

ALTERNATIVE DISPUTE RESOLUTION

Practice & Governance
for States



CLDP

COMMERCIAL LAW DEVELOPMENT PROGRAM

C O N T E N T S

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Foreword



Disputes can seem like an inevitable part of global commerce. Along with markets' ordinary ebbs and flows, businesses working across borders, cultures, and legal systems encounter novel issues that even sophisticated commercial parties do not anticipate. But disputes need not mark the end of otherwise valuable commercial relationships. Instead, with adequate procedural guardrails and a shared commitment to orderly operations, dispute resolution can act as a reaffirmation of parties' relationships, a validation of underlying value, and even a transformation to meet shifting needs.

Dispute resolution processes are therefore integral to effective long-term business relationships. Courts play a vital role in upholding the rule of law and safeguarding rights, but litigation alone is sometimes insufficient to meet the volume, speed, cost-effectiveness and specialization that may be required in modern disputes. Alternative dispute resolution (ADR) processes, including mediation and arbitration, have become essential complements to judicial systems, so much so that it is hardly fair to label them as "alternative" anymore. In many cases, mediation and arbitration are the *preferred* forms of dispute resolution. Properly designed, they relieve pressure on courts while preserving access to judicial remedies where authoritative adjudication is necessary. Driven by party autonomy and the simple but powerful idea that individual parties can resolve their own disputes, the limits of ADR go as far as the parties' creativity, dedication, and needs.

States, however, play an important role in establishing and preserving the legal baselines for managing disputes – both in and out of court. Recognizing the value of alternative dispute resolution generally requires practical follow-up: supportive

legislative acts, judicial practice, and executive implementations, which together form the hallmarks of good governance upholding parties' ability to resolve disputes.

This handbook, drafted by the U.S. Department of Commerce's Commercial Law Development Program (CLDP) in conjunction with the U.S. Department of State, supports both ADR users and State-level policymakers in strengthening dispute resolution frameworks through ADR. Its premise is practical: efficient, effective, and predictable dispute resolution advances commerce, economic development, and public trust. For day-to-day users of ADR, this handbook provides a guide to critical considerations at play in mediation and commercial and investment arbitrations. For policymakers, it offers guidance and expertise relevant to advancing the use of ADR through court-annexed ADR, private ADR centers, and incorporation into domestic executive regimes.

This handbook does not prescribe a single, one-size-fits-all model, since jurisdictions differ significantly in legal traditions, institutional capacity, and policy priorities. However, it does present an overview of the core international best practices that have emerged in the last half-century. In doing so, this handbook provides readers with a better understanding of both the practical considerations and institutional design elements of ADR.

Pierre Gentin
General Counsel, U.S. Department of Commerce

A handwritten signature in black ink, appearing to read 'P. Gentin', is centered below the text.

CHAPTER 1: **Historical Context,** **ADR Overview,** **and What This Book** **Provides**

ADR's Importance to Private and State Parties and Why It Matters

Over the last decade, the world has weathered and adapted to considerable shifts in global trade dynamics, including geopolitical and economic shocks and a global health crisis. In this environment, international business transactions, projects, and contracts have grown in number and complexity, including in highly regulated sectors such as renewable energy or finance. The involvement of States or State-owned entities inevitably implicates the public interest and domestic public policy. Conflict is an inherent consequence of these geopolitical events and a necessary feature of any human project, whether at the individual, corporate, or State level.

Whatever the cause, whether for businesses, individuals, or States, disputes hinder the goals and growth of most disputing parties, making efficient and effective dispute resolution particularly important. In international trade, investors, companies, or similar seek as much stability as possible for their investments. States, on the other hand, compete for investment under tight conditions while balancing their own regulatory aims, political pressures, and domestic and international obligations. The emerging relationships among multiple stakeholders, policies, and interests are usually tested when a contract or project implementation faces a challenge that results in a breach of rights, monetary damages, or other harm to a party to the transaction.

Determining how to resolve disputes once they have arisen is challenging. For many, the only recourse is to the local judiciary. Judiciaries, while expertly staffed and carrying State authority, are often not ideal for disputes requiring prompt and final resolution. Their focus on fact-finding and procedural rules frequently favors thorough exploration

over prompt resolution. For most business transactions, the resulting conflicts are subject to the dispute resolution clause specified at the start of the engagement. Over time, alternative dispute resolution (ADR) mechanisms, most notably arbitration and mediation, have proven to be preferred choices for international businesses, investors, and States acting as commercial parties in trade and development.

Sophisticated parties anticipating future conflict draft ADR clauses into their contracts or international legal instruments, designating the parties' desired dispute resolution forum. Foreign businesses and investors seeking to protect their commercial and legal interests have found comfort in familiar, predictable international dispute resolution standards. These standards serve as protection against perceived unfairness in domestic litigation (the "home court advantage"), common delays in backlogged courts, and a general unfamiliarity with the specifics of the domestic legal system. Among the various dispute resolution mechanisms that public and private parties can select in their contracts and treaties, international arbitration has emerged as a preferred forum because it is a cost-effective and efficient alternative to judicial litigation. In addition to flexibility in the design of arbitral rules and procedures, international arbitration also offers parties the ability to agree to the confidentiality of proceedings, select neutral arbitrators with subject-matter expertise, as well as the possibility for a final and internationally enforceable award.

In the wake of rising costs and the complexity of modern arbitration practice, both private parties and States are increasingly employing mediation for the same advantages that arbitration initially offered: party control, cost-effectiveness, and efficiency. Mediation has hit new strides in domestic, commercial, and international realms. Over the last 50 years, domestic judiciaries across the world have tried and tested mediation regimes for a wide range of disputes (from land

and family disputes to criminal and large commercial cases) to increase access to justice in constrained and overburdened court systems. Commercial parties have increasingly included mediation and mediation-arbitration clauses in their contracts as standard practices. And, as discussed later in this book, States have increasingly used mediation to resolve both domestic and international disputes. Notwithstanding these recent successes, negotiation-based processes, such as mediation, are not universally appropriate, and, as discussed below, present unique challenges such as party agency and the variable durability of a negotiated agreement.

Developing ADR Systems

A durable international dispute resolution system depends on a legal and institutional foundation that reliably enforces rights and obligations across borders. In recent decades, States have confronted the limits of adversarial and adjudicatory models and recognized the need for mechanisms that give parties greater control over process and outcome. Expanding the available methods to include negotiation-based processes, such as mediation, enables States, businesses, and public stakeholders to manage conflict more effectively.

For many States, improvements in the ADR system support the twin aims of (1) increasing foreign investment through reduced litigation risk and clarified commercial expectations and (2) improving the ability of all users to avail themselves of dispute resolution services through increased options for mediation and arbitration and reduced court backlogs. Most States are also mindful of their own role in ADR, whether through domestic mechanisms or under international agreements.

ADR has also proven instrumental for cross-border investment disputes, where investors bring claims directly against host States for violations of investor-State contracts or international investment law provisions included in international investment treaties (whether bilateral or multilateral). These treaties offer various investor-State dispute settlement (ISDS) mechanisms. International arbitration is the most frequently used ISDS venue, but the use of mediation in such a context is growing. Conciliation is also a viable and frequently invoked ISDS venue. For many years, these instruments attracted few claims, but the dramatic rise in disputes under these agreements has exposed States to significant financial, regulatory, and political risk. High-value awards, escalating costs, and prolonged proceedings have driven a reassessment of the system's balance. This book acknowledges that discourse, but instead focuses on opportunities for procedural efficiency through more informed State participation in arbitration and mediation.

Overview of Alternative Dispute Resolution Processes

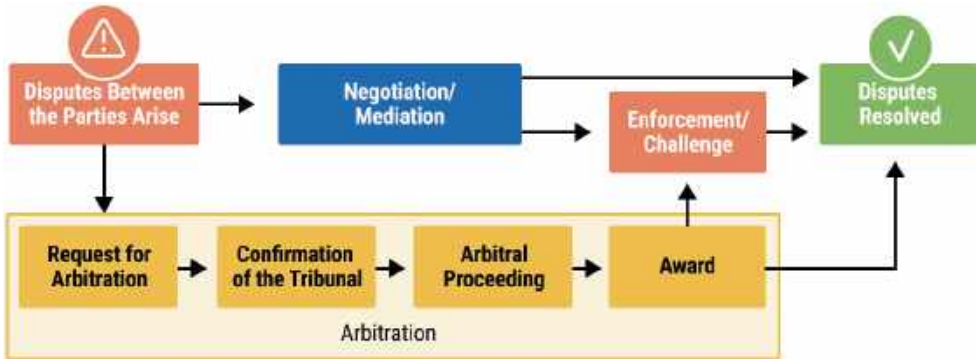


Fig 1.1: Alternative Dispute Resolution Process

Alternative Dispute Resolution (ADR) refers to a wide range of mechanisms and techniques used to resolve disputes without resorting to judicial proceedings. The defining feature of ADR is that it exists outside of traditional litigation. ADR can take multiple forms – each capable of functioning independently or in conjunction with others.

Party consent is a defining characteristic of ADR. It is expressed before a dispute arises in a dispute resolution clause (e.g., through a contract, treaty, legislation, or investment authorization), or after a dispute emerges, such as through a special agreement (*compromis* or submissions agreement). Many forms of ADR are institutionally supported, with dedicated rules and procedures, and some are employed in specific sectors such as construction, foreign direct investment, insurance or the financial industry. Aside from individual or a corporate entity's consent, sovereign States may

also agree to resolve disputes with investors from a foreign country through a government-to-government agreement, typically a bilateral investment treaty.

This book will focus primarily on mediation and arbitration, with reference to other processes. The following summarizes negotiation, mediation, arbitration, and hybrid processes, which include all three:

Negotiation

Negotiations are direct discussions between parties, without third-party involvement. They provide a flexible means of dispute resolution, with any structure the parties may impose, or without a formal structure. Negotiations aim to produce a mutually acceptable resolution, and, depending on the parties and the nature of the dispute, negotiated agreements may or may not be memorialized in a binding, enforceable agreement between the parties. Negotiations are generally appropriate for all kinds of disputes and are often considered the "first line of defense." If no substantive agreement is reached through negotiations, parties may still agree to resolve their dispute through other means, such as mediation or arbitration.

Mediation

Mediation is a method of resolving disputes with the assistance of a neutral third party who helps the disputing parties reach a mutually agreeable solution. As in negotiation, in mediation, the details of any resolution are determined by the parties themselves. The mediation process is highly adaptable to the parties' needs or the substance of the dispute. Common to all mediations is some form of confidentiality, which guarantees that parties can share what is essential without fear that such disclosures will disadvantage them should the matter be unresolved. Depending on the forum, mediated settlement agreements may be non-binding unless converted into a contract or enforceable under instruments such as the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation), in which case the settlements may be enforced in local forums similar to arbitral awards.

Arbitration

Arbitration is a private method of dispute resolution where parties agree to submit their disputes to a private tribunal rather than a national court. Unlike mediation and conciliation, where a neutral third party helps the parties reach a mutually agreed resolution, a tribunal renders a final and binding decision that is enforceable internationally. Arbitration serves as a neutral alternative to national litigation, and may be tailored to the parties' needs and the scope and nature of the dispute.

Hybrid Processes

Parties may agree to hybrid processes involving mediation and arbitration, such as "Med-Arb" and "Arb-Med." In Med-Arb, the parties seek to resolve their dispute through mediation. If unsuccessful, the parties arbitrate their dispute using the same or different neutral as arbitrator, resulting in a binding award. In Arb-Med, an arbitrator issues a sealed award and then conducts mediation. If the mediation is unsuccessful, the award is unsealed, resulting in a binding decision. Some parties may also negotiate or mediate during the pendency of an arbitration, reach a settlement, and then ask the arbitrator to codify the terms of the negotiated agreement in a consent award.

Fig 1.2: Summary of Common ADR Processes

The following summarizes conciliation, dispute boards, neutral evaluation, and expert determination, which are used less frequently or are industry-specific.

Conciliation

Conciliation is a specialized method for settling disputes through the appointment of one or more conciliators who provide an impartial examination of the dispute, attempt to define the terms of a mutually acceptable settlement, and provide the parties with any other assistance required to facilitate a settlement. It is particularly relevant in the investor-State dispute context, and provides an authoritative, but non-binding, statement of merits without a binding arbitral award.

Dispute Boards

Parties may establish dispute boards (either standing boards appointed at the start of a project or ad-hoc boards appointed when a dispute arises) to issue advisory or binding decisions on technical or contractual issues. Common in construction industry standard contracts (such as FIDIC), dispute boards seek to prevent disputes from escalating and prevent undue delays, particularly in large international construction projects.

Neutral Evaluation

Neutral evaluation is diagnostic and advisory rather than determinative. A neutral, often with legal, regulatory, or dispute resolution experience, assesses the strengths and weaknesses of the respective cases and predicts likely outcomes if adjudicated. The evaluation is nonbinding. Neutral evaluation aims to create a reality-tested basis for settlement discussions, including dispelling overconfidence regarding one's legal position. Neutral evaluation helps to avoid and prevent disputes, which can be as important in a governance objective as resolving disputes once they have arisen.

Expert Determination

Disputing parties may agree to appoint an independent expert to render a binding or non-binding opinion or resolve a dispute requiring specialized or technical expertise. Expert determinations are particularly common in disputes about construction, energy, and international property licensing, although they may be used more broadly.

Fig 1.3: Summary of Additional ADR Processes

The various ADR mechanisms described above provide distinctive criteria so that the most appropriate method, or combination of methods, can be applied to a party's specific situation.

Some dispute resolution clauses provide a menu of options, allowing parties to choose among ADR mechanisms or forums, such as mediation, negotiation, or arbitration. Dispute resolution clauses can be multi-tiered (often called escalation clauses), allowing or requiring parties to begin with a non-binding, consensual process (such as negotiation or mediation) and then proceed to binding dispute resolution mechanisms (such as arbitration). Multi-tiered clauses can be optional or mandatory. If optional, disputing parties *may* first attempt to negotiate or mediate a dispute. If mandatory, parties *must* first attempt these processes before they have jurisdiction to file for arbitration.

Indeed, the time to consider dispute prevention and amicable settlement spans far beyond the narrow window immediately preceding the actual arbitration. Instead, disputing parties can apply agile, responsive ADR methods to mitigate the dispute, maintain the parties' relationship, and achieve the desired outcomes.

Beyond resolving the dispute at hand, early coordination and response mechanisms can prevent the withdrawal or cancellation of pending and planned projects or investments that would otherwise be beneficial to the parties or broader society.

Features and Benefits of the Book for the Key Users and Stakeholders

This handbook, *Alternative Dispute Resolution: Practice and Governance for States*, offers a tailored, versatile, and reliable resolution framework to both public and private parties in cross-border transactions. The book highlights the legal, procedural, and institutional features of arbitration and mediation as tools for protecting and maintaining rights and interests. It also provides valuable expert insights on existing best practices and models worldwide, along with potential risks and methods for their avoidance and mitigation. Most concretely, the book provides detailed overviews of arbitration and mediation – the most prominent ADR methods in commercial and investment disputes – along with references to other dispute resolution mechanisms and their respective frameworks. It is a timely resource, produced on the verge of a decade of international and regional reforms that will define the law and practice of ADR in the years to come.

Crafted by experts and practitioners from diverse legal and professional backgrounds, this book offers clear and helpful information that will be particularly valuable for enhancing understanding between public and private parties in commercial and investment relations and disputes. Both businesses and governments can use the insights in this book to inspire policy changes that embrace ADR mechanisms and foster sustained economic growth.

This resource will contribute to the gradual balancing of the position of public and private parties in ADR. The chapters on mediation (Chapter 3: *Mediation*) and arbitration (Chapter 4: *Arbitration Overview*; Chapter 5: *Arbitration Procedure and Practice*) provide a common baseline for key stakeholders, bridging information gaps that often hinder the disputing parties' ability and willingness to explore and engage in ADR

to resolve their disputes. The book can benefit both businesses and government institutions by providing the building blocks for their strategic planning, helping governments to design and implement modern, responsive legal frameworks for trade and investment, and making business entities more familiar and comfortable with entering new and developing markets. The in-depth, comprehensive analysis in the book will span the landscape of legal and institutional frameworks for ADR, map key stakeholders, assess the scope and quality of potential models, and draw on the experiences of States from diverse regional and economic backgrounds. It will support government institutions and legal counsel participating in ADR, who will apply the models in practice.

For States, in particular, the knowledge and resources shared in the book should inform and enhance their ability to incorporate ADR into domestic regimes and to participate in an informed manner. The book provides a baseline for gradual improvement in good governance practices, inspiring increased inter-agency coordination and open communication with foreign businesses and investors.

International organizations and development agencies working on legal reform and rule-of-law initiatives can use the book as a baseline to develop curricula and programs for technical assistance and capacity development activities. Such a program can be offered jointly or adapted separately to the business community and public sector, in light of the needs and priorities in each sector or jurisdiction.

The book does not advocate any particular approach or dispute resolution model. Instead, it advances a systematic set of building blocks and considerations for ADR that can guide policymaking and the design of future dispute resolution clauses for commercial and investment disputes (both substantive and procedural). It does not purport to serve as a source of theoretical or academic analysis but rather provides

a high-level overview of critical policy and practical elements, with references to primary sources and commentary offering in-depth analysis of each topic. It will be helpful for a wide variety of users.

Outline of the Book Chapters

Each chapter will address its respective topic, presenting answers and solutions to the concerns identified by key stakeholders. The chapters will provide expert analysis of existing legal and institutional frameworks, along with perspectives on possible future developments and improvements. As such, they can help to inspire and support targeted reforms at the national and international levels, as addressed by the book's users.

- ➔ Chapter 2 highlights key individuals and institutions involved in mediation and arbitration (directly or indirectly), the various frameworks within which they mutually interact, and their respective rights and obligations.
- ➔ Chapter 3 provides well-rounded insight into the purpose, principles, and practices of mediation as a dispute resolution mechanism, distinct from arbitration or litigation.
- ➔ Chapter 4 turns to international arbitration, focusing on the distinction between commercial and investment arbitration, the key instruments of consent to international arbitration, and the international legal framework.
- ➔ Chapter 5 covers arbitration procedure and practice. It discusses case management tools, milestones, and procedures, along with tested methods to ensure procedural efficiency and effectiveness.

- ➔ Chapter 6 addresses post-award and post-agreement procedures. It provides a key analysis of the legal and procedural mechanisms for recognizing and enforcing international decisions and awards arising from ADR proceedings.
- ➔ Chapter 7 provides CLDP's roadmap for designing and implementing effective and efficient ADR systems, highlighting that building an effective ADR system is not the result of a single reform but the cumulative impact of coordinated action across legal, judicial, institutional, educational, and cultural domains.

The book is envisioned as an accessible, user-friendly go-to resource for stakeholders, serving as a reference point for ADR in commercial and investment disputes. As such, it does not delve deeper into the historical details of the topics it addresses, but provides a wealth of references, resources, and valuable links that lead readers to primary and secondary sources already dedicated to such analysis.

In the long term, the book should help its users create a robust and adaptable ADR framework that will be resilient to the unpredictable dynamics inherent in international trade, investment, and geopolitics.

Useful Resources

Key Conventions, Model Laws and Rules

- ➔ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958): <https://www.newyorkconvention.org/english>
- ➔ Convention on International Settlement Agreements Resulting from Mediation (2018): https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf
- ➔ Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf
- ➔ Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018): https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/22-01363_mediation_guide_e_ebook_rev.pdf
- ➔ ICC Dispute Board Rules (2015): <https://iccwbo.org/dispute-resolution/dispute-resolution-services/adr/dispute-boards/dispute-board-rules/>
- ➔ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965): <https://treaties.un.org/pages/showDetails.aspx?objid=080000028012a925>
- ➔ UNCITRAL Arbitration Rules (as adopted in 2013, with 2021 revisions): <https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration>

Guidelines and Commentaries

- UN General Assembly, A/RES/53/101, Principles and guidelines for international negotiations (1999): <https://digitallibrary.un.org/record/265687?ln=en&v=pdf>
- Overview of Conciliation under the ICSID Convention (2022): <https://icsid.worldbank.org/procedures/conciliation/convention/overview/2022>
- Max Planck Encyclopedia of Public International Law, Kari Hakapää, Negotiation (2013): <https://opil.ouplaw.com/abstract/10.1093/law:epil/9780199231690/law-9780199231690-e67>
- Max Planck Encyclopedia of Public International Law, Jean-Pierre Cot, Conciliation (2006): <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e20?prd=EPIL>

CHAPTER 2:

Stakeholders: Parties and Institutions Shaping ADR

The following chapter highlights key individuals and institutions involved in mediation and arbitration (directly or indirectly); the various frameworks within which they mutually interact; and their respective rights and obligations. Predictability and clarity in stakeholder roles elevates ADR processes overall and is equally important for stakeholders themselves, as it helps them establish reasonable expectations regarding other actors in ADR.

Disputing Parties

The primary stakeholders in the ADR process are the parties directly involved in the dispute. Disputing parties drive the process, define the claims, select the forum, present evidence, and ultimately bear the legal and financial consequences of the decision. Disputes can occur between private parties, between private parties and the State, and, sometimes, between States.

Private-private

Private disputes make up the majority of cases worldwide, including in international ADR, especially in commercial arbitration and mediation (see Chapters 3, 4, and 5). In complex disputes, companies typically engage corporate counsel or specialized arbitration practitioners who understand industry-specific issues.

Public-public

In disputes involving the mutual rights and obligations of sovereign States, or relating to the interpretation or application of their agreements, the competent institutions engage in dispute resolution amongst each other. Senior government lawyers or officials with deep expertise in treaty interpretation and public international law mostly represent the disputing parties. Their participation is shaped by constitutional limits, transparency obligations, and the need to balance international comity considerations with legal strategy. Unlike ADR in the commercial sphere, the procedure in these disputes is also affected by diplomatic protocols and considerations.

Public-private

Public-private: Disputes between private parties and the State make up the second most prevalent category of disputes. Conventionally resolved in judicial venues, States have increasingly turned to ADR to resolve disputes with private parties, including in labor, environmental, investment, and even criminal sectors. Investment arbitration and mediation are the most common ADR methods applied for the resolution of investor-State disputes (see Chapter 4). These disputes involve investors protected by international investment treaties or contracts, which allow them to sue their host State directly for violations of their guaranteed rights. Unlike commercial contracts where both parties sign a clause together, in ISDS, the State often gives "standing consent" via a treaty. The consent becomes effective only when the investor accepts this unilateral offer by filing a notice/request for arbitration. States are usually represented by government counsel and/or international law firms, while private entities rely on in-house counsel and/or external law firms.

Fig 2.1: Potential Dispute Pairings

Related Parties

In addition to the disputing parties, who have the most direct interest in resolving the relevant dispute, there are those not directly involved in the underlying dispute who could be affected by the process and its outcome. While their participation varies depending on the applicable procedural rules, these include NGOs, interest groups, international organizations, third-party funders, subcontractors, and local communities affected by the dispute. Unlike disputing parties, related parties do not have an inherent right to participate in ADR proceedings. Still, they may be included by agreement of the parties or otherwise under the applicable procedural rules.

Amicus Curiae

Also called 'friends of the court,' *amicus curiae* can provide tribunals with perspectives beyond those presented by the disputing parties. They are often NGOs, academic organizations, or industry associations offering specialized policy insight or legal interpretation. Although they do not control the proceedings, their submissions can influence broader systemic outcomes.

Non-disputing Treaty Parties

In treaty-based arbitration, the home State of the claimant investor may intervene to support or respond to questions of treaty interpretation relevant to the resolution of the dispute. These States can either submit their own interpretive statements or jointly address the issue with the disputing State. Their involvement helps ensure consistency in the application of treaty obligations.

Contract Non-signatories

Contract non-signatories are actors who, though not formal parties to an arbitration agreement, become implicated through corporate relationships, contract chains, or conduct closely related to the contract and dispute. They may be drawn into proceedings under doctrines such as the group of companies, implied consent, or principles of equity. Their participation raises complex questions about jurisdiction, consent to arbitration, and the scope of arbitration agreements.

Affected Communities

Communities affected by disputes involving natural resources, environmental impacts, or human or indigenous rights. Their involvement helps tribunals understand the social and cultural dimensions of the dispute. These communities typically lack formal procedural rights, but their perspectives can shape liability, remedies, and mitigation measures.

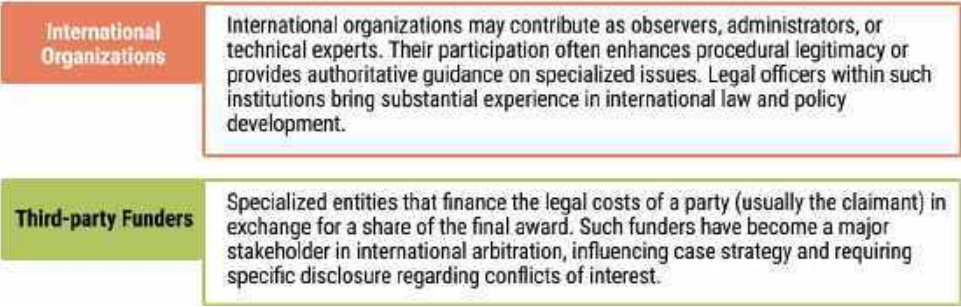


Fig 2.2: Examples of Related Parties

Experts, Witnesses, Amici

Disputing parties or the arbitral tribunal may request input from others to provide testimony on issues relevant to the case. Witnesses and subject matter experts provide insight and can help fill information gaps and enhance the common understanding of the disputed facts or technical issues. Amici are individuals with an interest in the dispute and help to provide perspectives beyond those of the parties. As such, they improve the quality of the ADR process and its outcomes.

Expert Witnesses	Fact Witnesses	<i>Amicus Curiae</i>
<p>These experts assist adjudicators in understanding technical or specialized issues central to a dispute. Their neutrality is essential, as their findings can significantly influence outcomes. Their reports often simplify complex subject matter for decisionmakers. These experts may be called by a disputing party or requested to join a dispute by the tribunal.</p>	<p>Witnesses provide factual accounts that support a party's case. Factual witnesses may be employees or public officials, while expert witnesses offer specialized analysis. Unlike expert witnesses who primarily play an objective, scientific role, fact witnesses support the arguments of the nominating party.</p>	<p>Also called "friends of the court", amicus curiae can provide tribunals with perspectives beyond those presented by the disputing parties. They are often NGOs, academic organizations, or industry associations offering specialized policy insight or legal interpretation. Although they do not control the proceedings, their submissions can influence broader systemic outcomes.</p>

Fig 2.3: Additional Potential Participants in Disputes

Neutrals

ADR relies on a diverse range of third-party neutrals who contribute to dispute resolution in distinct, often complementary ways, depending on the nature of the process. Some assist parties in reaching mutually acceptable solutions through negotiation and facilitated dialogue (e.g., mediators or conciliators). In contrast, others are empowered to determine the outcome through binding decisions or expert findings (commercial and investment arbitrators, expert board adjudicators). Understanding the distinctions between these roles is crucial because the choice of a neutral, whether a mediator, expert, or arbitrator, can dramatically shape the procedure, timelines, confidentiality, and enforceability of the outcome. Differentiating these actors helps readers select the appropriate ADR method based on the nature of the conflict and the parties. This book focuses on mediators and arbitrators, but several other types of neutrals are briefly summarized here.

- **Mediators and conciliators** each offer robust support as parties negotiate their dispute, and in both mediation and conciliation, the parties themselves are the ultimate decision-makers. **Mediators** focus on facilitating the discussion. They assist the parties in understanding the panoply of interests informing their positions, as well as those of the other side. They do not determine factual or legal issues in dispute; instead, they help parties reach a well-informed, interest-based solution. **Conciliators** differ from mediators in that they provide an authoritative, but non-binding, statement of merits. Their recommendations, while not binding, often offer a structured path to compromise.
- **Arbitrators** are the decision-makers in arbitration, issuing binding awards that are enforceable internationally. Although appointed by the disputing parties, arbitrators are bound by similar duties of independence and impartiality as judges, to maintain the legitimacy and integrity of the procedure.
- **Independent experts** or **neutral evaluators** render non-binding opinions or resolve disputes requiring specialized or technical expertise. Engineers, financial analysts, or environmental scientists may be engaged to assess risks or propose feasible solutions. In some sectors, such as construction or engineering, **dispute boards** can also serve as adjudicators in relevant disputes.

ADR Provider Institutions

A well-functioning ADR system provides disputing parties with access to providers whose processes and costs are commensurate with the scope and complexity of the dispute. Parties can opt for ADR under the rules of a specific institution (institutional) or in a more flexible framework (ad hoc) by expressly agreeing to the desired rules of procedure. These frameworks range from highly flexible ad hoc arrangements, where parties exercise maximum autonomy, to fully administered institutional mechanisms that provide procedural rules, case management services, and professional oversight.

ADR centers and arbitral institutions can still provide administrative services for ad hoc proceedings upon the parties' request. In arbitration, parties usually opt into institutional arbitration by selecting the rules of a specific institution, unless otherwise agreed in their dispute resolution clause. Incidentally, domestic courts can also come to play substantial roles in developing ADR protocols, overseeing proceedings, and exercising post-award/post-agreement competences (see Chapter 6: *Post-award, Post-agreement Procedures*).

The choice between ad hoc, institutional, or judicial involvement profoundly influences the cost, efficiency, transparency, enforceability, and overall trajectory of a dispute. A clear grasp of these structures enables users to select the most appropriate mechanism for their needs and to navigate the complexities of international dispute resolution with confidence.

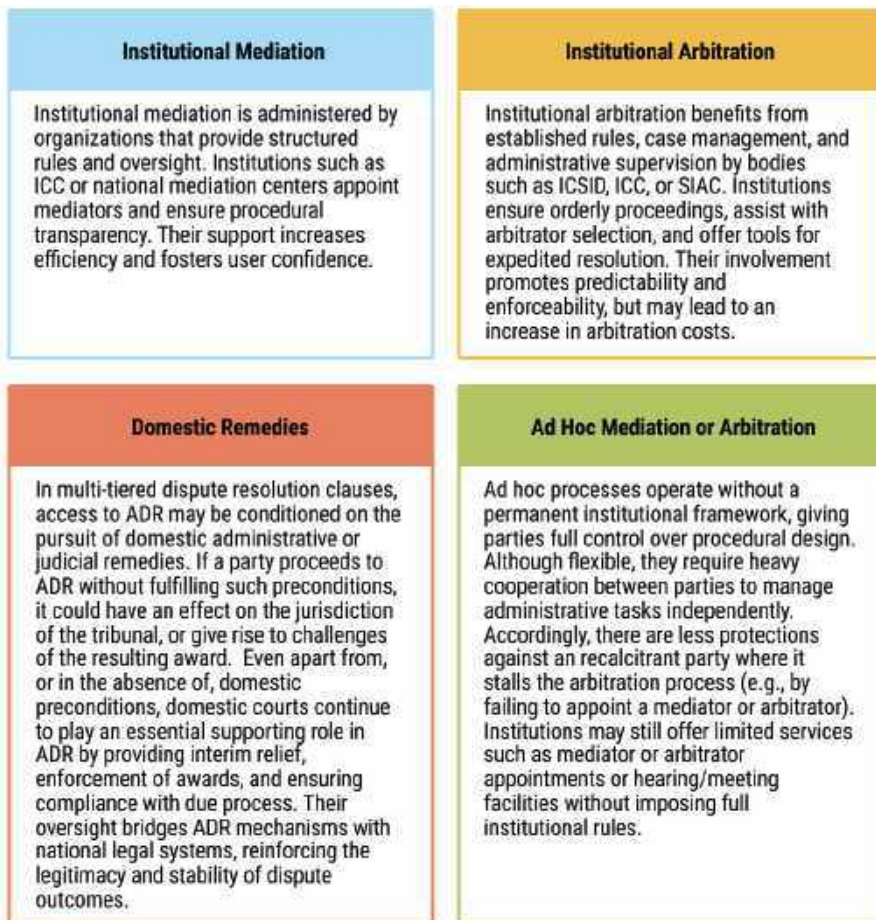


Fig 2.4: Institutional vs. Ad Hoc Options

One common question is whether to choose ad hoc or institutional mediation or arbitration. As noted in the figure above, the selected procedural framework determines the level of assistance to the parties regarding: (1) logistical conditions, (2) levels of procedural formality, (3) efficient case management, (4) procedural costs, (5) degree of party discretion on

procedural issues, (6) transparency, and (7) potential enforceability of the award. While using an institution incurs a cost, a party must also consider the additional logistical and procedural costs they would need to internalize if they were to undertake all the support provided by institutions.

