Notre Dame University

Louaize - Lebanon

Faculty of Political Sciences,

Public Administration & Diplomacy

ARBITRATION CLAUSE AND THE ENFORCEMENT OF ARBITRAL AWARD RELATED TO INTERNATIONAL AGREEMENT

M.A. Thesis in International Law

BY

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Submitted to the Faculty of Political Science, Public Administration & Diplomacy

In Partial Fulfillment of the Requirements for the Degree of Masters of Arts in International Law

Notre Dame University-Lebanon

2007

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I dedicate this thesis to His Beatitude and Eminence Cardinal Mar Nasrallah Boutros Sfeir for all the efforts he is undertaking, striving for a better Lebanon, and notably for Christians.

ACKNOWLEGEMENT

First of all, I would like to thank God who taught us that "everything is possible for those who believe" and this is where all begins because his inspirations and his words pave the way for us; what is left for us is to have the good will.

Hence, I would like first to thank my parents and my sisters who were always beside me and without their love and support I would have not achieved much in life.

I would like to acknowledge with much appreciation the crucial role of Dr. Georges Labaki for his valuable feedback and comments as well as for the endless patience and tolerance he showed in advising me for my thesis.

I extend my sincere gratitude and appreciation to Dr. Akl Kairouz and Dr. Michel Nehme who significantly contributed to my work in preparing this Master thesis.

In addition, I am much indebted to many friends and colleagues who were generous enough to share their feedback which was extremely helpful in bringing this work to a fruitful conclusion.

Last but not least I would like to thank Dr. Chahine Gaith, Dean of the Faculty of Political Sciences, for all his support and efforts in making this academic institution an agreeable cultural space notably for graduate students.

Raymond

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INTRODUCTION

At this point in time of widespread global movement of commerce and recent growth and expansion of the world financial and business communities, the concept of legal certainty has suddenly assumed genuinely exceptional significance. It has given prominence to the formation of the contract as the backbone of trading relationships and their governing laws. Also, it has significantly reinforced the relative importance of methods for resolving commercial disputes in general and that of the mechanism of arbitration in particular.

There is no doubt that it is hard and difficult to blindly trust local courts of law when the economic outcome of business transactions, having an international dimension, is involved. This is an attempt to avoid a real possibility of encountering local bias or partiality.

This reality appears in many countries where disputes for settlement and arbitration often prove to be the only viable option. Therefore parties to international contracts are increasingly resorting to arbitration in order to reduce uncertainties they may face in international commercial disputes. Arbitration, one of many other alternative means of dispute resolution, provides the parties with a choice other than litigation. It is governed by the principle of a party's autonomy where parties must agree to arbitrate their differences.

Arbitration as defined by Wikepidia: "is a legal technique for the resolution of disputes outside the courts, wherein the parties to a dispute refer it to one or more persons (the "arbitrators" or "arbitral tribunal"), by whose decision (the "award") they agree to be bound".

Once parties in dispute agree to use arbitration to solve their conflict, they select a neutral third party known as the arbitrator (one person) or arbitrators (usually three) to take their case in charge. Unlike litigation, arbitration takes place outside the court. The arbitrator's mission

is to find a solution for the dispute in hand and thus render a final and binding decision after each party takes the opportunity to present its case and defend it.

The place, scope, structure, number of arbitrators are all agreed upon by the contestant parties and are included in a provision drafted in their agreement known as the arbitration clause, or after the dispute arises known as the submission agreement.

However, in spite of the increasing importance and expanding scope of international arbitration, that has become an essential component of most, if not all, international trade contracts, the practical application of arbitration clauses proved to have various weaknesses, limitations and disadvantages notably when these clauses are not properly drafted and thoroughly revised.

Parties to international contracts and those negotiating international transactions are usually faced with the question whether to choose arbitration as the dispute resolution mechanism in their contract documents. Many reasons determine why this option is opted rather than relying on national court proceedings in settlement of potential disputes. Some of these reasons are worth mentioning:

1. <u>Procedural flexibility</u>:

International arbitration permits substantial procedural flexibility. To begin with, the parties are free to select arbitrators[1] and they are free or, if they fail to agree, the arbitrators are free to determine the way the arbitration is conducted. In addition, the arbitration process is not

1 Gary Born *International Arbitration and Forum Selection Agreements. Planning, Drafting. Enforcing* (The Hague: Kluwer Law International 1999), 2.

bound by the national court procedures of the country, which is the seat of arbitration, or by the legal system of either of the parties.

Such flexibility allows parties to adopt specified procedures, appropriate for their own contract or agreement while taking into account the subject and type of the dispute. This is particularly important as international arbitration frequently involves parties, counsels and arbitrators who are used to different jurisdictions and procedures of the common and civil law systems.

Hence, the parties and the tribunal (i.e. the arbitrator or arbitrators sitting to determine the dispute) determine the procedural rules to be adopted. In the case of choosing institutional arbitration, most institutional rules grant parties the right to determine the procedures to be applied. In the absence of an agreement, the tribunal has a considerable opportunity to determine the procedures; and it generally adopts elements of both common and civil law procedures. These often depend on the legal background of the tribunal and particularly that of the seat of arbitration, in addition to the background of the parties and their legal advisors.

Procedural flexibility is as well determined by the parties' ability to choose different rules notably during international arbitrations. For instance, parties often adopt International Bar Association (IBA) rules, which are a useful harmonization of procedures commonly used in international arbitration. These rules are drafted by eminent members of the International Bar Association having both common & civil law backgrounds. Parties may also adopt the United Nations Commission on International Trade Law Rules known as UNCITRAL rules.

2. Confidentiality

One of the basic advantages of arbitration is the privacy and confidentiality it ensures and thus avoids any publicity that may surround the dispute.

International arbitration is more likely than national court litigation to be a private and confidential dispute resolution process[2]. Besides the proceedings, all documents, evidence, the award, arbitration itself and the arbitration records can all remain confidential. Litigation, on the other hand can be fully publicized and litigation documents can be easily accessed by the public unless sealed by the court[3].

Hence and to avoid misunderstanding in this regard, an express agreement must be made reflecting the intention of the parties to keep the arbitration, its procedures and results classified. The importance of this agreement emanates, in addition, from the fact that disparities exist between countries and institutions notably as to what exactly is to be kept confidential. Disagreement might as well involve whether such obligations should be applied to witnesses, experts or any other third party involved as well as the parties themselves, arbitrators and institutions.

Therefore, an explicit affirmation by the parties concerning confidentiality of the arbitration, translated in a well drafted arbitration clause would avoid the parties any complications caused by the inconsistencies in the rules applied by the various jurisdictions and institutions.

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2 Gary Born *International Arbitration and Forum Selection Agreements. Planning, Drafting, Enforcing* (The Hague: Kluwer Law International 1999), 11.

3 Gary H. Barnes *Use of Arbitration Clauses in Commercial Agreements* [article on-line] (1997, accessed 29 September 2006); available from www.hg.org/adradd2.html; Internet.

3. Impartiality and neutrality

The selection of a neutral forum for arbitration is often preferable for several reasons. First of all, there is a matter of lack of trust in the counter party's national court system; in addition, parties are usually unwilling to engage in court proceedings in the other party's home territory for its unfamiliarity with the procedural rules.

It is usually the arbitrators, chosen by the parties to undertake the arbitration, role or duty to decide on this matter and chose a neutral forum for the arbitration[4].

Here comes the matter of impartiality and independence of the arbitrators from the moment they are assigned, throughout the proceedings and finally when issuing their award.

Impartiality and neutrality are two of the basic advantages of arbitration compared to litigation, especially when the dispute is between a private party and a public entity.

Private parties, nowadays, have become increasingly conscious of the special problems of litigating against governments or government institutions. Therefore, a provision in an agreement with a state entity to arbitrate future disputes evades the problems of sovereign immunity[5].

However, and despite this basic advantage, parties must be careful in choosing an independent impartial arbitrator who must not have a direct or indirect financial or personal association to the parties or dispute or a previously expressed opinion on the issues, subject of the dispute.

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4 Kathryn H. Nickerson *International Arbitration* [document on-line] (March 2005, accessed 25 January 2007); available from www.osec.doc.gov/ogc/occic/arb-98.htm

5 Andrea W. Lowenfeld *International Litigation and Arbitration* (West Publishing Co., 1993), 332.

It is worth noting here that absence of the arbitrator's independence and impartiality may cause refusal to enforce an arbitral award under the New York Convention (the United Nations Convention on the Recognition and Enforcement of Arbitral Awards, 1958).

4. Enforceability of arbitral awards:

As a result of the New York Convention, arbitral awards became much easily enforced compared to judgments of courts[6].

Ratified by 142 countries, the New York Convention provides international standards, which courts' jurisdictions of all the convention members are obliged to recognize as binding arbitral awards. They are as well bound to enforce these awards while using proceedings that are not substantially more complicated than those applicable to awards made within their own jurisdictions.

In contrast, there are only a few regional arrangements for the mutual enforcement of foreign judgments, and there is no global counter-part to the New York Convention for foreign judgments.

In the absence of such international treaties, the recognition and enforcement of foreign judgments in many nations is subject to local law which often makes it difficult or impossible to attain an effective enforcement[7].

In addition and due to this treaty, arbitration awards are considered decisive and can only be challenged under very limited circumstances[8].

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6 Andrea W. Lowenfeld *International Litigation and Arbitration*, 332.
7 Gary Born *International Arbitration and Forum Selection Agreements. Planning, Drafting, Enforcing* (The Hague: Kluwer Law International 1999), 13.

It is in what involves enforcement that the resolution of international disputes through arbitration provides the most tangible benefits compared to litigation. Hence, arbitral awards are nowadays more readily and more widely enforceable around the world than the judgments of national courts.

5. Cost and speed

Factors such as procedural flexibility, the limited scope for challenging and appealing against the award, the crowded court calendars in all the world's major commercial centers[9], in addition to many others, render arbitration one of the less costly and quicker means of resolving disputes.

However, doubts still exist and are negotiable. Accordingly, it could be considered imprudent to readily generalize as to which mechanism, arbitration or litigation, is quicker or cheaper[10]. Cost and speed of arbitration are to be considered as advantages compared to litigation. Consequently, an arbitral clause accurately specifying the number of arbitrators, must be drafted taking into account the complexity of the arbitration and ensuring a certain degree of cooperation between the parties.

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8 Kathryn H. Nickerson *International Arbitration*
9 Andrea W. Lowenfeld *International Litigation and Arbitration*, 333.
10 Gary Born *International Arbitration and Forum Selection Agreements. Planning. Drafting, Enforcing* (The Hague: Kluwer Law International 1999), 7

CHAPTER I

The Arbitration Agreement

Arbitration expresses the contractual and voluntary aspect of parties and allows them, choosing arbitration as a mean for settling disputes, to resolve their differences by referring to individuals, the arbitrators, and thus to renounce appeal to the country's courts of law[11].

Arbitration agreements are created at either of one of the following situation: during the negotiation of a contract or after a legal dispute arises[12]. In other words an arbitration agreement is promulgated either in the form of an arbitration clause or a submission agreement. An arbitration clause is a clause in the underlying contract, in which the parties agree to submit future dispute(s) to arbitration. Whereas, a submission agreement is an agreement to submit already existing dispute(s) to arbitration. Since practically it is usually difficult to reach agreement after a conflict arises, parties are well advised to obtain agreement to arbitrate at an early stage of their contractual relationship, thus including an arbitration clause in their agreement contract. Such a clause will later be detached from the underlying contract.

Nowadays, both national laws and applicable international instruments require the arbitration agreement to be done in writing.

Highlighting the importance of enforcing arbitral awards, the final output of arbitration, this research will aim at shedding the light on the importance of drafting an arbitral clause, the corner stone in arbitration. This clause will lead, if well drafted, to end the arbitral process by reaching the aim of the parties involved and therefore facilitate enforcement of the arbitral award with less limitations and complexities.

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11 Nayla Comair-Obeid *Arbitration in Lebanese Law: A Comparative Study*" (DELTA 1999), 51.
12 Kathryn H. Nickerson *International Arbitration*

Accordingly, this chapter will discuss the essential elements that must be addressed in every international arbitral clause.

1. Final and Binding Arbitration Agreement.

The process of arbitration inaugurates with the parties expressly stating in their arbitration clause that they want to resolve their disputes through arbitration. While this may seem straightforward, it could be intricate if parties do not explicitly mention in the clause that they want the award resulting from arbitration to be "final and binding".

Whether a decision is considered final and thus be enforced under the New York Convention has long been a matter of dispute before the courts. The following is an appropriate example relating to the *Publicis Communication, et al. v. True North Communication Inc.*

> *"In this case, the Chicago-based True North and Paris-based Publicis, two advertising companies, created a joint venture that turned to be unsuccessful. The parties agreed to arbitrate any dispute arising from the termination of the joint venture before the London Court of International Arbitration under the UNCITRAL arbitration rules. One area of the disputes was whether Publicis was obligated to release tax records to be filed with the United States tax and securities authorities. An arbitral tribunal was constituted. The chairman signed an "order" "for and on behalf of the Arbitrators" directing Publicis to turn over the requested tax information. Publicis failed to comply and True North sought to have the decision confirmed by the United States Courts for the Northern District of Illinois. The District Court confirmed the decision. In the confirmation proceeding, Publicis asserted that the tribunal's "order" was only an "interim order" and therefore not a final "award" subject to confirmation under the New York Convention. Publicis argued until the order was final, True North was*

limited to seeking relief from the tribunal itself or from the courts of England, the site of the arbitration. The Court rejected the argument. The Court acknowledged that the UNICTRAL Arbitration Rules (Art. 31-37) refer to final decisions as "award". The Court also noted that the New York Convention speaks only of recognizing "award", without referring to an arbitral order or any other term such as order. Nevertheless the Court observed it is the finality of the decision and not its "nomenclature" that shall determine its finality."[13]

The expression "final and binding" reflects the clear intentions of the parties regarding the issues discussed, mentioned and resolved during the arbitration and that these could not be tried again in any court.

