

HARMONISATION
OF
PROCEDURAL LAW
IN
INTERNATIONAL COMMERCIAL ARBITRATION

By
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Introduction

The principle of party autonomy is widely accepted in the practice of international commercial arbitration.¹ However, it still encounters certain limitations in its applications, especially for the fact that the demands of natural justice and the public good cannot be neglected by the parties.² The various states in the international system have and operate peculiar systems of mandatory rules and public policies, which tend to impart significantly on the arbitral procedure, thereby creating a situation of discordance of outcomes of arbitration in different countries.³ For this reason, this writer intends to examine ways by which the various procedural laws can actually be harmonised. This thesis shall therefore focus on the discordances and confusion that often arise in the interaction of the various laws that may be applicable to the arbitral process in international commercial arbitration, as well as ways of achieving a harmonisation of these laws.

Again for the fact that the arbitration laws of various states are likely to differ, the application of the principle of party autonomy under each of these different legal systems is likely to produce different results. Where the parties have not chosen the procedural law to conduct the arbitration, the usual solution is to resort to the *lex loci arbitri* to provide the applicable rules. The place for arbitration, however, may have little or no connection with the arbitral procedure, and should not

¹ Lew, Julian D.M., *Applicable Law in International Commercial Arbitration :A Study in Commercial Arbitration Awards*, 1978, p79

² Livingstone, Mia Louise, "Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact?", (2008), *Journal of International Arbitration*, Volume 5, No. 5, p532; Pryles, Michael, "Limits to Party Autonomy in Arbitral Procedure", (2007), *Journal of International Arbitration*, Volume 24, No. 3, p328

³ Bockstieegel, K-H., "Public Policy and Arbitrability", in *Comparative Arbitration Practice and Public Policy in Arbitration*, P. Sanders edn, 1987, p179-180

therefore automatically determine the procedure for the conduct of the arbitral proceedings.⁴ More importantly, the *lex loci arbitri* may not even represent the unexpressed intentions of the parties. On the other hand, although the parties' freedom to choose the rules of procedure is a widely recognized principle of international commercial arbitration, in practice it is usually subject to any restraints occasioned by mandatory rules and public policy.⁵ For this reason, the *lex loci arbitri* in the arbitral process appears to be in conflict with the very concept of party autonomy. This can result in a hindrance to the development of international commercial arbitration, exacerbated by the fact that states in the international system are usually unwilling to relinquish their supervisory powers over arbitration conducted in or sought to be enforced within their territory.⁶

The local procedural law, however, is generally in place for the conduct of national arbitration proceedings, but has been found to fall short of the standard required in international arbitration.⁷

Hence, some scholars have also submitted that arbitration can and ought to be able to extricate from the control of the law of the country of arbitration in order to guarantee the complete freedom of the parties to choose or design the framework of the arbitral process.⁸ This is known as the

⁴ Fouchard, Philippe, Gaillard, Emmanuel, and Goldman, Berthold, *Fouchard Gaillard Goldman on International Commercial Arbitration*, E. Gaillard & J. Savage edn, 1999, p635

⁵ Maniruzzaman, A. F. M., "International Arbitration and Mandatory Public Law Rules in the Context of State Contracts: An Overview", (1990), *Journal of International Arbitration*, Volume 7, No.3, p54

⁶ Dicey, A. and Morris, J., *The Conflict of Laws*, 12th edn, 1993, p583, Chukwumerije, O., *Choice of Law in International Commercial Arbitration*, 1st edn (USA, Quorum Books, 1994), p87

⁷ Reid, Alan S., "The UNCITRAL Model Law on International Commercial Arbitration and the English Arbitration Act: Are the Two Systems Poles Apart?", (2004), *Journal of International Arbitration*, Volume 21, No.3, p236-237

⁸ Paulsson J., "Delocalisation of International Commercial Arbitration: When and Why It Matters", (1983), *I.C.L.Q.*, Volume 32, p57

delocalisation theory;⁹ which substantially attacks the efficacy of traditional seat theory in effectively meeting the demands of modern arbitration practice. This is also in consonance with the current trend of international commercial arbitration of breaking free of the fetters of the *lex loci arbitri*. Many scholars support this theory because it appears to be in complete consonance with the party autonomy principle in trying to separate the arbitral process from the *lex loci arbitri*.¹⁰ Opposing views have however criticized this theory for its failure to address the issues that attend the recognition and enforcement of the arbitral award,¹¹ and for the dearth in practical cases in support of the theory.¹²

However, in practical terms the theory is bedeviled with severe limitations, posed by most national courts, which believe that it is their duty to supervise arbitration in the form of mandatory rules and public policy. A lot of the debates that have arisen as per the theory and practice of arbitration are usually in connection with the inevitable tensions arising from the interactions between the demands of the principle of party autonomy and the overbearing presence of state's legal controls.¹³ Hence, many states require that the arbitral process is subject to minimal control,

⁹ Maniruzzaman, Dr. A. F. M., "Conflict of Laws Issues in International Arbitration: Practice and Trends", (1993), *Arbitration International*, Volume 9, p371-404

¹⁰ Van den Berg, A.J., *The New York Arbitration Convention of 1958 Towards a Uniform Judicial Interpretation*, 1981, p30

¹¹ Chukwumerije, O., Fn 6, at p11-12

¹² *Gotaverken Arendal AB v. Libyan General National Maritime Transport Company* (1981) 6Y.Comm.Arb. p221, 237 and *Société Européenne d'Etudes et d'Enterprises (S.E.E.) v. Federal Republic of Yugoslavia*, P. Sanders edn, Vol. I, 1976, p195-198; *Chromalloy Aeroservices Inc. v. Arab Republic of Egypt*, 939 F. Supp. 907 XXII YBCA 1001 (1997) (D.D.C. 1996); *Omnium de Traitement et de Valorisation S.A. v Hilmarton Ltd.*, [1999] 2 Lloyd's Rep. 222 have all adopted the delocalisation theory.

¹³ Barraclough, Andrew and Waincymer, Jeff, "Mandatory Rules of Law In International Commercial Arbitration", (2005), *Melbourne Journal of International Law*, Volume 6, No.2,

interference or supervision by the mandatory rules of the procedural laws and the public policy of arbitral sites.¹⁴ On the other hand however, the interpretation, application and scope of the public policy still differ from state to state, thereby ensuring that the usual arguments concerning the relationship between party autonomy and the law of the sit continue to arise.

In an attempt to resolve the above issues, this thesis shall also attempt to establish how far the delocalisation theory can go in eliminating the discordances that usually arise from the operation of the procedural law,¹⁵ and whether the Model Law can achieve the much desired harmonisation of the procedural laws governing the practice of arbitration of various states. International commercial arbitration has become popular and is gradually being adopted in the commercial undertakings of states. However in many cases, it may call into question the applicability of the law of various states as a result of the differences in political orientation, social regimes, as well as culture, economy, customs and trade usages. In this regard, in an arbitration held in different states as regards the same subject matter, the very fact that different arbitration procedural rules are likely to be applied, is in itself likely to engender different outcomes in the different jurisdictions. It is against this background that the UNCITRAL Model Law has sought to harmonise the arbitration practice in the different

(<http://www.austlii.edu.au/au/journals/MelbJIL/2005/9.html>), access on 8 May 2009

¹⁴ Born, Gary B., *International Commercial Arbitration: Commentary and Material*, 2nd edn, 2001, p436. For example, Article 19(1) of the Model Law provides that “subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.” Article 19 also provides that, where the parties have not agreed upon procedure, the arbitral tribunal has power to conduct the arbitration in such manner as it considers appropriate.

¹⁵ Fn 9, at p371-404

legal systems, in the event that it is adopted by different states of the world.¹⁶ Unfortunately, the Model Law is not binding on countries around the world. They may choose merely to refer to the Model Law, or /and decide whether or not to adopt it. Many countries have adopted the Model Law into their arbitration laws in one form or the other, but there are still countries yet to have made any such adoption or reference.

Some scholars assert that the Model Law is more suited to the needs of developing countries, whose legal systems are not fully developed, and therefore more amenable to an internationally-oriented Model Law.¹⁷ In other words, the Model Law appears less suited, for the legal systems of the more developed countries which are likely to already have arbitration legislation firmly in place and practiced.¹⁸ Again, while the Model Law has been effectively adopted by some countries, some other countries have ostensibly adopted it but failed to effectively incorporate it into their arbitration practice. The issue as to whether the Model Law and the delocalisation theory have the potential of achieving harmonisation of the law applicable to the procedure has elicited much debate among practitioners and authors. This can also be seen in the latest withdrawal from the Model Law regimes by the new Scottish Arbitration (Scotland) Act 2009.

This thesis shall also propose methods of resolving this issue. Even though prominent scholars,

¹⁶ Redfern, A. and Hunter M, *Law and Practice of International Commercial Arbitration*, 4th edn (London: Sweet & Maxwell Ltd., 2004), p69

¹⁷ Davidson, Fraser P., "International Commercial Arbitration: The United Kingdom and UNCITRAL Model Law", (1990), *J.B.L.*, p480, 484

¹⁸ Fn 7, at p228. One such state is England, which in 1996 judged adoption of the Model Law to be unnecessary in light of the existence of England's own arbitration legislation (*English Arbitration Act 1996*).

like H.E. Judge Howard M. Holtzmann, H.E. Judge Stephen Schwebel and Dr. Yu, have proposed some framework or the other for resolution,¹⁹ the practicability of their solutions however seems doubtful to the present writer. This writer proposes that instead of establishing one supranational body, six should be established representing each of the six main continents. Each continent will have one supranational body within their continents of jurisdiction, which would operate as the top and final authority. We believe that being the final arbiter in arbitration matters, the six supranational bodies would prove a lot simpler to operate. These six bodies would be empowered by a Convention to reach final decisions, from which there shall be no appeals. Furthermore, these six supranational bodies should be equivalent in status and power to each other, and are not subject to the supervisory jurisdiction of any arbitral institution or court.

This writer shall therefore advance an argument in support of the use of supranational arbitration to achieve the harmonisation of arbitral practice. However, the key to the success of this model shall be hinged on the establishment and workings of six supranational bodies; the mechanics of which we shall discuss later on in this thesis.²⁰

¹⁹ Regarding these resolutions, please refer to Chapter 7 of this thesis. Yu, Hong-Lin, "Total Separation of International Commercial Arbitration and National Court Regime", (1998), *Journal of International Arbitration*, Volume 15, No.2, p161; H.E. Judge Howard M. Holtzmann, "A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards", in *The Internationalisation of International Arbitration: The LCIA Centenary Conference, Hunter*, edited by Martin and Marriott, Arthur and Veeder, V.V., 1995, p109

²⁰ Please refer to Chapter 7 of this thesis.

Chapter 1

Party Autonomy

1.1 Introduction

Party autonomy is an important guiding principle for the conduct of arbitral proceedings in international commercial arbitration. It is a principle that has not only been approved by national laws, but also by international arbitral institutions and organizations.¹ Although party autonomy has been accepted broadly, its practical application is however, usually limited by the mandatory rules and public policy of countries involved.² Conventionally, international commercial arbitration is subject to the *lex loci arbitri*,³ but this has been variously criticized, for the fact that the *lex loci arbitri* appears to be in conflict with the very concept of party autonomy, and it is feared that this can result in a hindrance to the development of international commercial arbitration.⁴ Many scholars and practitioners share the view that the parties are free to agree upon the law that should be applicable to the procedure, and some have gone further to postulate a theory that supports detaching from the control of the law of the country of origin. This explains the very essence of the “delocalisation” theory.⁵ Even so, this theory has proven not to be particularly satisfactory, and has provoked much debate about its practicability.⁶

¹ Redfern, A. and Hunter M, *Law and Practice of International Commercial Arbitration*, 4th edn (London: Sweet & Maxwell Ltd., 2004), p315

² Moss, Giuditta Cordero, “International Arbitration and the Quest for the Applicable Law”, (2008), *Global Jurist*, Volume 8, Issue 3, p19

³ Fn 1, at p1-37, (<http://www.kluwerarbitration.com.ezproxy.stir.ac.uk/arbitration/DocumentFrameSet.aspx?ipn=26306>), access on 17 March 2009

⁴ Dicey, A. and Morris, J., *The Conflict of Laws*, 12th edn, 1993, p583; Chukwumerije, O., *Choice of Law in International Commercial Arbitration*, 1st edn (USA, Quorum Books, 1994), p87

⁵ Dicey, A. and Morris, J., Fn 4, at p541-542

⁶ Article V(1)(d) and 2(b) of the New York Convention

Given the intense debates that have arisen regarding the relationship and interaction between party autonomy, the *lex loci arbitri*, and the “delocalisation” theory in the practice and study of international commercial arbitration, it shall be therefore worth our while to dedicate some space in this chapter to discuss this very important issue. The purpose of this chapter is to elaborate on the aforementioned points to establish the advantages of as well as the shortcomings inherent in the theory and practice of party autonomy and to propose ways of resolving the various issues highlighted.

1.2 Background of Party Autonomy

From history we know that around 403 B.C., Athens and Greece had both practiced arbitration, as a means of resolving disputes between parties.⁷ The parties chose a third party who acted as an arbitrator to hear their submissions and reach an appropriate decision. This approach had afforded the parties the freedom to choose the place of arbitration and the procedure to govern the conduct of the proceedings. Although a rather simple procedure, the parties nevertheless found this a more attractive method of resolving their disputes.

The concept of party autonomy has variously metamorphosed since the 16th Century when it was first advanced in the work of Charles Dumoulin, a French Scholar, who lived around that time. Dumoulin had advanced that with respect to contracts, “the will of the parties was sovereign.” Today party autonomy has become an internationally accepted principle governing choice of law in

⁷ Mustill, “Arbitration: History and Background”, (1989), *Journal of International Arbitration*, Volume 6, p43

contracts.⁸

The English court was the first of all the common law countries to recognize that parties were entitled to have their choice of law expressed in their contracts. In *Robinson v. Bland*,⁹ issue before the court was whether a contract which was valid under the law of France, where it was made, and void under English jurisprudence, could be judicially enforced in England. The plaintiff Robinson had loaned money to A in Paris, and A lost the money to the plaintiff through gaming. A then gave Robinson a bill of exchange payable in London to cover the entire debt. After A's death, the plaintiff brought an assumpsit against his administrator (the defendant-Bland) on three grounds: claiming for the bill of exchange, the borrowed amount of money and the money due to him on the gamble. The House of Lords held that the defendant must pay money on the loan, but the bill of exchange which represented money lost to the plaintiff on the game was void.

Lord Mansfield pointed out that: "The general rule, established *ex comitate* and *et jure gentium*, is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception when the parties at the time of making the contract had a view to a different kingdom."¹⁰ He explained the essence of the exception in these words: "The law of the place can never be the rule, where the transaction is entered into with an express view to the law of another country, as to the rule by which it is to be

⁸ Zhang, Mo, "Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law", (2006), *Emory International Law Review*, Volume 20, p511,516

⁹ *Robinson v. Bland* (1760) 1 Wm. BI 234. z Burr 1077

¹⁰ *Ibid* at p258-259

governed.”¹¹

It is worthy of note that for the fact the principle of party autonomy has been adopted in England, parties are free to choose the law to govern their contract even if it is different from that of the place where the contract is made. In the 1865 cases of *Peninsular and Oriental Steam Navigation Company*¹² and *Lloyd*,¹³ English courts had abandoned *lex loci contractus* in preference for the principle of party autonomy to determine the law applicable to a contract, even though this is a substantive law issue. Thereafter, this principle has been broadly applied in the field of private international law.¹⁴ In the case of *Dallal v. Bank Mellat*,¹⁵ the plaintiff brought proceedings against an Iranian state enterprise in 1980. An arbitration tribunal was established at The Hague, which dismissed his claim. The plaintiff then brought an action in England, the causes of action all relate to the initial transactions but framed in a different way. The plaintiff claimed that the tribunal had reached a wrong decision. The defendant then applied to strike out the claim by the reason that it had already been the subject of litigation before a competent tribunal. This case states that the English courts would recognize the validity of a foreign arbitration tribunal’s determination, whose competence originates from international law or practice; it follows that the court would recognize the Hague tribunal. In short, the plaintiff’s action was an abuse of process and can not be

¹¹ Ibid at p1078

¹² *The Peninsula and Oriental Steam Navigation Company v. Shand* (1865) 3 Mco. P.C. (N.S.) 272

¹³ *Lloyd v. Guibert* (1865) L.R. 1 L.Q.115

¹⁴ Lew, Julian D.M., *Applicable Law in International Commercial Arbitration :A Study in Commercial Arbitration Awards*, 1978, p76

¹⁵ *Dallal v. Bank Mellat* (1986) 83 L.S.G.779,(1986)130.S.J.185

accepted. It appears that English law is not adverse to the possibility of applying a foreign procedural law in any arbitration in furtherance of the principle of party autonomy and their freewill to determine the applicable procedural law.

This principle was later applied to the choice of procedural law in international commercial arbitration and would usually come to bear in relation to Conventions or Rules of international institution. For instance, this principle is given certain impetus in the Geneva Protocol of 1923 which provides *inter alia* that “the arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties...”¹⁶ A similar provision is contained in the Geneva Convention of 1927, which provides in part that one of the prerequisites for recognition and enforcement of awards is that the arbitral tribunal is “constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure.”¹⁷ Apart from the Geneva Protocol, the New York Convention has also indicated that the recognition and enforcement of a foreign arbitral award would be denied if “the arbitral procedure was not in accordance with the agreement of the parties.”¹⁸ Parties are therefore free to choose the rules to govern the arbitral proceedings. The history of the Model Law also has it that the principle of party autonomy had

¹⁶ Article 2 of the Geneva Protocol of 1923 provides that “The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.

The Contracting States agree to facilitate all steps in the procedure which require to be taken in their own territories, in accordance with the provisions of their law governing arbitral procedure applicable to existing differences.”

¹⁷ Article 1(c) of the Geneva Convention of 1927 provides that to obtain such recognition or enforcement, it shall, further, be necessary “That the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure.”

¹⁸ Article V(1)(d) of the New York Convention

received unanimous approval and exists in the following provision under the Model Law: “Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.”¹⁹

The principle of party autonomy has been adopted by International Chamber of Commerce (ICC), which spells this out in the following terms in its Rules: “The proceedings before the Arbitral Tribunal shall be governed by these Rules and, where these Rules are silent, any rules which the parties or, failing them, the Arbitral Tribunal, may settle...”²⁰ The London Court of International Arbitration (LCIA) contains a similar provision: “The parties may agree on the conduct of their arbitral proceedings, and they are encouraged to do so...”²¹ The AAA also broadly encompasses the determining procedure to be pursued by the arbitral tribunal contingent on the agreement of the parties.²² Article 182(1) of Swedish Arbitration Act also provides that “the parties may, directly or by reference to arbitration rules, determine the arbitral procedure; they may also submit it to a procedural law of their choice.”²³

Furthermore, Article 42(2) of Washington Convention 1965 also stipulates that “the Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties.” A specific few of the arbitration rules however are outlined in such a way as to require the transfer of control

¹⁹ Article 19(1) of the Model Law

²⁰ Article 15(1) of the Rules of Arbitration of the International Chamber of Commerce (ICC Rules of Arbitration)

²¹ Article 14(1) of the LCIA Arbitration Rules

²² Article 16 of the AAA International Arbitration Rules

²³ The leading international arbitration institution includes the ICC, LCIA, and AAA, each of which has adopted the parties is free to choose the law to conduct the proceedings.

from the parties to the arbitral tribunal at the stages of the arbitral proceedings. The UNCITRAL Rules for example provides that “subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate...”²⁴ However, the parties will still be able to exercise substantial freedom during the inquiry or hearing,²⁵ in determining the place of arbitration,²⁶ the language or languages to be adopted by the tribunal, and so on.²⁷

However, whilst parties possess the freedom to decide whether or not to submit their disputes to arbitration, and choose the place of arbitration, arbitrators and the arbitral procedure,²⁸ the exercise of this freedom is nevertheless limited by the strong influence of the jurisdictional elements in arbitration.²⁹

1.3 The Relationship between the Party Autonomy and Nature of Arbitration

As stated above, the rule of party autonomy has been accepted in international commercial arbitration. Similarly the attitude of the court towards the arbitration agreement appears to be closely connected to the nature of arbitration and the party autonomy rule. Hence, it is necessary to understand the fundamentals of party autonomy and its role of relation to the nature of arbitration.

Generally practitioners and scholars have advanced the jurisdictional, contractual, mixed/hybrid,

²⁴ Article 15.1 of the UNCITRAL Arbitration Rules (emphasis added)

²⁵ Article 15.1 of the UNCITRAL Arbitration Rules

²⁶ Article 16.1 of the UNCITRAL Arbitration Rules

²⁷ Article 17.1 of the UNCITRAL Arbitration Rules

²⁸ Ibid

²⁹ Fn 1, at p1-37, (<http://www.kluwerarbitration.com.ezproxy.stir.ac.uk/arbitration/DocumentFrameSet.aspx?ipn=26306>), access on 28 November 2008

and the autonomous theories respectively. The jurisdictional theory supports the full supervisory powers of states to govern any international commercial arbitration within their jurisdiction.³⁰ It postulates that an arbitration interprets a part of jurisdiction, and the arbitrator should apply the procedural law and conflict of laws rules of the place of arbitration.³¹ The contractual theory on the other hand holds that international commercial arbitration derives from valid arbitration agreements between parties, and for this reason arbitration should be held in compliance with the will of the parties.³² The arbitrator, as opposed to the judge, does not make the award accord to state's authority, but relies on the parties' authorization. In this case, the arbitrator is not the same as the judge who is restricted by the law of the place where the arbitration takes place, but is to conduct the arbitration proceedings in the light of the law selected by the parties in furtherance of the principle of party autonomy of conflict of laws.

The hybrid or mixed theory proposes a compromise between the jurisdictional and contractual theories, and maintains aspects of both the contractual and jurisdictional character.³³ On the other hand, the purport of the autonomous theory is that the development of arbitration should take complete cognizance of the interests of merchants who have an enormous stake in the outcome of the arbitration exercise.

³⁰ Yu, Hong-Lin, "Total Separation of International Commercial Arbitration and National Court Regime", (1998), *Journal of International Arbitration*, Volume 15, No.2, p148

³¹ Chukwumerije, O., Fn 4, at p12

³² Fn 30, at p148

³³ Ibid

1.4 The Practice of Party Autonomy

The party autonomy rule arises from the ethos in which commercial arbitration systems were developed and achieved. The affirmation of party autonomy applies mostly in the exercise of appointing arbitrators, choosing the venue and the governing law, selecting the experts, and determining a suitable timetable, (especially regarding ad hoc arbitrations), and where necessary, the language of the arbitration.³⁴

Although in most of cases the party autonomy rule is effectively applied by the attorneys acting on behalf of the parties, it also affords the parties the satisfaction that they have chosen the best arbitrators, the form and forum of arbitration, as well as the governing law.³⁵ Furthermore, the party autonomy rule offers the parties confidence that the arbitration will be conducted in accordance with their intentions, barring the usual limitations to this expectation. This principle also allows a party the liberty to abandon an arbitration in the thick of proceedings for a variety of reasons. For example, following a challenge of an arbitrator or where there has been a settlement achieved by the parties.³⁶

As stated above, the concept of party autonomy is a vital element in making an arbitral agreement. However in practice, arbitrators are generally persuaded to apply the domestic rules applicable to the procedure in the seat of arbitration,³⁷ and could be at liberty to adopt foreign laws.³⁸ More recently however, a new idea had evolved in support of detaching the arbitration from the control of law of the seat

³⁴ Chatterjee, C, "The Reality of Party Autonomy Rules In International Arbitration", (2003), *Journal of International Arbitration*, Volume 20, No. 6, p540

³⁵ Ibid

³⁶ Fn 34

³⁷ *Sapphire International Petroleum Ltd. v. National Iranian Oil Co*, 35 Int'l Law Reps. 136(1963)

³⁸ Article 44 of the ICSID Convention

of arbitration, thereby lending further credence to the general principle of party autonomy.³⁹ This school of thought advocates that instead of *lex loci arbitri*, the parties should have a broad freedom to agree on other procedural laws to guide the conduct of the arbitral proceedings. This principle had been acknowledged within the provisions of the famed New York Convention⁴⁰ as well as some other statutes, such as the UNCITRAL Model Law,⁴¹ ICSID Convention,⁴² and the English Arbitration Act, 1996.⁴³

The principle of party autonomy is widely accepted in the practice of international commercial arbitration because it is simple and logical.⁴⁴ The UNCITRAL Secretariat, regarding this matter, stated: “... it will be one of the more delicate and complex problems of the preparation of a Model Law to strike a balance between the interests of the parties to freely determine the procedure to be followed and the interests of the legal system expressed to give recognition and effect thereto.”⁴⁵

In the arena of private international law, both substantive and procedural laws should provide “certainty, predictability and uniformity.”⁴⁶ These three factors should also apply to the practice of international commercial arbitration, especially as the subjects of the disputes submitted to international commercial

³⁹ Yu, Hong-Lin, “Is the territorial link between arbitration and the country of origin established by Articles I and V(1)(e) being distorted by the application of Article VII of the New York Convention”, (2002), *International Arbitration Law Review*, p198; Bucher, A., “Court intervention in arbitration”, in Richard B. Lillich and Charles N. Brower edn, *International Arbitration: In the 21st Century: Towards “Judicialization” and Uniformity?*, Twelfth Sokol Colloquium, 1996, p41

⁴⁰ Article V(1)(d) of the New York Convention

⁴¹ Article 19 of the Model Law

⁴² Article 37(2)(a) of the ICSID Convention

⁴³ Section 34-38 of the English Arbitration Act, 1996

⁴⁴ Fn 14, at p79

⁴⁵ UN doc. A/CN.9/207, para. 21.

⁴⁶ American Law Institute, *Restatement of the Law, Conflict of Laws, Second*, para 6(2)(f). Volume 1, p10, 15-16

arbitration are becoming more and more complex, and with current trends in globalization and cross border trades, parties need to be assured that these three elements would characterize present day awards.

Furthermore, it must be pointed out that the freedom to choose the procedural law that is provided by the principle of party autonomy is often qualified by the mandatory rules and public policy of national laws. In leading arbitral fora, these requirements are usually minimal.⁴⁷ In many developed states, the aforementioned constraints of national law apply only to preclude conflict with the fundamental principles.⁴⁸ In most cases however, the *lex loci arbitri* does not coincide with the governing law.⁴⁹ In other words, the applicability of mandatory rules of the law of the place of arbitration is determined by the extent of the connection between the situation and the rule in question, and not just for the reason that mandatory rules are part of the *lex loci arbitri*.⁵⁰ For example, the English scholars Dicey and Morris have stated that “the doctrine of public policy has assumed far less prominence in English conflict of laws than have corresponding doctrines in the laws of foreign countries, e.g. France and Germany”⁵¹

⁴⁷ Born, G. B., *International Commercial Arbitration in the United States: Commentary & Materials*, 1994, p446-447

⁴⁸ Inter-American Convention, Article 2 provides that the arbitrators shall be appointed “in the manner agreed upon by the parties.” Article 3 provides that “[i]n the absence of the express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission.”

⁴⁹ Baniassadi, M.R, “Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration”, (1992), *Int. Tax & Bus Lawyer*, Volume 10, No.1, p59-84

⁵⁰ *Ibid* at p71-72

⁵¹ Fn 5, at p93

In 1980, French Court of Appeal also acknowledged this position in the case of *Gotaverken Arendel A.B.*⁵² In this case, the parties had provided in their agreement for arbitration in Paris under the ICC Rules. The arbitral tribunal made an award in favor of the plaintiff Gotaverken, but the defendant GMTC refused to carry out the award. The plaintiff then claimed to enforce the award in Sweden. On the other hand, the defendant had appealed to a French court for an order setting aside the award on grounds that the case was arbitrated in Paris, thereby making the award a French award. But French Court of Appeal considered that the ICC arbitration was not conducted under French arbitral procedure, thus it was not a French award. In the circumstances of French Court's refusal to give judgment in favour of the defendant, the Swedish Supreme Court held that the award was enforceable and conducted it immediately.

The French Court of Appeal had taken the view that an award made according to ICC Rules (or other procedure) is not a French award even if the proceedings were conducted in France. The Court's position reflects the view that arbitral proceedings should not be completely governed by the law of the seat of arbitration, but should reflect the freedom of the parties to choose the law applicable to the procedure even if that choice is different from the *lex loci arbitri*.

We shall hereunder touch on selected provisions from some of the laws that support party autonomy for a deeper analysis of the party autonomy rule.

⁵² *Gotaverken Arendal AB v. Libyan General National Maritime Transport Company (GMTC)* (1981) 6Y.Comm.Arb. p221, 237

1.4.1 Composition of Arbitral Tribunal

Under the Model Law, the parties have the freedom to determine the number of arbitrators.⁵³

Article 11 provides that no person shall be rejected by the reason of his nationality to act as an arbitrator, unless otherwise agreed by the parties. The parties are also free to agree on the procedure for selecting their arbitrator(s), subject to the provisions of paragraphs (4) and (5) thereof. Paragraph 1 is an important element in truly establishing international arbitration. However, it must be subject to the will of the parties, who are free to agree on the nationalities of their arbitrators.⁵⁴ Paragraph 2 does provide that the freedom is “subject to the provisions of paragraphs (4) and (5) of this article.” However those paragraphs do not limit the exercise of parties’ freedom, but only provide for a supplementary intervention by the courts in the event that the procedure agreed on does not work or occasions a deadlock.⁵⁵

Again, the ICSID Convention provides that the tribunal shall be composed of a sole arbitrator or any uneven number of arbitrators appointed as shall be agreed by the parties.⁵⁶ However, where the parties do not agree on the number of arbitrators using their appointing mechanism, the tribunal shall be composed of three arbitrators, one arbitrator appointed by each party and the third, who shall act

⁵³ Article 10(1) of the Model Law

⁵⁴ Seventh Secretariat Note, A/CN.9/264, Article 11, para. 1, p381 *infra*. The term *nationality* is undefined, but the Working Group indicated that it was to be given a wide interpretation in view of Article 11’s purpose of preventing discrimination. In particular, it was contemplated that the word embraced the term *citizenship*, which is used in some legal systems. Fifth Working Group Report, A/CN.9/246, para/ 31, p378 *infra*

⁵⁵ Third Working Group Report, A/CN.9/233, para.90, p373 *infra*

⁵⁶ Article 37(2)(a) of the ICSID Convention

as the president of the tribunal, shall be chosen collectively by the parties.

Similarly, the English Arbitration Act 1996 statutorily regulates this matter.⁵⁷ In Section 23 of the 1996 Act for example, parties have the freedom to agree on the conditions upon which the authority of an arbitrator can be annulled, even though the court has the power to remove an arbitrator under Section 24. Parties are free to agree on what should happen in the event of the resignation of an arbitrator, as to his entitlement to fees or expenses, and any liability incurred by his actions, or once the arbitrator no longer holds office, the parties are free to agree on a mechanism to fill the position of an arbitrator.⁵⁸

1.4.2 Choosing the Place of Arbitration

The freedom of the parties under the various laws to choose the place of arbitration also reflects the important rule of party autonomy. For example, the Model Law provides that the parties have the freedom to choose the place of arbitration. If the parties cannot reach such an agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the situations of the case, which includes the convenience of the parties.⁵⁹ On the other hand, unless otherwise agreed by the parties, the arbitral tribunal may look for any place it considers appropriate for discussion among members, to hear witnesses, experts or the parties, or to inspect goods, and other property or

⁵⁷ Section 15 of the English Arbitration Act 1996

⁵⁸ Schlosser, Peter, "The Competence of Arbitrators and of Courts", (1992), *Arbitration International*, Volume 8, No.2, p192

⁵⁹ Article 20(1) of the Model Law

documents.⁶⁰

The English Arbitration Act 1996 also contains stipulations concerning this issue. It provides that “The seat of the arbitration” can be designated by the parties under the arbitration agreement,⁶¹ or by any arbitral or other institution or person authorized by the parties with powers in this matter,⁶² or by the arbitral tribunal if so authorized by the parties, or determined, having no such designation, with regards to the agreement of the parties and all other related situations.⁶³

1.4.3 Agreeing on the Powers of the Tribunal

The Model Law has also made provisions as per the powers of the tribunal, which also fully reflects the rule of party autonomy. It provides that subject to the provisions of this law, the parties have the freedom to agree on the procedure to be followed by the arbitral tribunal in the arbitral proceedings.⁶⁴ However, if the parties can not reach an agreement, the arbitral tribunal may, under the provisions of this law, conduct the arbitration in such a manner it deems proper. The power given to the arbitral tribunal here also includes the power to determine the admissibility, relevance, materiality and weight of any evidence.⁶⁵

Furthermore, under the English Arbitration Act 1996, the parties are permitted the freedom to agree on the powers which are exercisable by the arbitral tribunal in regard to the proceedings.⁶⁶ In addition, the

⁶⁰ Article 20(2) of the Model Law

⁶¹ Section 3(a) of the English Arbitration Act 1996

⁶² Section 3(b) of the English Arbitration Act 1996

⁶³ Section 3(c) of the English Arbitration Act 1996

⁶⁴ Article 19(1) of the Model Law

⁶⁵ Article 19(2) of the Model Law

⁶⁶ Section 38(1) of the English Arbitration Act 1996

parties are able to ask the arbitral tribunal to make an order under any provision that provides any relief which it would have powers to offer at a final award.⁶⁷ This provision goes on to specifically stipulate that unless the parties agree to authorize the tribunal to exercise such a power, it has no such power.⁶⁸

The ICSID Convention also contains relevant stipulations, providing that the parties have the right to raise objections to the effect that the dispute is not subject to the jurisdiction of the Centre, or for any other reasons that the tribunal is not competent to handle the matter.⁶⁹ Unless otherwise agreed by the parties, if the tribunal deems it necessary at any stage of the proceedings, it may request the parties to produce documents or other evidence, and visit the place linked with the disputes, and conduct such inquiries there as it may consider appropriate.⁷⁰ Furthermore, except where the parties have agreed on something different, the Tribunal may, (if it considers that the situations are required), recommend any provisional measures to be taken to preserve the respective rights of the parties.⁷¹

It would appear from the provision aforesaid, that the discretion of the arbitral tribunal in this circumstance is quite wide. i.e. "it considers that the circumstances so require." However, in the case of the first ICSID Award of *Holiday Inns S.A. and others v. Morocco*,⁷² the claimants had applied to the Holiday Inns tribunal for the issuance of a provisional measure to prohibit Morocco from proceeding in the courts in pursuance to Article 47 of the ICSID Convention. The tribunal did not

⁶⁷ For the powers available to the tribunal to grant relief see Section 48; Section 39(1) of the English Arbitration Act 1996

⁶⁸ Section 39(4) of the English Arbitration Act 1996

⁶⁹ Article 41(2) of the ICSID Convention

⁷⁰ Article 43 of the ICSID Convention

⁷¹ Article 47 of the ICSID Convention

⁷² *Holiday Inns S.A. and others v. Morocco* (ICSID Case No. ARB/72/1)

accept their applications, but recommended that the parties give up any measure contrary to the agreement and to ensure that the action already taken should not produce any result in the future which would be contrary to its decision.⁷³

1.4.4 Applying for Interim Measures

The issue of interim measure in various arbitration laws also takes cognizance of the concept of party autonomy in, for instance, according to Article 9 of the Model Law, the parties are permitted to apply for interim measures of protection from the court. But, the Commission has pointed out that Article 9 does not overrule the parties' agreement not to apply for interim measure from a court. This article does not prohibit a clause in the agreement excluding such measures nor does it address the issue as to whether such a clause should be given effect or not.⁷⁴

On the other hand, under Article 17, unless otherwise agreed by the parties, the arbitral tribunal may entertain a request by a party to order any party to take such interim measure of protection as the arbitral tribunal may regard necessary in relation to the subject-matter of the dispute. The arbitral tribunal may also ask any party to provide appropriate security for such measures.⁷⁵ This provision is relevant, but different from the provisions of Article 9, which stipulates that it is harmonious with the arbitration agreement for a party to request an interim measure of protection from a court, or for the court to grant such interim measure of protection. Article 9 does not permit any authority but

⁷³ Ibid

⁷⁴ Holtzmann, Howard M. and Neuhaus, Joseph E., *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, 1994, p333

⁷⁵ Article 17 of the Model Law

merely provides for the principle that certain action, if allowed under other law, is harmonious with arbitration. Article 17 does not refer to questions of court enforcement of any interim measures ordered.⁷⁶

Nevertheless, the English Arbitration Act 1996 provides that unless otherwise agreed by the parties, the court has for the purposes of and with regard to the arbitral proceedings the same power of making orders about the preservation of evidence and related matters as it has for the purposes of and regarding legal proceedings.⁷⁷

1.4.5 The Parties have the Right to Designate Experts

The Model Law provides that unless otherwise agreed by the parties, the arbitral tribunal can, (among other things), assign one or more experts to report to it on particular issues to be decided by the arbitral tribunal.⁷⁸ In addition, the arbitral tribunal after having discussed with the parties is able to designate one or more experts, specify their terms of reference and obtain their reports.

The English Arbitration Act 1996 similarly provides that, unless otherwise agreed by the parties, the tribunal may appoint experts or legal advisers to make the report for it and the parties,⁷⁹ or designate assessors to support it on technical matters, and may permit any such expert, legal adviser

⁷⁶ Article 27 of the Law provides a tribunal with power to request courts for assistance in *taking evidence*. This power is different from the power to look for court assistance in enforcing measures of protection regarding the subject matter of the dispute, although in some cases, of course, exercise of the Article 27 power may have the effect of protecting the subject matter of the dispute.

⁷⁷ Section 44 of the English Arbitration Act 1996

⁷⁸ Article 26(1)(a) of the Model Law

⁷⁹ Section 37(1)(a)(i) of the English Arbitration Act 1996

or assessor to take part in the proceedings.⁸⁰

1.4.6 Determination of Rules of Procedure

Here the Model Law provides that, the parties have the right to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, subject to the provisions of the Model Law.⁸¹ This provision establishes the principle of the autonomy of both parties and the arbitrators in conduct of the arbitral proceedings. The principle of party autonomy is significant to an effective system of commercial arbitration for international cases because in such cases there is a special expectation on the part of the parties that and perhaps a subtle guarantee from arbitrators that the proceedings shall be free of the influences of any uncommon local standards.⁸² What is more, this principle is the pivot of modern systems of arbitration; as it more or less guarantees that parties and arbitrators would be able to conduct the arbitration in a fair and orderly manner towards a just resolution of a dispute. At the same time however, Article 18 places certain restrictions on this principle.⁸³

Similarly, Section 4(3) of the English Arbitration Act 1996 provides that the parties are free to apply the institutional rules or provide any other methods by which a matter may be decided under

⁸⁰ Section 37(1)(a)(ii) of the English Arbitration Act 1996

⁸¹ Article 19(1) of the Model Law

⁸² For examples of how parties from various legal traditions might usefully take advantage of the autonomy provided by Article 19, see the Seventh Secretariat Note, A/CN.9/264, Article 19, para.6, p584 *infra*. For a comparative study of arbitral practice in various parts of the world, see "Working Group 1-Comparative Arbitration Practice", in *Comparative Arbitration Practice and Public Policy in Arbitration* 17-174 (ICCA Congress Series No.3, P Sanders edn, 1987)

⁸³ Fn 74, at p550-563

the agreement.⁸⁴ It is submitted that subsection (3), being permissive rather than mandatory, is intended to amplify or extend and not to limit the phrase “arrangements by agreement” in subsection (2).⁸⁵ However, once the institutional rules of the arbitration have been determined, the proceeding will be guided by these rules and the parties would not usually have any control over that procedure.

1.5 Restriction on Party Autonomy⁸⁶

As mentioned above, party autonomy is an important guiding principle in conducting the arbitral proceedings; however, this principle does not mean the parties are completely free to eliminate a system of law, or certain elements of a system of law, from their arbitral relationship.⁸⁷ The arbitral procedure itself is usually still subject to the mandatory rules and public policy of law of the place of arbitration.⁸⁸ In other words, a large percentage of cases and their outcomes are still being influenced by the intervention of the mandatory rules or law which usually demands their direct application on the arbitral procedure, regardless of any law or rules of law chosen by the parties or determined by the arbitral tribunal. In such cases if the choice of law is made without due regard to the relevant provisions to the law of the place of arbitration, it may breach the mandatory rules and

⁸⁴ Section 4(3) of the English Arbitration Act 1996

⁸⁵ Section 4(2) of the English Arbitration Act 1996 provides that “The other provisions of this Part (the “non-mandatory provisions”) allow the parties to make their own arrangements by agreement but provide rules which apply in the absence of such agreement.”; Lord Richard and Salzedo Simon, *Guide to the Arbitration Act 1996*, 1996, p8

⁸⁶ Further discussions will be made in Chapter 3 on *Lex Loci Arbitri* and Chapter 4 on Mandatory Rules and Public Policy

⁸⁷ *American Diagnostica v. Gradipore*, (1998), N.S.W.L.R., Volume 44, p312, 328 (Sup. Ct. N.S.W.)

⁸⁸ Fouchard, Philippe, Gaillard, Emmanuel, and Goldman, Berthold, *Fouchard Gaillard Goldman on International Commercial Arbitration*, E. Gaillard & J. Savage edn, 1999, p635

public policy of host state thereby endangering the potency of the resultant award.⁸⁹ It would therefore appear that this limited range of exceptions to the principle of party autonomy have been developed to safeguard the adherence to the principles of natural justice in the arbitral process and to ensure that the issue of the public good is not ignored by the parties.⁹⁰

The drafters of the Model Law for example, did not offer unlimited freedom to parties to arbitration.⁹¹ The Model Law actually provides a framework with a liberal outlook, which permits and gives effect to various arbitration agreements designed to satisfy the necessity of parties and circumstances.⁹² Hence, some of the provisions of the Model Law are mandatory and cannot be rejected or modified by the parties. In other words, a limited number of exceptions to the principle of party autonomy have developed to make sure that natural justice and the public good cannot be neglected or otherwise ignored by the parties in conduct of arbitral proceedings.⁹³ For example, Article 11(2) provides that the parties are free to agree on a procedure for the appointment of the arbitrator or arbitrators, subject to the provision of paragraphs (4)⁹⁴ and (5),⁹⁵ which are mandatory.

⁸⁹ Blessing, Mark, "Mandatory Rules of Law versus Party Autonomy in International Arbitration", (1997), *Journal of International Arbitration*, Volume 14, Issue 4, p23; Hochstrasser, Daniel, "Choice of Law and Foreign Mandatory Rules in International Arbitration", (1994), *J. Int. Arb.* Volume 11, p57-86

⁹⁰ Livingstone, Mia Louise, "Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact", (2008), *Journal of International Arbitration*, Volume 25, Issue 5, p532

⁹¹ *Ibid*

⁹² Herrmann, "The UNCITRAL Model Law on International Commercial Arbitration", in *Essays on International Commercial Arbitration*, Volume 93, P. Sarcevic edn, 1989, p9-10

⁹³ Fn 89, at p532

⁹⁴ Article 11(4) of the Model Law provides that "Where, under an appointment procedure agreed upon by the parties, (a) a party fails to act as required under such procedure, or (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."

⁹⁵ Article 11(5) of the Model Law provides that "A decision on a matter entrusted by paragraph (3) and (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The

Again, whilst it is not clearly expressed, but giving the principles of natural justice it is almost certain that a court would construe Article 18 as mandatory; where it provides that “the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.” This means that even where the parties have agreed that only the claimant would be heard in the arbitration, this agreement would be held as invalid⁹⁶

On the other hand, public policy is a mechanism that is applied to safeguard both the basic legal principles and moral values of the forum. For instance, public policy grounds empower the courts to make a decision on whether it will be appropriate to apply the foreign law.⁹⁷ Under Article 36(1)(b)(ii) of the Model Law, one tenable reason for a refusal to recognize an award is that “the recognition or enforcement of the award would be contrary to the public policy of this State.” Similarly, Article V(2)(b) of the New York Convention provides that “recognition or enforcement of the award may be refused if it would be contrary to the public policy of [the country where recognition and enforcement is sought].”⁹⁸ Therefore, the respective contracting states can apply the public policy as a defence under the legal system of the New York Convention, and the national court can not

court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.”

⁹⁶ Fn 74, at p583

⁹⁷ Guedji, Thomas,, “Theory of the *Lois de Police*, a Functional Trend in Continental Private International Law – a Comparative Analysis with Modern American Theories”, (1991), Am. J. Comp. L, Volume 39, p660, 667, n27

⁹⁸ Article V(2)(b) of the New York Convention

exercise its right without encountering reservations or barriers.⁹⁹

Put differently, public policy will override the party autonomy rule as seen in Section 103(3) of the English Arbitration Act where it provides: “Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognize or enforce the award.” In *Soleimany v Soleimany*,¹⁰⁰ the English Court of Appeal refused to enforce an award where the business transaction was legal under the applicable law, but illegal under English law.¹⁰¹ The dispute had arisen from a contract made between a father and son, involving the smuggling of carpets from Iran which violated Iranian revenue laws and export controls. The father and son had agreed to submit their dispute to arbitration by the Beth Din, the Court of the Chief Rabbi in London, which applied Jewish law. According to the applicable Jewish law, the unlawful purpose of the contract did not affect the rights of the parties. Hence, the Beth Din went on to make an award for the enforcement of the contract. However, the English Court of Appeal declined to enforce the award.¹⁰² It shows that the choice of a foreign law for the purposes of perfecting an illegal purpose would not be permitted, and the relevant court may apply its own national rules of public policy.¹⁰³ However, it has been argued that the purpose of the

⁹⁹ Article 36(1)(b) of the Model Law follows the New York Convention 24 I.L.M.1302 (1985)

¹⁰⁰ *Soleimany v Soleimany (UK) Ltd.* [1999] Q.B. 785

¹⁰¹ Fn 1, at p1-37, (<http://www.kluwerarbitration.com.ezproxy.stir.ac.uk/arbitration/DocumentFrameSet.aspx?ipn=26306>), access on 15 March 2009

¹⁰² *Soleimany v Soleimany (UK) Ltd.* [1999] Q.B. 785; The court stated that: “The Court is in our view concerned not to preserve the integrity of its process, and to see that it is not abused. The parties cannot override that concern by private agreement. They cannot by procuring an arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract. Public policy will not allow it.”

¹⁰³ Fn 1, at p1-37, (<http://www.kluwerarbitration.com.ezproxy.stir.ac.uk/arbitration/DocumentFrameSet.aspx?ipn=26306>), access on 15 March 2009

New York Convention is to limit the scope of public policy because foreign arbitral awards should only observe those principles and concepts of public policy, which are relevant to relationships with a foreign element and not to extend to international cases with purely domestic issues. For the fact that the scope of domestic public policy is wider than that of international public policy, what is thought to be relevant to public policy in domestic cases may not necessarily involve public policy in international cases.

Furthermore, the exercise of the principle of party autonomy can also be limited by the law of the seat of arbitration. In *Union of India and McDonnell Douglas Corp*,¹⁰⁴ the contract between the parties contained an arbitration clause, which stated: “The arbitration shall be conducted in accordance with the procedure provided in the Indian Arbitration Act 1940 or any reenactment or modification thereof...The seat of the arbitration proceedings shall be London, United Kingdom.” When the parties submitted their dispute to the English court, the plaintiff asked that “the arbitration shall be conducted in accordance with the procedure provided in the Indian Arbitration Act 1940 as the parties had chosen Indian law to govern the arbitration proceedings.” However, the court rejected the parties’ autonomy to select the arbitral procedure, and held that as long as the parties had agreed that the seat of arbitration proceedings shall be London, it indicated that the English law should govern the arbitration proceedings.¹⁰⁵ The English Arbitration Act 1996 also provides (subject to certain limitations) that the tribunal shall treat the parties fairly and impartially, enabling each party a

¹⁰⁴ *Union of India v. McDonnell Douglas Corporation*, [1993]2 Lloyd’s Rep.48

¹⁰⁵ Section 4 of the English Arbitration Act 1996

considerable opportunity to present its case and deal with that of its opponent,¹⁰⁶ adopt procedures that are appropriate to the situations of each case, preventing unnecessary delay or expense, in order to provide a fair method for resolving issues brought before it by the parties.¹⁰⁷

1.6 Conclusion

Although the party autonomy rule is a general principle of international commercial arbitration and is to be respected in principle, it is usually exercised within the restrictions imposed by mandatory rules or subject to any restraints of public policy. The existence of such mandatory rules is considered to be outside the scope of the will and agreement of the contracting parties. For example, the Model Law contains stipulations on the equal treatment of parties, and provides therein that parties shall be treated equally, and each party should have the opportunity to fully present its case.¹⁰⁸ This means that a party's choice of arbitrator may be held to be invalid if the arbitrator presents with a pattern of bias towards any other party.¹⁰⁹ It might well be called the "due process" clause of arbitration, and likened to provisions in national constitutions that establish the requirement of procedural fairness as the essential foundation of any system of justice.¹¹⁰

Nowadays, the trends in arbitration legislation show that the national mandatory arbitration rules have to conform to international expectations. Hence, the New York Convention provides that each

¹⁰⁶ Section 33(1)(a) of the English Arbitration Act 1996

¹⁰⁷ Section 33(1)(b) of the English Arbitration Act 1996

¹⁰⁸ Article 18 of the Model Law

¹⁰⁹ *Gas & Fuel Corporation of Victoria v. Wood Hall*, [1978] V.R. 385 (Sup. Ct. Vict.)

¹¹⁰ Second Secretariat Note, A/CN.9/WG.II/WP.35, para.25, p553 *infra*.

state shall recognize awards as binding and enforce them in accordance with its procedural rules.¹¹¹

It also provides that procedural steps towards enforcement should not be based substantially on conditions more complicated than those applying to national arbitral awards.¹¹²

In this chapter we have discussed party autonomy under the English Arbitration Act 1996 and the Model Law, paying attention to its advantages and limitations. We found that the exercise of the principle itself appears to be contradictory to the law of the place of arbitration and this can be seen as its great limitation in the arbitral process. In other words, a major challenge in international arbitration is to achieve a balance between the autonomy of the parties and mandatory provisions aimed at securing the integrity of the arbitral process. In the next chapter we shall be discussing in more detail the role of party autonomy in the arbitral process, and the relationship between it and the procedural law. We shall also be concerned with the issues of the *lex loci arbitri*, mandatory rules and public policy, and the delocalisation theory in the successive chapters.

¹¹¹ Article III of the New York Convention

¹¹² Janićijević, Dejan, "Delocalization in International Commercial Arbitration", (2005), Law and Politics, Volume 3, No.1, Faculty of Law, University of Niš, Niš, p69 (<http://facta.junis.ni.ac.yu/lap/lap2005/lap2005-07.pdf>), access on 12 March 2009

Chapter 2

Procedural Law

2.1 Introduction

We stated in the previous chapter, that observance of party autonomy in an arbitration determines to a large extent the procedure that would be followed in the proceedings. We shall therefore be discussing the procedural law in this chapter. The procedural law which governs an international arbitration can greatly influence the proceedings as the arbitral tribunal would usually refer to it in determining a number of key issues; ranging from whether or not the dispute can be referred to arbitration, to whether it should order interim measures, as well as to the final judgment itself.¹ Generally, arbitral proceedings are conducted in accordance with the procedural law, which usually are expressed as the “curial law” or “*lex arbitri*.”² However in the past, whenever parties failed to choose their procedural law, it was usual for the arbitral procedure to be governed by the law of the place where the arbitration was held.

Today however, it is widely accepted that the place of the arbitration, which often chosen for various exigencies such as convenience and the demands of neutrality does not necessarily cause the

¹ Guermonprez, Yann, “How Do You Determine the Procedural Law Governing an International Arbitration”, (2006), Fenwick Elliott LLP, p1, (<http://www.fenwickelliott.co.uk/files/Arbitration%203%20-%20How%20do%20you%20determine%20the%20procedural%20law%20governing%20an%20international%20arbitration.pdf>), access on 26 August 2009

² Sherwin, Peter, Verma, Ana, and Figueira Elizabeth, *Proskauer on International Litigation and Dispute Resolution: Managing, Resolving, and Avoiding Cross-Border Business or Regulatory Disputes*, Proskauer Rose LLP, 2007, p1, (<http://www.proskauerguide.com/arbitration/19/V>), access on 19 January 2009

procedure to be subject to the law of that jurisdiction.³ As the choice of a seat is made by the parties, the arbitral institution or the arbitrators themselves are often made by reasons totally irrelevant to the arbitral procedure, that choice should not automatically have an impact on the conduct of the arbitral proceedings.⁴

However, as we have seen in the previous chapter, the principle of party autonomy has been extensively accepted in most national systems, which means that the conduct of the arbitral proceedings is mainly governed by the principle of party autonomy.⁵ Although the parties are free to choose the law applicable to the procedure, the exercise of that choice is also usually subject to the law of the place in which the arbitration is held. Generally, the scope and content of the procedural laws are not the same, due to the differences among arbitration laws of various states. It is therefore possible to experience a variety of discordances when these different procedural laws interact at any stage of arbitral proceedings.⁶

This chapter shall therefore also review the existing debates on how the parties should determine the applicable procedural law, critically examining the role of party autonomy in arbitral proceedings,⁷

³ Redfern, A. and Hunter M, *Law and Practice of International Commercial Arbitration*, 4th edn (London: Sweet & Maxwell Ltd., 2004), p1-37, (<http://www.kluwerarbitration.com.ezproxy.stir.ac.uk/arbitration/DocumentFrameSet.aspx?ipn=26306>), access on 15 July 2009

⁴ Fouchard, Philippe, Gaillard, Emmanuel, and Goldman, Berthold, *Fouchard Gaillard Goldman on International Commercial Arbitration*, E. Gaillard & J. Savage edn, 1999, p635

⁵ Buhring-Uhle, *Arbitration and Mediation in International Business*, 1st edn, 1996, p89

⁶ Born, Gary B., *International Commercial Arbitration: Commentary and Materials*, 2nd edn (Kluwer Law International, 2001), p415

⁷ Fn1, at p1, (<http://www.fenwickelliott.co.uk/files/Arbitration%203%20-%20How%20do%20you%20determine%20the%20procedural%20law%20governing%20an%20international%20arbitration.pdf>), access on 2 April, 2009

as well as the relationships that exist between the procedural law, party autonomy, and law of the seat of arbitration, if any. We shall also be examining how the choice of the laws made by the parties may be limited or otherwise regulated or influenced, by the law of the place in which the arbitration is held.

2.2 Distinction between Substantive and Procedural Laws in Arbitration

Basically, the applicable substantive and procedural law in an arbitration may originate from different legal systems. On one hand, the law applicable to the substance of the dispute governs the substantive rights and obligations of the parties, while on the other hand, the procedural law manages the conduct of the arbitration and the avenues open for appeal against the award. For example, parties may choose French law to govern their substantive agreement, whilst also choosing England and English law for the place of arbitration and for the procedural law to conduct the proceedings respectively. In this case, the arbitrators would apply French law to the merits of the dispute, and conduct the proceedings under English law.⁸

The interplay of substance and procedure is broadly recognized as an important element of international commercial arbitration.⁹ In effect, the parties may prefer a particular national law to manage their original agreement or contract, whilst at the same time consider that same law improper

⁸ Chukwumerije, O., *Choice of Law in International Commercial Arbitration*, 1st edn (USA, Quorum Books, 1994), p77

⁹ Rubino-Sammartano M, *International Arbitration Law*, 1990, p281

for resolving disputes that may arise from their substantive agreement.¹⁰ The separation of the law applicable to the substance from the law applicable to the arbitration, supports the point that arbitral proceeding could/should be free of/from the system of law that regulates the rights and obligations of the parties. In short, the substantive law governs the merits of the parties' right and obligation; whilst the procedural law governs the arbitration proceedings itself.¹¹ The separation of substance from procedure also implies that the determination of each applicable law can be influenced or determined by various considerations.

In *James Miller & Partners Ltd 1970*,¹² it was first recognized that procedural law could be applied independently and without any relation to the substantive laws legal system. In this case, a contract was entered into between an English company and a Scottish company on May 10, 1965, where the Scottish company was to carry out specific conversion work at the English company's factory in Scotland. The contract between the Scottish and English parties contained an arbitration clause that did not stipulate the law applicable to the procedure, but the place of arbitration and the law applicable to the merits of the disputes. Certain issues immediately arise here, viz whether the arbitration law in Scotland follows the Scottish procedure or the English law of arbitration, whether the law of arbitration may be different from the proper law of contract and whether the English Company should accept Scottish law as that which should govern the arbitration proceedings. Following the arbitration,

¹⁰ Fn 8, at p78

¹¹ Fn 6, at p412

¹² *James Miller & Partners Ltd., V. Whitworth Street Estate (Manchester) Ltd.*, [1970], A.C.583.

the court held that the nature of the contract proved that English law was its proper law, but the applicable law for the conduct of the arbitration could be different from the proper law of the contract. In the words of their Lordships: “The situation here is that, the arbitration clause having not specified the place of arbitration, it was perfectly within the scope of that clause to have it in Scotland, and, once it took place in Scotland, *prima facie*, Scottish rules of procedure should apply. It is clear that, once the arbitration was being held in Scotland, the parties acted throughout on the footing.”¹³

For reasons mentioned above, the law governing the arbitration may be different from the proper law of the contract. Where the parties have failed to choose the law governing arbitration proceeding, the proceedings would usually be governed by the law of the country in which the arbitration is held, on ground that it is the country most closely connected with the proceedings.¹⁴

English courts have been able to separate the procedural law from the substantive law. Parties can now very well exercise their free will to determine the law(s) to be applied to the merits of the dispute and to the procedure respectively. As procedural law governs the arbitral procedure, and substantive law regulates the rights and obligations of the parties, there is a strong possibility for the issue to transcend different legal systems. Municipal laws which apply to the arbitral proceedings may not be applicable to govern rights and obligations of the party. The separating of the procedural law from substantive law widens the freedom of parties to choose the law and encourages them to

¹³ Ibid

¹⁴ *James Miller & Partners Ltd. V. Whitworth Street Estate (Manchester) Ltd.*, [1970], A.C.583

opt for arbitration in resolving their disputes.

2.3 The Scope of the Procedural Law

The procedural law plays a very important role in arbitral proceedings. Some scholars have stated that the procedural law governs such issues as the parties' autonomy to decide on procedural issues in the arbitration. Procedural issues include such as hearing, administration of oath, discovery, evidential matters, appointment or removal of arbitrators, judicial supervision, extension or the intervention of the arbitration proceedings which includes ordering provisional relief or discovery in aid of arbitration, the liability and the ethical standards required of the arbitrator, as well as the form and content of the award.¹⁵ However, in some cases, the procedural law also extends to cover matters pertaining the interpretation and enforcement of the arbitration agreement which necessarily includes methods of determining whether the dispute is arbitrable,¹⁶ the resolution of conflict arising from the law or rules applicable to the substance of the dispute, and quasi-substantive issues; including rules governing interest¹⁷ and attorney's fees.¹⁸ Again, some scholars explain that arbitral proceedings arise from the parties' contract or the arbitration agreement is to be determined by a set or sets of legal rules.

¹⁵ Dicey, A. and Morris, J., *The Conflict of Laws*, 12th edn, 1993, p580-585

¹⁶ Mann, "*Lex Facit Arbitrum*", reprinted in, *Arb. Int'l*, Volume 2, 1986, p241

¹⁷ Hunter and Triebel, "Awarding Interest in International Arbitration", (1989), *J. Int'l Arb*, Volume 6, p7

¹⁸ Fn 3, at p1-36 (<http://www.kluwerarbitration.com.ezproxy.stir.ac.uk/arbitration/DocumentFrameSet.aspx?ipn=26312>), access on 10 April 2009

On the other hand, some scholars state that one of the features of international commercial arbitration is that its proceedings will usually be conducted in a “neutral” country, where neither of the parties reside or run their business. Therefore, in practice, the procedural law will not normally be the same as the law governing the substantive matters in dispute.¹⁹

Furthermore, in most cases, the procedural law (also known as the law governing the conduct of the reference), is defined as the law governing the obligation to arbitrate.²⁰ The national laws provide the court with the authority to exercise their powers, and the process of such an action will be reflected on the procedural rules, which in turn demonstrate how the country would resolve the dispute in a fair and efficient manner.²¹

One scholar has therefore suggested that the procedural law is likely to expand the definition and form of an agreement to arbitrate; determine whether a dispute is capable of being referred to arbitration; the constitution of the tribunal and any reasons for challenge of that tribunal; the power of the arbitral tribunal to rule on its jurisdiction; whether the parties will be treated with equality; freedom to consent on detailed rules of procedure; interim measures of protection; statements of claim and defence; the form of the hearing; the proceedings of default; assistance from the court if required; the powers of the arbitrators, including any powers to decide matters as “amiable

¹⁹ Ibid at p1-37, (<http://www.kluwerarbitration.com>)

ezproxy.stir.ac.uk/arbitration/DocumentFrameSet.aspx?ipn=26306), access on 10 April 2009

²⁰ Jacobs, Richard, Stanley, Paul and Masters, Lorelie, “Liability Insurance in International Arbitration: Choice of Law Issues in ‘Bermuda Form’ Arbitrations”, (2004), *Arbitration International*, Volume 20, No. 3, p274

²¹ Fn 8, at p75

compositeurs;” the form and validity of the arbitral award; the finality of the award, including any right to challenge it in the courts of the seat of arbitration.²² This writer wholly adopts this definition of the procedural law as it best reflects the function of procedural law in the arbitral process.

2.4 Party Autonomy and the Procedural Law

In general, the parties to an arbitration are free to choose whatever procedural rules they want to govern the arbitration.²³ Party autonomy allows the parties the freedom to determine the procedural and substantive law. They can also provide their own arbitral procedure rules.²⁴ Apart from the New York Convention that recognizes this freedom,²⁵ the European Convention on International Commercial Arbitration of 1961 also provides that “if the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of parties, or failing such agreement, with the provisions of Article IV of this Convention,” the arbitral award shall be set aside, and that shall constitute a ground for the refusal of the recognition and enforcement of such an award.²⁶

Article 1494 of the French New Code of Civil Procedure 1981 also provides: “The arbitration agreement may, directly or by reference to a set of arbitration rules, define the procedure to be followed in the arbitral proceeding.” French arbitration law allows the parties to choose the procedural law to govern their international arbitration. Choosing to rely on the national procedural rule is just one

²² Fn 3, at p2

²³ Article 19 of the Model Law

²⁴ Barin, *Carwell's Handbook of International Dispute Resolution Rules*, 1999, p495-512

²⁵ Article V(1)(d) of the New York Convention

²⁶ Article IX(1)(d) of European Convention on International Commercial Arbitration , 1961

of the options open to the parties, as the parties may choose the procedural rule of any other arbitration body besides the national law. They may also select a foreign procedural law. The German Code of Civil Procedure also provides that the parties may agree on the conduct of their arbitral proceedings and they are encouraged to do so.²⁷

In Chapter 1, we had stated Article 2 of the 1923 Geneva Protocol provides that the constitution of arbitral tribunals and arbitral procedures shall be governed by “the will of the parties and by the law of the country in whose territory the arbitration takes place.” A similar provision exists in Article 1(c) of the Geneva Convention of 1927, which provides *inter alia* that one of the prerequisites for recognition and enforcement of awards is that the arbitral tribunal is “constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitral procedure.”

Generally, it is believed that “by the law governing the arbitral procedure” implies that reference to the governing law by the Convention is “the law of the place of where the arbitration was held.”²⁸ It is clear from the terminology of the provision for the applicable arbitration procedure is differently used in these two conventions. It would appear that the concepts of “party autonomy” and the “territorial principle” can be superimposed on application. Besides, there would be a general principle of freedom of contract which empowers the parties to select the applicable legal system and which transcends national law.²⁹

²⁷ Article 1042(1) of the German Code of Civil Procedure of 1998

²⁸ Fn 8, at p79

²⁹ Lehmann, Matthias, “Liberating the individual from battles between states: justifying party autonomy

To circumvent the limitation constituted by both the Geneva Protocol of 1923 and the Geneva Convention of 1927, the United Nations had legislated afresh and came out with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1958.³⁰ The New York Convention of 1958 is an embodiment of the principle of party autonomy and a complete will to accept the right of parties' to determine the arbitral procedural law. This convention provides that if the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, recognition and enforcement of the award may be refused.³¹ This appears to operate to cure the flaw inherent in 1923 Geneva Protocol and 1927 Geneva Convention, that the arbitral procedure should be governed by the law of the place of arbitration. But it must be noted that the Convention is merely applicable to the "recognition and enforcement of award" and does not extend or regulate to the conduct of arbitral proceedings.³²

In order to resolve among others, the trading issues that arose between the Eastern and Western European countries, delegates from 22 states established the European Convention on International Commercial Arbitration in Geneva on April 21, 1961. The arbitral procedural rule established under the European Convention is very similar to that of the New York Convention, by providing that if "the

in conflict of laws", (2008), *Vanderbilt Journal of Transnational Law*, p7-8,

(http://www.accessmylibrary.com/coms2/summary_0286-35069848_ITM), access on 14 April 2009

³⁰ Article I(1) of the New York Convention provides that "This Convention shall apply to the recognition and enforcement of arbitral award made in the territory of a State other than the State where the recognition and enforcement are sought, and arising out of difference between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." It is thus clear that New York Convention broaden the scope of the application.

³¹ Article V(1)(d) of New York Convention.

³² Fn 8, at p80

composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, with the provisions of Article IV of the Convention” will constitute a reason to set aside the award as well as a valid ground for refusing its recognition and enforcement.³³

The Model Law also provides *inter alia* “subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.” “Failing such agreement, the arbitral tribunal may, subject to the provisions of this law, conduct the arbitration in such manner as it considers appropriate...”³⁴ Thus, under the Model Law, the party’s first choice in determining the arbitration procedural law and the arbitral tribunal merely plays a subsidiary role in deciding applicable procedure.

