



# INTRODUCTION TO INTERNATIONAL COMMERCIAL ARBITRATION

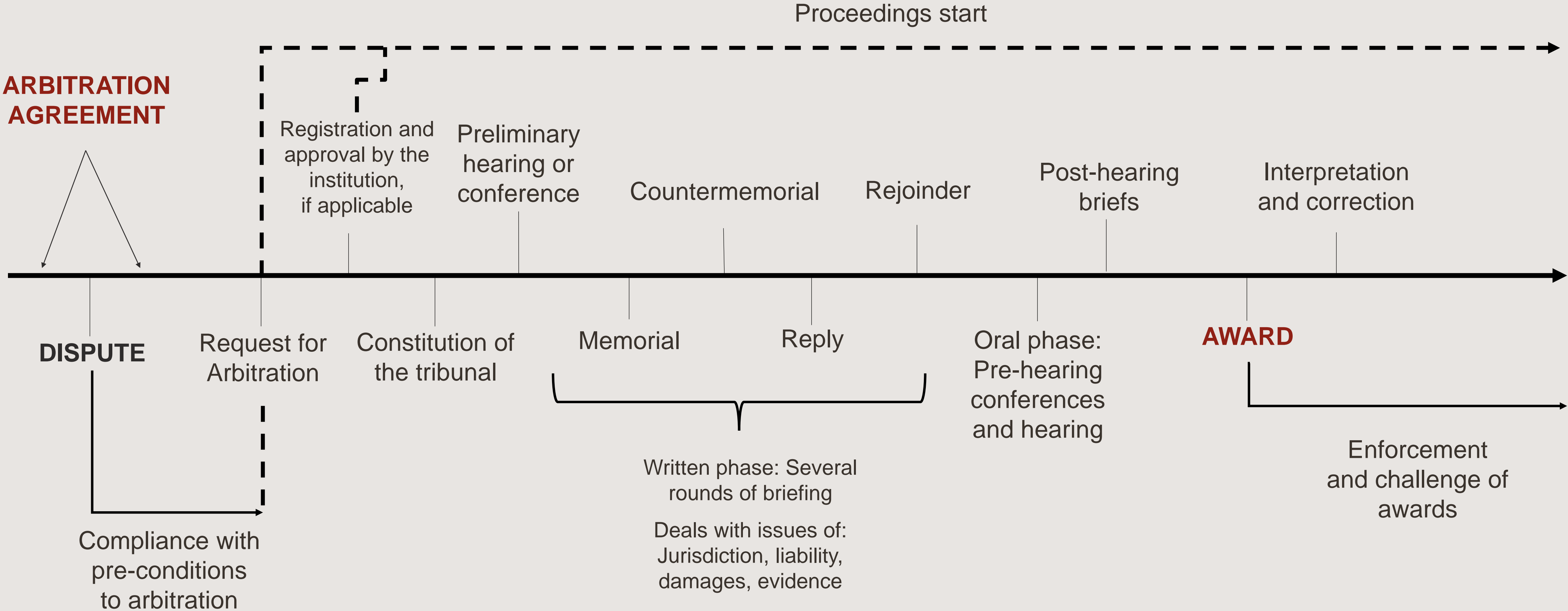
*Columbia Law School's  
Global Law and Business  
Seminar*

Patricia Saiz  
Arbitrator  
Member of the ICC Court  
Professor at ESADE Law School

# What is an arbitration agreement?

**An agreement to submit present or future disputes to arbitration**

# Timeline of an arbitration





# What are the effects of the arbitration agreement?

1. Negative effect: waives right to have matters resolved by court
2. Positive effect: establishes the jurisdiction of the tribunal (grant of jurisdictional powers)
3. Basic source of powers of tribunal
4. Records the consent of the parties

What are the requirements for an arbitration agreement to be valid?



An aerial, black and white photograph of the New York City skyline. The Empire State Building is the central focus, standing tall above the surrounding skyscrapers. The image is taken from a high vantage point, looking down on the city. A semi-transparent white rectangular box is overlaid on the center of the image, containing the text "New York Convention".

# New York Convention



## Article II(1) of the NYC:

“Each contracting state shall recognize an agreement **in writing** under which the parties undertake to submit to arbitration all or any differences which **have arisen or which may arise** between them in respect of a **defined legal relationship, whether contractual or not**, concerning a subject matter **capable of settlement by arbitration.**”



## Another two requirements per Article V(1)(a) of the NYC:

“The arbitration agreement must be **valid under the law** to which the parties have subjected it, or failing indication thereon, under the laws of the country where the award is made.

The parties to the arbitration agreement must have **legal capacity** under the law applicable to them.”





