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THE ROLE OF COURTS IN INTERNATIONAL
ARBITRATION

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EDİLMİŞTİR.

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[STAFFORDSHIRE
ÜNİVERSİTESİ]

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ABSTRACT

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Arbitration is an alternative dispute resolution method to court litigation. Due to party autonomy principle, the general approach in modern national laws has become that the court should only intervene in limited circumstances. Most international arbitrations take place without any need of the national courts. However, the coercive power of court, which the arbitral tribunal does not have, might be needed during the arbitration proceedings in particular circumstances. The court support might be necessary especially when the tribunal's orders were not complied voluntarily. The court's role during arbitration proceedings might include; taking evidence, interim relief, extension of time limits and determining the applicable law, challenge and appointment of arbitrator, in addition challenge, recognition and enforcement of arbitral awards.

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ÖZET

No - 8979

Tahkim, mahkeme yargısına alternatif bir uyuşmazlık çözüm yöntemidir. İrade serbestliği ilkesi uyarınca, mahkemenin yalnızca sınırlı hallerde müdahalesi modern hukuk sistemlerinde kabul edilmektedir. Uluslararası tahkim yargılamaları, yerel mahkemelere çoğunlukla ihtiyaç duyulmadan gerçekleşmektedir. Ancak, hakem heyetinin sahip olmadığı mahkemelerdeki yaptırım gücü, belirli durumlarda tahkim yargılaması aşamasında ihtiyaç duyulabilir. Mahkemenin dahili, özellikle tahkim kararlarına gönüllü olarak ifa edilmediği hallerde gerekli olabilir. Tahkim yargılaması sırasında mahkemenin muhtemel rolleri arasında; delil toplama, ihtiyati tedbir, süre uzatımı, uygulanacak hukukun belirlenmesi, hakemin reddi ve atanması ile tahkim kararlarının iptali, tanınması ve tenfizi konuları sayılabilir.

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1. INTRODUCTION TO ARBITRATION

Arbitration in general

Arbitration is an old Alternative Dispute Resolution (ADR) method, in which the rules and procedures are chosen by the parties and the dispute settled in a final and binding way by an independent and neutral arbitrator without recourse to any national courts in accordance with the rules and procedures agreed/intended by the parties.

Arbitration has gained significant importance and become widely effective in international commercial disputes during the last decades, parallel to the dramatic increase of globalisation. Due to the new trend, acceptance of party autonomy rule and upon the requests of the business communities, modern arbitration rules make the arbitration more independent from the courts. The general approach is that court should only intervene in limited circumstances.

Compared to domestic court system, arbitration has generally accepted advantages such as; it is more neutral, more confidential, cheaper, faster, more flexible and its decisions are accepted as final and binding. International arbitration has also transnational currency in enforcement with the New York Convention. On the other hand enforcement of a national court judgement¹ might be more difficult, since there is no multilateral treaty for enforcement of foreign court judgements.

The forms of Arbitration

There are two forms of arbitration; namely international arbitration and domestic arbitration. Each country has its own forms of procedure and rules both in domestic and international arbitration. International arbitration would arise whenever the parties are from different nationality or the nature of the dispute is international. It might also arise if the place where arbitration takes place is situated outside the country of the parties² or

¹ Hunter Martin 'International Commercial Dispute Resolution In The 21st Century: Changes And Challenges' Inaugural Victoria University of Wellington Foundation's Annual Dispute Resolution Lecture, delivered on 15 March 1999 at the Law Faculty in Wellington, New Zealand

² UNCITRAL Model Law on International Commercial Arbitration (Model Law) Section 1.3.b.i

the country where the award will be enforced and recognized is different from where the award is sought³. French law simply defines the arbitration as international if it ‘involves the interest of international trade.’⁴ On the other hand, domestic arbitration is related to disputes which have a purely national aspect.

Types of Arbitration

There are two different types of arbitration; these are institutional arbitration and ad hoc arbitration. In institutional arbitration, the parties choose a particular institution to deal with the procedure of the arbitration and these institutions apply their own rules and procedure to the arbitration process. The most important arbitration institutions are International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), International Centre for the Settlement of Investment Disputes (ICSID), American Arbitration Association (AAA), and World Intellectual Property Organisation Arbitration Centre (WIPO).

ICC is the leading institution in international commerce. ICC has its own court of arbitration, which is appointed by its council. The functions of the courts are; to appoint the arbitral tribunal unless decided by the parties, to confirm the appointment of arbitrators, to adjudicate the validity of the arbitration agreement, to determine the place of arbitration unless the parties have decided, to fix the cost and to scrutinise and approve the draft of award. LCIA is another institution which appoints arbitrators. The arbitration is conducted by a panel of arbitrators on terms of the LCIA rules and procedures, and unless otherwise agreed by the parties the seat of arbitration is in London. LCIA rules and procedures give much freedom to the parties and tribunal in choosing the applicable law. The functions of LCIA Court are to appoint or to confirm the appointment of the arbitral tribunal and to confirm the tribunal directions to the cost. ICSID was created in 1966 pursuant to the Washington Convention and with the support of World Bank. ICSID arbitration is available if at least one of the parties is a state or its agency, in other words it deals with disputes between investors and foreign

³ The New York Convention Recognition and Enforcement Foreign Arbitral Awards (The New York Convention) Article 1

⁴ French Code of Civil Procedure Article 1492

states. Unless otherwise agreed, the seat of arbitration in ICSID Arbitration is Washington. Its awards are enforced by the signatory states as a final court decision. World Intellectual Property Organization's Arbitration Centre (WIPO), located in Geneva, arranges arbitrators who are generally specialized in intellectual property.

On the other hand, ad hoc arbitration is not administered by any institution, nor does it have specific rules, instead it is generally guided by the rules chosen by the parties which are particular to that arbitration. In ad hoc arbitration, both the parties and the tribunal have wide flexibility in choosing the rules to govern their procedure. Alternatively they can adopt an established set of rules such as UNCITRAL Arbitration rules.

UNCITRAL (The United Nations Commission on International Trade Law): UNCITRAL was established by the United Nations (UN) in 1966 for the purpose of harmonizing international trade law. Its work extended to making of rules for the formation of contracts and international sale of goods. After a comprehensive study in various arbitration rules, UNCITRAL Model law, which aims to provide a model law and greater uniformity in international arbitration, was adopted in 1985. English law has not yet adopted the Model law, but reflects its format and provisions. Scotland adopted the Model Law by the law reform (Miscellaneous Provisions) Scotland Arbitration Act 1990.

The commercial nature of arbitration

In this paper, I will focus on international 'commercial' arbitration, in other words arbitration dealing with commercial or economic disputes. Thus, the public international law arbitration which is often subject to state participation and state sovereignty and subject to specific rules, or consumer arbitration which refers to strict protection rules, are out of the scope of this paper.

The meaning of commercial is a well known term, might be differ from country to country and was described in Model law in its footnote as a guideline to modern laws; "The term 'commercial' should be given a wide interpretation so as to cover matters

arising from all relationships of a commercial nature, whether contractual or not. Relationship of a commercial nature include, but are not limited to, the following transactions; any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of work; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation; agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air; sea, rail or road.”⁵ It should be noted that the national courts should not narrow the modern and international meaning of ‘commercial’ in their national laws.

The International Conventions

Unless the parties voluntarily enforce the arbitration agreement or award, it must take place through the national court. Every country has detailed and different procedures for enforcement. For the reason that, international conventions, particularly the New York Convention aim to make uniform the recognition and enforcement in international arbitration all over the world. Thus;

-The Geneva Protocol of 1923⁶ has made arbitration agreements enforceable internationally and made the arbitral award enforceable at the seat of arbitration among the signatory countries.

-The Geneva Convention of 1927⁷ provides enforcement of an arbitral award that was made in a contracting state. The convention provides that the arbitral award is binding to the parties and must be enforced provided that the award has been made in a territory or subject to the jurisdiction of one of the High Contracting Parties.

-The New York Convention has largely and successfully replaced and improved the other conventions in recognition and enforcement of arbitral awards and arbitration agreements as well. It was adopted in the United Nations Conference on Commercial Arbitration in New York in 1958 by many states including all EC members. The concept of application is stated at Art I.1 of the New York Convention;

⁵ Model Law Article 1

⁶ Geneva Protocol of 1923

⁷ The 1927 Geneva Convention (Convention for the Execution of Foreign Arbitral Awards, Geneva 1927)

“This 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, 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.”

Lord Mustill observed that the Convention was “the most effective instance of international legislation in the entire history of commercial law.”⁸ Redfern commented, “The New York Convention has proved to be a highly effective international instrument for the enforcement of arbitration agreements and...arbitration awards.”⁹

2. INTRODUCTION TO THE ROLE OF NATIONAL LAWS IN ARBITRATION

Arbitration is an alternative dispute resolution method to court litigation. Therefore in arbitration, the will of the parties is to exclude national court intervention and to choose an alternative way. Even though the national courts are not always willing to share their power, due to the development of international arbitration and acceptance of the party autonomy principle, the general approach in modern national laws has become that the court should only intervene in limited circumstances¹⁰. The Model Law¹¹ states “in matters governed by this Law, no court shall intervene except where so provided in this Law.” Many modern laws¹² limit, even exclude the intervention of the court role in arbitration. However in arbitration proceedings, the support of the national court may be needed in particular situations¹³.

⁸ Lord Mustill *Arbitration: History and Background* (1989) 6 *Journal of International Arbitration* 43

⁹ Redfern A, Hunter M *Law and Practice of International Commercial Arbitration* (4th edn Sweet & Maxwell London 2004) p 36

¹⁰ Claude Reymond ‘The Channel Tunnel Case and The Law Of International Arbitration’ 1993 *L.Q.R.* 109(JUL), 337-342

¹¹ Model Law Article 5

¹² Austria Arbitration Law s.578 (Civil Procedure Code)

¹³ A. Van der Berg ‘The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation’ (Kluwer 1981) at p. 30

The courts in English law have a more limited role since Arbitration Act 1996 was passed. The English DAC¹⁴ reported the current position of the English Law and stated that “courts nowadays generally only intervene in order to support rather than displace the arbitral process.”¹⁵, Lord Mustill in *Ken Ren* case¹⁶ observed the concept of party autonomy in England, “arbitration is a consensual process, and that national courts should, within very broad limits, recognise and give effect to any agreement between the parties, express or tacit, as to the way in which the arbitration should be conducted”. It was also held in *Fletamentos Maritimos SA v Effjohn International*¹⁷ that the court has no inherent power to correct procedural errors during the course of the reference. English law also held “it is now widely recognised as a first principle of arbitration law, and the English courts in common with those of other nations with developed systems of arbitration law strive to give effect to it.”¹⁸ However, the grounds for challenge under the English Law are still wider than those in the Model Law¹⁹. Some countries such as Scotland has adopted the Model Law for international commercial arbitration²⁰. Thus, contrary to English law²¹ in Scotland there is no right to challenge an award on substantive grounds and the award may be set aside on very limited grounds²².

The U.S. view was described in *Mitsubishi Motor Corporation v. Solar Chrysler-Plymouth Inc*²³, “we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative measure of dispute resolution.”. In a similar vein, the Supreme Court of India held; “It is obvious that since the [Arbitration] Act is calculated and designed to . . . [serve] the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through

¹⁴Departmental Advisory Committee on Arbitration (DAC) Report 1996

¹⁵ DAC Report para 22

¹⁶ *Coppee-Lavalin v. Ken Ren* [1994] 2 Lloyd’s Rep. 109 at 187

¹⁷ *Fletamentos Maritimos SA v Effjohn International* The Times, October 8, 1996

¹⁸ *Coppee-Lavalin v. Ken Ren* [1994] 2 Lloyd’s Rep. 109 at 187

¹⁹ Alan S Reid ‘The UNCITRAL Morel Law on International Commercial Arbitration and the English Arbitration Act: Are the Two System Poles Apart ?’ *Journal of International Arbitration* 21(3): 227–238

²⁰ Fraser P. Davidson ‘The Relationship Between Arbitration And The Courts In Scotland And England’ 1993 C.J.Q., 12(OCT), 372-390

²¹ (English) Arbitration Act 1996 s.69

²² Russell F, Sutton D Gill J *Russell on Arbitration* (22th edn Sweet and Maxwell London 2002) p.98

²³ *Mitsubishi Motor Corporation v. Solar Chrysler-Plymouth Inc* [1985] 473 U.S. 614 at 627

arbitration, any expression or phrase occurring therein should receive, consistent with its literal and grammatical sense, a liberal construction.”²⁴

The place of enforcement has also a considerable importance for a successful arbitration, since the State could use the public policy defence for domestic interests. For example, Vietnamese law requires an arbitral award to comply with the basic principles of Vietnamese law. In China the public policy defence could be used for purely local interests.²⁵ As a result, the parties should be careful to choose the place of the arbitration for not only practical convenience but also its neutrality. Besides the place of the arbitration, the role of the court may also depend on the governing law of arbitration²⁶ and the nationality and place of the parties²⁷.

