbitral awards.....	312
1. Correction and amendment of arbitral awards.....	312
2. Review of arbitral awards before state courts.....	313
3. Enforcing arbitral awards.....	315
4. Preclusion of grounds for challenge and defences to enforcement.....	318
V. Investment Arbitration in Brazil.....	318
G. International Arbitration in China (People's Republic).....	320
I. Introduction.....	324
1. The legal framework.....	325
2. The guiding principles of the PRC Arbitration Law.....	332

II. The arbitration agreement.....	333
1. The doctrine of separability.....	333
2. The law applicable to the arbitration agreement.....	334
3. The validity of the arbitration agreement: capacity, arbitrability, form.....	335
4. The scope and the interpretation of the arbitration agreement.....	336
5. The effect of the arbitration agreement and <i>Kompetenz-Kompetenz</i>	339
III. The arbitral tribunal and the conduct of the arbitral proceedings.....	341
1. The arbitral tribunal, impartiality and independence of the arbitrator.....	341
2. The conduct of the arbitral proceedings.....	343
3. Evidence, discovery, disclosure.....	347
4. The law governing the dispute and mandatory rules (<i>lois de police</i>).....	347
5. Interim relief in arbitration.....	348
6. Multi-party arbitration.....	350
IV. Control and enforcement of arbitral awards.....	351
1. Correction and amendment of arbitral awards.....	351
2. The reporting system.....	351
3. Review of arbitral awards before the people's courts.....	352
4. Enforcing arbitral awards.....	354
5. Preclusion of grounds for challenge and defences to enforcement.....	357
H. International Arbitration in England and Wales.....	358
I. Introduction.....	360
1. The legal framework.....	360
2. The guiding principles of English arbitration law.....	364
II. The arbitration agreement.....	365
1. The doctrine of separability.....	365
2. The law applicable to the arbitration agreement.....	366
3. The formation of the arbitration agreement.....	369
4. Termination of the arbitration agreement.....	372
5. The scope and the interpretation of the arbitration agreement.....	372
6. Enforcing arbitration agreements.....	376
7. The extent of the principle of <i>Kompetenz-Kompetenz</i>	382
8. Binding effect of state court decisions on jurisdiction of the arbitral tribunal.....	383
III. The arbitral tribunal and the conduct of the arbitral proceedings.....	384
1. The arbitral tribunal.....	385
2. The arbitral proceedings.....	387
3. Evidence, discovery, disclosure.....	393
4. The law governing the dispute and <i>lois de police</i>	395
5. Interim relief in arbitration.....	396
6. Multi-party arbitration.....	397
IV. The control, appeal and the enforcement of arbitral awards.....	398
1. Correction of award or additional award.....	398
2. Control, appeal and enforcement by the state courts.....	399
3. Enforcing arbitral awards.....	409
4. Preclusion of grounds for challenge and defences to enforcement.....	413
I. International Arbitration in France.....	415
I. Introduction.....	417
1. Legal framework.....	417
2. The guiding principles of arbitration law.....	421
II. The arbitration agreement.....	421
1. The doctrine of separability.....	421
2. The law applicable to the arbitration agreement.....	421
3. The validity of the arbitration agreement (capacity, arbitrability, form).....	422
4. The scope and interpretation of the arbitration agreement.....	425
5. The effect of the arbitration agreement and competence-competence.....	427
III. The arbitral tribunal and the conduct of the arbitral proceedings.....	429
1. The arbitral tribunal, impartiality and independence of the arbitrator.....	429
2. The arbitral proceedings.....	433

3. Evidence, discovery, disclosure	436
4. The law governing the dispute and mandatory laws (<i>lois de police</i>)	436
5. Interim relief in arbitration.....	437
6. Multi-party arbitration.....	438
7. Third-party funding.....	439
IV. The control and the enforcement of arbitral awards.....	439
1. Correction, amendment and other means of redress of arbitral awards	440
2. Review of arbitral awards before the state courts.....	441
3. Enforcing arbitral awards.....	446
