



# LALIVE

THE DISPUTES POWERHOUSE

The Enforcement of (foreign) Awards


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# Summary

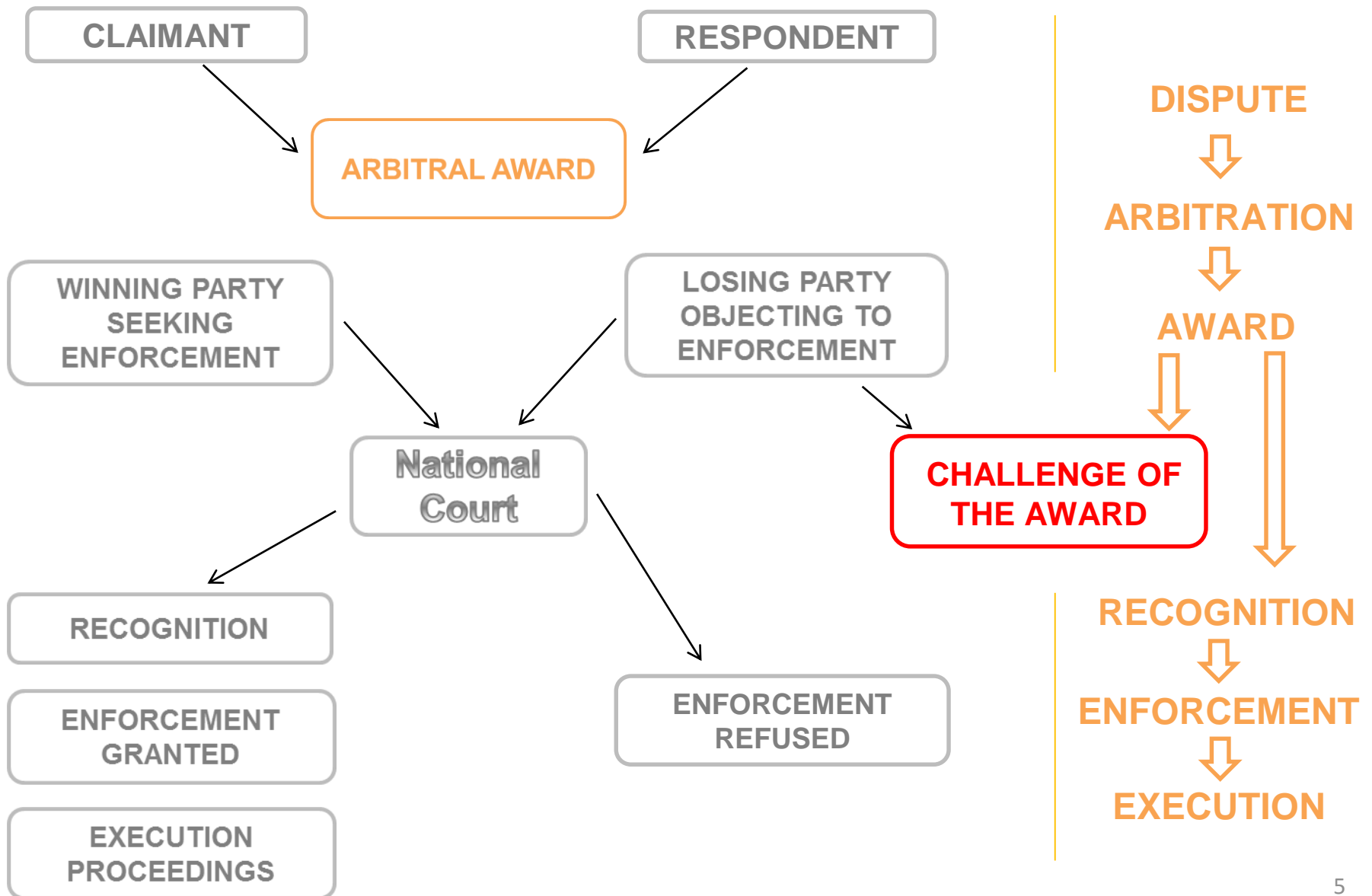
1. **Enforcement of awards – introduction**
2. **Important Terms and Definitions**
3. **The New York Convention**
4. **ICSID**
5. **Regional Conventions**
6. **Enforcement of (foreign) awards in Austria**
7. **Case law**
8. **Important practical aspects related to enforcement**

