

Introduction to International Commercial Arbitration

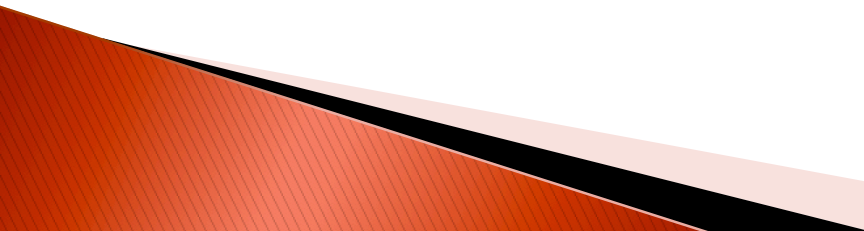
Prof. Giorgio F. COLOMBO



Arbitration and the Courts

Lesson n.10

Court intervention in Arbitration

- ▶ As said many times, International Arbitration is a private form of dispute resolution
 - ▶ Ideally, the State court system should interfere as less as possible with the Arbitration procedure
 - ▶ However, sometimes it is necessary or advisable that State courts intervene in the procedure
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Points of contact

- ▶ At the beginning of the Arbitration
 - ▶ During the Arbitral Proceedings
 - ▶ At the end/after the Arbitral Proceedings
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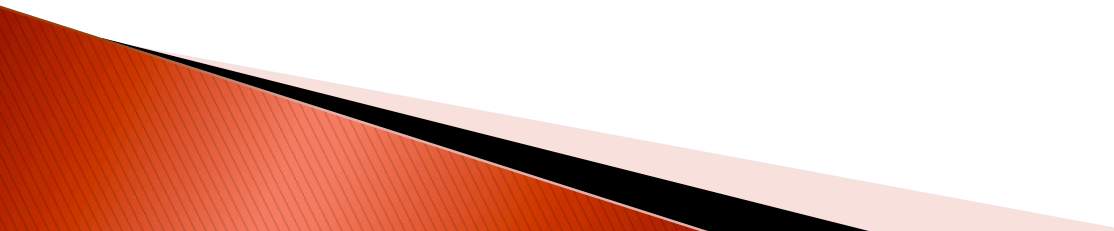
At the beginning of the Arbitration

- ▶ Enforcing the Arbitration Agreement
 - Usually the national court should just refuse to accept the procedure and refer the parties to arbitration directly
 - New York Convention, Article II, 3.
 - Model Law, Article 8
 - «...unless it finds that the agreement is null and void, inoperative or incapable of being performed»
 - How much should the Court enter into the detail?
 - The French Approach
 - The Chinese Approach

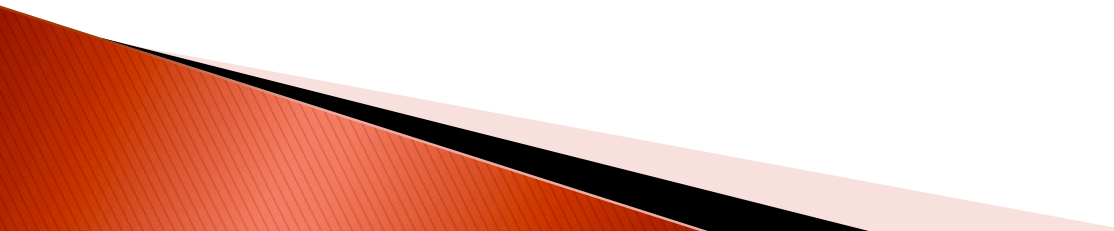
At the beginning of the Arbitration

- ▶ Establishing the Arbitral Tribunal
 - If the Parties failed to decide a procedure and there are no institutional or other rules (e.g. UNICITRAL) that could apply
- ▶ Challenges to Jurisdiction
 - Even though it is *conceptually* at the beginning, it may be *chronologically* later

During the Arbitral Proceedings

- ▶ Interim Measures
 - ▶ Measures related to the attendance of witnesses
 - ▶ Measures related to preservation/exhibition of evidence
 - ▶ Measures in respect of parallel proceedings
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Interim Measures

- ▶ When the Arbitral Tribunal has no power to issue them (it is uncommon now. *E.g.* Greece)
 - ▶ When the Arbitral Tribunal is not yet established
 - ▶ When they have to be issued against a third party
 - ▶ When it comes to their enforcement
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Issues of compatibility

- ▶ Is the request of an interim measure incompatible with an Arbitration Agreement?
 - Generally not
- ▶ When the Arbitral Tribunal has such power, who should a party ask for it?
 - Many different solutions:
 - First the Arbitral Tribunal (Switzerland)
 - To the Court only if there is urgency/risk/permission (UK, Ohio)

What kind of interim measures?

- ▶ UNCITRAL Model Law on International Commercial Arbitration, Chapter IV A, Art. 17
- ▶ An Order by the Arbitral Tribunal to a party to:
 - a) Maintain or restore the *status quo* pending determination of the dispute;
 - b) Take action that would prevent, or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself;
 - c) Provide a means of preserving assets of which a subsequent award may be satisfied; or
 - d) Preserve evidence that may be relevant and material to the resolution of the dispute

Measures related to the attendance of witnesses

- ▶ Generally speaking, national Courts have some kind of coercitive power to summon witnesses or the order the exhibition of documents and Arbitral Tribunals do not
- ▶ In order to summon witnesses under a civil or criminal penalty, the Arbitral Tribunal or the party concerned must refer to the national Court (UK, USA)

Challenge and Removal of Arbitrators

- ▶ In case of *Ad Hoc* Arbitration, parties need to challenge arbitrators according to the applicable law at the place of arbitration
- ▶ If the challenge is successful, then the Court will also have the power/duty to appoint another arbitrators

At the end/After the proceedings

- ▶ Challenge of Arbitral Award
 - Final Award/Partial Award
 - Review on the Merits?
- ▶ Enforcement