**“Cross-Fertilisation in International Commercial Arbitration, Investor-State Arbitration and Mediation: The Good, the Bad and the Ugly?”[[1]](#footnote-1)#**

**Luke Nottage[[2]](#footnote-2)\***

*6th ADR Address of the Supreme Court of New South Wales, 2 November 2023*

1. Introduction
2. The Explosion in International Arbitration
3. The Resurgence of Costs and Delays
4. The Fall of Arb-Med
5. The Rise of Multi-tiered Dispute Resolution Clauses
6. Conclusions

**Abstract:** International commercial arbitration (ICA) has proliferated worldwide, often cross-fertilising with investor-state arbitration (ISA). Yet costs and delays are resurgent. Little cross-fertilisation with international mediation has occurred in the form of Arb-Med (arbitrators themselves acting as mediators). Instead there has been growth in Med-Arb (separate mediators before arbitration), albeit not uniformly or not yet in ISA. Cross-fertilisation from ISA to ICA is evident in assessing whether non-compliance with agreed pre-arbitration steps generally goes to jurisdiction of the arbitral tribunal or merely admissibility of claims. This article urges more attention to these and other possible examples of cross-fertilisation among ICA, ISA and mediation, especially to reduce costs and delays in cross-border dispute resolution.

**1. Introduction**

International arbitration (IA) has burgeoned especially since the 1990s, including across the Asian region (as elaborated below in Part 2). The growth originated in international commercial arbitration (ICA), but it has been bolstered especially over the last 10-15 years from mostly now treaty-based investor-state arbitration (ISA). However, as in the 1990s, concerns are again building about escalating delays and especially costs (Part 3). This is due not just to the growing complexity of transactions and therefore disputes. Other factors contributing to costs and delays arguably include IA still having no real competitors for cross-border dispute resolution, the growth of large law firms and the billable hours culture, conservatism about controlling legal costs (eg via caps on fees or sealed offers), the double-edged sword of confidentiality, and the proliferation of soft law instruments.

There has been quite extensive discussion in case law and commentaries about the relationship between ICA and international litigation conducted through courts, as part of an overall system for resolving cross-border commercial disputes.[[3]](#footnote-3) The present paper takes an even more encompassing view. It teases out some connections or influences among ICA, ISA, international and domestic mediation, which may be or become more or less productive, particularly from the perspective of reducing costs and delays.

Cross-fertilisation from mediation practice has not yet borne much fruit globally in the form of hybrid Arb-Med, where parties authorise arbitrators to act as mediators (Part 4), in ISA and even in ICA. Instead, Med-Arb and other multi-tiered dispute resolution clauses are becoming more prevalent in cross-border transactions, aiming to reduce the costs and delays associated with proceeding to IA (Part 5). However, the spread has not been uniform across the world of ICA, and has not yet impacted much on investment treaties and therefore ISA. In addition, cross-fertilisation partly from ISA regarding the consequences of non-compliance with pre-arbitration steps in such clauses is causing complications, although it may lead to constructive solutions in ICA as well as ISA. Overall, various cross-overs are already evident among ICA, ISA and international mediation, and such cross-fertilisation needs to be tracked and channelled into the most productive interactions.

**2. The Explosion in International Arbitration**

When I first got interested and engaged in ICA, in the early 1990s in Japan and then as a rookie lawyer and lecturer in New Zealand, the field was very undeveloped in our region. In 1989, Australia had followed Hong Kong in adopting quite quickly the 1985 UNCITRAL Model Law on International Commercial Arbitration (ML). This template for legislation was influenced by the European civil law tradition in giving more autonomy to the parties and tribunals, compared to the (arguably[[4]](#footnote-4)) more court-supervised English tradition. Yet it took over two decades thereafter for the ML provisions to be extended in Australia to domestic arbitrations, and then still with some twists. New Zealand did manage to enact the ML as the core for both international and arbitrations, in 1996, but only thanks to a private Member’s Bill after the 1990 Law Commission report had languished for years.[[5]](#footnote-5) Singapore enacted its ML-based regime in 1994, but the Singapore International Arbitration Centre (SIAC, established in 1991) saw little uptake in case filings for the ensuing decade. The Australian Centre for International Arbitration (ACICA), established in Melbourne in 1985, saw only a few international arbitration filings annually over 1998-2009.[[6]](#footnote-6)

Yet case filings in other regional arbitration institutions started to pick up over that period, following earlier growth in Western “core” institutions like the International Chamber of Commerce (ICC) and London Court of International Arbitration (LCIA). SIAC experienced a noticeable boost after it opened the Maxwell Chambers facilities in 2010.[[7]](#footnote-7) That prompted the Hong Kong International Arbitration Centre (HKIAC) to lift its game too, improving its own facilities. HKIAC had also somewhat belatedly adopted new Rules for Administered Arbitration from 2008, rather than just providing more limited support for proceedings under the UNCITRAL Arbitration Rules – designed primarily for ad hoc arbitrations. The China International Economic and Trade Arbitration Commission (CIETAC) caseload also expanded dramatically, along with the surge in trade with and investment into the mainland. The growth in CIETAC arbitrations (although mostly domestic) and a proliferation of arbitration centres nation-wide was also bolstered because China’s 1994 Arbitration Act prohibited ad hoc arbitrations[[8]](#footnote-8) and the local court system has struggled with delays. corruption and other problems.[[9]](#footnote-9)

Similar reasons underpin the more recent growth in cases in the Vietnam International Arbitration Centre.[[10]](#footnote-10) The inter-governmental Kuala Lumpur Centre for Regional Commercial Arbitration rebranded in 2018 as the Asian International Arbitration Centre. It has seen a small increase in international arbitration filings but much more activity administering statutory adjudication of construction disputes.[[11]](#footnote-11) After the Asian Financial Crisis of 1997 and bailout of Korea by the International Monetary Fund, the Korea Commercial Arbitration Board (KCAB) also saw steady growth in domestic and then international arbitration filings, as inbound foreign direct investment (FDI) grew and many mergers and acquisitions encountered problems. Large Korean conglomerates and construction companies also increasingly ventured abroad.[[12]](#footnote-12)

Japan’s large firms have been less forceful in pressing for arbitration clauses specifying a local seat, prioritising other matters in cross-border contract negotiations and maintaining more of a view that spending money on pursuing arbitration (or litigation) is like throwing good money after bad.[[13]](#footnote-13) Yet Korea’s enactment of a ML-based statute in 1999 and establishment of Seoul International Dispute Resolution Centre facilities led, respectively a few years later, to similar initiatives from the Japanese government and growing group of arbitration experts in Japan. They too aim to turn the country into a more competitive regional hub for arbitration and mediation services, although this ambition may prove a case of “too little, too late”.[[14]](#footnote-14)

Overall, IA’s spread through the “periphery” in the East over the last 15-20 years has been quite dramatic. It has confounded those who still around the 1990s were suggesting that “Asian values” of harmonious dispute resolution explained the paucity of arbitration filings in the region.[[15]](#footnote-15) The expansion has instead been underpinned by most of the factors identified by Anselmo Reyes and Weixia Gu.[[16]](#footnote-16) First, almost all Asian jurisdictions have adopted the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards (NYC). Many have then adopted the ML to underpin locally seated international arbitrations, and indeed often domestic arbitrations (as in Japan, Korea, India in 1996, Thailand in 2002 and Malaysia in 2005).[[17]](#footnote-17)

Secondly, we can see the gradual spread of “pro-arbitration” judgments – rendered consistently with the wording and spirit of these two international instruments and other core IA principles. Increasingly such judgments “cross-fertilise” each other, including intra-regionally, especially among those in a similar legal tradition. A good example is the growing deference by seat and foreign enforcement courts to procedural rulings by arbitrators. English and American superior courts from the 1970s and 1980s limited the scope of the “public policy” exception to award enforcement to the most fundamental notions of justice or morality within the relevant jurisdiction, interpreted in an internationalist spirit. This conception spread first to Hong Kong courts in the 1990s, then the Singaporean courts in the 2000s, and through the Australian courts notably from around 2010.[[18]](#footnote-18) Another example of a pro-arbitration shift in case law comes from the Supreme Court of India from around 2012, retreating from various decisions that generated widespread criticism as overly interventionist first in domestic and then international arbitrations.[[19]](#footnote-19) The more positive case law developments over the last decade have prompted major legislative amendments from 2015, although one commentator recently describes some 2019 revisions as “one step forward, two steps backward”.[[20]](#footnote-20)

Thirdly, the expansion and growing sophistication of IA in many Asian jurisdictions has been undergirded by the establishment of at least one national dedicated arbitration institution. (However, this aspect does remain a work in progress in India – with its long and comparatively unusual tradition of ad hoc arbitrations – and China is also distinctive for having so many arbitration centres, often supported by local governments.) Relatedly, the most successful regional hubs further offer supportive arbitration “infrastructure”, including university-level and professional training for arbitrators and counsel, internationalised law firms and proliferating arbitration-related events.[[21]](#footnote-21) Some of the individuals and organisations spearheading such initiatives in the “periphery” initially brought back “symbolic capital” from the Western traditional “core”, as noted by legal sociologists analysing the worldwide spread of IA over the 1980s and 1990s.[[22]](#footnote-22) But we also see now symbolic capital (not just tangible experience and remuneration) being achieved by locals and expatriates in the key regional hubs, like Singapore, and then being mobilised to promote and cross-fertilise IA in neighbouring or inter-linked economies.

More recently, this dynamic and therefore a growing network of IA specialists has supported the gradual spread of ISA in or involving Asia. Burgeoning and new types of FDI have generated more disputes between foreign investors and host states. More treaties have been ratified particularly since the 1990s, increasingly adding full advance consent to ISDS arbitration, not only for developing economies in particular to attract more FDI but also to support their growing outbound investments.[[23]](#footnote-23) Most Asian states have further ratified the framework 1965 Washington Convention establishing the International Centre for the Settlement of Investment Disputes (ICSID), although there remain exceptions across major Asian economies (especially India, Vietnam and Thailand).[[24]](#footnote-24) The Convention makes awards significantly easier to generate (by not involving a seat court) and especially to enforce, so around two-thirds of ISA claims have been administered through ICSID, rather than being run ad hoc under UNCITRAL Arbitration Rules (or occasionally under Rules of non-ICSID institutions like the ICC).[[25]](#footnote-25)

In addition, various “institutional barriers” to bringing or defending ISDS arbitration claims, such as lack of expert counsel and arbitrators in the region, are coming down.[[26]](#footnote-26) Accordingly, the numbers and types of Asia-related claims are increasing – albeit off a comparatively low base, and in combination with efforts to better manage investment disputes before they escalate into formal ISDS arbitration claims.[[27]](#footnote-27) Asian states have rarely lost their first inbound ISDS claims, so have not abandoned the ISA mechanism altogether (unlike Australia, eschewing ISDS for future treaties over 2011-2013 and again from November 2022, or New Zealand from late 2017).[[28]](#footnote-28) However, two states subjected to more inbound claims – Indonesia and especially India – have terminated some old treaties with a view to acceding to new ISDS-backed treaties drafted to provide fewer protections for foreign investors.[[29]](#footnote-29) Some Asian states (Vietnam, Singapore, but not Japan) have also been amenable to the two-tiered “investment court” arbitration mechanism proposed by the European Union (EU) due to its internal politics since 2015 as an alternative to traditional ISDS. Some also are quite active in multilateral ISDS reform deliberations underway in UNCITRAL since late 2018.[[30]](#footnote-30)

**3. The Resurgence of Costs and Delays**

Despite this growth in IA worldwide, including around the Asian region, all is not rosy. Already in the 1990s, some commentators and practitioners had increasingly criticised the growing formalisation of IA. Yves Dezalay and Bryant Garth tied this to the displacement of the “grand old men” (mostly eminent professors of international law) appointed as arbitrators to resolve often contract-based investment disputes in the 1950s and 1960s, in favour of a new generation of arbitration specialists. They also observed the encroachment of large American and then English international law firms bringing to Europe from the 1970s and 1980s a more common law style of dispute resolution lawyering.[[31]](#footnote-31) This benefited some types of parties and improved due process generally, as well as underpinning initiatives like the ML in 1985, which reinforced core principles of party and tribunal autonomy – albeit through wording that sometimes led to disputation. By the late 1990s the leading arbitration institutions were forced to undertake rules amendments that sought to restore some cost and time efficiencies in IA. In the early 2000s, UNCITRAL also investigated reforms to the ML, although the main achievement in 2006 was limited to new powers for tribunals to issue and have enforced interim measures. It seemed therefore that the still-growing world of IA was shifting back towards a more informal and global approach, finding a new balance between the civil law and common law traditions.[[32]](#footnote-32)

However, from the mid- to late-2000s evidence and anecdotes started to accumulate that IA was again being more formalised.[[33]](#footnote-33) I have charted elsewhere the associated resurgence of costs and delays, even as IA became more popular in Asian economies where other services are still cheaper than in Europe or the US.[[34]](#footnote-34) I depicted this latest shift, and earlier movements, as follows:[[35]](#footnote-35)





This “weather map” further illustrates that the latest re-formalisation of the IA world is linked partly to the rebirth of ISA, although this time underpinned by advance consent given through investment treaties rather than ad hoc in individual investment contracts between foreign investor and host states. It is also true that even for the sub-field of ICA the underlying transactions and disputes have become more complex over the last few decades, compared to the more halcyon era of the 1970s-80s and especially the 1950s-60s.[[36]](#footnote-36)

An example is the growth of multi-party and multi-party disputes, which arbitration institutions have tried to address by expanding the scope of Rules applicable to joinder and consolidation.[[37]](#footnote-37) Yet such counter-measures are still limited by the need for parties to agree to arbitration through the same institution, despite some tribunals and jurisdictions occasionally experimenting with principles other than consent to bring in more parties or contracts into one efficient IA procedure.[[38]](#footnote-38) Australia’s International Arbitration Act (IAA) s24 was pioneering in adding the possibility of consolidation of related arbitration proceedings more broadly. However, it remains a (now rare) opt-in provision and has other limitations that need attention from the legislature to efficiently consolidate arbitrations across multiple institutions or tribunals.[[39]](#footnote-39)

In addition, to promote arbitration as the one forum to efficiently hear related disputes, in the Rinehart family trust domestic arbitration saga the High Court of Australia considerably widened in 2019 the scope for a non-signatory defendant (D2) to obtain a stay in litigation proceedings brought by a claimant against a defendant signatory to arbitration agreement (D1). The Court had to decide when a party (like D2) could seek a stay in favour of arbitration because proceedings were brought by “any person claiming through or under” a party to the arbitration agreement (like D1), which extends – based on old English law – the NYC (Art II) and ML (Art 8) provisions requiring a stay only for an arbitration agreement signatory. The majority of the Court held that the test should be “whether an essential element of the defence was or is vested in or exercisable by the party to the arbitration agreement” rather than the older test of whether the non-signatory stepped into the shoes of the signatory to derive its defence.[[40]](#footnote-40)

