The Prospects and Challenges for International Commercial Arbitration

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ACICA Rules drafting committee (2004-2024)

Overview

- International Commercial Arbitration (ICA) has been growing, including across Asia (but not much inside Japan, or Australia)
- ICA has multiple advantages over cross-border litigation
  - Takasugi et al 2020, compare some survey evidence both East and West
- Challenges to the traditional advantages of ICA:
  - Enforcement
  - Arbitrator neutrality & expertise
  - Confidentiality
  - Flexible procedures
  - Lack of appeal for error of law
- Prospects for improving ICA, especially reducing its costs & delays

Advantages of ICA: Takatori & Sonoo 2020 @ LTRI

第１部　国際商事仲裁等の現状と課題
１．国際商事仲裁手続の特徴

- 仲裁手続の特徴
  - 非公開性・秘密性 （confidentiality vs. transparency 先例拘束性との調整が課題）
  - 柔軟性
  - 迅速性・低コスト
  - 中立性
  - 専門性
  - 仲裁判断の執行容易性（ニューヨーク条約）

    （cf. 国際調停についてのシンガポール条約）

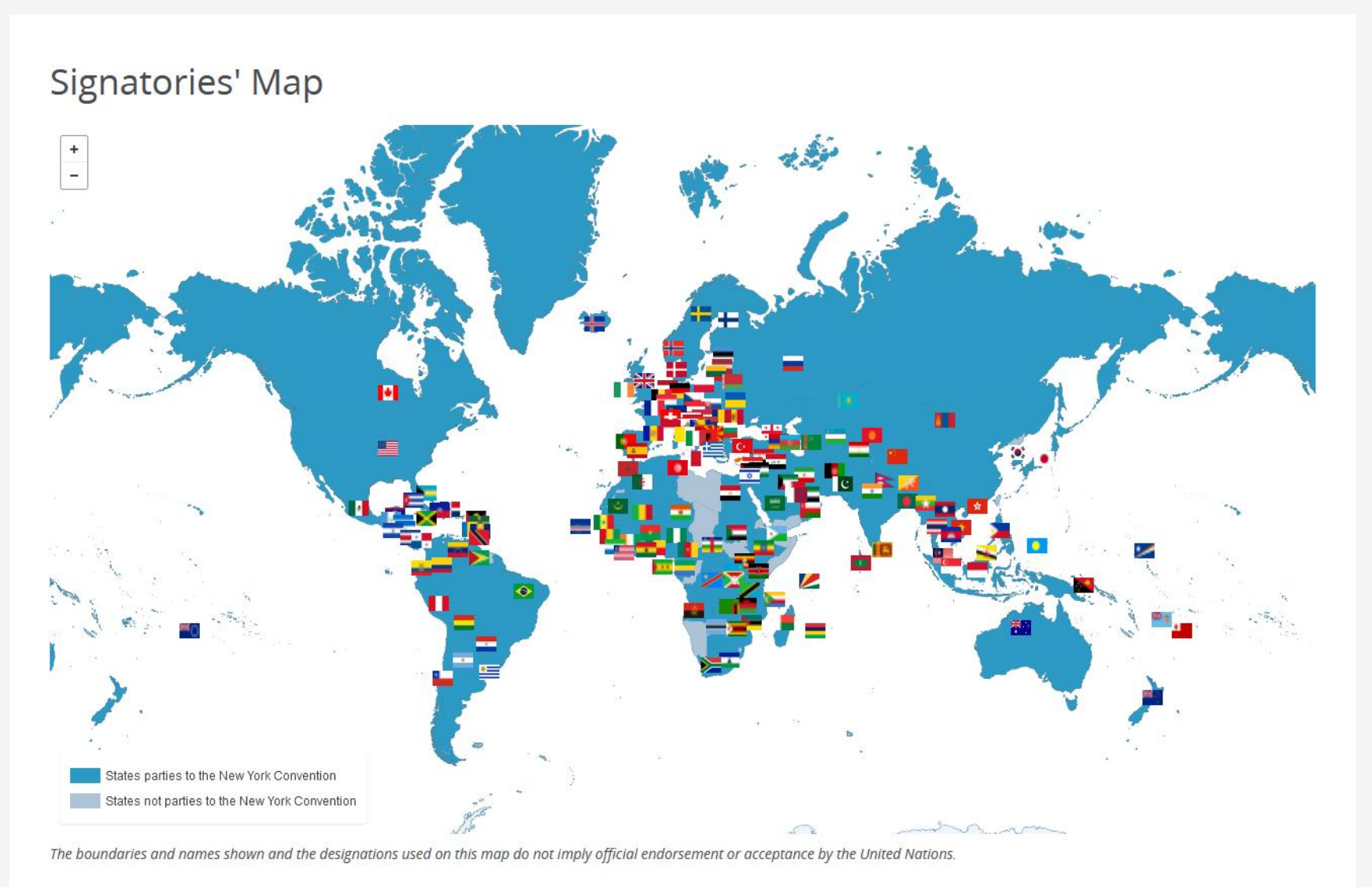
高取芳宏「企業間紛争解決の鉄則20」（㈱中央経済社、2012）70頁以下

See also: Surveys in 1990s (Christian Buhring-Uhle) & 2000s (Shahla Ali: more Asian respondents)

