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"*State Court Participation in Arbitration – Help or Hindrance?*"

International Arbitration Commission & Litigation Commission

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Introduction

This General Report of the International Arbitration and Litigation Commissions summarizes the work of almost two dozen national reporters that contributed national reports for nineteen (19) different jurisdictions in connection with the upcoming London 2015 working session titled: ***"State Court Participation in Arbitration – Help or Hindrance?"***

These national reports analyzed diverse bodies of law and brought to bear the expertise of the International Arbitration and Litigation Commissions' talented legal professionals. As described below, state courts participate in international arbitration every day around the globe and arguably help *and* hinder the process of dispute resolution through arbitration. One thing is certain, however, and that is that state courts will remain involved as participants in these proceedings and their role needs to be understood if it is to be harmonized with the aspirational goals that underlie international arbitration.

1 Enforcement of the Arbitration Agreement and other issues related to Jurisdiction

1.1 In your jurisdiction, is there an obligation for state courts to enforce an arbitration agreement, *i.e.* to deny or otherwise refrain from exercising jurisdiction on that ground?

In all of the reported countries there is an obligation for the state courts to enforce an arbitration agreement.

However, the United Kingdom reports that, even if the courts are reluctant to deny recognition and enforcement of arbitral agreements and awards, the courts have the ability to refuse enforcement, for example on public policy grounds and in the event that the agreement is found to be invalid. The United Kingdom also reports that in recent decades, when interpreting the validity of arbitration agreements, the courts have tended to look at the substance rather than the form of the agreement, endeavoring to enforce parties' contractual intentions.

The National Report for Sweden noted that a court may issue certain decisions in respect of security measures irrespective of an arbitration agreement.

1.2 If so, how is the enforcement carried out? Please give a short overview of the procedure and the type of decision that the court would issue.

In almost all the reported countries, the objection to the national court's jurisdiction due to the existence of an arbitration agreement must be raised by a party no later than when filing its first response on the merits in the case, before making other arguments (*in limine litis*) or similarly defined early stages of the proceedings. Latvia reports however, that if adjudication of a case is already ongoing, the judge would terminate the proceedings if the court ascertains that there is an arbitration agreement between the parties, or the parties agree to refer the dispute to an arbitral tribunal.

Regarding the type of decisions that the court would issue there are differences. In most of the reported countries (Spain, The Netherlands, Latvia, Belgium, Italy, Sweden, Austria, Finland, Switzerland, Brazil, Peru, Germany) the court will dismiss or refuse to hear the dispute if it determines that it lacks jurisdiction. Mexico and Canada report that the court will stay the proceedings. In the United Kingdom the court will stay the proceedings as well, or direct anti-suit injuctions at the respondent whereas in the USA the court can either dismiss for lack of jurisdiction or compel arbitration.

1.3 Is it required that the respondent(s) challenge or object to the court's jurisdiction or would the court enforce the arbitration agreement on its own motion, provided that it becomes aware of the fact that an arbitration agreement between the parties exists?

In most of the reported countries, the respondent(s) must challenge or object to the court's jurisdiction. Peru reports that the court can reject a claim based on the existence of an arbitration clause, on its own motion. Austria reports that it is disputed in Austria whether the court may also *ex officio* reject a claim based on the existence of the arbitration clause before even serving the claim on the respondent. Switzerland reports that for arbitrations seated abroad, the court may not on an *ex officio* basis reject a claim based on an arbitration clause. However, if the arbitration is seated in Switzerland, according to the prevailing view in legal doctrine, the court may do so in the event that the party is in default, i.e. has failed to file a submission and/or appear before the court altogether. USA reports that generally, one party must object to proceedings in the court on the basis of an arbitration agreement and that the courts do not have the authority to enforce an arbitration agreement *sua sponte*, but that in practice in special cases, the courts may sometimes *sua sponte* refer the parties to arbitration or decline to rule on the matter due to an arbitration agreement.

1.4 Does your jurisdiction allow a party to bring a declaratory action or any other kind of action to obtain an affirmative declaration by the court about an arbitration agreement (e.g. that an arbitration agreement exists between the parties, that it has a certain scope or that it covers a specific dispute between specific parties)?

In almost half of the reported countries (Nigeria, The Netherlands, Argentina, United Kingdom, Sweden, Canada, Finland, and Germany), an affirmative declaration can be obtained from the court. This declaration covers both the validity of the arbitration agreement and its scope. Spain, Austria, Brazil, Latvia, and USA report on the other hand that no such declaration can be obtained from the court. Switzerland reports that the general rule is that such a declaration cannot be obtained, but does not rule out that other rules can apply to exceptional cases. In the remaining countries the situation is unclear, but both Peru and France find it unlikely that such an opportunity would exist.

1.5 If so, what are the procedural requirements, if any, for bringing such a declaratory action? Please focus on the requirements which are specific for this type of action.

Among the countries that reported that a court declaration can be obtained, most of the countries report, as a procedural requirement, that there be uncertainty on the validity or scope of the arbitration agreement. In addition to this, there is a general rule that the party applying for the declaration must have an interest in the case (this is expressed differently in the different reports as follows. Sweden: "uncertainty is detrimental to the applicant", Switzerland/France: "legally protected interest in the case", The Netherlands: "economic interest in the decision".).

Argentina reports as well that the plaintiff must have no other means to resolve the problem. The United Kingdom reports that a written agreement of all parties is a requirement. If this requirement is not met, a party might have the right to obtain a declaration if this can lead to substantial cost savings, the application was made without delay, and if there is a good reason why the court should decide the matter.

1.6 Are there any restrictions as to timing for asserting an objection to the state court's jurisdiction or to bring an action for an affirmative declaration about arbitral jurisdiction? E.g. would on-going challenge proceedings on the ground that the tribunal lacked jurisdiction prevent such an action from being brought?

As to asserting an objection to the state court's jurisdiction on the basis of an arbitration agreement, in almost all the reported countries, the objection must be made on the first occasion that a party pleads his case, see comments thereon included under section 1.2 above. In addition to this requirement, Spain reports that an objection needs to be filed within the first 10 days of the term allowed to reply to the claim, or within the first 5 days following the summons to appear at the hearing.

Regarding affirmative declarations, both France and Germany report that such actions need to be initiated before the formation of the arbitral tribunal. For its part, Sweden noted that if challenge proceedings are pending, based on the ground that the tribunal lacked jurisdiction, it may not be possible to initiate an action for an affirmative declaration regarding arbitral jurisdiction due to *lis pendens*. Several other countries have reported that no specific answer is possible on this point as there is no specific regulation about such declaratory actions.

1.7 When deciding on arbitral jurisdiction, do the courts in your jurisdiction apply the *doctrine of assertion* or any other doctrine according to which evidence is not required with respect to certain facts (so-called facts of double relevance) or is the standard of proof lowered compared to decisions on the merits in regular civil litigations? If so, does the doctrine apply equally in a declaratory action regarding arbitral jurisdiction and in a litigation case where an objection to the court's jurisdiction has been made with reference to an arbitration agreement? Please describe.

Only Sweden and Germany report that they recognize the *doctrine of assertion*. In Sweden the *doctrine of assertion* is reported to be applied "with respect to the issue of jurisdiction both in litigation cases, where an objection to the court's jurisdiction has been made with reference to an arbitration agreement and in cases where an arbitral tribunal's award on jurisdiction has been challenged in court." The doctrine must however, not be applied "with respect to the issues of whether a valid arbitration agreement exists between the parties or which relationship the arbitration agreement covers." Sweden reports as well that it is uncertain whether the doctrine of assertion shall be applied for declaratory actions regarding arbitral jurisdiction. Germany reports that German courts generally apply the *doctrine of assertion*, which is well established in case law, and that the doctrine could be applied accordingly to decide on arbitral jurisdiction as well. However, there is no case law on its use either in declaratory actions regarding arbitral jurisdiction or objections to the court's jurisdiction.

Nigeria, Canada and France report that a *prima facie* analysis is made by the courts in order to decide if the party has an "arguable" case. Switzerland reports that state courts use the *Theorie der doppelrelevanten Tatsachen* for facts of double relevance, which means that less than full proof is necessary with regard to such facts. Accordingly, the state courts will assume that the asserted facts are true "unless the respondent can immediately and unambiguously rebut these facts". However, this doctrine is not applicable when an arbitral tribunal is to decide on its jurisdiction. Therefore the standard of proof is not lowered in these cases.

Austria notes that while ordinary rules regarding the standard of proof will apply, as regards the interpretation of the arbitration agreement, only the wording of the arbitration agreement will be relevant, and not any intentions of the parties, the so-called *Andeutungstheorie*.

The United Kingdom, Italy and Finland explicitly report that the same standards of proof as in ordinary litigation will apply.

1.8 When deciding on arbitral jurisdiction, how does your jurisdiction handle the situation where there are several alternative grounds for the claims, some covered by the arbitration agreement and some not (e.g. one ground based on contract, one on tort)? Will the courts split the case between different fora or if not, what forum will it refer the entire dispute to?

A clear majority of the reported countries report that in the event of alternative grounds, some of which are covered by the arbitration agreement and some of which are not, will lead to a split or bifurcation of the case. The reason for this being that the competence of the arbitration tribunal is bound by the arbitration agreement.

Among the minority of countries that do not bifurcate the method varies. The Netherlands and Austria report that if claims are based on the same factual grounds or same event, the case will not be bifurcated but referred to arbitration. Belgium reports on the other hand that if the case cannot be split according to the main rule, the state court will be competent for the whole litigation.

