

# INTERNATIONAL ARBITRATION - Crash Course zur Vorbereitung auf ein Seminar -

**19.10.2020**

■ Prof. Dr. Eckart Brödermann

Maître en droit (Paris), LL.M. (Harvard), FCI Arb (London)  
Rechtsanwalt (Hamburg) / Attorney-at-law (New York)



Universität Hamburg

DER FORSCHUNG | DER LEHRE | DER BILDUNG

# People and Expectations

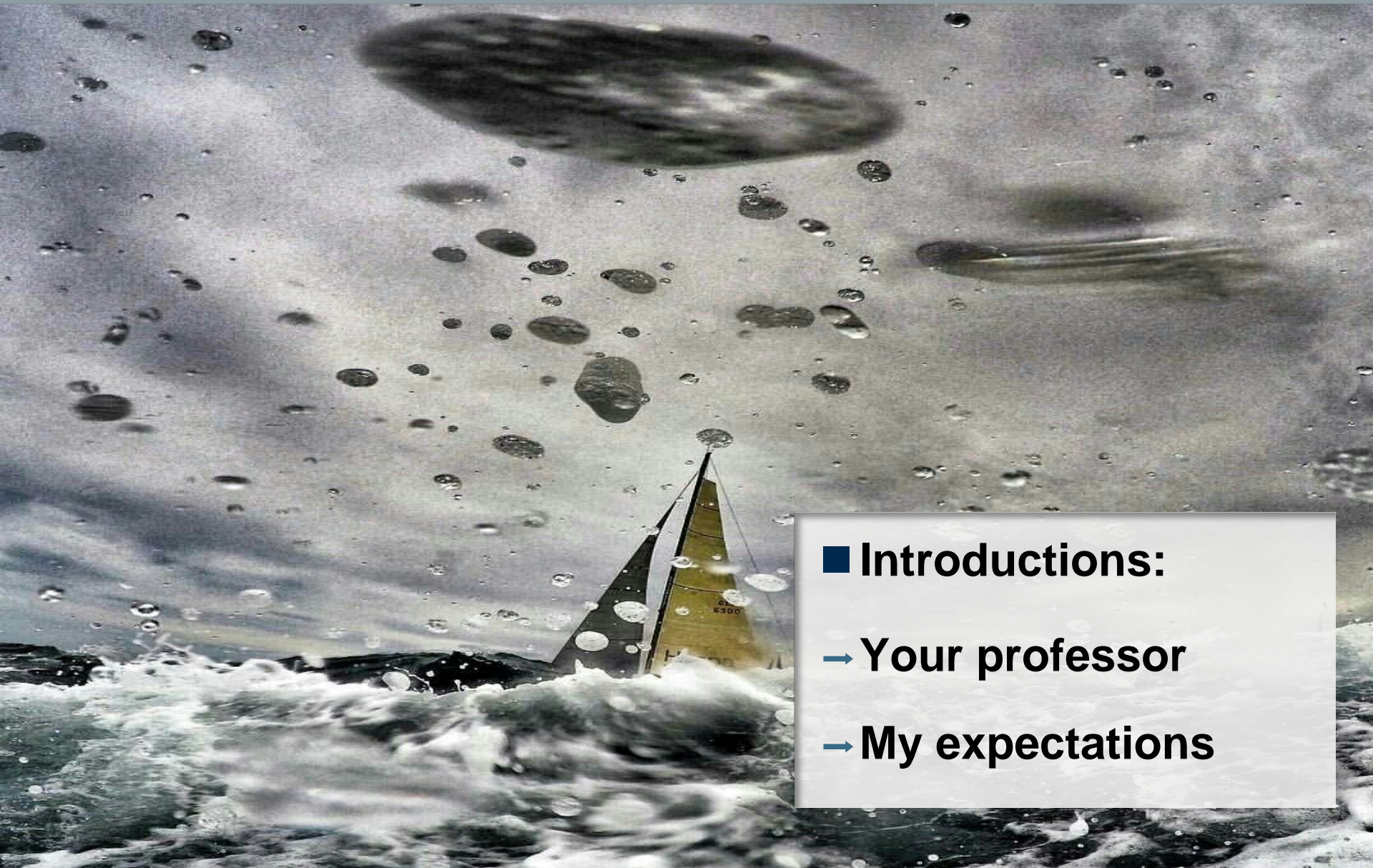
## ■ Introductions:

- Who are you ?
- Your expectations ?





# People and Expectations



## ■ Introductions:

- Your professor
- My expectations

Ich möchte erreichen, dass ..

- Sie das Meiste geben;
- **über sich hinauswachsen;**
- (noch) bessere Juristen werden;
- **Anfängerfehler meiden;**
- wissenschaftlich sauber arbeiten;
- **Sicherheit gewinnen;**
- Ihre Freude an der Rechtswissenschaft ausleben;
- **etwas mehr auf die Teilnahme an der globalen Wirtschaft vorbereitet werden;**
- → und den 28. Willem C. Vis Moot Court!

■ **Make the most of it!**



- Der heutige Vortrag dient dazu, einen Überblick zu vermitteln.
- Es geht um „Gedankenstützen“, „Erinnerungen wecken“ oder „Anregungen“ zum Selbststudium.
- In 12 Std. wollen wir so viel Stoff ansprechen, wie man ihn sonst in ca. 36 Std. vermittelt.

- These slides serve as a basis **for discussions with students at Hamburg University.**
- The purpose of these slides is not to be exhaustive. Some slides contain „buzz words“ as a *starting point* for discussions.
- Students shall rely, in addition, on the study materials provided.
- **Moreover:**
  - Concepts of arbitration differ.
  - Things which are right in this part of the world (Europe) may be different elsewhere,
  - see e.g. the Arbitration Law in Art. 975, 800 of the Algerian *Code de Procédure Civile et Administrative*.



# International Arbitration

**A**

**Your Expectations**

**B**

**My Expectations**

### International Arbitration

#### Generating Know How

##### ■ Lectures

- 19.10.2020 (15 – 19 Uhr): Organisation, Crash-Kurs I
- 21.10.2020 (16 – 20 Uhr): Crash-Kurs II,
- 26.10.2020 (16 – 18 Uhr): Crash-Kurs III,
- 29.10.2020 (18 – 20 Uhr): Crash-Kurs III (cont'd)
- Seminararbeit, ggf. Vis Moot Court Teilnahme
- z.B. *Brödermann/Rosengarten*, Internationales Privat- und Zivilverfahrensrecht (8. Aufl. 2019), 2. Teil m. vielen w.N.

**Seminar-  
Arbeit /  
Vis Moot**

### Blockseminar

**10./11. Januar 2021**

**Hotel Waldhalle, Waldhallenweg, 23879 Mölln**



# International Arbitration: Agenda (1)

**Why?**

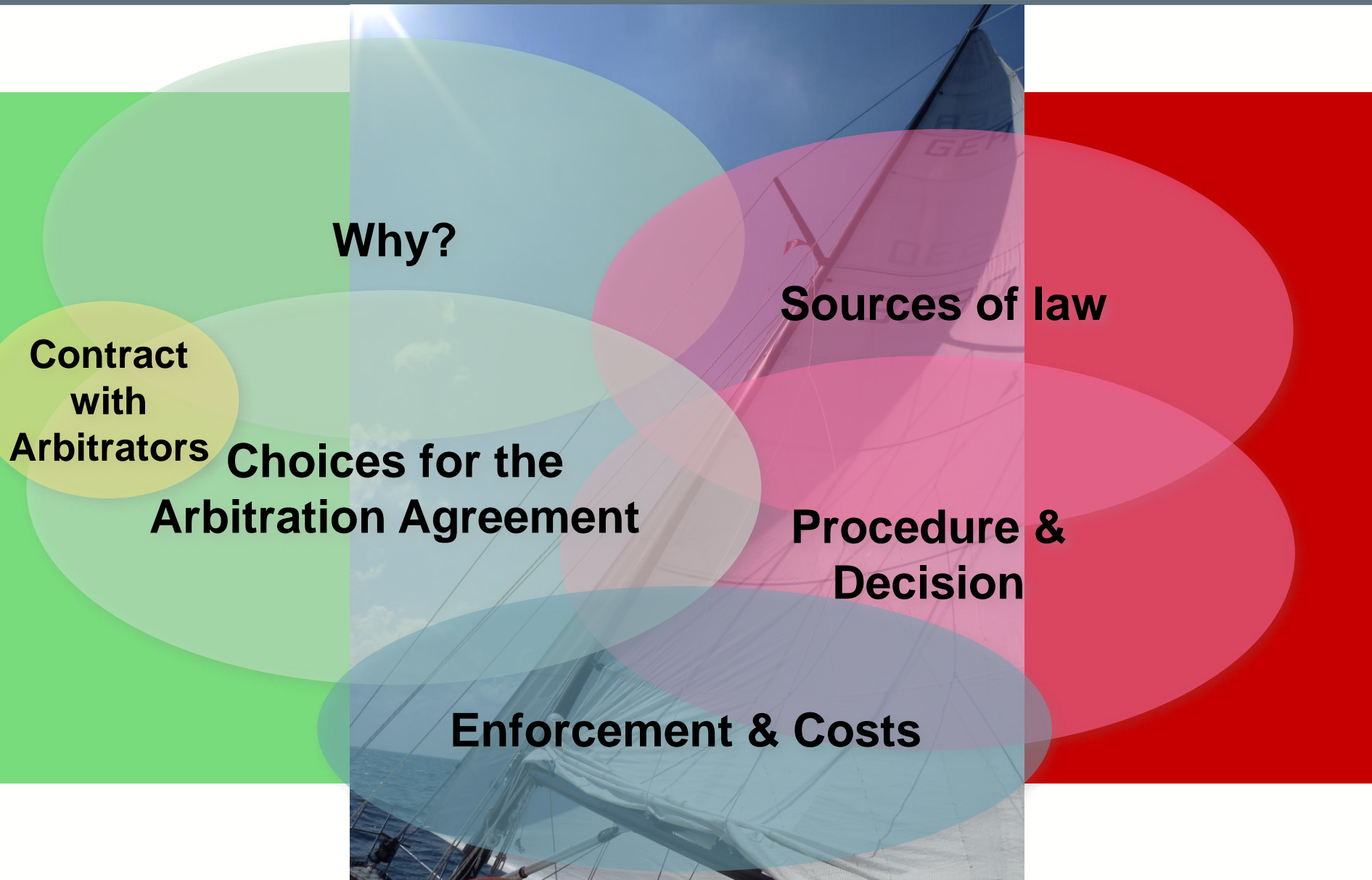
**Sources of law**

**Choices for the  
Arbitration Agreement**

**Procedure &  
Decision**

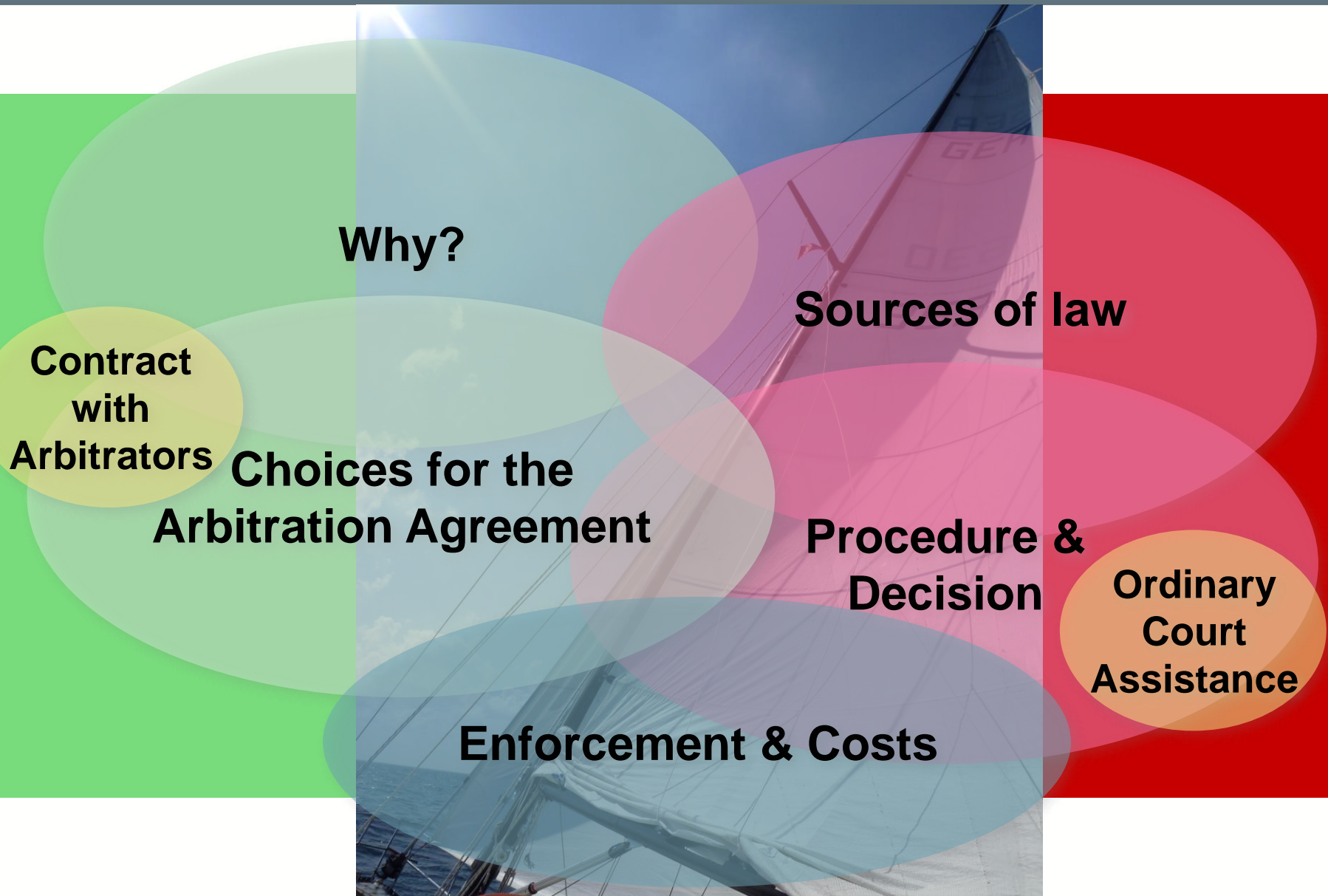
**Enforcement & Costs**

# International Arbitration: Agenda (1)





# International Arbitration: Agenda (1)



# International Arbitration: Agenda (3)

**Why?**

**Contract  
with  
Arbitrators**

**Choices: The  
Arbitration Clause**

**Sources of law**

**Applicable  
Substantive  
Law /  
Rules of Law**

**Procedure &  
Decision**

**Ordinary  
Court  
Assistance**

**Enforcement & Costs**

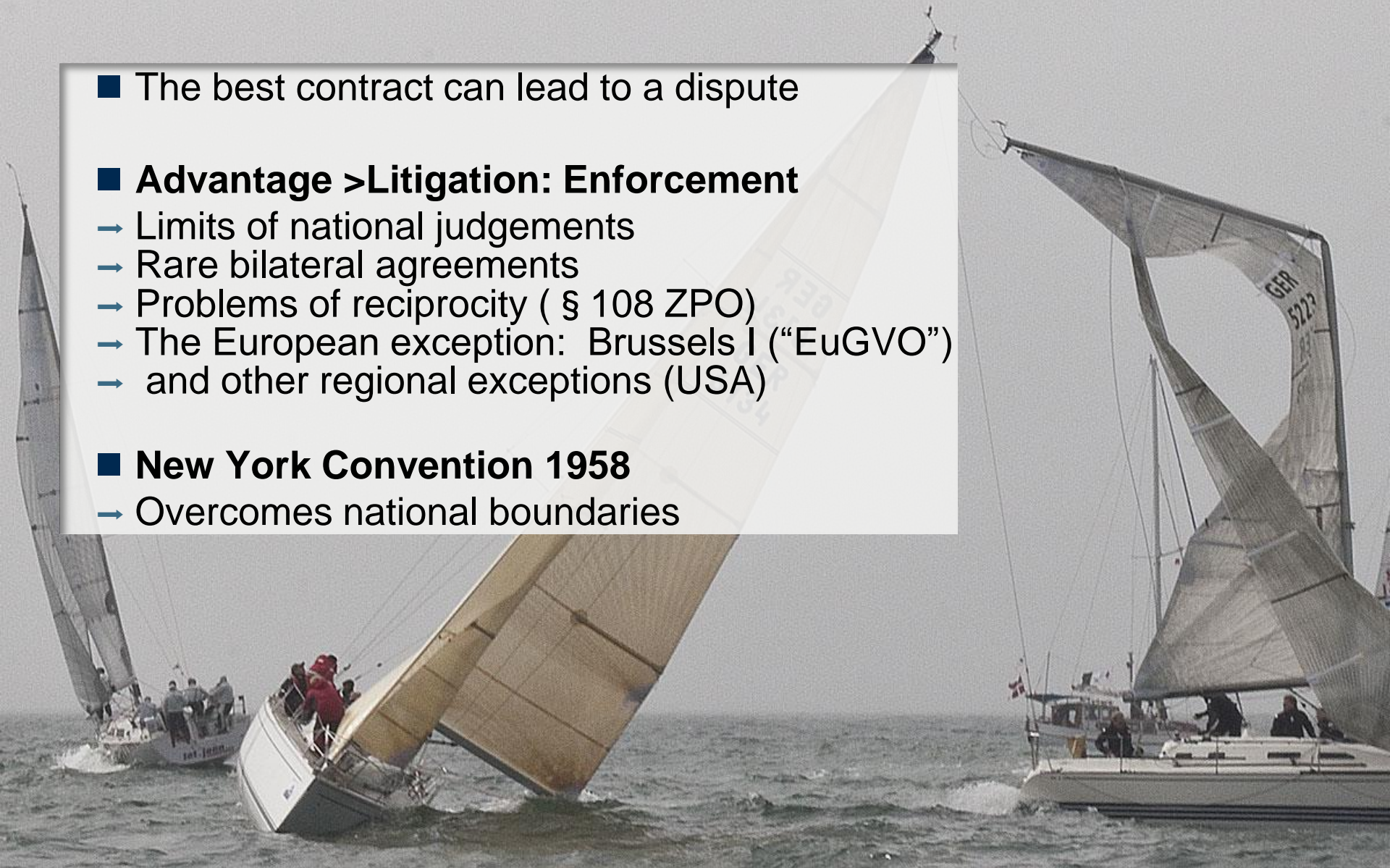


A low-angle, upward-looking photograph of a sailboat. A large, vibrant blue sail dominates the left side of the frame, with its intricate network of white lines clearly visible. To the right, the white mast and various rigging lines extend towards the top of the image. The background is a clear, pale blue sky. The overall composition conveys a sense of height and openness.

**A**

**Why arbitration?**

- The best contract can lead to a dispute
- **Advantage > Litigation: Enforcement**
  - Limits of national judgements
  - Rare bilateral agreements
  - Problems of reciprocity ( § 108 ZPO)
  - The European exception: Brussels I (“EuGVO”)
  - and other regional exceptions (USA)
- **New York Convention 1958**
  - Overcomes national boundaries





- The best contract can lead to a dispute
- **Advantage > Litigation: Enforcement**
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  - Overcomes national boundaries →

**A „must to know“  
for international  
business contracts**



### ■ Other advantages: Freedom

- Choice of arbitrators
- Choice of rules
- Choices of venues
- Choice of languages
- Choices of confidentiality
- Time & Money

### ■ History

- 1795: Arbitration as a constitutional right
- But the history of arbitration is yet older

French Constitution of 5<sup>th</sup> Fructidor  
Year III (1795), Art. 210:

*“Il ne peut être atteinte au droit de  
faire prononcer sur les différends par  
les arbitres au choix des parties.”*



### ■ Other advantages: Freedom

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#### China:

***Tiaorem* → Village elders**  
**(Zhou dynasty, 1027-771 BC)**  
→ **More of a mediation concept**  
→ **Community > Individual**  
(Kun Fan, Arbitration in China, 2013)

French Constitution of 5<sup>th</sup> Fructidor  
Year III (1795), Art. 210:

*“Il ne peut être atteinte au droit de  
faire prononcer sur les différends par  
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### ■ Negotiations

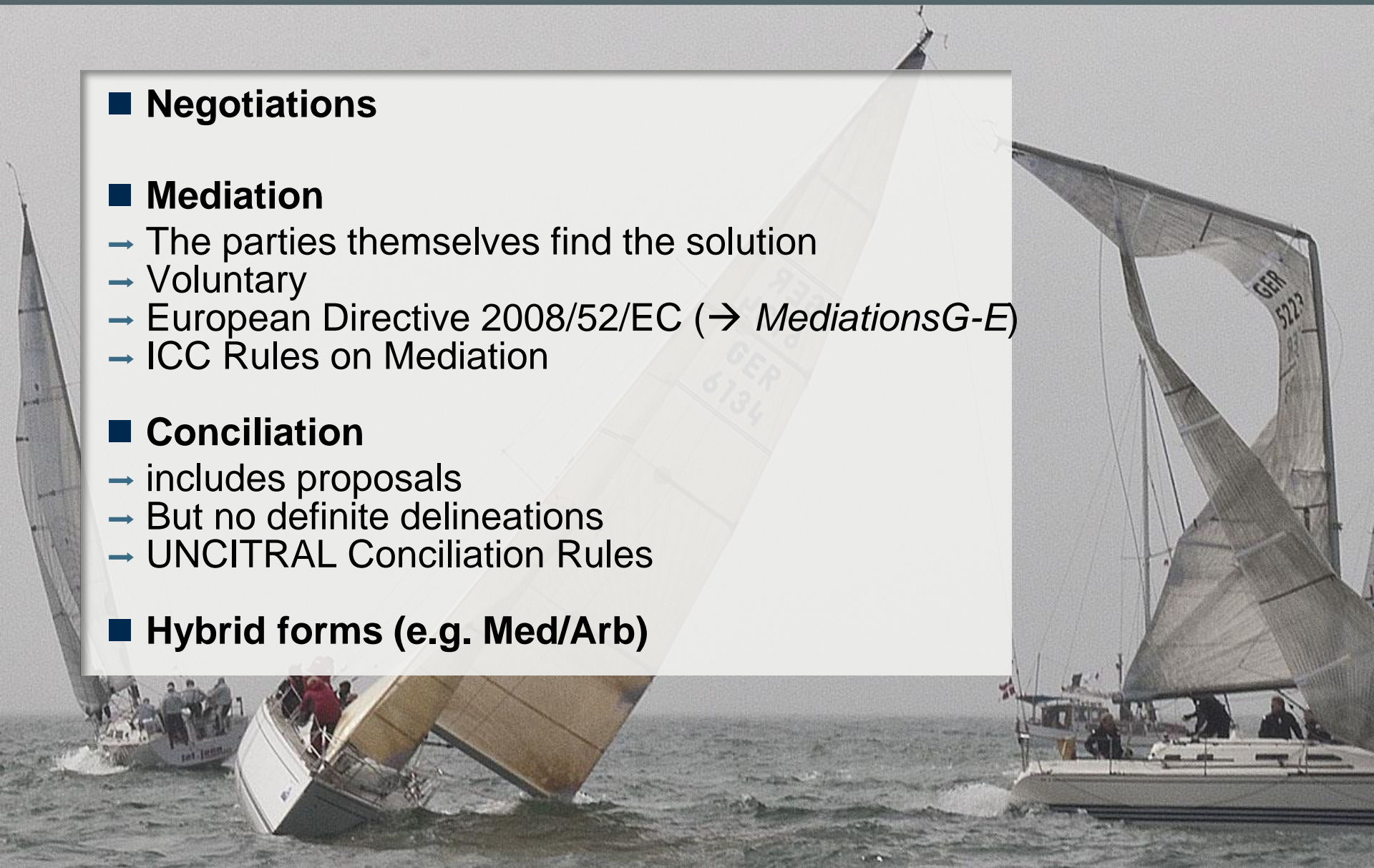
### ■ Mediation

- The parties themselves find the solution
- Voluntary
- European Directive 2008/52/EC (→ *MediationsG-E*)
- ICC Rules on Mediation

### ■ Conciliation

- includes proposals
- But no definite delineations
- UNCITRAL Conciliation Rules

### ■ Hybrid forms (e.g. Med/Arb)





### ■ Mediation

#### § 1 MediationsG

(1) Mediation ist ein **vertrauliches Verfahren**, bei dem Parteien mit Hilfe eines Mediators **freiwillig und eigenverantwortlich** eine **einvernehmliche Beilegung** ihres Konflikts anstreben.

Die Mediation kann durchgeführt werden

1. unabhängig von einem Gerichtsverfahren (**außergerichtliche Mediation**),
2. während eines Gerichtsverfahrens außerhalb des Gerichts (**gerichtsnahe Mediation**) oder
3. innerhalb des Gerichts von einem nicht entscheidungsbefugten Richter (**richterliche Mediation**).

(2) Ein Mediator ist eine **unabhängige und neutrale Person ohne Entscheidungsbefugnis**, die die Parteien durch die Mediation führt.

§ 2 (2) MediationsG **Der Mediator kann die Mediation beenden, insbesondere wenn er der Auffassung ist, dass eine eigenverantwortliche Kommunikation oder eine Einigung der Parteien nicht zu erwarten ist.**

→ No result without cooperation!

### ■ Mediation

#### Article 5 ICC ADR-Rules: Conduct of the ADR Procedure

1 The Neutral and the parties shall promptly **discuss**, and seek to reach agreement upon, the **settlement technique** to be used, and shall discuss the specific ADR procedure to be followed.

2 In the absence of an agreement of the parties on the settlement technique to be used, **mediation** shall be used.

3 The Neutral shall conduct the procedure in such manner as the Neutral sees fit. In all cases the Neutral shall be guided by the **principles of fairness and impartiality** and **by the wishes of the parties**.

4 In the absence of an agreement of the parties, the Neutral shall **determine the language or languages** of the proceedings and the **place of any meetings** to be held.