Response – 'highly relevant' or 'significant'	Region of Practice	
	East (Ali study)	West (CBU study)
Forum's neutrality	88 (%)	78 (%)
Forum's expertise	83	76
Results more predictable	36	42
Voluntary compliance*	42	24
Treaties ensure compliance abroad	85	69
Confidential procedure*	76	56
Limited discovery	47	56
No appeal	64	58
Procedure less costly	36	20
Less time consuming*	57	35
More amicable	52	35

1. Enforcement of arb agreements & awards

1958 New York Convention (NYC), ratified by Japan 1961! (total states: 172)



https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2

Art II (helps get arb started): court (eg in Japan) faced by foreign-seated arb must stay proceedings (not accept litigation), unless no agreement

Art V (helps after arb procedures): court must enforce foreign-seated arbitration award, except if

- arb agreement void, no notice of arbitration, dispute subject matter not 'arbitrable', or against substantive or procedural 'public policy'
- NB not: if error of law (or fact) by arbitrators in the award!

- BUT NB: ratifying states may make reservations to enforce only awards from other NYC member states (eg Japan), or only if arb is "commercial" (not defined in treaty, eg Korea)

UNCITRAL Model Law on ICA 1985 (revised 2006)

- template for legislation for arbitration procedures (middle phase)
- Mostly default provisions (so parties can agree otherwise, eg 1 not 3 arbitrators)
- Key mandatory provisions: arbitrator neutrality (Art 12), 'equal treatment and [reasonable] opportunity to be heard' (Art 18)
- Similar provisions as NYC for enforcing international arb agreements (Art 8) and awards (Art 36), but for both foreign-seated *and* locally-seated arbs
- Plus Art 34: similarly limited grounds for *setting aside locally-seated international arb awards* in seat court

- Adopted by 74 states, including Australia (1989, basically extended from 2010 to domestic arbs) and Japan (2003, intl & domestic arbs)
  - https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status

Competition from courts: still limited?

- Some states are quite generous in granting stays if parties agreed on foreign court jurisdiction, & enforcing their judgments, BUT
  - still more discretion than NYC (even Australia and Japan) & others very limited (eg no enforcement of foreign judgments in Indonesia, Thailand etc)
- Now also: Hague Choice of Court Convention 2005
  - Limited grounds, like NYC, for member states to refuse stay (Art 6) or enforcement of judgment from chosen foreign court (Art 9)
- But also eg reciprocity reservation, & anyway so far few ratifications
  - https://www.hcch.net/en/instruments/conventions/status-table/?cid=98

- Even if more ratifications, 2005 Convention does not (directly) regulate the middle phase of litigation in foreign court (like Model Law for ICA)
- So “international commercial courts” are being established, trying to create “arbitration-like” advantages, eg Singapore ICC in 2015??:
  - Includes foreign not just local judges (cf China ICC in 2018): neutral & expert
  - Parties may agree to limit appeals (otherwise to Singapore Court of Appeal)
  - Parties can request confidentiality of procedures
  - Parties can adopt non-Singaporean rules of evidence
  - Parties can use foreign lawyers if no Singaporean links or foreign law applies
  - Above features are like Arb, but also SICC can join third parties without consent
- But still parties rarely directly choose such courts, instead of ICA: see Man Yip et al 2023 https://ssrn.com/abstract=4652802 (& IACL book)

2. Arbitrators: neutral & expert

- Choosing a foreign court (eg Switzerland) can also create neutrality, but jurisdictions change (like now Hong Kong?)
- Arbitrators can be even more neutral as individuals (but NB when three, each party usually nominates one, who then choose 3rd!)
- Parties can also choose those with subject matter expertise
  - But NB lawyers (including ex-judges) have squeezed out eg engineers etc
- More challenges to arbitrators (made to arb institutions and/or courts)
  - Due to less experienced parties, counsel, arbitrators (eg as ICA spread to Asia)?
  - Plus now push for generational change in arbitrators & (especially gender) diversity
    - So new arbitrators (seeking reappointments!) become more prone to ‘due process paranoia’?

3. Confidentiality (mid-ranked ICA advantage)

- Now default provision in arbitration laws of many jurisdictions:
  - Eg as statutory or case law 'add on' to Model Law (eg Hong Kong, Singapore, Australia since 2015, but not eg … Japan)
- Anyway in most institutions' Arbitration Rules (eg JCAA, TOMAC)
  - But not all: eg ICC, SCC (confidentiality duties only on arbitrators, instn)
- Confidentiality is double-edged sword:
  - Might encourage arbitrators to write shorter awards (for the parties, not the public) and manage procedures more efficiently
  - BUT seems instead to contribute to the growing costs & delays observed in ICA: parties cannot assess whether arbitrators & lawyers provide best value for money!
  - And confidential awards make predictions harder, so less chance of settlement?

