

UNDERSTANDING AND UTILIZING INTERNATIONAL ARBITRATIONS

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Education

- Harvard Law School (LL.M., 1994)
- Judicial Research and Training Institute, Supreme Court of the Republic of Korea (1986-1988)
- Seoul National University Law School (LL.B., 1984, LL.M., 1988)

Position

- Vice President and Court member, ICC International Court of Arbitration
- Governing Board Member and Co-chair of Audit Committee, International Council for Commercial Arbitration (ICCA)
- Panel of Arbitrators, International Centre for Settlement of Investment Disputes (ICSID)
- Senior Advisor and Arbitrator, Korea Commercial Arbitration Board (KCAB)
- Panel of Arbitrators, Singapore International Arbitration Centre (SIAC)
- Panel of Arbitrators, Hong Kong International Arbitration Centre (HKIAC)
- Panel of Arbitrators, The Japan Commercial Arbitration Association (JCAA)
- Panel of Arbitrators, Beijing Arbitration Commission (BAC)
- Panel of Arbitrators, South China International Economic and Trade Arbitration Commission (SCIA)
- Panel of Arbitrators, Kuala Lumpur Regional Centre for Arbitration (KLRC)
- Advisory Member, American Arbitration Association (AAA)
- Editorial Board Member, Global Arbitration Review (GAR)

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What is Arbitration?

ARBITRATION.

arbitrary trademark. SEE TRADEMARK.

arbitration, *n.* A method of dispute resolution involving one or more neutral third parties who are usu. agreed to by the disputing parties and whose decision is binding. — Also termed (redundantly) *binding arbitration*. Cf. MEDIATION (1). [Cases: Arbitration ⚙ 1. C.J.S. *Arbitration* §§ 2–3.] — **arbitrate**, *vb.* — **arbitral**, *adj.*

Black's Law Dictionary, 8th Ed.

Why Arbitration?

WHY ARBITRATION?

Neutrality

Selection of Arbitrator

Language

Requirement for Attorneys

Convenient Service Process

Confidentiality

Recognition and Enforcement

What Sources of Law?

WHAT SOURCES OF LAW?

Arbitration Agreement in Contract

Arbitration Rules

- ICC Arbitration Rules, SIAC Rules, LCIA Rules, KCAB Rules....
- UNCITRAL Arbitration Rules

Arbitration Laws in Place of Arbitration or Enforcement

- Arbitration Act of Korea, Arbitration Act of Singapore....
- UNCITRAL Model Laws

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

IBA Rules

- IBA Guidelines on Conflict of Interest in International Arbitration
- IBA Rules on the Taking Evidence in International Arbitration

Arbitration Agreement.

BASIC STARTING POINT

Parties' AGREEMENT to bring dispute to Arbitration.

Mostly, in WRITING through CONTRACT.

SEVERABILITY ISSUE

ITEMS OF AGREEMENT

Governing Law

Arbitration Institutions

Place of Arbitration

Tribunal

Language

Costs

Procedural Rules

...Etc.

GOVERNING LAW

Can be Changed Depending on the Claims. (e.g., Torts...)

Substantive Matters.

Procedural Matters.

Arbitration Agreement.

**DIFFERENT
GOVERNING LAWS**

ARBITRATION INSTITUTIONS

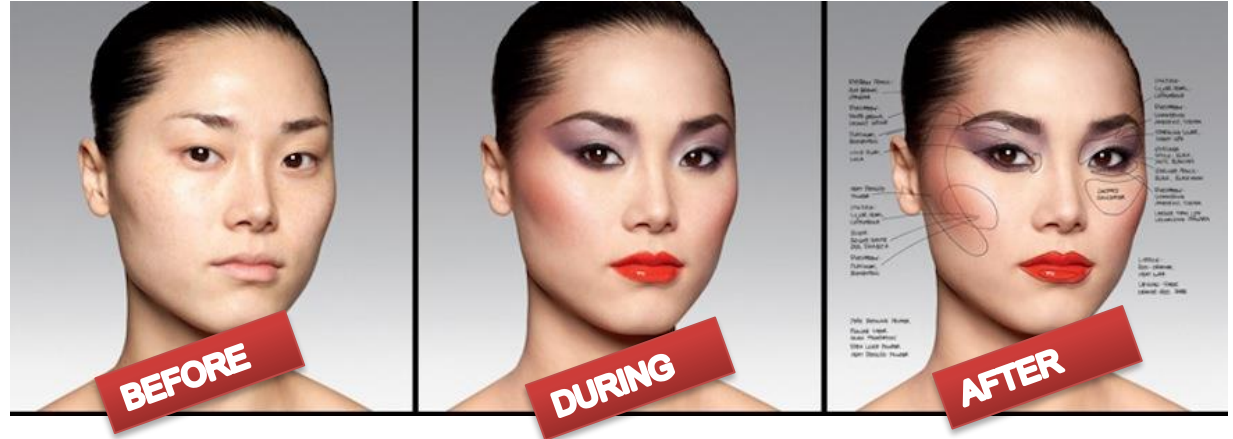
with their own **Arbitration Rules**.



PLACE OF ARBITRATION

Important because they determines... **Domestic Court's Role**

Phase of
Arbitration
Proceedings



Court's
Intervention



**REVIEW
CONSTITUTION
OF TRIBUNAL**



**HELP
COLLECTING
EVIDENCE**



**SET ASIDE
FINAL AWARD**

EXAMPLES OF PATHOLOGICAL CLAUSES

Selective Arbitration Agreement: “Lawsuit OR Arbitration”

“All disputes arising out of or in connection with the present contract shall be resolved by amicable consultation between the parties. If a dispute is not so settled within 30 days from the date when the dispute was raised for the consultation, either party may submit the dispute to ***arbitration under the KCAB Rules of Arbitration*** or file ***a lawsuit with the Seoul Central District Court.***”

EXAMPLES OF PATHOLOGICAL CLAUSES

Selective Arbitration Agreement: “Lawsuit **OR** Arbitration”

“Upon the occurrence of a dispute between the Purchaser [i.e., Republic of Korea] and the Seller [i.e., Korea-based supplier] who share the same nationality, the dispute shall be referred to **adjudication/arbitration** in accordance with the laws of the Purchaser’s country.)”

Source: *Supreme Court Judgment 2003Da318*, 22 August 2003 (“a clause providing for disputes to be referred to court adjudication or arbitration does not constitute a binding arbitration agreement...”).

EXAMPLES OF PATHOLOGICAL CLAUSES

Lawsuit as Appellate Procedure

- (1) Any dispute arising between the Parties during the performance of the Contract shall be resolved by mutual agreement.
- (2) In the event that the Parties fail to reach an agreement as in paragraph 1 above within thirty (30) days from the occurrence of the dispute, the dispute shall be resolved in the following manner.
 - (i) The dispute shall be submitted to ***either mediation by the Mediation Committee established under the applicable law or arbitration by an arbitration authority under the Arbitration Act.***
 - (ii) In case ***where an objection is raised to the mediation prescribed in paragraph 1 above, the dispute shall be subject to adjudication by the competent court having jurisdiction*** over the place where [a Party] is located.

EXAMPLES OF PATHOLOGICAL CLAUSES

Too Narrow Scope

“... disputes relating to the interpretation and performance of this contract.”

Misnamed Institutions or Rules

“... arbitration at *the Arbitration Centre of Singapore*.” (SIAC?)