Arbitration institutions such as the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and many others stipulate clear rules stating that any arbitration award shall be "binding" to the parties having a dispute. Therefore, and even if the parties do not explicitly mention in their clause that the award will be "final and binding", they implicitly waive their right to recourse by adopting such rules.

While keeping in mind that the award will be "final and binding", parties must have the following objectives in mind when they set forth their agreement to arbitrate:

a) Actions to compel arbitration;
b) Actions to resist arbitration;
c) Actions to set aside arbitration award;
d) Actions to modify arbitration award;
e) Action to enforce arbitration award[14].

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[13] Carolyn B. Lamm and Frank Spoorenberg *The Enforcement of Foreign Arbitral Awards under the New York Convention Recent Developments* [document on-line] (5 November 2001, accessed on 22 October 2007) available at http://www.sccinstitute.se/_upload/shared_files/artikelarkiv/lamm_spoorenberg.pdf; Internet.
14 Gary H. Barnes *Use of Arbitration Clauses in Commercial Agreements*

2. Scope of Arbitration

The first stage parties should consider and agree upon is how broad the arbitration clause will be and what kind of disputes might arise in the future and thus be subject to arbitration.

In addition, it is possible for the parties to determine that certain issues are to be dealt with through arbitration while others could be taken to a court of law[15] In general international arbitration clauses are drafted as broadly as possible to cover all possible disputes having any connection with the parties' agreement.[16]

The contrary applies as well, i.e., if parties' intention is to minimize chances of turning to arbitration to solve disputes, a narrow arbitration clause is to be drafted.

Several formulations are commonly used to define the scope of arbitral agreements. National courts distinctively consider different formulations contained in arbitration clauses. In the United States for instance, if the following sentence *"all disputes arising under this agreement"*, is used, this might lead to precluding arbitration of matters that are closely connected to the contract, but do not "arise out" of it.

Special and encompassing wordings are to be used if all potential disputes are intended to be subject for arbitration. In the U.S, this is reflected by stating the following: *"all disputes arising out of, connected with or relating in any way to this agreement"*[17] in the arbitration clause.

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15 Jay G. Martin *Drafting Arbitration Clauses in International Contracts* [document on-line] (17 September 2003, accessed on 17 May 2007); available at www.winstead.com/articles/articles/Drafting%20Key%20Arbitration%20Provisions.pdf; Internet.

16 Gary Born *International Arbitration and Forum Selection Agreements. Planning, Drafting, Enforcing* (The Hague: Kluwer Law International 1999), 40

17 R. Doak Bishop *A Practical Guide for Drafting International Arbitrational Clauses* [document on-line] (accessed on 12 June 2007) available at www.kslaw.com/library/pdf/bishop9.pdf; Internet.

In most cases, however, if the parties opt for international arbitration, their usual intention is to refer to arbitration all disputes arising out of, in connection with, or related to the agreement. To insure the breadth of the clause, the language and wordings used must be broad enough and at the same time avoid ambiguity or misinterpretation.

Accordingly, a reluctant party may benefit from a non comprehensive arbitration clause with an unclear scope and get the opportunity to claim resolving a particular dispute in a court of law rather than through arbitration. Hence and to minimize such possibilities under the pretext that the dispute in question is not considered within the scope of the arbitration clause; it is advisable to include in the contract the right and power of the arbitrator or the arbitral tribunal to decide upon the scope of his or their jurisdiction[18].

3. The Method of Arbitration

International arbitration can be conducted either as an ad-hoc process or through an institution.

3.1. Ad-Hoc Arbitration

Ad-Hoc Arbitration refers to a process by which the parties select the arbitration proceedings and structure without using an arbitration institution[19]. In ad-hoc arbitration, the parties and arbitration tribunal manage the arbitration themselves while employing an agreed set of comprehensive procedural rules. Since 1976 an internationally agreed set of rules for international arbitration developed by the United Nations Commission on International Trade Law (UNCITRAL) was promulgated to be

18 Jay G. Martin *Drafting Arbitration Clauses in International Contracts*, 4.
19 Kathryn H. Nickerson *International Arbitration*

used in ad-hoc arbitration, as well as a model for use by other institutions[20]. The UNICITRAL rules are specifically designed for ad-hoc international arbitration. If procedural disputes arise before the tribunal is fully established and was autonomously held in charge, the UNICTRAL rules authorize an "appointing authority" to decide on such disputes related to disagreements upon the selection and disqualifications of arbitrators[21].

3.2. Institutional Arbitration

Parties may choose to take advantage of the established mechanisms and procedures offered by one of the many institutions that are entirely devoted to arbitration and related matters, such as the London Court of International Arbitration (LCIA) and the American Arbitration Association (AAA). Other institutions such as the International Chamber of Commerce ICC or the Stockholm Chamber of Commerce undertake arbitration as one of their many other terms of references. These two options are known by institutional arbitration[22].

The precise functions of arbitral institutions vary among organizations. In general however, an arbitral institution will receive requests for arbitration made pursuant to its rules, confirm the parties' nomination of arbitrators, appoint arbitrators when the parties are not able or willing to do so, consider challenges to the independence of arbitrators, and decide upon requests for time extension for the filing of initial submissions[23].

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20 Andrea W. Lowenfeld *International Litigation and Arbitration*, 333.
21 Jay G. Martin *Drafting Arbitration Clauses in International Contracts*, 4.
22 Andrea W. Lowenfeld *International Litigation and Arbitration*, 333.
23 Gary Born *International Arbitration and Forum Selection Agreements. Planning, Drafting, Enforcing* (The Hague: Kluwer Law International 1999), 45.

Several factors should be considered by the parties when choosing an institution to administer an international arbitration, or to act as the appointing authority in ad-hoc arbitration.

First, the institution's reputation for independency and neutrality is essential and highly affects the institution's ability to enforce the award. If the institution has a respectful reputation internationally and is perceived as geographically neutral, then there will be less opportunity for the losing party to doubt and allege the transparency and neutrality of the arbitration process.

Second, the more specific the contract is about the qualifications of arbitrators to be chosen, the more significant it is for the selected institution to be able to draw from an appropriately broad pool of potential arbitrators.

Third, institutional stability and longevity are vital to prevent failure of the arbitration clause if the institution no longer exists when a dispute arises.[24]

3.3. Choosing between Institutional and Ad-hoc Arbitration

There are many advantages and disadvantages to both institutional and ad-hoc arbitration

The major advantages of institutional arbitration is that the institution has the potential to handle most of the administrative functions; provide parties with lists of experienced arbitrators, often listed by field of expertise; already has its own method for handling most procedural problems; and finally has the skills in persuading reluctant parties to

24 Jay G. Martin *Drafting Arbitration Clauses in International Contracts*. 4.

proceed with arbitration[25]. Furthermore, an award rendered under the auspices of a leading arbitration institution may carry great weight in national court enforcement proceedings[26]. Finally, institutional arbitration may also be desirable if it is anticipated that three or more parties might get involved in a single dispute. Most arbitral institutions are qualified and experienced in administering multiparty arbitration[27].

However, one of the main disadvantages of institutional arbitration is that institutions usually charge administrative fees for their services and their use of facilities, thus enduring their customers with higher fees. In addition, institutions' bureaucracy may lead to delays[28] .

On the other hand ad-hoc arbitration does not include similar administrative fees, which parties usually tend to avoid, and therefore turn out to be a less expensive process.

The ad-hoc approach allows a greater specificity in the design of an arbitration mechanism which would respect specificity of each contract. Hence, parties may opt to select ad-hoc arbitration to reduce costs, to quicken the process and or to structure proceedings in the best way that suits their particular needs[29]. The main disadvantage of ad-hoc arbitration is that national courts are more likely to intervene in order to perform procedural and administrative functions. Accordingly and in that particular case, the costs of an ad-hoc arbitration may exceed those of institutional arbitration. Last but not least, in ad-hoc arbitration no quality control review by institutions such as the ICC is involved[30].

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25 R. Doak Bishop *A Practical Guide for Drafting International Arbitrational Clauses*
26 Gary Born *International Arbitration and Forum Selection Agreements. Planning. Drafting. Enforcing* (The Hague: Kluwer Law International 1999)
27 Jay G. Martin *Drafting Arbitration Clauses in International Contracts*, 4.
28 Kathryn H. Nickerson *International Arbitration*
29 Kathryn H. Nickerson *International Arbitration*
30 R. Doak Bishop *A Practical Guide for Drafting International Arbitrational Clauses*

Finally, knowing that a successful arbitration is one in which all parties believe that there was a fair proceeding; other parameters contribute in rendering it successful besides whether institutional or ad-hoc arbitration was adopted. These parameters involve quality, experience, and competence of the arbitrators. For this reason ad-hoc UNCITRAL arbitration can be very effective if handed to a competent arbitration tribunal and an adept appointing authority. A proactive ad-hoc tribunal can handle many of the procedural matters that are addressed by institutional rules, while ensuring the parties the autonomy they seek.

In practice many international arbitration practitioners recommend institutional arbitration for the following several reasons: when the parties are from diverse geographic areas and/or cultural traditions; when the parties have not had a substantial prior relationship; when one of the parties never had any prior experience with international arbitrations or is from a country that has not been arbitration friendly; or when the arbitration might involve a particularly complex proceeding.

Ad-hoc arbitration, on the other hand, is recommended to parties who desire maximum autonomy, and who are from countries with a supportive history of resolving disputes through international arbitration[31].

4. The Place or Seat of Arbitration:

Choosing the appropriate place for arbitration is essential and important for several reasons.

31 Jay G. Martin *Drafting Arbitration Clauses in International Contracts*, 6.

To begin with, the venue should ideally be convenient for all parties, who may as well prefer it to be culturally neutral. If a mutually convenient location was hard to locate, the parties may as well choose a place that is equally inconvenient to both of them.

Second, knowing that almost all signatories to the New York Convention would enforce awards promulgated only in convention participant countries; it is preferable for the arbitration seat to be in a country signatory to the New York Convention.

Third, the seat determines the procedural law underpinning the arbitration which would eventually affect the conduct of the proceedings and can impact on the enforceability of the award.

Forth, because the arbitral site is usually the country whose courts will hear an action to vacate an award, it is important to consider the scope of awards' review available in that country[32] . The seat may also in some cases, be considered to determine the governing law of the arbitration agreement. The legal environment at the place of arbitration should therefore be favorable to arbitration, providing support from the national court when necessary without undue interference in the arbitral process.

One way to determine whether a particular country will offer a favorable legal environment is to ascertain whether it has adopted the Model Law.

The Model Law is not a convention or a treaty. However, it sets an example for states to follow, or at least to consider, in developing their own national arbitration legislations. The Model Law seeks to codify internationally acceptable standards of arbitration procedures (for example challenges to arbitrators and the conduct of proceedings). In

32 R. Doak Bishop *A Practical Guide for Drafting International Arbitrational Clauses*, 36.

addition, it reflects the importance of the party's autonomy and avoids interference of national courts (as it will be discussed in the next chapter).

As already discussed, many factors should be taken into consideration when choosing the place of arbitration. Parties should be aware to choose an appropriate seat in an attempt to ensure a reasonably predictable and efficient arbitration[33]. The most notable venues for international arbitration include London, Paris, Geneva, New York and Stockholm.

For cases involving Asian parties, proceedings may be held in Singapore, Kuala Lumpur, Hong Kong or when Chinese parties are involved, Beijing. For Latin American parties the more popular venues include Paris, Mexico and Huston.

5. Arbitrator Selection and Qualifications

Selecting or appointing arbitrators is one of the most critical steps in arbitration and it dates back to the drafting of the arbitration clause. The clause should answer several questions in this regard: how many arbitrators will there be? How will they be selected? What are their qualifications?

Arbitration usually involves a single arbitrator but the parties might prefer having several arbitrators. In that case, the common method would imply that that each party to the dispute would select an arbitrator and the two selected arbitrators would then get to nominate a third arbitrator. A sole arbitrator may be preferable for disputes involving small amounts of money[34]. In the case of the disputes involving amounts of money in

33 Gary Born *International Arbitration and Forum Selection Agreements. Planning. Drafting. Enforcing* (The Hague: Kluwer Law International 1999), 62.
34 Kathryn H. Nickerson *International Arbitration*

millions, parties usually prefer employing several arbitrators in an attempt to protect themselves against the whim of one arbitrator. Arbitration by a sole arbitrator will significantly cost less and ordinarily proceed faster than a three person panel. This is relevant knowing that scheduling troubles and delays increase in direct proportion with the number of arbitrators involved. On the other hand, a three person arbitral panel gives each party the opportunity to appoint an arbitrator familiar with its own method of running business and its national legal system. The parties may thereby be assured that the panel will have a thorough understanding of each party's business practices and point of view[35]. With respect to expertise and consistency, three arbitrators will have more skills to deploy, a variety of backgrounds, and other resources than a sole arbitrator[36].

