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Reading Material

ONE YEAR ADVANCED DIPLOMA IN
ALTERNATIVE DISPUTE RESOLUTION

1.4 INTERNATIONAL COMMERCIAL ARBITRATION

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Chapter I – Evolution of International Commercial Arbitration

International Arbitration has gained prominence in the last decade and appears to be the go-to choice for the resolution of international commercial disputes. Even though this method of dispute resolution has only recently taken the lime light, the roots of international arbitration go way back to ancient times first appearing in the 6th Century BC in the city-states of ancient Greece and the Roman Empire.[1] While then the method was used mainly for political disagreements and political disputes[2], with the advent of increasing trade, the method was also often used to settle a commercial dispute.[3]

The use of arbitration declined in the medieval ages and only scant references were there in Germany, Italy, France, and England.[4] However, with the growth of international trade especially in Europe, commercial centers such as port cities of the Mediterranean saw a rise in the submission of disputes to a specialized tribunal with the application of "*lex mercatoria*" which are a set of customary laws developed and used by the tradesman.[5] *Lex mercatoria* is often referred to as "*customary commercial law, customary rules of evidence and procedure and the general principle of commercial law*".[6]

It was in the 17th century that Hugo Grotius, often regarded as the father of international law, wrote about arbitration and its advantages in the settlement of international disputes.[7] Subsequently, in 1698 the arbitration statute, drafted by John Locke, became the law in England promoting settlement of a dispute with the exclusion of unnecessary legal constraints and difficulties.[8]

With the turn of the century in 1794, the Jay treaty between Great Britain and the United States saw the establishment of the arbitral tribunal comprising an equal number of arbitrators delegated by the parties[9] to settle issues that had emerged after the American war of independence. The treaty is considered remarkable as it set up different types of commissions to settle the disputes between the two state actors. Majorly there were three types of commission Disputes in relation to boundaries, claims for compensation due to British Nationals, and claims from US nationals against Great Britain for treatment of their property. The treaty paved the way not only for the modern arbitration followed today but also for settling disputes between actors of two different states.

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[1] Gdbor Szalay, *A brief History of International Arbitration, its role in the 21st Century and the examination of the Arbitration Rules of certain Arbitral Institutions with regards to privacy and confidentiality*, 7 (2016).

[2] Frank D Emerson, *History of Arbitration Practice and Law*, 19 l State L R, 1. 155-156, (1970).

[3] Temin P, *Statistics in Ancient History. Massachusetts Institute of Technology (MIT) Department of Economics Working Paper* No. 13-06 (2013).

[4] Gdbor Szalay, *A brief History of International Arbitration, its role in the 21sT Century and the examination of the Arbitration Rules of certain Arbitral Institutions with regards to privacy and confidentiality*, 8,9 (2016).

[5] W.R. Slomanson, *Historical Development of Arbitration and Adjudication*. 1 Miskolc J. Int'l Law 2 238, (2004).

[6] Guilhem, J. Lex Magica, *A Lex Mercatoria Reflection*, 37 Thomas Jefferson L R, 1, 125-126, (2014).

[7] H.S. Fraser, *A Sketch on the History of International Arbitration*, 11 Cornell L R 2, 182, (1926).

[8] J. Oldham, *Arbitration in America, the Early History.* 31 Law and History Review 1, 246 (2013).

[9] J.T. Newcomb, *New Light on Jay's Treaty,* 28 American J. Int'l L 4 686-689 (1934).

In 1768, the New York chamber of commerce was established with the objective of promoting the use of arbitration between Great Britain and the United States as the only civil tribunal.[10] In France, the decree of 16 - 24 August 1790 defined arbitration as "*the most reasonable means of dispute resolution between citizens*".[11]

The industrial revolution in the 19th century spread international trade and commerce to all parts of the world and arbitration seem like the only viable option to resolve such disputes. The treaty of Guadalupe Hidalgo in 1848 contained the first arbitration clause which put an end to the Mexican War.[12] Following the line of the Jay treaty, the treaty of Washington was signed in 1871 between Great Britain and the United States to resolve matters arising out of the Revolutionary War.[13]

England was the forerunner in developing the culture of arbitration by passing the Common Law Procedure Act of 1854 which placed commercial arbitral tribunals under the oversight of the domestic courts for the purposes of reviewing arbitral awards and at the same time the Arbitration Act of 1889 regulated several aspects of commercial arbitration.[14]

It was in 1899 and 1907 the Hague Peace Conferences that the most important document in the history of international arbitration i.e. the Hague Convention was adopted by the international community as the first multilateral treaty using arbitration between states in certain matters and establishing the system of arbitration. Under the Hague Convention, the Permanent Court of Arbitration with its seat at The Hague was established creating the first permanent tribunal as opposed to the several ad hoc ones in the past.[15]

The Hague Convention paved the way for the several multilateral treaties that would appear in the 20th century, especially after World War II as foreign investments started to flow and became influential. Disputes between high profile companies and States started to garn more attention and the impact on the general public and the business environment became more tangible leaning to the establishment of more arbitral tribunals in the world of international arbitration.[16]

Gradually, many chambers of commerce around the world started providing for their own set of arbitration rules and the freedom to select a jurisdiction to govern international commercial disputes.

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[10] J.T. Newcomb, *New Light on Jay's Treaty,* 28 American J. Int'l L 4 686-689 (1934).

[11] Noussia K, *Confidentiality in International Commercial Arbitration*, Springer Verlag Berlin Heidelberg, 14 (2010).

[12] H.S. Fraser, *A Sketch on the History of International Arbitration*, 11 Cornell L R 2, 199-200, (1926).

[13] W. R. Slomanson, *Historical Development of Arbitration and Adjudication*, 1 Miskolc J Int'l L 2, 238 (2004).

[14] Noussia K, *Confidentiality in International Commercial Arbitration*, Springer Verlag Berlin Heidelberg, 14 (2010).

[15] M.O Hudson, *The Permanent Court of Arbitration*, 27 American J Int'l L 3, 441-446, (1933).

[16] NEWCOMBE, A. & PARADELL, L. LAW AND PRACTICE OF INVESTMENT TREATIES, STANDARDS OF TREATMENT CHAPTER 1, HISTORICAL DEVELOPMENT OF INVESTMENT TREATY LAW 21-24, (KLUWER LAW INTERNATIONAL 2009).

This led to an obvious problem of enforcement of awards passed by different arbitral tribunals all over the world. To fill this void the Geneva Protocol on Arbitration Clauses and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 was adopted. However, there was a great dissatisfaction from the Geneva Treaties and so it was the International Chamber of Commerce (ICC) which proposed a preliminary draft Convention in 1953 for recognition and enforcement of arbitral awards.

The growth of arbitration requires sample or model rules, which signatory States may utilize and agree upon to regulate arbitration. This led to the adoption of Arbitration Rules by the United Nations Commission on International Trade Law (UNCITRAL) in 1976. Along the same lines, there was a need to create a sample or model law for nations to adopt in their respective countries and thus, in 1985 the UNCITRAL Model Laws was created.

The purpose of the UNCITRAL Model Law was to help and guide member states with respect to the regulation of arbitration and provide a model which could be incorporated into the national law of each country comprising procedure, jurisdiction, the composition of the tribunal, etc.

The Model Law also laid down the scope of interference by domestic courts and the obligations to respect the choice of the parties to have their disputes settled by arbitration including recognition and enforcement of the awards. With the Model Law and the UNCITRAL Arbitration Rules providing for procedural aspect, there was a great need for a neutral governing law. This need was fulfilled in 1994 by the UNIDROIT Principles on International Commercial Contracts.

The Journey from the Geneva Convention to the New York Convention.

After World War I, it was evident that where the international community would see a profit and peaceful commerce, wars were likely to destroy that profit and it was with this idea in mind that the ICC was created and the first International Court of Arbitration was set up. The objective was to provide for an international arbitral process that it could be integrated into a system of compliance effective across borders.[17]

The first difficulty that arose was that the arbitration would only be after the agreement has a dispute which arises, this is called a *compromise* as has been discussed earlier. In many countries, an agreement to arbitrate all disputes that might arise in the future in connection with a contract was not valid. It was also common that, even in countries in which the agreement to arbitrate was valid, it often did not effectively prohibit a court from taking jurisdiction over the dispute. If one of the parties commenced an action in court in spite of an agreement to arbitrate, there might later be an action for

[17] MARIKE PAULSSON, THE 1958 NEW YORK CONVENTION IN ACTION xxii, 3-4 (2016).

damages for breach of the agreement to submit the dispute to arbitration, but that tended to be an empty remedy.

It was in this context that the Geneva Protocol on Arbitration Clauses of 1923 and the Convention on the Execution of Foreign Arbitral Awards, 1927 came into existence providing that "*Each of the Contracting States recognizes the validity of an agreement whether relating to existing or future differences between the parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.*"

The arbitral tribunal was to be governed by the will of the parties and by the law of the country in whose territory the arbitration took place. The content of the Protocol is today incorporated into Articles II and V (d) of the 1958 New York Convention with only minor changes. However, there were many problems with the Geneva Convention. While it was never clear as to what was the need for the ICC to present the preliminary draft convention, the explanatory note claimed that it was necessary to replace the 1927 Geneva Convention.[18]

Within these fields, an essential objective of the Convention was uniformity; the Convention's drafters sought to establish a single uniform set of international legal standards for the enforcement of arbitration agreements and arbitral awards. In particular, the Convention's provisions prescribe uniform international rules that:

a. Require national courts to recognize and enforce foreign arbitral awards (Articles III and IV), subject to a limited number of specified exceptions (Article V);
b. Require national courts to recognize the validity of arbitration agreements, subject to specified exceptions (Article II); and
c. Require national courts to refer parties to arbitration when they have entered into a valid agreement to arbitrate that are subject to the Convention (Article II (3)).

The Convention's exceptions to the obligation to recognize foreign arbitral awards are limited to issues of jurisdiction, procedural regularity and fundamental fairness, compliance with the parties'

[18] INTERNATIONAL CHAMBER OF COMMERCE [ICC], Enforcement of International Arbitral Awards. Report and Preliminary Draft Convention (ICC Publication No. 174, 1953), reprinted in ICC Ct. Bull. 32 (1998); Convention on the Recognition and Enforcement of Foreign Awards, Travaux Preparatoires - Final Act and Convention on the Recognition and Enforcement of Foreign Arbitral Awards, at 32, U.N. DOC E/Conf.26/8/Rev.1 (1958). For this Proposal for a new Convention and Explanatory Note, see http://www.newyorkconvention.org/travaux+preparatoires/history+1923+-+1958.

arbitration agreement and public policy; they do not include a review by a recognition court of the merits of the arbitrators' substantive decision.

The problem with the Geneva Convention was that it required the awards to be first confirmed in the jurisdiction where they were made before they could be enforced in another jurisdiction. This requirement of two separate judicial processes was known as double *exequatur*.[19] One of the goals of the New York Convention was to simplify enforcement without having to resort to this requirement of double *exequatur* and creating an entirely new structure for enforcement which currently exists in Article IV and V of the New York Convention.

The New York Convention shifted the burden of proof to the respondent and created a presumption of enforceability in favor of the arbitral award. The idea was to make the enforcement of the award easy and in a speedy manner. The result of the changes in the New York Convention was that 157 Countries signed the convention and over 1800 decisions have been rendered worldwide over the treaty.[20]

Distinctions between the Geneva Convention and the New York Convention

Broadly the differences between the two Conventions i.e. the 1927 Geneva Convention and 1958 the New York Convention are as follows:

Under the Geneva Convention, a party seeking enforcement had to prove the negative fact that there was no reason for the refusal. Whereas, under the New York Convention the party seeking enforcement had to supply the original arbitral award or a duly certified copy of it and the original arbitration agreement or a duly certified copy of it to get the enforcement done. The party resisting enforcement has to prove, why the enforcement should be refused, the only exceptions are either that the subject matter is not capable of settlement by arbitration or that enforcement of award contrary to the public policy of that country. Apart from these two exceptions the burden of proof was reversed against the respondent and in the favor of the person seeking the enforcement.

Under the Geneva Convention, the party seeking enforcement of the award had to prove that the award was final in the country where it d been made, whereas, under the New York Convention the party resisting enforcement has to prove "*the award has not yet become binding on parties, or has been set aside or suspended by competent authority of the country in which, or under the law in which, that award was made*."

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[19] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 213 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).
[20] Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (June 10, 1958), 330 U.N.T.S.
38, available at http://www.newyorkconvention.org [hereinafter —New York Convention].

Another key difference between the two conventions is that the Geneva Convention restricted the autonomy of the parties as proceeding under the Geneva Convention had to be in accordance with both, the agreement of the parties and the law governing the arbitral procedure. Under the New York Convention, the enforcement of an arbitral award can be challenged if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, failing such agreement, not in accordance with the law of the country where the arbitration took place. Clearly, the New York Convention affords considerably greater freedom in the conduct of the arbitration proceeding. Parties are at liberty to refer to existing arbitration rules or draft rules themselves for the arbitration proceedings, the nomination of arbitrators and matters relating to evidence, etc. It is only in the circumstances that the parties failed to provide for these things that the law of the seat would apply.

Chapter II – Definition of Arbitration

Arbitration is a reference to the decision of one or more persons of a particular matter in difference between the parties. It is the submitting of a disputed matter to the judgment of one or more persons called arbitrators. In its broadest sense, arbitration is a substitution, by consent of parties, of another tribunal for the tribunals provided by the ordinary processes of law; a domestic tribunal; as contra-distinguished from a regularly organized court proceeding according to the course of law; depending upon the voluntary act of the parties disputant in the selection of judges of their own choice. Its object is the final disposition, in a speedy and inexpensive way, of the matters involved, so that they may not become the subject of future litigation between the parties.

HIRST LJ described arbitration as "*a procedure to determine the legal rights and obligations of the parties judicially, with binding effect, which is enforceable in law, thus reflecting in private proceedings the role of a Civil Court of law*".

FOUCHARD, GAILLARD, GOLDMAN remarks that "*arbitration is a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons; the arbitrator or arbitrators; who derive their powers from a private agreement, not from the authorities of a State, and who are to proceed and decide the case on the basis of such an agreement.*" (a key definition in bold.)

Sir ROBERT RAYMOND C.J. was held to have stated: "*An arbitrator is a private extraordinary judge between party and party, chosen by their mutual consent, to determine controversies between them. And arbitrators are so called because they have an arbitrary power; for if they observe the submission (arbitration agreement) and keep within due bounds, their sentences are definite from which there lies no appeal.*"

Further, Q. HOGG, a renowned scholar, defines arbitration as a reference for binding judicial determination of any matter in controversy capable of being compromised by an agreement by way of accord and satisfaction or rendered arbitrable by statute between two or more parties to some person or persons other than a Court of competent jurisdiction.

Another scholar RONALD BERNSTEIN describes arbitration as a procedure "*Where two or more persons agree that a dispute or a potential dispute between them shall be decided in a legally binding way by one or more impartial persons in a judicial manner, that is upon evidence put up before him or them, the agreement is called an arbitration agreement or a submission to an arbitration. When, after a dispute has arisen, it is put before such person or persons for the decision, the procedure is called arbitration, and decision, when made, is called an award.*"

GARY B BORN, the most seminal authority on the international commercial arbitration, defines arbitration as "*a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedure affording the parties an opportunity to be heard.*"

REDFERN AND HUNTER, another major authority, opines that arbitration is essentially a very simple method of resolving disputes. Disputants agree to submit their disputes to an individual whose judgment they are prepared to trust. Each puts its case to this decision maker, this private individual—in a word, this 'arbitrator'. He or she listens to the parties, considers the facts and the arguments, and makes a decision. That decision is final and binding on the parties—and it is final and binding because the parties have agreed that it should be, rather than because of the coercive power of any state. Arbitration, in short, is an effective way of obtaining a final and binding decision on a dispute, or series of disputes, without reference to a court of law (although, because of national laws and international treaties such as the New York Convention, that decision will generally be enforceable by a court of law if the losing party fails to implement voluntarily).

In the Indian Context, arbitration is defined as per section 2(1) (a) of the Arbitration and Conciliation Act, 1996, where arbitration means any arbitration whether or not administered by the permanent arbitral institution.

Definition of 'Commercial'

The phrase "Commercial" in the international commercial arbitration needs a close examination. There are no uniform criteria to determine as to what disputes are commercial. The term 'commercial' can be understood in the context of international arbitration wherein arbitration is related to two parties resolving a dispute having commercial relations between them and the dispute stems from that commercial relationship. However, there cannot be an absolute definition of the word commercial, as different nations have adopted their own definition. To ascertain whether the dispute is commercial or not, it is seen if the parties attached to it are carrying out anything commercial in nature. It is pertinent to specify, whether the nature of the dispute or the transaction involved or undertaken is commercial or not.

As mentioned above, none of the international convention concretely defines what commercial means but there are some attempts. The European Convention on International Commercial Arbitration 1961 (Geneva) does not specifically define "commercial". It gives a general definition with a reference – "*to arbitration agreements concluded for the purpose of settling disputed arising from international trade"* in the convention.[21] Similarly, Panama Convention in its text of one of the articles[22] only uses the term "commercial", when it says, " *An agreement in which parties undertake to submit to arbitral*

[21] Article 1(1) (a), Geneva Convention.
[22] Article 1, Inter-American Convention on International Commercial Arbitration, 1975 (Panama)

decision any differences that may arise or have arisen between them with respect to a commercial transaction is valid…"

In the New York Convention, the distinction between the commercial and non-commercial arbitration is reflected under Article 1(3) which contains what is known as commercial reservation. The reason why it was inserted because, in the absence of this provision, it would be practically impossible for some civil law countries, which has their reservations pursuant to commercial transactions and non-commercial transaction. Interestingly, convention approximately one-third of the contracting states have made use of this commercial reservation enshrined under the New York Convention.

The New York Convention argues that the term 'commercial' should be characterized by the virtue of 'national law' because the municipal courts have time and again interpreted the scope of the term 'commercial'.

However, a significant attempt is made by the Model Law to come up with a tentative definition envisaged in the footnote to an article[23] which reads as:

The term commercial should be given a wide interpretation so as to cover matters arising from all relationships of commercial nature, whether contractual or not. Relationships 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 constructions of works ; consulting ; engineering; licensing ; investment ; financing ; banking ; insurance ; exploitation agreement or concession ; joint venture and other forms of industrial business cooperation; carriage of goods or passengers by air, sea rail or road".

This definition though contained in the footnote, the drafters have given an inclusive and open-ended description to the term "commercial" which would be applicable to all aspects of international business. Internationally, the approach has been to interpret the term "Commercial" as widely as possible and the definition given by Model Law is more or less accepted on a universal scale and it serves as an important purpose.

It is pertinent to note that a number of countries have enacted their Arbitration laws based on the Model Law on arbitration, which make reference to commercial arbitration or commercial transactions. However, none of these jurisdictions have defined the term "commercial". Further, there were some attempts made by the arbitral institutions to define the term commercial such as The CIETAC (China International Economic and Trade Arbitration Commission) Arbitration Rules[24] which defins "Commercial Disputes" to "*include disputes between an enterprise with a foreign*

[23] Article 1 , UNCITRAL (United Nations Commission on International Trade Law) Model Law(i.e. Model Law on International Commercial Arbitration, adopted by UNCITRAL on June 21, 1985
[24] Article 2.

investment and another Chinese legal or physical person and/or other economic organisations through utilizing the capital, Technology or service form foreign countries, international organisations or form the Hong Kong SAR, Macao and Taiwan regions.[25]

The Moscow International Commercial Arbitration Court (ICAC) paragraph 1(2) of 1995 Rules is another definition paragraph, which provides that *matters which may be referred to it include disputes arising from contractual or other civil law relationship in the course of foreign trade and other forms of international economic affairs between enterprises with foreign investment, international associations and organisations set up in the territory of the Russian federation and from purchase and sale(delivery) of goods, contracts of service or labour, exchange of goods and/ or services, carriage of goods and passengers, commercial representation or agency, leasing, scientific-technical exchange, exchange with other results of intellectual activity, construction of industrial and other objects, licensing operations, investment, crediting and settlement operations, insurance, joint ventures and other forms of industrial and business co-operation.*[26]

The United-States of America has taken the most liberal approach as it excludes only matters arising out of legal relationships, whether contractual or not, which are not considered as commercial under the national law of the US[27] from the scope of New York Convention. In US even the international employment contracts have been considered to be a commercial relationship[28], itself shows the liberal approach, which it has adopted. In the case of *Societe Generale de Surveillance, S.A.* v. *Rayetheon European Management and Systems Co.*, an American company was involved in a dispute with a French Company in a contract for the field testing, inspection, and evaluation of missiles. Even though the contract was strictily one about services, and not about an exchange of commodities, the court held that it was commercial. The court also observed that there is a strong judicial policy favouring the submission of contractual disputes to arbitration particularly under the provisions of the Federal ArbitrationAct and the term commerce should be broadly construed.

While some countries while adopting the Model Law incorporated the text of the footnote to Article into a provision of their law[29] some just reproduced the text in a schedule[30] and others have not included, for various reasons, the definition of “Commercial” into their laws.[31]

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[25] CIETAC Rules, Articles 2(3) and (4).
[26] Supra n. 1, at p. 55.
[27] U.S. Reservation on Accession to the New York Convention (took effect from 29 December 1970). It is understood that personal , matrimonial and domestic employment matters are not of a commercial nature as quoted in Supra n.1 at p. 56.
[28] See paragraph International Inc. (Nova Scotia, Canada) and paragraph Inc. (US) and Pictorious Incorporated (Nova Scotia, Canada) and Philip Cox and Paul Davies v. Ralph Barhydt (US) 928 F Supp 983, XXII YBCA 901 (1998) (ND Cal 1996).
[29] The countries like Canada (British Columbia International Commercial Arbitration Act 1986), Bulgaria, ,Cyprus, Egypt, Ireland, Nigeria, Oman, Russia and Ukraine;
[30] These countries are Australia, Bahrain, Bermuda, Canada, Malta, and Singapore.
[31] These countries are Germany , Greece , Hong Kong , Hungary, Iran, Libya and Zimbabwe.

Meaning of Commercial under Indian Law

As far as India is concerned, India has adopted a different approach whereby it has clubbed the term "commercial" with "international commercial arbitration" and has defined is along with in Section 2(1) (f), The Arbitration and Conciliation Act, 1996. [32] The "commercial" aspect of the term defined as: "*dispute arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India*" according to Section 2. The meaning of the term derives its importance from the fact that it demonstrates the extent to which the scope of international arbitration would be covered by the Act.

In case an international arbitration does not come within the meaning of term "commercial" as used in the 1996 Act, it would not be considered as arbitrable in India.[33] Similarly, if India were to adopt a restricted definition of the term "commercial" , it could lead to foreign awards not being enforced , since the subject matter of the dispute was not one that the Indian law would have considered as commercial[34]. It seems the legislature has deliberately omitted any reference to the explanatory note of Article 1(1) of the UNCITRAL Model Law on International Commercial Arbitration also as to give discretion to the courts to decide the issue based upon the facts and circumstances of each case.[35] This would also enable the courts to expand or narrow the definition of "commercial" as the case may be talking onto accounts the contemporary requirements[36] or peculiar facts before the court.

The judicial trend in recent in recent times display a trend where the courts are taking a broader view of the term "Commercial" or "commercial transaction". The court in the case of *Atibari Tea Co. Ltd v. State of Assam*[37], the court has made an effort to describe what all activities can come under commercial nature. It held that, "*in the complexities of modern conditions, in their wide sweep are included carriage of persons and goods by road, rail, air, and waterway, building contracts, banking, insurance, transactions in the stock exchanges and forwards markets, communication of information, supply of energy, postal and telegraph services and many more activities-too numerous to be exhaustively enumerated- which may be called commercial intercourse.*"

But it does not mean that if the agreement is merely commercial nature, it will fall under the international commercial arbitration and will invoke the provision of the arbitration laws. In fact, it must also be established that the dispute is commercial by virtue of a provision of law or an operative legal principle in force in India. In *Indian Organic Chemicals Ltd. v. Chemtex Fibres Ltd.*, the

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[32] Section 2(1)(f), The Arbitration and Conciliation Act, 1996.
[33] See Supra n. 47 at p. 135.
[34] Section 44 of the Act reads: " … unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual ornot, considered as commercial under the law enforced in India…"
[35] See supra n. 47 at p. 135.
[36] Lakshmi Jambholkar, " International Commercial Arbitration : Recent Developments in Indian Law", 19(6)Journal of international Arbitration, 601-68(2002) p. 602.
[37] AIR 1961 SC 232.

Bombay High court held this view and remarked "*In order to involve the provision of the (convention), it is not enough to establish that an agreement is commercial. It must be also be established it is commercial by virtue of a provision of law or an operative legal principle in force in India.*" [38]

Further, in *Renusagar Power Co. Ltd v. General Electric Co*[39]., the courts have shed more light on this issue and have held that "*It is obvious that since the Act is calculated and designed to subserve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration any expression or phrase occurring therein should receive, consistent with its literal grammatical sense a liberal construction.*" The court, in *Fatehchand*[40] observed that any service or activity which in the modern complexities of business would be considered to be a lubricant for the wheels of commerce is 'commercial'.

A comprehensive remark of the court in the case of *Kamani Engg. Corp. Ltd. v. Societe De Traction Et. D' Electricity Sociate Anonyme*[41] pertaining to the issue is worth mentioning:

"It is difficult to find the exact meaning of the phrase "matters considered as commercial under the law in force in India". Neither side was been able to point out any particular law wherein the phrases "commercial" or "matters commercial" have been defined. The intent of the Legislature while using the above phrase was that in matters of commercial contracts foreign arbitrations and awards should be recognized and enforced. Having regard to the purpose of the Act, widest meaning must be given to the word "commercial". The contract, in this case, was on the face of it only a contract for technical assistance; it did not involve the defendants into any business of the plaintiffs; it was not in any sense participation in profits between the parties; by this contract, the defendants refused to be involved into any business of the plaintiffs and/or any contracts of the plaintiffs; they have scrupulously kept themselves out of any commercial relations with the plaintiffs. Accordingly, it was held that contract was more like a retainer or contract that was made between a solicitor, a counsel and an advocate on the one hand and a client on the other. Such a contract cannot be described as commercial."

The Court, on some occasions, took a narrow approach. In *Josef Meisanur Gmbr and Co. v. Kanauria Chemicals and Industries Ltd.*[42] the court was of the view that a contract for supply of technical Know-how and expertise to a party consideration of fee payable by the other party did not contain any

[38] AIR 1978 BOM 106.
[39] 1994 Supp (1) SCC 644.
[40] Fatechand Himmatlal v. State of Maharashtra, 1977 AIR 1825.
[41] AIR 1965 Bom 114.
[42] AIR 1986 Cal. 45.

element for transaction between merchants and traders as understood in India la and so did not qualify as "commercial". Likewise, view has been expressed by some other High courts. [43]

Similar narrow approach was reflected in *Indian Organic Chemicals Ltd. v. Chemtex Fibres Ltd.,* [44] where Bombay High Court held that … In order to involve the provisions of (the convention), it is not enough to establish that an agreement is commercial. It must also be established that it is commercial by virtue of a provision of law or an operative legal principle in force in India".

However, this view was overturned by the Bombay High court in *European Grain & Shipping Ltd. v Extractions (P) Ltd.,*[45] holding that, the mere use of the word "under" preceding the words "law in force in India" would not, necessarily mean that you have to find out a statutory provision or provision of law which specifically deals with the subject of a particular legal relationship being commercial in nature. It was stated that the contract, which was for sale and purchase of a commodity, was clearly a contract which brought about a legal relationship', which was commercial in nature under the Indian law.

Similar view was expressed by the Gujrat High Court in *Union of India v. Owner & Parties Interested in Motor Vessel M/V Hoegh Orchid*[46], when the court dealing with the question as to whether the contract in question was of "Commercial" nature, said that the term "commerce" … is a word of the largest import and takes in its sweep all the business and trade transactions in any of their forms, including the transportation, purchase, sale and exchange of commodities between the citizens of different countries.

However, the Supreme Court in its landmark judgment of *R.M. Investment trading Co. v. Boeing Co.,* [47] took a progressive view by expanding the scope of "Commercial" used in Foreign Awards (Recognising and Enforcement) Act, 1961. The court observed that the expression "commercial" has to be construed broadly, having regard to manifold activities, which are an integral part of international trade today. In this case, there was an agreement between an Indian party and Boeing Company to provide consultancy services for promotion of sale of Boeing Aircraft in India. Such transactions was held to be commercial by the court as it observed, "the Indian party was required to play an active role in promoting the sale of the aircraft of Boeing to customers and was required to provide 'commercial and managerial assistance and information which may be helpful to Boeing's sales efforts with customers'. This would show that the relationship between Indian Party and Boeing was commercial in nature.

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[43] Suresh Sinha v. Akuhari, AIR 1957 Pat. 256; National Thermal Power Corporation v. Singer (1992) 2 Comp. L J 256.
[44] AIR 1978 Bom. 106
[45] AIR 1983 Bom. 36.
[46] AIR 1983 Guj. 34.
[47] AIR 1994 SC 1136.

An interesting question arose in *Harendra H Mehta v. Mukesh H Mehta*[48], where in the court continuing its progressive interpretation trend of "Commercial" held that an arbitral award dividing a jointly run family business between two brothers is a "commercial" award, stating that the award satisfied all the requirements of international commercial arbitration.

The wider interpretation enlarges the scope for the uses of ADR mechanism. Commercial disputes are suitable for resolution through ADR mechanisms/ processes, as the likely chances for the intrusion of public interests are very bleak. Thus, it is clear that there is lack of clarity in India on the meaning of "commercial" in the filed of international commercial arbitration. although the act, is arbitration friendly in tenure, nevertheless there is a danger that the court exercising its discretion in settling disputes arising from the contract by applying the provisions of the act, may well rely on past proceedings, as there is no statutory definition of "Commercial".

While it is impossible to exhaustively list each and every commerical relationship, an express Amendment to the Indian Act in the main body of the statute, similar to Footnote 2 of the Model Law, would help in bringing about clarity and certainty. It would be advantageous for the global business if courts globally give liberal construction to commercial. Only then, international commercial arbitration would be ble to subserve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration. Otherwise, the world business community would be busy interpreting the word 'commercial' and in the process defeating the very purpose of commercial arbitration.

Definition of 'International'

The term 'international' draws the line between arbitrations which are domestic or national from those which go beyond national limits, called as 'international' or 'transnational'.[49] Technically, it can be argued that every arbitration is a national or a domestic arbitration since they are eventually taking place at some country, in accordance with the laws applicable in that particular country. [50] However, in reality, the same may not be true if not interpreted narrowly. Arbitration proceedings are conducted in accordance with the place of arbitration, i.e. law of the seat (*lex arbitri*), however, in international arbitration, parties are usually not connected with the law of the seat i.e. the seat is usually a neutral country.[51]

The Model Law explains when an arbitration is international. According to Article 1 (3) of the Model law, arbitration is international if:

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[48] AIR 1999 SC 2054.

[49] Judge Jessup used this term to describe rules of law that govern cross-border relationships and transactions: see Jessup, Transnational Law (Yale University Press, 1956).

[50] Francis A. Mann, *Lex Facit Arbitnim*, 2(3) ARB. Int'l 245 (1983).

[51] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 1.21 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).

a. *the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or*

b. *one of the following places is situated outside the State in which the parties have their Places of business:*

   I. *the place of arbitration if determined in, or pursuant to, the arbitration agreement;*

   II. *any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or*

c. *The parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.*

The difference between domestic and foreign arbitration can be determined by examining the relationship, dispute, and connection between the parties i.e. if any foreign elements are found while examining which provides for possible connection or nexus with other jurisdiction, the subject matter will be considered to be an 'International'.[52]

There are various factors which determine whether the arbitration in international or not such as:[53]

a) *The nationality and domicile of the arbitrator or arbitrators;*

b) *The nationality of the parties;*

c) *The domicile, residence or company headquarters of the parties;*

d) *Other connecting factors related to the substance of the dispute (such as the place where the contract was signed, the place where it was performed, the location of any property involved and the place where any loss was suffered).*

e) *The nationality or headquarters of the arbitral institution;*

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[52] EMMANUEL GAILLARD AND JOHN SAVAGE CHAPTER I - DEFINITION OF INTERNATIONAL COMMERCIAL ARBITRATION', IN EMMANUEL GAILLARD AND JOHN SAVAGE (EDS), FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, 46 (KLUWER LAW INTERNATIONAL; KLUWER LAW INTERNATIONAL 1999).

[53] EMMANUEL GAILLARD AND JOHN SAVAGE CHAPTER I - DEFINITION OF INTERNATIONAL COMMERCIAL ARBITRATION', IN EMMANUEL GAILLARD AND JOHN SAVAGE (EDS), FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, 46, 47(KLUWER LAW INTERNATIONAL; KLUWER LAW INTERNATIONAL 1999).

f) *The seat of the arbitration;*

g) *The place where the award will be enforced;*

h) *The law chosen to govern the arbitral proceedings;*

i) *The law chosen to govern the merits of the dispute*

In India, international commercial arbitration is defined under Section 2 (1) (f) of the Arbitration and Conciliation Act, 1996, which mandate the requirement of one of the parties to be a " foreign entity" for arbitration to be international commercial arbitration.

This section and the underlying issue was closely examined in the controversial judgment of *TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd.*[54] ("**TDM"**). In this case, there were two parties which were companies registered under the Companies Act of 1956. However, the directors and the shareholders of the petitioner company were residents of Malaysia and the Board of Directors of the petitioner also sat in Malaysia. The respondent entered into a contract with the petitioner, which also contained an arbitration clause. This arbitration clause mandated that the law applicable in case of a dispute would be the Indian Arbitration Act of 1940 and amendments thereafter.

Subsequently, differences arose between the parties. When the arbitration agreement was resorted to, the Respondent proposed an amendment to the arbitration clause by changing the venue of arbitration to Kuala Lumpur, Malaysia, and applying the law of Malaysia, and the Malaysian Arbitration Act of 2005. This proposal was rejected by the petitioner, subsequent to which both parties proposed nominees that were rejected by the other party. Therefore, an application was made under Sections 11(5) and 11(6) of the Arbitration and Conciliation Act of 1996 for the appointment of a sole arbitrator.

Section 11 of the Arbitration & Conciliation Act, 1996 deals with the procedure to appoint arbitrators. Section 11(12) states that only in cases of International Commercial Arbitration, the Chief Justice of India can exercise jurisdiction to appoint an arbitrator. In all other matters i.e. domestic arbitration, the appointment of the arbitrator has to be carried out by Chief Justices of High Courts. Thus, the matter hinged upon the issue whether this was a case of International Commercial Arbitration.

Section 2(1)(f)(ii) of the Arbitration & Conciliation Act defines International Commercial Arbitration as an arbitration where at least one of the parties is a body corporate which is incorporated in any country other than India. Section 2(1)(f)(iii) also defines International Commercial Arbitration wherein a party is a company or an association or a body of individuals whose central management and control is exercised in any country other than India.

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[54] (2008) 2 Arb LR 439.

It was contended by the UE Development group that as TDM Infrastructure Group is incorporated in India, it should also be legally deemed to be situated in India notwithstanding the fact of its directors being foreign nationals. Thereby, as both the companies would be incorporated in India, Section 2(1)(f)(ii) would not be applicable and the matter would be one of domestic arbitration. On the other hand, TDM Infrastructure raised the contention that as its central management and control is exercised from Malaysia, its day-to-day management does not take place in India. Therefore, as per Section 2(1)(f)(iii), it was International Commercial Arbitration and the Chief Justice of India could appoint the arbitrator.

