

Contents

	<i>page</i>
<i>Acknowledgments</i>	v
<i>Foreword</i>	vii
<i>Dedication</i>	ix
<i>Preface</i>	xi
<i>Table of Cases</i>	xxvii
<i>Table of Statutes</i>	lxxxix
<i>Table of Statutory Instruments</i>	xciv
<i>Table of European Legislation, International Conventions, Treaties and Protocols</i>	xcvi
<i>Table of Secondary European Legislation</i>	c

PART I

	<i>para.</i>
Chapter 1: Introduction	
A: AGREEMENTS FOR THE RESOLUTION OF DISPUTE IN INTERNATIONAL LITIGATION AND THE DIFFERENT GOVERNING REGIMES	1.01
B. COMPARATIVE APPROACH	1.09
C. PARALLEL LITIGATION AND CLASH OF JURISDICTION ..	1.12
D. MULTI-TIER CLAUSES	1.20
E. MATTERS FALLING OUTSIDE THE SCOPE OF THE BOOK	1.21

Chapter 2: Overview of the European Framework

INTRODUCTION TO CHAPTER	2.01
A. THE EC TREATY	2.07
B. THE BRUSSELS I REGULATION	2.11
Preamble—general principles	2.12
Creation of unified rules of jurisdiction and recognition and enforcement of judgments is essential	2.13
Predictable and certain rules of jurisdiction	2.14
Special rules on jurisdiction to be strictly construed	2.15

Protection of weaker party in identified relationships	2.16
Autonomy of the parties is to be respected	2.17
Avoiding irreconcilable judgments	2.18
Chapter I—Scope and application	2.19
Chapter II—Jurisdiction	2.20
Rules for determining which court is first seised	2.76
Hierarchy of jurisdiction provisions	2.79
Chapter III—Recognition and enforcement	2.80
Chapter II, Sections 3, 4 and 5—Insurance/consumer/employment contracts	2.87
C. MATERIAL USED IN CONSTRUING THE BRUSSELS I REGULATION	2.105
Preamble to Judgments Regulation	2.105
Reports on Brussels and Lugano Conventions	2.106
References to the Court of Justice	2.110
D. THE LUGANO CONVENTION	2.112
E. ALLOCATION OF JURISDICTION WITHIN THE UNITED KINGDOM	2.117

Chapter 3: Formal Requirements of Jurisdiction, Arbitration and Mediation Agreements

INTRODUCTION TO CHAPTER	3.01
A. JURISDICTION AGREEMENTS UNDER THE BRUSSELS I REGULATION, BRUSSELS AND LUGANO CONVENTIONS	3.03
1. Requirements as to domicile	3.10
2. Requirements as to conferring jurisdiction on a court or courts	3.24
3. Requirements as to form of agreement in order to establish consent	3.33
4. Formal requirements under Brussels/Lugano/Luxembourg protocol	3.49
B. JURISDICTION AGREEMENTS AT COMMON LAW	3.50
C. ARBITRATION AGREEMENTS	3.55
Provisions of English law	3.55
New York Convention and the Model Law of 1985	3.59
Recommendation regarding interpretation of New York Convention and amendments to Model Law	3.71
Recommendation regarding interpretation of New York Convention	3.72
Amendment to UNCITRAL Model Law on International Commercial Arbitration	3.78
D. MEDIATION AGREEMENTS	3.82

