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Composition and jurisdiction of arbitral tribunal

Action aimed at setting aside an award. Awards set aside in their country of origin (see seat of arbitration), not only cannot be enforced in that country but also lose the benefit of the New York Convention. However, some countries such as France, allow an award set aside in its country of origin to be enforced in their territory if the conditions for doing so are fulfilled. The modern laws of arbitration authorize only a limited control over the award, which in any case excludes any review of its merits. Under French law, the conditions for setting aside an award in international matters are the same as those for refusing its enforcement (see enforcement). Ad hoc arbitration Arbitration that, unlike institutional arbitration, is not administered by an arbitral institution. The parties do not benefit from any assistance in case of difficulty except before the "supporting" judge, if he/she has jurisdiction. However they may refer to arbitration rules, such as UNCITRAL arbitration rules and provide for an appointing authority to assist them in the constitution of the arbitral tribunal or the appointment of a sole arbitrator. American Arbitration Association - AAA Main arbitration institution in the United States, it has numerous sets of rules for dispute resolution (mediation, conciliation, arbitration) including one which is devoted to international arbitration: the AAA International Arbitration Rules. Amiable composition Power given by the parties to the arbitrators to seek an equitable solution to their dispute, by setting aside, if necessary the rule of law which would otherwise be applicable or the strict application of the contract, and instead of resolving it under national law or the lex mercatoria. It is said that in this case, the arbitrator decides *ex æquo ex bono*, as *amiable compositeur*, or in equity, these three expressions being often considered interchangeable. The only limit to the power of the arbitrator lies in international public policy, a breach of which would constitute a ground for refusing to enforce the award or for setting it aside (see Action to set aside). Arbitral case law Set of legal principles, which arise from published arbitral awards and to which further awards may refer in supporting the arbitrators' decision. They relate to both arbitral procedure and the substantive law. Arbitration Way of resolving disputes whereby the parties withdraw their dispute from the jurisdiction of State Courts to submit it to private individuals - the arbitrators - freely nominated by them and charged with the task of resolving the dispute by means of an enforceable decision. Arbitration agreement Agreement in which one or several parties agree that a dispute which has arisen (submission agreement) or which may arise between them in the future (arbitration clause) shall be resolved by one or more arbitrators. Arbitration Institute of the Stockholm Chamber of Commerce Independent body of the Chamber of Commerce of Stockholm devoted to dispute resolution, its mission is to lend assistance, in accordance with the arbitration rules of the Arbitration Institute of the Stockholm Chamber of Commerce, or other rules that it may adopt in the resolution of domestic or international disputes. Arbitral institution Organization that manages arbitral procedures, which take place under the arbitral rules it issues. Some institutions have adopted the UNCITRAL arbitration rules. Its role is more or less extensive depending on its arbitration rules but in no event does it have any jurisdictional function, the latter belonging to the arbitrators. In addition to the issuance of arbitration rules, its role consists mainly in assisting the parties in resolving certain difficulties and in controlling the proper conduct of the arbitration proceedings, including in some cases, such as the ICC, the formal scrutiny of draft awards. Arbitral tribunal Legal system of arbitration in a particular country. It deals especially with the validity and effects of the arbitration agreement, the functions of the arbitrator, the constitution of the arbitral tribunal, the mandatory procedural rules and actions to set aside the awards and their enforcement. It should not be confused either with the substantive law or the procedural law. It is sometimes referred to as the *lex arbitri*. Arbitration rules Set of provisions which determine the main rules regarding the establishment and conduct of the arbitration, facilitate the constitution of the arbitral tribunal or the appointment of the sole arbitrator and govern the powers and obligations of the arbitrators. They are usually issued by the arbitral institutions and used in arbitration proceedings conducted under their aegis. UNCITRAL offers arbitral rules devoted to ad hoc arbitrations. Arbitrator Private individual, in principle a natural person, to whom the parties submit a dispute, which has already arisen or which may arise with a mandate to decide the dispute and who accepts this mandate. Unless the arbitration agreement provides otherwise, no restriction under French law limits the choice of the arbitrators by the parties except that they must be independent from the parties. Some national laws require that they be lawyers when they are deciding matters based on the law. Award Written decision of the arbitrators, which finally partially or totally settles the dispute, which was referred to them, whether on the merits, on jurisdiction or on any other procedural issue which may lead them to put an end to the proceedings. The award is binding on the parties and terminates the arbitrators' jurisdiction over the dispute, which they have resolved. It is generally acknowledged