The Supreme Court held that the present case is not a case of international commercial arbitration, as both the parties have been incorporated in India and thus, it does not have the jurisdiction under the Act to nominate an arbitrator in this case. The Supreme Court did not accept the contention of the petitioner that the court had the jurisdiction to appoint an arbitrator in the present case as the central management and control of the company was exercised in Malaysia and this would bring it under the definition of international commercial arbitration provided in section 2(1)(f)(iii). The court held that in a case where such a company is registered in India and in a dispute where the opposite party is also an Indian entity, refuge to a foreign law cannot be taken. The court was of the opinion that when both the companies are registered in India, section 2(1)(f)(ii) would be taken into account and not section 2(1)(f)(iii).

Regarding the question as to whether the arbitration agreement falls under the purview of Section 2(1)(f) of the Act, the Court held that the determination of the nationality of the parties was crucial in the matter of appointment of an arbitrator. A company that is incorporated in India can therefore only have Indian nationality and where both the parties have Indian nationalities, then the arbitration between them cannot be said to be an international commercial arbitration. Thus the question of applicability of clause (iii) of Section 2(1)(f) would not arise.

The reasoning in TDM failed to take into consideration the use of the word “or” in between Section 2(1)(f)(ii) and (iii) and consequently ignored the intention of the Legislature that a company would be deemed to be a foreign national either if it was incorporated outside India or if its central management was located outside India. The Supreme Court clearly went against what is expressly written in the Act. Thus, the court has failed to provide for a solid reasoning to support its decision. As a consequence, an Indian subsidiary of a foreign corporate cannot seek to indulge in international commercial arbitration under the 1996 Act with another Indian entity or individual. In other words, any foreign party would think twice before conducting business with an Indian company, as the arbitration clause would then get subject to Indian Courts even if the place of functioning and management of the company is different.

The judgment marked out the scope of international commercial arbitration and domestic arbitration by testing them on the criterion of nationality and domicile. Such narrow approach is not in line with the international trends and especially in this present era of globalization, when the contracts between the companies are becoming more and more complex by the day and the jurisdictions are blending into each other, such narrow approach is contradictory to the essence of the arbitration laws which is to make it pro arbitration and respect the party autonomy.

Unfortunately, TDM inspired the Law Commission to propose an amendment to the definition of international commercial arbitration, in Section 2(f)(iii) by removing the reference to a company, which is already covered in Section 2(f)(ii). The intention behind the proposal was that the test for determining the residence of a company must be based on the its place of incorporation and not the place of central management/control. This re-enforced the place of incorporation principle laid down by TDM.

The amendment made it clear that the place of incorporation shall be the sole factor to determine whether a company/body is a foreign national for the purpose of deciding whether arbitration qualifies as an international commercial arbitration. Following the amendment, the position of law is that in an arbitration between an Indian party and a company/body corporate which

1. Is incorporated outside India, irrespective of the place of central management of the body corporate, the arbitration would be classified as an international commercial arbitration.
2. Is incorporated in India, irrespective of the place of central management of the body corporate, the arbitration would be not be an ICA.

Chapter III – The Monopoly of International Arbitration

Arbitration as a method of dispute resolution is used in almost 90 % of the international contracts. There is a dearth of any institutional or organizational mechanism which may provide the same benefit that a mechanism of arbitration provides. Therefore, it may not be out of place to say that the international commercial arbitration enjoys the monopoly of being the most preferred dispute resolution method across jurisdictions and borders.

Neutrality

One of the key problems in international trade dispute was a crucial question of litigation before which party's national court? The inherent fear being that the courts were likely to favor the resident of their country as opposed to sitting in judgment with impartiality and independence. Sometimes the concern was also that the courts in a particular country might lack a connection with any of the parties or with the subject matter of the disputes. International commercial arbitration addresses both these concerns as this method secures a high degree of neutrality as parties can choose arbitrators of their choice, who can come from a different nationality, ethnicity, different legal background or non-legal background. While many consider, nationality to raise the same concern as to the domestic court, sometimes having an arbitrator of the nationality of one of the parties is essential to understand cultural differences, trade and usage, customs and very often the economic and business aspects of the dispute.

International Enforceability

Arbitration scores over all other forms of dispute resolution as it provides for a binding decision now enforceable in 183 signatories of the New York Convention. At the end of the arbitration (if no settlement has been reached), the arbitral tribunal will issue its decision in the form of an award. In this regard, three points should be emphasised. First, the end result of the arbitral process will be a binding decision and not a recommendation that the parties are free to accept or reject as they please. Secondly the award will be final; it will not, as is the case with some court judgments, be the first step on a ladder of appeals, like an expensive game of 'snakes and ladders'. Thirdly, once the award has been made, it will be directly enforceable by court action, both nationally and internationally.

Advantages

The monopoly of international commercial arbitration exists because of its various inherent advantages which are missing in other forms of dispute resolution.

Flexibility

Alongside this neutrality, the flexibility to hold hearings at any place and time in the world makes arbitration extremely attractive to those with a busy schedule and located at different parts of the world. Moreover, with over 80 jurisdictions that have adopted the Model Law with almost no or minor amendments, the consistency, predictability and enforcement concerns have all been addressed. The national courts of various jurisdictions have adopted the Model Law which are bound to reject the unwarranted challenges and interference in the arbitral process. There is also a sufficient evidence of specialized commercial and arbitration courts being set up in Dubai, Singapore, Germany, and England with the broad objective of promoting arbitration in these jurisdictions.[55]

Party Autonomy

One other advantage for the monopoly of international commercial arbitration is the ability of the parties to choose from a pool of experience of international arbitrators who are more likely to have a business mindset and who are more up to speed with international commerce. These advantages often reflect very clearly in the creation of arbitral institutions. An arbitral institution has experienced arbitrators empaneled and whenever parties opt to have their disputes resolved by referring the disputes to one of the arbitration institutions, the parties elect their choice of arbitrators from those empaneled with the institution, thereby ensuring both expertise and neutrality.

Another key feature of arbitration is its advantage of party autonomy or party control i.e. the ability and freedom of the parties to choose not only their arbitrators but also the procedure to be followed by the arbitral tribunal. Very often, and especially in the country like India, several judges don’t have the required know-how, technical expertise and commercial understanding to adjudicate disputes in niche industries and hence arbitration scores yet again as the go-to choice for dispute resolution. Furthermore, arbitration helps in reducing and almost eliminating prejudices, assumptions, and principles of judge acquired by years of training and practice in international law.

Confidentiality

Arbitration continues as the method of choice because it provides parties the confidentiality that is never available in a courtroom trial. With the modern age and the advent of social media, trial by media and trial by social media have become more frequent than ever and arbitration is the only avenue to litigate a cause without public attention. There may be trade secrets or competitive practices

[55] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 1.104 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).

to protect, or there may simply be a reluctance to have details of a commercial dispute (or some bad decision making) made the subject of adverse publicity.[56]

Additional Powers of Arbitrators

Sometimes, an arbitral tribunal may possess greater powers than those of a judge. For example, under some systems of law or some rules of arbitration, an arbitral tribunal may be empowered to award compound interest, rather than simple interest, in cases in which the relevant court has no power to do so.[57]

Continuity of Role

Finally, there is a useful continuity in arbitration: an arbitral tribunal is appointed to deal with one particular case, and its task is to follow that case from beginning to end. This enables the tribunal to become acquainted with the parties, their advisers, and the case, as it develops through the documents, pleadings, and evidence. Such familiarity should help to move the case along—and it may indeed facilitate a settlement.[58]

Disadvantages

Conflicting Awards

There is no system of binding precedents in international arbitration—that is, no rule that means that an award on a particular issue, or a particular set of facts, is binding on arbitrators confronted with similar issues or similar facts. Each award stands on its own. An arbitral tribunal that is required, for example, to interpret a policy of reinsurance may arrive at a different conclusion from that of another tribunal faced with the same problem. The award of the first tribunal, if it is known (and it may not be known, because of confidentiality) may be of persuasive effect, but no more.[59]

Judicialization

It means that the arbitrations tend to be conducted more frequently with procedural intricacy and are more often subjected to judicial intervention and control. Moreover, procedures such as testimony of

[56] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 1.105 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).
[57] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 1.106 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).
[58] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 1.107 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).
[59] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 1.116 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).

witnesses and taking documents on record are time consuming and may cost considerable amount of money.[60]

Costs

International arbitration was once a relatively inexpensive method of dispute resolution. It is no longer so. There are several reasons for this. First, the fees and expenses of the arbitrators (unlike the salary of a judge) must be paid by the parties—and in international arbitrations of any significance, these charges are substantial. Secondly, it may be necessary to pay the administrative fees and expenses of an arbitral institution— and these too may be substantial. It may also be thought necessary to appoint a secretary or 'administrative assistant' to administer the proceedings. Once again, a fee must be paid. Finally, it will be necessary to hire rooms for meetings and hearings, rather than make use of the public facilities of the courts of law.[61]

Delay

Finally, a major complaint is that of delay, particularly at the beginning and at the end of the arbitral process. At the beginning, the complaint is of the time that it may take to constitute an arbitral tribunal, so that the arbitral process can start to move forward. At the end of the arbitration, the complaint is of the time that some arbitral tribunals take to make their award, with months—and sometimes a year or more—passing between the submission of post-hearing briefs and the delivery of the long-awaited award.[62]

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[60] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 1.118 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).
[61] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 1.123 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).
[62] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 1.126 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).

Chapter IV – Overview of the Regime Governing International Commercial Arbitration

In most arbitrations, the primary task of the arbitrators is to understand the facts and to apply the contract terms to the facts. Most often than not, procedural issues are addressed by the rules chosen by the parties. Though one may gather the impression that arbitration is governed entirely by the choice of the parties and the parties are free to choose whatever they want, it must be remembered that the contract of the parties and their disputes do not exist in a legal vacuum. In fact, it is a combination of layers of laws and rules that are applicable to international commercial arbitration.[63] The following are the essential aspects of regulatory framework that merits a discussion.

Agreement of the Parties

The first and foremost starting point of the regulatory framework is the agreement of the parties. This defines the contours of the whole arbitration process beginning with the most fundamental requirement i.e. the consent to submit the resolution of the dispute to arbitration. If the arbitration agreement or the agreement of the parties becomes invalid, then there is no requirement to proceed to any other law as there is no legal basis for arbitration.

It must be remembered that the arbitration clause in the main contract survives the challenge to the main contract and even if the main contract is determined or held to be invalid, that by itself does not make the arbitration agreement invalid. This is known as the 'doctrine of separability'. Therefore, if a party alleges the conclusion of the main contract through fraud or misrepresentation, the same can be adjudicated upon in an arbitration proceeding. In order to avoid arbitration altogether, the party alleging fraud must show that there was no intention to have their dispute resolved through arbitration in the first place.

Arbitration Rules

Once the arbitration agreement is found to be valid, the next applicable law is the arbitration rules chosen by the parties. The same can be those model arbitration rules adopted internationally such as the UNCITRAL Arbitration Rules or they can be created by the parties or the parties may choose to refer their dispute to an international arbitration institution, in which case the rules of that institution would apply. It must be noted that the parties are free to vary arbitration rules as per their arbitration agreement which is why many arbitration rules provide for the language "*unless otherwise agreed in writing by the parties*". This goes on to show that the arbitration rules accepted by the parties are not mandatory, but rather a default rule that will apply if the parties have not reached their own agreement

[63] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 55 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).

on a particular topic.[64] In the event, the parties do reach an agreement, the agreement of the parties will trump the arbitration rules unless a rule is considered mandatory by an arbitral institution.

National Laws

The next regulatory framework comprises both the substantive law and the *lex arbitri* (the law of the seat of arbitration). Since many countries worldwide have accepted the UNCITRAL Model Law into their domestic law, the law of the seat of many jurisdictions now has some uniformity. The Model Law is not to be interpreted as being in conflict with the arbitration rules but has to work in conjunction with arbitration rules. That is the reason that many of the Model Law provision uses the same default language i.e. "*until unless otherwise agreed by the parties*". Thus, if the parties have chosen a provision contrary to the provision of Model Law, or if the arbitration rules provide for something different from the Model Law, then the arbitration rules prevail over the Model Law. It must be remembered that by choosing the seat of arbitration i.e. the place where the courts would exercise supervisory jurisdiction and provide orders in support of arbitration e.g. interim measures, appointment of arbitrators, assistance in taking evidence, setting aside the arbitral award, etc., the parties inevitably chose the domestic arbitration law of the seat i.e. the *lex arbitri*.

Another aspect of the regulatory framework is the substantive law or the most basic choice of the parties i.e. the law governing the contract which is usually contained in a 'Governing law' clause in an agreement. This law is the one in which the rights and the liabilities of the parties are defined. Usually, the party with the higher bargaining power will try to impose or choose its own national laws like the law governing the contract. However, sophisticated parties, or parties with extensive experience in international trade and commerce, or evenly balanced parties in terms of bargaining power may choose international law or international principle such as the United Nations Conventions on Contract for the International Sale of Goods (CISG) or the UNODROIT Principles of international Commercial Contract or *Lex mercatoria*. If the parties have not chosen a governing law, then the tribunal will determine the law applicable.

International Arbitration Practice

In the event, there are gaps or lacunae in the above-mentioned regulatory framework, then arbitration tribunal take resort to international arbitration practice, some of which have been codified as rules or guidelines. For example, the International Bar Association Rules on the Taking of Evidence, on the Rules of Ethics, and Conflict of Interest in International Arbitration. The American Arbitration Association and the American Bar Association have also provided a code of ethics for arbitrators. Similarly, the UNCITRAL has codified the Notes on Organizing Arbitral Proceedings "*to assist arbitration practitioners by providing an annotated list of matters which an arbitral tribunal may*

[64] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 6 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).

wish to formulate decisions during the course of arbitration proceedings…….”[65] It is pertinent to note that these are considered as soft law and are not binding on the arbitral tribunal as they are usually used to fill gaps or harmonize the arbitration practice across the world.

International Treaties

After international arbitration practice, the framework taken resort to is that of international treaties beginning with the New York Convention as it governs both arbitration agreement and awards and because 183 countries are a signatory to it. Other treaties of importance are the Inter-American Convention on International Commercial Arbitration (the Panama Convention), the European Convention on International Commercial Arbitration, and the Convention on the Settlement of Investment Disputes Between States and National of other States (Washington Convention or the ICSID Convention).[66]

The Panama Convention is similar to the New York Convention but is geographically localized to Latin America as it is ratified or adopted by 14 South and Central American countries and by the United States and Mexico. Similarly, the European Convention supplements the New York convention in Europe between the contracting States. The ICSID Convention, on the other hand, was promoted by the World Bank to encourage investors to invest in developing countries and give the right to the investor to take action against the governments. Thus, the ICSID deals with the investor-state dispute as opposed to a commercial dispute between two parties.

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65 MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 7 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).

66 MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 8 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).

Chapter V – Types of Arbitrations

One of the choices parties must make when they decide to arbitrate is what kind of arbitration do they want to opt for, whether they want their arbitration to be ad hoc or administered by an arbitral institution. There are obvious advantages and disadvantages of both kinds of arbitrations but before dealing with them, it is prudent to understand the concepts of ad hoc arbitration and institutional arbitration.

Ad hoc Arbitration

According to PROF KROLL ad hoc arbitration is where the arbitration mechanism is established specifically for the particular agreement or dispute. In ad hoc arbitration the parties may establish their own rules of procedure (so long as these rules treat the parties with equality and allow each party a reasonable opportunity of presenting its case). Alternatively, and more usually, the parties may agree that the arbitration will be conducted without involving an arbitral institution, but according to an established set of rules, such as those of UNCITRAL, which provide a sensible framework within which the tribunal and the parties may add any detailed provisions as they wish—for example, rules providing for the submission of pre-trial briefs or the agreement of expert reports.[67] When the parties fail to agree on these issues, e.g. they have agreed only "arbitration" or "arbitration in a nominated city", usually default provisions of the law of the place of arbitration will be applicable.[68]

Where parties are silent and have not selected an institutional arbitration, the arbitration will be ad hoc. Further, in ad hoc arbitration, the power of constitution of the tribunal is vested upon the parties, where they are absolutely free as to choose their arbitrator(s). This freedom is recognized in all national legal system across the world. Since the constitution of the tribunal is directly done at the choice of the parties to an arbitration, ad hoc arbitration is cheaper and expeditious in nature.[69] On the other hand, it is pertinent to note that, the efficiency of ad hoc arbitration process depends upon the drafting of the arbitration agreement. In ad hoc arbitration, if a party fails to select an appointing authority then the national arbitration laws of many jurisdictions permit the courts of that jurisdiction to appoint arbitrators.

Advantages of Ad hoc Arbitration

One of the distinct features of ad hoc arbitration is that it can be designed in accordance to need and desirability of the parties, for this to be concluded in a proper manner and for that cooperation

[67] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 42 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).
[68] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 32 (THE HAGUE: KLUWER LAW INTERNATIONAL, 2003).
[69] EMMANUEL GAILLARD & JOHN SAVAGE, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 534(KLUWER LAW INTERNATIONAL, 1999).

amongst the parties is necessary.[70] Ad hoc arbitration is occasionally said to be more flexible and less expensive. Also, it is more confidential as compared to institutional arbitration. Ad hoc arbitration is independent of all institutions. In ad hoc, arbitration parties need not pay heavy fees of the arbitral institution. In ad hoc arbitrations parties have more options as to craft their own laws.[71]

Disadvantages of Ad hoc Arbitration

The principal disadvantage of ad hoc arbitration is that it depends for its full effectiveness on cooperation between the parties and their lawyers, supported by an adequate legal system in the place of arbitration. It is not difficult to delay arbitral proceedings, for example by refusing at the outset to appoint an arbitrator, so that there is no arbitral tribunal in existence and no agreed book of rules to say what is to be done.[72] It will then be necessary to rely on such provisions of law as may be available to offer the necessary support.

Institutional Arbitration

According to Prof. Kroll, institutional arbitration is where parties submit their disputes to an arbitration procedure, which is conducted under the auspices of or administered or directed by an existing institution. There are a large number of institutions of different kinds. These institutions aim to provide an arbitration service specifically, or within the context of their overall activities and objectives, and takes help of their infrastructure to organize a smooth running of the arbitration procedure.[73] There are many such institutions, some better established than others. Amongst the most well known are the ICC, ICSID, the LCIA, and the International Centre for Dispute Resolution (ICDR).[74]

Every arbitration institution has its own special characteristics. It is essential that parties are aware and take account of these. It is tied in with an understanding of the special requirements of different arbitration systems and rules. Institution also authorize the tribunal to select arbitrators in a particular dispute and adjudicate upon the following: a challenge to the arbitrator, for designating the place of arbitration, the fee payable, review of awards and etc. It is pertinent to note that, institutions do not arbitrate themselves. However, it is the duty of the appointed arbitrators to resolve the dispute

[70] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 43 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).

[71] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 11 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).

[72] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 1.145 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).

[73] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 32 (THE HAGUE: KLUWER LAW INTERNATIONAL, 2003).

[74] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 44 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).

between parties. Moreover, arbitrators are not the employees of the institutions. When parties fail to appoint an arbitrator, then by the virtue of the rules of the institutions, arbitrator(s) are appointed.

A further feature of institutional arbitration is the situation in which the institution itself reviews the arbitral tribunal's award in draft form before sending it to the parties. A review of this kind, which is built into the ICC Rules, serves as a measure of 'quality control'. [75]

The best-known international commercial arbitration institutions are:

- The International Chamber of Commerce ("**ICC**")
- The American Arbitration Association ("**AAA**") and its International Centre for Dispute Resolution ("**ICDR**")
- The London Court of International Arbitration ("**LCIA**")
- The Stockholm Chamber of Commerce Arbitration Institute ("**SCC**")
- The Singapore International Arbitration Center ("**SIAC**")
- The Hong Kong International Arbitration Centre ("**HKIAC**")
- The Vienna International Arbitral Centre ("**VIAC**")
- The Japan Commercial Arbitration Association ("**JCAA**")
- The World Intellectual Property Organization ("**WIPO**")
- The Swiss Chambers' Arbitration Institution ("**SCAI**")
- The German Institution of Arbitration ("**DIS**")
- The Chinese International Economic and Trade Arbitral Center ("**CIETAC**")
- The Cairo Regional Centre for International Commercial Arbitration ("**CRCICA**")
- The Australian Centre for International Commercial Arbitration ("**ACICA**")
- The Kuala Lumpur Regional Centre for Arbitration ("**KLRCA**")

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[75] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 1.152 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).

- The Indian Council of Arbitration (“**ICA**”)
- JAMS International

Advantages of Institutional Arbitration

Institutional arbitration is conducted in accordance with the prescribed set of rules of particular institutions and is supervised and administered according to that institution. This mitigates the risk of failure and a sudden breakdown of the process at the beginning of the arbitration process. It also reduces the risk of technical defects, which can arise during the time of arbitration proceeding or at the time of rendering the award.

The institution involvement is very helpful, at the time of appointment of arbitrators, challenging the arbitrator, selection of seat, fixing the fees. They will ensure that the arbitral tribunal is appointed, that advance payments are made in respect of the fees and expenses of the arbitrators, that time limits are kept in mind, and generally that the arbitration is run as smoothly as possible.

Moreover, various arbitral institutions have drafted their rules in a manner, which makes the arbitral process more reliable and speedier, such as provisions in institutional rules concerning competence-competence, separability, provisional measures, consolidation and joinder, disclosure, arbitrator impartiality, corrections and challenges to awards, replacement of arbitrators and truncated tribunals, costs and the like.[76]

Another advantage of institutional arbitration is the fact that there is a “comfort” element in its existence. There have been many cases under the rules of each institution, and every year it has a continuing number of new arbitrations. This provides an obvious comfort, as the parties know that the institution has experience in the way it establishes the tribunal and arranges for the award to be issued.[77]

An important advantage of institutional arbitration is that it avoids the discomfort of the parties and the arbitrators discussing, agreeing and fixing their remuneration. Most institutions have a mechanism for collecting from the parties the money from which the arbitrators will be paid and without directly involving the arbitrators. This means that the arbitrators are able to maintain a certain level of material

[76] GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 171 (2ND ED. KLUWER LAW INTERNATIONAL 2014).
[77] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 36 (KLUWER LAW INTERNATIONAL, 2003).

detachment. This has the very definitive advantage of allowing the arbitrators to focus solely on the substance of the case rather than discuss with the parties a matter that is personal to them.[78]

Disadvantages of Institutional Arbitration

In institutional arbitration, the parties pay a fixed fee in advance for the 'costs of the arbitration'—that is, the fees and expenses of the institution and of the arbitral tribunal. This fixed payment is assessed on an *ad valorem* basis. If the amounts at stake in the dispute are considerable and advisers experienced in international arbitration represent the parties, it may be less expensive to conduct the arbitration ad hoc. The need to process certain steps in the arbitral proceedings through the machinery of an arbitral institution inevitably leads to some delay in the proceedings. Moreover, the time limits imposed by institutional rules are often unrealistically short.[79]

The great thing about arbitration is that the parties are not forced to chose any one particular kind of arbitration. This is where the concept of party autonomy is very crucial in the arbitration regime. It is a fundamental principle of international commercial arbitration[80] that parties are free to choose form of the arbitration for resolving their disputes as they can either go for ad hoc arbitration or institutional arbitration.[81]

Arbitral Institutions

As discussed previously, there are obvious advantages of using services of arbitral institutions and is a popular mode of dispute resolution. Therefore, it is prudent to run through the famous and the most reliable arbitral institutions.

International Chambers of Commerce

It is one of the most prestigious arbitral institutions which is inclusive of members from all legal professionals from all around the world. ICC has its secretariat, which has permanent, and professional administrative staff. The basic features of ICC are, firstly, that every award is scrutinized by the court of arbitration, and the award is not provided to the parties till the time it has been reviewed by the court. However, the court cannot change the award, if it thinks anything erroneous or

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[78] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 36 (KLUWER LAW INTERNATIONAL, 2003).

[79] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 1.152 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).

[80] THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 21-22 (2d ed. 2007); EMMANUEL GAILLARD & JOHN SAVAGE, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION ¶ 46(KLUWER LAW INTERNATIONAL, 1999)

[81] Karl-Heinz Böckstiegel, *Party Autonomy and Case Management Experiences and Suggestions of an Arbitrator*, 11 Schiedsvz 1, 2 (2013); Kinga Timár, *The Legal Relationship Between the Parties and the Arbitral Institution*, 2013 (1) ELTE L.J. 103, 105 (2013).

incorrect, it sends the award back to the arbitrators inclusive of comments.[82] Another notable requirement of the ICC is that at the outset of the arbitration, the parties are required to complete and sign a document called the "terms of reference" which consist a summary of claims and relief sought by the parties, place of arbitration, scheduling, etc.[83]

The London Court of International Arbitration

LCIA is founded in 1892 and it is the second popular European institution in the field of international arbitration. The LCIA is one of the most promising and successful arbitral institutions these days. It has appointed five successive non-English presidents, and its vice-presidents include a number of non-English practitioners. In recent years, fewer than 20% of the LCIA's cases have involved any U.K. parties. LCIA is famous for an expeditious expedition formation of an arbitral institution. Most LCIA arbitrations are seated in London. In the absence of agreement by the parties to the contrary, London will be selected by the LCIA as the arbitral seat under Article 16(1) of the LCIA Rules.

Swiss Chambers' Arbitration Institution

Switzerland's premier arbitration institute is famous for its comprehensive set of rules which are particularly detailed and contain provisions regarding competence-competence, confidentiality, expedited procedure, emergency, interim relief, arbitrator immunity, and consolidation and joinder, etc.

Vienna International Arbitration Centre

This arbitral institution, based in Vienna, Austria was established in 1975. VIAC is the only arbitral institution that strictly conducts international arbitration as enunciated in its rules. [84] There has to be one non-Austrian origin or that dispute be of an international character to be conducted in VIAC.

Stockholm Chambers of Commerce Arbitration Institute

Founded in 1917, the SCC emerged as an important forum for resolving the dispute between parties of USSR and China during the 1970s and 1980s.[85] The SCC is one of the most preferred foreign arbitral institutions for Chinese state-owned entities. The SCC typically appoints members of the Swedish bar,

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[82] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 11(2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).

[83] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 11 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).

[84] GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 191 (2ND ED. KLUWER LAW INTERNATIONAL 2014).

[85] Ross, *The SCC and Ulf Franke: The Sino-Swedish Connection*, Global Arb. Rev. (27 April 2010).

with international experience, or former Swedish judges, as arbitrators. SCC arbitrations are usually seated in Sweden, although other places of arbitration can be chosen.[86]

Singapore International Arbitration Centre

The SIAC was established in 1991, especially for resolving disputes pertaining to construction, shipping, banking, and insurance contracts, but by the significant rise commercial and financial aspect of Singapore, it emerged as an international hub and SIAC has seen a variety of dispute pertaining to energy, financial, joint venture, sales, and other matters. SIAC is based upon UNCITRAL Model Law and was revised in 2007, 2010, 2013.

World Intellectual Property Organization

The Arbitration center of WIPO was established in 1994 in Geneva, Switzerland. Their arbitration rules are designed only for an intellectual property dispute. WIPO's Arbitration Rules contain detailed provisions pertaining to intellectual property disputes which include provisions relating to discovery, disclosure, and protection of trade secrets, and confidentiality of arbitral proceedings.[87]

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[86] GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 191 (2ND ED. KLUWER LAW INTERNATIONAL 2014).

[87] GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 195 (2ND ED. KLUWER LAW INTERNATIONAL 2014).

Chapter VI – Theories in International Arbitration

The first module discusses the importance of international commercial arbitration, and its rise in the world and over time it has become an organized and striking way to resolve disputes between parties that are in different regions. It is also important to understand that International Commercial Arbitration caters to a large number of people who are from different regions of the world, coming from different socio-cultural environments which leads to different interpretations of the same laws and statutes that exist.

It is also noted that different interpretations have been given by national courts on various aspects of arbitration. The reason for the same is that different national courts adopt different theories in relation to international commercial arbitration. For example, if we were to analyze the issue of delocalization which has been dealt with by different courts namely French, American and British. French and American courts have more emphasis on the contractual element and enforced some arbitral awards which have been set aside at the place of arbitration whereas the English Courts are still embracing the jurisdictional nature.

Generally speaking, the various theories can be classified into four. The jurisdictional theory, the contractual theory, the hybrid theory, and the autonomous theory. The jurisdictional theory is based on the State having complete control in regulating any commercial arbitration within their jurisdiction. The contractual theory, however, gives emphasis to the valid arbitration agreement that exists for dispute resolution between parties, thus if it exists they should be given complete independence in handling the arbitration according to their needs.

The hybrid theory as the name suggests takes a middle ground between the jurisdictional and contractual theory. It preserves the idea that International commercial arbitration has both contractual and a jurisdictional character.

The autonomous theory has been developed recently, it dismisses the traditional approach and places emphasis on the purpose of international commercial arbitration. Instead of fitting arbitration into the existing legal framework, this theory defines arbitration as an autonomous institution, which should not be restrained by the law of the place of arbitration. Thus, it advocates the idea of total sovereignty for the institution. There is another similar kind of theory propounded by legendary Prof. Gaillard which is in similar lines of the delocalization theory. It is known as the transnational theory and will be discussed in brief.

Therefore, it's important to study a theory a national court applies in respect of international commercial arbitration which also affects its attitude towards the procedure of arbitration. The main purpose of the study seeks to understand two main questions; 1) what is the conceptual framework of arbitration theories? and, 2) whether all theories are successful and fruitful? The following is an attempt to explain these theories in detail:

Chapter VII – National Order Approach/ Territoriality/Jurisdictional Theory

The current theory of territoriality or the national order is the reverse of the delocalization theory which provides that arbitration is firmly anchored in the give legal system. REDFERN & HUNTER explains this theory by giving an example that just as the law of contract ensures that contracts are performed and are not reduced to mere anti promises, in the same way, the *lex arbitri* ensures that the arbitral process works as it should.[88] This theory finds acceptance in the model law which provides for functions that the courts have to perform in support of arbitration proceedings.

The practical application of this theory is that first it should be checked whether there is any local law requirement at the seat which must be observed in order to obtain a valid award. Second, it should be checked that not every country is suitable to be designated as the seat of arbitration, parties should, in fact, choose the seat which is most pro-arbitration and neutral. In practice, the territorial approach prevails over delocalization because it is easy to comprehend and apply and at the same time it promotes reliability and certainty in international commercial arbitration. Thus, the law of the seat remains the important sources of the law governing arbitration and the delocalization theory seems more of an aspiration.

The jurisdictional theory invokes the impact of the supervisory powers of the states, especially that of the seat of arbitration. Although the jurisdictional theory does not dispute the idea that an arbitration has its origin in the arbitration agreement, it maintains the validity of arbitration agreements and arbitration procedures needs to be regulated by national laws and the validity of an arbitral award is decided by the laws of the seat and the country where the recognition or enforcement is sought. Moreover, the proponents of this theory state that all arbitration procedures have to be regulated by the rules of law chosen by the parties if there are any, and those rules of law chosen by the parties also have to be regulated by the laws in force in the place of arbitration. It is argued that arbitrators resemble judges of national courts because the arbitrators' powers are drawn from the states by means of rules of law. As with judges, arbitrators are required to apply the rules of law of a specific state to settle the disputes submitted to them.

The jurisdictional theory provides a strong basis for the national courts exercising supervisory powers over the arbitration process that takes place in their normal jurisdictional limits. Such supervisory powers find mention in the New York Convention of 1958, which as the first module mentions is the cornerstone document dealing with International commercial arbitration. According to Article V, in the absence of the express choice of law, the validity of arbitration agreements arbitral awards the

[88] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 182 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).

composition of the arbitral authority and the arbitral procedures have to be decided in accordance with the law of the country where the arbitration takes place. Also, the supervisory powers over the validity of the arbitral awards can be exercised by the courts where recognition or enforcement is sought, if the subject matter of the difference is not arbitrable under the law or the enforcement of such an award would be against public policy.

The jurisdiction over the arbitration, which might have no connection with the country, is based on three theoretical arguments, namely, the arbitrator's right to make binding adjudication is derived from a delegation by the state of its exclusive powers in the field that every act is subject to the law in force where it occurred, and the application of the *lex fori* (law of the forum) and the use of its courts are sometimes more efficient than any other system.

It is understood that arbitrators can only deal with only those disputes that the parties have chosen to arbitrate. The same has been discussed in detail in the first module. However, such a choice cannot overrule the mandatory rules of the *lex fori*.

In the absence of the parties' express choice of law, the issue of arbitrability will be governed by the law of the seat where the arbitration takes place. An arbitral award may be challenged before the courts if the arbitrator deals with issues that haven't been given to him or are beyond the scope of the laws that are applying to the arbitration.

In addition, under the jurisdictional theory, the courts in the country where the recognition or enforcement is sought also have regulatory power over the issue in stages of recognition or enforcement. Under, Article V (2) the courts have the discretion to refuse to recognize or enforce an arbitral award if it finds that "*The subject matter of the difference is not capable of settlement by arbitration under the law of that country.*" The same applies if the recognition or enforcement of the award will be contrary to the public policy of that country.

To elaborate further the *Mitsubishi case*[89] can be taken as an example. The case involved an anti-trust dispute which was prohibited from being resolved by means of arbitration in a domestic case. The Supreme Court of the United States enforced the parties' arbitration agreement involving an antitrust dispute, even assuming that a contrary result would be forthcoming in a domestic context. Thus, through this analysis, it can be interpreted that there is a supervisory relationship that exists between courts and arbitration through the above-mentioned theory.

In relation to arbitrators, the jurisdictional theory mainly follows the approach of the delegation theory. According to the delegation theory, in order to settle disputes between parties, an arbitrator must possess a delegated authority given by a state in which he sits to conduct an arbitration. An

[89] Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985).

award made by the arbitrator lacking this authority will be void and can be challenged. Due to this delegated power, the advocates of the jurisdictional theory deny that the arbitrator's power is originated from the parties' arbitration agreement. They maintain that the arbitrator's power is drawn from the State by means of the local law on the ground that it is in the public interest to permit private individuals to decide disputes when the parties have agreed. Because of the special status granted by the states, arbitrators are regarded as resembling judges of national courts. The difference, however, being that a judge gets his nomination and authority directly from the sovereign, whilst an arbitrator derives his authority from the sovereign but his nomination is a matter for the parties to decide upon.

In accordance with this theory, an arbitral award should be granted the same status and effect as a judgment made by a national court judge since the arbitrators are regarded as equivalents of judges. Because of a similar status of judgments, in the absence of the voluntary performance of the award by the losing party, the awards will have to be enforced by the court where the recognition or enforcement is sought.

The arbitration agreement is necessary to give the arbitrators their authority, but once that authority has been conferred on them, provided they keep within the limits of the task given to them, their freedom is absolute and the arbitration agreement has no influence on their award which is based on quite different matters.

Regarding the choice of the proper law, in most jurisdictions, judges of national courts, while dealing with international commercial disputes submitted to them, are only allowed to apply the law of their own country or the national laws of other states if the parties choose to do so. Alternatively, in the absence of parties' express choice of the proper law, they have to choose substantive law in accordance with the choice of law rules of the place where the seat is.

