International sale of goods and arbitration in Europe

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STRUCTURE OF THE PRESENTATION

- **International arbitration within the ADR system (I.)**
- **Arbitration in France since the 2011 reform (II.)**
- **Practical aspects of international arbitration and the CISG (III.)**

I. International arbitration within the ADR system

- **Definition of arbitration and the arbitrability of a dispute**
- **Classifications of arbitration**
- **Advantages and disadvantages of arbitration**

I. International arbitration within the ADR system

- **Definition of arbitration and the arbitrability of a dispute**
  - Definition of arbitration
  - Arbitrability of a dispute

I. International arbitration within the ADR system

- **Definition of arbitration**
  - **Alternative dispute resolution** refers to procedures for settling disputes by means other than litigation before national courts
  - Most established are **arbitration and mediation**
  - They are **not mutually exclusive**: mediation often attempted before arbitration

I. International arbitration within the ADR system

- **Mediation**:
  - ➢ attempt to settle a legal dispute
  - ➢ through the active participation of a third party (mediator)
  - ➢ who works in order to help parties reach a conclusive and mutually satisfactory agreement
- **Arbitration**:
  - ➢ consists in the submission of the dispute to one or more arbitrators
  - ➢ the proceedings usually end with a decision called an “award”
  - ➢ an award has essentially the same value as an ordinary judicial judgment

- **Arbitrability of a dispute**

  - Parties can submit their dispute to arbitration

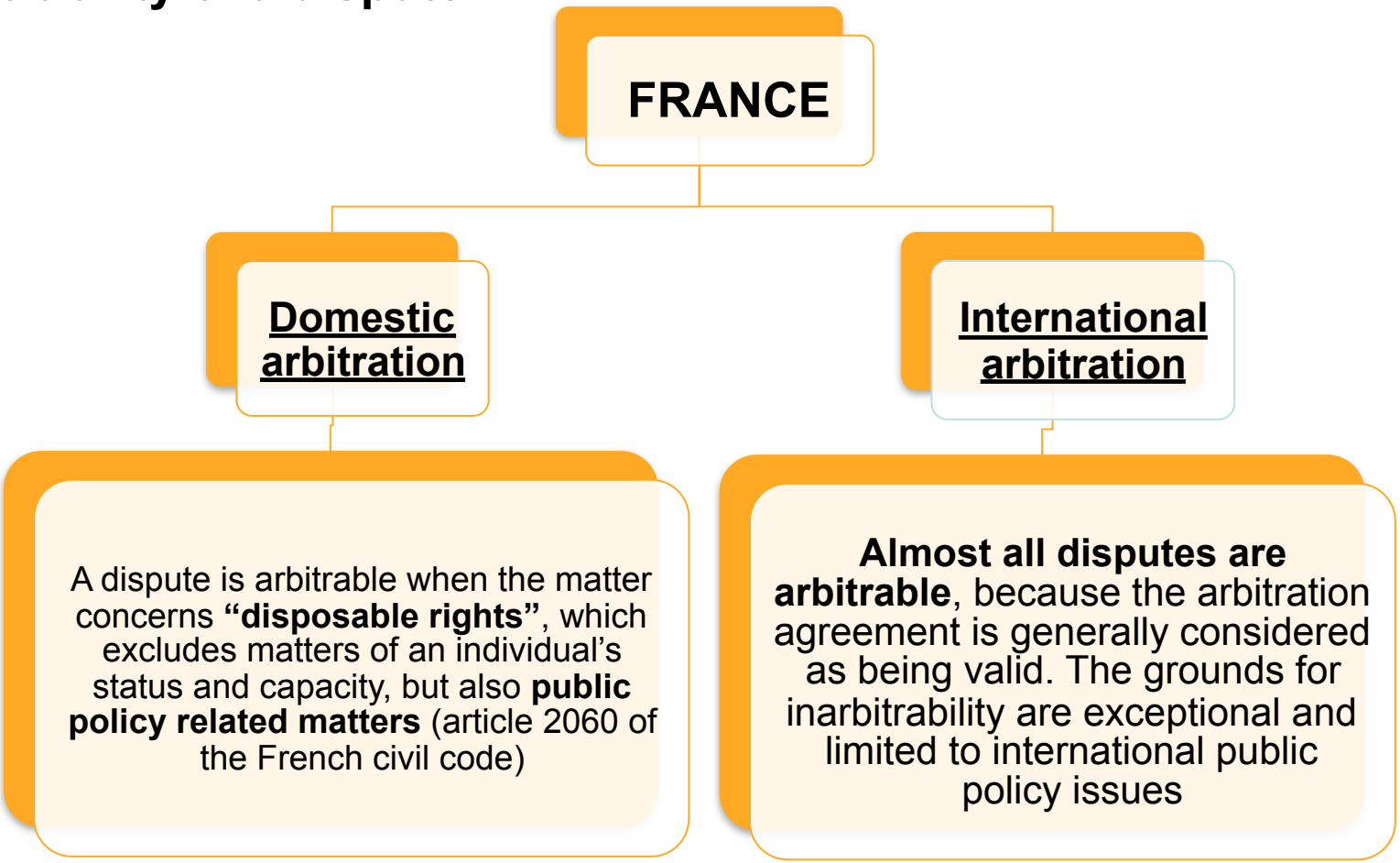
    ➢ by introducing an **arbitration clause** in their initial contract or
    ➢ by concluding an **arbitration agreement** once a dispute arises

