



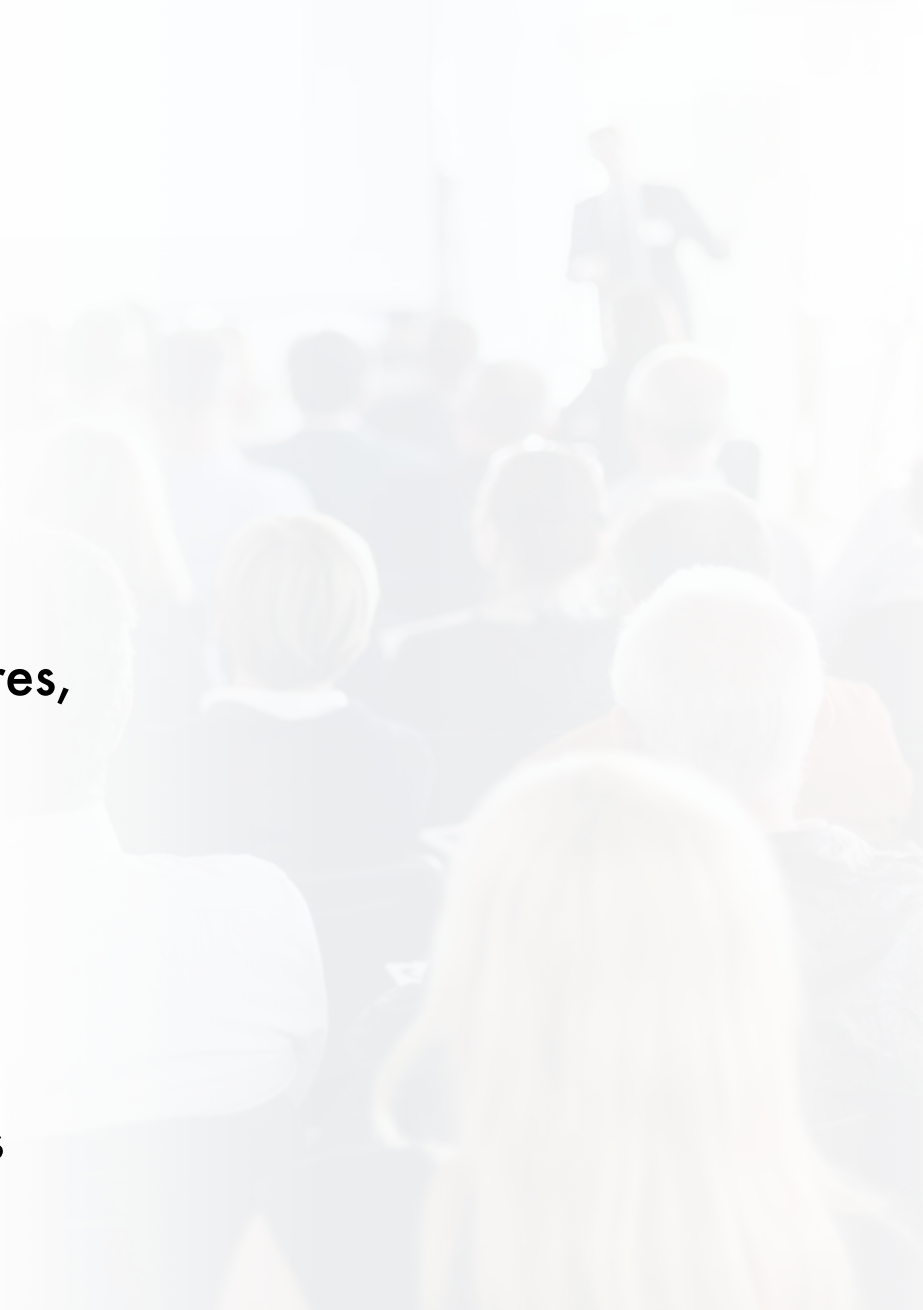
Key Concepts of International Arbitration

