

ORGANISERS



Department of Justice
The Government of the Hong Kong
Special Administrative Region



Trends in
**COMMERCIAL ARBITRATION
AND PRIVATE INTERNATIONAL LAW**

11 NOV 2021
16:00–18:00 (GMT+8)



Current Challenges of International Commercial Arbitration

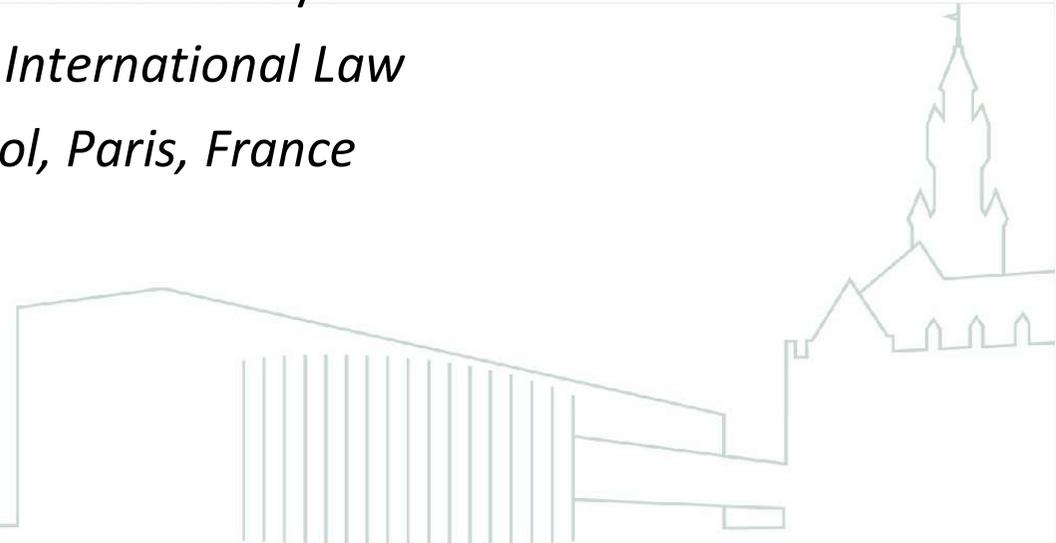
Professor Diego P Fernández Arroyo

The Hague Academy of International Law

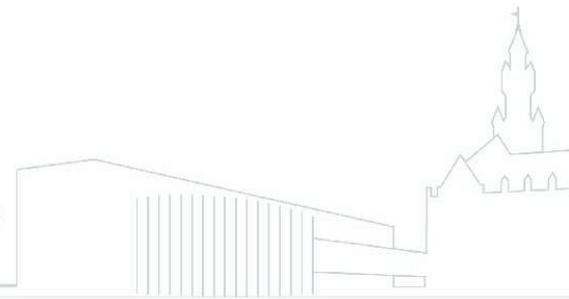
Sciences Po Law School, Paris, France

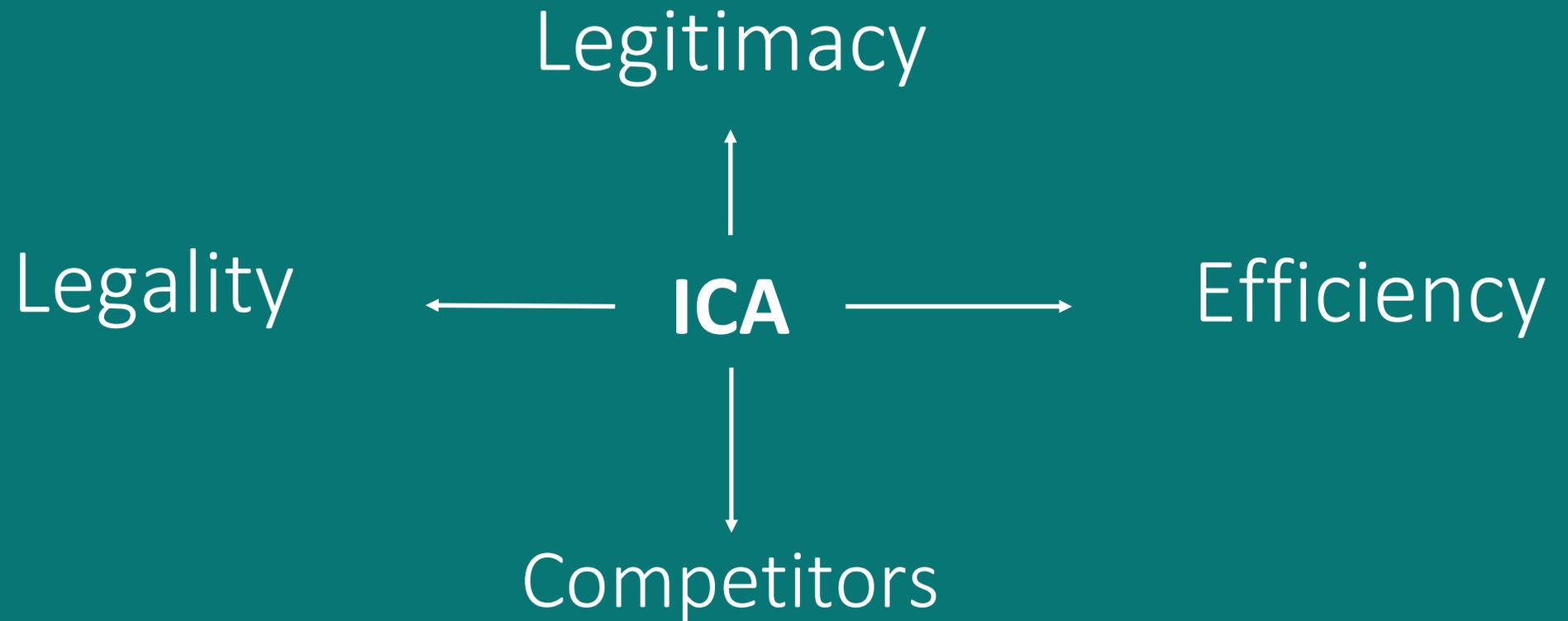
Trends in

