

Table of Contents

CHAPTER 1. INTERNATIONAL CONSTRUCTION ARBITRATION—AN OVERVIEW

I. ELEMENTS OF INTERNATIONAL CONSTRUCTION ARBITRATION

- § 1:1 Distinctive aspects of International Construction Arbitration
- § 1:2 The meaning of “international”
- § 1:3 The meaning of “commercial” as applied to construction contracts
- § 1:4 The meaning of “arbitration”

II. DISPUTE RESOLUTION PROCESSES COMPARED AND CONTRASTED TO INTERNATIONAL CONSTRUCTION ARBITRATION

- § 1:5 Construction dispute resolution processes related to arbitration—Overview
- § 1:6 Construction dispute resolution—Preventative measures
- § 1:7 —Required negotiation
- § 1:8 Construction dispute resolution processes related to arbitration—Decisions by design professionals
- § 1:9 Construction dispute resolution—Standing neutrals and DRBs
- § 1:10 Construction dispute resolution processes related to arbitration—Dispute adjudication boards (DABs)
- § 1:11 —Expert determinations
- § 1:12 —Statutory Adjudication
- § 1:13 Construction dispute resolution—Mediation and conciliation
- § 1:14 Construction dispute resolution processes related to arbitration—Med-arb, Arb-med, and Arb-med-arb

III. INTERNATIONAL CONSTRUCTION ARBITRATION—AN ASSESSMENT

- § 1:15 Generally

- § 1:16 Enforceability of awards
- § 1:17 Party autonomy and control
- § 1:18 Decision-maker expertise
- § 1:19 Time efficiency
- § 1:20 Convenience
- § 1:21 Cost
- § 1:22 Privacy and confidentiality
- § 1:23 Discovery challenges; lack of joinder processes
- § 1:24 Construction dispute resolution trends to watch

CHAPTER 2. THE AGREEMENT TO ARBITRATE INTERNATIONAL CONSTRUCTION DISPUTES

I. THE REQUIREMENT OF AN ENFORCEABLE AGREEMENT

- § 2:1 Overview
- § 2:2 Writing requirement
- § 2:3 Viability of arbitration agreement
- § 2:4 Existing or future disputes
- § 2:5 Defined legal relationship
- § 2:6 Dispute subject to arbitration

II. DRAFTING CONSIDERATIONS

- § 2:7 Overview
- § 2:8 Drafting considerations—Mutuality of right to arbitrate
- § 2:9 Pre-arbitration tiered or stepped processes
- § 2:10 Requirement that work continue pending dispute resolution
- § 2:11 Scope of issues to be arbitrated
- § 2:12 Statutes of prescription or limitation
- § 2:13 Selection of tribunal
- § 2:14 Selection of arbitrators—Number of arbitrators
- § 2:15 —Appointing authority
- § 2:16 —Qualifications of tribunal
- § 2:17 Choice of institutional or non-institutional arbitration
- § 2:18 Choice of rules
- § 2:19 Legal place or “seat” and location of arbitration
- § 2:20 Time Limits
- § 2:21 Choice of law governing substantive and arbitration provisions of contract
- § 2:22 Confidentiality and privacy

TABLE OF CONTENTS

- § 2:23 Language of the arbitration
- § 2:24 Interim provisional or conservatory relief
- § 2:25 Multiple parties; joinder, consolidation, intervention
- § 2:26 Discovery and exchange of evidence
- § 2:27 The award and remedies
- § 2:28 Relief on motions
- § 2:29 Bifurcation and partial awards
- § 2:30 Reasoned awards
- § 2:31 Currencies
- § 2:32 Special limitations on damages
- § 2:33 “Baseball” or “high-low” awards
- § 2:34 Costs, attorney’s fees, interest, and sealed offers
- § 2:35 Enforcement of the award
- § 2:36 Post-award judicial relief and appeals

III. INSTITUTIONAL AND FORM AGREEMENTS

- § 2:37 Overview
- § 2:38 FIDIC
- § 2:39 AIA documents
- § 2:40 ICC recommended clauses
- § 2:41 ICDR recommended clauses
- § 2:42 LCIA recommended clauses
- § 2:43 UNCITRAL recommended clauses