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Agenda

1. Evolution of international arbitration
2. Geography of international arbitration
3. Jurisdiction of arbitral tribunals
4. Consent and arbitration agreement
5. Key procedural elements: seat, interim measures, expedited proceedings
6. Arbitrators
7. Applicable law
8. Awards and review mechanisms
9. Enforcement
10. Relationship between arbitration tribunals and courts



Evolution of International Arbitration



Medieval & Renaissance periods

- Traders used local trade associations
- The Hanseatic League arbitration system to resolve disputes among its members



State-State arbitration

- Jay Treaty between the United States and Great Britain (1794)
- Creation of the Permanent Court of Arbitration (PCA) in 1899

Evolution of Applicable Law



Lex Mercatoria

- Merchants accept judgements of fellow merchants; the role of reputation
- No supervision or intervention of domestic courts



Domestic law

- States became bigger and 'nationalised' dispute settlement procedures
- National law and courts play a key role

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">• Negotiation (including diplomatic)• Cooling off periods	<ul style="list-style-type: none">• Mediation• Mini-trial• Conciliation• Stakeholder dialogue• Early neutral evaluation• Judicial settlement conference	<ul style="list-style-type: none">• Expert determination• Arbitration• Med-arb (hybrid process)



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)

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.



Characteristics of Arbitration

No official
definition

Dispute settlement

Binding nature

Consensual nature
(jurisdiction,
withdrawal)














Out of domestic
courts

International Arbitration Seats



Source: International Bar Association, *The Current State and Future of International Arbitration: Regional Perspectives* IBA Arb 40 Subcommittee (2015)

Top-10 Arbitration Rules

	Arbitration rules	Cases administered in 2022
1.	 American Arbitration Association (AAA)	10,273
2.	 China International Economic and Trade Arbitration Commission (CIETAC)	4,086
3.	 London Maritime Arbitrators Association (LMAA)	1,807
4.	  International Chamber of Commerce (ICC)	710
5.	 Singapore International Arbitration Centre (SIAC)	357
6.	  International Centre for Settlement of Investment Disputes (ICSID)	346
7.	 Hong Kong International Arbitration Centre	344
8.	 The London Court of International Arbitration (LCIA)	327
9.	  Permanent Court of Arbitration (PCA)	204
10.	 Stockholm Chamber of Commerce (SCC)	143





Group exercise

In small groups please discuss pros and cons of arbitration



Pros and Cons of Arbitration

Pros

- 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

Cons

- 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

The Agreement to Arbitrate

- Arbitration clause ("model clauses")
- 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



Arbitrability

Arbitrability

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



Examples of non-arbitrable disputes:

- Competition (antitrust) law
- Securities law
- Criminal law
- The rationale: to benefit not only the parties but society at large

Arbitration Clause Elements

- Choice of procedural rules
- Governing law
- The seat of arbitration
- Language
- Arbitral tribunal formation and composition
- Confidentiality

Recommended Clauses

Future disputes

For contracting parties who wish to have future disputes referred to arbitration under the LCIA Rules, the following clause is recommended. Words/spaces in square brackets should be deleted/completed as appropriate.

"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be [one/three].

The seat, or legal place, of arbitration shall be [City and/or Country].

The language to be used in the arbitral proceedings shall be [].

The governing law of the contract shall be the substantive law of []."

Types of Jurisdiction

Jurisdiction: the authority to hear and decide



type of jurisdiction	definition	examples
Subject matter jurisdiction	disputes based on the specific issues or topics outlined in the arbitration agreement	disputes arising out of a contract, disputes arising out of an investment
Personal jurisdiction	parties bound by the arbitration agreement (typically those named in the agreement)	specific states, investors, individuals
Temporal jurisdiction	the arbitration agreement must have been valid and in effect at the time the dispute arose	Specific limits in the arbitration clause, limitation periods, post-termination