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- This presentation follows up on **last year's discussion of current trends in ICA**. The current era marks the peak of private adjudication and the continuing role of public courts.
- “Private Justice” is protected and controlled by the (Public) “Justice.”. ICA nowadays enjoys a **quasi exclusive adjudicatory monopoly on transboundary commercial disputes**.
- This all raised and continues to raise several challenges for ICA to reinforce its current role and status.





Trends in

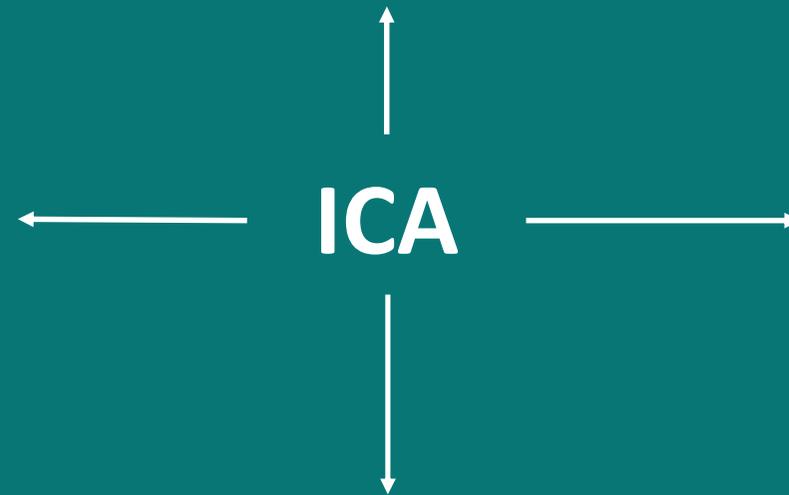
**COMMERCIAL ARBITRATION AND
PRIVATE INTERNATIONAL LAW**