“Arbitration shall be governed by the laws of the UK and shall be conducted in accordance with *the rules on commercial arbitration of The British Commercial arbitration board*.”

EXAMPLES OF PATHOLOGICAL CLAUSES

“May” instead of “Shall”?

“... either party may refer the dispute to arbitration...”

Over-specificity of Arbitrator Requirements

“Any dispute ... shall be finally resolved under the Rules of Arbitration of the ICC by *three arbitrators who are fluent in the Korean, Chinese, and English.*”

Specific Reference to Particular Arbitrator

“Disputes arising in connection with this agreement shall be determined by a single arbitrator. The arbitrator shall be *the Mayor of Seoul*, Korea.”

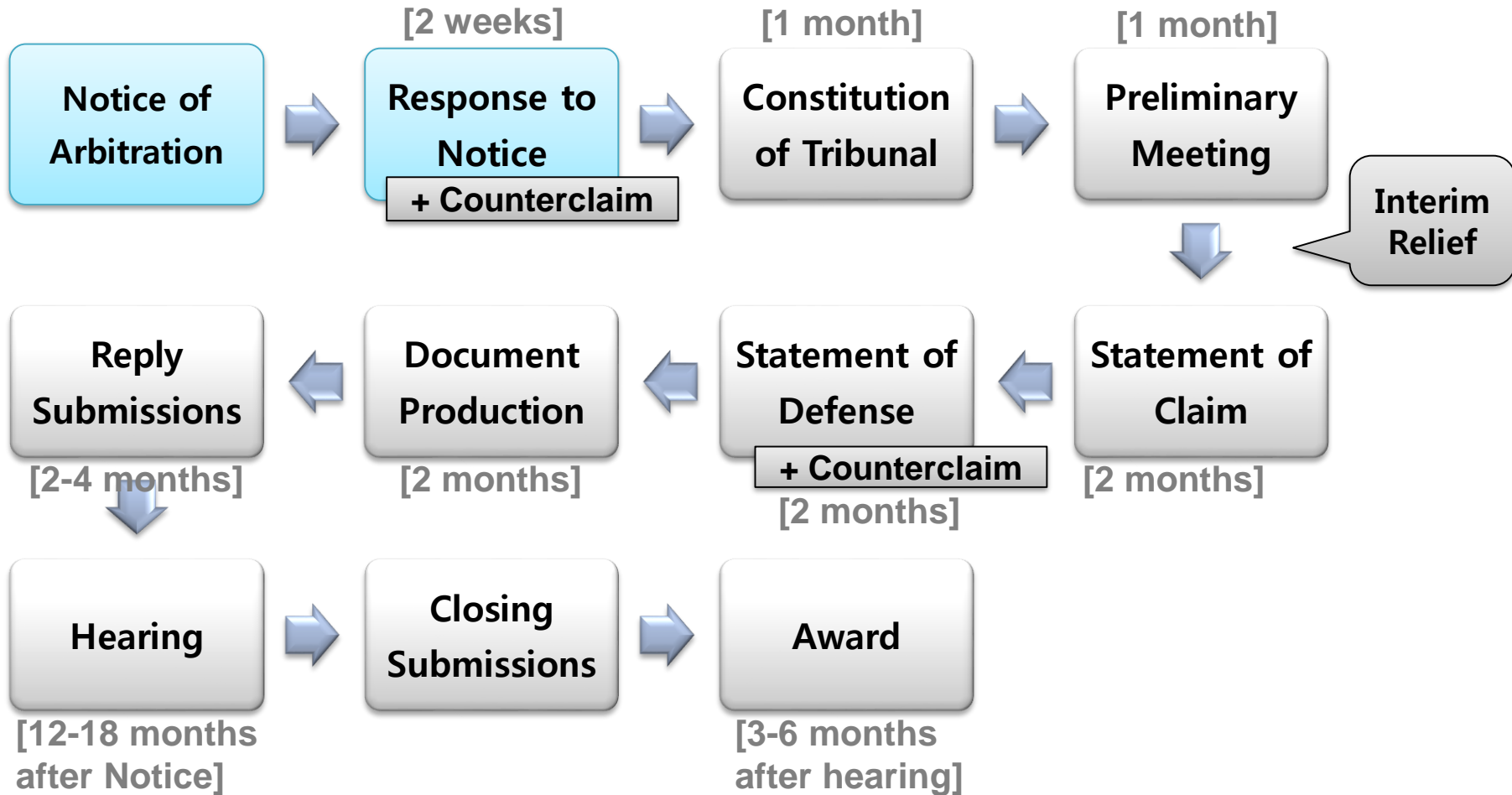
MODEL ARBITRATION AGREEMENT



“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”

Arbitration Proceedings.