E. JURISDICTION AGREEMENTS UNDER THE HAGUE CONVENTION	3.83
 Chapter 4: The Nature and Construction of Jurisdiction and Arbitration Agreements and Resolving Potential Conflict between Agreements	
INTRODUCTION TO CHAPTER	4.01
A. THE NATURE AND DIFFERENT TYPES OF JURISDICTION AGREEMENTS	4.02
Exclusive and non-exclusive jurisdiction agreements and their nature	4.02
The nature of a jurisdiction agreement under the Brussels I Regulation	4.06
Construction of jurisdiction agreements as exclusive, non-exclusive or hybrid	4.10
B. THE NATURE AND DIFFERENT TYPES OF ARBITRATION AGREEMENTS	4.17
Defining characteristics of an arbitration agreement	4.18
Nature of an agreement to arbitrate and its operation	4.24
No particular words are required to agree to submit to arbitration	4.28
Institutional arbitration	4.29
Ad hoc arbitration	4.30
Asymmetrical or one-sided agreements and options	4.31
<i>Scott v Avery</i> clauses	4.32
Seat need not be expressed in the agreement	4.33
Multi-tier clauses	4.34
C. SEPARABILITY	4.36
1. Arbitration agreements	4.36
2. Jurisdiction agreements at common law	4.44
3. Brussels I Regulation	4.49
4. Hague Convention on choice of court agreements	4.50
D. CONSTRUCTION AND SCOPE	4.51
1. Presumed intention of parties	4.51
2. Disputes or differences as to the construction of the contract	4.58
3. Where one contract replaces or relates to another	4.59
4. Disputes under a series of contracts with differing dispute resolution provisions	4.60
5. Set-off and counterclaims	4.62
6. Consequences of disputes falling outside the scope	4.66
7. Characterisation of claims	4.67
E. RESOLVING POTENTIAL CONFLICT OR POTENTIAL AMBIGUITY IN ARBITRATION AND COURT JURISDICTION AGREEMENTS	4.70

1. Multiple party disputes—parallel arbitration agreements	4.70
2. Resolving potential ambiguity in dispute resolution agreements	4.77
3. Non-existent or poorly defined institutions	4.87
F. ARBITRATION AGREEMENT AND THE HUMAN RIGHTS ACT	4.88

Chapter 5: Incorporation of Jurisdiction and Arbitration Agreements

INTRODUCTION TO CHAPTER	5.01
A. INCORPORATION OF INDUSTRY-STANDARD TERMS	5.04
B. INCORPORATION OF A JURISDICTION OR ARBITRATION AGREEMENT FROM ONE CONTRACT INTO ANOTHER	5.13
Incorporation of terms as between two parties from prior contracts	5.23
Is the dispute resolution agreement aptly worded to permit incorporation?	5.24
Identification of terms to be incorporated	5.25
Incorporated contract not concluded at date of subject contract	5.29
Clash between express terms and incorporated terms	5.30
C. INCORPORATION OF ONE PARTY'S STANDARD TERMS AND CONDITIONS	5.31
Standard terms incorporated by reference into contract in writing	5.35
Post-contractual reference to standard terms	5.39
Course of dealing	5.41
Trade usage	5.43
Battle of forms	5.44

Chapter 6: Choice of Law and Dispute Resolution Agreements

INTRODUCTION TO CHAPTER	6.01
A. IDENTIFICATION OF THE DIFFERENT APPLICABLE LAWS IN PROBLEMS CONCERNING DISPUTE RESOLUTION AGREEMENTS AND THEIR ENFORCEMENT	6.02
B. THE RELEVANCE OF A JURISDICTION OR ARBITRATION AGREEMENT IN DETERMINING THE GOVERNING SUBSTANTIVE LAW IN THE ABSENCE OF EXPRESS CHOICE	6.13
Jurisdiction agreements	6.17
Arbitration agreements	6.22

C. THE PRINCIPLES WHICH DETERMINE THE LAW GOVERNING A JURISDICTION OR ARBITRATION AGREEMENT	6.27
Common law principles applicable to both jurisdiction and arbitration agreements	6.29
D. THE PROCEDURAL LAW	6.44
E. MATTERS DETERMINED BY THE GOVERNING LAW	6.49
1. Matters determined by the governing substantive law	6.50
2. Matters determined by the governing law of the dispute resolution agreement	6.58
3. Matters determined by the law governing the arbitration reference	6.61
F. DISPUTE RESOLUTION AGREEMENTS AND SO-CALLED FLOATING PROPER LAWS	6.62
G. THE MEANING OF A SYSTEM OF LAWS IN THE CONTEXT OF DISPUTE RESOLUTION AGREEMENTS	6.67
1. Arbitration agreements	6.68
2. Jurisdiction agreements	6.71

Chapter 7: Parties to the Dispute Resolution Agreements, Who is Bound and Who can Enforce?

