Introduction

The most fundamental principle of international commercial arbitration is probably its contractual foundation. Parties must agree to submit a given dispute to arbitration. They may also largely design the arbitral process by agreement and, in certain legal systems, can agree on whether and how arbitral awards may be challenged.\(^1\) The most influential international instruments in the field, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards\(^2\) and the 1985 UNCITRAL Model Law on International Commercial Arbitration,\(^3\) assume the contractual foundation of international commercial arbitration by requiring the existence of an agreement to arbitrate\(^4\) and by granting the parties the freedom to design the arbitral process.\(^5\) In the words of the US Supreme Court, ‘arbitration is a creature of contract’.\(^6\)

While the parties have the power to design most of the arbitral process, the most important dimension of the contractual foundation of arbitration is the requirement that they agree to resolve the relevant dispute by way of arbitration.\(^7\) The parties must have consented to the principle of resolving their dispute outside of national courts. If they have not, there cannot be a valid arbitration, and any arbitral award rendered by a

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\(^{1}\) For instance, a number of legal systems allow, under more or less strict conditions, the parties to waive their right to a challenge of the arbitral award, see, e.g.: 1987 Swiss Law on Private International Law, Art. 192; French Code of Civil Procedure, Art. 1522. See also the power of the parties to waive their right to an appeal on a point of law in England: English Arbitration Act 1996, s. 69.


\(^{4}\) See New York Convention, Arts II and V(1)(a); UNCITRAL Model Law, Arts 8 and 34.

\(^{5}\) See New York Convention, Art. V(1)(d); UNCITRAL Model Law, Art. 19.


\(^{7}\) The literature on consent in international commercial arbitration is enormous. Three books were written in recent years, see: Karim Youssef, Consent in
tribunal which would have ignored it could be set aside in the country where it was made and would not be enforceable in other States. By contrast, if the parties agree to arbitrate their dispute, they may, but need not actually agree on the features of the arbitral process. If they only agreed on the mode of dispute resolution (arbitration), the applicable arbitration law will provide for a number of default rules which will apply in the absence of further agreement on issues such as the appointment of arbitrators or the procedural rules to be applied by the tribunal. This means that the vast majority of rules of arbitration law are default rules: parties may agree to displace them, but they are available and will apply in cases where the parties have not reached any agreement.

However, the most important rule of international commercial arbitration is not a default rule. The parties must have actually consented to resolve their dispute by way of arbitration. In the absence of such agreement, arbitration is not an option. The parties must therefore litigate in one of the national courts which would retain jurisdiction. Note that the parties could also have agreed to litigate in a given national court through a choice of court agreement. But even if they did not, the only available forum will be one or, in international disputes, typically several national courts. In international commercial dispute resolution, the default rule is therefore that parties should litigate and resolve their disputes before national courts.

In this book, I want to challenge this default rule and propose a radical change. Arbitration should become the default mode of resolution of international commercial disputes. In the absence of any agreement of the parties on dispute resolution, parties should have a right to arbitrate their dispute rather than to litigate before national courts. As will be developed below, the two essential reasons for such a shift in paradigm would be that arbitration is already the dominant mode of resolution of international commercial disputes, and that it is superior to litigation as it offers neutral adjudication.

The book builds on an article published in 2009 where I first explored the possibility and desirability of making arbitration the default mode of resolution of international commercial disputes. In recent years, the idea of default arbitration that I first developed in this article has been
endorsed by a number of scholars. In 2012, Professor Jack Graves elaborated on an idea that he had also first expressed in 2009\(^9\) and published an article asking whether it would be time for new default rule favouring arbitration over court litigation.\(^10\) In 2012, Professor Jacques de Werra made the same proposal in the context of international intellectual property disputes.\(^11\) Finally, in 2014, Gary Born, a leading practitioner of international commercial arbitration, proposed a model bilateral arbitration treaty which would establish default arbitration of private disputes between residents in the contracting States.\(^12\) Other scholars have also expressed favourable opinions\(^13\) or strong criticisms\(^14\) on the model of default arbitration that I proposed in 2009.

