

THE ICC INTERNATIONAL COURT OF ARBITRATION AND THE 2012 ICC RULES OF ARBITRATION

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BRIEF INTRODUCTION TO THE COURT AND ITS SECRETARIAT



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THE COURT

Founded in 1923

To date: 18800 cases

2011: 2293 parties from 139 countries

2011: 1341 arbitrators from 78 countries

2011: Place of Arbitration in 113 cities in 63 countries

Composition

President: John Beechey

15 Vice Presidents

Over 130 members worldwide

Sessions

Committee Sessions

Weekly

3 Court members

All types of decisions

Plenary Sessions

Monthly

Open to all Court members

Challenges, majority awards, States

New Cases Registered



THE SECRETARIAT



Management

- Secretary General
- Deputy Secretary General
- General Counsel
- Managing Counsel



Case Management Teams

- Counsel
- Deputy Counsel
- Administrative Assistants



Functions

- **External:**
Assist the users
- Correspondence
- Advice Application of the Rules
- Supervision
- **Internal:**
Assist the Court
- Prepare documents for Court Sessions
- Recommend courses of action
- Advice on Practices

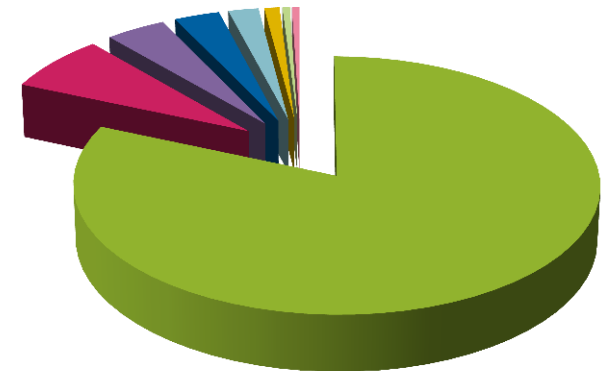


Regions Covered

- Asia
- Eastern Europe and Turkey
- France, North Africa and Middle East
- Germany, Austria, Northern Europe
- Switzerland, Italy
- Latin America and Iberian Peninsula
- North America
- United Kingdom, Common Wealth and other Common Law Jurisdictions

Languages

- | | |
|--------------|-----------|
| ■ English | ■ French |
| ■ Spanish | ■ German |
| ■ Portuguese | ■ Italian |
| ■ Arabic | ■ Chinese |



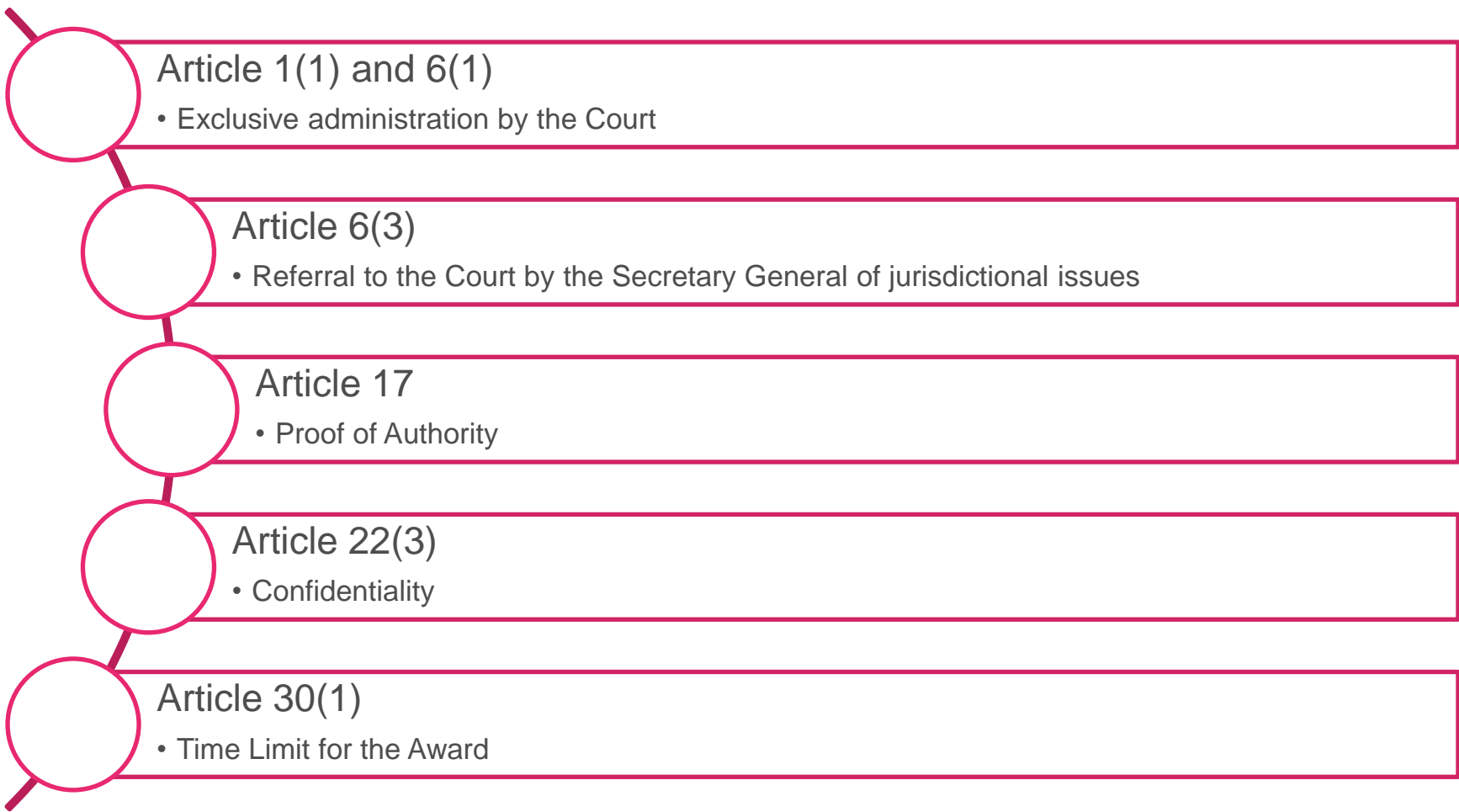
GENERAL PROVISIONS



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GENERAL PROVISIONS



The diagram consists of five horizontal rectangular boxes, each with a pink border, arranged vertically. To the left of each box is a pink circle. A vertical pink line connects the bottom of each circle to the top of the next circle below it. The top circle has a short pink line extending from its top-left edge. The bottom circle has a short pink line extending from its bottom-left edge. Each box contains an article reference and a bulleted point.

Article 1(1) and 6(1)

- Exclusive administration by the Court

Article 6(3)

- Referral to the Court by the Secretary General of jurisdictional issues

Article 17

- Proof of Authority

Article 22(3)

- Confidentiality

Article 30(1)

- Time Limit for the Award

MULTIPLE PARTIES, MULTIPLE CONTRACTS AND CONSOLIDATION



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INTRODUCTION

1. Identifying the Problem

- Change in number and demographics of ICC Arbitration (1998: 400 average new requests per year / 2009-2010: average of 800 new requests per year)
- Increase of Multi-Party Arbitration: 30% of total caseload

2. Identifying the Solution

- Development of Practices
- Crystalizing Practices into transparent rules

3. Implementing the Solution

- Separable section dealing with multi-party issues
- Comprehensive and simple provisions

INTRODUCTION

**GOAL:
SIMPLE RULES
FOR COMPLEX SITUATIONS**

THIRD SECTION: ARTICLES 7 - 10

- **Article 7: Joinder of Additional Parties**
- **Article 8: Claims between Multiple Parties**
- **Article 9: Multiple Contracts**
- **Article 10: Consolidation of Arbitrations**

JOINDER OF ADDITIONAL PARTIES

A B C



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JOINDER OF ADDITIONAL PARTIES

Practice under 1998 Rules

- Rules do not provide for joinder
- Joinder of additional parties may be allowed
- Decision of the ICC Court on whether or not to allow the Joinder
- The Joinder is allowed only when:
 - ✓ The party to be joined is signatory
 - ✓ There are claims against the party to be joined
 - ✓ No confirmation or appointment of arbitrators has taken place

A

JOINDER OF ADDITIONAL PARTIES

Implementation of the practice into the 2012 Rules

- **Choice of words**
 - ✓ Joinder / Incorporación / Integração
 - ✓ Additional Parties / Partes Adicionales / Partes Adicionais
- **Equal treatment between the parties**
 - ✓ Right to identify parties without decision from the ICC Court
 - ✓ Participation in the constitution of the arbitral tribunal
- **Time Limitation:** Constitution of the Arbitral Tribunal
- **Notion of Parties to the Proceedings:** Participation in a claim
- **Issues of Jurisdiction subject to decision of Arbitral Tribunal and, as the case may be, prima facie jurisdiction control by the ICC Court**
 - ✓ Article 6(3)
 - ✓ Article 6(4) (i)

B

JOINDER OF ADDITIONAL PARTIES

Procedure

- **Article 7(1) (2): Request for Joinder = Request for Arbitration**
- **Article 7(3): Registration Fee**
- **Article 7(4): Additional Party has the right to file Answer and Claims**
- **Article 7(1): ICC Court Secretariat has the power to fix a time limit to file a Request for Joinder**
- **Article 12: Additional Party participates in the constitution of Arbitral Tribunal as any other party**
 - Article 12(3): Joint nomination of a Sole Arbitrator
 - Article 12(7): Joint nomination with Claimant or Respondent of an arbitrator.
 - Article 12(8): In the absence of a joint nomination pursuant to Article 12(7), the Court may appoint all three arbitrators

C

CLAIMS BETWEEN MULTIPLE PARTIES

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CLAIMS BETWEEN MULTIPLE PARTIES

Practice under 1998 Rules

- Rules only expressly provide for claims made by the Claimant and counterclaims made by Respondent:
 - ✓ Principal claims
 - ✓ Counterclaims
- The ICC Court has allowed “cross claims” between parties on the same procedural role (e.g., claims between Respondents) subject to, if necessary, prima facie jurisdiction control
- The ICC Court has allowed claims between a party and an additional party subject to the ICC Court’s acceptance of the joinder of such additional party and, if necessary, prima facie jurisdiction control

