



INTRODUCTION TO INTERNATIONAL COMMERCIAL ARBITRATION

*Columbia Law School's
Global Law and Business
Seminar*

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A black and white photograph of a wooden gavel resting on a stack of coins on a wooden table. In the background, there are some papers and a pen. The text "Arbitral award" is overlaid in the center.

Arbitral award

What is an award?

CASE No. ARB(AF)/97/1

INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES
(ADDITIONAL FACILITY)

B E T W E E N:

METALCLAD CORPORATION
Claimant

and

THE UNITED MEXICAN STATES
Respondent

A W A R D

Before the Arbitral Tribunal constituted
under Chapter Eleven of the North
American Free Trade Agreement, and
comprised of:

Professor Sir Elihu Lauterpacht, QC, CBE
President
Mr Benjamin R. Civiletti
Mr José Luis Siqueiros

Date of dispatch to the parties: August 30, 2000

The Arbitral Award

- Term generally undefined
- Instrument by which the tribunal records its decision in the arbitration
- Not a recommendation
- Final settlement of the matters contained in it

What are the effects of an award?

A wooden gavel and a wooden mallet are shown in a close-up, low-angle shot. The gavel is positioned horizontally, with its head on the left and handle extending towards the right. The mallet is positioned vertically, with its head at the bottom and handle extending upwards. Both tools are made of dark wood and have a smooth, polished finish. The background is a light, neutral color, creating a clean and professional look.

The Arbitral Award

- Res judicata effect
- Subject to enforcement and set aside
- Extra steps may need to be taken (example under ICC rules the award must be submitted to the ICC court for scrutiny)

Are all decisions of the tribunal
considered to be awards?

The Arbitral Award

“The characterization given by the tribunal does not bind a court (for set aside or enforcement):

Publicis Communication v. True North “Communications, Inc., 3 F.3d 725 (U.S. 2d Cir., 2000). A joint venture between a French and an American firm had broken down. During the course of the arbitration to settle accounts between them the American firm requested the arbitral tribunal to issue an award ordering the French firm to turn over tax records to the American firm that the American firm said it needed in order to file with the tax authorities and the Securities and Exchange Commission. The tribunal granted the request, **but in the form of a procedural order** signed by the chairman “for and on behalf of the arbitrators.” **When the American firm sought confirmation of the procedural order as an award under the New York Convention** as a precedent to enforcement, the French firm argued that it was a mere procedural order for which enforcement was not available. **The trial court and the court of appeals held that the label given by the arbitral tribunal to its order was not binding on the court. Since the order of the arbitral tribunal was a final disposition of an issue that was in dispute, it was an award and could be enforced.”**

How many types of awards are there?

