International arbitration
2019-2020

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Class 1 "Introduction to course"

PART I: INTRODUCTION TO THE COURSE ITSELF

1. What is arbitration?

- Law is different there: applied differently than in Courts
- Used increasingly: growing field of political discussion
- Private judge: parallel to the Courts
- Final resolution: excludes courts
- Older than courts (at least since Ancient Greece)

2. Importance of arbitration

1. Socio-economic importance

- **Range of amount**: decisions worth $500 - $ 50'000'000'000 (from small to big amounts)
- **Usual commercial transactions** (they are not the only ones but usually they are), small consumer shopping online, determining quality of grain, oil refinery expropriations, large construction projects (bridges, big buildings, especially international contractors), decisions by states to curb smoking, phase out nuclear energy, sports disputes (e.g. Olympics → if you want to compete in the Olympics, you will have to consent to sports arbitration. Example: if you were kicked out of the game because of the doping, you can come out also through arbitration)

2. Politically sensitive

- **Robs states' political power to resolve economic crises and 'improve life'?** Robs states' the capacity to improve well-being by promoting HR, public health, environment. All of these have been attacked in Arbitration.
- **Robs people's rights and access to justice?** Example: crew members vs cruise owner, a crewmember injured. There was a clause of arbitration in the contract, so no tribunal was suitable. The law of Panama got applied and Panamanian law said there was no problem of liability. The person was left with this problem. Sports: athletes cannot sometimes be part of a federation if they say "no to arbitration clause" and this robs people's right!
- **Parallel system of justice for the rich?** Arbitration: you can't get a free court lawyer: you must pay for a lawyer

3. Practically important

- **Increase** in number of cases: 10% in 7 years.
- **More and more lawyers**
- **More and more contracts** with arbitration clauses

4. Academically interesting

- Dispute resolution is where the law bites decisions are taken and effects happen (allows us to see what law does).

5. Transnational

- **Same everywhere**: if you want to see the world, as a lawyer: arbitration might help you do that. The practice of arbitration is the same around the world.

3. What will happen if you stay

1. Contents

- **Study a phenomenon**
- **Not stick to rules and cases:**
  - It is a practical field
  - Where fortunes are made and lost.
  - Who makes the decisions?
  - Effects?
  - Practical fields?
- **No particular focus on Swiss law** (transnational phenomenon). Why? Arbitration is transnational and not specific to Switzerland. You don't need to be a Swiss lawyer to practice arbitration in Switzerland.
- **Focus on concepts**: (arbitrability, competence) and **not national idiosyncrasies** (we are not going to see the consequences on Swiss law).
  - Concept as an **intellectual construction.**

PART II SITUATING INTERNATIONAL ARBITRATION IN A WORLD OF DISPUTE SETTLEMENT

1. What arbitration is more precisely

1. Characteristics of Arbitration:

- **Dispute resolution mechanism is core** : it is not the only function but it's the core function.
- **Incidentally**: regulatory mechanism? law-making mechanism?
- **Based on consent of the parties**. Different from courts because we don't have to consent to the Court in order for the Court to have jurisdiction. **Arbitration: parties must consent.**
  - **Pre-dispute agreement** most of the time (= arbitration clause or agreement)
  - **Post-dispute agreement** (= compromis)
- **Awards**: arbitration produces **binding decisions** (called 'awards'). These are not recommendations: they are binding. It is a decision. We don't need to go to a Court to confirm the decision.
  - **Binding like Court decisions**: arbitral awards are binding like court judgements
  - They carry the **res judicata effects**.
- **Excludes Courts**: it replaces courts. It is a consequence of the binding effect of the arbitration. If we agree to go to arbitration, we cannot go to the court instead. The court will say "no": it has no jurisdiction because in the contract there is a jurisdiction on arbitration. So, we cannot go there.

2. Arbitration vs mediation:

- **Mediator helps negotiations**:
  - Mediator tries to **conciliate**
  - **Dispute-solving**: there is a (settlement) agreement to solve the dispute.
  - **Assistant**: the mediator is a negotiation assistant.
- **Mediator doesn't decide on outcome**
  - **Suggesting or proposing only**: he does not decide about the case. He can just suggest or propose what you should agree on, you and the other party.
  - **On the contrary**: the arbitrator makes a decision and makes the decision for you.
- **Mediation outcome**:
  - **Settlement**: the mediator brings the party to a **settlement** agreement.
  - **Settlement agreement**: binding like a contract. To enforce the settlement, we must go to the **Courts** first.

- **On the contrary**: in arbitration we have awards that are already binding. If we have an award of arbitration; then we can directly seize my assets because we don't need to go to Court to enforce it.

3. Arbitration vs recommendation:

- **Neutral evaluation.**
- **Third neutral hears arguments**: there is this neutral person for both parties. This is the same in arbitration.
- **Third neutral opinion:** the third person issues reasoned opinion on settlement
- **No decision**: but it is something like a decision but then parties must agree on; so it is not a decision.

4. Arbitration vs third party determination:

- **Decision issued**: the third neutral issues decision
- **Becomes contract**: this decision becomes part of contract between parties
- **Binding**: the decision is binding like a contract, not like a judgment, not like an arbitral award
- **Example**: there is a dispute on the delivering of a car. We go to the third party: we agreed, before, that this decision will become a new contract between you and me.

5. Arbitration vs national courts :

- **No consent**: national courts don't require respondent's consent. You can always sue someone somewhere. You don't require respondent's consent. **This is not so with arbitration.**
- **Doctrine of precedents**: courts have this doctrine (stare decisis, jurisprudence constante, etc.)
  - **Arbitration doesn't have** a **doctrine of precedent. No arbitral decision binds future same legal matters.** In commercial arbitrations, arbitrators do not make reference to previous cases. In sport cases, they make reference but legally speaking they don't have to. In investment they also refer to arbitral awards but must not. **« De facto stare decisis »: they can but must not.**

6. Arbitration vs international courts and tribunals (e.g. ICJ, WTO appellate body, etc.):

- **Arbitration is not permanent**: each arbitral tribunal only lives for one case. Each arbitral tribunal is there only for one case and after the case it ceases to exist. **On the contrary**, ICJ is permanent, it has been created and will remain.
- **Arbitrators don't have tenure**: they are appointed for one case at a time. This lasts 6 months to maximum 3 years. Then, you are out and need to be reappointed for the next arbitration. Judges: usually 9 years.
- **Also based on consent and issue binding decisions**: no State can go to ICJ if both haven't agreed on the jurisdiction of ICJ or WTO → unlike national courts.

2. What advantages it may have over alternatives

1. Arbitration over: mediation

- **Arbitration:**
  - **Guaranteed outcome in arbitration**: in arbitration, there is always a decision in the end.
  - **More binding**: arbitration is binding like a judgement.
  - **If bad outcome**: provides corporate / political excuse in case of a bad outcome
  - **Longer**
  - **Expensive**: 5 - 7 million dollars for each side in arbitration
  - **Tends to resolve disputes**
    - **Dispute**: specific disagreement over a question of legal rights
  - **Example**: CEOs of Apple and Samsung have a dispute. If they go to arbitration: you hire the best lawyers and you lose the arbitration; you would say "it is not my fault, it is the fault of these arbitrators who made the bad decision; I had chosen the best lawyers".
- **Mediation:**
  - **No guaranteed outcome in mediation**: in mediation, you don't always have an outcome. In mediation you can be stuck for a long time because it requires an **agreement with regards to the outcome.**
  - **Less binding:** mediation is binding like a contract
  - **Shorter**
  - **10 to 100 times cheaper** than arbitration. It costs around 50'000 dollars
  - **Tends to resolve conflicts:**
    - **Conflict**: general State of hostility between the parties
  - **Example:** CEOs of Apple and Samsung have a dispute. If they go to mediation and there is an agreement, the boards of the company could say "you should never have agreed on this; why did you accept this outcome" → could also not agree it!
- **Med-arb is possible** (first mediation, then arbitration)

2. Arbitration over: national courts

What to choose?

- **Less expensive and faster (?):**
  - **Faster**: can be the case but not always. The parties can control the procedure so it can be short but if they want to fight it can also be long. Anyway, in general its faster and cheaper than courts in general.
- **Confidential**: can be made confidential by the parties. It is an advantage because safeguards the reputation of the parties. All can be made confidential. What part is confidential? Every part can be confidential
- **Choice of arbitrators (neutral, specialized)**: the result is neutral because both they chose one arbitrator and the third one is the president; so there is neutrality. In arbitration parties can chose the arbitrators.
- **Flexibility**:
  - **Restrict the decision?** We can ask to restrict the decision within one month. We can ask to make it slower or faster or ask more evidences etc.
  - **Flexible than courts.** We are much more flexible than courts. Parties can say to the arbitrator to go to the place and investigate on the bridge etc. We cannot ask this to a judge.
- **Finality**: in court there is the first instance, then appeal and finally the supreme court usually. In first instance the case may be far from over. On the contrary, when we have an arbitral award (decision), the case is essentially legally over.
  - It is over and **difficult** to **review** it
- **Quasi worldwide easy enforceability**: 150 countries (also thanks to the NY Convention). It is easy to enforce a decision taken in Switzerland in another country, when it goes about arbitration.

Class 2. "Situating International Arbitration in a World of Dispute Settlement"

PART I: TYPES OF ARBITRATION

1. Types of parties

1. Interstate arbitration

- **State VS State**
- **Public international law applies**

2. Private arbitration

- **Private party** (company or individual) **VS Private party** (company or individual)
- **Public international law doesn't apply directly**, except one relevant treaty. Public international law puts obligations on States to do something about the arbitration, but does not apply to the arbitrators themselves.
- **Vast majority of arbitration**

3. Mixed arbitration

- **State** (mostly investment arbitration) **VS Private party** (company or individual)
  One-way arrow (private that suits the State)
  - **Private party**: the majority are investment arbitrations. There is an investor (company or individual) who invests aboard and has a dispute with a country where he invested. For example, a Swiss investor invests in Malaysia and Malaysia does something that breaches the right of the Swiss investor. The Swiss investor can open a trial against Malaysia. The individual is more confident that an arbitrator would be more reliable than the courts of the nation.
  - **State**: only one-way arrow: 99.8% of all investment arbitration cases are started by the individual against the State. It could theoretically be possible to be the other way, but it is really rare (ex: Tanzania against an individual).
- **Public international law applies**
- **Mostly investment arbitrations**

2. Field of law

1. Commercial arbitration:

- **Definition**: commercial matters between companies or individuals
- **James Crawford definition:** 'not non-commercial', default category, defined negatively, nothing follows from label.
- **Meaning**: there is no rule to an arbitration that is commercial, but the word commercial has in principle no legal impact.
- **Default category:** when we speak of commercial arbitration, we don't speak of these below-mentioned special forms of arbitration (consumer/ sports arbitration etc.). Commercial arbitration is the usual form. The others are just sub-forms. Rules that apply to commercial arbitration, apply to all of the sub-categories. **All of the commercial arbitration rules apply to the subcategories unless told otherwise.**

2. Consumer arbitration:

- **Consumer vs business**
- Example: you are in the US and buy a Dell PC you must order online; you must consent to arbitration clause. You cannot buy Dell without agreeing the arbitration clause. What is a consumer? Must be defined. Roughly simplified arbitration and this is not allowed in Europe. Much present in the USA.
- + Specific rules

3. Employment arbitration

- **Employment arbitration** would **not be allowed** for all claims relating to **mandatory employment rights** (holidays, overtime) which you have and regardless what the contract says. Employment arbitration would however be **allowed**, for claims related to **non-mandatory rights** provided for in an employment contract.
- Example: crewmembers vs company → could not go to a Court because there was a clause for arbitration in contract
- + Specific rules

4. Sports arbitration

- **Athlete and sport Federation**: typically, when sanctions for doping and athlete challenges this in arbitration.
- There is an arbitration for sports in Lausanne
- + Specific rules

3. Geography

1. 'International' arbitration

- Mostly rhetorical label to signal distance from local idiosyncrasies
- **Domestic vs international**: we often speak of international arbitration in this course. How should this be understood? When people say international arbitration, we deal with a phenomenon that is disconnected from local legal reflexes. The local bar should not interfere too much with arbitration.
    - **No difference made**: in many countries (UK/DE etc.) the word « international » does not have real consequence. They don't make difference between national and international.
    - **Difference made** however, in Belgium, France, Switzerland: there is a difference between national and international arbitration. In a minority number of States (incl. Belgium, France, Switzerland), there is a different legal regime for national or international arbitration.
- **Swiss rules (PIL) on Arbitration:** is arbitration national or international in Swiss law? We must see the domicile of the parties in the LDIP. If we talk about Swiss law, usually it is about international arbitration.

Federal Act on Private International Law

Chapitre 12: International Arbitration

Article 176

I. Scope of application. Seat of the arbitral tribunal

[1] The provisions of this chapter apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time when the arbitration agreement was entered into, at least one of the parties had neither its domicile nor its habitual residence in Switzerland.

- **Investment arbitration is for foreign investors only:**
    - **Foreign: between two States**. Investment arbitration is only for foreign investors. If we have investors in Switzerland, we must be a foreign company or individual. If we have investor in Switzerland and want to sue Switzerland; we must be a foreign individual or company. We cannot be a swiss person and sue Switzerland for foreign investment arbitration.

PART II - International arbitration in practice

1. How much arbitration is really used

1. Conventional wisdom

- **Arbitration self-promotion or reality?** Arbitration is the: "usual", "predominant", "preferred" or "monopolistic" mechanism for the settlement of international commercial disputes. Everyone would say this in arbitration.
- **'Predominance' of arbitration:** Percentage of arbitration clauses in commercial contracts? How much impact on our society as a parallel form of justice? Number of arbitration proceedings for commercial matters, compared to courts? How often do people put arbitration clause in the contracts as opposed as a choice of Court?
  a. **Percentage of arbitration clauses in commercial contracts?**
     ⇒ If asked, business actors say this: 29-56% prefer arbitration, against 4-28% that prefer litigation **(56% is not quite monopolistic)**
     ⇒ If contracts are examined, studies find arbitration clauses in 14.6%, 15%, 18%, 20.2%, 21.9%, 63% **(so, between 14.6% and 63%)**
     → **a lot of self-advertisement:** "usual", "predominant", "preferred" or "monopolistic"

  b. **Number of arbitration proceedings for commercial matters, compared to courts?**
     ⇒ **New cases in arbitration:** 'In 2016, the 12 most prominent international institutions have [jointly] registered **5661** new cases.' For each case there are 2 lawyers working full time on each side, this means 24K lawyers. **Considered stellar and record-breaking statistics.**
     ⇒ **Cases in civil law**: by extrapolation and on average, this would have represented **276 million** [civil cases (excluding family disputes) filed in court] worldwide in 2006'
     ⇒ **Arbitration vs court cases: 276'000'000 court cases vs 5'661 arbitrations**. **UK, 2014**: "In percentage terms, arbitration [proceedings] were 0.28% of the number of cases for that year proceeding in the civil courts.
        - **350% times more civil cases than arbitration cases.** Arbitration really does not have a monopoly in the disputes
        - But this does not mean that arbitration has no impact or is not important.

2. How important Geneva is for arbitration

1. Conventional wisdom

- **Geneva is one of the four premier places** for arbitration in the world (along with London, Paris, and New York)
- **Most important arbitration institutions :**
  - International Chamber of Commerce (ICC) in Paris
  - London Court of International Arbitration (LCIA)
  - Hong Kong International Arbitration Centre (HKIAC)
  - Stockholm Chamber of Commerce (SCC)
  - Deutsches Institut für Schiedsgerichtsbarkeit (DIS)

2. International Chamber of Commerce (ICC)

- Geneva is an important place for arbitration in ICC.
- 2016: 801 cases; Geneva selected as seat in 41 cases (7%), third best after Paris (92 cases) and London (57 cases). So, out of 801 cases, Geneva chosen in 41 cases → only Paris and London had more!
- 1995-2012 period: 6063 cases; Switzerland selected as seat in 1451 cases (23%), second best after France (24%).

3. London Court of International Arbitration (LCIA)

- 2018 (Q1+Q2): 285 cases; 218 seated in UK, **only 1 seat in CH**

4. Hong Kong International Arbitration Centre (HKIAC)

- 2017: all seat in Hong Kong

5. Stockholm Chamber of Commerce (SCC)

- 2017: virtually all in Sweden

6. Deutsches Institut für Schiedsgerichtsbarkeit

- 2018 (Q1+Q2): 118 new cases seated in Germany, 1 in Zug, 1 in Prag

7. Conclusion

Many arbitrations did not take place in Geneva. Geneva is not « the place where arbitration happens ». More and more arbitration take place in Asia. Geneva has a very old tradition of arbitration nevertheless. It is in many ways important in terms of culture, but not so much in terms of case law

3. Arbitration jobs in Geneva

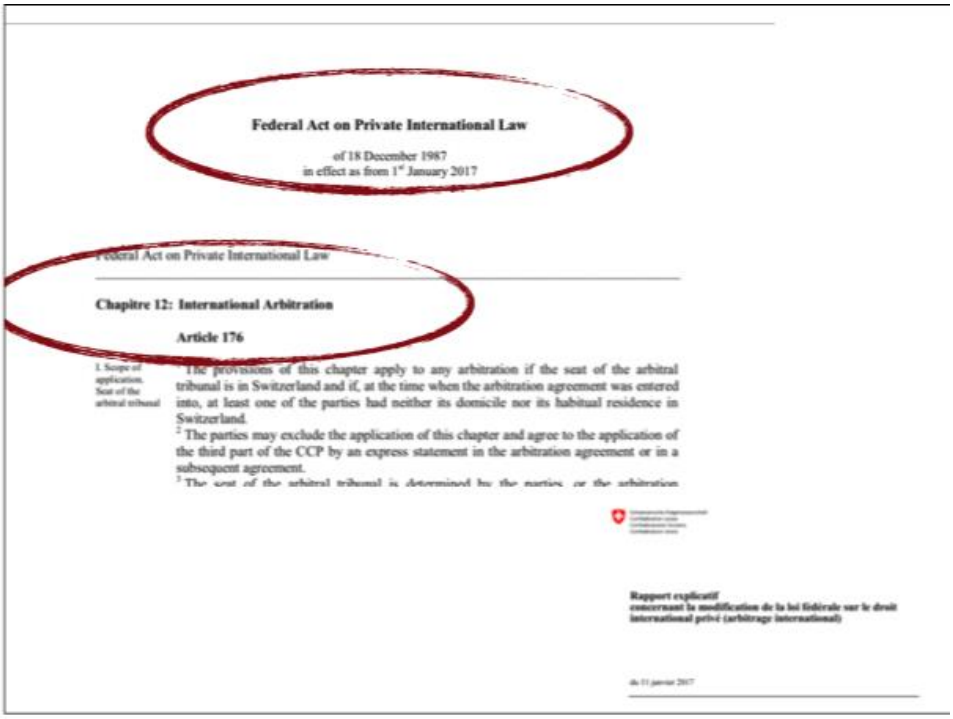
1. Remarks:

- **Arbitration-law knowledgeable lawyers, for cases in which a Geneva firm is hired as counsel or a Geneva-based individual is hired as an arbitrator, for arbitrations seated anywhere - 80% of jobs?**
    - Where arbitration law and knowledge is required, where people work in Geneva as Council or arbitration and where people need to have some knowledge of arbitration law is required (80% of jobs); in these cases, Swiss law is not necessary if you want to practice arbitration in Geneva.
- **Swiss-law knowledgeable lawyers for arbitrations seated in Switzerland - 18%?**
    - In 18% of the cases, Swiss arbitration law would be required. The person should not be qualified in Swiss law. We don't need to study Swiss arbitration law; because the arbitrations rules are quite the same (idiosyncratic). So, you don't need to be a Swiss lawyer.
- **Swiss-law qualified lawyers for challenges of arbitral awards before the Federal Tribunal - 2%?**
    - In these cases, you need Swiss and Geneva bar. How much would it help to be a Swiss Geneva lawyer to be an arbitrator? This is only the case in 2% of the cases: in the case where you want to challenge an award before the Federal Tribunal.

PART III - What regulates arbitration

1. National arbitration laws

- **Arbitration is part of PILA**, it is not separate.
- When we speak of **swiss arbitration law**, it is not a different law than PILA.



