AUSTRALIAN DISPUTES CENTRE
THOUGHT LEADERSHIP

CROSS-FERTILISATION IN INTERNATIONAL COMMERCIAL ARBITRATION, INVESTOR-STATE ARBITRATION & MEDIATION: THE GOOD, THE BAD & THE UGLY?

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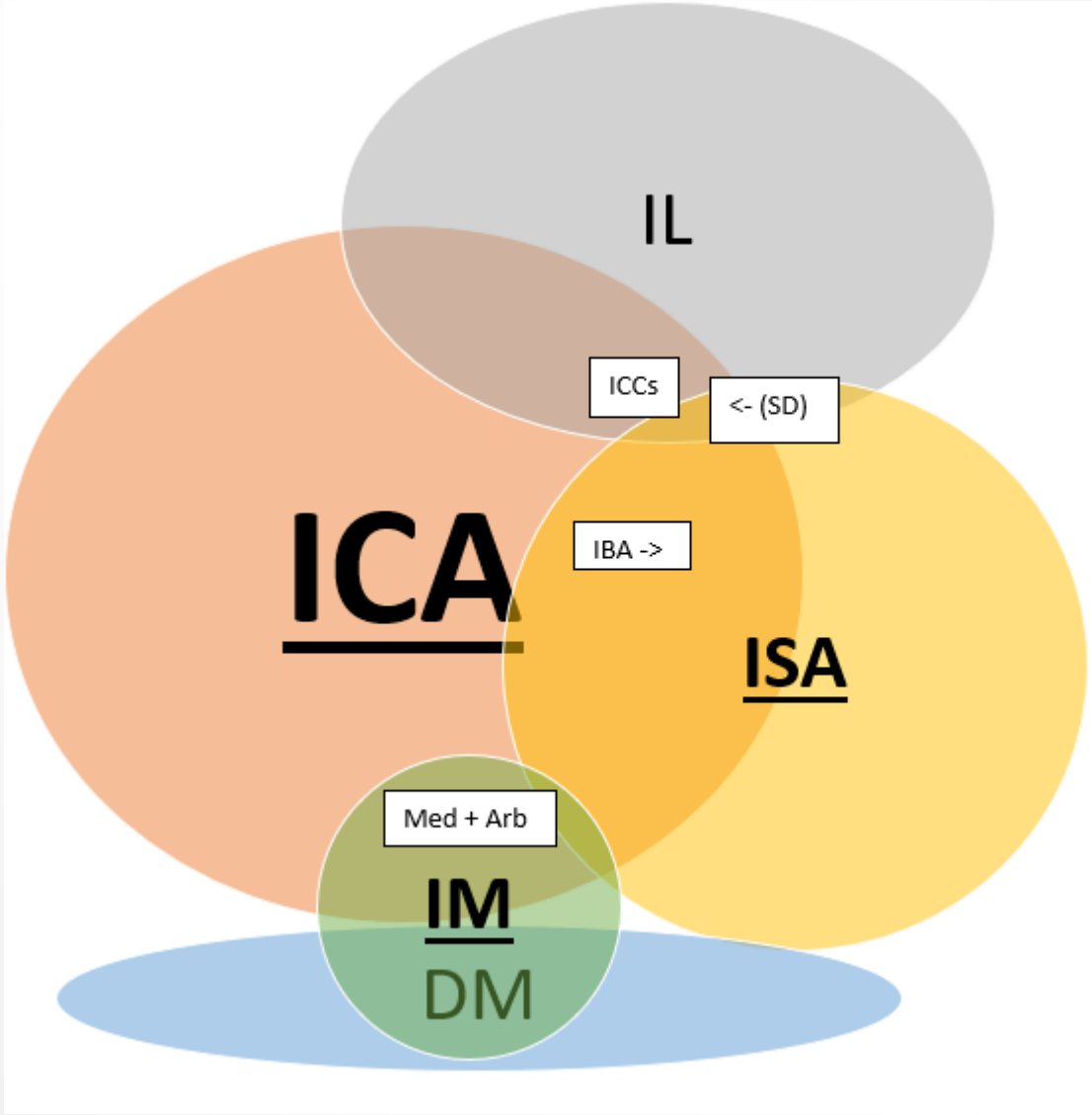
OVERVIEW

