## Contents

Pre	face to the Third Edition	page xv
For	reword to the First Edition by Eric E. Bergsten	xvii
	,	
I	Introduction to International Commercial Arbitration	I
	A. Purpose	I
	B. Defining Characteristics	2
	I. Consent	2
	2. Nongovernmental Decision Makers	2
	3. A Final and Binding Award	2
	C. Advantages of Arbitration	3
	D. Disadvantages of Arbitration	4
	E. The Regulatory Framework	6
	F. Institutional Arbitration v. Ad Hoc Arbitration	10
	G. Arbitral Institutions	II
	1. The International Chamber of Commerce (ICC)	
	International Court of Arbitration	II
	2. The American Arbitration Association's (AAA)	
	International Center for Dispute Resolution (ICDR)	12
	3. The London Court of International Arbitration (LCIA)	12
	4. Hong Kong International Arbitration Center (HKIAC)	13
	5. Singapore International Arbitration Center (SIAC)	13
	6. Other Arbitral Institutions	13
	7. Specialized Arbitral Institutions	14
	H. Arbitrations Involving States	15
	1. Commercial and Treaty Arbitrations	15
	2. The Permanent Court of Arbitration	16
	I. Other Dispute Resolution Methods	16
	1. Mediation	17
	2. Conciliation	17

vi	CONTENTS
**	

	3. Neutral Evaluation	18
	4. Expert Determination	18
	5. Mini-Trials	18
	6. Last-Offer Arbitration (Baseball Arbitration)	18
	J. Conclusion	19
2	The Arbitration Agreement	20
	A. Function and Purpose	20
	1. Arbitration Clauses and Submission Agreements	20
	2. Separability	21
	B. Validity	21
	1. The Writing Requirement	23
	a. Recommended Interpretation of Articles II and VII	26
	b. Amendment to Article 7 of UNCITRAL Model Law	28
	c. U.N. Convention on Use of Electronic	
	Communications	30
	d. Other Article 7 Issues	31
	e. Effect of the More Favorable Right Provision	32
	2. A Defined Legal Relationship	34
	3. Capable of Being Settled by Arbitration	35
	4. Null and Void, Inoperable, or Incapable of Being	
	Performed	36
	a. Null and Void	36
	b. Inoperable	37
	c. Incapable of Being Performed	37
	C. Binding Nonsignatories	37
	I. Agency	39
	2. Equitable Estoppel	40
	3. Implied Consent	41
	4. Group of Companies	4I 42
	5. Veil Piercing/Alter Ego	45
	<ul><li>6. Timing of Objections</li><li>D. Conclusion</li></ul>	45
•	Drafting the Arbitration Agreement	46
3		48
	A. Essential Requirements	50
	<ol> <li>Choice of Arbitrators</li> <li>Seat of the Arbitration</li> </ol>	51
		52
	3. Language of the Arbitration B. Additional Provisions	52
	1. International Bar Association Rules on Taking	5-
	Evidence	53
	2. Preliminary Relief	53
	3. Technical Expertise	54
	1	0 .

CONTENTS	vii

	4. Multistep Dispute Resolution Clauses	55
	5. Dispositive Motions	56
	6. Legal Fees and Costs	56
	7. Confidentiality	57
	8. Expanded Judicial Review	58
	9. Waiver of State Immunity	59
	10. Multiparty Agreements	60
	C. Conclusion	61
4	Applicable Laws and Rules	63
	A. Importance of the Law	63
	B. Delocalization v. Territoriality	64
	1. Arguments Favoring Delocalization	64
	2. Arguments Opposing Delocalization	65
	3. Some Modern Approaches to Delocalization	65
	a. Sports Arbitrations	66
	b. Online Arbitrations	67
	C. The Lex Mercatoria	68
	1. Definition of the Lex Mercatoria	69
	2. Application of the Lex Mercatoria	71
	a. Contracts between States	71
	b. Contracts between a State and a Private Company	71
	D. The Parties' Choice of Law	72
	1. The Law Governing the Arbitral Proceedings	73
	2. The Rules Governing the Arbitral Proceedings	73
	3. The Law Governing the Arbitration Agreement	74
	4. The Law Governing Arbitrability	77
	5. The Law Governing the Contract	78
	a. National or International Law	78
	b. Lex Mercatoria	79
	c. Unrelated National Law	80
	d. Dépeçage	81
	e. Renvoi	81
	f. Ex Aequo et Bono and Amiable Compositeur	83
	E. When Parties Fail to Choose the Seat or the	0 -
	Governing Law 1. Failure to Choose a Seat	83
		84
	2. Failure to Choose a Governing Law	84
	<ul><li>3. Conflicts of Laws</li><li>4. Voie Indirecte</li></ul>	8 <sub>5</sub> 86
	5. Voie Directe	86
	F. An Arbitrator's Duty to Apply the Law	87
	1. Law or Equity	87
	2. Duty to Render an Enforceable Award	88
	a. vary to religer all billoreable liveals	00

