



DRAFTING ARBITRATION AGREEMENTS: *Techniques, Pitfalls & Key Lessons*

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How does Arbitration come into existence?

Arbitration is a creature of contract. The parties agree to empower the tribunal to decide their dispute. The parties may confer powers upon the arbitral tribunal directly or indirectly, but only within the limits of applicable law.

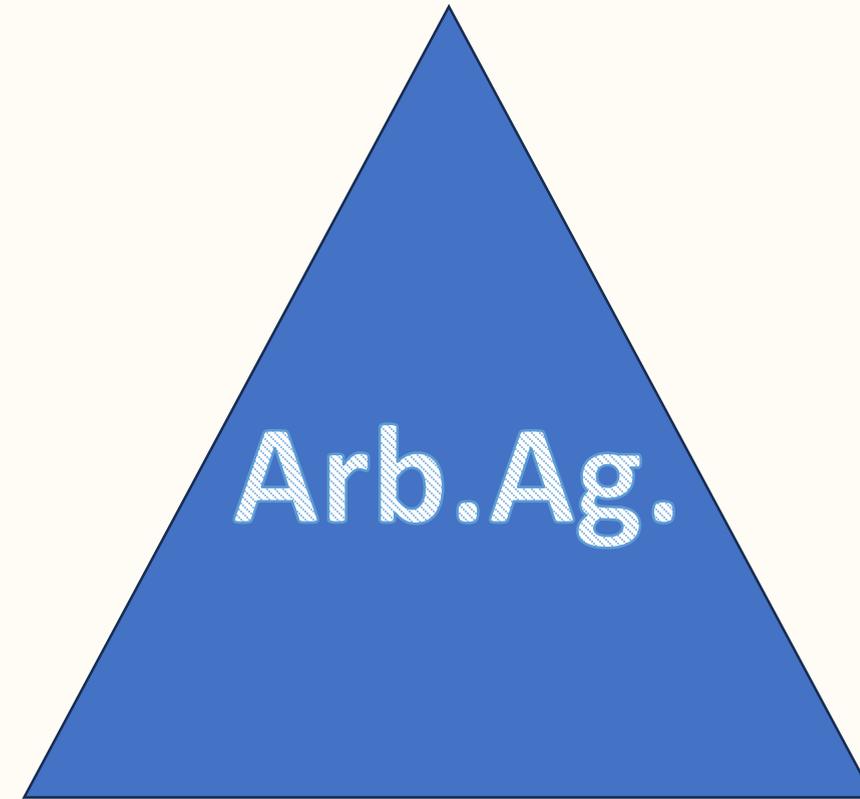


Part I:

*The Arbitrator's Jurisdiction – Party
Autonomy, Kompetenz Kompetenz,
Equality of Parties.*



B. Doctrine of Party Autonomy



A. Doctrine of
Separability

C. Doctrine of
Kompetenz
Kompetenz





A. Doctrine of Separability Explained : Severable or Autonomous

Arbitration Clause Independence

An arbitration clause remains effective and separate, even if the main contract is challenged or found invalid.

Survival of Arbitration Agreement

The arbitration agreement typically survives contract invalidity, allowing disputes to be settled via arbitration.

Example: In the case of *Fiona Trust & Holding Corp. v. Privalov*, an oft quoted decision, the English Court ruled that the arbitration clause could not be defective even where the underlying parent contract was claimed to have been the result of inducement due to bribery.



B. Doctrine of Party Autonomy

1. Choice of arbitration
2. Choice of rules
3. Choice of seat
4. Choice of arbitrators
5. Procedural flexibility

But subject to:

- Mandatory law
- Due process
- Public policy



Scope of Consent

- *Scope of consent determines the boundaries of what the parties agree to submit to arbitration.*
- *Do parties agree to arbitrate only contractual claims?*
- *If the party has a tort claim (e.g., defamation or slander resulting in reputational damage) that comes from the dispute, can the tribunal hear the claim?*
- *The language in the arbitration clause will be starting point.*



Most Model Arbitration Clauses Define the Scope of Consent Broadly



UNCITRAL Model Arbitration 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** as at present in force.”*

LCIA Model Arbitration Clause

*“In the event of a dispute arising out of or relating to this contract, including any question regarding its existence, validity or termination, the parties shall seek settlement of that dispute by mediation in accordance with the **LCIA Mediation Procedure**,”*

ICC Model 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.”