Basically the principle argument being that this leads to a close relationship between the place of arbitration and the procedural rules to be applied to international commercial arbitration, under the jurisdictional theory arbitrators are only allowed to choose the proper law of the contract in accordance with the procedural law chosen by the parties if there is any, and the *lex fori*. The consequence of the theory is to allow arbitrators no greater freedom in the application of substantive law that judges have. Arbitrators are required to decide the issues arising from international commercial arbitration according to municipal laws, which also include the choice of law rules of the place where arbitration is held.

According to several jurists who are proponents of this theory they believe that no proper definition of international commercial arbitration has been provided despite the "*numerous attempts that have been* *made in recent years to define an 'international commercial arbitration' there has been a failure to produce a clear formula*."[90]

Furthermore, it is stated that in accordance with strict interpretation, every arbitration is a national one and it should be governed by the municipal laws of the country where it is held. The so-called "international arbitration" is a fallacy since no arbitration can exist in a legal vacuum. Just as every system of private international law is a system of national law, every arbitration is a national arbitration, that is to say, subject to a specific system of national law.

Within the framework of International Commercial arbitration, only the *lex fori* can provide such a complete and effective control over the arbitration procedures to decide the relevant issues arising from the arbitration.

[90] Francis A. Mann, *Lex Facit Arbitnim*, 2(3) ARB. Int'L 245 (1983).

Chapter VIII – Contractual Theory

The proponents of the contractual theory argue that arbitration is based on the agreement between the parties. There is a denial that any strong links exist between the arbitration proceedings and the law of the place in which the arbitration takes place. It's also maintained that parties have the freedom to decide the relevant issues concerning the arbitration procedures and this freedom should normally not be restricted with by the powers of any state.

The theory attempts to explore the nature of arbitration from a contractual viewpoint. Although it cannot be denied that arbitration can be influenced by the relevant national laws, it is argued that arbitration has a contractual character that originates from the agreement between the parties. Since this kind of contract is voluntarily made between the parties, it allows them to determine the time and place of arbitration, select the arbitrators to hear the case and choose the laws governing both procedural and substantive matters.

The contract of which the arbitration clause is a part is a voluntary agreement. No law requires the parties to make such a contract, and it also does not give another party to arbitrarily impose things on the other.

In most jurisdictions, the mechanism of international commercial arbitration is designed on the foundation laid down by contractual theory. The actors to arbitration have over the years expressed a need for a more flexible and informal method of dispute settlement, most courts tend to follow the contractual theory and interpret the relationship between the parties and the arbitrators as a contract.

To elucidate further the case, in *Cereals S.A v. Tradax Export S.A.*[91] the court held that the relationship between parties and arbitrators is contractual in nature. Moreover, the arbitrators become parties to the agreement as soon as they accept the invitation to an appointment. The court also observed "*it is the arbitration contract that the arbitrators became parties to by accepting appointments under it. All parties to the arbitration are, as a matter of contract bound by the terms of the arbitration contract.*"

A similar decision was given in the case of *K/S Norjarl A/S v. Hyundai Heavy Industries*.[92] The court stated that arbitrators were entitled to reasonable remuneration. This entitlement was based on a trilateral contract between the two parties and the arbitrators. The implied terms of this contract require the arbitrators to "*conduct the arbitration with due diligence and at a reasonable fee*", by using all the reasonable means in entering on and proceeding with the reference.

[91] [1986] 2 Lloyd's Rep 301.
[92] [1991] 1 Lloyd's Rep. 260.

Moreover, the contractual relationship discussed here is, in fact, comprised of two contracts, one is a contract between the parties that is the arbitration agreement, while the other is the appointment agreement between the parties and the arbitrators. As far as the contract between the parties is concerned, subject to the statutory exceptions, to commence an arbitration there must be a valid arbitration agreement that exists between the parties. On the other hand, relation to the contract between the parties and the arbitrators, consent from both the parties and arbitrators is essential to form a valid appointment of the arbitrators, since the appointment of arbitrators cannot be carried out by one party's unilateral decision.

The delegation theory that is given by the jurisdictional theory is rejected by those who believe arbitration is governed by contractual theory. Thus, the argument that arbitrators are similar to judges of national courts is rejected. The most widely accepted theory puts arbitrators as agents of the parties. The opinion is that arbitrators do not perform any public function, arbitrators obtain their powers and authority from the parties' agreement when they are appointed. Being agents of parties, arbitrators represent the parties who appoint them to resolve the dispute according to the parties' instructions; moreover, any decisions, that is, arbitral awards, made by the agents have a binding effect on the parties.

However, even amongst the people who are advocates of the contractual theory, there are jurists who disagree that arbitrators are agents of the parties. The other viewpoint that is given is that the powers of arbitrators are drawn from the parties' arbitration agreement which allows the arbitrators to judge.

Another major criticism of the agent theory exists. It states that with respect to the relationship between principal and agent, the agent works on the principal's behalf and in their best interest. However, this cannot apply to the relationship between arbitrators and the parties within the present arbitration framework. Three reasons can be given for the same. The first one being that contrast to the role of agents, arbitrators are appointed to resolve the dispute between the parties independently and impartially, rather than being appointed to fight for the best interests of the party who appoints them, in fact, arbitrators are obliged to determine the rights of parties in an impartial manner since they owe an equal obligation for fairness to both sides.

Secondly, it is important for an arbitrator to be financially independent of the parties who appoint them. However, an agent cannot have that freedom. Thirdly, the scope of the agent's and the arbitrator's powers. According to the idea that arbitrators are agents, agents represent the authority within a scope of the authorization. Thus, agents can only decide upon matters authorized by the principals. However, it doesn't really shape out the work that an arbitrator does. Arbitrators possess powers that the parties don't such as summoning witnesses in certain countries or order security of costs against one of the parties.

Applying the agent theory to awards, the awards can be regarded as contracts made by arbitrators who act as agents of the parties. As a result of this principle and agent relationship, the contract, that is, the arbitral award has a binding effect on the principals, that is, the parties. The parties must accept the arbitrators' award as "*having the binding contractual force and to voluntarily give effect to it*."

The awards are said to have a contractual nature, as the arbitrators do not hold their power from the law or judicial authorities, but from the parties' agreement. The award thus has its genesis in its contractual nature.

According to the ethos of contractual theory, the parties are offered unlimited autonomy in choosing both the procedural law governing the arbitration and the proper law governing the contract. When it comes to the issue pertaining to the procedural law, in absence of any express choice of law made by the parties the *lex fori* can be used to fill the gap.

Chapter IX – The Hybrid Theory

The Jurisdictional and Contractual theories, both, have their merits and demerits, however, for a lot of theorists there remain grey areas that neither of the theories covers and satisfy in isolation. Thus, the hybrid theory is developed to cover the lacunae of both the theories and find a middle path that satisfies what is lacking from both of the other theories.

The hybrid theory thus is a compromise between the two theories that have been discussed so far. The development of the hybrid theory leads us to the suggestion that the nature of the International commercial arbitration is a mechanism with dual character. The contractual element remains from the fact that the genesis develops from the initiation of a private contract.

However, since it is conducted within national legal regimes in order to determine powers of the parties, and for the recognition and validity of the awards. Thus, arbitration has been defined as mixed *sui generis*, which has its origins in the parties' agreement and draws its jurisdictional effects from the civil law. In a more concise sense, arbitration has a jurisdictional nature involving the application of the rules of procedure while it derives its effectiveness from the arbitration agreement between the parties.

REDFERN AND HUNTER most appropriately explain it as "*international commercial arbitration is a hybrid. It begins as a private agreement between the parties. It continues by way of private proceedings, in which the wishes of the parties are of great importance. Yet it ends with an award that has binding legal force and effect and which, on appropriate conditions being met, the courts of most countries of the world will be prepared to recognize and enforce. The private process has a public effect, implemented by the support of the public authorities of each state expressed through its national laws.*"[93]

Thus, on one hand, the parties' have the freedom to make their contract agreements, select the arbitrators and choose the procedural laws, while on the other, the issues relating to the arbitral proceedings and the validity of the arbitration agreements are subject to the mandatory rules and public policy of the *lex fori*.

ROBERT HUNTER further elucidates on this hybrid nature: "*the arbiter is required to decide the whole matters submitted to him or her by means of a "decree arbitral" or "award", and in so doing must not merely adhere to some rule, principle, criterion or standard; he or she must not contravene the*

[93] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 2.34 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).

law. Though the power of the arbitrator over submitters is based on contract, there is thus a jurisdictional as well as a contractual element in arbitration."[94]

It has been pointed out that there exists a close link between the arbitration procedure and the forum of arbitration. The constitution of arbitration and the powers of the arbitrator are based on the parties' agreement while the validity of the agreement and enforcement of awards have to be decided in conformity with public policy or mandatory rules of the relevant laws, for example, the *lex fori* and the law of the country where the enforcement is sought.

The relationship between the arbitrators and the parties is regarded as contractual in nature. This contractual nature reflects the arbitration agreement made between the parties. Under the arbitration agreement, the parties must submit their disputes to arbitration and select the arbitrators who are considered competent to resolve the disagreement. Thus, logically, arbitrators obtain their powers from the parties within the scope of authorization. However, the extent of the arbitrator's power is subject to the scrutiny of the mandatory rules of *lex fori* and the public policy rules of the enforcing state.

The hybrid theory recognizes the significance of the supervisory powers of the national courts of the place of arbitration and enforcing states. It maintains that, in the absence of any express agreement between the parties, the law of the seat will be applied to govern the arbitration. Arbitrators are required to decide the proper law of the contract in accordance with the conflict of laws rules of the *lex fori*. In other words, arbitrators have to apply the law expressly chosen by the parties to the dispute; however, in the case where no expressed choice of law can be found, they have to resort to the conflict of law rules of the place of arbitration in order to decide the law governing the substantive issues.

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[94] ROBERT L & C. HUNTER, LAW OF ARBITRATION IN SCOTLAND, 3 (1987).

Chapter X – Delocalization/Autonomous Theory

One of the first effort to delocalize arbitration was made primarily in the 1980s, which categorized delocalization as stateless, floating or a-national arbitration. The theory proceeds on the premise that international arbitration should not be constrained by the domestic law of the seat where the arbitration takes place. This is supported by the fact that the parties usually opt for the neutral seat of arbitration, neither party has their presence, business interests or assets. The parties opt for the seat as a matter of convenience and many a time might not even be aware that but choosing a seat of arbitration, the parties will be bound by the mandatory laws of that country.

The concern with restricting arbitration to its seat is that the peculiarities of local laws and local courts system would reduce the effectiveness of arbitration proceeding and the same ought not to be imposed simply because the arbitration has taken place in a particular jurisdiction. Since the proceedings to set aside an award are usually filed at the seat of arbitration, it is apprehended that local courts might vacate the award under local law rendering the entire process fruitless.

It is argued by the proponents of delocalization that international arbitration should be a self-regulating process free from court interference and hence no State should be concerned about the private dispute between two parties, who are neither its citizen nor have any connection to such state. Furthermore, the proponents argued that there is no reason why the law of the seat and its conflicts of law rules should necessarily be applicable when an arbitration tribunal had to choose the governing law.

The jurists who support this theory place arbitration on a "supra-national" level and recognize its autonomous nature. In order to allow arbitration to enjoy the expansion it deserves, while all along keeping it within appropriate limits, its nature may have to be taken as neither contractual nor jurisdictional as autonomous.

As has been said by Samuel "*The question is to know whether arbitration does not extend beyond its two components to establish an autonomous institution, the nature of which should not be defined by reference to the contractor to jurisdiction, but whose legal authority is to be justified both by its purpose and by the guarantee necessary for those parties who do not bring their disputes before the official courts.*"

This theory proceeds on the basic premise that a single legal system should govern arbitration i.e. the place of enforcement of the award as opposed to the current system where the law of the seat regulates the arbitration and then the law of the place of enforcement (where the losing parties assets are located) regulates the enforcement. Thus, based on the autonomous theory, arbitration agreements and arbitral awards were enforceable in any country. The belief is that there needs to be an institution that does the same job. Thus, the proposed idea is of an original system, free from both the contractual and jurisdictional notions, would permit the necessary speed and guarantees which the parties legally claim to be brought together.

Some jurisdictions such as the French court have been moved to be liberal and more accepting for the delocalization theory. The Paris Court of Appeal *in General National Maritime Transport Co. v. Société Gotaverken Arendal A.B.*[95] held that even though the seat of arbitration is Paris, the arbitral proceedings were not subject to the French Law. The court in this instance was interpreting Article 11 of the 1975 ICC Rules (now Article 15 of the 1998 ICC Rules), which provided that:

"*The rules governing the proceedings before the arbitrator shall be those resulting from these rules and, where these rules are silent, any rules which the parties (or, failing them, the arbitrator) may settle, and whether or not reference is thereby made to a municipal procedural law to be applied to the arbitration.*"

The argument, therefore, was that a municipal procedural law need not be applied to arbitration in view of the complete party autonomy provided under Article 11. The court ultimately held:

"[I]n view of the very clearly-worded clause of the ICC rules, the place of arbitration, selected specifically to ensure neutrality of the arbitration proceedings, is not significant and may not be regarded as an implicit submission by the parties to French procedural law."

In another case, in *Société AKSA S.A. v. Société Norsolor S.A*.[96] the French courts had to interpret the ICC Rules and reach a conclusion as to the law of the seat since the parties have not provided expressly for the same. The court ultimately held that even though the arbitration took place in Paris, the award was a non-French award and subject to the remedies available for foreign awards. Thus, the court refused to attribute French law to the arbitration seated in Paris. It is pertinent to mention that these decisions are specific to ICC arbitration and much other arbitration institutes are clearly tied to a particular place.

Authors such as RENATA favors the delocalization theory as detaching international arbitration from mandatory procedural laws of the seats could impact the award and make the same unenforceable if the award does not comply with the local law of the seat.[97] However, it must be remembered that not

[95] Renata Brazil-David, *Harmonization and Delocalization of International Commercial Arbitration*, 28 J Int'l Arbitration 5, 454, 445-466 (KLI 2011).
[96] (1981) 70 RCDIP 545.
[97] Renata Brazil-David, *Harmonization and Delocalization of International Commercial Arbitration*, 28 J Int'l Arbitration 5, 454, 445-466 (KLI 2011).

all jurisdiction is as liberal as France or the United States. In fact, English Law and English judges typically attach the greater significance to the law of the seat.[98]

As far as the choice for the proper law is concerned, instead of confining arbitration within the national or international legal framework. The autonomous theory invokes the creation of a real "supra-national" law for international commercial arbitration. Under this truly supra-national arbitration, parties are entitled to choose any rules of law, a national system of law, international law, the new *lex mercatoria* the general principles of law or even amiable composition to govern their relationship. Furthermore, it's advocated that international commercial arbitration creates its own law to be applied to international commercial disputes.

It is also argued that in international commercial arbitration the arbitrator's power to choose the proper law should not be restricted within the scope of national laws. They should be free to decide the dispute on the basis of whether the municipal system of law or the general principles of international law, custom, usages of trade good sense, fairness, and justice.

In this context, it is imperative to study the observation which a renowned author LANDO makes. He says that "*by choosing the lex mercatoria the parties oust the technicalities of national legal systems and they avoid rules which are unfit for international contracts. Thus they escape peculiar formalities, brief cutoff periods, and some of the difficulties created by domestic laws that are unknown in other countries such as common law rules on consideration and privity of contract. Furthermore, those involved in the proceedings- parties, counsel, and arbitrators – plead and argue on an equal footing, nobody has the advantage of having the case pleaded and decided by his own law and nobody has the handicap of seeing it governed by foreign law.* "

Another renowned scholar, Luzzatto presents a similar observation and states that "*the detachment of the arbitral procedure from any municipal legal system and its organization according to the free will of the parties to the dispute require, therefore, that the operation of the said autonomy is recognized by means of an international convention, which also makes this aspect of international commercial arbitration relevant with regard to national laws. When the parties' autonomy becomes able to regulate the whole of arbitration procedure without any connection with municipal laws, and when international regulations provide the parties with machinery and facilities which may enable arbitration proceedings to fulfill their purpose without any resort to municipal courts, then it can be said that international commercial arbitration is recognized as such, in its truly international character, by the legal systems of the States which are parties to the convention.*"

[98] Renata Brazil-David, *Harmonization and Delocalization of International Commercial Arbitration*, 28 J Int'l Arbitration 5, 455, 445-466 (KLI 2011).

The counter to the theory of delocalization is that arbitration cannot exist in a vacuum as it requires the assistance of the courts before, during, and after the arbitral process e.g. for requesting interim relief, appointment of arbitrator, preserving evidence, etc. therefore, every arbitration must conform at a minimum to the mandatory laws of the seat of arbitration. This is also required to ensure that a private system of dispute resolution is not used to defraud parties and it's not tainted by corruption and more importantly there is court sanctioned enforcement of various orders of the tribunal.[99]

In 1985, Belgium attempted to incorporate the delocalization theory but providing that non-Belgian citizen who had no business in Belgium would not be permitted to apply to a Belgium court to set aside an arbitral award. It was believed that with no judicial review of the award in Belgium party would be attracted to Belgium as a destination for arbitration. However, the reality was that nobody opted for Belgium for the seat because of the lack of possible court review. This clearly suggested that parties in international arbitration prefer court supervision at the place of arbitration.

The idea behind having judicial control over arbitration proceeding is to ensure that the integrity of the award within the national border and the deficiencies in the integrity of the awards should be dealt with at the seat.[100] The counter to this argument is that once parties have expressly chosen an alternative dispute resolution method, the parties have clearly expressed their reservation to be governed by the national courts. Even if, it is said that the choice to arbitrate does not necessarily exclude the option to go to court, it is clear that the party's intent for the court is to take the back seat. The delocalization theory finds its roots in party autonomy as the advantages of arbitration are freedom and flexibility and that parties should have the freedom to not be tied down by the peculiarities of mandatory law and the seat.

It is necessary to clarify that the argument of detaching arbitration from the law of the seat does not mean that the arbitration should be detached completely from the supervision of national laws but only means that the courts at the seat should not perform any role in the arbitration. As it is, the award will always be subject to challenge at the place of enforcement.

RENATA argues that, the role of the courts at the seat may well be discharged by arbitral institutions as the institutions can appoint an arbitrator if the parties fail to do so, replace an arbitrator, if necessary, order interim or conservatory measures once the tribunal has been constituted or have emergency

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[99] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 57 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).
[100] William Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 Int'l & Comp. L.Q. 21 (1983).

arbitration before the constitution of the tribunal. Furthermore, arbitral institutions can also deal with maintaining the integrity of the award by scrutinizing the same.[101]

While delocalization holds the promise of minimum court interference, there are still issues which can only be resolved by courts such as passing orders against third parties which have not consented to the arbitration agreement. Also, courts have wider powers to grant interim measure as opposed to the arbitral tribunal and more importantly the power to enforce the order. Similarly, it is only the courts that can compel the appearance of a witness or bringing on record evidence. The most pertinent question that is to be addressed when one leans in favor or in against of delocalization is whether the courts at the seat support arbitration or disrupt the arbitration process? In the country like India, where courts have time and again have intervened in almost every step of the arbitral process in order to exercise control over the arbitration proceeding, the delocalization theory may make India more pro-arbitration. However, the pro and cons need to be weighed before one can blindly accept the detachment of local law to international arbitration.

One of the downsides of delocalization is also the fact that the award previously set aside at the seat of arbitration may be enforced at the seat due to the detachment from local law. However, this concern is misplaced as Article V(1)(e) of the New York Convention provides for a possible ground that an award will not be enforced if it had been set aside in the country of its origin. Though it must be clarified that the same is discretionary because of the use of the word "may" in Article V(1)(e) of the New York Convention.

In *Ticaret Sirketi v. Norsolor*[102], French Cour de Cassation held that an award that had been set aside in Austria can be enforced in France. The court placed reliance on Article VII of the New York Convention, which provides the following:

"[T]he 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 the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

This trend was later followed by the *French Cour de Cassation in Hilmarton v. OTV*[103] which permitted enforcement of the award which had been annulled in Switzerland. Similarly, the same court in *P.T. Putrabali Adyamulia v. Rena Holding*[104] permitted enforcement of the award which was annulled by the English Court. The court held that:

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[101] Renata Brazil-David, *Harmonization and Delocalization of International Commercial Arbitration*, 28 J Int'l Arbitration 5, 458, 445-466 (KLI 2011).
[102] Ticaret Sirketi v. Norsolor, Cass. 1e civ., October 9, 1984, 1985 Rev. Arb 431.
[103] Hilmarton v. OTV, Cass. 1e civ., March 23, 1994, 1994 Rev. Arb. 327.
[104] PT Putrabali Adyamulia v. Rena Holding, Cass. 1e civ., June 29, 2007, Arret no. 1021.

"*An arbitration award which is not linked to the legal order of a particular country, is a ruling of international justice, the validity of which is examined in the light of the rules of the country in which its recognition and enforcement is sought*."

Detaching awards from the local law of the seat has also been followed in the United States in *Chromalloy Aeroservices v. the Arab Republic of Egypt*[105], where the Court in America allowed the enforcement of an award set aside by the Court of Appeal in Cairo. Similarly, in *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*[106], the Fifth Circuit Court enforced an award set aside by the Indonesian Court, as the award had not been set aside at the seat i.e. Switzerland.

It is pertinent to note that these decisions have also been criticized for making arbitration unpredictable and unreliable. This could also affect the monopoly of international arbitration as a method of dispute resolution. In fact, in two decisions post *Chromalloy, In Baker Marine (Nig.) Ltd. v. Chevron Ltd*[107] and in *Spier v. Calzaturificio Tecnica S.p.A.*[108], the courts refused enforcement of awards set aside in Nigeria and Italy. The rationale for rejection was that "*the governing agreements made no reference to United States law, and nothing suggested that the parties intended United States domestic arbitral law to govern their disputes."*

Contrasting this approach with those of the English Courts in *Bank Mellat v. Helliniki Techniki S.A.*[109], the English Court of Appeal held that:

"*Despite suggestions to the contrary by some learned writers under other systems, our jurisprudence does not recognize the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law.*"

In *Naviera Amazonica Peruano S.A.* v. *Compania Internacional de Seguros del Peru*[110], the court categorically rejected the delocalization theory and held that:

"*English law does not recognize the concept of a "delocalized" arbitration ... Accordingly, every arbitration must have a "seat" or locus arbitri of forum which subjects its procedural rules to the municipal law which is there in force*"

105 Chromalloy Aeroservices v. Arab Republic of Egypt, 939 F. Supp. 907 (D.D.C. 1996).
106 Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 287–88 (5th Cir. 2004).
107 Baker Marine (Nig.) Ltd. v. Chevron Ltd., 191 F.2d 194 (2d Cir. 1999).
108 Spier v. Calzaturificio Tecnica S.p.A., 71 F. Supp. 2d 279 (S.D.N.Y. 1999).
109 Bank Mellat v. Helliniki Techniki S.A., [1984] Q.B. 291 (English Court of Appeal).
110 Naviera Amazonica Peruano S.A. v. Compania Internacional de Seguros del Peru, [1988] 1 Lloyd's Rep. 116 (Civ. Div.) (English Court of Appeal).

Chapter XI – Transnational Theory

Transnational theory is a recent addition to the theories of arbitration propounded by eminent jurist Prof. Emmanuel Gaillard who essentially suggests that there is a transnational system of legal order known as the arbitral legal order which stems from various national legal orders or systems which together constitutes the transnational nature of the international arbitration. What Prof. Gaillard means that national legal systems are not excluded from this transnational legal order, but the arbitral process no longer hinges on the particularities of the national legal order at the seat of the arbitration or elsewhere. Instead, this theory recognizes that the validity and legitimacy of international arbitration is rooted in the collectivity of national legal orders, as opposed to one or even several individual national legal systems. In other words, the arbitral legal order incorporates and reflects the trends stemming from national legal systems. Transcending national legal orders is therefore not synonymous with the creation of an a-national legal order or the delocalised approach, which would be characterized by a rejection of, or opposition to, national legal systems.[111]

In fact, the contrary view is that the transnational view of international arbitration is a vision that embraces rather than rejects the laws derived from national legal systems, acknowledging and following trends developed collectively by national legal systems. The views developed collectively by the community of nations can been seen in instruments such as the 1958 New York Convention, the UNCITRAL Model Law and numerous guidelines which reflect a common view as to how an arbitration should be conducted so as to be recognized as a legitimate means of adjudication.[112] Thus, the transnational theory recognizes an arbitral legal order that is founded on national legal systems, while at the same time transcending any individual national legal order.[113]

The transnational vision acknowledges that national courts may have differing approaches to questions brought before them but this does not mean that the parties have accepted that any particular local court has the ultimate decision-making power as regards the outcome of an international arbitration. If parties intended for national courts to have this authority they could have chosen to submit their dispute to the local courts rather than an arbitral tribunal. Thus, arbitrators endorsing a transnational view would likely consider that they are not bound by decisions rendered by local courts, particularly in situations where such courts appear to be improperly attempting to assist a local party in the arbitral process.

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[111] Emmanuel Gaillard, *The Representations of International Arbitration*, Journal of lnternational Dispute Settlement 9 (2010).

[112] Emmanuel Gaillard, *International Arbitration as a Transnational System of Justice* in Arbitration - The Next Fifty Years, ICCA Congress Series no. 16, 66 (2011).

[113] EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION 16 (Martinus Nijhoff Publishers 2010).

Chapter XII – Difference between Public International Law and Private International Law

As discussed in the previous modules, "international" of international commercial arbitration comes from the fact that the parties are based in different foreign jurisdictions or has some relation to its functionality based out of a foreign jurisdiction. Naturally, the law applicable then in such transactions should be international law and its branches. Therefore, the current section delves into the nature of international law vis-à-vis international commercial arbitration and its applicability and distinction between its branches viz. public international law and private international law.

International law is the set of legal rules that govern relations between states or international organizations or between private persons in an international context. It comprises of certain norms, which consists of texts ratified by different states, agreements, conventions, protocols and international treaties. Such law can be bilateral meaning it governs two states or could be multilateral which means that it governs several states. The idea behind international law is to apply the norms in respective signatory's territory, only if there is reciprocity, by granting them a level higher than their national standards. It is important to note that international law is binding on the state even if a rule of domestic law is contradictory to it.

As mentioned earlier, international law consists of two branches:

Public International Law

In general, public international law refers to all the legal rules governing international relations between public entities such as States and International Organisations.

According to Velimir Zivkovic, "*public international law is, most broadly speaking, a system of norms that governs relationship between legal entities recognized in the sphere of international law; primarily although not exclusively sovereign states an international organizations.*"

Public international law's principal focus traditionally has been the State. It regulates states, and attempts to do so uniformly, but doesn't restrict States to directly deal in business or seek to promote an environment supportive of business. Hence, States may enter into treaties that have a business purpose and impose duties on them relating to privating actors within their jurisdiction.

Private International Law

In general, private international law is the set of rules applicable to the relations of private persons of different nationality. The idea is to resolve conflicts of law arising out of relations between foreign persons, in particular to know which law applies to the relationship and to deal with conflicts of jurisdiction.

Private international law has a bit of deceiving name. It is actually a branch of national laws that deals, mostly, with determining what the applicable law should be when there is a foreign element in the relationship (foreign national involved, place of event was abroad, etc.). It is actually called in common law states conflict of laws which perhaps explains it better.

The main concept of private international law is the "*foreign element*". Private international law is the area of law that comes into play whenever a court is faced with a question that contains a foreign element, or a foreign connection. The mere presence of such a foreign element in a legal matter raises a number of questions and it is the function of private international law to provide an answer to these questions and to ensure just solutions.

Private international law is increasingly referenced in international arbitrations; arbitral tribunals are beginning to develop truly transnational principles, rules, and methodologies of private international law that are completely devoid of connections with the State.[114] States regularly conclude treaties on private international law or otherwise harmonize their domestic laws relevant to private international disputes.[115]

Distinction

The divide between the public and private international law suggests that the two occupy different, mutually exclusive domains. On one hand, public international law comprises the legally binding rules and principles governing states' interactions.[116] On the other hand, private international law concerns the civil and commerical interactions of private actors who might hail from different States but who are subject to domestic law regarding jurisdiction, the applicable law, and the enforcement of judgments. While public international law is commonly regarded as truly international, private international law is generally considered to be international only in name.[117] Further, public international law concepts shape a State's application of its own law whereas; private international law principles shape application of public international law in national courts.

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[114] Emmanuel Gaillard, *Aspects Philosophiques Du droit De L'Arbitrage International*, 329 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 49 (2007).

[115] Diego P. Fernandez Arroyo and Makane Moise Mbengue, *Public and Private International Law in International Courts and Tribunals: Evidence of an Inescapable Interaction*, 56 COLOUMBIA JOURNAL OF TRANSNATIONAL LAW 797, at 800 (2018).

[116] Diego P. Fernandez Arroyo and Makane Moise Mbengue, *Public and Private International Law in International Courts and Tribunals: Evidence of an Inescapable Interaction*, 56 COLOUMBIA JOURNAL OF TRANSNATIONAL LAW 797, at 800 (2018).

[117] Diego P. Fernandez Arroyo and Makane Moise Mbengue, *Public and Private International Law in International Courts and Tribunals: Evidence of an Inescapable Interaction*, 56 COLOUMBIA JOURNAL OF TRANSNATIONAL LAW 797, at 801 (2018).

Chapter XIII – Sovereign Immunity

The doctrine of sovereign immunity is a well-established principle of international law, based on comity and the equality of states. According to the doctrine of sovereign immunity, a sovereign state should not be impleaded in the courts of another sovereign state against its will. Its rationale is to promote the functioning of all governments by protecting states from the burden of defending litigation abroad.[118] Over centuries foreign states were considered to enjoy absolute immunity from jurisdiction and measures of execution in courts other than their own. Actions against state parties could only be brought with their express consent which was also required for any measure of execution. In the twentieth century the growing involvement of states in commercial activities led to a progressive erosion of the absolute immunity doctrine. Most countries now follow a restrictive immunity doctrine.[119]

Accordingly, when one party to a contract is a State or State entity, there is a risk that it will claim sovereign or State immunity from the jurisdiction of another State. However, if a State has agreed to an arbitration clause in its contract, that agreement is generally considered a waiver of its immunity, so that it should be bound to arbitrate under the rules and laws that govern the arbitration.[120] State immunity does not prevent a state or state agency from agreeing to submit to the authority of an arbitral tribunal. It is a well-established principle of international law that a sovereign is bound by an agreement to arbitrate contractual disputes,[121] and the ability so to submit may itself be seen as an incident or attribute of sovereignty.

State immunity exists at two levels: first, at the level of jurisdiction; and secondly, at the level of execution. Accordingly, there may be both immunity from jurisdiction and immunity from execution.

Jurisdictional Immunity

The defence of immunity from jurisdiction has been raised in arbitration as well as in national courts acting in support of arbitration. Concerning the jurisdiction of the arbitration tribunal, the private nature of arbitration raises the question whether the doctrine of sovereign immunity applies at all. The arbitration can proceed validly only on the basis that the state concerned has agreed to arbitrate, and such an agreement is generally held to be a waiver of immunity. In the United Kingdom, for

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118 BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 329 (5th edn, Oxford University Press 1998).
119 JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 743 (KLUWER LAW INTERNATIONAL, 2003).
120 MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 56 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).
121 This principle of international law is highlighted in the award of 12 April 1977 of Mahmassani, sole arbitrator in Libyan American Oil Co. (Liamco) v Government of the Libyan Arab Republic (1982) 62 ILR 140, at 178.

example, the State Immunity Act 1978 provides that where a state has agreed in writing to submit existing or future disputes to arbitration, the state is not immune in respect of proceedings in the courts of the United Kingdom that relate to the arbitration.[122]

Generally, if the state agrees to arbitration it cannot at a later stage invoke its sovereign immunity to resist the jurisdiction of the tribunal and thereby defeat the agreement it entered into. Such behaviour would violate general principles of law and good faith which are expressed in the principle of estoppel. This is clear in the international instruments and is also recognised by international practice.[123] For example, In Anglo-Iranian Oil Case, it was held by the International Court of Justice that a State's refusal to carry out an obligation to arbitrate in accordance to the terms of the contract with an alien amounts to a grave violation of International Law and denial of justice even when the State maintains that the contract is void *ab initio*. It must also be noted that the principles of justice, equity, fairness and good conscience would be defeated if the state invokes its internal legal or constitutional prohibitions when the state party does not have the facility or opportunity to verify the officials' credentials & competence to bind the state.

Immunity from Execution

The fact that a state cannot claim immunity from jurisdiction does not necessarily mean that the state is not immune from the actual execution of the award. Problems are most likely to arise when a winning party attempts to enforce and execute its award against a state or state entity. If the state concerned wishes to evade its obligations,[124] it may do so by claiming immunity from execution. It may be thought inappropriate that a state or state entity can escape its legal obligations in this way, but this is the logical result of conferring immunity upon states. Moreover, whilst the existence of an arbitration agreement is usually held to be a waiver of immunity from jurisdiction, such a waiver is generally not held to extend to immunity from execution. By way of example, statute in England[125] requires separate waivers in respect of execution and jurisdiction. Easily evident, if a foreign state is allowed to invoke immunity from execution of an arbitral award, the purpose of the entire process would be frustrated. It is now well-recognized that a state which consents to arbitration like any other party de facto commits to carry out the resulting arbitral award too.

[122] English State Immunity Act 1978, s. 9. See Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No. 2) [2006] EWCA Civ 1529.
[123] ICC case no 2321, I *YBCA* 133 (1976) 135; Delaume, *Sovereign Immunity and Transnational Arbitration*, 3 *Arb Int* 28, at 30 (1987).
[124] If it did not, presumably the question of enforcement would not arise, since it would carry out the award voluntarily.
[125] State Immunity Act 1978, s. 13(3).

Chapter XIV – Laws Governing Arbitration

Arbitration is the preferred means of dispute resolution because of the substantial autonomy and control over the process that the parties can avail which are not present in the traditional court administered system. In arbitration, parties have the flexibility to choose the following:

a) Who judges the dispute between the parties i.e. the arbitrator or a group of arbitrators;

b) What rules of procedure and evidence are to be applied by the arbitrators;

c) The place at which the arbitration is to be conducted i.e. the venue;

d) The law under which the parties would want the dispute to be decided e.g. Indian Contract Act, CISG, UNIDROIT Principles, etc.;

e) The law governing the arbitration agreement i.e. the law distinct from the main contract for the purposes of determining the validity, interpretation, and enforcement of the arbitration clause, irrespective of the validity or invalidity of the main contract;

f) The seat of arbitration (*lex arbitri*) i.e. the place where the courts would exercise supervisory jurisdiction and provide orders in support of arbitration e.g. interim measures, the appointment of arbitrators, assistance in taking evidence, setting aside the arbitral award, etc.

Law Governing the Capacity of the Parties

In arbitration, award can be refused if one or both of the parties did not have the capacity to enter into the arbitration agreement or there is no valid arbitration agreement. In order to fully understand the scope of this ground for refusal, it is necessary to refer to Article V (1) (a) of the New York Convention.

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement are sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have

subjected it or, failing any indication thereon, under the law of the country where the award was made;

In 1955, the early draft of the language used was "*that the parties against whom the award is invoked, being under legal incapacity, was not properly represented.*" This provision was substantially similar to Article 2 (b) of the Geneva Convention and Article IV (c) of the ICC Draft. Of all the country, New Zealand suggested that their drafts should specify by what law these criteria are to be interpreted and the law of the seat should be that law. However, this suggestion was dropped from the convention and the Netherlands introduced it as a last-minute amendment but that did not spark any substantial discussion.[126]

Under Article V(1) (a) of the New York Convention, the ground for refusal of recognition and enforcement of the arbitral award is where either party did not have the capacity enter into an arbitration agreement. This means that the party that entered into that arbitration agreement did not have the power to contract at the time of execution or consummation of the agreement. The party may be a juridical person, a government entity or the government itself. This is known as subjective arbitrability. However, it should be noted that questions of subjective arbitrability are of limited practical relevance and arise rarely.

