

# Table of Contents

Preface and Acknowledgements	xv
Preface and Acknowledgements to the Fifth Edition	xvii
Chapter 1	
Planning for International Dispute Resolution	1
A. Importance of Contractual Forum Selection in International Disputes	1
B. Forum Selection Clauses and Arbitration Agreements	2
C. Functions Served by Forum Selection and Arbitration Agreements	3
D. Choosing Between Forum Selection Clauses and Arbitration Agreements	4
1. Obtaining the Most Favorable Forum	4
2. Appellate Review	5
3. Cost and Speed	5
4. Competence, Neutrality, and Language	6
5. Solomonic Arbitral Compromises Versus Crisp Judicial Decisions	7
6. Enforceability of Dispute Resolution Agreements	8
7. Enforceability of Awards or Judgments	9
8. Confidentiality of Dispute Resolution Proceedings	9
9. Multi-Party and Multi-Contract Issues	10
10. Facilitating Amicable Settlement	10
E. Planning for Dispute Resolution in International Contracts	10
Chapter 2	
Drafting International Forum Selection Clauses	13
A. Exclusive Versus Non-Exclusive Forum Selection Agreements	13
1. Exclusive Forum Selection Clauses	14
2. Non-Exclusive Forum Selection Clauses	14
3. Choosing Between Exclusive and Non-Exclusive Forum Selection Clauses	14
B. Drafting Exclusive and Non-Exclusive Forum Selection Clauses	15
1. Common Law Approach to Exclusivity of Forum Selection Clauses	15
2. Civil Law Approach to Exclusivity of Forum Selection Clauses	16
3. Drafting Exclusive Forum Selection Clauses	17
4. Drafting Non-Exclusive Forum Selection Clauses	18

C.	Hague Convention on Choice of Court Agreements	18
D.	Scope of Forum Selection Clauses	19
1.	Scope of Forum Selection Clause Generally Determined by Parties' Agreement	19
2.	Formulae for Scope of Forum Selection Clauses	20
3.	Advantages of Forum Selection Clauses with Broad Scope	20
4.	Drafting Forum Selection Clauses with Broad Scope	20
5.	Exclusions from Scope of Forum Selection Clauses	21
E.	Selecting the Contractual Forum	22
F.	Asymmetrical (or "One-Sided") Forum Selection Clauses	22
G.	Forum Selection Clauses Selecting the Defendant's Place of Business	23
H.	Provisions Commonly Accompanying Forum Selection Clauses	24
1.	Consent to Service of Process	24
2.	Allocating Legal Costs	25
3.	Waiver of Foreign Sovereign or State Immunity	25
4.	Choice-of-Law Clauses	26
5.	Waiver of <i>Forum Non Conveniens</i>	26
6.	Waiver of Jury Trial	27
I.	Application of Forum Selection Clauses to Actions Seeking Provisional or Interim Relief	27
J.	Forum Selection Clauses in Routine Transactions	28
Chapter 3		
Drafting International Arbitration Agreements		
A.	Critical Elements of International Arbitration Agreements	30
1.	Agreement to Binding Arbitration	30
2.	Scope of Arbitration Agreement	31
a.	Formulae for Scope of Arbitration Agreements	31
b.	Advantages of Arbitration Agreements with Broad Scope	32
c.	Drafting Arbitration Agreements with Broad Scope	32
d.	Exclusions from Scope of Arbitration Agreements	33
i.	Injunctive Relief for Intellectual Property Rights	34
ii.	Validity of Intellectual Property Rights	34
iii.	Payment Obligations	35
3.	Institutional Versus <i>Ad Hoc</i> Arbitration	35
a.	Institutional Arbitration	36
b.	International Arbitral Institutions	36
i.	International Chamber of Commerce	37
ii.	American Arbitration Association and International Centre for Dispute Resolution	39
iii.	Singapore International Arbitration Centre	40
iv.	London Court of International Arbitration	41
v.	International Centre for Settlement of Investment Disputes	42
vi.	Australian Centre for International Commercial Arbitration	43