Special Considerations for States in Establishing ADR Frameworks

International disputes can raise enormous financial, legal, and public policy stakes for States. Governments increasingly seek to better understand and improve the institutional framework for preventing and managing such disputes. Doing so before disputes arise can help States avoid disputes and better address them once they occur, while saving costs and protecting vital legal and policy interests.

As discussed in Chapter 1: *Historical Context, ADR Overview, and What This Book Provides*, ADR plays an essential role both in attracting foreign direct investment and in depoliticizing investment disputes when they arise. By avoiding ADR, policymakers are missing a crucial opportunity to shape dispute resolution regulations in advance so that implementation advances policy objectives.

Policymakers should thus devise and propose legal and institutional safeguards to address the possible civil, criminal, or political exposure of government officials arising from their participation in ADR (particularly amicable settlement). As discussed below, this can be accomplished by creating inter-ministerial and inter-agency coordination bodies, communication roadmaps, and standard procedural roadmaps, which can clearly establish the roles of each institution and the collective settlement authority of the designated

bodies. This type of transparent and well-coordinated framework can enhance legal certainty for the disputing parties and also shield competent institutions and government officials from subsequent negative consequences or liabilities.

Legislative Drafting for ADR Reform

To support lasting, sustainable reforms in ADR regulation, policymakers should clearly trace and document the legislative intent behind their ADR policy choices, including the underlying motivations and goals. Where relevant policies address dispute resolution in particular sectors or require differing standards applicable to different stakeholders, there should be a clear legislative history outlining the expert or scientific basis for the respective rules. These supplementary materials create a record of legislative direction and provide the groundwork for continued efforts rather than sporadic pushes. It will also be an irreplaceable interpretive tool for judges and arbitrators resolving disputes based on such policies.

For further details on developing entire ADR ecosystems, see the discussion in Chapter 7: *A Roadmap to Designing Effective and Efficient ADR Systems*.

Policymakers must primarily remain aware of the proper hierarchy of norms between domestic and international law, ensure the reciprocity of global trade and investment agreements, and create institutional mechanisms to enforce the rights and obligations arising from public and private agreements. In other words, ADR is not beyond a State's control.

To this end, every State should ensure that it has established five prerequisites to effective representation in international ADR mechanisms for negotiation, mediation, and arbitration:



Fig 2.5: Prerequisites for States to Ensure Effective Representation in ADR

Three general models have been developed for representing a State in international disputes: outside counsel, in-house counsel, and a hybrid model.

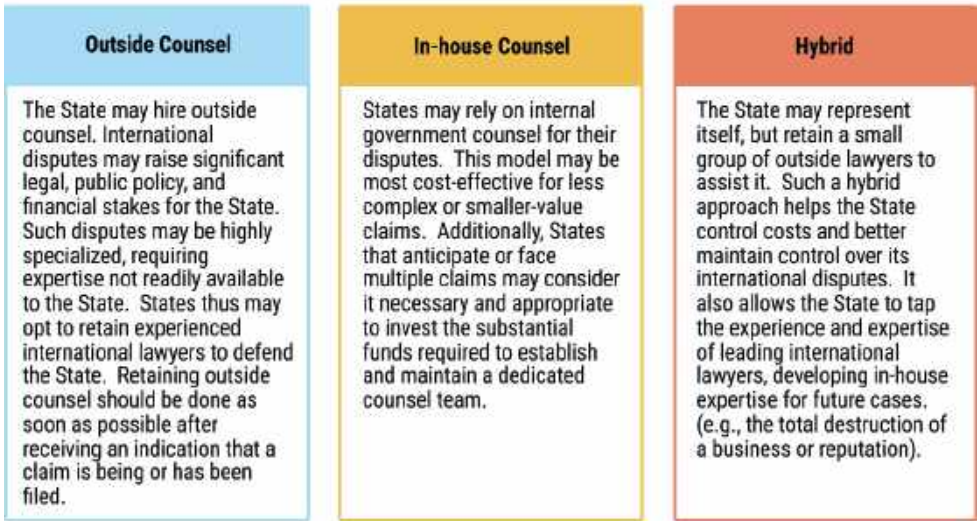


Fig 2.6: Counsel Types

State Coordination Models for Managing Foreign Investment Risk

States are increasingly establishing standing coordination bodies to help prevent and mitigate international investment disputes. Such bodies reflect different structures and functions. Some standard features and best practices, however, are evident. States have generally followed three different approaches to coordination: (1) a single agency (2) multiple agencies or (3) a hybrid approach:

Single Coordination Agency

- ➔ States may create a single coordination agency for the State, either as an autonomous body or within an existing ministry or a governmental agency. Several States, for example, have assigned the ombudsman to serve as a

coordination body (e.g., Brazil, Georgia, Greece, Kazakhstan, Mongolia, the Philippines, the Republic of Korea, the Russian Federation, and Ukraine).

- ➔ Other States have tasked their investment promotion agencies with serving as the coordination body (e.g., Chile's InvestChile, Georgia's Invest in Georgia).
- ➔ In other States, the coordination body has been established under a single ministry (e.g., Bulgaria's Litigation Directorate of the Ministry of Finance, Colombia's Directorate of Foreign Investment and Services within the Ministry of Commerce, and Czechia's Investment Protection Unit at the Ministry of Finance).

Multiple Coordination Agencies

- ➔ Some States distribute dispute prevention and mitigation functions across government agencies, each of which plays a specific role or addresses particular grievances.

Hybrid

- ➔ Some States adopt a hybrid approach, establishing a committee or commission comprising ministries and specialized or other relevant agencies, with one agency serving as the secretariat (e.g., Egypt: the ministerial committee on investment contracts dispute resolution, within the Cabinet of Ministers, helps settle disputes arising from investment contracts; China: the Ministry of Commerce, with other relevant departments under the State Council, established an interministerial joint meeting system to coordinate and facilitate investment disputes).

There is no one-size-fits-all approach for States wishing to establish such a coordination body. As stated by the United Nations Commission on International Trade Law:

“Whether it is a single coordination body, multiple agencies, or an inter-institutional committee, the internal operating procedures (composition of the authority, the monitoring and evaluation systems and to whom the authority is reporting) would need to be adapted for each State to ensure the efficiency of the authority and its legitimacy as well as to avoid conflicts of interest, lack of neutrality or vested interests. The way the authority is perceived by the investors, governmental officials, and other stakeholders is crucial to its success.”

Two examples of State-established platforms specializing in ADR Services include South Korea and Peru.



Fig 2.7: Examples of State-established ADR Service Platforms

Useful Resources

Guidelines for Stakeholders

- IBA, Guidelines on Conflicts of Interest in International Arbitration (2024): <https://www.ibanet.org/document?id=guidelines-on-conflicts-of-interest-in-international-arbitration-2024>
- IBA, Guidelines on Party Representation in International Arbitration (2013): <https://www.ibanet.org/MediaHandler?id=6F0C57D7-E7A0-43AF-B76E-714D9FE74D7F>
- UNCITRAL and ICSID, Code of Conduct for Adjudicators in International Investment Disputes (2023): <https://icsid.worldbank.org/resources/code-of-conduct>
- UNCITRAL Notes on Organizing Arbitral Proceedings (2016): <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-notes-2016-e.pdf>

Non-exhaustive Selection of Arbitral Institutions

- International Chamber of Commerce (ICC)
- London Court of International Arbitration (LCIA)
- Singapore International Arbitration Centre (SIAC)
- Hong Kong International Arbitration Centre (HKIAC)
- Permanent Court of Arbitration (PCA)
- International Centre for Settlement of Investment Disputes (ICSID)
- German Arbitration Institute (DIS)
- SCC Arbitration Institute (SCC)

- American Arbitration Association-International Centre for Dispute Resolution (AAA-ICDR)
- China International Economic and Trade Arbitration Commission (CIETAC)
- Vienna International Arbitral Centre (VIAC)
- Swiss Arbitration Centre (Swiss Arbitration)
- Cairo Regional Centre for International Commercial Arbitration (CRCICA)
- Dubai International Arbitration Centre (DIAC)
- Australian Centre for International Commercial Arbitration (ACICA)
- WIPO Arbitration and Mediation Center (WIPO)

Non-exhaustive Selection of Institutional Mediation Providers

- International Chamber of Commerce (ICC)
- Judicial Arbitration and Mediation Services (JAMS)
- American Arbitration Association-International Centre for Dispute Resolution (AAA-ICDR)
- Singapore International Mediation Centre (SIMC)

Non-exhaustive Selection of Institutions for Investment Mediation

- International Centre for Settlement of Investment Disputes (ICSID)
- Singapore International Mediation Centre (SIMC)
- Centre for Effective Dispute Resolution (CEDR)
- Stockholm Chamber of Commerce Arbitration Institute (SCC)
- International Chamber of Commerce (ICC)

CHAPTER 3: Mediation

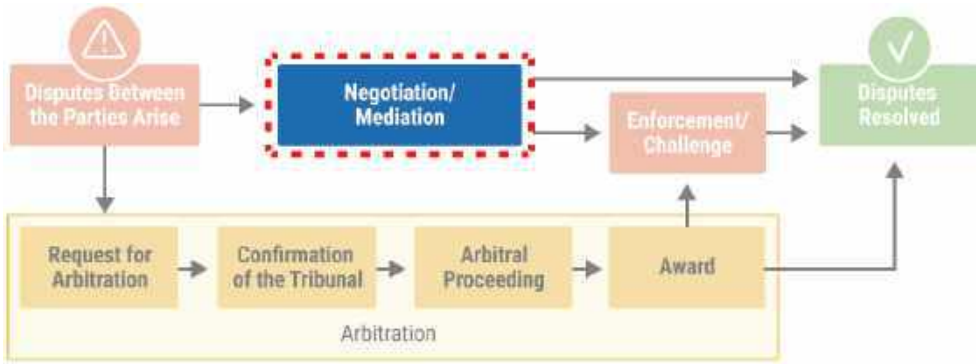


Fig 3.1: Alternative Dispute Resolution Process

Defining Mediation

Mediation is a process of facilitated negotiation in which all parties meet with a neutral third party (the mediator). The key features of mediation are voluntariness, confidentiality, and party self-determination. Mediation is beneficial for creative problem-solving and the efficient resolution of disputes. Mediation can be tailored to the scope and scale of all manner of disputes, from interpersonal or small claims to complex commercial and policy development. Mediation supports the principles of party autonomy and consent at their highest and relies on the principle of *self-determination*. The mediator guides the process and, in specific contexts, may offer an advisory evaluation, but does *not* decide the case.

The Principle of Self-determination

The mediator's role is to facilitate an equitable process that supports informed decision-making, not to impose outcomes or substitute the mediator's judgment for the parties' decisions. The disputing parties – with the support of the mediator – retain autonomy to choose whether to mediate, how the mediation will proceed, what information to present, whether to reach an agreement, and on what terms; those choices must be voluntary, informed, and free from coercion.

Mediation is built on the simple but powerful idea that people, when given the proper structure and support, can craft their own solutions to conflict. Unlike adjudicative dispute resolution, such as litigation or arbitration, mediation does not delegate authority to a judge or arbitrator. Instead, it creates a platform where parties can speak more openly about their interests in a dispute, examine the root causes of disagreement, and explore a wide range of outcomes beyond legal positions alone. Notably, the parties remain the architects of any outcome and, as a result, mediated agreements tend to be durable.

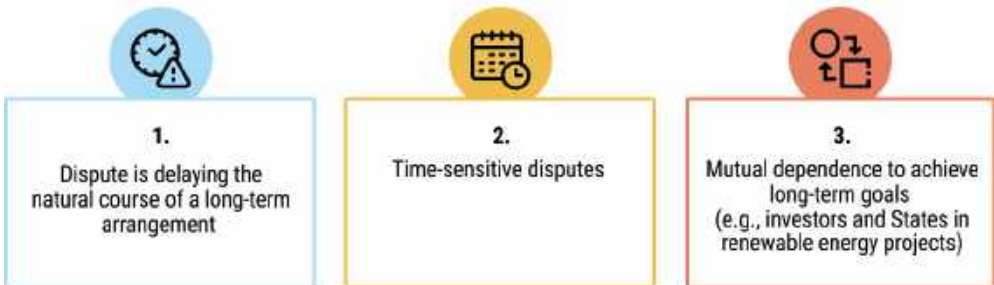


Fig 3.2: Some Types of Disputes Ideally Situated for Mediation

Mediation is more flexible than formal litigation or arbitration and adaptive to cultural differences, commercial realities, emotional dynamics, and the practical need to preserve ongoing relationships. The process is also confidential, typically less adversarial, and able to move faster than most court proceedings. Mediation is not a softer version of adjudication; it is a fundamentally different approach, reframing conflict as a shared problem to be solved with expansive possibilities, rather than a binary decision. The differences between mediation and adjudication also raise some common concerns about the process and any outcomes. These include concerns that participants may be unreasonable or lack authority, that confidentiality may be breached, that there is no legal framework for mediation, that enforcement of agreements will be challenging, and, for certain government officials, a risk of personal liability.

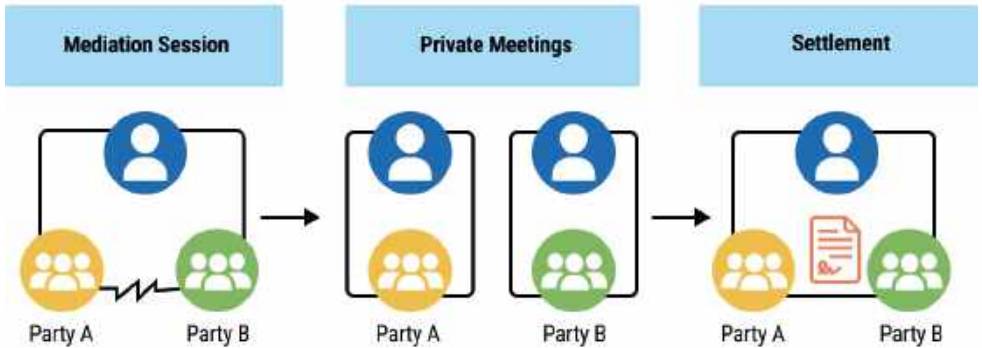


Fig 3.3: General Components of a Mediation

This chapter introduces the core principles and structure of mediation, including its place within the spectrum of dispute resolution processes. It sets the stage for a deeper examination of why and how mediation can be incorporated into State practice, both as a system for private users and as an option for State actors themselves.

Mediation Is Not Adjudication

Mediation can meet many but not all needs. In particular, mediation cannot work in matters that require adjudication for several reasons. Mediation does not:

- Adjudicate or vindicate parties' **legal rights** or declare a prevailing party
- Produce binding interpretations of law or fact, and thus rarely creates binding **precedent** (although a mediated outcome involving a State entity may prompt broader policy or statutory changes for consistency)
- Establish "**truth**" through fact-finding mechanisms such as compelled evidence production or cross-examination, thereby limiting its utility in resolving parties' intractable positions
- Find fault or impose penalties, limiting its utility to parties wanting **punishment**

The Mediation Process

Mediation is characterized by enormous adaptability. As long as specific core process values are maintained (e.g., confidentiality, ongoing consent, party self-determination, and the option to resolve or not), the process can be modified to fit the needs of any disputes, individuals, or institutions. Most mediations proceed with the following stages.

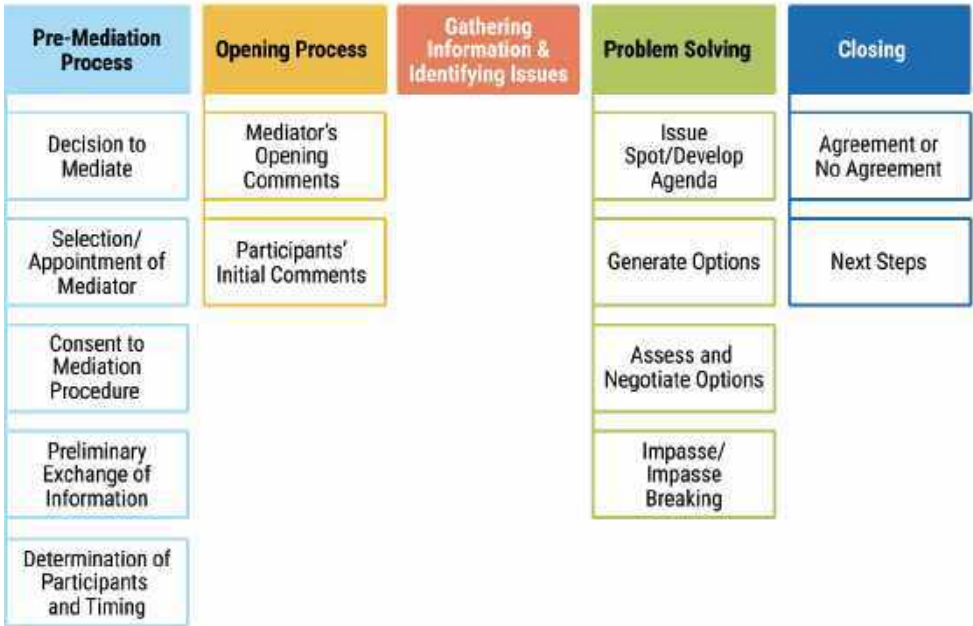


Fig 3.4: General Mediation Stages and Process Choices

Pre-dispute Mediation Agreement

Parties can agree to refer disputes to mediation before or after they arise. For commercial parties, it is typical to include a dispute-resolution clause in their contracts. Such clauses often identify the primary method for resolving disputes, which increasingly include agreements to mediate at some stage of the dispute resolution process.

How Does a Party Agree to Mediation?

Sample Mediation-arbitration Clause from the ICC

“In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. If the dispute has not been settled pursuant to the said Rules within [45] days following the filing of a Request for Mediation or within such other period as the parties may agree in writing, such dispute shall thereafter be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.”

Whether ad hoc or through an institution, the designation of a set of rules is critical to set out key aspects of the mediation process, including the mediators’ duties, the appointment process, the non-prejudicial nature of mediation, and confidentiality.

Foundational to mediation is the confidentiality of the process, which may be dictated by the established rules of an ADR provider or a court or developed by the parties and the mediator. Confidentiality typically applies to mediation conversations and to any materials explicitly prepared for the mediation process. Most, if not all, institutional rules contain extensive confidentiality obligations protecting the parties’ sensitive information and preventing the use of any information gained in mediation in a related dispute. These provisions protect the integrity of the mediation process and allow parties to discuss issues more candidly with the mediator and even with other disputing parties. Any information gained in the mediation is further “without prejudice,” meaning that discussions and information exchanged during the mediation cannot be submitted as evidence in subsequent legal or arbitral proceedings.

Parties, providers, or States may carve out exceptions to mediation confidentiality, so it is crucial that all participants in a particular mediation know, understand, and agree to the scope of confidentiality that applies before it begins.

Preliminary Questions When Considering Mediation

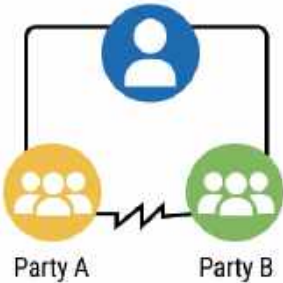
- Are the parties interested in maintaining their relationship?
- Do the parties seek a rapid resolution of their dispute?
- Do the parties prefer to keep control over the outcome?
- Do the parties seek tailored solutions or alternatives to the common remedies provided through monetary compensation?
- Are there multiple conflicts or issues in dispute between the parties, some of which could be negotiated/mediated?
- Does the dispute involve multiple parties with different interests?

Initiation of Mediation and Mediator Selection

Mediation is initiated either by the parties or by referral from an entity (such as a judge referring a case to a court-annexed center or NGO). A mediator is then attached to the matter by the parties' choice, the mediation provider's rules, or the referring entity. Mediation can be conducted as a collective process in which all participants are together, as a series of separate conversations with the mediator (a so-called "caucus"), or as a mix of the two. The parties and the mediator ultimately decide whether the stages take place jointly or in caucus.

Beginning Mediation

Mediation Session



The early stages of mediation are characterized by communications with the mediator to discuss threshold information including: (1) who should attend; (2) the exchange of any documents and information about the dispute; (3) the drafting of preliminary submissions for the mediator and/or the opposing side; and (4) the timing and venue for the initial mediation session. These early conversations also help build rapport between the mediator and the parties.

The rules and procedures of the mediation should be agreed upon (or reviewed if the procedures are determined by the referring entity, such as a court-annexed or private mediation center) before substantive information is discussed. In courts, parties may be referred to mediation as part of a conference with the judge. In that instance, it is not uncommon for the initial or only mediation session to begin with an exchange and discussion of this preliminary information. In mediation settings where the mediator is assigned/selected in advance of the initial session, this threshold exchange often happens before the first session.

The Mediation Session



Mediation can take place in a single meeting or over multiple sessions, depending on the parties and the nature of the dispute. Once the mediator and all participants are convened at an initial session, the mediator begins the process by reviewing the agreed procedures for the process, including any confidentiality (and exceptions) and self-determination, describing their role, and the roles of those present, and will confirm any other necessary details, such as any process for finalizing agreements should one be reached. This information is crucial if any parties to this mediation session did not attend the preliminary calls. The parties, and their counsel, if represented, also typically begin by sharing important information about the dispute.

Self-representation vs. Attorney Representation in Mediation

Mediation is often thought of as a party-to-party procedure, but, in reality, either or both parties may be represented by counsel. In more sophisticated disputes, mediators may communicate primarily with counsel or directly with the parties, as the parties decide.

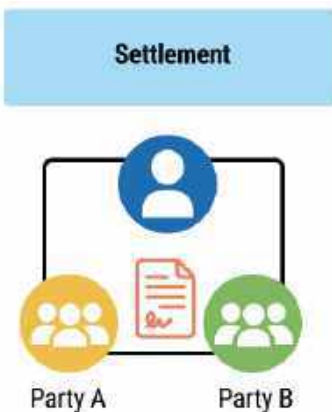
Mediators use conversation and questions to enhance the parties' understandings of the key issues (legal, relational, informational, and emotional) that prevent them from resolving the matter. In the early stages of mediation, the focus is on the parties' understanding of what they want (and why) and what the other party wants (and why). If the dispute

has a legal aspect, this understanding will integrate claims/defenses, evidence, and precedent.

In some conflicts, other information will feature prominently, including: emotional or other impacts of the dispute on the larger community, business, family, or workplace; comparisons to similar matters within the same legal or regulatory framework; or a party's ability, or inability, to pay to settle or continue the dispute.

In many matters, the mediator's ability to bring an enhanced understanding to the forefront is sufficient for the parties to determine a resolution. If not, the mediator can employ a range of other interventions to help the parties resolve the dispute. For example, where a party's expectations about the resolution of a dispute may not be feasible, a mediator may ask probing questions to test a party's expectations and assumptions about the legal or factual issues. Mediators may also discuss risks (including litigation risk), highlight the parties' alternatives to a negotiated settlement, explore the parties' larger goals and interests, or, with the parties' consent, use information gained from the parties to make proposals to overcome impasse or resolve the dispute.

Conclusion of Mediation



Typically, mediators will work with the parties until the matter is resolved or until one or both parties are certain it cannot be resolved. If mediation concludes without agreement, the mediator may make themselves available at a later date and/or once the parties have taken defined next steps (such as further exchange of information or an interim ruling by a judge or arbitrator).

Unlike adjudicated outcomes in court or arbitration – which can provoke resistance, petitions for annulment, or even appeal – mediated agreements rely on mutual buy-in and reflect the parties’ interests, priorities, and practical constraints. Negotiated resolutions are therefore said to be “durable” because the parties typically believe the agreement is in their best interest.

However, durability depends on the integrity of the process, the clarity of the obligations, and the parties’ ongoing willingness to adhere to the terms of their agreement. In certain disputes, the informal process and non-binding nature of the resolution can leave the settlement vulnerable to non-performance, so participants should conclude the mediation by considering whether and how to memorialize any result.

The most common and natural way to give effect to a mediated agreement is through voluntary compliance of the disputing parties. However, if the settlement includes monetary or contractual remedies, or if there is a legal requirement, the parties can request that an arbitral tribunal certify their settlement terms as an internationally enforceable arbitral award. Parties can also enforce mediated settlement agreements under the Singapore Mediation Convention, when applicable. (See Chapter 6: *Post-award, Post-agreement Procedures*.)

Mediator Credentialing

Any mediation scheme relies heavily on the quality of the available mediators. Credentialing can be determined through a mix of training, certification/licensing, and continued professional development. The development of any credentialing should be forum-specific and should align with the nature of the parties and the disputes. Credentialing

should take into account the need for any other degree or license (e.g., law, social work, business, accounting), for initial and advanced mediation process training, training related to the mediation of specific types of disputes or legal frameworks, and any other necessary competencies or knowledge, including linguistic, technical, or cultural. Optimally, a licensing or credentialing system will include ongoing feedback and/or professional development for mediators to ensure their skills continue to evolve alongside the mediation environment.

The development of mediator credentialing is directly related to the model of associating mediators with particular cases. When parties select their mediators, requirements regarding mediator credentials may be more relaxed. After all, in many local and business communities, there is a culture of “community mediators” (persons recognized for their status or skills) who are known to be quite effective. As institutions become more involved in creating mediator rosters and assigning mediators, the obligation to establish minimum competence standards is strengthened.

Mediator Independence and Impartiality

Related to mediator credentialing and assignment is the mediator’s duty to manage actual, potential, and perceived conflicts of interest or bias. In modern mediation practice, particularly in commercial disputes, mediators should be independent and impartial. That is, independent of either party and unbiased toward the parties’ positions and issues presented. This is for the dual purposes of upholding the integrity of the mediation process and, fundamentally, ensuring parties’ self-determination of the dispute. In other words, there should be no question that the outcome of the dispute favorably impacts the mediator’s own interests.

In many places, mediators will be required to consider and disclose any potential conflicts of interest they may have with the parties or the disputed issue. What constitutes a conflict is informed by the cultural norms surrounding the parties and the dispute. Crucial to identifying and disclosing conflicts is an understanding of local norms. When in doubt, mediators should disclose to parties any facts or relationships that could cause concern about the mediator's neutrality, or they should recuse themselves if they cannot or will not make such disclosure.

Why Must Mediators Not Only Be Impartial, but Also Appear Impartial?

In *CEATS vs. Continental Airlines*, the court examined whether a court-appointed mediator had violated his duty of neutrality by failing to disclose his complex professional and social ties to a law firm connected to an ongoing, high-profile dispute. Although the mediator did not act as a judge and there was no evidence that he had mishandled confidential information, the appellate court found that he had breached his ethical obligation to disclose relationships that could cause a reasonable observer to question his impartiality. The Court emphasized that the duty to maintain both actual and perceived neutrality is essential to protecting fairness and public confidence in mediation.

Mediation Venues and Costs

Mediation can be completely ad hoc or follow prescriptive institutional rules. The cost and structure of each mediation, therefore, vary considerably. In the purely private sphere, all decisions regarding the mediation process are under the

parties' control, including costs, mediator selection, location, and any confidentiality agreements. Private mediators who are unaffiliated with any organization may have their own rules of practice, mediation contracts, and pay scales to which the parties must agree. For some parties, this ad hoc private process may be optimal.

Private providers of mediation services, such as CPR, JAMS, and SIMC, operate under their own established rules for specific case types. The organization typically handles case administration and maintains an approved roster from which the parties may select a mediator. Parties pay a fee to the mediator, which the provider sets. This rate can be hourly or daily and often depends on a mediator's experience level or demand. Parties also pay a fee to the organization for its role in case administration.

Nonprofit organizations are also common providers of mediation services and may operate, in part, through State financing. State-supported mediation services can be developed to address specific issues, such as family disputes, small claims, and commercial disagreements. Non-profit organizations operate with their own mediation procedures, train and certify mediators, and offer mediation services at low or no cost to the parties. They are often used for low-cost disputes or for cases where money is not the central issue, such as family matters. They may also be helpful for small businesses or as part of a campaign to introduce mediation to stakeholders (see Chapter 2: *Stakeholders: Parties and Institutions Shaping ADR*).

Pakistan Legal Aid Society (LAS)

LAS is a non-profit organization that works to increase access to justice by helping communities settle disputes without going to court, easing court congestion, and providing faster resolutions to those in need. To that end, LAS partnered with the judiciary of Pakistan to pilot mediation programs, provide mediation training to 450 attorneys and judges, and offer mediation services directly to users. Since the pilot program concluded, LAS has continued to expand its network of mediators through national training programs.

Courts are also primary venues for mediation and, in some countries, have been instrumental in expanding their use. Often, courts initiate mediation protocols to alleviate backlogs and provide parties with swifter, cheaper access to resolution. Some court systems mandate mediation before a case can proceed in court. Others allow referral to mediation by the assigned judge at critical points in a case's progress, or establish mandatory mediation referral for specific case types or at certain stages of litigation. Courts may develop mediation procedures, train and certify mediators, or simply refer parties to outside mediation providers with a directive to participate.

Mediation offered through the courts is often subject to court-developed mediation rules. Cases mediated through a court program have an additional stakeholder – the assigned judge – and therefore may be less secure in terms of confidentiality than a private process. Parties should be made aware of any exceptions to confidentiality before they begin. Court-annexed mediation is often offered at reduced cost to the parties and is sometimes provided free of charge.

States' Engagement with Mediation

States and other highly regulated entities often assume that they cannot resolve disputes through a consensual process, such as mediation. This is both a misunderstanding and a missed opportunity. While some conflicts are more amenable to adjudication, in many situations, mediation can yield a more nuanced, tailored, and actionable resolution. From administrative disputes to transformative policy realignments, a State can mediate just as private parties do.

