UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

Dispute Settlement

International Commercial Arbitration

5.8 Court Measures

UNITED NATIONS
New York and Geneva, 2005

NOTE

The **Course on Dispute Settlement in International Trade, Investment and Intellectual Property** consists of forty modules.

This module has been prepared on the basis of a first draft by Mr. Rodrigo P. Correa Gonzalez at the request of the United Nations Conference on Trade and Development (UNCTAD). The views and opinions expressed in this module are those of the author and not necessarily those of the United Nations, WTO, WIPO, ICSID, UNCITRAL or the Advisory Centre on WTO Law.

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UNCTAD/EDM/Misc.232/Add.42

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WHAT YOU WILL LEARN

This module discusses some of the main problems presented by the involvement of state courts in international commercial arbitration. It does not treat enforcement of the award, which is the subject of a separate module (5.7 "Recognition and Enforcement of the Award", P. Sarcevic). In section 1 you will learn that the intensity of court intervention varies, and that to establish its proper degree the expectations of the parties to the arbitration agreement need to be taken into consideration. You will then learn in section 2 that the degree of court intervention depends on a number of factors, among which the most relevant are the domestic law of the arbitral situs and the agreement of the parties. International treaty law provides only the framework within which domestic laws and the parties determine the actual degree of court intervention. Therefore, not much can be said in general on the law that regulates specific court measures. Accordingly, the next sections point to the main problems you might confront in relation with the most typical court measures. Section 3 takes up interim measures of protection. Section 4 discusses court intervention in the appointment and challenge of arbitrators. Finally, section 5 introduces you to the setting aside of the award.

1. THE PROPER DEGREE OF COURT INTERVENTION

Objectives

Upon completion of this section you will have learned that both too little and too much court intervention in international commercial arbitration are undesirable. You will also have learned that the ideal degree of court intervention depends not only on theoretical considerations, but also on the expectations of the parties in a specific case. Therefore, it is a consideration that the parties should ideally pay attention to at the negotiation of the agreement to arbitrate.

1.1 The proper degree of court intervention

By choosing arbitration, parties expect to exclude courts from both the conduct of the proceedings and the adjudication of the case. This expectation can easily be frustrated by various court measures. A court can block an arbitration altogether by enjoining a party from participating therein. It can also disturb arbitration proceedings by interfering with the composition of the arbitral tribunal, by restraining foreign attorneys from representing a party in arbitration proceedings, by hearing challenges against procedural orders of the arbitrators, or by taking any other measure directed to control the course of the arbitral proceedings. Finally, courts can reverse the final award on appeal or deprive it of most of its legal force by setting it aside. Arbitration only exists in the space allowed to it by courts. Too much court intervention simply suffocates arbitration.

Notwithstanding the fact that arbitration exists to the extent that courts retreat, it is also the case that arbitration cannot exist without some degree of court intervention. At a minimum, court intervention is needed to enforce the arbitral award when the losing party resists voluntary compliance. But court measures in support of arbitration need not be limited to the enforcement of the final award. Enforcement is often necessary for other decisions throughout the arbitration proceedings, and even before their initiation. Court measures are thus often sought, *inter alia*, to compel arbitration, to challenge an arbitrator, to obtain provisional measures of protection, to gather evidence, and to set aside the award.

You may have noticed that setting aside the award has been mentioned as a court intervention both in prejudice of arbitration and in support thereof. This is no paradox. Were it an ordinary practice of courts to set aside arbitral awards on their merits, there would be no point in submitting a dispute to arbitration. Yet the knowledge that there would be no way to set aside an award even on the face of gross procedural misconduct would equally deter arbitration. This illustrates how difficult the problem of the proper degree of court intervention is.

The proper degree of court intervention depends not only on the general effect that a court measure has on fostering or deterring arbitration. It also depends

on the expectations of the parties. For example, they may sometimes expect courts to collaborate in constituting the arbitral tribunal when no agreement can be reached, although sometimes they may not. These expectations may reflect some features of the legal relationship, but also mere personal preferences and prejudices. In the next section you will learn that the degree of court intervention is something that the parties can control to an important extent. It is therefore important to evaluate their expectations at the earliest moment when arbitration is considered, and take account of them in the arbitration agreement.

In conclusion, international commercial arbitration depends for its existence on a minimum and a maximum of court intervention. The proper degree of court intervention depends on the expectations of the parties.

1.2 Test your understanding

1. **Is there a fixed number of court measures in connection with arbitration?**
2. **Is there a universal proper degree of court intervention with international commercial arbitration?**
3. **What is the minimum degree of court intervention compatible with international commercial arbitration?**

2. FACTORS DETERMINING THE DEGREE OF COURT INTERVENTION

After having studied this section you will have learned that the actual degree of court intervention depends on various factors, most prominently some treaty provisions, the laws and court practice of the state in which the arbitration takes place, the arbitration agreement, and the rules of arbitration, if any, under which the arbitral proceedings are conducted. You will also have learned that the parties to an agreement to arbitrate have considerable control over the level of court involvement in their possible future arbitration, both by choosing the arbitral site and by carefully drafting the agreement.

2.1 Determining the relevant jurisdictions

When you think of court measures, you should first consider which jurisdictions are relevant. In principle, courts all over the world could take measures intended to interfere with an arbitration. Consider the following illustration.

A begins arbitration proceedings in Switzerland against B according to an arbitration agreement. B applies to the courts in Argentina for an injunction against A proceeding with the arbitration. After B fails in Argentina, he files the same application in Bolivian courts. After he fails in Bolivia, he does the same in Spain.

There is something absurd in this illustration. Yet its absurdity lies not in the search of a court measure in a jurisdiction different from the one where the arbitration takes place. It rather lies in the applicant's disregard of any constraint, whether legal or practical, upon his unusual search. There are indeed four kinds of relevant constraints reducing the number of jurisdictions that might issue an order that would affect the arbitration:

- First, courts everywhere have legal rules that determine the cases upon which they have jurisdiction. Those rules require some connection between the case and the venue. In most cases there will only be a handful of courts prepared to assert jurisdiction in the first place.
- Second, most of the time it will be impossible to enforce a foreign court measure interfering with an arbitration.
- Third, indirect enforcement is limited to the jurisdictions where one of the parties has property.
- Fourth, a foreign court measure will not affect the legal force of the award, since an award adopted in spite of such a measure will nonetheless be enforceable under the New York Convention, and enforcement could be resisted only on the limited grounds of its Article V (see module 5.7 of this course).

This reduces significantly the number of relevant jurisdictions. First, it leaves the courts of the arbitral situs. Not only are their measures easily enforced, but disregard of them in the arbitration could lead to the later setting aside of the award, as you will learn in section 5 of this module. Second, it leaves the courts of those countries where one of the parties has property.

In conclusion, the courts best situated to collaborate or interfere with an arbitration are those of:

- The jurisdiction where the arbitration takes place;
- The jurisdiction where the award will be enforced;
- The jurisdiction where one of the parties has attachable property.

2.2 Factors determining court powers in connection with international commercial arbitration

After you have established which are the jurisdictions that could directly or indirectly interfere with the arbitration, it is necessary to consider which factors determine their degree of cooperation or obstruction with the arbitration. In order of importance, they are:

- First, the New York Convention;
- Second, the laws and practices of the potentially intervening jurisdictions;
- Third, the agreement to arbitrate and arbitration rules therein incorporated.

2.3 Maximum and minimum degree of court intervention

The maximum and minimum degree of court intervention is provided by the New York Convention. The New York Convention has been ratified by a large number of states and offers the most general framework within which international commercial arbitration is both regulated and practiced. Article II(3) of the Convention reads as follows:

New York Convention,Articles II (3)

> *The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.*

This provision is mirrored in Article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration. Yet it is important to have in mind that the UNCITRAL Model Law is not a binding instrument, but a model to be followed by the domestic laws on international commercial arbitration. It thus represents UNCITRAL's ideal domestic implementation of Article II(3) of the New York Convention:

UNCITRAL Model Law, Article 8(1)

A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

Article II(3) of the New York Convention contains both an explicit obligation and an implied prohibition:

- An explicit obligation directing courts to refer to arbitration the parties to an arbitration agreement.
- An implied prohibition for courts to take measures incompatible with the said obligation.

