

# The Arbitral Proceeding

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## The distinctive Nature of Arbitration as a Form of Dispute Resolution...

... and its **relevance** for the **legal framework** of the arbitral **proceedings**

- **Distinctive feature:** flexibility
- **Discuss:** benefits/desirability?



## The Hierarchy of Procedural Norms

- Mandatory provisions (of the *lex arbitri*)
  - Agreement by the parties (incl. arbitral rules)
    - Reflecting pivotal importance of party autonomy in international arbitration
  - Discretion of the Arbitrators
  - Non-mandatory provisions (of the *lex arbitri*)
- **Compare:** sec 594 para 1 ZPO; art 28 par 1 VR; art 19 ICC-R, art 14 LCIA-R



## The “Cross-Cultural” Dimension

- The “**common law/civil law divide**”
  - Background of arbitrators/parties/counsel (may) matter(s)
  - Relevance of other legal cultures (e.g. Asia)
- Growing trend towards international **harmonization**
  - **Examples:** IBA, UNCITRAL
- Standardization **v** Flexibility



## The Quest for the “Perfect Proceedings”

- Input from common law tradition:** e.g. one hearing to take evidence (ideally); examination of witnesses etc

- Input from civil law tradition:** e.g. significance of written submissions; toned-down version of common-law concepts (e.g. disclosure) etc

→ Increasing use of specialized international arbitration practices combining common law and civil law traditions



## Elements of typical arbitral proceedings

- Basic **logic** behind this structure
- Examples for “**best possible** procedural world”
- Different types of **advocacy**



# Core Principles of the Arbitral Procedure: Fair and Equal Treatment

- **Equality v Fairness**
  - **Compare:** art 17 I UNCITRAL-ML; sec 594 II ZPO; art 28 I VR
  - **Cases**
- **Ratio**
  - Fundamental procedural “justice”
  - Self-preservation of arbitration
  - Interplay of substantive leeway and procedural pillars
- **Safeguards**
  - **Compare:** setting aside and enforcing the award

# Core Principles of the Arbitral Procedure: Right to be heard



- **Notion and connection to fair treatment**
  - **Compare:** art 17 I UNCITRAL-ML; art 28 I (and 32) VR
- **Scope**
  - **Facts / Law** – *iura novit curia?* – avoiding unfair surprise
  - **Cases**
- **Violations**
  - Restrictive approach?
  - Causality?
  - Limitations:
- **Safeguards**
  - **Compare:** art V I (b) NYC; sec 611 II no 2 ZPO





## The Seat of the Arbitration

- What “**seat**” does (not) mean
  - **Compare:** art 20 I and II UNCITRAL-ML; art 18 II and III ICC-R
- The **relevance** of the seat
  - **Examples:** lex arbitri; setting-aside procedures; court-intervention etc

## The Language of the Arbitration



# The Taking of Evidence I

- **Truth-finding?**
- **Efficiency**
  - **Compare:** art 20 ICC-R
- **Witness Testimony**
  - **Written** witness statements (art 4 IV IBA-R)
  - **Examination** of the witness (art 4 VII IBA-R)
    - Direct examination
    - Cross examination
    - Witness conferencing
  - **Preparation** of witnesses?



## The Taking of Evidence II

- **Documents**
  - **Interplay** of (sequential) submissions and documentary evidence
  - **Document production** (compare art 3 IBA-R)
    - **Content** of request
    - Possible **objections**
    - **Redfern Schedule**



## The Taking of Evidence III

### Experts

- **Another example for diverging legal cultures:**
  - The bird eye's view
  - Expert of the tribunal?
  - Experts of the parties?
- **Examination of Experts**
  - Expert presentations
  - Cross examination
  - Witness conferencing



# Confidentiality of the arbitral proceedings

- **Ratio**
- **Scope/Limits**
  - **The hearing**
  - **The proceedings themselves**
    - Debate
    - Confidentiality agreements
    - Legal necessities (e.g. securities laws etc)
  - **The award**
    - Agreement by the parties
    - Other proceedings (e.g. enforcement proceedings)