Enforcement: Outside the Scope of Consent

Article V of the New York Convention allows a court to deny partial or full enforcement of an award if it is beyond the scope of the arbitration



Article V

1. 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:

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or



C. Doctrine of Kompetenz-Kompetenz

Kompetenz-Kompetenz (competence-competence) is a fundamental arbitration principle empowering tribunals to decide their own jurisdiction, including objections regarding the arbitration agreement's existence or validity. It promotes efficiency by minimizing premature court interference. This doctrine, often codified (e.g., [UNCITRAL Model Law Art. 16](#)), mandates that tribunals rule on their competence first, though courts may review this later.





Principle of Equality of Parties: The Core Procedural Guarantee

Equality of Parties

- Equal treatment
- Right to be heard
- Reasonable opportunity to present case

UNCITRAL Model Law / Rules

Article V(1)(b), New York Convention

- Most common ground for challenge



Part II:

*Arbitration
Agreement and
Commencement of
Proceedings*



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Arbitration Agreement AA Or The Clause Drafting Tips

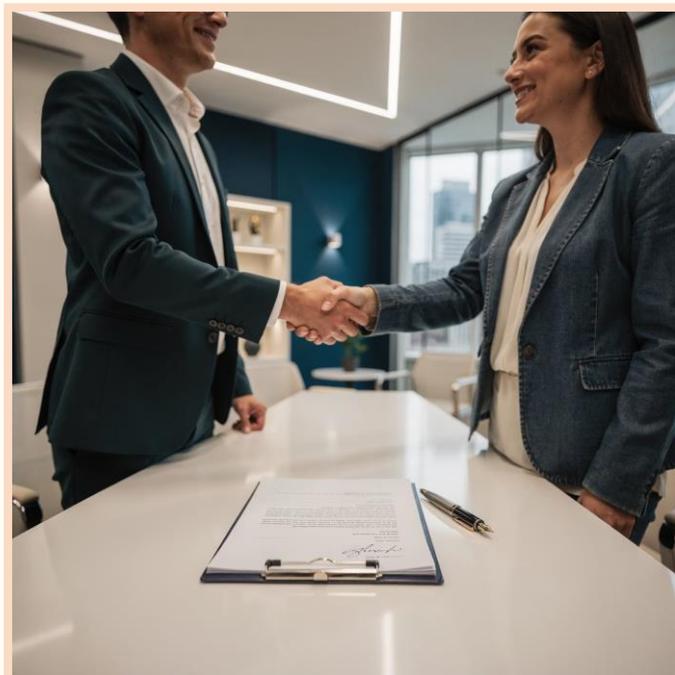


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II.1 Arbitration Agreements/Clauses

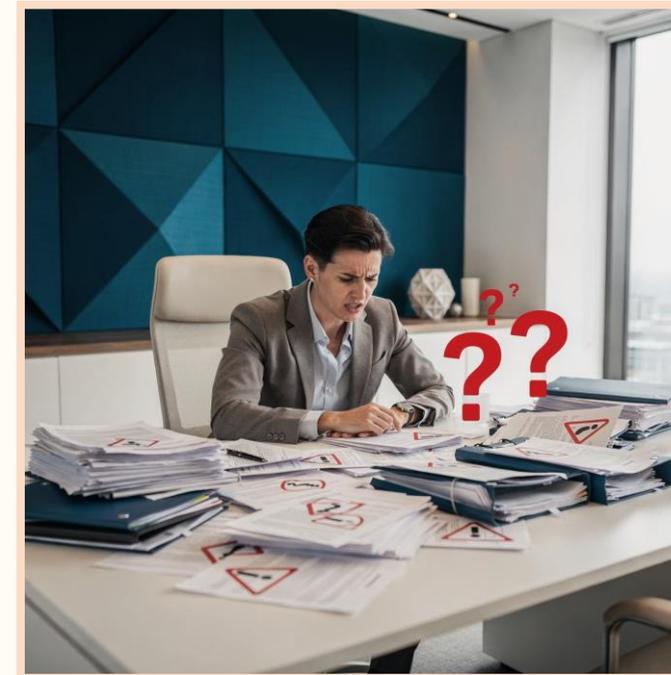
Why does the AA matter?

