

MAKING THE RIGHT CHOICES IN DRAFTING ARBITRATION AGREEMENTS

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Key requirements for a valid arbitration agreement

2

Core elements of international arbitration agreements

3

Pathological arbitration agreements: solutions and prevention

KEY REQUIREMENTS FOR A VALID ARBITRATION AGREEMENT



1. Key requirements for a valid arbitration agreement

a

- Formal requirement for validity

b

- Substantive requirements for validity

1. Key requirements for a valid arbitration agreement

a. Formal requirement – in writing

NY Convention

- “The term **agreement in writing** shall include an arbitration clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letter or telegrams”

Model Law 2006

- Option 1 requires the agreement be in writing, but recognizes a record of “contents” of the agreement “in any form”
- Option 2 omits any requirement as to form

1. Key requirements for a valid arbitration agreement

b. Substantive requirements

Parties have capacity to contract

The agreement is valid under its governing law

Arbitrability

A clear agreement to submit the present or future dispute to arbitration

1. Key requirements for a valid arbitration agreement

Drafting an arbitration agreement

- Arbitration is a creature of contract
→ need correct wording in the AA.
- Conducting an **efficient arbitration** starts with drafting an **effective AA**

1. Key requirements for a valid arbitration agreement

Consequences of a poorly drafted AA

Parallel proceedings

Challenges to Tribunal's jurisdiction

Affect the chances of successful enforcement

Bind the parties to an expensive or lengthy procedure

CORE ELEMENTS OF AN INTERNATIONAL ARBITRATION AGREEMENT



2. Core elements of an international arbitration agreement

Institutional or Ad Hoc Arbitration?

Arbitral Institution and its Rules

Scope of Arbitration Agreement

Seat of Arbitration

Law governing the arbitration agreement

Appointment of Arbitrators

Substantive law

2. Core elements of an international arbitration agreement

Institutional Arbitration

- Conducted pursuant to institutional rules
- Overseen by non-governmental administrative body with various functions
- Extent of institutional involvement varies

Ad Hoc Arbitration

- Conducted by arbitrators and parties
- Without involving any institution, relying on the assistance of the court
- Often conducted without pre-existing set of rules, which may be difficult agreed upon when the dispute arises

2. Core elements of an international arbitration agreement

Arbitral Institutions and its Rules

SIAC

ICC

LCIA

HKIAC

VIAC

CIETAC

Prescribe the **CORRECT** name of the institution!

