

INTERNATIONAL  
COURT OF  
ARBITRATION®

INTERNATIONAL  
CENTRE  
FOR ADR

LEADING DISPUTE  
RESOLUTION  
WORLDWIDE

# Recent ICC Innovations

**Marek Krasula**

Counsel, ICC International Court of Arbitration, New York  
Calgary (AB), May 8<sup>th</sup> 2018

# TREND IN NUMBER OF CASES REGISTERED BY YEAR



Number of new cases filed in 2017 **810**

Including 21 applications for Emergency Measures

1 548 pending cases

15,4% of cases involving states or state entities

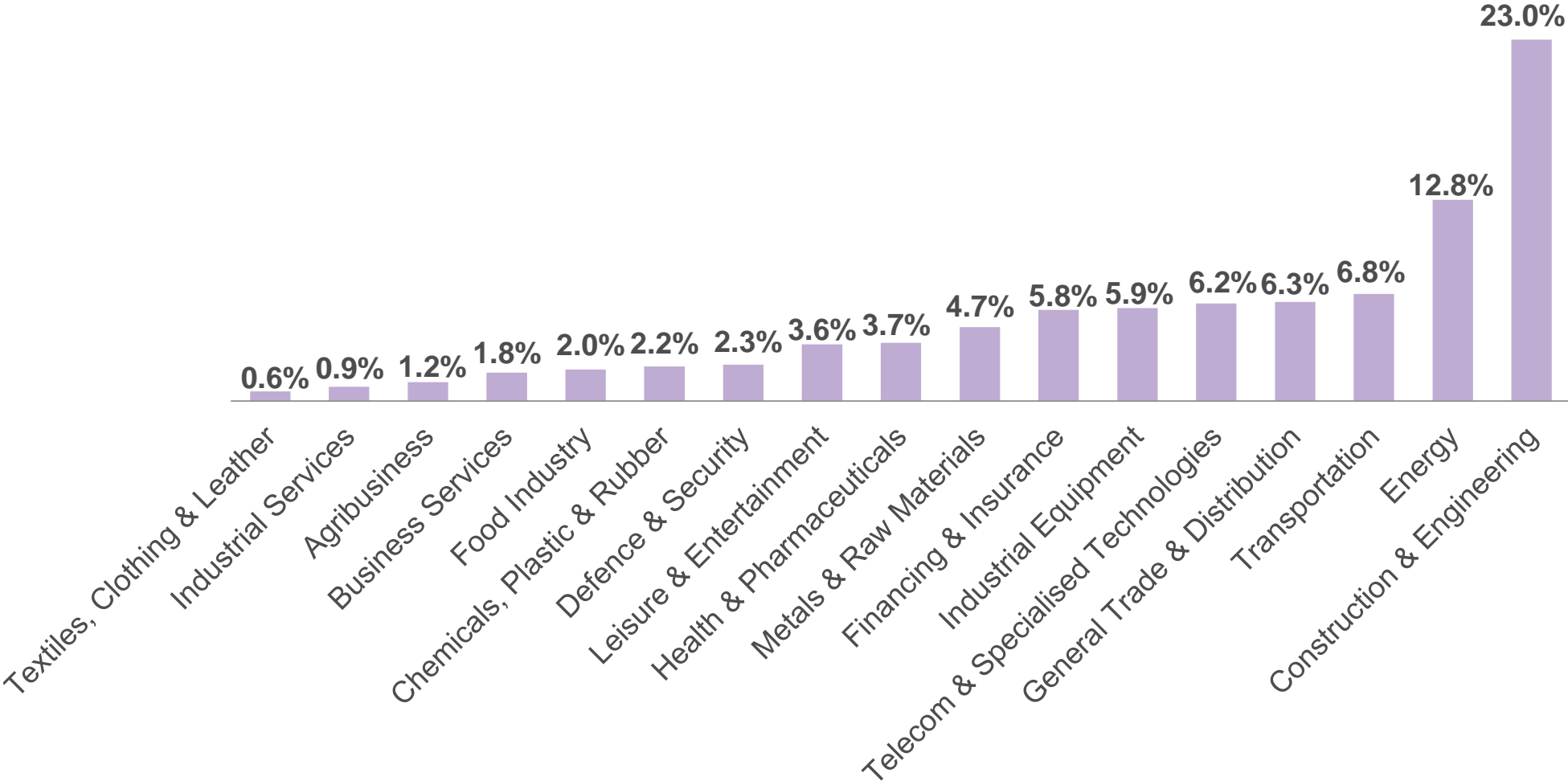
37% of cases with more than two parties

20,5% of cases with parties of same nationality

Amount in dispute < US\$ 2 million  
In 32% of cases

