



# LALIVE

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**Setting aside awards and the importance of the seat of arbitration**

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Where can you seek to annul an  
international arbitral award?

Competence for setting aside international awards

# The rules applicable to the arbitration

- Self-contained annulment procedure: ICSID Arbitration Rules (2006), Chapter VII (Rules 50 to 55)
- Other self-contained remedies such as correction, interpretation of the award or complement thereto by way of an additional award:
  - UNCITRAL Arbitration Rules (2010), Articles 37 to 39
  - THAC Arbitration Rules (2015), Article 74
  - VIAC Arbitration Rules (2017), Article 33
  - SIAC Arbitration Rules (2016), Rule 33
  - ICC Arbitration Rules (2017), Article 36
  - LCIA Arbitration Rules (2014), Article 27

## The law of the seat of the arbitration – the courts of the seat as a principle

- *“A challenge to an award (usually) takes place in the courts of the seat of the arbitration”* – Redfern & Hunter on International Commercial Arbitration (2015), § 10.5
- *“An award may [...] be “annulled” (alternatively termed “set aside” or “vacated”), but virtually always only by a court in the arbitral seat”* – G. Born, International Commercial Arbitration (2014), § 22.01[B][2]
- **Article 6 UNCITRAL Model Law:** “[t]he functions referred to in article[e] [...] 34(2) shall be performed by [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions]”

## The law of the seat of the arbitration – comparative overview

	Thailand	Singapore	Korea	Vietnam	Switzerland	France
Relevant provision(s)	Section 9 and 40 Arbitration Act BE 2545 (2002)	Sections 8 and 24 International Arbitration Act (2002)	Article 7(3)(2) Arbitration Act of Korea (2016)	Articles 7(1), 7(2)(f) and 68-69 Law on Commercial Arbitration (2010)	Article 191 Federal Act on Private International Law (1987)	Article 1519 Civil Code of Procedure (2011)
Competent court(s) for setting aside proceedings	Central (or regional) Intellectual Property and International Trade Court	High Court in Singapore	Court chosen by the Parties	Court chosen by the Parties	Swiss Federal Tribunal	Court of Appeal in the place where the award was rendered
	Court where the proceedings are conducted		Court in the place of arbitration	Court in the place where the award was rendered		
	Court in which either party is domiciled					
	Court which has jurisdiction over the dispute submitted to arbitration					
Time limit	90 days	3 months	3 months	30 days	30 days	1 month

## The courts of the applicable law as an exception – the Indian saga

- **Article V(1)(e) New York Convention:** “*Recognition and enforcement of the award may be refused [where] [t]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.*”
- In exceptional cases, national courts asserted jurisdiction on set-aside proceedings where the seat of the arbitration was NOT in their territory:
  - *Bhatia International vs Bulk Trading SA*, Supreme Court of India, 13 March, 2002 ;  
*Venture Global vs Satyam Trading*, 10 January 2008
  - Reversed by *Bharat Aluminium Co (Balco) vs Kaiser Aluminium Technical Services*, Supreme Court of India, 6 September 2012

When can you seek to annul an international arbitral award?

Grounds for setting aside international awards

## Article 34 of the UNCITRAL Model Law – application for setting aside as an exclusive recourse against arbitral awards

- (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
- (2) An arbitral award may be set aside by the court specified in article 6 only if:
  - (a) the party making the application furnishes proof that:
    - (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the State; or **[INCAPACITY/LACK OF VALID ARBITRATION AGREEMENT]**



(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or [**LACK OF DUE PROCESS**]

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on the matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or [***ULTRA PETITA OR EXCESS OF POWER***]

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

**[PROCEDURAL IRREGULARITY/IRREGULAR COMPOSITION OF THE ARBITRAL TRIBUNAL]**

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of the State; or **[INARBITRABILITY]**

(ii) the award is in conflict with the public policy of the State **[PUBLIC POLICY]** [...]

## Grounds – comparative overview

	UML	Thailand	Singapore	Korea	Vietnam	Switzerland	France
CAPACITY/LACK OF VALID ARBITRATION AGREEMENT	Article 34(2)(a)(i)	Section 40(1)(a), (b)	Section 24 Reference to Article 34 UML	Article 36(2)(a)	Article 68 (2)(a),(c) Wrong assertion of jurisdiction	Article 190(2)(b) Wrong assertion/denial of jurisdiction	Article 1520(1) Wrong assertion/denial of jurisdiction
DUE PROCESS	34(2)(a)(ii)	40(1)(c)		36(2)(b)		190(2)(d)	1520(4)
<i>ULTRA PETITA</i> /EXCESS OF POWER	34(2)(a)(iii)	40(1)(d)		36(2)(c)		190(2)(c) <i>Ultra petita</i> and <i>Infra petita</i>	1520(3) <i>Ultra petita</i> and <i>Infra petita</i>
PROCEDURAL IRREGULARITY/ IRREGULAR COMPOSITION OF ARBITRAL TRIBUNAL	34(2)(a)(iv)	40(1)(e)		36(2)(d)	68(2)(b)	190(2)(a) Tribunal composition	1520(2) Tribunal composition
INARBITRABILITY	34(2)(b)(i)	40(2)(a)		36(2)(a)	68(2)(e) Contradicts fundamental principles of Vietnamese law		
PUBLIC POLICY	34(2)(b)(ii)	40(2)(b)		36(2)(b)		190(2)(e)	1520(5)
ADDITIONAL GROUNDS				24(a) Fraud/corruption		Fraud/corruption (68(2)(d))	
			24(b) Prejudicial breach of natural justice				

## Annulment and enforcement

	UML Art 34 Setting aside	UML Art 36 Recognition/ enforcement	NYC Art V Defense to recognition/enforcement
CAPACITY/LACK OF VALID ARBITRATION AGREEMENT	34(2)(a)(i)	36(1)(a)(i)	V(1)(a)
DUE PROCESS	34(2)(a)(ii)	36(1)(a)(ii)	V(1)(b)
<i>ULTRA PETITA</i> /EXCESS OF POWER	34(2)(a)(iii)	36(1)(a)(iii)	V(1)(c)
PROCEDURAL IRREGULARITY/IRREGULAR COMPOSITION OF ARBITRAL TRIBUNAL	34(2)(a)(iv)	36(1)(a)(iv)	V(1)(d)
INARBITRABILITY	34(2)(b)(i)	36(1)(b)(i)	V(2)(a)
PUBLIC POLICY	34(2)(b)(ii)	36(1)(b)(ii)	V(2)(b)
ADDITIONAL GROUNDS		36(1)(a)(v) Award set aside/suspended « <i>by a court of the country <u>in</u> <u>which, or under the law of</u> <u>which, that award was made</u></i> »	V(1)(c) Award not yet binding/suspended or set aside « <i>by a competent authority of the country <u>in which, or under</u> <u>the law of which, that award</u> <u>was made</u></i> »

Thank you!

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