If the number of arbitrators was not easily decided among the parties, they could always seek arbitration rules, where most of them provide the number of arbitrators to be appointed and specify their selection method.

For example under the ICC rules, unless the parties have otherwise provided, or if special circumstances exist, the court of arbitration will select a single arbitrator of a different nationality than the parties. Under UNCITRAL rules article 5 states:

> *"If the parties have not previously agreed on the number of arbitrators. (ie. One or three), and if within fifteen days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed"* .

35 Jay G. Martin *Drafting Arbitration Clauses in International Contracts*. 7.
36 Gary Born *International Arbitration and Forum Selection Agreements. Planning, Drafting, Enforcing* (The Hague: Kluwer Law International 1999), 65

"Each party shall appoint one arbitrator and the third arbitrator shall be selected by the other two. If the two arbitrators are unable to agree on the third arbitrator, the latter shall be appointed by the appointing authority previously designated the parties"[37]

In the absence of an agreement between parties on the number of arbitrators, and in the absence of international rules, national courts may intervene to decide on this matter. This might, as expected, result in delays and disputes over jurisdiction.

Another issue to consider here is whether the parties should identify the arbitrators by names; or should they restrict themselves to specifying and describing qualifications of the candidate(s) to serve as an arbitrator(s).

Such qualifications should be tailored according to the type of dispute. For instance, if the agreement is to be contained in a purchase and sale agreement for a certain business; it might be preferable for the arbitrator to be an attorney, a PA or a business broker with a minimum experience in transactions involving purchase and sale. Legal, linguistic and technical experience may also be taken into account while choosing a qualified arbitrator.

6. Language of Arbitration

The arbitration clause of an international agreement should specify the language to be used during arbitration proceedings and the language in which the award should be

37 United Nations UN *UNCITRAL Arbitration Rules (1976)* [document on-line] (1976 accessed on 24 March 2007) available at http://www.jus.uio.no/lm/un.arbitration.rules.1976/doc.html#48; Internet, Article.7 (1) (2) (3).

issued[38]. If the language selected is not the language of one of the parties, a provision shall be added allowing for simultaneous translation and for equally sharing the cost of translating testimony and documents among the parties involved.

If again the parties fail to select the language, it is the arbitrators' duty to do so after the arbitral tribunal is constituted, while taking into account the contract language and few other conditions. Many institutional rules such as article 16 of the ICC, article 14 of AAA, article 17 of LCIA authorize the arbitral tribunal to select the language.

Another example from the UNCITRAL rules article 17 could be mentioned here as well. It states that:

> *"subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defense, and any further written statements and, if oral hearing take place, to the language or languages to be used in such hearings."*[39]

Generally, parties willing to have a well drafted arbitration clause should designate the main language themselves and then allow simultaneous interpretation into another language.

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38 The 'Lectric Law Library, *Use of Arbitration in International Business Disputes* [document on-line] (accessed 05 May 2007); available from www.lectlaw.com/files/adr14.htm; Internet.

39 United Nations *UNCITRAL Arbitration Rules (1976)* [document on-line] (1976, accessed on 25 May 2007); available at http://www.jus.uio.no/lm/un.arbitration.rules.1976/; Internet, Article 17.

7. Choice of Law:

If the agreement to arbitrate contains a clause pertaining to the choice of law, it is virtually always followed for many reasons. From one hand, international arbitration essentially respects parties' autonomy which involves freedom to choose a forum and to choose the law to govern their relations. On the other hand, arbitrators owe their jurisdiction to the agreement of the parties, and the choice of law clause is usually a condition of that agreement[40].

If the agreement to arbitrate does not contain a clause pertaining to the choice of law several possibilities exist and arbitrators may apply:

a- The law of the place of arbitration on the assumption that designation of the place imposed the choice of that law.

b- The conflict of law rules of the place of arbitration.

c- The arbitrators themselves may decide on the applicable law, either on the basis of their expectations, or based on the jurisdiction that is most significant with the dispute or the issue in question or the place of performance[41].

d- A kind of international merchants' law or Lex Mercatoria, which adopts commonly acknowledged rules of law such as a duty of good faith or a requirement of notice.

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40 Andrea W. Lowenfeld *International Litigation and Arbitration*, 338.
41 International Chamber of Commerce ICC *ICC - International Chamber of Commerce Arbitration Rules 1998* [document on-line] (1998, accessed on 25 May 2007) available at http://www.jus.uio.no/lm/icc.arbitration.rules.1998/; Internet, Article 13.3.

Finally some arbitrators believe that it may not be necessary to decide in advance on the law to be applied. They rather prefer to wait until they have a thorough knowledge about the case. This clarifies whether there is actually a legal issue between the parties. In case a legal issue was identified, it should be decided whether there is a real conflict between the law of the tenant's state of domicile or the land lord's[42].

A contention by a losing party that the arbitrators made an erroneous choice of law or mishandled it, will not generally be considered a basis for setting aside the award in the state where the arbitration was held nor for refusing enforcement in another state[43].

As an alternative to the application of law, arbitrators may be authorized under the arbitration agreement to settle the disputes as *amiable compositeurs*[44]. This implies that they are supposed to reach a just and fair agreement without referring to any particular rules of law. Generally, in suits of equity unlike the actions at law, in the Angelo-American tradition, arbitrators acting as *amiable compositeurs* will still apply legal principles, but with less emphasis on technical defenses or literal reading of documents that seem to contradict the intention of the parties.[45]

8. Costs and Fees

The arbitration agreement should clearly provide allocation of costs and attorneys' fees. The rules of major arbitration institutions authorize arbitrators to charge costs on one of

42 Andrea W. Lowenfeld *International Litigation and Arbitration*, 339.
43 United Nations *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* [document on-line] (New York, 10 June 1958, accessed on 05 May 2007); available at http://www.jus.uio.no/lm/un.arbitration.recognition.and.enforcement.convention.new.york.1958/; Internet.
44 Gary Born *International Arbitration and Forum Selection Agreements. Planning, Drafting, Enforcing* (The Hague: Kluwer Law International 1999), 79
45 Andrea W. Lowenfeld *International Litigation and Arbitration*, 339.

the parties, which is usually the defeated party, or to share them between the parties[46]. The rules generally define the costs to include:

a. Reasonable fees for legal representation
b. Arbitrators' expenses
c. Administrative fees
d. Fees and expenses of experts

In addition, the ICC rules allow "other costs" to be charged on a certain party[47]. The AAA international rules may also charge an award of costs in applying an interim relief[48].

9. Model Clauses

UNICTRAL rules, in addition to each of the leading arbitral organizations, provide a sample of arbitration clauses for inclusion in international contracts. The following is a list of these clauses

- UNICITRAL Arbitration Rules.

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration rules as present in force. Parties may wish to consider adding:

a) *The appointing authority shall be --------- (name of institution or person)*

b) *The number of arbitrators shall be ---------- (one or three)*

46 United Nations UN *UNCITRAL Arbitration Rules*. Art. 40 (1).
47 ICC *ICC - International Chamber of Commerce Arbitration Rules*, Article 31.
48 American Arbitration Association *AAA International Rules* [document on-line] (accessed on 12 March 2007): available at www.adr.org; Internet. Art 31.

c) *The place of arbitration shall be ---------- (town or country)*

d) *The language (s) to be used in the arbitral proceedings shall be-------"*

- American Arbitration Association AAA

"Any controversy or claim arising out of or relating to this contract shall be determined by arbitration in accordance with the International Arbitration rules of the American Arbitration Association.

The parties may wish to consider adding:

a) The number of arbitrators shall be ------- (one or three)

b) The place of arbitration shall be ---------- (city or country)

c) The language (s) of the arbitration shall be ------ (Specify)"

- ICC Arbitration Rules: International Chamber of Commerce:

"All disputes arising in connection with the present contract shall be finally settled under the Rules of [Conciliation and] Arbitration at the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said rules"

- London Court of International Arbitration LCIA

"Any dispute arising out of or in connection with this contract , including any questions regarding its existence, validity or termination shall be referred to and finally resolved

by arbitration under the Rules of the London Court of International Arbitration, which rules are deemed to be incorporated into this clause.

(i) The number or arbitrators shall be ------ (one or three)

(ii) The place of arbitration shall be ------ (city or country)

(iii) The language to be used in arbitration proceeding shall be ------

(iv) The governing law of the contract shall be the substantive law of[49]*--------"*

49 www.internationaladr.com

CHAPTER II.

The Enforcement of International Arbitral Award

The production of an enforceable award is the rationale behind the arbitration process. More specifically, when discussing international arbitration, notably commercial arbitration, this obviously would require formulation of an award that could be enforced in any place the respondent or the loosing party might be holding any form of assets. The award must be "transportable", meaning that it can be taken from the state in which it was promulgated under a certain law system, to another state where it should be fully recognized and enforced under the law system of the later state[50] .

For reasons already mentioned before, arbitration frequently occurs in states with which the parties have no connection. However, when it comes to enforcement this must, of course, take place in a state with which the losing party has to have a certain association such as assets.

The main thrust of international conventions in the arbitration field has always been in the area of recognizing and enforcing awards. This implicitly reinforces the importance of international commercial arbitration[51]. This would imply an increase in the number of international treaties that facilitate this process.

Such treaties (conventions) have achieved widespread international acceptance, and for this reason foreign arbitration awards are easier to enforce in many countries than foreign court judgments. Furthermore, there can be no doubt that the success of the New York Convention of 1958 and the effect of United Nations' harmonization efforts which led to the UNCITRAL Model Law on international commercial arbitration in 1985 are the two pillars upon which

50 Karl J. Mackie *A Hand Book of Dispute Resolution. ADR in Action* (London: Routledge with Sweet & Maxwell 1991), 62.
51 Karl J. Mackie *A Hand Book of Dispute Resolution*

modern international arbitration and the mechanism of enforcement of arbitral awards rest. The New York Convention now applied in over 140 jurisdictions. The Model Law has been adopted in numerous countries around the world and even where it was not adopted, it materialized the basis for a new and up-to-date legislation on arbitration[52]. Hence, the following will shed the light on the New York Convention and the Model Law in more details.

1. The New York Convention

The New York Convention is also known as the convention on the recognition and enforcement of foreign arbitral awards. In June 1958, after many years of negotiations, a convention was signed at the United Nations in New York concerning arbitration. The New York convention was perceived with widespread consent and it certainly contributed in rendering arbitration a favored method for resolving commercial disputes around the world.

The convention deals with the enforcement of arbitration agreements but its primary objective was to establish a more effective method of ensuring the recognition and enforcement of foreign awards[53]. The basic idea of the New York Convention was to make arbitral awards enforceable in a foreign state and in any state party to the convention. Without such a convention, it had often been difficult or impossible to enforce an arbitral award outside the state in which the arbitration had taken place, where a defendant might not be well established or have assets[54]. For example suppose that X, a French company and Y, a British company, signed a contract that contains an agreement to arbitrate in Switzerland. If a dispute arises and

52 For example the English Law Act 1996.
53 Karl J. Mackie *A Hand Book of Dispute Resolution*, 63.
54 Andrea W. Lowenfeld *International Litigation and Arbitration*, 34.

X seeks to bring an action against Y in the courts, say of Paris or London, the courts of either countries will reject the request and refer the parties to arbitration[55] .

If the arbitration goes forward in Switzerland, and if it results in an award in favor of either of the parties, that award can be enforced directly in France, Britain or any other country party to the New York Convention.

In examining the New York Convention regarding enforcement of awards, there are certain formal conditions and grounds for refusal of awards recognized in the convention and are worth mentioning:

1.1. Formalities

a. The Award must be foreign

Article 1 of the New York Convention clearly states that the place where the award is made is the main test for deciding whether the convention applies. The Convention is intended to apply to arbitration awards *"made in territory of a state other than the state where the recognition and enforcement of such awards are sought"*[56]. The convention also applies only *"to awards not considered as domestic"*[57].

The word domestic can be differently interpreted depending on the jurisdiction of the different countries parties to the convention. Under the New York Convention arbitral awards include those made either by a tribunal established solely to decide on a particular dispute or by a permanent arbitral body.

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55 France & Britain are parties to the New York Convention.
56 United Nations *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.* Article 1.
57 United Nations United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Article 1.

b. The Agreement must be in writing

Article II of the convention recognizes arbitration agreements. Each country that has ratified the Convention (a contracting state) must recognize an "agreement in writing" whereby the parties to such an agreement submit their disputes to arbitration. This does not necessarily mean that an arbitration clause has to be found in a signed contract. Article II stipulates that arbitration agreement may be "contained in exchange of letters or telegrams".

This has opened the door for some Judges to widely interpret the "in writing" requirement. To illustrate this, we will present a case as an example: FREY vs. CUCCARO.

In 1971, four Austrian firms entered into four separate contracts for the sale of lumber to the Italian firm Cuccaro. Each of the contracts contained a clause referring to arbitration of all disputes that might arise before the arbitral tribunal of the Vienna commodity exchange. When Cuccaro failed to make payments on time, the Austrian firms initiated arbitration proceedings in Vienna. Cuccaro did not attend to the arbitrations, and the arbitral tribunal rendered default awards against it on each of the four contracts. The four firms applied to the court of appeal in Naples for execution of the awards in accordance with Article IV of the New York Convention.

Each of the four contracts contained a clause stating:

"The present contract is based on the Austrian usages in the lumber trade. In case of dispute the parties shall resort to the arbitral tribunal of the Vienna Commodity Exchange. The buyer and seller shall each sign two copies of the present contract and shall return one copy to the broker in Vienna."

