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CENTER FOR INTERNATIONAL DISPUTE RESOLUTION



CISG Legal Training Workshop

Essential Know-How for Lawyers

Practical Tips for Lawyers on Contract Drafting,
Dispute Prevention, etc. in Light of CISG

RA Prof. Dr. Stefan Kröll, LL.M.

Outline

- General Remarks on Contract Drafting under the CISG.
- Selection of Applicable Law
- Selection of Dispute Resolution Mechanism

- Gap Filling and Interpretation

- Formation of the Contract
 - Individually agreed Terms
 - Standard Terms

- Obligations of the Parties
 - Obligation of the Seller
 - Obligation of the Buyer

- Breach of Contract and Remedies



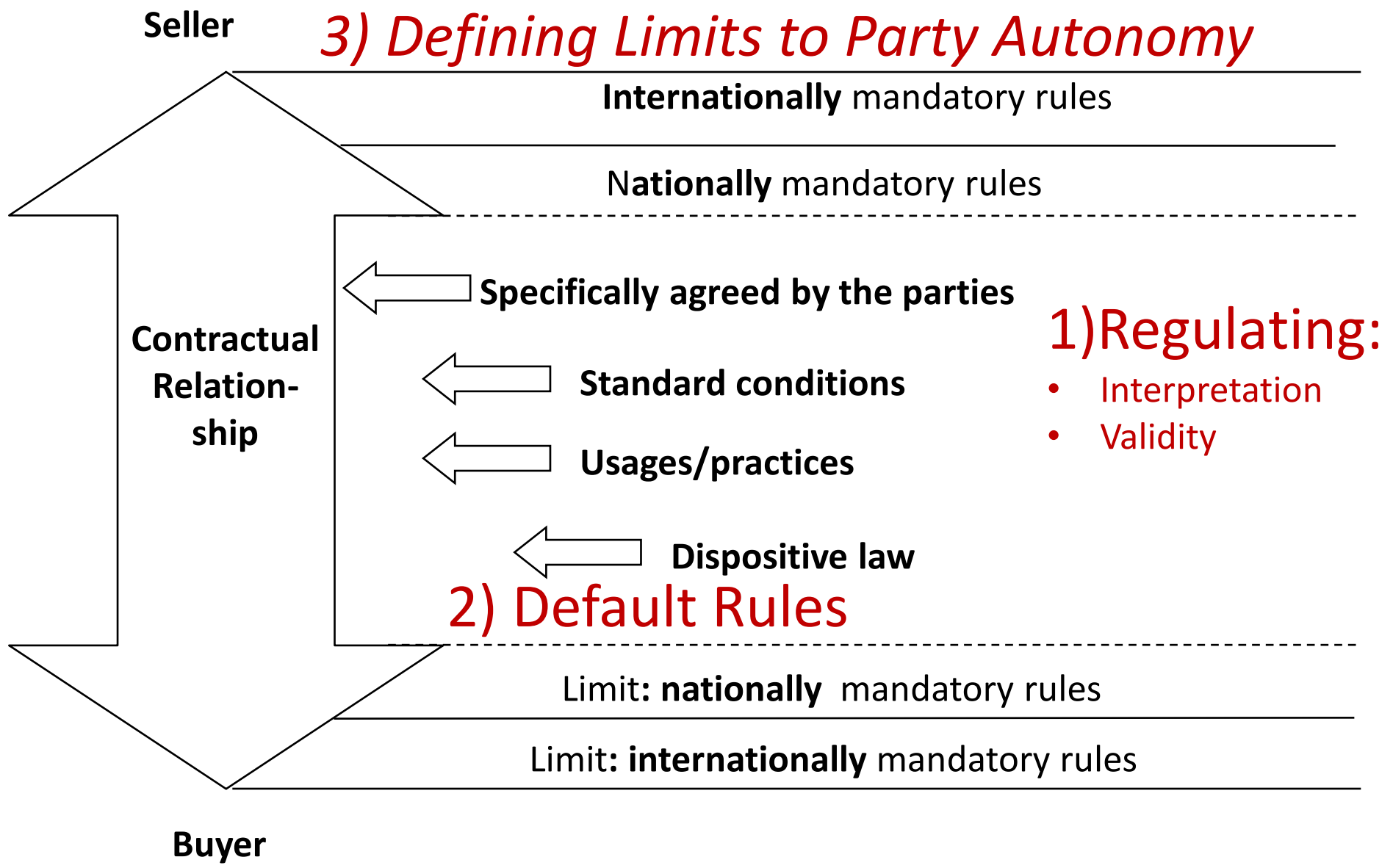
Factors relevant for drafting

- **Type of transaction**
 - High value – low value
 - Standardised – customized
 - One off – ongoing relationship / single contract – part
- **Parties involved**
 - Multinationals – SME – Natural Persons – State Parties
 - Strength of bargaining position
 - Cultural background
 - (pacta sunt servanda – living document as basis for negotiation)
- **Legal environment**
 - Existence of Model Contracts or Standard Terms
 - Existence of Statutes

Institutions Providing Support

- **ICC:** International Chamber of Commerce
 - The ICC Model International Sale Contract (Manufactured Goods) 2020
 - INCOTERMS 2020
- **ITC:** International Trade Center
 - Model Contracts for SME
- **UNCITRAL:** United Nations Commission for International Trade Law
 - Clout Database
 - UNCITRAL Arbitration Rules (Conventions/Model Law)

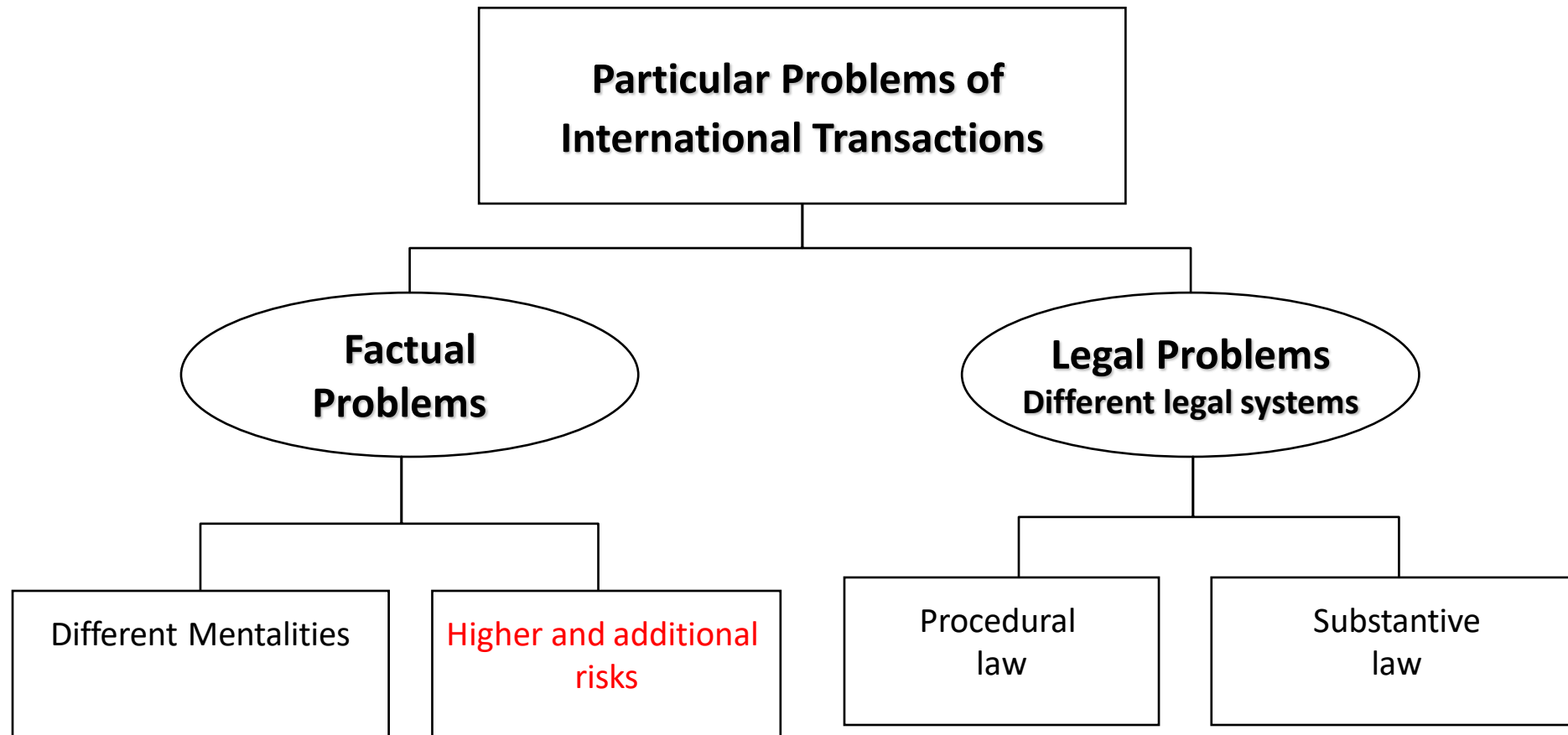
3) Defining Limits to Party Autonomy



Relevance of applicable law

It is important for lawyers and businesspeople to understand what the background laws and default rules are for a particular transaction. Parties to a contract **can change much of the law** that governs a contract but they can't do that if they don't **know what that law** is.

