

**Note: This is a non-copy-edited version of the introduction and first chapter of the book Understanding International Arbitration by Tony Cole and Pietro Ortolani. As a result, there are slight differences between this version of the chapter and the published version, although such differences are typographical rather than substantive.**

<https://www.crcpress.com/Understanding-International-Arbitration/Cole-Ortolani/p/book/9781138806047>

## Introduction

The structure and drafting of this book have been directed by one of the most distinctive features of international commercial arbitration, and one that makes arbitration such a fascinating and enjoyable field to be part of: arbitration is fundamentally about ideas. That is, the one thing that everyone knows about arbitration is that it is flexible: you can arbitrate in almost any way you want. But the flipside of that freedom is a lack of structure. There are almost no rules on how arbitration operates. There are no universal “civil procedure rules” dictating how arbitral proceedings should function. There are no universal professional qualifications that dictate who can and cannot work as an arbitrator, or as counsel. Moreover, even when there are rules, those rules are consistently drafted in ways designed to protect arbitration’s flexibility, and so impose only minimal constraint.

The important consequence of this is that arbitration is ultimately a field of legal practice dominated by ideas. Arbitration conferences and journals certainly include technical discussions of national laws and of which procedures work best, but also routinely include theoretical discussions, led by practitioners, on what arbitration really is, what an arbitrator’s proper function is, how arbitration should or should not interact with national legal systems, and more. In essence, the lack of binding rules has turned arbitration into a field of practice-makers, combining a focus on winning disputes for their clients or deciding disputes as arbitrators, with convincing others in the community to approach arbitration in the way that they think is correct. In short, the way that you practice arbitration is determined to a large extent by your own idea of what arbitration is, and how it should function.

For that reason, this book takes as its foundation the ideas underlying arbitration. While the many books that discuss the law and practice of arbitration are an essential support for anyone with an interest in the field, they can only ever be part of an arbitration education. You can be informed about how certain things are generally done, but unless you understand why they are done that way, you cannot really engage with arbitration practice, even if only to convince a tribunal to do things in a different way.

The goal of this book, then, is not to replace or supersede the excellent general discussions of arbitration that are already available. It is, rather, to supplement them, by focusing not on the technical details of how arbitration is practiced in certain jurisdictions, but on the reasons why arbitration practice has evolved the way it has, on the issues that arise in arbitration, and on how they can be thought about.

At times, of course, you will also read the view of one or both of the authors of how an issue is best approached, but these are only ever suggestions. There are no views expressed in this book with which you cannot quite legitimately disagree. Our goal as authors is to facilitate you in starting to think

about arbitration, not to dictate certain views that you should have. But whether your goal in learning about arbitration is to work in the field, pass a course, or even just understand what your company has agreed to do, you will be better placed to achieve that goal once you have grappled with the issues that motivate how arbitration is practiced.

There are certain methodological features of this book that should be emphasised. Firstly, each chapter is divided into two sections. It opens with a set of “Rules”. These are simple, one-sentence statements of a fundamental principle, each rule followed by a short explanation. Learning these rules will give you a solid foundation in arbitration, and if you are new to the field, they can give you a useful anchor. However, the essential reality of arbitration is that there simply are no fixed rules; any listing of the “rules of arbitration”, hence, will unavoidably be incomplete and even misleading. For that reason, the second part of each chapter provides a more detailed discussion of each rule, introducing the ideas behind the rule and highlighting the complexities that the simple statement of the rule unavoidably hides.

Secondly, we took the decision to try to “personalise” the discussion of arbitration, as a way of helping people not yet involved in mainstream arbitration connect more immediately to the ideas under discussion. That is, books on international commercial arbitration normally use examples involving large companies in cross-border disputes. That makes sense, because that is the standard context of international commercial arbitration. However, it also abstracts arbitration from the experience we have of our own lives. It makes us think of arbitration as something “they” do, rather than something we might be involved in ourselves. For that reason, we have used “human-sized” examples, in which two people are in a dispute, rather than two large companies. This makes no substantive difference to the example, but we believe that it helps make the situation more understandable, and so enhances the engagement with the ideas. It is easier to think “What would I want to do in this situation?” than it is to think “What would a major multinational want to do in this situation?”. For the same reason, we have excluded investor-State arbitration from the scope of the book. While treaty-based cases between private investors and States constitute an important field of arbitration practice, it was our intention to introduce the basics of arbitration in the simplest possible setting, rather than exploring the further complexities arising out of the use of arbitration in the area of international investments. Readers interested in these matters will find many useful textbooks and treatises focusing specifically on investor-State arbitration.

Thirdly, we have self-consciously “diversified” the discussion of arbitration in terms of nationalities. It is unavoidable that when we refer to case-law or institutional rules, we will often rely upon the major arbitration jurisdictions and arbitral institutions. However, we have attempted to add additional references to a broader range of laws and institutions, to reflect the reality that arbitration extends far beyond the major jurisdictions of England, France, and so on. Moreover, we have consciously constructed examples around individuals from a wide range of countries, many little known for their involvement in international commercial arbitration. We think recognition of the geographical diversity of arbitration is important.

Finally, you will notice that every arbitrator in this book is a woman. There is a reason for this: arbitration has a diversity problem. Not just with respect to gender, but gender is the one issue we can directly confront just through the choice of a particular pronoun. To the credit of those in the field, this

diversity problem is now being acknowledged, but there remains a long way to go, and one of the simplest steps that we can achieve is that when we imagine an arbitral tribunal, we don't imagine three white men sitting behind a table. Getting used to the idea of referring to arbitrators as "she" rather than "he" is a trivial act that can help substantially in achieving this goal.

Perhaps the best approach to using this book, then, is to initially read through the Rules at the beginning of a chapter. This will give you a clear basic idea of the primary ideas guiding the aspect of arbitration discussed in the chapter. Then, instead of simply reading through the remainder of the chapter, alternate between the two sections. Read a rule in part one, then read the discussion of the rule in part two. Then, importantly, think about it for yourself. Consider what you have read, and decide what you think about the issue under discussion. Then move on to the next rule, following the same process. By the end of the chapter, you won't be an expert in that area of arbitration, but you will have started to think about it seriously, so that when you do further research on the specific rules and laws that you will find discussed in other books, you will understand better why those particular approaches have been adopted, and be better positioned to critique whether they are good or not.

Ultimately, remember that arbitration is a field based on ideas. The more you think about how arbitration operates, why it operates that way, and how it should operate, the better you will understand it, and the better you will be at it.

## **Chapter 1**

### **What Is Arbitration?**

#### **Rules**

##### **1. Arbitration is a private, third-party mechanism of rule-based adjudicatory dispute resolution**

Arbitration is private in nature: proceedings need not take place in public, arbitrators do not act as government officials, and the parties have the power to decide how they want to arbitrate. Arbitrators perform an adjudicatory function: they hear the opposing parties' arguments and apply agreed rules to decide the disputed issues, binding the parties with their decision, rather than merely advising them.

##### **2. Party autonomy is central to arbitration**

Parties cannot be forced to arbitrate, but must agree to do so. The rules governing an arbitration are ultimately determined by the contents of the parties' agreement to arbitrate.

##### **3. Arbitration precludes litigation**

If parties have agreed to arbitrate a dispute, that dispute can only be taken to court if both parties agree to do so.

#### **4. Arbitral awards are final and binding**

A decision in which arbitrators resolve one or all of the substantive issues submitted to arbitration is called an “award”. Arbitration is fundamentally a “one-stop shop”: once an award has been delivered, there are very few grounds on which it can be challenged (simply being wrong is not enough). Parties must comply with an award, and if they refuse to do so, it can be enforced through the courts.

#### **5. Not all disputes can be submitted to arbitration**

National laws place limits on the types of disputes that can be submitted to arbitration. If parties arbitrate a dispute that is not “arbitrable” under the law governing the arbitration, courts applying that law will refuse to assist the arbitration or enforce any resulting award. Courts elsewhere in the world may refuse to enforce awards arising from that arbitration as well.

#### **6. Arbitration can be domestic or international**

Arbitration can be used to resolve both domestic and international disputes. Local law will determine whether an arbitration qualifies as “international”, and in some jurisdictions different laws will apply to an “international” arbitration, than apply to a “domestic” arbitration.

#### **7. Arbitration is not always between private parties**

Although arbitration is private in nature, the parties to it are not necessarily private themselves, and States and State entities now regularly use arbitration.

#### **8. Arbitration comes in different varieties**

Arbitration can be used to resolve different types of disputes, and different laws may apply depending on the type of arbitration in question.