A

CLAIMS BETWEEN MULTIPLE PARTIES

Implementation of the practice into the 2012 Rules

- **Choice of words**
 - No reference to “cross-claims” or any other concept belonging to one particular legal culture
- **Article 2(iii) Definition of claims**
- **Establishment of a Procedure:**
 - Before the Constitution of the Arbitral Tribunal
 - After the Constitution of the Arbitral Tribunal
- **Issues of Jurisdiction subject to decision of Arbitral Tribunal and, as the case may be, prima facie jurisdiction control by the ICC Court**
 - Article 6(3)
 - Article 6(4)

B

CLAIMS BETWEEN MULTIPLE PARTIES

Procedure

- **Article 8(2): Article 8 claims = Request for Arbitration
No Registration Fee**
- **Article 8(3): Addressee of the claim has the right to file Answer**
 - ✓ Before the Arbitral Tribunal: Following the procedure of Article 5
 - ✓ After Arbitral Tribunal: Procedure to be established by the Arbitral Tribunal
- **Article 23(4): After Terms of Reference no new claims without authorization of the Arbitral Tribunal**

C

MULTIPLE CONTRACTS

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MULTIPLE CONTRACTS

Practice under 1998 Rules

- Rules do not expressly provide for multi-contract arbitration
- The ICC Court has treated multi-contract cases under its prima facie jurisdiction control
- The ICC Court generally allows multi-contract cases to proceed provided that:
 - ✓ All parties have signed all contracts
 - ✓ All arbitration agreements are compatible
 - ✓ Contracts related to the same economic transaction
- **Objective: To assess on a prima facie basis whether all parties may have agreed to have all claims determined in a single arbitration**

A

MULTIPLE CONTRACTS

Implementation of the practice into the 2012 Rules

- **Choice of words**
 - Claims arising out of or in connection with more than one contract
 - Single Arbitration
 - One or more arbitration agreement under the Rules
- **Establishment of the Principle:**
 - Possibility of the making of multi-contract claims
 - Difference between contracts and arbitration agreements
- **Issues of Jurisdiction subject to decision of Arbitral Tribunal and, as the case may be, prima facie jurisdiction control by the ICC Court**
 - Article 6(3)
 - Article 6(4)(ii)

B

MULTIPLE CONTRACTS

Procedure

- **Article 4(f):** Indication of arbitration agreement under which each claim is made
- **Article 6(3):** In case of objections or absence of Answer, any question of whether the claims may be determined in a single arbitration to be decided by the Arbitral Tribunal, unless the Secretary General refers the matter to the Court
- **Article 6(4)(ii): The arbitration shall proceed:**
 - ✓ As to those claims with respect to which the Court is prima facie satisfied
 - ✓ that the arbitration agreements may be compatible
 - ✓ that all the parties to the arbitration may have agreed that those claims

C

CONSOLIDATION OF ARBITRATIONS

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CONSOLIDATION

Consolidation under 1998 Rules

- Rules do not expressly refer to “consolidation”
- Article 4(6) refers to inclusion of claims. The Court’s practice has lead to consolidation of arbitrations
- The Court decide to consolidate two arbitrations when:
 - ✓ The parties in all cases are identical
 - ✓ The cases relate to the same legal relationship
 - ✓ Terms of Reference have not been established
- The Court consolidates all cases into the first one that was filed

A

CONSOLIDATION

Consolidation under the 2012 Rules

- **Choice of words**
 - Consolidation
 - Arbitrations
- **Administrative Act by the Court not subject to reconsideration by the Arbitral Tribunal**
- **Expressly provides for consolidation by agreement of all parties**
- **Broadens the strict scope of the 1998 Rules to adapt to current commercial realities, in particular with respect to the issue of identity of parties**
- **Differentiates between cases filed under the same arbitration agreement and cases filed under more than one arbitration agreement**

B

CONSOLIDATION

Procedure

- **Article 10 first para. 1:** Upon parties' request
- **Article 10 first para. 1:** Always the Court will decide
- **Article 10(b):** In cases under one same arbitration agreement identity of the parties no longer a requirement
- **Article 10(c):** In cases under more than one arbitration agreement:
 - ✓ Same parties
 - ✓ Same legal relationship
- **Article 10 last para.:** In deciding, the Court will consider:
 - ✓ All relevant circumstances
 - ✓ Whether arbitrators have been confirmed or appointed
 - ✓ Whether the same or different arbitrators have been confirmed or appointed

C

THE ARBITRAL TRIBUNAL



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HIGHLIGHTS

2012

Impartiality

Arbitration involving states

Availability

Efficiency

Impact of multiple parties

Clarification of practice

New options for appointment method

Efficiency

Direct appointment of arbitrators involving states

Arbitration involving states

New default time period for co-arbitrators
to nominate the president

Efficiency

Constituting an arbitral tribunal to address costs

Modernisation

Gender neutral terminology

Modernisation

HIGHLIGHTS: THE MOST DISCUSSED ASPECTS

Impartiality

- Every arbitrator must be and remain **impartial** and independent of the parties involved in the arbitration. (Article 11(1))
- A prospective arbitrator shall sign a statement of acceptance, availability, **impartiality** and independence. . . .
- The prospective arbitrator shall disclose. . . any circumstances that could give rise to reasonable doubts as to the arbitrator's **impartiality**. . .
- A challenge of an arbitrator, whether for an alleged lack of **impartiality** or independence or otherwise. . . (Article 14(1))

Communication of reasons for decisions relating to arbitrators

- The decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final, and **the reasons for such decisions shall not be communicated**. (Article 11(3))

Court's ability to directly appoint arbitrators

- Role of National Committees and Groups
- Particular needs, including arbitrations involving states

CONSTITUTING THE ARBITRAL TRIBUNAL

NUMBER OF ARBITRATORS

Number of Arbitrators

- The disputes shall be decided by a **sole arbitrator** or by **three arbitrators**. (Article 12(1))

Default

- Where the parties have not agreed upon the number of arbitrators, the Court shall appoint a **sole arbitrator**, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators.
- In such case, the claimant shall nominate an arbitrator within a period of **15 days** from the receipt of the notification of the decision of the Court, and the respondent shall nominate an arbitrator within a period of **15 days** from the receipt of the notification of the nomination made by the claimant. If a party fails to nominate an arbitrator, the appointment shall be made by the Court. (Article 12(2))

CONSTITUTING THE ARBITRAL TRIBUNAL

Insofar as the parties have not provided otherwise, the arbitral tribunal shall be constituted in accordance with the provisions of Articles 12 and 13

Sole Arbitrator

- Parties may nominate the sole arbitrator
 - Within 30 days from the date when the Request for Arbitration has been received by the other party or within such additional time as may be allowed by the Secretariat
- If not, the Court will appoint (Article 12(3))

Three-Member Arbitral Tribunal

- Each party shall nominate in the Request and the Answer, respectively, one arbitrator for confirmation. (Article 12(4))
 - If a party fails to nominate an arbitrator, the appointment shall be made by the Court
- The Court will appoint the president unless the parties have agreed upon another procedure: (Article 12(5))
 - Should such procedure not result in a nomination within 30 days from the confirmation or appointment of the co-arbitrators or any other time limit agreed by the parties or fixed by the Court, the third arbitrator shall be appointed by the Court

MULTIPLE PARTIES AND THREE ARBITRATORS

Multiple claimants or respondents

- Where there are multiple claimants or multiple respondents, and where the dispute is to be referred to three arbitrators, **the multiple claimants, jointly, and the multiple respondents, jointly, shall nominate an arbitrator for confirmation** pursuant to Article 13. (Article 12(6))

Additional parties

- Where an additional party has been joined, and where the dispute is to be referred to three arbitrators, **the additional party may, jointly with the claimant(s) or with the respondent(s), nominate an arbitrator for confirmation** pursuant to Article 13. (Article 12(7))

When issues arise

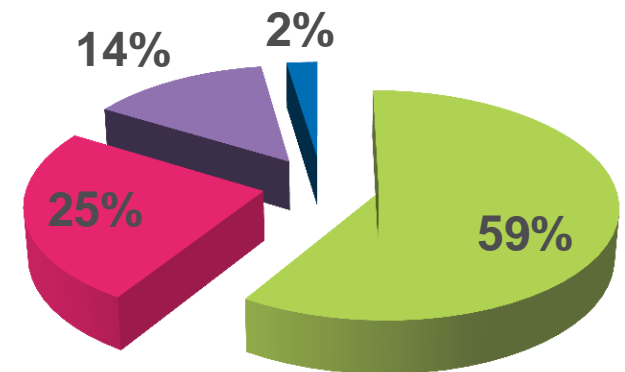
- In the absence of a joint nomination pursuant to Articles 12(6) or 12(7) and where all parties are unable to agree to a method for the constitution of the arbitral tribunal, **the Court may appoint each member of the arbitral tribunal and shall designate one of them to act as president.** In such case, the Court shall be at liberty to choose any person it regards as suitable to act as arbitrator, applying Article 13 when it considers this appropriate. (Article 12(8))

CONSTITUTING THE ARBITRAL TRIBUNAL



Arbitrators 2010

- By parties
- Upon NC proposal
- By co-arbitrators
- Direct appointment



THE ARBITRATORS

The Forms

- Before appointment or confirmation, a prospective arbitrator shall sign a statement of acceptance, **availability, impartiality** and independence. (Article 11(1))

