Global Dispute Resolution

by

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Part I
Foundations of International Dispute Resolution

The settlement of disputes across borders has become one of the defining challenges of our interconnected age. That much is uncontroversial. What remains contested, and what this book takes seriously, is whether the mechanisms we have built to meet that challenge are adequate to it, or whether they have calcified into structures that serve some interests far better than others.

This book offers a comprehensive examination of the systems, institutions, and frameworks through which international disputes are resolved in the contemporary world. It is designed for practitioners, scholars, students, and policymakers. But it is also written for anyone willing to question received wisdom about how conflicts between states, corporations, investors, and individuals ought to be managed in an era marked by both remarkable legal innovation and persistent structural inequality. That questioning is not merely academic. It is shaped, in part, by years of engagement with human rights adjudication, first as a member of the Human Rights Tribunal of Ontario, where the gap between formal procedural availability and genuine access to justice was a daily reality, and subsequently in teaching corporations and human rights at Toronto Metropolitan University, where the question of how legal systems actually serve or fail those who most need them is impossible to avoid.

The field of global dispute resolution encompasses far more than the traditional domains of international arbitration. While commercial and investment arbitration remain central to cross-border conflict management, mediation, online dispute resolution, hybrid mechanisms, and emerging technologies are reshaping how parties

engage with formal justice systems. In my view, these shifts are not merely procedural. They raise foundational questions about who dispute resolution serves, and who it systematically fails. The standard literature tends to treat innovation as progress. I am less certain that is always the right framing.

Longstanding debates about legitimacy, access, transparency, and the balance between private ordering and public interest have intensified in recent years, not, I would argue, because critics have become more strident, but because the structural tensions they identify have become harder to ignore. Those tensions look different when you have sat on a tribunal and watched parties with limited resources navigate processes designed for institutional actors. This work takes those tensions seriously rather than treating them as problems to be managed on the way to an otherwise sound system.

It is worth being direct about what kind of book this is and what it is not. It is not a practitioner's handbook in the narrow sense, though practitioners will find detailed comparative analysis of seats, clauses, enforcement frameworks, and procedural design throughout. Nor is it a polemic against international dispute resolution, though it does not shy away from structural critique where the evidence supports it. What it attempts is something more difficult: rigorous analysis that takes the system's genuine achievements seriously while refusing to treat those achievements as a reason to lower the standard of scrutiny. International dispute resolution has produced real benefits, real efficiency gains, and real protections for parties who would otherwise have had no meaningful recourse. It has also produced real injustices, real asymmetries, and real constraints on democratic governance. Both things are true. The intellectual task is to hold them in view simultaneously rather than choosing between them for reasons of institutional convenience or professional loyalty.

The book is structured to move from foundational concepts through detailed comparative analysis to critical engagement with contemporary reform debates. Part I establishes the historical, theoretical, and institutional foundations of international dispute resolution, tracing the evolution from ancient commercial practices to modern arbitral systems while examining the core principles of consent, party autonomy, and legitimacy that underpin and sometimes undermine these mechanisms.

Part II provides systematic comparative analysis of the world's leading arbitration seats: London, Singapore, Switzerland, the United Arab Emirates, the United States, Hong Kong, Paris, and others. The comparison is not merely descriptive. Each seat embodies particular choices about neutrality, enforceability, institutional culture, and relationship to state power, choices worth examining critically rather than simply mapping. Underlying that institutional analysis is a more fundamental question addressed in Chapter 3: whether the civil law and common law traditions that have shaped these systems are converging, diverging, or producing something more hybrid and unstable than either camp typically acknowledges.

Parts III through V address the practical architecture of cross-border arbitration, alternatives to arbitration, and the transformative impact of technology. The promises of online dispute resolution and artificial intelligence in adjudication deserve genuine scrutiny. The more compelling critique is not that these tools are new, but that they risk encoding existing power imbalances into systems presented as neutral and efficient. Access to justice is not automatically expanded by digitisation. That assumption is overstated in much of the current literature.

The mediation chapters in Part IV deserve particular mention. The book treats non-Western dispute resolution traditions, Ubuntu-based

community frameworks in Africa, Islamic mediation in the Gulf, and mandatory mediation systems across Latin America, as analytically central rather than merely as comparative footnotes to a presumptively Western model. That choice is deliberate. Any serious account of global dispute resolution that marginalises these traditions is, in my opinion, not yet truly global.