This prohibition marks the maximum degree of legitimate court intervention. Note that it is not a precise limit. Whether a court measure is or is not compatible with the obligation to refer the parties to arbitration depends on the interpretation of the quoted provision, which may vary considerably among the courts of the different states. You should first examine the practice of those courts before you can assert where the maximum degree of court intervention on a particular jurisdiction lies. Still, even within one jurisdiction courts may disagree on which court measures are contrary to their duty under the New York Convention to refer the parties to arbitration. Consider the following United States federal cases:

New York Convention,Articles II (3) and III

In McCreary Tire & Rubber Co. v. CEAT S.p.A.[1] the Court of Appeals for the Third Circuit in Philadelphia, was called to rule on the compatibility of a pretrial attachment with the New York Convention. The court declared:Quite possibly foreign attachment may be available for the enforcement of an arbitration award. This complaint does not seek to enforce an arbitration award by foreign attachment. It seeks to bypass the agreed upon method of settling disputes. Such a bypass is prohibited by the Convention if one party to the agreement objects... [A]rticle II(3) of the Convention provides that the court of a contracting state shall "refer the parties to arbitration" rather than "stay the trial of the action." The Convention forbids the courts of a contracting state from entertaining a suit which violates an agreement to arbitrate... The obvious purpose of the enactment of Pub. L. 91-368, permitting removal of all cases falling within the terms of the treaty, was to prevent the vagaries of state law from impeding its full implementation. Permitting a continued resort to foreign attachment in breach of the agreement is inconsistent with that purpose...

In Carolina Power & Light Co. v. Uranex [2] the federal district court for the Northern District of California had to determine the same issue as the court in McCreary. It ruled exactly on the opposite direction:The Convention and →

[1] *501 F.2d 1032 (3d Cir. 1974).*
[2] *451 F.Supp. 1044 (N.D. Cal. 1977).*

its implementing statutes contain no reference to prejudgment attachment, and provide little guidance in this controversy. Article II of the Convention states only that a "court of a Contracting State… shall, at the request of one of the parties, refer the parties to arbitration." To implement this aspect of the Convention, section 206 of Title 9 provides that "[a] court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States." The language of these provisions provides little apparent support for defendant's argument....This court... does not find the reasoning of McCreary convincing... [N]othing in the text of the Convention itself suggests that it precludes prejudgment attachment...[T]his court will not follow the reasoning of McCreary... There is no indication in either the text or the apparent policies of the Convention that resort to prejudgment attachment was to be precluded.

The minimum degree of court intervention under the New York Convention is established both by the explicit order of Article II(3) and by Article III. According to those provisions, courts are under the following obligations:

- To refer the parties to arbitration at the request of one of them (Article II(3));
- To recognize and enforce a foreign arbitral award (Article III).

In between these maximum and minimum degrees of court intervention the New York Convention remains silent, except for some rules concerning setting aside the award, which will be taken up in section 5 below. Within the New York Convention framework, courts determine whether or not to take a particular measure according to state law and, secondly, to the arbitral agreement. Precedence of state law is simply given by the fact that stipulations of the arbitral agreement or rules of arbitration therein incorporated will only be recognized by courts insofar as they do not contravene mandatory provisions of the law of the *forum*.

In conclusion, Articles II(3) and III of the New York Convention provide the following framework for court measures in connection with international commercial arbitration:

- **At a minimum, courts shall refer the parties to an arbitral agreement to arbitration;**
- **At a minimum, courts shall recognize and enforce a foreign arbitral award;**
- **At a maximum, court measures must not contradict the court's obligation under the treaty to refer the parties to arbitration.**

Within this framework there are many possible court measures having a different impact on international arbitration, from obstructive to cooperative. The New York Convention does not regulate these measures. They are regulated:

- **First, by the domestic laws and practice of the courts where they are sought;**
- **Second, by the arbitral agreement.**

2.4 Domestic laws and court practices

There is great variation among the domestic laws and court practice on international commercial arbitration. In some countries arbitration is simply prohibited. In others only domestic arbitration is explicitly regulated. Some, especially among developed countries, have specific legislation on international commercial arbitration. The same variation is found in court practice. Whereas for the courts of some countries international commercial arbitration is routine, for the courts of others it is completely unheard of. Consider the following illustration:

In Klöckner Industrien-Anlagen GmbH v. Kien Tat Sdn Bhd & Anor [3] *applicant and respondent had agreed to arbitrate at Kuala Lumpur, Malaysia, in accordance with the Rules of the Kuala Lumpur Regional Arbitration Centre. After arbitration had begun, applicant filed in a Malaysian court a request to have the case transferred to the court. It argued that respondent was under receivership and had been wound up, and that the receivers and managers lacked authority to continue with the arbitration. It further claimed that the court had jurisdiction to determine that question under the Arbitration Act 1952 as amended in 1980. The court first considered the effect of state law upon its jurisdiction to supervise arbitral proceedings. The relevant provision was section 34(1) of the Arbitration Act 1952:*

1. *Notwithstanding anything to the contrary in this Act or in any other written law..., the provisions of this Act or other written law shall not apply to any arbitration held under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965 or under the United Nations Commission on International Trade Law Arbitration Rules 1976 and the Rules of the Regional Centre for Arbitration at Kuala Lumpur.*

The issue turned on the question whether the expression "any other written law" should be taken to include the Companies Act 1965, under which the receivership had been declared, or not. The court found that it should, with the consequence that,

> *[T]he question of capacity or locus standi of a party to the arbitration… cannot be determined by the court by virtue of s 34. These are issues which the arbitral tribunal has to decide and the court cannot and will not interfere with the proceeding of the tribunal. The function of the court is confined only to the enforcement of the arbitral award if the award is sought to be enforced in Malaysia.*

[3] Malayan L.J. *183 (1990), reproduced in extract in W. Michael Reisman et al.,* International Commercial Arbitration: cases, Materials and Notes on the Resolution of International Business Disputes *174ff (1997).*

This decision was sensitive to the fact that too much court intervention is prejudicial to arbitration. State courts do not always have that sensitivity, and even if they do, you should not assume that promoting international arbitration is a policy they always pursue. Consider the following example:

> *In Builders Federal (Hong Kong) Ltd. and Josef Gartner & Co. v. Turner (East Asia) Pte. Ltd.* [4] *the parties were subject to arbitration in Singapore. One of the parties sought from the High Court of Singapore an injunction enjoining a New York law firm, attorneys for the other party, from participating in the arbitral proceedings. The court found that representing a party in arbitral proceedings amounts to practicing law, and that under the Legal Profession Act only persons with a practicing certificate may practice law in the country. It issued the injunction.* [5]

Examples of similar variations among domestic legislation could be mentioned. In section 5 *infra* you will see the very different approach among countries to the control by courts of the arbitral award.

The most difficult situation to assess is when there is no explicit domestic legal provision. That is often the situation in countries where, notwithstanding the validity of the New York Convention as law of the land, there is no legislation regulating arbitration, or no specific legislation dealing with international commercial arbitration, or, finally, very scarce legislation. That is more likely to be the case in those countries which have traditionally opposed arbitration. Many developing countries used to be in this situation. Sometimes it may be almost impossible to assert in advance, *inter alia*, whether they will accept foreign lawyers as arbitrators or counsels,[6] which cases will be considered arbitrable, or whether the arbitral tribunal will be recognized to have jurisdiction to rule on its own jurisdiction.[7] You should then carefully review their practice. An answer to some of these issues may be found there. But it is possible that some uncertainty will remain. Such uncertainty should be taken into consideration as providing an opportunity for some unexpected court interference with the arbitration.

The diversity of domestic arbitration laws and court practice provides an incentive for arbitral site shopping, i.e., to consider the advantages and disadvantages of arbitrating at different places and to choose the venue according to the expectations of the parties. But as acquiring the relevant

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[4] *Commented in Michael Polkinghorne, The Right of Representation in a Foreign Venue, 4* Arb. Int'l *333 (1988), reproduced in extract in W. Michael Reisman et al.,* International Commercial Arbitration: cases, Materials and Notes on the Resolution of International Business Disputes *901ff (1997).*

[5] *The law was subsequently changed in Singapore to permit foreign lawyers to represent parties in arbitration.*

[6] *Consider Article III of the European Convention on International Commercial Arbitration:*
In arbitration covered by this Convention, foreign nationals may be designated as arbitrators.