The purpose of this book is to continue the work I started in 2009 in two directions. First, I want to discuss the alternative models which have been proposed and, as the case may be, amend my own proposal. Secondly, I want to extend the scope of my work in several directions.

Before I do so, it is necessary to explain why I believe arbitration is the natural mode of resolution for international commercial disputes, and why, in this context, consent has ceased to be a meaningful requirement.

\[\text{I THE NATURAL MODE OF RESOLUTION FOR INTERNATIONAL BUSINESS DISPUTES}\]

It is commonplace to state that the essential features of arbitration make it the most suitable mode of dispute resolution for international business

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\(^12\) Gary Born, ‘BITS, BATS and Buts: Reflections on International Dispute Resolution’ (2014) 13 YAR.


disputes; neutrality and independence of the adjudicators, seriousness and flexibility of the arbitral process, higher prospects of enforceability of the decision in the majority of the world’s jurisdictions. It may also be that the development of international trade has led to a significant increase in the number of the cases resolved by way of arbitration. Even though it is almost impossible to assess the number of cases that are arbitrated each year, as the process is both confidential and decentralized, there is some anecdotal evidence that international commercial arbitration has exploded over the last fifty years. Most of the major international arbitral institutions report that their caseload constantly increases. Numerous specialists of international arbitration report that they have witnessed a tremendous development of the field, and even that ‘arbitration is now the principal method of resolving international disputes involving states, individuals, and corporations’. Even the US Supreme Court stated in 1985 that ‘as international trade has expanded in

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16 The advantages of the arbitral process are discussed in Part I and throughout the book.

17 Some scholars have nevertheless been able to propose estimates that 90 per cent of international contracts include an arbitration clause, see, e.g., Christopher R. Drahozal and Richard W. Naimark, in Christopher R. Drahozal and Richard W. Naimark (eds), Towards a Science of International Arbitration: Collected Empirical Research (Kluwer 2005) 59.

18 See, e.g., the reports of the International Chamber of Commerce or the London Court of International Arbitration. Other institutions such as the Singapore International Arbitration Centre can see their caseload decrease on a given year, but increase over a period of five or ten years. All these data are freely available on the sites of the relevant arbitral institution.

19 See, e.g.: Brower, Brower II & Sharpe (n 15) 416; Emmanuel Gaillard and John Savage (eds), Fouchard Gaillard Goldman on International Commercial Arbitration (Kluwer 1999) 1.

recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade.21

The suitability of the arbitral process to the resolution of international commercial disputes is not only attested by its features and the rise of arbitration. Several States have endorsed a pro-arbitration policy. In the US, the Supreme Court has insisted for several decades on the existence of an 'emphatic federal policy in favour of arbitral dispute resolution',22 and on 'a strong belief in the efficacy of arbitral procedures for the resolution of international commercial disputes'.23 In France, as will be discussed below,24 courts have applied an even more favourable policy than in the US, taking a variety of particularly liberal positions in favour of the arbitral process and making France, by and large, probably the most welcoming jurisdiction in the world for international arbitration.

The steps taken by many jurisdictions to liberalize their laws of arbitration certainly reflect to a certain extent a willingness, if not an eagerness to attract as much arbitration as possible within their borders in order to take advantage of the invisible benefits that may come with this activity. There is clear competition at the international level between several jurisdictions in this respect.25 Judges in leading arbitration venues are very much aware of the moves made in favour of arbitration by the courts of other jurisdictions, and try to be at the forefront of the liberalization of arbitration. Jurisdictions willing to enter into the market try to take radical steps to market themselves.26

Although the economic interest of the jurisdictions in seeking to attract arbitration may be an important factor in the evolution of many arbitration laws in the world, this book will argue that another critical reason for the development of arbitration is that it is perceived by many as the

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22 Id., at 631.
23 Id.
24 See below Chapter 4.
26 For instance, by allowing foreign parties to waive completely the possibility to challenge an award made on their territory, see William W. Park, ‘National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration’ (1989) 63 Tul. L. Rev. 647, 694 (discussing the Belgian and the Swiss experiences).
natural mode for the resolution of international commercial disputes, and rightly so. It is, however, paradoxical that a natural mode for the resolution of any disputes not be, if not mandatory, which is exceptional in a commercial context, at least a default solution. In other words, one wonders why, if arbitration is the natural mode for the resolution of international commercial disputes, it is not the default solution when the parties have not provided for the mode of resolution of their disputes and, in particular, have not included a jurisdiction clause in their contract.

