

Arbitration as a dispute resolution tool:
Advantages and disadvantages, tips and tricks, dos and don'ts

Speakers & Structure

Speakers



Francis Bellen
Partner | Lawyer
Dispute Resolution
Frankfurt

E: fbellen@deloitte.de
M: +49 175 931 7969
T: +49 69 71918 8429



Iris Kruse
Counsel | Lawyer
Dispute Resolution
Frankfurt

E: irkruse@deloitte.de
M: +49 151 1268 3786
P: +49 69 71918 8452

Structure

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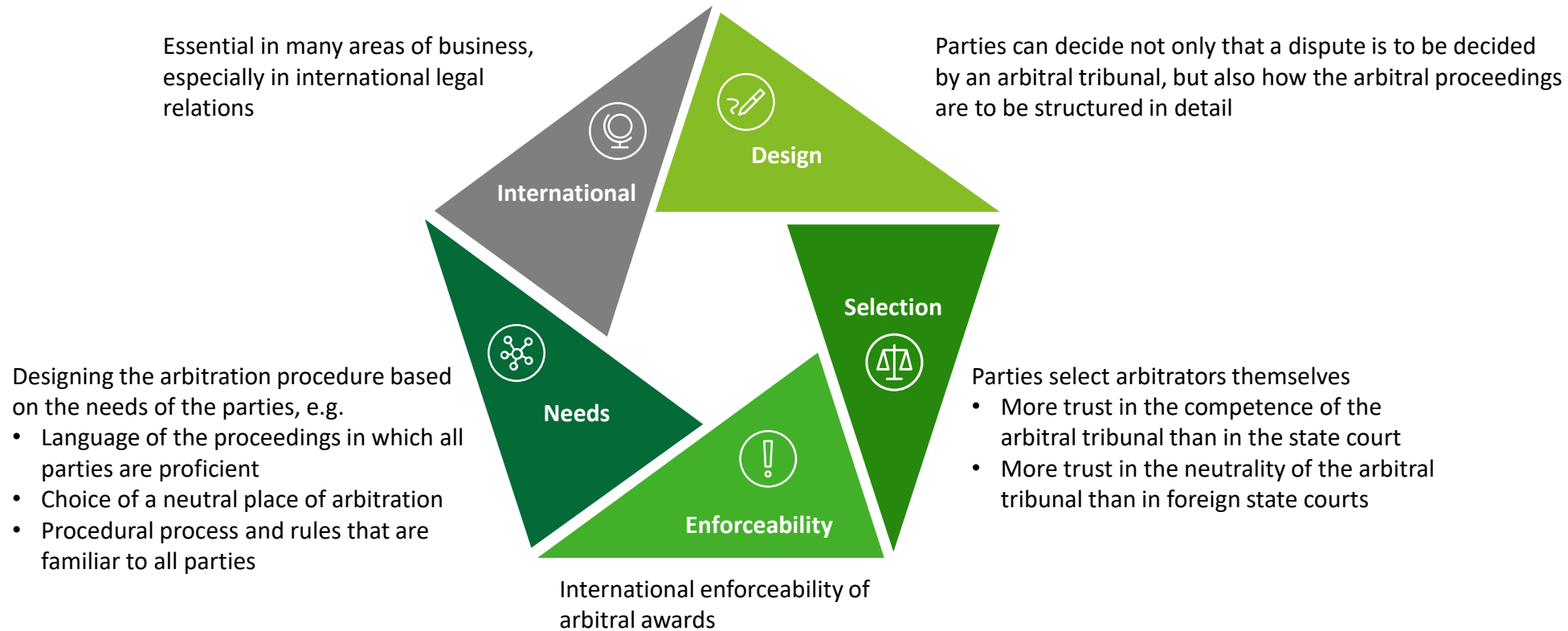
Introduction

What are arbitration tribunals?

- A dispute is finally decided by a court of arbitration
- Distinction from an arbitrator's opinion (*Schiedsgutachten*): Binding determination of (only) a decisive element of the dispute
- Distinction from alternative dispute resolution (e.g. mediation): No decision of the dispute

"Private arbitration courts are private courts based on legal transactions to which the adjudication of civil disputes has been entrusted instead of state courts."