Key to a State entity's productive participation in mediation is the identification and empowerment of the decision-maker's ability to bind the State to negotiated settlements. These individuals must have a substantive understanding of the dispute, be knowledgeable of the various individuals and offices within the State whose consent will be required to resolve it, and be empowered to negotiate on behalf of the State. Rarely does this role exist with only one person. Instead, State offices must be intentional about identifying the positions or people who, collectively, will make decisions on behalf of the State. This individual or coordinated body must be insulated from political reprisals.

Mediators assigned to State-involved disputes should also endeavor to understand the State's decision-making structure. They must know that States are not as nimble as private parties and often require extra time to consider and convey proposals. Changes in the political landscape can impact the course of a mediation. This can cause frustration and can also create opportunities.

When the State agrees to participate in mediation to resolve disputes, the process itself can become a tool for complex policy-making. Individuals and organizations who might be averse to the State work collaboratively to create a path forward. Instead of an adjudicated win or loss (which may

take years or decades, depending on the issues), the collective resources of the various stakeholders can be harnessed to find a solution. Resources dedicated to addressing past harms can be redeployed to designing forward-looking systems within a timeline and at a cost the State can afford.

CASE STUDY:

In Re: New York City Policing During Summer 2020 Demonstrations

Dispute

The response by the New York Police Department to the 2020 protests following the death of George Floyd, at the hands of former Minneapolis police officer Derek Chauvin, resulted in the filing of a complex multi-party case against the City. The case involved the New York City Police Department, State Attorney General Letitia James, the New York Civil Liberties Union, the Legal Aid Society, three police unions, and individual plaintiffs.

Settlement

The parties mediated a comprehensive set of reforms to change how the NYPD responds to protests. The parties established clear “tiers” of protest response, banned certain police practices, strengthened press protections, and created independent oversight – reforms that addressed concerns raised by the NYPD’s approach to the 2020 protests. Judge Colleen McMahon’s approval emphasized that the mediated settlement served the public interest. The broad participation and negotiated design of the reforms made the agreement both innovative and durable.

Investment Dispute Mediation

As discussed in Chapter 4: *Arbitration Overview*, States also face direct claims by foreign investors, such as under the dispute resolution provisions of bilateral investment treaties (BITs) or other international investment agreements (IIAs). Owing to the extensive time and cost of investor-State arbitration, States are increasingly turning to mediation to settle investment disputes, before and after claims have been brought. States enter into investment dispute mediation in several ways, including by explicitly incorporating invest-

ment mediation into their international agreements and by granting post hoc consent to mediation with foreign investors as a matter of policy.

Investment Mediation Institutions

Several institutions offer administrative services for investment mediation. Institutional mediation provides several advantages over ad hoc mediation, including reducing uncertainty, transaction costs, and organizational burden for governments managing complex investor-State disputes. Services include assistance in finding a mediator, administering the matter, structuring the process, and providing a neutral venue for sensitive disputes.

The advantages of investment mediation mirror those of mediation in other contexts, enabling the creation of creative, party-driven solutions that, importantly, allow the State to preserve its relationships with key foreign investors. Investment mediation also provides a low-cost off-ramp for investment disputes that could otherwise go to expensive arbitration proceedings and the risk of significant monetary awards against the State.

However, investment mediation can pose structural challenges that States need to address. States often hesitate to either settle investment disputes or consent to the mediation process through which the possibility of settlement may be explored. There is frequently an operational disconnect between the State agency or ministry involved in the investment and the agency involved in the investment dispute. State procurement, finance, or infrastructure ministries that interface with foreign investors are often leanly staffed, meaning officials have limited capacity to contribute to ongoing

disputes. These practical disconnects lead to asymmetries in understanding of the background to the dispute and access to relevant information, and also stymie the State's ability to act as a unified entity, undermining the central principle of self-determination in mediation.

Relatedly, States' internal incentives are often misaligned to settle investment claims before an award or judgment has been issued against them. Even where an investor's dispute has some merit (and may be reasonably settled earlier for a negotiated sum), many public officials hesitate to report that they have willingly paid for claims in investment disputes, which can be high-profile and often politically sensitive because taxpayer dollars fund them. These structural challenges are exacerbated by the exposure public officials face to political or even personal accountability for being seen to have settled a claim rather than fought it.

Although there are significant challenges to State participation in investment dispute mediation, they should nevertheless consider the potential monetary and relational benefits of a negotiated resolution. Mediation can occur any time, before, during, or even after an arbitration has formally concluded, and it does not require a prior express agreement between the parties. In many cases, even after an award is issued in favor of a foreign investor, the parties can consider alternative remedies and reduce enforcement risk. Any reduction in ultimate liability from an otherwise higher sum can be seen as a "win" from the State's perspective.

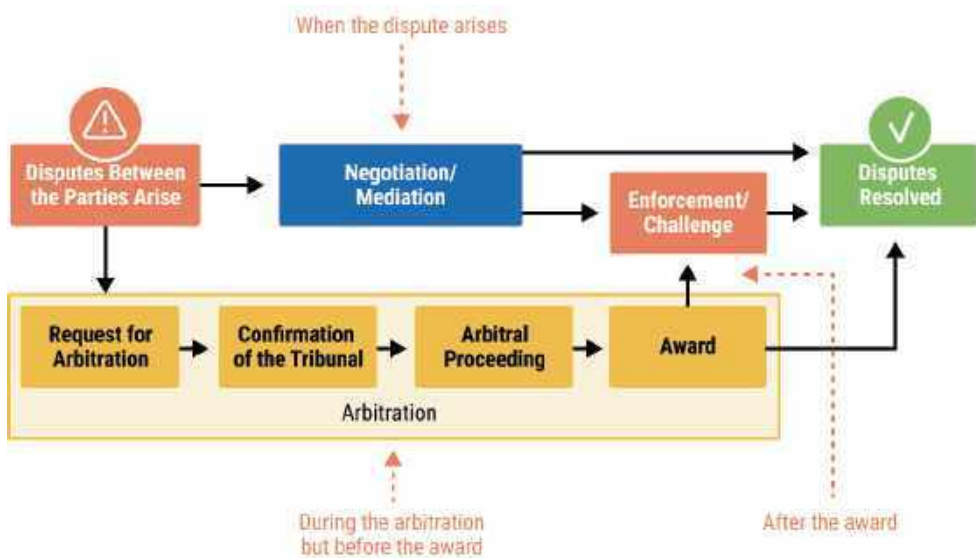


Fig 3.5: Common Opportunities to Commence Mediation

Useful Resources

Key Conventions, Model Laws, Clauses, and Rules

- Mediation Procedures of the American Arbitration Association (2009): <https://www.icdr.org/sites/default/files/Mediation%20Procedures%20of%20the%20American%20Arbitration%20Association%20Oct%2001%2C%202009.pdf>
- Singapore International Mediation Centre, Mediation Procedural Rules (2025): <https://simc.com.sg/sites/default/files/content-files/SIMC%20Mediation%20Rules%202025.pdf>
- Singapore International Mediation Centre, Protocol (n.d.): [https://www.judiciary.gov.sg/docs/default-source/sicc-docs/lml-protocol-\(final\).pdf](https://www.judiciary.gov.sg/docs/default-source/sicc-docs/lml-protocol-(final).pdf)
- Singapore International Mediation Centre, Mediation SIMC Model Clauses (n.d.): <https://simc.com.sg/model-clause>
- Singapore International Mediation Centre, Mediation Rules (2025): <https://simc.com.sg/sites/default/files/content-files/SIMC%20Mediation%20Rules%202025.pdf>
- JAMS Protocol, Mediators & Mediation Services (n.d.): <https://www.jamsadr.com/mediation?tab=overview>
- CPR Protocol, Mediation (n.d.): <https://drs.cpradr.org/rules/mediation>
- The Federal Judicial Centers, Patent Mediation Guide (2019): https://www.fjc.gov/sites/default/files/materials/05/Patent_Mediation_Guide.pdf

Guidelines and Commentaries

- UNCITRAL, Guidelines on Mediation for International Investment Disputes (2024): https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2401497e_mediation_guidelines_ebook_eng.pdf
- American Federal Juridical Center, Competencies for Federal Court Mediator (2019)
- International Centre for Settlement of Investment Disputes, Background Paper on Investment Mediation (2021): https://icsid.worldbank.org/sites/default/files/publications/Background_Paper_on_Investment_Mediation_Oct.2021.pdf

Non-exhaustive Selection of Institutional Mediation Providers

- International Chamber of Commerce (ICC)
- Judicial Arbitration and Mediation Services (JAMS)
- American Arbitration Association-International Centre for Dispute Resolution (AAA-ICDR)
- Singapore International Mediation Centre (SIMC)

Non-exhaustive Selection of Institutions for Investment Mediation

- International Centre for Settlement of Investment Disputes (ICSID)
- Singapore International Mediation Centre (SIMC)
- Centre for Effective Dispute Resolution (CEDR)
- Stockholm Chamber of Commerce Arbitration Institute (SCC)
- International Chamber of Commerce (ICC)

CHAPTER 4:

Arbitration Overview

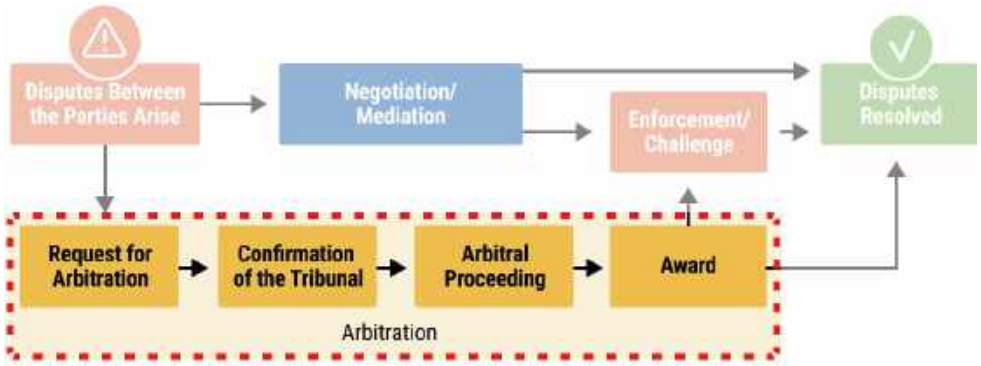


Fig 4.1: Alternative Dispute Resolution Process

Defining Arbitration

Arbitration is a private, consensual method of dispute resolution where parties agree to submit their disagreements to a private (i.e., non-governmental) tribunal rather than a national court. Arbitration stems from a specific agreement between the parties, whether a standalone contract (i.e., a “submissions agreement”), a clause within a larger contract (i.e., an “arbitration clause”), an investment treaty (i.e., a so-called “standing offer to arbitrate” or “unilateral arbitration clause”), or national investment legislation.

Unlike mediation, in which a neutral third party facilitates negotiation, an arbitrator has the power to render a final, binding, and enforceable award. In essence, arbitration serves as a neutral alternative to litigation, effectively decoupling the dispute from the national legal system of either party (see Chapter 3: *Mediation*).

Types of Arbitration

Arbitration is inherently flexible and adapts fluidly to the nature of the parties and the industry involved. This chapter focuses on defining and familiarizing the reader with the two significant categories of arbitration: commercial, contract-based arbitration, and investor-State arbitration (ISDS). This distinction fundamentally lies in the basis of consent:



Fig 4.2: Typical Bases of Consent

Beyond this distinction, the process is often categorized by how it is administered. Parties must choose between *Institutional Arbitration* (in which the case is administered by arbitration centers that provide case management and scrutiny) and *Ad Hoc Arbitration* (often using the UNCITRAL Rules, in which the parties and tribunal manage the administration themselves). While ad hoc arbitration offers maximum flexibility, it requires cooperation and can be derailed by uncooperative, resistant parties without an institution to keep the process on track. Parties thus sometimes designate an institution to administer an arbitration brought under ad hoc arbitration rules.

One of arbitration's greatest strengths is the parties' ability to adjust it to the needs of a specific industry. The industries that have developed bespoke procedures to suit their commercial realities include:

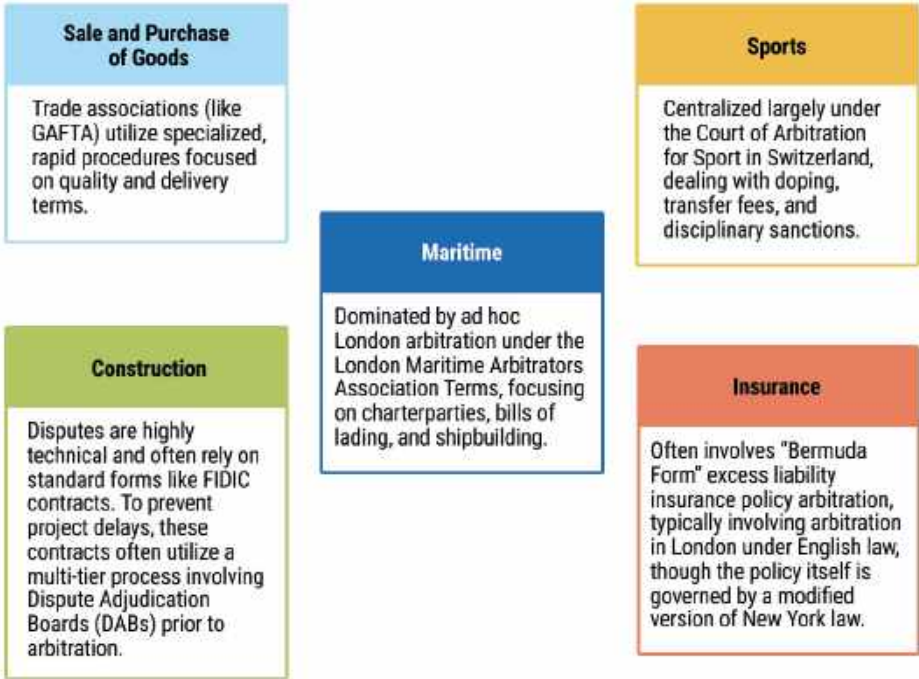


Fig 4.3: Common Industries with Specialized Procedures

When parties make reference to institutional rules, such reference serve as the default framework for the process. In international arbitration today, parties typically proceed with institutional arbitration. The process typically lasts 18-24 months and involves a full exchange of written pleadings (memorials), document production, witness testimony, and an oral hearing. In response to concerns about increasing length and costs of arbitration proceedings, many arbitration institutions have developed expedited procedures for lower-value or less document-intensive disputes. In these matters, various arbitral institutions offer an ‘expedited-track’ either as an opt-in (i.e., as a deliberate choice in the arbitration agreement or through submission when the dispute arises) or

as an opt-out (i.e., as part of institutional rules). For example, the ICC Expedited Rules automatically apply to disputes valued at USD 3 million or less (unless the parties expressly opt out), and require that the tribunal render its final award within six months. Similarly, the AAA-ICDR adopts the ‘opt-out’ system for certain ‘low-value’ matters. Pursuant to the AAA-ICDR framework, the ‘expedited procedures’ shall apply in any case where the amount in dispute does not exceed USD 250,000. Notwithstanding this, parties are free to refer to the expedited procedures on matters of any claim size (within boundaries of mandatory rules, such as due process).

Other institutions, for example the Stockholm Chamber of Commerce (SCC), adopts the ‘opt-in’ regime, whereby parties must expressly adopt the expedited rules either in their arbitration clause or through a submissions agreement.

Contract Arbitration

Contract arbitration is a private, confidential method of dispute resolution, rooted in the parties’ agreement. However, it is not entirely detached from national law. For instance, it relies on the “law of the seat” or “curial law” as the law applicable to the arbitration procedure. It results in an award that is final and binding, meaning there is generally no right of appeal on the merits, only limited grounds for annulment based on procedural defects. Two additional grounds for annulment are non-arbitrability and public policy, which invites some level of rehearing of the merits. However, the thresholds for success on such grounds are intentionally very high.

The Legal Framework

While international arbitration is a creature of parties' consent, it does not exist in a legal vacuum, and the following sets of global and national legal rules govern it:

- ➔ **New York Convention (1958):** This is the foundation of the system. Ratified by over 170 countries, it requires national courts to enforce arbitration agreements (for example by referring parties to arbitration) and to enforce foreign awards as if they were domestic court judgments, subject to very narrow exceptions.
- ➔ **National Legislation:** This is typically the arbitration law of the seat. It governs the arbitral procedure where no arbitration rules have been chosen, it establishes mandatory rules for the parties and the arbitrator (e.g., due process and neutrality), and it regulates the relationship between the arbitration and the courts (e.g., annulment, oath-taking, interim requests). Many national arbitration laws are based – in various degrees – on the UNCITRAL Model Law (e.g., Singapore and Germany). Other national arbitration laws are not (e.g., the U.S. Federal Arbitration Act).
- ➔ **Arbitration Rules:** These are the rules governing the procedure by implication of the parties exercising their party autonomy (e.g., AAA-ICDR, JAMS, ICC or LCIA Rules). The entire rules framework is incorporated by reference unless particular provisions are excluded. Arbitration Rules are more detailed than what is provided for in national arbitration acts and can therefore be treated as a “user manual” that governs the day-to-day conduct of the case, including deadlines for filings, the appointment of arbitrators, and the issuance of the arbitration award.

In addition to these “hard laws,” the practice is guided by soft law, which comprises non-binding yet widely accepted guidelines and best practices. For example, the International Bar Association (IBA) Rules on the Taking of Evidence help bridge the gap between U.S.-style discovery and civil law evidentiary restrictions. Furthermore, the IBA Guidelines on Conflict of Interest serve as the global standard for conflict of interest; that is, assessing arbitrator impartiality and independence and establishing a list of situations of potential conflict of interest and therefore where and when disclosure is advised or mandated.

Key Legal Concepts

The interaction of these laws creates the specific rules that govern international arbitration:

- ➔ **Party autonomy:** Parties have the freedom to design their own process, including their arbitration rules and party-appointed arbitrators, the language, the seat, and the applicable law. Courts generally will not intervene unless the process violates fundamental due process or mandatory laws.
- ➔ **Confidentiality:** Unlike court trials, arbitration is private. However, confidentiality is not automatic in all jurisdictions. Under English law, it is an implied duty; under the UNCITRAL Rules or U.S. law, it must often be explicitly agreed upon by the parties. It covers the existence of the arbitration, documents produced, and the final award.
- ➔ **Kompetenz-Kompetenz:** The arbitral tribunal has the jurisdiction to determine its own jurisdiction. If a party argues the arbitration clause is invalid, the arbitrators themselves decide that issue first. Courts generally will not intervene until the tribunal has issued its ruling. In

the U.S., many would refer to jurisdictional matters as “procedural arbitrability.” Thus, U.S. courts often deal with so-called jurisdictional “gateway” or “threshold matters” under the umbrella term procedural arbitrability.

- ➔ **Separability of the arbitration agreement:** The separability of an arbitration agreement means that the agreement to arbitrate is treated as an independent contract, separate from the main contract in which it is embedded. Even if the main contract is disputed, canceled, or alleged to be invalid, the arbitration agreement can still stand on its own. This ensures that an arbitrator, not a court, decides issues regarding the contract’s validity.

- ➔ **The seat of arbitration:** The seat is the legal domicile of the arbitration, meaning the national law that governs the procedural framework. The law of the seat also confers powers on the tribunal and, importantly, determines which national courts may confirm, annul, or intervene in the arbitral proceedings. The seat is not necessarily synonymous with the geographical venue where hearings take place. For instance, an arbitration “seated” in London is subject to the supervision of English courts, even if the hearings are held physically in Paris or Singapore.

CASE STUDY:
The Limits of "Kompetenz-Kompetenz"
Dallah Real Estate vs. Ministry of Religious Affairs of Pakistan (2010)

Facts	Outcome
<p>Dallah, a Saudi company, signed an MOU with a Pakistani Trust created by the Government to build housing for pilgrims. The Government itself did not sign the contract. When a dispute arose, Dallah initiated arbitration against the Government of Pakistan, arguing the Government was the true party. The Tribunal applied the principle of kompetenz-kompetenz. The Tribunal ruled that it did have jurisdiction over the Government, and issued an award for damages.</p>	<p>When Dallah tried to enforce the award in England, the U.K. Supreme Court refused. While a tribunal has the power to decide its own jurisdiction initially, the Court held that the tribunal's decision is not final. The Court conducted a full rehearing of the jurisdiction issue, found that the Government was not a party to the arbitration agreement, and refused to enforce the award. This highlights that while arbitrators have the first word on jurisdiction, the courts at the seat or enforcement stage have the final word.</p>

International Arbitration

International arbitration has surpassed litigation as the preferred method for resolving cross-border disputes. In global surveys, users of arbitration have repeatedly cited the following factors as driving the decision to resolve their disputes via arbitration:

- ➔ **Enforceability:** Under the New York Convention, an arbitral award is easier to enforce abroad than a court judgment. For example, a U.S. court judgment is challenging to implement in China due to the lack of a mutual treaty; however, a U.S. arbitral award is enforceable in China under the Convention.
- ➔ **Neutrality:** In cross-border deals, neither party wants to be dragged into the other party's home courts. Arbitration often provides a neutral forum in a third country.

- **Expertise:** Parties can select arbitrators with specific industry knowledge, such as engineers for construction disputes or energy experts for gas pricing reviews, ensuring the decision-makers understand the technical context.
- **Flexibility:** Parties can organize the procedure as they see fit. With both parties' agreement, they can determine the length and number of written submissions, the format of an oral hearing, if any, and set the procedural timetable. This flexibility is a significant deviation from most codes of civil procedure applicable in domestic litigation settings.
- **Finality:** Arbitration awards are generally final. Unlike court systems that allow for years of appeals, arbitration laws typically permit annulment only on narrow procedural grounds (e.g., lack of due process), and not on whether the tribunal made a mistake of fact or law (though some jurisdictions like England allow limited appeals on questions of law).
- **Cost and Speed:** Both of these were traditional benefits of arbitration being simple and informal. Nowadays, with the growth of more formal international arbitration and robust procedures, such textbook benefits are now being questioned. Expedited arbitration was established partly to respond to the issue. For many disputes, it is not clear whether cost and speed remain key characteristics of international arbitration. However, a well-structured arbitration can most certainly lead to cost and speed efficiency. Furthermore, the average international arbitration procedure is still faster and less costly than complex litigation in most jurisdictions.

Investor-State Dispute Settlement (ISDS)

ISDS is a mechanism rooted in public international law that allows foreign investors to bring claims directly against a host State. Historically, if a State seized a foreign investor's factory, the investor's only recourse was the local court of the seizing State or alternatively to seek assistance from its home government to resolve the dispute (i.e., diplomatic protection). For political reasons, the investor State was not always keen on engaging in such confrontation. When it was (e.g., when the investor was significant), the dispute could even escalate into gunboat diplomacy (i.e., coercion by threat of economic or military action). ISDS depoliticizes this friction by allowing the investor to sue the host State before a neutral tribunal. The system benefits both investors and capital-importing States: States agree to submit certain types of disputes to independent arbitration to attract Foreign Direct Investment, while investors gain protection against political risk.

The International Centre for Settlement of Investment Disputes (ICSID) occupies a unique position within the ISDS ecosystem and handles the majority of the ISDS disputes. Established under the auspices of the World Bank via the 1965 ICSID Convention, ICSID is the only institution designed exclusively for investor-State disputes. Unlike commercial institutions (such as the ICC or LCIA), which operate under the procedural law of their national seat, ICSID functions as a self-contained, delocalized system, with domestic courts having a limited back-end role in ICSID proceedings. Instead, the ICSID Convention and ICSID rules contain all the provisions required for arbitrating disputes, including those addressing the initiation of proceedings, jurisdiction, procedure, the award to be rendered by the tribunal, post-award remedies, and recognition and enforcement of the award. An ICSID award thus cannot be "set aside" by a national judge; it is subject only to an internal annulment mechanism.

The Legal Framework

The system relies on a vast network of Bilateral Investment Treaties (BITs) and Multilateral Treaties (MITs) (such as the United States-Mexico-Canada Agreement and the Energy Charter Treaty). In certain cases, the States also provide such protections to all qualifying foreign investors and investments in their national investment laws, or through an investment contract. These treaties generally contain States' standing offer of consent to arbitrate future disputes.

Since the legal framework and applicable law in ISDS is public international law, the Vienna Convention on the Law of Treaties (VCLT) plays a prominent role in the interpretation of the relevant BITs and MITs. The most central provision is Article 31 establishing the general rule of interpretation, and in particular sub-para (1) stating that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Sub-para (2) and (3) articulates what 'context' is. Articles 32-33 have a more limited function. Article 32 articulates when and how supplementary means of interpretations can be used. Article 33 deals with the interpretation of treaties that are authenticated in more than one language (e.g., the ICSID and New York Conventions).

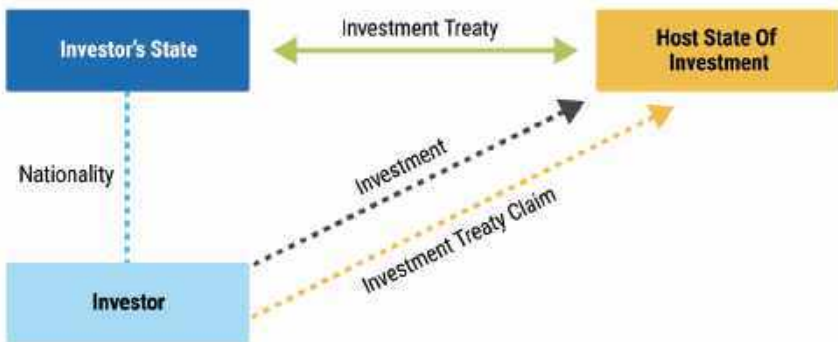


Fig 4.4: Typical Bilateral Investment Treaty Framework and Party Relationships

Jurisdictional Requirements and Attribution

Before a tribunal can hear the merits of a dispute, the claimant must satisfy the jurisdictional requirements. Unlike contract arbitration, where the contract is the primary source of jurisdiction, ISDS requires the claimant to fit within the strict definitions of the applicable treaty. The four pre-requisites for a Tribunals jurisdiction are:

- ➔ ***Ratione Voluntatis***: There needs to be consent, i.e., the State must have offered to arbitrate with the investor, who must have expressed his or her acceptance (e.g., by requesting arbitration under the applicable treaty).
- ➔ ***Ratione Materiae***: There must be a qualified investment. The definition is mostly contained in the applicable international investment treaty. The ICSID Convention has its own investment requirement, which some (not all) treat as an additional requirement (called “the double-keyhole” or “double-barreled” test). Not every business transaction qualifies as an “investment.” Mere sales contracts or one-off trade transactions are generally excluded. Many tribunals (but not all) often apply the Salini Test (derived from *Salini vs. Morocco*), which requires the activity to demonstrate: (1) a contribution of money or assets, (2) a specific duration, (3) an element of risk, and (4) a contribution to the economic development of the host State.
- ➔ ***Ratione Personae***: There must be a qualified investor. The definition is mostly contained in the applicable international investment treaty. The claimant. must be a national of the home State. There is a distinction made between natural persons and legal persons, inviting different issues. A critical practical issue here is dual nationality. Under the ICSID Convention (Article 25), a dual national who also holds the citizenship of the host State is often barred from bringing a claim. Further-

more, suppose the treaty contains a Denial of Benefits clause. In that case, a corporate claimant must prove that it is not merely a shell company incorporated in the host State, but that it has “substantial business activities” there, entitling it to claim the benefits of the treaty.

- ***Ratione Temporis***: The treaty must apply in time. A tribunal has jurisdiction over disputes arising from acts or omissions that occurred within a specific period – typically after the entry into force of an arbitration agreement, treaty, or relevant legal instrument. However, the determination of when an actual “dispute” arises or crystallizes is heavily fact-dependent and often is the subject of significant debate.

Apart from jurisdiction, there are often issues of admissibility manifesting in ISDS. Admissibility matters include:

- **Cooling-off Period**: Additionally, many treaties contain a mandatory cooling-off period (usually 6 months) requiring the investor to attempt settlement before filing for arbitration. While some tribunals view this as a procedural and curable issue, others consider it a strict jurisdictional bar (see Chapter 3: *Mediation*).
- **Fork-in-the-Road**: Providing that the investor must choose between litigation through domestic courts or ISDS, and that the choice made is final. Thus, if the investor has chosen local court, they may have lost the right to ISDS even if the tribunal would have jurisdiction.
- ***Res Judicata/Litis Pendens***: Sometimes the matter at hand (or part of it) has already been finally concluded or is currently the subject of process in another venue (arbitration or court). Such matters should either render the claim suspended or dismissed (with or without prejudice).

CASE STUDY:
What Constitutes an "Investment?"
Salini Costruttori S.p.A. vs. Kingdom of Morocco (2001)

Facts	Outcome
An Italian construction company contracted to build a highway in Morocco. When a dispute arose over payments and delays, Morocco argued that this was a simple construction contract dispute that belonged in Moroccan courts, not an "investment" under the BIT.	The tribunal disagreed, establishing the famous "Salini Test." It ruled that the construction project was an investment because it involved a significant contribution, spanned a long duration, involved operational risk, and contributed to the State's infrastructure development.

Attribution for Conduct Breaching International Legal Obligations: International Law Commission Draft Articles on State Responsibility (ARSIWA)

The ARSIWA regulates circumstances precluding wrongfulness. These include necessity, force majeure, self-defence, and distress (see articles 20-27). A frequent point of confusion for government practitioners is the concept of Attribution. Under the International Law Commission (ILC) Draft Articles on State Responsibility, the State is responsible for:

- ➔ **Organs of the State (see Article 4 ARSIWA):** This includes the executive, legislative, and judicial branches at all levels of government. A breach committed by a municipal mayor or a provincial court judge may be attributable to the State as much as an act by the President or Parliament.
- ➔ **Entities exercising governmental authority (see Article 5 ARSIWA):** A private or semi-private entity (like a privatized utility company) can bind the State if it is empowered by law to exercise elements of governmental authority (e.g., granting licenses or seizing land).

- ➔ **Conduct directed or controlled by the State (see Article 8 ARSIWA):** The acts of State-owned enterprises (SoEs), such as national oil companies, are generally *not* attributable to the State when they act commercially. However, if the government directs the State-owned enterprise to breach a contract for political reasons, that act may be attributable to the State.