(Nancy Kim, The Fundamentals of Contract Law and Clauses – A Practical Approach, 2016, p.8)



- Concerning contract negotiations
- Concerning contract performance

- Production- and
- Paymentrisk
- Countryrisk
- Transportrisk
- Currencyrisk
- Risk of bad performance

- no codified law / precedents
- different legal instruments
- different procedure



Steps in Drafting

- Determination of Issues
- Existing Legal Regulation
 - Determination of applicable law
 - Existing Rules
 - Acceptability of rules?
- *Negotiation*
- Drafting deviating contractual Provisions





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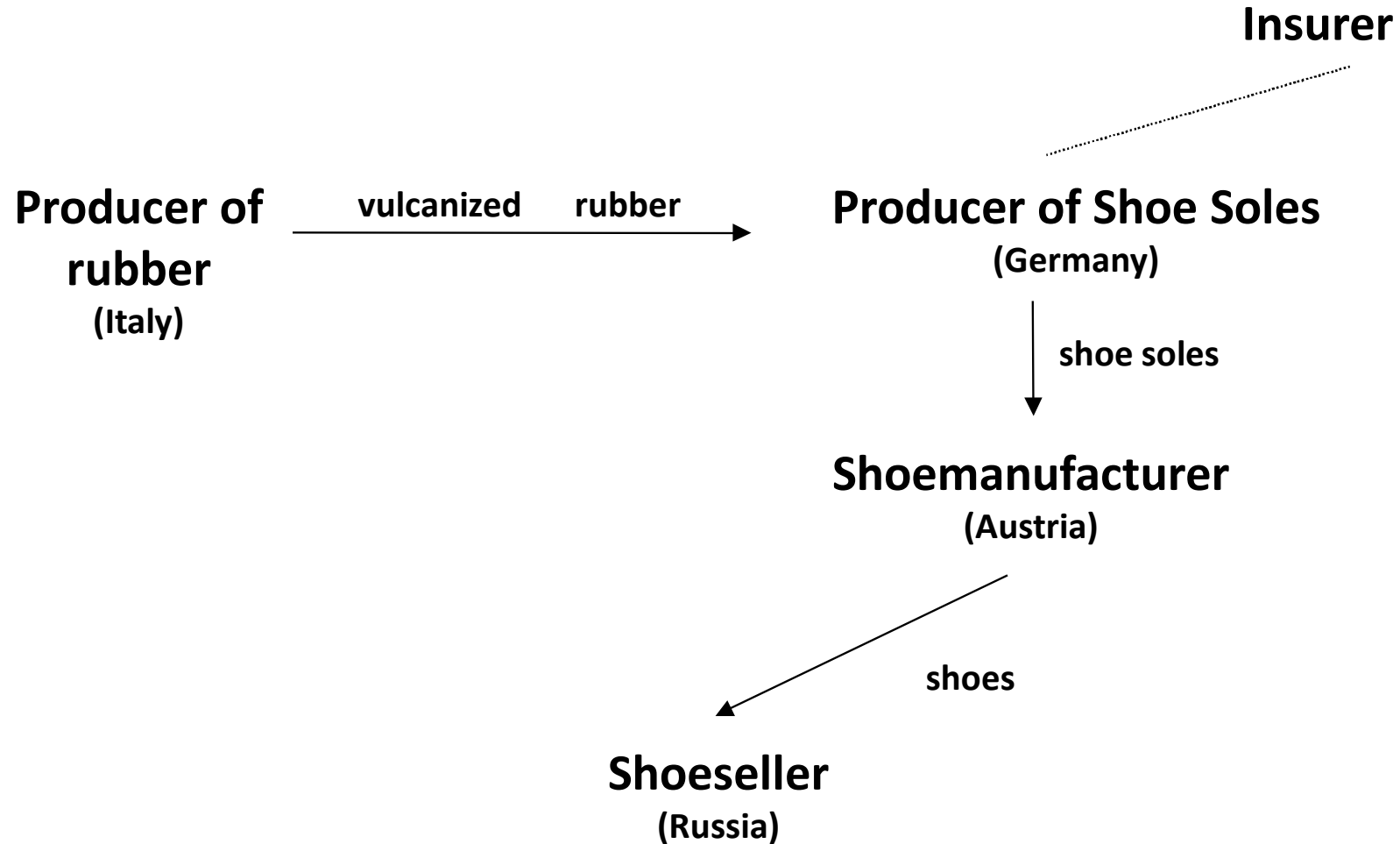
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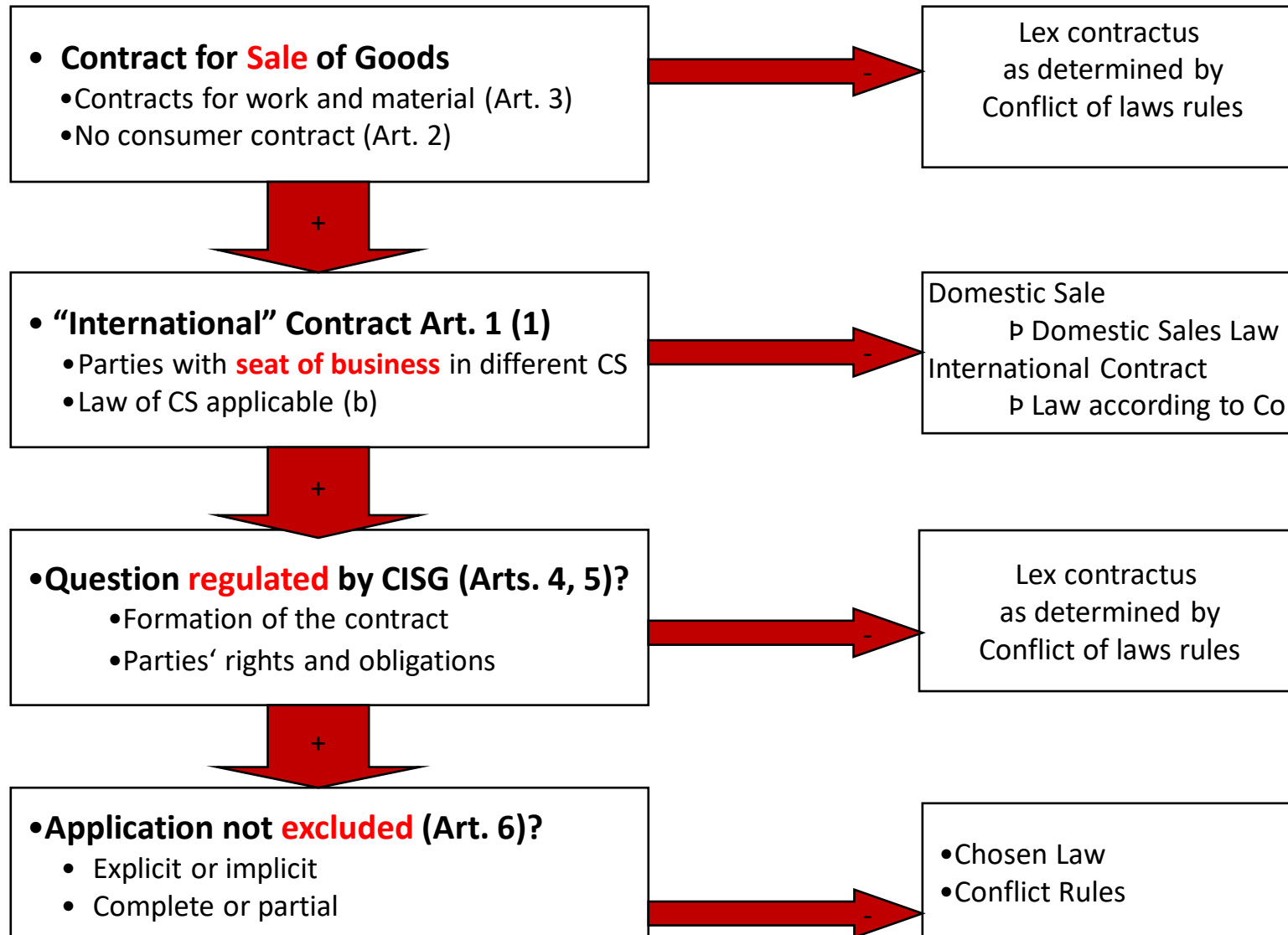
Choice of Law Clause

Arbitration Clause

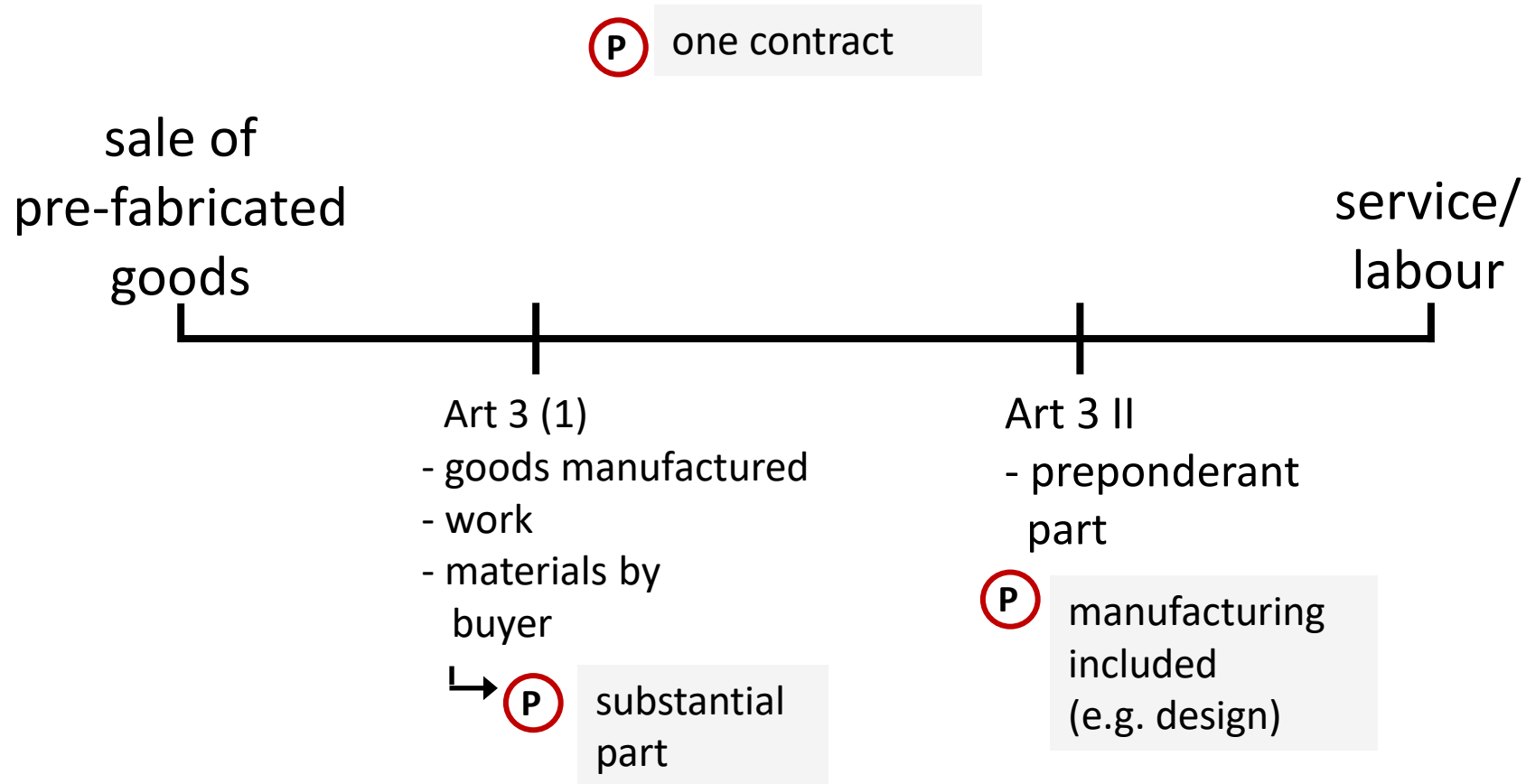
Typical International Sales Transaction
(Based on *Atlarex v. Rheinland Versicherung*)