Why do parties submit to arbitration?



Legal basis and Sources of Arbitration



Structuring the Arbitration Proceedings

Arbitration Agreement

An arbitration agreement is

"an agreement by the parties to submit to arbitration all or any disputes which have arisen or may arise between them in relation to a particular legal relationship of a contractual or non-contractual nature". (Section 1029 (1) ZPO)

An arbitration agreement can be concluded together with the main contract, but also after a dispute has arisen

Arbitration Agreement

What is the subject matter of a dispute that may be decided by arbitration?

1

All pecuniary claims (section 1030 (1) sentence 1 ZPO)

2

All non-pecuniary claims, provided the parties are entitled to reach a settlement on the subject matter of the dispute (section 1030 (1) sentence 2 ZPO).

3

If applicable, also disputes under company law

Form of the Arbitration Agreement



Between entrepreneurs

Arbitration agreement between entrepreneurs:

- Documented in writing (section 1031 (1) to (3) ZPO)



With consumers

Arbitration agreement with consumers:

- Separate document signed by hand (section 1031 (5) ZPO)



Lack of written form

- Lack of written form is cured by pleading the arbitral hearing on the merits (section 1031 subs. 6 ZPO)

Procedural Arrangements in the Arbitration Agreement

Arbitration Agreement



- The parties should, as far as possible, already determine the structure of the arbitral proceedings in the arbitration agreement

Subsequent Agreements



- Reaching appropriate agreements after the conflict has arisen is often difficult

Variants of the Process Design

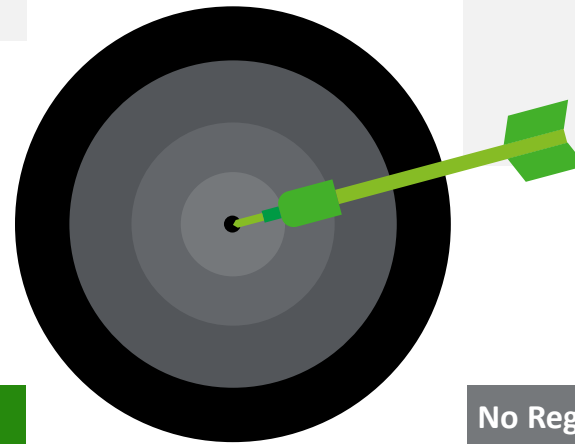


- Variants of procedural design in the arbitration agreement:
 - Individual design of the procedure (ad hoc Arbitration)
 - Reference to Arbitration Rules (Institutional Arbitration)

No Regulation of the Procedure



- In the absence of rules of procedure, the rules of procedure shall be determined by the arbitral tribunal at its discretion



Arbitration Rules of Arbitral Institutions

- Reference to an arbitral institution quite recommendable
- Advantages:
 - Customary arbitration rules regularly contain all the regulations necessary for the proceedings
 - When proceedings are slow, institutions often exert pressure on the arbitral tribunal
 - Generally good administrative support



Example of a Model Arbitration Clause

"All disputes arising in connection with the contract [...designation of the main contract...] or concerning its validity shall be finally settled in accordance with the Arbitration Rules of the German Institution of Arbitration e.V. (DIS) to the exclusion of the ordinary courts of law.

The place of arbitration shall be ...

The number of referees is ...

The language of arbitration is ..."



Jurisdiction of the Arbitral Tribunals



Contract

The jurisdiction of the arbitral tribunals shall be established by the contract of the parties to the arbitration.



Replacement of the Courts

The ordinary legal process in the state courts is replaced by an arbitration agreement, i.e. the state court is almost completely replaced by the arbitral tribunal.



