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Markham Ball

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The Essential Judge: the Role of the Courts in a System of National and International Commercial Arbitration

by MARKHAM BALL*

I. INTRODUCTION: THE PLACE OF ARBITRATION IN A SYSTEM OF JUSTICE

ARBITRATION IS the process through which a neutral third party, not a court, adjudicates a dispute and renders a legally binding decision. Because arbitrations take place outside the courts, arbitration is generally classed as ‘alternative dispute resolution’ or ‘ADR’, a form of dispute resolution that is an alternative to court litigation. The other principal form of ADR is mediation – also known, under certain circumstances and by some authorities, as ‘conciliation’ – in which a neutral third party helps the parties to settle their differences by agreement, rather than by adjudication. The discussion in this article is limited to arbitration, specifically the arbitration of commercial disputes.

To label arbitration as ‘ADR’ is a simple and useful way of describing what arbitration is, and of making the point that parties present their cases to arbitrators for decision, and not to courts. To the extent, however, that the phrase ‘alternative dispute resolution’ suggests that courts have nothing to do with commercial arbitrations, the term is also a serious and misleading oversimplification. Arbitration is not a separate, free-standing system of justice. It is a system established and regulated pursuant to law, and it necessarily bears a close relationship to a nation’s courts and judicial system. Under the laws that govern arbitration, the courts have a critically important role to play in making systems of arbitration work.

* Director, Alternative Dispute Resolution Center, International Law Institute, Washington, DC; Adjunct Professor, Georgetown University Law Center; Arbitrator. This article is a revision of a text prepared for a conference on ‘The Vital Role of State Courts in Arbitration’ sponsored by the Arab Union of International Arbitration and the Cairo Regional Centre for International Commercial Arbitration, Sharm El Sheikh, Egypt, November 2005. The author is grateful to Professor William Park and Mark Kantor, Esq. for their comments on an earlier draft of this article, and to Yacine Barry, LL.M., for her research assistance.

This article describes the eight principal functions that courts perform in the implementation and oversight of a national arbitration regime. It also discusses briefly the reasons that courts in countries with well-established arbitration systems are strong supporters of arbitration.¹

II. THE COURTS' ROLE IN THE ARBITRATION PROCESS

The roles of the courts relating to arbitration differ somewhat from country to country, depending on the terms of the governing national statutes and on the decisions of national courts in implementing those statutes. In broad outline, however, the courts' powers are much the same in all countries that have adopted modern arbitration statutes. Here, in summary, are the principal actions that courts may take – or in certain instances are required by statute to take – in the arbitral process:

- (1) Enforce agreements to arbitrate: national laws require courts to enforce arbitration agreements that are validly made. If a party sues in court with respect to a dispute covered by a valid arbitration agreement, the court must refer the parties to arbitration.
- (2) Enforce arbitration awards: national laws require the courts to recognise and enforce awards rendered in accordance with national and international standards.
- (3) Set aside domestic arbitration awards (awards made in the country where the court sits), or decline to recognise or enforce foreign or domestic awards, if the awards and the proceedings that produced them fail to meet national or international legal standards.
- (4) Decide challenges to the jurisdiction of arbitral tribunals: the time and manner of exercising this power will vary under various national laws.
- (5) Appoint arbitrators: in most countries, if the parties have agreed to arbitrate but have provided no effective means for appointing members of an arbitral tribunal, the courts have the power to make the appointments.
- (6) Remove arbitrators for interest or bias: many arbitration statutes give courts the power to remove arbitrators who do not meet required standards of neutrality, subject to such other procedures as the parties may agree.
- (7) Grant interim relief to preserve the status quo before an arbitration is commenced or while an arbitration is pending.
- (8) Order parties to produce evidence or witnesses in connection with an arbitration.

In the discussion of these powers that follows, we focus primarily on the applicable provisions of the UNCITRAL Model Law on International

¹ For convenience, and for convenience only, we refer to arbitrating parties throughout this article in the masculine singular. We do so only to avoid awkward combinations of 'he', 'she', 'it' and 'they', and not to express any bias.

Commercial Arbitration ('UNCITRAL Model Law' or 'Model Law'). We also refer to the provisions of certain other laws that are relevant. We note the varying circumstances under which courts may be asked to act in relation to the arbitration process, and the choices among laws that the courts must make in the performance of their various functions.

Certain of the functions listed above (tasks (1), (2) and (3)) are tasks that a court may be asked to perform with respect either to domestic or foreign arbitrations – arbitrations taking place in the country where the court sits, or taking place in a foreign country. The remaining functions (tasks (4) to (8)) – generally relate to domestic arbitrations only.

(a) Task 1: Enforcing Agreements to Arbitrate

The UNCITRAL Model Law, Article 8(2), requires the courts in nations that have adopted that law as their national arbitration law to enforce written agreements to arbitrate. The laws of all other nations with functioning arbitration systems are in accord, although, as discussed below, not all national arbitration laws require that an agreement to arbitrate be in writing in order to be enforceable. In the large majority of cases, when parties have agreed to arbitrate particular disputes or kinds of disputes, there is no need for anyone to ask a court to compel compliance with the arbitration agreement. Parties who have agreed to arbitrate usually adhere to their agreements and proceed voluntarily to arbitrate disputes when and if they arise. In countries that have enacted the Model Law or another modern law, however, the parties have no choice but to honour their agreements to arbitrate: it is the duty of the courts to hold them to their agreements. This is an essential function, a task that the courts must be prepared to perform whenever the circumstances require it, in order to ensure that the basic rules of the governing arbitration laws are adhered to.

(i) Procedures

The question of whether to enforce an arbitration agreement may come before a court in a number of ways. Probably the most common way is for one of the parties to a contract to disregard an arbitration clause in the contract, or to take the position that the clause does not apply to a particular dispute, and to bring a lawsuit in court to enforce his alleged rights under the contract. In such a case, the other party, wishing to enforce the arbitration agreement, will move the court to dismiss the complaint. If the court finds that the parties have indeed agreed to arbitrate the dispute, it must decline to hear the case on the merits. Its duty will be to refer the parties to arbitration (UNCITRAL Model Law, Article 8(2)).²

Another way in which the question of enforcing an arbitration clause may come before a court is for a party (most likely a claimant) to bring an action in court seeking an order compelling the other party to arbitrate. The US Federal

² In accord are the US Federal Arbitration Act (FAA), 9 U.S.C. § 3; the English Arbitration Act 1996, § 9; and the French Code of Civil Procedure (Book IV) (as amended in 1980 and 1981), art. 1458.

Arbitration Act (FAA) expressly authorises a party aggrieved by another party's refusal to abide by an arbitration agreement to bring an action in court and to obtain a court order compelling arbitration (FAA, Section 4; see also Section 206). Apparently, however, relatively few arbitrations are commenced in this fashion, at least outside the USA. Unlike the FAA, the UNCITRAL Model Law and other modern statutes do not include provisions authorising parties to bring lawsuits for orders to compel arbitration. This may mean that the courts have no powers under the UNCITRAL Model Law to issue such orders. Article 5 of the Model Law states, 'In matters governed by this Law, no court shall intervene except where so provided in this Law'.³ Under the Model Law a court must dismiss or stay an action if the issue in dispute is covered by an arbitration clause, but it is not expressly authorised to go further and direct the parties to arbitrate. Cases could arise in countries which have enacted the Model Law in which courts are asked to decide whether they have implied or inherent powers to issue such orders, notwithstanding the silence of the Model Law on this point.

