

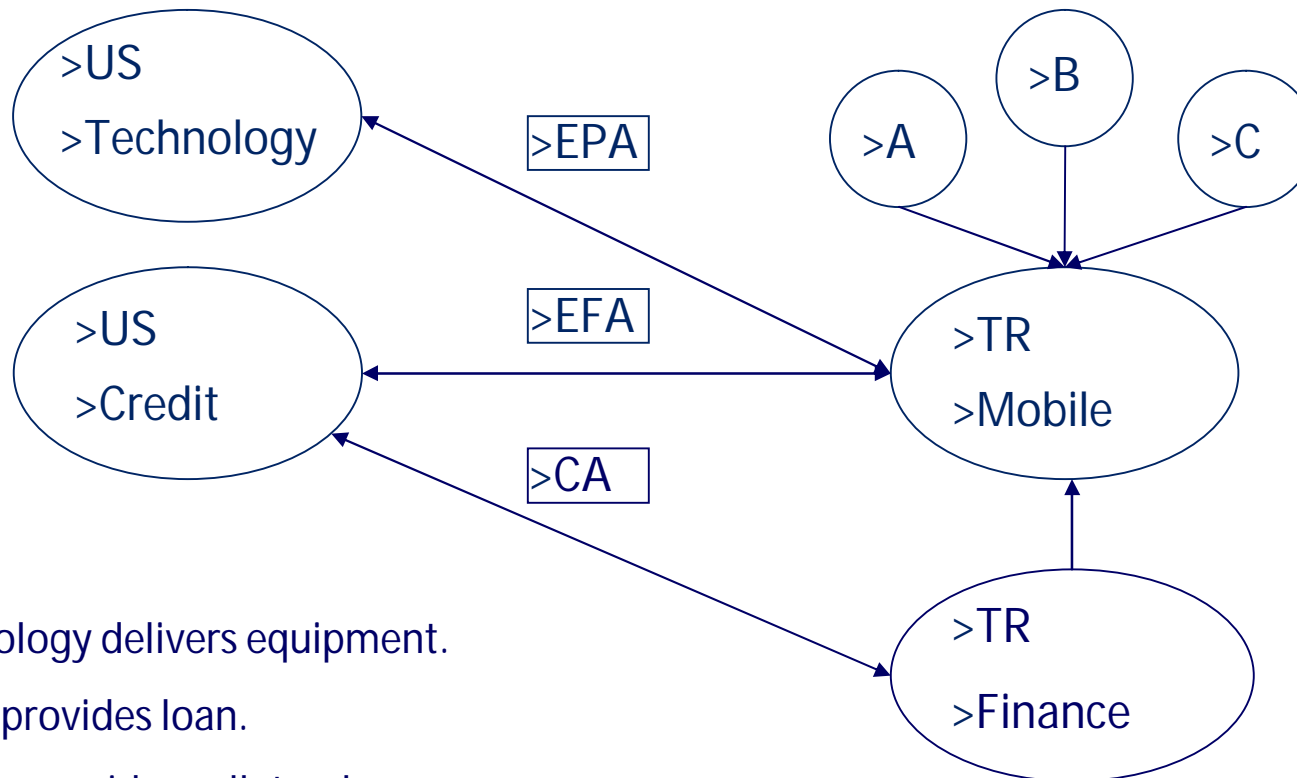
Torpedoes and Anti-Torpedo Torpedoes Using and Avoiding Parallel Court Proceedings

Remedies and Tactical Considerations before the Arbitrator

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Considerations in Front of the Arbitrator