that the award is *res judicata* with regard to that dispute. It is said to be partial when it settles only part of the dispute (jurisdiction, applicable law) and final when it disposes of all the issues. In principle, the award is not subject to appeal but may be subject to an action to set aside (see action to set aside). Award by consent Award whereby the arbitrators record the settlement entered into by the parties; it has the authority and effect of an arbitral award. Bilateral Investment Treaty (BIT) BITs are legal instruments between two for the encouragement, promotion and protection of investments in their territory by investors based in either country. BITs generally provide for a broad range of substantive protection to such investments, such as fair and equitable treatment, national treatment, most-favored-nation treatment, compensation in cases of expropriation, full protection and security, among others. BITs also generally provide dispute settlement mechanisms, such as ICSID, UNCITRAL, ICC, local courts, among others. More than 2,000 BITs have been ratified. CIRDI See ICSID. Competence - competence Generally accepted principle according to which the arbitrators have jurisdiction to decide on their own jurisdiction when a party to the arbitral proceedings challenges it, without having to suspend the proceedings until the State Court decides. In a broader sense, acknowledged by some national laws only, especially in France, the jurisdiction of the arbitrators to decide on their own jurisdiction is exclusive of the jurisdiction of the State Court, which, when faced with an arbitral agreement, does not have any jurisdiction either to decide the dispute or to decide on the validity of the agreement unless it is null and void and cannot be applied. This does not mean that the State court is prevented from assessing the validity or the subject matter of the arbitration agreement; but this assessment is postponed until the review of the award in connection with either its enforcement or an action to set it aside. CNUDCI See UNCITRAL. Equity See Amiable composition *Ex æquo et bono* See Amiable composition Exequatur Decision whereby the State Courts make an arbitral award enforceable in the territory of that State. The signatory State of the New York Convention undertakes not to refuse the exequatur of awards issued in other States (referred to as foreign awards) unless it is established that they do not comply with certain conditions, which should not be stricter than those provided by the Convention. Under French law, which is more liberal than the Convention, the exequatur of foreign awards can be refused only on the following five grounds: the arbitrator has decided in the absence of an arbitration agreement or on the basis of a void or expired agreement; there was an irregularity in the constitution of the arbitral tribunal or in the appointment of the sole arbitrator; the arbitrator's decision does not conform to the terms of his reference; the principle of due process has not been complied with; or the recognition or enforcement of the award would be contrary to international public policy. In addition, awards issued in France in international matters (see international arbitration) which may be criticized on these grounds may be set aside (see actions to set aside). Energy Charter Treaty (ECT) The ECT is a multilateral framework for the promotion of energy security through more open and competitive energy markets. The ECT focuses on four main areas, namely the protection of foreign investments, the creation of non-discriminatory rules for energy trade, promotion of energy efficiency, and the resolution of disputes between contracting States as well as disputes between investors and host States. The dispute resolution mechanism between investors and States in Article 26 of the ECT provides for arbitration under the ICSID Arbitration Rules, the UNCITRAL Arbitration Rules and the SCC Arbitration Rules. Enforcement Arbitral awards may, and in principle should, be subject to immediate enforcement by the losing parties, from the time of their notification to the parties; otherwise they may be subject to legal enforcement once they are declared enforceable (exequatur proceedings) by a judicial decision rendered in the country where enforcement is sought. Emergency arbitrator A number of arbitration institutes have a facility, offering parties the opportunity to apply to an emergency arbitrator for interim or conservatory measures, prior to the initiation of an arbitration on the merits, in cases of urgent need. Examples of institutions, offering an emergency arbitrator facility include the ICC, the SCC, SIAC, the NAI and the Swiss Chambers of Commerce. Expropriation Most BITs contain protection against expropriation, yet few of them define the term. Under international law, it is generally understood that an expropriation occurs when a State deprives an investor from assets at a fraction of their price, had the interference not occurred. Under international law, and as provided by many BITs, States have the sovereign power to expropriate assets from investors, provided it is intended for a public purpose, is non-discriminatory, is in accordance with due process, and adequate compensation is provided to the affected investor. Fair and Equitable Treatment (FET) Contained in many BITs, the obligation for States to provide Fair and Equitable Treatment for foreign investments is generally understood to mean treatment commensurate to the international minimum standard for investors. It is furthermore generally understood to protect investors from unjust, inconsistent, mala fides behavior from the State, non-transparent measures, coercion as well as ensure that their legitimate expectations are