1. Introduction
2. The Explosion in International Arbitration [ICA then ISA]
3. The Resurgence of Costs and Delays [in both fields of IA]
4. The Fall of Arb-Med [ie with same neutral]
5. The Rise of Multi-tiered Dispute Resolution Clauses [eg mediation before arbitration: different neutrals]
6. Conclusions

1. INTRODUCTION

- ADR and litigation are part of an overall system
- For international DR, much discussion on interface or cross-fertilisation between IL & ICA
- Focus here more on ICA & ISA
  - ie foreign investors arbitrating vs host states, usually now under BITs or FTAs with home states (aka ISDS)
- Plus interface with IM (limited, but pushed also by DM)
  - Arb-Med with same neutral
  - Med-Arb with different neutrals



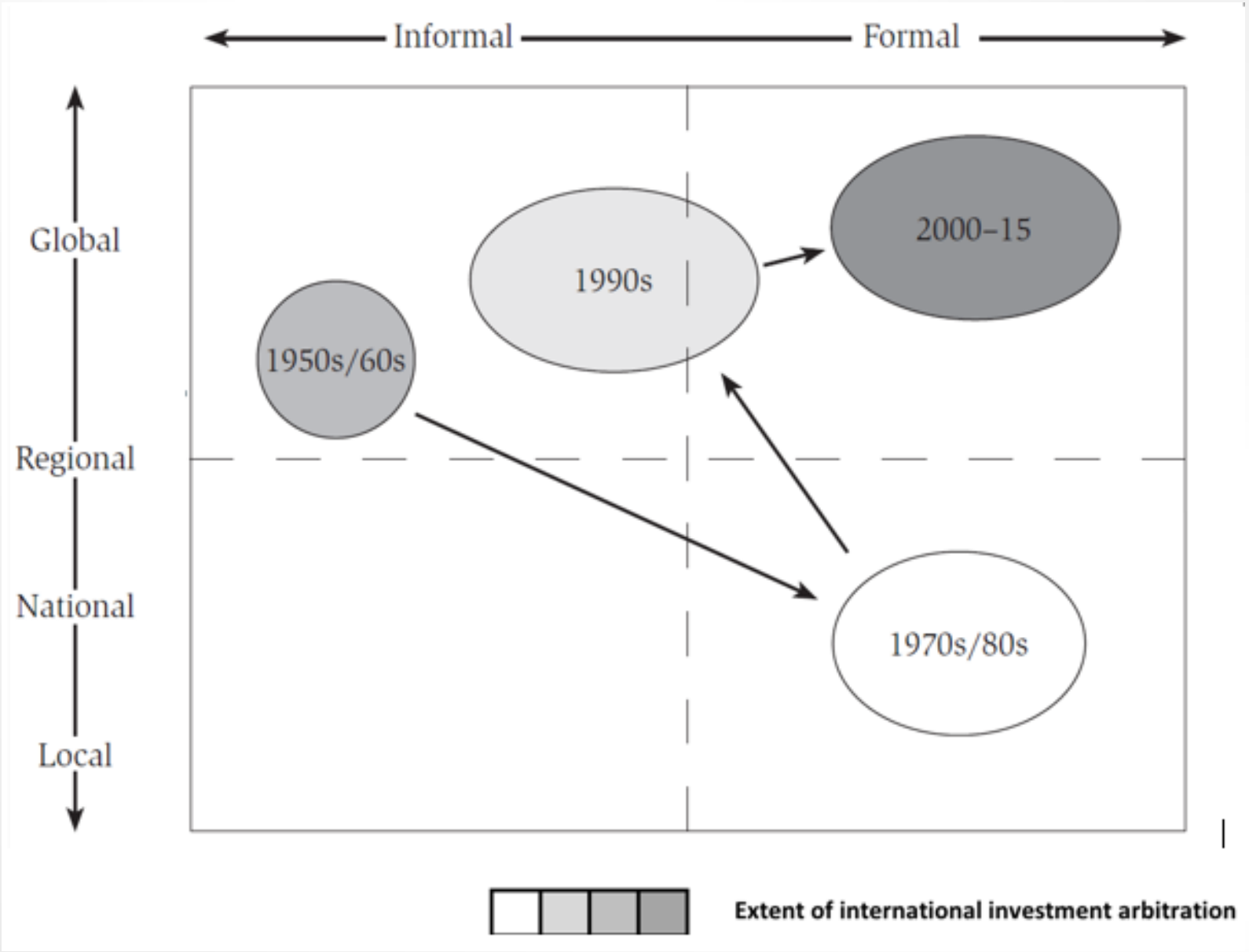
2. THE EXPLOSION IN INTERNATIONAL ARBITRATION (IA)

