

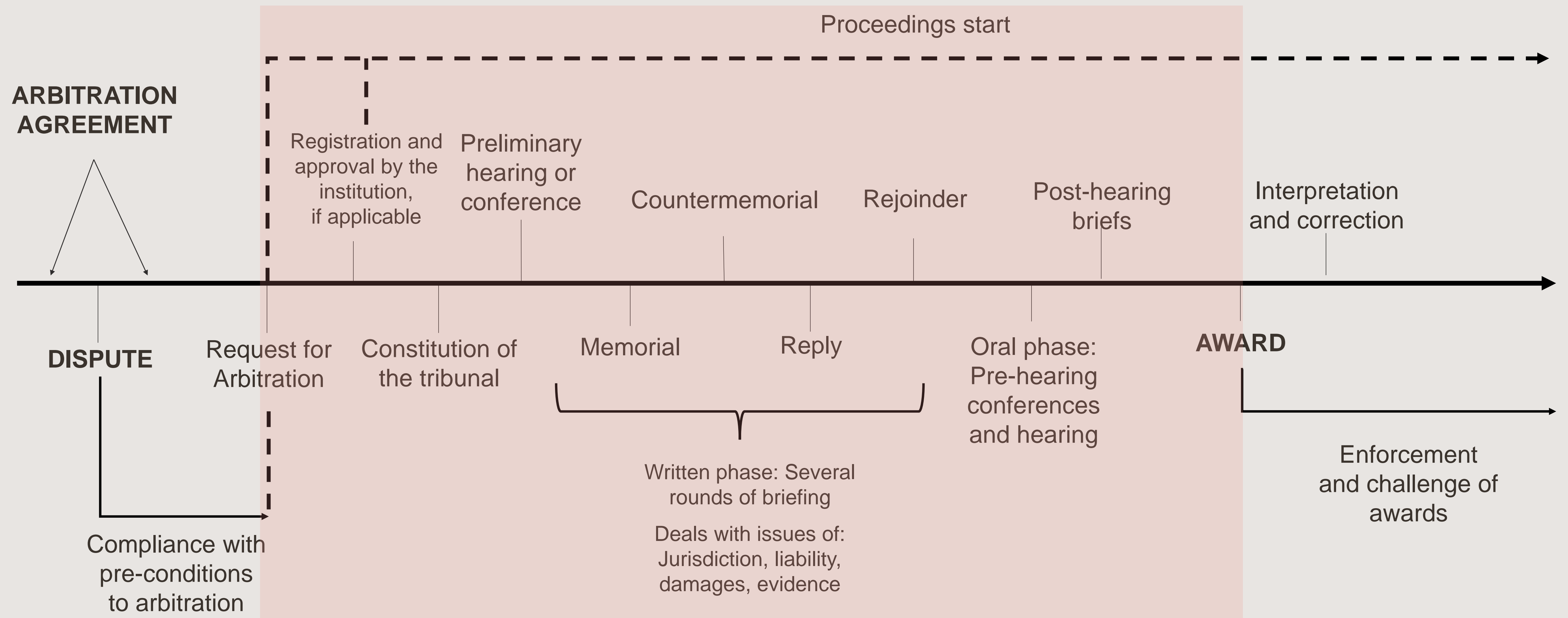


# INTRODUCTION TO INTERNATIONAL COMMERCIAL ARBITRATION

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

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# Timeline of an arbitration







# I. Constitution of the Arbitral Tribunal

What factors should be considered  
when choosing arbitrators?

**Type of claim:** large vs. small claim, legal vs. factual vs. industry

## **Qualifications of arbitrators**

**Number** – should be uneven

- Sole arbitrator (advantages: speed and economy, smaller fees, easier to arrange meetings or hearings, no need to deliberate)
- 2 arbitrators with subsequent umpire or referee (not recommended)
- 3 arbitrators (preference, more expensive but likely more satisfactory to parties)
- More (dictated by political considerations, not commercial, e.g. Iran US Claims Tribunal - 9)

Some rules nominally favor 1 in the absence of agreement but in practice 3 is preferred. Others default to 3 unless provided otherwise by the parties.

- **ICC, Article 12:** “1) The disputes shall be decided by a sole arbitrator or by three arbitrators. 2) 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.”
- **LCIA, Article 5.4:** “**A sole arbitrator shall** be appointed unless the parties have agreed in writing otherwise, or unless the LCIA Court determines that in view of all the circumstances of the case a three-member tribunal is appropriate.”
- **UNCITRAL Rules, Article 7:** “If the parties have not previously agreed on the number of arbitrators, and if within 30 days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, **three arbitrators shall be appointed.**”

In general: legal capacity

Restrictions imposed by the parties (unwise ahead of dispute, e.g. X years experience) vs imposed by applicable law

- Spain repealed its former rule that the arbitrator must be a qualified lawyer (art. 13 of the 2003 Arbitration Act – art.12(2) of the 1998 Arbitration Act).
- Saudi Arabia removed the requirement that all arbitrators be male and have knowledge of Shari'ah law (although the presiding arbitrator in a panel of three is still required to hold a degree in Shari'ah).
- Other examples: no foreigners

Professional qualifications (appointing a “lawyer” as sole arbitrator vs. 3-member panel)

Language (avoid translations/interpretation)

Experience and outlook

Education and training (especially in arbitration – need to educate new arbitrators)





# Choice of Arbitrators

## Qualifications:

- Independence and Impartiality
- Legal background
- Reputation
- Availability
- Nationality
- Command of languages
- Religion
- Expertise in a specific field
- Management skills



How to choose an arbitrator? Where  
would you start?

Public information available?