From a US perspective, the situation appears even more paradoxical as the Supreme Court never misses an occasion to recall indeed ‘emphatically’ that arbitration is ‘favoured’ by US federal law. If it really were so, one would think that, in the absence of any clear statement of the parties to an international business transaction, US law would not provide for the jurisdiction of its courts, but would give assistance to the party willing to initiate arbitration proceedings. The truth of the matter is that the so-called pro-arbitration policy of the Supreme Court is essentially an anti-discrimination policy, providing for the enforcement of arbitration agreements when they exist, exactly as other agreements.

There are, however, jurisdictions which genuinely favour international arbitration, and where arbitration agreements are not enforced like other contracts, but more favourably. The most advanced on that path is France. French law has now reached the extreme position where arbitration agreements are deemed valid and enforceable in all circumstances, irrespective of the traditional requirements of the French law of contract, or indeed of any other law. As will be discussed below, the policy reason behind this solution is that the contractual nature of arbitration can be used strategically by defendants to delay and sometimes avoid the arbitral process, and that a clear rule providing for the enforceability of arbitration agreements in all circumstances should be an efficient tool against such moves. The contractual nature of international arbitration

28 Mitsubishi (n 21) 631.
29 See, e.g.: Buckeye Check Cashing, Inc. v Cardegna, 546 U.S. 440, 443 (2006); Hall Street Associate, LLC v Mattel Inc., 128 S.Ct. 1396 (2008). Once a core consent to arbitration has been found, however, a number of presumptions on the scope of consent kick in which are certainly favourable to arbitral jurisdiction, see Alan Scott Rau, ‘Arbitral Jurisdiction and the Dimensions of “Consent”’ (2008) 24 Arbitration Int’l 199.
30 See below Chapter 4.
has thus begun to appear to the French judiciary as an obstacle to the development of international arbitration.

It could seem astonishing that the most essential feature of arbitration could appear as an obstacle to its implementation. If arbitration was indeed perceived as one alternative mode of dispute resolution among many others, but by no means a superior or more appropriate one, if arbitration was perceived as being one option among many others, then its contractual foundation should appear as the most natural technique to allow the parties to choose it and to protect them from being dragged into an alternative derogatory mode of dispute resolution without seriously considering making that unusual, out of the ordinary, choice. That is why one way to interpret an evolution like the French one that in effect negates the contractual nature of arbitration is to see a critical shift in paradigm. Far from remaining an alternative mode of dispute resolution, the chosen mode (by the legal order) which does not really need to be chosen (by the parties) becomes the natural mode of dispute resolution. Because it does not appear anymore as an unusual, out of the ordinary, way to resolve international commercial disputes, there is much less need, if any, to protect the consent of the parties to resort to it, and indeed to actually find such consent. In case of doubt, it makes sense to consider that the parties would actually agree to the natural mode of dispute resolution of the community.

This book, however, is not about French law. It wants to address a more general and normative question. Should arbitration become the natural mode of resolution of international commercial disputes? Should it lose its contractual foundation and become the default mode of dispute resolution in international commercial matters? Is it a good idea? Is it feasible? The central issue of the book is not even primarily one of international arbitration, but rather one of international dispute resolution. As States are far from being able to offer a viable solution to resolve international private disputes in general and international commercial disputes in particular, has the private sector been able to develop an alternative solution? International commercial arbitration is now a service which has shown its efficacy. It could develop under the assumption that States would control it and that only parties willing to resort to it would. After fifty years of success, however, it may be time to ask whether that tool could be used to fulfil other functions. Has the time come for the private sector to take over the resolution of international commercial disputes and provide this service to the international business community in a more efficient way than States?