#### **9. Arbitration can be institutional or *ad hoc***

Parties who have agreed to arbitrate can do so with the assistance of an arbitral institution, which will provide administrative support and rules to assist their arbitration. However, use of an arbitral institution is voluntary, and parties can also arbitrate *ad hoc*, or without the involvement of an arbitral institution.

#### **10. Arbitration offers potential advantages**

Arbitration can offer significant advantages over other forms of dispute resolution. In particular: (i) neutrality, (ii) speed, (iii) finality, (iv) enforceability, (v) expertise, (vi) flexibility, and (vi) confidentiality.

## **11. Arbitration has potential drawbacks**

Arbitration also has drawbacks that can make it less desirable for a particular dispute than other forms of dispute resolution: (i) cost, (ii) limits to arbitral jurisdiction, (iii) limits to arbitral power, (iv) lack of appeal, and (v) lack of expertise of arbitrators in arbitration.

## Analysis

### 1. Arbitration is a private, third-party mechanism of rule-based adjudicatory dispute resolution

One of the first difficulties faced by anyone encountering arbitration for the first time is getting a clear idea of what exactly “arbitration” is. That is a significantly harder task than it might seem to be, as there really is no such “thing” as arbitration. It is a mechanism for resolving disputes, but what exactly that mechanism is, it is very hard to say. Rather, there are just many things that are not arbitration. “Litigation” is not arbitration. “Mediation” is not arbitration. Flipping a coin or engaging in armed combat are not arbitration. But beyond this process of gradually setting limits to arbitration by listing things that are not arbitration, it is virtually impossible to describe with any precision what arbitration actually is.

One reason for this is that “arbitration” is a very old and widely used label, and it has been used and still is used to describe a very wide range of approaches to dispute resolution. “Arbitration”, that is, has often served as a label that means little more than “the resolution of a dispute through recourse to a third party, other than a court”.

Even this very basic definition, though, does give us some important insight into what arbitration is. Firstly, arbitration is a third party dispute resolution mechanism. Flipping a coin or engaging in armed combat might qualify as arbitration if you believe that a god or other higher power will determine the winner. But so long as you believe that the coin toss will be decided by luck, and the armed combat by whoever fights better, then there is no third party involved, and hence there is no arbitration. Similarly, then, negotiation between two parties is not arbitration – and even if a settlement agreement is reached, it cannot be enforced in court as an arbitral award.<sup>1</sup>

Notably, though, both litigation and mediation involve a third party – yet they are not arbitration. Clarifying why they are not gives us additional details about arbitration.

Litigating in national courts is, by its very nature, an unusual activity, a departure from the way that people normally interact with one another. It is a dispute resolution mechanism created by a State,<sup>2</sup> and used by people when either they do not have a relationship, or when that relationship has broken down so badly that they want formal, governmental validation of their position and enforcement of their rights.

Arbitration, on the other hand, is far more intimately connected to human relationships. It is a form of dispute resolution that is controlled by the parties to the dispute, and so can occur in almost any form that they wish to use. It varies in its form, in accordance with variations in the identities of the parties in the dispute.

Litigation, that is, involves a government effectively saying: “I will resolve your dispute, but I can’t make up new rules for every new case, so you need to use the same procedures as everyone else.” It is a “one size fits all” dispute resolution mechanism. Arbitration, on the other hand, has no rules, only limits. As long as the parties stay within those limits, they can resolve their dispute in any

way they wish, and it still constitutes arbitration. The second principle, then, is that arbitration is a private dispute resolution mechanism. It need not be “confidential”, as some arbitrations are held in public. But it is “private” in the sense that it is controlled by the parties to the dispute, and can vary its form to match their wishes and needs.

Mediation, though, is also private in this way. Distinguishing mediation from arbitration, then, gives us our third basic principle: Arbitration is an adjudicatory dispute resolution mechanism. In other words, while mediation involves a third party (the mediator), and is controlled by the parties (and so is private), it is based on the idea that the third party should help the disputants to reach an agreement. The mediator does not decide the dispute: she facilitates settlement, but it is up to the disputing parties to decide whether they want to settle, and on what terms. In arbitration, on the other hand, an arbitrator is appointed to consider the arguments and evidence presented by the parties and then deliver a decision (called an “award”), just as does a judge in litigation. One or even both parties may be unhappy with that decision, but by agreeing to arbitrate their dispute they agreed to allow the arbitrator to decide the dispute on their behalf. Consequently, if their procedure is to count as arbitration, they are bound by that decision even if one of them disagrees with it.

There is, though, one final basic principle that is always true of arbitration: Arbitration is a rule-centered dispute resolution mechanism. That is, while an arbitrator will have to make decisions on facts when resolving a case, if the dispute is resolved purely on the facts, it is not arbitration. So, for example, suppose that Ezra and Sufyaan agree that under their contract the wood used to build a house had to come from a particular species of tree, and they hire a third party to determine whether the wood actually used to build that house was the correct type. This is a dispute that can be resolved entirely by a decision on the facts. The decision on the facts has legal consequences, but the third party has only been asked to make a decision on the facts, not on the law. In many jurisdictions this procedure is known as “expert determination”, and it serves as another boundary to what constitutes arbitration. An arbitrator need not actually base her decision on the law, and can for example be authorized by the parties to decide *ex aequo et bono*, or on the basis of her own perception of rightness and fairness. However, whether the arbitrator is applying the law or making a judgement of fairness, a dispute resolution procedure can only qualify as arbitration if it involves a decision-maker applying a guiding rule to the facts of a dispute.

We have, then, four basic principles that can serve as guidelines as to what arbitration actually is: (1) Arbitration is a third party dispute resolution mechanism; (2) Arbitration is a private dispute resolution mechanism; (3) Arbitration is an adjudicatory dispute resolution mechanism; (4) Arbitration is a rule-centered dispute resolution mechanism.

Within the boundaries of these four principles, arbitration can be anything that the parties want it to be. In this way, arbitration is the essence of “private justice”.

## **2. Party autonomy is central to arbitration**

Perhaps the most commonly used expression in discussions of arbitration is “party autonomy”. It is invoked on a regular basis to describe how arbitration operates, to justify procedural decisions taken in arbitration, and to praise or criticise governments and courts for actions they take relating to arbitration. “Party autonomy” refers to the idea that arbitration is characterized by the freedom of the parties to control almost every aspect of the arbitral process, so that they can design their own dispute resolution procedure that will meet their particular needs and preferences. It has arguably become the central doctrine in arbitration, routinely invoked to justify interpretations of how arbitration should operate, and is almost never criticised.

When trying to understand the place of party autonomy in arbitration, it is important to draw a distinction between what can be called “independent” and “supported” conceptions of party autonomy. The independent conception of party autonomy arises naturally from the basic fundamentals of arbitration, as discussed in the previous section. Arbitration is essentially a form of private justice, in which two parties agree to resolve their dispute through an adjudicatory dispute resolution mechanism they set up themselves. The independent conception of party autonomy in arbitration, then, is purely descriptive: it simply recognizes that arbitration, by its private nature, delivers significant power to the parties to create their own dispute resolution process. Arbitration, as an idea, inherently includes this independent notion of party autonomy: it is the parties’ procedure, so they can shape it as they prefer.

Importantly, though, the independent conception of party autonomy relies upon a notion of arbitration as an entirely free-floating process, separate from government-run dispute resolution systems. The type of autonomy it involves is the same type of autonomy that you have when you are deciding where to eat your dinner if you are home alone. When your family is home they may perhaps expect you to eat with them at the dinner table, but if you are alone you can eat on the couch, in your bedroom, or anywhere else. The autonomy involved in the independent conception, hence, is the autonomy that comes from isolation. Because an arbitration is private, it can be run without the involvement of anyone but the disputing parties, and so can be run however they want to run it.

The problem with this picture of arbitration, though, is that while it describes a form of arbitration, it doesn’t describe a form of arbitration that many people find attractive. After all, the other side may not turn up at the time you agreed to arbitrate; the arbitrator may take a bribe; the loser may refuse to pay what the arbitrator decides they owe. The autonomy of this basic form of arbitration, that is, brings with it the autonomy of everyone involved in the process not to cooperate with it.

What parties actually want from arbitration is not this free-floating form of arbitration that the independent conception of party autonomy describes. Instead, as much as arbitration is constantly described as a private procedure, operating as an alternative to national court systems, what parties most want is arbitration connected to national laws and national courts. This way, when parties refuse to fulfil their agreement to arbitrate, they can be made to do so; when



arbitrators act corruptly, they can be removed; when losing parties refuse to pay what they owe, the debt can be collected against their will.