“Insiders”

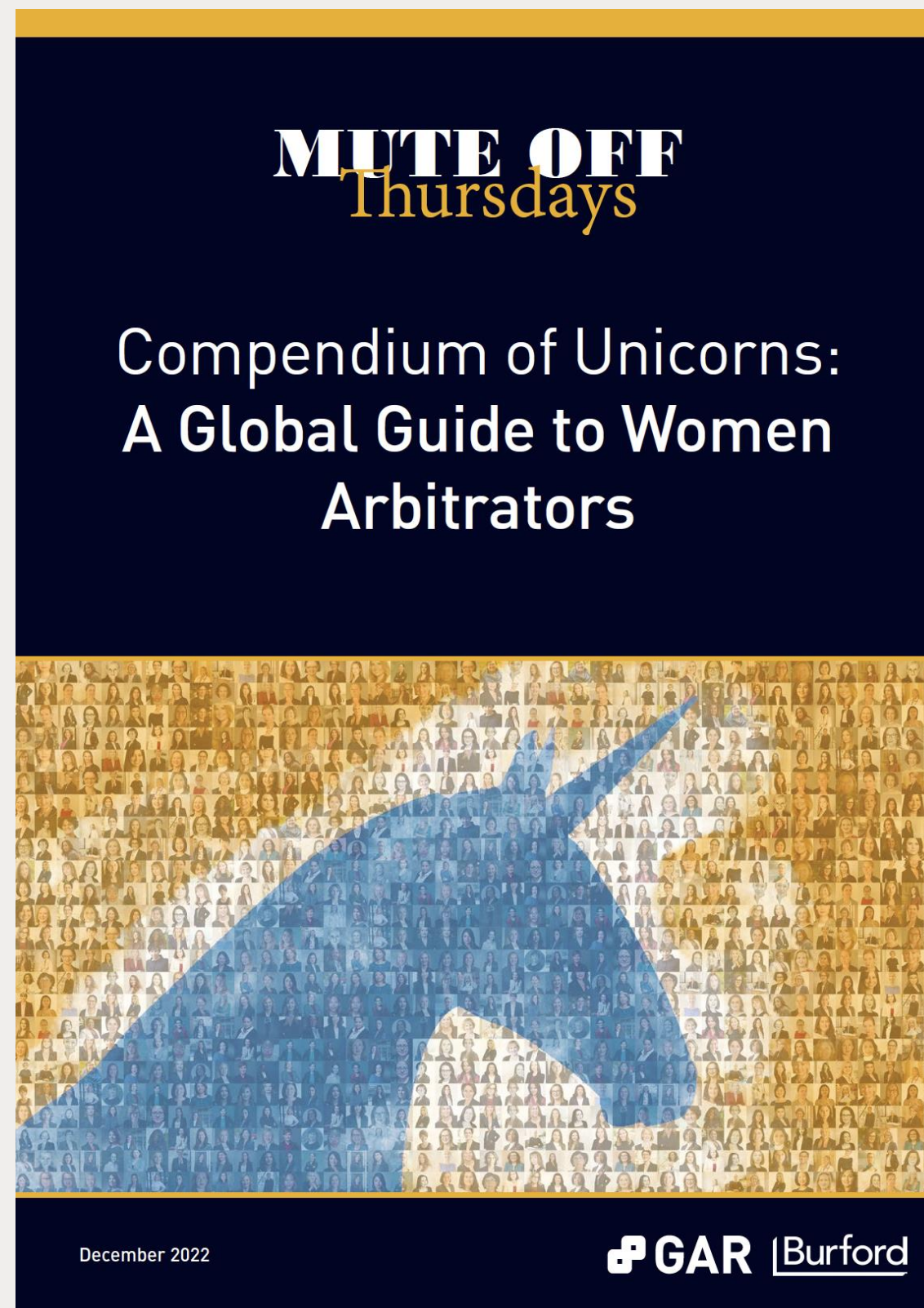
Institutions’ rosters and arbitrator appointments

LinkedIn and other social media, conferences, publications ➔ law firm databases

New information aggregators (i.e. Arbitrator Intelligence)

Interviewing prospective arbitrators

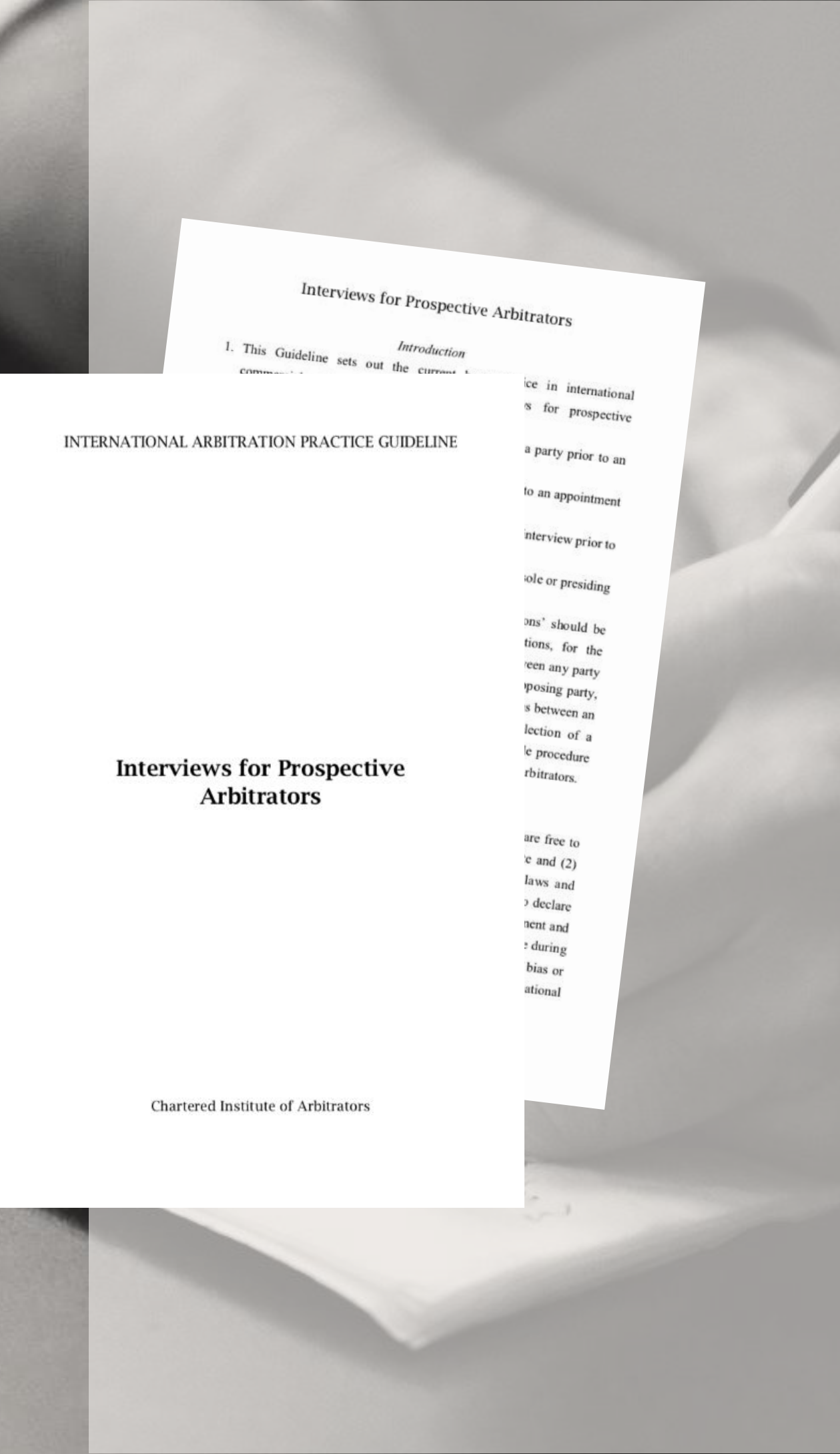
# Compendium of Unicorns: A Global Guide to Women Arbitrators