2. Core elements of an international arbitration agreement

Arbitral Institutions and its Rules

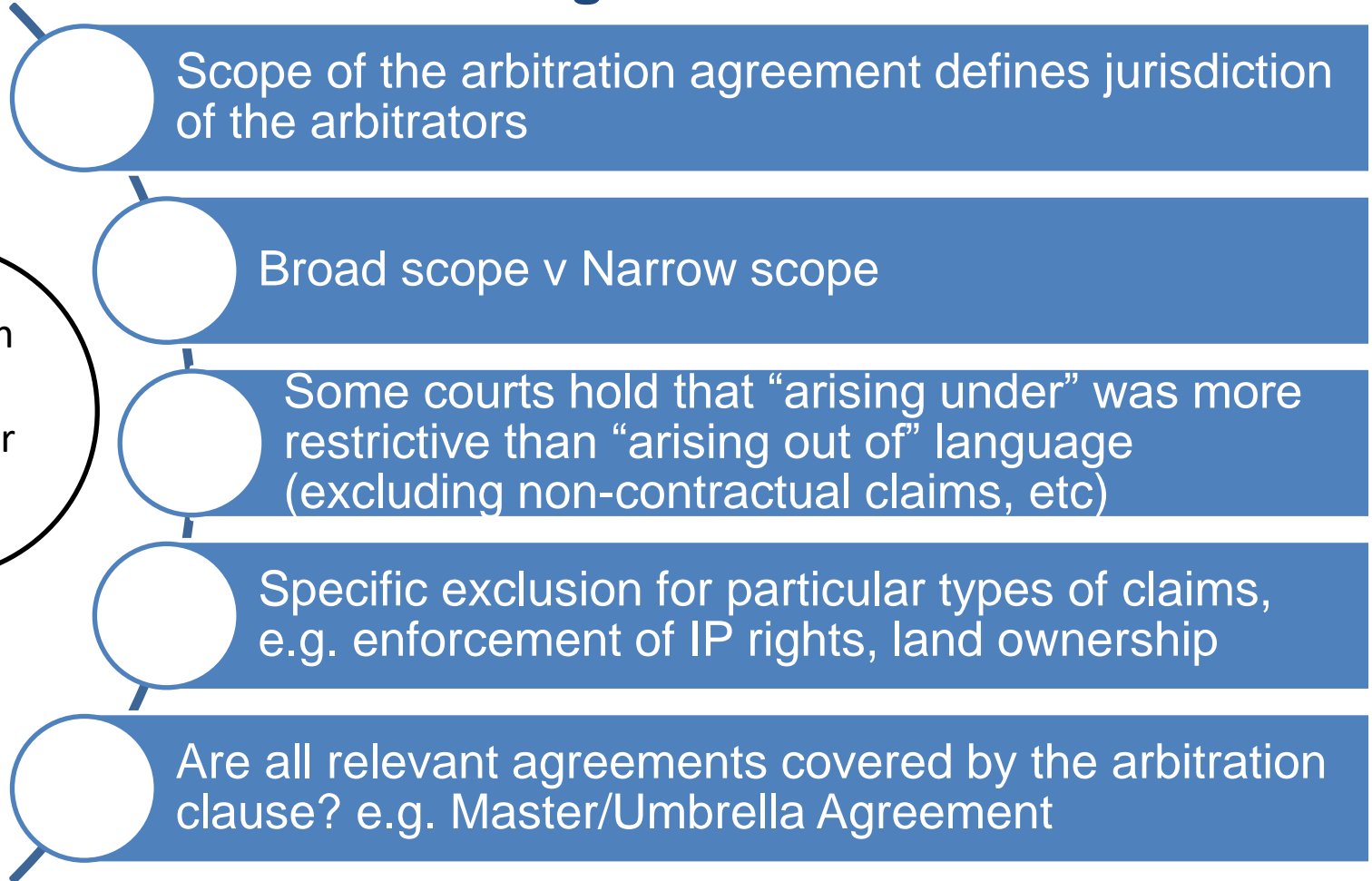
VIAC Model Arbitration Clause

- Any dispute arising out of or in relation with this contract shall be resolved by arbitration at the Vietnam International Arbitration Centre at the Vietnam Chamber of Commerce and Industry (VIAC) in accordance with its Rules of Arbitration.
- The place of arbitration shall be [city and/or country]
- The governing law of the contract shall be the substantive law of []
- The language to be used in the arbitral proceedings shall be []

2. Core elements of an international arbitration agreement

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Scope of the Arbitration Agreement



Arbitral Institutions and its Rules

Modified VIAC Model Clause

- “Any dispute, ***controversy or claim arising in any way*** out of or in relation with this contract (***including, without limitation: (1) any contractual, pre-contractual or non-contractual rights, obligations or liabilities; and (2) any issue as to the existence, validity or termination of this contract***) shall be resolved by arbitration at the Vietnam International Arbitration Centre at the Vietnam Chamber of Commerce and Industry (VIAC) in accordance with its Rules of Arbitration [...]”

2. Core elements of an international arbitration agreement

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Seat of arbitration

Why is the seat critical?

- Enforcement of arbitration agreement.
- Applicability of NYC
- Standards of arbitrators' independence and impartiality
- Judicial support for arbitral process, etc.

Preferred seat?

- Country that has joined NYC
- National legislation supportive of international arbitration
- Appropriate logistic/infrastructure