# 1. Enforcement of awards - introduction

- Dispute  Arbitration
- Final arbitral award
- Majority of awards – voluntary performance
- Non-performance of an award
- Recognition and Enforcement: to give effect to the award
- Arbitral Tribunals lack the coercive powers of a court of law
- Proceedings in a national court
- Enforcement against debtor at the location of assets
- Place of recognition and enforcement

# 1. Enforcement of awards - introduction

- Enforcement of an award in the state that is the «seat» of the arbitration
- Enforcement of an award which is «foreign» because it was made outside the territory of the state in which recognition or enforcement is sought:
  - NYC
  - ICSID
  - Regional conventions
- The present lecture focusses on enforcement of foreign awards and the application of the NY convention



## 2. Important Terms and Definitions

- **Arbitration agreement:** parties undertake in writing to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration (see Article II New York Convention)
- **Award:** (note: no definition in New York Convention)
  - Final awards – tribunal decides about all the claims and counterclaims
  - Partial awards – tribunal decides only on some of the claims submitted to it, or only on a part of the total amount of a claim
  - Interim/Preliminary awards – do not conclusively decide the case, neither finally nor in part (substantive or procedural issues); no *res judicata* effect

## 2. Important Terms and Definitions

- **Recognition** – is a (formal) confirmation, generally by a Court, of the legal force and effect of the award. Recognition is a shield against another litigation – *res judicata*.
- **Enforcement** – is a process that requires registration with a designated authority/Court and/or a specific procedure for the award to be enforced. It is used as a sword to compel the party against whom the award was made to carry it out.

### 3. The New York Convention: Introductory remarks

- Arbitral awards are «binding» in the territory of the State where the award was made. NYC provides for their recognition and enforcement outside of that territory
- NYC is the most successful multilateral instrument in the field of international trade law
- NYC has the broadest material and territorial scope of application compared to other conventions on enforcement
- Enforcement of awards rendered in *ad hoc* proceedings and in proceedings under arbitration rules such as ICC, Vienna Rules, LCIA, SCC, SIAC, UNCITRAL or ICSID Additional Facility
- NYC has been applied for over 50 years by the courts around the world
- Increasingly unified and harmonized application over past 50 years



## 3.1 The New York Convention: History

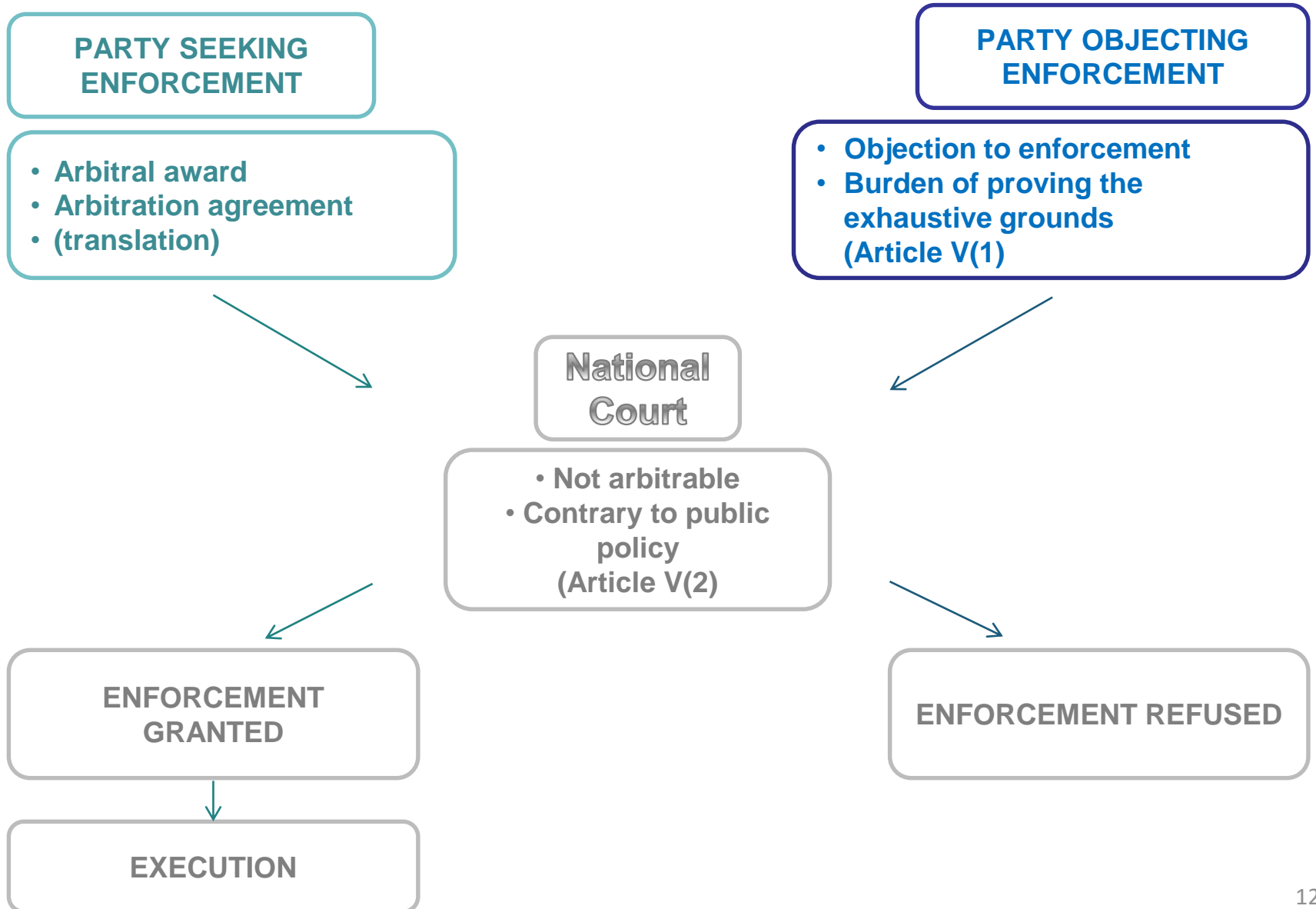
- Previous conventions:
  - the 1923 Geneva Protocol on Arbitration Clauses
  - 1927 Geneva Convention on the Execution of Foreign Arbitral Awards
- Work on NYC started with a draft that was originally produced by the International Chamber of Commerce (ICC) in 1955
- The ICC draft provided for the enforcement of «**international**» awards. The United Nations Economic and Social Council (ECOSOC) changed the draft to apply to "**foreign**" awards. This was the draft the Conference worked on from 20 May to 10 June 1958
- Elimination of the requirement of a **double exequatur** so that it would be possible to present awards for enforcement without first obtaining a declaration of enforceability from the courts of the State where they were rendered
- **Restriction of the grounds for refusal** of the award to the seven grounds listed in Article V and shift of the **burden of proving** those grounds to the party opposing enforcement

