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RESOLVING GLOBAL IP & TECH DISPUTES: A GUIDE TO INTERNATIONAL ARBITRATION

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AGENDA

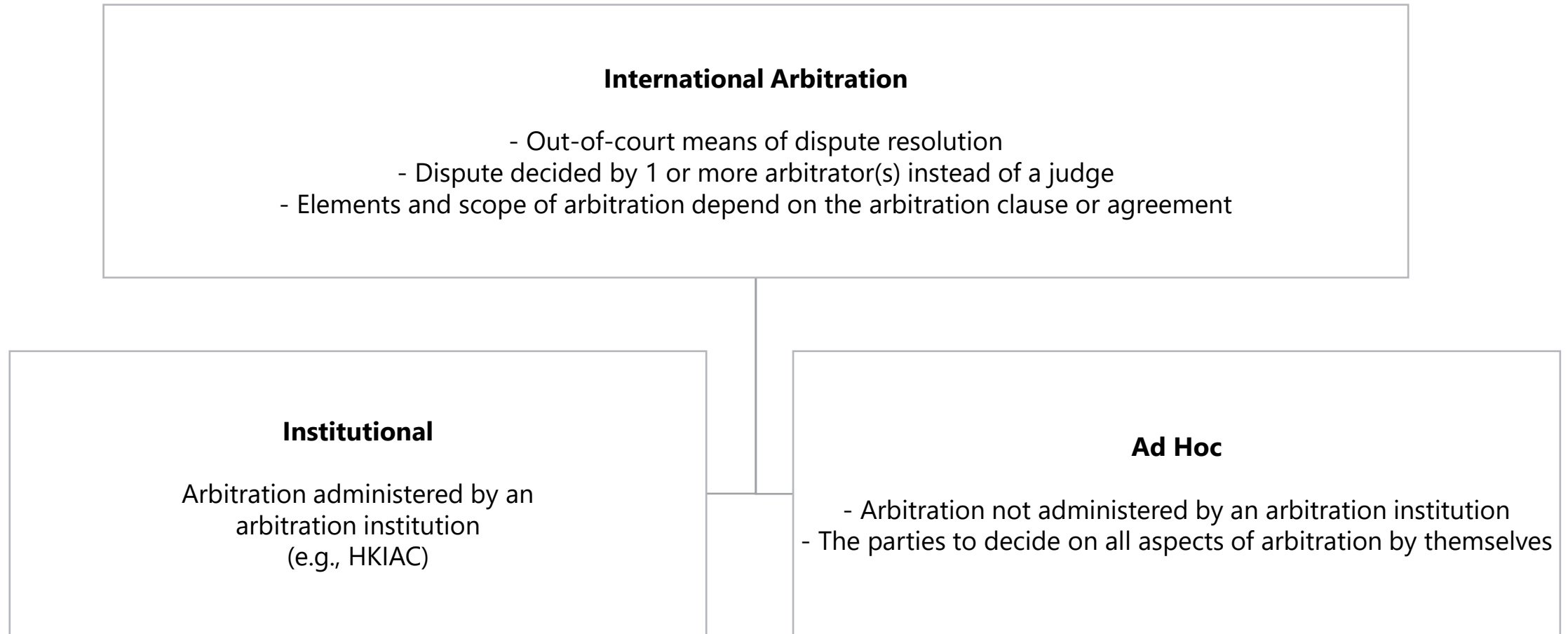
1. Introduction to and evolution of international arbitration
2. Advantages of arbitration over litigation
3. International arbitration procedure
4. Powers of an arbitral tribunal
5. Questions



01

INTRODUCTION TO AND EVOLUTION OF
INTERNATIONAL ARBITRATION

INTERNATIONAL ARBITRATION – WHAT IS IT?