The key point of consideration while determining incapacity of the party the relevant time frame is important and the incapacity should exist at the time of entering into the agreement. Most courts construe the question of incapacity narrowly,[127] especially courts in the United States.

Though on first impression it appears that questions related to agency would fall within incapacity i.e. whether a person acting on behalf of the parties is validity authorized and empowered to enter into an arbitration agreement or not does not fall within the question of subjective arbitrability but within the national law designated by the conflict of law rules of the seat.

Incapacity refers to the lack of complete knowledge or free will to enter into arbitration. A weaker party in a contract negotiation may claim incapacity. A Canadian Court found incapacity to mean evidence of oppression, high-pressure tactics, or misrepresentation. However, these were not present in the case before the court.[128]

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[126] PATRICIA NACIMIENTO, ARTICLE V(I)(A), IN HERBERT KRONKE, PATRICIA NACIMIENTO, ET AL. (EDS), RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 217 (KLI 2010).
[127] PATRICIA NACIMIENTO, ARTICLE V(I)(A), IN HERBERT KRONKE, PATRICIA NACIMIENTO, ET AL. (EDS), RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 218-219 (KLI 2010).
[128] Grow Biz International Inc. v. DLT Holding Inc. and Debbie Tanton, 2001 PESCTD 27 YCA XXX (2005).

The phrase "*under the law applicable to them*" in article V (1) (a) should be understood as a choice of law provision i.e. the law of the seat and does not necessarily mean law applicable to the arbitration agreement.

The second part of Article V (1) (a) deals with a refusal to enforce an award in the absence of a valid arbitration agreement. The validity of the main contract has to be examined separately from the validity of the arbitration agreement as per the doctrine of separability. Most jurisdiction including the New York convention requires the arbitration agreement in writing and signed by the parties. The writing requirement may also be satisfied if the modern means of communication would amount to signing i.e. expressly showing consent to arbitration.

Law Governing the Agreement to Arbitrate

Usually, it is the *lex arbitri* which deals with the formal validity of the arbitration agreement. However, the law governing the arbitration agreement itself may be governed by any number of laws. Most likely it will be the law of the place of the arbitration or the law governing the main contract. The validity of an arbitration agreement is mainly a matter of consent and governed by ordinary principles of the contract law. The question of consent arises either at the beginning when party resist arbitration or post-arbitration when one party resist enforcement or applies to set-aside the award

In an ICC award,[129] the tribunal was faced with the question of the validity of the arbitration agreement at the beginning of the arbitration proceeding and applying the law governing the contract, the arbitration agreement would have been invalid, whereas, the arbitration agreement will be valid in accordance with the law of the seat. The tribunal applied the law of the seat and held that the agreement was valid.

Article 178 (2) of the Swiss Private International Law Act provides the following "*as to the substance, the arbitration agreement shall be valid if it complies with the requirements of the law chosen by the parties, or the law governing the object of the dispute, and, in particular, the law applicable to the principal contract, or with Swiss law*." Thus, Switzerland has a very broad concept of the law governing the validity of the arbitration agreement and if the arbitration agreement is valid either under the law of the seat or the law governing the contract or the law of the forum then such arbitration agreement would be valid.

Under the Model Law, an arbitration agreement will not be valid under the law to which the parties have subjected it and in the absence of choice, under the law of the seat. Since the parties rarely choose a specific to govern the arbitration agreement, most often under the Modern Law, the invalidity of the arbitration agreement is determined by the arbitration seat.

[129] ICC Award in Case No. 6162, Consultant (France) v. Egyptian Local Authority (1992) XVII YearBook Commercial Arbitration 153.

Article 16(4) of the LCIA Rules provide for the following:

"The law applicable to the Arbitration Agreement and the arbitration shall be the law applicable at the seat of the arbitration, unless and to the extent that the parties have agreed in writing on the application of other laws or rules of law and such agreement is not prohibited by the law applicable at the arbitral seat."

One of the landmark judgments of the English court is the case of *Sulamérica Cia Nacional de Seguros SA and others v. Enesa Engenharia SA*[130] *and or* where the English Court of appeal held that the governing law of an arbitration agreement was English law even though the parties have expressly chosen the Brazilian law as the law governing the contract and the exclusive jurisdiction of the courts in favor of Brazilian Courts. The court laid down the test to determine the law applicable to the arbitration agreement as to the following:

The English Court of Appeal held that the law of the arbitration agreement was to be determined by the application of the three-stage inquiry established at common law.

1. *"If the parties made an express choice of law to govern the arbitration agreement, that choice would be effective, regardless of the law applicable to the contract as a whole.*
2. *Where the parties failed expressly to specify the law of the arbitration agreement, it was necessary to consider whether the parties had made an implied choice of law.*
3. *Where it was not possible to establish the law of the arbitration agreement by implication, it was necessary to consider what would be the law with the 'closest and most real connection' with the arbitration agreement.*"

The court accepted that in the absence of any contrary choice, it can be naturally assumed that the parties intended for the same law to govern the main contract as well as the arbitration agreement. On the facts and circumstances of the case, However, the court came into the conclusion that there was enough material to show that the parties did not intend that the Brazilian law should apply to the agreement. This position of law was previously held in *C v D and XL Insurance Ltd v. Owens Corning*.[131] In both cases, the court came to the conclusion that by choosing London as a seat of arbitration, there was an implied choice in favor of English Law as the Law governing the Arbitration agreement.

The Supreme Court of Sweden in the *BUL Bank* case clearly held that

"*…no particular provision concerning the applicable law for the arbitration agreement itself was indicated [by the parties]. In such circumstances the issue of the validity of the arbitration clause*

[130] 2012 EWHC 42 (Comm).
[131] [2000] 2 Lloyd's Rep. 500.

should be determined in accordance with the law of the state in which the arbitration proceedings have taken place, that is to say, Swedish law."

Thus, Supreme Court categorically ignored the Austrian Law as the express choice of law by following a rationale that the arbitration clause ought to be treated as a separate agreement subject to a separate law.

Similarly, in the case of Brussels Tribunal de Commerce, in *Matermaco v. PPM Cranes*[132] reading Article II (1) and V (2) (a) of the New York Convention held the law of Belgium (being the seat) to apply to the question of arbitrability, even though the parties had chosen the law of the State of Wisconsin to apply to the contract. The court held that:

> "*…and a consistent interpretation of the Convention requires that the arbitrable nature of the dispute be determined, under the said Articles II and V, under the same law, that is, the lex fori. Hence it is according to Belgian law that the arbitrable nature of the present dispute must be determined.*"

The importance of the law of the seat is paramount in the United States. The Federal Arbitration Act of 1925 is a body of federal substantive law and that it self-constitutes the law governing the arbitration agreement despite an express choice of the foreign law. This view has been affirmed by several cases such as *Pedcor Mgt Co. Inc. Welfare Benefit Plan v. North American Indemnity*[133], *AT&T Mobility LLC v. Concepcion, County of Nassau v. Chase*,[134] all of which state that the FAA preempts the state law which contradicts the purpose of FAA. Hence once the dispute is covered by the FAA, Federal Law applies.

However, this approach is not universally consistent and there are tribunals and courts that resort to the law governing the contract to determine the validity of the arbitration agreement. In ICC award in case no 2626135 the arbitral tribunal held that "it is commonly accepted the choice of law applicable to the principal contract also tacitly governs the situation of the arbitration clause, in the absence of a specific provision."

Reading of article 34 (2) (a) (i) of the Model Law, the law to which the parties have subjected the agreement would mean the substantive law chosen by the parties as the parties would have implicitly chosen the laws of the arbitration agreement as well. Various courts and tribunals have taken various

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[132] XXV Y.B. Comm. Arb. 673 (Brussels Tribunal de Commerce) (2000).
[133] 343 F.3d 355 (5^{th} Cir. 2003).
[134] 131 U.S. 1740 (2011).
[135] ICC Award in CaseNo. 2626; S. Jarvin and Y. Derains, *Collection of ICC Arbitral Awards*, 316 1974–1985 (1990).

approaches. The *French Cour de cassation*[136] held that it is the intention of the parties that determines the validity or invalidity of the arbitration agreement not the provisions of any national law. The court observed that:

"*[B]y virtue of a substantive rule of international arbitration, the arbitration agreement is legally independent of the main contract containing or referring to it, and the existence and effectiveness of the arbitration agreement are to be assessed, subject to the mandatory rules of French law and international public policy, on the basis of the parties' common intention, there being no need to refer to any national law*."

This is also in line with the theory of delocalization as it seems reasonable that once the parties have chosen the law governing the contract and the law of the seat, if the two laws conflict, the tribunal would be involved in a lengthy analytical effort to determine the validity of the arbitration agreement whereas, a simple intent of the parties test would be easier to apply and to meet the expectation of the parties.[137]

The U.K Supreme Court examined the French approach in *Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan*[138] and applying French law held the following:

"*[Under French law,] arbitration agreements derive their existence, validity and effect from supra-national law, without it being necessary to refer to any national law. If so, that would not avoid the need to have regard to French law 'as the law of the country where the award was made' under Article V(1)(a) of the Convention and s. 103(2)(b) of the 1996 Act. The Cour de Cassation is, however, a national court, giving a French legal view of international arbitration; and Dallah and the Government agree that the true analysis is that French law recognizes transnational principles as potentially applicable to determine the existence, validity, and effectiveness of an international arbitration agreement, such principles being part of French law.*"

However, many commentators such as REDFERN & HUNTER mention that it is illogical to state that when parties choose a particular law to govern their agreement, some other law which the parties have not chosen be applied to one of the clauses in the entire agreement simply because it is contained in the arbitration clause. Professor Lew states:

"There is a very strong presumption in favor of the law governing the substantive agreements the arbitration clause also governing the arbitration agreement. This principle has been followed in many

[136] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 47 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).
[137] Bridas S.A.P.I.C. v. Govt. of Turkmenistan, 345 F. 3d 347, 356 (5th Cir. 2003).
[138] [2010] UKSC 46.

cases. This could even be implied as an agreement of the parties as to the law applicable to the arbitration clause."

A French commentator has offered a similar view:

"The autonomy of the arbitration clause and of the principal contract does not mean that they are totally independent one from the other, as evidenced by the fact that acceptance of the contract entails acceptance of the clause, without any other formality."

It must be pointed out though this view runs contrary to the argument, that the arbitration agreement is autonomous and separable from the other clauses in the agreement. In fact, it is this autonomy of this arbitration clause which paves the way for the possibility that it may be governed by the different law. This view is supported by the New York Convention as it provides that the award must be valid 'under the law to which party had subjected it' or in absence of any indication thereon 'under the law of the country where the law was made' i.e. the law of the seat.

Chapter XV – Lex Arbitri

Lex arbitri or the law of the seat is the fundamental framework for the arbitration proceeding. However, various jurisdictions have their own narrations regarding *lex arbitri*. In modern times it includes the provisions which regulate the following matters (i) matters internal to the arbitration; (ii) the external relationship between courts and arbitration; and (iii) the broader relationship of arbitration and the public policies of the jurisdiction.[139] It is defined as the body of law which: [140]

> "*Legitimizes and provides a general legal framework for international arbitration. The relevant law might itself be found in an independent statute on international arbitration or it might be a chapter in another law, such as a civil procedure code or a law also governing domestic arbitration. [It] can also include other statutes and codes (even those not specifically dealing with arbitration), and case law which relates to the basic legal framework of international arbitrations seated there*

It is pertinent to note that the precise definition of *lex arbitri* may vary among the jurisdictions but there is some mutual ground i.e. it must govern the following:

a. *Appointment of arbitrators*

b. *The relationship between arbitration and national courts for supervision and assistance*

c. *Mandatory rules, public policy exceptions*[141]

ALASTAIR HENDERSON, one of the pioneer of this field, argues that the term 'seat' and 'place' can be used interchangeably, but the term 'seat' is most preferred as it replicates the more appropriate juridical nature of the concept, the nexus between applicable law and territorial attachment[142]. Similarly, the term 'venue' is not similar to the term 'seat'. The seat of arbitration flows from its juridical seat, whereas, 'venue' simply refers to the physical and geographical seat of arbitration

[139] Alastair Henderson, *Lex Arbitri, Procedural Law and the Seat of Arbitration - Unravelling the Laws of the Arbitration Process*, 26 SAcLJ 886, (2014).
[140] Simon Greenberg, *Christopher Kee, J. Romesh Weeramantry, International Commercial Arbitration: An Asia-Pacific Perspective* (CUP 2011).
[141] Alastair Henderson, *Lex Arbitri, Procedural Law and the Seat of Arbitration - Unravelling the Laws of the Arbitration Process*, 26 SAcLJ 886, (2014).
[142] Alastair Henderson, *Lex Arbitri, Procedural Law and the Seat of Arbitration - Unravelling the Laws of the Arbitration Process,* 26 SAcLJ 886, (2014).

which can be moved from one place to another in accordance with the convenience of the arbitral tribunal and parties.[143]

It is important to determine the seat of arbitration because the law of the seat will be the law governing the arbitration i.e. *lex arbitri*, Parties prefer the pro-arbitration and arbitration-friendly jurisdictions where their disputes can be resolved, so that the entire arbitral process can be protected from the unwarranted interruptions and prejudices. However, if there arises a need of the court interruption, the local laws of the 'seat' will apply.

It is also referred to as the 'procedural law' or 'curial law'. Lex *arbitri* is a procedural law but it also possesses some substantive elements. However, there is still an ambiguity between the lines and various countries have a various opinion upon the following:

a. *The courts at the seat are for all practical purposes the only national courts with the power to annul an award and*[144]

b. *The national courts of the "seat" may exercise this power to annul awards on the basis of whatever grounds for vacatur the local lex arbitri provides -- unfettered by international conventions*[145]

c. *And then, finally and most critically: Should the legitimacy of the arbitral proceeding be called into question by annulment at the seat (on whatever grounds), such a determination will be conclusive*[146]

The legitimacy of an arbitration agreement is linked to the fate of the arbitration proceedings as for which the role of the seat is vital. Moreover, if tribunals jurisdiction is based upon the consent provided in arbitration agreement, the law of the seat i.e. *lex arbitri* determines the power of the national courts of the seat to resolve any jurisdictional issues and parties to an arbitration agreement may wish to ensure coherence between the law and procedure for determining the validity of the agreement[147]. Therefore, with the inevitable qualifications, it is important to know about the law of the seat beforehand, for better understanding of the law governing the proceeding of the arbitration tribunal. The concept of law of the seat originated from Article 2 of the Geneva Protocol on Arbitration Clauses 1923[148]:

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[143] The Government of India v. Petrocon India Limited, [2012] 1 LNS 974.
[144] C. v. D., [2007] EWCA Civ. 1282.
[145] W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 Tex. Int'l L.J. 1, 11 (1995).
[146] Emmanuel Gaillard, *Aspects philosophiques du droit de l'arbitrage international* (2008).
[147] FirstLink Investments Corp. Ltd., at ¶ 15.
[148] Article 2, Geneva Protocol on Arbitration Clauses 1923.

"The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place"

Moreover, the UNCITRAL Model Law has taken a similar stance, stipulating that its provision will only apply "*If the place of arbitration is in the territory of the State*".

Similarly, the UNCITRAL Model Law is the perfect example to understand the concept of *lex arbitri* as the Model Law has been adopted by almost 183 Countries. However, it has not been adopted uniformly, various countries have modified it according to their need, but the major elements are uniform in all the countries who have adopted the Model Law.

The law of the seat determines the issues encapsulated under *lex arbitri:*[149]

a. *The formal validity of the arbitration agreement;*

b. *The capacity to resolve of the dispute through arbitration;*

c. *The composition of the tribunal;*

d. *Fundamental procedural guarantees;*

e. *The supervisory role of the courts; and*

f. *The judicial review of the arbitral awards*

The scope of *lex arbitri* varies from one jurisdiction to another because states have their own discretion as to what issues need to be determined and as per what law. It is certain, that this notion confirms the purely contractual notion of arbitration proceedings. Moreover, the concept of *lex arbitri* is not the same for domestic and international arbitration.[150]

It is pertinent to note the *lex arbitri* affects number of issues of arbitral process pertaining to the arbitration agreement and arbitral procedure. As explained above, the countries have their own reservations as to what issues and up to what extent it should be governed by a particular law. However, parties should choose the more arbitration-friendly jurisdiction as to their 'seat of arbitration' otherwise they would have to deal with unwarranted interferences.[151]

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[149] J.-F.Poudret & S. Besson, *Comparative Law of International Arbitration* 84 (2007).

[150] A. Bělohlávek, *Procesnípředpisy a rozhodčířízení [Title in translation: Procedural Laws and Arbitration]*, (12) Právnífórum, 431 (2007).

[151] Alexander J. Belohlavek, *Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth*, 31 ASA Bulletin 2, 262-292 (Association Suisse de l'Arbitrage; KLI 2013).

For effective conduct arbitral process depends upon the rules and regulations of the law of the seat. This can easily be determined by, taking reference to local laws for judicial assistance, even if the members of the tribunal has the power to grant provisional measure of protection, e.g. inspection or preservation of the property, because tribunals do not have powers to enforce such orders, particularly, when that disputed property is in possession of some third party, then it becomes paramount to take the assistance of the courts.[152]

Moreover, the choice of place of arbitration can have certain consequences, because the law of particular place grants certain powers to the state tribunals and courts not known the parties such as consolidation of arbitral proceedings. There can be a conflict between *lex arbitri* and a different system of law regarding the arbitrability of the dispute i.e. whether or not the particular subject matter of dispute can be resolved through arbitration or not.

At this juncture it is pertinent to state few examples of the matters with which the *lex arbitri* is expected to deal during the course of arbitral proceedings, followings are:[153]

a. *The definition and form of an agreement to arbitrate;*

b. *whether a dispute is capable of being referred to arbitration (that is, whether it is 'arbitrable' under the lex arbitri);*

c. *the constitution of the arbitral tribunal and any grounds for challenge of that tribunal;*

d. *the entitlement of the arbitral tribunal to rule on its own jurisdiction;*

e. *equal treatment of the parties;*

f. *freedom to agree upon detailed rules of procedure;*

g. *interim measures of protection;*

h. *statements of claim and defense;*

i. *hearings;*

j. *default proceedings;*

[152] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 169 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).

[153] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 168-169 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).

k. *court assistance, if required;*

l. *the powers of the arbitrators, including any powers to decide as amiables compositeurs;*

m. *the form and validity of the arbitration award; and*

n. *the finality of the award, including any right to challenge it in the courts of the place of arbitration*

In the case of *James Miller v. Whitworth Street Estates*[154], where an English party entered into a contract with a Construction company of Scotland for doing certain work on a building in Scotland. In this case, English Law was chosen by the parties to govern the interpretation of the contract, parties chose Scotland as the seat of arbitration and after the hearing of the evidence, the English Company requested the Tribunal to "state a case" before the High Court. However, the tribunal denied the request because under the law of Scotland the arbitrator is the final adjudicator of both factual as well as a legal question. Moreover, the House of Lords favored the arbitrator's refusal.

With respect to this issue, certain guidelines were laid down in the case of *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v. VSC Steel Company Ltd*[155], where Hamblen J. provided the following guidance:

a. *Even if an arbitration agreement forms part of the substantive contract (as is commonly the case), its proper law may not be the same as that of the substantive contract;*

b. *The proper law is to be determined by undertaking a three-stage inquiry into (i) express choice, (ii) implied choice and (iii) the system of law with which the arbitration agreement has the closest and most real connection;*

c. *Where the substantive contract does not contain an express governing law clause, the significance of the choice of the seat of the arbitration is likely to be ''overwhelming.'' That is because the system of law of the country of the seat will usually be that with which the arbitration agreement has its closest and most real connection;*

[154] [19701] I All E.R. 796 (H.L.).
[155] [2013] EWHC 4071.

d. *Where the substantive contract contains an express choice of law, this is a strong indication or pointer in relation to the parties' intention as to the governing law of the agreement to arbitrate, in the absence of any indication to the contrary;*

e. *The choice of a different country for the seat of the arbitration is a factor pointing the other way. However, it may not in itself be sufficient to displace the indication of choice implicit in the express choice of law to govern the substantive contract; and*

f. *Where there are sufficient factors pointing the other way to negate the implied choice derived from the express choice of law in the substantive contract, the arbitration agreement will be governed by the law with which it has the closest and most real connection. That is likely to be the law of the country of the seat, being the place where the arbitration is to be held and which will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective.*

Similarly, in the case of *Union of India v. Mc Donnell Douglas*[156], court made a detailed analysis on this particular issue and held that:

> *"It must be pointed out that the law of the seat or place where the arbitration is held, is normally the law to govern that arbitration. The territorial link between the place of arbitration and the law governing that arbitration is well established in the international instruments, namely, the New York Convention of 1958 and the UNCITRAL Model Law of 1985. It is true that the terms "seat" and "place" are often used interchangeably". "If parties have not made an express agreement as to the law to govern the arbitral proceedings then it is usually the law of the seat of arbitration will apply to the procedure"*

A lot of cases placed reliance on the popular opinion of REDFERN AND HUNTER, which explains the seat theory as[157] *"the concept that arbitration is governed by the law of the place in which it is held, which is the ("seat" or "forum" or locus arbitri) of the arbitration, is well established in both the theory and practice of international arbitration*."

[156] [1993] 2 Lloyds Rep. 48.

[157] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 3.51 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).

Chapter XVI – Law Governing the Contract

One of the key advantages of arbitration is the flexibility it affords to the parties to choose the law under which their dispute should be decided. Therefore, once the parties choose the law governing the contract any dispute that arises out of, or in connection with the contract, will be decided under the said law. This law can be the national law of one of the parties, or national law of a neutral jurisdiction, or the United Nation Convention on International Sale of Goods (CISG) *or lex mercotaria* embodied in the UNIDROIT Principles on International Contracts.

It is to these questions that attention must now be turned. The choices that may be available to the parties include:

a. *National law;*

b. *Public international law (including the general principles of law);*

c. *Concurrent laws (and combined laws—the tronc commun doctrine);*

d. *Transnational law (including international development law, the lex mercatoria, codified terms and practices, and trade usages); and*

e. *Equity and good conscience.*

Even if parties do agree on such neutral law such as the CISG or the UNIDROIT, it is still advisable to choose the national law as there may be questions which are not covered in either of these laws, especially questions regarding the validity of the contract. At this point, it is necessary to explain the concept of *lex mercatoria.*

One of the ideas promoted by the delocalization movement was a detachment of law from a particular jurisdiction. In this light, *lex mercatoria* or the law of the merchant which refers to the non-legal standards based in custom and practice which are universally followed becomes important. While the concept of *lex mercatoria* appears to be vague and uncertain, there is some agreement about what comprises *lex mercatoria*. Some characteristics definition are as follows:

a. *A loosely organized system of transnational legal principles, rules, and standards derived from the usages, customs, and practice of international commerce.*[158]

b. *General principles of law, transnational rules, a method of decision making.*[159]

[158] L. Yves Fortier, *The New, New Lex Mercatoria, or, Back to the Future*, 17 Arb. Int 121, 128 (2001).

c. *Customary commercial law.*[160]

d. *"Transnational substantive rules of law and trade usages and the method of their application to international economic transactions*."[161]

e. A set of substantive rules developed to regulate international trade in the business community, which are derived "*not only from international commercial dealings, standard clauses, international conventions and arbitral awards but also from various sets of legal rules issued by the International Chamber of Commerce (ICC) or other international organizations*"[162]

Moreover, while *lex mercatoria* is incapable of a specific definition, various common themes emerge from the above. First, it is not based on any one particular legal system but in co-operating international commercial rules, general principles of law, standards and trade usages. An example of *lex mercatraia is* contained in the UNIDROIT Principles of International commercial contracts. The preambles to these principles state that they apply when parties choose for them to apply or when the contract is governed by the general principle of law, the *lex mercatoria* or the like.

Another example of *lex mercatoria* can be found in the ICC's Uniforms Customs and Practice for Documentary Credits (UCP 600) which govern all letters of credit, the ICC's INCOTERMS which comprise the International Commercial Terms such as FOB and CIF. There is also a growing group of commentators which includes arbitration awards as well as principle derived from international conventions or the International Public Law to be part of *lex mercatoria.*

It is pertinent to remember that freedom to choose governing law stems from the concept of party autonomy[163] and many international conventions support this free choice of the parties such as the European Community Convention on the law applicable to contractual obligations (Rome Convention), CISG, the Inter-American Convention on the law applicable to international contract like the Mexico City Convention. However, party autonomy is not unlimited license to choose any law and is subject to mandatory law i.e. a law that cannot be excluded by a contract term and hence is subject to the public policy of the country.

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[159] Emmanuel Gaillard, *Transnational Law: A Legal System or a Method of Decision Making?* 17 Arb. Int. 59, 59–61 (2001).

[160] Roy Goode, *The Role of the Lex Loci Arbitri in International Commercial Arbitration*, 17 Arb. Int. 19, 21 (2001).

[161] Antonis Patrikios, *Resolution of Cross-Border E-Business Disputes by Arbitration Tribunals: The Emergence of the Lex Informatica*, 38 U. Tol. L. Rev. 271, 273 (2006).

[162] Dr. Beda Wortmann, *Choice of Law by Arbitrators: The Applicable Conflict of Laws System*, 14 Arb. Int. 97, 101(1998).

[163] Apple & Eve, LLC v. Yantai North Andre Juice Co. Ltd. 610 F. Supp. 2d 226, 228–29 (E.D.N.Y. 2009); Bautista v. Star Cruises, 396 F. 3d 1289, 1302 (11th Cir.2005).

In the United States under the Restatement Second, Conflict of Laws, there must be a substantial relationship between the party or the transaction or the law must be chosen or the reasonable basis for the parties' choice.[164] However, New York is the exception to this rule and will enforce the parties' choice of New York Law even if there is no relationship with the State of New York. There have been efforts in the United States to align the practice with international standard in the area of choice of law. Therefore, in 2001, the Uniform Commercial Code was amended to delete the "reasonable relationship" requirement for a contractual choice of law.

It must be emphasized that the choice of law clause is not to be taken casually as any changes in the law applicable to the contract may bring about changes in the contract itself e.g. a change in regulation regarding Bitcoin or Cryptocurrencies may make the entire contract illegal. Accordingly, it is not enough to know the agreement between the parties but it is imperative to know the law applicable to the agreement. In a purely domestic contract, the law applicable will be the national law of the country.

It is pertinent to note that the party autonomy or the freedom of the parties exist at the time of making of the contract and not subsequent. Therefore, it cannot be that the parties choose the applicable law once the dispute has arisen. However, Rome I Regulation provides for a subsequent agreement of the parties to change their choice of law.

[164] Germany, Court of Appeal, Hamm, Yearbook Commercial Arbitration, XXII (1997) at 707, 709.

Chapter XVII – Law Governing Enforcement of Award

Domestic award

Often awards arising out of international arbitration proceedings are actually enforced under the regime for domestic awards. Though each state is generally free to determine which awards it considers to be domestic, the relevant criterion is normally the place of arbitration. As a consequence, recognition and enforcement of award rendered within a country is usually governed by the provisions on domestic awards. irrespective of the national or international character of the underlying arbitration. The national legislature is generally free to regulate the recognition and enforcement of domestic awards. There are no international conventions imposing a minimum standard as exist for foreign awards. In general, however, national arbitration laws have adopted a pro-enforcement approach also for domestic awards.[165]

Foreign award

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 constitutes the backbone of the international regime for the enforcement of foreign awards. There are a number of other international conventions and bilateral treaties that provide for the enforcement of foreign awards.[166] A brief look at major international conventions, treaties, and national laws are as follows:

The New York Convention

The New York Convention is the most widely accepted international convention which has significantly simplified the enforcement of foreign awards and harmonized the national rules for the enforcement of foreign awards.[167] Article III of the New York Convention clearly provides that *each contracting state shall recognize arbitration awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied on.*" Moreover, Article III mandates that a foreign award must be enforceable without unnecessary inconvenience or excessive fees, and the conditions must not be more onerous than those for domestic awards.[168]

[165] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 690 (KLUWER LAW INTERNATIONAL, 2003).
[166] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 692 (KLUWER LAW INTERNATIONAL, 2003).
[167] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 692 (KLUWER LAW INTERNATIONAL, 2003).
[168] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 693 (KLUWER LAW INTERNATIONAL, 2003).

The 1961 European Convention

The 1961 European Convention deals with the enforcement of foreign awards indirectly. It provides that an award set aside at the seat of arbitration may be recognized by the courts of states applying the Convention.[169]

The 1965 Washington Convention

The 1965 Washington Convention is yet another convention with more than 130 countries as signatory which provides for its own enforcement procedures. Each member state is under an obligation to recognize an award rendered pursuant to the convention and enforce the pecuniary obligations imposed by the award considering it as a final judgment of the court in that state.[170]

The Panama Convention

The 1975 Inter-American Convention on International Commercial Arbitration (Panama Convention) is a convention of the American Region ratified by more than 15 South American states and the US which is more or less similar to New York Convention as it adopts the same standard.[171]

National Laws and Model Laws

It is of no surprise that various national arbitration laws also contain a provision dealing with the enforcement of foreign awards. However, a majority of them are in line with the New York Convention and have incorporated the verbatim text of the relevant international conventions or have simply provided that the enforcement of foreign awards will be governed by the New York Convention.[172] Model Law, under Article 36, also provides the grounds on which a court may refuse the enforcement of an award. These grounds are akin to the grounds mentioned under Article V of the New York Convention.

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[169] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 693 (KLUWER LAW INTERNATIONAL, 2003).

[170] Article 54(1), The Washington Convention, 1965.

[171] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 695 (KLUWER LAW INTERNATIONAL, 2003).

[172] Articles 1710-1723, Belgium, Judicial Code; Articles 34-40, Brazil's Arbitration Law; Articles 62-64, China's Arbitration Law; England, Sections 66, 99, and104, The English Arbitration Act, 1996.

Chapter XVIII – Composition of Tribunal

The fundamental component of an arbitration proceeding is its tribunal. Since dispute resolution through arbitration proceedings lack some of the safeguards of a national legal system, the quality of arbitration tribunal has a significant impact on the entire arbitration proceedings. In general, because parties know that they will not be able to appeal any decision on the merits, they want to choose the best arbitrator they can to make that decision. Therefore, a focus on the peculiarities of the arbitration tribunal and its various facets is important since all of it bear on the integrity of the process and on the efficiency and effectiveness of the dispute's resolution.

Appointment of Arbitrators

One of the most significant things a lawyer is supposed to do while resolving a client's dispute is to choose arbitrators who will preside over the proceedings and issue an award. The skill, experience, and knowledge of the arbitrators will have a significant impact on the quality of the process and of the award.[173] There are several different methods of appointing an arbitral tribunal. The most common are by the agreement of the parties, by an arbitral institution, by means of a list system, by means of the co-arbitrators appointing a presiding arbitrator, by a professional institution or a trade association, or by a national court.

Number of Arbitrators

In a commercial arbitration, the norm is to either appoint one or three arbitrators. Ideally, appointing a sole arbitrator is more convenient and effective since the costs will be less and it will be easier to manage the scheduling and other procedural aspects. Moreover, it is quicker since a sole arbitrator has to make decisions on its own without actually waiting for other arbitrators. Yet, the preference is for three arbitrators because they bring more to the table in terms of experience and knowledge as compared to one, especially when huge amount of money is at stake.[174] In addition, it is generally believed that the award is more likely to be within the parties' expectations when considered by three arbitrators, and that unusual or inexplicable awards are less likely to occur. If the dispute is particularly large and complex, three arbitrators may be more likely to arrive at a better, more comprehensive understanding than one arbitrator. Further, when parties are from different countries

[173] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 122 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).
[174] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 123 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).

and cultures, a comfort level is provided when each party is able to select one arbitrator who comes from a similar cultural or legal background.[175]

Parties may mutually decide on the number of arbitrators to be appointed in their arbitration agreement but if they have not agreed for a number, there are various arbitral rules which have different resolutions as to the number of arbitrators. Some rules will default to a sole arbitrator unless the matter seems particularly complex or involves a huge some of money.[176] Others default to three arbitrators, regardless of the circumstances.[177] However, the English Arbitration Act for example provides in Section 15(3) that if there is no agreement as to the number of arbitrators, the tribunal shall consist of a sole arbitrator. The Model Law, for example, provides in Article 10(1) that the parties are free to determine the numbers of arbitrators. Similar provisions can be found in most other arbitration laws.[178]

Qualifications

As mentioned earlier, parties can choose arbitrators who have knowledge and experience in the area of the subject matter of dispute. This eliminates the time and effort that would be necessary, if parties were litigating before a randomly selected judge, to educate the judge about the particular industry or the matter at issue.[179]

Further, while parties prefer arbitrators with a legal background, there are many arbitrators with non legal background who are appointed for their technical expertise along with general experienced non lawyer who are also reasonably well-versed in the relevant law. In fact, quite often, professors are also appointed as arbitrators with a good legal background. However, professors in general are not favored due to lack of practical knowledge or technical expertise.[180]

Sometimes arbitrators are also preferred for their language fluency i.e. the ability to be fluent in a particular language which may be important to the parties. However, most important aspect is the availability of these arbitrators as parties often want to engage well-known arbitrators, but these arbitrators may be so busy with other arbitrations that scheduling hearings become extremely

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175 MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 123 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).
176 MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 123 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).
177 MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 123 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).
178 England, Arbitration Act section 15(1); Switzerland, PIL Article 179(1); Sweden, Arbitration Act section 12; Austria, CCP section 580; Netherlands, CCP Article 1026(2); the various arbitration rules often contain comparable provisions; see only WIPO Rules Article 14(1); AAA ICDR Rules Article 5.
179 MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 124 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).
180 MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 125 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).

difficult.[181] Most importantly, the arbitrators must have a great reputation for fairness, integrity and wisdom.

Such qualifications can be spelled out in the arbitration clause, if agreed by the parties. For example, the parties could assert, for example that all arbitrators must speak English, they all must have experience in the construction industry, and the language of the arbitration must be English.[182]

Nationality

Ideally, the nationality or the country in which the arbitrator was born or the passport that he or she carries should be irrelevant. The fundamental criteria should be the qualifications, experience, and integrity of the arbitrator. Even the spirit of the Model Law provides that no person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.[183] However, the usual practice in international arbitration is to appoint a sole arbitrator (or a presiding arbitrator) of a different nationality from that of the parties to the dispute.