The problem this creates is that governments are also free. There is no inherent obligation on any government to support a private arbitration. It is now standard that they do so, but that is because they have decided that the use of arbitration is desirable for the achievement of their own goals. This means, however, that governments are able to condition their support of arbitration. They have every legitimate right to say: "Yes, I will support your private dispute resolution procedure, but only if you run it in accordance with these rules". This would not violate the independent conception of party autonomy, as disputing parties would still have the freedom to arbitrate in a way that violated the government's rules, if they were willing to do so without government assistance. Yet it creates a potential problem for arbitration, as if governments impose too many regulations, arbitration begins to lose its value as an alternative to court litigation.

This is where the supported conception of party autonomy comes in. The supported conception is not purely descriptive, as is the independent conception. It is instead a normative view of the role of party autonomy in arbitration: it posits that party autonomy is so important in arbitration that it creates rules for how arbitration can be regulated; that States unquestionably have the legitimate power to lay down detailed rules on how arbitrations can operate, but that they are wrong to do so. According to the supported conception, party autonomy does not just describe arbitration, but constitutes its central core. Consequently, governments should legislate in ways that assist arbitration, as this supports the parties' exercise of their autonomy. They should also exert control over arbitration to the extent necessary to ensure that each arbitration operates fairly, as this guarantees that the autonomy of one party is not overruled by the autonomy of another, more powerful party. But the supported conception of party autonomy also entails that a State should not insist that arbitrations operate in accordance with any particular rules, or obey particular social conceptions of how disputes can be resolved. To do so would impose on the parties the views of individuals and entities not themselves involved in the arbitral process. As a result, it would constitute a violation of the principle of party autonomy.

It is, beyond question, the supported conception of party autonomy that has come to dominate international arbitration, both in terms of how it is approached by practitioners, and in terms of how it is overwhelmingly viewed by governments. By creating a structural support for party autonomy, States do not limit the ability of parties to shape arbitration in accordance with their needs and preferences, but rather offer an infrastructure which ensures that party autonomy can operate effectively. Nonetheless, it is important to consider the consequences for arbitration of the centrality of party autonomy.

Firstly, one of the most important differences between arbitration and State court litigation is that the latter constitutes an expression of national sovereignty, while the former does not. In other words, the power of State courts to resolve disputes derives from the inherent authority of the State to govern actions subject to its jurisdiction. It constitutes a service provided by the government to individuals, and is made available to all. Consider, for example, one of the most

basic forms of dispute, based on a contract between two parties: if a dispute arises, either of the parties can commence proceedings before the competent State court, even if the contract made no reference to the possibility of bringing a claim in court. The right to bring a claim against another contracting party is simply a right given by the State to everybody under its jurisdiction.

By contrast, the centrality of party autonomy to arbitration means that no-one can be forced to arbitrate. Every arbitration must be based upon an agreement to arbitrate. This does not mean that both parties must wish to arbitrate when the arbitration commences, let alone throughout the entire course of the arbitral process. But they must both have bound themselves to arbitrate at some point. Parties cannot be forced to arbitrate, but they can be forced to fulfil their agreement to arbitrate: this does not violate party autonomy, as it merely enforces a party's prior autonomous choice to bind her future self.

This leads to a second important consequence: Arbitrators only have the powers that the disputing parties have given them. Judges receive their power from the State, and so have whatever powers the State has decided to give them. Consequently, they may have, and use, powers that neither party in a dispute wants them to have. An arbitrator, though, can do nothing that the parties have not mutually agreed she can do. If the parties have only agreed to arbitrate certain types of disputes, an arbitrator has no power to make decisions on other disputes between the parties. If the parties have agreed that the arbitrator cannot perform a certain action (e.g. order certain types of documents to be handed over to the other party), then she cannot do it – even if this involves a standard feature of arbitration.

Importantly, even if an arbitrator believes that the arbitration cannot be successful if a certain action is not taken, she cannot order that action to be taken if she has not been given the power to do so. The centrality of party autonomy to arbitration means that the parties not only have the freedom to decide whether or not to arbitrate, but also the freedom to decide how to arbitrate - even if this means arbitrating badly.

This idea that the arbitrator only receives her powers from the parties links to another central aspect of party autonomy in arbitration: unlike in court litigation, where a judge is appointed to each case through a process decided by the State, the parties to an arbitration select their own arbitrator. It is easy to see why this is such a central component of arbitration, as the right to arrange your own dispute resolution proceedings would mean little if the individual making the decision in your case was still being imposed on you by the government. But it is important to recognize how far this notion has been embraced in contemporary arbitration. There are still some jurisdictions in which constraints are placed upon who can be appointed as an arbitrator, if the parties wish their award to be subsequently enforceable through national courts. Overwhelmingly, however, States around the world have now embraced the idea that the parties to a dispute should have full autonomy in selecting their arbitrator. An arbitrator need not be a lawyer, need not be on a government-controlled list of permissible arbitrators, and indeed need know nothing whatsoever about arbitration. So long as she has been appointed through the process agreed to by the parties, then she can act as an arbitrator. Of course, even in the most

developed arbitration jurisdictions some constraint remains, and the arbitrator must at least have the mental capacity to perform the role, or else the resulting award would be open to be challenged. But within this very minor constraint, parties generally have absolute freedom to select their own arbitrator. The usual mechanisms through which the arbitrators are selected will be discussed in detail in Chapter 4.

Finally, as has already been suggested above, one of the core benefits that arbitration can provide to parties is the ability for them to design their own dispute resolution procedure, rather than having to adhere to the procedures used in any particular national court system. Earlier in arbitration's history it was not uncommon for States to refuse to enforce arbitral awards if the arbitration had been conducted in ways that differed substantially from national court procedures - after all, these procedures were regarded as essential for ensuring justice. It has, however, now been almost uniformly accepted that so long as the procedures agreed by the parties ensure the fundamental fairness of the arbitration, then the parties should be allowed to use whatever procedures they see as most appropriate for the resolution of their dispute. Arbitral procedure will be discussed in Chapter 5.

Of course, if the parties adopt procedures that result in an unfair process, such as by not allowing one of the two parties to present its case adequately, even courts in the most "arbitration friendly" jurisdictions will refuse to enforce any resulting arbitral award. Hence, in no jurisdiction is the embrace of party autonomy in arbitration absolute. But the very minor limits that are placed on party autonomy in contemporary international arbitration justify regarding party autonomy as indeed the central characterising feature of modern international arbitration.

### **3. Arbitration precludes litigation**

Access to justice is a fundamental right, enshrined in many international instruments and national constitutions.<sup>3</sup> Consequently, anyone who has suffered the violation of a legal right must be able to seek a remedy through litigation in State courts. However, any party who agrees to arbitrate loses the right to have his/her dispute heard by State courts: it is now accepted that when parties conclude an arbitration agreement, they simultaneously waive their right to access State courts. This is why parties cannot be forced to arbitrate without their consent. Arbitration entails the waiver of a fundamental right, and so parties can only be obligated to arbitrate if they have freely chosen to waive that right.

Note, though, that in the modern world this situation is not unproblematic, as many contemporary legal systems have adopted a very generous and often formalistic approach to determining whether an agreement to arbitrate exists. A commercial party may, for example, sign a long and complex contract, not noticing the existence of an arbitration agreement within it. Similarly, a party may agree to standard terms and conditions that include an arbitration agreement, without reading the text. In these cases, courts in jurisdictions supportive of arbitration will generally find that an agreement to arbitrate has been formed, and the right to access State courts waived.

Consent to arbitration, that is, does not generally have to be knowing or informed, and once consent has been given, the fundamental right to access State courts has been waived.

Moreover, once this waiver has been given, it cannot be unilaterally retracted. An arbitration agreement can be terminated, allowing both parties to access State courts, but only with the consent of both parties. If either party wishes to keep the arbitration agreement in force, then it will remain effective, despite the objections of the other party.

#### UNDERSTANDING ARBITRATION THROUGH CASE-LAW

##### Incorporation by reference: an example from practice

**Case details:** *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* [2010] EWHC 29 (Comm)

**Authority deciding the case:** Queen's Bench Division (Commercial Court)

**Facts of the case:** The parties concluded a series of fourteen contracts. Some of the contracts included an agreement to arbitrate, providing for arbitration in London. By contrast, other contracts did not expressly include an arbitration clause, but provided that “The rest will be agreed mutually”, or “The rest will be as per previous contracts”, or “All the rest will be same as our previous contracts”. A dispute arose out of the fourteenth contract, which did not include an arbitration agreement, but stated that “All the rest will be same as our previous contracts”.