Scope and Sphere of Application of the CISG



Mixed Contracts (Sale of Goods)



Matters Regulated by CISG

explicitly
included matters

Art 4
1st sentence

- 1) formation of contract
- 2) obligations of parties
(+ consequences of breaches thereof)

explicitly
excluded matters

Art 4
2nd sentence

- 1) validity of
 - contract
 - usage
- 2) effects on property

Art 5

- always

- 1) liability for death
or personal injury

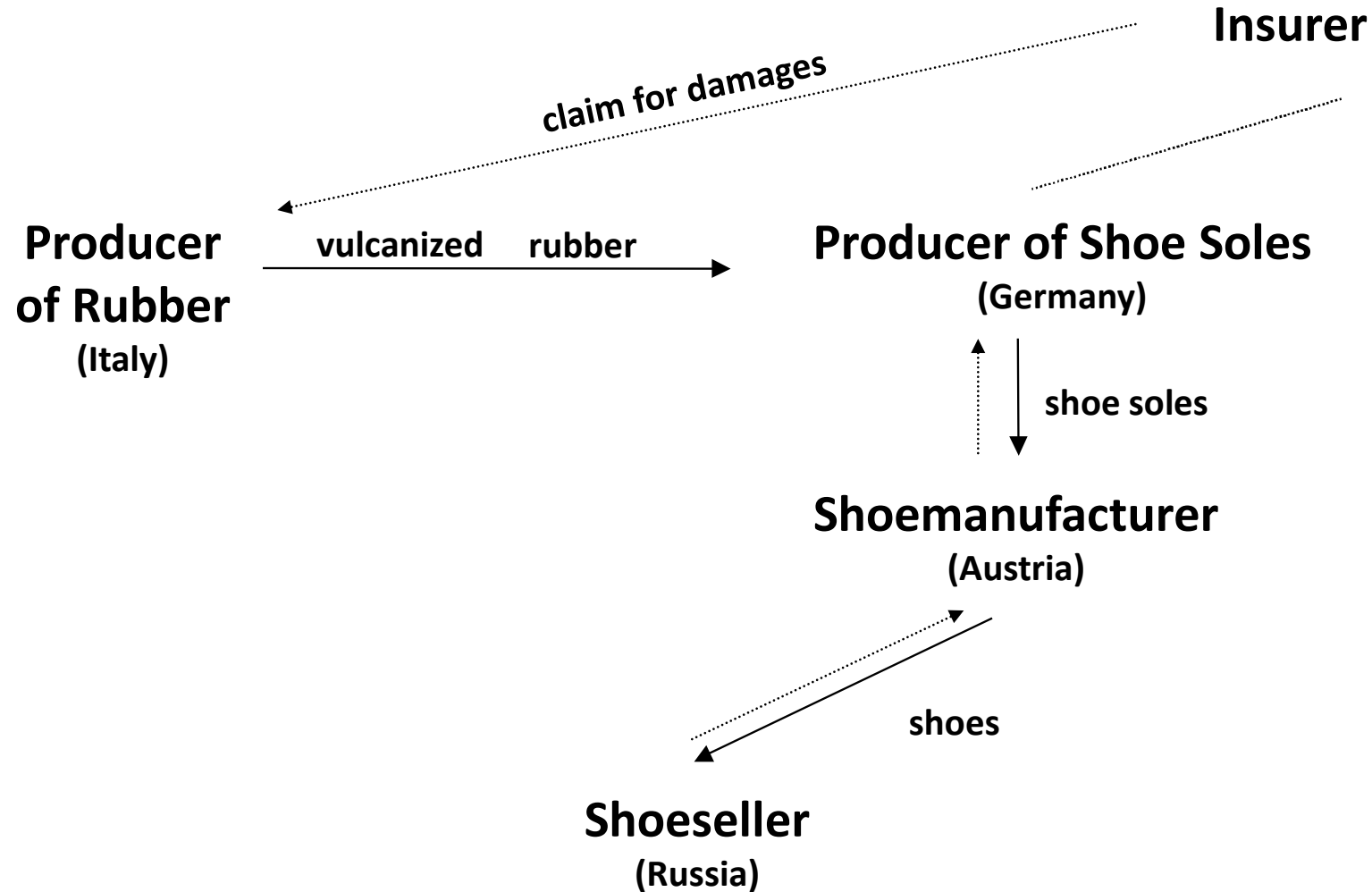
Article 6

The parties may **exclude** the application of this Convention or, subject to article 12, **derogate from** or vary the effect of any of its provisions.



Typical International Sales Transaction

(Based on Tribunale di Vigevano:
Rheinland Versicherungen vs Atlarex)



Advantages

- Uniform law governing all transactions
- No conflict of laws problems
- Part of national law: no need to prove
- Certainty through considerable case law and writing freely accessible
- Law particularly drafted for international sales.



Choice of Law Clause

- Decision about applicable law
 - Comparing advantages of domestic laws
 - “Agreeability” of domestic law
- Valid exclusion of the CISG
 - “The contract is governed by the law of Hong Kong excluding the CISG”
- In case of exclusion of certain provisions: alternatively applicable provisions
- Determination of applicable law for remaining questions
 - “The contract is governed by the CISG. German law is applicable to all unregulated questions.”



Examples from practice: Choice of Law

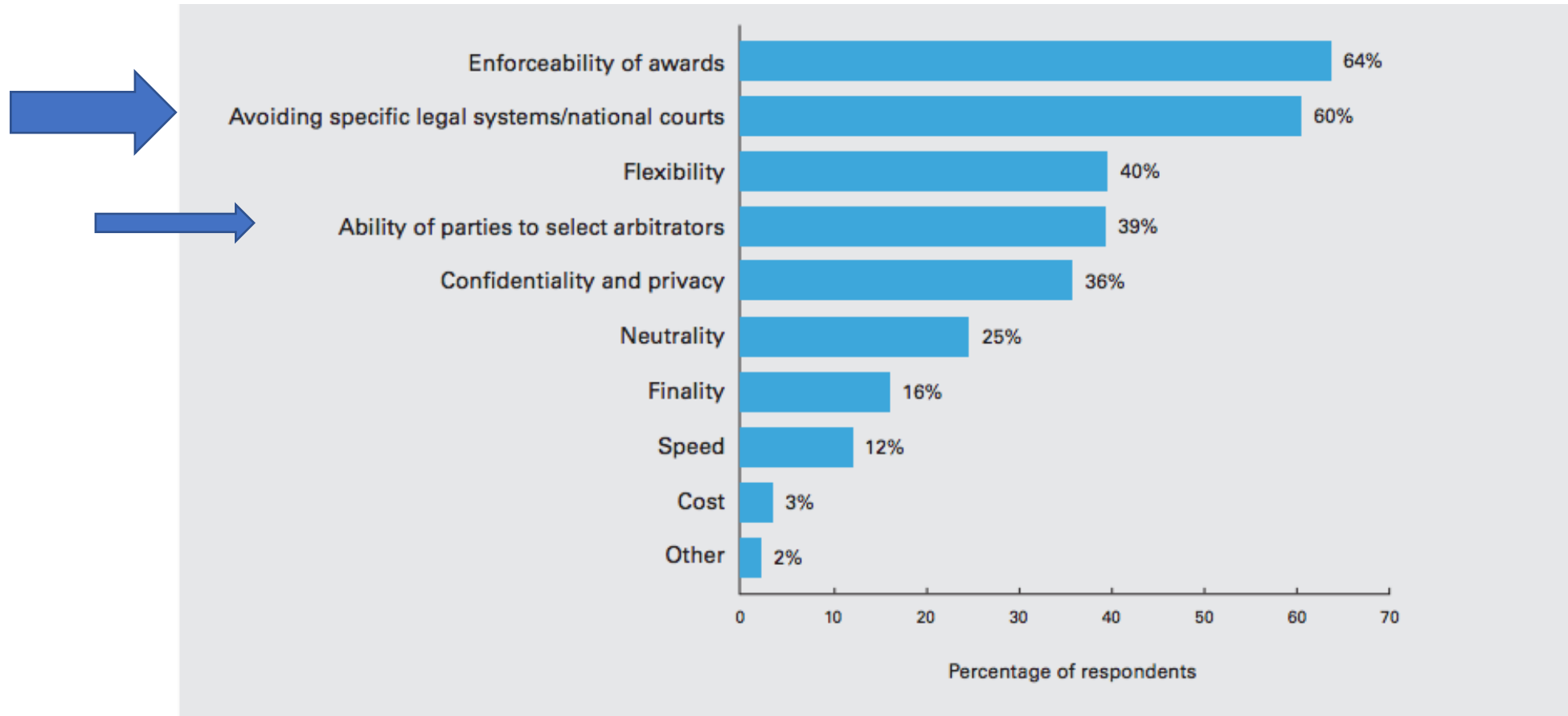
Law and Language

The Contract shall be governed by the law of the Federal Republic of Germany. This Contract shall be a **contract for works and services** according to sec. 631 seq. of the German Civil Code (BGB). The application of the law on conflict of laws, the sections on transportation law of the German Commercial Code (*HGB*), the Convention on Limitation of Liability for Maritime Claims of 1976 and the UN Conventions on Contracts for the International Sale of Goods (**CISG**) **is excluded**

If there are versions of any part of the Contract which are written in **more than one language**, the English version shall as a rule prevail. However, where a German term has been added in brackets after an English term only the German terms shall be decisive for the relevant English term whenever such English term is used in the Contract. The language for communications shall be English and German.

