

# Flexibility in International Dispute Resolution

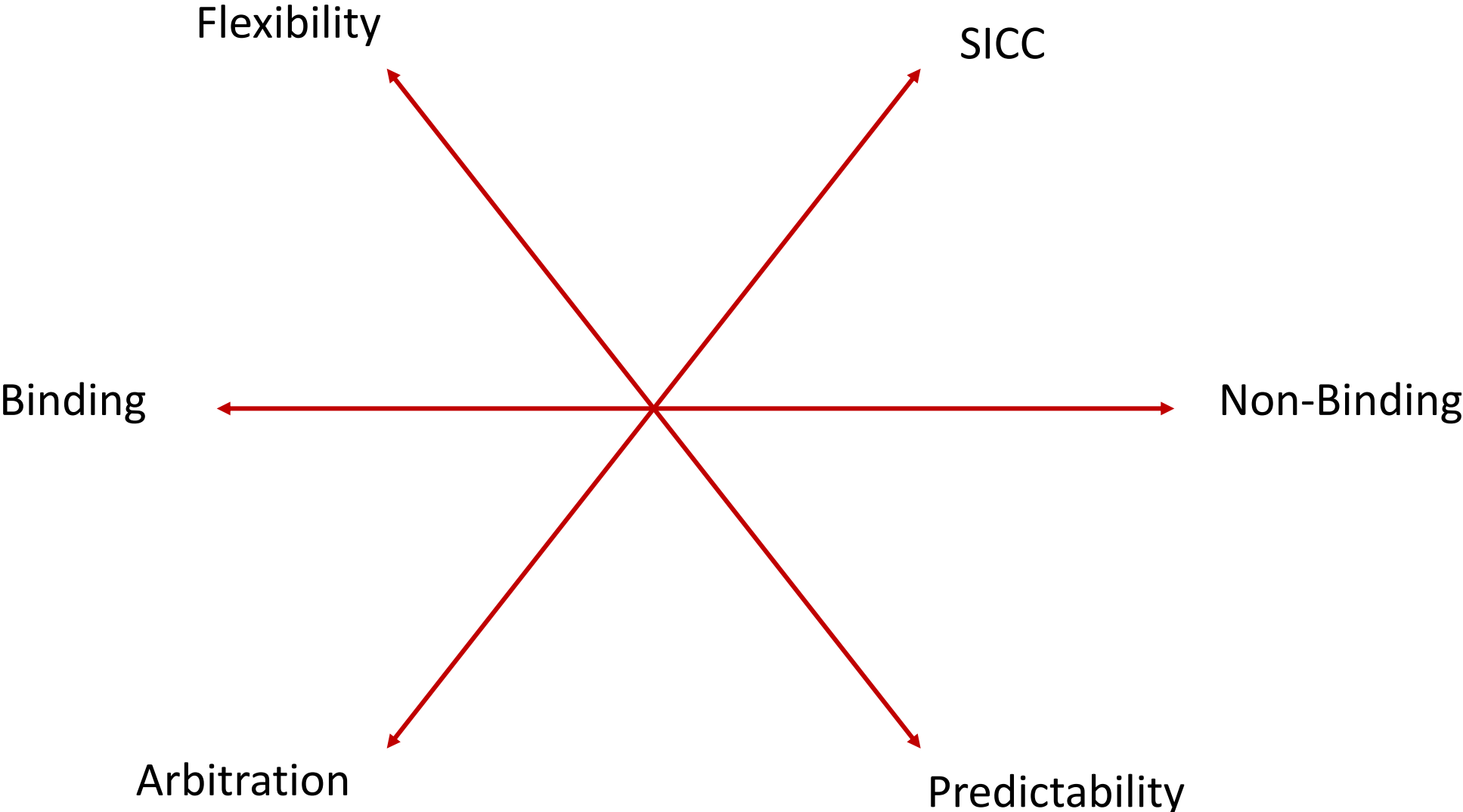
Professor Doug Jones AO



**CIArb Singapore Annual Thought Leadership Lecture**

Thursday, 9 November 2023

# Alternative Dispute Resolution: A Balancing Act



# Flexibility in International Dispute Resolution

## I. Binding ADR: Arbitration and the SICC

- A. Exchanges of Case
- B. Disclosure of Documents
- C. Witness Evidence
- D. Experts
- E. Pre-Hearing Engagement
- F. Main Evidentiary Hearing
- G. Finalisation of the Award

