

Introduction to and Practical Training on Effective Conflict Management







Stockholm 21 May, 2024

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Norburg & Scherp







Arbitration Committee Meeting 21 May 2024





Report from the ICC Sweden Secretariat

Henrik Blomqvist, ICC Sweden





Visit to the

ICC International Court of Arbitration

4 October 2024 | Paris

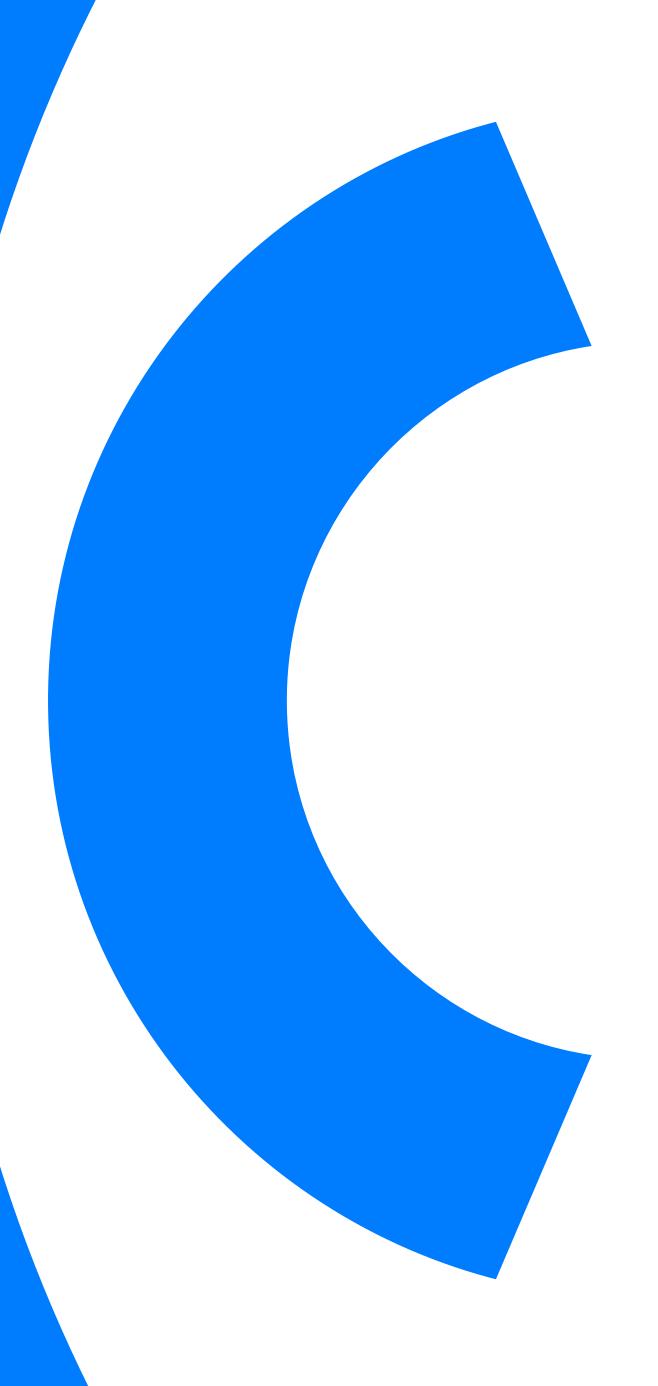
An opportunity to learn more about the ICC's world-leading dispute resolution institution.

The visit is organised together with the other Nordic ICC offices.

Limited number of participants.

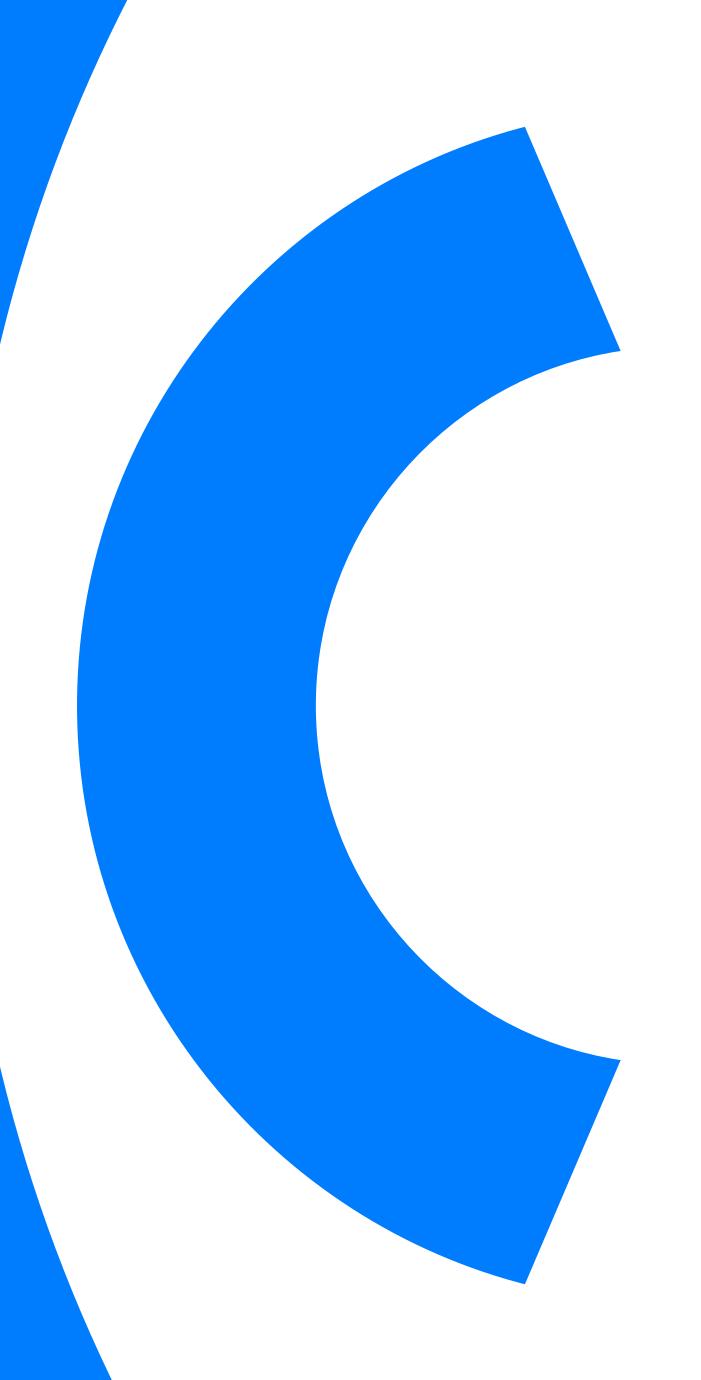
More information and registration »





Swedish Commission Members 2024–2027

- The process to appoint new Swedish members of the Global Commission on Arbitration & ADR for the term 2024–2027 is under way.
- Appointed members will be confirmed directly by the Commission in June, including those whose terms will be renewed.
- Strong emphasis on active engagement to be eligible for renewal.
- Increasing requirements from the Commission to appoint new representatives and to ensure diversity.



Survey: ICC Rules of Arbitration and ADR

A survey has been circulated to the Committee regarding the potential need for updating the different ICC Rules of Arbitration and ADR.

Please note, the deadline for responses is 23 May!



Access the survey >>



Upcoming Events



4 June: ICC Germany Arbitration Forum, Frankfurt

27–28 June: 9th ICC Asia Pacific Conference on International Arbitration, Singapore

3 September: ICC Institute of World Business Law Advanced Training on Oral Advocacy, Jakarta

25-26 September: 19th ICC New York Conference on International Arbitration

17-18 October: ICC FIDIC Conference on International Contracts and Dispute Resolution, Seoul

13 November: Conference on Res Judicata, Claim Preclusion, Issue Preclusion and Claim Splitting, Paris

For a full list of events, see ICC Knowledge 2 Go»





Update on the Work of the Global Commission on Arbitration & ADR

Chair Therese Isaksson, Westerberg & Partners Vice Chair Patricia Shaughnessy, Stockholm University





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Guide on Effective Conflict Management

How to Choose and Manage ADR Methods

(May 2024)



Program

- Introduction to ICC Court and ADR Centre
- 2. Introduction to ADR Methods
- Effective Conflict Management Guide of ICC
 Commission on Arbitration and ADR
- 4. Pre-Action Risk Assessment under the Guide
- 5. Workshop Based on a Case Scenario
- 6. Description of the ADR Processes with ICC

Get to know ICC

ICC Court

ICC International Court of Arbitration

Structure of the ICC Court

World Class Administration and Experience

- 1 President17 Vice-Presidents195 members worldwide
- Weekly committee sessions
- Bi-monthly special committee sessions

ICC International Court of Arbitration

ICC Court Secretariat

- 12 Case management teams
- 50+ Lawyers
- 30+ Nationalities
- 30+ Languages

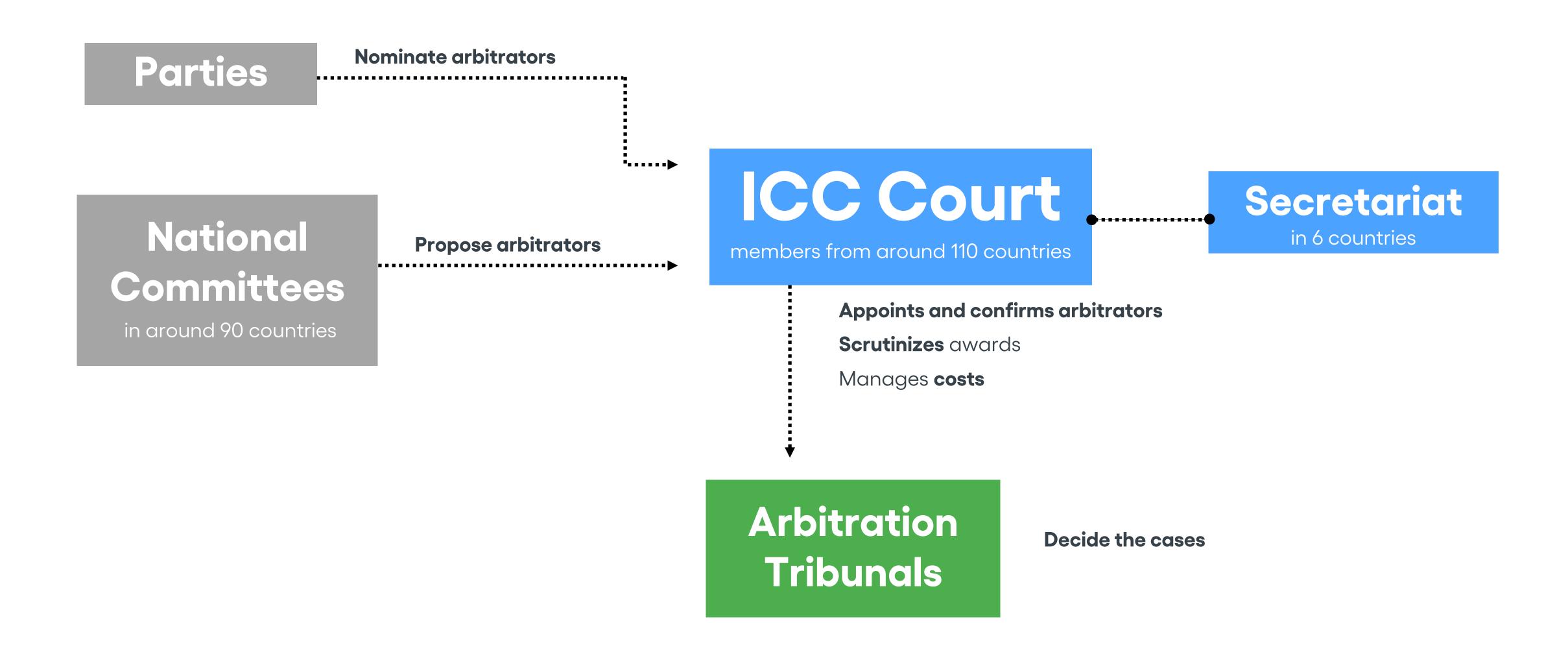
- Providing input on proposed modifications of dispute resolution rules
- Conducting studies on legal, procedural and practical aspects of arbitration and ADR
- 700+ members worldwide