[7] *Consider Article V(3) of the European Convention on International Commercial Arbitration:*
Subject to any subsequent judicial control provided for under the lex fori*, the arbitrator whose jurisdiction is called in question shall be entitled to proceed with the arbitration, to rule on his own jurisdiction and to decide upon the existence or the validity of the arbitration agreement or of the contract of which the agreement forms part.*

information is costly, shopping is not always a good option. This explains current efforts at unification. These efforts are moving at two different levels:

- Through international treaties;
- Through the United Nations Commission on International Trade Law, which has issued a Model Law on International Commercial Arbitration (UNCITRAL Model Law) to be used voluntarily by the different states as a model for their domestic legislation.

2.5 International treaties, multilateral and bilateral

You should thus check whether a multilateral or bilateral treaty modifies domestic law in relation to a particular arbitration. The European Convention on International Commercial Arbitration is such a treaty. Many other regional or bilateral treaties may bear on a specific case.

2.6 UNCITRAL Model Law

The UNCITRAL Model Law offers what may be considered a sensible regulation of court measures in connection with international commercial arbitration. Its Article 5 provides:

UNCITRAL Model Law, art. 5

> *In matters governed by this Law, no court shall intervene except where so provided in this Law.*

Then the Model Law provides for court intervention in the following instances:

- Interim measures of protection;
- Appointment of arbitrators;
- Challenge of arbitrators;
- Termination of the mandate of an arbitrator;
- Jurisdiction of the arbitral tribunal;
- Setting aside the award.

You should not assume that domestic laws follow the UNCITRAL Model Law.

In conclusion, there is great variation in the domestic legal regulation of court measures within the framework of the New York Convention. You should study that regulation as well as the court practice of the relevant jurisdiction in order to determine the likelihood of courts taking a certain measure.

2.7 Arbitration agreement

The parties to an arbitration can also determine by agreement the degree of court intervention of their choice. Yet they can do this only within the limits of domestic law and court practice. These limits are of three different kinds.

- First, under domestic law courts may refuse to take a measure for which they lack statutory authority, even if authorized by the parties to the agreement to arbitrate;
- Second, courts may consider null and void or inoperative an agreement to exclude any of its statutory powers;
- Third, an agreement modifying, limiting or increasing the powers of courts to take measures in connection with arbitration may require special formalities.

2.8 Expansion and exclusion of court powers by agreement

The powers of courts are determined by general law, and they are normally very reluctant to accept that new powers can be created through a private agreement. You can expect some flexibility depending on the kind of power being created. Whereas it would be rare for a court to accept an appeal created by agreement where no appeal was available at law, a court may be more ready to take a provisional measure not available at law but which was authorized in the agreement to arbitrate, especially if the court had a statutory power to take other provisional measures of a similar kind. In general though, you should have in mind that it is often impossible to increase the powers of courts by means of a private agreement.

Consider now the opposite situation, i.e., an agreement excluding the power of courts to take measures. Its validity will depend on whether the power concerned can be legally excluded. This depends on domestic law and on the way courts interpret it. The closer a power is connected with public policy considerations, the less likely that its exclusion will be accepted. A contractual clause saying that 'no court will have jurisdiction to halt arbitration on the ground that the matter is not arbitrable' is likely to be of no effect, since there is a public interest in preventing arbitration on non arbitrable matters. On occasion it may be difficult to determine whether a specific measure can be excluded. For example, you may not find guidelines to establish whether foreign parties may exclude the jurisdiction of local courts to set aside the award on procedural grounds. You should not assume that courts will enforce the exclusion agreement, but rather take into consideration the probability of a ruling to the contrary.

Finally, when domestic law permits an increase or an exclusion of court powers in connection with international commercial arbitration through contractual agreement, the fulfillment of specific formalities may be required. The formality

most typically required is that the agreement be 'in writing'. Its fulfillment may present some trouble when the increase or exclusion is incorporated by reference, which is the normal practice in institutional arbitration as opposed as *ad hoc* arbitration. Consider the following example:

Exclusion of court powers by agreement

In Arab African Energy Corp. Ltd. v. Olieprodukten Nederland B.V. [8] *an English court had to establish whether an arbitral clause stating "English law - arbitration, if any, London according I.C.C. Rules." excluded any appeal against the arbitral award. The relevant English legal provision at that time provided as follows:*

[T]he High Court shall not… grant leave to appeal with respect to a question of law arising out of an award… if the parties to the reference in question have entered into an agreement in writing (in this section referred to as an "exclusion agreement") which excludes the right of appeal under section 1 above in relation to that award…Article 24 of the ICC Rules then in force provided that:

1. *The arbitral award shall be final.*
2. *By submitting the dispute to arbitration by the International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made.*

The court found that "the phrase 'an agreement in writing which excludes the right of appeal' is apt to apply to an exclusion agreement incorporated by reference."

You should not assume that all jurisdictions will have this pro-arbitration stance. Some courts, particularly those less knowledgeable of international commercial arbitration, may require a more clear statement that a statutory right has been waived.

In conclusion, under the New York Convention:

- **Courts are under a duty to refer the parties to an agreement to arbitrate to arbitration;**
- **Courts may not take measures contrary to that duty; and**
- **Courts are under a duty to recognize and enforce a foreign arbitral award.**

Within this framework, court measures are primarily regulated by domestic law and practice, which vary considerably among countries. The parties to arbitration can regulate the availability of court measures within the framework of domestic law. This framework consists of:

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[8] *Lloyd's Rep. 419 (Q.B. 1983), reproduced in extract in W. Michael Reisman et al.,* International Commercial Arbitration: cases, Materials and Notes on the Resolution of International Business Disputes *1028ff (1997).*

- **Rules and practices severely limiting the creation of new court powers through contractual agreement;**
- **Mandatory rules prohibiting the exclusion of certain court measures; and**
- **Rules demanding specific formalities for the contractual agreements increasing or excluding court powers to take measures in connection with arbitration.**

It follows from what has been said that parties to an agreement to arbitrate have two tools at their disposal to secure a level of court involvement according to their expectations. First, they can choose the site of arbitration. As the law and practice at the arbitral site is the principal factor in the level of court involvement, the power of the parties to freely choose that site affords them a very important degree of control over the level of court involvement. Second, within the framework of the law at the arbitral site, the parties may be able to increase or exclude the powers of courts to take measures in connection with the arbitration.

Since court measures are mostly regulated by domestic law, and therefore differ from jurisdiction to jurisdiction, it is not possible to describe them in general. Sections 3, 4 and 5 introduce you to the main problems that the most common court measures present. Their solution will depend on the applicable law in the particular case.

2.9 Test your understanding

1. **What is the minimum degree of court intervention in international commercial arbitration allowed by the New York Convention?**
2. **What is the maximum degree of court intervention in international commercial arbitration allowed by the New York Convention?**
3. **To what extent can the parties determine the degree of court intervention in their arbitration by agreement?**
4. **What are the legal factors determining the actual degree of court intervention in an arbitration?**
5. **The courts of which jurisdictions are well situated to collaborate or interfere with an arbitration?**

3. INTERIM MEASURES OF PROTECTION

Objectives

In this section you will learn that international commercial arbitration is not per se incompatible with interim measures of protection. Such measures may be taken both by the arbitral tribunal and by courts. You will further learn that a measure taken by an arbitral tribunal may require enforcement in courts.

3.1 Enforcement of measure of protection taken by an arbitral tribunal

It takes time from the time a request for arbitration is filed until a final award can be enforced. In the meanwhile, it may be necessary to take measures of protection to secure that the final award will be enforceable. Arbitral tribunals often have power to take such measures. However, since those tribunals lack the power to enforce their orders, the assistance of state courts may be necessary.