VIII CONTENTS

	3. Applying the Law	88
	a. The Lex Arbitri	88
	b. Mandatory Law	89
	c. Mandatory Law and Public Policy	89
5	Judicial Assistance for Arbitration	92
	A. Enforcement of Arbitration Agreements	93
	1. Extent of Judicial Review	93
	2. Competence-Competence	96
	B. Anti-Suit Injunctions	100
	1. Anti-Suit Injunctions in the United States	IOI
	2. Anti-Suit Injunctions in Europe	105
	a. The West Tankers Case	107
	b. The Brussels Recast	108
	c. The Gazprom Case	109
	C. Interim Measures	IIO
	1. Kinds of Interim Measures	III
	2. Tribunal or Court - Where to Go for Interim Relief?	113
	3. Basis for Interim Measures	116
	4. Enforcement of Interim Measures	116
	D. Court Assistance in Obtaining Evidence	117
	1. Procedural Orders	117
	2. National Laws Concerning Court Assistance	119
	3. Summons Issued by U.S. Arbitrators	120
	4. Tribunal in the United States Seeking Evidence	
	Outside the United States	122
	5. Court Assistance in the United States to Foreign	
	Tribunals	123
	6. Conclusion	126
6	The Tribunal	127
	A. Appointment of Arbitrators	127
	1. How Many Arbitrators?	127
	2. Qualifications	128
	a. Knowledge and Experience	128
	b. Lawyers or Nonlawyers	128
	c. Professors as Arbitrators	129
	d. Language Fluency	130
	e. Availability	130
	f. Reputation	130
	g. Specifications and Requirements	130
	3. Method of Selection	131
	a. Three Arbitrators	131
	i The Rules	T2T

	ii. The Practice	13	32
	(1) Choosing the Party-Appointed Arbitrators		
	(Coarbitrators)	13	32
	(2) Choosing the Presiding Arbitrator (Chair of		
	the Tribunal)	13	35
	b. A Sole Arbitrator	13	37
	c. Ad Hoc Arbitration	13	38
	4. Interviewing Prospective Arbitrators	13	38
	B. Obligations of Arbitrators	IZ	40
	1. Independence and Impartiality	IZ	40
	a. The IBA Guidelines on Conflicts of Interest	IZ	4I
	i. Part I: The General Standards	IZ	42
	ii. Part II: Practical Application of the General		
	Standards	IZ	43
	b. The 1987 IBA Rules of Ethics for Arbitrators	IZ	48
	c. American Arbitration Association-American Bar		
	Association Code of Ethics for Arbitrators in		
	Commercial Disputes	IZ	49
	d. Duty to Investigate	15	50
	2. Other Obligations	15	<b>5</b> I
	C. Challenges to the Arbitrator	15	53
	D. The Role and Power of the Arbitrator		58
	E. Flawed Conduct of Arbitrators		60
	F. Replacement of Arbitrators		61
	G. Arbitrator Immunity		62
	H. Costs and Fees	16	64
	I. Conclusion	10	65
7	The Arbitral Proceedings	10	67
	A. Beginning the Arbitration	10	68
	B. Preliminary Matters	17	70
	C. Written Submissions	I	76
	D. The Hearing	17	77
	1. Chair Can Decide Procedural Issues	I	77
	2. Scheduling the Hearings	I	77
	3. Seat of the Arbitration	I'	78
	4. Language of the Arbitration	I	78
	5. Local Bar Requirements	I'	79
	6. Closed Hearings	I'	79
	7. Record of Proceedings	18	80
	8. Technology	18	80
	9. Time Limits per Side		80
	10. Default of Appearance	18	81