In practice there are not likely to be many cases arising today in which a court order compelling arbitration will be necessary or even useful. Any competently drafted arbitration agreement will designate the rules that will govern arbitrations under that agreement, *e.g.*, the Rules of the International Chamber of Commerce or another arbitral institution, or the UNCITRAL Arbitration Rules. All major sets of present day arbitration rules provide that a party that wishes to make a claim in arbitration may file a claim with the other party or with an agreed arbitral institution. A party that has agreed to arbitrate under such rules will, if he wishes to commence the arbitration, simply file his claim in the manner provided by the agreed rules. He will need no order from a court to permit him to do so.⁴ The claimant may commence and prosecute the arbitration, and under UNCITRAL Model Law, Article 25(b), as well as under most sets of arbitration rules,⁵ the respondent, having agreed to arbitrate, will be bound by the award of the arbitral tribunal. Indeed, the respondent will be bound by the tribunal's award whether or not he chooses to participate in the arbitration.⁶

Finally, we note another possible way that the question of enforcing an arbitration agreement may come before a court. Under the practice in US courts it is possible for a party that wishes to contest the validity of an arbitration clause to bring an action in a US court to enjoin the other party from proceeding with an arbitration. This practice is not expressly authorised in the US Arbitration Act; in the USA it is the creature of case law.⁷ We do not know the extent to

³ The English Arbitration Act is in accord; see Arbitration Act 1996, § 1.

⁴ The US statute, the FAA, was enacted in 1925, and § 4, authorising suits to compel arbitration, has not been amended since then. In those early days, when arbitration rules were less well developed, it was perhaps wise to authorise the courts to direct the parties to proceed to arbitration. Now, with modern arbitration rules in place, a claimant should seldom need such judicial assistance.

⁵ See *e.g.*, UNCITRAL Arbitration Rules, art. 32(2).

⁶ If, however, a party objects in a timely fashion that the arbitrators lack jurisdiction, a decision by the arbitrators that they have jurisdiction will be subject to judicial review. See Model Law, arts 16, 34 and 36.

⁷ See *e.g.*, *PaineWebber, Inc. v. Fowler*, 791 F. Supp. 821 (D. Kan. 1992); Gary B. Born, *International Commercial Arbitration* (2nd edn, 2001), p. 399, nn. 234–236.

which similar proceedings are possible in other nations. In countries which have adopted the UNCITRAL Model Law, however, such court actions may in fact be precluded by Article 5 of the Model Law, which bars court intervention in arbitrations ‘except where so provided in this Law’.

(ii) *Choice of law*

Once a request to enforce an arbitration clause is validly before a court, the court’s first task is to consider what laws it must apply in deciding whether and on what terms to compel arbitration.

Consider first a purely domestic case, the case of a court proceeding in state A involving a dispute between two nationals of state A under a contract governed by the law of state A and calling for arbitration in state A. Although the laws of only one nation (state A) are relevant, there are two kinds of state A law that must be considered by the court in determining whether to compel arbitration.

The first is the *arbitration law* of state A, the national statute governing arbitrations, as interpreted by the national courts. This body of law is commonly referred to as the ‘*lex arbitri*’, the largely procedural law that governs a particular arbitration.

The UNCITRAL Model Law and nearly all national arbitration laws now in effect provide that an arbitration clause, to be enforceable, must be in writing.⁸ The test of when an arbitration agreement is ‘in writing’ may differ, however, from state to state. Under the UNCITRAL Model Law, Article 7, the agreement to arbitrate must be in a writing signed by the parties or in an exchange of writings between them. Under US law, it appears to be the majority view that the writing requirement is satisfied if the arbitration clause is in a written offer, which offer may be accepted either by writing or by conduct.⁹ It is possible that other national courts will adopt comparably broad readings of the writing requirement, although perhaps few courts in states that have adopted the Model Law’s narrow definition of ‘in writing’ will find themselves free to do so.

There is another aspect of arbitration law that a court must consider when it is asked to enforce an arbitration agreement, namely, whether the dispute is of a kind that is arbitrable under the national arbitration law, or whether it is non-arbitrable. A non-arbitrable dispute is a dispute of a kind that may be resolved

⁸ See e.g., FAA, § 2; English Arbitration Act 1996, § 5. Sweden is among the nations that uphold the validity of arbitration agreements that are not in writing but that can be proved through other means. See Toby Landau, ‘The Requirement of a Written Form for an Arbitration Agreement: When Written Means Oral’, in *International Commercial Arbitration: Important Contemporary Questions* (2003), p. 19. The French Code of Civil Procedure requires domestic arbitration agreements to be in writing (art. 1443). However, the provisions of the French Code that address international arbitration contain no similar requirement. Most commentators have concluded that French law contains no requirement as to the form of international arbitration agreements. See Fouchard, Gaillard and Goldman, *International Commercial Arbitration* (1999), para. 607 *et seq.*

⁹ See e.g., *Filanto S.p.A. v. Chilewich International Corp.*, 789 F.Supp. 1229 (S.D.N.Y. 1992). This appears also to be the position under the arbitration law of the Netherlands. The Netherlands Arbitration Act of 1986 provides, in art. 1021, that a binding agreement to arbitrate is made when a written arbitration agreement is proffered by one party and ‘expressly or impliedly accepted’ by the other party. English Arbitration Act 1996, § 5, also appears to be in accord; see *Report of Department Advisory Committee on Arbitration Law* (February 1996).

only through procedures provided by another of the nation's laws. The courts must determine whether the dispute is within the scope of the national arbitration statute (and is thus 'arbitrable'), or whether the dispute must be resolved through another mechanism.¹⁰ Some sorts of disputes that may well be found non-arbitrable, and thus not subject to resolution under the nation's general arbitration statute, could include domestic relations matters, labour disputes, or disputes under criminal law or under special regulatory laws providing special forms of relief in the courts or in administrative bodies. Such non-arbitrable disputes include, in some countries, disputes under competition laws or human rights laws. It will be up to the courts of each country, as they interpret the relevant statutes of their country, to draw the line between categories of disputes that are non-arbitrable and those that are arbitrable under the national arbitration law.¹¹

The second kind of law that a court must consider when it acts on a request to compel arbitration is the *law of contracts* applicable to the arbitration agreement. Under Article 8(1) of the Model Law, a purported arbitration agreement will not be enforced if it is 'null and void, inoperative or incapable of being performed'. In our example of a purely domestic arbitration, the law that will determine whether the arbitration agreement is null and void or otherwise unenforceable is the contract law of state A, which is the only nation with any contact with the dispute. A court will not enforce an agreement to arbitrate if, for instance, under the governing contract law one of the parties lacked the capacity to make contracts. Almost certainly, it will not enforce an arbitration clause that was induced by fraud, or that is so one-sided as to be void or voidable on the ground that it is 'unconscionable'.¹²

The situation is more complicated if the dispute relates to an international contract. Article 8(1) of the Model Law implements and is based on the following language from Article II(3) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'):

The Court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an [arbitration] agreement ... , shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

In the international context, a court applying Article 8(1) of the Model Law, and (if it is in a New York Convention state) the substantially identical language of

¹⁰ The UNCITRAL Model Law does not expressly require that the subject matter of a dispute be arbitrable in order for the dispute to fall within the scope of the law. However, arts 34(2)(b)(i) and 36(l)(b)(i) provide that an award may be set aside or refused recognition and enforcement if the subject matter of the award is non-arbitrable.