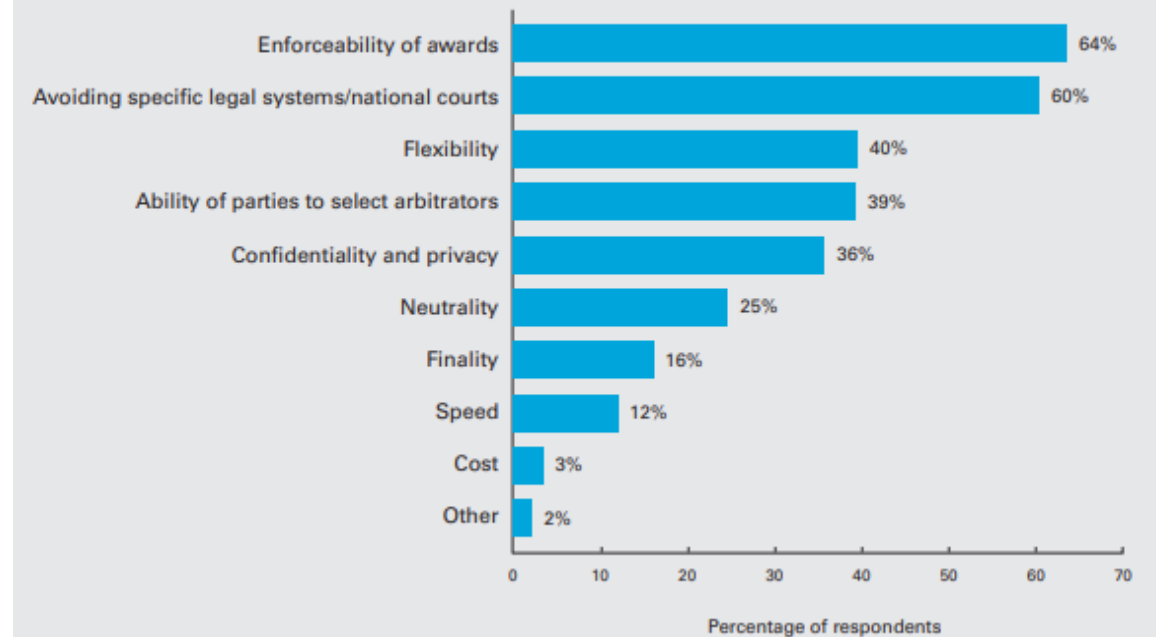
THE EVOLUTION OF INTERNATIONAL ARBITRATION

87% of respondents in a survey indicated that **international arbitration** is their preferred method of cross-border dispute resolution

- The 5 **most preferred seats** of arbitration are London, Singapore, Hong Kong, Beijing and Paris
- The 5 **most preferred arbitral rules** in Asia-Pacific are HKIAC, SIAC, and ICC

AI is changing the game

Chart 3: What are the three most valuable characteristics of international arbitration?



503 cases submitted to HKIAC in 2024, **352** of them were arbitrations

Parties from 53 **jurisdictions** participated in the HKIAC arbitrations in 2024

97.1% of all arbitrations commenced in 2024 were seated in **Hong Kong**

HKIAC Arbitration Statistics

86.1% of HKIAC administered arbitrations in 2024 were **international** in nature

Hong Kong law was the most commonly selected law for HKIAC disputes in 2024, followed by English and Chinese law

Of the arbitrations initiated in 2024 that were administered, **79.3%** were held in English

INVESTOR-STATE ARBITRATION

- Arises under investment treaties
- Many bilateral investment treaties protect IP rights



KENYA-JAPAN BIT

AGREEMENT BETWEEN THE GOVERNMENT OF JAPAN AND THE GOVERNMENT OF THE REPUBLIC OF KENYA FOR THE PROMOTION AND PROTECTION OF INVESTMENT

The Government of Japan and the Government of the Republic of Kenya,

Desiring to further promote investment in order to strengthen the economic relationship between Japan and the Republic of Kenya (hereinafter referred to as "the Contracting Parties");

Intending to further create stable, equitable, favourable and transparent conditions for greater investment by investors of a Contracting Party in the Area of the other Contracting Party;

Recognising the growing importance of the progressive liberalisation of investment for stimulating initiative of investors and for promoting prosperity in the Contracting Parties;

Recognising that these objectives can be achieved without relaxing health, safety and environmental measures of general application;

Recognising the importance of the cooperative relationship between labour and management in promoting investment between the Contracting Parties;

Convinced that this Agreement will contribute to the further development of the overall relationship between the Contracting Parties; and

Recognising that this Agreement is designed to allow each Contracting Party to regulate, and to introduce new measures relating to, investments in its Area in order to meet national public policy objectives;