## 3.2 The New York Convention: Member states

- The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted in New York, on 10 June 1958, and entered into force on 7 June 1959
- The first countries to sign the New York Convention were Belgium, Costa Rica, El Salvador, Germany, India, Israel, Jordan, The Netherlands, Philippines and Poland; Austria has been a Contracting State since 1961
- 157 Contracting States in 2016
- In 2015, entry into force for Andorra, the Comoros, Democratic Republic of Congo and Palestine and in 2016 Angola ratified it - territorial scope of NYC is expanding
- States have different methods of implementing international conventions (example of Brazil)

## 3.3 The New York Convention: Overview

- NYC applies to arbitral awards made in the **territory of another** [Contracting] **State** (Article I)
- NYC sets forth a **general obligation** for the Contracting States to recognize foreign awards as **binding** and to enforce them in accordance with **Contracting States rules of procedure** (Article III)
- Formal requirements for enforcement: a party seeking enforcement of a foreign award needs to supply to the court, along with the application: (a) the **arbitral award** (authenticated original award or duly certified copy) and (b) the **arbitration agreement** (original or duly certified copy) and (c) a **translation** of these documents (Article IV);
- The party against whom enforcement is sought can **object** to the enforcement by submitting **proof of one of the grounds for refusal** of enforcement which are listed in Article V(1)
- The court may on its own motion refuse enforcement for the reasons listed in Article V(2).



## 3.4 The New York Convention: Material scope

- «Arbitral awards» only
  - No procedural orders
  - In principle: no decision on interim measures (discussion)
  - Ad hoc and institutional awards (see Article I(2) NYC)
- Foreign arbitral award - made in the territory other than the State of enforcement
- Binding awards
- Arbitration agreements are presumed to be valid (see Article II)
- Arbitration agreements in writing, parties' intention to have the dispute settled by arbitration, binding on the parties
- Arbitrable dispute
- Second reservation of Article I(3): commercial relationships
- Awards "arising out of differences between persons, whether physical or legal" (subjective scope of NYC)