The current practice under most sets of institutional rules is that the sole or presiding arbitrator will almost certainly be someone of a different nationality from that of the parties to the dispute.[184] Article 6(7) of the UNCITRAL Rules, for example, provides that, in making the appointment, *the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.*

Article 13(5) of the ICC Rules goes further and provides that '*the sole arbitrator or the chairman of an arbitral tribunal shall be of a nationality other than those of the parties*'. Another provision allows an exception to this rule '*in suitable circumstances and provided that neither of the parties objects*', but nevertheless the general rule is clear: it is a rule of neutral nationality. The LCIA and HKIAC Rules take a similar line. Article 6(1) of the LCIA Rules provides: *Where the parties are of different nationalities, a sole arbitrator or the presiding arbitrator shall not have the same nationality as any party unless the parties who are not of the same nationality as the arbitral candidate all agree in writing otherwise.*[185]

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[181] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 125 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).
[182] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 126 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).
[183] Model Law, Article 11(1).
[184] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 4.63 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).
[185] HKIAC Rules, Art. 11(2)

Method of Selection

The arbitrator selection procedure can vary, depending on the parties' agreement and on the institutional rules. If parties do not state in their arbitration clause how they want to select arbitrators, but they choose rules to govern the process, the selection will take place according to the institutional rules. However, even if parties did not agree on a method of selection in their arbitration clause, if they can agree at the time of the arbitration, they can generally select the arbitrators, depending on institutional rules. If the parties cannot reach agreement, however, the institution will choose the arbitrators.[186]

However, in Ad Hoc Arbitration, parties need to be particularly careful to specify their method of arbitrator selection because there is no institution to intervene. The selection method should be clear. There should be a time frame for making the selection, and a statement of how the issue will be resolved if parties cannot agree on a sole arbitrator or if they do not make their choice of a party-selected arbitrator within the allotted time frame. It becomes readily apparent that in an ad hoc arbitration, even more than in an institutional arbitration, the arbitration clause must be carefully and thoughtfully drafted. A carelessly drafted clause may result in the parties litigating rather than arbitrating their dispute.[187]

Obligations of Arbitrators

Arbitrators have the obligation to be impartial and independent. This obligation is stated in numerous laws and rules.[188] *Impartiality* generally means that the arbitrator is not biased because of any preconceived notions about the issues and has no reason to favor one party over another. *Independence* generally means that the arbitrator has no financial interest in the case or its outcome. It can also mean that the arbitrator is not dependent on one of the parties for any benefit, such as employment or client referral, and that the arbitrator does not have a close business or professional relationship with one of the parties.[189]

As international law firms and multinational corporations have grown exponentially, the question of what conflicts prevent an arbitrator from being impartial and independent has become more complex. If an arbitrator has a serious conflict, she should not accept an appointment as arbitrator. If there is some possible conflict, which may not be serious, the arbitrator is supposed to disclose this to the parties, so they can decide whether they wish to challenge the arbitrator's appointment. The

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[186] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 126 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).
[187] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 133 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).
[188] UNCITRAL Model Law, art. 12(1–2); UNCITRAL Rules, art. 12(1); LCIA Rules, arts. 5.2, 10.3; ICDR Rules, art. 7(1); ICC Rules, art. 11(1). *See also* IBA Rules of Ethics, art. 3.1.
[189] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 136 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).

UNCITRAL Model Law and a number of arbitration rules require that an arbitrator disclose without delay any circumstances likely to give rise to justifiable doubts as to her impartiality or independence.[190] This obligation occurs not only at the time of appointment, but continues throughout the entire arbitral proceedings.

Perhaps the most fundamental obligation is to render an enforceable award, or at least to make best efforts to render an enforceable award.[191] Although this could be considered an ethical or a moral obligation, some arbitral institutions impose the obligation in their rules.[192]

Challenges to the Arbitrator

A party can challenge the appointment of an arbitrator and seek his removal at the time the tribunal is constituted – or later, if new facts come to light. The primary ground for challenging an arbitrator is a conflict of interest, but arbitrators can also be challenged for improper conduct – for example, repeatedly falling asleep at the hearings, having inappropriate *ex parte* conversations with one of the parties, or simply not moving the arbitration forward in a timely manner.[193]

In an institutional arbitration, the rules of the institution will provide the bases for bringing the challenge and the procedure to do so. For example, the LCIA Rules provide that an arbitrator may be challenged on the basis of "justifiable doubts as to his impartiality or independence," or if she "becomes unable or unfit to act."[194] The Rules explain further that the arbitrator may be considered unfit if she does not act fairly or impartially or does not conduct the proceedings with diligence.[195]

If the challenge is not successful, in many jurisdictions the party that brought the challenge may take the issue to a court. The UNCITRAL Model Law permits such a challenge within thirty days of receipt of notice that the challenge was rejected.[196] No appeal is permitted from the court's decision. If the particular jurisdiction does not provide for review of a rejected challenge to an arbitrator, a party may have to wait until the final award to obtain court review of the decision.

As international arbitration becomes increasingly adversarial, possibilities increase that a challenge to an arbitrator is simply a tactic to delay the proceedings. It is important, however, that parties have confidence in the arbitrators and the proceedings, which means they must have the right to challenge an arbitrator who does not inspire confidence. Challenges may be very well grounded. Moreover, many arbitrators will simply withdraw if they believe the parties do not have confidence in them.

[190] UNCITRAL Model Law, art. 12(1). *See also* CIETAC rules, art. 25; LCIA Rules, art 5.3; ICDR Rules, art. 7(1).
[191] Martin Platte, *An Arbitrator's Duty to Render Enforceable Awards*, 20 J. Int'l Arb. 307 (2003).
[192] LCIA Rules, art. 32.2; ICC Rules, art. 41
[193] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 147 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).
[194] LCIA Rules, arts. 10.1, 10.3.
[195] LCIA Rules, art. 10.2.
[196] UNCITRAL Model Law, art. 13(3).

Truncated Tribunals

Most party-appointed arbitrators act properly and in good faith. It occasionally happens, however, that a party-appointed arbitrator refuses to participate in the arbitration, or submits a resignation without sufficient reason. If this takes place early in the proceedings, or if the case is one in which the interests of justice do not require a quick decision, a replacement may be appointed.[197]

Appointing a new arbitrator may, however, be impractical when the resignation, or refusal to participate, occurs late in the arbitral proceedings. Finding and appointing a replacement, and allowing the new arbitrator to become familiar with the case, inevitably causes delay. The situation is particularly aggravated if the arbitrator chooses to resign, or refuses to participate, when the stage of the tribunal's deliberations is reached. In such cases, and in cases in which a quick conclusion to the arbitration is essential, the only sensible course may be for the two remaining arbitrators to continue with the proceedings and to render an award without the participation of the third arbitrator.[198]

A number of celebrated cases provide examples of situations in which arbitral tribunals have continued proceedings and rendered awards as truncated tribunals.[199] Most of these have been ad hoc arbitrations, but there have been cases under the UNCITRAL Rules[200] and the ICC Rules[201] in which proceedings have been continued and awards rendered by truncated tribunals.

It has been argued that the underlying rationale to ensure an equal representation of the parties in the tribunal, is affected where one of the party appointed arbitrator does not participate in part of the proceedings. Furthermore it has been maintained that an award rendered by a truncated tribunal of two arbitrators is not in accordance with the agreement of the parties on a three-member tribunal.[202]

It must be noted that the the prevailing view in international arbitration practice is that truncated tribunals should be allowed to proceed in such situations and to render an award, thus preventing an obstructive and partisan arbitrator from frustrating the whole arbitration.[203]

Determination of Jurisdiction

The jurisdiction of the tribunal is fundamental to the authority and decision making power of the arbitrators. Awards rendered without jurisdiction have no legitimacy. The absence of jurisdiction is

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[197] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 4.154 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).
[198] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 4.155 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).
[199] These cases were discussed at the 1990 ICCA Congress: *see* Schwebel and Böckstiegel, *Preventing delay or disruption of arbitration*, (1991) 5 ICCA Congress Series 241, at 270– 274.
[200] Sedco Inc. v National Iranian Oil Co., Case No. 129, reprinted in (1985) 8 Iran–US CTR 34.
[201] Böckstiegel, *Preventing delay or disruption of arbitration* (1991) 5 ICCA Congress Series 271.
[202] Szurski, *The Constitution of the Arbitral Tribunal*, *ICCA Congress series no 9*, 331.
[203] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 323 (KLUWER LAW INTERNATIONAL, 2003).

one of the few recognized reasons for a court to set aside or refuse recognition and enforcement of an award.[204]

An arbitration tribunal faced with the issue of its own jurisdiction must first determine whether it is competent to deal with the specific jurisdictional question or whether it must be referred to the court. The question that follows is the form in which the decision should be made. Before it can decide on the substantive issue in dispute an arbitration tribunal must ascertain that it has jurisdiction. This does not mean that arbitrators always have to make a full inquiry into all aspects of their jurisdiction. Generally, where both parties participate in the appointment of the tribunal and introduce their respective claims and counterclaims without reservations, jurisdiction will not be an issue. Where the tribunal is concerned about the scope of the arbitration agreement, and where there is no jurisdictional challenge, it may ask the parties to confirm the jurisdiction of the tribunal over the issue before it, which will give it jurisdiction if it did not exist before.[205]

To strengthen the jurisdiction of the arbitration tribunal and to minimize challenges being used to delay or derail arbitration proceedings most modern arbitration laws employ different techniques. The central element in those efforts is the recognition of the tribunal's authority to determine its own jurisdiction or competence, the so called "competence-competence" principle.[206]

Competence-Competence

The doctrine of competence-competence, which is followed in most jurisdictions, provides that arbitrators are competent to determine their own competence – that is, they are empowered to decide their own jurisdiction to hear and determine the dispute before them.[207]

Sometimes the doctrine is criticized by those who assume that arbitrators will most likely find that they have jurisdiction in order to avoid losing a good job opportunity. However, the view in many countries is that by choosing arbitration, parties intend for an arbitrator to decide all disputes arising out of the contract, even those concerning the jurisdiction of the arbitrator. However, it is pertinent to note that not all countries endorse the competence-competence doctrine.[208]

The doctrine of competence-competence may well be related to a court's approach as to whether it will give a full or a *prima facie* review of the validity of the arbitration agreement, because a strong

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[204] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 328 (KLUWER LAW INTERNATIONAL, 2003).
[205] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 329 (KLUWER LAW INTERNATIONAL, 2003).
[206] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 331 (KLUWER LAW INTERNATIONAL, 2003).
[207] UNCITRAL Model Law, art. 16(1); French Code of Civil Procedure, art. 1465; Netherlands Arbitration Act, art. 1052(1); ICDR Rules, art. 15(1); LCIA Rules, art. 23.1; ICC Rules, art. 6(3).
[208] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 91 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).

competence-competence doctrine, as in France, will tend to result in very slight review by a court. But some jurisdictions, such as China, have no competence-competence doctrine, so the tribunal will never determine its own competence.[209]

Other countries, particularly countries that have adopted the UNCITRAL Model Law, permit arbitrators in most instances to decide the issue of an arbitration agreement's validity, viewing them as competent to determine their own competence to hear the arbitration. As noted earlier, under the Model Law, a tribunal can rule on a question of its own jurisdiction either as a preliminary question or in a final award.[210] If, however, the tribunal rules as a preliminary matter that it has jurisdiction, a party can request within thirty days that a court review the decision and determine whether jurisdiction is proper.[211]

The Model Law under Article 16(1) mentions that the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

Separability

The doctrine of separability is another technique, recognized in arbitration rules and laws, which further strengthens the jurisdiction of the arbitrator. While competence- competence empowers the arbitration tribunal to decide on its own jurisdiction, separability affects the outcome of this decision. The doctrine of separability establishes that an arbitration agreement has a separate life from the contract for which it provides the means of resolving disputes and consequently survives the invalidity or breach of the contract of which it is a clause. [212]

The doctrine of separability essentially means that the arbitration clause in a contract is considered to be separate from the main contract of which it forms part and, as such, survives the termination of the contract. The fundamental principle of arbitration law is that arbitrators have the power to rule on their own jurisdiction. This principle is often presented as a direct result of the separability doctrine. It is because of the autonomy of the arbitration agreement that any claim that the main contract is in some way void will have no direct impact on the arbitration agreement.

In other words, when a party claims that the contract is void and argues that subsequently the arbitration clause is also going to be void, the doctrine of separability will come into effect. Therefore,

[209] Jingzhou Tao & Clarisse Von Wunschheim, *Articles 16 and 18 of the PRC Arbitration Law: The Great Wall of China for Foreign Arbitration Institutions*, 23 Arb. Int'l 309, 312 (2007).
[210] UNCITRAL Model Law, art.16(3).
[211] UNCITRAL Model Law, art.16(3).
[212] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 334 (KLUWER LAW INTERNATIONAL, 2003).

by treating arbitration agreements as distinct from the main contract, separability rescues many arbitration agreements from failing simply because they are contained in contracts the validity of which is questioned.

If simply by denying that the main contract is valid one party can deprive the arbitrator of competence to rule upon that allegation, this provides a loophole for parties to reject their obligation to arbitrate. This defeats one of the main advantages of choosing arbitration over litigation as a means of dispute settlement: speed and simplicity without the time and expense of the courts. The problem is worse in international arbitration agreements, since there is no international court with compulsory jurisdiction to determine and enforce the validity of the contract.

In most jurisdictions, this doctrine of separability permits the arbitrators to hear and decide the dispute even if one side claims, for example, that the contract is terminated, or is invalid because it was fraudulently induced. Such claims would not deprive the arbitrators of jurisdiction because they pertain to the main contract and not specifically to the arbitration clause. Because the arbitration clause is considered a separate and distinct agreement, it is not affected by claims of invalidity of the main contract, and still confers jurisdiction on the arbitrators to decide the dispute.[213] The separability doctrine is embodied in numerous arbitration laws and rules.[214]

The doctrine of separability came into picture in the French judgment of *Gosset*[215] where the *Cour de Cassation* held that "*in international arbitration, the arbitration agreement, whether concluded separately or included in the contract to which it relates, shall, save in exceptional circumstances, have full legal autonomy and shall not be affected by the fact that the aforementioned contract may be invalid*."

Similarly, the court in the United States of America in *Prima Paint Corp v. Flood & Conklin Manufacturing Co.*[216] held that claims of fraudulent inducement, directed at the underlying contract and capable of rendering it voidable, did not impeach the arbitration clause contained in that contract. This was reaffirmed in *Buckeye Check Cashing Inc. v. Cardegna*[217] where the court acknowledged that the separability rule permits a court to "*enforce an arbitration agreement in a contract that the arbitrator later finds to be void.*"

The UNCITRAL Model Law on International Commercial Arbitration incorporates the doctrine of separability in Article 16(1). Similarly, in India, Section 16(1) of the Indian Arbitration Act gives

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213 MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 19 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).

214 UNCITRAL Model Law, art. 16; English Arbitration Act, § 30; UNCITRAL Rules, art. 23(1); LCIA Rules, art. 23(1).

215 Cour de Cassation, 1st Chamber May 1963 DAlloz P 545.

216 388 US 395.

217 546 US 460.

statutory recognition to the doctrine of severability. It provides that an arbitration clause, which forms part of the contract, shall be treated as an agreement independent of the other terms of the contract and a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration agreement.

An arbitration agreement which forms or was intended to form part of another agreement shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid or did not come into existence or has become ineffective, and it shall for that purpose be treated as a different agreement.[218] In view of the provisions of sub-section (1) of section 16 of the Act, the Arbitration agreement can be invalidated on the ground which relates to the arbitration agreement and not merely a consequence of the invalidity of the main agreement. The challenge must be based on facts which are specific to the arbitration agreement. Allegations that are parasitical to a challenge to the validity of the main agreement will not do.[219]

Another famous case in this context is the *Fiona Trust & Holding Corp. v. Privalov*[220]where the House of Lords held that a claim that the parties' underlying contract was obtained by fraud by bribing one of the parties employee does not effect the alleged contract's putative arbitration agreement, unless the fraud was directly and specifically towards the arbitration agreement.

The doctrine of separability serves a very significant purpose in the international arbitral process. It restricts the challenges to jurisdictional objections to be focused specifically and property on the arbitration agreement itself rather than the underlying contract. Even if the parties' underlying contract is invalid or non-existent, this will often not affect the associated arbitration agreement, which will remain fully effective as a means to resolve the parties' disputes.

Costs and Fees

An arbitration is not necessarily less expensive for the parties than a lawsuit. However, cost savings may come from the fact that there is generally no appeal on issues of fact or law. In addition, arbitral tribunals generally do not permit the same level of discovery as courts, which can reduce costs substantially. On the other hand, the parties have to pay for the arbitrators and the costs of any institution that administers the arbitration, as well as legal fees, and those costs can be extensive.[221]

In an institutional arbitration, the arbitrators' fees generally must be approved by the institution and are sometimes determined by it. Parties may discuss fees with their party-appointed arbitrator, but not with the other two arbitrators. In ad hoc arbitrations, on the other hand, in which fees may be

[218] Harbour Assurance Co. (UK) Ltd. v. Kansa General International Insurance Co. Ltd. (1993) QB 701; Section 16(1) Arbitration Act, 1996.
[219] Premium Nafta Products Ltd. v. Fili Shipping Co. Ltd. (2007) UKHL 40
[220] (2007) UKHL 40.
[221] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 156 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).

discussed, all parties should participate in discussions with all arbitrators about their fees. Sometimes the presiding arbitrator is paid more than the party-selected arbitrators because he or she has additional obligations and duties.

Normally, parties are expected to pay some initial fees and costs in advance. If the respondent refuses to pay its share, the arbitration will not go forward unless the claimant pays the respondent's share. Although this initially burdens the claimant, the payments may be allocated against the respondent in the final award.[222]

[222] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 156 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).

Chapter XIX – Interim measures

Interim or conservatory measures are also referred to as provisional measures and the same are extremely important in international arbitration and international litigation. The relief sought by means of the request of an interim measure is usually to protect the rights or interest of the alleged innocent parties. Since there may be a gap between a request for arbitration and the formation of the arbitration tribunal, the subject matter or evidence may disappear or irreparable or non-compensatory damages may occur frustrating the rights of one of the parties or making enforcement impossible.

The objective of the interim measure is to achieve the effectiveness of judicial protection so that parties in dispute can be stopped from causing prejudice, harm or causing unwarranted damages to another party.[223] However, in the past, there was certain embargo upon the power's exercised by the arbitrators and tribunals at the time of granting provisional relief.[224] In the modern era of arbitration, various national laws took the forward steps and reduced those limits and vested more powers to the arbitrators and tribunals for granting interim measures. Provisional measures or the conservatory measures are very much important in international commercial arbitration for protecting parties and their legitimate concerns.[225]

Provisional measures are also known as "pre-award", "interim", "protective" or "conservatory" measures, these terms are quite often used interchangeably[226]. However, these terms are used in specific places for specific purposes such as "provisional" or "interim" orders are made prior to the final awards where the relief granted is not usually framed for protecting the parties during the course of proceedings and such orders are subject to alteration, modification or even elimination at the time of final award. E.g. provisional or interim decisions include grants of interim protective measures aimed at preserving the status quo or interim determinations (such as permitting a party to remain in possession of property or to exercise contract rights) during the pendency of a proceeding.[227]

On the other hand, "protective" or conservatory" measures are used when relief granted is for protecting or conserving the rights of the parties. E.g. "protective" measures include provisional or

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[223] *Opinion of Advocate General Tesauro, The Queen v. Secretary of State for Transp., ex parte Factortame Ltd*, Case No. C-213/89, [1990] E.C.R. I-02433, ¶18 (E.C.J.).

[224] GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 2427 (2ND ED. KLUWER LAW INTERNATIONAL 2014).

[225] GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 2427 (2ND ED. KLUWER LAW INTERNATIONAL 2014).

[226] UNCITRAL Model Law, Art. 9 ("interim measures" and "interim measure of protection"); Swiss Law on Private International Law, Art. 183 ("provisional or conservatory measures"); 2012 ICC Rules, Art. 28(2) ("interim or conservatory measures"); LCIA Rules, Art. 25 ("interim and conservatory measures"); ICSID Rules, Rule 39 ("provisional measures for the preservation of [a party's] rights").

[227] GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 2428 (2ND ED. KLUWER LAW INTERNATIONAL 2014).

final orders prohibiting a party from engaging in particular conduct (e.g., using intellectual property rights or other property)."[228]

One of the leading definitions is as follows:

"Properly defined, "provisional measures" are awards or orders issued for the purpose of protecting one or both parties to a dispute from damage during the course of the arbitral process. Most often, as discussed below, provisional measures are "intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought from the [tribunal] having jurisdiction as to the substance of the case"[229]

According to the European Court of Justice, interim measures are "*intended to preserve a factual or legal position so as to safeguard rights the recognition of which sought from the court having jurisdiction as to the substance of the case*".[230] The aim is to redistribute the risk for a duration of the arbitration shifting it from the party applying for the interim measure to the other party.

The 2006 revisions to Article 17 of the UNCITRAL Model Law provide a representative list of "interim measures" as follows:[231]

> "*An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to*:
>
> a. *Maintain or restore the status quo pending determination of the dispute;*
>
> b. *Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;*
>
> c. *Provide a means of preserving assets out of which a subsequent award may be satisfied; or*
>
> d. *Preserve evidence that may be relevant and material to the resolution of the dispute*

However, it must be remembered that the arbitrator or tribunal needs to be empowered to order interim measures. The Model Law provides for an 'opt-out' mechanism where "unless the parties

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228 GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 2428 (2ND ED. KLUWER LAW INTERNATIONAL 2014).
229 Van Uden Maritime BV v. Kommanditgesellschaft in Firma Deco-Line, Case No. C-391/95, [1998] E.C.R. I-7091, 7133 (E.C.J.).
230 Van Udel Maritime BV, trading as Van Uden Africa Line v. Kommanditgesellschaft in Firma Deco-Line [1998] ECT 1 7091, 7133.
231 Article 17 (2), UNCITRAL Model Law, 2006 Revision.

agree otherwise", the arbitrators can grant interim measures. The powers of arbitrators to grant an interim measure can be acknowledged by examining three specific questions:[232]

a. Applicability of international conventions;

b. Applicable national laws; and

c. The parties to an arbitration agreement, including institutional rules

d. Powers of arbitrators to grant interim measure under International conventions

International conventions do not directly address the powers of the arbitrators to grant the interim measure, e.g. the Geneva Protocol Convention and the Geneva Convention and the New York Convention also do not specify anything directly in regard to the powers of the arbitrator for making any interim orders and the same is with the Inter-American convention.[233] However, the European Convention unlike the above-mentioned convention, acknowledges provisional relief under Article VI (4):

> *"[a] request for interim measures or measures of conservation addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement, or regarded as a submission of the substance of the case to the court*"

The language used in the aforementioned provision enables the parties to seek provisional or interim measures from the national courts, without waiving their right to arbitrate or violating the agreement entered between the parties.[234] Furthermore, the ICSID Convention, under Article 47, recognizes the power of the arbitral tribunal to grant provisional relief:

> *"Except as the parties otherwise agree, the Tribunal may if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party."*

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[232] JULIAN LEW, COMMENTARY ON INTERIM AND CONSERVATORY MEASURES IN ICC ARBITRATION CASES, 11(1) ICC CT. BULL. 23, 30 (2000).

[233] GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 2429 (2ND ED. KLUWER LAW INTERNATIONAL 2014).

[234] GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 2429 (2ND ED. KLUWER LAW INTERNATIONAL 2014).

The ICISID convention ensures power to the tribunal to and subsequently rule upon the request of the provisional measure and the orders passed under Article 47 are binding in nature.[235]

U.S. Federal Arbitration Act

The FAA does not talk about the powers of the arbitrators to grant the provisional measure. However, the courts of the United States have now broadly recognized the power of the arbitral tribunal to grant interim measure.[236] Earlier courts use to interpret the arbitration agreement between the parties narrowly and held that the arbitrator's lack the power of granting the interim orders.[237] As opposed to the earlier times now, the lower courts of the United States has held that arbitrators are authorized to grant provisional measure unless otherwise agreed by the parties.[238]

In the case of *Next Step Med. Co. v. Johnson & Johnson Int'l*,[239] , the lower court of the United States held that: "*arbitrators normally have the power to grant interim relief unless the parties specify otherwise in the contract*". Subsequently, under the FAA, in the case of *Reins. Mgt Corp. v. Ohio Reins. Corp*[240], the court held that "*temporary equitable relief in arbitration may be essential to preserve assets or enforce performance which, if not preserved or enforced, may render a final award meaningless*"

Certainly, refusing to give effect to an arbitration agreement, which provides arbitrators power to order interim measure or provisional relief is contrary to the FAA basic principle that an agreement to arbitrate is fully enforceable; that rule incorporates disputes over interim relief and all other types of disputes, permitting the agreement between the parties for grant of interim relief.[241]

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235 RSM Prod. Corp. v. Repub. of Grenada, Award in ICSID Case No. ARB/10/6 of 14 October 2010; Occidental Petroleum Corp. v. Repub. of Ecuador, Decision on Provisional Measures in ICSID Case No. ARB/06/11 of 17 August 2007.

236 GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 2436 (2ND ED. KLUWER LAW INTERNATIONAL 2014).

237 Swift Indus., Inc. v. Botany Indus., Inc., 466 F.2d 1125, 1134 (3d Cir. 1972); Charles Constr. Co. v. Derderian, 586 N.E.2d 992 (Mass. 1992); Recyclers Ins. Group Ltd v. Ins. Co. of Am., 1992 WL 150662 (E.D. Pa.).

238 Toyo Tire Holdings of Ams. Inc. v. Cont'l Tire N. Am., Inc., 609 F.3d 975 (9th Cir. 2010); Arrowhead Global Solutions, Inc. v. Datapath, Inc., 166 F.Appx. 39, 44 (4th Cir. 2006); Meadows Indem. Co. Ltd v. Arkwright Mut. Ins. Co., 1996 WL 557513 (E.D. Pa.); Konkar Maritime Enter., SA v. Compagnie Belge d'Affretement, 668 F.Supp. 267, 271 (S.D.N.Y. 1987); Compania Chilena De Navegacion Interoceanica SA v. Norton, Lilly & Co., 652 F.Supp. 1512, 1517 (S.D.N.Y. 1987); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. DeCaro, 577 F.Supp. 616, 625 (W.D. Mo. 1983).

239 619 F.3d 67, 70239.

240 935 F.2d 1019, 1022-23 (9th Cir. 1991).

241 GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 2437 (2ND ED. KLUWER LAW INTERNATIONAL 2014).

The courts in the United States has upheld that, it is implied that the arbitrators have the power to grant interim measure by virtue of arbitration agreement between the parties.[242] As one of the courts of the United States also held that:

> *"[I]n general…, in the absence of an agreement or statute to the contrary, an arbitrator has inherent authority to order a party to provide security while the arbitration is continuing. It is reasonable to assume that parties, in agreeing to arbitration, implicitly intended that the arbitration not be fruitless and that interim orders to preserve the status quo or to make meaningful relief possible would be proper. In such a circumstance, the arbitrator's authority to act would reasonably be implied from the agreement to arbitrate itself."*[243]

Various commentators are of the opinion that the arbitration tribunals have the power to grant provisional relief.[244] Moreover, now there is no embargo on the extent of powers exercised by the tribunals other than any limits prescribed in the agreement to arbitrate between the parties. Moreover, Section 8 (b) of the revised Uniform Arbitration Act provides as follows:

> *"After an arbitrator is appointed and is authorized and able to act: (1) the arbitrator may issue such order for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, to the same extent and under the same conditions as if the controversy were the subject of a civil action."*

English Arbitration Act

The English Arbitration Act of 1996 mentions about provisional measure in an indirect form. It provides that, absent to any contrary agreement, an arbitral tribunal may issue orders concerning the preservation, detention, inspection, or sampling of property which is the subject matter of the dispute,[245] and for preserving evidence. Moreover, for other types of an interim measure, "*the parties are free to agree that the tribunal shall have the power to order on a provisional basis any relief which it would have the power to grant in a final award*."[246] These provisions of English Arbitration Act empowers the English seated arbitral tribunal to grant interim measure unless otherwise agreed by

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[242] Next Step Med. Co. v. Johnson & Johnson Int'l, 619 F.3d 67, 70 (1st Cir. 2010); Toyo Tire Holdings of Am. Inc. v. Cont'l Tire N. Am., Inc., 609 F.3d 975 (9th Cir. 2010); Arrowhead Global Solutions, Inc. v. Datapath, Inc., 166 F.Appx. 39, 44 (4th Cir. 2006); Banco de Seguros del Estado v. Mut. Marine Office, Inc., 344 F.3d 255 (2d Cir. 2003); Island Creek Coal Sales Co. v. City of Gainesville, 729 F.2d 1046 (6th Cir. 1984).

[243] Charles Constr. Co. v. Derderian, 586 N.E.2d 992 (Mass. 1992); *See also* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (U.S. S.Ct. 1991); Banco de Seguros del Estado v. Mut. Marine Office, Inc., 344 F.3d 255 (2d Cir. 2003). Compare Swift Indus., Inc. v. Botany Indus., Inc., 466 F.2d 1125 (3d Cir. 1972).

[244] C.C. Higgins, *Interim Measure in Transnational Martime Arbitration*, 65 Tulane L. Rev. 1519, 1535-36. (1990).

[245] §38(4), English Arbitration Act, 1996.

[246] GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 2438 (2ND ED. KLUWER LAW INTERNATIONAL 2014).

the parties, tribunals are also authorized to order any relief that it could grant in its final award.[247] However, it is pertinent to mention that the approach enshrined under the English Arbitration Act of 1996 is less desirable as compared to the FAA and the Model Law.[248]

[247] GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 2439 (2ND ED. KLUWER LAW INTERNATIONAL 2014).

[248] Gary B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 2439 (2ND ED. KLUWER LAW INTERNATIONAL 2014).

Chapter XX – Limitations on the Power of Arbitral Tribunal to Grant Provisional Relief

Across the globe, the power of the arbitral tribunal to grant an interim measure is well recognized in the community of international arbitration. However, these powers do have certain restrictions. These restrictions are the result of the inherent nature of the arbitral process, which is a byproduct of contractual legal relationship entered between the parties, these limitations are also result of domestic laws of the country.

Arbitral tribunal lacks the power for granting interim relief against the third party. It is pertinent to note that the powers of the arbitral tribunal are restricted to the parties to the arbitration and the respective agreement entered between the parties.[249] As per D. CARON[250], "*an arbitral tribunal's jurisdiction encompasses only the parties before it [and] interim measures may not be directed to non-parties*". Resultantly, an arbitrator can grant provisional measure only against the party to the arbitration. They do not possess the power to order against the third party e.g. attachment or preservation of property held by a third party.[251]

However, the limitation is evident in UNCITRAL Model Law and some other national legislation which authorizes an arbitral tribunal to "order any party to take such interim measures of protection" [252] deemed necessary. This is also made obvious by the Belgian Judicial Code, which provides that *"[w]ithout prejudice to the powers accorded to the courts and tribunals by virtue of article 1683, and unless otherwise agreed by the parties, the arbitral tribunal may order any interim or conservatory measures it deems necessary. However, the arbitral tribunal may not authorize attachment orders*".[253]

When there are no limits envisaged upon the powers exercised by the arbitrator's with respect to the third party, then too, it is implied that the arbitral tribunal's authority is limited to the parties involved in the arbitration. Moreover, the tribunals cannot order the attachment orders of assets which are in control or custody of the third party.[254]

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[249] Christopher Huntley, *The Scope of Article 17: Interim Measures Under the UNCITRAL Model Law*, 740 PLI/Lit. 1181, 86 (2005); E Schwartz, *The Practices and Experience of the ICC Court, in ICC, Conservatory and Provisional Measures in International Arbitration* 45, 59 (1993).

[250] D. CARON & L. CAPLAN, THE UNCITRAL ARBITRATION RULES: A COMMENTARY 517 (2D ED. 2013).

[251] Julian Lew, *Commentary on Interim and Conservatory Measures in ICC Arbitration Cases*, 11(1) ICC Ct. Bull. 23, 25 (2000).

[252] Article 17, UNCITRAL Model Law; §593(1) Austrian ZPO; §25(4), Swedish Arbitration Act; Article 17 (1), Greek International Commercial Arbitration Law.

[253] Belgian Judicial Code, Art. 1691; French Code of Civil Procedure, Art. 1468.

[254] McDonnell, *The Availability of Provisional Relief in International Commercial Arbitration*, 22 Colum. J. Transnat'l L. 273, 283 (1983-1984).

Further, the arbitral tribunal generally lacks the authority to enforce the provisional measure because the enforcement of orders passed by the tribunals is done by the courts at the application of one or the other party.[255]

Similarly, with the final relief, an arbitral tribunal lacks the power to compel the partied for direct compliance of the award or interim awards[256]. This is also evident from the language of the Swiss Law on Private International Law, which provides that "*[i]f the party so ordered [by the arbitral tribunal to take specified provisional measures] does not comply therewith voluntarily, the arbitral tribunal may request the assistance of the competent court*."[257] Even on the absence of such verbatim, it is abundantly clear that, in all arbitration's regime, the tribunal cannot order to adopt a coercive measure to enforce its own final awards. However, an arbitral tribunal can procure the compliance of the provisional measure indirectly through express or implied threat of adverse inferences against a non-compliant party.[258] Relatively various commentators are of the view that[259]: *"[T]he fact that arbitral tribunals can draw adverse conclusions from failure to comply with their decisions concerning [provisional] measures encourages voluntary compliance with such orders"*

The legislation has limited the power of the arbitral tribunal to grant the provisional relief.[260] The original text of UNCITRAL Model law 1985 grants power to the tribunal to issue provisional measure which they opined to be necessary for "in respect of the subject matter of the dispute".[261] That Article 17 of the UNCITRAL Model Law, limits the scope of the arbitral tribunal for granting interim measure related to "preserve the status quo or to prevent the disappearance of assets"[262]. Such 'narrow interpretation' of Article 17 refers to the subject matter of the dispute is totally justified on the grounds that "a broad interpretation of the subject matter could lead to a slippery slope whereby the tribunal will define the all-encompassing term to include anything and everything"[263]

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255 GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 2446 (2ND ED. KLUWER LAW INTERNATIONAL 2014).

256 GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 2447 (2ND ED. KLUWER LAW INTERNATIONAL 2014).

257 S. BERTI, IN S. BERTI ET AL. (EDS.), INTERNATIONAL ARBITRATION IN SWITZERLAND ART. 183, ¶16 (2000).

258 GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 2448 (2ND ED. KLUWER LAW INTERNATIONAL 2014).

259 JULIAN LEW, COMMENTARY ON INTERIM AND CONSERVATORY MEASURES IN ICC ARBITRATION CASES, 11(1) ICC CT. BULL. 23, 24 (2000). *See also* E Schwartz, *Conservatory and Provisional Measures in International Arbitration* 45, 59 (1993).

260 GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 2448-2449 (2nd ed. Kluwer Law International 2014).

261 Article 17, UNCITRAL Model Law.

262 A. REDFERN & M. HUNTER (EDS.), LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION ¶7.23 (5TH ED. 2009).

263 Christopher Huntley, *The Scope of Article 17: Interim Measures Under the UNCITRAL Model Law*, 740 PLI/Lit. 1181, 78 (2005).

This particular measure is of the general support for the interpretation of Article 17 in the Model Law drafting history[264]. However, the better view is that the drafting history is ambiguous[265] and that such interpretations are not in coherence with the objective of Model Law[266].

The prerequisite that the interim measure to be issued in accordance with the "subject matter of the dispute" shall not limit the power of the tribunal, in regard to the items whose ownership is in dispute. However, Article 17 can be understood and interpreted as extending to the preservation of the contractual rights or the stability of amongst the party.