Two Types of Arbitration



Ad hoc



Institutional

Applicable Law in Arbitration

Law which governs

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

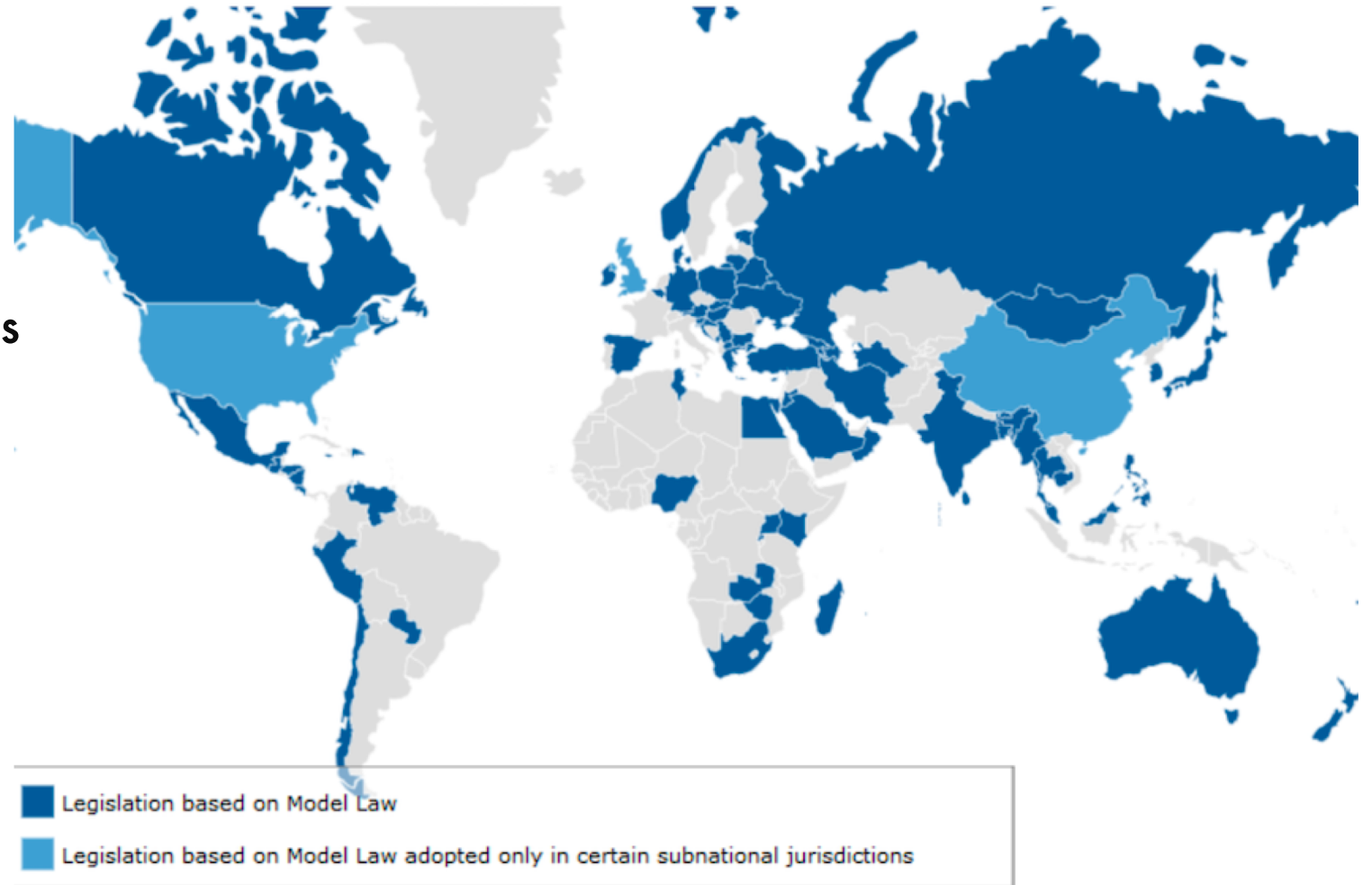
The role of domestic law

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

