1. The most suitable mode of dispute resolution

The essential aim of this book is to discuss whether a non-contractual model of arbitration is theoretically sound. Before doing so, however, I would like to show that this discussion is not only academic. Arbitration has important advantages which make it a better mode for resolving international commercial disputes. The proposed model would thus actually improve international dispute resolution.

Although arbitration has several advantages, one of them is critical and might explain alone why it has become the dominant mode of resolution of international disputes: it offers a fairer process. But arbitration also saves public resources and enables the parties to design the process which fits best their interests.

I A CRITICAL ADVANTAGE: ENHANCING FAIRNESS

The most important advantage that arbitration offers is a fairer process. The arbitral process is fairer in two ways. First and foremost, the adjudicator is more neutral. Second, the parties are put on a more equal footing.

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A) Neutrality

The reason which probably best explains the success of international commercial arbitration is the fear of the home-town advantage. Whether arbitration is better than litigation can be debated in a domestic context. But, for the resolution of international disputes, one single feature of arbitration makes the whole difference. As a leading arbitration practitioner and scholar has put it:

That is why the debate about the supposed advantages of arbitration, whether they are accepted or denied, must stop at the border if it is to remain at all coherent. Is it quicker? Is it less expensive? Is it less disruptive because it is confidential and informal? (...)

In international arbitration, all these elements of evaluation fade into relative insignificance when contrasted with a criterion that is dominant here although it is, by definition, irrelevant in the national context. (...) That unique criterion is neutrality.

Courts are not perceived as neutral when they decide disputes between locals and foreigners. It is well known that, unfortunately, corruption is rampant in many jurisdictions of the world. It is also well known that independence is not a luxury that many judiciaries can afford. In such cases, it is not even clear that the mode of dispute resolution offered by the relevant national courts may be properly termed adjudication. The game has other rules, that the parties are free to follow if they so wish.
But if they would rather have a neutral and independent third party decide their dispute, an alternative must be found. There is no international commercial court.\(^6\) Arbitration seems to be the only option. Of course, there are quite a few jurisdictions where the judiciary is a truly independent power. As a result, it could be argued that another option is to litigate before the courts of those jurisdictions.\(^7\) However, the superiority of those courts, in this or in any other respect, would never be accepted by the parties originating from jurisdictions where courts are not to be trusted. Moreover, judges in great democracies may be independent, but still be capable of anti-foreigner bias. If even a few instances of actual bias are made public, this will be enough to create a fear among all foreigners. Such cases will exist in most legal orders.\(^8\) Sometimes, there will be less anecdotal evidence, with the same devastating consequences.\(^9\) The only workable solution is thus to find an alternative to national courts altogether.\(^10\) This alternative is arbitration.

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\(^6\) In some specialized fields such as investment law, there have been calls (see, e.g., Susan D. Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’ (2005) 73 Fordham L. Rev. 1521, 1617) and indeed a recent proposal (by the European Union in the context of the negotiation of the Transatlantic Trade and Investment Partnership, see Stephen Schwebel, ‘The outlook for the continued vitality, or lack thereof, of investor–State arbitration’ (2016) 32 Arb. Int’l 1) for establishing one. For the time being not only is there no prospect of the establishment of such a court for commercial disputes, but it is unclear whether many States would want to commit to its jurisdiction. By contrast, the proposed model would not require the establishment of any new institution. There are already many international arbitrators who could serve on the tribunals which would need to be constituted.

\(^7\) See Dammann and Hansmann (n 4).


\(^9\) See, e.g., for the US, the survey finding that foreigners lose more often in American courts than they win (Utpal Bhattacharya, Neal Galpin and Bruce Haslem, ‘The Home Court Advantage in International Corporate Litigation’ (2007) 50 J. Law & Econ. 625). See, however, Kevin M. Clermont and Theodore Eisenberg, ‘Xenophobia in American Courts’ (1995–96) 109 Harv. L.R. 1120 (survey showing the opposite).