Other reported countries, like the United Kingdom and Switzerland, approach the matter by applying an extensive interpretation of what would fall under the arbitration agreement. Mexico and France also report that the arbitration tribunal (due to the *doctrine of kompetenz-kompetenz*) has the competence to decide on its competence. Despite this doctrine, France reports that regarding an action to set aside an award or an appeal against an enforcement order of an award, the courts can split the case and decide that some of the claims fall within the jurisdiction of the arbitral tribunal, and that some do not. Sweden reports that the main rule is to split the case but that where disputes are connected to the arbitration agreement it may be possible to try also a claim based on tort in the arbitration proceedings.

1.9 Does your jurisdiction allow for anti-arbitration injunctions or any other types of decisions attempting to prevent an arbitration from being initiated or from proceeding? Please describe.

In almost all the reported countries, anti-arbitration injunctions are not allowed. As an exception, Brazil reports that an interested party can file an ordinary lawsuit seeking a decision that declares that the claim cannot be adjudicated by an arbitration tribunal. The United Kingdom and Canada also report that state courts have the discretion to grant injunctions. In the case of the United Kingdom, this applies to "all cases where it appears to the court just or convenient to do so" and any such order "may be made either unconditionally or on such terms and conditions as the court thinks just". In the case of Canada, the term "anti-arbitration injunctions" are not used but the court may stay the arbitration proceedings "in cases where there is a strong *prima facie* case that a party's reliance on the arbitration provision may be impeached, and that continuance of the arbitration would be oppressive, vexatious or an abuse of the court's process". It should be noted that both United Kingdom and Canada report that such orders will only be granted in exceptional cases. The United Kingdom reports also that the threshold will be even higher in the event of arbitration proceedings seated outside the English jurisdiction.

Both The Netherlands and Argentina report that anti-arbitration injunctions in theory are possible but that they would only be restricted to exceptional cases.

1.10 If so, who can such an injunction be directed at – a party, the arbitrator(s), an arbitral institute, etc.?

Among the countries that report that anti-arbitration injunctions are allowed, almost all report that such an injunction shall be directed at the party. Brazil reports that in addition to this, an official letter shall be sent to the arbitral tribunal and the arbitral institute/chamber in order to stop the proceedings. USA reports that ordinarily it would be sufficient to direct injunctions at a party, but such injunctions can also be directed at arbitrators and arbitration institutes.

1.11 What connection to your jurisdiction is required for the state courts to be competent to hear such a request?

Among the countries that report that anti-arbitration injunctions are allowed, they all report that some connection is required for the state to be competent. If the defendant is residing in the state in question, that state will have jurisdiction in all the reported countries except the United Kingdom (where the jurisdiction is determined based on the place of arbitration) and USA (where subject-matter jurisdiction is also required). Also, the seat of arbitration gives jurisdiction in the Netherlands, the United Kingdom, Brazil, Mexico, and France. It should be noted also that the United Kingdom might have jurisdiction also when the seat of arbitration is outside the United Kingdom in some exceptional cases. If the arbitration tribunal is located outside Mexico, Mexico reports that it has jurisdiction if the defendant resides in the country, or the goods are located in Mexico. Nigeria reports also that it has jurisdiction if one of the parties carry on business in Nigeria.

1.12 Are you aware of any case in the past ten years where an anti-arbitration injunction or a similar type of decision has been issued by a state court in your jurisdiction? If so, please describe briefly the facts and what the effect of the injunction ultimately was.

Only four of the reported countries report that they are aware of such cases. Mexico reports that the only case that they are aware of is on-going and not public. Therefore, the details of that case have not been given. The remaining cases reported by the other three countries are referred to below.

Nigeria:

"In Champion Breweries Plc. v Brauerei Beck GMBH & CO KG AM,[1] the parties entered into an Agreement dated October 24, 2009 (the Agreement) whereby Beck, as licensor, granted Champion, as licensee, the exclusive right to use the Intellectual Property Rights (IPR) of Beck and to package, use, market, sell

[1] FHC/L/CS/29/2009, instituted at the Federal High Court, Lagos

and distribute Beck's beer and the exclusive right to use Beck's IPR to produce, sell and distribute other branded merchandise belonging to Beck. Instructively, Champion is a company registered under the laws of the Federal Republic of Nigeria and carries on business in Nigeria. Beck on the other hand, is a company established and existing under the laws of Germany. The Agreement was covered by the NOTAPA. Clause 19. 2 of the Agreement provided for arbitration in Geneva, Switzerland in case of any dispute between the parties arising out of and in connection with the Agreement.

A dispute arose between the parties. Beck commenced arbitration against Champion in Geneva. Champion commenced an action at the Federal High Court, Lagos, for a determination by the Court of the question of the illegality of Clause 19.2 of the Agreement. Champion also sought orders of interlocutory injunction restraining Beck from taking further steps with respect to the arbitration in Geneva, pending the determination of the suit. Upon being served with the Court process, Beck requested the Court to stay its proceedings and refer the parties to arbitration. In a ruling delivered on July 30 2009, the Court dismissed Beck's application for stay of proceedings and ordered the parties to maintain status quo pending the determination of the question of illegality.

The effect of the order to maintain status quo is that Beck could not proceed with the arbitration in Geneva."

United Kingdom:

"Claxton Engineering Services Limited v Tam Olaj-Es Gazkutato[2] was a case where the English court considered whether to grant an anti-arbitration injunction to prevent the Defendant pursuing arbitration proceedings in Hungary.

Claxton had started proceedings before the English High Court and the Defendant, Tam, had challenged the court's jurisdiction to determine the dispute. The court decided it could determine the question of jurisdiction and found that the parties had agreed an English exclusive jurisdiction clause.

The Defendant subsequently pursued arbitration proceedings in Hungary and sought an interim award in those proceedings to the effect that the parties were to be bound by an arbitration agreement.

Sitting in the English High Court, pursuant to section 37 of the Supreme Court Act 1981 Mr Justice Hamblen granted an anti-arbitration injunction. The judge confirmed, however, in line with earlier authority[3], that such injunctions will only be granted in exceptional circumstances. In this case, the exceptional circumstances were made out on the basis that a continuation of the arbitration would have breached the Claimant's legal rights. The court had already established that the contract was subject to an English exclusive jurisdiction clause and therefore the arbitration proceedings were in breach of the contractual agreement."

[2] [2011] EWHC 345

[3] Weissfisch v Julius [2006] EWCA Civ 218

Brazil:

"There is a current dispute between Petrobras – a government controlled company which operates in the energy sector, primarily in the areas of exploration, production, refining, marketing and transportation of oil, natural gas and its derivatives – and the Brazilian Oil Agency ("ANP") – the regulatory authority of the activities involving the industries of oil, natural gas and biofuels in Brazil.

The dispute derives from a divergence between the parties about the landmark of two oil fields located at Bacia de Santos. Petrobras states that they are two different fields, while ANP has already denied the split of the fields two times in 2011. The divergence influences the tax to be collected by Petrobras.

Petrobras filed administrative appeals against this decision. Petrobras, then filed a request for arbitration before the ICC against ANP, affirming that the concession contract had an arbitration agreement. At that time, ANP notified Petrobras alleging the illegality of the arbitration request.

ANP, then, on April, 29, 2014, filed a lawsuit before the Federal Court seeking the annulment of the arbitration proceeding (#0005966-81.2014.4.02.5101). The judge granted the preliminary injunction and stayed the arbitral proceeding. Against this decision, on May 21, 2014, Petrobras filed an interlocutory appeal (#0101176-39.2014.4.02.0000). On December 11, 2014 the Federal Court of Appeals did not grant the interlocutory appeal, but the decision was not unanimous. One judge understood that the interlocutory appeal should be granted and the matter should be analyzed by the arbitral tribunal due to the principle of Kompetenz-Kompetenz. On January 7, 2015, Petrobras filed a motion for clarification against the decision mentioned. The Federal Court of Appeals has not yet analyzed the motion for clarification and, therefore, the subject has not been decided by the Superior Court of Justice."

USA:

"[O]ne court granted an anti-arbitration injunction by analogizing to a court's power to enjoin parties appearing before it from proceeding with a parallel action in a foreign country in circumstances that are unjust—a test that discards the usual requirements for injunctions and looks instead for identity of the parties, whether one case is dispositive of the other, whether the foreign litigation would frustrate the policy of the forum, and whether the effect on comity would be tolerable. See Oracle America, Inc. v. Myriad Group AG, 2012 WL 146364, *3 (N.D. Cal. 2012) (noting that the injunction operates on the parties before the court, not the foreign tribunal). In that case, the parties and the claims were identical, and the court had previously ruled that the intellectual-property claims going forward in the litigation fell outside the scope of the parties' arbitration agreement in a license agreement (and so should not be arbitrated). The court found that allowing the arbitration to go forward as one party desired would frustrate the policy of the forum state for avoiding inconsistent judgments (in particular on the threshold questions of who decides arbitrability and whether the

IP claims belonged in court or arbitration), and against forum shopping and engaging in duplicative and vexatious litigation. The effect of the anti-arbitration injunction on international comity would be negligible, since the arbitration likely should have been seated in San Francisco (despite the pro-arbitration party's attempt to seat the arbitration in London) and arbitration does not involve another sovereign's courts anyway. On that basis, the court enjoined one party from proceeding further with arbitration of claims alleged in the lawsuit."