Federal Act on Private International Law

of 18 December 1987
in effect as from 1st January 2017

Federal Act on Private International Law

Chapitre 12: International Arbitration

Article 176

1. Scope of application. Seat of the arbitral tribunal

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[2] The parties may exclude the application of this chapter and agree to the application of the third part of the CCP by an express statement in the arbitration agreement or in a subsequent agreement.
[3] The seat of the arbitral tribunal is determined by the parties, or the arbitration

Rapport explicatif
concernant la modification de la loi fédérale sur le droit international privé (arbitrage international)

du 11 janvier 2017

Arbitration Act 1996

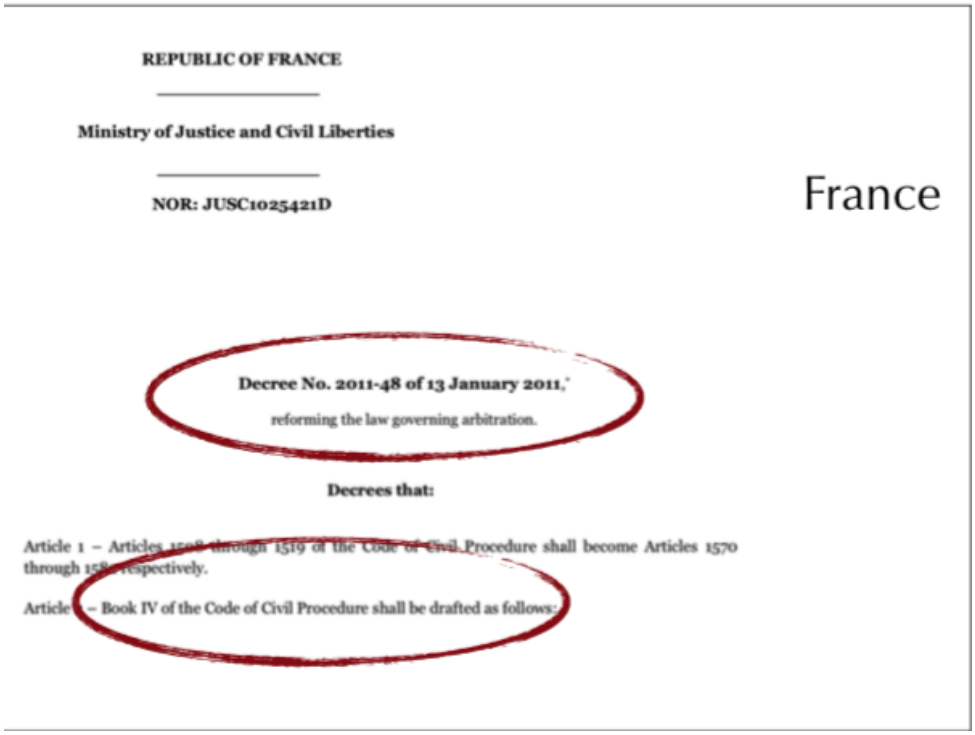
1996 CHAPTER 23

An Act to restate and improve the law relating to arbitration pursuant to an arbitration agreement; to make other provision relating to arbitration and arbitration awards; and for connected purposes. [17th June 1996]

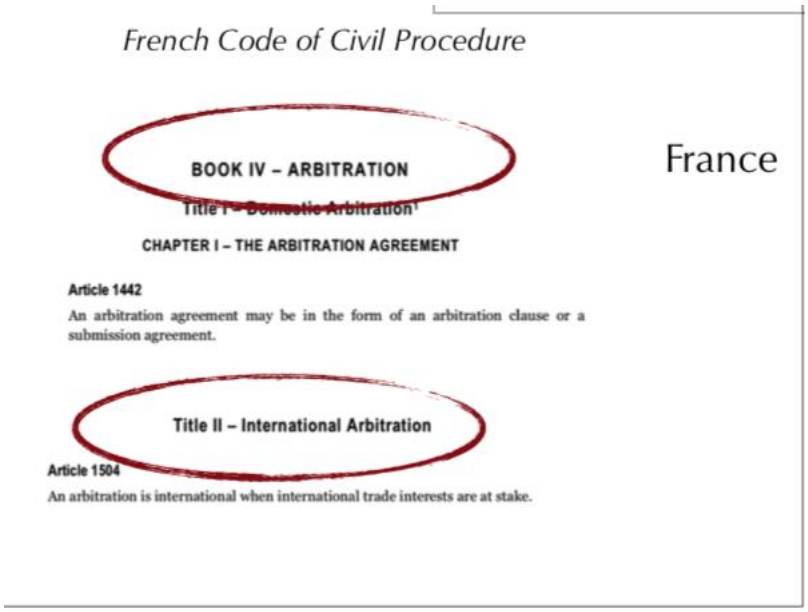
Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the

United Kingdom

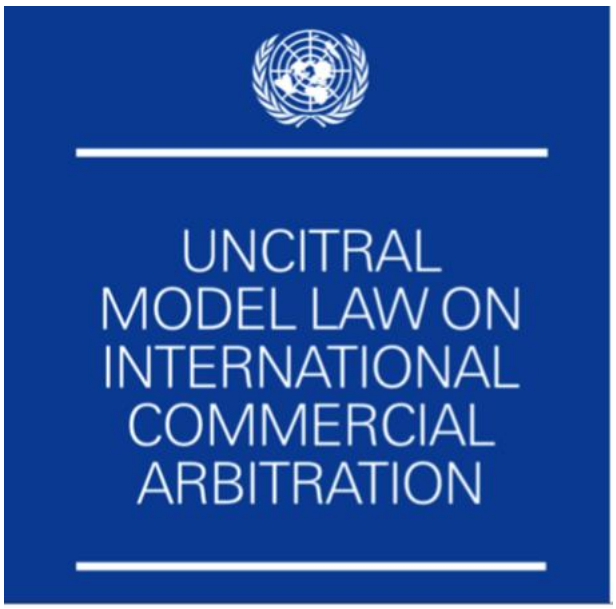
- **In UK it is different**: we have a specific act.



- **The Civil code regulates arbitration in France** → decree of 2011 that reforms the civil procedure. It is therefore not another law that regulates arbitration.
- In France: there is a difference between **domestic and international** arbitration

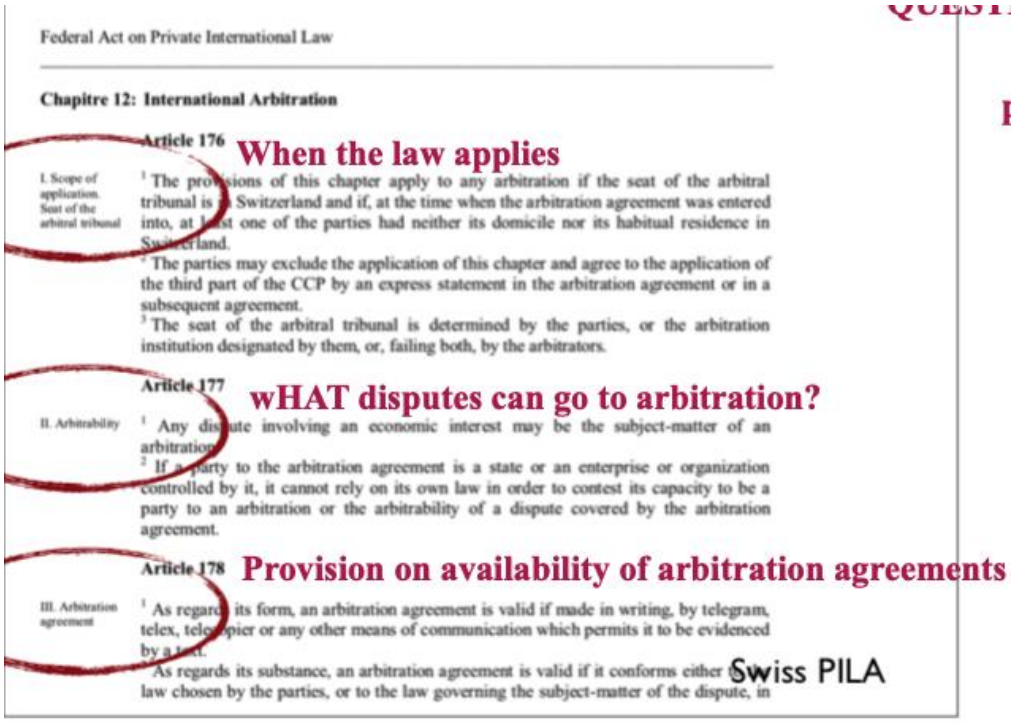


2. UNCITRAL



- **Model law**: UNCITRAL is the UN Commission on International Trade Law. It is a model law, template for States to find inspiration if they want to enact.
- **Not automatically applicable**: UNCITRAL does not apply to any arbitration directly. Many countries did not transpose these rules but found inspiration on this Model Convention.
- **Example**: Switzerland/France/UK are not UNICTRAL model law legislations.

3. Content of PILA Arbitration clauses



Federal Act on Private International Law

Chapitre 12: International Arbitration

I. Scope of application. Seat of the arbitral tribunal

Article 176 **When the law applies**

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[2] The parties may exclude the application of this chapter and agree to the application of the third part of the CCP by an express statement in the arbitration agreement or in a subsequent agreement.
[3] The seat of the arbitral tribunal is determined by the parties, or the arbitration institution designated by them, or, failing both, by the arbitrators.

II. Arbitrability

Article 177 **wHAT disputes can go to arbitration?**

[1] Any dispute involving an economic interest may be the subject-matter of an arbitration.
[2] If a party to the arbitration agreement is a state or an enterprise or organization controlled by it, it cannot rely on its own law in order to contest its capacity to be a party to an arbitration or the arbitrability of a dispute covered by the arbitration agreement.

III. Arbitration agreement

Article 178 **Provision on availability of arbitration agreements**

[1] As regards its form, an arbitration agreement is valid if made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.
[2] As regards its substance, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in

Swiss PILA

IV. Arbitral tribunal 1. Constitution

Article 179

[1] The arbitrators shall be appointed, removed or replaced in accordance with the agreement of the parties.
[2] In the absence of such an agreement, the matter may be referred to the court where the arbitral tribunal has its seat; the court shall apply by analogy the provisions of the CCP concerning the appointment, removal or replacement of arbitrators.
[3] Where a court is called upon to appoint an arbitrator, it shall make the appointment, unless a summary examination shows that no arbitration agreement exists between the parties.

2. Challenge of arbitrators

Article 180

[1] An arbitrator may be challenged:
a. if he or she does not meet the requirements agreed by the parties;
b. if the arbitration rules agreed by the parties provide a ground for challenge; or
c. if circumstances exist that give rise to justifiable doubts as to his or her independence.
[2] A party may challenge an arbitrator whom it has appointed or in whose appointment it

How to remove arbitrator : « challenging an arbitrator » especialy if corrupted etc.

Swiss PILA

- **Provisions on arbitrators**: who chose them? What if parties don't choose arbitrators?

If arbitration has been initiated,, no other tribunal or court can have jurisdiction

V. Lis pendens

Article 181

The arbitral proceeding is pending as of the time when one of the parties submits its request to the arbitrator or arbitrators designated in the arbitration agreement or, in the absence of such designation, from the time when one of the parties initiates the procedure for the constitution of the arbitral tribunal.

How procedure is to be determined

VI. Procedure
1. Principle

Article 182

[1] The parties may, directly or by reference to arbitration rules, determine the arbitral procedure; they may also submit it to a procedural law of their choice.
[2] Where the parties have not determined the procedure, the arbitral tribunal shall determine it to the extent necessary, either directly or by reference to a law or to arbitration rules.
[3] Whatever procedure is chosen, the arbitral tribunal shall ensure equal treatment of the parties and their right to be heard in an adversary procedure.

2. Interim relief and conservatory measures

Article 183

[1] Unless the parties have agreed otherwise, the arbitral tribunal may, at the request of a party, grant interim relief and conservatory measures.
[2] If the party so ordered does not comply therewith voluntarily, the arbitral tribunal may request the assistance of the competent court. Such court shall apply its own law.
[3] The arbitral tribunal or the court may make the granting of interim relief or conservatory measures subject to the provision of appropriate security.

conservatory measures, secures etc.

Swiss PILA

Evidence that can be used : hearing witnesses? recordings? etc.

3. Taking of evidence

Article 184

[1] The arbitral tribunal shall itself take the evidence.
[2] Where the assistance of state authorities is needed for taking evidence, the arbitral tribunal or a party with the consent of the arbitral tribunal may request the assistance of the court at the seat of the arbitral tribunal; such court shall apply its own law.

courts can be asked to help under certain conditions

4. Other judicial assistance

Article 185

For any further judicial assistance the court at the seat of the arbitral tribunal has jurisdiction.

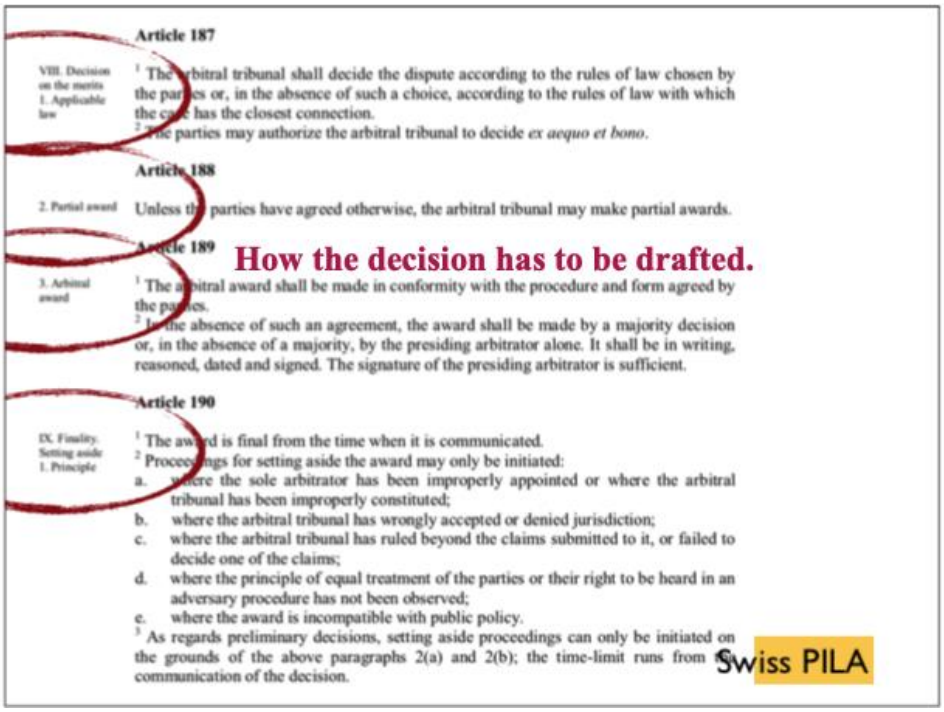
VII. Jurisdiction

Article 186

[1] The arbitral tribunal shall decide on its own jurisdiction.
[1bis] It shall decide on its jurisdiction without regard to an action having the same subject matter already pending between the same parties before a state court or another arbitral tribunal, unless serious reasons require to stay the proceedings.
[2] Any objection to its jurisdiction must be raised prior to any defense on the merits.
[3] The arbitral tribunal shall, in general, decide on its jurisdiction by a preliminary decision.

Jurisdiction: arbitral tribunal decides itsel that it has jurisdiction .
When there are objections to jurisdiction —> 187 LDIP

Swiss PILA



VIII. Decision on the merits
1. Applicable law

Article 187

[1] The arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the case has the closest connection.
[2] The parties may authorize the arbitral tribunal to decide *ex aequo et bono*.

2. Partial award

Article 188

Unless the parties have agreed otherwise, the arbitral tribunal may make partial awards.

3. Arbitral award

Article 189

How the decision has to be drafted.

[1] The arbitral award shall be made in conformity with the procedure and form agreed by the parties.
[2] In the absence of such an agreement, the award shall be made by a majority decision or, in the absence of a majority, by the presiding arbitrator alone. It shall be in writing, reasoned, dated and signed. The signature of the presiding arbitrator is sufficient.

IX. Finality. Setting aside
1. Principle

Article 190

[1] The award is final from the time when it is communicated.
[2] Proceedings for setting aside the award may only be initiated:
a. where the sole arbitrator has been improperly appointed or where the arbitral tribunal has been improperly constituted;
b. where the arbitral tribunal has wrongly accepted or denied jurisdiction;
c. where the arbitral tribunal has ruled beyond the claims submitted to it, or failed to decide one of the claims;
d. where the principle of equal treatment of the parties or their right to be heard in an adversary procedure has not been observed;
e. where the award is incompatible with public policy.
[3] As regards preliminary decisions, setting aside proceedings can only be initiated on the grounds of the above paragraphs 2(a) and 2(b); the time-limit runs from the communication of the decision.

Swiss PILA

- **Art. 190 LDIP**: How you can challenge an arbitral award; how to null it. We can « appeal it » (but in arbitration we use the following words : setting asides, nulling). This article says on which ground an award can be set aside; this can be because of serious violation of fundamental procedural rights rules only, and not because arbitrators applied the wrong law or made mistakes with law.

Courts that can set aside an arbitral award —> in CH Swiss federal tribunall. It is the only court to null an award if swiss law applies.

2. Competent court

Article 191

Setting aside proceedings may only be brought before the Federal Supreme Court. The procedure is governed by Article 77 of the Law of 17 June 2005 on the Federal Supreme Court.

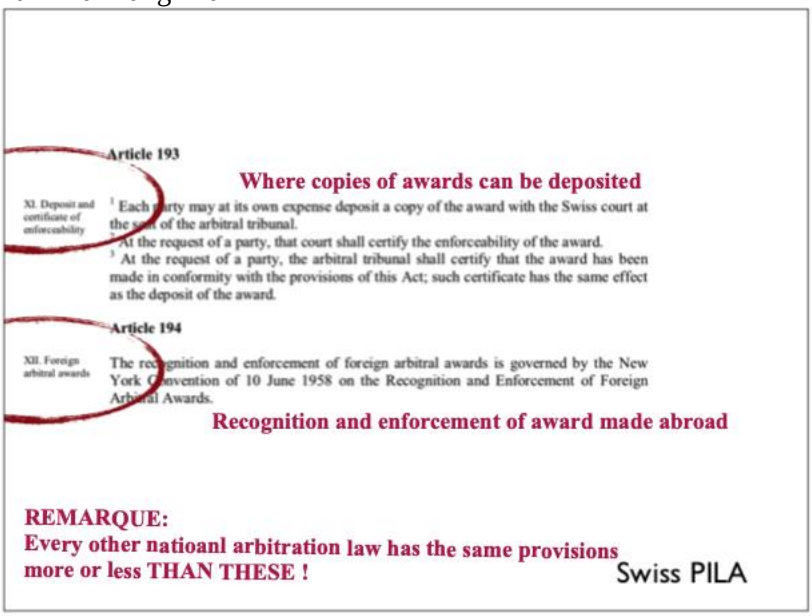
X. Exclusion agreements

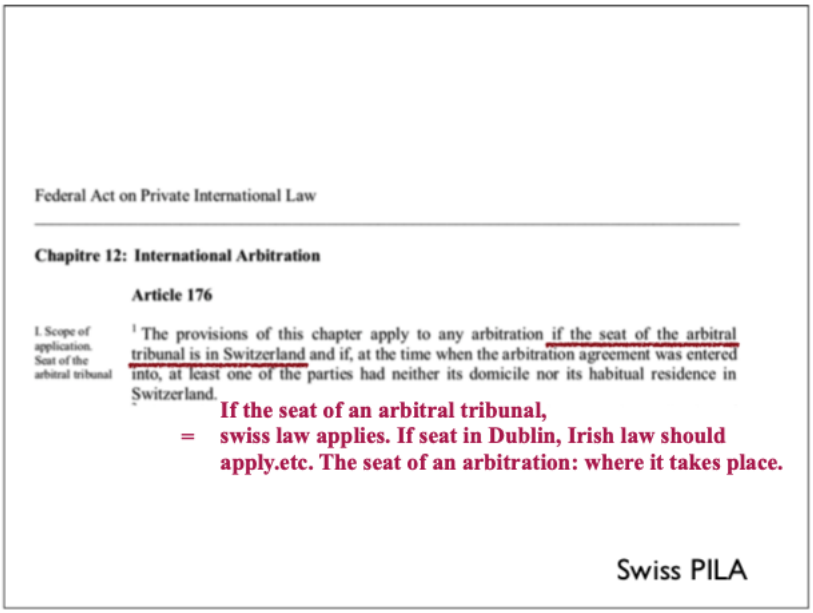
Article 192

[1] Where none of the parties has its domicile, its habitual residence, or a place of business in Switzerland, they may, by an express statement in the arbitration agreement or in a subsequent agreement in writing, exclude all setting aside proceedings, or they may limit such proceedings to one or several of the grounds listed in Article 190, paragraph 2.
[2] Where the parties have excluded all setting aside proceedings and where the awards are to be enforced in Switzerland, the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards applies by analogy.

We can chose the possibility to not null an award. No possibility to review an arbitral award.
Too bad, can t do anything.