2.4.1 The Right of Parties to Choose the Procedural Law

Over the course of the previous decades, the concept that parties have a right to choose the procedural law for their arbitration has managed to gain some prominence in this steadily growing field of law. Gradually, it has become recognized that parties have the freedom to choose the applicable law.³⁵ Regarding the eventual applicability of rules of arbitration as agreed by the parties, reference to the rules of arbitration is conditional insofar as the parties have the right to select the

³³ Article IX(1)(d) of the European Convention, 1961

³⁴ Article 19 of the Model Law

³⁵ Fn 29, at p4, (http://www.accessmylibrary.com/coms2/summary_0286-35069848_ITM), access on 26 April 2009.

procedural law.³⁶

As the Model Law provides “the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.” This is however “subject to the provisions of this Law.”³⁷ This article might be regarded as “the most important provision(s) of the Model Law.”³⁸ It establishes the principle of the party autonomy by recognizing the freedom of the parties to lay down the rules of procedure,³⁹ as well as generally guaranteeing the parties’ freedom to tailor the rules in accordance with their specific needs and wishes. The parties are free to choose those features familiar to them and even choose a procedure which exists in an entirely different legal system. The parties are also free to determine the number of arbitrators,⁴⁰ the place of the arbitration,⁴¹ and many other detailed provisions which the Model Law expressly permits by employing the phrase “unless otherwise agreed by the parties” or other similar terms.⁴² In practice, this means that the parties are free to choose the applicable law, the details of the arbitral proceedings, the way evidence is cited, time limits for presenting written pleadings, and whether an award should contain reasons for arriving at an award or not, and so on.⁴³ The aforesaid notwithstanding, there are still some mandatory

³⁶ Lionnet, Klaus, “Should the Procedural Law Applicable to International Arbitration be Denationalised or Unified?: The Answer of the UNCITRAL Model Law”, (1991), *Journal of International Arbitration*, Volume 8, No.3, p7

³⁷ Article 19(1) of the Model Law

³⁸ Seventh Secretariat Note, A/CN.9/264, Article 19, para. 1, p582-583; see also Summary Record, A/CN.9/322, para.2, appearing in the section on Article 22, p640-641

³⁹ Holtzmann, Howard M. and Neuhaus, Joseph E., *A Guide To The UNCITRAL Model Law On International Commercial Arbitration: Legislative History and Commentary*, 2nd edn (Deventer, The Netherlands, Kluwer Law and Taxation Publishers, 1994), p564

⁴⁰ Article 10(1) of the Model Law

⁴¹ Article 20(1) of the Model Law

⁴² Compare Article 21, 22(1), 23(1), 24(1), 25, 26(1), 29, 30(1), and 33(1)

⁴³ Trappe, Johannes, “The Arbitration Proceedings: Fundamental Principles and Rights of the Parties”, (1998), *Journal of International Arbitration*, Volume 15, No.3, p98

rules, the operation of which parties may not exclude even by agreement. For example such requirements that the parties must be treated with equality and each party shall be given a full opportunity to present its case.⁴⁴

Under Article V(1)(d) of the New York Convention, which generally recognizes the right of the parties to choose the procedural law they want, it is believed that recognition of the arbitral award can be refused if the arbitral proceedings have not been conducted in accordance with the agreement of the parties. However, this provision is one of the most debated and controversial of the New York Convention, because it is not exactly clear if the parties have the right to agree on proceedings independently of the mandatory rules of the seat of arbitration.⁴⁵ Article 16 of the ICC Rules is similar to Article V of the New York Convention. It is also plagued the same lack of clarity, because the questions as to whether the rules of arbitration really take priority or whether the mandatory provisions of the seat of arbitration must come first would necessarily arise.⁴⁶

2.4.2 Choice of Procedural Law

The principle of party autonomy is now recognized in almost all international arbitration laws, rules, and conventions.⁴⁷ Many agreements today contain arbitration clauses with an express choice of law, and in keeping with the principle of party autonomy, the choice of law of parties is usually

⁴⁴ Article 18 of the Model Law

⁴⁵ Fn 36, at p7

⁴⁶ Ibid

⁴⁷ Gaillard, Emmanuel, "The Role of the Arbitrator in Determining the Applicable Law", in *The Leading Arbitrators' Guide to International Arbitration*, Lawrence W. Newman & Richard D. Hill edn, 2004, p185, 199

applied by arbitrators.⁴⁸ However, most arbitrations are conducted in a specific country, and sometimes there may be no clear agreement on the subject of the procedural law. In this case, the law of the place of arbitration would usually provide the procedural law, and must be discussed here to decide the different issues governed by the procedural law.⁴⁹

In most cases parties will have incorporated a general choice-of-law clause in the agreement providing for the law applicable to their arbitration. On the other hand, for the parties to be able to determine what procedural law would govern their arbitration, it would entail the application of external conflicts rules or presumptions.⁵⁰ An exercise many parties would lack the technical expertise to do. If the parties have not chosen an applicable procedural law, some choices have to be made or implied or read into the arbitration agreement for them. The most likely or common choice is usually the law of the seat of the arbitration proceedings.⁵¹ In other words, "in most countries it seems to be accepted, or at least assumed, that the *lois de l'arbitrage* is the law of the country in which the tribunal has its seat...The other view...is to the effect that the *lex [arbitri]* is identical to the law chosen by the parties and thus determined by their autonomous act."⁵²

Furthermore, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the arbitral proceedings. Failing such agreement, methods of determining the procedural

⁴⁸ Reisman, W. Michael et al., *International Commercial Arbitration: Cases, Materials and Notes on the Resolution of International Business Disputes*, 1997, p712

⁴⁹ Born, Gary B., *International Commercial Arbitration in the United States: Commentary & Materials*, 1994, p165

⁵⁰ Fn 6, at p429-430

⁵¹ Ibid at p430

⁵² Ibid

law becomes significant. Nowadays, the legislation of determining the applicable procedural law in international commercial arbitration has been classified into two categories respectively. One is the primacy of party autonomy with the subsidiary provision, empowering a possible arbitrator's determination. For example, the UNCITRAL Model Law states that: "Failing such agreement, the arbitral tribunal may, subject to the provisions of this law, conduct the arbitration in such manner as it considers appropriate."⁵³

France, USA and the UNCITRAL Arbitration Rules contain similar provisions⁵⁴ by which to determine the arbitrator's position in the leading seat in the whole arbitration procedure. For example, if the parties do not choose the procedural law, then the arbitral tribunal may choose the procedural law as it considers appropriate. On the other hand, if in the absence of choice of procedural law, the applicable law is the *lex loci arbitri*. The New York Convention 1958 provides that "The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place then the recognition and enforcement of arbitral award would be refused."⁵⁵

This provision actually does indirectly regulate the standard of application of various possible laws to arbitral procedural law, and reveals the important role of the *lex loci arbitri*. As above

⁵³ Article 19(2) of the Model Law

⁵⁴ Article 1494 of French Code of New Civil Procedural procedure; Article 1(1) of AAA. International Rules; Article 1(1) of UNCITRAL Arbitration Rules

⁵⁵ Article V(1)(d) of the New York Convention

mentioned, even though various states or international conventions may have some different legislation or rules on the principle applicable to the arbitral procedure, yet it is consentaneous to respect the principle of party autonomy.

The tendency for the procedural law to have so much influence on the arbitral procedure is the reason that the procedural law governs the issues that are involved in the arbitral proceedings. For instance, issues such as rules of pleadings, timetables, need and type of hearing, discovery and so on, these are usually significantly impacted upon by the procedural law employed in the arbitration.⁵⁶ In other words, the procedural issues arising in the arbitral proceedings are usually directly subject to the procedural law. The New York Convention indirectly addresses the choice of procedural law in international arbitrations, to the extent that the arbitral authority or the arbitral procedure ought to be composed in accordance with the agreement of the parties, and failing such an agreement, if the composition does not comply with the law of place in which the arbitration is held, the recognition and enforcement of the arbitral award will be refused.⁵⁷ Hence, the recognition of an arbitral award may be refused if the arbitral proceedings were contrary to the procedural law agreed upon by the parties or, in the absence of such agreement, the procedural law of the place of arbitration. Similarly, the European Convention also addresses the choice of procedural law governing an arbitration, where it provides that an arbitral award may be set aside if the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, in

⁵⁶ Fn 49, at p166

⁵⁷ Article V(1)(d) of the New York Convention

line with the provisions of Article IV of this Convention.⁵⁸

On the other hand, the various national arbitration laws appear to have different methods for determining the choice of the procedural law governing an international arbitration. Some of these specifically permit the parties to choose the procedural law, including a foreign procedural law.⁵⁹ For example, the Code of Civil Procedure of France provides that the parties may directly or by reference to arbitration rules make an arbitration agreement, and decide on the arbitral procedure or follow any procedural law.⁶⁰ Similarly, the Switzerland's Private International Law Statute provides that "the parties may, directly or by reference to arbitration rules, determine the arbitral procedure; they may also submit it to a procedural law of their choice."⁶¹

2.5 Influence of the Seat of the Arbitration

As provided under most national laws, the parties may choose the rules they intend to govern the arbitral procedure. The autonomy of parties in choosing the law to govern the arbitral procedure is a natural fallout from their arbitration agreement, when they opt for the place of arbitration and institutional rules to govern the arbitration.⁶² The parties' comprehension of the law of the place of the arbitration and any chosen institutional rules forms a basis for their expectation of how the arbitration will be conducted. The terms of the parties' contract may denationalize the procedural law

⁵⁸ Article IX(1) of the 1961 European Convention

⁵⁹ 135 Int'l Law Reports 136 (March 15, 1963), p427-428

⁶⁰ Article 1494 of the French New Civil Code of Procedure

⁶¹ Article 182(1) of the Swiss Private International Law Statute

⁶² Schiller, Jonathan D., "Applying the Law Governing the Arbitration Procedure: Sensibly and Without Excessive Formality", (1999), ICCA Congress Series, No. 9, p392

governing the arbitral proceedings, and the parties' choice of the place of arbitration and institutional rules will reflect their expectations of how the arbitral process will turnout.⁶³

On the other hand, it is the trend for international commercial arbitration to be conducted in a country that is "neutral," where none of the parties resides or carries on business. This means that in practice the law of the place of arbitration, the *lex arbitri*, will often not be the law that governs the substantive matters in dispute.⁶⁴ However, in most cases, the law that would normally regulate the conduct of an international arbitration will be the procedural law of the arbitral seat. In other words, the arbitral proceedings are subject to the supervision of the national law of the country in which the arbitration is held,⁶⁵ especially as far as the mandatory rules are concerned. In theory, it is possible for parties to choose a national law to conduct the arbitration proceedings, provided that the law and public policy of the seat so allow. Nevertheless, one party may argue that the chosen procedural law which is different from that of the arbitral seat has to be applied to the proceedings whereas the other party may maintain that the law of the arbitral seat shall prevail. English law favours the traditional theory, which holds that the *lex loci arbitri* should appropriately govern the arbitration. In *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*,⁶⁶ the contract between Eurotunnel and Trans-Manche Link, was for the construction of the Channel Tunnel, with an arbitration clause that stated that the ICC Rules would oversee the conduct of the arbitration in Brussels. The contract was

⁶³ Ibid

⁶⁴ Fn 3, at p 1-37, (<http://www.kluwerarbitration.com>).

⁶⁵ Ibid

⁶⁶ *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd.*; [1993]A.C.334; [1993]2 W.L.R. 262

performed in London. Subsequently, a dispute arose between the parties. Eurotunnel applied to English court for an interim injunction to restrain TML from carrying out its threat. The House of Lords held that the English court did have a power to grant an interim injunction, but it would be inappropriate to do so, because the parties agreed that in the event of a dispute there was to be arbitration in Brussels under the ICC Rules. It would appear from the aforesaid that the court has the crucial say to make the *lex loci arbitri* as the procedural law to conduct the arbitration. That is to say, the Court believed that the supposition in favour of the law of the *situs* was “irresistible” following the lack of a detailed choice of some other law. This position is also supported by the New York Convention, which provides that an award may be set aside by the courts of the enforcing state if the arbitral procedure does not accord to the agreement of the law of the country where the arbitration took place. Similarly, the English Arbitration Act 1996 has further greatly limited the possibility of an arbitration conducted in England to be governed by procedural law of another state.⁶⁷

Again, the jurisdictional theory of arbitration advocates that all arbitrations are finally governed by a national law. It is believed that an arbitration can only be productive of legal rights and obligations if a particular legal system grants it the power to be so.⁶⁸ This opinion was supported by F.A. Mann, who argued that a state has the right to supervise and rule on every activity arising within its territory. He believed that the term “international arbitration” is incorrect, because “every system of private

⁶⁷ Section 2 of the English Arbitration Act 1996, also see Section.4(5), which provides that “The choice of a law other than the law of England and Wales or Northern Ireland as the applicable law in respect of a matter provided for by a non-mandatory provision of this Part is equivalent to an agreement making provision about that matter.”

⁶⁸ Fn 8, at p86

international law is a system of national law, every arbitration is a national arbitration, that is to say, subject to a specific system of national law.”⁶⁹ In this view, the legislative and judicial authorities of the seat of arbitration manage the process of arbitration, because the legal relevance and effect of the process is a product of the approval given to it by the legal infrastructure of the place of arbitration.⁷⁰

The will of the parties as reflected in the agreement can be actualised, if and only if they are authorized by the laws of the place where the arbitration is held. In his words: “Is not every activity occurring on the territory of a State necessarily subject to its jurisdiction? Is it not for such State to say whether and in what manner arbitrators are assimilated to judges and, like them, subject to the law? Various States may give various answers to the question, but that each of them has the right to, and does, answer it according to its own discretion cannot be doubted.”⁷¹

From the foregoing, international arbitrations could be subject to myriad of provisions of the national law. In other words, it has the tendency to influence international arbitration just as it would domestic arbitration. The jurisdictional theory has been supported by some judicial pronouncements and arbitral awards. For example, the recognition of the central role played by the place of arbitration was given judicial impetus, in the case of *Scherk v. Alberto-Culver Co*,⁷² where the U.S. Supreme Court held that “an agreement to arbitrate before a specified tribunal is, in effect, a specialized kind

⁶⁹ Mann, F.A., “*Lex Facit Arbitrum*”, in *International Arbitration: Liber Amicorum* for Martin Domke, P. Sanders edn, 1967, p159

⁷⁰ Park, William W., “Judicial Controls in the Arbitral Process”, (1989), *Arbitration International*, Volume 5, No.3, p116-120

⁷¹ Fn 69, at p162

⁷² *Scherk v. Alberto-Culver Co* (1974)417 US 506 at 519

of forum selection clause that posits not only the *situs* of the suit but also the procedure to be used in resolving the dispute.”⁷³

Also, in the *Sapphire Arbitration*,⁷⁴ the sole arbitrator had no doubt that the *lex loci arbitri* governed arbitration procedure. However, one scholar has argued that international arbitrations are subject to national laws only to the extent that public authorities intervene in the conduct of the arbitration or the enforcement of the award.⁷⁵ Besides, the intervention of state often arises when courts are requested to enforce an award, or when the loser argues the validity of an award at the place of the arbitral proceedings. The issues involved are not only those regarding the reasons for challenging awards, but also the timing and the geography of judicial review, or the when and the where of court intervention.⁷⁶

2.6 Procedural Law and the Enforcement of the Awards

The procedural law is applied to an international arbitration and would usually have a potentially important influence on the procedures employed in the arbitration. Furthermore, the procedural law may either require that specific arbitral procedures are followed or prohibit arbitrators from taking other procedural steps. It also influences to a large extent the outcome of actions to vacate or enforce arbitral awards.⁷⁷

⁷³ *Scherk v. Alberto-Culver Co* (1974)417 US 506 at 519. Compare the decision of the same court in *Gould v Iran* (1989) Y. Comm., Arb.763

⁷⁴ *Sapphire International Petroleum Ltd. v. National Iranian Oil Co* (1967) 35 I.L.R. 136 at 164, 169.

⁷⁵ Fn 70, at p235

⁷⁶ *Ibid*

⁷⁷ Fn 6, at p412

Again under the New York Convention, the procedural law governing the arbitration also has a determinative effect on the nation in which an action to vacate an arbitral award can properly be brought.⁷⁸ In this regard, for example, the New York Convention allows arbitral awards to be set aside by courts of the nation under whose laws the award was made.⁷⁹ Most commentators and courts agree that this refers to the procedural law of the arbitration.⁸⁰

According to Article V(1)(d) of the New York Convention, where the arbitral procedure is not carried out in accordance with the law of the country where the arbitration took place; the recognition and enforcement of the arbitral award may be refused by the enforcing state. The procedural law therefore does not only affect the arbitral proceedings, it also influences the procedure for and to some degree the actual enforcement of the award. Furthermore, parties must show that according to their own law, the subject-matter of the award is arbitrable, as well as that the award does not offend their public policy.⁸¹ There are actually a number of factors to be considered in order to determine the validity of an international arbitral award, such as the procedural law of a province or canton within a federal state. The relationship created by the interaction of the freedom of choosing the procedural law and the enforcement of the award is sometimes fraught with complex contradictions. Generally, when the parties to an international arbitration exercise the freedom to agree upon the way to conduct arbitral proceedings, it also encompasses the freedom to

⁷⁸ Article V(1)(a) & V(1)(d) of the New York Convention

⁷⁹ Articles V(1)(e) and VI of the New York Convention

⁸⁰ Fn 6, at p412-413

⁸¹ Article V(2) of the New York Convention

determine the procedural law of the arbitration even if it is based on a country's procedural law which is different from that of the country of the arbitration *situs*. Even commentators who do not agree with the de-localised arbitration accept the existence of such freedom; and in fact, according to the New York Convention the recognition and enforcement of an award may be refused if the competent authority of the country in which, or under the law of which, the award was made has set aside or suspended the award.⁸²

The second or alternative requirement here demands that, so long as the arbitral proceedings do not accord strictly with the procedural law of the arbitration seat, the award rendered in such arbitration would not be enforceable.⁸³ In other words, some of the exceptions to enforceability of arbitral awards according to Article V of the Convention demand the determination and application of the procedural law where arbitration is held.⁸⁴ That is to say that the standards laid down by virtue of the nation's body of laws which provide the procedural law of an arbitration must be determined, and applied to decide whether the recognition of an arbitral award can be refused or not.⁸⁵

The provisions of the procedural law will determine the effectiveness of the award rendered by the arbitrators. For example, according to the Panama Convention, an award will be treated in the

⁸² Article V(1)(e) of the New York Convention

⁸³ Fn 3, at p1-36, (<http://www.kluwerarbitration.com>.

ezproxy.stir.ac.uk/arbitration/DocumentFrameSet.aspx?ipn=26312), access on 12 April 2009

⁸⁴ New York Convention Article V(1)(a) & V(1)(d). *Int'l Law Reports*, Volume 35, No.136 (March 15, 1963), p795-796

⁸⁵ Fn 6, at p413

same way as a judgment made by the court: Under the applicable law or procedural rules, if an arbitral award is deemed not to be subject to appeal, the award will be enforced in the way of a final judicial pronouncement. An application for enforcement or recognition of the award will be treated in the same manner as the judgment issued by national or foreign ordinary court, which will be according to the procedural laws of the country where the enforcement is being sought, and also perhaps the provisions of international treaties.⁸⁶

2.7 Conclusion

Traditionally, where parties had not chosen the procedural law for the conduct of the arbitration, it was often the solution to have the arbitration conducted subject to the law of the place where the arbitration was held. However, the parties' choice of the place for arbitration may have little or no connection with the arbitral procedure, and should not therefore have their arbitration automatically to be subject to the law of the place of arbitration.⁸⁷ On the other hand, although the parties have the right to choose the law applicable to the procedure, it is considered in some quarters to be ultimately governed by the *lex loci arbitri*. The law of the seat of arbitration therefore plays a very important role in arbitration procedure.

In practice, the position is that once parties have chosen the arbitration rule that is to be adopted in the conduct of the arbitration, such rules should then be followed as much as is practicable and

⁸⁶ Fn 3, at p1-19, (<http://www.kluwerarbitration.com.ezproxy.stir.ac.uk/arbitration/DocumentFrameSet.aspx?ipn=26313>), access on 12 April 2009

⁸⁷ Fn 4, at p635

reasonable. In other words, although the parties' freedom of choice is a general principle of international commercial arbitration, it is usually subject to any restraints occasioned by mandatory rules and public policy.⁸⁸

No rule has been developed to temper the fallout of the uneven relationship created by the interaction between mandatory rules and the conduct of the arbitration in order to retain the advantages of arbitration while making sure that mandatory rules are duly observed. Existing scholarship has provided that policy makers must make a choice between either of two policies: one which favors arbitration and permits it to proceed with as minimal judicial intervention as possible; and the other which allows for substantial judicial review of arbitral awards.⁸⁹ But this issue continues to suffer persistent debate, the substance of which will receive appropriate attention in Chapter 4 of this thesis.

Contemporarily, international arbitration practice has gradually moved away from applying the *lex loci arbitri* in the absence of an expressed or otherwise contrary intention of the parties. It now rather permits the arbitrators complete freedom to choose the procedural law, or failing such, settling procedural issues as and when/if they occur. For instance, in *Texaco Overseas Petroleum Co. v. California Asiatic Oil Co.*⁹⁰ the arbitrators had applied rules of international law instead of the law

⁸⁸ Maniruzzaman, A. F. M., "International Arbitrator and Mandatory Public Law Rules in the Context of State Contracts: An Overview", (1990), *Journal of International Arbitration*, Volume 7, No.3, p54

⁸⁹ Guzman, Andrew T., "Arbitrator Liability: Reconciling Arbitration and Mandatory Rules", (2000), *Duke Law Journal*, Volume 49:1279, p1282-1283

⁹⁰ *Texaco Overseas Petroleum Co. and California Asiatic Oil Co (Texaco) v. Government of the Libyan Arab Republic* (1978) 17 I.L.M.3

of the place of arbitration. This supports our earlier proposition that international arbitration practice has moved away from applying the *lex loci arbitri* in the absence of express intention of the parties. This trend not only reflects party autonomy to a significant extent, but also greatly challenges the influence of the *lex loci arbitri*. This issue will receive an in-depth analysis in Chapter 5. However, the relationship between the principle of party autonomy and law of the seat of arbitration will be our primary focus in the next chapter.

Chapter 3

The *Lex Loci Arbitri*

3.1 Introduction

As we have discussed in Chapter 1 and Chapter 2, parties are free to choose the law(s) that would apply in their arbitral proceedings. However, the parties' right to choose law(s) is not without certain limitation(s); laws/rules chosen must be compatible with the *lex loci arbitri* (or the law of the place of arbitration). We can thus see that the place of the *lex loci arbitri* cannot be overemphasized. For this reason, this writer has deemed it necessary to this chapter to discuss the importance of the *lex loci arbitri* in the arbitration.

Generally, arbitral proceedings practiced under or otherwise controlled by the *lex loci arbitri* are more commonly accepted in international commercial arbitration.¹ However, some scholars believe strongly that arbitration ought to break away from the control of the law of the country of arbitration to ensure the full freedom of parties to choose or design the framework of the arbitral proceedings.² This concept is known generally as the delocalisation theory; which has greatly attacked the efficacy of traditional seat theory. This chapter shall focus on the basis of the *lex loci arbitri* theory, and its role in judicial control of arbitral proceedings. We shall also be concerned with

¹ Redfern, A. and Hunter M, *Law and Practice of International Commercial Arbitration*, 4th edn (London: Sweet & Maxwell Ltd., 2004), p1-37, (<http://www.kluwerarbitration.com.ezproxy.stir.ac.uk/arbitration/DocumentFrameSet.aspx?ipn=26306>), access on 1 July 2009

² Paulsson J., "Delocalisation of International Commercial Arbitration: When and Why It Matters", (1983), I.C.L.Q., Volume 32, p57

the current movement of international commercial arbitration away from being fettered by the *lex loci arbitri*.

3.2 The Seat of Arbitration

The concept of the seat of the arbitration has to do basically with the law of the place where the arbitration is held. Namely, this is the “seat” or “forum” or “*locus arbitri*” of the arbitration, as it is variously referred to in the theories and practice of international arbitration.³ The seat of the arbitration has influenced international conventions from the Geneva Protocol of 1923 to the New York Convention of 1958. The Geneva Protocol provides that: “The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed *by the will of the parties and by the law of the country* in whose territory the arbitration takes place.”⁴

The New York Convention maintains the reference to the seat of arbitration as “the law of the country where the arbitration took place.”⁵ It also has also been referred to as “the law of the country where the award is made.”⁶ This territorial link is also featured in the Model Law: “The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.”⁷

³ Fn 1, at p1-37, (<http://www.kluwerarbitration.com.ezproxy.stir.ac.uk/arbitration/DocumentFrameSet.aspx?ipn=26306>), access on 6 February 2009

⁴ Article 2(1) of the Geneva Protocol of 1923 (emphasis added).]

⁵ Article V(1)(d) of the New York Convention

⁶ Article V(1)(a) and (e) of the New York Convention

⁷ Article 1(2) of the UNCITRAL Model Law; Articles 8 and 9 are concerned with enforcing the arbitration agreement and interim measures of protection respectively; Articles 35 and 36 are concerned with recognition and enforcement of the award.

Among certain other modern legislations on arbitration, Swiss Law is particularly quite clear on the link between the seat of the arbitration and the *lex arbitri*. It states: “The provision of this chapter shall apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time when the arbitration agreement was concluded, at least one of the parties had neither its domicile nor its habitual residence in Switzerland.”⁸

In most parts of the developed world, it is generally established that parties are free to choose the law to govern the conduct of the arbitration.⁹ Once the parties agree upon the place of arbitration without setting out their preferred procedural law, it is usually implied that they have also chosen the procedural law of the country where they have agreed to conduct the arbitration.¹⁰ For example, the English Arbitration Act of 1996 may apply even in cases where the seat of arbitration is outside England, Wales or Northern Ireland or where no seat has been designated.¹¹ This provision generally reflects the old common law rule/belief that arbitration procedure is governed by the law of the country where the arbitration took place.¹²

However, the place or seat of the arbitration may not be a matter of geography at all. It is the territorial link between the arbitration itself and the law of the place or state where that arbitration is

⁸ Chapter 12, Article 176 (1) of the Swiss Private International Law Statute

⁹ For example, Article 182(1) of the Swiss Private International Law; Article 1042(1) of the German Code of Civil Procedure of 1998; Article 1494 of French New Code of Civil Procedure

¹⁰ Fn 1, at p1-37, (<http://www.kluwarbitration.com.ezproxy.stir.ac.uk/arbitration/DocumentFrameSet.aspx?ipn=26306>), access on 1 March 2009

¹¹ Section 2 of the English Arbitration Act 1996

¹² *Channel Tunnel Group v. Balfour Beatty Construction* (1993) AC 334; Article 1(2) of the UNCITRAL Model Law

legally held:

“When one says that London, Paris or Geneva is the place of arbitration, one does not refer solely to a geographical location. One means that the arbitration is conducted within the framework of the law of arbitration of England, France or Switzerland or, to use an English expression, under the curial law of the relevant country. The geographical place of arbitration is the factual connecting factor between that arbitration law and the arbitration proper, considered as a nexus of contractual and procedural rights and obligations between the parties and the arbitrators.”¹³

When parties choose a place of arbitration by their international arbitration agreement, they normally choose a place that does not have any connection with either themselves or their commercial relation. The place they choose is “neutral”.¹⁴ By doing this, it is not necessary for them to intend to choose the law of the place of arbitration to manage their relationship.¹⁵ For many reasons a place of arbitration may be chosen, even if it is not connected with the law of that place. One of the reasons may be due to its geographical convenience to the parties, or it could be because of its suitable neutral venue; or because of the high reputation of the arbitration services found there or other equally valid grounds.¹⁶

¹³ Reymond, “Where is an Arbitral Award”, (1992), L.Q.R., Volume 108, p3

¹⁴ Please refer to para 2-06 of Fn 1, at p1-37, (<http://www.kluwarbitration.com.ezproxy.stir.ac.uk/arbitration/DocumentFrameSet.aspx?ipn=26306>), access on 6 February 2009

¹⁵ Please refer to para 2-38 of Fn 1, at p1-37, (<http://www.kluwarbitration.com.ezproxy.stir.ac.uk/arbitration/DocumentFrameSet.aspx?ipn=26306>), access on 6 February 2009

¹⁶ Fn 1, at p1-37, (<http://www.kluwarbitration.com.ezproxy.stir.ac.uk/arbitration/DocumentFrameSet.aspx?ipn=26306>), access on 6 February 2009

For example, in the case of *Union of India and McDonnell Douglas Corp.*,¹⁷ the parties agreed that the arbitration shall be conducted according to the procedure of the Indian Arbitration Act 1940, and the seat of the arbitration to be London, United Kingdom. Obviously, the parties did not consider choosing the law of the place of arbitration (the English law) to conduct the arbitral proceedings. However, the court stated that even though the parties are usually free to choose the procedural law to conduct the arbitral proceedings under an arbitration agreement, but in this case if the parties agreed that the seat of arbitration proceedings shall be London, it would necessarily imply that English law would govern the proceedings. Similarly, in the case of *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd.*,¹⁸ the parties made an arbitration agreement that the ICC Rules were the regulations to conduct the arbitral procedure, and that the place of arbitration to be Brussels. The contract was performed in London. Consequently, the House of Lords held that it is not proper for the English court to be involved in this case, because the parties had agreed that the arbitration was to be held in Brussels by the ICC Rules. Evidently, the court believed that the law of the place of arbitration was to be the procedural law to conduct the arbitral proceedings.

3.3 The Nationality of Awards and the *Lex Loci Arbitri*

One traditional conception about arbitration is that arbitral awards should possess a nationality, and that the validity or otherwise of an arbitral award is determined to a large extent by whether it possesses a nationality or not. This is because if arbitration does not have a link to the law of a

¹⁷ *Union of India v. McDonnell Douglas Corporation*, [1993]2 Lloyd's Rep.48

¹⁸ *Channel Tunnel Group Ltd. v Balfour Beatty Construction Ltd.*; [1993]A.C.334; [1993]2 W.L.R. 262

particular state, more often than not it is seen as lacking legal effect.¹⁹ In other words, the place of arbitration determines the nationality of the award, which in turn plays an important role when the arbitral award seeks legitimacy through the support of national courts in the face of an application before those courts seeking to set aside the award.²⁰

One proponent of this view, F.A. Mann, submits that arbitration is controlled by the law of a particular state, in which each private right and powers are derivable through the mechanism and workings of domestic courts. In the practice of arbitration, this is usually called the *lex loci arbitri*.²¹ Putting it more clearly, Mann further states that an arbitral tribunal's proceeding and award can not be binding unless linked to a specific system of national law: "Every right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law which may conveniently and in accordance with tradition be called *lex fori*, though it would be more exact (but also less familiar) to speak of the *lex arbitri*."²²

Furthermore, for the reason that every arbitral award should be national, it follows then that it cannot exist in a legal vacuum. The *lex loci arbitri* decides the composition of arbitrators, the procedural rules, and the law applicable to the procedure. As a result, the nationality of an

¹⁹ Mann, F.A., "*Lex Facit Arbitrum*", in *International Arbitration: Liber Amicorum for Martin Domke*, P. Sanders edn, 1967, p157

²⁰ De Witt, Nicolas, "Online International Arbitration: Nine Issues Crucial To Its Success", (2001), *The American Review of International Arbitration*, Volume 12, p441, 451

²¹ Yüksel, Armağan Ebru Bozkurt, "Online International Arbitration", (2007), *Ankara Law Review*, Volume 4, No.1, p88, (<http://auhf.ankara.edu.tr/journals/alr-archive/ALR-2007-04-01/alr-2007-04-01-yuksel.pdf>), access on 2 July, 2009

²² Fn 16

arbitral award can be extended to determine issues, such as which national court has the power and jurisdiction for amendment, and, if certain conditions (that differ from state to state) are met, then the award may be set aside.²³

Nowadays for example, the German courts have begun to take real cognizance of this principle.²⁴ The seat of arbitration has been accepted as a possible basis for court's assuming jurisdiction in proceedings for the setting aside of arbitral proceedings and awards, which not only makes certain that almost all awards that result from arbitrations held in Germany can be subject to annulment there, it also suggests that the best solution is the system of the place of arbitration.²⁵

It is also worth paying attention to, because the New York Convention is also quite interested in an award which is made "in the territory of a State other than the State where the recognition and enforcement of such awards are sought,"²⁶ even though it does require the parties to be nationals of different states. Besides this, the Convention applies "to arbitral awards not considered as domestic awards in the State where the recognition and enforcement is sought."²⁷ In this case that the "nationality" of the arbitral award is irrelevant in consideration of whether it should be recognized or enforced. The Convention also clearly applies to situations where the award is made in the territory

²³ Baddack, Frank, "*Lex Mercatoria: Scope and Application of the Law Merchant in Arbitration*", (2005), Faculty of Law, University of Western Cape, p34, (http://etd.uwc.ac.za/usrfiles/modules/etd/docs/etd_init_3939_1174049802.pdf), access on 20 February 2009 Citing: Mann, "Schiedsrichter und Recht", in *Festschrift Flume* (1978), p598

²⁴ BGH 14.4.88, NJW 1988, 3090

²⁵ Samuel, Adam, "Arbitration in Western Europe - A Generation of Reform", (1991), *Arbitration International*, Volume 7, No. 4, p349

²⁶ Article I(1) of the New York Convention

²⁷ *Ibid*

of one contracting state and seeks enforcement and recognition in another.

In other words the New York Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought, or to arbitral awards not considered as domestic awards in the state in which their recognition and enforcement are sought.²⁸

According to Article I(1) of the Convention, “it shall also apply to arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought.” The Convention does not give non-domestic awards a definition. It has been suggested that the definition has been left out with the obvious intention to leave it as wide as possible to cover various qualified awards, while permitting the enforcing state to supply its own definition of “non-domestic” in line with its national law.²⁹ The definition has been omitted to make it easier for those states supporting the territorial concept to receive the Convention, and at the same time make the Convention reasonably acceptable for those states that are sympathetic to the argument that the nationality of the award is determined by the law governing the arbitral procedure. One scholar is of the opinion that awards “not considered as domestic” applies to awards which are bound to the Convention not due to their having been made abroad, but for the fact that they have been made within the legal framework of

²⁸ Article I(1) of the New York Convention

²⁹ Born, Gary B., *International Commercial Arbitration: Commentary and Materials*, 2nd edn (Kluwer Law International, 2001), p717

another country.³⁰

Furthermore, arguments bordering on the nationality of awards are more than an academic discourse or exercise. The essential significance of the *lex loci arbitri* was so aptly illustrated in the classic case of *Société Européenne d'Etudes et d'Entreprise (S.E.E.E) v. Yugoslavia*.³¹ S.E.E.E. had built a railroad in Yugoslavia before World War II, and was paid in French Francs which suffered devaluation. The panel was composed of two arbitrators, who found an implicit currency stabilization provision and on July 2, 1956, made a unilateral arbitral award that benefitted S.E.E.E. In an action before the cantonal court of Vaud, Yugoslavia argued that mandatory settlements provision under the domestic law had been breached by having an even number of arbitrators. The Swiss Court rejected the application of the party, holding that the arbitration was not governed by Vaud cantonal law.³²

In an attempt to enforce this decision in the Netherlands, the Dutch Supreme Court did not accept the Yugoslav argument that the award was invalid as not being tied to any national legal system. However, this “floating award” only had a short lived victory because after that, the Dutch Supreme Court held that the refusal of the Swiss court to hear the Yugoslav challenge had the same result as annulment of the award, which was in essence a refusal of recognition. The Dutch Court took into consideration the arbitrator’s decision to make a Swiss award in spite of the opposite view

³⁰ Born, Gary B., *International Commercial Arbitration: Commentary and Materials*, 2nd edn (Kluwer Law International, 2001), p717

³¹ *Société Européenne d'Etudes et d'Enterprise (S.E.E.E.) v. Yugoslavia* (1959) J.D.I. 1074

³² *Ibid*

of the Swiss Court.³³

3.4 The New York Convention

3.4.1 The Territorial Link between Arbitration and the Seat of Arbitration

As discussed above, the *lex loci arbitri* plays a significant role in the practice of international commercial arbitration, and is also significantly evident from a perusal of the provisions of the New York Convention, particularly Articles I, V and VII. Article I of the Convention provides for a framework for recognition and enforcement of arbitral awards between the contracting states and creates an obligation on all their parts to recognize and enforce the arbitral awards made in other contracting states.³⁴ It is generally believed that this provision provides a significant basis for the territorial link between arbitration and states in geographical terms. One scholar has stated that: “Arbitration, international as it may be, needs at least a supporting judicial authority (*autorité d'appui*), which is, failing an international authority competent in this respect, necessarily a national court. For example, the assistance of a national court may be needed for the appointment, replacement or challenge of an arbitrator.”³⁵

He has further pointed out that such a link should exist between arbitration and the state in which

³³ Ibid

³⁴ Article I of the New York Convention provides that “This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.”

³⁵ Van der Berg, A.J., *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, 1981, p30

the arbitration is held, because it is an accepted principle of the international division of judicial competence that the court of the state established by the law of the place where the arbitration is held, is the competent judicial authority for the arbitration. If the applicability of an arbitration law is rejected, it automatically affects the place of such a court³⁶

For Article I and V(1)(e),³⁷ the arguments that emphasize the territorial connection between arbitration and the seat of arbitration have received the approval of many scholars of international commercial arbitration.³⁸ In the absence of an agreement on applicable procedural law, it would be necessary for the arbitrators to refer to the *lex loci arbitri* to determine the appropriate procedure to guide the proceedings. For example, the English Arbitration Act 1996 has envisaged the importance of such connection when it provides that “the provisions of this Part apply where the seat of arbitration is in England, Wales or Northern Ireland.”³⁹ To further stress the importance of the link between arbitration and the state of origin, the control exercised by the jurisdiction of the seat of arbitration is mentioned again in the Act, where it stipulates that “the mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary.”⁴⁰

³⁶ Ibid

³⁷ Article V(1)(e) of the New York Convention provides that “Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.”

³⁸ Fn 31, at p267; Yu, Hong-Lin, “Is the territorial link between arbitration and the country of origin established by Articles I and V(1)(e) being distorted by the application of Article VII of the New York Convention”, (2002), *International Arbitration Law Review*, p197

³⁹ Section 2(1) of the English Arbitration Act 1996

⁴⁰ Section 4(1) of the English Arbitration Act 1996

3.4.2 The Arbitral Award has been Set Aside in the Country of Origin

For arbitral awards that have been set aside in their country of origin, the questions as to whether an award still exists after its annulment, and which state law ought to govern the existence and validity of an annulled award necessarily arise. Firstly, does an award still exist when the recognition or enforcement of the arbitral award has been refused at the place of arbitration? In this circumstance, the key issue is whether an enforcing court, outside the supervision of the place of arbitration should be bound by Article V(1)(e) and automatically refuse the recognition or enforcement of an award which has already been refused recognition or/and enforcement in the country of origin. The common consensus is that the position of Article V(1)(e) is settled as regards the faith of an award which was set aside by the competent jurisdiction. On the other hand however, it does not draw a parallel between the setting aside and refusal of recognition and enforcement. Hence, it is believed that such an award still has legal effect and will be enforced by a foreign court, even though it had suffered setting aside and refused recognition or enforcement in the country of origin.⁴¹ For example, in the cases of *SEEE*⁴² and *Götaverken*,⁴³ it was held that it is not obligatory for the enforcing courts of the signatory states to the New York Convention to apply Article V(1)(e) to such an award.⁴⁴

The second issue has to do with which states law governs the existence and validity of an annulled award. Article V(1)(e) of the Convention, recognizes that the legal validity of an award is, mainly, a

⁴¹ Yu, Hong-Lin, Fn 34, at p197, 203

⁴² *Société Européenne d'Etudes et d'Enterprise (S.E.E.E.) v. Yugoslavia* (1959) J.D.I. 1074

⁴³ *General National Maritime Transport Co. v. Societe Gotaverken Arendel A.B.*, (1981) 20 I.L.M. 42

⁴⁴ Fn 37, at p203

matter for the court having supervisory jurisdiction to decide.⁴⁵ This is attributable to the possibility that the law of the country where the arbitration was held might be different from the procedural law, which the parties agreed would govern the arbitral proceedings. The aforementioned opinions reflect the purpose of the Convention as well as the principle of party autonomy.

3.4.3 The Purpose of Article VII of the Convention

The New York Convention is extremely tolerant of other treaties. Article VII(1) provides that the Convention shall not influence the validity of multilateral or bilateral agreements relevant to the recognition and enforcement of arbitral awards that have been signed by the contracting states. Furthermore, Article VII(1) of the Convention clearly empowers any interested party to avail itself of an award in the manner and to the degree permitted by the law or the treaties of the enforcing state. Given the limitation to the refusal of recognition and enforcement for reasons other than those provided in Article V, Article VII is correctly understood as permitting any interested party to rely on the law or the treaties of the enforcing state when they are more liberal than the New York Convention. The New York Convention hence clearly envisages that all awards to which it is applied may be recognized and enforced relying on the law or the treaties of the enforcing state, where such awards may not have been recognized and enforced if Article V of the Convention had been relied on.⁴⁶ To further buttress this point, the Court of Appeal of *Cologne of Germany* was of the opinion

⁴⁵ *Hebei Import & Export Corp v Polytek Engineering Co. Ltd.*, [1999] 1 HKLRD 552 (Hong Kong Court of Final Appeal, 9 February 1999), (<http://www.hkllii.org>), access at 1 March 2009 (Litton PJ)

⁴⁶ Lastenouse, Pierre, "Why Setting Aside an Arbitral Award is not Enough to Remove it from the International Scene", (1999), *Journal of International Arbitration*, Volume 16, No. 2, p27

that: “The rationale of this provision is to avoid depriving a party who seeks recognition of an award of more favorable possibilities under the national law of the State where enforcement is sought.”⁴⁷

Proponents of territoriality, appear to hold fast to their belief in the doctrine, perhaps because many provisions of the Convention have tended to recognize the role of the *lex loci arbitri*.⁴⁸ On the other hand, the advocates of party autonomy and the statelessness of awards, have based their belief on the ground that Article VII clearly creates the right of enforcement states to permit enforcement of a foreign award under their domestic law. And notwithstanding that the arbitral award has been set aside by the court of origin, it can still be enforced where (according to the domestic law) annulment is not a reason for refusal of recognition of the award.⁴⁹

However, the New York Convention does not replace domestic law when it comes to the enforcement of foreign awards in the enforcing state. For example, the A.F.R. German Court of Appeal took a different view regarding an arbitral award made in Romania. This was occasioned by the fact that the New York Convention had been adopted in place of Section 1044 of the German

⁴⁷ Fn 31, at p82-83 Citing: Oberlandesgericht of Cologne, June 10, 1976 (F.R. Germ. No.14)

⁴⁸ See in particular Article II(1) (“differences . . . in respect of a defined legal relationship . . . concerning a subject matter capable of settlement by arbitration”, which is implicitly a reference to the *lex arbitri*); Article II(3) (which requires a court to refer a dispute to arbitration under the arbitration agreement “unless it finds that the said agreement is null and void, inoperative or incapable of being performed” ± again matters to be determined under the *lex arbitri*); Article V(1)(a) (enabling the court to refuse recognition if it finds that the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made); Article V(1)(d) (composition of the arbitral tribunal not in accordance with the agreement of the parties or, failing such agreement, not in accordance with the law of the country where the arbitration took place); Article V(e), previously set out; Article VI (empowering the court of the state of enforcement to adjourn the enforcement proceedings if an application is pending before the competent authority of the country in which, or under the law of which, the award was made). The *lex loci arbitri* controls even if the *lex arbitri* is different. See *infra*, n25.

⁴⁹ Goode, Roy, “The Role of the *Lex Loci Arbitri* in International Commercial Arbitration”, (2001), *Arbitration International*, Volume 17, No. 1, p23

Code of Civil Procedure, which happens to be the German domestic law on the enforcement of foreign awards.⁵⁰ As has been observed, this is not surprising as domestic law provisions on the enforcement of foreign arbitral awards in many states is a lot more cumbersome to deal with than the New York Convention.⁵¹

The important role played by the *lex loci arbitri* is recognized by the New York Convention. However, this should not be conceived as being in support of the concept of a stateless award. It is still strongly arguable that stateless awards would not be enforced under the Convention.⁵² In other words, the concept of stateless award has a revolutionary appeal and is worthy of more support than it currently receives. However, the lack of legal basis in support of and absence of recognition by most national courts for the “de-nationalized” arbitration agreement, make it a dangerous legal undertaking fraught with serious legal problems. It is therefore not surprising that such type of agreement is made only in very exceptional cases.⁵³

3.5 Judicial Control of the *Lex Loci Arbitri*

3.5.1 Mandatory Rules of the *Lex Loci Arbitri*

⁵⁰ Ibid, Citing: Oberlandesgerichts of Düsseldorf, November 8, 1971 (F.R. Germ. No.8): the Court held that the New York Convention could not be applied to the enforcement of the arbitral award as the sales confirmation containing the arbitral clause had not been returned, which is insufficient for Article II(2) (see *infra* p205-207), but granted the enforcement on the basis of German domestic law concerning the enforcement of foreign arbitral awards. The Court did, however, not mention Article VII(1) expressly

⁵¹ Fn 31, at p88

⁵² Fn 31, at p37. After 18 years Professor van den Berg's book is still the seminal work on the New York Convention.

⁵³ Ibid at p33-34

The legal system of each nation has its own laws or rules applicable to procedure. Some are mandatory while others are not.⁵⁴ Although based on the principle of party autonomy, the parties are free to choose the law to conduct their arbitral proceedings to fit their particular requirements. This principle grants the parties the power, with which they can freely select favorable procedural rules. However, the principle of party autonomy is not always sacrosanct and infallible. The parties should abide by mandatory rules of the place where the arbitration takes place. For example, the English Arbitration Act provides:

“The tribunal shall (1)(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and (b) adopt procedures suitable to the circumstance of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined. (2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.”⁵⁵

For municipal law, usually, a state requires that arbitration is governed by the *lex arbitri* and the mandatory rules of the place of arbitration. For example, Swiss Private International Law Statute states:

⁵⁴ Article 6-8 of the UNCITRAL Arbitration Rules 1976

⁵⁵ Section 33 of the English Arbitration Act 1996

“1. The provisions of this chapter shall apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time when the arbitration agreement was concluded, at least, one of the parties had neither its domicile nor its habitual residence in Switzerland. 2. The provisions of this chapter shall not apply where the parties have in writing excluded its application and agreed to the exclusive application of the procedural provisions of cantonal law relating to arbitration.”⁵⁶

Article 18 of the UNCITRAL Model Law states that “the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.” It provides that the basic requirement is procedural fairness. Similar rules contained in Article 182(3) of the Swiss Law on Private International Law provides: “Whatever procedure is chosen, the arbitral tribunal shall assure equal treatment of the parties and the right of the parties to be heard in an adversarial procedure.” Considering the aforesaid, it might not be so plausible to argue that the *lex loci arbitri* still has a great influence on the practice of international commercial arbitration. However, the present writer believes that the place of arbitration should not in any way influence or otherwise determine the choice of procedural law. This is because the place of arbitration is unconnected with the dispute in a lot of cases, and it is usually chosen for convenience. And, where the parties make an agreement, they usually do not stipulate the place of arbitration and only consider the convenience as far as transportation and communication is concerned. They also probably would not consider the issues of the other

⁵⁶ Article 176(1)(2) of Swiss Private International Law Statute

intricacies that may attend the place of arbitration nor will they be concerned at that stage with the issues of recognition and enforcement of the award. The parties may not think of the consequences of applying the law of the chosen place of arbitration and might not even care to consider the legal implications of choosing a certain place as the place of arbitration.⁵⁷

3.5.2 Judicial Intervention of the *Lex Loci Arbitri*

As stated earlier,⁵⁸ some scholars have proposed that arbitration ought to detach from the control of the law of the state in which it was conducted⁵⁹ in furtherance of parties' freedom to choose the arbitral procedure. On the other hand however, the domestic law is what gives arbitration a legally binding character.⁶⁰ Hence, it is almost impossible for arbitration to exclude the court from intervention or supervision.

Under the UNCITRAL Model Law, national courts still play a vital role in the conduct of arbitration. The assistance of the court is called upon in matters relating to specifying the procedure for appointment of arbitrators,⁶¹ in determining the procedure for challenging an arbitrator,⁶² providing the grounds for terminating the mandate of an arbitrator and the methods

⁵⁷ Lionnet, K. "Should the Procedural Law Applicable to International Arbitration be Denationalised or Unified", (1991), J.I.A, Volume 8, No. 3, p11

⁵⁸ Please refer to p1 and p6 of Chapter 1

⁵⁹ Fn 37, at p198; Bucher, A., "Court intervention in arbitration", in Richard B. Lillich and Charles N. Brower edn, *International Arbitration: In the 21st Century: Towards "Judicialization" and Uniformity?*, Twelfth Sokol Colloquium, 1996, p41

⁶⁰ *McCreary Tire & Rubber Co. v. CEATS. p.A.*, 501 F.2d 1032, 1038 (3d Cir. 1974); *Carolina Power & Light Co. v. Uranex*, 451 F. Supp. 1044 (N.D. Cal. 1977).

⁶¹ Article 11 of the Model Law

⁶² Article 13 of the Model Law

of doing so, the competence of arbitral tribunal to rule on its jurisdiction,⁶³ and application for setting aside as exclusive recourse against arbitral award.⁶⁴ Furthermore, issues like interim measures, recognition and enforcement of arbitral awards, and the appointment of arbitrators also require the assistance of law courts.⁶⁵ However, Article 5 of the UNCITRAL Model Law also provides that “in matters governed by this Law, no court shall intervene except where so provided in this Law.” The Commission explained the term “intervene” mentioned in Article 5 to include court action, which can be categorized more as “assistance” to the arbitration rather than as “intervention.”⁶⁶

Again, under the New York Convention, the recognition and enforcement of awards may be refused by the enforcing state if the said agreement is not valid under the law of the country where the award was made;⁶⁷ the award has been set aside or suspended by the country in which the award was made;⁶⁸ or the recognition or enforcement of the award would be contrary to the public policy of the country where the award was made.⁶⁹ This position also lends support the position of importance the *lex loci arbitri* is reputed to play in arbitral proceedings.

In practice, parties usually require the assistance of the court for a variety of reasons, including protection of evidence. For example, the Arbitration Law of the People’s Republic of China, 1994

⁶³ Article 16 of the Model Law

⁶⁴ Article 34 of the Model Law

⁶⁵ Ibid

⁶⁶ Summary Record, A/CN.9/309, para. 40, p237 *infra*

⁶⁷ Article V(1)(a) of the New York Convention

⁶⁸ Article V(1)(e) of the New York Convention

⁶⁹ Article V(2)(b) of the New York Convention

states that “if a party to a foreign-related arbitration applies for taking interim measures of protection of evidence, the foreign-related arbitration commission shall submit his application to the intermediate People's Court in the place where the evidence is located.”⁷⁰ Similarly, the Italian Code of Civil Procedure also provides that: “the arbitrators may not grant attachments or other interim measures of protection, except if otherwise provided by the law.”⁷¹ The Swiss Private International Law Statute also contains provisions with similar effect.⁷² Accordingly the arbitral tribunal lacks the power to issue interim measures, such power is reserved for the court.

Although the role of *lex loci arbitri* is so significant, yet the universal trend is to limit the control of the court over arbitral proceedings. For example, the Model Law seeks to balance party autonomy in international arbitration with as little judicial intervention as possible, careful however not to sacrifice the independence of the arbitral tribunal whilst ensuring fairness of procedure.⁷³ Therefore, although it recognizes that courts play a vital role in maintaining procedural fairness and in the speedy resolution of disputes, it lowers and defines the extent/limit of judicial supervision over the arbitral proceedings and awards.⁷⁴

⁷⁰ Article 68 of Arbitration Law of the People's Republic of China, 1994

⁷¹ Article 818 of Italian Code of Civil Procedure

⁷² Article 183 of the Swiss Private International Law Statute

⁷³ Lynch, Katherine L., *The Forces of Economic Globalization*, 2003, p239, (http://books.google.com.tw/books?id=PZKHwaTNz1oC&pg=PA239&lpg=PA239&dq=enhancing+party+autonomy+and+limiting+judicial+intervention&source=bl&ots=zj6aa9QTPI&sig=mC1IT6yQYHYPNq1p-K2FbhikMXU&hl=zh-TW&ei=HmNMSsP6AoHUMsrDwOgD&sa=X&oi=book_result&ct=result&resnum=4), access on 2 July 2009

⁷⁴ However, the term “intervene” mentioned in Article 5 of the Model Law was explained by the Commission to include court action, which can be categorized more as “assistance” to the arbitration rather than an intervention (Summary Record, A/CN.9/309, para. 40, p237 infra.).

Furthermore, some states that have been influenced by the delocalisation theory, have attempted to take away such sweeping supervisory powers from the state. For example, Article 1717(4) of the Belgian Judicial Code provides that “the parties may, by an explicit declaration in the arbitration agreement or by a later agreement, exclude any application for the setting aside of an arbitral award, in case none of them is a physical person of Belgian nationality or a physical person having his normal residence in Belgium or a legal person having its main seat or a branch office in Belgium.” This affords parties the authority to transfer the control of arbitral proceedings from the country of the place of arbitration to the state where the award is to be recognized and enforced. This provision also excludes the power to apply to the Belgian courts to set aside arbitral awards. However, this is not an entirely satisfactory situation, the potential of this provision is to shut out parties who have genuine need to seek judicial assistance or otherwise good reasons to apply to set aside an arbitral award.⁷⁵

As discussed, judicial supervision of the *lex loci arbitri* appears to conflict with the party autonomy principle. Even though the trend of international commercial arbitration is to limit the extent of court intervention,⁷⁶ the conflicts between the two are still very real as they basically co-exist like “uneasy bed fellows.” We shall be addressing the issue of ways to resolve the conflicts between the intervention of the court and party autonomy in Chapter 7.

⁷⁵ It is an accepted principle that while an enforcing court may refuse to recognize a foreign award, only the court of origin has the power to annul the foreign award.

⁷⁶ Raghavan, Vikram, “Heightened Judicial Review of Arbitral Awards: Perspectives from the UNCITRAL Model Law and the English Arbitration Act of 1996 on some US Developments”, (1998), *Journal of International Arbitration*, Volume 15, No. 3, p124,126

3.5.3 The Application of the *Lex Loci Arbitri*

As we have discussed in Chapter 2, the issue of whether arbitral procedures should be subject to the seat of the law was first discussed in the case of *James Miller v. Whitworth Street Estates*.⁷⁷ In that case, even though the parties had not stipulated the applicable law of arbitration procedure in their contract, they nevertheless held to have impliedly admitted Scottish Law as the applicable law to arbitral proceedings.⁷⁸

Similarly, in *American International Standard Electric Corp.*,⁷⁹ the court had taken a similar stand. In that case the claimant and respondent had agreed to submit the dispute to arbitration by the International Court of Arbitration of the ICC, and that the proceedings should be conducted according to ICC Rules in Mexico. The arbitral tribunal made an arbitral award in favor of the respondent. The claimant applied to the State's District Court, Southern District of New York to set aside the award. But the court rejected his application. The court held that: "Decision of foreign court under the Convention, supports the view that the clause in question means procedural and not substantive (that is, in most case, contract law). Accordingly, we hold that the contested language in Article V(1)(e) of the Convention refers exclusively to procedural and not substantive law, and more precisely to the regimen or scheme of arbitral procedural law under which the arbitration was conducted."⁸⁰

⁷⁷ *James Miller v. Whitworth Street Estates* [1970]1 All E.R. 796(H.L.)

⁷⁸ *Ibid*

⁷⁹ *International Standard Electric Corp (US). v. Bidas Sociedad Anonima Petrolera* (Argentina), United States Court, Southern District of New York, 1990, 745 F. Supp.172.reported in (1992) VII Yearbook Commercial Arbitration p639

⁸⁰ *Ibid* at p644-645

In other words, the court considered that in so far as the arbitration proceedings were conducted in Mexico, the law governing the arbitration proceedings would be the available Mexican law. This case exemplifies the importance of the law of the place of arbitration. From the aforesaid, this writer submits that if the claimant had made its application for setting aside that award to a Mexican court, and the court had acted accordingly, the American court might have refused to recognize and enforce such arbitral award under Article V(1)(d) of the New York Convention.

In the case of *American Diagnostica Inc. v. Gradipore Ltd.*⁸¹ which had come before the High Court of South Wales, Australia in 1999, the plaintiff was an American company while the defendant was an Australian company. A dispute actually arose in the course of executing their contract. The parties then inserted another clause in their agreement for the resolution of disputes in accordance with UNCITRAL Arbitration Rules. The arbitral tribunal eventually made an award in favor of the Australian company. The plaintiff, the American Company, appealed to the High Court of South Wales, but the defendant argued that the High Court had no jurisdiction, because the arbitral proceedings of this case was governed by the UNCITRAL Arbitration Rule, not the *lex loci arbitri*. The court held that no matter what law or rule had been chosen by the parties to conduct the proceedings, as long as the arbitral proceedings were conducted in South Wales, the court reserved jurisdiction over the case. Again in *Union of India and McDonnell Douglas*,⁸² the contract between

⁸¹ *American Diagnostica Inc. v. Gradipore Ltd.* Australia Business Law Review, Volume 28, 2000, No.5, p351-363

⁸² *Union of India v. McDonnell Douglas* (1993) 2 Lloyd's Rep. 48

the plaintiff Union of India and defendant McDonnell Douglas contained an arbitration agreement. The defendant had agreed to supply the plaintiff with some equipment in relation to the launch of a space satellite by the plaintiff. Under Article 11 of the agreement, the contract was to be governed and interpreted by the laws of India. Furthermore, Article 8 of the agreement also stipulated: "In the event of a dispute or difference arising out of or in connection with this Agreement, arbitration shall be conducted in accordance with the procedure provided in Indian Arbitration Act of 1940 or a reenactment or modification thereof. The arbitration shall be conducted in the English language....The seat of the arbitration proceedings shall be London, United Kingdom."

The court held that the parties under an arbitration agreement are usually free to agree on the procedures to be adopted in the arbitration, and in this case would appear to have agreed that it would be governed by a law other than that of the place of arbitration, subject to the proviso that the jurisdiction of the English Court under the Arbitration Act over an arbitration in England allows it to apply the laws of another state.

Similarly, In *Dubai Islamic Bank PJSC*⁸³ where the plaintiff was a Texan company and the defendant a merchant bank, a dispute arose between the parties. The arbitrator made an award in the plaintiff's favor at the seat at California. The court held, allowing the defendant's application, that English law demanded that an arbitration had to have a judicial seat before it began, and the

⁸³ *Dubai Islamic Bank PJSC v Paymentech Merchant Service Inc.* (2001) 1 All E.R. (comm.) 514. (2001) 1 Lloyd's Rep. 65

requirement imposed upon the court by Article 3 of the Arbitration Act 1996 (that is to say to consider the "relevant circumstances" in the determination of the appropriate jurisdiction of the seat), was one that involved consideration of the pre-arbitration circumstances, not those subsequently arising. On the facts of the present case the seat of arbitration was in California, since defendant's appeal to the court had invoked appeal procedure in that place, it was not possible to unilaterally change the seat or place.

Similarly, in the cases of *Sapphire International Petroleum Ltd. v. The National Iranian Oil Co.*,⁸⁴ *Saudi Arabia v. Aramco*,⁸⁵ and *B.P. Exploration Company v. Libya*⁸⁶ the court had held in favour of the *lex loci arbitri* to conduct the arbitral proceedings.

3.5.4 Departing from *Lex Loci Arbitri*

The *lex loci arbitri* is no doubt very significant in international commercial arbitration. However, it has long been the desire of international commerce to limit the influence of the seat of arbitration thereby away from the powers of the courts at the seat of arbitration to make internationally far reaching pronouncement regarding the nullity or otherwise of the award.⁸⁷ Article 1502 of the French New Code of Civil Procedure for example, which settles the enforcement of international awards or that made outside France, does not provide for the reason for refusal as provided for under

⁸⁴ *Sapphire International Petroleum Ltd. V. The National Iranian Oil Co* (1964) 13 I.C.L.Q. 1011

⁸⁵ *Saudi Arabia v. Aramco* (1963) 27 I.L.R., p117

⁸⁶ *B.P. Exploration Company v. Libya* (1979) 53 I.L.R., p297; (1980) 5 Y. Comm. Arb. p143

⁸⁷ Paulsson J., "Delocalisation of International Commercial Arbitration : When and Why it Matters", (1983), INT'L & COMP. L.Q., Volume 32, p53,54-61

Article V(1)(e) of the New York Convention.⁸⁸ Hence, according to the French law, if an arbitral award has been set aside in the country of origin, or under the law of which, it was made is not by itself a reason for refusal of enforcement of the award in France.⁸⁹ This shows that Article 1502 of the French New Code of Civil Procedure 1981 generally reflects the spirit of the delocalisation theory.⁹⁰

Belgian law has gone a step further by restricting to a large extent, court intervention into the consequences of the arbitration.⁹¹ For example, the purpose of Article 1717 of the Judicial Code is to restrict incidences of applications to set aside awards in those cases related to Belgian interests. Awards rendered in Belgium are generally subject to the Belgian arbitration law. It extends to situations where if the enforcement of an award will occasionally do something contrary to the

⁸⁸ Article 1502 of the French New Code of Civil Procedure (NCCP) provides that an appeal against a decision which grants recognition or enforcement of an award which is international or rendered outside France may be brought only in the following cases:

- 1) Where the arbitrator ruled in the absence of an arbitration agreement or on the basis of an agreement that was void or had expired;
- 2) Where the arbitral tribunal was irregularly constituted or the sole arbitrator irregularly appointed;
- 3) Where the arbitrator ruled without complying with the mission conferred upon him or her;

- 4) When due process has not been respected;

- 5) Where the recognition or enforcement is contrary to international public policy

⁸⁹ Freyer, Dana, "The Enforcement of Awards Affected By Judicial Orders of Annulment at the Place of Arbitration", in *Enforcement of Arbitration Agreements and International Arbitral Awards of the New York Convention in Practice*, 2008, p767-768, (http://www.skadden.com/content%5CPublications%5CPublications1421_0.pdf), access on 17 February 2009

⁹⁰ Article 1502 of the French New Code of Civil Procedure 1981 provides that : "An appeal against a decision granting recognition or enforcement may be brought only in the following cases:

1. If the arbitrator decided in the absence of an arbitration agreement on the basis of a void or expired agreement;
2. If the arbitral tribunal was irregularly composed or the sole arbitrator irregularly appointed;
3. If the arbitrator decided in a manner incompatible with the mission conferred upon him;
4. Whenever due process has not been respected;
5. If the recognition or enforcement is contrary to international public policy (ordre public)."

⁹¹ Fn 37, at p200

public policy or the dispute cannot be settled by arbitration, then the enforcement of such an award will be refused in Belgium.⁹²

The above are some examples that exemplify national legislations that are curtailing the influence of the *lex loci arbitri*. However in the French case of *General National Maritime Transport Co. v. Societe Gotaverken Arendal A.B*, the court had adopted/upheld a delocalisation award.⁹³ In that case a ship building company, Gotaverken entered a shipping contract with a Libyan company, General National Maritime Transport Co. In the agreement, the parties had adopted the ICC Rules of Arbitration for the conduct of their arbitration in Paris.

A payment dispute subsequently arose between the parties and was submitted to arbitration. The arbitral tribunal made an award in favor of Gotaverken. Dissatisfied, Libyan Maritime Co. appealed to the Paris Court of Appeal, applying to set aside this specific award. The appeal was rejected on the ground that even though the parties had chosen Paris to be the seat of arbitration, both parties had also agreed to adopt the ICC Rules of Arbitration instead of the French Arbitration Law. The French Court therefore lacked jurisdiction to apply those rules of procedure. The court also found that the parties had merely chosen Paris as the seat of arbitration, because of its neutrality. Article 11 of the 1975 ICC Rules of Arbitration has outlawed the application of domestic law, particularly in such cases where both parties and the arbitral tribunal have not chosen the French Arbitration Law to

⁹² Article 1710(3) of the Judicial Code; see *infra* Chaps. VII.3 and V.10

⁹³ *General National Maritime Transport Co. V. Societe Gotaverken Arendal A.B*, (1981) 20 I.L.M. 42

conduct the arbitral proceedings.

Gotaverken had also sought to enforce the arbitral award in Sweden. Libyan Maritime Co, on the other hand, had brought an action seeking to suspend the enforcement of the arbitral award on the ground that Gotaverken had previously applied to French court to have the award set aside. The Swedish Supreme Court rejected that argument and held that according to Articles V and VI of the New York Convention, if an arbitral award has been set aside by the court of origin, then the enforcing state may “issue such a refusal” instead of “having to refuse the enforcement.” It interpreted this provision to mean that even if the court of origin had set aside such an award, the enforcing state can still order its enforcement.

The purport of this judgment also reflects the movement away from the influence of the jurisdictional supervision of the seat of arbitration as well as the transfer of the right of supervision over awards to the enforcing state. When parties are foreigners to the place of arbitration, the arbitration agreement has nothing to do with the seat of arbitration, and they do not intend to apply for recognition and enforcement of the arbitral award in the seat of arbitration, then their rights should not be controlled by the law of the seat. The court of the place of origin of the award also has no ground to interfere with or review the arbitral award.⁹⁴

But some scholars believe differently, and argue that once an arbitral award has been set aside by

⁹⁴ Park and Paulsson, “The Binding Force of International Arbitral Awards”, (1983), *Virg. J.*, Volume 23, p253, 255-256

the court of origin, then any further application for its enforcement should be rejected by the enforcing court.⁹⁵ They argue further that the arbitral award had ceased to exist from the moment it was competently set aside, and that not only is it impossible to enforce an arbitral award that does not exist, but this also will violate the public policy of the enforcing state.⁹⁶ If arbitral awards that have been set aside by the state of origin can still be recognized and enforced in other states, then it might afford parties the opportunity to go enforcement shopping of the annulled arbitral award, and increase the costs incurable by the parties. This is also capable of rendering the general relationship of parties in relation to the real status of arbitral award unpredictable. What is more critical is that the enforcing state can now enforce an arbitral award that has been set aside by the state of origin. If, for example, an award has been set aside in the country of origin, and the party against whom the award was made receives a second award derived from another arbitration, this result will be directly contrary to the previous award, and this will become more complicated if the party applies for the enforcement of the second award in the enforcing state. This is bound to place the enforcing court in a “deadlock” position.⁹⁷

3.6 Conclusion

Various states in pursuance of state sovereignty considerations, would usually hope for a considerable degree of control over arbitrations conducted within their territory. Getting states to relinquish or even

⁹⁵ Sanders, Pieter, “New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,” (1955), Volume 6, Netherlands International Law Review, p43,55

⁹⁶ Ibid

⁹⁷ *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd.*, [1999] 2 All E.R. (Comm) 146; [1999] 2 Lloyd's Rep. 222

relax control will not be an easy feat to achieve. The reality is that a number of states have even tightened control, oblivious of the current trends in support of reducing such controls. The way things stand now it would appear that only arbitrations conducted overseas can be held to be immune from domestic laws.⁹⁸ Scholars and practitioners have challenged the efficacy of the traditional concept that the validity of arbitration was controlled by the *lex loci arbitri*. Supporters of “denationalisation” or “floating” arbitration believe that arbitral awards could and should still maintain enforceability even when detached from the law of the country of origin.⁹⁹ However, whether the delocalisation theory can overcome the constraints of the myriad of issues arising from the enforceability of arbitral awards in various states¹⁰⁰ will form the subject of further discussions in Chapter 5.

⁹⁸ Section 2(1), (3)(b) of the Arbitration Act 1996; Article 46 of Swedish Arbitration Act 1999

⁹⁹ Fn 1, at p1-53, (<http://www.kluwerarbitration.com.ezproxy.stir.ac.uk/arbitration/DocumentFrameSet.aspx?ipn=26303>), access on 23 June 2009; Carlquist, Helena, “Party Autonomy and the Choice of Substantive Law in International Commercial Arbitration”, (2006), Department of Law, Göteborg University, p22, (<http://gupea.ub.gu.se/dspace/bitstream/2077/3079/1/200656.pdf>), access on 26 June 2009

¹⁰⁰ Article V, paragraph 2 of the New York Convention

Chapter 4

Mandatory Rules and Public Policy

4.1 Introduction

In Chapter 1 of this thesis we had said that the principle of party autonomy has not only been approved by national laws, but also by international arbitral institutions and organizations.¹ However, the application of the principle of party autonomy has its limitations, especially as private commercial behavior will mostly be subject to different national rules and policies. Many issues have arisen regarding the uneasy interaction between party autonomy and state legal controls in arbitration.² Most states require that arbitral proceedings are subject to at least some minimum standards imposed by the mandatory rules of the procedural rules and public policy in arbitral sites.³

It thus becomes important to point out the interaction of mandatory rules and public policy with party autonomy in arbitral proceedings. The purpose of this chapter is to study the practice surrounding the application of mandatory rules and public policy in the practice of international commercial arbitration. We shall dedicate the first section of this chapter discussing the interrelationship between the mandatory rules and public policy, as well as a review of the mandatory rules. In the second part, we shall examine the role of the public policy and various procedural mandatory rules in the arbitral proceeding. We shall also be interested in other relevant issues surrounding mandatory rules and public policy.

¹ Redfern, A. and Hunter M, *Law and Practice of International Commercial Arbitration*, 4th edn (London: Sweet & Maxwell Ltd., 2004), p315

² Barraclough, Andrew and Waincymer, Jeff, "Mandatory Rules of Law In International Commercial Arbitration", (2005), *Melbourne Journal of International Law*, Volume 6, No.2, p1, (<http://www.austlii.edu.au/au/journals/MelbJIL/2005/9.html>), access on 8 May 2009

³ Born, Gary B., *International Commercial Arbitration: Commentary and Materials*, 2nd edn (Kluwer Law International, 2001), p436 For example, Article 19(1) of UNCITRAL Model Law provides that "subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings." Article 19 (2) further provides that, where the parties have not agreed upon procedure, the arbitral tribunal has power to conduct the arbitration in such manner as it considers appropriate.