However, Professor Richard Garnett has argued compellingly that the narrower test – extending the arbitration procedure only to non-signatories such as assignees, principals in agency relationships, liquidators or subrogated insurers – should be adopted in a second category of situations. That arises where the non-signatory (C2, such as an assignee but not just raising essentially the same legal arguments as C1) instead *claims* against a defendant, which then tries to assert a stay based on its arbitration agreement with another (C1). Garnett argues that a narrower test is appropriate in the second scenario because otherwise the non-signatory *claimant* “has been effectively coerced into arbitration by having its own court proceedings restrained”. He notes that the “consent deficit” is much more pronounced than in the first scenario of the non-signatory *defendant*, where at least the latter is the one now seeking to get into arbitration, which derives fundamentally from party consent.[[41]](#footnote-41) If Garnett’s important conceptual distinction between the two scenarios is upheld in future Australian case law, or perhaps even legislative clarification to its arbitration legislation, this prioritisation of party autonomy nonetheless will mean less promotion of efficient dispute resolution. More disputes will remain outside arbitration and instead in court proceedings, resulting in more costs and delays compared to extending the wider test also to claimant non-signatories, albeit for powerful philosophical reasons.[[42]](#footnote-42)

There are also other factors, beyond increasing multi-party or multi-contract disputes nowadays, which arguably contribute to resurgent delays and especially costs in IA. First, there are still really no other alternative DR methods available for cross-border contexts. International commercial courts have been established, notably in Singapore from 2015,[[43]](#footnote-43) but have not yet attracted many general commercial cases based on parties expressly agreeing on such forums.[[44]](#footnote-44) Court rules and then laws and institutions to promote more mediation of domestic disputes, and then international disputes, have emerged particularly in common law jurisdictions suffering from court congestion.[[45]](#footnote-45) But few states have ratified, as opposed to signing, the 2019 Singapore Convention aimed at facilitating the enforcement of international settlement agreements secured through mediation – inspired by NYC Article V.[[46]](#footnote-46)

Secondly, law firms have kept growing in size and geographical reach. They have incorporated the marketing and organisational tool of charging clients for “billable hours”, albeit to varying degrees perhaps still in some parts of Asia. This mechanism can lead to lower costs compared to resolving disputes based on the amount in dispute, but it can also lead to perverse incentives. As Shahla Ali noted already a decade ago in one of her interviews of mostly Asia-based IA stakeholders, finding also through survey evidence that IA in the region was not perceived as having much time or especially cost advantages over cross-border litigation (as in the West already from the 1990s):[[47]](#footnote-47)

“When I was a new partner involved in several arbitrations in which I could easily see a settlement option early on I suggested to the other partners that this case could easily settle. The partners didn’t say anything, but the unspoken message was that such a suggestion was not acceptable because their billable hour requirements were contingent on the prolongation of the arbitration. This was the key to their annual bonus.”

More recently, acknowledging higher pandemic-fuelled inflation and the slowdown in the global economy, we are seeing some law firms starting to acknowledge and promote other types of arrangements for keeping legal costs down, or funding them directly or via third parties.[[48]](#footnote-48) Yet this may be too little and too late to reinstate IA as an efficient cross-border DR mechanism.

Thirdly, perhaps reflecting conservatism among IA practitioners or even some self-interest, we have not witnessed much innovation among legal advisor or institutions to rein in costs, especially legal fees. As one example, in IA there has not been any noticeable spread of the “sealed offers” practice that emerged in Anglo-Commonwealth litigation practices to counteract the potentially harsh outcome of the “costs follow the event” principle, even though that principle is increasingly prevalent in ICA and more recently (and less distinctly) in ISA.[[49]](#footnote-49) The sealed or *Calderbank* offer practice can dramatically reduce dispute resolution costs and delays, and the Malaysian Arbitration 2005 s44(2) follows the New Zealand’s Arbitration Act (Schedule 2 Art 6(s) in adding a similar mechanism for domestic arbitrations. If one party’s written offer made “without prejudice to costs” is not accepted by the other, which ultimately achieves an outcome less favourable, the offer can be revealed and prevent the latter from claiming from the former its party (especially lawyer) costs incurred after the offer was rejected.

Anecdotal evidence suggests this arrangement is sometimes agreed in ICA among counsel and tribunals especially from common law backgrounds. However, none of the busiest arbitration institutions seems to have added this arrangement to its Rules for IA (either as an automatic provision if a tribunal applies the costs follows the event principle, or more conservatively as an extra opt-in or model clause). There was a brief mention in the 1999 and 2007 Arbitration Rules of the Institute of Arbitrators and Mediators Australia (IAMA). However, this was not carried over into its successor Rules and the institution was and remains primarily focused on domestic arbitrations.[[50]](#footnote-50) However, the quite recently-established New Zealand International Arbitration Centre, in Art 37.5 of its 2018 Standard Arbitration Rules, states that the tribunal “may take into account such matters as it considers relevant, including … whether a settlement offer no less favourable than the Award was made and rejected”.[[51]](#footnote-51) A July 2023 ICC report generally on *Effective Conflict Management* also mentions the possibility of using sealed offers to control legal costs.[[52]](#footnote-52) Nonetheless, the concept has not seemingly been otherwise much publicised in the otherwise proliferating public seminars or conferences supported by IA-focused institutions, or even wider associations promoting arbitration. It receives even less mention in ISA-specific contexts.[[53]](#footnote-53)

As another example of conservatism in IA, although there have recently been some Rules amendments to limit or at least scrutinise more carefully the fees paid to arbitrators (notably by the ICC from 2016, with discretion to dock fees for delays by arbitrators),[[54]](#footnote-54) no Rules of major IA-focused institutions have tried to limit costs claimed for lawyer fees. Typically, Rules do allow tribunals to limit costs to “reasonable” amounts, but arbitrators – perhaps with an eye to reappointments – seem much more reluctant to significantly dock lawyer fees awarded compared to judges with similar powers.

The 2014 Arbitration Rules of IAMA did innovate by adding an absolute cap on legal fees based on the amount in dispute (along with a cap based on the amount for tribunal fees, determined otherwise on an hourly basis under Article 41). They defined the costs of the arbitration in Article 40(e) to include:[[55]](#footnote-55)

“The legal costs directly incurred by the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs are reasonable *and only to the cap set out in Schedule 1* unless otherwise agreed in writing or directed by the arbitral tribunal”.

This innovative cap on (anyway only “reasonable”) lawyers’ fees claimable as costs, by the winning party in principle under Article 42(1), was carried over in Article 40(e) and Schedule 1 of the 2016 Arbitration rules of the Resolution Institute (which subsumed IAMA). However, Resolution Institute Arbitration Rules 2020 instead adopted the UNCITRAL Rules in effect from 2019, with specified amendments that did not transpose the cap on lawyer fees based on the amount in dispute (or indeed the cap on arbitrator fees, though maintaining a default hourly rate principle). The variation regarding Rule 40 merely allows the arbitrator a general discretion to direct limits on any arbitration costs (emphasis added):

“The amount of the costs of an arbitration (including the fees and expenses of the arbitrator) are to be in the discretion of the arbitrator. *The arbitrator may direct that the costs of an arbitration or any part of the arbitration, are to be limited to a specified amount*.”

These provisions are replicated in the 2023 Arbitration Rules, and an accompanying “Explanatory Note” states that the “major changes introduced in 2020 and carried through into the Resolution Institute 2023 Rules is that they … removes [sic] from the Rules a limit on recoverable legal fees by the successful party. Of course, the parties remain free to agree that in their contract if they wish”.[[56]](#footnote-56) No further explanation is provided for this change, but we may infer that the unusual approach of capping lawyer fees (applicable in arbitrations commenced from 2014 until 2019) was not well received – perhaps especially by legal advisors. It will be interesting to see if Resolution Institute arbitrations from 2020 nonetheless involve parties agreeing separately to cap lawyers’ fees claimable as costs, or tribunals directing this at their discretion. However, the former seems particularly unlikely as it goes against the financial interests of the parties’ legal advisors.

As a fourth factor arguably contributing to costs and delays in IA, there has been a gradual spread of confidentiality obligations on parties, not just arbitrators and institutions as in the ICC, related to arbitration proceedings. This reflects a considerable and persistent preference of commercial users, especially in Asia.[[57]](#footnote-57) In some states, as in Singapore and especially Hong Kong, confidentiality extends even to arbitration-related court proceedings. A growing number of states have added confidentiality to the ML template when enacting arbitration legislation, or developed generally similar case law principles (as England and Singapore). Even in those that do not (as in Japan), the major arbitration institutions have added and sometimes over time expanded confidentiality obligations on parties. Indeed, from their first edition in 2005, ACICA Rules extended confidentiality by requiring parties calling witnesses to ensure that the latter too maintain confidentiality.[[58]](#footnote-58)

Changes have been made to loosen confidentiality particularly around ISA, validly recognising the greater public interests in that hybrid form of arbitration. But it remains quite valued and prevalent in ICA, despite variations in the exceptions to confidentiality and the concept being a somewhat double-edged sword.[[59]](#footnote-59) On the one hand, confidentiality (combined with privacy of proceedings) means that arbitrators can direct their awards and procedures to the parties themselves, not the wider public as with the courts. This should allow them to render more succinct decisions and be more robust in procedural rulings, benefiting also from case law trends that often favour this approach.[[60]](#footnote-60) On the other hand, tribunals and awards are still quite often challenged and can become prone to “due process paranoia”,[[61]](#footnote-61) and confidentiality generally has the downside of exacerbating the information asymmetry that bedevils markets especially for services. The IA sector has fewer mechanisms (like mandatory warranties of due care) that help offset pernicious information asymmetry linked to confidentiality, thus making it hard for (especially newer or infrequent) users to assess whether IA service providers are giving the best value for money.[[62]](#footnote-62)

Admittedly, there have been recent efforts to disclose more information about arbitrators. Initiatives like Arbitrator Intelligence (collecting awards and other public information) are now connected to a database available through a major publisher of IA resources.[[63]](#footnote-63) Users and advisors can also access more information about at least the more experienced arbitrators, being considered or use for ICA cases, thanks to the increasingly public awards and other information available from ISA cases.[[64]](#footnote-64) However, there is far less good-quality public information about lawyers (and experts), which generate far more costs in the arbitrations compared to the arbitrators (or institutions administering arbitrations). This paucity of information, arguably contributing to the observed concerns about costs and delays in IA generally, may be exacerbated in jurisdictions (like Australia and Singapore) that still prefer to engage barristers for arbitrations rather than solicitors (as in the UK). This is because even repeat players in such jurisdictions may have less chance to determine whether their counsel are providing optimal value.

A fifth factor that could explain the persistent problem of costs and delays in IA is another development with both pros and cons: the proliferation of “soft law” instruments, notably from the International Bar Association (IBA).[[65]](#footnote-65) The 1999 IBA Rules on the Taking of Evidence in IA (revised in 2010 and 2020) and the 2004 IBA Guidelines on Conflicts of Interest in IA (revised in 2014) have been widely used to flesh out sparse provisions in arbitration legislation and even Rules arounds hearings and evidence-taking, as well as the key question of arbitrator neutrality.[[66]](#footnote-66) The 2005 ACICA Rules were quite ahead of the times in drawing attention to both instruments, although not binding parties, tribunal or the institution determining arbitrator challenges to using them. The 2016 Rules went a step further, making soft law guidelines somewhat “harder”, by requiring that parties should ensure that their lawyers abide by the 2013 IBA Guidelines on Party Representation in IA.[[67]](#footnote-67)

Such soft law instruments have the advantage of filling gaps with harmonised solutions, which is particularly helpful as parties, counsel and more recently arbitrators have become more diversified.[[68]](#footnote-68) The IBA Rules on Evidence-Taking also tried to reconcile often quite different common law and civil law traditions, eg around pre-hearing document disclosure or discovery.[[69]](#footnote-69) However, a disadvantage is that the fact of spelling out specific provisions – including revisions adding even more text – can generate more scope for canny lawyers to dispute procedures and outcomes in IA. Indicative applications, like the “traffic light” categories of situations set out in the Guidelines on Conflict of Interest, can also end up becoming set in stone.[[70]](#footnote-70) Some commentary has questioned the legitimacy of the formulations in those Guidelines, noting many of the IBA drafting committee members were from large law firms.[[71]](#footnote-71) Such firms could be more generous towards perceived conflicts of interest involving links between arbitrators and counsel. Such concerns are also heightened given the cross-over of arbitrators specialising in ICA into the world of ISA, and then the invocation of the IBA Guidelines also in the latter context.

From 2011, a prominent Swiss practitioner and arbitrator started voicing concerns about the evolving soft law instruments emanating especially from the IBA.[[72]](#footnote-72) In 2013, in a Message published in a prominent journal as President of the Swiss Arbitration Association, Dr Michael Schneider went on to elaborate:[[73]](#footnote-73)

“One of the principal factors which today absorb the time of arbitrators, parties and counsel, increasing the costs of arbitral proceedings, is the ever growing number of procedural motions. The greatest culprit in this respect is no doubt the document production requests, and the IBA played an important role in the spread of this curse. Before the adoption of the IBA Rules on the Taking of Evidence …, large parts of the world conducted arbitration without this form of discovery …

The Evidence Rules were followed by the IBA Guidelines on Conflicts of Interest which have become the widely accepted yardstick for determining conflicts and have replaced independent thinking as to whether a particular situation really constitutes an actual, potential or perceived conflict of interest — stimulating instead the imagination of all those who wish to disrupt proceedings by challenging arbitrators.”

Such critiques led to some significant debate within the wider IA community, driven particularly by experts within the civil law tradition concerned about the further encroachment of common law thinking and practices. Some joined together in issuing the 2018 Prague Rules on the Efficient Conduct of Proceedings in International Arbitration. These provide more civil law tradition inspired approaches to document production, examinations and numbers of witnesses, and pro-active case management by tribunals (including around time limits for introducing evidence). Other innovations compared to the IBA Rules include provisions on the *iura novit curia* principle (Art 7) and tribunal assistance in amicable settlement (Art 9).[[74]](#footnote-74)

However, the Prague Rules are not yet referenced in Rules of the major IA institutions or promoted by them.[[75]](#footnote-75) It is also unclear how often tribunals and parties choose to follow them instead of the IBA Rules on Evidence-Taking. Instead, for example, there some reflection of their more hands-on approach for tribunals in the Japan Commercial Arbitration Association (JCAA) “Interactive Arbitration Rules” inaugurated in 2019 (and revised in 2021) alongside updates to their longstanding Commercial Arbitration Rules. The Interactive Rules are:[[76]](#footnote-76)

“aimed at offering maximum predictability and efficiency of arbitrations by adopting a *more "civil law approach"*. Arbitral tribunals are encouraged to actively administer the proceedings and establish an open "dialogue" with the parties in the course of arbitration. …

At an early stage of the proceeding, the arbitral tribunal must present to the parties a written summary of each party's position on the factual and legal grounds of the claim and defense, and provide the parties with an opportunity to comment. This allows the arbitral tribunal to better understand the parties' positions and to identify the disputed issues at an early stage. …

Before any evidentiary hearing, the arbitral tribunal must provide the parties with a written summary of the factual and legal issues it considers important and its preliminary views on those issues. The parties must be provided with an opportunity to comment. This enables the parties not only to find out about possible misunderstandings on the part of the arbitral tribunal, but also to specifically focus on the important issues in the subsequent written submissions and/or at an evidentiary hearing.”