In cases of dispute concerning the continuing existence or nature of the contractual relationship between the parties, the interim measure for preserving all contours of that relationship is properly regarded as being "in respect of the subject matter of the dispute".[267]

Moreover, the same analogy can be extended for preserving the assets which are sufficient to satisfy the claims of the party e.g. security for cost or damages. Such type of reliefs is properly considered as being 'in respect' of the subject matter of the dispute between parties because it is "necessary" in order that the dispute between the parties can be resolved fairly.[268]

The text of Article 17 of the Model Law was revised in 2006, subsequently, Article 17 (1) was amended to omit the prerequisite that interim measure or provisional measure be "in the subject matter of dispute". Whereas, this particular amendment streamlined the Model Law, endorsing the broad authority of the arbitral tribunal to grant interim measure. However, the 2006 amendment clarified the existing subject matter of the Model Law.[269]

The tribunal lacks the power to order provisional relief until its constituted: it is pertinent that the arbitral tribunal cannot grant interim orders until it is duly constituted. Similarly, the arbitral institution rules impose more demanding requirements. Prior to the constitution of the tribunal, it does not have powers to act or issue any sort of relief.

Moreover, it is evident, that such type of limitations has substantial practical significance. However, the most crucial time for seeking interim measure is at the outset of the parties to the dispute, where, one party may seek to dispose of relevant asset, property or evidence to cause prejudice or alter the

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264 Report of the Secretary-General on the Analytical Commentary on Draft Text of A Model on International Commercial Arbitration, U.N. Doc. A/CN.9/264, Art. 9, ¶4, XVI Y.B. UNCITRAL 104, 115 (1985).

265 H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary,* 332-33 (1989).

266 Katran Shipping Co. v. Kenven Transp. Ltd, [1992] 1 HKC 538 (H.K. Ct. First Inst.).

267 GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 2449 (2ND ED. KLUWER LAW INTERNATIONAL 2014).

268 D. CARON & L. CAPLAN, THE UNCITRAL ARBITRATION RULES: A COMMENTARY 517-18 (2D ED. 2013).

269 GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 2450 (2ND ED. KLUWER LAW INTERNATIONAL 2014).

commercial or contractual relationship of the party or can take other steps to forestall arbitration proceedings.[270]

Meanwhile in absence of tribunal to which a request of the arbitral tribunal may be initiated in the initial time when the dispute arose may effectively thwart the tribunal for granting provisional measure.[271] Moreover, in many jurisdictions confer national courts with the concurrent jurisdiction to grant interim measure before the constitution of the tribunal. Likewise, in India, courts have concurrent jurisdiction for the grant of the interim measure before the constitution of the tribunal, envisaged under section 9 of the Arbitration and Conciliation Act, 1996:

Interim measures etc. by Court.—

1. *A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a Court-*
    - i. *for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or*
    - ii. *for an interim measure of protection in respect of any of the following matters, namely:-*
        - a. *the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;*
        - b. *securing the amount in dispute in the arbitration;*
        - c. *the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorizing any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;*
        - d. *interim injunction or the appointment of a receiver;*

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[270] Gary B. Born, Chapter 17 Provisional Relief in International Arbitration in International Commercial Arbitration 2450 (2nd ed. Kluwer Law International 2014).

[271] Gary B. Born, Chapter 17 Provisional Relief in International Arbitration in International Commercial Arbitration 2451 (2nd ed. Kluwer Law International 2014).

2. *such other interim measure of protection as may appear to the Court to be just and convenient and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it. 1 Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under subsection (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.*

3. *Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.*

Specialized Institution Rules

In this background, it is imperative to refer to the specialized institutional rules that govern or provide peculiar kind of interim relief such as Pre- Arbitral referees and Emergency arbitration. The ICC Rules was the forerunner in adopting pre-arbitral referee's procedure. The rules provide for the specialized procedure for provisional measures, issued by a 'referee' appointed for the purpose of issuing emergency relief before the constitution of the arbitral tribunal.[272] The ICC pre-arbitral referee rules came in force in 1990 but were used in very few avenues,[273] because for using ICC rules, parties need to agree in writing for the use of such specialized rules. However, in the early stage of negotiation parties usually, shift their focus from such intricacies which can arise in the future.

As far as emergency arbitration is concerned, ICDR in 2006 was the first institution to adopt the concept of emergency arbitrator and this procedure adopted a more ambitious stance for approaching the problem of the interim measure at the beginning of arbitration proceeding. In emergency arbitrations, a party can seek the appointment of an "emergency arbitrator" prior to the formation of the tribunal.[274]

The 2012 version of ICC Rules followed the same approach for adopting the provisions in pursuant to 'emergency arbitrators'. According to it, emergency arbitration was referred to when a party "*needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal*."

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[272] GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 2451 (2ND ED. KLUWER LAW INTERNATIONAL 2014).

[273] Gaillard & Pinsolle, *The ICC Pre-Arbitral Referee: First Practical Experience*, 20 Arb. Int'l 13 (2004); Christian Hausmaninger, *The ICC Rules for A Pre-Arbitral Referee Procedure: A Step Towards Solving the Problem of Provisional Relief in International Commercial Arbitration*, 7 ICSID Rev Inv. L.J. 82 (1992).

[274] Dunning et al., Using Article 37 of the ICDR International Arbitration Rules: Obtaining Emergency Relief, 62 Disp. Res. J. 68 (2007); M. Gusy, J. Hosking & F. Schwarz, *A Guide to the ICDR International Arbitration Rules*, 304-11 (2011); Lemenez & Quigley, *The ICDR's Emergency Arbitrator Procedure in Action, Part I: A Look at the Empirical Data*, 63 Disp. Res. J. 60 (2008); E. Schwartz, *Interim and Emergency Relief in Arbitration Proceedings*, 63 Disp. Res. J. 56 (2008); Sheppard & Townsend, *Holding the Fort Until the Arbitrators Are Appointed: The New ICDR International Emergency Rule*, 61 Disp. Res. J. 75 (2006).

The concept of 'emergency arbitrator' aims toward creating a temporary solution, however, the parties are bound to comply with the emergency arbitrators' orders. Moreover, the tribunal is not bound by the orders of the emergency arbitrators.[275]

Similarly, other institutions such as NAI, SIAC, SWISS, SCC, and ACIA adopted the approach of ICC Rule of 2012. In case of urgency a sole emergency arbitrator to be appointed for resolving the request of an interim measure, arose prior to the constitution of the arbitral tribunal.[276] It is pertinent to note that all these institutions do not mandate the separate agreement between the parties. As GARY BORN suggests:[277]

> "*At the same time, these Rules all require very prompt and professional action by the arbitral institution and emergency arbitrator, which imposes burdens and risks on the institution, and thus, the parties. Despite this, unless practical application in coming years is to the contrary, these approaches appear to be sensible steps towards improving the arbitral process*."

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[275] 2012 ICC Rules, Art. 29(1). Articles 29(1)(4) and Appendix V (Emergency Arbitration Rules) are collectively defined as the "Emergency Arbitrator Provisions".

[276] 2012 Swiss Rules, Art. 43; 2011 ACICA Rules, Art. 28(1); 2010 NAI Rules, Art. 42; 2010 SCC Rules, Appendix II, Art. 8 ("Emergency decisions on interim measures" involving appointment of special "emergency arbitrator"); 2013 SIAC Rules, Art. 26(2); Christopher Boog, *Swiss Rules of International Arbitration – Time to Introduce An Emergency Arbitrator Procedure?*, 28 ASA Bull. 462 (2010).

[277] GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 2453 (2ND ED. KLUWER LAW INTERNATIONAL 2014).

Chapter XXI – Standards for Provisional Relief

There are certain prerequisite, for grant of interim measures, such as (a) a risk of serious or irreparable harm to the claimant; (b) urgency; and (c) no prejudgment of the merits; (d) while some tribunals also require the claimant to establish a prima facie case on the merits; (e) a prima facie case on jurisdiction, and to establish that the balance of hardships weighs in its favor, tribunal also looks towards the nature of relief sought by the parties, and the injury suffered by each party, for final adjudication as to the grant of provisional measure. According to the leading authority GARY BORN:[278]

> *"In particular, some provisional measures (e.g., preserving the status quo or ordering performance of a contract or other legal obligation) will typically require strong showings of serious injury, urgency and a prima facie case, while other provisional measures (e.g., preservation of evidence, enforcement of confidentiality obligations, security for costs) are unlikely to demand the same showings."*

As far as risk of 'reparable' or 'serious' injury is concerned, the onus is upon the party to prove that the if provisional relief not granted, the party will suffer "serious", "substantial" or "irreparable" injury.[279] In other words, "*the Arbitral Tribunal may only order provisional measures, if the requesting party has substantiated the threat of a not easily reparable prejudice*".[280] Some authors are of the view that "*it is not appropriate to grant a measure where no irreparable or substantial harm comes to the movant in the event the measure is not granted.*"[281]

Some proponents argue that "irreparable" harm is a prerequisite for the grant of the interim measure. In the case of *Tokios Tokelés v. Ukraine*,[282] it was held that, "*a provisional measure is necessary where the actions of a party 'are capable of causing or of threatening irreparable prejudice to the rights invoked*" and subsequently in the case of *Plama Consortium Ltd v. Repub. of Bulgaria*[283], it was held that, "provisional measures is must "to avoid the occurrence of irreparable harm or damage". Furthermore, the Permanent Court of International Justice has ascertained that injury is irreparable

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[278] GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 2468 (2ND ED. KLUWER LAW INTERNATIONAL 2014).

[279] W. Craig, W. Park & J. Paulsson, *Annotated Guide to the 1998 ICC Arbitration Rules* 137 (1998); K.-P. Berger, *International Economic Arbitration* 336 (1993); JULIAN LEW, COMMENTARY ON INTERIM AND CONSERVATORY MEASURES IN ICC ARBITRATION CASES, 11(1) ICC CT. BULL. 23 (2000).

[280] Interim Award in ICC Case No. 8786, 11(1) ICC Ct. Bull. 81, 83-84 (2000). See also Interim Award in ICC Case No. 8894, 11(1) ICC Ct. Bull. 94, 97 (2000); Islamic Repub. of Iran v. U.S.A., Decision No. DEC 116-A15(IV) & A24-FT of 18 May 1993, 29 Iran-US C.T.R. 214 (1993).

[281] JULIAN LEW, COMMENTARY ON INTERIM AND CONSERVATORY MEASURES IN ICC ARBITRATION CASES, 11(1) ICC CT. BULL. 23, 28 (2000).

[282] Procedural Order No. 3 in ICSID Case No. ARB/02/18 of 18 January 2005.

[283] Order in ICSID Case No. ARB/03/24 of 6 September 2005.

where it "*could not be made good simply by the payment of an indemnity or by compensation or restitution in some other material form.*"[284]

In the case of *Behring Int'l, Inc. v. Islamic Repub. of Iran*, It was held that, concept of irreparable prejudice in international law is broader than Anglo-American law concept of irreparable injury and does not necessarily require showing that injury complained of is not remediable by an award of damages (i.e., where there is no certain pecuniary standard for the measure of damage).[285]

The injury required for grant of interim measure is not 'irreparable' harm in what is perceived to be the Anglo - American sense, but as an alternative, showing substantial, grave, or serious injury is enough. However, in the United States, the 'irreparable harm' "*is a harm that cannot readily be compensated by an award of damages. If this standard were strictly applied, most commercial disputes arbitrated under the UNCITRAL Rules would not qualify for interim protection under Article 26, since the award of money damages can, at least in theory, rectify nearly all commercial losses*"[286]

It is not easy in the reign of international commercial arbitration to determine 'irreparable harm' which cannot be compensated by money damages in a final award. 'Irreparable harm' requirement has set a limit in the cases pertaining to the provisional measure especially when one party is insolvent or in the cases where enforcement of the arbitral award would be impossible.[287]

GARY BORN suggests that for the formulation of the requirement for serious prejudice obscures more complex considerations. On close examination, tribunals appear to consider:[288]

a. the extent to which the claimant will suffer a serious injury during the arbitral proceedings;

b. the extent to which such injury appears compensable in a final award; and

c. the extent to which it is just or fair that the burden or risk of loss during the arbitral proceedings fall on one party or another (including considerations such as whether one party is seeking to alter the existing status quo to its advantage during the arbitral proceeding, the likelihood of success of each party on the merits of its case and the relative hardship to each of the parties if provisional measures are or are not granted)

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284 Denunciation of the Treaty of 2 November 1865 between China and Belgium, PCIJ Series A/B, No. 8, 7 (P.C.I.J. 1927).

285 Interim and Interlocutory Award in IUSCT Case No. ITM/ITL 52382-3 of 21 June 1985, 8 Iran-US C.T.R. 23 (1985).

286 S. Baker & M. Davis, *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran-United States Claims Tribunal*, 139-40 (1992).

287 D. CARON & L. CAPLAN, THE UNCITRAL ARBITRATION RULES: A COMMENTARY 521 (2D ED. 2013).

288 GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 2471 (2ND ED. KLUWER LAW INTERNATIONAL 2014).

Moreover, some authorities have persuaded this as a "balancing interest" or a "balancing of hardships". The 2006 and 2010 amendment to UNCITRAL Model in Article 12 and Article 26 has adopted a similar approach[289]:

"[h]arm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted."[290]

That a party seeking interim relief need not prove the 'serious injury' is certain to occur but they need to establish the existence of a sufficient risk or threat that can give rise to serious or grave harm if provisional relief is not granted. Thus, "*the Arbitral Tribunal may only order provisional measures if the requesting party has substantiated the threat of a not easily reparable prejudice*."[291] Moreover, a similar approach is taken in the investment arbitration in the case of *Occidental Petroleum Corp. v. Repub. of Ecuador*[292], where the tribunal held that a measure is urgent where action prejudicial to the rights of either party is likely to be taken before such final decision is given. Similarly, in the case of *Avena & Other Mexican Nationals (Mexico v. USA)*, the ICJ held that[293] "*interim measures of protection when "prejudice was probable or possible," or where serious harm could "not be excluded.*"

As far as Urgency is concerned, various tribunals across the jurisdiction require proof of 'urgency' and tribunal need to be persuaded that immediate or at least promptly an interlocutory action is mandated in order to prevent the irreparable damage.[294] Moreover, HUNTLEY states that: *"Implicit within the term 'necessary' is the notion that the party requesting a measure faces harm to the rights it is pursuing in the arbitration and that harm is so imminent that the requesting party cannot await the tribunal's final decision on the merits"*[295]

Another reputed scholar S. ROSENNE states the relevance of the urgency of the matter*" is "estimated period likely to elapse before the decision of the court or tribunal on the principal claim," because*

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[289] Award in Summary Arbitral Proceedings in NAI Case No. 2212 of 28 July 1999, XXVI Y.B. Comm. Arb. 198 (2001).
[290] UNCITRAL Model Law, 2006 Revisions, Art. 17A (1) (a); 2010 UNCITRAL Rules, Rule 26(3)(a).
[291] Interim Award in ICC Case No. 8786, 11(1) ICC Ct. Bull. 81, 83-84 (2000).
[292] Decision on Provisional Measures in ICSID Case No. ARB/06/11 of 7 August 2007.
[293] Order of 5 February 2003, [2003] I.C.J. Rep. 77, 91 (I.C.J).
[294] Biwater Gauff (Tanzania) Ltd v. United Repub. of Tanzania, Procedural Order No. 1 in ICSID Case No. ARB/05/22 of 31 March 2006; Tokios Tokelés v. Ukraine, Procedural Order No.3 in ICSID Case No. ARB/02/18 of 18 January 2005.
[295] Christopher Huntley, THE SCOPE OF ARTICLE 17: INTERIM MEASURES UNDER THE UNCITRAL MODEL LAW, 740 PLI. 1181, 75 (2005).

urgency exists where requested measure is "something that cannot wait until the final decision in the case."[296]

According to GARY BORN, the "urgency" requirement is closely related to the "serious harm" requirement. The pre-award relief is generally not ordered until such time it is necessary to prevent such serious damage from taking place. The exact degree of "urgency" which is required varies and can be affected by practical considerations.[297] Other proponents argue that, when there is a material risk of grave harm, the arbitral tribunals fail to draw a line in the timing of orders of provisional relief. However, the tribunals do not take time in granting the provisional relief when there are dire consequences on the head of the parties.[298] Tribunal in the case of *Tokios Tokelés v. Ukraine*[299], held that "*a measure is urgent where action prejudicial to the rights of either party is likely to be taken before such final decision is taken*."

With respect to the no prejudgment of merits, arbitral tribunals must refrain themselves from pre judging the dispute[300]. An arbitral tribunal while adjudicating upon the provisional tribunal ought not to grant the relief prayed by the parties in the final award.[301] It is pertinent to note that the pre - judgment requirement is an important notion that needs to be covered and following things need to be kept in mind:[302]

a. a grant of provisional measures may not preclude the tribunal from ultimately deciding the arbitration in any particular manner after the parties have presented their cases (e.g., provisional measures should not make it more difficult for the tribunal to render a decision in favor of one party or the other);

b. provisional measures have no res judicata or similar preclusive effect with regard to a decision on the merits;

c. a tribunal must take care to ensure that it does not, in considering and deciding an application for provisional measures, prejudge the outcome of the arbitration or even partially close its mind to one party's submissions or deny one party an opportunity to be heard in subsequent proceedings; and

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296 S. Rosenne, *Provisional Measures in International Law*, 135 (2005).

297 GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 2475 (2ND ED. KLUWER LAW INTERNATIONAL 2014).

298 D. CARON, L. CAPLAN & M. PELLONPÄÄ, THE UNCITRAL ARBITRATION RULES: A COMMENTARY 548 (2006).

299 Procedural Order No. 3 in ICSID Case No. ARB/02/18 of 18 January 2005.

300 JULIAN LEW, COMMENTARY ON INTERIM AND CONSERVATORY MEASURES IN ICC ARBITRATION CASES, 11(1) ICC CT. BULL. 23, 27 (2000).

301 JULIAN LEW, COMMENTARY ON INTERIM AND CONSERVATORY MEASURES IN ICC ARBITRATION CASES, 11(1) ICC CT. BULL. 23, 27 (2000).

302 GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 2477-2478 (2ND ED. KLUWER LAW INTERNATIONAL 2014).

d. The same relief that is sought as final relief may ordinarily be issued on a provisional basis, subject to later revision (although that relief might in some cases also be issued as partial final relief prior to a final award).

Prima facie case or probability of success on merits is another important requirement for a grant of provisional measure. Various authors are of the opinion that, the party seeking interim measure must show prima facie case on merits of his case before the tribunal,[303] the tribunal in one unidentified case held that *"the present Arbitral Tribunal is not a referee jurisdiction, but the jurisdiction of the merits seized of provisional measures…The powers of the merits ruling provisionally are not limited like those of the referee judge and a serious dispute does not prevent a broader appreciation, although on a provisional basis, of the respective arguments of the parties."*[304]

The tribunal should consider the prima facie case presented by the parties in respect of their claims while adjudicating whether to grant interim measure or not. It is pertinent to mention that the prima facie case does not prejudge the merits of the dispute, whereas it is purely a provisional assessment based upon a few early submissions and evidence.[305]

It is necessary for the tribunal to assess the existence of a prima facie case in order to make a commercially-sensible and rational decision pursuant to interim measure. For example, if a claimant licensee has failed to present a prima facie case of wrongful termination of a license agreement, while the respondent licensor has presented a comprehensive defense as to why it was contractually entitled to terminate, then a tribunal should be quite hesitant to order the respondent licensor to continue to permit use of licensed property and to supply updates and similar assistance on a provisional basis during the pendency of the arbitration.[306]

In matters, where parties are seeking interim measure has made a reliable, but no case of serious harm, during the arbitration proceeding, then consideration of the merits of the case appears both appropriate and sensible. In such situation the pertinent question arises is that how interim damage in the course of arbitral proceeding should be apportioned during the pendency of the arbitral proceeding so that the rights of the parties can be determined?

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[303] M Wirth, *Interim or Preventive Measures in Support of International Arbitration in Switzerland*, 18 ASA Bull. 31, 37-38 (2000).

[304] Partial Award in Unidentified ICC Case, discussed in E. A. Schwartz, *The Practices and Experience of the ICC Court, in ICC, Conservatory and Provisional Measures in International Arbitration* 45, 60 (1993). Marc Blessing, STATE ARBITRATIONS: PREDICTABLY UNPREDICTABLE SOLUTIONS? 22 J. Int'l Arb. 435 (2005); D. CARON & L. CAPLAN, THE UNCITRAL ARBITRATION RULES: A COMMENTARY 523 (2D ED. 2013); ALI YESILIRMAK, INTERIM AND CONSERVATORY MEASURES IN ICC ARBITRAL PRACTICE, 11(1) ICC CT. BULL. 31, 34 (2000).

[305] GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 2479 (2ND ED. KLUWER LAW INTERNATIONAL 2014).

[306] GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 2479 (2ND ED. KLUWER LAW INTERNATIONAL 2014).

Prima Facie Jurisdiction: In the case of *Bendone-Derossi Int'l v. Islamic Repub. of Iran*,[307] the tribunal held that the showing of arbitral tribunal's prima facie jurisdiction is sometimes the basic requirement for the grant of the interim measure. In famous ICSID decision of *Perenco Ecuador Ltd v. Repub. of Ecuador*[308] and *Quiborax SA v. Plurinat'l State of Bolivia*,[309] the learned tribunal held that: "*While the Tribunal need not satisfy itself that it has jurisdiction to determine the merits of this case for the purposes of ruling on the application for provisional measures, it will not order such measures unless there is at least a prima facie basis upon which such jurisdiction might be established*."

It is pertinent to note that, the analysis of jurisdiction in the request for an interim measure is limited to the prima facie inquiry only. Moreover, the tribunal should refrain itself from making any ruling on final jurisdiction rather tribunal limits itself to the question, whether there is a prima facie argument that jurisdiction exists. It is pertinent to note that, given the urgency attached to the request of an interim measure, a tribunal ought not to delay in adjudicating the case of provisional measure by examining the full jurisdiction.

[307] Interim Award in IUSCT Case No. ITM 40-375-1 of 7 June 1984, 6 Iran-US C.T.R. 130 (1984).
[308] Decision on Provisional Measures in ICSID Case No. ARB/08/6 of 8 May 2009.
[309] Decision on Provisional Measures in ICSID Case No. ARB/06/2 of 26 February 2010.

Chapter XXII – Types of Interim Measures

The interim measure can be of various types. However, broadly almost all jurisdictions provide for at least the kind of measures as contained in Article 17 (2) of the Model Law. In 2006, the Model Law was amended to provide for "preliminary order" in Article 17 B of the Model Law. Preliminary order is essentially the same as an interim order by the arbitral tribunal except that it is obtained ex-parte. A preliminary order expires after 20 days and it is within that time or the earliest possible moment within which the tribunal must hear the other party. After having heard the other party, the tribunal may issue an interim measure either adopts or modifies a preliminary order or it can simply choose to let the order expire. It is necessary to clarify that a preliminary order is binding upon the party but it is not an award cannot be enforced by a court. Many commentators disagree with the need for the introduction of preliminary order as it makes little sense to obtain an order which cannot be enforced by a court.

Section 17 (1) of the Indian Arbitration Act, 1996 provides for the following kinds of measures:

1. *A party may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to the arbitral tribunal*

    i. *for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or*

    ii. *For an interim Measure of protection in respect of any of the following matters, namely:*

        a. *the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;*

        b. *Securing the amount in dispute in the arbitration;*

        c. *the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorize for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party or authorizing any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;*

        d. *an interim injunction or the appointment of a receiver;*

e. *such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient and the arbitral tribunal shall have the same power for making orders, as the Court has for the purpose of, and in relation to, any proceedings before it.*

2. *Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the Court.*

Which interim measure is more appropriate in the given facts and circumstances is to be determined on the case to case basis may also be influenced by the domestic law or at the national laws of the seat of arbitration? It should be remembered that interim measures should be granted in limited circumstance as they can be determinative of the dispute and may be hard or even impossible to repair.[310]

In this context, it is necessary to clarify that interim measures in international arbitration can be granted by the court as well as by the arbitral tribunal. Usually, interim measures are provided by the court before the formation of the arbitral tribunal or in cases where the tribunal is not in the position to provide effective relief. In all other cases, once the tribunal has been formed, it is the tribunal that grants the interim measure. Taking the theory of delocalization further, another aspect has emerged in almost all institutional arbitrations except the DIS i.e. emergency relief. This refers to the appointment of the emergency arbitrator before the formation of the arbitral tribunal for the purposes of grant of interim relief.

The ICDR was the first to amend its rules to provide for Emergency Measures of Protection.[311] This permits the appointment of an emergency arbitrator within one business day of the request of the emergency relief and the emergency arbitrator has the power to award any interim or conservancy measure being necessary.

There are a variety of provisional measures, which are dealt with in international arbitration[312] there is a various form of an interim measure, which is granted or ordered towards the parties in dispute. However, they cannot bypass the limits enshrined by the medium of national laws, or the parties to an arbitration agreement.[313] For protecting or preserving the rights of the parties the tribunal can grant

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310 JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 586 (THE HAGUE: KLUWER LAW INTERNATIONAL, 2003).
311 Article 37 ICDR Rules.
312 GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 2483 (2ND ED. KLUWER LAW INTERNATIONAL 2014).
313 CHRISTOPHER BOOG, THE LAWS GOVERNING INTERIM MEASURES IN INTERNATIONAL ARBITRATION, IN F. FERRARI & S. KRÖLL (EDS.), CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION 409, 431 (2010).

any relief as mentioned under Article 17 (2) of UNCITRAL Model Law.[314] Such relief is granted through orders which are again of different types.

Orders Preserving Status Quo

Status quo is one of the common forms of an interim measure between the parties in a dispute for preserving the legal or contractual relationship, factual circumstances, etc.[315.] Within the domain of status quo, a party may be ordered to, not to take certain actions in relation to termination of contract, disclosing secrets, revoking letter of credit, etc. [316] The prime examples of interim protection and such orders are "*measures that serve to preserve the status quo until the final decision on the merits is rendered (preservation order)*".[317]

However, after the revision of UNCITRAL Model Law and UNCITRAL Rules tribunals are empowered to order interim measures for restoring the status quo.[318] An order preserving the status quo can be issued by the tribunal for protecting one party from the prejudice or harm in the course of proceedings[319] or for preserving tribunal's jurisdiction.[320] Furthermore, the purpose of the status quo is to protect the factual alterations, which can destabilize the final award of the tribunal.[321]

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[314] GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 2484 (2ND ED. KLUWER LAW INTERNATIONAL 2014).

[315] UNCITRAL Model Law, 2006 Revisions, Art. 17(2)(a).

[316] Final Award in ICC Case No. 9324 in JULIAN LEW, COMMENTARY ON INTERIM AND CONSERVATORY MEASURES IN ICC ARBITRATION CASES, 11(1) ICC CT. BULL. 23, 29 (2000); Plama Consortium Ltd v. Repub. of Bulgaria, Procedural Order in ICSID Case No. ARB/03/24 of 6 September 2005; Tanzania Elec. Supply Co. v. Independent Power Tanzania Ltd, Decision on the Respondent's Request for Provisional Measures in ICSID Case No. ARB/98/8 of 20 December 1999, 1999 WL 34765678.

[317]P. Berger, *International Economic Arbitration* 339 (1993);W. Craig, W. Park & J. Paulsson, *Annotated Guide to the 1998 ICC Arbitration Rules* 137 (1998).

[318] UNCITRAL Model Law, 2006 Revisions, Art. 17(2)(a); Donald Francis Donovan, *The Scope and Enforceability of Provisional Measures in International Commercial Arbitration: A Survey of Jurisdictions, The Work of the UNCITRAL and Proposals for Moving Forward* 82-149 (ICCA Congress Series No. 11 2003).

[319] Tokios Tokelés v. Ukraine, Procedural Order No. 1 in ICSID Case No. ARB/02/18 of 1 July 2003; Tanzania Elec. Supply Co. v. Independent Power Tanzania Ltd, Decision on the Respondent's Request for Provisional Measures in ICSID Case No. ARB/98/8 of 20 December 1999, 1999 WL 34765678; Amco Asia Corp. v. Repub. of Indonesia, Decision on Request for Provisional Measures in ICSID Case No. ARB/81/1 of 9 December 1983, XI Y.B. Comm. Arb. 159, 159-60 (1986).

[320] GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 2486 (2ND ED. KLUWER LAW INTERNATIONAL 2014).

[321] Award in ICC Case No. 6632, discussed in Reiner, *Les mesures provisoires et conservatoires et l'arbitrage international, notamment l'arbitrage CCI*, 125 J.D.I. (Clunet) 853, 890 (1998); Tokios Tokelés v. Ukraine, Procedural Order No. 1 in ICSID Case No. ARB/02/18 of 1 July 2003,; Rockwell Int'l Sys., Inc. v. Islamic Repub. of Iran, Award in IUSCT Case No. ITM 20-430-1 of 6 June 1983, 2 Iran-US C.T.R. 369, 371 (1983); Stephen Bond, *The Nature of Conservatory and Provisional Measures, in ICC, Conservatory and Provisional Measures in International Arbitration* 8, 9 (1993); C. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY ART. 47, ¶¶14-15 (2D ED. 2009).

The tribunals are usually keen to order interim measure for maintaining the status quo for safeguarding the subject matter of the dispute e.g. preservation of property in dispute etc.[322] In the case of, *Maffezini v. Kingdom of Spain,*[323] the tribunal held that "*An example of an existing right [justifying provisional measures] would be an interest in a piece of property, the ownership of which is in dispute. A provisional measure could be ordered to require that the property not be sold or alienated before the final award of the arbitral tribunal. Such an order would preserve the status quo of the property, thus preserving the rights of the party in the property*."

While granting the status quo, the tribunal shall look upon the injury that is likely to be suffered by the parties in arbitration during the course of proceeding, and the existence of prima facie claims and defenses presented by the parties. If the tribunal is of the opinion that one party has a relatively strong prima facie case and can suffer serious prejudice during the course of arbitral proceedings, then the tribunal shall order the restoration of status quo.

Orders Prohibiting Aggravation of Parties' Dispute

Such orders are for refraining action of either of the parties for prohibiting their conduct or action which can aggravate their dispute.[324] Such orders are directed towards the parties for restraining them from making any public statements in breach of their agreement[325]. The ICC tribunal held that: "*As held by several ICC awards, provisional measures may be ordered not only in order to prevent irreparable damage but also to avoid aggravation of the dispute submitted to arbitration*" [326] Subsequently in the case of *Tokios Tokelés v. Ukraine*[327], tribunal held that "*The parties to a dispute over which ICSID has jurisdiction must…refrain from any action of any kind which might aggravate or extend the dispute*." Similarly, in another ICSID Case of *Amco Asia Indonesia*, the tribunal referred to "*the good and fair practical rule, according to which both parties to a legal dispute should refrain…to do anything that could aggravate or exacerbate the same, thus rendering its solution possibly more difficult*."[328]

Tribunal while passing orders for 'preventing aggravation of the party's dispute' based their decision on commercial desirability of restraining unilateral steps of the parties to improve the position of the

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[322] UNCITRAL Model Law, 2006 Revisions, Arts. 17(2)(a), (c); LCIA Rules, Art. 25(1)(b) ("order the preservation, storage, sale or other disposal of any property"); 2013 CPR Rules, Rule 13; 2010 LCIA India Rules, Art. 25(1)(b)

[323] Procedural Order No. 2 in ICSID Case No. ARB/97/7 of 28 October 1999, 16 ICSID Rev.-For. Inv. L.J. 207, (2001).

[324] UNCITRAL Model Law, Art. 17(2)(b).

[325] GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 2488-24 (2ND ED. KLUWER LAW INTERNATIONAL 2014).

[326] Order in ICC Case No. 7388, in Reiner, *Les mesures provisoires et conservatoires et l'Arbitrage international, notamment l'Arbitrage CCI*, 125 J.D.I. (Clunet) 853(1998).

[327] Order No. 1 in ICSID Case No. ARB/02/18 of 1 July 2003.

[328] Amco Asia Corp. v. Repub. of Indonesia, Decision on Request for Provisional Measures in ICSID Case No. ARB/81/1 of 9 December 1983, XI Y.B. Comm. Arb. 159, 161 (1986).

parties in the dispute. Thus, according to E. Shcwartz, "*there is a tendency on the part of many arbitral tribunals…consistent with the view that they often have of their mandate, to construe the requirement of urgency sufficiently broadly to justify interim measures designed not so much to prevent irreparable harm as to avoid the 'aggravation' of the dispute that is the subject matter of the arbitration.*"[329]

Orders Requiring Specific Performance of Contractual or Other Obligation

This is the most common phenomenon in international arbitration, where the tribunal orders party to perform specified acts pertaining out of their contractual legal relationship with the other party e.g. the tribunal can order either of the party to fulfill their contractual obligation.[330]

Moreover, proponents are of the opinion that: "*interim specific performance of the contract (as when, for example, in a dispute relating to the termination of a charter party, the court prohibits any use of the vessel not in accordance with the charter).*"[331] Similarly, other commentators stipulate that "*if it is justified by the protection of the interest in the issue, the arbitrator may even order the provisional performance of the parties' obligations until the matter has been decided.*"[332]

Some orders require security for claims, i.e. one party to provide another party to pay. Security for other party's claims is the common form of interim measure granted by the tribunal in international arbitration. Such type of orders is formulated for ensuring the substantive claims brought forward by the party, not rendered insignificant if another party deliberately disperse its assets in the course of the arbitral proceeding.

It is the most famous practice in the common law jurisdiction, where various arbitration rules and statues, provide authority to the arbitrators to order security, for example:

- UNCITRAL Model Law, Art. 17(2) (c);
- English Arbitration Act, 1996, §39;
- Swedish Arbitration Act, §25(4);
- Canada Commercial Arbitration Act, 2013, Art. 17;
- Irish Arbitration Act, 2010, Art. 19;
- Singapore International Arbitration Act, 2012, Art. 12(1) (a);

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[329] E. Schwartz, *The Practices and Experience of the ICC Court, in ICC, Conservatory and Provisional Measures in International Arbitration* 45, 61 (1993).

[330] GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 2491 (2ND ED. KLUWER LAW INTERNATIONAL 2014).

[331] Stephen Bond, *The Nature of Conservatory and Provisional Measures, in ICC, Conservatory and Provisional Measures in International Arbitration* 8, 11 (1993).

[332] P. Lalive, J.-F. Poudret & C. Reymond, *Le droit de l'arbitrage interne et. international en Suisse Art. 183*, ¶7 (1989).

- Australian International Arbitration Act, 2011, §23;
- Indian Arbitration and Conciliation Act, Art. 17

Similarly, a tribunal in the case of On *Time Staffing, LLC v. Nat'l Union Fire Ins. Co*.,[333] held that *"the [arbitral tribunal], in the absence of language in the arbitration agreement expressly to the contrary, possesses the inherent authority to preserve the integrity of the arbitration process to which the parties have agreed by, if warranted, requiring the posting of pre-hearing security.…Otherwise, an [arbitral tribunal] with a well-founded concern that a party was financially unable to satisfy an eventual award would have no recourse to protect itself against the risk that its significant expenditures of time and effort would be for naught."*

It is pertinent to note that the request for security consists of the purest application of interim measure to distribute the risk of the delay in an arbitration proceeding. The opposite issue which arises is that who should take care of the risk involve and financial cost of reducing such risk that a party will fail to satisfy the financial burden of the final award.

Orders Requiring Security for Legal Costs

Security for the legal cost is also termed as "security for cost" which is altogether different from security for underlying substantive claims. Moreover, such type of orders mandates, either of the parties or both of the parties to post security to cover the substantive amounts that can be awarded to the other party, if it prevails in the arbitration proceedings and is authorized to recover legal costs.[334]

Security for the cost is the common form of provisional measure in arbitral proceedings having seat in Commonwealth jurisdiction or England, where this type of relief is most commonly used. For eg., English Arbitration Act; Singapore International Arbitration Act, 2012, §12(1); Hong Kong Arbitration Ordinance, 2013, §56; Australian International Arbitration Act, 2011, §23K; LCIA Rules; 2013 SIAC Rules, Art. 24(k); 2013 HKIAC Rules, Art. 23(6), as opposed to civil law jurisdictions.