## II. Non-Binding ADR: Mediation

- A. Overview
- B. Combining Mediation with Other ADR

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# I. Procedure for Arbitrators and Judges

Swiss Watch



or



Arbitrators'  
(Judges') Toolkit

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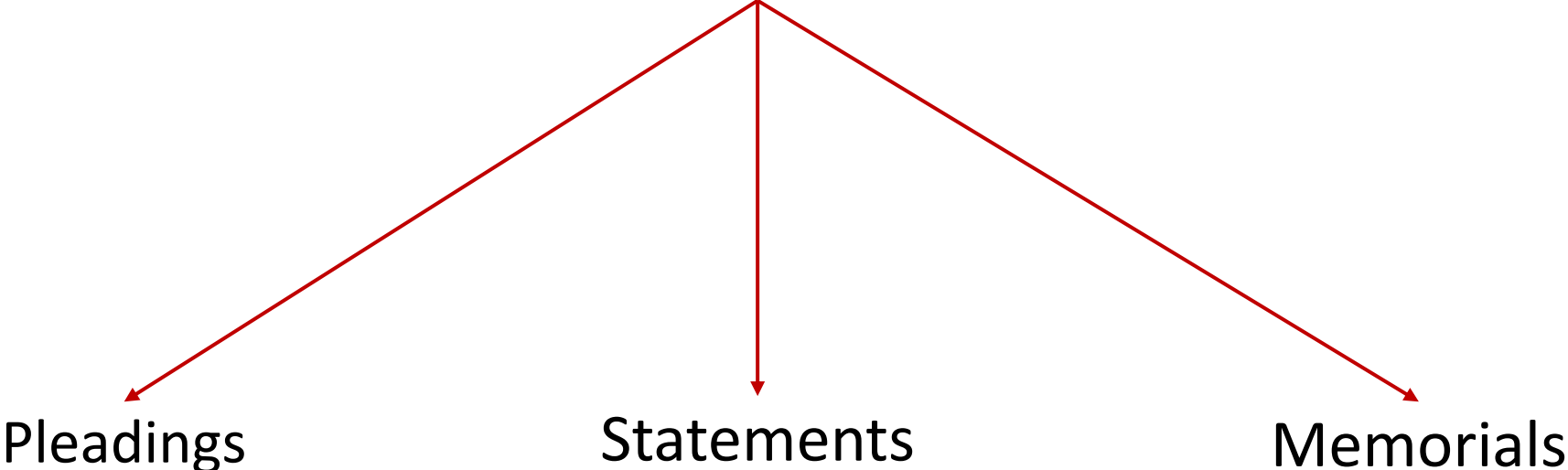
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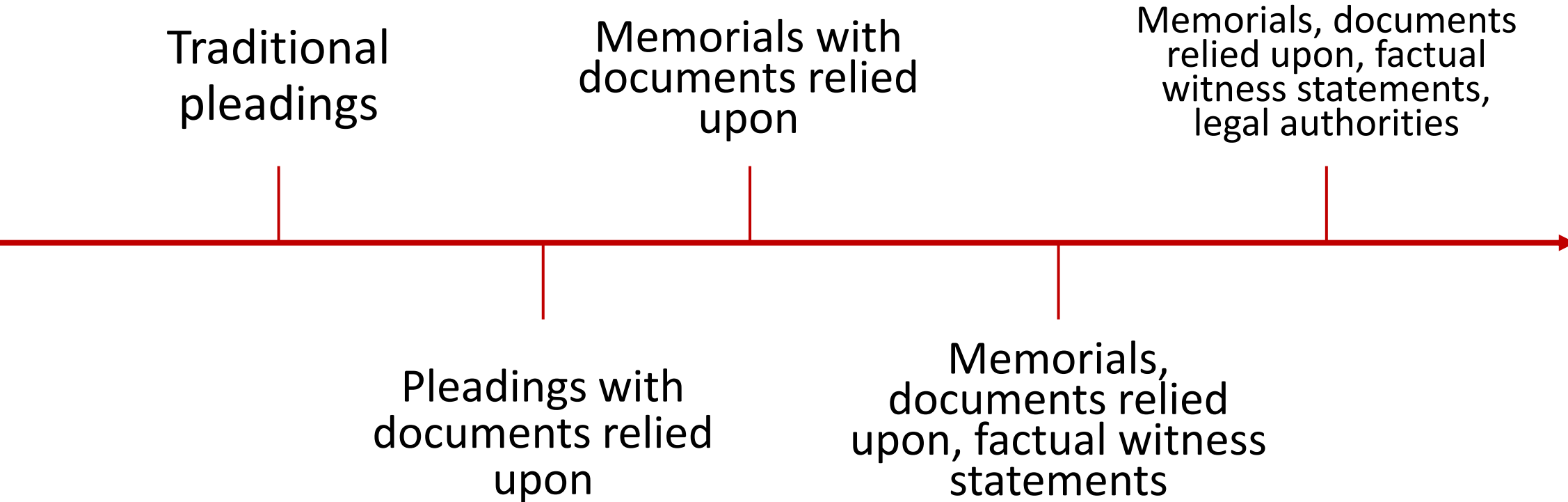
# A. Exchanges of Case in the SICCC