This work will investigate deeply the relationship between the state courts and arbitration in resolving international commercial disputes. I will discuss the subject of international arbitration and whether the national courts have any role to play in arbitration, such as to support, to supervise or to intervene. I will observe each step in detail; the beginning of arbitration, during the arbitral proceedings and lastly the post award period; challenging and enforcement of arbitral awards. I will make my arguments and analyze the problem from the views of international conventions, international institutions, UNCITRAL Model Law, and some modern national laws including the English Arbitration Act 1996.

3. COURT ROLE AT THE BEGINNING OF ARBITRATION

In this chapter, I will discuss the role of the national courts at the beginning stage of arbitration. We can actually see the court role before or at the beginning of arbitration proceedings in different situations. For instance, the court role may be needed at start the arbitration proceedings or to constitute of the arbitral tribunal where the normal route does not work.

²⁴ *Renusagar Power Co. Ltd v. GeneralElectric Co.* Air [1985] SC 1156

²⁵ Paulsson ‘The New York Convention in International Practice: Problems of Assimilation’ [1996] ASA Bulletin p 101

²⁶ Model Law s. 1.2

²⁷ German Code of Civil Procedure (ZPO) section 1025.3

The Court Role before the Establishment of the Arbitral Tribunal

It might be necessary to obtain an immediate protection when the evidence related to the dispute needs to be protected without delay or to prevent the rights of a party being harmed irreparably. When the arbitrators have not been identified or the arbitral tribunal has not constituted properly, a party may wish to apply to a national court for assistance to take such beneficial measures. Because, it would take time to establish an arbitral tribunal then to fulfil procedural requirements. In addition, evidence or assets may disappear before the arbitral tribunal is established. Thus there is a need to apply to national courts to take such urgent interim measures. It is accepted that this kind of necessary application is neither contrary to arbitration proceedings nor does it breach the arbitration agreement. Therefore, most of the national courts and Model Law allows the courts to take those kinds of measures²⁸ if it seems appropriate.

Enforcement of the Arbitration Agreement

We should firstly discuss the requirements for the validity of the arbitration agreement. The Model Law²⁹ has provisions about the validity of the arbitration agreement and states that the arbitration agreement must be in writing. Due to the technological development, it is accepted that besides a signed agreement, exchange of letters, telegrams, fax and even electronic sources will fit the requirement of the validity of the arbitration agreement. Even if the signature is not a requirement for the validity of the agreement, it is actually needed for the proof of the agreement.

Even if there is a valid arbitration agreement between the parties, a party may apply to the court after the dispute has arisen, in order to avoid the arbitration method or for tactical reasons. For instance, the party may think that the court proceeding will be an advantage for him, or he will benefit from the delay of the proceeding. Chuah remarked that when a party takes his case to a national court although there is an agreement to arbitrate, he would commit a breach of the agreement.³⁰ As generally accepted

²⁸ Arbitration Act 1996 s.44

²⁹ Model Law Article 2

³⁰ Chuah J C T *Law of International Trade* (2nd edn Sweet & Maxwell London 2001) p.661

principle, international arbitration cannot exist in a vacuum³¹, if we did so it will always find a way to survive. For this reason the New York Convention, with a mandatory provision³², as well as Model Law³³ provides the provision for the survival of the arbitration and states that the courts are obliged to enforce the arbitration agreement and refuse to accept the court proceedings unless the arbitration agreement is null, void, inoperative or incapable of being performed. Section 2 of the New York Convention and the Model law Art 8 are considered as a protective barrier between the arbitration institution and the national court, which establishes the independence of the arbitration³⁴.

Establishment of the Arbitral Tribunal

To provide quick dispute resolution, most of the arbitration procedures require the parties to agree on the identity of the arbitrators in a limited period of time. If the parties fail to constitute the arbitral tribunal on time and there are no institutional or other rules for application, the national court can help in the establishment of the arbitral tribunal on the request of a party³⁵. This may be the case when the parties cannot agree on the arbitrator or the prescribed appointment method has not worked. Under English Law, the court has a power to extend the time limit to begin arbitral proceedings under specific circumstances.³⁶

Anti Suit Injunctions

Anti suit injunctions are national court orders to protect the arbitral jurisdiction and to prevent violation of the court proceedings to the arbitration agreement. Anti suit injunctions provide that the dispute will be resolved by arbitration and the national court should not intervene in that particular dispute between the parties. These national court

³¹ Christer Söderlund 'Court Support And Assistance Enforcing The Arbitral Agreement' The Stockholm Chamber of Commerce, 6-8 September 2004

³² New York Convention Art II

³³ Model Law Art 8

³⁴ Binder 'International Commercial Arbitration in UNCITRAL Model Law Jurisdiction' (Sweet & Maxwell 1st edn 2000, London) para 2-037

³⁵ Model Law Art 11

³⁶ Arbitration Act 1996 section 12

orders that are given on the request of a party, can generally be seen in common law countries. Even though the anti suit injunctions are rarely used in practice³⁷, examples can be seen especially when a court proceeding has started in another country. In *ONGC & Western*³⁸, the Indian courts granted an injunction to the winning party for not enforcing the arbitral award in the US.

The English position was set out in *The Angelic Grace*; “where an injunction is sought to restrain a party from proceeding in a foreign Court in breach of an arbitration agreement governed by English law, the English Courts feel no difference in granting the injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced... The justification for the grant of the injunction in either case is without it the plaintiff will be deprived of its contractual rights in a situation in which damages is manifestly an inadequate remedy. The jurisdiction is, of course, discretionary and is not exercised as a matter of course...”³⁹

It is important to point out that, the enforcement of an anti suit injunction which prohibit another country court from taking any action on the dispute, may not be always welcomed by the foreign national court.

Challenges to Jurisdiction

Challenge of the jurisdiction of the arbitration in national courts has a significant importance, since it may stop the arbitration proceedings. A challenge might be dealt when there is an initial application to the arbitral tribunal. The final award may be challenged in the national court at the place where the recognition or enforcement will take place. The grounds of challenge will be discussed in detail in chapter 5.

³⁷ Lew J, Mistelis L and Kröll S, *Comparative International Commercial Arbitration* (Kluwer Law International: The Hague 2003) p 363

³⁸ *Oil & Natural Gas Commission Ltd v Western Company of North America* (1987) All India Rep SC 674

³⁹ *Aggeliki Charis Compania Maritima v Pagnan Spa* [1995] 1 Lloyd's Rep 87

4. COURT ROLE DURING THE ARBITRAL PROCEEDINGS

Most international arbitrations take place without any need of the national courts⁴⁰. However, the coercive power of court, which the arbitral tribunal does not have, might be needed during the arbitration proceedings in particular circumstances. The court support might be necessary especially when the tribunal's orders were not complied voluntarily. The court's role during arbitration proceedings includes; taking evidence, interim relief, extension of time limits and determining the applicable law.

Assistance by Taking Evidence

The arbitral tribunal needs evidence for the resolution of the dispute. In arbitration, it is the duty of the parties given by the arbitration agreement to tender the related evidence to the arbitral tribunal. However, the tribunal may experience some problems in taking evidence during the arbitration proceedings not only from the parties but also the third parties. The arbitral tribunal cannot force the witnesses to answer the questions or the third parties to tender the related documents. In these circumstances, a local court can support the arbitration with the request of the arbitral tribunal or its approval. There are related provisions in many modern laws and Model Law⁴¹ to assist the arbitral tribunal to take evidence.

Interim Measures

During the arbitration proceedings, there might be a need to issue an interim measure by an authority in order to preserve evidence, protect assets or maintain the *status quo*. In many cases, the arbitral tribunal is capable of issuing the necessary interim measures of protection. Model Law⁴², ICC rules and other rules⁴³ state that at the request of a party,

⁴⁰ Chuah J C T p 662

⁴¹ Model Law Article 27: "The tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence."

⁴² Model Law Art 17

⁴³ UNCITRAL Arbitration Rules Art 26, LCIA Arbitration Rules Art25, ICSID Arbitration Rules r.39

the arbitral tribunal may order any interim or conservatory measure which it deems appropriate.

In arbitration, the parties obey the orders of the arbitral tribunal voluntarily due to their duty given by the arbitration agreement. If the parties do not act voluntarily to comply with the order of the arbitral tribunal, court assistance will be necessary to enforce the interim award since the tribunal has a lack of coercive power to enforce the agreement. The categories of interim measures are generally;

- a) to preserve evidence and to force the witness to attend the hearing,
- b) to preserve the status quo⁴⁴. (This is especially the case when the damage does not fully compensate for the loss including damage to reputation or causes loss of business opportunities etc.)
- c) to provide security for costs such as legal fees, fees and expenses of experts, witnesses, transcript writers, cost of travel and accommodation⁴⁵.

The enforcement of the interim measure of the arbitral tribunal is not clearly resolved in the international arena. Since the New York Convention does not include any provision about interim measures. Thus, it is not always easy to grant the interim measure from the local court. For example in complex and multiparty disputes, the courts are not always willing to order interim relief easily⁴⁶. Moreover, the court application can be expressly excluded in the arbitration agreement⁴⁷. The enforcement of the interim measures depends on the law of the country where the judicial relief is sought. English Arbitration Act, following the modern view states in section 42.1 that “unless otherwise agreed by the parties, the court may make an order requiring a party to comply with a peremptory order made by the tribunal.” US courts have held that to apply an interim measure in a foreign country, the court has to decide whether the measure is final in the issue or part of an award⁴⁸. Prof. Lew⁴⁹ observed that although provisional and interim measures are not generally final, the interim measures in the form of partial awards and

⁴⁴ Jason Fry states that it is the first objective of the interim measures. ‘Interim Measures Of Protection: Recent Developments And The Way Ahead; (2003) 6(5) Int. A.L.R. 153-160

⁴⁵ Marshall E Gill: *The Law of Arbitration* p.50

⁴⁶ *Channel Tunnel Group Ltd v Balfour Betty Ltd* [1993] AC 334

⁴⁷ *Mantovani v Caparelli SPA* [1980] 1 Lloyd’s Rep 375

⁴⁸ *Yasuda Fire & Marine Insurance v Continental Casualty* [1999] 37 F3d 345

⁴⁹ Lew J, Mistelis L and Kröll S p 615, 717

meeting formal requirements are accepted as a New York Convention award and binding and enforceable.

The question arises whether a party can directly apply to the national court for an interim measure. The non intervention principle provides that, the interim measure is rendered by the arbitral tribunal and therefore the court should only grant interim measures on the direct application of the party if the case is urgent or the tribunal has no power or is unable to act effectively⁵⁰. International Conventions, the ICC Rules⁵¹ and Model Law⁵² state that application to the court for interim measures in urgent cases shall not be deemed incompatible with “the arbitration agreement, or regarded as a submission of the substance of the case to the court”⁵³ or “an infringement or a waiver of the arbitration agreement”⁵⁴. For instance, many national laws⁵⁵ and some states of the US⁵⁶ have the same view as the Model law. German courts are also entitled to make provisional measures such as attachments and preliminary injunctions⁵⁷. The English Arbitration Act 1996 Section 44, a non mandatory provision, gives a wide range of powers to the courts in relation to preserving the evidences and properties⁵⁸, such as inspection, preservation or detention of property, sale of a good and granting interim measure and freezing orders. In the UK, Mareva Injunctions allow English courts to take interim measures in support of the international commercial arbitration⁵⁹.

Extension of Time Limits

⁵⁰ Adam Johnson ‘Interim Measures Of Protection Under The Arbitration Act 1996’ (1997) 1(1) Int. A.L.R 9-18

⁵¹ International Chamber of Commerce (ICC) Rules Art 23.2

⁵² Model Law Article 9

⁵³ European Convention on International Commercial Arbitration of 1961 (European Convention) Article IV.4

⁵⁴ The ICC Rules Art 23.2.b

⁵⁵ German ZPO 1041.2, Netherlands Code of Civil Procedure Article 1022.2, Swiss Law on International Arbitration (PIL) Article 183.2

⁵⁶ A report on the New York Bar Association International Litigation Committee, Commercial and Federal Litigation Section: The UNCITRAL Model Law on International Commercial Arbitration’ 23 New York University Journal of International Law and Politics 87

⁵⁷ Westin & Chrocziel ‘Interim Relief Awarded by US and German Courts in Support of Foreign Proceedings’ 28 Columbia Journal of Transnational law 723,741

⁵⁸ Adam Johnson ‘Interim Measures of protection under the Arbitration Act 1996’ Int ALR (1997) 1 (1) 9-18

⁵⁹ The use of pre-judgement attachments and temporary injunctions in international commercial arbitration proceedings’ 50 U. Pitt L. Rev 671

The arbitration agreements generally provide time limits for starting the arbitration, the appointment of the arbitrators or rendering the award. If the required action cannot be taken in the agreed time, the arbitration could fail. Most laws do not have express provisions for allowing the courts to extend the time limits. However, English law provides express provisions to grant an extension time for starting the arbitration proceedings under section 12 Arbitration Act 1996, a mandatory provision, and for rendering the arbitration award under sections 50 and 79. English law provides a limitation on the intervention for time extension in section 12.3; “i) that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend the time or, ii) that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question.” The national court can also grant an extension of time when the court considers that the substantial injustice would arise⁶⁰.

