

Cambridge University Press

978-1-107-00878-6 - The Principles and Practice of International Commercial Arbitration
: Second Edition

Margaret L. Moses

Index

[More information](#)

Index

Note to Index: An *n* after a page number denotes a note on that page.

- AAA. *See* American Arbitration Association
AAA-ABA Code of Ethics for Arbitrators in
Commercial Disputes, 7, 142–144, 147
text of, 332–345
abuse of right, 36–37
Additional Facility Rules, ICSID Convention,
238–239, 242
ad hoc arbitration, 10, 45
arbitrator appointment and, 133
arbitrator challenges and, 148
arbitrator fees and, 156, 161
arbitrator replacement and, 153
ad hoc committee, ICSID, 13, 236,
248–250
ADR (alternative dispute resolution), 14–16
Advanced Micro Devices (AMD), 119
agenda letter, for first pre-hearing
conference, 162–165
agreement
multiparty, 57–58. *See also* arbitration
agreement
Aksen, Gerald, 134
Allianz SpA v. West Tankers, Inc., 102–105
alter ego, binding nonsignatories and,
39–41
alternative dispute resolution (ADR), 14–16
American Arbitration Association (AAA)
advice for drafting dispute resolution
clauses, 44
Commercial Rules, dispositive motions,
53
confidentiality clause, 74. *See also*
AAA-ABA Code of Ethics for
Arbitrators in Commercial Disputes;
International Centre for Dispute
Resolution
American Bar Association (ABA). *See*
AAA-ABA Code of Ethics for
Arbitrators in Commercial Disputes
American Law Institute, 208
*Amgen Inc. v. Kidney Center of Delaware
County, Ltd.*, 117
amiable compositeur and *ex aequo et bono*,
77–78, 83
a-national arbitration. *See* delocalization v.
territoriality
annulment
as common method of challenge, 203
of domestic awards, 55, 85
enforcement of annulled award, 225,
226
grounds for, 206, 227n73, 236
ICSID and, 204, 236, 247–250
mandatory law and, 86
partial, 236, 250
vacated award, effect on, 223. *See also*
awards, set aside attempts; vacated
awards
anti-arbitration injunctions, 97
anti-suit injunctions, 95–105
Article 17, UNCITRAL Model Law, 107,
110–111
Europe, 101–105
U.S., 96–101, 96n44
antitrust disputes, 4, 119–120
antitrust law, 32, 84–85, 226–227
appeals, 4–5
appearance default, 171–172

- arbitrability
 - awards enforcement and, 226–227
 - bankruptcy and, 32, 72, 73
 - governing law, 72–73
 - U.S. definition, 72*n*48
 - U.S. Supreme Court and, 94–95, 227
- arbitral institutions, 10–13
- arbitral proceedings
 - governing law, 69
 - parties' law, 68
- arbitration
 - ad hoc, 10, 45, 133, 148, 153, 156, 161
 - advantages of, 3–4
 - baseball, last offer, 16
 - bribery and, 32, 93, 154, 174–175, 175*n*58
 - consent and, 2, 37–38, 232–233
 - construction, 71–72, 77, 123–124, 125
 - defining characteristics, 2–3
 - disadvantages of, 4–5
 - federal law and, 35–36
 - final and binding award, 2–3
 - institutional *vs.* ad hoc, 9–10
 - language of, 169
 - mediation *vs.*, 14
 - nongovernmental decision makers, 2
 - online, 62–64
 - place of, 79, 168, 200–201
 - purpose of, 1
 - regulatory framework of, 5–9
 - securities and, 32, 227
 - states and, 13–14. *See also* arbitrability; investment arbitration; treaty/contract-based arbitration
- arbitration agreement
 - arbitration clauses, submission agreements, 2
 - binding non-signatories and, 34–42
 - enforcement of, 20
 - function, purpose of, 18–19, 43
 - governing law, 69–72
 - separability and, 19
 - validity of, 6, 19–31, 70–71, 220. *See also* arbitration agreement, drafting
- arbitration agreement, drafting, 43–58
 - additional provisions, 49–51
 - arbitration place, 47–48
 - choice of arbitrators and, 46–47
 - confidentiality and, 54
 - dispositive motions and, 52–53
 - essential requirements, 45–49
 - expanded judicial review and, 55–56
 - IBA Rules on the Taking of Evidence in International Commercial Arbitration and, 49–50
 - importance of, 45
 - language of, 48–49
 - legal fees and costs, 53
 - multiparty agreements and, 57–58
 - multistep dispute resolution clauses, 51–52
 - pathological clause, 43
 - preliminary relief and, 50–51
 - state immunity waiver and, 56–57
 - substantive law and, 48–49
 - technical expertise and, 51
- Arbitration Center of the Caracas Chamber, 152
- arbitration clauses
 - invalidation of, 93
 - neglect of, reasons for, 43–44
 - separability doctrine and, 19
 - submission agreements, 18
- arbitration laws and rules
 - AAA Commercial Rules, 53
 - CISG, 59, 69, 73–74, 76
 - conflicts of laws rule, 80–82
 - delocalization *v.* territoriality, 60–64
 - DIS, 58, 108
 - duty of arbitrator to apply, 82–86
 - governing law, failure to choose, 79–80
 - ICC, 11, 66, 79, 158, 159
 - importance of law, 59–60
 - INCOTERMS, 66, 74
 - JAMS, 13, 53
 - lex mercatoria*, 64–67, 74, 80, 81
 - mandatory/default, 6
 - mandatory law, public duty, 82–86
 - online arbitrations, 62–64
 - parties' choice, 64–78
 - SCC, 79
 - seat, failure to choose, 79
 - sports arbitrations, 62
 - Swiss Rules, 52
 - UNCITRAL, 62–63, 68
 - UNIDROIT Principles, 65, 66, 74, 80
 - websites, 351–352. *See also* International Centre for Dispute Resolution (ICDR); *specific laws and rules*
- arbitration proceedings
 - arbitrator discretion, 179
 - arbitrator intervention, 184
 - beginning, 158–160
 - briefs, form of award, 164
 - communications, 164
 - cooperation of counsel, 165

