



PROCEDURAL “INNOVATIONS”

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

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Emergency Arbitrator

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Expedited Proceedings

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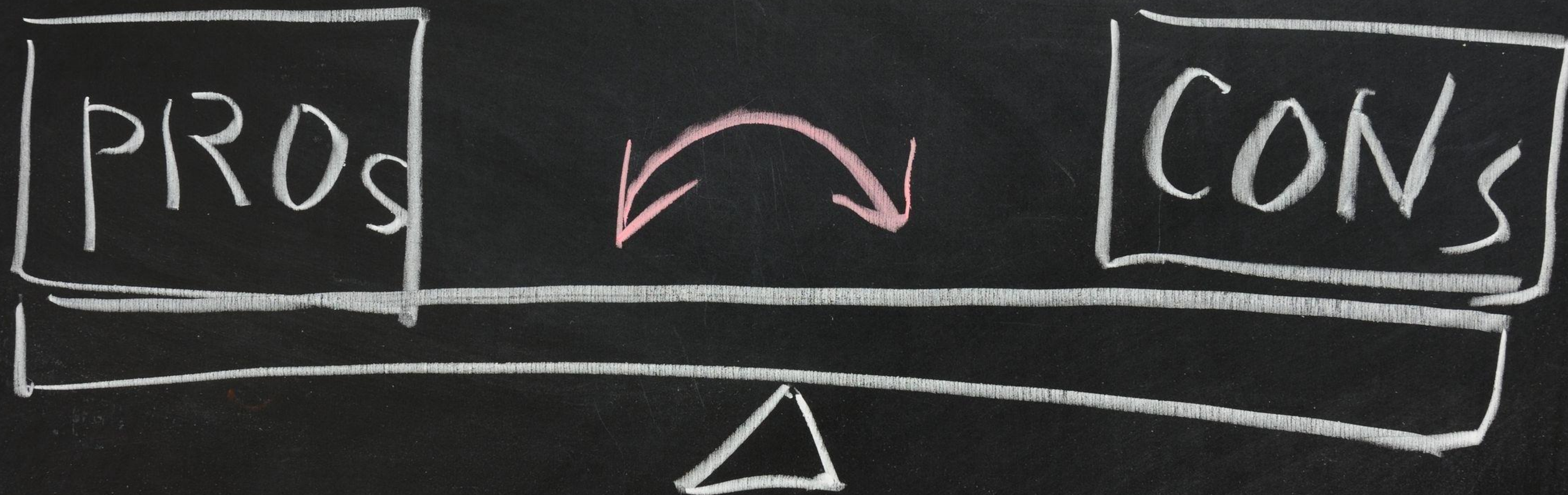
Emergency Arbitrator

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When might an emergency arbitrator be needed?

- Tribunal not yet constituted
- Party does not want to go to court (e.g., confidentiality concerns, speed)

Leading arbitral institutional rules include emergency arbitrator provisions.



Advantages

- Speed
- Costs
- Broad range of relief
- Impartiality
- Confidentiality
- Tactical considerations



- Among the successful applications, some were obtained through a consent Order, thereby limiting the issue of enforcement.¹⁶⁹ Preliminary feedback also indicates that EA proceedings are a potential early settlement tool on the merits. As a matter of fact, out of the first 80 ICC EA cases, 25 cases settled on the merits before the issuance of any final award, among which four settled before any Order was ever issued. For those cases, there are rarely enforcement issues given the high level of compliance with commitments undertaken in settlement settings.

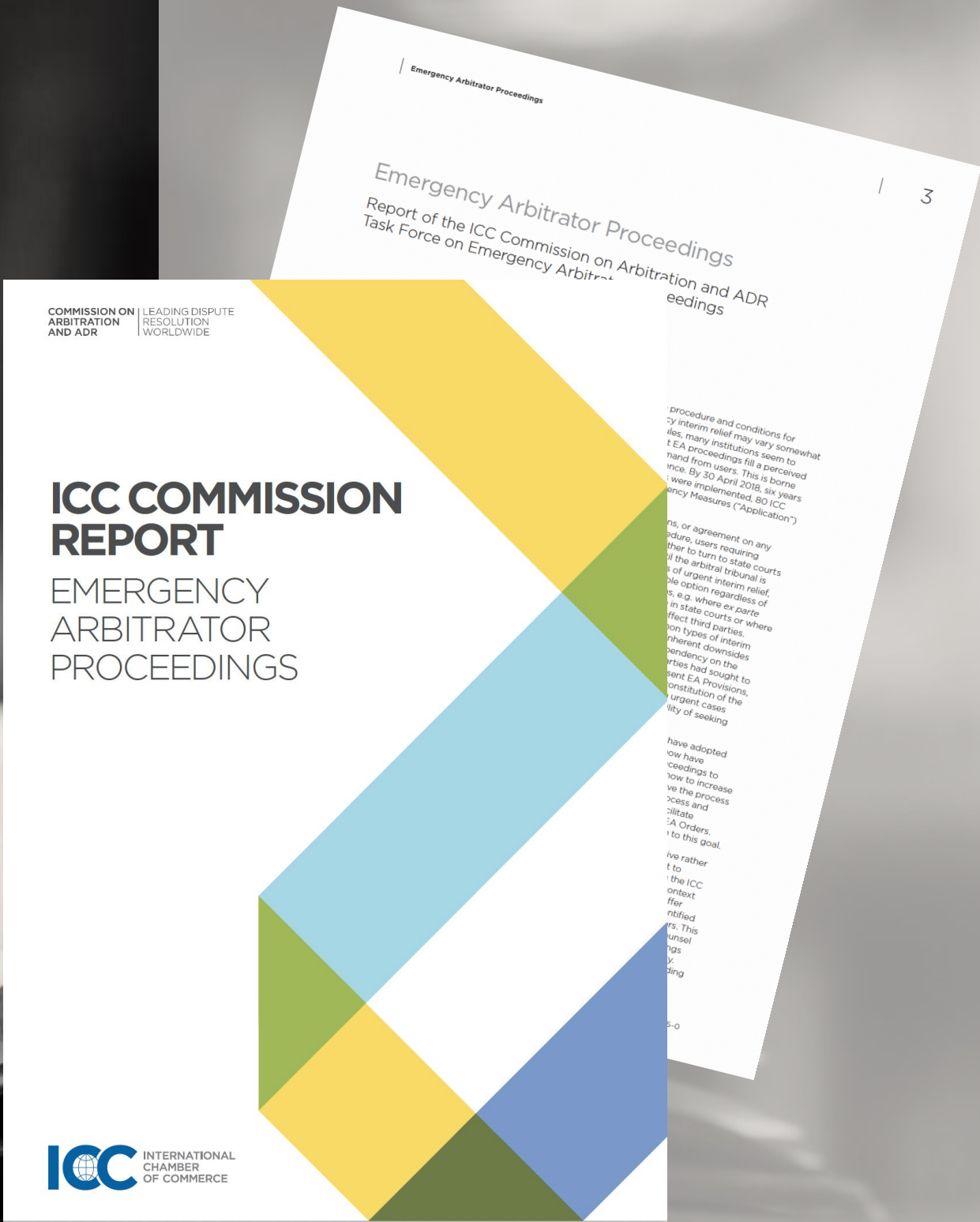
Disadvantages

- No *ex parte* relief (except for Swiss Rules 2021)
- Cannot bind third parties
- Enforceability:
 - Jurisdictions not favoring the enforcement of emergency arbitrator-ordered interim measures
 - Interim relief may be reserved to national courts

