

INTERNATIONAL
ARBITRATION

Law and Practice in Switzerland

GABRIELLE KAUFMANN-KOHLER
ANTONIO RIGOZZI



OXFORD

INTERNATIONAL ARBITRATION

Law and Practice in Switzerland

GABRIELLE KAUFMANN-KOHLER
ANTONIO RIGOZZI

OXFORD
UNIVERSITY PRESS



Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

© Gabrielle Kaufmann-Kohler and Antonio Rigozzi 2015

The moral rights of the authors have been asserted

First Edition published in 2015

Impression: 1

All rights reserved. No part of this publication may be reproduced, stored in
a retrieval system, or transmitted, in any form or by any means, without the
prior permission in writing of Oxford University Press, or as expressly permitted
by law, by licence or under terms agreed with the appropriate reprographics
rights organization. Enquiries concerning reproduction outside the scope of the
above should be sent to the Rights Department, Oxford University Press, at the
address above

You must not circulate this work in any other form
and you must impose this same condition on any acquirer

Crown copyright material is reproduced under Class Licence
Number C01P0000148 with the permission of OPSI
and the Queen's Printer for Scotland

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2014958061

ISBN 978–0–19–967975–1

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

Links to third party websites are provided by Oxford in good faith and
for information only. Oxford disclaims any responsibility for the materials
contained in any third party website referenced in this work.

CONTENTS—DETAILED

<i>Table of Cases</i>	xiii
<i>Table of Legal Texts</i>	lxix
<i>List of Abbreviations</i>	lxxxv
<i>Introductory Comments</i>	lxxxvii

1. The Concept and Sources of Arbitration

A. What is Arbitration?	1.02
1. Arbitration as a phenomenon	1.02
2. Definition and main characteristics of arbitration	1.16
3. Arbitration distinguished: other private dispute resolution methods	1.21
B. Why do Parties Resort to Arbitration?	1.38
1. Advantages of arbitration	1.38
2. Disadvantages of arbitration	1.47
C. The Sources of the Law of Arbitration	1.52
1. National laws, in particular Chapter 12 PILA	1.52
2. International treaties, in particular the New York Convention	1.58
3. Arbitration rules	1.70
4. Soft law	1.77
5. Jurisprudence	1.81
6. Scholarly writings	1.85
D. Switzerland as a Leading Place of Arbitration	1.86
1. Chapter 12 PILA	1.87
2. Arbitration and arbitration-related institutions and activities in Switzerland	1.103
E. Arbitration and the Courts	1.173
1. Court seized of the merits of a claim	1.174
2. Juge d'appui	1.177
3. Court granting provisional measures	1.180
4. Annulment court	1.182
5. Enforcement court	1.184

2. The Law of the Arbitration

A. Notions and Distinctions	2.02
B. The Determination of the Law of the Arbitration	2.05
1. Seat of the arbitration—the scope of Chapter 12 PILA <i>ratione loci</i>	2.09