Legitimacy

Legality

Efficiency



ICA

Competitors

*Consolidating
/Expanding the scope of
arbitrable matters*

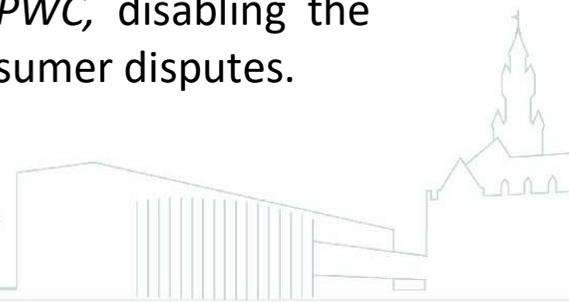
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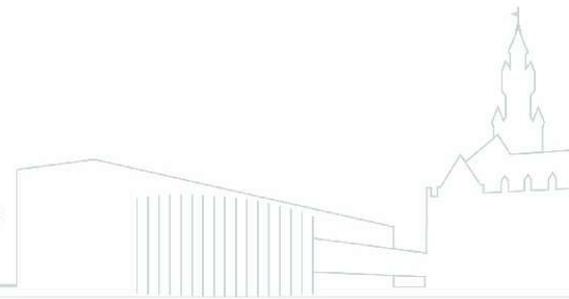
LEGALITY OF ICA – CHALLENGES AND RESPONSES

- The scope of **arbitrability** is in perpetual motion. So far, the trend remains one of constant and progressive *arbitralization*
- One may however still identify several matters in which the availability of ICA is repeatedly challenged, e.g. disputes involving States, insolvency disputes, labour disputes, consumer disputes, etc.
- E.g. French *Cour de cassation*, Civ. 1re, 30 sept. 2020, n° 18-19.241, *PWC*, disabling the negative effect of competence competence principle for international consumer disputes.



LEGALITY OF ICA – CHALLENGES AND RESPONSES

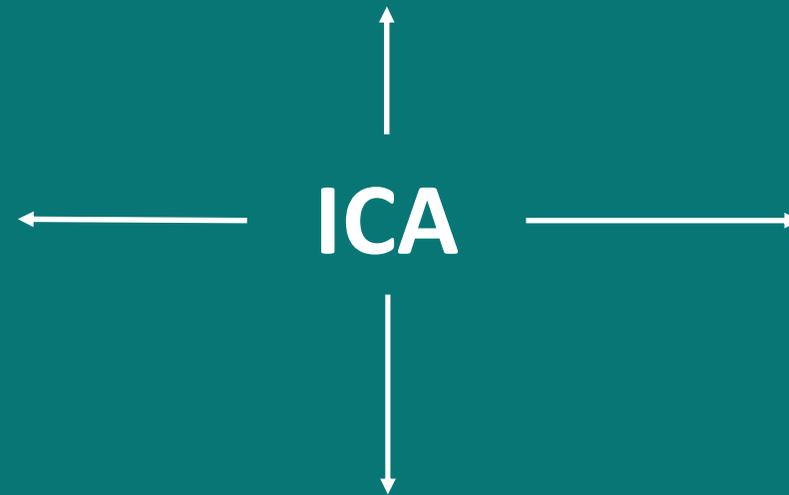
- **Arbitrability expresses a national policy.** It is naturally determined by States.
- The only appropriate response is to strengthen ICA's efficiency and legitimacy to encourage a broadening of arbitrability' scope. **Trust in arbitration is the key parameter for arbitrability.**



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Improved mechanisms to respond to users' needs and wishes