One of the parties commenced arbitral proceedings in London, seeking compensation. The other party objected that the arbitral tribunal did not have jurisdiction, because the fourteenth contract did not contain an arbitration clause and did not make express reference to the clause included in other previous contracts. The arbitral tribunal issued an Interim Final Award on Jurisdiction and Costs, deciding that it had jurisdiction because the arbitration clause present in the previous contracts had been incorporated in the fourteenth contract by virtue of the “All the rest” clause. The award was challenged before the Commercial Court in London.

**Decision:** The Court found that the arbitral tribunal had jurisdiction. English law generally allows the incorporation of standard terms, including arbitration agreements. The contract which gave rise to the dispute contained a very broad reference, encompassing “All the rest”; therefore, the agreement to arbitrate contained in the previous contract must be deemed to be incorporated in the fourteenth contract as well.

But what happens if a party brings a claim to court, despite the existence of an arbitration agreement? The precise details will differ from one legal jurisdiction to another, but in essence, once the existence of the arbitration agreement has been pointed out to the court, the court is obligated to refuse to allow the litigation to continue, and must direct the parties to arbitrate their dispute. Indeed, as will be discussed in Chapter 3, often the court will not even decide for itself whether a binding agreement to arbitrate exists, but will instead also leave that decision to be made by the arbitrator. As Chapter 3 will discuss in detail, the enforcement of arbitration

agreements in State courts is regulated by a particularly important instrument of international law, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

#### **4. Arbitral awards are final and binding**

Not only are agreements to arbitrate binding, but once an arbitral award has been rendered, it also is binding on the parties. The waiver of access to court litigation contained in an arbitration agreement is nearly absolute. Not only may parties not ignore an agreement to arbitrate and take their claim to court, but once the arbitrator has rendered her decision, the parties have very limited possibilities to challenge it.

This is an important point to understand about arbitration, as it is a fundamental way in which arbitration differs from litigation. A standard feature of court systems is the ability to appeal an initial court judgement to a higher court, arguing that the initial judge was mistaken in his/her ruling, either on the facts or the law. By contrast, while national laws and practices on the issue vary (see Chapter 7), the dominant approach to arbitration around the world allows very little scope for court challenges to an arbitral award.

This character of arbitral awards is generally referred to as “finality”: when the arbitrators have made a decision, it is final, and should not be overturned by courts, except in rare circumstances usually relating solely to procedural fairness. The arbitral award, in other words, normally constitutes the final word on the matters in dispute. Even if a judge believes that the award was wrong on the facts or misinterpreted the law, the award should generally remain in place. By agreeing to arbitrate, parties opted for a dispute resolution system in which they could select their own decision-maker, and as a result determine for themselves what views and expertise should be used to decide the case. If they selected poorly, and receive an award that is questionable, or even demonstrably wrong, this was a risk they took when they opted for arbitration. Consequently, so long as the arbitral process was fundamentally procedurally fair, courts will not assist parties who believe they have received a mistaken arbitral award – even if the court agrees.

In addition to being “final”, arbitral awards are also “binding” as soon as they are issued by the arbitrator: the losing party must comply with the decision. In this respect, the role of arbitrators is very different from that of mediators: mediators merely propose a solution to the parties, and each party has the right to reject the proposal if they do not like it. Arbitrators, by contrast, have the power to impose a ruling which the parties must respect even if they do not agree with it.

The winning party can rely upon the assistance of national courts in enforcing the award if the losing party refuses to obey it. Again, courts will offer this assistance even if they believe the award to be incorrect. This is one of the fundamental risks of arbitration: unless you choose your arbitrator carefully, you may be bound by an award even though it is demonstrably incorrect.

#### **5. Not all disputes can be submitted to arbitration**

Because of the fundamentally private nature of arbitration, there have always been certain types of disputes that could not be taken to arbitration. Parties could agree to appoint an individual to resolve their dispute, much as in arbitration, but neither party would be bound by that agreement, and the appointee's decision would not be legally binding, leaving either party free to re-litigate the dispute in court. The notion of "arbitrability" expresses this concept: it is only possible to submit a dispute to arbitration if the dispute is arbitrable.

The reason for these limitations is well illustrated by the classic example of a non-arbitrable legal claim, namely criminal acts. It is theoretically possible for the victim of a crime and a criminal actor to appoint a third party to decide guilt and appropriate punishment. However, even though criminal acts involve private individuals, crime is not regarded as a purely private matter: it raises considerations of broader public importance, including both the right to protect others from subsequent criminal acts by the wrongdoer and the right of the State to punish individuals for committing certain acts. As a result, even those States that are most supportive of arbitration have retained the right to ignore any private settlement or decision relating to a criminal act and bring criminal proceedings.

What sorts of disputes may and may not be arbitrated varies among national jurisdictions, but this notion of "public interest" characterizes the boundaries of arbitrability well. Nonetheless, it is necessary to interpret "public interest" broadly, as arbitrability restrictions can extend well beyond criminal matters. In some jurisdictions, for example, restrictions are placed on the arbitrability of disputes between consumers and traders – on the ground that a significant power imbalance exists between the consumer and trader, which can be used to create an unfair arbitration, conflicting with the "public interest" in ensuring the fair resolution of consumer disputes. Other examples of arbitrability restrictions include arbitrations involving governmental bodies, bankruptcy, patents, securities, family law, and other categories of disputes that have been argued to involve a "public interest" that will not be properly served by allowing such disputes to be taken to private arbitration.

Nonetheless, while there still remain arbitrability restrictions in even the States most supportive of arbitration, the boundaries of arbitrability have progressively expanded over time, with an increasing range of disputes being allowed to be submitted to arbitration. Chapter 3 will discuss arbitrability in more detail.

## **6. Arbitration can be domestic or international**

Arbitration can be used to resolve both domestic and international disputes. National laws will determine whether an arbitration qualifies as "domestic" or "international", but as a general guideline, a dispute will be treated as domestic if all of its elements, including the identities of the parties and the physical location of the actions underlying the dispute, relate to a particular State. Take the example of a contract concluded between two French nationals and residents, governed by French law and to be performed entirely in France: a dispute arising out of such a legal relationship can unmistakably be labelled as "domestic". When arbitration is used to resolve this

type of case, it is referred to as a “domestic arbitration”. By contrast, a dispute between a German and a Brazilian company is not purely domestic, as it involves nationals of two different States. Depending on the national law involved, even a slight level of “international” context can suffice to qualify an arbitration as international.

The importance of this distinction goes far beyond mere labelling, as in many States domestic and international arbitration are subject to very different legal rules. While international arbitrations are routinely treated with great deference by national courts, States have traditionally regarded domestic arbitration as a legitimate topic of national interest. As a result, in some States courts are willing to intervene in and even control domestic arbitrations, and can be far more willing to grant challenges to domestic arbitral awards than is the case for international arbitrations.

In addition to this formal difference, the practices of domestic and international arbitration can vary significantly within the same State, even where the same lawyers and arbitrators are involved. Domestic arbitration closely resembles court litigation in some States, with both arbitrators and lawyers merely using standard litigation practices in a different setting. By contrast, practitioners and arbitrators operating in the field of international arbitration have progressively developed a body of practices, guidelines and standards which distinguish international arbitration from its domestic counterpart. International arbitration practice can still be seen to vary from State to State, with local customs and preferences influencing how even international arbitrations are conducted, but the variations are less stark than in domestic arbitration, and occur around a core of shared international arbitration procedural standards. Because of this, even in the absence of a formal distinction in the applicable procedural law, international and domestic arbitration are often conducted in different ways.

#### **7. Arbitration is not always between private parties**

Arbitration has become most prominent in the form of commercial arbitration, in which businesses engaged in a commercial transaction agree to resolve their dispute through arbitration, rather than by litigating in court. Indeed, it may seem odd for a State to use arbitration, given that arbitration serves as an alternative to courts, and courts are provided by States. Nonetheless, there is nothing about the private nature of arbitration that entails that the parties themselves must be private entities, and States and State entities now regularly use arbitration, whether in the form of standard commercial arbitration, or in a version of arbitration expressly designed for the involvement of States.

#### **8. Arbitration comes in different varieties**

As discussed at the beginning of the chapter, arbitration is a supremely flexible form of dispute resolution, with very few rules about how it must be done. As a result, arbitration is easily adaptable for a wide range of disputes. One of the things that is important to recognize, however, is that while each of these forms of arbitration is indeed arbitration, there are nonetheless often significant differences in how each form operates, with adaptations made according to the type of dispute, the parties involved, and even the specific communities of arbitrators and practitioners

who work on such arbitrations. This section will give examples of some of the most prominent forms of arbitration, but it is by no means exhaustive.