- evidence presentation, 172–179
- exchange of reliance documents, 162
- exhibits, 164
- experts, 163
- expert witnesses, 185–187
- fact witnesses, 179–185
- form of award, 164
- governing law, 163
- hearing, 164, 167–172
- oral arguments, 183–184
- other discovery, 163
- preliminary matters, 160–166
- procedural and discovery decisions, 164
- protective orders, 163
- sample agenda, 162–165
- scheduling, 164
- Terms of Reference, 11
- time limitations, 163, 170–171
- tutorials, 163
- witnesses, 164
- witnesses statements of fact, 163
- witness scheduling, 164, 168
- written proceedings, 166–167
- arbitrators
 - authority of, 220–221
 - challenges to, 147–151
 - challenges to, failed, 148–149
 - choice of, 4
 - costs and fees of, 156, 161
 - discretion, 179
 - diversity, lack among, 5
 - duty, mandatory law and, 82–86
 - flawed conduct, 151–158
 - immunity of, 153–155
 - number of, 122–123
 - power of, lack, 5
 - professors as, 124–125
 - qualifications of, 123–125
 - replacement of, 153
- arbitrators, appointment of, 122–135
 - ad hoc arbitration, 133
 - availability and, 125
 - interviewing prospective, 134–135
 - language fluency and, 125
 - number of arbitrators, 122–123
 - qualifications, knowledge/experience, 123
 - qualifications, lawyers/nonlawyers, 123–124
 - qualifications, professors, 124–125
 - reputation and, 125
 - selection method, 126–133
 - selection method, sole arbitrators, 132–133
 - selection method, three arbitrators, 126–132
 - specifications, requirements, 126
- arbitrators, duties of, 82–86
 - applying the law, 83–86
 - duty to render award, 83, 145
 - law or equity and, 82–83
 - lex arbitri*, 83–84
 - mandatory law, 84
 - mandatory law and public policy, 84–86
- arbitrators, obligations of, 135–147
 - 1987 IBA Rules of Ethics for Arbitrators, 7
 - AAA-ABA Code of Ethics, 7, 142–144, 332–345
 - conflicts of interest, IBA guidelines, 136–141
 - duty to investigate, 144–145
 - independence and impartiality, 135–145
 - other, 145–147
- arbitrators, selection method
 - party-appointed arbitrator selection, 128–130
 - practice, 127–128
 - presiding arbitrator choice, 130–132
 - rules, 126–127
- Argentina, 247–250
- Article 7, UNCITRAL Model Law, 24–30
 - more favorable right provision, 24, 25, 26
 - Section 5, 29
 - Section 6, 29
- Article 17, UNCITRAL Model Law, 105–106, 107, 110–111, 112
- Article II, New York Convention, 20–24, 30, 90, 218–220, 279–281
- Article V(1)(e) loophole, New York Convention, awards enforcement and, 223–224
- Australia, confidentiality of awards and, 201
- Australian Centre for International Commercial Arbitration (ACICA), 51
- authentication, of documents, 176
- awards
 - CIETAC scrutiny of, 196
 - communication of, 194–195
 - compromise, 82
 - concurring, dissenting views, 195
 - confidentiality of, 3–4, 199–201
 - consent, 192–193
 - default, 193
 - defining, 189
 - draft award scrutiny, 195–196
 - enforcement of (*see* awards, enforcement of)

- awards (*cont.*)
 final, 190
 finality, clarity, scope, 196
 formalities of, 194
 ICC scrutiny of, 195–196
 interest, 196–197
 New York Convention and, 3
 orders *vs.*, 189–190
 other remedies, 197
 partial, interim, 191–192
 post-award proceedings, 201–202
 publication of, 238
 remedies and costs, 196–198
res judicata, effect of, 198–199
 time limits of, 195
 types of, 190–193
 validity of, 194–196
- awards, enforcement of
 annulled awards, 225, 226
 arbitral subject matter and, 226–228
 arbitration tribunal and, 222
 arbitrator authority and, 220–221
 Article V(1)(e) loophole, 223–224
 award nonbinding, 222–226
 binding award, 222
 in China, 213
 Contracting States, reciprocity and, 214
 European Convention on International Commercial Arbitration and, 224–225
 governing principles, 212–213
 ICSID and, 236–238, 239
 incapacity/invalidity and, 217–220
 international conventions and, 211–212
 jurisdiction, *forum non conveniens* and, 214–215
 lack of notice or fairness, 220
 LCIA and, 83
 local law deference, Article VII, 224
 New York Convention and, 73, 84, 193, 213–217
 nonenforcement grounds, 217–229
 parties' agreement and, 222
 procedures for, 216–217
 public policy and, 228–229
 scope, 213–214
 tribunals, 222
 vacated award effect, 222–223, 224–226
 writing requirement and, 20–21, 22–23, 33, 45, 218–220
- awards, set aside attempts
 based on merits, 207–208
 challenge grounds, 205–208
 challenge methods, 203–205
 in common law systems, 207
 Dutch law, 209
 under English Arbitration Act, 209–210
 German law, 210
 grounds for, 3
 under ICSID Convention, 204
 jurisdictional challenges, 205–206
 nonstatutory grounds, 207–208
 procedural challenges, 206–207
 public policy and, 207–208
 successful challenges, 209–210
 time limitations, 209
 UNCITRAL law and, 203. *See also* annulment; vacated awards
- Bachand, Frédéric, 89, 90
 Bahrain Chamber for Dispute Resolution (BCDR-AAA), 12
 bankruptcy, arbitrability of, 32, 72, 73, 226
 Barrington, Louise, 184
 baseball arbitration. *See* last offer arbitration
Base Metal Trading, Ltd. v. OJSC, 214–215
 Belgium, decolonization in, 61, 87–88
 bilateral investment treaties (BITs), 232, 239–242
 enforcing rights under, 241–242
 proliferation of, 232, 239
 substantive rights under, 240–241
 binding award, enforcement, 222
 BITS. *See* bilateral investment treaties
 breach of contract, 40–41, 193, 244, 245–246, 248
 bribery, 32, 93, 154, 174–175, 175n58
Bridas S.A.P.I.C. v. Government of Turkmenistan, 39–40
 burden of proof, 4, 10, 171, 174–175, 206, 217
 California, 77, 85–86, 117, 119
 CANACO (Mexico City National Chamber of Commerce), 11
 CAS (Court of Arbitration for Sport), 62
 case management conference (ICC), 165–166
 Case Management Techniques (ICC), 7
 chair, tribunal, 130–132
 challenge grounds, set aside attempts, 205–208
 Chamber of Commerce and Industry of Romania, 127
 Chartered Institute of Arbitrators (CIArb) Guidelines, 135
 Protocol for E-Disclosure in Arbitration, 170