2.	International nature of the arbitration—the scope of Chapter 12 PILA <i>ratione personae</i>	2.26
3.	'True' arbitration—the scope of Chapter 12 PILA <i>ratione materiae</i>	2.47
C.	Salient Features and Content of the <i>lex arbitri</i> , in Particular Chapter 12 PILA	2.55
1.	Main feature: party autonomy	2.56
2.	Arbitration agreement	2.58
3.	Arbitral procedure	2.64
4.	Award	2.67
3.	The Arbitration Agreement	
A.	Introductory Remarks	3.02
1.	Notion, typology, and legal framework	3.04
2.	Essential elements (<i>essentialia negotii</i>) of the arbitration agreement	3.10
3.	Non-essential elements	3.23
4.	Law applicable to the arbitration agreement	3.29
5.	Effects of an arbitration agreement	3.32
B.	The Arbitrability of the Dispute	3.36
1.	Notion and legal framework	3.36
2.	Arbitrability—test under Swiss law	3.41
3.	Disputes within the exclusive jurisdiction of state authorities	3.53
C.	The Form of the Arbitration Agreement	3.56
1.	Purpose and relevance of the written form	3.56
2.	Scope of Article 178(1) PILA	3.60
3.	'Made in writing'	3.66
4.	Exceptions to the form requirement	3.73
D.	The Substantive Validity of the Arbitration Agreement	3.75
1.	Applicable law(s)	3.75
2.	Formation of the arbitration agreement	3.81
3.	Defects in consent	3.98
4.	Capacity and authority to agree to arbitration	3.100
5.	Interpretation of the arbitration agreement	3.119
6.	Objective scope of the arbitration agreement	3.137
7.	Subjective scope of the arbitration agreement and extension to third parties	3.152
8.	Termination of the arbitration agreement	3.180
E.	The Conclusion of the Arbitration Agreement by Conduct	3.188
4.	The Arbitral Tribunal	
A.	The Constitution of the Arbitral Tribunal	4.02
1.	General rule: party autonomy	4.04
2.	Appointment of arbitrators in institutional arbitration	4.20
3.	Appointment of arbitrators in ad hoc arbitration	4.47
4.	Constitution of the tribunal in multiparty arbitration	4.78

Contents—Detailed

5. Review of the arbitration agreement in the context of the appointment of arbitrators	4.91
B. The Challenge of Arbitrators	4.96
1. Grounds for challenge	4.98
2. Challenge procedure	4.132
3. Arbitrator's duty to disclose	4.157
4. Consequences of a challenge	4.166
C. The Replacement of Arbitrators	4.168
1. General rule	4.168
2. Successful challenge	4.170
3. Removal	4.172
4. Revocation	4.177
5. Death and resignation	4.178
6. Exceptions	4.181
D. The Arbitrator's Contract	4.183
1. Status of arbitrators	4.183
2. Governing law	4.184
3. Rights and duties of arbitrators	4.186
4. Relevance of the arbitration rules	4.190
5. Immunity of arbitrators	4.192
5. The Jurisdiction of the Arbitral Tribunal	
A. The Arbitral Tribunal's Review of its Jurisdiction	5.06
1. Competence-competence	5.06
2. Defence of lack of jurisdiction	5.10
3. Decision on jurisdiction	5.17
4. Multi-tiered dispute settlement clauses	5.22
B. The Courts' Review of the Arbitral Tribunal's Jurisdiction	5.25
1. Arbitration defence (<i>exceptio arbitri</i>)	5.26
2. Power of review	5.32
3. Challenge against the court's decision on jurisdiction	5.48
C. The Relationship between Arbitral and Judicial Review of Jurisdiction	5.50
1. Effects of a court decision ruling on an arbitration defence	5.51
2. Effects of an arbitral award on jurisdiction	5.58
3. Effects of parallel proceedings	5.60
D. Anti-Suit Injunctions	5.66
6. The Proceedings before the Arbitral Tribunal	
A. Procedural Rules	6.02
1. Rules of procedure in the <i>lex arbitri</i>	6.05
2. Fundamental principles of procedure	6.21
3. Procedural rules adopted by the parties or the arbitrators	6.44