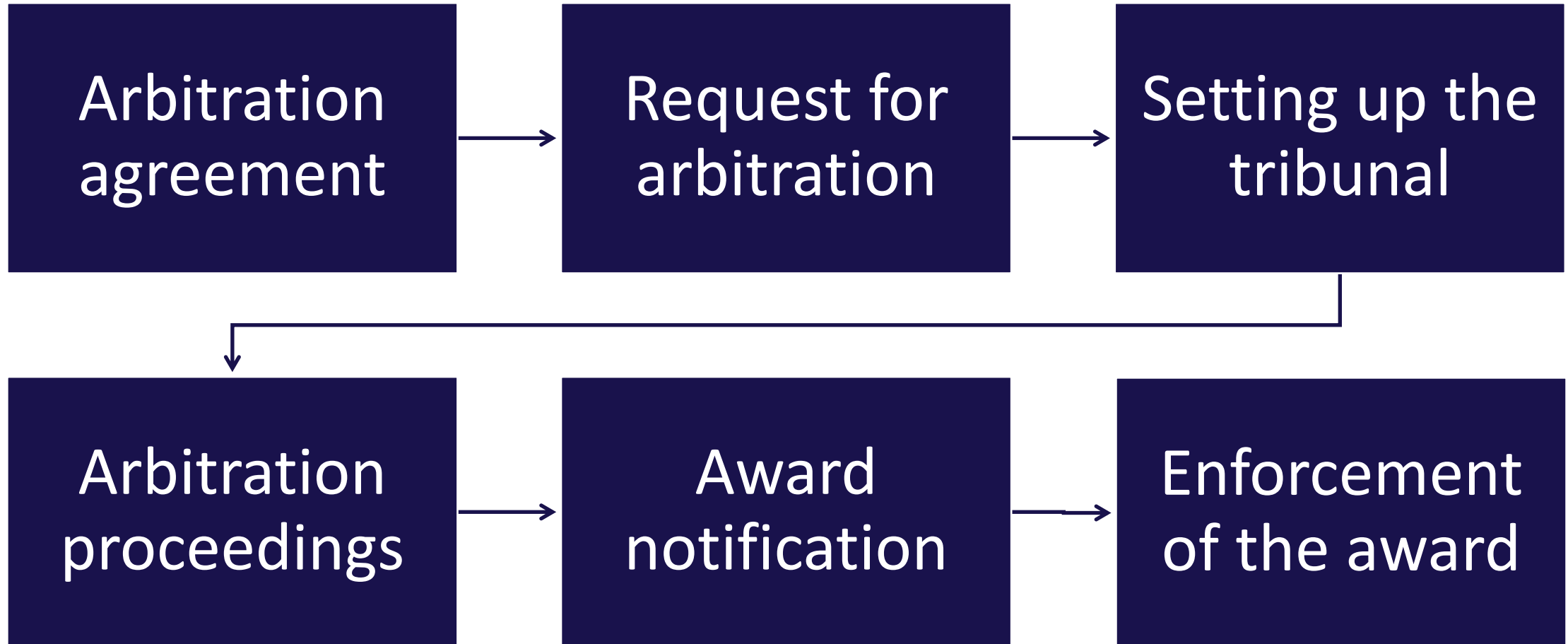


Model Law on International Commercial Arbitration (1985)

- Harmonization of arbitration laws
- Modernization of arbitration practices
- Flexibility and party autonomy
- Encouragement of arbitration-friendly legal environment
- Adaptability