Investment Treaty Planning

For corporate counsel, ISDS is not just a dispute resolution tool; it is a planning tool that can be used to mitigate risk. Investors must consider “treaty planning” at the outset of a project. This involves structuring the investment through a corporate vehicle in a jurisdiction that has a favorable BIT with the host State, for example, as follows:

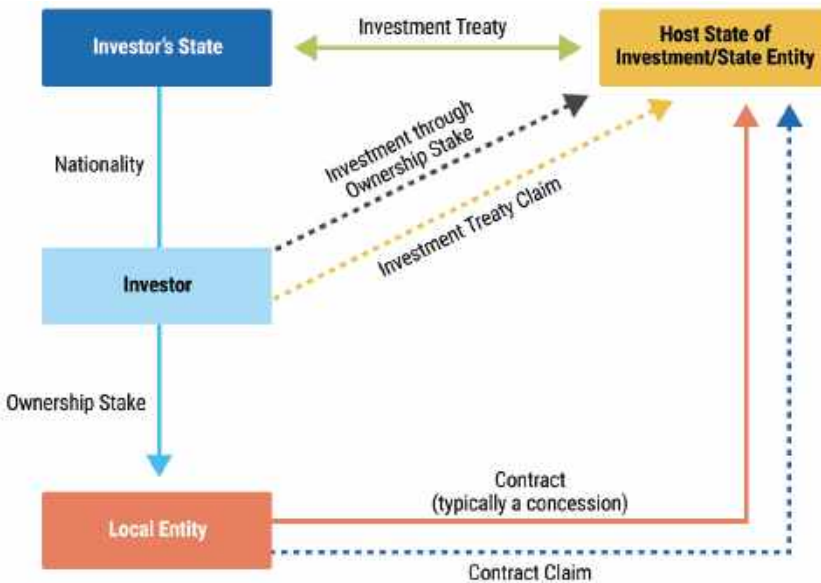


Fig 4.5: Investment Protection Options for a Potential Foreign Direct Investor

However, timing is critical. Restructuring a company to gain treaty protection *after* a dispute has arisen, or is foreseeable, is considered an abuse of process that could lead to the dismissal of the claim.

Substantive Protections

Once jurisdiction and attribution are established, the tribunal assesses whether the State's alleged conduct violated specific treaty standards. The most commonly invoked provisions relate to the following treaty protections:

- ➔ **Expropriation:** International law does not forbid expropriation; it prohibits expropriation without compensation. This includes both *direct* (a mandatory legal transfer of title or outright seizure of the asset) and *indirect* expropriation (measures that do not transfer title but substantially deprive the investor of the economic use and enjoyment of their investment, in a manner equivalent to a direct taking).
- ➔ **Fair and equitable treatment (FET):** A broad, catch-all protection that requires that the host State treat the investor fairly and equitably (i.e., that it cannot discriminate against the investor, or impose unreasonable or arbitrary measures). Often broadly worded, this treaty protection has evolved to cover legitimate expectations, denial of justice, arbitrariness, and discrimination.
- ➔ **National treatment:** The State must not treat the foreign investor or investment less favorably than its own domestic investors or investments in like circumstances.
- ➔ **Most-favored-nation (MFN):** The State must not treat the foreign investor or investment less favorably than it treats investors or investments from any third country. The MFN clause has at times been invoked to broaden

the jurisdictional definition in the applicable treaty by borrowing from a so-called “comparator” treaty. It is almost a uniform view that such extension is not possible. Others have used the MFN clause for procedural extension, i.e., import more favorable ISDS provisions from comparator treaties (e.g., arbitration clauses without cooling-off periods). Such use of the MFN protection is controversial, with an even split between arbitrators on whether it is – or should be – possible. The most uncontroversial use (until recently) is the incorporation of more favorable substantive treatment (e.g., FET protection). Nowadays, some argue that the MFN protection is limited to how the host State treats the investors in the country.

Quantifying Damage

If liability is established, the tribunal may be required to quantify damages. This is often the most contentious phase and may involve complex economic modeling. Standard valuation methodologies include:

- ➔ **Discounted cash flow (DCF):** To value a going concern with a proven track record of profit, the tribunal may project future profits and discount them to present value. A DCF valuation may yield significant arbitration awards by capturing the full economic value of future growth.
- ➔ **Comparables analysis:** The tribunal values the investment by reference to recent arm’s-length transactions of similar assets, or the market valuation of comparable companies.
- ➔ **Sunk costs:** For early-stage projects (e.g., a mine that has not yet started extraction), tribunals may reject DCF as too speculative and instead award sunk costs, reimbursing only the actual money spent by the investor.

ICSID Annulment Mechanism

A defining feature of the ICSID system is the absence of an appeals process. A party cannot challenge an ICSID award in national courts. Instead, the ICSID Convention provides for an internal Annulment Mechanism in which an ad hoc committee (composed of three new arbitrators) is appointed to review the award.

Still, its review is limited to specific enumerated flaws: (1) improper constitution of the tribunal, (2) manifest excess of powers, (3) corruption, (4) serious departure from a fundamental rule of procedure, or (5) failure to state the reasons for the award. Annulment was designed purposefully to confer a limited scope of review to safeguard against violation of the fundamental principles of law governing the underlying arbitration proceedings. The committee cannot review whether the tribunal got the facts or law right, only whether the process was fundamentally broken.

In contrast, non-ICSID awards (e.g., those issued in arbitrations seated in London or Paris under the UNCITRAL rules) are subject to the same set-aside proceedings in the seat's national courts as those in contract arbitration disputes. While the grounds are similarly narrow (usually mirroring the grounds for award enforcement under the New York Convention), the involvement of a national court introduces a layer of local judicial oversight that does not exist in the ICSID system.

Key Advantages and Potential for Negative Perception

The primary engine driving ISDS adoption is the encouragement of foreign direct investment. By providing a safety net against political risk, investment treaties with ISDS clauses historically promoted the flow of capital from developed States to underdeveloped or developing States. The protec-

tions offered bridged the inherent risks and uncertainties in such investments. However, this is no longer a “one-way road” of Western corporations suing developing States. As the global economy shifts, there is an increasing trend of investors from developing economies initiating disputes against developed nations, democratizing the usage of the system.

Beyond economics, the system offers unique procedural advantages:

- ➔ **Neutrality:** A foreign investor may be reluctant to submit disputes with the host State to the host State’s local courts, and the host State to the courts of another country. ISDS bridges this gap by offering a neutral, denationalized forum that compromises neither the State’s dignity nor the investor’s security.
- ➔ **Custom-made Protection:** ISDS is a creature of State consent. States act as the architects of the system, determining the level of protection, the procedural rules, and the definitions of investment through the treaties they draft. While States cannot change the rules retrospectively once a dispute has begun, they can modernize their treaty networks to reflect their current policy goals.
- ➔ **Enforceability:** Unlike domestic litigation, which can drag on through years of appeals, ISDS awards are intended to be final. Under the ICSID Convention, the enforcement process is theoretically straightforward, treating the award as a final judgment of the national court and limiting the grounds for annulment to fundamental procedural errors in the decision-making process.

By proactively creating the legal framework for ADR in investor-State disputes (combining mediation and arbitration) and genuinely engaging in the process, States fortify the legitimacy of the system for public and private parties and project

a positive image of a stable, modern framework for foreign investment. The best proof of this includes timely, streamlined engagement in the process and the recognition and enforcement of any settlements or awards arising from it, in accordance with international law.

Legitimacy Crisis and the Backlash Movement

Despite these advantages, ISDS has faced significant backlash over its legitimacy and its impact on States' ability to regulate in the public interest. The most potent criticism is the potential for internal politicization and the undermining of sovereignty. Critics argue that ISDS creates a regulatory chill, in which States hesitate to enact necessary public-interest laws (such as anti-smoking legislation or environmental bans) for fear of being sued for billions of dollars. This perception suggests that ISDS allows corporations to bypass national courts and infringe on a State's fundamental right to regulate. However, this risk is increasingly mitigated by modern treaties, which explicitly carve out the right to regulate in the public interest, ensuring that legitimate health and environmental measures cannot be treated as breaches of the treaty.

Further controversy surrounds the perception that tribunals favor investors. Despite the parties' ability to choose their arbitrators (States have the equal right to appoint a tribunal member who understands the nuances of public administration and regulatory necessity), there are allegations that a closed group of arbitrators prioritizes corporate property rights over human rights or environmental concerns. To the contrary, statistics prepared by leading arbitration organization, such as the UNCTAD and ICSID, suggest that States actually win roughly half of all known cases.

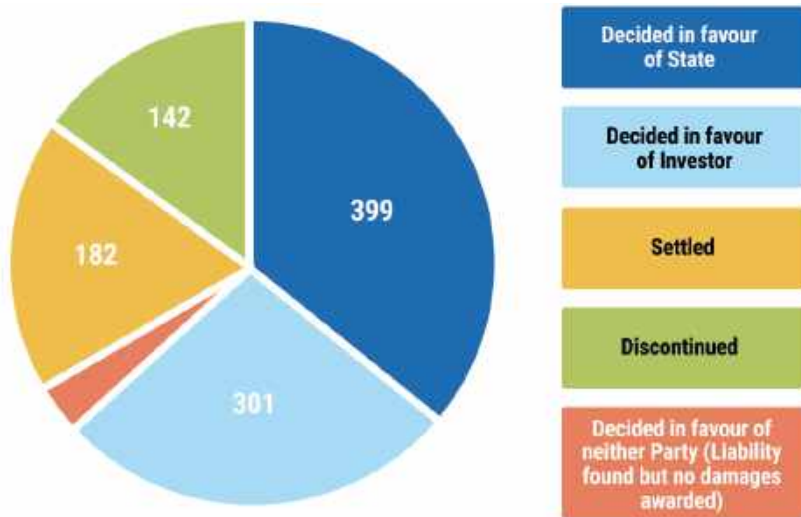


Fig 4.6: Concluded Original Arbitration Proceedings as of 31 December 2024
UNCTAD Investment Policy Hub

Finally, the system’s cost is a stark reality. Defending an ISDS claim can involve substantial legal fees and tribunal costs, often exceeding USD 5 to 10 million per case. For some States, these costs can represent a significant portion of the public budget. To counter this, the system has developed mechanisms such as “security for costs” (requiring shaky claimants to post bonds) and the loser-pays principle, under which victorious States are entitled to recover their legal expenses from the investor in the event of an unmeritorious claim.

Recent Developments: What Is New in the E.U.?

The landscape of international arbitration within the European Union has undergone a significant shift following the Court of Justice of the European Union’s 2018 *Achmea* judgment, which declared intra-E.U. investor-State arbitration incompatible with the autonomy of the E.U. legal order.

This ruling galvanized a coordinated political campaign to dismantle the existing ISDS regime, culminating in the 2020 Plurilateral Agreement to terminate intra-E.U. BITs and the recent withdrawal of the E.U. and several Member States from the Energy Charter Treaty. Despite the E.U.'s firm stance that these developments render arbitration clauses invalid, the vast majority of arbitral tribunals have consistently rejected these jurisdictional objections, maintaining that E.U. law does not supersede their mandate under public international law. However, a significant departure from this trend occurred in *Green Power vs. Spain*, where a tribunal seated in Stockholm accepted the intra-E.U. objection and declined jurisdiction. However, this is likely due to the fact that an eventual award would clearly be annulled in Swedish courts and the tribunal may have endorsed the idea that it has a duty to render enforceable awards.

The selected arbitration rules and seat of arbitration have a significant effect on the ability of the tribunal to uphold its jurisdiction, and on the enforceability of the arbitral award – ad hoc and institutional arbitrations seated in an E.U. Member State are much more vulnerable than those under the self-contained ICSID framework.

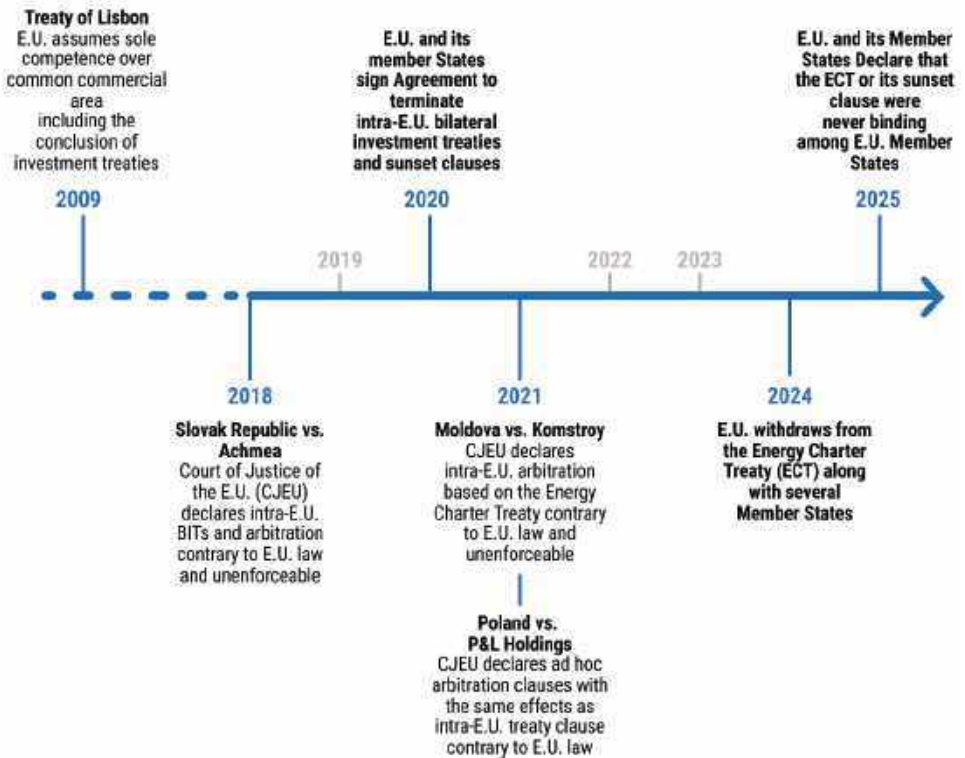


Fig 4.7: Timeline of Key Achmea-related Developments

Useful Resources

Conventions and Legal Frameworks

- United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958): https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards
- Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965): <https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf>
- UNCITRAL, Model Law on International Commercial Arbitration (1985) (amendments as adopted in 2006): https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration
- International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001): https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf
- Vienna Convention on the Law of Treaties (1969): https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

Arbitration Rules and Soft Law

- International Chamber of Commerce, Arbitration Rules (2021): <https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/>
- London Court of International Arbitration, Arbitration Rules, (2020): https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx

- ➔ International Centre for Settlement of Investment Disputes, Arbitration Rules (2022): <https://icsid.worldbank.org/rules-regulations/convention/arbitration-rules/introductory-note>
- ➔ International Bar Association, Rules on the Taking of Evidence in International Arbitration (2020): <https://www.ibanet.org/resources>
- ➔ International Bar Association, Guidelines on Conflicts of Interest in International Arbitration (2024): <https://www.ibanet.org/resources>
- ➔ AAA-ICDR Rules (2021): https://www.icdr.org/rules_forms_fees

Reports and Statistics

- ➔ London Court of International Arbitration, Costs and Duration Analysis (2024): <https://www.lcia.org/>
- ➔ International Centre for Settlement of Investment Disputes, Caseload Statistics (2025): <https://icsid.worldbank.org/resources/publications/icsid-case-load-statistics>
- ➔ UN Trade and Development, Investment Dispute Settlement Navigator (2023): <https://investmentpolicy.unctad.org/investment-dispute-settlement>
- ➔ Queen Mary University of London & White & Case LLP, International Arbitration Survey (2015, 2018, 2021, 2025): https://www.qmul.ac.uk/arbitration/research/2021-international-arbitration-survey/?utm_source=chatgpt.com
- ➔ Singapore International Dispute Resolution Academy, International Dispute Resolution Survey (2024): https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey-2024/SIDRA_Final_Report_2024.pdf?utm_source=-chatgpt.com

Non-exhaustive Selection of Arbitral Institutions

- International Chamber of Commerce (ICC)
- London Court of International Arbitration (LCIA)
- Singapore International Arbitration Centre (SIAC)
- Hong Kong International Arbitration Centre (HKIAC)
- Permanent Court of Arbitration (PCA)
- International Centre for Settlement of Investment Disputes (ICSID)
- German Arbitration Institute (DIS)
- SCC Arbitration Institute (SCC)
- AAA-International Centre for Dispute Resolution (AAA-ICDR)
- China International Economic and Trade Arbitration Commission (CIETAC)
- Vienna International Arbitral Centre (VIAC)
- Swiss Arbitration Centre (Swiss Arbitration)
- Cairo Regional Centre for International Commercial Arbitration (CRCICA)
- Dubai International Arbitration Centre (DIAC)
- Australian Centre for International Commercial Arbitration (ACICA)
- WIPO Arbitration and Mediation Centre (WIPO)

CHAPTER 5:

Arbitration Procedure and Practice

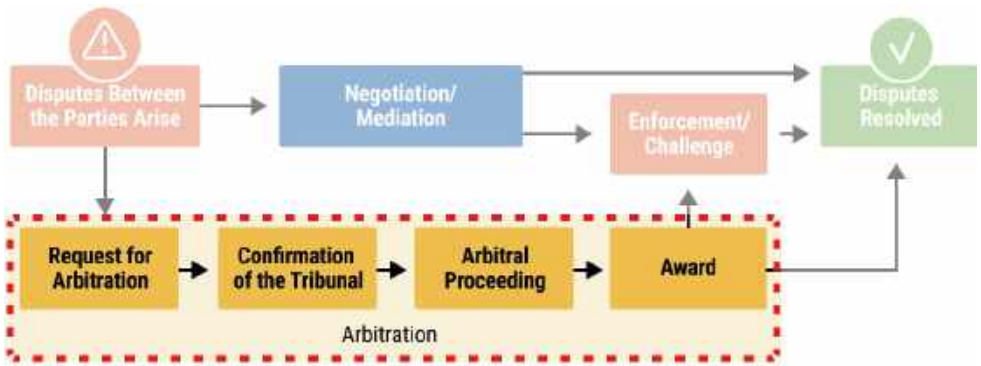


Fig 5.1: Alternative Dispute Resolution Process

This chapter provides a practical roadmap for the lifecycle of an arbitration dispute, from identifying the leading roles and early evaluation stages of a potential dispute, through to the conclusion of the oral hearing and issuance of an award. It starts by identifying the key players and examining the pre-arbitration phase. It then outlines the formal initiation of the dispute and the process of constituting the arbitral tribunal, emphasizing the strategic importance of arbitrator selection and the standards for independence and impartiality. It then describes best practices for gathering evidence, structuring written pleadings, and managing document production.

The chapter also touches upon procedural options such as interim measures and bifurcation of disputes. Finally, the chapter addresses the oral phase of arbitration, offering advocacy techniques for opening statements, cross-examination of witnesses, and closing arguments, before briefly discussing the dispute's culmination in the issuance of an award.

These typical phases of an arbitration can be seen laid out in a timeline format in Figure 5.2 below:

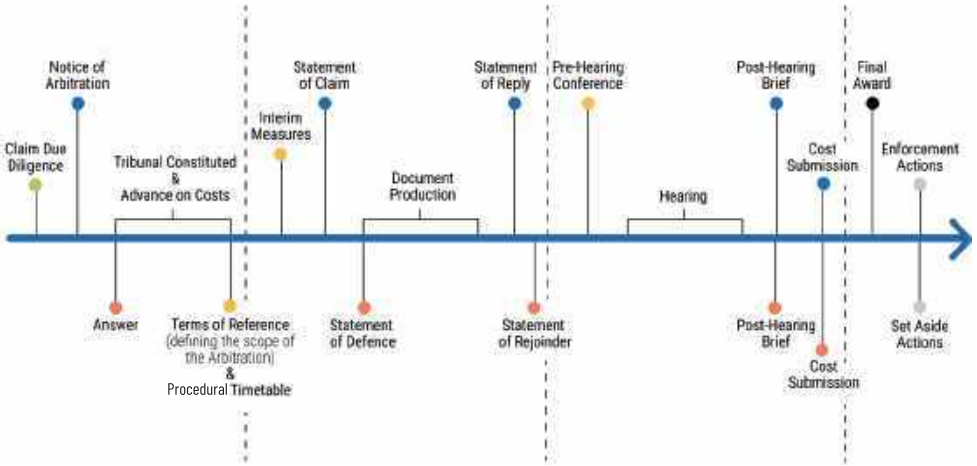


Fig 5.2: Timeline of Typical Arbitration Proceeding and Core Components

Practical Roles and Early Stages in Arbitration

The Claimant

As the party initiating the dispute, the Claimant bears the burden of proof. Consequently, the Claimant's primary role begins long before the Request for Arbitration is filed. Arbitration proceedings are often decided based on contemporaneous evidence, so the Claimant must organize its internal records, including emails, board and meeting minutes, and other internal documents, to establish its case on the facts. The arbitration is an asset class that requires substantial financing. The Claimant's legal team must assess the strength of its case, often by involving outside counsel, to determine the cost of pursuit versus the likely success in the arbitration and the chance of recovery. Arbitration can serve as leverage in negotiations, particularly when the parties want to preserve

their commercial relationship in the future. In many cases, the goal is not the award itself, but a negotiated settlement after the parties get an opportunity to consider the strengths and weaknesses of each other's case (see Chapter 4: *Arbitration Overview*).

The Respondent

In arbitration proceedings, the Respondent is often caught on the back foot and needs to mobilize rapidly to obtain timely legal advice to prepare its defense strategy and to fully participate in the determination of the applicable arbitration rules and the appointment of the tribunal. For each of these steps, the magic words are: coordination, coordination, and coordination – within the government, with external counsel, and with the investor. This is particularly important to ensure immediate mobilization, regulatory notification, development of counterclaims, and messaging (see Chapter 7: *A Roadmap to Designing Effective and Efficient ADR Systems*).

Upon receiving a notice of dispute (where the relevant contract or treaty requires an advance notification) or a request for arbitration, the Respondent's first duty is the preservation of evidence and identification of pertinent fact witnesses. This prevents the tribunal from drawing adverse inferences from the missing files or data. Publicly listed companies are often required to disclose potential disputes in their filings, and many insurance policies require immediate notice of a claim to trigger coverage for legal defense costs. Failure to notify within days can void coverage.

The Respondent must also quickly assess whether the best defense is filing a counterclaim. In commercial cases, this involves identifying the Claimant's performance failures. In ISDS, States are increasingly bringing counterclaims for environmental damage or human rights violations committed by

the investor. A well-substantiated counterclaim may increase the chance of achieving a favorable outcome in future settlement negotiations. To prevent inconsistent public statements by different institutions that can aggravate the dispute or be used as evidence against the government, it is essential to establish and project a unified narrative. Any public communication should be informative enough to satisfy the required level of transparency, but otherwise limited and filtered through a single government source.

Counsel

Counsel's primary job is to distill thousands of documents and technical facts into a compelling, coherent narrative that persuades the tribunal. They serve many other critical roles. Counsel must provide the client with a realistic success rate and a detailed budget. This often involves identifying jurisdictional issues (e.g., time bars, corruption, or invalid arbitration clauses) and carefully considering the merits of the dispute before a party extends significant sums to it. Tribunal selection is the most consequential strategic decision in the entire process, and experienced counsel have first-hand experience with many prominent arbitrators and access to data analytics and professional networks to research the track records of potential arbitrators. This valuable information allows them to appoint a decision-maker who is not only neutral but whose legal philosophy aligns with the client's theory of the case. Except in the case of minor or standard form disputes, it is genuinely recommended to involve an outside counsel even where the Claimant's or the Respondent's in-house team has substantial arbitration experience.

The Experts

Parties to an arbitration frequently retain independent experts to guide the tribunal through complex technical or foreign legal issues. These experts owe a duty of independence to the tribunal, not just to the client who pays them. This includes:

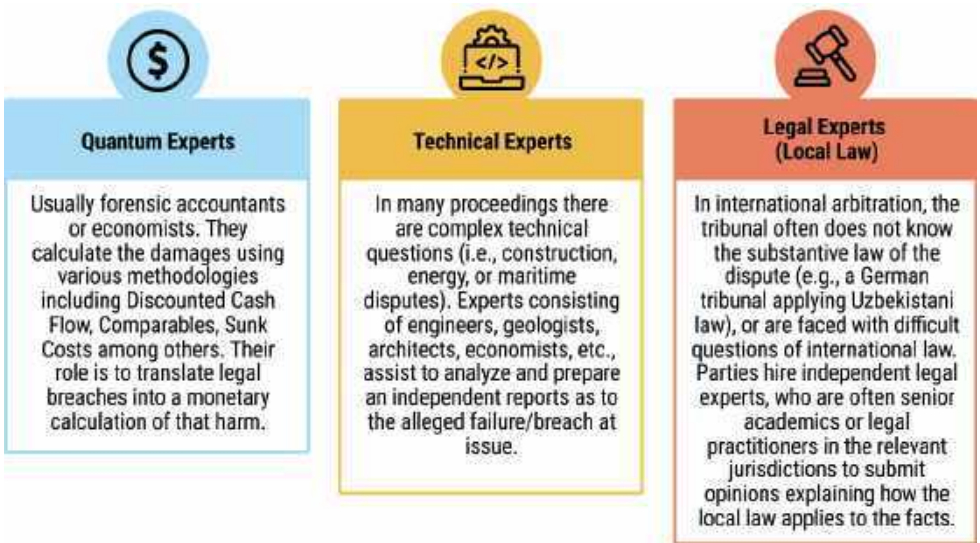


Fig 5.3: Common Categories of Experts

The Government

Governments play a unique dual role in the arbitration ecosystem: they are both frequent Respondents in disputes, occasional Claimants, and the policymakers who build the system.

As Respondents, Governments should establish a team (often within the Ministry of Justice, Finance, or Trade, or in coor-

dination with ministries) to centrally manage disputes. This prevents different ministries from within the same government from taking conflicting positions in any given case (and across cases), and simplifies the information gathering and the Government's control over its arbitration caseload. Such a team would also be responsible for hiring external counsel, often through public tenders.

As a policymaker, the Government needs to attract international business by promoting the rule of law, while protecting its sovereign policy space. This involves ratifying the New York Convention (to ensure the enforceability of arbitration awards) and the ICSID Convention (to safeguard foreign investment). Furthermore, Governments compete to make their countries attractive seats for arbitration by updating national laws to be arbitration-friendly, limiting court intervention, and ensuring confidentiality, often by adopting laws based on the Model Laws and model treaties developed by organizations such as UNCITRAL. Governments also actively negotiate Bilateral Investment Treaties and Free Trade Agreements, seeking to balance investment protection with the State's right to regulate in the public interest. These treaties also define the scope of future disputes through precise legal drafting, while protecting their own investors abroad.

Arbitration Procedure

Initiation of the Dispute: Notice of Dispute, Request for Arbitration

If the claimant decides to initiate a claim, it formally commences the arbitration in accordance with the arbitration agreement and the arbitration rules identified therein.

The request for arbitration or notice of dispute is typically a short document that provides a broad overview of the dispute. Upon receipt of the notice of dispute, the administering arbitral institution formally registers the case and transmits a copy to the respondent.

ICSID Guidance On Filing a Request For Arbitration

- Written in English, French, or Spanish (the official languages of the Centre)
- Include the name and contact details of all parties (including e-mail, street address, and telephone number)
- Signed and dated by the requesting party or its representative
- Enclose proof of the representative's authority to act, e.g., a power of attorney or a letter of engagement
- Description of the investment and of its ownership and control
- Summary of the relevant facts and claims
- Request for relief (with an estimate of the amount of damages)

- Indication that the legal dispute arises directly from the investment
- Copy of the instrument recording each party's consent to submit the dispute to arbitration under the ICSID Convention, the date of entry into force of that instrument, and evidence of its entry into force.

Composition of the Tribunal

Arbitrator selection is one of the most consequential phases in any arbitration. Unlike litigation, where parties do not choose their adjudicators, arbitration allows the parties to shape the composition of the tribunal that will ultimately decide their dispute. This degree of influence is a defining feature of the arbitral process and a significant reason that the parties opt for arbitration in the first place. In the early stages of a case, the selection of arbitrator(s) is a critical decision, as the arbitrator's role extends far beyond applying the law. An arbitral tribunal has broad procedural and decision-making powers, including managing the arbitration, ruling on jurisdiction, admissibility, and evidentiary issues, ordering document production, granting or approving interim measures, and rendering the final award. Because the tribunal wields such authority, utmost care must be taken in selecting an arbitrator with strong management capabilities, decisiveness, and the capacity to deliver clear, enforceable awards.

Parties' Role in Selecting an Arbitrator

Parties have a meaningful say in selecting the arbitrators. This opportunity allows them to consider factors beyond formal legal credentials, including:

- Nationality and cultural background, which may affect perceptions of neutrality or comfort in cases involving cross-border disputes
- Professional and legal experience, including familiarity with the relevant commercial, technical, legal, or regulatory issues
- Industry-specific expertise can be pivotal in disputes across the construction, energy, and mining sectors
- Caseload and availability, ensuring that the arbitrator can devote adequate time to the matter and deliver an award efficiently
- Personality and temperament
- Case management skills
- Credibility and professional reputation
- Analytical style and decision-making tendencies
- Viewpoint consistency, i.e., whether the arbitrator's prior decisions suggest predictability in handling specific issues

This ability to influence tribunal composition provides parties with a sense of comfort and confidence in the process. It can also materially affect both the quality and trajectory of the arbitration. Experienced arbitrators can manage proceedings effectively and efficiently, encourage productive cooperation among the parties, and, most importantly, render a clear, well-reasoned, and enforceable award.

Mechanism for Appointing the Tribunal

The method of appointing arbitrators is governed primarily by the arbitration agreement – whether contained in a commercial contract or an investment treaty – and, where applicable, supplemented by the institutional rules.



Sole Arbitrator

The parties may agree to appoint a sole arbitrator, in which they must typically jointly agree on the candidate. If the parties cannot reach an agreement, then the designated arbitration institution or the appointing authority will appoint the arbitrator.



Three-member Tribunal

Where an arbitration agreement provides for a three-member tribunal, typically each party nominates one arbitrator, and the two party-appointed arbitrators select the chair-person or presiding arbitrator. If the co-arbitrators cannot agree on the third arbitrator, or if a party fails to appoint an arbitrator, the institution or appointing authority will step in to make the necessary appointment.

Fig 5.4: Sole Arbitrator vs. Three-member Tribunals

Practical Steps in Selecting an Arbitrator

In practice, selecting an arbitrator requires due diligence akin to evaluating a professional expert and requires a thorough assessment of the candidate's professional background and attributes. The parties conduct a comprehensive review of publicly available biographical information, including background, legal training, professional experience, prior arbitral appointments, publications, and the arbitrator's track record in arbitrations. Additionally, the party may conduct a high-level pre-appointment interview. While care must be taken to avoid discussing the merits of the dispute, a brief interview may address the candidate's expertise, experience, competence, skills, availability, possible conflicts of interest, and expected fees.

Independence and Impartiality

At the heart of arbitrator selection lie the principles of independence and impartiality. To ensure independence, an arbitrator must have no close relationship with any party, counsel, or affiliated entity that could affect the arbitrator's ability to judge the case. Independence focuses on objective connections, such as financial, professional, or personal. Impartiality speaks more to the arbitrator's state of mind. An arbitrator must approach the dispute without bias, prejudice, or predisposition in favor of any party.

Disclosure Obligations

When approached for an appointment and throughout a case, arbitrators have a continuing obligation to disclose any circumstances that may call into question their independence or impartiality. For example, the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration proposes a Subjective Test, requiring the disclosure of information that "may in the eyes of the parties, give rise to doubts" about impartiality or independence — even if the arbitrator personally believes that no conflict exists. Failure to disclose can have significant consequences, including a party's objection at the outset, a challenge to the arbitrator during the course of proceedings, or, in extreme cases, grounds for setting aside or resisting enforcement of an award. Note, however, that the mere fact of non-disclosure is usually not, on its own, sufficient to successfully challenge an arbitrator. Delayed or undisclosed incidental professional contact or academic collaboration is typically insufficient to disqualify the challenged arbitrator.