Again, however, it is unclear how often such Interactive Rules are being chosen by parties and their legal advisors. Overall, the path dependence created by IBA instruments is likely to remain, even if not optimal in all respects for reducing costs and delays in IA.

**4. The Fall of Arb-Med**

To counter the formalisation of IA, underpinned arguably by factors such as those outlined above, one reaction has been to try to cross-fertilise the field by encouraging arbitrators themselves to mediate disputes (Arb-Med).[[77]](#footnote-77) This hybrid process has recently seen some resurgence of interest, even in common law jurisdictions. The International Mediation Institute’s transnational 'Mixed Mode Taskforce' Working Group 4, for example, has been exploring and developing techniques for active settlement facilitation by arbitrators.[[78]](#footnote-78) In the 2021 Queen Mary University of London (QMUL) / Pinsent Masons survey, furthermore, some interviewees asked about causes of inefficiencies in international construction arbitration suggested that “arbitrators should take a more proactive approach to managing cases, for example by focusing counsel’s minds on key issues before the evidentiary hearing”.[[79]](#footnote-79)

However, formal Arb-Med has had a chequered history. The idea started spreading around IA circles in the early 1990s. It was inspired by the civil law tradition particularly in Germany, Austria and Switzerland, in which judges themselves are expected to actively promote settlement of proceedings – albeit in open session, with all parties present. Arbitrators from those jurisdictions, furthermore often also drawn from among professors, extended this mentality to domestic and then IA proceedings.

In 1990, New South Wales experimented by amending its then (not yet ML based) Commercial Arbitration Act (s27) to allow parties to permit Arb-Med. Yet this innovation was too ahead of its time, and seemingly generated little uptake – or case law.[[80]](#footnote-80) For legal advisors at the time, this Arb-Med procedure seems to have created too much of a perceived conflict with the view of an adjudicator as more of a passive referee among the parties and their advocates, rather than a neutral professional trying to help the parties resolve their dispute by the most appropriate means. Arbitration was also not widely practiced, especially cross-border. Pure or separate mediation, itself, was only starting to gain traction in Australia’s dispute resolution landscape.[[81]](#footnote-81)

Around the same time, Hong Kong experimented by adding to its Arbitration Ordinance (Arts 32 and 33) enacted in 1989 based on the ML for international arbitrations, a provision that allowed for Arb-Med. It required arbitrators whose settlement attempts failed to disclose to the other party, before reverting to their role as arbitrators including finalising the award, any information disclosed in private mediation sessions with the other parties. The aim was to address concerns about such “caucusing” for two sets of principles fundamental, and therefore mandatory, to the ML-based regime: equal treatment of the parties and a full (ie reasonable) opportunity to be heard (Art 20), and independence and impartiality of arbitrators (Art 11). This provision was replicated in Singapore’s International Arbitration Act enacted in 1994, also as an add-on to the ML template.

However, it was hardly ever used in practice, in either jurisdiction. This seems to have remained so even after the Hong Kong Court of Appeal overturned a first-instance judgment that had refused enforcement of a mainland Chinese arbitration award due to public policy objections related to a failed mediation attempt in Xian.[[82]](#footnote-82) Legal advisors and parties seem to have seen the mandatory post-mediation disclosure as undermining the whole point of sharing confidential information in private sessions during the tribunal’s caucusing attempts.

This lack of impact eventually led Singapore to propose an extra model, for parties to adopt. It involved instead separate arbitrators and mediators, even though this creates extra costs and delays compared to having the same person(s) playing both roles as under the statutory scheme. Under an Arb-Med-Arb Protocol launched in November 2014 together with the Singapore International Mediation Centre (SIMC),[[83]](#footnote-83) parties consent to starting an arbitration with SIAC, which is then immediately suspended so the parties can commence a separate mediation through SIMC. If this mediation succeeds, the matter goes back to SIAC so its arbitrators can issue a consent award on the agreed settlement terms. If unsuccessful, the arbitrators resume proceedings and issue an award. From the SIMC’s launch until 2018 ‘approximately one-fifth of more than fifty mediation that it has administered used the AMA Protocol’,[[84]](#footnote-84) indicating some but not overwhelming success. (Nonetheless, in 2023 the SIMC and SICC launched a similar Litigation-Mediation-Litigation Protocol.[[85]](#footnote-85))

Enacted over 2010-2017, Australia’s new uniform ML-based CAA legislation (s27D) adopted a further add-on. Parties may authorise Arb-Med by the same neutral(s), and then if caucusing occurs any such confidential information must be disclosed as is considered material before resuming the arbitration proceedings (as under Hong Kong and Singaporean law). As an additional safeguard, however, the parties must provide a further consent if the mediation attempts are unsuccessful before the neutral(s) may resume the arbitration. Some case law[[86]](#footnote-86) and anecdotal evidence suggests there has been some use of this statutory “dual-consent” model, but not much.[[87]](#footnote-87) A disadvantage is that it could be used by a cunning respondent to torpedo the arbitration by withholding the second consent and forcing appointment of a different arbitrator to restart the arbitration.

The committee drafting the ACICA Arbitration Rules (on which I have served since 2004) tried to partially ameliorate that problem by proposing revisions for the 2021 Rules that were modelled on the CAA legislation, but adding an extra provision. If when parties gave their initial consent to Arb-Med a “back-up arbitrator” would be appointed, to save time by stepping in if the second consent was not forthcoming. However, these Arb-Med provisions in the Draft Exposure Rules did not gain enough public support to include ultimately in the 2021 ACICA Arbitration. Future Rules might nonetheless include them as separate opt-in provision (not as an automatic part that parties would then have to opt-out of as with other Rules). Meanwhile, parties could adapt them as Arb-Med provisions in individual contracts, although there could be a risk that ACICA would not appoint a back-up arbitrator.[[88]](#footnote-88) Adopting the dual-consent model, albeit quite conservative and not generally preferred by commentators,[[89]](#footnote-89) should insulate the process from challenges based on public policy associated with perceived partiality or lack of equality towards all parties, given its acceptance by Australian legislatures for even domestic arbitrations. However, it would be preferable for the federal government to respond to repeated calls to engage in public consultations to legislate some Arb-Med provisions in the IAA.[[90]](#footnote-90)

Yet another Arb-Med model worth considering, and being aware of especially in our regional context, is still practiced quite often in Japan – reflecting a tradition of judges also actively encouraging settlement, indeed even in private sessions with each party.[[91]](#footnote-91) The ML-based Arbitration Act 2003 and the JCAA Rules merely reiterate that the tribunal can only engage in Arb-Med if the parties expressly provide consent. But a common practice then has been for the parties to agree further with the tribunal that any information disclosed privately will not be used when reverting to arbitration if settlement attempts fail. Even some from the Anglo-American lawyering tradition have been pleasantly surprised with the usefulness of this approach.[[92]](#footnote-92) However, a disadvantage in practice could be proving to a supervisory or award enforcement court that this party undertaking was violated by the tribunal reverting to arbitration after the failed arbitration. Furthermore, the question has been raised whether the unadulterated ML Art 24(3), requiring a party to simultaneously disclose to other parties all information provided to the tribunal, should be considered mandatory because the principle is so inherent to the concept of an arbitration.[[93]](#footnote-93)

A final possibility is to sidestep issues around arbitrator bias, unequal treatment of parties and related public policy objections by conducting Arb-Med in open session. This was the primary proposal in the 2009 Centre for Effective Dispute Resolution (CEDR) report and Rules for the Facilitation of Settlement in International Arbitration. That was spearheaded by eminent Swiss arbitrator and professor Gabriel Kaufmann-Kohler and former senior English judge Harry Wolff, trying to bridge the common law / civil law divide.[[94]](#footnote-94)

The New Zealand International Arbitration Centre (NZIAC) 2018 Arb-Med Rules adopt this approach. Article 33.4 requires all information provided to the tribunal by a party to be extended simultaneously to the other parties and the NZIAC Registrar.[[95]](#footnote-95) This is consistent with the first-instance decision of the High Court of New Zealand J in *Acorn Farms Ltd v Schnuriger*,[[96]](#footnote-96) where Fisher J held that the arbitrator/mediator could not receive information without the other parties being present, and this therefore prevented break-out or caucusing sessions to facilitate settlement. That approach may appear more consistent with Fisher J’s earlier decision in [*Trustees of Rotoaira Forest Trust v Attorney-General*](https://advance.lexis.com/api/document/collection/cases-nz/id/5BBH-R6T1-JFSV-G25Y-00000-00?cite=Trustees%20of%20Rotoaira%20Forest%20Trust%20v%20Attorney%20-%20General%20%5B1999%5D%202%20NZLR%20452&context=1230042&icsfeatureid=1517128&federationidp=TZRTHJ54655), often cited in subsequent cases.[[97]](#footnote-97) Fisher J outlined that each party should be able to “understand, test and rebut its opponent’s case” and “the arbitrator will normally be precluded from taking into account evidence and argument extraneous to the hearing without giving the parties further notice” – extending also to “the arbitrator’s own opinions and ideas if these are not reasonably foreseeable as potential corollaries”. However, these principles were subject to various qualifications, including “the absence of express or implied agreement to the contrary”, with the overall task being to ensure a reasonable party “would not have foreseen the possibility of reasoning of the type revealed in the award, and further that with adequate notice it might have been possible to persuade the arbitrator to a different result”.[[98]](#footnote-98) This might give more comfort to parties or institutions seeking to authorise Arb-Med including at least some caucusing, without simultaneous or even subsequent disclosure of information provided to the tribunal. However, legislative reform would be preferable also in New Zealand, yet arb-med seems to have attracted very little discussion.[[99]](#footnote-99)

Meanwhile, caucusing does raises extra risks. They are highlighted by a recent ICC *Report on Facilitating Settlement in International Arbitration* (July 2023). It nonetheless provides some further general encouragement for Arb-Med, and related strategies to address problems of costs and delays in IA.[[100]](#footnote-100)

Overall, therefore, despite the promise of developing same-neutral Arb-Med particularly as IA has spread East from traditional Western core (described in Part 2 above), it has not borne much fruit.[[101]](#footnote-101) This tracks the renewed formalisation of IA (outlined in Part 3), including the growing numbers of challenges concerning arbitrator neutrality.[[102]](#footnote-102) Mainland China remains the only major jurisdiction for IA where Arb-Med is actively encouraged and practiced – probably still in a large minority of cases.[[103]](#footnote-103) Even in the largest institution, CIETAC, amendments to its Rules have allowed the institution’s staff to be agreed upon for Arb-Med rather than the arbitrators (Art 43 of the CIETAC Arbitration Rules), and for the arbitration to be suspended while mediation is attempted (i.e. separately). At least until a decade ago, arbitration through the JCAA often involved Arb-Med – especially when parties or counsel came from Japan or other civil law jurisdictions – but it is premised on clearer advance consent. The JCAA and other newer arbitration institutions are not actively promoting Arb-Med as a selling point for their services, although specific techniques for pro-active settlement facilitation by the tribunal are incorporated into the JCAA’s 2019 Interactive Arbitration Rules outlined above (Part 3).

In Taiwan, despite a significant tradition of court-annexed mediation and the expansion of other hybrid dispute resolution mechanisms, it seems that the Chinese Arbitration Association International neither encourages nor discourages Arb-Med by tribunals.[[104]](#footnote-104) It is also not provided for or mentioned in the Rules and/or comparatively successful promotional efforts by the KCAB, and more recently the Seoul International Dispute Resolution Center. This is despite one commentator writing in 2022 that the KCAB itself quite often provided informal settlement facilitation (*alseon*) before formal arbitration proceeds,[[105]](#footnote-105) particularly for domestic cases and with the practice declining for international arbitrations especially in recent years. Arb-Med by the same third-party neutral is seemingly not practised in Hong Kong or Singapore, and rarely in Australia even in domestic arbitrations, but remains pervasive in jurisdictions following the German tradition (albeit without caucusing).

Perhaps due to Arb-Med accordingly not spreading much world-wide, there has also been little cross-over or even discussion of its potential in ISA.[[106]](#footnote-106) Another reason for that could be the greater amounts in dispute and complexity or growing political ramifications of cross-border investor-state claims. Nonetheless, a significant proportion of ISDS arbitrations involve SMEs.[[107]](#footnote-107) They, or smaller-value disputes even involving larger firms or host states with small economies and budgets for lawyers, may still find Arb-Med to have some attractions even in ISA.

**5. The Rise of Multi-tiered Dispute Resolution Clauses**

In contrast to the fall or at least stagnation in Arb-Med, the use of multi-tiered dispute resolution clauses seems to have grown significantly over the last 15 years, especially recently and at least at an aggregate level globally.[[108]](#footnote-108) For example, in this first QMUL survey report published in 2006, respondents’ preferred mechanism for resolving international disputes was arbitration alone (29%) or IA with ADR (44%, which the survey designers understood as a “multi-tiered, or escalating, dispute resolution process”.[[109]](#footnote-109) In the 2021 QMUL survey with White & Case, the preferred post-COVID mechanism was IA alone (31%) but mostly IA with ADR (59%). The editors remarked that this was consistent with a trend observed over the surveys and related interviews, and that:[[110]](#footnote-110)

“interviewees noted that recourse to ADR was in the hope that a swifter and more cost efficient resolution could be found before resorting to arbitration. In many cases, there is a contractual mandate to use ADR, typically through multi-tiered escalation clauses. Even when there is no contractual requirement to do so, interviewees confirmed a willingness to explore suitable alternatives to resolve disputes. This explains opting for ‘arbitration together with ADR’ for the purposes of this question as opposed to arbitration as a standalone option.”

