

“National Intervention” in International Commercial Arbitration

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Résumé de l'article

À cause d'une croissance importante dans le commerce international, l'emploi de l'arbitrage international a augmenté. L'intervention de l'État dans la procédure, notamment dans la nomination des arbitres, les mesures provisionnelles et dans la preuve, ainsi que dans l'exécution des jugements de l'arbitrage, est analysée. Cette pratique étatique est, cependant, difficile à changer car l'arbitrage international opère dans une structure basée sur des termes nationaux qui diffèrent l'un de l'autre et pas sur des standards internationaux uniformes.

DROIT COMPARÉ

“National Intervention” in International Commercial Arbitration

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ABSTRACT

The use of international arbitration increased over the years as a result of growth in international trade. How the State intervenes in the process concerning the appointment of arbitrators, provisional measures and evidence, and in the enforcement of the judgment after arbitration, is analysed. This State practice is however, difficult to change since international arbitration operates in a structure based on differing national terms, and not on uniform international standards.

RÉSUMÉ

À cause d'une croissance importante dans le commerce international, l'emploi de l'arbitrage international a augmenté. L'intervention de l'État dans la procédure, notamment dans la nomination des arbitres, les mesures provisionnelles et dans la preuve, ainsi que dans l'exécution des jugements de l'arbitrage, est analysée. Cette pratique étatique est, cependant, difficile à changer car l'arbitrage international opère dans une structure basée sur des termes nationaux qui diffèrent l'un de l'autre et pas sur des standards internationaux uniformes.

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INTRODUCTION

The increase in the use of arbitration is a direct consequence of the actual situation of international trade. Trade among countries has grown steadily since the end of World War II, becoming highly internationalized. The increase in the importance of arbitration parallels this process. National jurisdictions have proved their inability to provide for proper answers to the large number of disputes arising out of international commerce, such as technical disputes requiring a prompt and specialized solution¹. Thus, the business community has moved toward arbitration in search of a device capable of giving a quick and safe solution to controversies², adopting arbitration as the normal way to settle the disputes arising out of trade among countries³.

1. N. KRISHNAMURTI, "The International Arbitration Movement", 1974 *Arbitrage Commercial: Essais in Memoriam Eugenio Minoli*, 281, p. 282.

2. P. SANDERS, "International Commercial Arbitration", 1974 *Arbitrage Commercial International: Essais in Memoriam Eugenio Minoli* 467, p. 468-469.

3. P. FOUCHARD, *L'Arbitrage Commercial International*, Paris, Dalloz, 1965, p. 1; P. LALIVE, "Problèmes Relatifs à l'Arbitrage International Commercial", (1967) 120 *R. des C.* 573; A. REMIRO BROTONS, "La Reconnaissance et l'Exécution des Sentences Arbitrales Étrangères", (1984) 184 *R. des C.* 177, p. 179; J.D.M. LEW, *Applicable Law in International Commercial Arbitration*, New York, Oceana, 1978, p. 51; B. GOLDMAN, "Les conflits de Lois dans l'Arbitrage International de Droit Privé", (1963) 109 *R. des C.* 353; P. FRAGISTAS, "Arbitrage étranger et Arbitrage International en Droit Privé", (1960) 49 *RCr.* 1; F.A. MANN, "Lex Facit Arbitrorum" *International Arbitration Liber Amicorum für Martin Domke*, The Hague, Nijhoff, 1967, p. 159; A. REMIRO BROTONS, *Ejecucion de Sentencias Arbitrales Extranjeras*, Madrid, Edersa, 1980; J. RUBELLIN-DEVICHI, *L'Arbitrage, Nature Juridique, Droit Interne et Droit International Privé*, Paris, LGDJ, 1965, p. 92; J. ROBERT, *L'Arbitrage, Droit Interne et Droit International Privé*, 5th. ed., Paris, Dalloz, 1983, p. 228; SANDERS, *loc. cit.*, note 2, p. 472.

The different legal systems show a receptiveness to the said situation by giving importance to the phenomenon of arbitration in international trade. They take into account arbitration's special characteristics by providing a more flexible regime than that for domestic arbitrations : the parties are given a much broader autonomy for they control among other things, the appointment of arbitrators and their challenge, the law governing the procedure and the merits⁴. Besides this, a different system of reviewing the award is devised. Further, the network of treaties that exists ensures that the award grants certain recognition and enforcement in other countries. The certainty is even higher than that enjoyed by foreign judgments. But the solution provided is still framed on a national basis. Clearly, the freedom granted to the parties is not absolute.

This study will show that a total separation between arbitration with an international object and the State does not exist, and that even more, it is not foreseen in the near future. States have something to say regarding international commercial arbitration, for they intervene in their procedures⁵ and also later, in the enforcement stage. We will approach the two stages separately⁶ : the nature of the intervention of the States, and the important differences between them.

I. NATIONAL INTERVENTION WITHIN THE ARBITRATION PROCESS

The different legislations and treaties accept the principle that the national courts are compelled to claim incompetence whenever a previous agreement to arbitrate exists. This principle was already embodied in the 1923 *Geneva Protocol on Arbitration Clauses*, where a general obligation for the courts to refer to arbitration was included⁷. However,

4. There is a basic preliminary limitation. The States have control over the field susceptible to arbitration. See SANDERS, *loc. cit.*, note 2, p. 483; FOUCHARD, *op. cit.*, note 3; LEW, *op. cit.*, note 3, p. 13; A. PONSARD, "La Jurisprudence de la Cour de Cassation et le Droit Commercial International", *Le Droit des relations Économiques Internationales : Études Offertes à B. Goldman*, Paris, Techniques, 1981, 241, p. 242-243.

5. The reference to "in the arbitration procedure" is made in a broad sense. In this matter it is that dealt with prior to the beginning of the arbitration, such as the appointment of arbitrators. They are studied together because they are interrelated.

6. The question of the validity of the arbitral agreement is excluded from the scope of this article.

7. Art. 3(4).

the treatment reflected the idea of arbitration that then existed; no jurisdictional activity could be understood outside the framework of the State. At that time, arbitration was considered to have a jurisdictional character. The intervention of the courts was deemed automatic, and did not require any request by the parties.

The 1958 *New York Convention on Recognition and Enforcement of Foreign Arbitral Awards*, institutes a change in this situation. Art. II(3)⁸ obligates the courts to claim incompetence upon request by the parties to the arbitration. Should the parties be silent, the national courts would hear the claim. This change, also accepted in the 1961 *European Convention on International Commercial Arbitration*⁹, reflects the modifications in the understanding of the nature of arbitration that have been occurring in the last years. It shows a shift from an arbitration reflecting the power of the State by means of control through the courts to an arbitration in which the intervention of the courts is supplementary to, and controlled by the will of the parties. More recently, Article 8¹⁰ of the UNCITRAL model law has recognized, "the 'negative' effect of an arbitration agreement"¹¹.

The model law constitutes a response to widespread problems arising from the great divergency in national laws regulating this field. It aims to provide for the harmonization and unification of the national

8. Art. II(3).

9. Art. VI(3).

10. UNCITRAL model law on International Commercial arbitration as adopted by the United Nations Commission on International Trade Law on June 21st, 1985. U.N. Document A/40/17, 1985, p. 1302; "United Nations Commission on International Trade Law, Secretary General's Report, Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration", UN Doc. A/CN.9/264; For a general approach to the UNCITRAL model law, see, A.H. HERMANN, "The International Arbitration Congress in Lausanne : Doubts over the UNCITRAL Model Law", (1984) 3 *Business Law Brief* p. 3-4; G. HERRMANN, "UNCITRAL Work Towards a Model Law on International Commercial Arbitration", *Report and other Documents of the Regional Seminar on International Commercial Arbitration*, 1984, New Delhi, AALCC Secretariat, p. 75-104; G. HERRMANN, "The UNCITRAL Model Law — Its Background, Salient Features and Purposes", (1985) 1 *Arbitration International* 6, p. 8; J.M. HUNTER, "International Commercial Arbitration : the UNCITRAL Model Law", (1984) April *Int. Bus. Lawyer* 189; J.D.M. LEW, "The Unification of the Law on International Commercial Arbitration", (1984) June *Bus. L. Rev.* 145.