- A valid AA manifests the parties' intention to submit disputes to arbitral resolution and to exclude resorting to state courts
- It is the jurisdictional foundation of the arbitral tribunal
- It creates operational and effective proceedings



A poorly drafted AA

- May give rise to long disputes on validity, scope, etc.
- May endanger the validity and enforceability of arbitral award
- Equals time and money lost





Arbitration Agreements/Clauses

What is an Arbitration Agreement?



Article 7 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 in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*
- 2. The arbitration agreement shall be in writing.*



Arbitration Agreements/Clauses



Scope of an Arbitration Agreement



Narrow or broad formulation:

"all disputes arising from this Contract"

"all disputes relating to this Contract"

"all disputes, claims and differences arising out of or in connection with this Contract, including in relation to its formation, validity interpretation, performance and/or termination"

"all disputes arising from this Contract"



Key Conditions

Written Arbitration Agreement

Article II requires any arbitration agreement to be in writing to ensure legal clarity and enforceability.

Defined Legal Relationship

Parties must agree to arbitrate disputes arising from a specific legal relationship, which may be contractual or non-contractual.

Arbitrable Subject-Matter

The dispute must involve a subject-matter that can be settled by arbitration, ensuring it is legally appropriate for arbitration.



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Pre-Arbitration Steps Dilemma

Multi-Tiered Dispute Resolution/Escalation Clauses (MTDR)

Multi-tiered agreements require parties to resolve disputes through negotiation or mediation before arbitration, encouraging early settlement.

Settlement Opportunities

These pre-arbitration steps aim to foster settlement opportunities, potentially avoiding costly arbitration proceedings.

Uncertainty and Delays

Compliance issues and unclear requirements may create uncertainty and cause delays in resolving commercial disputes.



Arbitration Agreements/Clauses



Capacity/Validity



1. Recognition and enforcement of the award may be refused...

(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; ...

New York Convention, Article V





How to draft an effective arbitration clause

Be clear

- *Avoid any risk of ambiguity*

Keep it simple

- *Parties are free to adapt the standard/model clause to their particular circumstances*



Think of Enforceability

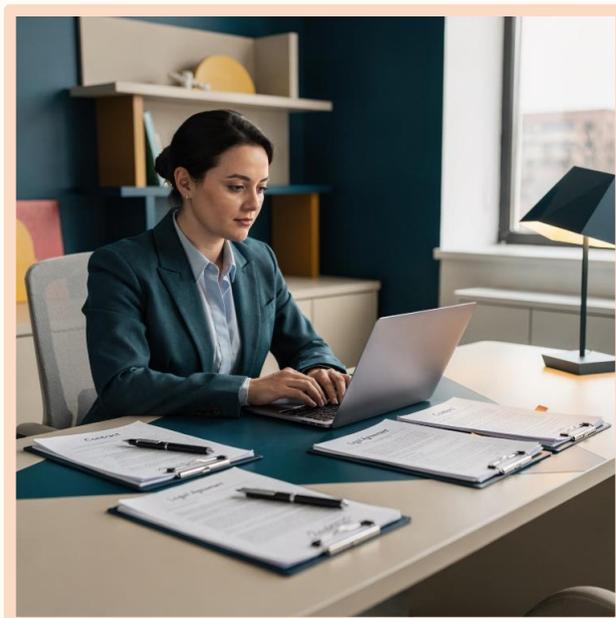
- *Mandatory requirements at the place of arbitration and the place of enforcement*





