



## **The changing role of national courts during arbitral proceedings**

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*“National court involvement in international arbitration is a fact of life, as prevalent as the weather”*

Prof. Julian D M Lew

# What is the role of national courts during arbitration?

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- National courts support the arbitration process:
  - Constitution of the tribunal;
  - Injunctions and interim measures;
  - Assistance in evidence gathering;
- National courts give effect to the binding force of arbitration agreements and recognize and enforce arbitral awards;
- National courts make sure that some fundamental and internationally-recognized standards, principles and policies are observed and complied with:
  - Independence and impartiality of arbitrators;
  - Equal treatment of parties;
  - Setting aside arbitral awards.

# The principle of judicial non-intervention

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- Limits the involvement of national courts to specific issues and predefined matters.
- Is commonly recognized in international conventions and national legislation:
  - Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958);
  - The European Convention on International Commercial Arbitration (Geneva 1961);
  - Judicial non-intervention is a recognized standard in national legislation, especially national legislation that adopted the UNCITRAL Model Law on International Commercial Arbitration.

# Enforcement of arbitration agreements

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- If a national court decides that an arbitration clause is binding, it will refer the parties to arbitration:
  - Increasingly flexible requirements as to the form of arbitration clauses;
  - Arbitrability is defined very broadly.
- Challenges to the jurisdiction of an arbitral tribunal are usually made at the beginning of arbitral proceedings:
  - The arbitral tribunal is competent to rule on its own jurisdiction (principle of *kompetenz-kompetenz*);
  - The arbitral tribunal may issue a decision regarding its jurisdiction and if such decision dismisses a jurisdictional challenge, the challenging party may appeal the dismissal to a national court.
- Case law and national legislation tend to support the validity of arbitration agreements; however, the final decision on the jurisdiction of an arbitral tribunal rests with the relevant national court.

# Arbitrators and constitution of arbitral tribunal

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- Some national arbitration laws eliminate the involvement of national courts in appointing/excluding arbitrators;
- Discussion on whether national courts should be involved in excluding arbitrators in cases where the parties agreed to appointing/excluding authority;
- Grounds for the exclusion of arbitrators are less often drawn from the national laws, but are being codified as a "soft law" (IBA Guidelines on Conflicts of Interest in International Arbitration).

# Interim measures or injunctions

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- Right to file a request with a national court for an interim measure or an injunction even if there is an arbitration clause;
- Arbitral tribunals have acquired a right to issue interim measures or injunctions on their own and those decisions tend to be easily enforced by the national courts;
- Parties to a dispute can obtain an interim measure or injunction from an emergency arbitrator prior to the constitution of an arbitral tribunal;
- Discussion whether interim measures or injunctions should be issued by arbitral tribunals in *ex parte* proceedings;
- Arbitral tribunal may still not issue an interim measure or injunction against any third party.

# Evidentiary proceedings

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- Arbitral tribunals are better equipped to deal with evidentiary proceedings without the assistance of the national courts:
  - Evidentiary procedures are being codified as a "soft law" (IBA Rules on the Taking of Evidence in International Commercial Arbitration);
  - A right to draw conclusions adverse to the interests of a party refusing to produce requested documents;
  - Arbitral tribunals may fine a party refusing to produce requested documents;
- Ability to issue requests for the production of documents in the form of enforceable interim or partial awards;
- Costs awards against parties unwilling to cooperate in producing the requested documents.



# Setting aside an arbitration award

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*“Judicial review of arbitral awards constitutes a form of risk management”*

William W. Park

- Grounds for setting aside arbitration awards are getting narrower;
- Excluding any possibility to set aside an arbitration award;
- An arbitration award set aside in one jurisdiction may still be recognized and enforced in another.

# Conclusions

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- The involvement and assistance of the national courts in arbitral proceedings is being limited, substituted by alternative mechanisms or even eliminated in many areas;
- There is a very subtle balance between assistance from the national courts and their intervention in arbitration proceedings, but arbitration still needs national court assistance;
- Arbitration tribunals are in some areas obtaining powers reserved until recently only to the national courts;
- This is resulting in a "judicialization" of arbitral proceedings.

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