Swiss PILA


Article 193
XI. Deposit and certificate of enforceability
Where copies of awards can be deposited
[1] Each party may at its own expense deposit a copy of the award with the Swiss court at the seat of the arbitral tribunal.
[2] At the request of a party, that court shall certify the enforceability of the award.
[3] At the request of a party, the arbitral tribunal shall certify that the award has been made in conformity with the provisions of this Act; such certificate has the same effect as the deposit of the award.
Article 194
XII. Foreign arbitral awards
The recognition and enforcement of foreign arbitral awards is governed by the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.
Recognition and enforcement of award made abroad
REMARQUE:
Every other natioanl arbitration law has the same provisions more or less THAN THESE !
Swiss PILA


Federal Act on Private International Law
Chapitre 12: International Arbitration
Article 176
I. Scope of application. Seat of the arbitral tribunal
[1] The provisions of this chapter apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time when the arbitration agreement was entered into, at least one of the parties had neither its domicile nor its habitual residence in Switzerland.
If the seat of an arbitral tribunal,
= swiss law applies. If seat in Dublin, Irish law should apply.etc. The seat of an arbitration: where it takes place.
Swiss PILA

4. International treaties

1. Two main treaties

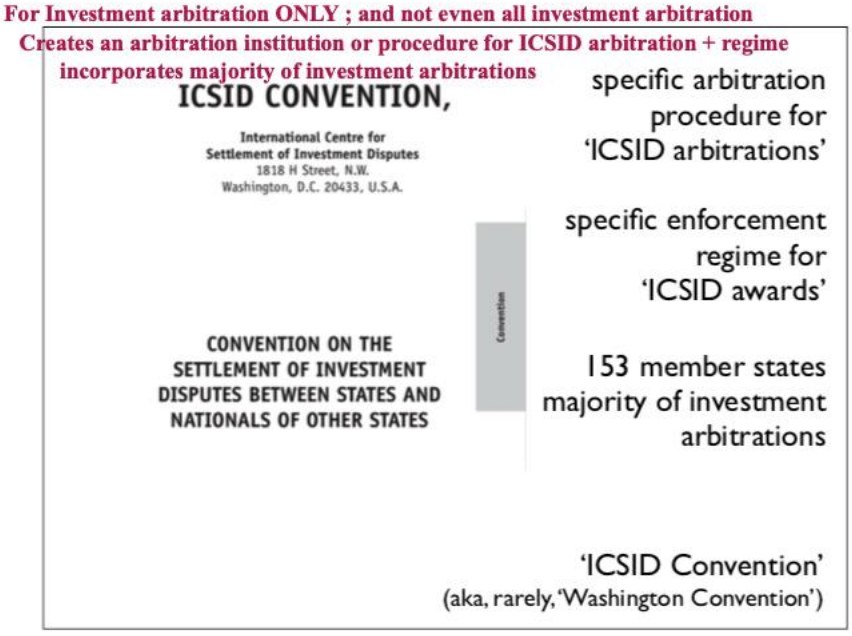
- **NY Convention (most important)**
- **ICSID Convention All**

2. NY Convention

- **Recognition and enforcement**: Member States have to **recognize** and **enforce arbitral awards** made abroad.
- **Huge success**: 159 Member States are parties.
- **"Made abroad" either:**
  (a) any state, for 84 states or
  (b) specifically, in other contracting states, for 75 states
- **Unless, Article V (Grounds on which opposing the award):**
  - invalid arbitration agreement
  - no proper notice of proceedings
  - due process violation
  - other jurisdiction issues (e.g. subject matter not covered by agreement)
  - award annulled
  - public policy

3. ICSID Convention

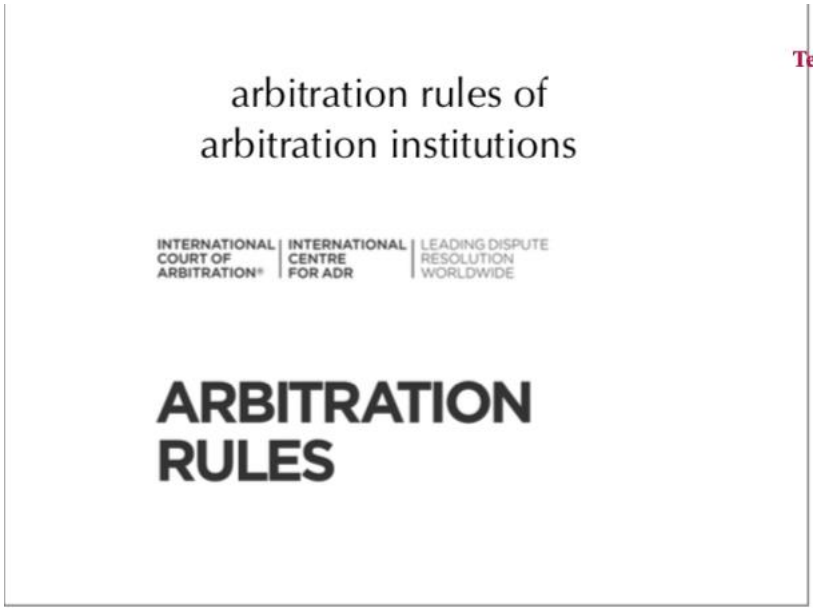
- **Investment arbitration** (only) and not even all of them.
- **ICSID Institution created**: ICSID creates an arbitration institution or procedure for ICSID arbitration + regime
- Incorporates the majority of investment arbitrations



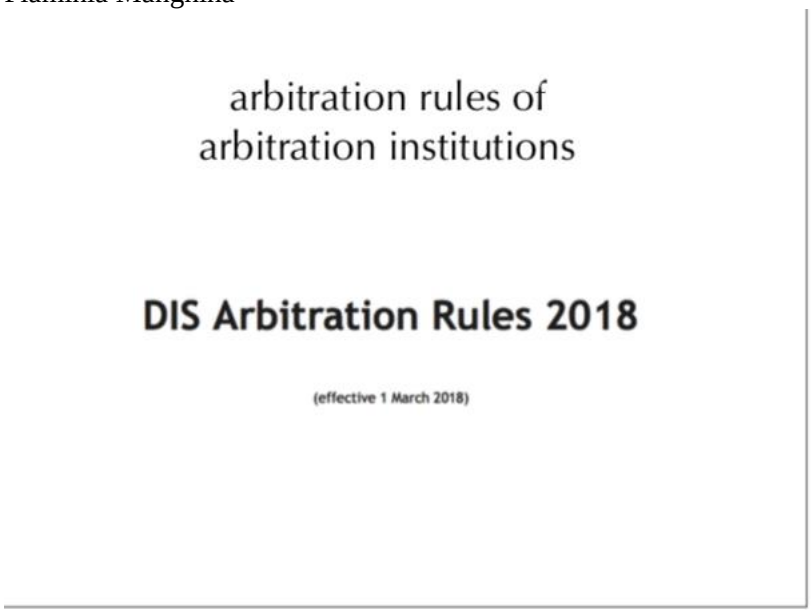
3. Private regulations

1. Arbitration rules of arbitration institutions

- **Arbitration rules**: applied in an arbitration
- **More rules than international arbitration laws:** the rules of institutions, provide more rules than international arbitration laws and conventions. What kind of rules are we talking about?



- **Own arbitration rules**. Arbitration institutions (ICC/LCIA…): these institutions have their own arbitration rules which complement sometimes the rules that are **otherwise applicable** because of the national arbitration laws that apply to the case. For example, if the parties chose to apply the ICC Rules, the contract says: « the disputes coming out of the contract are ruled by ICC » etc.



2. Soft law:

- **There are various professional rules ('soft law'):** these are beyond arbitration rules and can be applied in addition to the arbitration rules **if parties agree to it.**
- **IBA Guidelines on Conflicts of Interest in International Arbitration.** What are the criteria to admit there is a conflict of interests? This is a document created by the international bar association, it is not a law.
- **IBA Rules on the Taking of Evidence in International Arbitration.** Again, this applies only if parties agree to it.

PART IV What law is applied in arbitration

1. Law applicable to merits

- **ATTENTION**: "in arbitration" =/= "to arbitration" (what arbitrators can do, how it is enforced, evidences etc.).
- **Law applicable to merits**: consequence of me delivering stuff law, breaching contract, inflicting patterns.
- **Law chosen by the partie**s (e.g. English law, German law, Swiss law) (lex mercatoria: <1% of cases). It can be any national law.
- **Lex mercatoria**: very fancy theoretically but in practice, very few cases
- **Law of the closest connection (no duty to apply conflicts of law rules)**: if law has not been decided by the parties, the arbitrator decides which law is applicable. He will apply the law which is closest to the case.
- **Investment treaties and customary international law in investment arbitration**
- **Arbitral precedents in investment arbitrations (especially in sports arbitration):** in investment arbitrations, arbitrations must not follow prior cases, but they treat prior cases as if they were precedents. Everyone thinks precedents have shaped international investment law

Class 3. "Key Arbitration Concepts – Focus on decision-makers"

PART I - Arbitration institution and arbitral tribunal

1. Distinction arbitration institution / arbitral tribunal

- **Arbitration institution :**
  - ICC Paris, Sports arbitration Lausanne, Singapore arbitration center.
  - **Is like a Court.**
  - **Supporting the tribunal:** the institution is a framework supporting the entity within which the arbitral tribunal decides.

- **Arbitral tribunal:**
  - **Arbitrators** (5 members, until 7 members) form the arbitral tribunal
  - **Is like a panel of judges**
  - **In the name of the Tribunal**: the arbitrators speak in the name of the arbitral tribunal and not in the name of the arbitration institution
  - **Decision power**: the arbitral tribunal decides on his own name. We never say, « the ICC decided this ».

2.What an arbitral tribunal does

1. Elements of an arbitral tribunal

- **An arbitral tribunal**,
- Created specifically for a **given dispute** (exists for the **time** to decide for the dispute),
- Composed **of 1 or 3 arbitrators** (sometimes up to 5 and rarely to 7 members),
- Decides the case before them **by majority vote** (that's why we have an odd number),
- **'In the name' of the arbitral tribunal** itself (not of the institution, Arbitrators are not employees of an arbitration institution VS judges are employees of the court),
- '**For' the parties** (not 'for society': mandated by the parties and decide for the parties. On the contrary, judges decide for the society, beyond the parties).
- **Same level than the parties**: arbitrators are on the same level than the parties, not a higher level. No national flags. Business attire simply. They don't speak in the name of a State. Arbitrators are businesspeople and it is a parallel system of justice for business and by business people. The parties control everything. The procedure is controlled by the parties. The arbitrators do what parties agree to do. **On the contrary judges impose their ideas.**
- **Sport Arbitration**: less formalized and procedurals than court procedures. It is much more flexible. It can also be very informal: it can take place in a stadium. It can take place in hotels, conference rooms, law firms etc.

3. What an arbitration institution does

1. Procedural rules

- An arbitration institution provides for **procedural rules**
- Every institution **has its set or sets of rules.**
- Example: ICC is conducted under ICC rules of Arbitration.

2. Administrative support

- **Every institution organizes logistics of:** copies, preparing hearings, deadlines, secretarial work to provide administrative support

3. Financial issues (deposits, payments)

- **Collecting money** from parties, to pay arbitrators

4. List of arbitrators, open (optional) or closed (mandatory)

- **There is a list of names of arbitrators**. There are open and close lists.
    - **Open**: "can" → lists from which the parties **can chose an arbitrator** but don't have to. Here is a list, you can chose from here.
    - **Close**: "must" → arbitration institutions (minority) such as arbitration for sports which has a close list of arbitrators so you must choose between these.

5. Premises, use is optional

- **Meeting rooms at disposal**: each arbitration institution will give you the option to use a room, but it remains an option. While for the courts: you have to do it at the court !

6. ICC only: review of draft arbitral award

- **ICC reviews awards to improve legal errors**. ICC is only here to help to make suggestions
- **ATTENTION**: **ICC cannot change the decision** of the arbitral tribunal. The arbitrators make the decision.

7. Most important arbitration institutions in 2017 (out of ca. 200):

- International Chamber of Commerce International Court of Arbitration (ICC): **810 cases**
- London Court of International Arbitration (LCIA): **285 cases**
- Hong Kong International Arbitration Centre (HKIAC): **297 cases**
- Stockholm Chamber of Commerce (SCC): **200 cases**
- Deutsches Institut für Schiedsgerichtsbarkeit (DIS): **160 cases** (55 international)
- World Bank's International Center for Settlement of Investment Disputes (ICSID): **53 cases**, for Investment arbitrations only
- Permanent Court of Arbitration (PCA): **41 cases**
- China International Economic and Trade Arbitration Commission (CIETAC): **2183 cases** (485 international) (2016). Mostly domestic Chinese cases

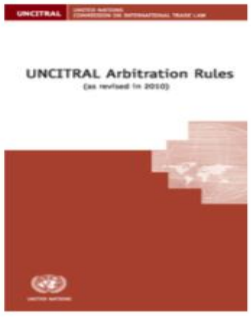
4. Distinction institutional arbitration / ad hoc arbitration

1. Institutional arbitration

- **Arbitration with an arbitration institution**
- **Procedural rules are** those of the institution

2. Ad hoc arbitration

- **Arbitration without an arbitration institution:** you can have institution-free arbitration (arbitration without institution), with only arbitral tribunal
- **Procedural rules are**…
  - **'Borrowed' from a public template**: typically, the UNCITRAL Arbitration Rules; OR
    - ⇒ **N.B:** UNCITRAL is a UN Organ and not an arbitration Institution. It has free rules that anyone is free to use.
  - **Creatively drafted by the parties** and/or the tribunal themselves (rare). The parties could draft the rules themselves for the arbitration. It is a possibility, but it is a bad idea because parties are unlikely to agree on things.
- **Example:**




Ad Hoc NAFTA Arbitration under UNCITRAL Rules

CHEMTURA CORPORATION
(formerly Crompton Corporation)

CLAIMANT

v.

GOVERNMENT OF CANADA

RESPONDENT

AWARD

Scope of application

Article 1

1. Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modifications as the parties may agree.

- **NAFTA arbitrations** are **Ad Hoc** arbitrations which are conducted under the rules of UNCITRAL. It refers on the scope of application of UNCITRAL rules
- **Yukos arbitration**: example of arbitration handled by an institution but conducted under other rules than those of the institution. Largest arbitration ever: arbitration concluded that Russia had to pay 50 Billion USD to former shareholders of Yukos. It took place under UNCITRAL but handled by the Permanent court of arbitration. It handled the Yukos case but the rules where not those of the PCA; but those of UNCITRAL. It was an Ad Hoc arbitration in which an institution helped to organize.

PART II - Arbitrators

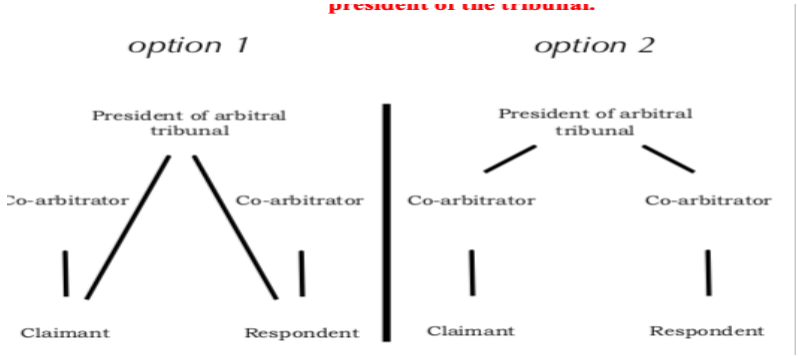
1. How arbitrators are appointed

If I chose an arbitration institution, should I apply its rules? This happens 95% of the cases. ICC applying ICC rules. Or, can I choose an institution (PCA like in Yukos) and then apply other rules? Yes, but very rare.

1. First option to appoint arbitrators

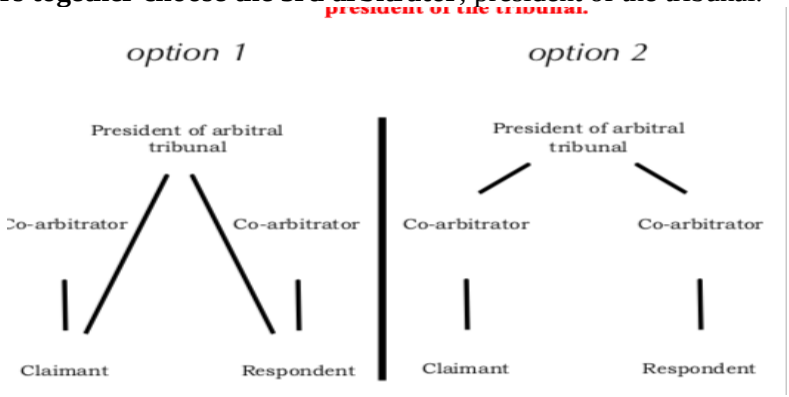
For 3 arbitrators panels:

- Claimant and respondent **chose each of them** a co-arbitrator (2 arbitrators)
- Then together (claimant + respondent) chose the **president of arbitral tribunal** (3d arbitrator).



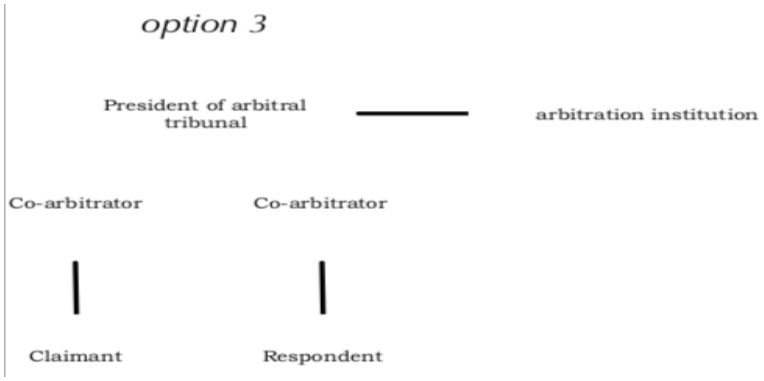
2. Second option to appoint arbitrators

- The claimant + respondent **chose for each of them** the co-arbitrator
- **The 2 arbitrators together choose the 3rd arbitrator**; president of the tribunal.



3. Third option to appoint arbitrators

- The claimant + respondent **chose for each of them** the co-arbitrator
- The **3rd arbitrator (president of tribunal)** is chosen by the **arbitration institution**

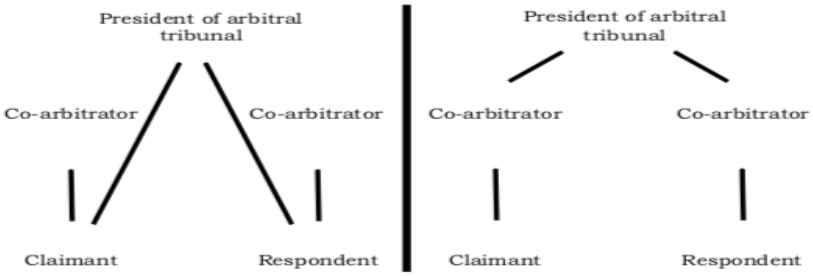


4. Default rules for ISCID/ CIETAC/ CH/ DIS/ UNCITRAL / HKIAC

It's called default because it's the default solution when parties don't choose something else. But if they choose something else, then this default solution does not apply.

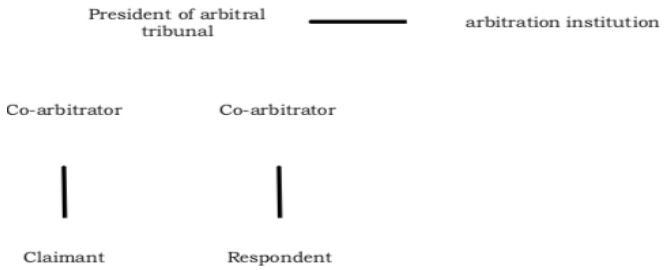
ICSID default
CIETAC default

Swiss Rules default
DIS default
UNCITRAL
HKIAC default



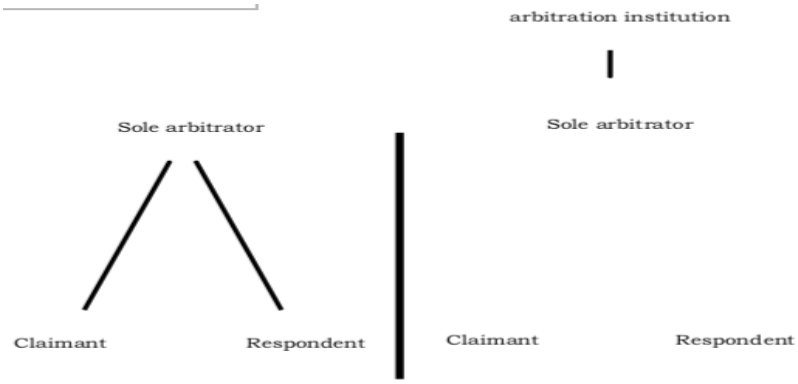
5. Default rules for SIAC/SCC/ICC/CAS

SIAC default
SCC default
ICC default
CAS Appeals division default



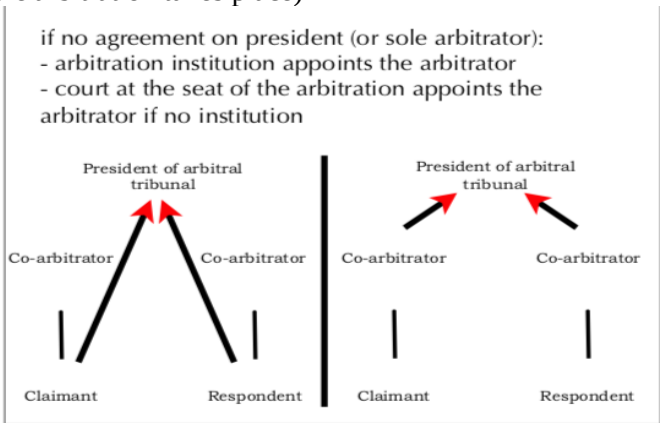
6. Rules when only 1 arbitrator

It is chosen by agreement by the parties or by the institutiton



7. Rules when no agreement on the president

- **Arbitration institution chooses the arbitrator**: if there is no agreement on president (or sole arbitrator): what if they don't agree? Under the rules of the vast majority of arbitration institution, the arbitration institutions chose for them; **OR**
- **Tribunal at the seat of the arbitration chooses the arbitrator if no institution**: if there is no arbitration institution involved? There is an ad hoc arbitration. The court at the seat of the arbitration choses (seat = where arbitration takes place)



2. Appointed for one case:

1. Re-appointed every time

- You need to be **reappointed** for each case
- **When arbitration starts**: Arbitrators are chosen when arbitration starts not when arbitration is agreed. Don't appoint arbitrators when it is agreed, why?
  - ⇒ **Why a bad idea?** The arbitration can take place much time after! They can be dead or sick etc.
  - ⇒ Arbitration clause in contract **(bad idea)**: "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 arbitrators Filipe Toledo, Gabriel Medina, and Julian Wilson."