GENERAL PROCEDURES

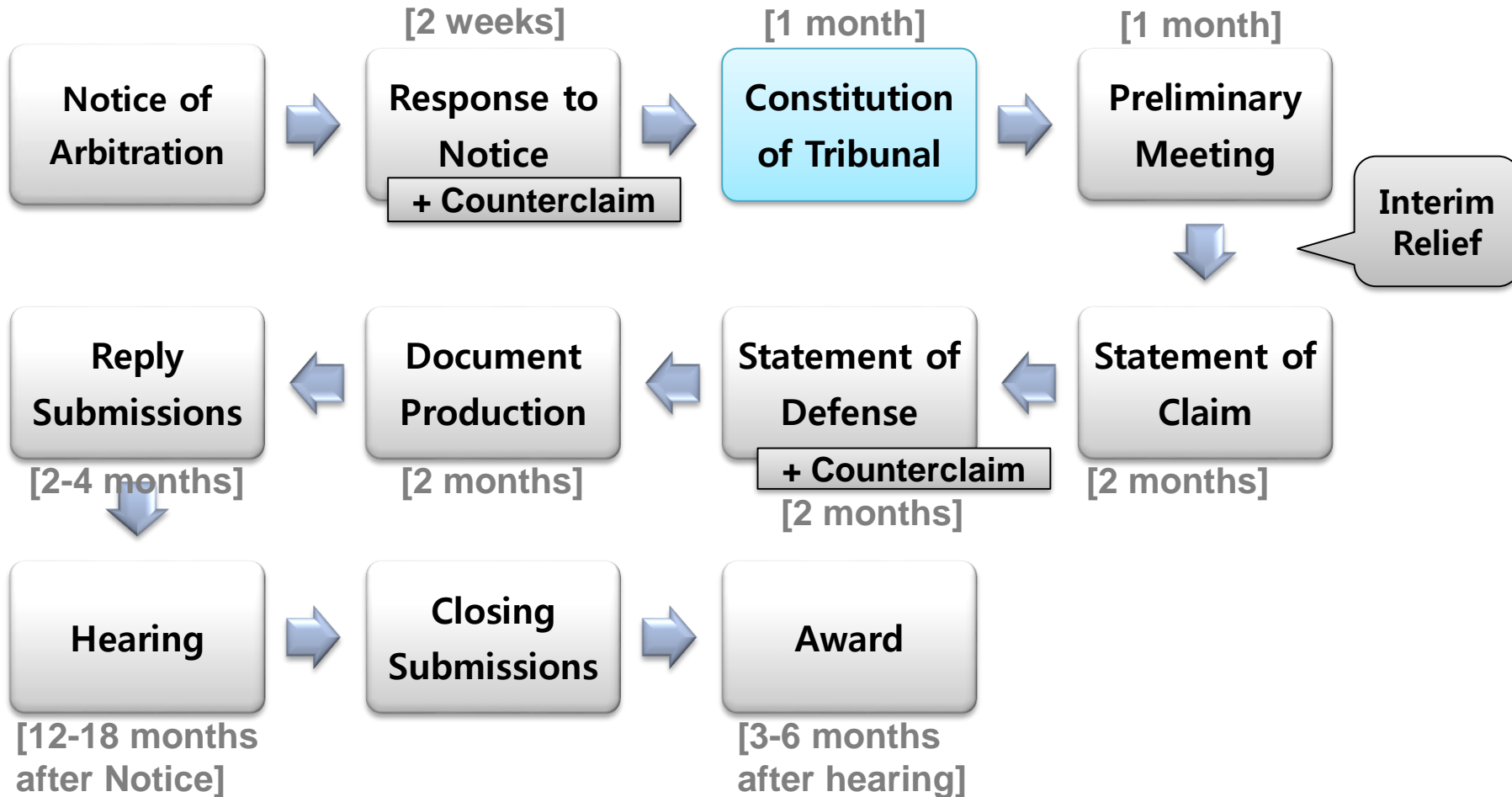


NO DEFAULT JUDGMENT

ICC Arbitration Rules – Article 6(8)

If any of the parties refuses or fails to take part in the arbitration or any stage thereof, *the arbitration shall proceed notwithstanding such refusal or failure.*

GENERAL PROCEDURES



SELECTION OF ARBITRATOR

Governed by Arbitration Clause, Agreement, or Arbitration Rules

Single or 3-arbitrator panel?

**INSTITUTION'S INTERVENTION WHEN PARTIES
DISAGREE ON ARBITRATORS**

SELECTION CRITERIA

Cultural background, standing, personality

International competence

Education & know-how

At the cross road between substantive law and arbitration law

Experience

Ability to understand the economics

Ability to understand the technical background

Independence

Availability to act as arbitrator

CHALLENGING ARBITRATORS

ICC Rules of Arbitration – Article 14

- (1) A challenge of an arbitrator, *whether for an alleged lack of impartiality or independence*, or otherwise, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based.

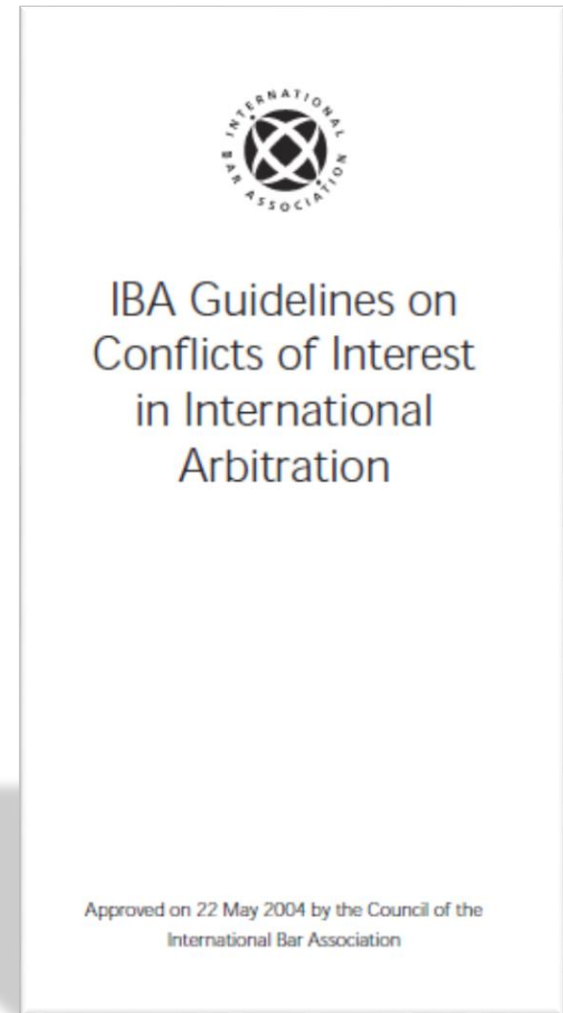
IMPARTIALITY, INDEPENDENCE, DISCLOSURE

IBA Guidelines on Conflict of Interest in International Arbitration

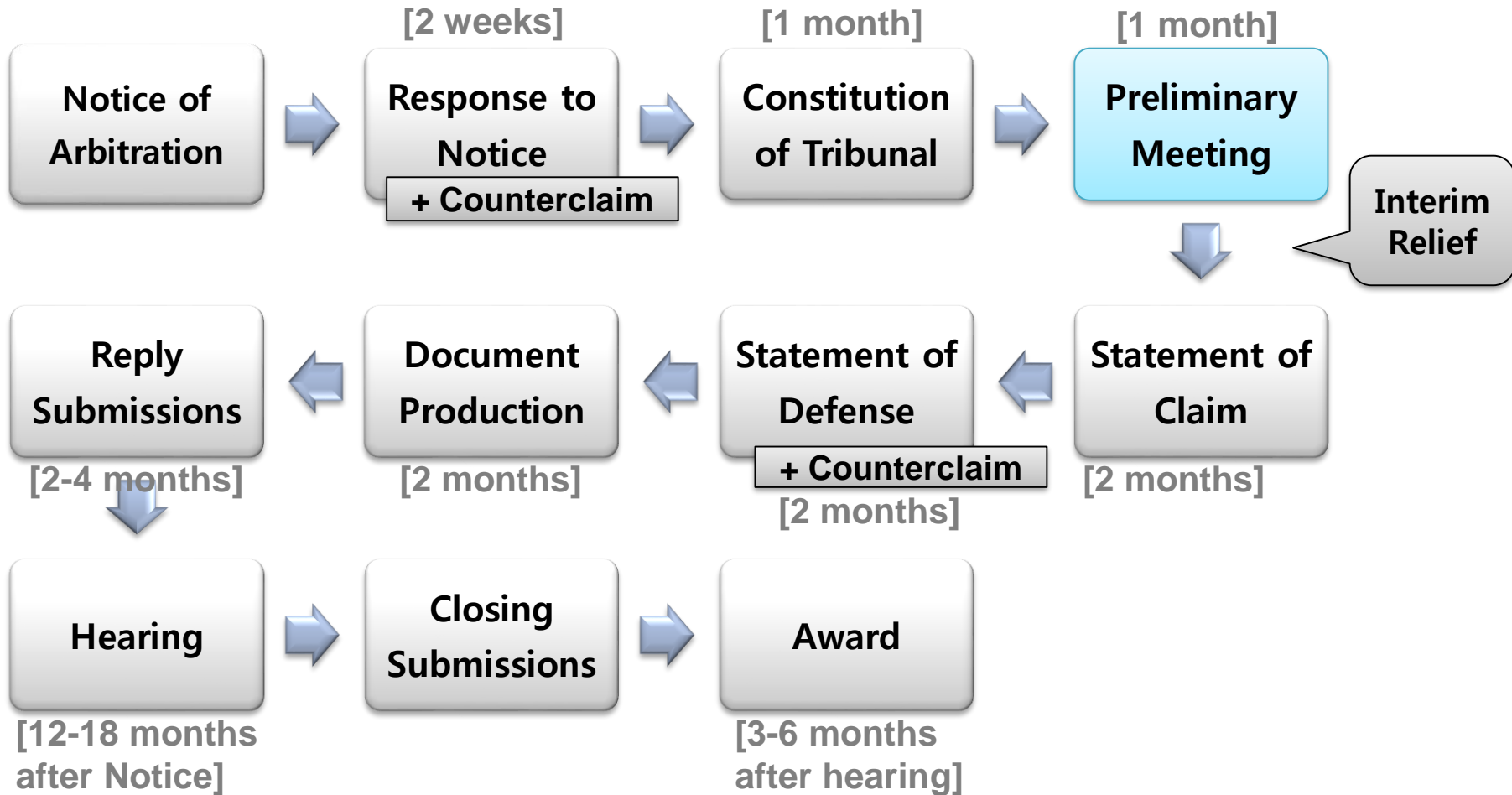
General standards regarding impartiality, independence, and disclosure