Disqualification and Challenge of Arbitrators

If doubts arise regarding an arbitrator's independence, impartiality, or ability to perform their duties, parties may seek the arbitrator's disqualification as specified in the grounds for challenge:

The Grounds for Challenge Are Set Forth in the Institutional Rules, Such As:

<p>ICSID Convention, Article 57, and ICSID Arbitration Rules (2022), Article 14.1</p> <p>Arbitrators must be persons of "high moral character and recognized competence" and may be disqualified if a manifest lack of the required qualities exists.</p>	<p>ICC Rules (2021), Article 14.1</p> <p>An arbitrator may be challenged for a "lack of independence or impartiality" or otherwise failing to meet the requisite qualifications.</p>	<p>LCIA Rules (2020), Articles 10.1–10.2</p> <p>Challenges may be made where there are circumstances giving rise to "justifiable doubts" as to impartiality or independence, or the arbitrator does not conduct the arbitration properly or with reasonable efficiency.</p>
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Fig 5.5: Grounds for Challenge in Selected Institutional Rules

Challenges must be timely and well-supported. Frivolous or tactical challenges are discouraged and can be damaging to a party's credibility before the tribunal.

First Procedural Conference

Once the tribunal has been confirmed, the first procedural conference marks the official launch of the arbitration. This is a critical early moment in the proceedings: it is the first time the parties and their counsel meet with the tribunal to discuss and agree on the ground rules governing the arbitration.

Before the conference, the parties typically exchange drafts of Procedural Order No. 1, the foundational procedural docu-

ment that sets out the framework for the arbitration. Procedural Order No. 1 identifies the parties' legal representatives and addresses all essential procedural matters, including: the language and place of the arbitration; the schedule and sequence of written submissions; rules governing document production and the submission of evidence; requirements for witness statements and expert reports; procedures for examining fact and expert witnesses; the organization of the pre-hearing meeting; the conduct and record of hearings; post-hearing briefs; statements of costs; and issues of confidentiality and, where applicable, publication of the award.

Greater Transparency in ISDS Cases

ISDS cases have often been confidential, affording the public little or no insight into cases involving public funds and potentially important public-interest issues. Recent arbitration rules — such as the 2022 ICSID Arbitration Rules and the 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration — provide for greater transparency in ISDS proceedings. These rules promote the publication of arbitral awards and other arbitration-related documents, submissions by third parties (such as civil society or other treaty parties), and open hearings. The rules contain safeguards to protect confidential or sensitive information.

Where the parties cannot agree on particular provisions of the draft procedural order, the first procedural conference provides each side with a structured opportunity to present its preferred approach. The tribunal then determines the procedure, taking into account the parties' submissions and any relevant institutional rules.

The tribunal's formal adoption of Procedural Order No.1 marks the true beginning of the arbitration. Once it is issued, the procedural roadmap is set, and the case generally proceeds forward in an orderly, predictable manner.

Developing Evidentiary Support For Your Arguments

Preliminary Fact-gathering

To effectively satisfy the burden of proof either as the claimant in a dispute asserting claims against the respondent or to defend against such claims sufficiently, it is critical to identify, collect, preserve, and utilize contemporaneous evidence related to the relevant dispute. Evidence comes in multiple forms, all of which may be useful to the tribunal.

The main types of evidence utilized in arbitrations are: (1) contemporaneous documents, (2) witness testimony, and (3) expert witness testimony. Documentary evidence is significant because it provides a snapshot of contemporaneous facts and is often the most reliable form of evidence. The supplementation of the factual record using witness testimony for information not captured in documents, and the analysis of the information contained in such documents by relevant technical, legal, or quantum experts, works in concert with the underlying documents to present the tribunal with a clear, compelling, and convincing presentation of the facts it requires to make its determination on the issues presented.

The following sections highlight essential steps to gather strong evidentiary support.

Relevant Custodians

Custodian is a term used to identify individuals who have access to relevant documents and/or data.

Relevant Custodians Can Include:

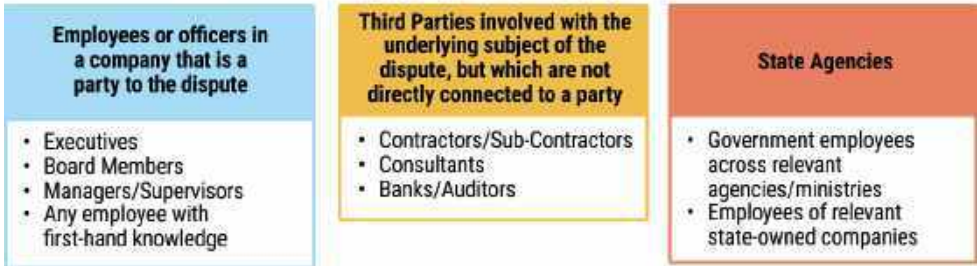


Fig 5.6: Categories of Typical Document Custodians

Gathering Evidence

State parties or State-owned entities may require additional focus and effort when collecting evidence. Oftentimes, relevant material is archived across multiple ministries, State agencies, or State-owned companies, and may carry various levels of confidentiality that must be navigated. Additional coordination amongst these custodians will be required to identify and collect relevant contemporaneous evidence. It is thus essential to identify and work with a point of contact in the Government who can make the necessary outreach, explain the need to gather documents, and the importance of preserving evidence.

In various jurisdictions, there may be mandatory laws requiring companies or individuals to put in place litigation holds that pause any periodic data deletion or document shredding to preserve the information as evidence

in a dispute. Depending on the nature of the claim and the relevant procedural law, it will be essential to identify and consider complying with such requirements at the point a dispute arises.

Relevant Categories of Documents

In addition to identifying the relevant custodians, it is crucial to gather the appropriate documentation. Relevant evidence can include:

- ➔ Contracts, agreements, correspondence, emails, letters, orders, press releases, internal memoranda, assessments, hard drives, mobile devices
- ➔ Laws, legislative acts, orders, resolutions, decrees, indictments, internal assessments
- ➔ Post-dispute documents (i.e., internal memoranda, valuation analysis)

Such information exists across a wide variety of formats, including paper copies, Word documents, PowerPoint presentations, spreadsheets, email, database files, online sites, etc. All relevant formats should be included as you gather potentially valuable evidence.

Interim Measures

Interim or Provisional Measures are a powerful procedural tool that act as emergency orders to preserve the status quo and to protect the parties' rights pending the tribunal's final decision on the merits.

Contrary to the perception that these are claimant-only tools, interim measures are actively utilized by both sides. Claimants typically seek measures to secure the eventual enforce-

ment of the award (e.g., freezing assets) or to maintain the contract during the dispute (e.g., preventing the termination of a franchise agreement). In contrast, Respondents frequently seek Security for

Costs. If the claimant is a shell company with no assets, the Respondent may ask the tribunal to order the Claimant to post a bond or bank guarantee. This ensures that if the Respondent wins, their legal fees can actually be recovered.

When Are Interim Measures a Good Choice?

To react to changing circumstances affecting the position of the parties

To prevent the aggravation of a past or foreseeable event

To ensure effective enforcement of its rights

To prevent the loss or dissipation of property rights

To protect crucial evidence from being moved or destroyed

Important deadlines and preclusion periods may lapse, and as a result, the Claimant may suffer harm that is not compensated by a tribunal's award of damages.

Obtaining an interim measure is difficult. Tribunals are generally reluctant to interfere with the parties' commercial freedom before they have seen the full evidence.

To Succeed on Interim Measures, a Party Must Typically Prove:



Fig 5.7: Elements for Interim Measures Requests

Types of Interim Measures

The specific powers depend on the procedural law governing the arbitration (“*lex arbitri*”) and the chosen Rules.

The Most Common Remedies Sought For Interim Measures Include:



Fig 5.8: Common Remedies Sought Through Interim Measures

Most modern institutional rules (ICC, LCIA, SIAC) also provide for the appointment of an Emergency Arbitrator, which allows the Claimant to obtain interim measures within 3 to 4 months, during which the parties and/or the relevant arbitration institution constitute the tribunal. Such an emer-

gency arbitrator is typically appointed within 24 to 48 hours of a request, and issues a temporary decision within roughly two weeks. This mechanism allows parties to obtain urgent relief without resorting to national courts, keeping the entire dispute within the confidential framework of arbitration.

Bifurcation and Early Dismissal

Upon receiving an arbitration claim, a respondent should promptly assess whether to request bifurcation of the proceedings – i.e., the division of the case into separate phases to address discrete issues that may be dispositive. Bifurcation most commonly involves separating jurisdictional issues from the merits of the dispute or dividing the liability phase from the damages phase. For respondents, this can be a strategically significant and cost-saving measure: if the tribunal finds that it lacks jurisdiction, the case ends without the need for a complete merits process; similarly, a decision finding no liability eliminates the need for a damages phase. Thus, in simple terms, bifurcation enables the tribunal to decide one big, dispositive question early – if the answer ends the case, there is no need for a full arbitration.

Tribunals apply well-established criteria when determining whether bifurcation is warranted. Although phrasing varies, the core considerations generally include whether:

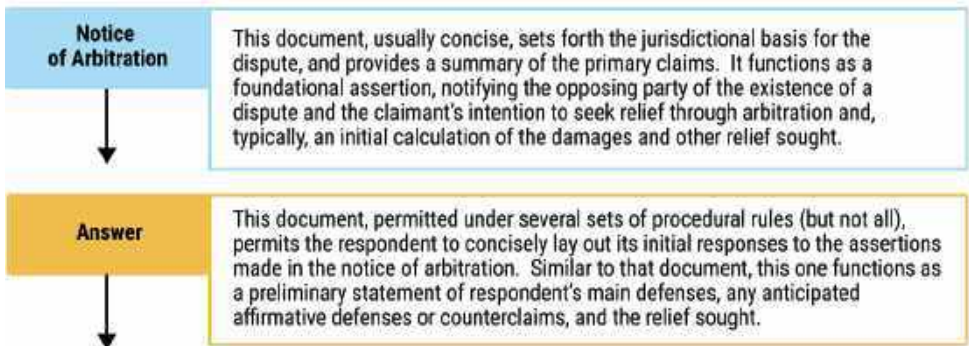
- ➔ The objection is substantial and not merely frivolous – the issue must be severe enough to justify separate consideration.
- ➔ Bifurcation would materially enhance procedural economy – it could significantly reduce the scope, time, or cost of the subsequent phase.
- ➔ The issue is sufficiently detached from the merits – if jurisdictional or liability issues are so intertwined with

the merits that they cannot be meaningfully separated, bifurcation may be denied.

Regardless of the forum, it is critical to emphasize that requests for bifurcation must be raised as early as possible – often at the very outset of the case – because late requests can disrupt the procedural timetable and are less likely to succeed.

Presenting the Claims and Defenses Through the Written Phase

Arbitration relies mainly on the exchange of substantive written briefs as the principal vehicle for advocacy and the presentation of a party's primary case. Arbitration often is document-driven, with multiple rounds of written submissions forming the backbone of the process. The written briefings are comprehensive submissions through which parties submit their factual accounts, legal arguments, witness and expert evidence, and the documentary evidence and authorities relied upon.



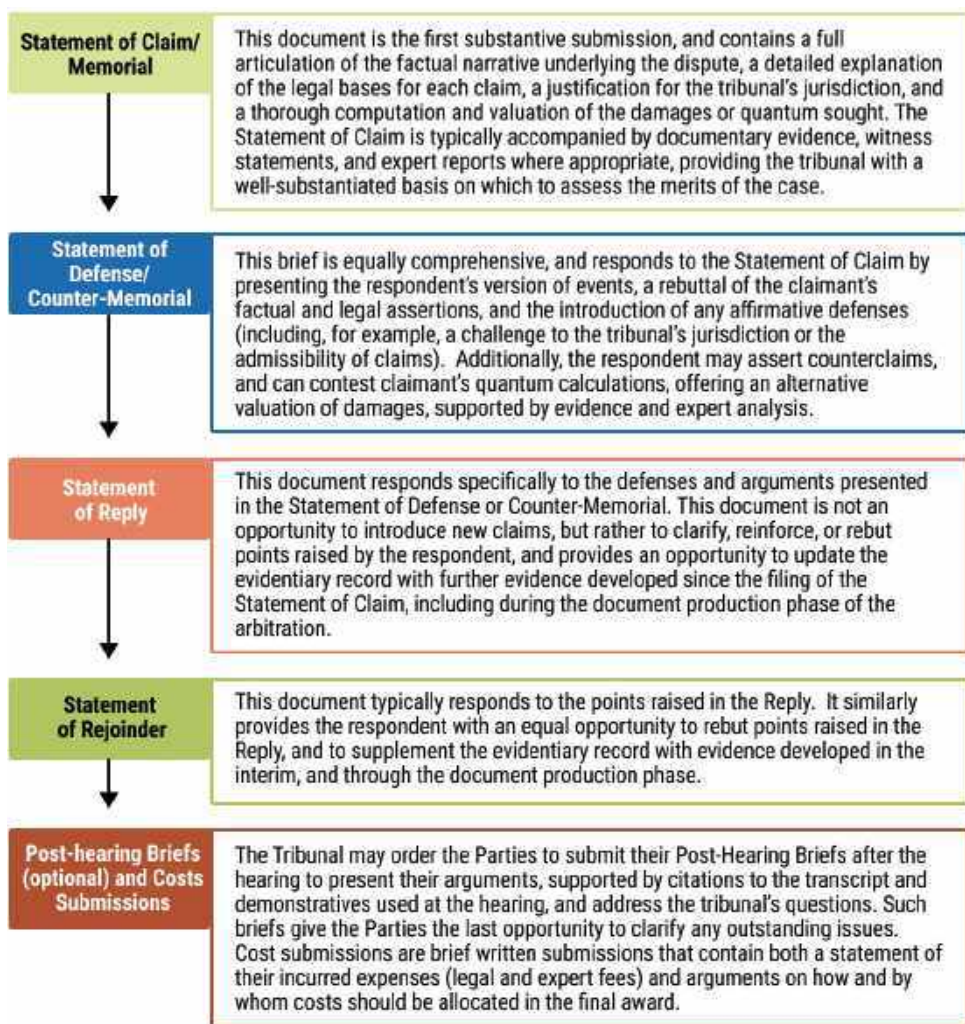


Fig 5.9: Common Written Pleadings in an Arbitration Proceeding

This sequential exchange ensures both parties have a fair opportunity to present their positions, respond to arguments, and address the evolving evidentiary record. The careful

structuring of substantive briefs is critical to providing both parties with a full and fair opportunity to establish their claims and defenses, to provide sufficient factual and legal support to satisfy their respective burdens of proof, and to prevent unfair surprises during the proceeding. It also ensures that the arbitral tribunal receives a comprehensive, organized, and persuasive presentation of the parties' cases that lays the groundwork for an effective oral phase of the proceeding, discussed further below.

Written witness and expert testimony play a critical role in substantiating claims and defenses throughout the written process. Comprehensive witness statements prepared by key individuals, in coordination with counsel, convey necessary contemporaneous knowledge of the relevant events. Witnesses often will refer to documentary evidence of which they have direct knowledge, providing appropriate context, background, and explanation to supplement the factual record.

The selection of witnesses should prioritize individuals with direct involvement or firsthand knowledge of relevant events, while also considering their ability to present clear, credible accounts during the oral hearing.

Expert reports and legal opinions form a fourth cornerstone of the submission process, alongside the written briefs, documentary evidence, legal authority, and factual witness statements.

- ➔ Expert reports are used to address specialized or technical issues that require specific knowledge or expertise. These reports should explain their methodological approaches and present the basis for any specialized analysis, such as economics, construction, or the relevant industry. Quantum experts, in particular, are often utilized given the complexity of calculating

damages and presenting their present value. Such experts will explain their chosen methodology and bases for their valuation, and provide a model demonstrating the results of those calculations.

- ➔ Legal Opinions may also be necessary to address core issues of local and international law. Highly qualified legal professionals should provide such opinions with demonstrable expertise in the pertinent jurisdictions.

In summary, the written phase is the opportunity for each party to present its arguments in detail, supported by the evidence and authorities selected from the overall quantity of evidence gathered as discussed above. This marks the start of the process of refining and identifying the strongest arguments and evidence, which will continue throughout the arbitral procedure.

Developing Evidence Through the Document Production Phase

In recent years, the approach to evidence-taking has become increasingly critical across all forms of arbitration, reflecting the growing complexity and internationalization of disputes. Parties and tribunals now recognize that adequate document disclosure can be pivotal in establishing facts, clarifying disputed issues, and ensuring procedural fairness.

Among the most influential instruments shaping modern practice are the IBA Guidelines on the Taking of Evidence in International Arbitration, which have attained the status of well-accepted soft law within the arbitral community. These guidelines are highly regarded and frequently cited by tribunals and practitioners alike, serving as a reliable reference for establishing clarity and predictability in arbitral proceedings.

The IBA Guidelines set out a structured framework for the assessment of evidence, focusing on the key pillars of:

- ➔ **Relevance and Materiality:** Only documents relevant to the case and material to its outcome should be produced. (IBA Guidelines Art. 3)
- ➔ **Scope:** Requests must be specific and not constitute a “fishing expedition.” (IBA Guidelines Art. 3)
- ➔ **Possession, Custody, or Control:** Parties are only required to produce documents within their possession, custody, or control. (IBA Guidelines Art. 3)
- ➔ **Potential Objections:** Typical objections include: lack of materiality or relevance, legal privilege, unreasonable burden, and commercial or technical confidentiality. (IBA Guidelines Art. 9)

The Guidelines create a shared understanding among parties and tribunals, reducing ambiguity and streamlining the presentation and challenge of evidence.

In addition to the IBA Guidelines, the applicable arbitration law and institutional rules may impose further requirements or limitations on document production. For example, the UNCITRAL Model Law, ICC Rules, and LCIA Rules each address document disclosure, often granting tribunals discretion to determine the scope and manner of production. Practitioners must be mindful of these standards, as they can influence both the process and the enforceability of any resulting award.

Sample Requests and Redfern/Stern Schedules

In practice, document production is typically managed through tools such as the Redfern Schedule or Stern Schedule. These schedules provide a structured format for parties to set out their requests, objections, replies, and the tribunal’s decisions.

Type of Request	Sample	Potential Objection
Individual Document	“Copy of the signed lease agreement dated 15 March 2021 for Aircraft Y.”	“Already in parties’ possession, custody and control.”
Category of Documents	“All maintenance logs for Aircraft Y from 2015 to 2025.”	“Overly broad; limit to logs relevant to the disputed period.”
Internal Communications	“All internal emails regarding the repossession of Aircraft Y.”	“Request is vague and unduly burdensome.”
Communications with Third Parties	“All correspondence with Manufacturer Z regarding engine repairs.”	“Overly broad, must limit to a specific period.”

Table 5.1: Sample Document Production Requests And Objections

Presenting the Claims and Defenses Through the Oral Phase

The oral phase is a critical stage in arbitration proceedings. It provides one of the few opportunities for direct, face-to-face engagement with the tribunal, allowing parties to clarify positions and address issues in real time. One of the most essential points to keep in mind once you reach the oral phase is that you must choose your strongest arguments and evidence to present to the tribunal. All oral proceedings are very time-limited, and the body of evidence presented is typically too extensive to be shown and summarized. A good way to visualize the process of focusing your argument and support is viewing the oral phase as the apex of the pyramid of evidence:



Fig 5.10: Focusing of Evidence Throughout the Lifecycle
of the Arbitration Proceeding

Opening Statements and Closing Arguments: Your Chance to Speak Directly to the Tribunal

Opening statements and closing arguments serve distinct purposes in the oral phase of arbitration. The goals for the openings and closings can be summarized as follows:

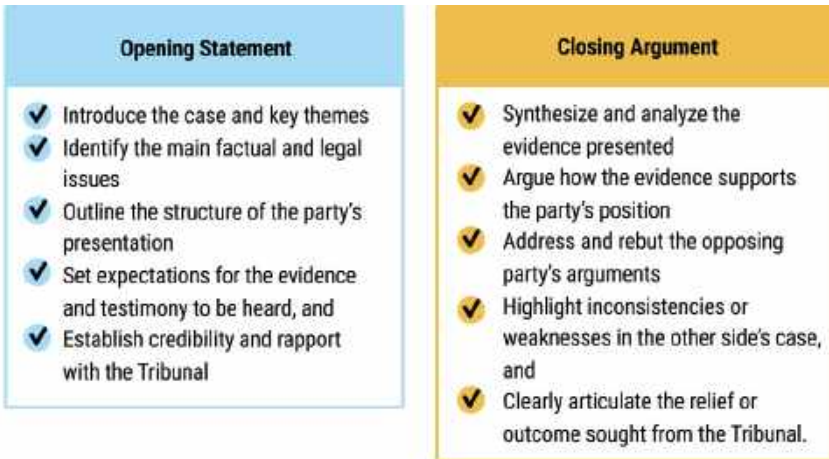


Fig 5.11: Typical Goals for Opening Statements and Closing Arguments

Witness and Expert Examinations

Examination of the witnesses and experts submitted with the written briefing (discussed above) is a central feature of the oral phase in arbitration. It is often the only opportunity to directly challenge a witness's or expert's credibility and reliability. Typically, examination of a witness or expert follows the sequence of: (1) direct examination, (2) cross-examination, (3) redirect examination, and, on occasion, (4) re-cross examination.

Direct examinations in arbitration tend to be limited and usually permit only questions from counsel about new issues that may have arisen since the witness or expert submitted their most recent statement.

The main focus of witness and expert examination is cross-examination, the primary purpose of which is to test the accuracy, consistency, and completeness of the opposing party's written and oral testimony. An effective cross-exam-

ination can significantly influence the tribunal’s assessment of the evidence presented by that witness or expert, and have a significant effect on the arbitration as a whole.

Core to cross-examination is the use of closed questions, which are typically answered with “yes” or “no” as opposed to open questions, commonly thought of as the “who, what, where, when, why.” A basic demonstration of the difference can be seen in the following contrasting series of questions, the left side formulated as open questions, and the right side, as closed:

Sample Open Questions	Sample Closed Questions
<ul style="list-style-type: none">• Where did you travel for vacation last week? (Guatemala)• How did you get to Guatemala? (We took a cruise)• Who did you travel with? (My fiancé)• What hotel did you stay at? (I stayed at a local Bed & Breakfast)• Did you hike the volcano while on vacation? (No, we explored the ruins at Tikal)	<ul style="list-style-type: none">• You took your vacation in Guatemala?• You traveled with your fiancé?• You arrived via cruise ship?• You did not stay at a hotel? • Rather, you stayed at a local bed & breakfast?• You chose not to hike the volcano?• Instead you explored the ruins at Tikal?

Fig 5.12: Example of Using Open Questions vs. Closed Questions

While preparing for your cross-examination, keep the following checklist in mind:

- ➔ **Prepare, prepare, prepare:** Successful cross-examination requires thorough preparation, including a detailed review of all written statements, prior testimony, and relevant documents (both those referenced by the witness or expert and material they know but have failed to reference).

- **Maintain control:** A cross-examiner should maintain control by asking concise, closed-ended questions that typically require a “yes” or “no” answer. This limits the witness’s ability to provide lengthy or evasive responses.
- **Sequence logically:** Questions should be organized logically, often starting with less contentious points before moving to critical issues. This helps build momentum and may increase the likelihood of admissions. It is also essential to be an active listener during the answers to identify opportunities for potential follow-up questions.
- **Look for impeachment points:** If a witness provides inconsistent testimony, or there is an inconsistency between what they have said and the underlying documentary evidence, counsel may use prior statements or documents to impeach the witness’s credibility, highlighting such discrepancies for the tribunal.

These considerations will help the examiner avoid common pitfalls that occur during cross-examination. For example, by asking open or unfocused questions (as opposed to closed questions), the examiner may lose control of the witness, who may elaborate or deviate from the topic, resulting in unhelpful testimony.

In addition to focusing on preparing the opening, closing, and examination material, the logistics of the oral phase must not be overlooked. This includes issues such as venue arrangements, technology requirements, and the preparation of demonstrative materials. Proper planning ensures the hearing proceeds smoothly and that all parties can present their cases effectively. When issues arise in relation to such minor points, it often detracts the tribunal’s focus from your oral presentations and can be to your detriment.

In summary, during the course of the oral advocacy phase, it is essential to: (1) be concise and direct so you can remain focused on the key points that support your case theory since this is your limited with the tribunal, (2) make targeted and specific use of key documents and authorities to support your arguments, and (3) listen actively to the opposing counsel, and the witness and expert answers, to incorporate rebuttal or follow-up points to your arguments.

Useful Resources

Arbitral Rules and Conventions

- International Centre for Settlement of Investment Disputes, Convention and Rules (2022): <https://icsid.worldbank.org/rules-regulations/2022-rules-and-regulations/resources>
- UNCITRAL, Arbitration Rules (2013): <https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration>
- International Chamber of Commerce, Arbitration Rules (2021): <https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/>
- London Court of International Arbitration, Arbitration Rules (2020): https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx
- United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958): https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards
- AAA-ICDR Rules (2021): https://www.icdr.org/rules_forms_fees

Soft Law and Guidelines (IBA)

- International Bar Association, IBA Guidelines on the Taking of Evidence in International Arbitration (2020): <https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b>

- International Bar Association, IBA Guidelines on Conflicts of Interest in International Arbitration (2024): <https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024>
- International Bar Association, IBA Guidelines on Party Representation in International Arbitration (n.d.): <https://www.ibanet.org/MediaHandler?id=6F0C57D7-E7A0-43AF-B76E-714D9FE74D7F>

Arbitrator Selection and Research Tools

- Global Arbitration Review, Arbitrator Research Tool (ART) (2025): <https://globalarbitrationreview.com/tools/arbitrator-research-tool>
- Jus Mundi, AI Agent for International Law and Arbitration (2025): <https://jusmundi.com/>

Procedural Management Tools

- UNCITRAL, Notes on Organizing Arbitral Proceedings (2016): https://uncitral.un.org/en/texts/arbitration/explanatorytexts/organizing_arbitral_proceedings
- International Council for Commercial Arbitration, ICCA Checklist for the Drafting of Procedural Orders (n.d.): https://cdn.arbitration-icca.org/s3fs-public/document/media_document/07042015_icca_checklist_first_procedural_order_a5_qr_final.pdf

Damages and Valuation

- International Valuation Standards (2025): <https://ivsc.org/>
- PWC, International arbitration damages study (2023): <https://www.pwc.co.uk/services/forensic-services/insights/international-arbitration-damages.html>

Advocacy and Oral Hearings

- International Council for Commercial Arbitration, The ICCA Guide to the Interpretation of the 1958 New York Convention (2011): <https://www.arbitration-icca.org/iccas-guide-interpretation-1958-new-york-convention>
- Seoul Protocol on Video Conferencing in International Arbitration (n.d.): <https://irp-cdn.multiscreensite.com/ffb7ea18/files/uploaded/Seoul%20Protocol%20on%20Video%20Conference%20in%20International%20Arbitration.pdf>

CHAPTER 6:

Post-award, Post-agreement Procedures

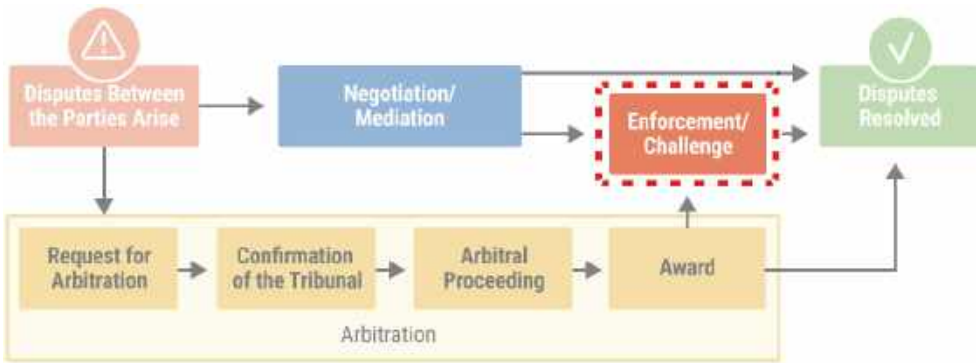


Fig 6.1: Alternative Dispute Resolution Process

Introduction

Successfully engaging in and concluding one of the ADR processes discussed above is only effective if the parties act on the final resolution. As detailed below, while some parties voluntarily comply with any determination arising from mediation or arbitration, this is not always the case. The ability to enforce these outcomes provides parties with certainty that their rights and obligations, as determined through arbitration or mediation, will be upheld by courts and relevant authorities. This not only promotes finality and efficiency in dispute resolution but also enhances confidence in ADR processes, supporting cross-border investment, and commercial relationships.

Post-hearing Arbitration Procedures

The arbitral award is often perceived as the ultimate goal of the arbitration process. A final award decisively resolves the dispute between the parties with final and binding effect. A tribunal could award many potential remedies:

- **Monetary compensation:** Damages awarded to compensate for loss or injury
- **Specific performance and restitution:** Orders requiring a party to perform contractual obligations or restore the other party to its original position
- **Injunctions:** Orders restraining a party from certain actions or compelling specific conduct
- **Declaratory relief:** Formal declarations regarding the rights or obligations of the parties
- **Rectification:** Correction of contractual documents to reflect the parties' true intentions
- **Adaptation of contracts and filling gaps:** Modification of contract terms or addressing unforeseen circumstances, where permitted
- **Punitive damages and other penalties:** Awarded only if expressly allowed by the applicable law or arbitration agreement
- **Interest:** Pre- and post-award interest on sums awarded
- **Costs:** Allocation of arbitration costs, legal fees, and expenses

While most awards are complied with voluntarily, this is not always the case – and increasingly less so. After issuing the award, a tribunal no longer has any authority over the parties or any mechanism to enforce that award against a non-compliant party. While mediation and settlement following the issuance of an award are always available, there is also a robust international framework that gives effect to arbitral awards (and, increasingly, structured settlement agreements).

The two most important international instruments governing international arbitration awards are:

- The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), commonly known as the **New York Convention**
- The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965), commonly known as the **Washington Convention** or the **ICSID Convention**

Other instruments, such as the Inter-American Convention on International Commercial Arbitration (1975), commonly known as the **Panama Convention**, remain important in regional contexts.

Side Note on the *Res Judicata* Effect of an Award

An arbitral award has *res judicata* effect, meaning it finally disposes of the disputes submitted to arbitration. The same conflict between the same parties generally cannot be resubmitted to arbitration or litigated in court (negative *res judicata*). If the award covers certain aspects but not all (e.g., a declaratory award), and a subsequent arbitration is commenced (e.g., for damages or specific performance), the previously determined aspects have positive *res judicata* effect. This principle ensures finality and prevents duplicative proceedings. If an award is annulled or set aside by a competent court, however, it loses its *res judicata* effect and does not bar subsequent proceedings on the same dispute. Additionally, the award's binding effect generally is limited to the parties to the arbitration agreement; it cannot confer rights or impose obligations on third parties who were not parties to the arbitration.