- Underpinned by the 1958 New York Convention
  - Art II stay of litigation: kickstarts the (foreign-seated) IA, ie first phase
  - Art V enforcement of awards (with limited exceptions … not: error of substantive law): regulates the last phase
    - Australia ratified in 1975 (Singapore 1986)
- And by the UNCITRAL Model Law (1985, revised 2006 for IMs)
  - Drawing on NYC concepts and especially (opt-in) 1976 UNCITRAL Arbitration Rules, to regulate especially the middle phase at ICA seat
    - Australia quite quick to adopt, in 1989 like HK (Singapore 1994), then 2010-17 as core also for domestic arbitrations
    - But still struggles to attract many ICA cases

- Spread "East" of ICA especially over last 20 years (Reyes & Gu '18):
  - Adopting first NYC, then ML
  - Emergence of pro-arbitration case law
    - eg narrowing 'public policy' objection to awards, so 'deference' to arbitrators' rulings on procedure: US/UK → HK → Singapore → Australia (in: Ferrari & Rosenfeld eds, Kluwer '23)
  - At least one dedicated int'l arb institution (or several, in PRC; cf India – ad hoc)
    - eg ACICA from '85 in Melbourne (rebooted in Sydney), SIAC → HKIAC, AIAC, KCAB, VIAC
  - Other supportive 'infrastructure' (including university-level & professional training)
- Gradual increase in ISA involving Asian parties
  - More treaties, with full advance consent (eg PRC, Thailand)+ more FDI = disputes
  - Fewer "institutional barriers" (eg local experts), but not all ratify 1965 ICSID Convention

YET: 3. RESURGENT COSTS AND DELAYS

- Déjà vu? Like 70s-80s, leading from mid-1990s to some countermeasures (eg Rules reforms, revised Model Law)
- But resurgent costs & delays this century is not so obviously driven by national (Anglo-American) litigation style; IA is more global



Eg **Singapore International Dispute Resolution Academy (SIDRA) Survey 2022:**
¾ external lawyers (39% Singapore), ¼ internal lawyers or execs (57%)
https://sidra.smu.edu.sg/research-program/international-dispute-resolution-survey/sidra-survey-2022