Determination of the Question of Law;

Due to party autonomy principle which is accepted by most of the laws and the Model Law, the question of law is determined by the parties of the arbitration agreement. When the parties fail to do so, the arbitral tribunal is generally accepted to have power to investigate its own jurisdiction, so called *Kompetenz- Kompetenz*. In this situation, the ICC Arbitration Rules⁶¹ states “any decision as to the jurisdiction of the arbitral tribunal shall be taken by the arbitral tribunal itself.” The tribunal will give its decision upon the agreement between the parties, the terms of appointment and relevant evidences. However, when the separation of the agreement and underlying contract is difficult, the question of jurisdiction will have to be considered on the underlying merits of the dispute⁶².

We should discuss the ‘form of court intervention’. Any challenge during the proceedings to the jurisdiction should primarily be made to the arbitral tribunal, and then the tribunal will make an interim award about the issue. After a failed challenge in

⁶⁰ Arbitration Act 1996 s. 50.3 and s. 79.3

⁶¹ ICC Arbitration Rules Art 6.2

⁶² Constantine Partasides p 688

the tribunal, a party may challenge the interim award in the national courts. The court control in the question of jurisdiction before the final award is described as a ‘concurrent control’⁶³ and adopted my many laws⁶⁴. It should be point out that the interference of the court during the arbitral proceedings should not be encouraged and that this control system might cause delays on proceedings. In a US case⁶⁵, the court decided that if the parties clearly intend the arbitrability of the dispute; the arbitral tribunal is the primary judge and the national court can only review in particular standards. Under English Law⁶⁶, the court may decide the question of law arising in the course of the proceedings on the application of a party. The court will intervene only if it is satisfied that the question of law “substantially affects the rights of one or more of the parties” and the intervention of the local court would save cost and time.

Challenge and Replacement of Arbitrators

After the arbitral tribunal has been established, the tribunal remains until the award is rendered or the parties have settled their disputes. Most modern national or institutional rules require⁶⁷ that the arbitrator must meet certain qualifications; he must be impartial and independent. Under Model Law⁶⁸ the arbitrator has a duty to disclose all circumstances that are likely to give justifiable doubts to his independence and impartiality⁶⁹. Otherwise the arbitrator can be challenged on an application by either party. It is observed that misconduct and non-disclosure may also lead to successful challenges⁷⁰. The International Bar Association drafted an ethical guideline⁷¹ stating that the arbitrator should be free from bias, accept appointments, disclose all related circumstances and communicate with the parties. In *Szilard v Szilard*⁷², the court held its view about how an arbitrator should be: “the arbitrators are to exercise their function not as the advocates of the parties nominating them, and a fortiori of one party when

⁶³ Redfern A, Hunter M p 305

⁶⁴ Model Law Art 16

⁶⁵ *Kaplan v MK Investments Inc (US)* [1995]115 Supreme Court 1920

⁶⁶ The English Arbitration Act 1996 section 45

⁶⁷ ICC Rules Article 11, UNCITRAL Arbitration Rules (10.1), LCIA Arbitration Rules (5.2, 10.3) and AAA International Rules (8.1)

⁶⁸ Model Law Article 12.1

⁶⁹ *Save & Prosper Pensions v Homepage* [2001] L&TR 107

⁷⁰ Calvo ‘The Challenge of ICC Arbitrators’ (1998) 15.4 J Int’l Arb 63,64

⁷¹ IBA Rules of Ethics for International Arbitrators

⁷² *Szilard v Szilard* [1955] SCD 3 at 4

they are agreed upon by all, but with as free, independent and impartial minds as the circumstances permit.”

The questions of what the impartial or independent arbitrator means, whether the appearance of impartiality or independence is enough for the challenge and which circumstances may lead to a successful challenge arise. Firstly, we should find out the meaning of ‘impartial or independent arbitrator’. Constantine Partasides⁷³ states that ‘impartial arbitrator’ means one who is not biased in favour of, or against a party or the case and that as such this is a subjective test. He further argued that independence means one who has no close financial, professional or personal relationship with a party and that this aspect involves an objective test. Independence is related to the prior or current personal, social or business contract between the party and the arbitrator. M.S Donahey said that “impartiality is the test for the lack of impermissible bias in the mind of the arbitrator toward a party or the subject matter in dispute.”⁷⁴ Lucy Reed and Doak Bishop drafted guidance of disqualifying factors for the test of impartiality⁷⁵. It may arise where the arbitrator has; a) a financial interest in the case or in a party or, b) a close family relationship with a party or, c) non financial involvement or, d) taken public position on the matter, or e) an adversarial relationship with a party. On the other hand they expressed the view that professional writings, lectures, professional associations and relationship with arbitral institution should not be considered as a disqualifying factor of an arbitrator. For instance in *Centrozap v Orbis*⁷⁶, it was found that the wife of one of the arbitrator was the assistant of one of the lawyers, thus the Swiss Federal Court disqualified the arbitrator. In *Groundshire v VHE*⁷⁷ considering the meaning of substantial injustice it was held that “the court is only to interfere if the court considers, not speculates, that the irregularity or unfairness has caused or will cause substantial injustice to the applicant.”

⁷³ Constantine Partasides p. 684

⁷⁴ M.S Donahey ‘The Independence and Neutrality of Arbitrators’ (1992) 4 Journal of Int Arb 32

⁷⁵ Practical Guidelines for interviewing, selecting and challenging party appointed arbitrators in international Commercial Arbitration, Arbitration International Vol 14, No 4

⁷⁶ *Centrozap v Orbis* [1996] ATF 92,

⁷⁷ *Groundshire v VHE* [2001] 1 BLR 395 at 400

Modern rules⁷⁸ accept that the appearance of bias is not enough for a successful challenge. In *Laker Airways Incorporated v FLS Aerospace Limited and Stanley Jeffrey Burnton*⁷⁹ it was held that the circumstances should also give justifiable doubts to his impartiality or independence. The allegation of the partiality ‘would lead a fair minded and informed observer to conclude that there was a real possibility.’⁸⁰ For example a pecuniary interest or close connection between the arbitrator and a party might be accepted as a bias⁸¹.

The other question is about the applicable test for challenge. Modern laws make the grounds for challenge of the arbitrator, referring to arbitrator’s independence or impartiality or both. For instance, Netherlands 1986 Act⁸² recognizes justifiable doubts as to both the arbitrator’s impartiality and independence as grounds for challenge. On the other hand, Swiss law⁸³ similar to ICC Rules⁸⁴ only referred to the doubt of the independence of arbitrator (not impartiality). When we look at the institutional rules or the national laws, it is seen that even if some laws refer to only impartiality or independence as grounds for challenge, they do not really mean to exclude the other ground for challenge, but only not to define or interpret the grounds strictly.

The English Arbitration Act 1996 has a mandatory provision⁸⁵ which allows the parties to challenge the arbitrators in limited circumstances. That is to say, if there are justifiable doubts about the arbitrator’s impartiality, his capacity to conduct the proceedings or making an award, his lack of qualifications required by the arbitration agreement or his physical or mental capability. The Department Advisory Committee (DAC) states that “we trust that the courts will not allow (this process) to be abused by those intent on disrupting the arbitral process...it should only be available where the conduct of the arbitrator is such as to go so beyond anything that could reasonably be defended that substantial injustice has resulted or will result.” In *AT&T Corp v Saudi*

⁷⁸ The LCIA Rules (10.2) Model Law Article 12.2

⁷⁹ *Laker Airways Incorporated v FLS Aerospace Limited and Stanley Jeffrey Burnton* [1999] 2 Lloyds Rep45

⁸⁰ *Re Medicament v Related Classes of Goods* [2001] 1 WLR

⁸¹ Chuah *Law of International Trade* p.669

⁸² Netherlands 1986 Act Art 1033

⁸³ Swiss Private International Act 1987 Article 180

⁸⁴ ICC Rules Article 11.1

⁸⁵ Arbitration Act 1996 s. 24.1

Cable Company, it was held that there should be a two stage test in relation to bias; “there was an automatic disqualification for any judge who had a pecuniary interest (such as owning shares) in one of the parties or was otherwise so closely connected with a party that he could truly be said to be judge in his own cause. Apart from that, it was for the Court to determine whether there was a real danger of bias in the sense that the judge might have unfairly regarded with favour or disfavour the case of a party under consideration by him or might be pre-disposed or prejudiced against one party’s case for reasons unconnected with the merits of the issue”⁸⁶.

In addition, the parties cannot exclude their right to challenge an arbitrator in advance and any advanced agreement would be contrary to public policy⁸⁷. However, there is a limit to challenge an arbitrator in most of the arbitration rules and laws. For instance ICC Rules⁸⁸ provide a limitation of 30 days after the notification or confirmation of the appointment of an arbitrator or when the facts giving rise to the challenge become known. Modern rules provide that if the parties knew the possible reasons for challenge before appointing the arbitrators, they are deemed to have waived their rights to challenge⁸⁹. Thus the Supreme Court of Canada stated in *Gherardosi v Minister of Highways* that; “...generally speaking, an award will not be set aside if the circumstances alleged to disqualify an arbitrator were known to both parties before the arbitration commenced and they proceeded without objection.”⁹⁰ Moreover, the court should not exercise its power unless the applicant has exhausted all available alternatives.⁹¹ In institutional arbitration, the party should first apply to the related arbitral institute where available⁹².

The Model Law also provides that “while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.”⁹³ This approach is accepted to avoid delays of the arbitration

⁸⁶ *AT&T Corp v Saudi Cable Company* [2000] 1 Lloyd’s Rep 22

⁸⁷ *Bezirksgericht, Affoltern am Albis* [1998] YBCA 754 paras 24

⁸⁸ ICC Rules 11.2

⁸⁹ Model Law (12.2), DIS Rules (18.1) and LCIA Rules article 10.3

⁹⁰ *Gherardosi v Minister of Highways (BC)* [1966] 56 DLR 463

⁹¹ Arbitration Act 1996 section 24

⁹² ICC Article 11, AAA ICDR Rules Article 8-9

⁹³ Model Law Art 16

proceedings during the application of the court to challenge an arbitrator. Also, some arbitration laws such as in France, Switzerland and Brazil, do not allow the unsuccessful party to apply to the court until the end of the arbitration proceedings.

The main reasons for challenging the arbitrators are; unwillingness to accept a biased arbitrator or, tactical reasons to delay the appointment and arbitral proceedings or, having an advantageous position in proceedings. Although the number of challenges against arbitrators has been increasing over the years, the challenges are rarely successful⁹⁴. If the challenge is successful, it may be problematic for the replacement arbitrator after evidence and legal argument have been considered. He should also know all the information presented, has the right to participate in each part of the proceedings and the parties should present their cases to the whole tribunal. This makes it costly and time consuming.

5. COURT ROLE AT POST AWARD

The post award part of the arbitration, in other words the period after the award is rendered, is probably the most important part of the proceedings, since the whole aim of the arbitration is to have an enforceable award. An arbitral award is considered as final and binding on both parties⁹⁵. There is a presumption that there is a binding agreement between the parties and the dispute is resolved under a fair procedure. Thus, subject to the right to challenge the award, the award should be enforced immediately. Problems may arise when the parties do not voluntarily enforce the award. If the award is not enforced voluntarily by the losing party, the court support will be needed. The court has the coercive power to enforce the award and order the authorities to provide the benefits of enforcement. Modern views like French Law and Model law require the State to recognize and enforce foreign arbitral awards as court judgements without any delay.