4.2 Relationship between the Mandatory Rules and Public Policy

In municipal law, the concept of public policy is frequently used to indicate “imperative” or mandatory rules, which can not be derogated from by the parties.⁴ However, the notion of public policy in private international law is a different one, because the functions and purposes of domestic and private international law of a given legal order are different from another. Hence, in the case law of various countries, a mandatory rule of domestic law need not prevail in international matters. This means that the judge does not necessarily have recourse to its “international public policy” if such a rule has been violated.⁵ This distinction reflects what obtains in practical terms and particularly the very nature of private international law; a branch of the law which examines the fundamental distinction between “domestic” and “international” circumstances.⁶

Even though being a separate phenomenon from private international law, mandatory rules are related to the public policy in many ways, especially as the values which these rules advance are usually of a public policy nature. Furthermore, legal texts and doctrinal writings use the term *lois d'ordre public* to describe the relationship of this concept to mandatory rules. Hence it would appear pertinent that in order to reach the problems arising from the interplay of mandatory rules in international arbitration, consideration must first be given to the mutual relationship between the notions of public policy and mandatory rules just as it obtains in the general theory of private international law.⁷

As mandatory public law rules of a state are intended to protect its public policy, they should be adopted when a specific contractual relationship has any relations to it in any respect, for example, in

⁴ Report by Y. Derains in ICCA Congress Series No. 3, No. 1

⁵ The Swiss Supreme Court in *Rothenberger v. GEFA*, ATF 93 II 379, 382: held that “The provisions of Article 493 Code of Obligations under which a warranty have to be in notarial form, are of a mandatory nature. Nevertheless, this does not mean that they should also be deemed as belonging to public policy.”

⁶ Lalive, Pierre, “Transnational (or Truly International) Public Policy and International Arbitration”, (1998), ICCA Congress Series No. 3, p260-261, (<http://www.kluwerarbitration.com.ezproxy.stir.ac.uk/arbitration/DocumentFrameSet.aspx?ipn=14788>), accessed on 8 May 2009

⁷ Zhilsov, A.N., “Mandatory and Public Policy Rules in International Commercial Arbitration”, (1995), NILR, XLII, p88

the constitution, and in the performance or enforcement of the contract. Hence, some of the related mandatory public law rules which will be applied by an international arbitrator would include (i) those which will influence the execution of a contract; (ii) those which compose part of the state's public policy under which an application for the enforcement of an award can be made; and/or (iii) those of the state that are closely related to the contract⁸

Though it is also possible for mandatory rules to cover national fundamental interests and policy, but they more often reflect rather specific interests and policy. Notwithstanding the aforesaid, it is important to note that every public policy is preemptory, but mandatory rules are imperative and operate to reflect the content of the public policy of the forum state. In fact, it is rather difficult to establish clearly whether the mandatory rules represent the principle of public policy because they are indeed superimposed, and the interpretation of the implication of public policy is not static but a reflection of the times and objective circumstance.⁹

Mandatory rules and public policy play a very important role in international commercial arbitration. They also have the following features in common: 1. their purpose is to maintain the national significance or basic interests, principle of fundamental rules and the concepts of fairness, justice and morality. 2. they all adopt the methods by excluding or restraining the application of a foreign law, and to refuse to recognize and enforce a foreign judgment and an arbitral award. 3. they reflect the concept and fundamental principle of politics, economics, society, law, morality and religion. 4. The policy and interests of mandatory rules must comply with the aim of a national public policy.¹⁰

Mandatory rules are provisions “[s]et out in public interest, which compulsorily apply to all

⁸ Maniruzzaman, A. F. M., “International Arbitrator and Mandatory Public Law Rules in the Context of State Contracts: An Overview”, (1990), *Journal of International Arbitration*, Volume 7, No. 3, p63

⁹ Bockstieegel, K-H., “Public Policy and Arbitrability”, in *Comparative Arbitration Practice and Public Policy in Arbitration*, P. Sanders edn, 1987, p179-180

¹⁰ Rubino-Sammartano, M.. *International Arbitration Law*, 1990, p291

relationships which have a connection with that legal system and which prevail on any contrary conflict of laws or rules.”¹¹ On the other hand, all rules of public policy inevitably contain a mandatory character as they reflect the basic concepts of morality and justice. However, not all mandatory rules are equal to public policy, because the interests protected may not be related to the basic values of the society.¹²

Every public policy rule is mandatory, but not every mandatory rule encompasses parts of public policy.¹³ As mentioned above, this distinction may also become relevant when considering the issue of arbitrability. Of course, some of the limited interpretations of public policy by arbitral tribunals and courts can only be comprehended on the basis of this distinction, as refusing qualifications of public policy to mandatory legal rules. This distinction has been codified in the Austrian law. It was not until 1983, and by virtue of the provision of Article 595(6) of Austrian Code of Civil Procedure¹⁴ that it became possible to challenge every domestic arbitral award that violated the mandatory law, while for foreign awards the New York Convention can be applied to the test of public policy.¹⁵ Furthermore, Article 595(6) of Federal Law, 1983 makes it possible to set aside awards that are not based on any mandatory rule, only if the award is contrary to mandatory provisions of the law. The application of this provision cannot be set aside by a choice of law clause inserted by the parties. A technique commonly used by parties to exclude those mandatory rules which are not part of public policy.¹⁶

¹¹ Rubino-Sammartano, M., *International Arbitration Law and Practice*, 2nd edn (The Hague: Kluwer Law, 2001), p505

¹² Committee on International Commercial Arbitration, *Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, (International Law Association, London Conference, 2000), p30

¹³ Böckstiegel, Karl-Heinz, “Public Policy as a Limit to Arbitration and its Enforcement”, (2008), IBA Journal of Dispute resolution, Special Issue, p123 seq., (http://www.arbitration-icca.org/media/0/12277202358270/bckstiegel_public_policy...iba_unconference_2008.pdf), access on 19 June 2009

¹⁴ Article 595(6) of Austrian Code of Civil Procedure provides that “if the award is incompatible with the basic principles of the Austrian legal system or if it infringes mandatory provisions of the law, the application of which cannot be set aside by a choice of law of the parties even in a case where a foreign contact according to Article 35 of the International Private Law Act is involved.”

¹⁵ Fn 9, at p183-184

¹⁶ Article 595(6) includes a reference to Article 35 of the International Private Law Act, which permits choice of law, but subject to limits thereof such as those of Art. 6 (Public Policy) of the same Act. See

The main distinguishing feature between mandatory rules and public policy are: (1) Mandatory rule is a compulsory provision of law, and it must be applied to an international relationship, irrespective of the law that governs that relationship.¹⁷ For example, Article 3 of French Civil Code provides: “The laws of police and public security bind all the inhabitants of the territory.”

This provision indirectly excludes the application of a foreign law which conflicts with these mandatory rules. On the other hand, if applying the foreign law causes a violation of the public policy, resort would be to the use of the mandatory rules to decide whether or not to exclude the application of foreign law. Thus, some scholars believe that mandatory rule is the first barrier to exclude the application of a foreign law, while public policy constitutes the second barrier.¹⁸ (2) Mandatory rules present themselves with the definite and specific legal regulations, and public policy often presents itself with the principle of law generally and abstractly. (3) The notion of public policy is broader than that of mandatory rules. Some scholars have therefore posited that mandatory rules are the same as the definite public policy and are interchangeable in their utilization.¹⁹

4.3 The Concept of Mandatory Rules

Mandatory rule refers to a compulsory provision of law which has to be applied to an international relationship regardless of the law that governs that relationship.²⁰

By virtue of Article V(1)(e) of the New York Convention, when an award “has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award

also Melis, *A Guide to Commercial Arbitration in Austria*, 2nd edn, (Vienna: Federal Economic Chamber, 1983), p25

¹⁷ Erauw, Johan, “Observations about Mandatory Rules Imposed on Transatlantic Commercial Relationships”, (2004), *Houston Journal of International Law*, p20, note5, (<http://www.articlearchives.com/law-legal-system/international-law/640187-1.html>), access on 19 June 2009

¹⁸ Mayer, P., “Mandatory rules of law in international arbitration”, (1986), *Arbitration International*, Volume 2, No. 4, p299-300

¹⁹ Fn 7, at p100-101

²⁰ Fn 2, at p1, (<http://www.austlii.edu.au/au/journals/MelbJIL/2005/9.html>), access on 8 May 2009

was made,” the recognition and enforcement of the award may be refused. Apparently, “a competent authority of the country” and “the state in which the award was made” can set aside the award if it violates the mandatory rules or public policy of the place of arbitration. Consequently, it is generally believed that parties cannot disregard the mandatory rules of those states for avoiding the effect of the validity of the award. The position of the mandatory rules of the place of arbitration in arbitral proceedings is so important in the arbitral set-up that it goes a long way to determine the validity or otherwise of the arbitral award as well as the recognition and enforcement of that award.

It is singularly the compulsory nature of such rules that make them applicable.²¹ It was observed recently that the Section titled “Mandatory Legal Rules of Public Nature,” in the UNCITRAL’s “Legal Guide on Drawing up International Contracts for the Construction of Industrial Works” provides:

“In addition to legal rules applicable by virtue of a choice of law by the parties, or by virtue of the rules of private international law, certain rules of an administrative or other public nature in force in the countries of the parties and in other countries (e.g. the country of a sub-contractor) may affect certain aspects of the construction. These rules, which are often mandatory, are usually addressed to all persons resident in or who are citizens of the State which issued the rules, and sometimes to foreigners transacting certain business activities in the territory of the State. They may be enforced primarily by administrative officials. Their purpose is to ensure compliance with the economic, social, financial, or foreign policy of the State. The parties should therefore take them into account in drafting the contract.”²²

²¹ Dodson, Scott, “Mandatory Rules”, (2008), *Stanford Law Review*, Volume 61, Issue 1, p9, (<http://lawreview.stanford.edu/content/vol61/issue1/Dodson.pdf>), access on 8 May 2009

²² *Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works*, prepared by the United Nations Commission on International Trade Law (UNCITRAL) United Nations, New York, 1988; *Guide on Drawing Up International Contracts on Industrial Co-operation by Economic Commission for Europe*, Geneva, United Nations, New York, 1976 (ECE/TRADE/124), para. 59 “Applicable Law”, p24; *Guide for Drawing Up International Contracts On Consulting Engineering (including some related aspects of technical assistance)* by Economic Commission for Europe, Geneva, United Nations, New York, 1983 (ECE/TRADE/145), para. 138 “Applicable Law and Related Matters”,

These rules have their source in the national sovereignty of the state for the understanding of and catering for the public interest. They may also originate from public international law which places specific rules of a mandatory nature that may not be derogated from, even by the states themselves.²³

4.4 Mandatory Rules of the *Lex Loci Arbitri*

Usually, a state requires that arbitration be governed by the *lex arbitri* and the mandatory rules of the place of arbitration.²⁴ The legal system of each nation has its own laws or rules applicable to procedure. Some are mandatory and some are not.²⁵ Parties cannot conduct arbitral proceedings in a way that violates any mandatory rules of the seat of arbitration. It is therefore imperative that parties observe the mandatory rules of the place where arbitration takes place to ensure that the resulting award would be enforceable.

For example, the Swiss Private International Law Statute states: “1. The provisions of this chapter shall apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time when the arbitration agreement was concluded, at least, one of the parties had neither its domicile nor its habitual residence in Switzerland. 2. The provisions of this chapter shall not apply where the parties have in writing excluded its application and agreed to the exclusive application of the procedural provisions of cantonal law relating to arbitration.”²⁶ This article provides for a mandatory federal or cantonal rule and the parties must observe it without compromise. ICC Rules of Arbitration 1998 also acknowledges the importance of the mandatory rules of the place of arbitration. Article 35 in particular, emphasizes that the arbitrator shall do his best to ensure that the

p35; Guide on Drawing Up Contracts for Large Industrial Works by Economic Commission for Europe, Geneva, United Nations, New York, 1973 (ECE/TRADE/117), para. 45 “Determination of the Applicable Law”, p28

²³ Fn 8, at p54

²⁴ Mann, F.A. “England Rejects Delocalised Contracts and Arbitration”, (1984), I.C.L.Q, Volume 33, p193; *James Miller v. Whitworth Street Estates* [1970] 1 All E.R. 796(H.L.); Mann, F.A., “*Lex Facit Arbitrum*”, in *International Arbitration: Liber Amicorum* for Martin Domke, P. Sanders edn, 1967, p157

²⁵ Section 4, 12,13,24, and 26 of the English Arbitration Act 1996

²⁶ Article 176(1)(2) of Swiss Private International Law Statute

award is enforceable under the law.²⁷

On the other hand, it should be pointed out that most national arbitration statutes provide some grounds for setting aside awards made within their territory.²⁸ The New York Convention permits refusal of an application for enforcement if an award has been set aside or suspended by a competent authority of the country in which the award was made.²⁹ Enforceability of the award is greatly influenced by the mandatory rules of the place of the award, at least to the extent that they reflect the related public policy.³⁰

4.5 Mandatory Rules of Law in Various Principles

It has become an important trend for modern arbitration law to pay minimal attention to the mandatory rules of law regarding the arbitral procedure, and to adopt the principle of party autonomy.³¹ Even so, each state still maintains some mandatory rules, which refer directly to the conduct of the international commercial arbitration. Hence, this section studies the issues of independent and impartial rule of the arbitrators, equality principle of the parties, and rule of due process.

4.5.1 The Principle of Independence and Impartiality

This section shall seek to discuss the principle of independence and impartiality of arbitrators. We shall also examine the issues that arise when an arbitrator is challenged, where circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

²⁷ Born, Gary B., *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, 2006, p180

²⁸ Craig, Park and Paulsson, *International Chamber of Commerce Arbitration*, 3rd edn, 2000, p499-500

²⁹ Article V(1)(e) of the New York Convention

³⁰ Von Hoffmann, "Internationally Mandatory Rules of Law before Arbitral Tribunals" in *Acts of State and Arbitration*, Karl-Heinz Böckstiegel edn, 1997, p9

³¹ Mantilla-Serrano, Fernando, "Towards a Transnational Procedural Public Policy", (2004), *Arbitration International*, Volume 20, No.4, p336

Some scholars opine that arbitrators should be independent and impartial when conducting an arbitration. They also submit that independence and impartiality are synonyms, describing the same phenomenon. In other words independence and impartiality are two ways of looking at the same matter. Hence, it is not surprising that given the same facts, the result of a challenge based on independence and one based on impartiality are likely to be the same.³²

On the contrary, another scholar has submitted that the relationship between independence and impartiality is that of alternative concepts.³³ It is also believed that independence may be a broader concept, which refers to the existence of connections between the arbitrator and any of the parties, while impartiality refers to the need to hold an open mind and complete exclusion of preconceived or biased notions. Actually, an arbitrator could approach a case with a completely open mind but still not be independent as a consequence of a connection with one of the parties.³⁴ On the other hand, the concept of independence and impartiality might overlap in some situations, while in other situations they might tow parallel lines. Equally, an arbitrator may not have any connections whatsoever to the parties but is inclined to one party or one line of reasoning and therefore not be impartial.³⁵

The French courts addressed the general requirement of independence in the case of *Consorts Ury v. S.A. des Galeries Lafayette*.³⁶ The *Cour de cassation* had held that “an Independent mind is indispensable in the exercise of judicial power, whatever the source of that power may be, [and it is] one of the essential qualities of an arbitrator.”³⁷ The Paris Court of Appeals reiterated this statement

³² Koch, Christopher, “Standards and Procedures for Disqualifying Arbitrators”, (2003), *Journal of International Arbitration*, Volume 20, No.4, p332

³³ Gearing, Matthew, “A Judge in His Own Cause?: Actual or Unconscious Bias of Arbitrators”, (2000), *International Arbitration Law Review*, p50

³⁴ *Ibid*

³⁵ *Ibid*

³⁶ *Consorts Ury v. S.A. des Galeries Lafayette*, Cass. 2e civ., Apr. 13, 1972, JCP, Edn G., Pt. II, No. 17,189 (1972) Cited by Fouchard, Philippe, Gaillard, Emmanuel, and Goldman, Berthold, *Fouchard Gaillard Goldman on International Commercial Arbitration*, E. Gaillard & J. Savage edn, 1999, p562. This case had originated from a domestic arbitration.

³⁷ Cass. 2e civ., Apr. 13, 1972, *Consorts Ury v. S.A. des Galeries Lafayette*, JCP, Edn G., Pt. II, No. 17,189

in several judgments concerning international arbitration,³⁸ and the requirement and qualities of an independent mind has been extolled in several cases.³⁹

It is believed that arbitrators must be and remain impartial and independent. However even though an independent arbitrator may be impartial in most cases, it is still probable that the parties might not be treated with equality. In other words, it is also possible for an independent arbitrator to be partial towards to one of the parties.⁴⁰

For instance, in the English case of *Catalina (Owners) v. Norma (Owners)*,⁴¹ the arbitrator's impartiality was questioned when he, referring to the two Norwegians who had given evidence, had unwittingly said in public that both of the witness were not Italians; that Italians were mostly liars in such cases and would say anything to suit their book. And that the same applied to the Portuguese. As Section 24(1)(a) of the English Arbitration act 1996 provides that any circumstances give rise to justifiable doubt as to arbitrator's impartiality enables the parties to apply to the courts to remove the arbitrator.

(1972), and P. Level's note; Dalloz, Jur. 2 (1973), and J. Robert's note; 1975 REV. ARB. 235, and E. Loquin's note Cited by Fouchard, Philippe, Gaillard, Emmanuel, and Goldman, Berthold, *Fouchard Gaillard Goldman on International Commercial Arbitration*, E. Gaillard & J. Savage edn, 1999, p562

³⁸ CA Paris, Dec. 12, 1996, *Commercial Agraria Hermanos Lucena v. Transgrain France*, 1998 REV. ARB. 699, and observations by D. Bureau Cited by Fouchard, Philippe, Gaillard, Emmanuel, and Goldman, Berthold, *Fouchard Gaillard Goldman on International Commercial Arbitration*, E. Gaillard & J. Savage edn, 1999, p562

³⁹ TGI Paris, réf., Sept. 21, 1989, *La Belle Créole S.A. v. The Gemtel Partnership*, 1990 REV. ARB. 176, 2d decision, and P. Kahn's note; Cass. 2e civ., Nov. 8, 1989, *Editions Médicafrique v. Le Concours médical*, No. 88-18.035, unpublished Cited by Fouchard, Philippe, Gaillard, Emmanuel, and Goldman, Berthold, *Fouchard Gaillard Goldman on International Commercial Arbitration*, E. Gaillard & J. Savage edn, 1999, p562

⁴⁰ In the last version of its Rules in 1998, the LCIA provided that impartiality instead of independence was the appropriate test, because an arbitrator who lacked "independence" in the most limited sense might still be impartial. Likewise, an arbitrator who would pass the independence test might be short of the necessary quality of impartiality, see Fn 1, at p1-36, (<http://www.kluwerarbitration.com.ezproxy.stir.ac.uk/arbitration/DocumentFrameSet.aspx?ipn=26308>), access on 17 June 2009

⁴¹ *Catalina (Owners) v. Norma (Owners)* (1938) 61 Ll. L. Rep. 360

This was a act by the claimants, the owners, master and crew of the Portuguese steamship Catalina , and the owners of the cargo, for the removal of Sir William Norman Raeburn, Bart., K.C., the arbitrator appointed involving between the claimants and the respondents, the owners of the Norwegian motor vessel Norma , regarding a collision between those vessels near Ushant on Sept. 28, 1937, by the reason that he had misconduct himself by acting not fairly and short of impartiality between the parties.

It would be contrary to the principle of natural justice, if there is no mandatory rule of impartiality to enable parties and the process check the excesses of this sort exhibited by arbitrator when they harbor such prejudices.⁴² Article 9(1) of the Swiss Rules of International Arbitration apart from providing for rules on “independence” also addresses “impartiality.”⁴³ It provides that “all arbitrators conducting an arbitration under these Rules shall be and remain at all times impartial and independent of the parties.” Article 10 provides further that “any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.”

4.5.2 The Rights of Party to Present His Case

The requirement that a party be given the opportunity to present his case is not only to provide parties the right to express their side of the case, but also for the arbitrator to listen, value and evaluate these statements, and to give parties the opportunity to submit and admit to the evidences. This principle has been established in the arbitration law of various states. For example, Section 1042 of the German Code of Civil Procedure provides that “the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.” Similarly, Section 33 (1)(a) of the English Arbitration Act 1996, also provides that arbitrators must act fairly and impartially between the parties, giving each party a reasonable opportunity of putting his case forward and dealing with that of his opponent. Furthermore, the tribunal shall choose procedures suitable for the situations of the particular case, preventing unnecessary delay or expense, in order to provide an impartial means for dealing with the matters brought before them.⁴⁴ The tribunal is under an obligation to observe this general obligation in conducting the arbitral proceedings, in its determinations on matters of

⁴² Ibid

⁴³ Scherer, Matthias, “New Rules on International Arbitration in Switzerland”, (2004), *International Arbitration Law Review*, Volume 7, No.4, p121

⁴⁴ Section 1(b) of the English Arbitration Act 1996

procedure and evidence and in the exercise of all other powers conferred on it.⁴⁵

The questions as to whether the parties had been given equal opportunities to present their cases, or had ample opportunity to submit and admit evidence have been dealt with in many cases. For example, in *Rice Trading (Guyana) Ltd. v. Nidera Handelscompagnie B*,⁴⁶ the Court of Appeal of The Hague on April 28, 1998 held that failure to give any party the opportunity to present its opinion in an oral or written statement in response to the latest document supplied by the other party, will result in a violation of the basic right of the parties in the arbitral proceedings; which is a matter of public policy.⁴⁷

On the other hand, there are some cases that have taken different view of the matter.⁴⁸ For instance, in the case of *Generica v. Pharmaceutical Basics*,⁴⁹ the dispute had arisen from a final arbitral award issued in August 1995 by an arbitrator of the International Court of Arbitration. The award concluded that Pharmaceutical Basics, Inc. ("PBI") had breached and repudiated its contract with Generica Limited ("Generica"), and caused great damage to Generica. In the district court, Generica filed a petition for an order confirming the foreign arbitral award and for judgment on the confirmed order. PBI responded with a cross-petition to set aside the award arguing that the award may not be enforced under Article V of the New York Convention. The district court issued a final judgment confirming the award and denying PBI's cross-petition.

However, the district court rejected the application to review the fact-finding of the arbitrator, but stated that it was sufficient to review the issue of exclusion of evidence, and that the court would find that the court had not deprived PBI of a fair hearing. It concluded that PBI had sufficient opportunity

⁴⁵ Section 2 of the English Arbitration Act 1996

⁴⁶ *Rice Trading (Guyana) Ltd. v. Nidera Handelscompagnie BV*, Yearbook XXIII (1998) p731-734 (Netherlands no. 24)

⁴⁷ Ibid

⁴⁸ For example, *Generical Limited, Plaintiff-Appellee, v. Pharmaceutical Basics, Inc.*, United States Court of Appeals for the Seventh Circuit, September 29, 1997, 125 F.3d 1123; Moscow District Court Paul Wurth v. V/O Tyazfpromexpoert, May 24 1996

⁴⁹ *Generical Limited, Plaintiff-Appellee, v. Pharmaceutical Basics, Inc.*, United States Court of Appeals for the Seventh Circuit, September 29, 1997, 125 F.3d 1123

to present its case for the fact that the arbitrator clearly denied reliance on Hynds' direct testimony and thereby discarded PBI's need to elicit further evidence from Hynds. The district court confirmed the award and made a judgment in favor of Generica and against PBI. PBI went further, and appealed to the U.S. Court of Appeals (7th Cir), which was of the opinion that the arbitrator should have provided each party adequate opportunity to submit evidence and present its case in the arbitral proceedings. It would violate the rule of due process if the party had proved at the review the exclusion of evidence by an arbitrator, had caused an unfair result. It may be concluded that the arbitrator did not overuse his discretion in making this evidentiary ruling. The arbitrator had before him sufficient evidence upon which to determine the dispute, and measured the contradictory evidence and determined that PBI had breached the Agreement.

Equal opportunity to present the case means the arbitral tribunal must provide the parties with the available opportunity to present their case to give the assurance that the arbitral award was made subject the fair treatment of the parties. However, if the arbitral tribunal had given the respondent proper and adequate notice, but the respondent had not presented himself in the arbitration nor participated fully in it, then the act of the respondent is deemed to constitute a waiver of his opportunity/right to present his case. In this case, the arbitral tribunal may disregard the refusal to participate in the arbitration by the party and consider the hearing unnecessary. Under the New York Convention, such an arbitral award can be recognized and enforced too.⁵⁰

In the case of *Biotronik v. Medford Medical Company*⁵¹ which was decided by the United States District Court in New Jersey, the American respondent had been invited to Switzerland to participate in the arbitration, to be conducted under the Arbitration Rules of the International Chamber of Commerce. However, the respondent did not take part in the arbitration. The arbitral tribunal ruled in

⁵⁰ Van den Berg, A.J., *The New York Arbitration Convention of 1958 Towards a Uniform Judicial Interpretation*, 1981, p306

⁵¹ *Biotronik v. Medford Medical Company*, U.S. Yearbook Commercial Arbitration, P. Sanders edn, Volume II, 1977, p250

favor of the claimant. While the claimant sought for an enforcement of the award, the respondent asserted that he was “unable to present his case” in the course of arbitral proceedings. Its reason for being inactive in the arbitration was that one of the contracts involved the dispute as to his rights and liabilities, and as the commissions for sale of “pacemakers” were not yet terminated, it could not settle accounts prior to end of the contract, thus preventing it from participating in the arbitration. It also argued that the award was fraudulent on the ground that the agreement had not been disclosed by the claimant to the arbitral tribunal. The Court however rejected this submission and held that Article V(1)(b) of the New York Convention provided that the primary elements of due process are notice of the proceedings and the opportunity to be heard. When the respondent received the notice from the arbitrator, it should and could have presented its case before the arbitral tribunal. The court deemed the respondent had misunderstood the meaning of the term of “due process.” The foregoing makes it clear that once the party receives the notice and does not take steps to participate in the arbitration (subject to he being physically able to participate in the arbitration) to present his case, he would be estopped from claiming that he was never given the opportunity to present his case.

4.5.3 Equal Rights in Appointing Arbitrators

When parties have been treated with equality and each party has been given a full opportunity of presenting its case, a trustworthy tribunal is thereby established, and reduces doubts as to the arbitrator’s impartiality and the likelihood of disputes arising from such issues. The equality of parties before the arbitral body is therefore a very important factor for the legitimate conduct of the arbitral proceeding.

Some countries have provided relevant regulations of mandatory rules on the equal rights for the parties to appoint arbitrators. For example, under Section 1034 (2) of the German Code of Civil Procedure, it is provided that “If the arbitration agreement grants preponderant rights to one party with regard to the composition of the arbitral tribunal which place the other party at a disadvantage,

that other party may request the court to appoint the arbitrator or arbitrators in deviation from the nomination made, or from the agreed nomination procedure.”

Similarly, Article 1028 of Netherlands Arbitration Act, Code of Civil Procedure provides: “If the arbitration agreement gives one of the parties a privileged position with regard to the appointment of the arbitrator or arbitrators, the other party may, despite the method of appointment laid down in that agreement, request the President of the District Court within one month after the commencement of the arbitration to appoint the arbitrator or arbitrators. The other party shall be given an opportunity to be heard. The provisions of Article 1027(4) shall apply accordingly.”

Again, the International Chamber of Commerce (ICC) has provided under Article 8(3)(4) of its Rules of Arbitration that:

“Where the parties have agreed that the dispute shall be settled by a sole arbitrator, they may, by agreement, nominate the sole arbitrator for confirmation. If the parties fail to nominate a sole arbitrator within 30 days from the date when the Claimant’s Request for Arbitration has been received by the other party, or within such additional time as may be allowed by the Secretariat, the sole arbitrator shall be appointed by the Court.⁵² Where the dispute is to be referred to three arbitrators, each party shall nominate in the Request and the Answer, respectively, one arbitrator for confirmation. If a party fails to nominate an arbitrator, the appointment shall be made by the Court. The third arbitrator, who will act as chairman of the Arbitral Tribunal, shall be appointed by the Court, unless the parties have agreed upon another procedure for such appointment”⁵³

4.5.4 Proper Notice to the Parties

Where the parties do not receive proper notice of arbitral proceedings, they will lose the

⁵² Article 8(3) of ICC Rules of Arbitration, 1998

⁵³ Article 8(4) of ICC Rules of Arbitration, 1998

opportunity to present their case, and therefore be disadvantaged in the proceedings. Thus, in order to render a fair and just award, it is necessary for the arbitrators to give each party a proper notice of the pending or instituted arbitration.

The use of the word “proper” in “proper notice” may be construed to mean sufficient notice of the appointment of arbitrator(s) or the notice of the proceedings must be given to each party.⁵⁴ In *Press Office S.A, Mexico*,⁵⁵ the respondents claimed the notice of the arbitral proceedings under the Arbitration Rules of International Chamber of Commerce and American Arbitration Association was given by mail, violated the Article 605 of No. IV of Mexican Code of Civil Procedure, because in accordance with that provision, the notice of the first summon must be delivered to the respondent in person, which is a regulation of public policy importance. However, the court rejected the objection of the respondent, and referred to Article V(1)(d) of the New York Convention. It held that inserting an arbitral clause in the contract, implied an intention to waive the provision of Article 605 No IV of the Mexican Code of Civil Procedure.

Three issues are readily of significance in this case. Firstly, the Court had held that the requirement of notice under the Convention is not necessarily fulfilled by following a specific official form, but is satisfied by using whatever means that conforms with the method of notification agreed to by the parties. Secondly, the Courts regard the question of due process under Article V(1)(b) as being part of public policy. Finally, the decision implies the application of the distinction between domestic and international public policy, which is remarkable for courts in Latin America. The Mexican court in that case obviously deemed the requirement of “proper notice” was satisfied by just complying with the agreement concluded between the parties and not necessarily having any special or formal notice.

⁵⁴ Ibid at p303

⁵⁵ *Presse Office S.A. v. Centro Editorial Hoy S.A. (Mexico no.1) Tribunal Superior de Justicia*, 18th Civil Court of First Instance of Mexico, D.F. February 24, 1977

4.6 The Notion of Public Policy

Public policy is a commonly recognized concept of law in private international law. The concept “*public order*” or “*ordre public*” is used mainly in civil law countries, while “public policy” is used in common law countries. In general, the meaning and extent of these concepts are not exactly the same. The concept “*ordre public*” in civil law countries has a broader dimension than “public policy” in common law countries. However in the process of getting more civil law countries to accept the notion of international public policy, the distinction between the concepts of “*ordre public*” and “public policy” has almost disappeared. In many circumstances, the concepts are used interchangeably to mean the same thing.⁵⁶

Many scholars have attempted to produce an affirmative definition of public policy. However public policy has proved to be an ambiguous phenomenon, thereby defying an exact and universal definition in some quarters, it has been described as “one of the most elusive and divergent notions in the world of juridical science.”⁵⁷

This difficulty is heightened because public policy has the tendency to vary or change according to time, circumstance and place. It usually mirrors the distinctive customs, ethos and habits and the concept of ethics and morality of any society. Thereby it is very difficult to arrive at an objective criterion.⁵⁸

The common law definition of public policy which has received massive judicial support was again recognized in *Egerton v. Brownlow*⁵⁹ where the English House of Lords in 1853 defined the concept as “that principle of law which holds that no subject can lawfully do that which has a

⁵⁶ Fn 50, at p359

⁵⁷ De Enterria, J.G., “The Role of Public Policy in International Commercial Arbitration”, (1990), Law and Policy in International Business, Volume 21, p401

⁵⁸ Lew, Julian D.M., *Applicable Law in International Commercial Arbitration :A Study in Commercial Arbitration Awards*, 1978, p532

⁵⁹ *Egerton v. Brownlow* 10 E.R. 359; (1853) 4 H.L. Cas.1

tendency to be injurious to the public, or against the public good.” Again, given the ambiguous nature the concept, it has also been notoriously described as “a very unruly horse and when once you get astride it you never know where it will carry you.”⁶⁰

The definition of public policy most frequently cited is that rendered by Judge Joseph Smith in *Parsons & Whittemore*,⁶¹ in which he stated that enforcement of a foreign arbitral award may be denied on public policy grounds “only where enforcement would violate the forum state's most basic notions of morality and justice.”⁶² This definition demonstrates the basic economic, legal, moral, political, religious and social standards of every state or extra national community.⁶³ Again, in using the term “public policy,” one scholar further stated that those moral, social or economic considerations which are applied by courts as the reasons for refusing enforcement of an domestic or foreign arbitral award.⁶⁴

In general, public policy is one traditional reason for the refusal of enforcement of foreign arbitral awards, foreign judgments, as well as the application of a foreign law. A public policy provision can be found in almost every international convention or treaty relating to these matters. Its function is basically to be the guardian of the “fundamental moral convictions or policies of the forum.” Article V(2)(b) of the New York Convention provides that, if the recognition or enforcement of an arbitral award violates the public policy of the enforcing country, the recognition or enforcement of the award may be refused. Furthermore, as we shall see in Chapter 5, the public policy cannot be overridden or suppressed by the principle of party autonomy in the arbitral process. In other words,

⁶⁰ *Richardson v. Mellish* (1824) 2 Bingham 229; 130 E.R. 294

⁶¹ *Parsons & Whittemore Overseas Inc. v. RAKTA*, United States Court of Appeals for the Second Circuit December 23, 1974 508 F.2d, p969

⁶² *Ibid*

⁶³ Fn 58, at p532

⁶⁴ Sheppard, Audley and Chance, Clifford, “Public Policy and the Enforcement of Arbitral awards: Should there be a Global Standard”, (2004), *Transnational Dispute Management*, Volume I, Issue #01, p3, (http://www.transnational-dispute-management.com/samples/freearticles/tv1-1-article_67.htm), access on 10 February 2009

the delocalisation theory still has to confront this issue.⁶⁵ As we shall discuss later, mandatory rules and public policy play a very important role in international commercial arbitration. They both operate to maintain the national significance or basic interests, fundamental rules and the concepts of fairness, justice, morality, and reflect the concept and fundamental principle of politics, economics, society, laws, religion and so on.⁶⁶ The reason why the concept of public policy is so difficult to grasp is that the degree of fundamentality of moral conviction or policy is conceived differently for every case in the numerous states.⁶⁷

4.7 The Role of Public Policy in International Arbitration

4.7.1 Public Policy of the Place of Arbitration

In general, the parties choose the place of arbitration based on considerations of neutrality and convenience. Usually there is no substantial link between the chosen place of arbitration and the parties or the underlying transaction. In most cases parties do not often take notice of the role and scope of the public policy of the state where the arbitration takes place at the time they agree to arbitrate. So it would seem unreasonable in this case to refuse the recognition and enforcement of arbitral award because of a conflict with the public policy of the country where the arbitration took place.⁶⁸ However, under the New York Convention, the recognizing and enforcing states can control the foreign arbitral proceeding and the enforcement of award by the reason of public policy.⁶⁹ Public policy is therefore the most potent ground for refusing the enforcement of a foreign arbitral award, foreign judgment and the application of a foreign law.

Furthermore, Article V of the New York Convention lists specific reasons providing a court with secondary jurisdiction grounds under which it might refuse enforcement. Contrary to the restricted

⁶⁵ Fn 3, at p558

⁶⁶ Fn 10, at p291

⁶⁷ Fn 58, at p532

⁶⁸ Article V(2)(b) of the New York Convention

⁶⁹ Ibid

authority of secondary jurisdiction courts to review an arbitral award, courts of primary jurisdiction (usually those of the place of arbitration) would have a much broader discretion to exercise in setting aside awards. While courts of a primary jurisdiction country may apply their domestic law in considering a request to set aside an arbitral award, the courts in countries of secondary jurisdiction may refuse to enforce it only by the reasons specified under Article V.⁷⁰

Besides, a court ought to consider the application of public policy in two occasions. One is that both parties have stipulated an arbitration agreement, and that notwithstanding one of the parties goes ahead to take the matter before a court. In this case, the court has to determine whether the arbitration agreement is valid in order to conclude if the court has a jurisdiction on that issue. In reaching a decision, the court has to resort to their national public policy to determine whether the subject-matter is capable of being settled by arbitration⁷¹ as well the parties' capacity to enter into an arbitration agreement.⁷² The other case is where a national court is requested to recognize and enforce a foreign award. A court must again consider the right of the parties to submit to arbitration and the arbitrability of the subject matter of the dispute. Furthermore, the court must consider whether the arbitral procedure and arbitral award violate the fundamental public policies of the forum, prior to determining if it should recognize and/or enforce the arbitral award.⁷³

4.7.2 Domestic Public Policy and International Public Policy

Domestic public policies are policies enshrined in domestic laws. International public policy is the type of public policy applied in courts of a certain state, and related to the recognition and

⁷⁰ Parlade, Custodio O, "Judicial Review of Arbitral Awards: Violation of Public Policy as Ground for Refusing Recognition of Foreign Arbitral Award", (2008), Asian International Arbitration Journal, Volume 4, No. 2, p190

⁷¹ Fn 1, at p1-37, (<http://www.kluwerarbitration.com.ezproxy.stir.ac.uk/arbitration/DocumentFrameSet.aspx?ipn=26306>), access on 19 June 2009

⁷² Article V(1)(a) of the New York Convention, Article 36 of the Model Law

⁷³ Fn 58, at p556

enforcement of foreign laws, judgments and arbitral awards.⁷⁴ The scope of the public policy is relatively narrow due to the basic character of public policy. Furthermore, its scope must be further limited in the international sphere; the distinction being between domestic and international public policy.

This distinction reveals that the embodiment of public policy in domestic relations is not the same in international relations. The incidence of issues actually falling under international public policy is smaller than in domestic arena. This distinction is justified when we consider divergent goals of domestic and international relations.⁷⁵ Put differently, “not every breach of a mandatory rule of the host country could justify refusing recognition or enforcement of a foreign award. Such refusal is only justified where the award contravenes principles which are considered in the host country as reflecting its fundamental convictions, or as having an absolute, universal value.”⁷⁶

This principle has been boldly adopted by Article 1502(5) of the New French Code of Civil Procedure which provides, that “an appeal against a decision which grants recognition or enforcement is available...where the recognition or enforcement is contrary to international public policy.”⁷⁷ Some scholars have submitted that although Article V, paragraph 2(b) of the New York Convention is not exactly specific on this point, it is believed that the reference in this provision to public policy is actually a reference to the international public policy of the host jurisdiction.⁷⁸ From the legislative history of Article V(2)(b) of the Convention, we can however infer that the international public policy is different from domestic public policy. The courts also have made

⁷⁴ Pryles, Michael, “Reflections on Transnational Public Policy”, (2007), *Journal of International Arbitration*, Volume 24, No. 1, p2

⁷⁵ Seriki, Hakeem, “Enforcement of Foreign Arbitral Awards and Public Policy-a Note of Caution”, (2000), *The Arbitration and Dispute Resolution Law Journal*, Volume 9, p196

⁷⁶ Fouchard, Philippe, Gaillard, Emmanuel, and Goldman, Berthold, Fn 36, p996

⁷⁷ Hanotiau and Caprasse, “Arbitrability, Due Process, and Public Policy Under Article V of the New York Convention - Belgian and French Perspectives”, (2008), *Journal of International Arbitration*, Volume 25, No.6, p730

⁷⁸ Fn 76, at p996

distinctions. For example, in *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd*,⁷⁹ laid down the distinction between what may be specified as international public policy, such as those combating fraud, corruption, drug trafficking; and domestic public policy, such as any other reasons on which an English court may refuse to enforce.⁸⁰

It is believed however that formulating a definition of national public policy presents a less cumbersome task than defining international public policy.⁸¹ It is however important to note that international public policy is usually a derivative of the domestic public policy. The concept of domestic public policy is wider than that of international public policy. Every mandatory principle or conception which is mandatory in the sense of private international law should also be mandatory in a domestic context.⁸² Public policy encompasses “international public policy” in the New York Convention, and excludes “domestic public policy,” which is rooted in the Geneva Convention of 1927.⁸³ Hence, the drafters of the Convention intended to limit the scope of public policy for foreign arbitral awards to be controlled only by those principles and notions of public policy, which are related to relationships with a foreign element and not to those with merely domestic content. Due to the fact that the scope of domestic public policy is wider than that of international public policy, issues thought to be related to public policy in domestic cases are not necessarily regarded as public policy in international cases.⁸⁴

The term “international public policy” contains the public policy exception similar to that in the conflict of laws; a foreign law will not be applied when it violates the forum’s notion of fundamental norms. The phrase “contrary to the public policy or the award was sought” also exists in the Geneva

⁷⁹ *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd*, [1999] 2 All E.R. (Comm) 146; [1999] 2 Lloyd’s Rep. 222

⁸⁰ Changaroth, Anil, “International Arbitration — A Consensus on Public Policy Defences”, (2008), Kluwer Law International, Volume 4, Issue 2, p157

⁸¹ Harmathy, Attila, “New Experiences of International Arbitration”, (2007), Electronic Journal of Comparative Law, Netherlands Comparative Law Association, Volume 11.3, p12, (<http://www.ejcl.org/113/article113-11.pdf>), access on 9 July 2009

⁸² Ibid

⁸³ Fn 50, at p361

⁸⁴ Fn 75, at p196

Convention of 1927. The ECOSOC⁸⁵ Draft Convention of 1955 uses “clearly incompatible with public policy or with fundamental principles.” In support of the notion that the provision should not be given an unduly broad interpretation, Working Party No. 3 suggested to restrict it to “public policy” alone. This restriction was approved by the Conference, which, also refused a Brazilian proposal to re-introduce “fundamental principles of law.”⁸⁶

Although shortly after the adoption of the Convention there were some doubts as to whether the difference between domestic and international public policy would also apply to the issue of arbitrability as provided for under Article V(2)(a) of the Convention. In many court decisions that apply provisions of the Convention, the distinction of domestic and international public policy is shown either expressly or impliedly. For example, in *Parsons & Whittemore Overseas Inc. v. RAKTA*,⁸⁷ the United States Court of Appeals for the Second Circuit observed that: “... the Convention’s public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum State’s most basic notions of morality and justice.”

Having made the above observation, the Court of Appeals refused the arguments of Overseas when it held:

“In correlating “national” policy with “public” policy of the United States, the appellant quite clearly misses the mark. To comprehend the public policy defense as a parochial device that protects national political interests would seriously weaken the utility of the Convention. This provision was not provided to place the vagaries of international politics according to the rubric of “public policy.” Rather, a restricted public policy doctrine was considered by the drafters of the Convention and every indication shows that the United States, in agreeing to the Convention,

⁸⁵ The Economic and Social Council (ECOSOC)

⁸⁶ Fn 50, at p361-362

⁸⁷ *Parsons & Whittemore Overseas Inc. v. RAKTA*, United States Court of Appeals for the Second Circuit December 23, 1974 508 F.2d 969

meant to support this supranational emphasis.”⁸⁸ “To refuse enforcement of this award due mainly to the reason that there is an argument between the United State and Egypt in recent years, would mean changing a defense that is expected to be of narrow scope into a major loophole in the mechanism of the Convention for enforcement. We have little hesitation, hence, in prohibiting the proposed public policy defense of Overseas.”⁸⁹

In certain other jurisdictions however, making a distinction between international and domestic public policy is not considered crucial in arbitral proceedings. In France and Germany, this distinction regarding the concept of public policy is non-existent in matters of domestic relations. Notwithstanding, the above analysis in these countries is believed to exist on an equal footing with domestic public policy in the sense that not only the parties are exempt from contracting out of relevant statutory provisions in the place where arbitration is conducted, the arbitrators too, may not disregard them. The distinction between these concepts is covered by Article V(2) of the Convention and would apply to these countries.⁹⁰

On the other hand, some French and Swiss authors state that there also contains a third type of public policy, which they have chosen to call the “truly international public policy.” The rules of public policy would include basic rules of natural law, the principles of universal justice, *jus cogens*,⁹¹ in public international law and the general principles of morality approved by what is regarded as “civilized nations.” The exact contents of this type of public policy are actually quite vague. To a large extent these rules can be seen as covered by international public policy. For this reason not many courts have succumbed to the ordeal of differentiating between “international public policy” and “truly international public policy.” Generally where there is no particular

⁸⁸ J. Joseph Smith, Circuit Judge, *Parsons & Whittemore Overseas Co.*, United States Court of Appeals for the Second Circuit December 23, 1974 508 F.2d 969

⁸⁹ Ibid

⁹⁰ Fn 50, at p361

⁹¹ The Latin term for compelling law is *jus cogens*, which is a fundamental principle of international law. It has been accepted by the international community of states as a norm from which no derogation is ever permitted.

regulation made under the New York Convention, this distinction will not be adopted.⁹²

In France and Germany, the courts have repeatedly held that in the case of a foreign award not every violation of mandatory provisions of German law would constitute an infringement of public policy; they accept the violation of public policy in “extreme cases only.”⁹³ Similarly, the Swiss courts assert that a violation of the Swiss public policy occurs only where the in-born feeling of justice is hurt in an unbearable manner, where basic provisions of Swiss legal order have been neglected, or where the Swiss legal thinking forces prevalence over the applicable or applied law. Whether this case can be determined solely on the facts of one case, to establishing when foreign decisions are to be enforced, the scope of public policy is narrower than in the case of a direct application of Swiss law.⁹⁴ The Court of Appeal of the Canton Geneva cited with approval a dictum from the Swiss Federal Supreme Court, laid down in an earlier decision on the Geneva Convention of 1927, had noted:

“The extent of the exception of Swiss public order is more restrictive in respect of the recognition and enforcement of foreign awards than in respect of the application of foreign law by Swiss Courts. Accordingly, as far as the procedure is concerned, this limitation means that an irregularity in the procedure does not necessarily entail the refusal of enforcement of the foreign arbitral award, even if such an irregularity would imply the setting aside of an award made in Switzerland. There must be a violation of fundamental principles of the Swiss legal order, hurting intolerably the feeling of justice...This exception of public order should not be twisted in order to avoid application of international conventions which are signed by Switzerland and which form part of Swiss law. This would ultimately lead to the exclusion of application of Swiss law. In the final analysis, it should not lead to a violation of a Convention, the purpose of which is precisely to

⁹² Fn 50, at p361

⁹³ Ibid at p365

⁹⁴ Ibid

recognize the existence of different legal systems and to coordinate them.”⁹⁵

4.8 Mandatory Rules and Public Policy of the Enforcing Courts

In exercise of jurisdiction granted them under national law, the domestic courts have the obligation to apply their own procedural mandatory rules. On account of the national policy and interests, a national court not only has the jurisdiction to agree with the parties to choose the foreign law or recognize and enforce foreign judgment or arbitral award, but also has a corresponding jurisdiction to reject the application of a foreign law as well as the enforcement of the foreign judgment and arbitral award pursuant to public policy considerations.⁹⁶ In general, there are two situations that the national court needs to take into account in the application of mandatory rules and public policy in international commercial arbitration. The first is that an agreement to submit to arbitration has been made by parties, yet one of the parties has brought the matter to the court. In this case, the court has to determine the validity of the arbitration agreement to determine the existence and extent of its jurisdiction. Thus, the court would be obliged to consider if there are any national mandatory rules and public policy negating the right of the parties to submit to arbitration. Apart from this, when the court is called upon to recognize and enforce a foreign award, it needs to determine whether the arbitral procedure and award are in violation of the fundamental public policies of the forum.⁹⁷ In addition, the court of the state where the arbitration took place has a right of supervision and examination over the award made in its territory in exercise of powers granted it under the national law. If a party dissatisfied with an arbitral award and appeals to the court to set it aside, the court needs to consider the applicability of mandatory rules and public policy too.⁹⁸

⁹⁵ Cour de Justice (1st Section) of the Canton Geneva, September 17, 1976

⁹⁶ Chukwumerije, O., *Choice of Law in International Commercial Arbitration*, 1st edn (USA, Quorum Books, 1994), p181-182

⁹⁷ Article V(2)(b) of the New York Convention

⁹⁸ Article V(1) (e) of the New York Convention

It has been argued that the mandatory rules of the expected place of enforcement of an award should be applied.⁹⁹ This is based on the assumption that the courts of the place where enforcement is sought will evaluate the award by the standards of their own public policy for its recognition. It becomes imperative therefore that an arbitrator should not make an award which violates the mandatory rules that are part of the public policy of the state, where enforcement of an award may be sought.¹⁰⁰ For this reason, Professor Mayer has suggested that arbitrators should pay attention to the future of their award, and should always take into cognizance the mandatory rules of the place(s) where enforcement may be sought. If these have not been applied by them, the award may suffer unenforceability in the country of enforcement. It usually turns out that such a country is the one, or at least one of many, which may exercise an actual control over the situation; so it will not be advisable neglect whatever legal contribution it may have to the validity of the award.¹⁰¹ In his words: “Although arbitrators are neither guardians of the public order nor invested by the State with mission of applying its mandatory rules, they ought nevertheless have an incentive to do so out of a sense of duty to the survival of international arbitration as an institution.”¹⁰²

One scholar has stated that an arbitrator should consider whether there will be problems in the application or violation of rules of domestic public policy or of mandatory rules of the enforcing state. In other words, the arbitrator should always be minded of the issue of the effectiveness of his decisions. This principle was expressed in Article 26 of ICC Rules of Arbitration,¹⁰³ and the ICC interim award made on September 23, 1982,¹⁰⁴ where the arbitrators made were of the opinion that: “. . . the tribunal will, however, make every effort to make sure that the award is enforceable at law.

⁹⁹ Fn 58, at p537: “An arbitrator must ensure that his award does not offend the national public policy of the place where enforcement is sought.”

¹⁰⁰ Fn 8, at p59

¹⁰¹ Fn 18, at p284

¹⁰² Fn 3, at p568

¹⁰³ This provision reads as follows: “In all matters not expressly provided for in these Rules, the International Court of Arbitration and the arbitrator shall act in the spirit of these rules and shall make every effort to make sure that the award is enforceable at law.”

¹⁰⁴ Interim Award of September 23 1982 in No. 4131, Yearbook, Vol. IX, 1984, p134

To this end, it will assure itself that the solution it adopts is compatible with international public policy, in particular, in France [the country where the award was to be enforced].”¹⁰⁵

Furthermore, most national arbitration statutes lay down reasons to set aside awards made within their territory.¹⁰⁶ The issue of enforceability should therefore always take into cognizance the mandatory rules of the place of arbitration, at least to the extent that they reflect the relevant public policy. Some have argued that since the applicability of the New York Convention is merely discretionary, party autonomy should take priority when the two conflict or their equities are equal.¹⁰⁷ However, where the procedural mandatory rules are concerned, this makes little sense. Especially when we consider that with widespread adoption of the Model Law,¹⁰⁸ many states would have the same mandatory procedural rules governing the practice of arbitration. If an award violates such a mandatory rule at the seat, jurisdictions that have adopted the Model Law are most unlikely to enforce such an arbitral award.¹⁰⁹

As far as the issue of public policy in the enforcing states goes, the recognition and enforcement of the award may be refused, if the award has been set aside or suspended by a competent authority of the country in which, or according to the law under which, that award was made.¹¹⁰ In another respect, the enforcing state has the power to determine whether the award can be enforced, and in so doing choose to consider or neglect the feelings of the state where the award was rendered. In other words, according to the New York Convention, an award should comply with both public policies of the state in which the award was made and (in principle) the state in which the award seeks its

¹⁰⁵ Hochstrasser, Daniel, “Choice of Law and “Foreign” Mandatory Rules in International Arbitration”, (1994), *Journal of International Arbitration*, Volume 11, No.1, p69-70

¹⁰⁶ Craig, Park and Paulsson, *International Chamber of Commerce Arbitration*, 3rd edn, 2000, p499–500

¹⁰⁷ Schöldström, Patrik, *The Arbitrator’s Mandate: A Comparative Study of Relationships in Commercial Arbitration under the Laws of England, Germany, Sweden and Switzerland*, 1998, p290

¹⁰⁸ Legislation based upon the Model Law has been enacted in 50 countries: see UNCITRAL, *Status of the Model Law on International Commercial Arbitration (2005)*, (http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html)> at 1 October 2005.

¹⁰⁹ Barraclough, Andrew and Waincymer, Jeff, “Mandatory Rules of Law In International Commercial Arbitration”, 2005), *Melbourne Journal of International Law*, Volume 6, No.2, p13, (<http://www.austlii.edu.au/au/journals/MelbJIL/2005/9.html>), access on 8 May 2009

¹¹⁰ Article V(2)(b) of the New York Convention

enforcement, so as to ensure the contracting state will recognize and enforce it accordingly.¹¹¹ For this reason, it would be unrealistic, for the parties to concern themselves only with the law and public policies of the enforcing courts. Although the relative contracting states can apply the public policy defense available under the legal system of New York Convention, the national court cannot exercise this right without limitations. Article 1(2)(e) of the 1927 Geneva Convention provides that an award will be enforced if “the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.”¹¹² This is clearly different from Article V(2)(b) of the New York Convention, which provides: “Recognition and enforcement of an arbitral award may also be refused, if the competent authority in the country where recognition and enforcement is sought finds that: the award would be contrary to the public policy of that country.”¹¹³

It is believed that because the 1927 Geneva Convention utilizes “the public policy or the principles of the law of the country,” but the New York Convention only uses “public policy.” It is clear that the scope of application of the New York Convention is narrower. Besides, the scope of application of “public policy” is different from that of “the principles of the law of the country.” However, the New York Convention has already waived the content of “the principles of the law of the country.” Consequently, the narrow interpretation of public policy exception is concerned with situations of direct infringement of the public policy and will not avail where the notion of public policy merely is raised, without more.¹¹⁴ A similar provision exists under Article 36(1)(b)(ii) of the UNCITRAL Model Law,¹¹⁵ and it empowers the courts to refuse recognition and enforcement by

¹¹¹ Article V of the New York Convention

¹¹² Article I (e) of the Geneva Convention 1927

¹¹³ Article 36(1)(b) of the UNCITRAL Model Law follows the New York Convention 24 I.L.M.1302 (1985)

¹¹⁴ Fn 77, at p730

¹¹⁵ UNCITRAL Model Law on International Commercial Arbitration, U.N. Doc. A/40/17, Annex I, adopted by the United Nations Commission on International Trade Law on June 21, 1985, 24 I.L.M. 1302 (1985) [hereinafter “UNCITRAL Model Law”]. Article 28(2) provides that where the parties did not designate the applicable law, “the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.” This would require reference to choice-of-law rules. In contrast, the

reason of public policy.¹¹⁶ Again, although under the Model Law an award may be set aside by a court of the seat of arbitration if the award violates the public policy of the forum,¹¹⁷ it is improbable that mandatory rules of the seat will be violated in arbitrations which do not have a relationship with the seat except for the location, unless the mandatory rules are of the “universal” type.¹¹⁸ Furthermore, the English Arbitration Act 1996 also provides for the acknowledgment or enforcement of a New York Convention award which may be rejected if “it would be contrary to public policy to distinguish or implement the award.”¹¹⁹

On the other hand, arguments based on public policy have frequently failed when it involved the enforcement of foreign arbitral awards. The reason is that international public policy is narrowly construed. In *Dalmia Dairy Industries v National Bank of Pakistan*,¹²⁰ an ICC arbitration award made in Switzerland ordered the defendant to pay sums to the plaintiff in India under the original party agreement. The defendant raised two points regarding public policy. Firstly, the enforcement of the award would violate public policy on the basis that, in order to abide by the award, the defendant, a bank incorporated in Pakistan, would have to carry out acts which were illegal under Pakistani law; namely the transfer of foreign exchange from Pakistan to India. This dispute was affected by the act required to be done, where the contract and the award were concerned. Payment was to be made in India, not Pakistan; and under Indian law the payment was legal. Secondly, the defendant argued that it violated the public policy to enforce an award between persons who are nationals of foreign states

International Chamber of Commerce Rules of Arbitration, January 1, 1998 [hereinafter “ICC Rules”] stipulate in Article 17(1) that in the absence of an agreement between the parties as to the applicable law “the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate.” This would enable arbitrators to directly select the applicable law, by-passing choice-of-law rules.

¹¹⁶ Fn 74, at p6

¹¹⁷ Article 34(2)(b)(ii) of the Model Law

¹¹⁸ Nygh, Peter Edward, *Autonomy in international contracts*, 1999, p228-229, (http://books.google.com.tw/books?id=MQZ1tc6ifyUC&pg=PA228&lpg=PA228&dq=mandatory+rules,+place+of+arbitration&source=bl&ots=Cg-dl0-fiC&sig=RkFVOKKfp61lie2jXosMh5WiXI&hl=zh-TW&ei=qFUCSvraCZeGkAWequjfBA&sa=X&oi=book_result&ct=result&resnum=3#PPA229,M1), access on 7 May 2009

¹¹⁹ Section 103(3) of the Geneva Convention awards are governed by s. 99 of the 1996 Act and Part II of the Arbitration Act 1950 including Section 37, which provides that “enforcement thereof must not be contrary to the public policy or the law of England.”

¹²⁰ *Dalmia Dairy Industries v National Bank of Pakistan* [1978] 2 Lloyd's Rep. 223

who are at war with each other. The Court of Appeal rejected this argument, because there was no reason why the enforcement of an award in a private dispute should contravene public policy.¹²¹

Similarly, in *Deutsche Schachtbau-und Tiefbohr-Gesellschaft M.B.H. Respondents v Shell International Petroleum Co. Ltd. (Trading as Shell International Trading Co.) Appellants*,¹²² the plaintiffs and the defendants, both foreign companies, entered into an agreement in 1976, for the exploration of oil in the state of R'As al-Khaimah. A clause in the agreement provided for the resolution of all disputes by arbitrators appointed in Geneva according to the rules of the International Chamber of Commerce. In March 1979, the plaintiffs submitted a dispute to arbitration in Geneva according to that clause, and a substantial award was made in favour of the plaintiffs. In April 1979 the defendants began proceedings in a court in R'As al-Khaimah and received rescission of the whole agreement and damages by the reason of misrepresentation. Neither of the parties participated in any part of the proceedings instituted by the other, and both the award and the judgment remained unenforced. The issue here was whether it would be contrary to public policy to enforce a foreign award under an agreement which had conferred upon the arbitrators the power to choose the applicable law and they had chosen "internationally accepted principles of law governing contractual relations." The Court of Appeal held that public policy did not prevent the enforcement of an award reached under a law determined under a procedure agreed upon between the parties.¹²³ Commenting on this case, Sir John Donaldson M.R. raised the issue of the potency of public policy as a reason for refusing enforcement of an award under Section 5(3) of the Arbitration Act 1975: "Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution...It has to be shown that there is some element of illegality or that the enforcement of the award would be

¹²¹ Fn 75, at p192-207

¹²² *Deutsche Schachtbau-und Tiefbohr-Gesellschaft M.B.H. Respondents v Shell International Petroleum Co. Ltd. (Trading as Shell International Trading Co.) Appellants*, House of Lords, [1988] 3 W.L.R. 230, [1990] 1 A.C. 295

¹²³ Fn 75, at p195

clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised.”¹²⁴

4.9 Conclusion

It has been accepted internationally that in accordance with the principle of party autonomy, the parties are free to choose the law applicable to procedure.¹²⁵ However, if the choice of law of the parties has not been properly tailored, it may violate the mandatory rules and public policy of the state.

For this reason, the parties’ freedom to choose the procedural law should be subject to the mandatory rules and public policy of the state. In other words, every state will impose its own standard of “due process” which is likely to differ from country to country.¹²⁶ These mandatory rules and public policy indeed limit the scope of the exercise of party autonomy. Again every state has some procedural rules parties and the arbitral tribunal must abide by, at least for those that guarantee the fairness of arbitral proceedings and the effective settlement of the dispute. These mandatory rules indeed curtail the scope of the exercise of party autonomy.

Furthermore, mandatory rules and public policy exist as a mechanism for balancing the exercise of party autonomy with the governance provided by the national legal system; it constitutes the basic standard of the social structure and legal foundation of every state.¹²⁷ In this situation, when there is a suit before the domestic court seeking recognition and enforcement of a foreign award, the court must examine the arbitral procedure and the award to determine whether they violate the

¹²⁴ *Deutsche Schachtbau-und Tiefbohrergesellschaft MBH v Shell International Petroleum Co. Ltd.* (Trading as Shell International Trading Co.) Appellants, House of Lords, [1988] 3 W.L.R. 230, [1990] 1 A.C. 295

¹²⁵ Fn 58, at p87

¹²⁶ Fn 3, at p429

¹²⁷ Fn 10, at p291

fundamental policy of the place of court and then decide whether or not to recognize and enforce such an award.¹²⁸ In the meantime, the courts of the country where the arbitration took place, in pursuance of powers granted under their national legal system have the jurisdiction to supervise and examine the arbitral awards. If the party takes objection to the award and appeals to the court to set aside that award, the court has to take into account the mandatory rules and public policy.¹²⁹ Arbitrators are generally bound to apply the mandatory rules and public policy of the seat of arbitration, in order to make a valid award and to perfect the expectations and wishes of the parties.¹³⁰

Though these legislations may not be the same in each state, they nonetheless manage to establish a standard, from which some efficiency can be achieved gradually. Thus, it would take a gradual process of change to resolve the difficulties inherent in the practice of international commercial arbitration. After all, the Arbitration Acts of many states in the international system are inclined towards some sort of unification. A more settled state of affairs will not be advantageous to the parties alone, it would also prove beneficial to the development of international commercial arbitration. It is actually not too late to for each state to corporately embark on such unification. This issue will be given more attention in Chapters 5 (Delocalisation Theory), 6 (Harmonisation of Arbitration) and 7 (Supranational Arbitration). This does not mean that public policy can be used without limitations. It should restrict its influence over arbitration to the minimum possible. Even though nowadays the extent to which the public policy defense can be applied is getting narrower, its shadow still hangs over every arbitration. We shall argue later that the courts must not turn themselves into an appellate arbitral tribunal when their main concern should be the enforcement of the award. It is important to maintain a balance between upholding mandatory rules, public policy, and offending international comity. In order to achieve this purpose and indeed the goal of the

¹²⁸ Article V(2)(b) of the New York Convention

¹²⁹ Article V of the New York Convention

¹³⁰ Article V(1)(e), (2)(b) of the New York Convention

drafters of the New York Convention, the courts must deal more with international public policy and not domestic public policy.

Chapter 5

The Delocalisation Theory

5.1 Introduction

We had mentioned in Chapter 3, that when it behooves on the parties to choose the procedural law of an international commercial arbitration, they would usually resort it to the law of the country in which the arbitration is held, or the *lex loci arbitri*. It is usually a safer option considering the complexities that could arise later on, especially in the area of conflict of laws.¹ The *lex loci arbitri* actually plays a very important role in international commercial arbitration.² The local procedural law however, apart from being inadequate for the standard required in international arbitration, is generally tailored for national arbitration proceedings and not considered appropriate for international arbitration. In other words, this solution has often produced unsatisfactory results and generally necessitated the development of the concept of a-national arbitration, also known as floating or delocalised arbitration,³ which advances the possibility that arbitral awards can be detached from the law of the country of origin and still remain enforceable.⁴ The notion that the practice of international commercial arbitration, and the resultant awards could be separated from the law of the place in

¹ *Bank Mellat v Helleniki Techniki SA* [1984] Q.B. 291; [1983] 3 W.L.R. 783; [1983] 3 All E.R. 428; [1983] Com.L.R.273; (1983)133 N.L.J. 597; (1983)127 S.J. 618, CA; affirming [1983]Com. L.R. 174; *Sapphire International Petroleum Ltd. V. The National Iranian Oil Co* (1964) 13 I.C.L.Q. 1011; *Saudi Arabia v. Aramco* (1963) 27 I.L.R., p117

² Article V(1)(d) of the New York Convention provides that “The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place”, the recognition and enforcement of arbitral awards will be refused .

³ Maniruzzaman, A. F. M., “Conflict of Laws Issues in International Arbitration: Practice and Trends”, (1993), *Arbitration International*, Volume 9, p371-404

⁴ Denationalised arbitration would have been more appealing prospect to this author if its proponents do not assert the legally binding character of the “a-national award”. Non-binding compromise and conciliation have had a long and honorable place in dispute resolution.

which arbitration took/takes place has become fashionable in recent times.⁵ In the previous chapters, we had discussed several issues surrounding the procedural law, party autonomy and *lex loci arbitri* as they affect the arbitral process and resultant award. However, the above issues can not be completely discussed without some reference to or in isolation of the delocalisation theory, because the notion of detaching international commercial arbitration from the control of the law of the seat has been the subject of much debate among practitioners and scholars of international commercial arbitration. The proponents of this theory state that international commercial arbitration should not be bound to laws of the seat of different states.⁶ On the other hand opponents believe that since no principle of law should/can exist in a legal vacuum, it is difficult for an arbitral process to be detached from the legal system of the seat of arbitration. In other words, any arbitral proceeding arising from private contractual stipulation will/should have a national character.⁷

In this chapter therefore we shall be discussing the basic elements of the delocalisation theory. We shall also be concerned with the problems usually encountered with delocalised arbitrations, as well as its advantages. Finally, we shall also attempt to establish whether the delocalisation theory can be broadly accepted in the practice of international commercial arbitration, and the methods by which we may ameliorate the shortcomings of the theory.

⁵ Fn 3, at p371-404

⁶ Yu, Hong-Lin and Nasir, Motassem, "Can Online Arbitration Exist Within the Traditional Arbitration Framework", (2003), *Journal of International Arbitration*, Volume 20, No. 5, p455 – 473

⁷ Mann, F.A., "*Lex Facit Arbitrum*", in *International Arbitration: Liber Amicorum for Martin Domke*, P. Sanders edn, 1967, p159-161

5.2 The Meaning of the “Delocalisation” Award

In recent years, practitioners and scholars of international commercial arbitration have begun to look for ways in which international arbitration can properly detach from the control of law of the seat of arbitration without compromising the validity of the award. This school of thought proposes a situation where arbitration can be conducted without any element of control or restraint practiced on it by the law of the country where arbitration is held.⁸ This is usually referred to as “delocalisation” or “denationalization.” The “delocalisation” theory of arbitration raises a challenge to the traditional “seat” theory.⁹ Some scholars even argue that a delocalised award may be accepted by the enforcing state even when it is independent from the law of the seat of arbitration.¹⁰ They argue further that in the absence of delocalisation, the statuses of awards can never be stable, as their validity is dependent on the *lex loci arbitri* and the law of the country where the recognition or enforcement of award is sought.¹¹ On the other hand delocalised proceedings produce “floating awards,” and because floating awards do not belong to any system of municipal law, international commercial arbitration itself would be “transnational,” “a-national,” “expatriate,” “supranational” or even “de-localised.”¹²

⁸ Yu, Hong-Lin, “Is the Territorial Link between Arbitration and the Country of Origin Established by Articles I and V(1)(e) Being Distorted by the Application of Article VII of the New York Convention”, (2002), *International Arbitration Law Review*, p198

⁹ Lew, Julian D.M., *Applicable Law in International Commercial Arbitration :A Study in Commercial Arbitration Awards*, 1978, p590

¹⁰ Redfern, A. and Hunter M, *Law and Practice of International Commercial Arbitration*, 4th edn, (London: Sweet & Maxwell Ltd., 2004), p1-53, (<http://www.kluwerarbitration.com.ezproxy.stir.ac.uk/arbitration/DocumentFrameSet.aspx?ipn=26303>), access on 23 June 2009. See also Carlquist, Helena, “Party Autonomy and the Choice of Substantive Law in International Commercial Arbitration”, (2006), Department of Law, Göteborg University, p22, (<http://gupea.ub.gu.se/dspace/bitstream/2077/3079/1/200656.pdf>), access on 26 June 2009

¹¹ Yu, Hong-Lin, “Total Separation of International Commercial Arbitration and National Court Regime”, (1998), *Journal of International Arbitration*, Volume 15, No. 2, p150

¹² Fn 3, at p371-404; Fn 10, at p1-37, (<http://www.kluwerarbitration.com.ezproxy.stir.ac.uk/arbitration/DocumentFrameSet.aspx?ipn=26306>), access on 23 June 2009

The delocalisation theory has its origins in the sovereign immunity doctrine.¹³ The sovereign immunity doctrine makes states in the international system immune from the jurisdiction of courts in foreign states. In addition, it precludes arbitrators from applying national arbitration laws in the conduct of the arbitration proceedings once any of the parties involved is a state.¹⁴ The case of *Arabian American Oil Company (ARAMCO)*¹⁵ best illustrates the theory of state immunity. In that case, a contract was entered into between the Government of Saudi Arabia (hereinafter called “Saudi”) and the Standard Oil Company of California on May 29, 1933. When a dispute arose, the parties took it to arbitration in Geneva, Switzerland. The arbitrators had to decide whether to apply the law of the place of arbitration to the proceedings.