# UNCITRAL Model Law



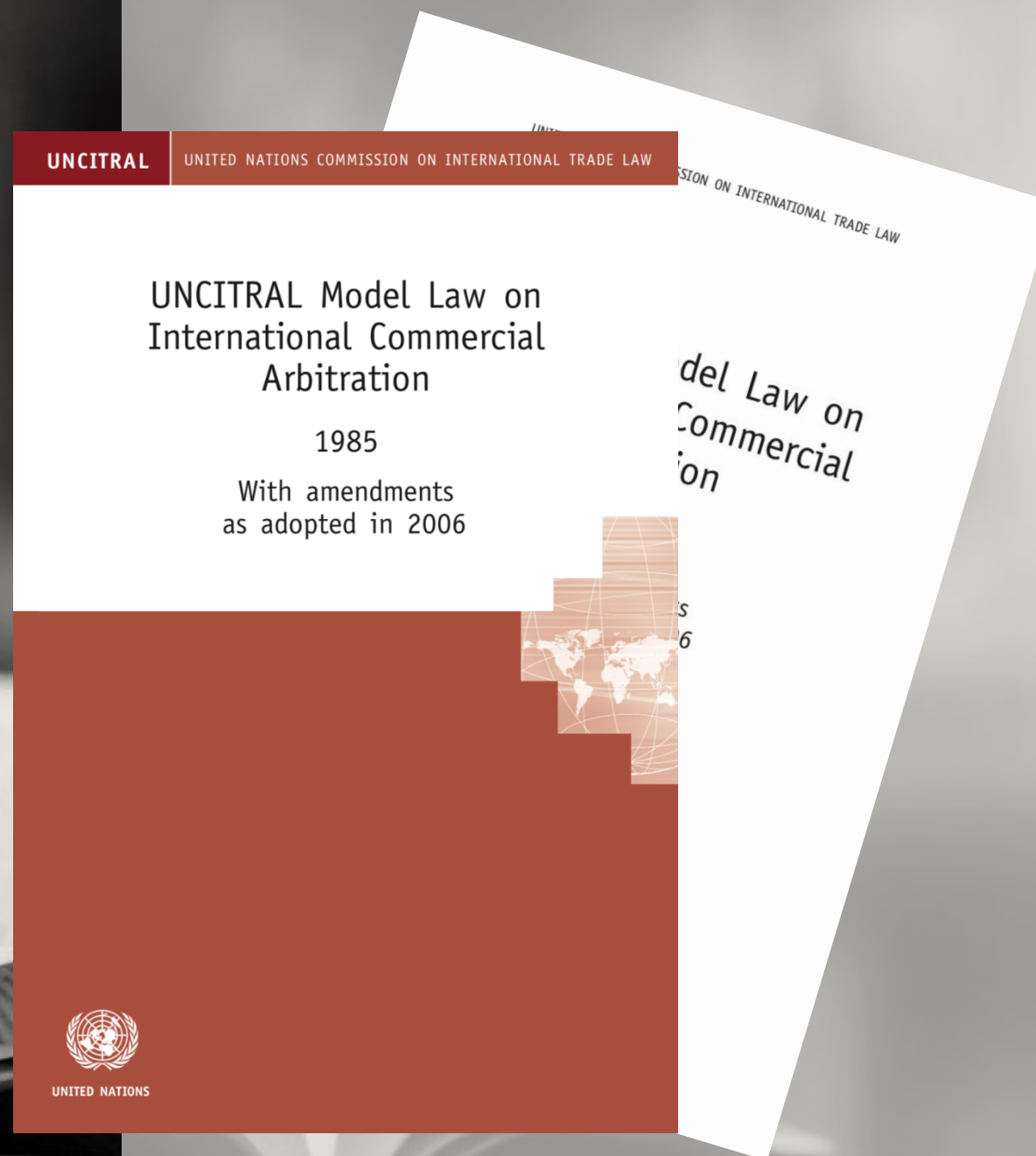


# Article 7 of the UNCITRAL Model law:

“(1) Arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which **have arisen or which may arise** between them or **which may arise** between them in respect of a **defined legal relationship, whether contractual or not**. An arbitration agreement may be in the form of an arbitration clause or in the form of a separate agreement.

(2) The Arbitration agreement shall be **in writing**.”

\*Other articles contain additional requirements.





# 1) IN WRITING

NYC Article II(2); and UNCITRAL Model  
Law Articles 7.2 and 7.3



## **2) A DEFINED LEGAL RELATIONSHIP**

**NYC Articles II(1) and V; and UNCITRAL  
Model Law Article 7.1**



### **3) ARBITRABILITY**

**NYC Articles II(1) and V(2)(a); and  
UNCITRAL Model Law Articles 34 and 36**



# **4) VALID UNDER THE LAW APPLICABLE TO THE ARBITRATION AGREEMENT**

NYC Articles II(3) and V; and UNCITRAL  
Model Law Articles 8.1, 34 and 36



What are the potential consequences  
of the arbitration agreement not  
being valid under the law applicable  
to it?

**NYC, Article V(1)(a):** “Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, **or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; (...)**”

**UML, Article 34:** “An arbitral award may be set aside by the court specified in article 6 only if (a) the party making the application furnishes proof that: (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the **said agreement is not valid under the law to which the parties have subjected it or, failing an indication thereon, under the laws of this State.**”

**UML, Article 36:** “Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that: (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is **not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; (...)**”



# What is the law applicable to the arbitration agreement?

1. The law of the place of arbitration
2. The law applicable to the contract
3. The law chosen by the parties
4. The procedural law applicable to the arbitration

Governs formation, validity, enforcement and termination.