¹¹ See Albert Jan van den Berg, *The New York Convention of 1958* (1981), p. 369. For a recent case in which an important US court appears not to have understood the concept of 'arbitrability', see *Sarhank Group v. Oracle Corp.*, 404 F.3d 657 (2d Cir. 2005) (construing art. V(2)(a) of the New York Convention).

¹² See e.g., *Engalla v. Permanente Medical Group, Inc.*, 15 Cal. 4th 951(1997); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S. 2d 569 (App. Div. 1998).

the Convention, is faced with a number of choice of law issues. The court must consider what nation's laws it should apply in determining whether an arbitration agreement must be in writing, and, if there is such a requirement, whether that requirement has been satisfied. It must consider under what nation's laws it should determine whether a dispute is arbitrable or non-arbitrable; and under what nation's contract laws it should determine whether an arbitration agreement is void or unenforceable. In the international context, these issues are complex and often difficult to resolve. They are also issues on which there are relatively few decisions of national courts to provide guidance. In the interest of conserving space and time, we put off the discussion of issues that may arise in international cases to another day, and do not deal with them in this article.

(b) *Task 2: Enforcing Arbitral Awards*

In every country which has enacted the UNCITRAL Model Law, and in every other country with an effective arbitration regime, a winning party in an arbitration may present his award to a specified court, and, upon application of that party, the court must recognise and enforce the award. Under the Model Law, this requirement applies with respect to both domestic awards and foreign awards (Model Law, Article 35(1)).¹³ If a claimant has obtained an award requiring the respondent to pay damages, or providing for some other form of relief, the court, on application of the claimant, is required to *enforce* the award – to issue a judgment giving effect to the award. If the respondent has prevailed in the arbitration and has received an award stating that the claimant is entitled to no relief, and if the claimant nevertheless sues on the same claim in court, the court must *recognise* the effect of the award and dismiss the suit on *res judicata* grounds. It will recognise, in other words, that the decision of the arbitrators denying the claim is final and binding, and will issue a judgment accordingly.

In a country that has ratified the New York Convention, the country's courts must recognise and enforce awards made in other countries. Article 35(1) of the Model Law incorporates this international obligation into the national arbitration law.¹⁴

The function of enforcing legally valid arbitration awards is another essential function that the courts must perform if a system of arbitration is to succeed. The obligation to recognise and enforce arbitral awards is not absolute, however. We discuss in the following section the grounds on which, under Articles 34 and 36 of the Model Law, the courts may set an award aside or decline to recognise or enforce it.

¹³ In accord are, *e.g.*, FAA, ss. 9, 207; English Arbitration Act 1996, §§ 66, 101; and French Code of Civil Procedure, arts 1477, 1498.

¹⁴ A total of 135 states have ratified the New York Convention. Article I(3) of the Convention permits states that ratify to limit their obligation to recognise and enforce foreign awards to awards made in the territory of another signatory state. States that have ratified the Convention with this reservation may choose to limit the obligation of Art. 35(1) correspondingly.

It is important to note that the UNCITRAL Model Law provides for the recognition and enforcement of awards only through the entry of judgments by the courts. It does not provide rules for execution upon these judgments. In Model Law countries, and in most other countries as well, the procedures for the attachment of assets or other measures to obtain execution upon judgments are provided in other parts of the nation's laws. The procedures provided for execution may vary substantially from country to country. Generally, the procedures for obtaining execution upon a judgment enforcing an arbitral award in a given country are the same as those for obtaining execution upon any other court judgment.

(c) Task 3: Setting Domestic Awards Aside; Refusing Recognition and Enforcement of Foreign Awards

We have said that arbitration awards must be enforced, as a rule. They must be enforced, however, only if they meet standards required by law. It is the essential job of the courts to determine whether these standards have been met.

(i) Awards made in the country where the court sits

We deal first with challenges in the courts of a country to awards made in arbitrations that were held in that country. We refer to these as 'domestic' awards.¹⁵

There are two ways that a losing party in a domestic arbitration may challenge the award. First, the loser may bring an action in a designated court in the jurisdiction where the award was made to have the award set aside. Article 34 of the UNCITRAL Model Law gives the losing party that right, as do all other functional arbitration laws.¹⁶ UNCITRAL Model Law, Article 34 provides that there are six grounds on which a court may set aside an award made in the country where the court sits. These six grounds include (to summarise and paraphrase) denial of a fair arbitration procedure, an arbitral award that goes beyond the issues submitted to arbitration, an award with regard to a subject matter that is not arbitrable under the laws of the nation where the court sits, and

¹⁵ We call such awards 'domestic' even though they may involve international transactions or parties of differing nationalities. For purposes of the present discussion of the enforcement and challenge of awards, it is the place of arbitration that makes them 'domestic'. We note, however, that under the FAA certain awards made in the USA may be enforced or denied enforcement by US courts under the New York Convention, as if they were rendered in another country, if they bear significant relationships with another country (FAA, § 202); and that an award made in France may be enforced or denied enforcement by the French courts in the same manner as an award made in another country if the award 'implicates international commercial interests' (French Code of Civil Procedure, arts. 1492, 1502). For purposes of recognition and enforcement of awards under the Model Law, however, the distinction between 'domestic' and 'foreign' awards made here is valid.

¹⁶ See e.g., FAA, § 10; French Code of Civil Procedure, art. 1486; English Arbitration Act 1996, § 67.

an award contrary to that nation's public policy.¹⁷ Under the terms of Article 34, and under Model Law, Article 5 (which states that the courts have only those powers relating to arbitrations that are expressly provided in the statute), the grounds expressly stated in Article 34 are the only grounds on which recognition and enforcement of a domestic award may be denied.¹⁸ The same is true under most modern arbitration statutes.¹⁹

Another way that the losing party in an arbitration may challenge a domestic award is by entering a defence in a court action brought by the winner seeking recognition or enforcement of the award. The court may deny recognition and enforcement if one or more of seven grounds specified in Article 36 are present. These grounds are the same as those provided in Article 34 for setting a domestic award aside, with one addition.²⁰

¹⁷ Article 34(2) states these grounds as follows:

An arbitral award may be set aside by the court specified in article 6 only if:

- (a) the party making the application furnishes proof that:
 - (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
 - (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
 - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
 - (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
- (b) the court finds that:
 - (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
 - (ii) the award is in conflict with the public policy of this State.