\(^10\) Actually, one could conceive that a given jurisdiction would agree to offer to the world its courts as neutral and independent adjudicators for disputes unrelated to any of the members of its community. The reason why most
As a private, non-national mode of dispute resolution, it does not raise any of the concerns discussed so far. An arbitral tribunal is not a public entity subject to the influence of any State. It will typically be composed of private individuals who are nationals of different States.

Moreover, it is also likely that arbitral tribunals are typically more neutral culturally. Most courts are composed of individuals whose training, background and experience are overwhelmingly national. Even if they are willing to be open to foreign customs, practices and realities, they are likely to see the world through their cultural lenses. There will be many occasions to misunderstand the facts and assume that what was not discussed is not different from what they have personally experienced.11 By contrast, arbitrators sitting in an international panel are constantly reminded of the international nature of the dispute and the likelihood that the experiences of the other actors of the process are essentially different. An international panel is therefore likely to be more open minded and thus to understand more often than not the context of the disputes and the facts.

The private nature of arbitral tribunals, however, raises the concern of another kind of bias. As the parties typically each appoint one arbitrator, two out of the three members of the tribunal can be suspected of wishing to favour the party who appointed them in order to be reappointed.12 Most arbitration specialists, in particular experienced arbitrators, claim that this rarely happens.13 Certainly, virtually all arbitration regimes

jurisdictions would actually not accept it is that the service would be funded by local tax payers. However, the benefits for the legal profession could be so great that it would become beneficial. In recent years, a number of jurisdictions (Dubai, Singapore) have established international commercial courts for that purpose. Time will tell whether such courts can become genuine competitors of international commercial arbitration. What seems clear, however, is that they could not possibly become a default solution for the resolution of international commercial disputes. Not only does it seem unrealistic to expect States to transfer their jurisdiction to the courts of another sovereign State, but it is unclear how they could agree on one of them.


12 While it seems clear that arbitrators wish to be reappointed, the actual reason may vary a great deal. For some, it will be the prospect of receiving additional fees. However, specialists of international arbitration also act as counsels, and this typically attracts higher fees (see Jan Paulsson, 'Ethics, Elitism, Eligibility' (1997) 14 J. Int’l Arb. 13 (hereinafter 'Paulsson, Ethics')). Their incentive seems to be to maintain or to enhance their reputation.

13 See, e.g., Lowenfeld (n 2) 101.
provide that arbitrators are under a duty to be impartial. The third arbitrator, who will often be the president of the tribunal, will have no incentive to be partial, and it may then be that his presence makes it difficult for the party-appointed arbitrators to favour too zealously the interests of the party who nominated them. Indeed, it is interesting to note that arbitral awards are often unanimous. However, such a hidden agenda of clientelism cannot be excluded. Yet, it must be emphasized that such a problem does not concern the entire tribunal, but one of its members. The third arbitrator, who will not have been appointed by one of the parties, will have no such bias. The other party-appointed arbitrator will either be impartial, or be biased towards the other party, thus cancelling the bias of the first party-appointed arbitrator. A world of unbiased arbitrators would be a better world, but a world of biased arbitrators sitting in unbiased tribunals is already a better world than the world of national courts. Certainly, parties resorting to international arbitration continue to draft arbitration clauses allowing them to each appoint one of the members of the tribunal. They rarely choose to confer to a third party the power to appoint all the members of the tribunal. While this may above all show that they want to keep some control over the experience and the professionalism of the tribunal, it also suggests that the incentives of individual arbitrators are not important causes for concern.