*Three 'Adjudication Tracks'*



# A. Exchanges of Case in International Arbitration

*One Spectrum*





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# B. Disclosure of Documents in the SICC

SICC Procedural Guide (1 March 2023)

## Annex F

- A simplified disclosure process
- Powers to modify and dispense with disclosure procedure

Case number					
Case Title					
Application for		Further & Better Particulars Production of Documents / Interrogatories <i>(Delete as appropriate)</i>			
S/N	A	B	C	D	E
	Category / Request	Issue / reference to pleading / affidavit / witness statement *	Applicant's submissions**	Respondent's submissions***	Applicant's submissions in reply to respondent's submissions
1.	(E.g. Minutes of Meeting of Board of Directors on 2 Jan 2021)	(E.g. Relevancy, Privilege)  (E.g. paragraphs 13 to 15 of the Defence / paragraphs 3 to 6 and page 32 of the affidavit of X dated dd/mm/yy)			
2.					
3.					

\* Reference to the specific paragraph and/or page of a pleading or affidavit or witness statement should be stated. Parties are to categorise the requests and confer on points of agreement.

\*\* The applicant is to state the applicant's submissions.

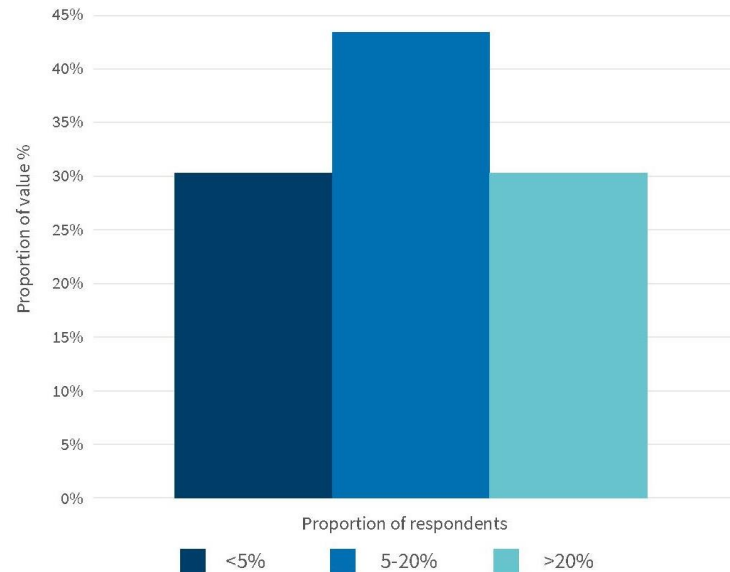
\*\*\*The respondent is to state the respondent's submissions. Where the respondent agrees to the request, the respondent may state so in this column.

