



Ensuring the enforceability of (foreign) arbitral awards

The Role of Arbitrators, Counsel and Arbitral Institutions

15 - 17 June 2017, Stockholm

Pitfalls for the later Enforcement in the Course of the Proceedings

- Initiation of Arbitral Proceedings
- Jurisdiction
- Procedural Issues
- Legal Issues
- Hearing on the Evidence
- Award
- Enforcement

A. Topics and Case Studies

I. Initiation of Arbitral Proceedings



A. Topics and Case Studies

I. Initiation of Arbitral Proceedings

1. Improper Service of Notice of Arbitration

Proper service in arbitration under the Swedish law:

Enforcement can be refused

1. if the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present his case;(Section 54, paragraph 2 of the Swedish Arbitration Act);
2. If the award or other documentation does not establish that the counterparty has received the notice of arbitration (NJA 1989 C 22);
3. if a party seeking enforcement cannot show that the notice of arbitration has actually reached the counter-party (NJA 2010 s. 219);
4. or if the counterparty can present evidence that establishes considerable doubt as to whether it has received the notice (NJA 2010 s. 219).

A. Topics and Case Studies

1. Initiation of arbitral proceedings

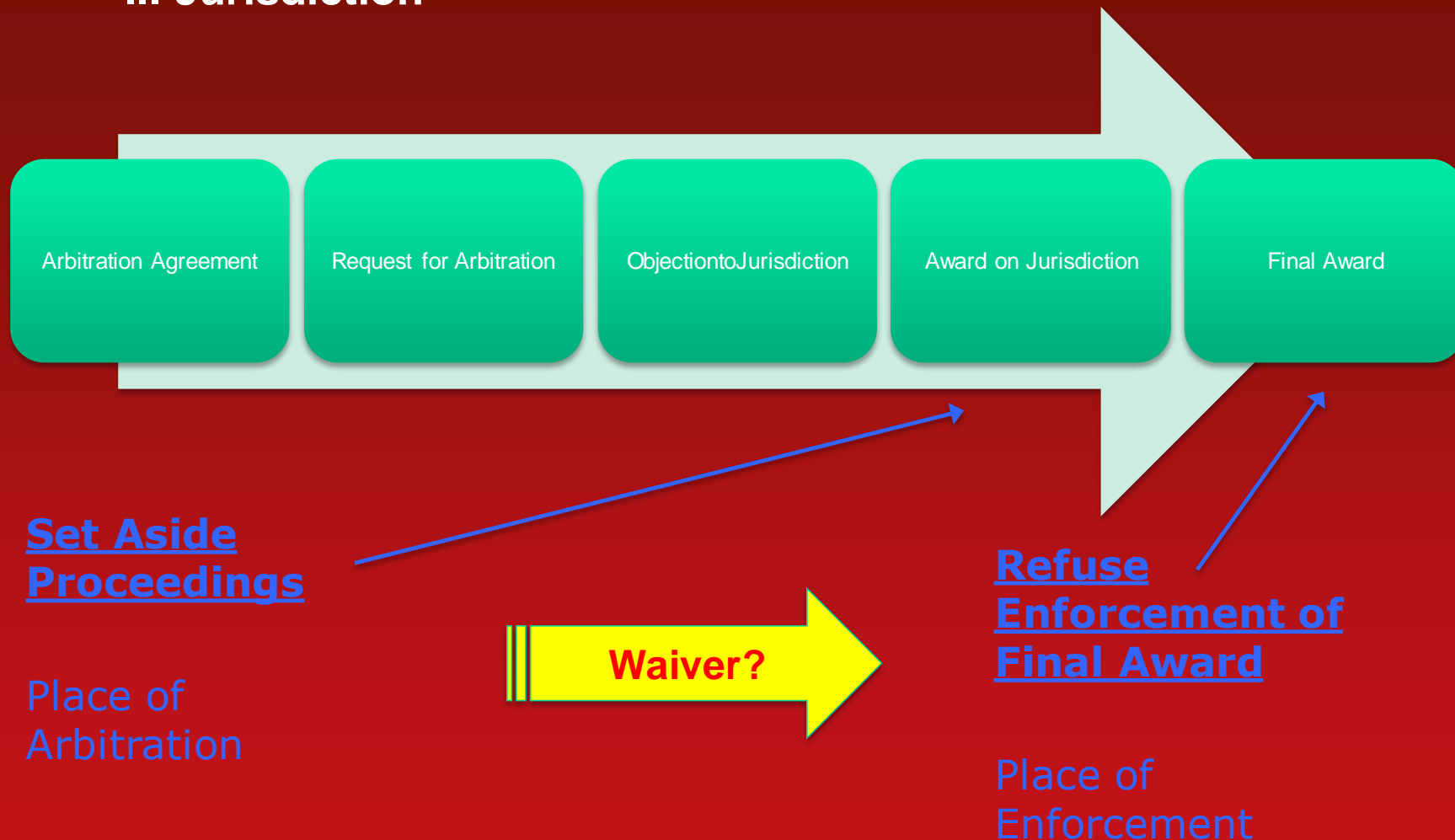
2. Prayers for Relief – Case Study

- Seat of arbitration in Germany
- Substantive law: German