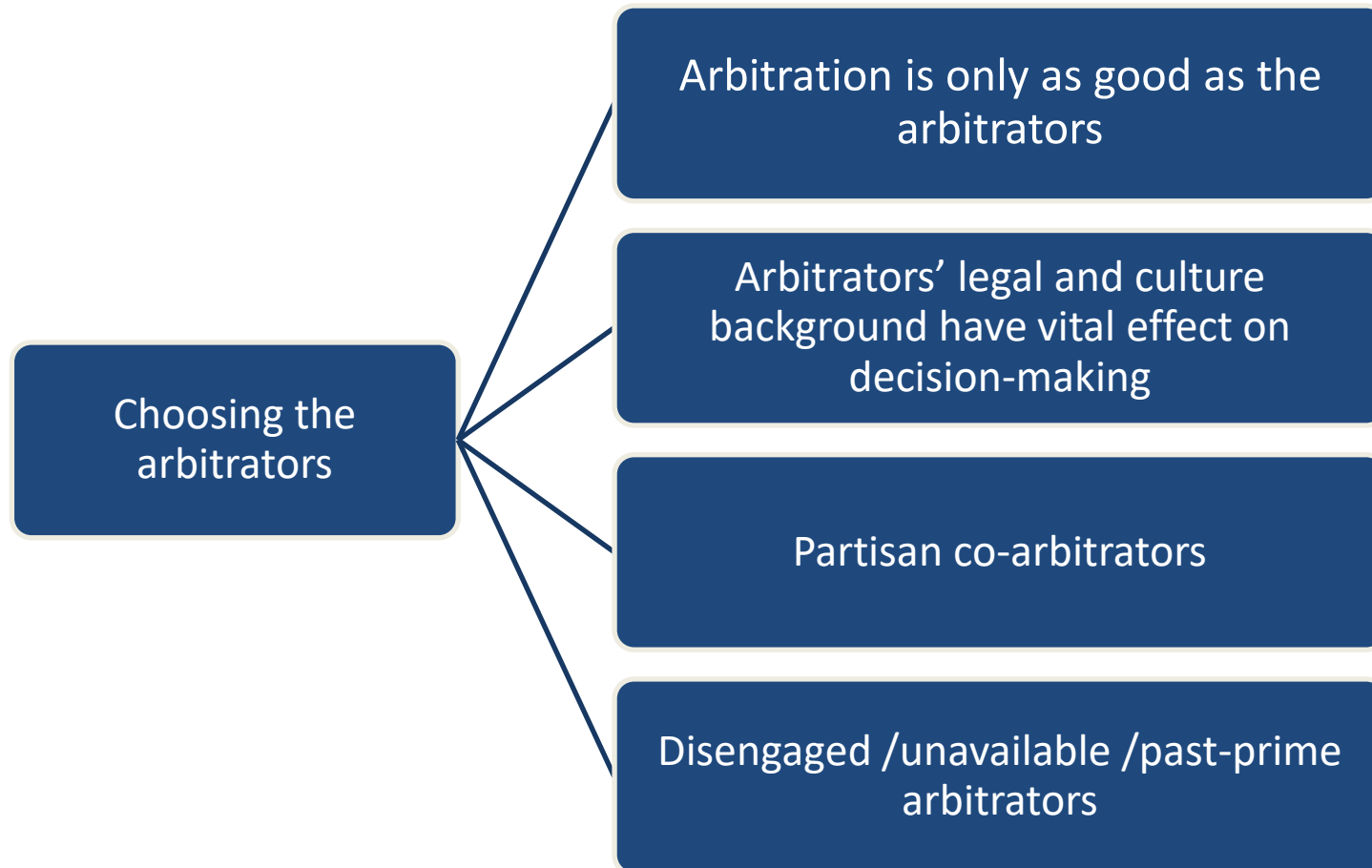
2. Core elements of an international arbitration agreement

Law governing the arbitration agreement

- Should the governing law of the arbitration agreement be that of the **substantive law of the contract** or the **law of the seat of the arbitration**?
- *SulAmerica Cia Bacuibak De Seguros S.A. and others v Enesa Engenharia S.A.* [2012] 1 Lloyd's Rep 671 cf. *FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others* [2014] SGHCR 12