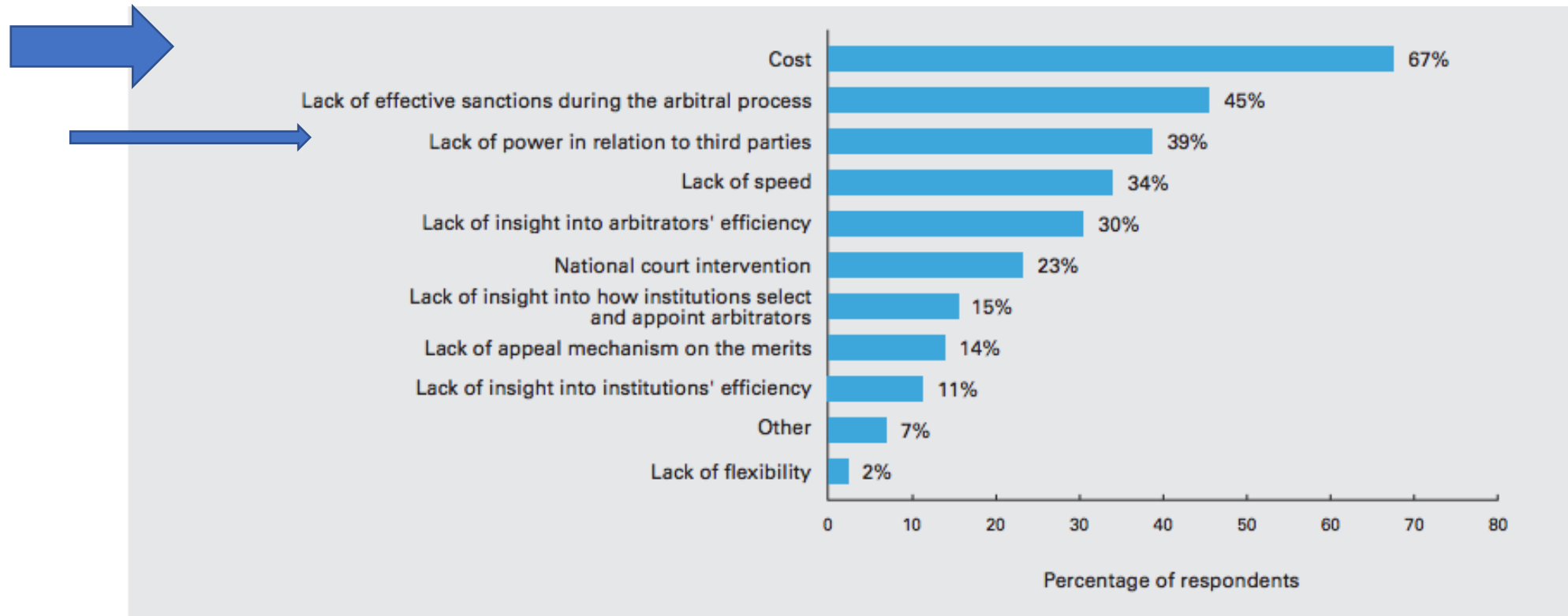
(Clause for the construction of an offshore windpark in the North Sea)

What are the three most valuable characteristics of international arbitration?



(2018: Queen Mary Study on International Arbitration)

What are the three worst characteristics of international arbitration?



(2018: Queen Mary Study on International Arbitration)

Arbitration Clause

DIS Model Clause for Arbitration 2018

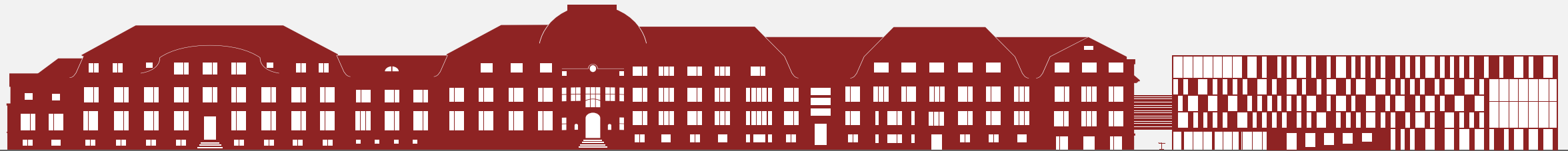
- (1) All disputes arising out of or in connection with this contract or its validity shall be finally settled in accordance with the Arbitration Rules of the German Arbitration Institute (DIS) without recourse to the ordinary courts of law.
- (2) The arbitral tribunal shall be comprised of [*please enter “a sole arbitrator” or “three members”*].
- (3) The seat of the arbitration is [*please enter city and country*].
- (4) The language of the arbitration shall be [*please enter language of the arbitration*].
- (5) The rules of law applicable to the merits shall be [*please enter law or rules of law*].





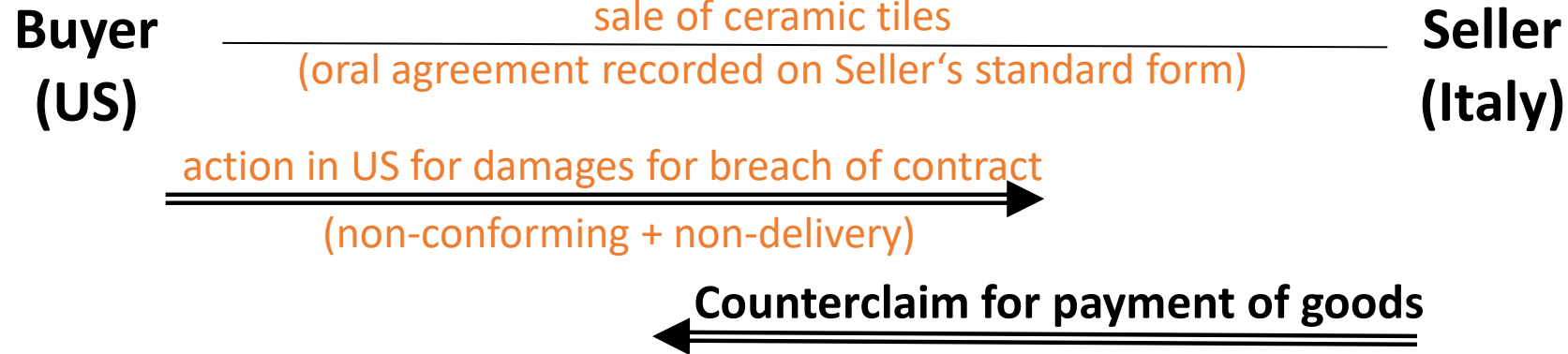
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Interpretation

MCC-Marbel
v.
Ceramica Nuova D'Agostino



Excerpts from Seller's Standard order form

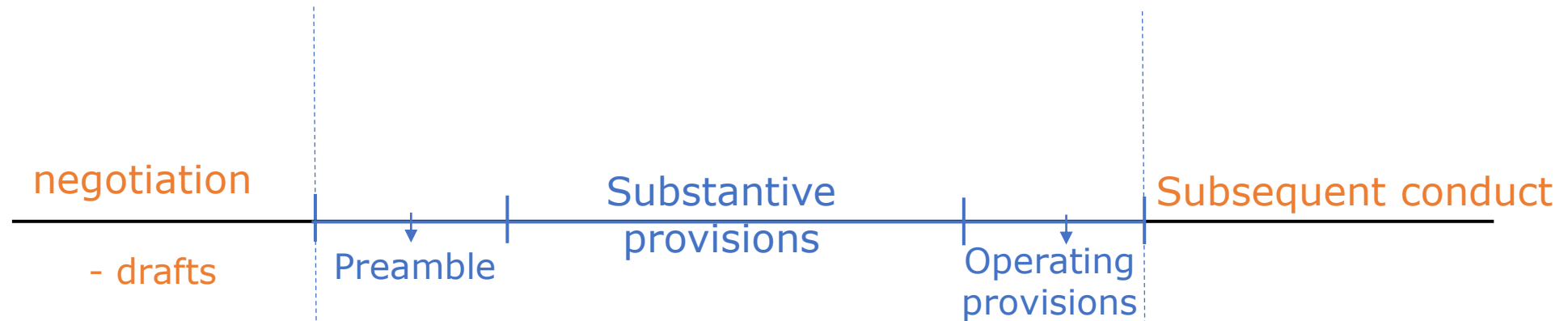
Clause 6(b), “[D]efault or delay in payment within the time agreed upon gives [seller] the right to . . . suspend or cancel the contract itself and to cancel possible other pending contracts and the buyer does not have the right to indemnification or damages.”

Clause 4 “Possible complaints for defects of the merchandise must be made in writing by means of a certified letter within and not later than 10 days after receipt of the merchandise”

MCC-Marbel
v.
Ceramica Nuova D'Agostino

- **Oral Agreement on basic terms at trade show**
 - MCC Director (no knowledge of Italian)
 - Director of Sales D'Agostino + Translator
- **Recorded on seller's standard pre-printed order form**
 - no translation from Italian
 - reference to standard terms directly below signature line
- **Further orders + requirement contract**
- Allegedly oral complaints about quality – deduction of price
- Non-delivery
- **Affidavit by all parties present at negotiation that intention not to be bound by standard terms**

Contract interpretation



- 1) wording: -natural/ ordinary meaning
- 2) systematic

- Ⓟ Objective
- 1) True intention (Art. 8 (1) CISG)
 - 2) Objective understanding
(Contract construction: rectification/implication)

Entire Agreement

Taken from ITC Model Contract (Standard Version 2010)

18. Entire agreement

18.1 This contract sets out the entire agreement between the Parties. Neither party has entered into this contract in reliance upon any representation, warranty or undertaking of the other party that is not expressly set out or referred to in this contract. This Article shall not exclude any liability for fraudulent misrepresentation. *[Add where relevant: “This contract supersedes any previous agreement or understanding relating its subject matter”].*

18.2 This contract may not be varied except by an agreement of the Parties in writing, (which may include e-mail). *[Add where Article 16.3 or equivalent is included: “Or in accordance with Article 16.3”].*

Entire Agreement (2)

§ 12 MISCELLANEOUS

- (1) This Contract contains the entire understanding between the Parties and fully replaces any other agreement or understanding between the Parties on its subject matter entered into before the conclusion of this Contract. Accordingly this § 12 (1) shall prevail over Arts 8 (3) and 11 CISG.
- (2) No amendment to this Contract shall be valid unless made in writing. The same shall apply with regard to any amendment to this written from requirement

(Taken from Ostendorf, International Sales Terms, 3rd ed. 2018, XII)