Recognition and Enforcement: The Shield and the Sword

Once the award is issued, absent voluntary compliance, there are two key steps that a party must take to give effect to the tribunal's findings.



First, the award must be *recognized* by the local courts before it can be enforced. This is done to ensure that any attempt by anyone (including the opposing party) to bring a suit or other claim based on the same issues already decided in the award cannot proceed. It thus protects the party like a shield by reducing the risk of relitigation of claims already decided.

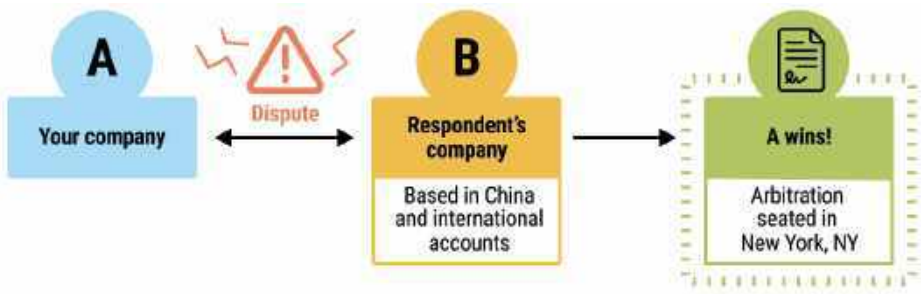


Second, a party can also seek to enforce an award by requesting that court or competent authority orders compliance with a recognized foreign judgment or arbitral award. It builds on recognition by confirming the award's validity and may involve converting it into a domestic judgment, thereby enabling coercive measures to compel performance.

→ **Third**, a party may seek to put the enforcement into effect, and execute the award, ensuring that the terms of the award are actually carried out. It involves practical, and often coercive, measures such as seizing assets, garnishing wages, or attaching property. At this final stage, the legal consequences of recognition and enforcement are realized through concrete action.

Where a party chooses to have an award recognized and enforced often depends on where the losing party is based or where it may have assets to satisfy the award. A single award may be recognized and enforced in multiple jurisdictions. Refusal to enforce an award in one country does not necessarily mean refusal to implement it in another. By contrast, a Set Aside (discussed further below) is only available at the

seat of the arbitration. The diagram below seeks to demonstrate the distinction between recognition/enforcement and set aside:



Locations of B's assets



Where does A seek recognition and enforcement?

- China
- Belize
- Maldives
- Potential other jurisdictions "just in case" assets may be discovered

Where does B seek set-aside?

- New York, NY

Fig 6.2: Geographic Considerations for Recognition and Enforcement vs. Set Aside of an Award

Enforcement of the Final Arbitral Award: New York Convention

Both the New York Convention and the ICSID Convention seek to establish common standards for the recognition and enforcement of awards. The ICSID framework is self-contained as pertains to annulment. Moreover, the ICSID

Convention has its own enforcement rules applicable to ISDS awards in articles 53-55. In contrast to the New York Convention with certain grounds for refusing enforcement in article V, the ICSID Convention states that an award shall be recognized by member States as binding and that the pecuniary obligations imposed by that award should be enforced as if it were a final judgment of a court in that State. However, the ICSID Convention only deals with pecuniary awards, and furthermore Article 55 clearly states that “[e]xecution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.”

The principal aim of the New York Convention is to ensure foreign arbitral awards are not discriminated against in their enforcement. The Convention thus obligates parties to recognize such awards in their jurisdiction the same way as domestic awards. While the drafters of the Convention decided not to define the term “binding” in the Convention itself, leaving it to the courts to determine the conditions under which an award should be considered binding, other protections have been offered to awards that establish precedent for enforcement by national courts. For example, the Convention repealed the double *exequatur* requirement, which required that a party seeking to enforce a foreign arbitral award obtain recognition of the award’s enforceability in both the country where the award was made and the country where enforcement is sought. This means that the binding nature of the award does not depend on whether the award is enforceable in the country where it was issued. Also, if a losing party fails to comply with the award, the winning party may seek to enforce it through State courts in any country where the losing party has assets. Further, a decision in the seat to set aside the award – i.e., invalidate it due to procedural irregularities or violations of public policy – may not prevent its enforcement outside the seat.

National courts often refrain from applying the requirements of the law of the seat when doing so would lead to a result contrary to the purpose of the New York Convention, such as the requirement that the award obtain national *exequatur* to become binding. Additionally, courts assessing the binding nature of an award have often considered the parties' intentions arising from the arbitration agreement or the arbitration rules. A Spanish court previously ruled that "the binding nature of the award must be examined under the rules governing the arbitration [...] rather than under the norms of the State where the arbitration took place when the award was rendered." The New York Convention, with its near-universal adoption made possible by the ratification of 172 countries, provides national courts with reinforced standards when ruling on the enforcement of awards and affords parties consistency with international and domestic court judgements.

The legal consistency of the Convention is further cultivated by its exclusive exceptions to enforceability: in particular, Articles V(1)(a)-V(1)(e), providing award debtors grounds to seek redress for procedural inconsistencies, breaches of due process and party autonomy, and rulings outside of the tribunal's authority. Articles V(2)(a) and V(2)(b) enable the courts to, at their own initiative, refuse to enforce an award which is not arbitrable in its jurisdiction, or otherwise breaches its public policy.

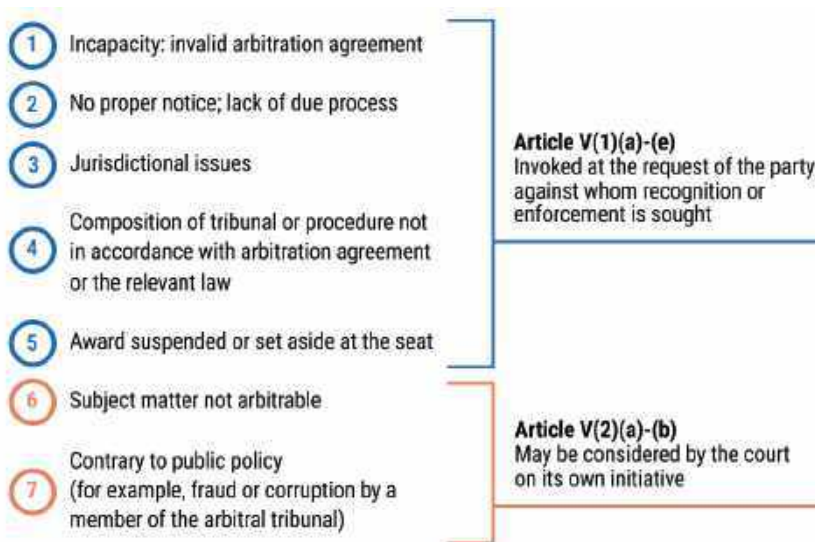


Fig 6.3: Grounds Under Article V of the New York Convention

These exceptions allow States to maintain their legal values, norms, and perception of justice inherent to their economic and political life.

Challenge and Set Aside

While recognition and enforcement proceedings are the sword used to execute an award, a Set Aside Action is the ultimate shield. It is crucial to understand the jurisdictional limits here: unlike enforcement, which can be sought in multiple countries simultaneously (wherever assets are located), a challenge to the validity of an award, seeking to have it “set aside,” “annulled,” or “vacated,” can generally only be brought on limited grounds before the national courts of the Seat of Arbitration (see Chapter 5: *Arbitration Procedure and Practice*) pursuant to the law governing the arbitration

(typically the law of the seat). While refusing recognition or enforcement can only be brought by limited grounds before national courts pursuant to either the New York Convention or the ICSID Convention where the award-creditor is seeking recognition and/or enforcement.

It is a fundamental principle of modern international arbitration that national courts should not review the merits of the dispute. In other words, a losing party cannot ask the court to set aside an award simply because they believe the arbitrators made a mistake of fact or law. Instead, the review is strictly procedural.

Grounds for Challenge and Set Aside (Non-ICSID)

If a party identifies a grievance with the process that affects the validity or integrity of the award, then it must frame its challenge within the narrow grounds provided by the national law of the seat (often modeled on the UNCITRAL Model Law). These grounds mirror the New York Convention defenses.

CASE STUDY:

RAV Bahamas Ltd and another vs. Therapy Beach Club Incorporated (2021)

Dispute

In a dispute over the lease of a beach club, the arbitrator awarded the claimant millions in damages for lost profits. In calculating the final figure, however, the arbitrator unilaterally discounted those losses on a basis which was not supported by the evidence and was not canvassed with, or addressed by, the parties.

Settlement

The Court partially set aside the award. The Court ruled that it was fundamentally unfair for a tribunal to adopt a valuation methodology that was not raised by the parties without giving them a chance to comment on it. The Court did not annul the entire decision on liability; it only set aside the part based on the flawed damages calculation back to the tribunal for reconsideration.

If the challenge is successful, the award is declared null and void at the seat. In most jurisdictions, this renders the award largely unenforceable globally. The courts of certain jurisdictions, such as France and the Netherlands, may enforce an annulled award based on defects in the judicial process in the courts of the seat. This is because the New York Convention Article V states that an award “may” be refused if it “has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.”

Furthermore, the challenge does not always lead to the setting aside of the entire award. When the procedural defect relates only to a specific part of the decision (e.g., a particular head of damages or a distinct jurisdictional issue that can be severed from the rest), the courts in many jurisdictions have the power to grant a partial Set Aside, annulling only the flawed portion while upholding the remainder of the award.

Successful Party	Unsuccessful Party
<ul style="list-style-type: none">✓ Determine which countries contain the assets of the losing party✓ If assets are located in different countries, review in which country is enforcement likely to be quickest and most effective (forum shopping)?✓ Since local law applies to the enforcement proceedings, get local advice from experienced lawyers in the relevant country	<ul style="list-style-type: none">✓ Take initiative by challenging the award in the courts at the place where the award was made✓ Use the award as the starting point for a negotiating process

Fig 6.4: Checklist of Steps for Parties to Consider Post Award

The ICSID Self-contained Regime

The enforcement and challenge regime under the ICSID Convention differs from that of commercial arbitration. The ICSID provides a self-contained system in which domestic courts play no role in the annulment process and a limited role in recognition and enforcement.

The ICSID Convention obliges Member States to “abide by and comply with” awards (Article 53). If a party fails to comply, the other party can enforce the pecuniary obligations of the award in the courts of any ICSID Member State as though it were a final judgment of that State’s highest court (Article 54). National courts are strictly forbidden from reviewing the award’s validity.

Because national courts cannot set aside an ICSID award, the Convention established an internal quality-control mechanism: the Ad Hoc Annulment Committee. This is a panel of three new arbitrators appointed by the Chairman of the Administrative Council (the President of the World Bank). They can annul an award only on five narrow grounds (Article 52):

1. The tribunal was not properly constituted
2. The tribunal manifestly exceeded its powers (e.g., applying the wrong law)
3. There was corruption by a member of the tribunal
4. There was a serious departure from a fundamental procedural rule (e.g., the right to be heard)
5. The award failed to state the reasons on which it is based

Historically, successful annulment cases are sporadic, but if annulled, awards cannot be enforced by the national courts of the countries that are parties to the ICSID Convention. If an award is annulled in full, the dispute is not “over”; the parties

return to square one and can resubmit the dispute to a new ICSID tribunal.

CASE STUDY:
Eiser Infrastructure Ltd vs. Kingdom of Spain (2020)

Facts	Outcome
<p>Eiser won a USD 128 million ICSID award against Spain regarding renewable energy reforms. After the award, Spain discovered that the claimant's appointed arbitrator had a long-standing professional relationship with the claimant's damages expert (they worked at the same consulting group), which was not disclosed.</p>	<p>The ICSID Ad Hoc Committee annulled the award in its entirety. It held that the undisclosed relationship created a "manifest lack of independence" and that the failure to disclose it constituted a "serious departure from a fundamental rule of procedure." This highlights that while ICSID awards are final, the integrity of the tribunal is non-negotiable.</p>

The New York Convention (1958) and the ICSID Convention standardize the arbitration ecosystem by providing procedural consistency, including challenges, and the enforcement of final awards. Many of these provisions have been enshrined in domestic law, though there is still room for subtle differences. Nonetheless, these governing Conventions cultivate expectations that translate to increased confidence when approaching commercial disputes.

The Final Hurdle: Sovereign Immunity

Even if an award is recognized and/or enforced in favor of the award-creditor, the plea of Sovereign Immunity from execution represents a final hurdle when the award-debtor is a State.

International law distinguishes between:

- ➔ **Immunity from Jurisdiction:** The right not to be sued. Most States waive this by signing the arbitration agreement (BIT or Contract).
- ➔ **Immunity from Execution:** The right not to have State assets seized. This is rarely waived.

Therefore, a claimant holding a valid award cannot simply seize the State's embassy or its central bank reserves. Under the laws of most enforcement States (such as the U.S. Foreign Sovereign Immunities Act or the U.K. State Immunity Act), enforcement is generally limited to assets used for commercial purposes. Such assets may include bank accounts used for commercial transactions, proceeds from commercial sales, or – in extraordinary circumstances – State-owned commercial aircraft. Sovereign assets that are generally protected from execution include diplomatic property, military assets, central bank reserves, and cultural heritage.

Most States do not have legislation on Sovereign Immunity. However, since Sovereign Immunity law is public international law, the courts of those States usually look at customary international law. In doing so, the courts are guided by the United Nations Convention on Jurisdictional Immunities of States and Their Property 2004 (UNCIS), which is considered in parts a reflection of customary international law, even though not yet in force. They are also guided by case law from the ICJ and other foreign court judgments. Article 19 of the UNCIS clearly articulates that State assets cannot be seized unless the “property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum” (i.e., the “commercial purpose” exception). The article also enumerates consent and earmarking as exceptions to immunity. Moreover, Article 21 of the convention establishes assets

that are absolutely immune by their very nature (e.g., military, central bank, diplomatic, and cultural heritage property). Finally, in practice, a big issue has been that States often have their commercial activity organized through State-owned or State-controlled entities. The rule is that these assets are out of reach for an award-creditor of the State. There are, however, limited exceptions to the presumption of separateness (e.g., where the entity is used to perpetuate fraud or is so tightly controlled and connected to the State that it is indeed its alter ego or agent).

Best Practices to Ensure Enforceability

While international conventions established an ecosystem in which arbitration can flourish, the parties involved continue to play a significant role in upholding the system. To ensure the system works properly, the parties:

- Should ensure that arbitration agreements are drafted clearly, remain legally valid, and are sufficiently comprehensive – ambiguous clauses must be avoided, as they can be exploited later
- Are expected to voluntarily comply with settlements, conciliation, and mediation, to come to an amicable result
- Select a seat in a pro-arbitration jurisdiction to provide a strong legal framework and reduce the risk of successful set-aside applications
- Begin identifying potential enforcement targets early so action can be taken swiftly once an award is rendered

As for the arbitration tribunals, they should work to:

- Stay within the mandate under the arbitration agreement

- Ensure due process
- Provide parties with full opportunities to present their case
- Avoid undue delays, costs, or deviation from party-selected rules
- Adhere to the international conventions under which they operate
- Try to be mindful of the public policy issues in the relevant jurisdictions

Despite the robust frameworks of the New York Convention and the ICSID Convention, enforcement remains the most significant friction point in international arbitration. The challenges typically stem from inconsistent application of public policy by domestic courts in less arbitration-friendly jurisdictions, and the practical difficulty of piercing the corporate veil of State-owned entities to seize assets. However, with over 170 nations committed to the New York Convention, the system remains the most effective mechanism available for resolving cross-border commercial and investment disputes.

Enforcement of Mediated Settlement Agreements: the Singapore Convention

The Singapore Convention on Mediation is a uniform, efficient framework that governs the recognition and enforcement of international mediated settlement agreements (iMSAs). Because an iMSA is contractual in nature, it sets out the parties' understanding of how to resolve their differences and specifies their rights and obligations. The term "international" refers to circumstances when two parties to the medi-

ated settlement agreement have their places of business in different States. It also includes when the State in which the parties to the mediated settlement agreement have their places of business is different from either the State in which substantial obligations under the iMSA are performed or the State with which the subject matter of the iMSA is most closely connected. Under this new enforcement regime, a party can enforce the iMSA directly if the other party does not comply with its terms, as arbitral awards may be directly implemented. Enforcement in any State or contracting party takes place under its rules of procedure and in accordance with the conditions set out in the Singapore Convention.

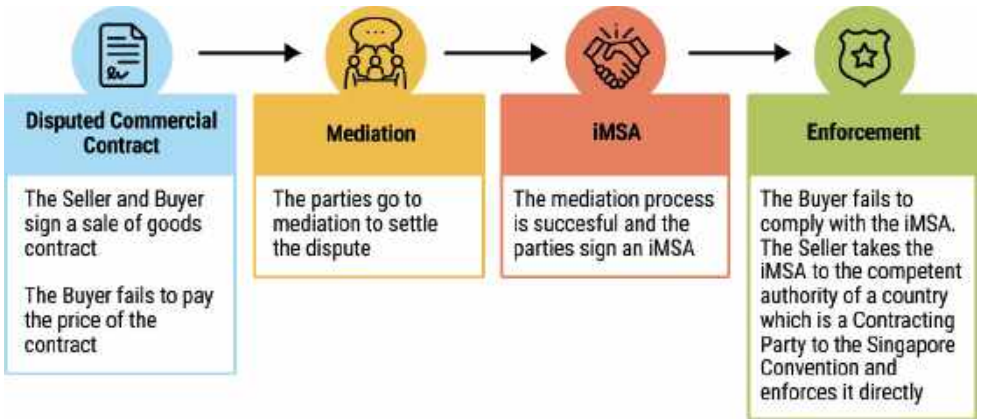


Fig 6.5: Typical Process for Enforcement of Mediated Solutions Under the Singapore Convention

The Singapore Convention affords mediating parties the means to protect themselves in the dispute. A party can directly enforce an iMSA if the other party does not comply with its terms. Alternatively, a party commences formal proceedings on a matter that has been resolved by mediation and recorded as an iMSA. In that case, the other party may invoke the iMSA to prove that the matter has already been resolved between the parties.

Key Requirements for Enforceable Settlement Agreements Under the Singapore Convention on Mediation

Origin: Agreement must result from mediation with a neutral third-party mediator.

Form: Must be in writing; electronic records accepted.

Scope: Covers **commercial** disputes with an **international** element; excludes consumer, family, inheritance, and employment matters.

Evidence: The party seeking enforcement must show that the agreement arose from mediation (e.g., the mediator's signature, institutional attestation, or other proof).

Internationality: At least two parties from different States, or a connection to varying States through performance or subject matter.

Refusal Grounds: Lack of capacity, nullity, incomplete/unclear obligations, serious mediator breach, or enforcement contrary to public policy.

Effect: Qualified agreements are directly enforceable across borders without litigation, akin to arbitral awards or court judgments.

Process of Enforcing an Arbitral Award or Mediated Settlement Agreement

While the New York and Singapore Conventions provide the legal enforcement authority, the actual procedure is governed by the national civil procedure rules of the country where the assets are located. This process generally involves the following steps:

1. **Asset Tracing:** Before filing any legal papers, the enforcing party must answer the question: Where is the money? A monetary award is only as valuable as the assets available to satisfy it. This involves identifying bank accounts, real estate, subsidiaries, or supply chain payments (e.g., intercepting payments owed to the debtor by third parties). In the case of the sovereign States, it is further necessary to identify assets that are not used or intended for governmental, non-commercial purposes, such as diplomatic and central bank functions. As noted below, most jurisdictions permit enforcement only against State assets used for commercial purposes.
2. **Application:** Once the jurisdiction is selected, the winning party files an application with the competent national court. Under Article IV of the New York Convention, the burden on the applicant is intentionally light. To trigger the court's power, the applicant generally only needs to supply: (1) the duly authenticated original award or a duly certified copy; (2) the original arbitration agreement or a duly certified copy; and (3) a certified translation of these documents if they are not in the official language of the country where enforcement is sought.
3. **Exequatur:** If the formal requirements are met, the national court issues an order often called an *exequatur* (from the Latin "let it be executed"). This judicial order effectively domesticates the international award, transforming it into a local court judgment. In many jurisdictions, this initial step is *ex parte* (without the other party present) to prevent the debtor from moving assets before the order is granted. Once the order is given, it is served on the debtor, who then has a limited window to object based on the Article V grounds.

4. **Execution:** Once the *exequatur* is final (or if the court allows immediate execution pending an appeal), the award is treated like a domestic court judgment. The winning party can now exercise the State's power to seize assets.

Whether designing or participating in ADR, it is essential to understand that the credibility of the dispute resolution system depends on consistency, because a dispute settlement process that produces unpredictable results will lose users' confidence in the long term and defeat its own purpose.

Useful Resources

Conventions and Legal Frameworks

- United Nations, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958): <https://www.newyorkconvention.org/english>
- United Nations, Convention on International Settlement Agreements Resulting from Mediation (2018): https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements
- ICSID, Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965): https://icsid.worldbank.org/sites/default/files/ICSID_Convention_EN.pdf
- United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCISI) (2004): https://legal.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf

Guidelines, Handbooks, and Commentary

- UNCITRAL, Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958): https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2016_guide_on_the_convention.pdf
- Singapore International Dispute Resolution Academy, A Handbook on the Singapore Convention on Mediation (2021): <https://www.singaporeconvention.org/sites/singaporeconvention.org/files/SMU%20SOL%20Singapore%20Convention%20Mediation%20Handbook.pdf>

- ➔ Global Arbitration Review, Enforcement under the New York Convention (2023): <https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/4th-edition/article/enforcement-under-the-new-york-convention>
- ➔ Aceris Law, How Enforcement Works: Turning Arbitral Awards into Real-World Results (2025): <https://www.acerislaw.com/how-enforcement-works-turning-arbitral-awards-into-real-world-results/>

CHAPTER 7: A Roadmap to Designing Effective and Efficient ADR Systems

Introduction

CLDP's work across Europe, the Middle East, Africa, and Asia demonstrates that building a strong ADR ecosystem is essential for any State seeking to strengthen its commercial environment and attract additional foreign direct investment.

A jurisdiction that embraces ADR sends a clear signal to businesses: disputes will be resolved fairly, efficiently, and in accordance with party agreement and international standards. This confidence drives foreign direct investment, supports sustainable economic growth, and reinforces the rule of law. Conversely, deficiencies in legislation, judicial practice, institutional capacity, educational opportunities, the business environment, or public awareness can undermine the ecosystem's credibility and constrain its economic potential.

How Can a State Meaningfully Strengthen Its ADR Ecosystem?

Experience shows that no single intervention transforms a given jurisdiction into an attractive venue for arbitration or mediation. Instead, it is the cumulative impact of coordinated reforms – legislative, legal, judicial, institutional, educational, and cultural – that ultimately fosters an environment where ADR can flourish.

This chapter presents CLDP's practical framework for developing a modern, resilient, and attractive ADR ecosystem. It identifies the key pillars that underpin mediation and arbitration globally – including legal frameworks, the judiciary, commercial end users, universities, bar associations, and independent ADR centers – and highlights how improvements in each area, and collectively, can transform a jurisdiction into

a competitive, reliable, and attractive venue for dispute resolution that promotes investment and attracts business.

The discussion first looks at ways to strengthen mediation ecosystems, then turns to strengthening arbitration ecosystems.

Strengthening Mediation Ecosystems

A functional mediation ecosystem requires, at its core, a legal framework that (1) enables parties to consent to, and participate meaningfully in, mediation, and (2) ensures the judiciary respects and enforces the negotiated settlement agreements resulting from that process.

A flourishing ecosystem, however, depends on a broad constellation of actors – government agencies, courts, mediators, counsel, institutions, and commercial end users – working in alignment to support these core principles. When these elements operate cohesively, mediation becomes a credible, efficient mechanism for resolving disputes and a source of confidence for international investors seeking predictable, non-adversarial pathways to settle their disputes.

Role of Government

Governments and policymakers play a foundational role in shaping the mediation landscape. By establishing clear institutional and legal frameworks, they signal – to both domestic stakeholders and foreign investors – that mediation is a legitimate, stable, and enforceable method of dispute resolution.

Government participation also matters because mediation cannot only grow organically; it requires a clear signal of political will and legal certainty before businesses will trust it. Effective government action includes:

- Creating the legal scaffolding that authorizes mediation, protects party autonomy, and ensures the enforceability of mediated settlements
- Instituting policy commitments that elevate mediation as a central dispute-resolution mechanism, for example, legislation such as Kosovo's Law on Sustainable Investment designates mediation as the primary means of resolving disputes, providing investors with greater predictability
- Supporting the development of mediation institutions responsible for practitioner training, accreditation, and oversight
- Promoting good governance and stability by ensuring that mediated outcomes cannot be easily overturned by political changes or shifting administrative priorities

Government commitment also strengthens investor confidence. The presence of a predictable, non-politicized mechanism for managing conflict helps stabilize investment horizons and reduces perceived risks associated with commercial disputes.

Legal Framework

A credible and effective mediation ecosystem rests not only on capable institutions but also on a sound legal framework that gives certainty to users, neutrals, and courts. Clear laws and internationally aligned standards ensure that mediated outcomes are respected, enforceable, and protected from

undue interference. By strengthening both international commitments and domestic legislation governing mediation, States can create an enabling environment that fosters confidence in ADR and encourages its use in commercial practice.

The following components outline the core legal foundations necessary to sustain a modern mediation ecosystem, beginning with international legal frameworks and then discussing domestic frameworks.

Adoption of the Singapore Convention on Mediation

A modern mediation ecosystem would benefit significantly when a State adopts the United Nations Convention on International Settlement Agreements Resulting from Mediation (2018) – commonly known as the Singapore Convention on Mediation, which:

- ➔ Provides a uniform, internationally recognized framework for enforcing mediated settlement agreements across borders
- ➔ Allows a party to a mediated commercial settlement to apply directly for enforcement in another signatory State, without needing to re-litigate the underlying dispute
- ➔ Enhances commercial certainty by ensuring that mediation is not merely a voluntary exercise but a process that yields binding, enforceable outcomes

Adoption of the Singapore Convention signals to the global business community that the jurisdiction supports efficient dispute resolution and aligns with international best practices.

For policymakers, the practical effect is simple: adopting the Convention helps businesses trust that settlements reached

in mediation will actually be honoured – even across borders. This predictability is a key incentive for foreign investors.

Incorporating Mediation into Investment Treaties

Since 2015, there has been a notable increase in treaties that contain express references to mediation in their dispute resolution clauses. For example, the latest generation of model BITs for the Netherlands, Thailand, Montenegro, and Bosnia and Herzegovina all include references to mediation.

Model BIT from the Netherlands (2019) Article 17(1): Alternative dispute resolution

“Any dispute should, as far as possible, be settled amicably through negotiations, conciliation or mediation. Such settlement may be agreed at any time, including after proceedings under this Section have been commenced. A disputing party shall give favorable consideration to a request for negotiations, conciliation or mediation by the other disputing party.”

While treaty clauses on mediation range from encouraging to mandatory, they universally treat mediation as a viable dispute-resolution method.

Strengthening Domestic Mediation Legislation

Even after undertaking international commitments, mediation also requires strong domestic legislation to function effectively. There is a wide variety of approaches that can be considered, ranging from hyper-local procedures that provide basic rules for initiation to finalization of mediation, and basic standards to regulate mediator practice, to the Singapore Convention on Mediation. Such legislation should:

- Define the scope and principles of mediation
- Protect party autonomy and ensure no party can be coerced into mediation;
- Clearly separate the roles of judges and mediators, preventing adjudicators from mediating their own cases
- Establish the enforceability of mediated settlements
- Provide accountability mechanisms, such as codes of conduct, complaint processes, and clear definitions of success and outcome tracking

Domestic mediation legislation increasingly incorporates both mandatory and voluntary mediation models, with many jurisdictions adopting statutory mandatory-referral or pre-action requirements. At the same time, robust opt-out mechanisms within these frameworks remain essential to safeguard party autonomy and maintain confidence in the legislative scheme. In practice, jurisdictions often begin with voluntary mediation and gradually experiment with targeted mandatory schemes, as long as parties retain the right to opt out, to avoid perceptions of coercion.

The Judiciary: Challenges and How Mediation Can Help

Judiciaries around the world face persistent challenges that impede access to ADR and the efficient delivery of justice. Reasons include:

- Heavy case backlogs and overreliance on judges
- Limited familiarity with mediation concepts
- Insufficient formal mechanisms to refer cases to mediation
- Concerns about the legitimacy or reliability of mediated outcomes due to an absence of mechanisms to finalize agreements or to ensure enforceability

Mediation, however, can be one of the most effective tools for relieving pressure on the judiciary. When used appropriately:

- Court-annexed mediation programs reduce caseloads, allowing judges to focus on matters that require adjudication.
- Referral systems empower courts to redirect suitable cases to mediation, accelerating resolution timelines.
- Clear enforcement pathways for mediated settlements increase judicial confidence in referring cases to mediation.

International experience – such as the Singapore courts' successful reduction of backlog through investment in mediation infrastructure and trusted institutional partners – shows that a judiciary aligned with mediation can significantly improve system efficiency and the jurisdiction's competitiveness in dispute resolution.

CASE STUDY: Mediation to Ease Judicial Backlogs

Challenge	Solution
<p>A CLDP partner country's judiciary was facing an overwhelming backlog of more than 3.5 million pending cases, resulting in severe delays and eroding public confidence in the justice system. In civil courts, the average time to resolve a basic dispute exceeded 10 years. Individual judges routinely carried dockets exceeding thousands of cases, creating an impossible workload—one judge noted that even if they adjudicated 100 cases per day, they would still be unable to meaningfully reduce the backlog. The system was effectively gridlocked, with no procedural relief mechanisms in place and limited public access to timely justice.</p>	<p>CLDP partnered with the national judiciary to introduce court-annexed mediation centers as a scalable alternative to traditional litigation. Together with the judicial council, CLDP helped design a framework to identify and refer appropriate case categories to mediation, diverting thousands of disputes from overburdened courts. CLDP also collaborated with the judicial academy, bar associations, and local ADR institutions to deliver comprehensive mediation skills training and training-of-trainers programs, ensuring the long-term sustainability of the initiative. As a result, the judiciary is on its way to changing cultural attitudes towards ADR and is building a self-sufficient mediation ecosystem capable of continuously training mediators and reducing caseloads—ultimately restoring efficiency, accessibility, and public trust in the justice process.</p>

Thus, for judges, the key is to view mediation not as competition, but as a complementary mechanism that preserves their indispensable judicial role while enhancing access to justice.

Awareness Among End Users

Ultimately, mediation systems succeed only when commercial actors, investors, SMEs, and counsel trust the process and understand their benefits. End users are the bellwether of a mediation ecosystem's health.

