



**LALIVE**  
THE DISPUTES POWERHOUSE

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Panel 4: Reforming Commercial Arbitration in Response to Legitimacy Concerns

**Commercial arbitration and the development of common law**

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# Commercial arbitration and the development of common law: The criticisms

## The Criticisms - England

*“...the diversion of more claims from the courts to arbitration [...] reduces the potential for the courts to develop and explain the law [...] transforming the common law from a living instrument into ... ‘an ossuary’”.* **Lord Chief Justice, Lord Thomas, 2016**

*“Arbitration is retreating into its lair, dragging with it into the darkness the very cases that should be used to develop the common law as it applies to modern commerce”.* **Bor, 2016**

*“the lack of publication, the lack of transparency, the difficulty or impossibility of getting such awards into the public domain, a fortiori in the light of institutional rules which bar any challenge or appeal to the courts whatsoever, mean that our commercial law is going underground.”* **Sir Bernard Rix, 2016**

## The Criticisms - Australia

*“An unintended side-effect of the increase in arbitration is the corresponding reduction in litigation [...] **stunting the development of the common law.**” **Stephenson and Andersson, 2016***

## Common law is akin to a living tree

*“All areas of law [...] are living, constantly evolving trees. Some branches sprout and grow; others crack and need trimming. Thus, the law develops and remains responsive to changes in society...”*

*“...the tree looks different than it used to. It may not be dead, but new branches are not appearing as often as they once did. And old branches that need pruning are often neglected.”*

***Rt. Hon. Beverley McLachlin, Chief Justice of Canada***

## The Criticisms – United States

*“The arbitration movement evicts entire classes of claims from the public justice system...There can be no dispute that **arbitration... fundamentally precludes the common law development**” **Myriam Gilles, 2016***

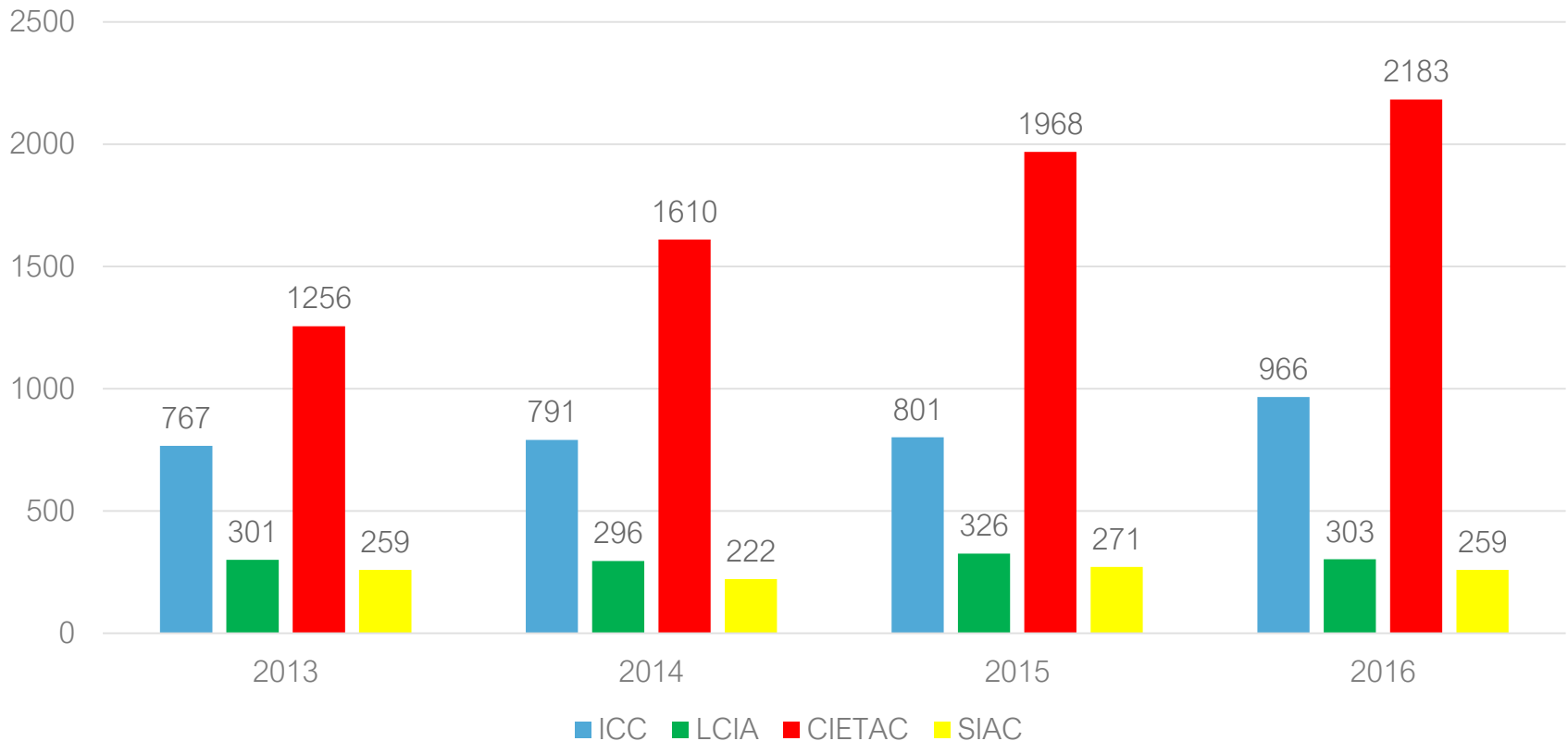
*“For the entire categories of cases that are ushered into this vault **common law doctrinal development will cease. That is what I mean by the end of law**” **Myriam Gilles, 2016***