Interpretation+Communication

- Provision that contract contains complete and conclusive provisions (merger clause)
- Writing requirement for all notifications
 - E.g. Art. 49 (Avoidance), Art. 39 (Notice)
- Writing requirement for amendments
 - Exclusion of Art 29 (2) (Reliance on conduct)
- Provision that communication may be done by fax and e-mail (Art. 13 CISG)





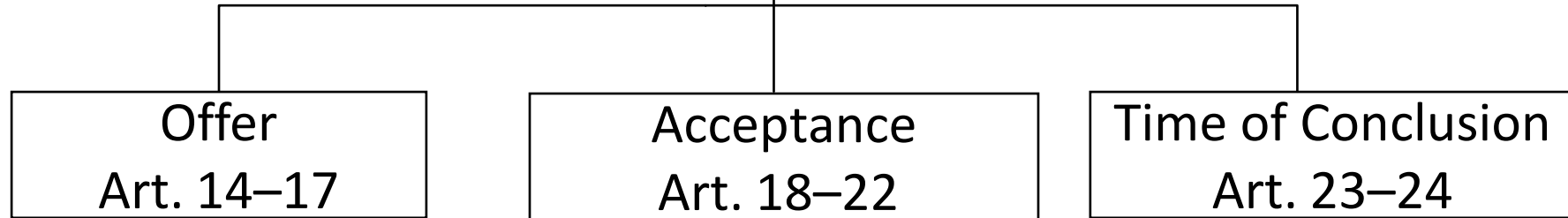
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Contract Formation

Rules on the Formation of Contracts (Part II Art. 14–24)

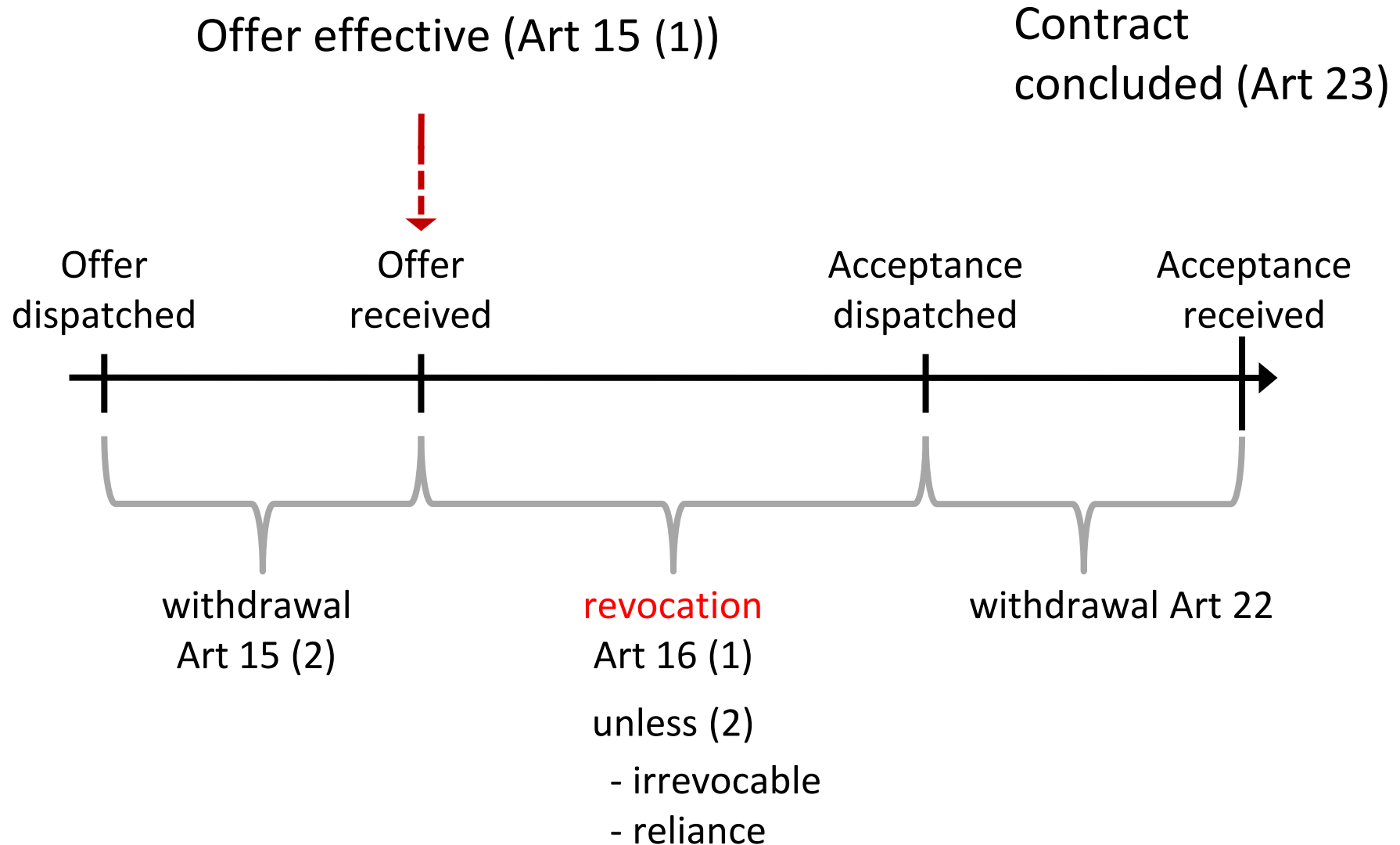


- Art. 14: minimum criteria for offer
- Art. 15: withdrawal
- Art. 16 revocation
- Art. 17 termination

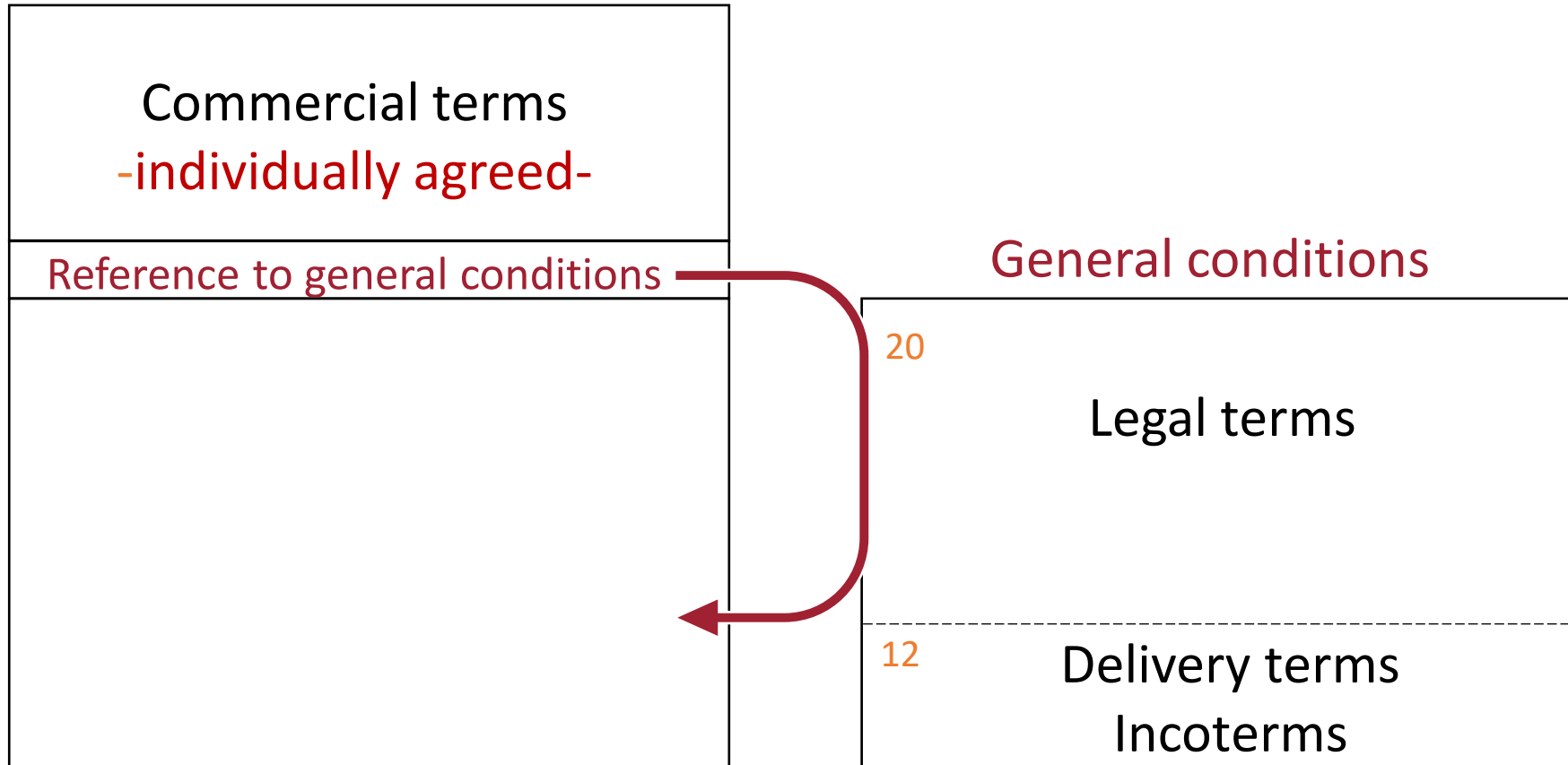
- Art. 18: definition of acceptance / irrelevance of silence
- Art. 19: non-matching acceptance
- Art. 20, 21 period allowed for acceptance
- Art. 22 withdrawal

- Art. 23: Conclusion when acceptance valid
- Art. 24: Definition of when declarations are received

Contract Formation



Contractual terms



Default rules of applicable law

Contract Formation

- Clarification of legal nature of request
- Determination whether offer is ir-/revocable
- Need for an acceptance

“This offer is considered to be rejected unless your acceptance has reached us by 13 June 2009”

- Provision dealing with deviations from offer

“An acceptance which deviates from this offer constitute a rejection. All deviations are considered to be material alterations in the sense of Art. 19 (2) CISG.”