5 Each party shall cooperate in good faith with the Neutral.

→ Result: private agreement

→ No result without cooperation!



### ■ Mediation

#### Article 5 ICC ADR-Rules: Conduct of the ADR Procedure

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3 The Neutral shall conduct the procedure in such manner as the Neutral

**Unenforceable by  
itself**

**(no „title“);**

**Need to bring a  
claim for enforcement**

**Except for China:**

**PRC a Chinese**

**mediation agreement**

**is binding  
in China**

**(new mediation law)**

**principles of fairness**

**and impartiality and by the wishes of the parties.**

4 In the absence of an agreement of the parties, the Neutral shall **determine**

**the date, time or languages of the proceedings and the place of any meetings**

5 Each party shall **cooperate in good faith** with the Neutral.

**→ Result: private agreement**

**→ No result without cooperation!**



### ■ Conciliation

#### Beijing-Hamburg Conciliation Rules

##### Preamble

Whereas the United Nations General Assembly in its resolution 35/52 adopted on 4th December, 1980, recommended the use of the **Conciliation Rules of the United Nations Commission on International Trade Law** (the "UNCITRAL Conciliation Rules") ..

##### Article 2 Aim of Conciliation

Where the parties wish and agree that disputes arising between them as mentioned under Article 1 above shall be settled in an **amicable manner**, on the basis of **mutual understanding**, fairness and justice, a conciliator (or conciliators, as the case may be) shall assist them in reaching such a settlement in accordance with these Rules.

##### Article 5 Settlement

The parties may agree, at any time before or during the conciliation proceedings, that they will accept as final and binding a settlement **proposal made by the conciliator**.

→ No result without cooperation!



### ■ Conciliation

**Beijing-Hamburg Conciliation Rules**

**China**

**Beijing Arbitration Commission („BAC“) Mediation Rules**

Preamble  
Whereas the United Nations Commission on International Law (UNCIL) adopted on 4th December, 1980, recommended the use of the Conciliation Rules of the United Nations Commission on International Law (UNCIL) ...

**with a time limit of 30 days after**

**approval of the mediator (Art. 21 BAC Rules)**

Article 2 Aim  
Where the parties wish and agree that disputes arising between them as mentioned under Article 1 shall be referred to a conciliator (or conciliators), as the case may be, shall assist them in reaching such a settlement in accordance with these Rules.

**Chinese alternative: CIETAC mediation**

**China**

**UNCITRAL Model Law → Conciliation**

Article 5 Settlement  
The parties may agree, at any time before or during the conciliation proceedings, that they will accept as final and binding a settlement proposal made by the conciliator.

**→ No result without cooperation!**

### ■ Hybrid

#### ■ “Step-Up” or “Waterfall” clauses:

- **Negotiation:** “The Parties undertake to settle disputes which may arise in good faith by negotiation...”

- **Escalation**, e.g. Operative level → Management or Owner level

#### ■ Mediation

- **Successful** → appropriate way to secure a title (by arbitration and “**award by consent**”)
- **Unsuccessful** → ...

#### ■ ... Arbitration

→ Arbitration if no mediation result



### ■ Hybrid

#### Example ICC ADR + subsequent ICC Arbitration

*In the event of any dispute arising out of or in connection with the present contract, the parties **agree to submit** the matter to settlement proceedings under the **ICC ADR Rules**. If the dispute has not been settled pursuant to the said Rules within **45 days following the filing** of a Request for ADR or within such other period as the parties may agree in writing, **such dispute 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 of Arbitration.*

→ Arbitration if no mediation result



### ■ Hybrid

## Example from China

Example Beijing Arbitration Commission („BAC“)  
continued:

*In the event of any dispute arising out of or in connection with the matter to settle, the parties 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 of Arbitration.*

**Request for arbitral award to record the settlement is possible (Art. 22 BAC Rules);**

**Mediator may not become arbitrator, unless otherwise agreed by the parties (Art. 25 BAC Rules)**

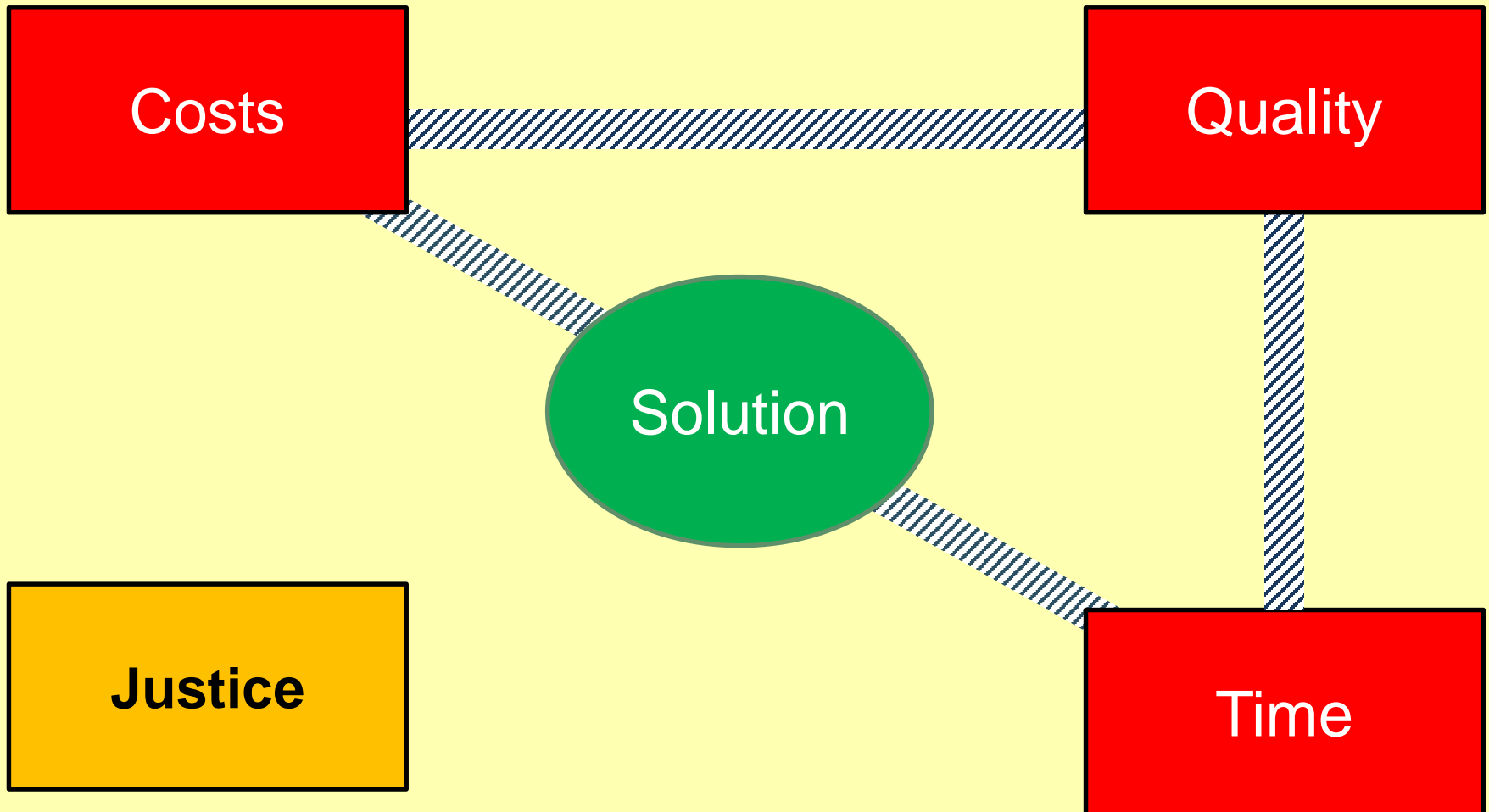
**→ Arbitration if no mediation result**



# Schiedsgerichtsbarkeit oder staatliche Gerichte

RA J. H. Nedden (Moderator)

RA Prof. Dr. E. Brödermann / RA M. Hagner / RAin Dr. F. Mazza / VRiLG D. Müller-Fritsch



## B

## Sources of Law



**For which  
question?**

**„qualification“; or  
„classification“**

**B**

**Sources of Law**

# International Arbitration

**For which  
question?**

**Issue of  
arbitration law**  
(e.g. valid  
Arbitration  
Agreement)

**„qualification“; or  
„classification“**

## **B** Sources of Law



# International Arbitration

**For which  
question?**

**Issue of  
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(e.g. valid  
Arbitration  
Agreement)

**Procedure law**  
(e.g. assistance  
by a state court)

„qualification“; or  
„classification“

## **B** Sources of Law

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**The substance  
of the dispute:**  
(e.g. contract)

„qualification“; or  
„classification“

## **B** Sources of Law



**For which question?**

**Issue of arbitration law**  
(e.g. valid Arbitration Agreement)

**Procedure law**  
(e.g. assistance by a state court)

**The substance of the dispute:**  
(e.g. contract)

(distinct e.g. from power of attorney, Transfer of property)

„qualification“; or „classification“

## **B** Sources of Law

# International Arbitration

**International  
Procedural Law**

**Issue of  
arbitration law**  
(e.g. valid  
Arbitration  
Agreement)

**Procedure law**  
(e.g. assistance  
by a state court)

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of the dispute:**  
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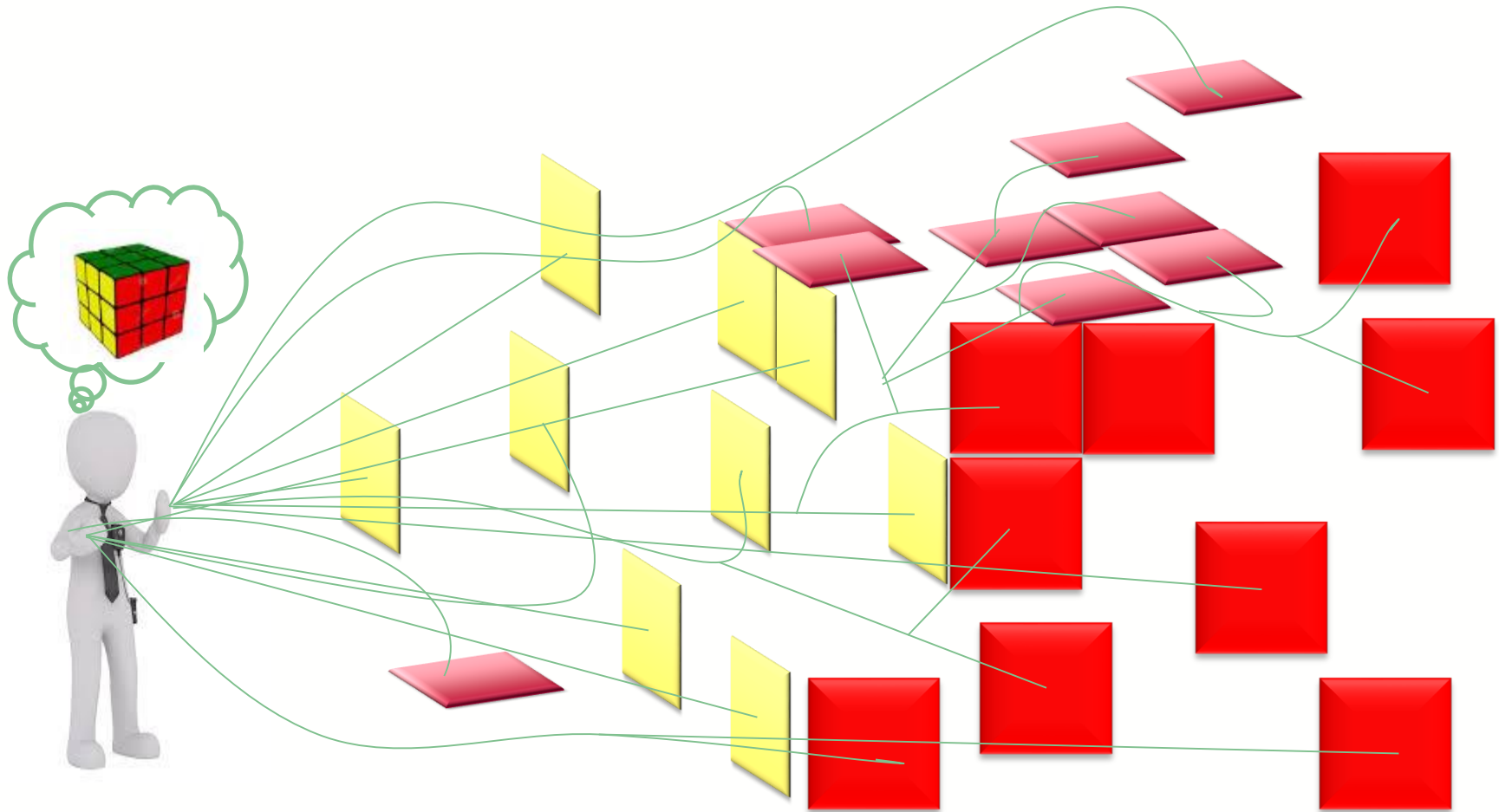
**B**

**Sources of Law**

**Private  
International Law  
(large sense)**



## The Ringmaster Perspective



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## Public International Law

### ■ New York UN Convention (“NYC”) 1958

- 149 states
- replacing the Geneva Protocol 1923 and the Geneva Agreement 1927 (Art. VII (2) NYC)

### ■ European Geneva Convention 1961

- important originally for East-West Trade
- all ca. 30 member states are also members of the NYC
- incl. **Principle of Most Favored Treatment** (Art. X para. 7)

### ■ (Additional) Paris Agreement 1962

- Goal: simplification of the Geneva Convention System
- 8 member states

**Issue of  
arbitration law**  
(e.g. valid  
Arbitration  
Agreement)



## Public International Law

**The NYC contains  
more than recognition  
and enforcement**

### ■ New York UN Convention (“NYC”) 1958

- 149 states
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### ■ (Additional) Paris Agreement 1962

- Goal: simplification of the Geneva Convention System
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**Issue of  
arbitration law,  
(e.g. valid  
Arbitration  
Agreement)**

- No European Law but
- National arbitration law
  - often based on **UNCITRAL Model Law**
  - e.g. in Germany ( § § 1025 - 1066 ZPO)

Ca. 70 jurisdictions

- ad hoc arbitration:
  - e.g. “ZPO” (only law)
  - or **UNCITRAL Arbitration Rules** (made for *ad hoc* arbitration) **plus** law

.., procedure &  
(formal aspects)  
of decision  
making

- Institutional Procedural Rules
  - e.g. International Chamber of Commerce
  - Increasingly based on **UNCITRAL Arbitration Rules** (e.g. Chinese European Arbitration Centre)

- National substantive law
  - e.g. on arbitrability

- Provisions in the Arbitration Agreement



## Public International Law

- New York Convention
  - Art. 5 (1)(c) NYC
- Geneva Convention
  - Art. VIII Geneva Convention

## ■ National arbitration law

- **UNCITRAL Model Law** (Art. 31)

as transferred into national law,  
e.g. in Germany

- e.g. § 1054 ZPO

## ■ Institutional Procedural Rules

**Here:**  
**(formal aspects)**  
**of decision**  
**making**

## Public International Law

- New York Convention
  - Art. 5 (1)(c) NYC
- Geneva Convention
  - Art. VIII Geneva Convention

## ■ National arbitration law

- **UNCITRAL Model Law** (Art. 31)

as transferred into national law  
e.g. in Germany, China

- e.g. § 1054 ZPO

## ■ Institutional Procedural Rules

**Here:**  
**(formal aspects)**  
**of decision**  
**making**

### Art. 31 Model Law:

#### Form and contents of the award

The award shall be made in writing ..

signed ....

shall state the reasons

upon which it is based ...

state its date and the place of  
arbitration...



# B Sources of law: On substantive law and its determination

„Ingredients“

## ■ Public International Law

### → New York Convention

- Art. 5 (2) NYC

### → Geneva Convention

- Art. VII on applicable law

## ■ European Law

### → Private International Law to determine the law applicable on the dispute

### → Rome I Regulation (Art. 1 para. 2 (e) debate e.g. for “rules of law”)



## ■ National Law

### → National arbitration law (e.g. § 1051 ZPO / Art. 28 UNCITRAL Model Law debate)

### → *Ex aequo et bono* alternative

## ■ Institutional Procedural Rules (e.g. Art. 35 CEAC Hamburg Arbitration Rules)

**Decision**  
(substantive aspects)

Private  
International  
Law



# B Sources of law: On substantive law and its determination

„Ingredients“

## ■ Public International Law

### → New York Convention

- Art. 5 (2) NYC

### → Geneva Convention

- Art. VII on applicable law

Plus uniform substantive law like CISG, CMR, COTIF if applicable (insofar no need for PIL)

## ■ European Law

- Private International Law to determine the law applicable on the dispute
- **Rome I Regulation** (Art. 1 para. 2 (e) debate e.g. for “rules of law”)

## ■ National Law

- **National arbitration law** (e.g. § 1051 ZPO / Art. 28 UNCITRAL Model Law debate)
- *Ex aequo et bono* alternative

- **Institutional Procedural Rules** (e.g. Art. 35 CEAC Hamburg Arbitration Rules)

**Decision**  
(substantive aspects)

Private  
International  
Law („PIL“)



# B Sources of law: On substantive law and its determination

„Ingredients“

## ■ Public International Law

→ New York Convention

Art. 5 (2) NYC

→ Geneva Convention

→ applicable law

## ■ Private International Law

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## ■ National Law

→ Institutional Procedural Rules

→ **National Arbitration law** (e.g. § 1051 ZPO / UNCITRAL Model Law debate)  
→ *et bono* alternative

Overriding  
Eu law?

Lex  
specialis?

**Decision**  
(substantive aspects)

# B Sources of law: On substantive law and its determination

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→ Institutional Procedural Rules

→ **National Arbitration law** (e.g. § 1051 ZPO / UNCITRAL Model Law debate)  
→ *et bono* alternative

**A hot topic  
→ Later.**

The opening door for:

- **UNIDROIT Principles** of International Commercial Contracts 2016;
- Generally **soft law**;
- The **avoidance of German law on unfair terms** in business to business contracts
- permitting adaptation reasonable **international standards**



- **Bilateral Investment Treaties**
- **Function**
- **‘Investment’ – definitions**
- **Fair & Equitable Treatment**
- **ICSID (Washington, D.C.) , UNCITRAL Arbitration**
- **Trends (incl. EU/Brexit); ECJ Achmea**



- **Contract between the arbitrator(s) and the parties: An issue of Substantive Contract Law**
- **Private International Law** to determine the law applicable on the contract **with the arbitrator**
  - Art. 3, 4 Rome I Regulation (exception in Art. 1 para. 2 (e) **n/a**)
- **Arbitration agreement**
  - It can contain conditions for the contract with the arbitrator
- **National arbitration law?**



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  - Conditions on validity?



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- **National arbitration law**
  - Conditions on validity?

**Party Appointment Confirmation?**

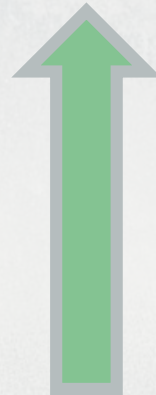


## Public International Law

- New York Convention (Art. V et al.)
- Geneva Convention
- Bilateral Conventions

## National civil procedure law

→ e.g. § 1061 German Civil Procedure Law (“ZPO”) which solely refers to the NYC and other treaties



Enforcement



## National Law: A simple reminder

Section 1061 German Code of Civil Procedure (Translation as per DIS-Website): „Foreign Awards“

(1) Recognition and enforcement of foreign arbitral awards **shall be granted in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958**

(Bundesgesetzblatt [BGBl.] 1961 Part II p. 121). The provisions of other treaties on the recognition and enforcement of arbitral awards shall remain unaffected.

(2) If the declaration of enforceability is to be refused, the court shall rule that the arbitral award is not to be recognized in Germany.

(3) If the award is set aside abroad after having been declared enforceable, application for setting aside the declaration of enforceability may be made.



## Part Three, Chapter 19 to Chapter 22 Chinese Civil Procedure Law

### Part Three Procedure of Enforcement

#### Chapter 19 General Provisions

**Article 224** Legally effective judgments or rulings of civil cases and the parts of judgments or rulings related to property in criminal cases shall be enforced by the people's court of first instance or the people's court at the same level where the property that is to be enforced is located. Other legal documents that are to be enforced by a people's court as prescribed by law shall be enforced by the people's court located in the place where the person to be enforced has his domicile or where the property that is subject to the enforcement is located.

**Article 225** If a party or any interested party considers that the enforcement is in violation of legal provisions, it may raise a written objection to the people's court in charge of the enforcement. If a party or any interested party raises a written objection, the people's court shall review the written objection within 15 days after receiving it. If the objection is tenable, the people's court shall rule to cancel or correct the enforcement; and if the objection is untenable, the people's court shall rule to reject the objection. If a party or any interested party is not satisfied with the ruling, it may apply for reconsideration to the people's court at the next higher level within 10 days after the ruling is served.

**Article 226** If the people's court fails to make enforcement within six months after receiving the application for enforcement, the person who has applied for the enforcement may apply for enforcement to the people's court at the next higher level. Upon review, the people's court at the next higher level may order the original people's court to make enforcement within a specified period of time, or may decide to make enforcement by itself or direct any other people's court to make enforcement.

**Article 227** If, during the course of enforcement, a person who is not involved in the case raises a written objection to the subject matter of the enforcement, the people's court shall review the written objection within 15 days after receiving it. If the objection is tenable, the people's court shall rule to suspend the enforcement on the subject matter; and if the objection is untenable, it shall be rejected. If a person who is not involved in the case or a party involved is not satisfied with the ruling and considers that there is an error in the original judgment or ruling, it shall be dealt with according to the procedure of adjudication supervision; and if a written objection is irrelevant to the original judgment or ruling, the relevant party may file a lawsuit with the people's court within 15 days after the ruling is served.

**Article 228** The enforcement shall be carried out by the enforcement officer.

The people's court may, when necessary, establish executive organs.

In carrying out a compulsory enforcement measure, the enforcement officer shall show his credentials. After the enforcement is completed, the enforcement officer shall make a written record for the particulars of the enforcement, and have it signed or sealed by the persons concerned on the scene.

The people's court may, when necessary, establish executive organs.

China, Thailand and others:  
Integration into national law



**Article 229** If a person or property to be subject to enforcement is in another locality, the people's court in that locality may be entrusted to enforce the enforcement. The entrusted people's court shall begin the enforcement within 15 days after receiving a power of attorney and shall not refuse to do so. After the enforcement has been completed, the entrusted people's court shall promptly inform the entrusting people's court with the result of the enforcement by writing. If the enforcement has not been completed within 30 days, the entrusted people's court shall also inform the entrusting people's court with the particulars of the enforcement by writing.

If the entrusted people's court fails to enforce the enforcement within 15 days after receiving the power of attorney, the entrusting people's court may request the people's court at a higher level of the entrusted people's court to instruct the entrusted people's court to enforce the enforcement.

**Article 230** If, during the course of enforcement, both disputing parties reconcile themselves and reach a settlement agreement on their own initiative, the enforcement officer shall make a written record of the terms of the settlement and have both parties affix their signatures or seals onto the record.

If the execution applicant enters into a mediation agreement with the person subject to execution as a result of fraud or coercion by the latter or one party concerned fails to fulfil the mediation agreement, the people's court may, at the request of the other party, resume the execution of the legal document which was originally effective.

**Article 231** During the course of enforcement, if the person to be enforced provides a surety, the people's court may, with the consent of the person who has applied for the enforcement, decide to postpone the enforcement or defer the time limit for the enforcement. If the person to be enforced fails again to perform his duty within the new time limit, the people's court shall have the power to enforce the guaranteed property of the person to be enforced or the property of the guarantor.

**Article 232** If the citizen to be enforced dies, his debts shall be paid off from his estate; if a legal person or any other organization to be subject to enforcement is terminated, the party that succeeds to its rights and obligations shall be the obligee.

**Article 233** After an enforcement has been enforced according to a judgment, ruling, or legal document, if a definite error is discovered in such a judgment, ruling, or legal document and therefore such a judgment, ruling, or legal document has been revoked by a people's court, the people's court shall, with respect to the property which has been enforcement, make a ruling to order the person who has received the enforcement property to return the property. If he refuses to return the property, a compulsory enforcement shall be enforced on him.

**Article 234** The provisions of this Part shall be applicable to the enforcement of a mediation agreement drawn up by a people's court.

**Article 235** The people's procuratorate shall have the right to perform legal supervision over the enforcement of civil cases.

China, Thailand and others:  
Integration into national law



### Chapter 20 Application and Referral of Enforcement

**Article 236** All the parties shall comply with a legally effective judgment or ruling in a civil case. If a party refuses to comply, the other party may apply to the people's court for enforcement, or the judge may refer the matter to an enforcement officer for enforcement.

All the parties shall also comply with a mediation agreement or other legal documents that are to be enforced by a people's court. If a party refuses to comply, the other party may apply to the people's court for enforcement.

**Article 237** If a party fails to comply with an award made by an arbitration institution that was established according to law, the other party may apply for enforcement to the people's court which has jurisdiction over the case. The applied people's court shall enforce the award.

If the party whom the application of enforcement is filed against provides evidence to prove that the arbitration award involves any of the following circumstances, the people's court shall, after examination and verification by a collegial bench, rule to revoke the enforcement of the arbitration award:

(1) Where the parties have not stipulated an arbitration clause in the contract or have not subsequently reached a written agreement on arbitration;

(2) Where the matters being arbitrated exceed the scope of the arbitration agreement or the authority of the arbitration agency;

(3) Where the formation of an arbitration tribunal or the procedure of arbitration is not in conformity with the legal procedure;

(4) The evidence based on which the arbitral award is made is falsified;

(5) The other parties conceal the evidence from the arbitral organ and is sufficient to affect the impartiality of the arbitral award; or

(6) Where the arbitrators involved in any of conducts of embezzlement, bribery, collusion, or other illegal acts in violation of the law in rendering arbitration award.

