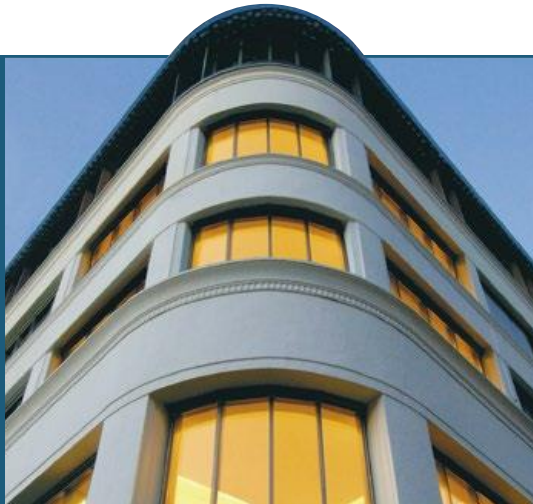


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## Shaping Arbitral Proceedings to Deal with Claims where Quantum Depends on Information Possessed Solely by the Respondent – the Lawyer’s View

Bernd Ehle

ASA Conference “Shaping Arbitral Proceedings to Best Examine Quantum”

Geneva, 3 February 2017

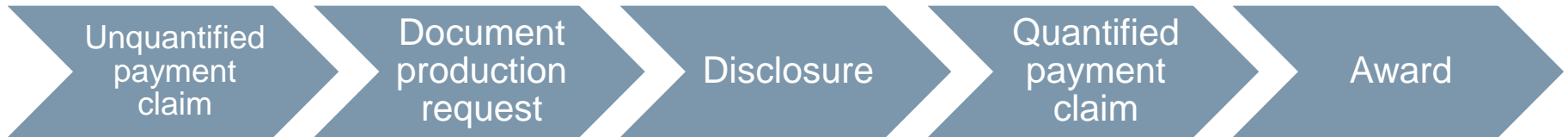
## Starting Point

- Claimant lacks access to information needed to quantify its claim
- Respondent holds the information but refuses voluntary disclosure
- US-style pre-trial discovery not available
- Claimant files for arbitration and claims, inter alia, access to information

# Shaping the Proceedings

- Enable Claimant to obtain information necessary to quantify its claim – if justified
- Adverse inferences of no avail to Claimant
- Clarification at the outset (e.g. at case management conf.):
  - Nature of requested information
  - Grounds for request: substantive vs. procedural right to information
- Different scenarios imaginable

# Scenario 1: Document Production Request



- **Issues:**
  - Availability of document production?
  - Standard: relevance / materiality / specificity, etc.
  - Procedural right to documents, not substantive right to information
  - Claimant to bear cost of extracting information

## Scenario 2: Action by stages

- Decisions issued in stages (bifurcation)
  - Stage 1: claim for disclosure of information + unquantified payment claim
    - Possibly combined with request for affirmation that information is accurate and complete or for access to independent auditor
  - Stage 2: quantification of payment claim subsequent to disclosure
- Procedural economy
  - joinder of actions to avoid multiple proceedings
  - all claims pending from the outset