Have agreed as follows:

Article 1 Definitions

For the purposes of this Agreement,

- (a) the term "investment" means every kind of asset owned or controlled, directly or indirectly, by an investor and has characteristics of an investment such as commitment of capital or other resources, the expectation of gain or profit, or assumption of risk, including:
 - (i) a local enterprise or branch;
 - (ii) shares, stocks or other forms of equity participation in an enterprise, including rights derived therefrom;
 - (iii) bonds, debentures, loans and other forms of debt, including rights derived therefrom;
 - (iv) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;
 - (v) claims to money and to any performance under contract having a financial value;
 - (vi) intellectual property rights, including copyrights and related rights, patent rights and rights relating to utility models, trademarks, industrial designs, layout-designs of integrated circuits, new varieties of plants, trade names, indications of source or geographical indications and undisclosed information;
 - (vii) rights conferred pursuant to laws and regulations or contracts such as concessions, licences, authorisations and permits, including those for the exploration, prospect, exploitation and extraction of natural resources; and
 - (viii) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges.

Article 19 Intellectual Property Rights

1. The Contracting Parties shall, in accordance with their respective applicable laws and regulations, grant and ensure the adequate and effective protection of intellectual property rights, and promote efficiency and transparency in the administration of intellectual property protection system. For this purpose, the Contracting Parties shall promptly consult with each other at the request of either Contracting Party. Depending on the results of the consultation, each Contracting Party shall, in accordance with its applicable laws and regulations, take appropriate measures to remove the factors which are recognised as having adverse effects to the investments of investors of the other Contracting Party.

2. Nothing in this Agreement shall affect the rights and obligations of the Contracting Parties under multilateral agreements in respect of protection of intellectual property rights to which the Contracting Parties are parties.



02

ADVANTAGES OF ARBITRATION OVER LITIGATION

ADVANTAGES OF ARBITRATION OVER LITIGATION

Arbitration

- Single forum – may be faster and cheaper
- Neutrality
- Invalidity ruling only binds parties to the arbitration
- Confidentiality
- Party autonomy
- Awards are readily enforceable, final and binding
- May be more time and cost efficient than litigation

Litigation

- Tribunal has no power to compel third parties
- Cannot join third-parties (unlike litigation)
- Difficult to appeal
- Awards lack precedential value
- Foreign interim arbitral relief may not be enforceable in some jurisdictions
- Not all disputes are arbitrable (e.g., validity of IP rights in China)