- Take into account special requirements for inclusion of standard terms
 - need to transmit standard terms



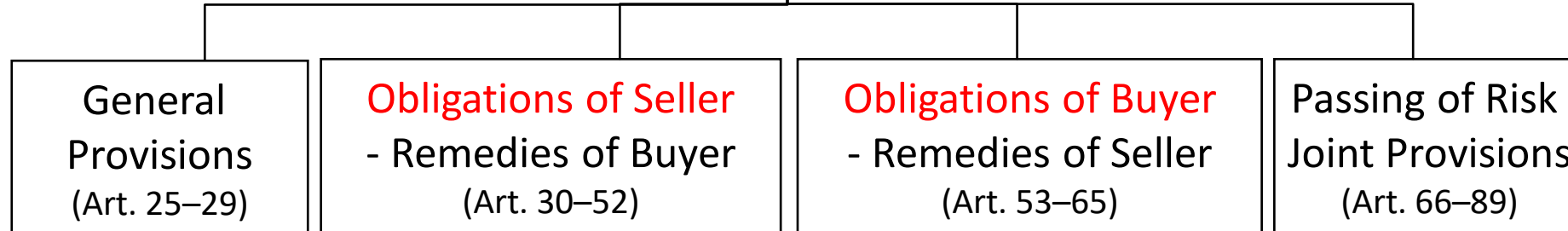
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Parties' Rights And Obligations

Rights and Obligations of the Parties (Part III: Sale of Goods Arts. 25–88)



• **Art. 25:**

Fundamental Breach

• **Art. 26–27**

Declaration of Avoidance / Communications

• **Art. 28**

Specific Performance

• **Art. 29**

Modifications

• **Obligations of Seller**

- Art. 30 General Rule
- Art. 31–34 Delivery
- Art. 35–44 Conformity

• **Remedies for Breach**

- Art. 45 General Rule
- Art. 46–52 Remedies

• **Obligations of Buyer**

- Art. 53 General Rule
- Art. 54–59 Payment
- Art. 60 Taking Delivery

• **Remedies for Breach**

- Art. 61 General Rule
- Art. 62–65 Remedies

Passing of Risk

Art. 66–70

Joint Provisions

Art. 71–73

Anticipatory breach
Installment contract

Art. 74–80

Damages/Exemptions

Art. 81–84

Effects of avoidance

Art. 85–88

Preservation of goods

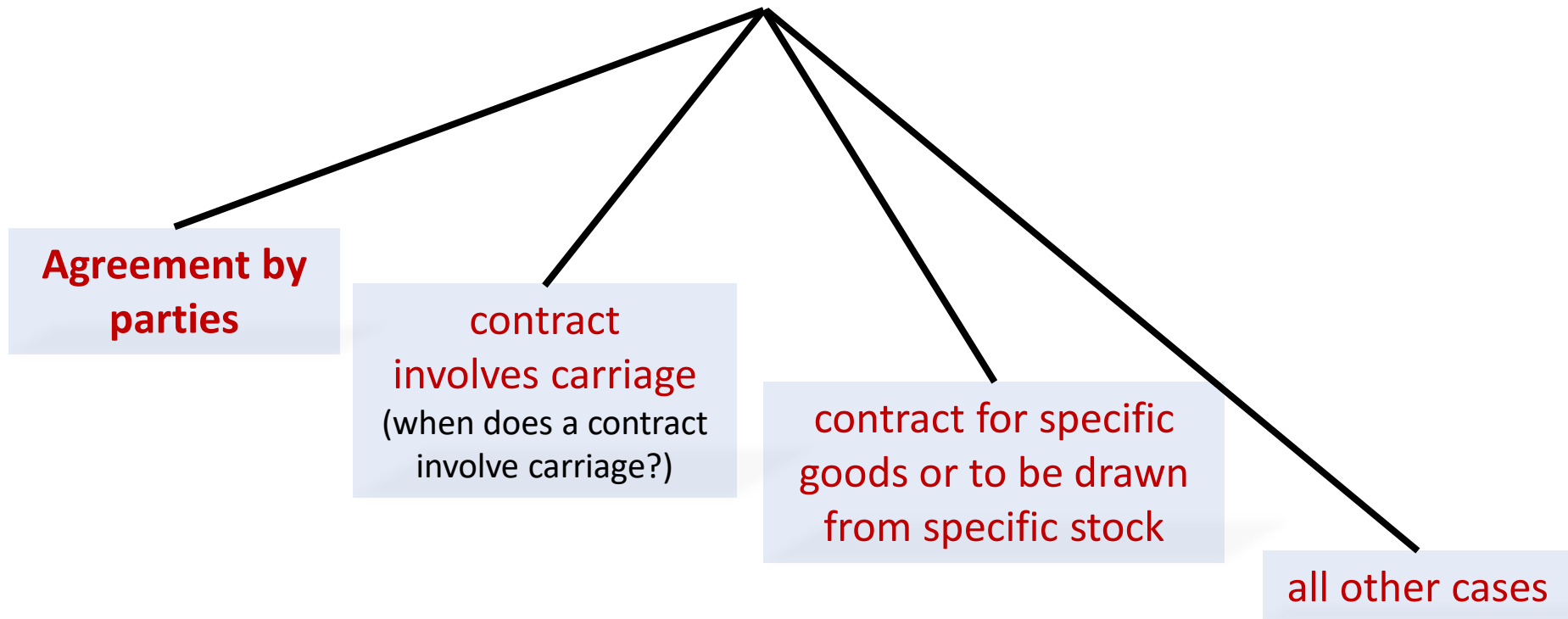


Article 31

If the seller is not bound to deliver the goods **at any other particular place**, his obligation to deliver consists:

- (a) if the contract of sale involves carriage of the goods – in **handing the goods over to the first carrier** for transmission to the buyer;
- (b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place - in placing the goods at the buyer's disposal at that place;
- (c) in other cases – in placing the goods at the buyer's disposal at the **place where the seller had his place of business** at the time of the conclusion of the contract.

Place of Delivery



P

Place of delivery

- 1) always if not contract goods present
- 2) independent carrier/ own personnel

**Seller's
place of
business**

Incoterms 2020

(International **co**mmercial **ter**ms)

Regulations on:

- when has seller completed his obligation to deliver goods
- who must arrange and pay for the main carriage
- when is the risk passed to the buyer
- who must deal with export and import formalities



Content of INCOTERMS

Seller

- A1: General obligations of the seller (delivery goods/invoice)
- A2: Licences, authorizations security clearance and other formalities
- A3: Contract of carriage and insurance
- A4: Delivery
- A5: Transfer of risk
- A6: Allocation of costs
- A7: Notices to buyer
- A8: Delivery document
- A9: Checking/packaging/ marking
- A10: Assistance with information and related costs

Buyer

- B1: General obligations of the buyer (payment)
- B2: Licences, authorizations security clearance and other formalities
- B3: Contract of carriage and insurance
- B4: Taking delivery
- B5: Transfer of risk
- B6: Allocation of costs
- B7: Notices to seller
- B8: Proof of delivery
- B9: Inspection of goods
- B10: Assistance with information and related costs



INCOTERMS 2010/2020

Main principle: party best positioned to undertake the function to clear the goods and pay duties and other costs in connection with export and import should do so

Group E Departure (EXW)	Exception from main principle: buyer has to assume obligations with respect to export and import
Group F Main Carriage Unpaid (FCA; FAS; FOB)	Seller should do what is necessary to clear goods for export
Group C Main Carriage Paid (CPT; CIP; CFR; CIF)	Seller assumes obligations with respect to export – buyer assumes obligations with respect to import
Group D Arrival ((DAT)); DAP; DPU; DDP)	Buyer should do what is necessary to clear goods for import: Exception: DDP.



Place and Time of Delivery

- Rudimentary provisions in the CISG (Art. 31ff)
- Regulation via INCOTERMS (Art. 6 CISG)
 - Provision referring to INCOTERMS 2020 (in particular Fob)
- Interest of the buyer to clarify the importance of the time for delivery

“Should the delay in delivery exceed 20 day the breach will be considered to be fundamental and the buyer is entitled to avoid the contract.”

“The seller has to pay damages in the amount of 0,1% for each day the delivery is delayed. Such damages shall not exceed 5% of the contract value.”

Specification of the Goods

- The conformity regime of the CISG
 - Art. 35 (1): contractual provisions
 - Art. 35 (2): purpose ((b): particular (a): ordinary)
- Interpretation through case law
 - e.g. BGH “New Zealand Mussels”

The Legal Framework: Art. 35

(1) The seller must deliver goods which are of the quantity, quality and description **required by the contract** and which are contained or packaged in the manner required by the contract.

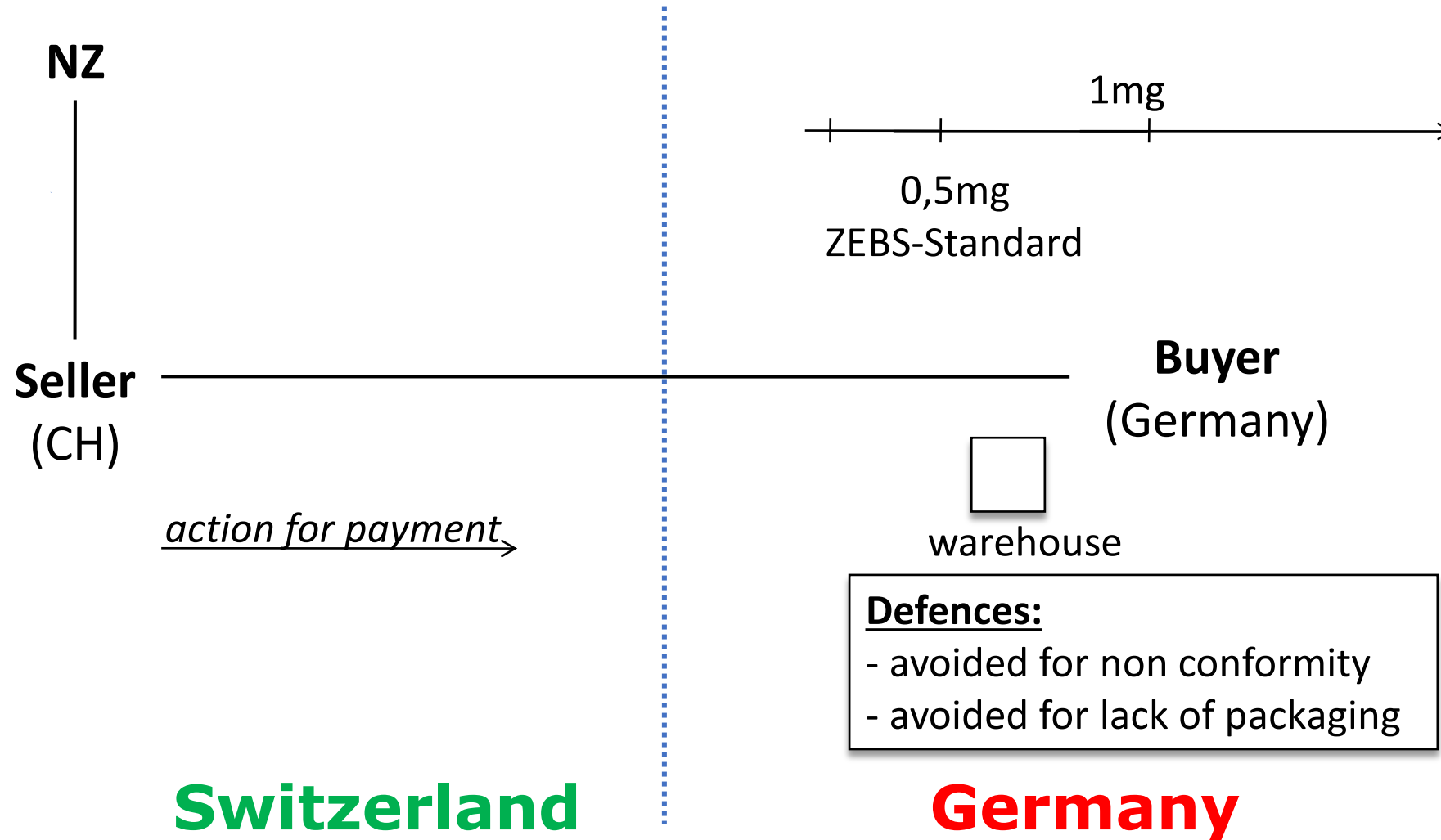
(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) are **fit for the purposes** for which goods of the same description would **ordinarily** be used;