Average amount in pending cases:  
US\$ 137 325 630

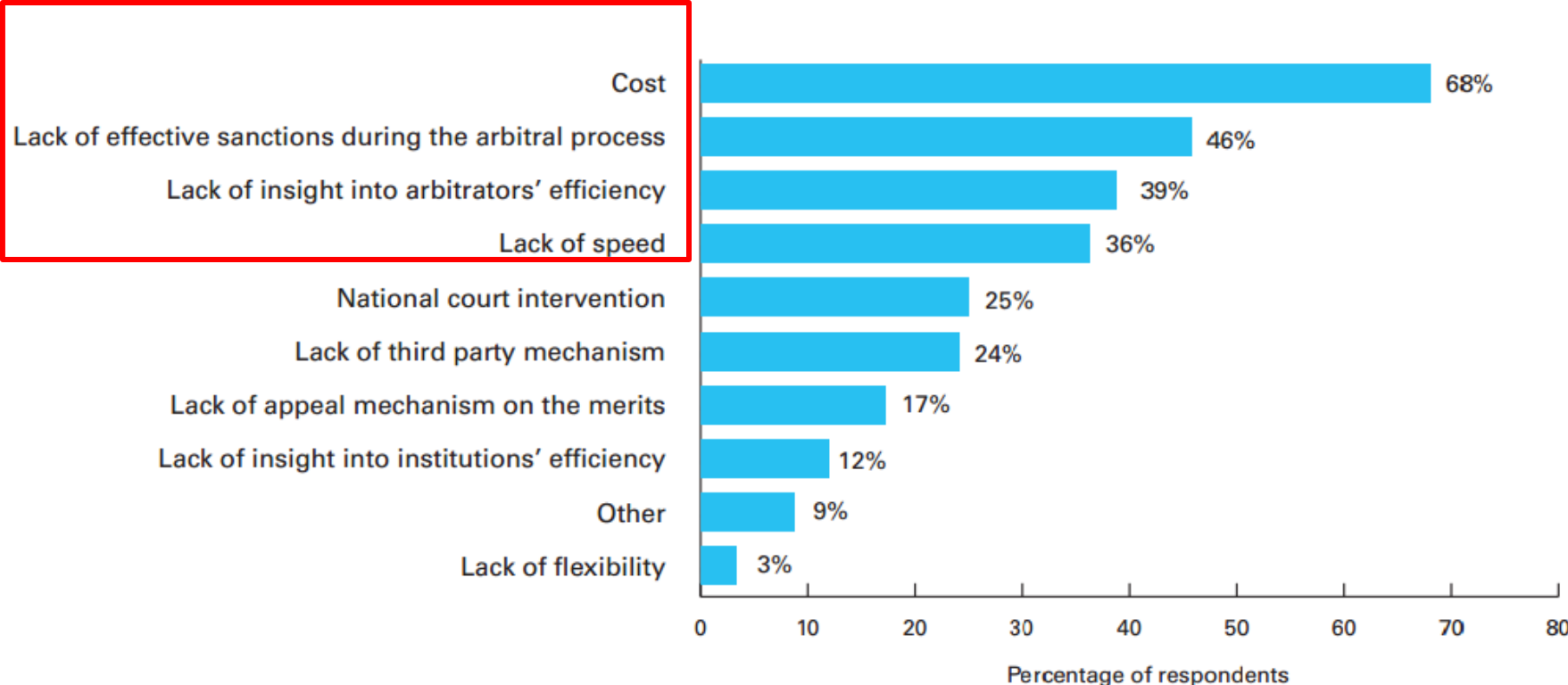
# BREAKDOWN OF 2017 ICC ARBITRATIONS BY ECONOMIC SECTOR



# INSTITUTIONAL ARBITRATION: USER FEEDBACK

2015 International Arbitration Survey: Improvements and Innovations in International Arbitration  
(White & Case with Queen Mary University of London and the School of International Arbitration)

**Chart 3: What are the three worst characteristics of international arbitration?**



# AWARDS AND TIMELINESS

---

As a general rule, awards must be rendered within 6 months from the establishment of the Terms of Reference or within any other time limit fixed by the ICC Court.