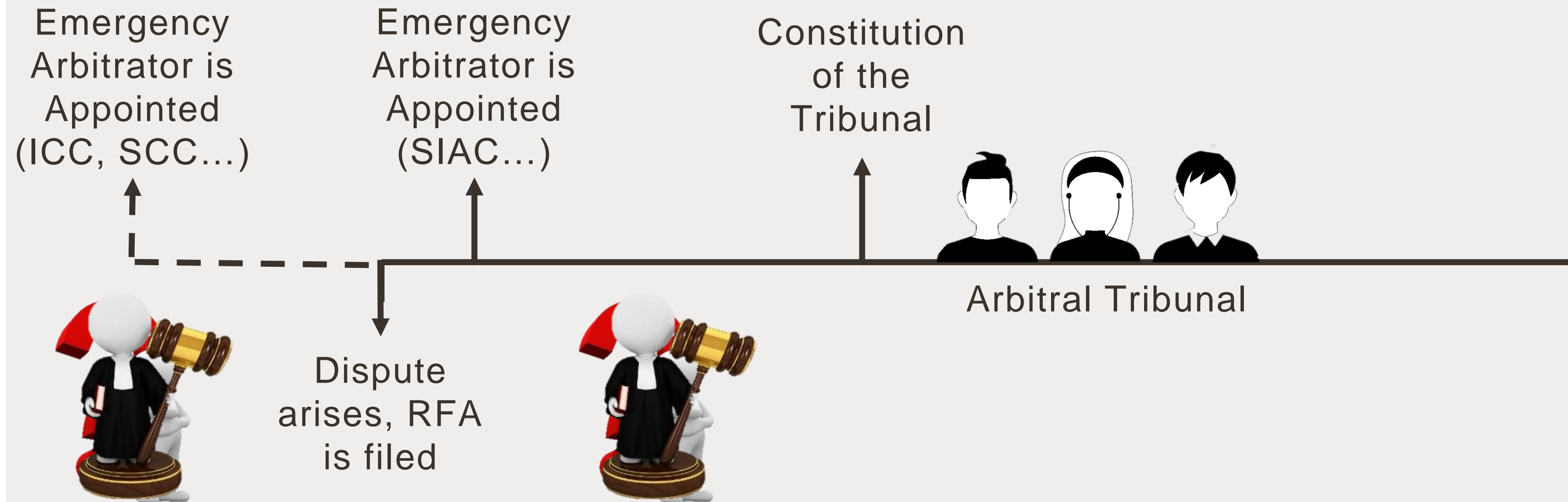
ICC Statistics

From 2012-2021, **181** EA applications
From 2012-2018:

Outcomes of ICC emergency arbitration applications	
Granted	8
Granted (in part)	15
Rejected on merits	36
Rejected on jurisdiction and/or admissibility	10
No orders made (application withdrawn)	9
EA provisions do not apply	2
Total (as of 30 April 2018)	80



Emergency Arbitrator




ICC Rules 2021, Appendix V



ARTICLE 1

Application for Emergency Measures

- 6 The President shall terminate the emergency arbitrator proceedings if a Request for Arbitration has not been received by the Secretariat from the applicant within 10 days from the Secretariat's receipt of the Application, unless the emergency arbitrator determines that a longer period of time is necessary.



The appointment of EA does not preclude from seeking the assistance of the relevant national court. In fact, a majority of rules expressly protect a party's right to seek such assistance.

However, a party might not want to:

- To preserve confidentiality
- Time and costs concerns
- Impartiality and competence concerns

ICC Rules 2021, Article 29

ARTICLE 29

Emergency Arbitrator

- 7 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.



How are emergency arbitrators appointed?

By the administering institution, within a very short time frame: usually 1-3 business days.

Usually requires the payment of a deposit, registration and administration fees.

ICC Rules 2021, Appendix V



ARTICLE 2

Appointment of the Emergency Arbitrator; Transmission of the File

- 1 The President shall appoint an emergency arbitrator within as short a time as possible, normally within two days from the Secretariat's receipt of the Application.

ICC Rules 2021, Appendix V



ARTICLE 7

Costs of the Emergency Arbitrator Proceedings

- 1 The applicant must pay an amount of US\$ 40,000, consisting of US\$ 10,000 for ICC administrative expenses and US\$ 30,000 for the emergency arbitrator's fees and expenses. Notwithstanding Article 1(5) of this Appendix, the Application shall not be notified until the payment of US\$ 40,000 is received by the Secretariat.

What powers do emergency arbitrators have?

1. Power to rule on own jurisdiction
2. No power to order *ex parte* relief (except for Swiss Rules 2021)
3. Power to amend or vacate own order
4. Power to order that the party provide security
5. No power to bind fully-constituted arbitral tribunal

What remedies can emergency arbitrators award?

Depending on the institutional rules, decision is called: order, interim award, award or interim emergency measure.

Rules differ in describing the remedies the arbitrator may award but, in general, EA has wide discretion to order whatever relief necessary.

ICC Rules 2021, Appendix V



ARTICLE 6

Order

- 1 Pursuant to Article 29(2) of the Rules, the emergency arbitrator's decision shall take the form of an order (the "Order").
- 3 The Order shall be made in writing and shall state the reasons upon which it is based. It shall be dated and signed by the emergency arbitrator.

What procedure will emergency arbitrators follow?



In general, the EA will set his or her own procedure.

Not necessary to hold a formal oral hearing involving the exchange of written memorials.

Hearing may be conducted by phone or by video conference.

ICC Rules 2021, Appendix V



ARTICLE 5

Proceedings

- 1 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.