4. Flexible procedures in ICA

- Recall: including limited pre-hearing 'discovery' of documents
  - But: IBA Rules on Evidence-Taking (1st in 1999) still envisage some discovery
  - So: Prague Rules 2018 (trying to promote more civil law tradition features, including more pro-active arbitrators) … but little uptake in practice?
    - Despite eg JCAA 2019 "Interactive Arb Rules": early clarification of issues by tribunal (*ronten seiri*!) & preliminary views before evidentiary hearing
- Other hardening, plus proliferation, of such "soft law" instruments
  - Eg IBA Guidelines on Party Representation 2013
    - Helps (especially new) arbitrators & counsel, but reduces flexibility
  - Also arb institutions increasingly provide sample documents & guidelines: see eg https://acica.org.au/acica-practice-procedures-toolkit/

5. Lack of appeal for error of law

- Still quite an attraction (recall again slide 4 above)
- Rare that parties agree to further review by arbitrators (but see eg GAFTA - for factual disputes, & AMINZ appeals – for confidentiality)
- But no appeal for error of law may make parties & lawyers more cautious during arb proceedings
- Lawyers (& even some arbitrators, eg ad hoc or in LCIA or ACICA arbitrations) also mostly operate on ‘time charge’ or ‘billable hours’ model, so less incentive to resolve cases quickly!
- Net result: growing concerns about delays & especially costs in ICA

So: What Prospects for Improvement in ICA?

1. Encourage competitors for cross-border enforcement

- Ratify 2005 Hague Convention & establish (liberal) international commercial courts or hybrids (eg procedures in English)
- Promote med-arb clauses in international contracts (& also build up mediation services locally, eg JIMC, but also for domestic disputes)
  - If settlement is reached cheaply thanks to mediator, but not complied with, the dispute can escalate to arbitration (although then at a cost)
  - Ratify the Singapore Mediation Convention 2019 (like Japan already!), so any mediated settlement can be enforced with limited exceptions (like NYC Art V)
    - But few ratifications so far again, & no analogue to NYC Art II re stays if mediation agreed
  - Clarify whether compliance with the mediation step is decided by a court (as the arbitrators have no jurisdiction) or by arbitrators (deciding on 'admissibility' of the claim, which cannot be reviewed by court even if error!)

2. Arbitrators (and institutions): restore more professional (non-lawyer) diversity – see eg Nottage, Teramura et al 2023 https://ssrn.com/abstract=3926914

3. Confidentiality: consider publishing redacted/anonymised

- awards (even some), and at least
- Institutions' procedural decisions (eg like LCIA, on arbitrator challenges)

4. Flexibility in procedures:

- promote 'competitors' to IBA 'soft law' (eg Prague Rules or variants)
- establish rules on 'Arb-Med' (parties authorise arbitrators to themselves promote settlement) eg ACICA draft Rules 2021
- Encourage 'document-only' arbs (eg SIAC Rules 2025)

5. Reduce incentives to expand ‘billable hours’:

- for arbitrator fees: eg set hourly fee but with total cap based on amount in dispute (eg JCAA general arbitration rules)
- for lawyers (& expert witnesses), 85%+ of total costs in arbs:
  - Cap based on amount in dispute (very rare in Arb Rules!)
  - encourage arbitrators or institutions to limit hourly rate to “reasonable” amount (like Anglo-Australian common law courts do), or
  - promote (Calderbank) ‘sealed offers (found in Anglo-Commonwealth litigation where also ‘costs follow the event’ ie losing party pays winner’s lawyer and witness costs): if offeree rejects offer of settlement and tribunal awards lesser amount, winning offeree cannot claim its lawyer and witness costs incurred subsequently to the offer

Further reading:

- Luke Nottage, '*Kokusai Shoji Chusai to Lex Mercatoria no Hensen* [The Vicissitudes of Transnational Commercial Arbitration and the Lex Mercatoria]' 113 *Ho no Shihai* 100-111 (Noboru Kashiwagi, trans, 1999),
  - based on Arb Int'l (2000), and updated as chapter 2 of:
- Luke 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/
- Luke Nottage, 'Cross-Fertilisation in International Commercial Arbitration, Investor-State Arbitration and Mediation: The Good, the Bad and the Ugly?' 50(3) Monash University (2024) https://ssrn.com/abstract=4872129
  - originally: https://disputescentre.com.au/supreme-court-of-new-south-wales-adr-address-2023/
- https://arbitrationblog.kluwerarbitration.com/author/luke-nottage/