

# Conceptual Foundations of International Adjudication

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# Issues covered today

- Brief history of international dispute resolution
- Methods of alternative dispute resolution
- Arbitration: characteristics, institutional and ad hoc, procedure
- Public and private adjudication: ownership, adjudicators, applicable law, review mechanisms, legitimacy

# History of International Dispute Resolution



- Lex Mercatoria
- Merchants would agree to settle the dispute by accepting the judgment of a fellow dealer
- The role of reputation
- Disputes were resolved without any supervision or intervention from a domestic court
- Subsequently states started to 'nationalise' dispute settlement procedures



# Dispute Resolution Today





# Alternative Dispute Resolution (ADR)

Non-binding ADR Processes without Third-party Intervention	Non-Binding ADR Processes with Third-party Intervention	Binding ADR Processes
<ul style="list-style-type: none"><li>• Negotiation (including diplomatic)</li><li>• Cooling off periods</li></ul>	<ul style="list-style-type: none"><li>• Mediation</li><li>• Mini-trial</li><li>• Conciliation</li><li>• Stakeholder dialogue</li><li>• Early neutral evaluation</li><li>• Judicial settlement conference</li></ul>	<ul style="list-style-type: none"><li>• Expert determination</li><li>• Arbitration</li><li>• Med-arb (hybrid process)</li></ul>



# Mediation and Conciliation

- **Mediation:** persuade the parties to focus on their real interests, mediator does not assume sole responsibility for generating solutions but facilitates the parties' own discussion and representation of their own interests
- Singapore Mediation Convention
- WIPO Mediation Rules
- UNCITRAL Model Law on International Commercial Mediation
- **Conciliation:** the main role is to make a proposal for settlement, the conciliator plays a relatively direct role in the actual resolution of a dispute and even advises the parties on certain solutions by making proposals for settlement
- UNCITRAL Conciliation Rules
- ICSID Conciliation Rules
- United Nations Model Rules for the Conciliation of Disputes between States



# Expert Determination & Dispute Review Boards

- Expert determination - an independent third party who is an expert in the subject to be considered appointed to decide the dispute. The expert's decision is binding on the parties, unless agreed otherwise at the outset
- Particularly suited to valuation disputes and technical issues rather than detailed legal issues
- Dispute Review Boards - an independent panel of impartial professionals providing guidance to resolve project issues and mitigate their impact
- For example, the Channel Tunnel Project any dispute had first to be referred to the Panel of experts and then to ICC arbitration. Similar to expert determination.



# Why ADR is Widely Used?



Can be quick and inexpensive



Can be less confrontational: instead of arbitration in some cultures people prefer face-saving, mutually agreeable compromises to awards proclaiming one party's rights



But can be difficult if the parties and the mediator/conciliator do not share a similar cultural background



If other ADR procedures fail, parties may have to refer to arbitration (*ad hoc* or institutional)