¹⁸ Courts in UNCITRAL Model Law countries will nevertheless also vacate domestic awards where the arbitrators have been shown to be biased or corrupt. These grounds for setting aside are said to derive from the express powers granted in the Model Law to set awards aside for lack of due process (art. 34(2)(a)(ii) and (iv)) or violations of public policy (art. 34(2)(b)(ii)). See William W. Park, 'Why Courts Review Arbitral Awards' in R. Briner, L. Y. Fortier, K.-P. Berger and J. Bredow (eds), *Law of International Business and Dispute Settlement in the 21st Century: Liber Amicorum Karl-Heinz Böckstiegel* (2001), pp. 595, 597, n. 9. Article 34 of the Model Law (and art. 36 also) incorporates language from New York Convention, art. V. In the USA, the FAA, § 10(a)(1) and (2), expressly provide that an award may be set aside if it was procured corruptly, or if there was 'evident partiality or corruption' on the part of an arbitrator. See also English Arbitration Act 1996, § 68.

¹⁹ There is no provision comparable to art. 5 of the Model Law in the FAA in the USA. The FAA is an older and less comprehensive statute than the Model Law and other modern statutes. To compensate for the less than comprehensive nature of the FAA, the courts in the USA have developed additional, judge-made criteria for denying recognition and enforcement that go beyond those stated in the FAA. These include violations of public policy (a ground for setting aside that is explicitly stated in the Model Law), and arbitral awards made 'in manifest disregard of the law'. Similarly, the French Code of Civil Procedure includes no provision comparable to art. 5 of the Model Law.

²⁰ The additional ground: 'the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made' (Model Law, art. 36(1)(a)(v)). This ground will be of relevance primarily to awards made in countries other than the one in which the court sits. As discussed *infra*, art. 36 applies to foreign, as well as domestic, awards.

There is one important omission – an intentional omission – from the lists in UNCITRAL Model Law, Articles 34 and 36 of grounds on which a domestic award may be set aside or denied recognition and enforcement. Under nearly all modern arbitration laws (and under US law as well) the fact that arbitrators made a mistake of law or did not properly assess the evidence is not a ground for setting their award aside or denying it recognition and enforcement. A notable exception to this general rule is England, where courts do have certain powers to set aside domestic awards (awards made in England) for errors of law. Under the English law, however, the parties have the power to exclude by agreement the possibility of judicial review of questions of law (English Arbitration Act 1996, Section 69). In all, or nearly all, other countries, when parties agree to arbitrate, they are deemed by law to have agreed to abide by any award produced, through fair process, by arbitrators acting within the powers granted to them by the parties in their arbitration agreement.²¹ The job of the reviewing court is to ensure that required procedures are followed and other statutory criteria are met. But if these criteria are satisfied, the work of the reviewing court is done.

(ii) *Foreign awards*

A challenge to a foreign award raises somewhat different considerations. Generally, the challenge to a foreign award will arise when the party that has prevailed in an arbitration in one country applies to a court in another country for a judgment recognising or enforcing the award. The other party may oppose the application by asserting that one or more of the grounds for denying recognition or enforcement specified in Article 36 of the UNCITRAL Model Law are present.²²

When the question of recognising or enforcing a foreign award comes before a court, the court's powers will be different than with respect to a domestic award. The court has no power to set a foreign award aside. Only the courts in the jurisdiction where the award was made have that power. Article 34, authorising the setting aside of awards, applies only to awards made in the country where the court is sitting. Therefore, when it hears a challenge to a foreign award, a court, if it agrees with the challenge, may refuse to recognise or enforce the award, but it may not set the award aside. The party seeking to enforce the award remains free to attempt to enforce it in another jurisdiction.

The seven grounds set out in Article 36 on which the denial of recognition and enforcement of a foreign or domestic award may be based are precisely the

²¹ There is currently a division of opinion among US courts over whether the parties, by agreement, can *enlarge* the jurisdiction of a reviewing court so as to permit it to set aside awards for errors of law or because findings of fact are not supported by sufficient evidence. Compare *e.g.*, *Lapine Technology v. Kyocera Corp.*, 130 F. 3d 884 (9th Cir. 1997) with *Chicago Typographical Union No. 16 v. Chicago Sun-Times Inc.*, 935 F. 2d 1501 (7th Cir. 1991).

²² It may also be possible, in theory at least, for a party who has lost in an arbitration in one country to bring an action in a second country seeking a declaration that the award will not be recognised or enforced in the courts of the second country, or for an injunction against its enforcement. Such a proceeding would have to be based, however, on statutes or court rules giving the courts general powers to entertain actions for declaratory or injunctive relief. There is no provision for such actions in the Model Law.

same – word for word – as the grounds specified in the New York Convention, Article V, as the only grounds on which the courts in a signatory state are allowed to deny recognition and enforcement of a foreign award. With respect to the recognition and enforcement of arbitration awards, the Convention has provided a model for the language of the arbitration laws of many Convention states.²³ These congruities reflect an emerging international consensus on how arbitration laws should work – a consensus that is reflected not only in Article 36 of the UNCITRAL Model Law (pertaining to both foreign and domestic awards), but also in Article 34 (regarding the setting aside of domestic awards). Most Convention states, whether or not they have patterned their national arbitration statutes on the language of the Model Law, have adopted criteria that are similar in substance.²⁴

Under Article III of the New York Convention, courts in a signatory state must recognise and enforce foreign arbitral awards ‘in accordance with the rules of procedure of the territory’ in which the court sits. The clear implication is that, in addition to the grounds discussed above, there may be procedural grounds – based on the law of the jurisdiction where an award is sought to be enforced – that could bar enforcement of the award in certain cases. Article III provides that a court, in enforcing a foreign award, may not impose conditions or fees that do not apply in the case of domestic awards.²⁵ The courts may require, however, that petitions to enforce foreign awards meet all local procedural requirements. The Convention does not specify the kinds of rules that may be considered ‘procedural’ for these purposes. That definition will have to be made by the courts in the various countries to which awards may be brought for enforcement. In determining what ‘procedural’ rules to apply, and in deciding whether applicable procedural requirements have been met, the courts in many countries may find themselves on uncharted ground. To be consistent with what is generally regarded as best modern practice, courts should interpret local

²³ See e.g., Model Law, art. 36; English Arbitration Act 1996, § 103. The FAA, § 207, incorporates the provisions of Art. V of the New York Convention by reference.

²⁴ The French Code of Civil Procedure presents, in this regard, a significant anomaly. The grounds listed in art. 1502 of the French law for refusing recognition or enforcement of a foreign award are similar in substance to those specified in art. 36 of the Model Law – but with one significant omission. The fact that a foreign award has been set aside by a court in the jurisdiction where the award was rendered is *not* a ground for refusing recognition or enforcement in France. See *Hilmarton v. OTV*, Cour de Cassation (10 June 1997), Rev. Arb. 376; *DAC/Dubai v. Bechtel*, Cour d’Appel, Paris, 2004/07635 (29 September 2005). Applying a different reasoning, a US court of first instance has also enforced a foreign arbitration award that had been set aside by the courts of the country where the award was made. *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907 (D.D.C. 1996). Outside France, however, ‘the emerging trend ... seems to be more toward the more sensible practice of granting comity to foreign annulment decisions’. Park, *supra* n. 18 at p. 602, n. 36.