The power of courts to enforce measures of protection taken by arbitral tribunals is determined by the domestic law and court practice where enforcement is sought. A threshold issue will be whether the measure fell within the jurisdiction of the arbitral tribunal. Some measures are obviously outside its jurisdiction, and for that reason would never be enforceable. This is the case, for example, with measures directed to persons that are third parties in relation with the agreement to arbitrate. The jurisdiction to take other measures of protection may find its source both in domestic law and in the agreement to arbitrate, and through the latter, in arbitration rules as well. Article 17 of the UNCITRAL Model Law provides a model of statute-based jurisdiction to take interim measures:

UNCITRAL Model Law, Article 17

> *Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.*

Enforcement Under the New York Convention

If the answer to the jurisdictional issue is affirmative, courts will have to determine whether enforcement is available. The New York Convention is silent on the matter of interim measures. Yet the courts in some jurisdictions may understand that they are under a duty to enforce a provisional measure under Article III of the New York Convention if the said measure is taken in the form of an award rather than in the form of a procedural order. Article III provides as follows:

New York Convention, Article III

> *Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles…*

In other jurisdictions courts may not accept that an award for interim measures is covered by Article III of the New York Convention. Article V(1)(e) of the same Convention authorizes a court to refuse enforcement of an award which has not become binding. It is sometimes argued that such an award is not binding because it is not a final disposition of the dispute. Where enforcement of an interim measure under the New York Convention is accepted, two practical problems may arise:

- First, arbitrators may doubt whether it is available to them to take an interim measure in the form of an award;
- Second, arbitrators may be reluctant to issue an interim measure in the form of an award, because it appears to provide the measure of stability that is not compatible with its interim character.

Some arbitration rules address the first concern explicitly. Consider for example Article 23(1) of the ICC Rules:

ICC Arbitration Rules, Article 23(1)

> *Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an Award, as the Arbitral Tribunal considers appropriate.*

The second concern is addressed by Articles 26(1) and (2) of the UNCITRAL Arbitration Rules, which provide greater flexibility to the arbitrators by giving them the power to make an interim award:

UNCITRAL Arbitration Rules, Articles 26(1) and (2)

> 1. *At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.*
> 2. *Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.*

Enforcement under domestic law

If enforcement of interim measures under the New York Convention is not available at the enforcement forum, it will be necessary to rely on domestic law and court practice. In general, you should consider that courts will be more reluctant to enforce those measures that are new to them. In most

jurisdictions courts have power to take a limited repertoire of interim measures of protection. It is unlikely that courts will enforce an arbitral measure which they themselves could not have taken.

In conclusion, when an interim measure issued by an arbitral tribunal requires enforcement, it will be necessary to apply for it to a court. Enforcement of a measure in the form of an arbitral award may be available under Article III of the New York Convention. Otherwise, enforcement has to be sought according to the law of the enforcing forum.

3.2 Interim measures of protection taken by courts

There are at least three reasons why directly obtaining a court measure of protection may be necessary:

- First, an arbitral tribunal can only take such a measure after it is constituted. But the time needed to constitute the tribunal might be too long to obtain the measure on time. On the contrary, state courts are there ready to act, and under some conditions they can grant preventive measures without even hearing the party against whom they are directed *(ex parte)*;
- Second, some provisional measures bind third parties, which are not under the reach of the arbitral tribunal's jurisdiction;
- Finally, some arbitral tribunals may lack power to take provisional measures altogether.

Which measures can be sought depends completely on the law of the forum. Some courts have taken the view that provisional measures are intrinsically incompatible with arbitration, or that they are contrary to the duty of courts under the New York Convention to refer the parties to an agreement to arbitrate to arbitration. See, for example, *page 7*. Yet most jurisdictions seem to be of the contrary opinion, i.e., that courts retain jurisdiction to take interim provisional measures, both prior to and during the arbitration proceedings.

Implied waiver of Arbitration agreement

In some jurisdictions applying to a court for interim measures of protection may be deemed a waiver of the arbitration agreement. Consider the following hypothetical:

> *A applies to court for the attachment of some property of B, on the ground that it has an arbitrable claim against B and that the attachment is necessary to secure the enforcement of the final award. A takes the necessary steps to constitute the arbitral tribunal. B refuses to cooperate with the constitution of the tribunal and asks the appointing authority not to proceed with it because the controversy does not fall within any valid agreement to arbitrate. It argues that by its request of provisional measures to a court A has waived its right to arbitrate the dispute. The appointing authority constitutes the tribunal notwithstanding B's allegation.*

In such a case the party resisting arbitration could still present its claim directly to the arbitral tribunal and in the courts. If the courts of the arbitral situs are of the opinion that an application for interim measures of protection to a court amounts to an implied waiver of the right to arbitrate a dispute, that party may be able to enjoin the other from continuing with the arbitration, or to subsequently set aside the award. Since the New York Convention is silent on the matter, it will be dealt with under the law of the forum and the agreement of the parties. Article 9 of the UNCITRAL Model Law provides as follows:

UNCITRAL Model Law, Article 9

> *It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.*

This or similar provisions, incorporated in the domestic laws of the arbitral situs, would prevent its courts from understanding that a request from a court of an interim measure implies a waiver of the agreement to arbitrate. If there is no provision to this effect in the arbitral situs, you should study the court practice.

Conventional Compatibility

The compatibility of court interim measures with arbitration can be included by the parties in their agreement to arbitrate, either directly or by reference. Some arbitration rules explicitly affirm that compatibility. Consider for example Article 26(3) of the UNCITRAL Rules:

UNCITRAL Arbitration Rules, Article 26(3)

> *A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.*

Here applies what was said in section 2 concerning agreements to arbitrate. You should not assume that courts in all jurisdictions will accept that the agreement of the parties can make compatible what the law of the forum makes incompatible. Therefore, even when the parties have agreed on the said compatibility, it is important to assess its the status in the law of the situs before applying to court for an interim measure.

UNCITRAL Arbitration Rules, Article 26(3)

In conclusion, interim measures of protection can be directly sought from courts. Courts will grant those measures according to their domestic law. In some jurisdictions the application for such a measure may be deemed an implied waiver of the agreement to arbitrate, but modern international commercial arbitration law tends to go in the opposite direction.

3.3 Test your understanding

1. **Is it possible under the New York Convention to enforce an interim measure of protection issued by an arbitral tribunal? If possible, on what conditions?**
2. **What is the significance of UNCITRAL Arbitration Rules Article 26(3) (see *page 18*)?**
3. **When would a party to arbitration seek an interim protective measure from a court rather than from the arbitral tribunal?**
4. **Are there any risks in applying to a court for an interim measure of protection?**

4. COURT INTERVENTION IN THE COMPOSITION OF THE ARBITRAL TRIBUNAL

Objectives

Upon completion of this section you will have learned how courts can intervene in the composition of the arbitral tribunal, both through the appointment of arbitrators and by deciding on a challenge to them.

4.1 Appointment of arbitrators

The composition of the arbitral tribunal is critical for a good arbitration. In court litigation you cannot choose your judge. In arbitration the arbitrators have to be chosen by someone. Under most domestic laws the choice of arbitrators lies on the agreement of the parties. In practice agreement is often impossible. One of the greatest contributions of arbitration law is to offer fair mechanisms for the appointment of arbitrators. An important distinction should be made between *ad hoc* arbitration, and institutional arbitration.

Ad hoc arbitration

In *ad hoc* arbitration court measures may sometimes be needed to constitute the arbitral tribunal. On the contrary, courts are normally expected to stay out of the appointment of arbitrators in institutional arbitration.

An agreement to arbitrate that is not under a set of institutional rules can either:

- Include in the agreement a mechanism to appoint the arbitrators; or
- Rely on the default mechanism under the domestic law of the arbitral site.

Agreement engaging courts

In the first case, the mechanism agreed by the parties may engage courts or a third person. If it engages courts, you should make sure that they will be receptive to the engagement. Consider for example section 206 of the United States Code Title 9:

United States Code, Title 9, section 206

> *§ 206 Order to compel arbitration; appointment of arbitrators*
> *A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.*

This provision empowers courts to cooperate in the appointment of arbitrators according to the agreement of the parties. But in other countries you may not find a similar provision. Courts may then refuse to appoint the arbitrators in the manner agreed by the parties if it differs from the statutory mechanism, thus rendering the arbitration agreement pathological and unenforceable. The reason for this is that courts usually consider that the source of their authority

is exclusively the law, and that accepting an authority granted by the parties without statutory basis may be in contradiction with their office. Such a finding would not be in contradiction with Article II(3) of the New York Convention (see *p.5 supra*). Though Article II imposes on states parties to the Convention the duty to refer to arbitration the parties to an agreement to arbitrate, it does not empower courts to appoint arbitrators. Therefore, if courts do not have this power under domestic law, they may find the agreement to be 'inoperative or incapable of being performed.'