How to draft an effective arbitration clause

IBA Guidelines for Drafting International Arbitration Clauses



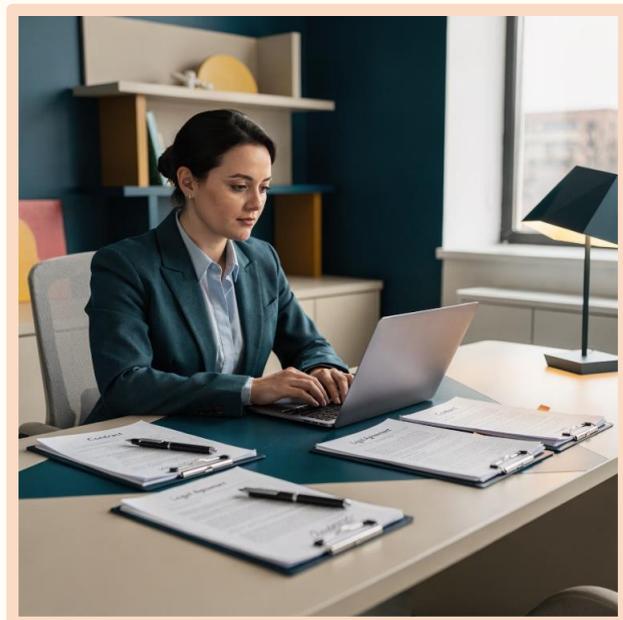
- 1. Decide between institutional and ad hoc arbitration*
- 2. Select a set of arbitration rules and use the model clause recommended for those rules as a starting point*
- 3. Absent special circumstances, do not limit the scope of disputes subject to arbitration and define the scope broadly*
- 4. Select the place of arbitration based on practical and judicial considerations*
- 5. Specify the number of arbitrators*
- 6. Specify the method of selection and replacement of arbitrators*
- 7. Specify the language of arbitration*
- 8. Specify rules of law governing the contract and any subsequent disputes*





How to draft an effective arbitration clause

IBA Guidelines for Drafting International Arbitration Clauses



- 1. The authority of the Arbitral Tribunal and Courts with respect to provisional and conservatory measures*
- 2. Document production*
- 3. Confidentiality issues*
- 4. Allocation of costs and fees*
- 5. Qualifications required of arbitrators*
- 6. Time limits*
- 7. Finality of arbitration*



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".

☐ **Suggestions:**

- *Place of arbitration*
- *Language of arbitration*
- *Applicable law*
- *Number of arbitrators (1 or 3)*

Emergency Arbitrators and Expedited Procedure Provisions apply according to conditions provided by the Rules.



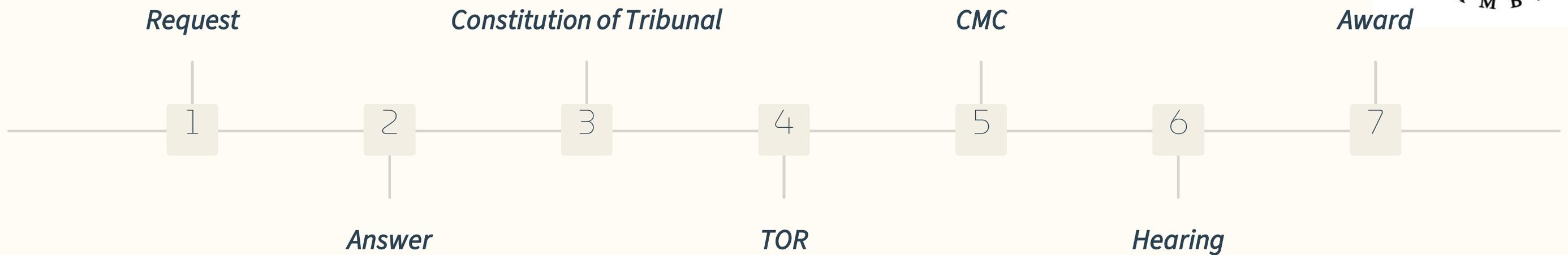
II.2 Commencement of Proceedings



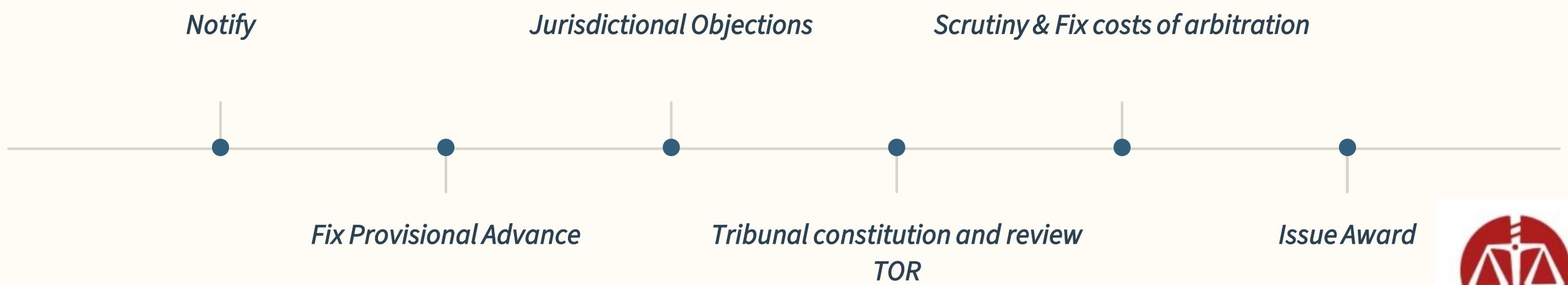
The Arbitral Process



The Arbitral Process



The ICC Court and Secretariat



Date of Commencement

Article 6(1) ICC Rules

*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.*

Article 21, UNCITRAL Rules

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.