Only two signed copies of the contract forms were returned to the broker. The award issued in this case is therefore considered valid for these two contracts and will be enforced, the thing that does not apply to the other two contracts. The prevalence of the New York Convention over the jurisdiction of Italian courts can not be derogated by contracts complying with the convention. This applies in particular when considering the requirement in Article II of the convention that states the necessity of initiating an agreement in writing, which is defined as an arbitration agreement either signed by the parties or contained through exchange of letters or telegrams.

The claimants, whom did not return a signed copy of the contract, claimed that their awards should also be enforced. Their argument stated that their contracts had been concluded and were to be applied in Austria, and the law of that country does not require a written agreement. This contention could not be acknowledged. There is an unchallenged agreement that the rule contained in international treaties prevails over internal laws of individual states.

One could therefore conclude that the jurisdiction invoked by the Austrian claimant could only be effective if based on a written arbitration clause according to the requirements of the convention[58].

c. The execution of arbitral award

Article VI of the New York convention imposes upon each contracting state the obligation to recognize and enforce arbitration awards conforming to the convention's requirements. In addition, article IV specifies the steps necessary for a party to acquire recognition and enforcement of an award which is in its turn supposed to be enforced *"in accordance with the*

58 Andrea W. Lowenfeld *International Litigation and Arbitration*, 349- 350.

rules of procedure of the territory where the award relies upon". Further, contracting states should not impose fees on the enforcement of convention awards higher than those *"imposed on the recognition or enforcement of domestic arbitral awards"*.

In order to enforce such awards, parties must provide the "Forum/Enforcing" country with all of the following:

1) The authenticated original award or a certified copy.

2) The original written arbitration agreement between the parties or a certified copy.

3) Certified translation of the awards or arbitration agreement if they are not written in the official language of the Forum [country][59].

After these basic requirements are satisfied, enforceability is still subject to the forum country's procedural rules. Besides, the New York Convention includes other limitations that will be discussed in the following.

1.2. Grounds for refusal:

The New York Convention acknowledges only limited resentments to the enforcement of arbitral awards. In general these are related to issues of fundamental fairness and public policy, and their recall is intended to be an exception rather than a rule[60]. Such defenses include the following:

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59 *International Arbitral Awards Under the New York Convention* [document on-line] (accessed on 26 May 2007): available at www.resolvedisputes.net/uploadeddocuments/test%201AW.pdf: Internet

59 Jay G. Martin *Drafting Arbitration Clauses in International Contracts*

a. Incapacity of the parties or invalidity of the arbitration agreement

Article V(I)(a) of the convention involves two cases where enforcement of awards could be reconsidered. These apply where (i) the parties to the arbitration agreement were facing some incapacity under the law governing them, or (ii) the arbitration agreement was not valid either under the law applicable to it or under the law of seat of the arbitration[61].

Parties involved into an arbitration agreement could be either individuals or corporations. Individuals are normally free to enter into contractual relationships, though it is always worth assessing whether an individual has the capacity to enter into such contracts taking into consideration the law of the country he is residing in and the law governing the contract.

On the other hand, a corporation's capacity is normally determined by its constitutional documents and the laws of its seat of incorporation or the laws of the place of its head office or the laws of the place where it manages its affairs or business. Therefore and in practice it would be unusual for either of those to restrict the ability of a corporation to enter into an arbitration agreement.

However, incapacity is more commonly an issue that applies to a state or a state agency. In some countries the state or its agencies are not permitted to resolve a dispute with a commercial party through arbitration. Furthermore, in some countries a state agency may require permission or approval from another authority before it is granted the consent to undergo an arbitration agreement. It is therefore always advisable before entering into an arbitration agreement with a state or a state agency to ensure that it has the capacity to enter into such agreements.

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61 Karl J. Mackie *A Hand Book of Dispute Resolution*

As we have mentioned in Chapter II, the arbitration agreement must be "in writing". Article II (2) of the New York Convention requires an agreement in writing for the validity of the arbitration agreement which should be either *"an agreement signed by the parties or in exchange of letters and telegrams"*[62]. The following is a related case study.

> *"Van Walsum N.V v. Chevalines S.A.: Considering that the Netherlands company van Walsum N.V. of Rotterdam asserts that it concluded a contract for the state of Argentine meant with Chevalines, S.A. of Geneva, confirmed by a communication dated June 3, 1966 setting forth in telegraphic style under different categories, the conditions of the transaction, and indicating, opposite the word "arbitration" the Netherlands Oil, Fats, and Oil Seed Trades Association in Rotterdam.*
>
> *Considering that subsequently, van Walsum initiated arbitration against Chevalines before the arbitration tribunal of the said Association; that respondent made no appearance; and that on November 17, 1966 the tribunal awarded NFI 8574.19 to claimant, plus expenses.*
>
> *Considering that van Walsum has applied to this court for recognition and enforcement of this award, pursuant to the New York Convention, and that the respondent has moved for dismissal, on the ground that it has done nothing to recognize the jurisdiction of the Rotterdam tribunal, nor did it agree on any arbitration clause.*
>
> *Considering that, according to Article II(2) of the New York Convention, a written agreement is defined as "a clause in a contract or an*

[62] The New York Convention Article II (2)

arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams;"

Considering that van Walsim has correctly pointed out that these expressions have introduced a new form, different from the written form required by Swiss law (Art. 13 of the Code of Obligations); that this innovation, as it has explained, arose out of the practical necessities of international commerce, which make more use of telexes and telegrams that of letters or formal contracts; ...

Considering, however, that even if one accepts unsigned messages, it is nevertheless true that the New York Convention requires an exchange of letters or telegrams, which implies communications that reply or at least correspond to one another in time and meaning; that there is no such evidence in the present case;

Considering that the duplicate of the "order confirmation" of June 3, 1966 was not issued by the Chevalines but by claimant itself, and that this text was not returned to van Walsum by the respondent, though it did receive the original;

Considering that the latest document evidencing the transaction in question is the advice if opening of a letter of credit No. 63877 of 15 June 1966, which makes no mention of an arbitration clause or arbitration tribunal;

Considering that it is true that case law has long ago added to the rule that silence cannot be considered agreement an exception "when the

rules of good faith requires that a party manifest its disagreement if it intends not to be bound;"

Considering that silence concerning a letter of confirmation can be considered to constitute agreement when the offeror diverges in good faith from an oral agreement or refers in good faith to an agreement that he regards as complete;

Considering that in the present case van Walsum does not claim that an oral contract on the subject of arbitration was formed;

Considering that in introducing this clause in its letter of confirmation, it proposed an addition to the contract which, unlike the other points in the contract, could not benefit from an implied acceptance;

Considering that it was nevertheless this circumstance that the arbitrators relied on to found their jurisdiction, in writing "... the Claimant has added to this contract a confirmation dated 3 June, 1966, which the Respondent has retained without protest;"

Considering that this fact is, however, not sufficient, either under the New York Convention or under Swiss law, to constitute an agreement to arbitrate;

And considering that absent agreement on this point, the award if the Rotterdam tribunal cannot be enforced in this country,

THE COURT: Dismisses the action and impose costs on plaintiff."[63]

[63] Andrea W. Lowenfeld *International Litigation and Arbitration* (West Publishing Co., 1993), 346-347

b. Denial of a fair hearing

Another argument that may hinder the enforcement of arbitral awards is the lack of fair hearings. This implies that the party against whom the award was promulgated *"was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case"*. This provision, if proven to be true, questions the integrity of the arbitral process. The most common response to such argument would be that there was a lack of a due process.

Different jurisdictions of course have different approaches of "fair hearing". At the recognition and enforcement stage however, a national court should not be trying to decide whether the award is a fair outcome, nor it is expected to apply to the arbitral process its own requirements of a court hearing. Rather, it should simply seek to ensure that the hearing was conducted similarly to what the parties had agreed upon and that each party has had the time and the opportunity to present its arguments.

In a decision of June 17, 1997, the United States District Court of Colorado stated that the inability of a party to pay the costs of the arbitration is not and can not be considered an inability to present the case and thus a ground for refusal under article V of the New York Convention. The court stated that: *"if the costs of the procedure were to be a defense. It would be difficult to imagine when this defense would not exist"*.[64]

c. Excess of authority or lack of jurisdiction

Another possibility for refusing recognition and enforcement of an award applies when the award "deals with a difference" that was not subject to the terms of submission to

[64] ICCA Yearbook Commercial Arbitration XXIVa (1999). .806-812.

arbitration. Another case could be considered when the award contains decisions on matters not within the scope of the submission to arbitration.

When considering the first case, a national court could reach a verdict stating that the tribunal exceeded its authority and therefore enforcement is to be declined. This argument is rarely used and therefore is rarely successful in resisting recognition and enforcement of awards; this is mainly because most national courts undermine their role under the convention and therefore hardly ever question a tribunal's decision-making process. An example could be given here from the United Mexican States vs. Metalcad Corporation case. In this case

> *"The United Mexican State ("Mexico") argued that a patently unreasonable error can be deemed as an excess of jurisdiction. The Supreme Court of British Columbia noted that former courts decisions referred to patently unreasonable error as an "abuse of authority" and stated that an unreasonable interpretation given to the facts results in an award contrary to the public order. In the case at bar, however, the Supreme Court refused to decide whether such patently unreasonable error is a ground for setting aside an award pursuant to the International Commercial Arbitral Awards. The Supreme Court eluded the question by holding that, there was not any patently unreasonable error committed by the arbitral tribunal."*[65]

In what concerns the second case, the convention has also tackled the issue and accordingly specified a mode that allows implementing lines of the awards by separating the issues that were not covered by the scope of the submission to arbitration. This in

[65] Carolyn B. Lamm and Frank Spoorenberg *The Enforcement of Foreign Arbitral Awards*

short, allows partial enforcement of an award if a national court perceived that the concerned tribunal had decided upon some maters falling outside its jurisdiction.

d. Procedural irregularities:

The fourth ground upon which refusal to recognize or enforce an award is based on the assumption that *"if the composition of the arbitral authority or arbitral procedure"* was not in accordance with what the parties had agreed upon. Another reason could be that the parties were unable to agree in accordance with the requirements of the country law where the arbitration would take place. This argument had not always found its way out for escaping enforcement of awards. National courts tend to restrictively interpret this ground that is rarely successfully raised. For instance, and even when a resisting party manages to prove this argument, courts have always found a discrete way of enforcing the awards disregarding the party's claim.

e. Invalid award

Under this rubric, two forms of refusing recognition and enforcement of the awards are discussed. In the first case, the award is considered invalid when it is yet to be considered binding; the second case is when the award has been set aside or suspended by the country that originally released the award. Whenever this last argument is raised it makes room for more investigations and judicial considerations than any of the other grounds.

The issue of setting aside or suspending a certain award seems to be a straight forward issue. For example it seems reasonable that if a Paris seated award was suspended by a French court, this award could not be enforced in France. Likewise, one could assume that other national courts would consider this same Paris award not enforceable. However, this has not always been the case. Although controversial and relatively rare, it is possible for an award to be suspended at the country of its origin but enforced under the convention in another country. This is clear in the article **V** of the convention that states that awards are not mandatory for national courts. In addition, the introduction of the same article states that a national court "may" refuse to recognize or enforce an award. Furthermore, article **VII** of the convention safeguards the right of a party to exempt itself of an award to the extent allowed by local law in the country where enforcement is sought. An additional reason for this anomaly is that the convention does not interfere on the grounds for setting aside or suspending an award. This is a question solely involving the courts or law of the country in which the award was made.

Accordingly, the New York Convention recognizes a certain favorability of some jurisdiction systems over others towards awards recognition and enforcement. Therefore, taking this argument into consideration a party should particularly pursue enforcement in such a jurisdiction if possible.

f. Non – Arbitrability

Parties seeking to resist enforcement of international arbitral awards may argue that certain disputes are *"not capable of settlement by arbitration under the law"* of the country in which enforcement is undertaken. Hence, most national courts have adopted

concise definitions of "non- arbitrability" as a way to evade enforcement of foreign arbitral awards[66].

Questioning whether a dispute is arbitrable arises at two different stages during the arbitration process. The first time it might be evoked, is at the commencement of the arbitration process, the second case at its wrapping up. After issuing an award, a party intending to resist enforcement under a certain jurisdiction, may argue that the matter of the dispute leading to that award is not arbitrable under that specific jurisdiction system. An example of a non-arbitrable dispute under many jurisdictions is the one involving, the subsoil. This is commonly the case in disputes related to the fields of oil, mineral explorations or development contracts. Some jurisdiction systems call for such disputes to be only dealt with in state courts.

g. Public policy

The term "Public Policy" relates to the basic principles or notions of law morality, justice and public good. Violating public policy (or public order) of the enforcing state has always been well acknowledged, among all arbitration practitioners and scholars, to be a valid rationale behind refusing recognition and enforcement of foreign judgments and awards[67]. This acknowledges the right of the state to exercise its ultimate control over the arbitral process. This has always, however, caused a certain form of tension between the legislatures and the courts. This tension evolves around two issues: one dealing with the non-willingness to provide the state with the authority of awards

66 Gary Born *International Arbitration and Forum Selection Agreements. Planning, Drafting, Enforcing* (The Hague: Kluwer Law International 1999), 113

67 Audley Sheppard & Clifford Chance *Public Policy* [document on-line] (accessed on 26 June 2007), available at www.transnational-dispute-management.com/samples/freearticles/tv1-1-article_67.htms; Internet.

enforcement which contravenes domestic laws and values; and the other, emanates from the desire to respect the conclusiveness of foreign awards.