In other words, the QMUL surveys have not singled out advance consent to med-arb or other multi-tiered dispute resolution. Yet the trajectory and interviews do suggest greater awareness, preference and use of such clauses world-wide. This may reflect some belated cross-fertilisation of multi-tiered dispute resolution clauses from domestic settings, at least in some countries, including where the government is a counterparty and subject to growing scrutiny from the public (as taxpayers) to minimise burgeoning legal fees and other project-related costs.[[111]](#footnote-111)

There remain concerns that requiring mediation before arbitration may not always be effective, mainly because the parties lack sufficient information to frame settlement negotiations. The question of optimal timing for the mediation will indeed likely depend on the case, as the July 2023 ICC Report suggests. Yet even if initially unsuccessful, the mediator can be kept on call, resuming mediation at a later stage of the arbitral proceedings. This is similar to what the Report calls “ongoing parallel mediation”,[[112]](#footnote-112) with some parallels seen occasionally in domestic disputes and very occasionally in international disputes.[[113]](#footnote-113) Furthermore, even if some mandatory early referrals to mediation fail, some do succeed, which is presumably why we see parties even now in cross-border parties increasingly using multi-tiered dispute resolution clauses.

Nonetheless, here too there remain regional and country-level differences. It seems that med-arb clauses are more typically found in cross-border contracts concluded by at least one party (assisted by local lawyers) from jurisdictions with now-pervasive practices of privately-supplied mediation services (such as Australia, Hong Kong and Singapore[[114]](#footnote-114)). This can be contrasted, for example, with a Korean survey in 2017 inspired by the QMUL studies: only 8% of respondents (seemingly Korean companies in particular) reported preferring using ‘international arbitration and ADR’ to resolve international disputes.[[115]](#footnote-115) Med-Arb clauses also seem far less commonly proposed or incorporated by parties from Japan, Malaysia, India or China.[[116]](#footnote-116) (However, Japanese firms do often agree to clauses providing first for good faith negotiations, then sometimes arbitration; and, albeit to a lesser extent nowadays than in China, they are familiar with tribunals being authorised to engage in Arb-Med.)

Such disparities help explain why there have been so few ratifications of the 2019 Singapore Mediation Convention. There is less pressing need if a state’s companies are comparatively less likely to incorporate med-arb clauses.[[117]](#footnote-117) In turn, this may underpin the paucity of med-arb clauses in investment treaties, along with the greater value, complexities and/or political ramifications of associated ISDS claims compared to commercial disputes ending up in ICA. However, another reason could be that investment treaties were signed mostly decades ago, long before commercially-supplied mediation services became prevalent in domestic dispute resolution in many countries due mainly to escalating costs and delays in civil litigation. As concerns about over-formalisation of ISA are becoming even more acute, and new treaties are being negotiated or renegotiated, states may therefore start to incorporate more provisions requiring mediation before arbitration of investment claims. Already, international bodies like UNCTAD, UNCITRAL and ICSID are starting to promote mediation of investment claims.[[118]](#footnote-118) In 2019, compulsory med-arb provisions were included in investment treaties signed between Australia and Indonesia,[[119]](#footnote-119) as well as Hong Kong and the United Arab Emirates.[[120]](#footnote-120)

The tendency to incorporate med-arb and other multi-tiered dispute resolution clauses in cross-border contracts nonetheless been growing overall. Yet this has not yet carried over much into investment treaty (re)drafting, and therefore ISDS practice. By contrast, there has been an interesting cross-fertilisation partly from ISA into the sphere of ICA recently. Until a decade or so ago, a major concern of courts faced with negotiation-arbitration or med-arb clauses in commercial contracts, especially in common law jurisdictions, was whether the negotiation or mediation obligations were sufficiently certain to create contractual obligations.[[121]](#footnote-121) A Singaporean judgment decided a decade ago, involving a negotiation-mediation-arbitration clause, gave an affirmative answer and further held that completion of each pre-arbitration step was a precondition to a valid arbitration process.[[122]](#footnote-122) The Singaporean High Court cited a Court of Appeal decision also from 2012 that had held enforceable the contractual provisions mandating good faith negotiations between the parties, noting moreover that:[[123]](#footnote-123)

“the “friendly negotiations” and “confer in good faith” clauses … are consistent with our cultural value of promoting consensus whenever possible. Clearly, it is in the wider public interest in Singapore as well to promote such an approach towards resolving differences.”

A contemporaneous commentator contrasted a judgment of the English High Court that year.[[124]](#footnote-124) Darius Chan noted that Hilyard J held that a rather similar multi-tiered dispute resolution clause was too equivocal in terms of the process required and too nebulous in terms of the content of the parties’ respective obligations to be given legal effect as an enforceable condition precedent to arbitration.[[125]](#footnote-125)

However, in [*BBA and others v BAZ and another appeal*](https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/ca-9-10-bba-v-baz---final-judgment-v7-9-290520-%28locked%29-pdf.pdf),[[126]](#footnote-126) the Singapore Court of Appeal, in refusing to set aside an arbitral award, held that issues of time bar due to statutory limitation periods go instead towards admissibility of the claimsand not jurisdiction of the arbitral tribunal. Iris Ng noted that such issues accordingly cannot be reviewedby the seat court under Singapore law (challenging the award), as its ML regime for IA precludes challenges based on merits review, and that the Court adopted the “tribunal versus claim” test that queries:[[127]](#footnote-127)

“whether the objection is targeted at the tribunal (in the sense that the claim should not be arbitrated due to a defect in or omission to consent to arbitration), or at the claim (in that the claim itself is defective and should not be raised at all). … In the former case the objection goes towards jurisdiction, and in the latter case, towards admissibility.”

Ng further wondered how Singaporean and other courts might address instead contractually-agreed time bar provisions, suggesting that under the “tribunal versus claim” test the results would likely depend on the arbitration agreement’s wording:[[128]](#footnote-128)

“It may be framed similarly to statutes of limitations, adopting wording such as “no claim shall be brought” or “all claims shall be dismissed” after a specified period. If so, there is no indication that the bringing of time-barred claims is something the parties did not consent to, and the time limit would be construed as targeting the claim and thus a matter of admissibility. Some support for this outcome is found in the Hong Kong Court of Appeal’s decision in [Grandeur Electricity Co Ltd v Cheung Kee Fung Cheung Construction Co Ltd](https://www.austlii.edu.au/cgi-bin/LawCite?cit=%5b2006%5d%20HKCA%20305) which held that the application of a contractual time bar was for the tribunal to rule on.

The arbitration clause may also contain “eligibility requirements, prohibiting arbitrators from hearing claims more than a fixed number of years after the alleged wrong occurred”. Such requirements might be construed as restricting the right to arbitrate by defining the scope of consent, and could conceivably be regarded as jurisdictional.”

Darius Chan agrees with putting emphasis on the wording used, along also with Dr Michael Hwang. Absent sufficiently clear wording, however, Chan suggests that Singapore should follow the award creditor’s argument in the *C v D* litigation then pending in Hong Kong: the presumption should be in favour of admissibility rather than jurisdiction.[[129]](#footnote-129)

That approach was indeed where the Hong Kong Court of Final Appeal landed in its later judgment rendered on 30 June 2023.[[130]](#footnote-130) It referred to the Singapore Court of Appeal’s decision in *BBA v BAZ*, but more pertinently case law from England and Australia involving contractually-agreed limitations,[[131]](#footnote-131) to conclude that compliance with an agreed pre-arbitration step (such as negotiations, in this case) should generally go to admissibility rather than jurisdiction. Some commentators warmly welcomed the decision, arguing it will:[[132]](#footnote-132)

“further underscore Hong Kong’s reputation as a pro-arbitration jurisdiction, where the courts will be slow to interfere with decisions of arbitrators absent compelling circumstances.  The decision also places Hong Kong firmly in line with international arbitration hubs, such as England & Wales and Singapore.”

Whether this is true for Singapore will need to await a case involving a contractually agreed negotiation or mediation step prior to arbitration. Ideally then a precedent should be established by Singapore’s Court of Appeal, given the 2012 High Court judgment holding that such steps are instead pre-conditions to arbitral jurisdiction. Furthermore, although the *C v D* judgment in Hong Kong and others elsewhere in similar vein can indeed be seen as “pro-arbitration” in that they give deference to the tribunal to rule of admissibility, the alternative of treating the pre-arbitration steps as pre-conditions to arbitral jurisdiction could be seen as “pro-ADR”. The latter description is apposite because they give more role for the courts to ensure that agreed procedures like good faith negotiations at various levels or mediation are properly interpreted and applied by parties and their legal advisors. Singapore and other jurisdictions are now in the business of promoting not just cross-border arbitration but also other ADR mechanisms, especially mediation.

A more nuanced solution is probably needed. The outcome should first depend on the *wording* chosen by the parties, as mentioned above by Iris Ng and by other commentators and courts.[[133]](#footnote-133) Arbitral institutions could assist by redrafting their model med-arb clauses, for example, yet curiously they do not appear to have done so.[[134]](#footnote-134) This may be because they mostly derive their income from arbitrations rather than mediations, so want to leave open the admissibility approach to favour the arbitral process.

Secondly, the outcome might usefully vary depending on the *type of pre-arbitration step* agreed by the parties. For a vaguer and less costly “good faith negotiation” requirement, the general principle could be that this goes to admissibility of claims, so the tribunal decides on compliance with the step. For a requirement instead that specific mediation rules should first be followed, the general principle could be instead that this goes to jurisdiction. Accordingly, the courts could ultimately decide whether the mediation was done properly (perhaps after the tribunal is formed and rules on its own jurisdiction under the competence-competence principle under ML Art 16 or equivalents).

Thirdly, the approach and outcome could vary depending on *when* the issue of compliance with the pre-arbitration steps was enlivened. If raised early in the dispute, when one party seeks a stay of proceedings to proceed to arbitration but the other alleges the tribunal has no jurisdiction because earlier steps such as mediation were pre-conditions, the matter can be resolved quite efficiently by courts.[[135]](#footnote-135) (Case law and commentary on this point too, however, appears quite inconclusive.[[136]](#footnote-136)) By contrast, if the complaint is raised at the award stage, efficiency would favour treating the issue as going to admissibility of claims. A main consequence would be that the arbitrator’s decisions on whether prior steps were complied with would not be struck down as erroneous by courts, thereby triggering a whole new arbitration process.[[137]](#footnote-137)

Fourthly, where one falls on this still open question could depend on *how widespread* a commercial mediation process is in the relevant state. If already extensive, there should be less value in courts retaining scope to review the arbitrators’ decisions on whether mediation was correctly carried out. If not extensive, however, court supervision may be more justified. This assessment may also then evolve over time: a state may begin with an approach that sees the mediation step compliance as going to arbitral jurisdiction at first, but switch to the admissibility approach as commercial mediation becomes more widely practiced and understood by parties, counsel and mediators. Such a progression may be particularly useful for countries still lagging in using commercially-supplied mediation services (such as Japan, Korea or India), compared to those where they are already widespread (like Singapore, Hong Kong and Australia).

Concluding with a point made early in this Part, it is worth noting that this question of “admissibility vs jurisdiction” in ICA recently is impacted not only by private international law, but also some cross-fertilisation through developments and discussions in ISA – in turn influenced by public international law discussions and developments. Quite a few ISA awards and related secondary literature have grappled with the question of whether investment treaty obligations on disputing parties requiring first to pause and/or negotiate in good faith go to admissibility or jurisdiction. Some leading commentators observe, for example, that:[[138]](#footnote-138)

“The reaction of tribunals to [investment treaty] provisions requiring an attempt at amicable settlement before the institution of arbitration has not been uniform. In the majority of cases, the tribunals found that the claimants had complied with these waiting periods before proceeding to arbitration.

In other cases, the tribunals found that non- compliance with the waiting periods did not affect their jurisdiction. Some tribunals found that the non- observance of the waiting period was inconsequential since further negotiations would have been pointless. Some tribunals found that waiting periods for amicable settlement were merely procedural and not a condition for jurisdiction. …

 Some tribunals have found that waiting periods need not necessarily be complied with prior to initiating proceedings but can be fulfilled before the tribunal makes a decision on its jurisdiction.

Other tribunals have reached a different conclusion [by deciding the arbitration filing was premature]. …”

More normatively, these commentators suggest that:[[139]](#footnote-139)

“the decisive question is whether there was a promising opportunity for a settlement. There will be little point in declining jurisdiction and sending the parties back to the negotiating table if negotiations are obviously futile. Even if the institution of arbitration was premature, the waiting period will often have expired by the time the tribunal is ready to make its decision on jurisdiction. Under these circumstances, declining jurisdiction and compelling the claimant to start the proceedings anew would be uneconomical. An alternative way to deal with non- compliance with a waiting period is a suspension of proceedings to allow additional time for negotiations if these appear promising.”

This longstanding debate within the world of ISA also seems to be finding its way into and potentially influencing national courts. Indeed, Iris Ng noted that an alternative to the “claim vs tribunal” test was the “presumed party intentions” test propounded by the United States Supreme Court in [BG Group Plc v Republic of Argentina](https://www.italaw.com/sites/default/files/case-documents/italaw3115.pdf),[[140]](#footnote-140) although Ng sides with commentary suggesting that the alternative test is not so helpful when transposed into the field of time bars.

More broadly in ISA, for example, the distinction between admissibility and jurisdiction is currently being explored to find more nuanced solutions in another context. That problem is how best to deal with situations where a foreign investor’s ISDS claim against a host state was procured by acceding to a request for bribes from officials in a host state, which nonetheless asserts a complete defence to substantive treaty claims due to lack of jurisdiction under the treaty.[[141]](#footnote-141) Developments regarding this question may also end up provide productive cross-fertilisation from ISA into ICA, as courts and tribunals increasingly grapple with the implications of burgeoning multi-tiered dispute resolution clauses.

**6. Conclusions: Good, Bad or Ugly?**

We live in a complex world. IA has been a great success story, spreading worldwide and underpinning burgeoning cross-border trade and investment. Yet it is struggling again with growing delays and especially costs. This undermine its legitimacy as IA has features that detract somewhat from rule of law values (like predictable application of law to facts).[[142]](#footnote-142) Some backlash against ISA generally may also be spreading to at least some forms of ICA.[[143]](#footnote-143) The COVID-19 pandemic from 2020 forced legal advisors and arbitrators to take up the technology for remote hearings, opening up the possibility of significant and enduring time and cost efficiencies.[[144]](#footnote-144) Yet in-person hearings and even meetings seem likely to keep re-emerging in IA.[[145]](#footnote-145)

 ICA has been helpfully cross-fertilised by the corresponding growth of mediation, first domestically and then internationally. However, this has mostly occurred by parties adopting med-arb and other multi-tiered dispute resolution clauses in commercial contracts, rather than authorising Arb-Med whereby arbitrators formally act also as mediators. The conceptual distinction between admissibility and jurisdiction to address problems about non-compliance with the pre-arbitration steps in such clauses is partly inspired by some cross-fertilisation from ISA, which could help result in some nuanced compromise solutions. Some may also welcome the growing transparency around ISA leading to less confidentiality around ICA, but others may see any such latter tendency as risking further over-formalisation of dispute resolution among commercial parties. Even less salutary may be the spread of soft law instruments, like the IBA Guidelines on arbitrator neutrality, spreading from ICA into the ISA world without taking into account the greater public interests involved in ISA.