*By taking cases away from courts, international arbitration causes **a dearth of precedent** in certain areas of the law and is perceived as a threat to the healthy development of the law.” **Ank Santens and Romain Zamour, 2015***

# Assessing the Criticisms

1. Does commercial arbitration hinder the development of common law?
2. If so, does this hindrance render commercial arbitration any less legitimate?
3. If so, how should commercial arbitration adapt?

# Steady growth in number of arbitration disputes

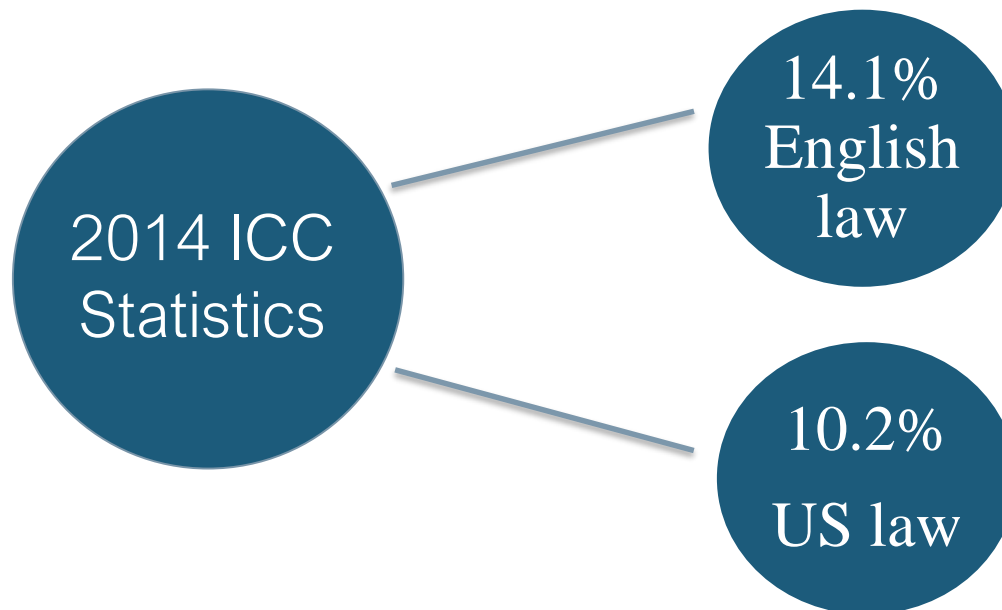




# Many arbitrations governed by common law

English and US law have been consistently the most frequent choices of law by the parties in recent years

*2014 and 2016 ICC Dispute Resolution Statistics, published in ICC Dispute Resolution Bulletin 2015/No.1 and ICC Dispute Resolution Bulletin 2017 No. 2.*



## “End of law” equation

Increase in  
arbitrations



Governed by  
common law



Fewer cases before common law courts



Fewer opportunities to develop common law

## Assessing the Criticisms

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# Standard of legitimacy

Narrower perspective:  
Party or arbitration community  
legitimacy

Broader perspective:  
National or global legitimacy



Hindrance of common law raises potential legitimacy issues  
from all perspectives

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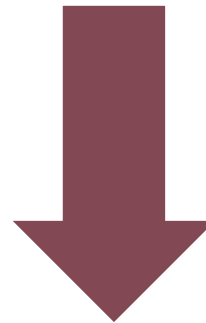
# The critics' proposed solution

## The critics' proposed solution

Increase scope of  
court jurisdiction



Decrease scope of  
arbitration



Overrides party autonomy to choose  
arbitration

## Critics' proposed solution is untenable

- ✘ Overrides party autonomy in choosing arbitration
- ✘ Increases costs and delay
- ✘ Counter-productive
- ✘ *“Sets the clock back almost 40 years”, Sir Bernard Rix, 2016*



A solution based on  
greater interaction between courts and  
tribunals

## Components for an alternative solution

✓ First input: Body of decisions produced by arbitral tribunals (or “law-making” for the bold)

✓ Second input: More systematic publication of arbitral decisions

## Wider publication of awards is advisable also from other legitimacy perspectives

*“As more and more international commercial cases go to arbitration rather than the courts, we are more and more losing sight of the basic feedstock of our commercial law. In such circumstances, it is in my opinion inevitable that **the public interest is being and will increasingly be damaged** as more and more **decisions on areas of commercial law become inaccessible** to the public arena.”*

*Sir Bernard Rix, 2015*

Thank you

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