11. UN Doc A/CN.9/264, *op. cit.*, note 10, p. 23. See also G. HERRMANN, "The Role of the Courts under the UNCITRAL Model Law Script", 1986 *Contemporary Problems in International Commercial Arbitration*, J.D.M. LEW Ed., Centre for Commercial Studies, Queen Mary College, 1986, p. 164.

legislations on international commercial arbitration¹², and embodies an approach which balances a broad recognition of the will of the parties as the governing principle in this arbitration with the introduction of certain limitations to the power¹³. The UNCITRAL text recognizes the idea of “negative effect”. Once the dispute has been taken to arbitration, parties cannot refer it to the national courts. If one of them does so, the court will be obliged to refer it back to arbitration, at the request of the other and “not later than when submitting his first statement on the substance of the dispute”¹⁴. Besides this, Article 5 specifies the scope of intervention of the national courts in the arbitration¹⁵ and Article 6 calls upon every State adopting the model law to designate a particular court which would perform certain functions of arbitration assistance and supervision : “The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by...”

Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions. The possible collaboration of the national courts in the arbitration procedure is expressly recognized¹⁶, or, the agreement to arbitrate, when valid, precludes courts from intervening¹⁷. It reflects the interest of the parties in taking the matter out of the national courts, and in resolving their disputes through arbitration. Therefore it is logical to make the intervention of the courts, so far previously rejected, dependent on the will of the parties. It is the parties who must ask the court to stay.

The national regulations are along these lines, stressing the distinction and independence of arbitration from the national jurisdiction and making the court’s obligation to step aside dependent on the will of

12. C. ESPLUGUES & M. MCNERNEY, “Aproximacion a la Nueva Ley Modelo de UNCITRAL sobre Arbitraje Comercial Internacional”, 1986 *Revista de la Corte Espanola de Arbitraje*, 11.

13. *Ibid.*

14. Art. 8(1).

15. HERRMANN, “The UNCITRAL Model Law — Its Background...”, *loc. cit.*, note 10, p. 8; UN Doc. A/40/17, *loc. cit.*, note 10, p. 59–64.

16. HERRMANN, “The UNCITRAL Model Law — Its Background...”, *loc. cit.*, note 10, p. 15–16; UN Doc. A/40/17, *loc. cit.*, note 10, p. 67–71.

17. The intervention referred to in Art. 8(1) is to be understood in terms of “procedural economy”, not for controlling the arbitration but for preventing future appeals. It tries to prevent the arbitration from continuing when it is obvious that the award will be rejected. This attitude permits the parties to correct the possible errors existing and also to begin another procedure.

the parties¹⁸. This implies the recognition of arbitration in international trade as a "sui generis" institution¹⁹.

Canada is not any longer an exception to this approach. Very recently it moved towards these positions. Until 1986 arbitration in common law provinces was governed by legislation based on the *English Arbitration Act, 1889*. It granted the courts two powerful tools to control arbitration, namely : the stated case procedure and the possibility to intervene regarding errors of law²⁰. In Quebec, the 1966 *Code of Civil Procedure* also embodied several vague provisions on arbitration²¹. This situation changed dramatically over the last two years as a consequence of the growing interest towards international commercial arbitration²².

18. See *United States Code*, Title 9 on Arbitration (hereinafter, *USC*), Sections 3 and 206 (notwithstanding Section 4). See *Bernhardt v. Polygraphic Co. of America Inc.*, 1956 US 198, 100 L ed 199, 76 SCt 273. See also (Annotation) "Contract Containing Arbitration Agreement as Subject to the Stay and Enforcement Provisions of the United States Arbitration Act — Federal Cases", 18 L ed 2d 1685, p. 1691 (particularly referring to Section 5 compelling the parties to go to arbitration, 1961-1962). An active attitude by the parties is requested, it stresses the idea of independence and difference from the jurisdiction of the State. See *Dale Metal Corp. v. Kiwa Chemical Industries C. Ltd.*, 422 F. Supp. 78 (SDNY 1977); *Siderus Inc. v. Compania del Acero del Pacifico S.A.*, 454 F. Supp. 22 (SDNY 1978). Also, see G. AKSEN, "Application of the New York Convention by the United States Courts", (1979) 4 *Yearbook of Commercial Arbitration*, (1979) 341, p. 347 *et seq.* A similar position is possibly embodied in Art. 1458 of the new French *Code de Procédure Civile*.

This approach was not so clearly followed by the English rules on Arbitration until 1975, when the *Arbitration Act* declared Section 4(1) & (2) of the 1950 *Arbitration Act* unapplicable to international arbitration. (The old rule was based on the 1923 *Geneva Protocol*). See SANDERS, *loc. cit.*, note 2, p. 277. The new *Act* introduces a rule conditioning the intervention of the courts to the will of the parties (See Section 1(1)). This is also the attitude followed by art. 940.1 of the new *Code of Civil Procedure* of Quebec and, art. 8.1 of the *Federal Act S.C. 1986*, c. 22 among others.

In all these approaches the same idea is embodied; arbitration is an independent procedure. The courts when required to deal with a dispute shall have to stay if satisfied that a previous agreement to arbitrate exists among the parties. The agreement when valid, excludes the initially competent courts from intervening.

19. B. OPPETIT, "Sur le Concept d'Arbitrage", *Le Droit des Relations Économiques Internationales : Études Offertes à B. Goldman*, *loc. cit.*, note 4, p. 231.

20. E.C. CHIASSON & M. LALONDE, "Recent Canadian Legislation on Arbitration", 1986 *Arbitration International*, 370, p. 370.

21. For an overview of the former situation, see M. POMERLEAU, "L'Arbitrage interprovincial et international au Canada", 1985 *Rev. Arb.*, 373, p. 373-404; B. CLAXTON, "Commercial Arbitration under Canadian Law" (1943) 21 *Can. Bar. Rev.* 170, p. 170; L. KOS-RABCEWICZ-ZUBKOWSKI, *Commercial and Civil Arbitration in Canada*, Ottawa, Univ. of Ottawa Press, 1978, p. 8; L. KOS-RABCEWICZ-ZUBKOWSKI, "National Reports", (1983) 8 *Yearbook of Commercial Arbitration*, 68; J.G. CASTEL, "Canada and International Arbitration" (1981) 36 *Arb. J.* 5.

22. CHIASSON & LALONDE, *loc. cit.*, note 20, p. 370.

Canada adhered to the 1958 *New York Convention* on August 10th, 1986²³ after reaching an unanimous agreement with all the provinces to this respect²⁴. These provinces also passed parallel legislation establishing the application of the *Convention* to their territories²⁵. Even more, the Federal Government and several provinces adopted the UNCITRAL model Law on *International Commercial Arbitration*. It is likely that many other provinces will soon pass legislation on the matter which is also based on the model law. In this article we adopt the British Columbia *International Commercial Arbitration Act*²⁶ as the paradigm of the new "Canadian" position respecting arbitration in international trade. It is a position in which "non seulement ont été abandonnés les éléments traditionnels tels le special case²⁷ l'annulation pour 'erreur manifeste', mais on a également introduit une nouvelle conception de l'arbitrage"²⁸. As already said, the *Act* includes the model law and, consequently, shares the spirit of the UNCITRAL text and its solutions.

This understanding does not, in practice, suppose an absolute separation between arbitration and national courts. The theoretical and practical limitations characterizing arbitration entail the intervention of national courts in its procedure. Two situations are symptomatic : the appointment of arbitrators and the adoption of provisional measures.

A. APPOINTMENT OF ARBITRATORS

It is a generally accepted principle that the parties are free to decide the constitution of the arbitral tribunal either indirectly through

23. CHIASSON & LALONDE, *loc. cit.*, note 20, p. 371. The official accession date of Canada to the 1958 New York Convention is May 12th, 1986 (in force on August 10th, 1986). See H. ALVAREZ, "La Nouvelle Législation Canadienne sur l'arbitrage Commercial International", 1986 *Rev. Arb.* 529, p. 533.

24. ALVAREZ, *op. cit.*, note 23, p. 533.

25. The first Act to enter into force was the *Foreign Arbitral Awards Act*, S.B.C. 1985, c. 74, from British Columbia. Also, there have been very important developments in Québec, including the *Loi Modifiant le Code Civil et le Code de Procédure Civile en Matière d'Arbitrage*, L.Q. 1986, c. 73; *International Commercial Arbitration Act*, S.N.S. 1986, c. 12; *The Enforcement of Foreign Arbitral Awards Act*, S.S. 1986, c. E 9-11; see ALVAREZ, *loc. cit.*, note 23, p. 533, footnote 11.

26. *Supra*, note 25.

