

Arbitral Precedent: Necessity, Not Formality

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What Arbitral Precedent Is Not

Stare decisis = “to stand by what is decided”.

No hierarchy

One arbitral tribunal is not superior to another.

No general appellate system

There is no central appellate system harmonising arbitral awards.

Case-by-case mandate

Each tribunal derives authority from the parties’ agreement and applicable law.

Arbitral Precedent and Persuasive Reasoning

Prior awards may guide later tribunals

- Not binding authority
- Not mechanical repetition
- Persuasive reasoning

Why a prior award may matter

- Similar issue
- Careful reasoning
- Consistent line of authority
- Accepted arbitral practice

Persuasive Arbitral Jurisprudence

- It is horizontal, not vertical
- It is not binding by command
- It is persuasive by reasoning
- It develops through repeated engagement with similar issues

Following Prior Awards: Commercial Arbitration

ICC survey:

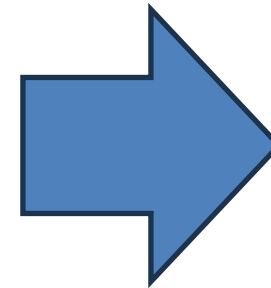
190 awards reviewed

Approx. 15% cited other arbitral decisions

Mostly on jurisdiction and procedure

Also on choice of law / governing law

Substantive issues rarely relied on arbitral awards



Not a strong doctrine of precedent

Rarely self-standing rule creation

Usually supports national law, institutional rules or scholarship

Persuasive mainly on recurring arbitral issues

Arbitral Precedent in Investment Arbitration

- No hierarchy; no general appellate body
- Recurring treaty standards: FET, expropriation, legitimate expectations, necessity, non-discrimination
- Approx. 2,500 BITs and multilateral treaties
- Prior awards function as persuasive authority

El Paso Energy International Co. v. Argentine Republic ICSID Case No. ARB/03/15 - Decision on Jurisdiction, 27 April 2006, para. 39

- “ICSID arbitral tribunals are established ad hoc... there is no obligation of stare decisis. It is nonetheless a reasonable assumption that tribunals... will generally take account of precedents established by other arbitration organs.”

The Argentina Necessity Cases

Same crisis - same BIT background - different outcomes.

CMS Gas Transmission Company v. Argentine Republic

ICSID Case No. ARB/01/08
Award of 12 May 2005
United States–Argentina BIT

Outcome: tribunal rejected the state of
necessity defence.

LG&E v. Argentina

ICSID Case No. ARB/02/1
United States–Argentina BIT

Outcome: tribunal held that Argentina was in a
state of necessity and excused non-performance
for 18 months.

Persuasive precedent does not require identical results —
it requires engagement, distinction and explanation

The CME / Lauder Arbitrations

Related disputes arising from the same investment produced difficult-to-reconcile outcomes

Lauder v. Czech Republic

UNCITRAL Arbitration, Award, 3 Sept 2001
Claim by the controlling US shareholder
Czech Republic–US BIT

Outcome: minor treaty infraction did not lead to liability.

CME Czech Republic B.V. v. The Czech Republic

Final Award on Damages, 14 March 2003
Claim by the Dutch subsidiary
Czech Republic–Netherlands BIT

Outcome: BIT breaches found; liability of almost US\$500 million.

Where a closely related award exists, the later tribunal should address it directly and explain why it is persuasive, distinguishable or not applicable.

Beyond Investment Arbitration

Sports arbitration (CAS)

- 1986–2003: only one award in six cited prior cases
- After 2003: nearly every award cited earlier CAS awards

IAAF v. USA Track & Field and Jerome Young, CAS 2004/A/628, 28 June 2004:

“No principle of binding precedent... however, a CAS Panel will obviously try... to come to the same conclusion on matters of law as a previous CAS Panel.”

Domain name dispute resolution (UDRP)

- Not arbitration stricto sensu, but comparable
- Uniform rules issued by ICANN
- Out of 110 awards issued in fall 2006, there were 540 citations to prior domain name decisions in 85 cases

Where rules recur and decisions are accessible, precedent develops naturally.

Consistency, Predictability, Credibility

Consistency

Arbitration is decentralized.

The concern is not divergence as such, but unexplained divergence.

Predictability

Prior awards help lawyers advise clients, parties to assess risk, and tribunals to handle recurring issues efficiently.

Credibility

Arbitration is more credible when similar issues are treated coherently and departures are explained.