Previously, the arbitral tribunals without English or commonwealth jurisdiction were very doubtful while ordering security for cost.[335] However, now various tribunals are willing to consider the request

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[333] 2011 U.S. Dist. LEXIS 50689 (S.D.N.Y.).

[334] B Berger, *Arbitration Practice: Security for Costs: Trends and Developments in Swiss Arbitral Case Law*, 28 ASA Bull. 7 (2010); W. Craig, W. Park & J. Paulsson, *Annotated Guide to the 1998 ICC Arbitration Rules* 138 (1998); Y. DERAINS & E. SCHWARTZ, A GUIDE TO THE ICC RULES OF ARBITRATION 296-97 (2D ED. 2005); Peter Fitzpatrick, *Security for Costs Under the Arbitration Act, 1996*, Int'l Arb. L. Rev. 139, (1998); Locknie Hsu, *Orders for Security for Costs and International Arbitration in Singapore*, Int'l Arb. L. Rev. 108 (2000); Noah Rubins, *In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration*, 11 Am. Rev. Int'l Arb. 306 (2000).

[335] A. Bucher & P.-Y. Tschanz, *International Arbitration in Switzerland* ¶161 (1988); Interim Awards in ICC Case No. 8670, 11(1) ICC Ct. Bull. 77 (2000); Interim Award in ICC Case No. 8223, 11(1) ICC Ct. Bull. 71 (2000); Order No. 6 in Zurich Chamber of Commerce of 12 November 1991, 13 ASA Bull. 84, 90 (1995).

for considering the security for cost. At this juncture, it is important to reproduce the view of one of the Swiss tribunals that held:[336]

> *"The traditional view in Switzerland was that lacking the parties' explicit agreement to the contrary, a Swiss Arbitral Tribunal had no authority to order security for a party's legal costs….[T]he modern view expressed in Swiss legal doctrine and arbitral practice is that the authority granted to the arbitrators by Article 183 [of the Swiss Law on Private International Law] also extends to orders requesting a party to provide security for the opposing party's legal costs."*[337]

Some arbitral tribunals are of the opinion that burden levied by the security of cost order on one of the parties may inhibit disproportionately with its chance to be heard, specifically in instances where the party lacks financial resources to deposit security for cost. However, in cases where the security of cost is ordered, the tribunal considers the financial status of the party from whom the security of cost is requested.[338]

Orders for Preservation or Inspection of Property

Such type of orders is granted by the tribunals for the evidentiary purposes. Moreover, the national legislation of the country grants authority for the same.[339] Orders of preservation or inspection of the property include the appointment of the neutral, independent expert for inspection of goods or other property.[340]

Orders pertaining to preservation or production of material for evidentiary purposes cannot usually be understood as interim relief. Also, such type of orders do not ask from the parties in dispute to take a certain action, but instead it gives direction regarding disclosure and evidentiary matters a part of fact finding the process of the tribunal.[341]

GARY BORN is of the opinion that "*such requests are made simply to mitigate loss arising from the pendency of the arbitration that would generally fall on both parties – as in the case of the sale of perishable goods, which would otherwise become valueless. In these instances, there is a substantial*

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[336] Order No. 4 in Zurich Chamber of Commerce Case No. 415 of 20 November 2001, 20 ASA Bull. 467, 470 (2002).

[337] Interim Awards in ICC Case No. 8670, 11(1) ICC Ct. Bull. 77 (2000); Interim Award in ICC Case No. 8223, 11(1) ICC Ct. Bull. 71 (2000); Commerce Group Corp. v. Repub. of El Salvador, Decision on El Salvador's Application for Security for Costs in ICSID Case No. ARB/09/17 of 20 September 2012.

[338] GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 2496 (2ND ED. KLUWER LAW INTERNATIONAL 2014).

[339] English Arbitration Act, 1996, §38(4); Christopher Huntley, *The Scope of Article 17: Interim Measures Under the UNCITRAL Model Law*, 740 PLI Lit. 1181, 77 (2005).

[340] GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 2497-2498 (2ND ED. KLUWER LAW INTERNATIONAL 2014).

[341] Compare Delphi Petroleum Inc. v. Derin Shipping & Trading Ltd, 73 F.T.R. 241 (Canadian Fed. Ct. 1993).

argument that a tribunal should generally order commercially-reasonable actions, without inquiry into issues of serious harm to one party or into the prima facie merits of the parties' claims, in order to minimize the overall losses resulting from the parties' dispute."[342]

[342] GARY B. BORN, CHAPTER 17 PROVISIONAL RELIEF IN INTERNATIONAL ARBITRATION IN INTERNATIONAL COMMERCIAL ARBITRATION 2499 (2ND ED. KLUWER LAW INTERNATIONAL 2014).

Chapter XXIII – Emergency Arbitration

In a majority of cases, parties may need an urgent interim relief even before an arbitral tribunal can be constituted or when parties cannot even wait till the constitution of a tribunal. In such cases, emergency arbitration comes into picture. Emergency arbitration is akin to the concept of emergency relief where a party may want to protect their assets and evidence that might otherwise be altered or lost. In essence, these measures seek to maintain status quo during the pendency of the dispute. In other words, the emergency relief may be in the form of an order to the other party to maintain the status quo during the arbitration – for example, by not selling disputed property, or by not using or licensing disputed intellectual property.[343] It is important to note that such arbitration is usually agreed to and arranged by the parties themselves without recourse to a tribunal at the first instance. However, the Emergency arbitrator provisions are applicable only to those parties that are signatories to the arbitration agreement that is relied upon for the application or successors to such signatories. The procedure is applicable unless parties have opted out of it. [344]

Therefore, it is clear from the aforementioned that the objective of the emergency arbitration is to provide urgent pro tem or conservatory measures to a party or for parties that cannot await the formation of an arbitral tribunal. Emergency Arbitration can eliminate the hassle of applying before numerous forums in different jurisdictions for obtaining a single instant relief. It is more time efficient than local court proceedings and the proceedings in front of an arbitral tribunal are more trusted than ones in a local jurisdiction. It also sets a behavioural standard for the parties. The parties are more likely to abide by an emergency award, since the award also becomes precedence once the arbitral tribunal is constituted.

In 2006, ICDR was the first institution to adopt the concept of emergency arbitrator followed by 2012 version of the ICC Rules, which were then followed, by other institutions such as NAI, SIAC, SWISS, SCC, and ACIA adopted the approach of ICC Rule of 2012. [345]

Under emergency arbitrator procedures, a sole arbitrator is appointed by the arbitral institution on an expedited basis to determine applications for interim relief that cannot wait for the formation of the substantive tribunal.[346] Emergency arbitrators are free to set their own procedures, which should be

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[343] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 88 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).

[344] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 108 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).

[345] 2012 Swiss Rules, Art. 43; 2011 ACICA Rules, Art. 28(1); 2010 NAI Rules, Art. 42; 2010 SCC Rules, Appendix II, Art. 8 ("Emergency decisions on interim measures" involving appointment of special "emergency arbitrator"); 2013 SIAC Rules, Art. 26(2); Christopher Boog, *Swiss Rules of International Arbitration – Time to Introduce An Emergency Arbitrator Procedure?*, 28 ASA Bull. 462 (2010).

[346] Martin J Valasek & Jenna Anne de Jong, *Enforceability of Interim Measures and Emergency Arbitrator Decisions*, NORTON ROSE FULBRIGHT, *available at,* https://www.nortonrosefulbright.com/en-in/knowledge/publications/6651d077/enforceability-of-interim-measures-and-emergency-arbitrator-decisions (May 2018).

clear from the outset. Such procedures may include the timelines for exchange of submissions, a hearing (if any), the scope of the reply submissions, the mode of communications between the parties and evidence which can be adduced.[347]

An Emergency Arbitration is capable of granting interim measures or conservatory relief only for a stipulated period of time. For all purposes, it exercises similar if not same functions as that of an ad hoc tribunal which has been constituted for a limited purpose and would immediately be dissolved, once the purpose is served or the said time frame in which such issues have to be decided, lapses.

Despite the interest and seeming demand for such relief, there are some questions over the enforceability of arbitrator interim measures. Key questions arise from the very nature of the relief; that it is interim binding and, in the case of emergency arbitrator decisions, is made by someone other than the substantive tribunal. The form of the relief can also play a part — particularly where arbitrator interim relief is in the form of an order rather an award.[348]

Generally, the relevant arbitral rules provide that decisions of emergency arbitrators are interim-binding, in that they can later can be varied or suspended by the substantive tribunal once formed. In some instances, such interim measures may expire by default after a certain period of time.[349] Under most rules, including the ICC Rules, the emergency arbitrator's decision is interim in nature and will not bind the arbitral tribunal with respect to any question, issue, or dispute determined in the order.[350] Although Article 29(2) of the ICC Rules requires the parties to undertake to comply with any order made by the emergency arbitrator, the consequences of non-compliance are uncertain. Parties will still need to rely on the support of the national courts to enforce interim measures granted by an emergency arbitrator against non-compliant parties.

It is not yet clear how local courts will react to such requests, given that an interim 'order' is unlikely to qualify as an award under the New York Convention. In some jurisdictions, specific legislative changes have been introduced to ensure that orders of emergency arbitrators are treated in the same way as those of an arbitral tribunal.[351]

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[347] Stephanie Khan and Benson Lim, *Emergency Arbitrator Procedures: What Should a Practice Note of Best Practices Consider?* KLUWER ARBITRATION BLOG, *available at,* http://arbitrationblog.kluwerarbitration.com/2019/01/11/emergency-arbitrator-procedures-what-should-a-practice-note-of-best-practices-consider/ (2019).

[348] Martin J Valasek & Jenna Anne de Jong, *Enforceability of Interim Measures and Emergency Arbitrator Decisions*, NORTON ROSE FULBRIGHT, *available at,* https://www.nortonrosefulbright.com/en-in/knowledge/publications/6651d077/enforceability-of-interim-measures-and-emergency-arbitrator-decisions (May 2018).

[349] Martin J Valasek & Jenna Anne de Jong, *Enforceability of Interim Measures and Emergency Arbitrator Decisions*, NORTON ROSE FULBRIGHT, *available at,* https://www.nortonrosefulbright.com/en-in/knowledge/publications/6651d077/enforceability-of-interim-measures-and-emergency-arbitrator-decisions (May 2018).

[350] Article 29(2), ICC Rules.

[351] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 4.21 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).

Chapter XXIV – Setting Aside an Award

One of the premier advantages of an arbitration is the finality of the award. The major arbitration laws and rules support such finality by limiting the possibility of setting aside the award.[352] The following section is an attempt to study how an award can be set aside, the basic requirements of setting aside an award, methods of setting aside an award, grounds for setting aside an award and ultimately the consequences or the effects of such attempts to set aside an award.

Purpose of Setting Aside an Award

The purpose of setting aside an award before a national court of the seat of arbitration is to get the award declared, in whole, or in part null and void. The consequence of such declaration is that the award now would be treated as invalid and accordingly unenforceable not only by the courts of the seat of arbitration but also by national courts elsewhere.[353] It is important to note that the court reviewing the challenge to an award cannot modify or adjust the terms of an award nor can it decide or adjudicate the dispute according to their own whims and fancies or their own vision of the merits.[354] The procedure for setting aside an award is a guarantee that the relevant courts may review the award if a party has a good reason to be dissatisfied or aggrieved with the arbitration and the way in which the award was rendered.[355]

Requirements for Setting Aside an Award

There are three pre-requisites that must be kept in mind in order to make a successful attempt of setting aside an award.

Legal Basis for Setting Aside an Award

Almost every domestic arbitration law, as well as the international instruments regulating arbitration, contain certain provisions for setting aside an award[356] consisting of certain grounds or actions on which an award can be set aside.[357] The law that will govern the action will be the *lex arbitri*, or the

[352] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 203 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).
[353] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 10.06 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).
[354] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 10.06 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).
[355] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 664 (KLUWER LAW INTERNATIONAL, 2003).
[356] Article 34, The UNCITRAL Model Law on International Commercial Arbitration, Articles 1704-1707, Belgium Judicial Code; Articles 32-33, Brazil's Arbitration Law; Articles 58-61, China's Arbitration Law; Sections 67-71, The English Arbitration Act, 1996.
[357] Article 34, The UNCITRAL Model Law on International Commercial Arbitration.

curial law, which governs the arbitration proceedings at the situs.[358] The procedural law for challenging an award in the majority of the jurisdictions will be based on the UNCITRAL Model Law on International Commercial Arbitration, which will provide the grounds on which an award can be challenged.[359]

National Courts

Before approaching the relevant courts for the setting aside of the award, parties who wish to set aside an award should first exhaust all the possibilities of a review of the award by the tribunal that rendered it[360] or rely on the institution within which the award was made.[361] The parties may also rely on other available remedies such as any available process of appeal or any available provision for the correction of the award or for an additional award.[362]

But if all these remedies are exhausted then the challenge to set aside an award must be filed with a court which has jurisdiction to hear the application. According to the Model Law[363] and the majority of arbitration laws,[364] this jurisdiction is with the court at the seat of arbitration.[365] Applications made to any other court, outside the place of arbitration are generally rejected.[366] Once the seat and the nationality of the award have been ascertained, the competent authority would be the one to entertain such challenge, normally a court of higher instance.[367] For example, an award made in an arbitration with its seat in England must be challenged in the English High Court, in Switzerland in the Swiss Supreme Court (Tribunal Federal); in France, challenges are heard by the relevant court of appeal.[368]

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[358] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 203 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).
[359] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 203 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).
[360] Section 70(2), The English Arbitration Act, 1996.
[361] Rule 12(6), GAFTA, Article 50, 52, 55 ICSID Rules.
[362] Section 70(2), The English Arbitration Act, 1996.
[363] Articles 34, 1, and 6, The UNCITRAL Model Law on International Commercial Arbitration.
[364] Article 33, Brazil's Arbitration Law; Article 58, China's Arbitration Law; Sections 67-71, The English Arbitration Act, 1996.
[365] Unless otherwise agreed by the parties. It has been suggested that it is unnecessary and unhelpful to exercise this freedom to choose another court. *See,* JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 664 (KLUWER LAW INTERNATIONAL, 2003).
[366] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 667 (KLUWER LAW INTERNATIONAL, 2003).
[367] The competent court is designated in Article 6, The UNCITRAL Model Law on International Commercial Arbitration.
[368] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 669 (KLUWER LAW INTERNATIONAL, 2003).

If the above action fails or if the party does not bring an action to set aside then the losing party has still another opportunity to resist enforcement. It can oppose the prevailing party's efforts to enforce the award in a different jurisdiction, where the losing party's assets are located.[369]

In India, interestingly, the Indian Arbitration Act makes it explicitly clear that in order to set aside an award, the parties have to file a written application under Section 34 of the Indian Arbitration Act. In India, a written application is the only recognized mode for challenging an award. The application has to be comprehensive in nature, indicating all points on which a party is aggrieved with the findings of the arbitral tribunal.[370] Merely stating that the award is bad in law and against facts would serve no useful purpose. Hence, the challenger must state, in detail, the objections and challenges clearly.

Time Limits

Challenges to an award must be brought promptly as time is of the essence. Time limits to bring a challenge to an award by an application to the relevant national court, are likely to be short and strictly enforced.[371] Failure to do so may bar a challenge to the award. As a matter of fairness, time limits start to run from the time the award was deposited or is notified to the party wishing to challenge it.[372]

A majority of national laws require the parties to initiate the setting aside proceedings within weeks rather than waiting for a month. The limit to bring such a challenge may be as short as twenty-eight (28) days,[373] often three (3)[374] months and sometimes as long as six (6) months.[375] The Model Law under Article 34(3) prescribes the time limit of three (3) months from the notification of the award to the party wishing to challenge it. While there may be very fewer chances of court condoning the delay, the party looking to challenge an award outside the time limit must satisfy the court that there is a justifiable and reasonable ground for condoning the delay.[376]

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[369] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 204 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).
[370] Dr. P.C. Kharbanda, Naresh Markanda *et al,* ARBITRATION STEP BY STEP 255 (Lexis Nexis, 2017).
[371] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 10.10 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).
[372] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 670 (KLUWER LAW INTERNATIONAL, 2003).
[373] Section 70(3), The English Arbitration Act; Articles 1486, 1505, France's NCPC.
[374] Article 1707(3), Belgium's Judicial Code; Article 33(1), Brazil's Arbitration Law; Article 1064(3) Netherlands, CCP.
[375] Article 59, China's Arbitration Law.
[376] In Aoot Kalmnoft v. Glencore International AG and Another [2002] 1 All ER 76 the request for an extension of the time limit to challenge the award (14 weeks after the expiration of the 28 day time limit) was rejected.

Chapter XXV – Grounds for Challenge

There are several grounds on which a challenge for setting aside an award may be brought in. The applicable law in the jurisdiction where the challenge is brought defines the grounds that can be used. According to REDFERN AND HUNTER, there are essentially three broad areas on which an arbitral award is likely to be challenged before a national court at the seat of the arbitration. *First*, an award may be challenged on jurisdictional grounds—that is, the non-existence of a valid and binding arbitration agreement—or other grounds that go to the admissibility of the claim determined by the tribunal. *Secondly*, an award may be challenged on what may broadly be described as 'procedural' grounds, such as failure to give a party an equal opportunity to be heard. *Thirdly*, and most rarely, an award may be challenged on substantive grounds, on the basis that the arbitral tribunal made a mistake of law.[377] These grounds often mirror the grounds listed in Article V of the New York Convention. Interestingly, Article 34 of the Model Law also sets out the same grounds on which an award may be set aside. Therefore, the following section is an attempt to briefly understand such different grounds on the basis of which an award can be set aside.

Grounds under the Model Law

The grounds under the Model Law are as follows:[378]

- Lack of capacity to conclude an arbitration agreement or lack of a valid arbitration agreement;
- The aggrieved party was not given proper notice of the appointment of the arbitral tribunal, or the arbitral proceedings, or was otherwise unable to present its case;
- The award deals with matters not contemplated by, or falling within, the arbitration clause or submission agreement, or goes beyond the scope of what was submitted;
- The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or with the mandatory provisions of the Model Law itself;
- The subject matter of the dispute is not capable of settlement by arbitration under the law of the state in which the arbitration takes place; and/or
- The award (or any decision within it) is in conflict with the public policy of the state in which the arbitration takes place.

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[377] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 10.36 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).
[378] Article, 34(2), The UNCITRAL Model Law on International Commercial Arbitration.

These grounds may be further categorized into jurisdictional, procedural and substantive grounds and are expansively discussed further.

Jurisdictional Grounds

According to MOSES, jurisdictional challenges may be made to an award, but they are more typically made at the beginning of the arbitration, rather than after the award is rendered. Under many laws, if a party does not challenge the jurisdiction at the beginning of the arbitration, it may lose the right to object.[379] It is obviously more efficient to determine whether jurisdiction is proper at the beginning of an arbitral procedure, rather than after parties have expended time, effort, and resources to reach the final award. Thus, if a party waits until the award is handed down before it objects to the tribunal's jurisdiction, it may well have lost its opportunity to challenge.[380] The grounds for challenge based on the jurisdiction could be as follows:

Incapacity or invalid agreement to arbitrate

The first ground for challenging an award under Article 34(2)(a)(i) of the Model Law provides that:

"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."

An arbitration award made in the absence of an arbitration agreement or submission of parties is liable to be set aside.[381] The rationale behind this ground is the basic rule that the international arbitral process is based on consent and that, absent consent, an arbitral award is invalid and ineffective.[382]

Excessive jurisdiction of the tribunal

A further ground of challenge under the Model Law is that the arbitral tribunal has far exceeded its powers under the decision it has rendered. Article 34(2)(a)(iii) states:

The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so

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[379] Section 31 and 73, The English Arbitration Act, 1996.
[380] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 205 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).
[381] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 670 (KLUWER LAW INTERNATIONAL, 2003).
[382] GARY B BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3188 (2ND EDN., KLUWER LAW INTERNATIONAL, 2014).

submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;

According to REDFERN AND HUNTER, this ground of challenge contemplates a situation in which an award has been made by a tribunal that did have jurisdiction to deal with the dispute, but which exceeded its powers by dealing with matters that had not been submitted to it.[383]

According to MOSES, a tribunal may have had jurisdiction under the arbitration agreement, but nonetheless could have rendered an award that it was not entitled to make. For example, if a party claimed only a certain quantum of damages, and the tribunal awarded more than that amount, the tribunal may have exceeded its jurisdiction.[384] The award may also be challenged if the tribunal either fails to consider all the issues before it or if it decides certain issues that were not before it. In some instances, if a court finds that the tribunal has exceeded its powers, the issues that were improperly decided may be severed, leaving the award as to other issues intact.[385]

Arbitrability

The concept of arbitrability constitutes yet another ground to challenge an award. In terms of the Model Law, an award can be challenged if '*the subject matter of the dispute is not capable of settlement by arbitration*'.[386] The arbitrability of a dispute is usually linked to the underlying public policy of the state in which the arbitration takes place.[387] As a matter of example, there are many jurisdictions that prohibit the arbitration of the disputes which deals with the matters of rights in rem and thus effects the world at large. Such disputes cannot be resolved in private and hence are not arbitrable. However, arbitrability ground will not cause many awards to be vacated, because few matters today are not considered arbitrable.[388]

Procedural Grounds

One of the major and the most common ground for challenging and setting aside an award relates to the deficiency in the procedure of the arbitration. As set out in Article 34(2)(c)(ii) of the Model Law, an award can be challenged when '*the party making the application was not given proper notice of the*

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[383] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 10.45 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).
[384] Paris Lapeyre v. Sauvate [2001] Rev. Arb. 806.
[385] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 206 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).
[386] Article 34(2)(b)(i), The UNCITRAL Model Law on International Commercial Arbitration.
[387] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 10.51 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).
[388] Some matters that are usually not considered arbitrable in most jurisdictions include family law matters, such as child custody, as well as criminal matters, tax issues, patent validity issues, and bankruptcy claims.

appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case'.

According to REDFERN AND HUNTER, certain minimum procedural standards must be observed in the fair and proper conduct of international arbitration.[389] These procedural standards are designed to ensure that the arbitral tribunal is properly constituted, that the arbitral procedure is in accordance with the agreement of the parties (subject to any mandatory provisions of the applicable law), and that the parties are given proper notice of the proceedings, hearings, and awards.[390] In essence, the ultimate purpose of this is to ensure that the parties are given equal treatment and a fair hearing with a proper opportunity to present their respective cases.[391] Failure to observe these rules of procedure may be a ground for the challenge of an award.[392]

Further procedural issues may include a challenge where the composition of the arbitral tribunal and the procedure adopted in the arbitration are not in consonance with the agreement of the parties or, failing such agreement, with the law.[393] REDFERN AND HUNTER illustrates it with a proper example, i.e. *failure to comply with the agreement of the parties as to the appointment of the tribunal could include cases in which an arbitrator does not meet the particular qualifications specified in the arbitration agreement; failure to comply with the required procedure could include the rendering of an award without reasons where such a requirement is imposed by law.*[394]

Moreover, many national arbitral legislations provide for the setting aside of an award if the arbitral tribunal (or a member thereof) did not satisfy applicable standards of independence and impartiality. This basis for annulment is not specifically included in the annulment provisions of some national arbitration statutes (*e.g.*, UNCITRAL Model Law), but is nonetheless generally available in contemporary international arbitration regimes.[395] It is imperative to note that a procedural irregularity or defect alone will not invalidate an award. The test is that of a significant injustice so that the tribunal would have decided otherwise had the tribunal not made a mistake.[396]

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[389] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 10.53 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).
[390] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 10.53 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).
[391] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 10.53 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).
[392] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 10.54 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).
[393] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 10.60 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).
[394] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 10.60 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).
[395] GARY B BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3276 (2ND EDN., KLUWER LAW INTERNATIONAL, 2014).
[396] Gannet Shipping Ltd. v. Eastrade Commodities Inc [2002] 1 All ER (Comm) 297, at 304.

Substantive Grounds

The most common grounds for a challenge to an award are jurisdiction, procedural irregularities, arbitrability, etc. However, there are yet other grounds that come into play when all the other grounds are properly met. These grounds may relate to the merits of the award and can pose a strong challenge if there is a mistake of law, mistake of fact or anything contrary to public policy in the award.

The first two grounds can be relied on to make an appeal against the arbitral award, if the law permits or unless the parties have agreed otherwise. However, such an appeal mechanism is supported by a few jurisdictions and is subject to a lot of substantial limitations. For example, in England, the appeal cannot be brought unless all the parties agree, or unless the court grants leave to appeal.[397] The court should grant leave only if the tribunal was obviously wrong on the point of law, or the question is of general public importance and the decision of the tribunal is open to doubt.[398]

Public Policy

If the arbitral award is in conflict with the public policy of its own country, it may be set aside by the national court of the place of arbitration. Public policy is defined differently in different jurisdictions, but in most, an award could be vacated if it was not consistent with fundamental notions of justice, honesty, and fairness. Thus, corruption, fraud, or lack of integrity in the process could be considered a violation of public policy, requiring the award to be annulled. In most Model Law jurisdictions, fraud or corruption would probably be considered a proper ground for challenging an award as a violation of public policy.[399]

Other Grounds under National Laws

Various other national laws have certain formal grounds which can be relied on to set aside an award. These grounds could be if the award is made after the specified time limit is expired or if the award is made with contrary decisions.[400]

Award made after the expiration of a certain time limit may be challenged if it was made after the expiration of time limits agreed by the parties or provided for in the applicable rules or law.[401]

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[397] Section 69(2), The English Arbitration Act, 1996.
[398] Section 69(3), The English Arbitration Act, 1996.
[399] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 206 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).
[400] This ground can be found in Article 25(2)(j) of the European Uniform Law on Arbitration and Article 1704(2)(J) of the Belgian Judicial Code.
[401] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 676 (KLUWER LAW INTERNATIONAL, 2003).

Further, In the United States, courts have created some non-statutory grounds for challenging an award. For example, an award can be vacated if it is in violation of the "*manifest disregard of the law*" which is a non-statutory ground for setting aside the award.[402] This doctrine requires that a party show that the arbitrator knew and understood the law, but deliberately disregarded it.[403] The standard is rarely met because it is quite difficult to show that an arbitrator deliberately disregarded the law that he knew and understood.

In India, an award can be set aside on the following grounds:

- Incapacity of parties[404]
- Invalid arbitration agreement[405]
- Composition of arbitral tribunal not in accordance with the agreement[406]
- Party unable to present its case[407]
- Failure to consider vital documents[408]
- Award based on no evidence[409]
- Arbitrator acting beyond submission[410]
- Award in ignorance of terms of the contract[411]
- Award contrary to law or substance of the dispute[412]
- Inconsistent findings in the award[413]
- Failure to adjudicate[414]
- Award by the illegally constituted tribunal[415]
- Matter not capable of settlement[416]
- Award contrary to public policy[417]

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402 MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 208 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).
403 MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 208 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).
404 Section 34(2)(a)(i), The Indian Arbitration Act, 1996.
405 Section 34(2)(a)(ii), The Indian Arbitration Act, 1996.
406 Mafatlal Securities Ltd. v. Birla Sun Life Securities Ltd. 2002 (2) Arb LR 304 (Bom); Harike Rice Mills v. State of Punjab, 1998 (1) RAJ 223 (P&H.)
407 Section 34(2)(a)(iii), The Indian Arbitration Act, 1996.
408 Hindustan Lever Ltd. v. Shiv Khullar, 2008 (2) Arb LR 42 (Del).
409 State of Andhra Pradesh v. K.Krishnam Raju, 2004 (1) Arb LR 566 (AP).
410 Section 34(2)(a)(iv), The Indian Arbitration Act, 1996.
411 Bharat Coking Coal Ltd. v. Annapurna Const., (2003) 8 SCC 154.
412 ONGC Ltd. v. Saw Pipes Ltd., AIR 2003 SC 2629.
413 Union of India v. Pundarikakshudu, (2003) 8 SCC 168.
414 Punjab State v. Chander Bhan Harbhajan Lal, AIR 1964 P&H 424.
415 Niraj Kumar Bohra v. Union of India, 2009 (2) Arb LR 123 (Cal) (DB).
416 Section 34(2)(b)(i), The Indian Arbitration Act, 1996.
417 Section 34(2)(b)(ii), The Indian Arbitration Act, 1996.

Chapter XXVI – EFFECTS OF CHALLENGE

The effects of a successful challenge vary depending upon the grounds of the challenge, the relevant law, and the decision of the court that dealt with. The court entertaining a request for setting aside an award has multiple options to deliver from. It may either reject the challenge and uphold the award, or it may accept the challenge and set aside the award, in whole or in part. In some circumstances, it may also remit the case back to the arbitration tribunal.

Court Rejects Challenge and Upholds Award

While there is no figures or data to support but it is generally accepted and quite obvious that most challenges bear no fruits. When the relevant court rejects a challenge, the award is confirmed and its national and international recognition is inevitable.[418]

Court Accepts Challenge

The consequence of a court accepting the challenge is the award getting annulled or vacated. This means that the award is not enforceable in the country in which it was made and various other countries as well. It is important to reiterate that the challenge may nullify the award it its entirety or in part.[419] If the reason behind accepting the challenge to an award is the invalid arbitration agreement, then the parties are no longer bound by it. The prevailing party should be able to initiate a court action on the same issues. Dutch law, for example, explicitly states that when a decision setting aside an award becomes final, the jurisdiction of the court shall revive.[420] If an award is set aside for reasons other than invalidity of the arbitration agreement, the agreement would survive the award and the parties would still be bound to have their disputes settled by arbitration.[421]

If the award has been set aside on any procedural, jurisdictional or substantive grounds, the situation is different and a substantial question arises as to whether or not a new arbitration can be started. If the award has been set aside for procedural defects (for example lack of due process), the party who won the arbitration, but lost the challenge, will have to resubmit the dispute to arbitration and the process will start over again. This is a daunting prospect for even the most resilient claimant.[422] Under

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418 JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 679 (KLUWER LAW INTERNATIONAL, 2003).

419 Richard A Davis v. Prudential Securities Inc, 59 F 3d 1186 (11th Cir 1995), where the award was affirmed in part, vacated in part and remanded.

420 Article 1067, Netherlands Arbitration Law. The provision appears to apply to all awards, not just those set aside on jurisdictional grounds.

421 MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 209 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).

422 NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 10.91 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).

the Swiss Concordat Article 40(4) the tribunal must re-hear the issues unless the parties object on the basis that the arbitrators participated in the previous proceedings.

The Model Law suggests a different approach. It suggests in Article 34(4) that the relevant court may remit the case to the arbitration tribunal.[423] The rationale behind this is if the problem with the award can be resolved short of declaring it null and void, most courts will try to choose a solution that will not require the parties to start all over again. Substantial duplication of effort, time, and resources would not benefit either party. The English Arbitration Act, for example, specifically provides that a court shall not "*set aside or . . . declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.*"[424]

Remission

The power to remit is essentially a means to 'cure' awards that might otherwise need to be set aside. The purpose of remission is to revisit some, or all, of its findings by the tribunal[425]. According to Article 61 of the Chinese Domestic Arbitration Law, remission is an appropriate result of a successful application for the setting aside of an award, subject to the discretion of courts.[426] It states that "*If the People's Court that has accepted an application for setting aside an arbitration award considers that re-arbitration can be carried out by the arbitration tribunal, it shall notify the tribunal that it should re-arbitrate the dispute within a certain time limit and shall rule to stay the setting aside procedure. If the arbitration tribunal refuses to re-arbitrate the dispute, the People's Court shall rule to resume the setting aside procedure.*"

As discussed before, Article 34(4) of the Model Law codifies remission officially. It states that "*The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.*" Generally, remission is the main remedy in common law jurisdictions; it is of lesser significance in Model Law jurisdictions.[427]

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[423] Article 61, China's Arbitration Law.

[424] Section 68(3)(c), The English Arbitration Act, 1996.

[425] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 10.51 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).

[426] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 682 (KLUWER LAW INTERNATIONAL, 2003).

[427] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 682 (KLUWER LAW INTERNATIONAL, 2003).

Chapter XXVII – Recognition and Enforcement of Foreign Arbitral Awards

One of the most touted advantages and a primary reason of parties including an arbitration clause and resorting to arbitration as a dispute resolution mechanism is the certain enforceability of the award. The probability of the enforcement of an award is extremely high because of the universality and global acceptance of international conventions that favors enforcement.[428] Undoubtedly, the recognition and enforcement of awards play a crucial role in the success of the international arbitration as it also helps in aiding the voluntary compliance due to the effective system for the enforcement of awards in case of non-compliance.[429] Therefore, a detailed discussion on recognition and enforcement are important as they provide official recognition of the arbitration process and confirms its outcome or product. The following section discusses the distinction between recognition and enforcement of foreign arbitral awards, regime governing the recognition and enforcement, prerequisites for applications to have a foreign award enforced and the grounds to refuse enforcement.

The Distinction between Recognition and Enforcement

The New York Convention and other relevant provisions always mention "recognition and enforcement" together. As a common understanding, if the award is enforced, it ought to be recognized but there may be instances where an award is recognized but not enforced.[430] Hence, the distinction between the two deserves a discussion.

Recognition is the national court proceedings in the form of a summary proceeding confirming the award, which amounts to a judicial decision. By this way, the courts acknowledge the existence of the arbitration and recognize the decision of the tribunal. According to LEW, MISTELIS, AND KROLL, recognition is useful when the unsuccessful party initiates court proceedings for any or all of the issues dealt with in the arbitration award. Recognition of the award will prevent court proceedings from being held in respect of decided matters.[431]

In other words, when a court "recognizes" an award, it acknowledges the validity and the binding nature of the award and thereby provides a preclusive effect with respect to the issues determined in

[428] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 211 (KLUWER LAW INTERNATIONAL, 2003).
[429] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 687 (KLUWER LAW INTERNATIONAL, 2003).
[430] Mark Dallal v. Bank Mellat [1986] QB 411, (1986) XI YBCA 547, 553, where an Iran-US Claims Tribunal award was recognised but not enforced.
[431] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 680 (KLUWER LAW INTERNATIONAL, 2003).

the award.[432] REDFERN AND HUNTER appropriately illustrate the above with the help of an example. According to it, if a company is made a defendant in legal proceedings by a foreign supplier for goods sold and delivered, but allegedly not paid for. Suppose that the dispute between the company and the foreign supplier has already been submitted to arbitration and that an award has been made, in which the foreign supplier's claim was dismissed. In these circumstances, the company will ask the court to *recognize* the award as a valid defense to the foreign supplier's new claim. If the court is prepared to do this, the claim is dismissed. The legal force and effect of the foreign award will have been recognized, but the award itself has not been enforced.[433]

On the other hand, enforcement is a step further from recognition which gives effect to the mandate of the award.[434] Enforcement is a tool which a successful party uses to request the assistance of the court to enforce the award by exercising its power and authority and penalize the opposite party for failure in compliance of the award. According to REDFERN AND HUNTER, *where a court is asked to enforce an award, it is asked not merely to recognize the legal force and effect of the award, but also to ensure that it is carried out, by using such legal sanctions as are available.*[435]

According to MOSES, there could be the various meaning of enforcement in a different jurisdiction. It may mean simply the process by which an international arbitration award is reduced to a judgment. In other jurisdictions, it may mean using whatever official means are available in the enforcing jurisdiction to collect the amount owed or to otherwise carry out any mandate provided in the award.[436]

To sum up, a court that is prepared to grant enforcement of an award will do so because it recognizes the award as validly made and binding upon the parties to it, and therefore suitable for enforcement. In the present context, the terms ‘recognition’ and ‘enforcement’ do run together: one is a necessary part of the other.[437]

Regime Governing the Recognition and Enforcement

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 constitutes the backbone of the international regime for the enforcement of foreign awards. There are

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[432] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 212 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).
[433] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 11.21 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).
[434] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 690 (KLUWER LAW INTERNATIONAL, 2003).
[435] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 11.22 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).
[436] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 212 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).
[437] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 11.22 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).

a number of other international conventions and bilateral treaties that provide for the enforcement of foreign awards.[438] A brief look at major international conventions, treaties, and national laws are as follows:

The New York Convention

The New York Convention is the most widely accepted international convention which has significantly simplified the enforcement of foreign awards and harmonized the national rules for the enforcement of foreign awards.[439] Article III of the New York Convention clearly provides that *each contracting state shall recognize arbitration awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied on.*" Moreover, Article III mandates that a foreign award must be enforceable without unnecessary inconvenience or excessive fees, and the conditions must not be more onerous than those for domestic awards.[440]

The 1961 European Convention

The 1961 European Convention deals with the enforcement of foreign awards indirectly. It provides that an award set aside at the seat of arbitration may be recognized by the courts of states applying the Convention.[441]

The 1965 Washington Convention

The 1965 Washington Convention is yet another convention with more than 130 countries as signatory which provides for its own enforcement procedures. Each member state is under an obligation to recognize an award rendered pursuant to the convention and enforce the pecuniary obligations imposed by the award considering it as a final judgment of the court in that state.[442]

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[438] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 692 (KLUWER LAW INTERNATIONAL, 2003).
[439] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 692 (KLUWER LAW INTERNATIONAL, 2003).
[440] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 693 (KLUWER LAW INTERNATIONAL, 2003).
[441] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 693 (KLUWER LAW INTERNATIONAL, 2003).
[442] Article 54(1), The Washington Convention, 1965.