2. The Arbitral Tribunal

2.1 Does your jurisdiction offer assistance by the state courts in appointing arbitrators? If so, please describe briefly what options are available.

Most countries reporting on this question indicate that their state courts can assist with the appointment of arbitrators. France, for its part, has appointed a judge acting in support of the arbitration (*juge d'appui*), who, among other things[4], can offer assistance in appointing arbitrators.

By way of additional example, Finland reports that under its Arbitration Act the district courts can appoint an arbitrator upon the request of a party. The district court can make the appointment where the parties fail to agree on a sole arbitrator;[5] a party fails to appoint its arbitrator(s) to a multi-member tribunal;[6] a third-party, which the parties to the arbitration agreement have agreed to appoint an arbitrator, fails to make the appointment;[7] the party-appointed arbitrators of a multi-member tribunal fail to agree on the chair of the tribunal;[8] the substitute arbitrator of a deceased, resigned or removed arbitrator dies, resigns or is removed;[9] the arbitrator agreed by the parties in the arbitration agreement dies or is not willing or able to accept the assignment and the parties fail to agree on the substitute arbitrator.[10]

In another example, Canada reports that both the *International Commercial Arbitration Act*, R.S.O. 1990, c.19 ("the International Act), and the *Arbitration Act* 1991, S.O. 1991, c.17 ("the Domestic Act") contain provisions for the appointment of arbitrators:

" s.10(1) of the Domestic Act states: "the court may appoint the arbitral tribunal, on a party's application, if, (a) the arbitration agreement provides no procedure for appointing the arbitral tribunal; or (b) a person with power to appoint the

[4] The *juge d'appui* also has power to decide on the legitimacy of an arbitrator's resignation or dismissal (Articles 1457 and 1458 of the CCP), to decide on challenge of arbitrators (Article 1459 of the CCP) or to extend the arbitration proceedings' time-limit (Article 1463 of the CCP).

[5] Section 16 of the Arbitration Act.

[6] Section 15 of the Arbitration Act.

[7] Section 15 of the Arbitration Act.

[8] Section 15 of the Arbitration Act.

[9] Section 14(1) of the Arbitration Act.

[10] Section 14(2) of the Arbitration Act.

arbitral tribunal has not done so after a party has given the person seven days' notice to do so…"

The International Act also pays initial deference to the arbitration agreement but, in the absence of such a clause, Article 11(3) offers court assistance in two instances:

"(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on a third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6 [Supreme or District Courts]; or

"(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6."

Article 11(4) provides further scope for court intervention: where there *is* an agreed procedure, and under that procedure:

"(a) a party fails to act as required under such procedure;

"(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure; or

"(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

"any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

Where the court appoints an arbitrator under these provisions, the decision is not subject to appeal - Article 11(5)."

2.2 What prerequisites, if any, must be satisfied for the court to deal with the appointment of an arbitrator (timing, failure by a party to act, etc.)?

Timing and delay were common themes among the countries reporting on this question.

The UK report notes that, "[a] party should apply as soon as possible as delay in making an application may prejudice their chances of persuading the court to exercise its discretion. However, the court's jurisdiction to intervene does not arise unless and until there has been a failure in the appointment process. This means that a party must first exhaust all appointment procedures specified by the arbitration agreement, including any agreed default procedures, as well as all applicable default appointment procedures specified by the Arbitration Act."

In Italy, "the main prerequisites to the court's intervention (be it to support with the direct appointment of an arbitrator or with his/her replacement) is the failure by a party to act within a certain term. In general, under Sect. 810.2 CPC, should a party fail to appoint his/her arbitrator and a certain period has elapsed,[11] the other party may file a petition to the chairperson of the competent first instance court seeking the appointment of the missing arbitrator."

For its part, article 1427 of Mexico's Commercial Code, provides that absent an agreed procedure to appoint arbitrators in the arbitration agreement (either expressly or by reference to an institution's rules), courts can under the following circumstances appoint arbitrators:

- In case of a sole arbitrator, where parties cannot agree on his/her designation, upon the request of any party, the court will appoint the sole arbitrator;
- In case of a three member panel, where a party fails to designate an arbitrator within thirty days the other so requires, the court will appoint the arbitrator upon request;
- In case of a three member panel, where the two party appointed arbitrators cannot agree on the designation of the third arbitrator, upon the request of any party, the court will appoint the third arbitrator.

In Canada, prematurity may be an obstacle too as the courts have held that "if on a proper construction of the agreement it is premature to appoint an arbitrator, the court will not do so.[12]"

2.3 When deciding thereon, will the court consider whether there is arbitral jurisdiction? If so, what level of review will the court undertake in this respect?

Generally, the reported answer is that most state courts will not consider whether there is arbitral jurisdiction.

In Finland, already discussed above, the district court will take into account only obvious deficiencies in arbitral jurisdiction when appointing arbitrators.

In France which has a special judge to assist in such matters, "the *juge d'appui* can appoint an arbitrator subject to the finding that the arbitration agreement is not manifestly void or inapplicable."

In the United Kingdom, "[a] party seeking the appointment of an arbitrator only has to satisfy the English court that there is an arguable case that there is an arbitration agreement. The court has ruled previously that the principles of party autonomy and

[11] According to some legal doctrine authors, the term provided to a party for the appointment of an arbitrator is not mandatory. See Salvaneschi, Laura pp. 225-226, quoting Supreme Court case no. 26257/2005.

[12] *Hyundai Auto Canada Inc. v Dayhu Investments Ltd.* 1993 CarswellOnt 4467.

kompetenz-kompetenz underline the fact that arbitrators must and are entitled to decide not only issues, but also their own jurisdiction.[13]"

2.4 Please describe briefly the procedure for the appointment of arbitrators by the state courts, including any time-limits.

The procedures and time-limits reported on vary from country to country. See 2.2 above for examples from a variety of representative jurisdictions. In general, there appears to be an overriding concern to insure that arbitral proceedings do not drag on with resolution on account of an impasse on the appointment issue. For example, France's legislation provides:

- the *juge d'appui* can appoint a co-arbitrator provided that one of the parties has not complied with another party's request to appoint an arbitrator within one month as from the receipt of the said request (Article 1452 §2 of the CCP),
- the *juge d'appui* can appoint the President of the arbitral tribunal provided that the co-arbitrators have not reach an agreement within one month as from the acceptance of their mission (Article 14525 §2 of the CCP).

In Mexico, the procedure also calls on the court to consult with experts in the field as follows:

"According to article 1467 of the [Mexican] Commercial Code … for the appointment of an arbitrator or arbitrators or adopting the measures for securing such appointment, and upon application of one of the parties, the following shall be observed:

- The court must hear all the parties previously. For such purpose, if it deems it appropriate, the court can call them for a hearing so they can state their positions.
- The court must previously seek advice, from one or several arbitral institutions, chambers of commerce or industry selected to its discretion.
- Unless parties agree otherwise or that the court determines to its discretion that the list-procedure is not appropriate for the case, the court shall observe the following:
    - Shall send all the parties an identical list containing at least three names.
    - Within 10 days after the receipt of this list, each party may return the list to the court, after having deleted the name or names to which it objects and numbered the remaining names on the list in the order of its preference. If a party does not make comments, it shall be understood that it agrees with the list communicated by the court.

[13] Noble Denton Middle East and another v Noble Denton International Ltd [2010] EWHC 2574 (Comm)

- After the expiration of the above time period, the court shall appoint the arbitrator or arbitrators from among the persons approved in the lists returned to it and in accordance with the order of preference indicated by the parties.
- If for any reason the appointment cannot be made according to this list-procedure, the court shall use its discretion for appointing the arbitrator or arbitrators.
- Before making the appointment, the court shall request the arbitrator or the arbitrators appointed, to divulge any circumstance that might give rise to justifiably doubts as to its impartiality and independence.

2.5 How does the court decide which arbitrator to appoint? Is there a list of arbitrators available to the court?

The national reporters indicate that on this question there are differing levels of guidance provided to the courts particularly in situations where the arbitration is not administered by an institute. In Finland, "there is no legislation or guidelines for the district courts regarding the procedure of deciding the arbitrator to be appointed. There is also no list of arbitrators available to the district courts. The district court will choose the arbitrator to be appointed taking into account the characteristics of each individual case."

In Germany, there are no known lists of arbitrators, but as criteria for the court's appointment of arbitrators, the court shall consider:

- the parties' will, as laid down in the arbitration agreement,
- all aspects which ensure independent and impartial arbitrators, and
- when appointing a single or the third arbitrator, whether an arbitrator with a nationality different from those of the parties might be expedient (sec. 1035 para. 4 ZPO).

2.6 Does the above apply irrespective of whether the arbitration is administered by an institute or not?

Generally, in instances where there is an institute involved, the rules of that institute will be applied. This is true in Finland.

In other countries, such as Germany, the rules cited at 2.5 above regarding state court participation in the composition of a tribunal apply irrespective of whether the arbitration is administered by an institute or not, provided that the place of arbitration is in Germany (sec. 1025 para. 1 ZPO), or where the place of arbitration has not yet been determined and one of the parties has its registered seat or habitual residence in Germany (sec. 1025 para. 3 ZPO).

2.7 Does your jurisdiction offer assistance by the state courts to remove or replace an arbitrator?

According to the reports, the state courts that offer assistance in the appointment of arbitrators, will also generally offer assistance to remove or replace the arbitrators under certain limited circumstances.