INTRODUCTION TO CHAPTER	7.01
A. ASSIGNMENT	7.04
1. Arbitration agreement	7.08
2. Exclusive jurisdiction agreement at common law	7.14
3. Article 23 of the Brussels I Regulation/Lugano Convention	7.18
B. STATUTORY TRANSFER, UNIVERSAL SUCCESSION AND NOVATION	7.24
1. Statutory transfer	7.24
2. Universal succession	7.27
3. Novation	7.28
C. CONTRACT (RIGHTS OF THIRD PARTIES) ACT 1999	7.29
1. Arbitration agreements	7.30
2. Jurisdiction agreements at common law	7.32
3. Article 23 of the Brussels I Regulation/Lugano Convention	7.33
4. Exclusion or limitation of liability and Himalaya clauses	7.35
D. NON-SIGNATORY AND ADDITIONAL PARTIES	7.39
E. MISTAKE IN NAMED PARTY	7.49
F. MULTI-PARTY CONTRACTS	7.50
G. JOINDER	7.52
H. CLASS ACTION IN ARBITRATION	7.55

Chapter 8: Relationship with International Convention

INTRODUCTION TO CHAPTER	8.01
A. DEROGATION FROM PROVISIONS OF INTERNATIONAL CONVENTION OR STATUTE	8.02
Carriage of goods by sea	8.03
International carriage of cargo, passengers and baggage by air	8.14
CMR Convention of the International Carriage of Goods by Road	8.19
B. INTERPLAY OF BRUSSELS I REGULATION AND INTERNATIONAL CONVENTION	8.27
C. INTERPLAY BETWEEN THE HAGUE CONVENTION AND OTHER RELATED INTERNATIONAL INSTRUMENTS	8.40

PART II

Chapter 9: Commencement of Proceedings or Arbitration and Service out of the Jurisdiction

INTRODUCTION TO CHAPTER	9.01
A. COMMENCEMENT OF PROCEEDINGS IN COURT	9.02
B. SERVICE OF PROCEEDINGS WITHIN THE JURISDICTION OR BY THE CONTRACTUALLY AGREED METHOD	9.03
C. SERVICE OF PROCEEDINGS OUTSIDE THE JURISDICTION UNDER THE BRUSSELS I REGULATION, BRUSSELS OR LUGANO CONVENTIONS WITHOUT PERMISSION	9.04
D. OBTAINING PERMISSION TO SERVE A CLAIM FORM OUTSIDE OF THE JURISDICTION (CASES FALLING OUTSIDE THE BRUSSELS I REGULATION, BRUSSELS AND LUGANO CONVENTIONS)	9.11
Jurisdiction gateway	9.14
Serious issue to be tried on the merits	9.20
England and Wales is the appropriate forum for the trial of the action	9.21
Service of claim form	9.22
E. COMMENCEMENT OF ARBITRATION AND CONSTITUTING THE TRIBUNAL	9.23
Commencement of arbitration	9.23
Commencement and time-limits	9.26
Extension of time for commencement of arbitration or dispute resolution procedures	9.28
Number and appointment of arbitrators	9.32

Chapter 10: Stay and Declining Jurisdiction (Jurisdiction Agreements)	
INTRODUCTION TO CHAPTER	10.01
A. EXCLUSIVE JURISDICTION AGREEMENTS AT COMMON LAW	10.03
Effective of express agreement that chosen forum is <i>forum conveniens</i>	10.15
Strong cause to override parties' bargain	10.16
Time-bar	10.17
Multiplicity of proceedings and <i>lis alibi pendens</i>	10.18
No available relief in English court	10.30
No defence to claim and no genuine desire for trial in chosen court	10.31
Re-litigation of issues in stay application	10.32
Submission to foreign court or delay in seeking stay	10.34
B. NON-EXCLUSIVE JURISDICTION AGREEMENTS	10.35
<i>Lis alibi pendens</i> and non-exclusive jurisdiction agreements	10.38
C. INHERENT JURISDICTION OF THE COURT TO CONTROL THE ORDER OF PARALLEL LITIGATION	10.39
D. EXCLUSIVE JURISDICTION AGREEMENTS UNDER THE HAGUE CONVENTION	10.40
1. Chosen court to exercise jurisdiction	10.42
2. Obligations of court not chosen	10.45
E. THE BRUSSELS I REGULATION AND LUGANO CONVENTION	10.49
1. The principles relating to acceptance of jurisdiction and stay of proceedings under the Brussels I Regulation	10.50
2. <i>Lis alibi pendens</i> , related proceedings and stay	10.52
3. Proposals for reform	10.90
F. PROCEDURE—APPLICATION TO STAY OR CHALLENGE TO JURISDICTION	10.94
1. Disputed jurisdiction—service out of the jurisdiction with permission	10.94
2. Application for stay of proceedings	10.100
3. Brussels I Regulation, Brussels and Lugano Conventions— challenge to jurisdiction	10.102
Chapter 11: Stay (Arbitration Agreements)	
INTRODUCTION TO CHAPTER	11.01
A. APPLICATION FOR STAY UNDER S.9 OF THE ARBITRATION ACT 1996	11.04
Section 9(1)	11.07
Section 9(2): An application may be made notwithstanding the need to exhaust other dispute resolution procedures prior to arbitration	11.38