The final section, Part VI, engages with what I consider the most contested arena of contemporary dispute resolution: investor-state dispute settlement. Through six detailed chapters, the book examines the legitimacy crisis confronting ISDS, the structural critiques that have emerged from civil society and governments alike, and the diverse reform initiatives now underway, from UNCITRAL's procedural innovations to the European Union's proposed Multilateral Investment Court, from contemporary treaty practice to the integration of climate change, ESG principles, and human rights considerations into investment arbitration. Chapter 15 addresses climate governance not as a peripheral concern but as a structural challenge that is actively reconfiguring what investment protection means and what arbitrators are being asked to decide. The intersection of corporate conduct, human rights obligations, and investment treaty protections, a terrain I have explored both in the classroom and in adjudicative practice, is among the most consequential and least settled areas of contemporary international law. Whether the current reform initiatives amount to genuine transformation or sophisticated preservation of an unequal system is, in my view, still an open question.

The comparative method that runs through this book also deserves a brief word of explanation, because comparative law is not a neutral enterprise. The selection of jurisdictions to compare, the frameworks used to evaluate them, and the standards applied in assessing success

or failure all embed assumptions that deserve to be made explicit rather than hidden in the architecture of analysis. This book makes a deliberate effort to treat non-Western legal traditions and dispute resolution systems as subjects of genuine comparative inquiry rather than as deviations from a Western norm. That means engaging with African customary dispute resolution, Islamic legal principles, Asian mediation traditions, and Latin American mandatory frameworks on their own terms, assessing what they are designed to achieve and how well they achieve it, rather than measuring them against criteria derived from the Anglo-American or continental European systems that have historically dominated the academic literature. Whether that effort fully succeeds is for readers to judge. The ambition, at least, is genuine.

Throughout, this book maintains a critical yet constructive perspective. It recognises the genuine achievements of international dispute resolution in facilitating commerce and providing alternatives to litigation. But it does not treat those achievements as a reason to look away from what the system consistently fails to deliver, namely consistency, democratic accountability, and genuine access for parties without institutional resources or political leverage.

Dispute resolution is not a purely technical domain. It never was. It is a profoundly political and ethical one, raising fundamental questions about power, justice, sovereignty, and the relationship between law and legitimacy in a world where those are distributed very unequally. The better reading of the current reform moment is not that the system is being modernised. It is that its foundational premises are being contested in ways that matter.

This book is offered in the hope that rigorous comparative analysis and honest engagement with structural challenges can contribute to something better: dispute resolution systems that are not only

effective and efficient, but just, inclusive, and responsive to the global challenges we actually face rather than the more convenient ones we sometimes pretend to address.

Chapter 1
Historical Evolution and Conceptual Foundations

This chapter advances a simple but uncomfortable claim: contemporary international arbitration cannot be understood as a neutral technical mechanism. It is a governance structure that redistributes authority in ways that demand democratic justification. The resolution of disputes across borders is as old as commerce itself. Long before modern nation-states, international legal institutions, or comprehensive treaty frameworks existed, merchants trading across distant territories needed ways to resolve conflicts that arose from their transactions. The courts of foreign lands were often inaccessible, unpredictable, or openly hostile to outsiders. Language barriers, unfamiliar procedures, and the near-certainty of bias in favour of local parties made litigation in national courts an unattractive or impossible option for those engaged in cross-border trade. From these practical necessities emerged the foundational principles of what we now recognise as international arbitration: submission of disputes to neutral third parties chosen by the parties themselves, application of customary commercial norms rather than the technical rules of any single legal system, and enforcement of decisions through mercantile networks rather than state coercion.

These ancient practices established values that continue to animate contemporary arbitration, not because they were consciously preserved, but because they solved real problems that have never disappeared. Party autonomy remains arbitration's defining characteristic. Neutrality addresses the fundamental challenge of resolving disputes between parties from different legal systems and

political communities. Finality and enforceability, critical for commercial certainty, distinguish arbitration from non-binding forms of dispute resolution while preserving its private character. Expertise and efficiency allow parties to access specialised knowledge and expedited procedures unavailable in generalist court systems burdened by congestion and formality. The assumption that these values operate neutrally across all participants is, however, overstated, and this is a point this book returns to repeatedly.