According to the Finish Arbitration Act, which has been highlighted in this section, "the district court shall remove an arbitrator upon the request of a party if the arbitrator is unable to perform his or her functions in an adequate manner or if he or she delays the arbitration without just cause.[14] … Before the arbitrator is removed, he or she shall be given an opportunity to be heard unless a particular obstacle for doing so exists.[15] The district court's decision regarding the arbitrator's removal is not appealable.[16]"

In the United Kingdom:

"A party may apply to the court to remove an arbitrator:

a. on any of the following bases set out in section 24 of the Arbitration Act;

(i) There are justifiable doubts concerning the arbitrator's impartiality;

(ii) The arbitrator does not possess the qualifications required by the arbitration agreement;

(iii) The arbitrator is physically/mentally incapable of conducting the proceedings or there are justifiable doubts as to their capacity to do so;

(iv) The arbitrator has refused or failed properly to conduct the proceedings, or unreasonably delayed in the conduct of proceedings or the making of an award, and that as a consequence substantial injustice has been, or will be, caused to the applicant.

b. pursuant to section 18 of the Arbitration Act and the power to revoke any appointments made (exercisable in case of failure of appointment procedures in order to start afresh); and

c. where a sole arbitrator has been appointed by default pursuant to section 17(2) of the Arbitration Act - due to the default of one party to agree - the defaulting party may apply pursuant to section 17(3) of the Arbitration Act to set aside that appointment."

2.8 If so, please describe the procedure therefore briefly.

[14] Section 19(2) of the Arbitration Act.

[15] Section 19(2) of the Arbitration Act.

[16] Section 19(3) of the Arbitration Act.

As might be expected, the procedures reported upon vary from place to place, but can be said to generally be concerned with removing arbitrators only in narrowly defined circumstances involving partiality, incapacity, and dereliction of duty or other such facts. Procedures, such as the Italian one described below, set out penalties to dissuade parties from seeking the removal of an arbitrator:

> "The party seeking the removal of an arbitrator shall file a petition before the chairperson of the first instance Court indicated by Sect. 810.3 CPC … Both parties have the power to file said petition, but Sect. 815.2 CPC provides that the party that has appointed an arbitrator (or agreed on the person to be appointed as arbitrator) cannot ask for his/her removal except for reasons that is discovered after the appointment. In any case, the party willing the removal has a ten days period, running from the date of appointment or from that of discovery of a ground for removal, to file the petition. The chairperson of the first instance court shall hear both the arbitrator and the parties, and collect summary information thereon. After these activities have been carried out, the court shall issue a non-challengeable order,[17] deciding also on the procedural expenses.[18] In particular, if the replacement petition is manifestly not admissible or ungrounded, Sect. 815.4 CPC expressly provides that the Court rejecting the petition shall condemn the petitioner to pay to the other party liquidated damages in an amount not exceeding three times the arbitrator's fees calculated according to the "*tariffe forensi.*"[19] Should the order accept the removal petition, Sect. 815.5 CPC states that the activities made by, or with the participation of, the removed arbitrator are to be considered ineffective."

3. Interim Measures

3.1 In your jurisdiction, does an arbitral tribunal have the power to issue an interim injunction? If yes, what is the way to enforce such interim injunction?

Italy and Latvia report that arbitral tribunals lack power to issue interim injunctions in these jurisdictions.[20] While arbitral tribunals in Sweden and Finland have the power to order interim measures, such measures are not enforceable should the respective party not comply with the arbitral tribunal's order.

In France, state courts have exclusive competence to order "conservatory attachments" and "judicial securities", while other interim or provisional measures may be issued by an arbitral tribunal. The United Kingdom reports that an arbitral

[17] The Court should not appoint a new arbitrator in said order, at least by its own motion.

[18] Benedettelli, Massimo V., Consolo, Claudio, Radicati di Brozolo, Luca G. (ed.) p. 168

[19] Very briefly, the so-called *tariffe forensi* are standard fees defined by Decree of the Italian Ministry of Justice providing minimum and maximum fees for legal activities, applicable unless otherwise agreed between counsel and its client.

[20] In Italy the only exemption being freezing orders regarding shareholders' resolutions if such shareholders' resolution is challenged before an arbitral tribunal.

tribunal has the power to make a final award that contains an interim injunction (unless otherwise agreed by the parties), while the general competence to grant interim injunctions must be conferred by express party agreement (which is rarely the case in practice).[21] In the remaining jurisdictions arbitral tribunals generally have the power to grant interim injunctions; according to the majority of the national reports, however, only unless otherwise agreed by the parties. The Netherlands reports that the arbitral tribunal may issue an interim injunction even on its own initiative (i.e. without a party's request).

When it comes to enforcement, most countries report that state courts will generally enforce interim injunctions of arbitral tribunals (as stated above, Sweden and Finland are the exemption) to the extent the parties do not comply with the order voluntarily. The following particularities should be mentioned: The UK Arbitration Act provides for a range of sanctions that may be applied by the arbitral tribunal in case of non-compliance with an interim measure, including the drawing of adverse inferences as the circumstances justify and making such orders as it deems fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance.[22] Most reports hold that state courts may not review the merits of an interim injunction issued by an arbitral tribunal. In the USA a single judge (without a jury) in principle decides in proceedings that are intended to be of summary fashion, however "the extent of motions practice, discovery, and other procedural maneuvering permitted to stand between the petitioner and the judgment of confirmation will rest within the discretion of the judge". As with other civil actions in the USA, the petitioner seeking enforcement of an interim injunction should have the respondent personally served. Mexico reports that state courts being addressed with a request to enforce an interim injunction of an arbitral tribunal will grant the respondent a 15 day period to reply to the request, and may grant another ten day period to produce or hear evidence. The court will then set a hearing within three days and decide on the recognition and enforcement of the interim injunction. Also in Germany the state court will decide on the basis of a summary examination and it may refuse the recognition of e.g. disproportionate orders (or on the grounds of lack of jurisdiction of the arbitral tribunal).

3.2 In your jurisdiction, what is the way, if any, to enforce an interim injunction issued by an arbitral tribunal having its seat outside your jurisdiction?

Peru, Mexico, Germany, Austria and Belgium report that interim injunctions issued by foreign arbitral tribunals are enforceable in these jurisdictions.[23]

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[21] Whether reference to specific rules of arbitration of an arbitration institution may constitute such express party agreement has not been addressed in the UK report. As regards freezing orders, it is generally unclear under UK law whether parties may give respective power to the arbitral tribunal at all.

[22] Section 41(7) Arbitration Act 1996.

[23] Provided of course no grounds for denial of recognition and enforcement analogues to the requirements for the enforcement of awards exist.

Italy, Latvia, Sweden and Finland will not enforce interim injunctions issued by a foreign arbitral tribunal.[24] In this context, Sweden and Finland report that an arbitral decision on interim measures will also not be considered as the equivalent of an award under the New York Convention. As for Italy, most scholars exclude the possibility of enforcing foreign interim measures, while at least some scholars affirm the enforceability of foreign interim measures under the regime of the New York Convention if issued in the form of an award.

Brazil reports that the enforceability of foreign interim measures is unclear. The Superior Court of Justice, which is competent to ratify decisions of foreign arbitral tribunals, however, will, as a general rule, only ratify final decisions. Amongst a certain number of scholars, therefore, it is stated that foreign interim measures are not enforceable in Brazil. The situation is similar in Switzerland, where pursuant to the prevailing view, foreign interim injunctions cannot be recognized and enforced directly as such for not being considered the equivalent of "foreign arbitral award". The prevailing view in Switzerland seems to be that there is no other option than to submit a letter rogatory to the Swiss authorities through diplomatic channels, a rather unsatisfactory solution considering the delay caused by such procedure (addressing Swiss courts directly being the more practicable solution).

Canada reports that at least in the jurisdiction of Ontario (on which the report focuses) a foreign interim injunction of an arbitral tribunal is unlikely to be enforced. Pursuant to case law, only decisions that dispose of part or the entire dispute shall qualify as an award. Spain reports that the direct enforceability of interim injunctions issued by foreign arbitral tribunals is disputed amongst scholars. The prevailing opinion is that exequatur proceedings are required.

As regards Argentina, foreign interim measures may only be enforced if a respective bi- or multilateral treaty (such as the New York Convention and the Inter-American Convention on International Commercial Arbitration, the "Panama Convention") exists. In the absence of such treaty, exequatur proceedings need to be initiated.[25] Nigeria will enforce interim orders as long they are issued in the form of an interim award. Likewise, France reports that provided a foreign interim injunction qualifies as an award, it may be enforced by French state courts (a respective decision can be appealed on the grounds of lack of jurisdiction, the arbitral tribunal not being constituted properly, the arbitral tribunal exceeding its competences, violation of due process or ordre public). The situation seems to be similar in the Netherlands.

Also the USA reports that a foreign interim measure may only be enforced under the New York Convention or the Panama Convention. Although not explicitly stated in the report, it seems that there is also a requirement that the interim measure be rendered in the form of an interim arbitral award (proceedings will be the same as for domestic arbitral decisions). That said, as to the "finality requirement", pursuant to

[24] Sweden and Finland report that an arbitral decision on interim measures will also not be considered as an award under the New York Convention.

[25] The Argentinian report does not state to which extent it is relevant that the foreign decision is of a "final" nature.