- It is the brainchild of Mute Off Thursdays, the female virtual-discussion group for mid to senior-level women in arbitration.
- “Unicorns” in the title reflects a comment, once upon a time, by a particular man that he would appoint qualified female arbitrators, if only he could find some.
- The guide profiles 176 women arbitrators and provides information about their experience.



# The interview with the arbitrator – How far may counsel go?



# Chartered Institute of Arbitrators, “Interviews for Prospective Arbitrators”

## Guidelines (See Chartered Institute of Arbitrators, “Interviews for Prospective Arbitrators”)

- In the arbitrator’s office or by phone
- Lead by external lawyer
- No hospitality
- Not more than 30 mins
- Notes that are disclosable
- Inform other arbitrators of fact and content of discussion

- Availability, conflicts, experience, qualifications
- No probing of arbitrator's views on merits of the case
- Sole or presiding arbitrators to be appointed by agreement of parties: joint interviews (one party not present)
- Communications ex parte not allowed outside this time period (Iran US Claims Tribunal examples: sharing the content of draft award, ask the party that appointed the arbitrator for further evidence)



# How are arbitrators appointed?

Agreement of parties

Party-appointed arbitrators appoint chair

Arbitral institution

Appointing authority

- Under the UNCITRAL Rules, if the parties have not agreed on an appointing authority, then “*any party may request the Secretary-General of the PCA to designate the appointing authority.*”

National courts



Arbitrators must be and remain ...  
impartial and independent

What's the difference between impartiality and independence?



Are party-appointed arbitrators  
independent and impartial?

## Required by the rules

- **ICC, Article 14.1:** “A challenge of an arbitrator, **whether for an alleged lack of impartiality or independence, or otherwise**, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based.”
- **LCIA, Article 10.3:** “An arbitrator may also be challenged by any party if circumstances exist that give rise to justifiable **doubts as to his impartiality or independence.**”
- **UNCITRAL, Article 12.1:** “Any arbitrator may be challenged if circumstances exist that give rise to justifiable **doubts as to the arbitrator’s impartiality or independence.**”

Not derogable although parties may agree a particular relationship does not disqualify the arbitrator

Is nationality a bias?

**ICC, Article 13.5:** “The **sole arbitrator or the president** of the arbitral tribunal shall be of a nationality other than those of the parties. However, in suitable circumstances and provided that none of the parties objects within the time limit fixed by the Court, the sole arbitrator or the president of the arbitral tribunal may be chosen from a country of which any of the parties is a national.”

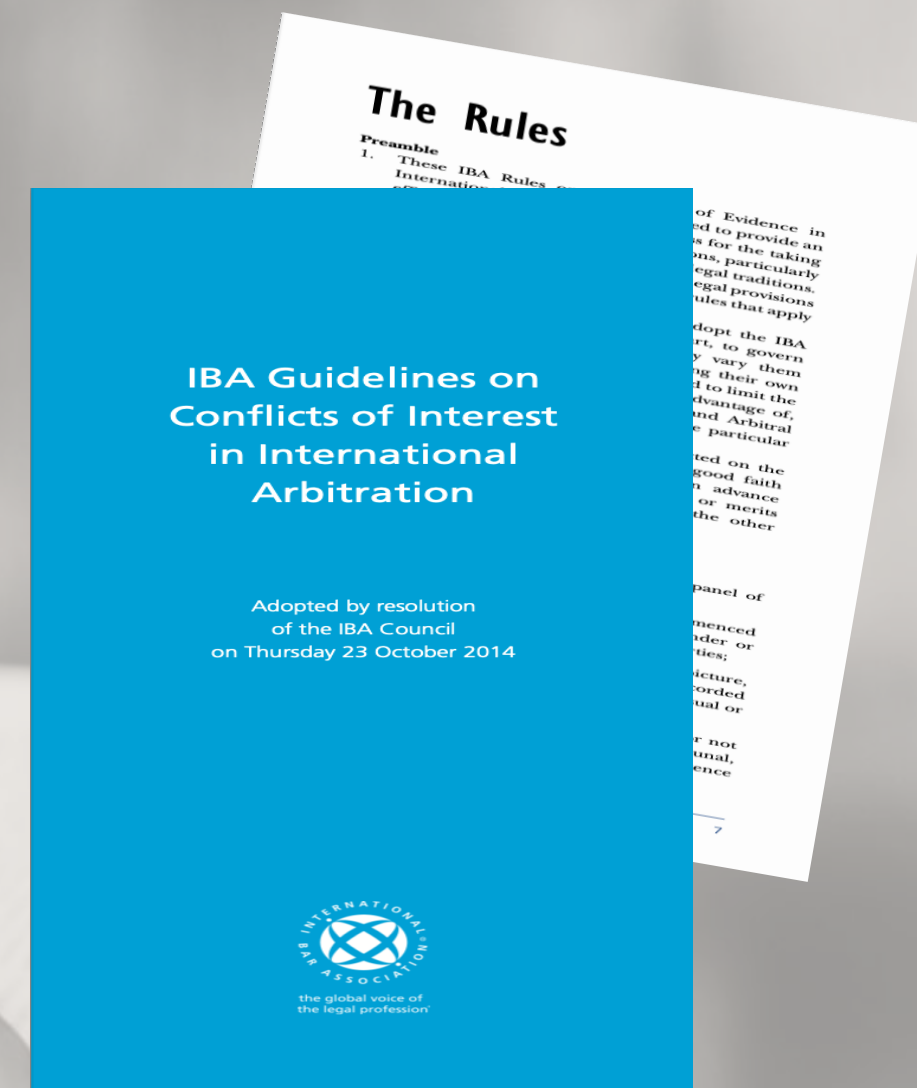
**LCIA, Article 6.1:** “Where the parties are of different nationalities, **a sole arbitrator or chairman of the Arbitral Tribunal** shall not have the same nationality as any party unless the parties who are not of the same nationality as the proposed appointee all agree in writing otherwise.”