The modern system of international arbitration is not simply a continuation of medieval merchant practice. That framing flatters the present arrangement. It is the product of deliberate institution-building efforts across the nineteenth and twentieth centuries, driven by evolving commercial needs, diplomatic imperatives, and the gradual construction of international legal order, a construction project that was never politically neutral and did not benefit all participants equally. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards stands as perhaps the most successful private international law treaty in history, providing the legal infrastructure without which contemporary arbitration could not function. Specialised institutions emerged to administer cases, develop procedural rules, maintain arbitrator panels, and lend legitimacy to what might otherwise appear as privatised justice operating beyond democratic accountability. Whether that legitimacy has been fully earned is, I would argue, a question the field has not answered as honestly as it should.

Alongside arbitration's remarkable success story run persistent tensions that deserve more than passing acknowledgment. Investment arbitration, in particular, has generated fierce controversy, and not without cause. That controversy is not that critics misunderstand the system, but that they understand it rather well.

Private tribunals exercising authority to review sovereign regulatory decisions, potentially awarding damages against states for measures adopted in the public interest, represent a significant transfer of power whose implications were not always visible when the relevant treaties were signed. What deserves greater attention is not simply procedural, it is not merely that arbitration is too expensive or too slow, but that the system's structural design privileges certain claimants and forecloses certain defences in ways that raise genuinely democratic concerns. Questions about transparency, diversity, cost, and the balance between private ordering and public accountability have intensified as arbitration has expanded from purely commercial disputes into areas touching environmental protection, human rights, and democratic self-determination.

This chapter establishes the historical and conceptual foundations necessary for understanding contemporary international arbitration in all its complexity. It traces the evolution from ancient commercial practice through medieval lex mercatoria to the institutional frameworks of the twentieth and twenty-first centuries, identifying both the genuine continuities and the transformations that those continuities sometimes obscure. It examines the theoretical principles, consent, party autonomy, and the consensual basis of arbitral jurisdiction, that legitimise arbitration as an alternative to state courts while also constraining its scope. And it considers the contemporary tensions between arbitration's private character and the public interests inevitably implicated in many of the disputes it now decides.

The conceptual vocabulary that international arbitration has inherited from its commercial origins is worth examining with some care, because that vocabulary does significant normative work that is not always acknowledged. Terms like party autonomy, consent, and neutrality carry the weight of foundational legitimating principles, yet

each of them conceals assumptions that deserve scrutiny. Party autonomy, as it operates in sophisticated international commercial arbitration, is not the autonomy of equal bargaining parties freely choosing their dispute resolution mechanism. It is, in many contexts, the autonomy of the stronger party to impose a dispute resolution framework on the weaker one through standard form contracts, unequal bargaining power, or the practical unavailability of alternatives. Consent to arbitrate, similarly, may be genuine and freely given in some commercial relationships while being effectively compelled in others. And neutrality, as Chapter 3 addresses in detail, is a claim that must be evaluated against the composition of arbitral tribunals, the distribution of appointments, and the cultural and ideological assumptions that arbitrators bring to their work regardless of their formal independence. None of this means that party autonomy, consent, and neutrality are empty concepts. They are not. But treating them as self-evidently legitimate foundations for a governance system that affects public interests requires more justification than the field has typically offered.

Arbitration's remarkable adaptability, its capacity to serve ancient merchants and modern multinational corporations, bilateral commercial contracts and complex multilateral treaties, purely private disputes and investor-state controversies, is often cited as evidence of the system's strength. Perhaps. But adaptability is not the same as coherence. In my opinion, whether a single conceptual framework can coherently encompass such diverse functions remains genuinely unresolved, and the field does itself no favours by treating the question as settled. Whether party autonomy can be reconciled with public accountability, whether arbitration's legitimacy rests on foundations secure enough to withstand mounting pressure for reform, these too remain open. This chapter does not resolve them. What it does is establish the historical and theoretical context from

which they emerge and without which they cannot be properly understood.