CHAPTER 3. LEGAL FRAMEWORK OF INTERNATIONAL CONSTRUCTION ARBITRATION

- § 3:1 Overview
- § 3:2 International treaties and legal systems as sources of jurisdiction—Overview
 - New York Convention
 - Investment treaties
 - Other multilateral treaties and conventions
 - Potentially-applicable local law—Overview
 - Lex arbitri*
 - Considerations in selecting the “place” or “seat” of arbitration
 - Jurisdictions of possible collateral proceedings—
Applications related to the arbitral tribunal
 - Applications for interim relief
 - Jurisdictions of arbitrators’, counsel’s, and parties’ residences or domiciles
 - Jurisdiction where arbitration physically conducted

- § 3:13 —Jurisdictions where evidence is located
- § 3:14 —Jurisdictions where enforcement of award may be sought
- § 3:15 Authorities chosen by parties—Overview
- § 3:16 —Agreement to arbitrate and “separability” doctrine
- § 3:17 —Law governing the construction agreement
- § 3:18 —Lex mercatoria and lex constructionis principles
- § 3:19 —Technical standards
- § 3:20 —Arbitration rules
- § 3:21 —Ex aequo et bono; amiable compositeur
- § 3:22 —Guides and Protocols

CHAPTER 4. STATE COURT INTERVENTION IN INTERNATIONAL CONSTRUCTION ARBITRATION

- § 4:1 State court intervention—Introduction
- § 4:2 State court intervention to enforce the agreement to arbitrate—Overview
- § 4:3 —Existence of agreement to arbitrate
- § 4:4 —Null and void; lack of capacity
- § 4:5 —Agreement inoperative or incapable of being performed
- § 4:6 —Unilateral option to arbitrate
- § 4:7 —Rescission; unconscionable agreements
- § 4:8 —Cancellation or termination of agreement
- § 4:9 —Actions to stay or compel arbitration
- § 4:10 State court intervention to appoint arbitrators
- § 4:11 State court intervention to determine jurisdictional challenges—Overview
- § 4:12 —Scope of agreement
- § 4:13 State court determination of parties bound to arbitrate—Overview
- § 4:14 —Signatories—Owners, employers, sponsors
- § 4:15 ——Governments and public agencies
- § 4:16 ——Design professionals
- § 4:17 ——Prime contractors
- § 4:18 ——Subcontractors
- § 4:19 ——Sureties, guarantors
- § 4:20 ——Insurers
- § 4:21 —Non-signatories—Overview
- § 4:22 ——Incorporation by reference
- § 4:23 ——Assignment
- § 4:24 ——Novation
- § 4:25 ——Third-party beneficiaries

TABLE OF CONTENTS

§ 4:26	— — Agency
§ 4:27	— — Assumption of obligation/estoppel
§ 4:28	— — Veil piercing
§ 4:29	— — Joint ventures/partnerships
§ 4:30	— — Subrogation
§ 4:31	— — Insolvency
§ 4:32	— — Practical problems
§ 4:33	State court intervention to consolidate separate arbitral proceedings
§ 4:34	State court intervention to determine preclusive effect of prior proceedings, time bars, conditions precedent, and waiver of the right to arbitrate
§ 4:35	State court intervention to assist in taking evidence
§ 4:36	State court intervention in post-award proceedings

CHAPTER 5. POWERS, DUTIES, AND AUTHORITY OF THE ARBITRAL TRIBUNAL

§ 5:1	Duties and authority of the arbitral tribunal—Overview
§ 5:2	Duties of the arbitral tribunal—Regarding independence and disclosure
§ 5:3	—To conduct the proceedings fairly
§ 5:4	—To apply the law
§ 5:5	Authority of the arbitral tribunal—To determine jurisdiction
§ 5:6	—Conferred by agreement
§ 5:7	—Conferred by applicable law
§ 5:8	—Pre-arbitral conditions—Overview
§ 5:9	— — Required negotiation
§ 5:10	— — Submission to designated decision-makers
§ 5:11	— — Dispute review and adjudication boards
§ 5:12	— — Mediation and conciliation
§ 5:13	— — Time bars and limitations
§ 5:14	—Regarding the “place” or “seat” of arbitration
§ 5:15	—Arbitral procedures—Overview
§ 5:16	— — Authority of the presiding arbitrator
§ 5:17	— — Communication and Scheduling
§ 5:18	— — Administrative services
§ 5:19	— — Confidentiality and cybersecurity
§ 5:20	— — Language(s) of arbitration
§ 5:21	— — Interim measures
§ 5:22	— — Taking of evidence—Overview
§ 5:23	— — Documents and Witnesses
§ 5:24	— — Hearing procedures

