

International Arbitration in Switzerland

A Handbook for Practitioners

SECOND EDITION

EDITED BY

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Law & Business

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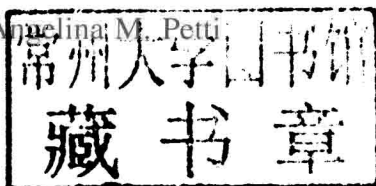
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Introduction to Second Edition

Nathalie Voser and Elliott Geisinger

Eight years have gone by since the first edition of this book was published. In this period, the importance of arbitration as the main choice of dispute resolution in international contracts has continued to grow. At the same time, the world of international arbitration has undergone great change.

In the Introduction to the first edition of this publication in 2004 it was mentioned by our predecessor, Gabrielle Kaufmann-Kohler, that the Swiss Rules of International Arbitration had been launched earlier the same year. From such period of time, the Swiss Rules of International Arbitration have been recognized as a reliable set of arbitral rules. These rules have recently undergone a revision which entered into force on 1 June 2012. Six months earlier, on 1 January 2012, the revised ICC Rules of Arbitration became effective. But not only institutional rules have changed; also the UNCITRAL Arbitration Rules and the IBA Guidelines on Taking of Evidence, as well as the UNCITRAL Model Law on International Commercial Arbitration, were revised during this period. Finally, within Switzerland we have a new legislative framework for domestic arbitration since the new Swiss Code of Civil Procedure now includes provisions on domestic arbitration. While this book focuses on international arbitration, where the comparison to the new regime of domestic arbitration is of interest, this will be pointed out.

Moreover, in recent years, the number of cases before the Federal Tribunal relating to arbitration has increased very significantly. Challenges of awards rendered by arbitral tribunals formed under the Court of Arbitration for Sport located in Lausanne, Switzerland account for a large part of this increase. The interest of these decisions do not lie exclusively in sports arbitration. Sports-related arbitration cases have given the Federal Tribunal the occasion to further shape Chapter 12 of the Swiss Private International Law Act (PILA) for the benefit of its users for commercial arbitration. The most noteworthy examples are the determination that notwithstanding the wording of Article 180(1)(c) of the PILA an arbitrator sitting in Switzerland must be

independent as well as impartial.¹ Furthermore, two sports-related arbitration cases led to the first finding of violation of procedural as well as substantive public policy since the enactment of the PILA.²

The second edition of this publication reflects all of these changes including the important developments in the practice of the Federal Tribunal since 2004. We have also added two new chapters – one on the legislative framework of Swiss arbitration law and one addressing costs of arbitration. Beyond that we have generally strived to make the best use of the wealth of practical expertise within our firm both as arbitrators and counsel.

We should also point out what has *not* changed: we have deliberately preserved the practice-oriented approach and the ‘down-to-earth’ style that are distinctive features of the first edition of this book. This publication is not a treatise. It aims to provide concrete answers to concrete questions that in-house lawyers, outside counsel and arbitrators are confronted with when practicing international commercial arbitration in Switzerland.

Since the publication of the first edition, Switzerland has maintained and further established its leading role in international arbitration be it as one of the preferred seats of arbitration or through the appointment of Swiss arbitrators which generally enjoy a very high reputation.³

Today, the challenge facing the Swiss legislator is to maintain the high image of Switzerland as a centre for arbitration. For this purpose, very recently the first steps were taken with a view to revise Chapter 12 of the PILA. There is a common understanding that the present Chapter 12 of the PILA was and still is an excellent piece of legislation and that any revision will be very ‘soft’ and limited to essential points. It is expected that such revision will take about two to three years.

We cannot complete this Introduction without expressing our thanks to the contributors, who invested huge time and effort in producing what we hope will be an indispensable tool for arbitration practitioners. Also, we are obliged to many members of the team at our firm who provided crucial support, in particular Ms Flavia Weber, whose painstaking work in ensuring up-to-date references in all chapters was invaluable. Last but far from least, we are deeply indebted to Ms Angelina M. Petti. Not only was she a contributor for several chapters: without her sharp organizational skills and her meticulous editorial work, this book would never have been completed.

