

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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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?

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