3. Who can be an arbitrator

1. General

- No **serious formal requirement** to be an arbitrator. This is the main idea but there can be exceptions. But usually, law of the different States do not put requirements.
- No (formal) need to be a **lawyer**
- No (formal) need to have a **diploma** in arbitration
- **Only requirement**: **capacity** to get into an agreement

2. Relatively to the case:

- **Requirements relative to the case at hand**:
  - **Nationality requirements**: arbitrators must have different nationalities of the parties (ICSID, LCIA)

  - **Conflicts of interest requirements**
    ⇒ **Independence**: arbitrators must be independent of the parties and no stakes in the dispute. This is the most important. It is relative, because depends on the case. See the following lists: these lists are found in the **IBA Guidelines on Conflicts of Interest in International Arbitration and are only applicable if parties agree to it (soft-law).** **Anyone can be an arbitrator unless there is a conflict of interest**

1. Non-Waivable Red List

1.1 There is an identity between a party and the arbitrator, or the arbitrator is a legal representative or employee of an entity that is a party in the arbitration.

→ An arbitrator **cannot be a party itself** or an employee of an entity or a legal representative of the party.

2. Waivable Red List

2.1 Relationship of the arbitrator to the dispute

2.1.1 The arbitrator has given legal advice, or provided an expert opinion, on the dispute to a party or an affiliate of one of the parties.

2.1.2 The arbitrator had a prior involvement in the dispute.

→ In these cases, **in principle**, the arbitrator cannot be an arbitrator.
→ **Exceptionally**, when parties waive this, then the arbitrator can still be arbitrator, even though one of those articles is fulfilled.

3. Orange List

3.1 Previous services for one of the parties or other involvement in the case

3.1.1 The arbitrator has, within the past three years, served as counsel for one of the parties, or an affiliate of one of the parties, or has previously advised or been consulted by the party, or an affiliate of the party, making the appointment in an unrelated matter, but the arbitrator and the party, or the affiliate of the party, have no ongoing relationship.

4. Green List

4.1 Previously expressed legal opinions

4.1.1 The arbitrator has previously expressed a legal opinion (such as in a law review article or public lecture) concerning an issue that also arises in the arbitration (but this opinion is not focused on the case).

3. ICSID Convention:

- Some institutions put **requirements**, such as ICSID.
- See **ICSID Convention** (International commercial settlement Investment Dispute).
- All ICSID arbitrators **must be persons**:
  - Of high **moral character**; and
  - With recognized **competence** in the fields of **law**, **commerce**, **industry** or **finance**; and
  - Who may be relied upon to exercise **independent judgment**

4. Who typically is an arbitrator

1. Professional characteristics

- Usually individuals highly specialized in arbitration
- Mostly partners in law firms
- More and more people are however specializing in this
- Many barristers in English chambers
- Some solo practitioners: not part of law firms, people who are only arbitrators (usually former judges or law professors)
- Some law professors specialized in arbitration / investment law

2. What kind of people become prominent arbitrators? 3 generations of arbitrators

There are two generations of arbitrators

- **First generation:**
  - **Until 1980s**
  - **Grand Old Men**: no women until 1980s. "Grand": does not mean "good" as an arbitrator but having a good socio-professional aura.
  - **General socio-professional standing and aura**
  - Academic **standing**, **scholarly publications**, **distinctions**: e.g professor in art law not specialized in arbitration.
  - **Family pedigree**: coming from old families, well-known.
  - **Having held high-profile**, **glamorous positions**, but **not necessarily** in the field of arbitration: Ambassadors, judges, presidents, chairmen of business institutions not specialized in arbitration. Even if they never studied arbitration.

- **Second generation of arbitrators**
  - From **1980s until 1996** (year of study)
  - **Technocrats** (specialized in arbitration)
  - **Arbitration expertise**; specialization
  - Academic standing **irrelevant if not in international arbitration**
  - Publications in **international arbitration**: professionalized area.
  - Speaking **engagements** in international arbitration
  - Academic **affiliations**, even minor, if in international arbitration
  - **High-profile positions** in world of arbitration
  - Having dealt with high-profile cases

- **Third generation of arbitrators**
  - Today (1996 -)
  - **Managers**
  - **Reliably handling case as a business affair**; as it were a business affair!
  - Proficiency in arbitration law and practice remains
  - **Commitment** and **professionalism**
  - **Availability**
  - **Management skills**:
  - **Sensitivity to cultural differences :** if there is an arbitration between Russia and UAE, you need to know how to deal with different-culture people.
  - **Business acumen**: not coming from academia. You got to understand the real world. People who understand actual business (not legal business).
  - **High-profile non-arbitration positions have become almost entirely irrelevant**: people who are judges or layers do not have a particular chance to become arbitrator.
  - **Ok to delegate the work**. Historically arbitrating was a personal job. Nowadays we don't care, you can chose a well-known arbitrator, but then the arbitrator can delegate.

Class 4. "Key Arbitration Concepts – Focus on procedure"

PART I - Arbitrability

1. Meaning of the concept

1. Core meaning of arbitration: subject matters solved by arbitration:

- **Arbitrability, core meaning:** defines the **range of subject- matters** that can validly be resolved by arbitration.
- **There are however many definitions** and people understand it differently. **Typical rough fault line:** economic matters (these can be, others can't)

2. Subjects that can be solved via arbitration

- **Subject-matters that can be resolved through an arbitration:**
  - Archetype: **liability for breach of sales contract** (delivering late). Usually arbitrable everywhere in the world.
  - **Competition** (CH, D, F, USA...) or anti-trust law.
  - **Intellectual property** (CH, D, US, JPN)
  - **Employment contracts** (CH, NL, USA)
  - **Consumer contracts** (CH, USA, EU but no pre-dispute arbitration clause): **you cannot agree to an arbitration before the issue arises in EU**. Does not mean that it is not arbitrable, but you **must agree after**. **In USA**: you buy a DELL, then in the contract it is written that if there is a conflict, you'll have to go to the arbitrator.
  - **Financial aspects of divorce** (CH, UK)
  - **Tort** (CH)

3. Subjects that cannot be solved via arbitration

- **Subject-matters that cannot be resolved through an arbitration:**
  - **Archetype**: criminal matters, non-financial family law matters (paternity, child custody, etc.). In every case someone needs to go to **jail** or in case there is **an offense**.
  - **Real estate/property** (EG, RU, RS): if you sell your house, it is usually not an economic matter.
  - Residential **lease** (G, AT): it is an economic matter, but not arbitrable in this case.
  - **Individual labor disputes** (D, JP): because it is not collective.
  - **Taxation** (F) : though in many countries it is indeed arbitrable.
  - **Banking** w. interests (SAU): not arbitrable in SAU but it is in many other countries.

- **Environmental damages** (RUS)
- Validity of **IP rights** (F, AT, SWE): validity of a patent.
- **Privatization** (RUS): If a company is privatized and you have a dispute with the State, there is no arbitration.
- **Commercial agency** (UAE)
- **Adultery** (Papua Guinea)
- **Sacrilege** (Homeric Greece)

4. Other meanings

- **Arbitrability, other meanings:**
  - '**Subjective arbitrability**': **person's capacity** to enter into arbitration agreement (e.g. sometimes in CH)
  - Whether a **given dispute can be submitted to arbitration** at a **given time** (USA)

2. Raison d'être of the concept

1. Arbitrability, why? State control vs dangerous privatization

- Each state considers that **certain subject-matters** should be the **exclusive preserve of courts**
- **Court = State control**
- **Privatization of disputes can be dangerous**
  - **Banking disputes** are sensitive so should be controlled by the State and should not be resolved by arbitration (privatization) because it is confidential. It should be resolved in a Court, in a democratic system.
  - **Employment contracts** are not arbitrable because it is at the core of inequality and should not be in the hands of professional industry but in the hands of the States. So, it is usually not arbitrable.

3. Procedural implications

1. Example (case)

What is the law applicable to arbitrability? Example: we have a banking dispute with some interests:

- One of the **parties** is in **South Arabia**
- The **seat of arbitration** is in **CH**
- We **challenge** the award **before CH courts**.

Which law should apply to arbitrability: Saudi idea of arbitrability - which does not make it arbitrable because they consider banking disputes not arbitrable - or the Swiss idea, because the seat of arbitration is in CH?)

We apply the law of the seat: so, CH law should determine if the subject is arbitrable.

2. Not arbitrable subject-matter:

- **If a subject-matter is not arbitrable**: it **cannot be decided by arbitration at all**; regardless when and how the parties agreed to it (e.g. post-dispute agreements are also invalid)
- **Whatever is not arbitrable = you can't go to arbitration**.
- **Your agreement would not be valid:** if there is an arbitration in **absence of agreement**, the decision would be **invalid** and could be **annulled**. **The whole arbitration is invalidated**
- **Consumer disputes within EU**: it is arbitrable. You can go to an arbitration. But you **cannot** agree going **before** to an arbitration. You can only go after the dispute has risen: there is only a limitation on deciding when you go to arbitration.

PART II – Seat of arbitration

1. Meaning of the concept

1. Seat, or place, of an arbitration: 'place of incorporation' of an arbitration

- **Geographical place**: **city** whose law has the **closest connection** to.
- **Note:**
  - **Seat designates a city (not a country)**, e.g. arbitral tribunal seated in London, Stockholm, Kuala Lumpur, etc.
  - **The parties choose the seat** (e.g. in the arbitration clause) and **if they cannot agree, the arbitrator(s) will**:
    - ⇒ **The seat is chosen by the parties**: the parties can choose the **seat anywhere**.
    - ⇒ **If they fail to do this**: then the **arbitrators place the seat for them**.
      - **It is possible to have an arbitration without seat.** Today there is roughly no arbitration without seat: **« delocalized arbitration »**: but it is a bad idea. So, it is possible to have arbitration without seat but bad idea.

2. Procedural implications

1. Implication 1 of seat: determination of lex arbitri (procedural rules)

- **If the seat is in Geneva → the *lex arbitri*** is Swiss law (LDIP, chap12)

- **Law of arbitration (*lex arbitri*) = law that governs the procedure (not the merits aka substance).**
  - **Procedure law**: how arbitration **must be conducted (arbitration agreement is valid?)**
  - **Substance law**: which law arbitrators apply to see if e.g the contract was reached

- **What matters in a *lex arbitri*:**
  - **Rules on validity of arbitration agreement**: in principle, not necessarily. Law of the seat says if the arbitration agreement is valid.
  - **Basic procedural rights of parties:** such as the right to be heard, equal treatment, independence, impartiality. That is the same everywhere in the world usually.
  - **Formalities on award:** drafted and written? Flying to the seat to sign the award? Arbitrators must mention reasons? Etc.
  - **Default procedural rules**: **they govern arbitration procedures unless the parties have chosen other rules**:
    - Rules of ICC

- Swiss chamber of arbitration
- LCIA
- → **These rules apply if you don't choose something else otherwise**. If you go to an *ad hoc* arbitration and do not chose your rules, you'll have default rules. ←

2. Implication 2 of seat: determination of jurisdiction for challenges

- **Courts of the seat competent**: arbitral awards can only be challenged / set aside / annulled **by the courts of the seat.** If you have an arbitration with a seat in CH, only **the court at the seat will** have competence to set aside the award.
  - **The court of the seat: Which Court?** See next slide.
  - **In principle, the Court applies its own law = law of the country.**

- **One degree of annulment proceedings:**
  - **Seat in Switzerland**: challenge before Swiss courts, namely **ONLY the Federal Tribunal** (no other court before the FT).
  - **Seat in Sweden**: challenge before the Svea Court of Appeal

  → **If there is one level only: it is much less time.**

- **Two degrees of annulment proceedings:** the law of annulment proceedings is the same as the **law of the seat.**
  - **Seat in the Netherlands**:
    i) District Court of appeal; and then
    ii) Supreme Court
  - **Seat in France**:
    i) Cour d'Appel; and then
    ii) Cour de Cassation

  → **If there are 2-3 levels: it can take also 3 years.**

3. Which courts can hear challenges is important because:

- **Different grounds for challenge**: broader or narrower (= more or less 'insulation' for the award)
  - In some countries, it is **difficult to set aside** an award.
  - You **must choose the seat in function also of « how difficult to set aside an award ».**
  - In CH it is quite difficult to set aside. In other countries it can get easier. If you want your award to be easily annulled, go in other countries. If you don't want the courts to interfere, go to CH/FR.

- **The judges of some courts are more proficient in arbitration than others**
  - **"Competent judges":** if you challenge awards in CH/FR/Sweden, judges know how to handle.
  - **"Less-competent judges"**: if you go to too remote countries - from an arbitration point of view - it may be that judges never heard of arbitration (e.g. case in Sri Lanka, where judges didn't apply the right law).

4. Implication 3 of seat: juge d'appui

- **Juge d'appui** = **main court that will assist an arbitration** (Court of the seat, attributed through *lex arbitri*)

- **Assistance of juge d'appui :**
  - **Appointment of arbitrators if no party choice**: **if parties did not choose an arbitrator → then the arbitration institution does it. When there is no arbitration institution because there is *ad hoc* arbitration → then the judge of the Court of arbitration will decide (the juge d'appui).**
  - **Challenge of arbitrators**: the Court at the seat will be the one who will **challenge the award with the arbitrator,** if the judge is not independent or impartial etc.

- **Support of procedure**

5. Implication 4 of seat: nationality of the award

- **Nationality of the award is relevant for application of New York Convention** :
  - If you have an arbitration **with seat in CH**, the result is a **swiss award.**
  - Why? Under the NY Convention there may be differences between nationalities of awards. (see **Art. I(3):** contracting states may declare to apply the Convention only to awards made in the territory of (= have the nationality of) another Contracting State)
    - ⇒ **Reservations**: countries when ratifying NY Convention, can enter into reservations: "only awards that have the nationality of another NY Convention State" (70-80 States over 161 over Contracting states of NY Convention)
    - ⇒ **70-08 of these States have entered the reservation** which say we apply the NY Convention only to the arbitral award that have the nationality / are made in another contracting State (= seat of arbitration is in another contracting state).
      - Ex: country not part of the NY Convention = North Korea. You get a tribunal award from a court with seat in North Korea, then you want to enforce it in the USA: the USA will say we don't apply the NY Convention!

3. What its procedural implications are not (of the seat)

1. Non-implication (venue vs seat) :

- Where the **hearings are held**, where the **arbitration effectively 'takes place'**, where its **venue** is
  - **Seat and place = same thing**
  - **Venue = where the seat takes place**
    - ⇒ Venue of arbitration can be in a **different place than a seat.**
    - ⇒ Venue of arbitration has **no implications on the proceedings.**
    - ⇒ **Venue = where the hearings take place,** where people **get together** to make things. It is **not an implication** of a seat. **You can have a seat in CH, but everything takes place in Canada (venue).**

2. Caveat 1:

- **Right to hold hearings outside the seat of arbitration** is "**almost unanimously**" recognized. not "unanimously".
- Some courts see trouble with this. **They would annul an award because the seat =/= venue**

3. Caveat 2:

- Partial statistical indications suggest that **hearings are usually held at the seat**. **It depends also on infrastructure.** You must see hotel rooms/airports/ proximity to parties.
  - **Legally however there is no necessity to hold hearings where the seat is.**
- Example: usually if the seat is in Geneva, then the hearings should be in Geneva.

4. Caveat 3:

- For most non-specialists, seat =/= venue sounds very **avant-garde** (= 'bad' in lawyer speak)
- For many people there is no **distinction between seat and venue**. It seems very avantgarde (= bad) to differentiate both things.

4. Competition among states to be 'better seats' to attract arbitrations

1. Ways to attract seats:

- **More hotels**: If for some people seat = venue, and if venue = use of hotels etc. then, the more attractive seat = the more hotel and business!

- **Facilitating the process**: if you are an arbitration seat, how do you make yourself more attractive? By facilitating the arbitral process and promoting the use of international arbitration = by exercising

a. less control over arbitration and b. making challenges of an award very hard (we do not want the award to be controlled too much, by another instance etc. so we make the challenging of the award more difficult).

- **Over the last 50 years**: 'race to the bottom' in states' control over arbitration

PART III – Competence-competence

1. What is competence-competence:

1. Definition:

- **Competence-competence**: the power (competence) of a tribunal to **rule on its own jurisdiction** (competence)
  - **An arbitral tribunal can decide that is has the power to deal with a given dispute.**
  - **Even on arbitrability**: even if it is unclear whether a given dispute is arbitrable, this question is decided by the arbitral tribunal itself. You don't have to go to a court to say: "can I go to the arbitration?" No, you must directly go the arbitration tribunal and it will answer « I can hear this or not ».

- **Positive effect: empowers arbitrator to rule on jurisdiction**

- **Negative effect: courts (not arbitral tribunal) decline jurisdiction if *prima facie* valid arbitration agreement** (e.g. articles 7 and 186(1) Swiss PILA).
  - **If you go to a Court over a dispute for a dispute over a breach of contract and it contains an arbitration agreement**: I can't tell you if an arbitral tribunal will have jurisdiction, I can only tell you to first go to arbitration and let's ask the arbitral tribunal to decide this matter. Courts will refer the parties back to arbitration to decide whether it has jurisdiction over the case or not. If the arbitral tribunal says « no I don't have jurisdiction »; then go to Courts.

PART IV – Separability

1. Separability

1. Meaning:

- The validity of the **arbitration agreement** is to be **separated from the validity of the main contract**; otherwise, an arbitral tribunal deciding that the main contract is invalid would disappear in a puff of logic!
  - An **arbitration agreement can be valid** even if the **main contract is in part invalid**. We can separate the validity of the main agreement from the validity of the main contract.

- E.g. **Article 178(3) PILA**: "The arbitration agreement **cannot be contested** on the grounds that the main contract is not valid [...]".

Class 5. "Key Arbitration Features"

PART I – Confidentiality

1. Importance of confidentiality

1. Introduction

- **Systematically mentioned as a key selling point of arbitration**
  - For every survey of arbitration user, they have interviewed arbitration people. "Why do you go to arbitration?" One thing comes out: **arbitration is confidential**.

- **Arbitration institutions always advertise confidentiality:** ICC, LCIA

- **Important because of reputation** - i.e. incompetence, lack of adequate financial resources...
  - **Why confidentiality is wanted**: because it protects reputation. You don't want that everyone knows that your company did something wrong. Or the financial situation of your company. **You hide things through arbitration.**
  - **Arbitration lives in a world of its own (parallel system)**: the social/ethical norms are not the same as those that apply in the society. It helps companies doing their dirty needs privately. This is a sentiment that is getting widespread. There are many proposals - in the US a lot - that there is something dodgy in the arbitrations. It is a parallel system that is considered wrong. **Transparency is the order of the day and in arbitration you would not know it.**

2. Not inherent, but implicit agreement

1. 'Arbitration is confidential': not quite.

- **Is it really confidential?** It is **not inherently confidential**.

- It must be **confidential unless parties decide it otherwise**. Confidentiality does not define arbitration!

- Arbitration **typically** is confidential. The parties make arbitration **confidential by agreement**

- **Agreement:** by agreeing to make it confidential, then it becomes confidential.
  - **The parties make arbitration confidential by agreement expressly (institutional rules) or by implicit agreement**

⇒ **Either** they agree to submit to the rules of an **arbitration institution explicitely** (and in their rules of ICC **there is a clause on confidentiality** - like any commercial arbitration institution there is a rule on confidentiality) **OR**

⇒ They can also make it **confidential implicitly**

- **In principle**: **confidential**. Generally considered that the arbitration agreement implies an implicit general duty of confidentiality. As soon as you agree to arbitration, you agree to confidentiality. It is implicit by submitting an arbitration agreement

2. Public arbitration is possible.

- It is entirely **possible,** and it sometimes happens and **particularly when States** are involved.

- **Investment arbitration should usually be public**. When a State is involved, the public interest is involved.

3. Dimensions

1. If institutional rules: all clear

- **If institutional rules say something on confidentiality**: you have to read the rules and see what part of the arbitration is confidential or not

2. If institutional rules are silent (or ad hoc arbitration and rules)?

- **Ad hoc**: **you do not import the UNCITRAL arbitration rule**, **you draft your own rules**.