Practical application of the General Standards

- **Non-Waivable Red List**
- **Wavable Red List**
- **Orange List**
- **Green List**



GENERAL PROCEDURES



TERMS OF REFERENCE

Case Study I: 2002 KOR-JPN World Cup Football Stadium Construction Contract Dispute

Restitution of unjust enrichment based on breach of contract claims

Facts

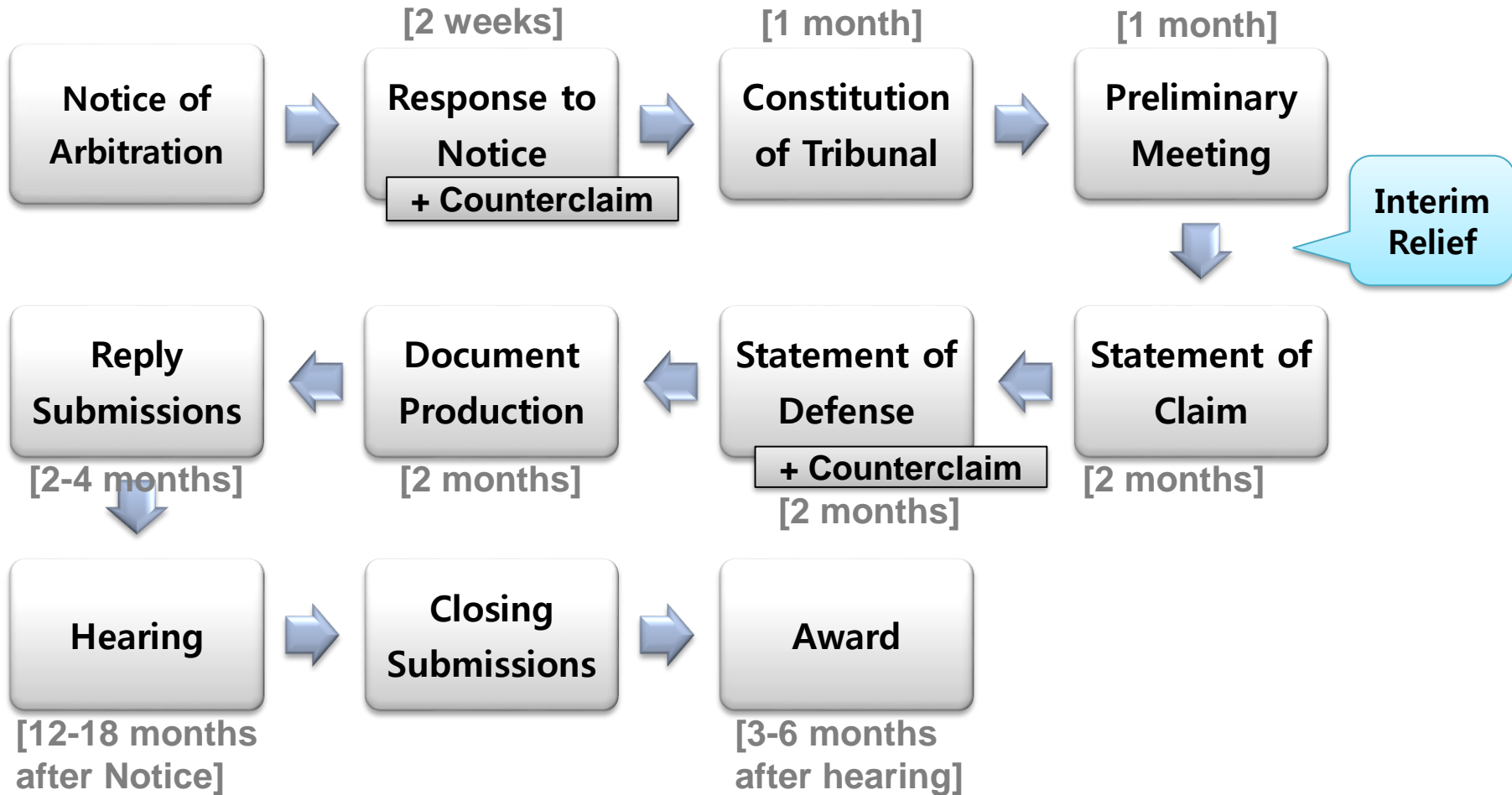
- Contract with a German contractor to construct the roof of a football stadium
- Contractor's delay of the construction and repeated failures to perform obligations under the contract
- The owner terminated the contract and called the performance bond.
- The German contractor asserted claims for damages alleging the owner's breach of contract

Issue

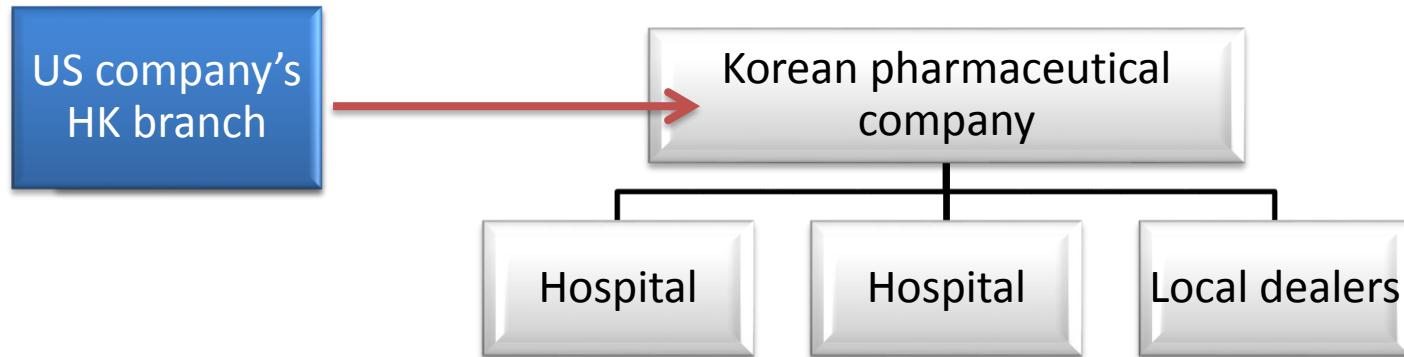
- Can the contractor request the restitution of the alleged unjust enrichment, the issue of which was not included in the Terms of Reference or any submissions filed until the end of the entire pleadings?



GENERAL PROCEDURES



Case Study II. Distributorship Agreement Dispute (re Artificial Joint Products)



Facts

- Increased exchange rates after the Korean economic crisis in 1997 → Increased import prices
- Decrease of sales; the failure to meet the target volumes as required under the Agreement.
- Termination of the Agreement; and request to return inventory

Issues

- The different names of the parties in the Agreement
- The names on the first page of the Agreement were different from those on the last page.
- → Who are the contracting parties?