Deals with:

- Formal aspects
- Arbitrability of subject matter
- Autonomy in relation to the main contract
- Kompetenz-competenz
- Extent of judicial review
  - Whether or not a submission agreement is required

## **5) CAPACITY OF THE PARTIES**

NYC Articles II(3) and V(I)(a); and UNCITRAL  
Model Law Articles 8.1, 34 and 36



# Fiona Trust & Holding Co. v. Privalov



1. What are the facts of the case?
2. What is the procedural history?
3. What are the legal issues raised?



# What is the concept of “separability”?

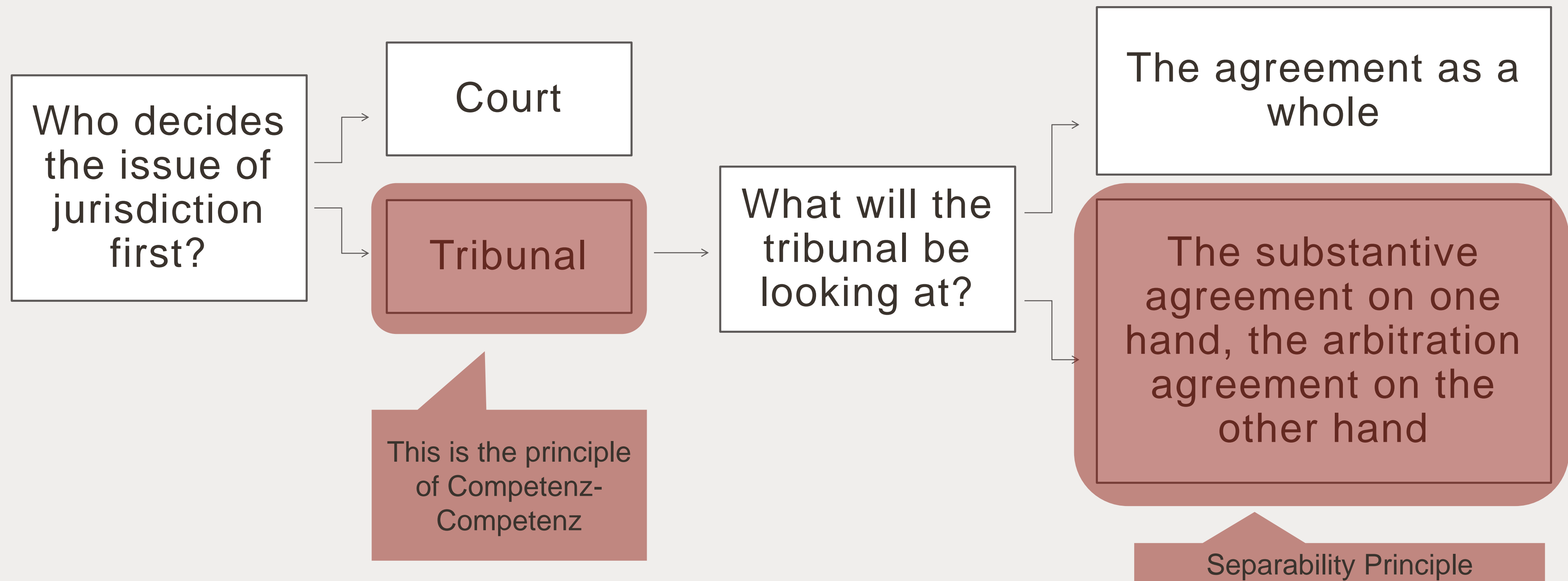
## And how is it different from “competenz-competenz”?

### PROBLEM

- If the main contract is null and void, so is the arbitration agreement
- Therefore, arbitrators **lack jurisdiction** to solve any of the issues, including whether the contract is invalid or not
- Thus, arbitrators **must not intervene until a court decides the matter**



# Competenz-Competenz + Separability





Serious bar for party that wishes to repudiate the AA (by questioning in court the validity of the arbitration agreement...by questioning the validity of the entire contract)

Both principles are endorsed by international rules of arbitration:

- UNCITRAL: “The Arbitral Tribunal **may rule on its own jurisdiction**, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract and which provides for arbitration under the rules **shall be treated as an agreement independent of the other terms of the contract**. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.”
- LCIA rules have a similar provision

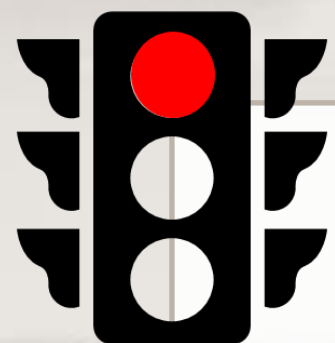
Also endorsed by national courts:

- French court de cassation in the Gosset case stated that “in international arbitration, the agreement to arbitrate, whether concluded separately or included in the contract to which it relates is always, save in exceptional circumstances, **completely autonomous in law**, which excludes the possibility of it being affected by the possible invalidity of the main contract.”