---

Draft awards Expected within 2 months (SA) or 3 months (3-member ATs) from last substantive submissions or hearing

---

Arbitrator fees may be increased where the case has been conducted expeditiously. Published guidance also details the procedural milestones used by the Court to set ICC administrative expenses and arbitrators' fees to increase predictability and transparency of costs.

---

Arbitrator fees may be decreased (5%-20% or more) where the draft award is submitted with delay, such delay not being attributed to factors beyond the arbitrators' control or other exceptional circumstances

---

# AWARDS AND TIMELINESS

---

Draft awards      Upon receipt, Secretariat promptly informs parties

---

Drafts are scrutinized within 3-4 weeks

---

After scrutiny, Secretariat informs parties whether draft has been approved or whether further scrutiny will be required

---

Where scrutiny is delayed for reasons not attributable to exceptional circumstances beyond the Court's control, the ICC administrative expenses are reduced up to 20%

---

# UNJUSTIFIED DELAYS: DRAFT AWARDS

## Reduction of arbitrators' fees for delayed submission of draft awards

- If a draft award is submitted beyond that timeframe and without satisfactory justification (delay not attributed to factors beyond the arbitrators' control or other exceptional circumstances), the Court may lower the arbitrators' fees proportionately to the delay

Draft award submitted for scrutiny **up to 7 months** after the last substantive hearing or written submissions, whichever is later

**fees reduced by 5 -10%**

Draft award submitted for scrutiny **up to 10 months** after the last substantive hearing or written submissions, whichever is later

**fees reduced by 10 - 20%**

Draft award submitted for scrutiny **more than 10 months** after the last substantive hearing or written submissions, whichever is later

