PART I

Vacating Commercial Arbitration Awards

1

Introduction

Intersection of Courts and Arbitration

Larry A. DiMatteo, Marta Infantino, and Nathalie M-P Potin

This chapter broadly reviews the relationship between the arbitration and judicial systems as well as substantive national laws that restrict the use of the arbitration process. The relationship is inherently in tension because two core principles are in conflict: independence of commercial arbitration and judicial intervention to ensure the fairness of the arbitration process. This chapter reviews and suggests how best to balance these two competing interests. This will include an analysis of the principle of separability (contract arbitration clauses are independent of the contract) and kompetenz–kompetenz (whether the arbitration panel or the courts are empowered to determine the jurisdiction of the arbitration panel and the scope of the arbitration clause). The chapter concludes by describing the structure and content of the chapters to follow and providing some final remarks. The editors would like to note that the scholarly contributors include some of the very best minds in legal scholarship. The list of contributors includes a diverse mix of scholars and practitioners from fifteen countries.

Alternative dispute resolution in the form of arbitration is the most common means of dispute resolution in international commercial transactions. The word *alternative* is generally acknowledged as an alternative to litigation and recourse to national court systems. But alternative does not mean independence from national court systems. Disputants and arbitrators can never fully escape the reach of the courts. At a basic level the courts are a necessary component of international commercial arbitration if nothing more than to provide an enforcement mechanism for implementing arbitration awards. Generally, arbitration tribunals have little ability to enforce their awards.[1] Fortunately, the New York Convention[2] has provided a secure and expedited process for the enforcement of arbitral awards by national courts. In the 164 countries[3] that to date have acceded to the convention, the national courts are required to enforce foreign arbitration awards.

The enforceability of arbitration awards is only the most obvious example of judicial intervention into arbitration. As the essays collected in this book show, relationships between international commercial arbitration and the court systems are multiple and multifarious. The volume provides a comprehensive review of the broad assortment of issues dealing with the interaction of courts and the law with arbitration proceedings. Contributions offer both generalized and specific

[1] It is possible to conceive of a private enforcement mechanism, such as the escrowing of funds or the provision for letters of credit to guarantee payment on any forthcoming awards.

[2] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) (June 10, 1958) at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf.

[3] *See* https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2.

analyses of core issues related to the numerous areas of involving judicial intervention into the arbitration process and flesh out variations through a comparative analysis of a representative set of countries. The book demonstrates that, while there is general agreement internationally on the relationship between courts and arbitration, this general agreement on the independence of arbitration proceedings masks major differences in application of the principle of independence under national laws and by national court systems.

The analyses presented in the book relate to three broad topical areas: vacating commercial arbitration awards, enforcing commercial arbitration awards, and scope and interpretation of arbitration clauses.[4] Embedded in these broad categories are more specific issues, including (1) What are the standards or criteria for determining arbitrator bias? (2) What types of actions or omissions during the proceedings are considered to be grounds of arbitrator misconduct? (3) What facts constitute cases of conflict of interest involving arbitrators? (4) What types of procedural irregularities are grounds for vacating an arbitration award? (5) What are the requirements for judicial enforcement of arbitration awards? (6) How do arbitrators and judges deal with the scenario when arbitration agreements refer to industry-specific arbitration rules as well as model or generic institutional rules when the rules conflict on given issues? (7) What types of anti-arbitration laws and policies exist at the national level that prohibit the use of arbitration in certain areas of law? (8) What are the different approaches that courts use in interpreting standard arbitration clauses? (9) How does one draft an enforceable and comprehensive arbitration clause or agreement (practitioner's perspective)?