X

	11. Consolidation	182
	12. Expedited Proceedings	183
	E. Presenting Evidence	184
	1. IBA Rules of Evidence	184
	2. Burden of Proof	185
	3. Documentary Evidence	186
	a. Hearsay Evidence	187
	b. Authentication	187
	c. Document Requests	187
	d. Arbitrator Discretion	190
	4. Fact Witnesses	190
	a. Testimony Prior to the Hearing	190
	b. Witness Statements	191
	c. Who Can Testify	191
	d. Meeting with Witnesses	191
	e. Examining Witnesses	193
	f. Arbitrator Intervention	195
	g. Availability of Witnesses	196
	h. Compelling Witness Testimony	196
	5. Expert Witnesses	197
	F. Closing the Hearing	199
	G. Post-Hearing Proceedings	199
	H. Conclusion	200
8	The Award	201
	A. Difference between "Orders" and "Awards"	201
	B. Types of Awards	202
	I. Final Award	202
	2. Partial and Interim Awards	203
	3. Consent Award	205
	4. Default Award	205
	C. Validity of the Award	206
	1. Formalities	206
	2. Communication	207
	3. Time Limits	207
	4. Concurring and Dissenting Views	207
	5. Scrutiny of the Draft Award	208
	6. Finality, Clarity, and Scope	208
	D. Remedies and Costs	209
	1. Monetary Damages	209
	2. Interest	209
	3. Other Remedies	209
	4. Costs	210

CONTENTS	X

	E. Res Judicata Effect of the Award	211
	F. Confidentiality of the Award	212
	G. Post-Award Proceedings	213
9	Attempts to Set Aside an Award	216
	A. Methods of Challenge	216
	B. Grounds of Challenge	218
	1. Jurisdictional Grounds	218
	2. Procedural Grounds	219
	3. Other Grounds	219
	4. Challenges Based on the Merits	220
	C. Time Limitations	222
	D. Effects of a Successful Challenge	222
	E. Conclusion	224
10	Enforcement of the Award	225
	A. Application of International Conventions	225
	B. Principles Governing Recognition and Enforcement	226
	C. Requirements for Enforcement	227
	I. Scope	227
	2. Jurisdiction and Forum Non Conveniens	228
	3. Procedures for Enforcement	231
	D. Grounds for Nonenforcement under the Convention	231
	1. Incapacity and Invalidity	232
	2. Lack of Notice or Fairness	234
	<ul><li>3. Arbitrator Acting in Excess of Authority</li><li>4. The Tribunal or the Procedure Is Not in Accord with</li></ul>	235
	the Parties' Agreement	236
	5. The Award Is Not Yet Binding, or Has Been Set Aside	236
	a. A Binding Award	236
	b. Effect of a Vacated Award	237
	c. The Article V(1)(e) Loophole	237
	d. The Court's Discretion to Ignore the Article V(1)(e)	
	Loophole	238
	e. Enforcement of Vacated Awards	238
	6. The Last Two Defenses under Article V	24I
	a. Subject Matter Not Arbitrable	241
	b. Public Policy	243
	E. Conclusion	244
II	Investor-State and State-to-State Arbitration	245
	A. Growth of Foreign Investment and Investor-State	
	Arbitration	245

xii

B. Investor Protection	246
1. The Washington (ICSID) Convention	246
a. Background	246
b. ICSID Jurisdictional Requirements	247
i. Consent	248
ii. Contracting State and National of Another	
Contracting State	248
iii. Legal Disputes and Investments	250
c. Special Features of ICSID Arbitrations	251
i. Delocalization	251
ii. Recognition, Enforcement, and Execution	252
iii. Publication of Awards	253
d. Additional Facility Rules	254
2. Bilateral Investment Treaties	255
a. Background	255
b. Substantive Rights	255
c. Enforcing Rights under a BIT	257
3. Multilateral Investment Treaties	258
4. Investor Protection Legislation	259
5. Reform Efforts	260
C. Overlap of Treaty-Based Rights and Contract-Based	
Rights	261
1. The Source of the Right	261
2. Umbrella Clauses	263
3. Distinguishing Contract and Treaty Claims	265
4. Coordinating Contracts with Treaties	268
D. Third-Party Funding	269
E. Transparency in International Investment Arbitration	271
F. State-to-State Arbitration	272
G. Conclusion	273
APPENDICES	
A. The United Nations Convention on the Recognition and	
Enforcement of Foreign Arbitral Awards (The New York	
Convention) (1958)	2==
	275
B. UNCITRAL Model Law on International Commercial	201
Arbitration (original 1985 version)	281
C. Revised Articles of the UNCITRAL Model Law on	
International Commercial Arbitration (2006)	295
D. UNCITRAL Recommendation Regarding the	
Interpretation of Article II, Paragraph 2, and Article VII,	
Paragraph 1, of the New York Convention	301
0 1 ,	201

CONTENTS	xiii
E. IBA Rules on the Taking of Evidence in International	
Arbitration	304
F. IBA Rules of Ethics for International Arbitrators 1987	330
G. IBA Guidelines on Conflicts of Interest in International	
Arbitration	335
H. The AAA-ABA Code of Ethics for Arbitrators in	
Commercial Disputes	359
I. IBA Guidelines on Party Representation in International	373
Arbitration  Arbitration	393
J. Model Clauses	373
Index	397