Objection

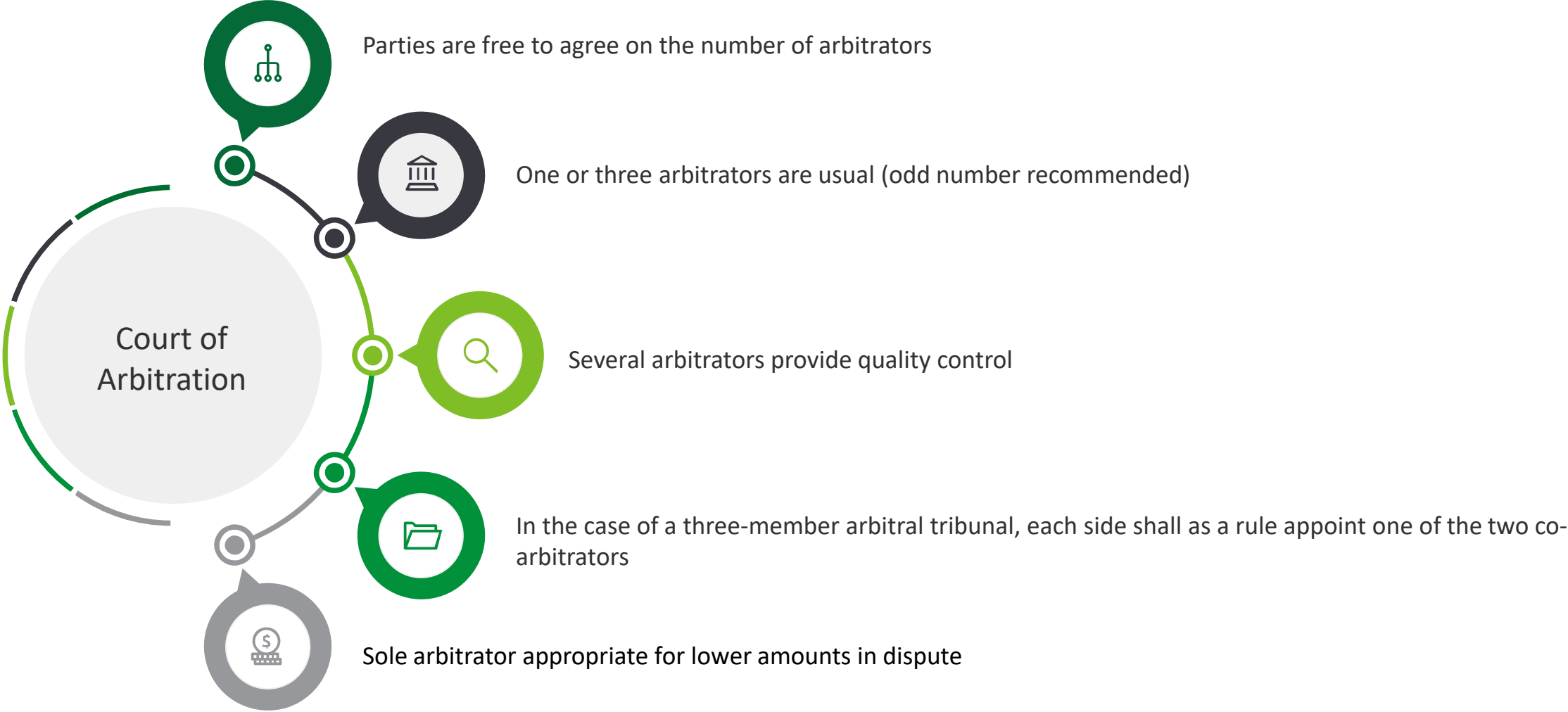
Defence of arbitration agreement in proceedings before state courts.



Measures

Arbitral tribunals can in principle also issue protective or provisional measures, but in the case of provisional relief, there is also the possibility of recourse to the state courts.