### Domestic Commercial Arbitration

Commercial arbitration is arguably the most well-known form of arbitration, and involves a dispute between two commercial entities, relating to a transaction between them. Whether because of concerns about the slowness of local courts, the desire for a trusted industry specialist to serve as arbitrator, or another reason relating to potential benefits that arbitration can offer, arbitration has come to play a central role in commercial dispute resolution in many States around the world.

Indeed, it is in the context of the resolution of commercial disputes that contemporary international arbitration, and the ideas on which it is built, was developed. This is because operating an effective arbitration takes both the resources needed to pay the costs involved (costs which are often paid by the government in court litigation), and enough understanding of arbitration to structure an effective and efficient arbitral process. For these reasons, ordinary citizens have traditionally been happy to take their disputes to courts, leaving businesses to develop arbitration as a form of dispute resolution.

### International Commercial Arbitration

It is, however, with the rise of cross-border commerce in the late 20<sup>th</sup> Century that arbitration came to particular prominence. Indeed, for most of the 20<sup>th</sup> Century arbitration remained a “niche” form of dispute resolution, used mainly within the context of specialized industries, or in significant cross-border transactions. The rise in the volume of cross-border transactions beginning in the final quarter of the 20<sup>th</sup> Century, however, led to a boom in arbitration, and to the prominence that it holds today. The international context is particularly appealing for arbitration because international transactions raise concerns about two issues arbitration is particularly good at dealing with: bias and procedural flexibility.

For example, a company from Brazil and a company from China may enter into a sales contract for goods manufactured in China, and to be delivered in Brazil. In any contract there is always the risk that a dispute will arise. However, the Brazilian party does not wish to have to litigate any such dispute in Chinese courts for several reasons: (1) China is far away, so that bringing executives, witnesses, etc. to China for a litigation will be expensive; (2) Litigating in China requires hiring Chinese lawyers, but the Brazilian party has no idea which Chinese lawyers are or are not good; (3) The Brazilian party is worried that Chinese courts may favour the Chinese party against a foreign party; (4) The Brazilian party has no idea how a Chinese court will interpret the contract; (5) The Brazilian party does not know the procedural rules of Chinese courts, or knows them but finds them “alien”, and perhaps inconsistent with a Brazilian sense of procedural justice. Similarly, though, the Chinese party does not wish to have to litigate in Brazilian courts, for precisely the same reasons. In the international context, therefore, arbitration becomes important as a “defensive” manoeuvre: a way of avoiding potential undesirable aspects of foreign courts.



The very different reasons that often motivate the use of arbitration in the domestic and international contexts explain why it is important to distinguish domestic and international commercial arbitration. Both are arbitration, and both are commercial arbitration. However, the very different contexts in which the parties are operating in the domestic and international commercial spheres means that the attractiveness of arbitration arises from very different considerations. As a result, domestic and international arbitration can differ considerably in form, and are sometimes even practiced by distinct communities of arbitration specialists.

### Investment Arbitration

The cross-border nature of contemporary commerce does not only mean that businesses may find themselves in dispute with businesses from other States. It also means that businesses will often need to subject themselves to the power of a foreign government, particularly if they choose to set up a long-term investment abroad, rather than merely entering into a sales transaction with a foreign party. Think, for example, of a US manufacturer of electronics opening a new production facility in India. In general terms, this phenomenon can be understood as a flow of resources: an entrepreneur decides to deploy some of her assets and invest them in a venture to be conducted in a foreign State. The foreign State where the investment is conducted (India, in the preceding example) is commonly referred to as the 'Host State'.

The risk this situation creates is that the Host State may take actions that harm or destroy the foreign investor's investment. There may be mechanisms under the law of the Host State through which the foreign investor could attempt to seek compensation, but in many States these mechanisms remain relatively undeveloped. In addition, the investor may be concerned that the domestic courts of the Host State will be biased in favour of the Host State's government. In such cases, foreign investors may be able to rely upon certain provisions of international law and bring their claim directly against the State in an investor-State arbitration – so long as the State has agreed to arbitrate such claims. As in all forms of arbitration, consent by both parties is necessary, and a State cannot be obligated to arbitrate even international law claims if it has not agreed to do so. Although investment arbitration is closely related to commercial arbitration, both in terms of its procedures and the practitioners involved, the laws involved and the fact that one of the disputing parties is a State have a significant enough impact on how it functions that it is appropriate to treat it as an independent form of arbitration.

### Consumer Arbitration

While historically arbitration was primarily a mechanism for the resolution of commercial disputes, the increasingly supportive approach to arbitration taken by courts and governments around the world has also led to many businesses choosing to incorporate arbitration agreements into consumer contracts. In some ways arbitration is an ideal dispute resolution mechanism for consumer disputes, as the procedural freedom contemporary arbitration involves allows arbitrations to be conducted more quickly and even more cheaply than is possible in many court systems. However, the unbalanced nature of the relationship between the consumer and the

business, which often involves the business insisting upon the use of an arbitration provider and arbitration rules that it has unilaterally selected, raise concerns of fairness that are less common in the commercial context. For these reasons the ability of consumers to be bound by arbitration agreements is in some States strongly limited, or even completely eliminated.

### State-State Arbitration

One final variety of arbitration is also worth covering here, given its historical importance. One of the significant limitations to court litigation is that court systems are controlled by national or sub-national governments. This creates a problem when two States are in dispute, as neither State will be willing to subject itself to the powers and judgements of the courts of the other State, or any third State. Historically, the most common way of solving such disputes was through either military action or trade sanctions.

However, there has also been a third mechanism that States have used to resolve their disputes: arbitration. Arbitration, after all, is a private dispute mechanism, and yet as discussed above, this does not mean that the parties themselves must be private entities, but only that it is controlled by the parties to the dispute. There is, hence, no reason why those parties cannot themselves be governments, so long as the dispute resolution mechanism itself is not part of any government's court system. State-State arbitrations are known to have occurred, for example, in Ancient Greece, as early as the 7<sup>th</sup> Century B.C. In 1899, the Permanent Court of Arbitration (PCA) was established, a specialised arbitral institution devoted to arbitrations involving States that remains active to this day. Note, however, that as it is an arbitral institution, the tribunals established by the PCA are not "courts", and none of them is "permanent" – such are the wonders of naming.

Currently, many State-State disputes are resolved at the International Court of Justice, but this does not mean that State-State arbitration has lost its practical relevance. For instance, according to Article 287(3) of the United Nations Convention on the Law of the Sea (UNCLOS), if the State parties have not expressed any preference concerning the resolution of disputes arising out of the interpretation or application of the Convention, the default rule is *ad hoc* arbitration under Annex VII of UNCLOS.

State-State arbitration is heavily influenced by the public international law nature of the disputes it typically aims at resolving. State-State arbitrations are often far more formal than commercial arbitrations, reflecting the involvement of governments on both sides, and while some commercial arbitration practitioners are also involved in State-State arbitrations, the latter have their own group of specialized practitioners.

## **9. Arbitration can be institutional or *ad hoc***

Courts are permanent institutions: they are part of the institutional architecture of a State, and the same court is involved in the resolution of a number of unrelated disputes involving many different parties. Take the example of a court case between Deon (claimant) and Janice

(respondent): the court already existed before Deon commenced the litigation, and will still exist once the case has been decided.

Arbitral tribunals, by contrast, are part of a dispute resolution process that has been set up to address a particular dispute. As a consequence, arbitral tribunals are by their nature temporary. Arbitrators are appointed to the tribunal to address particular issues between the parties, and once those issues have been finally resolved, the tribunal's mandate ends, and the tribunal ceases to exist.

One important consequence of this temporary nature of arbitral tribunals is that arbitrations can be pursued without the long-term institutional framework that is necessary for a functioning court system. If courts are to be able to operate effectively across a wide range of cases and a wide span of time, they require an administrative framework that allows them to move effectively from one case to the next, employees to provide the background work necessary to allow this transition to occur, and so on. On the other hand, as an arbitral tribunal will cease to exist as soon as it has delivered its final award, all that is required for an effective arbitration is an arbitrator.