- **Ad hoc: no institution!** So, **no rules applying** to the arbitration; except the rule of *lex arbitri.*

- **Distinguish**:
  - **Arbitration hearings and meetings: are confidential? Clearly yes.** The situation here is quite clear: all of the jurisdictions countries around the world would find that hearings and meetings are not a public affair. They are confidential and can't be attended by anyone. (The context: the rules aren't clear on that. Either the general provision says the arbitration is confidential OR the court says implicitly by agreeing to go to arbitration, you agree on the confidentiality of the arbitration).
  - **Existence of proceedings: uncertain whether confidential**.
    - ⇒ **Duty to provide information → no breach**. If there is a **duty to provide information** to auditors, shareholders, etc, then there is no breach.
    - ⇒ **If the press comes and says: what is going on?** Can we confess: we are on an arbitration? « Proceeding »: is admitting there is an arbitration. Generally speaking, **it is not necessarily a breach of a duty of confidentiality** to reveal the existence of arbitration existence.
    - ⇒ **The more neutral is the description the more likely it is not to be a breach of an implied duty of confidentiality.** You are in an arbitration with someone else: are you allowed to release info saying you are in an arbitration to the press? If the answer is yes: how would you have to describe your dispute? The more neutral, the less it is a breaching of confidentiality.
    - ⇒ **There may be public interest limitations to confidentiality.** In such a case, these rules (which force a company not to reveal any information that is relevant to gage the financial state of a company) would not be a breach of confidentiality. So even if you go to ICC and the party says, « my arbitration will be completely confidential because that's what ICC rules say »: **the full answer would be « not necessarily, we need to**

check what are the rules that may apply to you ». So even if the institutional rules imply confidentiality; this does not mean that the arbitration will totally be confidential.

- **Material disclosed during an arbitration:**
  - ⇒ **Clearly confidential**: **transcripts of the hearings, notes of evidence, pleadings, written submissions, witness statement**s. **Extension that hearings are private** and confidential. This would not be logical to make the material not confidential
  - ⇒ **Not confidential: documents not created for the purpose of the arbitration** (e.g. historical documents). You cannot say « we want a document to be confidential, so we submit it to arbitration so that it becomes confidential »: no, it does not work this way.

- **Award**

4. Typical rules

1. Example of institutional rule on confidentiality

LCIA Rule 30.1 : "The parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain (...)"
LCIA Rule 30.3
"The LCIA does not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal."

→ **Confidentiality binds the parties**
→ **LCIA is bound by confidentiality**

SRIA Article 44
"1. Unless the parties expressly agree in writing to the contrary, the parties undertake to keep confidential all awards and orders as well as all materials submitted by another party in the framework of the arbitral proceedings not already in the public domain, (...).
This undertaking also applies to the arbitrators, the tribunal-appointed experts, the secretary of the arbitral tribunal, [and all the persons related to the SRIA]."

SIAC Rule 39: Confidentiality
"1. Unless otherwise agreed by the parties, a party and any arbitrator, including any Emergency Arbitrator, and any person appointed by the Tribunal, including any administrative secretary and any expert, shall at all times treat all matters relating to the proceedings and the Award as confidential."

→ **Very very broad**

SIAC Rule 39: Confidentiality - sanctions
"4. The Tribunal has the power to take appropriate measures, including issuing an order or Award for sanctions or costs, if a party breaches the provisions of this Rule."

HKIAC Article 42
« 1. Unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to: (a) the arbitration under the arbitration agreement(s); or (b) an award made in the arbitration.
2 The provisions of Article 42.1 also apply to the arbitral tribunal, any Emergency Arbitrator (...) expert, witness, secretary of the arbitral tribunal and HKIAC.

→ **Broad**

PART II – Procedural flexibility

1. Principle

1. Procedure is controlled by the parties

- **Procedure is controlled by parties, not by the institution nor the arbitrator**.

- **There may be a tension** between in what parties and what the arbitrator wants. Power play between institution / arbitrator / parties.

- **In practice the arbitrator decides more than the parties**. « I (arbitrator) know you (party) want to submit more documents but it's pointless so I won't do it. »

2. Arbitration is there 'for the parties'

- **How it began**: 2 traders calling a 3rd trader to find a solution on a conflict. So the parties should really do what they want.

- **Shaping the procedure** is done by **both parties together.** (Re)shaping the procedure can be done at any time, but less hostility = easier to agree (so rather at time of arbitration agreement). **They can decide what procedure they want.**

2. Examples

1. Make only some parts of the arbitration public:

- **The award, sometimes hearings**. Hearings are public in investment arbitration for example or inter-state arbitration

2. Make the procedure more extensive:

- **Admit more evidence:** ask for site-visit of arbitrators, getting juridical arbitral truth closer to real truth by investigating more. Example: arbitrators fly where the bridge collapsed to look from themselves and go back to the hearings.

- **More money**: arbitration procedure becomes also more and more long because of the **interest** of the lawyers (make more money...)

- **Discovery:** if you are a party and I am a party too. I ask you to submit all the documents related to the case and you ask the same. I seize your documents/ contract to the procedure. **This leads for** me to give you **many documents** to make it **really hard** for you.

- **More rounds of submissions:** typically, party 1 sends briefs; then she responds; then another brief than another. etc. We make it last longer.

- **Addition of an appeals procedure:** we make arbitration in 2 layers. If the arbitration is lost, you can appeal before another higher arbitral tribunal within the same situation. Two levels of arbitration**. Only between arbitral tribunals (not a Court). (not the classical appeal ?!)**. Parties can agree to do this.

3. Make the procedure less extensive:

- **Fast-track arbitration.** I give the arbitrators e.g. 6 months to reach the decision: **we agree on it.**

- **CAS ad-hoc committee for the Olympics (decision within 24h).** E.g.: Arbitral tribunal: athlete kicked out for doping. If the decision is not taken in 24h, the athlete cannot participate to the race. Technically you can ask also in other domains to make a decision in 24h, even if it is hard.

3. Limits

1. In a nutshell: no limit

- **Almost no limit to shorten arbitration**: parties can waive essentially all of their rights, including the right to oral hearings, the right to independent arbitrators, and more generally the right to a fair trial. Is there a speed limit, however? No, the parties can waive all of their rights. In principle they can, even though this would amount the breach of **Art. 6§1 CEDH**; parties can do this in arbitration. They can waive their rights provided to them.

- **Almost no limit to extend the arbitration**: the parties can extend always an arbitration procedure or make it longer. Some arbitration procedures have taken 10 years because the parties wanted to submit more things. There is no limit to length for arbitration procedure as long as parties agree. including

2. Waiver after the fact: clearly unlimited

- **Arbitrator is partial; parties don't object:** they deemed to have waived the right to an impartial arbitrator. If something happens during the procedure and you don't complain you accepted it. Example: one of the arbitrators was a family member of one party. The both parties said to be ok. When one of the parties lost, if she said « breach of access to impartial justice »: no! The CEDH says: "you knew who the person was"!

3. Waiver before the fact: probably unlimited too, or close

- **Selecting an arbitrator who is clearly partial and not independent.** We select an arbitrator who is not partial and not independent. Parties can waive any rights.

4. "Forced consent to arbitration"?

- If everything is based on the **parties' consent**, what if a **weak party's consent is 'forced'?**

- **Protecting weak people or not?** Should people be left to make their own decisions, or should the law interfere to protect people themselves? Example: if an athlete is obliged to enter an arbitration clause where she has a small chance of winning, should that be acceptable? Should it be acceptable that a party is forced to enter into an arbitration agreement because otherwise risks to not compete in Olympic Games e.g.?

PART III – Finality

1. Arbitration has greater finality than courts

1. Great finality = limited grounds for annulment

Arbitral awards are more final than court decisions. The grounds for annulment of arbitral awards are more limited than those of appeal of judicial decisions. There are only limited grounds to annul or set aside in arbitration.

2. Typical grounds for annulment of arbitral awards:

Examples

- **Invalid arbitration agreement (see point 3. here under for more details)**
- **Irregular constitution**
- **Breach of due process**
- **Issues of jurisdiction**
- **Arbitrability**
- **Public policy**
- Generally, **no review of merits**

→ Law applicable to the merit wrong? Not a ground for annulment! Parties can't do anything about it.

3. Invalid arbitration agreement

Examples

- **Formal requirements not met** (e.g. Agreement not signed by one of the parties)
- **Lack of capacity of party**
- **Absence of consent:** I never consented to this arbitration
- **Agreement terminated:** we agree to go to arbitration; then we want to terminate the agreement and instead, we agree to go to a Court.

4. Irregular constitution

Examples:

- **Lack of independence or impartiality**

- **Appointment or composition violates applicable rules** (e.g. arbitrator does not meet agreed qualifications such as being e.g. an engineer or a scientist)

5. Lack of due process (or procedural public policy)

Examples:

- **Breach of right to be heard** (party prevented from presenting evidence, legal arguments or to rebut opponent's case). Arbitrator says « I hear party 1, but not party 2 »

- **Breach of equality of treatment** (parties subjected to different standards)

- **No proper notification:** party 1 was not notified of the existence of the arbitration

- **Failure to deal with all presented issues:** if party 1 submits 5 arguments to me and I deal only with 3.

6. Issues of jurisdiction

Examples:

- **Arbitrability**: you can try to annul if the dispute was not arbitrable

- **Formal and substantive validity of arbitration agreement:** if arbitration agreement was invalid, there is no jurisdiction over the case. Arbitration agreement covers the financial consequences of the breach of the pattern =/= same as « analyzing the validity of the pattern »

- **Existence of consent**

- **Scope of arbitration agreement:** which kinds of subject matters can go to arbitration and which cannot

- **Parties' capacity:** if one of the parties did not have capacity to represent the parties, she says she is representing.

7. Public policy breach (substantive)

Examples:

- **Intolerable conflict with sense of justice:** something happens in the way I conduct the arbitration about the decision. This leads to create a conflict in the sense of justice.

- **International, not domestic:** a breach of public policy in a domestic way, is not the same as in the international way.

- **Bribery, corruption**

- **Forced labour or child labour**

- **Violation of human rights**

- **Lifetime professional ban (on athlete)**: case which was won under the ground of public policy in a sports arbitration. Athlete had a lifetime ban to play football because had not paid debts. The sports arbitral tribunal confirmed the lifetime ban. The person went to TF which said, « this is a breach of public policy ».

- **Violation of *res judicata:*** a decision has been dealt with **by a court and this goes to arbitration:** arbitral tribunal issues a new decision by breaching *res judicata*.

- **Serious breach of mandatory law** (e.g. competition, securities, liability limitations)

- **≠ Arbitrariness (most important !!):** it is not a breach of public policy. Arbitral awards can come to arbitrary results, but this is not a breach of public policy. Arbitral awards can produce arbitrary results but nevertheless legally valid decisions that cannot be set aside.

2. Challenges before the Swiss Federal Tribunal

1. Statistics

- **576 decisions between 1989 and 2017**
- **45% related to sports arbitration**
- **Success rate of 7.53%:** 92.5% of challenges of arbitral awards were not successful
- **Only one award ever set aside for reasons related to merits** (unlimited worldwide ban on football player because couldn't pay damages to former club: breach of substantive public policy) → because arbitrators made something shocking with regards to merit, there is a very small proportion of awards set aside by Courts
- **CH: low success**. The success rate to set aside an arbitration award in CH is very low

2. Excluding all annulment possibilities in CH law

- **Parties can increase finality** (as soon as arbitrators render an award, that's the end of the story; no possibility to challenge it).
- **Art. 192 PILA:**

Article 192

X. Waiver of annulment

[1] If none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment or they may limit it to one or several of the grounds listed in Art. 190(2).

PART IV – Recognition and enforcement

1. Recognition is a shield, enforcement is a sword

1. Res judicata award = recognized = shield

- **Arbitral award recognized also in courts**: Arbitral awards will operate as a **res judicata bar** in a subsequent national **court litigation**. You must recognize my awards like a shield. National courts **will treat the award like a judgement** and **execute it against parties**.

2. New York Convention of 1958 (bases to not recognize / not enforce an award)

- **Most important international legal text for arbitration**

- **NY Convention 1958**: **MS in principle must recognize/enforce the foreign awards**, **unless** such conditions are fulfilled. Foreign arbitral awards may be refused recognition and/or enforcement if:
  - **invalid arbitration agreement (see here under point 3)**
  - **other jurisdiction issues**
  - **no proper notice of proceedings**
  - **irregular constitution**
  - **due process violation**
  - **award annulled**
  - **public policy**

→ Are usually the same grounds as those on which you can annul/set aside an arbitral award

- '**Arbitration friendly' spirit**

- **Restrictive in its grounds to stop enforcement and recognition**. It is interpreted in a restrictive manner (grounds to oppose recognition are very limited)

3. Invalid arbitration agreement

Examples:

- **Formal invalidity** (e.g. Arbitration agreement not signed by one of the parties)
- **Lack of consent**
- **Lack of capacity**
- **Issues outside scope of agreement**

4. Other jurisdiction issues

Examples:

- **Subject-matter not covered by agreement**
- **Award addresses party not bound by agreement**

5. Irregular constitution

Examples:

- **Lack of independence or impartiality**

- **Composition or procedure not in accordance with *lex arbitri* or parties' agreement** (e.g. incorrect number of arbitrators or wrong appointing authority)
- **Constitution the arbitral tribunal:** if the procedure to appoint the arbitrators is not followed, this may lead to an irregular constitution of the tribunal (see last week's course)

6. Due process violation

Examples:

- **Party prevented from submitting crucial evidence**
- **Party prevented from commenting or responding to other party's evidence**: right to rebut the opponent
- **Decision based on facts not presented** or **discussed:** the tribunal based its decision on facts that it knew but parties did not know the tribunal had these info
- **Unequal treatment**
- **Insufficient time to present case in light of exceptional circumstances** (earthquake in Italy)

7. Public policy (substantive or procedural)

Examples:

- **Criminal prohibitions** (terrorism, slavery, drugs): some arbitral awards involved slavery, drugs etc; and where not annulled at the seat, so they were valid but the party blocked the enforcement on these grounds.
- **Fraud, corruption, bribery**
- **Excessive damages or interests**
- **Award *extra petita:*** tribunal decided on facts that were not asked
- **Failure to give reasons** (as mandated)
- **Violation of *res judicata***

Class 6. "Arbitration decision-making"

PART I – Formalism v. legal realism

1. Formalism

1. Formalism is « just » a school of thought

- **Judges (and arbitrators) apply law to facts**: this is uncontentious. Judges apply the law to the facts of the case and, if this is done competently, thus reach the correct answer

- **Logical deduction**: legal decisions are correctly inferred from rules and facts through logical deduction: logics is enough to come to a legal correct solution.

- **Adjudicative decision-making**: is a rule-based activity with external factors having no bearing on the outcome of cases
  - **Adjudicative = decision made by a judge**
  - **Judges apply the law deductively coming therefore to a correct answer**. If judges are competent, they apply rules to the facts. External factors have nothing to do with adjudicative decisions.
    - ⇒ **How about a judge's sense of justice**: is it normal to apply the law as a mechanism "because the law says it is like this" even though our deep sense of justice tells us we should think it otherwise?
    - ⇒ **Do judges really have no ideologies, political preferences**? Is it credible that you have a political ideology everyday but not when you make a decision? Why do we have courses in legal philosophy (and not in formal logic)?

- "[Interpretation] **begins and ends with what the text says** and **fairly implies**."

2. Legal realism and formalism schools of thought

→ **Realism**: every decision you make is one thing but the justification in another matter
→ **Formalism**: on the contrary does not differentiate decision-making from justification

On the justification:

- **Formalists legal logics**: the formalists « got it right » it is correct with regard on how judges justified by pointing mechanical deductions and rules applied to facts. Legal logics explain justification in judgements
- **There are different schools of thought than formalism:** law teaching in most law schools (focused on formalism only) makes law school like a school of divinity, as opposed to a faculty of theology
    - **Theology**: **you learn about religions, ideas, rule of religion**
    - **Divinity**: **you learn to think as the members of religion and of faith**. You are supposed to **learn and reproduce but you cannot have your own idea**

Formalists —> there is A (one) correct answer

On the decision making:

- **Legal realists**: legal logic plays a rule but there is a whole range of different other factors. Realistic says that judges are **human beings**. Of course, judges take law into consideration as they make decisions, they see what legal logics tell them to do, **but they are also influenced by variety of other factors,** pursue of justice, most of them hope for a promotion in a higher court etc. You have to look beyond the law of the books.
- **Realist**s: there is more than one correct decision. Because, what is a correct decision after all? A correct decision is one that can be justified. In law there can yet be different decisions that can be justified.

Interaction between formalists and realists:

When judges decide, they already think of how they would have to justify their decision. I will have the justification at the time I make the decision and when I justify, I will be influenced by what really led me to the decision (dialectical mutual influence). It is wrong to say the law has no rule to play: many people accuse realists for this.

PART II – Law and economics

1. Law and economics applied to arbitrators

1. Self-interest

- **Law and economics**: look at arbitrators, or any other decision-makers, as rational, self- interest maximisers. Every arbitrator or decision-maker wants to maximize its own interest

2. Rational pursuit of own and others' interests:

- **Interest is self-regarding interests** (e.g. make us richer) and
- **Other-regarding interests** (e.g. make someone we like happy), if this is valuable to the decision-maker

2. Decisions on the merits

1. Meet parties' expectations: transnationalize law applicable to the merits

- **Reduction of idiosyncrasy (making it less individual and more transnational)**: they have an interest applying the law applicable to the merits in the way it corresponds to the parties' expectations. This means to transnationalise the law applicable to the merits. If Turkish law is applicable to the merits of the case, arbitrators will apply the law differently as what would have been done by Courts. Every legal system is made less idiosyncratic and more interpreted according to what is done elsewhere. Idiosyncrasy will be reduced.

2. Low market value of good decisions on merits

No direct sanction for bad decisions on the merits. Decisions on merits have a low market value. As an arbitrator, your interests as an arbitrator are not advanced much by making good decisions on the merits (whose justifications are well articulated etc.). You don't gain much by having a good justification on the merits.

Because:

- Barely possible to annul an award on merit: no direct sanctions. Because your award is very unlikely to be set aside. **There are very few possibilities to set aside an award**, so why would I make big efforts to make a right and just decision. No one would say it is wrong.

- Most awards are confidential: little reputation sanction. Most arbitrations are confidential. You can't challenge an award because errors on the law are not grounds for a merit to be set aside; **so you don't care if it's a bad award because anyway it is confidential and no one on the outside will know about it**; only the parties will know it. Yet when you are a judge everybody knows it. Legal proficiency for arbitrator on merits is not a characteristic for a good arbitrator.

- Appointment of arbitrators appears not to be based on reputation for decision on merits: parties tend to say that they are only interested in whether they won or lost. **Arbitration is not about justice. It is about winning.**

3. Evidence and consequences

- **Evidence**: many arbitrators who have rendered decisions with a reasoning considered 'manifestly contradictory, inconsistent or practically non- existent' keep being appointed

- **Consequences**
  - **Little incentive to make efforts to produce good decisions on the merits**: on average, probably lower quality decisions on merits in arbitration than in many courts. There is a lower quality of merits from arbitrator than from judges: but, difficult to say it really, because arbitrations are confidential.

- **Delegation:** problem of 'the 4th arbitrator': why don't you let your junior associate do it for you? It does not matter to make good decision on the merits so you can also delegate it to someone else.
- **Following prior awards of important people might be more important than to 'get it right'.** Following decisions of important people in the fields is a way to flatter them, this could help them making career in arbitration. If you don't follow their awards, they might keep you in the dark and could stop your career. You must follow the awards of people in career.

3. Decisions on procedure

1. Higher market value of good decisions on procedure

- Procedural decisions have a higher value on the market of arbitration decision-making. This is the opposite than what happens on merits. **Because:**

  ⇒ **Annulment actions mostly on procedure: direct sanctions for bad procedural decisions**

  - Procedurally bad = ground to set aside. If you render a bad procedural decision, your award can be set aside because it can be a ground for an award to be set aside. You'll be considered as not having done your job properly**.**
  - 'Derailed' arbitration easy to identify by arbitration community. Procedural mistakes are easily identifiable: it leads to moves from the parties; yet a bad decision on awards provoke little reaction.

  ⇒ **Consequence 1:**
  Probably most arbitrations fairly well conducted

  ⇒ **Consequence 2:**
  Little delegation of the procedural handling of an arbitration. Arbitrators control the procedure; they don't give it away to anyone else. When you select an arbitrator, you can expect to get a real day in court to have a good procedure.

2. Partly competing interest: 'increasing the arbitration pie'

- **Procedural decision makes increase the arbitration pie**. It creates more jobs for arbitration. Your decisions on, e.g., jurisdiction and admissibility determine whether you, and other people in similar situations, have a job or not.

- **Consequence**: obstacles for individual arbitrations to take place have decreased over time.
  - **The judge in Court would say**: I am not competent for this case (because he does not want to work more and be paid a little more only).
  - **The Arbitrator will always say:** he is competent because he'll get richer by agreeing to the arbitration

4. Special case of extreme decisions

- **Oscar Wilde:** 'The only thing worse than being talked about is not being talked about.' It is worst to have a bad reputation than not having a reputation.

- **Clear and systematic bias in favor of one type of party** is valuable for appointments derailing an arbitration (i.e. bad procedural decisions) benefits the respondent
  - There are some arbitrators who rule in 80% of the cases in favor of one type of party (either the investor or the state) and these are appointed again and again.

- **Derailing an arbitration** (i.e. bad procedural decisions) benefits the respondent:
  - **Bad decisions can also be attractive for the parties who want to derail an arbitration**. Ex: a friend came to me who was representing a State. He asked me: what do you think about this

arbitrator? I answered it would be a mess and would derail the whole thing. He smiled and said it is really what they wanted. As the state, you want the investor to go bankrupt before the end of the arbitration

5. Sourcing non-arbitrator work

- **Keep a name**: interest of using an arbitration to make/keep a name for yourself in certain circles (business, NGOs, etc.)
  - They have the **incentive to please some communities** because they act not only as arbitrators but also incentive to be seen positively by the communities that want to give them work. If you give advises in a law firm to pharma companies: you cannot make decisions against pharma companies because you would lose these clients. Double hatting (acting as an arbitrator and as a council in a law firm).