The thesis of this book is that arbitration should become the default mode of resolution of international commercial disputes. The book will
therefore essentially address two issues. First, it will discuss what I have identified as the most important arguments against this thesis, and respond to them. Then, it will present several models of non-consensual arbitration for international commercial disputes. Before presenting the structure of the book in more details, however, it is useful to emphasize why I believe that the requirement that parties consent to arbitration has ceased to perform any meaningful function.

II IS CONSENT IMPORTANT?

There are reasons why arbitration has a contractual foundation. Given the centrality of consent in this mode of dispute resolution, one would think that these reasons are very good, and that each could be turned into a decisive objection to my thesis. I have identified three possible explanations for the role of consent in arbitration.

Normalcy of Litigation

The first is that arbitration is an unusual mode of dispute resolution. The usual mode of dispute resolution is litigation. The typical way of presenting the operation of the legal system is that the law is made by a parliament (and, in common law jurisdictions, by courts), and that disputes are decided by courts. The consequence of this presentation is that litigants expect that their disputes will be decided by courts. Thus, the default rule should be that courts have jurisdiction to decide disputes unless the litigants agree otherwise. Such rule would ensure that the parties would never be surprised by whom the competent adjudicator would be. In the absence of any agreement on jurisdiction, the adjudicator would be a court, and this is what the litigants should expect. Were they to decide to go to arbitration, their adjudicator would be the one agreed by the parties, and there would again be no surprise.

The normalcy of litigation is certainly the most logical argument in favour of the contractual foundation of arbitration. However, it only works if the parties do perceive litigation as the normal mode of dispute resolution. I will not challenge the fact that, in most legal orders, litigation is clearly perceived as the normal mode of resolution for domestic disputes. This is because courts are a genuine alternative to arbitration. But this is not the case for international commercial disputes. As already noted, it is a common ground to state that arbitration has become the normal mode for the resolution of international commercial
disputes. For the leading practitioners of international dispute resolution, it is clear that the normalcy is not litigation, but arbitration.\footnote{Craig (n 20) 2.} As will be discussed below,\footnote{See below Chapter 1.} this is because, in practice, courts are not really an option, and arbitration is thus a de facto monopoly.\footnote{Jan Paulsson, *The Idea of Arbitration* (OUP 2013) 174; Jan Paulsson, ‘International Arbitration is not Arbitration’ (2008) Stockholm. Int. Arb. R. 1, 2.} As was also already noted, evidence of this reality may be found in the proportion of international commercial disputes which are arbitrated.

For international commercial disputes, therefore, there is no need to protect the expectations of the parties that their dispute will be resolved by a public court, because there is no such expectation. International commercial people know that arbitration rules. The first function of consent in arbitration has thus become irrelevant for international commercial disputes.

**Superiority of Litigation**

The second possible explanation for the role of consent in arbitration is that it is a less efficient mode of dispute resolution than litigation. Courts could be perceived as better adjudicators than arbitral tribunals. There could be a variety of reasons for that. It could be argued that courts are better because judges are better. Judges are public officials. They are trained lawyers. They are independent and impartial. It could also be argued that courts are better because the judicial process is better. Courts have more powers. They can summon witnesses or issue injunctions. Courts often explain well their decisions. And some critiques of arbitration may go as far as arguing that courts just simply decide disputes better, because arbitrators try to please all parties and are not ready to decide disputes merely on the merits of the case.

Quite clearly, if arbitration was such an inferior mode of dispute resolution, it should never be imposed on any party. The State should ensure that parties are well aware of the mistake they are making before allowing them to go to arbitration. The first guarantee should be consent. No party which would not have consented to go to arbitration should be forced to go. Indeed, mere consent could be regarded as too small a guarantee. So States could decide that the parties who would be willing to go to arbitration not only should consent, but should reiterate their consent at several stages. For instance, it could be imagined that parties who would have agreed to settle their disputes by way of arbitration in an
arbitration clause would need to reiterate their consent after the dispute has arisen.\(^\text{34}\) This would give them an additional chance to understand how inferior arbitration is, and decide to go to court.