What this Address has tried to show, nonetheless, is that cross-overs are already happening among ICA, ISA and international mediation. International law experts have also analysed recently the growing cross-fertilisation among international courts, somewhat assuaging fears about the fragmentation of international law that surfaced from the 1990s, although recently concerns have emerged again on that score.[[146]](#footnote-146) It also seems that there is more convergence regarding procedural than substantive international law, arguably linked to the need for many procedural decisions to be made amidst considerable discretion afforded, as well as the still quite small numbers of individuals and organisations involved in and around such forums.[[147]](#footnote-147) This Address has shown that crossovers among IA and international mediation seem to be accelerating too. There should be ongoing scrutiny of the pros and cons of examples identified (and doubles others[[148]](#footnote-148)), particularly from the perspective of reducing costs and delays. This cross-fertilisation needs to be tracked and then channelled into the most productive interactions for the overall system of international commercial dispute resolution.[[149]](#footnote-149)

1. # I am grateful for the invitation from the Australian Disputes Centre for the invitation to present this annual public lecture and to the Chief Justice of New South Wales, the Hon Andrew Bell, for hosting this series. For editorial and research assistance I thank Kim Nguyen and especially James Tanna. For helpful information and/or feedback on earlier drafts I thank Giorgio Colombo, Robert French, Catherine Green, Michael Hwang, Amokura Kawharu, Joshua Paine, Stacie Strong, Julie Ward, Marilyn Warren, Man Yip; and especially Julien Chaisse, Richard Garnett, Joongi Kim and Wayne Martin. Any remaining misconceptions or errors remain my sole responsibility. [↑](#footnote-ref-1)
2. \* Professor of Comparative and Transnational Business Law, University of Sydney Law School; Special Counsel, Williams Trade Law. [↑](#footnote-ref-2)
3. See, eg, Michael Hwang, ‘Commercial Courts and International Arbitration—Competitors or Partners?’ (2015) 31(2) Arbitration International 193; James Allsop and Samuel Walpole, ‘International Commercial Dispute Resolution as a System’ in Sundaresh Menon and Anselmo Reyes (eds) *Transnational Commercial Disputes in an Age of Anti-Globalism and Pandemic* (Hart 2022) 43; Franco Ferrari and Friedrich Rosenfeld, ‘Deference in International Commercial Arbitration: Setting the Stage’ in Franco Ferrari and Friedrich Rosenfeld (eds), *Deference in International Commercial Arbitration* (Wolters Kluwer, 2023) 3. [↑](#footnote-ref-3)
4. But see recently Stavros Brekoulakis, ‘The Historical Treatment of Arbitration under English Law and the Development of the Policy Favouring Arbitration’ (2019) 39(1) *Oxford Journal of Legal Studies* 124. [↑](#footnote-ref-4)
5. Megan Richardson, ‘Arbitration Law Reform: The New Zealand Experience’ (1996) 12 *Arbitration International* 57. [↑](#footnote-ref-5)
6. Luke Nottage and Richard Garnett, ‘Introduction’ in Luke Nottage and Richard Garnett (eds), *International Arbitration in Australia* (Federation Press, 2010) 32, Appendix I, comparing case filing numbers in ACICA compared to other arbitral institutions over that period. ACICA does not publicise annual filings like most other institutions but in 2022 reported small step-ups in filings over 2011-2017 (3-8 cases filed annually) and 2018-2021 (12-16 annually). See ACICA, ‘Reflections on the Last Decade of Activity at the Australian Centre for International Commercial Arbitration’ (2022) <<https://acica.org.au/wp-content/uploads/2022/11/ACICA_Reflections-WFF1.pdf>>, 23. [↑](#footnote-ref-6)
7. Mark Bezant and James Nicholson, ‘International Arbitration After the Pandemic’, *FTI Consulting* <<https://www.fticonsulting.com/insights/reports/international-arbitration-after-pandemic>> 7 (Table 1). [↑](#footnote-ref-7)
8. Draft revisions publicised in 2021 will allow ad hoc arbitrations but only in foreign-related disputes. See Ming Liao, ‘The Turn to Fact or Fiction: Ad Hoc Arbitration in the Draft Amendment to PRC Arbitration Law’, *Kluwer Arbitration Blog* (Blog Post, 24 October 2021) <<https://arbitrationblog.kluwerarbitration.com/2021/10/24/the-turn-to-fact-or-fiction-ad-hoc-arbitration-in-the-draft-amendment-to-prc-arbitration-law/>>. [↑](#footnote-ref-8)
9. Kun Fan, ‘Beyond Law and Politics: Judicial Mediation in China’ (2023) *Journal of International Dispute Settlement* 1. [↑](#footnote-ref-9)
10. See ‘2022 Stattistic’, *VIAC* (Web Page) <<https://www.viac.vn/en/statistics/2022-stattistic-s41.html>>. [↑](#footnote-ref-10)
11. It recorded 9 international and 67 domestic arbitration filings in 2022. See ‘2022 Annual Report’, *AIAC* (Report) <<https://admin.aiac.world/uploads/ckupload/ckupload_20230501125726_30.pdf>> 19. [↑](#footnote-ref-11)
12. Joongi Kim, ‘Arbitration Reform in Korea: At the Threshold of a New Era’ in Anselmo Reyes and Weixia Gu (eds), *The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia Pacific* (Hart, 2018) 109. [↑](#footnote-ref-12)
13. Anselmo Reyes and Weixia Gu, ‘Introduction: Towards a Model of Arbitration Reform in Asia Pacific’ in Anselmo Reyes and Weixia Gu (eds), *The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia Pacific* (Hart Publishing, 2018) 1. [↑](#footnote-ref-13)
14. James Claxton, Luke Nottage, and Nobumichi Teramura, ‘Developing Japan as a Regional Hub for International Dispute Resolution: Dream Come True or Daydream?’ (2019) 47(1) *Journal of Japanese Law* 109. [↑](#footnote-ref-14)
15. Philip McConnaughay, ‘Rethinking the Role of Law and Contracts in East-West Commercial Relationships’ (2001) 41(2) *Virginia Journal of International Law* 427. Compare also, eg, Eugene KB Tan, ‘Harmony as Ideology, Culture, and Control: Alternative Dispute Resolution in Singapore’ (2007) 9(1) *The Australian Journal of Asian Law* 120. [↑](#footnote-ref-15)
16. Anselmo Reyes and Weixia Gu, ‘Introduction: Towards a Model of Arbitration Reform in Asia Pacific’ in Anselmo Reyes and Weixia Gu (eds), *The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia Pacific* (Hart Publishing, 2018) 1. [↑](#footnote-ref-16)
17. Gary F Bell (ed), *The UNCITRAL Model Law and Asian Arbitration Laws: Implementation and Comparisons* (Cambridge University Press, 2018). [↑](#footnote-ref-17)
18. Luke Nottage, ‘Deference from National Courts to Tribunals on Issues of Procedure at the Post-Award Stage’ in Franco Ferrari and Friedrich Rosenfeld (eds), *Deference in International Commercial Arbitration* (Wolters Kluwer, 2023) 141. See also, more generally, Dean Lewis, ‘*The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration: Focusing on Australia, Hong Kong and Singapore*’ (Kluwer Law International, 2016), reviewed at <<https://japaneselaw.sydney.edu.au/2017/04/book-review-dean-lewis-the-interpretation-and-uniformity-of-the-uncitral-model-law-on-international-commercial-arbitration/>>. [↑](#footnote-ref-18)
19. Hiro Aragaki, ‘Arbitration Reform in India: Challenges and Opportunities’ in Anselmo Reyes and Weixia Gu (eds), *The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia Pacific* (Hart Publishing, 2018) 221. [↑](#footnote-ref-19)
20. Subhiksh Vasudev, ‘The 2019 amendment to the Indian Arbitration Act: A classic case of one step forward two steps backward?’, Kluwer Arbitration Blog (Blog Post, 25 August 2019) <<https://arbitrationblog.kluwerarbitration.com/2019/08/25/the-2019-amendment-to-the-indian-arbitration-act-a-classic-case-of-one-step-forward-two-steps-backward/>>. Compare, eg, regarding some earlier Australian developments, Albert Monichino, ‘Arbitration Downunder - Two Steps Forward, One Step Back’ (2016) 169(1) *Australian Construction Law Newsletter* 28. [↑](#footnote-ref-20)
21. Such as Arbitration or ADR weeks, even recently in India: see ‘India ADR Week 2023’, *India ADR Week 2023* (Web Page) <<https://www.adrweek.in/>>. [↑](#footnote-ref-21)
22. Yves Dezalay and Byrant Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press, 1996). [↑](#footnote-ref-22)
23. Notably China, see, eg, Matteo Vaccaro-Incisa, *China’s Treaty Policy and Practice in International Investment Law and Arbitration* (Brill | Nijhoff, 2021). [↑](#footnote-ref-23)
24. ‘Database of ICSID Member States’, *International Centre for Settlement of Investment Disputes* (Web Page) <<https://icsid.worldbank.org/about/member-states/database-of-member-states>>. [↑](#footnote-ref-24)
25. ‘Investment Dispute Settlement Navigator’, *United Nations Conference on Trade and Development* (Web Page, 31 December 2021) <<https://investmentpolicy.unctad.org/investment-dispute-settlement>>. [↑](#footnote-ref-25)
26. Luke Nottage and Romesh Weeramantry, ‘Investment Arbitration in Asia: Five Perspectives on Law and Practice’ (2012) 28(1) *Arbitration International* 19. [↑](#footnote-ref-26)
27. See, eg, ‘Foreign Investment Ombudsman’, *Office of the Foreign Investment Ombudsman (Korea)* (Web Page) <<https://ombudsman.kotra.or.kr/ob-en/index.do>>; Nguyen Ngoc Minh and Nguyen Thi Mai Anh, ‘Vietnam’, *Global Arbitration Review* (Blog Post, 27 May 2022) <<https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2023/article/vietnam>>. [↑](#footnote-ref-27)
28. Compare, eg, Luke Nottage and Sakda Thanitcul, ‘An Introduction - Special Issue: International Investment Arbitration in Southeast Asia’ (2017) 18(5-6) *Journal of World Investment & Trade* 767 with Luke Nottage and Amokura Kawharu, “Has ISDS Gone Rogue for Australia and New Zealand? CPTPP (C-3PO), RCEP (R2-D2) and Beyond” *Yearbook on International Investment Law and Policy* (Oxford University Press, 2017) 536 and Luke Nottage, ‘Australia’s (Dis)Engagement with Investor-State Arbitration: A Sequel’, *Kluwer Arbitration Blog* (Blog Post, 21 December 2022) <<https://arbitrationblog.kluwerarbitration.com/2022/12/21/australias-disengagement-with-investor-state-arbitration-a-sequel/>>. [↑](#footnote-ref-28)
29. See, eg, Prabhash Ranjan and Pushkar Anand, ‘Investor State Dispute Settlement in the 2016 Indian Model Bilateral Investment Treaty: Does it Go Too Far?’ in Julien Chaisse and Luke Nottage (eds), *International Investment Treaties and Arbitration Across Asia* (Brill, 2018) 579; Antony Crockett, ‘The Termination of Indonesia’s BITs: Changing the Bathwater, but Keeping the Baby?’ in Julien Chaisse and Luke Nottage (eds), *International Investment Treaties and Arbitration Across Asia* (Brill, 2018) 159. [↑](#footnote-ref-29)
30. See, eg, Anthea Roberts, ‘Investment Treaties: The Reform Matrix’ (2018) 112(1) *American Journal of International Law* 191. [↑](#footnote-ref-30)
31. Yves Dezalay and Bryant Garth, *Dealing in Virtue International Commercial Arbitration and the Construction of a Transnational Legal Order* (The University of Chicago Press, 1996). [↑](#footnote-ref-31)
32. Luke Nottage, *International Commercial and Investor-State Arbitration: Australia and Japan in Regional and Global Contexts* (Elgar, 2021) 41-42, 52-86. [↑](#footnote-ref-32)
33. See, eg, Nobumichi Teramura, *Ex Aequo et Bono as a Response to the ‘OverJudicialisation’ of International Commercial Arbitration* (Kluwer Law International, 2020) 14-20; Sundaresh Menon, ‘Arbitration’s Blade: International Arbitration and the Rule of Law' (2021) 38 *Journal of International Arbitration* 1, 18-19; Emma Garrett, 'Interviews with Our Editors: In Conversation with the Hon Wayne Martin AC KC' *Kluwer Arbitration Blog* (Blog post, 10 October 2023) <https://arbitrationblog.kluwerarbitration.com/2023/10/10/interviews-with-our-editors-in-conversation-with-the-hon-wayne-martin-ac-kc/>. [↑](#footnote-ref-33)
34. Luke Nottage, ‘In/formalization and Glocalization of International Commercial Arbitration and Investment Treaty Arbitration in Asia’ in Joachim Zekoll, Moritz Baelz and Iwo Amelung (eds), *Formalisation and Flexibilisation in Dispute Resolution* (Brill, 2014) 211. See also eg Singapore International Dispute Resolution Academy, SIDRA International Dispute Resolution Survey: 2022 Final Report <https://sidra.smu.edu.sg/research-program/international-dispute-resolution-survey/sidra-survey-2022> especially Exhibits 4.2 and 4.3. [↑](#footnote-ref-34)
35. Nottage (n 30) 216, reproduced from Luke Nottage, ‘A Weather Map for International Arbitration: Mainly Sunny, Some Cloud, Possible Thunderstorms’ in Stavros Brekoulakis, Julian Lew and Loukas Mistelis (eds) *The Evolution and Future of International Arbitration* (Wolters Kluwer, 2016) 59, 64. [↑](#footnote-ref-35)
36. Remy Gerbay, ‘Is the End Nigh Again? An Empirical Assessment of the “Judicialization” of International Arbitration’ (2014) 25(2) *American Review of International Arbitration* 223. [↑](#footnote-ref-36)
37. Gordon Smith, ‘Comparative Analysis of Joinder and Consolidation Provisions Under Leading Arbitral Rules’ (2018) 35(2) *Journal of International Arbitration* 173, 187; Luke Nottage, Julia Dreosti and Robert Tang, ‘The ACICA Arbitration Rules 2021: Advancing Australia’s Pro-Arbitration Culture’ (2021) 38(6) *Journal of International Arbitration* 775. [↑](#footnote-ref-37)
38. Stavros Brekoulakis, ‘Parties in International Arbitration: Consent v. Commercial Reality’ in Stavros L Brekoulakis, Julian David Mathew Lew, and Loukas Mistelis (eds), *The Evolution and Future of International Arbitration* (Wolters Kluwer, 2016) 119; Loukas Mistelis and Giammarco Rao, 'The Judicial Solution to the Arbitrator’s Dilemma: Does the ‘Extension’ of the Arbitration Agreement to Non-Signatories Threaten the Enforcement of the Award?' (2022) 39(3) *Journal of International Arbitration* 351. [↑](#footnote-ref-38)
39. See Mark Lewis, *Consolidation and Third-Party Joinder in International Commercial Arbitration - Procedural Panacea or Poison?* (University of Melbourne LLM Minor Thesis, 2023). [↑](#footnote-ref-39)
40. *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514, 540 [66]. [↑](#footnote-ref-40)
41. Richard Garnett, ‘Third Parties and International Commercial Arbitration: Reframing the Debate’ (2023) 47(1) *Melbourne University Law Review* (advance), 154 and 168. He goes on to note that US and Singaporean courts, for example, seem to agree on the philosophical and practical differences between the two scenarios. [↑](#footnote-ref-41)
42. Greater likelihood of inconsistent outcomes through multiple fora also arguably undermines the rule of law. Menon (n 31, 19-22) contends that this accepted as attenuated in IA compared to litigation through courts, but partly because of IA’s relative cost and time efficiencies, yet those are diminishing and this therefore undermines the legitimacy of IA and the rule of law generally. [↑](#footnote-ref-42)
43. Zhengxin Huo and Man Yip, 'Comparing the International Commercial Courts of China with the Singapore International Commercial Court' (2019) 68(4) *International & Comparative Law Quarterly* 903; Marilyn Warren and Clyde Croft, ‘An International Commercial Court for Australia: An Idea Worth Taking to Market’ in Luke Nottage, Shahla Ali et al (eds), *New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution* (Wolters Kluwer, 2021) 39. [↑](#footnote-ref-43)
44. See, eg, SICC list of judgments at <<https://www.sicc.gov.sg/hearings-judgments/judgments>> and, regarding CICC, <<https://cicc.court.gov.cn/html/1/219/211/223/index.html>>. [↑](#footnote-ref-44)
45. Comparing Singapore and Hong Kong for example, see Nadja Alexander, ‘The Emergence of Mediation Law in Asia: A Tale of Two Cities’ (2021) 3 *Transnational Dispute Management* 1. [↑](#footnote-ref-45)
46. Some context and possible reasons for this slow uptake are sketched below (Part 5). Japan will become the 12th state to bring the Convention into force (from April 2024). The only other significant economy and thought leader in international law, at least in Asia, has been Singapore itself. See status at <<https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status>> and compare generally the more optimistic prognosis by Stacie Strong, ‘Promoting International Mediation Through the Singapore Convention on Mediation’ Luke Nottage, Shahla Ali et al (eds), *New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution* (Wolters Kluwer, 2021) 337. [↑](#footnote-ref-46)
47. Shahla F Ali, *Resolving Disputes in the Asia-Pacific Region: International Arbitration and Mediation in East Asia and the West* (Routledge, 2010) 268. (Proceeding with cross-border litigation might be even more lucrative for lawyers, given the possibility of multiple appeals, but is precluded by the growing awareness of and popularity of IA.) [↑](#footnote-ref-47)