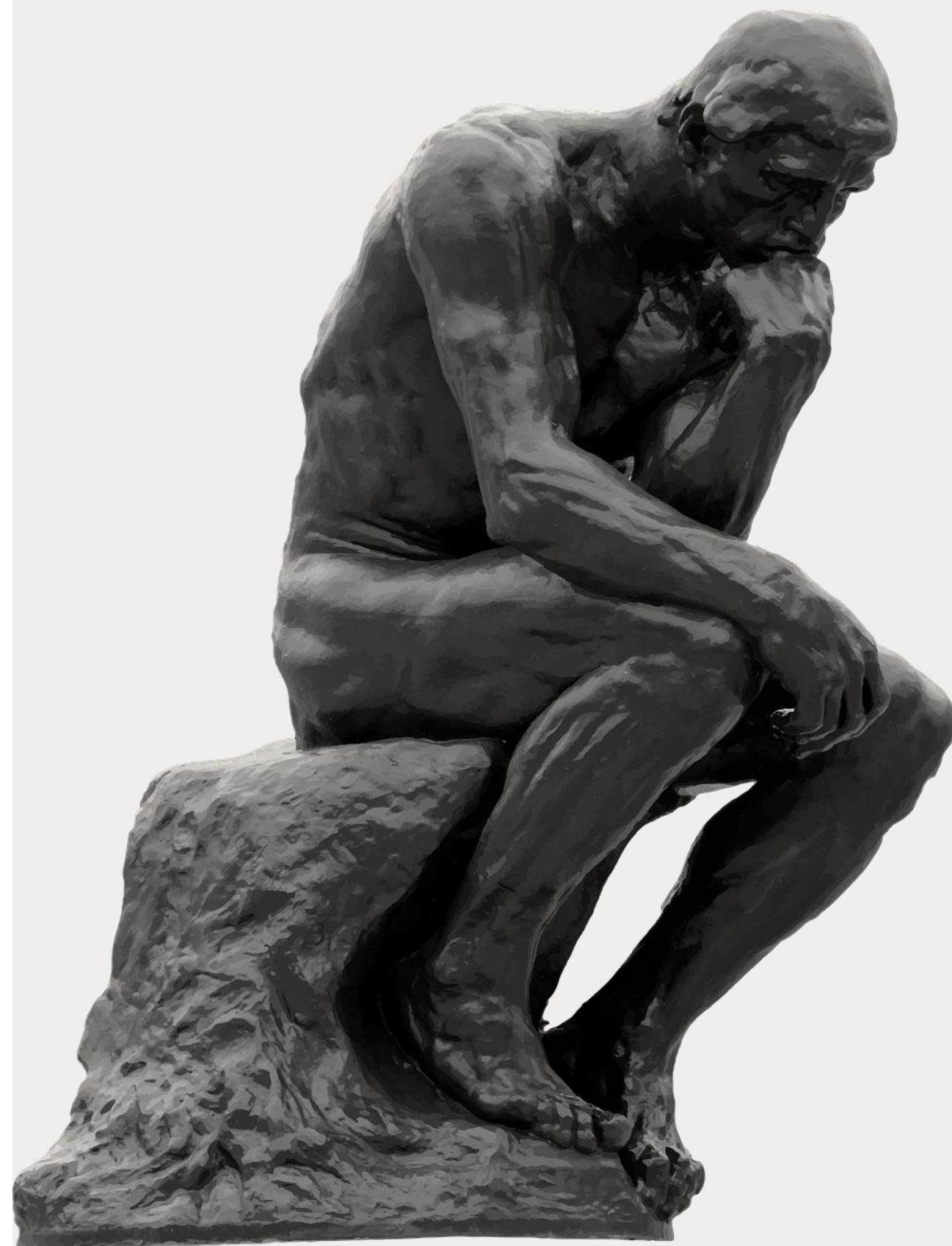
Final
Partial
Interim
Consent
Default
Additional



Enforcement and challenge of
awards...

Flip sides of same coin

What are the options for the losing party?



COMPLY

- 90 % ICC

CHALLENGE

- In seat under *lex arbitri*
- Advisable
- Careful with time limits
- Psychological effect on court
- Grounds wider than resisting recognition and enforcement?

RESIST

- In seat or outside
- No possibility of forum shopping

NEGOTIATE

What are the options for the winning party?