Very short time to make a decision, e.g.:

- **LCIA 2020, SIAC 2016:** 14 days from appointment of emergency arbitrator
- **ICC 2021:** 15 days from transmission of the file
- **SCC 2023:** 5 days from referral of the application
- **HKIAC 2018:** 14 days from transmission of the file

ICC Rules 2021, Appendix V

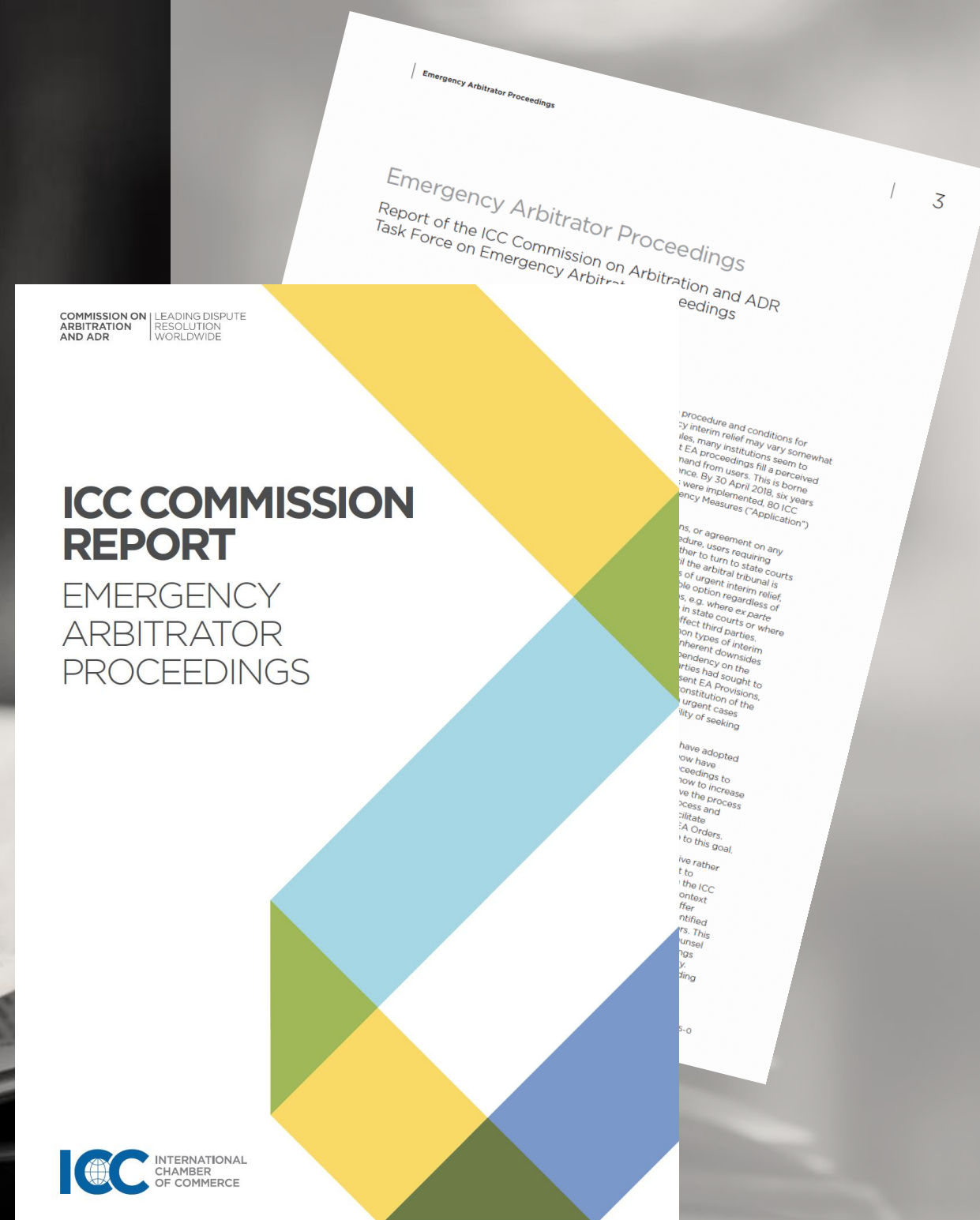


ARTICLE 6

Order

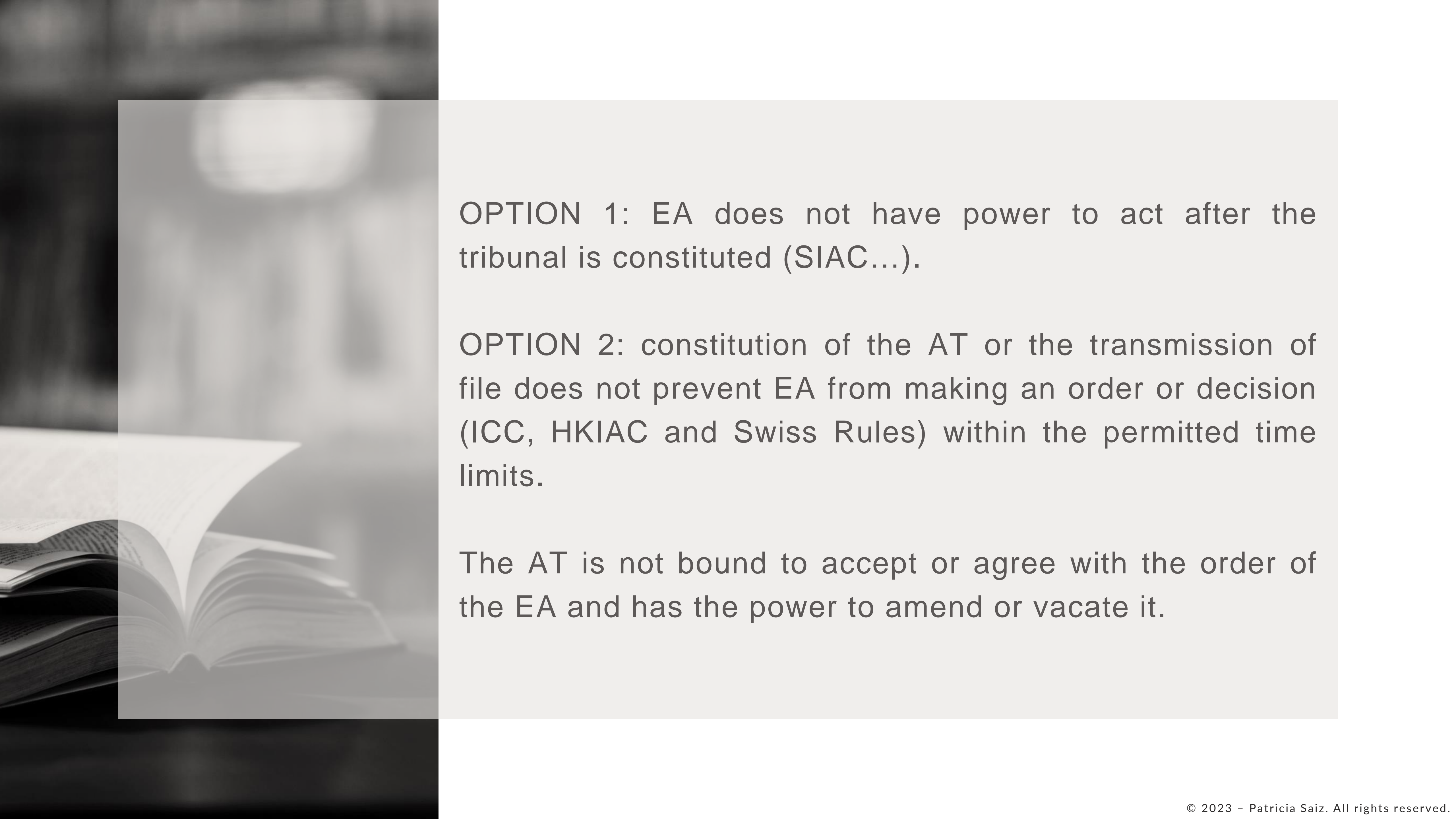
- 4 The Order shall be made no later than 15 days from the date on which the file was transmitted to the emergency arbitrator pursuant to Article 2(3) of this Appendix. The President may extend the time limit pursuant to a reasoned request from the emergency arbitrator or on the President's own initiative if the President decides it is necessary to do so.