INDEX

361

- chess clock, 171*n*45
- China
 awards enforcement in, 213
 judicial review in, 91, 92
 local bar requirements, 169*n*38
 time limits on award challenges, 209
- China International Economic Trade Arbitration Commission (CIETAC), 12–13, 92–93, 348
 appointment of arbitrators, 127
 draft award scrutiny by, 196
- Chromalloy Aeroservices v. Arab Republic of Egypt*, 225–226
- CIArb Guidelines, 135
- CIETAC. *See* China International Economic Trade Arbitration Commission
- circuit courts, U.S.
 arbitral summons, 115–117
 arbitrator, duty to investigate, 144
 arbitrator disclosure, 150–151
 enforcement, 215, 216
 expanded judicial review, 55
 interim relief, 109
 judicial review, 89–90
 nondisclosure, 150–151
 public policy, effect on award enforcement, 228
 writing requirements, 21–22, 30–31
- CISG (United Nations Convention on Contracts for the International Sale of Goods), 59, 73–74
- civil law
 anti-suit injunctions, 96
 arbitrator immunity, 154–155
 attorney fees, 198
 burden of proof, 174
 documentary evidence, 176
 equitable estoppel, 36–37
 fact witnesses, 179
 punitive damages, 197
 witnesses, 180, 181, 182, 183
- claim preclusion. *See res judicata* effect
- closed hearings, 169
- coarbitrators, 128–130
- Code of Ethics for Arbitrators, 7
- Code of Sports-related Arbitration, 62
- codes & guidelines websites, 353
- Commercial Rules, AAA, 53
- common law
 anti-suit injunctions, 96, 97
 arbitrator immunity, 154
 burden of proof, 174–175
 documentary evidence, 175–176
 fact witnesses, 179
 judicial review, 55
 punitive damages, 197
 set aside attempts, 207
 witness examination, 181–182
 witness meetings, 181
- Commonwealth Coatings Corp. v. Continental Cas Co.*, 393 U.S. 145 (1968), 149–150
- Compania de Aguas del Aconquija, S.A.(CAA) & Vivendi v. Argentine Republic*, 247–250
- companies. *See* group of companies doctrine
- competence-competence doctrine, 19*n*2
- competition law, 85
- compromise awards, 82
- concession contracts, 247–250, 247*n*72
- conciliation, mediation *vs.*, 15
- conferencing, 187
- confidentiality
 AAA clause, 74
 of awards, 3–4, 199–201
 included in arbitration agreement, 54
 ICC, 200
 ICDR, 200
 ICSID, 238
 of interim measures, 110
 LCIA, 200
 mediation and, 14–15
 mini-trials and, 16
 WIPO, 200
 witnesses and, 3–4, 54
- conflicts of interest, IBA guidelines, 136–141
- conflicts of laws, 80
- confrontation, 187
- consent, 2, 232–233
 implied, 37–38
- consent award, 192–193
- conservatory measures. *See* interim measures
- construction arbitration, 71–72, 77, 123–124, 125
- contracts
dépeçage, 76
ex aequo et bono and *amiable compositeur*, 77–78, 83
 law governing, 73–78
lex mercatoria, 64–67, 74
 national or international law, 73–74
renvoi, 76–77
 substantive law and, 7, 46, 68–69
 treaty claims *vs.*, 247–250
 unrelated national law, 74–75. *See also* governing law, contracts
- Convention on Contracts for the International Sale of Goods, 28

- Convention on Recognition and Enforcement of Foreign Arbitral Awards. *See* New York Convention
- Convention on the Settlement of Investment Disputes (ICSID). *See* Washington (ICSID) Convention
- Convention on the Use of Electronic Communications and International Contracts (CUECIC), 28–29
- Cooperative Agreements, 12
- cost insurance and freight (CIF), 66*n*29
- costs and fees, 4, 10, 44, 53, 156, 161, 197–198. *See also* remedies and costs
- Cour de Cassation, French, 58
- courtesy trap, 52
- court intervention, 47, 91–92
- Court of Arbitration for Sport (CAS), 62
- CPR (Institute for Conflict Prevention and Resolution), 13
- criminal law, as not arbitrable, 32, 72, 73, 226
- CUECIC (Convention on the Use of Electronic Communications and International Contracts), 28–29
- curial law, 68
- Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan*, 40–41
- declaratory awards, 197
- default awards, 193
- defined legal relationship, validity and, 31–32
- delocalization
Washington Convention and, 236. *See also* delocalization v. territoriality
- delocalization v. territoriality, 60–64
modern approaches, 61–64
online arbitrations, 62
pro/counter arguments, 60–61
sports arbitration and, 62, 63
- dépeçage, 76
- depositions, 50, 115, 116, 163
documentary evidence and, 176
fact witnesses and, 179, 180
showing need for, 163
- Derains, Yves, 84
- DIFC-LCIA Arbitration Center (Dubai), 12
- direct benefits, theory of, 37
- DIS. *See* Germany, DIS Rules of Arbitration
- disclosure
AAA-ABA Code *vs.* IBA Guidelines, 142–144
- Commonwealth Coatings* and, 149–151
e-disclosure, 170
- discovery, 4, 50, 53, 88. *See also* depositions;
documentary evidence; interrogatories
- dispositive motions, 52–53
- documentary evidence, 175–179
authentication of, 176
compelling, before or at hearing, 115–116
hearsay evidence as, 176
requests to produce, 176–179
showing of need for, 163
- domestic arbitration, non-neutral arbitrators
in, 142–143
- domestic awards
annulment of, 55, 85
appeal rights in France, 55
- domestic law
anti-suit injunctions, bypassing, 106
investment contracts and, 245
state-private company contracts and, 67
validity issues, 23
writing requirement and, 24, 25, 28–29, 30
- draft award scrutiny, 195–196
- Droulers, Diana, 152
- Dundas, Hew, 131
- Dutch law
contracts, 76
set aside awards, 209
- ECJ. *See* European Court of Justice
- Eco Swiss China Time Ltd. v. Benetton International NV*, 85
- electronic commerce, writing requirement
and, 28–29
- Electronic Communications, UN Convention
on, 27, 28–29
- Electronic Signatures in Global and National
Commerce Act (E-Sign), 30–31
- Electronic Transaction Arbitration Rules,
Hong Kong, 63
- Emergency Measure of Protection, 50
- Energy Charter Treaty, 242–243
- enforcement
arbitration agreement, 20
arbitration settlement capability and,
32–33
under BITS, 241–242
competence-competence doctrine and,
91–95
geographic restrictions, 116–177,
118–119
of ICSID awards, 236–238, 239