# Characteristics of Arbitration

No official  
definition

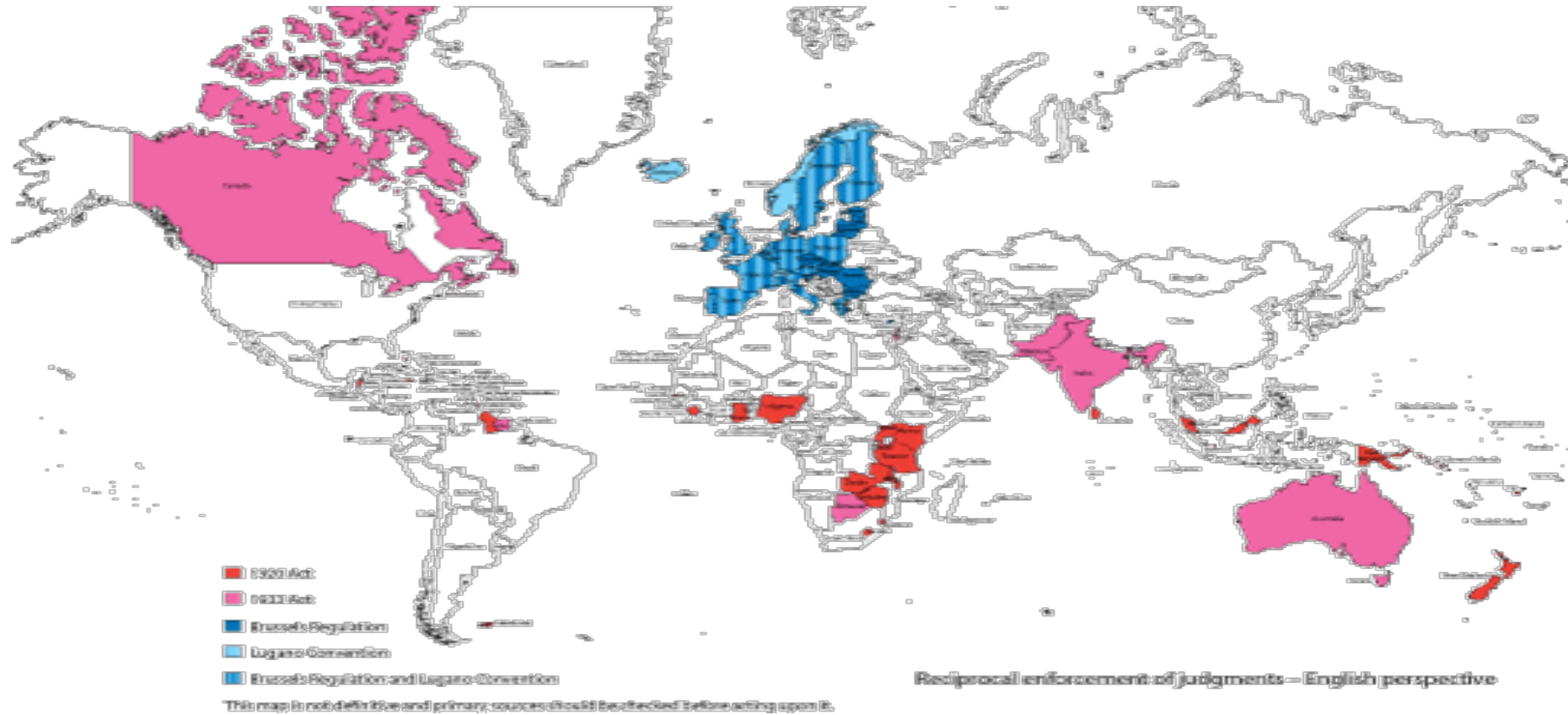
Dispute  
settlement

Binding nature

Consensual nature  
(jurisdiction,  
withdrawal)