What are the required elements for  
an arbitration agreement?





**Must be present  
for clause to be  
enforceable**

- Unequivocal submission to arbitration
- Scope of arbitration agreement (disputes covered by the clause)
- Unequivocal endorsement of arbitration to resolve disputes in final and binding manner



**Absence may delay  
commencement or  
continuation**

- Ad hoc vs institutional arbitration and rules\*\*
- Arbitral seat\*\*
- Law applicable to the merits
- Number of arbitrators and method of appointment
- Language of the arbitration



**Optional**

- Settlement negotiations as a pre-condition to arbitration
- Interim measures
- Fast track
- Apportionment of costs and fees
- Confidentiality
- Document production
- Arbitrators' particular qualifications
- Others

**\*\* Indicates “strongly recommended”**



# Scope, Scope, Scope

Determination by arbitrator (outset, less restrictive) or by courts (enforcement phase)

- **NYC, Article V(1)(c)**: recognition and enforcement may be refused “if the award deals with a difference **not contemplated by, or not falling within**, the terms of the submission to arbitration, or if it contains decisions on **matters beyond the scope** of the submission to arbitration”
- **UNCITRAL Model Law**: Articles 34(2)(ii) and 36(a)(iii), almost identical provision

Wording matters: in connection with / arising of / relating to VS “under this contract”

- **UNCITRAL Model Clause**: “any **dispute, controversy or claim** arising out of, or relating to, this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL rules as at presently in force”

Contractual, tortious, statutory claims (securities and anti-trust)

# Seat, Seat, Seat

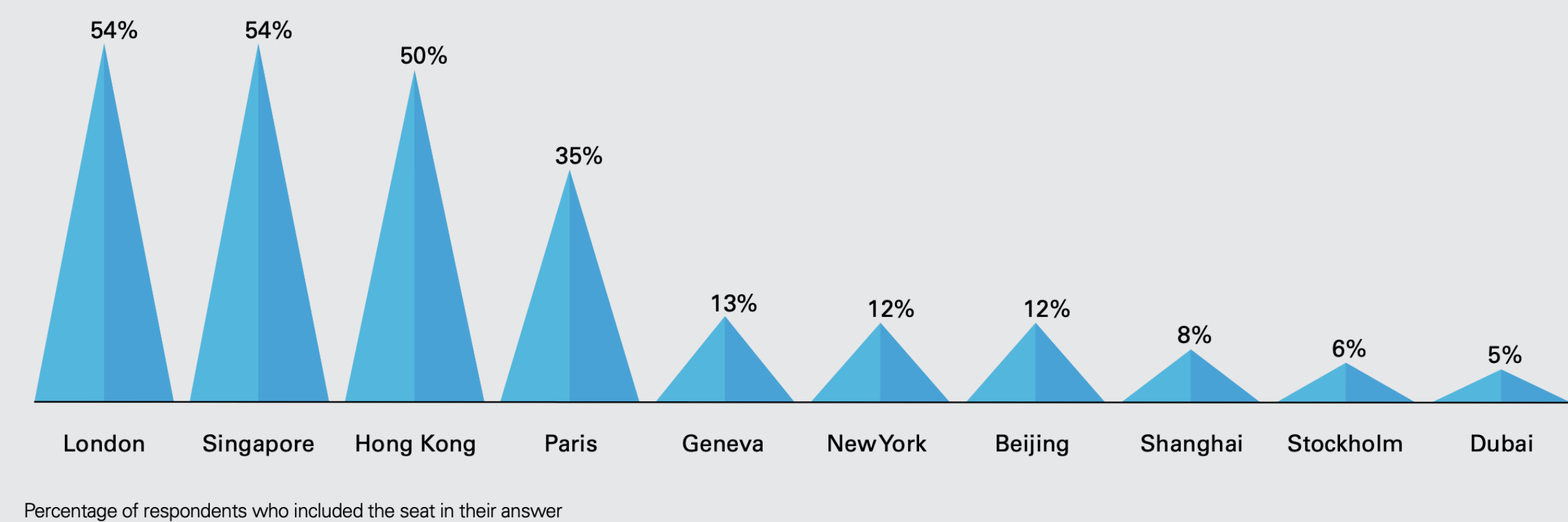
A choice must be made – freedom of parties (in arbitration agreement/after); or left to tribunal

- **Logistics of hearing** (but may be different location)
  - neutrality (nationality matters), residence/place of business of counsel, arbitrators and clients, logistics of hearings (visas, hotels, conference rooms, transportation, communications, infrastructure, transcripts, skilled support), political factors, economic factors
- **Law applicable to the arbitration proceedings, the arbitration agreement, relationship with local courts** (may be a different law if parties choose)
  - form and definition of the arbitration agreement, enforce international agreements to arbitrate (NY Convention/UNCITRAL Model Law), arbitrability of the matters in dispute, assistance of courts to constitute the tribunal, assistance of courts to tribunal to perform tasks, no interference, signatory to the NY Convention so reciprocity may be expected in enforcement stage, annulment action
- **Nationality of award**
- **Subtle effects:** nationality, training and orientation of arbitrators (and counsel)



# Seat, Seat, Seat

Chart 2: What are your or your organisation’s most preferred seats?



