CHAPTER

5

Settling Business Disputes: Mediation, Arbitration and the Courts

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Introduction

Negotiation does not always succeed. The parties may be too far apart, too angry or too suspicious of each other to agree; one of them may expect to obtain more from a judge than from the other side; or the dispute may raise questions of law that only an authority can answer. When negotiation fails, firms, workers and governments turn to third parties, who either help them to reach agreement or decide the dispute for them. The choice of third party, and the rules under which it acts, shape not only the outcome but also its cost, its speed and what is left of the relationship afterwards.

This chapter examines the institutions of dispute settlement. Section 5.1 presents the ladder of settlement, from negotiation through facilitated procedures to binding decisions, and compares the steps on cost, speed, confidentiality, control and the relationship. Section 5.2 explains how conciliation and mediation work and why they succeed or fail. Section 5.3 turns to arbitration and litigation, the two ways in which a third party decides a dispute. Section 5.4 examines the special institutions for labour disputes, drawing on examples from India and Poland, and the growth of online dispute resolution. Section 5.5 moves to the international level and the institutions that settle disputes between firms, between investors and states, and between states over trade: the International Chamber of Commerce, the International Centre for Settlement of Investment Disputes and the World Trade Organization.

The chapter completes Part I. Chapter 4 introduced negotiation and the book's framework; this chapter shows what lies behind every negotiation, since the procedures available when talks fail define each side's alternatives, and therefore its **power**. Third parties also change the value at stake, the **profit**, by adding costs

and delays, and they demand a different kind of **persuasion**, addressed to a mediator, an arbitrator or a judge rather than to the other side. The Deal File follows a dispute in which a commercial concession, a global sale and the rivalry between great powers met in two container terminals at either end of the Panama Canal.

DEAL FILE

Panama Canal Ports, from Sale to Seizure

Since 1997 Panama Ports Company, a subsidiary in which the Hong Kong group CK Hutchison holds an indirect 90 per cent interest, had operated the ports of Balboa on the Pacific and Cristóbal on the Atlantic, at either end of the Panama Canal. Its concession contract had been approved by Law No. 5 of 16 January 1997 and was later extended (CK Hutchison Holdings, 2026a). For most of that time the concession attracted little attention outside the shipping industry.

That changed in 2025. The new American administration regarded Chinese influence over the canal as a threat to its interests, and on 2 February 2025 the Secretary of State, Marco Rubio, told Panama's President, José Raúl Mulino, that the status quo was unacceptable; absent immediate changes, the United States would take the measures necessary to protect its rights under the canal treaty (US Department of State, 2025). On 4 March 2025 CK Hutchison announced agreements in principle to sell its ports business, covering 43 ports in 23 countries, and its 90 per cent interest in Panama Ports Company to a consortium of BlackRock, its unit Global Infrastructure Partners and Terminal Investment Limited (TiL), part of the MSC group. The transaction valued the ports at an enterprise value of US$22.8 billion and was to bring CK Hutchison more than US$19 billion in cash (CK Hutchison Holdings, 2025). The sale, which needed regulatory approvals, turned a commercial concession into an object of rivalry between the United States and China.

From court ruling to seizure. On 29 January 2026 Panama's judiciary announced that the Supreme Court of Justice had declared unconstitutional the law approving the concession contract, together with its amendments and the act extending it. On 3 February Panama Ports Company began arbitration against the Republic of Panama under the concession contract and the Rules of Arbitration of the International Chamber of Commerce (ICC); CK Hutchison's board said that it strongly disagreed with the ruling and reserved all its rights (CK Hutchison Holdings, 2026a). When the ruling was published in the official gazette on 23 February, it took effect, and the government took over the terminals under an executive decree. On 24 February APM Terminals, part of the Maersk group, began to operate Balboa for up to 18 months, while TiL took over Cristóbal (APM Terminals, 2026).

Table 5.1

The Panama Canal ports dispute at a glance

Parties	Panama Ports Company and its parent, CK Hutchison; the Republic of Panama; indirectly, the governments of the United States and China and the operators appointed to replace Panama Ports Company
At stake	The concession to operate two strategic terminals; compensation for the investment made; the wider sale of CK Hutchison's ports business
Timeline	Concession approved in 1997 and later extended; sale announced in March 2025; concession law declared unconstitutional by the Supreme Court on 29 January 2026; arbitration under the concession contract begun on 3 February; terminals taken over on 23 February 2026; investment treaty arbitration begun on 20 August 2026
Status in October 2026	Two arbitrations against Panama: one by Panama Ports Company under the ICC Rules and one by CK Hutchison under an investment treaty, claiming damages of more than US$1.5 billion; temporary operation of the terminals by APM Terminals and TiL

Note. Author, based on APM Terminals (2026) and CK Hutchison Holdings (2025, 2026a, 2026b).