²⁵ It will be the job of the courts and legislatures in Convention states to ensure that foreign awards are not subjected to undue conditions or fees. To look at just one country whose laws were discussed at the recent Sharm El Sheikh conference on ‘The Vital Role of State Courts in Arbitration’, there appears to be a conflict of opinion among scholars in Egypt over whether Egypt’s laws satisfy the requirements of Art. III of the Convention. See Dr. Borhan Amrallah, ‘Enforcement of Foreign Arbitral Awards in Egypt’ (paper presented at conference sponsored by the Arab Union of International Arbitration and the Cairo Regional Centre for International Commercial Arbitration, 21 November 2005).

procedural rules in light of the bias in favour of the enforcement of foreign awards that applies generally under most national arbitration laws and under the New York Convention.²⁶

(d) *Tasks 4 to 8: Functions Relating Only to Domestic Arbitrations*

We now discuss the judicial functions that we have listed as tasks (4) to (8). These are tasks that a court may perform to facilitate domestic arbitrations – and domestic arbitrations only – to help make the arbitration process work properly and effectively within the jurisdiction where the court sits. As a general rule, a court in one nation may not attempt to exercise these functions with respect to arbitrations elsewhere. Because we are talking here about powers that a court has under its own national arbitration law (and in certain cases under other domestic laws or court rules defining the powers of the nation's courts), conflict of laws questions generally present no problems. A court in state A must act only under the arbitration law of state A, and any other laws or court rules of state A that define the powers of the courts in state A.

(i) *Task 4: deciding, at an early stage in an arbitration, whether an arbitral tribunal has jurisdiction over a particular dispute*

Although as a rule courts have the power, after an arbitration has been concluded and an award made, to set the award aside if they find that the arbitrators lacked jurisdiction over the dispute,²⁷ the courts may also have a role to play at an earlier stage. They may be asked to rule on whether the arbitrators have jurisdiction at an initial stage of a proceeding, before the rendering of an award, and, generally, before an arbitral hearing on the merits of the case.

²⁶ See van den Berg, *supra* n. 11 at p. 239. Professor van den Berg reviews the drafting history of Art. III of the Convention and concludes: 'the rules of procedure of the forum for the enforcement of a Convention award as mentioned in Article III are not concerned with the *conditions* for enforcement. The rules of procedure within the meaning of Article III are confined to questions such as the form of the request and the competent authority [*i.e.*, the question of in which court the award is to be enforced]'.
Two recent decisions of an influential appellate court in the USA illustrate the difficulty that may arise in specific cases in distinguishing between 'conditions for enforcement' and 'rules of procedure'. In one of the cases, the court refused to enforce a foreign award on the ground of lack of personal jurisdiction over the respondent party, a result that the court found was required by the US Constitution. *Glencore Grain Rotterdam, BV v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114 (9th Cir. 2002) (respondent lacked 'minimum contacts' with USA to satisfy requirements for personal jurisdiction under 'due process' clause). In the other case, the court refused enforcement of the foreign award on the ground of *forum non conveniens*. *Monegasque de Reassurances S.A.M. v. NAK Naftogaz of Ukraine*, 311 F.3d 488 (2nd Cir. 2002). In both cases, USA's adherence to the New York Convention was held no impediment to application of rules generally applied by US courts to determine whether to open their doors to particular cases.

²⁷ As discussed *supra*, after an arbitral award is made, a court asked to review the award may set it aside (if it is a domestic award) or refuse to recognise or enforce it (if it is either a domestic or a foreign award) on a number of grounds specified in the national arbitration law. Under the UNCITRAL Model Law, these grounds include the lack of a valid agreement to arbitrate (arts 34(2)(a)(i) and 36(1)(a)(i)) and an award outside the scope of the issues parties had agreed to arbitrate (arts 34(2)(a)(iii) and 36(1)(a)(iii)). These are 'jurisdictional' grounds: the arbitrators lack jurisdiction to decide a particular dispute because no valid agreement of the parties gives them the power to do so.

If the first step in the process of resolving a particular dispute is an action in court – a suit on the merits or an action to compel or enjoin an arbitration – the question of arbitrator jurisdiction will arise if one of the parties claims that the dispute is covered by a valid arbitration agreement and the other party claims that he did not agree to arbitrate the dispute – because he was not a party to the purported arbitration agreement, for example, or because the dispute is of a sort not covered by the agreement to arbitrate. In such a case, the party contesting the jurisdiction of the arbitrators (if he is acting carefully to preserve his rights) will raise that argument at the outset of the proceeding. It will be the job of the court to decide whether the parties have agreed to arbitration of the dispute – in other words, whether the arbitrators will have jurisdiction to decide the dispute.²⁸

Suppose, however, that an arbitration has been commenced and one of the parties promptly presents to the arbitrators themselves an objection that the arbitrators lack jurisdiction. If the arbitrators find that they have jurisdiction and proceed with the arbitration, should the objecting party not be permitted to go to court at once to challenge the arbitrators' ruling on their jurisdiction? That could be a more efficient process than waiting until after the arbitration has been completed and an award made on the merits.

For this reason, the English Arbitration Act 1996 permits a party, under certain circumstances, to apply to a court for a ruling on the arbitrators' jurisdiction at the beginning of an arbitral proceeding.²⁹ The FAA in the USA does not adopt this approach, however: it makes no provision for interlocutory appeals on the question of the arbitrators' jurisdiction. As a rule, the courts in the USA may not review an arbitral tribunal's finding that it has jurisdiction until the arbitrators have rendered their award on the merits.³⁰ This may indeed be inefficient in many cases, but it is not always a bad thing. It prevents the

²⁸ We stated above that all of the powers of a court with respect to the functions listed as tasks 4 to 8 are defined by the law of the nation where the court sits. It could be argued, however, that, if the transaction is an international transaction, it might be preferable to look to the law of another state to determine the arbitrator's jurisdiction – whether a particular party is bound by an arbitration agreement, or whether a particular dispute falls within the scope of the arbitration agreement. Suppose two parties in state B enter into a contract, governed by the law of state B, to be performed in state B. If a court in state A is asked to enforce an allegedly valid arbitration clause, it could be argued that no interest of state A is served by the court's applying the law of state A to determine whether arbitrators sitting in state B will have jurisdiction. In practice, however, the courts in most countries seem to resolve questions of this nature under their own laws, without considering whether a proper conflict of laws analysis would lead them to apply another country's laws. They thus spare themselves the often difficult task of discerning and applying a foreign country's laws. For example, in the well known case of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985), the arbitration clause called for arbitration in Japan and the parties' underlying agreement was subject to Swiss law. Nevertheless, the US Supreme Court, apparently without considering whether another nation's laws might be relevant on the point, applied US arbitration law to determine whether the dispute was within the scope of the arbitration agreement. Finding that US arbitration law required a broad reading of the clause, the Court held that the dispute was within the scope of the agreement, and it referred the case to arbitration in Japan.

²⁹ English Arbitration Act 1996, § 32.

³⁰ A party in the USA may, however, pursue other routes to get the question of the arbitrators' jurisdiction before the courts before the arbitrators have made their award. A court action to enjoin the arbitration is one such possible route. See Born, *supra* n. 7 at pp. 93–94.

interruption of the arbitral process and the postponement of the final award on the basis of a challenge that may be without merit.