ICC Commission on Arbitration and ADR

ICC International Centre for ADR

- 1 Case management team = 4 lawyers
- Standing committee = 14 members

The International Court of Arbitration



ICC Secretariat



Composition

Approximately **80** staff members

Diverse nationalities & languages

One counsel, several deputy counsel per team

Mission

Daily case administration

Contact with parties, arbitrators

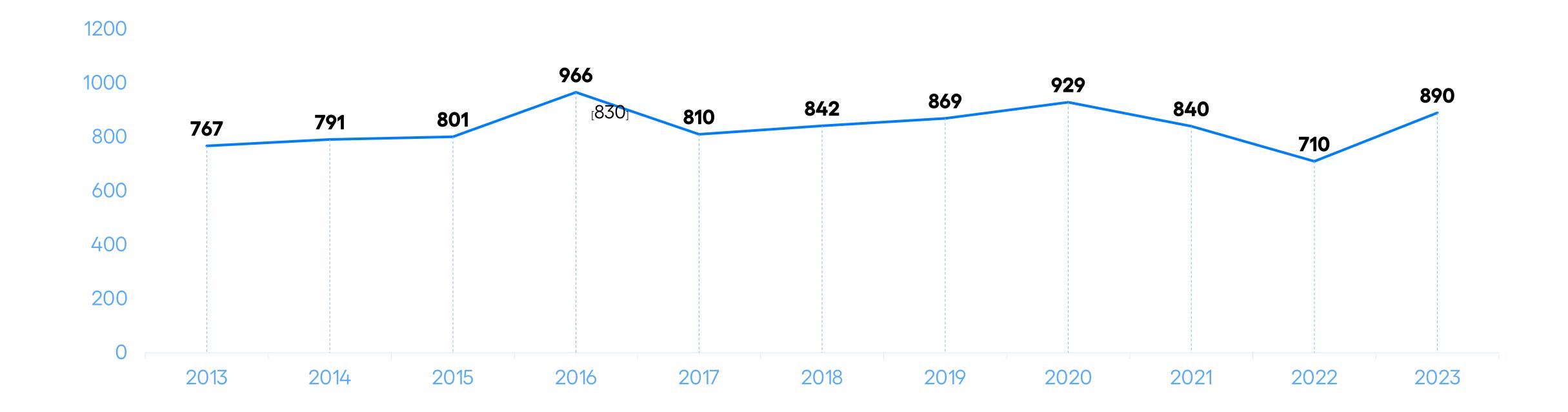
Advice on practices, briefings and recommendations to the Court

Communication with parties and Arbitral Tribunals

General info on application of the Rules

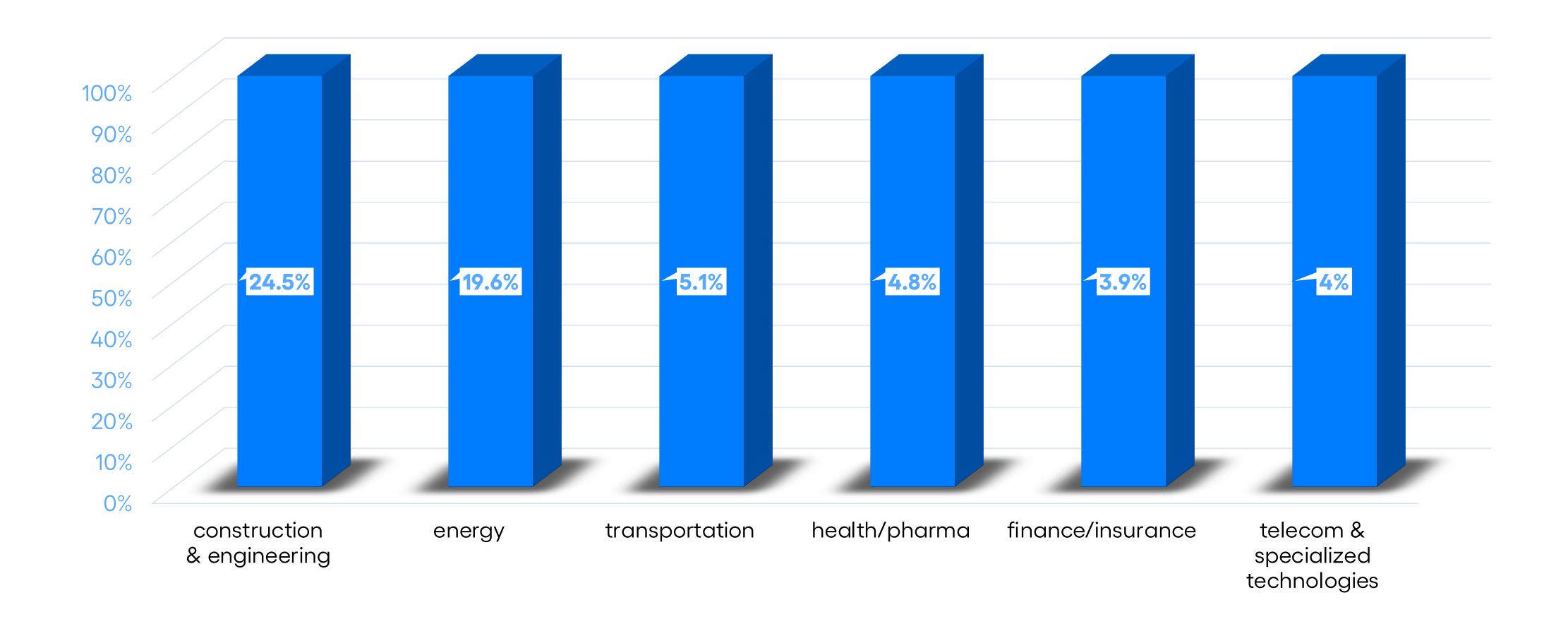


Cases (new) 2013-2023

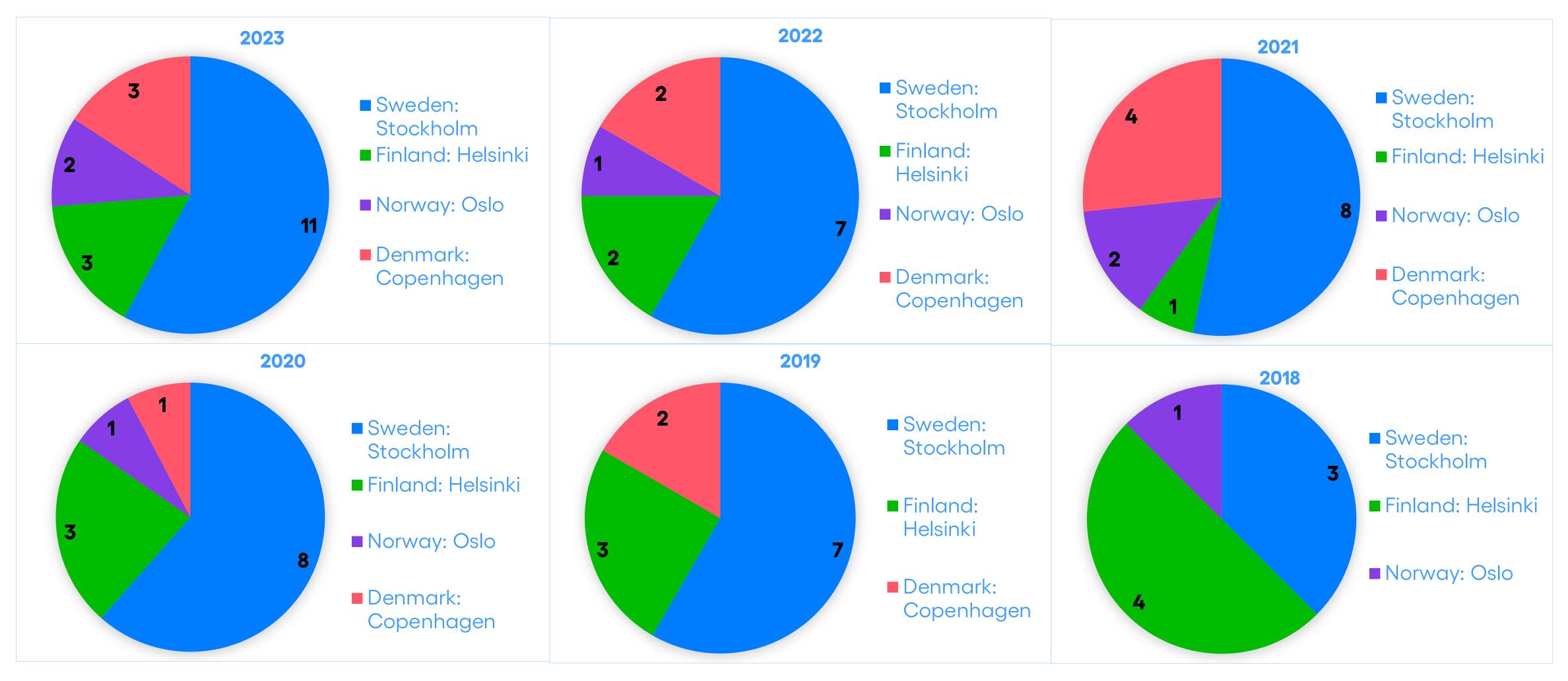


1,812 pending cases as of 19 March 2024

Sectors 2023



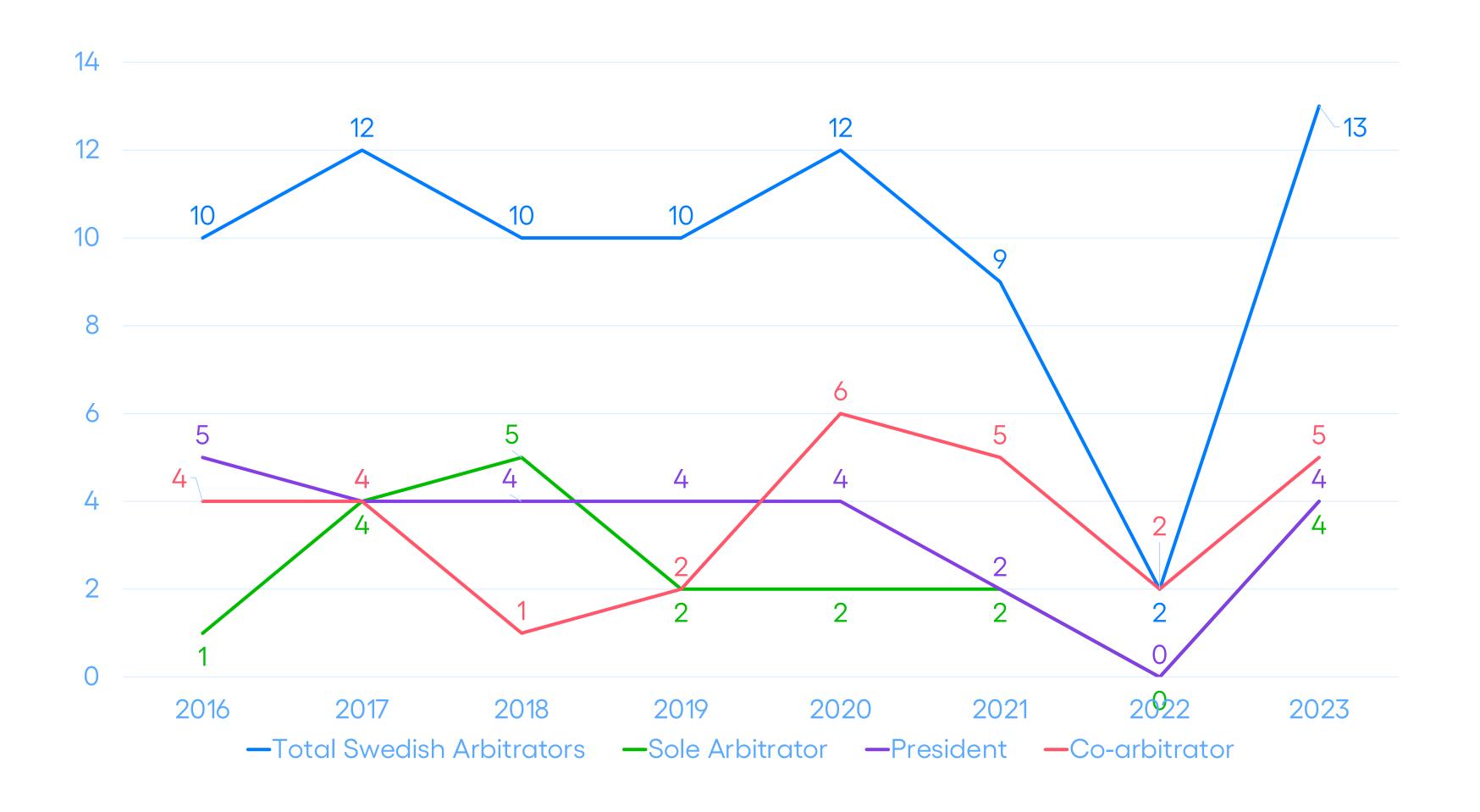
Detailed Breakdown of Seats in Northern Europe