- of interim measures, 111–112
- judicial assistance and, 88–95
- judicial review and, 88–91
- trends, 34
- Washington Convention, 239. *See also*
 - awards, enforcement; nonenforcement
- England
 - arbitral procedures, 178
 - confidentiality of awards and, 200
 - point-of-law appeals, 207
 - time limits on award challenges, 209
- English Arbitration Act, 212, 68
 - awards, set aside attempts under, 209–210
 - expanded judicial review and, 55–56
 - interim relief, 107–108
 - judicial assistance, 114
 - remand, 202
- English Court of Appeal, 93
- E-Sign, 30–31
- estoppel
 - doctrine of judicial, 226/169
 - equitable, and binding non-signatories, 36–37
- Europe
 - anti-suit injunctions, 101–105
 - arbitrability and, 227
 - judicial assistance, 101–105, 113–114
- European Community Directive Relating to Self-Employed Commercial Agents, 85–86
- European Convention on International Commercial Arbitration, 8, 224–225
- European Court of Arbitration, 12, 204
- European Court of Justice (ECJ), 85–86, 96, 101–103
- European Union (EU), 104, 114, 119, 227
- European Union Directive on Unfair Terms in Consumer Contracts, 227
- evidence, court assistance in obtaining, 112–121
 - arbitrator summons, U.S., 114–118
 - inside U.S., foreign tribunals, 119–120
 - national laws, 113–114
 - outside U.S., U.S. tribunals, 118–119
 - procedural orders, 112–113
- evidence presentation, 172–179
 - arbitrator discretion and, 179
 - authentication, 176
 - burden of proof, 174–175
 - documentary evidence, 175–179
 - document requests, 176–179
 - hearsay, 176
- IBA Rules, 173–174
- evidence taking rules, IBA, 173–174, 282–308
- ex aequo et bono* and *amiable compositeur*, 77–78, 83, 145
 - governing law, 77–78, 83
- execution, defining, 212, 237
- expanded judicial review, 55–56
- expedited hearing, 172
- expert determination, 15–16
- experts
 - confidentiality and, 3–4, 54
 - exchange of reports of, 163
- expert witnesses, 124, 185–187
- FAA. *See* Federal Arbitration Act
- fact witnesses, 179–185
 - availability of, 185
 - compelling testimony of, 185
 - confidentiality and, 54
 - examining, 181–184
 - exchange of statements of, 163
 - intervention by arbitrator, 184
 - meeting with, 181
 - testimony prior to hearing, 179–180
 - who can testify, 180–181
 - witness statements and, 163, 180
- failure to choose governing law, 79–80
- failure to choose seat, 79
- fair and equitable treatment, 240
- family matters, as not arbitral, 32, 72, 73, 226
- fast track arbitration, 172
- favorable nation. *See* most favored nation treatment
- favorable rights. *See* more favorable rights
- Federal Arbitration Act (FAA), 68
 - antitrust law, 227
 - arbitral summons, 114–118
 - awards, enforcement, 213, 226
 - awards, grounds for vacating, 207
 - interim measures, 109
 - judicial review grounds under, 5, 55
 - Section 7, 115–117
 - written provision requirement, 30–31
- Federation of Oils, Seeds, and Fats Association (FOSFA), 13
- final and binding award, 2–3
- final awards, 190
- Fiona Trust & Holding Corporation v. Yuri Privalov*, 93–94
- First Options v. Kaplan*, 93–94
- flawed conduct, of arbitrators, 151–158
- floating. *See* delocalization v. territoriality

- foreign investment, growth of, 230
 “fork in the road” provision, 242
 formalities, awards, 194
forum non conveniens, awards enforcement and, 214–216
 FOSFA (Federation of Oils, Seeds, and Fats Association), 13
Four Seasons Hotels and Resorts v. Consorcio Barr S.A., 98–99
 France
 enforcement of vacated awards, 224
 expanded judicial review in, 55
 French Code of Civil Procedure, 92
 judicial review in, 89*n*7, 91–92
 François-Poncet, Sarah, 141, 186
 free on board (FOB), 66*n*29
 free transfer of funds, 241
 full protection and security, 240
functus officio doctrine, 202
- GAFTA (Grain and Feed Trade Association), 13
 Geneva Convention, 1927, 222
 geographic restrictions, on enforcement, 116–177, 118–119
 German Institution of Arbitration (DIS), 12, 58, 108, 348
 Germany
 awards, set aside attempts, 210
 DIS Rules of Arbitration, 58, 108
 enforcement of vacated awards, 224
 judicial assistance, 113–114
 witnesses, 180
Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 215
 good faith, 36–37
 governing law, contracts
 amiable compositeur and *ex aequo et bono*, 77–78, 83
 arbitrability, 72–73
 arbitral proceedings, 60, 69
 arbitration agreement, 69–72
 d’épéage, 76
 failure to choose, 79–80
 lex mercatoria, 64–67, 74
 national/international law, 73–74
 renvoi, 76–77
 unrelated national law, 74–75
 Grain and Feed Trade Association (GAFTA), 13
 Green List, 139–140, 143, 330–331
 group of companies doctrine, binding nonsignatories and, 38
 guidelines
 CIArb Guidelines, 135
 for disclosure, 142–144
 for drafting arbitration clauses, 44
 websites, 353. *See also* IBA Guidelines on Conflicts of Interest in International Arbitration
 Hague Evidence Convention, 118–119
Hall Street Assoc. v. Mattel, Inc., 208
Harbour Assurance Co. (UK) Ltd v. Kansas General International Insurance, 93
 hearings, 167–172
 agenda letter for first pre-hearing conference, 162–165
 appearance default, 171–172
 closed, 169
 expedited proceedings, 172
 language of, 169
 local bar requirements, 169
 procedural issues, 167
 recording, 170
 scheduling, 168
 seat, determining, 168
 technology use, 170
 time limits, 170–171
 hearsay evidence, 176
 Hong Kong International Arbitration Centre, 63
 hot-tubbing, 187
 hybrid law model, 180
- IBA. *See* International Bar Association
 IBA Guidelines for Drafting International Arbitration Clauses, 44
 IBA Guidelines on Conflicts of Interest in International Arbitration, 7
 Green List, 139–140, 143, 330–331
 impartiality and independence of arbitrators, 136–141
 Orange List, 139, 328–330
 Part I: General Standards, 137–138, 317–324
 Part II: Practical Application of General Standards, 138–141, 324–331
 Red List, 138–139, 327–328
 text of, 314–331
 Working Group members, 315*n*1
IBA Rules of Ethics for Arbitrators (1987), 7, 141–142, 145–147, 309–313
IBA Rules on the Taking of Evidence in International Arbitration, 7, 49–50