Hypothetical Case



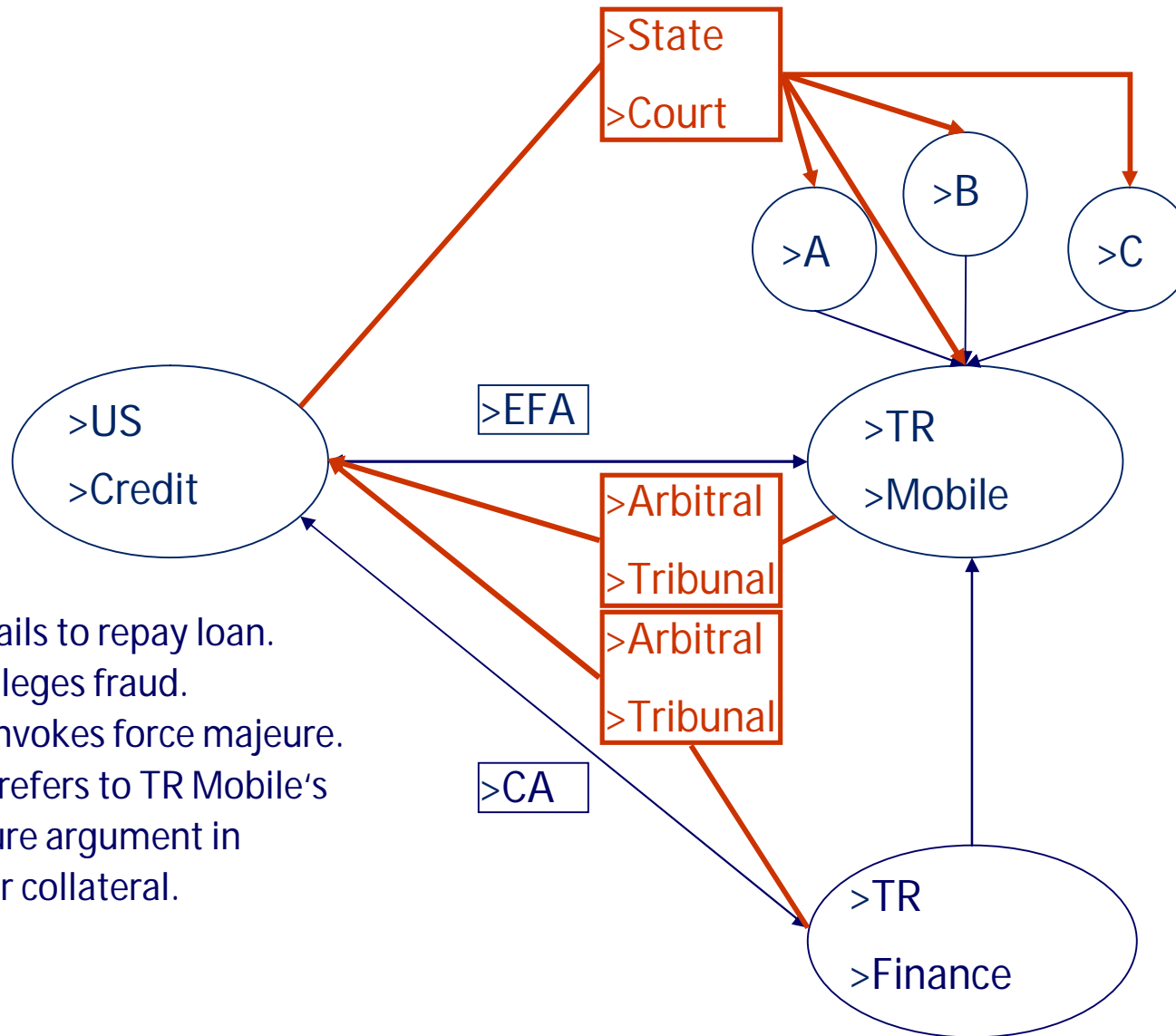
>US Technology delivers equipment.

>US Credit provides loan.

>TR Finance provides collateral.