Request for Arbitration

How long should the Request be?

1. What is the desired result of filing the Request (e.g. triggering settlement discussions or having the dispute resolved by arbitration)?
2. Are there any valid reasons for not conducting an early case assessment?
3. Are there any real cost savings in filing a shorter Request? Would they be outweighed by the benefits of filing a longer Request?
4. Are there any other strategic or legal considerations that may affect the timing of the filing of the Request?



Request for Arbitration

A Request is a demand that a dispute be referred to arbitration.

Article 4, ICC Rules

The Request shall contain the following information: Names/Address/Contact details of parties

- Names/Address/Contact details of any persons representing the Claimant
- Description of the nature and circumstances of the dispute
- Statement of relief sought, including quantified claims.
- Will ask for estimate of unquantified amount if amount in dispute is partially quantified/unquantified.
- Arbitration agreement
- Comments/proposals on number of arbitrators and their choice of arbitrator
- Comments/proposals on the place of the arbitration, the applicable rules of law and the language of the arbitration



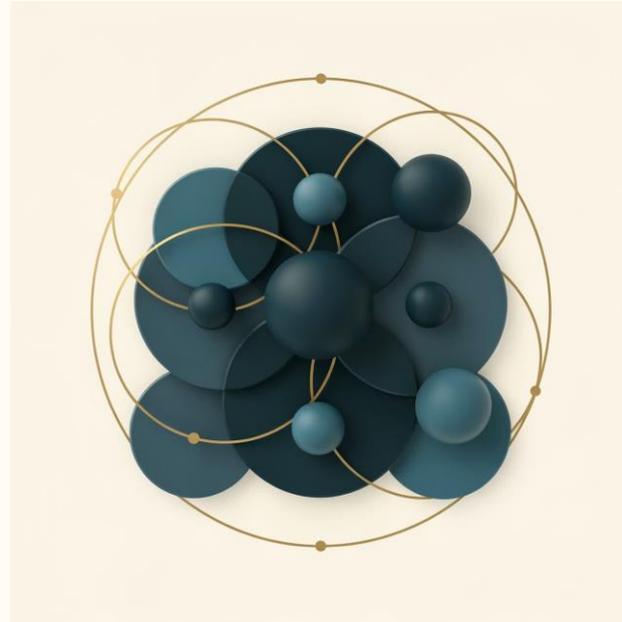
- *Many systems of law supplement the power of arbitral tribunal by*
 - *Giving powers directly to the tribunal*
 - *Authorizing national courts to exercise powers on behalf of the arbitral tribunals or the parties themselves*
- *Example English Arbitration Act 1996, Article 38*

38 General powers exercisable by the tribunal.

- (1) The parties are free to agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings.
- (2) Unless otherwise agreed by the parties the tribunal has the following powers.
- (3) The tribunal may order a claimant to provide security for the costs of the arbitration.

This power shall not be exercised on the ground that the claimant is—

- (a) an individual ordinarily resident outside the United Kingdom, or
 - (b) a corporation or association incorporated or formed under the law of a country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom.
- (4) The tribunal may give directions in relation to any property which is the subject of the proceedings or as to which any question arises in the proceedings, and which is owned by or is in the possession of a party to the proceedings—
 - (a) for the inspection, photographing, preservation, custody or detention of the property by the tribunal, an expert or a party, or
 - (b) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property.
 - (5) The tribunal may direct that a party or witness shall be examined on oath or affirmation, and may for that purpose administer any necessary oath or take any necessary affirmation.
 - (6) The tribunal may give directions to a party for the preservation for the purposes of the proceedings of any evidence in his custody or control.



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. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.