Composition of the Arbitral Tribunal



Place of Arbitration

Place of Arbitration to be agreed by Parties

- Place of arbitration determines applicable local arbitration law. Therefore, when choosing the place of arbitration, consider, among other things:
- In some states, state courts have broad powers to rule into arbitration proceedings

Arbitration Location

- Arbitration can in fact take place elsewhere

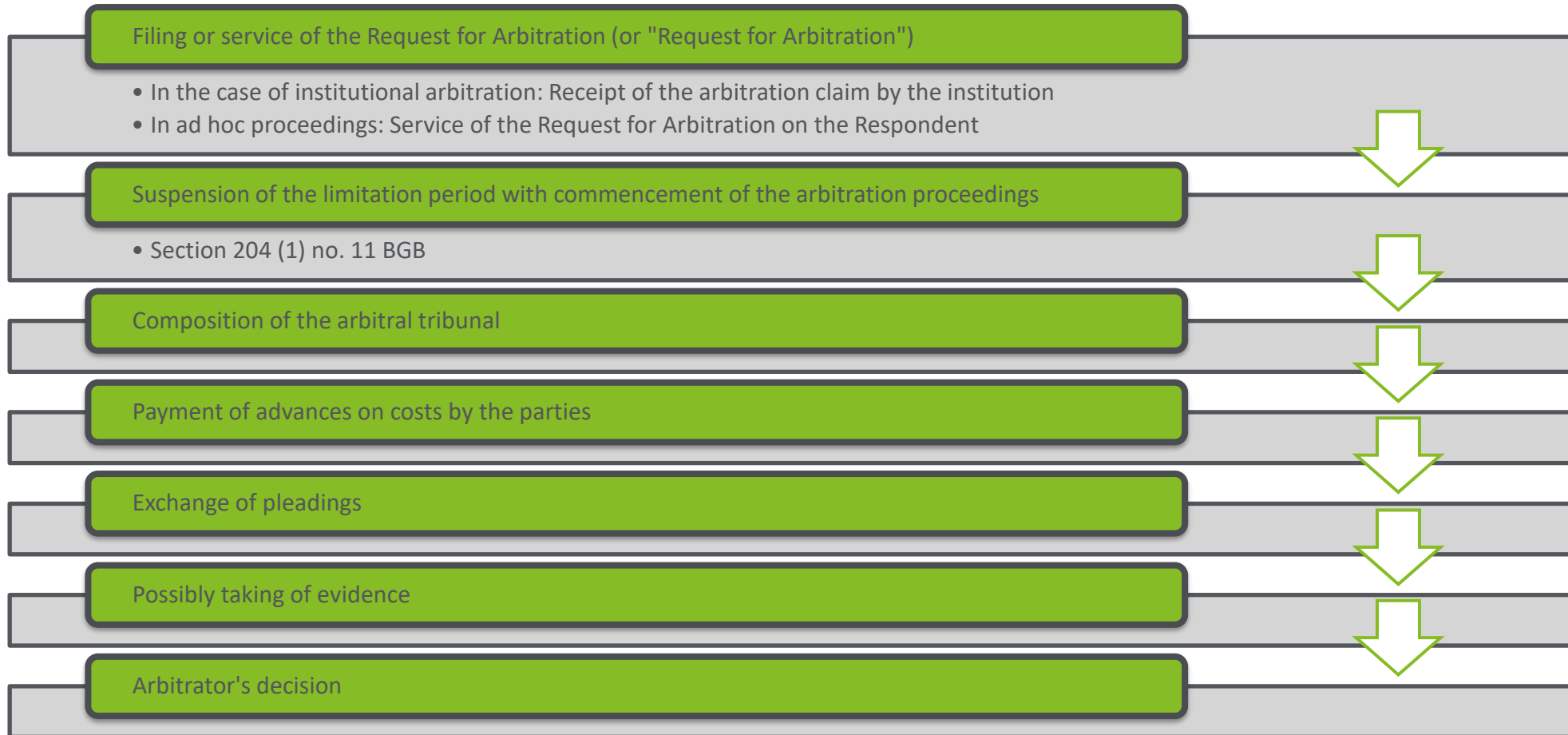


Court Decision

- If a state court at the place of arbitration sets aside the award, it is no longer enforceable elsewhere (Art. V para. 1 e) New York Convention).