Considerations in Front of the Arbitrator

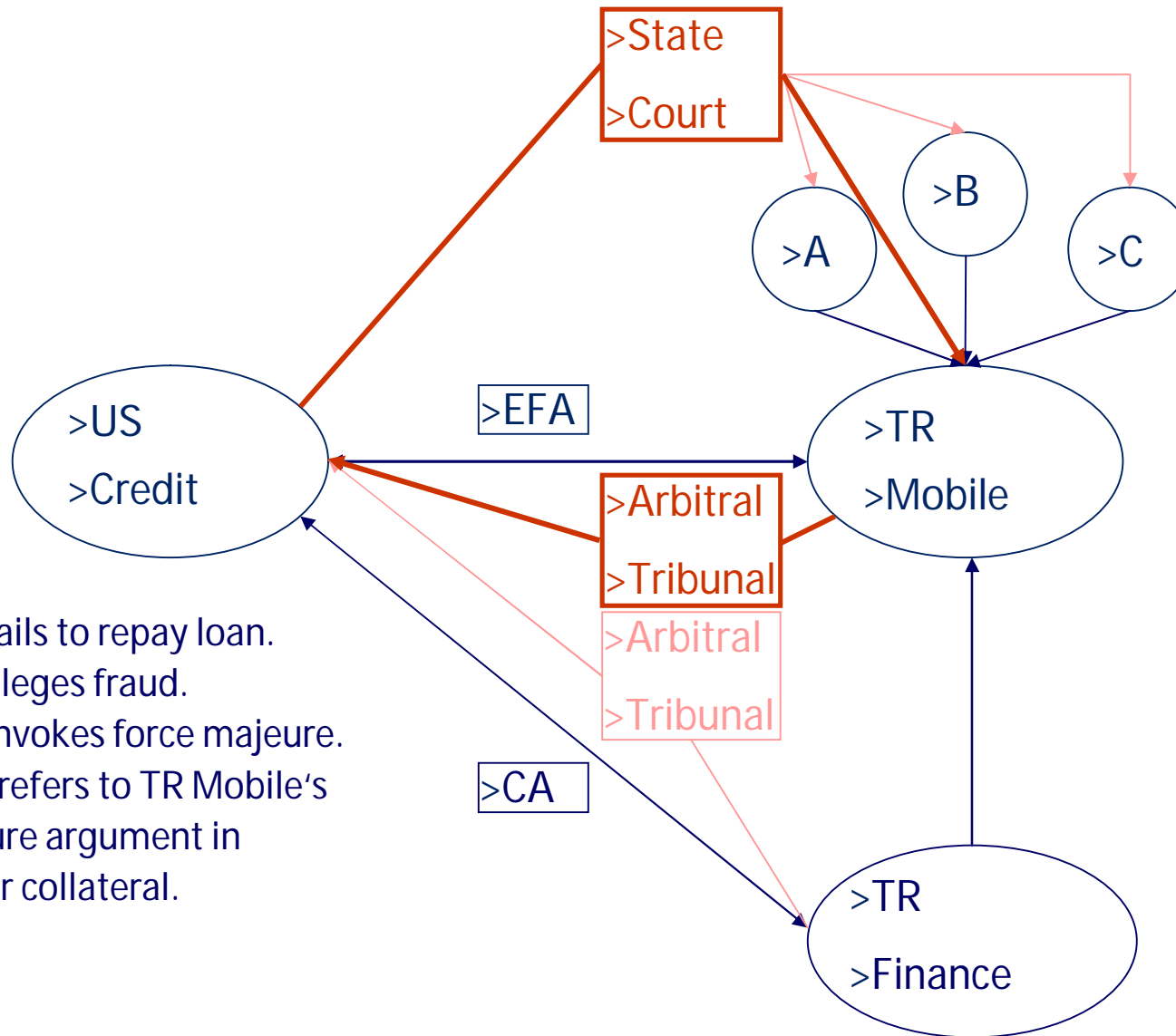
Hypothetical Case



- >TR Mobile fails to repay loan.
- >US Credit alleges fraud.
- >TR Mobile invokes force majeure.
- >TR Finance refers to TR Mobile's force majeure argument in dispute over collateral.