To reach a decision on that issue, the tribunal had ascertained whether the arbitration proceedings should be governed by the procedural law of a state and whether in the circumstances the Kingdom of Saudi Arabia enjoyed the sovereign immunity. Arbitral tribunal concluded that the dispute was not between two states, but between a state party and an American company. In international law and relations,¹⁶ every state in the international system possesses immunity derivable from its sovereignty.

¹³ Chukwumerije, O. “ICSID Arbitration and Sovereign Immunity”, (1990), Anglo-American L.R, Volume 19, p166

¹⁴ Chukwumerije, O., *Choice of Law in International Commercial Arbitration*, 1st edn (USA, Quorum Books, 1994), p90

¹⁵ *The Kingdom of Saudi Arabia v. Arabian American Oil Company (Aramco)* (1963) 27. I.L.R., p117

¹⁶ This principle of international law is emphasized in the award of April 12, 1977 of Mahmassai, sole arbitrator in *Libyan American Oil Company v. Government of the Libyan Arab Republic* (1982) 62 I.L.R.140, 178. It was indicated that even U.N. General Assembly Resolution No. 1803, dated December 21, 1962, which proclaims permanent sovereignty over natural resources, confirms the duty of states to respect arbitration agreements. The system of law managing the relationship of sovereign states and their rights and duties regarding to one another.

The arbitral tribunal therefore found that the arbitral procedure should not be governed by the laws of another state. The arbitrator held as follows:

“The jurisdictional immunity of States excludes the possibility, for the judicial authorities of the country of the seat, of exercising the right of supervision and interference in all the arbitral proceedings which they have in certain cases. Considering the jurisdictional immunity of foreign States, recognized by international law in a spirit of respect for the essential dignity of sovereign power, the Tribunal is unable to hold that arbitral proceedings to which a sovereign State is a Party could be subject to the law of another State. Any interference by the later State would constitute an infringement of the prerogatives of the State which is a party to the arbitration.”¹⁷

In this case, though the place of the arbitration was in Geneva, Switzerland, the arbitral tribunal was constrained to apply international law rather than the law of the seat of arbitration, because one of the parties was clothed in immunity deserving of statehood.¹⁸ It was sufficient that one of the parties was a state for the proceedings to be governed by principles of international law.

However, even under the principle of immunity from foreign sovereign authority, it is still possible for a state agency to submit disputes to arbitration. A sovereign is bound by an agreement to arbitrate contractual disputes under international law.¹⁹ Section 2(2) of UK State Immunity Act of

¹⁷ *The Kingdom of Saudi Arabia v. Arabian American Oil Company (Aramco)* (1963) 27. I.L.R., p155-156

¹⁸ Martin, Elizabeth A, *A Dictionary of Law(Oxford)*, 4th edn, 1997, p240-241

¹⁹ Fn 10, at p1-31, (<http://www.kluwerarbitration.com.ezproxy.stir.ac.uk/arbitration/>)

1978 provides that “a State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to be governed by the law of the United Kingdom is not to be regarded as a submission.”

Thus, some countries also refer to that legislation, and have enacted similar law.²⁰ Besides the Foreign Sovereign Immunity Act, the Australian State Immunity Act also contains similar provisions. The position is that when a state makes an agreement in advance to submit to arbitration, it will be bound by the agreement and is deemed to have waived its sovereign immunity.²¹

5.3 State Immunity

State immunity is also called sovereign immunity, which also infers jurisdictional immunity. State immunity is a thing of international law and manages as a request in bar to the jurisdiction of the national court, whereas the act of state principle is a rule of domestic law which states that the national court is not capable of adjudicating on the lawfulness of the sovereign acts of a foreign state.²² Furthermore, sovereign immunity is based on the concept that no state may be bound by

DocumentFrameSet.aspx?ipn=26304), access on 23 June 2009

²⁰ Section 4(2)(1) of the Canada, State Immunity Act, Section 10(2) of the Australia, Foreign Sovereign Immunity Act.

²¹ This principle of international law is emphasized in the award of April 12, 1977 of Mahmassai, sole arbitrator in *Libyan American Oil Company v. Government of the Libyan Arab Republic* (1982) 62 I.L.R.140, 178. It was indicated that even U.N. General Assembly Resolution No. 1803, dated December 21, 1962, which proclaims permanent sovereignty over natural resources, confirms the duty of states to respect arbitration agreements. The system of law managing the relationship of sovereign states and their rights and duties regarding to one another.

²² Lauterpacht, Elihu, Greenwood, C.J., and Oppenheimer A.G., *International Law Reports*, 2002, p223, (http://books.google.com.tw/books?id=_mutsUVLw7gC&pg=PA223&lpg=PA223&dq=The+doctrine+of+State+immunity+bars+a+national+court&source=bl&ots=GHZCBWXU3s&sig=JkQazpy9VmvWiwYEEYaQ_Tk9C5zg&hl=zh-TW&ei=6HpBSrbSHdWMkAXQm-DvCA&sa=X&oi=book_result&ct=result&resnum=7), access on 24 June 2009

legal process except they voluntarily submit to it.²³

State immunity is classified into absolute immunity and restricted immunity. The former means the immunity is given no matter whether the state's act is public or private, unless that state waives the immunity voluntarily. In the past, the United Kingdom insisted on absolute immunity, but changed this position when they acceded to the European Convention on State Immunity 1972 ("the ECST").²⁴ The United Kingdom eventually completely abandoned the notion of absolute immunity when they enacted the UK State Immunity Act in 1978.²⁵ The United States also adopted state absolute immunity in practice. In the early years of the 19th century, Marshall CJ's judgment in *The Schooner Exchange* was in support of this position.²⁶ But following the change in orientation and certain other circumstances in the international community, the United States gradually moved away from the absolute immunity principle and by the enactment of the Foreign Sovereign Immunity Act in 1976. It firmly and decisively entrenched the principle of "restricted immunity" in its foreign policy. Section 1605(a)(6) thereof, provides:

"...the action is brought, either to enforce an agreement made by the foreign State with or for the

²³ Vishny, Paul H., "Litigating with Foreign Governments: Sovereign Immunity and the Act of State Doctrine", (2008), Fundamentals of International Business Transactions, ALI-ABA, p1, (http://files.ali-aba.org/thumbs/datastorage/skoobesruoc/pdf/C1037-ch30_thumb.pdf), access on 24 June 2009

²⁴ Article 2 of European Convention on State Immunity 1972 provides that "A Contracting State cannot claim immunity from the jurisdiction of a court another Contracting State if it has undertaken to submit to the jurisdiction of that court either" a. by international agreement; b. by an express term contained in a contract in writing; or c. by an express consent given after a dispute between the parties has arisen.

²⁵ Under UK State Immunity Act 1978, Section 1 provides that "A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act."
(2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question

²⁶ *The Schooner Exchange, Koskenniemi, From to Utopia*, 1989, p433

benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is authorized to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition or enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection applies. [Section 1607 deals with counterclaims and paragraph(1) deals with explicit or implicit waiver of immunity.]²⁷

This amendment clarifies the position only to a limited extent, as it neglects to provide for the situation covering the exception to arbitrations taking place or authorized to take place in a country other than the United States, and where the agreement or awards is not governed by a treaty for the recognition or enforcement of arbitral awards to which the United States is a party. Nor, on the basis of the case cited above, would such a case be governed by the implicit waiver provision. However, in the case of *Ipitrade Int'l, SA v. Federal Republic of Nigeria*,²⁸ the district court held that an agreement to arbitrate outside the United States would constitute a waiver of a foreign state's immunity

²⁷ Section 1605 (a)(6) of The Foreign Sovereign Immunities Act, US, as amended in November 16.1988

²⁸ *Ipitrade Int'l, SA v. Federal Republic of Nigeria* 465 F. Supp. 824 (D.D.C. 1978) , court enforces arbitral award against foreign state

if, according to the arbitration, the winning party(ies) seek to enforce the foreign arbitral award in the United States.²⁹

5.4 The Restricted Immunity

The so-called restricted immunity indicates the kind of immunity merely available to states in the performance of public acts; the state's private acts would still be subject to jurisdiction. The restrictive theory of state immunity offers foreign states immunity from jurisdiction regarding their "public acts" (*acta jure imperii*), but not from their "private acts" (*acta jure gestionis*), which includes commercial activities. The adoption of the restrictive theory requires the courts to be able to differentiate between sovereign acts and commercial acts.³⁰

It is the trend for international treaties to stipulate that states may not be entitled to immunity when it concerns commercial ventures transacted by them. For example, Article 5 of the European Convention on State Immunity contains such a stipulation. However, there is still no unified international convention dealing with the issue of state's commercial acts. The American Foreign Sovereign Immunities Act 1976 (as amended in 1988) adopts the term "Commercial activity" and defined it thus: "a commercial activity" means either a regular course of commercial conduct or a particular commercial

²⁹ Born, Gary B., *International Civil Litigation in United States Courts: Commentary and Materials*, 1996, p234, (http://books.google.com.tw/books?id=vu0h0IgkmM4C&dq=International+Civil+Litigation+in+United+States+Courts&printsec=frontcover&source=bn&hl=zh-TW&ei=m_RCSun5MdOWkQW8xe2WDw&sa=X&oi=book_result&ct=result&resnum=4), access on 25 June 2009

³⁰ Brunnée, Kindred, and Saunders, *International Law, Chiefly As Interpreted and Applied in Canada*, 2006, p305, (http://books.google.com.tw/books?id=yCFkTkYZnlEC&printsec=frontcover&dq=International+Law,+Chiefly+As+Interpreted+and+Applied+in+Canada&ei=OPVCSnnMIulkAS5_Yj3Dg), access on 25 June 2009

transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.”³¹ The UK State Immunity Act 1978 equally provides “commercial transaction means: (a) any contract for the supply of goods or services; (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority.”³² The Canadian State Immunity Act provides a definition of “Commercial activity” in the following terms: Commercial activity means any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character.³³ As stated above international treaties and states’ legislation have each supplied broad interpretations of the concept of “commercial activity” or “commercial transaction” in their collective attempt to narrow down the scope of state immunity, by making the criteria for immunity more stringent.

5.5 Immunity from Enforcement

It is a commonly recognized principle that property of a foreign state shall be exempt from execution or seizure by the other states. This principle had received approval in *Benvenuti and*

³¹ Section 1603 (4) of the U.S. Foreign Sovereign Immunity Act (1976, amended in 1988)

³² Section 3 (3) of the UK State Immunity Act of 1978

³³ Section 2 of the State Immunity Act, Canada. An Act to provide for state immunity in Canadian Courts.

*Bonfant Srl.*³⁴ In 1973, Benvenuti and Bonfant Srl (hereinafter called “B&B” Company), an Italian company, entered into an agreement with the government of the People’s Republic of the Congo (hereinafter “Government”) to set up a company to manufacture plastic bottles and produce mineral water. The parties had disputes concerning production and operation of the business. B&B Company then submitted the situation to ICSID³⁵ for arbitration on December 15, 1977. The arbitral tribunal of ICSID made an award in favour of B&B Company after examining the circumstances of the dispute. It was the decision of the tribunal that the Congo Government compensates B&B Company for all the losses they had suffered as a result of the actions of the government.

On its part, the Congo Government refused to honor the arbitral award, thereby, necessitating a further appeal by B&B Company to Paris Civil Court in France for the enforcement of the award. Paris Civil Court made a decision on December 23, 1980 ordering a conditional *exequatur*³⁶ in favour of B&B Company, in the following terms: “We rule that no measure of enforcement, or even a conservatory measure, can be taken pursuant to said award, on any assets located in France without our prior authorization”³⁷

The proviso was in recognition and protection of the Congolese Government’s sovereign immunity

³⁴ *Benvenuti and Bonfant Srl v. The Government of the People’s Republic of the Congo*, (1993) 1.ICSID Report, p331-375

³⁵ ICSID was founded by the Convention on the Settlement of Investment Disputes between states and nationals of other states produced at Washington, March 18, 1965. This Convention is also known as the ICSID Convention, and entered into force on October 14, 1966. It was formed by the executive directors of the International Bank for Reconstruction and Development and was submitted by them to the governments of the member states of the Bank on March 18, 1965.

³⁶ The award has been granted recognition.

³⁷ Court of appeal of Paris judgment, France, which concerns the recognition and enforcement of award in context of ICSID convention, I.L.M. (20) 1981, p879.

and covering its property with immunity from enforcement. B&B Company did not however accept the reservation stated in the said order, because it took away teeth from the award, making it practically unenforceable and of no use to B&B. On January 12 1981, B&B took its case back to the Paris Civil Court, this time seeking a modification of the exequatur, and failed there too.

B&B Company was also dissatisfied with that decision, and further appealed to the Paris Appeal Court, which annulled the binding condition attached to the exequatur handed down by the Paris Civil Court on June 21, 1981. The appeal court held that in respect of the recognition and enforcement of an award under the Washington Convention (which contained two distinctive procedures for obtaining the enforcement order and real enforcement order), the enforcement order given by the first trial court was incapable of entering into any relative or real executive stages as a result of the foreign state's immunity from enforcement.

Article 55 of the Convention had provided that nothing in Article 54 was to be construed as limiting the immunity from enforcement enjoyed by a foreign state. The order granting an exequatur for an arbitral award could not be enforced. However, it constituted not of a measure of enforcement, but merely of a preliminary measure prior to measures of enforcement.

The judge in first instance had therefore exceeded his competence under Article 54 of the Convention by becoming involved in examining the question of immunity from enforcement of foreign states which was only relevant at the second stage, i.e. the stage of the actual enforcement of

the award. In addition to obtaining the enforcement order unconditionally, B&B Company also received a seizing order to arrest/sequester the funds held by the government in The Congo Commercial Bank. The government was also dissatisfied with the ruling of the appeal court and appealed to the same Court for the order to be set. The Court of Appeal in Paris was of the opinion that the aim of ICSID was directed at the Congo Government and The Congo Commercial Bank was not a subsidiary organization, or a branch or an arm of the government of People's Republic of Congo, and therefore, not duty bound to bear any responsibility to contribute towards payment against that award. And on that ground, it decided to annul the seizure order held by B&B Company.

B&B Company challenged that decision, appealing to the Court of Appeal in Paris, arguing *inter alia* that even if the foreign nationalized organization was distinct from the qualification of state's juridical person, it was equivalent to its country. The foreign nationalized organization should be regarded as a part of the relative foreign country, no matter how much or how little control foreign state had over such an organization. But, the Court of Appeal in Paris did not accept this reasoning and rejected B&B Company's appeal on July 21, 1987. The Court held that the examination of the nature and extent of control exercised by the state over the commercial entity was not sufficient to treat that related entity as a subsidiary organization of the country. The Congo Commercial Bank was indeed not a subsidiary organization of the People's Republic of the Congo. The Congo Government was the rightful debtor to B&B Company and not The Congo Commercial Bank.

From this case we may infer the following: obtaining an enforcement order is different from the actual enforcement procedure. The Court of Appeal in Paris had conclude that Article 54 of the Washington Convention only provided for the procedure for obtaining enforcement, while Article 55 had to do with the enforcement stage of the arbitral award. And the sovereign immunity issue only becomes relevant at the enforcement stage.

As per the issue of the property of a state being immune from enforcement, the French Civil Court held that the funds or assets subject to/of sovereign actions or public interest enterprises could enjoy immunity from enforcement, yet, the funds or assets held as a result of, or pursuant to, or gotten from a state's business activities would not be covered by this immunity. In practice however, it could be rather difficult for the creditor to obtain such compelling evidence, to accurately determine the origin of the funds or assets involved in the range of business activities, while seeking to enforce the award. It appears that a real inequality exists between the sovereign state and foreign private investor. The private investor has to properly and carefully consider the risk of investment whenever they intend to enter into any sort of investment cooperation with the states, especially states with a poor record in honoring debts.

The Congo Commercial Bank is not a subsidiary body of The People's Republic of the Congo. The sovereign state and its subsidiary are the only bodies that would qualify to take the responsibility for their debts. At the same time, even though the state exercises controlling interests in an entity, this

would not automatically mean such an entity is a subsidiary body on that account alone. It is clear from the above that the principle of party autonomy does not apply in the domestic legal environment, but to any non-domestic or foreign law of arbitration. It presents party autonomy as possessing a somewhat supranational character.³⁸

The opinion of the courts expressed in ARAMCO was further given legal impetus in Texaco 10 years later. The sole arbitrator in Texaco showed its recognition of state's sovereignty when it chose to apply the international law. Again for the fact that the parties had agreed that the arbitrator be appointed by the President of International Law Court, meant that they had consented to have their arbitration governed by the international law system. This reasoning was adopted in *Texaco Overseas Petroleum Co. (TOPCO) and California Asiatic Oil Co.*³⁹ in 1973 and 1974. Texaco Overseas Petroleum Co. (TOPCO), California Asiatic Oil Co. (hereinafter called "the companies") and Libya Government (hereinafter called "Libya") entered into an agreement. Under this agreement, the arbitration clause provided that, the parties had the right to appoint "two arbitrators, each party having the right to elect one arbitrator as well as an umpire to be appointed by the Arbitrators." Clause 16 inserted in each contract stated "the contractual rights expressly created by this concession shall not be altered except by mutual consent of the parties"

In September 1, 1973 and February 11, 1974, Libya proclaimed decrees purporting to nationalize

³⁸ Fn 9, at p75

³⁹ *Texas Overseas Petroleum Company and California Asiatic Oil Company (Texaco) v. The Government of the Libyan Arab Republic*, (1978) 17.I.L.M. p3

all of the rights, interests and property of Texaco Overseas Petroleum Company and California Asiatic Oil Company in Libya granted to them jointly under 14 Deeds of Concession. However, the decrees were rejected by the Companies arguing that the Libyan Government's action broke the terms and conditions of their Deeds of Concession.

In pursuance to arbitration clauses in the Deeds of Concession, the Companies subsequently submitted this dispute to arbitration and appointed an arbitrator. However, Libya refused to accept arbitration and did not appoint an arbitrator arguing that the dispute was not subject to arbitration, because the nationalizations were acts of sovereignty. The Companies asked the President of the International Court of Justice to appoint a sole arbitrator to hear and determine the disputes. Libya opposed the request and argued that the disputes were not subject to arbitration because the nationalizations were acts of sovereignty. The president of the International Court of Justice eventually appointed the Sole Arbitrator.

The arbitrator referred to Clause 28 of the Deeds of Concession, which provided: "This concession shall be governed by and interpreted in accordance with the law of Libya and such rules and principles of international law as may be relevant but only to the extent that such rules and principles are not inconsistent with and do not conflict with the laws of Libya"

For reasons mentioned above, it was clear that the parties had intended that the arbitrator should be able to decide on his choice of jurisdiction. However, the arbitral tribunal was also saddled with

the burden of deciding what law or system of laws should rightly govern the arbitration, and at the same time would not be in conflict with Libyan law. It was understood that the parties were free to choose the law to govern the conduct of the arbitration proceedings. However, in that case, in the absence of any expressed agreement between the parties, the arbitral tribunal had to choose the law applicable to the arbitral proceedings. The arbitral tribunal found that there were two possible solutions, viz: firstly, there was the possibility of drawing impetus from the arbitration between *Sapphire International Petroleum Limited and the National Iranian Oil Company Arbitration*,⁴⁰ and submit the arbitration to a given municipal law, which would generally but not necessarily be that of the place of arbitration. Secondly, and on the contrary, to adopt the Aramco rule, that “is to consider this arbitration as being directly governed by international law.”⁴¹ The arbitral tribunal considered the rule of “respect for immunity of sovereignty” and the fact that Libyan Government was a state party, which could not be subjected to the law of other nations. The arbitrator held that international law should govern the arbitral proceedings.⁴²

Scholars recommend that this theory supports the freedom of parties to choose the place of arbitration for purely neutral forum reasons, without being unduly burdened by the *lex loci arbitri*.

⁴⁰ *Sapphire International Petroleum Limited and the National Iranian Oil Company Arbitration*, ((1964) 13 I.C.L.Q. 1011.

⁴¹ *Arabian American Oil Company v. the Kingdom of Saudi Arabia*. (1963) 27.I.L.R. p.117.

⁴² *Texaco Overseas Petroleum Co. and California Asiatic Oil Co (Texaco) v. Government of the Libyan Arab Republic* (1978) 17 I.L.M.3, p3-4. We notice here that the recommended procedure had the attributes of delocalisation .

They advocate that the obligatory force of an arbitral award need not necessarily derive from the law of the seat of arbitration. Even where the award does not apply or rely on the law of the seat of arbitration, it could still enjoy an equivalent legal effect and will be enforceable in other enforcing states.⁴³ This theory emphasizes that the tribunal could produce a legally good award in the absence of the *lex loci arbitri*, as long as arbitral procedure had complied with the requirements of *international public order*.⁴⁴

ARAMCO and TEXACO were the very first cases where arbitral proceedings were detached from the law of the *situs*. Those cases did not comply with the traditional concept of the right of supervision by the law of the place of arbitration. However, the special situation was that one of the parties in each the cases was a state. It is therefore quite imperative that the arbitrators consider the issue of sovereign immunity in arbitral proceedings, because the state should not be subject to the law of the place of arbitration. While the “delocalisation” theory has its strongest support in cases where one of the parties is a state, the theory may also apply to private parties in arbitral proceedings.

5.6 Delocalisation Theory and the New York Convention

It is also important to discuss whether the delocalisation theory is adopted in the New York

⁴³ Lynch, Katherine L., *The Forces of Economic Globalization*, 2003, p304, (http://books.google.com.tw/books?id=HMAXbq_-17gC&pg=PA304&lpg=PA304&dq=award,+law+of+the++place+of+arbitration&source=bl&ots=PKimeZgc0u&sig=qRvnxObWmobjnhLTJfDI8WDnsUI&hl=zh-TW&ei=_SZDSrDfOM6LkAXXnsykDw&sa=X&oi=book_result&ct=result&resnum=9), access on 25 June 2009

⁴⁴ *Robinson v. Bland* (1760) 2 Burr. At 1077,1084. *Regazzoni v. K.C.Sthia, Ltd.*, (1956) 2 Q.B. at 490,524 (C.A.) English scholars Dicey and Morris indicate that “the doctrine of public policy has assumed far less prominence in English conflict of laws than have corresponding doctrines in the laws of foreign countries, e.g. France and Germany.”

Convention due to the fact that the New York Convention is the most influential convention in the current practice of international commercial arbitration. There are different views on the applicability of this theory. One school advocates that the effect of arbitral award does not necessarily derive from the law of the country where the arbitration takes place. The award is still valid and can be recognized and enforced in the country where it is sought to be enforced.⁴⁵ Opposing views hold that “delocalisation” arbitration is attractive theoretically, but is shaky and uncertain in its legal positioning.⁴⁶ In the famous S.E.E.E, both the French and Dutch Courts held that the delocalisation award is applicable under the New York Convention. In *Société Européenne d'Etudes et d'Enterprises (S.E.E.E.) v. Federal Republic of Yugoslavia*,⁴⁷ the parties entered into a contract on January 3 1932.

On completion of the contract however, S.E.E.E claimed that it had not been paid in full because of the devaluation the French franc suffered at the time. It subsequently submitted the dispute to arbitration in Switzerland. The Yugoslav authorities however refused to take part in the arbitral proceedings in the Canton Vaud, Switzerland. On July 2 1956, the two arbitrators, made an award in favor of S.E.E.E.

The Yugoslav State brought an action to set aside the award in the appeal court in Vaud arguing that the award was contrary to Article 516 of the Code of Civil Procedure of the Canton Vaud which

⁴⁵ Fn 8, at p196

⁴⁶ Janićijević, Dejan , “Delocalization In International Commercial Arbitration”, (2005), Law and Politics, Volume 3, No. 1, p63-64

⁴⁷ *Société Européenne d'Etudes et d'Enterprises (S.E.E.E.) v. Federal Republic of Yugoslavia*, P. Sanders edn, Volume I, 1976, p195-198

stipulated for an uneven number of arbitrators.⁴⁸ However, the Court rejected the appeal, but returned the award to the S.E.E.E. The court agreed that Article 516 of the Code of Civil Procedure of the Canton Vaud prescribed an uneven number of arbitrators, however the arbitral procedure was not governed by the law of the place of arbitration. So that it was not a Swiss award.

S.E.E.E subsequently attempted to enforce this award in a number of countries, but was unsuccessful. One of those attempts at enforcements was done in the Netherlands. The enforcement of the award was also refused by the Hague Court of Appeal on September 8 1972. The Court held that although Article V(1)(d) gave the parties the freedom to regulate the composition of the arbitral tribunal and the arbitral procedure, under Article V(1) (e) of the Convention the arbitral proceedings would still be governed by a national law. For the fact that the award was not governed by the Code of Civil Procedure of the Canton Vaud, the Court was of the opinion that the award had not been made in the territory of another contracting state. For this reason, the award was not an award within the meaning of the New York Convention,⁴⁹ which meant that the Convention was not applicable to it.

However, the Dutch Supreme Court quashed the decision of the Court of Appeal of The Hague on October 26 1973.⁵⁰ The Supreme Court held that the Court was asked to enforce a Convention award, and therefore should not have gone further to examine the relationship between the award

⁴⁸ Tribunal of the Canton Vaud, February 12, 1957.

⁴⁹ Hof of The Hague, September 18, 1972 (Neth. no. 2A).

⁵⁰ Supreme Court, October 26, 1973 (Neth.no.2B).

and the law of the country where it was made. The award should be enforced even in the absence of such relationship.

On October 25 1974, the Hague Court of Appeal again refused to enforce the award on grounds that the award was contrary to the public policy of the enforcing state. S.E.E.E again appealed to the Dutch Supreme Court. But the appeal was rejected again. The Dutch Supreme Court was of the opinion that “the order of the Tribunal of the Canton Vaud was to be equated to a setting aside of the arbitral award as mentioned in Article V(1)(e) of the Convention.”⁵¹ The Supreme Court observed that the award was handed down in Switzerland and unenforceable under the New York Convention, because Article V(1)(e) of the Convention provides that “The award has been set aside by a competent authority of the country in which, or under the law of which, that award was made.”

S.E.E.E attempted again to have the award enforced in Paris, and obtained orders for an *exequatur*⁵² award from the French Court. However, on July 8 1970, this decision was quashed by the same Court on the ground that the award violated the French public policy. The recognition and enforcement of the award may be refused by the Court of Appeal of Orleans because of public policy considerations. The Supreme Court of France however finally quashed the decision of the Court of Appeal of Orleans, and remitted the case to the Court of Appeal of Rouen for reconsideration of the original appeal.

⁵¹ Supreme Court, November 7, 1975 (Neth. No. 2C).

⁵² The award has been granted recognition.

On November 13 1984, the Court of Appeal of Rouen handed down a judgment that granted enforcement. Yugoslavia rejected the above judgment, and applied for revocation of the decision on November 13 1984, but the appeal was dismissed in 1986. The Supreme Court of France held, that Yugoslavia had submitted the dispute to arbitration in furtherance of the arbitration clause contained in the original contract, and this meant that Yugoslavia had accepted the award. In which case, the award could subsequently be supported with the grant of an exequatur.⁵³ Furthermore, the powers of arbitrators were derived from the intention of the parties and not from public authority. The arbitrators were entitled to interpret the international agreement in issue, and there was really no need to seek the interpretation of the Government authority. The judge could not refuse to grant an exequatur based on the interpretation given by the arbitrators, because it was different from that given by the French Government.⁵⁴

Finally, the award was enforced in France relying on the New York Convention. The decision of the French court in this case shows that a foreign award might be recognized and enforced even though the award was detached from its country of origin.⁵⁵ The law of the place of arbitration does not necessarily always govern the arbitral proceedings. The “delocalisation” theory or at least a variant of it had been adopted in this case.⁵⁶

⁵³ The award has been granted recognition

⁵⁴ *Société Européenne d'Etudes et d'Enterprises (S.E.E.E.) v. Federal Republic of Yugoslavia*, P. Sanders edn, Volume I, 1976, p195-198

⁵⁵ Later, the recognition of the award was refused by the Dutch Supreme Court regarding the Swiss refusal to hear the case as equivalent to setting aside the award.

⁵⁶ Fn 8, at p200

Again, a judgment in 1980 handed down by French Court of Appeal in *Gotaverken Arendel A.B*⁵⁷ produced a “de-localised” arbitral award. The Gotaverken Arendel A.B entered into an agreement with General National Maritime Transport Company (GMTC). A dispute arose and was submitted to ICC in Paris for arbitration as stipulated under the contracts. The tribunal was composed of a French arbitrator as Chairman, and two other members; a Norwegian, and a Libyan. The arbitral tribunal rendered an award in favor of Gotaverken on April 5, 1978, which the Libyan arbitrator refused to sign, and the Libyan Maritime Co. (GMTC) refused to abide by the terms of the award. Gotaverken sought to enforce the award in Sweden. On the other hand, GMTC applied to the French court to set aside the award.

Gotaverken obtained an order for the attachment of the three vessels. GMTC argued in Sweden that the award was not binding anywhere until the outcome of its challenge, still before the courts in the country where it was made. Gotaverken attacked the jurisdiction of French Court to conduct international arbitral proceedings, arguing that France had merely provided a geographically neutral ground for arbitration.

Gotaverken argued that the challenged award was not a French award. Neither of the parties was French, and neither of them had companies or assets in France. The contracts they made also had no contractual connection with France. Gotaverken also argued that it was not necessary for the arbitral

⁵⁷ *Gotaverken Arendal AB v. Libyan General National Maritime Transport Company* (1981) 6Y.Comm.Arb. p221, 237

proceedings to be attached to any national legal system. Under the New York Convention, the laws of the seat of arbitration merely governed the conduct of the proceedings in the absence of a specific agreement by the parties. Such an agreement, according to the shipyard, was present in that case by virtue of their reference to Article 11 of the I.C.C. Rules, which authorized the detachment of arbitral proceedings from local law.⁵⁸ Thus the award was not French, and could not be set aside by a French court.

Actually, as neither of the parties nor their transactions had any connection with France, and as neither they nor the arbitrators had chosen French law to conduct the proceedings, and finally as the I.C.C. Rules no longer mandated application of the laws of the seat of arbitration in the absence of a choice of law by the parties, the Court of Appeal in Paris concluded that the award was not governed by French procedural law and was not therefore a French award.⁵⁹ In the absence of a judgment by the French court, in pursuance of Article V(1)(e) of the New York Convention, the Swedish Supreme Court held that the award was enforceable and performed it immediately. It is necessary to point out that the result of this case ran contrary to the expectation of the parties, because the parties only chose the arbitral place ("Paris") but did not choose French arbitral procedural law as the applicable law. Both parties misunderstood the nature of the whole arbitral regulations and used the incorrect procedural law resulting in the "de-localised" arbitral award. The aforesaid notwithstanding,

⁵⁸ Article 11 of the I.C.C. Rules, superseded by amendment dated 1975, provides that "The rules governing the proceedings before the arbitrator shall be those resulting from these Rules and, where these Rules are silent, any rules which the parties (or, failing them, the arbitrator) may settle, and a whether or not reference is thereby made to a municipal procedural law to be applied to the arbitration."

⁵⁹ Ibid

a most instructive outcome of this case is that the Swedish Supreme Court clearly held that the state of enforcement of an award was powerful enough to determine or decide whether the award was binding and enforceable, and it was not even necessary to refer to the place where the award was made in the whole scheme of things, especially against the background of the law of that award.⁶⁰

It should be pointed out in this case that the Swedish court treated the award as a “French award” and not an “unnational award” (delocalisation award) while the award is being enforced. Gotaverken also treated the award as a “French award” while applying for enforcement of the award. The French court on the other hand had held that award was not a French award. It would appear that this case ended up being one fraught with seemingly irreconcilable contradictions. Though the whole decision constituted a “run around” situation between France and Sweden, this writer believes strongly that the issues canvassed in this case and the various outcomes were quite instructive, because the French court appeared to have supported the “delocalisation” theory or the possibility of delocalised awards. Furthermore, according to Article 1494 (1) of French New Code of Civil Procedure:

“The arbitration agreement may, directly or by way of reference to a resolution by arbitration, lay down the procedure to apply in the course of the arbitration proceedings, it may equally bring the latter under a law of procedure which shall be specified.

Where the agreement is silent, the arbitrator shall lay down the procedure, to the extent that the

⁶⁰ *Gotaverken Arendal AB v. Libyan General National Maritime Transport Company* (1981) 6Y.Comm.Arb. p221, 237

same is necessary, either directly, or by way of reference to a law or to a rule of arbitration.”

This case supports the view that arbitration is not imperatively governed by the law of the seat of arbitration, and that the parties are free to choose the law they wish should govern the arbitral proceedings. Again, this freedom also applies to the exclusion of any national system of law.⁶¹ It therefore presents an interesting inspiration for those who support and advocate “delocalisation” theory. Moreover, the Swedish court accepted the enforcement of the award in this case in furtherance of Article V(1)(e) of the New York Convention. The court also appeared to broaden the scope of application of the New York Convention and provided the legal grounds for “delocalisation” theory. In addition, the adoption of “delocalisation theory” also promotes the principle of party autonomy, which is proving to be a crucial principle of international arbitration.

The French court had declined to entertain the challenge to the award for reason that the award was neither French in nationality, nor for any other reason subject to French legal system. In this sense, it made the award a so-called “floating award.” The present writer submits that the French court no doubt would have had to justify its position had the award been held plausible. However, the view expressed by the French court would appear incomplete. This case had taken place in Paris and the award was made in that city. So if the French court did not have jurisdiction over this case, which other nations would have possessed such jurisdiction or which national law should properly

⁶¹ Ibid

govern the proceedings? The French court did not completely address this matter.

5.7 Does an Award Need a Nationality

The question as to whether an arbitral award should have a nationality remains an important issue in international arbitration. The traditional view is that an arbitral award should have a nationality, as having a nationality goes a long way in determining the binding enforce of such an award. F.A. Mann is the representative advocator of this view. He submits that arbitral proceedings are governed by *lex arbitri*. “Every arbitration is a national arbitration, that is to say, subject to a specific system of national law.”⁶² He insists that every and all arbitration proceedings derive from the grants of private agreement, but with a national character. In this case, no arbitration proceeding can extricate itself from the control from the state law. Mann further explains:

“Even the idea of the autonomy of the parties exists only by virtue of a given system of municipal law and in different systems may have different characteristics and effects...Every right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law which may conveniently and in accordance with tradition be called *lex fori*, though it would be more exact (but also less familiar) to speak of the *lex arbitri*...”⁶³

This means that, the binding enforce of any arbitral award is conferred by the country where the award was made. If the binding effect of the award is not recognized by the country where the award

⁶² Fn 7, at p157

⁶³ Ibid at p160

was made or has been set aside by it, it renders the award devoid of legal value, and the recognition and enforcement of the award may be refused by the other nations. In support of this notion, Article V(1)(e) of the New York Convention for example provides that recognition and enforcement of the award may be refused if the award “has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.” Apparently, the situation “binding on the parties” is conferred by the specific state. If the award has been set aside by a specific state, then the enforcing state may refuse to recognize and enforce that award. One can assert that neither the New York Convention nor the UNCITRAL Model Law have the function of supervision, or the power to govern the arbitral award and process. As a matter of fact, the courts appear to be the proper authority which is usually saddled with the task of supervising the arbitral award by relying on and exercising its powers of “setting aside the award” and extending to the activity of “recognition and enforcement of the award.” Such supervisory mechanism actually outlays the geographical concept of arbitration. In other words, as long as the arbitration proceeding is governed by the law of the place of arbitration, the resultant award should also be subject to the law of the place of arbitration.⁶⁴

Those opposed to this view argue that the award does not need a nationality. The binding effect of the award is not necessarily given by the law of the place of arbitration, which in most cases lacks any direct or substantial connection with the dispute or issue. The procedural law does not need to

⁶⁴ Schwartz, Eric A., “A Comment on *Chromalloy — Hilmar ton, à l'américaine*”, (1997), J. I.A, No.2, p129

operate in the shadow of the law of the place of arbitration; it is therefore incorrect to insist that the validity of international commercial arbitral award can be given only or exclusively by the law of the place of arbitration.⁶⁵ Even when an arbitral award has been set aside by the court of the country in which the award was made, thereby possessing no nationality and floating internationally; the recognition and enforcement of the award may still be obtained through the courts of the enforcing country.⁶⁶

In our view, this position will inspire the proponents of “delocalisation” theory because it actually deals with all the issues that arose in the course of arbitration proceeding, which stemmed out of the international treaty entered into between Iran and the United States. The “Iran-United States Claims Tribunal” was however merely an ad hoc arbitration, which had its own procedural rules: i.e. “The Claims Settlement Declaration” and “Tribunal Rules of Procedure,” and, in fact, the proceedings were not governed by the mandatory Hague Rules which was the place of arbitration. Just as it obtained in this case, the law governing an arbitration procedure is capable of an independent existence from the law of the place of arbitration and may not be subject to the mandatory rules and public policy of the place of arbitration.

5.8 Practice of the “Delocalisation” Theory in International Instruments

The “Iran-United States Claims Tribunal” which was established by the Algeria Declaration

⁶⁵ Fouchard, Philippe, Gaillard, Emmanuel, and Goldman, Berthold, *Fouchard Gaillard Goldman on International Commercial Arbitration*, E. Gaillard & J. Savage edn, 1999, p635

⁶⁶ Fn 65, at p130

typifies a delocalised award.⁶⁷ However, there are a number of differences between the “Iran-United States Claims Tribunal” and the other cases earlier mentioned; i.e. “ARAMCO,” “TOPCO”, “S.E.E.E” and “Gotaverken” cases. For example, in the present case both parties are states. The procedure to decide the arbitration venue, choose the rules to govern its conduct as well as selecting the membership of the tribunal were issues peculiar to the present case. The Iran-United States Claims Tribunal was completely free to decide the law applicable to the arbitral proceedings,⁶⁸ which was free from any control by the law of the seat of arbitration. Thereby producing delocalised arbitral award.

The best example is the International Centre for Settlement of Investment Disputes (ICSID) established under the Washington Convention of 1965. The ICSID has its headquarter in Washington D.C., but arbitration conducted under its rules can be held elsewhere in the world. The purpose of the ICSID is to provide the facilities for conciliation and arbitration of investment disputes between contracting states and nationals of other contracting states in accordance with the provisions of the Convention.⁶⁹ The preamble to the Washington Convention talks about considering the need for international cooperation for economic development, and the role of private international investment therein; and the possibility that from time to time disputes may arise in connection with such

⁶⁷ The Declarations include (1) Declaration of the Government of the Democratic and Popular Republic of Algeria (2) Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic of Iran. (1981) I.L.M.Vol.20 pp.224-233

⁶⁸ Toope, Stephen J., *Mixed International Arbitration: Studies in Arbitration between States and Private Persons*, 1990, p373-374

⁶⁹ Article 1(2) of Washington Convention.

investment between contracting states and nationals of other contracting states; recognizing that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases, and so on. Under the auspices of the World Bank, the Convention on the Settlement of Investment Disputes between Contracting States and nationals of other Contracting States came into force on October 14, 1966.⁷⁰ According to Article 44 of the ICSID (Washington) Convention 1965 provides: “Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.”

This provision makes it clear that the arbitral proceedings conducted by the ICSID are subject to the Convention and it need not to be subject to the supervision of the laws of the seat of arbitration. The arbitral tribunal must be the competent authority to conduct the arbitration proceedings. Therefore, ICSID arbitration could have no connection with the law of the seat of arbitration. Particularly, an ICSID award emanating from the ICSID Convention is independent to the laws of the seat of proceedings. It means that the ICSID award is the “delocalisation award” because it exists and does not apply to the law of the place of arbitration. Furthermore, these provisions cover matters relevant to: submission of requests for the arbitration and the power of the Secretary to screen

⁷⁰ United Nations Treaty Series 159; (1965) 4 International Legal Materials 532

requests,⁷¹ constitution of the arbitration tribunal,⁷² the powers and functions of the tribunal,⁷³ conduct of the arbitration proceedings in the absence of one of the parties,⁷⁴ the power of the tribunal to rule on incidental issues and on counter-claims,⁷⁵ provisional measures,⁷⁶ the arbitral award,⁷⁷ interpretation of the arbitral award, revision and annulment of the arbitral award,⁷⁸ replacement and disqualification of arbitrators,⁷⁹ cost of the proceedings,⁸⁰ and the location of the proceedings.⁸¹

Some of these rules have been stipulated in the Convention as mandatory and the parties may not alter them by agreement, unless the Convention itself grants the parties the freedom to do so. For example, the Article 37(2)(a) provides: “The tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree.” Being a mandatory rule, the parties may only appoint a sole arbitrator or any uneven number of arbitrators, and can not appoint any even number of arbitrators, and cannot appoint even number of arbitrators. Again, Article 37(2)(b) provides: “Where the parties do not agree upon the number of arbitrator and the method of their appointment, the Tribunal shall consist of three arbitrators...” The Convention therefore grants power for the parties to decide the uneven number of arbitrator as well as the method of their

⁷¹ Article 36 of ICSID Convention

⁷² Article 37-40 of ICSID Convention

⁷³ Article 41, 43 of ICSID Convention

⁷⁴ Article 45 of ICSID Convention

⁷⁵ Article 46 of ICSID Convention

⁷⁶ Article 47 of ICSID Convention

⁷⁷ Article 48-49 of ICSID Convention

⁷⁸ Article 50-52 of ICSID Convention

⁷⁹ Article 56-58 of ICSID Convention

⁸⁰ Article 59-61 of ICSID Convention

⁸¹ Article 62-63 of ICSID Convention

appointment, and imposes 3 in the event that they cannot reach an agreement on the number.⁸²

Moreover, Article 44 of the same Convention provides: “If any question of procedure arises which is not covered by this Section or by the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.” This provision is of unique significance, because it more or less alters the traditional concept that generally applies the laws of the seat of arbitration to govern the conduct of the arbitration where the parties have failed to choose their preferred procedural law, but leaves that for the Tribunal to decide. Thus, an ICSID arbitration can have no connection with the municipal laws of the states, or the law of the seat of arbitration.⁸³

Furthermore, Rule 1(1) of Rules of Procedure for Arbitration Proceedings (Arbitration Rules) states: “Upon notification of the registration of the request for arbitration, the parties shall, with all possible dispatch, proceed to constitute a Tribunal, with due regard to Section 2 of Chapter IV of the Convention.”⁸⁴ This means that any procedure adopted by the parties in constituting the tribunal, should be in accordance with the Convention. In other words, the Arbitration Rules apply only to the extent that the parties do not agree otherwise. If both the parties and the Rules are silent with respect to any procedural matter, the arbitral tribunal has residual power to decide it. As a result the self-contained⁸⁵ and exclusive nature of ICSID arbitration, the Arbitration Rules differ significantly

⁸² Hirsch, M. *The Arbitration Mechanism of the International Center for the Settlement of Investment Disputes*, 1993, p112

⁸³ Ibid at p115-116

⁸⁴ Section 2 of Chapter IV of the Convention includes Article 37-40, which regulates about “Constitution of the Tribunal”.

⁸⁵ Broches, A “Observations on the Finality of ICSID Awards”, (1991), *ICSID Review Foreign Investment Law Journal*, Volume 2, p322

from other international rules: They are not subject to the provisions of the domestic law of any state.⁸⁶ They also provide for permissible avenues to challenge award, usually defined only in domestic legislation. This is necessary because under the Convention, the courts of a contracting state can not overturn, annul, or refuse enforcement of an ICSID award, even on the ground that the award violates public policy. However, someone has advocated that in as much as the Convention provides that the arbitral tribunals must think over the public policy of the international community, it would mean that the fact that the freedom of parties is seriously curtailed once they choose to apply the rules of the convention, would appear to run contrary to the public policy of the international community.⁸⁷

By adhering to the Convention, contracting states undertake to recognize and enforce an ICSID award as if it were a final judgment of its own courts.⁸⁸ The Arbitration Rules, therefore, cover the time period between the notice of registration of a request for arbitration through to the rendering of an award and exhaustion of all available means of recourse. The initiation of ICSID proceedings is governed by the Institutions Rules.⁸⁹ This provision does not require the Arbitration Rules to follow the regulations of the law of the seat of arbitration or *lex arbitri*. It makes an interesting breakthrough in the search for more meaningful legislation for the furtherance of the purpose of international

⁸⁶ Article 1(2) of the UNCITRAL Arbitration Rules , Article 15(1) of ICC Rules of Arbitration.

⁸⁷ Fn 82, at p113-114

⁸⁸ Article 54 (1) of ICSID Convention

⁸⁹ Introduction of The Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the Institution Rules) provides that “The Institution Rules are restricted in scope to the period of time from the filing of a request to the dispatch of the notice of registration. All transactions subsequent to that time are to be regulated in accordance with the Conciliation and the Arbitration Rules.”, (<http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partD-rule.htm#r01>), access on 26 June 2009

commercial arbitration. In particular, the ICSID award emanating from this Convention is independent of the laws of the *situs* of proceedings. It could also mean that the ICSID award is the “delocalisation award” because it exists and applies oblivious of the *lex loci arbitri*.⁹⁰

The ICSID Convention of 1965 also established for itself an autonomous “self-contained” regime for recognition and enforcement of the “ICSID” award.⁹¹ Comparing the ICSID “self-contained” set-up with New York Convention 1958, we find that the procedure under the ICSID is a lot simpler and more convenient, the conditions also more liberal. We can say, it fully represents the combined intelligence of the legal experts and scholars drawn from some eighty states at that time.⁹² This institution provides the parties with a neutral and independent arbitration and devoid of any link with any local rules of arbitration. In addition, each contracting state “shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligation imposed by that award within its territories as if it were a final judgment of a court in that state.”⁹³ The municipal procedural law need not be applied to the recognition and enforcement of the award, thereby establishing a “self-contained” jurisdictional system.⁹⁴ There are now 155 countries which have ratified the convention.⁹⁵ It is indeed worthy of some of our attention here, because the ICSID

⁹⁰ Fn 3, at p371-404

⁹¹ Fn 86, at p322

⁹² Broches, Aron, *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law*, 1995, p232

⁹³ Article 54 of ICSID Convention.

⁹⁴ Fn 10, at p1-36, (<http://www.kluwerarbitration.com.ezproxy.stir.ac.uk/arbitration/DocumentFrameSet.aspx?ipn=26312>), access on 26 June 2009

⁹⁵ International Centre for Settlement of Investment Disputes (ICSID) Official Website, (http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=MemberStates_Home), access on 26 June 2009

arbitration has proven to be the most successful example of “delocalisation” theory, and because it was specifically created to be a-national. Specifically three articles from this Convention govern the issues of award and enforcement. Article 53 for example provides:

“(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

(2) For the purposes of this Section, “award” shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.”

This reflects that the award is binding on the parties; each party shall abide by and comply with the terms of the award. This provision appears to focus completely on the parties. It clarifies the position of the parties in relation to arbitral award and their obligations following the rendering of the award. The binding force of the “ICSID” arbitration means that the award shall be binding on the parties and guaranteed of strict enforcement. Article 54 of the Convention provides:

“(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that state. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat

the award as if it were a final judgment of the courts of a constituent state.

(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority, which State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

(3) Enforcement of the award shall be governed by the laws concerning the enforcement of judgment in force in the State in whose territories such enforcement is sought.”

Section (1) of this article indicates that the “ICSID” award should have an equivalent effect as that of a final award rendered by the court of the contracting state. This appears to be the most important and far reaching provision in this Convention.⁹⁶ It provides that each contracting state is obliged or duty bound to recognize and enforce such award, including the obligation to “recognize an award rendered pursuant to this Convention as binding “and” enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that state.” The implication of the phrase “as if it were a final judgment of a court in that state” in this article is that each contracting state should regard the award as the final judgment just as it would recognize and enforce a similar judgment of its highest domestic court. It does be believed here however, that by this it intended that the Convention has or should become part of the national law. It only goes to

⁹⁶ Fn 68, at p118

show the level of respect to be accorded an award under the Convention by contracting states.

Subsection (2) of Article 54 provides that there is no need to review the original certificate of the award but a copy of the award certified by the Secretary-General ought to suffice.⁹⁷ Article 54(3) equally provides that “enforcement of the award shall be governed by the laws concerning the enforcement of judgment in force in the State in whose territories such enforcement is sought.” It expresses that ICSID has not sought to create a unified procedure among contracting state for the enforcement of its awards. It allows them the freedom to rely on procedure stipulated in their laws. This is all well and good as each state is likely to have its peculiar and distinctive juridical system, making any unified system of enforcement by ICSID practically impossible to achieve. This Convention not only respects the law of the executing country, but also considers the position of ICSID. When enforcing states carry out the enforcement of the award, they may be faced with the problems of sovereign immunity and immunity from enforcement involving states that have not voluntarily waived their immunity.⁹⁸ However, this article shall not be construed as derogating from the law in force in any contracting state relating to immunity of that state or of any foreign state from enforcement.⁹⁹

Article 55 of the Convention provides: “Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign

⁹⁷ Fn 86, at p326

⁹⁸ Ibid at p329

⁹⁹ Article 55 of ICSID Convention.

State from enforcement.” The purpose of this provision is to clarify the position of the applicability of Article 54, i.e. not be construed as derogating from the law in force in any contracting state relating to immunity of that state from enforcement, as well as provide that a foreign property shall be immune from enforcement by the other states. This provision simply shows the Conventions respect for the principles of international law, but does not exempt the state from the obligations imposed under Articles 53 and 54. The drafters had included the immunity from enforcement clause so that if one of the parties is a state, they have the belief that this party would have the international integrity to enforce the award in good faith, because being a contracting or signatory state translates to a promise to fulfill its obligation under the Convention. The state would therefore have no reason to break its obligations freely given under the Convention.¹⁰⁰ However, in order to provide for a situation where some states don’t carry out the Convention, the Article 27 of the Convention provides:

“(1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute. (2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.”

¹⁰⁰ Baldwin, Edward, Kantor, Mark, and Nolan, Michael, “Limits to Enforcement of ICSID Awards”, (2006), *Journal of International Arbitration*, Volume 23, No. 1, p5

Article 64 of the Convention also provides that “Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the State concerned agrees to another method of settlement.”

Besides the aforesaid, the ICC awards also adopt the delocalisation theory. Article 15(1) of ICC Rules 1998, for example provides: “The proceedings before the Arbitral Tribunal shall be governed by these rules, and, where these rules are silent, by any rules which the parties or, failing them, the Arbitral Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.”

Under this article, the proceedings shall be governed by the ICC Rules, and if these rules are silent, the parties are free to choose the rules to govern the conduct the arbitral proceedings, failing which, this article grants arbitrators the powers to choose the procedure to conduct the arbitral proceedings. In this situation, there is no need to consider the mandatory rules and public policy of the *lex fori*. For this reason as well, the ICC Rules of Arbitration has indeed lent some support to the development of the “delocalisation” theory.¹⁰¹

Similarly, the Swiss Private International Law Act 1989 also allows the parties to choose the

¹⁰¹ Yu, Hong-Lin, “The Delocalization Theory-An Arbitration Paradise”, *Commercial Arbitration*, Volume 51, 1998, p63-64

arbitral procedure, and in absence of that choice, the arbitral tribunal may reserve the power¹⁰² to treat the parties equally and the rights of the parties to be heard in procedure.¹⁰³ Even before the enactment of this Act, Swiss courts usually respected the will of the parties to determine the arbitral procedure. This Act allows the parties to choose laws to govern their arbitration. Even where the parties fail to agree on the arbitral procedure, the law of the seat of arbitration will still not apply, but the arbitral tribunal is empowered to apply the procedural rules. This Act attempts to stay away from the procedural law of states and therefore represents a significant breakthrough in international arbitration.

However the concept of delocalisation has not been universally accepted. For instance, Article 19(1) of the Model Law states: “Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.” This article guarantees the freedom of the parties to determine the rule in arbitration proceedings.¹⁰⁴ However, the freedom of parties to agree on the arbitral procedure is restricted by the Article 1(2) of the Model Law, which provides that “The provisions of this Law, except article 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.” It would appear from the above that the principles of the “delocalisation theory” have not been completely adopted by the Model Law.

¹⁰² Article 182(1)(2) of the Federal Statute of Private International Law

¹⁰³ Article 182(3) of the Federal Statute of Private International Law

¹⁰⁴ Holtzmann, Howard M. and Neuhaus, Joseph E., *A Guide To The UNCITRAL Model Law On International Commercial Arbitration: Legislative History and Commentary*, 2nd edn (Deventer, The Netherlands, Kluwer Law and Taxation Publishers, 1994), p582

Similarly in England, the freedom of parties to agree on arbitral proceedings has been limited.

Section 4(3) of Arbitration Act, of 1996 states: “The parties may make such arrangement by agreeing to the application of institutional rules or providing any other means by which a matter may be decided.” However, Section 2(1) provides that “the provision of this Part shall apply where the seat of the arbitration is in England and Wales or Northern Ireland.” And Section 2(2) states: “The following sections apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined...” Furthermore, Section 4(1) states that “the mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary.” Schedule 1 provides for “stay of legal proceedings,” “power of court to extend agreed time limits,” “application of Limitation Acts,” “power of court to remove arbitrator,” “enforcement of award” and so on.

In practice, if the parties agree the seat of arbitration proceeding shall be London, it would necessarily imply that English law would govern proceedings. For example, in *Union of India and McDonnell Douglas*,¹⁰⁵ the plaintiff Union of India and defendant McDonnell Douglas entered into an agreement, in which the defendant had agreed to supply the plaintiff with some equipment in relation to the launch of a space satellite by the plaintiff. Under Article 11 of the agreement, it was to be governed and interpreted by the laws of India. Furthermore, Article 8 of the agreement also provided as follows: “In the event of a dispute or difference arising out of or in connection with this

¹⁰⁵ *Union of India v. McDonnell Douglas* (1993) 2 Lloyd’s Rep. 48

Agreement...The arbitration shall be conducted in accordance with the procedure provided in Indian Arbitration Act of 1940 or an reenactment or modification thereof. The arbitration shall be conducted in the English language....The seat of the arbitration proceedings shall be London, United Kingdom.”

The parties' eventually submitted their dispute to arbitration under Article 8 of the agreement. The claimants contended that according to the words: “The arbitration shall be conducted in accordance with the procedure provided in Indian Arbitration Act of 1940,” that Indian law should govern the proceedings. But, the defendant argued that stipulating London as the “seat” of any arbitration proceedings under Article 8, the parties have made clear not merely that any arbitration will take place in London, but that the English law will govern the arbitration proceedings. The court held that the parties under the agreement had not agreed on the procedures to be adopted in the arbitration, and as such it would be governed by a law other than that of the place of arbitration, subject to the provision that the jurisdiction of the English Court under the Arbitration Act over an arbitration in England could not be excluded from applying the laws of another state.

5.9 Mandatory Rules, Public Policy and Delocalisation Arbitration

According to proponents of delocalisation, the development of international commercial arbitration may be hindered due to restrictions imposed on arbitration procedures by different national courts; not only are arbitrators forced to be conscious of more than one national law, they are also saddled

with the necessity to handle various and possibly conflicting rules imposed by different laws.¹⁰⁶ In other words, whilst party autonomy is still observed within the sphere of national or international interest, its full expression is however restricted by considerations of mandatory rules and public policy of the third country.¹⁰⁷ For example, the Rome Convention on the Law Applicable to Contractual Relations of October 9, 1980, which provides that “When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract....”¹⁰⁸

On the other hand, when the parties enter into an arbitration agreement of relatively equal bargaining power, the operation of mandatory rules may be limited in practice. A narrow interpretation of such statutory rules would improve the possibility of enforcement and avoid destroying the international arbitral process.¹⁰⁹ Furthermore, modern arbitration practice is more inclined towards the exclusion of overriding mandatory rules that tend to curtail the parties’ exercise of their autonomy in the arbitral process.¹¹⁰

Where the *lex arbitri* of the seat of the arbitration permits an application to set aside the award

¹⁰⁶ Park, William W, “National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration”, (1989), Tul. L.R., Volume 63, p647, 667

¹⁰⁷ Dimitrios, Athanasakis, “Law applicable to merits of the arbitration dispute (an overview of the English, Swiss and French arbitration laws)”, (2008), MPRA Paper No. 10334, p14, (http://mpr.ub.uni-muenchen.de/10334/1/MPRA_paper_10334.pdf), access on 11 July 2009

¹⁰⁸ Article 7(1) of the Rome Convention, (http://www.tldb.net/create_pdf.php?docid=501000), access on 1 September 2009

¹⁰⁹ Garnett, *A Practical Guide to International Commercial Arbitration*, (USA Oceana Publications: 2000), p24

¹¹⁰ ICC 1512/ 1971, C. of ICC Aw. 1974-1985, at pages 3-5

nevertheless allows the parties exercise some autonomy in the organization of the arbitral procedure, such as the freedom not only adopt a private set of arbitration rules, but perhaps also to choose a national law of procedure to govern the arbitral proceedings; delocalisation is not guaranteed because the mandatory provisions of the *lex arbitri* of the seat continue to determine the basic requirements relating to the regularity of the award, and to define the jurisdiction of the courts to control over procedure to be adopted in challenge proceedings. The parties simply enjoy their autonomy to the extent permitted by the law of the seat. It makes no difference whether they choose a private set of arbitration rules or a foreign law of procedure, for in both cases their autonomy is restricted by the mandatory provisions of *lex arbitri* of the seat.¹¹¹

The best way to eliminate these potential obstacles, however, is to liberate arbitration proceedings from the constraints constituted by national courts. Some scholars argue that arbitration proceedings should be delocalised and completely set free from the mandatory rules and public policy of the place of arbitration.¹¹² This theory advocates that arbitrators should not have to deal with inconveniences of having to examine various national mandatory rules and public policies imposed by the *lex fori* or to attempt to settle the law of the place where the contract was made, the law of the place of performance, or the law of the place of enforcement, and so on. Accordingly, arbitrators are

¹¹¹ Poudret, *et al*, *Comparative law of international arbitration*, 2007, p94, (http://books.google.com.tw/books?id=wPRaZaEV3kEC&pg=PA94&lpg=PA94&dq=delocalisation,+mandatory+rules&source=bl&ots=8d0LKyE4Nc&sig=trtumjBY3wuclxG9Z8QbHDhfy0&hl=zh-TW&ei=wihXSuz_BpTgNfCLOJ0l&sa=X&oi=book_result&ct=result&resnum=4), access on 10 July 2009

¹¹² Paulsson J., "Delocalisation of International Commercial Arbitration: When and Why It Matters," (1983), *The International and Comparative Law Quarterly*, Volume 32, p58-61; Avanesian, Aida B., "The New York Convention and Denationalised Arbitral Awards (With Emphasis on the Iran-United States Claims Tribunal)", (1991), *Journal of International Arbitration*, Volume 8, p28-29

not only permitted to neglect the *lex fori*, but may also apply any procedural law they consider suitable.¹¹³

However, the roles and powers of the courts are debatable in the area of delocalised arbitration. In practice, however, the courts still possess certain jurisdictional powers over parties on the basis of the location, notwithstanding that the dispute cannot be submitted to the national court as the parties have agreed to resolve their disputes by arbitration. The role of the court in such circumstances will always be restricted by statutory provisions related to arbitrations of an international nature.¹¹⁴ For example, in *Minmetals v. Ferco Steel* case,¹¹⁵ the court refused an application to set aside the award that the applicant had claimed was contrary to English public policy. The dispute, in this case, arose out of a contract which contained a clause to arbitrate in China. Two arbitration awards were made by the China International Economic and Trade Arbitration Commission (CIETAC). Ferco applied to set aside the award to enforce the awards granted to Minmetals under Section 101 of the English Arbitration Act 1996. The court had to decide whether Ferco had any opportunity to present its case; whether the procedure for arriving at the awards had been according to the parties' agreement, thus under the CIETAC rules, and whether Ferco had shown that the means of arriving at the awards violated the notion of substantial justice, thereby rendering it contrary to English public policy to enforce it. The court dismissed the application following Article V of the New York Convention,

¹¹³ Fn 6, at p463-464

¹¹⁴ Fn 46, at p 67, (<http://facta.junis.ni.ac.yu/lap/lap2005/lap2005-07.pdf>), access on 5 March 2009

¹¹⁵ *Minmetals v. Ferco Steel* 1 ALL ER (Comm) 315

which applied to the awards, i.e. that an enforcer had a reasonable opportunity to present its case in regards the findings of fact arising from the investigations undertaken by the arbitrators. A court considering whether to set aside leave to enforce a foreign award would have to look into the claim of injustice in the arbitral procedure, to determine whether the enforcer had called upon the courts of the country concerned to exercise their supervisory jurisdiction, and whether it had failed or neglected to make use of any remedy available under that jurisdiction, and if such failure had been reasonable. In the present case, Ferco had clearly failed to present its case. The arbitrators had not conducted the proceedings properly in accordance with Article 53 of the CIETAC rules on fairness and reasonableness in rendering the first award. However, the Beijing court held a resumed hearing and Ferco had not challenged the evidence relied upon by the arbitrators at the first hearing. The only logical conclusion is that Ferco had thereby waived its right to challenge the award. In this case, no substantial injustice would result from enforcement of the awards. This case epitomizes the importance of party autonomy and establishes some of the limitations suffered by the arbitration law and court of the place of arbitration.¹¹⁶

5.10 New Cases on the “Delocalisation” Theory

As mentioned before, some national laws, international conventions and jurisdictional authorities have adopted the “delocalisation” theory. However the concept still stirs controversy. Although there are advantages to the concept, there are still certain disadvantages to be considered as well.

¹¹⁶ Fn 46, at p67, (<http://facta.junis.ni.ac.yu/lap/lap2005/lap2005-07.pdf>), access on 5 March 2009

Generally where parties enter into an arbitration agreement, they usually do not stipulate the place of arbitration and probably neither do they consider the standpoints of the place of arbitration nor the recognition and enforcement of the award. The parties may not think of the consequences that applying the law of the chosen place of arbitration may attract, and may not even care for/about the legal implication of choosing the place of arbitration.¹¹⁷

Some scholars advocate that it is necessary to provide for the procedure to govern the conduct of arbitral procedure. This sort of control should not be left to the law of the country where arbitration was made, but the state where recognition and enforcement is sought. For instance, the New York Convention provides that recognition and enforcement of an arbitral award may be refused if the award would be contrary to the public policy of the country where recognition and enforcement is sought.¹¹⁸ This provision illustrates that the state where recognition and enforcement is sought indeed possesses great power over governing the award, as per whether or not to enforce.

This situation was illustrated in the well-known case of *Chromalloy*.¹¹⁹ The Air Force of the Arab Republic of Egypt (hereinafter called “Egyptian Air Force”) and a U.S. corporation Chromalloy Aeroservices (hereinafter called “CAS”), entered into a contract which contained an arbitration clause, providing in relevant part: “It is...understood that both parties have irrevocably agreed to

¹¹⁷ Lionnet, K., “Should the Procedural Law Applicable to International Arbitration be Denationalised or Unified”, (1991), *J/I.A.*, Volume 8, No. 3, p11

¹¹⁸ Article V(2)(b) of the New York Convention

¹¹⁹ *Chromalloy Aero Service Inc. v. Ministry of Defence of the Republic of Egypt*, 936 F.Supp. 907, 1996.

apply Egypt (sic) Laws and to choose Cairo as seat of the court of arbitration. . . . The decision of the said court shall be final and binding and cannot be made subject to any appeal or other recourse.”

According to the contract, CAS had an obligation to provide the Egyptian Air Force with parts for maintenance, and repair for helicopters. A dispute arose between CAS and Egyptian Air Force, and the parties subsequently submitted it to arbitration. The arbitral tribunal in Cairo made an award in favor of the CAS. However, Egyptian Air Force appealed to the Egyptian Court of Appeal to set aside the award. Finally, the Egyptian Court of Appeal made a decision to set aside the award. Nevertheless, CAS further sought enforcement of the award in U.S. via the District Court for the District of Columbia. The Court discussed the issue whether, according to Article V(1)(e) of the New York Convention, “recognition and enforcement of the award may be refused” if Egypt furnished the Court “proof that. . . the award has been set aside. . . by a competent authority of the country in which, or under the law of which, that award was made.” In the present case, the seat of arbitration was Egypt, subject to the laws of Egypt in conduct of the proceedings, and the Egyptian Court of Appeal had set aside the award. Thus, the Court may, at its discretion, refuse to enforce the award. However, the court was of the opinion that Article V provides for a discretionary standard, as well as that Article VII of the Convention, which provides that,

“the provisions of the present Convention shall that not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into

by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.”

In other words, under the Convention, CAS maintains all rights to the enforcement of this arbitral award that it would have had in the absence of the Convention. Section 9 of the U.S. Uniform Arbitration Act §201 provides that Article VII does not eliminate all consideration of Article V; it merely requires that this Court protect any rights that CAS has under the domestic laws of the United States. There is no conflict between CAS’ use of Article VII to invoke the FAA and the language of the Convention. Here the United States Federal Court for the District of Columbia enforced an award which was made in Egypt, despite the fact that it had been set aside in that country.

While the award made in this case had been set aside by Egyptian court, CAS had also appealed to the French court for enforcement. On May 4, 1995, French court decided to enforce that award. However, Egyptian Air Force appealed to the Paris Appeal Court and argued that Article 33 of “the Treaty of Judicial Mutual Assistance” entered between France and Egypt in 1982, which placed an obligation on France to accept the decision of Egyptian court setting aside the award and the court ought to refuse to enforce it. But French court pointed out that relying on the Article 1502 of the French Code of Civil Procedure, the refusal of recognition and enforcement of foreign arbitral award is exclusively governed by Article V (1) (e) of the New York Convention which provides in part:

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

Thus, the French court held that although Egyptian law governed the arbitral award, the award did not have any connection with the Egyptian legal system, because it was an international award. According to the aforementioned French law, the recognition and enforcement of the award was not contrary to the international public policy, even if it had been set aside by the court of the seat of arbitration. The U.S. and French courts insisted that enforcement of the award should not necessarily be refused in a case where the award had been set aside in the country of origin. However, this remains a controversial issue.

The prime advocate of upholding the “delocalisation” theory is Jan Paulsson. He has submitted that it is not necessary to consider the fact that the award has been set aside in the country of origin. He has praised the U.S. court for daring to have applied Article VII of the New York Convention to enforce the award, and at the same time declining to consider the stipulation of Article V of the Convention, which had been advanced in support of the argument that the award had been set aside by the Egyptian court.¹²⁰ Sampliner has also supported the position taken by the United States court in applying Article VII of the New York Convention, stating that national law and the municipal public policy were in support of the enforcement of a foreign arbitral award. The decision of the

¹²⁰ Paulsson, J., “Rediscovering the N.Y. Convention: Further Reflections on Chromalloy.”, (1997), Mealey’s Int’l Arb. Rep, Volume 12, p20, 30

court had conformed to the purpose of the New York Convention¹²¹

On the other hand, Freyer has opposed this view. She criticizes the decision and sees it as a judgment fraught with errors, because Article V(1)(e) of the New York Convention and Article 36(1)(a) of the UNCITRAL Model Law have provided that once “the award has been set aside...by a competent authority of the country in which, or under the law of which, that award was made,” then “recognition and enforcement of the award may be refused.” Therefore, she deemed that the recognition and enforcement of the award should have been refused by the U.S court and at worst declined jurisdiction over this case.¹²²

In practice, however, in the exercise of determining whether or not to set aside a foreign arbitral award, it would be impossible to guarantee that there had been no errors leading up to the setting aside the award or whatever conclusion the court reaches. For example, where the award was probably procured by corruption, fraud, or undue means, where the adversarial principle has not been respected, or where the recognition or enforcement shall be contrary to public international order, etc.¹²³ Moreover, the obligatory force of an award in one country may be refused by the other country. Conversely, the enforcing states also have the right to grant the obligatory force to an arbitral award. All that notwithstanding, the present writer worries if the enforcing state has not been granted

¹²¹ Sampliner, Gary H., “Enforcement of Nullified Foreign Arbitral Awards Chromalloy Revisited”, (1997), *Journal of International Arbitration*, Volume 14, No.3, p142

¹²² Freyer, Dana, “United States Recognition and Enforcement of Annulled Foreign Arbitral Awards - The Aftermath of the Chromalloy Case” (2000), *J.I.A*, Volume 17, No.2, p1-9

¹²³ .Section 10 (1) of the United States Federal Act, Article 1502 (5) of the French Code of Civil Procedure

too excessive a power to be able to disregard the fact that an award has been set aside by foreign country, and give fresh life to the award to enjoy validity and enforceability in some other country. It not only beats the imagination of the parties, but also eludes any reasonable line of thought held by the scholars.