Queen Mary and White & Case, *2021 International Arbitration Survey: Adapting arbitration to a changing world*

## Places of arbitration

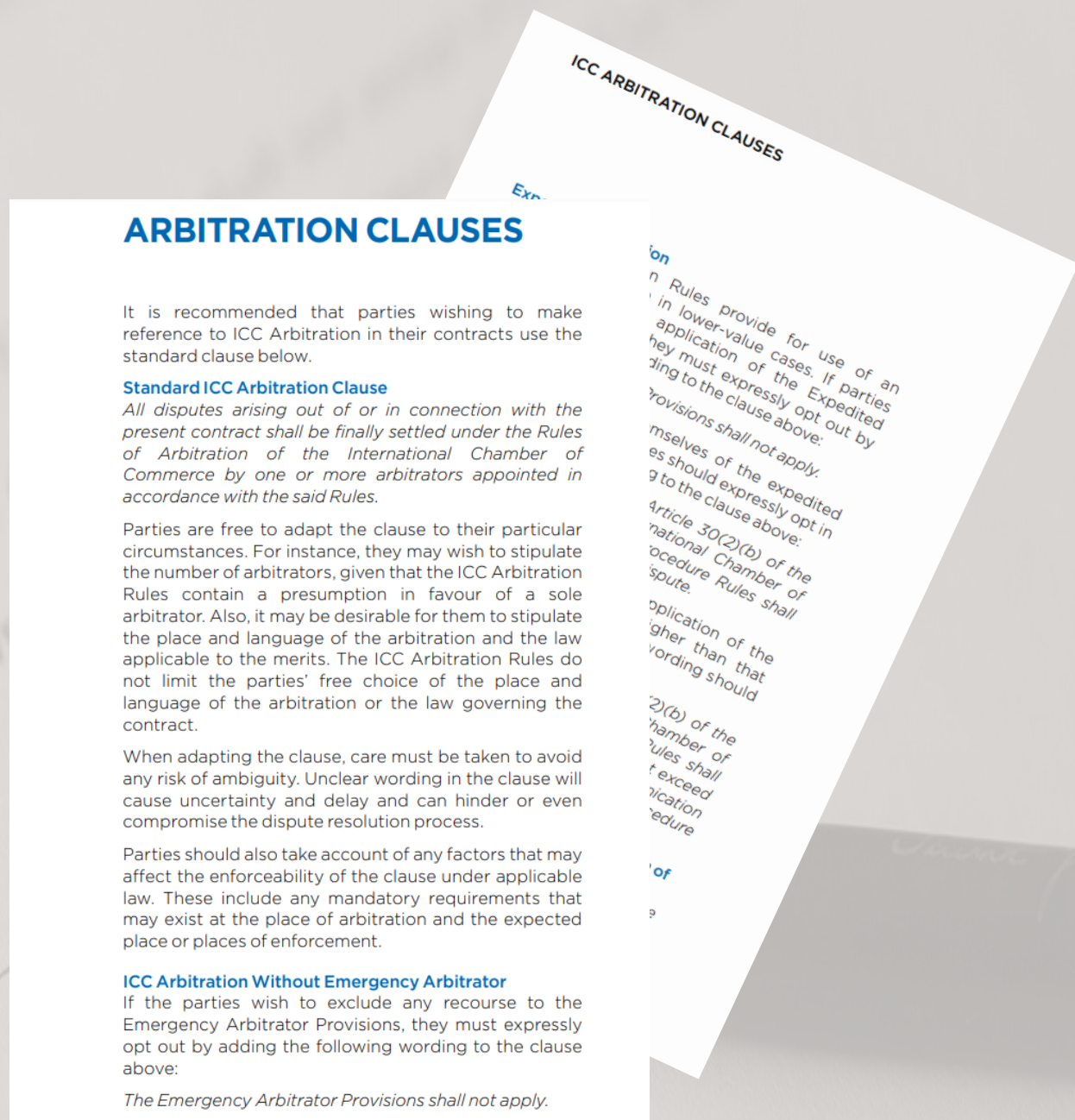
Table 08 Ten most frequently selected cities

City	Number of cases	% of all places of arbitration
Paris	87	12.2%
London	85	12.0%
Geneva	60	8.4%
New York	49	6.9%
Zurich	37	5.2%
Singapore	26	3.7%
Dubai	23	3.2%
Doha	22	3.1%
Sao Paulo	20	2.8%
Hong Kong	19	2.7%

*2020 ICC Dispute Resolution Statistics*

# Examples of Arbitration Clauses





# ICC Model Clause 2021

“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”

# ICC Arbitration without Emergency Arbitrator 2021

“The Emergency Arbitrator Provisions shall not apply.”