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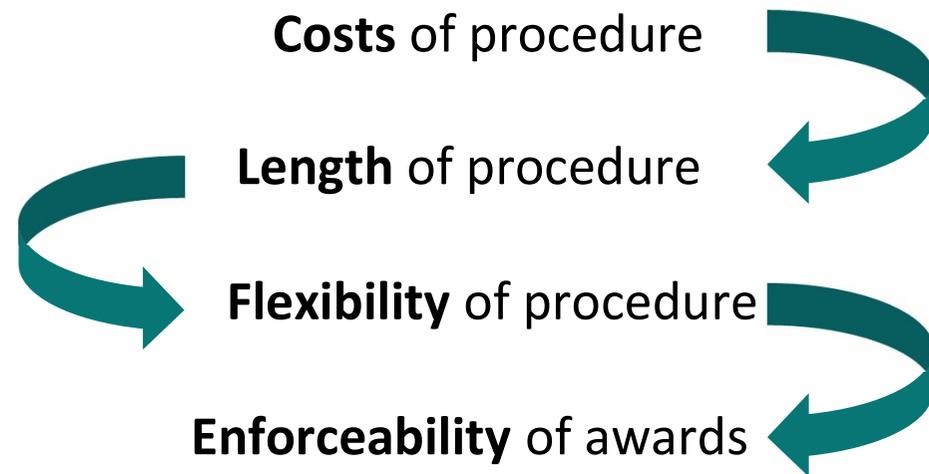
EFFICIENCY OF ICA – CHALLENGES AND RESPONSES

- Efficiency and Legitimacy are closely linked. A distinguishing aspect is that efficiency is usually assessed by focusing on the **users' key needs and expectations**. Legitimacy in comparison has a broader audience.

*As identified for instance in
the 2021 Survey conducted by*



WHITE & CASE



EFFICIENCY OF ICA – CHALLENGES AND RESPONSES

- New UN contribution to ICA development — UNCITRAL Expedited Arbitration Rules (2021) (incorporated into the UNCITRAL Arbitration Rules - Art. 1(5) -)

Challenge — right balance between efficiency concerning time and costs and due process and fairness



EFFICIENCY OF ICA – CHALLENGES AND RESPONSES

- Efficiency is the “battle horse” of arbitral institutions which play a crucial role to improve arbitration procedures.
- A virtuous competition — a constant process of revision of arbitration rules exists nowadays through which improvements are tested/compared/shared across institutional settings.



EFFICIENCY OF ICA – CHALLENGES AND RESPONSES

- Costs, see e.g. *2021 ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration pursuant to the ICC Rules, para 182.*

The Court fixes arbitrators' fees. **Separate fee arrangements between the parties and arbitrators are not permitted.**

- See also *2021 ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration pursuant to the ICC Rules, para 193.*

Arbitral tribunals may make decisions as to costs, **except for those to be fixed by the Court**, and order payment thereof at any time during the proceedings (Article 38(3)).

- See also *ICC Commission Report Decisions on Costs in International Arbitration.*



EFFICIENCY OF ICA – CHALLENGES AND RESPONSES

- Length of the Procedure, e.g. *2021 ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration pursuant to the ICC Rules, para 155.*
Where the draft award is submitted after the time referred to in paragraph 153, **the Court may lower the fees as set out below**, unless it is satisfied that the delay is attributable to factors beyond the arbitrators' control or to exceptional circumstances, and without prejudice to any other measures that it may take, such as replacing one or more of the arbitrators:
 - > draft award submitted for scrutiny up to 7 months after the last substantive hearing or written submissions — **fees reduced by 5% to 10%.**
 - > draft award submitted up to 10 months — **fees reduced by 10% to 20%.**
 - > draft award submitted for scrutiny more than 10 months after — **fees reduced by 20% or more.**



EFFICIENCY OF ICA – CHALLENGES AND RESPONSES

- The issue of flexible procedures is not new and **should certainly not be analysed only through the COVID19 prism** which obviously required specific arrangements for hearings, notifications etc.

E.g. ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic

- The issue of **flexible and adapted procedures** is broader and has already been addressed by Arbitral Institutions in the last years.