Case Study III. Dispute between Shareholders

HYUNDAI HEAVY INDUSTRIES V. IPIC HANOCOL IPICI

ICC Arbitration

Singapore

English

Three Members of Tribunal



Neil Kaplan Q.C.

Michael Moser

Michael Pryles

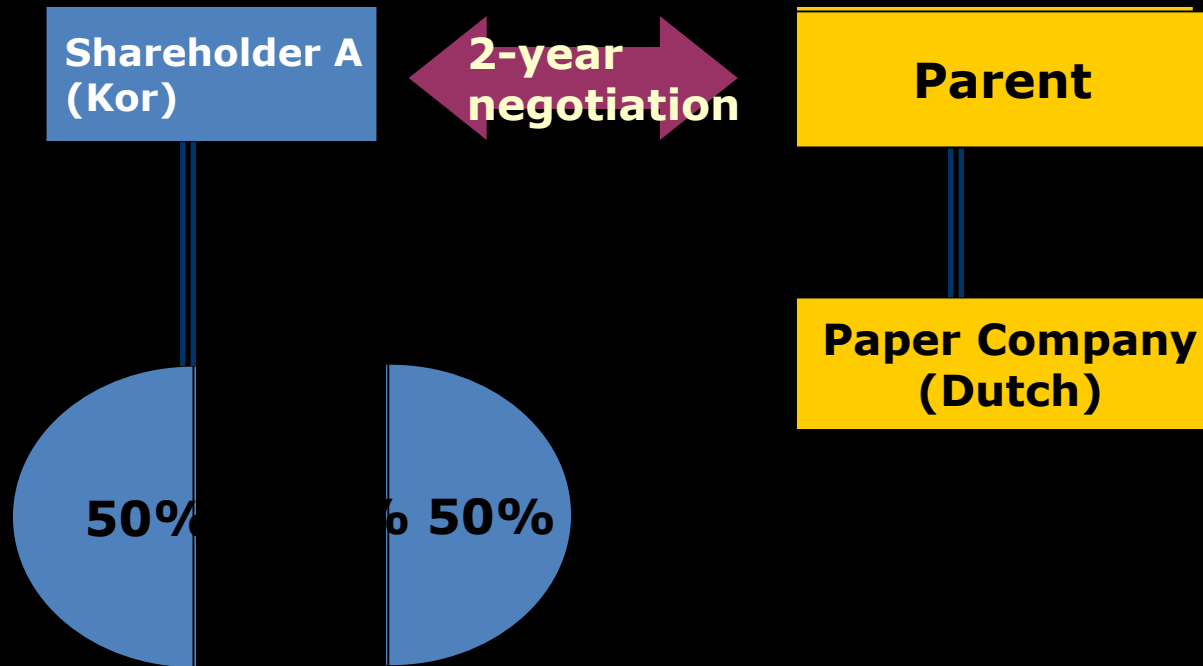
Breach of Shareholders' Agreement

“Deemed Offer” “25% Discount”

Case Study III. Dispute between Shareholders

HYUNDAI HEAVY INDUSTRIES V. IPIC HANOCOL IPICI

PARTIES



Case Study III. Dispute between Shareholders

HYUNDAI HEAVY INDUSTRIES V. IPIC HANOCOL IPICI

Parent Company Guarantee

- Upon the parent company's request, Shareholder A entered into a contract with a paper company as a formality and included the following paragraph.
- “The Parent hereby unconditionally guarantees the full and timely performance of each and every **obligation** of the Paper Company hereunder **as if a direct Party hereto**, and covenants to maintain, directly or indirectly, control and ownership of Paper Company throughout the term of this Agreement.”
- **Arbitration:** Shareholder A brought claims against both the parent company and the paper company.

Case Study III. Dispute between Shareholders

HYUNDAI HEAVY INDUSTRIES V. IPIC HANOCOL IPIC

Interim Award

IX. Relief regarding IPIC

101 Therefore, this Tribunal, having considered all the evidence, both written and oral, as well as all the submissions presented to it, does AWARD, DECLARE and ORDER that:—

THIS TRIBUNAL HAS NO JURISDICTION OVER IPIC
(RESPONDENT 1).

Case Study III. Dispute between Shareholders

HYUNDAI HEAVY INDUSTRIES V. IPIC HANOCOL IPICI

Interim Award

X. Decision regarding HDO on Agreed Terms

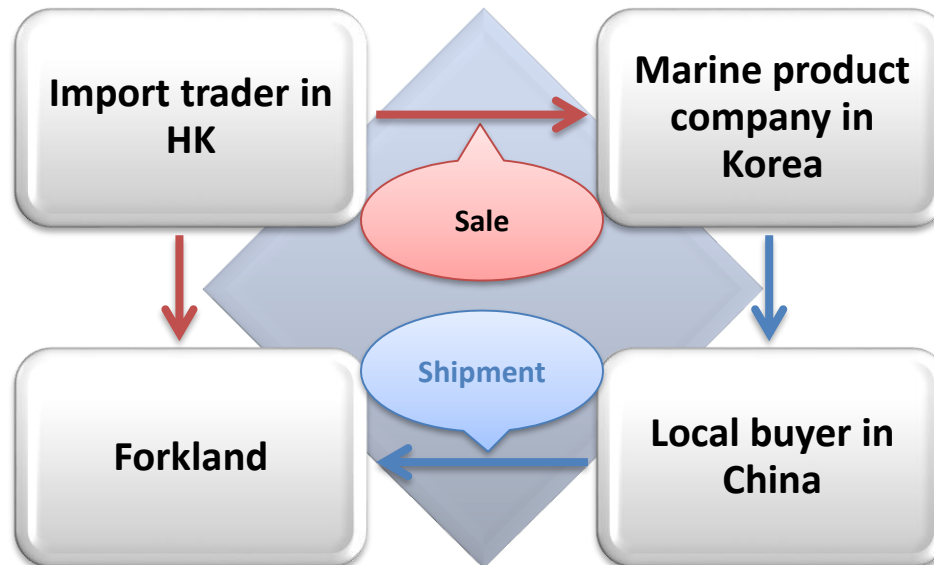
102 Further, this Tribunal, by AGREEMENT between the Claimants and HDO as set out above, does AWARD, DECLARE and ORDER that:-

BY CONSENT, HDO (RESPONDENT 4) IS DISMISSED FROM THESE PROCEEDINGS.

INTERIM MEASURES

Case Study IV. Squid Export Contract (Forkland squids)

Storage and disposal by auction during the arbitral proceedings



Facts

- Decreased price of squids resulting from the *El Nino* effects
- Alleging the defects in the squids, the import trader terminated the contract and requested to refund the contract price paid.