**fees reduced by 20% or more**

# TIMELY SUBMISSION OF DRAFT AWARDS TO THE COURT – 1 JANUARY 2016 TO 26 JUNE 2017

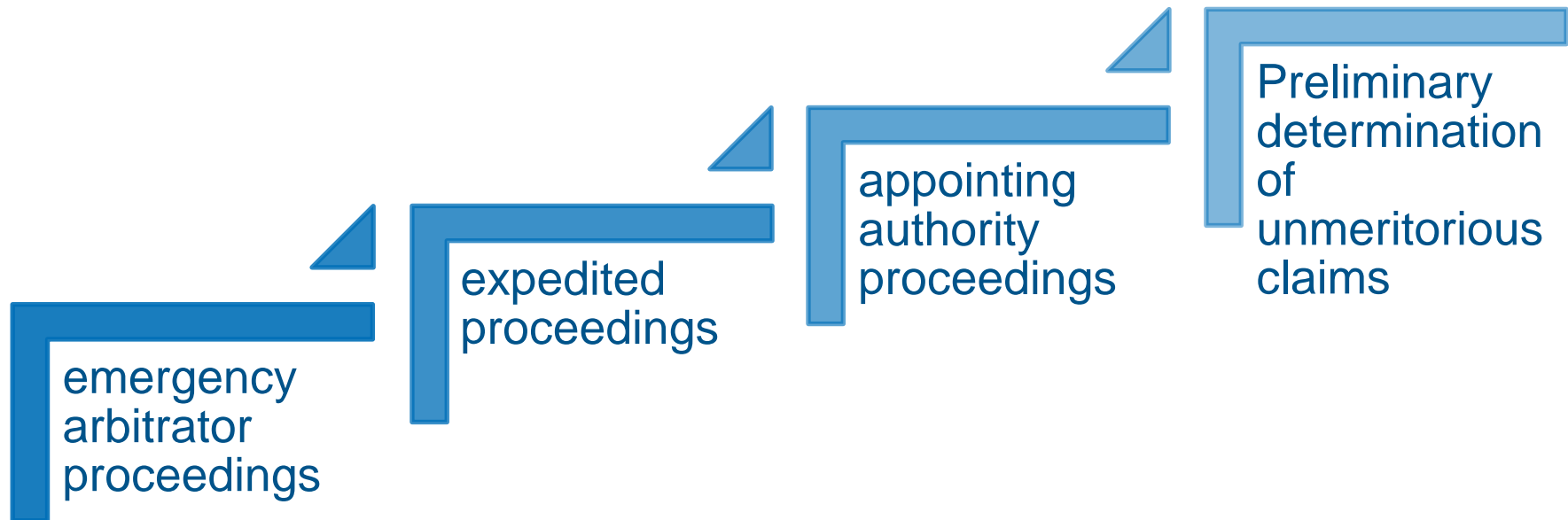
---

- **Out of a total of 431 awards, 198 were submitted late**
  - insignificant delay (36)
  - by 1 month (24)
  - between 1 and 3 months (87)
  - between 4 and 10 months (48)
  - more than 12 months (3)
- **Excusable delays or mitigating factors**
  - “factors beyond the arbitrators control or [...] exceptional circumstances”
  - complexity of case and quality of award
- **Thus, it is critical for the arbitral tribunal to communicate reasons for anticipated delay to the ICC Court (e.g. risk of dissent)**



# I. OTHER - EFFICIENCY AND NEW RULES

---



# EMERGENCY ARBITRATION

---

## Arbitration agreements entered into on or after 1 January 2012


- Urgency
- Interim relief
- Applications may be made before Request for Arbitration
- 15-day time limit for rendering of order
- Signatories and successors only
- Do not displace curial remedies

# EMERGENCY ARBITRATION IN NUMBERS

---

## 80 applications to date

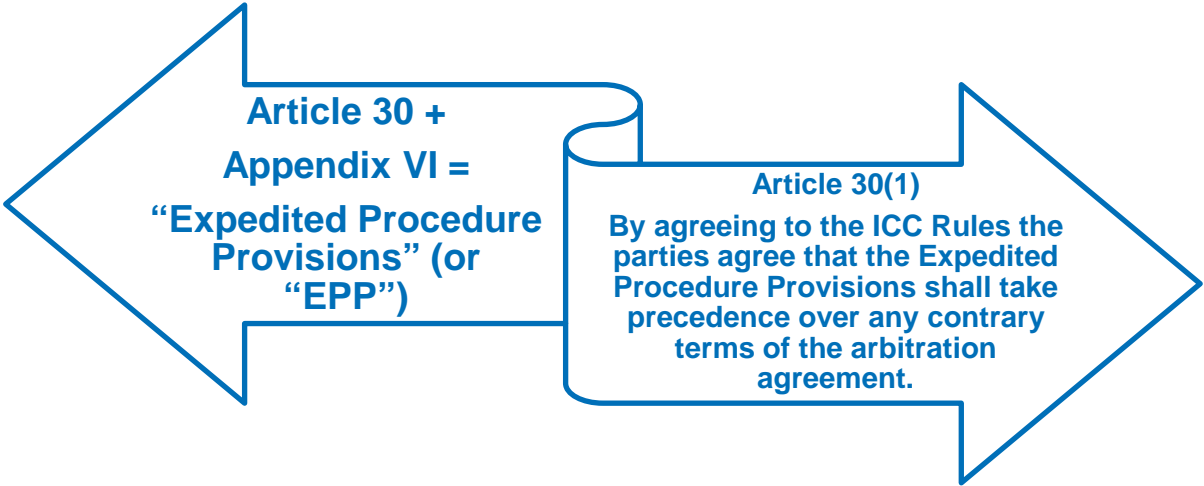
- 2 applications filed in 2012, 6 in 2013, 6 in 2014, 10 in 2015, 25 in 2016, 21 in 2017 and 10 in 2018
- 77 set in motion by the President
- In only two cases, the President considered that the EA provisions did not apply (BIT and arbitration agreement prior to entry into force of EA provisions). Other third case proceeded but without parent company.
- 1 set in motion, but the EA held he did not have jurisdiction
- 65 orders – 16 days in average
- 7 cases involving States and/or State entities (always as Respondents), including 1 BIT

- 
- 
- Settlements during the EA proceedings: out of the first 50 cases, 48 cases commenced and only three were withdrawn because the parties settled (before RFA was due)