1 JURISDICTION OF ARBITRAL PANELS AND JUDICIAL INTERVENTION

This book aims to fully investigate the intersection between the courts and international commercial arbitration. Two common scenarios of this intersection are judicial intervention before arbitrators have had the opportunity to decide on their own jurisdiction and those cases that seek to challenge an already existing arbitral decision on jurisdictional or procedural grounds in the context of an action for vacation of an arbitral award. The questions presented in these scenarios include (1) Who determines the jurisdiction of arbitral tribunals – arbitrators or judges? (2) When is it appropriate for courts to intervene in arbitral proceedings in determining the scope of the arbitration (interpretation of arbitration agreement or clause) and the jurisdiction of the arbitral tribunal? (3) Assuming the general principle of deference – courts deferring to arbitration panels to answer questions of jurisdiction – what is the standard of review when a court needs to determine the validity of the arbitration agreement, when litigation has started and one party objects to the court's jurisdiction due to the existence of an arbitration agreement and also when a party seeks interim measures?

1.1 *Standard of Review*

One of the purposes of this book is to review the differences in national laws relating to these and other issues. For example, countries differ as to the standard of review in determining jurisdictional issues. In 2017, the Spanish Supreme Court adopted a pro-court standard of review providing that courts have the right to conduct a de novo review to determine the validity, enforceability, and scope of an arbitration clause when the court's jurisdiction is questioned.[5]

[4] The terms *arbitration clause* and *arbitration agreement* are used interchangeably in this chapter.
[5] *See* Chapter 20 (Spain).

Under this standard, courts have the power to resolve these issues before the arbitration panel comes into existence. France, on the other hand, has adopted an arbitrator-friendly approach by prohibiting lower courts from reviewing these issues once an arbitration panel is established. If the arbitration has yet to be constituted, the courts will refer the parties to arbitration if there is a prima facie argument of the existence of an arbitration agreement. On issues of the scope of an arbitration clause, French courts will always defer to the arbitrators to interpret a clause in determining its scope.[6] Under the English Arbitration Act, courts reject the prima facie approach in favor of an arbitrator-unfriendly approach of *beyond a reasonable doubt*. If the English court cannot determine the application or scope of an arbitration provision then the court will require a trial on jurisdictional issues before ordering a stay in the litigation.[7]

1.2 *Principle of Separability and Kompetenz–Kompetenz*

The concepts of separability and kompetenz–kompetenz are among the most significant principles in the field of international arbitration. The reason for their importance is that they provide the norms on which the basis of jurisdiction of arbitrators is defined. The core principle of separability promotes the autonomy of the arbitration agreement (clause) from the main contract. This is based on the fiction that the parties intended for an arbitration clause in a contract be treated independently of that contract. The accepted rationale for this autonomy is that the arbitration clause is procedural in nature, which is independent of the substantive rights and obligations provided elsewhere in the contract. Kompetenz–kompetenz recognizes the competence of arbitral panels to determine their own jurisdiction, such as deciding the scope of an arbitration clause. This does not prevent a party from challenging the arbitral panel's determination of jurisdiction by seeking judicial intervention. Thus the overarching principle of separability can be stated as follows: an arbitral panel determines its own jurisdiction (over the parties and the issues to be disputed) until a court says otherwise! Thus courts have the ultimate say as to the validity or enforceability of an arbitration agreement and its scope. The problem is that national court systems differ as to under which circumstances is it appropriate to for courts to intervene.[8]

1.3 *Judicial Intervention*

Despite the existence of the New York Convention, international arbitration awards need to be enforced at the national law. As such, the requirements of enforceability may vary from country to country. Also, disputing parties often seek judicial intervention in the interpretation of arbitration clauses, to challenge the qualification or independence of given arbitrators and to vacate arbitral awards due to arbitrator misconduct. National arbitration laws vary as to when and on what grounds it is appropriate for courts to intervene in arbitration proceedings or to deny enforcement of arbitral awards.[9]

The dominate role of commercial arbitration as the preferred means of dispute resolution[10] in international business transactions has not resulted in a seamless system due to competing