From seizure to arbitration. The dispute then moved to the arbitrators. On 20 August 2026 CK Hutchison began a second international arbitration against Panama, this time for alleged breaches of an investment protection treaty, claiming damages of more than US$1.5 billion for a series of measures in 2025 and 2026 that, in its words, ended in the destruction of the concession contract and the takeover of the terminals (CK Hutchison Holdings, 2026b). The two proceedings run in parallel and are likely to take years.

Questions to keep in mind. Why did a commercial concession end in a court ruling and a seizure rather than a negotiated settlement? Why did the investor turn to international arbitration rather than to Panama's own courts? What can arbitrators do, and what can they not do, for a party which has lost its business? How did the involvement of the world's two largest powers change the options open to each side? The chapter answers these questions in turn.

5.1 Negotiate, Mediate or Decide? The Ladder of Settlement

From Agreement to Decision

The procedures for settling disputes can be arranged on a ladder, shown in Table 5.2. On the lower rungs, the parties keep control of the outcome: they negotiate themselves, or a third party helps them to negotiate. On the higher rungs, they hand control to a third party who decides for them. Higher up the ladder, costs, delays and formality usually rise, while the parties' control over the result and the chances of preserving their relationship usually fall.

Table 5.2

The ladder of dispute settlement

Procedure	Role of the third party	Outcome binding?	Typical cost and speed	Confidential?	Effect on relationship
Negotiation	None	Only if agreed	Lowest; fastest	Yes	Usually preserved
Conciliation	Brings the parties together, may suggest terms	Only if agreed	Low	Usually	Usually preserved
Mediation	Structures the talks and helps the parties find their own solution	Only if agreed	Low to moderate	Yes	Often preserved or repaired
Expert determination	Decides a technical question	Usually, by contract	Moderate	Yes	Partly preserved
Arbitration	Hears both sides and makes a binding award	Yes	Moderate to high	Usually	Often strained
Litigation	A court applies the law and gives judgment	Yes, subject to appeal	High; slowest	No, as a rule	Often broken

Note. Author, based on Ury et al. (1988) and Moore (2014).

The ladder echoes the distinction drawn in Chapter 3 between reconciling interests, determining rights and contesting power. Negotiation, conciliation and mediation are interest-based procedures; arbitration and litigation determine rights. Strikes, blackouts and seizures, which lie off the ladder altogether, are contests of power. A well-designed system, as Chapter 3 explained, encourages parties to settle on the lowest rung that will work and allows them to step back down when a higher rung has clarified the issues.

Bargaining in the Shadow of the Law

The higher rungs matter even when they are never used. Mnookin and Kornhauser (1979) showed that parties who negotiate a settlement do so *in the shadow of the law*: each compares the offer on the table with what it expects a court or arbitrator would award, minus the costs and risks of getting there. The expected judicial outcome thus sets each side's alternative to agreement, its BATNA in the language of Chapter 4. A party expecting to win in court can demand more; a party facing high legal costs or a long delay will accept less. Most commercial disputes are settled before a judgment or award, but the terms of those settlements reflect the decision that the parties expect.

KEY MOVE

Before negotiating a dispute, estimate what a court or arbitrator would probably decide, how long it would take and what it would cost. That estimate is your real alternative to agreement.

5.2 How Do Conciliation and Mediation Work?

Conciliation and Mediation Compared

Conciliation and **mediation** both involve a neutral third party who helps the disputants to reach their own agreement without imposing one. The terms are often used interchangeably, and their meaning differs from one country and field to another. In general usage, a conciliator concentrates on bringing the parties together, improving communication and, often, proposing terms of settlement, while a mediator manages a structured process designed to help the parties identify their interests and design a solution themselves. In labour relations, conciliation is frequently a statutory step carried out by a public official before a dispute may proceed further, as Section 5.4 shows.