- admissibility and assessment of evidence, 306–308
- Arbitration Committee, about, 291
- changes to rules, 2010, 173–174
- compelling testimony, 185
- consultation on evidentiary issues, 296
- definitions, 294–295
- documents, 296–299
- evidentiary hearing, 305–306
- inspection, 304–305
- party-appointed experts, 301–302
- request to produce documents, 177
- Rules, 294–308
- Rules of Evidence Review Subcommittee members, 288–290
- scope of application, 295–296
- text of, 282–308
- tribunal-appointed experts, 302–304
- witness, meeting with, 181
- witness availability, 185
- witnesses of fact, 299–301
- witness statements, 180
- Working Party members, 286–287
- ICC. *See* International Chamber of Commerce
- ICCA. *See* International Council for Commercial Arbitration
- ICCA (International Council for Commercial Arbitration), 14
- ICCA Congress Series, 14
- ICC International Center for Expertise, 51
- ICC International Court of Arbitration, 11, 58
- ICC Rules
 - arbitration, beginning of, 158, 159
 - arbitrator challenges under, 147
 - confidentiality, 200
 - emergency arbitrator, 51
 - interim measures, 147
 - remand, 202
 - scrutiny of draft award, 195–196
 - Terms of Reference, 165–166
 - time limits, 172*n*49
- ICC Uniform Customs and Practice for Documentary Credits (UCP 600), 66
- ICDR. *See* International Centre for Dispute Resolution
- ICSID. *See* International Center for the Settlement of Investment Disputes
- immunity
 - of arbitrators, 153–155
 - waiver of state, 56–57
- impartiality, of arbitrators, 135–136
- implied consent, binding nonsignatories and, 37–38
- incapacity/invalidity, awards enforcement and, 217–220
- INCOTERMS, 66
- independence, of arbitrator, 136
- Indonesia, 226*n*69
- Ingmar GB Ltd. v. Eaton Leonard Technologies, Inc.*, 85
- injunctive relief, 50, 197
- Institute for Conflict Prevention and Resolution (CPR), 13
- institutions, arbitral, 10–13
- Intel Corp. v. Advanced Micro Devices, Inc.*, 119–120
- Inter-American Commercial Arbitration Commission (IACIC), 12
- Inter-American Convention on International Commercial Arbitration, 8
- interest awards, 196–197
- interest-based procedure. *See* mediation
- interim awards, 191–192
- interim measures, 105–112
 - basis for, 110–111
 - confidentiality of, 110
 - enforcement of, 111–112
 - kinds of, 105–107
 - tribunal *vs.* court, 107–110
 - UNCITRAL, 105–107, 110–112
- international arbitration practice, 7–8
- International Bar Association (IBA)
 - arbitration exclusion deletion and, 104
 - evidence presentation rules, 173–174
 - guidelines for drafting arbitration clauses, 44
 - rules of ethics for arbitrators, 7, 141–142, 145–147, 309–313. *See also* IBA *Guidelines on Conflicts of Interest in International Arbitration*; IBA *Rules on the Taking of Evidence in International Arbitration*
- International Center for the Settlement of Investment Disputes (ICSID)
 - ad hoc committee of, 13, 236, 248–250
 - annulment and, 204, 236, 247–250
 - award challenges and, 204
 - award confidentiality and, 238
 - consent, 232–233
 - creation of, 8–9
 - legal disputes and investments, 235
 - multilateral investment treaties and, 242. *See also* Washington (ICSID) Convention

- International Centre for Dispute Resolution (ICDR)
 advice for drafting dispute resolution clauses, 44
 arbitration, beginning of, 158, 159
 arbitrators, impartial and independence, 143
 confidentiality, 54*n*31, 200
 creation of, 10
 dispositive motions, 53
 emergency arbitrator, 50
 expansion of, 11–12
 interim relief, 109
 model clause, 347
 step clause recommendation, 52*n*25
- International Chamber of Commerce (ICC)
 arbitration laws and rules, 11, 79, 158, 159
 arbitrator challenges, 58
 award confidentiality, 54*n*31, 200
 case management conference, 165–166
 Case Management Techniques, 7
 draft award scrutiny by, 195–196
 INCOTERMS, 66
 model clause, 346
 Report on E-Discovery, 170
 UCP 600, 66. *See also* ICC Rules
- International Commercial Disputes Committee of the Association of the Bar of the City of New York, 216
- international conventions
 award enforcement and, 211–212
 websites, 349–350
- International Council for Arbitration for Sport, 62
- International Council for Commercial Arbitration (ICCA), 14
- interrogatories, 50, 175
- intertwined issues, theory of, 37
- interviews, of prospective arbitrators, 134–135
- investment arbitration
 bilateral investment treaties, 239–242
 growth of foreign investment and, 230–231
 legislation, 243
 multilateral investment treaties, 232, 242–243
 protection of investors, 231–243
 treaty/contract-based arbitration, 243–251
 Washington (ICSID) Convention and, 231–239
- Iran Aircraft Industries. v. Avco Corp.*, 220
- Iran-U.S. Claims Tribunal, 175*n*58
- JAMS, 13, 53
- judicial assistance
 anti-suit injunctions, 95–105
 anti-suit injunctions, Europe, 101–105
 anti-suit injunctions, U.S., 96–101
 arbitration agreement enforcement, 88–95
 in Europe, 101–105, 113–114
 interim measures, 105–112
 obtaining evidence, 112–121
- judicial estoppel doctrine, 226*n*69
- judicial review
 in China, 91, 92
 circuit courts, U.S., 89–90
 enforcement and, 88–91
 expanded, 55–56
 in France, 89*n*7, 91–92
 grounds under FAA, 5, 55
 New York Convention on, 88–91
 UNCITRAL Model Law on, 90, 93
- jurisdictional challenges, 205–206
- jurisdictional requirements, Washington Convention, 232–235
- Kälin-Nauer, Claudia, 128–129
- Karaha Bodas Co. (KBC) v. Negara*, 100–102
- Karrer, Pierre, 160, 173
- lack of notice or fairness, 220
- language fluency, of arbitrator, 125
- language of arbitration, 169
- last offer arbitration, 16
- law, importance in commerce arbitration, 59–60
- lawyers, transactional, 44
- LCIA. *See* London Court of International Arbitration
- LCIA India, 12
- legislation, investor protection, 243
- Lemaire, Gillian, 161
- letters rogatory, 114
- lex arbitri*, 6, 47, 67, 68–70, 203
- lex mercatoria*, 64–67, 74, 80, 81
 application of, 66–67
 contracts between states, 66
 contracts between states/private parties, 67
 defined, 64–66
- l'intime conviction du juge*, 174
- LMAA (London Maritime Arbitration Association), 13