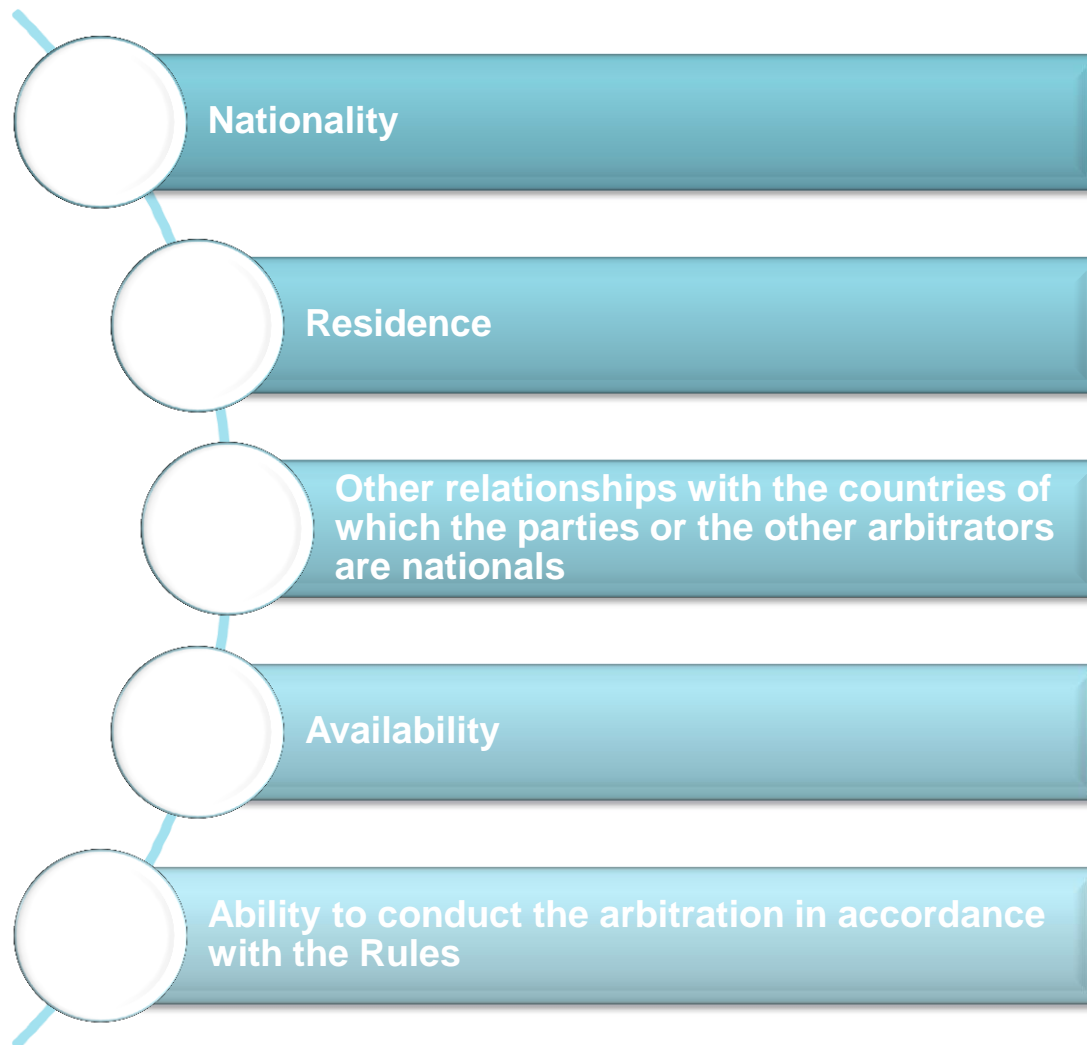
Disclosure by prospective arbitrators

- The prospective arbitrator shall disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to **call into question the arbitrator's independence in the eyes of the parties**, as well as any circumstances that could **give rise to reasonable doubts as to the arbitrator's impartiality**.
- The Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them. (Article 11(2))

Continuing disclosure

- An arbitrator shall immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of a similar nature to those referred to in Article 11(2) concerning the **arbitrator's impartiality or independence** which may arise during the arbitration. (Article 11(3))

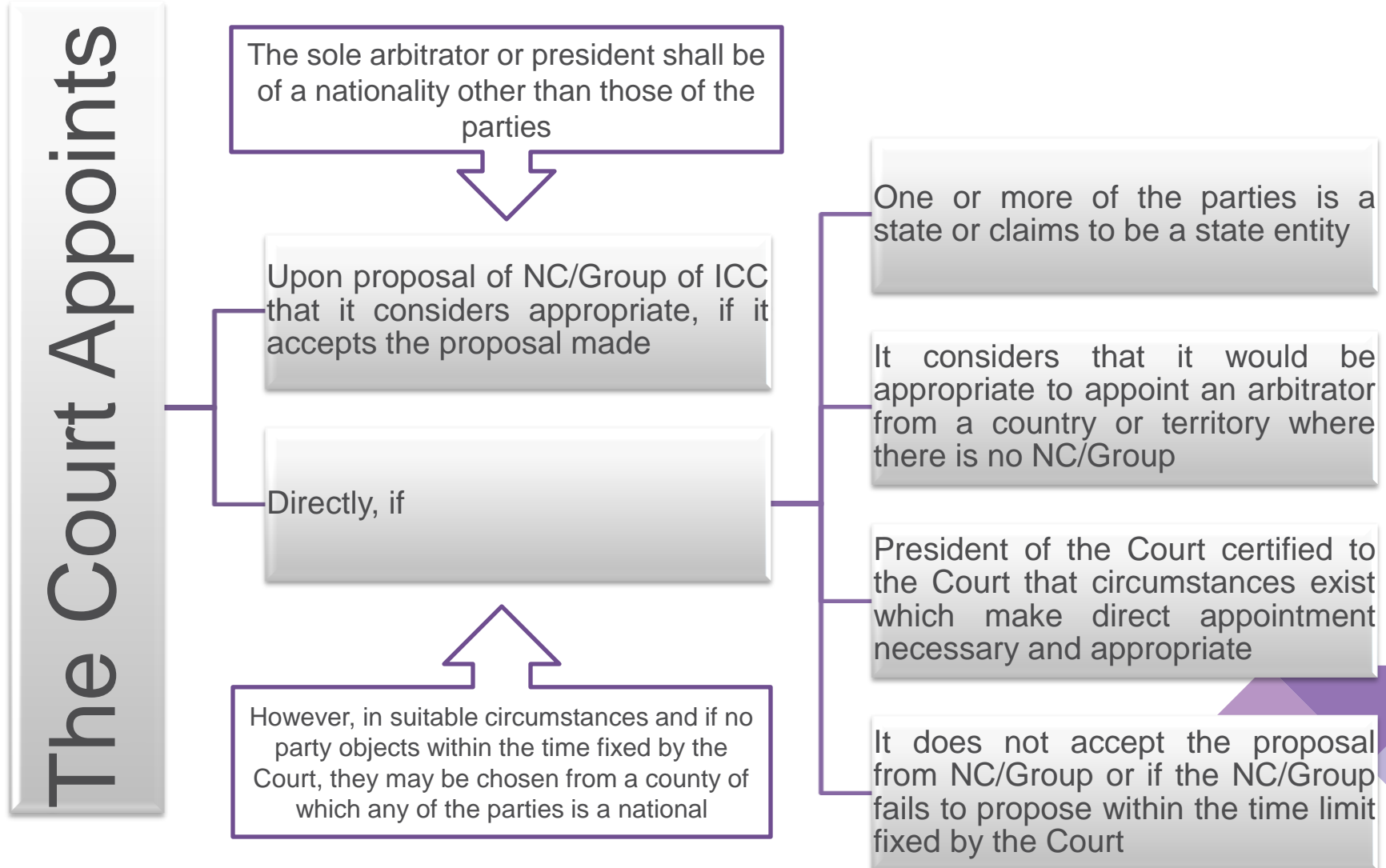
CONSIDERATIONS



Common considerations for decisions on confirmation/appointment

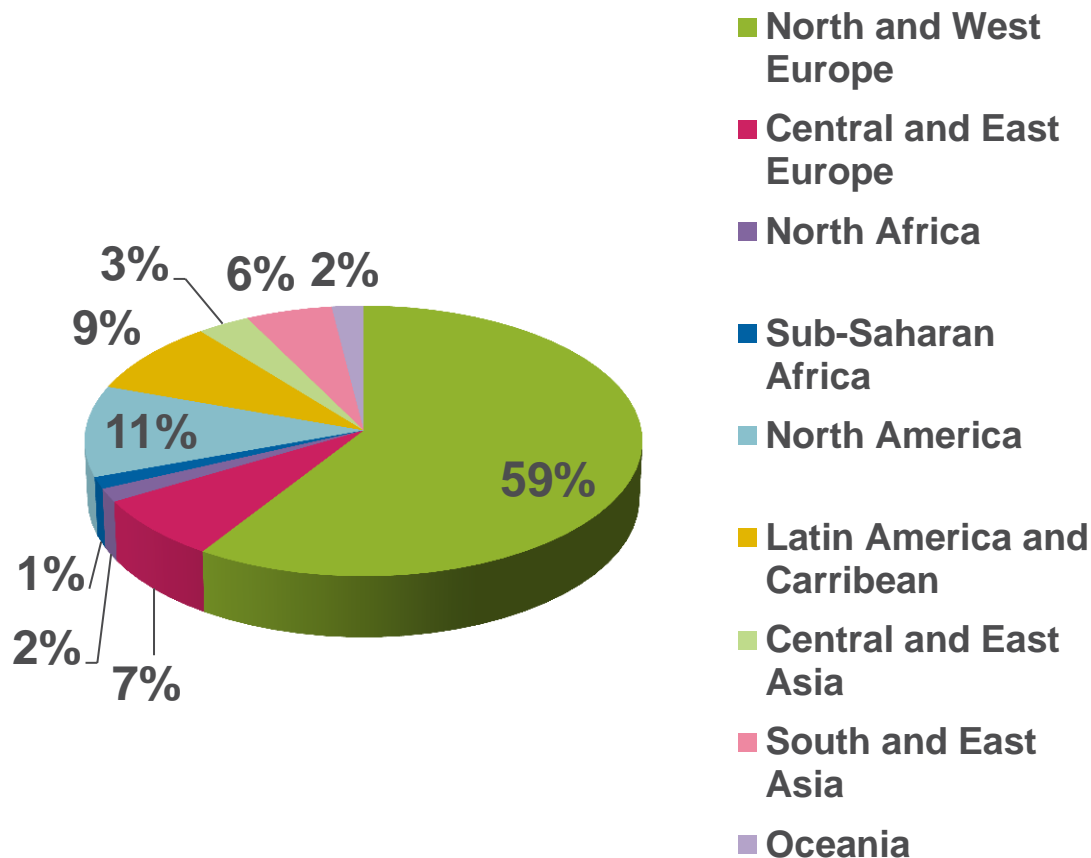
- Independence
- Impartiality
- Availability
- Language ability
- Ability to conduct the proceedings