Management texts distinguish several kinds of mediator. An *eminent outsider*, a respected person trusted by both sides, may mediate informally; a *nongovernmental board* or panel may be created by the parties; and a *governmental*

or semi-governmental body may supply mediators under public rules. Whatever its form, skilful and sympathetic mediation can resolve differences that would otherwise lead to a stoppage of work or a breakdown of trade.

What Mediators Do

Moore (2014) describes mediation as a process that moves through recognisable stages: making contact with the parties, gathering information, designing the process, opening joint sessions, defining the issues, uncovering interests, generating options, assessing them and reaching a formal settlement. Within this process, mediators use three broad kinds of intervention (Kressel & Pruitt, 1989):

- **reflexive** interventions, which build rapport and trust and orient the mediator to the dispute;
- **contextual** interventions, which change the atmosphere and the process: separating the parties, controlling the agenda, reducing tension and improving communication;
- **substantive** interventions, which address the content: suggesting options, pointing out the costs of failure, testing the realism of each side's demands and proposing compromises.

Carnevale (1986) argued that a mediator's choice among strategies depends on two judgements: how much the mediator values the parties' own aspirations, and how likely the parties seem to find common ground. When common ground seems likely, mediators tend to help the parties solve the problem; when it seems unlikely and the parties' goals matter, they press harder with proposals of their own.

When Mediation Succeeds and Fails

Research has identified several conditions under which mediation is most likely to succeed (Kressel & Pruitt, 1989; Wall & Lynn, 1993). The dispute is moderately intense rather than at the extremes of escalation; the parties are motivated to settle, often because the stalemate described in Chapter 3 has begun to hurt; the issues are divisible rather than matters of principle; the resources at stake are not severely limited; and the mediator is seen as competent and impartial. Mediation is less likely to succeed when one party believes it can win outright, when the conflict concerns values or identity, or when the parties' positions have been made public and hardened.

The form that mediation takes also varies with culture. In high-context cultures such as China, disputes between individuals and firms are commonly handled through intermediaries, frequently a friend of both parties or a respected elder, because communication through a third party avoids direct confrontation

and reduces the risk that either side will lose face; impartiality and the maintenance of face are regarded as the two key conditions of successful mediation (Jandt, 2018). In low-context cultures, by contrast, the parties are more likely to address the issues directly and to engage a professional mediator whose authority derives from expertise and procedure rather than from personal relationships.

Moore and Woodrow (2010), drawing on Moore's earlier work, distinguish five kinds of intercultural mediator. **Social network mediators** are trusted members of the parties' own network, who need not be wholly impartial but are believed able to help. **Benevolent mediators** are respected figures of high status to whom disputants turn for advice. **Administrative or managerial mediators** hold formal positions in an organisation and could decide the issue, but prefer to help the parties reach their own agreement within the organisation's rules. **Vested interest mediators** are powerful parties with a stake in the outcome, who encourage, cajole or press the disputants to agree. **Independent mediators** are neutral towards the parties and impartial on the issues, and offer help with the process. Which kind is acceptable depends on culture. Parties from hierarchical and collectivist cultures tend to prefer mediators with status and authority, who direct both the process and the substance and may apply personal or social pressure, as mediators of China's people's mediation committees and many commercial mediators in Hong Kong and Singapore do. Parties from individualist cultures, such as the United States, northern Europe and Australia, tend to choose mediators for expertise rather than status and expect them to leave control of the outcome to the parties (Moore & Woodrow, 2010). Chapter 18 examines these differences in more detail.

Legal frameworks increasingly encourage mediation. The European Union's Mediation Directive of 2008 requires member states to ensure that settlements reached through mediation in cross-border civil and commercial disputes can be made enforceable. At the global level, the United Nations Convention on International Settlement Agreements Resulting from Mediation, signed in Singapore in 2019, provides for the enforcement of international mediated settlements across borders, much as the New York Convention does for arbitral awards.

In the Deal File, mediation was hardly attempted. The issues had become matters of constitutional law and national security, the parties' positions were public and the great powers behind them treated the outcome as a test of strength: precisely the conditions under which mediation is least likely to work.

KEY MOVE

Use mediation early, while positions are still flexible and before the dispute becomes a matter of principle or public prestige. Choose a mediator both sides regard as competent and impartial.