E.g. ICC Emergency Arbitration, for a party that needs **urgent interim or conservatory measures** which cannot await the constitution of an arbitral tribunal

E.g. ICC Expedited Procedure, for a disputes not exceeding certain amounts (e.g. US\$ 3,000,000 if the arbitration agreement was concluded on or after 1 January 2021)



EFFICIENCY OF ICA – CHALLENGES AND RESPONSES

- Enforceability of awards: e.g. scrutiny of awards by ICC Court

2021 ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration pursuant to the ICC Rules, para 163.

The scrutiny process carried out by the Court with the assistance of its Secretariat is a **unique and thorough procedure designed to ensure that all awards are of the best possible quality and more likely to be enforceable**. Before a draft award is submitted to the Court for scrutiny, it is reviewed first by the counsel of the team in charge of the arbitration that has followed the proceedings, and then by the Secretary General, the Deputy Secretary General or the Managing Counsel. For certain arbitrations, generally those involving state parties or dissenting opinions, a Court member will draft a report with recommendations on the draft award.



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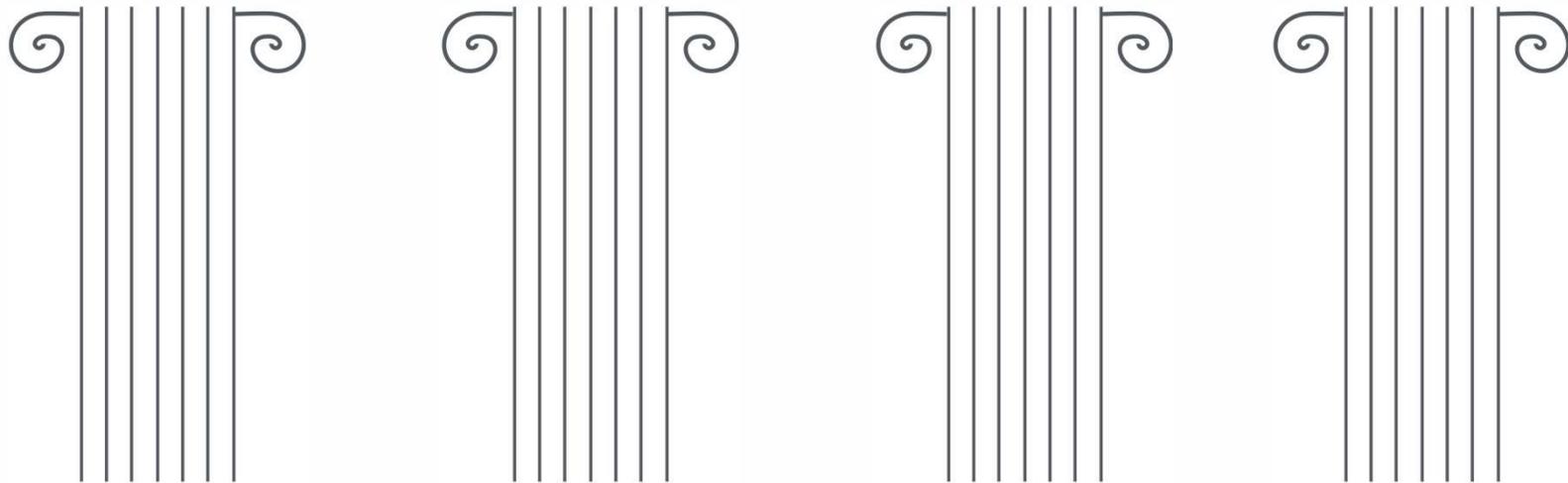
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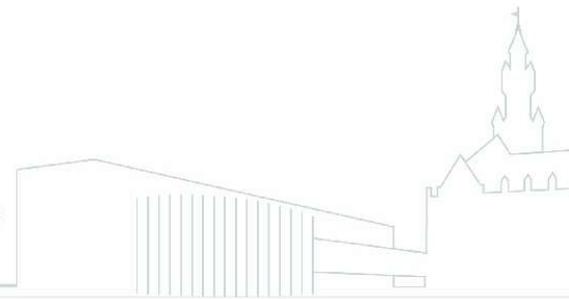
**COMMERCIAL ARBITRATION AND
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The legitimacy of International Commercial Arbitration ...



