Dispute Resolution

(Resolution of Private International Disputes)

Session 5: International Commercial Arbitration

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Introduction

What is international commercial arbitration?

- **Arbitration** = Dispute between the parties that is submitted by agreement to a private third party chosen by the parties (= arbitrator or arbitrators) for resolution in a judicial manner (i.e. third party has the power to render a binding decision).
- **Arbitral tribunal** = private body which, based on an agreement between the parties, has the power to adjudicate a matter instead of a court.
  - An arbitral tribunal does not posses the power to act as a public organ &
  - has no power vis-à-vis third parties that are not bound by the arb. agreement
- **Commercial arbitration** = "The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not", for example trade transactions for the supply or exchange of goods or services, distribution agreements, construction of works, banking, transport & insurance matters (Art. 1(1) footnote 1 UNCITRAL ML).
  - Between the parties, an arbitral award has the same effects as a court judgment.
- Class deals with **international arbitration** (not purely domestic disputes), (read Art. 1(3) UNCITRAL Model Law)

Distinguish arbitration from other dispute settlement mechanisms

Mediation

- Process by which disputing parties engage the assistance of a neutral third party to act as a mediator – a facilitating intermediary – who has no authority to make any binding decisions but who uses various procedures, techniques and skills to help the parties resolve their dispute by negotiated agreement without adjudication
- Essentially negotiations supported by a neutral third party
- Mediators sometimes have knowledge of psychology (business psychology)
- The main difference between arbitration and mediation lies in the fact that a mediator cannot decide the dispute against the will of one (or both) party/ies.

Distinguishing (2)

Dispute settlement bodies of associations

- Associations, for example in the world of sport, sometimes agree with their members that the latter are subject to certain restrictions regarding their access to courts.
- Those associations may impose sanctions against members that violate a certain code of conduct (e.g. order an athlete not to participate in the next matches of a league). Tribunals of the association control the legality of such sanctions.
- In addition: CAS (Court of Arbitration for Sport) shall have jurisdiction for international championships (athletes that want to participate in this event must submit themselves by agreement to the jurisdiction of this (private) court).

Distinguishing (3)

Arbitration between States / Investor-State arbitration

- Disputes between States / International Organizations concern disputes on trade policy etc.
- Disputes between States and private parties concern for example the following mechanisms/treaties
  - International Center for the Settlement of Investment Disputes (ICSID) (Washington)
  - Trade Agreement EU-Vietnam (not ratified yet)
  - Transatlantic Trade and Investment Partnership (TTIP) (under construction)
  - Iran-US Claims Tribunal (The Hague)

Why arbitration?

Advantages

- Confidentiality, because public is not admitted
- Ensuring decisions by competent persons chosen by the parties (unlike judges in state courts)
- Possibility to choose language of proceeding
- More choice with regard to the applicable law (also lex mercatoria can be chosen)
- Neutrality (not ensured by all courts in the world)
- Lengths of proceeding (that depends…)?

Disadvantages

- Usually no appeal (can be good or bad)
- Costs (that depends)
- Some arbitration institutions might have “bad” (e.g. biased or incompetent) arbitrators
- Foreseeability of the dispute’s outcome?

Why does the law confer the power to private arbitrators to adjudicate commercial disputes?

- Power flows from the principle of party autonomy
- Parties may agree that they want to replace the judge with an arbitrator
- Consequence: privatization of justice
- Many jurisdictions (including Vietnam) accept arbitration.
- More disputed is the degree to which courts can control arbitral tribunals.

Arbitration as “business and brand”

- Law is a product, which attorneys like to “sell” (competition amongst legal orders)
  - Some legislatures initiate legal reforms to attract foreign parties
- Arbitral tribunals must constantly prove that they are the better alternative for the settlement of disputes than courts.
  - Competition for the best arbitration rules amongst the various arbitration institutions
  - (Worldwide) training of attorneys/arbitrators (e.g. by Chartered Institute for Arbitrators, International Chamber of Commerce etc.) for the promotion of private dispute settlement and as a means to enhance one’s professional career (FAQ: “How do I promote myself as an arbitrator?”)
  - Publication of arbitration cases by arbitration institutions as proof of their acceptance in the business community.