THE COURT'S OPTIONS REGARDING APPOINTMENT



DIVERSITY

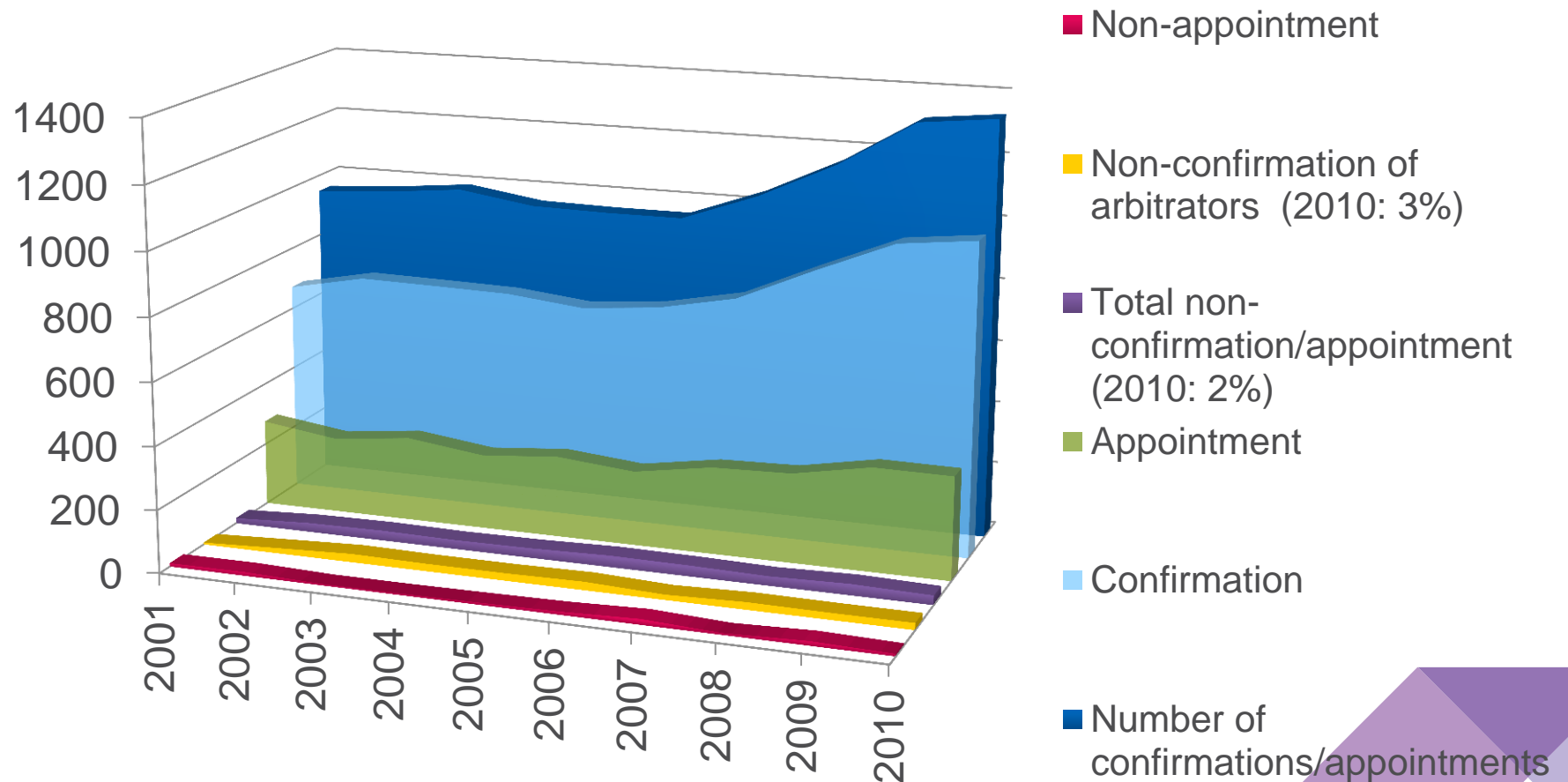
Origin of Arbitrators (2010)



2010: 73 Countries The Top Ten are:

• Switzerland	(13.52%)
• United Kingdom	(13.30%)
• France	(9.02%)
• USA	(7.51%)
• Germany	(6.61%)
• Belgium	(3.61%)
• Austria	(3.46%)
• Canada	(3.38%)
• Brazil	(3.01%)
• Italy	(2.78%)

APPOINTMENTS AND CONFIRMATIONS



REPLACING ARBITRATORS

REPLACEMENT OF ARBITRATORS

Subsequent to the close of the proceedings, instead of replacing an arbitrator.
...the Court may decide, when it considers it appropriate, that the remaining arbitrators shall continue the arbitration

An arbitrator shall be replaced upon death or the Court's acceptance of:

An arbitrator's resignation

A challenge

A request of all parties

The Court has discretion to decide whether to follow the original nominating process

After inviting the parties to comment, the arbitral tribunal determines to what extent prior proceedings should be repeated

REPLACEMENT ON THE COURT'S INITIATIVE

The Court considers replacing an arbitrator on its own initiative



The Secretariat invites the arbitrator concerned, the parties, and any other members of the arbitral tribunal to comment in writing and ensures that the comments are communicated to the parties and the arbitrators



The Court replaces an arbitrator on its own initiative when it decides that the arbitrator is:

prevented *de jure* or *de facto* from fulfilling the arbitrator's functions,

not fulfilling those functions in accordance with the Rules or within the prescribed time limits

CHALLENGING ARBITRATORS

CHALLENGE OF ARBITRATORS

Timing

- 30 days
 - From notification of appointment or confirmation of the arbitrator OR
 - From the date the party making the challenge was informed of the facts and circumstances upon which it is based