- Prayers for relief: order respondent to pay EUR 10.000.000
- Claimant does not claim any interest
- In award: arbitral tribunal awards interest to claimant

Award enforceable?

A. Topics and Case Studies

II. Jurisdiction



A. Topics and Case Studies

III. Procedural Issues – Case Study

- Respondent did not participate in the proceedings
- The arbitral tribunal found that respondent was served Request for Arbitration at its latest known address
- Notification of the hearing sent to the same address had been returned with notice that the addressee was not at the address stated
- Respondent never informed about new address

A. Topics and Case Studies

III. Procedural Issues – Case Study

FINDINGS (Swedish Supreme Court decision NJA 2010 s. 219)

- **Stringent requirements** must be set in relation to a notification of arbitration
- A general requirement that it shall have **reached the counterparty** should be maintained
- It must be proven that the Request and other documents were delivered **to any authorized representative of Respondent**
- Claims regarding **the obligation to report a new address lack any bearing on the situation**

A. Topics and Case Studies

IV. Legal Issues - General Remarks on Public Policy exemption

- Setting Aside:
 - » Article 34(2)(b)(ii) UNCITRAL Model Law:

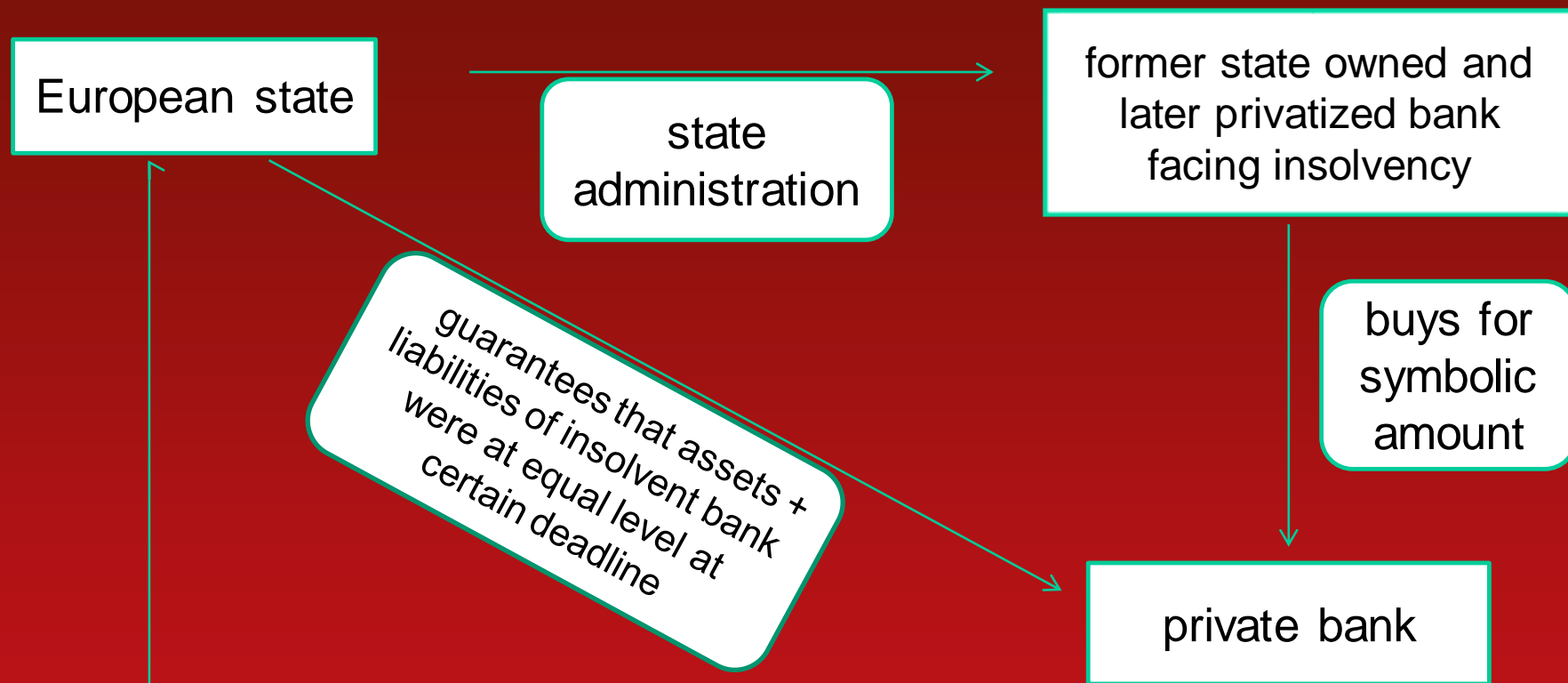
If “*..the award is in conflict with the **public policy** of this State.*”