UNCITRAL Arbitration Rules

A variation of this problem may arise under an agreement to arbitrate under the UNCITRAL Arbitration Rules. These rules are not associated with any particular institution as appointing authority. Consider the following provisions of the said rules concerning the default mechanism to appoint a sole arbitrator:

UNCITRAL Arbitration Rules, Article 6(2), (3) and (4)

> 2. *If within thirty days after receipt by a party of a proposal made in accordance with paragraph 1 the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority agreed upon by the parties…*
> 3. *The appointing authority shall, at the request of one of the parties, appoint the sole arbitrator as promptly as possible. In making the appointment the appointing authority shall use the following list-procedure, unless both parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:*
> *(a) At the request of one of the parties the appointing authority shall communicate to both parties an identical list containing at least three names;*
> *(b) Within fifteen days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which he objects and numbered the remaining names on the list in the order of his preference;*
> *(c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;*
> *(d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.*
> 4. *In making the appointment, the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.*

Parties should not assume that, if they designate local courts as the appointing authority, those courts will use the mechanism of Article 6(3) quoted. Courts may simply apply the statutory mechanism available under domestic law or, even worse, they may declare the agreement unenforceable. The reason is the same just considered: UNCITRAL Rules are binding only as part of an

agreement to arbitrate, and courts may understand that their authority to appoint arbitrators can only rest in domestic law.

If the agreement to arbitrate provides a mechanism to appoint arbitrators not engaging domestic courts, you should make sure that the mechanism agreed upon will be respected by courts. Consider the following hypothetical.

A and B have included in their contract the following arbitral clause:

Any dispute arising out of this contract will be submitted to arbitration in X according to local law. The arbitral tribunal will consist of three arbitrators, one appointed by each party and a chairman appointed by the local bar association. Any party may request the appointment of the chairman. If a party fails to appoint the arbitrator of its choice within thirty days after notification by the other party of its decision to bring a matter to arbitration, the local bar association will do the appointment at the request of the latter.

A dispute has arisen between A and B. A has notified B of its decision to bring the matter to arbitration according to the agreement and of the name of its arbitrator. B has answered that it no longer considers the local bar association authorized to proceed with the appointment of arbitrators, and that if A insists in proceeding with arbitration, arbitrators should be agreed upon by both parties or appointed by the local court according to domestic law. After thirty days of its notification, A has requested the local bar association to appoint two arbitrators, one of them as chairman of the tribunal. In the meanwhile, B has applied to the local court for an injunction enjoining the local bar association from proceeding with the requested appointments. B argues that the local bar association could only proceed with the appointment under two conditions: a) that the bar association be an agent of both A and B, and b) that the appointment is not contrary to mandatory domestic laws. B further argues that any agency which could have existed between A and B, on the one hand, and the bar association on the other, was terminated by B. It finally argues that for the bar association to proceed with the appointments would in any case be contrary to domestic law, according to which courts must appoint arbitrators failing agreement of the parties.

Whether B's application will succeed or not will depend on domestic law and practice.

Institutional Arbitration

The same problem of recognition of the mechanism to appoint arbitrators is present when the parties agree upon institutional arbitration. In general, institutional sets of arbitration rules such as those of the ICC, the AAA, and the LCIA, designate as default appointing authority the institution to which those rules belong.[9] Consider paragraphs 2 and 4 of Article 11 of the UNCITRAL Model Law:

[9] *The UNCITRAL Arbitration Rules, which are for non-institutional arbitrations, designate the Secretary-General of the Permanent Court of Arbitration at The Hague to name the appointing authority in the absence of agreement of the parties on an appointing authority.*

UNCITRAL Model Law, Article 11(2) and (4)

> *(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.. . .*
>
> *(4) Where, under an appointment procedure agreed upon by the parties,*
>
> *(a) a party fails to act as required under such procedure, or*
>
> *(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or*
>
> *(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.*

Under provisions such as these courts would be obliged to respect the appointing mechanism of the institutional rules chosen by the parties. You should make sure that the domestic law of the place of arbitration has rules similar to these, or that the practice of its courts is to respect institutional appointing mechanisms. Otherwise you may learn that the party opposing arbitration may be able to obtain a court measure enjoining the appointment of arbitrators or setting aside an award made by arbitrators appointed according to institutional arbitration rules. In general, the domestic law and court practice in countries where international commercial arbitration is commonplace will not present problems in this regard, but the same cannot be said for countries where arbitration has been traditionally looked upon with suspicion, or where international commercial arbitration is hardly known.

In conclusion, when the parties cannot agree on the name of one or more arbitrators, someone has to appoint them. If parties prefer to have it done by courts, they should make sure that courts have the power to do so. If they want courts to make the appointment according to a conventional mechanism different from the statutory mechanism, they should first check that the latter is not considered mandatory. If parties prefer a different authority making the appointments, they may choose a mechanism that courts will not interfere with.

4.2 Challenge of arbitrators

In the challenge of arbitrators it is important to distinguish between *ad hoc* and institutional arbitration. As with the appointment of arbitrators, one would expect more court intervention in the former and less in the latter.

Ad hoc arbitration

In *ad hoc* arbitration the challenge of arbitrators presents one significant difference with their appointment. Whereas the parties often consider the issue of appointment in their agreement, very rarely do they consider the issue of challenge. The New York Convention is silent on this issue. Therefore, the challenge of arbitrators in ad hoc arbitration, except for arbitration under the UNCITRAL Arbitration Rules discussed below, will be generally governed by the arbitral law of the arbitral situs. You should at least consider the following issues:

- Whether an arbitrator may be challenged in domestic courts;
- The opportunity to challenge an arbitrator;
- The grounds for challenge;
- Whether arbitration proceedings may continue while a challenge is pending in courts;
- The manner in which a removed arbitrator is substituted.

You can expect a significant variation in the domestic regulation of these issues.

Consider now the default challenging mechanism of the UNCITRAL Model Law:

UNCITRAL Model Law, Article 12(2)

An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

UNCITRAL Model Law, Article 13(3)

If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

It should be remembered that this is only a model for states to follow in their legislation, but that actual domestic law may embody very different principles and rules.

Institutional arbitration

Institutional arbitration rules generally entrust the decision on a challenge of an arbitrator to the institution to which those rules belong. Similarly, the UNCITRAL Arbitration Rules entrust it to the appointing authority discussed above in connection with the appointment of arbitrators. Consider for example the ICC Rules of Arbitration:

ICC Rules of Arbitration, Article 7(4)

The decisions of the Court [10] as to the… challenge… of an arbitrator shall be final and the reasons for such decisions shall not be communicated.

ICC Rules of Arbitration, Article 11(1) and (2)

A challenge of an arbitrator, whether for an alleged lack of independence or otherwise, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based. The Court shall decide on the admissibility and, at the same time, if necessary, on the merits of a challenge after the Secretariat has afforded an opportunity for the arbitrator concerned, the other party or parties and any →

[10] *The Court being the International Court of Arbitration of the International Chamber of Commerce, not a state court, but rather "the arbitration body attached to the ICC." ICC Rules of Arbitration, Article 1(1).*

other members of the Arbitral Tribunal to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators.

This is a mechanism that works without court intervention. Court intervention may indeed interfere negatively with the mechanism in two ways:

- By offering judicial review of the decision of the arbitral institution on the challenge;
- By admitting a challenge of an arbitrator by-passing the institutional mechanism.

Whether courts will intervene in any of these ways depends on the arbitration law of the forum. In jurisdictions where international commercial arbitration is little known such intervention may be reduced by persuasively arguing that the institutional mechanism is part of the agreement to arbitrate, and that a decision by the arbitral institution on the challenge of an arbitrator is of an administrative character. This argument is likely to reduce the chances of judicial review, but less so those of a court admitting a direct challenge. The latter will depend on whether the courts of the forum accept that the parties may reduce their powers by agreement, an issue discussed in general in chapter 2 *supra*.