If a people's court determines that the enforcement of an arbitration award would contradict the social and public interest, it shall make a ruling of not to enforce the award.

The above-mentioned order shall be served on both parties and the arbitration agency.

Where an arbitration award is ruled by a people's court not to be enforced, the parties may, according to the written arbitration agreement reached by them, apply to the arbitration agency for a new arbitration or bring a lawsuit to a people's court.

**Article 238** If a party fails to comply with a certificate of obligation enforcement by a notary office according to law, the other party may apply to the people's court that has the jurisdiction over the case for the enforcement of the obligation and the applied people's court shall enforce such an obligation.

If a people's court discovers a definite error in a notarized certificate of obligation, the people's court shall make a ruling not to enforce the obligation and serve the letter of the ruling to the both parties and the notary office.

China, Thailand and others:  
Integration into national law



**Article 239** The time limit for the submission of an application for enforcement shall be two years. The suspension or termination of the time limit for the submission of an application for enforcement shall be governed by the provisions on the suspension or termination of the statute of limitation.

The time limit prescribed in the preceding paragraph shall be calculated from the last day of the period specified by a legal document for its performance. If a legal document specifies an installment performance, the time limit shall be calculated from the last day of the period specified for each installment of performance. If a legal document does not specify the period of performance, the time limit shall be calculated from the day when the legal document takes effects.

**Article 240** The execution officer shall, upon receiving the application for execution or the writ of referral directing execution, send an execution notice to the person subject to execution and may carry out compulsory execution immediately.

### Chapter 21 Enforcement Measures

**Article 241** If a person to be enforced fails to fulfill the obligations specified in a legal document as instructed by the enforcement notice, he shall report his property situation for the time being and one year before he has received the enforcement notice. If a person to be enforced refuses to report his property situation or makes a false report, the people's court may, based on the circumstances, impose a fine or detention on the person to be enforced, his legal representative or the principal leading personnel of the unit or the person directly responsible.

**Article 242** If the person subject to execution fails to, according to the execution notice, fulfil his obligations specified in the legal document, the people's court shall have the right to make inquiries with the relevant entities concerning his property, such as savings, bonds, stocks and funds, and may seize, freeze, transfer or appraise his property according to the situation. The property under the inquiry or seizure or that is transferred or appraised by the people's court shall not be subject to the same beyond the scope of obligation of the person subject to execution.

The people's court shall, in deciding to seize, freeze, transfer or appraise property, make a ruling and issue a notice for assistance in execution. The concerned entities must cooperate on this issue.

**Article 243** If a person to be enforced fails to fulfill the obligations specified in a legal documents instructed by an enforcement notice, the people's court shall have the power to withhold or withdraw the portion of his income to fulfill his obligation. However, the court shall leave the necessary living expenses for the person and his dependent family members.

A people's court shall make a ruling to withhold or withdraw a person's income and issue a notice for assisting the enforcement. The unit for which the person to be enforced works, banks, credit unions, or other units that deal with savings deposits shall comply with the notice.

**Article 244** If a person to be enforced fails to fulfill his obligation specified in a legal document instructed by the enforcement notice, the people's court shall have the power to seize, detain, freeze, auction, or sell the portion of his property in order to fulfill his obligations. However, the court shall leave the articles of daily necessity used by the person and his dependent family members.

The people's court shall make a ruling in order to take the measures specified in the preceding paragraph.

## China, Thailand and others: Integration into national law



**Article 245** When a people's court seizes or detains a property, if the person to be enforced is a citizen, the court shall notify the person or an adult member of his family to appear on the scene; if the person to be enforced is a legal person or another organization, the court shall notify its legal representatives or the principal leading personnel to appear on the scene. Their refusal to appear on the scene shall not prevent the enforcement. If a person to be enforced is a citizen, his unit or the basic-level organization in the place where his property is located shall send someone to the scene.

An inventory of the seized or detained property shall be made by the enforcement officer and, after the inventory has been signed or sealed by the persons on the scene, a copy of the inventory shall be given to the person subject to the enforcement. If the person subject to the enforcement is a citizen, a copy of the inventory may also be given to an adult member of his family.

**Article 246** The enforcement officer may ask the person to be enforced to safeguard the seized property. The person who is subject to enforcement shall be held responsible for any losses incurred due to his fault.

**Article 247** After property has been sealed up or detained, the execution officer shall instruct the person subject to execution to fulfil his obligations specified in the legal document. If the person fails to fulfil his obligations upon expiration of the period, the people's court may sell the sealed-up or detained property through public auction. If the property is not suitable for auction or both parties agree not to sell the property through public auction, the people's court may entrust relevant entities to sell the property or sell the property itself. If the goods are prohibited from free trading by the State, relevant entities shall purchase the goods at a price fixed by the State.

**Article 248** If a person to be enforced fails to fulfill his obligations specified in a legal document and conceals his property, the people's court shall have the power to issue a search warrant and search his domicile or the place where the property may be concealed.

The adoption of the measures mentioned in the preceding paragraph shall be subject to a search warrant signed by the president of the people's court.

**Article 249** The delivery of property or negotiable instrument specified in a legal document shall be conducted in the presence of both parties summoned by the enforcement officer or the enforcement officer may entrust the person to be enforced to deliver the property or negotiable instrument. The recipient of the property or the negotiable instrument shall sign a receipt.

Any unit that holds the property or negotiable instruments to be enforced shall pass it on according to the enforcement assistance notice issued by the people's court and the recipient shall sign a receipt.

If any citizen holds the property or negotiable instruments to be enforced, the people's court shall notify him to relinquish them. If he refuses to do so, a compulsory enforcement may be enforced.

China, Thailand and others:  
Integration into national law



**Article 250** For a compulsory eviction from a building or a plot of land, the president of a people's court shall sign and issue a public announcement to order the person to be enforced to perform his obligations within a designated period of time. If the person fails to do so within the designated time, a compulsory enforcement may be enforced by the enforcement officer.

When a compulsory enforcement is being enforced, if the person subject to the enforcement is a citizen, the person or an adult member of his family shall be notified to be present on the scene; if the person subject to the enforcement is a legal person or any other organization, its legal representatives or principal leading personnel shall be notified to be present on the scene; their refusal to be present shall not stop the enforcement. If the person to be enforced is a citizen, his work unit or the basic-level organization in the locality of the building or the plot of land to be enforcement shall send people to participate in the enforcement. The enforcement officer shall make a written record of the particulars of the compulsory enforcement, and the people on the scene shall affix their signatures or seals to the record.

The people's court shall assign personnel to transport the properties involved in a compulsory eviction from a building to a designated location and deliver them to the person to be enforced or to an adult member of his family; if any loss is incurred due to the person's refusal to accept the properties, he shall be liable for the loss.

**Article 251** During the course of enforcement, if some formalities to transfer the certificates of titles need to be done, the people's court may issue an enforcement assistance notice to relevant units and these units shall comply with the notice.

**Article 252** If a person to be enforced fails to fulfill his obligations prescribed in a judgment, ruling, or any other legal document as instructed by the notice of enforcement, the people's court may conduct a compulsory enforcement or entrust a relevant unit or other persons to carry out the enforcement and the person subject to the enforcement shall bear the expenses thus incurred.

**Article 253** If a person to be enforced fails to fulfill his obligations of paying money within the time limit specified by a judgment, ruling, or any other legal documents, he shall pay a multiplied interest for the debt based on the default; if the person subject to the enforcement fails to fulfill his other obligations within the time limit specified by a judgment, ruling, or any other legal documents, he shall pay a surcharge for the deferred performance.

**Article 254** After a people's court adopts an enforcement measure stipulated in Articles 242, 243 and 244 of this Law, if the person subject to the enforcement is still unable to pay debts, he shall continue to fulfill his obligations. Once the creditor discovers that the person subject to the enforcement has other properties, the creditor may at any time apply to the people's court for an enforcement of these properties.

**Article 255** If a person to be enforced fails to fulfill the obligations specified in a legal document, the people's court may adopt or notify relevant units to assist to adopt the measure of restricting the exit, making records on the credit system, making public the information about nonperformance of duty through public media or any other measure stipulated by law.

China, Thailand and others:  
Integration into national law



## Chapter 22 Suspension and Termination of Enforcement

**Article 256** Under any of the following circumstances, the people's court shall make a ruling to suspend the enforcement:

- (1) The applicant indicates that the enforcement may be postponed;
- (2) A person not involved in the case raises a justified objection to the subject matter of the enforcement;
- (3) A citizen as one of the parties dies and it is necessary to wait for an heir to inherit the rights of the deceased or to succeed his obligations;
- (4) A legal person or any other organization as one of the parties ceases its existence, and the person succeeding to its rights and obligations has not been determined; or
- (5) Other circumstances that the people's court deems the enforcement should be suspended.

Enforcement shall be resumed when the circumstances that caused the suspension of enforcement have disappeared.

**Article 257** Under any of the following circumstances, the people's court shall make a ruling to terminate the enforcement:

- (1) The applicant has withdrawn his application of enforcement;
- (2) The legal document on which the enforcement is based has been repudiated;
- (3) The citizen to be enforced dies and there is no estate to be enforced and no one to succeed his obligations;
- (4) The person who is entitled to alimony or supports for children or elders dies;
- (5) The citizen to be enforced is too poor to repay his debts, has no sources of income, and loses his ability to work; or
- (6) Other circumstances that the people's court deems the enforcement should be concluded.

**Article 258** A ruling to suspend or terminate the enforcement shall become effective immediately after being served on the parties concerned.

China, Thailand and others:  
Integration into national law



→ What matters:

## **Public International Law**

- **New York Convention (Art. V et al.)**
- **Geneva Convention**
- **Bilateral Conventions**

**Enforcement**



→ What matters:

## **Public International Law**

- **New York Convention (Art. V et al.)**
- Geneva Convention
- Bilateral Conventions

**Enforcement**

**Nota bene: How to research the existence of multi- and bilateral treaties?**



→ What matters:

## **Public International Law**

- **New York Convention (Art. V et al.)**
- Geneva Convention
- Bilateral Conventions

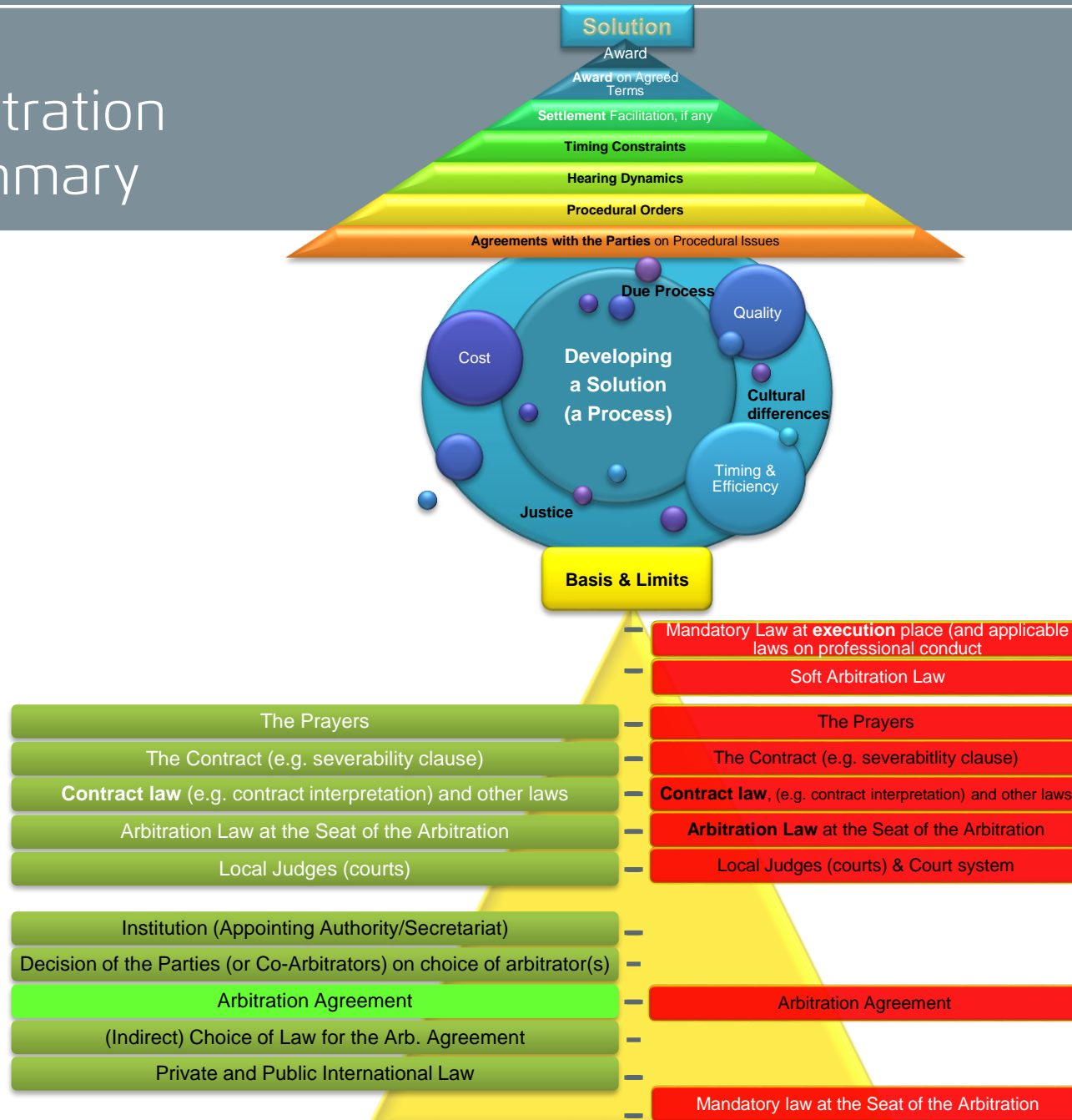
**Enforcement**

**Nota bene: How to research the existence of multi- and bilateral treaties and of national reservations thereto?**

**Germany:  
Bundesgesetzblatt  
B**



# Arbitration Summary



III.

I.

II.

**Contract with the Arbitrator**

**Institutional Arbitration Rules**

**& Costs**



## C

## Choices: The Arbitration Agreement

# C Choices: The Arbitration Agreement

► Ad Hoc arbitration

► Institutional Arbitration

► Mixed clauses

Sources of law

Influence

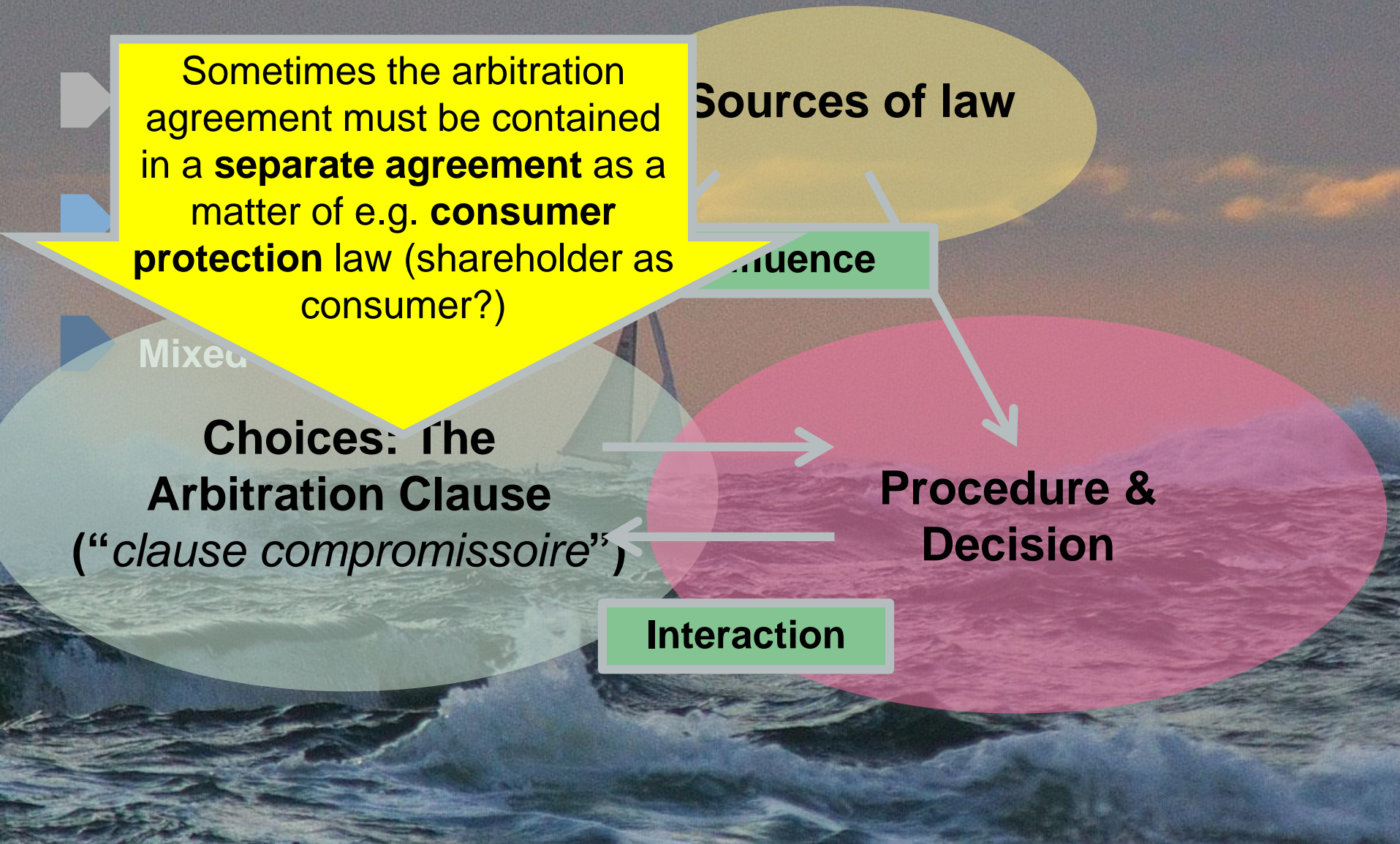
Choices: The  
Arbitration Clause  
(“*clause compromissoire*”)

Procedure &  
Decision

Interaction



# C Choices: The Arbitration Agreement





# C Choices: The Arbitration Agreement

► Ad Hoc arbitration

► Institutional Arbitration

► Mixed clauses

Sources of law

Influence

Choices: The  
Arbitration Clause  
(*“clause compromissoire”*)

Procedure &  
Decision

Interaction

The more you know about the influencing factors, the better you can draft an arbitration clause.



# C Choices: The Arbitration Agreement

Example for a simple standard arbitration clause:

► Ad hoc, ZPO

**Continental  
Thinking unlike  
Anglo-American  
Thinking**

Any dispute **out of or in connection with this agreement** shall be settled by arbitration by *arbitration in Hamburg, Germany*. Each Party shall nominate one arbitrator. The *two arbitrators* shall jointly agree on the Chairman. In case the Parties cannot agree on the *Chairperson*, the President of the Hanseatic Appellate Court shall nominate the Chair-Person.

# C Choices: The Arbitration Agreement

Example for a simple standard arbitration clause:

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Any dispute **out of or in connection with this agreement** shall be settled by arbitration by *arbitration in Hamburg, Germany*. Each Party shall nominate one arbitrator. The *two arbitrators* shall jointly agree on the Chairman. In case the Parties cannot agree on the *Chairperson*, the President of the Hanseatic Appellate Court shall nominate the Chair-Person.

What is regulated by now? What is missing?



# C Choices: The Arbitration Agreement

Example for a standard arbitration clause:

► Ad hoc, ZPO

**Missing: E.g.**  
**Place of arbitration → Impact on applicable procedural law?**  
**→ Possible Impact on Private International Law (later)**  
**→ Related agreements?**  
**→ Time line?**

Any dispute **out of or in connection with this agreement** shall be settled by arbitration by *arbitration in Hamburg, Germany*. Each Party shall nominate one *arbitrator*. The two arbitrators shall jointly agree on the Chairman. In case the Parties **cannot agree on the Chairperson**, the President of the Hanseatic Appellate Court shall nominate the Chair-Person.

What is regulated by now? What is missing?

# C Choices: The Arbitration Agreement

Example for an arbitration clause:

► Ad hoc, ZPO

**Arbitration Tribunal:** Any dispute **out of or in connection with this Agreement** will be decided, solely and **conclusively**, by an arbitration tribunal. The arbitration tribunal may also decide on the validity of these arbitration arrangements with a binding effect on state courts.

Unlike UK: s. 69 Arb.  
Act → Appeal on  
points of law

What is regulated by now? What is missing?



# C Choices: The Arbitration Agreement

## ► Ad hoc, ZPO (continued)

**Composition of Arbitration Tribunal:** The arbitration tribunal is composed of three arbitrators of whom one will act as chairman.

The chairman must have qualified for the office of a judge.

The arbitration tribunal will be called when the Contractual Partner who has initiated the arbitration process by stating the nature of the dispute appoints an arbitrator and calls upon the other Contractual Partner to appoint a second arbitrator.

Should one of the Contractual Partners fail to appoint an arbitrator within four weeks, ...

# C Choices: The Arbitration Agreement

## ► Ad hoc, ZPO (continued)

..., the other Contractual Partner may request the president of the Hanseatic Higher Regional Court in Hamburg to propose a second arbitrator.

This proposal is binding on both Parties.

The two appointed arbitrators will select a chairman.

Should the arbitrators not have appointed a chairman within four weeks, one of the Contractual Partners may request the president of the Hanseatic Higher Regional Court in Hamburg to propose a chairman.



# C Choices: The Arbitration Agreement

Example for an arbitration clause:

► Ad hoc, ZPO

**Place of Arbitration:** The arbitration process will take place in Hamburg. According to § 1062 of the German Code of Civil Procedure (*“Zivilprozessordnung”*), the responsible court is the Hanseatic Higher Regional Court (*“Oberlandesgericht”*) in Hamburg. Otherwise the arbitration process will be subject to §§ 1025 to 1065 of the Code of Civil Procedure.



# C Choices: The Arbitration Agreement

Example for an arbitration clause:

► Ad hoc, ZPO (cont'd.)

**Execution of the Agreement in the event of a dispute:** During a dispute settlement proceeding the Contractual Parties are still obliged to fulfill the requirements of the Agreement.





# C Choices: The Arbitration Agreement

Example for an arbitration clause:

► Ad hoc, ZPO (cont'd.)

**Interim legal protection:** This arbitration clause does not prohibit the right of a Contractual Party to apply for interim measures in proceedings of the Hamburg Regional Court.

**UNCITRAL 2006 Revised Model  
Law: allows for application  
to the arbitration tribunal  
for interim measure  
Problems?**



# C Choices: The Arbitration Agreement

Example for an arbitration clause:

► Ad hoc, ZPO (cont'd.)

**Best for national arbitration:**

- ❖ So many issues to discuss.
- ❖ Freedom implies **strategic drafting responsibility**
- ❖ Often too complex in international cases  
Involving different cultures



# C Choices: The Arbitration Agreement

Example for a very short arbitration clause:

## ► Hamburg Friendly Arbitrage

(Sec. 20 of the so-called local usage for the Hamburg trade of goods of 1958, Hmb. Amtl. Anz. No. 237 of 13.10.1958)

Disputes, if any, shall be settled amicably by arbitration in Hamburg.

What is regulated by now? What is missing?

The advantage of pre-existing rules!



# C Choices: The Arbitration Agreement

Example for a clause providing for institutional arbitration:

► Deutsche Institution für Schiedsgerichtsbarkeit („DIS“)

"All disputes arising in connection with this contract or its validity shall be finally settled in accordance with the Arbitration Rules of the German Institution of Arbitration (DIS) without recourse to the ordinary courts of law."

What is regulated by now? What is missing?



# C Choices: The Arbitration Agreement

Example for a clause providing for institutional arbitration:

## ► Deutsche Institution für Schiedsgerichtsbarkeit („DIS“)

"All disputes arising in connection with this contract or its validity shall be finally settled in accordance with the Arbitration Rules of the German Institution of Arbitration (DIS) without recourse to the ordinary courts of law."

The following points should be considered:

- The place of arbitration is ...
- The number of arbitrators is ...
- The language of the arbitral proceedings is ...
- The applicable substantive law is ...

# C Choices: The Arbitration Agreement

Example for a clause providing for institutional arbitration:

► International Chamber of Commerce („ICC“)

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.

What is regulated by now? What is missing?



# C Choices: The Arbitration Agreement

Example for a clause providing for institutional arbitration:

## Chinese European Arbitration Centre („CEAC“)

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by institutional arbitration **administered** by the Chinese European Arbitration Centre (CEAC) in Hamburg (Germany) in accordance with the **CEAC Hamburg Arbitration Rules**.

What is regulated by now? What would be better?

# C Choices: The Arbitration Agreement

## Chinese European Arbitration Centre („CEAC“) (cont'd.)

### Options:

x

(a) The **number of arbitrators** shall be \_\_\_\_ (~~(i) one or (ii) three or (iii) three~~ unless the amount in dispute is less than € \_\_\_\_ [~~e.g. 100.000 €~~] in which case the matter shall be decided by a sole arbitrator) ;

(b) Regardless of the seat of arbitration, the arbitral tribunal is **free to hold hearings** in **Kuala Lumpur, Malaysia** (~~town and country~~);

x

(c) The **language(s)** to be used in the arbitral proceedings shall be **English** \_\_\_\_\_;

x

(d) **Documents** also may be submitted in **English** \_\_\_\_\_ (language).

(e) The Arbitration shall be **confidential**.

(f) The parties agree that also **the mere existence** of an arbitral proceeding shall be kept **confidential** except to the extent disclosure is required by law, regulation or an order of a competent court.

x

(g) The arbitral tribunal shall apply the **CEAC Hamburg Arbitration Rules as in force at the moment of the commencement of the arbitration** unless one of the parties requests the tribunal, within 4 weeks as of the constitution of the arbitral tribunal, to operate according to the CEAC Hamburg Arbitration Rules as in force at the conclusion of this contract.