Nonetheless, while arbitration can occur without any supporting institutional framework, and large numbers of arbitrations use this model every year, the absence of an institutional framework can create difficulties. After all, an arbitration is still a legal process, so there will need to be rules regarding how the procedure will operate, materials will need to be exchanged between the parties, if hearings are needed then hearing rooms must be booked, transcripts of hearings may be needed, arbitrators must be paid, and so on. But whereas in the context of a court system all of these issues will be handled by the court's supporting institutional framework, in arbitration they must be handled by the parties themselves. The parties, however, may have no experience with arbitration, and so have no idea what must be done. Moreover, the parties are currently in dispute, and so may be highly antagonistic to one another and unable to agree on even minor details.

"Arbitral institutions" are the solution that has evolved over time to deal with this issue. Arbitral institutions are permanent bodies, often private businesses but sometimes government entities, which take on the role of providing support to arbitrations: they offer professional secretarial staff, often provide hearing rooms, and so on. In addition, they will usually have a set of institutional rules describing how arbitrations administered by the institution must operate, thereby freeing the parties from the requirement to make up their own rules. It is important to emphasise, however, that arbitral institutions are not decision makers: they assist in the organization of the arbitral proceedings, but they play no role in deciding the dispute. Decision-making is entirely performed by the arbitral tribunal.

Arbitral institutions, that is, provide to arbitrations the same type of institutional framework from which national courts benefit. However, unlike the institutional framework that supports national courts, which is a mandatory system for any case heard by the court, parties must agree to use an arbitral institution, and remain free not to use any arbitral institution at all. Parties may choose

not to use an arbitral institution, for example, if they are already familiar with arbitration, if they want to avoid the constraints deriving from the involvement of an arbitral institution, or if they want to prevent anyone other than the parties and the arbitrators from knowing the details of the dispute.

Moreover, national laws allow parties only limited freedom to choose their court, generally allowing the litigants to select the location in which they wish their case to be heard, but then mandating that any cases heard in a given location must be submitted to a particular court. By contrast, parties involved in arbitration retain absolute freedom in their choice of arbitral institution. Not only can they choose not to use an institution at all, but they can choose to use any institution from anywhere in the world, no matter where their arbitration is taking place (so long as the institution itself is willing to take their case). As a result, the mere fact that a given arbitral institution is located in France, for example, does not mean that it only handles arbitrations located in France – it can, in fact, handle arbitrations located anywhere in the world.

There are literally thousands of arbitral institutions around the world, although many handle few, and often no, arbitrations. Moreover, while there are substantial similarities in the types of support that arbitral institutions offer to arbitrations, significant differences do exist. As a result, it is always important to examine the rules and approach to arbitration offered by an institution to determine if it is appropriate for the parties and the dispute. The role of institutional rules in regulating the conduct of arbitration will be described in detail in Chapter 2.

As the institutional framework of arbitration, arbitral institutions have also come to play a broader role within arbitration, often taking on the task of promoting understanding of arbitration amongst businesses, legislators and judges. In addition, because arbitral institutions often have the role of appointing arbitrators when the parties in a dispute cannot agree on an arbitrator, or when one party has failed to appoint an arbitrator, arbitral institutions also play an important role in helping develop arbitration as a profession, giving opportunities to new arbitrators, and providing training and networking opportunities to those interested in a career in arbitration.

When arbitration is conducted under the auspices of an arbitral institution, it is referred to as “institutional arbitration”. By contrast, if there is no arbitral institution administering the arbitration, the proceedings are called “*ad hoc*”.

## **10. Arbitration offers potential advantages**

Given that parties cannot be forced to arbitrate, arbitration can only succeed if it is seen as providing benefits over other forms of dispute resolution. This section will highlight certain features of arbitration that are often argued to make it preferable to other dispute resolution mechanisms.

### Neutrality

One of the most important features of any dispute resolution mechanism is that it provides a neutral forum, in which the dispute between the parties can be addressed fairly and without bias. Arbitration is certainly not alone in being able to provide this forum, and one of the primary virtues of court litigation is precisely the neutrality of judges and the State-controlled litigation process.

There are situations, however, in which the neutrality of court litigation can come into question, and questions concerning court neutrality in international disputes have been a primary factor in the rapid growth of international arbitration since the middle of the 20<sup>th</sup> Century. Specifically, when a dispute involves parties coming from different States, both parties are likely to be concerned about having to litigate their dispute in the other party's "home" court system.

Firstly, parties sometimes fear that they will be treated unfavourably by the other party's "home" court system simply because they are from another State. This problem is often referred to as "home bias", and refers to an alleged tendency of some State courts to favour the interests of local disputants over those of foreigners. Sometimes such favouring can be explicit, and constitute actual bias of courts against foreign parties, but at other times it can merely reflect cultural differences, with courts from a State more likely to approve of behaviour in accordance with its own cultural norms.

Of course, the risk of home bias is particularly high when the dispute involves a State or a State-controlled entity. In such cases, local courts may feel that national interests should override private commercial interests, or may even be placed under direct pressure from governmental authorities. Moreover, judges may have been appointed to their position by the very government whose actions are being challenged, and their career advancement may depend on government officials having a positive view of their actions.

Nonetheless, even when a State's national courts are trusted to act impartially, other neutrality concerns can be raised by cultural differences relating to the proper means of resolving legal disputes. In some States, for example, witnesses are not expected to testify against their employer, while in other States such testimony is regarded as essential if a case is to be resolved fairly. Similarly, in some States parties in litigation have the ability to request large amounts of documentation regarding the dispute from the other party, as a means of helping to substantiate their claim or defence; in other States such "disclosure" is much more limited, in order to preclude "fishing expeditions" in which claims are brought without proof, in the hope that proof will be found in disclosed documents. Because of the significant differences that can exist between national court systems, foreign parties can have concerns about the legitimacy of the processes used in a State's courts, even if they concede that the courts themselves show no home bias.

Arbitration is seen as providing an important alternative to court litigation in such contexts, as it is perceived as providing a neutral forum over which both parties have control. It is important to understand, however, the manner in which arbitration's neutrality works. Unlike courts, which are (ideally) expressly designed to provide a neutral forum, an arbitration is constructed by the

parties to the dispute – each of which will usually be only too happy to have the arbitral process biased in its favour. Selection of arbitrators, selection of procedural rules, and all the other aspects of the arbitral process, then, are not done with an eye to neutrality, but are instead often approached by the parties as part of the “conflict”, with each attempting to secure an advantage.

That arbitration provides a neutral forum despite being subject to active attempts to bias it results from the balance of biases that it secures, rather than any inherent neutrality. That is, arbitration’s procedural flexibility means that arbitration is easily biased. However, so long as both parties are active in the design of the arbitration, and have roughly equivalent power over it, their respective efforts to secure advantages will counteract one another, and produce a genuinely neutral process. The parties can agree on an arbitrator, or each party can ensure that its own preferred arbitrator sits on a tribunal of three arbitrators; parties can agree on mutually-acceptable procedures, or those procedures can be set by a tribunal reflecting their respective viewpoints; and so on.

This, then, is the neutrality of arbitration in a nutshell. Arbitration is not inherently neutral, and indeed is easy to bias. However, a balanced arbitral process will provide a more assuredly fair and neutral dispute resolution forum than any court system.

### Speed

One of the common conceptions of arbitration is that it is a “speedy” form of dispute resolution, providing a faster resolution of disputes than is usually available from national courts. Speed of resolution can be particularly important in the context of commercial disputes, as disputing parties wish to be able to move forward, but may not be able to do so until their dispute is resolved.

Speed is indeed a valuable feature offered by arbitration, but it is important to recognize the complexity in arbitration’s connection with “speed”. Firstly, there is nothing inherently fast about arbitration. Indeed, in a 2014 survey of European arbitration practitioners, 46% stated that most domestic arbitrations in which they had been involved in the past 5 years took over 1 year to conclude. The situation was even more extreme in international arbitration, with 84% stating that most arbitrations took over a year to conclude, and 28% stating that most arbitrations took over 2 years to conclude.

Arbitration, then, is not inherently fast; this is particularly true for international commercial arbitration, which is likely to involve more complex transactions and greater scheduling obstacles than domestic arbitration. Nonetheless, 82% of the same respondents reported that arbitration was “faster” than the national courts in their home State, and 48% stated that it was “much faster”. Arbitration, then, may not be “speedy” in absolute terms, but it is “*comparatively* speedy”. Resolving a complex dispute through arbitration will still take a significant amount of time, but it will usually take less time than would be required to resolve the same dispute through litigation.