- § 5:25 —Party defaults
- § 5:26 —Awards—Overview
- § 5:27 ——Partial and Consent Awards
- § 5:28 ——Effect of final award on arbitrators' jurisdiction
- § 5:29 When the arbitral tribunal refuses or fails to exercise authority

CHAPTER 6. INITIATING THE INTERNATIONAL CONSTRUCTION ARBITRATION

I. PRELIMINARY CONSIDERATIONS

- § 6:1 Overview
- § 6:2 Selecting counsel
- § 6:3 Institutional vs. "ad hoc" administration
- § 6:4 Institutional vs. ad hoc rules

II. INTERNATIONAL ARBITRAL INSTITUTIONS

- § 6:5 Overview
- § 6:6 International Chamber of Commerce (ICC) Court of Arbitration
- § 6:7 American Arbitration Association/International Centre for Dispute Resolution (ICDR)
- § 6:8 London Court of International Arbitration (LCIA)
- § 6:9 International Centre for the Settlement of Investment Disputes (ICSID)

III. INITIAL ARBITRAL PLEADINGS

- § 6:10 Request for arbitration
- § 6:11 Response to request for arbitration

IV. PAYMENT OF FEES AND ADVANCES ON COSTS

- § 6:12 Overview
- § 6:13 The "ad valorem" method
- § 6:14 The "time spent" method
- § 6:15 The "fixed fee" method
- § 6:16 Negotiation
- § 6:17 Security

V. INTERIM RELIEF FROM THE TRIBUNAL

- § 6:18 Generally

TABLE OF CONTENTS

VI. APPOINTMENT AND SELECTION OF ARBITRATORS

- § 6:19 Overview
- § 6:20 Arbitration agreement
- § 6:21 Institutional rules
- § 6:22 Selection by appointing authority
- § 6:23 Judicial appointment
- § 6:24 Number of arbitrators
- § 6:25 Qualifications, experience, and attributes
- § 6:26 Nationality and language
- § 6:27 Requirement of neutrality, independence, and impartiality
- § 6:28 Arbitrator disclosure requirements—Overview
 - ICC
 - ICDR
 - LCIA
 - UNCITRAL
 - IBA Guidelines
- § 6:34 Arbitrator selection; inquiries and investigation
- § 6:35 Arbitrator selection; interviewing prospective arbitrators

VII. CHALLENGE TO AND REPLACEMENT OF ARBITRATORS

- § 6:36 Overview
- § 6:37 Grounds
- § 6:38 Procedure
- § 6:39 Waiver of right to challenge
- § 6:40 Filling vacancies; truncated tribunals

CHAPTER 7. DEVELOPING THE CONSTRUCTION CASE IN AN INTERNATIONAL ARBITRATION

- § 7:1 Overview
- § 7:2 Initial meetings
- § 7:3 Initial document review
- § 7:4 Initial research
- § 7:5 Theory of the case
- § 7:6 Theme of the case
- § 7:7 The case story
- § 7:8 Keeping it simple, strong, and credible
- § 7:9 Reverse engineering the award
- § 7:10 Typical claims and defenses—Overview

INTERNATIONAL CONSTRUCTION ARBITRATION HANDBOOK

- § 7:11 —Owner/employers
- § 7:12 —Constructors
- § 7:13 —Subcontractors and vendors
- § 7:14 Reconstructing history of the project
- § 7:15 —Limitations on discovery
- § 7:16 —Rule of probability
- § 7:17 —Obtaining key documents
- § 7:18 —Interviewing witnesses
- § 7:19 —Viewing the site
- § 7:20 —Managing documents and electronic data
- § 7:21 ——Collection and coding
- § 7:22 ——Copying, imaging, and OCR scanning
- § 7:23 ——Indexing
- § 7:24 ——Secure websites
- § 7:25 ——Preservation and exchange of electronic files
- § 7:26 Selecting, and using experts—Overview
- § 7:27 —Subjects requiring expertise
- § 7:28 —Selection process
- § 7:29 —Investigation and analysis
- § 7:30 Selecting and using experts—Objectivity and neutrality
- § 7:31 —Preparing reports
- § 7:32 Organizing the arbitration team
- § 7:33 Chronologies, dramatis personae, glossaries, tutorials, graphs, charts, photographs, and other communication aids
- § 7:34 Testing the case—Mock presentations
- § 7:35 Balancing case preparation and presentation with case budgets

