

A new path forward: efficiency through transparency

The 8th Asia Pacific ADR Conference, Seoul
20 September 2019

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Today's question

Will the availability of information about ICA increase the quality, efficiency and legitimacy of the process?

Transparency



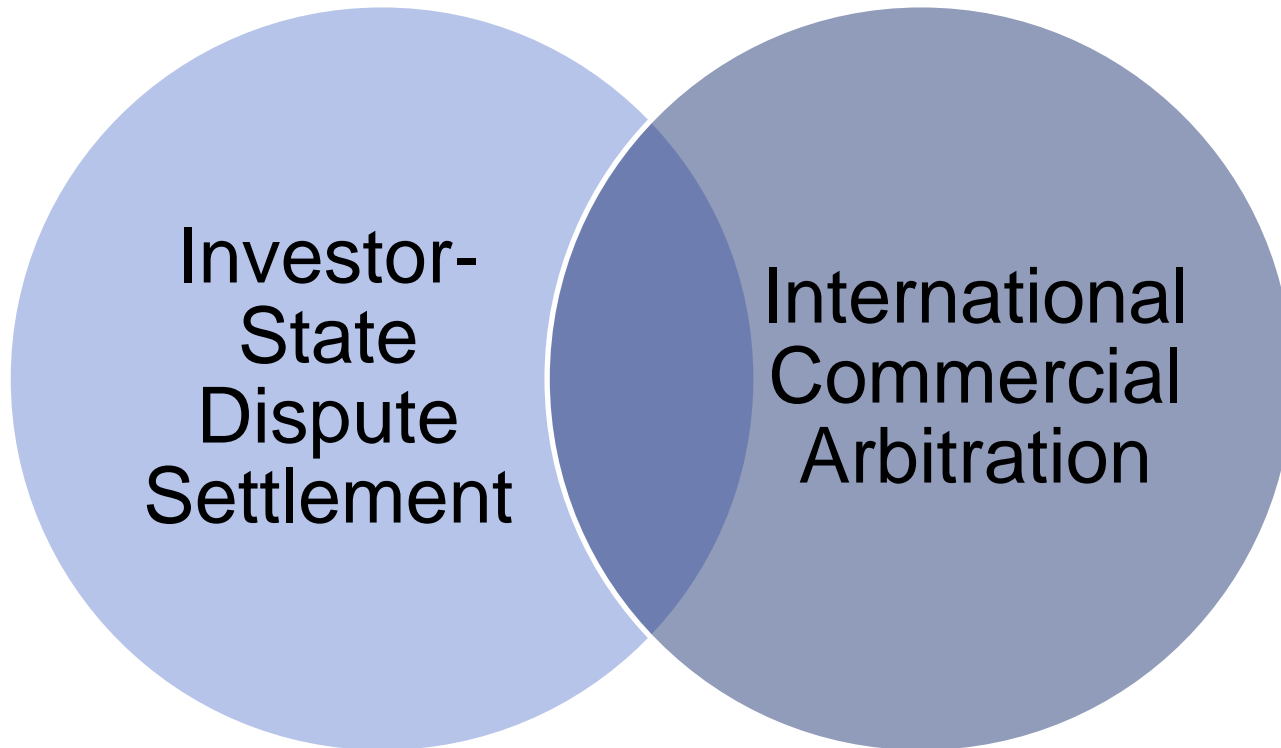
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Efficiency