May produce curious results, e.g. Swiss party, Swiss seat, Swiss applicable law

No guarantee of independence or impartiality



How much should arbitrators  
disclose before / after their  
appointment?



# 2014 IBA Guidelines on Conflicts of Interest in International Arbitration

To be discussed in Advanced Topics in International Arbitration

May arbitrators issue provisional measures?

Tribunal may be authorized to issue them under institution rules or national laws

- **ICC Rules, Article 28:** “Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal **may, at the request of a party, order any interim or conservatory measure it deems appropriate.**”
- **ICSID, Rule 39:** “At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights **be recommended** by the Tribunal.”

National laws may also prohibit arbitrators from issuing them.

# For what purpose?

1. Preserve evidence
2. Protect assets
3. Maintain *status quo*



Is assistance from a national court  
necessary?



“An arbitration is only as  
good as the arbitrator is”

*Unknown author*

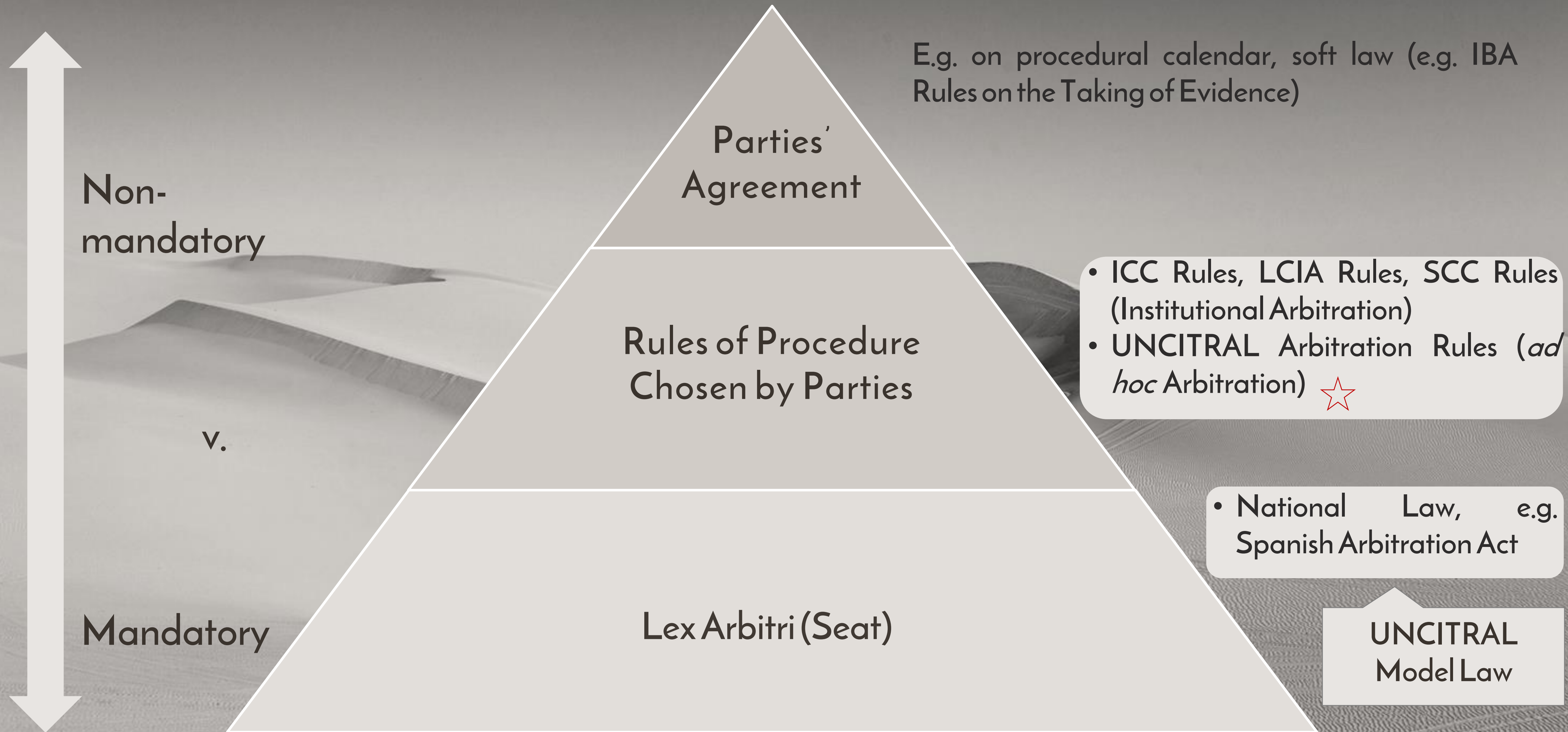


## II. Anatomy of Arbitral Proceedings

What is the guiding principle in  
arbitral proceedings?



Are there restrictions to party  
autonomy? How do they come into  
play?