The truth of the matter, however, is that, as far as international commercial disputes are concerned, litigation is not a superior mode of dispute resolution. Whether litigation is better than arbitration for the resolution of domestic disputes could be debated. But it cannot be seriously argued that it even compares to arbitration for international disputes. As one of the leading practitioners of international dispute resolution puts it, ‘whatever the interest in the question in a purely national setting, it is nonsense as soon as one considers the most basic of international contexts’.\(^\text{35}\) The reason why is simple: arbitration is the only way to ensure neutrality of adjudication.\(^\text{36}\) And indeed, as was already mentioned, States may be more or less cautious with regard to domestic arbitration, but they are most often very supportive of international commercial arbitration. The US has an emphatic pro-arbitration policy. France is even more favourable.\(^\text{37}\) And the international treaty which is the foundation of the modern law of arbitration, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, is one of the most successful international treaties of all time. It seems clear, therefore, that most States regard arbitration as a suitable, and often the most suitable, mode of resolution of international commercial disputes.

It cannot be seriously argued that arbitration is an inferior mode of dispute resolution in an international context. Quite to the contrary, it is probably the most suitable one in that context. There is therefore no special need to protect the parties from being dragged into arbitration. Consent is thus unnecessary for that purpose as well.

\(^{34}\) This was the law of France until 2001 except in commercial contracts. Consent expressed in arbitration clauses (\textit{clauses compromissaires}) had to be confirmed after the dispute had arisen in a new agreement (\textit{compromis}). This is one of the reasons which explain the practice of terms of reference, see Serge Guinchard, Cécile Chainais and Frédérique Ferrand, \textit{Procédure civile} (Dalloz 2012) 1449.

\(^{35}\) Paulsson (n 33) 1.

\(^{36}\) The advantages and disadvantages of arbitration over litigation are discussed below in Chapter 1.

\(^{37}\) See below Chapter 4.
Danger of Arbitration for Certain Categories of Parties

The third possible explanation for the role of consent in arbitration is that some parties should be specially protected from resorting to this mode of dispute resolution. Reasons for affording greater protection vary, so an important distinction should be drawn.

The first group of parties who arguably deserve greater protection are parties who are weaker from an economic standpoint. The traditional example is that of employees or consumers willing to initiate proceedings against a corporate defendant. In such cases, the mere fact that the plaintiff would have to pay the fees of one or several arbitrators is arguably an obstacle which may often turn out to be so big that he will eventually drop his case.\(^{38}\)

In such cases, consent is an important safeguard. It gives the opportunity to weaker parties to refuse to go to arbitration when it is against their interests. The problem, however, is that it is not a sufficient safeguard, as the weakness of those parties might also result in a low bargaining power, and thus the inability to genuinely discuss the terms of the contract. In other words, employees or consumers do have the theoretical possibility of refusing to conclude any contract including an arbitration clause, but in real life they do not really have a choice, as they need the job or the good that they want to purchase. This is the reason why a very common approach has been to actually prohibit arbitration clauses in employment or consumer contracts.\(^{39}\) Alternatively, arbitration clauses can be allowed for the sole benefit of the weaker party.\(^{40}\)

The need for protection of weaker parties is not lower in an international setting. Quite to the contrary, it is arguably higher. The resolution of international disputes typically costs more. The parties typically use different languages, so one of them will typically incur translation costs. Additional issues arise such as international jurisdiction or choice of law, which must be resolved and thus results in the provision of

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\(^{38}\) But there could be other reasons: in some legal orders, arbitration could be a far more expensive mode of dispute resolution than litigation (see below Chapter 1). Weaker parties would thus not only be at a disadvantage because they would have to pay the fees of the arbitrators, but also because their defence would cost more.

\(^{39}\) See the survey of national arbitration laws of Born (n 15) 1008.