Besides, we can see the court's role when the losing party tries to challenge or appeal at the place of the arbitration or alternatively takes action against the award at the place of

⁹⁴ Lew J, Mistelis L and Kröll S p 303

⁹⁵ Arbitration Act 1996 Section 58

the enforcement for its refusal. The New York Convention⁹⁶ which has the modern *lex arbitri* view⁹⁷ states that the foreign arbitral award should be enforced immediately as a judgement and the court can only refuse the enforcement of an arbitral award in exceptional circumstances; where the award is so defective in form or substance that to enforce it would be contrary to public policy⁹⁸. These grounds are described as a ‘delicate balance between the autonomy of arbitration and judicial control.’⁹⁹ Although many modern laws and Model Law¹⁰⁰ clearly states that there is no appeal on the merits against an arbitral award¹⁰¹, some laws including English Law allow appeal on a point of law. It is clearly seen that the court role is more obvious and more crucial at the post award period. Thus, I will deeply analyse these possible processes of the arbitration after the award is rendered in the following chapters, namely challenge of the arbitral awards at the place of arbitration, recognition and enforcement of arbitral awards and finally the refusal of the recognition and enforcement of arbitral awards.

A) CHALLENGING ARBITRAL AWARDS

Modern national laws and institutional arbitration rules provide that an arbitral award is to be final and binding on the parties and the parties agree to carry it out without delay¹⁰². However, the losing party may try to appeal the arbitration award. The modern laws do not provide leave to challenge unless the losing party has exhausted all other remedies in arbitration proceedings. These remedies include any available process of review or appeal of arbitral award or any available provision for correction of the award or an additional award¹⁰³. For example ICC Rules¹⁰⁴ state that upon the request of a party, arbitral tribunal may correct a clerical, computational or typographical error, or

⁹⁶ New York Convention Article 5

⁹⁷ Model Law Article 34.2

⁹⁸ Article 1502 of the Nouveau Vode de Procedure Civile of France has only set the first five grounds for refusal of the New York Convention.

⁹⁹ Binde P, *International Commercial Arbitration in UNCITRAL Model Law Jurisdiction* (Sweet&Maxwell, 2000, London)

¹⁰⁰ Model Law Article 34.1

¹⁰¹ Stefan Kroll 'Setting Aside Proceedings In Model Law Jurisdictions – Selected Procedural And Substantive Questions From The Case Law' Int. (2005) 8(5) A.L.R., 170-178

¹⁰² UNCITRAL Arbitration rules Art. 32.2, ICC Arbitration rules Art 28.6, LCIA Arbitration rules Art 26.9

¹⁰³ Redfern A, Hunter M p.480

¹⁰⁴ ICC Rules Art 29.1

any error similar of a nature. Similarly an arbitral tribunal can make an interpretation of the award or make an additional award omitted from the original award¹⁰⁵.

After exhausting all remedies available, there are some limited situations where the challenge of arbitral awards to the court is possible at the place of arbitration. The possibility arises whether the relevant rules of arbitration or the law of the seat of arbitration have a procedure for challenging an arbitral award. It is observed that setting the award aside is only possible where there is a direct attack on the validity of the award in the country of origin or the country whose procedure was applied¹⁰⁶. Lord Diplock stated in *The Nema* case; "... in weighing the rival merits of finality and meticulous legal accuracy there are, in my view, several indications in the Act itself of Parliament's intention to give effect to the turn of the tide in favour of finality in arbitral awards... at any rate where this does not involve exposing arbitrators to temptation to depart from 'settled principles of law'¹⁰⁷.

On challenging the arbitral award, the court may vary the award, send it back to the arbitrators for reconsiderations or set it aside in whole or in part. If an award is set aside or annulled, the award will usually be treated as invalid and unenforceable. Rensman¹⁰⁸ and Van der Berg¹⁰⁹ assert that transnational or a-national arbitral awards, such as some sports arbitration and online arbitration, cannot be challenged because of their nature and having no direct connection with particular national law. There are the general grounds for challenging an arbitral award under Model Law which guides to modern national laws:

¹⁰⁵ UNCITRAL Rules Art 35, 36, 37

¹⁰⁶ Lookofsky J pg 581

¹⁰⁷ *Pioneer Shipping Naviera SA v Salen Rederierna BA* [1985] AC 191 at 203

¹⁰⁸ Rensman 'Anational Arsitration Awards' (1998)15(2) J Int'l Arb 37

¹⁰⁹ Van der Berg A. 'The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation' at p. 28-51

GROUND S FOR CHALLENGE UNDER MODEL LAW

There are two types of grounds to challenge the arbitral tribunal at the seat of arbitration. These grounds are namely procedural grounds and substantive grounds for challenge.

I) Procedural Grounds: The procedural grounds for challenging the arbitral awards are related to the procedural irregularities during the proceedings of the arbitration.

a) Incapacity of the parties or invalid agreement to arbitrate

The capacity of the parties is a requirement for an enforceable arbitration agreement. As a general principle, the parties must have a legal capacity to enter into a contract; otherwise that contract will be invalid. The Model Law accepts the challenge when “a party to the arbitration agreement... was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State.”¹¹⁰ For instance in *Pyramids*¹¹¹ a party successfully challenged the award on the basis that he was not a party to the arbitration agreement. *Dalmia Dairy Industries Ltd v Pakistan*¹¹² case held that a void arbitration agreement was a ground for challenge. The court may allow a challenge to the award if a party asks a competent court to stop the arbitration at the beginning of or during the arbitration, on the basis that the parties have a lack of capacity, which makes the arbitration agreement void, inoperative or incapable of being performed¹¹³. On the other hand, the invalidity of the arbitration agreement as a ground for challenging an arbitral award may occur if the arbitration agreement is ambiguous¹¹⁴ or not validly assigned by the parties.¹¹⁵ International conventions and Model Law require that a valid arbitration agreement

¹¹⁰ Model Law Article 34.2.a.i

¹¹¹ *Pyramids*[1984] 23 ILM 1048

¹¹² *Dalmia Dairy Industries Ltd v Pakistan* [1978] 2 Lloyd’s Rep 223

¹¹³ Van der Berg ‘Arbitrability’ (1996) XXI Yearbook Commercial Arbitration 450

¹¹⁴ Corte di Appello Florence, 27 January 1988, *Eastern Mediterranean Maritime Ltd V Spa Cerealtoscana* , (1990) XV YBCA 496

¹¹⁵ District Court of Moscow, 21 April 1997, *IMP Group (Cyprus) Ltd v Aeroimp*, (1998) XXIII YBCA 745

must be in writing. In addition, English law¹¹⁶ emphasis the need of the signatures of the all parties while there is neither internationally accepted requirements nor compulsory provision¹¹⁷. Redfern¹¹⁸ observed the importance of the parties' signature and pointed out that a national court at the place of arbitration may refuse to enforce an arbitration agreement because of a lack of any of the parties' signature. The national court at the place of enforcement may impose a signature requirement as a pre-requisite to the validity of an agreement. Model law provides that the exchange of letters, telex, telegrams or other means of telecommunication can be a substitute for signatures.

b) Lack of due process

Arbitration must comply with certain minimum standards¹¹⁹. The Model Law has accepted lack of due process as a ground for challenge. It provides that the tribunal should be properly constituted, arbitral procedure should be in accordance with the arbitration agreement, and parties are to be given proper notice of the proceedings and hearings. The aim of this article of Model Law¹²⁰ is to provide equality for the parties, giving them a fair hearing and full opportunity to present their cases. For instance in a dispute between a German and a Danish party, the German party challenged the award of the tribunal in court on the basis that they were not informed about the names of the arbitrators. It was held there was a lack of due process since the parties were not given a proper notice of the constitution of the arbitral tribunal.¹²¹ The *Corporacion Transnacional v STET International*¹²² case set the standard for challenging an arbitral award on the basis of lack of due process; it states that lack of proper notice of the arbitration proceedings can only be a ground for challenge if the arbitration procedure seriously offends the basic notions of justice and morality. In addition, even if the

¹¹⁶ Arbitration Act 1996 Section 52

¹¹⁷ Obergericht of Basil, June 3 1971 (1979) IV Yearbook Commercial Arbitration 309

¹¹⁸ Redfern A, Hunter M p 161

¹¹⁹ Redfern A, Hunter M p 490

¹²⁰ Model Law s. 34.2.a.ii

¹²¹ (1982) VII Yearbook Commercial Arbitration 345 at 346

¹²² *Corporacion Transnacional de Inversiones SA de CV v STET International SPA and STET International Neterlands NV* [1999] 45 OR 183

parties can waive their right to challenge, the fair hearing guarantee cannot wholly be waived by the arbitration agreement¹²³.

I also would like to point out the relation between the human rights and Arbitration. Due process, which provides fair hearing and full opportunity to the parties to present their case, is a basic element of human rights. For the reason that, fair hearing and the independence and impartiality of arbitrators is said to be the *magna carta* of arbitration¹²⁴. ECHR¹²⁵ has a express provision related to international arbitration: “in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” The purpose of this provision is to ensure that every party to court proceedings has a fair and public opportunity to put forward its case and defend themselves equally.

c) Issues of Jurisdiction

The authority of the tribunal comes from the agreement between the parties. Thus, the tribunal can only determine the disputes which the parties have agreed that they will. In this kind of challenge, the tribunal exceeds its powers by dealing with the matters that are not submitted to arbitration or beyond the scope of submission. The Model Law states that of “the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.”¹²⁶ In *Paris Lapeyre v Sauvage*¹²⁷, the Cour D’Appel de Paris held that the arbitral tribunal exceeded its power by awarding a remedy in damages higher than was claimed. French law allows the losing party to challenge an

¹²³ Georgios Petrochilos *Procedural Law in International Arbitration* (Oxford Private International Series, 2004) para 4.5.1

¹²⁴ Mistelis Lukas, ‘QM Lecture notes 2006 slide 13’.

¹²⁵ Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 (ECHR) Article 6(1)

¹²⁶ Model Law Art 34.2.a.iii

¹²⁷ *Paris Lapeyre v Sauvage* [2001] Revue de l’Arbitrage 806 n. Derains

international award where “the arbitrator gave judgement in the absence of an arbitration agreement or on the basis of a void or expired agreement”¹²⁸.

Challenges to the jurisdiction of an arbitral tribunal may be a partial challenge or a total challenge. In the former, some of the determined claims are within the scope of the arbitration agreement, but some of them are not. In the latter, the issue of jurisdiction is outside of the agreement or the whole basis of the arbitration is invalid. Total challenge may arise when a party claims that he is not bound by the arbitration agreement, or he is not the party of the dispute, or the agreement was invalid, inoperative or incapable¹²⁹.

d) Other Procedural Issues

Model Law¹³⁰ has accepted another ground for challenge: when the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the arbitration agreement of the parties or, failing such agreement, was not in accordance with the law of arbitration. For instance the tribunal has a lack of related qualifications, or the procedure of the arbitration does not fit with the requirements of the arbitration agreement or the law of arbitration¹³¹.

II) Substantive Grounds

Besides the procedural grounds, there are further grounds for challenging an arbitral award, known as substantive grounds. I would like to point out that even though these grounds are not procedural; the first two grounds, non-arbitrability of the dispute and public policy, are accepted internationally, but in different ways.

a) Arbitrability

The issue relates to the capability of the dispute by arbitration and the desire of the national law to reserve a specific dispute for national courts. Model Law states that the

¹²⁸ French Code of Civil Procedure Art 1501

¹²⁹ Redfern A, Hunter M p 298

¹³⁰ Model Law Art 34.2.a.IV

¹³¹ Redfern A, Hunter M p.495

court at the seat of arbitration may set the award aside if the “subject matter of the dispute is not capable of settlement by arbitration.”¹³² These grounds are often linked to the concept of public policy of the seat of the arbitration¹³³. The ground for challenging an arbitral award might differ from country to country which is decided in accordance with their political, social and economic policy. Criminal matters such as if the underlying contract is illegal or related to bribery, and matters affecting the status of the party such as bankruptcy or insolvency, are considered as not arbitrable. Moreover, it is accepted that patents and trademarks are matters of public authority over which the State has a right of monopoly.

Non Arbitrability ex officio¹³⁴: Non-arbitrability of a dispute is generally claimed by a party who wants to prevent the arbitration and prefers jurisdiction. However, sometimes no party challenges the non arbitrability of the dispute. It may arise when the parties have not realized the situation or they have an interest in not having their dispute heard in the national jurisdiction. When there is neither an application nor a challenge to the court on the basis that the dispute lacks arbitrability, the question arises whether the court can examine the issue *ex officio*. In ICC case (no 1110), it was held “in this respect both parties affirmed the binding effect of their contractual undertakings and competence to consider and decide their case in accordance with the terms of reference. However, in the presence of a contract in dispute of the nature set out hereafter, condemned by public policy decency and morality. I cannot in the interest of due administration of justice avoid examining the question of jurisdiction on my own motion.” It is argued that the arbitral tribunal should not consider whether the dispute is arbitrable if the parties insist on the resolution method of arbitration. On the other hand the tribunal might also deny the jurisdiction of a non arbitral dispute. Even though the parties are free to choose the applicable rules to their dispute as a principle, they cannot exclude the mandatory rules, since the arbitral tribunal owes a duty not only to parties, but also to the public.