Section 9(3): Limitations on the bringing of an application	11.42
Section 9(4): “the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed”	11.45
Section 9(5): <i>Scott v Avery</i> clauses	11.52
B. INTERFACE OF STAY APPLICATIONS AND THE BRUSSELS I REGULATION	11.54
C. APPLICATIONS FOR STAY UNDER THE ARBITRATION (INTERNATIONAL INVESTMENTS DISPUTES) ACT 1966	11.56
D. COURT’S INHERENT JURISDICTION TO STAY PROCEEDINGS AND CASE MANAGEMENT OF PARALLEL OR RELATED COURT AND ARBITRAL PROCEEDINGS	11.57
Chapter 12: Restraining Injunctions and Orders	
INTRODUCTION TO CHAPTER	12.01
A. EARLY HISTORY AND DEVELOPMENT OF PRINCIPLE	12.07
B. MODERN DEVELOPMENT AND PRINCIPLE	12.18
Summary of principles applicable to alternative forum cases	12.27
Summary of principals applicable to single forum cases	12.28
C. ANTI-SUIT INJUNCTIONS AND INVASION OF A LEGAL RIGHT NOT TO BE SUED	12.30
D. ANTI-SUIT INJUNCTION AND NON-EXCLUSIVE JURISDICTION AGREEMENTS	12.40
E. ANTI-SUIT INJUNCTIONS, THE BRUSSELS I REGULATION AND LUGANO CONVENTION	12.50
<i>Turner v Grovit</i>	12.50
Application to art.23 agreements	12.58
Limits of prohibition	12.59
F. THE BRUSSELS I REGULATION AND INJUNCTIONS TO RESTRAIN BREACH OF AN ARBITRATION AGREEMENT	12.61
Limits of the prohibition and <i>The Front Comor</i> decision	12.72
European reform	12.83
G. ANTI-SUIT INJUNCTIONS AND OBSERVATIONS ON COMITY	12.84
H. THE HAGUE CONVENTION	12.87
I. RESTRAINT OF ARBITRATION BY INJUNCTION	12.88
1. Injunction in support of legal or equitable right not to have claims brought in arbitration	12.89
2. Attempts to restrain arbitration on grounds of vexation or Oppression	12.91

J. VEXATION AND OPPRESSION AND PARTICULAR FORMS OF INJUNCTION	12.99
1. Restraining enforcement in England of foreign judgment	12.100
2. Restraint of re-litigation or attempts to set aside an award ..	12.102
3. Mandatory injunction to discontinue and not re-commence	12.106
4. Restraint of assignees/subrogated claimants	12.107
5. Restraint of foreign disclosure proceedings or deposition Taking	12.108
6. Anti-anti-suit injunction	12.112
7. Restraint of third-party proceedings	12.115
8. Injunction to restrain third parties from assisting breach of jurisdiction/arbitration agreement	12.116
9. Restraint of breach of privacy obligation in arbitration	12.117
10. Injunctions against States	12.120
11. Anti-suit injunctions and Human Rights Act	12.121
K. INTERIM INJUNCTIONS, THRESHOLD TEST ON MERITS AND <i>AMERICAN CYANAMID</i>	12.123
L. DO THE FOREIGN PROCEEDINGS IN QUESTION AMOUNT TO A BREACH OR MERIT INJUNCTIVE RELIEF?	12.127
1. Statutory causes of action only available in the foreign court	12.128
2. Security proceedings	12.130
3. Foreign discovery proceedings	12.131
M. WHEN TO APPLY	12.132
N. APPLYING FOR AN INTERIM INJUNCTION	12.135
1. Statutory jurisdiction	12.135
2. Without notice application before commencement of action	12.142
3. On notice application after commencement of proceedings	12.150
4. Arbitration claim form and application for interim injunction	12.151
O. ARBITRATORS AND INTERIM MEASURES OF PROTECTION	12.154
1. Introduction	12.154
2. Tribunal's jurisdiction to make such orders	12.157
3. Justification for the grant of anti-suit-type orders in international arbitration	12.164
4. Provisional measures in investment treaty arbitrations	12.166
5. Principles applied by international arbitral Tribunals outside investment treaty cases	12.172
P. COMPARATIVE REVIEW	12.175