Considerations in Front of the Arbitrator

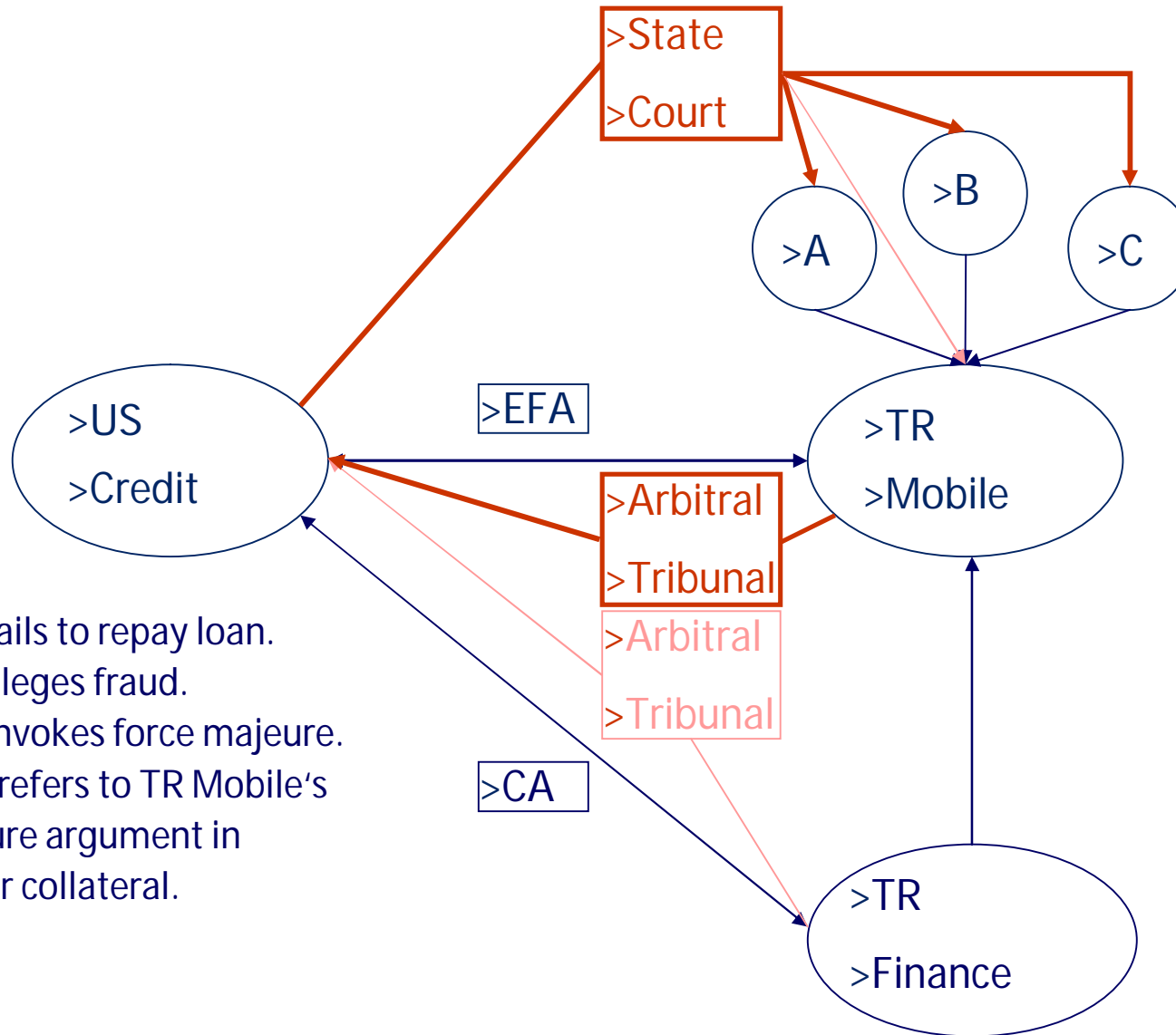
Adversary Parallel Proceedings



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Considerations in Front of the Arbitrator