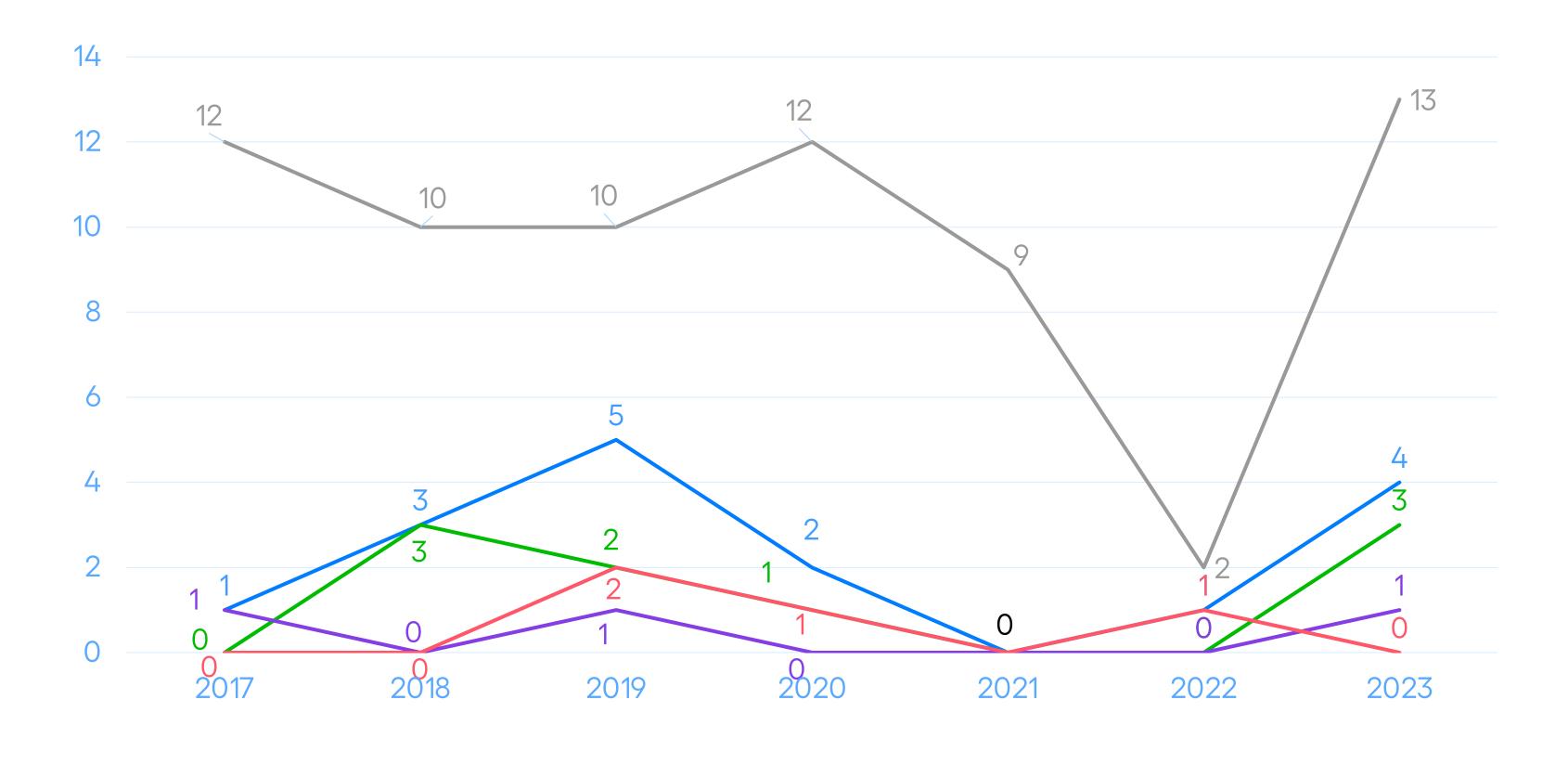
Swedish Parties in ICC Arbitrations



Swedish Arbitrator Appointments by Role

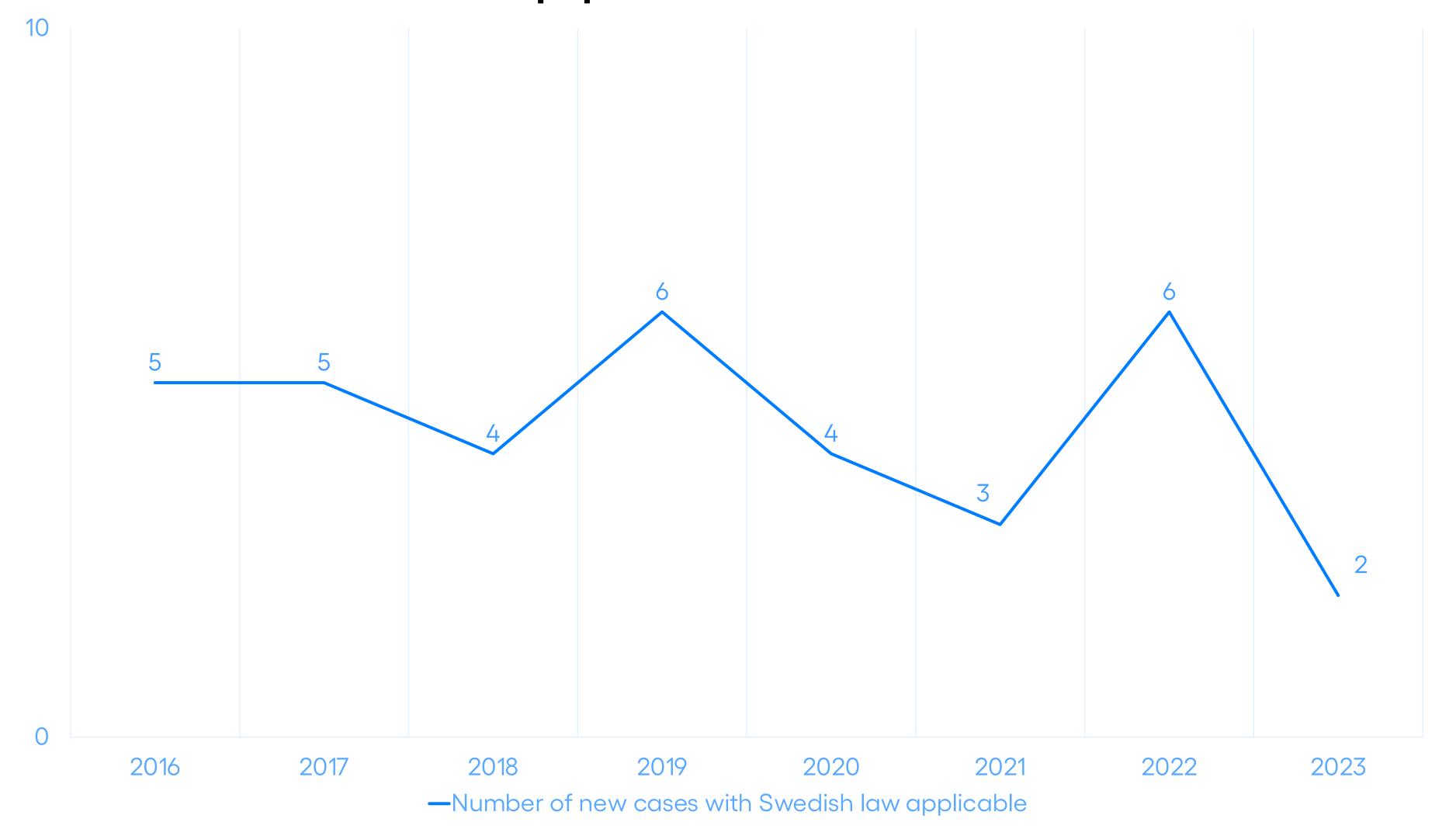


Swedish Female Arbitrator Appointments 2017-2023

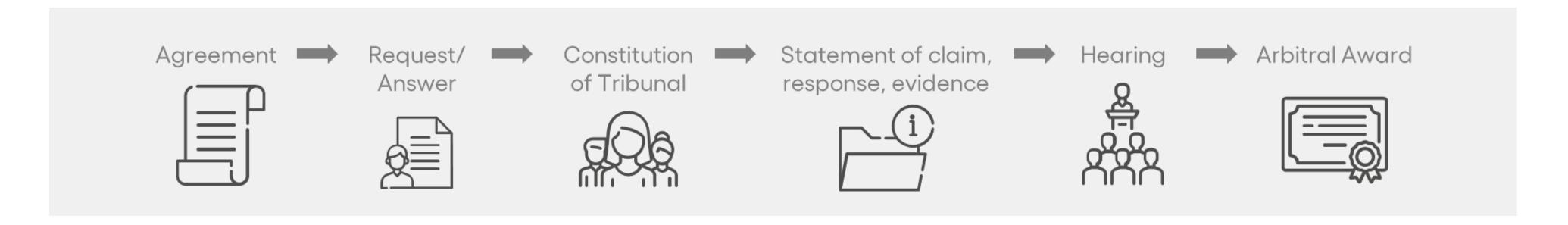




Swedish Law as Applicable Law to the Merits



What the ICC Court and Secretariat do

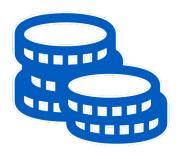




Determines whether there is a prima facie agreement / fixes the place of arbitration



Decides on consolidation of cases



Manages the costs



Appoints, replaces, and confirms arbitrators



Monitors the process and supports arbitrators, parties and counsel



Post-award services (certified copies, certificates, etc.)



Approves the terms of reference (ToR)*, in case of lack of signature or absence of a party



Scrutinizes the award

^{*} The ToR frames the exact issues to be determined by the tribunal and also ascertains the amount in dispute.