[6] *See* Chapter 14 (France).
[7] *See* Chapter 23 (United Kingdom).
[8] *See* Chapter 25, Section 2.1.
[9] *See* Id. at Section 2.3.
[10] Between 80 and 90 percent of international contracts concluded by multinationals and small- and medium-size enterprises (SMEs) are said to include arbitration clauses.

arbitration rules, anti-arbitration government policies and laws, and various types of judicial interventions in the arbitration process. This book focuses on the intersection between governmental and judicial control of arbitration with a focus on the vacation of arbitration awards due to arbitrator misconduct, public policy that limits the coverage of arbitration, interpretation of the scope of arbitration clauses, and requirements related to the enforcement of arbitration awards. So far the legal literature has failed to fully analyze the important role that government policy and judicial intervention play in the recognition and enforcement of arbitral awards. The book will fill this gap by investigating the differences and conflicts between arbitration rules – this often occurs when industry-specific rules conflict with more generic or institutional arbitration rules. National arbitration laws also prohibit the arbitration of certain types of claims. Anti-arbitration law and public policy also vary across countries.[11]

2 SCOPE OF THE BOOK

This book presents an opportunity for an in-depth analysis of the intersection of courts and arbitration tribunals. The volume brings together some of the top arbitration scholars and practitioners from the civil and common law systems, so that the topical areas are covered by a balanced mix of academics and lawyer–arbitrators. The core question to be discussed is whether the international arbitration system is as independent as perceived from national and judicial authorities. This core question leads to many other questions yet to be resolved involving the role governments, courts, and arbitration associations play in the management of the arbitration process and the enforceability of arbitral awards. A sampling of the questions that are discussed in the book includes the following categories.

2.1 *Roles of Courts and Governments*

Are there clearly defined roles for courts, government policy, and arbitration associations in the management and processing of disputes through the process of arbitration? Are there certain areas that these roles are blurred or fluid in nature?

2.2 *Arbitrator Bias*

What are the factors that arbitration association rules and courts use in determining arbitrator bias? What factors do courts use in determining conflicts of interest and whether such conflicts can be resolved?

2.3 *Misconduct during Arbitral Proceedings*

What types of actions during the arbitral proceedings are grounds for a court to vacate an arbitration award? What types of actions taken by arbitrators are considered irregular in nature? What factors do courts use to determine if an arbitral panel has exceeded its powers? What type of actions or omissions do courts consider to be representative of arbitrator misconduct?

[11] *See supra* note 8, at Section 6.

2.4 Role of Public Policy: Due Process

How do national rules of evidence interrelate to the admission or failure to admit evidence in arbitration? What necessary factors are recognized by courts to ensure a fair hearing? Do national or constitutional principles of due process affect courts view of arbitral due process?

2.5 Scope of Arbitration

How do countries vary in determining if certain subject matters are outside of the scope of arbitration? Can victims of violations of fundamental or human rights be forced to arbitrate (broad arbitration clause)? How do national legal systems vary as to the recognition of class action arbitration claims?

2.6 Enforcement of Arbitral Awards

Do national arbitration laws vary as to the requirements needed for the enforcement of arbitration awards? What are the grounds for courts to invalidate or vacate an arbitration award? Do the types of grounds for vacation vary from country to country? How have courts interpreted generic arbitration clauses? How have courts determined the scope of standard language, such as "any and all claims related"?

2.7 Industry-Specific Arbitration

How have industry-specific arbitration clauses and industry-specific arbitration rules been interpreted by courts? How have courts ferreted out conflicts between general versus industry-specific arbitration rules where both sets of rules are applied in a dispute?

2.8 Drafting and Interpretation of Arbitration Clauses

What factors and issues should a lawyer consider in drafting an enforceable arbitration clause? How does a lawyer provide guidance for future judicial interpretation of arbitration clauses?

2.9 Comparative Analysis: Country Reports

How do specific countries (Argentina, Australia, Bulgaria, China, France, Germany, Italy, Nigeria, Poland, Russia, Spain, Switzerland, Ukraine, the United Kingdom, and the United States) compare as to the stated issues? What are the areas of divergence?