The players in arbitration

Parties – Agree on arbitration

Arbitral tribunal

- Ad-hoc-tribunals
  - Parties confer power on tribunal to adjudicate a given case and also design the rules for the arbitral proceeding, cost allocation etc.
  - Such a form of arbitration is recommended only for very special disputes
- Institutional arbitration (“ready to use”)
  - Parties agree to conduct arbitration under the auspices of an arbitration institution (International Chamber of Commerce (ICC)CC, Singapore International Arbitration Center (SIAC), Vietnam International Arbitration Center (VIAC)
  - Institution often assists arbitrators with a secretariat and offers facilities such as rooms, a library, data bases etc.
  - Institutions have “ready to use” (and often mandatory) arbitration rules
  - Institutions often regulate the selection of arbitrators
  - Rules for costs and payment of arbitrators.
  - Model clause for arbitration

The players (2)

Courts (powers vary in the various jurisdictions across the globe)

- Review of arbitration agreement (for the protection of the parties)

  Example: Spouses agree that arbitral tribunal shall decide on their divorce.

- Safeguarding the arbitration proceeding

  Example: One party files suit before a state court despite having agreed to arbitration.

- Review of the arbitral award (protection of public interests)

  Example: Tribunal orders defendant to receive 100 lashes.

- Recognition and enforcement of arbitral awards

  Example: Plaintiff that has won the case wants to enforce the award. Enforcement cannot be not privatized as state has the monopoly to enforce judgments “with force”; therefore enforcement through state organs mandatory.

Arbitration in Vietnam (VIAC)

- In Vietnam, there are various centers for arbitration (e.g. Ho Chi Minh City Commercial Arbitration Centre (TRACENT), Financial Arbitration Centre, VIAG)
- Most important for international disputes: Vietnam International Arbitration Centre (VIAC) (established 1993)
  - VIAC (Hanoi) + offices in Da Nang, Can To & Ho Chi Minh City
- In 2013 VIAC dealt with 99 cases (figures constantly on the rise)
- Then 52% of the caseload involved foreign parties
  - Foreign involvement concerned mostly Asian countries: Singapore (25%), Korea (25%), China (ca. 15%)
  - USA (20%), United Kingdom (5%), Germany (5%)
- Language of arbitration (often agreed by the parties): Vietnamese (78%), English (20%), other languages (2%).

All information from Nguyen & Duong Vu, Journal of Int. Arb., 31 (2014), p. 675 et seq.

Legal Framework

Legal framework

International Agreements

– New York Convention (1958) (ratified by approx. 150 countries!)

Model laws

– UNCITRAL Model Law on International Commercial Arbitration of 1985 (amended 2006) = UNCITRAL ML

National Law

– German Code of Civil Procedure, Vietnamese rules on Arbitration etc.

Arbitration rules for ad-hoc arbitration

– UNCITRAL Arbitration Rules 1975 (amended 2010)

Arbitration rules of institutional arbitration bodies

– ICC Arbitration Rules

– Rules of the Singapore International Arbitration Centre (SIAC)

– Rules of the China International Economic and Trade Arbitration Commission ("CIETAC") etc.

The agreement to arbitrate

Basic issues

- What is the function of an agreement to arbitrate?
- Who is bound by the agreement?
- What should the parties write into an agreement to arbitrate?

Example: Your client manufactures machines and wants to sell them on the U.S. market. Its potential sales agent in New York proposes to confer jurisdiction upon the courts in New York which shall decide future disputes in accordance with the laws of New York. Your client asks you to take a look at the proposed contractual arrangement and to formulate an alternative proposal.

Definition and function of the agreement to arbitrate

Definition

- Art. 7(1) UNCITRAL ML “Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

Function

- Gives arbitral tribunals the power to adjudicate a certain matter.
- Agreement alters the right of the parties to seek justice before a court.