The reasons for this situation are important to understand. Firstly, there are certain aspects of arbitration that unavoidably create short-term delays. State courts and judges are already in place before parties have a dispute: as a result, commencing litigation simply involves bringing a claim through the appropriate process. Arbitration, by contrast, requires that one or more arbitrators be appointed, either by agreement of the parties or through a process allowing each party to nominate an arbitrator to the tribunal. In either case, a party wishing to hinder arbitration can do so by delaying agreement on or appointment of an arbitrator. Similarly, courts supply buildings, administrators, procedural rules and full-time judges whose only job is usually to preside over litigations. In arbitration, on the other hand, all these elements must be either agreed between the parties or decided by a tribunal (once appointed), and must then be arranged.

On the other hand, however, there are aspects of arbitration that facilitate the fast resolution of disputes. Court litigation is often delayed by the need to compete against other disputes for the court's time, with overloaded courts struggling to coordinate the demands on their limited time. By contrast, so long as both parties in an arbitration wish their dispute to be resolved quickly, they have the freedom to arrange their arbitration so that it concludes in a time convenient for them. If one party wishes to delay resolution of the dispute, this can slow the arbitral process, but the same is true of litigation.

A useful image for the comparison of arbitration and litigation, then, might be that of a human (litigation) racing a car (arbitration). Cars take longer than humans to start moving – however, once the car is moving, it can pass the human and leave it behind with no difficulty at all. Similarly, then, arbitration starts slowly, but the control the parties have over the process means that once it is moving, a properly-functioning arbitration can always be faster than litigation, if that is what the parties want.

### Finality

The preceding discussion does not even consider one of the most important reasons why arbitration is often viewed as faster than litigation: arbitral awards cannot usually be appealed.

One of the greatest delays involved in litigation is the ability of a losing party to appeal unfavourable decisions to a higher court. Because of the availability of appeal, even winning in litigation does not guarantee that the dispute has concluded. Instead, a losing party may re-litigate the dispute in one or more successively higher courts. In some jurisdictions this process can result in parties waiting a decade or more for their dispute to be finally resolved. Arbitration, conversely, usually involves very limited opportunities for appeal. An award is final, and can be immediately enforced against the losing party. Moreover, while it is possible for a losing party to attempt to challenge an arbitral award or resist its enforcement, the grounds on which this can be done in most jurisdictions are so limited that such attempts are rarely successful.

Arbitration, then, can not only be faster than litigation, but provides a “one-stop” forum, in which the decision of the arbitrator will almost always finally resolve the dispute – thereby avoiding the risk of years of protracted litigation in appellate courts.

### Enforceability

An arbitral award in itself has little value. An arbitrator is not an agent of a State, and so cannot compel a losing party to obey the terms of the award. In itself, that is, an arbitral award is just the view of a private individual on how a dispute should be resolved, and has no greater value than the view of any other private individual.

If this were the end of the story, then arbitration would be rarely used. The arbitral award would be no more than a recommendation to the parties on how their dispute should be resolved, and the losing party could simply ignore it. As a result, there would be little value in arbitration in most cases. Arbitration, however, has been widely embraced and supported by States, who have accepted the view that it provides an important alternative to court litigation. As a result, most contemporary States have laws allowing rapid enforcement of arbitral awards, while providing only very limited grounds on which enforcement can be challenged. Moreover, States have entered into international treaties, most famously the New York Convention on the Recognition and Enforcement of Arbitral Awards, in which they have agreed to enforce arbitral awards delivered in other States, while again providing only very limited grounds on which enforcement can be challenged.

As a result, while arbitration is a private process, it has been endorsed so strongly by States that an arbitrator's decision has at least as much power as that of a judge. Indeed, given the limited grounds on which arbitral awards can be challenged, and the treaties that allow arbitral awards to be enforced abroad more easily than court judgments,<sup>4</sup> there is good reason to state that an arbitrator's decision is actually significantly more powerful than that of a judge.

Recognition and enforcement of arbitral awards will be discussed in detail in Chapter 7.

### Expertise

One of the greatest benefits that arbitration provides to parties is the power to select the arbitrator(s). The identity of the decision-maker is arguably the most important feature of any adjudicative dispute resolution process, as it has a major impact not only on how the law is interpreted and applied, but also with respect to many procedural decisions that will be taken in the course of the process.

In litigation, parties must simply accept the judge who is allocated to hear their case. This may mean, though, that the judge lacks the expertise necessary to understand fully certain technical elements of the parties' arguments, or the business context in which a transaction occurred. Some types of disputes hinge on industry-specific problems and therefore require a special technical expertise: a complex construction contract, for example, may be best resolved by an arbitrator with a strong background in engineering. In other cases, the parties may want their dispute resolved by someone with a strong commercial sensitivity, e.g. someone who understands the realities of international business relations.



In arbitration, parties are able to ensure that the arbitrator(s) possesses the technical knowledge or contextual understanding necessary to decide the case correctly. Moreover, as both parties are involved in arbitrator selection, each party can prioritise something of particular importance to its own case.

Unfortunately, too often parties fail to take advantage of this opportunity, and appoint someone merely because they are an experienced arbitrator, or are recommended by their counsel or by an acquaintance. Ultimately, however, it is up to the parties to select the right arbitrators, and thereby ensure a high quality final award. If they fail to make the effort necessary to select an arbitrator who is right for their particular arbitration, they have wasted one of the greatest benefits that arbitration provides.

### Flexibility

Whereas in litigation parties must conform to the procedural rules and the schedule of the court, arbitration can take almost any form agreed to by the parties, restricted only by the need for the process to be fundamentally fair to both of them. By way of example, the parties can agree on which documents they should and should not have to disclose to the other side; on whether witness testimony should be allowed, and in what form; on what languages should be used; on the rules of evidence to be applied; ultimately, on every aspect of the arbitral process.

Arbitration, hence, is best understood as a bespoke dispute resolution mechanism, which gives the parties to a dispute the power to design their own process, to have no procedural rules at all, or even just to mimic the procedures of their preferred court system. While court litigation is fundamentally a standardised service provided by the State, arbitration belongs to the parties to the dispute, and leaves them free to decide how they wish to resolve that dispute.

### Confidentiality

Arbitration is a private, third-party dispute resolution mechanism. It is, however, not necessarily confidential.

This is an important point to emphasise, as many people unfamiliar with the details of arbitration make the mistake of confusing arbitration's privacy with confidentiality. Arbitration is private in that it is controlled by the parties, who can therefore usually preclude all other parties, including the State, from involvement in the process. There is, however, nothing essentially confidential about arbitration, and whether information revealed in an arbitration can be repeated to third parties varies from one State to another. Parties seeking confidentiality, therefore, must examine the applicable law(s) in order to determine if there are specific acts they must undertake, such as signing a confidentiality agreement, to ensure the confidentiality of the process.

Nonetheless, while arbitration is not inherently confidential, it provides an opportunity for confidentiality that court litigation cannot provide. The privacy of arbitration means that as long as the parties and other participants in the arbitration maintain confidentiality, it is possible for

an arbitration to take place without third parties even knowing of its existence, let alone of the subject matter of the dispute. There is, for example, no obligation to record the existence of an arbitration in public records, or to deposit any documents from the arbitration in a publicly-accessible repository, both of which may be required by court litigation. Indeed, so long as both parties willingly conform to the award, taking the actions that it directs them to take, there is usually no obligation to deposit an award with the State, or even notify the State that the arbitration has taken place.

Arbitration, then, is not inherently confidential, but it provides an opportunity for confidentiality that even the most confidential court litigation cannot provide.

## **11. Arbitration has potential drawbacks**

While arbitration has many virtues, no dispute resolution process is perfect, and arbitration has some important drawbacks as well.

### Cost

One of the greatest benefits provided to parties involved in litigation is the subsidisation of public courts by governments. While court systems vary in the costs they impose on users, court litigation is ultimately a service provided by governments to assist individuals resolve their disputes. To achieve this goal, judges must be paid, buildings must be provided, court employees must be paid, jurors must be recruited, and so on. There are many expenses involved in providing court litigation, and traditionally parties have had to pay very little of that cost (although this situation is increasingly changing, and the costs of litigation can vary significantly from jurisdiction to jurisdiction).

Arbitration, however, while encouraged by many governments, is not provided by the government. It is a private process, voluntarily undertaken by the parties, as an alternative to using the government-provided court system. As a result, even those governments most supportive of arbitration have seen no reason to provide financial support to those using arbitration instead of court litigation. The consequence, of course, is that all the expenses connected with arbitration must be paid by the parties themselves.