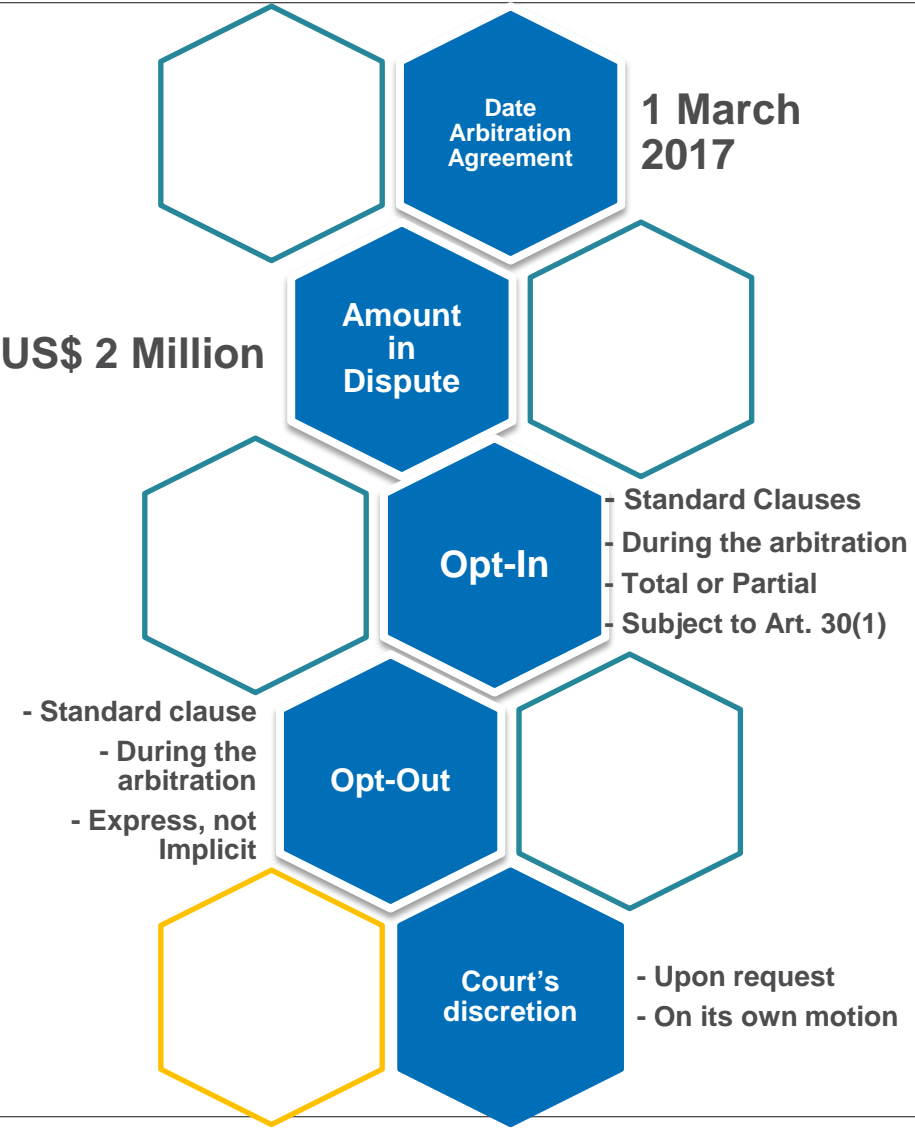
### **Requesting to act versus preserving status quo:**

- 30 seek maintaining the status quo and guarantee enforcement,
- 12 seek obtaining a specific performance under the contract,
- 9 seek declaratory relief
- 7 seek a transfer of money into an escrow account
- 6 seek interim payment
- 5 anti-suit injunction
- **Two** were dismissed on grounds of admissibility
- **One** was dismissed for lack of jurisdiction
- **40** orders addressed emergency relief on the merits:
  - entirely rejected 20 times
  - partially granted 14 times
  - fully granted in 6 times