Part III
Powers and Jurisdiction of
the Arbitral Tribunal :
Arbitrator's Powers



Source of an Arbitrator's Power



- **Direct conferment:** Parties expressly agree upon powers they wish the arbitrators to have.
- **Indirect conferment:** Parties have agreed that the arbitration is to be conducted according to pre-established rules that set out the powers of the tribunal



Powers Conferred on the Tribunal by Law

- *Many systems of law supplement the power of arbitral tribunal by*
 - *Giving powers directly to the tribunal*
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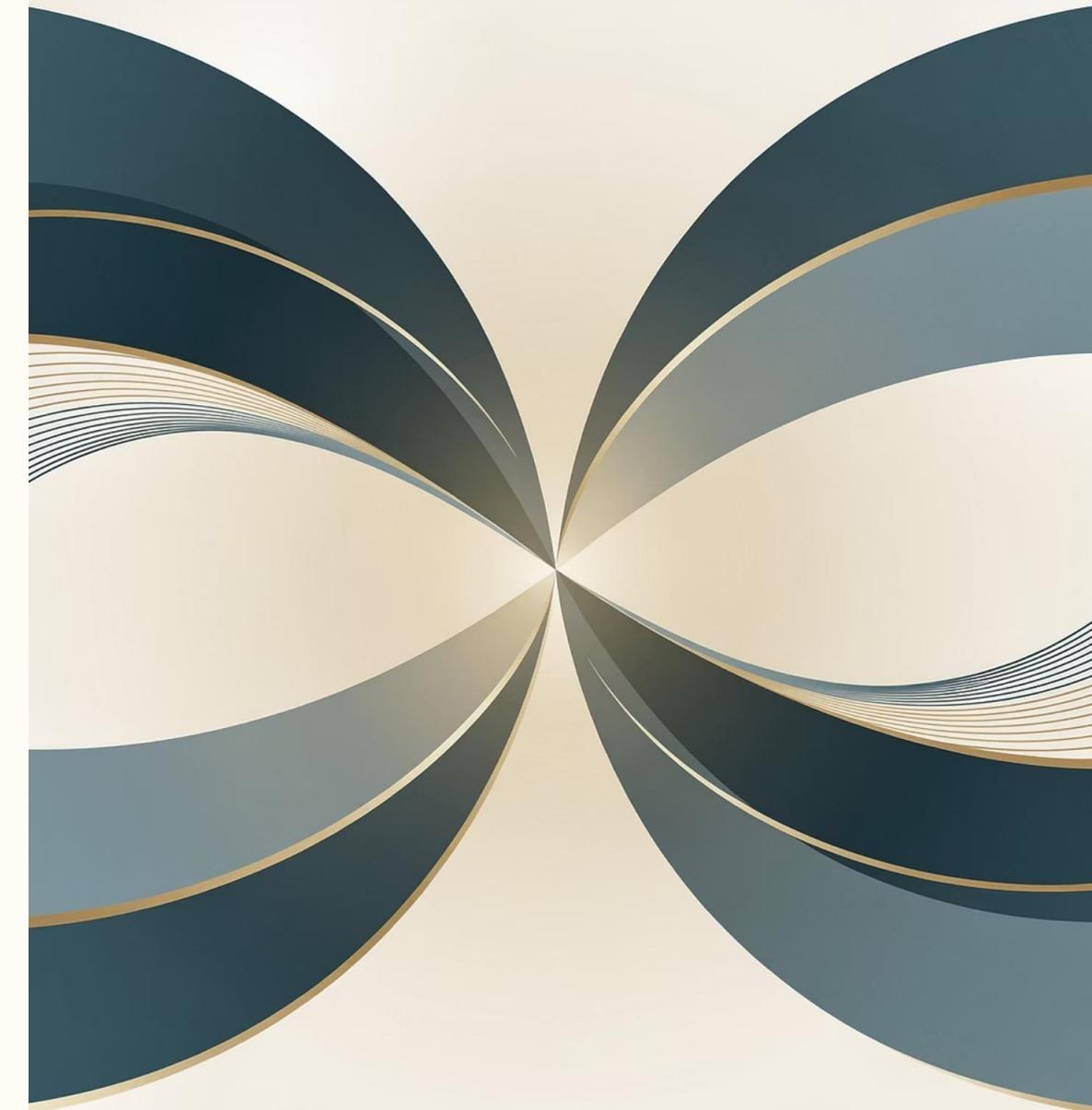
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Power to Determine Procedure

A tribunal has the power to determine procedure, subject to its respect of due process or natural justice or the rules the parties have agreed to. Parties must be afforded a right to be heard and equally treated.