27. "Selon cette procédure, bien connue des praticiens de l'arbitrage commercial international, chaque partie pouvait demander à l'arbitre de déclarer qu'il existait un spécial cas sur une question de droit et de soumettre celle-ci aux tribunaux étatiques. Si l'arbitre refusait la demande d'une des parties, cette partie pouvait demander à la juridiction étatique de prescrire qu'un spécial cas soit déclaré. Cette procédure offrait une mesure dilatoire idéale à une partie récalcitrante et permettait une intervention incommode des tribunaux", H. ALVAREZ, *loc. cit.* note 23, p. 530.

28. ALVAREZ, *loc. cit.*, note 23, p. 535.

the selection of an international arbitral institution, or directly by deciding the number of arbitrators and the manner in which they are to be appointed and challenged.

This idea was partially accepted in the 1923 *Geneva Protocol on Arbitration Clauses*²⁹. However, the vision of arbitration as a reflection of the power of the State then in existence, conditioned the constitution of the arbitral tribunal to both the will of the parties and the "law of the country in whose the arbitration takes place", thereby providing the national legal system with a "de facto" control over the matter³⁰. Parties were not allowed to go further than the framework of the law of the place where arbitration occurred and to which it belonged. Despite a certain "autonomy" in the way it took place, it was a reflection of the jurisdiction of that State. This arbitration was connected to the State and subject to its rules.

The 1958 *New York Convention*, recognizing the change that was happening in the global approach to arbitration in international trade³¹, refers the composition of the "arbitral authority" exclusively to the "agreement of the parties". Only when the parties are silent, is the law of the country where the arbitration takes place to intervene. Although this law has solely a suppletory role to play, it is still a role. It is so even when there is no reminiscence of the old idea of control as accepted in the 1923 *Geneva Protocol*.

Further, this idea was accepted and enlarged upon to some extent in the 1961 *European Convention*³². The UNCITRAL model law admits it too, as the parties are free to choose the number of arbitrators and their appointment³³. Also, the regulations of the different international

29. Art. 2.

30. In that scope the idea of autonomy of the parties was limited by the scope of the national law. An international understanding of arbitration similar to the present one was lacking. The parties were able to choose between several options but always constricted not to breach the law of the country in which the arbitration took place. Article I (c) of the *Geneva Convention of the Execution of Foreign Arbitral Awards* is to be construed in the same way, as making the arbitration dependent on the law "governing" it.

31. See Article V, I (d). See J.D. BREDING, "La Convention de New York du 10 juin 1958, pour la Reconnaissance et l'Exécution des Sentences Arbitrales Étrangères", (1960) 87 *Chunet* 1002, p. 1003 *et seq.*; P.J. POINTET, *La Convention de New York sur l'Exécution des Sentences Arbitrales Étrangères*, Zurich, Ruegg, 1958; J. ROBERT, "La Convention de New York de 1958 sur la Reconnaissance et l'Exécution des Sentences Arbitrales Étrangères", 1958 *Rev. Arb.* 70; P. SANDERS, "La Convention de New York", 1960 *Arbitrage International Commercial*, The Hague, Nijhoff, T. II, 315.

32. Art. IV, I. See also P.J. POINTET "La Convention de Genève sur l'Arbitrage Commercial International", in *Arbitrage International Commercial*, *loc. cit.*, note 31, 1965, T. III, p. 290 *et seq.*; J. ROBERT, "La Convention Européenne sur l'Arbitrage Commercial International Signée à Genève le 21 avril 1961", (1961) I D, 177.

33. Art. 10 and 11 of the model law. See also, UN Doc A/CN.9/264, *loc. cit.*, note 10, p. 25-29; UN Doc A/40/17, *loc. cit.*, note 10, p. 99-111.

permanent centres for arbitration³⁴ and the national legislations accept it³⁵, thus establishing the parties' right to control this process. The *British Columbia Act* provides for admits it as well, in Article 10. Yet, certain problems may arise respecting Art. 11 of the *Act* since it allows any person, regardless of his nationality, the right to be arbitrator³⁶.

Practice is slightly different from theory. In principle there is no intervention of the party State as to the constitution of the arbitral tribunal. However, situations arise where the presence and intervention of the courts of a certain nation are required³⁷. Since the procedure may be stopped because of either the parties or the arbitrators, it is necessary for the national courts to act. Two cases are distinguished here. On one hand, the situation where a permanent arbitral institution has been chosen, and on the other hand, that of *ad hoc* arbitration.

1. A permanent arbitral institution has been chosen

This first case does not create many problems. The institutional regulations take this possibility into account and provide an answer for it³⁸. The intervention of the international centres presupposes the existence of only one solution to the situation and prevents the cases where two national courts have appointed different arbitrators³⁹.

34. ICC Rules Art. 2(1) and AAA Rules, Section 14.

35. Article 1493 of the new French *CPC*. The formula included is structurally similar to that of the 1961 *European Convention*. The solution adopted "codifies" the old French practice. See J. ROBERT, *Arbitrage Civil et Commercial en Droit Interne et Droit International Privé*, 4th ed., Paris, Dalloz, 1964, p. 381-382; FOUCARD, *loc. cit.*, note 3, p. 249-250.

In England, this principle underlies the 1950 *Arbitration Act* (See Sections 1, 6, 7, 8, & 9). The 1979 *Act* does not modify this situation although it reduces any possible intervention by the courts (Sections 6(3)). See J. STEYN, "National Reports : England", (1983) 8 *Yearbook of Commercial Arbitration* 10. As to the USA, see Section 5 *USC*. For Canada, see Art. 10 of the *British Columbia Act* and, art. 940 of the Quebec *CCP*.

36. "While respecting an egalitarian sentiment, it must be noted that the provision may run counter to the many existing agreements by parties which exclude nationals from serving. The overall respect for party autonomy should prevail...", CHIASSON & LALONDE, *loc. cit.*, note 20, p. 373.

37. FOUCARD, *loc. cit.*, note 3, p. 250.

38. ICC Rules, Article 2 (3) (4). Also, AAA Rules, Sections 13 & 14.

39. In ROBERT, *loc. cit.*, note 3, p. 259.

Ad hoc arbitration

This situation is different from the case of *ad hoc* arbitration⁴⁰. As far as the international regulations are concerned, the 1958 *New York Convention* is silent on the matter. The 1961 *European Convention*, however, refers to it. It accepts only the intervention of a President of the Chamber of Commerce when the parties so request⁴¹.

The UNCITRAL model law provides a concrete answer to this situation. In principle parties are free to choose the number of arbitrators, but Article 10 established the number to three should the parties reach no agreement. Regarding the problems arising from the appointment of arbitrators, Article 11 makes a reference to "the court specified in Article 6". The decision rendered by the court upon the request of the parties will be final. The *British Columbia Act* shares the position⁴².

Before the UNCITRAL model law, there was no uniform mechanism providing a simple answer in the *ad hoc* arbitration. The absence of a satisfactory treatment by the international conventions left the question open to the national legislatures. The different States have handled the problem in several ways. In France, for instance, article 1493 of the *Code de Procédure Civile* permits the intervention of the French courts in various cases⁴³.

"If there are difficulties in the composition of the arbitral tribunal, when arbitration takes place in France or is submitted by the French parties to French procedural law, the most diligent party may bring an action before the president judge of the district court of Paris unless the agreement provides otherwise in accordance with the provisions of Article 1457"⁴⁴.

40. Specially when the arbitration clause does not include precise rules to appoint arbitrators. See G.R. DELAUME, "L'Arbitrage Transnational et les Tribunaux Américains", (1981) 108 *Chunet* 788, p. 800, for the problem of the acceptance of this appointment by a third State.

41. See ROBERT, *loc. cit.*, note 32, p. 177-183.

42. Arts. 10 & 11 (see note 36). See to this respect, art. 941 (1) of the Quebec *Code of Civil Procedure*.

43. See M. HUYS, *L'Arbitrage en Droit Belge et International*, Bruxelles, Bruylant, 1981, p. 544 *et seq.*; P. SANDERS, "Trends in the Field of International Commercial Arbitration", (1975) 145 *R. des C.* 238.