- LME (London Metal Exchange), 13
 local bar requirements, 169
 London Court of International Arbitration (LCIA), 12, 46
 arbitration, beginning of, 158
 arbitrator challenges under, 58, 147, 151
 arbitrator choice, 132
 award confidentiality and, 200
 award enforcement, 83
 failure to choose seat, 79
 model clause, 346
 procedural decisions, 167
 right to hearing and, 52–53
 London Maritime Arbitration Association (LMAA), 13
 London Metal Exchange (LME), 13
- Major League Baseball, 16
mandat apparent, 36
 mandatory law, arbitrator's duty and, 82–86
 manifest disregard doctrine, 208
 Mayer, Pierre, 71, 83, 132
M&C Corporation v. Erwin Behr GmbH Co., 202
McCreary Tire & Rubber v. CEAT, SpA, 109–110
 mediation, 14–15
 arbitration *vs.*, 14
 conciliation *vs.*, 15
 Mexico City National Chamber of Commerce (CANACO), 11
 mini-trials, 16
Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 84–85
 model clauses, 45
 CIETAC, 348
 DIS, 348
 ICC, 346
 ICDR, 347
 LCIA, 46, 346
 SCC, 347–348
 typical, 46
 UNCITRAL, 347
 websites, 352–353
Monegasque de Reassurances v. Nak Naftogaz of Ukraine and State of Ukraine, 216
 monetary damages, 196
 more favorable rights, 24–25, 26, 28, 29–30, 220, 224, 225
 most favored nation treatment, 241, 244
 multilateral investment treaties, 232, 242–243
 Energy Charter Treaty, 242–243
 NAFTA, 242
 multiparty agreements, 57–58
 multiparty disputes, 5
 multistep dispute resolution clauses, 51–52
- NAFTA. *See* North American Free Trade Agreement
 nationality issues, Washington Convention, 234–235
 national law, 6–7
 websites, 350. *See also* substantive law
 national treatment, 241
 Netherlands Arbitration Institute (NAI), 12, 50
 neutral evaluation, 15
New Regency Productions, Inc. v. Nippon Herald Films, Inc., 144–145
 New York, unrelated national law and, 75–76
 New York Convention, 3
 Article II, 20–24, 30, 90, 218–220, 279–281
 Article III/Article V interrelation, 218–219
 Article III, 212
 Article V, 217, 219, 220, 221, 222–223, 226, 228
 Article V(1)(e) loophole, 223–224
 Article VII, 24–25, 30, 220, 224, 225–226
 enforcement of awards, 73, 84, 193
 enforcement requirements, 213–217
 function of, 212–213
 interim measures, 111–112
 judicial review, 88–91
 modernization of, 24
 nondomestic/domestic issues, 213, 216
 nonenforcement of awards, grounds for, 217–229
 original/certified arbitration clause requirement, 166
 place of arbitration and, 48
 recognition of awards by, 212
 text of, 253–258
 validity of arbitration agreements, 19–31, 33, 45
 writing requirement (*see* writing requirement)
- nonenforcement, of awards, 217–229
 nongovernmental decision makers, 2
 nonsignatories, binding, 34–42
 agents, authority of, 36
 equitable estoppel and, 36–37
 group of companies doctrine and, 38

- nonsignatories, binding (*cont.*)
 implied consent and, 37–38
 timing of objections, 42
 veil piercing/alter ego and, 39–41
- North American Free Trade Agreement (NAFTA), 239, 242
- Notes on Organizing Arbitral Proceedings (UNCITRAL), 7, 161
- Olympics, 62
- online dispute resolution (ODR), 62–64
- on-site inspection, 186
- oral arguments, 53
- oral hearings, 157, 167, 180
- oral testimony, 176, 178, 183
- Orange List, 139, 325, 326, 328–330
- orders, awards *vs.*, 189–190
- Panama Convention, 8
- Paramedics Electromedicina Comercial Ltda. v. GE Medical Systems Information Technologies, Inc.*, 97–98
- Paris Cour d'Appel, 41, 55
- Park, William W., 87–88, 215
- Parsons & Whittemore Overseas Co., Inc. v. Société Générale de l'Industrie du Papier*, 228
- partial annulment, 236, 250
- partial awards, 98, 99, 112, 191–192, 222
- parties' choice, 67–78
 governing law, arbitrability, 72–73
 governing law, arbitral proceedings, 68
 governing law, arbitration agreement, 69–72
 governing law, contract, 73–78
 governing rules, arbitral proceedings, 69
- patents, as not arbitral, 32, 72, 73, 226
- pathological clauses, 33, 43, 45
- Permanent Court of Arbitration (PCA), 12, 13–14, 45
- Pertamina, 100–101, 124
- Pieckowski, Sylwester, 124, 127
- Pink List, 138–139
- Portugal, local bar requirements in, 169n38
- post-award proceedings, 201–202
- post-hearing proceedings, 188
- predispute arbitration agreements, 227
- pre-hearing conference, agenda letter for, 162–165
- preliminary order, definition of, 106–107
- preliminary relief, 50–51
- preservation *vs.* taking of evidence, 112
- prima facie* review, 89, 90–91
- private companies and states, contracts
 between, 67
- privilege, 173–174
- procedural challenges, 206–207
- procedural laws, 68
- professors, as arbitrators, 124–125
- Protocol for E-Disclosure in Arbitration, 170
- publication, of awards, 238
- Publicis Communication v. True North Communications*, 192
- public policy
 awards, enforcement, 228–229
 awards, set aside attempts, 207–208
 mandatory law and, 84–86
 Turkish court and, 228
- punitive damages, 197
- reasonable relationship requirement, 75
- Redfern Schedule, 178
- Red List, 138–139, 327–328
- Reetz, Ryan, 99
- regulatory framework, 5–9
- reliance documents, exchange of, 162
- remands, 59, 99, 202–203, 210
- remedies and costs
 costs, 197–198
 interest, 196–197
 monetary damages, 196
 other, 197
- remissions, 202, 209, 210
- renvoi*, 76–77
- reputation of arbitrators, 125, 194
- research websites, 355–356
- res judicata*, 34
- res judicata* effect, 198–199
- Restatement of the United States Law of International Commercial Arbitration, 208
- Revised Uniform Arbitration Act (RUAA), 210
- rights, 18
 enforcement, BITS, 241–242
 more favorable rights, 24–25, 29–31, 220, 224, 225
 substantive (*see* substantive rights)
- rights-based procedure. *See* mediation
- Rosell, Jose, 187
- RUAA (Revised Uniform Arbitration Act), 210
- Rubino-Sammartano, Mauro, 175
- Rule 45, 117
- rule of law, 80, 81–82, 242