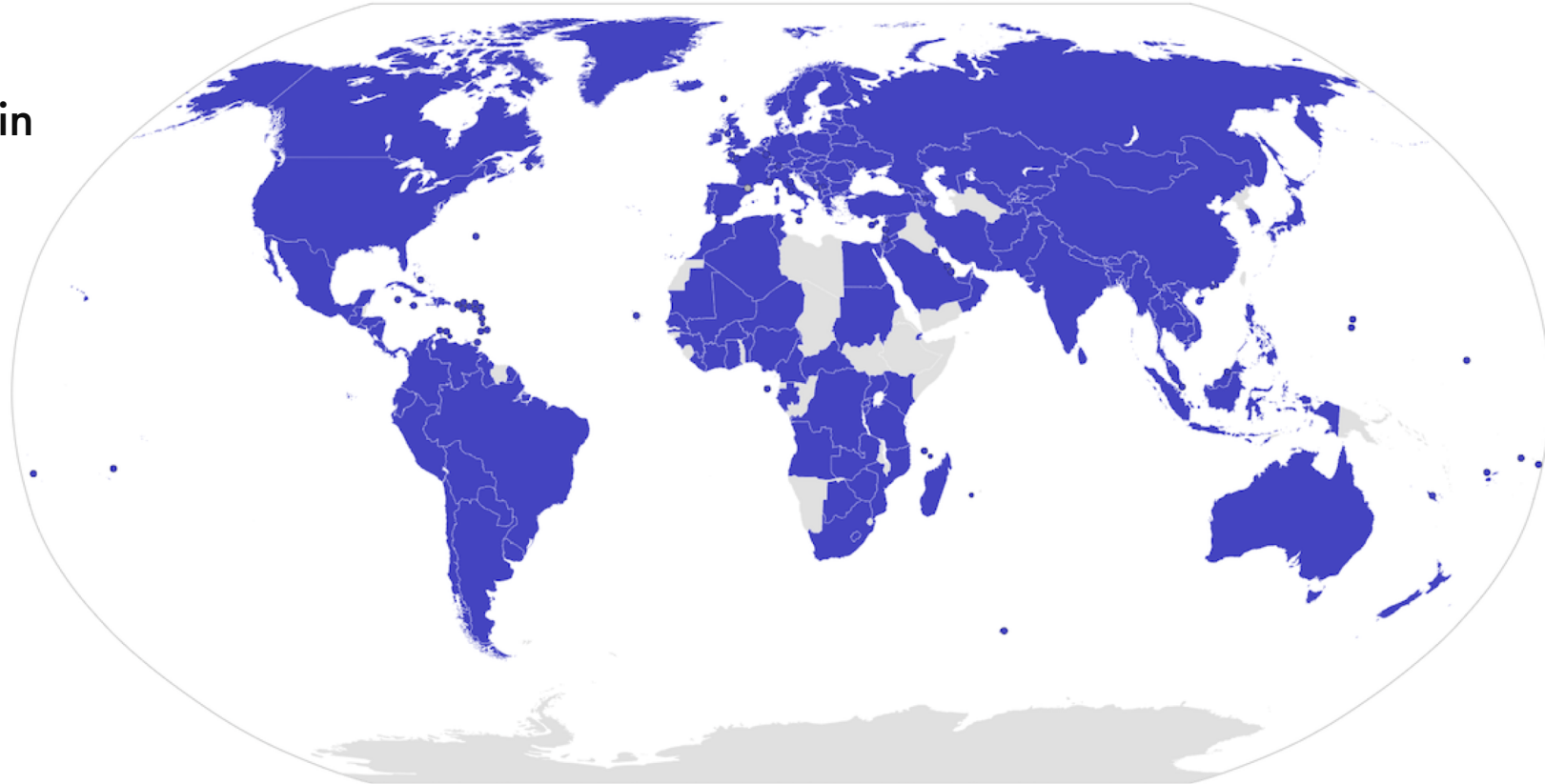


The Arbitration Process



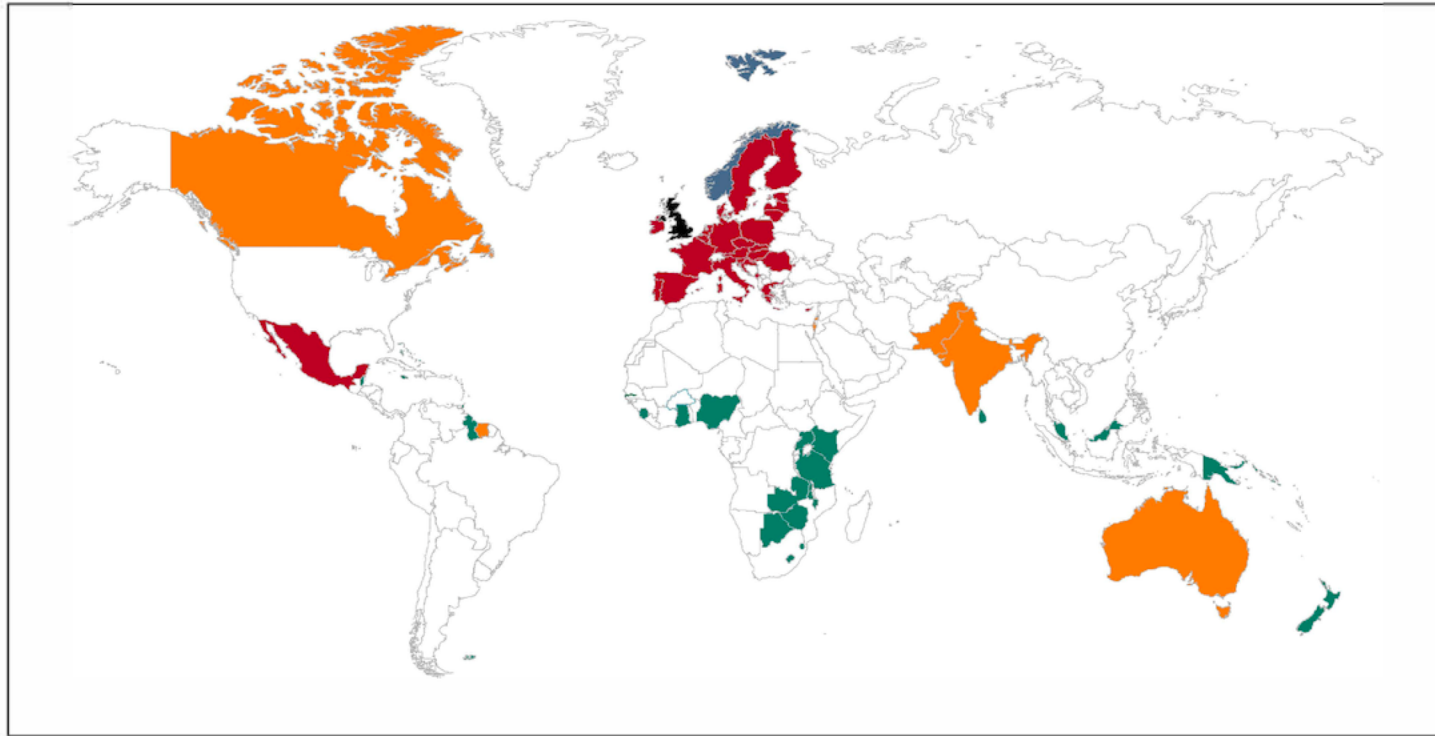
New York Convention (1958)

- Enforcement of arbitral awards in different countries
- Ratified by over 170 states
- The backbone of international arbitration
- Limited grounds for refusal of enforcement
- Minimization of local bias



Enforcement of English Judgments

States and territories with which England and Wales have reciprocal enforcement arrangements for court judgments