1. DFT 136 III 365 (known as the *Valverde* decision).

2. DFT 136 II 345 (violation of procedural public policy due to a disregard of the principle of *res judicata*) and DFT 138 III 322 (violation of substantive public policy arising from a breach of Article 27 of the Swiss Civil Code).

3. According to the latest available statistical report of the ICC for 2010, Swiss arbitrators received the highest number of appointments and Switzerland was the number two jurisdiction for the seat of arbitration (see ‘2010 Statistical Report’, *ICC ICArb. Bull.* 22 (2011) 12-13).

Introduction to the First Edition

Gabrielle Kaufmann-Kohler

'The arbitrators shall meet at Geneva, in Switzerland, at the earliest convenient day after they shall have been named, and shall proceed impartially and carefully to examine all questions that shall be laid before them'. These are the words of the Washington Treaty of 1871, by which the United States of America and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland chose Geneva, as the seat of arbitration for the famous *Alabama* case. The United States alleged that the United Kingdom had violated its duties as a neutral during the American Civil War, because the Southern States had built and fitted out a large number of vessels in English shipyards, including a vessel named the *Alabama*. These vessels sank cruisers of the North inflicting substantial loss, for which the United States claimed compensation in the arbitration.

As the then usual practice of resolving such disputes by a mixed commission appeared inadequate, a different type of tribunal was set up, an arbitral tribunal composed of five members, two representatives of the parties, a former Italian minister and senator, a Brazilian diplomat, and a former Swiss federal councillor, all appointed by their governments in accordance with the treaty. The tribunal held a number of hearings between December 1871 and June 1872 and ultimately issued its award in September 1872. By four votes to one, it awarded an amount of 15.5 million gold dollars to the United States, a huge sum at the time. The United Kingdom protested against the award, but nevertheless paid as it was ordered to do.

The hearings were held and the award was made at the City Hall in Geneva, in a room later named the *Alabama Hall*, the very room in which the First Geneva Convention of the Red Cross was signed in 1864 and which later hosted other well-known arbitrations.

The *Alabama* arbitration is significant for a number of reasons. First, at the time, it averted the acute danger of a war between the United States and the United Kingdom.¹

1. Speech by Judge Gunnar Lagergren in the Rann of Kutch arbitration between India and Pakistan in the *Alabama Hall* on 15 February 1966, in Gillis Wetter, *The International Arbitral Process: Public and Private*, Vol. 1, New York, 1979, p. 17.

But its significance for the future was perhaps even greater, as Sir Gerald Fitzmaurice put it when opening the *Beagle Channel* case in the Alabama Hall in 1976: '*Coming when it did, it gave great impetus to the concept of arbitration as a judicial or quasijudicial method of settling international disputes*'. At the same time, still in Sir Fitzmaurice's words, '*there can be little doubt that it furthered the idea of Geneva as an international city*' To which he added: '*When I speak of Geneva as an international city, [...] I have in mind simply its unsurpassed record in the promotion of the cause of peace and humanity, of good relations between States, and of the settlement of disputes according to justice and law*'.²

The *Alabama* case was undoubtedly a milestone in the history of dispute resolution in general, and of dispute resolution in Geneva and Switzerland in particular. Since that time, numerous arbitrations of many different types have taken and are taking place here. A convenient, neutral location, with a long-standing tradition of arbitration, arbitration-friendly legislation, arbitration-supportive courts, and a good infrastructure, are probably the main reasons why parties so often choose Switzerland as a place of arbitration.

Today, the arbitration activity carried out in Switzerland is both intensive and varied. It includes ad hoc arbitration, often governed by the UNCITRAL Arbitration Rules, as well as institutional arbitration. Among the various forms of institutional arbitration in Switzerland, one counts first and foremost ICC arbitration, but there is also a good number of proceedings under other institutional rules, whether they be specialized rules, such as those in the areas of sports and intellectual property, rules administered by foreign associations, or the Swiss Rules of International Arbitration, which the Swiss Chambers of Commerce launched in January 2004.