INDEX

369

- rules, arbitration. *See* arbitration laws and rules
- Rules of Professional Conduct, 181
- Salomon, Claudia, 48, 152
- SCC. *See* Stockholm Chamber of Commerce
- Schwartz, Eric, 84, 183–184
- Schwenzer, Ingeborg, 16
- seat of arbitration, 168
 confidentiality and, 200–201
 failure to choose, 79
- Section 7, Federal Arbitration Act, 115–117
- securities, arbitration and, 32, 227
- separability doctrine, 19
- Seppälä, Christopher, 125, 129, 130
- set aside attempts. *See* awards, set aside attempts
- SGS v. Pakistan*, 245
- SGS v. Philippines*, 245–246
- SIAC (Singapore International Arbitration Center), 11–12
- Siemens AG v. Dutco*, 57–58
- Simon, Nicholas, 182
- Simula, Inc. v. Autoliv, Inc.*, 109
- Singapore International Arbitration Center (SIAC), 11–12
- Smit, Hans, 119–120
- sole arbitrators, selection method, 132–133
- source of right, in treaty/contract-based arbitration, 243–245
- South Korea, local bar requirements, 169n38
- Special Administrative Region (SAR), 63
- sports arbitration, 62, 63
- stateless. *See* delocalization v. territoriality
- states and state entities
 arbitration and, 13–14
 contracts between, 66
 contracts with private parties, 67
 ICSID arbitration and, 13
 immunity waivers by, 56–57
- Stockholm Chamber of Commerce (SCC), 12
 arbitration laws and rules, 79
 emergency arbitrator, 51
 interim measures, 191
 model clause, 347–348
- Stolt Nielsen v. Animal Feeds*, 208, 221
- subcontractors, multiparty agreements and, 57
- submission agreements, 2, 18
- substantive law, 6, 7, 48–49
 in ad hoc arbitration, 133
 arbitral proceedings and, 64, 67–68
 arbitration agreements and, 69–72
 choosing, 73–74
 conflicts of laws and, 76, 80, 81
 in Europe, 86
 in Turkey, 228
- substantive rights
 under BITS, 240–241
 fair and equitable treatment, 240
 free transfer of funds, 241
 full protection and security, 240
 most favored nation treatment, 241, 244
 national treatment, 241
 umbrella clauses, 245–247
 uncompensated
 expropriation/nationalization
 protection, 240–241
- summons, for obtaining evidence, 114–118
- Supreme Court. *See* U.S. Supreme Court
- Swiss Private International Law Act, 70
- Swiss Rules, dispositive motions, 52
- Switzerland, judicial assistance in, 113–114
- taking *vs.* preservation of evidence, 112
- Tao, Jingzhou, 127
- technical expertise, 15, 51, 124, 185
- Techniques for Controlling Time and Costs
 in Arbitration (ICC), 178
- technology, used during arbitrations, 170
- testimony, prior to hearing, 179–180
- three arbitrators, selection method, 2,
 126–135
- time limits
 arbitration proceedings, 170–171
 of awards, 195
 ICC Rules on, 172n49
 set aside attempts, 209
- timing of objections, binding nonsignatories
 and, 42
- tort law, 31–32, 46, 155, 197
- transnational lawyers, 44
- travaux préparatoires*, 90
- treaty-/contract-based arbitration, 243–251
 contract *vs.* treaty claims and, 247–250
 coordinating contracts with treaties,
 250–251
 source of right and, 243–245
 umbrella clauses and, 245–247
Vivendi annulment decision, 247–250
- tribunals
 awards enforcement and, 222
 chair of tribunal, 130–132
 composition of arbitral tribunal, 262–264
 inside U.S., seeking evidence outside U.S.,
 119–120
 interim measures, tribunal *vs.* court,
 107–110