Importantly, the flexibility of arbitration means that parties who want an inexpensive dispute resolution process can ensure that arbitration is actually cheaper than litigation, by choosing to eliminate aspects of the process that would normally be expensive, or just by choosing cheaper options than they might have used in court. But unless such cost-cutting efforts are made, an arbitration that matches precisely litigation in a given court system will unavoidably cost more for the parties than court litigation.

This said, however, it must be remembered that there are “costs” to a dispute resolution process that may not be as obvious as out-of-pocket expenses, but must nonetheless be taken into account. By way of example, a State court system charging very low court fees but requiring

several years to resolve a case may be formally cheaper than a corresponding arbitration, but those benefits may rapidly be lost in opportunities that must be foregone while the litigation continues, and in the reputational damage that may be suffered before a decision is finally reached.

### Limits to Arbitral Jurisdiction

Courts are based upon the power of the State to control the people and activities within their jurisdiction. As a result, courts have the power to compel individuals to assist a court case, even if they are not themselves parties to the dispute, and even if they have no wish to do so. In general, courts draw upon the power of the State to compel individuals to perform certain actions.

Arbitration, by contrast, is based upon the consent of the parties, not upon the power of the State. Consequently, arbitrators only have the powers given to them by the parties, and can only be given powers that the parties are able to give. The parties to a dispute, in particular, have no legal power to compel unconnected third parties to do anything; consequently, they cannot give this power to an arbitral tribunal. Similarly, the tribunal only has the power to make decisions over those aspects of a dispute that have been submitted to arbitration – there may be other aspects of the same dispute that are not covered by the arbitration agreement, and so the arbitrators have not been given the power to decide them.

As a result, the jurisdiction of an arbitral tribunal is limited: it normally only covers the parties to the arbitration agreement, and only those subject matters the parties agreed to refer to arbitration. This may in some cases create problems: a dispute, for example, may require that evidence be provided by an entity which was not a party to the arbitration agreement; or the dispute may be closely related to another dispute between the same parties, but that is not covered by the arbitration agreement. An arbitral tribunal has no power to address these situations unless given it by the applicable law, and so parties must usually rely on local courts to offer support to the arbitration, such as by compelling non-parties to participate in the arbitration.

These problems are less significant than they used to be, as the strong support States have given to arbitration means that courts often interpret arbitration agreements broadly, as covering things not expressly referenced in the language of the agreement, while arbitration laws often obligate courts to provide assistance to arbitrations. Nonetheless, national laws and the views of courts regarding arbitration still vary around the world, and so these limitations to arbitral jurisdiction can still constitute an obstacle if the arbitration is taking place in a less supportive State.

### Limits to Arbitral Power

Another consequence of the fact that arbitrators only have the powers that they are given by the parties, and so only have the powers that parties are able to give them, is that there are sometimes limitations placed by the State on the powers of arbitrators. In other words, sometimes States do not allow parties to give arbitrators certain powers.

The most prominent example of such limitations is that of arbitrability, which refers to whether or not the law allows a certain type of dispute to be submitted to arbitration. If the applicable law, for example, does not allow disputes relating to gambling to be submitted to arbitration, then such disputes must be taken to court litigation, even if both parties wish to use arbitration. Any tribunal appointed to such a dispute must hold that it does not have the power to hear the dispute, or risk its award being unenforceable in the jurisdiction in question – as the parties did not have the power to submit the dispute to arbitration, and so could not give the arbitrators the power to hear it.

These limitations also sometimes relate to specific powers, rather than to the broader question of the right to arbitrate a dispute at all. Historically, for example, many legal systems precluded arbitral tribunals from ordering interim/provisional measures, such as requiring that a party not sell property the ownership of which was the subject matter of the arbitration. Instead, parties were required to make an application for interim/provisional measures to a local court, which would issue the order in support of the arbitration. Contemporary State support for arbitration means that such limitations are now becoming less common, and interim/provisional measures is one area in which significant changes have indeed occurred. Nonetheless, limitations of this nature still do exist in many jurisdictions, and so must be considered when choosing a jurisdiction in which to arbitrate.<sup>5</sup>

Finally, even when arbitral tribunals are not formally denied a power, courts have sometimes adopted doctrines presuming that the parties did not wish to give a particular power to arbitrators, unless they stated explicitly that the arbitrators should have that power. Many courts, for example, deny that arbitrators have the right to impose financial sanctions on parties who refuse to produce requested evidence, or otherwise refuse to cooperate with the arbitration. While such sanctions are standard in many systems of court litigation, they will often be struck down by courts if issued by arbitrators. As a result, arbitrators are forced to use “softer” versions of compulsion, such as adopting a presumption that evidence not produced by a party was unfavourable to that party. Such presumptions are less effective than the sanctions that could be imposed by a court, but nonetheless give arbitrators some power over uncooperative parties.

### *Lack of Appeal*

As noted above, one of the most beneficial features of arbitration is the lack of appeal from an arbitrator’s award. This lack of appeal means that an arbitration is final, and parties do not need to be concerned about continued re-litigation of their dispute in appeals courts years after the original decision was issued.

There is, though, also an important negative aspect to the lack of appeal in arbitration. While it is possible to challenge an arbitral award in court, in even the most pro-arbitration jurisdictions, few contemporary legal systems allow such challenges to be made to the substantive decision of the arbitrators. As a result, so long as the procedures used in the arbitration were fundamentally fair

to both parties, courts will enforce an arbitral award – even if they believe that it was clearly wrong on either the facts or the evidence.

The lack of appeal in arbitration, that is, provides certainty to the parties and a quick resolution of their dispute – but it also means that if they receive a poor decision, or even one that is demonstrably wrong, there is often nothing they can do about it, and that decision will be enforced by courts around the world.

#### *Lack of Expertise of Arbitrators in Arbitration*

One final consideration must also be kept in mind: despite the lack of formal rules, arbitration is very technical, especially because it often needs to interact with national legal systems and national courts. Arbitration, after all, is based upon the consent of the parties, and arbitrators only have the powers that the parties have given them. Moreover, national arbitration laws do vary, and courts may refuse to enforce an award that was given in an arbitration that did not conform to local arbitration law. This means that while parties are largely free to arbitrate however they wish, arbitrators must be careful to adhere to applicable local law, and to demonstrate in their award that they have at all times remained within the powers legitimately given to them by the parties.

Unfortunately, while the lack of formal requirements in most jurisdictions for serving as an arbitrator enhances the ability of the parties to select an arbitrator they believe is most suitable for their dispute, it can also lead parties to select arbitrators with inadequate knowledge of the technicalities of arbitration. As a result, while most arbitrations produce enforceable awards, and arbitration has become a highly effective dispute resolution mechanism, it is far from unknown for parties to end up with an unenforceable award simply because they did not select an arbitrator who genuinely understood arbitration.

---

<sup>1</sup> The enforcement of settlement agreements is traditionally regulated in different ways by several national laws. However, on 20 December 2018, the United Nations Commission on International Trade Law (UNCITRAL) adopted a Convention on the enforceability of settlement agreements resulting from mediation (“Singapore Convention”). The Convention is open for signature as of 7 August 2019, and may significantly change the legal regime governing the enforcement of settlement agreements in the near future.

<sup>2</sup> Some readers may be initially confused by the use of the word “State” in this book. In the U.S. and some other countries, the word is often used to designate the U.S. states, such as California or Florida. In this book, however, the word is used in a different and more general meaning, to indicate all sovereign States around the world, such as for instance France or Japan. To mark this difference, “State” is spelt with a capital “S”.

<sup>3</sup> The right of access to court is an inherent aspect of the right to a fair trial under Article 6 of the European Convention on Human Rights: see European Court of Human Rights, *Golder v. the United Kingdom* (21 February 1975, §§ 28-36, Series A no. 18). Furthermore, Article 13 of the Convention enshrines the right to an effective remedy. Along similar lines, Article 47 of the Charter of Fundamental Rights of the European Union recognises the right to an effective remedy and to a fair trial. Article 8 of the American Convention on Human Rights also guarantees the right to a fair trial. For a landmark theorisation of access to justice grounded in comparative law see B.G. Garth and M. Cappelletti, ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective’ (1978) 27 Buffalo Law Review 181.

---

<sup>4</sup> The recognition and enforcement of foreign court judgments is not impossible, but it is made more difficult by the absence of an international convention as successful as the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as “The New York Convention”). Things, however, may change in the future: on 2 July 2019, the Hague Conference on Private International Law concluded a Convention on the recognition and enforcement of foreign judgments in civil or commercial matters. The instrument is currently open for ratification

<sup>5</sup> For instance, Article 818 of the Italian Code of Civil Procedure still prevents arbitrators from issuing interim measures.