Matters subject to interim measures

- Storage and disposal of the squids during the arbitral proceedings

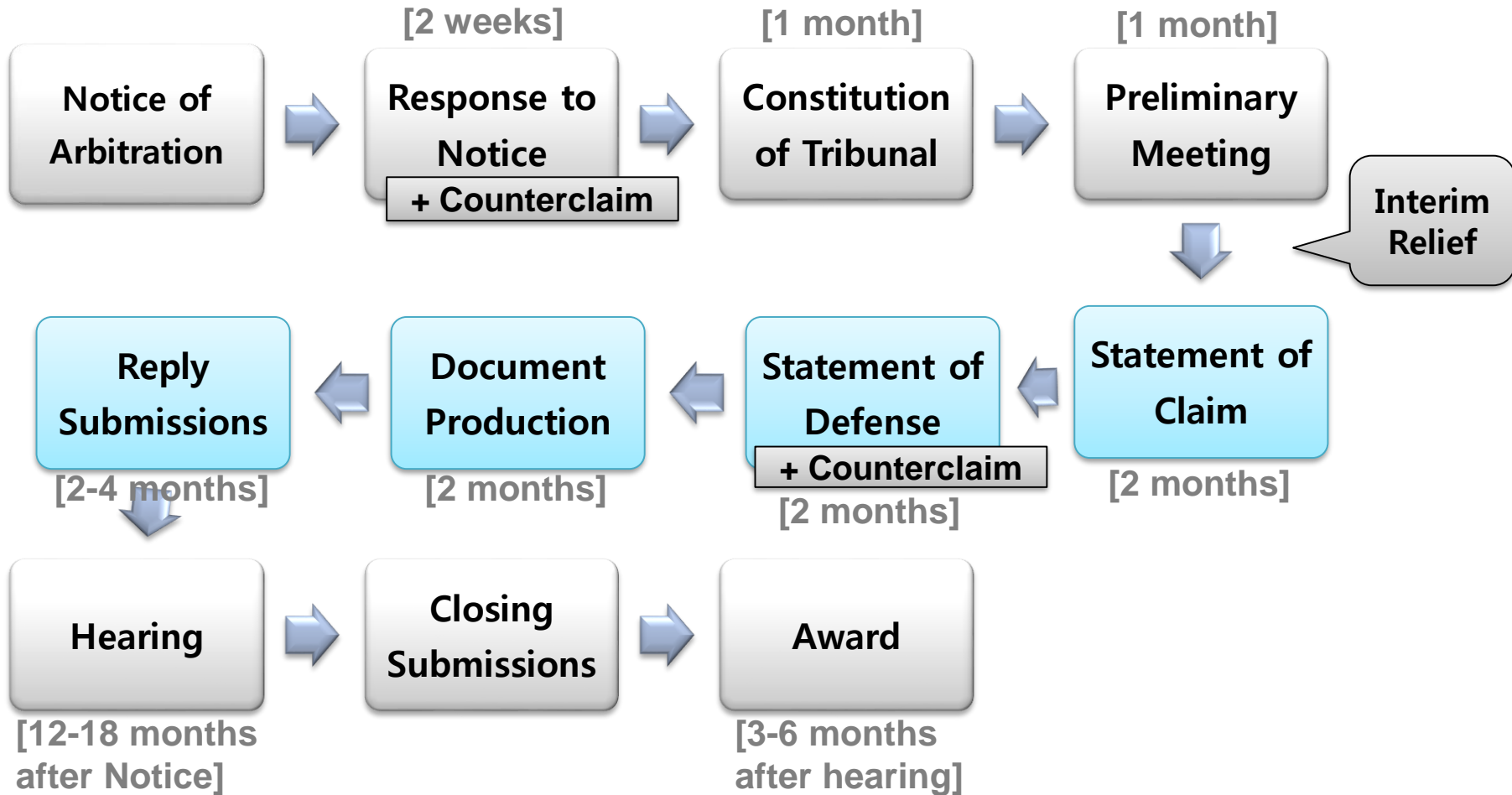


EMERGENCY ARBITRATOR

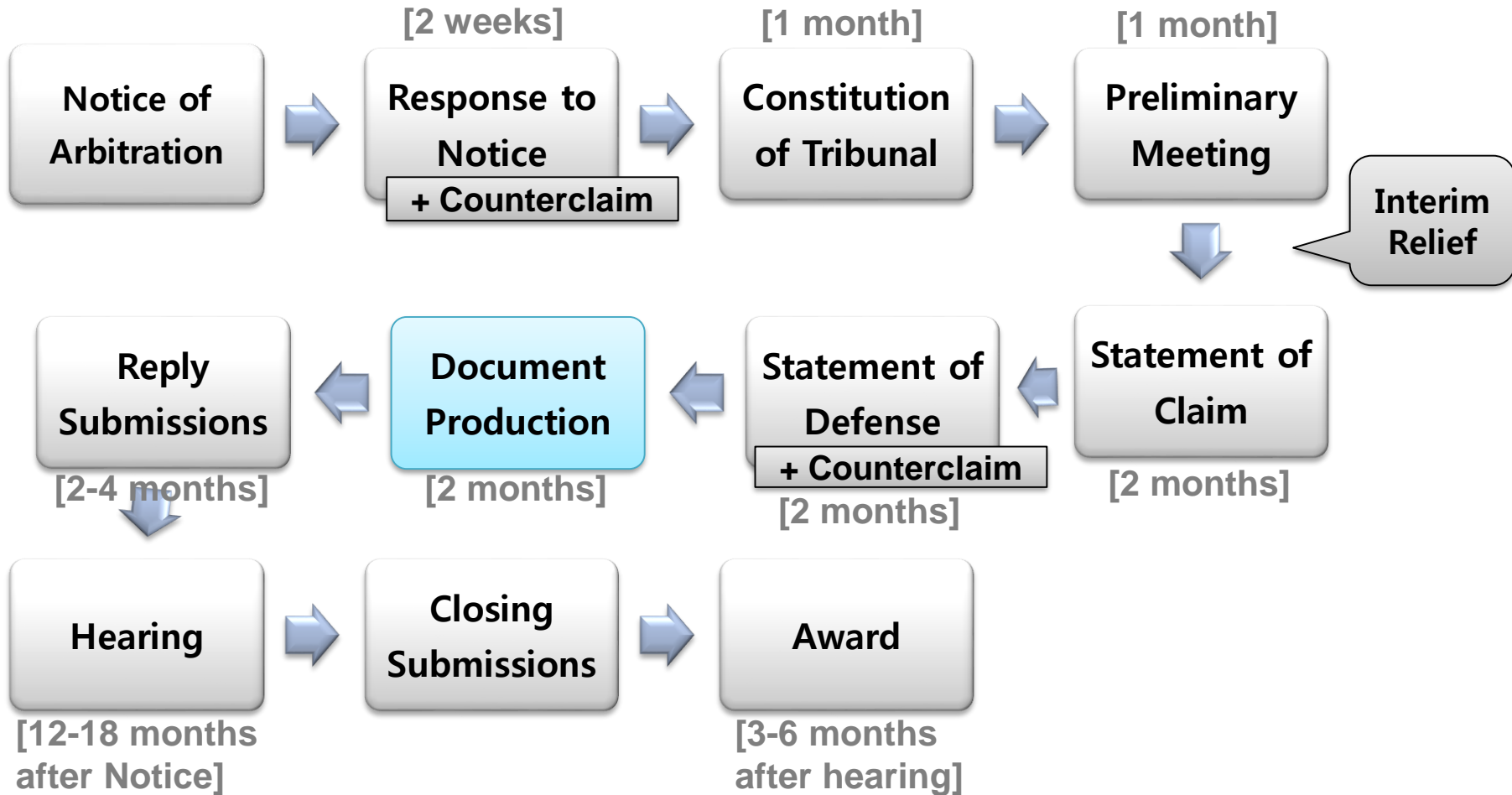


- Decision on Admissibility and jurisdiction.
- Proceedings deemed appropriate.
- Apply before the file being sent to the tribunal.
- Irrespective of Request for Arbitration.
- As short a time as possible, normally 2 days.
- Schedule within 2 days of transmission of file.