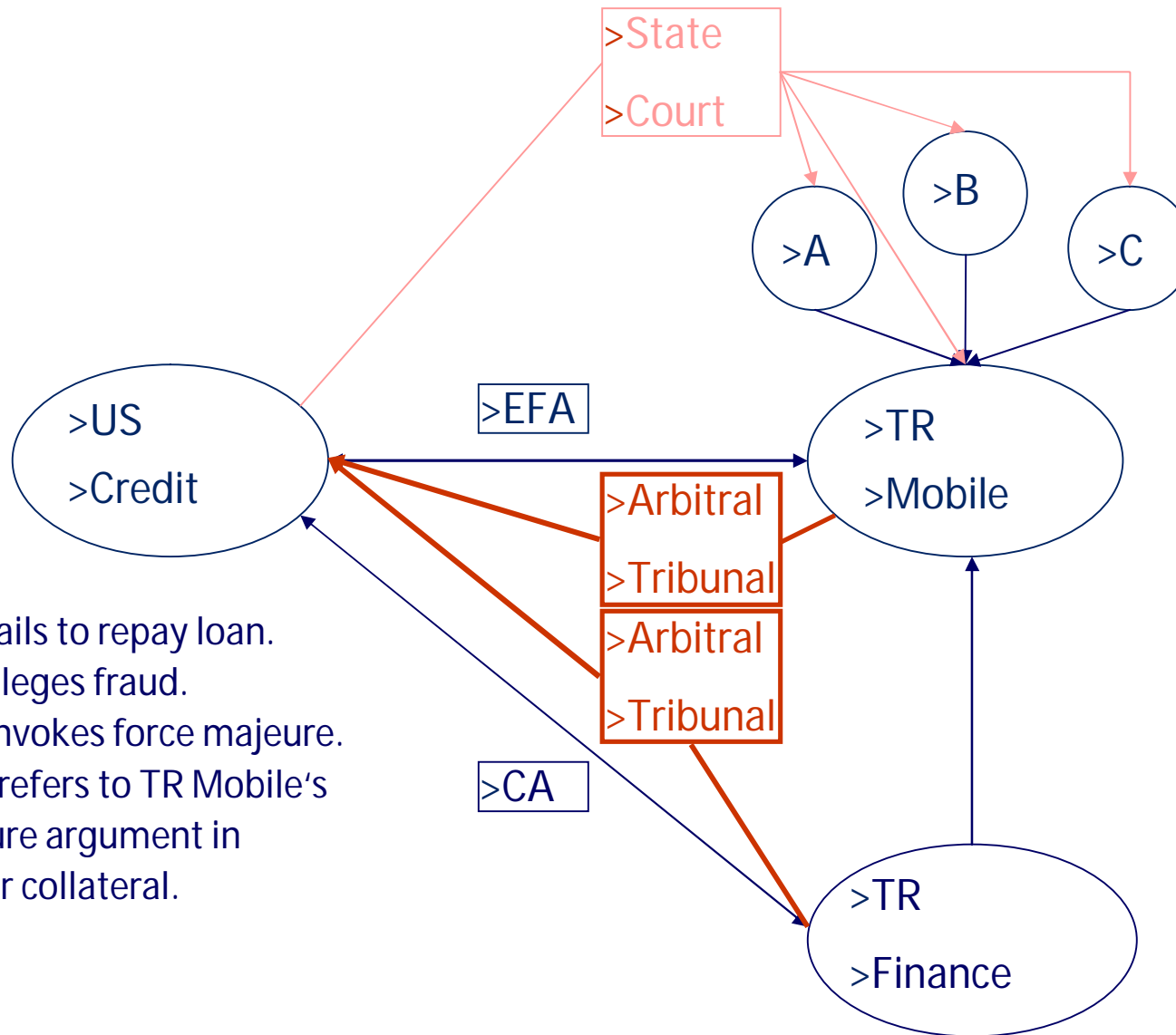
Complementary Proceedings I



- >TR Mobile fails to repay loan.
- >US Credit alleges fraud.
- >TR Mobile invokes force majeure.
- >TR Finance refers to TR Mobile's force majeure argument in dispute over collateral.

Considerations in Front of the Arbitrator

Complementary Proceedings II



- >TR Mobile fails to repay loan.
- >US Credit alleges fraud.
- >TR Mobile invokes force majeure.
- >TR Finance refers to TR Mobile's force majeure argument in dispute over collateral.

Considerations in Front of the Arbitrator

Adversary Parallel Proceedings

- > Reasons for adversary parallel proceedings:
 - > Diverging assessment of opportunities (remedies, evidence).
 - > Positive assessment of state court's jurisdiction, **enforcement** despite arbitration agreement.
 - > Putting pressure on opposing party.

- > Avoiding parallel proceedings via the arbitrator (defence):
 - > Plea of lack of jurisdiction.
 - > Plea of *lis pendens* (potential first-mover advantage)?
(in general no, unless no plea of lack of jurisdiction is made in state-court proceeding, which may be considered a waiver of the arbitration agreement)
 - > Refusal to pay a share of the deposits, refusal to cooperate in case of pathological arbitration agreements.

Considerations in Front of the Arbitrator

Adversary Parallel Proceedings

> Avoiding parallel proceedings via the arbitrator (offence):

- > Anti-arbitration injunctions protected by contempt-of-court measures as a potential role model.

("As to the ... arbitrations, it is painfully obvious that they were commenced in an effort to undercut the ... proceedings before, this Court... Accordingly the defendants here are hereby immediately **ordered to restore and maintain the status quo ante by taking all steps necessary to place the Swiss arbitrations on hold...**"; 2002 U.S. Dist. LEXIS 19632)

- > Obligation not to sue in state courts (CH, D) / to arbitrate (US) and Art. II(3) NYC / Art. 8(1) UNCITRAL Model Law as potential bases on the merits.
- > Competence to issue interim measures, and to decide upon matters related to the arbitration agreement as jurisdictional bases for antisuit injunctions.