Out of domestic  
courts

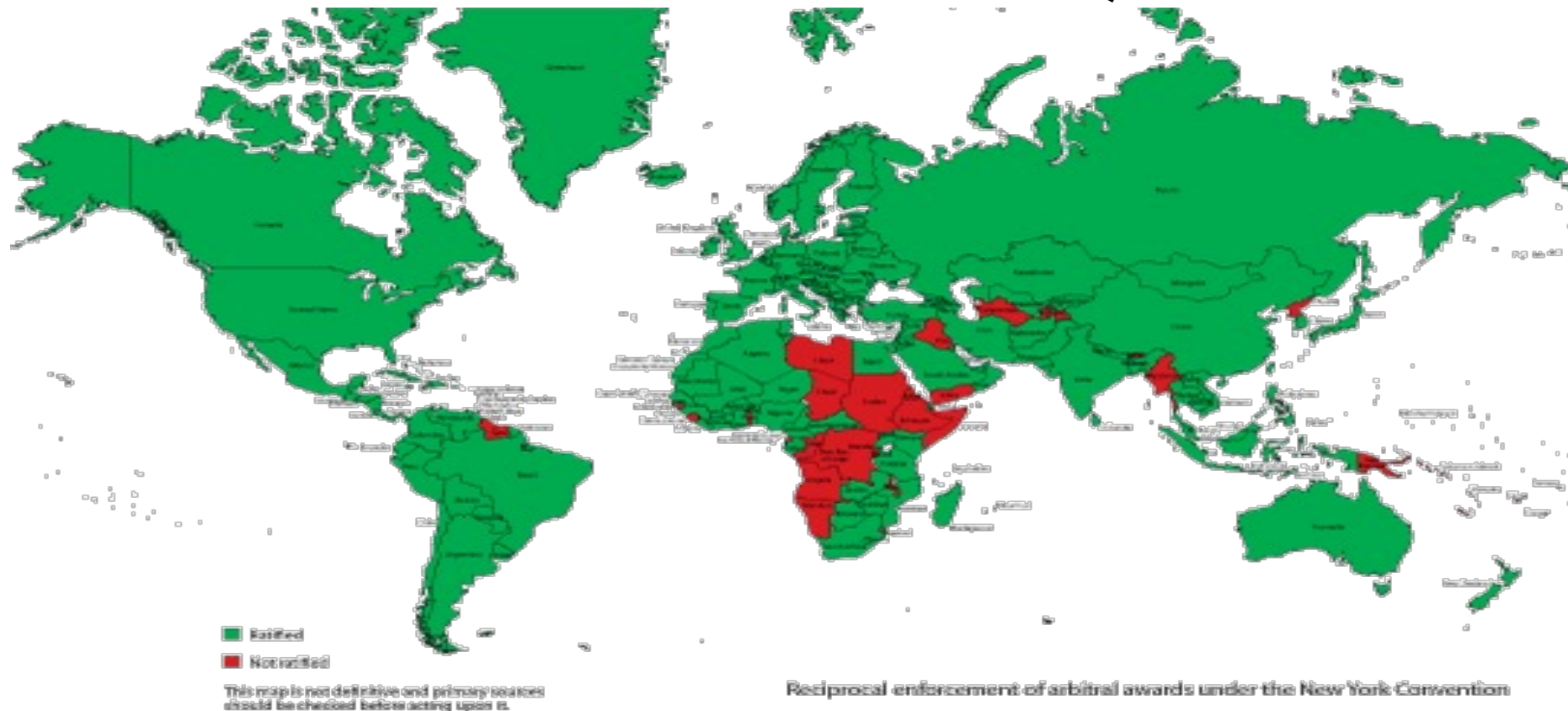
# Enforcing English judgments



Source: <http://plc.practicallaw.com/0-376-2181>



# Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)



Source: <http://plc.practicallaw.com/0-376-2181>



# Disputes & Arbitrability

- The need to have a genuine dispute
- A real disagreement rather than a fake dispute
- 'Arbitrability'

Examples of non-arbitrable disputes:

- Competition (antitrust) law
- Securities law
- Criminal law

The rationale: to benefit not only the parties but society at large



# The Agreement to Arbitrate

- Arbitration clause
- Submission agreement (agreement after a dispute has actually arisen)
- Should be "in writing" under the New York Convention
- Once agreed - the parties may not unilaterally withdraw
- Enforcement of arbitration agreement



# Two Types of Arbitrations



Ad hoc



Institutional



# *Ad Hoc* Arbitration: Pros and Contras

- Less expensive and cumbersome
- Even more flexible
- If the parties cannot agree on institution
- The framework for *ad hoc* is
  - The Rules of Arbitration of the United Nations Economic Commission for Europe (1966)
  - The UNITRAL Arbitration Rules (1976)
- Less detailed rules
- Difficult if there are disagreements between the parties
- Administrative support can be difficult