CHAPTER 8. CONDUCT OF THE ARBITRAL PROCEEDINGS—PRE-HEARING MATTERS

I. PRELIMINARY PROCEDURAL CONFERENCES

- § 8:1 Overview
- § 8:2 Matters to be considered—Overview
- § 8:3 —Rules
- § 8:4 —Language(s)
- § 8:5 —“Place” or “seat”; meeting locations
- § 8:6 —Administrative matters; tribunal secretaries
- § 8:7 —Fees and costs
- § 8:8 —Confidentiality and privacy

TABLE OF CONTENTS

- § 8:9 —Hearing dates and timetable
- § 8:10 —Bifurcation, consolidation and early decisions
- § 8:11 —Statements of claims, defenses and issues
- § 8:12 —Exchanges of documents and ESI
- § 8:13 —Inspections, site views, tests
- § 8:14 —Exchanges of witnesses' names and information
- § 8:15 —Expert testimony
- § 8:16 —Subpoenas
- § 8:17 —Depositions
- § 8:18 —Briefs and memorials
- § 8:19 —Hearing procedures
- § 8:20 —Award and allocation of costs
- § 8:21 —Scheduling order and timetable

II. PLEADING OR STATING THE CASE

- § 8:22 Overview
- § 8:23 First pleadings; Request for arbitration and answer
- § 8:24 Counterclaims, cross claims, third-party claims
- § 8:25 Subsequent detailed statements
- § 8:26 Amendments
- § 8:27 Common and civil law perspectives on pleading
- § 8:28 "Terms of Reference"
- § 8:29 Chronologies, *dramatis personae*, charts, diagrams, glossaries, schedules, etc

III. PREHEARING PROCEDURES

- § 8:30 Motions and applications to tribunal; issue-dispositive motions
- § 8:31 Management by the tribunal and chair
- § 8:32 Bifurcation, joinder, and consolidation
- § 8:33 Exchange of evidence and discovery—Overview
- § 8:34 —Institutional rules
- § 8:35 —Common and civil law concepts
- § 8:36 —Evidentiary rules, protocols, and guidelines
- § 8:37 —Electronically stored information (ESI)
- § 8:38 —National laws
- § 8:39 —Summary
- § 8:40 Informal investigations
- § 8:41 Site views, inspections, and testing
- § 8:42 Tribunal and party-appointed experts

CHAPTER 9. CONDUCT OF THE ARBITRAL PROCEEDINGS—THE HEARING PROCESS

I. PRELIMINARY CONSIDERATIONS

- § 9:1 Overview
- § 9:2 Due process and procedures
- § 9:3 Hearing location
- § 9:4 Attendees and privacy
- § 9:5 Rules of evidence

II. CONDUCTING THE HEARING

- § 9:6 Opening statements and submissions
- § 9:7 Order of evidence
- § 9:8 Witness evidence
- § 9:9 —Experts
- § 9:10 —Oaths and affirmations
- § 9:11 —Direct examination
- § 9:12 —Cross-examination
- § 9:13 —Summaries
- § 9:14 —Sequestration
- § 9:15 Documentary evidence—Overview
- § 9:16 —The “core record”
- § 9:17 —Prehearing exchange
- § 9:18 —Joint or common exhibits
- § 9:19 —Marking exhibits
- § 9:20 —Objections
- § 9:21 —hearing presentation
- § 9:22 —Advance submission
- § 9:23 —Demonstrative exhibits
- § 9:24 —Created during hearing
- § 9:25 —Privileges and confidentiality
- § 9:26 Effective hearing advocacy
- § 9:27 Time management
- § 9:28 Recording evidence

III. CLOSING THE HEARING

- § 9:29 Post-hearing matters—Evidence
- § 9:30 —Arguments and submissions
- § 9:31 Closing the record
- § 9:32 Tribunal deliberations