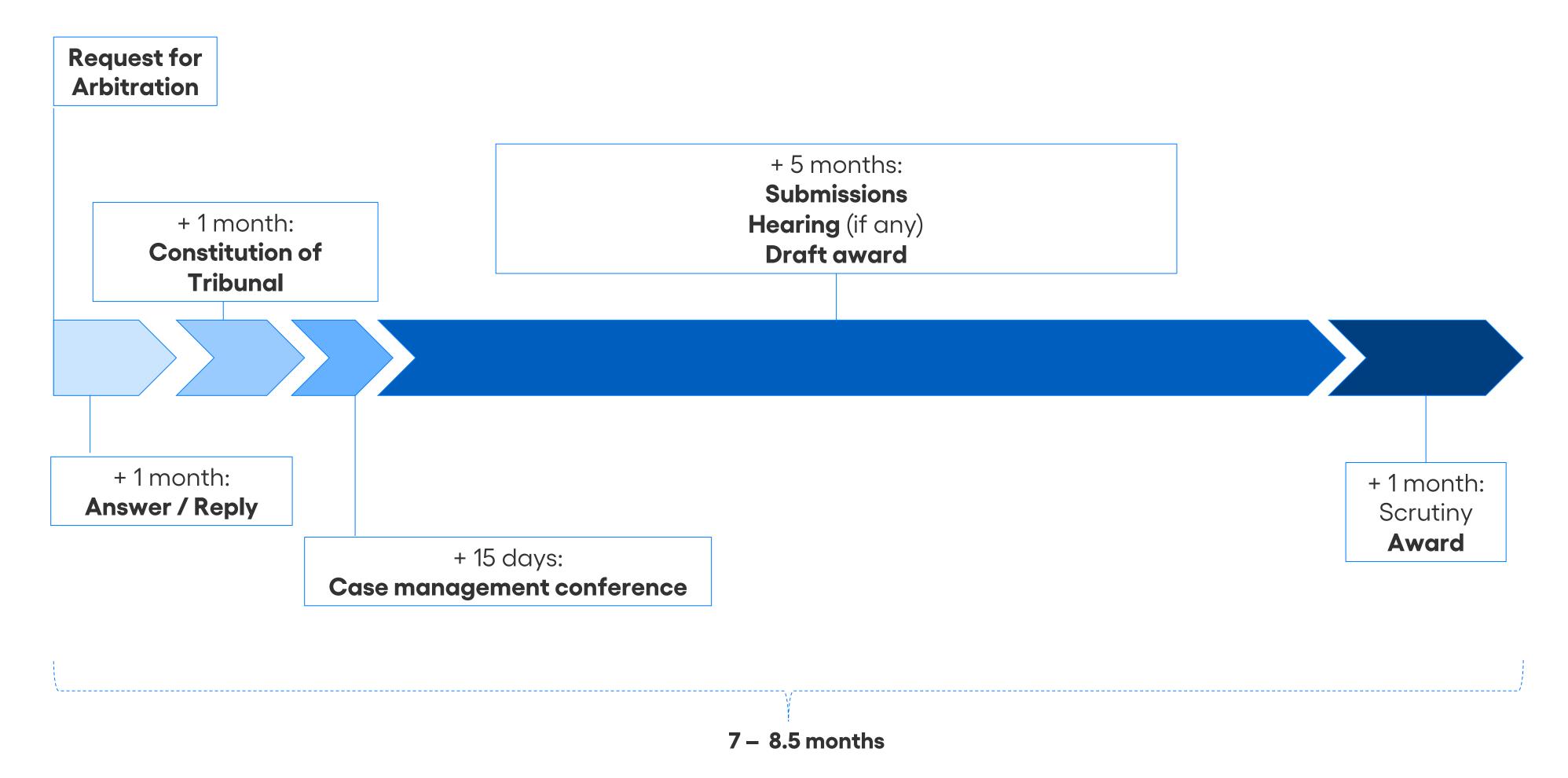
Fast-track arbitration

For cases below 3 million USD

Normally sole arbitrator

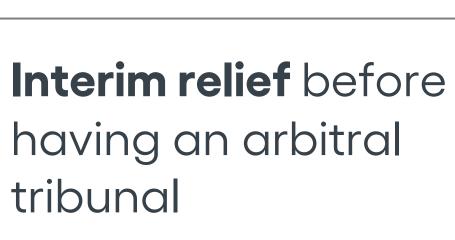
Within 6 months*

Expedited Arbitration





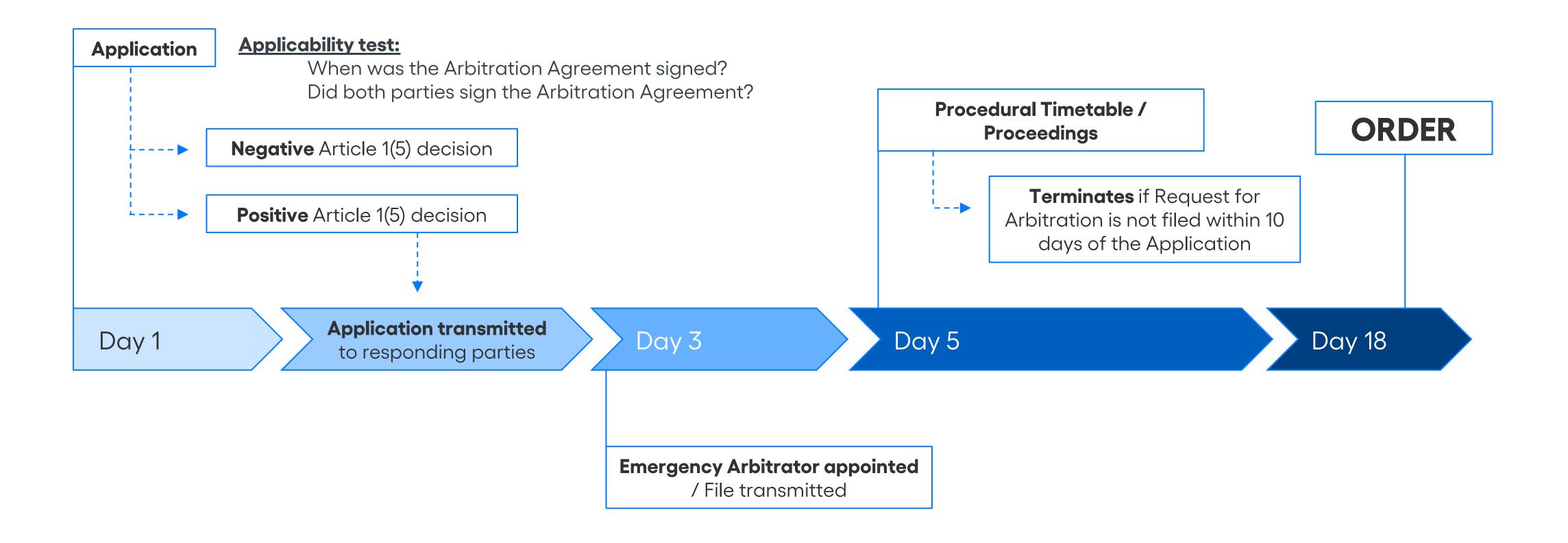




Within 15 days*



Emergency Arbitration







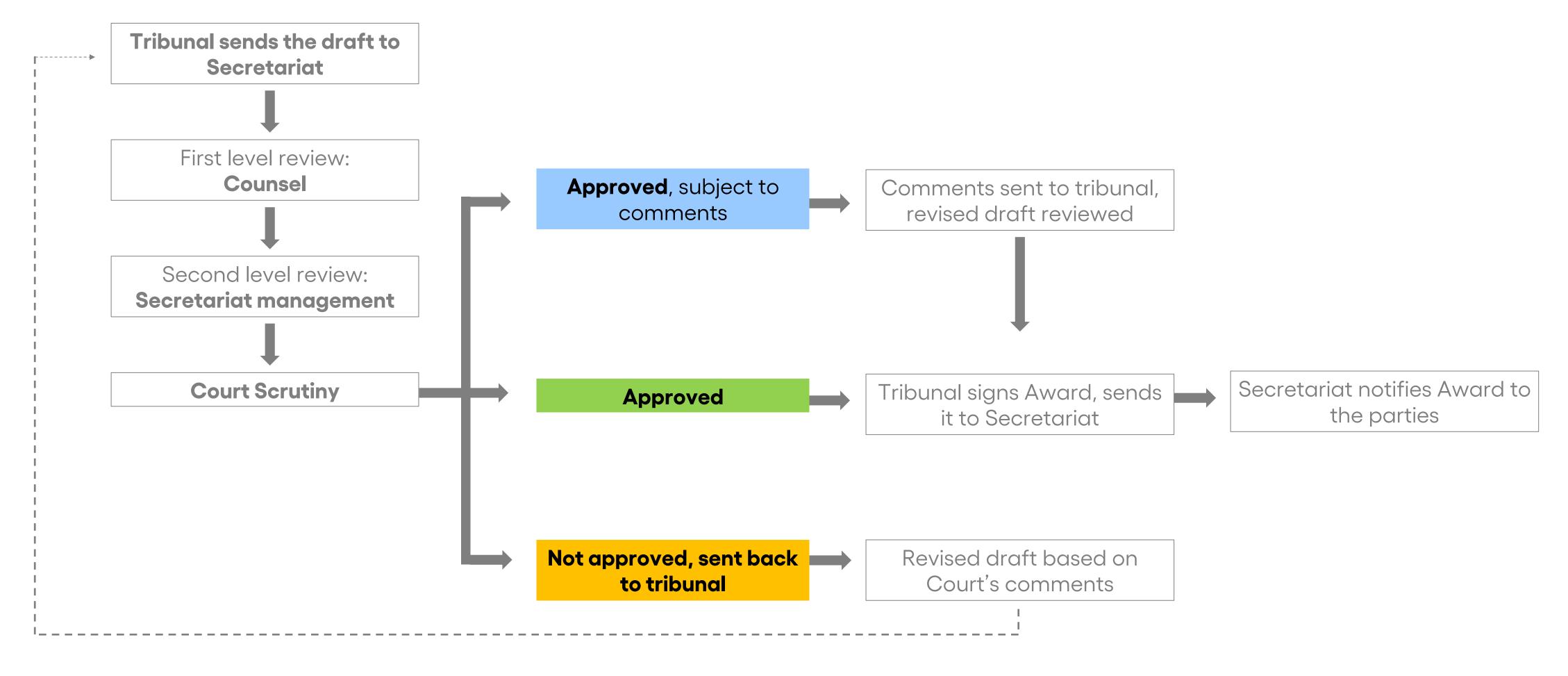




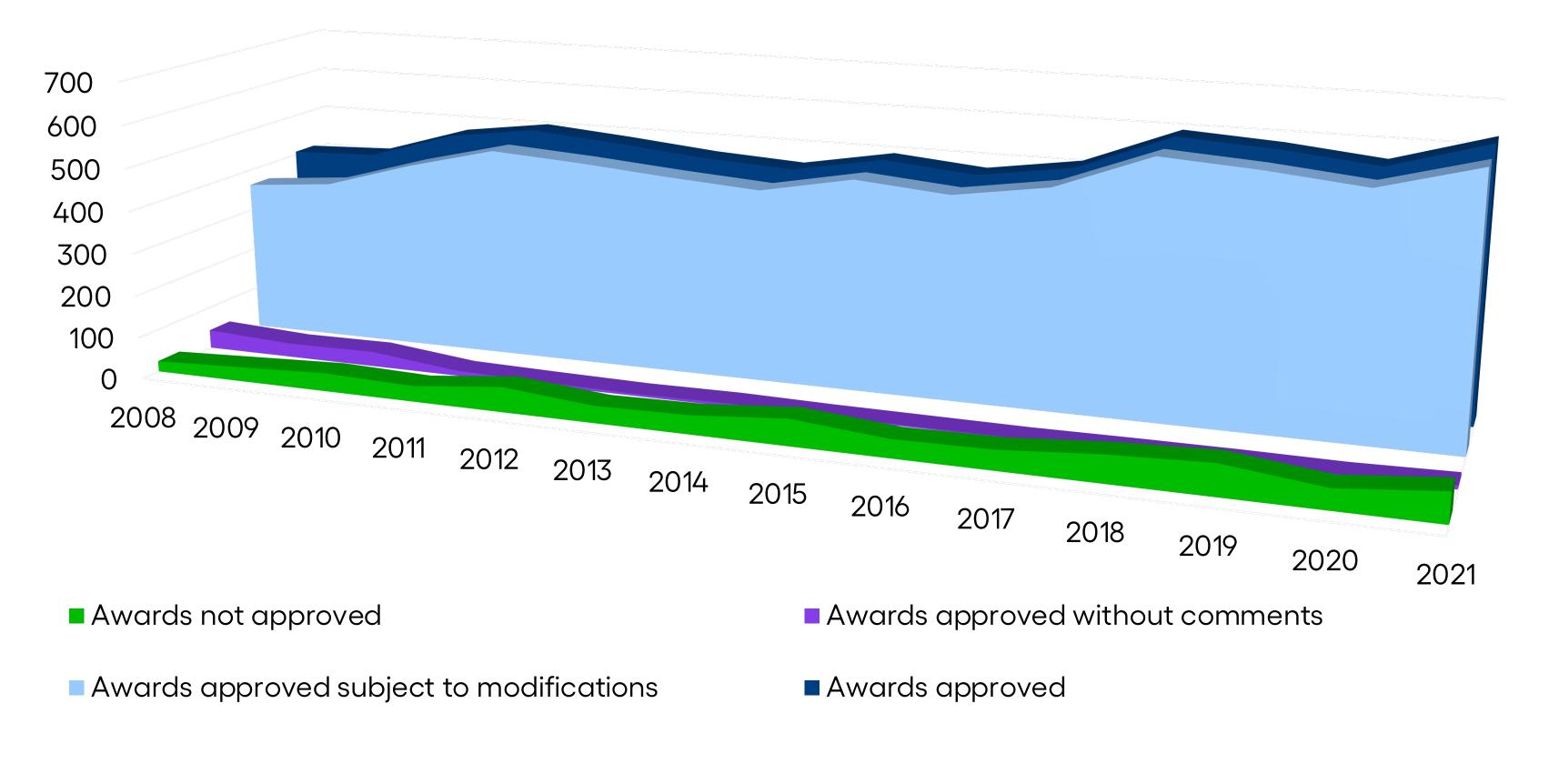
SCRUTINY

Court provides comments regarding the form of the draft award and may draw the attention to points of substance.

Scrutiny of Awards



TRENDS 2011-2021



2011:

508 Awards37 not approved496 approved "subject to"12 approved without comments

2021:

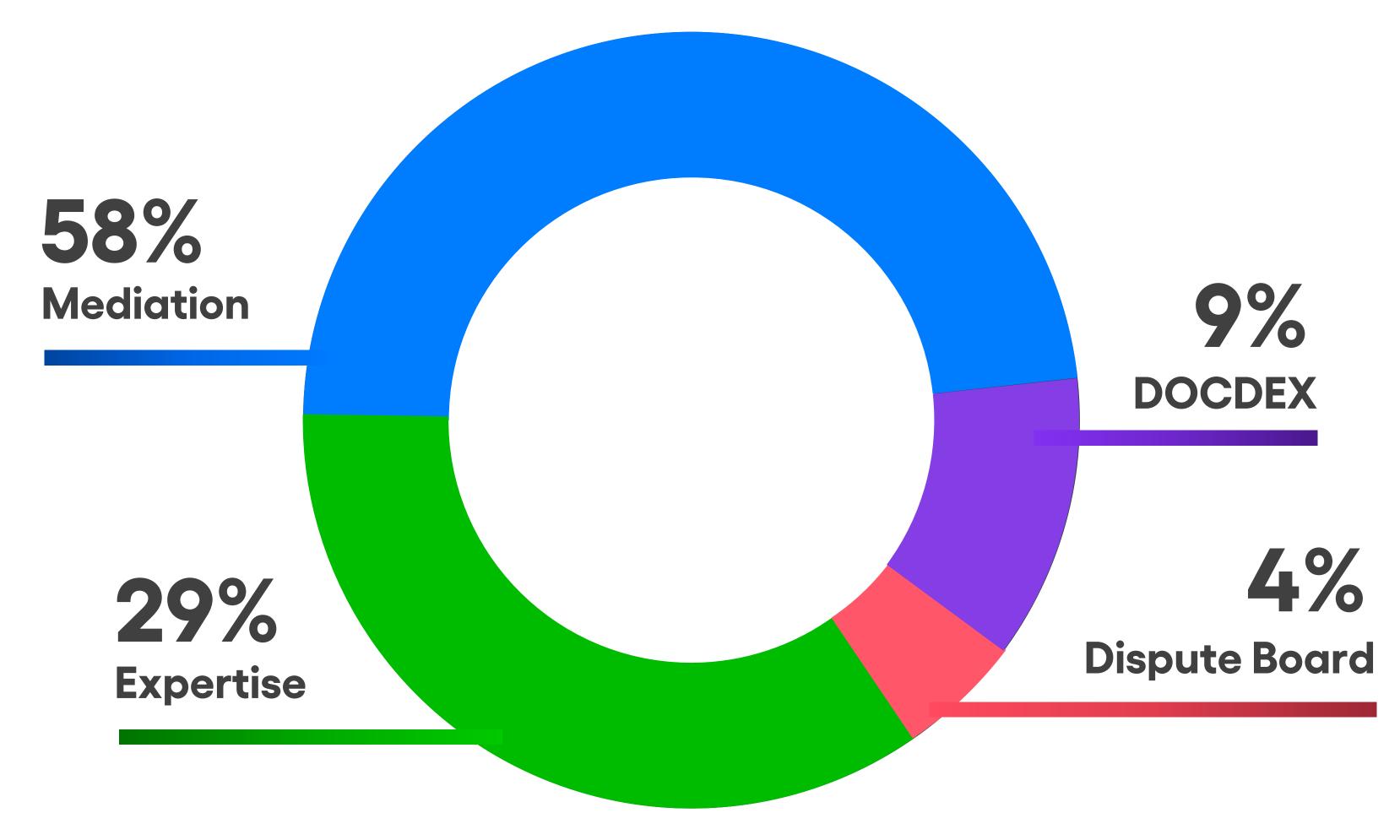
630 Awards69 not approved621 approved « subject to »9 approved without comments

ADR Centre

Introduction to ICC International Centre for ADR

ICC International Centre for ADR

Cases filled with the Centre in 2021



Introduction to ADR Methods

Introduction



MEDIATION

- 1. Helps the parties resolve their disputes through negotiations assisted by a professional neutral.
- 2. Interest-based



EXPERT EVALUATION

Helps the parties
obtain an evaluation
concerning a technical
or legal question
causing the
disagreement.



EXPERT DETERMINATION

Helps the parties
obtain a decision
concerning a technical
or legal question
causing the
disagreement.



DISPUTE BOARD

- 1. Helps the parties avoid disputes during the lifetime of the contracts.
- 2. For certain disputes, helps the parties to obtain a conclusion.

Mediation