## Mandatory provisions of the arbitration rules

- **UNCITRAL Rules, Article 17.1:** “Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, **provided that the parties are treated with equality** and that at an appropriate stage of the proceedings each party is given a **reasonable opportunity of presenting its case.**”
- **UNCITRAL Rules, Article 17.3:** “If at an appropriate stage of the proceedings any party so requests, the arbitral tribunal **shall hold hearings for the presentation of evidence** by witnesses, including expert witnesses, or for oral argument.”

## Mandatory provisions or public policy of the seat

- **UNCITRAL Model Law, Article 18:** “The parties **shall be treated with equality and each party shall be given a full opportunity of presenting his case.**”

What is the consequence of an arbitrator not respecting the parties' agreement?

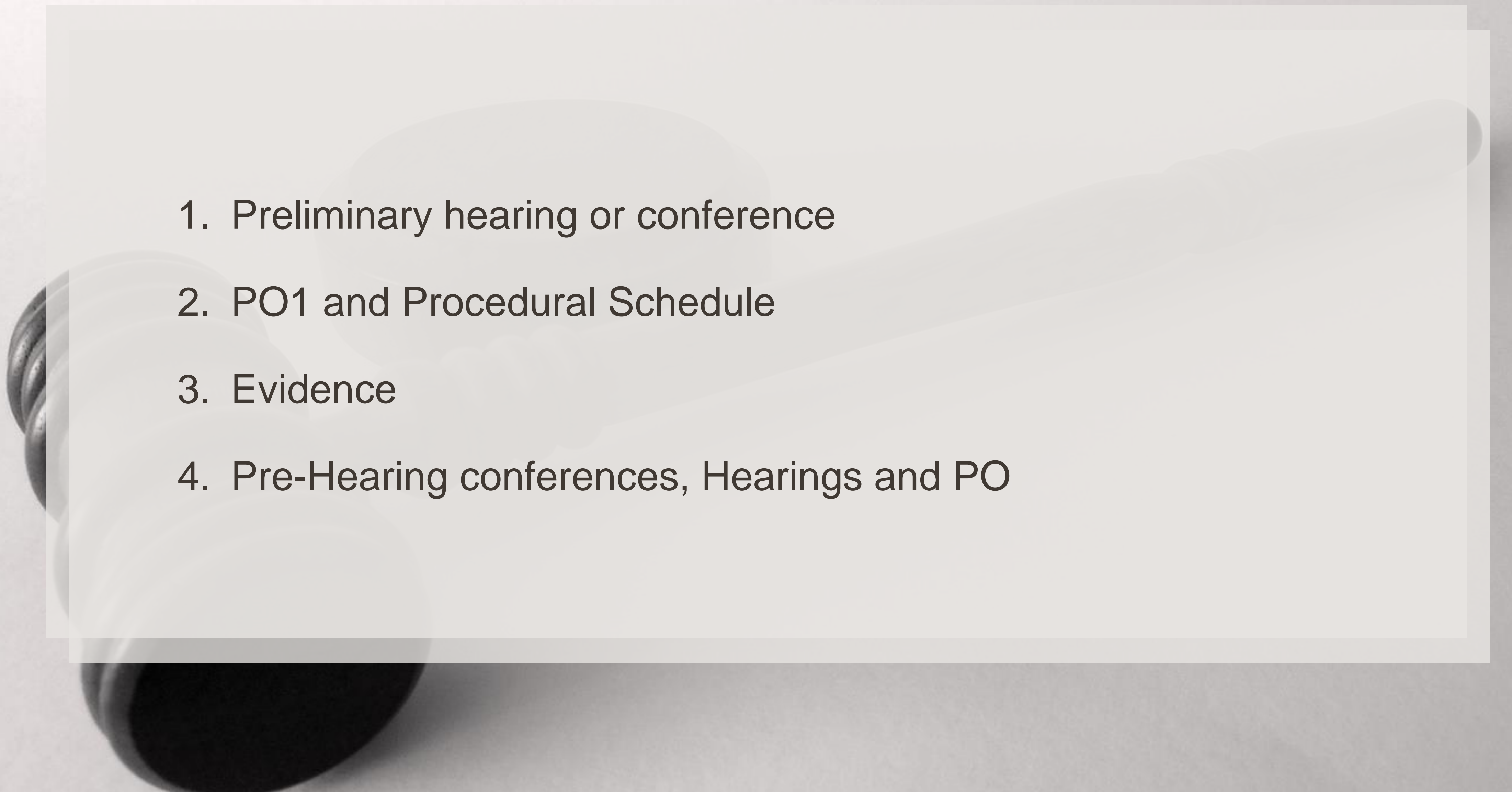


Risk of setting aside or lack of enforcement - see New York Convention, Article V:

“1. Recognition and enforcement of the award may be refused, (where)  
d) The composition of the arbitral authority **or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.**”