PRESSURE TO ACHIEVE COMPLIANCE

- Diplomatic or commercial
- E.g.: credit worthiness before World Bank

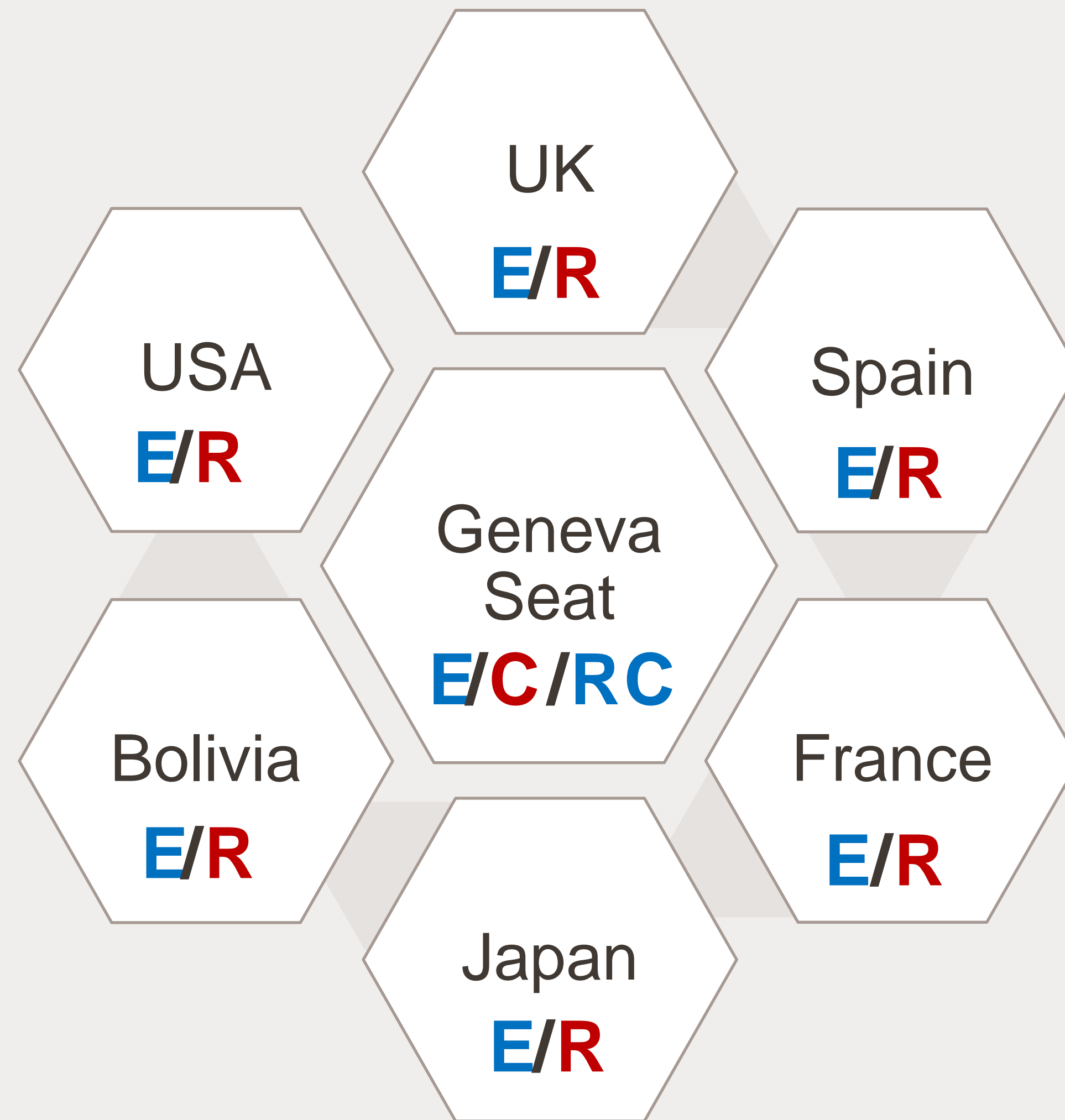
ENFORCE THE AWARD

- Locate country where assets are
- In the seat or outside the seat
- Consider forum shopping
- Take advice from experienced lawyers in the jurisdiction