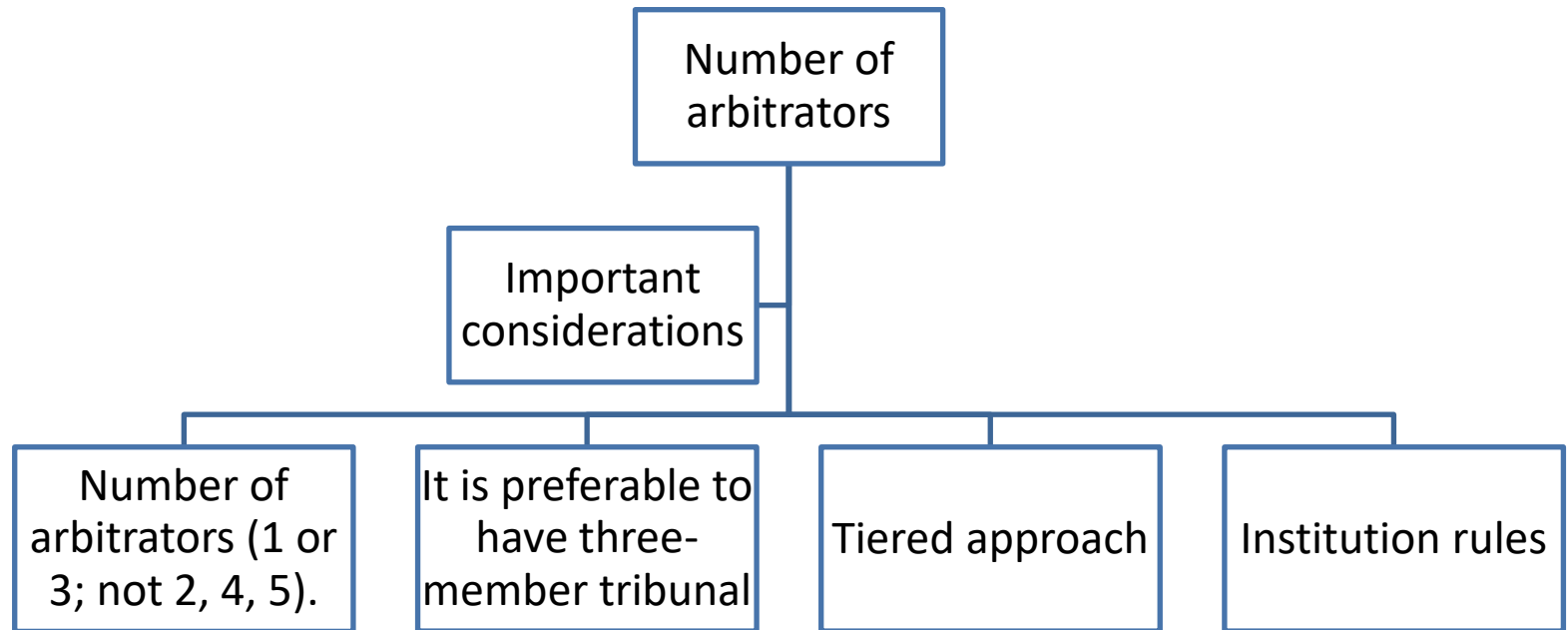
2. Core elements of an international arbitration agreement

Appointment of arbitrators



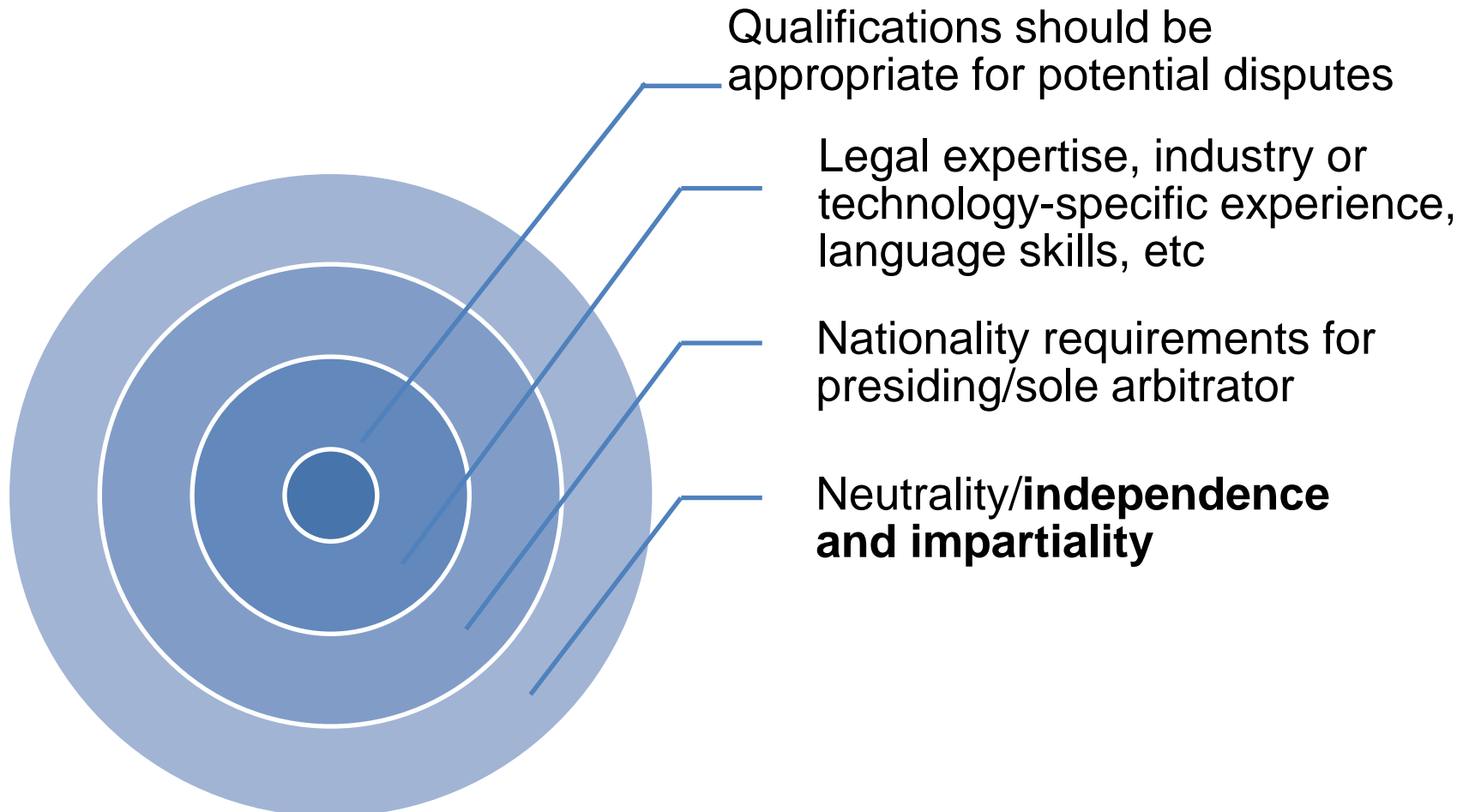
2. Core elements of an international arbitration agreement