# B. Disclosure of Documents in International Arbitration

ACICA, 2023 Evidence in International Arbitration Report (6 September 2023)

p 30

Fig. 21: Proportion of value in dispute spent on documentary evidence



*How to live through the Redfern nightmare...*

- International guidelines don't solve the problem (IBA Rules, Prague Rules)
- Requests for the experts
- CMCs to explain the need for documents, including the experts

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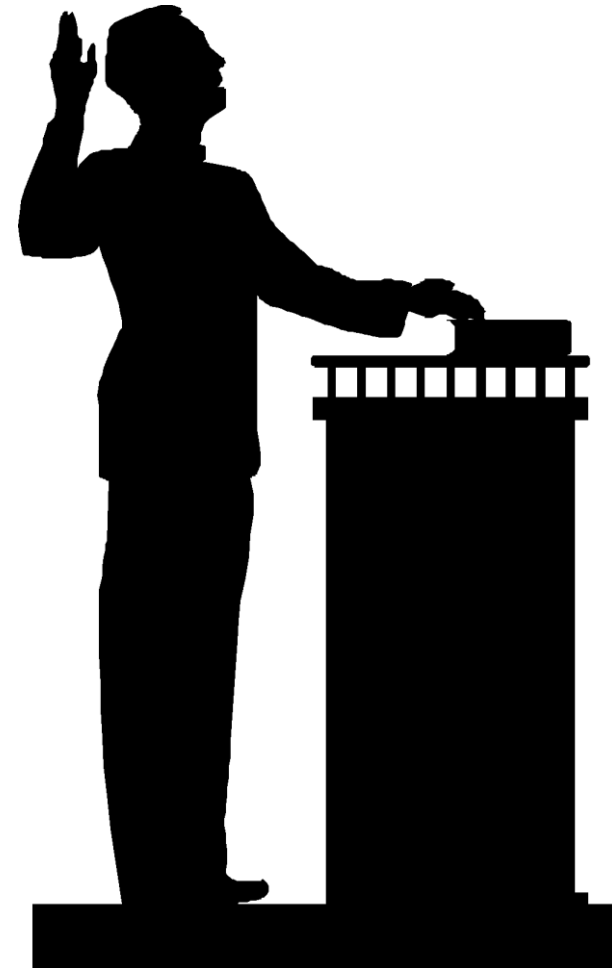
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# C. Witness Evidence in the SICCC

- Evidence-in-chief by witness statement
- Affidavits where required in law or ordered by the Court
- Flexibility regarding rules of evidence



# C. Witness Evidence in International Arbitration

- ‘Did you really write this?’
- Guidance for counsel – a protocol adapting the Practice Direction on Trial Witness Statements in the English Business and Property Courts
- Keep submissions out of them!
- Do not repeat documents that speak for themselves