The effectiveness of arbitration as an independent, self-enforcing dispute resolution system is not as clear or simple as has been largely accepted in the legal and practitioner-focused scholarship. Despite the power of the freedom of contract principle, arbitration cannot fully escape the formal court system or government policies. For example, in some countries an employee cannot be required to pursue arbitration when the subject of the claim relates to a fundamental or human right, while others allow it.[12]

In light of such divergences, the country reports analyze how the procedural and substantive issues presented in Parts I–III of the book are dealt with in given countries. Each chapter

[12] *See* Id.

explores a given country's approach to the independence of the arbitration system, examining in particular how domestic law allocates the determination of jurisdiction and scope of arbitration between the arbitral panel and the courts, and what types of grounds are recognized for vacating arbitration awards. In the area of arbitrability, the national chapters discuss nuances of government law and policies that are anti-arbitration in nature. More specifically, in the area of vacation, the reports analyze factors and/or criteria used by national courts to vacate arbitration awards in the widely accepted areas of arbitrator misconduct, conflict of interest, and procedural irregularities. They also examine the differences among countries in the interpretation of standard and industry-specific arbitration clauses. The national reports allow for an academic-theoretical discussion of key issues to be tested by their resolution in a representative sampling of countries.

3 STRUCTURE OF THE BOOK

The book is partitioned into five parts consisting of a total of twenty-six chapters.

Part I discusses the scenarios and factors used in the vacating of arbitral awards. The chapters examine the grounds for vacating arbitration awards, with a focus on arbitrators and their actions. The areas of arbitrator malfeasance include arbitrator bias, conflict of interest, and arbitrator misconduct during the proceedings (such as, admission or lack thereof of probative evidence, procedural irregularities, and not conducting a fair hearing). In particular, Chapter 2 provides a summary of some available precedents in international arbitrations about arbitrators' independence and impartiality and examines how the question is treated by reference to a sample of institutional rules, model laws, professional guidelines, and several national arbitration laws. Chapter 3 continues the discussion of arbitrator bias by focusing on the specific issue of conflict of interest. It reviews factors that are used to disqualify an arbitrator due to conflicts of interest or the appearance of impropriety. It examines the different views on which potential conflicts are considered sufficient to disqualify an arbitrator. Finally, it shows how certain conflicts may be overcome by full disclosure. Finally, Chapter 4 focuses on the arbitrators' discretion in how to conduct arbitration proceedings. This discretion varies depending on the applicable arbitration rules. However, there are core principles as to the basic conduct of arbitration that arbitrators have to respect. The chapter examines cases where arbitration proceedings have been considered to be flawed, leading to the vacation of the award. The areas of malfeasance covered by the chapter include lack of fair notice and inability to provide a fair hearing, evidentiary issues (especially for the arbitrators' failure to admit or consider probative evidence), and excess of powers.

Part II then investigates the issues relating to the enforcement of arbitral awards. Chapter 5 analyzes the relationship between different arbitral institutions and the possible enforceability problems that may arise from the overlapping competences of a plurality of arbitral organizations and rules. Chapter 6 examines the requirements for the enforceability of arbitral awards – that is, the generic requirements for enforceability under the New York Convention and in most national laws. The chapter investigates different national approaches to the issue of enforceability of foreign arbitral awards, and offers a conceptual systematization for understanding different countries' attitudes to the issue.