In conclusion, except for arbitrations under the UNCITRAL Arbitration Rules, the challenge of arbitrators in *ad hoc* arbitration will generally be decided by the courts at the arbitral site, if the domestic law gives these courts power to do so. In institutional arbitration, challenge will be normally decided by the arbitral institution, but the courts of the arbitration may interfere by offering judicial review of the decision or by admitting a challenge submitted directly to them.

4.3 Test your understanding

1. **Which significant difference is there between *ad hoc* and institutional arbitration concerning the intervention of courts in the constitution of the arbitral tribunal.**
2. **In which law may the parties find legal constraints on an agreement concerning the appointment of arbitrators?**
3. **How can courts interfere with the agreement of the parties in regard to the appointment of arbitrators?**
4. **How are arbitrators to be challenged in *ad hoc* arbitration?**
5. **Which factors determine whether an arbitrator can be challenged in court in institutional arbitration?**

5. SETTING ASIDE THE AWARD

Objectives

In this section you will learn that under the New York Convention the courts of the jurisdiction where the award is made may set it aside. Once an award has been set aside a defense against recognition and enforcement exists under the said Convention. You will further learn that the grounds upon which an award can be set aside are determined by the law of the forum.

5.1 Control of adjudication in court litigation

In court litigation the party who did not get all it had asked for has the right to appeal. On appeal, all issues of law can be determined anew, and in some jurisdictions new findings of fact can also be made. This makes sense only with regard to the functions and structural features of modern state courts. Courts are there both to solve conflicts between parties and to enforce the law of the land. The relative weight of these two goals varies among different countries and legal traditions, but nowhere does one completely outweigh the other. Courts are thus structured not only to guarantee that they solve the conflicts submitted to them, but also to enhance the correct application of the law. A hierarchical organization has been found particularly appropriate to serve this goal. Trial courts are at the bottom of the hierarchy. Above them are courts of appeal, served by judges expert in the correct application of the law. These courts have the power to reverse trial judges and thus control the correct application of the law.

5.2 Control of adjudication in arbitration

In arbitration the conflict-solving goal often outweighs any public interest in the correct application of the law. It is therefore not surprising that arbitral tribunals are not organized hierarchically, that they do not belong to a fixed structure, and that broad rights of appeal are not available. This notwithstanding, the parties to arbitration expect the arbitral proceedings to be conducted according to fundamental rules of procedural justice, and, unless they have authorized arbitrators to decide *ex aequo et bono*, they also expect the award to be based on the applicable law. These expectations may be frustrated. When this is the case, is there anything that the frustrated party can do? Is arbitration subject to some control?

5.3 Appeal to a second level arbitral tribunal

The laws of some states authorize the parties to have an arbitral appeal, i.e., an appeal to a second arbitral tribunal. Arbitral appeal is rarely used. When parties agree to arbitrate, there is no reason for them to further agree on an appeal to an arbitral tribunal and, after the award has been rendered, the winning

party will have no reason to consent to any appeal whatsoever. Arbitral appeal may be used when the losing party has a right to appeal to courts, and the winning party agrees to arbitrate the appeal in order to avoid going to court. As appeal is usually waived with the agreement to arbitrate, review by an arbitral tribunal is of little practical use.

5.4 Control of arbitration at time of enforcement

Parties have a limited opportunity to have the arbitration controlled at the time of enforcement. The New York Convention authorizes courts to deny enforcement on some limited grounds. This is taken up in module 5.7 on recognition and enforcement of arbitral awards. Control by the enforcement forum may not be sufficient for the expectations of the parties. One important shortcoming of this form of control is that its effects are limited to the state where enforcement was sought. If enforcement is refused in one jurisdiction, the winning party can try enforcement in a different jurisdiction. Denial of enforcement in one country does not deprive the award of its legal force.

5.5 Setting aside an award

The New York Convention has designed a system of control of arbitration that relies on the law and courts at the site of arbitration. Its Article V(1)(e) provides as follows:

New York Convention, Article V(1)(e)

> *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:…(e) The award… 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.*

An award set aside by the courts of the country in which, or under the law of which, it was made, is difficult to enforce under the New York Convention. There is a significant difference between a court denying enforcement on any of the grounds of Article V and a court of the country where the award was made setting it aside. The former does not affect the legal force of the award and the *prima facie* duty of courts of state parties to the New York Convention to recognize and enforce it. On the contrary, an annulment of the award in the country where it was made creates a defense under the New York Convention that can always be invoked against the enforcement of the award. Consider the following illustrations:

Illustration 1: control at the enforcement forum
A obtains an award against B in Argentina. A applies for enforcement of the award under the New York Convention in Chilean courts, where B has substantial property. At B's request, Chilean courts deny enforcement on the ground that the award went beyond the agreement to arbitrate (New York Convention, art. V(1)(c)).
A may still enforce the award in any other country. Whereas B can again claim that the award went beyond the agreement to arbitrate, it will have to prove its claim anew. The fact that Chilean courts denied enforcement of the award does not create a new defense under the New York Convention.

Illustration 2: control at the arbitral situs
A obtains an award against B in Argentina. This time B obtains a court measure in Argentina setting the award aside. If A tries enforcing the award in Chile, B will have a defense under Article V(1)(e) of the New York Convention. The defense does not consist of the merits upon which the award was set aside in Argentina, though they may constitute an independent ground under Article V. It rather consists of the award having been set aside by the courts of the country where it was made. This defense can be invoked in any jurisdiction where enforcement is sought.

Article V(1)(e) of the New York Convention presents us with the following four problems. First, it recognizes two jurisdictions with power to set aside an award: the jurisdiction where the award was made and the jurisdiction of the *lex arbitri*. Second, it is not clear whether a court is simply authorized to refuse enforcement of a vacated award or if it is rather obliged to refuse the said enforcement. Third, enforcement of an award can be sought while an action to have it set aside is pending. Fourth, the New York Convention does not specify the grounds under which an award may be set aside.

5.5.1 Proper jurisdiction to set aside

Which is the proper jurisdiction to set aside an award? The jurisdiction where the award was made? The jurisdiction of the law under which the award was made (*lex arbitri*)? Both of them concurrently? Article V(1)(e) refers to both jurisdictions. The 'law under which the award is made' refers to the law that controls the arbitration, not to the law applicable to the merits of the dispute. Normally, an arbitration is conducted and the award is made according to the law of the venue. Therefore, unless the parties have agreed to arbitrate in one country under the laws of another country, there is no difficulty in determining the appropriate jurisdiction to set the award aside. This is the normal case.

When parties split the venue and the law governing the arbitration proceedings, there are two possible interpretations of Article V(1)(e). According to one of them, there are two *prima facie* concurrent jurisdictions to set aside the award. According to the other, only the courts of the country under the law of which the award was made may set it aside. Both interpretations present problems, the first one linguistic, the latter practical. The language of Article V(1)(e) is not easy to accommodate with concurrent jurisdiction. It does not refer to

"*the* country in which the award was made or the country under the law of which the award was made," but rather "the country in which, or under the law of which, that award was made" (emphasis added). The Spanish and French versions of the provision are similar. The alternative interpretation presents the practical problem that in its interplay with the domestic laws of most countries it may result in no jurisdiction having power to set aside the award. This is because even if Article V(1)(e) of the New York Convention authorizes the courts of the country under the law of which the award was made to set it aside, it is still necessary for those courts to assert jurisdiction over the application to set aside. In most countries this may not be possible: courts will normally deny jurisdiction to hear an application to set aside an award made in another country, even if made under the law of the forum. Consider the following illustration:

The parties of a contract agree to arbitrate their dispute in country A under the arbitration law of country B. After the award is rendered, the losing party applies to have the award set aside in the courts of B. The courts of B will only hear the application if they have jurisdiction under their domestic laws to set aside an award made in A under the law of B. If they do not, the losing party may try to have the award set aside in A. He may then find to his regret that the courts of A deny supervisory jurisdiction because the award was made under the law of B. Even if the award is set aside in A, the losing party may later learn that the courts of a third country do not think that A was the proper jurisdiction to have the award set aside, and therefore proceed with its recognition and enforcement.