PART III – Behavioral economics analysis

1. Behavioral economics applied to arbitrators

- **Bounded rationality**: rationality is always in fact limited, many factors interfere with rational decision-making, e.g. emotional and identity-based factors

- **Justice Scalia:** "all sorts of extraneous factors – emotions, biases, and preferences – can intervene, most of which you can do absolutely nothing about"

2. Group dynamics

1. Judges and arbitrators are tied up with their communities

- **Central idea**: who you are, is defined (among other things) by the social roles you inhabit; your 'self' is 'encumbered' by its social roles → You describe yourself through social rules and social class, religion, membership in communities.

- **Your decision-making is 'encumbered' by your social roles,** your decision-making is group-directed to:
  - Promote the group, and thus yourself
  - Ensure your belonging to the group

- **Judges / arbitrators aren't Kantian autonomous rational** (=perfectly rational) individuals

- **Judges /arbitrators are tied up with their communities**, social class, gender, race, and other conditions of life

- **Feminist legal studies** (e.g. male judges tend to favor men and values considered 'male', mostly unconsciously, and therefore more women are needed in the judiciary). We need women as judges not to give women a career but also because the decisions they produce would be different. We also need people from other countries and horizons.

- **Arbitration decision-making is influenced**…:
  - By the particular characteristics of the **arbitration community**
  - By the arbitration ethos

- **Arbitration community is 'pale, male, and stale'**: min. 50 years, thus more conservative than general population. Pale: from Western countries; susceptible of favoring parties from Western countries. Were educated in western universities. In US/EU have a different idea of what justice is than in Asia or South America. This has a consequence: usually the party who is from an occidental country will more often win the case.

3. Ideology in arbitration: self-referential

- **Arbitration is good, legitimate**: many concepts are interpreted in an arbitration way because people really believe it is good. **Self-referential attitude**
- **Sub-ideologies within arbitration linked to national legal cultures** re the role of the judge
  - Arbitrators are from legal systems where the judges are expected to lead the parties to settlement. In Germany they should lead the parties to a settlement. It is an ideological preference in Germany. If you speak to an arbitrator of another country, it can be that you find an arbitrator that will prefer the confrontation because of the cultural background he has.

4. Arbitration culture

- **Strongly corporate culture**: big law firms are heavily involved in the arbitration

5. Political attitude in arbitration

1. Arbitration community: on the political right (weak parties should have access to arbitration?)

What if you are a consumer, employee, developing State struggling with its finances? If you are a consumer /employee, you know that a dominant political attitude is against you in arbitration. In investment arbitrations, arbitrators favor investor and rich countries. If you are a weak party, the attitude will clearly be against you; while in Court it is not like this. Should we then allow employees or consumers to get to arbitration?

6. Groupthink and stereotypicality

1. Groupthink (in a nutshell): too homogeneous groups think badly

- **Arbitration, a very homogeneous community**, so the arbitration community probably doesn't think very well, as a community → Heterogeneous group think better collectively. If you all think alike, we'll never challenge one another ideas. **Arbitration is very homogeneous wile in Courts, the community is much more heterogeneous**

- **Groupthink**:
  - Member homogeneity +
  - Insulation of group from outside +
  - High stress

  =

  Illusion of invulnerability, closed-mindedness, pressures towards uniformity, illusion of unanimity, self-censorship, incomplete survey of objectives and alternatives

→ If group homogeneity is too high, the reasoning of the members of the group decreases, which leads to poorer outcomes

PART IV – Some reactions to fix this

1. Appointed by arbitration institutions for better control

- All arbitrators should be appointed by arbitration institutions (more impartial than if chosen by parties) → better control over arbitrator attitudes that are to be promoted better way to enforce cultural, ideological, political, gender diversity
- **Replace investment arbitration with an investment court**
    - No need for frequent reappointment appointment of arbitrators by states only, because their interests are more at stake
    - Only works better than arbitration if judges of this court have a different ethos

Class. 7 "Issues of costs and time"

PART I – The costs and time problem

1. Arbitration over: national courts

1. Less expensive and faster (?)

- **2% of individuals surveyed**: low costs are one of the three most valuable characteristics of arbitration
- Three worst characteristics of arbitration:
  - → Costs - 68% complained about it
  - → Arbitrator efficiency - 39%
  - → Slowness - 36%
  - → 92% in favor of simplified procedures in institutional rules for smaller claims

PART II – Types of costs

1. Arbitration costs, average list of items:

1. fees of the arbitrators;
2. value added tax or similar taxes applicable on the arbitrators' fees;
3. expenses of the arbitrators (eg travel, accommodation, courier services);
4. additional exp. Of arbitrators (e.g. hearing room, court reporting services)
5. fees of any secretary to the arbitral tribunal
6. expenses of the secretary, if applicable;
7. registration fees of the arbitral institution;
8. administrative costs of the institution, if applicable;
9. fees of experts appointed by the arbitral tribunal;
10. expenses of such experts.
11. fees and expenses of legal representation;
12. fees of party-appointed experts;
13. expenses of these experts;
14. translation of oral testimonies of fact witnesses or experts;
15. expenses related to witnesses (travel costs for attending the hearing);
16. costs associated with the production of documents;
17. costs of a party's in-house resources (legal, technical, or management);
18. some other out-of-the-pocket expenses.

PART III – Cost breakdown

1. The "82/16/2 breakdown"

- 82%: Costs of the parties to present their cases
- 16%: Arbitrators' fees and expenses
- 2%: Administrative expenses of the institution

PART IV - Actual costs and duration

- CHF 1,750,000 in common law countries
- CHF 2,000,000 in civil law countries (a difference of nearly 13%)

PART V - Cost allocation

- Can I make the other party pay for me? Yes. If you win the arbitration.
- Most tribunals adopt a "costs follow the event", or "loser pays" approach.
- Irrespective of the rule on costs (whether there is or not an express, rebuttable presumption that the successful party will be entitled to recover reasonable costs).
- Losers are to pay ‘reasonable’ costs of the winner reasonable: depends on procedural conduct of parties during procedure full apportionment of costs (i.e. losing party is ordered to pay the full costs of arbitration and all costs of legal representation): 45% of the cases

PART VI - Investment arbitration specifics

Cost, duration and size of claims all show steady increase.

Class 8 "How international arbitration came to protect foreign investors"

1. The Abadan Affair

1. UK pride (from AIOC to BP):

- Marked the history of investment arbitration: appropriation led investors being in trouble
- There are many refineries in Abadan, Iran.
- 1950ies: Iran Persian petroleum: **discovered** by the British, **developed** by the British and **exploited** by the British, "through British skill and British ingenuity".
- Iranian government had given a **concession to a UK company for the exploitation** of this oil to the British over a specific region
- **The United Kingdom's "single largest overseas asset":** the AIOC (Anglo Iranian oil company) was the biggest company abroad "source of national pride"
  - ⇒ Because of the British preponderance → for them it was not Persian. It was « British »: BP British Petroleum, changed the name in 1955.

2. Nationalization of Persian oil and coup d'État

- **Nationalization and expropriation**: Mohammad Mosaddeq was elected in 1951 and considered that Iranian oil should return to Iranian people. He nationalized British Oil. So British were expropriated from their oil. Oil companies remained expropriated and defenseless.
- **Coup d'État:** this led to the coup d'État by the British and the US! US/UK would not have had to intervene if there was an arbitration. Now, they hate each other (US/Iran)

3. Dispute UK vs Iran:

- CEO of the AIOC writes: « we are defenseless against Iran who expropriated us and our assets »
- WB offers to be a mediator between Iran and the AOIC:
  - Iran didn't want; they wanted control over their resources.
  - UK wanted that oil because for them it was a national pride.
- Within the WB: something was needed to help foreign investors and settle disputes. We wanted an organ inside the WB. **This resulted in the signature of the ICSID Convention**
  - Started immediately after the events in Iran and is central for international investment arbitration

2. Broader historical context of the protection of foreign investors

1. Antiquity

- Investments date back to this time
- Egyptians building and operating mines

2. 17th century BEIC (British East India Company)

- Foreign investment grew rapidly with the BEIC
- East India Company: half of the world's trade. Biggest foreign investor ever: building, operating, controlling. It was a governmental power. Many of these investments were direct.

3. FDI and FII

- **Foreign direct investments (FDIs):**
  - Company from one country making a **physical investment** into building a factory in another country: buildings, machinery, equipment...
  - **Controlled by the foreign investor**
  - **Exploited by the foreign investor**

- **Foreign indirect investments**:
    - Loans, shares in foreign companies; portfolio investment
    - **Controlled by the foreign investor** but different from a purchase or sale agreement.
    - **Exploited by the foreign investor**

4. 19th century: push back against FDIs (nationalization)

- Projects **built and controlled by foreigners**
- With the rise of technology, investments expanded to new sectors:
    - bridges
    - power plants railroads
    - cultivation of export crops
    - pharmaceutical
    - water distribution
    - telephone systems
    - agriculture automobile factories
    - affordable
    - telegraph systems roads
    - waste management
    - pharmaceutical industries
    - exploitation of natural resources
    - pipelines
      housing
    - street lighting
    - electrical power systems

- **Expropriation and nationalization**: there was something wrong with this: these sectors were vital for welfare of the population and its security. People thought it was not ok that foreign investors could control all. The government should be controlling these sectors. People convinced the government to expropriate the foreign investors. It was national sovereignty. Expropriation is based on sovereignty. I take it over expropriation of FDIs

- **Example**: Soviet Union decided to nationalize all the banks

5. Rights of the foreign investors

- **In the Middle-Age**: no rights for foreign investors as soon as they left their country

- **Progressively**: right to travel and to trade

- **Emer de Vattel:** States have the right to set conditions on the entry of foreigners, States can keep foreigners out, but when entered, a state has duty to protect foreigners as it would a national.
    - Foreigners retained "membership" in the home state.
    - **"Membership" includes property**
    - **Foreigner's property is foreigner's home state property:** membership: It is part of the foreigner states' property. UK Investor invests in India, the investment is part of a UK investment. Every harm made to UK investor, any injury, is thereby an injury to the home-state. If India takes away my property; you take away UK's property.
        - ⇒ **This leads to diplomatic protection.** I am the UK; I can attack India because you harmed me via harming my citizen's property.
        - ⇒ **Debt to foreigner is debt to foreigner's home state:** you, India, have a debt towards the India Company because you expropriated the assets and by extension, this is a debt against the UK, the investor
        - ⇒ **Legal to send boats to defend the foreigner's investment.**

- **Gunboat diplomacy**: troops are sent to take away the belongings. States were behind the investors and sent troops to defend them from the expropriating State. Foreigners turned to their governments. The government sent boats: « Gunboat diplomacy ».
- **This was allowed initially**: allowed to send warships to recover a debt, it was historically legal, there was a rough historical sketch of rights of foreigners

- **18th century**: marks today's system: end of the warships.
  - **1907 Drago-Porter Convention:** "The Contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals. This undertaking is, however, not applicable when the Debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any 'compromis' from being agreed on, or, after the arbitration, fails to submit to the award."
    ⇒ It was **prohibited** only as long as the debtor state **refused to submit the claim to arbitration:** if India says no to an arbitration, UK can send warships.

  - **1928 Kellogg-Briand Pact:** "ARTICLE I: The High Contracting Parties solemly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another. ARTICLE II: The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means."
    ⇒ **Prohibited the use of force and required states to resolve dispute only by pacific means for the recovery of debts**
    ⇒ **Since Kellogg Briand: no more of warships**

  - **Pacific settlement of disputes :** I cannot attack you any longer because of the Kellogg Briand pact. So what can I do to recover to protect myself using pacific remedies against India?

3. The limitations of the traditional options for the pacific settlement of disputes

1. Home courts

- **Immunity**: no because with immunities, the State cannot be sewed before the courts of another state unless it agrees to, but this is rare.
- **Enforcement**: perhaps the State will sue another state, but if I win the case, it will still be hard to enforce the judgement.

2. Courts of home state

- **Neutrality**: can BP sue India before Indian courts? Not a good idea, because the courts of any state would be partial and in favor of its own state. Anywhere in India would be partial in favor of the respondent in such a case.

3. Diplomatic protection: espousal claims

- **Espousal claims**
  ⇒ **Non-legal form**: the investor governments talks to the government of the host state to see if they can sort things out. They can exchange things, threaten reactions etc. I could turn to my own government: I could ask for diplomatic protection
  ⇒ **Legal form**: if my rights have been breached, then my nationality state makes the claim of the investor its own claim. It becomes the Home State 's claim (idea of Vettel). This is the base of diplomatic claim. Recognized in 1924 by the PCIJ—> Elementary principle in international law. This claim, the UK making my claim its own claim. With that claim, the

state goes to an international law (CIJ e.g.) against justice, or any other international court and tribunal.

- **Negative effects of the espousal claims:** there are some problems with this practice of espousal claims:
  - ⇒ **exhaust local remedies:** for the protecting state (UK), to file a claim before an international court on behalf of me, investor - espousing my claim - I first must as an investor exhaust local remedies (Art. 44b of OIOC on state responsibilities). **I investor, must go to all the courts (all levels of instances)** in the different courts in India, all the way to the supreme court, **before my protecting state can file a claim**. Exhausting local remedies = UK investor in India, must exhaust all the courts in the investing country… not a good idea, because the investor is not in its home country, but in the host country.

  - ⇒ **investor loses control:** the investor loses control over its claim. The UK has a right to file a claim on behalf on his investor. But, there is no obligation to do it. The protecting state can but must not. The protecting state can do whatever it wants: wave it or reject it. The investor is completely at the mercy of the protecting state.

  - ⇒ **only big fish**: espousal claims work only for big fish: if I were to turn to the CH government to protect me in my case, against Australia: because I set up a shop there. The CH government would tell me: I have many things to do, just let me do my things. So only big companies would have the attention of the government, and not the small ones. Which is not right.

  - ⇒ **fouls international relations**: between home State and host state. Those States must discuss other things; they don't want to discuss these claims. We need the cooperation of the other country for other matters which are more important, so we don't care to help you.

  - ⇒ **Power play:** it does not work for smaller state. A small Caribbean State suing the USA: possible legally speaking, but in practice it is hard

  - ⇒ **Consent is hard to get**: France can sue Italy only if before the claim arose, they consented to sue each other. Otherwise no international tribunal is competent. Espousal claims work only if there is consent of both (principle of arbitration) for the Court or Arbitral Tribunal to have jurisdiction
    - **Example of the UK-Iran: no dispute resolution clause (ICJ: no jurisdiction)**
      - The UK tried in 1952 to take Iran to the ICJ, UK had failed under OIOC against the government of Iran. Mosaddeq attended the hearing before the ICJ. The ICJ dismissed the case because of no jurisdiction.
      - **No jurisdiction**: the concession agreement (choice of court) was signed **by Iran and by AIOC but not by the UK!** So AIOC could bring the case but not at the ICJ (only between States). There was **no dispute resolution clause between UK and Iran** and Iran was not willing to enter in a dispute resolution clause *post* the case.

4. Investment Arbitration

- **Filed by investor against host state**: the investor remains in control of its own claim. The investor can negotiate with the host state, based on the possibility to file the claim. Investor: if you don't compensate me, I will sue you. Arbitrations can absolutely order the host state to pay the investors; and this order is enforceable against the loosing state.

- **No need for home state permission**: the investor is in control of the claim. He does not have to ask the permission to file the claim. The government does not play any role. If a FR company had filed a claim against the IT government; the FR government would have been involved and this is bad for their relations. **The ICSID Convention (Art. 27): once there is an agreement to arbitrate, diplomatic protection is off the table. There is no more diplomatic protection**

possible as soon as there is such an agreement. We replace the espousal claim by an investment arbitration.

- **No need to exhaust remedies**: I don't need to go to any Court to the host state. I can go straight ahead to the arbitration (goal of the arbitration!)

- **Neutral (in theory)** as opposed as the courts of host state, is that it is neutral. The arbitration has no interest to rule in favor of both parties. No interest to rule for the State or the investor.

- **Even the small fish can file such a claim**. Problem of cots however: investor wants to file a claim against Australia but where will he find the money if it is a small company? There are some loans / financial assistance (third party funding) for these claims. Then the institution will have the financial loan back.

- **Relatively easy enforceability of arbitration decisions** by virtue of two conventions with 150+ member states (today): **ICSID and NYC**. For example, the investment arbitral award will be enforceable in 150 members against India's assets in those members states. I can enforce my award around the world against the assets you, India, have in these different member states

→ All these advantages (above) are inherent to arbitration but the enforceability started with these 2 conventions

5. 1864 Suez Canal arbitration

Before those conventions, there were already investment arbitration.1864: Suez Canal Company (Turkish) was digging the Suez Canal in Egypt. Egypt was unhappy with this and passed a law that ended the concession given to the Suez Canal Company to dig the canal. Turkish investor was unhappy and tried to sue the Egyptian government. Egypt agreed to the arbitration against the Turkish Company. Napoleon III was the arbitrator. **These were ad hoc arbitrations, based on post-dispute agreements**. The Egyptian government accepted the arbitration after the case begun. But this is rare: why did Egypt accept to go to the arbitration? We don't know, it is an exception. In many cases, the responding party would not accept.

It is much easier to agree to arbitration before the dispute arises: need for international conventions with pre-dispute arbitration clauses to protect foreigners, in particular investors.

6. Treaties with pre-dispute arbitration clause (BITs, IAs, multilateral treaties)

a) BITs: Bilateral investment treaties

International conventions between States. In international treaties = important to protect foreign investors, more and more arbitration clauses were introduced. Bilateral Investment Treaties (BITs), containing an investment arbitration clause (for future disputes). BITs contain investment arbitration clauses for future disputes. There are a lot of BITs in the world today: more than 300.
Nowadays: almost all bilateral treaties include an arbitration provision

b) IAs

International investment agreements; not only bilateral. These provide protection of international foreign investments.

c) Multilateral treaties with investment protection chapter and investment arbitration

- **NAFTA / USMCA**: North America Free Trade Agreement; now is USMCA on investment arbitration (note: no investment arbitration in USMCA with Canada)
- **CAFTA**: Central America F-T agreement (Guatemala / Honduras etc)
- **Energy Charter Treaty**: EU-Russia multilateral treaty

d) Recent negotiations:

- "Trans-Pacific Partnership: USA-Asia
- (TPP)" (defunct) the "Transatlantic Trade and Investment Partnership (TTIP)" (semi-halted) : meant to be EU-USA
- The "Regional Comprehensive Economic Partnership (RCEP)",
- The "Tripartite Free Trade Area (TFTA)"

Hard negotiation of these treaties. NGOs did not want an arbitration clause: increase power of corporations to run the societies. It is not a trading agreement. We don't privatize judicial systems.

Class 9 "How investment arbitration works"

PART I – ICSID and UNCITRAL ad hoc arbitration

1. Differences between ICSID and UNCITRAL ad hoc

1. General remark:

ICSID and UNCITRAL ad hoc are not the only forms of investment arbitration. You could for example have the ICC Rules, or other rules. But these are used in 90% of all investment arbitration.

2. ICSID institutional arbitration

- **The main one**

- **Handled by ICSID institution**

- **ICSID is part of the World Bank**, it is therefore an **international organization**

- **Rules**: ICSID Convention, Regulations and Rules (procedural rules and all what governs an ICSID arbitration). Own ICSID **institution rules** apply to the arbitration procedures

- **Public**: one of the main differences with the UNCITRAL ad hoc. **When you have an investing contract with a State you better insist for an investment arbitration clause in the contract. Would you better choose a UNCITRAL arbitration or a ICSID arbitration? Depends if procedure is public or not.**
    - **If a procedure is more public (ICSID),** you can use arbitration to show how the state expropriated you, and you can harm a state and harm it. So, as an investor you may want a procedure to be public. This allows you to negotiate with the state saying: "State, you do not do this, I will start an investment arbitration against you and this will hurt you".
    - **If a procedure is more confidential (UNCITRAL)**: on the other hand, you are not doing something very ethic, and you may want the dispute to remain confidential.

- **No rule of precedent**: they must not follow prior decision: you cannot blame an arbitral award on that ground. You cannot annul it because of this. But the parties have started to refer to prior cases because as a lawyer you want to convince an arbitral tribunal that what you did was the good thing to do. As soon as investment awards are published, people will try to use them to convince tribunals and therefore tribunals systematically refer to precedents. **This does not mean that prior decisions are binding, but they are prior decisions on the same point**. So, no obligation to follow precedents but some are followed. What precedents are followed? Arbitrators decide. Today you can cite 5 different case-law in the past that defined what a prior case is. And these cases are all very different. They can pick and choose which of these precedents they want to follow. So do not take this too seriously.

- **No seat of arbitration:** in principle they have no seat, but this does not mean they do not take place anywhere. **Place or seat vs the venue is not the same thing. The venue is where things actually happen. And the seat/place is the geographical legal anchor of an arbitration. ICSID convention does not put a « seat » in place.**

- **Ad hoc annulment committee:** you can go to any court to set it aside. **There is no control of any court that can annul or set aside an ICSID award.** So how can you do it? There is a specific procedure in the ICSID framework, and you have to turn to ICSID itself. **ICSID will set up an ad hoc annulment committee of 3 people constituted just for the purpose of a**

given annulment. These 3 people are taken from ICSID own list of arbitrators. Just to remember, ICSID has open and close lists:

- **Open list**: you can choose from this list but do not have to.
- **Close list**: **in this case, for the «ad hoc annulment committee »:** if you want 3 people, you will choose only someone from that list. Each of ICSID Member State can appoint 2 people to be put on this list.