44. The rule embodies a claim to jurisdiction in favour of the French courts, and a rule of jurisdiction in the international set. But also, it refers to venue. The "District Court of Paris" intervenes in the absence of a decision to the contrary. The jurisdictional rule is imperative but the venue one is not. See L. CRAIG, "French Codification of a Legal Framework for International Commercial Arbitration, the Decree of May 2, 1981", (1982) 6 *Yearbook of Commercial Arbitration* 407, p. 415 *et seq.* For an overview of the French system, see P. BELLET & E. MEZGER, "L'Arbitrage International dans le Nouveau Code de Procédure Civile", (1981) 70 *RCr* 611; G.R. DELAUME, "International Arbitration under French Law. The Decree of May 12, 1981", (1982) 37 *Arb. Journal* 38; J. ROBERTS, "L'Arbitrage en Matière Internationale. Commentaire du Décret n. 81-500 du 12 mai 1981, art. 1492 à 1507 du Nouveau Code de Procédure Civile", (1981) I, D 209.

The parties can refer to the courts, provided that the arbitration is held in France or that the French procedural rules have been declared applicable by the French parties. In these cases only the French courts “may” not have to accept jurisdiction. The French courts will intervene, complementing or interpreting the will of the parties, or filling the existing gaps⁴⁵, but only when there is a connection between the arbitration and France⁴⁶. Also, the intervention of the French courts is sporadic and exceptional, subject to the request of a party. The court’s role is not to control the development of arbitration, but to help assure its success.

The treatment of the question in the United States is based on the respect for the will of the parties,

“[...] but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy then upon the application of either party to the controversy the courts shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specially named therein; and unless otherwise provided in the agreement the arbitration shall be a single arbitration”⁴⁷.

As in France, the intervention by the courts is subject to the “application of either party to the controversy” in accordance with the provisions of the arbitration agreement⁴⁸. The main difference is the idea

45. See CRAIG, *op. cit.*, note 44, p. 415.

46. Despite the reference to “French parties”. See DELAUME, *loc. cit.*, note 40, p. 808, criticising this solution.

47. See USC Sections 5, 206 and 208. This attitude is reflected in the case *Astra Footwear Ind. v. Harwyn International* (422 F. Supp. 907 (1978)) referring to a Yugoslavian footwear manufacturer who sought action against a New York footwear distributor to compel arbitration over a contract dispute. The problem concerned the institution’s decision to whom arbitration should be referred : to the ICC or to the New York CC (an institution no longer active in the field of arbitration). The court stressed the fact that there was an overall agreement to arbitrate and this was the relevant element, “The Court finds that 9 USC Sec 5 was drafted to provide a solution to the problem caused when the arbitrator selected by the parties cannot or will not perform. In view of the federal policy to construe liberally arbitration clause and to resolve doubts in favour of arbitration... the court concluded that it cannot ignore the plain language of USC Sec. 5; nor do the equities of the cases warrant doing so. The court thus agrees to appoint an arbitrator pursuant to 9 USC Sec. 5” (p. 910-911).

Subsequently, the court invited the parties to appoint arbitrators before a certain time. Should this deadline arrive, the court would appoint them. See also, *Cia de Navegacion OMSIL S.A. v. Hugo Nen Corp.* 359 F Supp 898 (SDNY 1972) in which the court did not appoint an arbitration but forced the parties to do so.

48. See DELAUME, *loc. cit.*, note 40, p. 801. The answer will depend on the solution provided by the different systems. In a system like France, the controversy is much more reduced by the use of the expression “may”. The courts are competent but not exclusively. The position embodied would allow France to accept these measures. Nevertheless a unified answer is lacking.

of the connection of arbitration to the U.S.A. Section 5 of the *United States Code* does not require such a relation. Technically, there would be no obstacle for the American courts to intervene in an action not connected to the U.S.A. when a party so requests.

A similar attitude is adopted in the new *1979 Arbitration Act of England* which modifies Section 10 of the *1950 Act*⁴⁹. This section alludes to the power of the courts to appoint an arbitrator, or umpire, in certain cases⁵⁰. The intervention is not dependent on any geographical, personal or legal connection to the U.K. As in the U.S.A. or in France, there is an emphasis on the idea of the "consensual" concept of arbitration⁵¹. Thus, the old approach of judicial supervision is rejected, at least in principle⁵².

The American and English solutions coincide in their spirit and structures. An intervention of the courts in the process of appointment of arbitrators is accepted on the condition that the parties must so request. This intervention is not conditioned by any connection between the States and the arbitration. Both systems accept the participation of their courts notwithstanding the relations existing between them. In this case, there is no questioning of the conditions of the arbitration, whether it is with a national or an international objective. This philosophy is reflected in the absence of a different regulation for arbitration in international trade and national arbitration. Section 5 *USC* and Section 10 of the *U.K. Arbitration Act* apply generally to all arbitrations without distinction.

49. For an overview of the *1979 Arbitration Act* see, DICEY & MORRIS, "Foreign Arbitrations and Awards", in *The Conflict of Laws*, London, Stevens, 1981, 10th ed., Vol. II, Ch. 34; M. ELLAND-GOLDSMILL, "The Arbitration Act 1979", 1980 *Droit et Pratique du Commerce International* 63; P.K. GASLAMBIDE, "La Loi Anglaise de 1979 sur l'Arbitrage", 1979, *Rev. Arb.* 447; W.H. GILL, "National Report : U.K., (1977) 2 *Yearbook of Commercial Arbitration* 90; M.E.R. KERR, "International Arbitration v. Litigation", 1980 *Journal of Business Law* 164; W.H. PARK, "Judicial Supervision of Transnational Commercial Arbitration; the English Arbitration Act of 1979", (1980) 20 *Harvard Int. Law Journal* 87; C.M. SCHMITTHOFF, "The United Kingdom Arbitration Act 1979", (1980) 6 *Yearbook of Commercial Arbitration* 231, p. 232 *et seq.*; D.R. THOMAS, "An Appraisal of the Arbitration Act 1979", (1981) 2 *Llodes Mar. and Comm. Law Quarterly* 199.

50. See Section 10.

51. C.M. SCHMITTHOFF, "Comment on *South India Shipping Co. Inc. v. Bremer Vulcan Schiffbau und Maschinenfabrick*", (1982) 7 *Yearbook of Commercial Arbitration* 162. For an approach to the practice of the new system, see C.M. SCHMITTHOFF, "Comment on '*Pioneer Shipping Ltd. Liberia v. Armada Marine S.A. v. BTD Tioxide Ltd. (U.K.)*'", (1981) 6 *Yearbook of Commercial Arbitration* 160.

52. This new approach to arbitration in international trade makes any intervention by the national courts in the actuation of arbitration impossible. The dismissal will be always due to the parties. This is implicitly admitted in the New York and 1961 *European Convention* and in the French, Canadian and US rules on Arbitration. Only the *1950 Arbitration Act* maintains a different position.

This approach differs from that maintained in the new French *Code de Procédure Civile*, the UNCITRAL model law and the *British Columbia Act*, in which a connection between the country and the arbitration is required. Besides this, according to the French provisions, the matters that can be subject to national arbitration differ from those in international arbitration.

All these regulations share a common problem : the degree of efficacy to be given to measures taken in one country. The absence of an international solution to the question of the intervention of the courts in the appointment of arbitrators leaves a gap that is filled solely by the repercussions that a decision taken in one country will have in another⁵³ where the intervention of the courts in the arbitration are national ones. Many vary from country to country. This gives rise to situations where the same arbitration is considered national by several countries. The UNCITRAL model law may be an important factor clarifying this situation. Of course, its success will depend on the number of countries which adopt it in the future.

B. PROVISIONAL MEASURES

The question of the provisional measures clearly shows some of the tensions and contradictions that exist in arbitration. The fact that arbitration lacks its own enforcement system makes it dependent on the national courts.

Throughout the process, a party may seek to attach certain goods in order to ensure the future enforcement of the award. Usually arbitrators lack the means to do so and must rely on the courts. The *1985 New York Convention* does not address the problem of the provisional measures while arbitration is underway. Article VI alludes only to the question of a party's deposit paid to ensure suitable security for the other party's enforcement. The *1961 European Convention*, on the contrary, devotes Article VI (4) to the problem :

"A request for interim measures of conservation addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement, or regarded as a submission of the substance of the case to the court."⁵⁴

53. See DELAUME, *loc. cit.*, note 40, p. 801 *et seq.*

54. The reference to "judicial authority" is interesting and significant. A clear contrast to the solution provided in the case of the appointment of arbitrators exists. A change in the spirit of the approach is ascertainable (a change due to the characteristics of the matter dealt with). There is no remission to the President of a certain Chamber of Commerce. Provisionary measures are not an "internal" arbitration procedure question but affect the property of persons and may affect third parties. Besides this, an action of attachment of goods effective against the parties and third parties is to be done, this requires both help and recognition by the relevant State.