¹³² Model Law 36.1.b

¹³³ Redfern A, Hunter M p. 496

¹³⁴ Court action without any application by the parties

b) Public Policy

Model Law accepts that an arbitral award may also be set aside if the award is contrary to the public policy of the seat of the arbitration¹³⁵. The concept of public policy may differ from state to state and from time to time, reflecting the changing values of society¹³⁶. For instance, public policy is defined as ‘essential to the moral, political or economic order’ by the Cour Supérieure de Justice of Luxembourg¹³⁷. Swiss law admits the public policy defence to the issues that are incompatible with the Swiss legal and economic system¹³⁸. In addition to the grounds in Swiss law, German law¹³⁹ accepts that the issues in conflict with fundamental notions of justice will violate public policy. The Ontario court held that public policy will arise when the award is contrary to the most basic and explicit principles of justice, fairness and essential morality, or intolerably ignores or corrupts one of the parties¹⁴⁰. The English House of Lords in 1853 discussed public policy as “principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against public good”¹⁴¹. English courts have also held that “public policy can never be exhaustively defined... It has to be shown that there is some element of illegality or that enforcement would wholly offend to the ordinary reasonable and fully informed member of the public”¹⁴². It is argued that while a totally comprehensive definition of public policy has never been proffered, public policy reflects the fundamental economic, legal, moral, political, religious and social standards of a state¹⁴³.

Some European civil law countries such as France¹⁴⁴ and Switzerland do not accept only purely domestic public policy grounds on a challenge of arbitral awards and accept

¹³⁵ New York Convention Article V.2, Model law 34.2.b,

¹³⁶ Yu ‘The Impact of National law elements on international commercial arbitration’ [2001] 4.1 Int ALR 17 19

¹³⁷ *Kersa Holding Company Luxemburg v Infancourtage and Famajuk Investment and Isnny* [1996] XXI YBCA 617 at 625

¹³⁸ Swiss Federal Supreme Court September 18, 2001 [2002] Bull ASA311

¹³⁹ Anne Hoffmann ‘Duty of Disclosure and Challenge of Arbitrators’ (2005) ASA Bulletin Volume 21 Number 3

¹⁴⁰ *United Mexican States v Marvin Roy Feldman Karpa*, Ontario Supreme Court file no 03-cv-23500 at para 87

¹⁴¹ *Egerton -v- Brownlow* (1853) 4 HLC 1

¹⁴² *DST v Rakoil* [1987] 2 Lloyd’s Rep 246,254

¹⁴³ Lew J, *Applicable Law in International Commercial Arbitration* (Oceana 1978) p 532

¹⁴⁴ French Decree Law, The French Code of Civil Procedure Article 1471 and 1495

a restrictive approach of public policy, called international public policy¹⁴⁵. On the contrary, some countries such as Denmark, Netherlands and Norway apply domestic public policy¹⁴⁶. The goals of the application of international public policy are to preserve party autonomy, to provide an easy and efficient arbitral process and to promote the finality of arbitral awards.¹⁴⁷

Other Substantive Grounds for Challenge

There are two arguments on the challenging of arbitral award on substantive grounds. One side argue in favour of reviewing an arbitral award on the basis that there is risk of inconsistency in arbitral precedent and the arbitral tribunal may not do its work properly. The other side draw attention to the inconvenience of reviewing the award; the local court awards will substitute the arbitral awards, besides the dispute will become open to the public and the appeal process will cause delays in resolution of the dispute as well.

We should discuss the “Mistake of Law and Fact” as a ground for challenging the arbitration award. The modern view is that the arbitral award is final and there should not be a review of an arbitral award except in limited circumstances. Thus, most of the modern laws reject the appeal on issues of fact. It is assumed that the right to appeal was excluded by the parties in international arbitration. However, the parties can agree on the right to appeal in their arbitration agreement. For instance in Switzerland, the parties can contract in the right of appeal about arbitrability of an award if it is manifestly unsupportable on the facts¹⁴⁸. In *La Pine*¹⁴⁹, the parties agreed on the right of appeal on the issue of fact and the US Court stated that “the parties indisputably contracted for heightened judicial scrutiny of the arbitrator’s award when they agreed that review would be for errors of fact or law.” Accordingly, the US court reviewed the award on the issues of fact and law. Contrary to modern view, English law accepts the

¹⁴⁵ International Law Association (ILA) Report London 2000

¹⁴⁶ Audley S ‘Interim ILA Report on Public Policy as to Enforcement of International Arbitral Awards’ [2003] Arbitration International Vol 19 No 2 LCIA

¹⁴⁷ Fernando Mantilla-Serrano ‘Towards a Transnational Procedural Public Policy’ Arbitration International, Volume 20 Number 4

¹⁴⁸ Swiss Concordat Art 36.f

¹⁴⁹ *La Pine Technology Corp v Kyocero Corp* [1997]130 F.3d 884

appeal on point of law unless agreed otherwise. I will discuss this issue in the following chapter.

The Grounds for Challenge under English Law

The English Arbitration Act allows appealing an arbitral award on the ground of serious irregularity under s. 68 and failure of substantive jurisdiction under s. 67, which are mandatory sections, as well as appeal on point of law under s 69 which is not a mandatory provision.

The Failure of substantive jurisdiction

The Arbitration Act 1996 states in s.67 that a party may apply to the court to challenge the arbitral award, additionally for an order to declare an arbitral award on the merits to have no effect in whole or in part, because the tribunal did not have substantive jurisdiction. The matters of substantive jurisdiction set out in sections 30 and 82 under English Law that are almost the same as Article 34.2 of Model Law. On the other hand the tribunal firstly has the power to rule its own jurisdiction whether there is a valid arbitral agreement, or whether the tribunal constituted properly or whether the submitted matters to arbitration comply with the arbitration agreement¹⁵⁰.

Serious irregularity

Section 68 of Arbitration Act 1996 states that, upon notice to the other parties and the tribunal, a party to arbitral proceedings may apply to the court to challenge an award on the ground of serious irregularity affecting the tribunal, the proceedings or the award.¹⁵¹ As stated in *The Avala*, the applicant party has to prove two elements; that there was a serious irregularity, and that irregularity has caused or will cause substantial injustice.¹⁵² There are situations¹⁵³ when an irregularity might be considered to cause substantial

¹⁵⁰ *Christopher Brown v Genossenschaft Osterreichlicher Waldbesitzer* [1954] 1 QB 8

¹⁵¹ Arbitration Act 1996 s. 68.1

¹⁵² *Glencore International AG v Beogradska Plovidba (The Avala)* [1996] 2 Lloyd's Rep 311

¹⁵³ Arbitration Act 1996 s. 68.2

injustice to the applicant: a) Failure by the tribunal to comply with the general duty to act fairly and impartially, to adopt procedures suitable to the circumstances of the particular case and to give the parties reasonable opportunity to present their cases. The tribunal should also avoid unnecessary delay and expense¹⁵⁴; b) The tribunal exceeding its powers; c) Failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties; d) Failure by the tribunal to deal with all the issues that were put to it; e) Any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers; f) Uncertainty or ambiguity as to effect of the award; g) The award being obtained by fraud or the award or the way in which it was procured being contrary to public policy; h) Failure to comply with the requirements as to the form of the award; or i) Any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.”

In *Lesotho Highlands v Impregilo SpA* pointed out that a remedy under s.68 is always ‘exceptional’¹⁵⁵; “I have always wished to see arbitration, as far as possible, and subject to statutory guidelines no doubt, regarded as a freestanding system, free to settle its own procedure and free to develop its own substantive law... That is not the position generally which has been taken by English law, which adopts a broadly supervisory attitude, giving substantial powers to the court of correction... (The arbitration bill) has given the court only those essential powers... that is rendering assistance when the arbitrators cannot act in the way of enforcement or procedural steps, or, alternatively, in the direction of correcting very fundamental errors.” There are also some other cases that followed the same view¹⁵⁶.

¹⁵⁴ Arbitration Act 1996 s.33

¹⁵⁵ *Lesotho Highlands development Authority v Impregilo SpA* [2005] UKHL 43

¹⁵⁶ Such as *Fidelity Management SA & Others v Myriad International Holdings BV & Others* [2005] 2 Lloyd’s Rep. 508

Appeal on point of law

Even though the modern view rejects the view of appealing on point of law, English Law¹⁵⁷ provides that unless otherwise agreed by the parties, the arbitral award might be appealed on point of law. Regarding sections 69.3.b and c of the Arbitration Act, leave to appeal can be given if the court is satisfied that the determination of the law will considerably affect the rights of a party¹⁵⁸. The right to appeal can appear only if the award on question of law is obviously wrong, or related with the general public importance, or open to serious doubt so it would be just and proper for the court to decide¹⁵⁹. In *The Nema*, Lord Diplock said¹⁶⁰ where “the question of law is the construction of a one-off clause the application of which to the particular facts of the case is an issue in the arbitration, leave should not normally be given unless it is apparent to the judge, on a mere perusal of the reasoned award itself without the benefit of the adversarial argument, that the meaning ascribed to the clause by the arbitrator is obviously wrong.”

Nevertheless, section 69 of Arbitration Act 1996 is not mandatory and the parties can agree to take out the review of the award by the national court. In *Sanghi Polyesters v The International Investor*, the arbitration agreement was based on ICC Rules and the court accepted that by choosing the ICC rules which provides the finality of the award, the agreement showed the intension of the parties to dispense with their right to appeal¹⁶¹.

The Arbitration Act 1996 Section 70.1 applies to all grounds for refusal of enforcement and states that the application cannot be brought “if the applicant has not first exhausted a) any available arbitral process of appeal or review and b) any available recourse under s 57 (correction of award or additional award) in a certain period of time. *LG Caltex Gas v Chine National Petroleum*) indicated that a party could lose his right to raise an

¹⁵⁷ Arbitration Act 1996 section 69

¹⁵⁸ *Antaios Cia Naviera SA v Salen Rederierina AB* [1985]

¹⁵⁹ Arbitration Act 1996 s. 69.3 c.ii

¹⁶⁰ *Pioneer Shipping Ltd & Others v BTP Tioxide Ltd* [1981] 2 All ER 1030

¹⁶¹ *Sanghi Polyesters Ltd (India) v The International Investor* (KCFC) (Kuwait) [2001] 1 Lloyds Rep 480

objection under s.67 and 68 if he does not take any action during the proceedings after he knew the ground.¹⁶²

On appeal, the court may¹⁶³ a) confirm the award, b) vary the award and the variation will have an effect as part of the award¹⁶⁴, c) remit to tribunal for reconsideration; then the tribunal will make a fresh award in respect of matters remitted or d) set aside the award in whole or in part, then the court may order that that the award has no effect in relation to that subject matter.

B) RECOGNITION AND ENFORCEMENT

Finality of an arbitral award is vital in international trade for a certain degree of predictability and certainty. Prof. Lew stated “the finality of the award is of paramount importance in international commercial arbitration”.¹⁶⁵

More than ninety percent of arbitral awards are complied voluntarily¹⁶⁶. Otherwise, the party’s dishonouring the arbitral award may cause damage to his/her reputation, lead to blacklisting and boycotting in his/her trade environment. If the losing party does not honour the arbitral award voluntarily, court assistance is needed. Since, there is a need to convert the arbitral award to a judgement or a court award. All modern laws provide the set of rules for the recognition and enforcement of arbitral awards. However, a foreign award that satisfies the requirements can be recognized or enforced under New York Convention which provides a uniform, modern, easy and efficient way for recognition and enforcement.

The core of the New York Convention is the recognition and enforcement of arbitral awards which are rendered in a foreign state. The scope of the convention is set out in Article 1; the convention applies to “arbitral awards made outside the State where recognition and enforcement is sought.” The convention extends its applicability with

¹⁶² *LG Caltex Gas Co Ltd v Chine National Petroleum Corp* [2001] BLR 235

¹⁶³ Arbitration Act 1996 s. 69.7

¹⁶⁴ Arbitration Act 1996 s. 71

¹⁶⁵ Lew J, Mistelis L and Kröll S p.731

¹⁶⁶ Berger K ‘International Economic Arbitration’ Kluwer, Deventer, 1993

the second criterion; “arbitral awards not considered as domestic awards in the State where recognition and enforcement are sought.” But a contracting state can make a reservation restriction. Regarding Article 3 of the Convention, contracting states must recognize the foreign arbitral awards as binding and enforce those using procedures comparable with domestic awards procedures. The New York Convention has made constructive changes from the Geneva Arbitration Convention 1927 in which the burden of proof of having conditions was on the party seeking enforcement. The New York Convention has shifted the burden proof to the defendant party and limited the grounds for refusal of enforcement of arbitral awards. Still, a binding award needs some formalities to be fulfilled at the place of arbitration to make it enforceable worldwide. The claimant must provide the duly authenticated original award or its duly certified copy, the original arbitration agreement or its duly certified copy. In addition, if the award or the arbitration agreement is in a foreign language, the claimant has to provide their translation. Therefore, the Convention provides very easy process for recognition and enforcement and the national court of a contracting state will leave to enforce the arbitral award on the face of the documents.