A neutral facilitator, a mediator, helps the parties try to resolve their dispute through negotiations.

Mediation

Content

Depends on the parties

Depends on the mediation style of the mediator



ICC Mediation Rules:

- Deliberately flexible
- May be amended*

^{*} All of the parties may agree to modify any of the provisions of the Rules, provided, however, that the Centre may decide not to administer the Proceedings if, in its discretion, it considers that any such modification is not in the spirit of the Rules. At any time after the confirmation or appointment of the Mediator, any agreement to modify the provisions of the Rules shall also be subject to the approval of the Mediator. (ICC Mediation Rules, Art. 1.4)

Expert Services

An **independent expert** issues a **report** concerning a dispute/question submitted to them.

Evaluation or Determination by Expert

1 EXPERT'S MAINTASK

Make findings in a report
within the time limits set by the mission
after giving the parties the opportunity to
be heard and/or to make written
submissions.

2 EXPERT REPORT

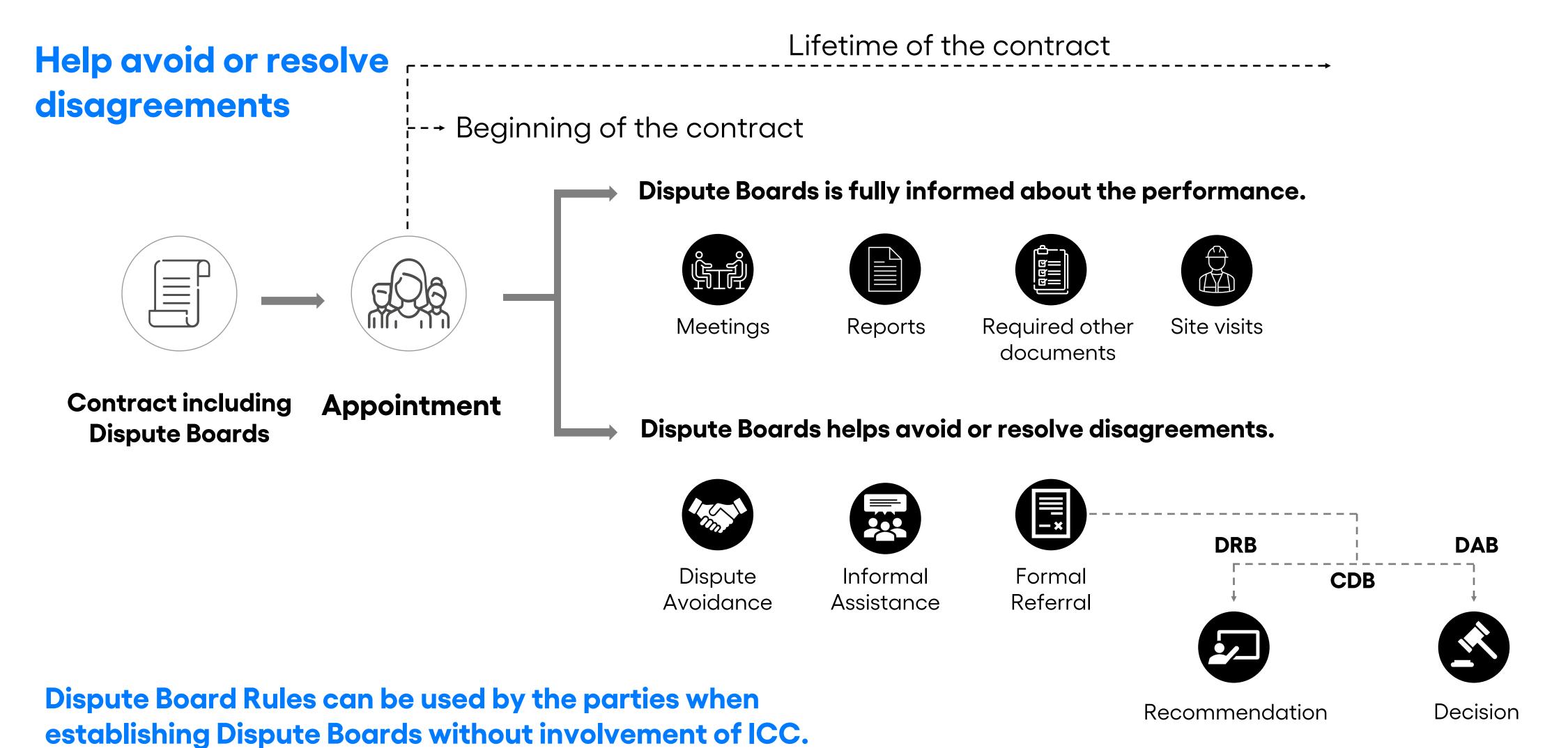
- Can be binding (determination) or nonbinding (evaluation)
- Under ICC Rules, by default it is not binding, unless otherwise agreed
- Admissible in judicial and arbitral proceedings*

^{*}unless otherwise agreed by the parties

Dispute Board

A neutral **ADR panel** provides **real-time decisions or recommendations** (typically in **medium- and long-term contracts)**to help parties avoid and/or resolve
disagreements as they arise.

