



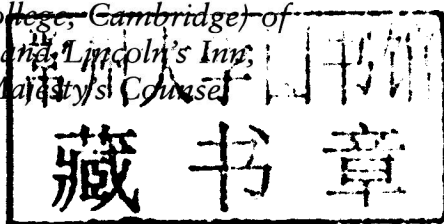
# JURISDICTION AND ARBITRATION AGREEMENTS AND THEIR ENFORCEMENT

*Second Edition*

*By*

David Joseph Q.C.

*BA (Pembroke College, Cambridge) of  
Middle Temple and Lincoln's Inn,  
One of Her Majesty's Counsel*



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# JURISDICTION AND ARBITRATION AGREEMENTS AND THEIR ENFORCEMENT

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# Foreword

In this second edition of his outstanding book David Joseph Q.C. has developed and expanded his treatment of two of the most important areas in practice in transnational dispute resolution, and brought it completely up to date.

When I started in practice in the 1960s the whole subject of jurisdiction clauses was dealt with, comprehensively, in *Dicey and Morris* in just one-and-a-half pages. The first substantial piece of litigation which I handled was the case of *Evans Marshall & Co. Ltd v Bertola SA* in which the Court of Appeal was persuaded that England was the appropriate forum for my clients' claim notwithstanding that the contract provided for the exclusive jurisdiction of the Barcelona courts: [1973] 1 W.L.R. 349. After trial, my clients were awarded a substantial sum of damages by the Court of Appeal. Robert Alexander Q.C., the foremost advocate of his day, then persuaded the House of Lords to grant leave to appeal, even though the case involved no point of law, still less an important point of law. His ingenious argument was that, if the action had been brought in Barcelona (as the contract provided), his clients would have had an automatic right of appeal to the Spanish Supreme Court, and it would be doubly unjust if they were deprived not only of the Barcelona jurisdiction for resolution of the dispute, but also of their automatic right to appeal to the highest court in the land. Lord Diplock and his colleagues were persuaded. On the appeal the House of Lords then reduced the damages to a paltry amount: [1976] 2 Lloyd's Rep. 17.

In those days there was only a handful of reported cases on jurisdiction clauses. Now hardly a week goes by without a new decision on jurisdiction clauses or arbitration agreements. Some questions have been settled (at least for the time being) by the courts. In the first edition David Joseph criticised the decisions of the European Court in which the right of the chosen court to determine its own jurisdiction was undermined (the *Erich Gasser* case), and in which the right of the court to prevent abuse of process abroad was declared incompatible with the Brussels regime (*Turner v Grovit*). The logical extension of those decisions in the *West Tankers* case, preventing anti-suit injunctions to restrain proceedings in Member States in breach of arbitration agreements, comes in for criticism in this second edition, reinforced by the recommendations of the Heidelberg report to restrict its scope.

The enormous number of recent decisions on jurisdiction clauses is fully reviewed. It is possible that the original commercial objective of non-exclusive jurisdiction clauses has not been fully understood. They came into extensive use in the 1970s in bank loan agreements in order to give banks the greatest possible flexibility in enforcing the borrower's obligations. It is quite another question whether they were intended to authorise bona fide disputes to be determined in courts which had no connection with the subject matter of the dispute.

No-one with the slightest familiarity with the field of arbitration can have failed to notice the explosive growth in international arbitration in recent years. This is not the place to speculate on the reasons for the growth, but no practitioner in international commerce or dispute resolution can afford to be ignorant of recent developments in this field, not all of which are easily accessible to non-experts. This book draws together all the modern strands in international arbitration, including the relationship between investment treaty arbitration and national court proceedings, the impact of state immunity on the enforceability of awards, and the complex issues surrounding choice of law in arbitrations between investors and host States, and impact of investment treaty arbitration provisions on exclusive jurisdiction clauses in the contract between the investor and the host State.

The breadth of knowledge in this book is enormous. I have learned a great deal from it, and so will, I am sure, every practitioner and scholar in the field.

*Lawrence Collins*  
*July 2010*

**To my ever beautiful wife, Denise**

# Preface

As any reader or practitioner in this field will be aware, the law has not stood still in the five years since the first edition. This has made for an interesting time spent updating and expanding the book for the second edition. There has been a flood of important and challenging decisions from the European Court of Justice, the House of Lords (as it then was), the Court of Appeal and the Commercial Court. On top of that the superior courts of our fellow common law and civil jurisdictions have hardly been silent. There has been reform of the Model Law and clarification of the New York Convention. Furthermore the Hague Convention on Exclusive Choice of Court Agreements has been signed and stands a good chance of coming in force at least as regards the European Union and United States. Yet further the EC Commission now appears to be cognisant of certain systemic problems in the Brussels I Regulation that need to be addressed by way of reform to that important instrument.

I have endeavoured to guide the reader through all this material. I have also given new or much expanded treatment to a number of increasingly important topics notably:

1. dispute resolution agreements involving multiple parties or multiple contracts (Ch.4);
2. the Hague Convention on Exclusive Choice of Court Agreements (Ch.8);
3. anti-suit injunction (Ch.12);
4. arbitrators' interim measures (Ch.12);
5. a new and separate chapter dealing with the enforcement of civil judgments obtained pursuant to or in breach of a choice of court agreement (Ch.15);
6. a new and separate chapter dealing with all aspects of enforcement of awards (Ch.16);
7. separate treatment of irregularity challenges to an award (Ch.16); and
8. a new and separate chapter dealing with the increasingly central topic of arbitration against States including investment treaty disputes (Ch.17).

I would like to thank all my friends and colleagues both in England and around the world who have contributed so much to my understanding on the issues encompassed by this book. I remain eternally grateful to all those who have kindly taken time to send me cases, materials, articles and suggestions. It is always invidious to mention individuals. Nevertheless I do wish to thank for their guidance and considerable intellectual curiosity both Ricky Diwan and Sam Wordsworth. Both have assisted in the manner described above but have also not held back in case of disagreement either. Once again responsibility for any errors is of course mine alone.

As with the first edition I want once more to thank my wonderful and supportive family: my wife, Denise, and my three fabulous growing sons, Sam, Ben and Joe. In recent months they have seen me all too often sitting at the computer at strange hours preparing this edition and have understood that although it is not something they would wish to undertake themselves, it is nevertheless something that is important to me at least! The good news is that third edition is now some way off.

I have endeavoured to state the law as at July 26, 2010.

*David Joseph  
Essex Court Chambers  
24 Lincoln's Inn Fields  
London WCA 3ED  
June 2010*

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