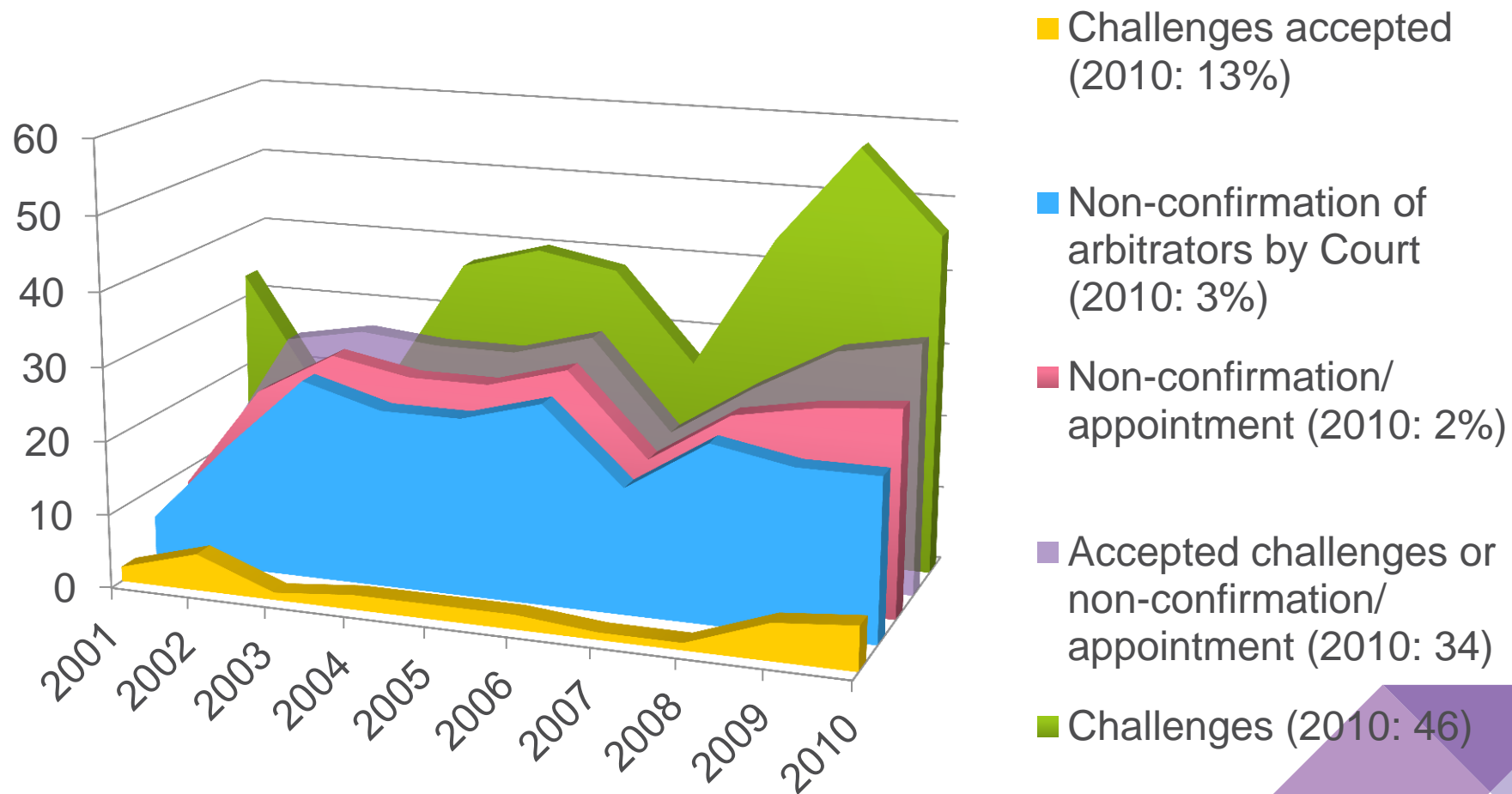
Grounds

- Alleged lack of impartiality or independence, or otherwise

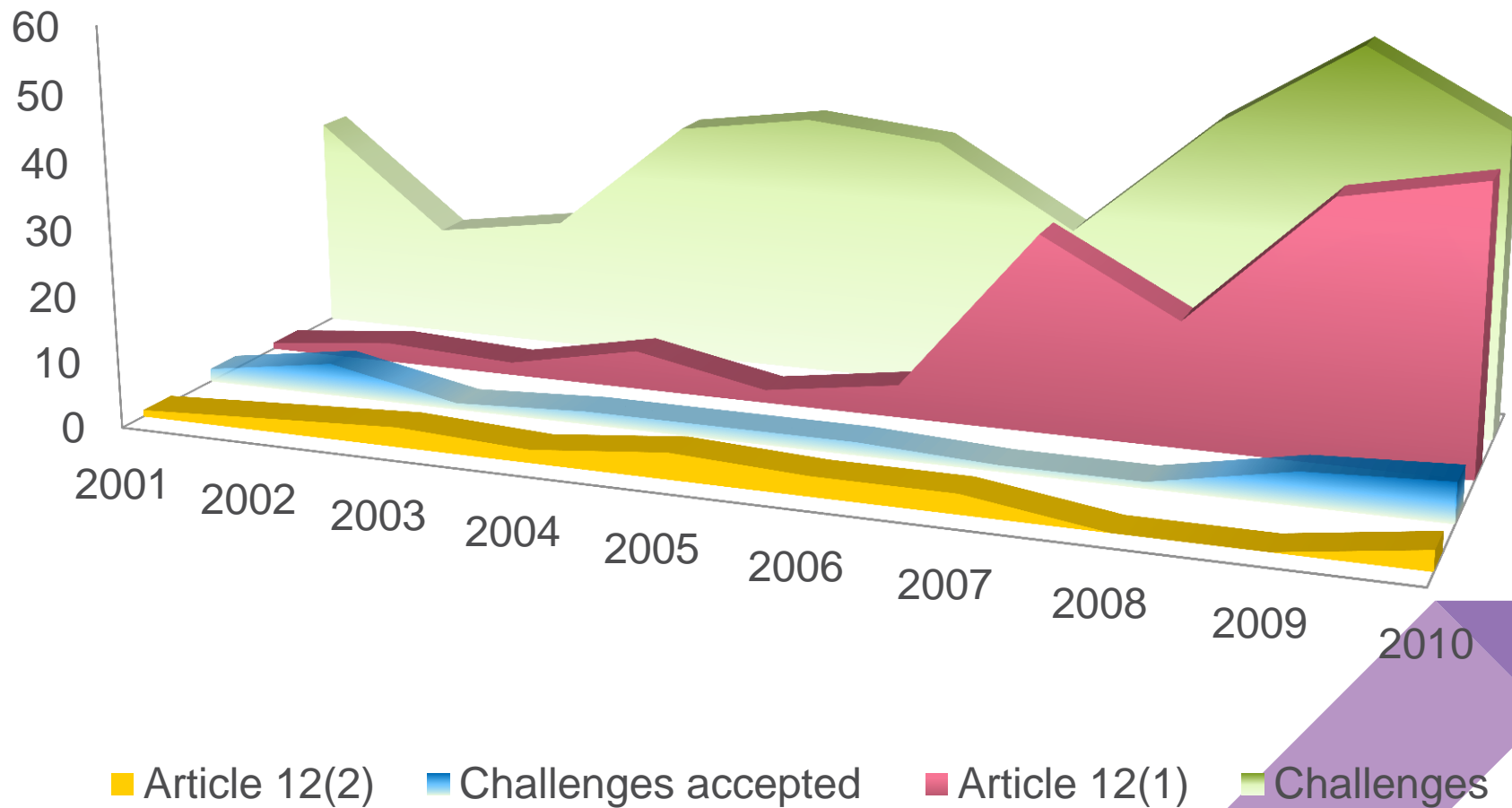
Process

- Secretariat affords the arbitrator concerned, other party or parties and any other members of the arbitral tribunal the opportunity to comment in writing within a suitable period of time
- Secretariat ensures such comments are communicated to the parties and the arbitrators
- Court decides on the admissibility and, at the same time, if necessary, on the merits of a challenge

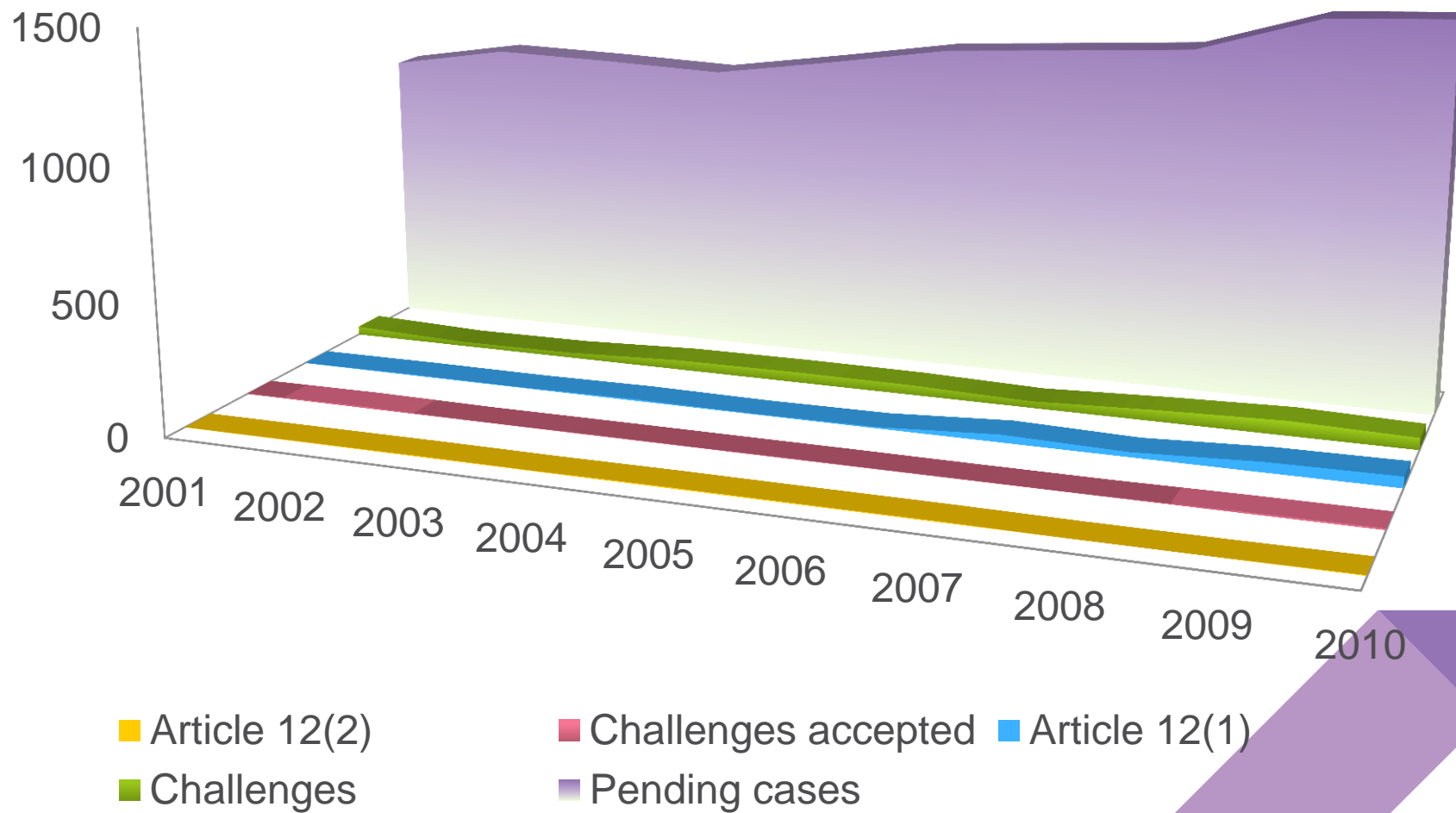
CHALLENGES AND NON-CONFIRMATION



REPLACEMENTS AND CHALLENGES



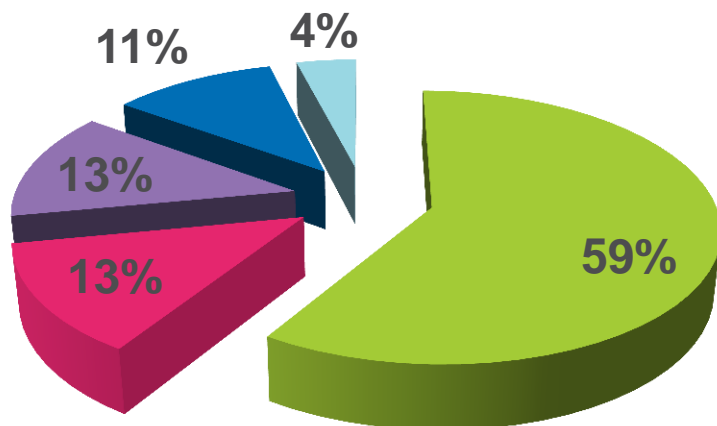
REPLACEMENTS AND CHALLENGES



CHALLENGES: 2010

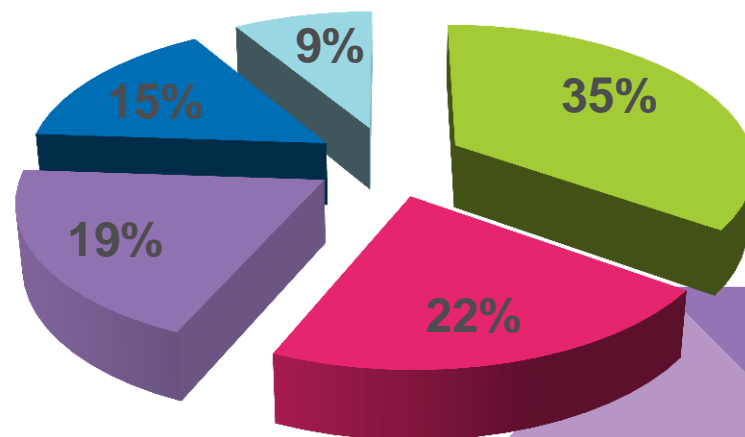
Primary Grounds for Challenges in 2010

- Impartiality
- Independence
- "Otherwise"
- Lack of qualification
- Impartiality & Independence



Arbitrators Challenged

- Chairman
- Sole Arbitrator
- Arbitral Tribunal
- Co-arbitrator Claimant(s)
- Co-arbitrator Respondent(s)



CASE MANAGEMENT



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OUTLINE

Introduction	Techniques Control Time and Costs
	Participation of In-House Counsel in the Drafting Committee
	Guiding Principles
Obligations	General Obligation
	For the Arbitrators
	For the Parties
Means	Miscellaneous Provisions
	Case Management Conference
	Case Management Techniques
Sanctions	For the Parties
	For the Arbitrators
Conclusion	Responsibility
	Tailoring Arbitrations

BACKGROUND

Statistics on Costs

Parties	82%
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Arbitrators	16%
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ICC	2%
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Techniques for Controlling Time and Costs