Chapter 13: Declaratory Relief and Challenges to Arbitrator's Ruling on Jurisdiction

INTRODUCTION TO CHAPTER	13.01
A. THE GRANT OF DECLARATORY RELIEF IN COURT WITH REGARD TO JURISDICTION AGREEMENTS	13.02
1. Affirmative declaratory relief regarding jurisdiction agreement	13.04
2. Negative declaratory relief	13.05
3. A claim for a declaration that no contract exists, where if the contract was found to exist it would contain an English court jurisdiction	13.09
4. Claims for declaratory relief in the context of the Brussels I Regulation, Brussels and Lugano Conventions	13.10
B. DECLARATORY ACTION AND ARBITRATION AGREEMENTS	13.13
1. An affirmative declaration from the court as to the substantive jurisdiction of the arbitral Tribunal	13.14
2. A declaration that the parties are obliged to arbitrate and not litigate their disputes	13.32
3. Declaratory relief, that no valid arbitration agreement has been concluded	13.35
C. ARBITRATOR'S RULING ON JURISDICTION AND CHALLENGE TO AWARD ON JURISDICTION	13.40
1. Arbitrator's ruling on jurisdiction	13.41
2. Challenge to arbitrators ruling on jurisdiction and loss of right of challenge	13.46

Chapter 14: Damages

INTRODUCTION TO CHAPTER	14.01
A. PRINCIPLES GOVERNING CLAIMS FOR DAMAGES	14.02
1. Costs	14.05
2. Damages other than costs	14.13
3. Third parties and inducement	14.17
B. ISSUES ARISING UNDER THE BRUSSELS I REGULATION, BRUSSELS AND LUGANO CONVENTIONS	14.18

Chapter 15: Enforcement of Judgments, Injunctions and Orders

INTRODUCTION TO CHAPTER	15.01
A. DECLARATORY JUDGMENTS IN THE ENGLISH COURTS	15.03
1. Issue estoppel	15.03
2. Defences to issue estoppel	15.15

3. Brussels I Regulation	15.16
B. FOREIGN JUDGMENTS FROM THE COURTS OF NON-MEMBER STATES	15.33
1. Administration of Justice Act 1920	15.35
2. Foreign Judgments (Reciprocal Enforcement) Act 1933	15.37
3. Common law action on foreign judgment	15.39
4. Res judicata	15.43
5. Statutory control of re-litigation under s.34 of the Civil Jurisdiction and Judgments Act 1982	15.47
6. Statutory control of overseas judgments brought in breach of agreement for the settlement of disputes	15.49
C. JUDGMENTS OF MEMBER STATE AND LUGANO CONTRACTING STATE COURTS	15.57
Judgment given in breach of an art.23 agreement	15.58
Judgment given in breach of an arbitration agreement	15.59
D. HAGUE CONVENTION ON EXCLUSIVE CHOICE OF COURT AGREEMENTS	15.62
E. ANTI-SUIT INJUNCTIONS	15.69
1. Enforcement in the English courts	15.70
2. Brussels I Regulation and Brussels and Lugano Conventions	15.77
3. Enforcement and recognition in civil law systems	15.78