While knowing that public policy is often regarded as a vague concept uneasily defined and that varies from state to state, a large room for uncertainty and unpredictability materializes. This has always been a favorable medium for the defeated party to claim to resist enforcement of the award.[68]

In this case

> *"two awards were made in favour of Techno of approximately $200 million. The dispute was related to Techno's purchase of no-ferrous metals from the International Development Trade Services (IDTS). Techno sought enforcement of the award and IDTS opposed arguing that the arbitral tribunal was corrupt. Indeed, IDTS alleged having tested the tribunal's integrity by offering bribes. Apparently IDTS was able to produce different exchanges of correspondence attesting that the tribunal was willing to accept the bribes. No payment, however, was made and IDTS continued to participate to the arbitration. IDTS raised the issue of bribery only at the stage of the confirmation of the award. The District Court for the Southern District of New York granted the motion for an order to confirm the award. The Court of Appeals affirmed the District Court's decision. The Court of Appeals considered that IDTS knowing concrete facts indicating corruption of the arbitral tribunal, but remaining silent until after the award has been rendered has actually waived its objection."*[69]

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[68] Audley Sheppard & Clifford Chance *Public Policy*
[69] Carolyn B. Lamm and Frank Spoorenberg *The Enforcement of Foreign Arbitral Awards*. p.12

So the court here did not take the Public Policy notion into consideration as a ground to refuse enforcement.

Another case is also worth mentioning here:

The Parsons & Whittemore v. RAKTA case

What happened in 1974, in one of the leading American federal circuit courts (i.e., the appellate level above the US district courts and immediately below the US supreme court), is considered to be an outstanding example of what "public policy" stands for. This case is of special interest for the Middle East, because it involves enforcement in the United States of an award obtained by an Egyptian corporation as a result of an arbitration concerning a dispute on a construction project in Alexandria.

The facts were as follows: Parsons & Whittemore, a contracted American company had entered into a contract (with an arbitration clause) in 1962 for the construction of a paperboard mill. Work progressed until the outbreak of the 1967 Arab-Israeli War. The contractor considered that the "force majeure" clause excused further work implementation and abandoned the nearly finished project. RAKTA, the owner, an Egyptian corporation, completed the work and invoked the arbitration clause. The ICC arbitration panel found that the force majeure defense was limited to a very brief period and that the contractor had made but perfunctory efforts to secure special visas for its foreign personnel. In its final award, the tribunal held the contractor liable for US$ 312,507 in damages for breach of contract (and also assessed the contractor for ¾ of the arbitrators' fees).

In attempting to resist the award enforcement in the US courts, Parsons had various arguments one of which was that enforcement of the award was to violate the public policy of the United States.

While noting that there were some arguments both for narrowing and for broadening the public policy defense, arising out of differences in the Convention language from that of the prior Geneva Convention, the circuit court looked at the inferences to be drawn from the New York Convention's history as a whole. It found a pro-enforcement bias and thus a narrow reading of the public policy defense. It concluded that enforcement should be denied only where enforcement would violate the forum state's most basic notions of morality and justice.

Applied to the facts of that case, the court found resistance to award enforcement easily dismissed. The contractor had attempted to argue, with respect to the public policy defense (there were other defenses as to arbitrability, excess of jurisdiction and disregard of law, all equally rejected by the court), that after the severance of Egyptian – American diplomatic relations, it felt required, as a loyal American citizen, to abandon the project. In addition, its return to work would have defied national policy and contravened US public policy. The reaction of the court, regarding this attempt to wrap the flag of patriotism around a poor commercial decision which had been found by the arbitrators to have been a breach of contract, was quit direct:

"In equating "national" policy with United States "public" policy, Parsons & Whittemore quite plainly missed the mark. To read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of "public policy". Rather, a circumscribed public

policy doctrine was contemplated by the Convention's framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis. To deny enforcement of this award largely because of the United States' falling out with Egypt in recent years would mean converting a defense intended to be of narrow scope into a major loophole in the Convention's mechanism for enforcement. We have little hesitation, therefore, in disallowing [Parsons & Whitehorse's] proposed public policy defense".

The International Law Association (ILA) considered that using public policy as a ground for vacating an arbitral award includes both procedural as well as substantive violations. According to ILA, using public policy as a pretext could be a real success in avoiding enforcement of international awards[70].

2. The UNCITRAL Model Law

In 1977 the Asian African legal consultative committee requested revision of the operation and implementation of the New York Convention. The committee found out that there was an apparent lack of uniformity in the approach of national courts to the enforcement of awards. Accordingly, the Secretary General of UNCITRAL concluded that harmonization of the enforcement practices of states, and a proper judicial control over arbitral procedures, could be better achieved through promulgation of a model or uniform law, rather than by attempting to revise and adjust the New York Convention[71].

70 "Arbitration" *The Journal of the chartered institute of arbitrators*. 71 n.1 (February 2005), Thomson Sweet & Maxwell: 10

71 Audley Sheppard & Clifford Chance *Public Policy*

The final text was then adopted in 1985, and was later carried out predominantly by common law jurisdictions, and adopted as a frame of reference by several civil law jurisdictions. Hong Kong was one of the first common Law Jurisdictions to adopt the Model Law. In the Middle East, Bahrain, Egypt, Jordan, Iran and Oman are from the countries that adopted the Model Law. In Canada, the UNCITRAL model law has been adopted at the federal level.

In Africa, Nigeria and Zimbabwe have both embraced legislation based on the Model Law. New Zealand, has adopted the UNCITRAL Model Law for both domestic and international arbitration. The English Arbitration act of 1996 provided a comprehensive codification of the law governing international arbitration in England, broadly modeled on the UNCITRAL Model Law. Other countries that have adopted the Model Law include Kenya, India, Scotland, Australia, Singapore, Germany, Russia and Spain.

The main purpose of the Model Law is to harmonize international arbitration agreements and awards in a more readily, predictably, and uniformly enforceable manner. Through adoption of the model law, less room for judicial interference in international arbitral proceedings[72] is possible, as will be discussed later.

The following will attempt to shed the light on the essential features of the Model law that contribute or deal with the enforcement of arbitral awards.

72 Gary Born *International Arbitration and Forum Selection Agreements. Planning, Drafting, Enforcing* (The Hague: Kluwer Law International 1999), 101

2.1. Essential Features of the Model Law

a. The Scope of application

The Model law, as defined in article 1(3) of the law, applies to international commercial arbitration. While examining the definitions in the model law, the most frequently applied definition will be the first, which provides that arbitration would be international if the parties have, at the time of the conclusion of their agreement, their places of business in different countries.

In addition, Article 1 (3) b (ii) stipulates that an arbitration could be treated as international if the place, to which the matter of the dispute is closely connected, is located outside the state of the parties' businesses[73].

b. The form of the arbitration agreement

While oral arbitration agreements are still adopted in practice and are recognized by few national laws, article 7 (2) of the Model Law requires, similarly to the New York convention, that the parties' arbitration agreement should be in writing[74]. The same article specifies the forms in which an agreement is considered to be done in writing, and these are if *"it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunications which provide a record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by the other"*. Another form would be when the contract refers to a document containing an arbitration clause,

73 United Nations *UNCITRAL Model Law on International Commercial Arbitration (1985)* [document on-line] (1985, accessed 25 May 2007): available at www.jus.uio.no/lm/un.arbitration.model.law.1985/doc; Internet.
74 *Commercial Arbitration and Other Alternative Dispute Resolution Methods* [document on-line] (accessed on 26 June 2007) available at www.sice.oas.org/dispute/comarb/uncitral/icomarbe3.asp#neot; Internet

provided that the contract is in writing and there are sufficient words of incorporation of the provision.

c. Form of the award and the grounds for setting it aside:

Article 31 specifies that the award shall be done in writing and should state the reasons upon which it is based unless the parties agreed otherwise. National laws on arbitration, often matching award with court decisions, provide a variety of means to avoid implementation of arbitral awards. This happens usually within different and often long periods of time and with an extensive record of arguments that differ widely with the various legal systems. The Model Law attempts to avoid facing such situations, which are of substantial concern to parties involved in international commercial arbitration[75].

Article 34 of the Model Law provides a list of exclusive grounds that could result in setting aside an arbitral award by the courts where the arbitration took place. These arguments are limited to:

a. Ground 1, where any one of the following might apply:

   (i) A party to the arbitration agreement was under some incapacity or the arbitration agreement is not valid under the applicable law.

   (ii) A party was unable to present its case.

   (iii) The award deals with issues outside the submission to jurisdiction.

   (iv) Irregular composition of the arbitral tribunal.

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b. Ground 2, when either:

(i) The subject matter of the dispute is not capable of settlement by arbitration under the law of the state where the arbitration takes place. Or,

(ii) The award conflicts with the public policy of the state where the arbitration takes place.

d. Recognition and enforcement of awards

In what concerns recognition and enforcement of awards, the Model Law resembles the New York Convention in many aspects. For instance, article 36 (1) of the Model Law states the same provisions contained in Article V of the Convention as the only grounds for refusing recognition and enforcement of an award. These are essentially very similar to what has Art. 34 of the Model Law stated as grounds for setting aside an arbitral award. What could be added onto these grounds involves that an enforcing state can refuse to recognize and enforce an award if the award is yet to become binding for the parties or has been set aside or suspended by the country court in which the award was promulgated[76]. In other words, the Model Law terms provide an appropriate association between setting aside an award at the place of its promulgation and the obligation of implementing it on the enforcing state. Last but not least, article 36 (1) of the Model Law specifically stating that all what was discussed above has to take place *"irrespective of the country in which the award was made"*, cuts across the reciprocity principle adopted by many states.

76 United Nations *UNCITRAL Model Law*, Article 36 (1) V.

2.2. The Model Law and court intervention

One of the main concerns when arbitrating a dispute relates to the ability of the tribunal to effectively deal with all of the arising issues without the need for local courts interference. In all of the above instances, new legislative improvements have reinforced enforceability of international arbitration agreements and awards, while emphasizing importance of parties' autonomy and limiting the scope of national courts' interference in the arbitral process. Dealing with a certain hearing solely through an arbitral tribunal would contribute in making the flow of the arbitration process more efficient. In addition, neutrality of the process, one of the prime reasons for preferring arbitration over litigation, may be jeopardized when involvement of the local courts gets overarching. On the other hand, confidentiality of the case could become more susceptible to public scrutiny with increased local court interference. In short, local courts interferences may unlikely render the arbitral process unsatisfactory compared to the parties' intention or arbitral agreement.

Hence, and in an attempt to avoid all what has been discussed earlier, the Model Law provisions impose limitations on local courts' intervention. Article 5, for instance, states that: *"In matters governed by this law, no court shall intervene except where so provides in this law"*. The main purpose of Article 5 is not to totally delimitate local courts' ability to intervene in the arbitration process; it is however an attempt to limit these interferences to certain circumstances. Arbitration processes are prone to several delays; and within certain circumstances intervention of the local courts is necessary and an integral part for a successful arbitration system.

In fact, there are no arbitration legislations or institutionalized arbitration rules that totally preclude local courts' intervention. Rather the enforcement role of these courts is an essential factor for legitimizing the arbitral process.

This is the precise purpose behind the formulation of the New York Convention, in the first place. In addition, and besides enforcement considerations, it must be noted that it is in the public's interest to maintain a certain orthodoxy of due processes and justice. Accordingly, arbitral tribunals should not be given the right to overcome any other rule of law and act only at their convenience. Courts' intervention, at the very least on the enforcement level, ensures that the arbitral process and the award are met with the minimum level of justice. Article 16 of the Model Law encloses two well phrased principles related to the jurisdiction of arbitral tribunal. These are the principle of seperability i. e. an arbitration clause in a contract shall be treated as an independent agreement of the contract and the principle of " Kompetenz- Kompetenz" i.e the arbitral tribunal may rule on its own jurisdiction including any objections with respect to the existence or the validity of the arbitration agreement[77].

The Model Law envisions court involvement in certain circumstances. These can be divided into two categories. The first category comprises matters related to the arbitrators themselves as well as issues concerning setting aside an award. These include the appointment, challenge and termination of the arbitration mandate (Articles 11, 13 and 14) jurisdiction of the arbitral tribunal (Article 16) and setting aside of the arbitral award (Article 34). According to (Article 6) these instances, when faced, should be delegated, and for the sake of administration, specialization and efficiency, to a specially designed court or, possibly to another authority (e.g. arbitral institution, chamber of commerce) as stated in Articles 11, 13 and 14.

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A second category of reasons, under which a court involvement is favorable and sometimes recommended, comprises matters related to discovery, security and enforcement. In respect to these matters, court assistance is sought in collecting evidence (Article 27), recognizing of the arbitration agreement, including its compatibility with court ordered interim measures of protection (Articles 8 and 9) and finally recognizing and enforcing of arbitral awards (Article 35 and 36)[78].

Court intervention can be distinguished at three different stages of the arbitral process. At the establishment of the referral to arbitration, the courts could ensure a kind of assistance, during the arbitration process the court would render powers of supervision and intervention, together with powers of assistance and after the awards is granted; the court would render powers of recognition and enforcement.

When the arbitral process commences a party would typically forward a letter to the other party declaring the dispute in question, specifying its basis and substance, and asking the other party to initiate the arbitration process according to what was agreed upon in their arbitration agreement. At this point a crucial interference of the court is thought essential in the cases where the opponent party refuses the referral to arbitration or if both parties confronted trouble adopting arbitration procedures related to issues of appointment, language, place of arbitration, choice of law.