respected. Full Protection and Security Contained in many BITs, the obligation for States to provide Full Protection and Security is generally understood to protect investors from private and public action, imposing on the State the obligation to exercise due diligence to provide such adequate protection. The standard is generally understood as an objective obligation of vigilance and care. ICC International Court of International arbitration Arbitration body connected to the ICC. In spite of its name, the Court does not have any jurisdictional power; its mandate is to allow international dispute resolution by the application of the ICC's arbitration rules and rules of conciliation. It intervenes, among other things, to appoint the arbitrators and confirm those nominated by the parties, as well as to scrutinize the draft award before its final issuance by the arbitrators. Independence and impartiality Essential characteristics of the arbitrator at the time of the acceptance of his/her function and throughout tenure. The absence of these attributes may lead either to a challenge of the arbitrators, the setting aside of the award (see Action to set aside), or a refusal to enforce the award. The lack of independence is demonstrated, according to the French jurisprudence, through "the existence of material or intellectual links, a situation which is liable to affect the judgment of the arbitrator by creating a definite risk of bias in favor of a party to the arbitration". The arbitrator may be suspected of partiality primarily on the grounds of lack of independence, especially towards one party, but also because the arbitrator's previous knowledge of the case may have led him to take a prior position that could be prejudicial to one of the parties; it may be also evidenced by the arbitrator's behavior during the proceedings if it shows clear bias in favor of one party. Some arbitration rules, such as those of the ICC, the AAA, of the LCIA, require the arbitrators to provide the parties with a statement of independence whereby they must disclose any facts or circumstances which might be of such nature as to call into question the arbitrator's independence in the eyes of the parties in order to allow a possible challenge before the proceedings begin. Institutional Arbitration Arbitration which proceeds under the aegis of institutional arbitration rules; it is the opposite of ad hoc arbitration. International Arbitration The notion of international arbitration varies from country to country. Under French law, Article 1504 of the Code of Civil Procedure states that: "an arbitration is international when international trade interests are at stake". This means that apart from any other external criteria, such as nationality, the parties' domicile or headquarters, the seat of the arbitral institution, the place of arbitration (see place of arbitration) or the law applicable to the merits, the arbitration is international under French law if it deals with an economic transaction involving a transfer of goods or services or a cross-border payment. International Centre for Settlement of Investment Disputes - ICSID Arbitral institution established under the aegis of the World Bank by the Washington Convention of 18 March 1965 ("Convention for the settlement of investment disputes between states and nationals of other states"), it offers the means of conciliation and arbitration to settle investment disputes between contracting States and nationals of other contracting States. As of 20 November 2012, the Convention had been signed by 158 States and ratified by 147. International Chamber of Commerce - ICC Institution founded under French law in 1919 with a view to fostering the development of world trade. In this context, among others, it offers parties arbitration rules and one of the main international arbitral institutions in the world: the ICC International Court of Arbitration. International public policy Set of rules or principles applicable to the merits of the dispute or the proceeding, which should be followed in the law of a particular State. The breach of these rules could justify setting aside the award or refusing its enforcement. There also exists a transnational public policy or true international public policy with which the arbitrators have to comply regardless of the substantive law or the procedural law. Language of the arbitration Language used in the parties' written and oral submissions, in the procedural orders and in the award(s) issued by the arbitrators. It is chosen based on joint agreement of the parties, usually in the arbitration clause, or is otherwise decided by the arbitral tribunal. The flexibility of the arbitral procedure allows the parties and the arbitrators to provide for the most appropriate solutions, the only limits to the imagination of the parties being the costs of translation and interpretation. Thus, it is possible to foresee an arbitration in several languages, for example, with each party expressing itself orally in its own language while the procedural orders and the award are drafted in only one language. It is also possible for the written submissions and the award to be drafted in two different languages. London Court of International Arbitration - LCIA Arbitral institution based in London, which issues its own arbitration rules. Lex Mercatoria International trade usages and general principles of law developed by arbitral awards, resulting from the convergence of national laws, or stated by public or private international organizations. The parties who submit to arbitration may give the arbitrator the power to apply a national law taking into account the general principles of law or submit their dispute directly for resolution under the *lex mercatoria* alone. Most-Favored