1.1 From Ancient Commerce to Modern Arbitration

International arbitration's origins trace to ancient commercial practice. Babylonian, Greek, and Roman merchants resolved cross-border disputes through neutral third parties rather than foreign courts, establishing principles of party autonomy, neutral adjudication, and consensual dispute resolution that persist today.[1] Medieval lex mercatoria (the law merchant) developed customary commercial rules enforced through merchant courts at European trade fairs, creating a transnational legal order independent of territorial sovereigns.[2] This merchant-driven system prioritized speed, expertise, and enforceability over formal legal procedure. These values remain central to modern international arbitration's appeal. The assumption that they have been seamlessly transmitted from medieval merchant practice to contemporary institutional arbitration is, however, overstated, the modern system is the product of deliberate political choices, not organic evolution.

The Jay Treaty (1794) between the United States and Britain pioneered modern interstate arbitration, establishing mixed commissions to resolve boundary disputes, debt claims, and shipping controversies, demonstrating arbitration's utility for sensitive political disputes where neither state would accept the other's courts.[3] The Alabama Claims arbitration (1872) solidified arbitration as a legitimate mechanism for resolving disputes between sovereign states when

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[1] Alan Redfern et al., *Law and Practice of International Commercial Arbitration* 3–8 (4th ed, Sweet & Maxwell 2004).

[2] Leon E Trakman, *The Law Merchant: The Evolution of Commercial Law* 9–23 (Fred B Rothman 1983).

[3] Jay Treaty, US-GB, 19 November 1794, 8 Stat 116.

diplomatic negotiations failed but parties sought to avoid warfare.[4] From my perspective, these early interstate precedents matter not merely as historical curiosities but because they reveal something the commercial arbitration literature tends to underemphasize: arbitration has always been as much a political instrument as a legal one.

Twentieth Century Institutionalization

The Permanent Court of Arbitration (1899) provided institutional support for international arbitration while maintaining an ad hoc tribunal structure rather than a standing court, and the Hague Conventions codified arbitration procedures for interstate disputes.[5] Modern international arbitration, however, truly emerged post-World War II through three critical developments: the New York Convention (1958), which created a nearly universal framework for recognizing and enforcing foreign arbitral awards across more than 170 countries; the ICSID Convention (1965), which established a specialized system for investment disputes between foreign investors and host states; and the proliferation of arbitral institutions (ICC, LCIA, AAA/ICDR, SCC, SIAC, and others) that provided administrative support, procedural rules, and the institutional legitimacy that transformed arbitration from an occasional diplomatic tool into a routine mechanism for commercial and investment disputes.[6]

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[4] *Alabama Claims Arbitration* (US v GB), Award, 14 September 1872, 29 RIAA 125.

[5] Convention for the Pacific Settlement of International Disputes, 29 July 1899, 187 CTS 410.

[6] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 UNTS 3; Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18 March 1965, 575 UNTS 159; Gary B Born, *International Commercial Arbitration* 171–210 (3rd ed, Kluwer Law International 2021).

These institutional developments are not simply that they solved a technical enforcement problem. They did that. But they also constructed a particular vision of international economic order, one that privileged private dispute resolution over public adjudication and, in doing so, made choices about whose interests the system would most reliably serve.[7] Contemporary arbitration now resolves commercial disputes between private parties, adjudicates investor-state controversies under bilateral investment treaties, and provides a neutral forum for cross-border transactions where parties distrust each other's national courts.[8] With thousands of cases filed annually addressing construction, energy, finance, intellectual property, and state-investor conflicts, arbitration has become indispensable infrastructure of global commerce and investment.[9] The sharper critique of this infrastructure is not that it fails to function (it functions remarkably well) but that it was designed with certain users in mind, and that design still shows.

1.2 The Landscape of Global Dispute Resolution

While arbitration dominates contemporary international dispute resolution, it exists within a broader ecosystem of mechanisms addressing cross-border conflicts. Global dispute resolution encompasses processes ranging from informal negotiation to formal adjudication, each suited to different types of disputes, party relationships, and desired outcomes. Understanding this landscape requires recognising that parties facing international disputes choose