Dispute Board



Dispute Board

Formal Referral



Both admissible in any judicial or arbitral proceedings

unless otherwise agreed by the parties

Comparison and Benefits

Comparison and benefits of mediation, expert evaluation/determination and dispute boards

Different Roles and Functions

	ROLE	FOCUS OF SERVICES
Mediator	Facilitate the parties' negotiations, and if the parties agree, offer a view on the merits or suggest possible settlement terms.	Help parties to reach their own negotiated settlement.
Expert	 Non-binding evaluation for one party. Non-binding evaluation for both/all parties. Binding determination. 	 Evaluation of the strengths and weaknesses of the party's case. Provide a basis for negotiated settlement. Binding resolution of one or more issues in dispute.
Dispute Board Member	 Provide opinion on issues that have potential to cause disputes (standing DBs only). Provide recommendations on disputes (DRB). Provide contractually binding decisions on disputes (DAB). 	 Avoidance/de-escalation of disputes. Dispute resolution assistance. Binding resolution of disputes, which may be revisited in arbitration or litigation.

Why Choose Mediation?

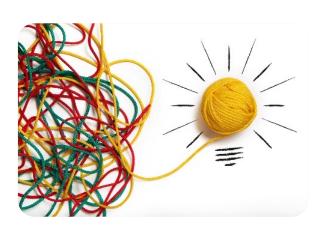
Benefits of Mediation



Parties control the process and outcome



Based on the actual interests of the parties



Creative solutions



Managing litigation risks



Fast



Less expensive



Flexible



Confidential



Preserving the relationships



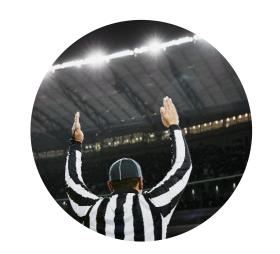
High settlement rate

Why Choose Experts and Dispute Boards?

Benefits of Expert Services and Dispute Boards



Subject matter expertise



Answers the subject matter question



May be binding



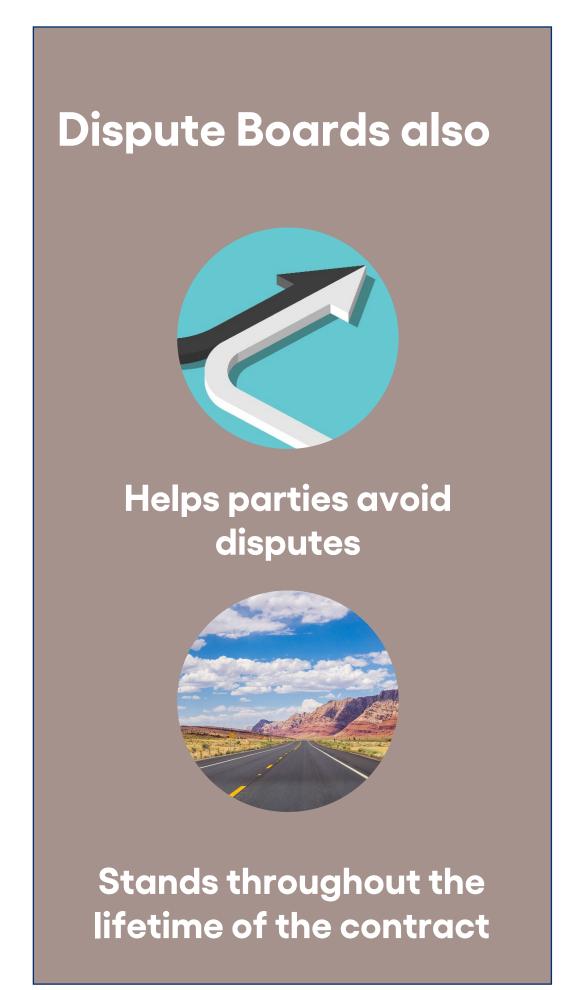
Faster than adjudication



Preserves the relationships



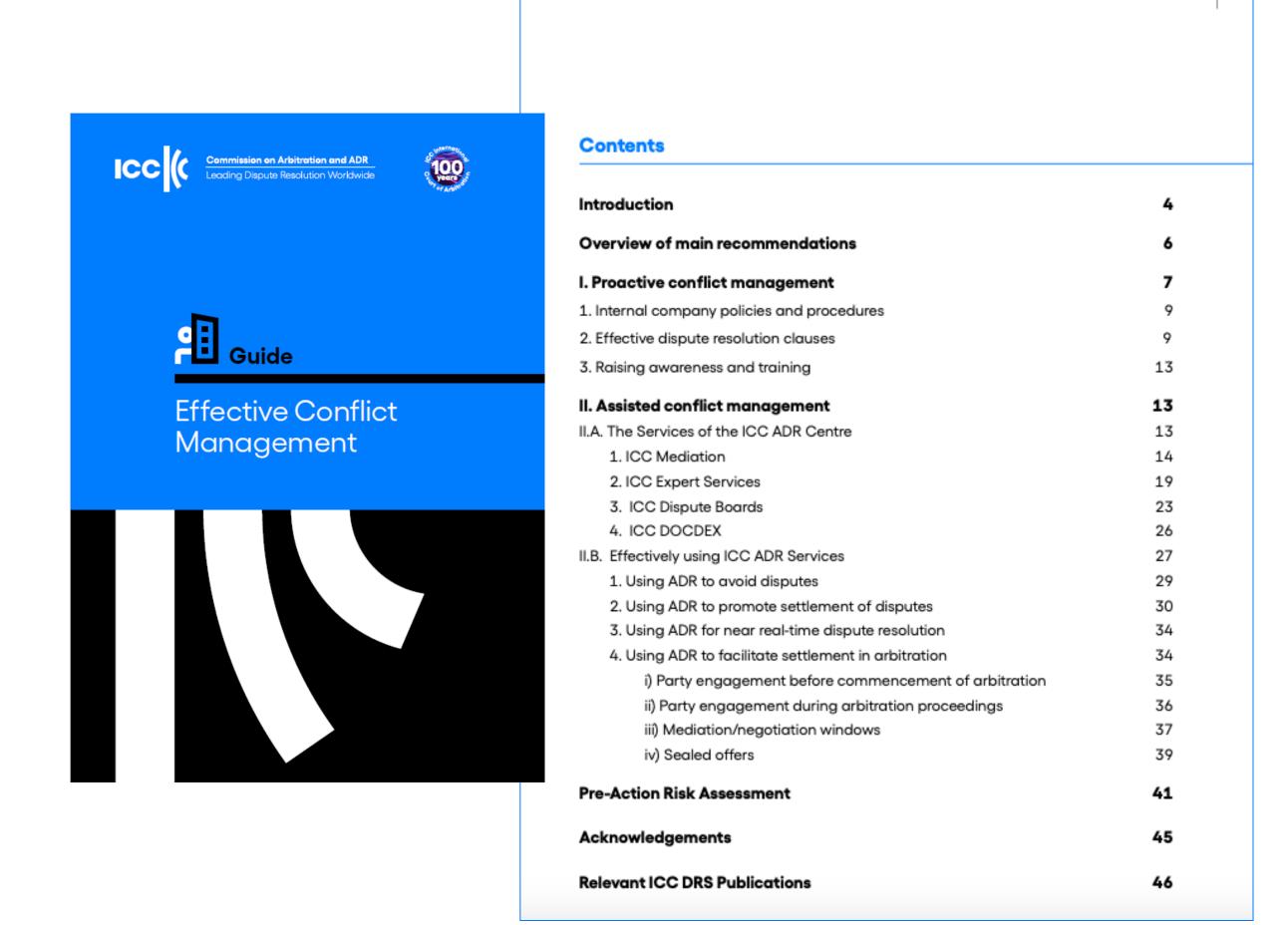
Less expensive than adjudication



ICC Commission Guide on Effective Conflict Management

Introduction to the Guide of the ICC Commission

On Effective Conflict Management



Effective Conflict Management

1

Easy-to-understand guidance

for business managers, decision makers, in-house and external counsel

2

Aims at helping businesses manage disputes and access/select the right ADR methods at the right time.

3

Also contains several recommendations to arbitrators regarding facilitating settlement in the context of an arbitration.

Overview of Main Recommendations

Guide on Effective Conflict Management



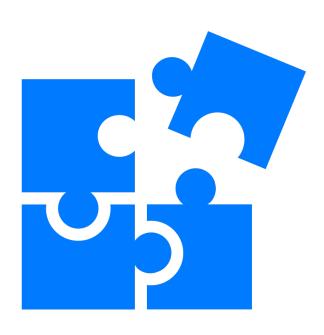
ADR services as business tools

- using appropriate ADR at right time



Identify issues early

and attempt to avoid or de-escalate disputes early.



Tailor ADR to the dispute every dispute is different

Overview of Main Recommendations (cont'd)

Guide on Effective Conflict Management

Specific recommendations for use of ADR methods

- In long-term contracts: dispute board or standing mediator
- The combination of two or more tools for certain disputes (e.g. an early non-binding expert evaluation followed by mediation)
- Expert determination for a timely and cost-efficient final decision on a specific issue in dispute.

Specific recommendations for facilitating settlement after arbitration

- Pro-active participation of in-house counsel or other party representatives in establishing an arbitration procedure facilitating settlement (for e.g., CMC)
- Mediation/negotiation windows in their dispute resolution clauses
- Sealed offers

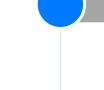
Key Moments in the Life of a Dispute

When Parties Can Influence the Overall Cost of Managing the Conflict

Before conflicts emerge

Conflict emerged but no arbitration filed

Arbitration has commenced



Setting in place conflict management policies and drafting the dispute resolution clause.

Revisiting the choices made in the dispute resolution clause and seek the services of an ADR Neutral, even if that was not contemplated in the dispute resolution clause.

Explore most efficient arbitration procedure and consider possibility for settlement.

Proactive Conflict Management

How Businesses Can Approach Conflict Management Without Assistance

1

Internal company policies and procedures for early dispute management

Effective dispute resolution clauses

5

Internal awareness of conflict management

Assisted Conflict Management

How and When to Effectively Use ADR, Before and During Arbitration Proceedings

- 1. Available ICC ADR tools
- 2. ADR to avoid disputes: standing Dispute Board and standing Mediator
- 3. ADR to promote settlement of disputes: early neutral evaluation by Dispute Board or Expert
- 4. Using ADR for near real-time dispute resolution: binding determination by Dispute Board or Expert
- 5. Using ADR to facilitate settlement in arbitration
 - Party engagement before arbitration proceedings
 - Party engagement during arbitration proceedings
 - Mediation windows
 - Sealed offers

Pre-Action Risk Assessment

Considerations:

- (a) cost implications
- (b) quantifiable outcome implications
- (c) other (unquantifiable) implications

Pre-Action Risk Assessment

Cost Implications – Cost Estimation Test

- Factors: the mode(s) of dispute resolution chosen, the applicable rules, and the circumstances of the dispute, geography and sector.
- 2. Hidden/unquantifiable costs, for e.g.:
- Disruption factor caused by the internal management of a dispute and the rerouting of resources
- Level of anxiety and emotional stress of the people involved in the process

Phase 1: Claim preparation

Internal costs

External costs

In-house / Corporate lawyers

External counsel

(deemed hourly rate, budgeted time required)

Expert input(s) (if required)

Commercial team (deemed hourly rate, budgeted time required)