Conduct of the Arbitration Proceedings

Conduct of the Arbitration Proceedings



Arbitrators

Selection of the Arbitrators

- The arbitration clause may already provide for the criteria that the arbitrators must fulfil
- Possible criteria:
 - Special qualifications (e.g. lawyers, technicians, business economists)
 - Industry knowledge and specific expertise
 - Nationality and cultural background
 - Experience with arbitration
 - Language skills
 - Availability
- The more criteria that have to be fulfilled, the smaller the circle of potential referees!
- Impartiality and independence (particularly strict requirements)

Arbitrators

Appointment of the Arbitrators

- Sole arbitrator
 - Agreement of the parties
 - If no agreement is reached, appointment by arbitral institution or President of the Higher Regional Court
 - Arbitration agreement may, however, provide for appointment by a third party from the outset
- Tribunal of three arbitrators
 - Usually, each party appoints an arbitrator
 - The arbitrators appointed by the parties shall agree on a presiding arbitrator.
 - If they do not agree on a presiding arbitrator, appointment by arbitral institution or President of the Higher Regional Court
- Problem of multiparty arbitration

Arbitration



Collection of Evidence

- Significant differences between continental European and common law legal culture influenced arbitration proceedings
- International standard in arbitration is determined by a mediating view between continental European and common law principles ("IBA Rules on the Taking of Evidence in International Arbitration", new version 2020)
- If the place of arbitration is Germany, the arbitral tribunal may request assistance from state courts in the taking of evidence (section 1050 sentence 1 ZPO).

Arbitration



Arbitrator's Decision

- Arbitral award or award with agreed wording
- Approx. 40 - 50% of arbitration proceedings in Germany are ended by settlement

Arbitration



Confidentiality

- Arbitration proceedings are not public
- Arbitrators are bound to confidentiality
- Obligation of the parties to maintain confidentiality in the event of a corresponding agreement

Arbitration



Costs

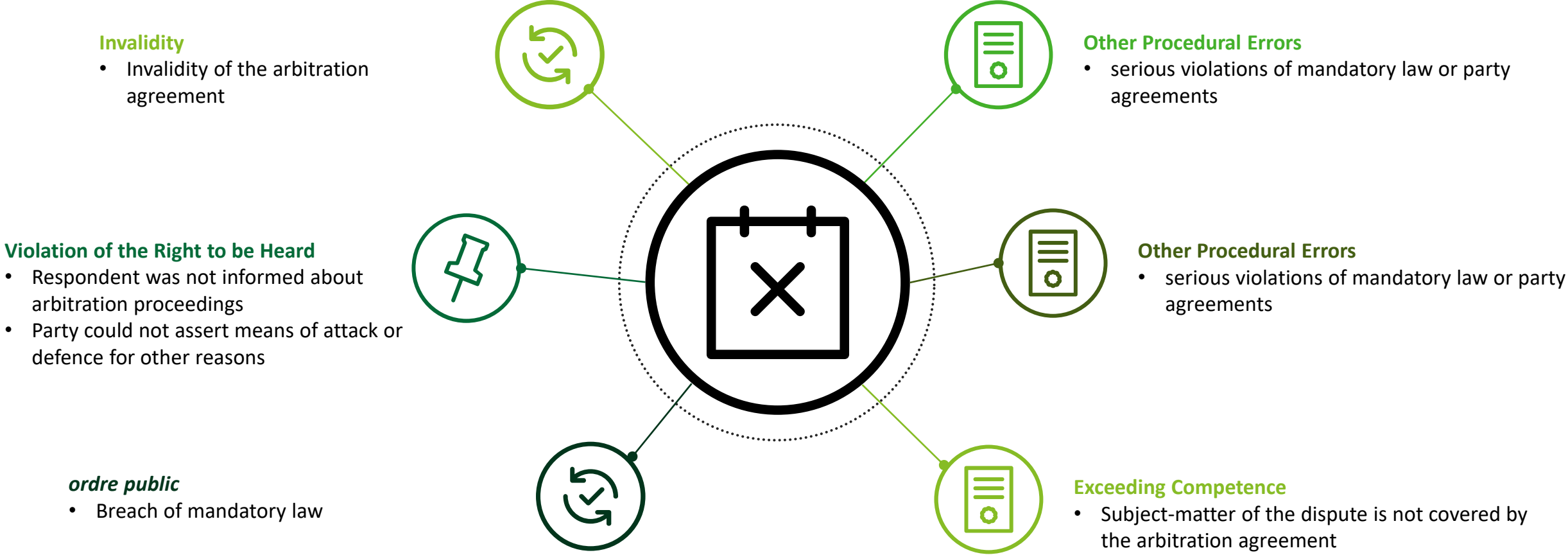
- Costs for arbitration, especially for low amounts in dispute, often higher than for litigation before state courts
- As a rule, the loser pays
- Amount of costs in institutional arbitration: Administrative fee for the institution and arbitrator's fee often according to the fee table of the Rules of Arbitration.
- Amount of costs in ad hoc arbitration proceedings: To be agreed, often based on RVG tables
- Lawyers' fees are usually also recoverable at agreed hourly rates