The scope of arbitration activity also extends well beyond commercial arbitration. It suffices to mention the United Nations Compensation Commission for Claims arising out of the Iraqi invasion of Kuwait, the WTO dispute settlement procedures, the Claims Resolution Tribunal for dormant accounts, and the Property Claims Commission for the compensation of victims of Nazi persecution.

This book is intended to provide insight into one part of this rich field of activity, the part dealing primarily with *commercial arbitration*. It covers the different phases of arbitral proceedings more or less in chronological order, from the drafting of the arbitration clause, including the choice between ad hoc or institutional arbitration, to the challenge of the arbitral award. In addition, Chapter 10 provides an overview of the main Swiss and Swiss-based dispute resolution mechanisms, including all of those mentioned above as well as others. Finally, in light of its growing importance as an alternative means of dispute resolution, mediation is also addressed.

This book focuses on *international arbitration* and does not seek to examine domestic proceedings. International and domestic arbitrations are governed by different rules, Chapter 12 of the PILA for international arbitration and the Concordat for domestic arbitration. It is expected that the Concordat will soon be replaced by Part III

2. *Ibid.*, p. 19.

of the forthcoming Federal Civil Procedure Act.³ This dual statutory regime obviously gives rise to the question of what constitutes international arbitration as opposed to domestic arbitration. Article 176(1) of the PILA adopts a ‘subjective test’ based upon the domicile or habitual residence of the parties. Accordingly, Chapter 12 of the PILA applies to any arbitration if (i) the seat of the arbitral tribunal is in Switzerland; and (ii) at least one of the parties did not have its domicile or habitual residence in Switzerland at the time of the conclusion of the arbitration agreement.⁴

Focusing on international commercial arbitration, this book adopts a *practice-oriented* approach, adding theoretical support whenever necessary. It primarily aims to provide foreign in-house and external counsel with up-to-date practical information, which will enable them to make the appropriate choices and decisions. The reader will thus find answers to questions such as ‘How to draft an arbitration clause?’, ‘How to choose between ad hoc and institutional arbitration?’, ‘Will the arbitral tribunal grant a specific type of interim measures?’, ‘How long will setting aside proceedings before the Swiss Federal Tribunal last?’ or ‘How much will such proceedings cost?’.

With this practice-oriented approach, the authors and editors hope that this book will provide helpful guidance to users and would-be users of international arbitration in Switzerland.

3. *Avant-projet de la commission d'expert et rapport accompagnant l'avant-projet de la commission d'expert*, June 2003 available at < www.ejpd.admin.ch/doks/mm/files/030626a_ent-f.pdf >.

4. In a decision of 24 June 2002 (4P.54/2002) in [2003] Bulletin ASA 131, the Swiss Federal Tribunal held that the test is addressed to the domicile (at the time of the arbitration agreement) of persons that are parties to the arbitral proceedings and does not take into consideration the domicile of persons that were parties to the arbitration agreement but are not parties to the arbitral proceedings. For critical comments, see e.g. G. KAUFMANN-KOHLER/A. RIGOZZI, *When is a Swiss arbitration international?*, Jusletter 7 October 2002, available on < www.weblaw.ch/jusletter >.

List of Abbreviations

AAA	American Arbitration Association
AAA/ICDR Rules	International Dispute Resolution Procedures (including Mediation and Arbitration Rules), as amended on 1 June 2009
ACICA	Australian Centre for International Commercial Arbitration
ACICA Rules	Arbitration Rules of the Australian Centre for International Commercial Arbitration entered into force on 1 August 2011
ADR	Alternative Dispute Resolution
Art./s	Article/s
AS	Amtliche Sammlung des Bundesrechts (Official collection of the Federal Statutes of Switzerland), also referred to as Recueil Officiel du Droit Fédéral (RO)
ASA	Swiss Arbitration Association
ASA Bull.	Bulletin of the Swiss Arbitration Association
ASA Special Series	Special Series of the Bulletin of the Swiss Arbitration Association
BBl	Bundesblatt der Schweizerischen Eidgenossenschaft (Report from the Swiss Parliament), also referred to as Feuille Fédéral de la Confédération Suisse (FF)
Brussels Convention	Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters concluded in Brussels on 27 September 1968
Bull.	Bulletin
CAS	Court of Arbitration for Sport