Appointment of arbitrators



2. Core elements of an international arbitration agreement

Arbitrators qualifications



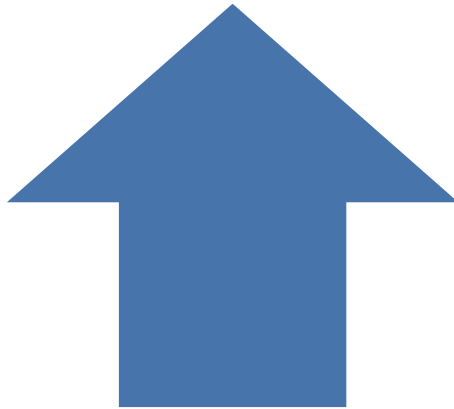
2. Core elements of an international arbitration agreement

Substantive law

The parties should determine the law that will be applied to resolve the dispute
E.g: This contract shall be governed by the Laws of England & Wales

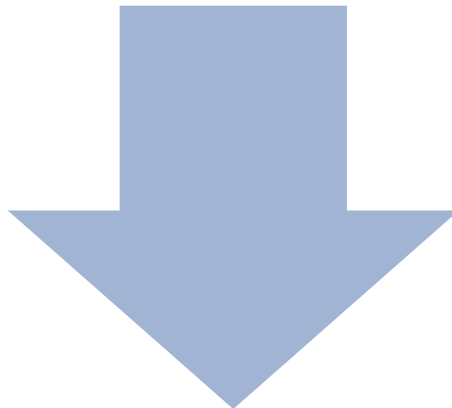
2. Core elements of an international arbitration agreement

Unilateral arbitration agreement



Type 1

- Arbitration (both parties)
- Litigation (granted to one party)



Type 2

- Litigation (both parties)
- Arbitration (granted to one party)

2. Core elements of an international arbitration agreement

Unilateral arbitration agreement

Jurisdictions refused to enforce the agreement

- Sony Ericsson case [2012] (Russia)
- Mme X vs Banque Privee Edmon de Rothschild [2012] [France]

Jurisdictions enforced the agreement

- NB Three Shipping Ltd vs. Harebell Shipping Ltd [2004] (UK)
- Dyna-Jet case [2016] (Singapore)

Multi-tiered arbitration agreement

- In the event of any dispute arising out of or in connection with the present contract, the parties **shall first refer the dispute to proceedings under the ICC Mediation Rules**. If the dispute has not been settled pursuant to the said Rules within [45] days following the filing of a Request for Mediation or within such other period as the parties may agree in writing, **such dispute shall thereafter 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 of Arbitration

2. Core elements of an international arbitration agreement

Arbitration Agreements in the COVID-19 era

- Virtual hearing and conducting arbitration proceeding in the WFH mode is essential for all international arbitration centers

- VIAC modified arbitration clause to add:

“Upon request of a party, the Tribunal may conduct procedural meetings and any hearings via video conferencing or other virtual means or platforms.”