5.3 Who Decides When Talks Fail? Arbitration and Litigation

Arbitration

In **arbitration** the parties agree to submit their dispute to one or more private decision makers, the arbitrators, whose award is binding. The agreement may be made in advance, usually through an arbitration clause in the contract, or after the dispute has arisen. Arbitration differs from conciliation in a fundamental way: a conciliator helps the parties reach a decision, whereas an arbitrator decides the dispute.

Arbitration offers business several advantages over the courts (Born, 2021):

- **neutrality**, since neither party has to accept the courts of the other's country;
- **choice of decision makers**, who can be selected for their expertise in the industry or the law concerned;
- **confidentiality**, which protects commercial information and reputations;
- **flexibility**, since the parties can shape the procedure, the language and the seat;
- **finality**, since awards can be challenged only on narrow grounds;
- **enforceability**, since the New York Convention of 1958, to which more than 170 states are party, obliges courts to recognise and enforce foreign arbitral awards with few exceptions.

The last advantage is decisive for international business. A judgment of a national court can be difficult to enforce abroad, while an arbitral award can usually be enforced wherever the losing party has assets. Arbitration also has costs: fees for arbitrators and institutions, lengthy proceedings in complex cases, limited rights of appeal against a mistaken award and, in many cases, a confidentiality that hides rulings from public scrutiny.

Litigation

Litigation is the resolution of a dispute by a court of the state. Its strengths are the mirror image of arbitration's weaknesses. Courts can compel parties and witnesses to appear, they offer appeals to correct errors, their judgments create precedents guiding future conduct, and their proceedings are generally public, which supports accountability. Their weaknesses are delay, cost, formality, lack

DEAL SNAPSHOT

Uniper against Gazprom, 2022 to 2024

Uniper, then Germany's largest importer of natural gas, had long-term contracts to buy gas from Gazprom Export that were due to run into the mid-2030s. From June 2022 Gazprom cut its deliveries, and after late August 2022 it delivered no gas at all. Uniper had to buy replacement gas, at times at extremely high prices, and was rescued by the German state, which became its main shareholder. At the end of 2022 it began arbitration. On 7 June 2024 a tribunal seated in Stockholm and applying Swiss law awarded Uniper more than €13 billion in damages and the right to terminate its contracts, which it did a few days later (Uniper, 2024). Uniper itself acknowledged that it was unclear whether significant sums would ever be received. The outcome demonstrates both the strength and the limits of arbitration: a neutral tribunal can establish rights and assess damages with authority, but collecting an award from a party that refuses to pay is a separate battle.

of specialist expertise in some fields and, in international disputes, the difficulty of enforcing a judgment abroad and the suspicion that a court may favour its own nationals or government.

The Deal File shows why an investor may distrust the courts of its host state. It was Panama's own Supreme Court that struck down the concession. For Panama Ports Company, continuing to argue before Panama's courts offered little hope, whereas international arbitration offered a neutral forum and an award that could, in principle, be enforced against Panamanian assets abroad. Table 5.3 compares arbitration and litigation.

Table 5.3

Arbitration and litigation compared

Feature	Arbitration	Litigation
Basis	Agreement of the parties	Jurisdiction of the state
Decision maker	Chosen by the parties	Appointed by the state
Procedure	Flexible, shaped by the parties and the rules chosen	Fixed by procedural law
Publicity	Usually confidential	Usually public
Appeal	Very limited	Usually available
International enforcement	Strong, under the New York Convention	Often difficult
Precedent	Limited	Important in many legal systems

Note. Author, based on Born (2021).

KEY MOVE

Decide on the forum when you sign the contract, not when the dispute arises. An arbitration clause that names the rules, the seat and the language is one of the most valuable terms in any international agreement.

5.4 Labour Tribunals and Online Dispute Resolution

Settling Labour Disputes

Disputes between employers and workers have their own institutions in most countries, because of their social importance and because a stoppage of work can harm many people beyond the parties. A widely used classification in management teaching distinguishes five methods of settling industrial disputes: *investigation* of the facts by a board or court of inquiry; *mediation*; *conciliation*; *arbitration*, which may be voluntary, when the parties choose to refer their dispute to an arbitrator, or compulsory, when the law or the government requires it; and *adjudication* by labour courts and tribunals.