US case law interim orders are enforceable to the extent they "finally and conclusively" dispose of a "separate and independent" claim, which can also be a claim for injunctive relief notwithstanding the fact that they do not dispose of all the claims that were submitted for arbitration.

The UK reports that under the Arbitration Act English courts have the power to support arbitral proceedings where no seat has been designated or determined and that have a connection with England and Wales or Northern Ireland provided that the court is satisfied that it is appropriate to do so. Arguably, therefore, the English courts may support foreign arbitral proceedings like domestic ones. English courts, however, have a reputation for being cautious in providing such support and only in cases of urgency and where deemed appropriate.

3.3 If a specific interim measure as issued by a foreign arbitral tribunal is not available in your jurisdiction where it is sought to be enforced, what would be the way to proceed?

Only countries where the enforcement of interim measures issued by a foreign arbitral tribunal is generally possible shall be considered in this Section (*please see* Section 3.2 above). As for Italy, however, an interim measure that is not available in its jurisdiction would be deemed to be against mandatory provisions of Italian law concerning the issuance of interim measures, and would thus not be enforced even if one would affirm the enforceability of interim measures of foreign arbitral tribunals in general.

Belgium, Germany, Austria, Mexico, Peru and the Netherlands report that arbitral tribunals are not bound by the list of interim measures provided by law, and that therefore, an arbitral tribunal may order measures it deems fit and that such measures are also enforceable in these jurisdictions. In that context, Austria, Germany, Mexico, Peru and the Netherlands report that the court may adopt the order issued by the arbitral tribunal to ensure the effectiveness of the interim injunction, without however changing its content or nature.[26] Violation of public order will always be a reason to deny enforceability. As for Switzerland, state courts (provided that the petitioner succeeded in overcoming the hindrances as described in Section 3.2 hereof) would also amend or modify the measure under basically the same principles as in other jurisdictions where state courts have such power.

The USA reports that once the requirements to enforce an interim measure (in the form of an interim award, *see* Section 3.2 hereof) are met, such interim measure would most likely be enforced in the USA.

As for the UK, the English courts can decline to enforce interim measures that are not recognized by, are incompatible with, or even offend English legal principles and public policy. There is general discretion for the courts to decide whether or not they deem it appropriate to support arbitral proceedings. English courts have shown

[26] In Austria only upon respective request of the petitioner; the opponent needs to be heard by the court.

reluctance to grant relief where they identified a marked divergence between the relevant provisions of the arbitration law applicable to the proceedings of a foreign seat and the arbitration laws of England.

Spain and Nigeria report that to the extent an interim measure as issued by a foreign arbitral tribunal is not available in its jurisdiction there will be no possibility of having it enforced by their courts. In France, the situation has not been clarified by case law so far but the National Reporters doubt that such measure would be enforced. The same is true for Argentina.

3.4 In your jurisdiction, are state courts competent to decide on a request for interim relief despite the fact that the parties entered into an arbitration agreement? May a party file for interim relief with a state court even before arbitration proceedings are initiated? If yes, what are the consequences with respect to the "main" claim that is sought to be secured by such interim injunction, i.e. is the party asking for interim relief obliged to commence arbitration within a certain period of time?

In Peru, Belgium, Finland, Sweden, Argentina[27], Nigeria[28], Spain, the Netherlands[29], Germany[30], Austria[31], Switzerland, the USA and Brazil[32], the existence of a valid arbitration agreement does not prevent the parties from applying for interim measures before state courts. Peru, Belgium, Spain and Austria explicitly report that such application is not considered a waiver of the arbitration agreement. In Switzerland, prior to the constitution of the arbitral tribunal, state courts are exclusively competent to issue interim measures; once the arbitral tribunal has been constituted, a party may either apply to the state courts or the arbitral tribunal.[33] In Italy, state courts are exclusively competent to issue interim measures even if arbitral proceedings are already pending.

In Peru, after the constitution of the arbitral tribunal, jurisdiction is transferred to the arbitral tribunal; state courts are then obliged to provide the arbitral tribunal with all court records regarding the proceedings on the interim measure (regardless of the stage of the proceedings). Furthermore, the arbitral tribunal may modify, replace and rescind any interim measures issued by state courts.

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[27] The Argentinean National Reporter deems it likely that state courts would forward the case to the arbitral tribunal (except under extraordinary circumstances).

[28] The Nigerian National Reporter deems it prudent to initiate arbitral proceedings before approaching a state court for interim relief.

[29] Unless the parties have agreed on the exclusive competence of the arbitral tribunal to decide on interim measures.

[30] Since jurisprudence is not entirely clear concerning the competence of German state courts if the parties select an arbitration seat outside of Germany, the National Reporters suggest including a clarification that German courts are competent to hear applications for interim relief in the arbitration agreement.

[31] In Austria, parties may not validly exclude the competence of the state courts.

[32] In Brazil, the jurisdiction of the state courts comes to an end with the formal constitution of the arbitral tribunal.

[33] Unless the parties have excluded the jurisdiction of the arbitral tribunal or of the state courts.

Peru, Belgium, Finland, Sweden, Brazil, Argentina, Italy, Mexico, Spain, the Netherlands, Germany[34], Austria, Switzerland[35] and the USA all report that parties may file for interim relief with a state court even before arbitration proceedings are initiated. In most of these jurisdictions, the party applying for interim measures has to initiate arbitral proceedings within certain time limits (Peru[36] and Argentina: within ten days from the court's decision; Finland and Sweden: within one month from the court's decision;[37] Brazil: within thirty days from the enforcement of the interim relief; Italy[38], Latvia, Austria, Switzerland[39] and the Netherlands[40]: within the time period stipulated in the interim injunction); in these jurisdictions, failure to do so results in the expiration of the interim measure. In Belgium, the respondent may apply for an amendment of the interim measure if the petitioner does not initiate proceedings on the merits.

In the USA, there are no time limits within which the applicant shall initiate arbitral proceedings, but the court will determine the duration of the interim measure and resolve timing issues based on the specific circumstances of the individual case. The actual availability of interim measures may vary from state to state; however, it seems that the majority rule among US courts is that interim relief is available to preserve the status quo and to prevent the arbitration from becoming a hollow finality.[41] After constitution of the arbitral tribunal, state courts will generally defer to the arbitral tribunal instead of issuing an injunction.

In Canada, state courts are generally competent to decide a request for interim relief despite a valid arbitration agreement.[42] However, a party may only request interim measures before a state court with regard to a matter covered by an arbitration agreement once the arbitration has been commenced or at the very least the notice commencing the arbitration is in the process of being served. Furthermore, it seems to be advisable to approach the arbitral tribunal first (if possible) as it may question a party's intention in going to a state court for something the arbitral tribunal is equally capable of awarding.

As for France, state courts have exclusive jurisdiction to order conservatory attachments or judicial securities regardless of whether or not arbitral proceedings have already been initiated. However, the party applying for interim measures must

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[34] Different opinions exist as to the party's autonomy to exclude this competence of the state courts.

[35] In Switzerland, prior to the constitution of the arbitral tribunal, state courts are actually exclusively competent to issue interim measures.

[36] In Peru, failure of the arbitral tribunal to constitute itself within ninety days will also result in the expiration of the interim measure.

[37] In Sweden, the time period commences with the decision of the higher court if the decision on the interim measure is appealed.

[38] In the absence of such stipulation: within sixty days from the court's decision.

[39] Usually thirty days.

[40] Usually a few weeks.

[41] In the US, preliminary relief is granted on an *ex parte* basis or with prior notice; the applicant must establish that it would suffer irreparable harm, show a likelihood of success on the merits and post security costs.

[42] Both in domestic and in international arbitral proceedings.

initiate arbitral proceedings within one month from the court's decision; failure to do so results in the expiration of the interim measure. When it comes to other interim or conservatory measures and provided that the matter is considered "urgent", a party may apply to the competent state court. In practice, such measures are often time limited and conditioned upon the initiation of arbitral proceedings.

Brazil reports that the jurisdiction of the state courts to issue interim measures ends with the formal constitution of the arbitral tribunal; interim measures granted by state courts only remain effective until the arbitral tribunal is able to decide on the matter of the interim relief.

In Latvia, parties may request a state court to secure a claim in case the parties have concluded an arbitral agreement. This is however only possible before arbitral proceedings are initiated, Latvian procedural rules do not provide for the possibility of interim measures at all once arbitration has been commenced. The party requesting security for a claim must initiate arbitral proceedings within the time period set by the state court.

In Mexico, parties may request a state court to secure a claim if the parties have concluded an arbitral agreement; here, parties are not required to commence arbitration within a certain period of time after the issuance of an interim measure.

The UK reports that under the UK Arbitration Act, the role of the state courts is supportive rather than supervisory. Whether or not a party may seek interim relief before state courts without first referring the matter to an arbitral tribunal appears to depend on whether the applicant has commenced (or intends to commence) arbitration: A party intending to commence arbitration and seeking a pre-emptive declaration on jurisdiction must first appoint an arbitrator and then allow the tribunal to deal with any objections.[43] On the contrary, a party not intending to commence arbitration may apply straight to the state courts for a declaration on jurisdiction. The potential impact of proceedings on interim measures before state courts on the progress of pending arbitral proceedings can vary; in some cases,[44] arbitral tribunals are expressly entitled to continue arbitral proceedings. However, it seems that arbitral tribunals will often stay the arbitral proceedings until all court applications have been heard and determined.