- Enforcement:
 - » Article 36 UNCITRAL Model Law (*idem* to above)
 - » Article V(2)(b) NYC:

If “*...the recognition or enforcement of the award would be contrary to the **public policy** of that country.*”

A. Topics and Case Studies

IV. Legal Issues - EU competition law



demands payment for liabilities that occurred at a later point in time

Arg: no state aid exemption by Commission

A. Topics and Case Studies

IV. Legal Issues – Case Study

Contract in dispute violates antitrust law; none of the parties invokes this violation.

What should the arbitral tribunal do?

- » Ex officio application?

OR

- » Give a legal advice to the parties and grant the parties the right to submit additional pleadings?

OR

- » Decide, taking antitrust law into consideration, without hearing the parties first?

A. Topics and Case Studies

V. Hearing on the Evidence – Case Study – Facts (1)

- SPA between seller (S) and buyer (B)
- Dispute about the amount of the purchase price payable
- B refused to pay the purchase price
- Arbitration clause: DIS-Rules 1998 and place of arbitration in Germany
- S filed a claim for damages in DIS arbitration proceedings against B

A. Topics and Case Studies

V. Hearing on the Evidence – Case Study – Facts cont’ed

- Bifurcation of the proceedings
- Quantum phase:
 - Conference call scheduled: Chairman advised that the arbitral tribunal would strictly follow the DIS Arbitration Rules and the ZPO, unless the parties agreed otherwise.
 - Arbitral tribunal circulated a draft of „Procedural Order No. 10“ („PO 10“)
 - Requested parties to approve or comment
 - Upon parties’ requests of changes, arbitral tribunal amended PO 10 and the parties approved the amended PO 10

A. Topics and Case Studies

V. Hearing on the Evidence – Case Study – Facts (cont’ed)

- PO 10 reads (translated to English):
“Furthermore, the arbitral tribunal documents the parties’ agreement as to the content of the written submissions.”
- Section III of PO 10:
“Any documents which a party-appointed expert has reviewed and taken into consideration have to be attached to the expert report.”
- S submitted expert report without attaching all documents the expert had reviewed and taken into consideration.
- B’s request to AT to order S to disclose all documents was rejected.