Chapter 16: Enforcement of Awards and Arbitrators' Orders

INTRODUCTION TO CHAPTER	16.01
A. ENFORCEMENT OF AWARDS MADE IN THE JURISDICTION OR OUTSIDE OF THE NEW YORK CONVENTION	16.05
1. Enforcement of Declaratory Awards made in England	16.05
2. Enforcement of substantive awards in England	16.14
3. Serious irregularity	16.24
4. Tribunal or arbitral institution exceeding its powers or admitted irregularity in conduct of proceedings	16.40
5. Appeal on a question of law	16.53
B. ENFORCEMENT OF NEW YORK CONVENTION AWARDS	16.58
General approach to enforcement of New York Convention Awards	16.62
Incapacity of a party to the arbitration agreement	16.68
Invalidity of arbitration agreement	16.72
Improper notice of appointment of arbitrator or otherwise unable to present case	16.75
Award beyond the scope of submission	16.76

Irregularity in the composition of the arbitral Tribunal or failure to conduct arbitration in accordance with the applicable arbitral procedure	16.77
Award not yet binding, or has been set aside, or suspended by a competent authority of the country in which or under the law of which the award was made	16.79
Award in respect of a matter not capable of settlement by Arbitration	16.83
Contrary to public policy	16.84
C. ENFORCEMENT OF ARBITRATOR'S ORDERS	16.86
1. Enforcement before the Tribunal	16.87
2. Enforcement in the courts	16.91

Chapter 17: International Arbitration Against States

INTRODUCTION TO CHAPTER	17.01
A. PRIVATE LAW ARBITRATION AGREEMENTS WITH STATES	17.03
1. General legal framework for State immunity	17.03
2. Arbitration agreements, State immunity and court Proceedings	17.06
B. ENFORCEMENT OF AN AWARD AGAINST A STATE UNDER THE NEW YORK CONVENTION	17.11
C. INVESTMENT TREATY ARBITRATION AGREEMENTS AND DISPUTE RESOLUTION PROVISIONS	17.19
1. Investment treaties and agreements to arbitrate disputes with investors	17.19
2. Governing law of the agreement to arbitrate	17.29
3. Rules on treaty interpretation and application to treaty arbitration agreements	17.31
4. Disputes as to whether an investor can only arbitrate questions of quantum or liability and quantum	17.33
5. Incorporation of dispute resolution provisions from other treaties by reference to most favoured nation provisions	17.35
6. Fork in the road	17.45
7. Does the existence of an underlying investment contract with an exclusive jurisdiction clause oust the jurisdiction of the investment treaty Tribunal to consider similarly based investment treaty claims against the State?	17.48
8. Does the investment treaty Tribunal have jurisdiction to determine breach of contract claims?	17.51
9. Can an umbrella clause elevate pure contract claims into BIT claims?	17.53

10. Admissibility of claims for breach of an umbrella clause in the light of exclusive jurisdiction provisions in underlying private law contract	17.58
 Chapter 18: The Enforcement of Multi-tier Clauses and Provision for ADR	
INTRODUCTION TO CHAPTER	18.01
A. ENFORCEMENT BY COURTS OF ADR PROVISION	18.05
B. ARBITRATION AND MULTI-TIER CLAUSES	18.13
C. ENFORCEMENT BY ARBITRATORS	18.15
D. EU DIRECTIVE ON MEDIATION IN CIVIL AND COMMERCIAL MATTERS	18.17
 APPENDICES	
APPENDIX A	
Council Regulation (EC) No.44/2001	A.01
APPENDIX B	
Arbitration Act 1996	B.01
APPENDIX C	
Lugano Convention	C.01
APPENDIX D	
Recommended Interpretation of New York Convention	D.01
APPENDIX E	
UNCITRAL Model Law on International Commercial Arbitration 1985	E.01
APPENDIX F	
Hague Convention on Choice of Court Agreements	F.01
APPENDIX G	
German Model Treaty 2008	G.01
APPENDIX H	
Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Argentine Republic Article 10	H.01
APPENDIX I	
ASEAN Comprehensive Investment Agreement Article 33	I.01
APPENDIX J	
Supreme Court Act 1981 Part II	J.01
APPENDIX K	
Arbitration (International Investment Disputes) Act 1966	K.01