3.5 May parties file for interim relief with a state court even though an arbitration is already pending in the respective matter?

In Italy (where state courts have the exclusive competence for issuing interim measures; see 3.4 above), parties must always file relevant petitions with the state courts.

[43] If a party, however, still prefers to seek the assistance of the state courts, is has to seek the consent of the arbitral tribunal or of the respondent.

[44] E.g. in case of court proceedings on the removal of an arbitrator or on the determination of the preliminary point of jurisdiction and/or the preliminary point of law.

In Belgium, Finland, Sweden, Spain, the Netherlands[45], the UK, Germany, Austria[46], Nigeria and Mexico, a party may file for interim relief with a state court even if arbitral proceedings are already pending. The same applies for Canada, where it seems to be best practice to approach the arbitral tribunal (if possible) before filing for interim relief with a state court.

Switzerland reports that parties may freely choose whether to apply to the arbitral tribunal or to a state court. By applying to state courts, parties may avoid difficulties regarding the enforcement of the measures. However, the applicant may not bring the identical request to an arbitral tribunal if it has already been rejected by state courts (and vice versa). A new request is only admissible if the circumstances materially changed or if the requirements for granting provisional measures are not identical before the state court and the arbitral tribunal.

As for the USA, filing for interim relief with state courts after commencement of arbitral proceedings is only possible under narrow circumstances, e.g. if the arbitral institution has no provisions to provide emergency relief or if the arbitral tribunal is not yet ready to act on the party's request for interim relief.

France, Latvia, Brazil and Peru report that parties may not file for interim relief with state courts once arbitral proceedings are pending. In France, a notable exception is the exclusive jurisdiction of state courts to order conservatory attachments and judicial securities even after the constitution of the arbitral tribunal.

3.6 In your jurisdiction, does a state court have the power to order reimbursement of legal costs in proceedings for interim relief? If yes, what are the consequences if the claim that is sought to be secured by interim relief is subject to an arbitration agreement?

In the UK, state courts may award costs in respect of any matter brought before them, including costs in proceedings for interim relief.

In Germany, Nigeria, Italy, Argentina, Spain, Finland, Sweden and the Netherlands, state courts will award the prevailing party the costs of the proceedings on the interim measure.[47] In Austria only the defendant may be awarded reimbursement of legal cost, while the applicant, even if prevailing in the interim proceedings, needs to request reimbursement of its costs always in the main proceedings (irrespective of whether these are pending before a state court or an arbitral tribunal).

In Finland and the Netherlands, the question of reimbursement of legal costs incurred in conjunction with proceedings on interim measures shall be decided by the arbitral tribunal together with its decision on the merits.

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[45] Unless the parties have agreed that the arbitral tribunal shall have exclusive jurisdiction when it comes to interim measures.

[46] In Austria, an interim measure issued by an arbitral tribunal which is incompatible with an earlier measure issued by a state court will not be enforced.

[47] The principles of cost reimbursement (cost follows the event, reimbursement according to a tariff/reimbursement of actually incurred costs, etc.) in state court proceedings differ widely between the particular jurisdictions.

In Switzerland, state courts have the power to order reimbursement of legal costs in proceedings for interim relief; such decision may be deferred until the final decision on the merits is rendered. The prevailing view seems to be that the state court's competence to decide on the costs does not cease with the constitution of the arbitral tribunal.

As for Canada, it seems that the state courts are willing to make cost orders regarding interim measures even though the Canadian International Act does not explicitly provide for that possibility.

France reports that state courts can order the reimbursement of legal costs in proceedings for interim relief; however, if the claim is subject to an arbitration agreement and the arbitral tribunal has not yet been constituted, no reimbursement of legal costs may be ordered.

Belgium reports that that reimbursement of costs may only be ruled by way of a final ruling; a decision in summary proceedings does not qualify as such final ruling. In Brazil, state courts do not have the power to order reimbursement of legal costs in proceedings for interim relief at all.[48] As for the USA, the general principle that each party has to bear its own costs in the absence of an applicable fee-shifting statute or an explicit party agreement to the contrary, also applies in proceedings on interim measures.

In Mexico, there are no specific provisions addressing the power of courts to order reimbursement of legal costs in proceedings for interim relief.

Furthermore, Switzerland and Peru report that the applicant is liable for damages caused by unjustified interim measures.[49] In Switzerland, the arbitral tribunal or the competent state court may reduce such damages or relieve the applicant entirely from liability if the applicant proves that the application was made in good faith.

4. Evidence

4.1 In your jurisdiction, do the state courts play a role in the gathering of evidence for use in arbitration?

In most of the reported countries, the state courts play some role in the gathering of evidence for use in arbitration, although the level of involvement varies greatly.

Two of the reported countries' courts play virtually no role in arbitral evidence-gathering: Latvia and Peru. In the former, the courts' involvement is limited to establishing legal facts upon request; in the latter, the discovery procedures, or lack thereof, limit the courts' involvement in arbitral evidence-gathering to rare circumstances where the parties can request a list of the anticipated evidence.

[48] Except orders for conservatory attachments and judicial securities, see 3.5 above.

[49] The same is true for Austria.

The more consistent pattern from the reported countries is some level of involvement in the gathering of evidence for arbitration. Of all the reported countries, Spain's courts play the greatest role in the process. Under Article 33 of Spain's Arbitral Act, "[t]he arbitrators or either of the parties, with the approval of the arbitrators, may request the competent court's assistance in taking evidence according to the rules of evidence which may apply. Such assistance may consist of taking evidence in the competent court or the [court] adopting the specific measures required so that the evidence may be taken by arbitrators." Courts in the Netherlands and Argentina are also equipped to play an active supporting role for arbitral evidence-gathering. As described in the two sections, that follow, the United States courts are also equipped to assist in the gathering of evidence for use in arbitral proceedings, subject to certain limitations and certain geographic variation among the federal circuits.

Another common pattern from the reported countries is the use of the state courts as a tool of last resort when the arbitral tribunal is unable to acquire necessary evidence. The United Kingdom, Switzerland, Finland, and Brazil all adopt this model. Switzerland reports that, "[a]lthough the arbitral tribunal administers the evidence by itself . . . it lacks effective coercive powers to impose sanctions (based on criminal law) in case of non-compliance with its order. . . . If these (third) parties fail to comply with the orders voluntarily, recourse to state courts may become necessary".

A third, and probably most common, pattern is some middle-road between the two former models. In Germany, the courts can be called upon to fill some gaps that arise from the arbitral tribunal's limitations: namely, the power to force witnesses or experts to appear. Similarly, in Mexico "courts can provide assistance in the gathering of evidence if either the [tribunal] or any party with the approval of the [tribunal] so request."

4.2 If your state courts play a role in the gathering of evidence for use in arbitration, how is the assistance or intervention of the state court requested (letters rogatory, petition, motion, filing of an action, etc.)?

The mode of requesting state court assistance or intervention varies from country to country.

In the United Kingdom, intervention is requested through the filing of a procedural application or an arbitration claim with the English High Court. Nigeria has a similar application procedure for requesting the intervention or assistance of the courts.

In France, the level of the court's involvement hinges on whether the request is made prior to or after the formation of the arbitral tribunal. If the requested assistance or intervention occurs prior to the formation of the tribunal, then the courts will have the power to gather evidence from the parties and third parties through an adversarial proceeding initiated through summons. Once the tribunal is formed, the courts only become involved in gathering evidence from third parties, which is

conducted through summary proceedings known as "*comme en matière de référé*." Belgian courts provide all their assistance through a writ of summons in summary proceedings.

In Austria, "[t]he request for court assistance is filed with the regular courts. The request itself is aimed at the execution of certain requested acts, such as the summons and examination of a witness.[50] The requesting party has to provide the court with all necessary information for it to determine whether the request is justified, i.e. the arbitration agreement, the reason why the tribunal itself is unable to take the requested act and any other information or documents the court will require.[51]"

In Italy and Mexico the courts are called upon for assistance or intervention through the filing of a petition. In the former, there are four types of relief that the court can provide for the arbitral tribunal. One is prescribed by law and can only be sought through a request of the tribunal itself. The other three forms of evidence-gathering relief are triggered through the filing of a petition with a competent court. Similarly in Mexico, intervention is sought through the filing of a petition within the framework of a special proceeding.

In the United States the level of assistance or intervention which the courts may provide varies depending on whether the arbitration is foreign or domestic. (See Question 4.3 and 4.7). When the court's involvement is requested in a domestic arbitration, the party seeking relief does so through the filing of an action. When the arbitration is foreign, the court is called upon to act through letters rogatory or through the statutory 28 U.S.C. § 1782 mechanism for gathering US-based evidence for use in foreign proceedings. For the latter statute, there is a split among US Circuits on the questions of whether the statute is applicable in the context of private commercial arbitration. There is no question that the statute applies in the context of treaty-based arbitration. Argentina also requires the use of letters rogatory to request court assistance.

4.3 Is there specific legislation or other legal authority governing the assistance that the state courts can provide?

There are two models with respect to specific legislation authorizing court assistance in arbitral evidence-gathering: independent statutory basis and authorization deriving from the courts' general rules.

The vast majority of reporting countries that authorize their courts to assist in the evidence-gathering process do so through specific legislation. In Nigeria, for example, the authority for courts to assist with the arbitral evidence procedures is found in the Arbitration and Conciliation Act and the Lagos State Arbitration Law

[50] Hausmaninger, Christian, in *Kommentar zu den Zivilprozessgesetzen*, mn 32ss to section 602.