RESIST A CHALLENGE AT THE SEAT

NEGOTIATE

- Winner
- Loser



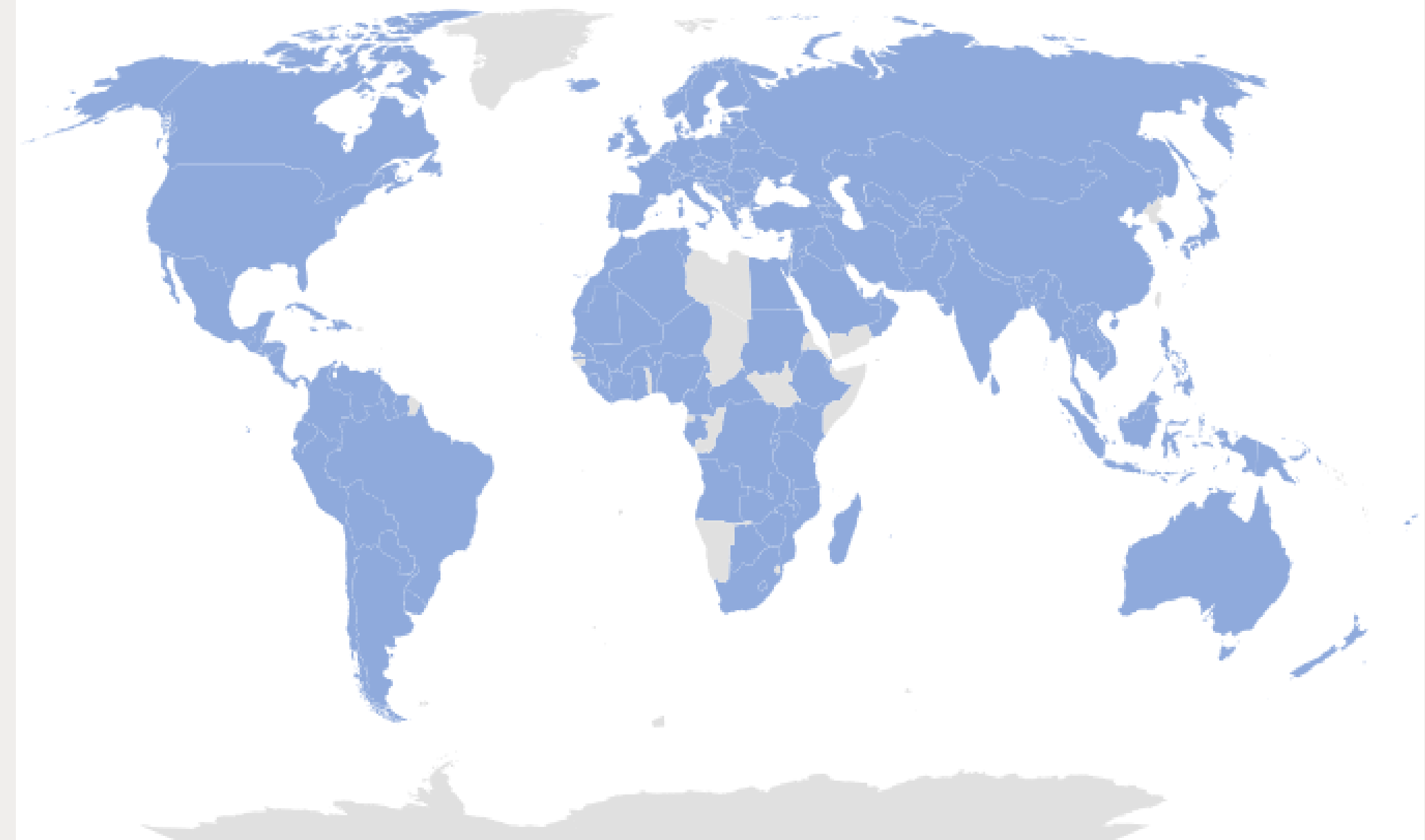
What are the relevant legal instruments?

Legal Framework: The New York Convention

1958 New York Convention on Recognition and Enforcement of Foreign Awards

- Foundation instrument of International Arbitration
- 172 Members
- Two anchors:
 - At the commencement of the arbitration (art. II.3)
 - At the end of the arbitration (art. III)