B) Equality

Arbitration is also a fairer process because it offers procedural equality. Most arbitral regimes expressly provide that arbitrators are under the obligation to treat the parties fairly and equally. More importantly, most national laws of international arbitration allow the challenge of arbitral awards made in violation of procedural fairness. As awards cannot be

15 See Lowenfeld (n 2) 82 (reporting his experience where the opposing party arbitrator seemed too zealous in defence of the party who nominated him).
16 See Paulsson, Ethics (n 12) 14.
17 See, e.g.: English Arbitration Act 1996, s. 33; Swiss 1987 Law of International Private Law, Art. 182(3). The obligation is also provided by numerous arbitration rules, see, e.g.: 2012 ICC Rules of Arbitration, Art. 22(4); 2014 LCIA Rules, Art. 14(4); 1976 UNCITRAL Arbitration Rules, Art. 15.
challenged on the merits in most jurisdictions, this ground has become very important in practice. Experienced arbitrators know that losing parties may rely on any procedural unfairness to try to challenge the award, as typically they will have no other ground to challenge it. As a consequence, experienced arbitrators take procedural fairness extremely seriously. Thus, the practice has developed to offer the most extensive procedural equality to the parties. Each party is given the very same number of days to prepare at each stage of the procedure. If one party is late by a few days, the other party knows that the tribunal will award it the exact same amount of extra time if it so requests. Parties are also awarded the same time to argue their case, sometimes to the minute. This may seem, and indeed is, quite formal, but it prevents parties from even attempting to argue that they were not on an absolute equal footing in the procedure. A consequence of the emphasis put on procedural equality is that national practices which do not comport perfectly with procedural equality are banned.19

II TWO OTHER ADVANTAGES

In international disputes, the most important advantage of arbitration is to offer a fairer adjudicatory process. But arbitration also has two other important advantages, which I present below. It saves public resources, and it offers a process which is more flexible.20

19 For instance, the English practice of not addressing legal issues in written pleadings (‘skeleton of arguments’) and waiting for the day before the hearing to send the list of the cases relied upon, or the French practice of giving to the adjudicator, but not the other party, oral pleadings notes (dossier de plaidoirie) at the end of the oral argument, see Emmanuel Gaillard and John Savage (eds), Fouchard Gaillard Goldman on International Commercial Arbitration (Kluwer 1999) 692 and 707.

20 In any other survey of the comparative advantages of arbitration and litigation, two additional advantages would typically be discussed: confidentiality and the higher prospects of international enforcement of arbitral awards. However, the model that I propose would not be confidential and would be unlikely to benefit from the 1958 New York Convention (see below Chapter 9, Sections III and IV). I thus do not discuss them as they would not influence my model. I do not discuss either some perceived advantages which are now hotly disputed such as the cost and the speed of the process, or the reduction of forum shopping. The practice of modern international arbitration has shown that it is unwise to generalize in the respect of cost and speed (see, e.g.: Born (n 1) 66; Lowenfeld (n 2) 3), and that arbitration has been able to generate a good deal of parallel
A) Saving Public Resources

The issue of the comparative cost of arbitration and litigation has traditionally been addressed from the perspective of the litigants. This is because the goal of the authors who discuss the comparative advantages of arbitration and litigation is to assess whether the parties should decide to resolve their dispute by way of arbitration, or not. Therefore, they logically take their perspective. However, it is probably unwise to generalize in this respect. Arbitration can be cheaper or more expensive, depending on a variety of factors.²¹

If one takes the perspective of the State, however, the issue becomes very different. Arbitration is a private mode of dispute resolution, which is entirely funded by the litigants. As a result, it obviously saves public resources. Arbitral tribunals decide disputes which would have otherwise been decided by courts. In many jurisdictions, public resources are scarce. Policies which entail public resources savings are therefore likely to be particularly appreciated by policymakers. Diminishing the docket of courts has certainly been a critical factor in the promotion of alternative dispute resolution in many legal orders.²² It demonstrates that many policymakers would regard this consequence of the proposed model as critically important.