India provides a long-standing example of such a system. For more than seventy years, industrial disputes were governed by the Industrial Disputes Act of 1947, which provided for conciliation officers and boards of conciliation, voluntary and compulsory arbitration and a three-tier system of adjudication by labour courts, industrial tribunals and a national tribunal for disputes of national importance. On 21 November 2025 the Act was replaced by the Industrial Relations Code of 2020, one of four labour codes brought into force on that day, which consolidated the law on industrial disputes, trade unions and standing orders (Ministry of Labour and Employment, 2025). The Code replaces the labour courts and tribunals of the old Act with industrial tribunals and a National Industrial Tribunal (*Industrial Relations Code, 2020*). Students using older texts should note the change, which illustrates how dispute institutions evolve with the economy they serve.

Poland follows a different model. Under the Act of 23 May 1991 on the resolution of collective disputes, a dispute between a trade union and an employer must pass through negotiations and then mediation, with a mediator agreed by the parties or, failing agreement, appointed by the ministry responsible for labour from an official list. If mediation fails, the union may call a warning strike of no more than two hours, or the employee side may ask a council of social arbitration to settle the dispute instead of striking (Eurofound, n.d.). Individual employment disputes, such as claims for unfair dismissal, are heard by the labour divisions of the ordinary courts. Chapter 10 examines collective bargaining and industrial conflict in Poland and Central Europe in more detail.

Online Dispute Resolution

Digital technology has created a new rung on the ladder. **Online dispute resolution** (**ODR**) uses internet platforms to handle disputes, often small and numerous ones, between consumers and businesses or between businesses. Online marketplaces and payment providers resolve millions of complaints each year through automated negotiation tools and online mediation, and many courts now allow hearings and filings to take place online.

Not every ODR initiative has succeeded. In 2016 the European Union launched an online platform to connect consumers and traders with approved dispute resolution bodies. Few complaints, however, ever reached such a body, because traders rarely responded. The EU legislators concluded that the platform's performance did not justify its public and private costs; it stopped accepting complaints on 20 March 2025 and was closed on 20 July 2025 (Regulation (EU) 2024/3228, 2024). The lesson is that technology lowers the cost of access to dispute resolution, but cannot by itself oblige an unwilling party to take part. Chapter 20 returns to the role of artificial intelligence in negotiation and dispute resolution.

KEY MOVE

Know the special procedures that apply to your dispute. Labour disputes, consumer complaints and disputes with public bodies often have mandatory steps that must be followed before a court will hear a claim.

5.5 How Are International Disputes Settled? ICC, ICSID and the WTO

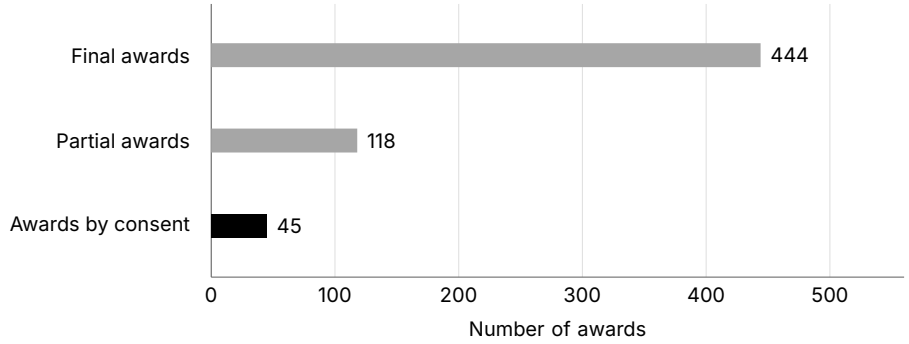
Commercial Disputes: The International Chamber of Commerce

When firms from different countries cannot agree, they most often turn to international commercial arbitration administered by an institution. The largest is the International Court of Arbitration of the International Chamber of Commerce (ICC), based in Paris. In 2025, 881 new cases were registered under its arbitration rules, involving 2,531 parties from 147 jurisdictions; the cases pending at the end of the year had an aggregate value of US$299 billion. Construction and engineering accounted for 28 per cent of new cases and energy for 15 per cent, and 150 states or state-owned entities appeared as parties (International Chamber of Commerce, 2026). Arbitrations were seated in 123 cities in 70 countries, with France, the United Kingdom, the United States, Switzerland and Singapore the most frequent jurisdictions. Figure 5.1 shows the awards that the ICC's International Court of Arbitration approved in the same year.