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[7] Gus Van Harten, *Investment Treaty Arbitration and Public Law* 1–30 (Oxford University Press 2007); Susan D Franck, 'Development and Outcomes of Investment Treaty Arbitration' (2009) 50 *Harvard International Law Journal* 435.
[8] Gary B Born, *International Commercial Arbitration* 83–101 (3rd ed, Kluwer Law International 2021).
[9] ICC Court of Arbitration, *2023 Annual Report* 6–14 (ICC 2024); ICSID, *Caseload Statistics, Issue 2023-2*, 7–12 (ICSID 2023).

not merely between arbitration and litigation, but among diverse options including mediation, conciliation, expert determination, dispute boards, and hybrid mechanisms combining multiple approaches. The assumption that arbitration is the natural or inevitable endpoint of this spectrum is, in my view, overstated; it reflects the dominance of certain professional communities in shaping the field's self-understanding more than it reflects the actual needs of disputing parties.[10]

Negotiation remains foundational. Most international disputes resolve through direct party discussions without third-party intervention, preserving relationships and allowing creative solutions unavailable through adjudicative processes. When negotiation fails, mediation provides structured facilitation where a neutral mediator assists parties in reaching voluntary settlement, maintaining confidentiality and party control over outcomes. International commercial mediation has grown substantially, particularly in Asia-Pacific where cultural preferences for consensual resolution have driven the establishment of specialised institutions and the incorporation of mediation clauses into international contracts as standard practice.[11] Conciliation and expert determination occupy distinct functional niches, the former finding particular application in investment disputes where preserving the investor-state relationship retains value, the latter addressing technical disputes in construction, intellectual property, and accounting where parties prefer a binding decision from an industry specialist over a legal tribunal.[12]

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[10] Susan Blake et al., *A Practical Approach to Alternative Dispute Resolution* 1–30 (5th ed, Oxford University Press 2020).

[11] Nadja Alexander and Shouyu Chong, *The Singapore Convention on Mediation: A Commentary* 1–30 (Kluwer Law International 2019).

[12] John Kendall et al., *Expert Determination* 1–50 (5th ed, Sweet & Maxwell 2015).

Contemporary Innovations and Hybrid Mechanisms

Modern practice increasingly combines mechanisms to optimise dispute resolution. Dispute boards, particularly prevalent in construction and infrastructure projects, provide ongoing oversight throughout project execution with standing panels addressing issues as they arise, preventing escalation while maintaining project momentum. Med-arb and arb-med procedures attempt to capture the benefits of both mediation and arbitration, though the former raises genuine concerns about mediator impartiality that the literature has not fully resolved.[13] International courts, the ICJ, ITLOS, regional human rights courts, the WTO dispute settlement system, address specific categories of interstate and human rights disputes, though state consent requirements and enforcement constraints limit their reach compared to commercial arbitration's robust regime under the New York Convention.[14]

Choosing Among Mechanisms: Strategic Considerations

Parties selecting dispute resolution mechanisms confront strategic considerations that go well beyond procedural preference. Relationship preservation favours consensual mechanisms. Precedent-setting value may favour litigation. Speed and cost considerations vary significantly by mechanism and context. The more compelling point, however, is one the standard comparative literature tends to underemphasise: these choices are rarely made on equal terms. Sophisticated repeat players, major corporations, institutional investors, experienced states, navigate this landscape with resources and expertise that one-time participants simply do not

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[13] Robert Gaitskell, *Dispute Boards: Procedure and Practice* 1–40 (2nd ed, Sweet & Maxwell 2016).

[14] Shabtai Rosenne, *The Law and Practice of the International Court* 1–100 (4th ed, Martinus Nijhoff 2006).

have. Mandatory arbitration clauses frequently eliminate weaker parties' choice altogether. Acknowledging this does not require abandoning arbitration, but it does require designing mechanisms with that asymmetry in mind.[15] Enforceability concerns continue to favour arbitration over mediation for most international disputes, though the Singapore Convention on Mediation (2019) represents a genuine attempt to address that imbalance by creating an international enforcement framework for mediated settlement agreements.[16]

Future Trajectories: Technology, Access, and Legitimacy

Global dispute resolution faces transformative pressures reshaping traditional mechanisms. Online dispute resolution platforms handling high-volume, low-value cross-border disputes have expanded access to justice for consumers and small businesses previously excluded by the costs of traditional processes. Artificial intelligence applications, predictive case outcome analysis, automated document review, settlement range calculation, are augmenting human decision-makers in ways that raise serious questions about algorithmic transparency and the replication of existing biases at scale.[17] Access to justice concerns remain structurally unresolved: the costs of international arbitration and litigation continue to exclude individuals, small enterprises, and developing country governments from effective dispute resolution. Third-party funding partially addresses this, but introducing commercial funders into dispute

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[15] Jean R Sternlight, 'Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration' (1996) 74 *Washington University Law Quarterly* 637.