\(^{40}\) This is the case of France in employment matters, where only employees may rely on arbitration clauses included in their employment contract, see French Supreme Court for civil and criminal matters (Cour de cassation), 30 November 2011, Deloitte Conseil v Serant (2012) Rev. Arb. 332.
additional services by lawyers. Parties and witnesses may have to travel farther. This is the reason why I do not advocate to shift to a model of non-consensual arbitration for disputes involving weaker parties. My thesis is that such an evolution only makes sense for those parties who have equal economic and bargaining power, and who thus do not need special protection. I therefore limit the scope of my inquiry and of my proposal to commercial people. True, some businesses are bigger and more powerful than others, but I think that it is fair to say that differences are not significant enough to put them in a situation comparable with that of employees and consumers. Certainly, while many arbitration laws distinguish between consumers/workers and other parties, and offer greater protection to the latter, very few, if any, offer any additional protection to businesses which conclude contracts with more powerful commercial partners.

Another category of parties is often considered to deserve special protection although its members actually often enjoy strong economic power. These are States and public bodies. The rationale for protecting them from arbitration is that they are in charge of the public interest. The disputes they are involved in thus often involve the public interest as well. For that reason, it might be argued that they should only be decided by public courts.41

As for weaker parties, the need for protecting the public interest had led States to offer protections of different kinds. In some jurisdictions, States and public bodies were simply forbidden to resort to arbitration. In many others, however, it was admitted that States might resort to arbitration, but the requirement of consent was considerably strengthened, in particular by requiring that several State organs participate in the expression of the consent of the State.42 Therefore, the requirement of consent was used again for the purpose of protecting a special category of parties which was found to deserve it.

The concern of the protection of the public interest does not change in an international context. In principle, therefore, I do not argue that the function of protecting States does not need to be performed. Consent remains a meaningful requirement for that purpose. I therefore exclude States and public bodies from the scope of my proposal. States should remain free to decide for each particular case whether it is incompatible with the public interest to resort to arbitration to resolve the disputes they

41 The argument is even stronger for those jurisdictions which have established special courts for deciding public disputes, as is often the case in civil law jurisdictions.
42 See the examples given in Gaillard and Savage (n 19) 313 (Iran, Syria).
are involved in. That being said, it could also easily be argued that the rationale for excluding States from my model of non-consensual arbitration is weak. First, States and public bodies are not only engaged in public activities. They are also involved in commercial activities, and are indeed important actors of international trade. One could thus easily think of an alternative to my exclusion, which would extend my model to States and public bodies for disputes arising out of their private and commercial activities. An interesting parallel could be drawn with sovereign immunities, which is another rule aiming at protecting States. The scope of the jurisdictional immunities of States has been reduced in many jurisdictions to disputes arising out of acts of public nature. Acts arising out of commercial transactions, by contrast, typically fall out of the scope of jurisdictional immunities. Secondly, there is an important trend in the case law of international arbitral tribunals and indeed in some laws of international arbitration to ignore additional requirements laid down for the purpose of protecting the consent of States and public bodies. Such requirements are perceived as technicalities which are unfair to the contracting parties of public bodies. This means that, in practice, the special position of States and the need to protect the public interest is already often ignored. States are thus treated as normal actors of international trade. There might therefore be a case for including them fully in my model. Thirdly, it must be recognized that excluding States from my model would be somewhat paradoxical given that, for the time being, the only field of the law where a model of non-consensual arbitration is already operating is foreign investment law, and precisely concerns disputes involving States. As will be explained in Chapter 2, however, the reason why this regime of non-consensual arbitration has developed is that protection had to be offered to private investors in order

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46 See below Chapter 2.
to convince them to invest abroad. The foundation of this evolution is thus quite different from the foundation of my proposal.

III STRUCTURE OF THE BOOK

This book is structured as follows. In Parts I and II, I make two preliminary points. First, in Part I, I explain why I believe arbitration should be promoted. I argue that, in an international context, arbitration is a more suitable mode of dispute resolution, and that extending its scope would actually improve the settlement of international commercial disputes.

Then, in Part II, I show that, although the contractual foundation of international arbitration has never been challenged, the thesis of this book is arguably the final stage of a process which has been going on for decades. For years, the decline of consent as the foundation of arbitration has been noticed by scholars and practitioners. Foreign investment arbitration is obviously one of the most salient examples, but arguably quite a few national legal orders have begun to loosen consent as a requirement for private commercial arbitration as well. I present several of these experiences in order to show that the thesis of this book might actually not be revolutionary, but rather the next step of the development of international dispute resolution.