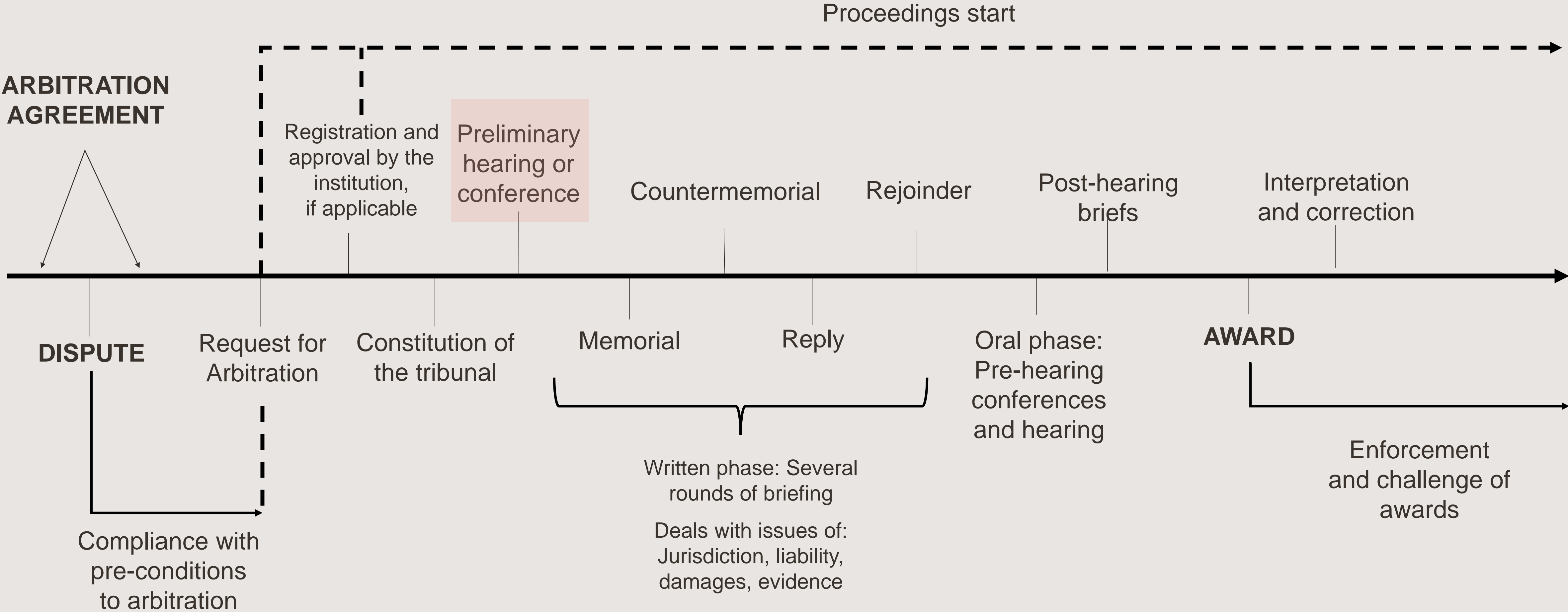
# Procedural Milestones

- 
- A hand holding a pen, with a list of items written on a notepad. The list includes: 1. Preliminary hearing or conference, 2. PO1 and Procedural Schedule, 3. Evidence, 4. Pre-Hearing conferences, Hearings and PO.
1. Preliminary hearing or conference
  2. PO1 and Procedural Schedule
  3. Evidence
  4. Pre-Hearing conferences, Hearings and PO

# Preliminary hearing or conference



# Timeline of an arbitration





# 2021 ICC Arbitration Rules

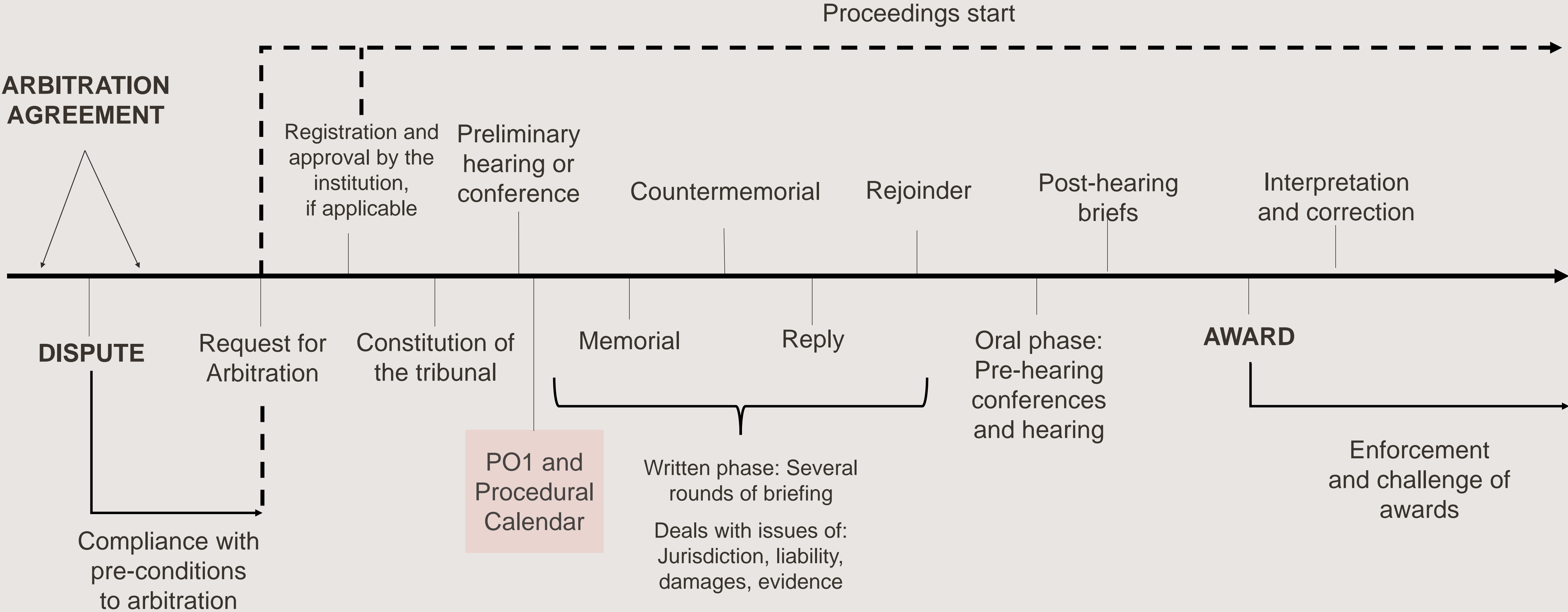
## Article 24: Case Management Conference and Procedural Timetable

“When drawing up the Terms of Reference or as soon as possible thereafter, **the arbitral tribunal shall hold a case management conference to consult the parties on procedural measures that may be adopted** pursuant to Article 22(2) (...)

4) (...) The **arbitral tribunal may request the parties to submit case management proposals in advance of a case management conference** and may request the attendance at any case management conference of the parties in person or through an internal representative.”