vii.	Cairo Regional Centre for International Commercial Arbitration	43
viii.	China International Economic and Trade Arbitration Commission	43
ix.	Dubai International Arbitration Centre	44
x.	German Institution of Arbitration	44
xi.	Hong Kong International Arbitration Centre	45
xii.	Indian Council of Arbitration	45
xiii.	Inter-American Commercial Arbitration Commission	45
xiv.	JAMS International	46
xv.	Kuala Lumpur Regional Centre for Arbitration	47
xvi.	Netherlands Arbitration Institute	47
xvii.	Permanent Court of Arbitration	47
xviii.	Stockholm Chamber of Commerce Arbitration Institute	49
xix.	Swiss Chambers' Arbitration Institution	49
xx.	Vienna International Arbitral Centre	50
xxi.	World Intellectual Property Organization	50
c.	Selecting An International Arbitral Institution	51
d.	Incorporating Institutional Arbitration Rules	51
e.	Modifying Institutional Arbitration Rules	52
f.	Ad Hoc Arbitration	52
g.	Choosing between Ad Hoc and Institutional Arbitration	54
h.	Procedural Rules for Ad Hoc Arbitration	55
4.	Specifying the Seat or Place of Arbitration	55
a.	Importance of Arbitral Seat	56
b.	Deciding What Arbitral Seat to Specify	58
c.	Potentially Problematic Arbitral Seats	60
i.	Brazil	60
ii.	Russia	61
iii.	India	62
iv.	China	63
d.	Drafting Provisions Specifying An Arbitral Seat	63
e.	Location of Arbitral Seat Based on Identity of Claimant	64
5.	Number, Methods of Selection, and Qualifications of Arbitrators	64
a.	Specifically-Named Arbitrators	65
b.	Number of Arbitrators	65
c.	Methods of Selecting Arbitrators	66
d.	Qualifications and Nationality of Arbitrators	69
e.	Independence and Impartiality of Arbitrators	70
f.	IBA Guidelines on Conflicts of Interest in International Arbitration	71
6.	Language of the Arbitration	72
7.	Choice-of-Law Clauses: Law Applicable to Arbitration Agreement and to Arbitral Proceedings	73
8.	Formalities, Capacity, and Validity	74
9.	Representative Institutional and <i>Ad Hoc</i> Arbitration Clauses	75
B.	Potentially Desirable Elements of International Arbitration Agreements	77
1.	Provisions Allocating Legal Costs	77

2.	Award of Interest	80
3.	Currency of Award	81
4.	Disclosure or Discovery	81
5.	IBA Rules on the Taking of Evidence in International Arbitration	83
6.	Pre-Arbitration Notice and/or Consultation	85
7.	Multi-Tiered Dispute Resolution Clauses	86
8.	Fast-Track Arbitration and Contractual Time Limits	88
9.	<i>Amiable Compositeur</i> or <i>Ex Aequo et Bono</i>	90
10.	Entry-of-Judgment Clauses	90
11.	Multi-Party Contracts and Arbitrations	90
12.	Non-Signatories	92
13.	Multi-Contract Arbitrations	92
14.	Exclusion of Judicial Review	94
15.	Heightened Judicial Review	95
16.	Contractually Specified Procedural Regimes	95
17.	Provisional and Interim Relief	95
18.	Emergency Arbitrators	97
19.	E-Commerce Arbitration	98
20.	Limitations on Arbitrators' Remedial Authority	98
21.	High-Low and Baseball Arbitration	98
22.	Expert Determination	99
23.	ICC Rules for the Administration of Expert Proceedings	101
24.	Confidentiality of Arbitral Proceedings	102
25.	Incorporation of Arbitration Agreement by Reference	103
26.	Asymmetrical Arbitration Clauses	104
27.	Preliminary Decision of Dispositive Issues	104
28.	Decisions Regarding Time Bars and Similar Defenses	105
29.	Jurisdictional Decisions	106
30.	Submission Agreement	107
31.	Class Action Arbitration Waivers	107
C.	Arbitration Agreements in Contracts with States	108
1.	ICSID Arbitration	108
a.	ICSID Arbitration Clause	109
b.	ICSID Jurisdictional Requirements	109
i.	"Investment" Dispute	109
ii.	Nationality of Investor	109
iii.	Host State Entities	110
c.	Preservation of Other Remedies	110
d.	Exhaustion of Local Remedies	111
e.	Waivers of State Immunity	111
2.	Alternatives to ICSID Arbitration	111
a.	UNCITRAL Arbitration	111
b.	ICC, ICDR, SIAC, and LCIA Arbitration	112
c.	Permanent Court of Arbitration	112
d.	ICSID Additional Facility	112
D.	International Arbitration Agreements in Routine Transactions	113