ICSID Convention:

ad hoc annulment committee

Article 52

(3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons.

no annulment by national courts

Article 53

(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms

- **Similar annulment grounds as UNCITRAL:**

Article 52

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

(a) that the Tribunal was not properly constituted;

(b) that the Tribunal has manifestly exceeded its powers;

(c) that there was corruption on the part of a member of the Tribunal;

(d) that there has been a serious departure from a fundamental rule of procedure; or

(e) that the award has failed to state the reasons on which it is based.

- **Enforcement regime (very different from UNCITRAL):** the enforcement is the same as in local courts judgments. It is easier to have an ICSID award recognized and enforced. **All ICSID MS because are party to that convention, by ratifying it, they** recognize the enforcement as if it were the judgement of one of their court. You cannot oppose the enforcement of an ICSID **investment** arbitral award. Contrast to a Court judgement: from CH to USA, the USA can say no thanks; some principles say that we can recognize **it, but** we can also say no. With ICSID, we cannot: it is much easier to enforce and difficult to resist the enforcement.

ICSID Convention:

easy enforcement

Article 54

(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal

- **Consent (same for UNCITRAL ad hoc): where do we find consent to go to an investment arbitration? The validity for the arbitration to take place?** Not in the ICSID Convention (though required for ICSID arbitrations)**,** but in contract national legislation, or treaty (e.g.: BIT). **By being a MS of ICSID is not a consent to go to an investment arbitration! You**

have to find a consent, but it is not in the ICSID. Being a MS of ICSID, makes the arbitration being possible if BOTH put consent. It is therefore not a sufficient condition to go to an arbitration.

3. UNCITRAL ad hoc

- **UNCITRAL is not an arbitration institution**: **it is just a commission**, an entity that drafts rules and that leads the negotiations of international conventions. It is not an arbitration institution.
    - Draft rules that anyone can use
    - Other people, parties, investors, States, refer to rules drafted by UNCITRAL. UNCITRAL does not get involved at all.

- **UNCITRAL rules are often handled by PCIA in the Hague** but PCIA does not apply its own rules, they apply the UNCITRAL rules. They offer rooms for arbitrations and venues where arbitration folds and brings administrative part of arbitration

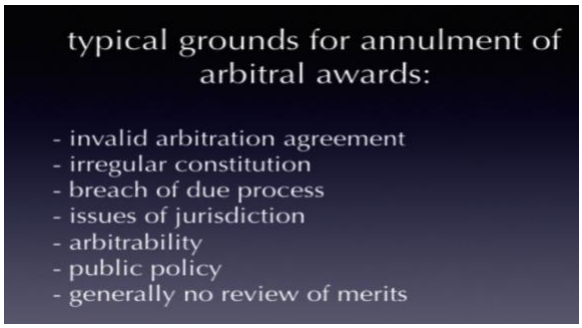
- **"Confidential" (main difference with ICSID):** less public than ICSID. Nevertheless, many aspects can be public (hearings e.g. are confidential) but to say everything is public is a simplification. We can do it all confidential, but we try to make it more public. Civil society wants to know what's going on and therefore ask publicness. **When you have an investing contract with a State you better insist for an investment arbitration clause in the contract. Would you better choose a UNCITRAL arbitration or a ICSID arbitration? Depends if procedure is public or not.**
    - **If a procedure is more public (ICSID),** you can use arbitration to show how the state expropriated you, and you can harm a state and harm it. So, as an investor you may want a procedure to be public. This allows you to negotiate with the state saying: "State, you do not do this, I will start an investment arbitration against you and this will hurt you".
    - **If a procedure is more confidential (UNCITRAL)**: on the other hand, you are not doing something very ethic, and you may want the dispute to remain confidential.

- **No rule of precedents, they must not follow prior decision: you cannot blame an arbitral award on that ground.** You cannot **annul** it because of this. But the parties have started to refer to prior cases because as a lawyer you want to convince an arbitral tribunal that what you did was the good thing to do. As soon as investment awards are published, people will try to use them to convince tribunals and therefore tribunals systematically refer to precedents. **This does not mean that prior decisions are binding, but they are prior decisions on the same point.** So**, there is** no obligation to follow **precedents,** but some are followed. What **precedents** are followed? Arbitrators decide. Today you can cite 5 different case-law in the past that defined what a prior case is. And these cases are all very different. They can pick and **choose** which of these precedents they want to follow. So do not take this too seriously.

- **Normal** seat of arbitration

- **Annulment: Courts of the seat**. Procedure to annul it → you turn to **the Court at the seat of the arbitration**, it is the same as in commercial arbitration. E.g.: UNCITRAL ad hoc investment arbitration with seat in Geneva, you will turn to the TF to have the award set aside.

- **Similar annulment grounds as ICSID:** NB: in ICSID too, a wrong application of the law on the merits and arbitrary awards that the arbitrator got wrong, is not a ground for annulment.



- **Enforcement like commercial arbitral award:** NY Convention 1958 on the recognition and enforcement of foreign arbitral awards.

- **Consent**: being part of UNCITRAL is not enough. We need a consent in a contract, national legislation or treaty (BIT).

2. Consent to go to investment arbitration can be found in:

1. Clause in contract:

Contract between the State and the investor: contract (concession agreement between State and foreign investor e.g): you can operate mines to search for mines. It is a concession, agreement, there will be an arbitration clause:

Clause 1

The [Government]/[name of constituent subdivision or agency] of name of Contracting State (hereinafter the "Host State") and name of investor (hereinafter the "Investor") hereby consent to submit to the International Centre for Settlement of Investment Disputes (hereinafter the "Centre") any[6] dispute arising out of or relating to this agreement for settlement by [conciliation]/[arbitration]/[conciliation followed, if the dispute remains unresolved within time limit of the communication of the report of the Conciliation Commission to the parties, by arbitration] pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter the "Convention").

2. Law of the host State:

Number of countries have investment codes which regulate investments.

You may find in domestic legislations, **unilateral agreement to go to arbitration** with any foreign investor. DRC agrees to go to arbitration unilaterally = with any foreign investor. You invest here, and through my domestic arbitration I give my consent to go to arbitration with you. This is how I give my consent. This is my unilateral offer to go to arbitration, in my domestic legislation.

OFFICIAL JOURNAL OF THE DEMOCRATIC REPUBLIC OF CONGO

Cabinet of the President of the Republic

LAW N0 004/2002 OF 21 FEBRUARY 2002 ON THE INVESTMENT CODE

Article 38

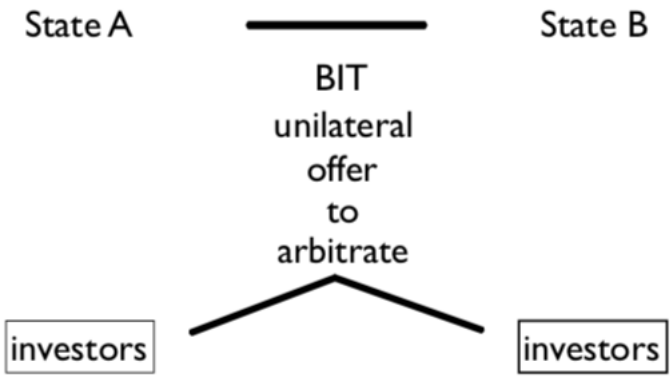
All differences between the investor and the DRC related to:

- **A contract or Investment agreement;**
- **An investment authorisation granted by the relevant authorities, or; Any violations of the investor's rights and/or of the investment attributed or created by the Investment Code or by other national laws or by Treaties or International Conventions to which the DRC adheres to and is governed by such negotiations.**

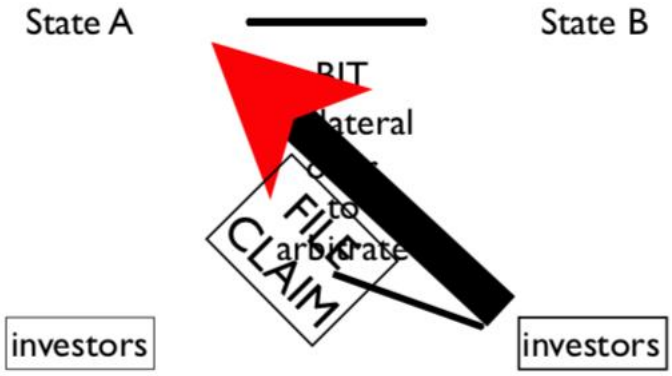
If the parties do not arrive at an amicable settlement of their differences within a period of 3 months to be counted from the first written notice demanding entry in to such negotiations, the difference shall be, settled, to the request of the wronged party, in conformity with arbitration procedures ensued.

- **Of the Convention of 18 March 1965 for the settling of differences relative to investments between States and Nationals from other States, (Convention CIRDI), ratified by the DRC on 29 April 1970 or;**
- **The dispositions of the regulations on supplementary Mechanism, if the investor does not fulfill the conditions of nationality stipulated in article 25 of the CIRDI convention;**
- **The settling of differences by the International Chamber of Commerce of Paris.**

3. Treaty (e.g BITs):



Treaties are only between States:
Investors cannot be parties to BIT. The BIT contains a **unilateral offer/ agreement**, to go to arbitration with unknown investor, as long as they are citizen of the other State. Investor of State A can start an arbitration against State B.
In principle, only investors from State B can sue State A; but investors of State B cannot sue State B because it is an international arbitration, not national.

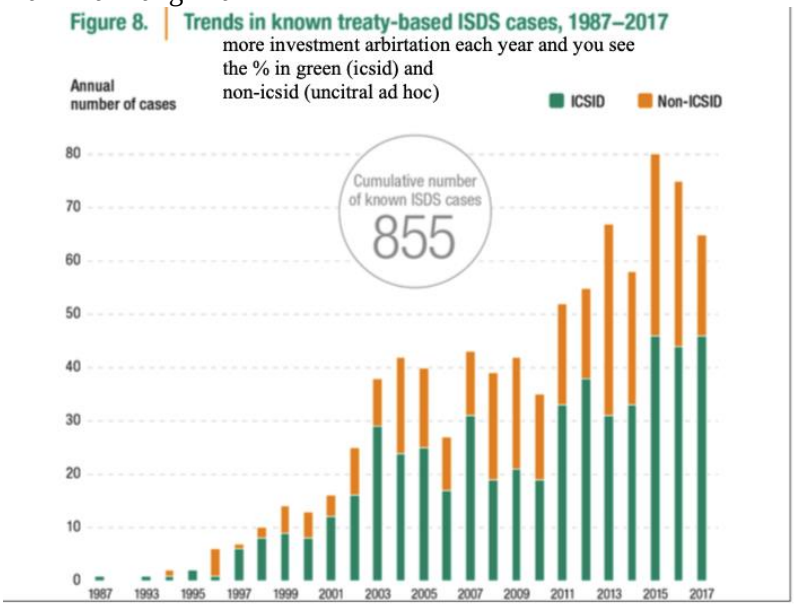


Example of an arbitration clause contained in a BIT:

1. Any dispute between a Contracting Party and an investor of the other Contracting Party shall be notified in writing including a detailed information by the investor to the host party of the investment, and shall, if possible, be settled amicably.

2. If the dispute cannot be settled in this way within six months from the date of the written notification mentioned in paragraph 1 above, it may be submitted upon request of the investor either to:

(a) the competent tribunal of the Contracting Party in whose territory the investment was made; or
(b) the International Centre for the Settlement of Investment Disputes (ICSID) established by the convention [on] the settlement of investment disputes between States and Nationals of the other states opened for signature in Washington D.C. on 18th March 1965; or
(c) the Regional Centre for International Commercial Arbitration in Cairo;
(d) the Regional Centre for Arbitration—Kuala Lumpur;
(e) the International Arbitration Institute of Stockholm Chamber of Commerce; or
(f) the Ad-hoc Court of Arbitration established under the arbitration rules of procedures of the United Nations Commission for International Trade Law.[3]



PART II – Substantive international investment law

1. Expropriation: types of expropriation

1. Direct expropriation:

- Also called: formal taking
- Also called: nationalization
- Does not happen much those days

2. Indirect expropriation or regulatory expropriation

- **What it is**: I am a State and you are an investor, but I choose your CEO and this CEO will also be in my interests. Shares will also be mine. I will not take what is yours, but I'll make your investment worth less. **Regulatory expropriation / indirect expropriation by regulation**: I regulate your investment in a way that it will take away some benefits to your investment **(protecting HR, environment, child labor etc.)**. I will therefore prohibit to conduct business as usual. I will therefore deprive you from some benefits.

- **Two types of indirect expropriation**:
  - **One-go expropriation**
  - **Creeping expropriation:** progressive indirect expropriation by series of small things. I raise taxes by 20%, the second year I add another regulation and progressively I deprive you of the benefits of your property.

- **Example**: Metalclad vs US. A US company building waste in Mexico; where garbage was treated, it was polluting a lot. Metalclad would receive a permit to exploit, if Mexico was ok with the permit. The permit was granted to the US company in Mexico. But then, the municipality said no: they called on the police force to kick out the investor to say they do not have the authorization; what the federal State, said has no importance. **Metalclad sued the Mexican government saying they were being expropriated. The consent to go to arbitration was expressed in the concession agreement. The tribunal concluded there was an indirect expropriation**; indeed illegal because Mexico deprived the owner in whole or significant part, of the use or reasonably to be-expected economic benefit of property.

3. Effects of the expropriation:

a. Cannot be annulled by tribunal

The arbitral tribunal cannot give back the property or undo the legislation that led to the deprival of property.

b. Prompt and adequate compensation

The arbitral tribunal can only ask a compensation. There are 2 ways to compensate.

- **The pure effects doctrine: strict liability**. If a foreign investor has been deprived of benefits, **(significant loss)** then a compensation is due. End of the story.
- **The public interest's doctrine**: the public interest doctrine says that if the State has effectively expropriated the investor in order to **protect the environment, or public health, in the public interest**, then the amount of compensation **is reduced or even no compensation is due.**

Which of the 2 the arbitrator will choose? They can choose whatever they want. As an investor, it is quite unpredictable.

2. The Minimum Standard of Treatment:

- Customary international law: applicable even if no treaty. As soon as you are an investor investing abroad, you have these rights even though there is no treaty. The State is subject to customary international law vis a vis of its investors.

1. Denial of justice:

Serious inadequacies in the State's judicial or administrative system.

- **Formal denial of justice:**
  - ⇒ **Refusal of access to court:** you are an investor, your concession agreement is not renewed, before an arbitration you want to sue someone in the Host State and the State Courts say, "we don't want to give you access".
  - ⇒ **Undue delay in court proceedings:** in Italy it took 10 years in Court to get a decision. If you are an Italian national it takes 10 years to have a decision. If you are a foreign investor and it takes 10 years to have a decision from the Court, then you can sue the state in an investment arbitration. **Foreigners are better protected than national thanks to customary international law.**
- **Substantive denial of justice: clearly improper and discreditable court decisions.** It must be really impartial and about incompetence. It is really manifesting legally wrong. The TF renders a crazy bad decision and you cannot do anything, but if you are an investor (foreigner) you can sue the state through an investment arbitration.

2. Lack of due process: regarding administrative acts

An administration does something you you as an investor, which does not follow the guidelines of due process. You can sue the State for that.

3. Lack of due diligence: in protecting foreigners:

As soon as you are a foreigner and you go to another country, you are a foreigner: the State owes you due diligence.

- **From injurious acts of private parties, including mobs and insurgents (i.e. protection from physical violence):** meetings of the G8, if you are a foreigner, you can sue the state because the State did not protect you from these mobs who destroyed your property.
- **In the administration of justice (e.g.: prevent crimes or arresting and bringing culprits to justice)**: the State must administrate justice by investigating or prosecuting responsible for these expropriation acts. E.g.: you are a foreign investor and sue the CH

tribunals because CH did not try to catch the criminals: good luck! **As a foreigner, you can sue the State in an arbitration because that State did not catch the criminal**

4. Arbitrariness:

Targets any behavior of the State, that "willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety" (ICJ, ELSI (USA v. Italy)).

- **Illegality is not sufficient:** it is more than unreasonable or illegal: it aims at the real non-sense of a State behavior.
- "Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law"
- Arbitrariness: catch all provision with every high threshold. If any authority in CH does something which really does not make sense, the foreign investor can sue the state under customary international law.

5. Discrimination:

Illegitimate distinction between people or situations that are in a similar situation

3. Fair and equitable treatment (FET):

1. Most important standard in BITs:

- **Vague and undefined standard** of protection for foreign investors
- **Main protection:** investor's legitimate expectations. If you invest in a country, you may have expectations about what is going to happen to you, if these expectations are breached, you can sue the government for a breach of this standard. **This FET is not part of customary international law, the foreign investor is protected from this only if a BIT provides for it, in principle.**
- **Legitimate**:
    a. **Conditions offered by a host state at time of the investment:**
    You make an investment in a country at a certain time because condition offered to you at that time is good. You expect to have these conditions the whole time of the investment. If you invest and then the conditions improve, that does not create acquired rights. VAT is 10%. **But if it goes from 10% to 20% it may be a breach of conditions offered by state.** The purpose of this clause is to attract foreign investors, so if rules changes so much, then it could be a breach.
    b. **Specific and unambiguous state conduct:**
    Encouraging remarks from government officials saying the VAT will not increase, is **not enough**. **It is better to have a license or permit to see really what the State is offering.**
    c. **Justifiable and reasonable:**
    If you get at the time of the investments a formal letter from the government saying that no tax will be applied to my investment for the next 20 years, **so then it will never be justifiable and reasonable to change** it. Or, if we get a letter saying that Labour Law will never apply to our investment: then this is also not justifiable nor reasonable!
    d. **Not obtained by fraud (corruption, bribery or coercion) :**
    Case where an investment arbitral tribunal asked the CEO of the investor to appear as a witness before it. The CEO came to the arbitral tribunal and this one asked the witness (CEO): how this investment took place? The CEO said: I was asked to come with a case with some millions inside in order to meet the president. I was asked to leave my case outside, they took it, and after this, I had wonderful conditions for my investment → corruption. **So, you cannot now sue the government if the conditions of investment are not met.**
    e. **Can be inconsistent with local laws:**
    You may get an assurance from a government saying that in your case, you are not subject to certain forms of regulations. You start to invest and then the environment ministry says: you breached some rules on environment. The investor goes to the

government saying: you said I could do this! The foreign investor is not supposed to know the local laws so should rely on this.

4. Stabilization clauses:

1. Stabilization clause (not standard of protection):

- The stabilization clauses are not a standard of protection, just a **type of clause. They are contained in a contract between a State and a foreign investor;** whereby the state commits not to alter the regulatory framework in a way that undermines the economic viability of the investment**.**
- Stabilization clauses freeze parts of the law**:** I can promise to you that any changes will not apply to you, making you effectively an exception to the law. **You will be a citizen to which new legislation won't apply thanks to the stabilization clause. You can sue me if I change the law. The changes must be really serious. These are still used in the extractive industries or infrastructure or drilling etc. Example**: **you are the investor and I am a State, but I will only invest, if you won't change your tax law, IP Law etc.**

- **Clause used when:**
  - **Investor: doubts about future regulatory and political changes.** The investor feels that they are not able to predict what kind of political changes may occur affecting the value**.** E.g.: political unstable power. The new government is coming to power and do not know what will happen**:** you want to protect yourself against this. You negotiate that the law of the former government will govern your investment; not those of the new government.
  - **State**: **give host states an economic advantage in attracting foreign investors**

- **Why use stabilization clause:**
  - **Bargaining power:** bargaining power of the host State is low at the time of the investment, because States want to introduce things to attract investments. Once you invest, you inject costs and therefore bargaining power decreases. As an investor you cannot say the State: if you don't do this, I will leave. Over time, the bargaining power of investor goes down and bargaining power of the state goes up.
  - **Host State**
  - **Investor**
  - **Time (+sunk costs)**

- **Examples of state measures challenged in investment arbitration:**
  - **Giving a concession agreement to company X which (involuntarily) terminates exclusive concession agreement given earlier to company Y (indirect expropriation):** after the end of soviet union in Georgia. A foreign company had received a concession agreement from Georgia to build pipelines. 2 years later, a new government comes to power and this one did not knew about the rights given to the investor. The new government therefore gives those rights to another investor → you have 2 companies having an exclusive concession to operate the pipeline. The first investor sued the government saying that you expropriated me by giving me those concession, but in fact I cannot benefit this because you gave the same to another investor.
  - **Increase of corporate tax from 30% to 50% (during economic crisis) (indirect expropriation, FET):** during an economic crisis in Argentina. At one stage, they did not have money to pay things. So, they increased taxes to generate revenue; even for foreign investors. The foreign investors said it was a breach of FET because they did not expect this tax increase. The investor won the case.
  - **Unpegging currency A from USD (during economic crisis) (indirect expropriation, FET)** : during an economic crisis in Argentina. Argentina had to devalue its currency. A

peso was worth 1 dollar at the beginning and then was 0.5. The investor said they had to be given the real value, so they had to be paid the difference.