Contents—Detailed

B. The Hierarchy of the Rules Governing the Proceedings	6.50
1. Relationship between statutory provisions and party-agreed rules	6.51
2. Relationship between party-agreed specific rules and arbitration rules	6.53
3. Relationship between the rules adopted by the parties and the tribunal's powers	6.60
C. The Arbitral Proceedings in Practice	6.65
D. Provisional Measures	6.84
1. Jurisdiction to order provisional measures	6.88
2. Provisional measures ordered by arbitral tribunals	6.112
3. Enforcement of provisional measures	6.130
7. The Law Applicable to the Merits and the Award	
A. The Law Applicable to the Merits of the Dispute (Article 187 PILA)	7.03
1. Choice of law or party autonomy	7.07
2. Determination by the tribunal or objective method	7.38
3. Transnational rules of law	7.52
4. Trade usages	7.61
5. Arbitration <i>ex aequo et bono</i>	7.64
6. No remedies against the choice and application of the law governing the merits	7.86
7. Arbitrators apply the law <i>ex officio</i>	7.87
B. International Public Policy and Mandatory Rules	7.89
1. International public policy	7.89
2. Overriding mandatory rules	7.91
C. The Arbitral Award	7.102
1. Types of awards	7.104
2. Deliberation	7.112
3. Form and content of the award	7.121
4. Decision on costs	7.129
5. Drafting, scrutiny, and dissenting opinions	7.152
6. Time limits, notification, and publication	7.167
7. Effects of the award	7.187
8. The Annulment and Enforcement of the Award	
A. The Annulment of Awards	8.03
1. Statutory framework	8.03
2. Admissibility of the annulment action	8.07
3. Waiver of annulment	8.49
4. Annulment procedure	8.76
5. Grounds for annulment	8.130

Contents—Detailed

B. The Revision of Awards	8.206
1. Admissibility of a request for revision	8.208
2. Merits of a request for revision	8.218
3. Consequences of a successful request for revision	8.224
C. The Recognition and Enforcement of Foreign Arbitral Awards	8.230
1. Introduction	8.230
2. ‘Foreign arbitral award’	8.240
3. Grounds for refusal of recognition and enforcement	8.249
<i>Bibliography</i>	535
<i>Index</i>	561

TABLE OF CASES

References are by paragraph number; chapter numbers appear in bold, paragraph numbers in plain.
Decisions/Legal texts reproduced in full or substantial part are indicated by paragraph numbers
in bold.

Table of cases (Swiss Supreme Court)

Date	Parties	Case No.	ATF/BGE	Language	English translation available in swissarbitrationdecisions.com	Reported in ASA Bull.	Paragraphs
25.11.2014	A. <i>J. Internationales Olympisches Komitee (IOK)</i>	4A_586/2014	D			2014, 826	8.24
04.11.2014	A. SA <i>J. B., C., D.</i>	4A_446/2014	F			2014, 782	8.152
16.10.2014	Fenerbağcı Spor Kulübü <i>J. UEFA</i>	4A_324/2014	D			2014, 782	8.193
08.10.2014	A. Inc. <i>J. B. SA</i>	4A_199/2014	F			2014, 782	6.31
15.09.2014	A. <i>J. B.</i>	5A_409/2014	F			2014, 782	8.261,
						2014, 782	8.266
02.09.2014	Sàrl X. <i>J. Y. AG</i>	4A_606/2013	F			2014, 782	8.192
28.08.2014	A. SA <i>J. B.</i>	4A_74/2014	140 III 477	D		2014, 782	8.22;
28.08.2014	A. <i>J. Club B.</i>	4A_6/2014	F			2014, 782	8.75
23.07.2014	X. Ltd. <i>J. Y. Ltd. (in liquidation)</i>	4A_118/2014	D			2014, 782	7.105,
07.07.2014	A. SA <i>J. B. SA</i>	4A_124/2014	F			2014, 782	8.22,
						2014, 782	5.24,
30.06.2014	A. <i>J. B. AG, C., D. AG, E. AG</i>	4A_560/2013	D			2014, 782	8.150
19.06.2014	A. Kft. <i>J. B. GmbH</i>	4A_597/2013	D			2014, 782	5.36,
11.06.2014	A. <i>J. Nationale Anti-Doping Agentur Deutschland</i>	4A_178/2014	140 III 367	D		2014, 782	5.42
28.05.2014	A. SA <i>J. B. Sàrl</i>	4A_35/2014	140 III 267	F		2014, 782	2014, 782
27.05.2014	A. <i>J. B.</i>	4A_508/2013	140 III 278	F		2014, 782	8.10
26.05.2014	A. S.p.A. <i>J. B. Asociación Civil</i>	4A_544/2013	D			2014, 782	5.54,
						2014, 782	8.191,
						2014, 782	8.192
						2014, 782	8.175