Who is bound by the agreement to arbitrate?

- Only a party that has consented to arbitration and its successors (for example in case of an assignment).
- Third parties are not bound by the agreement.

What should the parties write into the agreement?

Necessities

- Arbitration clause must be drafted as to allow the arbitral tribunal to adjudicate the matter in a **binding way** (even against the will of one party) **at the place of the (otherwise) competent (state) courts**.

  DIS Model Clause: "*All disputes arising in connection with this contract or its validity shall be **finally settled** in accordance with the Arbitration Rules of the German Institution of Arbitration (DIS) **without recourse to the ordinary courts of law**."*

- Disputes, covered by the agreement to arbitrate must be **clearly defined**:

  *SIAC Model Clause: "**Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination**, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre ("SIAC") in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this clause."*

Useful points to be addressed

For the facilitation of the arbitration proceedings the parties should address the following points in their arbitration clause:

- Seat of arbitration
- Number of arbitrators
- Language of the arbitration
- The law that the arbitrators shall apply to solve the dispute

SIAC Model Clause: "*Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre ("SIAC") in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this clause.*
*The **seat of the arbitration** shall be [Singapore].*
*The **Tribunal shall consist of** _____**arbitrator(s).***
*The **language of the arbitration shall be** _____.*
*This contract is **governed by the laws** of **_____**."*

What do you think about the following clauses?

- “All disputes arising from this contract will be finally resolved by an arbitral tribunal, if no party makes recourse to a court.”
- “Any dispute arising out of or in connection with this contract shall be decided by an ICC arbitral tribunal. The courts of England shall have jurisdiction.”
- “Disputes are finally settled in accordance with the arbitration rules of the German Chamber of Commerce.”
- “The parties agree to arbitration in Vietnam.”
- “Any dispute arising out of or in connection with this contract shall be decided by an arbitral tribunal in accordance with a separate contract concluded between the parties on the issue of arbitration.” [parties do not ultimately conclude a separate contract on arbitration]

Formation of the agreement to arbitrate

Agreement between the parties

– Agreement is a contract. Parties need to agree that their dispute shall be resolved by the arbitral tribunal

Applicable law

– Arbitration agreement and main contract (e.g. contract for sale) must be regarded as two contracts (*doctrine of separability*) and may be governed by different laws.

– Choice-of-law for the arbitration agreement possible, but rarely executed in practice.

– Usually the law that applies to the formation of the arbitration agreement is the law of the seat of the tribunal. Some submit the agreement to arbitrate to the law that applies to the main contract.

Formation (2)

Form

Art. 7 UNCITRAL ML

> “(2) The arbitration agreement shall be in writing.
>
> (3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.”

Enforcing the arbitration agreement

Example

Your German client wants to claim damages from his Vietnamese contractual partner. The contract between the parties state: "*All disputes shall be settled by the Arbitration Court of the International Chamber of Commerce in Munich.*" The Vietnamese opponent is of the opinion that the German firm has no claim and contends that the arbitration agreement is invalid. Any action must therefore be brought before a court in Vietnam, as the contract had to be fulfilled in Hanoi.

- Which forum has to decide on the validity of the agreement to arbitrate?
- Can the Vietnamese firm make recourse to the defense of arbitrability (i.e. ask the court to order that parties "go to arbitration") if the German firm sues the Vietnamese party before a court in Vietnam?
- Take a look at Art. 16 UNCITRAL ML

The limits of arbitration

Limits (selection)

- Limits defined by the law of the seat of the tribunal.
- May also play a role when enforcing the arbitral award in a foreign state.
- Limits vary across jurisdictions
  - Some legal orders exclude certain persons from arbitration, for example consumers
  - Many legal orders exclude certain subject matters from arbitration, for example family cases (divorce etc.).
  - It is common that the tribunal must respect “due process”
  - Arbitrators that are not impartial because they are involved in the dispute may not decide on the case.