CAS ad hoc Division Rules	CAS Arbitration Rules for the Olympic Games as amended 10 July 2012
CAS Rules	Arbitration Rules of the Court of Arbitration for Sport as amended on 1 January 2012
CC	Swiss Civil Code of 10 December 1907 (SR / RS 210), status as of 1 January 2012
CCIG	Geneva Chamber of Industry and Commerce
CCP	Swiss Code of Civil Procedure of 19 December 2008, entered into force on 1 January 2011 (SR / RS 272)
CEDR	Centre for Effective Dispute Resolution
CHF	Swiss Franc
CIArb	Chartered Institute of Arbitrators
CISG	United Nations Convention on Contracts for the International Sales of Goods, concluded in Vienna on 11 April 1980
CO	Swiss Code of Obligations of 30 March 1911 (SR / RS 220), status as of 1 March 2012
con.	Consideration
Concordat	Swiss Intercantonal Concordat on Arbitration of 27 March 1969 (SR / RS 279), status as of 1 July 1995 (no longer in force)
CPR	International Institute for Conflict Prevention and Resolution
CPR Rules	Non-administered Arbitration Rules of the CPR effective as of 1 November 2007
CRT	Claims Resolution Tribunal
DAB	Dispute Adjudication Board
DEBA	Swiss Debt Enforcement and Bankruptcy Act of 11 April 1889 (SR / RS 281.1), status as on 1 January 2012
DFT	Decision of the Federal Tribunal (Official collection of Decisions of the Federal Tribunal)
DNS	Domain Name System
DRB	Dispute Review Board
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
e.g.	exempli gratia (= for example)
EC	European Community
EC Treaty	The Treaty Establishing the European Community

ECHR	European Convention on Human Rights of 4. November 1950 (SR / RS 0.101), status as on 23 February 2012
ECJ	European Court of Justice
ed.	Edition
Ed./s	Editor/s
et al.	et alii (= and others)
et seq.	et sequens or et sequential (= and the following)
etc.	et cetera (= and so forth)
EU	European Union
EWHC	High Court of England and Wales
Federal Tribunal	Schweizerisches Bundesgericht / Tribunal Fédéral Suisse / Tribunale Federale Svizzera / Tribunal Federal Svizra (which is the Federal Supreme Court of Switzerland)
FF	Feuille Fédéral de la Confédération Suisse (Report from the Swiss Parliament), also referred to as Bundesblatt der Schweizerischen Eidgenossenschaft (BBl)
FIDIC	International Federation of Consulting Engineers
FIFA	Fédération Internationale de Football Association
FTA	Federal Tribunal Act of 7 June 2005 (SR 173.110), status as on 1 April 2012
GBP	Pound Sterling
i.e.	id est (= that is)
IAI	International Arbitration Institute
IBA	International Bar Association
IBA Conflict of Interest Guidelines	IBA Guidelines on Conflict of Interest in International Arbitration adopted on 22 May 2004
IBA Drafting Guidelines	IBA Guidelines for Drafting International Arbitration Clauses adopted on 7 October 2010
IBA Rules on Evidence	IBA Rules on the Taking of Evidence in International Commercial Arbitration adopted on 29 May 2010
ICANN	Internet Corporation for Assigned Names and Numbers
ICAS	International Council for Arbitration for Sport
ICC	International Chamber of Commerce
ICC ADR Rules	Alternative Dispute Resolution Rules of the ICC in force as from 1 July 2001