Of the 607 awards, 45 were awards by consent, in which the tribunal records a settlement negotiated by the parties themselves, a reminder that arbitration and

Figure 5.1

Awards approved by the ICC International Court of Arbitration, 2025, by type (number)



Note. Author, based on International Chamber of Commerce (2026). Awards by consent record a settlement reached by the parties during the arbitration.

negotiation often run side by side. The choice of seat matters, because the courts of the seat supervise the arbitration and decide any challenge to the award. Cities such as Paris, London, New York, Singapore and Geneva are chosen because their courts are known to support arbitration and to intervene rarely. Other institutions, such as the London Court of International Arbitration, the Singapore International Arbitration Centre and the Arbitration Institute of the Stockholm Chamber of Commerce, compete for the same business.

Investment Disputes: ICSID

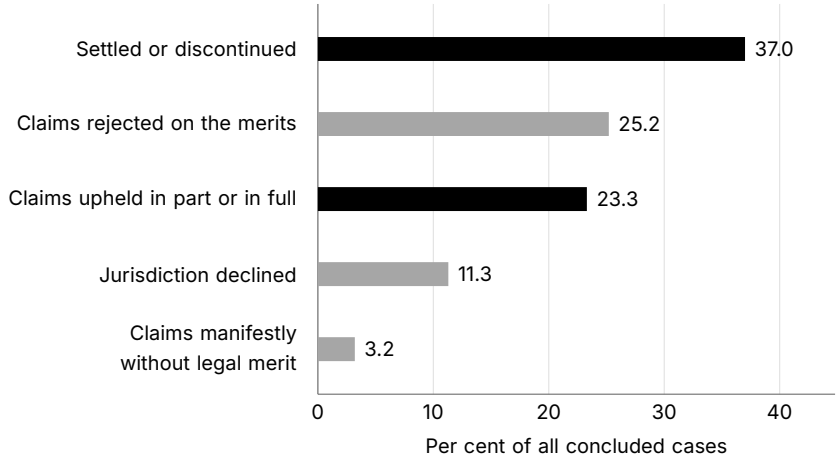
Disputes between foreign investors and host states raise special problems, as the Deal File shows. The investor fears that the host state's courts will not be impartial, while the state insists on its sovereignty. Since the 1960s, these disputes have increasingly been settled by **investor-state arbitration**, under investment treaties, investment laws or contracts in which the state consents in advance to arbitration with foreign investors. The International Centre for Settlement of Investment Disputes (ICSID), part of the World Bank Group, is the main institution.

In its fiscal year ending 30 June 2026, ICSID administered 363 cases, the highest number in its history, and registered 60 new ones. Most new cases relied on the consent given in bilateral investment treaties (62 per cent), and oil, gas and mining together accounted for 43 per cent (ICSID, 2026). Figure 5.2 shows how the cases concluded in that year ended.

The figures carry an important lesson for negotiators. Investors win, in part or in full, in fewer than a quarter of concluded cases, and according to ICSID no damages were awarded at all in 70 per cent of the tribunal decisions of that year. More than a third of cases end in a settlement or are discontinued, often after

Figure 5.2

Outcomes of ICSID cases concluded in the fiscal year 2026 (per cent of all concluded cases)



Note. Author's calculation, based on ICSID (2026). ICSID reports that 37 per cent of concluded cases were settled or discontinued and 63 per cent decided by tribunals; the shares of tribunal decisions have been converted into shares of all concluded cases.

the arbitration has clarified each side's chances. Arbitration, in other words, is frequently a stage in a negotiation rather than its replacement. Panama Ports Company's claim under the ICC Rules and CK Hutchison's treaty claim face the same uncertainty. The author's research on foreign direct investment in India and Poland examines how host-state institutions and the protection of investors shape the decisions of foreign firms (Kumar, 2020), and Chapter 15 returns to bargaining between firms and states.

Trade Disputes between States: The WTO

Disputes about trade rules between governments are settled under the Dispute Settlement Understanding of the World Trade Organization. The system begins with consultations, a mandatory period of negotiation; if these fail, a panel of experts rules on the dispute, and either side may appeal to the seven-member Appellate Body. The system was long regarded as the most successful of its kind in international law. Since December 2019, however, the Appellate Body has been unable to function, because the United States has blocked the appointment of new members. A party losing before a panel can therefore appeal "into the void", leaving the dispute unresolved.