NYC CONTRACTING STATES 2023



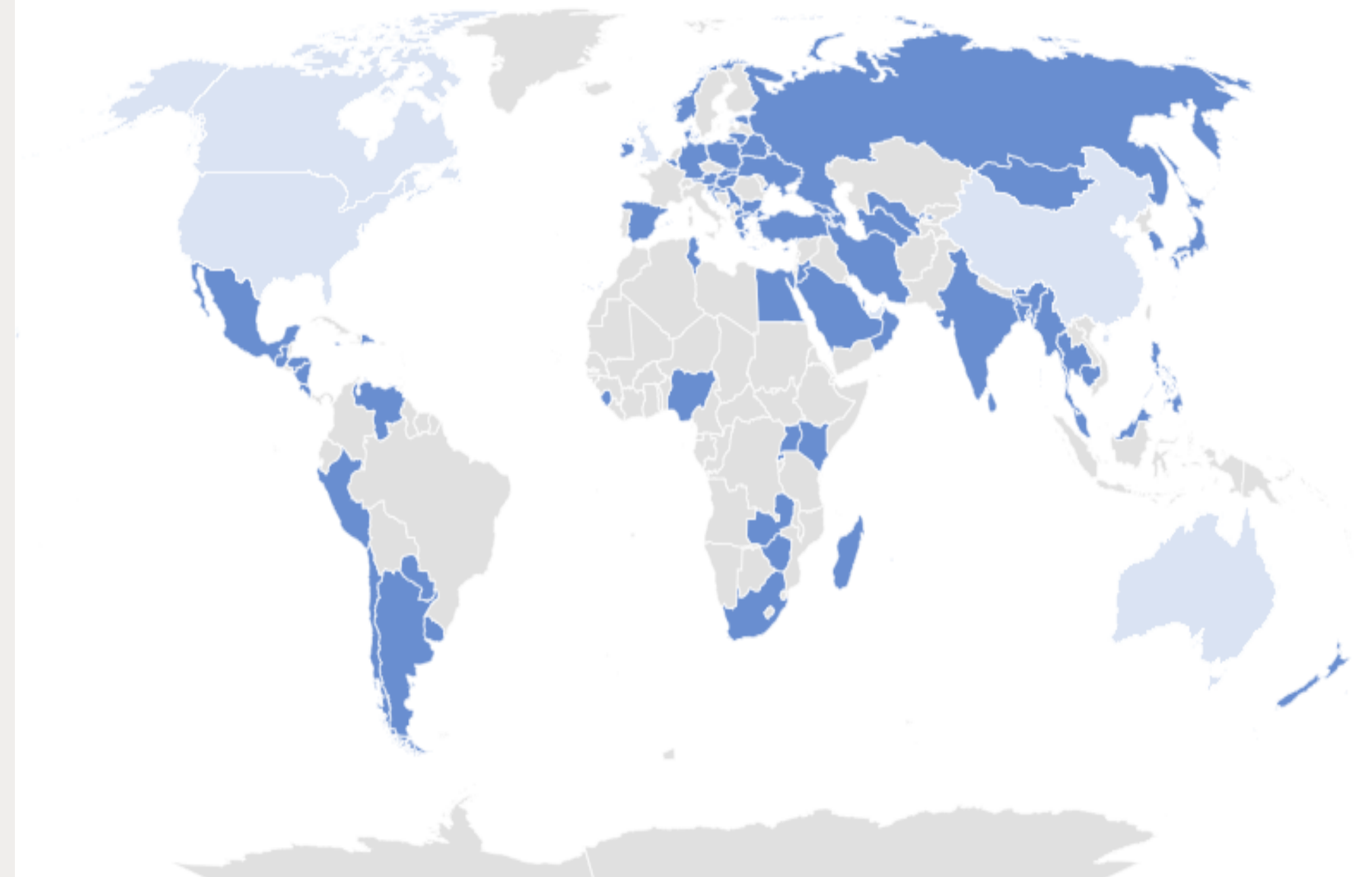
Legal Framework: The UNCITRAL Model Law

UNCITRAL Model Law on International Commercial Arbitration (1985, 2006 amendment)

- More than 87 States in 120 jurisdictions
- Worldwide consensus on key aspects of Intl' Arbitration practice
- Assists States in reforming and modernizing their arbitration laws
- Harmonization through uniform rules