The *Convention*, filling the gap existent in the 1958 text, makes clear that a reference to a court for interim measures does not imply a breach of the arbitration agreement.

The Article does not specify either, who is to ask for these provisional measures, or when they may be requested. This silence could mean that both parties and arbitrators may make a request. The *Convention* does not stipulate the moment of the intervention either, it only recognizes that it is possible for the arbitrators and the parties to demand several provisional measures by a "judicial authority"⁵⁵. The claim is implicitly made dependent on the parties to the arbitration.

The UNCITRAL model law deals with this matter in two separate articles : Articles 9 and 17 both treating different measures. Article 9, like the 1961 *European Convention* makes clear that the recourse to a national law does not mean a breach of the arbitration agreement.

"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 a measure."

The article implies that the "negative" effect of an arbitration agreement, which is to exclude court jurisdiction, "does not operate with regard to such interim measures"⁵⁶. In conjunction with Article 9, Article 17 gives to the arbitration tribunal the power to order interim measures. However, the scope of this rule is much narrower than that of Article 9. It refers to interim measures granted by the arbitration tribunal itself to protect the subject matter of the process. They are addressed to one or both parties to the arbitration and do not refer to the method of enforcement to be employed⁵⁷.

The model law does not provide a complete solution to the question of how the provisional measures shall be rendered. The law ensures the power of national courts, and that arbitral tribunals grant these kinds of measures⁵⁸ and nothing else.

The rules of some of the permanent international institutions for arbitration also include a reference to the role the national courts play in enacting provisional measures. Article 8(5) of the ICC regulation states that,

55. Either by mistake or as a consequence of the "independence" of arbitration. See ROBERT, *loc. cit.*, note 32, p. 179-180; and DELAUME, *loc. cit.*, note 40, p. 805.

56. UN Doc A/CN.9/264, *loc. cit.*, note 10, p. 25-26.

57. UN Doc A/CN.9/264, *loc. cit.*, note 10, p. 25, p. 42-43. See also, HERRMANN, "The UNCITRAL Model Law-Its Background...", *loc. cit.*, note 10, p. 19.

58. See HERRMANN, *loc. cit.*, note 11, p. 11-12.

“... the parties shall be at liberty to apply to any competent judicial authority for interim measures or conservatory measures and they shall not by so doing be held to infringe the agreement to arbitrate or to affect the relevant power reserved to the arbitrator.”

The sole condition placed on the parties is the subsequent notification to the Secretariat of the Court of Arbitration.

The national laws treat the problem in different ways. The *British Columbia Act* incorporates the same wording as the UNCITRAL model law⁵⁹. In France, the new regulation on “International Commercial Arbitration”⁶⁰ makes no provisions for it. However the courts have long since accepted “... que l’existence d’une convention arbitrale n’interdit pas au juge des référés d’être saisi d’une demande de mesures provisoires, lorsqu’il y a urgence et qu’il n’a pas à préjudicier du fond”⁶¹. No reference is made as to which courts are capable of dealing with this matter. In the U.S.A. as well, the *USC* is silent in this respect⁶². As in France, the courts also recognized until 1970 that the parties may refer to them for these measures, both before⁶³ and after the procedure begins⁶⁴. Nevertheless, after the ratification of the *1958 New York Convention* by the U.S.A., there are two different positions accepting and rejecting the intervention.

In cases like *McCreary Tire and Rubber Co. v. CEAT S.p.A. v. Mellon Bank NAC*⁶⁵, *Article II(3) of the New York Convention* is interpreted as preventing the national courts from intervening in the matter when there is an agreement to arbitrate,

“[...] Quite possible 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 for settling disputes. Such a bypass is prohibited by the convention if one of the parties to the agreement objects... the convention forbids the courts or a contracting state from entertaining a suit which violates an agreement to arbitrate. Thus the convention that arbitration is merely

59. See Arts. 9 and 17.

60. The new French *CPC* refers, like the 1961 *European Convention*, to “International Commercial Arbitration”.

61. FOUCHARD, *loc. cit.*, note 3, p. 122. See Civ (S. Civ) 4/Dec./1953 (*D* 1954, 108); Civ. (S. Com) 24/March/1954, (*Rev. Arb.*, 1955, 95); Civ (S. Civ) 7/June/1957 (*Bull. Civ.* 1957, II, 354); Comm. 3/June/1951 (*D* 1970, 1); Comm. 4/Nov./1959 (*Gazz. Pa.* 1960, I, 191).

62. Only Section 8 refers to it, and in relation to the admiralty cases.

63. See *American Reserve Ins. Co. v. China Ins. Co.*, (1948) 297 NY 322, 79 NED 2d 425.

64. See *Compania Panamena Maritima San Gerassimo v. International Union Ltd.*, 1959 187 NYS 2d 449 (Sup. Ct).

65. (501 F2d 1032). The case deals with the refusal by the US District court for the WD of Pennsylvania to grant a motion to dissolve a foreign attachment.

another method of trial to which provisional remedies should equally apply is unavailable”⁶⁶.

The arbitration procedure is different from the jurisdiction of the State, and intervention by a national court is a consequence of a request by either the parties or the arbitrators. The courts have no “discretion in compelling arbitration”⁶⁷; they have no role to play on their own. This interpretation has not been unanimously accepted. Certain courts adhere to the approach of *Compania Panamena*⁶⁸ which accepts a direct intervention by the courts,

“[...] there is no indication in either the text or the apparent policies of the Convention that resort to prejudgment attachment was to be included.”⁶⁹

In England nothing is said on the subject.

A clear regulation of the matter is lacking in the national set. In general terms it is possible to speak of an acceptance of the possibility for the national courts to order provisional measures conditioned by the parties or arbitrators calling for it⁷⁰. A sporadic and dependent intervention is a direct consequence of the special nature of the provisional measures

66. *Id.*, p. 1037-1038, the relief should have been granted. See DELAUME, *loc. cit.*, note 40, p. 805.

67. *ITAD Associates Inc. v. Podar Bros.* (1981) 636 F2d 75 4th Cir. 77. The case reaffirms the doctrine of McCreary. See also *Metropolitan World Tanker Corp. v. P.N. Pertamina Minjakdangan Bumi, National (PM Pertamina)*, (1975) 427 F Supp (SDNY); *Coastal States Trading Inc. v. Zenith Nav. S.A.*, (1977) 446 F Supp 330, 341 (SDNY); *Boys Market Inc. v. Retail Clerks Union*, (1970) 398 US 235, 9 SCt 1538, 26 LEd 2, 199.

68. *Carolina Power and Light Co. v. URANEX*, (1977) 451 F. Supp 1044 (ND Cal); *Andros Compania Maritima S.V. v. André et Cie. S.A.*, (1977) 430 F. Supp 88 (SDNY); *Atlas Chartering Services v. World Trade Group* (1978) 435 F. Supp 861 (SDNY); *Paramount Carriers Co. v. Cook Industries Inc.*, (1979) 465 F. Supp 399 (SDNY). *Carolina* is the only case on the list not referring to admiralty. The cases on admiralty are special in so far Section 8 accepts the possibility to attach. The court in *Paramount* does implicitly accept this separation, “... the cases relied upon by defendant are readily distinguishable, as judge Conner pointed out, since they involve estate attachment procedures and presented entirely different issue.” (p. 602)

69. *Andros* case, *op. cit.*, note 68, p. 89; also *Paramount* case, *op. cit.*, note 68, p. 401.

70. Should the request by only one of the parties be understood as a breach of the previous agreement to arbitrate? The answer will depend very much on the understanding of arbitration and the role of these measures. They are not really a part of arbitration, and parties are not escaping arbitration through them. But they may create delay and harsh to the other party in so far it has to defend its position in two places instead of one. See NEWMAN, “Note on *Carolina Power & Light Co. v. Uranex* : Quasi in Rem Jurisdiction to Secure a Potential Arbitration Award : An Exception to *Shaffer v. Heitner's* Minimum Contacts Requirement”, 5 *North Carolina Journal of International Law and Com. Reg.*, p. 254.

and the non-existence of an enforcement structure specific to arbitration : “L’intervention du judiciaire répond souvent à une nécessité pratique — urgence et efficacité — le recours aux arbitres pour des mesures provisoires étant souvent malaisé singulièrement avant l’introduction de la procédure arbitrale⁷¹.”

Besides this, there is no reference to any relationship between the arbitration and the States for the courts to intervene. In principle, they are allowed to grant provisional measures in any arbitration where requested by the parties. Their urgency could justify this approach. There is an interest in helping the process, regardless of whether it is connected with a national system.