C) REFUSAL OF RECOGNITION OR ENFORCEMENT OF ARBITRAL AWARDS

The obligation of a national court to recognize and enforce the arbitral award has some exceptions situated in Article III of the New Convention. The grounds for refusal of the recognition and enforcement in the Convention are almost the same as the grounds for challenge in the Model Law. These procedural grounds are accepted as exclusive grounds and should be interpreted narrowly¹⁶⁷. Thus the court shall not interfere into the merit of an award. Van Der Berg¹⁶⁸ said, “as far as the grounds for refusal for enforcement of the award as enumerated in Article V are concerned, it means that they have to be construed narrowly”. Therefore the Convention does not allow for the re-examination of the merits of the award.

¹⁶⁷ *Eco Swiss China Time Ltd v Benetton International NV*, European Court of Justice [1999] Case C-126/97

¹⁶⁸ Van der Berg ‘The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation’ at p.267

Besides, it is discussed that the court is not obliged to refuse to recognize or enforce an award even if one of the exceptional grounds for refusal of the enforcement is satisfied¹⁶⁹. The court of enforcement always has the last judgment on enforcement¹⁷⁰. For instance, the Hong Kong Supreme Court stated that “the residual discretion enables the enforcing court to achieve a just result in all the circumstances”¹⁷¹ and decided to enforce the arbitral award even if one of the grounds for refusal is satisfied. The Ontario Court has also followed the same view.¹⁷²

THE GROUNDS FOR REFUSAL

There are two groups of exceptions for refusing the enforcement of arbitral awards. The first group includes five grounds which are procedural grounds. These grounds are related to the right of the losing party to a fair arbitration and the procedural irregularity must be proved by the opposing party. In addition, the national court may only refuse the enforcement or recognition of the arbitral award if the party firstly objected to the arbitral tribunal during the proceedings for the same ground. If the parties have not made any objection during or before the arbitration proceedings or after they knew the reason, they will be accepted to waive his right to object for that issue. The second group includes the arbitrability of the dispute and public policy reason, and the court can examine these issues without any application by the parties.

I. Procedural grounds

a) Incapacity of the parties or invalid arbitration agreement

The New York Convention¹⁷³ like the Model Law¹⁷⁴ provides that; the court may refuse to enforce the arbitral award if it is proved that the parties to the agreement were under

¹⁶⁹ Pilar Perales Viscasillas ‘Case Law On The Recognition And Enforcement Of Arbitral Awards Under The Uncitral Model Law On International Commercial Arbitration’ [2005] Int. A.L.R. 8(5), 191-201

¹⁷⁰ *Hebei Import & Export v Polytek Engineering Comp Ltd* [1999] 1 HKLRD

¹⁷¹ *China Nanhai Oil Joint Service Corporation, Shenzhen Branch v Gee Tai Holdings Co Ltd*. High Court of Hong Kong, July 13, 1994,

¹⁷² *Europcar Italia SpA v Alba Tours International Inc* [1997] O.J. No. 133

¹⁷³ New York Convention Art V.1.a

incapacity, or the agreement is not valid under the applicable law or, failing any indication thereon, under the law of the seat of arbitration.

Capacity of the parties to enter into an agreement may be a ground for refusal of the recognition or enforcement of an arbitral award if a party claimed during the proceedings that one of the parties was under some incapacity under the applicable law. In *Fougerolle SA (France) v Ministry of Defence of the Syrian Arab Republics*¹⁷⁵, The Administrative Tribunal of Damascus refused the enforcement of an ICC award on the basis of incapacity of the party, stating that the award was given “without the preliminary advice on the referral of the dispute to arbitration, which must be given by the competent Committee of the Council of State.” The Court of First Instance of Tunis accepted that the party was under an incapacity when he invoked his sovereign immunity related to governmental capacity in a non-commercial dispute¹⁷⁶. In foreign trade transactions, a party may be also restricted to enter an arbitration agreement for need of special permission. Thus the parties must be very careful whether the other party has the capacity to represent his corporate and to enter an arbitration agreement.

b) Violation of due process;

The New York Convention Art V.1.b accepts violation of due process as a ground for the refusal of the recognition or enforcement of the award, when proved by the losing party. The aim of this provision is to ensure that the arbitration itself is conducted properly with proper notices for appointments, proceedings and hearings, and also that the procedure was fair. The requirements for due process should be in accordance with the agreement between the parties and the principles of equality of treatment¹⁷⁷. Fairness is seen as the impartiality and independence of the arbitrator and giving the parties full opportunity to the party to present their cases. It is observed that fairness would arise when the arbitrator felt compelled to depart from the issues, admitted or

¹⁷⁴ Model Law Art 36

¹⁷⁵ *Fougerolle SA (France) v Ministry of Defence of the Syrian Arab Republics* [1990] XV Yearbook Commercial Arbitration

¹⁷⁶ 22 March 1976 *Societe tunisienne d'Electricite et de Gaz (STEG) v Societe Entropese (France)* [1978] III YBCA 283

¹⁷⁷ Redfern A, Hunter M p 533

conceded by the parties¹⁷⁸. Fairness and observance are generally seen as a part of the international public policy, thus these defences may have common ground with the public policy defence set out in Article V.2.c of the Convention.

For instance in *Polytek Engineering Co Ltd v Hebei Import and Export Corp*¹⁷⁹, a party's non-participation in taking of evidence or in discovery proceedings, was held as a violation of due process. US case law¹⁸⁰ accepts the defence of violation of due process when the party proves that he was not given a reasonable opportunity in time and manner during proceedings; "It is clear that an arbitrator must provide a fundamentally fair hearing... (*which*) is one that meets the minimal requirements of fairness' – adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator." Corte di Appello Naples¹⁸¹ refused to enforce the arbitral award on the basis that the notice of appointment and proceedings was not timely and appropriate. Thereby, the parties should be given a fair hearing to present their case by the arbitral tribunal, whether the party uses his right or not. In *Mousaka Inc v Golden seagull Maritime Inc & Ors*¹⁸² it was held that the arbitral tribunal has a duty to give full reasons with the award.

c) Jurisdictional Issues

An award without jurisdiction has no legitimacy¹⁸³. One of the few reasons to set aside or refuse to recognize an arbitral award is the absence of the jurisdiction of the arbitration. The problem of jurisdiction might arise in different stages, during the proceedings or when arbitration is set aside or applied for enforcement. The grounds¹⁸⁴ may arise when the arbitral tribunal exceeds its power within the terms of the arbitration agreement or deals with a dispute that was not submitted to arbitration. In the first situation, the tribunal awarded more than requested, in the second one, the arbitrator has

¹⁷⁸ Chuah p.677

¹⁷⁹ *Polytek Engineering Co Ltd v Hebei Import and Export Corp* [1998] XXII YBCA 666

¹⁸⁰ *Generica Ltd v Pharmaceuticals Basics Inc* XXIII YBCA 1076 (1998) 1078-9 '7th Cir, 1997

¹⁸¹ *Bauer & Grobmann OHG v Fratello Cerrone Alfredo e Raffaele*, [1985] X YBCA 461

¹⁸² *Mousaka Inc v Golden seagull Maritime Inc & Ors* [2002] 1 All ER 726

¹⁸³ Lew J, Mistelis L and Kröll S p 329

¹⁸⁴ The New York Convention Art V.1.c

decided outside the jurisdiction agreed by the parties. In *Kostas Melas*¹⁸⁵, the court stated that it was not the duty of the tribunal to make temporary financial adjustments unless it was agreed by the parties. Similarly in *Lesotho Highlands v Impregilo SpA*¹⁸⁶, it was held that the tribunal did not have the power to make an award that is in different currency than agreed by the parties. These defences have rarely been successfully invoked, since there is a presumption in arbitration law that the arbitrator acted within its power.

d) The arbitral tribunal was not constituted properly or the procedure of arbitration did not comply with the arbitration agreement

In the fourth ground for refusal, the composition of the tribunal or the procedure was not in accordance with the agreement of the parties or failing such agreement the law of the place of arbitration. The New York Convention states “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.”¹⁸⁷ Even though this ground has rarely been successful in courts¹⁸⁸, an attempt in Italy was successful¹⁸⁹. The court refused to enforce the award on the basis that the arbitral tribunal was constituted by two arbitrators where the agreement required three.

e) Awards are not binding, suspended or set aside

Many modern laws and rules of institutions state that the arbitral award is final and binding upon the parties. However, the question arises whether the arbitral award will be enforced even if it has been set aside or suspended by the court at the seat of arbitration. The Convention accepts the view that recognition or enforcement may be refused if it is set aside or suspended at the place of arbitration¹⁹⁰. Alternatively, the

¹⁸⁵ *Kostas Melas* [1981] 1 Lloyd’s Rep 18

¹⁸⁶ *Lesotho Highlands Development Authority v Impregilo SpA and Ors* [2003] EWCA Civ 1159

¹⁸⁷ The New York Convention Art V.1.d

¹⁸⁸ Lew J, Mistelis L and Kröll S p 715

¹⁸⁹ Corte di Appello Florence, *Rededi Aktiebolaget Sally v Termarea srl*, [1979] IV YBCA 294

¹⁹⁰ New York Convention Art V.1. e

court at place of enforcement also has an option to postpone its decision when an award has been set aside or suspended. In addition, the court can enforce the arbitral award even if it was set aside at the place of arbitration. This provision was criticized for allowing local standards of enforcement¹⁹¹, since the grounds to set aside may differ from country to country. Moreover the national court of the seat of arbitration may impose local requirements that are not acceptable in the country of enforcement. Therefore, the national courts that follow the modern view should apply this provision narrowly and enforce the arbitral award if it was challenged on the basis of a local condition.

In some countries such as France and Belgium, it is possible to recognize and enforce a foreign award even if it was set aside by the court of seat of arbitration¹⁹². In addition, nullification of award at the end of a successful challenge is also not a ground for refusal in France¹⁹³. In *The Hilmarton*¹⁹⁴, the French court enforced an arbitral award that was set aside in Switzerland. Austria¹⁹⁵ has also followed the same approach as France. Similarly in *Chromalloy*¹⁹⁶, the US court enforced an award that was set aside in Egypt. The court stated that; “while Article V provides a discretionary standard, Article VII of the Convention requires that, ‘The provisions of the present Convention shall not... deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to extend allowed by the law... of the country where such award is sought to be relied on.’”

II. Substantive Grounds

There are two further grounds for refusing the recognition or enforcement of foreign arbitral awards: a) the subject matter of the dispute is not capable of settlement by

¹⁹¹ Van der Berg ‘The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation’ p. 355

¹⁹² Hamid G. Gharavi ‘The International Effectiveness of the Annulment of an Arbitral Award’ (Kluwer 2002)

¹⁹³ NCPC Article 1502

¹⁹⁴ *Hilmarton Ltd v Omnium de Traitement et de Valorisation* (OTV) [1994] Revue de l’Arbitrage 327

¹⁹⁵ *Kajo – Erzeugnisse Essenzen Gmbh v DO Zdravilische Radenska*, [1999] XXIVa YBCA

¹⁹⁶ *Chromalloy Aeroservices Inc v Arab Republic of Egypt*, [1996] 939 F. Supp. 907 at 909

arbitration under the law of that country; or b) the recognition or enforcement of the award would be contrary to the public policy of that country.¹⁹⁷

a) Arbitrability

The New York Convention provides that an award may be refused if the subject matter of the dispute cannot be settled by arbitration at the place of enforcement¹⁹⁸. Besides the common ground of non arbitrability of the dispute referred to above, each country has different aspects on which disputes they would reserve for the courts. For instance the Belgian Cour de Cassation held that the disputes relating to ‘unilateral termination of concessions for exclusive distributorships for an indefinite time’ is under the authority of national courts¹⁹⁹. In addition, many Arab countries reserve the jurisdiction of agency agreements for only national courts. On the other hand, German law²⁰⁰ accept every claim involving an economic interest as arbitrable. Article 2059 of the French Civil Code provides that “all persons may enter into arbitration agreements relating to the rights that they may freely dispose of.” However Art 2060 of French law continues that parties may not freely arbitrate in some particular fields of disputes like family law and ‘more generally in all matters that have a public interest’. The Corte di Cassazione of Italy²⁰¹ held that the award was not enforceable because of the non arbitrable nature of trade mark disputes. However licence agreements are not in this concept and may be referred to arbitration. These examples prove the crucial importance of the place of enforcement for a successful arbitration.