  - Arbitration is mostly used for disputes resulting from legal relationships dealing with **international commerce**

    ➢ Arbitration is generally used in complex trans-boarder transactions
    ➢ Therefore arbitration is appropriate for CISG governed transactions

- **Arbitrability of a dispute**
  - However subject matter must be **arbitrable**:
    - ➢ International conventions have not laid out the requirements for arbitrability
    - ➢ Has been left to national legislation of each State

- **Arbitrability of a dispute**



I. International arbitration within the ADR system

- **Arbitrability of a dispute**

Other legal systems use more **concrete criteria** in determining whether a dispute is arbitrable

Swiss law: any claim involving an economic interest can be the subject of an arbitration agreement

US Federal Arbitration Act of 1925: any matter which does not concern a significant federal interest expressed in a federal law can be subject to arbitration

- **Classifications of arbitration**
  - **Domestic vs. international arbitration**
  - ***Ad hoc* vs. institutional arbitration**

I. International arbitration within the ADR system

Domestic vs. International arbitration

Domestic arbitration: deals purely with national or domestic matters: all the elements of the arbitration must be related to one jurisdiction

(art. 1442 – 1503 CPC)

International arbitration: no uniform definition exists. Under rules and practices of arbitration institutions, a dispute may be regarded as international in reference to its nature or its parties (art. 1504 –1527 CPC)

- Uncitral model law combines both approaches
- In French law, article 1504 CPC is widely drafted: “an arbitration is international when international trade interests are at stake.”

I. International arbitration within the ADR system

Ad hoc vs. institutional arbitration

Ad hoc arbitration:

- Definition: parties agree on **their own arbitration procedures:** they choose not only the location, the language, the applicable law, the number of the arbitrators, but also the administrative rules
- The role of national courts: if parties cannot agree on the administrative modalities for setting up the procedure, they can seek assistance from national courts ("judge acting in support of the arbitration" - *juge d'appui*) whose powers are imperatively limited to administration issues.

Institutional arbitration

- Definition: parties can choose to designate an **arbitral institution**, who will
  - **apply pre-established procedures** and **administer the arbitration** according to its own rules
    - provide the parties with purely administrative services
- Examples of arbitral institutions: ICC, AAA, Beijing Arbitration Commission (BAC)

I. International arbitration within the ADR system

- ***Ad hoc* vs. Institutional arbitration: advantages of institutional arbitration**

  - **Often parties opt for institutional arbitration**, because *ad hoc* arbitration does not offer an organisation framework for conducting the arbitration procedure

  - **However *ad hoc* arbitration comes with several advantages**

I. International arbitration within the ADR system

- ***Ad hoc* vs. Institutional arbitration: advantages of *ad hoc* arbitration**

  - **<u>Economical interest</u>**:

    - ad hoc arbitration is generally less expensive than institutional arbitration
    - since the parties do not have to pay a private or commercial institution and fees of national courts (if any) are very low

I. International arbitration within the ADR system

- ***Ad hoc* vs. Institutional arbitration: advantages of *ad hoc* arbitration**

  - **<u>Legal security</u>**:

    ➢ in case of an institutional arbitration, only the arbitral institution will settle the controversy between the parties, whereas in an *ad hoc* arbitration the national "judge acting in support of the arbitration" will intervene and make a procedural decision

    ➢ The intervention of the arbitral institution is not final, as opposed to the decision made by the national judge in case of an *ad hoc* arbitration, since the risk that one party brings an action for annulment of the award before the national judges will persist

I. International arbitration within the ADR system

- **Advantages and disadvantages of arbitration**
  - **Advantages**
  - **Disadvantages**

I. International arbitration within the ADR system

- **Advantages of arbitration**
  - The parties can directly choose the arbitrator and ensure he is an expert in the area of law regarding the dispute
  - Arbitration procedures are time-wise efficient compared to classic procedures in courts which last longer
  - The procedural timetable is set by the arbitrator and the parties depending on their availability → procedure is therefore very flexible

I. International arbitration within the ADR system

- **Advantages of arbitration**
  - Arbitral proceedings can be made confidential
  - The New York Convention of 1958 has facilitated the enforceability of foreign arbitral awards at a global level
  - Arbitration is also characterized by its neutrality, predictability and security

I. International arbitration within the ADR system

- **Disadvantages of arbitration**
  - Economical interest
  - Legal security

I. International arbitration within the ADR system

- **Disadvantages of arbitration**
  - **Economical interest**: arbitration is considered as being more expensive than proceedings before national courts
    - ➢ However, national proceedings are in most cases much longer, because there are several instances which is not the case in arbitration
    - ➢ And before national courts there can be the need for translating drafted legal documents in the court's language which produces further costs

I. International arbitration within the ADR system

- **Disadvantages of arbitration**

  - **Legal security**: the problem can arise that an arbitral tribunal cannot include a third party in the proceedings, who has not given its consent.

    Because it is not bound by the arbitration agreement (for instance in group of contracts), this problem can be solved in different ways:

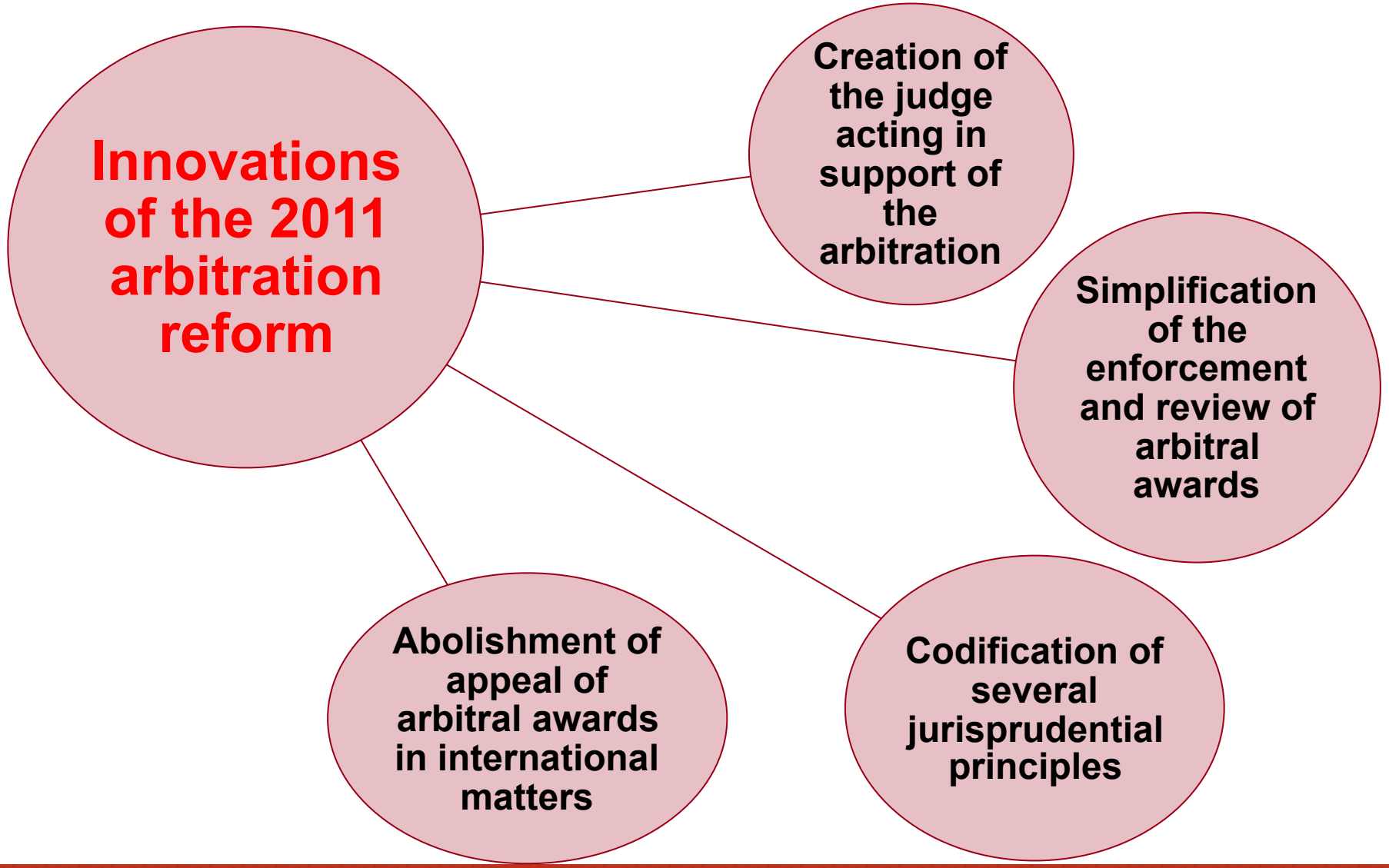
    - ➢ The parties can of course insert the same arbitration clause in each individual contract, which is however in practice not very easy to achieve
    - ➢ National judges can intervene in favour of arbitration by extending the individually concluded arbitration clause to the whole contractual grouping
    - ➢ National judges can order the production of evidence, if party requesting the measure has obtained the arbitral tribunal's invitation