To avoid disagreeable surprises, parties should not agree to arbitrate in one country (A) under the arbitration law of another (B). It is much preferable to agree to arbitrate in the country whose law is to be applicable to the arbitration. Under most modern arbitration laws it is permissible to hold hearings in other countries. Under those laws the "place of arbitration", and therefore the law applicable to the arbitration, remains that agreed upon by the parties.

5.5.2 Effects of an award set aside

A court decision to set aside an award, if made by the proper court under Article V(1)(e) of the New York Convention, provides a defense against enforcement of the said award. May a court nonetheless grant enforcement of the vacated award? There are two sources of uncertainty. First, Article V says that recognition and enforcement of an award *may* be refused under the grounds therein listed. This language still leaves discretion to the court, which may agree to enforce the award notwithstanding that it was vacated at the proper jurisdiction. The Spanish version of the treaty is similar to the English, whereas the French one does not appear to give courts the same discretion. One is therefore not surprised to discover that there have been different approaches to the question of whether an award set aside can be nonetheless enforced under the New York Convention.

The second source of uncertainty is a consequence of Article VII(1) of the New York Convention:

New York Convention, Article VII(1)

> *The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.*

This provision can be used to obtain enforcement of a vacated award. Consider the following case:

> *In Pabalk Ticaret Ltd. Sirketi v. S.A. Norsolor,[11] the French Cour de Cassation set aside a decision of the Court of Appeals of Paris refusing enforcement of part of an award. The award had been made in Vienna and the Vienna Court of Appeals had set aside part of it. The Court of Appeals of Paris based its decision on Article V(1)(e) of the New York Convention. In setting aside this decision, the Cour de Cassation offered the following reason:*
>
> > *Whereas, according to Article VII of the New York Convention, the Convention does not deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon; as a result the judge cannot refuse enforcement when his own national legal system permits it, and, by virtue of Article 12 of the New Code of Civil Procedures, he should, even sua sponte, research the matter if such is the case;*
> >
> > *...*
> >
> > *Whereas by ruling in this manner, where the Court of Appeals had a duty to determine, even sua sponte, if French law would not allow Pabalk to avail himself of the award at stake, the Court of Appeals violated the above mentioned provisions.*

In conclusion, whereas an award set aside at the place where it was made is difficult to enforce under the New York Convention, its enforcement under other treaties or domestic law cannot be completely discarded.

5.5.3 Staying enforcement while application to set aside is pending

You already know that once a decision to set aside has been rendered by the proper court, the party opposing enforcement has a defense under Article V(1)(e) of the New York Convention. Yet it takes time for a court to decide on an application to set aside an award. In the meanwhile, the winning party may apply for enforcement in a different jurisdiction. Are the courts of the enforcing forum under an obligation to recognize and enforce the award?

[11] *24* I.L.M. *663 (1986), reproduced in W. Michael Reisman et al.,* International Commercial Arbitration *1058ff (1997).*

Article VI of the New York Convention applies to this situation:

New York Convention, Article VI

> *If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.*

This provision grants authority to the courts of the enforcement forum to suspend enforcement. The underlying rationale is the avoidance of contradictory decisions. If enforcement is granted, and the award is later set aside at the arbitral situs, it may be very difficult, if not altogether impossible, to force restitution of what was paid in the enforcement forum. The jurisdiction granted by the Convention is discretionary. The enforcing court is not obliged to stay enforcement. The Convention does not even offer criteria to guide the exercise of the discretion, but one would expect courts to take into consideration the probability of contradictory decisions. The authority is discretionary also in that the enforcing court may, at the request of the party demanding enforcement, require security from the party against whom the award is sought to be enforced.

5.5.4 Level of control

You have learned that the courts of the country where the award is made are recognized as having a special supervisory role by the New York Convention. Beyond this recognition, the Convention remains silent. It falls upon the domestic law of each country to determine the kind of control of arbitral awards that will be available. One should at least distinguish:

- Countries where arbitral awards can be appealed on questions of fact and law (e.g., Chile);
- Countries where arbitral awards can be appealed only on questions of law (e.g., England);
- Countries where it is possible to set aside an award only on procedural grounds;
- Countries where no control by courts is available.

This classification is only for the purposes of this general exposition. Domestic laws can made further distinctions. They may, for example, offer a different level of control, depending on whether the case has some connection with the forum or not.

Where control by courts is available, the parties should also consider whether it can be waived, and if it can, the formalities required. In England for example, an agreement to dispense with reasons for the tribunal's award is considered such a waiver (Arbitration Act 1996, section 69(1)). Where the waiver has to be explicit, one should make sure that an agreement to arbitrate under certain

rules declaring the arbitral award final will be accepted as such a waiver. This is just a specific case of an agreement to exclude court powers, of which more has been said in chapter 2 *supra*.

In conclusion, under the New York Convention recognition and enforcement of an award set aside by the courts of the arbitral situs may refused. The law of the arbitral situs determines whether and on which grounds its courts have jurisdiction to set aside an arbitral award. Where this law is not mandatory, the parties may modify it by agreement.

5.6 Test your understanding

1. **What are the differences between refusing recognition and enforcement of an award and setting it aside?**
2. **Which is the proper jurisdiction to set aside an award?**
3. **What are the legal consequence of setting aside an award at the proper jurisdiction?**
4. **Which law regulates the grounds upon which an award may be set aside?**

6. CASE STUDIES

6.1 Cases to be studied in groups

Case 1

Consider the following provisions of the European Convention on International Commercial Arbitration:

European Convention on International Commercial Arbitration, Article IX - Setting Aside of the Arbitral Award

1. The setting aside in a Contracting State of an arbitral award covered by this Convention shall only constitute a ground for the refusal of recognition or enforcement in another Contracting State where such setting aside took place in a State in which, or under the law of which, the award has been made and for one of the following reasons:

(a) the parties to the arbitration agreement 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 requesting the setting aside of the award 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 need not be set aside;

(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, with the provisions of Article IV of this Convention.

2. In relations between Contracting States that are also parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958, paragraph 1 of this Article limits the application of Article V(1)(e) of the New York Convention solely to the cases of setting aside set out under paragraph 1 above.

Suppose an award governed by the European Convention is set aside by a court in the place where it was made on the ground that the substantial law was incorrectly applied on the merits. Assume that the domestic law at the arbitration site authorized courts to make such a decision. What effect does this setting aside have on the award? In the discussion consider whether it makes a difference in which jurisdiction enforcement of the award is sought.

Case 2

Consider the hypothetical on *page 19 supra*. Discuss whether court intervention could be prevented and respect for the institutional appointing mechanism agreed upon by the parties secured through careful drafting of the arbitration agreement. Draft an arbitration clause and discuss it in groups.

Case 3

Suppose you are counsel for a party to arbitration proceedings. Suppose there is a witness critical for your case who is not willing to give testimony voluntarily. Discuss whether it would be possible to obtain a court measure ordering the said witness to give testimony. Though this module has not addressed the issue of court measures to obtain evidence, the problems it raises are analogous to those raised by court interim measures of protection. In your discussion consider:

- i. The general sub-issues that you will have to research.
- ii. The way those sub-issues are dealt with under a particular domestic law (for example, that of your domicile).

See also Article 27 of the UNCITRAL Model Law.

Case 4

Suppose the domestic law at the arbitral site does not have a special rule concerning international commercial arbitration, but only some general old rules on arbitration in general. Among those rules there is the following:

> Party appointed arbitrators may not be challenged but for grounds for recusation and lack of independence appearing after their appointment, or unknown at that time.

Discuss the possible effect of this provision on the power of courts to review a decision on a challenge of an arbitrator made by an arbitral institution in an institutional arbitration, and on their power to entertain a direct challenge. Discuss whether party appointed arbitrators stand on a different footing than arbitrators appointed by the arbitral institution. In your discussion consider that the quoted provision is more than fifty years old.

Case 5

Discuss the risks of arbitrating in a jurisdiction where international commercial arbitration is little known and the local bar is opposed to foreign lawyers acting as arbitrators or counsel. How could domestic courts disrupt arbitration? Do the parties have means to minimize the risks involved?