# PO1 and Procedural Calendar

# Timeline of an arbitration



# Evidence





# Evidence

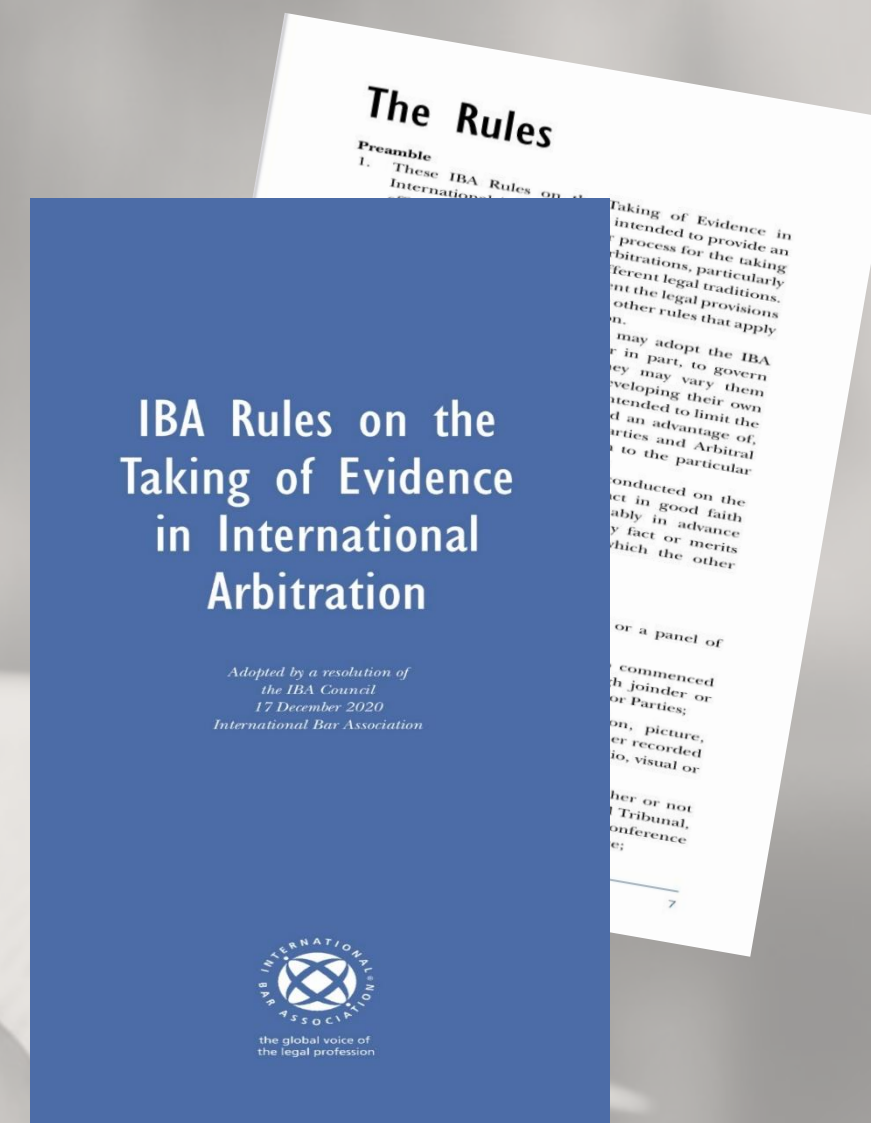
Establishing the facts of the case:

- Documentary Evidence
- Testimony of Witnesses of Facts
- Opinions of Experts Witnesses
- Inspection of the subject-matter of the dispute

Art. 25(4) 2021 ICC Rules: *“At any time during the proceedings, the arbitral tribunal may summon any party to provide additional evidence.”*

Burden of proof?

- “Balance of probability”
- Inner conviction test



# 2020 IBA Rules on the Taking of Evidence in International Arbitration

To be discussed in Advanced Topics in International Arbitration





# Documents



- Great weight
- Documents relied on vs. **document production requests**
- Becoming a norm
- Even if the rules do not explicitly provide for DP, tribunal has power to establish the facts by “all appropriate means”
- Tribunals often incorporate the **IBA Rules on the taking of evidence** as a guiding point in PO1



# Fact and Expert Witnesses



## Testimony of **fact witnesses**

- Helps to establish the facts of a case
- Based on memory
- Usually accompanied by a witness statement, limited or no direct
- Ok to prepare a witness?
- **Limitations and different ethical rules in different jurisdictions**
- Less weight than contemporary documents

## Opinions of **expert witnesses**

- Helps to better understand complex technical aspects of the dispute
- Based on opinion/their expertise, not facts
- Accompanied by expert report
- Tribunal may appoint its own experts, but parties entitled to examine materials and witness
- Hot-tubbing

Examination and cross-examination of witnesses is key

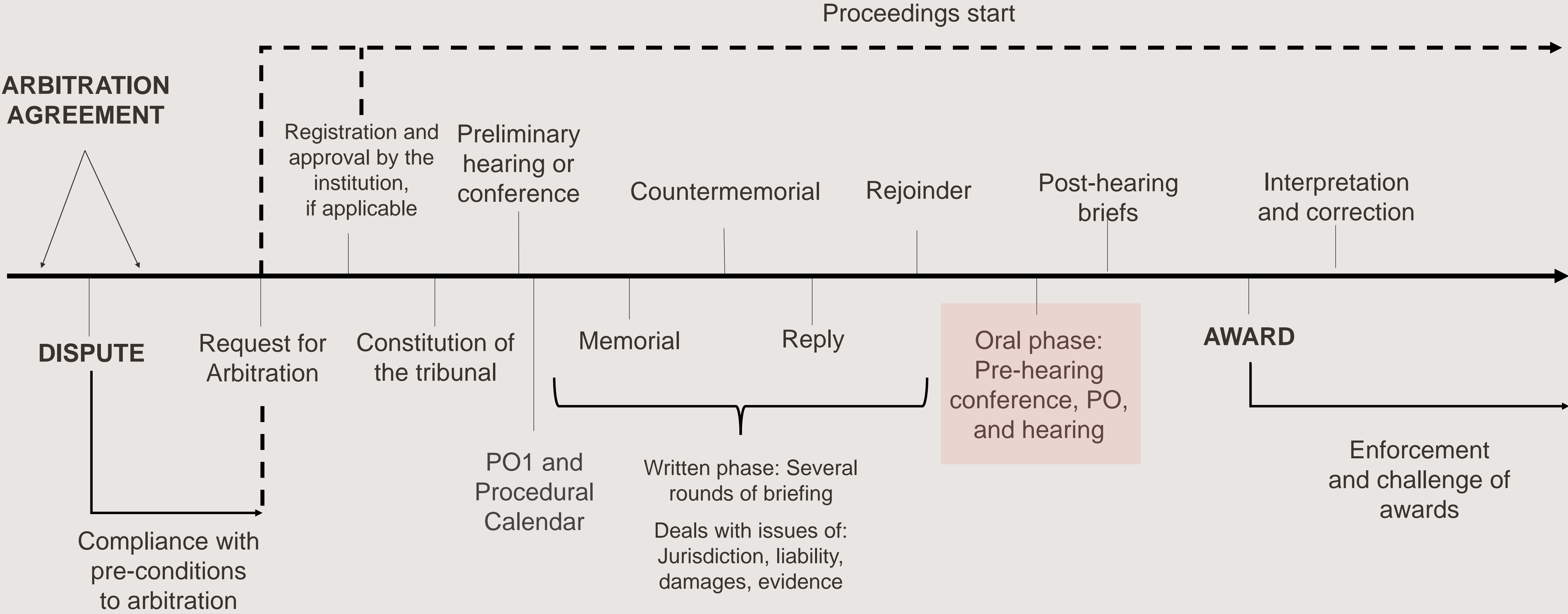
- Direct examination (“examination in chief”) by the lawyer of the party calling that witness
- Cross-examination by the opposing party’s lawyer
- Re-examination (re-direct) by the first party