Phase 2: Negotiation

Internal costs

External costs

As above

External counsel

Phase 3: ADR Techniques

Internal costs

External costs

As above, plus costs resulting

External counsel

from management/board involvement

Mediation / ADR fees

Phase 4: Arbitration / Litigation

Internal costs

External costs

As above, including sufficient time for witness preparation

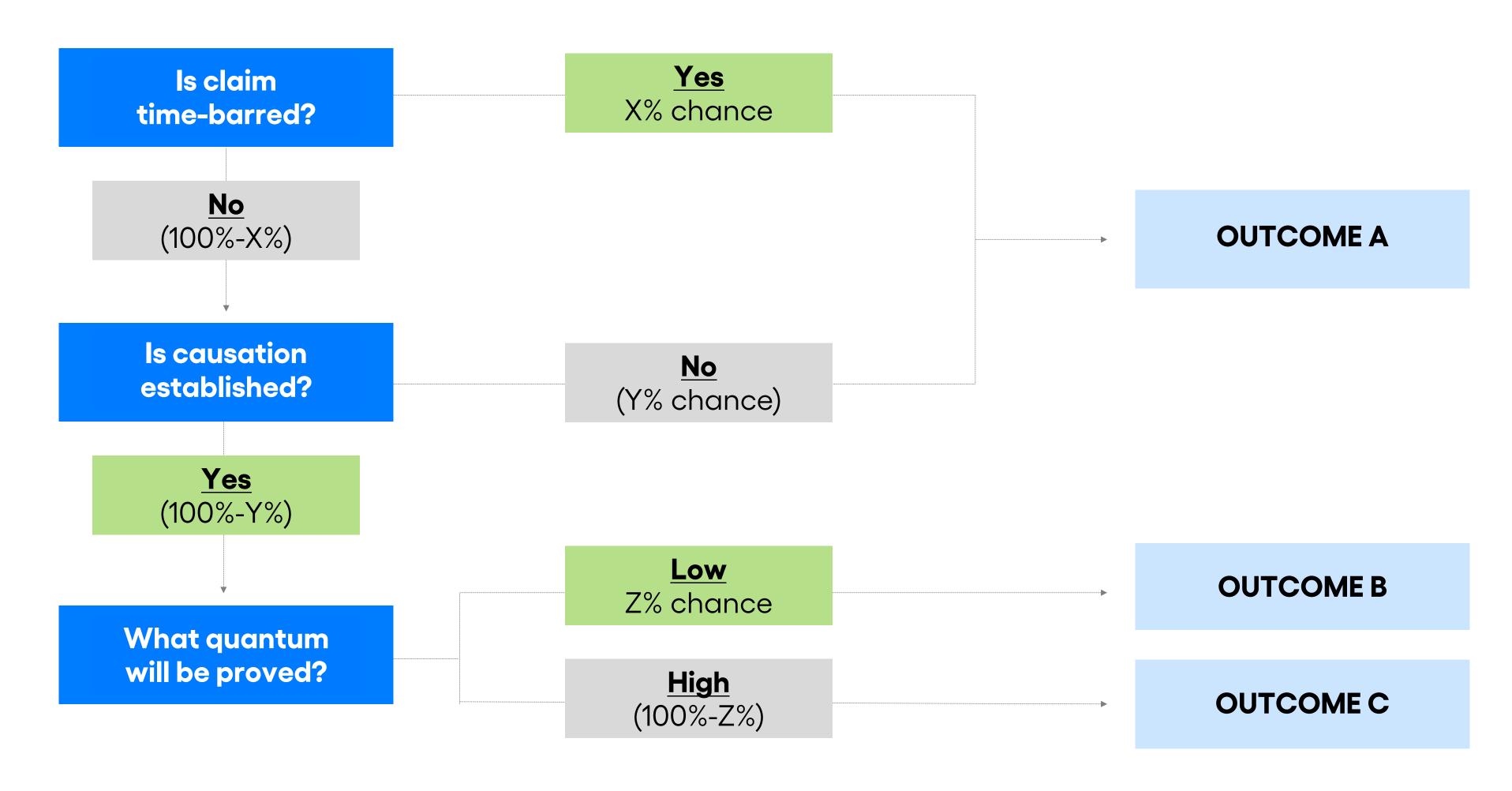
External counsel

Expert input(s)

Arbitration / Litigation costs, including (e-)discovery, transcriptions, hearings, meetings, travel, accommodation

Pre-Action Risk Assessment

Quantifiable Outcome Implications - Illustration



Workshop

Case Scenario Part 1

Transaction

In November 2021 the Infrastructure Management Company ("Employer") of the Host State ("Host State") and Best Builders, an international construction company registered in the Kingdom of Atlantis, ("Contractor") entered into an agreement based on a standard contract (the "Construction Agreement") for the repair of Conference Facilities for COP100 in the capital city of the Host State (the "Project").

The amount of the Agreement was for 5 million euros. Under the Construction Agreement, the Contractor was supposed to repair the Conference Facilities by 31 October 2023 in line with the Project Specifications provided by the Employer. Under the Construction Agreement, the Contractor was required to make available all the equipment and personnel before the repair works commenced. The repair works were supposed to start within 2 weeks after signing of the Construction Agreement. The Contractor made a representation in the Construction Agreement that it currently possesses and freely disposes all the required equipment and personnel to complete the repair. The Agreement also included the following provision: "The Contractor shall take all reasonable steps to protect the environment (both on and off the Site) and to limit damage and nuisance to people and property resulting from pollution, noise and other results of his operations."

Transaction

The repair of the Conference Facilities was subject to a strict deadline since the facility was required to be completed before COP100 started on 30 November 2023.

A month after signing the Construction Agreement, the Contractor entered into a supply agreement with the Local Construction Procurement LLC (the "Subcontractor") to buy all the local materials required for the construction with a value of 500 000 euros (the "Supply Agreement"). The Supply Agreement also included a provision requiring the Subcontractor to take all the measures to provide goods that are environmentally friendly.



Draft the dispute resolution clause of the Construction Agreement and Supply Agreement: which dispute resolution mechanisms would you include?

Workshop Instructions – Part 1

Transaction







Draft the dispute resolution clause of the Construction Agreement and Supply Agreement: which dispute resolution mechanisms would you include?



Name a representative who will briefly – in max 2 minutes – present to the larger group how you solved the task

Please see breakout group composition in your handouts.

Group Discussion Part 1

Discussion Questions

- Draft the dispute resolution clause of the Construction Agreement and Supply Agreement: which dispute resolution mechanisms would you include?
- Why did you choose the dispute resolution mechanisms that you did?
- What are the pros and cons of these mechanisms?

Case Scenario Part 2

Disagreement and Dispute

Disagreement

The works did not proceed smoothly. A week after signing of the Construction Agreement, the Employer informally informed the Contractor that they are considering some changes in the Project Specifications. The Contractor decided to await the confirmation of the Project Specifications. After 2 months the Employer sent a notice to the Contractor asking why the works had not started. The Employer also informed the Contractor that while they were considering some changes to the Project Specifications, that would have only affected the façade of the building, without impacting most of the repair works. The Contractor informed the Employer that they need a month to mobilize the necessary equipment, materials, and resources to the construction site in order to begin the project. The Employer informed the Contractor it was the first time the Contractor raises this issue and it not in line with representation made in the Construction Agreement.



Assume that the Agreement provided for the constitution of a standing DAB within 28 days of the commencement date and the DAB was formed. Would that help or add any value? Why?

Disagreement and Dispute

Disagreement

In June 2022 after the roof of the building was constructed, and first photos of the Conference Facilities appeared on the newspapers. Some journalists reported that the materials of the roof were not environmentally friendly, and it was a shame that a building that was going to host a major climate conference did not follow the best practices in environmentally-friendly solutions. The Employer sent a notice to the Contractor, and the Contractor informed the Employer that the materials they use were completely in line with the legislation of the most developed and environment-cautious countries and best practices. The engineers of the Employer disagreed.

In the meantime, the Contractor also informed the Subcontractor the materials were not in line with the Supply Agreement, as they were not environmentally-friendly, and the Subcontractor would be liable for any costs that were incurred due to non-conforming materials.



Would you refer this disagreement to any ADR mechanism? If yes, which ADR methods would you choose?

Disagreement and Dispute

Dispute

The repair of the Conference Facilities was only partially completed before the start of the COP100 events, i.e. 30 November 2023. As a result the Employer was heavily criticized in the media reports. However, when the repair finished later on 31 December 2023 the quality of the Conference Facilities was very high and while the Employer was satisfied with the overall quality, it claimed the Contractor was liable for the delay. The Employer submitted a Request for Arbitration under ICC Rules for the delay claim, and the Contractor brought a counterclaim for delay costs and damages in its Answer to the Request for Arbitration.

In the meantime, the capital city of the Host State was selected to host the Olympics in 2028, and the Employer was awarded a contract requiring it to build numerous hotels and stadiums in the capital city.

The Contractor is in the process of transferring back or disposing of its equipment and remaining materials, which is quite costly.



Would you refer this dispute to mediation? When? Why? Who would be the parties?

Workshop Instructions – Part 2

Disagreement and Dispute



30 minutes



Discuss how to address the disagreements and dispute that arise. See case scenario for further instructions and discussion questions.



Name a representative who will briefly - in max 5 minutes - present to the larger group how you solved the task

Please see group composition in your handouts.

Group Discussion Part 2

Discussion Questions

- Assume that the Agreement provided for the constitution of a standing DAB within 28 days of the commencement date and the DAB was formed. Would that help or add any value? Why?
- Would you refer this disagreement to any ADR mechanism? If yes, which ADR methods would you choose?
- Would you refer this dispute to mediation? When? Why? Who would be the parties?



Introduction to and Practical Training on Effective Conflict Management







Stockholm 21 May, 2024

SPONSORS:



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ICC ADR Processes

Description of the ADR processes with the involvement of the ICC International Centre for ADR.

Mediation Options

Routes to Mediation

1

Include a **mediation clause** in the contract

(ICC Mediation Rules, Art. 2)

2

Initiate mediation with the ICC directly

(ICC Mediation Rules, Art. 3)