TABLE OF CONTENTS

CHAPTER 10. EXPEDITED CONSTRUCTION ARBITRATIONS

- § 10:1 Generally
- § 10:2 Statutory Adjudication
- § 10:3 The Society of Construction Arbitrators' "100-day" rules
- § 10:4 The CPR International Institute for Conflict Prevention and Resolution Expedited arbitration procedures
- § 10:5 Construction Industry Model Arbitration Rules (CIMAR)
- § 10:6 The AAA Construction Industry approach to expedited arbitration
- § 10:7 The LCIA approach to expedited arbitration
- § 10:8 Other expedited procedures
- § 10:9 Positional tensions with accelerated procedures
- § 10:10 Practice tips and techniques for accelerated arbitration

CHAPTER 11. ARBITRAL RULINGS AND AWARDS

- § 11:1 Categories of Rulings and Awards—Overview
- § 11:2 —Procedural orders
- § 11:3 —Partial and interim awards
- § 11:4 —Provisional or emergency awards; preserving status quo
- § 11:5 —Default awards
- § 11:6 —Consent awards
- § 11:7 —Final awards
- § 11:8 Scope of Remedies—Overview
- § 11:9 —Injunctive relief
- § 11:10 —Rectification of contracts
- § 11:11 —Declarations of rights and obligations
- § 11:12 —Awarding costs and fees
- § 11:13 Form of Awards—Overview
- § 11:14 —Reciting the arbitration agreement
- § 11:15 —Reciting the applicable law
- § 11:16 —Reciting the applicable rules
- § 11:17 —Language of the award
- § 11:18 Requirement of Reasoned Awards—Overview
- § 11:19 —Elements
- § 11:20 —Adherence to contract and applicable law
- § 11:21 Use of Award Schedules for Multiple Issues
- § 11:22 Draft Awards—Overview

- § 11:23 —ICC “scrutiny”
- § 11:24 Time Limits for Issuing Awards

CHAPTER 12. POSTAWARD PROCEEDINGS

- § 12:1 Postaward proceedings—Overview
- § 12:2 Arbitral appeals
- § 12:3 Application of the New York Convention—
“International” awards
- § 12:4 —Primary and secondary jurisdictions
- § 12:5 Postaward proceedings at the seat of arbitration—
Grounds for vacating or setting aside the award
- § 12:6 Postaward proceedings at the place of enforcement—
Grounds for refusal of recognition and
enforcement—Overview
- § 12:7 —New York Convention, Articles V(1)(a), V(1)(c),
and V(1)(d)
- § 12:8 —New York Convention, Article V(1)(b)
- § 12:9 —New York Convention, Article V(1)(e)
- § 12:10 —New York Convention, Article VI
- § 12:11 —New York Convention, Article V(2)
- § 12:12 —Miscellaneous cases

CHAPTER 13. PROFESSIONAL CONDUCT IN INTERNATIONAL CONSTRUCTION ARBITRATION

I. PARTY REPRESENTATIVES

- § 13:1 Potentially applicable legal standards
- § 13:2 Choice of controlling legal standards
- § 13:3 Conflicts of interest
- § 13:4 Competence
- § 13:5 Compensation arrangements
- § 13:6 Communications with arbitrators
- § 13:7 Communications with opposing party representatives
and third persons
- § 13:8 Communications with witnesses; witness preparation
- § 13:9 Witness compensation
- § 13:10 Information exchange and disclosure
- § 13:11 Submissions to arbitral tribunal
- § 13:12 Sanctions for misconduct

II. ARBITRATORS

- § 13:13 Applicable standards

TABLE OF CONTENTS

- § 13:14 Choice of controlling legal standards
- § 13:15 Solicitations
- § 13:16 Requirement of neutrality, independence and impartiality
- § 13:17 Duties to disclose
- § 13:18 Communications with parties and counsel
- § 13:19 Compensation arrangements
- § 13:20 Competence and diligence
- § 13:21 Duties to determine jurisdiction and apply the law
- § 13:22 Duty to manage the proceeding
- § 13:23 Arbitration and settlement
- § 13:24 Deliberations

III. EXPERT WITNESSES

- § 13:25 Objectivity and independence
- § 13:26 Engineers
- § 13:27 Accountants

Table of Laws and Rules

Table of Cases

Index