This is embodied in Article 17(1) of the UNCITRAL Rule.



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Power to Issue Interim Measures



- *Interim measures are awards issued by a national court or an arbitral tribunal pending arbitral proceedings for the purpose of protecting or preserving the assets or claims of one of the parties.*
- *Most arbitration rules uphold the power of a tribunal to issue interim measures.*

Example 1: LCIA Rules

Article 25 Interim and Conservatory Measures

25.1 The Arbitral Tribunal shall have the power upon the application of any party, after giving all other parties a reasonable opportunity to respond to such application and upon such terms as the Arbitral Tribunal considers appropriate in the circumstances:

- to order any respondent party to a claim or cross-claim to provide security for all or part of the amount in dispute, by way of deposit or bank guarantee or in any other manner;
- to order the preservation, storage, sale or other disposal of any documents, goods, samples, property, site or thing under the control of any party and relating to the subject-matter of the arbitration; and
- to order on a provisional basis, subject to a final decision in an award, any relief which the Arbitral Tribunal would have power to grant in an award, including the payment of money or the disposition of property as between any parties.

Example 2: UNCITRAL Rules

Article 26

- The arbitral tribunal may, at the request of a party, grant interim measures.**
- An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:**
 - Maintain or restore the status quo pending determination of the dispute;**
 - Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;**
 - Provide a means of preserving assets out of which a subsequent award may be satisfied; or**
 - Preserve evidence that may be relevant and material to the resolution of the dispute.**

Example 3: ICSID Rules

Rule 39 Provisional Measures

- 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. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.
- The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).
- The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.
- The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.



Power to Compel Disclosure of Documents & Security for Costs

Compel Disclosure of Documents

- The tribunal can compel parties to produce documents or evidence.*
- If party fails to comply with the tribunal's order, then the tribunal can draw adverse inferences.*
- Power to compel the disclosure of documents ordinarily does not extend to non-parties.*

Security for Costs

- In a final award, the tribunal can order the losing side to pay the costs of the arbitration.*
- To ensure compliance with an award for costs, a tribunal can require the parties to pay security for costs upfront*



Power to Appoint Experts and Power to Examine Subject Matters

The tribunal can decide to appoint its own independent expert. More frequently, however, the tribunal will hear from party-appointed experts.

When using party-appointed experts, the tribunal can order “dueling experts” to prepare a joint report noting areas of agreement and areas of disagreement.

Power to Examine Subject Matters

Arbitrators are allowed to examine the subject matter, including site visits.

In evaluating an expert report, arbitrators can ask for an expert’s underlying calculations, including asking for copies of the spreadsheets or any other software used by the expert in calculating damages.



Power to Decide the Dispute

- *The tribunal's resolution of the dispute is binding on the parties.*
- *Generally, the tribunal can make an error of law or fact, and the decision cannot be overturned by a supervising court.*
- *The decision of the tribunal can only be vacated on narrow grounds, generally those acknowledged in the New York Convention.*
 - *Incapacity*
 - *Invalid agreement*
 - *Unable to Present Case*
 - *No Notice of the arbitration*
 - *Outside Scope of Arbitration*
 - *Improper Constitution*
 - *Non-arbitrability*
 - *Against the Public Policy of that Country*