- tribunals (*cont.*)
 jurisdiction of arbitral tribunal, 264–265
 outside U.S., seeking evidence in U.S.,
 118–119
 Turkey, 228
 Turkmeneft. *See* *Bridas S.A.P.I.C. v. Government of Turkmenistan*
- UCP 600 (Uniform Customs and Practice for Documentary Credits), 66
- Ukraine, 216
- umbrella clauses, 245–247
- UNCITRAL (United Nations Commission on International Trade Law)
 CUECIC and, 28
 interim measures, defining, 105–106
 model clause, 347
 more favorable right provision, 24–25, 26, 28, 29–30, 220, 224, 225
 Notes on Organizing Arbitral Proceedings, 7, 161
 online arbitrations, 62–63
 preliminary order, defining, 106–107
 validity of arbitration agreement, 24–25, 220
 validity of award, 194. *See also* UNCITRAL Model Law on International Commercial Arbitration
- UNCITRAL Arbitration Rules (UNCITRAL Rules)
 ad hoc arbitrations and, 10, 45, 133
 arbitration, beginning of, 158, 159
 award formalities, 194
 governing law choice and, 80
 interim measures, 191
 multilateral investment treaties and, 242, 243
- UNCITRAL Convention on Electronic Commerce, 28
- UNCITRAL Convention on International Arbitration, 29
- UNCITRAL Model Law on Electronic Commerce, 27, 28, 29
- UNCITRAL Model Law on International Commercial Arbitration
 anti-suit injunctions, 107, 110–111
 arbitrator challenges, 148
 arbitrator disclosure, 136
 Article 7, 25
 Article 17, 105–106, 107, 110–111, 112
 Article 27, 113
 conciliation, 15
 countries/territories/states adopting, 6111–7112
 evidence taking, 113, 178
 failure to choose seat, 79
 interim measures, 105–107, 110–112
 interim measures, definition of, 105–106
 judicial review, 90, 93
 law governing arbitral proceedings, 68
 overview of, 6–7
 preliminary order, defining, 106–107
 procedural challenges, 206–207
 procedural decisions, 167
 remand, 202
 revised articles, 2006, 273–278
 time limits on award challenges, 209
 validity of agreement, 70–71, 93
 writing requirement and, 23, 24–28, 29–30, 45, 194, 218–220. *See also* UNCITRAL Arbitration Rules (UNCITRAL Rules); UNCITRAL Model Law on International Commercial Arbitration, original version, 1985
- UNCITRAL Model Law on International Commercial Arbitration, original version, 1985, 259–272
 arbitration agreement, 261–262
 composition of arbitral tribunal, 262–264
 conduct of arbitral proceedings, 265–267
 general provisions, 259–261
 jurisdiction of arbitral tribunal, 264–265
 making of award and termination of proceedings, 267–269
 recognition and enforcement of awards, 270–272
 recourse against award, 269–270
- UNCITRAL Model Law on International Commercial Conciliation, 15
- UNCITRAL Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1, of the New York Convention, 279–281
- uncompensated
 expropriation/nationalization protection, 240–241
- U.N. Convention on Electronic Communications, 27, 28–29
- UNIDROIT Principles of International Commercial Contracts, 65, 74, 80
- Uniform Arbitration Act, 210
- Uniform Customs and Practice for Documentary Credits (UCP 600), 66

INDEX

371

- United Nations Conference on Trade and Development (UNCTAD), 230
- United Nations Convention on Contracts for the International Sale of Goods (CISG), 59, 73–74
- United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). *See* New York Convention
- United States (U.S.)
 - anti-suit injunctions, 96–101
 - arbitrability in, 72*n*48, 94–95, 227
 - award challenges, nonstatutory grounds, 207–208
 - award enforcement, 214–216, 225–226
 - awards, set aside attempts in, 210
 - confidentiality of awards and, 200
 - evidence, court assistance in obtaining, 114–120
 - expanded judicial review, 55
 - judicial assistance, 96–101
 - judicial review, 89–90
 - non-neutral arbitrators in domestic cases, 142–143
 - time limits on award challenges, 209
- unrelated national law, 74–76
- U.S. Supreme Court
 - antitrust law and, 227
 - arbitrability and, 94–95, 227
 - awards, grounds for setting aside, 208
 - excess of authority and, 221–222
 - judicial review and, 5, 55
 - manifest disregard and, 208
- vacated awards
 - action to vacate *vs.* enforce, 204
 - anti-suit injunctions and, 97, 99
 - effect of, 222–223
 - enforcement of, 223–226
 - evident partiality as grounds for, 150
 - grounds for, 55, 71, 72–73, 83–84, 195, 196, 206
 - Karaha Bodas* case and, 100
 - local law and, 60, 239
 - public policy as grounds for, 207–208
 - rehearings and, 210
 - remittance of, 209–210. *See also* annulment; awards, set aside attempts
- validity
 - arbitral subject matter and, 32–33
 - arbitration agreement and, 6, 19–31, 70–71, 220
 - of awards, 194–196
 - defined legal relationship and, 31–32
 - domestic law and, 23
 - inoperability and, 34
 - null and void issues, 33
 - performance and, 34
 - UNCITRAL Model Law and, 70–71
 - writing requirement and (*see* writing requirement). *See also* New York Convention
- veil piercing/alter ego, binding nonsignatories and, 39–41
- Vienna International Arbitration Centre (VIAC), 12
- Virtual Magistrate, 62*n*10
- Vivendi* annulment decision, 247–250
- voie directe*, 80, 81–82
- voie indirecte*, 80, 81
- Wagoner, David, 16–17, 161–165, 168
- Washington (ICSID) Convention, 8–9, 231–239
 - Additional Facility Rules, 238–239
 - awards publication, 238
 - background, 231–232
 - consent issues, 232–233
 - Contracting States and, 233–234
 - delocalization and, 236
 - enforcement under New York Convention, 239
 - jurisdictional requirements, 232–235
 - legal disputes and investments, defining, 235
 - nationality issues, 234–235
 - recognition, enforcement, execution, 236–238. *See also* bilateral investment treaties (BITs)
- websites
 - arbitration rules, 351–352
 - codes & guidelines, 353
 - international arbitration organizations, 353–355
 - international conventions, 349–350
 - model clauses, 352–353
 - national laws, 350
 - research, 355–356
- WIPO. *See* World Intellectual Property Organization, Arbitration and Mediation Center

- witnesses
 confidentiality and, 3-4, 54
 expert, 124, 185-187
 language issues, 169
 preliminary matters concerning, 161
 scheduling, 164, 168
 subpoena issues, 114, 115, 116-117, 178.
See also fact witnesses
- World Bank, 9, 231, 238
- World Intellectual Property Organization,
 Arbitration and Mediation Center
 (WIPO), 13
- arbitrator replacement, 153ⁿ¹¹²
- award confidentiality, 200
- failure to choose seat, 79
- writing requirement, 19-31
 amendment to, 25-28
 award enforcement and, 20-21, 22-23,
 33, 45, 218-220
 circuit court interpretation of, 21-22
 electronic commerce and, 28-29
 more favorable right provision,
 29-31
 satisfaction of, 29
 UNCITRAL interpretation of, 23, 24-28,
 29-30, 45, 194, 218-220
- Yanos, Alexander, 215
- Yearbook Commercial Arbitration*,
 14