Challenge of Arbitral Awards

Challenge of the Arbitral Award under Section 1059 ZPO

- Request for setting aside of a domestic arbitral award
- Foreign arbitral awards cannot be set aside by a German state court, but may not be enforceable in Germany.
- Annulment procedure also applicable to (domestic) "arbitral award with agreed wording".
- Minority of awards challenged in annulment proceedings
- Competent: Higher Regional Court
- Limited review of the arbitral award by the state court
- State court does not have to review whether the arbitral tribunal has decided correctly in terms of content (prohibition of *révision au fond*)
- But: Were at least elementary principles of arbitral procedure observed?

Essential grounds for annulment



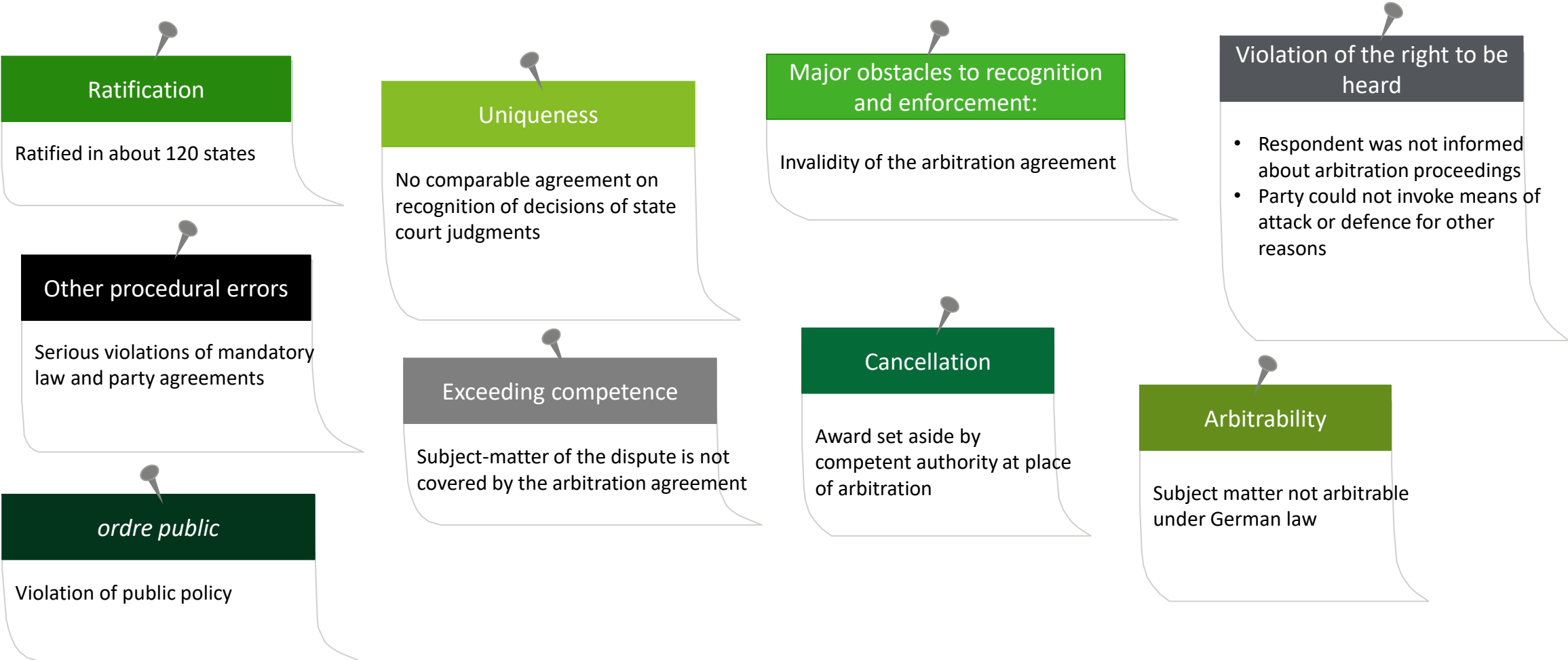
Recognition and Enforcement

Recognition and Enforcement of Arbitral Awards

- Enforceability of arbitral awards is not ordered by the arbitral tribunal itself, but by the state court
- Arbitral award is not an enforcement order
- Competent: Higher Regional Court
- Enforceability proceedings not very numerous, because in arbitration obligations arising from arbitral awards are predominantly fulfilled voluntarily

- Recognition and enforcement of national arbitral awards is governed by national law
 - No conflicting grounds for annulment (see above)
- Recognition and enforcement of foreign arbitral awards is governed by the "UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10.06.1958" ("New York Convention").

UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards



Epilogue

Are arbitration proceedings appropriate in every case?

Case-by-case consideration

Advantages



- Informal service of arbitration claims
- "Tailoring" the process
- Neutrality
- Stronger motivation of arbitrators than in state proceedings
- Quality of the arbitral tribunal
- Secrecy
- International enforcement facilitation
- (Shorter duration of proceedings)

Disadvantages



- Multiparty proceedings
- Third party notices
- Too expensive for disputes with relatively low amounts in dispute
- Lack of precedent

Questions & Answers

Thank you for your attention!