What are substantive criteria for granting emergency relief?



- Urgency (Art. 29 ICC Rules)
- Other factors:
 - Likelihood of success on the merits (*fumus boni iuris*)
 - Risk of irreparable harm (*periculum in mora*)
 - Risk of aggravation of the dispute
 - No prejudgment on the merits
 - Balance of equities (proportionality)

What happens when the tribunal is
constituted?



OPTION 1: EA does not have power to act after the tribunal is constituted (SIAC...).

OPTION 2: constitution of the AT or the transmission of file does not prevent EA from making an order or decision (ICC, HKIAC and Swiss Rules) within the permitted time limits.

The AT is not bound to accept or agree with the order of the EA and has the power to amend or vacate it.

ICC Rules 2021, Article 29

ARTICLE 29

Emergency Arbitrator

- 3 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.
- 4 The arbitral tribunal shall decide upon any party's requests or claims related to the emergency arbitrator proceedings, including the reallocation of the costs of such proceedings and any claims arising out of or in connection with the compliance or non-compliance with the order.



How is an emergency order or award enforced?

EA has no coercive powers.

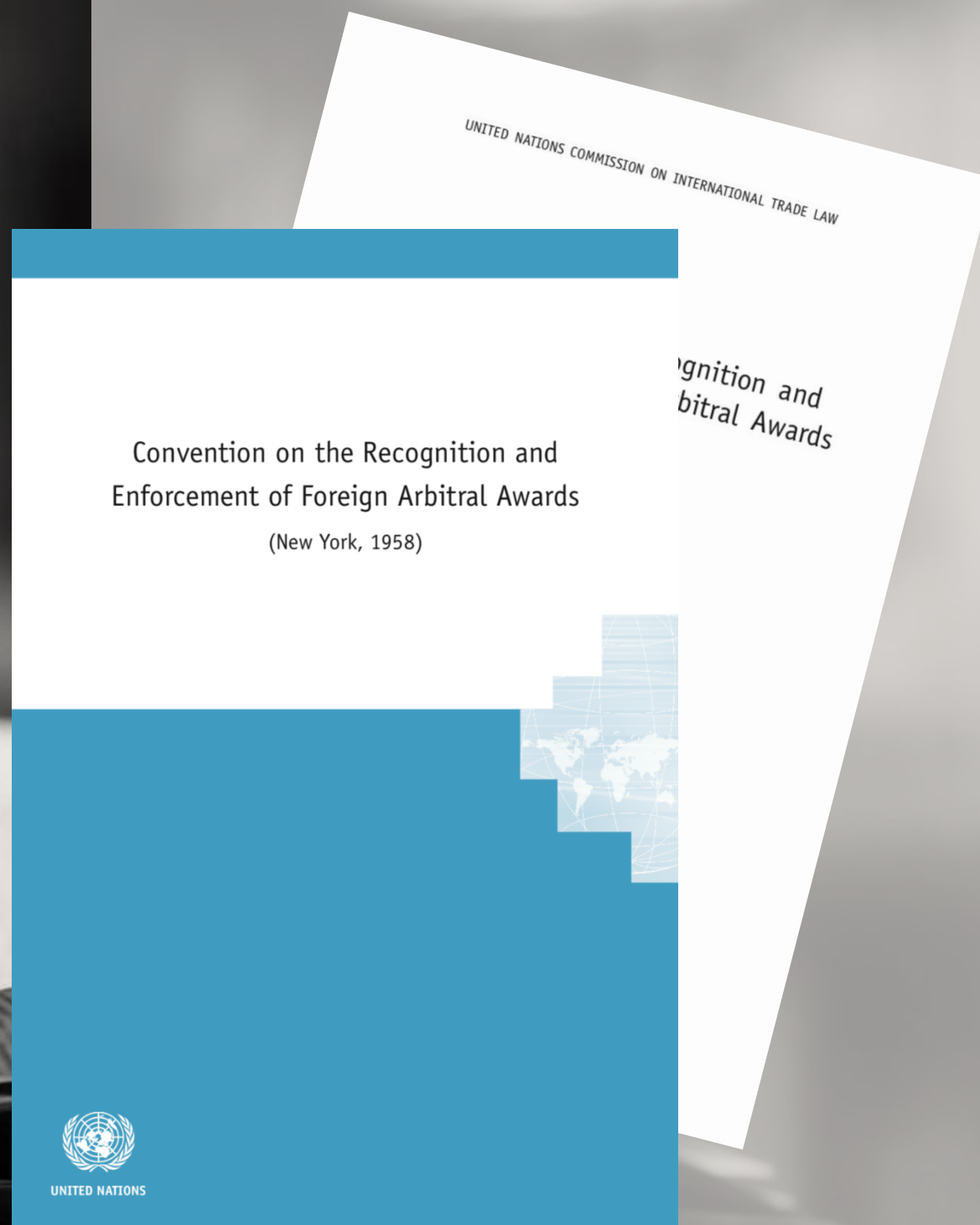
Enforcement will depend on the country's arbitration law, e.g., Singapore.

Final and binding?

Unlikely to be considered *final* and binding for purposes of article V of the NYC.

Article 9.9 of the LCIA Rules 2020 states that an EA award shall “*take effect as an award under article 26.8 [final and binding]*”.

Remains to be seen how national courts will enforce such awards.




ICC Rules 2021, Article 29



ARTICLE 29

Emergency Arbitrator

- 2 The emergency arbitrator's decision shall take the form of an order. The parties undertake to comply with any order made by the emergency arbitrator.

A black and white photograph of a chess knight piece on a chessboard. The knight is white and is positioned on a light-colored square. A semi-transparent white rectangular box is overlaid on the image, containing the text. The background is dark and out of focus.

Practical tips for applying for appointment of emergency arbitrator

Do the rules on emergency arbitrators apply?

Check:

1. The date the arbitration agreement was entered into
2. Is the respondent a signatory or “successor of signatories” to the arbitration agreement?
3. Have the parties expressly opted out or modified any relevant emergency arbitrator provisions?

ICC Rules 2021, Article 29

ARTICLE 29

Emergency Arbitrator

- 6 The Emergency Arbitrator Provisions shall not apply if:
- a) the arbitration agreement under the Rules was concluded before 1 January 2012;
 - b) the parties have agreed to opt out of the Emergency Arbitrator Provisions; or
 - c) the arbitration agreement upon which the application is based arises from a treaty.



ICC Rules 2021, Article 6



ARTICLE 6

Effect of the Arbitration Agreement

- 1 Where the parties have agreed to submit to arbitration under the Rules, they shall be deemed to have submitted *ipso facto* to the Rules in effect on the date of commencement of the arbitration, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement.