48. See, eg, Tom Furlong and Kath Sanger, ‘Inside arbitration: beyond the hourly rate – what are the options?’, *Herbert Smith Freehills* (Legal Briefing, 15 March 2023) <<https://www.herbertsmithfreehills.com/insight/inside-arbitration-beyond-the-hourly-rate-%E2%80%93-what-are-the-options>>. However, little changed after a leader arbitrator’s call over a decade ago to revisit the billable hours approach in IA, in light of growing costs and delays even then: Lucy Greenwood, ‘Keeping the Golden Goose Alive: Could Alternative Fee Arrangements Reduce the Cost of International Arbitration?’ 28(6) *Journal of International Arbitration* 591. [↑](#footnote-ref-48)
49. See, eg, Simon Greenberg, Christopher Kee and J Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press, 2012) 405-7, and (for ISA) Gabriel Bottini et al, ‘Excessive Costs and Recoverability of Cost Awards in Investment Arbitration’ (2020) 21(2-3) *Journal of World Investment & Trade* 251. The sealed offer practice was validated by *Calderbank v Calderbank* [1975] 3 All ER and is now reflected in England for example in *MEF v. St. George's Healthcare NHS Trust* [2020] EWHC 1300 (QB) and in Australia in, eg, *Hazeldene’s Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* [2005] VSCA 298. [↑](#footnote-ref-49)
50. Schedule 1 on “General Arbitration Procedure” states that “The Arbitrator may make such directions or rulings he or she considers appropriate, including in respect of … 10 The service of offers of settlement without prejudice except as to costs”. [↑](#footnote-ref-50)
51. The same provision is found in the New Zealand Dispute Resolution Centre’s 2018 Standard Arbitration Rules (Art 37l.5), available via <https://nziac.com/arbitration/arbitration-rules/standard-arbitration-rules/> and <https://nzdrc.co.nz/arbitration/standard-arbitration-rules/>. [↑](#footnote-ref-51)
52. ICC Commission on Arbitration and ADR, *Effective Conflict Management* (July 2023) via <<https://iccwbo.org/new-report-and-guide-to-drive-thought-leadership-in-dispute-prevention-and-resolution/>>, 39-40. This report further alerts readers (at its n64) to C Seppolo et al, The New Assistance the ICC Provides to Protect the Confidentiality of a Sealed Offer’ [2017-1] *ICC Dispute Resolution Bulletin*. [↑](#footnote-ref-52)
53. But see briefly, eg, Bottini et al (n 47) 269. [↑](#footnote-ref-53)
54. Nottage, Dreosti and Tang (n 35) 790-1. [↑](#footnote-ref-54)
55. Available, along with the other Arbitration Rules cited herein, via ‘Dispute Resolution Rules’, *Resolution Institute* (Web Page) *<*<https://resolution.institute/Web/Web/Public-In-Dispute/Rules-and-Regulations/Rules-and-Regulations.aspx>> (emphasis added). [↑](#footnote-ref-55)
56. Available at ‘Resolution Institute Arbitration Rules 2023’, *Resolution Institute* (Explanatory Note, 2023) <<https://resolution.institute/common/Uploaded%20files/Rules%20and%20Regulations/Arbitration%20Rules%202023%20Explanatory-note%20.pdf>>. [↑](#footnote-ref-56)
57. See Shahla F Ali, *Resolving Disputes in the Asia-Pacific Region: International Arbitration and Mediation in East Asia and the West* (Routledge, 1st ed, 2010) 50, 53; and QMUL surveys summarised in Caroline Kenny, ‘Confidentiality in International Commercial Arbitration: Is It an Accepted Principle; and if so, Should the *Model Law* Regulate It?’ (JSD Thesis, Monash University, 2023) at <<https://bridges.monash.edu/articles/thesis/Confidentiality_in_International_Commercial_Arbitration_Is_it_an_Accepted_Principle_and_if_so_Should_the_Model_Law_Regulate_it_/23294540>>. [↑](#footnote-ref-57)
58. Luke Nottage, Simon Greenberg, and Romesh Weeramantry, ‘The 2005 Rules of the Australian Centre for International Commercial Arbitration – Revisited’ in Luke Nottage and Richard Garnett (eds), *International Arbitration in Australia* (Federation Press, 2010) 79, 91. However, the 2023 Rules of the Asian International Arbitration Centre deem parties to have consented to it publishing awards after two years, unless a party or the tribunal objects (Art 21.5). [↑](#footnote-ref-58)
59. Nottage (n 30) 236-258. [↑](#footnote-ref-59)
60. Nottage (n 16). [↑](#footnote-ref-60)
61. See generally, eg, Klaus Peter Berger and J Ole Jensen, ‘Due Process Paranoia and the Procedural Judgment Rule – A Safe Harbour for Procedural Management Decisions by International Arbitrators’ (2016) 32 *Arbitration International* 415; and recent developments in Singapore outlined in Chiann Bao, ‘Return to Reason: Reining in Runaway Due Process Claims’ (2021) 38 *Journal of International Arbitration* 59. See also Alain Hosang, *Obstructionist Behavior in International Commercial Arbitration* (Eleven 2014). [↑](#footnote-ref-61)
62. Nottage (n 32). [↑](#footnote-ref-62)
63. See ‘Arbitrator Intelligence Reports’, *Wolters Kluwer* (Web Page) <<https://www.wolterskluwer.com/en/solutions/kluwerarbitration/arbitrator-intelligence>>. [↑](#footnote-ref-63)
64. See generally Ana Ubilava, ‘Amicable Settlements in Investor-State Disputes: Empirical Analysis of Patterns and Perceived Problems’ (2020) 21 *Journal of World Investment and Trade* 528-57. [↑](#footnote-ref-64)
65. See generally Thomas Stipanovich, ‘Soft Law in the Organization and General Conduct of Commercial Arbitration Proceedings’ in Lawrence Newman, Michael Radine and Kabir Duggal (eds), *Soft Law in International Arbitration* (Kluwer, 2nd ed, 2021) and also, eg, UNCITRAL’s Notes on Organizing Arbitral Proceedings (1996, revised in 2016) available via ‘UNCITRAL Notes on Organizing Arbitral Proceedings (2016)’, *United Nations Commission On International Trade Law* (Web Page, 2016) <<https://uncitral.un.org/en/texts/arbitration/explanatorytexts/organizing_arbitral_proceedings>>. The IBA – along with UNCITRAL, competition among arbitral institutions, and core individuals (eg in developing arbitration mechanisms for dealing with mass claims) – is identified as a major contributor to procedural convergence in IA by John Crook, ‘Procedural Convergence in International Courts and Tribunals’ in Chiara. Giorgetti & Mark Pollack (eds), *Beyond Fragmentation: Cross-Fertilization, Cooperation and Competition among International Courts and Tribunals* (Cambridge University Press 2022) 87. [↑](#footnote-ref-65)
66. See, eg, QMUL Survey 2015 Charts 31 and 32, via ‘Research’, *Queen Mary* *University of London School of International Arbitration* (Web Page) <<https://arbitration.qmul.ac.uk/research/>>. The IBA instruments can be found via ‘IBA guides and reports’, *International Bar Association* (Web Page) <<https://www.ibanet.org/resources>>. On arbitrator neutrality, see generally Margaret Beazley, [“Conflicts of Interest in Commercial Arbitration”](https://disputescentre.com.au/adr-address-supreme-court-of-nsw-2019/), 2nd Annual ADR Address, Supreme Court of New South Wales, 3 October 2019, available at <https://disputescentre.com.au/adr-address-supreme-court-of-nsw-2019/>. [↑](#footnote-ref-66)
67. In the 2021 (current) ACICA Arbitration Rules, see Art 9.2. The IBA Guidelines on arbitrator neutrality also influenced the 2015 amendments to India’s Act, specifically the Fifth Schedule listing situations that might lead to a successful challenge. See Naresh and Ria Dalwani, ‘An Arbitration Seated in India – What Can You Expect’ (21 October 2022) <https://www.ibanet.org/an-arbitration-seated-in-india-what-can-you-expect>. [↑](#footnote-ref-67)
68. However, some still see the field especially for arbitrators as still rather closed. A select group are indeed often chosen to resolve especially ISA cases, although such concentrations are often found in human networks: see Sergio Puig, ‘Social Capital in the Arbitration Market’ (2014) 25 *European Journal of International Law* 387. More recently and comprehensively across IA, see generally Giorgio Fabio Colombo et al (eds), *Diversity in International Arbitration: Why it Matters and How to Sustain It* (Elgar, 2022). [↑](#footnote-ref-68)
69. See, eg, Greenberg eg al (n 47) 318-22. [↑](#footnote-ref-69)
70. But see, declining to apply a situation listed in the Non-Waivable Red List without assessing the circumstances of the particular arbitrator, *W Ltd v M* [2016] EWHC 422. On this and other recent criticisms of the Guidelines, including from Gary Born, see Umang Bhat Nair, ’The IBA Guidelines on Conflict of Interest: Time for a Relook’ *Kluwer Arbitration Blog* (Blog Post, 29 March 2023) <https://arbitrationblog.kluwerarbitration.com/2023/03/29/the-iba-guidelines-on-conflicts-of-interest-time-for-a-relook/>. [↑](#footnote-ref-70)
71. Michael Bond, ‘A Geography of International Arbitration’ (2005) 21(1) *Journal of International Arbitration* 99. For a recent empirical study confirming the dominance of private lawyers generally nowadays on the main bodies producing soft law, arbitration rules and other resources for international arbitration, see Luke Nottage, Nobumichi Teramura and James Tanna, ‘Lawyers and Non-Lawyers in International Arbitration: Discovering Diminishing Diversity’ (2024) *Loyola of Los Angeles International and Comparative Law Review*, forthcoming, manuscript at <[https://ssrn.com/abstract=3926914](https://ssrn.com/abstract%3D3926914)>. [↑](#footnote-ref-71)
72. Michael Schneider, ‘The Essential Guidelines for the Preparation of Guidelines, Directives, Notes, Protocols and other Methods intended to help International arbitration Practitioners to avoid the need for Independent Thinking and to promote the Transformation of Errors into “Best Practices”’ in Laurent Levy and Yves Derains (eds), *Liber amicorum en l'honneur de Serge Lazareff* (Éditions Pedone, 2011) as cited in Diego Fernandez Arroyo, ‘Soft Law and Arbitral Procedure: A Conditioned But Inescapable Couple’ (2018) 7(2) *European International Arbitration Review* 78, n 28. [↑](#footnote-ref-72)
73. Michael Schneider, ‘President’s Message: Yet another opportunity to waste time and money on procedural skirmishes: The IBA Guidelines on Party Representation’ (2013) 31(3) *ASA Bulletin* 497-501. [↑](#footnote-ref-73)
74. Under the Art 7 principle that ‘the court knows the law’, also derived from the civil law tradition, the tribunal can apply legal provisions not pleaded by the parties if it finds it necessary but shall seek the parties' views on them. See generally ‘News’, *Prague Rules* (Web Page) <<https://praguerules.com/>> and generally Kabir Duggal and Rekha Rangachari, ‘A Challenger Approaches: An Assessment of the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration’ (2020) 37 *Journal of International Arbitration* 27. Crook (n 63, 110-11) also briefly notes the Prague Rules as a recent example of pushback towards harmonisation of procedure in international dispute resolution. [↑](#footnote-ref-74)
75. However, for example, a brief comparative analysis can be found on the HKIAC website: Rafael Roman Cruz and Quisumbing Torres, ‘The Prague Rules and the IBA Rules: Different Sides, Same Coin’ (Web Page, undated) <https://www.hkiac.org/content/prague-rules-and-iba-rules>. [↑](#footnote-ref-75)
76. ‘Arbitration Rules, *The Japan Commercial Arbitration Association* (Web Page) <<https://www.jcaa.or.jp/en/arbitration/rules.html>>. [↑](#footnote-ref-76)
77. Luke Nottage and Richard Garnett, ‘The Top Twenty Things to Change In or Around Australia’s International Arbitration Act’ in Luke Nottage and Richard Garnett (eds), *International Arbitration in Australia* (Federation Press, 2010) 149, 179-84. See also Clyde Croft, ‘Alternative Dispute Resolution in Arbitration: Is Arb-Med Really an Option?’, speech presented at the International Arbitration Conference, November 2014, Sydney <https://www.supremecourt.vic.gov.au/about-the-court/speeches/alternative-dispute-resolution-in-arbitration-is-arb-med-really-an-option>; and [Dilyara Nigmatullina](https://www.routledge.com/search?author=Dilyara%20Nigmatullina), *Combining Mediation and Arbitration in International Commercial Dispute Resolution* (Routledge 2018), based on a UWA PhD thesis at <[THESIS\_DOCTOR\_OF\_PHILOSOPHY\_NIGMATULLINA\_Dilyara\_2016.PDF](https://api.research-repository.uwa.edu.au/ws/portalfiles/portal/9759400/THESIS_DOCTOR_OF_PHILOSOPHY_NIGMATULLINA_Dilyara_2016.PDF)>. [↑](#footnote-ref-77)
78. Edna Sussman and Klaus Peter Berger, ‘Arbitrator Techniques and their (Direct or Potential) Effect on Settlement’ (2021) 14(1) *NYSBA New York Dispute Resolution Lawyer* 25. See generally‘Mixed Mode Task Force’, *International Mediation Institute* (Web Page) <<https://imimediation.org/about/who-are-imi/mixed-mode-task-force/>>. [↑](#footnote-ref-78)
79. Queen Mary University of London, ‘2019 International Arbitration Survey: International Construction Disputes’, *Queen Mary University of London School of International Arbitration* (Web Page) 24 <<http://www.arbitration.qmul.ac.uk/research/2019/>>. [↑](#footnote-ref-79)
80. Alan Redfern, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 2004). [↑](#footnote-ref-80)
81. See generally Hilary Astor, *Dispute Resolution in Australia* (Lexis Nexis, 2nd ed, 2002). Arguably there is still quite a disjuncture between Australian legal professionals providing services in domestic mediation compared to arbitration and litigation. [↑](#footnote-ref-81)
82. *Gao Haiyan and Xie Heping v Keeneye Holdings Ltd and New Purple Golden Resources Development Ltd* [2012] 1 HKC 335, noted eg by Josh Wilson and William Lye, ‘Arb-Med in Hong Kong: Corrected Position or Enduring Suspicion’ (December 2013) *The Arbitrator and Mediator* 47. [↑](#footnote-ref-82)
83. Cheryl Ng, ‘The Arb-Med-Arb Protocol: Promising in Concept, Problematic in Design’ (2020) 32 *Singapore Academy of Law Journal* 124. [↑](#footnote-ref-83)
84. Man Yip, ‘Combinations of Mediation and Arbitration’ in Anselmo Reyes and Weixia Gu (eds), *Multi-Tier Approaches to the Resolution of International Disputes* (Cambridge University Press, 2022) 182, 201. The Singapore arbitration community has been informed that by the end of 2022, SIMC had completed 29 Arb-Med-Arb cases (and 248 other mediations). [↑](#footnote-ref-84)
85. The acknowledged background to this initiative is that it will take time for states to ratify and implement the 2019 Singapore Convention, in support of mediation. Speech by Second Minister for Law Edwin Tong SC at Appropriate Dispute Resolution: The Singapore Way (12 January 2023) <https://www.mlaw.gov.sg/news/speeches/2023-01-12-speech-2m-edwin-tong-appropriate-dispute-resolution-singapore-way/> [8]-[10]. The SICC also signed in April 2023 an MOU with the CICC for each respectively to encourage parties to agree to a Litigation-Mediation-Litigation model: see <<https://cicc.court.gov.cn/html/1/219/208/209/2370.html>> and <<https://www.sicc.gov.sg/docs/default-source/memorandum-of-guidance/lml-mou-factsheet-and-details.pdf>>. [↑](#footnote-ref-85)
86. See notably *Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2019] NSWCA 2. [↑](#footnote-ref-86)
87. See Alan Limbury, 'Mediation under the NSW Commercial Arbitration Act 2010 s.27D' (2011) 77(1) *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 105; Nick Longley and Chris Cho, ‘Arbitration Insights: Australia Med-Arb’, *HFW* (Blog Post, 6 August 2021) <<https://www.hfw.com/downloads/003245-HFW-Arbitration-Insights-Australia-4-Med-Arb.pdf>>. [↑](#footnote-ref-87)
88. Nottage, Droesti and Tang (n35). The Prague Rules (n 72) Art 9.3(a) also provide for a second consent for the authorised arbitrator/mediator to continue with the arbitration if the mediation attempts fail. By contrast, the 2023 Asian International Arbitration Centre Rules simply provides that the arbitrator may facilitate settlements if parties agree, and they then waive rights to challenge arbitrator impartiality based on ‘participation and knowledge acquired’ in facilitation (Art 14). [↑](#footnote-ref-88)
89. Kun Fan and Kaufmann-Kohler, ‘Integrating Mediation into Arbitration: Why It Works in China’ (2008) 25(4) *Journal of International Arbitration* 479. [↑](#footnote-ref-89)
90. Nottage and Garnett (n 74); Luke Nottage, ‘International Commercial Arbitration in Australia: What’s New and What’s Next?’ (2013) 30(5) *Journal of International Arbitration* 465; Nigmatullina (n 74); Albert Monichino and Nobumichi Teramura, ‘New Frontiers for International Commercial Arbitration in Australia: Beyond the “Lucky Country”’ in Luke Nottage, Shahla Ali, Bruno Jetin and Nobumichi Teramura (eds), *New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution* (Wolters Kluwer 2021) XXX. [↑](#footnote-ref-90)
91. Nottage (n 30) 92, 112. [↑](#footnote-ref-91)
92. Mark Goodrich, ‘Arb-Med: Ideal Solution or Dangerous Heresy*?*’ (2012) 15 *International Arbitration Law Review* 12. [↑](#footnote-ref-92)