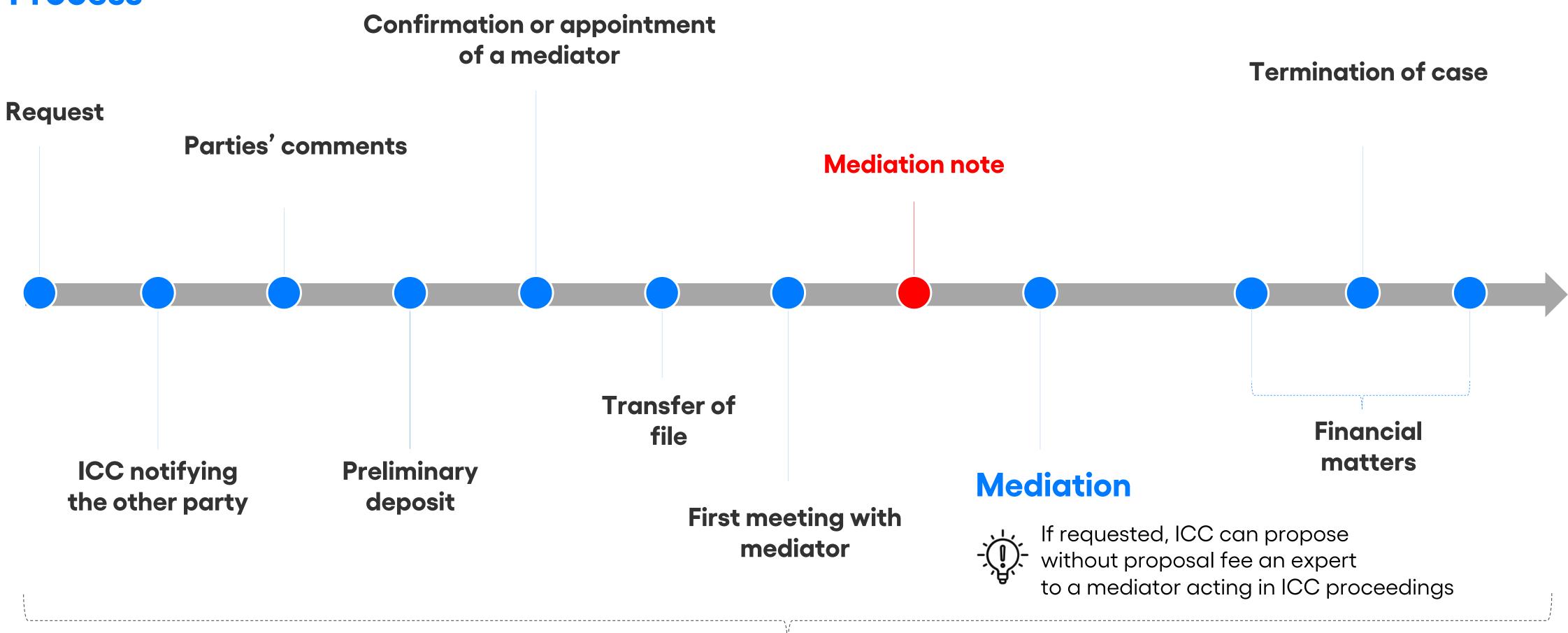
3

Reference from arbitral tribunals

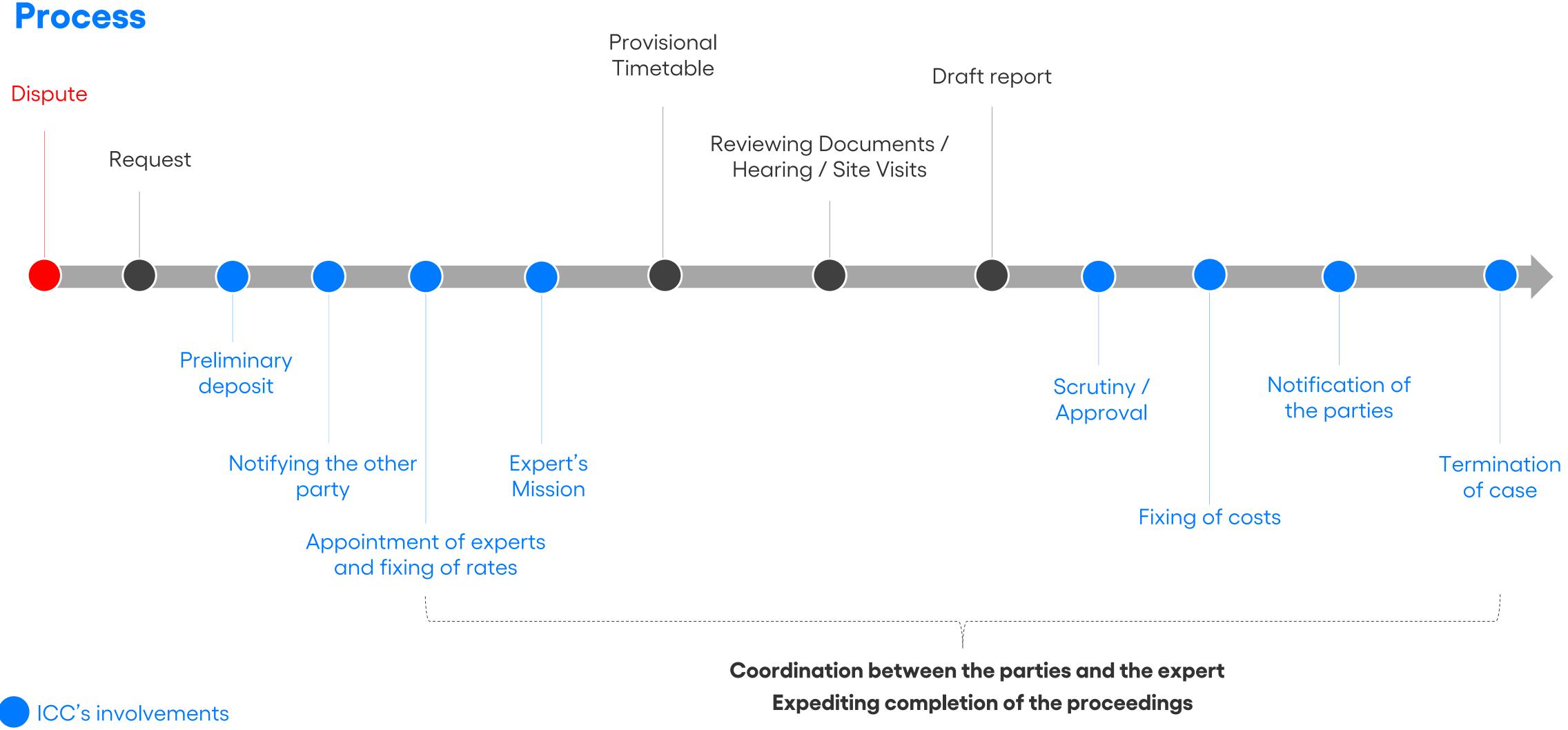
(ICC Arbitration Rules)

ICC Mediation

Process

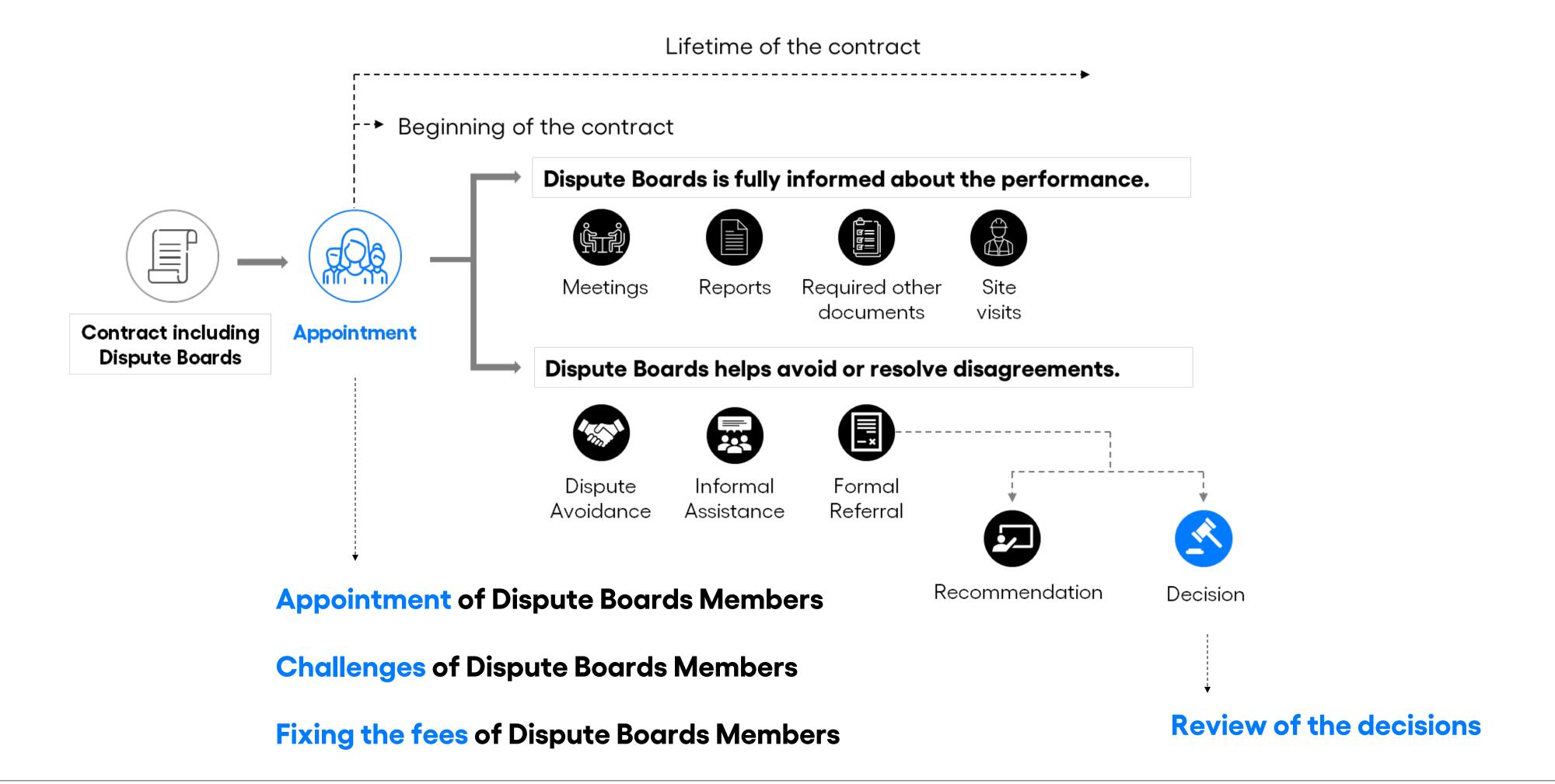


Expert Services Administered by ICC



Dispute Board

What the ICC International Centre for ADR Can Do



Costs of ADR Services Offered by ICC

Costs for the International Centre for ADR's Services: Appointment

APPOINTMENT

Appointing an expert or neutral



- > US\$3,000 filing fee for appointment of a <u>mediator</u>
- > US\$5,000 fee for objections
- > Free appointment of mediator in ICC arbitrations upon a joint request of the parties

Costs of ADR Services Offered by ICC

Costs for the International Centre for ADR's Services: Proposal

PROPOSAL

> Proposing an expert or neutral





- > Free proposal of mediator in ICC arbitrations upon a joint request of the parties.
- Free proposal of <u>expert</u> in ICC arbitrations or mediations upon a request from the tribunal or mediator

Costs of Expert Services Administered by ICC

Costs





Fixed by the Centre between U\$\$2,500 and U\$\$50,000



Based on hourly rates or fixed fee set by the Centre depending on the complexity

ICC Dispute Board

ICC Administrative Costs

Appointment Fee

US\$5,000 for one Dispute Board member Challenge Request

Fixed by the Centre, usually at U\$\$5,000, capped at U\$\$10,000 (including the registration fee of U\$\$5,000)

Dispute Board Fees

Agreement on fees
 If no agreement on fees,
 Centre may fix the filing fees for U\$\$5,000

Review of
Dispute Board
Decision

Fixed by the Centre, including the registration fee of US\$5,000 (capped at US\$10,000)



@ICC_Arbitration



Learn more: ow.ly/Epj450Nrrmw

@ICCMediation

...



ICC Mediation @ICCMediation · Feb 11

More than 100 people were in the audience today at Sciences Po, Paris, at the final session of the 18th edition of the ICC International Commercial Mediation Competition.

Are you excited to know the winning team of #ICCMW 2023?

Stay tuned for the winner announcement!

Feed

Download the ICC DRS app today!





Not an iPhone/iPad or Android user?

Our mobile site works on all types of devices.

Visit us at

www.iccwbo.org/drsapp





Useful Links

Mediation

2014 Mediation Rules

https://iccwbo.org/dispute-resolution/dispute-resolutionservices/adr/mediation/mediation-rules/

2014 Mediation Guidance Notes

https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-2014-mediation-guidance-notes/

ICC suggested mediation clauses

https://iccwbo.org/dispute-resolution/dispute-resolutionservices/adr/mediation/mediations-clauses/

Useful Links

Expertise

ICC Rules for the Administration of Expert Proceedings

https://iccwbo.org/dispute-resolution/dispute-resolutionservices/adr/experts/administration-of-experts-proceedings/rules-for-theadministration-of-expert-proceedings/

Rules for the Appointment of Experts and Neutrals

https://iccwbo.org/dispute-resolution/dispute-resolutionservices/adr/experts/appointment-of-experts-and-neutrals/rules-for-theappointment-of-experts-and-neutrals/

Suggested clauses for ICC Administration of Expert Proceedings

https://iccwbo.org/dispute-resolution/dispute-resolutionservices/adr/experts/administration-of-experts-proceedings/suggested-clausesreferring-to-the-icc-rules-for-the-administration-of-expert-proceedings/

Suggested clause providing for ICC as appointing authority for expert proceedings

https://iccwbo.org/dispute-resolution/dispute-resolutionservices/adr/experts/appointment-of-experts-and-neutrals/suggested-clauseproviding-for-icc-as-appointing-authority-for-expert-proceedings/

Useful Links

Dispute Board

Dispute Board Rules

https://iccwbo.org/dispute-resolution/dispute-resolutionservices/adr/dispute-boards/dispute-board-rules/

Standard Dispute Board clauses

https://iccwbo.org/dispute-resolution/dispute-resolutionservices/adr/dispute-boards/standard-dispute-board-clauses/



THANK YOU!

For more information about ICC ADR services, contact adr@iccwbo.org

For more information about **DRS Education & Training**, contact **DRSLearning@iccwbo.org**