Drafting the Arbitration Agreement

Selection of Counsel and Arbitrators

Case Management

Written Submissions, Evidence, Hearings

DRAFTING PROCESS

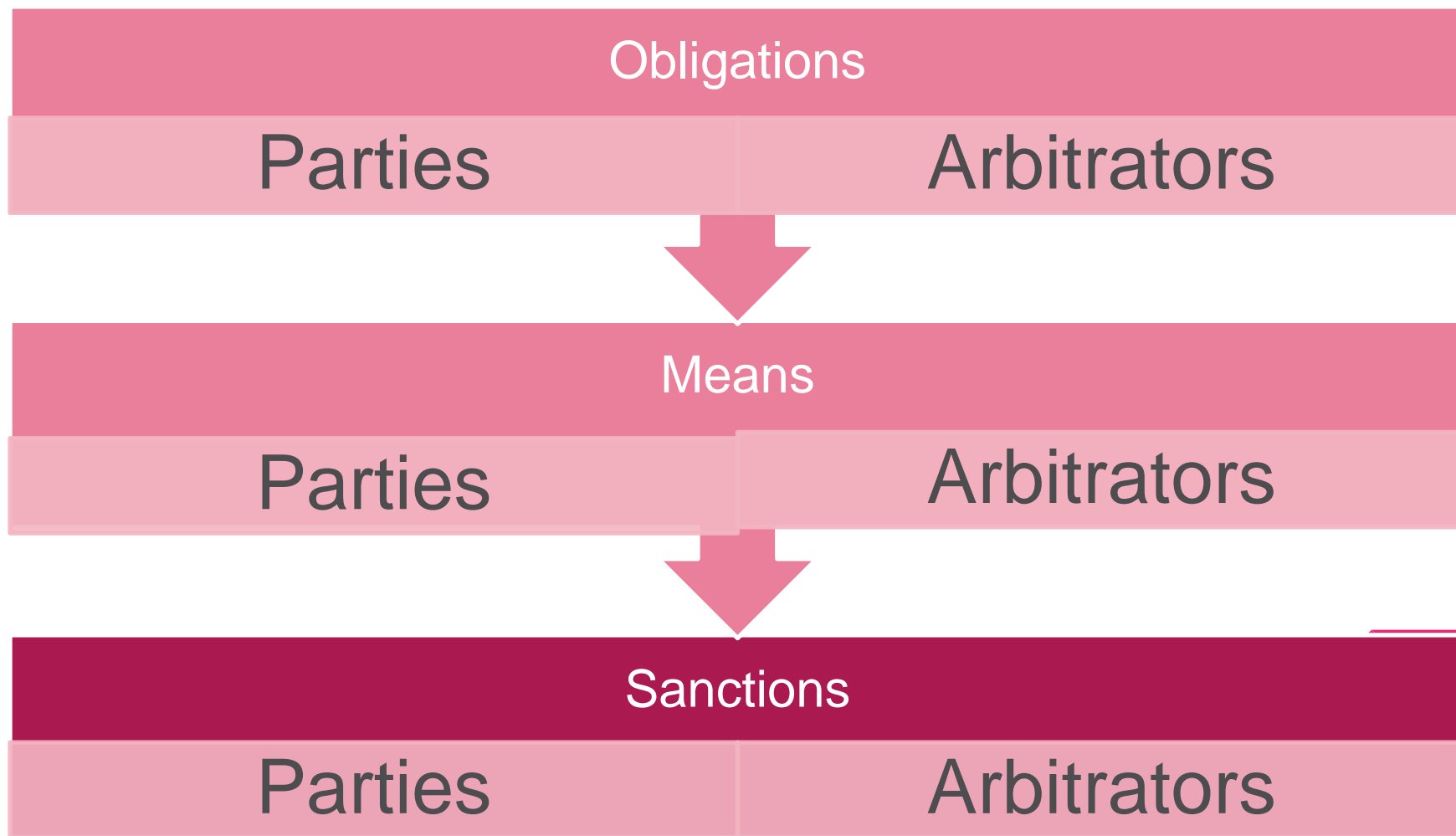
Composition of Drafting Committee

- Court and Secretariat
- Arbitrators
- Counsel
- **In-House Counsel**

Guiding Principle

- *“The Task Force should (1) provide answers to the concerns raised concerning the time and cost-efficiency of arbitration as a means of dispute settlement , and (2) introduce provisions aimed at reducing time and costs in the arbitration proceedings.”*

DRAFTING PROCESS



OBLIGATIONS



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NEW GENERAL OBLIGATION

Article 22(1)

- “The **arbitral tribunal** and **the parties** shall make every effort to conduct the arbitration in a cost-effective manner having regard to the complexity and value of the dispute”

OBLIGATIONS FOR THE ARBITRATORS

Article
11(2)

- Shall sign a declaration of availability

2012

Article
22(4)

- Shall ensure that each party has a reasonable opportunity to present its case

Article 23

- As soon as it has received the file, shall draw up a document defining its Terms of Reference

Article
24(1)

- Shall convene a case management conference

2012

Article
25(1)

- Shall proceed, within as short a time as possible, to establish the facts of the case

Article
26(1)

- Shall be in full charge of the hearings

OBLIGATIONS FOR THE ARBITRATORS

Article 27

- As soon as possible after final hearing or final submission, shall (1) close the proceedings and (2) inform Secretariat and parties of expected date for submission of the award

2012

Article 30

- Shall render the Final Award within (1) six months or (2) any other time limit fixed by the Court pursuant to the procedural time table

2012

OBLIGATIONS FOR THE PARTIES

To comply with the Requirements of Articles 3, 4 and 5

To comply with any order made by the Arbitral Tribunal

- Article 22(5)

2012

To pay the advance on costs

- Article 36(2)

MEANS



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MISCELLANEOUS PROVISIONS



The parties may submit such other documents or information with the Request or Answer as may contribute to the efficient resolution of the dispute

- Articles 4(3), 5(1), and 7(2)

The Terms of Reference shall include a list of issues to be determined, unless the Arbitral Tribunal considers it inappropriate

- Article 23(1)(d)

CASE MANAGEMENT CONFERENCE: NEW ARTICLE 24



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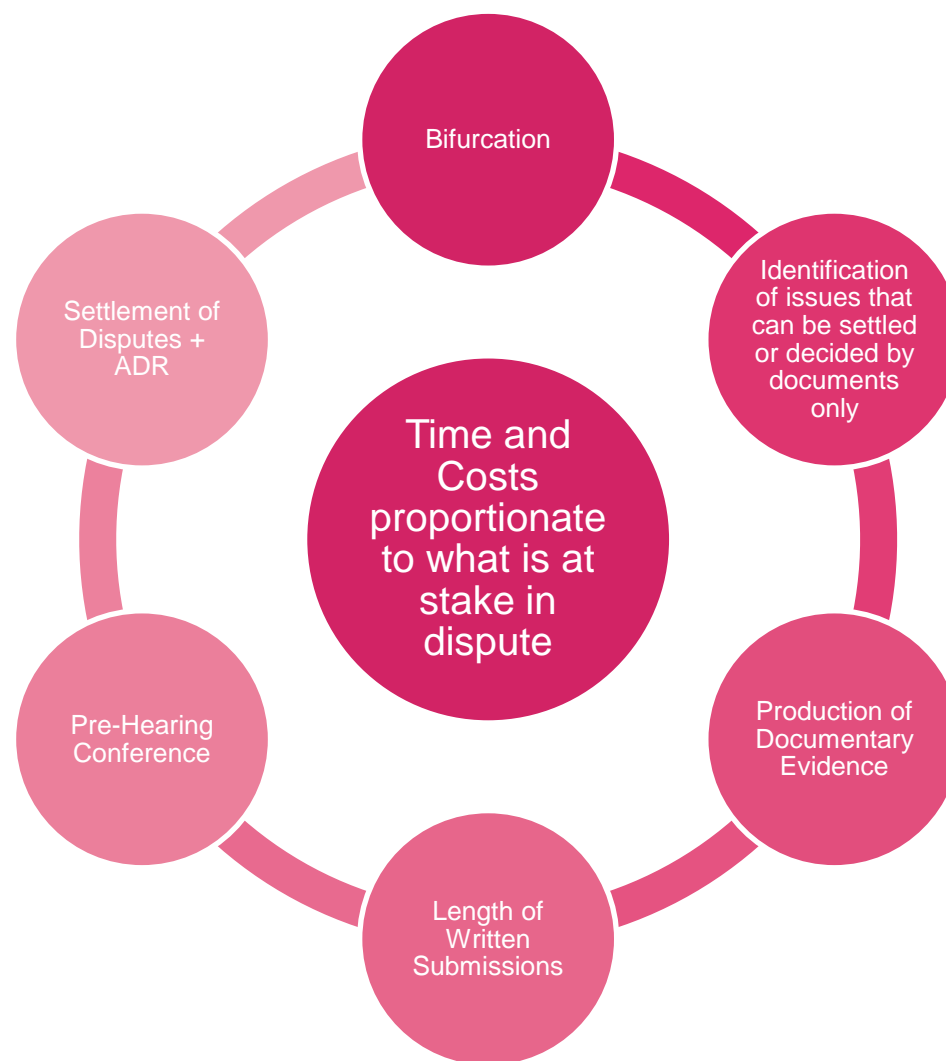
Objectives: to (1) consult the parties on procedural measures to achieve general obligation of cost-efficiency, and (2) establish the procedural time table

Timing: (1) when drawing up the Terms of Reference or as soon thereafter, and (2) at other appropriate stages to ensure continued effective case management

Means: meeting in person or by electronic means

Participants: Arbitral Tribunal and parties' representatives. The Arbitral Tribunal can request the attendance of the parties (in person or through internal representative)

CASE MANAGEMENT TECHNIQUES: NEW APPENDIX IV



THE SANCTIONS



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TO THE PARTIES

Article
37(5)

- In making decisions on costs, the Arbitral Tribunal may take into account the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner

Article
2(2)
App.III

- In setting the arbitrator's fees the Court shall take into consideration [...] the time spent [...] and the complexity of the dispute



TO THE ARBITRATORS

Article
15(2)

- An arbitrator shall be replaced on the Court's own initiative when it decided that the arbitrator is not fulfilling his/her functions in accordance with the Rules or within the prescribed time limits