II. Arbitration in France since the 2011 reform

- **Important innovations of the 2011 arbitration reform**

- **Differences between domestic and international arbitration**

II. Arbitration in France since the 2011 reform



II. Arbitration in France since the 2011 reform

- **The creation of the judge acting in support of the arbitration**

  - The role of the judge acting in support of the arbitration:

    - ➢ It is a concept originally borrowed from Swiss law
    - ➢ But already known by the French doctrine and jurisprudence
    - ➢ In France the "judge acting in support of the arbitration" is generally the President of the Paris' "*Tribunal de Grande Instance*"
    - ➢ He assists the parties in case they do not agree upon certain administrative matters, such as the constitution of the arbitral tribunal

II. Arbitration in France since the 2011 reform

- **The creation of the judge acting in support of the arbitration**
  - The scope of the assistance of the judge:
    - According to article 1452 of the French code of civil procedure, the judge will only intervene on a **subsidiary basis**, if the parties have not opted for an institutional arbitration. In case of an institutional arbitration, only the institution has the authority to hear and decide on challenges brought against arbitrators
    - The judge is limited to giving assistance **for merely administrative matters**, for instance to appoint an arbitrator, and **will not give any legal appreciation** and **decision on the dispute** itself or the **validity of the arbitration agreement**

II. Arbitration in France since the 2011 reform

- **The creation of the judge acting in support of the arbitration**
  - The areas of intervention of the judge:
    - ➢ He intervenes when the parties have **selected France** as the place of arbitration, **French law** as the **applicable law to the arbitration** procedure, or **French courts as having jurisdiction** in the matter
    - ➢ But he also has a **universal competence,** if one of the parties is exposed to the risk of a **denial of justice**, even if the dispute is not linked to the French legal order (article 1505 CPC)

II. Arbitration in France since the 2011 reform

- **Simplification of the enforcement and review of arbitral awards**

  - According to article 1526 CPC, in international arbitration, an award rendered in France **will always be enforceable, even if a party has filed an action to set aside the award**

  - In practice, the application of this rule has a great impact: the losing party will not be able to file an action to set aside the award for the only purpose of delaying the award's enforcement

II. Arbitration in France since the 2011 reform

- **Codification of several jurisprudential principles**

  - The 2011 arbitration reform has also asserted some important principles that have already been established by the jurisprudence before, such as:

    - **The competence-competence principle**: according to this principle, the arbitral tribunal rules on its own jurisdiction (art. 1465 CPC)
    - **The principle of procedural estoppel**: according to this principle, a party who has not objected to a procedural irregularity during the arbitration proceedings as well as the parties and their legal advisors must not invoke this irregularity before a national court (art. 1466 CPC)
    - **The principle of celerity:** aims at ensuring that the arbitral tribunal, as well as the parties and their legal advisors act efficiently and without delay (art. 1464 par. 3 CPC)
    - **The principle of independence and impartiality:** according to this principle, the arbitrators have to disclose potential objections to the parties (art. 1456 CPC)

II. Arbitration in France since the 2011 reform

- **Differences between domestic and international arbitration**

	Domestic arbitration	International arbitration
Validity of the arbitration agreement	➢ Legislator has given a definition ➢ The arbitration agreement is required in writing ➢ The number of arbitrators must be uneven and they cannot be legal entities.	➢ No definition ➢ Legislator permits that arbitration agreement is not subject to any requirements as to its form

II. Arbitration in France since the 2011 reform

- **Differences between domestic and international arbitration**

	Domestic arbitration	International arbitration
Confidentiality of the arbitration proceedings	➢ According to article 1464(4) of the French code of civil procedure, arbitral proceedings shall be confidential	➢ No equivalent article in the chapter dedicated to international arbitration ➢ This means that the arbitral proceedings are not necessarily confidential ➢ Reason: international public investment issues are often governed by transparency rules ➢ However, the parties can expressly stipulate in the arbitration agreement that they wish the procedure to be confidential

II. Arbitration in France since the 2011 reform

- **Differences between domestic and international arbitration**

	Domestic arbitration	International arbitration
Annulment of the arbitral award	➢ The action for annulment of the arbitral award has a suspensive effect on the award ➢	➢ The action for annulment of an arbitral award has not a suspensive effect ➢ This means that the award is enforceable even if an action of annulment is brought before a court

II. Arbitration in France since the 2011 reform

- **Differences between domestic and international arbitration**

	Domestic arbitration	International arbitration
Appeal of arbitral award	➢ The parties can appeal an award, if they have agreed upon it	➢ The parties can only set aside (action for annulment) and not appeal an arbitral award ➢ ➢ The action for annulment is only permitted for a limited number of specific reasons: • the arbitral tribunal wrongly upheld or declined jurisdiction • the arbitral tribunal was not properly constituted • the arbitral tribunal ruled without complying with the mandate conferred upon it • due process was violated • recognition or enforcement of the award is contrary to international public policy ➢ ➢ The appeal is exceptionally possible if the parties have waived any right to set aside the award (action for annulment)

III. Practical aspects of international arbitration and the CISG

- **The principle of party autonomy**
- **Some practical aspects of party autonomy**

III. Practical aspects of international arbitration and the CISG

- **The principle of party autonomy**
  - party autonomy as an important pillar in the CISG and arbitration
  - party autonomy as an interpretive standard in the CISG and arbitration

III. Practical aspects of international arbitration and the CISG

Party autonomy: important pillar in the CISG and arbitration

CISG: article **6** guarantees the parties' autonomy by establishing that the parties can exclude the application of the

Arbitration: Article **1511** CPC: "*The arbitral tribunal shall decide the dispute in accordance with the* ***rules of law*** *chosen*

III. Practical aspects of international arbitration and the CISG

- **Party autonomy** used by **arbitrators** as an **<u>interpretive standard</u> for filling contractual gaps**

  - Filling of contractual gaps for matters not governed by the CISG (external gaps in the sense of article 4) in the absence of a choice of law

  - Filling of contractual gaps for matters governed by the CISG, but not expressly settled (internal gaps in the sense of art. 7)

III. Practical aspects of international arbitration and the CISG

Filling of contractual gaps for matters not governed by the CISG (external gaps in the sense of article 4) in the absence of a choice of law

According to **article 4 CISG**, the Convention is not concerned with the validity of the contract, its provision or usage and the

Article 1511 CPC focuses on **party autonomy in a triple way**:

- The article entitles the arbitrator in the

III. Practical aspects of international arbitration and the CISG

- **Filling of contractual gaps for matters governed by the CISG, but not expressly settled** (internal gaps in the sense of art. 7)