Yet, the desirability of a policy cannot be assessed by examining its direct effect on public resources only. If such policy also entails costs, a cost–benefit analysis must be conducted in order to determine whether the benefits outweigh the costs. As far as the proposed model is concerned, two series of costs can be identified. First, the private resolution of disputes shifts costs from the State to the litigants. The litigation costs of the parties increase. Secondly, courts serve functions other than dispute resolution that private adjudicators may not serve, or at least not as well. The proposed model may then entail societal costs. The proposed model will only be beneficial if the benefits outweigh the costs. I conduct this cost–benefit analysis in Part IV, and conclude the costs entailed by the proposed model are limited and that it is thus clearly beneficial. At this stage of the book, I would like to make a more limited point. Irrespective of my findings and indeed of critiques of alternative dispute resolution, arbitration has been promoted in many legal orders for litigation (see, e.g., Linda Silberman, ‘International Arbitration: Comments from a Critic’ (2002) 13 Am. Rev. Int’l Arb. 9, 10).

²¹ Born (n 1) 66.
several decades. This indicates that either the policymakers have conducted a cost–benefit analysis and have also concluded that the benefits outweigh the costs, or that saving public resources is so important that they would rather ignore or bear the costs entailed by private dispute resolution than stop promoting alternative dispute resolution. In any case, for those policymakers, saving public resources will be perceived as an important advantage of the proposed model.

This advantage will be even bigger in legal orders where public adjudication is more expensive. The costs of public adjudication are higher in some legal orders than in others. This may be so for a variety of reasons. Judges can obviously be paid different salaries. A different number of judges and staff may be involved in the settlement of each dispute. The civil procedure of each jurisdiction may lead judges to spend more or less time on each case. This last difference may be the one which makes the biggest difference. In the common law world, trials last several weeks. Judges then draft lengthy decisions. In the civil law world, even in important commercial cases, hearings can last less than an hour. Judges will then typically draft much shorter decisions. Unsurprisingly, judges in the common law tradition typically handle significantly less cases than judges in the civil law tradition. It follows that, in those jurisdictions where adjudication is more expensive, saving public resources is likely to be a very powerful argument. In those jurisdictions where adjudication costs less, it will be a less powerful argument. But arbitration will then be attractive in a way unknown to more expensive jurisdictions: allowing the parties to design the arbitral process in order to increase the resources dedicated to the settlement of the dispute, and improve the adjudicatory process.

24 Id.
25 A striking and telling difference is the number of cases handled by Supreme Courts. The French Supreme Court for private and criminal matters (Cour de cassation) is composed of more than a hundred judges who handle more than 20,000 cases a year. Common law Supreme Courts typically handle a hundred or less cases per year.
B) Designing Process

The second advantage that arbitration offers is procedural flexibility. The parties have the power to design the arbitral process. They can determine the procedural rules which will be applicable during the arbitration. This procedural flexibility can be used in different ways. The parties may shape a process which is only slightly different from the process of the court which would have decided the dispute in the absence of an agreement to arbitrate. But the parties may also wish to shape a process which will be very different from the alternate judicial process, so much so that it may become almost as important an advantage as the fairness of arbitral process.

The clearest example is how parties from jurisdictions where less public resources are invested in the judicial process may wish to design a more costly mode of dispute resolution. For instance, the parties may wish to present their case orally for more than a few minutes. They may wish to seek assurance that the adjudicators will carefully read and dedicate as much time as will be necessary to the study of their written submissions. They may wish to have the adjudicators hear witnesses. If arbitration gives the parties the possibility to enjoy a process which will be different on so many accounts, it not only gives them flexibility but also gives them an entirely different commercial justice: more serious, more accurate, more satisfying.

Let us take an example. Here is a French major company. It has a commercial dispute with a foreign company. If the case is litigated in France, it will go before a French commercial court. French commercial courts are staffed by members of the business community, who serve part-time as judges. There is no requirement that they have a legal training. Hearings before French commercial courts typically last less than an hour. Witnesses are virtually never heard by the court. In any case, a French rule of evidence makes evidence originating from any of the parties inadmissible, which means that no employee of any of the two parties can testify. This situation is quite different from an American or an English approach. This is the kind of arbitral process which can be designed.