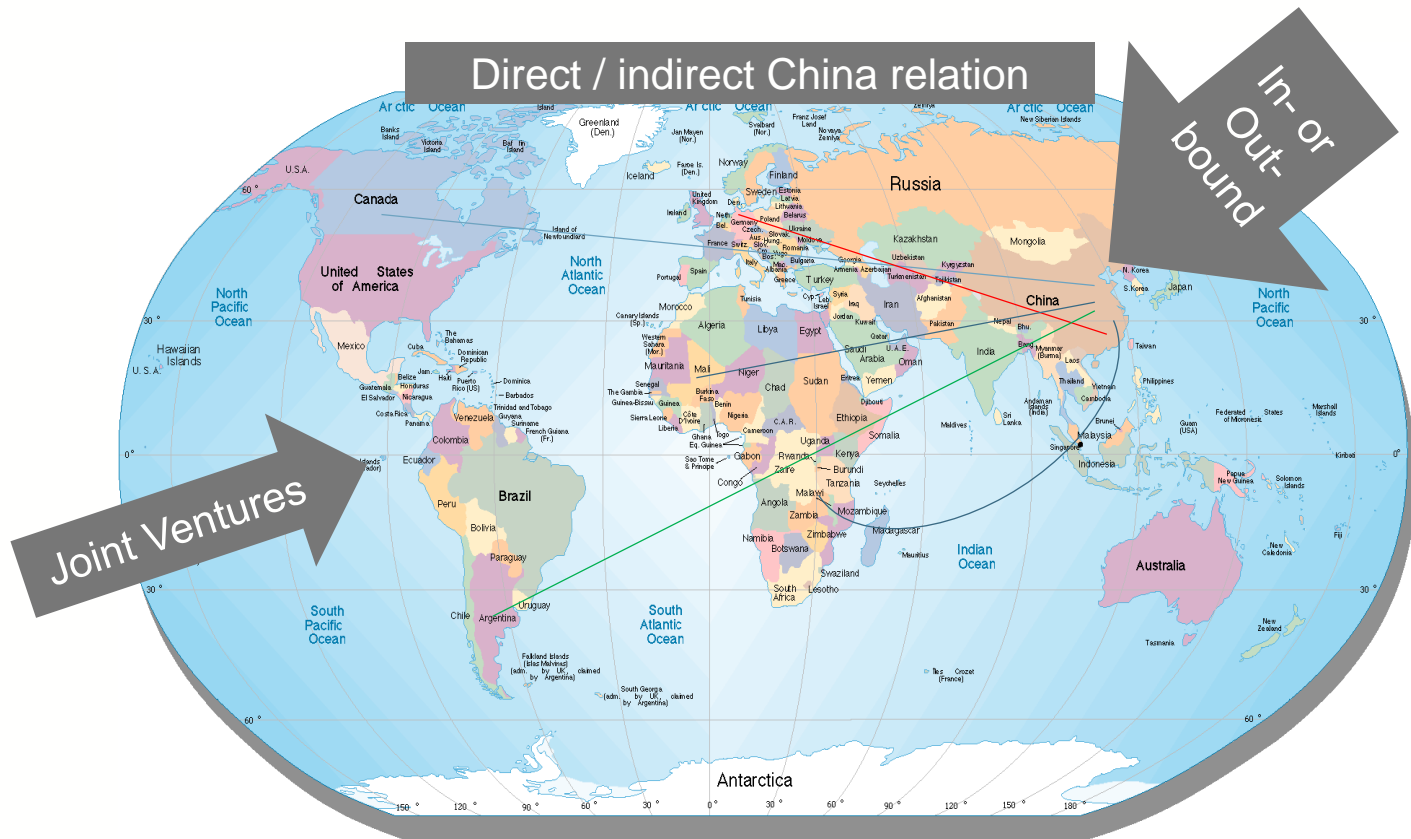
# **How to Select the right Arbitration Institution for a Dispute?**

## **What are the Differences between the Arbitration Institutions?**

**From a presentation on behalf of the Chinese  
European Arbitration Centre on 25.3.2012 in Peking**



# Different answers in different scenarios (1/3)



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Robinson Projection





# The Selection Process (2/3)

## Example (1)

- a) A German tool manufacturer enters into a **Joint Venture with a Chinese Party**
- b) A German tool manufacturer sets up a **subsidiary in China**
- c) For that purpose, he concludes a joint venture agreement with another European or a US party
- d) The Chinese subsidiary enters into national contracts in China



# The Selection Process (2/3)

## Example (1)

- a) A German tool manufacturer enters into a **Joint Venture with a Chinese Party**
- b) A German tool manufacturer sets up a **subsidiary in China**
- c) For that purpose, he concludes a joint venture agreement with another European or a US party
- d) The Chinese subsidiary enters into national contracts in China

## Example (2)

- a) A Chinese textile producer enters into a **Joint Venture with a European Party**
- b) A Chinese textile producer sets up a **subsidiary in a European country**
- c) For that purpose, he concludes a joint venture agreement with another party from Hong Kong
- d) The European subsidiary enters into national contracts in Europe

**Domestic  
Arbitration!**



## Agenda:

- ▶ **Goals of the Selection**
- ▶ **Impact of the Goals on the Selection Process**
- ▶ **Overview of Choices**  
**(incl. differences between the Arbitration Institutions)**

•



## Which arbitration institution is likely to produce the best result?

i.e. an award

- which is **recognizable and enforceable**
  - made according to the applicable law or rules of law (as chosen by the Parties) or in accordance with equity (“*amiable compositeur*”), if so chosen by the Parties
- within a **reasonable frame of time**
- and at **reasonable costs**
- by a **neutral arbitration tribunal**

or a settlement (“award on agreed terms”)







## Which arbitration institution is likely to produce the best result?

i.e. an award

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  - made according to the applicable law or rules of law (as chosen by the Parties) or in accordance with equity (“*amiable compositeur*”), if so chosen by the Parties

**Enforceability is essential!**

- within a **reasonable frame of time**

- and at **reasonable costs**

- by a **neutral arbitration tribunal**

or a settlement (“award on agreed terms”)

**Neutrality is key !**





## Which arbitration institution is likely to produce the best result?

i.e. an award

- which is **recognizable and enforceable**
    - made according to the applicable law or rules of law (as chosen by the Parties) or in accordance with equity ("*amiable compositeur*"), if so chosen by the Parties
  - within a **reasonable frame of time**
  - and at **reasonable costs**
  - by a **neutral arbitration tribunal**
- or a settlement ("award on agreed terms")

**Enforceability is essential!**

**Risk minimization!**

**Neutrality is key!**





➤ As the award is made by arbitrators, it is important to focus on the **selection process of the arbitrators**

➤ **Cultural and legal aspects:**

- **Which brains** (of which training) will judge?
- **Which type** of arbitrators is likely to be needed?
- **Degree of party autonomy** in the process of the **composition of the arbitral tribunal**?
  - Do the rules allow that **each Party** nominates one arbitrator?
  - Do the rules allow the **reaching of consent** with respect to the **Chairman**?
- **Default mechanism:** Decision process of **arbitrator selection in the absence of party agreement**

Who will judge?

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○ **Default mechanism:** Decision process of **arbitrator selection in the absence of party agreement**

**Will the judge understand you?**

**Who will judge?**



- As the award is made by arbitrators, it is important to focus on the **selection process of the arbitrators**
- **Cultural and legal aspects:**
  - **Which brains** (of which training) will judge?
  - **Which type** of arbitrators is likely to be needed?
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    - Do the rules allow that **each Party** nominates one arbitrator?
    - Do the rules allow the **reaching of consent** with respect to the **Chairman**?
  - **Default mechanism:** Decision process of **arbitrator selection in the absence of party agreement**

Will the judge understand you?

Who will judge?

Will you understand the judge?

# Impact of the Goals on the Selection Process

- As the award is made by arbitrators, it is important to focus on the **selection process of the arbitrators**
- **Cultural and legal aspects:**
  - **Which brains** (of which training) will judge?
  - **Which type** of arbitrators is likely to be needed?
  - **Degree of party autonomy** in the process of the **composition of the arbitral tribunal**?
    - Do the rules allow that **each Party** nominates one arbitrator?
    - Do the rules allow the **reaching of consent** with respect to the **Chairman**?
  - **Default mechanism:** Decision process of **arbitrator selection in the absence of party agreement**

Will the judge understand you?

Who will judge?

Is the default mechanism neutral?



# Overview of Choices (Arbitration Institutions)

- Ca. > **1.000 (!) Arbitration Institutes** worldwide (including international, regional and national institutions) – 20% of it China?

:



# Overview of Choices (Arbitration Institutions)

- Ca. > **1.000 Arbitration Institutes** worldwide (including international, regional and national institutions) – 20% of it China?
- Arbitration rules and national arbitration laws belong to **different “families”**:

Distinctions by  
the **legal  
environment**

Distinctions by  
**Product** or  
Trade  
orientation  
(e.g. coffee, grain,  
chambers of commerce)

Distinction by  
**markets**  
(e.g. East Europe  
Trade, **China**,  
Russia)





- **Institutions with “self-created” Arbitration Rules**
- **UNCITRAL based Institutions**

UNCITRAL = United  
Nations Commission  
of International  
Trade Law

- **Anglo-Saxon Institutions (American and English families)**



## ➤ Famous examples: “Self-created” Arbitration Rules

- **ICSID (International Centre for Settlement of Investment Disputes), Washington D.C.** → For investment disputes
- **ICC (International Chamber of Commerce), Paris**
  - A landmark institution (“Rolls Royce”)
  - 32 languages
  - **Procedure with Terms of Reference**
- **CIETAC (China International Economic and Trade Arbitration Commission)** → New rules!; **Beijing Arbitration Commission** and ca. 200 other Chinese arbitration institutions
- **SIAC (Singapore International Arbitration Centre)**





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- 32 languages
- Procedure with Terms of Reference

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**Great but not always acceptable to the foreign party**

- SIAC (Singapore International Arbitration Centre)

**Exkurs zum Exkurs:** Zum Wort „great“ (größte Schiedsgerichtsinstitution der Welt; aber z.T. anderes Rechtsverständnis und/oder als fremd empfunden)



## ➤ Famous examples: “Self-created” Arbitration Rules

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**Great but not always acceptable to the foreign party**

- **SIAC (Singapore International Arbitration Centre)**
- Anglo-saxon background is different from the continental-Chinese background**

# Distinction by the Legal Environment (3/4)

- **UNCITRAL based Institutions**
- **Different levels:**

## Procedure

**UNCITRAL  
Model  
Law**

e.g. China,  
Germany



**Ca. 70  
states**

## Procedure

**UNCITRAL  
Arbitration  
Rules  
(1976/2010)**

e.g. CEAC, Kuala  
Lumpur, Kairo

Or: Use of UNCITRAL  
Rules with special  
clause (CIETAC,  
SIAC)

## Substance

**Civil Law  
Environment**

e.g. China,  
Germany



## ➤ Anglo-Saxon Institutions

- + Procedure: anglo-saxon environment
- + Substance: anglo-saxon environment

Anglo-Saxon thinking:  
procedure, evidence  
and settlement

### Examples:

- American Arbitration Association incl. International Centre for Dispute Resolution, Bahrain Arbitration Centre
- London Court of International Arbitration, Dubai Court of International Arbitration, Hong Kong (and Singapore) International Arbitration Centre,



## ➤ Anglo-Saxon Institutions

- + Procedure: anglo-saxon environment
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Anglo-saxon thinking:  
procedure, evidence  
and settlement

### Examples:

- American Arbitration Association incl. International Centre for Dispute Resolution, Bahrain Arbitration Centre
- London Court of International Arbitration [cf. also: **Chartered Institute of Arbitrators** (training; appointment of arbitrators; institutional Rules)]



# Overview of Choices (Arbitration Institutions)

The only arbitration Centre which offers a tailor made China environment outside China is CEAC.

Others come close, but **only** CEAC operates

- out of a civil law environment **and**
- with the “United Nations Commission on International Trade Law Rules”
- with the background of UNCITRAL based (German) law
- And, in addition, its special choice of law clause

Distinctions by  
the **legal environment**

Fit for all  
**Products**

Distinction by  
**markets**  
(e.g. East Europe Trade,  
**China**, Russia)



## Thank You.

### **Professor Dr. Eckart Brödermann**

President  
Chinese European Legal Association

Managing Partner  
Brödermann & Jahn RA GmbH  
[www.german-law.com](http://www.german-law.com)

[eckart.broedermann@german-law.com](mailto:eckart.broedermann@german-law.com)



### **Patrick Zheng**

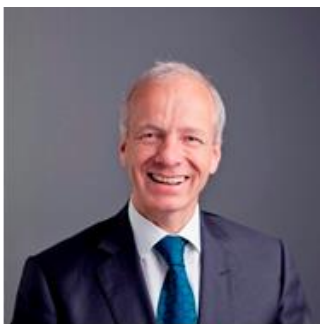
Beijing, China

Partner,  
Clifford Chance Beijing  
[www.cliffordchance.com](http://www.cliffordchance.com)

[Patrick.zheng@CliffordChance.com](mailto:Patrick.zheng@CliffordChance.com)



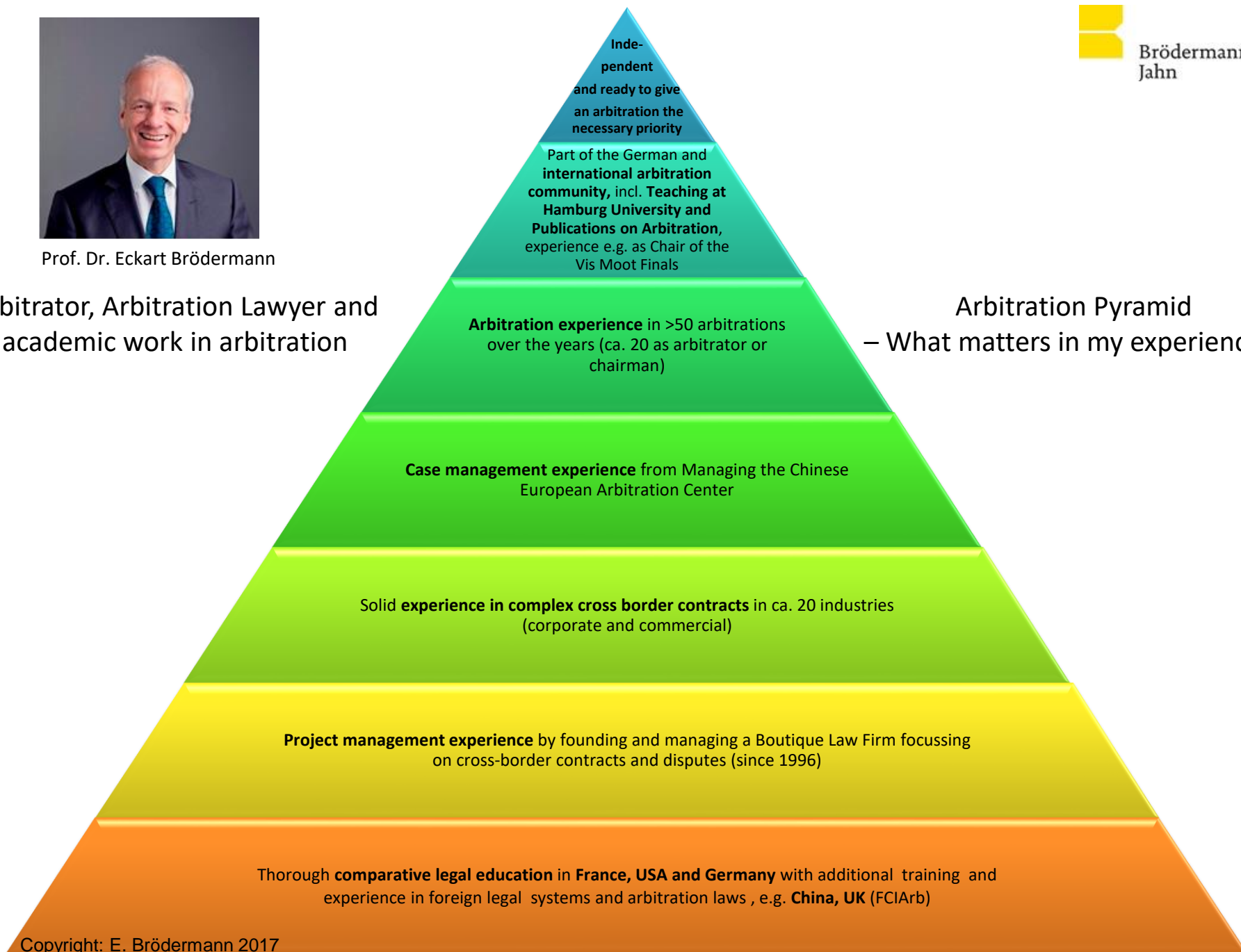




Prof. Dr. Eckart Brödermann

Arbitrator, Arbitration Lawyer and  
academic work in arbitration

Arbitration Pyramid  
– What matters in my experience –



# International Arbitration



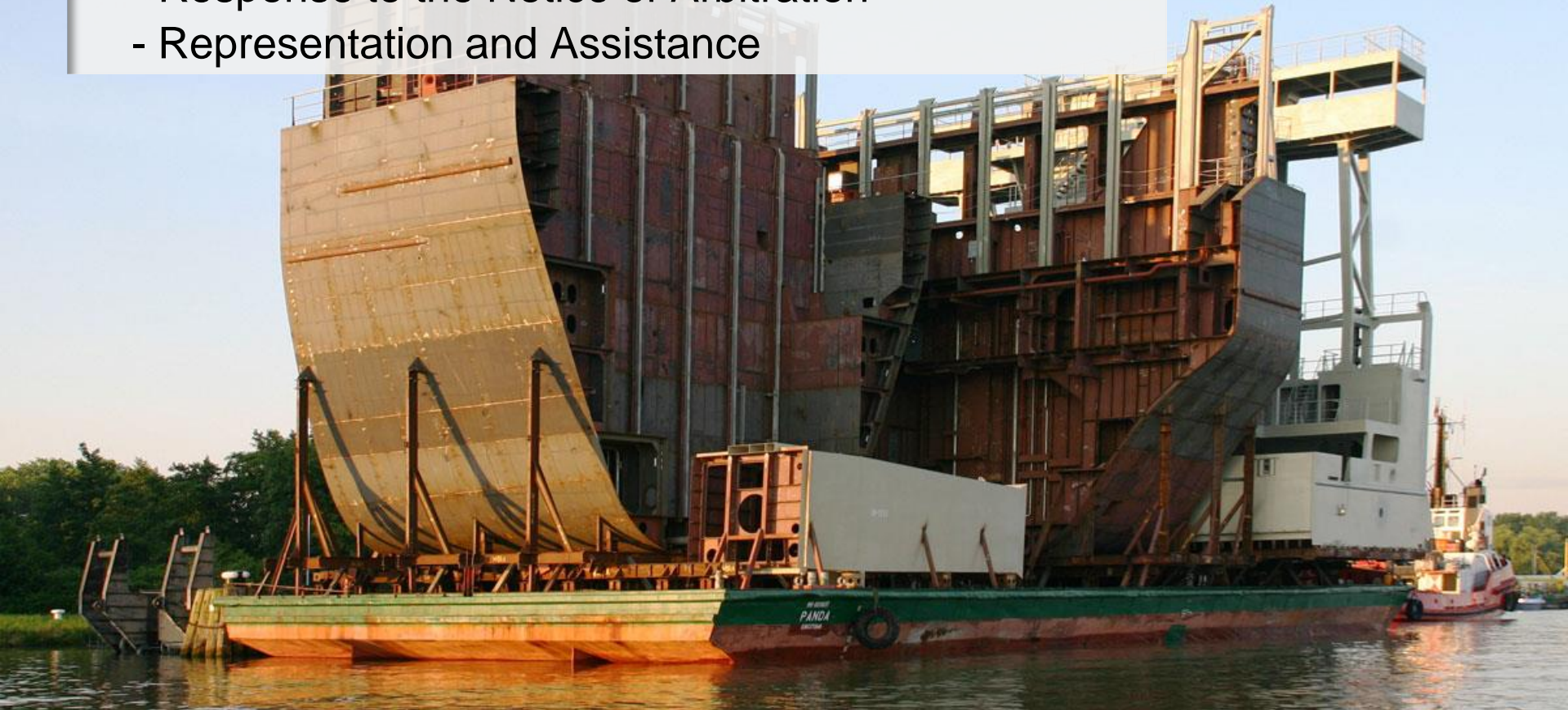
## **D** Procedure



### Initial Stage

#### ■ Initiation of Proceedings

- Notice of Arbitration
- Response to the Notice of Arbitration
- Representation and Assistance



### ■ Composition of the Arbitral Tribunal

#### - Appointment of Arbitrators

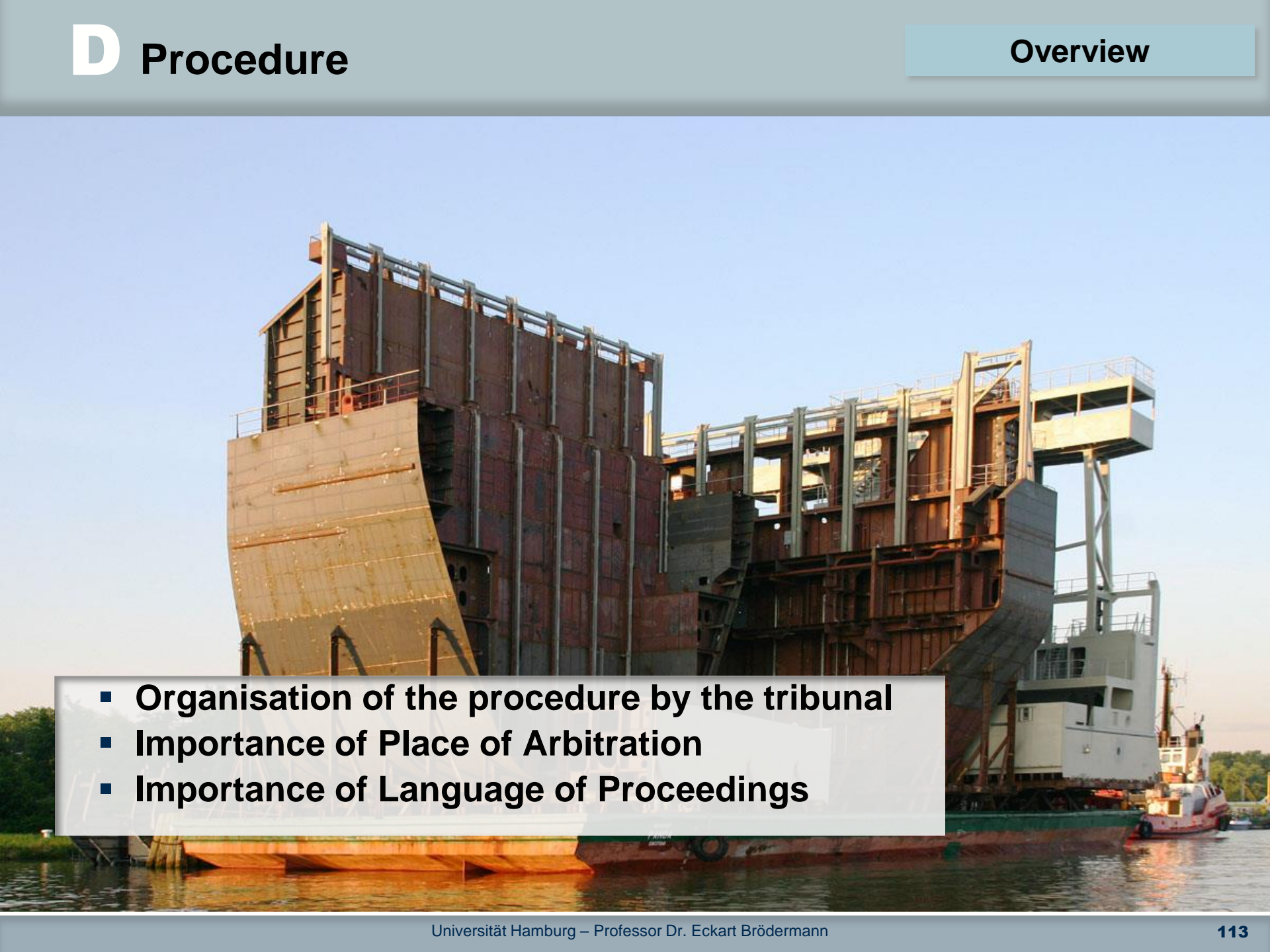
Number of Arbitrators

Choice of Arbitrators

Appointment of Arbitrators by the Institution  
in Institutional Arbitration (example of ICC)

→ Contract with the  
arbitrator



- 
- Organisation of the procedure by the tribunal
  - Importance of Place of Arbitration
  - Importance of Language of Proceedings

### Arbitral Proceedings

- Exchange of Written Statements
  - Statement of Claim
  - Statement of Defense
  - Periods
  - Objections to Jurisdiction
- Rebuttal

### Interim Measures

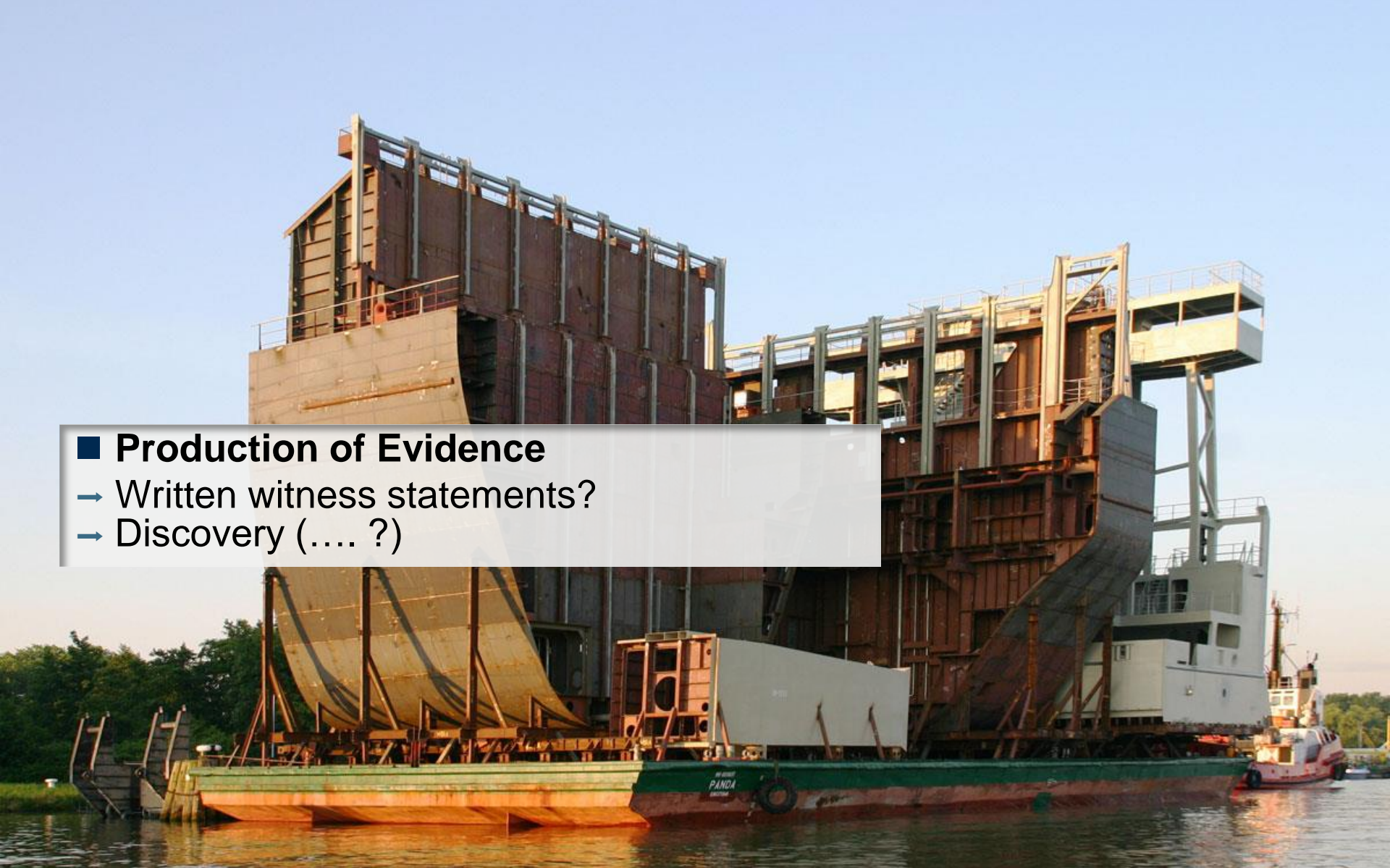
### Procedural Orders on Evidence





### ■ Production of Evidence

- Written witness statements?
- Discovery (.... ?)