2. Core elements of an international arbitration agreement

Arbitration Agreements in the COVID-19 era

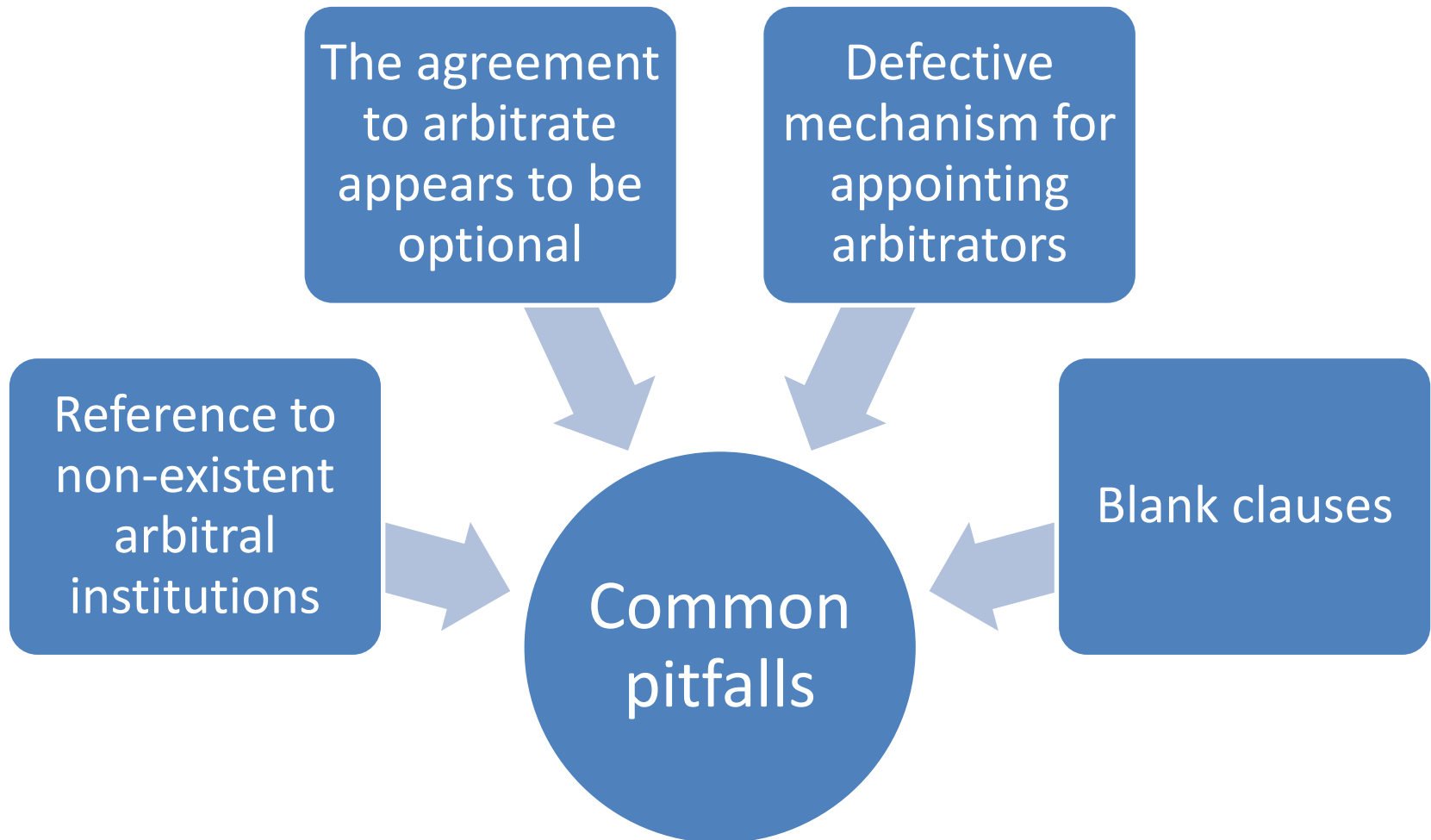
- Arb-med clause?