The Model Law provides that the court shall refer the parties to arbitration unless the arbitration agreement is null and void[79] In the event where the parties were unable to reach an understanding on the appointment of the arbitrator or arbitrators, and/or if they fail to nominate an appointing authority to appoint such arbitrator(s), the court could be asked by the parties to do so. This would secure appointment of an arbitral tribunal, and

78 *Commercial Arbitration and Other Alternative Dispute Resolution Methods*
79 United Nations *UNCITRAL Model Law*. Article 8 (1).

the party requesting arbitration could ensure initiation of the arbitration process despite the resentment of the opponent party.

Another field of intervention for the court could be seen as necessary in assisting the arbitral tribunal in taking evidence[80], interim measures, orders for discovery, security for costs, inspections and other procedures.

This ability of intervention by the court to take interim measures was confirmed in a decision of May 1, 2001 by the United Sates District Court, California in the following case.

> *"In a case China National Metal Products Import/Export Company v. Apex Digital, Inc., 141 F.Supp.2d 1013. The issue to be resolved was whether a national court can issue interim measures despite its obligation under Article II(3) of the New York Convention to "refer the parties to arbitration" when the parties have made an agreement of arbitration. The parties had initiated an arbitration under the rules of China International Economic Trade Arbitration Commission (CIETAC). The CIETAC's arbitration rules direct the parties to submit any application for interim measures to the "people's court for a ruling in the place where the domicile of the party against whom the property preservative measures are sought is located or in the place where the property of the said party is located". However, China National sought a writ of Attachment from the Californian court against Apex's property. China National demonstrated that any award could be rendered ineffectual absent a writ of attachment due to the defendant's inability or unwillingness to pay its outstanding debts. Apex*

80 United Nations *UNCITRAL Model Law*, Article 27.

argued that Article II(3) of the New York Convention prevents any state court to take interim measure when an arbitration is pending. In particular Apex contended that the terms "refer the parties to arbitration" results in the transfer to the arbitration tribunal of the whole matter, including the power to grant a provisional order. The Court rejected the argument. The Court grounded its decision on the purpose of the interim measures as opposed to the text of the Convention. The Court noted that this purpose is to "reinforce the procedural powers of the arbitrators" and "to render more effective the decision at which the arbitrators will ultimately arrive on the substance of the dispute". Considering this aim of reinforcement, the Court held that the granting of interim measures has nothing "contrary to the spirit of international arbitration".[81]

However, the most crucial role of the court comes after promulgation of the award by the arbitral tribunal. At this stage, the court has the power of enforcement notably in the event where one of the parties is reluctant to abide by the terms of the award. In this case, the winning party seeking to effectively implement the award would present an application to the court requesting to make the award an order of court. In this case, failure to comply with the court's order would accuse the order breaching party of contempt of the court.

Finally, it is worth noting that the court has the authority of setting aside the award under certain conditions, already discussed above.

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CHAPTER III

The Enforcement of International Arbitral Awards in Lebanon

1. The Lebanese Legal System: Arbitration

To begin with, it is worth noting that Lebanon is a country open to foreign investments especially by multinational companies and notably involved in the services and tourism sectors. This situation has imposed on the Lebanese Government an obligation of providing the investors with the appropriate and necessary legal infrastructure and incentives that it might be looking after.

Accordingly, an effective dispute settlement tool is thought to be essential to motivate foreign investment especially if it originates from a country having different legal interventions from what is adopted in the Lebanese Government. Arbitration comes to play a leading role in this domain.

Hence, in 1983 the government introduced a modern arbitration legislation into its judicial system known as the Arbitration Act of 1983. According to article 809 of the Lebanese Code of Civil Procedure L.C.C.P "Arbitration is international if it involves international commercial interests". The Lebanese system distinguishes between local and international arbitration, in the sense that one may encounter more flexibility and less restrictions in the chapter of the L.C.C.P pertaining to the international arbitration.

1.1. The new amendment

In 2002, the Lebanese legislators passed a law amending few articles of the LCCP related to arbitration (the amendment). This was considered an important milestone for Lebanon adopting arbitration as one of its main means of disputes' settlement, notably international ones[82]. An example of the intervention of the Lebanese legislature could be examined when the Lebanese Conseil d'Etat had rendered on 17/7/2001 two verdicts concerning the contracts of the two cellular phone companies operating in Lebanon: Cellis and Libancell. During this instance, the Lebanese Government had cancelled the two arbitration clauses in the companies' contracts, and reaffirmed that its jurisdiction relating to the administrative contracts passed by the Government cannot be challenged.

It is worth noting here that the Lebanese legislation is not only well known to be impregnated with the French law but also with its doctrine and case law.

The amendment introduced by the Lebanese legislators in 2002 came to dissipate the investors' concerns about the legal guarantee of the contracts they engage in with the Lebanese state. This became notably important especially that the arbitration clause turned out to be a major guarantee for investments. In addition, and in light of what the Conseil d'Etat had issued of verdicts canceling the arbitration clauses stipulated in the two companies' contracts, the new amendment came to confirm that, it was rightfully applying the law that needed to be amended[83].

The amendments brought by the Law n. 440 dated 29 July 2002, explicitly recognized the capacity of the state and its public institutions to enter into domestic and

82 Law number 440 published in the official journal, issue number 43 on 1/ 8/ 2002
83 Abdel Hamid El-Ahdab "Amendment of the Lebanese Arbitration Law" *DIAC Journal*, 1 (March 2004)

international arbitration[84], and made administrative contracts arbitrable subject to the Council of Ministers' authorization[85].

This has highly raised confidence in the Lebanese legal system and specifically in arbitration[86].

2. The recognition of International Arbitral Awards and the Mechanism of Enforcement:

2.1. Conditions:

According to article 814 of the Lebanese Code of Civil Procedure related to International arbitration, arbitral awards can only be recognized and granted proper enforcement if their existence is recognized by the concerned party and if they are not obviously contradicting the international public order[87].

Before we elaborate further, it is worth mentioning that a basic distinction is to be drawn between recognition and enforcement. Recognition is incidental and could materialize during a trial or a proceeding which has no relation with the issue or conflict between the parties. This could be raised in a form of claim or defense against the other party[88]. Whereas, enforcement is considered an independent procedure and is always judged essential to give the issued award its effectiveness in Lebanon.

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84 Lebanese Code of Civil Procedure LCCP (20/06/1996); Article 809, Par. 2.
85 Lebanese Code of Civil Procedure LCCP (20/06/1996); Article 762, par. 2
86 See also: Nayla Comair-Obeid *Investment encouragement within the framework of the Lebanese experience of dispute settlement lawyers for the new millennium* (Beirut Lebanon 2003).
87 Lebanese Code of Civil Procedure LCCP (20/06/1996); Article 814.
88 See also: Abdel Hamid El-Ahdab *Arbitration with The Arab Countries*, 2nd edition (The Hague – London – Boston: Kluwer Law International, 1999) 338.

Thus, back to Article 814 of the L.C.C.P, two conditions are required for recognition and enforcement of an award:

a. The existence of an award must be proved:

Article 814 (2) clarifies the way awards may be proved. First, the original or a certified copy of the award must be presented together with the original or certified copy of the arbitration agreement. Second, if the award and the agreement to arbitrate are drafted in a foreign language, noting that this happens often notably when involving an award issued abroad by an arbitration institution, the two documents must be translated into the Arabic language by a certified translator.

b. No obvious violation to international Public Policy

At this stage, it must be proved that there is no obvious violation to international public policy .The rational behind this step implies only a rapid examination by the competent judge of the documents in question. The in depth revision and control is reserved to the court of appeal.

2.2. Procedures

Article 815 of the L.C.C.P refers back to articles 793 to 797 of the same code which in their turn are related to national arbitration. Hence, according to Article 793, once the award has been issued, in order to obtain an enforcement order for it, one of the

arbitrators or the more diligent party must dispose a draft of the decision accompanied by a copy of the arbitration agreement, to the clerk of the court of first instance in which jurisdiction was the agreed seat of the arbitration. If this was not possible for a certain reason, the above mentioned documents could be delivered to the clerk of the court of first instance of Beirut[89].

The arbitrator should attach his signature to the copy deposed with the draft noting that the copy conforms to the original. This authentication could as well be performed by another competent authority (official) or by the chief clerk of the court.

Following a proper delivery procedure, a report must then be prepared by the clerk confirming the date of the award presentation to be delivered later for enforcement[90]. After reviewing and examining the draft of the arbitral award and the agreement for arbitration, the president of the court of first instance where the award has been presented grants the enforcement order[91].

In the case of the arbitration process being undertaken abroad, a certified copy of the original arbitral award must be presented in order to be registered and to obtain accordingly authority to enforce[92]. In the cases where the dispute has to abide by the jurisdiction of the administrative courts, the execution order emanates from the president of the Council of State. In case of refusal of an order, appeal against refusal could be claimed under the section for reclamations[93].

89 Lebanese Code of Civil Procedure LCCP (20/06/1996): Article 793, Par. 1 & Article 770, Par.2
90 Lebanese Code of Civil Procedure LCCP (20/06/1996); Article 793, Par. 1 & Article 770, Par.2
91 Lebanese Code of Civil Procedure LCCP (20/06/1996); Article 795.
92 Lebanese Code of Civil Procedure LCCP (20/06/1996); Article 815.
93 Lebanese Code of Civil Procedure LCCP (20/06/1996): Article 795, Par. 2

3. Setting Aside International Awards

In Lebanon, foreign and international awards are not subject to appeal, or any other method of juridical review, including setting them aside.

> *"No recourse can be lodged directly against international arbitral awards issued abroad either by appeal or by annulment, because article 819 of the L.C.C.P provides that international arbitral award issued in Lebanon may be subject to annulment, and this means that international arbitral award issued abroad cannot be subject to such means of recourse, So the only way left for the parties is to make an appeal against the decision granting leave to enforce under specific conditions provided by law"*
>
> Beirut court of APPEAL, 3rd section n°_ 1011/2000-3/4-/2003

An action of setting aside the award could be undertaken in Lebanon only to international awards rendered in Lebanon[94].

> *"Since in many countries of the world, the setting aside of the award in the country where the arbitration was held shall (or at least may) lead to refusal of exequatur in the country where enforcement is requested (based on the mechanisms stipulated by the New York Convention itself)*[95]*, for example, this setting aside procedure organized under Lebanese Law seems particularly important"*[96].

94 Samir Saleh *Commercial Arbitration in the Arab Middle East*, 2nd edition (Oregon: Hart publishing, 2006)
95 United Nations United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article V (1)(c) & Article VI.
96 Walid J. Kassir "The Potential of Lebanon as a Natural Place for International Arbitration" *The Lebanese Review of Arbitration*, 34 (2005).

Setting aside an award rendered in Lebanon must be presented to the court of appeal in the jurisdiction in which the award was made 30 days after the award notification day[97]. Failing to respond to such notifications could result in setting aside the award at any time without any time limits[98].

Grounds for setting aside an international award rendered in Lebanon, as provided in article 819, of the L.C.C.P examined within article 817 are five:

1. The arbitrator decided in the absence of an agreement to arbitrate or on the basis of void or expired agreement.

2. The arbitral tribunal was irregularly appointed.

3. The arbitrators decided in a manner incompatible with the mission given to them.

4. Due- process or fair hearing has not been respected.

5. The award is contrary to international public order.

These same five reasons mentioned above are to be invoked in the case of refusing enforcement.

> *"These reasons seem to confirm to the international trend in the field of arbitration and that the control of Lebanon jurisdictions over international arbitration awards seems very liberal. Thus it is obvious that most of these grounds (the first three, specifically) are mainly motivated by the desire to respect the intention of the parties. As to the last two grounds, they are considered as fundamental in all countries of the world, the fist being*

97 Lebanese Code of Civil Procedure LCCP (20/06/1996); Article 819 Par. 3
98 See also Nayla Comair-Obeid *Arbitration in Lebanese Law. A Comparative Study*" (DELTA 1999), 141.

considered as necessary for respecting the function of arbitration as a real justice (due process) and the second for protecting the essential notions of the country concerned (international public policy)"[99].

4. Means of Recourse against Judicial Review of the decisions recognizing and granting leave to enforce or refusing such recognition and enforcement.

Unlikely to what has been discussed above, the possibility of setting aside an award in Lebanon applies only on international awards rendered in Lebanon. International arbitral awards whether made in Lebanon or abroad are subject to a unified method of juridical review, i.e are subject to appeal only when submitted for recognition and or enforcement[100] . It is worth noting here a distinction to be drawn between an appeal against a decision refusing recognition and enforcement of an award and an appeal against a decision which grant leave to enforce or recognizes the award.

4.1. Appeal against the decision refusing recognition and or granting leave to enforce

Recourse of appeal can be brought forward in an attempt to refuse recognition or granting the enforcement order, by virtue of article 816 of the L.C.C.P[101]. Article 816 of the L.C.C. P does not however specify the competent court to receive such recourse. It is therefore by reference to article 821 of the L.C.C.P. that one may apply article 804 - paragraph 1 of the code, referred to by article 821, and which stipulates that the appeal is

99 Walid J. Kassir "The Potential of Lebanon as a Natural Place for International Arbitration" *The Lebanese Review of Arbitration*, 34 (2005).
100 Samir Saleh *Commercial Arbitration in the Arab Middle East*, 275.
101 Lebanese Code of Civil Procedure LCCP (20/06/1996): Article 816

made and judged according to the rules of litigation followed by the court of appeal[102]. These rules include the method for filing the appeal, the investigation and decision. Since the appeal in this case does not address the award itself but rather the decision refusing to recognize the award or to grant leave to enforce it; therefore the court role here is confined to the examination of matters related to the enforcement and recognition without any considerations regarding merits of the case[103].