In Parts III and IV, I discuss what I have identified as the most important arguments against my thesis, and respond to them. In Chapter 5, I first address the critical issue of the legitimacy of international arbitrators. In the traditional model of voluntary arbitration, the legitimacy of arbitrators flows from the agreement of the parties. By agreeing to have their dispute settled by way of arbitration, the parties have not only empowered the arbitrators, but also abided by the power that they have conferred on them. In the model that I propose, however, arbitration loses its contractual foundation. Would arbitrators also lose all legitimacy? In the absence of any acceptance of the parties, can adjudicatory power be conferred on private individuals? The comparative legitimacy of courts and of arbitrators to settle international commercial disputes is the first issue that I discuss in Part III. I find that the legitimacy of arbitrators is not lower than the legitimacy of courts but is actually, on many accounts, higher.

I then turn to the more traditional critiques of arbitration. Legal scholars have long debated the desirability of private adjudication. Many of them have concluded that its costs outweigh its benefits, and that it is thus undesirable. In Chapter 6, I argue that this critique assumes certain
features of the arbitral process which are not necessary. I present recent developments in specialized fields of international arbitration and argue that they indeed show that the costs of private adjudication have been overstated.

In Part IV, I explore whether such an evolution would face important doctrinal obstacles. Obviously, the proposed model could only be adopted by changing the existing law. It could be, however, that some legal doctrines would constrain lawmakers and prevent them from implementing it. In most jurisdictions, such doctrines would be constitutional in nature. For instance, there could be constitutional rights of access to courts. The issue would then arise as to whether non-consensual arbitration would jeopardize such rights. Constitutions could also provide for the jurisdiction of courts, and prevent any stripping of such jurisdiction. Another issue would then be whether non-consensual arbitration would amount to such jurisdiction stripping.

Building on the conclusions reached in the previous parts, I propose three models of non-consensual arbitration in Part V. First, I propose my model of non-consensual arbitration for international commercial disputes in Chapter 9. Parties would be entitled to resort to arbitration in the absence of any arbitration agreement. Either the plaintiff or the defendant could make the decision to arbitrate, and the other party would have to abide by such a decision. In case that other party would not want to freely participate to the arbitral proceedings, the party willing to go to arbitration could seek enforcement of its right before a court. The availability of the model would be limited. As I believe that its most important rationale would be to ensure neutrality of adjudication, I propose that it apply only to disputes involving parties domiciled in different jurisdictions. I also discuss the grounds for review of the resulting awards, the likely unavailability of the New York Convention, confidentiality, the applicable arbitration regime and the issue of coordination with jurisdictions which would not implement a similar model.

In Chapters 10 and 11, I explore whether a model of non-consensual arbitration could serve other purposes and present two variants of the main model. In Chapter 10, I explore whether arbitration could be contemplated as an alternative forum in the context of the common law doctrine of forum non conveniens. I propose that parties sued in common law courts be entitled to show that an arbitral tribunal would be a clearly more appropriate adjudicator than the forum, and that, if satisfied, the court should compel arbitration. In Chapter 11, I present a model of default arbitration aiming at reducing the caseload of the public court system. Contrary to the two other models, the goal would not be to improve the resolution of international disputes, but rather to alleviate the
burden of the civil justice system by outsourcing a range of disputes to arbitration. The scope of the model would thus not be limited to international cases and, as the issue would not be the bias of local courts, a different regime could be considered, including reviewing arbitral awards on points of law.

Finally, in Part VI, I explore how my model could be implemented. I argue that, while the conclusion of a multilateral treaty is highly unlikely, there are incentives which could lead States to unilaterally implement the model. One such incentive would be the desire to market one’s jurisdiction as arbitration-friendly in order to attract the economic benefits of international commercial arbitration. Another incentive could be reciprocity. As the evolution of foreign investment law has shown, it is not unrealistic to expect States to conclude bilateral treaties offering fairer adjudication to each other’s nationals, and then to see the trend spread through most favoured nation clauses. I also explore whether the success of international arbitration could mean that it has already become a trade usage in many industries, and should thus already apply irrespective of any express agreement of the parties.