4. Preclusion of grounds for challenge and defences to enforcement.....	447
J. International Arbitration in Germany	449
I. Introduction.....	451
1. The legal framework.....	452
2. The guiding principles of German arbitration law	455
II. The arbitration agreement.....	455
1. The doctrine of separability	456
2. The law applicable to the arbitration agreement	456
3. The validity of the arbitration agreement	457
4. The scope and the interpretation of the arbitration agreement.....	460
5. The effect of the arbitration agreement and <i>Kompetenz-Kompetenz</i>	463
III. The arbitral tribunal and the conduct of the arbitral proceedings.....	466
1. The arbitral tribunal	466
2. The conduct of the arbitral proceedings.....	469
3. Evidence, discovery, disclosure	474
4. The law governing the dispute and <i>lois de police</i>	475
5. Interim relief in arbitration.....	477
6. Multi-party and multi-contract arbitration.....	478
IV. The control and the enforcement of arbitral awards.....	479
1. Correction and amendment of arbitral awards.....	479
2. Review of arbitral awards before the state courts.....	479
3. Enforcing arbitral awards.....	485
4. Preclusion of grounds for challenge and defences to enforcement.....	487
K. International Arbitration in Hong Kong	489
I. Introduction.....	491
1. The legal framework.....	492
2. The guiding principles of Hong Kong arbitration law.....	495
II. The arbitration agreement.....	495
1. The doctrine of separability.....	496
2. The law applicable to the arbitration agreement	496
3. The validity of the arbitration agreement (capacity, arbitrability, form).....	496
4. The scope and the interpretation of the arbitration agreement	498
5. The effect of the arbitration agreement and <i>Kompetenz-Kompetenz</i>	499
III. The arbitral tribunal and the conduct of the arbitral proceedings.....	503
1. The arbitral tribunal, impartiality and independence of the arbitrator.....	504
2. The arbitral proceedings.....	506
3. Evidence, discovery, disclosure	509
4. The law governing the dispute and <i>lois de police</i>	510
5. Interim relief in arbitration.....	511
6. Multi-party and multi-contract arbitration.....	512
7. Third-party funding of arbitration.....	513
IV. The control and the enforcement of arbitral awards.....	515
1. Correction and amendment of arbitral awards.....	516
2. Review of arbitral awards before the state courts.....	516
3. Enforcing arbitral awards.....	523
4. Preclusion of grounds for challenge and defences to enforcement.....	530

V. Immunity.....	531
1. State immunity.....	531
2. Crown immunity.....	533
3. Conclusion.....	533
L. International Arbitration in India.....	534
I. Introduction.....	536
1. The legal framework.....	537
2. The guiding principles of Indian arbitration law.....	541
II. The arbitration agreement.....	542
1. The doctrine of separability.....	542
2. The law applicable to the arbitration agreement.....	542
3. The validity of the arbitration agreement (capacity, arbitrability, form).....	543
4. The scope and the interpretation of the arbitration agreement.....	545
5. The effect of the arbitration agreement and Kompetenz-Kompetenz.....	547
III. The arbitral tribunal and the conduct of the arbitral proceedings.....	549
1. The arbitral tribunal.....	549
2. The arbitral proceedings.....	552
3. Evidence, discovery, disclosure.....	555
4. The law governing the dispute.....	556
5. Interim relief in arbitration.....	557
6. Multi-party arbitration.....	559
IV. The control and the enforcement of arbitral awards.....	559
1. Correction and amendment of arbitral awards.....	559
2. Review of arbitral awards before the state courts.....	560
3. Enforcing arbitral awards.....	563
4. Preclusion of grounds for challenge and defences to enforcement.....	565
M. International Arbitration in the Netherlands.....	567
I. Introduction.....	569
1. The legal framework.....	570
2. The guiding principles of Dutch arbitration law.....	574
II. The arbitration agreement.....	574
1. The doctrine of separability.....	575
2. The law applicable to the arbitration agreement.....	575
3. The validity of the arbitration agreement (capacity, arbitrability, form).....	576