- **Banning a chemical product considered harmful for health used as component of products (indirect expropriation, FET)**: Mexican investor investing in California producing chemicals. California banned that product saying it was bad for health, the Mexican investor said it was a breach of their right.
- **Preventing tobacco companies from using their logo on cigarette packs (indirect expropriation (of IP rights)):** Australia → no longer brand of cigarettes. This leads the cigarette to taste less good because people cannot choose their favorite brand. People therefore smoke less and therefore companies make less money: expropriation of trademark rights.

Class 10 "Arbitration and its discontents"

PART I – Discontents with arbitration in general

1. Functions of dispute settlement

1. Satisfying the parties

- **Highest cumulative objective and subjective interests** : of course one party wins and the other loses, but still it is in both parties interest
- **Increasing costs and time :** if you go to arbitration, even if you win the case, you will have to pay so much and it will take so long, you will not be terribly happy
- **Interests of parties and 'the system' less aligned that in court context :** longer and more expensive procedures = better for lawyers but worst for parties. In arbitration, there are few work counterforces: courts have interest opposed to those of lawyers. For Courts, fewer shorter procedures are better than longer procedures and more expensive ones. **In a Court: the judge will not have a higher salary.**

2. Enforce societal values

- **Dispute settlement brings the law's values to bear on reality**
- **Arbitration tends to promote sectoral values**, creating a parallel system of justice with different values, a certain way of thinking and political orientation. Arbitration has created a parallel system of justice in which law is applied differently
- **Confidentiality in arbitration makes certain values more difficult to enforce**
    - E.g. Google's arbitration scheme for sexual harassment claims. Every claim in Google had to be solved by arbitration. There were many harassment claims that people wanted to file within google and had all to be made under arbitration and as arbitration is confidential, then no one knew about this; even outside google: **keeping it secret, prevented broader societal value enforcement to operate. Sanctions and other people to file claims, which is easier to file it if you know that other people filed it**. Protected from society values against harassment because arbitration keeps this secret.
    - **Difficult access to justice suppresses certain behavior** from value enforcement e.g. collective / class-action consumer claims avoided by arbitration

3. Promote the rule of law

- **Dispute settlement creates or specifies law as dependable a set of guideposts** for self-directed action. We can think of law not as a societal value, but as a value-neutral framework. Law is here to create guidelines for people: law is here to know what will happen. Law permits us to predict what happens if we breach it.
- **Confidentiality prevents law clarification for others:** because arbitral awards are confidential, arbitration can clarify the law. The law does not improve through arbitral awards. **Decisions are confidential so we don't have arbitral awards making the law more defined or clear.**
- **Arbitration prevents the development of the law by courts :** it does not make the law evolve.

4. Conclusion on arbitration in general

- **Arbitration as a potent idea of a justice beyond the narrow strictures of the law** (less formal, more adaptable, etc.)
- **Arbitration is for situations that are at the fringes of justice:** situations that are not handled by law properly.
- **Arbitration has come quite far from its initial idea: is this evolution normal?** Arbitration as an industry is not invulnerable: societies will lash back, and this is bad for industries that have gone too far.

- **Conveyor belt theory in legal anthropology**: new dispute settlement mechanisms become progressively more formal, heavy, proceduralised, and then it is replaced by a new mechanism
    - As it becomes more expensive
    - As people are asking for more rights
    - As people are asking for more predictability
    - As the system is becoming slower , it will be replaced by a new one.
    - Arbitration were created because Courts were slow, but now arbitration is also slow, and we must find another system.

PART II – The failed promises of investment arbitration

1. Main promises of investment arbitration

1. Depoliticize investment disputes

- **Problems with investment arbitration:** investment arbitration has been developed for some reasons and came with some problems. Can States sue investors? Many BIT allow States to start investment arbitration vs investors. They can but it is very rare. In many cases, countries do a « counter-claim » to an investor claim.
- **Separation of the State to the investor**. Professor Reisman (Yale): the 'central achievement' of investment treaty arbitration is the isolation of investor-state disputes from 'the caprice of sovereign-to- sovereign politics' → investor' State should not intervene because this is bad for the political relations. This is the idea of depoliticization. **The investor must be the only party against the other state, but not the Investor's state.**
- **Professor Andreas Lowenfeld (NYU):** controversies between foreign investors and host states are insulated from political and diplomatic relations between states
    - Example: think about an American investor investing in Antigua and Barbuda, an US investor investing there. **The idea is that the USA would not put pressure into some kind of settlement on the Antigua in attempting pressure** « we have been giving you money until now so if you don't settle this arbitration claim we will stop giving you money ». Remember: espouse the claim = the UK files a claim before the ICJ against India
- **Does investment arbitration actually depoliticize (reduce home state intervention in) investment disputes? <u>Nuanced answer</u>**
    - **Evidence in favor of the idea: Brazil (no investment arbitration) tends threaten of economics sanctions to protect its investors** (e.g. stop paying for gas exports, block development loans, support secessionist movements). Brazil is not party to BIT! Brazilian investors don't have the right to go to investment arbitration thanks to BIT because Brazil does not conclude BIT with investment arbitration clause. **So Brazil usually steps in to protect the investors abroad. Brazil politicize investment dispute.** But does Brazil do this because there is no access to investment arbitration or because it would do it anyway?
    - **Evidence against the idea**:
      USA - WikiLeaks:
        - ⇒ Only **rare threats of sanctions** to settle investment disputes. Case opposite to Brazil: investment clauses exist and USA does not interfere in the dispute. There is therefore a depoliticization. Causality? We don't know. It is not causality but correlation, but it is not due to the presence of arbitration clauses in BIT
        - ⇒ Presence of investment treaty had **no impact on U.S. choosing to escalate the dispute**
        - ⇒ ***Occidental* case**: investment arbitration + US threat to cancel negotiations over free trade agreement. Equador-US: US investor (called Occidental) investing in Equador. Occidental investor opened a file against Equador. In addition, US steps in and threatens Equador if does not give to Occidental what he wanted.

Russia / Many EU States / Canada / USA:

⇒ Sue of investment disputes as a token in negotiations to promote foreign policy agendas with host states. These governments have done the reverse: have politicized investment dispute bringing them up to State level and intervening as home State, but not to protect investors. They have used this, to promote foreign policy agendas.

⇒ USA: we know our investor wants to sue you, UAE, but if you, allow me to build a new military base on your territory, then we'll talk to the investor and find a way to prevent him filing a claim = politicizing the dispute.

Can we show that in the cases where the investor can go to the arbitration, leads to the government to be less likely to intervene? No. Investment dispute don't get depoliticized by investment arbitration clause (ce n'est pas pcq y a une clause d'arbitrage que cela va éviter que l'état de l'investisseur intervienne). **No statistical correlation!**

2. Accelerate economic growth

Investment arbitration = good for economy?

- 1950s: 'Abadan-type crises' bad for economic development of poor countries

- **Political risk = disincentive to invest**. If you are less likely to be expropriated = more incentive to invest = invest more

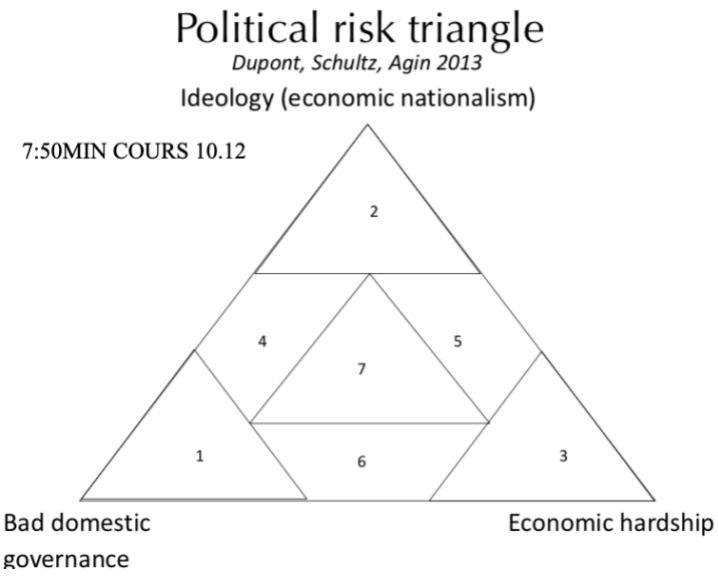
- **How reducing a political risk?** Allowing foreign investors to sue a State in an arbitration. Giving the possibility to sue the state = I will think twice before expropriating you; so more investments = economic growth.

- **Less political risk = less disincentive to invest = more investment**

- **How can I benefit more economic growth?** By making you invest more in my country and not expropriating you, by allowing to sue me in an investment arbitration. So does this all (less political risk leading to more investment leading to more eco growth) permit more economic growth?

a) give foreign investors more rights creates disincentive for state to act on political risk,	arbitration = less political risk
b) more rights to foreign investors attracts more foreign investments,	less disincentive to invest = more investment
c) more foreign investment inflows translates into economic growth	= more economic growth

- **What kind of political risk do you try to protect?**



Ideology (nationalism): we will nationalize because our oil belongs to our people (Persian oil)

Bad domestic governance: political situation in Georgia was a mess. A concession is given at 2 companies at the same time and where things cannot work out the way it should.

Economic hardship: you invest somewhere and there is an eco-crisis. I am a government and there is a crisis. I will try to take money from you, investor. Foreign American companies e.g. : Argentina found money from foreign companies (US oil companies)→ easy way!

1. Answers to our premises:

1. Give foreign investors more rights create disincentive for state to act on political risk: rather unlikely

It is unlikely that foreign investors, create a disincentive for a state to act on political risk. States don't act differently in the context of political risk, because foreign investor has the right start an investment arbitration. Investment arbitration has little effect on the materialization of political risk.

2. More rights to foreign investors attracts more foreign investments: largely contradicted by evidence

Bargain "rights for investments": does it work? The role of rights in the investment strategies of investment firms. Imagine you are a company and he's the State. Is it safe to invest in that country? The answer will be: we have the right to go to an investment arbitration or not? You will tell the CEO of your company, that only invest if we can go to an investment arbitration

- Limited direct evidence

- **Rule of law at home makes investors seek rule of law abroad**: if you are a company operating in a state where courts are corrupted anyway or run by the mafia. You never go to courts. You invest there: why would you be looking for a rule of law in that country?
- **In-house lawyers of large US multinationals: presence of investment treaty, not a criterion**. When you as a lawyer, green light for an investment to take place abroad, do you look at the presence of a BIT? Or possibility to go to arbitration if a problem arises? We expect that of course, yes. **The answer was that only few people look at the possibility of going to an**

arbitration in order to decide whether to invest or not. Lawyers don't really give much importance to that.

- **Japanese investors only ever filed one investment arbitration:** Japan = law works very well. Japanese investors coming from a rule of law country to file an investment arbitration such as any other investor: they do not! Only 1 case has been filed by a Japanese investor. Japanese investors don't use arbitration: they use other ways, but don't go even to Courts.

- Quite clear incidental evidence

- **Signing BIT with France does not increase share of investment from France**: France has many BIT: has always had BIT. Do French investors investing abroad, invest more in countries with which France has BIT, than with countries without BIT? If you are Senegal / Congo ?
- No statistically significant overall relationship between investor rights and aggregate FDI flows

- What seems to attract investors is financial and tax incentives

3. More foreign investment inflows translates into economic growth? Sometimes, not always.

- **Investment for growth: does it work?**
- **To recall:**
  - **Direct investment**: I invest in another country and control and exploit a business
  - **Indirect investment**: portfolio, I don't control really.
- **Indirect investment and growth**: **indirect investment inflows do not cause growth.** Generally, no cause for growth, only sometimes, not systematically.
- **FDI and growth**
  - No systematic relationship; works only in certain conditions
  - **Some FDI don't contribute to growth at all**: not all inward investment is good (sustainable) investment. Many forms of FDI cause **pollution** which will be **more costly than the short term benefit.** Many forms of oil extraction are polluting, and this pollution has a cost: this costs a lot of money to the company. Or: Olympic Games infrastructure: just there for a few times. Mid- or long-term costs may exceed short-term growth/benefits (e.g. land grabbing). Some types of FDI do lead to a short bump in the economy but in the long term it is different. Land grabbing: after last food crisis, many multinational companies bought lands in Africa ; they were sold for periods of 2 years to foreign investors (lands of size of France). They did this in case that when the next food crisis, they would sell this land at a higher price. They don't do anything with this land, they just wait for it to become more valued and sell it at a higher price. **This does not contribute to the economic growth of the country on the long term.**

4. More rights and more rights' enforcement is always good.

- **It can't have downsides**
- **Can investment arbitration per se have downsides for the states consenting to it/ giving foreign investors rights?** Access to justice cannot be bad: but let's think twice. No right without remedy. Is it really good to give remedy and to allow someone to enforce their rights? When States give rights to investors, does this have downsides?

PART III – The socioeconomic impact of investment arbitration

Main negative effects of giving foreign investors too much rights and remedies

1. Main negative socioeconomic impact:

1. Decrease investment flows

- **Decrease investment flows to the country hosting the investment**

- **Merely filing a known investment arbitration claim**: decreases investment flows to the respondent state! **Once a state is hit by an investment claim being filed by a foreign investor, the overall flow for investments tend to diminish: the impact is immediate**. The claim itself affects the **reputation** of the State to invest. You are the investor: you file a claim (=/= not necessarily win): I will be hurt because economically other investors elsewhere will invest less. Just by suing you, I will hurt you.

- **Regardless of the merits of the claim** : even if frivolous claim, even if the claim has no sense in the law, even if I will lose as an investor, still it has an effect

- **Claim denied: investment flows go back up**.
    - Philipp Morris changed nationality just to file the claim: gross abuse of investment arbitration system, confirmed by PCA. It took the Tribunal 4 years to take this decision! It was unclear for 4 years whether Philipp Morris was right or not: investments for Australia sunk during 4 years in Australia. Taking away the design on the cigarette packages, will lead people to smoke less because cigarettes psychologically have a different flavor. This tends to push investments down. However, Philip Morris Australia could not sue Australian government because investment arbitration is for foreign investors. In that case it was Philipp Morris Australia so no foreign investor. Just after the Australian legislation, Philipp Morris Hong Kong bought 99% of the shares of Australian Philipp Morris…
- **Claim upheld: flows go further down**. The tribunal confirms the state breached the investors rights. The investment flows continue to go down.

You can as an investor **unilaterally want to make me poor by filing a case** even though you have no reason. Arbitration: you can only sue me if I consented it (BIT e.g.): why would I (State) give you the right to sue me even if I have done nothing wrong? As a State I have to think twice before giving investors a remedy! **The point is giving remedy to allow the investor to enforce their rights, rights that already exist under customary international law (substantively)**

2. Shrinks policy space ("political straightjacket")

a) Threats of claims scare States:

States renounce regulating environment, health, minimum wage, human rights, etc. **Political straightjacket** = terms coming from IMF lending money comes with some strange conditions: states must behave in a strange way in exchange for the loan and this makes hard for the countries to recover

- **You are the investor and can hurt me simply by filing a claim.**
- **Example 1:** what happens is that you come to me and you will tell me: if you protect the environment, I will sue you. I will harm you anyway. I am the president of Qatar: if I protect the environment, this is super bad for me because people will invest less. Also, if I put min. wage, I will be sued in investment arbitration.
- **Example 2:** Lakes in Ontario less protected than they would be. The lakes in Canada would be much clearer if it was not for threat of arbitration claims. Intra-ministerial conferences: people from trade ministry + people from environmental ministry had a

discussion. People from the environment said we need to protect environment VS trade ministry: we will be sued in investment arbitration and makes the country poorer.

- **Example 3:** plain packaging cigarettes initiatives enacted later or not at all. In Africa: legislations (the same as in Australia) wanted to prohibit the cigarette's brand. Philipp Morris said if you enact the same legislation as Australia, we will sue you. You are already in a bad situation, you don't want to be in a worse one, right? So don't do it. People smoke more ! They renounced regulating because the fear of Philipp Morris threats

b) Relative lack of predictability of investment arbitration decisions :
Why investment arbitration is less predictable than courts? International law is quite vague, but also there is no following of precedents, so they do like they want, many arbitrators also think they are rock stars.

2. Why do states sign BITs and consent to investment arbitration?

1. Photo-ops

- **Pictures**: people signing the treaties were taking pictures as a proof.
- **Friendship between countries:** signing BIT is a matter as a diplomacy and a sign of friendship and collaboration between States. **BIT are short treaties w short provisions and say the same things more or less (expropriation etc.) and usually they are proposed by the richer State parties.** The negotiation goes like: Chinese goes to Senegal and then says « sign here »: **there is no negotiation from the weaker party**. There is a richer party that proposes something to the weaker party.
- **Negotiating a BIT looks as a perfect public-relation move**: everyone wants more investment, so giving the impression to having investment BIT is seen as something as positive
- Treaty for the Promotion and Protection of Reciprocal Trade and Investment = Act Intended To Make Things Better in General

2. Diplomats 'working hard'

- **Display the number of treaties diplomats sign**: BIT are easy, a no-brainer. We have to justify our salaries as diplomats. What is a better way of proving I am a good diplomat; than saying how many treaties I have signed? I am a good diplomat, I have signed 52 BIT! One particular diplomat said that « my salary was X » « my per diem (when traveling abroad) is 2X! »: you find any reason to travel abroad. Best excuse? Sign treaties! Which one? BIT.

3. Foreign relations

- **Many States sign BIT to have more foreign relations**
- **Best predictor of US BIT signing was intention to establish/nurture foreign relations (strategic countries) :** USA wants a new base to be created in Saudi Arabia. How to interact? Let's sign a BIT. The US government **did not care about the economic political tradeoffs** with regards of the protection of those treaties, what US was interested in, was to build those bases. So: I am a government, let's do this and then we will go out for dinner and really talk about what is important for us: flying over your territory, bombing your territory, arms. The BIT is just an excuse for us to meet.

PART IV – How to negotiate investment treaties

1. As a state who wants to empower its investors (capital- exporting state)

- **Investment arbitration, if possible ICSID (publicity of claims matters):** why ICSID? Because ICSID **claims are public.** It is important because ICSID are the most notable and investors will notice the most strongly. If I sue you, State, as an investor, it will be public. **If I do it in an ad hoc arbitration, no one will know it.**

- **Investment treaty rather than contract:** treaties = better because protectors all investors

- **Broad and numerous substantive standards of investment protection**; if not broad then vague: and usually interpretation is always made in favor of investor so if it is not broadly made, then will protect the investor.

- **Low requirements on corporate nationality (attract intermediaries, collect taxes)**

- **Consider possible change tide in investment flows (e.g. no stabilization clause**): 20 years ago, China was **trying to keep its rights to keep investments rights low**. **They were capital investing import countries.** Now, China is investing more abroad: Chinese investors are much protected by the State. So, this is a change of investment tide. Also, USA was exporting capital country, so there was a high level of protection in the BITs. Now, it is an importing country, so they should think twice before putting a too high level of protection (because they apply to investors of both states of the treaty)

2. As an investor who wants to maximize its protection and negotiation power

- **Investment arbitration, if possible ICSID (publicity of claims matters):** only States are part to treaties, so investor is not a part of it but he can put the BIT in a way or the other. Better to have through ICSID because it is public.

- **Investment contract instead of treaty is mostly ok (state may give in more):** the contract is better. You must not as an investor convince your State to enter into a BIT with another state, it is enough to get an investment contract. Why it is likely to get more rights in a contract than a treaty signed by your state with the other? **Because you know you are giving rights to the investor directly and not to all other corporate nationals.** So, you, as a State, will **give extensive rights to one person and not to all of them.**

- **If specific risk is expected, provisions to target these risks, otherwise broad and numerous standards, if not broad then vague**: when working with oil, you have risk of some national rules expected. You face environmental protection. You will try to have specific provision targeting those risks.

- **Stabilization clause:** stabilization clause freezes the law applicable to you. We enter into a stabilization clause: I can continue to change my legislation but my changes in legislation do not apply to you, investor, because you signed this clause with me.

- **Include intermediaries in different countries in corporate chain:** include intermediaries in my chain, as many of them. As a Swiss investor, I would like to have subsidiaries everywhere in other countries. Forum shopping.

3. As a state who wants to attract investors while keeping its policy freedom

- **Investment contracts instead of an investment treaty:** not a treaty. I want **you** to invest, not anyone, so I conclude a contract with **you** specifically. A contract is more specific on who can sue me.

- **No vague substantive standards of protection (define FET, for instance) :** as a host state, I would be against a vague substantive standard of treatment if I enter into a contract with you, because I say I want **you** to invest, I should not grant you FET like that only. I **should first define it, and this is for me to control the arbitrators**, because indeed arbitrators tend to interpret always in favor of investors. **The more precise the notions are, the less the arbitrators can play with the words.**

- **No stabilization clauses, or only narrow** : try **to resist stabilization clause as much as possible** because we don't know how much the person **will harm the HR, environment** etc.

- **No investment arbitration;** instead e.g. Political risk insurance, investment facilitation measures. Better to promote an arbitration insurance, better than arbitration. So if you have a problem, better if you go to the insurance instead of going to the State.

- **If arbitration, then secret:** If you really insist on arbitration, then I will keep it secret.

- **Local employment and technology transfer provisions; environmental sustainability**: make the investment sustainable: use of local employment (use people in my country and not hire all of your personnel from your country, if you grow new seeds, then I will ask you to transfer the technology to me)