  - Article 7 CISG deals with the issue of (internal) **gaps in the contract** regarding **matters governed by the Convention**, **but not expressly settled** by the latter
  - In this case, the gaps in the contract must be filled by referring to **general principles of the Convention**
  - **In absence** of these principles, national law must be applied
  - These principles are not expressly set forth in the CISG, but have to be **deduced from the legal conception** that has to be interpreted **in the spirit of the CISG**
  - Therefore, since **arbitrators** dispose of a **larger margin of appreciation** than national judges, we consider that arbitrators are probably in a better position to **go**, what the freedom of interpretation concerns, **the whole way**

III. Practical aspects of international arbitration and the CISG

- **Some practical aspects of party autonomy**
  - The battle of the forms
  - Opting in the CISG

III. Practical aspects of international arbitration and the CISG

- **The battle of th**

The definition of the battle of the forms

- In international transactions, the situation can arise in which the **parties use standard form contracts**

-The legal framework of the CISG regarding the battle of the forms can be found under **article 19**
The first paragraph of

III. Practical aspects of international arbitration and the CISG

- **The battle of the forms**
  - The last-shot rule as an out-dated solution
    - It can be a complex challenge for the courts to determine what the exact terms of the contract are
    - Both scholars and case law consider **that article 19 (2) CISG incorporates the so-called "*last-shot rule*"**
    - According to this rule, the **terms contained in the last submitted form must be applied to the contract**
    - The last-shot rule is based on the idea that if **no valid objection** has been made within a reasonable period of time, the **party has tacitly accepted the terms**
    - Consequently, **the last person who sends its form** is in control of the terms of the contract and **wins the battle of the forms**
    - This legal solution is **not appropriate for modern and international business**, since it can give rise to **legal insecurity**
    - Therefore, in practice this solution not only **shall be criticised**, but both parties and arbitrators should **try to avoid it**

III. Practical aspects of international arbitration and the CISG

- **The battle of the forms**

The means to avoid the application of the last-shot rule

Implicit and explicit exclusion:

- The parties can **expressly** exclude the application of the last-shot rule under article 6 CISG

However, the **problem** can arise that parties fail to realize that the CISG is applicable to their contract

Consequently, they often do not provide for the exclusion of the last-shot rule, because they are unaware to what rules the contract is subject to.

Presumption of the exclusion of the last shot rules as a business standard:

- We can consider that according to a **widely spread business standard and/or trade usages the parties would have preferred the last-shot rule not to be applied to the contract**

The **problem** is that the last-shot rule comes with **a procedural conflict,** in particular for **national judges**: they are hesitant to presume the parties' will to

III. Practical aspects of international arbitration and the CISG

- **The possibility of *opting in* the CISG**
  - Opting out: according to article 6 CISG, the parties have the freedom to exclude the application of the CISG
  - Opting in: the parties have the possibility to apply the CISG, even if the conditions of article 1 and following are not fulfilled

III. Practical aspects of international arbitration and the CISG

- **The different scope of the contractual clause**
  - **Before a national court:**
    - ➢ The clause will only have **limited effectiveness**
    - ➢ The CISG won't be applicable as the general law of the international sales of goods, because the contract is not within the scope of the CISG
    - ➢ Therefore, the **national law of the State where the court has been seized will govern the contract**
    - ➢ Only if the national law allows derogations from the general provisions that are applicable, the national judge will take the provisions of the CISG into account
    - ➢ Consequently, the CISG will only be applicable if the national law leaves certain matters to the discretion of the parties
    - ➢ **In this case, CISG can be compared to soft law**
  - Before the arbitrator:

III. Practical aspects of international arbitration and the CISG

- **The different scope of the contractual clause**
  - **Before an arbitral tribunal:**

➢The arbitrator will give a great importance to the choice of law made by the parties

➢The arbitrator will consider it being the ***lex contractus***, in other words the substantive law of the contractual relationship

➢He will take national law only into account, if the parties have stipulated that it must be applied as subsidiary law or to fill in gaps not covered by the provisions of the contract.

Conclusion

- **Arbitration:** an ADR method in international business
- **France:** a definitively pro-arbitration place in Europe and the world
- **CISG & international arbitration:** an intelligent, efficient and successful partnership

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Thank you for your attention!