93. Cf Greenberg et al (n 47) 93 (referring to an opinion of Aaron Broches). [↑](#footnote-ref-93)
94. Available via ‘Arbitration’, *CEDR* (Web Page) <<https://www.cedr.com/alternative-dispute-resolution-processes/arbitration/>>. [↑](#footnote-ref-94)
95. Available via ‘Arb-Med Rules’, *New Zealand International Arbitration Centre* (Web Post, 2018) <<https://nziac.com/arb-med/arb-med-rules>>. [↑](#footnote-ref-95)
96. [2003] 3 NZLR 121. [↑](#footnote-ref-96)
97. See generally Williams et al, *Williams and Kawharu on Arbitration* (LexisNexis, 2nd ed, 2017) 17-20 and 514-19. [↑](#footnote-ref-97)
98. [1999] 2 NZLR 452, 463. Applying these principles Fisher J upheld the award, even though the arbitrator (who had not engaged in Arb-Med) had not hewed closely to the award debtor’s evidence and arguments. For similar significant deference to arbitrator discretion in challenges based on procedural public policy (including natural justice) see *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214. [↑](#footnote-ref-98)
99. For rare engagement, based on a paper drafted for discussion at the 2013 AMINZ conference, see Roydon Hindle, “Is Arb-Med an Oxymoron?” in Tony Angelo et al (eds) *New Zealand Association of Comparative Law Special Issue XVII* (2014) 225 via <https://www.wgtn.ac.nz/law/research/publications/about-nzacl/publications/special-issues>. [↑](#footnote-ref-99)
100. Available via ‘New report and guide to drive thought leadership in dispute prevention and resolution’ (Report, 3 July 2023) <<https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/new-report-and-guide-to-drive-thought-leadership-in-dispute-prevention-and-resolution/>>. [↑](#footnote-ref-100)
101. The SIDRA Survey 2022 (n 32, Exhibit 8.1) does show some significant ‘experience’ with Arb-Med, but at a similar level to Arb-Med-Arb – probably linked to the large proportion of Singaporean respondents, familiar with the SIMC-SIAC Protocol. The reported experience with Arb-Med may similarly due mainly to 5% of the external counsel respondents being from China and 4% from Japan, for example, with another 10% of the corporate executive and counsel respondents coming from Japan. [↑](#footnote-ref-101)
102. See generally Beazley (n 64) and eg *Hancock v Hancock Prospecting Pty Limited* [2022] NSWSC 724 (albeit rejecting the challenge of the Hon Wayne Martin AC KC in the Rinehart family trust arbitration saga). Even if ultimately unsuccessful, challenges cause extra delays and costs, and can have a chilling effect on tribunals and lawyers trying new approaches to resolving disputes. [↑](#footnote-ref-102)
103. See generally Kun Fan, ‘An Empirical Study of Arbitrators Acting as Mediators in China’ (2014) 15 *Cardozo Journal of Conflict Resolution* 777; and Weixia Gu, ‘Combinations of Mediation and Arbitration: The Case of China’ in Anselmo Reyes and Weixia Gu (eds), *Multi-Tier Approaches to the Resolution of International Disputes* (Cambridge University Press, 2022) 69. [↑](#footnote-ref-103)
104. See generally Kuan-Ling Shen, ‘Multi-tier dispute resolution: present situation and future developments in Taiwan’ in Anselmo Reyes and Weixia Gu (eds), *Multi-Tier Approaches to the Resolution of International Disputes* (Cambridge University Press, 2022) 110; Winnie Ma, ‘Dispute Resolution in Asia: Taiwan’ (Guest lecture, University of Sydney Law School, 24 August 2023). [↑](#footnote-ref-104)
105. Joongi Kim, ‘Might There Be a Future for Multi-tiered Dispute Resolution in Korea?’ in in Anselmo Reyes and Weixia Gu (eds), *Multi-Tier Approaches to the Resolution of International Disputes* (Cambridge University Press, 2022) 161, 173 (Table 7.6, showing a gradual decline from 165 international *alseon* cases by KCAB in 2010, with an uptick of 137 in 2016, to 59 cases in 2019). Kim remarks that *alseon* ‘is not based on any rules and is less structured’ than the (still rare) formal mediations administered by KCAB (ibid, 172). [↑](#footnote-ref-105)
106. But see, eg, Luke Nottage, Micah Burch and Brett Williams, ‘Appropriate Treaty-Based Dispute Resolution for Asia-Pacific Commerce in the 21st Century’ (2012) 35(3) *UNSW Law Journal* 1013. Compare also, on some proactive steps that arbitrators could anyway try to take in ISA, Bottini et al (n 47) 275-6. [↑](#footnote-ref-106)
107. See David Gaukrodger and Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community* (OECD Working Papers on International Investment 2012/03) 18 (Figure 1), available via <<https://www.oecd.org/investment/internationalinvestmentagreements/publicconsultationisds.htm>>. [↑](#footnote-ref-107)
108. See generally Weixia Gu, ‘Mapping and Assessing the Rise of Multi-tiered Approaches to the Resolution of International Disputes Across the Globe: An Introduction’ in Anselmo Reyes and Weixia Gu (eds), *Multi-Tier Approaches to the Resolution of International Disputes* (Cambridge University Press, 2022) 3; Hiro Naraindas Aragaki, ‘A Snapshot of National Legislation on Same Neutral Med-arb and Arb-med Around the Globe’ in Anselmo Reyes and Weixia Gu (eds), *Multi-Tier Approaches to the Resolution of International Disputes* (Cambridge University Press, 2022) 25. [↑](#footnote-ref-108)
109. Queen Mary University of London and Price Waterhouse Coopers, *International Arbitration: 2006 Corporate Attitudes and Practices* (Report, 2006) 5 <<https://arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2006.pdf>>. Other preferences were international mediation and other ADR (16% of respondents) and transnational litigation (11%). [↑](#footnote-ref-109)
110. Queen Mary University of London and White & Case, *2021 International Arbitration Survey: Adapting Arbitration to a Changing World* (Report, 2021) 6 <<https://arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/>>. Other preferences were ADR only or litigation only (2% each) and litigation combined with ADR (6%). [↑](#footnote-ref-110)
111. For example, Dispute Avoidance Board provisions now appear widespread in major infrastructure projects involving the New South Wales government (but perhaps less so for other state governments). Courts are also helping governments to use more ADR, for example by recently dismissing an objection that mediation would not serve the public interest. See *Aversa v Transport for New South Wales (No 2)* [2023] NSWSC 892, discussed by Alan Limbury, ‘Court-ordered Mediation – Some Australian Developments’ Kluwer Mediation Blog (Bloig Post, 22 October 2023) <https://mediationblog.kluwerarbitration.com/2023/10/22/court-ordered-mediation-some-australian-developments/>. [↑](#footnote-ref-111)
112. ICC, n 50, 11. However, it observes that the March 2021 introduction of concurrent mediation into International Centre for Dispute Resolution arbitration seems so far to be associated with parties mostly choosing to opt out of this innovation. [↑](#footnote-ref-112)
113. I am grateful for one commentator on an earlier draft suggesting that a practice is emerging of “running medtations”, viewed as an ongoing process rather than an event, aimed at avoiding the costs and delays of arbitration as well as litigation. Compare also the fascinating but still very unusual example of a cross-border arbitration turning into an ongoing mediation process, to avoid and manage ongoing disputes (involving Harvard Professor Robert Mnookin), see also [Christian Bühring-Uhle](https://aria.law.columbia.edu/?s=Christian+Buhring-Uhle) ‘The IBM – Fujitsu Arbitration: A Landmark in Innovative Dispute Resolution’ (1991) 2 *American Review of International Arbitration* 8. [↑](#footnote-ref-113)
114. See generally, eg, on the last two jurisdictions, Nadja Alexander, ‘The Emergence of Mediation in Asia: A Tale of Two Cities’, *Transnational Dispute Management* (Online Article, 2021) <https://www.transnational-dispute-management.com/article.asp?key=2836>. [↑](#footnote-ref-114)
115. Kim (n 103) 177 (Table 7.7). [↑](#footnote-ref-115)
116. See ‘Asia ADR Week 2021 – Session on Roles of In-House Counsel’ *Japanese Law and the Asia-Pacific* (Blog Post, 9 August 2021) <<https://japaneselaw.sydney.edu.au/2021/08/asia-adr-week-2021-session-on-roles-of-in-house-counsel/>> (recording on file with the author). [↑](#footnote-ref-116)
117. Other reasons for the slow uptake in ratifications may be that: (i) settlements from mediations are voluntary so are expected to be enforced; (ii) an arbitration clause can be added to the settlement agreement to enhance enforceability; (iii) if there is a med-arb provision agreed before disputes arise, then if the settlement is not enforced an arbitration can be commenced (albeit at extra cost); and (iv) and disruptions to legislative processes from the COVID-19 pandemic from 2020. [↑](#footnote-ref-117)
118. See generally Ana Ubilava, *Mediation as a Mandatory Pre-condition to Arbitration* (Brill, 2023); Romesh Weeramantry, Brian Chang and Joel Sherard-Chow, ‘Conciliation and Mediation in Investor-State Dispute Settlement Provisions: A Quantitative and Qualitative Analysis’ (2023) 38(1) ICSID Review - Foreign Investment Law Journal 201. [↑](#footnote-ref-118)
119. Under this treaty, the host state can require the investor to undertake mediation before commencing arbitration. See Ana Ubilava and Luke Nottage, ‘Novel and Noteworthy Aspects of Australia’s Recent Investment Agreements and ISDS Policy: The CPTPP, Hong Kong, Indonesia and Mauritius Transparency Treaties’ in Luke Nottage et al (eds), *New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution* (Wolters Kluwer, 2021) 115. [↑](#footnote-ref-119)
120. This was probably at the instigation of Indonesia and the UAE respectively, as Australia and Hong Kong had not been subject to many inbound ISDS arbitration claims and did not include compulsory med-arb in their own BIT signed in 2019. See further James Claxton, Luke Nottage and Ana Ubilava, ‘Pioneering Mandatory Investor-State Conciliation Before Arbitration in Asia-Pacific Treaties: IA-CEPA and HK-UAE BIT’, *Kluwer Arbitration Blog* (Blog Post, 5 September 2020) <<https://arbitrationblog.kluwerarbitration.com/2020/09/05/pioneering-mandatory-investor-state-conciliation-before-arbitration-in-asia-pacific-treaties-ia-cepa-and-hk-uae-bit/>>. [↑](#footnote-ref-120)
121. See, eg, Richard Garnett, ‘Multi-tier Dispute Resolution in Australia: A Tale of Escalating' Acceptance’ in Anselmo Reyes and Weixia Gu (eds), *Multi-Tier Approaches to the Resolution of International Disputes* (Cambridge University Press, 2022) 343. [↑](#footnote-ref-121)
122. International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd [2012] SGHC 226. [↑](#footnote-ref-122)
123. HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd [2012] SGCA 48 at [40]. [↑](#footnote-ref-123)
124. Wah (Aka Alan Tang) & Another v Grant Thornton International Ltd & Others [2012] EWHC 3198 (Ch)*.* [↑](#footnote-ref-124)
125. Darius Chan, ‘Enforceability of Multi-tiered Dispute Resolution Mechanisms – the Singapore Judiciary’s Promotion of Consensus as a Cultural Value’, *Kluwer Arbitration Blog* (Blog Post, 8 January 2013) <<https://arbitrationblog.kluwerarbitration.com/2013/01/08/enforceability-of-multi-tiered-dispute-resolution-mechanisms-the-singapore-judiciarys-promotion-of-consensus-as-a-cultural-value/>>. [↑](#footnote-ref-125)
126. *BBA v BAZ* [2020] SGCA 53. [↑](#footnote-ref-126)
127. Iris Ng, ‘Jurisdiction or Admissibility? The Status of Time Bars Under Singapore Arbitration Law’, *Kluwer Arbitration Blog* (Blog Post, 2020) <<https://arbitrationblog.kluwerarbitration.com/2020/08/07/jurisdiction-or-admissibility-the-status-of-time-bars-under-singapore-arbitration-law/>> (referring to the judgment at [77]). [↑](#footnote-ref-127)
128. Ibid (contrasting *Grandeur* [[2006] HKCA 305](http://www.hklii.org/eng/hk/cases/hkca/2006/305.html) and William W Park, ‘Arbitral jurisdiction in the United States: Who Decides What?’ (2008) 11(1) *International Arbitration Law Review* 33, 35). [↑](#footnote-ref-128)
129. Darius Chan and Joel Soon, ‘Non-Satisfaction of Pre-Arbitration Requirements: Moving Away from Conditions Precedent Towards the Admissibility of a Claim— *NWA v NVF*’ [2022] *Singapore Journal of Legal Studies*, 450, 461, referring to Michael Hwang and Si Cheng Lim, ‘The Chimera of Admissibility in International Arbitration’ in Neil Kaplan & Michael Moser (eds), *Jurisdiction, Admissibility and Choice of Law in* *International Arbitration* (Kluwer Law International, 2018) 265. [↑](#footnote-ref-129)
130. *C v D* [2023] HKCFA 16. [↑](#footnote-ref-130)
131. See Cheung CJ at [34]-[38], elaborating on, eg, *Republic of Sierra Leone v SL Mining Ltd* [2021] Bus LR 704 and *The Nuance Group (Australia) Pty Ltd v Shape Australia Pty Ltd* [2021] NSWSC 1498. [↑](#footnote-ref-131)
132. Simon Chapman et al, ‘Milestone Arbitration Judgment from Hong Kong’s Highest Court Brings Greater Certainty For Commercial Contracts’, *HSF Arbitration Notes* (Blog Post, 30 June 2023) <<https://hsfnotes.com/arbitration/2023/06/30/milestone-arbitration-judgment-from-hong-kongs-highest-court-brings-greater-certainty-for-commercial-contracts/>>. (Admittedly, these authors declared that they had successfully argued the case in the Court of Final Appeal!) See also, eg, Albert Monichino and Gianluca Rossi, ‘Staying Court Proceedings in the Face of ADR Clauses’ (2022) 52(1) *Australian Bar Review* 94, 120-123 (praising the Court of Appeal judgment also ruling in favour of admissibility rather than jurisdiction). [↑](#footnote-ref-132)
133. Ng (n 125), Chan and Soon (n 127), Hwang and Lim (n 127). [↑](#footnote-ref-133)
134. However, the draft 2023 SIAC Rules provide for an “emergency arbitrator” now to be appointed even before filing of the notice of arbitration. Commentators explain that with multi-tiered dispute resolution clauses, if is “not uncommon” for emergency arbitrators to be challenged because of “non-fulfilment of pre-arbitration steps prior to filing the notice of arbitration”, causing delays. See Anjali Anchayil and Aiman Singh Kler, ‘The 2023 SIAC Draft Rules: Raising the Bar for Efficiency’ *Kluwer Arbitration Blog* (Blog Post, 26 October 2023) <https://arbitrationblog.kluwerarbitration.com/2023/10/26/the-2023-siac-draft-rules-raising-the-bar-for-efficiency/>. [↑](#footnote-ref-134)
135. This topic therefore raises somewhat similar issues as to whether and how courts can be approached to determine whether there is a valid arbitration agreement creating jurisdiction for the tribunal. Some commentators prefer always to prioritise the tribunal’s capacity first to rule on such issues (eg, Albert Monichino and Alex Fawke, ‘International Arbitration in Australia: 2020/2021 in Review and Reflections on a Decade since Reform’ (2023) 32(3) *Australian Dispute Resolution Journal* 154, commenting on *Degroma Trading Inc v Viva Energy Australia Pty Ltd* [2019] FCA 649). But the NYC Art II regime does not demand this (see, eg, *CPB Contractors Pty Ltd v DEAL S.R.L.* [2021] NSWSC 820). Nor, albeit more debatably, does the combination of ML Arts 8 and 16 for seat courts. (See, eg, *Tomolugen Holdings Ltd and another v Silica Investors* [2015] SGCA 57 where no tribunal had been formed, and *Malini Ventura v Knight Capital Pte Ltd and others* [2015] SGHC 225 where a tribunal had even been formed but Prakash J did not simply require it first to rule on the challenge to the clause providing for Singapore-seated arbitration.) The better view is that a court can be approached to rule on this issue (at least before the tribunal has been constituted, as under Germany’s add-on to the ML) but it should only decide it at the stay stage on a prima facie basis, then leaving it potentially for the tribunal and then later courts to review fully. (See generally Greenberg et al (n 47) 218-22 and 230.) However, the question is finely balanced under the ML and deserves wider public discussion, leading preferably to legislative clarification particularly in ML-based regimes (as occurred under German law). [↑](#footnote-ref-135)
136. *WCX M4-M5 Link AT Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd (No 2)* [2022] NSWSC 505 at [106]-[121], Rees J issued a stay to refer the matter to arbitration even though the prior agreed ADR steps had not been completed, by holding that such non-compliance did not make the arbitration agreement “inoperative”, after reviewing some English, Hong Kong and Australian case law. Her Honour distinguished or declined to follow a decision of Hammerschlag J in *John Holland Pty Limited v Kellogg Brown & Root Pty Ltd* [2015] NSWSC 451, which suggested the contrary albeit where parties had expressly made compliance with the pre-arbitration steps a condition precedent to arbitration. Without giving further authorities, Rees J stated at [117] (*emphasis added*):