C. ASSISTANCE IN TAKING EVIDENCE OR OVERCOMING PASSIVE ATTITUDES

The UNCITRAL model law refers to the role the national courts may play in taking evidence⁷² in Article 27.

“The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.”

The intervention depends upon a request by the arbitral tribunal to the parties⁷³. A similar attitude is adopted in the U.S.A. There, Section 7 *USC*⁷⁴ accepts the intervention of the “... U.S. District Court for the district in which such arbitrators or a majority of them are sitting making it dependent on the request by the arbitrators.” The Code introduces a connection between the arbitration and the national jurisdiction unknown in other situations⁷⁵. The requirement of this connection might be open to criticism, no clear argument being found in its favour. Even the efficacy argument is not acceptable as there are several other situations

71. HUYS, *loc. cit.*, note 43, p. 487. Also ICC Award 1976/2444, (1977) 104 *Chunet*, 932 (See note by Yves Derains).

72. The *British Columbia Act* adopts a similar position.

73. See UN Doc A/CN.9/264, *loc. cit.*, note 10, p. 59.

74. See Section 7. Practice shows how prudent the courts are when intervening. They try to avoid getting involved in a “dette qui leur échappe par définition” (DELAUME, *loc. cit.*, note 40, p. 804). See *Movil Oil Indonesia Inc. v. Asamera Oil (Indonesia) Ltd.*, (1977) 43 NY ed 276, 401 NYS 2d 186. *Batson Yarn and Fabric Machinery Group Inc. v. Sauser Allma GmbH — Allgauer Maschinenbau*, (1970) 311 F. Supp 68 (D C Car).

75. This connection is understandable from a point of view of effectivity of the intervention. See to that respect, H. HOLTZMAN & R. COULSON, “L’Administration de la preuve dans les Arbitrages Commerciaux Américains”, 1974 *Rev. Arb.* 128, p. 130 *et seq.*

of intervention by the courts in which such a relationship is not required ⁷⁶.

The *U.K. Arbitration Act* also refers to a possible collaboration of the national courts in obtaining evidence or in overcoming the passive attitude of one of the parties to the arbitration. Nevertheless the position maintained in the U.S.A. is not shared by the *1950 Act* whose Section 12(4) and (5) ⁷⁷ do not require any connection. The intervention of the courts is accepted as regards any arbitration, the tendency being to help arbitration in general, enabling it to reach a proper result ⁷⁸.

The analysis of these situations shows that the activity of the courts is usually not dependent on any special connection between the arbitration and the State. Further, the intervention of the national courts of a specific country is intended to be in the form of collaboration with the arbitral tribunal as opposed to a control over it. The different legal systems admit this principle of collaboration without distinguishing between national arbitrations and arbitrations with an international objective ⁷⁹. The aim is to ensure the success of the arbitration, not to control it ⁸⁰. The absence of any set of specific rules on this matter with the exception of the *1961 European Convention* reflects the acceptance of this approach.

Additionally, the activity of the courts is made dependent on the request by the parties. The scope and character of the court's intervention at this time, make the idea of connection irrelevant. This study has shown that such a connection is required in only the UNCITRAL

76. See H. HOLTZMAN, "National Report : United States", (1977) 2 *Yearbook of Commercial Arbitration* 116, p. 128 *et seq.*

77. See Section 12 (4).

78. The new French *CPC* is silent in this respect. In the U.S.A., the courts are given a power to consolidate different arbitration procedures, even without the consent of the parties. See *Vigo Steamship Corp. v. Marship Corporation of Monrovia/Frederick Snare Corporation*, (1970) 126 NY 2d 157, *Shipping C. Ltd. v. Maro Shipping Ltd.*, (1980) 494 F Supp 183 (D Conn). This mandatory approach is not embodied in Art. 27 (2) of the *British Columbia Act*. It only recognizes the right of the parties to consolidate an arbitration. See ALVAREZ, *loc. cit.* note 23, p. 537; CHIASSON & LALONDE, *loc. cit.*, note 20, p. 374.

79. In France, U.S.A. (almost totally), and United Kingdom, the legal régime at this stage of arbitration applies both to national arbitration and arbitration international trade. The characteristics of the collaboration at this stage do not make a differentiation necessary.

80. Despite the fact that the State has interests and policies to maintain in certain cases, the role played by the courts here "is that of an executive partner to provide greater effectiveness to the arbitral process"; M. KERR, "Arbitration and the Courts : the UNCITRAL Model Law", (1985) 34 *ICLQ* 1, p. 2.

model law, France and the British Columbia⁸¹ regarding the appointment of arbitrators, and in the U.S.A. when dealing with the practice of proof.

The analysis undertaken shows that the specific conditions of arbitration in international trade are taken into account from the outset by the different treaties and the national regulations. They grant the parties an almost total control over the arbitration. However, these broad powers cannot hide the fact that arbitration today still relies on the State in two basic points.

On the other hand, the object of arbitration is limited by national law. Not all the subjects are arbitrable, and this possible “arbitrability” varies from country to country. Besides this, the law governing arbitration may be affected by the law of the State where it takes place⁸². Even if the first argument is rejected because control over the object of arbitration does not prevent the existence of a transnational procedure in the field susceptible to arbitration, the second limitation will still exist there. The acceptance of a law other than a national law, whatever its name and characteristics to govern the substance of an arbitration, does not preclude intervention of the mandatory rules of the place where it is held. These rules are applied on a territorial basis despite the possible relation existing between the procedure and the place where it occurs⁸³.

The arbitration may have no connection with that State, but this does not necessarily mean that it has an absolutely neutral position. It may have certain interests in the arbitration being carried out in a particular way or in certain attitudes being maintained.

II. NATIONAL INTERVENTION AFTER THE ARBITRATION PROCEDURE

Once the arbitration is concluded there is an award to be enforced. Statistics show a high rate of voluntary enforcement⁸⁴. In this

81. This intervention, as already said, is more of a consequence of the specific conditions surrounding the enactment of the 1981 Decree in the French case, or, reflects a quest for efficiency (in the case of Section 207 *USC*).

82. See HERRMANN, “The UNCITRAL Model Law — Its Background...”, *loc. cit.*, note 10, p. 7 to 8.

83. Mandatory rules both referring to the substance and to the procedure. Even when the parties have not done so, the arbitrators may, in practice, circumvent the application of the traditional *locus* of conflict of laws.

84. Also FOUCHARD, *loc. cit.*, note 3, p. 459-461 (for reasons). Also, “Note”, 65 *RCr* (1976) 541, p. 541 : a study by the ICC showed that only 8 % of the awards rendered every year under the ICC rules require compulsory enforcement. For a study of the corporative coercion, see A. SCHMITT, “Article V of the New York Convention on the Recognition of Foreign Arbitral Awards, Comparative Study of the Courts Ruling in the Federal Republic of Germany, France and the United States of America, Harvard Law School, LLM Thesis (unpublished), p. 1-2.

case, the intervention of a national court is not required. The enforcement stage is handled by the business community itself. Apart from this, there are a certain number of “anomalous” cases of non-voluntary enforcement, which require the intervention of national courts. In these cases, only the different States are able to enforce the award⁸⁵, for they have the “monopole de la contrainte... sur leurs territoires respectifs”⁸⁶. The arbitral tribunal lacks “coercion”. It has no compulsory structure to enforce decisions on its own. Therefore it has to refer to the national courts.

The position maintained by different States regarding recognition of the arbitral awards has varied widely over time. The modification that the idea of arbitration has taken for the last few decades has substantially influenced the way the awards are treated in the post-arbitral period. The different legal systems recognize the control the States has, and which it exercises over the effects of the arbitration procedure. It determines whether or not it is going to be effective in the country⁸⁷. But their attitude towards recognition today is very positive. Most of the regulations stand on the presumption of enforceability of the award rendered in these kinds of disputes. The non-recognition is accepted solely when the party opposing the recognition establishes certain specific and limited grounds.

A. TREATMENT BY THE TREATIES AND THE UNCITRAL MODEL LAW

This has not always been the universally accepted approach. For a long time, arbitration was a reflection of the State’s sovereignty. It was understood as based on and belonging to, a national legal system. As a consequence of this approach, the award was not effective until accepted by the legal system. These ideas underlie the 1927 *Geneva Convention on the Execution of Foreign Arbitral Awards*.

“... To obtain such recognition or enforcement, it shall further be necessary... (d) that the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition, “appel” or “pourvoi en cassation” (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending...”