Exhibit 4.3

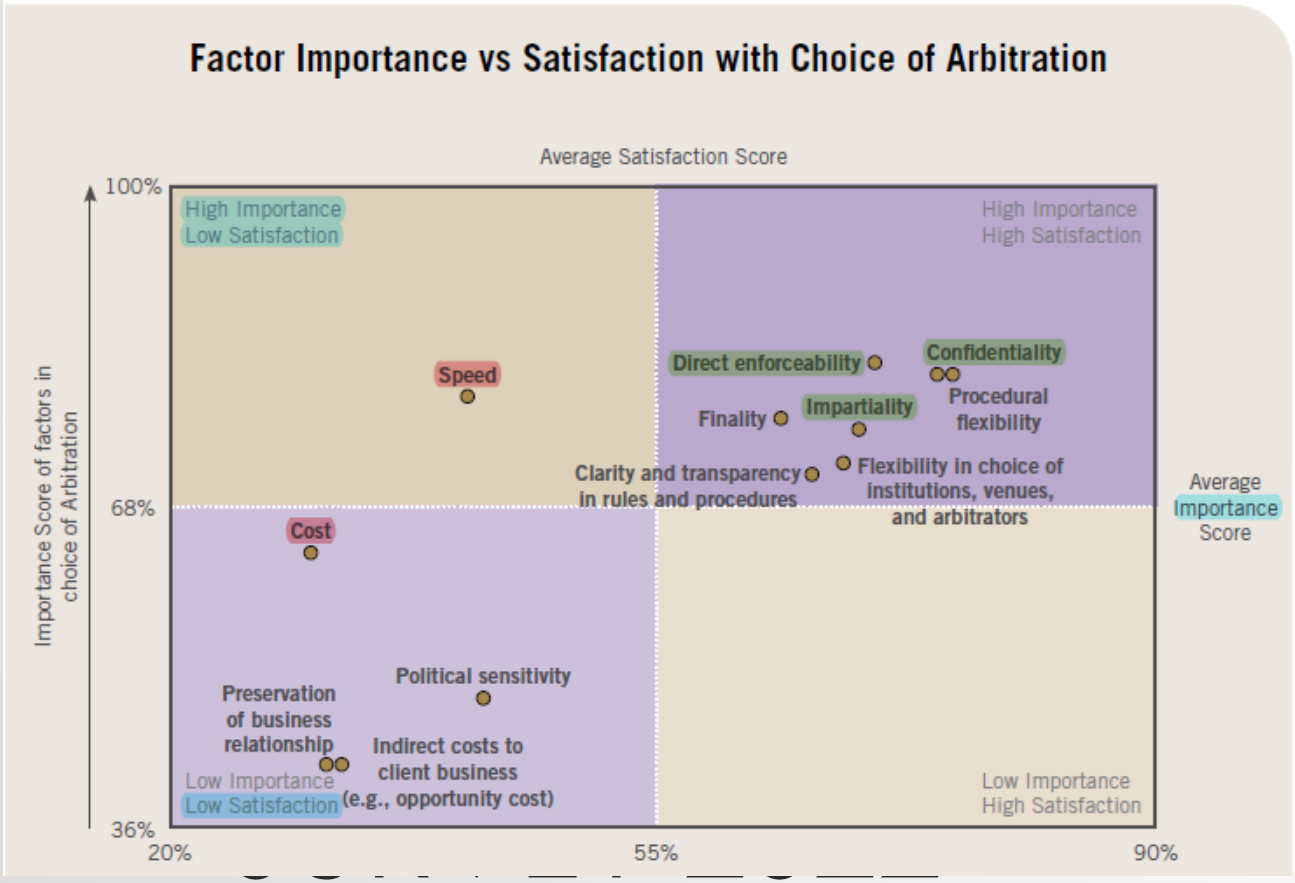