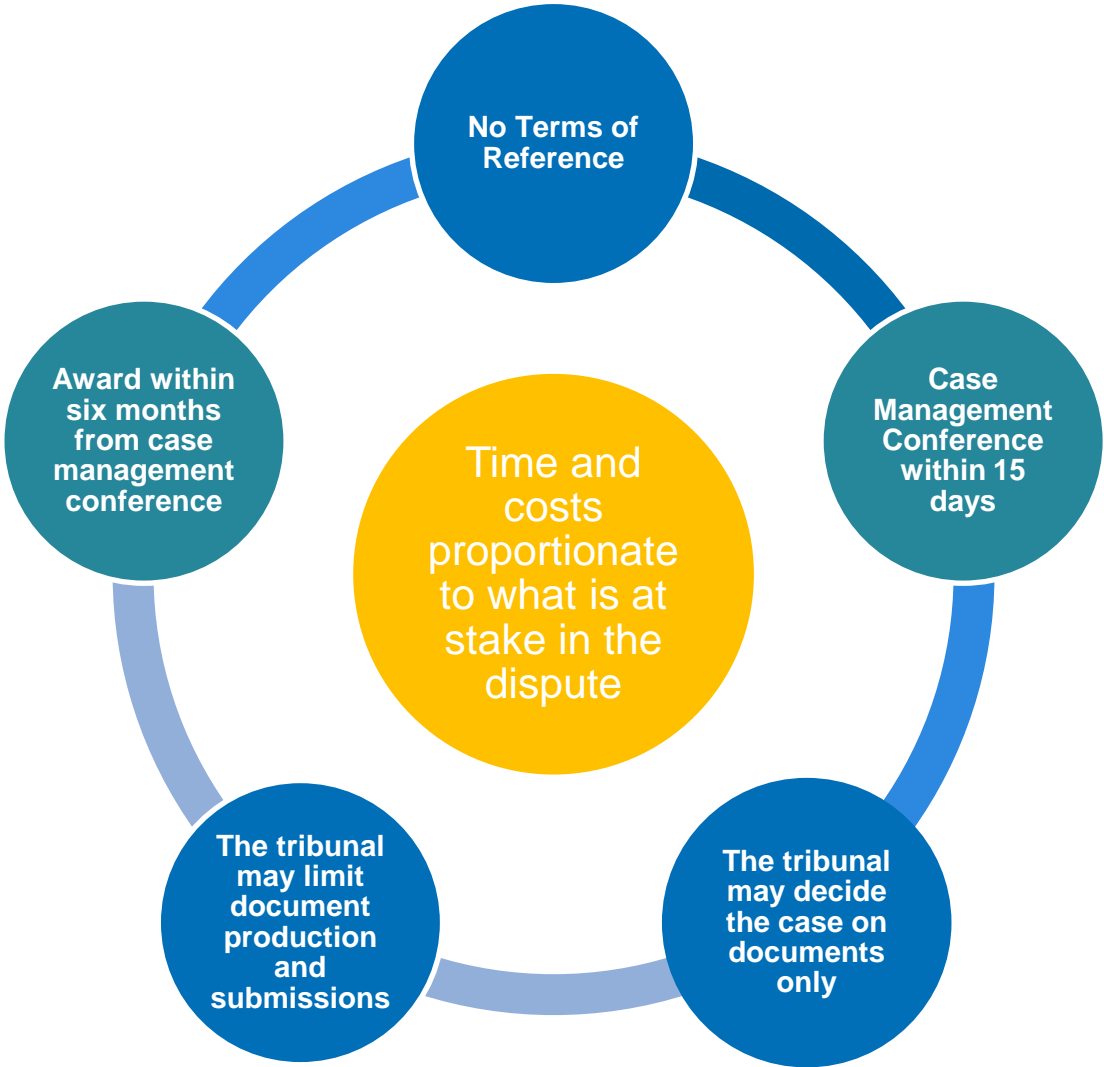
# 2017 RULES: EXPEDITED PROCEDURE PROVISIONS



# SCOPE OF APPLICATION OF EXPEDITED PROCEDURE RULES



# PROCEEDINGS BEFORE THE TRIBUNAL



# EXPEDITIOUS DETERMINATION OF UNMERITORIOUS CLAIMS OR DEFENCES

---

- **Note confirms availability of expeditious determination under Art. 22**
- **Criteria**
  - “claims or defenses (...) manifestly devoid of merit or falling] manifestly outside the arbitral tribunal’s jurisdiction” (para. 60)
  - Tribunal to decide whether application to proceed, taking into consideration
    - Stage of the proceedings
    - Need to ensure time and cost efficiency
- **Procedure**
  - By application, “as promptly as possible after the filing of the relevant claims or defenses”
  - Responding party to be given “fair opportunity to answer the application” (further presentation of evidence to be allowed “only exceptionally”)
  - Application to be decided promptly
  - In the form of an award (subject to scrutiny) or order