6.2 Other case studies

Case 6

A and *B* have included in their contract the following arbitral clause:

> Any dispute arising out of this contract will be submitted to arbitration in X according to local law. The arbitral tribunal will consist of three arbitrators, one appointed by each party and a chairman appointed by the local bar association. Any party may request the appointment of the chairman. If a party fails to appoint the arbitrator of its choice within thirty days after notification by the other party of its decision to bring a matter to arbitration, the local bar association will do the appointment at the request of the latter.

A dispute has arisen between *A* and *B*. A has notified *B* of its decision to bring the matter to arbitration according to the agreement and of the name of its arbitrator. *B* has answered that it does not longer consider the local bar association authorized to proceed with the appointment of arbitrators, and that if *A* insists in proceeding with arbitration, arbitrators should be agreed upon by both parties or appointed by the local court according to domestic law. After thirty days of its notification, *A* has requested the local bar association to appoint two arbitrators, one of them as chairman of the tribunal. In the meanwhile, *B* has applied to the local court for an injunction enjoining the local bar association to proceed with the requested appointments. *B* argues that the local bar association could only proceed with the appointment under two conditions:

a) that the bar association be an agent of both *A* and *B*, and

b) that the appointment is not contrary to mandatory domestic laws. *B* further argues that any agency which could have existed between *A* and *B*, on the one hand, and the bar association by the other, was terminated by *B*. It finally argues that for *A* to proceed with the appointments would in any case be contrary to domestic law, according to which courts must appoint arbitrators failing agreement of the parties.

Draft a memo pointing out *A*'s defense against *B*'s request for an injunction. Assume *B* has filed the application in the courts of the country where you have residence.

Case 7

A and B are parties to a dispute. They agree to submit the matter to arbitration in city X under UNCITRAL Arbitration Rules. They further agree that the tribunal will consist of three arbitrators, and that the appointing authority will be X Chamber of Commerce. After each party appoints one arbitrator, X

Chamber of Commerce appoints the chairman of the Tribunal, all this in accordance with Article 7 of the UNCITRAL Arbitration Rules. After the tribunal has been constituted, B files in X's local court a challenge of the arbitrator appointed by *A*. *B* argues that the challenged arbitrator is partner of a law firm which five years ago gave legal counseling to *A* in an important litigation. This was not revealed at the time the challenged arbitrator was appointed. As a protective measure it asks the court to stay the arbitral proceedings pending decision on the challenge. X's arbitration law has the following provision:

> Party appointed arbitrators may not be challenged but for grounds for recusation and lack of independence appearing after their appointment, or unknown at that time.

Articles 9 through 12 of the UNCITRAL Arbitration Rules provide as follows:

UNCITRAL Arbitration Rules, Articles 9 through 12

> ***Article 9***
> *A prospective arbitrator shall disclose to those who approach him in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances.*
>
> ***Article 10***
> 1. *Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.*
> 2. *A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made.*
>
> ***Article 11***
> 1. *A party who intends to challenge an arbitrator shall send notice of his challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after the circumstances mentioned in articles 9 and 10 became known to that party.*
> 2. *The challenge shall be notified to the other party, to the arbitrator who is challenged and to the other members of the arbitral tribunal. The notification shall be in writing and shall state the reasons for the challenge.*
> 3. *When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. In neither case does this imply acceptance of the validity of the grounds for the challenge. In both cases the procedure provided in article 6 or 7 shall be used in full for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator a party had failed to exercise his right to appoint or to participate in the appointment.*

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Article 12

1. *If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be made:*
   - *(a) When the initial appointment was made by an appointing authority, by that authority;*
   - *(b) When the initial appointment was not made by an appointing authority, but an appointing authority has been previously designated, by that authority;*
   - *(c) In all other cases, by the appointing authority to be designated in accordance with the procedure for designating an appointing authority as provided for in article 6.*
2. *If the appointing authority sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in articles 6 to 9 except that, when this procedure would call for the designation of an appointing authority, the appointment of the arbitrator shall be made by the appointing authority which decided on the challenge.*

a) Prepare a memo outlining the defense of the arbitrator named by *A*.

b) Prepare a variation of the same memo assuming that X has adopted the UNCITRAL Model Law as its law on international commercial arbitration.

6.3 Mastery test - Yes or No test

	YES	NO
1. Is there a fixed number of court measures in connection with arbitration?		
2. Is there an international general and comprehensive regulation of court measures in connection with international commercial arbitration?		
3. May the courts of states party to the New York Convention entertain a legal action covered by a valid arbitration agreement?		
4. Are courts of states party to the New York Convention under a duty to refer to arbitration the parties to an arbitration agreement?		
5. Is a court interim measure of protection *per se* incompatible with an arbitration agreement?		
6. May it be possible to enforce interim measures of protection issued by an arbitral tribunals under the New York Convention?		
7. Does the New York Convention allow for a court of the place where an award was made to set it aside?		
8. Is there under the New York Convention a defense against enforcement of an arbitral award that was set aside at the place where it was made?		
9. Is institutional arbitration compatible with intense court intervention in the appointment of arbitrators?		
10 May a party to an arbitration agreement under the UNCITRAL Rules request from a court an interim measure of protection without waiving the said agreement?		
11. Does the UNCITRAL Model Law allow for an indefinite number of court measures?		
12. If article 9 of the UNCITRAL Model Law (see *page 18 supra*) were incorporated in the domestic law of a country, would it give jurisdiction to its courts to issue interim measures notwithstanding an arbitration agreement?		
13. Is it absolutely impossible to enforce an award set aside at the arbitration situs?		
14. Do the parties have any influence on the level of court intervention in their arbitration?		

7. FURTHER READING

7.1 Important websites

- American Arbitration Association, International Arbitration Rules, available at <*http://www.adr.org/*>
- International Court of Arbitration (ICC), Rules of Arbitration, available at <*http://www.iccwbo.org/court/english/rules/rules.asp*>
- London Court of International Arbitration (LCIA), Arbitration Rules, available at <*http://www.lcia-arbitration.com/download/*>
- United Nations, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), available at *http://www.uncitral.org/english/texts/arbitration/NY-conv.htm*
- United Nations Commission on International Trade Law (UNCITRAL), UNCITRAL Model Law on International Commercial Arbitration, available at <*http://www.uncitral.org/english/texts/arbitration/ ml-arb.htm*>
- UNCITRAL Arbitration Rules, available at <*http://www.uncitral.org/english/texts/arbitration/arb-rules.htm*>

7.2 Printed publications

- **Guillermo A. Alvarez**, The Challenge of Arbitrators, *J. Int'l Arb*. Jan. 1990, at 203.
- **Joseph D. Becker**, Attachments in Aid of International Arbitration - the American Position, 1 *Arb. Int'l* 40 (1985)
- **Charles N. Brower & W. Michael Tupman**, Court Ordered Provisional Measures and the New York Convention, 80 Am. *J. Int'l L*. 24 (1986)
- **Christopher R. Drahozal**, Enforcing Vacated International Arbitration Awards: An Economic Approach, 11 *Am. Rev. Int'l Arb*. 451 (2000)
- **Lawrence F. Ebb**, Flight of Assets from the Jurisdiction in the Twinkling of a Telex: Pre- and Post-Award Conservatory Relief in International Commercial Arbitration, 7 *J. Int'l Arb*. 9 (1990)
- **Susan L. Karamanian**, The Road to the Tribunal and Beyond: International Commercial Arbitration and Unites States Courts, 34 *Geo. Wash. Int'l L. Rev.* 17 (2002)
- **Gregoire Marchac**, Interim Measure in International Commercial Arbitration under the ICC, AAA, LCIA and UNCITRAL Rules, 10 *Am. Rev. Int'l Arb*. 123 (1999)
- **Neil E. McDonell**, The Availability of Provisional Relief in International Commercial Arbitration, 22 *Colum. J. Transnat'l* L. 273 (1984)

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- **Douglas D. Reichert**, Provisional Remedies in the Context of International Commercial Arbitration, 3 *Int'l Tax & Bus. L.* 368 (1986)
- **W. Michael Reisman, W. Laurence Craig, William Park & Jan Paulsson**, *International Commercial Arbitration: Cases, Materials and Notes on the Resolution of International Business Disputes*