BENEFITS OF ARBITRATION IN IP DISPUTE

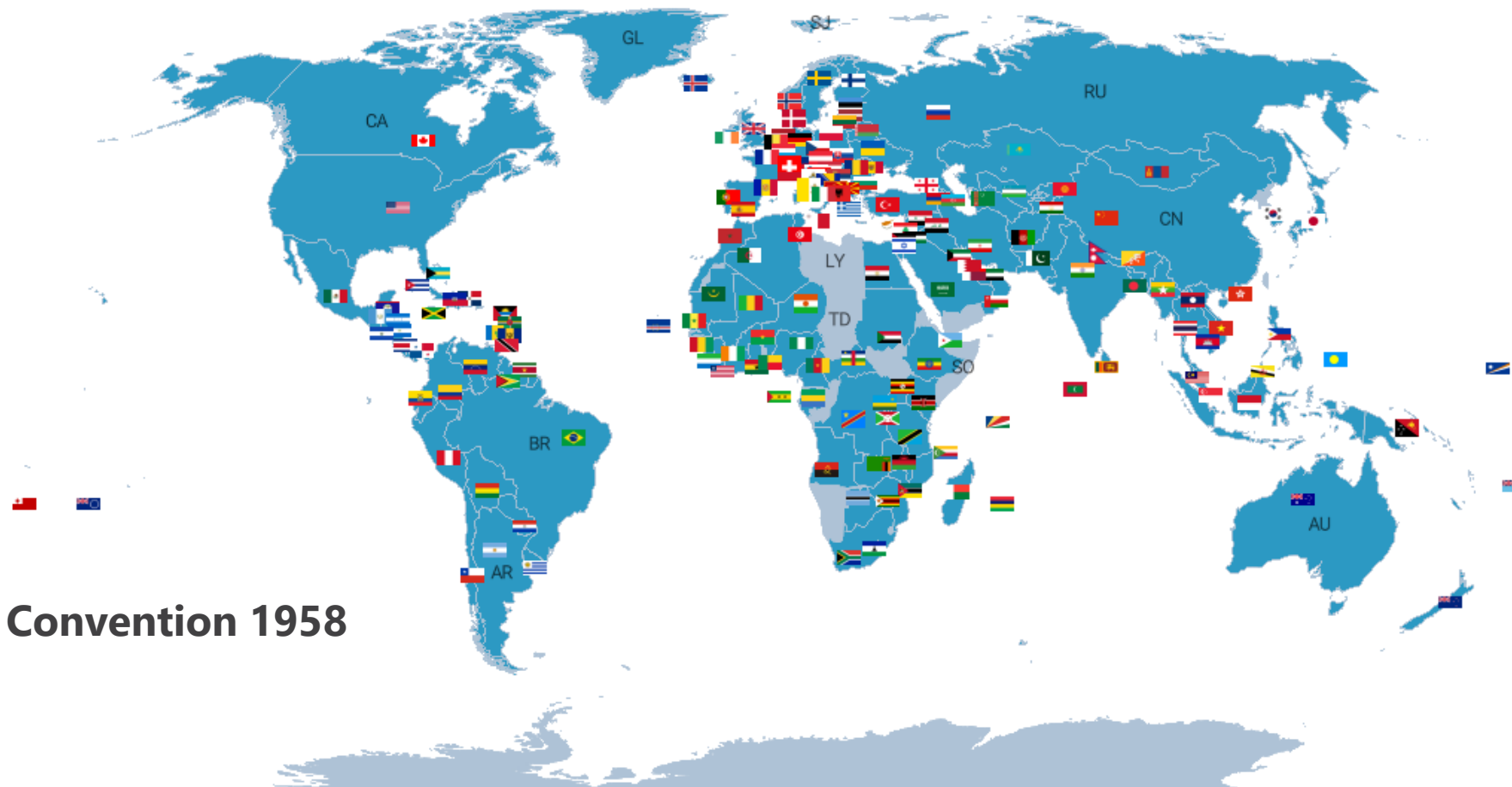


CONFIDENTIALITY

- Confidentiality may work against IP owners' favour - may wish to disclose the existence of the arbitration and the award
- Disclosure could be prohibited by law or arbitration rules
- Consider regulating confidentiality of the arbitration by contract
 - Scope of confidential information
 - Permitted disclosures
 - Term of confidentiality obligation
 - Consequence of breach



ENFORCEMENT OF ARBITRAL AWARDS




New York Convention 1958

SOME LIMITATIONS OF ARBITRATION

- Arbitral award not binding on the courts or IP registries
- Other grounds may render a dispute non-arbitrable
 - E.g. dispute also concerns another subject matter which is considered non-arbitrable under the law (such as criminal offences)
- Arbitral award might be contrary to public policy
 - E.g. the award was obtained by fraud
 - E.g. the award seeks to give effect to an anti-competitive agreement





03

INTERNATIONAL ARBITRATION PROCEDURE

APPLICABLE LAWS AND RULES

- Institution
- Governing law
- Legal seat
- Parties have autonomy in shaping the proceedings



WRITTEN SUBMISSIONS

- Request for Arbitration
- Answer/Counterclaims
 - Answer to Counterclaims
- Constitution of arbitral tribunal
- PO1
- Bifurcation/trifurcation
- 2 rounds of pleadings, filed with all supporting documentary evidence, legal authorities, witness statements, and expert reports
- Document disclosure between rounds