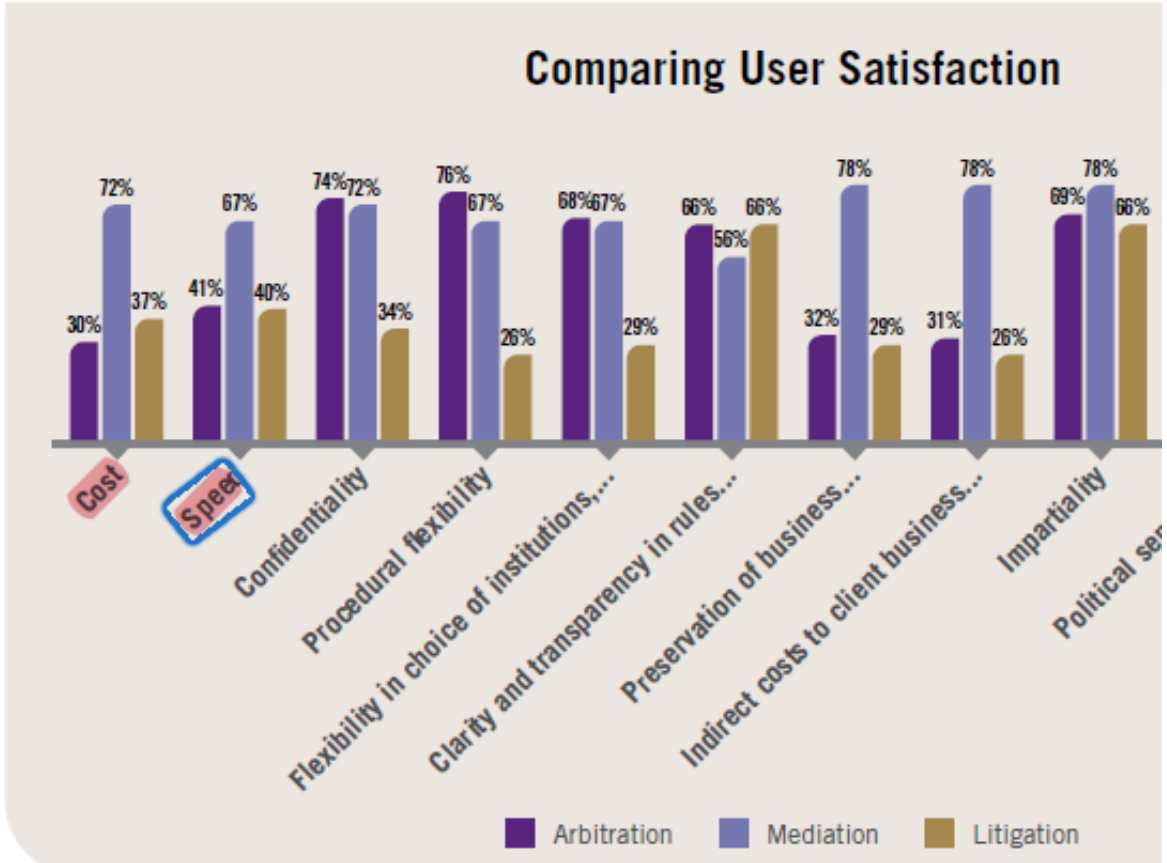