Considerations in Front of the Arbitrator

Adversary Parallel Proceedings

> Prerequisites for an antisuit injunction:

(Discussed in ZCC cases nos. 240 and 525; ICC cases nos. 8307 and 8887; Iran-US Claims Tribunal interim award in case no. 338; cf. also Laurent Lévy, *Antisuit Injunctions Issued by Arbitrators*, in Gaillard, *Anti-suit Injunctions in International Arbitration*)

> (*Prima facie*) success on the issue of jurisdiction.

> Danger of irreparable harm / interest worthy of legal protection.

(Dismissal of plea of lack of jurisdiction in state-court proceeding (comity – restrictive approach), order to produce confidential documents prior to ruling on jurisdiction).

(Exposure to an incompetent state court; liberal approach).

> Obligation not to sue in state court must be actionable.

(Not actionable for jurisdictional disputes among courts in member countries to the Lugano Convention, *West Tankers*, C-185/07; not actionable in Swiss courts, or if arbitration agreement is waived due to failure to raise plea of lack of jurisdiction).

(Arbitral tribunals are afforded its power to effectively decide disputes by state jurisdictions; Kompetenz-Kompetenz of state courts; final review by state courts based on Art. V(1)(a) NYC).

Considerations in Front of the Arbitrator

Adversary Parallel Proceedings

> Antisuit injunctions as a viable approach?

> Enforcement under New York Convention.

(Procedural issue; open for discussion).

> Arbitral tribunals do not have the power to protect interim measures with contempt-of-court measures.

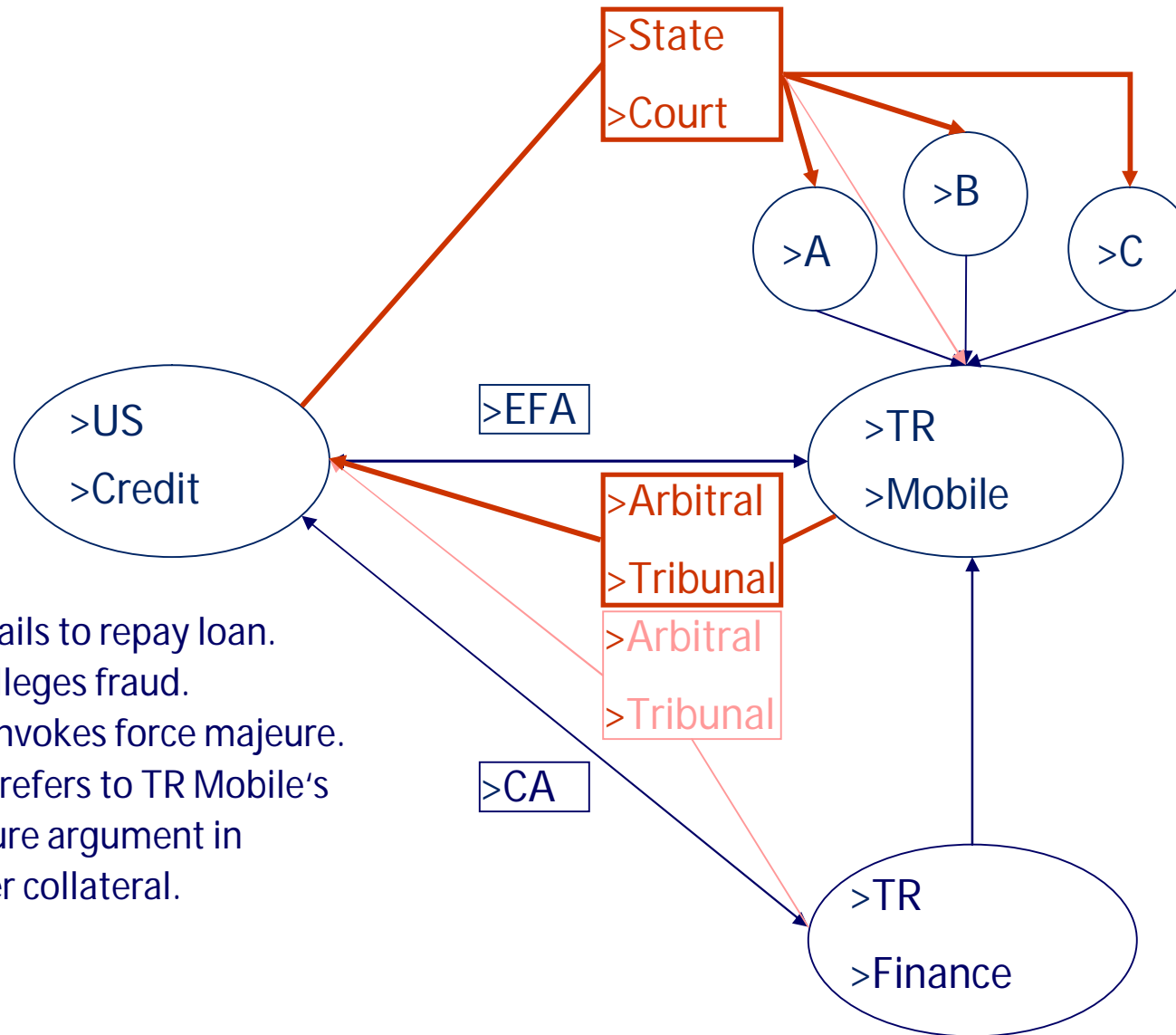
(exceptions: French astreinte; criminal sanctions via state court as per setc. 42(2) EAA); otherwise judicial assistance is necessary).