[51] Schumacher, Hubertus, *Beweiserhebung im Schiedsverfahren*, mn 176; Hausmaninger, Christian, in *Kommentar zu den Zivilprozessgesetzen*, mn 39 to section 602.

2009. Similarly, in the United Kingdom, the authority is found in sections 42, 43, 44, and 45 of the Arbitration Act.

A subcategory of the independent-statutory-basis model is found in the Austrian system. Under said system, the basis of the courts' authority is found in an independent provision of the general Austrian Code of Civil Procedure: Section 602. This is also the case in Sweden, where the authority is found in Section 26 of the Swedish Arbitration Association and in the Swedish Code of Judicial Procedure.

Canada and the United States also follow the majority model of independent statutory authority but are unique among the reporting countries because of the difference in treatment between domestic and foreign arbitration. In Canada, the authority of courts to intervene in domestic arbitrations is found in the Arbitration Act of 1991; the authority to intervene in foreign arbitrations is found in the International Commercial Arbitration Act. Similarly, in the Untied States, the authority of courts to intervene in domestic arbitration evidence-gathering is located in Section 7 of the Federal Arbitration Act. Regarding international arbitrations, there is no clear rule in the United States. Some federal courts interpret 28 U.S.C. § 1782 as authorizing the courts to assist in international arbitration, while other federal courts interpret the statute as inapplicable to private international arbitration.

The second major model, authorization deriving from the courts' general rules, is followed by a minority of reporting countries, including Italy, Belgium, and Argentina. In Argentina, the authority for the court to assist in arbitral evidence-gathering is tied to the general evidence-gathering authority of the courts in the Federal Rules of Civil and Commercial Procedure. Similarly, in Belgium, the authority is located in "the relevant provisions on evidence in the Code of Civil Procedure."

4.4 What requirements must the party requesting the evidence-gathering assistance satisfy in order to obtain the state court's assistance?

The responses to this question reveal the same variety in terms of deference to the arbitral tribunal already described in this General Report.

In some countries such as the United States, the requirements are statutory or rule based and are concerned primarily with satisfaction of the statutory elements and the court's power of compulsion over the discovery target.

In other countries, the courts need to be satisfied that the arbitrators could not obtain the same evidence. For example, in Argentina, the party seeking court assistance must prove that the evidence could not be gathered by the arbitrator(s) or that the requested party failed to comply. Secondly, the requesting party must prove that the court has jurisdiction over the discovery respondent.

On the other end of the spectrum are countries like Finland where the courts exercise much more deference to the arbitral tribunal. As reported by Finland:

"…the first requirement for court assistance in evidence gathering is that the arbitral tribunal has accepted the request for court assistance. In practice, this means that the arbitral tribunal makes an assessment as to whether the evidence requested is material for the resolution of the dispute at hand and whether it is necessary to have the state courts intervene in the evidence gathering.

It has been stated in Finnish legal literature that court assistance in evidence gathering during arbitration proceedings should, in practice, be necessary only very seldom. The opinion of legal scholars is that there are other means available for the arbitrators which sufficiently replace, e.g. witness testimonies under oath and other coercive measures. As stated above, the arbitral tribunal may require a party, a witness or any other person to appear for examination as well as request a party or any other person in possession of a written document or other object which may have relevance as evidence to produce the document or object. If a party, e.g. fails to appear at an evidentiary hearing, if there are grounds to question the credibility of the party or if a party does not comply with the arbitral tribunal's document production order, the tribunal may draw adverse inferences from such behaviour when evaluating evidence and deciding the matter. The arbitral tribunal should also take into account that court assistance will most likely delay the proceedings, wherefore the tribunal should consider carefully whether court assistance is really necessary.[52]

Should the arbitral tribunal find that court assistance is necessary, the tribunal shall make a written decision (or make a note in the minutes) for the requesting party regarding the court assistance. If the decision concerns document production, the documents have to be sufficiently specified (this shall be done by the requesting party) in order for the court to be able to order the production of the documents with a threat of a fine and, where necessary, for the bailiff to be able to retrieve the documents.[53]

If the decision on court assistance concerns hearing of a party or some other person, the decision must contain information about the requesting party, who shall be heard in court and on what themes the person is to be heard. It is up to the party requesting court assistance to provide this information to the arbitral tribunal as all of these issues will be necessary when the tribunal assesses the necessity of court assistance."

The situation is similar in Germany where "the requesting party needs to hand in the approval of the arbitral tribunal describing the desired action … In case the request

[52] See further discussion on the topic: Savola, Mika. *Guide to the Finnish Arbitration Rules*, Helsingin seudun kauppakamari 2015, p. 296-297, Savola, Mika. *Muut ratkaisut kuin lopulliset välitystuomiot välimiesmenettelyssä,* Defensor Legis N:o 3/2003, p. 408-409 and Leppänen, Tatu. *Välimiesmenettelyyn liittyvästä suullisesta todistelusta tuomioistuimessa,* in Velka, vakuus ja prosessi – Juhlajulkaisu Erkki Havansi, Kauppakaari Oyj 2001, p. 190-194.

[53] Note that US-style discovery is not familiar to the Finnish legal system but it is not excluded in arbitration proceedings if the parties so agree. However, when requesting court assistance in evidence gathering all requested documents have to be sufficiently specified as a state court cannot enforce a decision concerning very broad and unspecified discovery orders.

for court support is not introduced by the arbitral tribunal itself but by one of the parties, the other party must be heard before the request is carried out (sec. 1063 para. cl. 2 ZPO)[54]. The court may then review the request and refuse assistance either if the arbitral tribunal itself has not mandated the evidence-gathering, if the arbitral tribunal itself could undertake the requested measure or if the requested measure is not permitted under German procedural law. Otherwise, it is obliged to perform the requested assistance[55]."

Lastly, Mexico reports that in accordance with article 1444 of Mexico's Commercial Code, the arbitral tribunal must approve the request for assistance by the court prior to its filing by any of the parties before the courts.

4.5 What kinds of evidence gathering can the state courts authorize or assist in (document production, sworn interrogation, dispositions, in-court examination by the judge, inspections, etc.)?

Several of the reporting countries take a liberal view in terms of what evidence they can provide. In Austria, for example, "[t]he requested court may take any measure requested by the parties as long as it is not forbidden under Austrian law (cf. section 38(2)(2) Jurisdiction Code). It is, however, not necessary that the measure is provided for in Austrian law. The court must grant both the parties and the members of the tribunal the right to ask questions to any witness or expert. In practice, the court mostly will be asked to summon and examine recalcitrant witnesses, to deliver writs and to request legal assistance from foreign courts and authorities.[56]"

In Belgium, the court may order the appointment of an expert in order to assess, evaluate and determine the origin of damages, the questioning of witnesses, and the production of documents containing proof of a relevant fact to the dispute, among other things.

In Argentina, orders making evidence available for expert examination or permitting entrance into premises may also be obtained.

In the United Kingdom, the court can assist with the following:

a. securing the attendance of witnesses provided that the witness is within the jurisdiction, and the arbitral proceedings are being conducted in England, Wales or Northern Ireland;

b. Taking of evidence of witnesses. There is no condition that the relevant witness needs to be within the jurisdiction as there is with respect to a section 43 witness summons, and letters of request can be sent to foreign courts to seek their assistance in obtaining evidence from witnesses, oral and documentary;

[54] Zöller/*Geimer*, ZPO, sec. 1050 para. 3.

[55] Zöller/*Geimer*, ZPO, sec. 1050 para. 6.

[56] Hausmaninger, Christian, in *Kommentar zu den Zivilprozessgesetzen*, mn 25ss to section 602.

c. Making orders relating to property which is the subject of proceedings (e.g. inspection, photographing, preservation, custody or detention of the property; and

d. Ordering samples to be taken, observations made or experiments conducted on the property which is subject to the proceedings.

4.6 What rules govern the evidence gathering (rules of the state court, rules of the arbitral institute, others)?

Once a court becomes involved in arbitration, the reporting countries' courts generally follow one of two rules: the rules of the court or the rules of the arbitration tribunal.

The majority of reporting countries follow the former rule, including Canada, the United Kingdom, France, Austria, Switzerland, Belgium, and Argentina. In Austria, for example, once a court intervenes in arbitral evidence-gathering, "[t]he proceedings are government by the Austrian Code of Civil Procedure." Argentina's courts similarly follow the Federal Rules of Civil and Commercial Procedure when becoming involved in arbitral evidence-gathering.

A minority of reporting countries' courts follow the rules of the arbitration tribunal when intervening in its evidence gathering. These countries include Spain, Italy, the Netherlands, and Nigeria. In Spain, for example, Article 25 of the Spanish Arbitration Act states that the courts must follow the rules established by the parties in the arbitration agreement. If the parties do not address the specific issue in their agreement, the courts must follow the rules devised by the arbitration tribunal. In Nigeria, the rules of the arbitral institution govern the courts' actions.

Italy has adopted a hybrid of the two systems. The Italian Code of Civil Procedure governs the courts' arbitral evidence-gathering. However, under the Code of Civil Procedure, the parties are free to establish their own rules of evidence-gathering in the arbitration agreement that govern the courts' actions.

In the United States the 28 U.S.C. § 1782 statute provides for application of either the Federal Rules of Civil Procedure or other applicable rules.