Your contact persons

Deloitte Legal

Francis Bellen

Partner
Legal | Dispute Resolution
Frankfurt, Germany

E: fbellen@deloitte.de
P: +49 6971918 8429
M: +49 175 931 7969



Francis Bellen is a partner in Deloitte Legal's Frankfurt office and a member of the Litigation & Dispute Resolution practice group. He has been advising and representing clients in litigation and arbitration for 24 years. His clients include national and international companies from a wide range of industries, including banks and private equity houses.

He focuses on disputes in the areas of corporate, commercial and business law, as well as antitrust damages claims, post-M&A disputes and banking and finance law. He regularly represents clients before state courts, the Court of Justice of the European Union and in arbitration proceedings. In addition, he is frequently appointed as an arbitrator in national and international arbitration proceedings.

Francis Bellen has been ranked, inter alia, by Handelsblatt ("Germany's Best Lawyers") and by Best Lawyers since 2014 as one of Germany's leading litigation and arbitration specialists.

Iris Kruse

Counsel
Legal | Dispute Resolution
Frankfurt, Germany

E: irkruse@deloitte.de
P: +49 69 71918 8452
M: +49 151 1268 3786



Iris Kruse joined Deloitte Legal on 1 May 2022 as Counsel in the Dispute Resolution department at the Frankfurt/Main office.

She advises companies in complex national and international court and arbitration proceedings as well as in out-of-court disputes. A particular focus of her work is on disputes in the field of corporate, commercial and business law. Iris Kruse also has experience in post-M&A disputes, real estate disputes and banking and finance law, including insolvency-related disputes.

Before joining Deloitte Legal in May 2022, Iris Kruse worked for other international commercial law firms in Frankfurt.

Iris Kruse is a member of DIS 40. In 2022, Iris Kruse was listed by Handelsblatt ("Germany's Best Lawyers") and Best Lawyers as one of the leading lawyers in the field of arbitration.

She speaks German and English.



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