The arbitration proceeding (overview)

Basic issues

Seat (place) of arbitration

- Seat of arbitration (place of arbitration) = legal concept
  - is chosen by parties or
  - in the absence of such a choice is determined by the arbitral tribunal
- Seat determines the applicable procedural law (lex arbitri) + “nationality” of award.
- The meetings for hearing the parties or experts need not necessarily be held at the tribunal’s seat, unless the parties have agreed otherwise, Art. 20 UNCITRAL ML

  Example: Parties agree that the seat of the arbitral tribunal shall be Hong Kong. As the lawyers of both parties have an office in Singapore, the parties agree to schedule some meetings of the tribunal in the rooms of one of the law firms in Singapore and some in a conference center in Hong Kong.
- Seat has also an impact on the jurisdiction of state courts. Courts at the seat have
  - exclusive jurisdiction for actions for annulment of the award
  - non-exclusive jurisdiction for support measures

Basic issues

Lex arbitri

- What is the lex arbitri? = state law that sets forth the general framework for conducting the proceeding.
- Those mandatory rules must be respected by the arbitral tribunal as a party may apply to the courts to annul the decision in the event of a violation.
- How is the lex arbitri determined?
  - Territoriality principle
  - Law of the seat of the tribunal applies, choice of law not permitted.

Constituting the arbitral tribunal

Commencement of arbitral proceedings

- Art. 21 UNCITRAL ML: Claimant submits a Notice of Arbitration to the Respondent
- Rule 3 SIAC Rules: Claimant files with the SIAC-Registrar a Notice of Arbitration and pays the fee for filing the claim. In addition, the claimant has to send a copy of the Notice to the Respondent and notifies the Registrar that it has done so, specifying the mode of service employed and the date of service.
- Arts. 6, 7 VIAC Rules: Claimant submits its Request for Arbitration to the Centre. Unless the parties have agreed otherwise, the Centre shall, within 10 days from the date of receipt of the Request for Arbitration, … send to the Respondent a Notice, the Request for Arbitration, the arbitration agreement and other relevant documents.
- All Rules specify which documents shall be attached to the Request for Arbitration (e.g. arbitration agreement, names and addresses of the parties, summary of the content of the dispute etc.)

Appointing the arbitrators

- Important issue: How many arbitrators shall decide the dispute?
  - Sole arbitrator?
  - Two arbitrators?
  - Three arbitrators?
  - Five (or more) arbitrators?

- Depends on
  - Subject matter (“small” cases may be decided by one arbitrator, “complex” cases might need three arbitrators)
  - Rules of chosen institution (some rules prescribe that one arbitrator shall decide, others foresee three arbitrators, often there is some flexibility) and arbitration agreement (parties can choose number of arbitrators)
  - Costs the parties are willing to pay for the arbitration (parties must pay the arbitrators’ fees and expenses -> the more arbitrators deciding, the higher the costs of the dispute)

Appointing the arbitrators (3)

UNCITRAL

- Arts. 10, 11 UNCITRAL ML: Unless agreed otherwise, each party appoints one arbitrator and then the two appointed arbitrators choose the third (presiding) arbitrator. If one party does not appoint an arbitrator or the two arbitrators do not appoint a presiding arbitrator, a court or authority can appoint the arbitrator.

SIAC

- Rule 6 SIAC Rules: “A sole arbitrator shall be appointed unless the parties have agreed otherwise or unless it appears to the Registrar, giving due regard to any proposals by the parties, the complexity, the quantum involved or other relevant circumstances of the dispute, that the dispute warrants the appointment of three arbitrators.”
- Rule 7 SIAC Rules: “If a sole arbitrator is to be appointed, either party may propose to the other the names of one or more persons, one of whom would serve as the sole arbitrator.” If there is no agreement after 21 days, SIAC-President appoints arb.
- Rule 8 SIAC Rules: In case of three arbitrators, each party suggest one arbitrator to be appointed by the President. Third arbitrator is chosen and appointed by SIAC-President (unless otherwise agreed).