## 3.5 The New York Convention: Territorial scope

- Seat of arbitration - awards made in the territory of a State other than the State where recognition and enforcement are sought
- Foreign non-domestic awards in a State where enforcement is sought
- Domicile, habitual residence or nationality of parties is irrelevant
- Territory of 157 Contracting Parties to the NYC (2017)
- First Reservation of Article I(3): reciprocity
- [Date of entry into force]

### 3.5 The New York Convention: Territorial scope – some non member states

 Andorra	 Angola	 Bhutan	
 Burundi	 Cape Verde	 Chad	 Comoros
 Congo, Republic of the	 Democratic Republic of the Congo	 Equatorial Guinea	 Eritrea
 Ethiopia	 Gambia	 Grenada	
 Guinea-Bissau	 Guyana	 Iraq	 Kiribati
 North Korea	 Libya	 Malawi	
 Maldives	 Federated States of Micronesia	 Namibia	 Nauru
 Niue	 Palau	 Papua New Guinea	 Saint Kitts and Nevis
 Saint Lucia	 Samoa	 Seychelles	
 Sierra Leone	 Solomon Islands	 Somalia	 South Sudan
 Sudan	 Suriname	 Swaziland	 Taiwan
	 Timor-Leste	 Togo	 Tonga
 Turkmenistan	 Tuvalu	 Vanuatu	 Yemen

## 3.6 The New York Convention: More favourable right principle

- Article VII of the NYC
- More favourable right can be found in:
  - National law of the forum
  - Treaties applicable in the territory where enforcement is sought
- More favourable provision – less demanding criteria or lower standards (procedure, grounds for enforcement)
- Application of the principle to the formal requirements?



## 3.7 The New York Convention: Relation with domestic law and other treaties

- **NYC and other international treaties:**

- NYC does not affect the validity of other international treaties. The more favourable principle of the NYC derogates from classical rules of international law on conflicting treaties

- **NYC and national law:**

- NYC and national law both have rules on the same issue – NYC supersedes national law
- NYC contains no rule on a given matter – national law supplements the NYC
- NYC refers explicitly to national law – national law applies to the extent permitted by the NYC

## 3.8 Some examples of enforcement regulations: UNICITRAL Model Law and some national laws

### **General remarks**

#### **3.8.1 UNICITRAL Model Law**

#### **3.8.2 German ZPO**

#### **3.8.3 Swiss Private International Law Statute (PILS)**

## 3.8.1 UNICITAL Model Law

### CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

#### Article 35. Recognition and enforcement

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.

### 3.8.1 UNICITAL Model Law

#### Article 36. Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

### 3.8.1 UNICITAL Model Law

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

### 3.8.1 UNICITAL Model Law

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

## 3.8.2 German ZPO

### **Section 1061 Foreign awards**

(1) Recognition and enforcement of foreign arbitral awards shall be granted in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (Bundesgesetzblatt [BGBl.] 1961 Part II p. 121). The provisions of other treaties on the recognition and enforcement of arbitral awards shall remain unaffected.

(2) If the declaration of enforceability is to be refused, the court shall rule that the arbitral award is not to be recognized in Germany.

(3) If the award is set aside abroad after having been declared enforceable, application for setting aside the declaration of enforceability may be made.

## 3.8.2 German ZPO

### **Section 1062 Competence**

(1) The Higher Regional Court ("Oberlandesgericht") designated in the arbitration agreement or, failing such designation, the Higher Regional Court in whose district the place of arbitration is situated, is competent for decisions on applications relating to

1. the appointment of an arbitrator (sections 1034 and 1035), the challenge of an arbitrator (section 1037) or the termination of an arbitrator's mandate (section 1038);
2. the determination of the admissibility or inadmissibility of arbitration (section 1032) or the decision of an arbitral tribunal confirming its competence in a preliminary ruling (section 1040);
3. the enforcement, setting aside or amendment of an order for interim measures of protection by the arbitral tribunal (section 1041);



## 3.8.2 German ZPO

4. the setting aside (section 1059) or the declaration of enforceability of the award (section 1060 et seqq.) or the setting aside of the declaration of enforceability (section 1061).

(2) If the place of arbitration in the cases referred to in subsection 1, no. 2, first alternative, nos. 3 and 4 is not in Germany, competence lies with the Higher Regional Court ("Oberlandesgericht") where the party opposing the application has his place of business or place of habitual residence, or where assets of that party or the property in dispute or affected by the measure is located, failing which the Berlin Higher Regional Court ("Kammergericht") shall be competent.

(3) In the cases referred to in section 1025 subs. 3, the Higher Regional Court ("Oberlandesgericht") in whose district the claimant or the respondent has his place of business or place of habitual residence is competent.