4.2. Appeal against the decision recognizing and/or granting leave to enforce

The losing party in an international award has the right to appeal against the decision granting the recognition and enforcement of such an award. This is mainly because and as we have previously discussed, no direct recourse can be undertaken against international arbitral award issued abroad.

The only way a losing party can act in this regard obliges it to wait until the other party acquires a decision from the Lebanese court granting recognition or enforcement of the award and then it could have the chance to make a plea against it by lodging an appeal[104].

The appeal is brought before the court of appeal in which the ruling was made, 30 days following the notification of the judge's decision[105]. Accordingly an appeal against recognition and enforcement could be undertaken provided that the award has one of the following defects:

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102 Nayla Comair-Obeid *Arbitration in Lebanese Law. A Comparative Study*" (DELTA 1999), 137.
103 Samir Saleh *Commercial Arbitration in the Arab Middle East*..276.
104 Edward Eid- *Civil procedure* Arbitration 3, Part 12 (1989), 201.
105 Lebanese Code of Civil Procedure LCCP (20/06/1996) Articles 818 & 819 Par.3

1. Absence, nullity or expiry of an arbitration agreement.

2. Irregular appointment of the arbitrators.

3. Non- Compliance with the arbitrators' mission, as defined by the parties.

4. Non- respect of due process or the principle of fair hearing.

5. Violation of a rule related to international public policy.

As we see the above reasons are the same reasons for setting aside awards made in Lebanon therefore it is of utmost importance to discuss them each one seperately.

a. Absence, nullity or expiry of an arbitration agreement

Article 817 of the LCCP rises many inquiries when it mentions absence, nullity or expiry of an arbitration agreement as one of the grounds for making an appeal against the decision granting recognition and or leave to enforce[106]. These inquiries revolve mainly around how would the Lebanese Judge rule regarding the validity of the agreement.

Dr. Abdel Hamid Ahdab a professional in arbitration wrote in this regard saying that: *"There are two trends in this respect:*

a. The first is influenced by the litigious nature of arbitration and only recognizes the validity of an award if the law of a given Country is applied by the court to make sure of the validity of the award and the agreement to arbitrate.

106 Lebanese Code of Civil Procedure LCCP (20/06/1996) Articles 818 & 819 Par.3

b. The second is influenced by the contractual nature of arbitration and admits a procedure free from any dependence on State laws. This considers that the contract is the law of the parties and that the parties' mutual intention is the basis of the validity of the agreement to arbitrate and of consent. In this second trend, arbitral awards are not governed by the law of the country where they are made. This trend was adopted by Lebanese law on international arbitration"[107].

It is worth mentioning here that the arbitration agreement is independent of the contract that includes it, due to the autonomy principle of the arbitration agreement. This consequently would lead to the fact that even if the main contract becomes null or void, the arbitration agreement remains valid and this has been consistently taken into consideration by the Lebanese Jurisprudence:

"Where as the appellant states that the arbitral clause is void since the whole contract was not executed between the two parties, and since the contract was signed by unqualified persons, whereas it is undisputed jurisprudentially and in the doctrine that the arbitral clause is independent of the contract in which it was included; it remains in force in itself regardless of the contract in which it was mentioned. Therefore, the claims of the appellant concerning this matter shall be rejected[108]".

107 Abdel Hamid El-Ahdab *Arbitration with The Arab Countries*, 2nd edition (The Hague – London – Boston: Kluwer Law International, 1999), 402-403.
108 Beirut court of Appeal, 3rd section "Decision n.464 / 2003- 3/4/2003" The *Lebanese Review of Arbitration* (2003): 26.

b. Irregular appointment of the arbitrators:

In order to decide upon whether such violations exist or not, and since the Lebanese law does not tackle this issue, the court may rule depending on article 810 of the Lebanese Code of Civil Procedure which states the following: *"the agreement for arbitration may designate the arbitrator or arbitrators directly, or by reference to a set of rules for arbitration, or it may provide for the method of their designation".*

In addition, the court may take several aspects into consideration such as the intention of the parties, the nature of the dispute and some other factors. The following is a case where a court of appeal took the decision:

"Whereas paragraph 5 of article 8 stipulates... Whereas both parties adopted the arbitration principle organized by legal person, which is represented by Aeroswisse organization, in accordance with the system adopted by the latter. This tacitly means that they incline, as for the procedures and rules of the arbitration, to the system adopted by that legal person, including the way of assigning the arbitrators.

Whereas the same articles state that each party has the right to request the assignment of three arbitrators instead of only one in case the value of the lawsuit exceeds one hundred thousand dollars, which means that even if the value of the conflict exceeds one hundred thousand dollars, the principle remains the same, and it is that an Aeroswiss Organization shall assign one arbitrator, unless one of the parties request the assignment of three arbitrators instead of only one.

Whereas it is clear from the documents mentioned above and from the minutes of the arbitral trial that the appellant did not object the nomination of one arbitrator only and did not request at all the assignment of three arbitrators instead.

Therefore, it is concluded that the appellant accepts the unique arbitrator and its claim concerning what was mentioned above shall be rejected"[109].

To conclude, as we have seen in this decision, the court of appeal rejected the submitted notice by the appellant who used clause 2 of article 817 in an attempt to disregard the order of the executive formula.

c. Non compliance with the arbitrators mission, as defined by the parties

Usually, the parties specify in their arbitration clause the nature of the dispute that might arise; accordingly, the arbitrators must then settle the precise points of law according to the parties' requirements. The court's role in this regard involves ensuring that the arbitrator did not exceed the limits of the mission he was appointed. The arbitrator must specifically not overstep the mission conferred upon him by the parties in the following areas: subject of the dispute, scope of the mission, and the means he can adopt to end such a mission[110]. The Lebanese jurisprudence had tackled this issue and had recently promulgated the following:

> *"Whereas, the appellant claims also under this reason that the arbitrator had overstepped the mission conferred, by deciding on matters beyond or far more than what exists in the arbitration agreement, and that is deciding whether there was corruption in the goods, focusing on the transportation of previous goods also playing a role of an expert giving his opinion in technical matters...*

109 Beirut court of Appeal "Decision n.464 / 2003- 3/4/2003"
110 Edward Eid- *Civil procedure*: 207

Whereas, all the claims mentioned by the appellant in matters which relates to the merits, and of how the arbitral tribunal settled the dispute are matters beyond the jurisdiction of this court because it assumes to decide on the merit of the dispute...

And no place to check all this within the frame of this recourse ...»[111]

d. Non- respect of due process or of a fair hearing

This ground for appeal is considered one of the most important because it is related directly to the right of the parties to have a fair trial where they can express their opinions, present their requests, remarks and the necessary evidence. This would allow them as well to freely appear in oral hearing, bring their witnesses and the documents which seem useful to advance the case. Finally this ensures their notification and involvement in all the proceedings of the trial.

"The Beirut Court of Appeal held that an ICC award may be made in absentia, not with standing the fact that the terms of reference had not been signed by the defendant, and this is because the latter had been repeatedly invited to do so.

Furthermore, the dates of the arbitral hearings had been notified to the losing party, the defendant. Hence the arbitrator was justified in carrying on the arbitral proceedings in the absence of the defendant"[112].

The Beirut Court of appeal also ruled stating that:

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[111] Beirut Court of Appeal – 3d section – 22/06/2006

[112] Samir Saleh *Commercial Arbitration in the Arab Middle East*. 277

"Concerning the invalid representation of the appellant since the lawyer that represented the latter does not have a power of attorney that empowers him to do so, and since he lives outside of Switzerland, it is clear after the revision of the proxy of the said attorney , submitted with its translation in the primal file, that it expressly relates to the representation of the appellant by this attorney in the legal conflict between the appellant and Eat, on one hand. The residence of the lawyer outside Switzerland, on the other hand, has nothing to do with the deprivation or not of the appellant right of defense.

Therefore, all the claims of the appellant concerning the invalidity of its representation shall be rejected"[113].

e. Violation of international public order:

There is an important distinction to be made here between a domestic and international public order.

The notion of public order or public policy has always been ambiguous, open ended and highly varied among different states, circumstances and time spans.

So what is considered appropriate in a certain state may not be so in another.

However, it is well known that the international public policy rules comprise the following: the international fundamental rules of natural law, the principles of universal

113 Beirut court of Appeal "Decision n.464 / 2003- 3/4/2003"

Justice, and the general principles of morality adopted by the nations[114]. Hence and back to article 817 of the Lebanese Code of Civil Procedure para.5, it is stated that the appeal will be recognized if the decision which grants recognition and or leave to enforce violates the rules of international and not national public order.

The court of Cassation reasons that the absence of arguments in a judgment or award governed by English law does not constitute a breach of international public policy[115].

Also in another decision the Court of Cassation decided that the Court of Appeal had misinterpreted the law in refusing an enforcement order for a judgment made abroad which had contravened public policy by lack of given notice[116].

Therefore, and in an attempt to conclude, one could argue that if an award is issued abroad in country X and was brought to be enforced in Lebanon, and even if the award contradicts the public order of country X, it will be enforced in Lebanon because the ground upon which the enforcement of awards would be refused is when such international awards contradict international public policy and not national policy.

114 Charles Molineaux "Arbitration Award Enforcement - The Public Policy exception" *The Lebanese Review of Arbitration*, 12 (1999): 9.
115 Court of Civil Cassation, 1st Chamber –" Decision n.19- 19/11/1973" *Al ADL*, 3 (1973).
116 Nayla Comair-Obeid *Arbitration in Lebanese Law: A Comparative Study*" (DELTA 1999), 70.

CONCLUSION

The importance of arbitration as one of the most approved tools for dealing with international commercial disputes could be attributed to many of its aspects. At one hand, it offers to those negotiating international disagreements a certain level of autonomy and freedom in choosing the arbitrators, the language, the scope and the place of arbitration. This would eventually lead to promptly terminating and settling disputes by experts usually not available in national courts; in addition to many other advantages already discussed in this thesis.

However and similarly to what has been already discussed earlier, all the raised advantages are worthless if the parties were unable to agree, while drafting their arbitration clause, on every step and try to well equip themselves to every expected loophole that may face them. In addition, another essential measure to be taken into consideration necessitates including the arbitration clause encompassing all the necessary elements, already discussed earlier in this thesis, or adopting the model clauses provided by International arbitration institutions.

It is worth noting here that enforcement of international awards is the most crucial factor in the arbitration process. Besides that, acquiring a judgment from the national court of the country where the enforcement is sought is essential to ensure enforcement of international arbitral awards. Hence, this positions on the parties, agreeing on adopting arbitration as the mean for settling their disputes, a set of questions to keep in mind in order to facilitate the enforcement mechanism. These questions could be the following:

1- Whether the country is party to the New York Convention.

2- Whether the county has adopted the Model Law or has enacted its own legislation based on the Model Law.

3- Whether it is clear enough for the country's courts that their role should solely be supportive to the arbitral process with limited intervention.

4- Whether the country is reputable in the field of settling disputes by arbitration.

While taking all the above into consideration, whether related to the arbitration clause or to the enforcement of arbitration awards, parties can make of arbitration the most thriving mean for settling international commercial disputes.

This research shed the light on the Lebanese system of arbitration in an attempt to highlight a practical example on how an international arbitral award may be recognized and enforced and what means of recourse can be lodged against it inside a country that has ratified the New York Convention.

The enactment of the Lebanese Law n. 440 dated 29 July 2002 brought amendments to the New Code of Civil Procedure and established the validity of arbitration clauses in administrative contracts. These amendments can, under certain conditions, be considered a very significant approach in encouraging arbitration in Lebanon and they highlight the intention of the Lebanese Government to rebuild confidence in the Lebanese system of arbitration. This law was enacted after the said confidence was jeopardized when the Lebanese Conseil d'Etat promulgated a decisions on the 17th of July 2001 concerning the highly publicized arbitration dispute between the state and the two cellular mobile phone operators. This decision considered that the arbitration clauses stipulated in the concerned BOT contracts are null and void, thus violating a basic principle in international law and international arbitration. This principle bans states and public entities from involving an alleged lack of empowerment to withdraw from an arbitration agreement.

In ICC case n. 1939 of 1971, the arbitration court held that: "... *international pubic policy would be strongly opposed to he idea that a public entity, when dealing with a foreign party, could openly, knowingly and willingly enter into an arbitration agreement, on which its contractor would rely, only to claim subsequently, whether during arbitral proceedings or an enforcement of the award, that its own undertaking was void*".[117]

Finally, parties seeking to settle their disputes through arbitration can consider the Lebanese system a legal ground that can facilitate enforcing their awards with maximum flexibility and minimum restrictions. This is true especially that as mentioned before no direct recourse can be lodged against arbitral awards issued abroad; while the only way through is to make an appeal against the decision that may be issued by the Lebanese court when granting leave to enforce, under limited conditions provided by the law.