(b) are fit for any **particular purpose expressly or impliedly made known** to the seller at the time of the conclusion of the contract,
except where the circumstances show that the buyer **did not rely**, or that it **was unreasonable** for him to rely, on the seller's skill and judgement;

“New Zealand Mussels”

(BGH 8.5.1995)



Specification of the Goods

- Interest of buyer to submit goods to standards of the buyer's country (Art. 35 (1) CISG)

“The goods have to comply with the applicable safety and labelling standards in Hong Kong”

- Interest of buyer to receive guarantee in the sense of Art. 36 (2) CISG

Obligations of the buyer (Art. 53–65)

Characteristic Duties

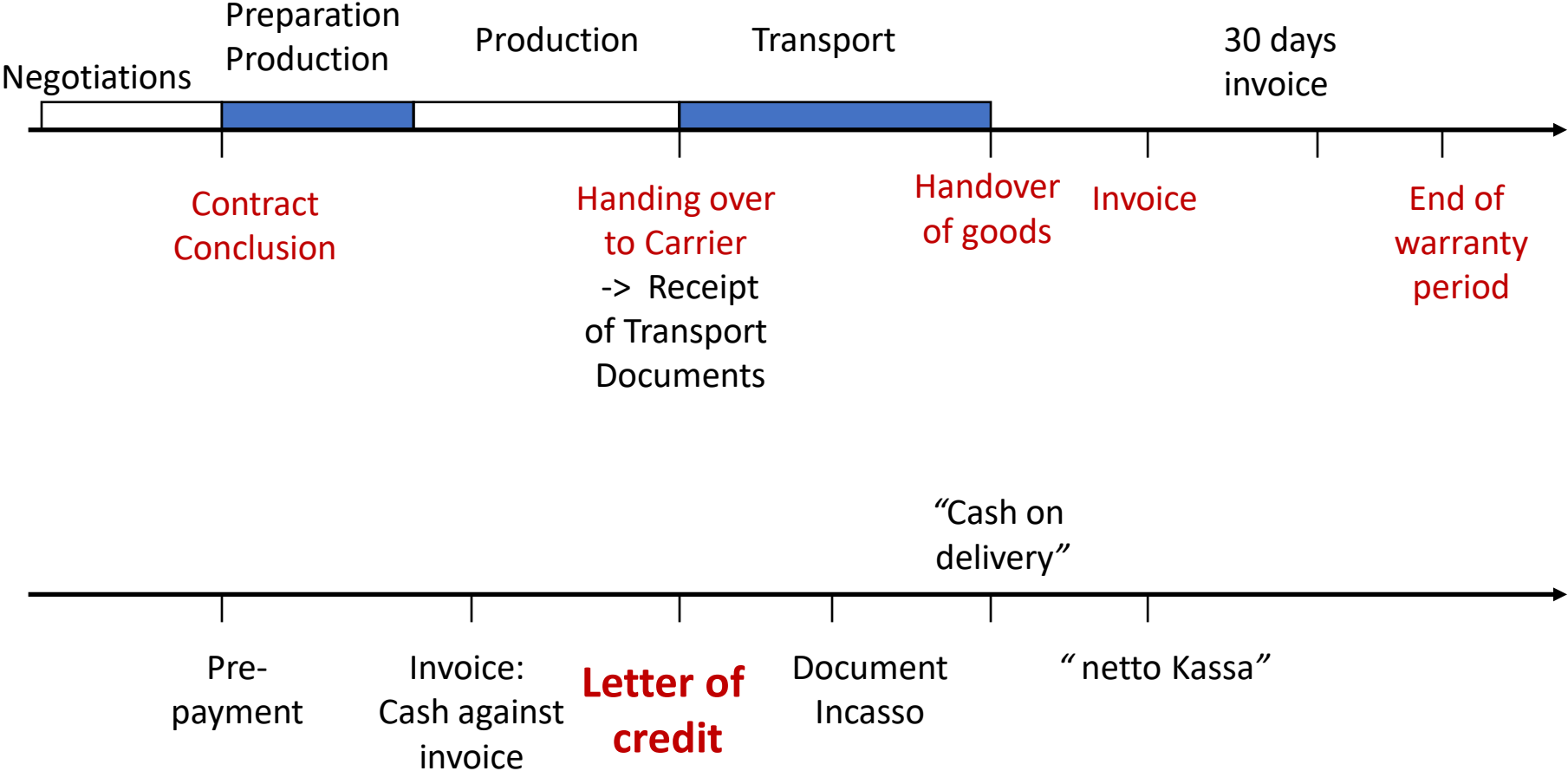


- Price as agreed by the parties (Interpretation: Art. 55, 56)
- Taking of preparatory steps (Art. 54)
- Opening of letter of credits etc.
- Place of payment: Art 57
- Time of payment: Art 58
- Payment due: Art 59 (no request necessary)

- Taking of goods and documents (Art. 60 (b))
- Taking of necessary steps (e.g. specification, request for delivery)
- Mode of taking delivery depends on mode of delivery
- Time of taking delivery depends on time of delivery (Art. 33)

- Contractually agreed by parties
e.g. Non-competition clauses
- Arising from usages/ practices: Art. 9
- Arising out of CISG
 - Art. 86 (Preservation)
 - Art. 65 (Specification of goods)
 - Art. 7 (duty to cooperate)

Dates for Payment



Place and Time of Payment

- Provisions in the CISG: Art. 57,58
- Interest of the buyer in regulating place of payment in deviation of Art 57 (1) lit. a
 - Otherwise potentially jurisdiction of the seller's courts (see also Brussels Ia Regulation in EU)
- Interest of seller in “documentary” payment clauses
 - Clarification that presentation of non-conforming documents constitutes a fundamental breach in the sense of Art 25
- Regulation of applicable interest rate



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Breach of Contract and Remedies

Remedial System of CISG

- Principle: uniform system Art. 45
- Available remedies
 - Specific Performance: Art 46 (Art. 28)
 - Price Reduction: Art. 50
 - Damages: Art. 45 (1)(b), Arts 74 *et seq.*
 - Avoidance: Art. 49
- Existing hierarchy

Exclusion of liability

Cure by the seller

Before date of delivery, Art. 37

After date of delivery, Art. 48

Non-compliance with duty to notify seller within time

Non-conforming goods:
Arts. 38, 39 (40, 44)

Defective Title:
Art. 43(1) (43(2), 44)

Statutory exclusion

- Knowledge
Art. 36 (3)
- Failure caused by the buyer,
Art. 80

Exclusion through agreement between the parties

- Individually agreed Exclusion
 - Quantity
 - Certain specified damages
- Standard Terms

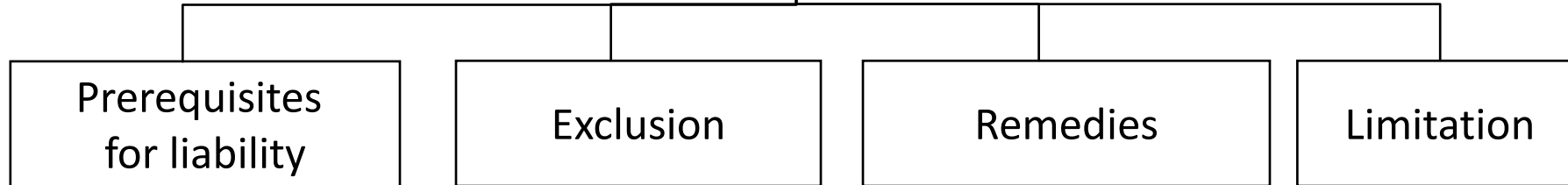
Article 42

(1) The seller must deliver goods which are free from any **right or claim** of a third party based on **industrial property or other intellectual property**, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:

(a) under the law of the State where the **goods will be resold** or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; r

(b) in any other case, under the law of the State where the **buyer has his place of business**.

Rights of the Buyer in the case of a third party right or claim



- Third party right or claim, Art. 41
- Right or claim based on intellectual property, Art. 42
 - Only if seller knew or could not have been unaware of that right or claim
- At the time of delivery

- Assent of buyer, Art. 41
- Buyer knew or could not have been unaware, Art. 42 (2) (a)
- Claim results from buyer's specifications, Art. 42 (2) (b)
- Notification, Art. 43
- Cure by the seller, Art. 48
- Exclusion of liability clause in the contract

- Generally:
 - Performance, Art. 46 (1)
 - Damages, Art. 45 (1) (b)
- In case of a **fundamental breach**, Art. 25
 - Avoidance, Art. 49 (1) (a)

- Not governed by the CISG UN-Convention on Limitation (few Member States)
=>Conflict of Law Rules
- If German Law applies:
 - ➔ § 438 BGB:
 - (I no. 1: 30 years
 - I no. 3: 2 years)

Duty to Notify (Art. 39)

- Interest of buyer in excluding Art. 39, 43

- Completely
- Specification requirement – notice sufficient

- Regulation of what constitutes a “reasonable time”

The buyer has to examine the goods immediately upon delivery and has to notify the seller about a non-conformity of the goods as soon as possible but not later than 14 days after the arrival of the goods at the place of destination. The notice must be in writing and specify the non-conformity. Should no notice be given within this time the goods are considered to be accepted and all remedies for lack of conformity are excluded pursuant to Art. 39 CISG.