5.11 Conclusion

The opponents to the delocalisation theory believe that any worthwhile principle of law should not exist in a legal vacuum; it is practically very difficult for arbitral process to detach from the legal system of the country where the proceedings take place. Any arbitral proceeding arising from private contractual stipulation is bound to have a national character.¹²⁴ Arbitral tribunals may be empowered by the rules governing the proceedings to, for instance, make interim measures. Powers may also be implied, or taken away, considering the implication of powers excluded by the *lex arbitri*.¹²⁵

Furthermore, the award by the arbitrator, the legal effect of the arbitration agreement, the power of the arbitrator and enforcement of the award all depend on enforcement mechanisms provided in the laws of the state.¹²⁶ An arbitration will be meaningless and invalid unless the domestic law recognizes that the parties' have the right to submit to arbitration, to authorize the hearing by the arbitrator, and

¹²⁴ Fn 7, at p159-161

¹²⁵ Section 38,39 of the English Arbitration Act 1996; Article 26 of the UNCITRAL Arbitration Rules; Article 47 of ICSID Convention; Article 23 of ICC Rules; Article 17 of the Model Law; Collins, L. "Provisional and Protective Measures in International Litigation", (1992), 111 Hague Recueil 9 (and in Essays in International Litigation and the Conflict of Laws.

¹²⁶ Fn 9, at p52

to enforce the award. The power and effect of arbitration is a concession from the country executing the arbitration.¹²⁷ If any of the parties refuses to enforce the award, then the other party would need to rely on the court to obtain enforcement.¹²⁸ The award is actually worthless if it is not enforceable.¹²⁹

In practice and in view of the above discussion, we find that it is not easy for arbitration proceedings to run independently of the national legal system. Apparently, majority of arbitration proceedings are governed by the laws of the seat of arbitration and this likely remains the case,¹³⁰ unless and until the aforementioned problems can be resolved by international treaties like the ICSID Convention on ICSID arbitration.¹³¹

Undoubtedly, some cases, as well as certain rules or international conventions have adopted the “delocalisation” theory. It only goes to show that this theory has certainly captured the attention of practitioners, scholars and other stakeholders in international commercial arbitration, and deserves careful study and a chance to develop. It also needs to contend with the reality that only a limited number of disputes so far submitted to arbitration had adopted the “delocalisation” theory for

¹²⁷ Fn 14, at p11-12

¹²⁸ Fn 10, at p1-31, (<http://www.kluwerarbitration.com.ezproxy.stir.ac.uk/arbitration/DocumentFrameSet.aspx?ipn=26304>), access on 26 June 2009; Article 18 of the Model Law provides that “The parties shall be treated with equally and each party shall be given a full opportunity of presenting his case”; Article V(1)(b) of the New York Convention provides that “Recognition and enforcement may be refused---if the party---proof that (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceeding or was otherwise unable to present his case.”

¹²⁹ Ibid at p1-53, (<http://www.kluwerarbitration.com.ezproxy.stir.ac.uk/arbitration/DocumentFrameSet.aspx?ipn=26303>), access on 2 June 2009;

¹³⁰ Fn 10, at p1-37, (<http://www.kluwerarbitration.com.ezproxy.stir.ac.uk/arbitration/DocumentFrameSet.aspx?ipn=26306>), access on 23 June 2009

¹³¹ Fn 101, at p2

settlement and most of them had a state as one of the parties.¹³²

The difficulty with “delocalisation” theory is that it restricts the national law of the place of arbitration chosen by the parties, which limits the courts of the place of arbitration to supervise the arbitral proceeding.¹³³ It restricts the assistance and supervision of national courts, with the result that this affects the effectiveness of the arbitration proceedings, since arbitrators lack “sovereign powers equivalent to those of the State with which, they can neither enforce their awards; nor do they have adequate powers to ensure the proper conduct of the arbitration proceedings.”¹³⁴ Under the UNCITRAL Model Law, we find that national courts still play a very important role in the conduct of arbitration.¹³⁵ In the light of this, without the assistance of court, it would be difficult for arbitral proceeding to proceed smoothly. This represents a severe shortcoming of this theory.

Furthermore, the only legitimate limitation to delocalisation may be the mandatory rules and public policy concerns, because under Article V(1)(e) of the New York Convention, if the award “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,” the recognition and enforcement of the award may be refused. The

¹³² In *Arabian American Oil Company v. the Kingdom of Saudi Arabia*. (1963) 27.I.L.R. p.117. And *Arabia American Oil Company v. the Kingdom of Saudi Arabia* (1963) 27.I.L.R. p117. *TEXACO v. The Government of the Libyan Arab Republic* (1978) 17. I.L.M, p3. Both the Kingdom of Saudi Arabia and The Government of the Libyan Arab Republic are all state parties.

¹³³ Fn 14, at p91

¹³⁴ Ziegel, Jacob S. and Lerne, Shalom, *New Developments in International Commercial and Consumer Law*, 1998, p296

¹³⁵ These functions relate to the procedure for appointment of arbitrators (Article 11), raising the question of and procedure for challenging an arbitrator (Article 13), the grounds for terminating the mandate of an arbitrator and the methods of doing so, the competence of arbitral tribunal to rule on its jurisdiction (Article 16), and application for setting aside as exclusive recourse against arbitral award (Article 34).

legislative purpose of Article V(1)(e) is to encourage the contracting states to look further afield when recognizing and enforcing the foreign arbitral award.¹³⁶ Dr. van den Berg advocates this, alleging this provision to be “the more- favourable-right-provision.”

Apparently, “a competent authority of the country” and “the state in which the award was made” possesses the requisite jurisdiction to set aside the award if it violates the mandatory rules of the place of arbitration. Hence, it is believed that the parties to arbitral proceedings cannot disregard the effect of mandatory rules of those states on the validity of the award. On the other hand, Article V(2)(b) provides that if “the recognition or enforcement of the award would be contrary to the public policy of that country,” the recognition and enforcement of the award may be refused by the enforcing state. It can choose either to consider or disregard the public policy of the state in which the award was made, as regards the legal efficacy of the award. In this case, a domestic court faced with an application to recognize and enforce a foreign award must first examine if the arbitral procedure adopted and resultant award violates the fundamental policy of the place of court.¹³⁷ Therefore, just as we had concluded in Chapter 4, the mandatory rules and public policy of the place of arbitration are very important for the recognition and enforcement of the arbitral award.

Having discovered the obvious and fundamental flaws in the “delocalisation,” it is rife to consider and develop a more workable theory or properly amend this one. The present writer regards

¹³⁶ Atterbury, S.W., “Enforcement of A-National Arbitral Awards Under the New York Convention of 1958”, (1992), *Virginia Journal of International Law*, Volume 32, p487-489

¹³⁷ Article V(2)(b) of the New York Convention

the place of arbitration and the arbitral procedure as the most objective and decisive connecting factors between the awards and their successful recognition and enforcement. On the other hand, if the *lex loci arbitri* is applied, it will indeed obstruct the parties' right to freely choose their preferred procedural law and greatly curtail their enthusiasm to submit the disputes to arbitration. Where the number of international commercial disputes submitted to arbitration declines, certainly the development of international commercial arbitration will suffer a set back. Consequently, the most appropriate solution around this eventuality would be concerted support for the principle of party autonomy with the hope that this would arouse the will of the parties to select arbitration for the resolution of their disputes, thus encouraging the popularity of international commercial arbitration, and enhancing its potential for growth

Chapter 6

Harmonisation of Arbitration

6.1 Introduction

International commercial arbitration may touch upon the applicability of procedural laws of different states. Disputes with similar issues submitted to arbitration at different places may result in different outcomes due to the different provisions contained in different procedural laws of the places of arbitration. This reflects the importance of the place where the arbitration takes place and its laws in the whole arbitral process and outcomes.¹ As mentioned in Chapter 5, in recent years, international commercial arbitration has considered the idea of delocalised arbitration, i.e. being able to detach international arbitration from the control and influences of domestic law of the seat of arbitration, thus creating what is known as a “floating award.” The “delocalisation” theory of arbitration in essence challenges the traditional “seat” theory. This school of thought has sought to establish a practice which leaves arbitration subject only to the control of the law of the country where the recognition and enforcement of arbitral award is sought.² In this way, the arbitral award will be valid both in the law of the situs and the enforcing states.³ However, the reality of international arbitration shows that national courts and laws still play the roles of support and

¹ Redfern, A. and Hunter M, *Law and Practice of International Commercial Arbitration*, 4th edn (London: Sweet & Maxwell Ltd., 2004), p91

² Yu, Hong-Lin, “Is the territorial link between arbitration and the country of origin established by Articles I and V(1)(e) being distorted by the application of Article VII of the New York Convention”, (2002), *International Arbitration Law Review*, p198

³ Lew, Julian D.M., *Applicable Law in International Commercial Arbitration :A Study in Commercial Arbitration Awards*, 1978, p590

supervision over arbitral proceedings.⁴ Furthermore, we submit that the delocalisation theory can not achieve the harmonising of the myriad of arbitration laws that ultimately shape the status of international arbitration awards.

In answer to harmonising these laws, the United Nations General Assembly unanimously endorsed the UNCITRAL Model Law (hereinafter called “the Model Law”) on December 11, 1985. Apart from helping to achieve the harmonisation of the arbitration concepts of different legal systems, it is hoped that the Model Law would also influence judiciary control as far as it relates to arbitration procedures, and would be welcomed by the different legal, economic and political regimes of the world.⁵ The Model Law is also hoped to further the development and harmonisation⁶ of the international economy through the establishment of a set of fair and efficient legal structures respected by each state, and to fulfill the purpose of the harmonisation and integration of arbitration laws.⁷

Unfortunately, the Model Law does not have a mandatory effect on countries around the world.

⁴ Goode, Roy, “The Role of the *Lex Loci Arbitri* in International Commercial Arbitration”, (2001), *Arbitration International*, Volume 17, No.1, p24

⁵ Fn 1, at p69

⁶ Holtzmann, Howard M. and Neuhaus, Joseph E., *A Guide To The UNCITRAL Model Law On International Commercial Arbitration: Legislative History and Commentary*, 2nd edn (Deventer, The Netherlands, Kluwer Law and Taxation Publishers, 1994), p4; Montineri, Corinne, “Legal Harmonisation Through Model Laws: The Example of the UNCITRAL Model Law on International Commercial Arbitration”, in *Celebrating Success: 20 Years UNCITRAL Model Law on International Commercial Arbitration*, 2005, p8; Yeo, Alvin, “Harmonisation, Party Autonomy and Mandatory Provisions Under the UNCITRAL Model Law”, in *Celebrating Success: 20 Years UNCITRAL Model Law on International Commercial Arbitration*, 2005, p50; Umar, M Musseyn, “Interim Measures in International Arbitration (With Reference to Indonesia)”, in *Celebrating Success: 20 Years UNCITRAL Model Law on International Commercial Arbitration*, 2005, p115

⁷ Holtzmann, Howard M. and Neuhaus, Joseph E., Fn 6, at “Foreward”

States have the freedom to decide whether or not to refer and/or to adopt the Model Law. A number of countries have already adopted or at least referred to the Model Law in their arbitration laws, but there are still many that have not made any such adoption or reference in their arbitration laws. However as detail of the efficacy of the Model Law towards achieving harmonisation of arbitration laws will be discussed in this chapter, this writer shall also attempt to ascertain the extent to which the goal of harmonisation of arbitration law is attainable, especially given the issues arising from the operation of the Model Law. This writer shall also examine some of the solutions to achieve harmonisation that have been proffered by certain renowned scholars, as well as those that have been advanced by this writer himself.

6.2 Definition of Harmonisation

Literally “harmonization”⁸ is the adjustment of the discrepancies and unlikeness of different measurements, methods, procedures, specifications schedules, or systems to make them uniform or mutually compatible.⁹ Another source defines “harmonization” as the process and/or results of adjusting differences or inconsistencies to bring significant features into agreement.¹⁰

Yet, another source has defined the concept of harmonisation in terms of the process by which member states of the EU make changes in their national laws, in accordance with Community legislation, to produce uniformity, particularly relating to commercial matters of common interest.

⁸ The words harmonisation is the English variation of the word harmonization

⁹ <http://www.businessdictionary.com/definition/harmonization.html>, access on 30 June 2009

¹⁰ <http://www.answers.com/harmonization>, access on 30 June 2009

The Council of Ministers has, for example, issued directives on the harmonisation of company law and of units of measurement.¹¹

Various arbitration scholars have also provided definitions of harmonisation. One scholar believes that harmonisation describes the process where standards of different countries are combined into one practical standard. Any extremes of the common points of these standards will gradually be eliminated until each country has the same standard as all the other countries in mutual consent.¹²

Again harmonisation has been described as the compatibility of both regulatory requirements and consistency of reviews. This implies that to achieve harmonisation, all countries would need the same policies, priorities, or strategies. The desired destination is the consistency of the regulations of data collection, testing procedures, and exchange of information.¹³

On the other hand, other scholars define harmonisation as the coordination of conflicts of laws. Legal conflicts are resolved by these traditional solutions, but do not influence the rules of substantial laws of each country.¹⁴ Likewise, harmonisation is usually not all-inclusive but is relatively limited. This means that harmonisation of laws is not intended to build a unique authority of law on a

¹¹ Martin, Elizabeth A., *A Dictionary of Law(Oxford)*, 4th edn, 1997, p211

¹² Harmonization of Professional Standards, (1998), International Federation for Information Processing, (http://www.ifip.or.at/minutes/C99/C99_harmonization.htm), access on 20 July 2009

¹³ Bijman, Jos, "Biosafety Regulation", (1994), *Biotechnology and Development Monitor*, No.18, 1994, p8, (<http://www.biotech-monitor.nl/1809.htm>), access on 30 June 2009

¹⁴ Guo, Yujun, "Globalization of Economy & Legal Harmonisation and Unification", (2001), *Wuhan University Journal(Philosophy & Social Science)*, Volume 54 ,No. 2, p1

particular topic.¹⁵ In other words, harmonisation looks to effect an approximation or co-ordination of different legal provision or systems by eliminating major differences and creating minimum requirements or standards.¹⁶ The term harmonisation discusses the appointing of one singular concept to reflect like characteristics or similar forms. Harmonisation can only be achieved if the concept it represents is almost or exactly the same.¹⁷

In summary, therefore harmonisation aims to unify and bring hitherto incompatible and inconsistent structures into some kind of agreement. However in arbitration circles, the harmonisation of law indicates the process involved in applying the same law to different countries, and bringing national laws in line with each other.¹⁸

Generally harmonisation of law indicates the process involved in the application of the same law to different countries, bringing national laws in line with each other. Usually in international contractual operations, the regulatory principle of stronger states is transplanted into those of weaker states.¹⁹ One vivid attempt at harmonisation in international commercial arbitration can be seen in the creation of the Model Law.

6.3 The Origin of the UNCITRAL Model Law

¹⁵ Ibid

¹⁶ Ibid

¹⁷ Terminology work – Harmonisation of concepts and terms, January 2006, Review of Content Standard, ISO860:1996

¹⁸ [http://www.babylon.com/definition/harmonise/Chinese%20\(T\);](http://www.babylon.com/definition/harmonise/Chinese%20(T);)

[http://www.babylon.com/definition/Harmonisation/Chinese%20\(T](http://www.babylon.com/definition/Harmonisation/Chinese%20(T), access on 30 June 2009

¹⁹ Ibid

The Asian-African Legal Consultative Committee (“AALCC”) passed a resolution on July 5, 1976. It invited the UNCITRAL to prepare a protocol towards the New York Convention in order to resolve some issues relating to arbitration procedure, such as an impartial judicial investigation, legitimate procedures and renouncement of state immunity.²⁰ This suggestion and the comments made by the Secretariat of the UNCITRAL were submitted for discussion in the 1977 annual meeting of the UNCITRAL. The UNCITRAL requested that the Secretariat, the AALCC and the other institutions which participated one way or the other in the preparation of the protocol negotiated, undertake a research on the various issues raised.²¹ In response to that request, the Secretariat held a Consultative Conference in Paris in September 1978, with the representative of the AALCC, the members of the International Council for Commercial Arbitration and the arbitrators of the ICC in attendance.²² The experts in attendance at this meeting unanimously submitted that, in order to strengthen the legal structure of international arbitration, the most effective action that the UNCITRAL could take was to start preparing something akin to a Model Law. They suggested that, if each state could adopt the Model Law, it would not only ensure the establishment of a coherent arbitration procedure which would accommodate the needs of international trade, but also help fulfill universal fairness advocated by the AALCC.²³ The experts also believed that the Model Law would help drastically reduce the incidences of parties’ dissatisfaction with arbitral awards.²⁴

²⁰ Secretariat Note Reporting AALCC Decision, A/CN.9/127, Annex, para.3, p1162 *infra*. The AALCC decision was adopted on 5 July 1976.

²¹ 1977 Commission Report, A/32/17, para. 39, p.1167 *infra*.

²² Secretariat Note on Further Work, A/CN.9/169, para. 3, p.1173 *infra*.

²³ Fn 7, at p10

²⁴ Secretariat Note on Further Work, A/CN.9/169 paras. 6-9, p1173-74 *infra*.

The Secretariat eventually submitted the conclusions reached at the Paris meeting to the 1979 Annual Meeting of the UNCITRAL, as well as a detailed report on interpretation and application of the New York Convention.²⁵ The conclusion of the report showed that, through stipulating a set of model or uniform law, the harmonisation of the practice of enforcing arbitral awards by the international community and cutting down on the judiciary control on the aspect of arbitration procedures, can be effectively achieved. Modifying the New York Convention or passing a protocol to help achieve harmonisation and control would not be necessary.²⁶ The UNCITRAL accepted these points and further requested that the Secretariat and the relevant institutions, especially the AALCC, convene a discussion session with the International Council for Commercial Arbitration, and prepare a preliminary draft on the model law of arbitration procedures. At the same time, the UNCITRAL also directed that the scope of the draft should be restricted to international commercial arbitration, not domestic arbitration, and it should adequately consider the relevant provisions of the New York Convention and the UNCITRAL Arbitration Rules. After the catalyst meeting of 1977, it took a further eight years to conclude preliminary preparations, draft the Model Law, and organize extensive consultation to procure opinions on the draft. In 1985, the UNCITRAL submitted the draft law for review at the General Assembly of the United Nations, which accordingly gave its assent to the Model Law. The UNCITRAL strongly recommended it to the government of each state for their

²⁵ Generally 1979 Commission Report, A/34/17, paras. 76-81, p1187-88 *infra*.

²⁶ 1979 Commission Report, A/34/17, paras. 76-80, p1187-88 *infra*.

consideration and possible adoption.²⁷

6.4 The Purpose of the Model Law

The Model Law is a set of international standard documents which has the potential to revolutionize the practice of international commercial arbitration. As more than 60 states and 18 international organizations took part in the formation of the draft, the Model Law itself generally represents the thoughts of the states and international organizations.²⁸ The General Assembly of the United Nations ratified Resolution 40/72 on the Model Law on December 11, 1985, and it suggested that each member state consider the adoption of the Model Law for the purpose of promoting the integration of arbitration procedural rules towards materializing the specific needs of international commercial arbitration.²⁹ The basic purpose of the Model Law was to promote the modernization and integration of world arbitration legislations and to further harmonisation of domestic laws which regulate international commercial arbitration.³⁰ In Resolution 40/72, the General Assembly of the United Nations also clearly pointed out that arbitration was an important approach to resolving international disputes, and that if states of different legal and economic regimes would adopt the

²⁷ 1979 Commission Report, A/34/17, paras. 81, p1188 *infra*.

²⁸ Fn 7, at p13

²⁹ *Ibid* at "Foreword"

³⁰ Montineri, Corinne, "Legal Harmonisation Through Model Laws: The Example of the UNCITRAL Model Law on International Commercial Arbitration", in *Celebrating Success: 20 Years UNCITRAL Model Law on International Commercial Arbitration*, 2005, p8; Yeo, Alvin, "Harmonisation, Party Autonomy and Mandatory Provisions Under the UNCITRAL Model Law", in *Celebrating Success: 20 Years UNCITRAL Model Law on International Commercial Arbitration*, 2005, p50; Umar, M Musseyn, "Interim Measures in International Arbitration (With Reference to Indonesia)", in *Celebrating Success: 20 Years UNCITRAL Model Law on International Commercial Arbitration*, 2005, p115; Fn 7, at p4

Model Law, it would help the progress of harmonising international economic relations.³¹ It would further help in establishing a set of fair legal regimes which would serve to resolve international commercial disputes effectively. Passing the Model Law was and still is an outstanding contribution towards the harmonisation and modernization of present international commercial arbitration. It remains the singular most outstanding development in this area and the most influential accomplishment in the field of international commercial arbitration during the 1980s.³²

6.5 Policy Goals and Significance of the Model Law

6.5.1 Content of the Model Law

The Model Law presents eight chapters and thirty-six articles and its content concern each aspect of arbitration, the scope of application, the formation and effects of an arbitration agreement, the composition and powers of an arbitral tribunal, arbitration procedures, indictment of an arbitral award, as well as the recognition and enforcement of an arbitral award. The Model Law also provides that the scope of its application is restricted or confined to “international commercial arbitration” and provides a wide interpretation of the term, “international” and “commercial.”³³ In the same vein, it confers an arbitral tribunal with considerable discretion and emphasizes that an

³¹ Fn 7, at p13

³² Ibid at “Foreword”

³³ Article 1(1),(3) of the Model Law

arbitral award may be set aside on ground of irregularity.³⁴ It believes in the possibility of universal effect of an arbitral award; and enumerates the grounds for enforcements and refusal to recognize an arbitral award in accordance with the New York Convention.³⁵ All in all, the Model Law refers to the New York Convention for further development without conflicting with it and other related conventions.³⁶

6.5.2 The Model Law as a Tool for Harmonising Arbitration Legislation

The provisions of the Model Law were the product of the deliberations of arbitration experts from various different parts of the world. It contains the expressed ideas of the countries with different political, economic and cultural backgrounds and orientation. It also reflects the feelings and opinions of most member states on arbitration legislation.³⁷ The model is meant to be incorporated into the laws of any willing state, and it is merely recommended, not obligatory. States should also inform the UNCITRAL Secretariat of any implementation of the law.³⁸ However being a product of a consensus of sorts, it is expected states should accept the Model Law fairly easily. But in contrast to a convention which would typically severely restrict or prohibit changes to the uniform text, the Model Law permits modification and some of its provisions may be left out upon incorporation into national legislation. This flexibility has the tendency to diminish the overall potency of the law in

³⁴ Regarding to the application for setting aside as exclusive recourse against arbitral award, see Article 34 of the Model Law.

³⁵ Article V of the New York Convention.

³⁶ Fn 7, at p9

³⁷ "UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use", (2002), United Nations Publication Sales No.E.05.V.4, p13

³⁸ Ibid

achieving harmonisation, but at the same time allows the Model Law easy access into an already-established legal system, which is particularly relevant in cases where the uniform text and the legal system of the state are closely linked. This flexibility of form contributes to the widespread acceptance of the Model Law over other like conventions. However, the UNCITRAL “Guide to Enactment and Use” allows only a certain minimum of adjustments to the Model Law, and in the interest of universality, these adjustments should remain within the purpose of the Model Law.³⁹

When the Model Law was drafted, the following principles were stipulated: to confine the intervention of domestic courts, accept the principle of party autonomy, and allow parties to freely choose the ways to resolve their disputes, so as to achieve the materialization of the liberalization of international commercial arbitration. Necessary mandatory rules were stipulated in order to guarantee that arbitration would proceed in terms of fair and appropriate procedure.⁴⁰ The establishment of a set of international commercial arbitration procedural laws and regulations guarantees that arbitration can proceed smoothly even where parties fail to reach an agreement on procedural issues. Such rules provide additional impetus for the enforcement of arbitral awards and point out the ways of resolving those substantial issues. From the abovementioned, we can see that the Model Law digests the merits of domestic and international arbitration legislations respectively, as well as striving to balance the principle of party autonomy and the power of judicial control of courts. All in all the Model Law produces far-reaching solutions for the harmonisation of legislations of various states, as it

³⁹ Ibid at p13-14

⁴⁰ Article 18, and 19 of the Model Law

stipulates and modifies arbitration laws of each state that adopts it, with the result that it establishes a stable and predictable international legal framework for international commercial arbitration.

6.6 An Examination of the Procedural Law in Various States

We shall also be interested in the issues that would normally arise from the interaction of related arbitral procedure contained in the arbitration laws of different countries, as well as the harmonising role played by the Model Law. We shall also examine the shortcomings of the Model Law and suggest ways to achieve a more effective system.

6.6.1 Arbitration Laws among Various States

This section shall be dedicated to a discussion of relevant provisions in the arbitration laws of various countries. The purpose of this exercise is to understand the differences that exist among various arbitration laws, and to establish the possibility or otherwise of achieving some sort of harmonisation through the delocalisation theory or the Model Law.

6.6.1.1 Provisions Relating to Court Intervention in the Model Law

The relationship between a national court and an arbitral tribunal is actually one of constrained incompatibility and real partnership.⁴¹ Even though modern international commercial arbitration already shows great deal of independence when international trade is concerned, it cannot be

⁴¹ Fn 1, at p349

intervened by national sovereignty.⁴² The arbitration clause of the arbitration agreement, for example, is still generally considered to be an independent agreement, and generally not influenced by defects in the underlying agreement.⁴³

Article 5 of the Model Law provides that “in matters governed by this Law, no court shall intervene except where so provided in this Law.” The term “intervene” used by Article 5 was explained by the Commission to include court action, which can be categorized more as “assistance” to the arbitration rather than an intervention.⁴⁴ As far as the issue of court intervention in the Model Law is concerned, the purpose of Article 5 of the law is to enable the draftsmen describe as clearly as possible the circumstances where the court may have the power to control arbitral proceedings, so as to reduce incidences of confusion between the parties and arbitrators as well as further the development of a universal standard. According to the Secretariat, the provision operates mainly to “exclude any general or residual powers” given to a court of the enacting state in statutes other than the Model Law.⁴⁵ In appropriate situations, Article 5 should not be seen as expressing hostility to court intervention or assistance, but only to satisfy the need for certainty, in relation to the range of circumstances where court action is permissible. The Model Law provides for situations of court involvement under Articles 8 (arbitration agreement and substantive claim before court), 9 (interim measures), 11 (appointment of arbitrators), 13 (challenge procedure), 14 (failure or impossibility to

⁴² Ibid

⁴³ Ibid at p173

⁴⁴ Summary Record, A/CN.9/309, para. 40, p237 infra.

⁴⁵ Seventh Secretariat Note, A/CN. 9/264, para2, p.288 infra Summary Record, A/CN. 9/309, para 40, p237 infra

act), 16 (competence of arbitral tribunal to rule on its jurisdiction), 27 (court assistance in taking evidence), 34 (setting aside an award) and 35 and 36 (recognition and enforcement of awards). In a great majority of cases, Article 5 has been relied upon to determine the extent of permissible intervention, with difficulties only arising in marginal cases.⁴⁶

Furthermore, Article 6 of the Model Law provides that “the functions referred to in Articles 11(3), 11(4), 13(3), 14, 16(3) and 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.]” Apparently, this provision of the Model Law allows the legislature of a state adopting the Model Law to determine which court or authority in the state should perform certain functions under the law. Although in certain courts in a domestic system a certain degree of consultation may serve for competence, the Model Law’s main purpose is to assist foreign parties in pinpointing the competent court or authority and obtaining information on its procedures and practices.⁴⁷ Furthermore, the determination of a single court or authority would allow the Model Law to gain experience in arbitration.⁴⁸ The aforementioned provision makes it clear however, that more than one court or authority may be designated.⁴⁹

6.6.1.2 The Issue of Interim Measures among the Model Law Countries

⁴⁶ Commission Report. A/4/17, para.61, p238 *infra*.

⁴⁷ Seventh Secretariat Note. A/CN, 9/264, para 2 p249 *infra*.

⁴⁸ *Ibid*

⁴⁹ Commission Report, A/40/17, para.68, p255 *infra*.

In the course of arbitral proceedings, a tribunal may be constrained to order interim measures to take and preserve evidence, secure property, or other measures in order to maintain the *status quo* of the *res* and the dispute in general, pending the outcome of the arbitral proceeding. These different measures are known by different names in arbitral and legal parlance; some called “interim measure of protection,”⁵⁰ while others are called “conservatory measures.”⁵¹ However regardless of the terminology employed, they are all types of conservatory measure made pending the outcome of the arbitration proceedings.⁵² Article 9 of the Model Law provides that: “it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.” It clearly states that application to the court for interim measures does not contradict with the arbitration agreement. However where a party applies to the court for interim measures, the court might not be willing to make a decision that would influence, or otherwise preempt the outcome or determination of the matter submitted for arbitration.⁵³

Under Article 17 of the Model Law, interim measures of protection are presumed to apply “by

⁵⁰ Article 23 of International Chamber of Commerce Arbitration Rules 1998

⁵¹ Article 183 of Switzerland's Private International Law Statute provides that “1. Unless the parties have agreed otherwise, the arbitral tribunal may, at the request of a party, order provisional or protective measures.

2. If the party so ordered does not comply therewith voluntarily, the arbitral tribunal may request the assistance of the competent court. Such court shall apply its own law.

3. The arbitral tribunal or the court may make the granting of provisional or protective measures subject to the provision of appropriate security.”

⁵² Article 23 (1) of International Chamber of Commerce Arbitration Rules 1998

⁵³ *Channel Tunnel Group Ltd. v Balfour Beatty Construction Ltd.*, [1993] A.C. 334, p367–68

order” of the arbitral tribunal.⁵⁴ Many states when adopting the Model Law amended the aspect that the Model Law does not provide for the execution of orders. Egypt, for example, fundamentally adjusted the rule in Article 17 in its new arbitration law. In place of “unless otherwise agreed by the parties,” the arbitral tribunal can order interim or conservatory measures under the condition that both parties “agree to confer upon the arbitral panel” this power.⁵⁵ If there is a failure to execute the order by the party against whom it was made, then the arbitral tribunal may authorize the other party to undertake the procedures necessary for its execution. These procedures will be carried out without prejudice to the right of the other party to apply to the President of the Court for an execution order. This appears to place the order on the same level as a final award.⁵⁶

Perhaps to clarify the status of an interim order or measure against a final award, the province of British Columbia in Canada for example has included a definition of award into its International Commercial Arbitration Act. For the intention of this Act, “arbitral award” is defined as any determination of the arbitral tribunal regarding the matter of the dispute including an interim award made for the preservation of property.⁵⁷ Once a Model Law country, Scotland, in its new Arbitration (Scotland) Act 2009 has provided that the tribunal may order a party to permit the tribunal, an expert

⁵⁴ Article 17 of the Model Law provides that “Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.”

⁵⁵ Article 24(1) of Law No. 27 For 1994 Promulgating The Law Concerning Arbitration in Civil and Commercial Matters, Egypt

⁵⁶ Article 24(2) of Law No. 27 For 1994 Promulgating The Law Concerning Arbitration in Civil and Commercial Matters, Egypt

⁵⁷ Section 2 of International Commercial Arbitration Act, British Columbia, Canada

or the other party to examine, take photograph, preserve or take custody of any property which the party owns or holds which is the subject of the arbitration, or as to which any question causes of the arbitration, and so on.⁵⁸ On the other hand, the Rule also states that “the court has the same power in an arbitration as it has in civil proceedings to grant interdict (or interim interdict), or to grant any other interim or permanent order.”⁵⁹

Tunisia kept “order” in its Law Arbitration Code that which basically re-enacts the provisions of Article 17 of the Model Law, but added to the part which provides that if a party does not agree with the order, the assistance of the First President of the Court of Appeal of Tunis may be sought for by the arbitral tribunal.⁶⁰ The Tunisian method resembles the position in the United States where the law of California in its s.1297.171 repeats Article 17 of the Model Law. However at the same time, by s.1297.92 the court can act on a request to enforce interim measures of protection ordered by an arbitral tribunal.⁶¹

On the other hand, courts in jurisdictions such as Hong Kong and Japan have greater power than arbitral tribunals in conducting the process necessary for interim measures. For example, regarding the special power available to a court in relation to arbitration proceedings, the Hong Kong model states that the court or a judge of the court may make an order directing an amount in dispute to be

⁵⁸ Rule 34(a)(i) of Schedule 1-Scottish Arbitration Rules, Arbitration (Scotland) Act 2009

⁵⁹ Rule 43(1)(f)(g) of Schedule 1-Scottish Arbitration Rules, the Arbitration (Scotland) Act 2009

⁶⁰ Article 62 of the Tunisia Law Arbitration Code, 1993

⁶¹ Sanders, Pieter, “Unity and Diversity in the Adoption of the Model Law”, (1995), *Arbitration Law*, Volume 11, No.1, p16

secured, as well as issue an interim injunction or conduct any other interim measure it deems fit or necessary to be taken and so on. However, the court or a judge of the court may reject to make an order regarding a matter which is at the material time the subject of arbitration proceedings; and consider it more appropriate for the matter to be resolved by the relevant arbitral tribunal.⁶² Some scholars⁶³ appear to suggest that the High Court of Hong Kong⁶⁴ would tow the same line when considering applications for the grant of interim measures in matters already before an arbitral tribunal. Moreover, applying to the court to exercise such power does not contradict the arbitration agreement.⁶⁵ Besides, the Model Law does not contain any provision which prohibits a tribunal from giving orders to parties in connection to matters in issue in the arbitral proceedings, but under Hong Kong's law there are two situations where the tribunal cannot order the parties to provide any security deposit.⁶⁶ Furthermore, the courts have the power to overturn the decision which has been given by the arbitral tribunal; therefore the court appears to occupy a higher niche of authority than the arbitral tribunal.⁶⁷ Thus, when there is a conflict between decisions made by court and arbitral

⁶² Article 2GC, Chapter 341, Arbitration Ordinance of Hong Kong

⁶³ Kaplan, Neil and Bunch, Tony, *International Handbook on Commercial Arbitration*, Volume II – Hong Kong, 1997, p27

⁶⁴ Article 17 of the Model Law and Section 34 (E) of the Arbitration Ordinance, Hong Kong, introduced by the Arbitration (Amendment) Ordinance 1991. However, Section 34(E) was repealed in 1996.

⁶⁵ Section 34(E) of Arbitration Ordinance, Hong Kong once provided that “Subject to article 5 of the UNCITRAL Model Law, section 14(4), (5) and (6) applies to arbitrations which are governed by the UNCITRAL Model Law.” However, this provision was repealed in 1996.

⁶⁶ Section 2GB(3) of Arbitration Ordinance, Hong Kong, provides that “(3) An arbitral tribunal must not make an order requiring a claimant to provide security for costs only on the ground that the claimant – (a) is a natural person who is ordinarily resident outside Hong Kong; or (b) is a body corporate that is incorporated, or an association that is formed, under a law of a place outside Hong Kong, or whose central management and control is exercised outside Hong Kong.”

⁶⁷ Article 2GC(5), Arbitration Ordinance, Hong Kong,

“(5) The powers conferred by this section can be exercised irrespective of whether or not similar powers may be exercised under section 2GB in relation to the same dispute.”

tribunal or as to jurisdiction, the court's jurisdiction would prevail. Also, Japanese law permits the court, and the arbitral tribunal, to issue interim measures.⁶⁸ There is no provision in the Japanese Code of Civil Procedure (CCP),⁶⁹ directly governing the interim measure of protection in the field of arbitration. However, the claimant in an arbitration can request a competent court to issue a provisional measure or provisional attachment.⁷⁰ On the other hand, the Model Law only authorizes the arbitral tribunal to issue such an order for the parties in the arbitral proceedings.⁷¹

In comparison, the IAA (International Arbitration Act, Singapore) provides quite clearly that the High Court or judge would have the same power as the tribunal in governing the arbitration dispute.⁷² Yet, IAA further gives specific powers to the arbitral tribunal to issue interim measure upon properties or valuable goods that are the *res* in the dispute, so that the arbitral tribunal can preserve the value as well as its very existence so as to give meaning and essence to the final award as much as possible. Also, the arbitral tribunal may grant all manner of injunctive reliefs under the IAA.⁷³ On the other hand, IAA permits the High Court⁷⁴ to exercise the same power as the arbitral

⁶⁸ Article 15 and 24 of Japan Arbitration Law

⁶⁹ The Code of Civil Procedure, Book VIII, Arbitration Procedure, Japan

⁷⁰ Prof. Teruo Doi, *International Handbook on Commercial Arbitration*, Volume II – Japan, 1997, p22

⁷¹ Article 17 of the Model Law provides that “Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.”

⁷² Article 12(7) of International Arbitration Act 2002 (Singapore) provides that “(7) The High Court or a Judge thereof shall have, for the purpose of and in relation to an arbitration to which this Part applies, the same power of making orders in respect of any of the matters set out in subsection (1) as it has for the purpose of and in relation to an action or matter in the court.”

⁷³ Section 12(1)(i) of the International Arbitration Act 2002 (Singapore) provides that “(i) an interim injunction or any other interim measure”

⁷⁴ Section 12(7) of the International Arbitration Act 2002 (Singapore) provides that “The High Court or a Judge thereof shall have, for the purpose of and in relation to an arbitration to which this Part applies, the same power of making orders in respect of any of the matters set out in

tribunal; therefore, a dissatisfied party to an arbitration may apply to the High Court for re-evaluation. Since by virtue of Section 12(6) of IAA the High Court of Singapore shares coordinate jurisdiction with the arbitral tribunal in dealing with the arbitration issues,⁷⁵ the interim measures issued by the arbitral tribunal would have the same force as the order which emanates from the High Court. Also, the Singaporean law makes specific provisions regarding the costs and expenses incurred during the arbitral proceedings as well as many of the property-related issues to be governed by the arbitral tribunal.⁷⁶

Another good example would be Australian law, which provides that both the court and arbitral tribunal may order interim measures.⁷⁷ Accordingly, Article 7(2) and (3) of the International Arbitration Act, 1974 provides that the High Court has the authority to make orders for interim measure. However, Article 23 of the Act also provides that Australia shall adopt Article 17 of the Model Law (which empowers the arbitral tribunal to issue interim measures). In short, the Australian Act does not make a clear-cut distinction between the court and the arbitral tribunal, whereas other countries mentioned above have made legislative attempts to clarify their respective duties and obligations. The jurisdiction to preside over issue of interim measures is shared between the courts and the arbitral tribunals.

subsection (1) as it has for the purpose of and in relation to an action or matter in the court.”

⁷⁵ Section 12(6) of the International Arbitration Act 2002 (Singapore) provides that “All orders or directions made or given by an arbitral tribunal in the course of an arbitration shall, by leave of the High Court or a Judge thereof, be enforceable in the same manner as if they were orders made by a court and, where leave is so given, judgment may be entered in terms of the order or direction”

⁷⁶ Article 12(1) of the International Arbitration Act 2002(Singapore)

⁷⁷ Article 7(3) of the International Arbitration Act 1974, Australia

On the other hand, Zimbabwe law provides that the parties may request from the High Court an interim measure of protection where the arbitral tribunal has not yet been constituted and the matter is urgent; or the arbitral tribunal is not capable of issuing the order or interdict; or the matter is so urgent, such that it makes it impracticable to pursue such order or interdict from the arbitral tribunal; and the High Court shall not grant any such order or interdict if the arbitral tribunal is able to grant the order or interdict, and he/she has determined an application.⁷⁸

Canada is another country which has adopted the Model Law. There are different arbitration laws in force in its provinces. Ontario is one of the provinces⁷⁹ that align closely with the Model Law. Ontario law permits the arbitral tribunal to make orders for interim measures, and the order given by the arbitral tribunal shall have the same effect as the award. On the other hand according to Quebec law, the arbitral tribunal does not have the jurisdiction to make orders for interim measures, and only courts may do so.⁸⁰

Again, Malta law provides that the Registrar will be the link between the arbitral tribunal and the parties, such as when initiating arbitration. The claimant is required to submit its notice to the Registrar in order for the arbitration proceedings to begin.⁸¹ In other words, there is no direct communication between the parties and the arbitral tribunal. Every document or request must be

⁷⁸ Article 9 of the Arbitration Act 1996, Zimbabwe

⁷⁹ Quebec City, Quebec Province

⁸⁰ Barin, Babak , Little, Andrew D., Pepper, Randy A., and Osler, Hoskin & Harcourt (Firm), *The Osler Guide to Commercial Arbitration in Canada*, 2006, p88-89

⁸¹ Article 17 (1) of the Malta Arbitration Act 1996

submitted through the Registrar. However, among these countries that have adopted the Model Law, the major difference in legislative provisions concerning the issue of the court intervention is in the area of which body is competent to make orders for interim measure; whether it is the court⁸² or the arbitral tribunal.⁸³ Furthermore, the court does not only possess the power to grant interim measure, it also has the authority over certain other parts of the arbitration.

Furthermore, unlike under the Model Law which endows the arbitral tribunal with enormous powers, in Germany, the parties may make an arbitration agreement whereby they concede to grant the Court (before or during arbitral proceedings), powers to make order for interim measure of protection relating to the subject-matter of the arbitration.⁸⁴ Put differently, if parties have not agreed in the contract that the court should have the power to make an order for interim measure of protection, then the court has no jurisdiction to do so. Peru law also differs from the Model Law. It

⁸² Countries which states that the court will issue the interim measure including the following:
Article 9 of Law of the Russian Federation on International Commercial Arbitration, Russia
Section 16 of Arbitration Act, BE 2545 (AD 2002), Thailand
Article 9 of The Commercial Arbitration Law of the Kingdom of Cambodia, Cambodia
Section 9 of Danish Arbitration Act, Denmark
Article 14 of Law No. 27 For 1994 Promulgating The Law Concerning Arbitration in Civil and Commercial Matters, Egypt
Article 9 of The Arbitration and Conciliation Act, 1996 (No. 26 of 1996), India
Article 9 of The Law on International Commercial Arbitration, Iran
Article 7 of Arbitration International Commercial Act, 1998, Ireland
Article 7 of The Arbitration Act, 1995 - No. 4 of 1995, Kenya
Article 758 of Code Of Civil And Commercial Procedure 1953, Libya

⁸³ Countries which empower the arbitral tribunal to issue the interim measure including the following:
Article 17 of Law on International Commercial Arbitration, Ukraine
Article 26 of The Bermuda International Conciliation and Arbitration Act 1993, Bermuda
Section 26 of Act LXXI of 1994 on Arbitration, Hungary
Article 17 of The Arbitration and Conciliation Act, 1996 (No. 26 of 1996), India
Article 20 of The Republic of Lithuania Law on Commercial Arbitration, Lithuania
Article 1433 of Commercial Code, Title IV (of Book V), Commercial Arbitration, Mexico
Article 24 of Law No. 27 For 1994 Promulgating The Law Concerning Arbitration in Civil and Commercial Matters, Egypt
Article 13 of Arbitration Act No. 11 of 1995, Sri Lanka

⁸⁴ Section 1033 of the German Arbitration Law 1998

provides that the arbitrators have the right to settle, or raise conciliation at any time and to hear and settle all related issues, including the validity or efficacy of the agreement, which may arise during the proceeding.⁸⁵

Nigerian law provides that “a court before which an action which is the subject of an arbitration agreement is brought shall, if any party so requests not later than when submitting his first statement on the substance of the dispute, order a stay of proceedings and refer the parties to arbitration.”⁸⁶ In other words, if the parties have not made such an indication, the court can very well entertain a matter which is already the subject of an arbitral proceeding. This is at variance with the intent and purpose of the Model Law, which is to separate arbitration from the litigation. Article 8 of the Model Law provides that “A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is real and void, inoperative or incapable of being performed.”⁸⁷ Yet, when a party to an arbitration proceeding has not raised an objection to the other party’s breach of arbitration clauses, then the party cannot on this ground alone be held to have forfeited his right to challenge the breach.⁸⁸

⁸⁵ Article 38 of Decree Law No. 25935, in force 10 December 1992, Peru

⁸⁶ Article 4(1) of Arbitration and Conciliation Decree 1988, Nigeria

⁸⁷ Article 8(1) of the Model Law

⁸⁸ Article 817 of Arbitration (Title VIII of Book IV of the Italian Code of Civil Procedure), Italy

Furthermore, under India's Arbitration and Conciliation Act 1996, the court also has a wider jurisdiction than the arbitral tribunal in conducting the arbitral proceedings. For instance, an Indian court⁸⁹ has the same power as the arbitral tribunal⁹⁰ in making orders for interim measures. The court must also examine the award before enforcement. In order for the award to qualify as a foreign award seeking enforcement in India, the court must examine three documents, viz: the copy of the award; the copy of the arbitration agreement; and any necessary document that is needed to prove that the nationality of the award is not Indian.⁹¹ Besides, the state retains its power to intervene in the issue where the matter(s) in dispute relates to a public claim.⁹² The provisions relating to the issue of court intervention are generally controlled by the social and cultural orientation of the countries concerned.

6.6.2 The Arbitration Agreement

6.6.2.1 Regulation by the Model Law

The definition of "arbitration agreement" in Article 7 of the Model Law provides one of the most

⁸⁹ Article 9 of The Arbitration and Conciliation Act 1996 (No. 26 of 1996), India states that "A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a Court ... (e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."

⁹⁰ Article 17, The Arbitration and Conciliation Act 1996 (No. 26 of 1996), India

⁹¹ Sood, Sandeep S., "Finding harmony with UNCITRAL Model Law: Contemporary Issues in International Commercial Arbitration in India after the Arbitration and Conciliation Act of 1996", Northwestern University School of Law, p27

⁹² Huleatt-James and Gould, *International Commercial Arbitration: A Handbook*, Volume 9, 2nd edn, 1999, p16; Reddy and Nagaraj, "Arbitrability: The Indian Perspective", (2002), J. Int'l, Volume 19, p117, 118, 124-125 (stating that the following areas have generally been found to be non-arbitral in India: 1) constitutional issues; 2) matrimonial matters; 3) insolvency; 4) welfare legislation; 5) mandatory non-private arbitration provided by statute; 6) taxation or foreign currency matters; 7) tortious claims; 8) public policy based on illegal activity; and 9) criminal matters.)

important attempts the Model Law has made towards the unification of national arbitration statutes. According to the Model Law, the form of the arbitration agreement shall be in writing. Whether the content of the arbitration agreement or contract is concluded orally, or by conduct or other means, the arbitration agreement has to be written down. However if the information contained in the agreement is accessible or usable by electronic communication for subsequent reference, then the requirement that an arbitration agreement shall be in writing has been met. “Electronic Communication” here means communications of data messages that can be made by the parties. “Data messages” here means information that can be produced, sent, stored, or received by magnetic, electric, optical, or any similar means. These methods include, (but are not limited to) electronic mail, telex, electronic data interchange (EDI), telecopy, or telegram. Also, if the arbitration agreement contains the exchange of claim and defence statements and the existence of this agreement is recognized by all parties, then the arbitration agreement shall also still be in writing. When arbitration clauses are included in a contract or any document, and the reference is made to that clause or part of the contract, then the arbitration agreement has been constituted in writing.⁹³

Two fundamental principles of Article 7 are that “it indicates that an arbitration agreement may relate to the dispute that has already happened or yet to occur. By doing so, it would help to eliminate the difference between a compromise and a clause compromissoire. It also requires that

⁹³ Article 7 of the Model Law

the arbitration agreement must be in written form.”⁹⁴ The first paragraph of the article attempts to assist parties rather than imposing upon them strict regulations. The arbitration agreement is envisaged only in respect of an already existing or future dispute, which can arise out of either a contractual or a non-contractual relationship. The agreement can be in many forms; such as it can be written as an arbitration clause or as an independent agreement. Paragraph 2 provides that only the form of the agreement must be in writing. However, there have been different interpretations concerning the written form requirement of Article 7(2) of the Model Law. In the first place the intention behind Article 7(2) is to ensure that parties agree to go into arbitration voluntarily, and this is evidenced in its strict requirement of a written form for arbitration agreement, exchange of letters or records of the arbitration agreement, as well as exchange of statements of claims and defence, where one party has stated there is an agreement in existence, and the other party neither denies nor agrees.⁹⁵

The Model Law has been criticized as lacking in power to regulate the arbitration agreement. Some scholars have also pointed out that there are certain restrictions on the permissibility of the arbitration agreement, which can also be found in the other applicable laws. The Working group admits the fact that the Model Law does not govern the legality of parties to enter into arbitration agreement.⁹⁶ Also, the Model Law does not make any provision⁹⁷ which will be suitable for

⁹⁴ Fn 7, at p240-241

⁹⁵ Liebscher, Christoph, “Interpretation of the Written Form Requirement Art.7(2) UNCITRAL Model Law,” (2005), *International Arbitration Law Review*, p164-169

⁹⁶ First Working Group Report A/CN.9/216, para.28, p277 *infra*; Second Working Group Report, A/CN.9/232,

situations involving state immunity.⁹⁸ However, as opposed to the domestic law, the Model Law does not prioritize in situations where there is doubt directly affecting the arbitration, such as when the validity of the material and the arbitration agreement come into consideration.⁹⁹ Finally, the Model Law does not make any provision as per the crucial indices to establish whether an issue is arbitrable or not. Even though the Model Law does not provide for the possibility of or otherwise envisages oral agreement, it does not mean that it is not under the scope of the Model Law. An oral agreement can still be enforceable where the parties have applied to the arbitral tribunal for a waiver of the requirement of the agreement form.¹⁰⁰

6.6.2.2 The Issue of Arbitration Agreement among the Model Law Countries

By reference to the Model Law, a number of countries have similar provisions in their laws about the format of the arbitration agreement.¹⁰¹ However, among those that have adopted the provisions

para.39, p279 infra

⁹⁷ Third Working Group Report A/CN.9/233, para.66, p281-82 infra; Second Working Group Report.A/CN.9/232, para.46, p280 infra

⁹⁸ First Working Group Report A/CN.9/216, para.28, p277 infra; First Secretariat Note, A/CN.9/207, paras.51-54, p272-73 infra

⁹⁹ First Working Group Report. A/CN.9/216, para.25, p276 infra; First Secretariat Note, A/CN.9/207, para.44 p270 infra

¹⁰⁰ Fn 7, at p258-262

¹⁰¹ Countries adopt the same provisions upon the arbitration agreement as the Model Law include:

Article 7 of The Commercial Arbitration Law of the Kingdom of Cambodia, Cambodia

Article 7 of The Law on International Commercial Arbitration, Iran

Article 4 of The Arbitration Act, 1995 - No. 4 of 1995, Kenya

Article 9 of The Republic of Lithuania Law on Commercial Arbitration, Lithuania

Section 5 of Act LXXI of 1994 on Arbitration, Hungary

Article 7 of The Arbitration and Conciliation Act, 1996 (No. 26 of 1996), India

Section 1031 and 1029 of Code of Civil Procedure - Book IV – Arbitration, Germany

Article 1423 of Commercial Code, Title IV (of Book V), Commercial Arbitration, Mexico

Article 7 of Law of the Russian Federation on International Commercial Arbitration, Russia

Article 3 of the Arbitration Act No. 11 of 1995, Sri Lanka

Section 11 of Arbitration Act, BE 2545 (AD 2002), Thailand

Article 7 of Law on International Commercial Arbitration, Ukraine

Article 2AC of Arbitration Ordinance, Hong Kong

of the Model Law in one form or the other, the Egyptian Arbitration Law imposes a stricter duty on parties entering into arbitration agreements. According to the Egyptian Arbitration Law, arbitration is prohibited in matters which can not be compromised. Besides, if one of the parties lacks the legal capacity to enter into contracts, then, the agreement signed by that party is considered a nullity.¹⁰² Furthermore, the Egyptian law requires the arbitration agreement to include the laws of penalty and nullity. Yet, if an arbitration agreement has not identified the existing dispute in issue when it is submitted for arbitration, the agreement will be considered invalid as well as lacking a cause of action or subject. However, neither the submission of the dispute for arbitration nor an arbitration clause contained in the arbitration agreement will be legally binding on the parties at any time before the parties perfect the process of appointment of the arbitrators, who will be responsible for conducting the arbitral proceedings for any existing or future disputes.¹⁰³ Again according to the Egyptian Arbitration Law, an arbitration agreement must also satisfy the legal conditions for a valid contract. However apart from the provisions which restrict and stipulate that the form of an arbitration agreement to be in writing, none of the above conditions contained in the Egyptian model exist in the Model Law.¹⁰⁴

Japanese arbitration law also provides that an arbitration agreement concerning future disputes

¹⁰² Article 11 of Law No. 27 For 1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters, Egypt provides that "Arbitration agreements may only be concluded by natural or juridical persons having the capacity to dispose of their rights. Arbitration is not permitted in matters which can not be subject to compromise."

¹⁰³ El-Kosheri, Ahmed S., *International Handbook on Commercial Arbitration*, Volume II – Egypt, 1997, p8-9

¹⁰⁴ Egyptian Arbitration Law No.27 of 1994

shall not be valid, unless it involves a specific relationship of rights and controversies arising between the parties.¹⁰⁵ Denmark law provides that notwithstanding that the arbitration dispute is contractual or not, the parties relying on their clear legal relationship can agree to submit their disputes that might arise, or/and those that have already arisen between them for arbitration. An agreement to submit to arbitration may take the form of an arbitration clause or separate agreements. And where a consumer contract is involved, and an arbitration agreement has ended before the dispute is resolved, then an arbitration agreement shall not be binding on the consumer.¹⁰⁶

There is also the “opting-out of the Model Law Regime” option in the conduct of international arbitration. Many states believe that the parties to an international arbitration should be allowed to agree on whether they prefer opting-out of having their arbitration regulated by the Model Law in preference of domestic rules governing arbitration.¹⁰⁷ For example, in Australia, parties to an international arbitration held in Australia can opt out of the application of the Model Law by an agreement in writing.¹⁰⁸ However as far as the written form requirement for arbitration agreements

¹⁰⁵ Article 787 of The Code of Civil Procedure (CCP), Japan provides that “An arbitration agreement regarding future disputes shall not be valid unless it concerns a specific relationship of rights and controversies arising therefrom.” Prof. Teruo Doi, *International Handbook on Commercial Arbitration*, Volume II – Japan, 1997, p8

¹⁰⁶ Section 7 of the Danish Arbitration Act 2005, Denmark provides that “(1) the parties may agree to submit to arbitration disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in a form of an arbitration clause in a contract or in a separate agreement.

(2) In case of a consumer contract, an arbitration agreement concluded before a dispute arose shall not be binding on the consumer.”

¹⁰⁷ Fn 62, at p5

¹⁰⁸ Article 21 of International Arbitration Act 1974-1989, Australia provides that “If the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the Model Law, the Model Law does not apply in relation to the settlement of that dispute.””

under the Model Law goes, there has been different and often conflicting view.

For example when faced with the question of the interpretation of Article II(2) of the New York Convention,¹⁰⁹ the Austrian Supreme Court was of the opinion that if a submitted letter merely consists of the signature of the other party, then this letter fulfills the writing requirement.¹¹⁰ The court also held that it was sufficient to establish an agreement in writing if the respondent's reply is endorsed on the signed copies of these letters. The court did not consider it necessary for the respondent to draft a separate text.¹¹¹

The Model Law has not categorically specified what documents must satisfy the requirement of references in agreements to qualify for validly incorporating arbitration clauses. This raises two questions, viz: whether references can clearly constitute arbitration clauses, or whether references are sufficient to the document.¹¹² In 1993, the Supreme Court of Bermuda dealing with the clause, "the reference is such as to make that clause part of the contract"¹¹³ as stipulated in Article 7 of the Model Law, had to consider the question whether it is possible for arbitration clauses to be incorporated in another document by reference. The Court held that although it was not necessary for a clear reference to arbitration clauses to be inserted in the contractual documents, the incorporation

¹⁰⁹ Article II(2) of the New York Convention provides that "2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

¹¹⁰ OGH, May 2, 1972 (1985) 10 Y.B.C.A. 417.

¹¹¹ OGH, February 21, 1978 (1985) 10 Y.B.C.A. 418.

¹¹² Fn 96, at p164-169

¹¹³ Article 7 of the Model Law

employing the use of general wordings should be sufficient.¹¹⁴ Bermuda has also provided by law that parties may agree in the arbitration agreement or any other document in writing that any dispute that has arisen or may arise between them is not to be settled in accordance with the Model Law.¹¹⁵

Similarly, Hong Kong's Ordinance also states that the parties to an international arbitration agreement may agree in writing "(a) that this Part is to apply; or (b) that agreement is, or is to be treated as a domestic arbitration agreement; or (c) that a dispute is to be arbitrated as a domestic arbitration."¹¹⁶ Furthermore, the Supreme Court of Hong Kong in considering the issue of written form requirement, had stated that Article 7(2) of the Model Law, apart from operating to prevent the admissibility of written evidence to be relied on (as it postdates the arbitration agreement), it also held that there is a direct conflict between arbitration agreement and the exclusive jurisdiction clause.¹¹⁷ It also concluded that even though it is possible to comply with the written form requirement, a lot beyond the court's competence is still required to ensure that the arbitration agreement is binding on the parties.¹¹⁸ However, one year after that, the Supreme Court of Hong Kong again held that a valid agreement may be inferred "provided a record of the agreement" is

¹¹⁴ CLOUT case 127, Supreme Court of Bermuda, January 21, 1994.

¹¹⁵ Section 29 of Bermuda's International Conciliation and Arbitration Act 1993 provides that "Where the parties to an arbitration agreement have, whether in the agreement or in any other document in writing, agreed that any dispute that has arisen or may arise between them is not to be settled in accordance with the Model Law, the Model Law does not apply in relation to the settlement of that dispute and in such a case unless otherwise agreed in writing by the parties the Arbitration Act 1986 shall apply."

¹¹⁶ S. 2M of Hong Kong's Arbitration Ordinance.

¹¹⁷ CLOUT case 43, High Court of Hong Kong, September 8, 1992.

¹¹⁸ CLOUT case 43, High Court of Hong Kong, September 8, 1992.

wide enough to include the exchange of letters evidencing the arbitration agreement that had been entered into at the same time or at a later date.¹¹⁹ Again in relation to the issue that no further clarification regarding the phrase “statement of claim and defence” have been made, the Supreme Court of Hong Kong also held that correspondence of the court would be sufficient to complete the written form requirement of Article 7(2) of the Model Law¹²⁰ and there was “no reason why they should be read as referring only to the pleadings in the formal sense once an arbitration has commenced.”¹²¹

In another case, a court held that the exchange of the telefaxes between the parties was sufficient to satisfy the writing requirement of Article II (2) of the New York Convention.¹²² These telefaxes had concerned the commencement of arbitral proceedings in which the parties expressed their intention to resolve their disputes through arbitration.¹²³ In another case dealing with the same issue, the German court saw the reference of one contract to another contract as sufficient to constitute the existence of a valid arbitration agreement. Concerning the issue of the recommended form such agreement by reference should take, the court further held that if general reference to general conditions is printed on the opposite side of the respective contract, then the arbitration agreement is valid.¹²⁴ This arbitration agreement can even take the form of an arbitration clause between one of

¹¹⁹ CLOUT case 44, High Court of Hong Kong, February 17, 1993.

¹²⁰ CLOUT case 87, High Court of Hong Kong, November 17, 1994.

¹²¹ Ibid

¹²² Obergericht Basel-Land, July 5, 1994 (1996) 21 Y.B.C.A. 685.

¹²³ Obergericht Basel-Land, July 5, 1994 (1996) 21 Y.B.C.A. 685.

¹²⁴ Bayrisches OLG, September 17, 1998 (1999) 24a Y.B.C.A. 645; OGL Schleswig, March 30, 2000 [2000] R.I.W. ⁷⁰⁶.

the parties and a third party in the letter of one party to another.¹²⁵

Generally speaking, if parties can publicly state their intention in a written arbitration agreement, then the requirement of writing would be fulfilled. However, such a broad rule without exceptions cannot be applied to the form requirement.¹²⁶ The Queen's Bench of the Saskatchewan Court, Canada in 1996 had held that the act of acceptance does not have to be in written form, but can be deduced from the conduct of the parties.¹²⁷ The United States Court of Appeal appears to also agree with the exceptions mentioned above, in interpreting the provisions of Article II(2) of the New York Convention.¹²⁸ Here the court had considered the question whether arbitration clauses can be contained in the exchange of letters, to hold that even if there are no enclosed arbitration clauses in the reference of letters, arbitration clauses can still be inferred.¹²⁹ The court in considering this issue cited with approval the decision of the Second Circuit of the Court of Appeals, where it had held that the signatures of the parties are not required in an exchange of letters of the parties evidencing an arbitration agreement. The court based its reasoning on the fact that the New York Convention provides that "an arbitral clause in a contract be signed by the parties or contained in an exchange of letters or telegrams."¹³⁰

¹²⁵ OLG Hamburg, July 30, 1998 (2000) 25 Y.B.C.A. 714.

¹²⁶ Fn 7, at p262

¹²⁷ CLOUT case 365, Saskatchewan Court of Queen's Bench, October 1, 1996.

¹²⁸ Article II(2) of the New York Convention states that "2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

¹²⁹ United States Court of Appeals, June 20, 2003 (2004) 29 Y.B.C.A. 978.

¹³⁰ United States Court of Appeals 29 July 1999 (1999) 24a Y.B.C.A. 900.

As far as Article 7 of the Model Law goes, several states believe that it is helpful to insert a provision relating to the capacity of the state or a state agency to enter into an arbitration agreement. For instance, Peru's new arbitration law contains a provision which states that "without any prior authorization being required, issues arising from contracts entered into by the Peruvian state and governmental entities with foreigners, as well as those related to their goods, may be freely submitted to international arbitration before arbitral tribunals established by virtue of international agreements to which Peru is a party."¹³¹ This clearly permits the state and governmental entities to submit disputes to arbitration relying on international agreements to which Peru is a party, and permitting privately managed or mixed economy state-owned companies to arbitrate in or outside of Peru.¹³² Bulgaria as well has included a specific provision in its law, to the effect that parties to international commercial arbitration may also be considered a state or a state agency.¹³³ Also, Egyptian Arbitration Law provides that "the provisions of the Law shall apply to all arbitrations between public law or private law persons, whatever the nature of the legal relationship around which the dispute revolves, when such an arbitration is conducted in Egypt, or when an international commercial arbitration is conducted abroad and its parties agree to submit it to the provisions of this Law..."¹³⁴

¹³¹ Article 85(1) of Decree Law No. 25935, in force 10 December 1992, Peru

¹³² Article 85(3) Decree Law No. 25935, in force 10 December 1992, Peru

¹³³ Article 3 of Law on International Commercial Arbitration, Bulgaria

¹³⁴ Article 1 of Law No. 27 for 1994 for Promulgating the Law Concerning Arbitration in Civil and Commercial Matters, Egypt

6.6.2.3 The Issue of Arbitration Agreement of States Not Adopting the Model Law

Meanwhile, countries that have established their own arbitration system outside the structure of the Model Law also exhibit certain differences in approach and form, which can be traced to the different cultural and economic background of each of these countries. For example, in Chinese Arbitration Law, arbitration agreements can only be made when arbitration clauses are incorporated in the contract, and written forms of submission of the agreement is also provided. The written form of the agreement shall be provided only before or after any disputes arises. The content of an arbitration agreement shall include the reason why arbitration is sought, the subject matter of arbitration, and a list showing commission of the board for the proposed arbitration.¹³⁵ Meanwhile, although there are not many restrictions regarding the form of an arbitration agreement, there are still circumstances where arbitration agreements may be held to be null or void.¹³⁶ Some of the situations when the arbitration agreement shall be held to be such, is when the range of issues to be dealt with by arbitration are prohibited by law or otherwise illegal, as well as situations where arbitration agreement is entered into by parties, one of whom completely lacks the capacity or has limited capacity to enter into such agreements; or the conclusion of arbitration agreement involved coercion or duress practiced on one of the party's by the other. In addition, contents of arbitration shall include provisions that aid the clarity of subject's matters for arbitration or the arbitration commission. If the provisions are unclear, or ambiguous or do not contain any provision clearly stating the matters for arbitration or the arbitration commission, then the parties may be allowed to reach a

¹³⁵ Article 16 of China Arbitration Law, Chapter 3

¹³⁶ Article 17 of China Arbitration Law, Chapter 3

supplementary agreement. Arbitration Agreement shall be considered null and void shall if no such supplementary agreement can be reached.¹³⁷ Norwegian law allows for much larger latitude. It does not require a certain form for an arbitration agreement. It can be made orally, with a reference to a standard arbitration clause or as an express written agreement.¹³⁸

In addition, Netherlands law provides that the agreement must be in a written form which is same as the Model Law; however, it further requires that the agreement also show, either expressly or impliedly that the agreement is acceptable to the parties.¹³⁹ The Model Law does not contain a similar provision. Again, when cases in Brazil are submitted to arbitration, the relevant arbitral agreements must specifically require whatever information attached to it, but the Model Law does not impose such a requirement in this matter.¹⁴⁰ Libya also has a different provision from the Model Law, because Libyan law does not require the arbitration agreement to be in a written form;¹⁴¹ whereas according to the Model Law, the form of the arbitration agreement shall be in written form.¹⁴²

¹³⁷ Article 18 of China Arbitration Law, Chapter 3

¹³⁸ Section 26 of Norwegian Arbitration Act of 14 May 2004

¹³⁹ Article 1021 of Netherlands Arbitration Act 2004 provides that "The arbitration agreement must be proven by an instrument in writing. For this purpose an instrument in writing which provides for arbitration or which refers to standard conditions providing for arbitration is sufficient, provided that this instrument is expressly or impliedly accepted by or on behalf of the other party. The arbitration agreement can also be proven by electronic means. Article 227a, paragraph 1 of the Civil Code shall apply accordingly."

¹⁴⁰ Article 10 of Law No. 9.307 of 23 September 1996, Brazil

¹⁴¹ Article 739 of Code of Civil and Commercial Procedure 1953, Libya provides that "The parties may, generally, agree to refer to arbitration all disputes amongst them arising out of the performance of a particular contract. They may also agree to arbitrate a particular dispute."

¹⁴² Article 7(2) of the Model Law provides that "2. The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract."

The intendment of the Model Law in this regard is to ensure that parties agree to go into arbitration voluntarily, which is probably better evidenced by a written form of arbitration agreement, exchanged letters of records of the arbitration agreement, or exchanges of statements of claim and defence that one party has stated there is an existence of an agreement, while the other party does not deny or agree.¹⁴³

The Swiss Supreme Court, in considering the issue that form requirement also applies with exceptions, held that due to the modern development of the meaning of telecommunication, liberal interpretation should be given to Article II(2) of the New York Convention. It further held that “in certain situations, the parties' behavior may fill the gap in the observance of a formal validity requirement by virtue of the rules of good faith.”¹⁴⁴ Therefore we may conclude here that the Swiss Supreme Court have in considering the issue that form requirement applies with exceptions, reached the same conclusion that the act of acceptance does not have to be in written form, but can be deduced from the conduct of the parties.