... must be assessed and strengthened as ICA now enjoys a quasi-exclusive jurisdictional monopoly



Transparency

- *2010 ILA Report on Confidentiality in ICA (Committee on ICA)*
- *2021 ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration pursuant to the ICC Rules, section IV.B (Publication of Information)*

Consistency

- *2021 ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration pursuant to the ICC Rules, section IV.C (Publication of awards)*

Accountability

- *Tribunal Supremo, First Chamber, Spain (2017) : 2 arbitrators ‘palpably violated the arbitration rules’ by excluding the third arbitrator from deliberations
> ordered to reimburse 750,000 EUR in fees each.*

Diversity

- *ICC on-going strategy to enhance diversity of ICC tribunals: disclosure of statistics on the gender balance of ICC tribunals.*



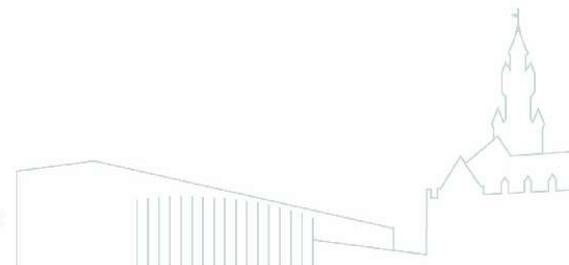
LEGITIMACY OF ICA – CHALLENGES AND RESPONSES

- Many of the contemporary challenges have already been identified more than a decade ago. As a result, trends already emerged in response to these challenges. This is for instance the case for **consolidated trends towards greater transparency, consistency and accountability.**
- These trends have raised a variety of **new questions and issues.**
- E.g. Tribunal judiciaire de Paris, 31 March 2021, RG n°19/795 : the Paris main first instance court ruled on the **international jurisdiction of French courts to determine arbitrators' liability.** The Court held that it was a contractual claim in the meaning of Article 7(1)(b) of the Brussels I bis Regulation and thus declined jurisdiction on the ground that the arbitrator had provided his service in Germany.



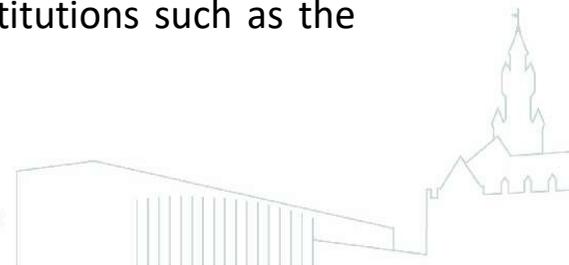
LEGITIMACY OF ICA – CHALLENGES AND RESPONSES

- Some of the contemporary challenges for ICA only start to be properly acknowledged by the arbitral community. This is for instance the case of the **diversity deficit** which is in comparison largely acknowledged and identified as a concern for ISDS.
- The diversity deficit is now identified in ICA as well but tools are still limited. Institutions are playing an important role but party-appointment remains the general rule. In comparison, ISDS is the subject of a larger and more comprehensive reform process.



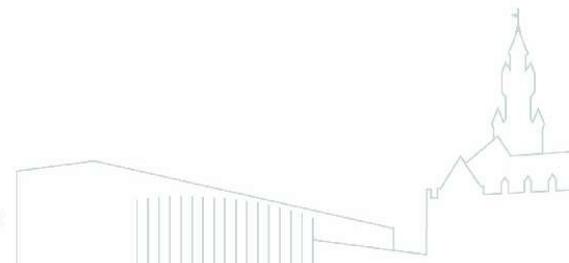
LEGITIMACY OF ICA – CHALLENGES AND RESPONSES

- The issue of **impartiality, independence and ethics** can be subsumed under several *legitimizing* streams such as **transparency** and **accountability**. It is however not only a *legitimizing* feature but foremost a fundamental requirement for the integrity of the arbitral process.
- E.g. UK Supreme Court, *Halliburton v Chubb* (2020), confirming that an arbitrator is under a duty to disclose facts and circumstances which would or might reasonably give rise to the appearance of bias. The Court stated that this legal duty **furthered transparency** and was in alignment with the best practice set out in the IBA Guidelines and the approach taken by arbitration institutions such as the LCIA and ICC.