Chapter 4		
Enforcing International Forum Selection Agreements		115
A.	Presumptive Enforceability of Forum Selection Clauses in Major Trading States	116
1.	EU Approach to Enforceability of Forum Selection Clauses	116
2.	U.S. Approach to Enforceability of Forum Selection Clauses	116
3.	Other Approaches to Enforceability of Forum Selection Clauses	117
B.	Exceptions to Presumptive Enforceability of Forum Selection Clauses	117
1.	Initial Invalidity of Forum Selection Clause	117
2.	Enforcement of Forum Selection Clause Would Be Unreasonable or Unjust	118
3.	Public Policy or Illegality	118
C.	Choice-of-Law Issues Relating to Forum Selection Clauses	119
Chapter 5		
Enforcing International Arbitration Agreements		121
A.	Legal Framework for Enforcing International Arbitration Agreements	121
1.	New York Convention	121
2.	Other International Arbitration Conventions	122
a.	ICSID Convention	122
b.	Panama Convention	122
c.	European Convention on International Commercial Arbitration	123
d.	Bilateral Investment Treaties	123
3.	National Arbitration Legislation	123
4.	UNCITRAL Model Law	124
B.	Presumptive Validity and Enforceability of International Arbitration Agreements	125
C.	Separability of International Arbitration Agreements	125
D.	Interpretation of International Arbitration Agreements	126
E.	Exceptions to Presumptive Enforceability of International Arbitration Agreements	126
1.	Invalidity of Arbitration Agreement	126
2.	Nonarbitrability Exceptions	127
H.	Further Reading on International Arbitration Agreements	127
Chapter 6		
Recognizing and Enforcing Foreign Judgments		129
A.	No Worldwide Convention on Foreign Judgments	129
B.	Presumptive Enforceability of Foreign Money Judgments in Most Major Trading States	130
C.	Exceptions to Presumptive Enforceability of Foreign Money Judgments	130

Chapter 7	
Recognizing and Enforcing International Arbitral Awards	133
A. Presumptive Validity and Enforceability of International Arbitral Awards	133
B. Exceptions to Presumptive Validity and Enforceability of International Arbitral Awards	134
1. Public Policy and "Nonarbitrability"	134
2. Procedural Irregularity	135
3. Arbitrators' Lack of Jurisdiction	135
Chapter 8	
Drafting and Enforcing Choice-of-Law Clauses	137
A. Planning and Drafting Choice-of-Law Clauses	138
1. Scope of Choice-of-Law Clauses	138
2. <i>Renvoi</i> Versus "Whole Law"	138
3. "Procedural" Issues	139
4. Choice-of-Law Clauses in Investment Contracts	139
5. Which Law Should Be Chosen?	139
a. Developed, Stable, and Commercially-Sophisticated Law	139
b. Familiarity and Ease of Access	140
c. Enforceability	140
d. "Favorable" Laws	140
e. Literal Language Versus Equity	140
f. Interaction with Dispute Resolution Provisions	141
6. Non-National Legal Systems	141
a. General Principles of Law	142
b. UNIDROIT Principles of International Commercial Contracts	142
c. "Concurrent" Choice-of-Law Clause	142
7. Stabilization Clauses	143
8. Exclusion of CISG Convention	144
9. Amiable Composition and <i>Ex Aequo et Bono</i>	144
B. Enforceability of Choice-of-Law Clauses	145
1. Presumptive Enforceability of Choice-of-Law Clauses	145
2. Exceptions to Presumptive Enforceability of Choice-of-Law Clauses	145
a. Reasonable Relationship Requirement	145
b. Public Policy or Mandatory Law	146
Appendix A	
United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), New York, 10 June 1958	147

Appendix B	
Convention of 30 June 2005 on Choice of Court Agreements ("Hague Convention on Choice of Court Agreements")	161
Appendix C	
UNCITRAL Model Law on International Commercial Arbitration (1985)	177
Appendix D	
UNCITRAL Model Law on International Commercial Arbitration (2006 Revisions)	191
Appendix E	
UNCITRAL Arbitration Rules (as revised in 2010)	203
Appendix F	
International Arbitral Institutions	223
Appendix G	
Select Bibliography on International Arbitration and Forum Selection Agreements	233
Appendix H	
Model Submission Agreement	239
Appendix I	
Model Institutional Arbitration Clauses	241
Appendix J	
Representative International Arbitration Clauses	249
Index	313