> Do you need it?

(State-court judgment will presumably not be enforced abroad if there is a valid arbitration agreement; arbitral award enforceable based on New York Convention, under specific circumstances even if set aside at the seat of the arbitration, cf. e.g. Amsterdam Court of Appeals, 28 April 2009 in Yukos v. Yuganskneftegaz; 939 F.Supp. 907, Chromalloy v. Egypt; Court de Cassation, 29 June 2007, Putrabali v. Rena).

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Considerations in Front of the Arbitrator

Complementary Proceedings

> Extension to non-signatories.

> Based on implied consent, implied representation, abuse of rights.

(corporate veil piercing, alter ego, Durchgriff, group-of-companies doctrine etc.).

(e.g. if involvement in the performance of the container contract suggests the non-signatory agrees to be a party to the arbitration agreement; respectively if involvement in contract negotiation and/or performance demonstrates the mutual intent to arbitrate; DFT 134 III 565 consid. 5.3.1; 129 III 727 consid. 5.3.2; Paris court d'appel, 21 October 1983, Dow Chemicals; French court de cassation, 11 June 1991, Orri).

(e.g. if one company dominates another including its day-to-day business and/or exercised this power to work fraud or other inequity and/or to evade legal obligations; General Electric v. Deutz, 270 F.3d 144; DFT 4A_160/2009 consid. 4.3).