LEGITIMACY OF ICA – CHALLENGES AND RESPONSES

- Any inquiry into the legitimacy of ICA must also consider the distinguishing features of contemporary ICA and the debates around the conceptualization/legal representation of arbitration.
 - Autonomy of Arbitration
 - Transnational nature



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Competitors

- *Domestic courts*
- *International commercial courts*
- *Mediation*

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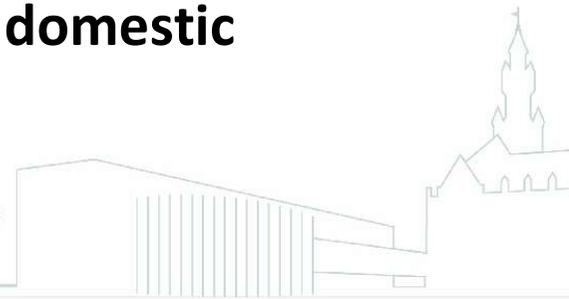


COMPETITORS OF ICA – A REAL CHALLENGE?

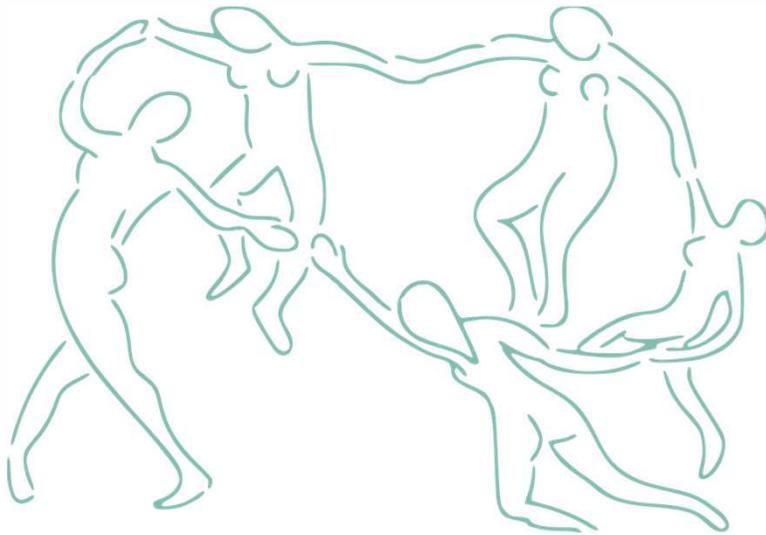
- **The existing framework of the NY Convention** largely explains why an overwhelming majority of existing arbitral awards all over the world is **complied with on a voluntary basis**.

VS?

- **The 2018 Singapore Convention (Mediation)**
- **The frameworks of the 2005 (Choice of court) and 2019 (Judgments) Hague Conventions**
- **Specialised domestic courts**



COMPETITORS OF ICA – A REAL CHALLENGE?



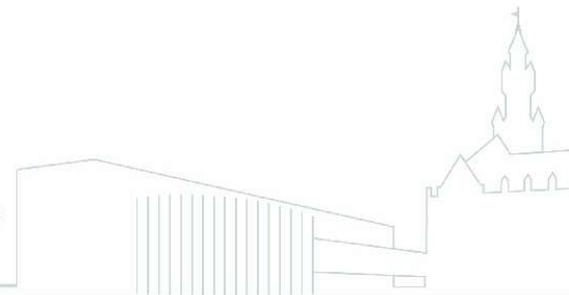
Multiple actors are engaged in this global process to ensure peaceful private dispute resolution, i.e. courts (domestic/international commercial), mediators and arbitral tribunals.

They all:

- Compete
- Cooperate

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Thank you!

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