4. The scope and the interpretation of the arbitration agreement.....	579
5. The effect of the arbitration agreement and <i>Kompetenz-Kompetenz</i>	581
III. The arbitral tribunal and the conduct of the arbitral proceedings.....	583
1. The arbitral tribunal, impartiality and independence of the arbitrator.....	584
2. The arbitral proceedings.....	588
3. Evidence, discovery, disclosure.....	592
4. The law governing the dispute and <i>lois de police</i>	593
5. Interim relief in arbitration.....	594
6. Multi-party arbitration.....	595
IV. The control and the enforcement of arbitral awards.....	596
1. Correction and amendment of arbitral awards.....	596
2. Review of arbitral awards before the state courts.....	597
3. Enforcing arbitral awards.....	602
4. Preclusion of grounds for challenge.....	604
N. International Arbitration in the Russian Federation.....	606
I. Introduction.....	608
1. Arbitrazh courts and arbitral tribunals.....	609
2. The legal framework.....	610
3. The guiding principles of Russian arbitration law.....	614
II. The arbitration agreement.....	614
1. The doctrine of separability.....	615
2. The law applicable to the arbitration agreement.....	615
3. The validity of the arbitration agreement (capacity, arbitrability, form).....	615

4. The scope and the interpretation of the arbitration agreement.....	618
5. The effect of the arbitration agreement and <i>Kompetenz-Kompetenz</i>	620
III. The arbitral tribunal and the conduct of the arbitral proceedings.....	621
1. The arbitral tribunal, impartiality and independence of the arbitrator.....	621
2. The arbitral proceedings.....	623
3. Evidence, discovery, disclosure.....	625
4. The law governing the dispute and <i>lois de police</i>	626
5. Interim relief in arbitration.....	627
6. Multi-party arbitration.....	628
IV. The control and the enforcement of arbitral awards.....	628
1. Correction and amendment of arbitral awards.....	629
2. Review of arbitral awards before the state courts.....	629
3. Enforcing arbitral awards.....	632
4. Preclusion of grounds for challenge and defences to enforcement.....	633
O. International Arbitration in Singapore	635
I. Introduction.....	637
1. The legal framework.....	637
2. The guiding principles of Singapore arbitration law.....	643
II. The arbitration agreement.....	643
1. The doctrine of separability.....	643
2. The law applicable to the arbitration agreement.....	644
3. The validity of the arbitration agreement (capacity, arbitrability, form).....	644
4. The scope and the interpretation of the arbitration agreement.....	647
5. The effect of the arbitration agreement and <i>Kompetenz-Kompetenz</i>	648
III. The arbitral tribunal and the conduct of the arbitral proceedings.....	650
1. The arbitral tribunal, impartiality and independence of the arbitrator.....	650
2. The arbitral proceedings.....	652
3. Evidence, discovery, disclosure.....	655
4. The law governing the dispute and <i>lois de police</i>	656
5. Interim relief in arbitration.....	657
6. Multi-party arbitration.....	658
7. Third-party funding.....	659
IV. The control and the enforcement of arbitral awards.....	660
1. Correction and amendment of arbitral awards.....	660
2. Review of arbitral awards before the state courts.....	660
3. Enforcing arbitral awards.....	663
4. Preclusion of grounds for challenge and defences to enforcement.....	665
P. International Arbitration in Spain	667
I. Introduction.....	668
1. Legal framework.....	669
2. The guiding principles of Spanish arbitration law.....	672
II. The arbitration agreement.....	672
1. The doctrine of separability.....	672
2. The law applicable to the arbitration agreement.....	673
3. The validity of the arbitration agreement.....	673
4. The scope and the interpretation of the arbitration agreement.....	678
5. The effect of the arbitration agreement and <i>Kompetenz-Kompetenz</i>	679
III. The arbitral tribunal and the conduct of the arbitral proceedings.....	681
1. The arbitral tribunal, impartiality and independence of the arbitrator.....	681
2. The arbitral proceedings.....	683
3. Evidence, discovery, disclosure.....	685
4. The law governing the dispute.....	685
5. Interim relief in arbitration.....	686