### ■ Production of Evidence

- Written witness statements?
- Discovery (?)

**Different concepts  
of discovery –  
Compromise  
IBA Rules of  
Evidence**



### ■ Hearing

- Opening by the Chairman
- Protocol / documentation of consent with tribunals action
- Pleadings
- Importance of Timing
- At the end again: Documentation of consent

**Moment of Settlement**

### ■ Hearing

- Opening by the Chairman
- Protocol / documentation of consent with tribunal's action
- Pleadings
- Importance of Timing
- At the end again: Documentation of consent

Different  
approaches  
around the globe

**Moment of  
Settlement**



### Final Stage: The Award

- Decision
- Termination of Proceedings
- Finality of the Award
- Costs





**Always with an eye  
on the enforcement**

### **Final Stage: The Award**

- Decision
- Termination of Proceedings
- Finality of the Award
- Costs



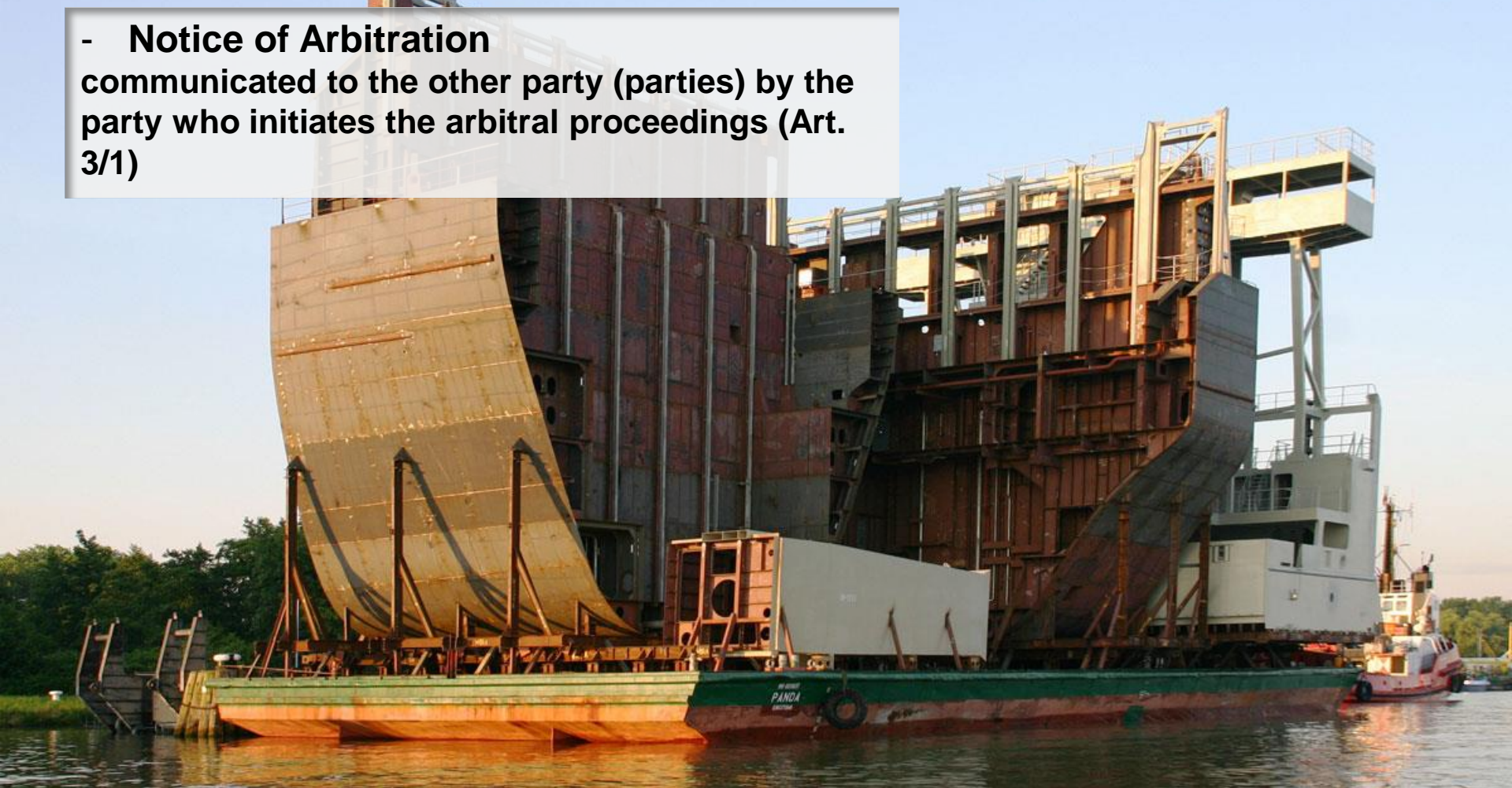
### Final Stage: The Award

- Decision
- Termination of Proceedings
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- Costs

**In case of Settlement  
– Award by consent**

### The stages of Arbitral Procedure by way of the example of UNCITRAL Arbitration Rules 2010:

- **Notice of Arbitration** communicated to the other party (parties) by the party who initiates the arbitral proceedings (Art. 3/1)





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**Choice of arbitrator  
→ Contract with the  
arbitrator**



### - Initiation of Proceedings

Proceedings are deemed to begin at the date on which the notice of arbitration is received by the respondent (Art. 3/2)





### - Initiation of Proceedings

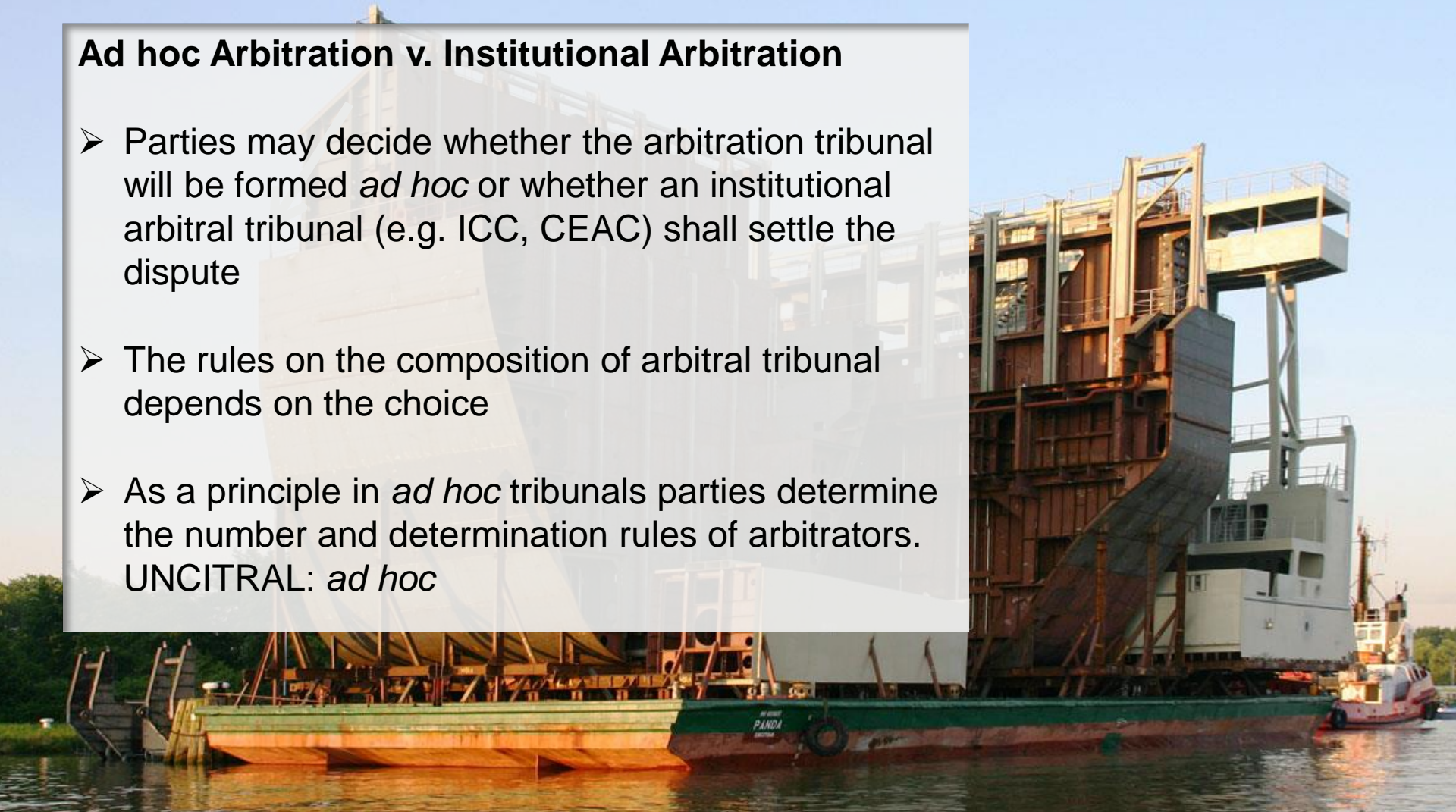
Proceedings are deemed to begin at the **date on which the notice of arbitration is received by the respondent (Art. 3/2)**

In case of use of the UNCITRAL Rules by arbitration Institutions (e.g. CEAC, Kuala Lumpur) this is replaced by receipt **by the institution**

### Composition of the Arbitral Tribunal

#### Ad hoc Arbitration v. Institutional Arbitration

- Parties may decide whether the arbitration tribunal will be formed *ad hoc* or whether an institutional arbitral tribunal (e.g. ICC, CEAC) shall settle the dispute
- The rules on the composition of arbitral tribunal depends on the choice
- As a principle in *ad hoc* tribunals parties determine the number and determination rules of arbitrators.  
UNCITRAL: *ad hoc*





### Composition of the Arbitral Tribunal

#### Appointment of Arbitrators:

- **Number of Arbitrators (art. 7)**
  - parties agreement
  - In absence of agreement: three arbitrators



### Composition of the Arbitral Tribunal Appointment of Arbitrators:

#### ➤ Choice of Arbitrators

- Sole Arbitrator: parties agreement  
(Art. 8) appointing authority  
(*where parties can not agree*)
- Three arbitrators: one from each party, two arbitrators decide the third one  
(Art. 9) appointing authority:  
*“appoints the chairman if the two arbitrators do not come to an agreement“*



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##### Appointing Authority (Art. 6 UNCITRAL)

Parties at any time may agree on a authority which will serve as an appointing authority: „steps in where parties can not agree on the appointment of arbitrators“

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Any arbitrator may anytime be challenged if there are justifiable doubts regarding his impartiality or independence



### Composition of the Arbitral Tribunal

#### Appointment of Arbitrators:

##### ➤ Choice of Arbitrators

- Sole Arbitrator: parties agreement (Art. 8)

- Three arbitrators: one from each party, two arbitrators designated by one appointing authority (Art. 9)

IBA Guidelines on  
Conflicts of Interest  
in International  
Arbitration  
Approved

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#### Appointment of Arbitrators:

## Rules of Ethics of international arbitrators

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(Art. 8)

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### Composition of the Arbitral Tribunal

#### Appointment of Arbitrators (in institutional Arbitration, by way of the example of ICC Arbitration Rules 2012)

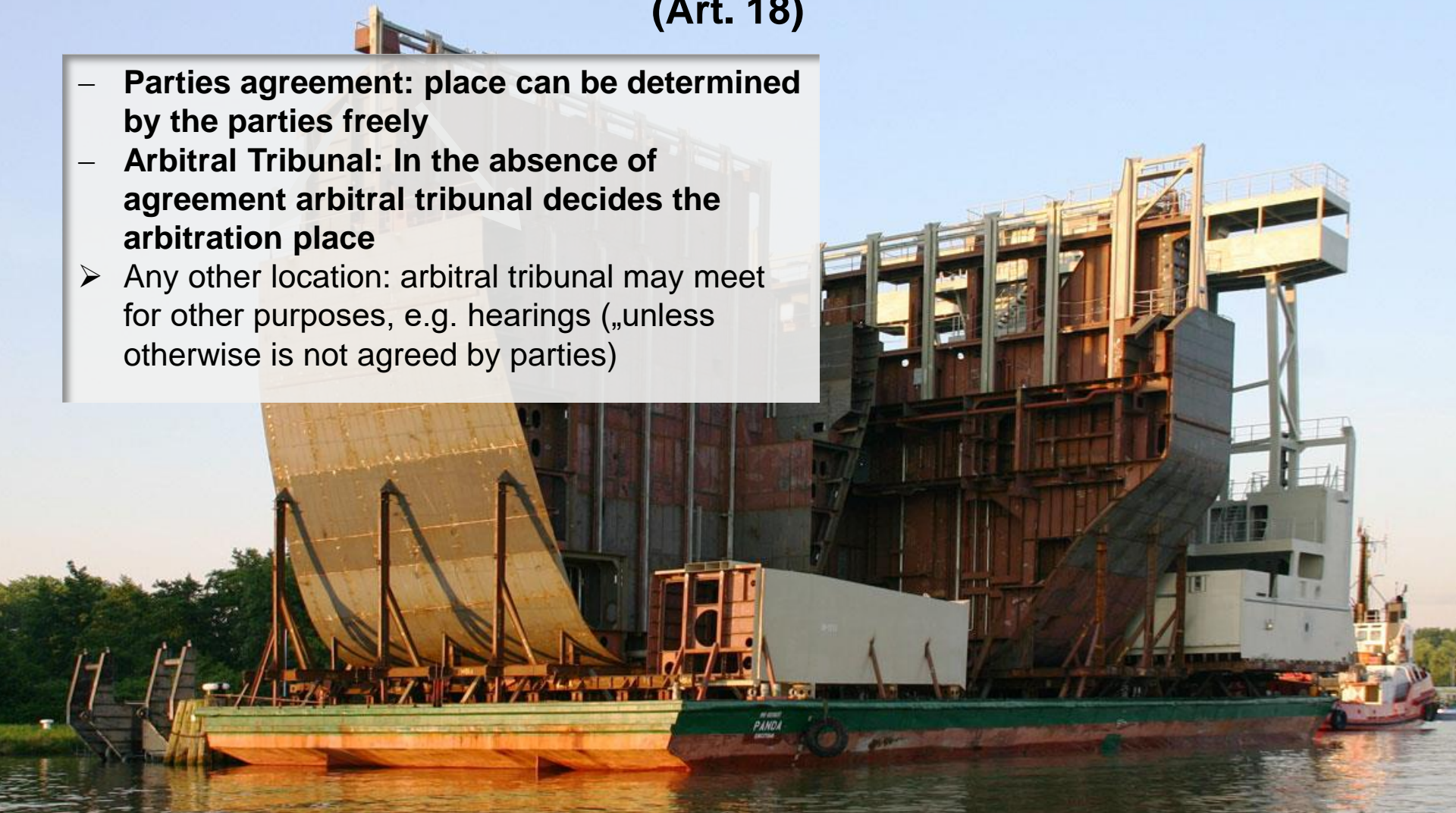
##### Art. 12:

- Agreement of parties: sole or three arbitrators
  - In absence of agreement: the International Court of Arbitration („Court“) appoint one arbitrator
  - In case of three arbitrators: each party appoint one arbitrator
- Third arbitrator is appointed by the Court as the president of arbitral tribunal



### Place of Arbitration (Art. 18)

- **Parties agreement: place can be determined by the parties freely**
- **Arbitral Tribunal: In the absence of agreement arbitral tribunal decides the arbitration place**
- Any other location: arbitral tribunal may meet for other purposes, e.g. hearings („unless otherwise is not agreed by parties)





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**One of the most important advantages of the international arbitration is that parties may freely decide on several aspects of arbitral proceedings, particularly in *ad hoc* proceedings.**

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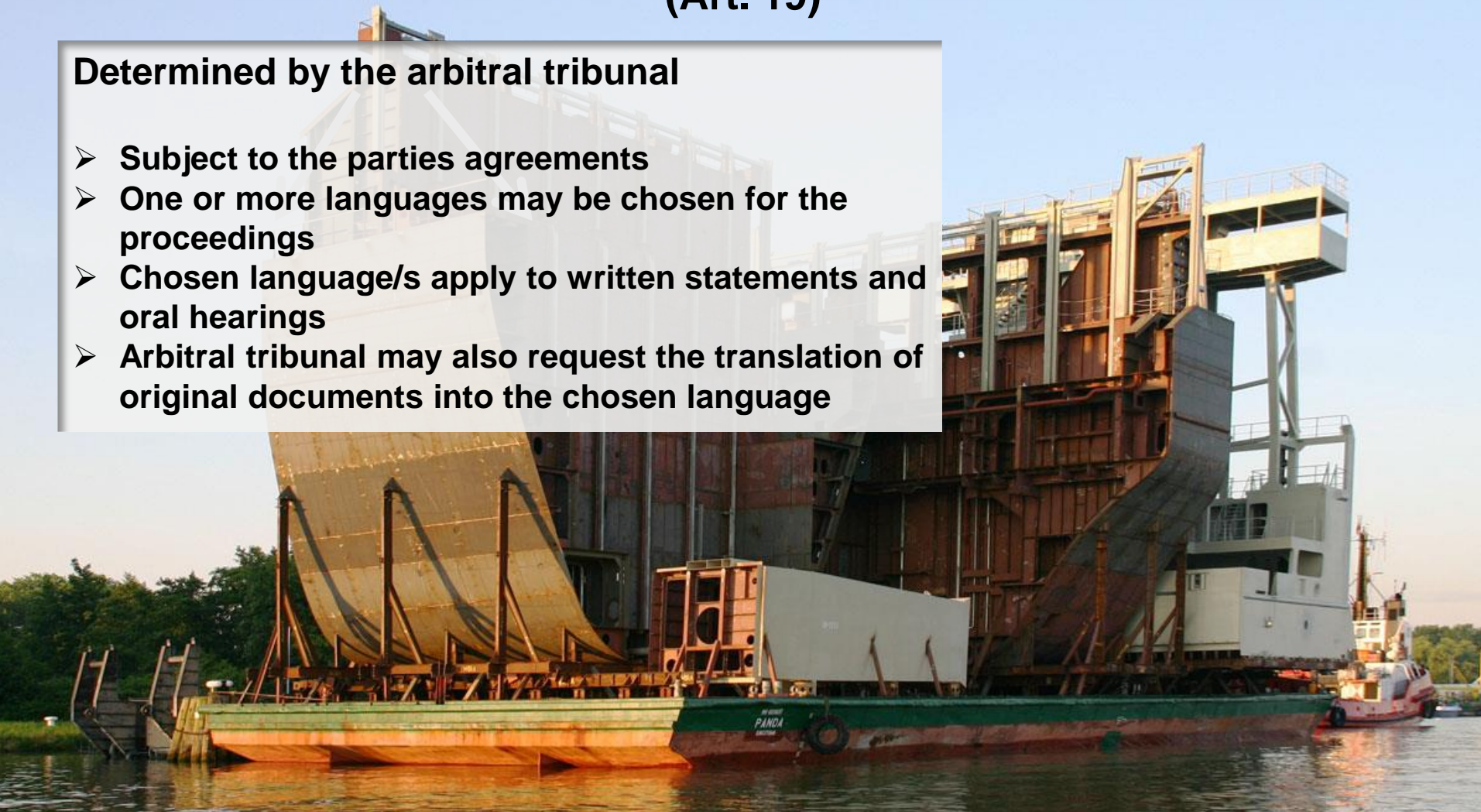
**e.g. on speed, evidence**



### **Language of the Proceedings (Art. 19)**

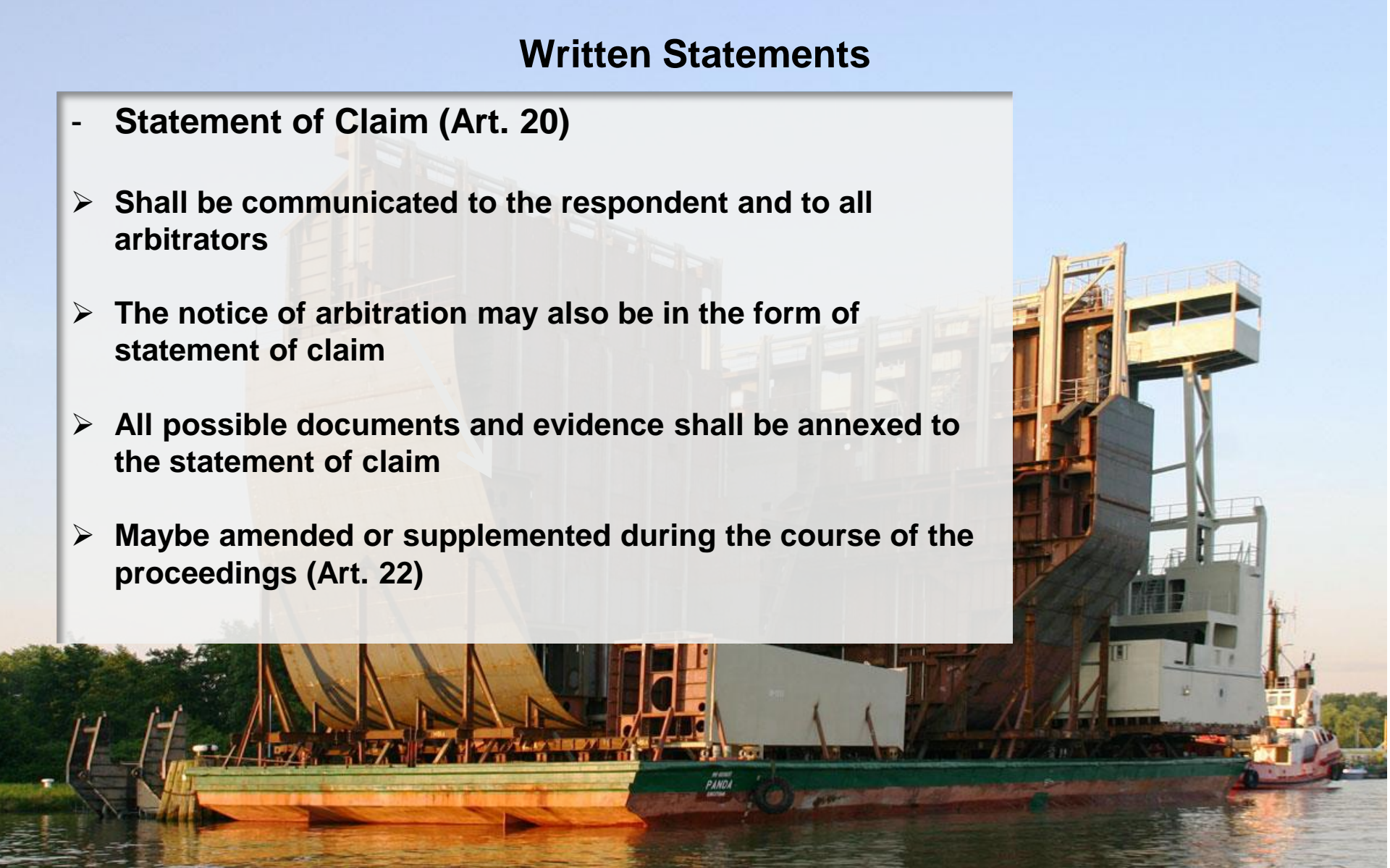
#### **Determined by the arbitral tribunal**