85. R. DAVID, *L'Arbitrage dans le Commerce International*, Paris, Economica, 1982, 103. See also F. RIGAUX, “Souveraineté des États et Arbitrage Transnational”, in *Le Droit des Relations Économiques Internationales : Études Offertes à B. Goldman*, loc. cit., note 4, p. 263 et seq.

86. DAVID, loc. cit., note 85, p. 496. As to the consequences created by the lack of a uniform authority controlling arbitration, see FOUCHARD, loc. cit., note 3, p. 511; also, J. PAULSSON, “Arbitration Unbound : Award Detached from the Law of its Country”, (1981) 30 *ICLQ* 358, p. 368.

87. See FOUCHARD, loc. cit., note 3, p. 533.

A double *exequatur* requisite was devised. The award was understood not to be valid in itself, but effective only in as far as the country to which it was connected, the country of its “nationality” accepted it as valid⁸⁸.

Besides this requisite for the award to be effective in a third State, an *exequatur* by the country in which execution is sought is required. Once the award was definitive, no further revision was possible in the place of origin⁸⁹. The Article was built on the premise that every arbitration was necessarily connected to a national jurisdiction and has a nationality. Its structure moved around the old dichotomy, national versus foreign arbitration⁹⁰.

After 1927 the world underwent many changes and the connection among the different countries became more apparent. Arbitration similarly evolved. It began to be recognized as the best device to solve the problems arising out of international trade, and its specific jurist nature and characteristics were even more admitted.

This evolution is recognized and accepted by the authors of the 1958 *New York Convention*. The arbitration award is deemed to be valid in itself without requiring acceptance by any State. The efficacy of the award will only depend on the *exequatur* granted by the State where enforcement is sought. Its perspective on enforcement has also changed. There is a presumption of validity.

But Article V implicitly recognizes the existence of a connection between the arbitration and the State where it takes place. It stresses the geographical factor in paragraphs (a), (d) and (e). According to the latter, the award may only be declared void “in the country of origin”⁹¹. Other States may refuse to recognize or execute the award, but cannot set it aside; that may only be undertaken in the country to which the arbitration is most closely connected. The rules permit a double system of control. Firstly setting aside by the country “under which or under the law of which” it was rendered, and secondly, refusal of recognition or enforcement by any State where enforcement is sought.

A similar position is taken with certain variations in Article IX of the 1961 *European Convention*. Yet in principle, it is more restrictive with respect to State intervention than Article V of the *New York*

88. See FOUCHARD, *loc. cit.*, note 3, p. 533.

89. See P. SANDERS, “Vingt Années de la Convention de New York de 1958”, (1979) *Droit et Pratique du Commerce International*, 360, p. 363 *et seq.*, explaining the shift from “definition to obligatory” in the New York Convention. Also, FOUCHARD, *loc. cit.*, note 3, p. 533 *et seq.*

90. Also, there is a presumption in favour of the enforceability of the award. However, in the 1927 Convention, the party interested in the enforcement of the award had to show its enforceability.

91. See SANDERS, *loc. cit.*, note 89, p. 370.

Convention. The philosophy underlying the former is more progressive, and the grounds for refusal of the award narrower. In principle, all awards are to be recognized unless they have been previously set aside by the State where "... or under the law of which the award has been made..." and based on several limited grounds. Besides this, the position of the courts of the State where enforcement is sought is weaker than ever, and they have almost no control over it. For instance, public policy does not intervene⁹².

Like the 1958 *New York Convention*, the 1961 *Treaty* also accepts the special connection between the arbitration and the State where it occurs. To some extent, stressing this point to make the recognition of the award by a third State dependent on the attitude of the country where the award was rendered, has led toward this arbitration. The fact that Article IX refers only to "setting aside" instead of "set aside", or "suspended" and "binding", is irrelevant in so far as there is still a recognition of the dependence of arbitration on a State, and the power of this State to review the procedure and set aside this award⁹³.

But, the idea of dual control cannot be solely approached in terms of connection between a State and the arbitration. In the end, the double control is an instrument for justice and also an element of certainty for the parties. The losing party may be on a definitive way without relying on the other party to initiate the recognition and enforcement procedure in different places.

In this sense, the maintenance of the double control device is justified. The reference to the courts of the place where arbitration occurred despite the possible arbitrariness it may involve is understandable from a practical standpoint. The courts of that place, of that State, are the best prepared to deal with the setting aside. Presumably evidence, such as witnesses will be more available there than elsewhere.

The existence of this dual control, therefore, may be considered an element of progressiveness instead of a reflection of the power of the State, perhaps a "left over" from the past. This idea underlies the new UNCITRAL model law. The law adopts the double control system and introduces provisions to correct any negative effect which may arise. Article 34 recognizes the right to request a court to set aside an award⁹⁴.

92. See Article IX. Also, FOUCHARD, *loc. cit.*, note 3, p. 535 *et seq.*

93. See SANDERS, *loc. cit.*, note 89, p. 371 *et seq.*

94. Article 34.1 does not specify the territorial scope of application of the rule, it only says that :

"Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article".

The Draft text presented to the Eighteenth Session of the United Nations Commission on International Trade Law Included such specification :

"Recourses to a court against an arbitral award made (in the territory of this State) (under this law) may be made...". However, the reference was dropped throughout the discussions

However, the use of this procedure is limited to the three months following “the date on which the party making the application had received the award or, if a request has been made under Article 33, from the date on which that request had been disposed of by the arbitral tribunal”⁹⁵.

The time limitation fits perfectly with the spirit of the model law in which the setting aside procedure is envisaged as an “alternative defense system”⁹⁶ given to the losing party and enabling him to adopt an “active” position in contesting the award. Besides this, the grounds for setting aside and refusing recognition or enforcement are unified⁹⁷ in an attempt to prevent “split” awards : that is, awards invalid in the place where they were rendered and enforceable elsewhere. In this sense it goes a step further than the *1961 European Convention*.

This progressive attitude is also encountered in the recognition and enforcement stage. The model law refers to international awards as distinct from the place where arbitration took place⁹⁸. Further, the recognition of international awards is not dependent on any reciprocity requirement. The law shows that a double control requirement must not necessarily be considered as a regressive instrument. Moreover, double control is not in conflict in a very liberal environment as the UNCITRAL text⁹⁹.

in the session. It was considered redundant; “As regards the words placed between square brackets... it was noted that they addressed the questions of the territorial scope of application which the Commission has discussed at an earlier stage... In conformity with the prevailing law, the Commission agreed that the court of the given State, which enacted the model law, was competent for setting aside those awards made in its territory” (UN Doc A/40/17, *loc. cit.*, note 10, p. 276). This clear approach has included in article 1(2).

95. Art. 34(9).

96. UN Doc A/CN.9/264, *loc. cit.*, note 10, p. 72, n. 8.

97. Article 34.

98. UN Doc A/CN.9/264, *loc. cit.*, note 10, p. 72-73, n. 9-12. For differences on the drafting and possible interpretation of Article 34 and 36, see HERRMANN, *loc. cit.*, note 10, p. 20 *et seq.*

99. See UN Doc A/CN.9/264, *loc. cit.*, note 10, p. 72. Still a danger in the sense that judges will check this according to their internal law and principles. Nevertheless, practice shows that the courts are extremely flexible when dealing with arbitrations in international trade. A specific set of rules and principles exists more and more to this respect. See AKSEN, *loc. cit.*, note 18; P.H. BERTIN, “Le rôle du juge dans l’Exécution de la Sentence Arbitrale”, (1963) *Rev. Arb.* 281 *et seq.* See also, *Scherk v. Alberto-Culver Co.* (417 US 506).

B. THE NATIONAL SOLUTIONS

The *New York Convention*, the *1961 European Convention* and the UNCITRAL model law give the State where arbitration takes place or whose law governs it, the right to revise and set aside arbitration procedures. Yet nothing is said as to the actual conditions necessary for the revision to take place. The diverse national systems provide various answers to this question.

The *British Columbia Act* adopts the exact wording of the model law which, in the end, reproduces that of the *New York Convention* in force in British Columbia through the *Foreign Arbitral Awards Act*¹⁰⁰. The only difference between the *Act* and the model law refers to Article 34(2)(v) relating to the setting aside of the arbitration which introduces a cause not known in the UNCITRAL text.