# ICC Opting-out of Expedited Arbitration in Lower Amount

“The Expedited Procedure Provisions shall not apply.”

# ICC Expedited Arbitration in Higher Amount Cases

“The parties agree, pursuant to Article 30(2)(b) of the Rules of Arbitration of the International Chamber of Commerce, that the Expedited Procedure Rules shall apply irrespective of the amount in dispute.”

# ICC Changing the Threshold

“The parties agree, pursuant to Article 30(2)(b) of the Rules of Arbitration of the International Chamber of Commerce, that the Expedited Procedure Rules shall apply, provided the amount in dispute does not exceed US\$ [specify amount] at the time of the communication referred to in Article 1(3) of the Expedited Procedure Rules.”

## ARBITRATION CLAUSES

It is recommended that parties wishing to make reference to ICC Arbitration in their contracts use the standard clause below.

### Standard ICC Arbitration Clause

*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.*

Parties are free to adapt the clause to their particular circumstances. For instance, they may wish to stipulate the number of arbitrators, given that the ICC Arbitration Rules contain a presumption in favour of a sole arbitrator. Also, it may be desirable for them to stipulate the place and language of the arbitration and the law applicable to the merits. The ICC Arbitration Rules do not limit the parties' free choice of the place and language of the arbitration or the law governing the contract.

When adapting the clause, care must be taken to avoid any risk of ambiguity. Unclear wording in the clause will cause uncertainty and delay and can hinder or even compromise the dispute resolution process.

Parties should also take account of any factors that may affect the enforceability of the clause under applicable law. These include any mandatory requirements that may exist at the place of arbitration and the expected place or places of enforcement.

### ICC Arbitration Without Emergency Arbitrator

If the parties wish to exclude any recourse to the Emergency Arbitrator Provisions, they must expressly opt out by adding the following wording to the clause above:

*The Emergency Arbitrator Provisions shall not apply.*

ICC ARBITRATION CLAUSES

Exp

on  
n Rules provide for use of an  
in lower-value cases. If parties  
application of the Expedited  
they must expressly opt out by  
ding to the clause above:

Provisions shall not apply.

mselves of the expedited  
es should expressly opt in  
g to the clause above:

Article 30(2)(b) of the  
national Chamber of  
cedure Rules shall

spute.

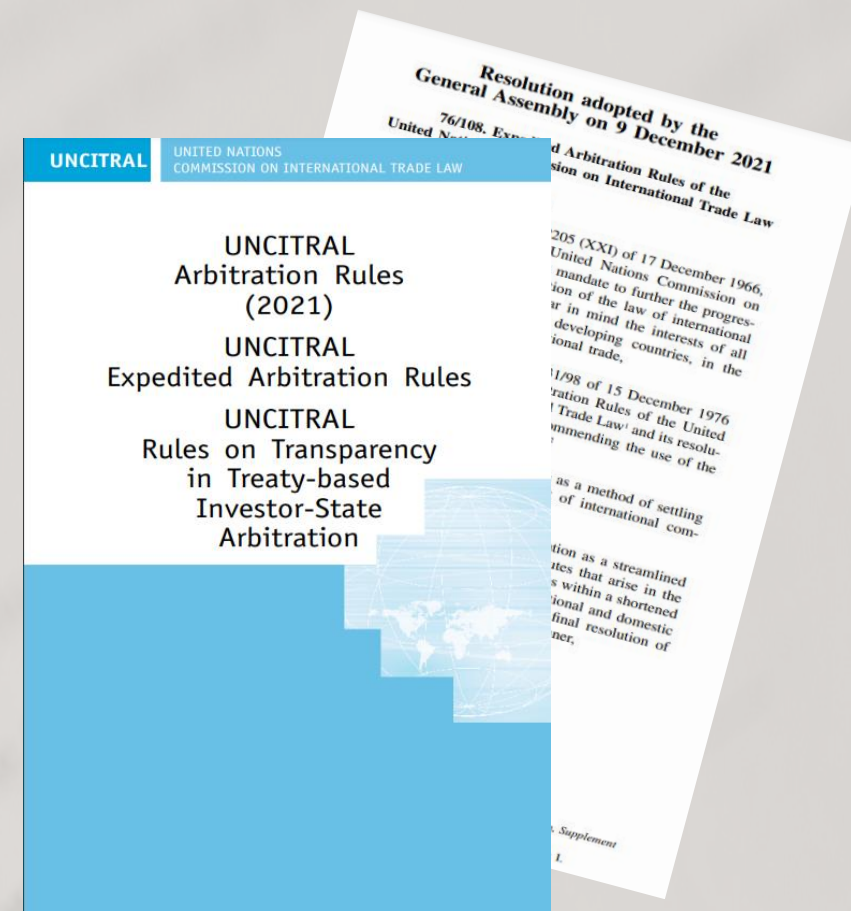
plication of the  
gher than that  
wording should