The Swiss Courts, in considering the issue of the form of references have also held that arbitration agreement can be validly incorporated in two situations viz: when signing the contract, and the contract contains certain reference that include general conditions of arbitration clauses, and when general reference is made to the general conditions that are printed on the reverse side of the underlying contract. In the first case, parties have been clearly informed of the existence of the arbitration clause, thus general

¹⁴³ Liebscher, Christoph, “Interpretation of the Written Form Requirement Art.7(2) UNCITRAL Model Law”, (2005), *International Arbitration Law Review*, p164-169

¹⁴⁴ BG, January 16, 1995 BGE 121 III 38.

conditions here do not need to be attached. In the latter case, arbitration agreement can also be valid if the general conditions are already known to the parties. The parties might know of the general conditions because of their regular business relationship, so much so that the other party should know to which document the reference was made, when considering the trade usage and nature of the legal relationship.¹⁴⁵ Also, the Swiss Federal Supreme Court had in another matter considered the issue of authority, and held that arbitration agreements cannot be handled through a representative or an agent, acting on behalf of its principal. In the words of the court, "it must be acknowledged, given the nature of the transaction, that the forwarding agent, in discharging a bill of lading, was acting on behalf of the charterer, which thus in turn acquired title to the merchandise, subject to certain restrictions," even if they have not signed the charterer as the person beneficiary.¹⁴⁶

As regards this same issue, it would appear that jurisprudence is at loss for a complete and universal definition. The Moscow City Court, in Russia had at one time confirmed an arbitral award even though it had found for a fact that the person who had signed the contract, which had contained the arbitration clause, had done so on behalf of the defendant. It would appear that this person did not possess the requisite capacity as the parties to do so, which meant that the underlying contract, as it were, could not have been an enforceable agreement upon which to arbitrate. However, the issue on representation was not further clarified by the court.¹⁴⁷

¹⁴⁵ Liebscher, Christoph, "Interpretation of the Written Form Requirement Art.7(2) UNCITRAL Model Law", (2005), *International Arbitration Law Review*, p164-169

¹⁴⁶ BG, February 7, 1984 (1986) 11 Y.B.C.A. 532.

¹⁴⁷ CLOUT case 147, Moscow City Court, Russian Federation, December 13, 1994.

In addition to the written requirement, the form requirement of the termination of arbitration agreement is also another issue, yet one that has not been clarified by the Model Law. However, it is sufficiently trite that the termination of arbitration agreement should not be subject to the same form requirements for the coming into being of the arbitration agreement.¹⁴⁸ Therefore, as far as the issue of arbitration agreement goes, there are certain differences in the prevalent practices among states. For the parties, once the arbitration agreement has been signed, there will be no possibility for the parties to file a suit in court that pertain those same issues. On the other hand, from the court's view point, when the parties have established an arbitration agreement based on a specific dispute, as soon as this agreement is signed by the parties, they would have relinquished their right to bring a suit in court, and hence arbitral tribunal will be the only competent authority for the case. Arbitration agreement plays a very important role in the whole arbitration and post-arbitration process. When an arbitration agreement has been declared invalid under the law to which the parties have subjected the agreement or the law of country where the award was made, this agreement will in fact have lost its effectiveness and would be lacking in the requisite potency at the point of recognition and enforcement. Nevertheless, even among those states that adopt the Model Law, there are still certain difficulties in achieving harmonisation. Furthermore, even though the Model Law is taken as the harmonising tool for arbitration laws in force in different states, it appears not to have been widely accepted yet. The Model Law was seen as being possibly better suited for states with no developed law or practice of arbitration, for those with a reasonably modern law but not much practice

¹⁴⁸ Liebscher, Christoph, "Interpretation of the Written Form Requirement Art.7(2) UNCITRAL Model Law", (2005), *International Arbitration Law Review*, p164-169

and for those with outdated or inaccessible laws; it was not thought suitable for a country such as England, where the law of arbitration is up to date and where there is extensive current practice. The Model Law has also been held to be largely incomplete.¹⁴⁹

6.6.3 Number of Arbitrators

6.6.3.1 Under the Model Law

Article 10 of the Model Law provides that “the parties are free to determine the number of arbitrators...failing such determination, the number of arbitrators shall be three.” The Working Group had considered stipulating an odd numbers rather than the possibility of even numbers so as to conveniently and significantly reduce the possibility and incidences of deadlocks.¹⁵⁰ But the Secretariat was of the view that the law did not need to be “overprotective.”¹⁵¹ The Secretariat considered that some parties may prefer an even number of arbitrators; and only if a deadlock actually occurred would there be a need to appoint an umpire.¹⁵² The Working Group saw merit in this view, especially as it was also a plus to considerations of party autonomy. Thus at the conclusion of its work, the Working Group came out with the provision that: “the parties are free to determine the number of arbitrators” which features prominently in the first section of this article. The Working Group had given three reasons in support of their proposal for including the provision for the

¹⁴⁹ Harris, Bruce, *Plantenrose, & Honathan Hecks, The Arbitration Act 1996: A Commentary 1*, 3rd edn, 2003; Davidson, Fraser P., “International Commercial Arbitration: The United Kingdom and UNCITRAL Model Law”, (1990), J.B.L., p480, 484

¹⁵⁰ Seventh Secretariat Note, A/CN. 9/264, Art. 10 para.2.p356 *infra*.

¹⁵¹ First Secretariat Note, A/CN. 9/207, Art. 10 para.67.p349-50 *infra*.

¹⁵² First Secretariat Note, A/CN. 9/207, para 67 pp 349-50.*infra*; First Working Group Report, A/CN,9/216 para 47 p 351 *infra*

appointment of three arbitrators: 1. A panel would better guarantee an unbiased understanding of the positions advanced by the parties to the dispute; 2. The arbitral tribunal in International Commercial Arbitration was usually composed by three persons; 3. Article 5 of the UNCITRAL Arbitration Rules also provides that unless parties agree otherwise, the number of arbitrators shall be three.¹⁵³

6.6.3.2 The Issue of Number of Arbitrators among the Model Law Countries

Many countries have adopted this provision wholesale into their own arbitration law, while some others have merely enacted something into their own arbitral system.¹⁵⁴ For example, in Hong Kong, there are two separate and distinct systems, regulating their international and domestic arbitration respectively. Thus, for its international arbitration system and practice, Hong Kong has adopted similar provision to that of Article 10 of the Model Law. The relevant section of the Hong Kong law provides that either the parties determine the number of arbitrators or three arbitrators will be appointed for them, if the parties cannot reach an agreement.¹⁵⁵

¹⁵³ Second Working Group Report, A/CN, Art. 10, para. 3, p. 356 *infra*

¹⁵⁴ Countries follow the Model Law are as the following:

Article 18 of The Commercial Arbitration Law of the Kingdom of Cambodia, Cambodia

Article 9 of Law on Arbitration, Croatia

Section 10 of Danish Arbitration Act, Denmark,

Article 10 of The Law on International Commercial Arbitration, Iran

Article 13 of The Republic of Lithuania Law on Commercial Arbitration, Lithuania

Article 19 of Malta Arbitration Act

Article 10 of the Russian Federation on International Commercial Arbitration, Russia

Article 6 of Arbitration Act No. 11 of 1995, Sri Lanka

Article 10 of Law on International Commercial Arbitration, Ukraine

Section 13 of Act LXXI of 1994 on Arbitration, Hungary

Section 1034 of Code of Civil Procedure - Book IV – Arbitration, German

¹⁵⁵ 34C of Arbitration Ordinance, Hong Kong provides that “(1) an arbitration agreement and an arbitration to which this Part applies are governed by Chapters I to VII of the UNCITRAL Model Law.

(2) Article 1(1) of the UNCITRAL Model Law shall not have the effect of limiting the application of the UNCITRAL Model Law to international commercial arbitrations.

(3) HKIAC is the court or other authority competent to perform the functions referred to in article 11(3) and (4) of the UNCITRAL Model Law and may make rules to facilitate the performance of those

However, some jurisdictions have made some major adjustments to their arbitration legislation to better satisfy their peculiar needs in their own countries. Under Thailand law, the arbitral tribunal shall be composed of an odd number of arbitrators. If the parties stipulate an even number of arbitrators, the arbitrators shall together appoint an additional arbitrator to be the presiding arbitrator. This means that the parties can only agree upon an odd number of arbitrators.¹⁵⁶ Similarly, Bangladesh law also contains such a provision. However under Bangladesh law, the relevant provision does not stipulate that the parties must appoint an even or odd number of arbitrators; instead, it states that in the situation where the parties have decided on an even number of arbitrators, the arbitrators so appointed must appoint an additional arbitrator to be the chairman of the arbitration.¹⁵⁷ In other words, it also permits only odd number of arbitrators to conduct the arbitration. From the above it would appear that these individual jurisdictions have different requirement for the appointment of arbitrators in their arbitration laws. The Indian Arbitration and Conciliation Act, 1996 provides that the parties are free to determine the number of arbitrators but such number shall be an uneven number. However where the parties fail to determine the number,

functions. Any such rules take effect only when the Chief Justice has approved them. (Replaced 75 of 1996 s. 14)

(4) The Court of First Instance is the court or other authority competent to perform the functions referred to in articles 13(3), 14, 16(3) and 34(2) of the UNCITRAL Model Law. (Added 75 of 1996 s. 14. Amended 25 of 1998 s. 2)

(5) If the parties to an arbitration agreement to which this Part applies fail to agree as to the number of arbitrators that is to determine a dispute arising under the agreement, the number of arbitrators is to be either 1 or 3 as decided by HKIAC in the particular case. This subsection applies to the exclusion of article 10(2) of the UNCITRAL Model Law. (Added 75 of 1996 s. 14)

¹⁵⁶ Section 17 of the Arbitration Act, BE 2545 (AD 2002), Thailand

¹⁵⁷ Sanders, Pieter, "UNCITRAL's Model Law on International and Commercial Arbitration: Present Situation and Future", (2005), *Arbitration International*, Volume 21, No. 4, p450

the arbitral tribunal shall be composed of a sole arbitrator.¹⁵⁸ Also, under Mexican¹⁵⁹ and Kenyan laws respectively¹⁶⁰ where the parties cannot reach an agreement as to the number of arbitrators, their arbitration laws each provide that only one arbitrator can be appointed. Similarly, Australian law stipulates that if the parties fail to determine the number of arbitrators for the arbitral tribunal according to law, it would be composed by a sole arbitrator.¹⁶¹ Egypt¹⁶² and Tunisia¹⁶³ avoid this difficulty by providing that the arbitral tribunal shall in any case consist of an odd number of arbitrators.

6.6.3.3 The Issue of Number of Arbitrators of States Not Adopting the Model Law

Just as with the countries discussed above, countries which have not taken the Model Law as the model in enacting their arbitration law, also exhibit certain differences in their arbitration law compared with the Model Law. For example, in Belgium, number of arbitrators should be an uneven number, which is somewhat similar to the provision under the Model Law, but somewhat different. The Model Law provides for three arbitrators if the parties have failed to reach an agreement, whereas Belgian law

¹⁵⁸ Article 10 of the Arbitration and Conciliation Act, 1996, India

¹⁵⁹ Article 1426 of Commercial Code, Title IV (of Book V), Commercial Arbitration, Mexico provides that "Parties are free to determine the number of arbitrators. Failing such determination, there shall be only one arbitrator."

¹⁶⁰ Article 11 of The Arbitration Act, 1995 - No. 4 of 1995, Kenya

¹⁶¹ Article 6 of Australia, South Wales Commercial Arbitration Law

¹⁶² Article 15(2) of Law No. 27 for 1994 for Promulgating the Law Concerning Arbitration in Civil and Commercial Matters, as last amended by Law No. 8/2000 (Official Gazette No. 13, 4 April 2000), Egypt states that "If there is more than one arbitrator, the panel must consist of an odd number, on penalty of nullity of the arbitration."

¹⁶³ Article 55 of Arbitration Code. (Promulgated by Law No. 93-42 of 26 April 1993 in force 27 October 1993), Tunisia provides that "1. The parties are free to determine the number of arbitrators. However the number shall be uneven. Failing such determination, the number of arbitrators shall be three."

provides for only an uneven number or a sole arbitrator.¹⁶⁴ Likewise, in Malaysian law, if the number of arbitrators is not mentioned in the agreement, there will be sole arbitrator.¹⁶⁵ The Model Law on the other hand has provided that the number in such eventuality would be three.¹⁶⁶ In Scotland, before it has given up adopting the Model Law in 2009, the provision stipulating the number of arbitrator's was amended by the Reform Act 1990 to a single arbitrator to be appointed when the parties are unable to reach an agreement.¹⁶⁷ The same provision is adopted in Rule 5 of Scottish Arbitration Rules, Arbitration (Scotland) Act 2009.¹⁶⁸

Again as regards the number of arbitrators, Brazilian law states that if the parties have not determined the number of arbitrators in the arbitration agreement and cannot otherwise reach an agreement on the number, the arbitral tribunal shall be composed of an odd number of arbitrators. Libya has also enacted in its laws a different provision from the Model Law. According to Libyan law, the number of arbitrators must be an uneven number. Under the Code of Civil and Commercial Procedure 1953, the parties are free to appoint a sole arbitrator or several of them. In the case of the nomination or appointment of more

¹⁶⁴ Article 1681 of Judicial Code, Belgium provides that "1. The arbitral tribunal shall be composed of an uneven number or arbitrators. There may be a sole arbitrator. 2. If the arbitration agreement provides for an even number or arbitrators, an additional arbitrator shall be appointed 3. If the parties have not determined the number of arbitrators in the arbitration agreement and do not reach agreement on the number, the arbitral tribunal shall be composed of three arbitrators.

¹⁶⁵ Article 8 of Arbitration Act 1952, Malaysia provides that "When reference is to a single arbitrator unless a contrary intention is expressed therein, every arbitration agreement shall, if no other mode of reference is provided, be deemed to include a provision that the reference shall be to a single arbitrator."

¹⁶⁶ Article 10 of the Model Law provides that "(1) the parties are free to determine the number of arbitrators. (2) Failing such determination, the number of arbitrators shall be three."

¹⁶⁷ Article 10(2) of Reform Act 1990, Scotland provides that "Failing such determination, there shall be a single arbitrator."

¹⁶⁸ Rule 5 of Schedule 1-Scottish Arbitration Rules, Arbitration (Scotland) Act 2009

than one arbitrator, it must be an uneven number of arbitrators.¹⁶⁹ Further on the issue of number of arbitrators, England, and the USA have provided in their relevant laws that if the parties fail to determine the number of the arbitrators according to statutory stipulation, it should be composed by a sole arbitrator.¹⁷⁰ Obviously, the Model Law has so far been unable to achieve harmonisation and unification of the various and different arbitration laws in force globally. It has therefore become necessarily expedient to look elsewhere for arrangements and structures better suited for the accomplishment of this task.¹⁷¹

6.6.4 Appointment of Arbitrators

6.6.4.1 Under the Model Law

Article 11 of the Model Law provides for the procedure for the appointment of arbitrators. It provides for an essential principle regarding nationality of arbitrators at the beginning, and then goes on to provide for the mechanism for the appointment proper.¹⁷² This article provides that no one should be held unappointable as an arbitrator based on their nationality.¹⁷³ The parties are also free to appoint arbitrator(s), but if the parties fail to agree to appoint the arbitrator(s), this article further provides a mechanism which allows the parties appoint one or a three-person tribunal, without the courts intervention. In the event that the methods above fail to produce arbitrators, this article further

¹⁶⁹ Article 744 of Code of Civil and Commercial Procedure 1953, Libya provides that "If there are several arbitrators, their number must always be uneven except in the case of an arbitration between husband and wife which must comply with the provisions of the Shari'a."

¹⁷⁰ Section 15(3) of the English Arbitration Act 1996; Section 5 of Federal Arbitration Act

¹⁷¹ In the next chapter, the supranational arbitration will be discussed

¹⁷² Fn 7, at p358-359

¹⁷³ Fn 7, at p359

stipulates that the court has the power to appoint arbitrator(s). However the court is to remain independent and just in so doing, and in its management of related issues, as well as in managing related issues such as not limiting the nationality of the arbitrators.¹⁷⁴ As a general rule, under the Model Law, the parties are free to agree upon the procedure for appointment of arbitrators. However, in the event that the parties are not able to reach an agreement in a three-arbitrator's arbitration, the parties will each appoint one, and the two so appointed will then appoint the third arbitrator. In the case of a sole arbitrator arbitration, the court of appointed authority will appoint the arbitrator.

6.6.4.2 Provisions Relating to the Appointment of the Arbitrator among the Model Law Countries

Many countries have adopted this provision on procedure for appointment of arbitrators into their arbitration system, taking care to ensure that it aligns quite closely with relevant provisions under the Model Law.¹⁷⁵ However some other countries have enacted laws with different provisions than the Model Law on this point. Furthermore, Croatian law provides that only judges of the Croatian courts

¹⁷⁴ Ibid

¹⁷⁵ Countries adopt the laws Article 11 of the Model Law include:

Article 19 of The Commercial Arbitration Law of the Kingdom of Cambodia, Cambodia

Section 11 of Danish Arbitration Act, Denmark

Article 17 of Japan Arbitration Law, Japan

Article 14 of The Republic of Lithuania Law on Commercial Arbitration, Lithuania

Article 1427 of Commercial Code, Title IV (of Book V), Commercial Arbitration, Mexico

Article 11 of Law of the Russian Federation on International Commercial Arbitration, Russia

Article 7 of Arbitration Act No. 11 of 1995, Sri Lanka

Section 18 of Arbitration Act, BE 2545 (AD 2002), Thailand

Article 11 of Law on International Commercial Arbitration, Ukraine

Section 14 of Act LXXI of 1994 on Arbitration, Hungary

Article 11 of The Arbitration and Conciliation Act, 1996 (No. 26 of 1996), India

Article 17 of Law No. 27 For 1994 Promulgating The Law Concerning Arbitration in Civil and Commercial Matters, Egypt

Section 1035 of Code of Civil Procedure - Book IV – Arbitration, German

are eligible to be appointed as the presiding arbitrator or the sole arbitrator.¹⁷⁶ On the other hand, the Model Law does not restrict the appointment of arbitrators by reference to the qualification of the presiding or the sole arbitrator. The provision of the Croatian law on the presiding and sole arbitrator actually violates one of the pillar purposes of the Model Law; which is to minimize as much as is possible and practicable the intervention of the court in the arbitral proceedings. The Commission had made it very clear that the term “intervene” in Article 5 included court action that might be thought as “assistance” to the arbitration. Consequently, Article 5 should not be interpreted as expressing hostility to court intervention or assistance in arbitral proceedings, but merely to satisfy the dictates of necessity with regard to when court action is desirable.¹⁷⁷ Furthermore, the Model Law does not require any specific person or organization to be appointed as the third arbitrator, and the parties have absolute freedom to appoint. Croatian law also stipulates that if the parties wish to appoint a judge as one of the arbitrators, they can only appoint the judge to sit as the sole or presiding arbitrator.¹⁷⁸

Again, Egyptian law provides that when an arbitrator’s capability has been impugned by credibility issues arising from other incident(s), such a person cannot be appointed arbitrator unless that credibility has been restored one way or the other. Furthermore to be appointed arbitrator, such person must have attained full legal capacity. Egypt, for example, specifically provides a detailed list

¹⁷⁶ Article 10 of Law on Arbitration, Croatia

¹⁷⁷ Fn 7, at p25

¹⁷⁸ Article 10 of Law on Arbitration, Croatia

of categories of persons who will not ordinarily qualify as arbitrators, such as minors, persons under curatorship or guardianship, persons deprived of their civil liberties for committing criminal offences or persons declared bankrupt and have not had a full restoration of their rights.¹⁷⁹

Some other jurisdictions have provided for a wider range of restrictions on the qualification for appointing arbitrators. Hungarian arbitration law for example provides for certain categories of people that cannot be appointed as arbitrator. These include people who are less than 24 years of age, who have committed crime, or those who are serving prison sentences at the material time.¹⁸⁰ Malta and Iran also have some specific limitations for appointment. In the case of Malta, the appointment is done neither by the parties nor the arbitral tribunal. The parties must submit a statement of claim indicating their choice of arbitrators to the chairman of the arbitration center, who will then make the appointment of arbitrators for the parties.¹⁸¹ Iranian law provides a very different kind of limitation based basically on the nationality of the arbitrator. It stipulates that the arbitrator cannot have the same nationality as any of the parties.¹⁸² Generally, many of the countries whose laws are different from the Model Law have such differences in the provisions for the qualifications or the procedure for appointment of arbitrators. It is only in Iran that we find a provision to the effect that a dispute may not qualify for arbitration if any of the arbitrators are of the same nationality as any of the parties.

¹⁷⁹ Article 16 of Law No. 27 For 1994 Promulgating The Law Concerning Arbitration in Civil and Commercial Matters, Egypt

¹⁸⁰ Section 12 of Act LXXI of 1994 on Arbitration, Hungary

¹⁸¹ Article 20 of Malta Arbitration Act 1996

¹⁸² Article 11(1) of The Law on International Commercial Arbitration, Iran

6.6.4.3 Provisions Relating to the Appointment of the Arbitrator of States Not Adopting the Model Law

Besides the aforementioned states, there are still some other countries that have not adopted the Model Law, but have made some important points worth mentioning here. For example, Chinese law has set out certain criteria to *wit*: “If the parties agree that the arbitration tribunal shall be composed of three arbitrators, they shall each appoint or entrust the chairman of the arbitration commission to appoint one arbitrator. The parties shall jointly select or jointly entrust the chairman of the arbitration commission to appoint the third arbitrator who shall be the presiding arbitrator.”¹⁸³ However, the Model Law does not have such provisions. The Swedish Arbitration Act is similar to China’s; it also has provided certain limitations in the appointment of arbitrators, such as its relationship with the parties and disputes respectively. The Model Law does not contain provisions which limit appoint ability of this kind of arbitrators.¹⁸⁴ Scotland, in its recent Arbitration (Scotland) Act 2009, has provided a similar provision to the Model Law, stating that an individual is not capable to act as an arbitrator if he is under 16 years of age or an incapable adult.¹⁸⁵

Also, according to the Switzerland Private International Law Statute, the arbitrator’s appointment is based on the agreement between parties. If there is no agreement between parties, either party may apply

¹⁸³ Article 31 of the China Arbitration Law, 1994; Article 34 of Arbitration Law of the People's Republic of China provides that “In one of the following circumstances, the arbitrator must withdraw, and the parties shall also have the right to challenge the arbitrator for a withdrawal:

(1) The arbitrator is a party in the case or a close relative of a party or an agent in the case;
(2) The arbitrator has a personal interest in the case;
(3) The arbitrator has other relationship with a party or his agent in the case which may affect the impartiality of arbitration; or
(4) The arbitrator has privately met with a party or agent or accepted an invitation to entertainment or gift from a party or agent.”

¹⁸⁴ Section 7, 8 of the Swedish Arbitration Act

¹⁸⁵ Rule 4 of Schedule 1-Scottish Arbitration Rules, Arbitration (Scotland) Act 2009

to the court of the place of arbitral proceedings. The court will appoint the arbitrator for the party subject to the provision of the state law for the appointing of an arbitrator.¹⁸⁶ In South Africa case, according to South Africa Arbitration Act, appointment of arbitrators and the power/authority to fill vacancy are allowed by power of parties. Arbitrators may at any time appoint arbitrators up to three, if an arbitration agreement gives for reference an even number of umpires, and unless a contrary intention is expressed or can be inferred. If there are three arbitrators appointed, and one of the arbitrators is appointed by the other two, then such agreements will be explained as providing for the appointment of an arbitrator by the other two umpires after they themselves have been appointed, unless a contrary intention is expressed within or can be inferred. Parties or umpires may only appoint another arbitrator in another appointed arbitrator's place, when the appointed arbitrator refuses or is incapable of acting. Situations caught by this provision, would include death, removal from office, or purely a termination of appointment.¹⁸⁷

6.6.5 Procedure for Challenge of Arbitrators

Article 13(1) of the Model Law allows the parties the freedom to agree on the procedure for challenging an arbitrator. Parties mostly agree on the procedure for challenging an arbitrator by reference to arbitration rules. It has been provided in para 1 of the Model Law, that this freedom is dependent on the provisions of para.3. If the parties have not yet agreed on a procedure, then the first step will be to ensure the arbitral tribunal (which includes the challenged arbitrator) settles the challenge (para.2). If the challenge turns out to be unsuccessful, whether under the procedure of

¹⁸⁶ Article 179 of Swiss Private International Law Statute

¹⁸⁷ Article 11(2) of Arbitration Act 1965, South Africa

para.2 (decision by the arbitral tribunal) or procedure agreed upon by the parties, then the challenging party may request the court to settle the challenge, in which case the court's decision becomes final and unimpeachable. The arbitral tribunal, including the challenged arbitrator, may continue with the arbitral proceedings even to the point of handing down the arbitral award pending the outcome of the challenge (para.3).

6.6.5.1 The Issue of Challenging an Arbitrator among the Model Law Countries

The Model Law has provided for the procedure and the grounds available to challenge the appointment of arbitrator(s). It provides generally that when an arbitrator has exhibited bias in conducting the arbitration, one of the parties will have reasonable grounds to raise a challenge. The challenge application should be submitted in the first instance to the arbitral tribunal for its determination. If the challenge is not successful from the arbitral tribunal, the aggrieved party may go higher to submit it to a court of competent jurisdiction for reconsideration. However, if the court of competent authority reaches a decision, it shall be final and unappealable. This procedure has been adopted by many countries.¹⁸⁸ However, there are still some jurisdictions that have made

¹⁸⁸ Countries adopt same grounds of challenging an arbitrator as the Model Law:
Article 18 of Law No. 27 For 1994 Promulgating The Law Concerning Arbitration in Civil and Commercial Matters, Egypt
Section 1036 of Code of Civil Procedure - Book IV – Arbitration, German
Section 18 of Act LXXI of 1994 on Arbitration, Hungary
Article 12 of The Arbitration and Conciliation Act, 1996 (No. 26 of 1996), India
Article 12 of Law of the Russian Federation on International Commercial Arbitration, Russia
Article 10 of Arbitration Act No. 11 of 1995, Sri Lanka
Section 19 of Arbitration Act, BE 2545 (AD 2002), Thailand
Article 12 of Law on International Commercial Arbitration, Ukraine
Article 20 of The Commercial Arbitration Law of the Kingdom of Cambodia, Cambodia
Article 12 of Law on Arbitration, Croatia
Section 12 of Danish Arbitration Act, Denmark

some modification to this general procedure for challenge. For example, Malta does not allow direct communication between the parties and the arbitral tribunal. It provides for an authority known as the Registrar to deal with the communication between the parties and the arbitral tribunal. Every submission from the parties to the arbitral tribunal is required to go through the Registrar. By this procedure, if a party wishes to challenge an arbitrator, it would need to submit an application in writing to the Registrar indicating the reason for the challenge, who will in turn submit the application to the arbitral tribunal for determination.¹⁸⁹

Nigerian law does not involve the arbitral tribunal in the settling of the challenge. It, however, has delegated this task to the authority that was appointed.¹⁹⁰ The Secretary-General of the Permanent Court of Arbitration, The Hague, will act as the Appointing Authority, if no party has been designated.¹⁹¹ The UNCITRAL Arbitration Rules, under its provision on “the decision on the challenge delegating to the Appointing Authority,” may have inspired this procedure in the Nigerian model.¹⁹² In Tunisia, the parties are free to agree on a challenging procedure, as for example, delegating the challenge to an Arbitral Institute in pursuance of the provisions of paragraph 3 of Article 58.¹⁹³ In case a challenged arbitrator does not withdraw from his office or the other party

Article 12 of The Law on International Commercial Arbitration, Iran

Article 18 of Japan Arbitration Law, Japan

Article 13 of The Arbitration Act, 1995 - No. 4 of 1995, Kenya

Article 15 of The Republic of Lithuania Law on Commercial Arbitration, Lithuania

Article 1428 of Commercial Code, Title IV (of Book V), Commercial Arbitration, Mexico

¹⁸⁹ Article 25(2) of Malta Arbitration Act 1996

¹⁹⁰ Section 45(9) of Arbitration And Conciliation Decree 1988, Nigeria

¹⁹¹ Section 54 (2) of Arbitration And Conciliation Decree 1988, Nigeria

¹⁹² Article 12 of the UNCITRAL Arbitration Rules

¹⁹³ Article 58(1) of Arbitration Code, Tunisia

does not agree to the challenge, the Court of Appeal of Tunis will provide for the determination on the challenge mentioned in this paragraph.¹⁹⁴ Tunisian law deviates from the Model Law as a determination on the challenge taken by the arbitral tribunal (arbitrator), failing an agreement on the challenge procedure by the parties is omitted.¹⁹⁵

In Canada, Section 13 of the International Commercial Arbitration Act, the British Columbia, is almost *impari materia* as Article 13 of the Model Law. However Section 13(5) of the Act provides that “if a request is made under subsection (4), the Supreme Court may refuse to decide on the challenge, if it is satisfied that, under the procedure agreed on by the parties, the party making the request had an opportunity to have the challenge decided by a means other than the arbitral tribunal.” Thus the court can refuse to determine the challenge in case where for instance the parties could have delegated the decision to an Arbitral Institute.

In addition, Indian law also differs from the Model Law in this respect. According to the Model Law, the arbitral proceeding will not be suspended or delayed even when the parties have filed a challenge application. The arbitral tribunal, including the challenged arbitrator will continue the proceedings and can even make an award.¹⁹⁶ However, under Indian law, the arbitral tribunal will not resume the arbitral proceeding unless the challenge issue has been resolved.¹⁹⁷ Indian law also

¹⁹⁴ Article 58(3) of Arbitration Code, Tunisia

¹⁹⁵ Article 13(2) of the Model Law

¹⁹⁶ Article 13(3) of the Model Law

¹⁹⁷ Article 13(4) of The Arbitration and Conciliation Act, 1996 (No. 26 of 1996), India

provides that once the arbitrator has been successfully challenged, the court will determine if the challenged arbitrator should be entitled to fees.¹⁹⁸ The Model Law is however silent on this issue. Egyptian law contains provisions similar to Article 13 of the Model Law. It had amended Article 19 of its new law in 1994, by inserting a fourth paragraph which provides that “if the arbitrator is successfully challenged, whether by a decision of the arbitral tribunal or by the court reviewing the challenge, the arbitral proceedings already conducted shall be considered null and void, including the arbitral award.”¹⁹⁹ The Model Law however provides for the appointment of a substitute arbitrator in such an eventuality of a successful challenge.²⁰⁰

Tunisian law had also modified the Model Law in this respect, but does not empower the arbitral tribunal to determine the application of challenging an arbitrator. Instead, the question as to whether an arbitrator can be challenged is left solely to the court to determine.²⁰¹ Furthermore, just as it obtains under Article 13(3) of the Model Law, Danish law has provided that if a challenge made by the parties or according to the procedure under subsection (2) does not succeed, the challenging party may appeal to the courts to determine the challenge, within thirty days after receiving notice of the decision rejecting the challenge. While such a request is pending, the arbitral tribunal, sitting with

¹⁹⁸ Article 13(6) of The Arbitration and Conciliation Act, 1996 (No. 26 of 1996), India provides that “(6) Where an arbitral award is set aside on an application made under sub-section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.”

¹⁹⁹ Article 19(4) of Law No. 27 for 1994 for Promulgating the Law Concerning Arbitration in Civil and Commercial Matters (Official Gazette No. 13, 4 April 2000), Egypt

²⁰⁰ Article 15 of the Model Law

²⁰¹ Fn 60, at p451

the challenged arbitrator, may proceed to with the proceedings and even issue an award.²⁰²

However, under the Model Law, there will be no appeal following the decision made by the court.²⁰³ Under Danish law, on the other hand, if a challenge conducted according to any procedure agreed on by the parties is not successful, the challenging party may request the courts to decide on the challenge.²⁰⁴ But a party cannot be deprived of his right by agreement or by the rules of an arbitration institution. Furthermore, the court cannot reinstate an arbitrator who has retired due to the challenge or who has been removed by the appointing authority.²⁰⁵ German law also omits the stipulation of no appeal in challenging an arbitrator.²⁰⁶ The parties have the right of further appeal if they are not satisfied with the decision made by the court of first instance.

In Scotland, the Rules of the Scottish Arbitration Rules, Arbitration (Scotland) Act 2009 have provided similar provisions to the Model Law regarding the grounds of challenging the appointment of arbitrators;²⁰⁷ however, the outcome of the challenge are different for both regulations. This is due that above Rules stating that an arbitrator may be removed by parties,²⁰⁸ the Outer House may remove an arbitrator if any party applies with satisfied application, and especially the Outer House may dismiss the tribunal if a party apply with reason that substantial unfairness has been or will arise to that party, as the tribunal was unable to conduct the arbitration according to the arbitration

²⁰² Section 13(3) of the Danish Arbitration Act

²⁰³ Article 13(3) of UNCITRAL Model Law

²⁰⁴ Section 13(3) of Danish Arbitration Act 2005, Denmark

²⁰⁵ Philip, Allan, *International Handbook on Commercial Arbitration*, Volume II – Denmark, 1997, p8-9

²⁰⁶ Fn 60, at p451

²⁰⁷ Article 12 of the Model Law, Rule 10 of Schedule 1-Scottish Arbitration Rules, Arbitration (Scotland)Act 2009

²⁰⁸ Rule 11 of Schedule 1-Scottish Arbitration Rules, Arbitration (Scotland)Act 2009

agreement, these rules which they apply, or any other agreement by the parties regarding to conduct of the arbitration.²⁰⁹ Furthermore, the Outer House may remove an arbitrator, or dismiss the tribunal, only if the arbitrator or tribunal may have been notified of the application for removal or dismissal, and so on.²¹⁰ Besides, if the parties agree to the resignation, an arbitrator may resign by sending word of resignation to the parties and any other arbitrators and so on.²¹¹

6.6.6 Recognition and Enforcement of the Award

The purpose of arbitration is not only to enable an amicable settlement of a commercial dispute, but also to ensure that the arbitral award shall be binding and final on the parties. Once this award has been made, the parties would usually try to carry out the award to the letter. It is a reasonable expectation that the successful party hopes the award to be performed in as short a time as possible.²¹² Generally, the majority of awards are executed voluntarily. However, in such cases where the party against whom the award had been made rejects it and refuses to abide by it, the other party would be constrained to take steps to compel the performance of the award.²¹³

A dispute might arise wherein the party in whose favour the award had been made, insists that the dispute had already been decisively resolved. In proof of his/her position, and to obtain a favorable order of the court, the party would present to the court the award, and ask the court to admit the

²⁰⁹ Rule 13 of Schedule 1-Scottish Arbitration Rules, Arbitration (Scotland)Act 2009

²¹⁰ Rule 14 of Schedule 1-Scottish Arbitration Rules, Arbitration (Scotland)Act 2009

²¹¹ Rule 15 of Schedule 1-Scottish Arbitration Rules, Arbitration (Scotland)Act 2009

²¹² Boyd, Mustill, *Commercial Arbitration*, 2nd edn, p47; Fn 1, at p461

²¹³ Fn 1, at p461

award as valid, as regards all relevant issues covered by the arbitration. However, where a court is asked by the party to enforce an award, they not only request the court to admit the legal effect and result of it, but also requests for the court to apply practicable legal sanctions, to ensure that the award is enforced and duly complied with. Enforcement is a step farther than admission. The court would be prepared to grant the enforcement of an award, because it admits that the award was validly made, binding on the parties to it, and therefore good and suitable for enforcement.²¹⁴

Recognition is a mechanism used to prevent any party from raising any issues in the new procedure, which has already been properly resolved in the arbitration.²¹⁵ The purpose of enforcement here is to apply legal sanctions to force the party against whom the award had been made to comply with the stipulations of the award.

6.6.6.1 The Position Under the Model Law

The provisions of the Model Law regime for the enforcement of arbitral awards were borrowed from the New York Convention. Article IV(II) of the New York Convention has been wholly adopted by Article 35(2) of the Model Law; to wit: the award and the arbitration agreement or a duly certified copy with translation shall be accompanied by an application for enforcement. Article 36(1) of the Model Law basically repeats the same grounds for refusal of enforcement as contained in

²¹⁴ Ibid

²¹⁵ As expressed in the English Arbitration Act 1996, s.101(1), the award is recognized “as binding on the persons as between whom it was made” so that it may accordingly be used by these persons “by way of defence, set-off or otherwise” in any legal proceedings in England and Wales or Northern Ireland.

Article V of the Convention. Article 36(2) of the Model Law also borrows directly from Article VI of the New York Convention, which deal with the coincidence of an application for setting aside or suspension of the award with a request for enforcement. These provisions of international commercial arbitration notwithstanding the location have similarities that would go a long way towards ensuring the uniform treatment of international awards.²¹⁶

As far as the recognition and enforcement of arbitral awards go, Article 35(1) of the Model Law provides that, “An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.” The enforcement regime under Article 35(1) applies regardless of the country in which the award was made. The Model Law applies only if the place of arbitration is in the territory of this state, with an exception made specifically where Articles 8, 9, 35 and 36 are concerned.²¹⁷ Therefore these enforcement provisions can also apply to awards that are made abroad regardless of whether the foreign country adopts the Model Law or not.

6.6.6.2 The Issue of Recognition and Enforcement of the Award among the Model Law Countries

Several states have modified versions of the Model Law. Egypt presents a good example, as it did not make the exception for Articles 35 and 36 mentioned above. Thus its enforcement proceedings

²¹⁶ Analytical Commentary by the Secretary-General, 25 March 1985, Guide to the Model Law, p1040 at 3

²¹⁷ Article 1(2) of the Model Law

can only apply to domestic awards or awards made outside Egyptian territory, but which nevertheless was done in accordance with Egyptian law.²¹⁸ Egyptian law also provides that a valid, recognizable and enforceable award must contain detailed records, such as name of the parties, the nationality of the arbitrators, etc;²¹⁹ whereas the Model Law only requires a valid award to indicate the place of arbitration and the date of the award. Furthermore the practice in Egypt also stipulates that when applying for the enforcement, the award will only be considered as valid if it is in writing and contains: (1) the original or certified copy of the arbitration agreement; (2) a summary of the parties' submission; (3) a list of the document was submitted by the parties; (4) the reason of such documents is being submitted; (5) expressly indicate that the decision has been agreed by the majority of the arbitral tribunal; (6) the place and date of the issuance; and (7) the arbitrators must also sign the award.²²⁰ Some other states have even gone as far as completely expunging Article 35 and 36 of the Model Law from their version of the law. For example, the Australian Act states that except for this section, where both Chapter VIII (Recognition and Enforcement of Awards) of the Model Law and Part II of Australia's International Arbitration Act would apply in regards to an award, Chapter VIII of the Model Law does not apply.²²¹

The same situation exists under the Bermudan Act, wherein it stipulates that "Where, but for this

²¹⁸ Article 9, 58 of Law No. 27 for 1994 for Promulgating the Law Concerning Arbitration in Civil and Commercial Matters, Egypt., Article 1 of the Model Law

²¹⁹ Article 43, Law No. 27 For 1994 Promulgating The Law Concerning Arbitration in Civil and Commercial Matters, Egypt

²²⁰ Fn 104, at p34

²²¹ Article 20 of Australia's International Arbitration Act

section, both Chapter VIII of the Model Law and Part IV of this Act would apply in relation to an award, Chapter VIII of the Model Law does not apply in relation to the award.”²²² Furthermore, several states in the USA adopting the Model Law avoid inserting Articles 35-36, as they have to follow the Federal Arbitration Act.²²³ Oregon; however, has added a third paragraph to s.36.522, thereby regulating in further detail the enforcement action, despite its wholesale adoption of Articles 35 and 36 in its ss.36.522 and 36.524 (grounds). Californian law, on the other hand which is actually tailored according to the Model Law, does not contain Articles 35 and 36 or any equivalent provision. Only certain provisions on enforcement of interim awards in ss.1297.92 and 171 are contained. However, the Texas Statute does not contain any provisions whatsoever on the enforcement of awards.²²⁴ Peru, in its new law, maintains the grounds for refusal as enshrined in Article 36(1) of the Model Law, but has expunged Article 36(2) on the issue of the setting aside and enforcement of proceedings.²²⁵ Mexican law provides that Article 360 CCP will provide the procedure, which indicates that accelerated procedure and court decisions without appeal are exactly what this article seeks to introduce.²²⁶

In addition, Germany has adopted a system which accords the same legal treatment to both New

²²² Article 28 of The Bermuda International Conciliation and Arbitration Act 1993 states that “Where, but for this section, both Chapter VIII of the Model Law and Part IV of this Act would apply in relation to an award, Chapter VIII of the Model Law does not apply in relation to the award.”

²²³ For the Federal Arbitration Act of the USA see Annex I to National Report: USA in ICCA Handbook

²²⁴ Fn 62, at p24-25

²²⁵ Article 109 of Decree Law 1992, Peru

²²⁶ Article 1463(2) of Code of Commerce Title IV, Book V Commercial Arbitration, Mexico provides that “Recognition and enforcement proceedings shall be conducted in accordance with the provisions of Article 360 of the Federal Code of Civil Procedure. The decision shall be subject to no appeal.”

York Convention award and non-New York Convention awards.²²⁷ The same applies to Japan.²²⁸

Since there appear to be too many different and often conflicting provisions regarding the recognition and enforcement of foreign awards among different states, some other states have chosen not to differentiate between the recognition and enforcement of a New York Convention award and regular foreign arbitral award; they recommend the same procedural rules for both kinds of awards. For example, some states have adopted the same procedural rules for both the convention award and domestic arbitral award. The New Zealand 1996 Arbitration Act for example, provides that irrespective of the state where the award was made, it should be recognized as a binding award. All courts should recognize such award as binding, and it can also be entered in the register in the supreme court as an award or subject of a lawsuit in the supreme court for enforcement.²²⁹

The same situation is obtainable in Sri Lanka and Thailand where there is no differentiation between awards made for member states or non member states of the New York Convention.²³⁰ Where parties have applied to the court for enforcement or to set aside an award, the court must determine if there are any issues in the award that might be the subject of an appeal or ground an order to set aside.²³¹ The court will enforce such an award only if and when it is satisfied that none of elements

²²⁷ Section 1061 of German Arbitration Law 1998

²²⁸ Article 802 of Code of Civil Procedure, Japan provides that “1. Enforcement under the arbitral award can be carried out only when an enforcement judgment declares that such enforcement is permissible.2. “ An enforcement judgment shall not be rendered when there is a ground to set aside the arbitral award.”; Article 1498-1507 of Code of Civil Procedure - Book IV – Arbitration, France

²²⁹ Article 35, 36 of Arbitration Act 1996, New Zealand., Tomas Kennedy - Grant, Intl. Handbook on Comm. Arb., Suppl. 25, 1998, New Zealand, p32

²³⁰ Section 33 of Arbitration Act No. 11 of 1995.Sri Lanka., Section 23 of Arbitration Act, BE 2545 (AD 2002), Thailand

²³¹ Section 34(2) of Arbitration Act No. 11 of 1995, Sri Lanka provides that “If an application for setting aside or suspension of an award has been made to a court on the ground referred to in sub-paragraph (v) of paragraph (a) of subsection (1) of this section, the court where recognition or enforcement is sought

which can necessitate it setting aside the award can be found in the award. However Sri Lankan law also requires the party seeking enforcement to begin proceedings for enforcement no later than one year after the expiry of fourteen days after the award.²³² Thai law provides that, the court will only enforce the award that was made by the courts in which the award was given in accordance with a treaty or convention to which Thailand has agreed or is committed to, and also, only to the extent to which Thailand has agreed to follow or be bound.²³³ This is in sharp contrast with the Model Law's drive at harmonisation. Under the Model Law, the arbitral tribunal has absolute power to decide disputes that have been submitted to arbitration, and to which the court or the country will not interfere unduly unless some specific problems had occurred.²³⁴ Just as in Sri Lanka, under Lithuania's law, the parties are required to submit their award to the court to pronounce on the validity of the award. Where the court confirms the award as valid, it will then adopt it as a judgment, ready to be enforced. In other words, the subsequent judgment of the court gives the award the special quality of enforceability.²³⁵

may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.”

²³² Article 31 of Arbitration Act No. 11 of 1995, Sri Lanka

²³³ Section 41 of Arbitration Act 2002 Thailand provides that “Subject to the provisions of sections 42, 43 and 44, an arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application to the competent court, shall be enforced

In case of an arbitral award made in a foreign country, a competent court shall enforce the award only if it is governed by a treaty, convention or international agreement to which Thailand is a party, and it shall have effect only to the extent that Thailand agrees to be bound.”

²³⁴ Article 5 of UNCITRAL Model Law provides that “In matters governed by this Law, no court shall intervene except where so provided in the Law.”

²³⁵ Article 39 of The Republic of Lithuania Law on Commercial Arbitration, Lithuania provides that “1. An arbitral award made in any State which is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards shall be recognized and enforced in the Republic of Lithuania according to the provisions of this Article, Article 40 and the New York Convention mentioned above.

2. The party applying the recognition and enforcement of a foreign arbitral award shall supply the Lithuanian Court of Appeal with the duly authenticated original award or a duly certified copy thereof,

Also worthy of mentioning is Malta's law of enforcement. Under Maltese law, once the arbitral tribunal has rendered the award, the parties decide if they would want to register the award with the Arbitration Center. However, Article 61 of the Maltese Arbitration Act 1996 provides two separate procedures to be followed, for the enforcement of awards which have been registered with the center and those that have not been registered respectively. Where parties have sought registration of their award, the law provides that no award can be enforced if it is made within three months. However if the parties wish to register an award that is less than three months old, then they must submit a statement of claim with the application for enforcement, which must state that none of the parties will file any further appeals seeking to have the award enforced.²³⁶ The Center²³⁷ will then examine the award, and decide on its enforceability. Once the Centre has decided in favour of enforcing the award it will be enforced without the necessity of going through the court system for examination.²³⁸ On the other hand, where parties had decided to seek enforcement of their award without registration with the center, the parties are required to submit the award to the court for

and the original arbitration agreement referred to in Article 9 or a duly certified copy thereof. If the arbitral award or arbitral agreement is not made in an official language of this state, the party shall supply a duly certified translation thereof into the Lithuanian language.

3. Recognized foreign arbitral awards in Lithuania shall be enforced in the manner prescribed by the Code of Civil Procedure of the Republic of Lithuania.”

²³⁶ Article 61(4) of Malta Arbitration Act 1996 provides that “The Registrar shall not register an international award prior to the lapse of at least three months from the date of the award unless the parties confirm in writing that they do not intend to take any recourse against the award in terms of applicable law.”

²³⁷ Malta Arbitration Centre as a centre for both domestic and international commercial arbitration, to make provisions regulating the conduct of arbitration proceedings and the recognition and enforcement of certain arbitral awards.

²³⁸ Article 72(5) of Malta Arbitration Act 1996 provides that “(5) upon its registration with the Centre the award shall be final and binding and, furthermore, may not be challenged”

evaluation, and once the court is convinced of its validity, it orders enforcement of the award.²³⁹

It suffices to say here however, that the Model Law has in place a well-organized structure for the recognition and enforcement of awards so much, so that among those countries that have integrated the Model Law into their legal system, many have done a wholesale importation of provisions of the Model Law into their legislations.

6.6.6.3 The Issue of Recognition and Enforcement of the Award of States Not Adopting the Model Law

Other than the examples given above for those countries which have adopted the Model Law, here are some examples for the arbitration regulations among countries that have not adopted Model Law in establishing their arbitration system. Among them, the objection against awards could be addressed at either a substance organization or courts. For example, in Saudi Arabia, parties could address the objection against awards to the committee on setting aside the arbitral award.²⁴⁰ When parties are allowed to object to awards, they generally and usually choose to appeal through the court system. French Code of Civil Procedure provides that the laws which apply to the enforcement of a domestic arbitral award would also apply to the enforcement of foreign award. This is a simpler

²³⁹ Article 61(8) of Malta Arbitration Act 1996 provides that “Where no party has registered the award with the Centre in terms of this article, any party relying on an international award may at any time apply to the Court of Appeal for recognition and enforcement of the said award in accordance with Part VIII of the Model Law and the provisions in that part shall apply mutatis mutandis to any appeal which may have been reserved in terms of article 69A (3).”

²⁴⁰ Article XVIII of the Arbitration Regulations of the Kingdom of Saudi Arabia states that parties can submit their objections of the award to the authority if the award was deposited within fifteen days from the date of their notification of the award. This rule also applies to explanatory awards and to appeals from an award correcting the original award on the grounds that the arbitrators exceeded their authority. Failing timely objection, the award becomes final.

procedure for the recognition and enforcement of foreign award.²⁴¹ However, at the stage of enforcement, after the award has been made, enforcement of it must be supervised by the court.²⁴² Some countries have been influenced by the theory of non-domestic, and abandoned the authority to supervise in the country. For example, Article 1717(4) of Belgian Judicial Code provides that “the parties may, by an explicit declaration in the arbitration agreement or by a later agreement, exclude any application for the setting aside of an arbitral award, in case none of them is a physical person of Belgian nationality or a physical person having his normal residence in Belgium or a legal person having its main seat or a branch office in Belgium,” so that the authority to control arbitral proceedings transfers from the country of the place of arbitration to the country where the award was recognized and enforced. Judicial supervision in arbitral proceedings could only delay to the stage of recognition and enforcement after the award has been made.²⁴³

From the above, it is obvious that the adopting countries of the Model Law do not completely adopt the provisions of the Model Law on this issue, and there are also certain differences in the various laws in force in adopting countries. Although the non-domestic awards which were made by virtue of the “delocalisation theory” should not encounter difficulties while enforcing the awards, in practice, they do not receive common support from each country. As for whether arbitral awards will be recognized or

²⁴¹ Chapter IV, Article 1498 of Code of Civil Procedure, France provides that “Arbitral awards shall be recognized in France where their existence has been established by the one claiming a right under it and where recognition of the same would not manifestly be contrary to public international order. Under the same conditions, they shall be rendered enforceable in France by the judge for enforcement.”

²⁴² Article V of New York Convention

²⁴³ 473. U.S. 614 (1985).

enforced in the state of the enforcement or not is still a problem. Therefore, there are still differences in the provisions of the arbitration acts in force in different countries. Although the Model Law made efforts to influence the arbitration act of each country, it appears to be very far from achieving unification and coordination.

There are also countries that have quite different laws, such as Libya. Under the arbitration law of Libya, the courts are required to examine the enforceability of the award before enforcement can take place as well as that “The ruling is endorsed on the award and the clerk of the court notifies the parties of the registration as well as the grant of leave to enforce by the court according to the procedure provided for notification of judgments. Recourse against the decision to refuse leave to enforce must be made before the Court of First Instance, if the refusal was made by a sole judge and before the Court of Appeal if it was made by the Court of First Instance.”²⁴⁴ Nevertheless, the Model Law does not require or empower the courts to perform such examinations. Yet, by establishing the provision which prohibits court intervention unless certain situations arise,²⁴⁵ the Model Law attempts to minimize the court intervention in the arbitration process. Therefore, the arbitral tribunal will decide the content of the award as well as the enforceability. On the other hand,

²⁴⁴ Article 763 of Code of Civil and Commercial Procedure 1953, Libya provides that “The award is only enforceable following a ruling by the judge of summary proceedings of the court with which the original of the award was registered, made upon a request from one of the concerned parties. This ruling must be made after consideration of the award and the agreement to arbitrate, and after having made sure that there is no reason which would prevent it from being enforced The ruling is endorsed on the award and the clerk of the court notifies the parties of the registration as well as the grant of leave to enforce by the court according to the procedure provided for notification of judgments. Recourse against the decision to refuse leave to enforce must be made before the Court of First Instance, if the refusal was made by a sole judge and before the Court of Appeal if it was made by the Court of First Instance.”

²⁴⁵ Article 5 of the Model Law provides that “In matters governed by this Law, no court shall intervene except where so provided in this Law.”

the court will not examine the enforceability when the party applies for enforcement and there is no need for the parties to submit their arbitration agreement.²⁴⁶ On the contrary, according to the Libyan law, the court will once make sure that the award is enforceable when the parties apply for enforcement, and for that reason, the parties are also required to submit a copy of the arbitration agreement to the clerk of the court.²⁴⁷ Furthermore, Libyan law provides that an award will acquire its power as an executor before the interested party's request for the enforcement has been granted.²⁴⁸ The order to grant such enforcement can only be granted by the judge upon summary proceedings of the court before which the application for the enforcement of award is heard. The judge shall examine the award upon the elements of the existence of the arbitration agreement, and taking into cognizance any reason that might prohibit the enforcement of the award. After all these conditions have been satisfied, the judge will then indicate at the bottom of the original award, an order granting the application for enforcement.²⁴⁹ Although Libyan law does not require the parties to submit their arbitration agreement, it however indicates that the court may not be interested in examining the reasons advanced by the arbitrator for the award. It will only be examining the

²⁴⁶ Article 35 of the Model Law

²⁴⁷ Article 763 of Code of Civil and Commercial Procedure 1953, Libya

²⁴⁸ Article 763 of Code of Civil and Commercial Procedure 1953, Libya provides that "The award is only enforceable following a ruling by the judge of summary proceedings of the court with which the original of the award was registered, made upon a request from one of the concerned parties. This ruling must be made after consideration of the award and the agreement to arbitrate, and after having made sure that there is no reason which would prevent it from being enforced. The ruling is endorsed on the award and the clerk of the court notifies the parties of the registration as well as the grant of leave to enforce by the court according to the procedure provided for notification of judgments. Recourse against the decision to refuse leave to enforce must be made before the Court of First Instance, if the refusal was made by a sole judge and before the Court of Appeal if it was made by the Court of First Instance."

²⁴⁹ Ksdiki, Khaled, *International Handbook on Commercial Arbitration Volume III – Libya*, 1997, p10

legality of the award.²⁵⁰

Based on the analysis above, the scope of the reasons which may be advanced for refusing the recognition and enforcement of the award and whether the reasons can be approved would impact greatly upon the chances of the award being enforced in the future. Therefore, if every state lacks definite standard providing for reasons upon which the refusal or recognition and enforcement of arbitral awards may be based, and then every state can decide to refuse an award based on whatever the reason they want. This would greatly and negatively impugn on the potency and effectiveness of awards and gravely affect the process of enforcement.

6.6.7 Recourse against Award and Setting Aside the Arbitral Award

In international commercial arbitration, the arbitral proceedings will be deemed to have come to an end after rendering the arbitral award. Usually, the party in favour of whom the award is made would hope that it can enforce the arbitral award without delay and begin to enjoy the fruits of the said award. The purpose of arbitration is to reach a decision which should be ordinarily binding on the parties as resolving the dispute between them. To prevent the enforcement of the award the losing party could properly raise an objection according to the arbitration law of countries. The

²⁵⁰ Article 763 of Code of Civil and Commercial Procedure 1953, Libya provides that “The award is only enforceable following a ruling by the judge of summary proceedings of the court with which the original of the award was registered, made upon a request from one of the concerned parties. This ruling must be made after consideration of the award and the agreement to arbitrate, and after having made sure that there is no reason which would prevent it from being enforced The ruling is endorsed on the award and the clerk of the court notifies the parties of the registration as well as the grant of leave to enforce by the court according to the procedure provided for notification of judgments. Recourse against the decision to refuse leave to enforce must be made before the Court of First Instance, if the refusal was made by a sole judge and before the Court of Appeal if it was made by the Court of First Instance.”

relevant organizations and court would therefore be left in a dilemma as to whether to enforce the award or set it aside.

6.6.7.1 The Position Under the Model Law

By virtue of Article 34 of the Model Law, recourse to a court against an arbitral award can be made only under the condition that it is in the form of an application for setting aside. The grounds on which this can be applied are also listed therein. Time limit for the introduction of the action to set aside is provided for in paragraph 3 thereof. The fourth paragraph creates the possibility for the court to delay proceedings to set aside, to give the arbitral tribunal an opportunity to resume the arbitral proceedings or do some other thing, which the tribunal considers sufficient to arrest the situation named as the grounds for the application to set aside. The objection challenging the validity of an award is usually addressed by the court with jurisdiction. Generally the court with jurisdiction means the court in the country where the award was made. In addition, parties could submit to arbitration under the law to which the parties have agreed should govern the conduct to their arbitration.²⁵¹ Again from a perusal of the provisions of the Model Law, the intention of the drafter appears to infer that the drafters had intended that the courts would have jurisdiction to set aside only those awards rendered within their native country.²⁵²

It is obvious therefore, that the Model Law has set out (as a general rule) to establish the arbitral

²⁵¹ Article V(1)(e) of the New York Convention

²⁵² Article 34 of the Model Law

tribunal as the highest authority that should the arbitral proceedings and its decision be the ultimate solution to the disputes between the parties. On the other hand however, the Model Law takes cognizance of the fact that there may be situations where parties would be dissatisfied with the award for a range of reasons and has therefore provided for the grounds upon which parties may apply to set aside an award. These grounds focus mainly on the legality of the award and the logical link between the award and the conduct of proceedings as agreed between the parties.²⁵³ However, where parties are allowed to raise such objections to awards, it can be expected that would in most cases channel their appeal through the court system. Different countries have different procedures laid down by which parties may object to awards through the court.

6.6.7.2 The Issue of Recourse against Award and Setting Aside the Arbitral Award among the Model Law Countries

Many legal systems of the world have adopted these grounds, or at least something quite akin in their procedure for considering the application to set aside an award.²⁵⁴ However, as is usually the

²⁵³ Article 34 of the Model Law

²⁵⁴ Countries stipulate same grounds for setting aside as the Model Law:

Article 42 of The Bermuda International Conciliation and Arbitration Act 1993, Bermuda

Article 44 of The Commercial Arbitration Law of the Kingdom of Cambodia, Cambodia

Article 36 of Law on Arbitration, Croatia

Section 37 of Danish Arbitration Act, Denmark

Article 35 of The Arbitration Act, 1995 - No. 4 of 1995, Kenya

Article 40 of The Republic of Lithuania Law on Commercial Arbitration, Lithuania

Article 1457 of Commercial Code, Title IV (of Book V), Commercial Arbitration, Mexico

Article 34 of Law of the Russian Federation on International Commercial Arbitration, Russia

Article 32 of Arbitration Act No. 11 of 1995, Sri Lanka

Section 40 of Arbitration Act, BE 2545 (AD 2002), Thailand

Article 34 of Law on International Commercial Arbitration, Ukraine

Section 55 of Act LXXI of 1994 on Arbitration, Hungary

Article 53 of Law No. 27 For 1994 Promulgating The Law Concerning Arbitration in Civil and Commercial Matters, Egypt

Article 34 of The Arbitration and Conciliation Act, 1996 (No. 26 of 1996), India

Section 1059 of Code of Civil Procedure - Book IV – Arbitration, German

case, some countries have introduced significant changes into their arbitration law to handle applications to set aside awards. For instance, Iranian arbitration law introduces an additional ground upon which parties may base such an application. According to the Iranian law, if any of the parties discovers other evidences relevant to the dispute capable of affecting the award, even after the award is made, the court will still be in a position to set aside the award²⁵⁵ as long as the delay in discovering this evidence was beyond that party's fault. Again, in the Iranian case, parties are required to deposit a certain amount of money with the court when they make their application for setting aside the award. The court will only grant the application and/or suspend or delay the enforcement of the award if and when the applicant has provided the required deposit for the application.²⁵⁶ However, the above situation cannot ground an application to set aside an award under the Model Law, because the Model Law clearly provides that if the parties have failed to provide relevant evidence in support of the arbitration dispute, or the arbitral tribunal is able to do its work based on the information available to it, it can continue the proceedings and make an award.²⁵⁷

However the only other change introduced by Iranian law about the violation of public policy of

²⁵⁵ Article 33 of the Law on International Commercial Arbitration, Iran

²⁵⁶ Article 35 of The Law on International Commercial Arbitration, Iran provides that "1. Except in cases referred to in Articles 33 and 34, an arbitral award shall be final and shall be binding after it has been served; if a request has been made in writing from the court specified in Article 6, the procedure for the enforcement of courts' judgments shall be pursued

2. If one of the parties requests the annulment of the award from the court specified in Article 6 and the other party applies for its recognition and enforcement, the court may, upon request by the party applying for the recognition and enforcement of the award, order that the party requesting the annulment, provide an appropriate security."

²⁵⁷ Article 35(c) of the Model Law

the Model Law will be discussed subsequently²⁵⁸ as well as certain procedural grounds for setting aside. An award may be set aside if the court finds that “the award is in conflict with the public policy of this state.” Violation of public policies covers basic principles of law and justice in respect to the subject matter of the dispute as well as issues of procedure.²⁵⁹ Usually when a court has found “the subject matter of the dispute is not capable of settlement by arbitration under the law of this State;” it would follow up with public policy considerations to ground setting aside the award. However a number of states have made certain changes in the process of adoption. Australian law for example provides that an award conflicts with the public policy of Australia where: “ (a) the making of the award was induced or affected by fraud or corruption; or (b) a breach of the rules of natural justice occurred in connection with the making of the award.”²⁶⁰ Bermuda’s Act of 1993 similarly provides that “Without limiting the generality of Articles 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law, it is declared, for the avoidance of doubts, that, for the purposes of Article 34(2)(b)(ii) and 36(1)(b)(ii), an award is in conflict with the public policy of Bermuda if the making of the award was induced or affected by fraud or corruption.”²⁶¹ The Law Reform (Miscellaneous Provisions) Act 1990 of Scotland, before Scotland has given up adopting the Model Law in 2009, retained the phrase “the award is in conflict with public policy” as a ground that could compel the court to grant an application for setting aside.²⁶² This also one of the grounds that a party must provide proof of in

²⁵⁸ Article 34(2)(b)(ii) of the Model Law

²⁵⁹ UNCITRAL Commission Report August 1985, Guide to the Model Law, p1002 at no.297

²⁶⁰ Section 19 of International Arbitration Act 1974-1989, Australia

²⁶¹ Section 27 of The Bermuda International Conciliation and Arbitration Act 1993

²⁶² Article 34(2)(b)(ii) of Schedule 7 UNCITRAL Model Law on International Commercial Arbitration, Chapter VII Recourse Against Award, Law Reform (Miscellaneous Provisions) (Scotland) Act 1990

support of its application on that ground that: “the award was procured by fraud, bribery or corruption.”²⁶³ Article 34(3) of this same Act creates a time-limit of three months starting from the receipt of the award, within which a party should make its application for setting aside, does not apply to the new ground.²⁶⁴

Tunisia’s new law of 1993 also provides that an arbitral award may be set aside by the Court of Appeal of Tunis “when the court finds that the award is in conflict with public policy, as understood in private international law.”²⁶⁵ The provision “as understood in private international law,” refers to the restrictive notion of international public policy.²⁶⁶ On the other hand, the Decree Law of Peru provides that “an application for annulment against an international arbitral award may only be filed with the Superior Court of the place where the arbitration was held, when the party filing the application proves that: “The award is contrary to public order in the Republic.”²⁶⁷ This provision therefore brings the grounds of “the subject-matter of the dispute not being capable of settlement by arbitration and the award being contrary to public order in the Republic” under a single head of grounds.²⁶⁸

6.7 Criticisms of the Model Law

²⁶³ Article 34 (2)(a)(v) of Schedule 7 UNCITRAL Model Law on International Commercial Arbitration, Chapter VII Recourse Against Award, Law Reform (Miscellaneous Provisions) (Scotland) Act 1990

²⁶⁴ Article 34(3) of Schedule 7 UNCITRAL Model Law on International Commercial Arbitration, Chapter VII Recourse Against Award, Law Reform (Miscellaneous Provisions) (Scotland) Act 1990

²⁶⁵ Article 78(2)(II) of Arbitration Code. Promulgated by Law No. 93-42 of 26 April 1993 in force 27 October 1993, Tunisia

²⁶⁶ Fn 62, at p21

²⁶⁷ Article 106(6) of Decree Law No. 25935, in force 10 December 1992 ,Peru

²⁶⁸ Article 106 of Decree Law No. 25935, in force 10 December 1992 ,Peru

The era of “globalization” has exponentially increased the demand for arbitration, and in turn the variety and complexities of disputes submitted to arbitration. The differences in scale between these disputes have also grossly multiplied. The Model Law has tried in its limited capacity to encourage modernizing and has attempted to unify the available arbitration legislations, in a frenzied bid to harmonise and co-ordinate the development of arbitration as a major player in modern international commerce. However, its aim at universality and acceptability is the Model Law’s undoing as it can have little or no effect in advancing the state of arbitration procedure, by being overly general.²⁶⁹ It is also believed that the Model Law is better suited to jurisdictions with underdeveloped systems of arbitration to avoid a situation where the policies of such countries are deeply estranged in comparison to countries with more advanced systems.²⁷⁰

On the other hand, the Model Law may be seen as far less suited for developed states where arbitration legislation is already in place and practiced.²⁷¹ While the Model Law has been successfully adopted by some countries, some other countries have ostensibly adopted it but failed to effectively incorporate it, and some have not adopted it at all.²⁷² Again, the formal adoption of the Model Law is not enough to guarantee the practical functioning of its policies within a country. Thus,

²⁶⁹ Reid, Alan S., “The UNCITRAL Model Law on International Commercial Arbitration and the English Arbitration Act: Are the Two Systems Poles Apart”, (2004), *Journal of International Arbitration*, Volume 21, No. 3, p237

²⁷⁰ Gélinas, Fabien, “Arbitration and the Challenge of Globalization”, (2000), *Journal of International Arbitration*, Volume 17, No. 4, p121

²⁷¹ One such state is England, which in 1996 judged adoption of the Model Law to be unnecessary in light of the existence of England’s own arbitration legislation (English Arbitration Act 1996)

²⁷² Davidson, Fraser P., “International Commercial Arbitration: The United Kingdom and UNCITRAL Model Law”, (1990), *J.B.L.*, p480, 484

while some countries lag behind, other countries are revising and advancing their arbitration policies, and the gap in the development of arbitration culture between countries inevitably widens. The Model Law, as such, can be said to be deficient insofar as it lacks the effect of an international treaty. Apart with being inarguably incomplete, the Model Law has no substantive power.²⁷³

Happily though, during the last decades, the nature of the relationship of the courts to the arbitration process has shifted significantly away from one of control, in which courts generally could intervene in almost every aspect of the arbitration proceedings. However, arbitration is ultimately unable to enforce its decisions on its own, without the assistance of the courts.²⁷⁴ The fact is, then, that the arbitration process cannot be accurately described as being independent from the courts. In the suggestion of one commentator, the relationship between the courts and the arbitration process is at minimum one of “complementarity.” However, developing the emphasis on party autonomy would serve to weaken the control of courts on arbitration process.²⁷⁵ Nevertheless, the Model Law has being criticized in its emphasis on the party autonomy, as it has not been able to resolve the problem of arbitration’s dependence upon court for enforcement of its awards and other orders.

6.8 Reform of the Model Law

The matter of the relationship between the judiciary and the arbitration process is a difficult one.

²⁷³ Fn 227, at p229

²⁷⁴ Article 6 of the Model Law

²⁷⁵ Refer to Chapter 1 of this thesis

The Model Law seeks to reduce the interference and involvement of the judiciary in the arbitration process; and to achieve this, it is necessary that judiciary respect arbitral decisions, and the arbitral tribunal approach their task with the attitude that if their decisions must be authoritative and outside the reach of the judiciary, then they must be beyond reproach.²⁷⁶ The development of the Model Law will have to take this objective into account and in this respect, the qualifications and authority of the arbitral tribunal will have to be considered more deeply, and perhaps given more weight in the textual stipulations of the law.²⁷⁷ To smoothing the areas of tension between the arbitration process and the judiciary, it is either the national law ceases to play any part in arbitration, or national laws on arbitration must be harmonised.²⁷⁸

It may also be advisable that the courts be given a certain degree of discretion in deciding how to enforce an interim measure, whether or not it should be enforced in the first place, as well as be minded to deal with the issuance of orders of interim measures in a harmonised text.²⁷⁹ On the other hand, the international/national arbitration distinction should be done away with. For one, this would eliminate the problem of possible confusion within a Model Law country that has its own domestic arbitration policies. A full universalization of the arbitration process would further the aim of affirming the validity and autonomy of the arbitration agreement form, and to a great extent establish

²⁷⁶ Fn 227, at p227

²⁷⁷ Ibid at p236-237

²⁷⁸ Ibid

²⁷⁹ Sorieul, Renaud, "Update on Recent Developments and Future Work by UNCITRAL in the Field of International Commercial Arbitration, (2000), Journal of International Arbitration, Volume 17, No. 3, p179-180

it as independent of the judiciary.²⁸⁰ These recommendations would appear to be beneficial to the future reform of the Model Law.