Appointing the arbitrators (2)

VIAC

- Art. 10 VIAC Rules: Unless parties have agreed that the dispute shall be resolved by a sole arbitrator, the dispute shall be resolved by three arbitrators
- Art. 11 VIAC: The claimant shall select an arbitrator or request the Centre to appoint an arbitrator from VIAC's list of arbitrators which then must appoint the arbitrator within 7 days. The same proceeding applies to the respondent. The two appointed arbitrators select the third presiding arbitrator. If they fail the president of VIAC selects the presiding arbitrator.
- Art. 12 VIAC Rules: A sole arbitrator shall be appointed unless the parties have agreed otherwise or unless it appears to the Registrar, giving due regard to any proposals by the parties, the complexity, the quantum involved or other relevant circumstances of the dispute, that the dispute warrants the appointment of three arbitrators."

  Note: The President shall have due regard for the necessary qualifications of an arbitrator as agreed by the parties and pursuant to these Rules. The President shall also consider whether or not the appointed arbitrator has sufficient time to resolve the dispute efficiently

Challenging the arbitrators

UNCITRAL

Art. 12 UNCITRAL ML (Grounds for challenge):

1. *When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.*
2. *An arbitrator may be challenged only if circumstances exist that give rise to justify able doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.*

Art. 13 UNCITRAL ML (Procedure):

Unless otherwise agreed, the party who intends to challenge an arbitrator must within 15 days after the tribunal was established or after becoming aware of any circumstance referred to in Art. 12(2), send a written statement of the reasons for the challenge to the tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the tribunal shall decide on the challenge.

Challenging the arbitrators (2)

Art. 15 VIAC Rules

1. An arbitrator shall refuse to resolve the dispute, and the parties shall have the right to request the replacement of an arbitrator only in the following circumstances:

a) The arbitrator is a relative or representative of a party;

b) The arbitrator has an interest related to the dispute;

c) The arbitrator was a mediator, representative or lawyer for either party in the dispute currently being brought to the Centre for resolution unless the parties have agreed otherwise in writing;

d) There are clear grounds demonstrating that the arbitrator is not impartial or objective;

e) The arbitrator fails to meet the specific qualifications agreed by the parties.

2. The request by the parties for the replacement of an arbitrator shall be submitted to VIAC. Where the Arbitral Tribunal has not yet been constituted, the Centre's President shall decide on the replacement of the arbitrator. Where the Arbitral Tribunal has been constituted the remaining members of the Arbitral Tribunal shall decide on the replacement of the arbitrator; otherwise the Centre's President shall make a decision and also in the case that the Tribunal is comprised of a sole arbitrator.

A glimpse at the proceedings before the tribunal

Principle of party autonomy (Art. 19 UNCITRAL Model Law)

- Parties may decide how proceeding will be conducted (within the limits set forth by the applicable procedural law of the state of the seat of the tribunal)
- Often parties agree that the proceeding shall be conducted in accordance with the rules of an arbitration body, such as the ICC Rules, SIAC Rules, or VIAC rules.

“Due process” (Art. 18 UNCITRAL Model Law)

- Tribunal must treat parties with equality
- Tribunal must ensure the parties’ right to be heard.

Language (Art. 22 UNCITRAL Model Law)

- Can be chosen by the parties
- Absent such a choice, the language will be determined by tribunal

A glimpse … (2)

Termination of proceedings

- Settlement between the parties, Art. 30 UNCITRAL Model Law
- Final Award, Art. 32(1) UNCITRAL Model Law (usually majority opinion) which has the same effect as a judgment.
- Order for the termination of the arbitral proceeding (cf. Art. 32(2) UNCITRAL Model Law)
  - Claimant withdraws claim and respondent does not object and tribunal recognizes a legitimate interest on his part in obtaining a final settlement.
  - Parties agree on the termination of the proceedings.
  - Tribunals find that the continuation of the proceedings has for any other reason become unnecessary or impossible (for example because the arbitration agreement has been voided or the parties do not continue to participate in the proceeding).