A. Topics and Case Studies

VI. Award – Case Study



Award submitted
to the Parties

No signature of
one Co-Arbitrator

A. Topics and Case Studies

VI. Award – Case Study

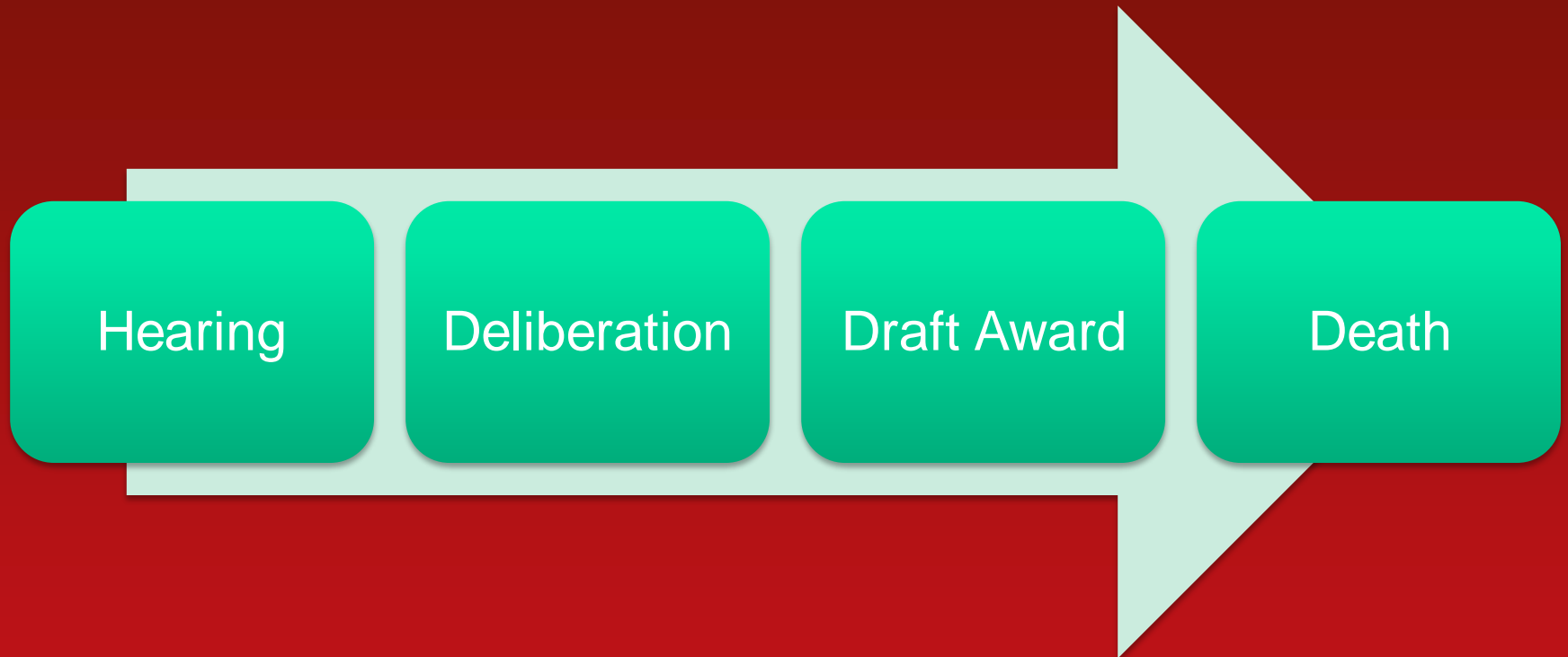


Award submitted
to the Parties

No signature of
Chairperson

A. Topics and Case Studies

VI. Award – Case Study



A. Topics and Case Studies

VII. Enforcement

- Arbitral award issued in China against a Finnish party under the auspices of a local arbitration institution
- Proceedings conducted and the award issued in Chinese
- When the award is being enforced in Finland, the Finnish party claims that the proceedings were conducted in an entirely inappropriate manner
- The arbitrators appointed are being accused of having been openly biased and among others to have refused to hear the witnesses of one party and ruled almost all written evidence of that party inadmissible

A. Topics and Case Studies

VII. Enforcement (Continued)

- The arbitrators allegedly refused to record the objections raised during the proceedings
- Finnish party claims that due to advice given by the local counsel, no formal written objections were filed before the issuance of the arbitral award
- no formal written objections were filed before the issuance of the arbitral award
- The Chinese party did not have an outside counsel

A. Topics and Case Studies

VII. Enforcement (Continued)

- The Chinese party is in possession of the arbitral award, but a great amount of the correspondence with the institute and arbitrators is missing
- The recordings from the hearing are missing
- All the available documents are in Chinese
- The Chinese party speaks hardly any English
- The arbitrators do not respond to any contact attempts

What assistance could/should the relevant arbitration institute offer to the Chinese party to ensure that the arbitral award is enforced?

B. Tips and Tricks to Ensure Enforceability of Arbitral Award

I. To Counsel

- Draft arbitration agreement carefully
- Specific, detailed and clear prayers for relief
- Proper service of Request for Arbitration (use several channels of service)
- Raise objections immediately
- Immediate challenge of award on jurisdiction
- Proper service of all procedural documents

B. Tips and Tricks to Ensure Enforceability of Arbitral Award II. To Arbitrators

- Equal treatment of parties
- Observe right to be heard
- Observe/apply mandatory rules of all relevant jurisdictions
- Invite parties to comment on relevant provisions

THANK YOU!

Questions?



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