# Institutional Arbitration: Pros and Cons

- Essentially, incorporation of a book of rules into a contract between parties
- Periodical revision of procedural rules in consultation with relevant stakeholders
- Deals with situations such as unwillingness to arbitrate or refusal to appoint an arbitrator
- Trained staff to administer the arbitration
- Some institutions (e.g., ICC) offer additional review of draft awards before publishing them
- The parties may have to pay a fixed fee in advance
- Additional costs related to maintenance of the secretariat
- Short time limits



### AAA-ICDR - NEW YORK

- Largest arbitration centre globally, by number of cases filed (2013)
- 2013 saw 1,165 new case filings
- 80% increase in number of new case filings between 2003 and 2013

### LCIA - LONDON

- Third largest arbitration centre globally, by number of cases filed (2013)
- 2013 saw 290 new arbitration case filings
- 179% increase in number of new case filings between 2003 and 2013

### COMMERCIAL COURT - LONDON

- 48% of claims through the Commercial Court only involve parties based outside of England and Wales
- 2014: 1,085 new case filings

### ICC - PARIS

- Second largest arbitration centre globally, by number of cases filed (2013)
- 2013 saw 767 new case filings
- 32% increase in number of new case filings between 2003 and 2013

### ICSID - WASHINGTON DC

- ICSID specialises in investor-to-state disputes
- Approximately 36% of all ICSID cases are settled or discontinued before a final ruling is made
- 2014: 38 new case filings
- 40% increase in number of new case filings between 2004 and 2014

### HKIAC - HONG KONG

- One of the largest arbitration centres in the Asia Pacific region, by number of cases filed
- 2014: 477 new dispute matters of which 252 were arbitration cases
- 93% of arbitrations were international

### DIFC COURTS - DUBAI

- The DIFC Courts (established in 2008) are an independent common law judiciary based in the Dubai International Financial Centre (DIFC) with jurisdiction governing civil and commercial disputes

### SICC - SINGAPORE

- The SICC was launched on 5 January 2015. The SICC offers litigants the option of having their disputes adjudicated by a panel of experienced judges comprising specialist commercial judges from Singapore and international judges from both civil law and common law traditions

### DIFC LCIA - DUBAI

- The DIFC LCIA is a partnership between the LCIA and the DIFC (a financial centre established in 2004)

### DIAC - DUBAI

- Approximately 300% increase in the number of new case filings between 2007 and 2013
- 2013 saw 310 new case filings

### SIAC - SINGAPORE

- 41% of all claims filed at SIAC in 2014 were between USD 1-10 million and 13% of claims were in excess of USD 10 million
- 2014 saw 222 new case filings
- 185% increase in the number of new case filings between 2004 and 2014

Statistics taken from: Bezzant, M., J. Nicholson and H. Rosen (2015) "Trends in International Arbitration: A New World Order" FTI Journal [Electronic]; ICSID website (2015); and SIAC Annual Report 2014 (2014)



# Choice of Law Governing the Conduct of Proceedings

- The International Chamber of Commerce (Paris, since 1923)
- The American Arbitration Association (New York, since 1926)
- The London Court of International Arbitration (since 1982)
- The Arbitration Institute of the Stockholm Chamber of Commerce (since 1949)
- The International Center for Settlement of Investment Disputes (Washington, since 1965)



# Considerations in Choosing an Arbitration Institution

- Permanency
- Modern rules of arbitration
- Qualified staff
- Reasonable charges
- Jurisdiction with a well-established rule of law and friendly towards arbitration



# Regulation of International Arbitration

## Law which governs

- The agreement to arbitrate
- The actual arbitration proceedings
- Law applicable to substance of the dispute
- Law applicable to international recognition and enforcement of awards

## The role of domestic law

- Enforce an agreement to arbitrate
- Provisional measures
- Challenging awards
- Recognition and enforcement of awards