Hidden defects are to be notified to the seller within 10 days after their discovery. Claims for non-conformity may only be raised within a period of two years after delivery of the goods.



Article 25


A breach of contract committed by one of the parties is **fundamental** if it results in such detriment to the other party as **substantially to deprive** him of what he is **entitled to expect** under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result



“Cobalt Sulphate”

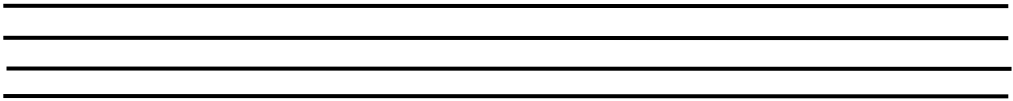
BGH 3.4.1996

Producer
(South Africa)


(United Kingdom)

4 contracts

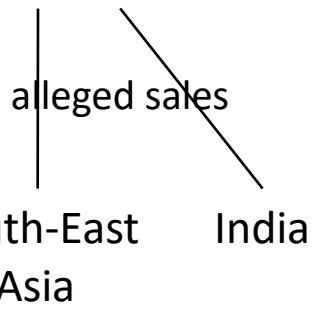
Seller
(Netherlands)



Buyer
(Germany)

Brooker’s purchase agreement

“roduct: Cobalt Sulfate 21% Quality; ex M. Payment: CAD [cash against documents] by cable transfer Documents: Certificate of Analysis.”



Final remarks:

“cobalt sulfate, at least 20/21% (*Feed Grade*); origin: England”
Certificate of Origin and Certificate of Analysis have to be provided



Fundamental Breach

- Potential for disputes about “fundamentality” of a dispute
- Interest of the seller
 - High threshold for breach of own contractual duties
 - Often regulated implicitly by wide right to cure
- Interest of the buyer

The breach of the aforementioned explicitly regulated duty to deliver constitute a fundamental breach in the sense of Art. 25 CISG, which is otherwise excluded. The covers in particular delay in delivery and the delivery of non-conforming goods.



Damage Claims

- Regime of the CISG:
 - Compromise between Civil- und Common Law
 - Not fault based liability with limitations (Art. 79)
- Conflicting interests of buyer and seller
 - Buyer: full compensation of all damages including loss of profit and consequential damages
 - Seller: Limitation of liability to
 - fault
 - value of the goods
- Often specific force majeure/hardship clauses
- Contractual provisions often dependent on bargaining power

Change of Circumstances

- Potential Conflict with Sanctity of Contract

Pacta sunt servanda vs. Clausula rebus sic stantibus

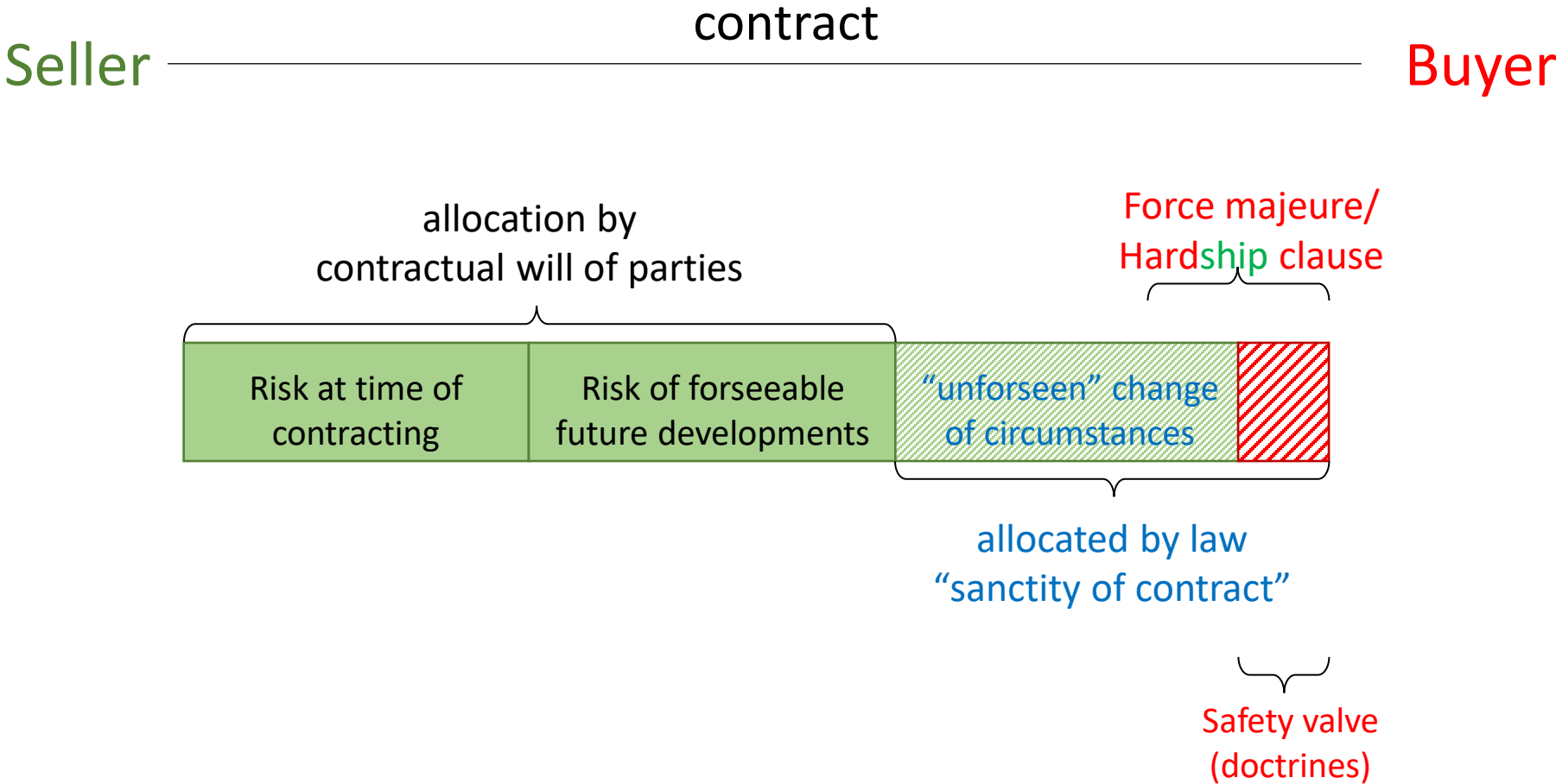
- Risk allocation: complete or only foreseeable risks?

Increasingly recognized that complete allocation not in line with parties' intent

- *e.g.: hardship provision in UNIDROIT Principles*
- *Economic analysis of law: different factors*

Risk allocation

- e. g. obligation to deliver -



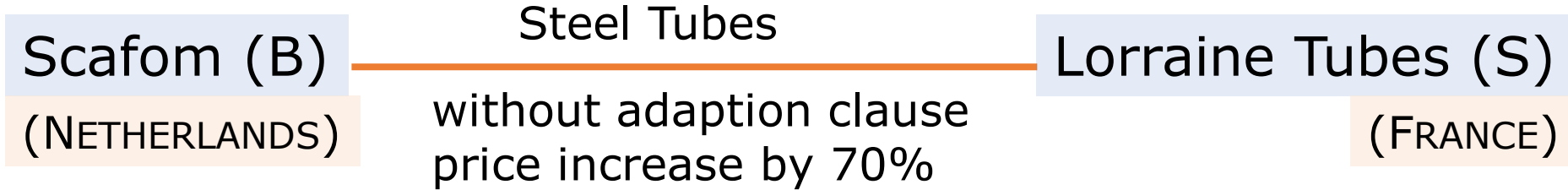
ICC: Force Majeure Clause 2020

(1) Definition. “Force Majeure” means the occurrence of an event or circumstance (“Force Majeure Event”) that **prevents or impedes** a party from performing one or more of its contractual obligations under the contract, if and to the extent that the party affected by the impediment (“the Affected Party”) proves:

- a) that such impediment is **beyond its reasonable control**; and
- b) that it could **not reasonably have been foreseen** at the time of the conclusion of the contract; and
- c) that the effects of the impediment could **not reasonably have been avoided** or overcome by the Affected Party.

Scafom v. Lorraine Tubes

(Belgian Supreme Court 19 June 2009)



1st instances: adaption rejected
→ imprévision not settled in CISG

2nd instance: gap in CISG
→ French Law: good faith

Supreme Court: Art 7 (2)
↳ UNIDROIT

ICC-Hardship Clause - Requirements

1. A party to a contract is bound to perform its contractual duties even if events have rendered performance more onerous than could reasonably have been anticipated at the time of the conclusion of the contract.

2. Notwithstanding paragraph 1 of this Clause, where a party to a contract proves that:
 - a) the continued performance of its contractual duties has become excessively onerous due to an event beyond its reasonable control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract; and that
 - b) it could not reasonably have avoided or overcome the event or its consequences, the parties are bound, within a reasonable time of the invocation of this Clause, to negotiate alternative contractual terms which reasonably allow to overcome the consequences of the event.



ICC-Hardship Clause 2020: Remedies

3A – Party to terminate:

Where paragraph 2 of this Clause applies, but where the parties have been unable to agree alternative contractual terms as provided in that paragraph, the party invoking this Clause is entitled to terminate the contract, but cannot request adaptation by the judge or arbitrator without the agreement of the other party.

3B – Judge adapt or terminate:

Where paragraph 2 of this Clause applies, but where the parties have been unable to agree alternative contractual terms as provided for in that paragraph, either party is entitled to **request the judge or arbitrator to adapt the contract** with a view to restoring its equilibrium, or to terminate the contract, as appropriate.

3C – Judge to terminate:

Where paragraph 2 of this Clause applies, but where the parties have been unable to agree alternative contractual terms as provided in that paragraph, either party is entitled to request the judge or arbitrator to declare the termination of the contract.