

Table of Contents

Introduction	1
I. Organisation of This Book	4
II. International Arbitration	5
III. International Mediation	8
IV. International Mediation and Arbitration as Risk Mitigators	10
 Chapter One	
The Elements of an International Dispute Resolution Agreement	11
I. Different Sorts of International Dispute Resolution Clauses	12
II. The Basic Components of an International Dispute Resolution Agreement	14
A. The Core of the Arbitration Agreement: Submission of Disputes to Arbitration	15
B. Referral to Arbitration	18
C. The Four Main Variables of an International Arbitration Clause	20
1. The Place (or 'Seat') of Arbitration	21
a. Place of Arbitration and Procedural Law	23
b. Place of Arbitration and the Courts	27
c. Place of Arbitration and Enforceability of Awards	32
d. Good and Bad Places of Arbitration	33
2. Institutions that Administer Arbitration and Mediation and Their Rules	36
a. Nature and Role of Arbitral Institutions	36
b. Which Arbitral Institution to Choose?	39
i. International Chamber of Commerce (ICC)	39
ii. International Centre for Dispute Resolution (ICDR)	45

iii.	London Court of International Arbitration (LCIA)	47
iv.	Singapore International Arbitration Centre (SIAC)	49
v.	International Centre for Settlement of Investment Disputes (ICSID)	51
vi.	Regional Institutions	53
vii.	National Institutions	55
3.	Ad Hoc Arbitration	62
4.	Number of Arbitrators	68
5.	Language of the Arbitration	70
D.	'Bells and Whistles'	72
1.	Joinder and Consolidation	73
2.	Requiring Negotiation Prior to Arbitration	77
3.	ICC Pre-Arbitral Referee Procedure	78
4.	Arbitrator Qualifications	79
5.	Procedure and Evidence	80
6.	Allocation of Costs	80
7.	Time Limits for Award	81
8.	Baseball Arbitration	81
9.	Waiver of Sovereign Immunity	82
E.	Conclusion on Elements of an Arbitration Clause	83
III.	Agreements to Mediate before Arbitration	84
A.	The Elements of a Mediation Step Clause	85
B.	Mediation Institutions	88

Chapter Two

	Negotiating an International Dispute Resolution Agreement	93
I.	Attempting to Avoid Negotiation: 'Standard' Dispute Clauses	94
II.	Negotiating the Dispute Clause on the Basis of Common Dispute Resolution Values	95
A.	Answering Objections to Using Arbitration (Rather Than the Courts)	96
1.	Arbitration or Litigation: Which Is Better?	97
2.	Strategies to Address Resistance to Arbitration	103
B.	Answering Objections to Institutional Arbitration	106
C.	Answering the Insistence on Arbitration in a Country Without a Reliable Court System	107
III.	Mitigating, Quantifying, and Accepting the Risks of Disadvantageous or Imperfect Dispute Resolution	110
IV.	Spotting the Real Deal-Breakers	113

Chapter Three

	When the Dispute Arises	117
I.	Preliminaries Once Litigation is Probable	118
A.	Contractual Pre-arbitration Procedures	119
B.	Letters Before Action and Preliminary Correspondence	121

C.	Privilege and New Document Creation	123
D.	Key Employees and Witnesses	124
E.	Documents	125
F.	Insurance Notifications	129
G.	Media	130
II.	The Decision Whether to Submit or Respond to a Request for Arbitration	132
A.	Claimant or Respondent?	132
B.	Alternatives to Commencing Arbitration, or to be Carried Out in Conjunction with Starting Arbitration	132
C.	Amending the Dispute Resolution Clause	133
D.	Considering and Proposing Informal Resolution Options	133
III.	Using Early Evaluation to Quantify the Entire Dispute Risk	134
A.	The Nature of an Early Case Assessment (ECA): Predicting the Ultimate Outcome and the Cost of Getting There	135
B.	Gathering Evidence and Assessing the Facts	139
C.	Assessing the Legal Merits	144
D.	Potential Implications of an ECA on Balance Sheet Accounting (Financial Reserves of Disputes)	144
E.	Estimating the Total Cost of the Arbitration and Factors Influencing Costs	146
IV.	Engaging and Disengaging Counsel	154
A.	'In-sourcing' Arbitration Work	154
B.	Retaining External Counsel	156
C.	Estimating, Budgeting, and Managing Costs of External Counsel	165
D.	Disengaging and Replacing External Counsel	170

Chapter Four

International Settlement Negotiation and Mediation		173
I.	Optimising the Settlement Process	176
A.	Settlement Goals that Leverage the Uncertainties of a Dispute	177
B.	Selling the Idea of Mediation	180
1.	Proposing Mediation to the Other Side(s)	182
2.	Arb-Med: Combining Mediation and Arbitration	185
II.	Finding an International Mediator and Organising the Mediation	187
A.	Agreeing on When and Where	187
B.	Finding the Right Mediator for the Parties and the Dispute	188
1.	Traditional Sources of Information about Potential Mediators	189
2.	Mediation and Arbitration Institutions	191
3.	Emerging Information Sources: Certification, Directories, and Blogs	192
4.	Important Criteria for Identifying a Suitable Mediator	194