The UNCITRAL Model Law adopts an intermediate approach on this issue. Under Article 16(2) of the Model Law, a party who wishes to contest the jurisdiction of an arbitral tribunal must raise his objection no later than the submission of his statement of defence, or be deemed to have waived his objection. Under Article 16(3) of the Model Law, the arbitrators, faced with a timely challenge to their jurisdiction, may, if they choose, decide the question of jurisdiction as a preliminary question and render a partial award on jurisdiction. If the tribunal holds that it has jurisdiction, and if a party objects to the tribunal's ruling, he may go at once to court to challenge the ruling. While the matter is before the court, however, the arbitrators may, if they choose, continue with the arbitration up to and including the rendering of an award.

If, in a nation that has adopted the Model Law, a court is called on to rule on the arbitrators' jurisdiction while an arbitration is pending, it should act with as much speed as the circumstances permit. The court must recognise that an underlying purpose of the governing arbitration law is to resolve disputes as quickly and efficiently as possible, and it must act with dispatch to resolve the jurisdictional issue, so that, if the arbitrators are held to lack jurisdiction, the arbitration may be promptly terminated; or, if the arbitrators are held to have jurisdiction, the arbitration may proceed expeditiously, with the parties and the issues to be arbitrated properly defined.

(ii) Task 5: appointing arbitrators

Under Article 11 of the Model Law, the parties to an arbitration agreement are free to agree on how arbitrators are to be appointed. Typically, the arbitration rules agreed to by the parties will specify how arbitrators are to be appointed, either by the parties or, to the extent the parties fail to make appointments, by an arbitral institution or other neutral appointing authority. If, however, the parties have failed to appoint arbitrators, and if any appointment procedure they have agreed to has failed, then the courts are generally authorised by the national arbitration law to make the appointments. See UNCITRAL Model Law, Article 11(4).³¹

Indeed, under those circumstances, if the arbitration process is to go forward at all, the courts must act to save the process. The courts are free to devise their own procedures for making appointments, and under Article 11(5) of the Model Law their decisions in this regard are not subject to appeal.

Under modern practice, courts are seldom called on to appoint arbitrators. Most well drafted arbitration clauses state that arbitrations under the clauses will be carried out under a stated set of arbitration rules. All major rules include procedures for the appointment of arbitrators, by an arbitral institution or another appointing authority, if the parties themselves fail to make the appointments. Generally, these rules work well and there is no need for a court to intervene.

³¹ FAA, § 5, is similar. See also English Arbitration Act 1996, § 18; French Code of Civil Procedure, art. 1444.

(iii) Task 6: removing arbitrators for interest or bias

If, after an arbitral award is made, it appears that an arbitrator was biased or had an improper interest in the case, that is a ground under the UNCITRAL Model Law and all modern statutes for setting the award aside or denying it recognition or enforcement.³² In addition, many if not most arbitration statutes provide for the removal of arbitrators for interest or bias at an earlier stage of an arbitration.³³ Article 12 of the Model Law provides that arbitrators may be challenged for lack of independence or impartiality. Article 13(1) and (2) of the Model Law provide that parties are free to agree on challenge procedures, and that, if they do not, the challenge may be made to the arbitral tribunal. If the arbitral tribunal rejects the challenge or if the agreed alternative procedure is not successful, the Model Law, Article 13(3), provides that the challenging party may present the challenge to a designated court.³⁴ Most such challenges are made at an early stage in an arbitration.³⁵ Thus, the courts may have a role to play regarding challenges to arbitrators at an early stage of an arbitration. Their action at the outset of an arbitration may resolve issues of arbitrator bias or interest well before the stage of court review and enforcement of the arbitral award.

In practice, few challenges of arbitrators for interest or bias come to the courts until after final arbitral awards are made. In most cases the parties agree, as they are authorised by statute to do, on arbitral rules that provide for challenges to be made to an arbitral institution or other appointing authority. Parties appear generally to accept the decisions of such entities, at least on a provisional basis.³⁶ A party who has made a challenge that has been denied may, however, preserve his challenge as a ground for setting aside an award or denying it recognition and enforcement. As in the case of challenges to the jurisdiction of arbitrators, the courts serve, at the outset of an arbitration, as a necessary, if seldom used, safeguard against breakdown of the arbitral process agreed by the parties.

(iv) Task 7: granting interim relief

The role of the courts in granting interim relief while an arbitration is pending is very much like the courts' role in granting interim relief while a court action is pending. The Model Law, Article 9, recognises that a party does not waive his right to arbitrate if he applies to a court for interim relief or if a court grants such

³² See *supra* n. 18.

³³ See Born, *supra* n. 7 at pp. 643–644.

³⁴ English Arbitration Act 1996, § 24, gives the courts somewhat broader powers, including the power to remove arbitrators for partiality or misfeasance at any stage of a proceeding. The more rudimentary FAA contains no provision for court intervention to remove arbitrators for interest or bias while an arbitration is under way. Some US courts have, however, provided such relief in the exercise of their inherent judicial powers. See e.g., *Michaels v. Marjorum Shipping SA*, 624 F.2d 411 (2nd Cir. 1980); *Metropolitan Property and Casualty Ins. Co. v. J.C. Penny Casualty Ins. Co.*, 780 F.Supp. 885 (D. Conn. 1991); see also Born, *supra* n. 7 at p. 649.

³⁵ The UNCITRAL Model Law requires any party knowing of a ground to challenge an arbitrator for interest or bias to raise its objection within 15 days of learning of the grounds for challenge. Model Law, art. 13(2).

³⁶ See Born, *supra* n. 7 at pp. 638–639.

relief. Most other modern arbitration laws do the same.³⁷ These statutes do not, however, themselves confer on the courts the power to grant interim relief, or provide guidance on how that power is to be exercised. With respect to the courts' power to grant interim relief, the UNCITRAL Model Law says only, '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 measure' (Article 9). For the rules and procedures governing the granting of interim relief, the courts must look, not to the national arbitration law, but to the laws and rules that govern national courts generally.

The power to grant interim relief is an important one in the process of arbitration. As in a case in court, if the status quo is not preserved while a case is pending, the decision on the merits may be of no value. Irreparable harm may have been done or assets may have been irrevocably dissipated by the time an arbitration case has been decided on the merits.

All major arbitral rules give arbitrators the power to grant interim relief,³⁸ as does the Model Law itself (Article 17). More is needed, however, to protect the disputants' interests fully. The courts too must have a role to play.

Court intervention may be needed, for example, as soon as a dispute arises in order to prevent irreparable harm. At the outset of the dispute there may be no arbitrators in place to order interim relief. It may take months to appoint an arbitral tribunal. If the parties are to be protected in that interim period, only the courts can protect them.³⁹ Furthermore, even after an arbitral tribunal is in place, its powers will be less than the courts'. Arbitrators do not have the enforcement powers – fines, or even imprisonment – that courts have. Arbitrators do not have the power to issue orders binding on persons who are not parties to the arbitration agreement.

When asked to provide interim relief in support of an arbitration, the courts should find themselves on familiar ground. Generally, courts apply the same rules and procedures that they apply when asked to provide interim relief in support of a court case. This is the practice in the USA.⁴⁰ The English Arbitration Act 1996, s. 44(1), expressly states that 'unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of

³⁷ See *e.g.*, English Arbitration Act 1996, § 44; *The Rena K* [1979] QB 377. For French law, see Law No. 91-650, art. 67, *Journal Officiel*, 9 July 1991, p. 9228.