### 3.8.2 German ZPO

(4) For assistance in the taking of evidence and other judicial acts (section 1050), the Local Court ("Amtsgericht"), in whose district the judicial act is to be carried out, is competent.

(5) Where there are several Higher Regional Courts ("Oberlandesgerichte") in one Land, the Government of that Land may transfer by ordinance competence to one Higher Regional Court, or, where existent, to the highest Regional Court ("oberstes Landesgericht"); the Land Government may transfer such authority to the Department of Justice of the Land concerned by ordinance. Several Länder may agree on cross-border competence of a single Higher Regional Court.

### 3.8.3 Swiss Private International Law Statute (PILS)

#### Article 194 PILS

#### XII. Foreign arbitral awards

The recognition and enforcement of foreign arbitral awards shall be governed by the New York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

*[Austria: see section 6 of this presentation]*

## 3.9 The New York Convention: Reservations

- **Reciprocity** (Article I (3) first sentence)
  - Only to the awards made in the territory of another Contracting State
  - 2/3 of the Contracting States have made this reservation
  
- **Commercial nature** (Article I (3) second sentence)
  - Differences arising out of relationships that are deemed commercial under the national law of the State making such declaration
  - 1/3 of the Contracting States have made this reservation
  - Notion of «commercial» is interpreted broadly

## 3.10 The New York Convention: Consequences of non-application

- NYC is an international treaty creating obligations under international law
- Acts of courts are regarded as acts of the State itself
- Non-application or incorrect application of the NYC engages the international responsibility of a State
- The award remains unaffected by the breaches

## 3.11 Grounds for refusal: Article V NYC: Overview

- Exhaustive grounds
- General Rule: Burden of proof on respondent to prove the exhaustive grounds
- Exception: Control *ex officio* by the court
- Narrow interpretation of the grounds for refusal
- No review on the merits
- The competent authority "may" or "must" refuse recognition?  
(see wording of Article V)

## 3.12 Grounds for refusal to be examined at the request of the respondent

### Article V (1) NYC

1. Incapacity of party and invalidity of arbitration agreement
2. No proper notice of appointment of arbitrator or of the proceedings; violation of due process;
3. Scope of arbitration agreement (outside or beyond the scope of the arbitration agreement (*ultra petita*); decision beyond claims submitted)
4. Composition of arbitral tribunal not in accordance with agreement of the parties or failure to respect the applicable arbitral procedure
5. Award not binding, suspended or set aside

### 3.13 Grounds for refusal to be examined by the court *ex officio*

#### Article V (2) NYC

1. Dispute not capable of settlement by arbitration under law of enforcement State
2. Incompatibility with public policy of the enforcement State
  - No definition of public policy in the NYC
  - Frequently raised as defence to enforcement
  - International public policy not national public policy
  - Rarely successful:
    - Mitsubishi vs Soler Chrysler (U.S. Supreme Court, 2 July 1985)
    - Westcare Investments vs. Jugimport (U.K., Court of Appeal, 1999, 3 All ER 864)



## 3.14 The New York Convention: Key advantages

- Key instrument in enforcement of arbitral awards
- Provides actual enforceability of the awards
- Unified rules for enforcement in Contracting States
- Increasing harmonized application of the NYC

## 3.15 The New York Convention: Pitfalls

- Lack of definitions in the text of NYC
- Public policy: diverging practices
- Differences in translations between official languages
- Bias of national courts towards their national parties
- Uncertain relationship between annulment and enforcement proceedings

## 3.16 The New York Convention: Draft revision (not a UNICITAL document)

After 50 years of its existence, the New York Convention may be in need of modernization. To this end, a Preliminary Draft Convention on the International Enforcement of Arbitration Agreements and Awards was prepared by Albert Jan van den Berg, in which provisions of the current Convention were (a) completed, (b) revised, (c) clarified, (d) updated, and (e) aligned with prevailing judicial interpretation.