- **Subject to the parties agreements**
- **One or more languages may be chosen for the proceedings**
- **Chosen language/s apply to written statements and oral hearings**
- **Arbitral tribunal may also request the translation of original documents into the chosen language**



### Written Statements

- **Statement of Claim (Art. 20)**
  - **Shall be communicated to the respondent and to all arbitrators**
  - **The notice of arbitration may also be in the form of statement of claim**
  - **All possible documents and evidence shall be annexed to the statement of claim**
  - **Maybe amended or supplemented during the course of the proceedings (Art. 22)**





### Written Statements

- **Statement of Defence (Art. 21)**
  - **Shall be communicated to the claimant and to all arbitrators**
  - **The response to notice of arbitration may also be in the form of statement of defence**
  - **All possible documents and evidence shall be annexed to the statement of claim**
  - **Maybe amended or supplemented during the course of the proceedings (Art. 22)**



### Written Statements

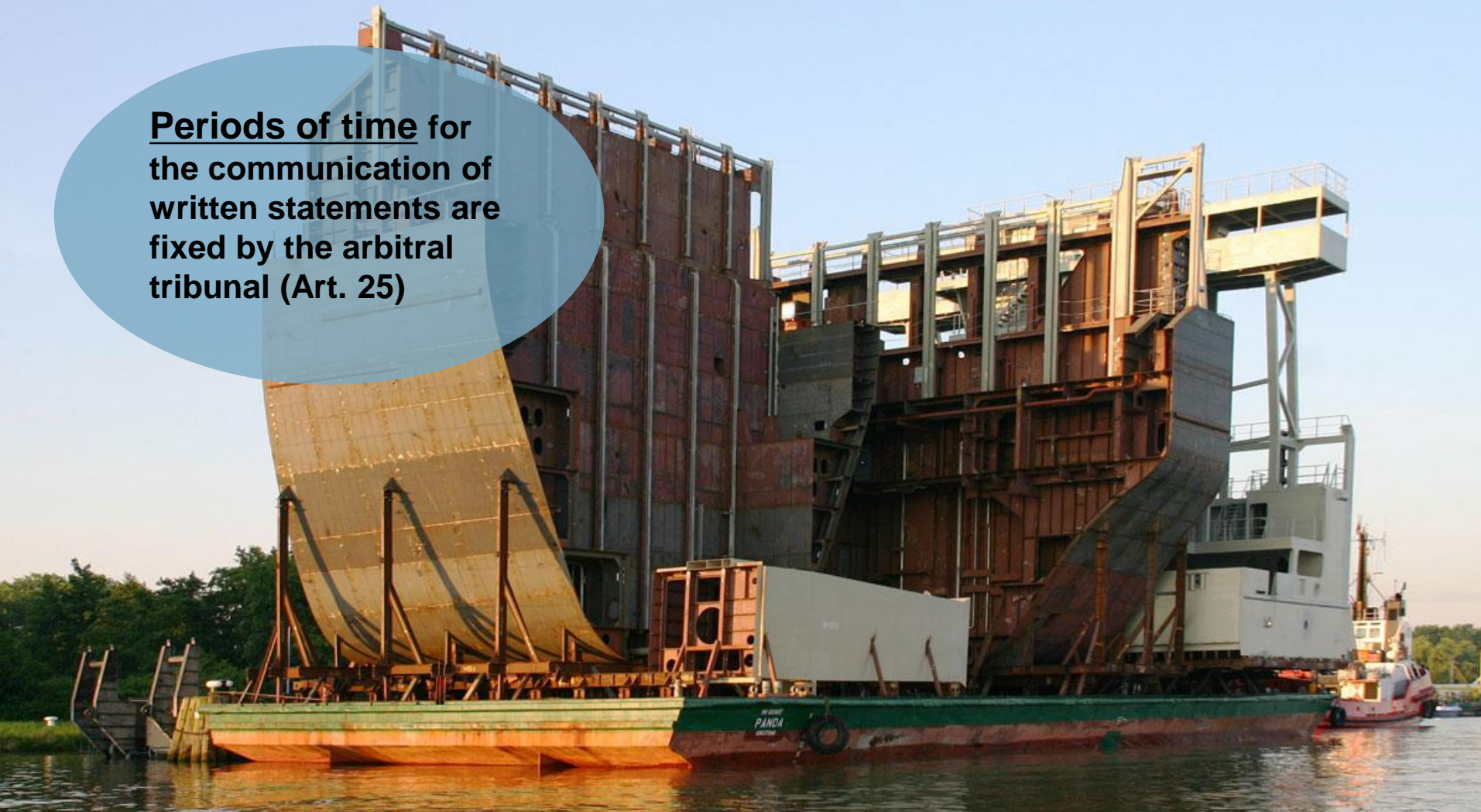
- **Statement of Defence (Art. 21)**
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**Approach to written  
Witness statements**



### Written Statements (cont'd)

**Periods of time for the communication of written statements are fixed by the arbitral tribunal (Art. 25)**



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**Periods of time for the communication of written statements are fixed by the arbitral tribunal (Art. 25)**

**Objections to the jurisdiction**

- Arbitral tribunal may rule on its own jurisdiction
- Such plea shall be raised at latest in the statement of defence

(Art. 23)



### Written Statements (cont'd)

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- Such plea shall be raised at latest in the statement of defence

**(Art. 23)**

**\*Such a plea does not suspend proceedings**

### Interim Measures (Art. 26)

#### **Interim Measure**

**Any measure taken by the arbitral tribunal with the aim of maintaining current status regarding the dispute matter and preventing unrepairable damages**



### Interim Measures (Art. 26)

- The arbitral tribunal is empowered to grant interim measures:
  - Request of one of the parties
  - Parties shall be able to present that:
    - the possibility of an unrepairable harm
    - reasonable possibility that the requesting party will succeed on the merits of the claim
  - Request for security: „in connection with the measure“
  - Judicial interim measures: „Any interim measure request to a judicial authority does not hinder arbitral proceedings“



### Evidence

#### Evidence (Art. 27)

- Request of documents: arbitral tribunal may in any stage ask for documents or other evidence
- Witnesses and expert witnesses (may be written or they can be heard at the oral hearings)



#### Appointment of Experts (Art. 29)

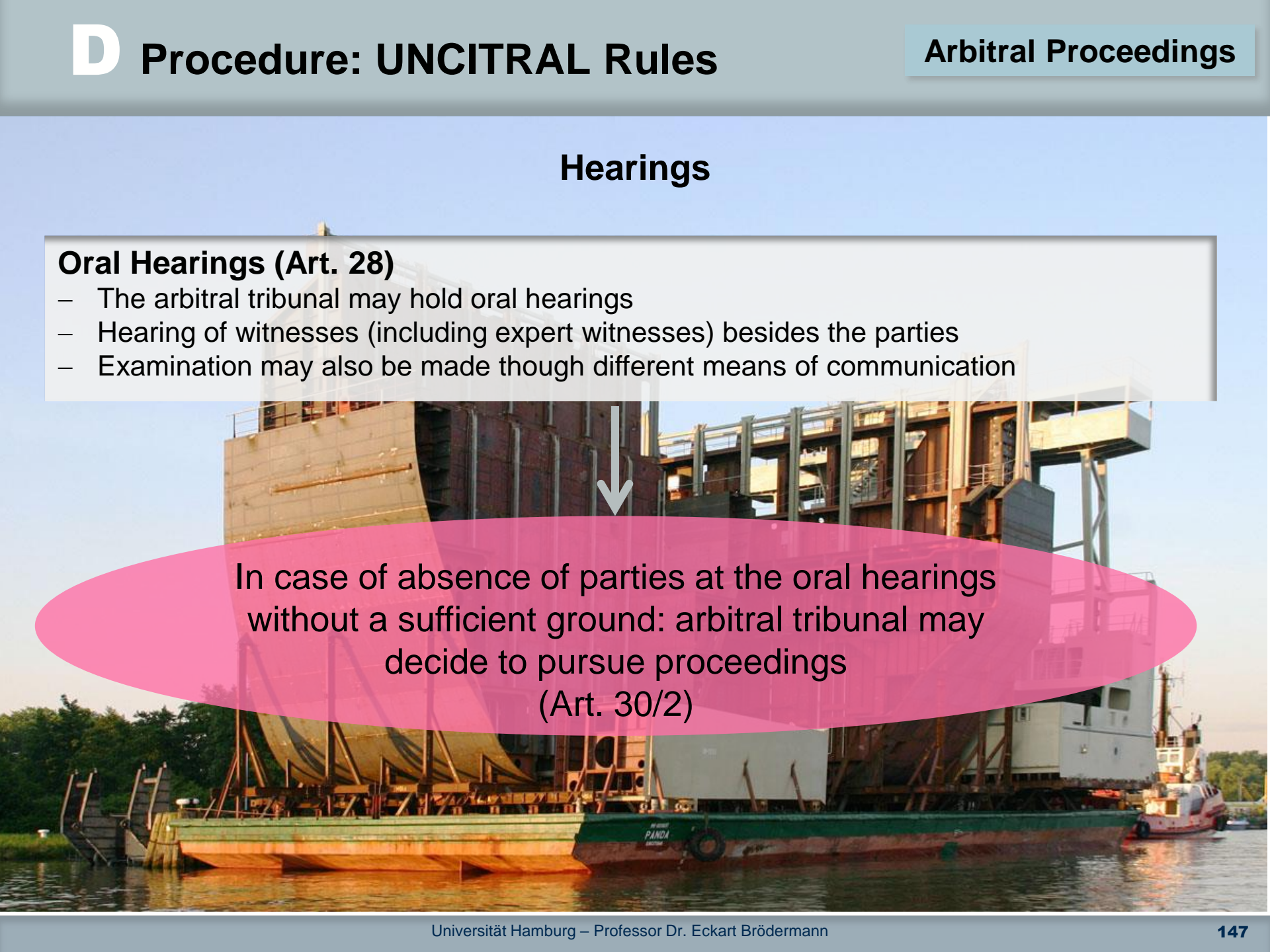
consultation with parties for determination of  
specific issues



### Hearings

#### Oral Hearings (Art. 28)

- The arbitral tribunal may hold oral hearings
- Hearing of witnesses (including expert witnesses) besides the parties
- Examination may also be made through different means of communication

A large ship is being lifted by a crane on a barge. The ship is green and white, and the crane is yellow. The barge is on a body of water. The ship is being lifted by a crane on a barge. The ship is green and white, and the crane is yellow. The barge is on a body of water.

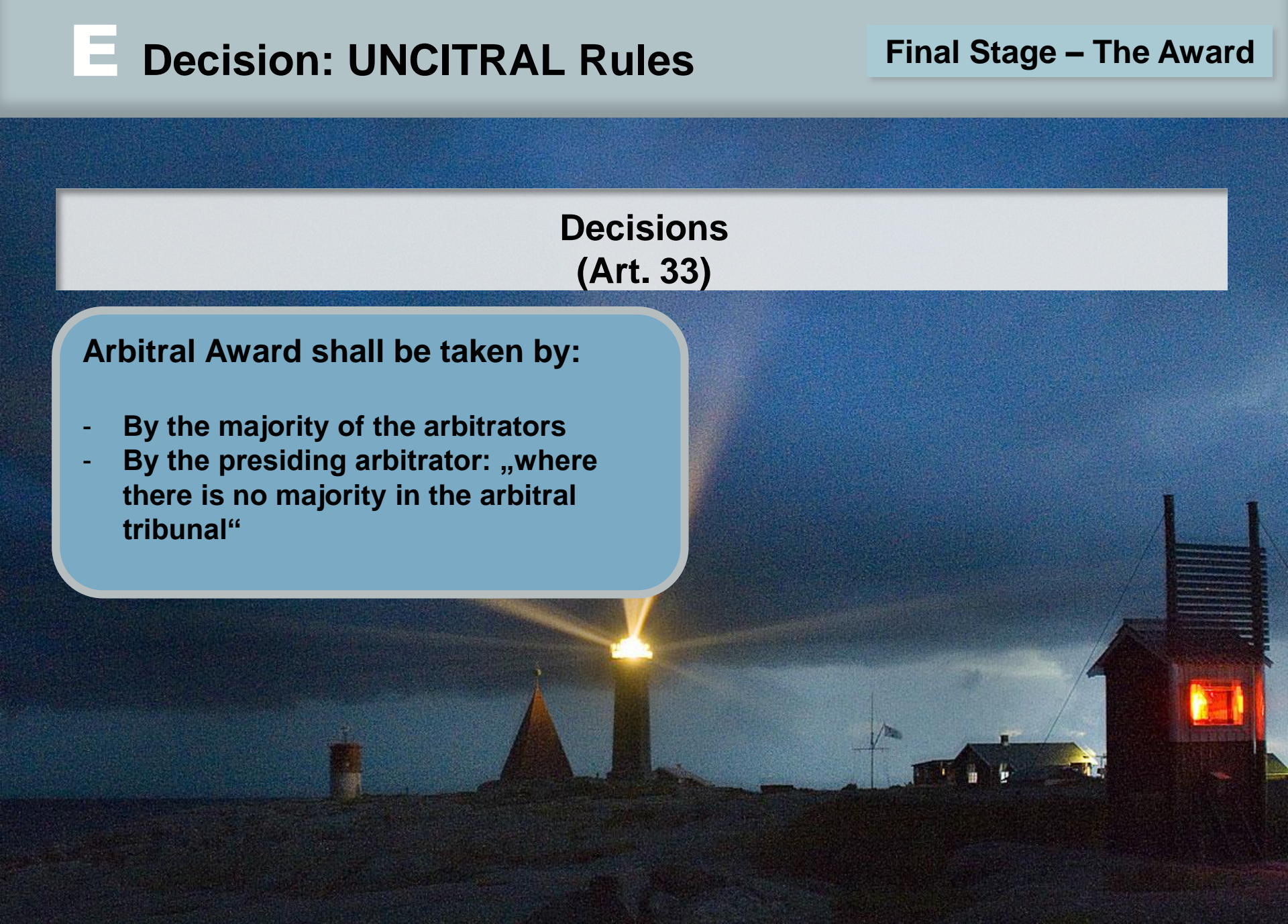
In case of absence of parties at the oral hearings  
without a sufficient ground: arbitral tribunal may  
decide to pursue proceedings  
(Art. 30/2)



### **Decisions (Art. 33)**

**Arbitral Award shall be taken by:**

- By the majority of the arbitrators
- By the presiding arbitrator: „where there is no majority in the arbitral tribunal“





### **Decisions (Art. 33)**

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#### **Form (Art. 34)**

- Written form  
requirement
- Decision has to be  
reasoned
- Signed by arbitrators
- Includes date and  
place of arbitration



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**One  
place!**



### Decisions (Art. 33)

#### Arbitral Award shall be taken by:

- By the majority of the arbitrators
- By the presiding arbitrator:  
„where there is no majority in the  
arbitral tribunal“

#### Effect (Art. 34)

- Final and binding for the parties
- Shall be carried out by parties without delay

#### Form (Art. 34)

- Written form requirement
- Decision has to be reasoned
- Signed by arbitrators
- Includes date and place of arbitration

**One  
place!**

**Risk  
of several  
places!**



### **Termination of Arbitral Proceedings (before a deciding Arbitral Award) (Art. 36)**

- **Settlement of the dispute by parties' agreement:**
  - An order on termination of proceedings
  - Settlement by form of an arbitral award (recorded by the Arbitral Tribunal)
- When proceedings become unnecessary or impossible (for any reason other than parties' settlement)
  - An order on termination of proceedings



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**Award**

**on agreed  
terms**



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  - An order on termination of proceedings

**Attention:**  
**No misuse for  
money laundry**

**Award  
on agreed  
terms**



### Finality of the Award

International Arbitration is designed only to be one instance, therefore:

- **Main principle: The awards granted by the Arbitral Tribunal are FINAL** and they are to be complied by parties without delay





### Finality of the Award

- **No appeal for arbitral awards but:**
  - **Interpretation of the Award** – one of the parties may request from the arbitral tribunal (Art. 37)
  - **Correction of the Award** – one of the parties may request the correction of any clerical, typographical error or computation errors (or errors of similar nature)



### Finality of the Award

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  - Interpretation of the Award – request from the arbitral tribunal (Art. 37)
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Importance for further stages  
(recognition and enforcement of the arbitral award)





**F**

**Pause: Another look at arbitration ...**

# F ... Understanding of the arbitration (or litigation) procedure as a risk

## Risk analysis

Choice of jurisdiction

Procedure/ Service

Conflicts of law

Substantive Law

International Public Law

Litigation versus Arbitration

Institutional versus ad hoc arbitration

Comparative Rules of Evidence

Comparative Conflicts of law

Comparative Law

Mandatory Law

European Law

Decision on Strategy

Statement of Claim

Analysis of Respondents Answer

Rebuttal

Oral Hearings

Post Hearing Brief

Appeal

Case I

Settlement Negotiations

Appeal

Appeal

Case II

Judgement or Award

Research of Facts

Controlling of Facts

Analysis Background of Judge/ Arbitrator

Cost estimation

Budget

Cost Controlling

Coordination of Invoicing

Know How Management

Quality Management

Project Management

Liaison with Client



# **F** The Arbitration Agreement (Clause): A risk of cost and time, **but first of all a risk minimisation device**



# F Arbitration: A risk of cost and time, but firstly a risk minimisation device

## Planning of risk management

### Risk Management

The clause on dispute settlement (resp. Mediation and **Arbitration**) constitutes together with the choice of law clause (and the research on applicable mandatory law) the **backbone** of an international contract.

### Risk Control



## **G1-7**      **Special Issues**

**G1 Contract with Arbitrator**

**G2 Procedural Rules & Orders**

**G3 Support by State Courts**

**G4 The Applicable Arbitration Law**

**G5 Determination of the Applicable Law on the Matter Itself**

**G6 Costs**

**G7 Special Features of Arbitration**



Composition of the arbitral tribunal is closely related to the contract with the arbitrator(s):

- Contract between both parties and arbitrator(s)

Arbitrator(s)  
serve both  
parties





Composition of the arbitral tribunal is closely related to the contract with the arbitrator(s):

- Contract between both parties and arbitrator(s)
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**Institutional Arbitration:**  
Contract with arbitrators  
by the arbitration  
institution **on behalf of  
the parties**  
(e.g. ICC, DIS-arbitration)



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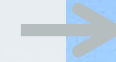
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(e.g. ICC, DIS-arbitration)



Composition of the arbitral tribunal is closely related to the contract with the arbitrator(s):

- Contract between both parties and arbitrator(s)
- Independent from the arbitration agreement
- No specific form requirement



Arbitrator(s)  
serve both  
parties

**Institutional Arbitration:**  
Contract with arbitrators  
by the arbitration  
institution **on behalf of  
the parties**  
(e.g. ICC, DIS-arbitration)

Under what law?  
→ European  
thinking



### Nature of the Contract: Sui Generis

#### Double Function

**Private law contract:**  
defines the legal relationship between parties

- Duties of parties, remuneration, liabilities, advance payments, etc.



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#### Double Function

**Private law contract:**  
defines the legal relationship between parties

- Duties of parties, remuneration, liabilities, advance payments, etc.

**Process Agreement:**  
creates procedural effects

- Assigns arbitrators procedural duties



### Conclusion of the Contract (*Ad hoc* Arbitration)

- **Separate Appointment:** where each party appoints an arbitrator
- **Joint Appointment:** where parties appoint arbitrator(s) jointly with mutual agreement



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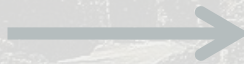
**Communication of the appointment to the other party:**

no need for specific acceptance of the other party



### Conclusion of the Contract (*Ad hoc* Arbitration)

- **Separate Appointment:** where each party appoints an arbitrator
- **Joint Appointment:** where parties appoint arbitrator(s) jointly with mutual agreement



**Acceptance of the arbitrator to take part in the proceedings**



### **Conclusion of the Contract (Institutional Arbitration) (e.g. ICC, CEAC)**

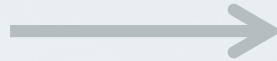
- Appointment by parties**
- Appointment by Appointing Authority**





### Conclusion of the Contract (Institutional Arbitration) (e.g. ICC, LCIA, DIS)

- Appointment by parties



Acceptance of arbitrator  
**and** confirmation of the  
institution

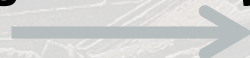
Art. 9 ICC Arbitration  
Rules: confirmation of the  
arbitrators is required

- Appointment by Appointing Authority



### **Conclusion of the Contract (Institutional Arbitration) (e.g. ICC, CEAC)**

- **Appointment by parties**
- **Appointment by Appointing Authority**



Acceptance of the  
arbitrator



### Applicable Law

- **Contract with arbitrator: nature of a service agreement**
- Determination of the applicable regime of private international law

→ A special and separate issue from the law applicable to the procedure or to the substance of the case (classification!)



### Applicable Law


- **Contract with arbitrator: nature of a service agreement**
- Determination of the applicable regime of private international law
- All regimes recognize the Freedom of choice
- In the EU: Rome I Regulation Art. 3
  - Parties may freely agree on the applicable law to the contract



### Applicable Law

- **Contract with arbitrator: nature of a service agreement**
- Determination of the applicable regime of private international law
- All regimes recognize the Freedom of choice
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- 
- A large, rusted metal shipwreck, likely a ship's hull, lies on a sandy beach. The structure is heavily corroded and partially submerged in the ocean. The background shows a blue sky with scattered clouds and a green, hilly coastline.
- In the absence of choice of law
  - Rome I Regulation Art. 4 (1) (b)  
law of the usual residence of the arbitrator



### Ad hoc Arbitration v. Institutional Arbitration

#### **Ad hoc:** Parties

- may define own procedural rules

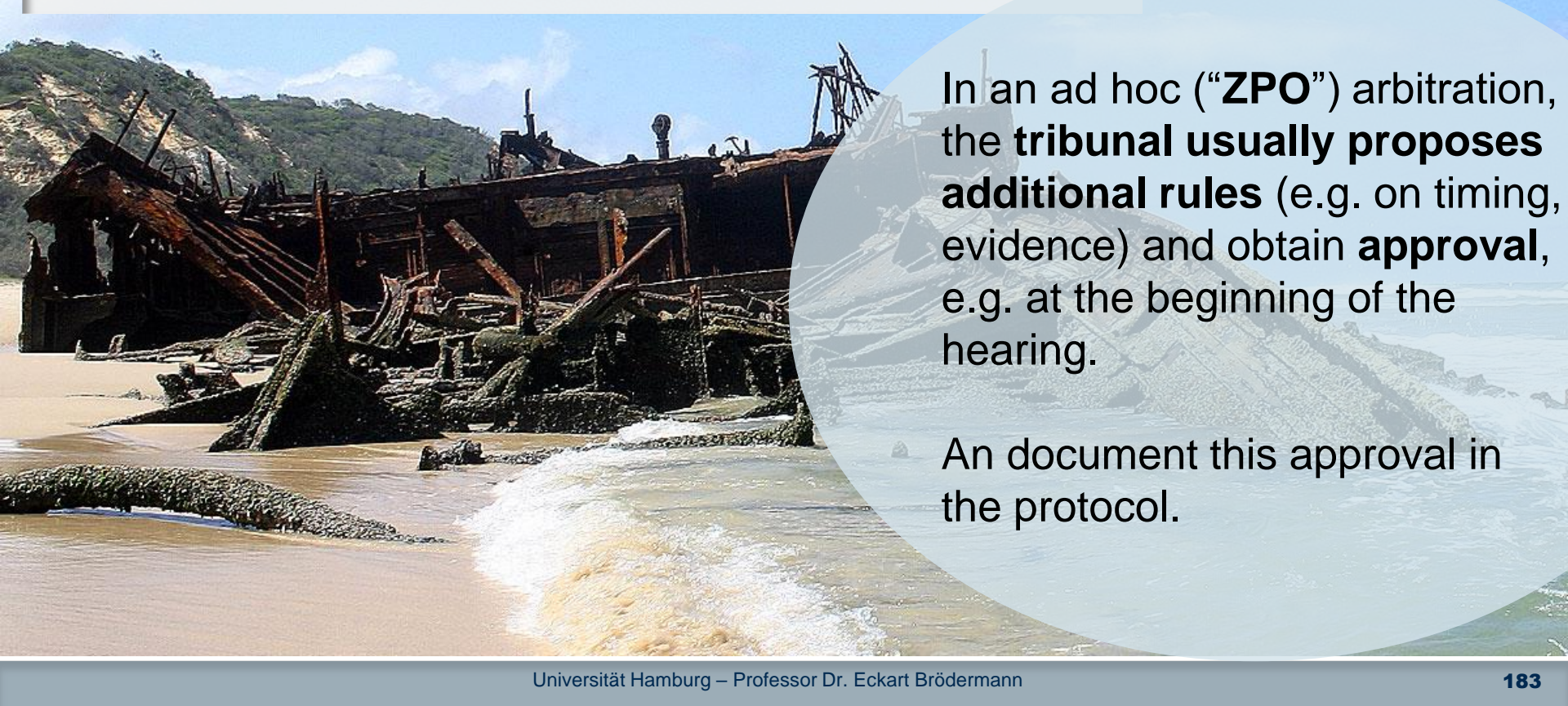




### Ad hoc Arbitration v. Institutional Arbitration

#### **Ad hoc:** Parties

- may define own procedural rules

A large, rusted metal shipwreck, likely a ship's hull, lies on a sandy beach. The structure is heavily corroded and partially submerged in shallow, murky water. In the background, there are green hills under a blue sky with some clouds. The scene is a stark contrast between the man-made wreckage and the natural environment.

In an ad hoc (“**ZPO**”) arbitration, the **tribunal usually proposes additional rules** (e.g. on timing, evidence) and obtain **approval**, e.g. at the beginning of the hearing.