³⁸ See *e.g.*, ICC Arbitration Rules, art. 23(1); UNCITRAL Arbitration Rules, art. 26(1).

³⁹ Under rules recently adopted by the American Arbitration Association, parties may agree to expedited procedures under which the AAA, on application, may appoint a single arbitrator on short notice to consider applications for interim relief: AAA Optional Rules for Emergency Measures of Protection. An UNCITRAL Working Group is also considering amendments to Art. 17 of the Model Law that, if enacted into national law, would permit an arbitral tribunal, if requested by a party, to issue a 'preliminary order' of protection without advance notice to the other party. See *Report of the Working Group on Arbitration and Conciliation*, United Nations Doc. A/CN.9.589 (12 October 2005).

⁴⁰ The FAA says nothing about the granting of interim relief. The courts grant such relief under their general powers. See *e.g.*, *Filanto Sp.A. v. Chilewich International Corp.*, 789 F.Supp.1229 (S.D.N.Y. 1992).

making orders ... as it has for the purposes of and in relation to legal proceedings'.⁴¹

Needless to say, the courts' powers and the way they exercise them will differ from country to country. In principle, however, the practices in all developed systems are the same: the courts in appropriate cases will issue interim relief to prevent unfair and irreparable injury, and in doing so they will have the same wide discretion in deciding what relief is appropriate as they do in relation to proceedings in court.

(v) Task 8: ordering the production of documents and the attendance of witnesses

As in the case of interim relief, the powers of the courts to order discovery and the attendance of witnesses derive largely from their general powers with regard to litigation. Article 27 of the UNCITRAL Model Law states, '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 Model Law, however, does not specify what rules apply to the taking of evidence: those rules must be found in rules applicable generally to the taking of evidence in court cases. The English Arbitration Act 1996, § 43, expressly states that the rules to be applied by the courts in ordering the production of witnesses and documents for use in arbitral proceedings are the same as those that apply in relation to court cases. In the USA, the FAA, § 7, authorises the courts to issue orders to produce documents and witnesses for arbitral proceedings. Under US law, such orders may be issued to third parties, as well as the parties to the relevant arbitration agreement.⁴²

The case could arise in which a court in one country is asked to issue an order compelling persons within the court's jurisdiction to produce evidence for use in an arbitration taking place in another country. Whether the court has the power to issue such an order will depend on the laws of the country where the court sits. As noted above, the English Arbitration Act 1996, Section 43, provides that parties to arbitration proceedings in England may use the same court procedures to secure

⁴¹ We have said that the powers of the courts to take action to facilitate the arbitral process (tasks (4) to (8) in this article) are powers that a court may exercise only with respect to arbitrations that take place in the jurisdiction where the court sits. Perhaps we should note a possible exception to this general proposition with respect to a court's power to grant interim relief. One can imagine a situation in which a court in state B is asked to issue an injunction or an order securing assets in state B to protect the interests of a party who has commenced an arbitration in state A. Whether the court in state B will have the power to take such action will turn on provisions of the laws of state B defining the court's subject matter jurisdiction and defining the classes of persons over which the court may have personal jurisdiction. These provisions of law will not be found in the national arbitration statute, but in other laws, or in court rules or constitutional provisions, defining generally the jurisdiction and powers of the national courts.

⁴² Arbitrators' powers derive from the agreement and consent of the parties to an arbitration agreement. By definition, third parties have not entered into the arbitration agreement. They are not bound by it. They have not agreed that the arbitrators have any power over them, and (unless a statute otherwise provides) the arbitrators have no such powers. Certain statutes in the USA, most notably the FAA, s. 7, give arbitrators the power to issue discovery orders binding on third parties. These statutes seem to be unusual in international practice, however.

the attendance of witnesses to testify or produce documents as are available to parties in litigation. Parties may use the court procedures with the arbitral tribunal's permission only with respect to witnesses in the United Kingdom and only if, in the case of an arbitration whose seat is outside England, the English court does not find it 'inappropriate' to do so.⁴³

The English statute is unusual in this regard. Typically, the national arbitration statute will not speak to the issue. Other national laws and court rules must be looked to. In the USA, a law regulating federal court procedures generally provides that, on application, a US court may order a person within its jurisdiction to produce evidence for use 'in a proceeding in a foreign or international tribunal'.⁴⁴ This provision has been held, however, not to apply to evidence to be used in an arbitration outside the USA.⁴⁵ We are not aware of other provisions in US law, or (with the exception of the English Act) in the laws of other countries, that have permitted parties to obtain orders from domestic courts for the production of evidence for use in arbitrations in other countries.

The rules that the courts apply in ordering discovery, both for litigation and for arbitration, may vary greatly from country to country. In some countries, in particular those that follow the common law adversarial system, it is considered necessary to ensure the effectiveness of any adjudication, including any arbitration, that each party have access to all relevant evidence, including evidence in the control of the other party. The practices in other countries may differ, placing greater reliance on each party to produce relevant evidence without assistance, or on the courts or arbitrators (especially in civil law countries) to take such actions as may be necessary to ensure that adequate evidence is before them.

The important point here is that the courts have a decided role to play, and their role will most likely be modelled on the familiar role that courts play in ordering the production of evidence for litigation. One cannot expect practices to be the same in all countries. Each court will fashion rules suited to its own national jurisprudence. In this area, perhaps more than in others, national practices, as developed by national courts, will provide the guiding principles that apply with respect to arbitration as well as litigation.

Again, in this area, the parties, by their choice of arbitral rules, may agree to procedures that will make it unnecessary in most cases for them to ask the courts to intervene. Most major arbitral rules give the arbitrators the power to order the production of documentary evidence and the attendance of witnesses at an arbitration.⁴⁶ Nevertheless, even when the rules provide for discovery pursuant to orders of the arbitrators, the courts may have a necessary supporting role. Only they can back up a discovery order with sanctions to ensure compliance. If orders

⁴³ English Arbitration Act 1996, § 2(3)(a).

⁴⁴ 28 U.S.C. § 1782.

⁴⁵ *National Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999).

⁴⁶ See e.g., ICC Arbitration Rules, art. 20(3); UNCITRAL Arbitration Rules, art. 24(3).

are to be extended to third parties, only the courts have the power under the laws of most nations to issue such orders.⁴⁷

III. WHY COURTS SUPPORT ARBITRATION

The courts in many nations, particularly those with well developed legal and judicial systems, have come to embrace arbitration as a means of resolving commercial disputes. An effective arbitration system, they find, helps them manage their ever increasing caseloads, and enhances, rather than undercuts, the role of the courts in overseeing a system of justice.