C.	Mediator Fees	201
D.	Affirming the Confidentiality of the Mediation	205
E.	Mediation Logistics	207
F.	Scheduling Considerations in Delaying or Deferring the Arbitration or Other Binding Dispute Resolution Pending Mediation	208
III.	Mediation Advocacy	208
A.	Procedural Flexibility of Mediation	209
1.	Preparation and Advocacy before the Mediation Begins: Obtaining Settlement Authority and Defining Settlement Objectives	210
2.	Position Papers and 'For Mediator's Eyes Only' Memoranda	216
3.	Strategic Use of Opening Offers and Counteroffers	217
4.	Advocacy at the Plenary Session	218
5.	Effective Advocacy during Caucusing Sessions	220
6.	Establishing Direct Contact with the Other Side	221
7.	Documenting the Settlement	222
8.	Concluding without Settlement but Leaving the Door Open	223
B.	Common Pitfalls for Advocates in a Mediation	224
 Chapter Five		
The Conduct of the Arbitration		225
I.	The Preliminary Phase	227
A.	Commencing the Arbitration: The Request for Arbitration	227
B.	Other Initial Written Submissions: Answer and Reply	236
C.	Default Proceedings: When a Party Does Not Participate in the Arbitration	238
D.	Early Disposal for Lack of Jurisdiction	241
E.	Appointment of Arbitrators	243
1.	Drawing up a Shortlist: Obtaining Information about Arbitrator Performance	253
2.	Approaching the Candidates	255
3.	Interviewing Arbitrator Candidates and Further Due Diligence	255
4.	Evaluation and Decision	257
5.	Selection of Sole Arbitrator or Chair by Agreement of Parties or Co-arbitrators	257
F.	Challenge, Removal, and Replacement of Arbitrators	260
G.	Appointment of a Secretary to the Tribunal and the Risk of a 'Fourth Arbitrator'	265
H.	Arbitrators' Fees and Expenses	266
I.	Preliminary Steps Taken by the Tribunal When Constituted: Procedural Timetable and 'Terms of Reference'	269

J.	Time Limits for the Completion of the Arbitration	274
K.	Bifurcation (or Early Disposal of Discrete Issues by the Tribunal)	276
L.	Fast-Track or Expedited Arbitration	277
M.	Urgent or Provisional Measures	280
II.	Written Submissions and Evidence	284
A.	Written Submissions	285
B.	Written Evidence	288
1.	Contemporaneous Documents	289
2.	Witnesses and Experts	298
a.	Witnesses of Fact	298
b.	Expert Witnesses	301
c.	Tribunal-Appointed Experts	305
d.	Court-Appointed Experts	307
3.	Inspection of Goods or a Site	307
III.	The Hearing Phase	307
A.	The Hearing	308
B.	Post-hearing Submissions	314
IV.	The Award Phase	316
A.	Deliberations	316
B.	The Award	318
C.	Correction, Interpretation or Revision of the Award	325
D.	Effects of the Award	325

Chapter Six

After the Arbitration: Challenge, Recognition and Enforcement of the Award

I.	Challenging International Arbitral Awards	327
A.	Types of Challenge	328
B.	Procedure for an Action to Set Aside	329
C.	Grounds for an Action to Set Aside	332
D.	Effects of the Setting Aside of an Award	335
II.	Recognition and Enforcement of International Arbitral Awards	341
A.	Negotiation and Settlement of International Arbitral Awards	342
B.	Recognition versus Enforcement of Foreign Arbitral Awards	343
C.	The Legal Framework for Recognition and Enforcement of International Arbitral Awards	345
1.	Treaties Concerning Enforcement of International Arbitral Awards	346
2.	National Laws on Enforcement of Arbitral Awards	346
D.	Administrative Steps before Enforcement Proceedings	348
E.	Procedure for Enforcement and Resisting Enforcement	349
F.	Grounds for Resisting Enforcement	353
G.	Enforcement of Awards set Aside at the Seat of Arbitration	354
H.	Sovereign Immunity as a Defence to Enforcement	355

I.	Effects of a Refusal to Enforce or Recognise an Award	360
J.	Enforcement in Practice	361
 Chapter Seven		
	ICSID and Investment Treaty Arbitration	367
I.	Investment Treaty Arbitration	370
A.	Which Investors and Investments are Protected by Investment Treaties?	373
1.	Investors	373
2.	Investments	375
B.	What Protections are Offered to Investments Covered by Investment Treaties?	376
C.	The Availability of Arbitration to Enforce Treaty Protections	381
D.	Types of Conduct for which Parties have sought Redress in Arbitration under Investment Treaties	382
E.	Enhancing Investment Treaty Protection when Planning Foreign Business Activities	385
II.	ICSID Arbitration	387
 Appendix 1		
	Glossary of International Arbitration Terms and Abbreviations	397
 Appendix 2		
	Caseload of Selected Arbitral Institutions	405
 Appendix 3		
	List of Selected International Arbitration and Mediation Institutions, Rules, Laws, Conventions and Other Instruments	407
 Appendix 4		
	Model Clauses for Institutional Arbitration	413
 Appendix 5		
	Model Clause for Ad Hoc Arbitration	415
 Appendix 6		
	Model Early Case Assessment (ECA) Template	417
 Appendix 7		
	Suggested Model Request for Arbitration for ICC Arbitration	419
 Appendix 8		
	Model Answer to Request for Arbitration [and Counterclaim] for ICC Arbitration	425

Appendix 9	
Suggested Model Terms of Reference for ICC Arbitration	431
Appendix 10	
Suggested Model Provisional Timetable for ICC Arbitration	437
Appendix 11	
Suggested Model Request to Produce Documents for ICC Arbitration	441
Appendix 12	
Suggested Model Privilege Log for ICC Arbitration	445
Appendix 13	
Suggested Model ‘Redfern Schedule’ for ICC Arbitration	447
Appendix 14	
Bibliography	449
Appendix 15	
Netherlands Model Bilateral Investment Treaty	463
Appendix 16	
US Model BIT	471
Index	507