Application for appointment

- Rules specify what information must be included
- Carefully consider *(i)* what relief is applied for, and *(ii)* whether the EA arbitrator can grant it
- If the application is made before the proceedings have commenced, ensure the RfA can be filed within the required time limit
- Ensure party has funds to make the application
- Verify who is to notify the respondent of the application (the applicant or the institution?) and ensure sufficient copies are made
- Consider whether additional court proceedings should be initiated

ICC Rules 2021, Appendix V



ARTICLE 1

Application for Emergency Measures

3 The Application shall contain the following information:

- a) the name in full, description, address and other contact details of each of the parties;
- b) the name in full, address and other contact details of any person(s) representing the applicant;
- c) a description of the circumstances giving rise to the Application and of the underlying dispute referred or to be referred to arbitration;
- d) a statement of the Emergency Measures sought;
- e) the reasons why the applicant needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal;

- f) any relevant agreements and, in particular, the arbitration agreement;
- g) any agreement as to the place of the arbitration, the applicable rules of law or the language of the arbitration;
- h) proof of payment of the amount referred to in Article 7(1) of this Appendix; and
- i) any Request for Arbitration and any other submissions in connection with the underlying dispute, which have been filed with the Secretariat by any of the parties to the emergency arbitrator proceedings prior to the making of the Application.

The Application may contain such other documents or information as the applicant considers appropriate or as may contribute to the efficient examination of the Application.

ICC Rules 2021, Appendix V

ARTICLE 1

Application for Emergency Measures

- 5 If and to the extent that the President of the Court (the “President”) considers, on the basis of the information contained in the Application, that the Emergency Arbitrator Provisions apply with reference to Article 29(5) and Article 29(6) of the Rules, the Secretariat shall transmit a copy of the Application and the documents annexed thereto to the responding party. If and to the extent that the President considers otherwise, the Secretariat shall inform the parties that the emergency arbitrator proceedings shall not take place with respect to some or all of the parties and shall transmit a copy of the Application to them for information.



A black and white photograph of a chessboard with two knight pieces. One knight is white and stands on a light square, while the other is dark and stands on a dark square. The background is a light gray rectangle containing the title text.

Practical tips for resisting appointment of emergency arbitrator

- Verify deadline to object to the appointment of EA
- Grounds to resist:
 - Has the respondent been given proper notice?
 - Are requirements for appointment met? (art. 1(3), Appendix V)
- In the response to the application, respondent may consider whether:
 - To object to the jurisdiction of the EA
 - EA provisions do not apply
 - No urgent need for the interim relief
 - Irreparable harm would be suffered by respondent if measure granted
 - Greater harm would be suffered by respondent if measure granted than by the applicant if measure denied
- Respondent should insist that the applicant provide adequate security

ICC Rules 2021, Appendix V



ARTICLE 3

Challenge of an Emergency Arbitrator

- 1 A challenge against the emergency arbitrator must be made within three 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.

Expedited Proceedings

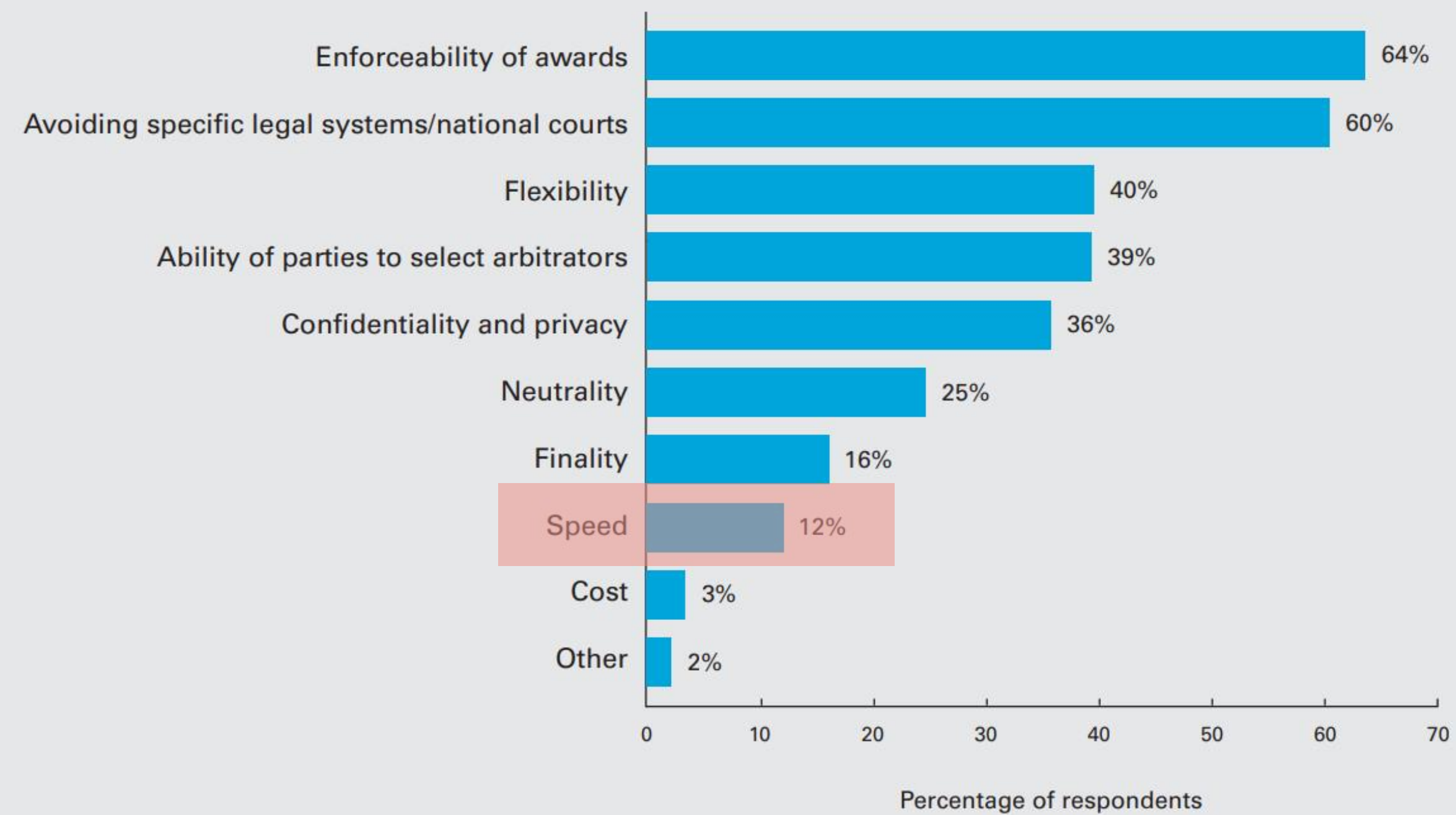
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What are expedited procedures and why are they necessary?