# International Conventions and Model Laws

- Montevideo Convention 1889 (arbitration clauses between Latin American countries)
- Geneva Protocol of 1923 and Geneva Convention of 1927 (ICC initiative, under the auspices of the League of Nations, arbitration clauses and awards enforcement)
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
- Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965
- Bilateral Investment Treaties
- UNCITRAL Model Law on Arbitration 1985



# Pros and Cons of Arbitration

- Allows expert analysis of complex issues
- Less formal and tailored proceedings
- Sometimes faster (particularly with expedited procedure)
- Almost always in a "neutral" country
- Confidential
- Greater finality
- Very limited judicial review (no "appeal")
- Harder to delay results
- Uncertain rules and procedures
- Limited checks on arbitrator's powers
- Experience of arbitrators often differs widely

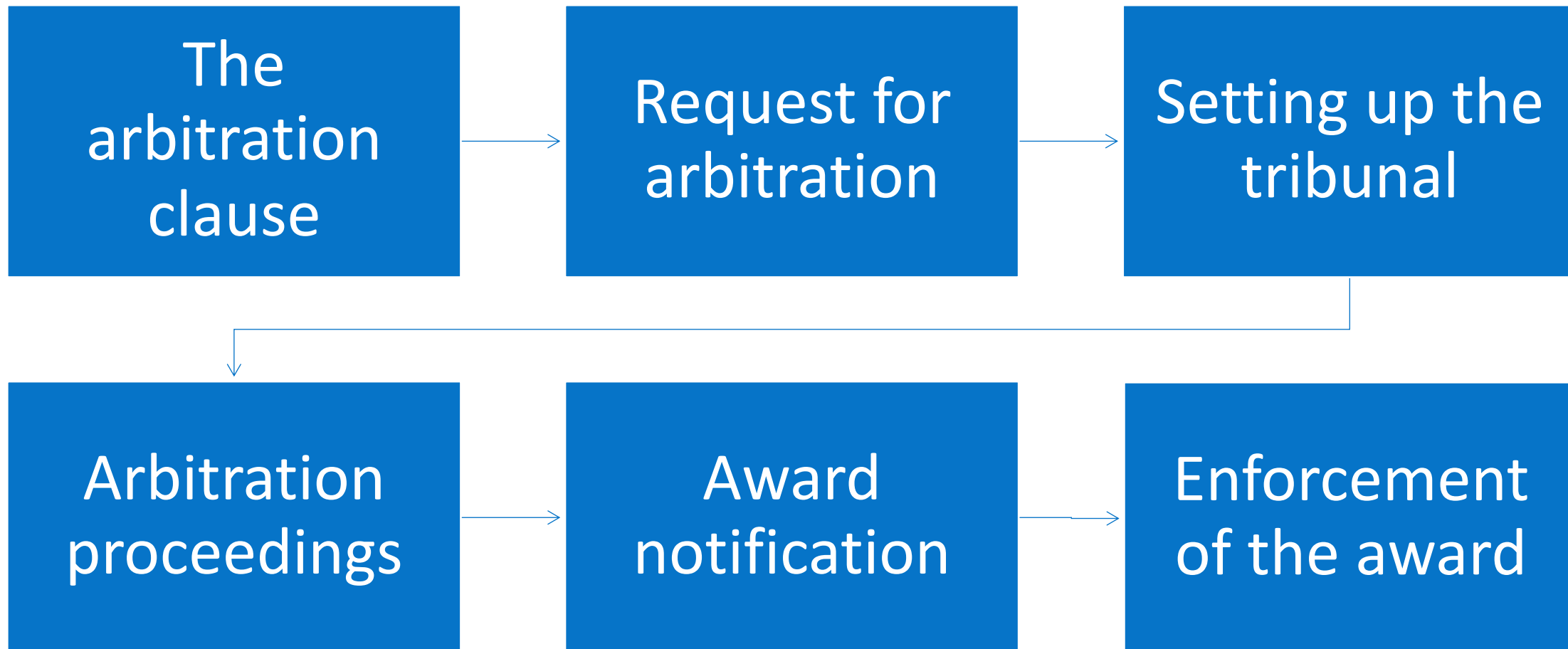


# Advantages of International Arbitration

- Helps to avoid courts of another state
- Language & procedure
- Choice of substantive law
- State parties (reduces inequalities)
- Enforcement abroad (compare to court judgements)
  
- Any disadvantages?