IBA Rules on the Taking of Evidence in International Arbitration

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



EVIDENTIARY HEARING

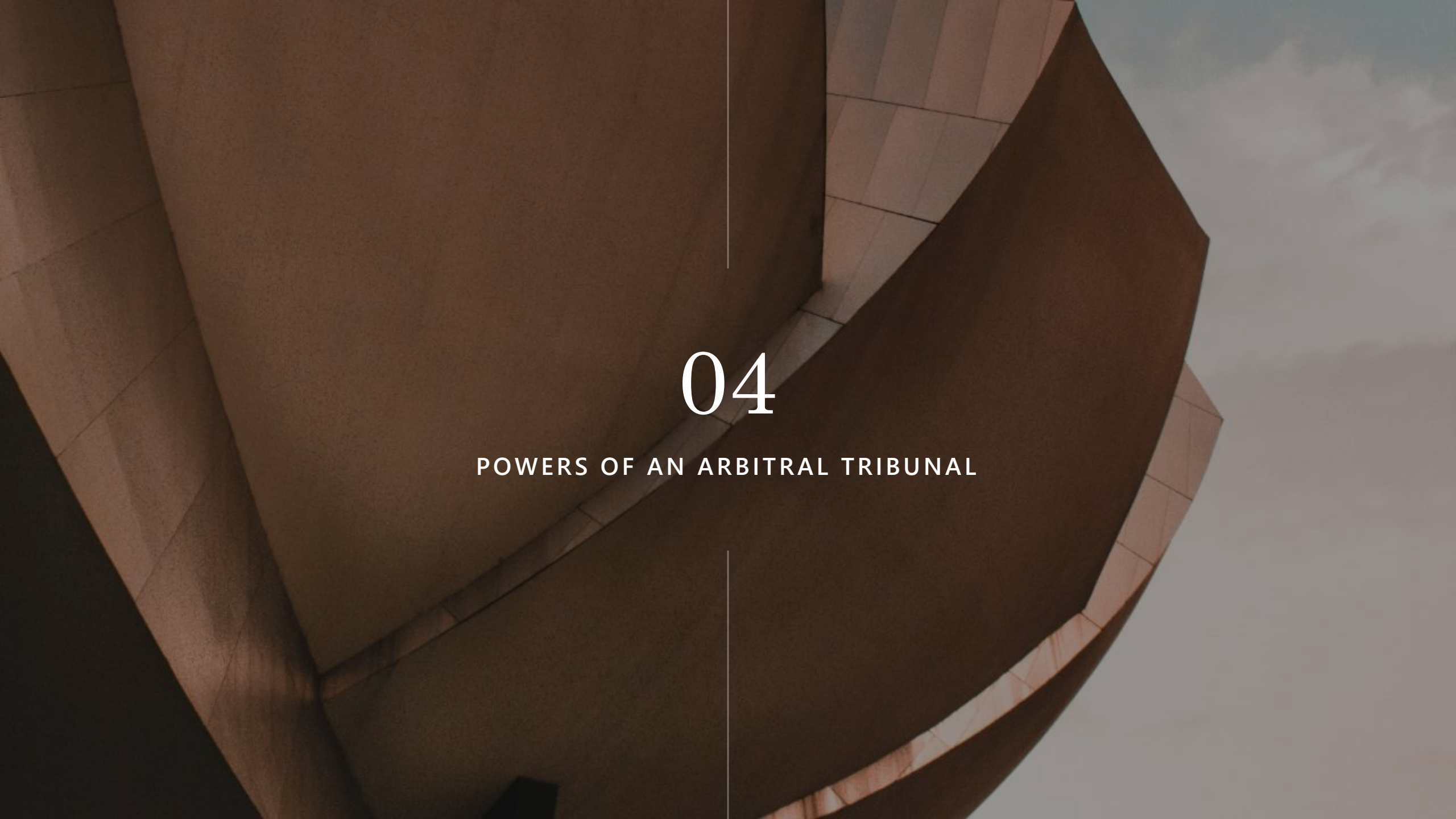
- Opening statements
- Witness testimony:
 - Fact witness statements and expert reports stand in place of direct-examination
 - Cross-examination
- Conferencing of experts, if ordered
- Closing statements, if ordered



POST-HEARING

- Post-hearing brief(s) and replies, if ordered
- Costs submissions and any responses
- After issuance of Final Award, enforcement and/or annulment proceedings





04

POWERS OF AN ARBITRAL TRIBUNAL

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Confidentiality
Order



*Kompetenz-
kompetenz*



Consolidation



Interim relief



Injunctive relief

POWERS OF AN ARBITRAL TRIBUNAL



Expedition of
proceedings



Security
provision



Attachment of
assets



Interest



Cost-shifting



QUESTIONS

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