# NEW 2018 APPOINTING AUTHORITY RULES - SERVICES PROVIDED

---



# SEALED OFFERS

---

- Definition
  - Without prejudice settlement offers save as to costs <sup>1</sup>
- Procedure
  - Possibility of using sealed offers may be raised at CMC
  - Relevant correspondence may be deposited with ICC Secretariat in sealed envelope(s)
  - After determination of liability and quantum issues, but before deliberations as to costs, correspondence released to Tribunal
- Arbitral tribunal retains discretion as to weight, if any, to be given to sealed offer(s)

---

<sup>1</sup> Sometimes called “Calderbank offer”; see *Calderbank v. Calderbank* [1975] 3 All ER 333 (EWCA)

## II. OTHER - TRANSPARENCY

---



communicating  
reasons for  
decisions



publishing  
arbitrator  
names

# ICC COURT DECISIONS: REASONING

---

Reasons ICC Court may communicate reasons on decisions relating to the constitution of the tribunal when requested by any party (new amendment to the rules)

---

Concerns decisions on challenges (14), to initiate replacement proceedings / replace an arbitrator (15(2)), on whether a case shall proceed (6(4)) and on consolidation requests (10).

---

Requests for reasons must be made in advance of the relevant ICC Court decision.

---

ICC Court has full discretion to accept or reject a request to communicate reasons.

---

# PUBLICATION OF INFORMATION ON ICC TRIBUNALS

## Publication of information Regarding the Composition of Arbitral Tribunals

- For arbitrations registered on or after 1 January 2016, the ICC publishes on its website:
  - (i) arbitrators' **name**,
  - (ii) **nationality**,
  - (iii) **method of appointment**,
  - (iv) **role on the tribunal**, and
  - (v) whether the arbitration is **pending or closed**.
- Should the arbitral tribunal's composition change, the published information is updated, without disclosing the reasons for a change.
- The arbitration reference number, the parties' names and that of their counsel are omitted (unless parties agree to request they be included).
- Parties have the option, by mutual agreement, of opting out of this limited disclosure.

### III. OTHER - DIVERSITY

---



**appointment of  
arbitrators**



**regional and local  
initiatives**

# GUIDANCE NOTE ON CONFLICT DISCLOSURES

Duty to disclose circumstances that might call into question an arbitrator's independence in the eyes of the parties or give rise to reasonable doubts as to his or her impartiality.

- Failure to disclose is not in itself a ground for disqualification
- Duty to disclose is on-going and cannot be discharged by an advance waiver.

Duty to consider relationships among arbitrators, between members of the same barristers' chambers, and with entities having direct economic interests in the dispute.

- Arbitrators considered as bearing the identity of their firm, and a legal entity will include its affiliates
- Arbitrators have the duty to make reasonable enquiries in their records, those of their law firm, and in other readily available materials.

Duty to devote the necessary time to conduct the arbitral proceedings as diligently, efficiently and expeditiously as possible.

- Arbitrators must indicate in their Statement of Acceptance the number of arbitrations in which they currently act as well as their availability in the following 24 months

# NOTE ON CONFLICT DISCLOSURES (II)

---

**Includes a non-exhaustive list of circumstances that may warrant disclosure.**

**Arbitrators are invited to consider, for example:**

- Whether they or their law firm:
  - has a business relationship with one of the parties or one of its affiliates, or a personal interest of any nature in the outcome of the dispute.
  - is or has been involved in the dispute, or has expressed a view on the dispute in a manner that might affect his or her impartiality.
- Whether the arbitrator:
  - has a professional or close personal relationship with counsel to one of the parties or the counsel's law firm.
  - acts or has acted as arbitrator in a related case.
  - has in the past been appointed as arbitrator by one of the parties or one of its affiliates, or by counsel to one of the parties or the counsel's law firm.