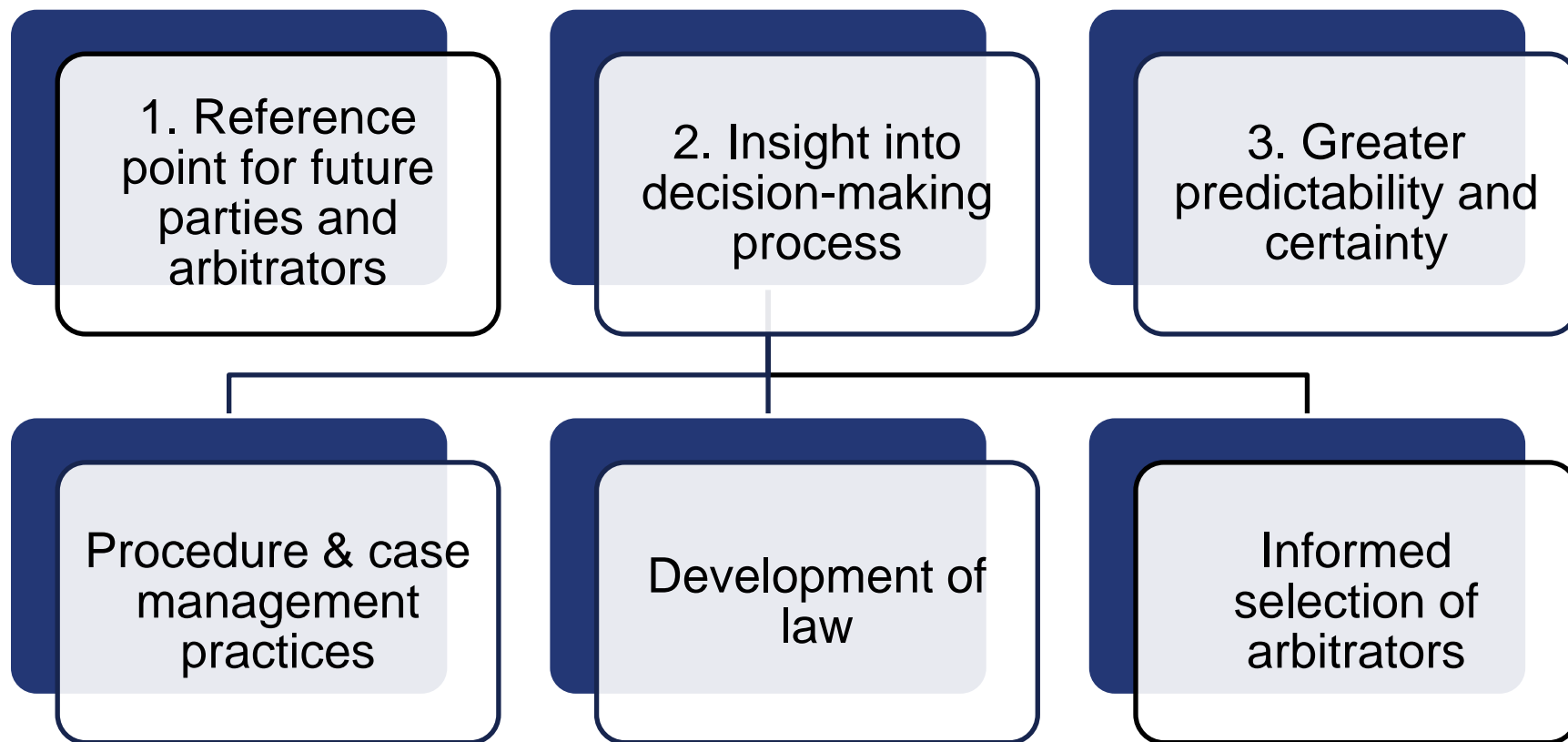
Overview

- ▶ Legitimacy in ISDS and ICA
- ▶ Arbitral awards
- ▶ Procedure
- ▶ Arbitrators

Legitimacy debate: From ISDS into ICA



Arbitral Awards: Why Publish?