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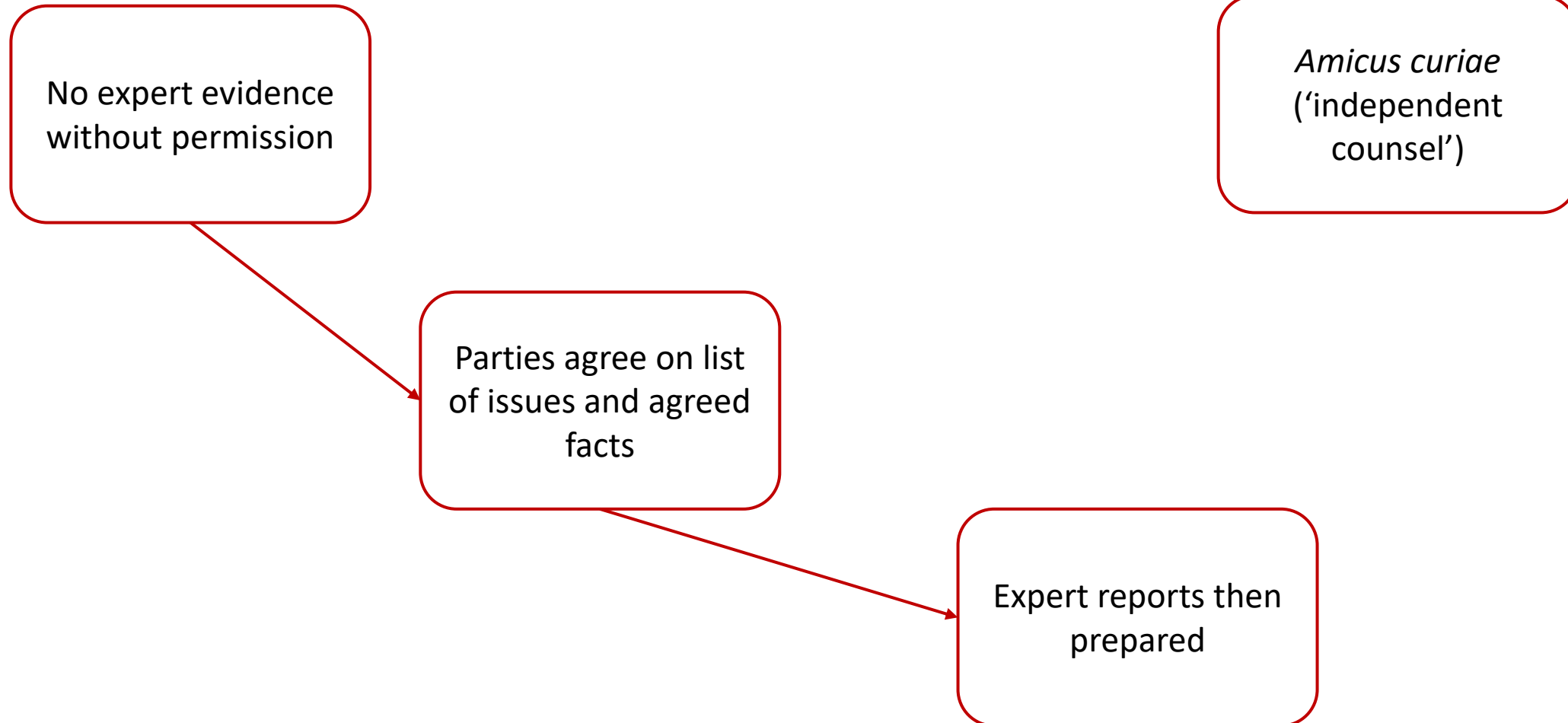
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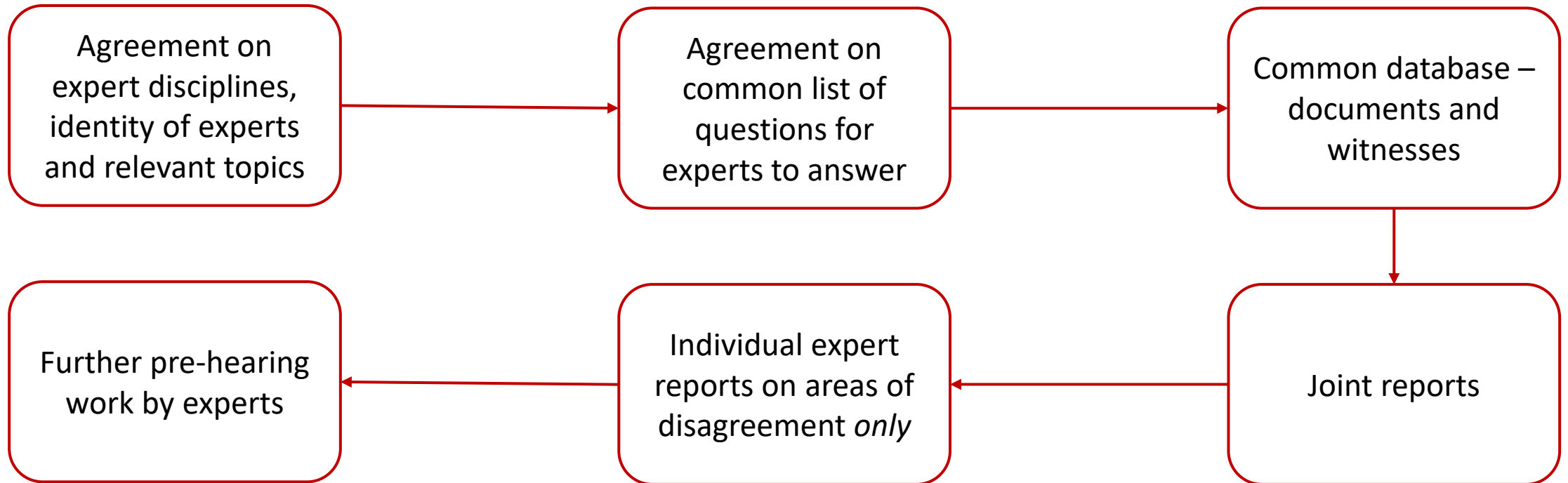
# D. Experts in the SICC