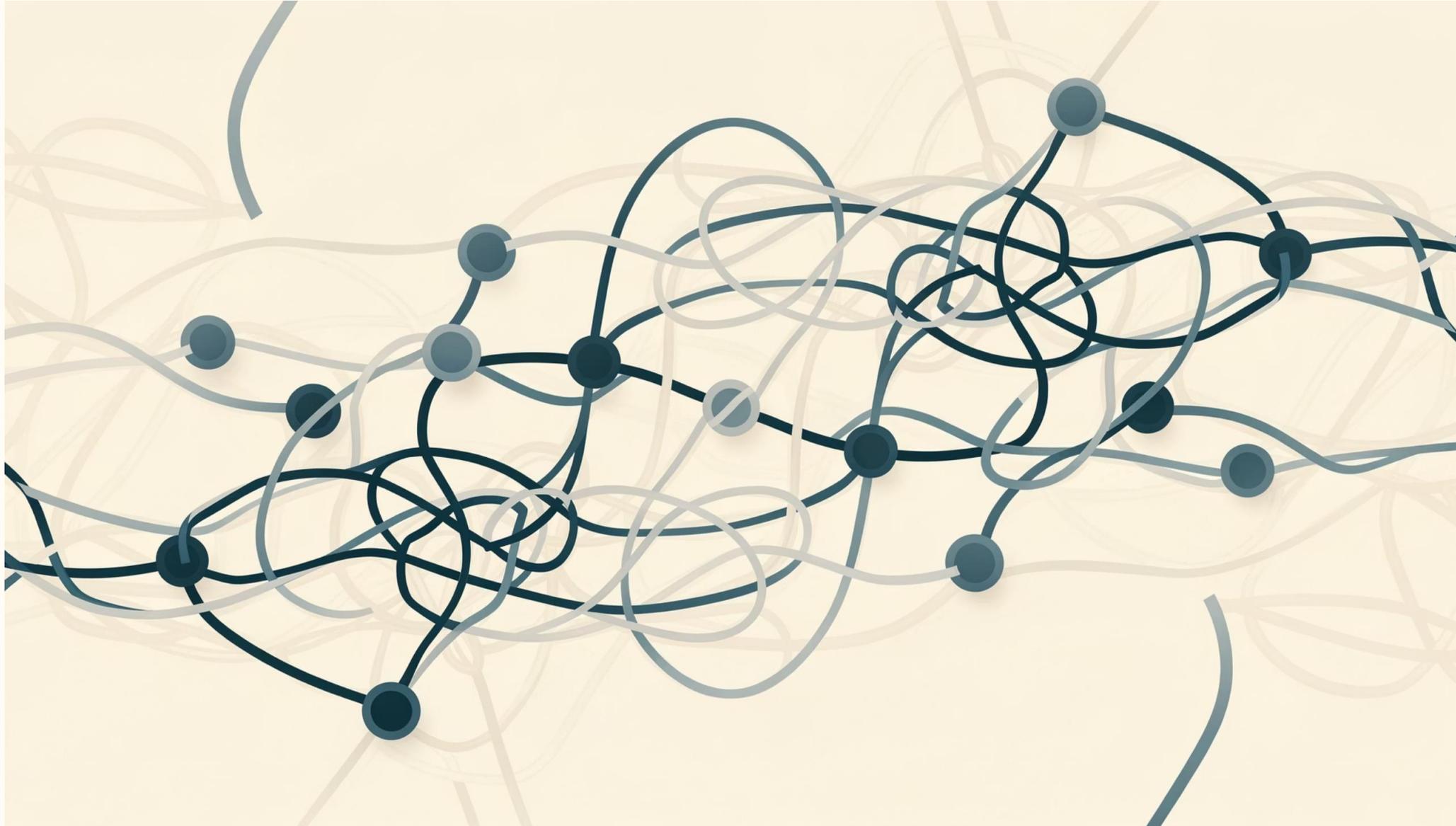
Defects in Consent

The typical contractual defenses are also available for arguing against an arbitration clause.

- *Duress*
- *Incapacity*
- *Undue Influence*
- *Unconscionability*
- *Agreement not in Writing*



Pathological Clauses



Example of a Pathological Arbitration Clause



Marks 3-Zet-Ernst Marks GmbH & Co KG v. Presstek Inc. 455 F.3d 7 (1st Cir. 2006)

"Any dispute...between the Parties arising out of or relating to this Agreement which cannot be settled amicably shall be referred to and determined by arbitration in the Hague under the International Arbitration Rules."

- The arbitration clause does not specify which institution will arbitrate the dispute.*
- The PCA declined to accept the matter.*
- The US Court of Appeals for the First Circuit determined that the clause was pathological and refused to compel arbitration.*



Part IV: Functus Officio Doctrine



Article 32. Termination of proceedings

(1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

(a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the proceedings;

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34(4).



Post-Award Remedies



- Some arbitration laws, such as the Model Law, allow for the tribunal to provide *clarification or interpretation* of the award after it is rendered.
- Under Article 34(4) of the Model Law, a court could remit the case back to the tribunal and revive the tribunal's jurisdiction if it believes there is a potential ground for setting aside the award that could *be cured by remission*.
- Some jurisdictions allow for reconsideration of an award in the event it was procured through *fraud*. See, e.g., *Fougerolle c. Procofrance*, Judgment of 25 May 1992, 1993 Rev. arb. 91

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.