(Continued)

Date	Parties	Case No.	ATF/BGE	Language	English translation available in swissarbitrationdecisions.com	Reported in ASA Bull.	Paragraphs
06.01.2014	X. / Z., FIFA	4A_476/2013	F			2014, 54	8.39, 8.41
10.12.2013	Y. Limited / X. Limited	4F_8/2013	F			2014, 586	8.167
19.11.2013	A. / B.	4A_254/2013	D			2014, 586	2.41, 4.186, 8.17
13.11.2013	Club X. / Z.	4A_282/2013	139 III 511	F		2014, 89	8.24, 8.144
05.11.2013	X. / Z.	4A_540/2013	F				8.130
29.10.2013	A. Limited, B. Sàrl, C. Ltd. / D. Limited	4A_93/2013	I			2014, 351	8.58
09.10.2013	A.K. LDA, masse en faillite de B.K. SA, C.K. SA, D. SA, E. Ltd., X., Y., Z. / V., W. Company	4A_688/2012 4A_126/2013	F			2014, 351	8.207, 8.211, 8.212, 8.221
02.10.2013	X. AG, X. Technologies S.A.E. / Y.	4A_305/2013	D				3.180
30.09.2013	X. SA / Z. Limited	4A_232/2013	F				3.32, 8.147
17.09.2013	X. Corp. / Y. Ltd.	4A_330/2013	D				6.30
05.08.2013	FC X. / FC Z., FIHA	4A_274/2013	D				8.176, 8.178
05.08.2013	X. SA / Y. SA	4A_214/2013	F				6.17, 8.175, 8.185
26.07.2013	X. SA / Y. -- X. SA / Z.	5A_68/2013 5A_69/2013	F			2014, 326	8.249, 8.251, 8.253, 8.260, 8.261, 8.270, 8.282

15.07.2013	X. SA ./ A. et al.	4A_188/2013	F	swissarbitrationdecisions.com	ASA Bull. 2013, 853	6.18, 8.175
20.06.2013	Egyptian Football Association ./ Al-Masry Sporting Club	4A_682/2012	F	swissarbitrationdecisions.com	ASA Bull. 2014, 305	5.10, 5.12, 5.16, 6.38, 8.165, 8.202
03.06.2013	X. ./ Y. SNC	4A_666/2012	F	swissarbitrationdecisions.com	ASA Bull. 2014, 148	8.215
24.05.2013	X. SA de C.V. J. A.	4A_476/2012	D	swissarbitrationdecisions.com	ASA Bull. 2014, 148	5.10, 6.34
29.04.2013	X. ./ IAAF, Z.	4A_730/2012	F	swissarbitrationdecisions.com	ASA Bull. 2014, 68	8.161, 8.181, 8.182
17.04.2013	X. Ltd./ Y. Ltd	4A_669/2012	F	swissarbitrationdecisions.com	ASA Bull. 2014, 108	6.32, 8.122, 8.177, 8.179, 8.181
17.04.2013	Fondation pour l'animation socioculturelle lausannoise (FASL) ./ X.	4A_515/2012	F	swissarbitrationdecisions.com	ASA Bull. 2014, 335	3.42
15.04.2013	X. (International) AG J. A.	4A_596/2012	D	swissarbitrationdecisions.com	ASA Bull. 2013, 842	8.223
21.03.2013	A. ./ UEFA	4A_522/2012	D	swissarbitrationdecisions.com	ASA Bull. 2013, 625; RS DIESZIER 2014, 326	8.200
18.03.2013	A. ./ Bulgarische Fussballunion	4A_388/2012	D	swissarbitrationdecisions.com	ASA Bull. 2013, 625; RS DIESZIER 2014, 326	3.14, 3.51