6.9 Conclusion

International commerce has been continuously expanding; and this expansion increased chances of contractual relationships between two or more states. There are different commercial laws in force in the different countries of the world, so that without a sort of unified arbitration law; the present state of affairs would continue to produce massive conflicts and contradictions. Furthermore, it would also make the law unstable and ambiguous.²⁸¹ This state of affairs would mean that it would be difficult for arbitration proceedings to secure independence from the national legal system. Apparently, majority of arbitration proceedings are governed by the laws of the seat of arbitration.²⁸² The enforcement of the award all depend on enforcement policies and laws of the enforcing state.²⁸³ The delocalisation theory can not avoid the need for the support and assistance of the law of the state where the award was made; otherwise it will have negative influence upon the arbitral proceedings.²⁸⁴ The arbitration would be meaningless and invalid unless the domestic law recognizes that the parties' have the right to submit to arbitration, and to enforce the award. The arbitral award is also worthless if it is not enforceable.²⁸⁵

²⁸⁰ Fn 227, at p235

²⁸¹ Ibid at p227

²⁸² Fn 1, at p81

²⁸³ Fn 3, at p52

²⁸⁴ Lando, O., "The Law Applicable to Mrito of the Disputes", in Contemporary Problems in International Arbitration, J.D.M.Lew edn, 1987, p101

²⁸⁵ Fn 1, at p449. Article 18 of the Model Law provides that "The parties shall be treated with equally and

The Model Law has attempted to shorten the gap between the legal systems of countries. Hence, it has definitely helped in some way in unifying and settling the law and procedures.²⁸⁶ Furthermore, the Model Law itself presents extensive applicability and elasticity. As long as it does not exist in the form of a convention, states can upon adoption delete provisions or supplement the Model Law according to their peculiar needs. The Model Law therefore has played an important role in reducing the conflicts among international arbitration, thereby creating and maintaining the harmonisation of international commercial arbitration.²⁸⁷

A comparison is made of “intervention of court,” arbitration agreement, and other issues regulated by the arbitration laws of countries that have already adopted the Model Law. The concept of harmonisation of laws can be rightly influenced by different and varied ideas, some of which require that laws must be consistent to reach harmonisation, while others believe that being similar suffices. The definition of the word harmonisation mostly means to coordinate, which the former does not appear to fully capture. Even though the latter seems to fulfill the meaning of harmonisation, yet only very few countries see the concept from that same light.

each party shall be given a full opportunity of presenting his case.” New York Convention, Article V(1)(b): “Recognition and enforcement may be refused---if the party---proof that (b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceeding or was otherwise unable to present his case.”

²⁸⁶ Okekeifere, Andrew, “Public Policy and Arbitrability Under the UNCITRAL Model Law”, (1999), Int’l A.L.R., Volume 2, No.2, p70, 76; “It [The Model Law] therefore set out to achieve ... the enationalisation of international commercial arbitration, especially in its procedural aspects, and its liberation from the stranglehold of national laws.”

²⁸⁷ In the next chapter, the supranational arbitration will be discussed

In light of the above, we can ask ourselves again if the Model Law fulfills its goal of harmonisation. In summary, we can glean from the above comparisons that although many countries have referred to, adopted the content of the Model Law (wholly or with modifications), and have produced their versions of arbitration law; it would seem that the content of the regulations are not quite the same. But if we conclude from this that the Model Law does not thereby achieve the function of harmonisation, it seem too dogmatic an expectation, given the fact that many countries have actually adopted and made reference to the Model Law, and have tried their best to accept the purpose and intention of the Model Law. It can be seen that the Model Law still stands as a very relevant force in the drive to eliminate the differences in the main arbitration laws of various countries, and coordinate the legislation of each country towards modernization and unification.²⁸⁸ We must admit however, from the consideration of the definition and function of harmonisation that the Model Law to a large extent provides for the possibility of harmonisation, given the right circumstances. The Model Law does not have the effect of an international convention, which means that it cannot force every country into adopting it. This has also led to a shared belief among scholars that the Model Law does not only have a long way to go by way of improvement, but also lacks the much desired influence.²⁸⁹ Furthermore, it is calculated that in the total of 195 sovereign nations, 61 dependent areas, and 6 disputed territories throughout the world,²⁹⁰ there are

²⁸⁸ Fn 244, at p 70, 76

²⁸⁹ Fn 227, at p229

²⁹⁰ <http://www.infoplease.com/ipa/A0004373.html#A0004376>, access on 1 July 2009

192 countries that belong to the United Nations.²⁹¹ However up to now, only 51 countries and 3 partial territories of a country out of the 192 countries of the United Nations have adopted the Model Law.²⁹² This statistic shows clearly that about 140-150 countries are yet to adopt the Model Law or are operating one kind of arbitration law or the other, perhaps without recourse to the Model Law. Among these are some developed countries such as England, France, Italy, and Switzerland. Yet due to their difference in political, economic, and cultural backgrounds and orientation, many of these countries either refused to or yet to adopt the Model Law, have enacted for themselves arbitration laws that cannot be combined into a single version of common relevance. We therefore believe that the Model Law has at best fulfilled the role of a catalyst in achieving partial harmonisation throughout the world, and still has a long way to go to fulfill complete harmonisation. It is time to rethink, re-strategize and make plans towards injecting new blood and a renewed and firmer purpose into the drive for harmonisation.

²⁹¹ <http://www.un.org/members/list.shtml>, access on 1 July 2009

²⁹² http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html, access on 1 July 2009

Chapter 7

Concluding Chapter - Supranational Arbitration

7.1 Introduction

International commercial arbitration may have to deal with the problems associated with the practical applicability of the laws of different states to the arbitral process. These differences in legislations are usually occasioned by differences in polity, social regimes, economic circumstances and customs; as well as the failure of the Model Law to attract wide spread acceptance.¹ We know that various countries, as independent national and international entities subscribe to different laws; (including arbitration legislation) to regulate all manner of commercial transactions. However, in the absence of a unified system of laws and regulations, there is bound to be a lot of confusion and uncertainty surrounding the practice of arbitration, especially in the broad arena of the enforcement process of agreements and awards. Many scholars have proffered solutions to surmount the shortcomings inherent in the delocalisation theory of arbitration, which has been criticized for laying too much emphasis on party autonomy, whilst failing woefully to address the pertinent issue of the practical enforcement of arbitral awards outside jurisdiction or legal reach of the arbitration seat. Again in practice, arbitral proceedings are still very much subject to the supervisory and review jurisdiction of courts of the land. The delocalisation theory has not provided a complete and full proof way of dealing with the traditional and usual difficulties associated with the reciprocal respect,

¹ Redfern, A. and Hunter M, *Law and Practice of International Commercial Arbitration*, 4th edn (London: Sweet & Maxwell Ltd., 2004), p91

recognition and enforcement of arbitral awards among independent international entities or states.

Put succinctly, various national laws continue to play a supervisory role over arbitration proceedings, thereby hampering the possibility of achieving universal fairness in the enforcement process.²

The UNCITRAL Model Law was introduced in 1985 to assist states in reforming and modernizing their laws on arbitral procedure by taking into account the specific and unique features and needs of international commercial arbitration.³ The Model Law was to provide a supplementary arbitral resource. Unfortunately however, the Model Law lacked a domineering presence best suited in the scheme of things, and thus ended up playing an advisory function, rather than a mandatory one; thereby lacking the force of law necessary for the desired level of observance, reverence and compliance. Furthermore, the Model Law had failed in the crucial function of documenting arbitration cases and similar references. It has therefore failed to constitute itself an adequate reference point in arbitration matters. This writer is therefore in agreement with other scholars on the point that the Model Law has failed in achieving widespread acceptance, and consequently the goal of harmonisation; the sole purpose for its introduction in the first place.

Again, even though the Model Law has been severally amended and adjusted and received into the *corpus juris* of a number of states, there still appears to be major discrepancies in the relevant

² Paulsson, J. "Delocalisation of International Commercial Arbitration: When and Why It Matters", (1983), I.C.L.Q., Volume 32, p53; "Arbitration Unbound: Award Detached from the Law of Its Country of Origin", (1981), I.C.L.Q., Volume 30, p358

³ The UNCITRAL Model Law Website, (http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html), access on 13 September 2009

laws in these states as well as those of non-receiving states, making the goal of harmonisation more illusory. With this, neither the Model Law nor the delocalisation theory has been able to achieve the harmonisation of arbitral laws.

In this chapter we shall attempt to advance an argument in support of supranational arbitration. The thrust of our argument shall be the practicability, applicability and advantages of supranational arbitration. Our submission here shall be that with resort to supranational arbitration, the problems of inconsistency and unenforceability that have characterized the arbitration system can finally be eliminated. We shall find validity for this submission in discussing the relationship between supranational arbitration and party autonomy, state sovereignty, delocalisation theory, and harmonisation arbitration, among other issues.

7.2 Supranational Arbitration and State Sovereignty

7.2.1 Definition of Supranational Arbitration⁴

Supranational law, be defined as a law binding democratic states, through majority vote of democratic governments ministers meeting.⁵ One opinion also has it that supranational law encompasses the limitations of the rights of sovereign nations between one another. In this regard

⁴ There are few materials on this issue. However, it is important to examine this issue in this thesis. It is because this thesis studies how to eliminate the inconsistency of arbitral procedures, hence we try to understand the principle of party autonomy and procedural law, yet in the process of our study, we find that party autonomy contradicts with mandatory rules and public policy of the state sovereignty. Therefore we try to study whether delocalisation theory can resolve this problem, yet it still has its faults. Subsequently, this writer further studied the UNCITRAL Model Law to see whether it can achieve the goal of harmonisation, but to find that it can only achieve partial harmonisation. Hence, he now studies if a supranational body can fulfill this goal.

⁵ Schuman, Robert, "Is the European Union a Federal Union or a Supranational One," Schuman Proposal, p15, (<http://www.schuman.info/>), access on 26 December 2008

therefore, supranational law can be said to be just another form of international law. Moreover, these genres of rules are frequently classifiable as public international law, but are also capable of evolving into enforceable private rights. The implication of this is that when we talk of supranational law, the legal and political structures of the sovereign states that establish those institutions, legal rules and procedures that are authoritatively interpreted by institutions do not exist.⁶

Furthermore by agreements between two or more sovereign states, the rights and duty relationships of the citizens of those states can regulate their social interactions as the supranational law. The most common of such situations is where two sovereign states, constitute an applicable code of law or rules to regulate certain interests. Such code of law or rule as supranational law may not only be better than the regulations put in place by the sovereign entities national law, and may also be applied to those items that are regulated.⁷ Going a step further, when speaking of supranational arbitration, we engage a concept or scenario very much like supranational law, and more clearly exemplified by reference to the workings of the European Union (EU).

Supranational arbitration presents an avenue for efficient alternative dispute resolution in the interest of workable competition within the EU. It also represents a historical mandate of the EU. Remedy-related arbitrations of European Commission (EC) have in this manner also constituted a

⁶ Westbrook, Jay Lawrence, "Legal Integration of NAFTA Through Supranational Adjudication" (2008), Texas International Law Journal, p1, (<http://www.allbusiness.com/government/government-bodies-offices-law-courts/11467981-1.html>), access on 29 December 2008

⁷ Lew, Julian D.M., *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, 1978, p286 Citing: "Arbitrage étranger et arbitrage international en droit privé", 49 Rev. Crit. 1 (1960), especially at p14-20

form of supranational arbitration. It has been variously argued that only international law can properly fill the vacuum. It has also been similarly stated that supranational arbitration is a kind of international arbitration. To put this more clearly, this type of arbitration has been held to be beyond the control of national law, and directly supervised by international law.⁸

7.2.2 State Sovereignty

As far as arbitration goes, state sovereignty appears to be the reach of the jurisdiction of the court. From current developments in international commercial arbitration, it would appear that the entity which is saddled with the task of developing arbitration is the state. This is simply due to the very notorious fact that states have always been better poised to provide the most effective supervision of and support for arbitration. State sovereignty therefore is about the single most important factor in arbitration, as it has a natural capacity to exert direct power, control, or influence over the conduct of arbitration in the international commercial scene. This therefore, necessitates our need to do a comprehensive discourse and analysis of the concept of state sovereignty in this chapter.

7.2.2.1 Definition of Sovereignty

The concept of sovereignty has become one of the most debated issues in both political science and international law. Sovereignty was originally defined as the equivalent of supreme power. However, sovereignty in practice often deviates from this traditional definition accorded it.⁹

⁸ Ibid

⁹ Britannica Online Encyclopedia, (<http://www.britannica.com/EBchecked/topic/557065/sovereignty>), access on 26 December /2008

Territoriality is a feature of sovereignty, and at the same time also an important quality of political authority. Members of a community must define their sovereignty in line with the principle of territoriality. Membership of the community is drawn from residences located within the relevant territorial borders. Being present within geographical borders allows people belong to a state and consequently be subject to the authority of that state.¹⁰

State sovereignty can be exhibited in so many ways and measured by using various indices; ranging from competence and independence, to legal equality of states. Generally this concept is inclusive of all matters which international law permits every state to determine and act upon on their own without the intervention or to the exclusion of other sovereign states or entities.¹¹ Sovereignty has also been described as representing the supreme authority, and will continue to grow in common in so far as political rules in states are presumed to pass through the world, including the sovereign body of law and institutions that confine each government and civil right to individuals.¹²

State sovereignty in international arbitration, is perhaps better explained in the work of Dr Francis

Mann where he stated:

¹⁰ Philpott, Daniel, "Sovereignty, Stanford Encyclopedia of Philosophy", (2003), Stanford Encyclopedia of Philosophy, p8, (<http://plato.stanford.edu/entries/sovereignty/>), access on 26 December 2008

¹¹ Weiss, Thomas G, Hubert, Don , "State Sovereignty", in *The Responsibility to Protect: Research, Bibliography, Background Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty*, International Development Research Centre, 2001,p13, (http://www.idrc.ca/en/ev-28492-201-1-DO_TOPIC.html), access on 26 December 2008

¹² Fn 10, at p18, (<http://plato.stanford.edu/entries/sovereignty/>), access on 26 December 2008

“No one has ever or anywhere been able to point to any provision or legal principle which would permit individuals to act outside the confines of a system of municipal law; even the idea of the autonomy of the parties exists only by virtue of a given system of municipal law and in different systems may have different characteristics and effects. Similarly, every arbitration is necessarily subject to the law of a given State. No private person has the right or the power to act on any level other than that of municipal law. Every right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law which may conveniently and in accordance with tradition be called the *lex fori*, though it would be more exact (but also less familiar) to speak of the *lex arbitri* or, in French, *la loi d'arbitrage*.”¹³

Arbitration therefore, cannot exist in a legal vacuum.¹⁴ Following from the impact of territorial jurisprudence and the principle of state sovereignty, arbitrations conducted in a state should be subject to the municipal law. The legality and effect of arbitration come from the *lex loci arbitri* (i.e. the law of the forum place or court where the arbitration had taken place). As a matter of fact, in real life situations, few states are willing to relinquish control over arbitrations held within their territories.¹⁵

¹³ Mann, F.A., “*Lex Facit Arbitrum*”, in *International Arbitration: Liber Amicorum* for Martin Domke, P. Sanders edn, 1967, p157, 160; Horacio, A. Grigera Naon, *Choice-of-law Problems in International Commercial Arbitration*, 1992, p84-85

¹⁴ Fn 1, at p81

¹⁵ Fn 1, at p88; As mentioned in Chapter 3, in the *Gotaverken* case, the parties chose the place of Paris as the seat of arbitration, and the ICC Arbitration Rules to conduct their arbitral proceedings. Hence, the French court held that in this case the applicable law is not French law, finally the French court refused to accept the application of the party due to no jurisdiction.

7.2.2.2 The Circumscription of the State Sovereignty

From political history, sovereignty is most often violated by the people who wield political power. Cultural, environmental, and economic influences in the recent drive towards globalization have been generally characterized by the dismantling of international borders and reduced emphasis on the requirement of entry visa. Thus in the past decade, there have been more developments in the common perception about the size of the sphere of influence occupied by state sovereignty.¹⁶ In addition, state sovereignty and state jurisdiction in international law have important and generally accepted limitations.¹⁷ It also appears to be the case today that actions to limit state sovereignty usually translate into insignificant and conditional measures. Limitation imposed on a nation-states sovereignty included perhaps in the framework of interstate associations is usually considered voluntary.¹⁸

In the same vein, H.E. Judge Howard M. Holtzmann has proposed the creation of a new international court of arbitral awards that would replace municipal courts in resolving disputes regarding the enforceability of international commercial arbitration awards. Actualizing this would definitely be of great value to 21st century commerce.¹⁹ This proposal would especially take away

¹⁶ Fn 11, at p1, (http://www.idrc.ca/en/ev-28492-201-1-DO_TOPIC.html), access on 26 December 2008

¹⁷ Ryan, Christopher M., "Sovereignty, Intervention, and the Law: A Tenuous Relationship of Competing Principles," (1997), *Millennium: Journal of International Studies*, Volume 26, p77; and Makinda, Samuel M., "Sovereignty and International Security: Challenges for the United Nations," (1996), *Global Governance*, Volume 2, No. 2, p149

¹⁸ Ryzhkov, Vladimir, "Sovereignty Vs Democracy", (2005), *Russia in Global Affairs*, p5, (<http://eng.globalaffairs.ru/numbers/13/970.html>), access on 22 November 2008. Vladimir Ryzhkov is a deputy of the State Duma. This article derives from a lecture given by the author at the Moscow School of Political Studies at Golitsyno, July 27, 2005.

¹⁹ H.E. Judge Howard M. Holtzmann, "A Task for the 21st Century: Creating a New International Court

jurisdiction in arbitration matters from national courts, as conferred on them today by virtue of the New York Convention 1958, which lays down the specified and limited circumstances under which recognition and enforcement of an arbitral award may be refused. Two of such circumstances being whether or not the subject-matter of the dispute is capable of being settled by arbitration under the law of the country where the dispute had originated, and whether recognition or enforcement of the arbitral award would be contrary to the public policy of that state. The new international court of arbitral awards would have exclusive jurisdiction to provide appropriate remedies. In other words, it has become attractive for groups of states to limit their state sovereignty, and together constitute an international court to resolve international disputes, in order to prevent situations of inconsistency and confusion, by each state insisting on adopting their domestic laws. However such an institution would necessarily still rely on national authorities for the enforcement of its decisions.²⁰

7.2.3 Party Autonomy and State Sovereignty

7.2.3.1 The Principle of Party Autonomy

The principle of party autonomy, which was first developed by academic scholars and subsequently adopted by national courts, has gained extensive acceptance in various national legal systems. Despite the differences in their legal orientation, common law, civil law and socialist

for Resolving Disputes on the Enforceability of Arbitral Awards”, in *The Internationalisation of International Arbitration: The LCIA Centenary Conference*, edited by Hunter, Martin and Marriott, Arthur and Veeder, V.V., 1995, p109

²⁰ H.E. Judge Stephen M. Schwebel, “The Creation and Operation of an International Court of Arbitral Award”, in *The Internationalisation of International Arbitration: The LCIA Centenary Conference*, edited by Hunter, Martin and Marriott, Arthur and Veeder, V.V., 1995, p115

countries alike have all been affected by the movement towards this rule of social relations. This development has come about independently in these countries; without any concerted efforts *per se* by nations. It has been the result of separate, though contemporaneous and pragmatic evolution within the various national systems of conflict of laws.²¹ As will be mentioned later in this work, the jurisdictional approach gives the application of the local law more support than the contractual one.

With the recognition given party autonomy and its acceptance as applying also in arbitration contracts, it now became possible for parties to agree to subject their proceedings to laws other than those of the place of arbitration.²² This is clearly evident in the evolution of French law.²³ As early as 1914, the Court of Cassation²⁴ applied the principle of party autonomy in an international arbitration case, in considering the issue of the law governing the proceedings²⁵

However, despite the acceptance and recognition of party autonomy by most nation states,²⁶ arbitration still fully relies on the basic support of the courts, which is the usual and singular institution entrusted with the power and jurisdiction to salvage the system when litigants attempt to sabotage it. According to Lord Mustill:

²¹ Fn 1, at p97-98

²² Mayer, Professor Pierre, "The Trend Towards Delocalization in the Last 100 Years", in *The Internationalisation of International Arbitration: The LCIA Centenary Conference*, edited by Hunter, Martin and Marriott, Arthur and Veeder, V.V., 1995, p39

²³ Article 1494 of the French Code of Civil Procedure

²⁴ The Court of Cassation is the highest court in the French judiciary, (http://www.courdecassation.fr/about_the_court_9256.html), access on 02 December 2008

²⁵ Fn 22, at p38-39

²⁶ Fn 1, at p100

“[T]here is plainly a tension here. On the one hand the concept of arbitration as a consensual process reinforced by the ideas of transnationalism leans against the involvement of the mechanisms of state through the medium of a municipal court. On the other side there is the plain fact, palatable or not, that it is only a Court possessing coercive powers which could rescue the arbitration if it is in danger of foundering.”²⁷

The Courts in England have for centuries been doing everything possible to protect their system, and have remained vigilant to check any violation within their jurisdiction. These courts have also faced very severe battles in opposition to the performance of their constitutional functions and have had to sacrifice others, in order to maintain their boundaries or even expand their jurisdiction. Commercial law was one unfortunate victim of this drive. As the common law courts gradually usurped the powers of those institutions most responsive to external influences, they gradually lost much of their international character. These common law courts are notably the ecclesiastical courts, the courts of Admiralty and the merchant courts. Arbitration was seen as a private dispute settlement mechanism designed to oust the jurisdiction of the courts and to substitute private adjudication for public decision-making, and was for a long time viewed with disdain and suspicion. This hostility towards the private process of arbitration was actually a very widespread phenomenon, and certainly not confined to the English courts alone.²⁸

²⁷ Lord Mustill in *Coppée Levalin NV v Ken-Ren Fertilisers and Chemicals* [1994] 2 Lloyd's Rep. 109, p116 (HL).

²⁸ Goode, Roy, "The Role of the *Lex Loci Arbitri* in International Commercial Arbitration", (2001), *Arbitration International*, Volume 17, No. 1, p20

The pressures from the commercial community in England and elsewhere eventually began to gain legal momentum, and could not be ignored for much longer. Fierce judicial opposition to arbitration, pursued under the strictest of judicial scrutiny, gradually gave way to a wary acceptance. It was only in the last half of the twentieth century, and for England just in the last two decades, that the courts finally came to terms with the fact that parties to arbitration agreements actually desire privacy, confidentiality and finality, which could best be offered by these arbitral panels, and view judicial intervention in the arbitral process or in the review of awards as a measure to be taken only in exceptional circumstances.²⁹

The arbitrators rather than the courts should be the ones in the position to control the procedure, as it was the parties themselves that had entrusted the determination of their dispute to an arbitral tribunal in the first place. Ideally, the arbitral tribunal, and not the court, should in the first instance decide such matters as the validity of the contract in dispute and the extent of the tribunal's jurisdiction.³⁰

7.2.3.2 State Sovereignty

States within the present framework of international commercial arbitration are the bodies which have significant power to decide how the arbitration scene should develop. This is more so as they have been known to play a proper and useful in providing supervisory and supportive support to

²⁹ Ibid

³⁰ Ibid

arbitral proceedings and decisions. However the influence of the courts is determined by their jurisdiction and the arbitral awards brought before them seeking recognition or enforcement.³¹ The controlling power of the government can be practiced in any and all of the various and different stages of the arbitration. Under Article V of the New York Convention, at the request of the party against whom the recognition and enforcement of a foreign arbitral award is invoked, the enforcement and recognition of an arbitral award may be refused only when the party against whom the award was made provides the competent authority where the recognition and enforcement is sought, proof³² that for example, the award is yet to 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 order was made.³³ One scholar has submitted that this appears to be a contradiction of sorts, and inconsistent with the spirit and intention of the Convention, which ought to support a system of obligatory recognition and enforcement of arbitral awards in all signatory states.³⁴

Again, the provisions of Article VII of the New York Convention, are not intended to influence the validity of the multilateral or bilateral agreements that are recognized and enforced in relation to arbitral awards made in contracting states, nor take away any right that may be available under an award to any interested party in the manner and to the extent, as it is allowed under the law or the

³¹ Yu, Hong-Lin, "Total Separation of International Commercial Arbitration and National Court Regime", (1998), *Journal of International Arbitration*, Volume 15, No.2, p145

³² A great deal of ink has been spent on the significance of the word 'may' in the English text, as opposed to 'shall'.]

³³ Ibid

³⁴ Fn 28, at p22

treaties of the state in which such an award is sought to be relied on.³⁵

In considering the various arguments advanced in connection with the issue of territoriality and party autonomy, one of the most remarkable features is that both cite the New York Convention to support the position that the role of *lex loci arbitri* has apparently been recognized by territorialists on the grounds of various provisions of the Convention;³⁶ and that the advocates of party autonomy and the statelessness of awards, argue that Article VII has clearly stated that the enforcement authorities in the state of enforcement can enforce the permit of the enforcement of foreign arbitral awards to follow local orders, despite its annulment by the courts in its state of origin, where the reason for the annulment under domestic laws is not the refusal of recognition of arbitral awards. However, the New York Convention appears to recognize the importance of the *lex loci arbitri*. Again if Article VII envisages and provides for a situation where the *lex loci arbitri* may be derogated from in the manner and to the extent to which it is allowed by the law or the treaties of a country where such award is sought to be relied upon, recognized or otherwise enforced, then wherein lies the possibility of the guarantee of a stateless award? One expert in the provisions of the Convention has stated:

“It is not only the legislative history of the Convention which seems to be contrary to the Convention's applicability to the ‘a-national’ award. The system and text of the Convention too

³⁵ Ibid at p23

³⁶ Article II(1) and (3) of New York Convention

appear to be against such interpretation. The Convention applies to the enforcement of an award made in another State. Those who advocate the concept of the 'a-national' award, on the other hand, deny that such award is made in a particular country ('sentence flottante', 'sentence apatride'). How could such award then fit into the Convention's scope?³⁷

Therefore states are faced with the task of deciding whether to recognize arbitration as a mechanism with which to legally resolve disputes. Apart from having to deal with the issue of the recognition of arbitration as an alternative dispute settlement mechanism, states in the international community rely on various standards by which to determine, the sorts of disputes that should properly be submitted to arbitration and how the arbitration mechanism should operate. All of these factors together constitute the vital ingredients that have forged their traditional views about arbitration, as well as the traditional relationship between arbitration and the courts. Furthermore, these states are usually the authority to determine the validity of the arbitral awards at the recognition and enforcement stage.³⁸

7.2.3.3 Party Autonomy Spectrum and State Sovereignty

The traditional concept of territoriality is based on the general principle of international law; that a state has sovereignty within its own territory, and its courts in particular have power within that

³⁷ Van den Berg, A.J., *The New York Arbitration Convention of 1958 Towards a Uniform Judicial Interpretation*, 1981, p37. After 18 years Professor van den Berg's book is still the seminal work on the New York Convention.

³⁸ Fn 31, at p145

territory to decide the legal effects of acts done, within those boundaries, including subsequent arbitral awards made.³⁹ On the other hand, the concept of party autonomy in arbitration affirms that arbitral tribunals and resultant awards derive their authority solely from the agreement of the parties rather than from national laws.⁴⁰

Neither of these concepts is an embodiment of a single and homogenous concept. The territoriality principle covers situations where a court has to decide whether or not to follow, be bound by or be persuaded by the decisions of a court of competent jurisdiction in another territory. Similarly, there is also no one definition of the concept of party autonomy. Territoriality and party autonomy in fact, cannot be clearly divided into two separate concepts, and put in two separate definitional compartments. They together constitute the same phenomenon, which will be explained below.⁴¹

In the first place, under normal circumstances the law of the enforcing state will ask its court to refuse to recognize and enforce an arbitral award that has been set aside by a court of competent jurisdiction. In other words, that legal system adopts the Article V of the New York Convention approach, which is a provision that sounds mandatory, but at the same time, its applicability appears to be discretionary. An example of this kind of model is the Italian Code of Civil Procedure and the Netherlands Private International Law Act respectively. The Italian Code of Civil Procedure provides that:

³⁹ Fn 28, at p24

⁴⁰ Ibid

⁴¹ Ibid

“The Court of Appeal should refuse the recognition and enforcement of foreign arbitral awards, and if the opposing proceedings between the other party or adopted arbitral award prove to be one of the following conditions: (5) The arbitral award has not yet been bound by the party, or been set aside or suspended by the competent authorities of the state either under, or in which the law was being made.”⁴²

However the relevant provision under the Netherlands Private International Law Act is couched a little differently but of the same effect:

“If there are no provisions relevant to recognition and enforcement that can be applied, or applicable provisions are permit by provisions for parties to depend on seeking the recognition and enforcing of the law of the states, the arbitral awards made in foreign states can be recognized and enforced in Netherlands....unless: (e) The arbitral award has been set aside by a competent authority of a state that made the award.”⁴³

Thus under the Italian model, arbitral awards that are set aside in the seat of arbitration, are simply unenforceable. These laws provide a fine example of territoriality.

Secondly, the laws of the enforcing state can empower the courts of the land to pronounce on the legality or otherwise of acts done and in particular arbitral awards made within that territory. The

⁴² Article 840(5) of the Italian Code of Civil Procedure

⁴³ Article 1076(1)(A)(e) of the Netherlands Private International Law Act

above however refers only to domestic laws and decisions of courts of the land, given within the countries territory, and in the absence of any specific powers of recognition and enforcement. For political reasons, and perhaps also for mutual respect for state sovereignty in the international system, the decision to set aside an arbitral award endorsed by a competent judicial, but foreign court, will usually attract nothing more than the respect and understanding of the court of the state where the arbitral award was made.

States that follow this model have generally adopted provision in their arbitration laws that accord to Article V of the New York Convention. Some states have made revisions, while others have not. And even though the full impact of Article V weakens the likelihood of the enforceability of foreign arbitral awards, the judicial authority before which such awards are sought to be enforced nevertheless reserves discretionary powers in deciding whether or not to enforce such an award just like it obtains under Article V of the Convention.⁴⁴

As we said earlier, the validity of arbitral awards depends on the *lex fori* and the law of the country where the party seeks recognition and enforcement. In addition, the arbitration state must recognize the validity of the award at the time when the party seeking enforcement, starts enforcement proceedings for the award. This kind of situation can also indirectly cause uncertainty in the system

⁴⁴ Examples are like English Arbitration Act 1996, the Mexican Commercial Code, the German Code of Civil Procedure, and the Swiss Private International Law Act 1987. Legislation of Germany and Switzerland, however, simply incorporates the provisions of the New York Convention by reference, which happens to be the first two track the wording of Article V(1)(e).

of international commercial arbitration.⁴⁵ In other words, as a result of the deep incursions by the judicial system into the arbitral process a lot of times it is impossible to achieve a balance between party autonomy and the supervisory function of national courts.

In order to resolve this situation of conflict, some scholars have proposed the supranational arbitration concept. Their hope is that having such a system in place will finally put an end to the aforementioned problems in the system of international commercial arbitrations.⁴⁶

7.2.4 State Sovereignty and Supranational Arbitration

State sovereignty that appears outside is what is called the jurisdiction of domestic courts. Although international commercial arbitration relies on the “party autonomy principle,” arbitration however still needs the assistance of the court. With international trade developing rapidly, arbitration associated with the conduct of international trade appears to be enjoying some level of independence from the scrutiny of the domestic courts. For example, the United States treats issues arising from international commercial arbitration differently from those arising from domestic arbitration; such as in the dispute of arbitrability. In *Mitsubishi Corp. v. Soler Chrysler-Plymouth, Inc.*,⁴⁷ the American Supreme Court held that anti-trust disputes can be submitted to arbitration among international cases. Germany has clearly stipulated in her anti-trust law that all anti-trust disputes that have already occurred, and those that are likely to occur, export cartels that have not exerted any influence on the

⁴⁵ Fn 31, at p150

⁴⁶ Fn 19, at p109, Fn 20, at p115-116; Fn 31, at p150

⁴⁷ *Mitsubishi Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614 (1985)

German market, and anti-trust disputes that do not influence other German markets can all be submitted for arbitration or be subjects of arbitral enquiry.⁴⁸

The Netherlands, Switzerland⁴⁹ and France⁵⁰ also have similar provisions in their laws permitting the submission of anti-trust disputes to be handled through arbitration. Although the aforementioned states consent to anti-trust disputes being handled through arbitration, however at the same time they also limit the jurisdiction of the arbitral bodies in handling such cases by prescribing the exact situations and circumstances that may be submitted to arbitration. In the *United States (US) Mitsubishi Corp Case* for example, even though the US Supreme Court had permitted anti-trust disputes to be submitted to arbitration, in the same breath it had also provided that the court may still exercise its jurisdiction to review the award at the enforcement stage.

Under the New York Convention, whenever the recognition and enforcement of an arbitral award violates the public policy of the United States, the court will have the power to refuse its recognition and enforcement.⁵¹ Similarly, according to relevant German law, if parties in Germany must submit future anti-trust disputes to arbitration, then it has to be stated in the arbitration clause that this dispute has to be submitted to the court for review.⁵² Switzerland also has similar provision in its law.⁵³

⁴⁸ Article 91, 98(2) of Act Against Restraint of Competition (German Cartel Law)

⁴⁹ Berger, Klaus Peter, *International Economic Arbitration*, 1993, p193-194

⁵⁰ Kirry, Antoine, "Arbitrability: Current Trends in Europe", (1996), *ARB. Intl*, Volume 12, p386, n4

⁵¹ Article V(2)(b) of the New York Convention

⁵² Article L123-6, Code of Commercial Law TITLE II: Anti-competitive practices (Art. L. 420-1 to L. 420-7)

⁵³ Article 17(1) of Federal Act on Cartels and Other Restraints of Competition (Cartel Act; LCart)

We notice from the aforesaid that the sphere of anti-trust disputes or matters in general is widely recognized by the international community as being capable of settlement by arbitration. But at the same time, the courts of the state of recognition and enforcement, as well as those of the seat of arbitration, still retain the jurisdiction to review awards resulting from the resolution of anti-trust disputes.

Recent trends in international commercial arbitration appear to be in favour of limiting the intervention and jurisdiction of the state in the arbitral process. This appears to be the case, notwithstanding the stage of the proceedings at which such intervention is made; whether the state's judicial intervention is made during the actual proceedings or after the award has been made.⁵⁴

Supports for this point of view can be found in legislation and decided cases. Article 5 of the Model Law, for example, provides that: "in matters governed by this law, no court shall intervene except where so provided in this law." However, the Model Law can not exclude the "authoritative court" from providing "some arbitral assistance and supervisory functions."⁵⁵

In France too, the Court of Appeal in Paris in the case of *Gotaverken*,⁵⁶ had refused to review the arbitral award that was submitted to it on the grounds that it lacked the jurisdiction to do so. Again the Swiss International Private Law also contains provisions that eliminate the chances of appeals or

⁵⁴ Murray, "Letting Arbiters Get On with the Job", (1997), Scots Law Times, p64, 65-66

⁵⁵ Article 5 of the Model Law

⁵⁶ *Gotaverken Arendal AB v. Libyan General National Maritime Transport Company* (1981) 6Y Comm Arb. p221-237

vacate procedures, provided that the parties to the international commercial arbitration are of Swiss nationality and have contracted out of any legislative provision that permits reviews of the proceedings of arbitral tribunal.⁵⁷ Belgian law contains an identical provision.⁵⁸

However, the truth is that the courts in fact do make certain obvious contributions at different stages of an arbitration. For example, the court at the seat of arbitration can, in response to the request of the parties, set aside an arbitral award on the ground that the award is contrary to the principles of fairness and justice.⁵⁹ On the other hand, the enforcing court can refuse to recognize or enforce the award at the recognition and enforcement stage.⁶⁰ It is clear therefore that no matter how much the parties try to avoid the intervention of state sovereignty, when the arbitral award gets to the stage of recognition or enforcement, (no matter how much it accords with the regulations of New York Convention⁶¹ or the Model Law⁶²), it may still be subject to the review and superior jurisdiction of the court system. Accordingly, one scholar has pointed out:

“Under these circumstances, the status of an award is in an uncertain position, as its validity depends on the *lex fori* and the law of the country where the winning party seeks recognition or

⁵⁷ Article 192 of the Swiss Private International Law, 1987

⁵⁸ The Belgian Judicial Code (adopted 4 July 1972 and amended 27 March 1985 and 19 May 1998):
“The parties may, by an explicit declaration in the arbitration agreement or by a later agreement, exclude any application for the setting aside of an arbitral award, in case none of them is a physical person of Belgian nationality or a physical person having his normal residence in Belgium or a legal person having its main seat or a branch office in Belgium.”

⁵⁹ Fn 31, at p149

⁶⁰ Article V of the New York Convention.; Article 35, 36 of the Model Law

⁶¹ Article V of the New York Convention

⁶² Article 35, 36 of the Model Law

enforcement. Moreover, the enforcing country will not be known until the winning party commences its action to enforce the award. This situation may indirectly cause further uncertainty within the mechanism of international commercial arbitration.⁶³

In order to resolve the conflict between the constitutional duties and roles of the national courts and principle of party autonomy whilst maintaining the essential features of international commercial arbitration, a new international commercial arbitration framework would have to be worked out. This new framework proposes a system where states and their adjudicative paraphernalia must be prepared to give up supervisory powers in the area of arbitration, and permit parties to completely hand over their commercial disputes to the arbitrators of a supranational body. To be workable such supranational bodies, and the states, must first recognize arbitration as an effective method of resolving commercial disputes between the parties to a commercial transaction. Secondly, it is also important that states recognize the autonomous jurisdiction of the arbitral tribunal, as well as respect the binding and obligatory force of the arbitration agreements and resultant awards. Furthermore, more professionals should be encouraged to be arbitrators, and laws should be drawn up in such a way as to protect them, so they can independently and fairly exercise and utilize their powers in furtherance of the arbitral process.⁶⁴

In order to adequately respond to the current liberal trends in the international system and

⁶³ Fn 31, at p150

⁶⁴ Ibid at p155

movement towards establishing an enduring supranational arbitration framework, entailing the transfer of the traditional supervisory powers of a state over arbitration to these well-designed and specialized supranational bodies in exchange for a supportive role. It when this is done that international commercial arbitration can lay claim to be truly international. It also at this point that these institutions can truly operate in the commercial world, using one set of regulations. In addition, this body, being an arbitral tribunal, would independently control the legality of arbitral procedures and arbitral awards, as well as hold exclusive jurisdiction over arbitration.⁶⁵ Furthermore, this operation of these bodies shall be bound by international mandatory regulations and public policies, and parties that submit disputes to these institutions must respect the decisions reached by them, as final resolution of the dispute.⁶⁶

In this new framework, these supranational bodies would be assured of the support of the state at every stage of arbitral proceedings; such as speedy receipt and enforcement of such complementary judicial reliefs as interim measures perhaps *mandamus* for instance and orders compelling the attendance of witnesses.⁶⁷ For disputes that may arise as per the validity of arbitral awards, as long as the award is handed down by the supranational body with unique and compelling powers, all stakeholders will be assured that the arbitral process is not flawed by or otherwise faulted on the grounds of improper or irregular procedure. After these institutions have handed down their decision,

⁶⁵ Fn 19, at p112; Fn 31, at p155; The proposal of Judge Holtzmann and Dr. Yu has a slight difference. Judge Holtzmann proposed that the support of the municipal court is still needed, while Dr. Yu proposes for the total separation of the court and arbitration

⁶⁶ Fn 31, at p155

⁶⁷ Fn 31, at p155-156

states can now see the awards to their enforcement within jurisdiction in furtherance of their duty of support in this new arbitral dispensation.⁶⁸

As far as the issue of the validity of arbitral awards, that are likely to arise from time to time in the scheme of things goes, scholars have also proposed the establishment of an international court of arbitral awards, to take care of the mischief befalling the current system championed by the New York Convention.⁶⁹ In this new system, regulated by an international convention, “applications to set aside or enforce awards would be within the sole jurisdiction of the new international court,”⁷⁰ so that “execution of judgments of the new international court will not be subject to interference or delay by municipal courts.”⁷¹ Every state that adopts this new convention would have a suitable ministerial official who will act speedily to enforce the decisions or orders of the international court, just as it obtains with domestic courts.⁷² If any of the signatory state fails, neglects, or refuses to honour its conventional obligation, the international court would impose a penalty on such state.⁷³

It is believed that such changes would promote the negotiation of international contracts, and serve to eliminate or at least streamline the party’s choices of arbitral seats available to parties and

⁶⁸ Ibid

⁶⁹ H.E. Judge Howard M. Holtzmann, “A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards”, at p109-114, H.E. Judge Stephen M. Schwebel, “The Creation and Operation of an International Court of Arbitral Award”, at p115-123, in *The Internationalisation of International Arbitration: The LCIA Centenary Conference*, edited by Hunter, Martin and Marriott, Arthur and Veeder, V.V., 1995,; also see F.S. Nariman Esq (p155), Martin Hunter Esq (p157), H.E. Judge Bola A. Ajibola (p159), Professor Hand van Houtte (p161)

⁷⁰ Fn 19, at p112

⁷¹ Ibid at p113

⁷² Ibid

⁷³ Ibid at p109-114

consequently the difficulties and challenges that are often met.⁷⁴ Moreover, “such a court would promote uniform standards and predictability. Further, a new court would be better positioned to avoid the delays that are often experienced in crowded and overloaded municipal courts where it can take up to several years to reach a final judgment. And most significantly, such a court would facilitate international trade and investment by reducing the risks and uncertainties that business people fear when they must submit their affairs to the court of a foreign country.”⁷⁵

The concept of party autonomy can also be infused into this dispensation. As far as the choice of law issue goes, parties would have the freedom to choose the national law that should govern the resolution of their disputes. Apart from having the first option of the governing national law for the dispute, parties also have the freedom to choose the suitable law of the contract.⁷⁶

7.3 International Commercial Arbitration

7.3.1 Emergence of a Private Dispute Resolution System

International commercial arbitration is an emerging system of private dispute resolutions where the parties are free to choose for themselves. It is not only private and effective, but also a generally accepted method of resolving international business disputes over the world.⁷⁷ Evidences of the development of private dispute resolution systems can be found in medieval Europe, when

⁷⁴ Hunter, Martin Hunter Esq, “Intervention of Martin Hunter Esq: “The Impossible Dream””, in *The Internationalisation of International Arbitration: The LCIA Centenary Conference*, Hunter, edited by Martin and Marriott, Arthur and Veeder, V.V., 1995, p157-158

⁷⁵ Ibid

⁷⁶ Fn 31, at p157

⁷⁷ Fn 1, at p1

merchants and traders from different regions would gather at markets and fairs to do business.⁷⁸

Similarly a number of the recently constituted supranational arbitration bodies had already operated for many years in a somewhat similar capacity, and had already received widespread recognition and acceptance among practitioners of international commercial arbitration and the parties to arbitral proceedings. However in order to fully appreciate the organizational framework of a supranational body, it is imperative we understand the structure of popular international arbitration institutions or relevant international organizations that have emerged recently.

7.3.2 Representative of Supranational Arbitration

The International Centre for Settlement of Investment Disputes (ICSID) for example, emerged as an autonomous international institution, established by Convention, to resolve the investment disputes between states and nationals of foreign states. ICSID has a membership of a little more than 140 states.⁷⁹ The ICSID Convention was executed in Washington, DC, and for this reason it is also known as the Washington Convention.⁸⁰ The Convention opened for signatures on March 18, 1965, and entered into force on October 14, 1966. The Convention provides for the mandate, organization, structure, and core functions of ICSID.⁸¹

⁷⁸ Mustill, Michael, "Is it a bird ..." in Claude Reymond, *Liber Amicorum, du Juris-Classeur Edn*, Paris, 2004, p209

⁷⁹ About ICSID, ICSID Site, (http://icsid.worldbank.org/ICSID/ICSID/AboutICSID_Home.jsp), access on 23 December 2008

⁸⁰ Reed, Paulsson, and Blackaby, *Guide to ICSID Arbitration*, 2004, p1-12

⁸¹ Fn 79

ICSID specializes in investment disputes. As a result the ICSID not only takes away the issue of the nationality of arbitration proceedings, it also ensures and guarantees the credibility of investment and trading affairs.⁸² The ICSID therefore offers a neutral forum for foreign investors to settle disputes that arise out of investments and other trade transactions. The constitution and mode of operation of the ICSID is totally different from what obtains in the domestic legal system. The current ICSID represents the unique model of international law.⁸³ The provisions of the Washington Convention which among others governs the challenge, recognition and enforcement of ICSID awards, excludes national law from any kind of control over ICSID arbitrations. By virtue of Article 53 of the Convention, an ICSID is binding on parties and no right of appeal shall lie nor shall any other remedy avail, except in the manner and for those as provided for under the Convention itself.⁸⁴

The ICSID is however fraught with several shortcomings. In the first place, it is designed that the ICSID award cannot be challenged except on limited grounds⁸⁵ however an dissatisfied party can bring an action to annul proceedings even though government has the right to challenge the award before its local court.⁸⁶ Furthermore, ICSID lacks a unified standard for the review of or the reasons

⁸² Sunderam, Vidya, "Settlement of Investment Disputes-Washington Convention- Indian consideration", (2008), indlaw news, p4, (<http://www.indlawnews.com/display.aspx?4382>) , access on 01 December 2008

⁸³ Ridgway, Augenblick, "Dispute Resolution in World Financial Institutions", (1993), J. Int'l Arb., Volume 10, p73, 78-80

⁸⁴ Article 53 of the ICSID Convention, Regulates and Rules

⁸⁵ Article 52 of the Washington Convention

⁸⁶ Fn 82

for setting aside awards.⁸⁷ This is due to the fact that the Convention combines a balance of contradiction and benefits, therefore the review system of the ICSID is not isolated, but must be combined with other systems of the ICSID in order to arrive at a decision.⁸⁸ Again even though by acceding to the Washington Convention states agree by default to surrender part of their sovereignty, this does not preclude them from exercising their right to immunity from enforcement. Therefore in situations where the enforcing party is a private investor and the other party a state, it is still possible for the contracting state to challenge such enforcement.

7.4 Theoretical Relevance of Supranational Arbitration to International Commercial Arbitration

7.4.1 Theories of International Commercial Arbitration

Both municipal law and the national courts play significant roles in arbitration practice in the various states. Again a number of theories have been advanced in relation to judicial intervention in international commercial arbitration and these can be categorized into four basic theoretical approaches, viz:

7.4.1.1 The Jurisdictional Theory

The jurisdictional theory supports the allocation to states and their judicial paraphernalia the powers of complete supervision, over commercial arbitration conducted within their jurisdiction.⁸⁹

⁸⁷ Article 27, 54 of the Washington Convention

⁸⁸ Chen, An, *ICSID: International Centre for Settlement of Investment Disputes*, 2001, p255

⁸⁹ Fn 13, at p157, 162

Even though this school of thought recognizes that arbitration proceedings derive their existence from the agreement of the parties, it also advocates that intervention of national law is usually warranted the award made by the arbitrator, the legal effect of the arbitration agreement, the power of the arbitrator and the effects of the enforcement of the award.⁹⁰ The arbitral award will not take effect if there is no delegation of sovereign authority.⁹¹

However, this theory gives too much weight to the belief that the power of the arbitrator derives and is regulated by the domestic law, but neglects the reality of the right and the freedom of parties, and not national law to select the arbitrator(s).⁹² The power of the arbitrator therefore derives from the agreement of the parties and not the law of state. It is therefore plain to see that the purport of jurisdictional theory, that arbitration derives its power from the authority of law is terribly biased.⁹³ It is true that there exist a relationship of some sort between arbitration and the *lex loci arbitri*, but it is certainly not the only or most important connection in arbitration. If arbitration overemphasizes the *lex loci arbitri*, it will lose the feature of arbitral autonomy and consequently obviate the active development of arbitration.⁹⁴

However, the most logical explanations on the issue of the arbitrator's immunity, powers, duties, public policy, and state control over arbitration is provided by the jurisdictional theory. It is,

⁹⁰ Fn 7, at p52

⁹¹ Ibid

⁹² Chukwumerije, O., *Choice of Law in International Commercial Arbitration*, 1st edn (USA, Quorum Books, 1994), p78-85

⁹³ Ibid at p12

⁹⁴ Ibid

nevertheless, criticized especially in relation to the delocalisation theory and the application of a-national principles as the proper law, plus its failure to adequately respond to recent developments in the practice of arbitration, and the need to obtain a more liberal environment for international commercial arbitration.⁹⁵

7.4.1.2 The Contractual Theory

The contractual theory of arbitration is founded on the belief that international commercial arbitration proceedings come into being from the valid arbitration agreements between the parties. Therefore, arbitration should be conducted according to the will of the parties.⁹⁶ The agreement, allows parties the freedom to submit to the arbitration, decide how to proceed with the arbitral hearing, arbitration way, location, time, language and composition of arbitral tribunal or panel.⁹⁷ The implication of this is that the power of an arbitrator is derivable from the authority of the parties to the arbitral proceedings, and not the law. In short, arbitrator's power is contractual.⁹⁸

However, this theory ignores the fact that the will of parties is not without limit in the arbitral process. It cannot ignore the restraints which are imposed by the law in practice. In practice, where any of the parties violates the public policy and mandatory rules of the seat of arbitration, then the award will be held to be invalid and set aside, as a result.⁹⁹ This theory fails to explain the legal

⁹⁵ Fn 31, at p149

⁹⁶ Ibid at p148

⁹⁷ Fn 7, at p54-57

⁹⁸ Ibid at p55

⁹⁹ Fn 92, at p11-12

hurdles an arbitral award would ordinarily have to scale in the enforcing state.¹⁰⁰

7.4.13 Mixed or Hybrid Theory

This theory is built on the argument that arbitration has both contractual and judicial characteristics. Neither of these approaches, (i.e. jurisdictional and contractual approaches) by themselves can be used to describe the nature of arbitration in its entirety. The hybrid theory can be said to represent compromise between the contractual and jurisdictional theories, and in its present form contains aspects of the jurisdictional and contractual theories.¹⁰¹ The thrust of this theory lies in the proposition that the judicial powers of the state and party autonomy in contractual matters exist in a workable blend, completely complementary to one another and not as adversaries.¹⁰² Although this theory was developed to reconcile the deficiencies of the jurisdictional and contractual theories, it has also been criticized for lacking in being able to completely separate the elements of the component theories, as well failing to provide for a clear framework for the operation of international commercial arbitration.¹⁰³ A strong, though not overwhelming connection between the arbitration and the seat of arbitration is seen as a major influence on the ideology behind the hybrid or mixed theory. A workable connection must exist between the wishes of the parties and the law of the seat of arbitration.¹⁰⁴

¹⁰⁰ Article V(1)(e) of New York Convention

¹⁰¹ Tsakatoura, Anastasia, "The Immunity of Arbitrators", (2002), Inter-Lawyer Law Firms Directories, p7, (<http://www.inter-lawyer.com/lex-e-scripta/articles/arbitrators-immunity.htm>), access on 13 October 2008

¹⁰² Fn 92, at p12-13

¹⁰³ Fn 31, at p149

¹⁰⁴ Fn 7, at p58

However, this theory appears to have failed by paying too much attention to party autonomy, and neglecting to consider the reality of arbitration. It is based on the belief that contract and judicature can interact workably. The reality of the situation is that if the practice of arbitration does not receive assistance from the state, it will be difficult, if not impossible for its awards and decisions to enjoy recognition and enforcement.

7.4.1.4 The Autonomous Theory

The autonomous theory was introduced in the 1960s. The theory incorporates traditional arbitration method and puts some focus on the purpose of international commercial arbitration. Although this theory concedes that arbitration belongs under the modern legal structure, the autonomy principle places the definition of arbitration as an autonomous institution. That it should be an institution that should not be limited by the law of the seat of arbitration. Parties to an arbitration ought to have unlimited autonomy to decide whether or not to submit to arbitration, when a dispute ensues.¹⁰⁵

However, this theory overemphasizes the aim and function of arbitration and the principle of party autonomy. It reflects some trends in response to the growing needs of business people; i.e. for a flexible and private way of dispute resolution and development of international commercial

¹⁰⁵ Ibid at p148

arbitration,¹⁰⁶ but neglects the social, political and economic issues that determine the direction in which international arbitration can develop. In summary the autonomous theory of arbitration in the following: “in order to allow arbitration to enjoy the expansion it deserves, while we along keeping it within its appropriate limits, one must accept, I believe, that its nature is neither contractual, nor jurisdictional, nor hybrid, but autonomous.”

7.4.2 Procedural Law and Supranational Arbitration

As we have discussed in Chapter 2, the center of most international arbitrations is the arbitral proceedings themselves. Arbitral proceedings can take a wide variety of forms in matters of international dimensions, depending on the legal, practical, commercial, cultural, and other considerations normally brought into play by the place where it was conducted.¹⁰⁷ This is separate from the underlying contract or arbitration agreement that the parties had entered into, which is bound by a set or sets of legal rules.¹⁰⁸ The procedural law that is applicable to an international arbitration would greatly influence the procedures that would be adopted during the arbitration. Specifically, the procedural law may either provide for certain arbitral procedures to be applied or exclude the application of other procedural steps from the arbitral proceedings. The procedural law

¹⁰⁶ Fn 92, at p13-14

¹⁰⁷ Born, Gary B., *International Commercial Arbitration: Commentary and Materials*, 2nd edn (Kluwer Law International, 2001), p409-410

¹⁰⁸ Ibid at p411-412

also determines to a large extent the procedure to be adopted in vacating or enforcing arbitral awards.¹⁰⁹

However because supranational bodies operate independent of any national laws, providing a regulatory frame work or procedural laws to guide the proceedings of supranational bodies is a very important challenge. In response to this,¹¹⁰ Judge Holtzmann and H.E.Judge Stephen Schwebel have suggested the application of both the UNCITRAL Model Law and the New York Convention to achieve the goal of harmonisation to fill this void,¹¹¹ while Yu is of the opinion that the UNCITRAL Arbitration Rules or the UNCITRAL Model Law can be applied as procedural rules to regulate arbitration that are practiced under the new framework.¹¹² For these scholars, as far as the procedural rules regulating arbitration operated under this dispensation are concerned, no new rules will be required. The adoption of the UNCITRAL Arbitration Rules or the Model Law as procedural rules would be sufficient.¹¹³

However, as we also discussed earlier, not only are the UNCITRAL Model Law and UNCITRAL Arbitration Rules not authorized under the Convention, they are also not mandatory.

In addition, they are fraught with certain obvious defects and have been criticized by a number of

¹⁰⁹ Ibid at p412

¹¹⁰ Fn 31, at p162

¹¹¹ H.E. Judge Howard M. Holtzmann, "A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards", at p110; H.E. Judge Stephen M. Schwebel, "The Creation and Operation of an International Court of Arbitral Award", at p116-118, in *The Internationalisation of International Arbitration: The LCIA Centenary Conference*, edited by Hunter, Martin and Marriott, Arthur and Veeder, V.V., 1995

¹¹² Fn 31, at p162

¹¹³ Ibid

scholars as such.¹¹⁴ Therefore if the UNCITRAL Model Law and/or UNCITRAL Arbitration Rules are to be adopted, then they must receive authorization, and certain other modifications must be made, to ensure they are workable and would apply smoothly.¹¹⁵ The key issue as to whether the new framework is practicable will be discussed later in this chapter.

7.4.2.1 The *Lex Loci Arbitri* and Supranational Arbitration

The *Lex Loci Arbitri* emphasizes state sovereignty in its supervisory functions and roles. But the form of supranational arbitration proposed requires each state to give up intervention based on state sovereignty; even requiring each state to transfer the right to intervention or national supervisory role to judicial support.

Again as discussed in Chapter 3, the *lex loci arbitri* has a close connection with the arbitration procedure. This is because the arbitral procedure is usually regulated by the law of the state where the arbitration is conducted. The seat of arbitration is therefore perhaps the most important factor in determining the arbitration procedural law.¹¹⁶ Where there is a strict application of the *lex loci arbitri*, an arbitrator would appear to obtain his power from the national law and not from the arbitration agreement. This is an example of the *territorial sovereign* concept which in this case explains how the *lex fori* replaces the agreements of the parties.¹¹⁷

¹¹⁴ Refer to pages 72-73 of Chapter 7 of this thesis

¹¹⁵ Refer to pages 75-76 of Chapter 7 of this thesis

¹¹⁶ Fn 1, at p1-37, (<http://www.kluwarbitration.com.ezproxy.stir.ac.uk/arbitration/DocumentFrameSet.aspx?ipn=26306>), access on 15 December 2008

¹¹⁷ Dimitrios, Athanasakis, "Law applicable to merits of the arbitration dispute (an overview of the English, Swiss and French arbitration laws)", (2008), MPRA Paper, No. 10334, p42

The seat of the arbitral tribunal has been known to be able to determine the nationality of an arbitral award. Of all the laws that may be applied to the arbitration, only the laws of the state of where the arbitration takes place can directly control the proceedings and supervise the work of the arbitrators.¹¹⁸ Arbitration agreements can never be valid, and awards cannot be recognized or enforced without reference to the national law.¹¹⁹ Thus even if the symbol of state sovereignty is known to be the *lex loci arbitri*, the effectiveness of arbitral awards and procedural processes still need the assistance of the court of law of the seat of arbitration.¹²⁰ In fact, within the present arbitral framework, international commercial arbitration is subject to the municipal laws of states. Subjecting the arbitral process to the scrutiny of different national laws would adversely affect the development of international commercial arbitration.¹²¹

As a measure to extricate international commercial arbitration from the control and influence of municipal law, there has been an increasing movement towards the unification of international commercial practice and rules of law, characterizing practice and attitudes in the field of international commerce.¹²² Furthermore, both academics and practitioners alike should subscribe to the idea of harmonisation of the law to decisively deal with the conflicts created by the differences in the

(http://mpa.ub.uni-muenchen.de/10334/1/MPRA_paper_10334.pdf) ,access on 26 December 2008

¹¹⁸ Fn 108, at p411-522

¹¹⁹ Ibid

¹²⁰ Fn 28, at p19

¹²¹ Lionnet, K., "Should the Procedural Law Applicable to International Arbitration be Denationalised or Unified", (1991), *Journal of International Arbitration*, Volume 8, p5

¹²² Fn31,at p160

various applicable national laws. This would finally put an end to the problems that have arisen from the unavailability of a reliable and uniform set of laws to regulate the international arbitral mechanism.¹²³

As the international society and judicial system continues to develop, it is possible that many arbitral decisions reached at international panels may not have been based on rules connected with the seat of arbitration. In addition, these days states have begun considering their specific benefits and needs, and in a number of them now encourage parties to choose more liberal laws to handle their disputes.¹²⁴ However due to the strong and persistent judicial intervention in the arbitration process, it has become difficult to strike the desired balance between the principle of party autonomy and the power of the state court.¹²⁵ It is therefore essential for the conduct of supranational arbitration to transform the intervening judicial role into one of assistance. Supranational arbitration relies on its own international arbitration institution and set-up to conduct arbitral procedures, and the arbitral award that emanates from its proceedings would have legal force. When the supranational arbitration body determines matters bordering on the enforceability of arbitral awards, each state would have an obligation to see to the enforcement of such decisions that are relevant to persons or properties within its respective territory.¹²⁶

¹²³ Ibid at p161

¹²⁴ Ibid at p145-146

¹²⁵ Ibid at p150

¹²⁶ Ibid at p155-156

When states transfer their supervisory power to this body, then international commercial arbitration will be completely detached from the national judicial system. This however does not mean that states can simply toss their responsibility to this organization, and just stand by and not make any further contributions themselves.¹²⁷ National courts can contribute to the success of this system by playing a supporting role.

7.4.2.2 Party Autonomy and Supranational Arbitration

Party autonomy is the principle that enables parties to determine the procedure to be followed when settling their dispute by arbitration. Party autonomy principle is not only recognized by national laws, but also approved by international arbitration institutions and organizations. The legislative history of the Model Law has is that this principle received unanimous approval by participating nations and was adopted accordingly. The context of the Model Law itself takes express cognizance of this and contains the provision in the following terms: “Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.”¹²⁸ In China for example, both the CIETAC Arbitration Rules 2005¹²⁹ and the Arbitration Law 1994¹³⁰ incorporate the principle of party autonomy.¹³¹

However, we have also found that it has become necessary to develop a new arrangement to

¹²⁷ Ibid at p161

¹²⁸ Article 19(1) of the Model Law

¹²⁹ For example, Article 20(2) and Article 21 of CIETAC Arbitration Rules 2005

¹³⁰ For example, Article 4, Article 5 and Article 6(1) of Arbitration Law 1994, China

¹³¹ Fn 31, at p148

resolve the usual conflicts between party autonomy and jurisdictional power of national courts.¹³² Again as we had noted previously, the adoption of party autonomy by international legislation has become trendy. Therefore under this new framework, there will be no reason to subjugate party autonomy and parties can enjoy the freedom to choose the arbitral procedural laws. However, certain commentators have argued in favour of setting some limit to the application of this principle.¹³³ For example, in all the jurisdictional systems, equal treatment of parties is recognized as a basic principle to ensure a fair settlement of their dispute. This principle is also recognized in both the New York Convention¹³⁴ and the Model Law.¹³⁵ Unrestricted exercise of party autonomy would mean that parties would be able to contract out of the applicability of this important judicial principle.

On the other hand, the Model Law does not appear to have such an intendment, to allow parties uninhibited or absolute autonomy over the conduct of the arbitration. One scholar has suggested that it was meant to allow parties some general autonomy, and at the same time striking a balance by introducing mandatory provisions. In other words, when parties sign a contract, the arbitration must not breach the mandatory provisions, for they are considered fundamental to the proper operation of arbitration mechanism.¹³⁶ The requirement that parties have to be treated equally for example, can be cited as one limitation to party autonomy. The parties' agreement to treat one party unfairly will

¹³² Ibid at p150

¹³³ Fn1, at p286

¹³⁴ Article V(1)(b) of the New York Convention

¹³⁵ Article 18 of the Model Law

¹³⁶ Yeo, Alvin, "Harmonisation, Party Autonomy and Mandatory Provisions Under the UNCITRAL Model Law", in *Celebrating Success: 20 Years UNCITRAL Model Law on International Commercial Arbitration*, 2005, p51

not be acceptable even under the principle of party autonomy. For instance, the agreement allowing the arbitrators to hear the arguments put forward by only one of the parties will be regarded as breach of Article V(1)(c) or V(2)(b) of the New York Convention. This presents an example of a situation where the court of enforcement can successfully invalidate arbitral agreement or proceedings even if both parties have accepted it.¹³⁷ In the first place, such will tantamount to a breach of the legally sacrosanct principle of natural justice, which every judicial or quasi-judicial body, alike must protect and uphold. On the other hand however, where parties are uncertain whether their agreement on procedure can be affected or curtailed by a mandatory provision and public policy, they would be likely to take a careful approach, which may result in substantial restriction of their autonomy.¹³⁸

As a result of the strong influence of judicial elements in arbitration process, sometimes it is impossible to achieve a balance between party autonomy and power of the national court. Yu has suggested that setting-up of a supranational body to accommodate the permanent conflicts between party autonomy and jurisdictional power of national courts in the current arbitration framework, would effectively resolve this dispute.¹³⁹

7.4.2.3 Delocalisation Theory and Supranational Arbitration

It can be seen that both the delocalisation theory and supranational arbitration are positioned

¹³⁷ Fn 1, at p1-41 (<http://www.kluwerarbitration.com>.

ezproxy.stir.ac.uk/arbitration/DocumentFrameSet.aspx?ipn=26310), access on 26 December 2008

¹³⁸ Fn 137, at p56

¹³⁹ Fn 31, at p150

towards achieving the same goal. This is to separate the operation of the arbitral process from the jurisdiction of *lex loci arbitri*, so that party autonomy can be actualized, with the effect that parties are free to choose the applicable law for their arbitration regardless the country of domicile or origin of such law. However, delocalisation theory and supranational arbitration exhibit certain differences essentially in basic theory, methodology and function. While the delocalisation theory still cannot resolve the issue of recognition and enforcement of foreign arbitral awards, supranational arbitration aims to build an international court of arbitral awards or a supranational body to overcome the shortcomings of the delocalisation theory, essentially as the recognition and enforcement of foreign awards is pertained. As we had argued in Chapter 5, proponents of the delocalisation theory propose the separation of international commercial arbitration from the law of the seat of arbitration (*lex fori*)¹⁴⁰ as international commercial arbitration loses its unique character and usefulness when it is hamstrung by often conflicting laws of different nation states.¹⁴¹

Although the delocalisation theory emphasizes the importance of party autonomy, the main concern however should be the issue of the right of appeal against an arbitral award to have it set aside on specific grounds before a court, and to prevent the winning party from enforcing it

¹⁴⁰ Delocalizing the arbitral procedures refers to removing the supervisory authority of the *lex fori* and the local courts where the arbitration is held. As far as a delocalized arbitral award is concerned, it means removing the power of the courts at the place of arbitration to make an internationally effective declaration of the award's nullity. Accordingly, the delocalization theory can be applied at two stages of the arbitration procedures. One is delocalizing the arbitral procedures from the controls of the *lex fori*. The other one is delocalizing arbitral awards. See Jan Paulsson, *The Extent of Independence of International Arbitration from the Law of the Situs*, in *Contemporary Problems in International Arbitration* 141 (J. Lew edn, Centre for Commercial Law Studies, London, 1986).

¹⁴¹ Yu, Hong-Lin and Nasir, Motassem, "Can Online Arbitration Exist Within the Traditional Arbitration Framework", (2003), *Journal of International Arbitration*, Volume 20, No. 5, p455-473

anywhere;¹⁴² the issue of the recognition and enforcement of awards by foreign authorities still remains unresolved.¹⁴³ Again in consideration of the fact that the New York Convention has failed in achieving complete internationalisation of the commercial arbitration system, Judge Holtzmann had proposed the creation of an international court through an international convention. He challenged the windmills of state sovereignty; by suggesting advocating the creation of a new international court that would replace municipal courts in resolving disputes regarding the enforceability of international commercial arbitration awards.¹⁴⁴ This international court according to Judge Holtzmann would remove the issues that bedevil the current regime of the New York Convention. The New York Convention allows for recourse to municipal courts, which happens most often in the place of arbitration or the loser's country. The new court would have exclusive jurisdiction to try appeals bordering on questions regarding circumstances where refusal of the recognition and enforcement of an international arbitration award may be made, based on any of the reasons stated under Article V of the New York Convention.¹⁴⁵

What is more, the award made by the arbitrator, the legal effect of the arbitration agreement, the power of the arbitrator and enforcement of the award all rely on the power of enforcement by the law of the state. Unless the domestic law recognizes that the parties have the right to submit to

¹⁴² Mayer, Professor Pierre, "The Trend Towards Delocalisation in the Last 100 Years", in *The Internationalisation of International Arbitration: The LCIA Centenary Conference*, edited by Hunter, Martin and Marriott, Arthur and Veeder, V.V., 1995, p44

¹⁴³ Avanession, A.B., "The New York Convention and Denationalised Arbitral Awards", (1991), *J.I.A.*, Volume 8, No.1, p25-26

¹⁴⁴ Fn 19, at p109

¹⁴⁵ *Ibid* at p112

arbitration, as well as the power to authorize the arbitral hearing and enforce the award, the arbitration will be meaningless and invalid.¹⁴⁶ From the aforesaid, it is clear that it is not easy for arbitration proceedings to be independent of the national legal system. A vast majority of arbitration proceedings are clearly still governed by the laws of the seat of arbitration,¹⁴⁷ and would continue to remain so unless, and until the above problems can be resolved by international treaties such as Washington Convention on ICSID arbitration.¹⁴⁸

In order to resolve the issues surrounding the recognition and enforcement of the arbitral award, a number of scholars have put forward a few suggestions. One opinion has it that as practice and recent legislation between states and international arbitral bodies have provided more and more freedom, and as they respond to the demands of a truly international arbitration framework, it will be relatively logical for the transfer of the supervisory power of states to another well-organized international body with states giving up their supervisory role in exchange for one of support. In order to guarantee the legitimacy of arbitral procedures and resultant awards, this body would hold exclusive jurisdiction over arbitration. The ideal situation would be that once states transfer their supervisory powers over arbitration to a supranational body, international commercial arbitration can then truly internationalize and operate in the commercial world by a set of identical rules. Furthermore, in the setting up of international mandatory rules to govern the operation of this

¹⁴⁶ Fn 7, at p52

¹⁴⁷ Fn 1, at p81

¹⁴⁸ Ridgway, Augenblick, "Dispute Resolution in World Financial Institutions", (1993), *J. Int'l Arb.*, Volume 10, p73, 78-80

institution and in accordance with a range of its public policies, the decision of parties to submit their disputes to arbitration should be regarded as a contract that must be enforced.¹⁴⁹

This scholar also proposes a new framework, where parties would be assured of a system devoid of dispute over the validity of arbitral awards, in so far as the award is determined by the supranational body. This would ensure that no issue bordering on improper procedures adopted by the arbitral will ever arise. After this body has performed its duty in guaranteeing the enforceability of the arbitral award then the state shall exercise its jurisdiction to see the arbitral award to its enforcement.¹⁵⁰

However the practicability of having this kind of supranational body in real life commercial practice has been doubted by many. We shall devote some time later on in this chapter to discussing some of these views. However it shall suffice for now to state that this writer subscribes to philosophy behind this arrangement, as a bold step in the right direction for the future of international commercial arbitration.