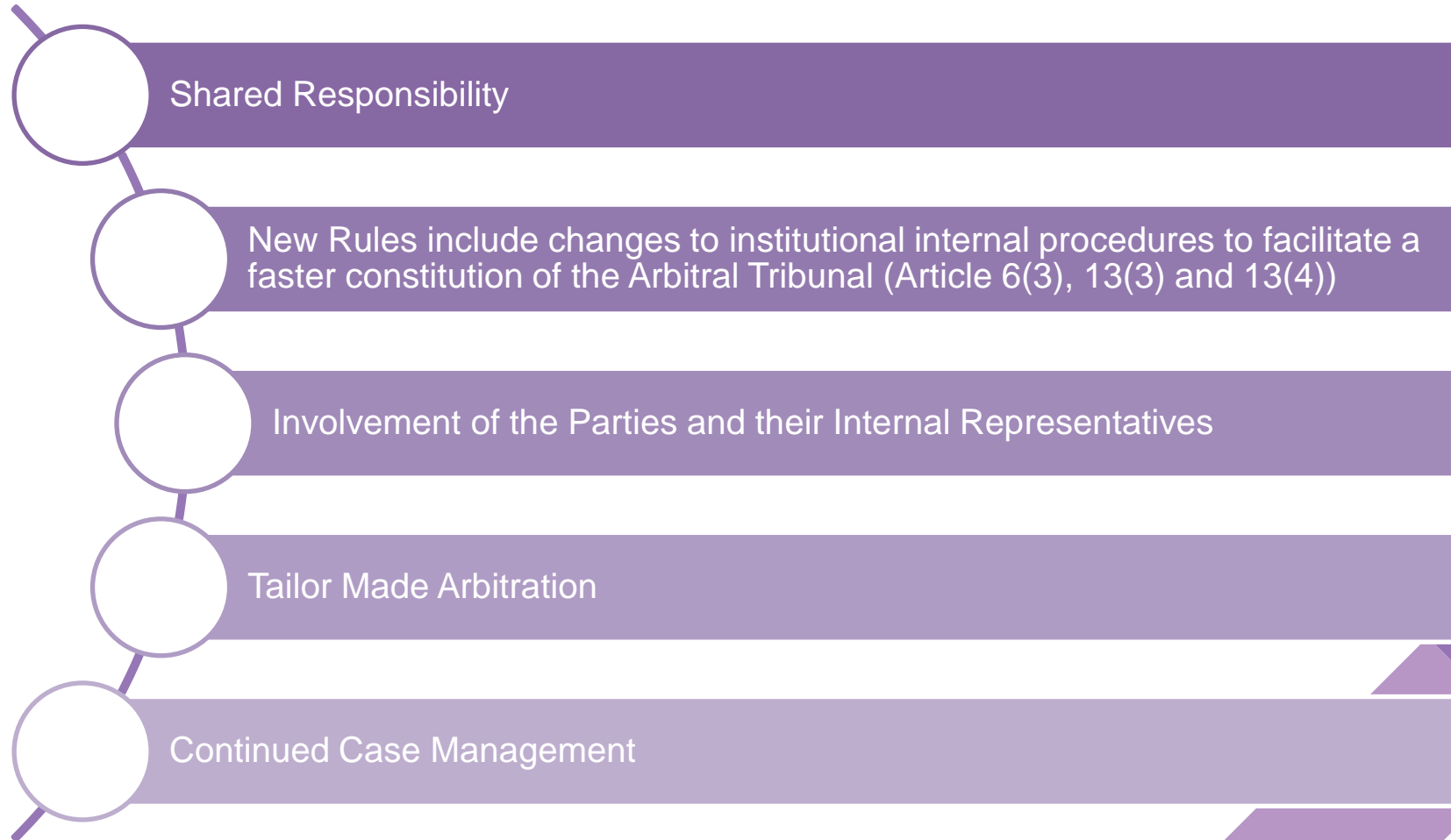
Article 2(2)
App.III

- In setting the arbitrator's fees, the Court shall take into consideration the diligence and **efficiency** of the arbitrator, the time spent, the rapidity of the proceedings, the complexity of the dispute **and the timeliness of the submission of the draft award**



2012

CONCLUSION



EMERGENCY ARBITRATOR



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PURPOSE

Why?

- Urgent interim or conservatory measures prior to the transmission of the file to the arbitral tribunal (Article 29(1))

Does not preclude going to local courts

- The Emergency Arbitrator Provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures, and in appropriate circumstances even thereafter, pursuant to the Rules. Any application for such measures from a competent judicial authority shall not be deemed to be an infringement or a waiver of the arbitration agreement. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat (Article 29(7))

General option

- Available unless they are excluded – Opt out provisions (Article 29(6))

SCOPE

Focus

- Urgent interim or conservatory measures prior to the transmission of the file to the arbitral tribunal. (Article 29(1))

Parties

- The Emergency Arbitrator Provisions shall apply only to parties that are either **signatories** of the arbitration agreement under the Rules that is relied upon for the application or **successors to such signatories**. (Article 29(5))

Do not apply if:

- the arbitration agreement under the Rules was concluded before 1 January 2012;
- the parties have agreed to opt out of the Emergency Arbitrator Provisions; or
- the parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures. (Article 29(6))

OVERVIEW AND TIMELINE



OVERVIEW OF MAJOR STEPS



HOW TO FILE AN APPLICATION

When?

- Prior to the constitution of the Arbitral Tribunal
- Irrespective of whether the party making the application has already submitted its Request for Arbitration (Article 29(1))

Where?

- At any of the offices specified in the Internal Rules of the Court (Article 1(1) of Appendix V)
- With a copy by email to emergencyarbitrator@iccwbo.org

What?

- Sufficient number of copies (one for each party, one for the Emergency Arbitrator, one for the Secretariat) of the Application (Article 1(2) of Appendix V)
- Proof of payment of US\$ 40 000 (Article 1(3)(h) of Appendix V)

How?

- In the language of the arbitration if agreed upon by the parties or, in the absence of any such agreement, in the language of the arbitration agreement. (Article 1(4) of Appendix V)

APPOINTMENT OF THE EMERGENCY ARBITRATOR

Impartial and Independent

- Every emergency arbitrator shall be and remain impartial and independent of the parties involved in the dispute. (Article 2(4) of Appendix V)
- In all cases, the emergency arbitrator shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case. (Article 5(2) of Appendix V)

Forms

- Before being appointed, a prospective emergency arbitrator shall sign a statement of acceptance, availability, impartiality and independence. The Secretariat shall provide a copy of such statement to the parties. (Article 2(5) of Appendix V)

Cannot act as arbitrator

- An emergency arbitrator shall not act as an arbitrator in any arbitration relating to the dispute that gave rise to the Application. (Article 2(6) of Appendix V)

PROCEEDINGS

Place

- If the parties have agreed upon the place of the arbitration, such place shall be the place of the emergency arbitrator proceedings. (Article 4(1) of Appendix V)
- In the absence of such agreement, the President shall fix the place of the emergency arbitrator proceedings, without prejudice to the determination of the place of the arbitration pursuant to Article 18(1) of the Rules. (Article 4(1) of Appendix V)

Procedural Timetable

- The emergency arbitrator shall establish a procedural timetable for the emergency arbitrator proceedings within as short a time as possible, normally within two days from the transmission of the file to the emergency arbitrator pursuant to Article 2(3) of this Appendix. (Article 5(1) of Appendix V)

Meetings

- Any meetings with the emergency arbitrator may be conducted through a meeting in person at any location the emergency arbitrator considers appropriate or by video conference, telephone or similar means of communication. (Article 4(2) of Appendix V)

Conduct

- The emergency arbitrator shall conduct the proceedings in the manner which the emergency arbitrator considers to be appropriate, taking into account the nature and the urgency of the Application. (Article 5(2) of Appendix V)

CHALLENGE

3 days

- From receipt by the party making the challenge of the notification of the appointment, or
- From the date when that party was informed of the facts and circumstances on which the challenge is based, if such date is subsequent to the receipt of such notification (Article 3(1) of Appendix V)

Comments

- Invited by the Secretariat from the parties and the Emergency Arbitrator (Article 3(2) of Appendix V).

Decision

- ICC Court decides on the admissibility and, at the same time, if necessary, on the merits of the challenge (Article 3(2) of Appendix V)
- The decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final, and the reasons for such decisions shall not be communicated

THE ORDER



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ORDER

Order, Not an Award

- Decision shall take the form of an Order (Article 6(1) of Appendix V, Article 29(2))
- Not scrutinized by the Court

Formal elements

- In writing, dated, signed (Article 6(3) of Appendix V)

Reasoned

- The Order shall state the reasons upon which it is based. (Article 6(3) of Appendix V)

Decision on Admissibility and Jurisdiction/Merits

- In the Order, the emergency arbitrator shall determine whether the Application is admissible pursuant to Article 29(1) of the Rules and whether the emergency arbitrator has jurisdiction to order Emergency Measures. (Article 6(2) of Appendix V)

Decision on Costs/Conditions

- The emergency arbitrator's Order shall fix the costs of the emergency arbitrator proceedings and decide which of the parties shall bear them or in what proportion they shall be borne by the parties. (Article 7(3) of Appendix V)
- The emergency arbitrator may make the Order subject to such conditions as the emergency arbitrator thinks fit, including requiring the provision of appropriate security. (Article 6(7) of Appendix V)

EFFECT OF THE ORDER

Before transmission of the file to the Arbitral Tribunal

- Upon a reasoned request by a party made prior to the transmission of the file to the arbitral tribunal pursuant to Article 16 of the Rules, the emergency arbitrator may modify, terminate or annul the Order (Article 6(8) of Appendix V)

Ceases to be binding upon:

- a) the President's termination of the emergency arbitrator proceedings because no Request for Arbitration is filed;
- b) the acceptance by the Court of a challenge against the emergency arbitrator pursuant to Article 3 of this Appendix;
- c) the arbitral tribunal's final award, unless the arbitral tribunal expressly decides otherwise; or
- d) the withdrawal of all claims or the termination of the arbitration before the rendering of a final award. (Article 6(6) of Appendix V)

Does not bind the Arbitral Tribunal

- The emergency arbitrator's order shall not bind the arbitral tribunal with respect to any question, issue or dispute determined in the order. The arbitral tribunal may modify, terminate or annul the order or any modification thereto made by the emergency arbitrator. (Article 29(3))

COMPLIANCE

Undertaking

- The parties undertake to comply with any order made by the emergency arbitrator. (Article 29(2))

Non-compliance

- The arbitral tribunal shall decide upon any party's requests or claims related to the emergency arbitrator proceedings, including the compliance or noncompliance with the order. (Article 29(4))

Enforceability

- ?