Lack of speed



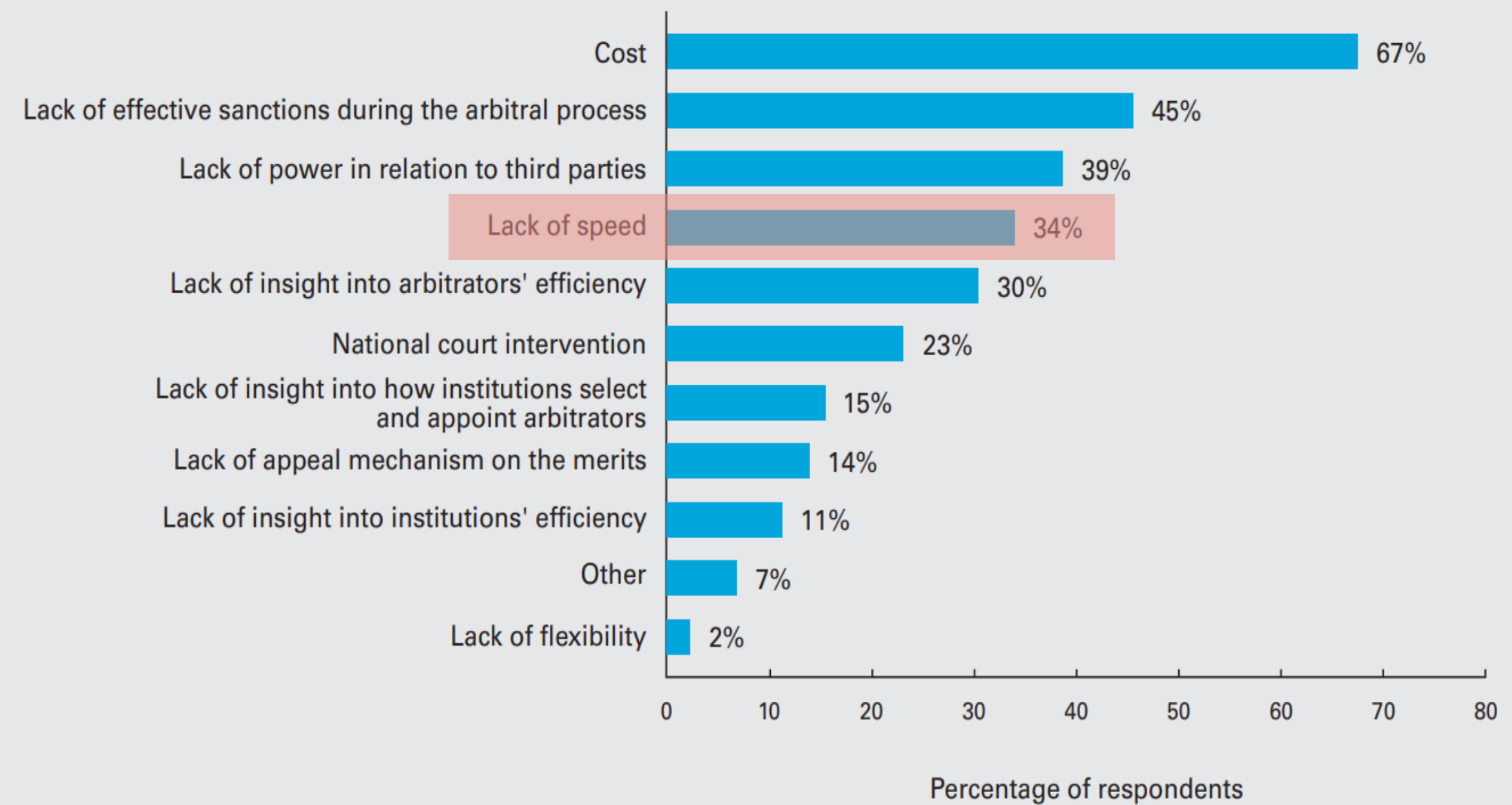
Chart 3: What are the three most valuable characteristics of international arbitration?



School of International Arbitration at Queen Mary, University of London's (QMUL)
2018 International Arbitration Survey (sponsored by White & Case)

Lack of speed

Chart 4: What are the three worst characteristics of international arbitration?



School of International Arbitration at Queen Mary, University of London's (QMUL)
2018 International Arbitration Survey (sponsored by White & Case)





EP shorten certain time limits to:

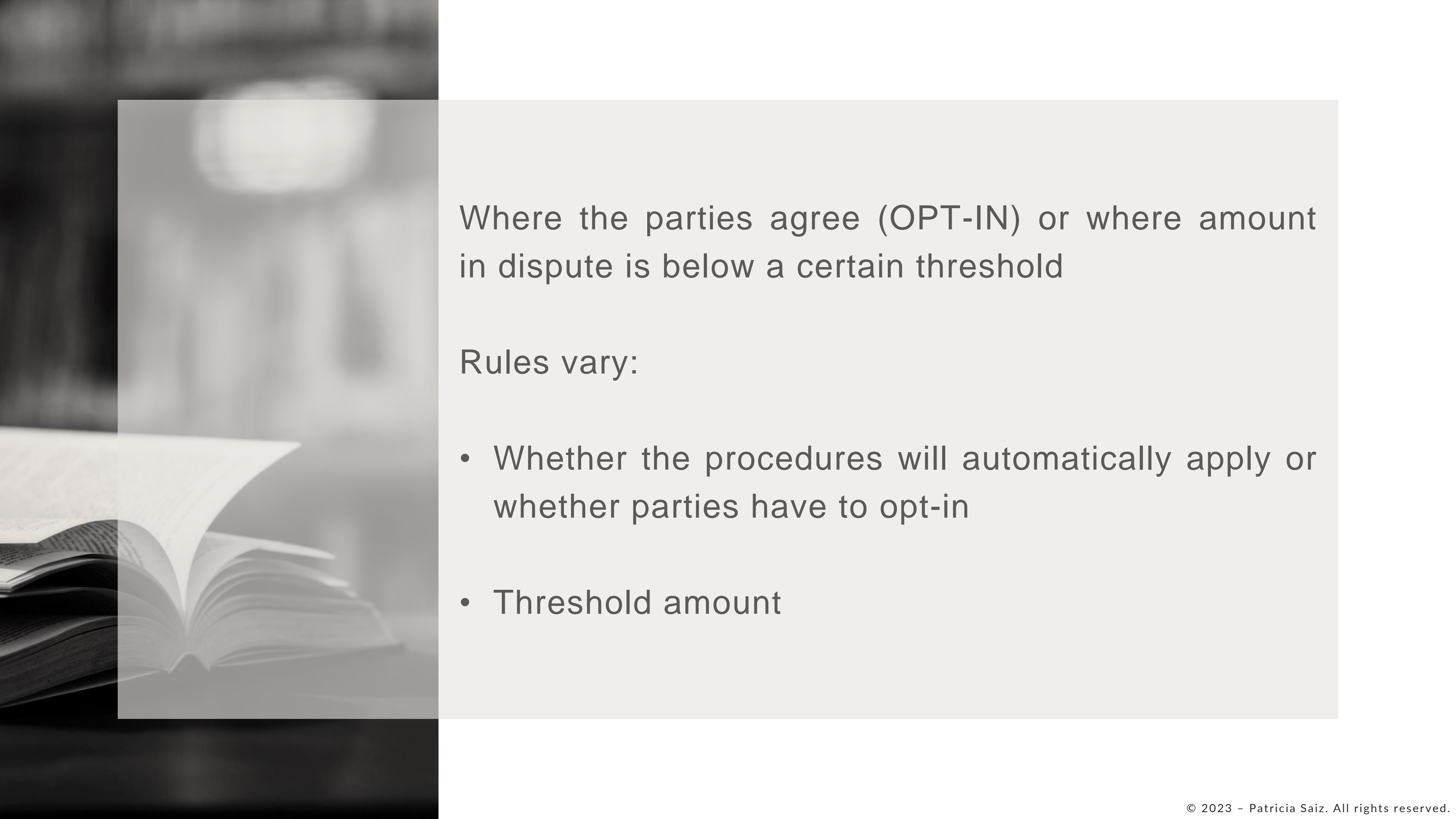
- Constitute the tribunal
- Hold a case management conference
- Render an award