Exhibit 4.2



SO: WHAT NOW DRIVES COSTS & DELAYS?

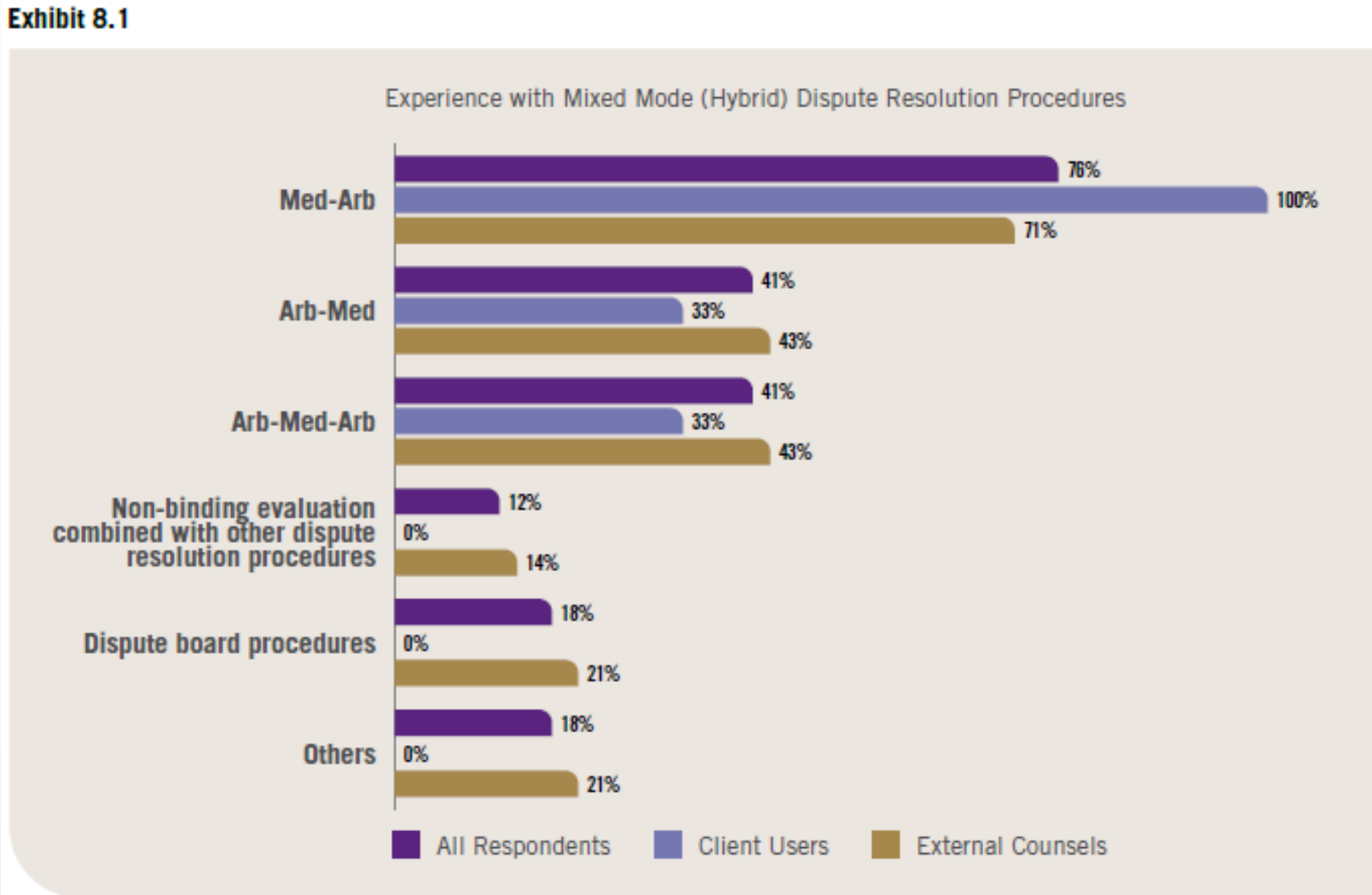
- Transactions hence disputes are indeed *more complex*:
  - eg multi-party/contracts, IA does struggle to address these as rooted in consent (Garnett '23 MULR)
- BUT also: (i) **IA has no real competitor** (especially ICA): NYC provides worldwide <u>enforceability</u> of rulings
  - cf even the new Int'l Comm Courts, or 2019 Singapore Mediation Convention (few)
- (ii) **Expansion of (large) law firms**, especially 'billable hours' model
- (iii) **Conservatism around controls over legal fees**: cf eg
  - Absolute caps based on dispute amount? (IAMA '14 = RI '16, no more!)
  - Calderbank 'sealed offers'? Little practice/encouragement
- (iv) **Confidentiality** & (v) **IBA 'soft' law**? Double-edged (esp now ICA → ISA)
  - Some pushback, eg Swiss Arb Association, Prague Rules '18, JCAA Interactive Arb Rules