6. Multi-party arbitration.....	687
IV. The control and the enforcement of arbitral awards.....	687
1. Correction and amendment of arbitral awards.....	687
2. Review of arbitral awards before the state courts.....	688

3. Enforcing arbitral awards	692
4. Preclusion of grounds for challenge and defences to enforcement.....	695
Q. International Arbitration in Sweden	697
I. Introduction.....	698
1. Legal framework.....	699
2. The guiding principles of Swedish arbitration law.....	701
II. The arbitration agreement.....	701
1. The doctrine of separability.....	702
2. The law applicable to the arbitration agreement.....	702
3. The validity of the arbitration agreement (capacity, arbitrability, form).....	703
4. The scope and the interpretation of the arbitration agreement.....	705
5. The effect of the arbitration agreement and <i>Kompetenz-Kompetenz</i>	707
III. The arbitral tribunal and the conduct of the arbitral proceedings	709
1. The arbitral tribunal, impartiality and independence of the arbitrator.....	709
2. The arbitral proceedings.....	712
3. Evidence, discovery, disclosure	715
4. The law governing the dispute and <i>lois de police</i>	716
5. Interim relief in arbitration.....	717
6. Multi-party and multi-contract arbitration.....	718
IV. The control and the enforcement of arbitral awards.....	719
1. Correction and amendment of arbitral awards.....	719
2. Review of arbitral awards before the state courts.....	719
3. Enforcing arbitral awards.....	723
4. Preclusion of grounds for challenge and defences to enforcement.....	725
R. International Arbitration in Switzerland	727
I. Introduction.....	729
1. Switzerland's position in international arbitration.....	729
2. Legal framework.....	729
3. The guiding principles of Swiss international arbitration law.....	735
II. The arbitration agreement.....	736
1. The doctrine of separability.....	736
2. The law applicable to the arbitration agreement.....	736
3. The validity of the arbitration agreement (capacity, arbitrability, form).....	737
4. The scope and the interpretation of the arbitration agreement.....	740
5. The effect of the arbitration agreement and <i>Kompetenz-Kompetenz</i>	743
III. The arbitral tribunal and the conduct of the arbitral proceedings	746
1. The arbitral tribunal: impartiality and independence of the arbitrator.....	746
2. The arbitral proceedings.....	750
3. Evidence, discovery, disclosure	753
4. The law governing the dispute and <i>lois de police</i>	754
5. Interim relief in arbitration.....	755
6. Multi-party arbitration.....	756
IV. The control and the enforcement of arbitral awards.....	757
1. Correction and amendment of arbitral awards.....	758
2. Review of arbitral awards before the state courts.....	758
3. Enforcing arbitral awards.....	763
4. Preclusion of grounds for challenge and defences to enforcement.....	764
S. International Arbitration in the U.S.	766
I. Introduction.....	767
1. The legal framework.....	768
2. The guiding principles of U.S. arbitration law.....	773
II. The arbitration agreement.....	773
1. The doctrine of separability (severability).....	773
2. The law applicable to the arbitration agreement.....	774
3. The validity of the arbitration agreement (capacity, arbitrability, form).....	774
4. The scope and the interpretation of the arbitration agreement.....	776
5. The effect of the arbitration agreement and <i>Kompetenz-Kompetenz</i>	778

III. The arbitral tribunal and the conduct of the arbitral proceedings.....	782
1. The arbitral tribunal, impartiality and independence of the arbitrators.....	782
2. The arbitral proceedings.....	785
3. Evidence, discovery, disclosure.....	788
4. The law governing the dispute and <i>lois de police</i>	790
5. Interim relief in arbitration.....	791
6. Multi-party and multi-contract arbitration.....	792
IV. The control and the enforcement of arbitral awards.....	794
1. Correction and amendment of arbitral awards.....	794
2. Review of arbitral awards before the state courts.....	795
3. Enforcing arbitral awards.....	799
4. Preclusion of grounds for challenge and defences to enforcement.....	801
Table of Cases.....	803
Index.....	903