An document this approval in the protocol.



### Ad hoc Arbitration v. Institutional Arbitration

#### Ad hoc: Parties

- may define own procedural rules
- may refer to already existing **standard arbitration** rules (e.g. UNCITRAL Arbitration Rules)

→ A large set of issues is covered.





e.g.

- On **timing (deadlines)**
- On **issues not covered** in the arbitration agreement or the procedural rules (e.g. language)
- On **preliminary views or questions** in preparation of a hearing

Different approach  
in different  
jurisdictions

Help to one side  
is a detriment to  
the other side

Finding the  
balance (cf.  
§ 139 ZPO)



**Institutional Arbitration:** Institutions (ICC, DIS, LCIA, AAA, CEAC, KLAC, HKIAC, CIETAC etc.)

- Have their own arbitration rules
- establish detailed procedural rules, e.g. on evidence



**Institutional Arbitration:** Institutions (ICC, DIS, LCIA, AAA, CEAC, KLAC, HKIAC, CIETAC etc.)

- has own arbitration rules/orders
- establish detailed procedural rules, e.g. on **evidence**

- Written witness statements
- Witness conferences

Different approach  
in different  
jurisdictions

e.g. ICC-  
Rules on  
Evidence



### Institutional Arbitration: ICC Specialty

#### Art. 23 ICC Arbitration Rules – Terms of Reference

- Agreement **signed** by the Parties and the Arbitrators
- defines the limits of the claims of the parties
- new claims exceeding terms of reference are not allowed



= A big effort

### **Institutional Arbitration:** ICC Specialty

**Art. 23 ICC Arbitration Rules**

- Agreement signed by the Parties and the Arbitrators

**Pleadings and Telcos to agree on such a contract**

- defines the limits of the claims of the parties
- new claims exceeding terms of reference are not allowed

**Pro:**  
**Clarity on the issues in dispute**

**Contra:**  
**Time. Money.**  
Sometimes substantial additional workload for Counsels and Chairman



### **Arbitral Tribunals may require the assistance of state courts during their proceedings:**

- General principle: Arbitral Tribunal pursues its own proceedings
- Where national legislation expressly allows/requires such assistance
- Only for certain matters

**Evidence Taking**

**Interim Measures**



### Evidence Taking:

- **Arbitral Tribunal has the power to collect evidences:** (e.g. Art. 27 UNCITRAL Rules)
  - To hear witnesses, expert witnesses
  - May request expert reports
  - May request from parties to produce any documents or other evidences
- **Assistance of the Court:** for disclosure of materials
  - Particularly where disclosure is sought from third parties

§ 1050 ZPO: German Civil Procedural Code provides the possibility of evidence taking and similar procedures by state courts

- Arbitrator(s) are allowed to take part in such proceedings



### **Interim Measures:**

- **Concurrent jurisdiction:** exception to the principle of international arbitration to centralize the resolution of disputes in a single forum
- **Rationale:**
  - To provide immediate relief to stop irreparable harm
  - Inability of arbitral tribunals to always grant effective measures (e.g. where the measures involve third parties)
- **Concurrent jurisdiction, no breach of Arbitration Agreement**
- **Possibility established in international conventions, standard Arbitration Rules and in national jurisdictions**

**Opt-out from  
competence of judicial  
authorities in the  
arbitration agreement?  
Disputed**



## Exkurs:

**Vortrag RA Grau (Hamburg) beim 1. Norddeutschen Schiedsgerichtstag mit nützlicher Übersicht über die Eingriffsmöglichkeiten nationaler Gerichte in Schiedsverfahren in Deutschland**

# **Einbindung staatlicher Gerichte in Schiedsverfahren**

**1. Norddeutscher Schiedsgerichtstag - Handelskammer Hamburg - 8. Februar 2013**

**Carsten Grau**

Rechtsanwalt

Solicitor (England & Wales)

L2C Rechtsanwälte, Wirtschaftsprüfer, Steuerberater (Hamburg)



**Zitat bei leichter Veränderung des Layouts und Anpassung an die neue  
Rechtsschreibung**

## 1032 Abs. 2 ZPO:

### Antrag auf Feststellung der Zulässigkeit bzw. Unzulässigkeit eines schiedsrichterlichen Verfahrens;

Zuständig: OLG, das in der Schiedsvereinbarung bezeichnet ist bzw. in dessen Bezirk der Ort des schiedsrichterlichen Verfahrens liegt (§ 1062 Abs. 1 Nr. 2 ZPO) bzw. der Sitz oder gewöhnliche Aufenthaltsort des Antragsgegners liegt oder Belegenheit des in Anspruch genommenen Vermögensgegenstands, hilfsweise: KG Berlin (§ 1062 Abs. 2 ZPO);

Zeitpunkt: Eingang des Antrags beim OLG spätestens gleichzeitig mit Bildung, d. h. Konstituierung des Schiedsgerichts (OLG Saarbrücken, SchiedsVZ 2008, 313), also spätestens mit Zugang der letzten Annahmeerklärung eines Schiedsrichters bei den Parteien bzw. dem Vorsitzenden bzw. den anderen Schiedsrichtern;

Entscheidung: Beschluss (§ 1063 Abs. 1 ZPO);

Rechtsmittel: Rechtsbeschwerde zum BGH (§ 1065 Abs. 1 S. 1 ZPO).

Einbindung staatlicher  
Gerichte  
in Schiedsgerichtsverfahren



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Zeitpunkt: Eingang des Antrags beim OLG spätestens gleichzeitig mit Bildung, d. h. Konstituierung des Schiedsgerichts (OLG Saarbrücken, SchiedsVZ 2008, 313) oder bei widersprechenden Klauseln (z.B. Schiedsklausel v. Annahmeerklärung eines Schiedsrichters bei den Parteien bzw. dem Vorsitzenden bzw. den anderen Schiedsrichtern);

Entscheidung: Beschluss (§ 1063 Abs. 1 ZPO);

Rechtsmittel: Rechtsbeschwerde (§ 1065 Abs. 1 ZPO) und damit kein Widerspruch?

Einbindung staatlicher  
Gerichte  
in Schiedsverfahren

## § 1034 Abs. 2 ZPO:

### Antrag auf Benennung eines oder mehrerer Schiedsrichter

abweichend von der Schiedsvereinbarung, wenn eine der Parteien hinsichtlich der Zusammensetzung des Schiedsgerichts im Nachteil ist, z. B. wenn eine Partei auf die Ernennung des Einzelschiedsrichters oder des 3. Schiedsrichters größeren Einfluss hat als die andere (KG Berlin NJW 2008, 2719; OLG Frankfurt SchiedsVZ 2006, 219);

Zuständig: OLG, das in der Schiedsvereinbarung bezeichnet ist bzw. in dessen Bezirk der Ort des schiedsrichterlichen Verfahrens liegt  
( § 1062 Abs. 1 Nr. 1 ZPO);

Zeitpunkt: Antragstellung spätestens zwei Wochen nach Kenntnis der betroffenen Parteien von der Zusammensetzung des Schiedsgerichts bzw. der Ernennung des Einzelschiedsrichters ( § 1034 Abs. 2 S. 2 ZPO).

Entscheidung: Beschluss ( § 1063 Abs. 1 ZPO): Ablehnung oder Bestellung gemäß § 1035 ZPO (Unabhängigkeit, Unparteilichkeit, Zweckmäßigkeit);

Rechtsmittel: Unanfechtbar ( § 1065 Abs. 1 S. 2 ZPO).



## § 1035 Abs. 3 ZPO:

### Antrag auf Bestellung eines Schiedsrichters

mangels Parteivereinbarung (§ 1035 Abs. 3 S. 1 ZPO), ggf. Anordnung geeigneter Maßnahmen durch das OLG, wenn vereinbartes Verfahren zur Bestellung nicht eingehalten wird (§ 1035 Abs. 4 ZPO);

Zuständig: OLG, das in der Schiedsvereinbarung bezeichnet ist bzw. in dessen Bezirk der Ort des schiedsrichterlichen Verfahrens liegt (§ 1062 Abs. 1 Nr. 1 ZPO);

Zeitpunkt: Antragstellung innerhalb eines Monats nach Empfang der Aufforderung zur Bestellung bzw. innerhalb eines Monats nach Bestellung keine Einigung über 3. Schiedsrichter (§ 1035 Abs. 3 S. 3 ZPO);

Entscheidung: Beschluss (§ 1063 Abs. 1 ZPO): Ablehnung oder Bestellung;

Rechtsmittel: Unanfechtbar (§ 1065 Abs. 1 S. 2 ZPO, BGH NJW-RR 2010, 1251);

## § 1037 Abs. 3 ZPO:

### Antrag auf Entscheidung über Ablehnung eines Schiedsrichters

wenn Ablehnung nach Verfahren gemäß Parteivereinbarung ( § 1037 Abs. 1 ZPO) bzw. nach Verfahren gemäß § 1037 Abs. 2 ZPO erfolglos geblieben ist;

Zuständig: OLG, das in der Schiedsvereinbarung bezeichnet ist bzw. in dessen Bezirk der Ort des schiedsrichterlichen Verfahrens liegt ( § 1062 Abs. 1 Nr. 1 ZPO);

Zeitpunkt: Antragstellung durch ablehnende Partei innerhalb eines Monats nach Kenntniserlangung von der Entscheidung, mit der Ablehnung verweigert wurde ( § 1037 Abs. 3 S. 1 ZPO);

Entscheidung: Beschluss ( § 1063 Abs. 1 ZPO): Ablehnung des Antrags oder Aufhebung der Entscheidung des Schiedsgerichts, mit der Ablehnung des SR verweigert wurde;

Rechtsmittel: Unanfechtbar ( § 1065 Abs. 1 S. 2 ZPO).

Einbindung staatlicher  
Gerichte  
in Schiedsgerichtsverfahren



# § 1038 Abs. 1 S. 1 ZPO:

## Antrag auf Entscheidung über Amtsbeendigung

wenn SR im Fall der Untätigkeit oder rechtlicher oder tatsächlicher Unmöglichkeit der Amtsausübung nicht zurücktritt bzw. Parteien sich über Amtsbeendigung nicht einigen können (z. B. schwere Erkrankung, Geschäftsunfähigkeit, Erlangung von Organstellung in einer Partei, Auflösung der angerufenen Schiedsgerichtsinstitution: BGHZ 125, 7);

Zuständig: OLG, das in der Schiedsvereinbarung bezeichnet ist bzw. in dessen Bezirk der Ort des schiedsrichterlichen Verfahrens liegt (§ 1062 Abs. 1 Nr. 1 ZPO);

Zeitpunkt: Antragstellung innerhalb eines Monats ab Kenntnis der die Untätigkeit (innerhalb angemessener Zeit) bzw. Unmöglichkeit der Amtsausübung begründenden Umstände;

Entscheidung: Beschluss (§ 1063 Abs. 1 ZPO): Ablehnung des Antrags oder Aufhebung der Entscheidung des Schiedsgerichts, mit der Ablehnung des SR verweigert wurde;

Rechtsmittel: Unanfechtbar (§ 1065 Abs. 1 S. 2 ZPO).

Einbindung staatlicher  
Gerichte  
in Schiedsgerichtsverfahren

## § 1050 Abs. 1 S. 1 ZPO:

### Gerichtliche Unterstützung bei Beweisaufnahme und sonstigen richterlichen Handlungen:

auf Antrag der Partei mit Zustimmung des Schiedsgerichts sowie auf Antrag des Schiedsgerichts; insbesondere Ladung und Vernehmung von Sachverständigen, Einholung von Behördenauskünften, Aussagegenehmigungen, auch: Richtervorlage an EuGH oder BVerfG (*Münch, Müko-ZPO*, 3. Auflage, München 2008, § 1050 Rn. 11); auch für im Ausland geführte Schiedsverfahren (§ 1025 Abs. 2 ZPO, s. hierzu ausführlich *Steinbrück*, Diss. Köln 2009) Parteien und Schiedsrichter dürfen an der richterlichen Beweisaufnahme teilnehmen und Fragen stellen (letztere: § 1050 Abs. 1 S. 3 ZPO);

Zuständig: AG, in dessen Bezirk die richterliche Handlung vorzunehmen ist (§ 1062 Abs. 4 ZPO);

Entscheidung: Beschluss (§ 1063 Abs. 1 ZPO): Ablehnung oder Ausführung der beantragten richterlichen Maßnahmen;

Rechtsmittel: Anfechtbar in Anlehnung an § 159 GVG bzw. durch sofortige Beschwerde nach § 567 Abs. 1 Nr. 2 ZPO (*Thomas/Putzo*, ZPO-Kommentar, 33. Auflage, München 2012, § 1050 Rn. 2).

Einbindung staatlicher Gerichte in Schiedsverfahren



## § 1059 ZPO:

### Antrag auf Aufhebung eines Schiedsspruchs:

§ 1059 Abs. 2 ZPO: mangelnde Fähigkeit einer Partei zum Abschluss einer Schiedsvereinbarung, Ungültigkeit der Schiedsvereinbarung, nicht gehörige Inkennzeichnung von der Schiedsrichterbestellung, Schiedsspruch überschreitet oder verfehlt „Scope“ der Schiedsvereinbarung, unzulässige Bildung des Schiedsgerichts, Streitgegenstand nach deutschem Recht nicht schiedsfähig, Anerkennung oder Vollstreckung gegen *ordre public*;

Zuständig: OLG, in der Schiedsvereinbarung bezeichnet bzw. in dessen Bezirk der Ort des schiedsrichterlichen Verfahrens liegt ( § 1062 Abs. 1 Nr. 4 ZPO);

Zeitpunkt: innerhalb von drei Monaten ab Empfang des Schiedsspruches, soweit zwischen den Parteien nichts anderes vereinbart wurde ( § 1059 Abs. 3 S. 1, 2 ZPO);

Entscheidung: Beschluß ( § 1063 Abs. 1 ZPO): Ablehnung oder Aufhebung oder Zurückverweisung an Schiedsgericht in geeigneten Fällen auf Antrag ( § 1059 Abs. 4 ZPO);

Rechtsmittel: Rechtsbeschwerde zum BGH ( § 1065 Abs. 1 S. 1 ZPO). **Einbindung staatlicher Gerichte in Schiedsverfahren**

## § 1060 ZPO:

### Antrag auf Vollstreckbarerklärung inländischer Schiedssprüche:

§ 1060 Abs. 1 ZPO: kein Aufhebungsgrund im Sinne von § 1059 Abs. 2 ZPO, es sei denn, Aufhebungsgründe bereits nach § 1059 Abs. 3 ZPO durch Fristablauf präkludiert; materiell-rechtliche Einwendung noch zulässig, soweit sie in den Anwendungsbereich der Vollstreckungsabwehrklage gemäß § 767 ZPO fallen (BGH NJW-RR 2011, 213), z. B. Aufrechnung oder Erfüllung nach Schiedsspruch;

Zuständig: OLG, in der Schiedsvereinbarung bezeichnet bzw. in dessen Bezirk der Ort des schiedsrichterlichen Verfahrens liegt ( § 1062 Abs. 1 Nr. 4 ZPO);

Zeitpunkt: innerhalb von drei Monaten ab Empfang des Schiedsspruches, soweit zwischen den Parteien nichts anderes vereinbart wurde ( § 1059 Abs. 3 S. 1, 2 ZPO);

Entscheidung: Beschluss ( § 1063 Abs. 1 ZPO): Ablehnung oder Vollstreckbarerklärung;

Rechtsmittel: Rechtsbeschwerde zum BGH ( § 1065 Abs. 1 S. 1 ZPO).



# § 1061 Abs. 1 ZPO, New York Convention:

## Antrag auf Vollstreckbarerklärung ausländischer Schiedssprüche:

1061 Abs. 1 ZPO in Verbindung mit Übereinkommen vom 10.06.1958 über die Anerkennung und Vollstreckung ausländischer Schiedssprüche (BGBl. 1961 II S. 121) – „New York Convention“; strengere Formvorschriften angesichts der Vielfalt internationaler Schiedssprüche (*Wolff*, New York Convention, Commentary, 1. ed., Munich/Oxford 2012); Aufhebung der Vollstreckbarerklärung, wenn Schiedsspruch im Ursprungsland aufgehoben wird (§ 1061 Abs. 3 ZPO);

Zuständig: OLG, in der Schiedsvereinbarung bezeichnet bzw. in dessen Bezirk der Ort des schiedsrichterlichen Verfahrens liegt (§ 1062 Abs. 1 Nr. 4 ZPO);

Zeitpunkt: innerhalb von drei Monaten ab Empfang des Schiedsspruches, soweit zwischen den Parteien nichts anderes vereinbart wurde (§ 1059 Abs. 3 S. 1, 2 ZPO);

Entscheidung: Beschluss (§ 1063 Abs. 1 ZPO): Ablehnung oder Vollstreckbarerklärung;

Rechtsmittel: Rechtsbeschwerde zum BGH (§ 1065 Abs. 1 S. 1 ZPO).

Einbindung staatlicher  
Gerichte  
in Schiedsgerichtsverfahren

## § 1063 Abs. 1 ZPO:

### Anordnung des Vorsitzenden einstweiliger Maßnahmen vor Vollstreckbarerklärung des Schiedsspruchs zur vorläufigen Sicherung:

auf Antrag ohne vorheriges rechtliches Gehör, nur zur Sicherung, nicht zur Befriedigung (*Sessler/Schreiber*, SchiedsVZ 2006, 119), z. B. vorläufiges Zahlungsverbot für Kontoverbindung, wenn Gläubiger glaubhaft macht, dass keine anderen vollstreckungsfähigen Vermögensgegenstände in Deutschland verfügbar (*Grau/Blechtschmidt*, OLG Frankfurt/M. SchiedsVZ 2010, 227f.);  
Abwendungsbefugnis des Schuldners durch Sicherheitsleistung; kein eigenständiger Gebührentatbestand nach RVG (*Grau/Graumann*, OLG Hamm, SchiedsVZ 2012, 221f.);

Zuständig: OLG, in der Schiedsvereinbarung bezeichnet bzw. in dessen Bezirk der Ort des schiedsrichterlichen Verfahrens liegt ( § 1062 Abs. 1 Nr. 4 ZPO);

Entscheidung: Beschluss ( § 1063 Abs. 1 ZPO): Ablehnung oder Anordnung;

Rechtsmittel: Rechtsbeschwerde zum BGH ( § 1065 Abs. 1 S. 1 ZPO).

Einbindung staatlicher  
Gerichte  
in Schiedsgerichtsverfahren



## § 1033 ZPO:

### Einstweilige Maßnahmen:

vorläufige oder sichernde Maßnahmen (Arrest oder einstweilige Verfügung: §§ 916ff. ZPO) vor oder nach Beginn eines Schiedsverfahrens sind durch Schiedsvereinbarung nicht ausgeschlossen, auch bei Schiedsort im Ausland (wg. § 1025 Abs. 2 ZPO), Einrede der Schiedsvereinbarung (§ 1032 Abs. 1 ZPO) insoweit nicht zulässig;

Zuständig: „Gericht der Hauptsache“ (LG) bzw. LG im Sinne von § 919 ZPO, d. Ort des Schiedsverfahrens oder der Belegenheit des betroffenen Vermögensgegenstands; daneben auch das Schiedsgericht (§ 1041 Abs. 1 ZPO);

Entscheidung: Beschluss bzw. Urteil;

Rechtsmittel: Widerspruch (§ 924 ZPO) bzw. Berufung (§§ 511ff. ZPO).

## § 1041 Abs. 2 ZPO:

### Vollziehung vorläufiger oder sichernder Maßnahmen, die das Schiedsgericht angeordnet hat:

auf Antrag, soweit nicht bereits einstweiliger Rechtsschutz bei Gericht beantragt wurde; Schadensersatzanspruch gemäß § 1041 Abs. 4 ZPO, wenn Maßnahme des Schiedsgerichts sich als von vornherein ungerechtfertigt erweist;

Zuständig: OLG, in der Schiedsvereinbarung bezeichnet bzw. in dessen Bezirk der Ort des schiedsrichterlichen Verfahrens liegt ( § 1062 Abs. 1 Nr. 4 ZPO);

Entscheidung: Beschluss;

Rechtsmittel: Kein Widerspruchsverfahren nach § 924 ZPO (*Thomas/Putzo*, ZPO-Kommentar, 33. Auflage, München 2012, § 1041 Rn. 2).

Einbindung staatlicher  
Gerichte  
in Schiedsgerichtsverfahren

Ende Zitat Folien von  
RA Grau, Vortrag 1.  
Norddeutscher Schieds-  
rechtstag (08.02.2013)



### Interim Measures (cont'd):

#### International Conventions

**Art. VI/4 European Convention:** explicit reference to jurisdiction of judicial authorities

- A request for interim measure is not incompatible with arbitration agreement

**New York Convention:** silent on the concurrent jurisdiction

#### Arbitration Rules

**UNCITRAL Art. 26/9**

**ICC Art. 23/3**

possibility of request for interim measures to judicial authorities

**ICSID Art. 23/2**

allows interim measures;  
requires parties' consent in the arbitration agreement

**§ 1033 ZPO:** Arbitration agreement does not prevent parties to apply for interim measures to judicial authorities



### The Applicable Law on the Dispute itself:

- **The basic rule:** the (mainly procedural) arbitration law which is applicable at the seat of the arbitration tribunal
- **Reason:** If ever an issue of arbitration is raised at a state court, the state court at the seat of the arbitration tribunal has jurisdiction. Such state court will apply the international procedural law (applicable at its court seat, the *forum*). Such international procedural law will refer (usually and often implicitly) to the arbitration law at the seat of the court.



## A distinct issue:

- Distinct from the interpretation of a contract before a state court because **other sources of law** may apply
- **Remember?** → **B above** on “Sources of Law”.





## Thumb rule (with different founding, e.g. § 1051 ZPO)

- **Principle - Free choice of parties:** Parties are free to define the applicable law to the substance within the arbitration agreement
- **In the absence of choice of applicable law:** Assessment by the arbitral tribunal for each case in light of international conventions, national arbitration legislation and standard/institutional arbitration rules

**Traditional Rule:**  
The law which is defined by the laws rules of the state where the arbitral proceedings take place



## International Conventions

**European Convention Art. VII (1):** reference to conflict of laws of the state that is deemed appropriate by the arbitral tribunal

**Public International Law** is binding in relations with the contracting states, e.g. Russia





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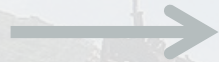
**New York Convention:** silent on the determination of the applicable law



## Arbitration Rules

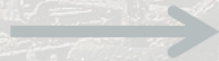
ICC Art. 7

UNCITRAL Art. 35



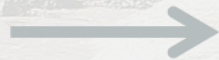
no reference to conflict of laws;  
**the law the arbitral tribunal  
determines to be appropriate**

DIS Art 23/2



the law of the state with which  
the merits of the dispute is  
most closely related

CEAC Art. 35



Choice of law with default rule

## Art. 35 CEAC Rules: Choice of law Clause

■ *The Arbitration Tribunal shall apply the law or rules of law designated by the parties as applicable to the substance of the dispute ...*

- ☐ a) *the law of the jurisdiction of \_\_\_\_\_, or*
- ☐ b) *the ... CISG [neutralised,  
supplemented by the UNIDROIT Principles], or*
- ☒ c) *the **UNIDROIT Principles**  
supplemented by the otherwise applicable law...*



# B Sources of law: On substantive law and its determination

„Ingredients“

## ■ Public International Law

→ New York Convention

Art. 5 (2) NYC

→ Geneva Convention

→ applicable law

## ■ Private International Law

→ Private International Law to determine the law applicable on the dispute

→ **Rome I Regulation** (Art. 1 para. 2 (e) debate e.g. for “rules of law”)

## ■ National Law

→ Institutional Procedural Rules

→ **National Arbitration law** (e.g. § 1051 ZPO / UNCITRAL Model Law debate)  
→ *et bono* alternative

**A hot topic  
→ Later.**

The opening door for:

- **UNIDROIT Principles** of International Commercial Contracts 2016;
- Generally **soft law**;
- The **avoidance of German law on unfair terms** in business to business contracts
- permitting adaptation reasonable **international standards**

## The Conflict

### EU Law: Rome I Regulation

- Art. 3: Free choice by parties limited to “**Law**”
- This does not include **rules of law** such as the UNIDROIT Principles on International Commercial Contracts

### National Legislation

§ 1051 ZPO (= Art. 28 UNCITRAL Model Law) :

- Permits the choice of law **or rules of law**
- Such as the UNIDROIT Principles on International Commercial Contracts



## The practical approach

### EU Law: Rome I Regulation

- Recital 13 permits the incorporation of “rules of law”
- A choice of the UNIDROIT Principles under the wrong heading “Choice of Law” would be valid in light of Recital 13 and the principle of party autonomy (“*falsa demonstratio non nocet*”), but it would not be a “choice of law” in the sense of Art. 3 Rome I
- The applicable law is then determined under Art. 4 Rome I
- No conflict with mandatory law in light of Art. 1.4 UNIDROIT Principles.

## The practical approach (2)

### Article 1.4 UNIDROIT Principles:

#### Mandatory rules

Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law.



Hot topic for arbitrations in the European Union (1)

## The academic dimension

Are arbitrators bound by the Rome I-regime?

Factors:

- ❖ **European Law has priority** over national law
- ❖ The **exception** in Art. 1 para. 2 (e) Rome I Regulation is **limited**:

“2. The following shall be **excluded from the scope** of this Regulation:

...

(e) **arbitration agreements** and agreements on the choice of Court; ....