Access to Awards and Legitimacy

Access obstacle

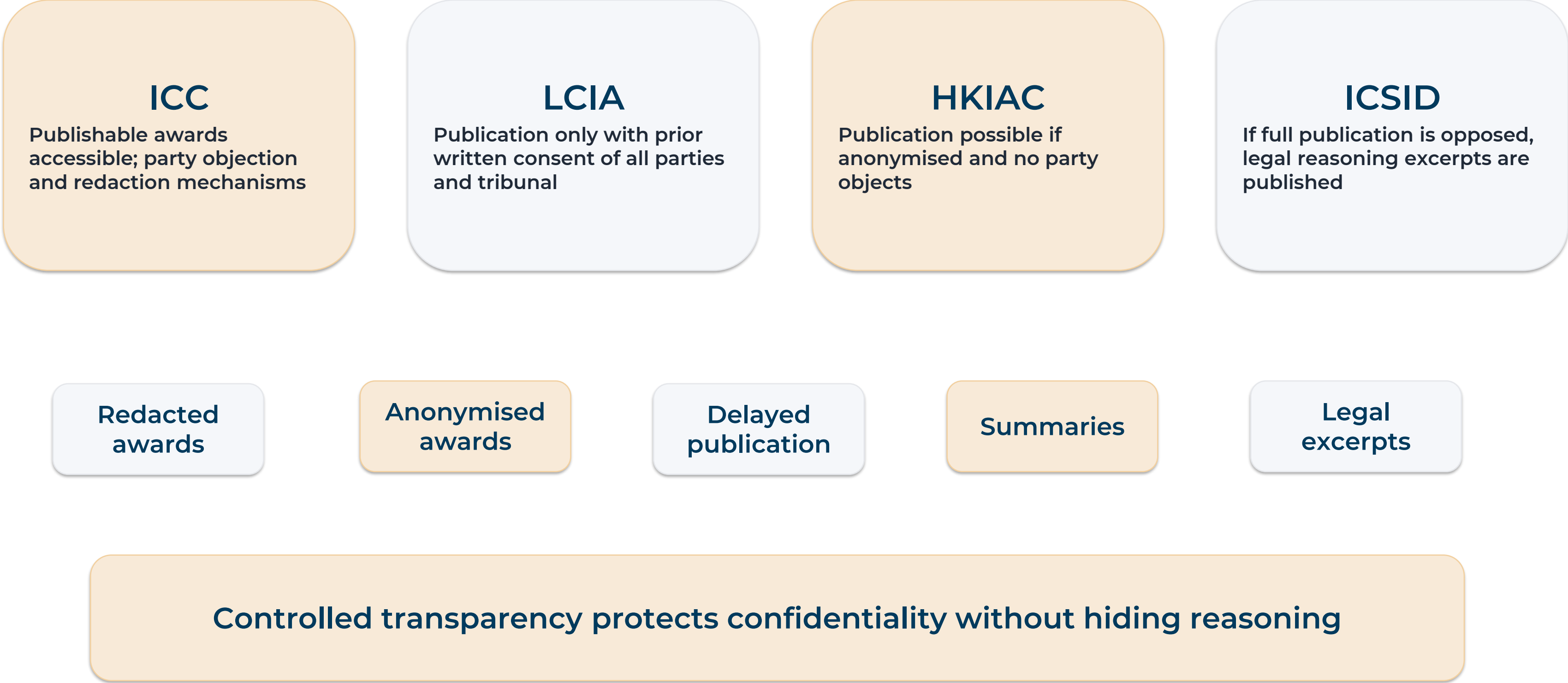
- Precedent depends on visibility
- Arbitral awards often remain private
- Recurring reasoning may therefore stay fragmented and unavailable

Legitimacy concern

- Tribunals decide issues of significant legal, financial and public importance
- Users cannot easily test consistency, fairness or coherence if reasoning is inaccessible
- Transparency therefore underpins confidence in the system

Transparency is not merely about publicity — it is about confidence in arbitration as a rule-based system.

Institutional Approaches and Controlled Transparency



Conclusion

Arbitral Precedent exists as persuasive arbitral jurisprudence.

It influences submissions, reasoning and expectations. It promotes consistency and predictability.

It supports the development of arbitral doctrine, since dialogue between tribunals is necessary for arbitration to develop coherently.

“[I]f we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on: and that will be bad for both.”

Denning LJ, Packer v. Packer [1954]

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