"[...] (v) que la constitution du tribunal arbitral, ou la procédure arbitrale, n'a pas été conforme à la convention des parties, à condition que cette convention ne soit pas contraire à une disposition de la présente loi à laquelle les parties ne peuvent déroger, ou, à défaut d'une telle convention, qu'elle n'a pas été conforme à la présente loi..."

The 1979 *U.K. Arbitration Act* accepts review of certain arbitrations. The *Act* abolishes the old "special case" procedure and Section 1 of the *1950 Arbitration Act*¹⁰¹. In the new system, revision is accepted only in limited cases. The *Act* provides for an appeal from an arbitral award on a question of law to the High Court, but the Court shall not grant leave to appeal unless it considers that, taking into account all the circumstances the determination of the question of law concerned could substantially affect the rights of one or more of the parties¹⁰². This possible revision refers to any arbitration, either domestic or non-domestic. If the revision is not carried out, the arbitration award is considered as final¹⁰³.

Despite Section 4, the solution provided is a progressive one. The capacity given to the parties to reject any court intervention reflects the acceptance of the independence of arbitration. This approach is a consequence of the new understanding of the role that courts and the State play in arbitration. The State has an interest in maintaining certain standards of fairness and justice in the process, but this interest is limited by the special condition of the institution.

100. The model law incorporates the concept of "International arbitration" lacking in the New York Convention. Canada ratified the New York Convention without signing the reciprocity reservation. See CHIASSON & LALONDE, *loc. cit.*, note 20, p. 371.

101. For an analysis of the old system, see SANDERS, *loc. cit.*, note 43, p. 242 *et seq.*

102. SCHMITTHOFF, *loc. cit.*, note 49, p. 233.

103. SCHMITTHOFF, *loc. cit.*, note 51, p. 160-161.

In the U.S.A., the *USC* gives the American courts a general right to review arbitration awards without differentiating between national and international situations. However, this power is dependent on the will of the parties¹⁰⁴. Sections 10 and 11 *USC*¹⁰⁵ respond to the same philosophy, since the awards are presumed to be valid and arbitration proceedings need not meet procedural requirements. Awards are not reviewable for errors or misinterpretation of law, and arbitrators are not required to give reasons for their decisions. Only those grounds specified in Section 10 may be considered as a possible basis for vacating. The burden of establishing such grounds rests on the party seeking to upset the award¹⁰⁶. The application of these rules to arbitration in international trade is limited by Section 202¹⁰⁷.

The position maintained by the *U.K. Arbitration Act* and the *USC* shows similarities. Both accept in principle the right of their national courts to review certain awards. In the case of the *USC* this right is limited by some geographical requirements. In both cases, the power to review is dependent on the parties to the arbitration; the courts will intervene only upon the request of the parties. This subordination of the intervention of the courts to the request by the parties mirrors, in both cases, the recognition of the arbitration procedure as independent and valid by itself.

The French system also grants the courts this power to review the arbitration awards. This capacity has long been recognized, but the conditions of its practice were changed in 1981. The old system embodied in the *C.P.C.* was characterized by the complexity and inadequacy of the conditions of modern arbitration¹⁰⁸. First in 1980 and then in 1981, the

104. Some authors admit the inexistence of a power to review but to set aside the award. There is no actual control over the activity of the arbitrators but acceptance or rejection as a whole. This is consistent with the understanding of the specific nature of the arbitration. See HOLZTMANN, *loc. cit.*, note 76, p. 137; also, AKSEN, *loc. cit.*, note 18, p. 351 *et seq.*

The distinction made by Section 202 *USC* is not taken into account here. Moreover, both rules refer to the "United States courts in and for the district wherein the award was made". Only the courts of the place where the award was made are able to control it. The criterion adopted is the opposite to that of S. 202, a geographical approach instead of the personal one. Without making a reference to the national or "international" character of the award.

105. See Sections 10 & 11 *USC*.

106. M. SCHULENBERGER, "Construction and Application of Section 10, 8 (a-d) of United States Arbitration Act of 1947 (9 USCS S. 10 (a-d). Providing Grounds for Vacating Arbitration Awards" (Annotation, 20 ALR Fed 29).

107. This situation can always be avoided through Section 9 of the Act. See, also, Section 207.

108. See PONSARD, *loc. cit.*, note 4, p. 243 *et seq.*, also, F. JEANTET, "L'Accueil des Sentences Étrangères ou Internationales dans l'Ordre Juridique Français", (1981) *Rev. Arb.* 503.

C.P.C. was modified, introducing a new regulation for “national” and “international arbitration” respectively. The new regulation is deeply affected by the attitude adopted by the French courts in previous years.

The new regulation gives the French courts the right to review¹⁰⁹ or set aside¹¹⁰ an arbitral award under certain conditions. The right to appeal refers to awards rendered abroad or in “international” arbitration. The power to set aside is limited to arbitrations rendered in France in “international arbitral proceedings”, in other words, in arbitrations dealing with international trade. This power of revision over all the awards rendered in France supposes a direct answer to the situation created in 1980 by the Cour d’Appel de Paris. The court, in *G.N.M.T.C. c. Gotaverken*¹¹¹ and in *Aksa c. Norsolor*¹¹² decided in February and December of 1980 respectively to declare the “appel nullité” not applicable to these cases. The appeal was a review procedure, available solely for French awards. These two awards were not to be considered French¹¹³,

“[...] la sentence litigieuse, rendue selon une procédure qui n’est pas celle de la loi française et qui ne se rattache en aucune manière à l’ordre juridique français puisque les deux parties sont étrangères, et que le contrat a été conclu et devait être exécuté à l’étranger, ne peut être considérée comme française [...]”¹¹⁴

The reform of 1981 makes any results similar to these impossible. Since 1981, all arbitration awards rendered in France have been reviewable by the French courts regardless of their connection with France¹¹⁵,

“[...] the arbitrators... have the power to rule on the existence or validity of the arbitration agreement... (but) their ruling is subject to revision by the judge competent to set aside the award as provided in Article 1504 of the new *Code of Civil Procedure*”¹¹⁶.

The article implicitly requires a request by the parties for the courts to intervene.

109. See Article 1502 *CPC*.

110. See Article 1504 *CPC*.

111. Paris 21/Feb/1980, *D* (1980) 568; see note by J. ROBERT, (1980) 107 *Clunet* 669; note by P. FOUCHARD; (1980) 69 *RCr* 763, note by P. MEZGER; (1980) *Rev. Arb.* 524, note by JEANTET. See PAULSSON, *loc. cit.*, note 86, p. 364 *et seq.*

112. Paris 9/Dec/1980, (1981), *Rev. Arb.* 306, note by JEANTET.

113. See ROBERT, *loc. cit.*, note 3, p. 335.

114. See ROBERT, *loc. cit.*, note 111, p. 671.

115. See CRAIG, *loc. cit.*, note 44, p. 413 *et seq.* Also J. PAULSSON, “France and the Arbitral Process in 1980, a New Law and a Major Court Decision”, (1981) *Svensksoch Internationell Skoljedom* 43.

116. C. App. Paris 12/June/1984, *Arab Republic of Egypt c. Southern Pacific Properties, Ltd. & Southern Pacific Properties (Middle East) Ltd.*, (1986), *Rev. Arb* 75.

CONCLUSION

So far, the analysis has been of different treaties and some representative national legislations on international commercial arbitration. The study shows firstly, a high receptivity to the phenomenon of arbitration in international trade. And, secondly, that it is envisaged as being within the national framework to a certain extent.

We cannot finish this article without asking ourselves if this situation is likely to change in favour of a much broader recognition of the “peculiarities” of arbitration having an international object?

The question is not easy to answer and, perhaps, after the last developments in the field it should be “stated”. The problem is not so much whether this modification is going to occur but whether its occurrence is necessary for a better functioning of arbitration in the international set.

Certainly, this phenomenon requires a solution taking the international factor into account. But the need to deal with the international element does not necessarily imply the acceptance of the international answer as the sole valid answer. The actual regulation of arbitration with an international object seems in principle flexible enough to achieve its goals of speediness and certainty. The regulations embody an extremely flexible regime. Public policy and mandatory rules are analyzed by the courts in very restrictive terms and from a clearly international approach. Besides this, there is a high number of voluntary enforcement with the subsequent reduction of the importance of the power of review by the courts. Also, the change is not so easy in practice for arbitration takes place in a world structured on national terms. The interrelation between national and international levels will cause maladjustments both at the theoretical and practical levels. The change, as almost every change, seems possible. The question of its necessity is at stake. Whatever decision taken will have to be based on the reality and necessities of arbitration, and not only on new theoretical approaches.