Post-arbitration issues

Review by the arbitral tribunal

- Usually appeal to another (higher) arbitral tribunal is not possible (unless agreed by the parties)
- Upon request of one party the arbitral Tribunal can correct obvious errors (calculation mistakes, typing mistakes etc.)
- Upon request of one party the tribunal may interpret the award but only if the award is unclear.

Recourse against the award before a court

- States retain some power to review arbitral awards.
- Parties may apply for setting aside the award before the courts in the country of the seat of arbitration (exclusive jurisdiction).
  - Each state defines in its procedural rules which court shall hear applications for setting side an award (including deadlines, e.g. submission within 30 days after receiving the award).
  - Read Art. 34 UNCITRAL Model Law, Art. 6 UNCITRAL Model Law
- P: How rigorous should this review be?
- Overly strict control may devalue arbitration. Therefore most states agree that
  - there should be no review on the merits (*révision au fond*) and
  - review should be restricted to grave violations of the law.
- Read Art. 34 UNCITRAL Model Law

Recognition and enforcement of awards

- An arbitral tribunal has no powers to force the losing party to comply with the award
- State institutions must aid in the enforcement of an award.
- Very important convention: United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) (“NY Conv”)
  - More than 150 contracting states
  - Including France, Germany, China, Russia, USA, Vietnam
- Convention’s important rules were “integrated” in Arts. 35 & 36 UNCITRAL Model Law (with slight linguistic alterations)

Article III NY Conv

"Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

- Each state lays down a procedure to enforce foreign awards, for example
  - Which courts have the power to enforce the awards.
  - Whether the defendant must be heard and whether there must be an oral proceeding.
  - What kind of defenses can be relied upon by the defendant.

- If an award rendered by an arbitral tribunal in Hong Kong is to be enforced
  - in Vietnam, the Vietnamese rules of procedure apply.
  - in Germany, the German rules apply.

Article IV NY Conv

"1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original [arbitration] agreement (…) or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent."

- Applicant must hand in the award + arbitration agreement
- Translation might be necessary

Article V (1)(a)/(b) NY Convention

"Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the [arbitration] agreement (…) were, under the law applicable to them, 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 the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (….)"

Enforcement must be refused at the request of a party in the event of

- Incapacity (to be judged in accordance with the applicable law)
- An invalid arbitration agreement (invalidity according to the chosen law or, in absence of choice, under the law of the country of the seat of the arbitration)
- Violations of due process (right to be heard)

Article V (1)(c)/(d)/(e) NY Convention

"(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it 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, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."

Enforcement must be refused at the request of a party in the event of

- Tribunal having gone beyond its jurisdiction under the arbitral agreement
- Composition of tribunal and arbitral procedure was not in line with agreement/or law of seat of arbitration
- Awards was not binding or was set aside

Art. V (2) NY Convention

"Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country."

Enforcement must be refused "ex officio"

- If the subject matter is not capable of settlement by arbitration according to the law of the country in which recognition is sought (disputes involving consumers, family disputes etc.)
- If enforcement would result in a violation of the public policy of the country in which recognition is sought
  - Public policy may relate to the proceeding (e.g. tribunal was not neutral)
  - Public policy may relate to the merits of the case ("punitive damages" example)

Example

Arbitral award was rendered by a tribunal in State X. The courts of State X set aside the award due to a violation of the public order of that state. Can the award be enforced in State Y if both states are parties to the NY Conv and the party against whom recognition is sought contests enforcement by relying on Art. V (1)(e) NY Conv?

- Award has been set aside by competent court; Art. V (1)(e) NY Conv bars enforcement (= general rule).
- P: What happens if the award had been set aside “for political reasons”, for example because of a minor violation of the law which had been declared a public policy violation?
  - Some courts in the U.S. have argued that in such a case the award is not “set aside” as the decision of the foreign court in State X would not be recognized in State Y.
  - With this argument U.S. courts have under certain conditions recognized and enforced arbitral awards that were set aside by the courts in the state of arbitration.
  - Was this line of argument taken up by courts in other countries?

Thank you very much for your attention!