Other typical measures include restrictions on:

- Number of submissions
- Preference for document-only arbitrations

Usually adjudicated by sole arbitrator

When do expedited procedures
apply?



Where the parties agree (OPT-IN) or where amount in dispute is below a certain threshold

Rules vary:

- Whether the procedures will automatically apply or whether parties have to opt-in
- Threshold amount

Arbitral institutional rules	Threshold amount for value of dispute	Automatic application or opt-in
UNCITRAL Expedited Arbitration Rules 2021	No threshold amount	Opt-in
ICC Rules 2021	US\$3 million (on or after 1 Jan 2021) or US\$2 million if before	Automatic application (parties may opt-out). Opt-in available for higher value disputes
SCC Expedited Arbitration Rules 2023	No threshold amount	Opt-in
Swiss Rules of International Arbitration 2021	CHF1 million	Automatic application. Opt-in available for other disputes
ICSID Arbitration Rules 2022	No threshold amount	Opt-in

ICC Rules 2021, Article 30



ARTICLE 30

Expedited Procedure

- 1 By agreeing to arbitration under the Rules, the parties agree that this Article 30 and the Expedited Procedure Rules set forth in Appendix VI (collectively the “Expedited Procedure Provisions”) shall take precedence over any contrary terms of the arbitration agreement.
- 3 The Expedited Procedure Provisions shall not apply if:
 - a) the arbitration agreement under the Rules was concluded before the date on which the Expedited Procedure Provisions came into force;
 - b) the parties have agreed to opt out of the Expedited Procedure Provisions; or
 - c) the Court, upon the request of a party before the constitution of the arbitral tribunal or on its own motion, determines that it is inappropriate in the circumstances to apply the Expedited Procedure Provisions.

A black and white photograph of an office interior. In the foreground, there are two modern office chairs with chrome frames and black seats. Behind them is a long wooden desk. In the background, there are large windows looking out onto a city street with buildings. A semi-transparent light gray rectangular box is centered over the image, containing the text 'Constitution of the tribunal' in a bold, black, sans-serif font.

Constitution of the tribunal



No. of arbitrators: sole arbitrator as default

Time limits to make appointment:

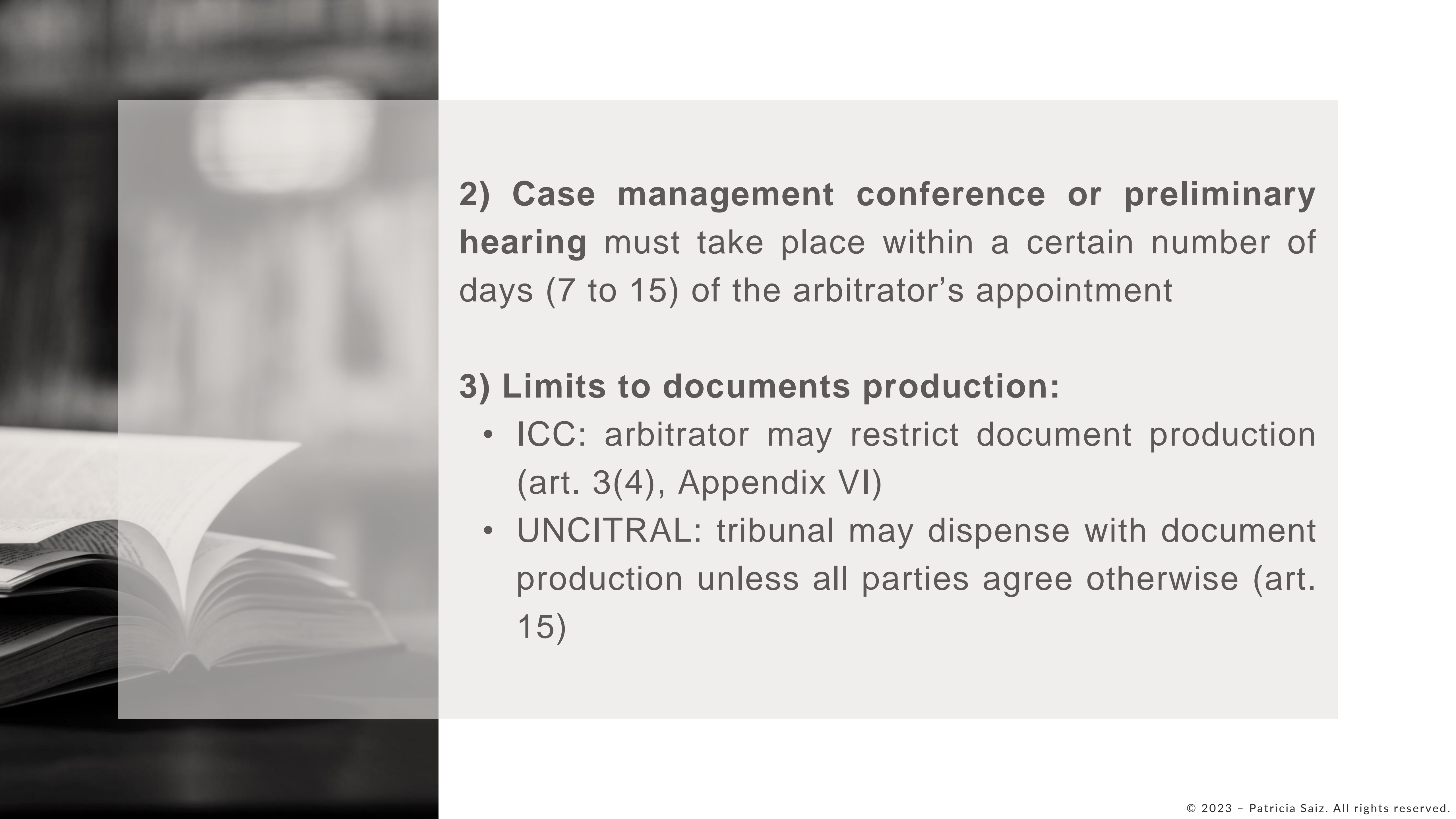
- Time limit to appoint the tribunal (10 - 15 days) – e.g. SCC, UNICTRAL, VIAC
- Other rules are silent – e.g. HKIAC, SIAC, Swiss Rules
- Under ICC Rules, the Secretariat will set time limits

Procedure



1) Limits on submissions – examples:

- The RfA (or Notice) and Answer (or Reply) should constitute the SoC or SoD
- Time limits for SoD and Counterclaim
- ICSID: Claimant's and Respondent's Memorials (60 days, 200 pages), Reply and Rejoinder (40 days, 100 pages)
- ICC: silent on submissions




2) Case management conference or preliminary hearing must take place within a certain number of days (7 to 15) of the arbitrator's appointment

3) Limits to documents production:

- ICC: arbitrator may restrict document production (art. 3(4), Appendix VI)
- UNCITRAL: tribunal may dispense with document production unless all parties agree otherwise (art. 15)

Will there be a hearing or a documents-only arbitration?


