A new path forward: efficiency through transparency

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Today's question

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

- Legitimacy in ISDS and ICA
- Arbitral awards
- Procedure
- Arbitrators
Legitimacy debate: From ISDS into ICA

- Investor-State Dispute Settlement
- International Commercial Arbitration
Arbitral Awards: Why Publish?

1. Reference point for future parties and arbitrators

2. Insight into decision-making process

3. Greater predictability and certainty

Procedure & case management practices

Development of law

Informed selection of arbitrators
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

- IBA Rules
- Prague Rules

Source: World Bank
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

Background | Arbitral Awards | Procedure | Arbitrators
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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