(Continued)

Date	Parties	Case No.	ATF/BGE	Language	English translation available in swissarbitrationdecisions.com	Reported in ASA Bull.	Paragraphs
28.02.2013	X. / J. Fédération Internationale d'Haltérophilie	4A_576/2012	F			2014, 543	8.34
21.02.2013	X. SA / J. A.Y. Holdings SA, B.Y. SpA, C.Y. SpA, D.Y. Holdings Inc.	4A_552/2012	D				8.163
20.02.2013	X. SE, Y. GmbH / J. Z. BV	4A_407/2012	D			2013, 659	6.42, 8.170
19.02.2013	X. SA / J. Y.	4A_550/2012	F				8.129
17.01.2013	X. / J. Y. Ltd	4A_538/2012	F				6.30,
							8.134,
							8.150,
							8.175,
							8.185
17.01.2013	FC X. / J. Y.	4A_244/2012	D			2013, 608	3.15, 8.150
10.01.2013	Erat X. / J. Société Y.	4A_146/2012	F				
							3.186,
							8.101,
							RSDIE/SZIER
							8.111,
							2014, 312
							8.144
21.12.2012	A. / J. B., C.	5A_355/2012	139 III 135	F		2013, 418	ASA Bull.
14.12.2012	A. / J. X.	4A_198/2012	F				1.132,
11.12.2012	X. / J. Z.	4A_414/2012	F			2014, 580	7.126,
							8.28, 8.130
10.12.2012	A S p A. / J. B.	4A_635/2012	I			2013, 344	8.22, 8.58,
16.10.2012	Fédération X. / J. Club A., Club B., Confédération C.	4A_314/2012	F				8.120
							8.161
							8.161

16.10.2012	X. Lda./Y. Ltd	4A_50/2012	138 III 714	D	swissarbitrationdecisions.com	ASA Bull. 2013, 354; RSDIESZIER 3.105, 2014, 307	3.100, 3.101, 8.147 8.10, 8.10
09.10.2012	X. / Y. AG	4A_297/2012	138 III 610	D	swissarbitrationdecisions.com	ASA Bull. 2013, 174	4.128, 7.181, 8.121, 8.138
09.10.2012	X. / UCI, Fédération Z.	4A_110/2012		F	swissarbitrationdecisions.com	ASA Bull. 2013, 174	4.128, 7.181, 8.121, 8.138
19.09.2012	Fédération X. / European Chess Union (ECU)	4A_274/2012		F	swissarbitrationdecisions.com	ASA Bull. 2013, 149	6.32 8.223
21.08.2012	A. S.p.A./J. B.	4A_750/2011		I	swissarbitrationdecisions.com	ASA Bull. 2013, 100	3.134
20.08.2012	X. SA, Y. BV/J. Y. SA	4A_240/2012		F	swissarbitrationdecisions.com	ASA Bull. 2012, 864	3.127, 5.36
xix	06.08.2012 X. AG/J. Y.	4A_119/2012	138 III 681	D	swissarbitrationdecisions.com	ASA Bull. 2012, 864	3.127, 5.36
23.07.2012	Erat X. / Y. AG	4A_570/2011		F	swissarbitrationdecisions.com	ASA Bull. 2014, 550	8.214, 8.221, 8.222
16.07.2012	Olympique des Alpes SA/J. UEFA, Atlético de Madrid SAD, Stade Rennais Football Club, Celtic PLC, Udinese Calcio SpA	4A_134/2012		F	swissarbitrationdecisions.com	ASA Bull. 2013, 138	8.30, 8.31, 8.33, 8.34
12.07.2012	X. / Y.	4A_150/2012		F	swissarbitrationdecisions.com	ASA Bull. 2013, 138	6.32, 8.170, 8.176, 8.196, 8.199, 8.202