Watch out! Do not confuse with UNCITRAL Arbitration Rules

STATES WHOSE ARBITRATION LAW IS BASED ON UML



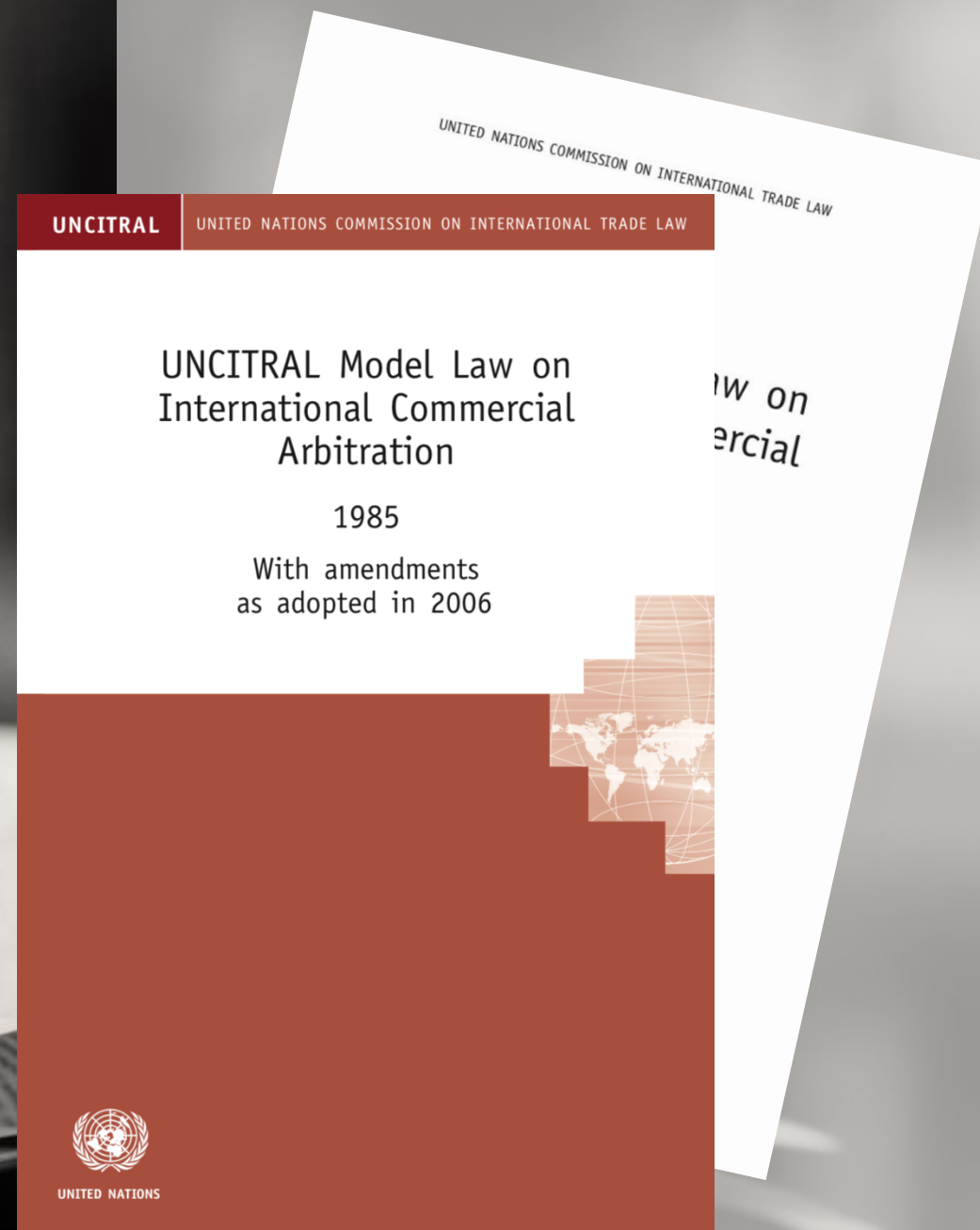


Challenge of awards

UNCITRAL Model Law

- Offensive effort to overturn an award
- Where: before national court at seat under lex arbitri
- Effect: treated as invalid by courts of seat but also by national courts elsewhere under NYC and ML
- May need to exhaust available remedies: appeal to second tier tribunals or review, correction of award or additional award
- Time limits for application to relevant national court – example UNCITRAL Model Law, Article 34:

“(3) An application for setting aside **may not be made after three months have elapsed from the date on which the party making that application had received the award (...)**”



Grounds for Challenge under the Model Law

- Challenge in respect of an “award made within the territory” of the state concerned
- Brought before “designated court” in that state, and only on the grounds set out in Article 34:

CHAPTER VII. RECOURSE AGAINST AWARD

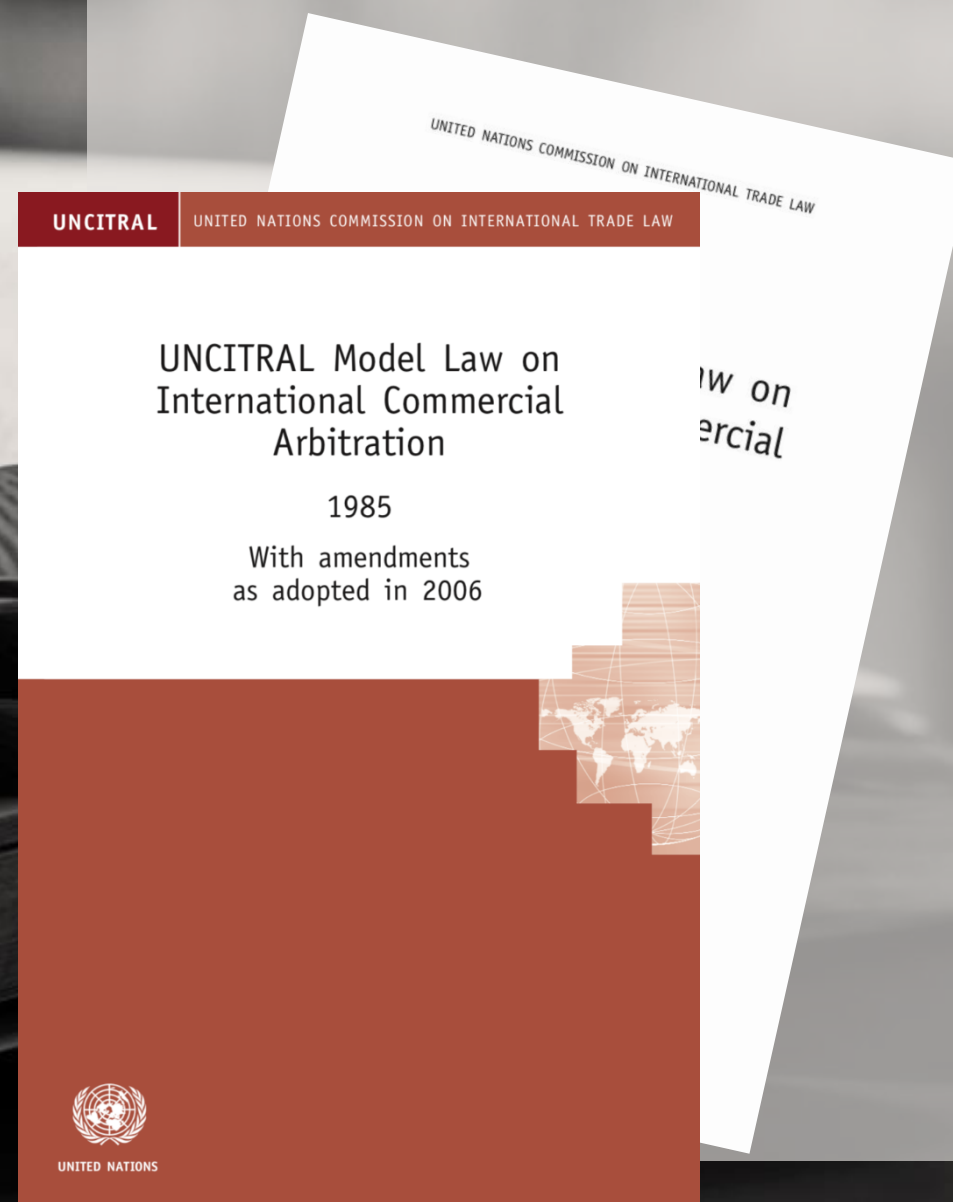
Article 34. Application for setting aside as exclusive recourse against arbitral award

- (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
- (2) An arbitral award may be set aside by the court specified in article 6 only if:
- (a) the party making the application furnishes 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 this State; or
- (ii) the party making the application 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
- (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or 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, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
- (b) 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 award is in conflict with the public policy of this State.