Commercial courts strongly support the trial of disputes in arbitral fora as a means of relieving overcrowded court dockets and avoiding delays in dispute resolution. The courts in developed legal systems typically apply a ‘pro-arbitration bias’ in interpreting and applying their national arbitration statutes, and in cases of doubt tend to err on the side of arbitration – to refer disputes to arbitration in close cases, and to uphold arbitral awards.⁴⁸ This is consistent with the ‘pro-arbitration bias’ built into the New York Convention.⁴⁹ In the USA, former Chief Justice Warren Burger, in speeches as well as in judicial decisions in the 1970s and 1980s, strongly endorsed arbitration as a means to relieve courts from the congestion and delay threatened by rapidly expanding dockets.⁵⁰

Of at least equal importance, courts have found that, by supporting the resolution of disputes through arbitration, they can enhance the capacity of their national systems of justice to resolve disputes expeditiously and fairly – and to do so without compromising the courts’ ability to ensure the integrity of those systems. Even when they acknowledge and support the role of arbitrators in deciding disputes, the courts retain significant powers to supervise the arbitral process and, in appropriate circumstances, to intervene in order to enhance the efficiency, effectiveness and fairness of the process. In fact – as we hope the preceding sections of this article have made clear – the efficacy of the arbitral laws and procedures in most, if not all, countries depends on the courts in those countries. Only if the courts exercise their powers to oversee and assist the process of arbitration, and only if they exercise those powers wisely, will a nation’s system of justice in general, and the arbitral process in particular, meet their objectives of providing fair, honest and efficient procedures for resolving commercial disputes.

⁴⁷ See FAA, § 7; English Arbitration Act 1996, § 44. The rule in France seems to be the same. See Fouchard, Gaillard and Goldman, *supra* n. 8 at para. 1336.

⁴⁸ See e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

⁴⁹ See van den Berg, *supra* n. 11 at pp. 155, 313.

⁵⁰ ‘[N]either the federal nor the state court systems are capable of handling all the burdens placed upon them ... [A]rbitration should be an alternative that will complement the judicial systems’: Chief Justice Burger, Address to the American Bar Association (January 1982), 68 *ABA J.* 274 at p. 277; *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 747 (1981) (Burger CJ, dissenting) (‘litigation is costly and time consuming, and, more to the point ... judges are less adapted to the nuances of the disputes that typically arise in shops and factories than shop stewards, business agents, managerial supervisors, and the traditional ad hoc panels of factfinders’).

Historically, the earliest response of many courts to the development of the practice of arbitration has been to resist that development. Until the 1920s, courts in the USA were inclined to view arbitration agreements as ‘contrary to public policy’.⁵¹ They reasoned that, as a matter of public policy, laymen should not be permitted to usurp the role of the courts.⁵² But the market – the commercial parties and their lawyers – has demanded quicker and more efficient procedures for resolving disputes than the courts had traditionally been able to provide. For their part, the courts in one country after another have come to accept, and then actively to support, the increasing use of arbitration in the resolution of commercial disputes.

The process of judicial acceptance, and then endorsement, of arbitration has followed similar patterns in country after country. In countries with well developed laws and well established judicial systems the process came to full fruition by, if not well before, the late 1970s and early 1980s. By that time numerous countries desiring to be major centres of international arbitration adopted ‘modern’ international arbitration statutes designed to attract arbitrations to their respective jurisdictions. These modern statutes include the English Arbitration Acts of 1979 and 1996, the French Arbitration Law of 1981, the Netherlands Arbitration Act of 1986, and the Swiss Arbitration Law of 1981. Practitioners, chambers of commerce and other business groups, and arbitration institutions have promoted national and international arbitration, and have advertised the benefits of arbitrating in their jurisdictions, in speeches, publications and educational programmes.

The spread of arbitration to a large and growing number of countries was encouraged and advanced by the promulgation in 1985 of the UNCITRAL Model Law on International Commercial Arbitration. As of today, some 43 countries have enacted arbitration statutes modelled on that law, in whole or in part.⁵³ These laws apply to international arbitrations, and in many cases to domestic arbitrations as well. In enacting the Model Law, national legislatures have recognised and joined in what is becoming a worldwide arbitration culture.

Judges are generally not the first in their countries to espouse the development of arbitration laws and arbitration practices. More often, as nations have for the first time adopted modern arbitration statutes, unqualified judicial support of arbitration – support of the vigor and intensity now prevalent in countries where the practice of arbitration has become well established – has been relatively late in coming. The pattern in country after country, however, is that in time the

⁵¹ See e.g., *White Eagle Laundry Co. v. Slawek*, 296 Ill. 240, 245 (1921).

⁵² See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 407 (1967) (Black J, dissenting) (‘the arbitrators who the Court holds are to adjudicate the legal validity of the contract need not even be lawyers, and in all probability will be nonlawyers, wholly unqualified to decide legal issues, and even if qualified to apply the law, not bound to do so’).

⁵³ The countries include: Australia, Azerbaijan, Bahrain, Bangladesh, Belarus, Bulgaria, Canada, Chile, Croatia, Cyprus, Egypt, Germany, Greece, Guatemala, Hong Kong, Hungary, India, Iran, Ireland, Japan, Jordan, Kenya, Lithuania, Madagascar, Malta, Mexico, New Zealand, Nigeria, Oman, Paraguay, Peru, the Philippines, the Republic of Korea, the Russian Federation, Scotland (in the United Kingdom), Singapore, Spain, Sri Lanka, Thailand, Tunisia, Ukraine, Zambia and Zimbabwe.

courts have seen the benefits, to themselves and to the systems of justice that they oversee, in supporting the practice of arbitration, and they have become firm supporters and champions of the process.

A recent example, among many, of this kind of history is Brazil. The Constitution of Brazil provides that citizens have an absolute right of access to the courts.⁵⁴ Brazil adopted an Arbitration Law based on the principles of the UNCITRAL Model Law in 1996. That Law gave parties the right to agree irrevocably to binding arbitration of commercial disputes, and thus, in effect, to waive their constitutional right to sue. It was not until 2001 that the Supreme Court of Brazil, after years of uncertainty, held that the Arbitration Law was constitutional.⁵⁵

Provisions that preserve the right of access to the courts are found in numerous national constitutions.⁵⁶ In each of the nations where such provisions appear in the national constitution, the courts will be required inevitably to decide whether voluntary agreements to submit disputes to binding arbitration are constitutional. To date, we are aware of no decision by the highest court of any nation holding an arbitration act unconstitutional.

The trend of history seems clear and irreversible. Legislatures in country after country are enacting modern arbitration laws. Lawyers and business people are finding these laws useful and are including arbitration clauses in more and more of their contracts. The courts, in due course, are coming to endorse and support national arbitration laws and the arbitrations that take place under these laws. In this process the involvement of the courts has been, and will continue to be, both important and necessary.

⁵⁴ Article 5, item XXXV, of the Brazilian Constitution states that “the law will not be able to exclude from the judgment of the Judiciary any violation or threat to a legal right”: Batista Martins, *Arbitration in Brazil* (2004), p. 5, available at www.oecd.org/dataoecd/48/10/33941901.pdf

⁵⁵ See *MBV Commercial and Export Management Establishment v. Brazil Resil Indústria e Comércio Ltda.*, Federal Supreme Court of Brazil (12 December 2001), described in Martins, *supra*, n. 54.

⁵⁶ See e.g., Constitution of the Republic of South Africa (1996), ch. 2, s. 34, available at www.polity.org.za/html/govdocs/constitution/saconst.html?rebookmark=1; Constitution of the Republic of Mexico (1917 with reforms up to 2004), art. 17, available at www.georgetown.edu/pdba/Constitutions/Mexico/mexico2004.html.