[16] United Nations Convention on International Settlement Agreements Resulting from Mediation, 20 December 2018, GA Res 73/198.

[17] Richard Susskind, *Online Courts and the Future of Justice* 1–50 (Oxford University Press 2019).

resolution raises its own concerns about funder influence over settlement decisions and the commodification of legal claims.[18]

Legitimacy questions particularly affect investor-state dispute settlement, where systemic reform debates, appellate mechanisms, permanent investment courts, increased transparency, reflect recognition that the current system's credibility is genuinely under strain. Environmental and human rights integration into dispute resolution reflects a broader shift: international disputes, particularly investment arbitrations involving extractive industries or infra-structure projects, affect communities and ecosystems whose interests the bilateral architecture of traditional dispute resolution was never designed to accommodate. These reform pressures is not that the system is being fine-tuned; it is that its foundational assumptions are being contested by actors who were not in the room when those assumptions were made.[19]

Contemporary global dispute resolution is defined by structural tensions that no procedural innovation fully resolves. Efficiency competes with thoroughness. Confidentiality faces mounting pressure from demands for transparency. Private ordering strains against public accountability. These tensions are not problems to be managed on the way to a stable endpoint; they are constitutive features of a field that serves genuinely competing interests and values.[20]

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[18] Maya Steinitz, 'Whose Claim Is This Anyway? Third-Party Litigation Funding' (2011) 95 *Minnesota Law Review* 1268.
[19] Anthea Roberts, 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration' (2018) 112 *American Journal of International Law* 410.
[20] Gary B Born, *International Commercial Arbitration* 83–101 (3rd ed, Kluwer Law International 2021).

1.3 Theoretical Foundations: Consent and Party Autonomy

Arbitration fundamentally rests on party consent. No tribunal possesses jurisdiction absent an agreement to arbitrate, a principle that distinguishes arbitration from litigation, where courts exercise compulsory jurisdiction over parties within their territorial reach. This consensual foundation provides arbitration's core legitimacy and explains its acceptance across diverse legal systems: parties voluntarily surrender access to courts in exchange for the procedural benefits arbitration offers.[21]

Consent enables genuine procedural flexibility. Parties may design procedures suited to their dispute, select arbitrators with relevant expertise, choose governing substantive law, determine the seat, and maintain confidentiality. From my perspective, this flexibility is arbitration's most underappreciated feature, not the speed or cost savings, which are frequently overstated, but the capacity to design a process that reflects the actual character of the relationship and the dispute. That said, the assumption that this flexibility is equally available to all contracting parties is overstated. Standardised arbitration clauses in contracts of adhesion mean that consumers, employees, and small businesses often lack any genuine negotiating power to refuse arbitration despite formally agreeing to it.[22] The consent is real in law. Whether it is real in practice is a different question.

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[21] Gary B Born, *International Commercial Arbitration* 209–250 (3rd ed, Kluwer Law International 2021).

[22] Jean R Sternlight, 'Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration' (1996) 74 *Washington University Law Quarterly* 637, 650–675.

In investor-state arbitration the consent problem runs deeper. Host states' treaty commitments made years or decades earlier bind successor governments to arbitrate disputes with foreign investors who were not themselves parties to the original treaty. This raises questions about continuing consent and democratic legitimacy that the field has not satisfactorily answered.[23] Mandatory arbitration requirements in certain jurisdictions compound the problem further, effectively eliminating alternatives while preserving the formal vocabulary of voluntariness.