## Hot topic for arbitrations in the European Union (2)

❖ “Arbitration Agreement”



“Contract on substance” to be interpreted in an arbitration proceeding

**Professor Mankowski** (RIW 2011 etc.):  
That is it (along with numerous detailed further arguments)

❖ Consequence: Rome I to be applied

❖ Important e.g. for “choice of UNIDROIT Principles” (rules of law, no “law”)

Uniform Law Review 2011 etc.: **Brödermann**

❖ **No intention of the legislator** to override Art. 28 UNCITRAL Model Law based national arbitration law such as § 1051 ZPO

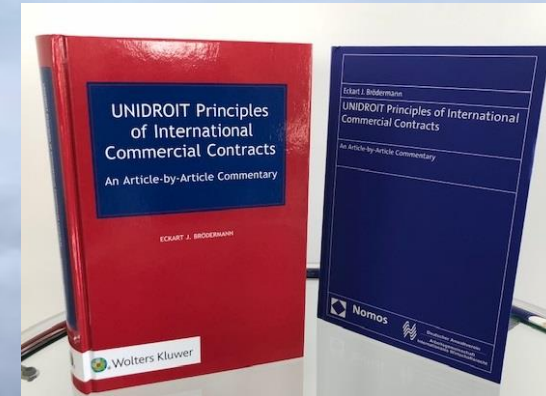
❖ **No intention to cause differences** between “ad hoc” and “institutional” arbitration (because choice of law rules of institutions are covered)

❖ **“Effet utile”** interpretation requires only consistency before state courts

❖ Broad interpretation of Art. 1 (2) (e) Rome I Regulation **beyond its wording**



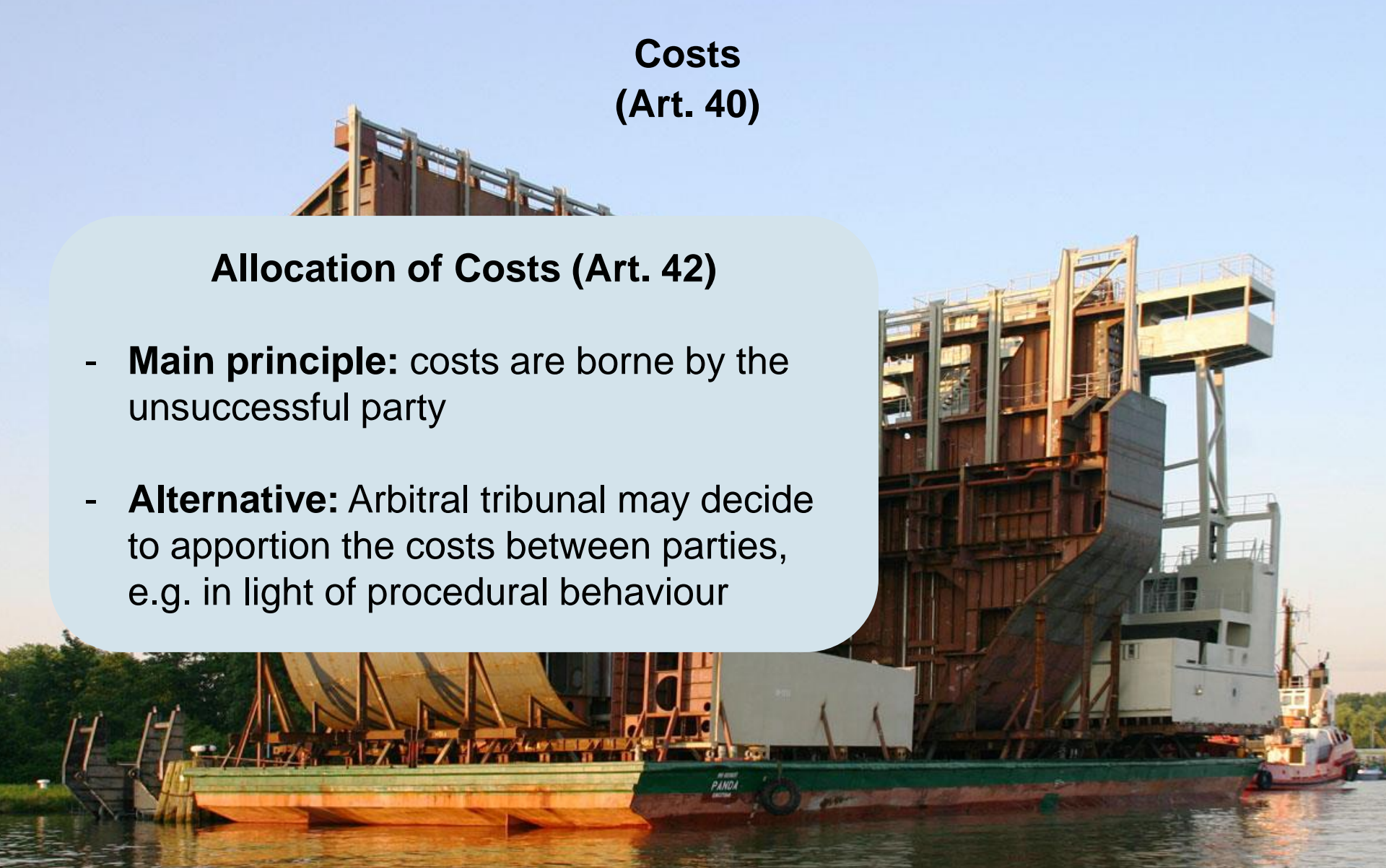
**Advantages of the UNIDROIT Principles, best  
combined with an arbitration clause**



### Costs (Art. 40)

#### Allocation of Costs (Art. 42)

- **Main principle:** costs are borne by the unsuccessful party
- **Alternative:** Arbitral tribunal may decide to apportion the costs between parties, e.g. in light of procedural behaviour





### Costs (Art. 40)

#### Allocation of Costs (Art. 42)

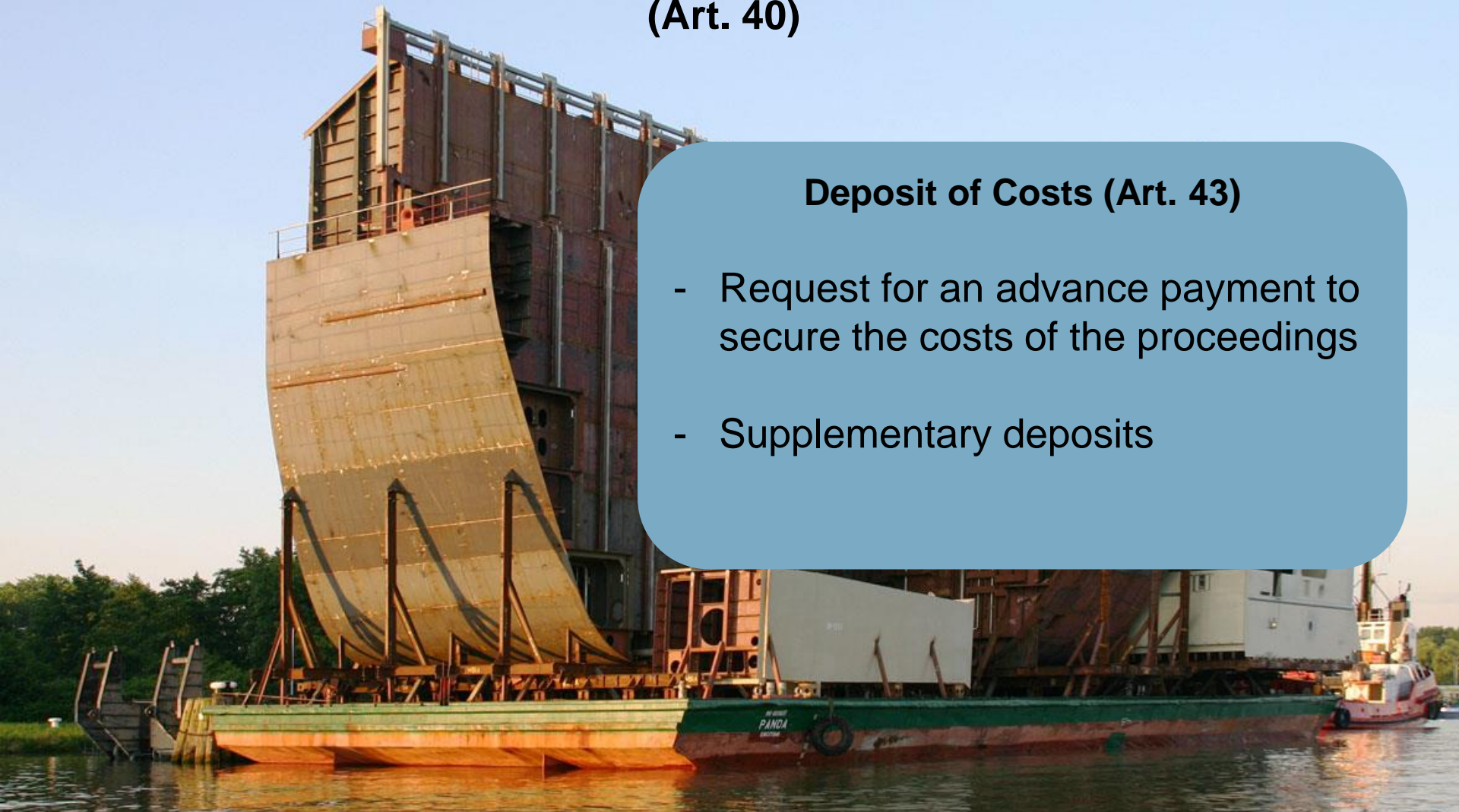
- **Main principle:** costs are borne by the unsuccessful party
- **Alternative:** Arbitral tribunal may decide to apportion the costs between parties e.g. in light of procedural behaviour

**Example ICC Tribunal 2011:**  
Criminal action in Germany with threats of one party to the witnesses of the other party caused a last minute transfer of the hearing from Hamburg to Istanbul

### Costs (Art. 40)

#### Deposit of Costs (Art. 43)

- Request for an advance payment to secure the costs of the proceedings
- Supplementary deposits





### Costs (Art. 40)

#### Deposit of Costs (Art. 43)

- Request for an advance payment to secure the costs of the proceedings
- Supplementary deposits

#### Suspension or termination of proceedings:

If the deposit payment is not duly made within the determined period

### Arbitration in Construction Contracts

#### “FIDIC” General Conditions of Construction Contracts

- **Red Book: Civil Engineering Construction (e.g. Road, Railway construction)**  
the agreement between the employer and the contractor
- **Silver Book: EPC/Turnkey Projects (engineer-procurement-construction)**
  - Refers to civil construction
  - Decreases the risks of employer
  - Contractor bares the majority of risks
- An engineer is appointed to supervise the contractor

**FIDIC**  
**(International Federation of Consulting Engineers)**  
→ produces standard forms of construction contracts



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Distinct from  
Adjudication by  
experts

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**(International Federation of Consulting Engineers)**  
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### Arbitration in Construction Contracts (cont'd)

#### A gradual dispute resolution system

Where a dispute arises from a construction contract:

- **Application to the Engineer for the claims:**  
Engineer may approve or disapprove the claims.





### Arbitration in Construction Contracts (cont'd)

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Where a dispute arises from a construction contract:

- **Application to the Engineer for the claims:**  
Engineer may approve or disapprove the claims.

then

- **Reference to **Dispute Boards (DB)****
  - One or three members: professionals experienced in the type of construction
  - Decisions become final and binding for parties if it is not challenged in due time (**Notice of Dissatisfaction**)



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→ See also ICC DBs

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If Notice of Dissatisfaction with DB decision

then

➤ **Amicable Settlement:**

- Parties shall try to settle amicably before initiating arbitral proceedings
- If not successful or torpedoed by one party (lack of any attempt for amicable settlement within a pre-determined period)

then

➤ **Arbitration:**

- procedural rules freely chosen
- e.g. UNCITRAL Arbitration Rules
- Fall back: ICC Arbitration Rules



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For contracts financed by Asian Development Bank: SIAC (Singapore International Arbitration Centre)



### Arbitration in Construction Contracts (cont'd) Some practical Problems

**Different application** of the FIDIC DB-System around the globe,  
e.g. in **India**: World Bank report on Indian Road Construction Industry (2008):

- DBs not pre-established
- DBs dominated by elderly members who often serve on multiple boards
- Recommendations often rejected
- Lengthy proceedings

No possibility of direct initiation of arbitration proceedings



### Different cultural Influences around the globe

Effect of International Arbitration Rules on national law systems: A mixture of Legal Systems  
(Example of **Malaysia**)

- In Malaysia, the arbitration legislation is based on UNCITRAL Model Law
- The KLRCA (Kuala Lumpur Regional Centre for Arbitration) Rules are based on UNCITRAL Arbitration Rules (2010)
- But also respect to the **islamic** influence:



- **Additional Possibility of Arbitration of Islamic Banking and Financial Services:** besides the international rules, the arbitration proceedings are also subject to the **supervision of Sharia Advisory Council** (Central Bank of Malaysia Act 2009, Sec. 56)

### Model Clause:

“Any dispute, controversy or claim arising from Islamic Banking business, takaful business, Islamic financial business, Islamic development financial business, Islamic capital market products or services or any other transaction business which is based on **Shariah principles** out of this agreement/contract shall be decided by arbitration in accordance with the Rules for Arbitration of Kuala Lumpur Regional Centre for Arbitration (Islamic Banking and Financial Services).”

## H

## Enforcement



→ What matters:

## Public International Law

- New York Convention (Art. V et al.)
- Geneva Convention
- Bilateral Conventions

Nota bene: How do you interpret an international Convention like the NYC or the German-Italian Recognition and Enforcement Convention ?

Enforcement

See  
“**Vienna Convention**  
on the law of treaties”

Art. 31 ff.: Wording, Contracting Parties intention



## Public International Law

### ■ New York Convention (Art. V et al.)

## Enforcement

As a result:

- Importance of reading ..
- Awareness of political process → not everything is necessarily exactly where you might expect it
- Conditions of recognition not only in Art. V



## Recognition under the New York Convention

Ex officio:

### Article I NYC

- The existence of a **foreign arbitral award** (Art. I para. 1, 2 New York Convention);

### Article II NYC

- The **validity of the arbitration agreement** (Art. II para. 1, 2 New York Convention);

### Article IV NYC

- The **duly certified copy** of the arbitral award and arbitration agreement additional to translations;  
**and conditions of Article V NYC (the core discussion)**

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Place of  
its making  
(One place!)

Obvious

China:  
Place of the  
seat of the  
administration  
institution



## Text of the New York Convention

### Article V NYC

1. ....

Ex officio:

2. Recognition and enforcement of an arbitral award **may** also **be refused if the competent authority** in the country where recognition and enforcement is sought **finds that:**

- (a) The subject matter of the difference is **not capable of settlement by arbitration under the law of that country**; or
- (b) The recognition or enforcement of the award would be **contrary to the public policy** of that country.

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What is the difference?

## Article V NYC

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## Text of the New York Convention

### Article V NYC

On  
proven  
request:

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:

(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**; or ...



On  
proven  
request:

## Article V NYC

(b) The party against whom the award is invoked was **not given proper notice** of the appointment of the arbitrator or of the arbitration proceedings or was **otherwise unable to present his case**; or

(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

On  
proven  
request:

## Article V NYC

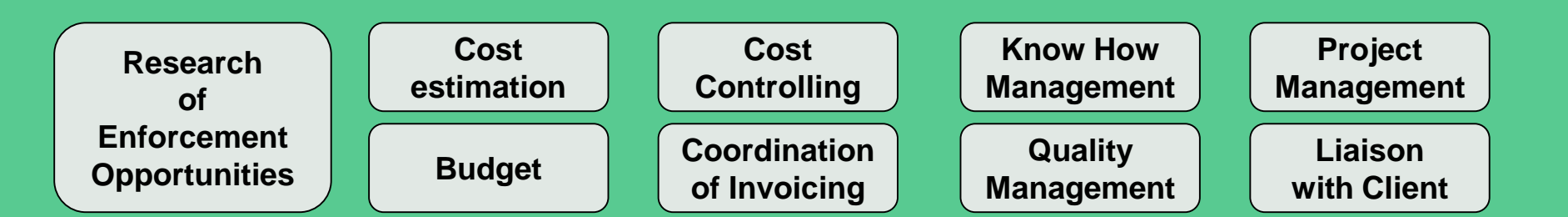
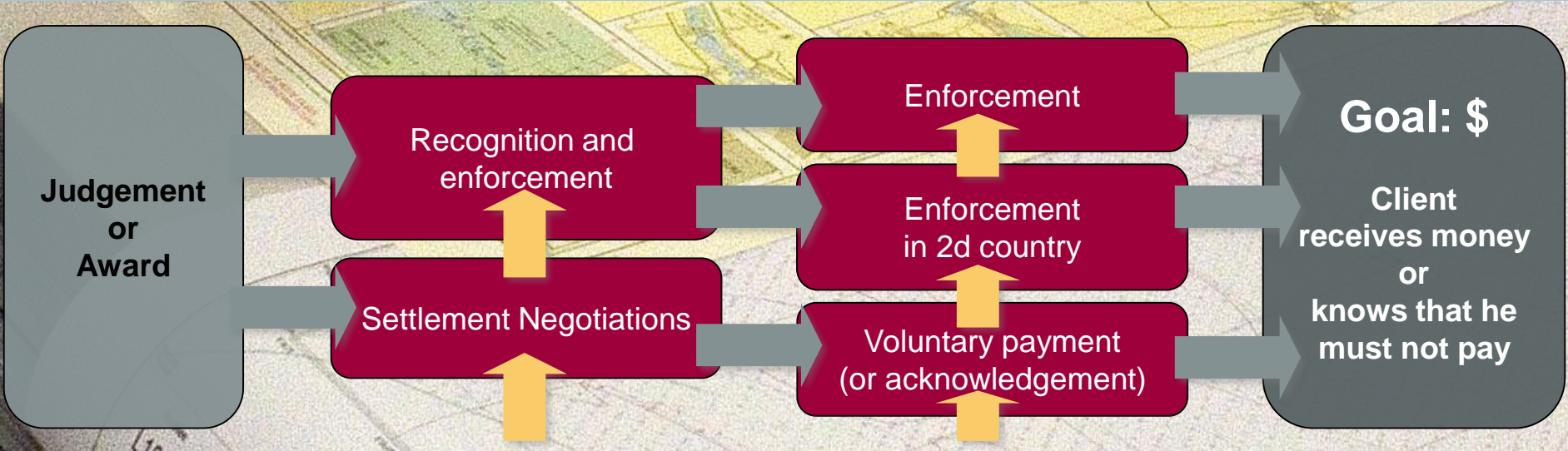
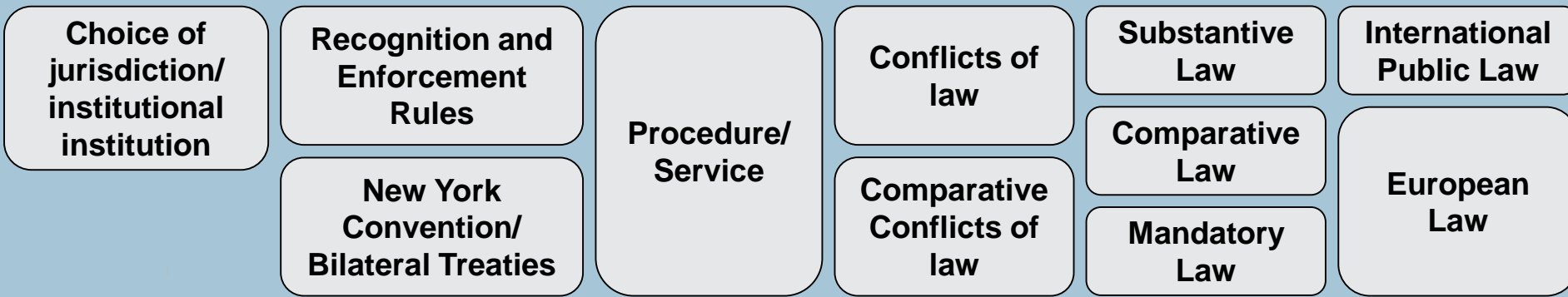
(d) The **composition of the arbitral authority** or the **arbitral procedure** was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country **where the arbitration took place**; or

(e) The **award has not yet become binding**, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.



# Understanding of the enforcement procedure as an additional risk

Risk analysis





**Recherche / Wissenschaftliches Arbeiten /  
Seminararbeiten / Vortragskunst**



## Grundlagen jeder Recherche

### Was ist die Fragestellung?

Welches Produkt will ich produzieren? → **Seminararbeit**

### Wie sieht die ideale Seminararbeit zu diesem Thema aus?

Welche (Recherche-)Produkte kommen in Frage, um die Frage(n) zu lösen?

### Interaktion zwischen Strategie und Recherche: Antwort auf die Rechtsfrage führt zu Strategieplanung.

Recherche muss in die „**Tiefe**“ gehen, aber auch in die „**Breite**“ – wobei die Frage der Breite der Recherche je nach Thema unterschiedlich ist (das Ergebnis muss immer richtig und bis zu Ende recherchiert sein!)

**Dreidimensionales Denken** bei der Recherche darf nicht vergessen werden!

**Ziel** der Aufgabe nicht aus dem Auge verlieren!

Passt die Fundstelle zu meiner Aufgabe? Vergleichbarkeit?

Rechts / links / vorne / hinten (ggf. andere Rechtsordnungen befragen, internationales Umfeld, andere Gesetze / Kommentierungen)

Kreativ bleiben!

**Jura ist nicht nur Mathematik, sondern Argumentationstechnik**

Recherche-Ergebnis mit der Aufgabe (ggf. dem Sachverhalt) verproben!

**Quelle lesen und zwar ganz!**

**Mehrere Quellen sichten um festzustellen, ob rechtliche Frage strittig ist**



## Wo recherchieren?

Grobe Systematische Einordnung in das Rechtsgebiet (z. B. Schiedsrecht, international oder national)

Stichwort oder Normensuche (Gesetz, Kommentar, Beckonline, Stichwortverzeichnis / Fokus nicht zu eng anlegen und Normen vorher und nachher lesen)

### 1. **Der erste Blick sollte immer ins „Gesetz“ gehen!**

*.... erleichtert die Rechtsfindung*

*..... erspart Geschwätz*

Gibt in jedem Fall einen ersten Überblick über Systematik und häufig steht die Antwort schon in der Norm – es ist erstaunlich was alles so im Gesetz steht .

### 2. **Kommentar, Rspr., Literatur**

**Ggf. auch ausländische (englischsprachige).**

**Richtig zitieren**, z.B.: *Autor*, \_\_\_\_, in: \_\_\_\_ (Hrsg.), \_\_\_\_, S. \_\_\_\_, \_\_\_\_.

Welche Art **Quellen** sollten zu diesem Thema **zitiert** werden?  
(z.B. Rspr. / Grundlagenurteil, ein aktuelles Urteil, 2 Kommentare, 1 Grundlagenaufsatz)

**Den Leser an die Hand nehmen, selbst beim zitieren** → z.B.: S. hierzu wiederum *Meyer* .... (op. cit. Fn. \_\_\_\_), S. \_\_\_\_ (mit eingehender Darstellung von ...) → zeigen, dass man die Quelle gelesen und verstanden hat.



## **Dokumentation der Recherche / Recherche-Ergebnisse**

- Qualität der Quelle (BGH oder AG?/ Wer ist Autor?)
- Wie zitieren? -> **Internet ist allenfalls ein Hilfsinstrument aber idR nicht zitierfähig (sonst sagen, wann die Website besucht wurde).**

Quellen und Zitate prüfen im Hinblick auf richtigen Fundstellenverweis und Kontext!!! Aktualität der Quelle (neueste Rechtsprechung oder überholt, neueste Auflage)?

**Keine Blindzitate!!!**

Urteile prüfen! (Beispiel: Hat der BGH die Frage wirklich entschieden oder nur in der Urteilsbegründung verschiedene Literaturmeinungen dargestellt?)

Was heißt „vgl.“ bei Zitaten?

## Online oder Printversion?

### Online pro:

Schneller verfügbar; gut für gezielte Urteilssuche

### Online contra:

#### **Vermittelt häufig keinen Gesamtüberblick**

Effektiv nur, wenn man die Datenbank sicher beherrscht

Oft zeitintensiv durch Optimierung der Suchbegriffeingabe

**Gefahr bei der Stichwort-Suche: Scheinbar richtiges Ergebnis kann völlig daneben liegen!**

Deswegen Appell an Nutzung der Printversion:

Schneller Überblick über Systematik, Gesamtzusammenhang.

Ermöglicht angrenzende Problemstellungen zu erfassen (bzw. kennenzulernen); Breitere Suche möglich

In der Bibliothek fällt evtl. der Blick auf weitere Bücher zum Thema



**Thema auslegen. Mut zur Auslegung (Wortlaut, Sinn, Ziel).**

**Einlesen.**

**Erneut auslegen.**

**Eingrenzen. Eingrenzungen begründen.**

- **u.U. Abweichung zwischen der Seminararbeit und dem Vortrag zur Arbeit:** denn die Kommilitonen brauchen u.U. mehr Einführung als die schriftliche Arbeit.

**Spannend bleiben.**

**Zeigen, dass man das Thema beherrscht („souverän im Thema“).**

Ggf. lebensnahe Beispiele.

**Mut zu eigenem Denken.**

**→ Auf der Grundlage des Standes der Wissenschaft.**



**Mut zu moderner Gestaltung,**

**ggf. wenige Wörter: die Folien sind für den Zuhörer bestimmt, nicht für den Vortragenden.**

**Freier Vortrag. Sie wollen die Seminarteilnehmer erreichen.**



## J Reflections, Discussions, Student Presentations

**Why arbitration?**



# Vielen Dank. 谢谢

- Prof. Dr. Eckart Brödermann  
Maître en droit (Paris), LL.M. (Harvard),  
FCIArb (London)  
Rechtsanwalt (Hamburg)/  
Attorney-at-law (New York)  
Fachanwalt für Internationales Wirtschaftsrecht

[Eckart.Broedermann@jura.uni-hamburg.de](mailto:Eckart.Broedermann@jura.uni-hamburg.de)  
[Eckart.Broedermann@german-law.com](mailto:Eckart.Broedermann@german-law.com)



Universität Hamburg

DER FORSCHUNG | DER LEHRE | DER BILDUNG