GENERAL PROCEDURES



GENERAL PROCEDURES



MANAGING DOCUMENTS



FACILITATING OR OBSTRUCTING PAYMENT?



TAKING EVIDENCE

IBA Rules on Taking Evidence

Can be incorporated in the arbitration agreement

OR

Can be used by the parties and tribunal on a case-by-case basis

Four Methods of Disclosure

- Document request.
- Witness statement.
- Site inspection.
- Expert opinion.

IBA Rules on the Taking of Evidence in International Arbitration

*Adopted by a resolution of
the IBA Council
29 May 2010
International Bar Association*



the global voice of
the legal profession™

MANAGING DOCUMENT PRODUCTION

REDFERN SCHEDULE

Column (1): documents requested / basis for request.

Column (2): reply / objections to production.

Column (3): response to reply/objection

Column (4): left blank for the decision of the tribunal on each request.

Hyundai Heavy Industries Co., Ltd et al. (Claimants)

-v-

Hanocal Holding B.V. and IPIC International B.V. (Respondents)

“REDFERN SCHEDULE” TO HANOCAL AND IPICI’S REQUEST TO PRODUCE DATED FEBRUARY 27, 2009 (AS AMENDED)

* Text in bold italics represents Hanocal and IPICI’s replies to Claimants’ objections.

Request No.	Description of Requested Documents	Hanocal and IPICI’s (“Respondents”) Justification for the Request and Reply to Claimants’ Objections*	Claimants’ Response	Tribunal’s Decision
1.	<p>All documents within the possession, custody or control of any Claimant containing, reflecting or relating to the preparation for, content of and decisions taken as a result of the meeting between [REDACTED] and [REDACTED] in September 2007 and/or their meeting on November 7, 2007, including but not limited to:</p> <p>(i) correspondence within or among any of the Claimants and/or their respective subsidiaries, affiliates or advisors;</p> <p>(ii) minutes and/or other records of meetings or discussions of, and reports to, any boards, committees or other formal or informal organs of any of the Claimants;</p> <p>(iii) reports, notes and/or memoranda authored by or received from any of the Claimants and/or their respective subsidiaries, affiliates or advisors; and</p> <p>(iv) correspondence and/or other documents reflecting or relating to any offer [REDACTED] was authorised to make or</p>	<p><u>Relevance and Materiality</u></p> <p>Hanocal and IPICI assert that Claimants commenced this arbitration with the improper motive of blocking the lawful sale of Hanocal and IPICI’s shares of HDO shares to a third party. Hanocal and IPICI claim that this improper motive was communicated by [REDACTED] to [REDACTED] at a meeting on November 7, 2007, when JR Kim threatened that if Hanocal and IPICI declined to sell all of their shares in HDO at Claimants’ desired price, Claimants would fight to frustrate the solicitation process by issuing notices of legal dispute and Event of Default. Shortly thereafter, on December 4, 2007, Claimants served a Notice of legal Dispute on Hanocal and IPICI. Claimants deny that their motive in serving the Notice of Legal Dispute or in commencing this arbitration was to block Hanocal and IPICI’s sale process. As Claimants’ reasons for serving the Notice of Legal Dispute and in commencing this arbitration are in dispute and are central to Hanocal and IPICI’s Counterclaim, the documents requested are relevant and material to the outcome of the case.</p>	<p>Subject to and without waiving its general objections to this request, Claimants will produce the requested documents, if any exist.</p>	

EXPERT OPINION

Case Study V. Confidentiality Agreement Dispute

Facts

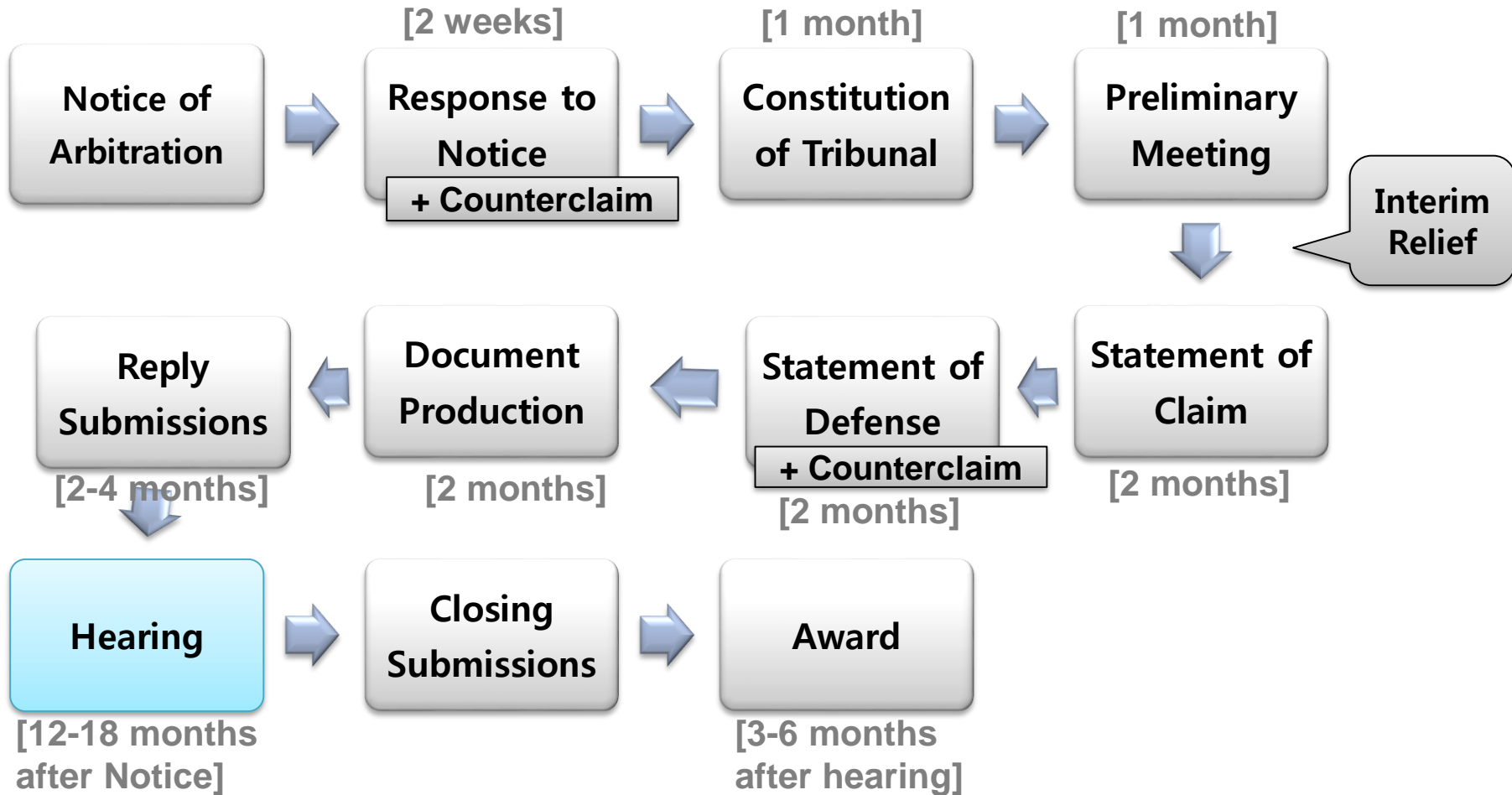
- A Korean pharmaceutical company orally agreed with a foreign drug maker to manufacture a medicine product by importing raw materials for the product from that foreign drug maker.
- The parties entered into a confidentiality agreement followed by a marketability assessment.
- While the application for the manufacturing permission was pending in Korea, the foreign party withdrew the contractual arrangement.
- The Korean company completed the permission procedure on its own.