The Panama Convention

The 1975 Inter-American Convention on International Commercial Arbitration (Panama Convention) is a convention of the American Region ratified by more than 15 South American states and the US which is more or less similar to New York Convention as it adopts the same standard.[443]

National Laws and Model Laws

It is of no surprise that various national arbitration laws also contain a provision dealing with the enforcement of foreign awards. However, a majority of them are in line with the New York Convention and have incorporated the verbatim text of the relevant international conventions or have simply provided that the enforcement of foreign awards will be governed by the New York Convention.[444] Model Law, under Article 36, also provides the grounds on which a court may refuse the enforcement of an award. These grounds are akin to the grounds mentioned under Article V of the New York Convention.

Requirements for Enforcement

Jurisdiction of the Enforcement Court

In order to get the foreign award enforced in the court, the court should have valid jurisdiction over the parties. To establish jurisdiction for enforcement actions, it is sufficient if the parties prove that there are assets existing in that court's territorial jurisdiction. A good thing about enforcement proceedings is that such proceedings can be initiated at every place where the assets are located.[445] In the United States, however, some courts have refused to enforce foreign arbitral awards either on the grounds that there was no personal jurisdiction over the award debtor, or that the forum was inappropriate under the doctrine of *forum non conveniens* (an inconvenient forum).[446] It is important to note that no permission for enforcement is needed in the country where the award was made. Under the New York Convention, it is sufficient that the award is "binding" in the country of origin.[447]

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[443] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 695 (KLUWER LAW INTERNATIONAL, 2003).

[444] Articles 1710-1723, Belgium, Judicial Code; Articles 34-40, Brazil's Arbitration Law; Articles 62-64, China's Arbitration Law; England, Sections 66, 99, and104, The English Arbitration Act, 1996.

[445] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 703 (KLUWER LAW INTERNATIONAL, 2003).

[446] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 214 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).

[447] Article V(1)(e), Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

Required Documents

The New York Convention under Article IV prescribes certain minimum formalities to make enforcement certain, clear and simple. The party seeking recognition or enforcement must submit to the court an authenticated award or certified copy and, if necessary, translations and the original or a copy of the arbitration agreement and, if necessary, translations. The rationale behind the same is to provide authentic evidence of the entitlement of the party seeking enforcement.[448]

The same has to be accompanied by an application formally written to initiate the proceedings of enforcement. It is also prudent to note that the party seeking enforcement also must produce a translation of the award and the agreement if they are in a language other than the official language of the court in which enforcement is sought.[449]

In India, an arbitral award becomes enforceable only upon application for its enforcement being made by the party and upon the application being allowed by the court. The court may even refuse the enforcement of an arbitral award on grounds mentioned in Article 36(1) of the UNCITRAL Model Law. Even under section 66(1) of the English Arbitration Act, 1996, an arbitral award becomes enforceable only when the leave of the court is given for enforcement thereof.

Time Limits

The time limits for the commencement of recognition and enforcement of arbitral award proceedings are generally provided in the domestic legislations. It must be followed strictly. In the United States, for example, time limits vary from state to state and, when it comes to recognition or enforcement of an award, the relevant period may be anything from one year to three years.[450]

In India, an award can be enforced only after the time for making an application for setting aside the award under section 34 has expired, or if such application has been made, it has been refused. During this period, there is an automatic suspension of enforcement of the award and only thereafter, it shall be enforceable under the Code of Civil Procedure in the same manner as if it were an order of the court.[451]

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[448] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 703 (KLUWER LAW INTERNATIONAL, 2003).

[449] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 704 (KLUWER LAW INTERNATIONAL, 2003).

[450] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 11.33 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).

[451] National Aluminum Co Ltd v. Pressteel & Fabrications (P) Ltd (2004) 1 SCC 540; Madavpura Mercantile Co-operative Bank v. Shah Bhimani Chemicals Pvt Ltd, 2009 (2) Arb LR 287 Guj.

Chapter XXVIII – Grounds for Non-Enforcement under the Convention

It is important to note here that under the New York Convention, the court do not deny the enforcement of an award simply because the arbitrators made a mistake of the law or a fact. Instead, the permitted grounds emphasize on the integrity of the procedure with special attention to the fairness to the parties and a reasonable opportunity to present their case. There are few things worth noting before discussing the grounds individually and in depth.

First, neither the Model Law or the New York Convention allows any scope of challenge on the merits of an award to which the New York Convention applies.[452] Second, the New York Convention and the Model Law presents exhaustive grounds for refusal of recognition and enforcement. It must be noted that these are the only grounds on which recognition and enforcement may be refused. Third, the New York Convention lays down five (5) separate grounds on which recognition and enforcement of a foreign award may be refused at the request of the party against whom it is invoked. The remaining two grounds on which recognition and enforcement may be refused are grounds that may be invoked by the enforcing court on its own motion.[453]

Fourth, it is important to understand that the enforcement courts are under no obligation to refuse the enforcement if any of the grounds for the refusal of recognition and enforcement are met. Fifth, the grounds for the refusal of the enforcement of the award has to be construed narrowly as the very intention of the New York Convention and the Model Law is that the grounds for refusing recognition and enforcement of arbitral awards should be applied restrictively.[454]

The grounds for refusing enforcement are as follows:

Incapacity and Invalidity

The first ground for refusal enshrined in Article V(1)(a) of the New York Convention is that there is some incapacity of the party or the agreement is invalid either under the law chosen by the parties, or, if the parties did not choose a governing law, then under the law of the country where the award was made. A court may refuse enforcement if it is shown proof that "*the parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement*

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[452] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 11.53 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).
[453] Article V(2), Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.
[454] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 11.60 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).

is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made."[455]

The issue of incapacity could involve matters such as sovereign immunity, or a question of whether the arbitration agreement was signed by someone who did not have the authorization to act on the behalf of the party. The invalidity issue may simply be a question of meeting the form requirements of the law in question, which may be the law chosen by the parties or the law of the seat of arbitration. Questions of invalidity may also concern the proper formation of a contract to arbitrate.[456]

Lack of Due Process

Another ground of refusing the recognition and enforcement of the award is if the party resisting enforcement furnishes proof under Article V(1)(b) that "*he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case*." This is the most important ground for refusal under the New York Convention and the Model Law. It is directed at ensuring that the arbitration itself is properly conducted, with proper notice granted to the parties and procedural fairness.[457]

A party must be provided with notice of the appointment of the arbitrator and of the arbitral proceedings. Parties must also be given a full opportunity to present their cases. Thus, the award will not be enforced if the party did not receive proper notice or if the arbitrators prevented a party from being able to present its case – that is if the party was denied a fair hearing.[458] The principle behind this defense is to uphold certain standards of fairness and equal treatment observed by the arbitration tribunal. Ultimately the question of violation of due process is a matter of fact, which the parties will have to prove.

LEW MISTELIS AND KROLL gives various examples which can amount to a ground for challenge of an award under this provision such as if a party has not been able to participate in the taking of evidence or in discovery proceedings,[459] that a party had been denied the right to introduce certain evidence,[460] or to comment on an expert's report submitted to the tribunal[461] or that the standards of adversarial

[455] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 706 (KLUWER LAW INTERNATIONAL, 2003).
[456] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 218 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).
[457] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 11.71 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).
[458] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 220 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).
[459] Polytek Engineering Co Ltd v. Hebei Import and Export Corp, (1998) XXII YBCA 666 (High Court Hong Kong, 16 January 1998).
[460] US, Iran Aircraft Industries v. AVCO Corporation, 980 F 2d 141, XVIII YBCA 596 (1993) (2d Cir, 1992).
[461] Paklito Investment Ltd v. Klockner East Asia Ltd, (1994) XIX YBCA 654 (Supreme Court of Hong Kong, 15 January 1993).

proceedings adopted by the tribunal deprived a party of its fundamental right to defense.[462] However, it is only required that the tribunal gives the parties the opportunity to present their case. It is immaterial if the party actually makes use of it or not, and in which way, does not generally affect the enforceability of the award.[463]

The Arbitrator has Acted Beyond Their Jurisdiction

Another important ground for refusal of recognition and enforcement of award under the New York Convention is enshrined in Article V(1)(c) which states that "*the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced"*

This provision covers two different issues. First, *extra petita* or the case where the tribunal rendered a decision outside its jurisdiction or without jurisdiction, and second, *ultra petita* where the tribunal has exceeded its jurisdiction. In either case it is assumed there is an arbitration agreement which in principle confers jurisdiction on the tribunal.[464] It is imperative to note that the arbitrator's power comes from the consent of the parties, and if the arbitrator exceeds the authority specifically given to her under the parties' arbitration agreement, then the resulting award is not enforceable under the New York Convention.[465]

Extra petita defense covers cases where the tribunal has decided matters outside the jurisdiction conferred upon it by the parties for example when the tribunal awards consequential damages while the contract between the parties expressly excluded this type of damages[466] or when the tribunal awards remedies not specified in the contract despite the objection of one party.[467]

The defense of *Ultra Petita* comes into picture when the tribunals award more than requested. In such cases, only those part which is within the mandate of the tribunal is enforced. For example, in an Italian case, the court held that only the part of the award which is consistent with the mandate of the

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462 US firm v. German firm, II YBCA 241 (1977).

463 Sam Ming Forestry Economic Co v. Lam Pun Hing, (2000) 15(1) Mealey's IAR 12 (HCHK).

464 JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 713 (KLUWER LAW INTERNATIONAL, 2003).

465 MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 221 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).

466 Fertilizer Corporation of India v IDI Management, 517 F Supp 948, VII YBCA 382 (1982).

467 In the Matter of the Arbitration between Millicom International v Motorola Inc and Proempres Panama SA, 2002 WL 472042, XXVII YBCA 948 (2002).

tribunal is enforceable but not the remaining part of the award which exceeded the tribunal's jurisdiction.[468]

Procedural Irregularity or Composition of Tribunal

The composition of tribunal or procedure not in accordance with the arbitration agreement or the relevant law is yet another ground for refusal of recognition and enforcement of an award under Article V(1)(d) of the New York Convention. It states that enforcement can be refused if "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.*" It introduces two grounds on which enforcement may be refused. It establishes the supremacy of party autonomy over the law of the place of arbitration and allows a national court to refuse recognition and enforcement.[469]

In the circumstances, if the parties do not reach an agreement on either of these two matters, then the constitution of the tribunal and the arbitral procedure must be in compliance with the law of the country where the arbitration took place.[470] This defense is rarely claimed, and when it is claimed, is not usually successful.[471] One of the famous examples of it is a Hong Kong Supreme Court judgment where it was argued that enforcement of an award made in China should be refused because the composition of the arbitral tribunal was not in accordance with the agreement of the parties.[472] The arbitrators who had been appointed were on the Shenzhen list of arbitrators, but not (as specified in the arbitration agreement) on the Beijing list.

The Award is not Binding or has Been Suspended or Set Aside

The next ground for refusal of recognition and enforcement under the New York Convention is envisaged in Article V(1)(e) which allows for the refusal of enforcement when the award *"has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.*" Although no definition of "binding" is provided in the New York Convention, most courts consider that an award is binding if there is no way of bringing an appeal on the merits. The choice of the word "binding" was made in the

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468 General Organisation of Commerce and Industrialisation of Cereals of the Arab Republic of Syria v SpA Simer, VIII YBCA 352 (1983).
469 JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 714 (KLUWER LAW INTERNATIONAL, 2003).
470 Article V(1)(d), Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.
471 MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 222 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).
472 NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 11.83 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).

New York Convention to try to avoid issues raised under its predecessor, the 1927 Geneva Convention.[473]

The drafters of the New York Convention intentionally chose the expression "not binding" and not the word "final" (as was the case with the 1927 Convention). The reason was simply to avoid the problem of the party seeking enforcement having to request leave for enforcement by the courts at the place of arbitration. Therefore, if the award is not subject to a genuine appeal on the merits to a relevant forum or court, it must be considered as "binding".[474] It is important to note here that partial awards are binding and hence enforceable. Thus, if the above conditions are satisfied, the award is binding and may not be used as a ground to refuse enforcement.

The second requirement under this provision is that the award should not have been previously set aside or vacated in the country where rendered or under the law to which it was subjected. If the party resisting enforcement has successfully applied for a suspension or setting aside of the award the enforcement court may adjourn its decision.[475] Keep in mind that to vacate an award, a losing party must apply to the local court where the award was rendered. To enforce an award, the prevailing party must apply to a court where the losing party's assets are located.[476]

Subject Matter not Arbitrable

The Model Law, as well as the New York Convention, provides that recognition and enforcement of an arbitral award may be refused "*if the competent authority in the country where recognition and enforcement is sought finds that the subject matter of the difference is not capable of settlement by arbitration under the law of that country."* This means that a national court may refuse recognition and enforcement if the subject matter cannot be settled by arbitration on its own territory. There may be many kinds of dispute that are not arbitrable for example, criminal matters, IPR disputes, child custody disputes, etc. that concerns the third parties and rights in rem and so will have to be decided in a court of law.

Arbitrators, on the other hand, are expected to be responsible only to resolve the dispute with respect to the parties before them, not to represent the public interest.[477] Therefore, the awards can be refused to be enforced if it is passed on a subject matter which cannot be settled through arbitration. However, the concept of arbitrability has expanded considerably in recent decades as a consequence of a general

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473 MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 222 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).
474 JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 715 (KLUWER LAW INTERNATIONAL, 2003).
475 Article VI, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.
476 MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 223 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).
477 MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 226 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).

policy favoring arbitration. There are very few cases in which enforcement of an award has been refused for lack of arbitrability of the underlying dispute.[478]

Public Policy

Recognition and enforcement of an arbitral award may also be refused if it is contrary to the public policy of the enforcement state. Article V(2)(b) provides that recognition or enforcement of an arbitral award may be refused if a court finds that it would be contrary to the public policy of that country. It is quite understandable that a state may wish to have the right to refuse to recognize and enforce an arbitration award that offends its own notions of public policy.[479] This defense is only available "*where the enforcement would violate the forum state's most basic notions of morality and justice.*"[480] The public policy exception set out in Article V(2)(b) is an acknowledgment "*of the right of the State and its courts to exercise ultimate control over the arbitral process.*"[481]

The basic tenet of this provision is to protect the fundamental moral beliefs and social order of the country where recognition and enforcement are sought from being harmed.[482] Some of the widely recognized examples of violations of international public policy include biased arbitrators, lack of reasons in the award, serious irregularities in the arbitration procedure, allegations of illegality,[483] corruption or fraud,[484] the award of punitive damages and the breach of competition law. It is generally rare that an award is successfully refused enforcement in a state because of the violation of its international public policy. [485]

[478] Audi-NSU Auto Union AG v. Adelin Petit & Cie (Belgium), V YBCA 257 (1980).
[479] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 11.105 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).
[480] Parsons and Whittemore Overseas Co, Inc v Société générale de l'industrie du papier (RAKTA), 508 F 2d 969, 974 (2d Cir, 1974).
[481] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 721 (THE HAGUE: KLUWER LAW INTERNATIONAL, 2003).
[482] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 726 (THE HAGUE: KLUWER LAW INTERNATIONAL, 2003).
[483] Soleimany v. Soleimany [1998] 3 WLR 811.
[484] Westacre Investments Inc v. Jugoimport-SPDR Holding Co Ltd And Others [1999] 2 Lloyd's Rep 65 (CA).
[485] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 722 (THE HAGUE: KLUWER LAW INTERNATIONAL, 2003).

Chapter XXIX – Public Policy

According to PROFESSOR KROLL, it is difficult, if not impossible, to define the concept of public policy. In 1853 the House of Lords identified the public policy notion as "*that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good.*"[486] Public policy serves as the rationale on which a domestic court may refuse the enforcement of an arbitral award, which is contrary to the laws or standards of the court's jurisdiction. If the court feels that enforcement of an award would violate the basic notions of morality and justice, the court may vacate such award.[487]

Of course, each state has its own concept of what is required by its 'public policy'. It is possible to envisage, for example, a dispute over the division of gaming profits from a casino. The dispute may be taken to arbitration and an award made. In many states, the underlying transaction that led to the award would be regarded as a normal commercial transaction and the award would be regarded as valid. However, in states that do not tolerate gambling, the award might well be set-aside on the basis that it offends public policy by upholding and interpreting an illegal contract.[488]

One of the most cited explanations of the concept comes from the case of *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de I'Industrie du Papier*[489], in which the US Second Circuit Court of Appeals in affirming the enforcement of an arbitral award against an American Company, stated that "*the public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice.*"

The Supreme Court of Korea gave a narrow interpretation to the public policy principle in *Adviso NV (Netherlands Antilles) v Korea Overseas Construction Corp.*[490] The court *stated that the basic tenet of the public policy principle is to protect the fundamental moral beliefs and social order of the country where recognition and enforcement is sought from being harmed.* Similarly, in Switzerland, the court acknowledged the same stance and upheld the restricted application of the public policy principle.[491] Further, German courts have held that an award will violate public policy if it conflicts with

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[486] *Egerton v Brownlow* (1853) 4 HLC 1.
[487] Curtin, Kenneth-Michael, *Redefining Public Policy in International Arbitration of Mandatory National Laws,* Def. Counsel J. 64, at 271 (1997).
[488] NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 10.82 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).
[489] 508 F.2d 969 (2d Cir. 1974)
[490] XXI YBCA 612 (1996).
[491] Camera di Esecuzione e Fallimenti Canton Tessin, 19 June 1990, *K S AG v CC SA*, XX YBCA 762 (1995).

fundamental notions of justice, *bonos mores*, or conflicts with principles that are fundamental national or economic values.[492]

Widely accepted examples of violations of international public policy include biased arbitrators, lack of reasons in the award, serious irregularities in the arbitration procedure, allegations of illegality, corruption or fraud, the award of punitive damages and the breach of competition law.[493] It is generally rare that an award is successfully refused enforcement in a state because of violation of its international public policy. Although there are occasional examples of misuse of the public policy defense, in most countries courts have been reluctant to refuse enforcement on public policy grounds.[494]

Indian Context

In India, the expression "public policy of India" has been held to mean fundamental policy of Indian law, justice and morality.[495] The Supreme Court in *Renusagar Power Co. Limited v. General Electric Company*[496] ("**Renusagar**"), recognized that merely a violation of Indian laws would not suffice to attract the bar of public policy. Subsequently, the apex court in the 2003 decision of *ONGC v. Saw Pipes*[497] ("**ONGC**") expanded the test of 'public policy' to mean an award that violates the statutory provisions of Indian law or terms of the contract. Such an award is considered as 'patently illegal' and therefore in violation of public policy. This interpretation practically affords the losing party an opportunity to re-argue all the points afresh and prolong the final adjudication of the case.

The Court's observation in ONGC is worth noting. The observed that the *phrase 'Public Policy of India' used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar's case, it is required to be held that the award could be set aside if it is patently illegal. Result would be – award could be set aside if it is contrary to: –*

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[492] See the decision of the Karlsruhe Court of Appeal of 14 September 2001 cf NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 10.83 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).
[493] JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 722 (KLUWER LAW INTERNATIONAL, 2003).
[494] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 229 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).
[495] Bharti Airtel Limited v. Union of India, 231 (2016) DLT 71
[496] 1994 Supp (1) SCC 644.
[497] (2003) 5 SCC 705.

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.

The judgment in ONGC diverged from the interpretation given to the expression "public policy" in Renusagar on the ground that Renusagar dealt with enforcement of an award which had attained finality, whereas the issue before the court in ONGC was with regard to the validity of the arbitral award itself, which was under challenge under Section 34 of the Act.

Thereafter, with the advent of the ruling in *Venture Global v. Satyam Computers*[498] ("**Venture Global**"), foreign awards i.e. awards passed in arbitrations seated outside India became amenable to challenge under Section 34 of the Act. This resulted in foreign awards being subject to the broader test of "public policy" as enunciated in ONGC.

Thus, ONGC coupled with *Bhatia International v. Bulk Trading S.A.*[499] ("Bhatia International") and Venture Global led to an undesirable situation and opened the floodgates to petitions challenging arbitral awards on the ground of 'patent illegality.' Any and all arbitral awards involving Indian parties were being challenged before the Indian Courts and were completely re-heard on the merits, defeating the entire purpose of the arbitration in the first place.

In *Phulchand Exports Limited v. O.O.O. Patriot*[500] ("**Phulchand**"), the Supreme Court expanded the meaning of the expression 'public policy' under section 48 of the Act, and held that the scope and purport of the expression under section 34 and 48 are the same. Thus, even in a scenario where the award attains finality, upon an action for enforcement of the foreign award being instituted, the parties by virtue of the decision in Phulchand could apply the extremely broad standard of 'public policy' in ONGC and almost re-open the entire matter.

The decision given in *Phulchand* has now been overruled by *Shri Lal Mahal Ltd. v. Progetto Grano Spa*[501] ("**Lal Mahal**"). In this matter, an award passed under the rules of the Grain and Feed Trade Association, London and upheld by courts in the UK was sought to be enforced in India. Objection to the enforcement of the award was raised under section 48 of the Act on the ground that the award was contrary to the terms of the contract and thus patently illegal and in violation of 'public policy'. The Supreme Court held that the expression 'public policy' as found under Section 48 of the Act would

[498] (2008) 4 SCC 190.
[499] (2002) 4 SCC 105.
[500] (2011) 10 SCC 300
[501] (2014) 2 SCC 433.

not bring within its folds the ground of ‘patent illegality’. Further, such ground is limited to section 34 of the Act where the issue is whether the award should be set aside or not.

The Court noted that the applicability of the doctrine of ‘public policy’ is comparatively limited in cases involving conflict of laws and matters involving a foreign element such as a foreign seated arbitration. The court ruled that the expression ‘public policy of India’ under Section 34 was required to be interpreted in the context of the jurisdiction of the court where the validity of the award is challenged, before it becomes final and executable in contrast to enforcement of an award after it becomes final. The Supreme Court clarified that Section 48 does not offer an opportunity to have a second look at the foreign award at the enforcement stage, or permit review of the award on the merits. Accordingly, the court held that the meaning of the expression public policy under Section 48 is limited to fundamental policy of India, interests of India, and justice and morality.

Thereafter, *ONGC v. Western Geco International Ltd.*[502] against deliberated on the public policy issue wherein a 3-judge bench of the Supreme Court widened the scope of ‘public policy’ and stated that the expression must include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country.

The Law Commission of India in its 246th Report recommended the restriction of the scope of “public policy” in both sections 34 and 48 and bring the definition of public policy in line with the definition propounded by the Supreme Court in *Renusagar*. The formulation proposed by the Commission was even more stringent and did not include the reference to “interests of India” as the term is vague and is capable of interpretational misuse, especially in the context of challenge to awards arising out of international commercial arbitrations. Thus, under the formulation of the Commission, an award can be set aside on public policy grounds only if it is opposed to the “fundamental policy of Indian law” or it is in conflict with “most basic notions of morality or justice”.

These recommendations were incorporated in the 2015 Amendment of the Arbitration Act which eventually amended Section 34 of the Indian Arbitration Act to include that an award is in conflict with the public policy of India, only if:

- The making of the award was induced or affected by **fraud or corruption**;
- It is in **contravention with the fundamental policy of Indian law**; or
- It is in **conflict with the most basic notions of morality or justice**.

Therefore, the latest amendment curtails the expanse of public policy and hence reduces the scope of judicial intervention.

[502] (2014) SLT 564.

Chapter XXX – Enforcement of Award Annulled at the Seat

If the award is annulled at the seat of arbitration, does it mean that the award will be unenforceable elsewhere in the world? This is because, under both the New York Convention and the Model Law, a competent court may refuse to grant recognition and enforcement of an award that has been set aside by a court of the seat of arbitration.[503] The use of the word "may" suggest discretion granted to the courts, where the recognition and enforcement of an annulled award is sought. Few decisions have declined to consider the recognition of awards that were annulled or refused confirmation in the place where they were made.[504] These decisions have generally contained little analysis, but apparently rest on the (mistaken) notion that an award ceases to exist when it has been annulled in the arbitral seat.[505] However, various courts have taken the position that a vacated award can nonetheless be enforceable.[506]

At first sight, the proposition that an award may be refused recognition and enforcement if it has been set aside or suspended by a court at the place (or seat) of the arbitration seems reasonable enough. If, for example, an award has been set aside in Switzerland, it will be unenforceable in that country and it might be expected that, if only as a matter of international comity, the courts of other states would regard the award as unenforceable also.[507] But this does not reflect the reality. Many courts have taken the view that they will enforce an arbitral award even if it has been set aside by the courts of the seat of the arbitration.[508]

Whether or not enforcement courts decide to enforce an annulled award is influenced by how the enforcement courts characterize the nature and role of the arbitral seat. Broadly, one can relate this with the seat theory i.e. where an award has been set aside by the competent authority in the country where it was rendered, it ceases to exist and is not enforced. Secondly, with the delocalization theory according to which the annulment decision has no bearing or enforcement, and an annulled award may be enforced unless it falls within the grounds to refuse enforcement under the domestic law of the enforcement court.[509]

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503 Article V(1)(e), The New York Convention; Article 36(1)(a)(v), Model Law.

504 Clair v. Beradi, VII Y.B. Comm.Arb.319 (*Paris Courd'appel*) (1982) refusing to enforce award made in Switzerland against French defendant after award was annulled as "arbitrary" by Swiss court; Judgment of 13 August 1979, Götaverken v. GMTC, VI Y.B. Comm. Arb. 237 (Swedish S.Ct.) (1981).

505 Judgment of 28 October 1999, XXV Y.B.Comm.Arb. 717, 718 (Oberlandesgericht Rostock) (2000) refusing to recognize awards made, but annulled, in Russia, on grounds that they were no longer "binding" and therefore not recognizable under German law.

506 MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 224 (2ND EDN., CAMBRIDGE UNIVERSITY PRESS, 2012).

507 NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 11.88 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).

508 NIGEL BLACKABY, J. MARTIN HUNTER ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 11.89 (6TH EDN. KLUWER LAW INTERNATIONAL; OXFORD UNIVERSITY PRESS 2015).

509 Albert Jan van den Berg, *Enforcement of Annulled Awards,* 9 (2) ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN 15, 15 (1998)

Under the seat theory, it is doubtful whether an enforcement court might recognize and enforce a foreign award which had been set aside by courts in the arbitral seat. This is because the contemplated *erga omnes* effect of a successful application to set aside an award would generally lead to the conclusion that there was simply no award to enforce. In other words, if an award is annulled, the courts will refuse enforcement as there does not longer exist an arbitral award and enforcing a non-existing arbitral award would be impossible. In essence, it means that if the award is invalid under the law of the seat of the arbitration, it cannot have any validity in any other jurisdiction.

Few landmark cases under this approach are the *Baker Marine Case*[510] and the *Termo Rio v. Electranta*[511] case which held and confirmed that if the award has been set aside by the competent authority in the country where it was rendered, the award ceased to exist simply because out of nothing follows nothing. The rationale behind these cases is that enforcing courts should defer to decisions to set aside an award made by the competent court in the country of origin. If the annulment decision of an award was not recognized by courts in original jurisdiction but instead got recognized by courts in the second attempt jurisdiction, this could cause considerable uncertainty for the parties to the arbitration.

The problem with the seat theory is that it is in direct contravention to the text of Article V(1)(e) of the New York Convention, which confers discretionary power to enforce the award. Moreover, seat theory is grounded on an outdated assumption that the law of the seat court provides the award's legal force. The seat of arbitration is agreed upon by parties mainly out of convenience or compromise, instead of inherent importance of the arbitral seat itself. Further, the parties' agreement did not include submitting to the exclusive jurisdiction of a particular court. By agreeing to extra-curial arbitration, they arguable intended to avoid the reach of the seat court in the first place. The seat theory contradicts the parties' intentions as it allows seat courts to interfere with the legal effect of the award. [512]

Under the delocalization theory, it is believed that no state should have the final say on the validity of the award. Accordingly, each enforcement court should be entitled to form its own view on the validity of the award, regardless of what the courts at the seat of arbitration may think. This means that the enforcing courts are free to ignore a decision setting aside an award by a court in the seat of arbitration. The justification of the delocalized approach stems from Article VII of the New York Convention under which the party seeking enforcement may rely on a more favourable provision in

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[510] Baker Marine (Nig.) Limited v. Chevron (Nig.) Limited, Chevron Corp., Inc. and others v. Danos and and Curole Marine Contractors, Inc. Judgement of the United States Court of Appeals, Second Circuit in Yearbook Commercial Arbitration 1999 – Volume XXIVa, pp. 909-914.

[511] Termo Rio S.A. E.S.P. (Colombia), Lease Co Group and others v. Electranta S.P. (Colombia), et al. Judgement of the United States Court of Appeals, District of Columbia Circuit, in Yearbook Commercial Arbitration 2008 – Volume XXXIII, pp. 955-969.

[512] Pieter Sanders, *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1994) 6:55 Nethl Intl L Rev 199.

the country where enforcement is sought. One of the prime examples of it is the decision rendered in *Putrabali*[513] where the court held that the impact of a national court's decision to annul an award is confide to its own jurisdiction and that the enforcement court decides whether to enforce based on its own rules. Moreover, national courts of various jurisdictions have started following delocalization approach.

In France, the law governing international arbitrations provides that an award may be denied enforcement only on the basis of five specific grounds.[514] The setting aside of an award by the court in the country where the award was rendered is not one of those specific grounds.[515] Thus, a French court will enforce a vacated award unless the basis for vacating the award was one of the specific grounds listed in its law. For example, in *Putrabali,*[516] the French Courts enforced an award set aside in England. In doing so, the *Cour de Cassation* held that "*An international arbitral award, which does not belong to any state legal system, is an international decision of justice and its validity must be examined according to the applicable rules of the country where its recognition and enforcement are sought."* Therefore, French courts are by law under an obligation to enforce a foreign award even if it was set-aside in the country of origin.

Similarly, European Convention on International Commercial Arbitration also provides that an award will be set-aside only on the basis of one of the exclusive grounds set forth in the convention.[517] Therefore, if the award is annulled at the seat for reasons other than the exclusive grounds, it would still be enforceable in other jurisdictions.

In the United States, Courts in the landmark case of *Chromalloy Aeroservices v. Arab Republic of Egypt*[518] enforced an award that was set aside by the court at the place of arbitration. In this case, a U.S. company had obtained an award against the State of Egypt, which was then set aside by the Egyptian court. The U.S. court determined that under Article V it had discretion whether or not to enforce the vacated award. Applying Article VII of the Convention, the court found that the U.S. Federal Arbitration Act was a more favorable law that should permit the award to be enforced.[519]

[513] Société PT Putrabali Adyamulia v. Société Rena Holding et Société Mnogutia Est Epices [2007] Rev Arb 507.
[514] French Code of Civil Procedure, arts., 1520, 1525. *See also* various rulings in the case of Hilmarton v. OTV, from 1994 to 1997, discussed in Hamid G. Gharavi, *Enforcing Set Aside Arbitral Awards: France's Controversial Steps beyond the New York Convention*, 6 J. Transnat'l L. & Pol'y 93 (1996).
[515] *See* French Code of Civil Procedure, art. 1520.

[516] Société PT Putrabali Adyamulia v. Société Rena Holding et Société Mnogutia Est Epices [2007] Rev Arb 507.
[517] 484 U.N.T.S. 349 (1961), art. IX.
[518] F. Supp. 907 (D.D.C. 1996).
[519] Chromalloy Aeroservices v. Arab Republic of Egypt, F. Supp. 907, at 909 (D.D.C. 1996)

Similarly, an award made and challenged in Slovenia was enforceable in Austria,[520] and an award made in Austria but partly set aside there was enforceable in France.[521]

The discretion exercised by courts in recognizing and enforcing awards set aside at the place of arbitration has been welcomed by many writers[522] and criticized by others.[523] In any event the practice is justified as a matter of Article VII New York Convention and more favorable positions in national law or international conventions as discussed above. While there may not be a unified interpretation or approach used by either supporters of the seat theory or the delocalized theory as a lot of it will depend on which jurisdiction the application for enforcement is filed, but establishing international standards for annulment of awards can still give a reasonable hope to bring uniformity and certainty in this regard.

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[520] Kajo-Erzeugnisse Essenzen GmbH (Austria) v DO Zdravilisce Radenska (Slovenia), XXIVa YBCA 919 (1999).

[521] Pabalk Ticaret Limited Sirketi (Turkey) v Norsolor SA (France), 24 ILM 360 (1985).

[522] Chan, *The Enforceability of Annulled Foreign Awards in the United States: A Critique of Chromalloy*, 17 *Boston U Int'l L J* 141 (1999); Gaillard, *Enforcement of Awards Set Aside in the Country of Origin: The French Experience*, *ICCA Congress Series no 9*, 505; Paulsson, *The Case for Disregarding LSAS (Local Standard Annulments) Under the New York Convention*, 7 *Am Rev Int'l Arb* 99 (1996).

[523] Bajons, *Enforcing Annulled Arbitral Awards – A Comparative View*, 7 *Croat Arbit Yearb* 55 (2000); Giarding, *The International Recognition and Enforcement of Arbitral Awards Nullified in the Country of Origin*, in Briner, Fortier, Berger and Bredow (eds), *Law of International Business and Dispute Settlement in the 21st Century, Liber Amicorum Karl-Heinz Böckstiegel* (2000), 205; Rogers, *The Enforcement of Awards Nullified in the Country of Origin*, *ICCA Congress Series no 9*, 548; Schwartz, *A Comment on Chromalloy: Hilmarton à l'americaine*, 14(2) *J Int'l Arb* 125 (1997).