DEAL SNAPSHOT

An Interim Appeal Arrangement for the WTO, 2020 to 2026

In 2020 a group of WTO members, led by the European Union, created the Multi-Party Interim Appeal Arbitration Arrangement (MPIA). Its participants agree that, while the Appellate Body cannot function, appeals in disputes among them will be decided by arbitration under the WTO's own rules, so panel reports cannot be blocked by appeals into the void. With the accession of Cambodia in September 2026, the arrangement covered 62 WTO members, accounting for 60.4 per cent of world trade, including the EU, China and the United Kingdom (European Commission, 2026c). The MPIA shows how parties who cannot restore an institution can negotiate a substitute among themselves, a solution to a problem of power reached by agreement among those willing to take part.

KEY MOVE

In international business, identify in advance which institution would settle a dispute and whether its decisions could be enforced. Treaties, institutional rules and the seat of arbitration are part of your bargaining power.

BACK TO THE DEAL FILE

Reading the Panama Canal Ports Dispute

The tools of this chapter help to explain why the dispute left the negotiating table and where it may go next.

The ladder was climbed quickly and partly skipped. The parties moved from a commercial relationship, through a constitutional ruling and a seizure, directly to arbitration. Mediation was barely possible: the dispute had become a matter of sovereignty and national security, and the governments behind it treated the outcome as a test of strength.

The investor chose the forum offering neutrality and enforcement. Since Panama's own Supreme Court had annulled the concession, Panama Ports Company turned to international arbitration, which offered decision makers independent of the host state and an award enforceable abroad, at least in principle.

The shadow of the award shapes the negotiation that continues. Panama's government, the new operators and the investor will all form expectations about what the tribunal is likely to decide and when. The ICSID statistics in Figure 5.2 suggest that investors win in fewer than a quarter of concluded cases, while more than a third of cases settle. A negotiated settlement before the award therefore

remains possible, and the arbitration is as much a source of leverage as a means of decision.

Power lies behind every rung. The ruling and the takeover came after open pressure from the United States, and the planned sale to an American-led consortium had made the terminals an object of rivalry between the great powers. Third-party procedures can settle the legal questions, but they cannot remove the political forces that created the dispute.

The relationship has ended, but not the conflict. Panama Ports Company has lost its terminals and Panama has gained control of them, but the dispute continues through two arbitrations and through the diplomatic relations of three governments.

MA EXTENSION

Which Disputes Reach a Decision?

Priest and Klein (1984) argued that the disputes ending in a judgment are not a random sample of all disputes. Parties settle when they can predict the outcome, so the cases that reach a decision tend to be those in which the result is genuinely uncertain. One implication is that win rates among decided cases tend towards 50 per cent, whatever the strength of the law. Combine this with the idea of bargaining in the shadow of the law (Mnookin & Kornhauser, 1979). How might the selection of cases help to explain the outcomes shown in Figure 5.2? What does the high rate of settlement imply about the role of arbitration in negotiations between investors and states? How might the involvement of powerful governments change the parties' incentives to settle in the Deal File?

ETHICS CHECK

Panama's Supreme Court struck down a concession that the state had granted and extended, and the government took over the terminals as soon as the ruling took effect, at a time of open pressure from a foreign power. When, if ever, is it legitimate for a state to end an investor's rights in the name of the public interest or national security? What does a state owe to an investor whose investment it has taken, and what does an investor owe to the country whose strategic assets it operates?

Pillar Scorecard

Your Move

This is a constructed teaching case.

You are the chief executive of a software company in Wrocław that has built a logistics management system for a Danish retailer. The project is four months late, and the retailer has refused to pay the final instalment of €1.2 million, claiming that the system does not meet the agreed specifications. Your team believes

Table 5.4

Pillar Scorecard: the Panama Canal ports dispute, 2025 and 2026

Pillar	Importance in this case	Evidence
Profit	High	A concession for two strategic terminals, a sale valued at US$22.8 billion and treaty claims of more than US$1.5 billion were at stake
Power	Very high	A sovereign state, its Supreme Court and the pressure of two great powers decided the outcome more than any contract
Persuasion	Moderate	Public statements by governments framed the dispute in terms of sovereignty and security; arguments before the tribunal will now matter

that the delays were caused by the retailer's repeated changes to its requirements. The contract contains an escalation clause providing for discussion between project managers, then between chief executives, then mediation, and finally ICC arbitration seated in Stockholm. You want to continue working with the retailer, which has asked you to bid for a second project.