# Inspections of the subject matter of the dispute

# Hearings

# Timeline of an arbitration







# Structure

- Opening arguments
- Examination of witnesses (direct, cross-examination, re-direct)
- Examination of experts (direct, cross-examination, re-direct)
- Closing arguments





# Time allocation

- Identical vs. equal distribution; consider number of witnesses and simultaneous or successive translation
- “Chess clock” method

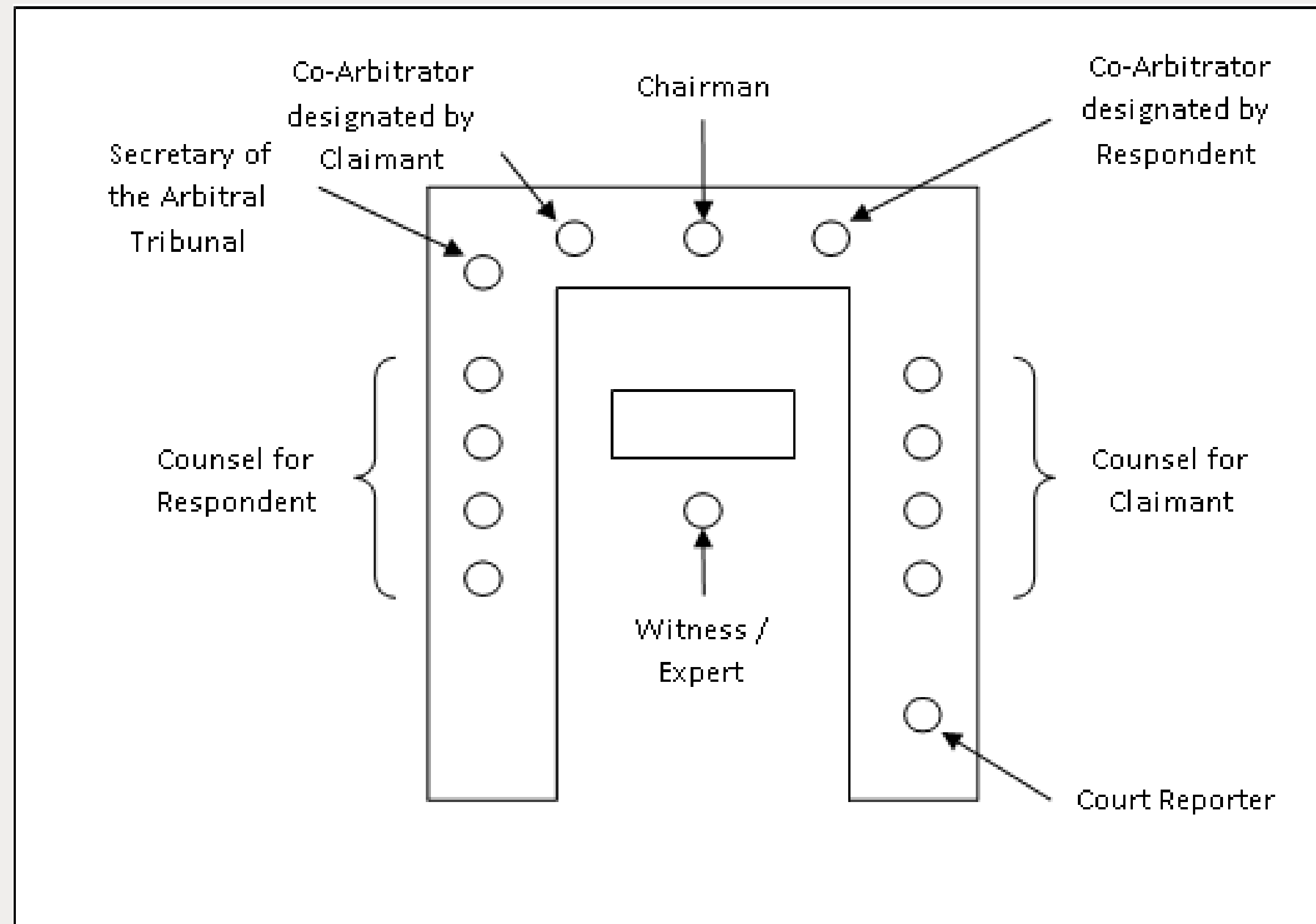




# Fact and expert witnesses

- Claimant and then Respondent
- Group them by subject matter: factual, technical, legal, quantum
- Witnesses shall not attend the hearing until they are cross-examined, unless they are also representatives of the parties
- Synchronous transcription

# Setting for face-to-face hearings











# Virtual hearings



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THANK YOU!