Part III reviews issues relating to the scope and interpretation of arbitral clauses. A vague, overly broad arbitration clause is often the grist for disputes within the arbitration process and reason for judicial intervention. Chapter 7 examines generic arbitration clauses and the ubiquitous phrase of scope: "any and all claims related to the contract." Does this arbitration clause capture ex contractu causes and claims, such as those based on tort (or delict) and competition

law, employer–employee relationships, sexual harassment, and other claims based on public and private law? The chapter examines the different approaches that might be used in interpreting such standard arbitration clauses. Chapter 8 looks at issues relating to industry-specific arbitration clauses, including their divergence from generic or institutional clauses and their interpretation. Industry-specific arbitration clauses often incorporate industry-specific arbitration rules. Such industry-specific arbitration rules may raise interpretative doubts requiring arbitration panels, and eventually courts, to resolve such conflicts. The chapter delves into the problem raised by industry-specific arbitration clauses and also provides a case study involving clauses and rules found in the energy sector. Chapter 9 then views arbitration clauses from the practitioner's perspective relating to the drafting of arbitration clauses. The chapter reviews cases where arbitration agreements and awards are held not to be legally enforceable. While the New York Convention provides that foreign arbitration awards are to be fully enforced in all member states, arbitration awards may be held to be unenforceable in national courts if they are the outcome of a proceeding that failed to meet due process standards of appropriate notice and fair hearing. This chapter examines what factors the courts analyze in making their determinations on due process and reviews the other types of claims that can be brought against the enforceability of arbitration awards. It also assesses the issues that most often give rise to disputes and judicial challenges, and offers some suggestions on how to write a clause that minimizes the risk of multiple interpretations.

Part IV surveys a number of countries and their legal systems to determine the extent that courts exert jurisdiction or control over arbitration proceedings and the enforcement of awards. This survey allows for an analysis of the variety of divergences between national arbitration laws despite the universal recognition of arbitration as a preferred means of dispute resolution, especially in international business transactions. The countries chosen to review were based on geographical location and on the importance of the countries as seats of arbitration.

The European countries surveyed are Bulgaria, France, Germany, Italy, Poland, Russia, Spain, Switzerland, Ukraine, and the United Kingdom. Starting from eastern Europe, Bulgaria provides a case study on the evolution of an arbitration system in a former Soviet republic. Chapter 12 reviews the recent developments of Bulgarian arbitration law and practice on the issues covered in the book. Chapter 18, on Poland, also acts as a case study of a former Soviet satellite that has advanced from a developing to a developed country. The chapter examines this shift from the perspective of arbitration law and practice, highlighting the major developments that have taken place in recent years. Post-socialism is also the historical framework of Chapters 19 and 22, on Russia and Ukraine, respectively. Chapter 19 investigates Russian arbitration rules, as well as rules and regulations of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC), an independent permanent arbitration institution located in Moscow that is also the leading arbitration institution in Russia and in eastern Europe. Chapter 22 delves into Ukraine's recent arbitration reform and improved rules of judicial control over arbitration. In particular, the chapter scrutinizes Ukraine's new procedural rules on courts and their power of vacating arbitration awards, issues about the scope of arbitration clauses and public policy against arbitration, and recognition and enforcement of domestic and international arbitral awards.

Moving to western Europe, Chapter 14 shows how, in the last decades, France moved from a restrictive arbitration regime to a more arbitration-friendly one. The chapter focuses in particular on French arbitration law and practice after the major arbitration reform undertaken in 2011. Chapter 15 provides insights into German arbitration rules as well as the rules of the German

Arbitration Institute (*Deutsche Institution für Schiedsgerichtsbarkeit*; DIS), showing that German is an arbitration-friendly country, and German arbitrators are highly regarded and appointed in international commercial arbitration. In contrast, Chapter 16 on Italy demonstrates that, despite the fact that current Italian rules on arbitration are largely in line with those of other jurisdictions, as well as with international legal standards, Italy is generally perceived as a nonfriendly arbitration country. The chapter investigates the factors underlying the Italian view on arbitration and, in particular, the attitude of Italian courts toward arbitral proceedings and awards. Chapter 20 analyzes the current Spanish Arbitration Act (Act 60/2003 of December 23, 2003) and its amendments. The Act is based on the UN Commission on International Trade Law (UNCITRAL) Model Law, is aligned with international principles, and has largely succeeded in setting up a modern legal framework for arbitration that has enabled a very positive evolution and sound consolidation of arbitration in Spain for more than a decade. Nonetheless, the chapter also underlines that, in recent years, the escalation of disputes related to interest rate swap agreements settled by arbitration triggered a succession of rulings setting aside arbitral awards on the grounds of breach of "economic public policy." Chapter 21 deals with Switzerland, a very important country for international arbitration, given its highly developed arbitration system and the popularity of Swiss law as the applicable law to international transactions. The chapter examines the main features and the reasons underlying the global success of the Swiss arbitration system. Finally, Chapter 23 shows that the United Kingdom's arbitration law, found in the English Arbitration Act (EAA), is less friendly to the independence of the arbitration system than one might expect it to be. The chapter explores the features of the United Kingdom's arbitration system and shows how it provides for a greater role of courts in the interpretation and enforcement of arbitration clauses and agreements.