End-user acceptance of mediation	<p>End users will participate in mediation when it is perceived as:</p> <ul style="list-style-type: none"> • Reducing uncertainty • Ensuring confidentiality • Preserving business relationships • Saving time and cost • Ensuring enforceable, durable outcomes
End-user reluctance to use mediation	<p>End users are reluctant to participate in mediation if:</p> <ul style="list-style-type: none"> • Lack of awareness of mediation as an option to access justice • Misconceptions that mediation is a sign of weakness • Absence of practitioner guidance or contractual clauses promoting mediation • Unclear processes or inconsistent mediator quality, and the absence of competence
Measures that can build end-user awareness and lead to acceptance of mediation:	<p>Building user awareness requires coordinated efforts:</p> <ul style="list-style-type: none"> • Institutions that offer training, accreditations, publish practice standards, and develop transparent rules • Counsel who guide clients realistically and discourage positional bargaining that makes mediation unworkable • Public-education initiatives explaining how mediation fits into commercial planning and risk management

Table 7.1: Summary of End-user Awareness Alternatives

When stakeholders – government, judiciary, mediators, institutions, and commercial actors – are aligned and working together to support the mediation ecosystem, it sends a powerful signal that the jurisdiction can reliably manage conflict without protracted litigation or politicized intervention. That confidence strengthens the business climate and economic competitiveness, and supports sustainable investment.

Strengthening Arbitration Ecosystems

A functional arbitration ecosystem has many parallels to what is needed to provide a robust mediation ecosystem. It requires, at its foundation, a modern legal framework that recognizes arbitration agreements, limits unnecessary court intervention, and ensures the effective enforcement of arbitral awards.

A *flourishing* arbitration ecosystem, however, extends well beyond statutory provisions. It depends on a broader constellation of actors – government, advanced legislation, a capable and pro-arbitration judiciary, arbitral institutions, qualified arbitrators and counsel, universities and academic legal programs, bar associations, and commercial end users – working in concert. When these elements align, arbitration becomes a credible, efficient, and predictable mechanism for resolving commercial disputes, enhancing investor confidence and positioning the jurisdiction as a reliable venue for both domestic and international arbitration.

Legal Framework

A credible and arbitration-friendly jurisdiction begins with a clear, modern, and internationally aligned legal framework. The legal infrastructure must not only reflect global best practices but also provide predictable procedures, minimize unnecessary judicial intervention, and give commercial actors – and foreign investors in particular – confidence that arbitral awards will be respected and enforced.

The legal framework consists of two foundational pillars: international treaty commitments and domestic arbitration legislation. Together, these establish the rules of engagement

for parties choosing arbitration and define the role of courts, institutions, and arbitrators within the arbitration system.

International Law Commitments

Ratification of the New York Convention

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is the cornerstone of international commercial arbitration. By ratifying the Convention, a State commits to:

- Recognize and enforce foreign arbitral awards subject only to limited, narrowly defined exceptions
- Give effect to arbitration agreements by referring parties to arbitration when such agreements exist
- Provide a unified, predictable framework aligned with the global arbitration community

Without the New York Convention, a jurisdiction will struggle to become an attractive seat for arbitration or a reliable location for enforcing arbitration awards.

Ratification of the ICSID Convention

For States seeking to attract FDI, ratifying the ICSID Convention adds a layer of protection and credibility. Benefits include:

- Direct access for investors and States to ICSID arbitration
- A unique, self-contained enforcement regime that does not require national courts to review ICSID awards
- Increased investor confidence due to predictable, depoliticized dispute resolution mechanisms

Domestic Arbitration Legislation

International commitments alone are not enough. A jurisdiction must also adopt modern, comprehensive, and internally coherent national stand-alone arbitration legislation that governs both domestic and international commercial arbitrations.

Alignment With the UNCITRAL Model Law

A widely accepted standard is the UNCITRAL Model Law on International Commercial Arbitration, particularly as revised in 2006. To ensure predictability and compatibility with international practice, domestic arbitration laws should:

- ➔ Be substantially Model Law-compliant, ideally adopting key provisions verbatim unless deviations are necessary and clearly justified
- ➔ Incorporate core Model Law principles such as:
 - ▶ Kompetenz-Kompetenz (Article 16), allowing arbitral tribunals to rule on their own jurisdiction
 - ▶ Limited judicial intervention and a clearly defined role for the judiciary (Article 5)
 - ▶ Recognition of arbitration agreements and flexible form requirements allowing electronic agreements
 - ▶ Having an interim measures regime consistent with the 2006 amendments
 - ▶ Clear grounds for setting aside and refusing enforcement aligned with Articles 34 and 36.

Where an existing law is based on the 1985 UNCITRAL Model Law, amendments should be introduced to reflect the 2006 updates, particularly regarding interim measures and electronic communications. To be recognized as an UNCITRAL

Model Law-compliant jurisdiction, the State must request UNCITRAL's confirmation, while acknowledging that some provisions are mandatory and cannot be derogated from.

Closing Domestic Gaps in Legislation

Many jurisdictions developing arbitration frameworks encounter similar issues, including:

- ➔ The absence of comprehensive arbitration legislation leaves gaps in arbitrators' impartiality, independence, confidentiality, and procedural rules
- ➔ The absence of statutory guidance on arbitrator immunity or liability potentially deters qualified practitioners from accepting appointments
- ➔ Unclear or missing confidentiality provisions lead to uncertainty about privacy expectations in proceedings
- ➔ Discrepancies between the arbitration legislation and the civil procedure code
- ➔ Lack of clear rules on costs, cost allocation, or recovery
- ➔ Limited public accessibility to key legislation – such as laws not translated into widely used commercial languages – reduces usability for international parties

Addressing these gaps is essential for creating a predictable and attractive arbitration environment.

Role of the Judiciary

A modern arbitration framework cannot function effectively without a judiciary that understands, respects, and supports the arbitration process. Courts play a limited but essential role in upholding the integrity of arbitration

agreements, providing support during arbitration proceedings, and ensuring that arbitral awards are recognized and enforced in accordance with international standards. Where courts demonstrate predictability, neutrality, and efficiency, commercial actors gain confidence that the jurisdiction is genuinely arbitration-friendly.

However, many judiciaries worldwide face systemic constraints, including limited exposure to arbitration principles, inconsistent application of international norms, and heavy case backlogs. Addressing these challenges – and building a judiciary capable of fulfilling its role in supporting arbitration – is essential for a strong commercial dispute-resolution ecosystem.

Qualities of a Pro-arbitration Judiciary

A judiciary that supports arbitration is characterized by:





- ✓ Understanding its limited but crucial role in the arbitration ecosystem: primarily the referral of disputes to arbitration, the enforcement of arbitration agreements, and the recognition and enforcement of domestic and foreign arbitral awards
- ✓ Respect for Kompetenz-Kompetenz, allowing arbitral tribunals to rule on their own jurisdiction
- ✓ Timely disposition of arbitration-support and supervisory functions, including appointments, interim measures, and enforcement applications
- ✓ Predictability and restraint, intervening only where expressly permitted under domestic law or international commitments such as the New York Convention

- ✓ Consistent and narrow interpretation of the public-policy exception, in line with Article V of the New York Convention
- ✓ Clear, well-reasoned, and accessible judgments that contribute to transparency and consistency, and enhance international user confidence

In short, courts should act as guardians, not supervisors, of the arbitration process. These qualities are learned and cultivated; they do not arise automatically from legislation.

Judicial Challenges and Core Objectives in Supporting an Arbitration-friendly Jurisdiction





In many jurisdictions, courts face significant obstacles in handling arbitration-related matters. These challenges commonly include:

-  There is limited familiarity with the core principles of arbitration, including the UNCITRAL Model Law, the New York Convention, and international best practices
-  Uncertainty regarding the scope and limits of the public-policy exception under the New York Convention, at times, leads to overly broad refusals to enforce arbitral awards
-  Arbitration is perceived as an exceptional or unfamiliar mechanism rather than a parallel to the mainstream mechanisms within the commercial dispute-resolution system
-  Heavy court backlogs delay arbitration-related applications and undermine the timely administration of justice

Together, these issues weaken the jurisdiction's reliability as both a seat of arbitration and a venue for enforcement. These systemic constraints underscore the need to strengthen judicial understanding, capacity, and procedural efficiency.

One way to alleviate judicial pressure is through ADR mechanisms such as court-annexed mediation discussed above, which allow judges to refer suitable disputes to mediation and reserve adjudication for cases that genuinely require judicial intervention.

To build an arbitration-friendly ecosystem, judiciaries can additionally pursue several core objectives:

-  Rapidly and efficiently process arbitration-related court functions, including interim measures, arbitrator appointments and challenges, and the recognition and enforcement of awards
-  Develop a cadre of specialized judges or dedicated commercial divisions with expertise in navigating the domestic legislation on arbitration and the nexus with international arbitration
-  Provide transparent and predictable judicial guidance, particularly on enforcement standards and the application of the public-policy exception contained in the New York Convention
-  Ensure that arbitration-related court decisions are publicly accessible, consistent, and enable international users to evaluate the jurisdiction's jurisprudence and reliability

Collectively, these judicial reforms strengthen the jurisdiction's credibility, enhance investor confidence, and increase its attractiveness as a reliable seat for arbitration and the enforcement of arbitral awards.

Measures to Strengthen Judicial Support of ADR

To translate these objectives into practical reform, jurisdictions can adopt a series of targeted measures designed to enhance judicial competence, efficiency, and predictability in arbitration-related matters.

The following steps represent a blueprint for building a judiciary well-equipped to support arbitration – from developing specialized judicial expertise to streamlining procedures, improving transparency, and fostering cooperation with arbitral institutions.

Judiciaries can:

- ➔ Develop specialized arbitration or commercial lists
- ➔ Establish judicial training programs and benchbooks
- ➔ Adopt protocols for the expedited handling of arbitration filings
- ➔ Publish practice directions on enforcement and public policy
- ➔ Improve case management and use of technology
- ➔ Establish judicial liaisons with arbitration institutions

When implemented together, these measures create a coherent framework that strengthens the judiciary's role within the broader arbitration ecosystem and increases confidence among domestic and international users alike.

To support policymakers in applying these principles, we provide consolidated recommendations outlining the core components that can enhance judicial support for ADR, as detailed further in Appendix [A].

Independent ADR Centers: Building Trust, Credibility, and Institutional Capacity

Independent ADR centers are critical pillars of a well-functioning dispute resolution ecosystem. These centers are privately run, separate from the courts or any State entity. Their legitimacy, professionalism, and accessibility shape how businesses, practitioners, and foreign investors perceive the jurisdiction's commitment to fair, efficient, and modern dispute resolution.

Strong institutions serve as visible proof that ADR is not merely theoretical but is actively supported by reliable case management, qualified neutrals, transparent rules, and a commitment to continuous improvement. For policymakers, investing in an ADR center is among the most visible and impactful reforms, as it provides businesses with a clear, neutral venue for resolving disputes.

When independent centers operate effectively, they create a multiplier effect: they legitimize ADR in the eyes of users, provide practical training opportunities for students and young practitioners (such as through Vis Moot internship pipelines), host regional events that raise awareness, and help shift cultures that may initially be skeptical of ADR. Experiences from various jurisdictions show that even where ADR was initially met with doubt, sustained institutional investment, such as training programs, ADR awareness weeks, and transparent case administration, can dramatically increase public trust and usage over time.

Independent ADR centers are thus much more than administrative bodies — they are engines of legitimacy, innovation, and professional development that strengthen the rule of law. When well governed and adequately resourced, they anchor the arbitration and mediation ecosystem, foster public trust,

and contribute directly to a jurisdiction’s standing as a reliable venue for dispute resolution.

CASE STUDY:

Strengthening Independent ADR Centers to Attract Foreign Investment

Challenge

CLDP works with a small partner country that is seeking to increase foreign investment but faces persistent obstacles in its dispute-resolution landscape. The prevailing approach among businesses and practitioners was to default to litigation before domestic courts, and there was limited cultural understanding or acceptance of ADR mechanisms such as mediation and arbitration. When CLDP began its engagement, the country’s independent ADR center was struggling to gain traction. The center handled fewer than five cases per year, lacked visibility, and had difficulty demonstrating its value to the local business community, foreign investors, and legal practitioners. This limited uptake also contributed to the country’s low score on the Ease of Doing Business indicators related to contract enforcement and dispute resolution. With a minimal caseload and limited credibility, the center faced an uphill challenge in establishing itself as a trusted institution capable of supporting commercial growth.

Solution

Over several years, CLDP partnered closely with the independent ADR center to strengthen its institutional capacity and promote a culture of ADR. CLDP facilitated sustained regional engagement—connecting the center with established ADR institutions and experts—and supported it in adopting international best practices.

CLDP also helped the center expand its professional footprint by organizing conferences and comprehensive trainings in mediation and arbitration. These programs attracted members of the legal community, law students, regional ADR counterparts, and representatives from leading global law firms. The center also began collaborating with Supreme Court judges on ADR integration and judicial support.

As a result of this long-term engagement, the ADR center has blossomed into a well-respected regional convener and credible dispute-resolution option, playing a key role in improving the country’s commercial environment and investor confidence.

To support practitioners, policymakers, and emerging ADR institutions in applying these principles, we provide consolidated recommendations providing the core components of a strong, credible ADR center in Appendix [B].

Universities: Building the Next Generation of ADR Practitioners

Universities play a foundational role in shaping the future of the ADR ecosystem by educating the next generation of lawyers, arbitrators, mediators, and policy leaders. A jurisdiction's long-term capacity to sustain a modern arbitration and mediation environment depends heavily on the strength of its legal education system and the opportunities available to students to engage with ADR in both theory and practice.

Integrating ADR into the Legal Curriculum

A jurisdiction cannot sustain a modern ADR ecosystem without a pipeline of trained professionals. Universities, therefore, serve as the long-term foundation of the system, ensuring continuity and cultural normalization of ADR practice. A contemporary legal curriculum should expose students to the full spectrum of dispute-resolution mechanisms — arbitration, mediation, negotiation, adjudication, and dispute avoidance. Core elements for integrating ADR into university curriculum include:



Fig 7.1: Core Elements for Integrating ADR into a University Curriculum

By embedding ADR into the curriculum, universities ensure that students graduate with a foundational understanding of the processes most commonly used in international commerce today, thereby planting the seeds for cultural acceptance and thriving ADR ecosystems.

Supporting Participation in the Willem C. Vis International Commercial Arbitration Moot and Other International Competitions

Participation in the Willem C. Vis International Commercial Arbitration Moot Court Competition and similar moot court competitions is among the most effective ways to train law students in international arbitration.

Universities should consider:

- ➔ Providing institutional support for Vis Moot teams, including coaching, research assistance, and financial support to attend oral rounds
- ➔ Integrate Vis Moot preparation into academic credit or seminar structures, recognizing the rigorous legal research and advocacy skills students develop
- ➔ Establishing Vis Moot Alumni Associations in collaboration with other teams in the same country or region to ensure continuity, mentorship, and sustainable knowledge transfer across student generations

Ultimately, these students often become the first generation of home-grown arbitration practitioners – filling a gap that no legislation alone can solve.

CASE STUDY:
Building a New Generation of ADR Practitioners

Challenge

Across many developing jurisdictions in Central Asia, Eurasia, South Asia, and Eastern Europe, ADR—particularly international commercial arbitration—had long been perceived as inaccessible, unfamiliar, or culturally misaligned. Historically, sophisticated arbitration practice was concentrated in global hubs such as London, Paris, and New York, leaving local courts and practitioners without meaningful exposure to modern ADR techniques. In many partner countries, there was no domestic cadre of arbitration practitioners, and ADR faced resistance within the legal community and among commercial actors. As a result, businesses lacked viable alternatives to slow or inexperienced court systems, and countries struggled to integrate into the global trade and investment environment.

Solution

For many years, CLDP has helped transform these ADR landscapes by supporting student participation in the Willem C. Vis International Commercial Arbitration Moot. Working with leading international arbitration experts, CLDP has delivered intensive boot camps, comprehensive training, and regional pre-moot competitions held directly in partner countries. These programs have produced cohorts of students who not only compete successfully in Vienna and Hong Kong but who later return as coaches, lecturers, and mentors, building a self-sustaining national ecosystem of arbitration expertise.

Today, many countries in these regions have institutionalized Vis participation, formed active Vis alumni associations, and even host their own national and regional Vis bootcamps. This long-term investment has catalyzed a generational shift: jurisdictions that once had no meaningful ADR presence now boast sophisticated arbitration practitioners.

The above demonstrates that participation in the Vis Moot and similar moot competitions strengthens students' legal analytical, writing, and advocacy abilities, exposes them to international commercial law, and connects them to a global network of future practitioners – contributing directly to the long-term growth of the jurisdiction's ADR capacity.

SPOTLIGHT: The Western Balkans

About the Vis Moot Program

The Western Balkans Vis Moot Program, initiated and supported by CLDP since 2015 tells a tremendous success story that has transformed the legal landscape and practice of ADR in the region. Since its inception, the program has provided intensive trainings, research materials, and expert support for the teams and coaches from 10 universities in the region. Beyond their notable performances in the Vis Moot, at the time of writing the program has created 10 generations of highly dedicated, trained and competent legal practitioners who are now thriving in major domestic and international law firms, universities, judiciaries, international organizations and government institutions.

A Decade of the Western Balkans Vis Moot Program in Numbers

- 20 intensive training programs
- 12 successful regional pre-moot competitions
- 250 students and 57 coaches trained and supported
- 14 placements in the elimination rounds, including semifinals on 3 occasions
- 18 scholarships for LL.M. degrees at European and U.S. universities
- Hundreds of internships at leading domestic and international law firms

Creating Pipelines for ADR-focused Internships for Law Students

To bridge the gap between academic study and professional practice, universities should partner with national and international stakeholders to create structured ADR internships to give students hands-on experience working in alternative dispute resolution.

Three core internship pathways are especially valuable:

- ➔ Internships with international, national, or regional arbitration institutions
- ➔ Internships with law firms or corporate legal departments specializing in arbitration
- ➔ Internships with courts handling arbitration or ADR-related matters

By integrating ADR deeply into legal education, supporting premier competitions such as the Vis Moot, and offering structured practical training opportunities, universities become essential contributors to a sustainable and thriving ADR ecosystem. Their role ensures not only the development of technical expertise but also cultivates a culture that values efficient, fair, and internationally aligned dispute resolution.

Bar Associations: Shaping Professional Culture and Practice in ADR

Bar associations also play a pivotal role in shaping the professional norms and attitudes that determine how widely ADR mechanisms – including arbitration and mediation – are accepted and used in practice. In some jurisdictions, however, bar associations have been a source of resistance to ADR reform. This resistance often stems from misconceptions: some practitioners view arbitration and mediation as processes that shorten the lifespan of disputes, potentially reducing billable hours and making ADR appear less financially attractive than traditional litigation.

Overcoming these perceptions requires a deliberate effort to cultivate a more informed professional culture. Bar associations can be powerful allies in this process by:



Fig 7.2: Potential Methods for Building ADR Awareness

By embracing these roles, bar associations help correct misconceptions, strengthen the legal community’s capacity to serve commercial users, and ensure that ADR becomes an integral and respected component of the dispute-resolution landscape. Their engagement is essential to building a sustainable ecosystem in which lawyers see ADR not as a threat to traditional practice, but as a necessary avenue for delivering timely, effective, and client-centered legal services.

Awareness of Commercial End Users

A strong arbitration ecosystem depends not only on sound laws and a capable judiciary but also on the awareness and confidence of the businesses that rely on these mechanisms. In many jurisdictions, arbitration and other ADR processes remain unfamiliar to commercial parties – small- and medium-sized enterprises (SMEs) – which often lack access to specialized legal guidance or exposure to international contracting practices.

As a result, businesses may fail to incorporate arbitration clauses into their contracts, misunderstand the advantages of ADR, or default to litigation even where more efficient options exist. When businesses integrate ADR clauses into contracts, the jurisdiction’s dispute-resolution environment becomes more predictable, reducing risk premiums and directly supporting investment and economic growth.

But building a culture in which commercial actors understand, trust, and proactively use ADR requires deliberate public education and outreach. This includes:



Fig 7.3: Potential Methods for Building ADR Awareness

When businesses — large and small — understand how ADR mechanisms function and how to embed them into contracts from the outset, disputes are less likely to escalate into costly litigation. This increased literacy among end users strengthens the overall dispute-resolution environment, promotes early settlement, and enhances the jurisdiction’s appeal to investors seeking predictable, commercially oriented ways to manage risk.

Useful Resources

Policy and Implementation Toolkits

- UNCITRAL, Draft toolkit on prevention and mitigation of international investment disputes (A/CN.9/1185) (2024): https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/toolkit_on_prevention_and_mitigation_for_website_2_2.pdf
- ICSID, Practice Notes for Respondents in ICSID Arbitration (2015): <https://icsid.worldbank.org/sites/default/files/publications/Practice%20Notes%20for%20Respondents%20-%20Final.pdf>
- ICC Commission on Arbitration and ADR, Guide on Effective Management of Arbitration: A Guide for In-House Counsel and Other Party Representatives (2017): <https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/effective-management-of-arbitration-a-guide-for-in-house-counsel-and-other-party-representatives/>

Education and Mooting

- Willem C. Vis International Commercial Arbitration Moot (a student competition in the area of commercial and sale of goods law) (forthcoming, 2026): <https://www.vismoot.org/>
- Frankfurt Investment Arbitration Moot Court (a student competition in the area of investment protection law) (n.d.): <https://www.investmentmoot.org/>
- Foreign Direct Investment International Arbitration Moot (a student competition in the area of investment protection law) (2025): <https://fdimoot.org/>

- International Chamber of Commerce's Mediation Competition (a competition in mediation) (forthcoming, 2026): <https://iccwbo.org/dispute-resolution/dispute-resolution-services/adr/mediation/mediation-competition-week/>

Key Conventions and Model Laws

- United Nations, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958): <https://www.newyorkconvention.org/english>
- United Nations, Convention on International Settlement Agreements Resulting from Mediation (2018): https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements
- UNCITRAL, Model Law on International Commercial Arbitration (1985) (amendments as adopted in 2006): https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration
- UNCITRAL, Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018): https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation

Soft Law

- International Bar Association (IBA), Guidelines on Conflicts of Interest in International Arbitration (2024): <https://www.ibanet.org/document?id=guidelines-on-conflicts-of-interest-in-international-arbitration-2024>
- International Bar Association (IBA), Rules on the Taking of Evidence in International Arbitration (2020): <https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b>
- Chartered Institute of Arbitrators (CI Arb), Professional Practice Guidelines (n.d.): <https://www.ciarb.org/resources/professional-practice-guidelines>

Conclusion

As the preceding chapters illustrate, ADR offers States a powerful blend of policy architecture and dispute-management functions. Its most visible benefit, of course, is settlement. Yet its more profound contribution is systemic – rules that scale with demand, institutions that attract users and instill trust, and processes that earn legitimacy through transparency and steady, predictable application.

Two areas are significant for State policymakers' consideration: the deliberate domestic incorporation of ADR systems and States' own participation in ADR.

As to the former, ADR promises increased access to justice for all, reduces the burden on overloaded judiciaries, stabilizes the business and investment environment, and enables commercial users to resolve disputes quickly, cheaply, and efficiently. For States, encouraging users to resolve disputes on their own terms is usually the best approach. Through this, private users are empowered with reliable legal frameworks, innovation flourishes, and can outpace statutory updating. ADR's inherent flexibility allows users to resolve disputes with durable solutions creatively. The role of the State, including its judiciary, is complementary, not a competition. The State sets policy and provides necessary oversight, but its role in ADR is not operational.

As to the latter, States have long realized that encouraging foreign direct investment requires accommodating some expectations of international investors, but State participation in the ADR methods embedded in investment agreements has been mixed. Skewed perceptions about the investment dispute system and its practice have driven disparities in participation and, potentially, outcomes. Through informed participation, States can better understand the decision points in these disputes, whether handled by officials or together with outside counsel, and reap the benefits of self-determined dispute resolution.

In the end, users apply ADR to their own purposes. As this book has explored, it is grounded in the simple but powerful idea that people, when given the proper structure and support, can best craft their own solutions to conflict. In global trade, this idea takes on even more importance as participants operate across geographic, cultural, and legal differences. Along each of these dimensions, ADR presents solutions to bridge these differences, peacefully resolve disputes, and provide a path forward in an ever-changing world.

APPENDIX A: CLDP Road Map for Strengthening Judicial Support for ADR

The table below consolidates the key judicial reforms discussed in Chapter 7: *A Roadmap to Designing Effective and Efficient ADR Systems* into a practical reference tool for policymakers, judges, and court administrators. While the main text outlines the rationale for strengthening judicial competence, efficiency, and predictability in arbitration-related matters, this Appendix translates those concepts into a clear set of implementable measures. Presented as a blueprint, the table highlights the institutional steps judicial systems can take to support arbitration better, ranging from the creation of specialized lists to improvements in case management, training, transparency, and cooperation with arbitral institutions.

By organizing these recommendations in a structured format, the appendix serves as both a diagnostic guide for assessing current judicial practice and a roadmap for jurisdictions seeking to enhance their credibility and effectiveness within the broader arbitration ecosystem.

<p>1. Create Specialized Arbitration or Commercial Lists</p>	<ul style="list-style-type: none"> • Designate a panel of judges with specialized arbitration training to handle: <ul style="list-style-type: none"> – Appointment and challenge applications – Interim relief in aid of arbitration – Enforcement and set-aside proceedings • Implement expedited case-management rules for arbitration matters
<p>2. Establish Judicial Training Programs and Bench Books</p>	<ul style="list-style-type: none"> • Develop bench books outlining the jurisdiction's approach to arbitration, referencing: <ul style="list-style-type: none"> – Kompetenz-Kompetenz – Enforcement procedures – Interpretation of public policy – New York Convention obligations • Partner with international partners such as UNCITRAL, CIArb, foreign governments or foreign courts, and arbitral institutions to deliver continuous judicial education • Focus training on: <ul style="list-style-type: none"> – Restrictive interpretation of the public-policy exception – Avoiding formalistic grounds for annulment – Understanding arbitration as a standard mechanism, not an exception
<p>3. Adopt Protocols for Expedited Handling of Arbitration Filings</p>	<ul style="list-style-type: none"> • Require initial hearings for enforcement or interim relief applications within 14 days • Establish simplified rules for evidence and submissions • Impose clear timelines for the issuance of judgments

<p>4. Publish Practice Directions on Enforcement and Public Policy</p>	<ul style="list-style-type: none"> • Issue written guidance on: <ul style="list-style-type: none"> – When and how courts may review awards – Restricted use of public policy grounds – Expected timelines for enforcement • Publish court decisions on arbitration in an accessible database and encourage annotation of landmark rulings
<p>5. Improve Case Management and Use of Technology</p>	<ul style="list-style-type: none"> • Introduce: <ul style="list-style-type: none"> – Electronic filing for arbitration-related applications – Remote hearings for urgent matters – A fast docket dedicated to arbitration support
<p>6. Establish Judicial Liaison with Arbitration Institutions</p>	<ul style="list-style-type: none"> • Hold regular meetings between senior judges and arbitral institutions to: <ul style="list-style-type: none"> – Align expectations – Identify recurring procedural issues – Support the development of appointments and emergency relief processes

Table Appendix A.1: Road Map for Strengthening Judicial Support for ADR

APPENDIX B: CLDP Road Map for Designing Effective Independent ADR Institutions

To support practitioners, policymakers, and emerging ADR institutions in applying these principles, we provide a consolidated table outlining the core components of a strong, credible ADR center.

The table below distills the key institutional features discussed in this section – ranging from case management and accreditation to governance, infrastructure, and regional cooperation – into a practical reference tool.

It is intended to serve both as a diagnostic framework for centers seeking to benchmark their current practices and as a step-by-step guide for those working to strengthen their operational capacity and international standing.

<p>1. Case Management Excellence</p>	<p>Effective ADR institutions must provide:</p> <ul style="list-style-type: none"> • Professional case administration, with trained staff who understand arbitration and mediation workflows • Digital case management systems that allow for secure online filings, document exchanges, and remote hearings • Clear timelines and user-friendly procedures that ensure predictability and efficiency <p>High-quality case management elevates institutional credibility and reinforces confidence in the ADR process.</p>
<p>2. Accreditation and Rosters of Mediators and Arbitrators</p>	<p>Institutions should:</p> <ul style="list-style-type: none"> • Establish transparent appointment procedures and publish the bios of arbitrators and mediators • Maintain a diverse, well-trained roster reflective of both domestic and international expertise • Develop certification and accreditation programs, ideally in partnership with organizations such as CIArb <p>Accredited rosters ensure that neutrals meet consistent standards of competence, ethics, and impartiality.</p>
<p>3. Institutional Staff Capacity: Business Development and Operations</p>	<p>Independent ADR centers must invest in two parallel staff functions:</p> <ul style="list-style-type: none"> • Business Development: <ul style="list-style-type: none"> – Conduct public-awareness campaigns about ADR services – Engage with chambers of commerce, SMEs, and legal communities to promote ADR adoption – Organize ADR weeks, practitioner trainings, and outreach events

<p>3. Institutional Staff Capacity: Business Development and Operations</p>	<ul style="list-style-type: none"> • Business Operations: <ul style="list-style-type: none"> – Manage sustainable funding models – case fees, institutional memberships, and, where appropriate, government support that does not compromise independence – Ensure efficient administrative systems, secure payment processing, and compliance with institutional governance <p>These functions ensure the center’s operational sustainability and community relevance.</p>
<p>4. Transparent and Modern Arbitration Rules and Procedures</p>	<p>Institutional rules are the backbone of user trust. Centers should ensure:</p> <ul style="list-style-type: none"> • Rules are publicly available on the website, easy to understand, and accessible in multiple languages. • Regular rule reviews – ideally annual – to adapt to evolving global practice • Updates to incorporate modern features such as: <ul style="list-style-type: none"> – Expedited procedures – Emergency arbitrator provisions – Consolidation of claims – Digital hearings and electronic evidence <p>Institutions that fail to modernize risk being perceived as outdated or unpredictable. Adaptability is a hallmark of credible arbitral centers.</p>
<p>5. Supporting Services and Infrastructure</p>	<p>Effective ADR centers provide supporting facilities that reinforce professional administration, including:</p> <ul style="list-style-type: none"> • Hearing rooms, secure breakout spaces, and virtual hearing capabilities • Translation, transcription, and interpreter services • Secure case-file storage and communication systems <p>These features enhance user experience and align the center with international expectations.</p>

<p>6. Regional Cooperation and International Positioning</p>	<p>Independent centers benefit from building partnerships with similarly situated institutions, including through:</p> <ul style="list-style-type: none"> • MOUs for institutional cooperation, reciprocal training, or shared rosters • Joint regional conferences or ADR weeks, which increase visibility and standardize best practices • Promotion in international forums, encouraging foreign parties to select the jurisdiction as a seat or hearing venue <p>Regional cooperation expands case volume, enhances credibility, and accelerates institutional learning.</p>
<p>7. Governance and Independence</p>	<p>To mitigate concerns about undue state influence, ADR centers must:</p> <ul style="list-style-type: none"> • Maintain independent governance structures, ideally with mixed public-private boards • Adopt internal safeguards ensuring neutrality and transparency • Publish annual reports and anonymized case statistics – filings, duration, enforcement rates, and costs <p>Transparency builds trust and aligns the center with international expectations of accountability.</p>

Table Appendix B.1: Road Map for Designing Effective Independent ADR Institutions

Glossary

Adjudication: An ADR method mostly used in major project planning or implementation (particularly in the construction sector) with sole (expert) adjudicators or three-member panels (Dispute Adjudication Board). It is often combined with arbitration in dispute resolution clauses. Adjudication plays a crucial role in early dispute prevention by resolving grievances and disagreements as they arise. Arbitral tribunals and courts can overturn Adjudication decisions, unless the parties comply voluntarily.

