Contents

Acknowledgments   page xii

Introduction:
The Varieties of Arbitration  1

PART I  ARBITRATION AND PRIVATE LAW

1  The Liberal Case for Arbitration  9
   1.1  What Is Arbitration?  9
   1.2  Arbitration and Private Autonomy  12
   1.3  The Strengths of Arbitration  16
   1.4  The Non-utilitarian Character of the Liberal Case  24
   1.5  The Conjunction of Two Basic Rights: the Right to Arbitration and the Right to Judicial Protection  28
   1.6  Conclusion  30

2  Constitutionalizing the Right to Arbitration  31
   2.1  Arbitration and the Diversity of Constitutional Cultures  32
   2.2  Legitimating Arbitration against Constitutional Charges  40
   2.3  Protecting Arbitration against Legislative Measures  44
   2.4  Protecting Arbitration against Judicial Rulings  47
   2.5  Conclusion  48

3  Boundaries and Constraints  49
   3.1  An Important Distinction  49
   3.2  Justifying Legal Constraints on Arbitration: the Need for a Focused Analysis  51
   3.3  Impartiality and Fairness  54
   3.4  Discriminatory Arbitral Agreements  59
   3.5  Substantive Norms and Reasons in Arbitration  60
### Contents

3.6 Judicial Review of Arbitral Awards  
3.7 When Mandatory Law Is at Stake  
3.8 Consumer and Employment Contracts  
3.9 When Arbitrators Confront Unconstitutional Legislation  
3.10 Preliminary References to Supranational Courts  
3.11 Conclusion  

4 Arbitration and the Lawmaking Process  
4.1 The Dual Function of Courts: Dispute Resolution and Rule Formulation  
4.2 Arbitration’s Inability to Produce Rules through a System of Precedents  
4.3 The Independence of Arbitrators: Too Little, Too Much?  
4.4 Conclusion  

5 The Special Case of International Commercial Arbitration  
5.1 The New York Convention of 1958: an Effective Legal Instrument for the Enforcement of Arbitral Agreements and Awards  
5.2 The New York Convention as a Constitutional Charter  
5.3 Arbitration and the Neutrality of the Law  
5.4 Arbitration and the Neutrality of the Forum  
5.5 Overcoming Local Biases: External and Internal Strategies  
5.6 International Arbitration and the Lawmaking Process  
5.7 Conclusion  

PART II INVESTMENT TREATY ARBITRATION  

6 The Rise of Investment Treaty Arbitration  
6.1 The Foundations of the International Investment Regime  
6.2 What Is Special about Investor-State Arbitration?  

7 Privileging Foreign Investors?  
**The Equality Challenge**  
7.1 Attracting Foreign Investments or Ensuring Equality?  
7.2 An Implicit Assumption  
7.3 Doctrinal Consequences  
7.4 Is the Arbitral System Skewed in Favor of Foreign Investors?  
7.5 Conclusion  

8 Adjudicative Coherence and Democratic Checks on Arbitral Jurisprudence  
8.1 A Culture of Precedent
# Table of Contents

8.2 Democratic Checks on Arbitrators 149
8.3 Toward Permanent Investment Tribunals? 158
8.4 Conclusion 162

9 Investment Treaty Arbitration, Regional Integration, and Fragmentation of International Law 164
  9.1 Investment Treaty Arbitration and Regional Integration 164
  9.2 Investment Treaty Arbitration and the Fragmentation of International Law 167
  9.3 Do Human Rights Conventions Have a Higher Normative Rank than Investment Treaties? 170
  9.4 In Search of Jurisprudential Dialogues and Institutional Coordination 173
  9.5 Conclusion 175

PART III STATE-TO-STATE ARBITRATION

10 The Arbitral Foundations of International Adjudication 179
  10.1 Historical Overview 179
  10.2 The Principle of Consensuality in International Adjudication 183
  10.3 The Normative Relevance of State Consent in International Law 185
  10.4 Toward Compulsory Jurisdiction? 190
  10.5 Conclusion 194

11 The Virtues and Limitations of State-to-State Arbitration 196
  11.1 The Advantages of International Arbitration 196
  11.2 The Shortcomings of Arbitration 201
  11.3 The Arbitrability of Ius Cogens 202
  11.4 Arbitration and the Production of Case Law 204
  11.5 Arbitration and the Failures of International Courts 208
  11.6 State-to-State Arbitration and Regional Integration 210
  11.7 Conclusion 213
  Afterword 214

Index 216