Hague Convention on
Choice of Court
Agreements

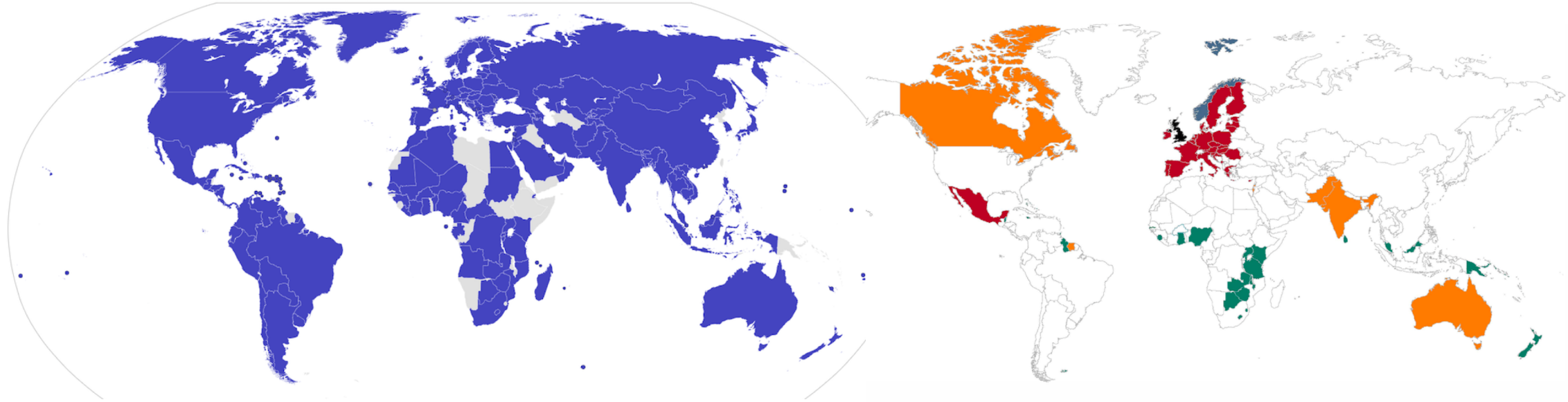
Norway-UK Bilateral
Treaty*

Administration of
Justice Act 1920

Foreign Judgments
(Reciprocal
Enforcement) Act 1933

source

Arbitration Awards v Court Judgements



Recognition and Enforcement of Arbitral Awards

- New York Convention's Role
- Other regimes
- National Implementation
- Challenges and Defenses

1
2 IN THE _____ COURT OF _____ COUNTY
3 STATE OF _____
4
5 _____)
6 PLAINTIFF)
7 VS.) Case No. _____
8)
9 _____)
10 DEFENDANTS)
11 **COMPLAINT TO ENFORCE ARBITRATION AWARD**
12 _____, Plaintiff, files this Complaint to enforce arbitration award
13 against Defendant, _____ and would state in support of this
14 complaint the following:
15
16 1. This Court has jurisdiction of this proceeding pursuant to the Statutes and Court
17 Rules of the State of _____.
18 2. Plaintiff is a resident of _____ County, _____ whose address is
19 _____, Defendant is a resident of _____ County,
20 _____ whose residence address is _____. Defendant may be
21 served with process pursuant to the applicable Court Rules at his residence address or business
22 address at _____.
23 3. On or about _____, Plaintiff and Defendant agreed to settle a
24 dispute between them by binding arbitration. The dispute was arbitrated by arbitrator, _____
25 in the City of _____, State of _____. All documents relevant to the
26 arbitration are attached hereto as follows:
27
28 (a) Arbitration Agreement, Exhibit "A."

Role of National Courts

- Jurisdictional Challenges
- Enforcement of Awards
- Setting Aside Awards



Arbitration Awards

- Binding decisions of tribunals
- Interim and final
- Jurisdiction and merits
- Awards on quantum, costs, other procedural aspects
- Final award contents: reasoning, decision, costs

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WESTWATER RESOURCES, INC.

Claimant

v.

THE REPUBLIC OF TÜRKIYE

Respondent

ICSID Case No. ARB/18/46

AWARD

Members of the Tribunal

Honourable Ian Binnie, C.C., K.C.
Professor Robert G. Volterra, Co-Arbitrator
Professor Brigitte Stern, Co-Arbitrator

Secretary to the Tribunal

Anneliese Fleckenstein

Date of dispatch to the Parties: 3 March 2023

Public and Private Adjudication



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
<p>Institutions are established by and funded by states with no or nominal fees for the disputing parties</p>		<p>Institution established by states, funded primarily by fees of parties (states and investors) but subsidized by an intergovernmental organization</p>	<p>Institutions are established by and funded by private actors with significant fees for the parties</p>	



Adjudicators

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



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>	



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