4.7 Does the kind of arbitration (domestic vs. international, investor-state, commercial, etc.) impact what evidence can be gathered with the assistance of the state court?

Generally speaking, the division between the reporting countries on this question is between the civil law systems and the common law systems.

The reporting civil law countries do not treat domestic and international arbitration any differently in terms of their laws and the authority of their courts to intervene. This is true in France, Spain, Belgium, Argentina and Brazil. In Austria, for example, Section 602 of the Austrian Code of Civil Procedure makes no distinction between arbitrations seated within Austria and those seated abroad.

A notable exception to this general rule is Switzerland, which does distinguish between domestic and international arbitrations. An arbitral tribunal seated in Switzerland, regardless of its international or domestic concern, may directly request assistance from the Swiss courts. An arbitral tribunal with its seat outside Switzerland may seek court assistance only through letters rogatory.

The reporting common law systems do generally treat domestic and international arbitration differently. In both the United States and Canada, two separate laws govern the courts' powers in domestic and international arbitrations. In the United Kingdom, only one law governs both domestic and international arbitration but the law specifically limits the ability of the courts to compel a witness' attendance to persons domiciled in England, Wales, or Northern Ireland. Therefore, in effect, the courts of the United Kingdom would be more greatly limited in international arbitration than in domestic arbitration.

Nigeria is an exception to the common-law rule in that it does not treat domestic and international arbitration any differently.

4.8 Who can the courts order disclosure or discovery from? In other words, who do the state courts have jurisdiction over?

In some places, the courts are limited in their ability to order disclosure or discovery from non-parties to the arbitration. For example, in the United Kingdom, "[t]he courts can only order disclosure or discovery from the parties to the arbitration and this is in the first instance within the purview of the tribunal. Whilst the court can order third parties to preserve and/or deliver up evidence and documents pursuant to section 44 of the Arbitration Act, this power does not permit the court to make an order for disclosure of documents against a third party (as it could if it was straightforward English court proceedings pursuant to the CPR)[57]."

By contrast, in the United States, the analysis involves the limits of the court's subpoena powers which are oftentimes limited to a certain geographic area, but not concerned with the question of whether the discovery target is a party or non-party. As such, if evidence is needed from disparate places, it may be necessary to request the assistance of more than one court. Typically, US courts are analyzing personal jurisdiction factors and domicile to determine whether they have jurisdiction. In another aspect that may be counter-intuitive, 28 U.S.C. §1782 case law suggests that the statute is less likely to be applied when the discovery sought is from a party who presumably is under the jurisdiction of the arbitral tribunal.

4.9 Does the state court have the power to compel the discovery or disclosure target to give the evidence? When will the state court take that step?

[57] Assimina Maritime Ltd v Pakistan Shipping Corporation [2004] EWHC 3005 (Comm),

In Austria the applicable procedure provides that if the witness fails to appear before court, the judge will first order the witness to bear the costs caused by his failure to appear. "At the same time, the court will summon the witness again and threaten a fine for the failure to apply. If the witness again fails to appear in court, the court will summon the witness again doubling the fine and will order the witness to be brought before the judge by force."

In Belgium, the powers appear to be more limited such that "[t]he state court may order the party refusing to disclose to produce the required evidence, usually by ordering it to pay non-compliance penalties per day of non-disclosure. The state court's intervention will end there. Its ruling will be enforceable so that it can be implemented by a bailiff at the request of the party demanding disclosure."

In Canada, the case law recognizes that "the role of the court is merely to exercise for the arbitral tribunal the compulsion power which the arbitral tribunal may not have".

4.10 What can the state court do if the discovery or disclosure target fails to comply?

As described in 4.9, there is a spectrum of options available to the courts in instances of non-compliance. Specifically, failure to comply can result in penalties ranging from an assessment of attorneys' fees and costs, to forced appearance, or even imprisonment as is the case in the United States when there is serious and ongoing contempt of court.

4.11 Who can request assistance from the state court (parties to the arbitration, the tribunal, the arbitral institution, others)?

In most countries, the parties or arbitral tribunal can request the assistance from the state court.

For example, in Peru, "[t]he arbitral tribunal or either party with the tribunal's approval, can request legal assistance for the [taking] of evidence, accompanying his request, copies of the document proving the existence of arbitration and the decision entitling the party to resort to such assistance … Unless the [taking] of the evidence is manifestly contrary to public order or express prohibitive laws, the judicial authority is limited to comply promptly with the request for assistance, without assessing [] their origin and without admitting opposition or appeal against the decision of the arbitral tribunal."

In the United States, there is extensive authority on the question of whether "interested parties" can request assistance from the state courts. In the context of 28 U.S.C. § 1782, some non-party interested parties have been allowed to apply for assistance under the statute so long as they can show a need or make a showing that they are contemplating becoming parties to a foreign proceeding.

4.12 Can the disclosure or discovery target seek relief from state court or to otherwise modify or prevent the disclosure or discovery?

The countries responding on this question generally report the state courts that intervene in disclosure will act to modify or prevent the disclosure under certain circumstances which may be brought to their attention. In Canada and the United States, the parties or non-parties subject to an order for discovery may bring a motion to protect certain documents from inspection, to limit discovery in other ways through a protective order or may move to quash a subpoena compelling their production of documents or attendance at a deposition.

4.13 What consideration will be given by the state court to concerns about the invasion or a privilege (attorney-client, etc.), confidentiality protections, or potential criminal liability in the event of disclosure? Whose laws and rules will the state court apply?

Most countries report that their courts will be protective of privileges such as the attorney-client privilege, confidentiality protections, and other such rights as may be threatened by the requested disclosure.

Austria reports that its law "respects certain privileges, though these are far narrower than those found in common law. While, *e.g.,* the attorney can invoke a privilege when asked to produce a document prepared for a client, the client could not." In Belgium, the state courts will apply the law of the country as decided by the parties in respect of privilege and confidentiality protections. In Brazil, the courts will intervene if there is a violation of some fundamental right or public policy in Brazil, including in instances where someone's attorney-client privilege may be invaded.

4.14 Do the state courts need to enquire into the view of the arbitral tribunal on the disclosure or discovery?

On this question there is a split, with some countries' courts being more deferential to the view of the arbitral tribunal, on the disclosure or discovery. This is the case in Austria.

Other countries' courts are less deferential, including those in Belgium and Canada. In the latter, it is reported that, "[i]t does not seem that the view of the tribunal will be enquired into. As above, the court is given discretion as to whether to grant the request at all, and does so according to its rules. The court has exclusive jurisdiction to determine its own rules of procedure and evidence, and so the tribunal is not to be consulted as to whether disclosure ought to be ordered on the court's rules."

In the United States, the courts will consider whether the requested discovery attempts to circumvent a prohibition or proof gathering restriction.

4.15 Do the state courts need to enquire into the ultimate admissibility of the evidence in the arbitration?

Most of the reporting countries report that the enquiry of their courts in this regard is narrow. In Austria the court may only decide whether the measure is forbidden by Austrian procedural law and may not assess whether the evidence is admissible or necessary in the arbitral proceedings.[58] In Argentina, the courts will only enquire into whether the request for evidence represents an infringement upon third-party rights or public order. In Brazil, the court's inquiry is limited to whether the evidence gathering is illegal under its law. Similarly, in the United States, the courts will not concern themselves with the admissibility of the evidence they are being asked to help gather, deferring instead to the arbitral tribunal to decide the question at the appropriate juncture in the arbitration.

4.16 Do the state courts have the power to order reimbursement of attorneys' fees or expenses incurred by the disclosure or discovery target? If so, in what instances will they order that?

The majority of reporting countries (the United Kingdom, France, the Netherlands, Germany, Sweden, Argentina, and Nigeria) generally hold that intervening courts may order reimbursement of attorneys' fees or expenses related to compelled disclosures.

In the Netherlands, for example, this outcome follows from the general rule that attorneys' fees and expenses are recoverable in standard litigation. "[A]s disclosure proceedings are very similar to standard litigation it should not be surprising that the same rules for reimbursement of attorneys' fees apply." In the United Kingdom, English courts have general discretion on awarding attorneys' fees and this discretion extends to court-assisted arbitral evidence gathering proceedings.

In other countries, some fees or expenses may be recovered by certain parties but not others. In Spain, for example, the courts are not empowered to reimburse attorneys' fees or expenses but Article 37.6 of the Arbitration Act empowers arbitrators to reimburse the parties' costs. Therefore, the costs are sometimes recoverable by the parties themselves but not third parties. Similarly, in Switzerland, the winning party is entitled to its attorneys' fees and costs but third parties are only entitled to reasonable compensation. Finland, for its part, holds the opposite rule: the parties must generally bear their own costs but third parties can be compensated.

A minority of reporting countries, the general answer is that attorneys' fees and expenses are not recoverable. In Brazil, the courts are not empowered to order reimbursement of attorneys' fees or expenses. The rule is less clear in Canada, but generally speaking, attorneys' fees and costs are not recoverable except in "extremely limited circumstances." Lastly, in the United States, both parties and non-parties are generally responsible for bearing their own attorneys' fees relating to discovery. Parties typically also bear their costs. Third-parties fare better in terms of costs but

[58] Hausmaninger, Christian, in *Kommentar zu den Zivilprozessgesetzen*, mn 43 to section 602.

must generally apply to the court if there is disagreement as to the payment of such costs by the party seeking the evidence.