I also would like to point out the subject of ‘antitrust and competition law’ particularly. Art 81 of EU Treaty prohibits agreements that effect the prevention, restriction or distortion of competition. In *Eco Swiss China Time Ltd v Benetton International NV*²⁰², the European Court of Justice accepted that Art 81 of the European Treaty was a matter

¹⁹⁷ The New York Convention Article V.2

¹⁹⁸ The New York Convention Article V.1

¹⁹⁹ *Audi-NSU Auto Union AG (Germany) v Adelin Petit & Cie* (Belgium) [1980] V Yearbook Commercial Arbitration 257

²⁰⁰ German Code of Civil Law 1030.1 and 2

²⁰¹ *Sherk Enterprises AG v Socite des Grandes Marques* [1979] IV YBCA 286

²⁰² *Eco Swiss China Time Ltd v Benetton International NV* Case C-126/97 [1999] XXIV Yearbook Commercial Arbitration 629

of public policy. In the *American Safety* case²⁰³, the court considered whether a claim under antitrust law is only a private matter and capable of arbitration. The court held that such claims could only be resolved in court. Additionally, Art 82 forbids the abuse of a dominant position. The *Mitsubishi* case²⁰⁴ held that the claims under antitrust laws were not capable of being subject to arbitration. Nevertheless, antitrust issues coming from an international law asserting a) the public importance, b) the intention of parties whether they seek a violation of those laws and c) the complexity of the dispute, might be arbitrable.

b) Public Policy

The violation of public policy has long been a ground for refusing recognition or enforcement of foreign awards. This principle is situated in Article V.2 of the New York Convention¹ and Article 36 of the UNCITRAL Model Law. The public policy exception to enforcement is an acknowledgement of the right of the court's ultimate control over the arbitral process and those grounds are particular for each country. Accordingly, there is a conflict between national values and the desire of the finality of foreign awards. To resolve the conflict, some laws²⁰⁵ apply a narrower concept of public policy referred to as international public policy (or *ordre public international*) which is a desired approach for the success of international arbitration. Neither the international conventions nor the UNCITRAL Model Law make express reference to international public policy or transnational public policy.

Public policy covers the fundamental principles of law and justice in substantive and procedural respects²⁰⁶. The International Law Association published a report on public policy as a ground for refusal of recognition and enforcement of international arbitral awards.²⁰⁷ The International Law Association discussed the sub-categories of rules and

²⁰³ *American Safety Equipment Corp v JP Maguire & CO*, 391 F 2d 821 (2d Cir. 1968)

²⁰⁴ *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc* [1985] 473 US 614

²⁰⁵ France New Code of Civil Procedure Articles 1498 and 1502, Portugal Code of Civil Procedure Article 1096(f), Spain The Court of Appeal of Milan 4 December 1992, reported in [1997] XXII *Yearbook* 72

²⁰⁶ UN Doc. A/40/17, para. 297

²⁰⁷ Committee on International Commercial Arbitration, *Recommendation I(d)* International Law Association New Delhi Conference (2002) *Arbitration International* Vol 19 No 2 LCIA, 2003 The

norms of substantive grounds of public policy; a) mandatory laws (*lois de police*) b) fundamental principles of law, c) public order/good morals, and d) national interests/foreign relations. It then discussed the possible procedural categories of public policy; a) fraud/corrupt arbitrator b) breach of natural justice/due process c) lack of impartiality d) manifest disregard of the law, e) *Res judicata*²⁰⁸ f) Annulment at place of arbitration. The Paris Cour d'Appel accepted that if there was a proved fraud, the award would be annulled²⁰⁹. Moreover, corruption and bribery are also general grounds for refusal on an international level.²¹⁰ It is further argued that, besides the referred grounds for the refusal of the enforcement or recognition of arbitral award that stated in New York Convention or Model Law, 'defence of state immunity'²¹¹ is also another ground for refusal which could be at the level of jurisdiction or execution.

Modern case law argued public policy grounds should be interpreted narrowly and an enforcement or recognition of an arbitral award could only be refused 'where enforcement would violate the forum state's most basic notions of morality and justice'²¹². The Hong Kong Court of Final Appeal²¹³ also followed the same view. Swiss Court stated public policy exceptions in *KS AG v CC SA*²¹⁴ as "the violation of fundamental principles of our (Swiss) legal system, which would contrast in an unbearable manner with our feeling of justice.

In *Soleimany v Soleimany*, the English Court held that, the contract between the parties for an illegal purpose has no effect on the rights of the parties. The court refused to enforce the award stating that "the court is in our view concerned to preserve the integrity of its process, and to see that it is not abused. The parties cannot override that

meaning of international public policy defined as (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned; (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as "lois de police" or "public policy rules"; and (iii) the duty of the State to respect its obligations towards other States or international organisations."

²⁰⁸ Prior judgment of a local court on the same subject matter

²⁰⁹ Boisseson 'L'arbitrage et la fraude' [1993] *Revue de l'Arbitrage* 3

²¹⁰ Julian DM Lew "Contemporary problems in international arbitration" (Martinus Nijhoff Publishers, Lancaster 1987)

²¹¹ Redfern A, Hunter M p 549

²¹² *Parson & Whittemore Overseas Co Inc v Societe Generale de l'Industrie du Papier (RAKTA)* 508 F.2d 969

²¹³ *Hebei Import and Export Corporation -v- Polytek Engineering Co. Ltd* [1999] 2 HKC 205

²¹⁴ *KS AG v CC SA* [1995] XX Yearbook Commercial Arbitration 762

concern by private agreement. They cannot by procuring arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract. Public policy will not allow it”²¹⁵. In *Hi-Fert Pty Ltd and Cargill Fertilizer Inc v Kiukiang Maritime Carriers and Western Bulk Carriers Ltd* the court held that “The common law doctrine that the jurisdiction of the court should not be ousted is based on public policy that the access of citizens to the courts should be preserved”²¹⁶.

It should be pointed out that The New York Convention does not authorize the state courts to review the merits of the dispute²¹⁷. However in *Hiscox v Outhwaite*²¹⁸, the dispute took place in London but the award was dated and signed in Paris. Even though there was a foreign award under Convention the House of Lords held that, an English court undertake a substantive review of the merits of the case. This case proves that if the seat of arbitration is in London, English courts may still be involved in the process; to set aside or remit an award on the basis of errors of fact or law on the award’s appearance²¹⁹. This case law is criticized of giving non-modern ADR climate and may cause the parties to begin to turn away from arbitration in London²²⁰.

6. CONCLUSION

This work has discussed the role of national courts in international arbitration from the view of international conventions, Model Law, some national laws and international institutions. In addition, the paper has argued how should be the court role in modern laws. The court’s role in international arbitration can be seen at different stages of the arbitration proceedings such as before the arbitral tribunal was constituted, during the arbitration proceedings or even after the arbitral award is rendered. However, given the dramatic improvement in international trade and dramatic increase in globalization, modern national laws following the Model Law accept that the local court intervention

²¹⁵ *Soleimany v Soleimany* [1999] Q.B 785

²¹⁶ *Hi-Fert Pty Ltd and Cargill Fertilizer Inc v Kiukiang Maritime Carriers and Western Bulk Carriers Ltd* Federal Court of Australia [1998] XXIII YBCA 606

²¹⁷ *Ulyses Compania Naviera SA v Huntington Petroleum Services Ltd and others (The Ermoupolis)* [1990] 1 Lloyd’s Rep 160

²¹⁸ *Hiscox v Outhwaite* [1991] 3 WLR 297

²¹⁹ Arbitration Act 1996 s.71

²²⁰ Lookofsky J ‘Transnational litigation and commercial arbitration : a comparative analysis of American, European, and international law’ (Transnational Juris Publications 1992) Copenhagen pg 622

in arbitration is exceptional. Model Law which makes an arbitration friendly environment aptly describes its view that the court shall not intervene except where so provided²²¹. The New York Convention which is the most important element for the recognition and enforcement of foreign award makes the court intervention minimum. Thus, the modern view accepts that the involvement of local court must only be possible under specific circumstances where their support or supervision is essential. Modern laws states that court intervention should be possible if only expressly allowed in the arbitration agreement or the situation has not been covered by the applicable law²²². Section 69 of the Arbitration Act 1996 which allows setting aside of the arbitral tribunal on a point of law, does not comply with the modern view.

The relationship between the arbitral tribunal and the national courts “depends on a complex bundle relationship arising out of the various statutory and common law remedies vested in the courts for the purpose of supporting and controlling the arbitral process.”²²³ The relationship between the arbitral tribunal and the court ‘resemble a relay race’²²⁴. At the beginning the court tries to enforce the arbitration agreement, at the end court enforce the arbitral award. The national courts have the power to rescue the system when a party seeks to sabotage it²²⁵. Therefore, international arbitration would not be successful without the judicial system ‘as a safety-net in the background’²²⁶ However, it should be bear in mind that arbitration is a dispute resolution method to litigation that is preferred by the willingness of the parties and this should be respected.

As a result, the arbitration agreement between the parties shows their intention to solve their disputes by arbitration and not by national courts. By accepting the party autonomy rule, the traditional court authority has been limited and also depends on the parties’ agreement. Due to modern view, except in matters of public policy, the local

²²¹ Model Law Art 5

²²² Lew, Mistelis, Kröll p.354

²²³ Stewart C Boyd QC ‘The role of national law and the national courts in England’ University of London (1986)

²²⁴ Lord Mustill ‘Comments and Conclusions in Conservatory and Provisional measures in International Arbitration’ 9th Joint Colloquium ICC Publications at 118

²²⁵ Redfern A, Hunter M p388

²²⁶ Binder P para 1-09

court should only act to provide necessary assistance and a supportive role in arbitration proceedings. Arbitral tribunals and national courts must be ‘partnerships’²²⁷ to achieve a successful arbitration and to provide the desired justice.



²²⁷ Goldman ‘The complementary Role of Judges and Arbitrators’ ICC Publication No 412 p 259

BIBLIOGRAPHY

CONVENTIONS

- Convention for the Protection of Human Rights and Fundamental Freedoms
- The European Convention on International Commercial Arbitration of 1961 Done at Geneva, April 21, 1961
- The Geneva Convention of 1927 (Convention for the Execution of Foreign Arbitral Awards, Geneva 1927)
- The Geneva Protocol of 1923
- The New York Convention the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)
- The Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other Washington, 18 March 1965

STATUTES and RULES

- Belgian Code Judiciare
- Civil Procedure Rules, Part 62 Arbitration Claims (Practice Direction)
- Departmental Advisory Committee on Arbitration (DAC) Law Report 1996
- The English Arbitration Act 1996
- French Code of Civil Procedure
- German Code of Civil Procedure (ZPO)
- Netherlands Code of Civil Procedure 1986
- The New Swiss Law on International Arbitration (PIL)
- Portugal Code of Civil Procedure
- UN Doc. A/40/17, para. 297

CASES

- *Aggeliki Charis Compania Maritima v Pagnan Spa* [1995] 1 Lloyd's Rep 87
- *American Safety Equipment Corp v JP Maguire & CO*, 391 F 2d 821 (2d Cir. 1968)
- *AT&T Corp v Saudi Cable Company* [2000] 1 Lloyd's Rep 22
- *Audi-NSU Auto Union AG (Germany) v Adelin Petit & Cie (Belgium)* [1980] V Yearbook Commercial Arbitration 257
- *Bauer & Grobmann OHG v Fratello Cerrone Alfredo e Raffaele*, [1985] X YBCA 461
- *Centrozap v Orbis* [1996] ATF 92
- *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334
- *China Nanhai Oil Joint Service CPN v Gee Tai Holding Co Ltd* (1995) XX Yearbook Commercial Arbitration 671
- *Christopher Brown v Genossenschaft Osterreichlicher Waldbesitzer* [1954] 1 QB 8
- *Chromalloy Aeroservices Inc v Arab Republic of Egypt*, [1996] 939 F. Supp. 907
- *Coppee Levalin NV v Ken-Ren Fertilisers and Chemicals* [1994] 2 Lloyd's Rep. 116
- *Corporacion Transnacional de Inversiones SA de CV v STET International SPA and STET International Netherlands NV* [1999] 45 OR 183
- *Dalmia Dairy Industries Ltd v Pakistan* [1978] 2 Lloyd's Rep 223
- *DST v Rakoil* [1987] 2 Lloyd's Rep 246
- *Eastern Mediterranean Maritime Ltd V Spa Cerealtoscana*, Corte di Appello Florence, 27 January 1988, [1990] XV YBCA 496
- *Eco Swiss China Time Ltd v Benetton International NV*, European Court of Justice [1999] Case C-126/97, [1999] XXIV Yearbook Commercial Arbitration 629
- *Egerton -v- Brownlow* (1853) 4 HLC 1
- *Europcar Italia SpA v Alba Tours International Inc* [1997] O.J. No. 133