Nation Clause (MFN) Contained in many BITs, the MFN standard is generally understood as for States to provide the investors of other States the same terms they have granted, or may grant in the future, to investors of other nations that are more favorable in respect of the same matters. Multi-Lateral Treaty (MIT) MITs are legal instruments between more than two countries for the encouragement, promotion and protection of investments in their territory by investors based in either country. MITs generally provide for a broad range of substantive protection to such investments, such as fair and equitable treatment, national treatment, most-favored-nation treatment, compensation in cases of expropriation, full protection and security, among others. MITs also generally provide dispute settlement mechanisms, such as ICSID, UNCITRAL, ICC, local courts, among others. Some of the most important MITs in investment protection are the Asean Free Trade Area ("AFTA"), Common Market of Eastern and Southern Africa ("Comesa"), Dominican Republic-Central America Free Trade Agreement ("DR-CAFTA"), Mercado Común del Sur ("Mercosur"), North American Free Trade Agreement ("NAFTA"), among others. Multiparty Arbitration Arbitration involving more than two parties. Multiparty arbitration does not pose specific problems when the parties consist of two groups having common interests and a common procedural position (claimant or defendant) and each is able to nominate an arbitrator. When this is not the case, difficulties arise with respect to the constitution of the arbitral tribunal, with each party having, in principle, the right to nominate an arbitrator. National Treatment Contained in many BITs, the National Treatment standard is generally understood as the obligation for States to provide the investors of other States the same terms they have granted, or may grant in the future, to investors of their own territory in respect of the same matters. New York Convention The "Convention on the recognition and enforcement of foreign arbitral awards" issued in 1958 by an international conference under the aegis of the United Nations mainly aims at facilitating the enforcement of arbitral awards, the States undertaking to recognize and to enforce foreign arbitral awards issued in another State, unless the defendant in the enforcement action can establish the existence of one of the limited grounds not to enforce the award, which excludes any review on the merits. Ratified by more than 148 States as of 1 January 2013, the Convention facilitates the international movement of awards, and constitutes an important instrument of international arbitration. Pathological clause Used to describe an arbitration clause, or more generally an arbitration agreement, whose defective drafting does not allow the constitution of an arbitral tribunal or the appointment of a sole arbitrator without the intervention, not anticipated by the parties, of the "supporting" judge, or even renders it impossible to establish jurisdiction. In this last situation, the arbitration agreement is null and void or cannot be applied and the State Courts regain jurisdiction to settle the dispute. Procedural law The set of rules applicable to the conduct of the arbitral proceedings, it is determined by the parties, directly or indirectly by reference to arbitration rules, or by the arbitral tribunal without reference to a national law. It should not be confused with either the impartiality Submission agreement See arbitration agreement Substantive law Rules and principles of law applicable or applied to the resolution of the dispute. Their origin may be State law (national law), international law (international convention) or private law (*lex mercatoria*). When the substantive applicable law has not been chosen by the parties, the arbitrators apply the substantive law they deem appropriate taking into account the reasonable expectations of the parties. A distinction has to be made between the substantive law and the procedural law. Supporting judge Used to describe the judge who intervenes to lend support to the arbitration by resolving certain difficulties, especially during the constitution of the arbitral tribunal (in connection with the appointment or challenge of an arbitrator), in evidentiary matters or to grant provisional and conservatory measures. Terms of Reference The terms of reference are a characteristic of ICC arbitration and certain institutions. Under Article 23 of the 2012 ICC arbitration rules, it is a document drawn up by the arbitral tribunal or the sole arbitrator which includes at least: a summary of the parties' respective claims, the main rules applicable to the proceedings and, if appropriate, a list of issues to be resolved. It is signed by the parties, unless one of them refuse to sign, in which case it is approved by the International Court of Arbitration. Its main purpose is to define the dispute once and for all, the parties not being allowed to present new claims beyond the limits of the terms of reference after its signature, without the authorization of the arbitrators. United Nations Commission on International Trade Law - UNCITRAL Main legal organ of the United Nations in the field of international commercial law, empowered by the General Assembly to promote the progress of international commercial law's harmonization and unification. In this context, UNCITRAL has created several instruments in the field of arbitration, including arbitration rules applicable to ad hoc arbitrations and also used by certain arbitral institutions, and a model law on international commercial arbitration which has been totally or partially adopted by numerous States in their domestic laws.

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