4. THE FALL OF ARB-MED

- As ICA spread East, the practice of the arbitrator acting as mediator attracted interest (notably, still, in PRC): efficiencies?
- But concerns, especially if 'caucusing', over equal treatment and neutrality - led to eg:
  - HK in '89 → Singapore '94 adding that if mediation fails, arbitrator must disclose material information received in confidential caucusing
    - Not used! So from '15 SIMC/SIAC Arb-Med-Arb, with separate neutrals (29 / 277)
  - CAA (NSW) 1990 innovation also not used, so 2010 revision adds above plus requirement of second consent by parties if mediation fails – not used?
    - ACICA Arb Rules draft had similar model (plus 'back-up arbitrator'): not adopted
  - Japan adds practice of parties agreeing neutral will not use material information in award, but doesn't actively advertise Arb-Med (nor Korea)

Recall: *SIDRA Survey 2022*

- Significant experience with **Arb-Med-Arb** - as many Singaporean respondents!
- Also with **Arb-Med** – maybe as eg 5% of lawyer respondents from PRC, 4% from Japan (and 10% of client user respondents)?
- Cf much higher experience with **Med-Arb** (especially among *client users* = corporate execs and counsel, valuing especially confidentiality) …



https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey-2022/4/index.html

5. THE RISE OF MED-ARB ETC

- Instead, growing use of multi-tiered DR clauses (eg QMUL surveys)
  - Although regional variance: less in international contracts involving eg parties from Korea, Japan, China … more if from the common law jurisdictions in Asia
    - more costs/lawyers leads to courts/legislatures promoting ADR domestically, so commercially supplied mediation services / familiarity grow? But not eg India
  - This may also explain few ratifications of 2019 Singapore Mediation Convention
- Also still rare for mandatory mediation before arbitration in ISDS
  - Eg unusually in Australia-Indonesia FTA and HK-UAE BIT, but NOT in Australia-HK BIT, all signed in 2019: with Ana Ubilava et al via https://arbitrationblog.kluwerarbitration.com/author/luke-nottage/

- Anyway, ISA tribunals have discussed whether pre-arb good faith negotiations step compliance goes to jurisdiction of tribunal (pre-condition to arb) or admissibility of the claim
  - If former, non-compliance could lead to award annulment
  - If latter (mostly), error of law so not reviewable by courts etc
- Influencing (?) debate now in domestic courts:
  - *IRC* 2012 SGHC suggested usually pre-condition, but recent doubts
  - *C v D* 2023 HKFCA presumed usually not (so arbitrator determines admissibility), seen as 'pro-arbitration' … but is this 'anti-mediation'?
- Arguably should depend on: wording, type of pre-arb steps, when issue arises (stays vs awards), how widespread is ADR?

6. CONCLUSIONS

- ICA and then ISA have grown, spreading from West to East, with arbitrators, counsel and others moving between the fields
- But costs and delays remain problematic in IA
- So ISM is emerging, but especially for commercial disputes, in jurisdictions with high litigation costs hence privately-supplied domestic mediation; NOT yet for ISDS involving foreign investors
- Some cross-overs among ICA, ISA and ISM (all influenced by domestic litigation and DR) may be more productive than others, as with interfaces with international litigation

FURTHER READING:

- Nottage, *International Commercial and Investor-State Arbitration – Australia and Japan in Regional and Global Contexts* (Elgar 2021)
  - https://japaneselaw.sydney.edu.au/2020/08/book-in-press-with-elgar/
  - Including eg: 'A Weathermap for International Arbitration: Mainly Sunny, Some Cloud, Possible Thunderstorms' (2015) 26 ARIA 496,
  - 'In/Formalisation and Glocalisation of International Commercial Arbitration and Investment Treaty Arbitration in Asia' in Zekoll et al eds, Formalisation and Flexibilisation in Dispute Resolution (Brill 2014)
    - Those and others via http://ssrn.com/author=488525
- Nottage et al (eds) *New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution* (Wolters Kluwer 2021)
- Reyes & Gu (eds), *Multi-Tier Approaches to the Resolution of International Disputes* (CUP 2022)