Arbitral Awards: Developments to-date



Arbitral Institutions

- ▶ ICC - 635 awards published
- ▶ Other innovations - LCIA, SIAC and KCAB



ISDS

- ▶ Publication of awards is commonplace

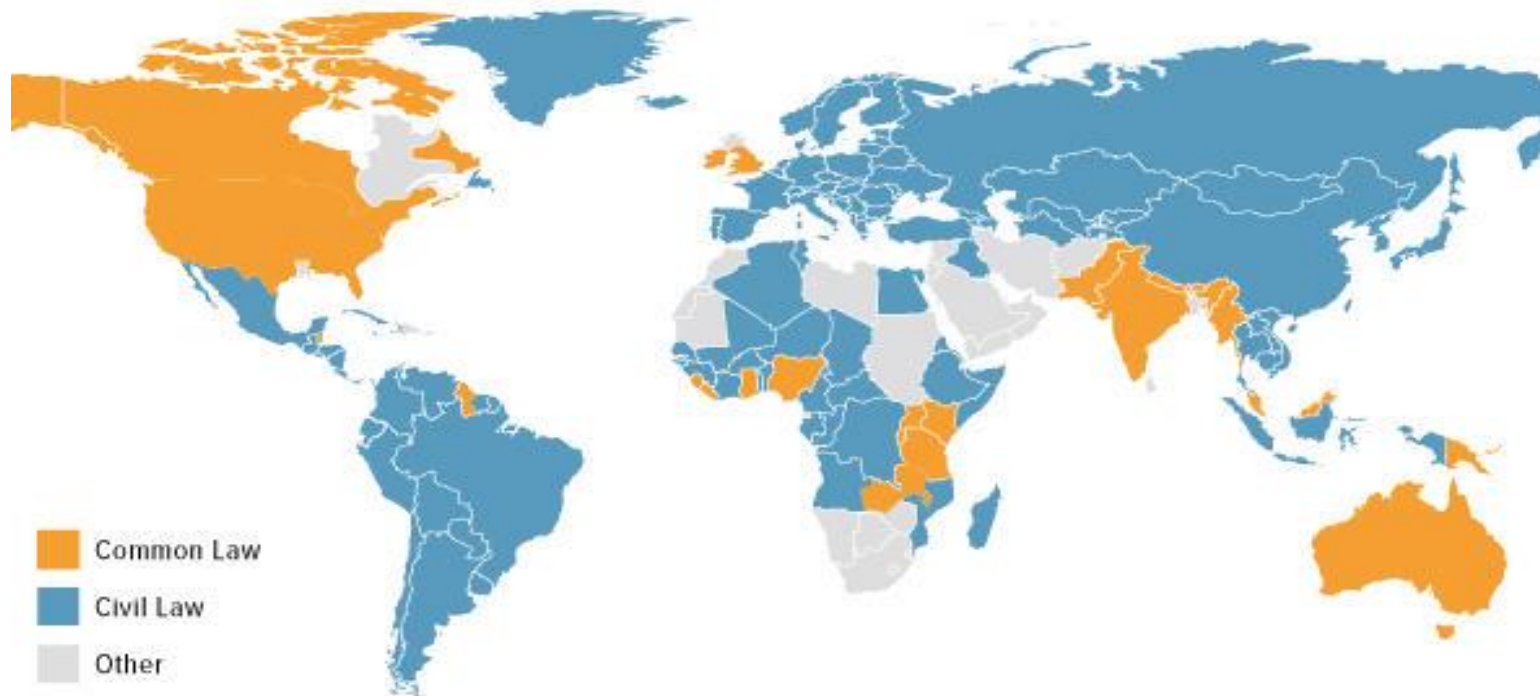


Looking forward

- ▶ Balancing confidentiality and transparency
- ▶ Support from institutions, parties and arbitrators

Procedure: Soft Law Guidelines

Lessons from the Civil Law World



Source: World Bank

- ▶ IBA Rules
- ▶ Prague Rules

Case study: Document Production



Voluminous Requests

- ▶ Technical evidence
- ▶ Adversarial objections



Temporal Difficulties

- ▶ Requests early
- ▶ Prior to ventilation of issues



Best Practice

- ▶ Transparent innovation required to develop procedure

Appointment of Arbitrators

Efficiency is often driven by arbitrator performance

- Choice of arbitrator is therefore important
- Parties' choice is often based on available information

There is some information currently available

- Information provided by arbitrators
- Commercial directories and arbitral institutions
- Referrals and word-of-mouth

But, there is a paucity of objective information

- Greater objective information on arbitrator quality and performance will allow parties to make an informed decision

Appointment of Arbitrators



Party Autonomy

- ▶ Fundamental - Art 11 of the Model Law
- ▶ 4th most valuable characteristic QMUL 2018 respondents



Independence

- ▶ Growing scrutiny
- ▶ Important in virtually all jurisdictions



Perceptions of bias

- ▶ Evidence in ISDS
- ▶ Alternative appointment - ICDR's AAA

Conclusion

1. The legitimacy "crisis" in ISDS has informed debate in ICA.
2. It provides a unique opportunity to drive efficiency through transparency, in respect of arbitral awards, procedure and the appointment of arbitrators.
3. Transparency must be balanced against the confidentiality of arbitral proceedings.
4. The approach toward transparency must preserve the attractive features of ICA while addressing legitimacy concerns.



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