Recognition and enforcement



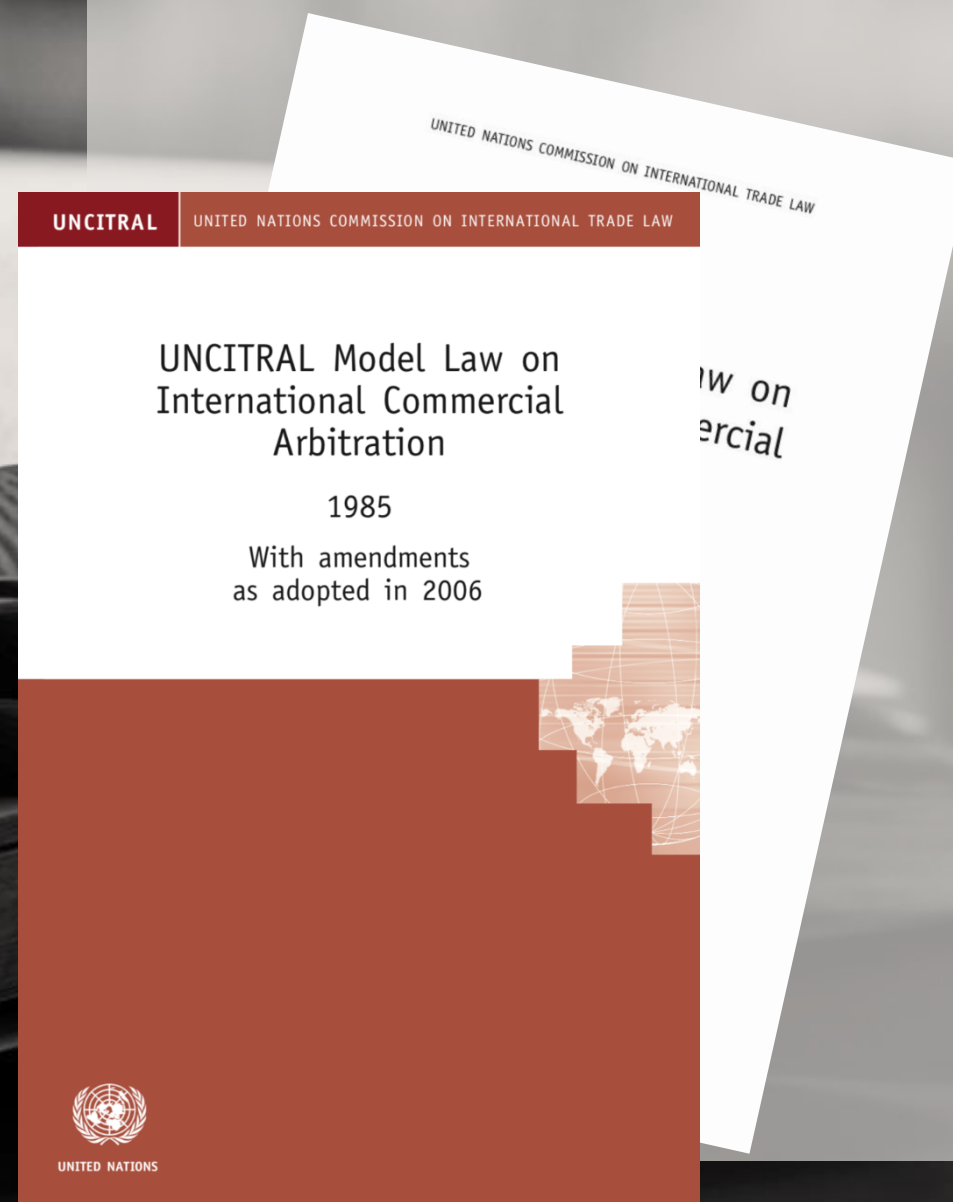
Recognition and enforcement

- Ultimate sanction for non-performance of an award
- Takes place against assets: need to trace assets (usually not in the seat)
 - Forum shopping
 - Enforcement may be denied in jurisdiction X, granted in Y
- Recognition and enforcement done under local law of place of enforcement: New York Convention, local arbitration law
- Need advice from lawyers in that jurisdiction



Grounds for Refusing Recognition and Enforcement

- Under the New York Convention, Article V
- Under the UNCITRAL Model Law, Article 36



Grounds for Refusal under the NY Convention

- Once necessary documents have been supplied, court will grant enforcement unless one of the grounds for refusal are present
- Same language as in the Model Law

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, 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

(b) 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; or

(c) The award deals with a difference 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

(d) The composition of the arbitral authority 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

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:


(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.



Case study:

Termorio v. Electranta



Case study:

Other jurisdictions



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www.saizarbitration.com



THANK YOU!