- 
- **UNCITRAL 2021, Appendix, Article 11:** “The arbitral tribunal may, after inviting the parties to express their views and in the absence of a request to hold hearings, decide that hearings shall not be held.”
 - **ICC 2021, Appendix VI, Article 3(5):** “The arbitral tribunal may, after consulting the parties, decide the dispute solely on the basis of the documents submitted by the parties, (...).”
 - **SCC 2023, Article 32(1):** “A hearing shall be held if requested by a party, or if the Arbitral Tribunal deems it appropriate.”

How quickly will the award be rendered, and will it be reasoned?

Specific time limit in which tribunal must render the award.

Not all rules state whether an award will be reasoned. If they do, general rule is in summary form, unless the parties agree on no reasons at all.

Could the award be set aside or
enforcement refused?

A black and white photograph of a hand moving a white chess king piece on a checkered board. The piece is being lifted from its original position and moved to a new square. The background is a solid light gray.

Institutional power to limit delay vs. party autonomy

ICC Rules 2021, Appendix VI

ARTICLE 30

Expedited Procedure

- 1 By agreeing to arbitration under the Rules, the parties agree that this Article 30 and the Expedited Procedure Rules set forth in Appendix VI (collectively the “Expedited Procedure Provisions”) shall take precedence over any contrary terms of the arbitration agreement.

ARTICLE 2

Constitution of the Arbitral Tribunal

- 1 The Court may, notwithstanding any contrary provision of the arbitration agreement, appoint a sole arbitrator.





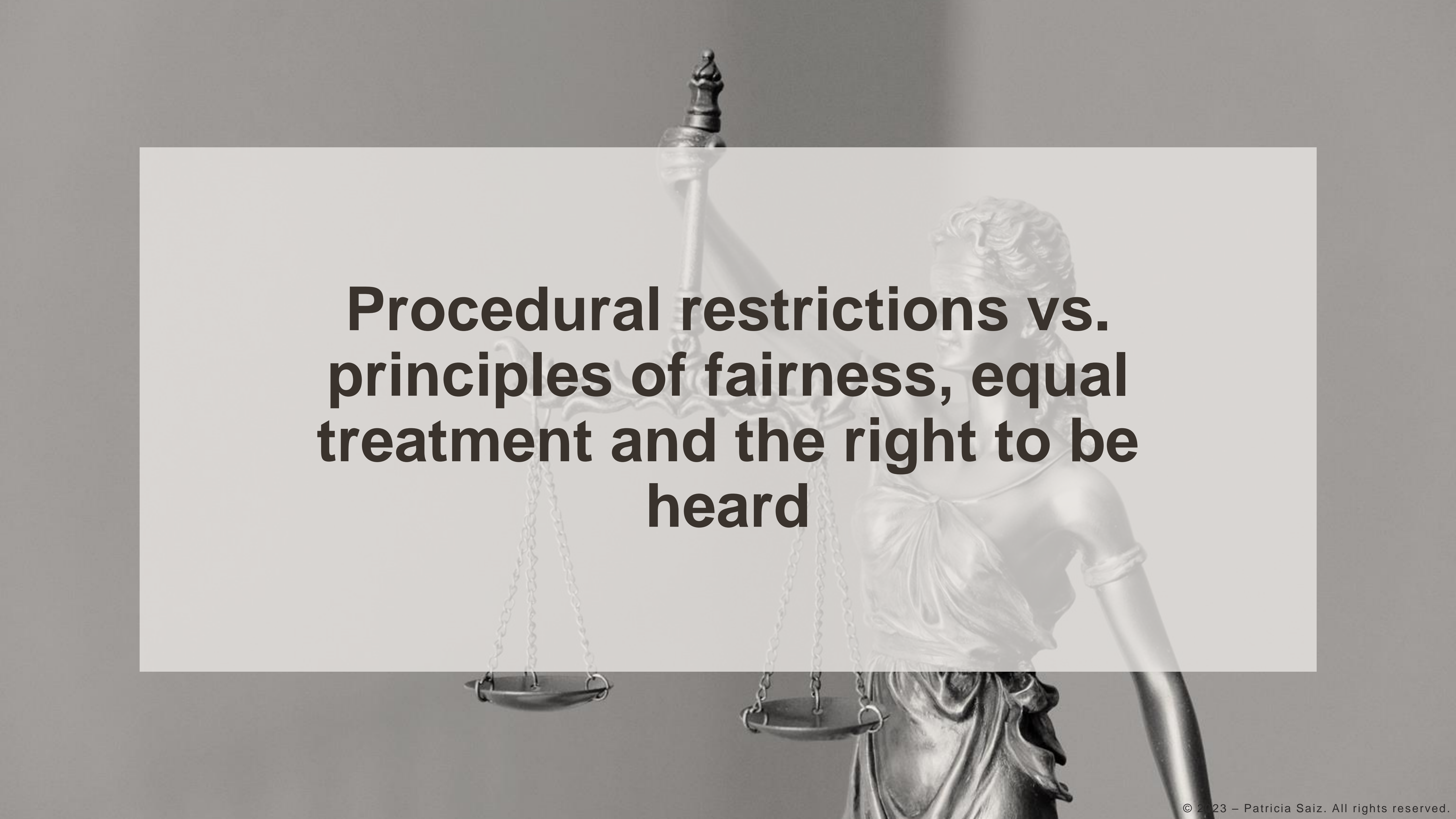
CASE STUDY: Singapore High Court upholds SIAC award under Expedited Procedure

AQZ v ARA [2015] SGHC 49



CASE STUDY: China Court refuses to enforce SIAC award under Expedited Procedure

*Noble Resources International Pte Ltd v
Shanghai Good Credit International Trade Co,
Ltd [2016] Shanghai No.1 Intermediate
People's Court*



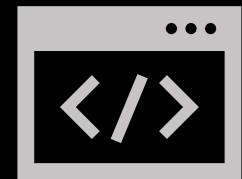
Procedural restrictions vs. principles of fairness, equal treatment and the right to be heard



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THANK YOU!