The Asian-Pacific venues studied are Australia and China. Chapter 11 analyzes Australian arbitration laws as a hybrid system influenced by English common law's restrictive view of arbitration and the explosion of cases in Asian arbitration venues, such as Singapore, Shanghai, and Hong Kong. The chapter explains the most recent developments in Australian arbitration law in the context of the country's hope to capture a larger portion of the ever-growing arbitration industry in Southeast Asia. Chapter 13, on mainland China, presents the specificities of Chinese arbitration law, including its unique "prior reporting system" to ensure uniformity in the judicial review of arbitral awards. The chapter also provides an original quantitative study of annulment and enforcement procedures carried out in China.

In the Americas, the South and North American countries examined are, respectively, Argentina and the United States. Chapter 10 on Argentina investigates a vibrant international arbitration system. Yet the chapter also provides an overview of the specificity and the struggles that Argentinian arbitration law and practice have faced in recent years. Chapter 24 on the United States focuses on the US Federal Arbitration Act, which sets federal policy in favor of arbitration as the country's preferred means of dispute resolution. The chapter examines how courts at the federal level have expanded the areas for which arbitration is allowed, while more recently the US Supreme Court placed obstacles for arbitrating certain types of actions, such as class arbitration claims.

The sole African country explored is Nigeria. Chapter 17 shows how the Nigerian arbitration system lies between the well-advanced arbitration systems of Egypt and South Africa and those of lesser-developed African countries. The chapter highlights the features and specificities of Nigerian arbitration law and practice. As noted, the country reports provide the means to perform a comparative analysis to determine how generally accepted are the principles of arbitral

independence and the enforceability of arbitral awards. This is done in Part V, which provides a meta-analysis of the countries surveyed.

Chapter 25 focuses on the commonalities and divergences across national laws. It ferrets out trends and provides a greater understanding of the nuances of national arbitration laws, dealing in particular with setting aside and enforceability of awards, arbitrator bias, conflict of interest and misconduct, interpretation and scope of arbitration clauses and the effect of anti-arbitration policy. Chapter 26, written by the recognized German arbitration practitioner and scholar Friedrich Rosenfeld, reconceptualizes the shared governance exerted by arbitration panels and courts in the operation of the arbitration system. The chapter starts from the premise that arbitration has a dual foundation in party autonomy on the one hand and the applicable arbitration framework on the other and that the ultimate guardians tasked to examine whether an arbitral award produces legal effects are state courts. However, the chapter also emphasizes that the arbitration framework does not always reflect a strict binary allocation of responsibility among private and public actors. The responsibility to control arbitration proceedings is shared among multiple actors, including arbitral tribunals, the parties, arbitral institutions, state courts at the place of arbitration and state courts at the place of recognition and enforcement. The chapter provides a taxonomy of the different layers of judicial control and, in particular, examines whether and, if so, to what extent determinations made at an earlier level of control (e.g., determinations by the parties, arbitral tribunals, arbitral institutions, courts at the place of arbitration) have effects upon the assessment at a later level of control (e.g., determinations by a court at the place of recognition and enforcement).