**Is there a need for revision of NYC?**

## 3.17 Conclusions: The New York Convention

- Enforcement of awards under NYC:
  - Facilitates enforceability of arbitration awards internationally
  - Ensures unilateral treatment of awards
  - No need for double *exequatur*
  - Burden of proof on the debtor of the award
  - No requirement that the award should be in compliance with the principles of the law of the State of enforcement

## 4. ICSID

- Convention on the settlement of investment disputes between States and nationals of other States of 1965 (Washington Convention)
- Investment arbitration
- The Washington Convention provides for the enforcement of awards rendered in proceedings involving a **Contracting State** and an **investor** from another Contracting State
- Awards under ICSID are directly enforceable within the territories of all States parties to ICSID
- Over 150 Member States

## 5. Regional Conventions

- The European Convention on International Commercial Arbitration of 1961 (Geneva Convention)
- The Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Relations of Economic and Scientific-Technical Cooperation of 1972 (Moscow Convention)
- The Inter-American Convention on International Commercial Arbitration of 1975 (Panama Convention)
- OHADA: Rules and Conventions

## 6. Enforcement of (foreign) awards in Austria: Section 614 ZPO

- Section 614(1) ZPO

(1) Die Anerkennung und Vollstreckbarerklärung ausländischer Schiedssprüche richten sich nach den Bestimmungen der Exekutionsordnung, soweit nicht nach Völkerrecht oder in Rechtsakten der Europäischen Union anderes bestimmt ist. Das Formerfordernis für die Schiedsvereinbarung gilt auch dann als erfüllt, wenn die Schiedsvereinbarung sowohl den Formvorschriften des § 583 als auch den Formvorschriften des auf die Schiedsvereinbarung anwendbaren Rechts entspricht.

- Section 614(2) ZPO

(2) Die Vorlage der Urschrift oder einer beglaubigten Abschrift der Schiedsvereinbarung nach Art IV Abs. 1 lit b des New Yorker UN- Übereinkommens über die Anerkennung und Vollstreckung ausländischer Schiedssprüche ist nur nach Aufforderung durch das Gericht erforderlich.

## 6. Enforcement of (foreign) awards in Austria: Section 577 ZPO

- Section 577 (1) und (2) ZPO

(1) Die Bestimmungen dieses Abschnitts sind anzuwenden, wenn der Sitz des Schiedsgerichts in Österreich liegt.

(2) §§ 578, 580, 583, 584, 585, 593 Abs. 3 bis 6, §§ 602, 612 und 614 sind auch anzuwenden, wenn der Sitz des Schiedsgerichts nicht in Österreich liegt oder noch nicht bestimmt ist.



## 6. Enforcement of (foreign) awards in Austria

- Section 614 ZPO – recognition and declaration of enforceability of foreign arbitral awards (see also section 577 (2) ZPO)
- Foreign arbitral awards are not afforded any legal effects in Austria, if they are not recognised and enforced in Austria
- No provision similar to Article 35 ML: no extensive and exclusive provisions with respect to the actual conditions and procedure for recognition, enforcement and execution in ZPO: relevance of EO (see sections 79 and 86 EO and general provisions on execution)
- Section 614 is merely the basis for the application of NYC or other multilateral treaties (which co-exist and apply in parallel)

## 6. Enforcement of (foreign) awards in Austria

- Foreign arbitral awards set aside in the State of the seat of arbitration, because it violates the public order of that State, can be enforced in Austria within the scope of the European Convention, provided that it is not completely incompatible with the Austrian legal order
- Arbitration agreement valid when it complies both with section 583 ZPO and the law applicable to the arbitration agreement
- Section 614(2) leaves it to the discretion of domestic courts to request the submission of the original or a duly certified copy of the arbitration agreement
- Competence of Bezirksgericht where the respondent has its seat or domicile or where the particular execution is to be conducted: same tribunal for enforcement and execution

## 7. Case Law: Parson & Whittemore Overseas US vs. RAKTA; US CA 2d Cir., 1974

- Construction of paper mill in Alexandria - breach of contract
- Challenge to the enforcement on the grounds of public policy, due process, excess of jurisdiction and manifest disregard of law
- Outcome:
  - Public policy exception construed narrowly
  - Enforcement of foreign awards may be denied only when it would violate the forum State's most basic notions of morality and justice
  - Compare ILA Reports in respect of reasons dealing with public policy defence



## 7. Case Law: Dallah v. Pakistan, UK Supreme Court, 2010

- Contract to build houses for pilgrims in Mecca
- UK – refused to enforce the award – no valid arbitration agreement between the parties
- France – annulment of the award – refused
- Article VI of the NYC
- Comparison of UK and French decisions



## 8. Important practical aspects related to enforcement

- Exact names of parties
- Operative part (and therefore the relief sought) should include the object, the type, the extent and the time of the obligation of the debtor
- Notification of documents during the arbitration
- Securing the enforcement in advance of the award
  - Negotiation of the Contract
  - Pre-Arbitral Stage
  - During the Arbitration
  - Post-Award
- Immunities – enforcement against States
  - Sovereign immunity
  - Commercial assets

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