ICC Bull. Special Supplement	ICC International Court of Arbitration Bulletin Special Supplement
ICC Court	International Court of Arbitration of the ICC
ICC DB Rules	Dispute Board Rules of the ICC in force as from 1 September 2004
ICC IC Arb. Bull.	ICC International Court of Arbitration Bulletin
ICC Pre-Arbitral Referee Rules	ICC Pre-Arbitral Referee Rules as from 1 January 1990
ICC Rules	Arbitration Rules of the ICC International Court of Arbitration in force as from 1 January 2012
ICC Rules 1998	Arbitration Rules of the ICC International Court of Arbitration of 1998
ICCA	International Council for Commercial Arbitration
ICDR	International Centre for Dispute Resolution: A Division of the American Arbitration Association
ICEP	Independent Committee of Eminent Persons
ICHEIC	International Commission on Holocaust Era Insurance Claims
ICSID	International Center for the Settlement of Investment Disputes
ICSID Additional Facility Rules	ICSID Additional Facility Rules as effective as of 10 April 2006
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (SR / RS 0.975.2), status as on 18 May 2007
ICSID Rules	ICSID Rules of Procedure for Arbitration proceedings in force as of 1 January 1968, revised on 26 September 1984
INTA	International Trademark Association
IOC	International Olympic Committee
IOM	International Organization for Migration
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
JOA	Swiss Judicial Organization Act of 16 December 1943 (SR / RS 173.110), status as of 20 June 2006 (no longer in force)
LCIA	London Court of International Arbitration

LCIA Rules	Arbitration Rules of the LCIA effective as of 1 January 1998
Lugano Convention	Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 30 October 2007 (SR / RS 0.275.12), status as of 3 May 2011
MF/1 Forms	Model Forms of the Institution of Engineering and Technology
n.	paragraph number
NEC Forms	New Engineering Contract, Guide on drafting documents on civil engineering and construction projects by the Institution of Civil Engineers
New York Convention	New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (SR / RS 0.277.12), status as of 17 February 2011
No./s	Number/s
OSCE	Organization for Security and Cooperation in Europe
PCA	Permanent Court of Arbitration
PCC	Property Claims Commission
PILA	Swiss Private International Law Act of 18 December 1987 (SR / RS 291), status as on 1 January 2011
RO	Recueil Officiel du Droit Fédéral (Official collection of the Federal Statutes of Switzerland), also referred to as Amtliche Sammlung des Bundesrechts (AS)
RS	Recueil Systématique du Droit Fédéral (Official collection of the Federal Statutes of Switzerland, in a systematic order), also referred to as Systematische Sammlung des Bundesrechts (SR)
SBA	Swiss Bankers Association
SCC	Stockholm Chamber of Commerce
SCC Rules	Arbitration Rules of the Stockholm Chamber of Commerce in force as of 1 January 2010
SchiedsVZ	Zeitschrift für Schiedsverfahren
SIAC	Singapore International Arbitration Centre
SIAC Rules	Arbitration Rules of the Singapore International Arbitration Centre
SLD	Second Level Domain

SR	Systematische Sammlung des Bundesrechts (Official collection of the Federal Statutes of Switzerland, in a systematic order), also referred to as Recueil Systématique du Droit Fédéral (RS)
Swiss Attorney Act	Swiss Federal Act on the Free Movement of Attorneys of 23 June 2000 (SR / RS 935.61), status as of 1 January 2011
Swiss Code of Criminal Procedure	Swiss Code of Criminal Procedure of 5 October 2007 (SR / RS 312.0), status as of 1 July 2012
Swiss Criminal Code	Swiss Criminal Code of 21 December 1937 (SR / RS 311.0), status as of 1 January 2012
Swiss Federal Constitution	Swiss Federal Constitution of 18 April 1999 (SR / RS 101), status as of 11 March 2012
Swiss Rules	Swiss Rules of International Arbitration in force as of 1 June 2012
Swiss Rules 2004	Swiss Rules of International Arbitration in force as of 1 January 2004 (amended in 2012)
Swiss Mediation Rules	Swiss Rules of Commercial Mediation of the Swiss Chambers of Commerce and Industry in force as of April 2007
Swiss Rules Court	Arbitration Court of the Swiss Chambers' Arbitration Institution
TLD	Top Level Domain
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights dated 15 April 1994
UDRP	Uniform Domain Name Dispute Resolution Policy adopted on 26 August 1999
UDRP Rules	Rules for Uniform Domain Name Dispute Resolution Policy of 30 October 2009 as revised in 1 March 2010
UEFA	Union of European Football Associations
UN	United Nations
UNCC	United Nations Compensation Commission
UNCC Rules	UNCC Provisional Rules for Claims Procedure approved by the UN Security Council on 26 June 1992
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Arbitration Rules	UNCITRAL Arbitration Rules of 1976 as revised in 2010