(Continued)

Date	Parties	Case No.	ATF/BGE	Language	English translation available in swissarbitrationdecisions.com	Reported in ASA Bull. 2013, 156	Reported in Paragraphs
02.07.2012	X. SA ./ Z. LLC	5A_754/2011	138 III 520	D	YCA 2012, 305	8.237, 8.238, 8.282	
27.06.2012	X. ./ Y. Inc.	4A_54/2012		F	swissarbitrationdecisions.com	4.114, 8.121, 8.123	
18.06.2012	A. ./ Fédération X.	4A_636/2011		D	swissarbitrationdecisions.com	8.30, 8.34, 8.37	
18.06.2012	X. ./ UCI, Comitato Olimpico Nazionale Italiano (CONI), Federazione Ciclistica Italiana (FCI)	4A_488/2011		F	swissarbitrationdecisions.com	ASA Bull. 2013, 877	
31.05.2012	Club X. ./ Club Y.	4A_682/2011		D	swissarbitrationdecisions.com	ASA Bull. 2014, 137	
29.05.2012	Club de basketball X. ./ Y.	4A_232/2012		F	swissarbitrationdecisions.com	8.176	
23.05.2012	Serbischer Fussballverband (Football Association of Serbia) J. M.	4A_654/2011		D	swissarbitrationdecisions.com	1.132	
02.05.2012	X. SA ./ Y. SPRL	4A_16/2012		D	swissarbitrationdecisions.com	3.51, 8.147, 8.164	
02.05.2012	X. GmbH, V. GmbH J. Y. Sàrl	4A_14/2012	138 III 270	F	swissarbitrationdecisions.com	2013, 635	
						2014, 303	8.175, 8.201
							8.201, 8.144, 8.151, 8.167, 8.190, 8.199, 8.201, 8.202
							3.185, 4.156, RSDIESZIER

30.04.2012	X. / Y.	4A_763/2011	F	swissarbitrationdecisions.com	ASA Bull. 2013, 831	8.221, 8.222,
05.04.2012	Swatch AG / X. SA	4A_589/2011	D	swissarbitrationdecisions.com	ASA Bull. 2012, 591; RSDIE/SZIER 2014, 321	5.67 3.52, 8.196, 8.198, 8.200, 8.204, 8.205
27.03.2012	Francelino da Silva Matuzalem / FIFA	4A_558/2011	D	swissarbitrationdecisions.com	ASA Bull. 2012, 591; RSDIE/SZIER 2014, 321	3.52, 8.196, 8.198, 8.200, 8.204, 8.205
08.03.2012	International Ice Hockey Federation (IIHF) / SCB Eishockey AG	4A_627/2011	D	swissarbitrationdecisions.com	ASA Bull. 2012, 647; RSDIE/SZIER 2014, 312	3.167, 8.120
07.03.2012	Club X. / Club Y. SA	4A_652/2011	F	swissarbitrationdecisions.com	ASA Bull. 2012, 431	8.161 3.73, 3.92, 3.94, 5.65, 8.111, 8.149
13.02.2012	A., B., / AMA, Fédération flamande de tennis (VTV)	4A_428/2011	F	swissarbitrationdecisions.com	ASA Bull. 2012, 634	6.22, 6.24, 6.33, 7.75, 8.122, 8.130, 8.173, 8.177, 8.178
31.01.2012	X. / Z. Inc.	4A_360/2011	F	swissarbitrationdecisions.com	ASA Bull. 2012, 634	6.22, 6.24, 6.33, 7.75, 8.122, 8.130, 8.173, 8.177, 8.178
23.01.2012	U., V., W., X., SA / Y., Z.	4A_528/2011	D	swissarbitrationdecisions.com	8.176	8.176
23.01.2012	U., V., W., X., SA / Y., Z.	4A_526/2011	D	swissarbitrationdecisions.com	8.176	8.176

(Continued)