1. Where on the ladder of settlement in Table 5.2 does the dispute now stand, and which rung would you aim to settle on?
2. Estimate your alternative to agreement by considering what an arbitral tribunal might decide, how long it would take and what it would cost.
3. Would you propose mediation? What kind of mediator would you choose, and why?
4. How would your strategy change if the retailer threatened to go to court in Denmark instead?

Conclusion

When negotiation fails, the parties climb a ladder of procedures, from conciliation and mediation, which help them reach their own agreement, to arbitration and litigation, which decide the dispute for them. Each rung offers a different balance of cost, speed, confidentiality, control and effect on the relationship, and the higher rungs cast a shadow over the lower ones, since every settlement reflects the parties' expectations of what a judge or arbitrator would decide. Labour disputes have their own institutions, which evolve with the economy, as India's new Industrial Relations Code shows, and online tools offer new rungs whose value depends on the willingness of the parties to use them. At the international level, the ICC, ICSID and the WTO provide forums for disputes between firms, between

investors and states and between states, although the paralysis of the WTO's Appellate Body shows that such institutions survive only as long as the most powerful parties support them. The Panama Canal ports dispute brings these themes together: when power and sovereignty dominate, third parties can settle legal questions but not the conflict which produced them. Part I is now complete. It has shown what conflict is, where it comes from, how it develops, how negotiation can resolve it and what happens when negotiation fails. Part II turns to the first pillar of the book's framework, profit, beginning in Chapter 6 with the goals that firms pursue when they sit down to negotiate.

Exercises

A. Objective Questions

1. Which of the following procedures leaves control of the outcome with the parties?
   a) arbitration
   b) litigation
   c) mediation
   d) adjudication

2. "Bargaining in the shadow of the law" means that:
   a) negotiations must be supervised by a court
   b) the expected outcome of litigation shapes the terms of settlement
   c) lawyers must be present at every negotiation
   d) only legal issues can be negotiated

3. A mediator who suggests options and points out the costs of failure is using:
   a) substantive interventions
   b) contextual interventions
   c) reflexive interventions
   d) adjudication

4. The main reason why international businesses prefer arbitration to litigation is:
   a) arbitration is always cheaper
   b) arbitration allows unlimited appeals
   c) arbitrators must follow precedent
   d) arbitral awards are easier to enforce across borders under the New York Convention

5. In voluntary arbitration:
   a) the parties themselves choose to refer their dispute to an arbitrator
   b) the government forces the parties to arbitrate
   c) the arbitrator has no power to decide
   d) the dispute is heard by a labour court

6. In India, the Industrial Disputes Act of 1947 was replaced on 21 November 2025 by:
   a) the Trade Unions Act
   b) the Code on Wages
   c) the Industrial Relations Code of 2020
   d) the Factories Act

7. Under Polish law, if mediation in a collective dispute fails, a union may call a warning strike lasting no more than:
   a) one day
   b) two hours
   c) one week
   d) one month

8. The Multi-Party Interim Appeal Arbitration Arrangement was created because:
   a) the WTO had no panels
   b) the ICC had closed its court
   c) ICSID had stopped registering cases
   d) the Appellate Body of the WTO could no longer function

B. Short-Answer Questions

1. Describe the ladder of dispute settlement and explain how cost, control and the relationship change as one moves up it.
2. Distinguish conciliation, mediation and arbitration.
3. Under what conditions is mediation most likely to succeed?
4. State three advantages and two disadvantages of arbitration compared with litigation.
5. Describe the main stages of a collective dispute under Polish law.
6. What does Figure 5.2 suggest about the chances of success for an investor that brings a claim against a state?
7. Explain the problem that the MPIA was designed to solve, and how it solves it.

C. Long-Answer Questions

1. Analyse the Panama Canal ports dispute using the ladder of dispute settlement. Why did the dispute move so quickly to arbitration, and what are the chances of a negotiated settlement?

2. "Arbitration is not an alternative to negotiation but a stage of it." Discuss with reference to bargaining in the shadow of the law and to the statistics on investor-state arbitration.

3. Compare the institutions for settling labour disputes in India and Poland. What do they have in common, and how do they reflect the economies and histories of the two countries?

4. Assess the strengths and weaknesses of the institutions for settling international business disputes, using the examples of the ICC, ICSID and the WTO.

Further Reading

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