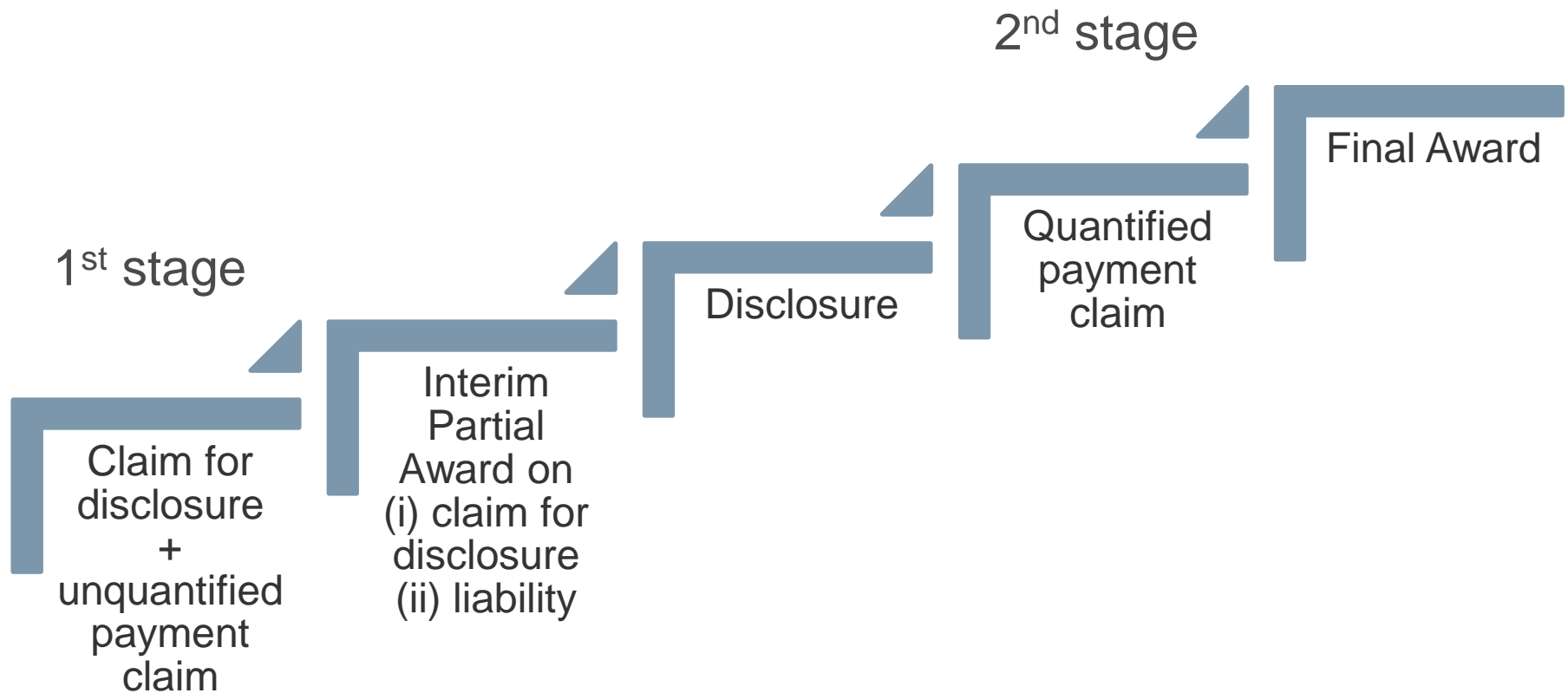
## Action by stages – Origins

- German law
  - Sec. 254 Civil Procedure Code (“*Stufenklage*”)
- Swiss law
  - Decision of Federal Supreme Court 123 III 140 of 17 February 1997
  - Sec. 85 Civil Procedure Code (Action for an unquantified debt)

## Action by stages – Conditions

- Substantive right to information
- Claimant is – through no fault of its own – ignorant as to the extent of its claim
- Respondent can easily provide the information (not overly burdensome)
- Information sought must be reasonable in light of all circumstances (i.e. necessary to compute quantum – not more, not less)

# Action by stages





## Action by stages in arbitration – Examples

- Decisions of the Swiss Federal Supreme Court:
  - 4A\_2/2007 dated 28 March 2007 (ASA Bull. 2007, 630)
  - 4A\_69/2009 dated 8 April 2009: interim partial award in dispute over fees under consultancy agreement (discussed in ASA Bull. 2010, 130-136)
  - 4A\_424/2011 dated 2 November 2011
- Decision of Higher Regional Court of Munich of 22 January 2010: challenge of partial award issued in dispute over a sales agent's commission (on DIS website)

## Action by stages – Issues and complexities

- Long-winded / more time-consuming
- Partial Award: possible scrutiny / challenge / enforcement
- Combination with claims for which no disclosure is needed
- Modalities of audit determined by governing law or in contract
- Confidentiality / data protection
- Non-participation of Respondent
- Value in dispute

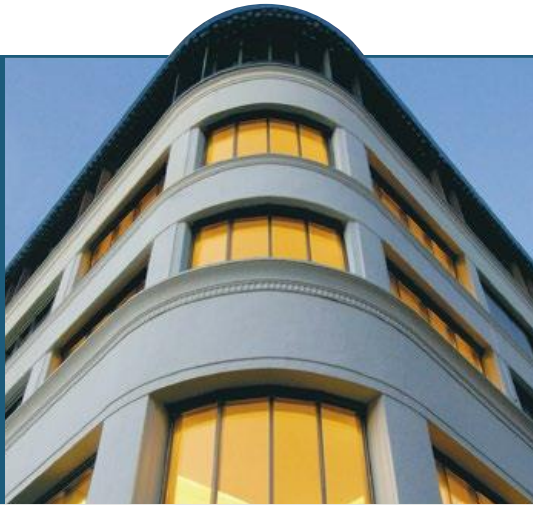
## Scenario 3: Combination? Agreement?

- Claimant requests information based on substantive right to disclosure *a/so* through document production
  - Risk of confusion / procedural inefficiencies
  - Uncertainty as to applicable standard (IBA Evidence Rules by analogy?)
- Agreement between Parties to deal with disclosure requests as a procedural (rather than a substantive) matter?

## Conclusions

- Distinguish between substantive right and procedural right to information
- Assess disclosure request in light of totality of claims to ensure procedural efficiency
- No “one-size-fits-all” solution: room for creativeness
- If possible: Parties agree in good faith as to how to shape proceedings to deal with disclosure requests

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Thank you!

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