“Generally, ‘inoperative’ has been interpreted across jurisdictions implementing the [NYC] and the [ML] as meaning that the arbitration agreement has ceased to have effect *for the future*, either for a specific type of dispute or at large. An arbitration agreement may be “inoperative” as it is unenforceable, has been amended by a further agreement, is the subject of *res judicata*, has been set aside by a Court, has been frustrated or discharged by breachor by reason of waiver, estoppel, election or abandonment or has otherwise been repudiated”.

The [*UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mal-digest-2012-e.pdf)(available at <https://uncitral.un.org/en/case\_law/digests>), for example, does note at [17] that a Ugandan court in 2004 (and a Hong Kong court in 1999, earlier cited by her Honour) found that non-compliance with a prior ADR step did not make the arbitration agreement inoperative. But relatedly this Digest at [16] remarked: “Several cases stand for the proposition that the substantive requirement set out in [ML] article 8 will not be met if the parties’ undertaking to arbitrate is subject to a condition that has not been fulfilled'. [↑](#footnote-ref-136)
137. I am grateful to Dr Winnie Jo-Mei Ma and Louise Parsons for highlighting this timing issue, in their comparative law analysis presented at a book workshop hosted by Griffith University Law School on 14 August 2023. [↑](#footnote-ref-137)
138. Rudolf Schreuer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2022) 379-80. [↑](#footnote-ref-138)
139. Ibid, 380-81. See also generally Hwang and Lim (n 127). [↑](#footnote-ref-139)
140. 134 S. Ct. 1198 (2014). [↑](#footnote-ref-140)
141. See, eg, Nobumichi Teramura, Luke Nottage and Bruno Jetin (eds), *Corruption, Illegality and Asian Investment Arbitration* (Springer, 2024 (forthcoming)) with extensive further references and some draft chapters available via <https://japaneselaw.sydney.edu.au/2022/03/corruption-and-illegality-in-asian-investment-arbitration/>. [↑](#footnote-ref-141)
142. Menon (n 31) 5. [↑](#footnote-ref-142)
143. ##  On concerns around ISDS and business-to-consumer arbitration, see Robert French ‘ADR and the Elusive Butterfly of Social Justice’, 5th Annual ADR Address of the Supreme Court of New South Wales, 17 November 2022, available at <<https://disputescentre.com.au/the-supreme-court-of-new-south-wales-adr-address-2022/>>. On a development detracting from ICA, see Andrew Bell, ‘The Rise of the Anti-Arbitration Injunction’, 3rd Annual ADR Address of the Supreme Court of New South Wales, 15 October 2020, available via <https://www.supremecourt.nsw.gov.au/about-us/speeches/chief-justice.html>.

 [↑](#footnote-ref-143)
144. Julie Ward, ‘Online Dispute Resolution in the Age of COVID-19’, 4th Annual Address of the Supreme Court of New South Wales, 30 September 2021, summarised at https://disputescentre.com.au/online-dispute-resolution-in-the-age-covid-19/. More generally on the impact of technology, see the pre-pandemic prognosis provided by Tom Bathurst, ‘ADR, ODR and AI-DR, or Do We Even Need Courts Anymore’, Inaugural ADR Address of the Supreme Court of New South Wales, 20 September 2018, available via <https://www.supremecourt.nsw.gov.au/about-us/speeches/past-judges.html#bathurst>. [↑](#footnote-ref-144)
145. Nottage (n 30) 378-83; Lei Chen, ‘Will Virtual Hearings Remain in Post-pandemic International Arbitration?’ (2023) *International Journal for the Semiotics of Law,* <https://doi.org/10.1007/s11196-023-10054-7>. [↑](#footnote-ref-145)
146. Chiara Giorgetti and Mark Pollack, ‘Beyond Fragmentation: Cross-Fertilization, Cooperation, and Competition among International Courts and Tribunals’ in Chiara Giorgetti and Mark Pollack (eds) *Competition among International Courts and Tribunals* (Cambridge University Press 2022) 1, 5-26. [↑](#footnote-ref-146)
147. Helene Ruiz Fabri and Joshua Paine, ‘The Procedural Cross-Fertilization Pull’ in Chiara Giorgetti and Mark Pollack (eds), *Beyond Fragmentation: Cross-Fertilization, Cooperation and Competition among International Courts and Tribunals* (Cambridge University Press 2022) 39, 46-66. [↑](#footnote-ref-147)
148. These include the early dismissals of unmeritorious claims and disclosure of third-party funding, added for example in the 2021 ACICA Rules (Nottage, Droesti and Tang, n 35). They too have crossed over, at least in part, from ISA. See, eg, Chester Brown and Sergio Puig, ‘The Power of ICSID Tribunals to Dismiss Proceedings Summarily: An Analysis of Rule 41(5) of the ICSID Arbitration Rules’ (2011) 10 *The Law and Practice of International Courts and Tribunals* 227 and Julien Chaisse, ‘Delays Expected but Duration of Delays Unpredictable: Causes, Types and Symptoms of Procedural Applications in Investment Arbitration’ (2021) 37 *Arbitration International* 863. Chaisse notes how both are now associated with delays in ISA, with early dismissal rarely allowed under the 2006 amendment to the ICSID Rules. This is ironic especially as it was designed to expedite proceeedings, and leads to some arbitral institutions experimenting with alternative formulations: see generally Mino Han and Arjun Solanki, ‘Early Determination: A Secret Recipe for Arbitral Efficiency’ *Kluwer Arbitration Blog* (Blog Post, 12 May 2023) <https://arbitrationblog.kluwerarbitration.com/2023/05/12/early-determination-a-secret-recipe-for-arbitral-efficiency/> and Anjali and Kler (n XXX). [↑](#footnote-ref-148)
149. See generally Allsop and Walpole (n 1). [↑](#footnote-ref-149)