# D. Experts in International Arbitration

- Party vs tribunal appointment?
- Hired guns – how to take away the guns?
- Tribunal proactivity leading to the ‘hot tub’



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# E. Pre-Hearing Engagement in the SICCC

- Provisions for CMCs:

*A case management conference will be held as provided in these Rules or at any time the Court thinks appropriate.*

—SICC Rules 2021, O 9 r 1(1)

# E. Pre-Hearing Engagement in International Arbitration

## *Issues (Midstream) CMCs*

- Usually after first round of parties' cases, tribunal summarises the issues
- That summary is discussed with the parties at the midterm CMC
- Schedule of issues prepared by tribunal is updated by the parties thereafter, indicating where to find factual, expert and documentary evidence relating to each issue
- This involves some hard work by the tribunal

## *What does this achieve?*

- An educated tribunal
- An ongoing reference for each issue leading into the hearing
- Assistance with limiting the reply evidence to what is material

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### **F. Main Evidentiary Hearing**

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# F. Main Evidentiary Hearing in the SICCC

- *The Court has control over the conduct of all trials*, including:
  - Identifying / limiting issues to which factual evidence may be directed
  - Identifying witnesses to be called
  - Exchange of written closing submissions
  - Making of oral closing submissions
  - Limiting time?

— *SICCC Rules 2021, O 20 r 5(1)*

# F. Main Evidentiary Hearing in International Arbitration

*Chess-clock procedures: 'for adults only'\**

- Pre-Hearing CMC well before the hearing
- Time management – limited time chess-clock hearings



\* Jan Paulsson, 'The Timely Arbitrator: Reflections on the Böckstiegel Method' (2006) 22(1) *Arbitration International* 19, 22

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# G. Finalisation of the Judgment in the SICCC

- Bifurcation of liability and quantum

# G. Finalisation of the Award in International Arbitration

## *Post-Hearing Expert Access Protocol*

- Tribunal given ‘access’ to two quantum experts
- Tribunal to consult experts on a confidential basis to perform calculations, on the basis of:
  - i. Materials and methodologies already in the evidentiary record
  - ii. Factual assumptions as provided by the Tribunal

*For the avoidance of doubt, the Arbitral Tribunal will **not** engage in confidential communications with the Quantum Experts on matters requiring an expert opinion, rather than the performance of calculations.*

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# A. Overview of Mediation

*[A] process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ('the mediator') lacking the authority to impose a solution upon the parties to the dispute.\**



**SINGAPORE  
CONVENTION  
ON MEDIATION**

\* United Nations Convention on International Settlement Agreements Resulting from Mediation, opened for signature 7 August 2019 (entered into force 12 September 2020) Article 2(3)

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## B. Combining Mediation with Other ADR

### 1. *Encouragement of mediation by judge or arbitrator*

- SICC LML Framework
- SIAC Arb-Med-Arb Clause
- 'Pause' – provision in procedural orders?

### 2. *Facilitation of settlement by judge or arbitrator*

- The Chinese experience
- Doing this in arbitration?
  - Lessons from the ICC Commission's Report on *Facilitating Settlement in International Arbitration* (July 2023)



# Conclusion

***Flexibility***

*is the key to*

*effective*

*international dispute resolution*

# Q&A



Professor Doug Jones AO  
[www.dougjones.info](http://www.dougjones.info)



Link to full paper (available at  
[www.dougjones.info/publications](http://www.dougjones.info/publications))