Issues

- The scope of the confidentiality agreement and its application (Legal Expert)
- Difference between the concepts of “Generic” and “Original” (Expert)



GENERAL PROCEDURES



ORAL HEARING



ORAL HEARING



ORAL HEARING



WITNESS EXAMINATION

Timing : Chess clock system

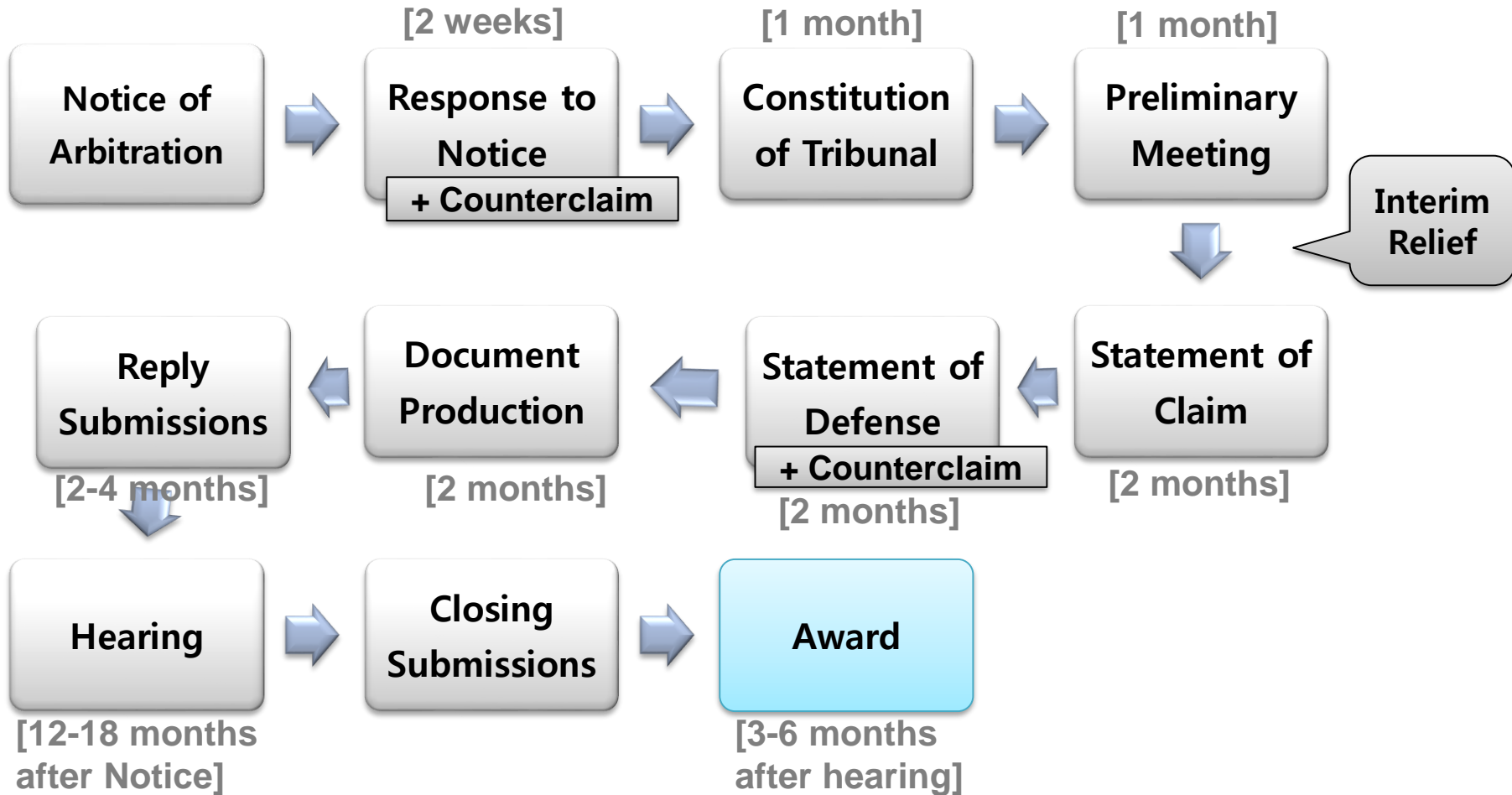


WITNESS CONFERENCING

Hot Tubbing



GENERAL PROCEDURES



EXAMPLE



HYUNDAI HEAVY INDUSTRIES V. IPIC HANOCOL IPICI

X. Operative Order

414 In accordance with findings set out above, the Tribunal A W A R D S ,
O R D E R S a n d D I R E C T S :—

- (1) The Respondents have materially breached the SHA;
- (2) The Claimants were entitled to accept, and have duly accepted on or around 25 March 2008, the Deemed Offer which has arisen under section 7.2 of the SHA on or around 18 March 2007, and accordingly:—

Enforcement, Setting Aside of Award.

ENFORCEMENT OF AWARD

NEW YORK CONVENTION OF 1985

“Arbitral awards shall have the same effect on parties as a final and conclusive judgment of the court.”

RECOGNITION

ENFORCEMENT

EXAMPLE



HYUNDAI HEAVY INDUSTRIES V. IPIC HANOCOL IPICI

Enforcement lawsuit (Seoul Central District Court)

Injunction prohibiting disposition of shares (Seo-san)

Injunction prohibiting disbursement of dividends (Seo-san)

Undertaking with adequate security (Seoul Central District Court)

ENFORCEMENT LAWSUIT (SEOUL CENTRAL DISTRICT COURT)

EXAMPLE

Hyundai
Oilbank



HYUNDAI HEAVY INDUSTRIES V. IPIC HANOCOL IPICI

주 문

1. 원고들과 피고들 사이의 국제상공회의소(International Chamber of Commerce) 국제중재재판소(International Court of Arbitration)의 사건번호(Case No.) 15521/JEM/CYK 중재사건에 관하여 중재판정부가 2009. 11. 22. 한 별지 목록 기재 중재판정에 기한 강제집행을 허가한다.
2. 소송비용은 피고들이 부담한다.
3. 제1항은 가집행할 수 있다.

Decisions

1. This Court permits the enforcement of the arbitral award rendered by the Tribunal in the ICC Case No. 15521/JEM/CYK on 22 Nov. 2009.
2. The costs of this litigation are borne by the defendants.
3. The enforcement of the arbitral award may be provisionally executed.

SETTING ASIDE OF AWARD

NEW YORK CONVENTION of 1985

Invalidity of the Arbitration Agreement

Breach of Due Process

**Exceeding the Tribunal's Authority
or Scope of Arbitration Agreement.**

Violation of the Applicable Procedure Rules

Non-Arbitrable Subject Matter

Violation of Public Policy

**Similar Rules
in Domestic Arbitration Law**



THANK YOU!

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