The screenshot shows a web browser window with the URL medup.vmc.org.vn/vi/. The page features a green and white color scheme. On the left, there are four menu items in a 2x2 grid: 'Quy tắc hòa giải trực tuyến' (Online Dispute Resolution Rules) with a scales icon, 'Các hướng dẫn' (Guidelines) with a document icon, 'Biểu phí Hòa giải trực tuyến' (Online Dispute Resolution Fees) with a money bag icon, and 'Danh sách Hòa giải viên trực tuyến' (Online Dispute Resolution Panel) with a magnifying glass icon. On the right, the page displays the 'vmc' logo (Trung tâm Hòa giải Việt Nam) and the 'medup' logo. At the bottom right, there are two buttons: 'TẠO VỤ TRANH CHẤP MỚI' (Create New Dispute) and 'ĐĂNG NHẬP' (Login). The browser's address bar and navigation icons are visible at the top.

PATHOLOGICAL ARBITRATION AGREEMENTS



3. Pathological Arbitration Agreements



Selecting a non-existent arbitral institutions

- In international arbitration, a relatively common mistake is to refer to the International Chamber of Commerce “in Geneva”, “in Zurich” or “in Vienna”
- ICC Case No. 5103 recognized the validity of a clause referring to the non-existent arbitral institution

3. Pathological Arbitration Agreements

Decision No. 1240/2013/QĐ-GQKN (Vietnam Company v. BMB)

- Vietnam Company requested the court to decide that the VIAC Tribunal had no jurisdiction over the case
- The arbitration clause in the Appendix 1 of the Contract does not clearly indicate the a specific arbitral institution. The parties did not reach an agreement on the institution.
- The court held that Claimant shall have right to select the arbitral institution pursuant to Article 43.5 LCA, and the Tribunal has jurisdiction over the case.

Blank clause

- A blank clause is one containing no indication, whether directly or by reference to arbitration rules or to an arbitral institution, as to how the arbitrators to be appointed.
- E.g: “*Resolution of disputes: arbitration, Paris*”

Non-mandatory arbitration clause

Decision No. 1222/2014/QĐ-PQTT (Vina v. Kim Thanh)

- Article 9 of the Contract: “[...]one of the parties shall have rights to bring any dispute to the competent court”
- Article 13 on the remedy for breach of: “[..]the disputes shall be resolved at the Vietnam International Arbitration Centre [...]”
- Respondent requested the court to set aside the award because Article 13 was inconsistent with the Article 9
- The court refused Respondent’s request and hold that the Tribunal had jurisdiction over the case

Non-mandatory arbitration clause

Decision No. 923/2017/QĐ-PQTT

- Respondent requested the court to set aside the case
- In the Contract Appendix (June 29, 2013): *“Any dispute which cannot be resolved by negotiation between the parties shall be submitted to the Economic Court of HCMC [..]”*
- Article 21 of the contract (June 1, 2013): *“All disputes arising from the contract shall be resolved by negotiation between the parties in good faith. In the event that the parties are unable to reach an agreement, either party may submit the dispute to an arbitration centre [...].”*

Non-mandatory arbitration clause

Decision No. 923/2017/QĐ-PQTT

- Both Parties did not agree to terminate Article 21
- The court held that VIAC accepted the case before it confirmed that both parties had not yet conducted the court proceedings (Article 4.2.a Resolution 01/2014)
- Therefore, VIAC's acceptance of this case did not violate the parties' agreement, and the Tribunal has jurisdiction over the case.

Selective arbitration clause

Loan agreements

“Notwithstanding [submission to jurisdiction of English courts clause], the Lender may, at any time before instituting any court proceedings, or otherwise submitting to the jurisdiction of a court, elect to have any Dispute finally settled by arbitration. The arbitration shall be conducted in accordance with the Rules of the Singapore International Arbitration Centre in effect at the time of the arbitration (the “Rules”), except as they are modified by the provisions of this Agreement.”

Selective arbitration clause

Business Cooperative Agreement

“If a dispute is not resolved in mediation the parties will arbitrate, but the seat/location of arbitration will depend upon the party initiating the dispute. If A (VN) initiates, the arbitration would take place in the United States under the AAA/ICDR rules, and if B (US) initiates, the arbitration would take place in Vietnam under VIAC rules.”

- ✓ **Make right choices**
- ✓ **Don't "invent" too much**
- ✓ **Once selected the seat: ensure the AA operates under the *lex fori***
- ✓ ***Utilise Med-Arb combo and technology!***



THANK YOU!

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