COSTS



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COSTS

US\$ 40 000

- US\$ 10 000 for ICC administrative expenses
- US\$ 30 000 for the Emergency Arbitrator's fees and expenses
- May be increased by the President (Article 7(2) of Appendix V)

Who pays?

- The Applicant (Article 7(1) of Appendix V)

Withdrawal or termination

- In the event that the emergency arbitrator proceedings do not take place or are otherwise terminated prior to the making of an Order, the President shall determine the amount to be reimbursed to the applicant, if any. (Article 7(5) of Appendix V)

Non-refundable amount

- US\$ 5 000 (Article 7(5) of Appendix V)

STANDARD ICC ARBITRATION CLAUSES

Arbitration

- All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

Arbitration without emergency arbitrator

- All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. The Emergency Arbitrator Provisions shall not apply.

THE SCRUTINY PROCESS

TYPES OF AWARDS

Article 2(iii) of the 1998 Rules or Article 2(v) of the 2012 Rules provides

- *“Award’ includes, inter alia, an interim, partial or final award.”*

Final Awards

- resolve all of the issues submitted for resolution by the Arbitral Tribunal and terminate the proceedings

Interim Awards

- although this term is often used for awards on jurisdiction, applicable law and liability, it is generally considered that this term should be used for Awards that do not finally settle an issue

Partial Awards

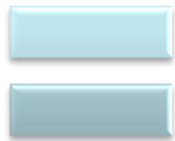
- finally resolve some, but not all, of the issues submitted for resolution by the Arbitral Tribunal, and for this reason are sometimes called “Partial Final Awards”

Awards by Consent

- record the parties’ settlement and make the terms thereof subject to the New York Convention

SCRUTINY FROM 1998 TO 2012

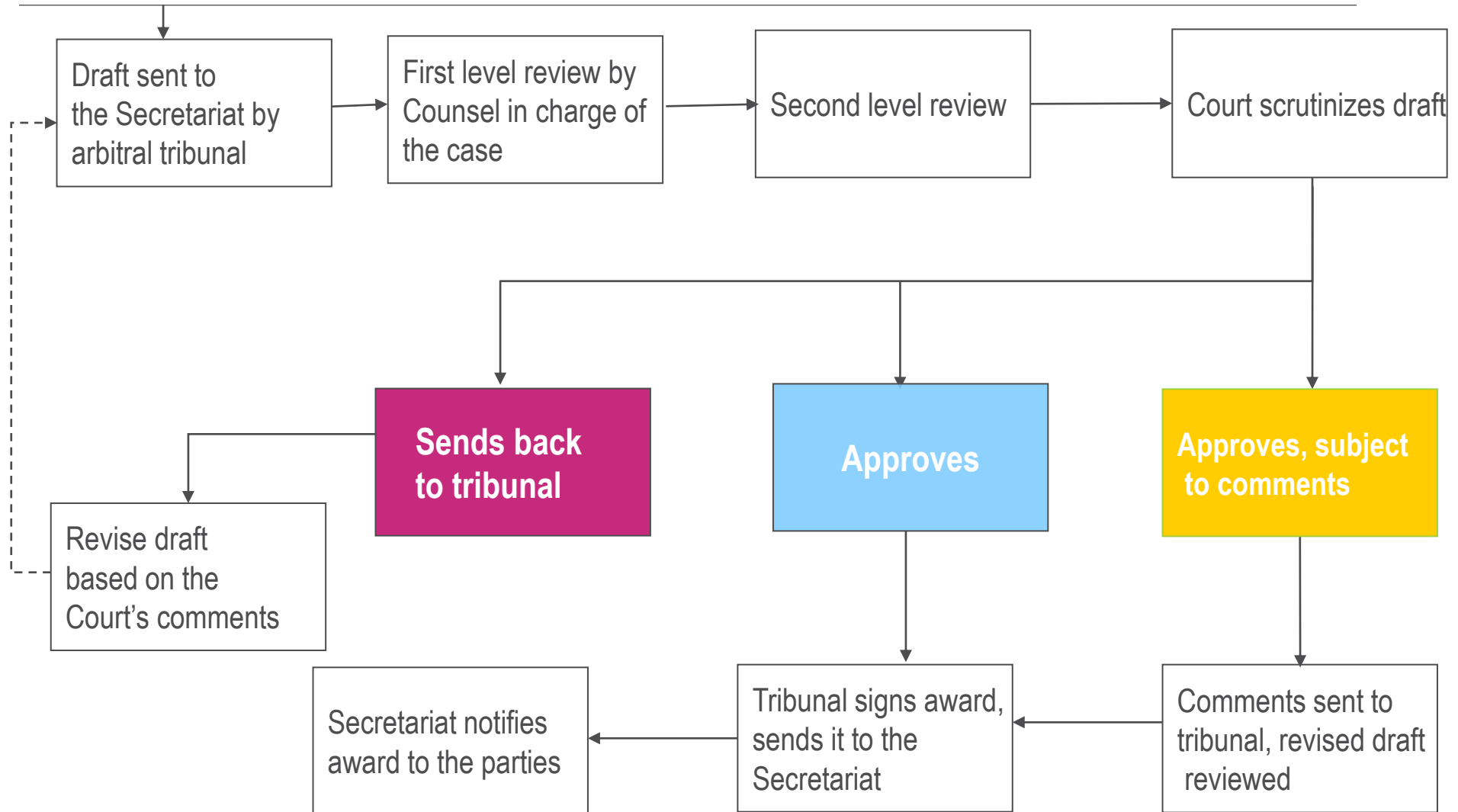
1998:
Article
27



2012:
Article
33

- Before signing any award, the arbitral tribunal shall submit it in draft form to the Court.
- The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance.
- No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form.

THE SCRUTINY PROCESS



COMMON ISSUES ADDRESSED

1

- Dispositive

2

- Due process

3

- Consistency/Sufficiency of reasoning

4

- Issues with Applicable Law

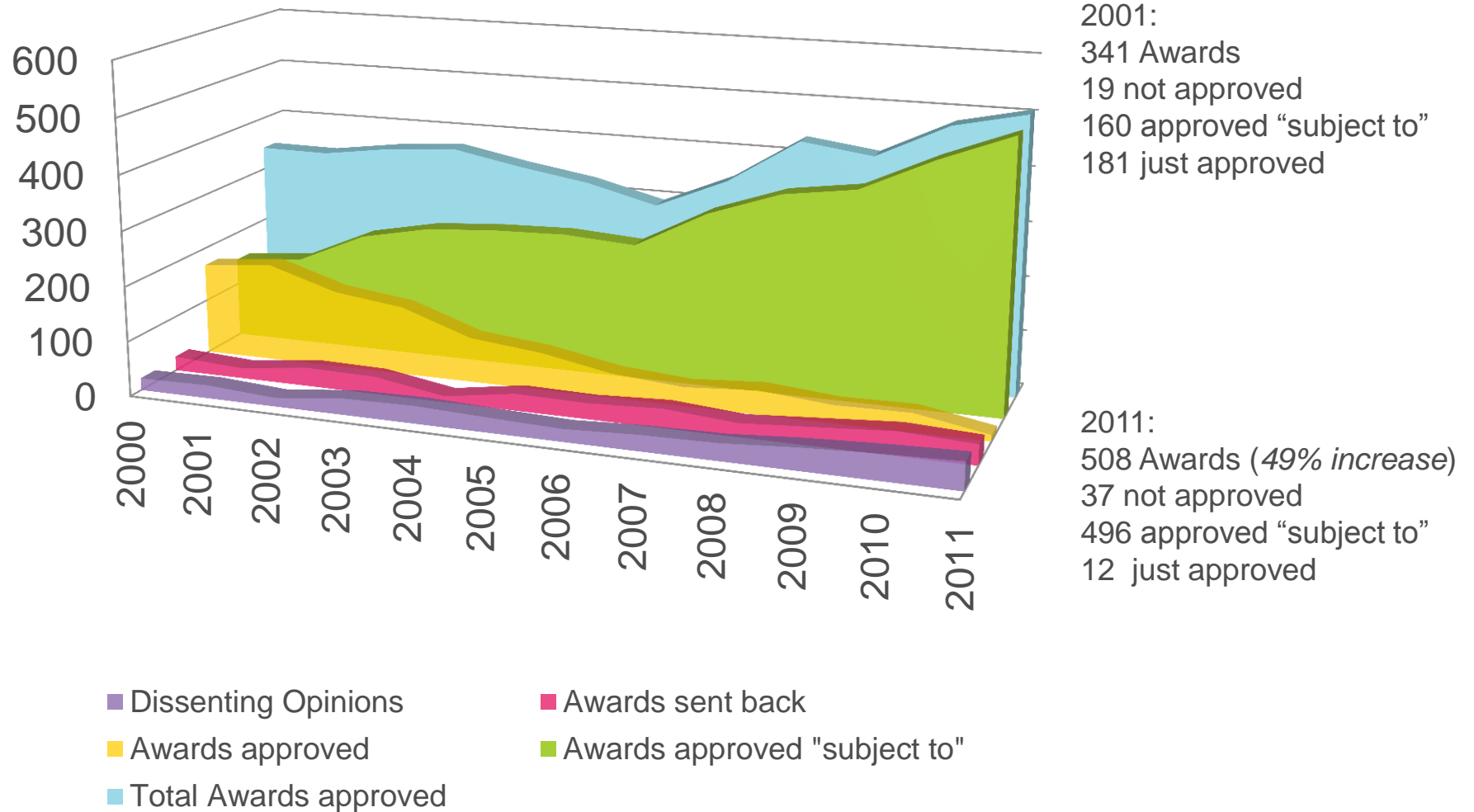
5

- Calculations

6

- Interest and Costs

EXPERIENCE



THE ICC INTERNATIONAL COURT OF ARBITRATION AND THE 2012 ICC RULES OF ARBITRATION

José Ricardo Feris
Deputy Secretary General
ICC International Court of Arbitration



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