Party Autonomy and Its Limits

Party autonomy, the freedom to structure dispute resolution according to the parties' own preferences, provides arbitration's core normative justification and distinguishes it from court litigation's predetermined procedures. The more substantial critique of party autonomy lies not in its conceptual structure, but in the implicit constraints that shape its operation and are insufficiently articulated in the literature. Courts refuse to enforce arbitration agreements or awards that violate fundamental public interests, competition law, anti-corruption rules, human rights. Mandatory procedural requirements such as minimal due process, arbitrator impartiality, and equal treatment constrain party autonomy even where parties have expressly agreed otherwise.[24] Increasingly, transparency requirements and third-party participation mechanisms in investment arbitration subordinate party preferences to public interest considerations, particularly where disputes involve governmental regulatory measures affecting health, the environment, or

[23] Gus Van Harten, *Investment Treaty Arbitration and Public Law* 45–70 (Oxford University Press 2007).

[24] Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* 60–80 (Kluwer Law International 1999).

public welfare. Whether this represents a welcome correction or a fundamental renegotiation of what arbitration is for remains, in my opinion, one of the field's genuinely open questions.

1.4 Contemporary Tensions and Legitimacy Debates

For investor-state arbitration, the theoretical foundations prove particularly contested. States cannot ordinarily be sued without consent under sovereign immunity principles, yet investment treaties grant foreign investors standing to pursue arbitration claims directly against host states. This raises fundamental questions about whether treaty commitments constitute valid consent binding future governments, or whether they represent an illegitimate constraint on democratic sovereignty, particularly when the treaties in question were concluded decades earlier under entirely different political and economic circumstances.[25] The better reading of this problem is not that investment arbitration is inherently illegitimate, but that its legitimacy cannot simply be assumed from the existence of a treaty. Consent given by one government does not automatically carry the democratic authority needed to bind its successors on matters of genuine public importance.

Critics argue that ISDS enables private parties to challenge public welfare regulations through unaccountable international tribunals, constraining states' capacity to address climate change, public health, financial stability, and social welfare. Damages awards and defence costs, often running into the tens or hundreds of millions of dollars, divert public funds from essential services while generating regulatory chill: the phenomenon whereby governments refrain from adopting legitimate regulations precisely because they fear the cost of

[25] Gus Van Harten, *Investment Treaty Arbitration and Public Law* 1–30 (Oxford University Press 2007).

defending them in arbitration.[26] The more compelling version of this critique goes beyond procedure. It questions whether investment arbitration's postwar justifications, protecting foreign capital in newly independent states with underdeveloped legal systems, retain any validity in a world where most states possess functional courts and established legal institutions. If the original rationale no longer holds, the normative case for maintaining special investor privileges requires reconstruction, not merely defence.

Legitimacy Concerns in Commercial Arbitration

Legitimacy concerns are not confined to investment arbitration. Commercial arbitration faces its own accumulating criticisms: power imbalances embedded in adhesion contracts, lack of precedent producing inconsistent decisions, confidentiality preventing public scrutiny of significant legal developments, limited judicial review allowing errors to stand uncorrected, and costs that exclude smaller claimants despite arbitration's reputation for efficiency. In my view, the field has been too slow to take these criticisms seriously, treating them as external complaints rather than internal obligations. Reform movements seeking greater transparency, stricter arbitrator ethics, genuine diversity in arbitrator appointments, and expedited procedures for smaller claims reflect a recognition (belated in some quarters) that legitimacy must be earned continuously, not inherited from historical success.[27]

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[26] Jonathan Bonnitcha, Lise Johnson and Michael Waibel, *The Political Economy of the Investment Treaty Regime* 1–30 (Oxford University Press 2017).

[27] M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* 1–50 (Cambridge University Press 2015).

Balancing Competing Values

Modern international arbitration balances competing values that cannot be fully reconciled: efficiency against fairness, party autonomy against public interest, consensual foundations against practical power imbalances, private commercial facilitation against disputes touching broader social, environmental, and human rights concerns. These tensions are not engineering problems awaiting technical solutions. They are expressions of genuine disagreement about what dispute resolution is for and whose interests it should prioritise. The challenge for arbitration's next chapter is preserving its genuine advantages (flexibility, expertise, enforceability) while addressing legitimacy deficits through reforms that respond seriously to critics without abandoning the consensual foundations that gave arbitration its distinctive character. Whether that balance is achievable, or whether the system's contradictions have become too deep to resolve through incremental adjustment, is a question this book returns to repeatedly.[28]

[28] Anthea Roberts, 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration' (2018) 112 *American Journal of International Law* 410.