30(2)(b) of the  
hamber of the  
ules shall  
f exceed  
ication  
edure

of

P

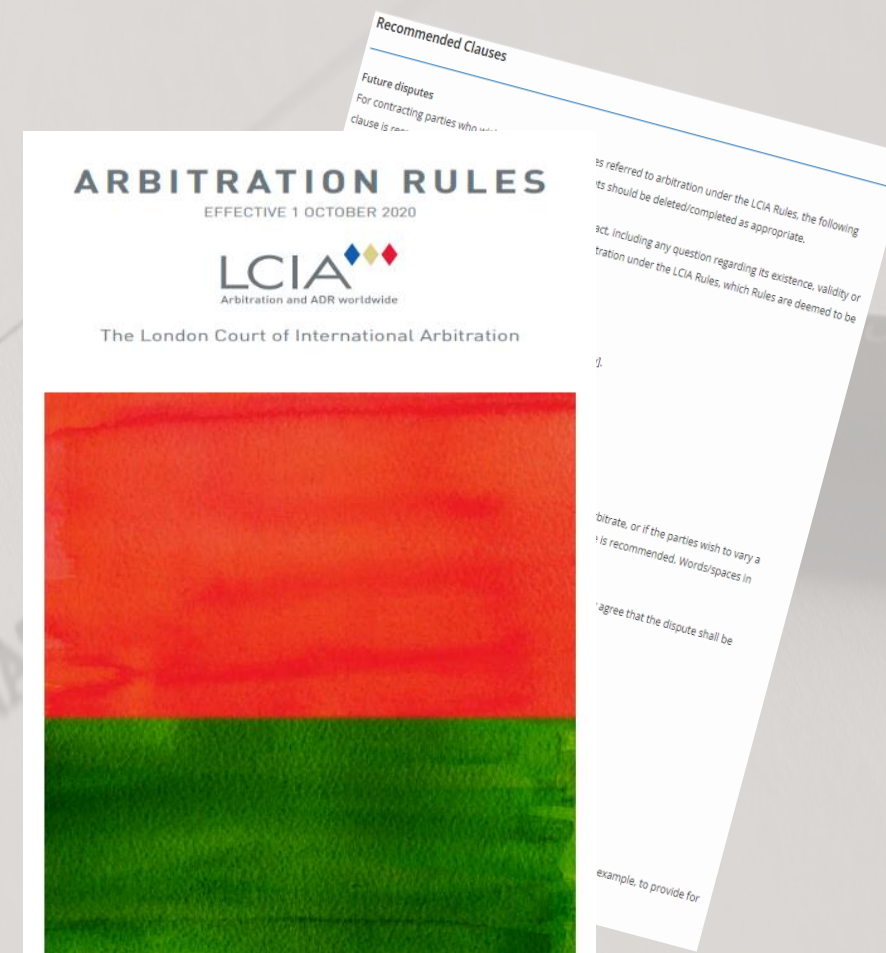




## UNCITRAL Model Clause

“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules.”

## LCIA Model Clause



“Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause. The number of arbitrators shall be [one/three]. The seat, or legal place, of arbitration shall be [City and/or Country]. The language to be used in the arbitral proceedings shall be [ ]. The governing law of the contract shall be the substantive law of [ ].”



What is a “pathological” arbitration agreement?





# The “Midnight Clause”

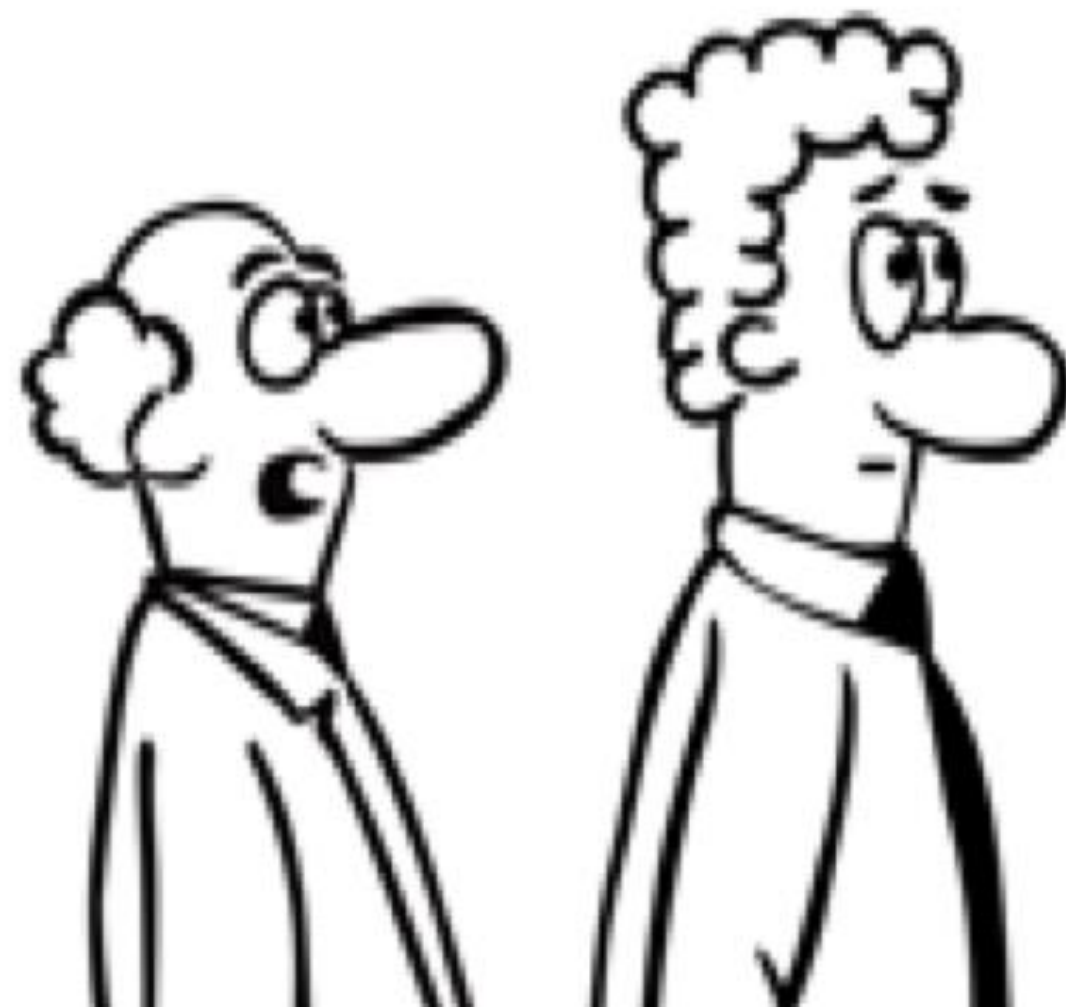
The arbitration agreement:

- Fails to **bind** the parties
- Fails to **give power** to the arbitrator to settle the dispute
- Fails to **put in place a procedure** leading to the rendering to an award that is susceptible of judicial enforcement

Why are pathological clauses a problem?



We're here to litigate  
the arbitration clause  
that was meant to  
avoid litigation.



- Increase uncertainty, **time and costs** for parties involved.
- **Litigation** before local courts may be necessary.
- The clause may be so defective it **may not be enforced** as an arbitration clause at all.

What makes an arbitration agreement “pathological”?



**EQUIVOCATION:** arbitration clause does not exclude recourse to ordinary courts (except hybrid clauses)

**INCONSISTENCY:** Courts/tribunals will attempt to strike out the inconsistency

**UNCERTAINTY:**

- ICC has accepted vague and imprecise formulations as references to the ICC International Court of Arbitration: “the official chamber of commerce in Paris, France” “the arbitration commission of the Chamber of Commerce and Industry of Paris” and “a commission of arbitration of French chamber of commerce, Paris”.
- Also when parties refer to arbitration “by the International Chamber of Commerce in Geneva” or the Hague or Stockholm

**INOPERABILITY OR NOT CAPABLE OF BEING PERFORMED:** For example, an arbitration clause requiring that the third arbitrator was to be appointed by the British Political Resident in the Gulf, an official whose post had ceased to exist at the time the dispute arose vs. specification of a non-existent institution or body of rules

How would this “pathology” be raised  
by the parties?



# Examples of Pathological Clauses



# Pathological Clauses

“Any dispute between the parties arising out of or relating to this Agreement which cannot be settled amicably may be finally settled by the Arbitration Commission of the Chamber of Commerce and Industry of Paris.”

“The construction, validity and performance of this Agreement shall be governed by Norwegian law and the Parties hereto hereby submit to the sole and exclusive jurisdiction of the Norwegian courts. The Parties shall use reasonable efforts to settle any dispute under this Agreement including where appropriate, referral to senior management personnel for resolution. In the event the Parties are unable to resolve any dispute arising under or related to this Agreement, such dispute shall be referred to the London Court of International Arbitration (LCIA) and finally resolved by arbitration under LCIA rules, including when seeking injunctive relief against improper use or disclosure of Proprietary Information. The Parties agree that the venue for all arbitrations shall be Oslo, Norway.”



# Hybrid Clauses





# Hybrid Clauses

## **Symmetric** hybrid clause:

- “For the resolution of any dispute or litigation arising out of this contract, the parties may choose to submit the dispute to arbitration by the Netherlands Arbitration Institute or to the courts of s'Hertogenbosch (The Netherlands).” (SAP Madrid 18 October 2013)

## **Asymmetric** hybrid clause:

- “Party A shall submit all disputes arising from this contract to the jurisdiction of the courts of the city of Madrid. Party B, on the other hand, shall be free to choose between submitting the dispute to the jurisdiction of the courts of the city of Madrid or to arbitration in Madrid on the following terms (...)”

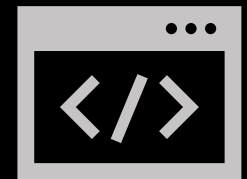




patricia.saiz@esade.edu



Patricia Saiz



www.saizarbitration.com



THANK YOU!