Ad Hoc Tribunal: A panel of arbitrators or adjudicators appointed by the disputing parties to resolve a dispute, outside of a formal framework of an ADR institution. The powers, procedure, and dynamics of the arbitration process are primarily subject to the agreement of the parties and the law of the seat of arbitration. The parties may select the rules of the specific arbitration institution to govern the process, or approach an institution for administrative and logistical support. This does not change the ad hoc nature of the process.

Affected Communities: Communities affected by disputes involving natural resources, environmental impact, or human/indigenous rights. Their involvement helps tribunals understand the social and cultural dimensions of the dispute, especially when such context would contribute to dispute resolution. Otherwise, local communities typically lack formal procedural rights.

Amicus Curiae: Also called “friends of the court.” These are often NGOs, academic organizations, or industry associations offering specialized policy insight or legal interpretation that can provide tribunals with a perspective beyond that presented by the disputing parties. In investment disputes, the home State of the investor and the Respondent State can submit unilateral or joint interpretations of the applicable treaty, or otherwise submit relevant information to the tribunal in the form of *amicus curiae* briefs.

Appointment: Also known as the constitution of the tribunal. Most often, each party nominates one arbitrator; the parties or the appointed arbitrators will then attempt to reach an agreement on the nomination of the chairman of the arbitral tribunal. For the agreement on the constitution of the arbitral tribunal, arbitration rules typically provide a time frame (e.g., 90 days from the date of registration of the request for arbitration). In cases where no agreement has been reached, the chairman is appointed by the default appointing authority (usually the arbitral institution, such as ICSID or PCA). As a general rule, no arbitrator may be of the same nationality as any of the parties (subject to agreement – ICSID Rule 1).

Appointing Authority: A neutral person or institution designated by the parties, the applicable law, or institutional rules to make procedural decisions, appointments, or actions when the disputing parties cannot agree. Appointing authorities play a key role in avoiding unnecessary stalemates or delays by appointing arbitrators or deciding on arbitrator challenges and other matters. In the absence of a designated appointing authority, this role is by default performed by the competent court under the applicable law.

Arbitrator: Primary decision-makers in arbitration, issuing binding awards that are enforceable internationally. Although appointed by the disputing parties, arbitrators are bound by the same duties of independence and impartiality as judges: to maintain the legitimacy and integrity of the procedure.

Arbitral Tribunal: The body deciding (by majority vote) on the outcome of the dispute. In investment-related cases, arbitral tribunals are almost, without exception, composed of three arbitrators.

Arbitral Award: A final and binding decision issued by an arbitral tribunal to resolve a dispute submitted to arbitration.

Arb-Med: A hybrid ADR method where an arbitrator issues a sealed award and then conducts mediation. If the mediation is unsuccessful, the award is unsealed, resulting in a binding decision. Some parties may also negotiate or mediate during the pendency of an arbitration, reach a settlement, and then ask the arbitrator to codify the terms of the negotiated agreement in a consent award.

Attribution: Attaching a given action or omission to a State under international law.

Award Enforcement: The process of registration with a court/relevant authority to compel the party against which the award was made to proceed as was decided by the arbitral tribunal. The party against which enforcement is sought can object to the enforcement by submitting proof of one of the grounds for refusal of enforcement, which are listed in Article V(1) of the New York Convention.

Award Recognition: Upon issuance of the arbitral award by the tribunal, it is generally recognized by local courts, thereby confirming its legal effect.

Amicable Settlement: A non-adversarial, consensual, interest-based dispute resolution method which often precedes adversarial litigation or arbitration. The process unfolds as a negotiation between the parties, with or without a third-party neutral (mediator, conciliator, etc.). The resulting settlement agreement is not binding, but the parties can request a tribunal to certify their settlement in an award on settled terms, which is then enforceable as an arbitral award under national and international law.

Bilateral Investment Treaty (BIT): An international agreement concluded between two States that serves to promote, protect, and regulate investment by nationals and companies of one State in the territory of the other State. Such treaties

most often give rights to protected investors from the respective treaty party to directly pursue their investment claims in international arbitration.

Bifurcation: The division of the case into separate phases to address discrete issues that may be dispositive. Respondents often request the bifurcation of the dispute into a jurisdiction and merits phase, or liability and quantum (damage valuation) phase. Bifurcation can significantly contribute to the time and cost-efficiency of the proceedings: it can avoid a full merits hearing if the tribunal finds that it does not have jurisdiction over the case, or a lengthy damage valuation period if it does not find liability in the bifurcated liability phase.

Kompetenz-Kompetenz: The arbitral tribunal has the jurisdiction to determine its own jurisdiction. If a party argues the arbitration clause is invalid, the arbitrators themselves decide that issue first. Courts generally will not intervene until the tribunal has issued its ruling, but they will have the last word on the matter.

Conciliation: A specialized method for settling disputes through the appointment of one or more conciliators who provide an impartial examination of the dispute, an attempt to define the terms of a mutually acceptable settlement, and provide the parties with any other assistance required to facilitate a settlement.

Conciliators: They provide an authoritative but non-binding statement of merits. Their recommendations, while not binding, often offer a structured path to compromise.

Confidentiality: Unlike court trials, arbitration is private. However, confidentiality is not automatic in all jurisdictions. Under English law, it is an implied duty; under the UNCITRAL Rules or U.S. law, it must often be explicitly agreed upon by the parties. It covers the existence of the arbitration, documents

produced, and the final award. For mediation, this means that statements and materials are not discoverable if the matter proceeds to litigation, a key pillar of the process.

“Cooling-off” Period: The mandatory pre-arbitration period for amicable settlement (usually 6 months), requiring the claimant investor to attempt settlement before filing for arbitration. While some tribunals view this as a procedural and curable issue, others consider it a strict jurisdictional bar.

Comparables Analysis: In investment arbitration, the tribunal values the investment by reference to recent arm’s-length transactions of similar assets, or the stock market valuation of comparable publicly traded companies. This is common when the dispute relates to an alleged breach of the national or most-favored-nation standard under the applicable treaty.

Contract Arbitration: Arises from a specific contract between parties (whether private individuals, companies, and/or States or State-owned enterprises) acting in a commercial capacity.

Contract Non-signatories: Actors who, though not formal parties to an arbitration agreement, become implicated through corporate relationships, contract chains, or conduct closely related to the contract and dispute. They may be drawn into proceedings under doctrines such as the group of companies, implied consent, or principles of equity.

Consent: Agreement to submit to an ADR mechanism, whether expressed before a dispute has arisen (such as through a contract, treaty, or legislation) or after a dispute has arisen (such as through a special agreement or request for arbitration). Consent is a fundamental prerequisite for ADR, and in mediation, it must exist throughout the process (ongoing consent).

Discounted Cash Flow (DCF): To value a going concern with a proven track record of profit, the tribunal may project future profits and discount them to present value. A DCF valuation may yield significant arbitration awards by capturing the full economic value of future growth.

Dispute Boards: Parties may establish dispute boards (either standing boards appointed at the start of a project or ad-hoc boards appointed when a dispute arises) to issue advisory or binding decisions on technical and contractual issues.

Disputing Parties: Those that drive the process, define the claims, select the forum, present evidence, and ultimately bear the legal and financial consequences of the decision. Disputes can occur between private parties, between private parties and the State, and, sometimes, between States.

Expert Determination: Disputing parties may agree to appoint an independent expert to render a binding or non-binding opinion or resolve a dispute requiring specialized or technical expertise.

Expert Witnesses: Experts who assist adjudicators in understanding technical or specialized issues central to a dispute. Expert witnesses offer specialized analysis that can influence outcomes or simplify complex subject matters for decision-makers.

Expropriation: International law does not forbid expropriation; it prohibits expropriation without compensation. This includes both direct (a mandatory legal transfer of title or outright seizure of the asset) and indirect expropriation (measures that do not transfer title but substantially deprive the investor of the economic value, use, and enjoyment of their investment, in a manner equivalent to a direct taking).

Fact Witnesses: Provide factual accounts that support a party's case, such as employees or public officials. Fact witnesses support the arguments of the nominating party.

Fair and Equitable Treatment (FET): A broad, catch-all protection that requires that the host-State treat the investor fairly and equitably (i.e., that it cannot discriminate against the investor, or impose unreasonable or arbitrary measures). Often broadly worded, this treaty protection has evolved to cover legitimate expectations, denial of justice, arbitrariness, and discrimination. Arbitral tribunals usually resort to treaty interpretation in the context of the facts to provide an adequate decision under the standard.

Home Court Advantage: Perceived unfairness/bias against foreign parties in domestic litigation.

Hybrid Counsel: The State may represent itself but retain a small group of outside lawyers to assist it, helping maintain control over international disputes.

Hybrid Coordination Agencies: Some States adopt a hybrid coordination approach, establishing a committee or commission comprising ministries and specialized and other relevant agencies, with one agency serving as the secretariat.

Hybrid Processes: Parties may agree to hybrid processes involving mediation and arbitration, such as "Med-Arb" and "Arb-Med."

Independence: Arbitrators must remain impartial toward the parties in dispute and may be challenged for lack of neutrality.

In-house Counsel: Internal government counsel, hired for a case or maintained as a continuously existing team.

International Investment Dispute: A dispute between an investor and a State or a regional economic integration organization (or any constituent subdivision of a State or agency of a State or a regional economic integration organization) submitted for resolution under an instrument of consent.

Investor-State Dispute Settlement (ISDS) or Investor-State Arbitration: Arises from a bilateral or multilateral treaty, an investment contract between a foreign investor and a government, or foreign investment law where a Sovereign State offers standing consent to arbitrate disputes with foreign investors. ISDS is a mechanism rooted in public international law that allows foreign investors to bring claims directly against a host State.

International Investment Agreements (IIAs): A broad category of international agreements concluded by States – including bilateral investment treaties (BITs) and investment chapters of free trade agreements – which promote, protect, and regulate investment by nationals and companies of one State in the territory of another State.

Mediation: Mediation is a process of facilitated negotiation in which all parties meet with a neutral third party (the mediator) who has been trained to resolve conflicts confidentially. The key features of mediation are voluntariness, confidentiality, and party self-determination.

Mediators: Focus on facilitating the negotiations between the parties in mediation. They assist the parties in understanding the panoply of interests informing their positions, as well as those of the other side. They do not determine factual or legal issues in dispute, but rather help parties reach a well-informed, interest-based solution.

Med-Arb: Under this contract clause, the parties seek to resolve their dispute through mediation. If unsuccessful,

the parties arbitrate the dispute using the same or different neutral as arbitrator, resulting in a binding award.

Most-favored-nation (MFN): The State must not treat the foreign investor or investment less favorably than it treats investors or investments from any third country. Procedurally, claimants sometimes use MFN clauses to import more favorable provisions from other treaties that the host State has concluded.

Multiple Coordination Agencies: Some States distribute dispute prevention and mitigation functions across government agencies, each of which plays a specific role or addresses particular grievances.

Multi-tiered (or “Escalation”) Clauses: Allowing or requiring parties to begin with a non-binding, consensual process (such as negotiation or mediation) and then proceed to binding dispute resolution mechanisms (such as arbitration).

National Treatment: The State must not treat the foreign investor or investment less favorably than it treats its own domestic investors or investments in similar circumstances.

Neutrals: Individuals who contribute to dispute resolution in distinct, often complementary ways, depending on the nature of the process. Some assist parties in reaching mutually acceptable solutions through negotiation and facilitated dialogue (e.g., mediators or conciliators), while others are empowered to determine the outcome through binding decisions or expert findings (commercial and investment arbitrators, expert board adjudicators).

Neutral Evaluators: Render non-binding opinions or resolve disputes requiring specialized or technical expertise. Engineers, financial analysts, or environmental scientists may be engaged to assess risks or propose feasible solutions.

Non-disputing Treaty Parties: In treaty-based arbitration, parties to the treaty other than the respondent State may intervene to address questions of treaty interpretation relevant to the dispute.

Negotiation: Direct discussions between parties, without third-party involvement. This provides a flexible means of dispute resolution without a formal structure. It aims to produce a mutually acceptable resolution, which the parties may memorialize.

Neutral Evaluation: A diagnostic and advisory rather than determinative. A neutral party, often with legal, regulatory, or dispute resolution experience, assesses the strengths and weaknesses of the respective cases and predicts likely outcomes if adjudicated. The evaluation is non-binding.

Outside Counsel: International lawyers whom States retain to navigate the legal, public policy, and financial stakes for the State.

Party Autonomy: Parties have the freedom to design their own process, including the language, the seat, and the applicable law. Courts generally will not intervene unless the process violates fundamental due process or mandatory laws.

Party Consent: It is expressed before a dispute arises in a dispute resolution clause (e.g., through a contract, treaty, legislation, or investment authorization), or after a dispute emerges, such as through a special agreement (*compromis*).

Private-private Disputes: Disputes between two or more private parties.

Public-public Disputes: Disputes involving the mutual rights and obligations of sovereign States, or relating to the inter-

pretation and application of their agreements, the competent institutions engage in dispute resolution amongst each other.

Public-private Disputes: Disputes between private parties and the States, which include disputes concerning labor, environmental, investment, and even criminal sectors. These disputes involve investors protected by international investment treaties or contracts, which allow them to sue their host State directly for violations of their guaranteed rights.

Post-award Settlement: Mutual agreement between the parties after the arbitral tribunal has issued its award, through which they modify the awarded remedies, agree on alternative performance, or otherwise on the form and timeline of implementation of the arbitral award.

***Ratione Materiae* Jurisdiction:** The tribunal's authority over a dispute based on the subject matter of the dispute, such as covered "investments" in international investment arbitration.

***Ratione Personae* Jurisdiction:** The tribunal's authority over a dispute based on the persons or entities involved, such as covered "investors" in international investment arbitration.

***Ratione Temporis* Jurisdiction:** The tribunal's authority over a dispute based on when the events or actions giving rise to the dispute occurred.

***Ratione Voluntatis* Jurisdiction:** The tribunal's authority over a dispute based on the consent to arbitrate, i.e., the offer of the host State and the acceptance of the investor.

Seat of Arbitration: The seat is the legal domicile of the arbitration, meaning the national law that governs the procedural framework. The law of the seat also confers powers on the tribunal and, importantly, determines which national courts may confirm or annul the award or intervene in the arbitral

proceedings. Although the terminology referring to the seat may vary (some referring to the “place of arbitration”), the seat is not necessarily synonymous with the geographical venue where hearings take place. For instance, an arbitration “seated” in London is subject to the supervision of English courts, even if the hearings are held physically in Paris or Singapore.

Separability of the Arbitration Agreement: The separability of an arbitration agreement means that the agreement to arbitrate is treated as an independent contract, separate from the main contract in which it is embedded. Even if the main contract is disputed, canceled, or alleged to be invalid, the arbitration agreement can still stand on its own. This ensures that an arbitrator, not a court, decides issues regarding the contract’s validity (and its own jurisdiction – Kompetenz-Kompetenz).

Set-aside proceedings: The challenge to the arbitration award in the court of the seat of the arbitration. If successful on limited grounds under national legislation (based on the UNCITRAL Model Law), such a challenge can render the award fully or partially unenforceable under Article V of the New York Convention.

Single Coordination Agency: To prevent and manage investor-State disputes, States may create a single coordination agency, either as an autonomous body or within an existing ministry or a governmental agency, such as an ombudsman or investment promotion agencies.

Sunk Costs: The actual expenses and capital made by a foreign investor that can be awarded by an arbitral tribunal, instead of applying more speculative methods. This method is suitable for early-stage projects, such as a mine that has not yet started extraction.

Third-party Funders (TPF): Specialized entities that finance the legal costs of a party (usually the claimant) in exchange for a share of the final award. Such funders have become a major stakeholder in international arbitration, influencing case strategy and requiring specific disclosure regarding conflicts of interest.

Acronyms

AAA – American Association of Arbitration

AAA-ICDR – American Arbitration Association-International Centre for Dispute Resolution

ADR – Alternative Dispute Resolution

ART – Arbitrator Research Tool

AS – Agreement Settlement

BITs – Bilateral Investment Treaties

CEDR – Centre for Effective Dispute Resolution

CEPA – Comprehensive Economic Partnership Agreement

CIArb – Chartered Institute of Arbitrators

CJEU – Court of Justice of the European Union

CLDP – Commercial Law Development Program

CLE – Continuing Legal Education

CPR – Civil Procedure Rules

DABs – Dispute Adjudication Boards

DCF – Discounted Cash Flow

ECT – Energy Charter Treaty

E.U. – European Union

EUR – European

FDI – Foreign Direct Investment

FET – Fair and Equitable Treatment

FIDIC – Federation Internationale des Ingenieurs-Conseils (International Federation of Consulting Engineers)

FTA – Free Trade Agreement

GAR – Global Arbitration Review

GAFTA – Grain and Feed Trade Association

HKIAC – Hong Kong International Arbitration Centre

IBA – International Bar Association

ICC – International Chamber of Commerce

ICCA – International Council of International Arbitration

ICSID – International Centre for Settlement of Investment Disputes

IAs – International Investment Agreements

ILC – International Law Commission

IP – Intellectual Property

ISDS – Investor-State Dispute Settlement	SIAC – Singapore International Arbitration Centre
IVS – International Valuation Standards	SIDRA – Singapore International Dispute Resolution Academy
JAMS – Judicial Arbitration and Mediation Services	SIMC – Singapore International Mediation Centre
LAS – Legal Aid Society	SMEs – Small and Medium- sized Enterprises
LCIA – London Court of International Arbitration	SOEs – State-owned Enterprises
MFN – Most-favored-nation	U.K. – United Kingdom
MIT – Multilateral Investment Treaty	U.S. – United States of America
MOU – Memorandum of Understanding	UKSC – United Kingdom Supreme Court
NAFTA – North American Free Trade Agreement	UN – United Nations
NGOs – Non-governmental Organizations	UNCITRAL – United Nations Commission on International Trade Law
NYC – New York Convention	UNCIS – United Nations Convention on Jurisdictional Immunities of States and Their Property (2004)
NYPD – New York Police Department	UNCTAD – United Nations Conference on Trade and Development
PCA – Permanent Court of Arbitration	USD – United States Dollar
PO1 – Procedural order number 1	VCLT – Vienna Convention on the Law of Treaties
SC – Supreme Court	
SCC – Stockholm Chamber of Commerce Arbitration Institute	
SDNY – Southern District of New York	

Guide to This Book

Who Is This Book For?

This book is for those seeking to determine how best to resolve disputes without resorting to judicial proceedings, using Alternative Dispute Resolution (ADR). Whether you are considering ADR from a governmental, academic, or industry perspective – as a State entity, community organization, investor, or service provider – this handbook provides context, highlights options, and sets expectations for the ADR process. Policymakers and regulators from emerging economies, in particular, will benefit from this handbook’s perspectives on designing ADR systems, incorporating ADR to achieve policy goals, and participating in ADR. Students and legal practitioners will also find the overview of the ADR framework, references and citations, and influential case studies helpful.

What Is the Scope of This Book?

This handbook introduces readers to ADR, including detailed overviews of mediation and arbitration, as well as perspectives on designing ADR systems for policymakers. Particular attention is given to ADR as a tool in international trade and for international investment. However, this book approaches ADR from its foundational principles – party autonomy, procedural flexibility, and problem-solving – providing valuable insights for other actors as well. This book does not advocate for a particular method but rather highlights the advantages and disadvantages of ADR from system design and practical perspectives.

Who Wrote This Book?

The authors are a diverse team of ADR experts, including government officials, lawyers, public policy experts, and academics. This handbook seeks to capture their collective practical experience and current knowledge.

It does not, however, represent the policy positions of the organizations, institutions, countries, and/or companies with which the individual authors are or have been affiliated. For such views, please refer to the publications and websites of the respective organizations, institutions, countries, and/or companies. The authors hope this handbook will advance the global development and implementation of ADR.

How Was This Book Developed?

This book is the culmination of years of ADR development work at the Commercial Law Development Program (CLDP), and the product of concentrated drafting sessions at the *Deutsche Institution für Schiedsgerichtsbarkeit* (DIS) in Bonn, Germany. The authors then shared the manuscript with editors from Columbia Law School and Durham Law School before publication.

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How May I Use This Book?

This handbook serves as a reference and starting point for further discussion, policy development, and scholarly work. It may be read sequentially, particularly for those with a limited background in ADR. For readers interested in specific aspects of the ADR process, refer directly to Chapters 3, 4, 5, and 6 for mediation, arbitration, and enforcement, respectively. Policymakers may skim the early chapters, then read Chapter 7 and the Conclusion with particular interest.

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Eric Ives is Senior Counsel for the Europe team with the Commercial Law Development Program (CLDP) in the Office of the General Counsel of the U.S. Department of Commerce. Mr. Ives leads a team of legal development professionals who work bilaterally in Ukraine, Belarus, Kosovo, North Macedonia, Bosnia and Herzegovina, and Albania, and multilaterally across Europe. Mr. Ives previously served as Attorney-Advisor for the Central Asia and Pakistan team,

where he led the agency's bilateral legal development portfolio with Uzbekistan and its alternative dispute resolution portfolios in Pakistan and across the MENA region. Mr. Ives received his JD from Columbia Law School, where he was a James Kent Scholar, Davis Polk Leadership Fellow, and editor of the Journal of Transnational Law. He is admitted to practice law in the State of New York.



Raquel Martinez Sloan is an Attorney-Advisor (International) with the Commercial Law Development Program (CLDP) in the Office of the General Counsel of the U.S. Department of Commerce, where she works on programs throughout Eastern Europe, Central Asia, and Latin America. Before joining CLDP, Ms. Sloan was a Senior Associate in the International Arbitration group of White & Case LLP where she represented foreign sovereigns and private parties in

complex investment arbitration matters before the International Centre for Settlement of Investment Disputes (ICSID) and other major arbitral institutions pursuant to bilateral investment treaties (BITs) and multilateral agreements such

as the Energy Charter Treaty (ECT). She is actively involved in the international arbitration community and is the Communications Chair for the Institute of Transnational Arbitration's quarterly publication, *ITA in Review*. Ms. Sloan received her JD from the University of California, Berkeley, School of Law. She also holds BA and MA degrees from New York University, where she graduated magna cum laude. Ms. Sloan is fluent in Spanish and is licensed to practice law in California, New York, Washington, DC, and before the U.S. Supreme Court.

International Experts



Fahira Brodlija is an Advisor for investment law and dispute resolution in a regional GIZ program in the Western Balkans. Her work includes advisory support for governments in the Western Balkans and abroad on investment treaty and policy design; support in designing and developing dispute prevention and management mechanisms; and capacity development, including practical training and simulations. Fahira is a lecturer at the International University of Sarajevo, and she frequently writes and speaks on ISDS reform, investment law, and international dispute resolution more broadly. She is a tutor for the CiArb Diploma program and a lecturer for the Africa Arbitration Academy program. She has appeared as a guest lecturer at esteemed universities in Europe, the U.S., Africa, and Asia. Fahira has authored over 50 articles, most recently published in the *Penn State Law journal* and the *European Investment Law and Arbitration Review*, and others in university journals and on online platforms such as the *Kluwer Arbitration Blog*. In addition, she has co-edited three books on international commercial and investment arbitration and has contributed chapters to

others. She is a member of the Association ARBITRI and the founder of the GEM diversity and mentorship program, which supports young academics and practitioners in international arbitration.



Dr. Ylli Dautaj is Associate Professor in Commercial Law and Commercial Arbitration at Durham Law School, U.K. Dr. Dautaj is also a Partner with DER Disputes, Stockholm, Sweden. Dr. Dautaj represents clients primarily in litigation and arbitration, domestic and international, commercial and investment. He represents individuals, private enterprises, State-owned enterprises, and States in various disputes, including matters incidental or ancillary to arbitration. Dr. Dautaj's published books and journal articles, include *International Commercial Agreements* (Kluwer International, 7th edition, 2023) and *Sovereign Immunity from Execution and International Arbitration: Theory and Practice* (Kluwer International, 2025).



Matthew Drossos is a partner in the International Disputes and Advisory Practice at White & Case LLP, and is based in Washington, DC. Mr. Drossos advises clients on issues of international and cross-border arbitration, investment protection, crisis management, and dispute avoidance. Over the past decade, his practice has involved issues arising out of or involving Central America, Eastern Europe, and Central Asia. He has represented both corporations and sovereign States in international investment planning and in disputes before the International Centre for the Settlement of Investment Disputes (ICSID), the Geneva Chamber of Commerce, the Court of Arbitration for Sport, the International Chamber of Commerce (ICC), and U.S.

federal courts. Representative matters have included disputes involving metals and mining, construction, textiles, and sovereign financial instruments. Mr. Drossos also regularly leads training on international law, alternative dispute resolution, and contract drafting. At Georgetown University Law Center, he served as Editor-in-Chief of the Georgetown Journal of International Law and remains an Advisory Board Member of the Journal.



Dr. Kabir Duggal is a preeminent international arbitration and public international law practitioner, serving as a Partner in Akin Gump’s New York office and as Senior Fellow and Advisor at Columbia Law School’s Center for International Commercial and Investment Arbitration (CICIA). Recognized as a “Chartered Arbitrator” and Certified Mediator, he has served as arbitrator in over 70 complex investor-State and commercial

disputes across multiple jurisdictions and industries, frequently acting as an expert on international arbitration and public international law matters, and has contributed to shaping global arbitration standards. He is a Lecturer-in-Law at Columbia, an adjunct professor at Fordham, and Course Director for the Columbia Law School–CIArb Comprehensive Course on International Arbitration. Dr. Duggal’s work includes over 60 publications, multiple books – *including Evidence in Investment Arbitration* (Oxford), *Principles of Evidence in Public International Law* (Brill), and *Pro-Arbitration Revisited* (Juris) – and more than 400 speaking engagements worldwide. Dr. Duggal also advises the UN Office of the High Representative for LDCs on the Investment Support Program, works with the U.S. Department of Commerce’s CLDP initiatives, has conducted extensive global training for governments and institutions, and serves on numerous advisory and steering committees for international arbitration bodies. He is consistently ranked by Lexology, Chambers Global, Chambers USA,

Legal500, and Lawdragon. His work has been recognized with numerous awards, including the Hind Rattan, Smit-Lowenfeld Prize, the “Champion for Change” award by ArbitralWomen, Legal Era’s “40 under 40 Rising Star,” and the Dispute Resolution Practitioner of the Year – Americas and Global awards. He holds degrees from the University of Mumbai (University Medal), University of Oxford (DHL-Times of India Scholar), NYU (Hauser Global Scholar), and Leiden (CEPANI Academic Prize), is currently pursuing an SJD at Harvard Law School, and is admitted to practice in New York, the District of Columbia, England & Wales, and India.



Dr. Emad Hussein is an international arbitrator, accredited mediator (CEDR, SIMI, and IMI), and a keen academic. He is the Deputy President of the International Court of Arbitration of the Organisation of Islamic Cooperation Arbitration Centre (OIC-AC) and a Senior Advisor, Middle East and North Africa, with the Singapore International Dispute Resolution Academy (SIDRA). He is also an Associate Lecturer with Newcastle University. He is

empaneled as an arbitrator with several international arbitral institutions, including the ICC, DIAC, ADCCAC, arbitrateAD, HKIAC, QICCA, CRCICA, SCCA, AAA-ICDR, LCICA, and SIAC. He is also an empaneled mediator with the CAO of the World Bank. He is an approved faculty member (AFL) with the CIArb and has trained several arbitrators and mediators under the fellowship route in collaboration with the SCCA. He also conducts regular ADR capacity-building training for members of the judiciary in Saudi Arabia, Morocco, and Iraq, in partnership with the SCCA, the Commercial Law Development Program (CLDP U.S.A), and UNCITRAL. In these capacities, he leads research on advancing ADR in the MENA region. Additionally, he is a Senior Advisor with CIMAC and a member of the advisory boards of LCIC, OIC-AC, InnovADR, and the British University in Dubai. He holds a PhD in international commercial arbitration from SOAS,

University of London, U.K., a PhD in Management from ISM, U.S.A; an LLM in international arbitration from Queen Mary University of London, U.K., and an LLM in mediation and international commercial dispute resolution from Newcastle University, U.K.



Ivan Philippov is an international dispute resolution lawyer. He has extensive experience in advising States, State-owned entities, private corporations, and individuals on complex disputes. Ivan's practice spans a diverse range of industries, with a particular focus on oil and gas, mining, construction, transport, and financial services. He has acted on matters involving clients and projects across Latin America, South and

Southeast Asia, Central Asia, Eastern Europe, and the Middle East. Ivan is admitted to practice in England & Wales. He holds degrees in Russian and international law from MGIMO University and in international dispute resolution from Queen Mary University of London. He also completed his legal studies at the University of Law and BPP.



Rebecca Price is the Director of the Alternative Dispute Resolution (ADR) Program at the U.S. District Court for the Southern District of New York. Before this position, she directed the Mediation Clinic at Brooklyn Law School, was a Supervising Attorney in the Mediation Clinic at CUNY School of Law, and taught ADR at the New York University School of Continuing Professional Studies. Rebecca has also taught lawyering/legal writing, interviewing,

and counseling at Cardozo Law School and served as a supervising attorney in the Economic Justice Program at CUNY School of Law. Rebecca is the former Coordinator of the Special Education/Early Intervention and ACCES VR Mediation

Programs for Safe Horizon Mediation Program (now the New York Peace Institute). Before turning her focus to ADR, Rebecca was the Assistant Director of Visual AIDS, created and oversaw the Children's Mental Health Project at New York Lawyers for the Public Interest, and was a Senior Attorney in the Special Litigation and Appeals Unit of the Mental Hygiene Legal Service. Rebecca is certified as an Initial Mediation Trainer for the Community Dispute Resolution Centers Program of the Unified Court System of the State of New York. Rebecca currently teaches an ADR Survey at New York University School of Law and is a frequent speaker and trainer about mediation, conflict resolution, and communication. In the Spring of 2023, she was appointed Lecturer in Law at Columbia Law School, overseeing the mediation clinical programs for that semester. Rebecca was named a 2017 honoree for Distinguished Leadership as part of the New York Law Journal's Professional Excellence Awards, Frontline Champion by the Association for Conflict Resolution of Greater New York for Mediation Settlement Day 2019, and the recipient of the Charles Newman award from the New York State Bar Association in 2025.



Jeremy K. Sharpe is an international arbitrator; Member of the Board of the United Nations Register of Damage (UNRoD), Lecturer in Law and Senior Fellow at Columbia Law School, and an editor of the *ICSID Review – Foreign Investment Law Journal*. He previously was a partner in Shearman & Sterling's international arbitration and public international law practices in London and Paris, Chief of Investment Arbitration in the Office of the Legal Adviser at the U.S. Department of State, Legal Adviser to the U.S. Embassy in Baghdad, Attorney-Adviser in the State Department's Office of African and Near Eastern Affairs and Office of International Claims and Investment Disputes, and a law clerk at the Iran-United States Claims Tribunal in *The Hague*.