7.4.2.4 Harmonising Arbitration Laws and Supranational Arbitration

As we have discussed in the previous chapter, the Model Law does not make it mandatory for countries to adopt its provisions. Each country has choice as to whether or not to adopt the Model Law. Since the Model Law does not have the effect of an international convention, it cannot compel

¹⁴⁹ Fn 31, at p155

¹⁵⁰ Ibid at p155-156

its adoption by any country. As a result, the reality today is that many countries are yet to adopt the law, even whilst making or revising their arbitration laws. It is our belief therefore that because the Model Law is merely of persuasive effect, it can at best only achieve partial harmonisation of arbitration laws. In its current form it cannot achieve complete harmonisation.¹⁵¹

Supranational type of arbitration has been variously discussed by practitioners and scholars alike. One scholar has written that supranational arbitration can exist independent of the judicial system, but can, at the same time still be recognized by sovereign states.¹⁵² Other proponents of this view argue that since obligation to the Model Law, unlike the Convention is not mandatory, and that the validity of the arbitral award would rely on the *lex fori* and the law of the state in which the winning party seeks recognition and enforcement.¹⁵³ This can ultimately result in arbitral proceedings being subject to judicial interference and influences.¹⁵⁴ In such circumstance, it will be commonplace to encounter situations where the eventual enforcement of the award would be completely at variance with the original award, perhaps occasioned by the difference in laws between that of the seat of arbitration and the enforcing state. We therefore submit here that in order to achieve an ideal

¹⁵¹ Holtzmann, Howard M. and Neuhaus, Joseph E., *A Guide To The UNCITRAL Model Law On International Commercial Arbitration: Legislative History and Commentary*, 2nd edn (Deventer, The Netherlands, Kluwer Law and Taxation Publishers, 1994), p4, Montineri, Corinne, "Legal Harmonisation Through Model Laws: The Example of the UNCITRAL Model Law on International Commercial Arbitration", at p8; Yeo, Alvin, "Harmonisation, Party Autonomy and Mandatory Provisions Under the UNCITRAL Model Law", at p50; Umar, M Musseyn, "Interim Measures in International Arbitration (With Reference to Indonesia)", at p115; in *Celebrating Success: 20 Years UNCITRAL Model Law on International Commercial Arbitration*, 2005.

¹⁵² Fn 31, at p151

¹⁵³ Fn 1, at p1-37 (<http://www.kluwerarbitration.com>.

ezproxy.stir.ac.uk/arbitration/DocumentFrameSet.aspx?ipn=26306), access on 23 October 2008

¹⁵⁴ Ibid

arbitration framework, and to ensure the rapid development of arbitration, the practice of arbitration must be linked to the judicial system. States could relax or give up their supervisory power over arbitration proceedings, replacing it with the will to support supranational arbitration bodies. This supranational body must hold exclusive and absolute jurisdiction over arbitration in order to control the legitimacy of arbitral procedure, proceedings and the resulting award or decision. In this dispensation, states must recognize the autonomous jurisdictions of the arbitral tribunal in arbitration proceedings, and must resolve to provide the necessary support measures, and recognize the validity of the arbitral award. Even more, in the setting up of international mandatory rules essential for the working of this supranational body as well as providing for the range of its public policies, the decision of parties to submit their disputes to arbitration should be regarded as a contract that must be enforced. Necessary protection should also be given to arbitrators, like that accorded judges. Arbitrators should also enjoy the array of immunities necessary for a judicial office. At the same time, arbitrators should, be subject to the same obligations and responsibilities as judges. For example, they must perform their duties independently, fairly, and justly conduct arbitral proceedings.¹⁵⁵ Other scholars have suggested that in order to create the ideal framework for a supranational body, the international court has to be established through the signing of international conventions by the various interested states. The validity and enforcement of arbitral awards should be within the exclusive competence and jurisdiction of this international court, and should not be subject to

¹⁵⁵ Fn 31, at p155

intervention by the laws of sovereign states. This theory has received the support and approval of many scholars and practitioners alike. It is therefore also possible for it to work in real life arbitration.¹⁵⁶

The founding mission of the Model Law was to achieve harmonisation of arbitration law. However in practice the usefulness of the Model Law in this regard has proven to have its limits. Therefore supranational arbitration does indeed provide a unique solution in both theory and practice. This approach provides an ideal framework for supranational arbitration, but the question as to whether it can be carried out effectively for desired results will be the focus of our discussions below.

7.5 Development of International Commercial Arbitration

7.5.1 The Inability of Old International System to Satisfy the Needs

Supranational does not imply the absence of a standard, but rather not to have one that is bound and limited by particular values and instructions of the states involved.¹⁵⁷ The cases of the ICSID and The International Criminal Tribunal for the former Yugoslavia at The Hague are examples of international situations that support this view. The International Criminal Tribunal for the former

¹⁵⁶ H.E. Judge Howard M. Holtzmann, "A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards", at p109-114; H.E. Judge Stephen M. Schwebel, "The Creation and Operation of an International Court of Arbitral Award", at p115-123, in *The Internationalisation of International Arbitration: The LCIA Centenary Conference*, edited by Hunter, Martin and Marriott, Arthur and Veeder, V.V., 1995; Fn 31, at p155

¹⁵⁷ For other developments in international laws and courts and in their relationships with national laws and courts see Joseph H. H. Weiler, "The Democracy Deficit of Transnational Governance: What Role for Technology?" presented at the International Political Science Association congress in Quebec City, August 1-5, 2000. For a detailed discussion of the importance of enforcement capabilities of supranational bodies, their development in the EU, and the implications for world courts, see Helfer and Slaughter, "Toward a Theory of Effective Supranational Adjudication," (1997), *Yale Law Journal*, Volume 107, p273-328

Yugoslavia is an international arbitration organization that with the basic features of a supranational institution. At the Yugoslavian tribunal, judges' rule on cases of international law instead of those based on specific or general instructions from individual nations.¹⁵⁸ Today however, the ICSID represents the most prominent example of supranational arbitration. The advantages of ICSID not only include the removal of the nationality of arbitration proceedings, it also guarantees the integrity of investment and trading affairs.¹⁵⁹ On the other hand, the basic shortcoming of ICSID is that the arbitral awards it renders cannot be appealed against. The parties can only apply for the setting aside of the arbitral award on limited grounds for remedies.¹⁶⁰ Furthermore, ICSID lacks a unified law providing for possible situations or reasons for the review or the setting aside of awards.¹⁶¹ Besides, even though signatory states to the Washington Convention appear to have given up sovereign immunity, this does not preclude them from exercising the international law and policy right of immunity from enforcement.¹⁶² In cases where the agreements of the parties are obscure, unclear or ambiguous, the arbitrator is then obliged to interpret this agreement. However, such interpretation would lack a uniform international standard. Arbitrators also come from different states, orientations, backgrounds and cultures, which may result in a situation where varied interpretations are given to the same document or situation, consequently facilitating dispute

¹⁵⁸ Radmila, May, "The Yugoslav War Crimes Tribunal: Part Two," (1999), *Contemporary Review*, Volume 275, p174-179

¹⁵⁹ Sunderam, Vidya, "Settlement of Investment Disputes-Washington Convention- Indian consideration", (2008), *indlaw news*, p8, (<http://www.indlawnews.com/display.aspx?4382>), access on 01 December 2008

¹⁶⁰ Article 53 of the ICSID Convention, *Regulates and Rules*

¹⁶¹ Article 27, 54 of the Washington Convention

¹⁶² Maniruzzaman, A F M, "State Enterprise Arbitration and Sovereign Immunity Issues: A Look at Recent Trends", (2005), *Dispute Resolution Journal*, p1-4, (http://findarticles.com/p/articles/mi_qa3923/is_200508/ai_n15704692/pg_3), access on 30 December 2008

situations.

This old system of intergovernmental relations here combines international efforts made by single national governments, many kinds of joint efforts made by such governments, and international organizations that are governed by national states. Even so, an examination of the problems inherent in the old system strongly indicates that the old system is overloaded, and largely inappropriate for a *high and rising* capacity of *significant* activity.¹⁶³ The old system of intergovernmental relations has therefore been unable to cope with transnational problems that have arisen.

7.5.2 Recognizing the Supervisory Power of the States

There are two main factors in the development of international commercial arbitration; the expectations of businessmen to have an alternative mechanism for resolving their disputes, and the support of the state.

The supervisory power of the state, presupposes among other things that any activity held in that country, including arbitration, must be controlled by the law of that country.¹⁶⁴ Similarly, F.A. Mann, stated that “every arbitration is a national arbitration, that is to say, subject to a specific system of national law.”¹⁶⁵ Some commentators however argue that with the presence of the jurisdictional

¹⁶³ Etzioni, Amitai, *Political Unification Revisited: On Building Supranational Communities*, 2001, pVIII-IX

¹⁶⁴ Fn 13, at p161

¹⁶⁵ Julian D.M. Lew QC, “Achieving the Dream: Autonomous Arbitration”, (2006), *The Journal of the London Court of International Arbitration*, Volume 22, No. 2, p188, Mann, F.A., “*Lex Facit Arbitrum*”, in *International Arbitration: Liber Amicorum* for Martin Domke, P. Sanders edn, 1967, p159

elements, the national supervision and controlling power have been adopted under this new system.

In the first place, the jurisdictional elements show quite clearly that international commercial arbitration can actually be operated in different states. Furthermore, the states not only have the power to control the duties and powers of the arbitrator, but also to control how the arbitral proceedings should be conducted. Besides this, the national court also has the power to review the validity of the arbitral awards, or to seek for recognition and enforcement of the arbitral award under the jurisdiction of the states.¹⁶⁶ In short, it almost goes without saying, that the supervisory power of the state greatly influences the practice of international arbitration. However states are keen to support arbitration as an alternative method of resolving disputes between the parties because they realize that arbitration has the potential of helping to reduce the heavy case load experienced by national courts, and adequately responding to the need for an alternative dispute settlement mechanism of the international commercial society.¹⁶⁷

7.5.3 Building a Supranational Body

7.5.3.1 The Structure of the Supranational Body

It is useful to think of supranationality as a compound entity made up of several elements. It is therefore not enough to have more of each element, but all the elements in equal proportion. One fundamental “supranational” element is determination conducted by a governing body that is not composed of representatives of the states, but a tribunal that follows its own rules, policies, and

¹⁶⁶ Article V of the New York Convention.

¹⁶⁷ Fn 31, at p151

values instead of listening to instructions from national governments. This characteristic often permits them to move with more flexibility and speed than other similar international organizations.¹⁶⁸ Another element is that the states that subscribe to the birth of these entities are expected to follow the rulings of these bodies, rather than require separate decisions by the national governments of parties that are affected by its decision. Moreover, supranational bodies may provide their own kind of effective enforcement mechanism, such as the ability to directly fine corporations within the member states or order them to discontinue certain action, instead of imposing fines, or asking them to compel such corporations to do an act or refrain from doing some other thing. In other words, supranationality implies some degree of surrender of sovereignty by the member nations.¹⁶⁹

7.5.3.2 Why Build A Supranational Body?

As discussed above, the role of supervisory power of states cannot be ignored in international commercial arbitration. But there are still some states, like Belgium, which have deviated somewhat from this practice, and had attempted to detach arbitration from the control of national power. Belgium had partially adopted the delocalisation theory in 1985, by amending the Belgian *Code judiciaire*. Under this Code, where parties to arbitration are non-Belgian an award made in Belgium involving non-Belgian parties will not be invalid. Article 1717(4) of the Belgian Judicial Code states that “The parties may, by an explicit declaration in the arbitration agreement or by a later agreement,

¹⁶⁸ Fn 163, at pXIX

¹⁶⁹ Ibid

exclude any application for the setting aside of an arbitral award, in case none of them is a physical person of Belgian nationality or a physical person having his normal residence in Belgium or a legal person having its main seat or a branch office in Belgium.”

It would appear that Belgium does not allow foreigners a choice for the opportunity of local judicial review, and their arbitration practice unfettered.¹⁷⁰ It is worthy of note however that arbitration in Belgium is not totally delocalised, thereby casting a reasonable doubt on its seemingly unfettered nature. For example, in typical Belgian arbitration, matters such as nomination of arbitrators, gathering evidence and provisional measures to preserve property may attract state intervention, at pre-award stages by the Belgian court and so on.¹⁷¹

To cure this lacuna, Yu suggests that any discussion on the jurisdictional characteristics of arbitration should go a step further than placing emphasis on any theory about the jurisdiction system, to one which tries to link the fast development of the arbitration system with the already existing level of jurisdictional intervention, in order to strike the ideal balance. States must be prepared to permit parties to hand in commercial disputes to a private judge that is an arbitrator, and give up their supervisory power over arbitration to a well-designed supranational body.¹⁷²

¹⁷⁰ Paulsson J., “Arbitration Unbound in Belgium”, (1986), *Arb. Int'l*, Volume 2, No.1, p68–69, p71.

¹⁷¹ As expressed by one Belgian commentator, ‘International arbitral awards rendered in Belgium are foreign awards within the meaning of the New York Convention because they are still, to a large extent, governed by Belgian law.’ Vanderelst, “Increasing the Appeal of Belgium as an International Arbitration Forum— The Belgian Law of 27 March 1985, Concerning the Annulment of Arbitral Awards”, (1986), 3 *J. Int'l Arb*, p85

¹⁷² Fn 31, at p155

The phenomenon known as the European Union epitomizes the ideal supranational body. As a matter of fact, the case for “supranational arbitration” actually originated from the history behind the founding of the European Union. Monnet has suggested a way around the problem of state sovereignty by beginning the struggle against the principle from attacking the principle of “indivisibility of sovereignty.” This can be achieved by gradually tearing apart state sovereignty by the method of federalist-functionalist, in order to take away sovereignty from states and transfer same to independent supranational institutions that are organized to follow a federalist institutional model.¹⁷³ And although the general structure of this supranational body has attracted many criticisms,¹⁷⁴ it had worked well for the economic repositioning of the Region.¹⁷⁵ The purpose and organizational mechanism of the EU appears to be different from the traditional concept of international commercial arbitration, but it is nevertheless an attractive concept since it satisfies the needs.¹⁷⁶

7.5.3.3 Building A New International Court

In order to combat the usual issues occasioned by the actions for the recognition and enforcement of arbitral awards, Judge Holtzmann has proposed the creation of a new international court. This court would be driven by the mandate to resolve disputes that may arise from actions towards the

¹⁷³ BÓKA ÉVA, “Rethinking European Supranationalism in a Historical Perspective”,(2008), Grotius, p3, (<http://www.grotius.hu/publ/displ.asp?id=TJCVQS>), access on 09, December 2008

¹⁷⁴ These criticisms will be later discussed in the chapter

¹⁷⁵ Fn 174, at p1-4, (<http://www.grotius.hu/publ/displ.asp?id=TJCVQS>), access on 09, December 2008

¹⁷⁶ Blanke, Gordon, “The Case for Supranational Arbitration - Ideas and Prospects”, (2008), European Business Law Review Special Edition - Arbitrating Competition Law Issues, p17

enforcement of arbitral awards.¹⁷⁷ Judge Holtzmann has submitted that the international commercial arbitration system works at its best within a framework that contains five elements that are separate but nonetheless interrelated. These five elements are:

- (a) effective arbitration clauses,
- (b) efficient procedural rules,
- (c) experienced arbitral institutions,
- (d) national laws that encourage arbitration, and
- (e) international treaties that ensure the enforcement of arbitration agreements and foreign arbitral awards.¹⁷⁸

Judge Holtzmann has stated further that up till now, element (e) has not yet been accomplished, whilst elements (a) to (d) have been accomplished. Furthermore as the Model Law has continued to receive approval by states, international commercial arbitration appears have begun its gradual march towards its goal of harmonisation.¹⁷⁹ However, this writer does not agree that harmonisation is that near, for reasons that will be discussed later in this work.

International treaties are considered vital elements in the framework of international commercial arbitration, because they provide the best mechanism to assure that there shall be mutual recognition

¹⁷⁷ Fn 19, at p109

¹⁷⁸ Ibid at p110

¹⁷⁹ Ibid

and enforcement of arbitral awards among states.¹⁸⁰

If a treaty today that can be said to be the most influential and proved the most effective instrument for the recognition and enforcement of foreign arbitral awards, it will be the New York Convention, so much so that there is very strong indication of its continued acceptance in the years to come.¹⁸¹ However, even though the New York Convention is that popular, it has been unable to achieve complete internationalisation of the commercial arbitration system. This is because even though the Convention touches on the reasons that affect or would properly limit the recognition and enforcement of awards, it leaves with the municipal courts of the enforcing state the function of deciding whether these reasons exist.¹⁸² What is more, if the subject matter of the dispute cannot be settled by arbitration under the law of that state, or that the recognition and enforcement of the arbitral award runs contrary to its public policy, then that application for enforcement may be refused.¹⁸³ Hence, the role of municipal courts under the convention can be both or either pervasive and/or decisive in considering whether international arbitration awards are enforceable.¹⁸⁴ This participation of municipal courts in the enforcement procedure for foreign arbitration awards creates a pragmatic effect on the free flow of international commerce.¹⁸⁵

For the new international court, it would have exclusive jurisdiction on questions regarding the

¹⁸⁰ Ibid

¹⁸¹ Ibid

¹⁸² Article V, paragraph 1 of the New York Convention

¹⁸³ Article V, paragraph 2 of the New York Convention

¹⁸⁴ Fn 19, at p110-111

¹⁸⁵ Ibid at p11

instances where recognition and enforcement of an international arbitration award can be made, subject to any of the reasons stated in Article V of the New York Convention. States that subscribe to the new Convention would undertake an obligation akin to that under an international treaty; i.e. to see judgments of the new international court concerning persons and property within its territory to their fruition. The new court should be empowered to impose some sort of sanction on states that fail or neglect to fulfill that obligation.¹⁸⁶

7.5.3.4 International Court of Arbitral Awards

The idea of building a new court was developed in the Judge Holtzmann's proposal of International Court of Arbitral Awards. Judge Holtzmann's proposal has been endorsed by Judge Schwebel, who originally suggested that the new court be named the "International Court of Arbitral Awards."¹⁸⁷ F.S. Nariman, Martin Hunter, H.E. Judge Bola A. Ajibola and Professor Hans van Houtte also agree on this point.¹⁸⁸ Judge Schwebel has stated further that for now there are no international courts that private parties may resort to for the recognition or enforcement of a foreign arbitral award with such effective capacity or jurisdiction. There is the necessity for a new court to be established, as not even any of the existing international court can meet to the standards necessary for

¹⁸⁶ Fn 19, at p112

¹⁸⁷ H.E. Judge Stephen M. Schwebel, "The Creation and Operation of an International Court of Arbitral Award", at p115; H.E. Judge Howard M. Holtzmann, "A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards", at p114, in *The Internationalisation of International Arbitration: The LCIA Centenary Conference*, edited by Hunter, Martin and Marriott, Arthur and Veeder, V.V., 1995

¹⁸⁸ *The Internationalisation of International Arbitration: The LCIA Centenary Conference*, Hunter, edited by Martin and Marriott, Arthur and Veeder, V.V., 1995, p155, 157-158, 159-160, 161-163

the work of this super court.¹⁸⁹

Judge Schwebel has therefore suggested that UNCITRAL should designate an international convention that would prepare for the birth or founding of an International Court of Arbitral Awards.

The jurisdiction of this Court would be limited to the determination of questions that pertain to the validity of international commercial arbitral awards. A convention, that would, in its preamble clauses, set out to do the following:¹⁹⁰

- (a) recollect the appropriate provisions of the New York Convention;
- (b) realize that disputes concerning the recognition and enforcement of arbitral awards appear in front of national courts;
- (c) remember that those disputes are facing different dispositions;
- (d) assuring that uniformity and consistency of results in the challenge dispositions of the processes of international arbitration and awards will facilitate the validity of international commercial arbitration, and that the true conducting of appropriate treaty obligations will also equally encourage the international contractual and trading relationships which depend so heavily on those processes; and
- (e) state that, accordingly, the states parties have decided to build an International Court of Arbitral Awards to provide original, final and definitive judgment on the validity of such awards at the

¹⁸⁹ Fn 20, at p116

¹⁹⁰ Ibid

time and place challenged.¹⁹¹

He has further stated that the Convention should clearly provide for the laws applicable to the Court as follows:

- (a) the New York Convention or whatever other treaties that are valid and can govern international commercial arbitration;
- (b) any law regulated by the parties of the applicable arbitration agreement;
- (c) any law which can be governed by virtue of the rules of conflicts of laws;
- (d) the customary law of international arbitration;
- (e) international public policy; and
- (f) the general principles of law that are recognized by nations participating in the international arbitral community.¹⁹²

The Convention should also provide that the government of the contracting states and the court should recognize and enforce the judgments of the International Court of Arbitral Awards, and that states and local courts of whatever level or character shall trust the judgments of the Court.¹⁹³ Yu has suggested that states should be persuaded to give up their supervisory powers of arbitration for two reasons; that states should be persuaded to change the current arbitration framework, and these

¹⁹¹ Fn 20, at p116

¹⁹² Fn 20, at p118

¹⁹³ Ibid

changes should fit the interests of each state.¹⁹⁴ For the first step, for fact of the deficiencies inherent in the four theories, and the satisfaction of the needs of the international commercial community and national interests, the arbitration laws of many states have moved towards liberalism and internationalism.¹⁹⁵ And for the second, even where states have given up their supervisory powers, the building of a supranational body can solve the disputes of different states, rectify the deficiencies of each state, and fit the very interests of each state.¹⁹⁶

However in the first stage of this new method, states need to recognize that in a state's jurisdictional system, arbitration is a valid and neutral method for the effective resolution commercial disputes between parties.¹⁹⁷ The second stage is for states to recognize the autonomous jurisdictional characteristics of an arbitral tribunal, agree on the crucial mandatory nature of arbitration contracts and arbitral awards, and must be ready to provide the arbitrator every necessary support in the arbitral procedure.¹⁹⁸ The third stage would be to encourage more professionals to become arbitrators, whilst states provide protection for these arbitral officers on the same scale to that accorded judges. Finally guided by importance of public policies, arbitrators would need to bear some responsibility such as actual examination and independently and fairly exercising their powers in arbitral proceedings.¹⁹⁹

¹⁹⁴ Fn 31, at p159-160

¹⁹⁵ Fn 31, at p160

¹⁹⁶ Ibid

¹⁹⁷ Fn 1, at p23

¹⁹⁸ Fn 28, at p19

¹⁹⁹ Fn 31, at p155

Ideally, this organization should be established under an independent supervisory body that already enjoys international recognition. The primary mission of this body would be to produce a well-designed arbitration framework, and to persuade states to transfer their supervisory powers to this organization. This organization shall cater for the branches that would be set up regionally. In order to meet the demands of international commercial arbitration, organizations would have to coordinate and unify current states and international arbitration legislations, and govern issues that arise from arbitration and international trade according to its jurisdiction, instead of enacting new regulations.²⁰⁰ It is hoped that through the recognition of the needs of a proper framework for international arbitration and the establishment of a well-designed central organization, states can be persuaded that it is to their benefit to join the organization and contribute to the development of this new framework.²⁰¹

Besides, in working out means of resolving the issue of the validity of arbitral awards under the new framework, some scholars have identified the undesirable situation created under the New York Convention, whereby municipal courts are granted jurisdiction to resolve disputes related to the enforcement of international awards.²⁰² One scholar has suggested that by the provisions of an

²⁰⁰ Ibid at p160-161

²⁰¹ Ibid

²⁰² H.E. Judge Howard M. Holtzmann, "A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards", at p109-114; H.E. Judge Stephen M. Schwebel, "The Creation and Operation of an International Court of Arbitral Awards", at p115-123; Nariman, "Intervention", at p155-156; M. Hunter, "Intervention", at p157-158; H.E. Judge Ajibola, "Intervention", at p159-160; Van Houtte, "Intervention", at p161-163, in *The Internationalisation of International Arbitration: The LCIA Centenary Conference*, Hunter, edited by Martin and Marriott, Arthur and Veeder, V.V., 1995

international convention, applications to set aside or enforce awards should be within the sole jurisdiction of the new international court. With this the execution of awards handed down by the new international court will not subject to interference or delay occasioned by the courts of the state.²⁰³ Accordingly, each state that supports the new convention would have their ministerial officials promptly carry out judgments, or orders, of the new international court. Where states cannot fulfill their convention obligations, they would be sanctioned by the international court.²⁰⁴

7.5.4 Debates of the Supranational Policy

From above, it can be seen that some scholars support the proposal for the creation of a supranational body. They advance a myriad of reasons as necessitating their proposition, and are united in the belief that by creating such a new international court, disputes on the enforceability of arbitral awards would be a thing of the past. They also believe that this new court will finally remove the inconsistency associated with the adoption of arbitral procedural laws.

7.5.5 The Likelihood of States Agreeing to Give Up State Sovereignty

7.5.5.1 Neutrality and Transparency

Neutrality and transparency of the Court, has to do with its impartiality. The more transparent and neutral the court and its proceeding present, the more parties will tend to trust the jurisdiction of the court and its judgments. For example, if a party finds all the arbitrators to be of the same nationality

²⁰³ Fn 19, at p113

²⁰⁴ Ibid

as his adversary, he might not expect a fair hearing and award. Hence, the neutrality or fairness of arbitration is normally of paramount concern to the parties. Commentators have emphasized that a neutral arbitration should contain three characteristics: the equal treatment of the parties; not showing loyalty to political parties; and a suitable legal environment.²⁰⁵

However, supranational institutions are often condemned for not being sufficiently transparent.²⁰⁶

Appointments to supranational courts typically do not have as much transparency, compared to domestic judicial appointments.²⁰⁷ In our example of the European Union, it only has 27 member states, yet in practice it find difficult to ensure transparency in its policy formulation, therefore attracting so much condemnation and criticisms.²⁰⁸ Moreover, serious concerns about national prejudices entertained by supranational judges actually exist.²⁰⁹

For example, the International Court of Justice (ICJ) has presided over disputes among nations since 1946. Its defenders have argued that the ICJ makes impartial judgments. Its critics on the other

²⁰⁵ Laurence, Craig, W., "Some Trends and Developments in the Laws and Practice of International Commercial Arbitration", (1995), *Texas International Law Journal*, Volume 30, p12

²⁰⁶ Lerner, Renée Lettow, "International Pressure to Harmonize: The U.S. Civil Justice System in an Era of Global Trade", (2001), *BYU L. REV.*, p284–286 (criticizing the current rules limiting access to NAFTA proceedings); Young, Earnest A, "Toward A Framework Statute for Supranational Adjudication", (2007), *Emory Law Journal*, Volume 57, p110-111

²⁰⁷ Mackenzie, Ruth and Sands, Phillippe, "International Courts and Tribunals and the Independence of the International Judge", (2003), *HARV. INT'L L.J.* Volume 44, p271,277–278; see also Movsesian, Mark L, "Judging International Judgments", (2007), *VA. J. INT'L L.* Volume 48, p92–93 ("Typically, international organizations far removed from national communities appoint international judges. These organizations use selection procedures that are opaque or even secretive . . .") (internal quotation marks omitted).

²⁰⁸ Liu, Kuang-Hwa, *A Series of the European Union Institutions*, 1st edn, 2006, p86

²⁰⁹ Posner, Eric A. and. de Figueiredo, Miguel F. P, "Is the International Court of Justice Biased?",(2005), *Journal of Legal Studies*, Volume 34, p599;Young, Earnest A, "Toward A Framework Statute for Supranational Adjudication", (2007), *Emory Law Journal* 57, p111

hand argue that the members of the ICJ vote for the interests of their home states. Previous empirical studies on this issue are reported to have produced unclear findings. A test was carried out to analyze this bias. Statistical readings from the test, produced strong evidence proving that (1) judges favor their home states and that (2) judges favor the states that are about as economically viable as their states of origin.²¹⁰

Another scholar has also stated that at this moment in history, the existing international institutions do not appear able to sufficiently protect the interests of everyone, whether big or small, rich or poor. In terms of stability, cooperation and development of/in international trade and so on, the economically strong countries which, in spite of appearances, would have much to gain, are apparently reluctant to consider a possible redistribution of power in the world, and only see the problems that this might create, remaining oblivious of the great opportunities that it would provide. The less developed countries generally seldom have the opportunity to define the priorities and agenda of such a possible change, which simply indicates that supranational institutions cannot be said to be neutral.²¹¹ As we stated earlier, many solutions have been advanced to resolve the issues that militate against the recognition and enforcement of international awards. Judge Holtzmann and Judge Schwebel have proposed the creation of an international court to resolve international disputes, while Yu has opined that the court and arbitration should be totally separate, and instead a supranational body

²¹⁰ Posner, Eric A. and de Figueiredo, Miguel F. P, "Is the International Court of Justice Biased", (2005), *Journal of Legal Studies*, Volume 34, p599

²¹¹ Bradanini, Alberto, "From the present International Institutions to the "People's Community", (2003), *Politica Internazionale*, p2, (<http://www.politicainternazionale.it/file%20PDF/A&T%201.2003%20-%20en/3.pdf>), access on 30 December 2008

should be created. Both approaches are well positioned, yet neither has provided for the issues surrounding the impartiality and transparency of the court. Hence, these approaches have left a lot to be desired.

7.5.5.2 States Support for the Supranational Body

As we have discussed in Chapter 3, the arbitral award is not binding unless it is linked to national laws. Then whether the new framework succeeds depends on whether it is supported by the state. However states must recognize and face up to the needs of international commercial arbitration. We have identified the building of a supranational body is necessary for the future of international commercial arbitration, and the credibility of the system. States in the international system must also realize that their support of this new framework will serve their best interests in the long run.²¹² The framework we propose, also aims to achieve a unified system of national arbitration laws and practices. Overcoming the situation characterized by the operation of different and often conflicting arbitration laws, and enthrone the much talked about new dispensation which guarantees integrity of the process will require states to donate their supervisory power to a supranational arbitral body.²¹³

When states transfer their supervisory power to the supranational body, then international commercial arbitration and the national jurisdictional system can be totally separated.²¹⁴ States

²¹² Fn 31, at p159-160

²¹³ Ibid at p161

²¹⁴ Ibid at p159-160

will have to play supporting role as an enforcing body; they have to be willing to enforce valid arbitral awards turned out from the central body supported by the committee states.²¹⁵ However, one scholar sees this new framework as too idealistic.²¹⁶ Furthermore, another proponent has opined that this new framework does not reject the *lex arbitri* and supervisory power of the state. It merely proposes the transfer the supervisory power of the states to a well-designed independent body, and does not neglect the supervisory power of the states. This is merely to adapt the whole system to fit the practical needs ²¹⁷

However, whether states will be willing to transfer their sovereignty to a supranational body still raises some serious doubts. One scholar is of the opinion that in today's world, no state will be willing to recognize a supranational institution's authority to determine important interests, by yielding up large parts of its sovereignty. This is easier to understand when we recall incidences where bodies created to manage fundamental supranational interests are criticized by international press for lacking transparency, "accountability" and democratic representation in their operations and composition. Three principles regarded as inalienable in the operations of a supranational institution, entrusted with such responsibilities.²¹⁸

²¹⁵ Ibid at p161

²¹⁶ Samuel, *Jurisdictional Problems in International Commercial Arbitration: A study of Belgian, Dutch, English, French, Swedish, Swiss, U.S., and West German law ... de l'Institut suisse de droit compare*, 1989, p1-2 Citing G.Sauser-Hall. *L'arbitrage en droit international private*, 44-1 *Ann.inst.dr.int'l* 469(1952).

²¹⁷ Ibid; Fn 31, at p159

²¹⁸ Bradanini, Alberto, "From the present International Institutions to the "People's Community", (2003), *Politica Internazionale*, p2 (<http://www.politicainternazionale.it/file%20PDF/A&T%201.2003%20-%20en/3.pdf>), access on 18 December 2008

Similarly, one case has also provided the same situation. For example, in the case of the *Anglo-Iranian Oil and the UK government*, Iran had nationalized its British-owned oil industry in 1951. The British Government brought a suit against Iran before the World Court on behalf of the Anglo-Iranian Oil Company (AIOC). The British government had brought this action in furtherance of protecting the interest of the British company, invoking the principle of state sovereignty. Iran also invoked state sovereignty in its refusal to recognize the jurisdiction of the court in a dispute between a private company and a sovereign state, arguing that it should be settled by Iranian courts. Although the Court ruled in favor of Iran, however of the principle of state sovereignty as upheld in this case appears to be in conflict or at variance with the very essence of an interdependent world.²¹⁹

Even though some scholars and practitioners propose the creation of an international court or at least total separation of arbitration from the court system, and have provided many reasons in support of this argument, all these proposals actually are based on presuppositions of the existence of ideal situations. This writer believes that the issue as to whether states would be willing to give up such large amounts of their sovereignty in pursuit of these ideas is still a very relevant question. And if states are willing to surrender state sovereignty, on what grounds would they willing to do so? States should be clearly notified of what they will gain if they agree to do so or what incentives would be available to them. And even so, the states must first voluntarily give up such a

²¹⁹ The *Anglo-Iranian Oil and the UK government*, Marsh, Steve, HMG, AIOC and the Anglo-Iranian oil crisis: In defence of Anglo-Iranian, *Diplomacy & Statecraft*, Volume 12, Issue 4, 2001, p143 - 174

right, before the gains can become apparent, which is situation many states are not willing to be involved in because of risk of not getting anticipated value from the arrangement.

7.5.5.3 The Issue of the Unified Law

Judge Holtzmann and Judge Schwebel have proposed the use of the UNCITRAL Model Law and the New York Convention by the new international court to achieve harmonisation,²²⁰ while Yu is similarly of the view that the UNCITRAL Arbitration Rules and UNCITRAL Model Law should be considered in building a supranational body.²²¹ These scholars believe that the said rules can satisfy the procedural needs of the supranational body towards a harmonised system of international arbitration, marked by unity of interpretation and application of relevant laws.²²² However, one scholar has warned that the Model Law is yet to receive universal approval. In his words: “The Model Law was seen as being possibly suitable for states with no developed law or practice of arbitration, for those with a reasonably modern law but not much practice and for those with outdated or inaccessible laws; it was not thought suitable for a country such as England, where the law of arbitration is up to date and where there is extensive current practice. The Model Law was also seen to be incomplete.”²²³

²²⁰ H.E. Judge Howard M. Holtzmann, “A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards”, at p110 and H.E. Judge Stephen M. Schwebel, “The Creation and Operation of an International Court of Arbitral Award”, at p116-118, in *The Internationalisation of International Arbitration: The LCIA Centenary Conference*, Hunter, edited by Martin and Marriott, Arthur and Veeder, V.V., 1995

²²¹ Fn 31, at p162

²²² Ibid

²²³ Davidson, Fraser P., “International Commercial Arbitration: The United Kingdom and UNCITRAL Model Law”, (1990), J.B.L., p480, 484

Again, the Model Law has been described as a Model Law in the classical sense. It is also not an international treaty that carries the force of international law behind it. The Model Law in nature is exciting rather than mandatory.²²⁴ It is also far from comprehensive, since it does not provide for pertinent matters that have continued to be the bane of arbitration.²²⁵ Furthermore, as we discussed in Chapter 6, although at present the Model Law has been adopted in one form or the other by one-fifth of the states and regions of the whole world, yet the legislations of these states can not be said to have been harmonised. Proponents of the new framework have argued that the Model Law can be applied to the new framework after some revisions have been made to the law. However, this writer is worried that this framework sounds too ideal and utopian, especially considering that states are yet to achieve harmonisation of their laws, as well as the fact that no concrete solutions have been advanced to resolve these issues. Hence, it behooves on these scholars to provide sufficient reasons to persuade others to accept this concept.

Similarly, even though the New York Convention has received certain general acclaim, it lacks the degree of presence and reverence necessary to achieve complete internationalisation of the commercial arbitration system.²²⁶ In addition, the New York Convention is fraught with many shortcomings,²²⁷

²²⁴ Okekeifere, Andrew, "Appointment and Challenge of Arbitrators Under the UNCITRAL Model Law Part 1: Agenda for Improvement", (1999), *Int'l A.L.R.*, Volume 2, p167; "The UNCITRAL Model Law ... has indeed turned out to be a model piece of legislation and ... a marvellous success in international persuasive legislation."

²²⁵ Reid, Alan S., "The UNCITRAL Model Law on International Commercial Arbitration and the English Arbitration Act: Are the Two Systems Poles Apart?", (2004), *Journal of International Arbitration*, Volume 21, No. 3, p228

²²⁶ Article V, paragraph 1 of the New York Convention

²²⁷ Van den Berg, A.J., "Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards", (2008), *AJB/Rev06*, p1-2,

such as the need to add certain new provisions,²²⁸ revisions are needed for the current provisions,²²⁹ a number of provisions are unclear,²³⁰ some provisions have to be updated,²³¹ and still a number of provisions need to be brought in line with prevailing judicial interpretation.²³²

The above shortcomings cannot be remedied by the Model Law as revised in 2006.²³³

Concrete solutions to these shortcomings have not been provided in the new framework, hence the argument that there are almost no grounds to persuade states to accept this new framework pending the resolution of these issues.

Furthermore, the present writer believes that the concept of a supranational body is still only an ideal, hence whether these rules are truly applicable still raises some doubts. At present, many states still cannot specifically define public policy, due to differences in political and cultural orientation, economic power, and so on. If a unified definition of concept as basic as a public policy is still elusive,²³⁴ wherein lies the belief in the possibility of arriving at unified system of arbitral rules any

(http://www.arbitration-icca.org/media/0/12133703697430/explanatory_note_ajb_rev06.pdf), access on 07 January 2010

²²⁸ For example, a definition of the scope of application related to agreements that fall under the referral provisions of article II(3); a waiver of a party to depend on a reason for refusing of enforcement; a reference to the arbitration agreement in the more favorable-right provision of article VII(1)

²²⁹ For example, the written form as requested by article II(2) for the arbitration agreement is stricter than almost any national law; the refusal of enforcement on the reason of a setting aside on any ground in the state of origin may import parochial annulment

²³⁰ For example, the concept of an award “not considered as domestic” in article I(1); the expression “duly authenticated original award” in article IV(1)(a); the word “may” in the English text of article V(1); the words “terms of submission” and “scope of submission” to arbitration in article V(1)(c); the concept of a “suspended” award in article V(1)(e); the reference to “any interested party” in article VII(1)

²³¹ For example, the reference to “permanent arbitral bodies” in article I(2); the reference to the law under which the award was made in Article V(1)(e)

²³² For example, the public policy referred to in article V(2) means international public policy

²³³ Fn 228, at p2, (http://www.arbitration-icca.org/media/0/12133703697430/explanatory_note_ajb_rev06.pdf), access on 07 January 2010

²³⁴ Lalive, Pierre, “Transnational (or Truly International) Public Policy and International Arbitration”,

time soon?

7.5.5.4 The Problem of Cost and Time

Yu has argued that achieving the new framework, would entail massive investment of time and financial resources from states.²³⁵ She further points out that as the new framework is made by the convention, then the costs should be shared among participating states. Drawing up the new framework, would require an investment of time by the various states for plenary discussions, planning, preparations, through to completion. Scholars have observed that from formation to execution of such convention would usually entail great effort and time, citing such examples as the UNCITRAL Arbitration Rules, the Model Law on International Commercial Arbitration, the UNIDROIT Principles of International Commercial Contracts which took at least 10-20 years to reach their current form. Furthermore, around 40 years was spent on the New York Convention, from its formation to the time when most states ratified it.²³⁶ Even though this concept appears to be ideal, it however contains some issues that need to be resolved. For example, the European Union has, incurred tremendous financial costs in its operations.²³⁷ In 2008, the European Court of Auditors had for the fourteenth year running, refused to completely sign-off the EU accounts. This

(1998), ICCA Congress series no. 3, p261,(<http://www.kluwerarbitration.com.ezproxy.stir.ac.uk/arbitration/DocumentFrameSet.aspx?ipn=14788>); access on 12 February 2009

²³⁵ Fn 31, at p164

²³⁶ Ibid at p165, The UNCITRAL took a decade (1966-1976) for the producing of UNCITRAL Arbitration Rules, 9 years (1977-1985) for the adoption of Model Law on International Commercial Arbitration. Furthermore, 15 years (1980-1995) were spent on the producing of the UNIDROIT Principles of International Commercial Contracts. The New York Convention also spent about 40 years (1958-1996) to be ratified by majority States of the world.

²³⁷ Farage, Nigel, MEP, "The EU and What It Costs You", (2000), Sovereignty, p1-7, (<http://www.sovereignty.org.uk/features/articles/eucost.html>), access on 03 December 2008

body had expressed its concerns over expenditure trends, quantified at about 92% of the budget spent by member state governments and EU agencies.²³⁸ Even after so many years as a member of the Union, continued membership of the Union is costing the UK so much, in monetary terms, loss of self-government, national identity, and so on. Hence, it has been variously suggested that the United Kingdom should withdraw from the European Union. One scholar submitted that for such a wealthy state as the UK and a firm supporter of international arbitration to object to the high costs spent on its membership of European Union, then it almost goes without saying that the less economically viable states might not support the establishment of a supranational body.²³⁹

This being the case, time should not be of key concern. Issues such as neutrality, state support, and cost and the like must be addressed, in order to build the ideal supranational body with unanimous international support.

7.5.5.5 The Issue of Efficiency

Judge Holtzmann has proposed that the Court should have exclusive jurisdiction over issue of the validity of international arbitral award. The validity of the arbitral award cannot be the subject of intervention by other states. If parties wish to challenge the arbitral award, then they should submit it to the Court.²⁴⁰ This approach has the advantage of compelling various states to recognize the arbitral

²³⁸ Batten, Gerard, MEP, "How Much Does the European Union Cost Britain? 2008", (2008), The Bruges Group, p30, (<http://www.brugesgroup.com/CostOfTheEU2008.pdf>), access on 01 November 2008

²³⁹ Ibid

²⁴⁰ Fn 19, at p112

awards under the new Convention.

However, this writer submits that if parties intend to challenge the arbitral award, then this challenge might entail so much. It is doubtful whether the Court would have that much resource and time to handle all cases coming in from all over the world. If these challenges cannot be handled in time, then the Court will be overloaded and case saturated, bearing down on the efficiency of the process, inevitably creating a negative influence for the development of international arbitration.

Again should there be further objection to the outcome of an appeal, there could be a further appeal to a higher domestic court or the supranational court. And if appeals go to the supranational court, then the case of overload still is not resolved. Furthermore, if the appeal is heard by the higher domestic court, then the functions of the supranational court would appear underachieved. Moreover, even though Yu has proposed that the court should be totally separated from arbitration, she has not provided any solution around the issue of efficiency.²⁴¹

7.6 The New Approach

The rapid development in the field of international trade has brought with it certain complexities. There have been increased controversies in economic and political relations among states in the international system. And because international laws have not been harmonised, the issue of the validity of the arbitral awards has remained uncertain and often problematic. Of very serious concern

²⁴¹ Fn 31, at p154-155

also is the fact that arbitral awards often cannot be enforced in foreign states. Scholars have sought solution in either the delocalisation theory, or the Model Law, hoping in both cases to blend together the laws of each state, in order to achieve harmonisation. However as we discussed in Chapter 5 and 6, it is difficult for either or both the delocalisation theory and the Model Law put together to provide a complete solution to these issues.

From the above, we have seen that both Judge Holtzmann and Judge Schwebel have proposed the setting up of a new international court to resolve disputes, while Yu has maintained that it is necessary for the success of this exercise for the court and arbitration to be totally separated. Together, they posit that through the instrumentality of an international convention entered into by each state, to establish a supranational body, which will make sure that the validity and enforcement of arbitral awards in various states is assured. These proposals certainly contain some sound sense and provide great expectations for the future.

However, there is still a long way along the road towards the harmonisation of arbitration laws and practices. Hence, this writer emphatically posits that in order to promote the development of international commercial arbitration, it would be completely necessary for each state to give up their prejudices as well as some parts of their sovereignty. Even if there comes the day when this proposition is achieved, this writer is nevertheless more concerned as to whether this new framework would prove more efficient, elicit wide enough acceptances, and would be more transparent than the

arbitration practice existing today. If it is proved not to be the case, then supranational arbitration will lose its original value.

7.6.1 Establishing Six Supranational Bodies

This thesis, among other key issues, attempts to proffer solutions to the shortcomings of the delocalisation theory, as well as ways by which to make arbitral awards easily recognized and enforceable in foreign states. We are also interested in the methods by which we may harmonise procedural laws of various states and resolve the deficiencies inherent in the approaches offered by Judge Holtzmann, Judge Schwebel, and Yu. One may ask what methods can be applied to the arbitration process to ensure that it is more convenient, acceptable, and transparent and so on. We propose very strongly here that unlike in the other models, instead of establishing one supranational body, six should be established for the six main continents; i.e. Asia, Europe,²⁴² North America, Latin America, Africa, and Oceania.²⁴³ The reasons why this writer propose to establish six supranational bodies is, firstly, there are six continents throughout the world, and each continent share similar political, economic, and cultural background, which will enable them to communicate easier. Secondly, these continents have equal political position, which also enjoy the same rights for arbitration. Each continent would accommodate a supranational body, which would be the apex and final arbitral authority for that continent. However, others may ask if parties who come from different countries or different continents, how do they determine the

²⁴² Iceland and Greenland are included in this Continent

²⁴³ Antartica is included in this Continent

jurisdiction of arbitration, and which supranational body has the jurisdiction for the arbitration. This writer advocates that this issue can be discussed in different aspects. If the parties have agreed upon the place where the arbitration is to be held, such a place shall have the jurisdiction to conduct the arbitral procedure.²⁴⁴ For example, in a case where X comes from Japan and Y comes from England. X entered into an agreement with Y. A dispute arose and was submitted to the Asian supranational body for arbitration as stipulated under the agreement. In this case, the Asian supranational body certainly possesses the jurisdiction to conduct the arbitral proceedings. Failing such agreement, the arbitral tribunal has the right to decide the place of the arbitration considering the circumstances of the case, which includes the convenience of the parties. It means that the place chosen by the arbitral tribunal has the jurisdiction for arbitration.²⁴⁵

It should be noted also that Yu has also proposed that supervisory bodies should be established on a regional basis. However in her research, these supervisory bodies, or regional centres, are not themselves supranational organization, but are subordinate to a supranational controlling body.²⁴⁶ This differs from our proposals here as our six supranational bodies would serve as the final authority within their continents of jurisdiction. Apart from the difference in organizational structure, the mechanics of both frameworks are also quite different. This writer believes that being the top and final authority, the six supranational bodies would prove a lot simpler to operate, than the more

²⁴⁴ Both Article 20 of the Model Law and Article 16 of the UNCITRAL Arbitration Rules support my view on the choosing of the place of arbitration. Regarding the issue of the place of arbitration having the jurisdiction to conduct the arbitral procedure, please refer to p64, 71 of this thesis.

²⁴⁵ Ibid

²⁴⁶ Fn 31, at p161,164

complex model put forward by Yu. Unlike in Yu's proposal, where supervisory bodies have to report their findings to the superior supranational controlling body, our six bodies would be empowered by a Convention to reach final decisions themselves.²⁴⁷ Our six supranational bodies would also have equal status and power and would not be subject to any other supervisory arbitral institutions. Unlike Yu's proposed framework, which we believe here to be merely idealistic, our approach would prove to be more realistic, down-to-earth, and consequently elicit greater reverence, support and acceptance from all stakeholders.

Again, Judge Holtzmann has pointed out that the international court he proposes is rightly designed to circumvent the need for the introduction of another judicial layer. He has stated that where one party has entered a challenge to the recognition and enforcement of an arbitral award in a convention state, the other party could appeal to the new Court, thereby extinguishing the jurisdiction of the national court entertain the challenge.²⁴⁸ Another scholar, Jean-Louis Delvolvé, has opined that the rights of appeal could distort the nature of arbitration. He believes the action of appealing indicates the lack of respect to the will of the parties to have their disputes decided conclusively by arbitration.²⁴⁹ Another scholar further posits that if arbitral awards became subject to judicial review, then arbitration would become a precedent step to litigation and just another vehicle in the usual machinery of ordinary courts. In addition he has suggested it would be best if

²⁴⁷ Ibid at p164

²⁴⁸ Fn 20, at p119

²⁴⁹ Delvolvé, Jean-Louis, "The Fundamental Right to Arbitration", in *The Internationalisation of International Arbitration: The LCIA Centenary Conference*, edited by Hunter, Martin and Marriott, Arthur and Veeder, V.V., 1995, p147

arbitrations were not made to be the precedent step, because when parties choose to go the way of judicial review after arbitration, they will throw away the vital characteristics of the award.²⁵⁰

However, our six supranational bodies would not adopt any procedure that would encourage judicial review of the arbitral award. This writer's model would make arbitral proceedings and decisions reached before any of these six supranational bodies final and binding.

They shall be brought into being pursuant to the provisions of an international convention, giving them equal powers and co-ordinate jurisdiction, with their terms of reference regulated by the said convention. For example, we can adopt the UNCITRAL Arbitration Rules or other rules that would be acceptable to a majority of states. In this way, the inconsistency that can arise from multiplicity of arbitral procedural laws can be eliminated. Moreover, each state, under the new international convention, shall recognize and enforce arbitral awards emanating from each other's territory applying the same standard. This would overcome the issue faced by the delocalisation theory where stateless awards encounter the difficulty of being recognized and enforced in foreign states. Such a method will enhance the fair and impartial treatment of foreign awards, and solve the inhibition problems faced by domestic courts when confronted with issues of public policies and other grounds, which may compel them to reject the recognition and enforcement of foreign arbitral awards. This method can eliminate the issues encountered in recognition and enforcements of awards under the present New York Convention.

²⁵⁰ Smit, Hans, "Contractual Modification of the Scope of Judicial Review of Arbitral Awards", (1997), *Am. Rev. Int'l Arb.*, Volume 8, p147-148

This writer is firmly of the opinion that these supranational bodies can harmonise laws of various states by resorting to the convention entered into by all states. With just one convention providing for the workings of the six supranational bodies, the hitherto elusive harmonisation appears to be finally within grasp.

7.6.1.1 Convenience

It is the present writer's opinion that by establishing one supranational body in each of the six continents, convenience, acceptance, transparency and so on would be easier guaranteed. Primarily, in the issue of convenience, the first issue that needs to be considered is that unless otherwise agreed by the parties, parties would usually submit their dispute to the supranational body which stands in the most convenient position to them. Hence, having six choices of arbitration venues or of arbitral bodies would be more convenient than just one supranational body. For example, if a Japanese company and Indonesian company were to submit their dispute to arbitration, they would want to submit dispute to a supranational body in Asia for convenience of distance, similarity in culture and belief. Compared with a situation where there was just one situated in Europe for example. Herein lies the advantage of six over one.

However, one might argue that if parties come from different continents, then parties still have to make the journey to another continent, and this will not actually amount to saving time. Furthermore, they now have six locations to choose from instead of one, which might seem too complex to some.

However, this writer does not believe that this is the case. In fact, he proposes that the setting up of the six supranational bodies is more convenient than having just one. In the example of two companies, one in the United States and the other in England, conducting their business in Asia, and have chosen Hong Kong as their delivery place. The American and British company in this case might choose the supranational body that is located in Asia to arbitrate, for the reason that it will be more convenient for them to travel to Hong Kong.

7.6.1.2 Issue of Overload

If there are 36 disputes for example waiting to be resolved, by the submissions of Judge Holtzmann, Judge Schwebel, or Yu, all 36 disputes would be handled by one institution. However, applying the suggestion of this writer, with six supranational bodies to handle disputes, each body would ordinarily handle 6 disputes, thereby better managing work load per supranational body, occasioning saving operational time and consequently improve the efficiency of the arbitration.

7.6.1.3 Convenience of Communication

In this case parties are free to choose the supranational body that is most convenient for them. This supranational body may have arbitrators or members with similar political, economic, and cultural background, which will enable them to communicate easier. Easier communication enables the parties to better understand each other, which speeds up the process of arbitration and improves its efficiency. Hence this writer believes that this is another advantage of having six supranational

bodies over one.

7.6.1.4 Whether Six Supranational Bodies Will Be Accepted

As the political, economic, and cultural circumstances of states in the world system vary, it is usually difficult for parties to submit or succumb to the authority of an arbiter of another nationality. Apart from the reason of state sovereignty, another important reason for this is that the different socio-economic/political and cultural orientation could very easily lead the parties into misunderstandings. Hence this writer submits that with reduced differences in socio-economic/political and cultural circumstances of states, the higher the approval supranational bodies will receive.

On the other hand, the binding force of the new international convention made among the six bodies will also enhance their acceptability. In the example about states attempting to enforce awards in foreign countries without any treaties or conventions in place, the enforcing party can more easily enforce awards that are made in states with more developed arbitration system. This is due to the huge gap in national power between states with a developed arbitration system readily in place and states still grappling with having one established. In this case, the latter states would be more inclined to give in to an award obtained in a state with the developed arbitration system. However, when arbitral awards made by the states in the latter category are to be enforced in the former states, they would often encounter resentment from these states. This writer therefore proposes the introduction of a binding international convention, which he believes will decisively take care of this problem. It

is his firm belief that as the states in the former-category, i.e. those with a developed arbitration system are usually looked up to for leadership,²⁵¹ they would therefore be in the best position to lead the other states to accede to such a convention. The latter states would also be motivated to sign this convention, considering the numerous benefits they could gain, including guarantee of prestige and respect accorded awards emanating from their state. Therefore, both former and latter states would be willing to give up some of their sovereignty to enjoy the benefits offered by membership of the Convention.

7.6.1.5 Issues of Transparency and Efficiency

In the issue of transparency and efficiency, this writer submits that as what would have been the case load of one supranational body is divided among six supranational bodies, the operations of the bodies would be simpler, faster, and more economical. Simpler operations would translate to shorter lengths of time and reduced costs of arbitration. It would also be easier to publicize the process of arbitration.

Furthermore, we suggest that that the membership each body can cut across six continental blocks. This has the potential to reduce incidences of misunderstanding and increase the level of trust, thereby making for a smoother running of institutions business. Each supranational body would be

²⁵¹ "The name "United Nations", coined by United States President Franklin D. Roosevelt, was first used in the "Declaration by United Nations" of 1 January 1942, during the Second World War, when representatives of 26 nations pledged their governments to continue fighting together against the Axis Powers", History of the United Nations , (<http://www.un.org/aboutun/unhistory/>); access on 15 January 2009

able to meet highest standards of transparency whilst fulfilling its remit.

7.6.1.6 Whether Six Supranational Bodies Will Reach the Harmonisation of Procedural Law

Some scholars may question if the same issue was submitted to different supranational bodies, they may separately develop on a regional basis, and hence the goal of harmonisation can not be achieved. This is because these six supranational bodies are established in different continents, far from each other, and are all independent from each other; they are all top and binding authorities.²⁵² However, this writer does not share this view. It is believed that the reason of the inconsistency of arbitral procedural laws is due to the different procedural laws in various states. When parties submit their dispute to different countries, different results might be reached because the arbitral tribunal of different countries may apply different procedural laws. For example, the arbitration laws of Denmark, Australia, and The Netherlands provide that arbitration agreements should be in written form.²⁵³ On the contrary, arbitration laws of Canada, Norway, and Switzerland provide that arbitration agreements need not to be in the written form.²⁵⁴ It can be realized that if parties submit their oral agreements to Denmark, Australia, and The Netherlands, the arbitration agreement will not be considered as valid.²⁵⁵ It could be understood that it is because various laws cause different

²⁵² For example, the examiner of the viva, Dr Bryan Clark, has asked this question: "How could it be ensured that each body did not develop on a regional basis to ensure that the goal of harmonisation could be achieved?"

²⁵³ Section 7 of the Danish Arbitration Act 2005, Article 1021 of Netherlands Arbitration Act 2004, Article 21 of International Arbitration Act 1974-1989, Australia

²⁵⁴ CLOUT case 365, Saskatchewan Court of Queen's Bench, Canada, October 1, 1996, which held that the act of acceptance does not have to be in written form, but can be deduced from the conduct of the parties; Section 26 of Norwegian Arbitration Act of 14 May 2004; BG, January 16, 1995 BGE 121 III 38

²⁵⁵ Section 7 of the Danish Arbitration Act 2005, Article 1021 of Netherlands Arbitration Act 2004, Article 21 of International Arbitration Act 1974-1989, Australia

results. On the other hand, the establishing of six supranational bodies in six continents will not cause different results. This is because the six supranational bodies are bound by the same international convention. Some scholars might think that the arbitrators for each supranational body are different with different views, or have moral issues, such as corruption, bribery, and biased reasons, which all might cause different results. However, this writer believes that the above situations can also exist in the one supranational body,²⁵⁶ in other words, these situations are not only a product of the six supranational bodies. Nevertheless, this writer holds that these shortcomings can be eliminated, such as enacting the laws under the authorization of the convention, providing that these six supranational bodies should hold meetings regularly and unify legal interpretations and commentaries, but any sensitive data which enables any third parties to identify the parties and the disputes will have to be removed. If personal moral issues of the arbitrator influence the result of the arbitration, he/she should also be punished by the regulations made to prevent such a matter.²⁵⁷ This way, the possibilities of unfairness and differences can be eliminated.

Furthermore, it is believed that arbitrators must be impartial and independent to conduct arbitral proceedings. In other words, if the arbitrator is not impartial and independent to the parties, then the

²⁵⁶ For example, Article 52 of the Ireland Arbitration Act 1980 has provided that “Either party may request annulment of the award by an application in writing addressed to the Secretary-General that there was corruption on the part of a member of the Tribunal”; The English decision in *K/S Norjal A/S v Hyundai Heavy Industries Ltd* [1992] 1 QB 863, also held that such behavior was considered to be misconduct.

²⁵⁷ Rule 12 of the Schedule 1-Scottish Arbitration Rules, Arbitration (Scotland) Act 2009; Rule 66 of the Schedule 1-Scottish Arbitration Rules, Arbitration (Scotland) Act 2009; Section 24 of the English Arbitration Act 1996

arbitrator will be removed.²⁵⁸ This view has also been adopted by the court, for example, in the case of *Locabail (UK) Ltd v Bayfield Properties Ltd*,²⁵⁹ Locabail and litigants had in some joined cases made appeals to claim direct or possible partiality and bias regarding the judges or tribunal chairmen. The court held that dismissing the appeal of Locabail for retrial, that the right to an impartial trial by a fair arbitrator was a basic right strengthened by the European Convention on Human Rights 1950. The rule provided that for disqualification of a judge, if an actual danger or a potentiality of bias could be revealed on a re-examination of the case, this would usually be sufficient protection against bias.

Besides, some may suppose that because the six supranational bodies are independent from each other, if inconsistency of the arbitral award has occurred in different supranational bodies, then how can they be resolved to achieve the goal of harmonisation? Evidently, the consistency is not only on the procedural law matters but also the decisions made by the arbitrators. Hence, some may ask how to reach the consistency in the awards made in different supranational bodies? This writer submits that above questions are only assumptions, and might not actually take place. This issue will be resolved by the six supranational bodies themselves even if they do occur. For example, if there were moral issues such as bias, misconduct, fraud, corruption found in an arbitrator, the arbitral award will be vacated.²⁶⁰ Moreover, as mentioned above, each supranational body can hold regular meetings

²⁵⁸ Rule 12 of the Schedule 1-Scottish Arbitration Rules, Arbitration (Scotland) Act 2009; Section 24 of the English Arbitration Act 1996

²⁵⁹ *Locabail (UK) Ltd v Bayfield Properties Ltd*, [2000] Q.B. 451; [2000] 2 W.L.R. 870

²⁶⁰ The grounds for setting aside an award enumerated in the UNCITRAL Model Law on International

and discuss case examples with other supranational bodies. This can lower the possibility of the inconsistencies of arbitral awards to a minimum. From the above analysis, it can be clearly seen that the establishing of six supranational bodies will not cause different results of arbitration.

On the contrary, under Yu's proposal, she proposes to build a well-designed arbitration framework, with different regional branches established under this institution.²⁶¹ In her proposal, each supervisory body in its region should report its progress to the supranational controlling body. She states that in this way, the international commercial arbitration would be governed by the same central organization and follows the same procedural rules.²⁶² However under this framework, the issue of consistency of the arbitral award has not been resolved, as well as issues of transparency, efficiency, overload and so on. Therefore, this writer believes that this framework still cannot work. In other words, the proposal of this writer is most valid.

7.7 Conclusion

The adoption of the principle of party autonomy is the trend of international commercial

Commercial Arbitration, which has been adopted as the arbitration law of a number of countries, mirror the grounds for non-enforcement found in the New York Convention. Similarly, the United States Federal Arbitration Act (FAA) 9 U.S.C. §§ 1-14 has narrowed grounds for setting aside an arbitral award, and does not provide for review of the merits of the arbitrators' decision. The FAA includes the following grounds for vacatur in 9 U.S.C. § 10:

1. Where the award was procured by corruption, fraud or undue means.
2. Where there was evident partiality or corruption in the arbitrators, or either of them.
3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
4. Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

²⁶¹ Fn 31, at p160-161

²⁶² Ibid, at p163-164

arbitration. However, certain commentators are of the opinion that there should still be some limits to the application of this principle.²⁶³ Traditionally, if the parties do not choose the procedural law for the conduct of the arbitration, the usual solution to this lacuna is to have the arbitration conducted subject to the law of the place where the arbitration was held.²⁶⁴ Even where the parties have chosen the procedural rules for the conduct of the arbitration, such rules should be followed as much as is practicable and reasonable. In other words, although the parties' freedom of choice is a general principle of international commercial arbitration, it should be subject to any restraints occasioned by mandatory rules and public policy.²⁶⁵ In addition, the interpretation of and scope of public policy by states differ from state to state, thereby provoking arguments, which have continued unabated; with no real solution in sight. It would appear that a solution to the worries expressed by stakeholders in this regard is still very far away. Even though many states have adopted the Model Law, this too has proven insufficient in achieving harmonisation.

International arbitration practice is gradually moving away from simply applying the *lex loci arbitri* in the absence of an expressed or contrary intention of the parties.²⁶⁶ The modern practice is to allow the arbitrators complete freedom to choose the procedural law, or in place of that, settling

²⁶³ Fn 1, at p286

²⁶⁴ Fouchard, Philippe, Gaillard, Emmanuel, and Goldman, Berthold, Fouchard Gaillard Goldman on International Commercial Arbitration, E. Gaillard & J. Savage edn, 1999, p635

²⁶⁵ Maniruzzaman, A. F. M., "International Arbitrator and Mandatory Public Law Rules in the Context of State Contracts: An Overview", (1990), *Journal of International Arbitration*, Volume 7, No.3, p54

²⁶⁶ *General National Maritime Transport Co. V. Societe Gotaverken Arendal A.B.*, (1981) 20 I.L.M. 42; Park and Paulsson, "The Binding Force of International Arbitral Awards", (1983), *Virg. J.*, Volume 23, p253, 255-256

procedural issues as and when they occur. This trend not only reflects party autonomy to a significant degree, but also greatly challenges the influence of the *lex loci arbitri*.²⁶⁷

On the other hand, although the delocalisation theory emphasizes party autonomy, a yet unresolved issue arising is the right of appeal to a court, to set aside an arbitral award on specific grounds, and to prevent the winning party from enforcing it anywhere.²⁶⁸ In other words, even though the adoption of the “delocalisation” theory is helpful to the development of the doctrine of party autonomy, the “delocalisation” theory still has its problems in lacking a solution in the event that recognition and enforcement of the award is refused by other states as well as situations where such awards are denied assistance from other states when recognition and enforcement is sought.²⁶⁹

It is clear that the Model Law would be unable to resolve the issue of inconsistency of the applicability of procedural law and the recognition and enforcement of awards. If a comparison is made of different issues regulated by the arbitration laws of countries that have already adopted the Model Law, we can find that although many countries have referred to, or adopted the Model Law, wholly or with modifications, in producing their versions of arbitration law, we would discover that

²⁶⁷ Maniruzzaman, Dr. A. F. M., “Conflict of Laws Issues in International Arbitration: Practice and Trends”, (1993), *Arbitration International*, Volume 9, p371-404; Redfern, A. and Hunter M, *Law and Practice of International Commercial Arbitration*, 4th edn.(London: Sweet & Maxwell Ltd., 2004) p1-37, (<http://www.kluwerarbitration.com.ezproxy.stir.ac.uk/arbitration/DocumentFrameSet.aspx?ipn=26306>), access on 23 June 2009

²⁶⁸ Mayer, Professor Pierre, “The Trend Towards Delocalisation in the Last 100 Years”, in *The Internationalisation of International Arbitration: The LCIA Centenary Conference*, edited by Hunter, Martin and Marriott, Arthur and Veeder, V.V., 1995, p44

²⁶⁹ Fn 92, at p98

the contents of the regulations are not quite the same.²⁷⁰ The Model Law has been unable to achieve harmonisation. This is more so as the Model Law does not have the effect of an international convention, so that it lacks even the force of soft law, and cannot compel or command any sort of observance. This has also led to a shared belief among scholars that the Model Law does not only have a long way to go by way of improvement, but also lacks the much desired presence.²⁷¹ Furthermore, it is calculated that between 140-150 countries are yet to adopt the Model Law or are operating one kind of arbitration law or the other, perhaps without any sort of recourse to the Model Law. We can therefore conclude that the Model Law has at best merely played the role of a catalyst in achieving partial harmonisation.

The suggestions that have been preferred by Judges Holtzmann and Schwebel, even though well intentioned, have however neglected to provide for issues like the impartiality and transparency of the international court they speak about. Our way around this is the establishment of 6 supranational bodies, distributed around the 6 continents in the world, to operate in the manner described above.

This writer strongly believes that this approach is by far the most feasible, workable and comprehensive method of guaranteeing the harmonisation of international arbitration practice, respect and enforceability of international awards and the integrity of the process and resultant

²⁷⁰ Okekeifere, "Public Policy and Arbitrability Under the UNCITRAL Model Law", (1999), Int'l A.L.R., Volume 2, No.2, p70, 76

²⁷¹ Fn 228, at p229

awards.

However, as is/has been the case with most structures in the world, there are always criticisms to face in the very beginning of construction and teething problems on implementation. That notwithstanding, this writer believes that in order to promote the development of international commercial arbitration, we should be courageous enough to face whatever challenge of criticisms we may encounter. We should imitate the spirit of Christopher Columbus, known as the man who discovered America, taking no heed to the setbacks he encountered along the road to the unpredictable future. Hence, we are convinced that we must propose and practice this structure in order to plot a new course for international commercial arbitration, in our collective desire to take it to a new horizon.

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