Considerations in Front of the Arbitrator

Complementary Proceedings

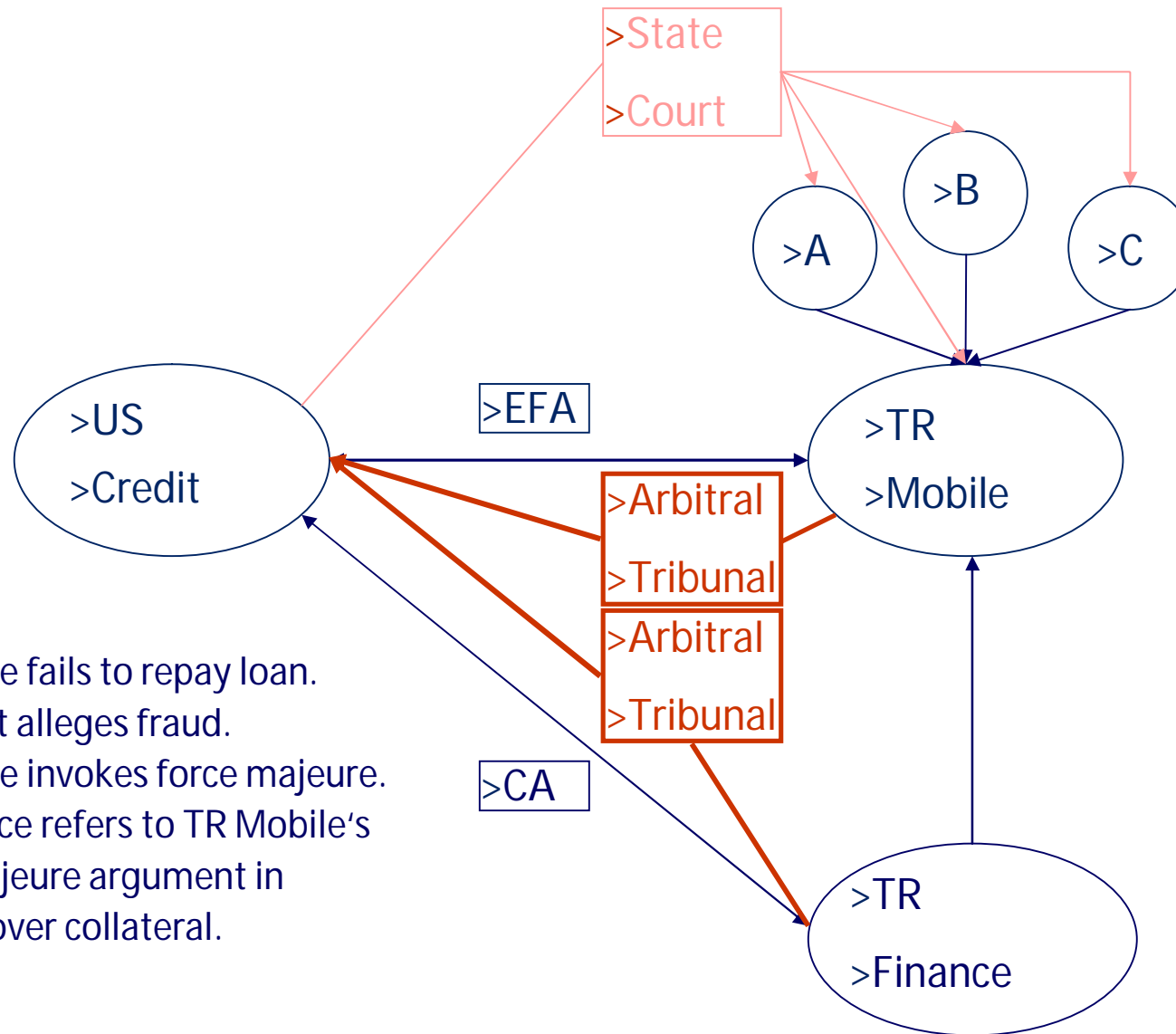
- > Extension by non-signatories.
 - > Based on implied consent, implied representation, abuse of rights.
 - > Based on a provision in the applicable rules allowing a non-signatory to take part.

("Where a third party requests to participate in arbitral proceedings already pending under these Rules ... the arbitral tribunal shall decide on such request, after consulting with all parties, taking into account all circumstances it deems relevant and applicable."; Art. 4(2) Swiss Rules).

- > Enforcement issues (Art. V(1)(a) NYC).
(writing requirement, separability etc.).
- > Wide wording of the arbitration agreement.
(e.g. "the Parties and their subsidiaries"; DFT 4A_244/2007 consid. 5.4).

Considerations in Front of the Arbitrator

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Considerations in Front of the Arbitrator

Complementary Proceedings

> Consolidation of proceedings.

(by agreement of the parties or as set forth by the applicable rules, e.g Art. 4(6) ICC Rules, Art. 4(1) Swiss Rules).

> Joinder of (“signatory”) third parties.

(Art. 22(1)(h) LCIA Rules, Art. 4(1) Swiss Rules).

(Art. 17(5) Draft UNCITRAL Rules: “The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds ... that joinder should not be permitted because of prejudice to any of those parties”).

Considerations in Front of the Arbitrator

Parallel Proceedings

> Impact on procedure?

> Independent proceedings.

(no *res iudicata* effect of procedural decisions; e.g. with respect to document production, hearing of witnesses).

> Bringing parallel proceedings in line may save time and costs.

(timetable; joint hearings if parallel arbitrations).

> Confidentiality, if different parties are involved.

Considerations in Front of the Arbitrator

Parallel Proceedings

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Attorneys at Law

> Thank you.