26 The power to determine the applicable procedural rules is provided by virtually all arbitration laws and rules, see, e.g.: English Arbitration Act 1996, s. 34; French Code of Civil Procedure, Art. 1509; Swiss 1987 Law of Private International Law, Art. 182(2); 2012 ICC Rules of Arbitration, Art. 19.


28 Hazard (n 23) at 1673.

companies may validly testify.\textsuperscript{30} If this company goes to arbitration, it will be able to appoint a prestigious jurist as an arbitrator, and so will probably its opponent as well. The hearing will last for several days. Witnesses will be heard, in particular employees who negotiated the contract for each company. The parties will expect the arbitrators to study carefully all the written submissions and the evidence submitted. It will cost more to the parties, but the French company will clearly see what it is getting for its money. The arbitral process will not be marginally different; the arbitral process will be essentially different.\textsuperscript{31}

Arbitration may enable the parties who can afford it to avoid the poor process that available courts offer, and to benefit from a better justice. Critics may argue that this creates one type of justice for the poor, and another type of justice for the rich. Further, it could be argued that offering an alternative to those who can afford it diminishes their incentives to work at improving the civil procedure of their country of origin. These criticisms may be fair. However, prohibiting arbitration is not an option, as a neutral forum is needed to decide international disputes. For some commercial parties, resorting to arbitration also means obtaining a better justice. Good for them.

III DISADVANTAGES

Arbitration does not only have advantages. It also has disadvantages. Some of them are undisputed, and acknowledged even by arbitration’s advocates. For instance, it is admitted by all that arbitral tribunals lack some of the remedies which are available in litigation, such as the

\textsuperscript{30} See, e.g., \textit{X v SNCF}, Cour de cassation, 2 April 1996, case no. 93-17181.

\textsuperscript{31} The flexibility of the arbitral process may offer other opportunities to shape an essentially different process. In jurisdictions where the judicial process is costly, the parties may wish to give up some of the procedural guarantees that it offers to make it cheaper. For instance, American parties may wish to waive some of the guarantees afforded by American civil procedure in order to decrease the cost of the adjudicatory process, see, e.g.: J. Stewart McClendon and Rosabel E. Everard Goodman, \textit{International Commercial Arbitration in New York} (World Arbitration Institute 1986) 4. A survey conducted among participants to international arbitrations under the aegis of the American Arbitration Association shows that often cited reasons for using arbitration were to save money and to limit discovery. By contrast, the fact that the dispute was international was not cited often. See Richard W. Naimark and Stephanie E. Keer, ‘International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People’ (2002) 30 Int’l Bus. Lawyer 203.
contempt power, and that the contractual foundation of arbitration is an obstacle to the efficiency of the arbitral process. Yet, nobody has ever argued that these disadvantages outweigh the advantages of arbitration.

The critics of arbitration have a different point of view. They strongly criticize arbitration, on many accounts. They argue that arbitrators lack democratic legitimacy, that their decisions are not subject to appellate review, that the decline of adjudication entails important social costs. These critiques are severe. Logically, they lead their authors to conclude that the disadvantages of arbitration are so high that they outweigh the advantages. It is thus necessary and important to address these issues. I will not do it now, however, but will do so in Parts III and IV. This is because these critiques would not merely cancel the advantages of arbitration that I have articulated. In the model that I propose, the problems that these critics identify would not only remain, but actually get more acute. Therefore, they are likely to become more specifically critiques of the proposed model.

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32 See, e.g.: Blackaby, Partasides, Redfern and Hunter (n 1) 33; Gaillard and Savage (n 19) 697. Note that this last disadvantage would disappear in a non-contractual model of arbitration such as the one that I propose, see below Chapter 9, Section V.

33 For instance, the issue of the lack of legitimacy of arbitrators, which is already an issue for those critics in the traditional model of consensual arbitration, would become dramatic in a model where the parties would not even agree to go to arbitration, see below Chapter 5.