# The Sequence of an Arbitration





# Public and private adjudication

Procedural and substantive aspects of adjudication:

Ownership and funding

Appointment and tenure of adjudicators

Requirement on diversity of adjudicators

Adjudicators' background

Transparency and confidentiality

Applicable law

Setting precedents

Internal review mechanisms

External review mechanisms



# Transparency

Institution	Commencement of proceedings	Publication of key documents	Submission by a third party	Submission by a non-disputing party	Hearings	Disclosing the votes of the sitting panels	Publication of separate opinions
ICJ	yes	yes	yes	yes	yes	yes	yes
ECtHR	yes	yes	yes	yes	yes	yes	yes
ICSID	varies	varies	varies	varies	varies	varies	varies
ICC	no	no	no	no	no	no	no
SIAC	no	no	no	no	no	no	no



# Ownership and funding of institutions

public adjudication	hybrid adjudication	private adjudication
ICJ      ECtHR	ICSID	ICC      SIAC
Institutions are established by and funded by states with no or nominal fees for the disputing parties	Institution established by states, funded primarily by fees of parties (states and investors) but subsidized by an intergovernmental organization	Institutions are established by and funded by private actors with significant fees for the parties



# Adjudicators

public adjudication		hybrid adjudication	private adjudication	
ICJ	ECtHR	ICSID	ICC	SIAC
Adjudicators appointed by states, mostly for fixed terms		Adjudicators appointed by parties or the institution for each case	Adjudicators appointed by parties or the institution for each case	
Rigid requirements on diversity of adjudicators on geographic and development level of the country of origin		No requirements on diversity of adjudicators on geographic and development level of the country of origin	No requirements on diversity of adjudicators on geographic and development level of the country of origin	
Adjudicators primarily have public law and public service background		Adjudicators public private law and/or private practice background	Adjudicators primarily have private law and private practice background	



# Applicable law & role of precedent

public adjudication		hybrid adjudication	private adjudication	
ICJ	ECtHR	ICSID	ICC	SIAC
<p>Disputes are resolved primarily on the basis of public law with open-ended principles playing the most important role</p> <p>Decisions in earlier cases often serve as guidance for future cases</p>		<p>Disputes are resolved on the basis of public and private national and international law with open-ended principles playing the most important role</p> <p>Decisions in earlier cases often serve as guidance for future cases</p>	<p>Disputes are resolved primarily on the basis of private national law rules playing the most important role</p> <p>Decisions in earlier cases do not serve as guidance for future cases</p>	



# Internal and External Review Mechanisms

public adjudication		hybrid adjudication	private adjudication	
ICJ	ECtHR	ICSID	ICC	SIAC
<p>An internal review mechanism of rendered decisions in limited circumstances</p> <p>An internal review mechanism of rendered decisions in limited circumstances</p> <p>No internal review mechanism of rendered decisions</p> <p>Decisions cannot be challenged or set aside by domestic courts</p>		<p>An internal review mechanism of rendered decisions in limited circumstances</p> <p>An internal review mechanism of rendered decisions in limited circumstances</p> <p>No internal review mechanism of rendered decisions</p> <p>Decisions cannot be challenged or set aside by domestic courts</p>	<p>An internal review mechanism of rendered decisions in limited circumstances</p> <p>An internal review mechanism of rendered decisions in limited circumstances</p> <p>No internal review mechanism of rendered decisions</p> <p>Decisions can be challenged and set aside by domestic courts</p>	



# Questions?