- *Fidelity Management SA & Others v Myriad International Holdings BV & Others* [2005] 2 Lloyd's Rep. 508
- *Fletamentos Maritimos SA v Effjohn International* The Times, October 8, 1996
- *Fougerolle SA (France) v Ministry of Defence of the Syrian Arab Republic* (1990) XV Yearbook Commercial Arbitration 515
- *Generica Ltd v Pharmaceuticals Basics Inc* XXIII YBCA 1076 (1998) 1078-9 '7th Cir, 199
- *Gherardosi v Minister of Highways (BC)* [1966] 56 DLR 463
- *Glencore International AG v Beogradska Plovidba (The Avala)* [1996] 2 Lloyd's Rep 311)
- *Groundshire v VHE* [2001] 1 BLR 395
- *Hebei Import and Export Corporation -v- Polytek Engineering Co. Ltd* [1999] 2 HKC 205
- *Hilmarton Ltd v Omnium de Traitment et de Valorism (OTV)* (1994) Reveu de L'Arbitratge 327
- *Hiscox v Outhwaite* [1991] 3 WLR 297
- *Hi-Fert Pty Ltd and Cargill Fertilizer Inc v Kiukiang Maritime Carriers and Western Bulk Carriers Ltd* Federal Court of Australia [1998] XXIII YBCA 606
- *IMP Group (Cyprus) Ltd v Aeroimp*, District Court of Moscow, 21 April 1997, [1998] XXIII YBCA 745
- *Kersa Holding Company Luxemburg v Infancourtage and Famajuk Investment and Isny* [1996] XXI YBCA 617
- *La Pine Technology Corp v Kyocero Corp* [1997] 130 F.3d 884
- *Laker Airways Incorporated v FLS Aerospace Limited and Stanley Jeffrey Burnton* [1999] 2 Lloyds Rep 45
- *Lesotho Highlands development Authority v Impregilo SpA* [2005] UKHL 43
- *LG Caltex Gas Co Ltd v Chine National Petroleum Corp* [2001] BLR 235
- *Kajo – Erzeugnisse Essenzen Gmbh v DO Zdravilische Radenska* , [1999] XXIVa YBCA

- *Kaplan v MK Investments Inc* (US) [1995] 115 Supreme Court 1920
- *Kostas Melas* [1981] 1 Lloyd's Rep 18
- *KS AG v CC SA* [1995] XX Yearbook Commercial Arbitration 762
- *Lesotho Highlands Development Authority v Impregilo SpA and Ors* [2003] EWCA Civ 1159
- *Mantovani v Caparelli SPA* [1980] 1 Lloyd's Rep 375
- *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc* [1985] 473 US 614
- *Mousaka Inc v Golden seagull Maritime Inc & Ors* [2002] 1 All ER 726
- *Oil & Natural Gas Commision Ltd v Western Company of North America* (1987) All India Rep SC 674
- *Paris Lapeyre v Sauvage* [2001] Revue de l'Arbitrage 806 n. Derains
- *Parsons & Whittemore Overseas Co Inc v Société Générale de L'Industrie du Papier (RAKTA)* 508 F.2d 969 (2nd Cir. 1974)
- *Pioneer Shipping Naviera SA v Salen Redeierna BA* [1985] AC 191
- *Pioneer Shipping Ltd & Others v BTP Tioxide Ltd* [1981] 2 All ER 1030
- *Polytek Engineering Co Ltd v Hebei Import and Export Corp* [1998] XXII YBCA 666
- *Pyramids Arbitration (The Arab Republic of Egypt v Southern Pacific Prroerties* (1984) 23 ILM 1048
- *Re Medicament v Related Classes of Goods* [2001] 1 WLR 700
- *Rededi Aktiebolaget Sally v Termarea srl, Corte di Appello Florence*, [1979] IV YBCA 294
- *Renusagar Power Co. Ltd v. GeneralElectric Co.Air* [1985] SC 1156
- *Sangi Polyesters Ltd v The International Investor (KCFC)* [2001] 1 Lloyd's Rep. 480
- *Save & Prosper Pensions v Homebase* [2001] L&TR 107
- *Sherk Enterprises AG v Socite des Grandes Marques* [1979] IV YBCA 286
- *Szillard v Szillard* [1955] SCD 3

- *Societe Tunisienne d'Electricite et de Gaz (STEG) v Societe Entropese* 22 March 1976 (France) [1978] III YBCA 283
- *Soleimany v Soleimany* [1999] Q.B 785
- *Ulyses Compania Naveria SA v Huntington Petroleum Services Ltd and others (The Ermoupolis)* [1990] 1 Lloyd's Rep 160
- *United Mexican States v Marvin Roy Feldman Karpa*, Ontario Supreme Court file no 03-cv-23500
- *Yasuda Fire & Marine Insurance v Continental Casualty* [1999] 37 F3d 345

INSTITUTIONAL RULES

- The London Court of International Arbitration Rules - LCIA Rules 1998
- ICC (International Chamber of Commerce) Arbitration Rules
- International Bar Association (IBA) Rules of Ethics for International Arbitrators
- International Law Association (ILA) Report London 2000
- International Centre for the Settlement of Investment Disputes (ICSID) Arbitration Rules
- UNCITRAL Model Law on International Commercial Arbitration
- UNIDRIOIT Principles of International Commercial Contracts
- World Intellectual Property Organization (WIPO) Arbitration Rules

BOOKS

- Berg A. Van der *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer 1981)
- Berger K *International Economic Arbitration* (Kluwer, Deventer, 1993)
- Binder P *International Commercial Arbitration in UNCITRAL Model Law Jurisdiction* (Sweet & Maxwell 1st edn 2000, London)

- Carr I *Principles of International Trade Law* (3rd edn Cavendish Publishing Ltd London 2005)
- Cato M *Arbitration Practice & Procedure* Lloyds of London Press (Informa Publishing U.K. 2002)
- Chuah J C T *Law of International Trade* (2nd edn Sweet & Maxwell London 2001)
- D'arcy L, Murray C and Cleave B *Shmithoff's Export Trade: The Law and Practice of International Trade* (10th edn Sweet & Maxwell London 2000)
- Georgious Petrochilos *Procedural Law in International Arbitration* (Oxford Private International Series, 2004)
- Hamid G. Gharavi *The International Effectiveness of the Annulment of an Arbitral Award* (Kluwer 2002)
- Harris B, Planterose R, Tecks J *The Arbitration Act 1996 a Commentary* (3rd edn Blackwell Oxford 2003)
- Lew J, Mistelis L and Kröll S, *Comparative International Commercial Arbitration* (Kluwer Law International: The Hague 2003),
- Lew Julian DM, *Applicable Law in International Commercial Arbitration* (Oceana 1978)
- Lew Julian DM *Contemporary problems in international arbitration* (Martinus Nijhoff Publishers, Lancaster 1987)
- Lookofsky J *Transnational litigation and commercial arbitration : a comparative analysis of American, European, and international law* (Transnational Juris Publications Copenhagen 1992)
- Marshall E *Gill: The Law of Arbitration* (4th edn Sweet and Maxwell London 2001)
- Partasides Constantine
- Redfern A, Hunter M *Law and Practice of International Commercial Arbitration* (4th edn Sweet & Maxwell London 2004)
- Rubino-Sammartano M *International Arbitration Law* (Kluwer Law and Taxation Publishers Deventer 1990)
- Russell F, Sutton D Gill J *Russell on Arbitration* (22th edn Sweet and Maxwell London 2002) p.98

- Sutton, Gill *Russell on Arbitration* (22nd edn Sweet and Maxwell Great Britain 2003)
- Tweeddale K & Tweeddale A *A Practical Approach to Arbitration Law* (Blackstone London 1999)

ARTICLES

- ‘A report on the New York Bar Association International Litigation Committee, Commercial and Federal Litigation Section: The Uncitral Model Law on International Commercial Arbitration’ 23 New York University Journal of International Law and Politics 87
- Audley S ‘Interim ILA Report on Public Policy as to Enforcement of International Arbitral Awards’ [2003] *Arbitration International* Vol 19 No 2 LCIA
- Boisseson ‘L’arbitrage et la fraude’ [1993] *Revue de l’Arbitrage* 3
- Boyd Stewart C QC ‘The role of national law and the national courts in England’ University of London (1986)
- Calvo ‘The Challenge of ICC Arbitrators’ 15.4 *J Int’l Arb* 63 (1998) 64
- Committee on International Commercial Arbitration, *Recommendation 1(d)* International Law Association New Delhi Conference (2002) *Arbitration International* Vol 19 No 2 LCIA, 2003
- Davidson Fraser P. ‘The Relationship Between Arbitration And The Courts In Scotland And England’ 1993 C.J.Q., 12(OCT), 372-390
- Donahey M.S ‘The Independence and Neutrality of Arbitrators’ 1992 4 *Journal of Int Arb* 32
- Fernando Mantilla-Serrano ‘Towards a Transnational Procedural Public Policy’ *Arbitration International, Volume 20 Number 4*
- Fry Jason ‘Interim Measures Of Protection: Recent Developments And The Way Ahead; *Int. A.L.R.* 2003, 6(5), 153-160

- Goldman 'The Complementary Role of Judges and Arbitrators' (1993) ICC Publication No 412
- Gaillard 'Interference of Courts in international Arbitral Process' New York Journal, February 2001
- Johnson Adam 'Interim Measures Of Protection Under The Arbitration Act 1996'[1997] Int. A.L.R 1(1), 9-18
- Hoffmann Anne 'Duty of Disclosure and Challenge of Arbitrators' 2005 ASA Bulletin Volume 21 Number 3
- Hunter Martin 'International Commercial Dispute Resolution In The 21st Century: Changes And Challenges' Inaugural Victoria University of Wellington Foundation's Annual Dispute Resolution Lecture, delivered on 15 March 1999 at the Law Faculty in Wellington, New Zealand
- Kroll Stefan 'Setting Aside Proceedings In Model Law Jurisdictions – Selected Procedural And Substantive Questions From The Case Law' Int. A.L.R. 2005, 8(5), 170-178
- Mistelis Lukas, QM Lecture notes 2006 slide 13.
- Lord Mustill 'Arbitration: History and Background' (1989) 6 Journal of International Arbitration 43
- Lord Mustill 'Comments and Conclusions in Conservatory & Provisional Measures in International Arbitration' (1993) ICC Publication 9th Joint Colloquium
- Paulsson 'The New York Convention in International Practice: Problems of Assimilation' [1996] ASA Bulletin p 101
- Practical Guidelines for interviewing, selecting and challenging party appointed arbitrators in international Commercial Arbitration, Arbitration International Vol 14, No 4
- Reid Alan S 'The UNCITRAL Model Law on International Commercial Arbitration and the English Arbitration Act: Are the Two System Poles Apart ?' Journal of International Arbitration 21(3): 227–238
- Rensman 'National Arbitration Awards' [1998]15(2) J Int'l Arb 37
- Reymond C 'The Channel tunnel Case and the Law of International Arbitration' (1993) 109 LQR 337
- Söderlund Christer 'Court Support And Assistance Enforcing The Arbitral Agreement' The Stockholm Chamber of Commerce, 6-8 September 2004

- 'The use of pre-judgement attachments and temporary injunctions in international commercial arbitration proceedings' 50 U. Pitt L. Rev 671
- Van der Berg A. 'The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation' at p. 28-51
- Van der Berg A 'Arbitrability' [1996] XXI Yearbook Commercial Arbitration 450
- Viscasillas Pilar Perales 'Case Law On The Recognition And Enforcement Of Arbitral Awards Under The Uncitral Model Law On International Commercial Arbitration' [2005] Int. A.L.R. 8(5), 191-201
- Westin & Chroczel 'Interim Relief Awarded by US and German Courts in Support of Foreign Proceedings' 28 Columbia Journal of Transnational law 723,741
- Yu 'The Impact of National law elements on international commercial arbitration' [2001] 4.1 Int ALR 17 19

WEBSITES

- <http://www.dis-arb.de/materialien/schiedsverfahrensrecht98-e.html>
- www.lexisnexus.com
- www.lexmercatoria.org
- www.kazanci.com.tr
- www.lawtel.com
- www.westlaw.com