[117] ICC case n. 1939 of 1971 "Italian Company V. African state owned entity" *Revue de l'Arbitrage* (1973): 122-145.
See also: www.alemlaw.com/Arbitrationbetweenthestate&privateentitiesinlebanon.pdf

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Annex 1:

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (NEW YORK, 1958)

Article I

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

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not, concerning a subject-matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article shall at the request of one of the parties, refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
a) The duly authenticated original award or a duly certified copy thereof.
b) The original agreement referred to in article 11 or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
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; or
b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
c) 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 decisions 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 recognised and enforced; or
d) 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; or
e) 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.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
a) The subject-matter of the difference is not capable of settlement by arbitration under the law of that country; or
b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until December 31, 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialised agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary- General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary- General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:
a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;
b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;
c) A federal State Party to this Convention shall at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit of such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:
a) Signatures and ratifications in accordance with article VIII;
b) Accessions in accordance with article IX;
c) Declarations and notifications under articles I, X and XI;
d) The date upon which this Convention enters into force in accordance with article XII;
e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Done at New York, June 10, 1958; entered into force for the United States December 29, 1970, subject to declarations. 21 UST 2517: TIAS 6997; 330 UNTS 3.
Implementing Legislation Pub. L., 91-368, 84 Stat 692, 9 USC 201-208.

Annex 2:

UNCITRAL Model Law on International Commercial Arbitration (1985)

CHAPTER I - GENERAL PROVISIONS

Article 1 - Scope of application (1)

1. This Law applies to international commercial (2) arbitration, subject to any agreement in force between this State and any other State or States.

2. The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.

3. An arbitration is international if:
(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.

4. For the purposes of paragraph (3) of this article:
(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;
(b) if a party does not have a place of business, reference is to be made to his habitual residence.

5. This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.
construction of works; consulting; engineering licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.

Article 2 - Definitions and rules of interpretation

For the purposes of this Law:
(a) "arbitration' means any arbitration whether or not administered by a permanent arbitral institution;
(b) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;
(c) "court" means a body or organ of the judicial system of a State;

(d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;
(e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties; such agreement includes any arbitration rules referred to in that agreement;
(f) where a provision of this Law, other than in articles 25 (a) and 32 (2) (a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

Article 3 - Receipt of written communications

1. Unless otherwise agreed by the parties:
(a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;
(b) the communication is deemed to have been received on the day it is so delivered.

2. The provisions of this article do not apply to communications in court proceedings.

Article 4 - Waiver of right to object

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

Article 5 - Extent of court intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.

Article 6 - Court or other authority for certain functions of arbitration assistance and supervision

The functions referred to in articles 11(3), 11(4), 13(3),14,16 (3) and 34 (2) shall be performed by ... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

CHAPTER II - ARBITRATION AGREEMENT

Article 7 - Definition and form of arbitration agreement

1. "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal

relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

2. The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

Article 8 - Arbitration agreement and substantive claim before court

1. A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is real and void, inoperative or incapable of being performed.

2. Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

Article 9 - Arbitration agreement and interim measures by court

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

CHAPTER III - COMPOSITION OF ARBITRAL TRIBUNAL

Article 10 - Number of arbitrators

1. The parties are free to determine the number of arbitrators.

2. Failing such determination, the number of arbitrators shall be three.

Article 11 - Appointment of arbitrators

1. No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

2. The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

3. Failing such agreement,
(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the

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

4. Where, under an appointment procedure agreed upon by the parties,
(a) a party fails to act as required under such procedure, or
(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or
(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,
any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

5. A decision on a matter entrusted by paragraph (3) and (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

Article 12 - Grounds for challenge

1. When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

2. An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Article 13 - Challenge procedure

1. The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

2. Failing such agreement, a party which intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

3. If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

Article 14 - Failure or impossibility to act

1. If an arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

2. If, under this article or article 13 (2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12 (2).

Article 15 - Appointment of substitute arbitrator

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

CHAPTER IV - JURISDICTION OF ARBITRAL TRIBUNAL

Article 16 - Competence of arbitral tribunal to rule on its jurisdiction

1. 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.

2. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

3. The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which

decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

Article 17 - Power of arbitral tribunal to order interim measures

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

CHAPTER V - CONDUCT OF ARBITRAL PROCEEDINGS

Article 18 - Equal treatment of parties

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Article 19 - Determination of rules of procedure

1. Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

2. Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Article 20 - Place of arbitration

1. The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

2. Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

Article 21 - Commencement of arbitral proceedings

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Article 22 - Language

1. The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise

specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

2. The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Article 23 - Statements of claim and defence

1. Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

2. Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

Article 24 - Hearings and written proceedings

1. Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

2. The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

3. All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

Article 25 - Default of a party

Unless otherwise agreed by the parties, if, without showing sufficient cause,
(a) the claimant fails to communicate his statement of claim in accordance with article 23 (1), the arbitral tribunal shall terminate the proceedings;
(b) the respondent fails to communicate his statement of defence in accordance with article 23 (1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;
(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.
Article 26 - Expert appointed by arbitral tribunal

1. Unless otherwise agreed by the parties, the arbitral tribunal

(a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;
(b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

2. Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

Article 27 - Court assistance in taking evidence

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

CHAPTER VI - MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 28 - Rules applicable to substance of dispute

1. The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

2. Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

3. The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.

4. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Article 29 - Decision-making by panel of arbitrators

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

Article 30 - Settlement

1. If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

2. An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

Article 31 - Form and contents of award

1. The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitrator proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

2. The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

3. The award shall state its date and the place of arbitration as determined in accordance with article 20 (1). The award shall be deemed to have been made at that place.

4. After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

Article 32 - Termination of proceedings

1. The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

2. The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:
(a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;
(b) the parties agree on the termination of the proceedings;
(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

3. The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34 (4).

Article 33 - Correction of interpretation of award; additional award

1. Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:
(a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errord in computation, any clerical or typographical errors or any errors of similar nature;
(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.
If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

2. The arbitral tribunal may correct any error of the type referred to in paragraph (1) (a) of this article on its own initiative within thirty days of the day of the award.

3. Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

4. The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

5. The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

CHAPTER VII - RECOURSE AGAINST AWARD

Article 34 - Application for setting aside as exclusive recourse against arbitral award

1. Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

2. An arbitral award may be set aside by the court specified in article 6 only if:
(a) the party making the application furnishes proof that:
(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
(b) the court finds that:
(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
(ii) the award is in conflict with the public policy of this State.

3. An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received that award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

4. 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.

CHAPTER VIII - RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35 - Recognition and enforcement

1. An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

2. The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language. (3)

Article 36 - Grounds for refusing recognition or enforcement

1. Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:
(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitrator proceedings or was otherwise unable to present his case; or
(iii) the award deals with a dispute 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 decisions 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; or
(iv) the composition of the arbitral tribunal 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; or
(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or
(b) if the court finds that:
(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

2. If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1) (a) (v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

Endnotes

(1) Article headings are for reference purposes only and are not to be used for purposes of interpretation.
(2). The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. 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;
(3). The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions.

Annex 3:

UNCITRAL Arbitration Rules (1976)

Section I. Introductory rules

SCOPE OF APPLICATION

Article 1

1. Where the parties to a contract have agreed in writing* that disputes in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing.

2. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

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*MODEL ARBITRATION CLAUSE

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.
Note - Parties may wish to consider adding:
(a) The appointing authority shall be ... (name of institution or person);
(b) The number of arbitrators shall be ... (one or three);
(c) The place of arbitration shall be ... (town or country);
(d) The language(s) to be used in the arbitral proceedings shall be ...

NOTICE, CALCULATION OF PERIODS OF TIME

Article 2

1. For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received if it is physically delivered to the addressee or if it is delivered at his habitual residence, place of business or mailing address, or, if none of these can be found after making reasonable inquiry, then at the addressee=s last-known residence or place of business. Notice shall be deemed to have been received on the day it is so delivered.

2. For the purposes of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice, notification, communication or proposal is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

NOTICE OF ARBITRATION

Article 3

1. The party initiating recourse to arbitration (hereinafter called the "claimant") shall give to the other party (hereinafter called the "respondent") a notice of arbitration.

2. Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.

3. The notice of arbitration shall include the following:
(a) A demand that the dispute be referred to arbitration;
(b) The names and addresses of the parties;
(c) A reference to the arbitration clause or the separate arbitration agreement that is invoked;
(d) A reference to the contract out of or in relation to which the dispute arises;
(e) The general nature of the claim and an indication of the amount involved, if any;
(f) The relief or remedy sought;
(g) A proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon.

4. The notice of arbitration may also include:
(a) The proposals for the appointments of a sole arbitrator and an appointing authority referred to in article 6, paragraph 1;
(b) The notification of the appointment of an arbitrator referred to in article 7;
(c) The statement of claim referred to in article 18.

REPRESENTATION AND ASSISTANCE

Article 4

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons must be communicated in writing to the other party; such communication must specify whether the appointment is being made for purposes of representation or assistance.

Section II. Composition of the arbitral tribunal

NUMBER OF ARBITRATORS

Article 5

If the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within fifteen days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.

APPOINTMENT OF ARBITRATORS (Articles 6 to 8)

Article 6

1. If a sole arbitrator is to be appointed, either party may propose to the other:
(a) The names of one or more persons, one of whom would serve as the sole arbitrator; and
(b) If no appointing authority has been agreed upon by the parties, the name or names of one or more institutions or persons, one of whom would serve as appointing authority.

2. If within thirty days after receipt by a party of a proposal made in accordance with paragraph 1 the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority agreed upon by the parties. If no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses to act or fails to appoint the arbitrator within sixty days of the receipt of a party's request therefor, either party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority.

3. The appointing authority shall, at the request of one of the parties, appoint the sole arbitrator as promptly as possible. In making the appointment the appointing authority shall use the following list-procedure, unless both parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:
(a) At the request of one of the parties the appointing authority shall communicate to both parties an identical list containing at least three names;
(b) Within fifteen days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which he objects and numbered the remaining names on the list in the order of his preference;
(c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;
(d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.

4. 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 7

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the tribunal.

2. If within thirty days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator he has appointed:
(a) The first party may request the appointing authority previously designated by the parties to appoint the second arbitrator; or
(b) If no such authority has been previously designated by the parties, or if the appointing authority previously designated refuses to act or fails to appoint the arbitrator within thirty

days after receipt of a party's request therefor, the first party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate the appointing authority. The first party may then request the appointing authority so designated to appoint the second arbitrator. In either case, the appointing authority may exercise its discretion in appointing the arbitrator.

3. If within thirty days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by an appointing authority in the same way as a sole arbitrator would be appointed under article 6.

Article 8

1. When an appointing authority is requested to appoint an arbitrator pursuant to article 6 or article 7, the party which makes the request shall send to the appointing authority a copy of the notice of arbitration, a copy of the contract out of or in relation to which the dispute has arisen and a copy of the arbitration agreement if it is not contained in the contract. The appointing authority may require from either party such information as it deems necessary to fulfill its function.

2. Where the names of one or more persons are proposed for appointment as arbitrators, their full names, addresses and nationalities shall be indicated, together with a description of their qualifications.

CHALLENGE OF ARBITRATORS (Articles 9 to 12)

Article 9

A prospective arbitrator shall disclose to those who approach him in connexion with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances.

Article 10

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrators impartiality or independence.

2. A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made.

Article 11

1. A party who intends to challenge an arbitrator shall send notice of his challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after the circumstances mentioned in articles 9 and 10 became known to that party.

2. The challenge shall be notified to the other party, to the arbitrator who is challenged and to the other members of the arbitral tribunal. The notification shall be in writing and shall state the reasons for the challenge.

3. When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. In neither case does this imply acceptance of the validity of the grounds for the challenge. In both cases the procedure provided in article 6 or 7 shall be used in full for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator a party had failed to exercise his right to appoint or to participate in the appointment.

Article 12

1. If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be made:
(a) When the initial appointment was made by an appointing authority, by that authority;
(b) When the initial appointment was not made by an appointing authority, but an appointing authority has been previously designated, by that authority;
(c) In all other cases, by the appointing authority to be designated in accordance with the procedure for designating an appointing authority as provided for in article 6.

2. If the appointing authority sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in articles 6 to 9 except that, when this procedure would call for the designation of an appointing authority, the appointment of the arbitrator shall be made by the appointing authority which decided on the challenge.

REPLACEMENT OF AN ARBITRATOR

Article 13

1. In the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 6 to 9 that was applicable to the appointment or choice of the arbitrator being replaced.

2. In the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of his performing his functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in the preceding articles shall apply.

REPETITION OF HEARINGS IN THE EVENT OF THE REPLACEMENT OF AN ARBITRATOR

Article 14

If under articles 11 to 13 the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated; if any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal.

Section III. Arbitral proceedings

GENERAL PROVISIONS

Article 15

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

2. If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

3. All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party.

PLACE OF ARBITRATION

Article 16

1. Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration.

2. The arbitral tribunal may determine the locale of the arbitration within the country agreed upon by the parties. It may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.

3. The arbitral tribunal may meet at any place it deems appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.

4. The award shall be made at the place of arbitration.

LANGUAGE

Article 17

1. Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence, and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.

2. The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of

the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

STATEMENT OF CLAIM

Article 18

1. Unless the statement of claim was contained in the notice of arbitration, within a period of time to be determined by the arbitral tribunal, the claimant shall communicate his statement of claim in writing to the respondent and to each of the arbitrators. A copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed thereto.

2. The statement of claim shall include the following particulars:
(a) The names and addresses of the parties;
(b) A statement of the facts supporting the claim;
(c) The points at issue;
(d) The relief or remedy sought.
The claimant may annex to his statement of claim all documents he deems relevant or may add a reference to the documents or other evidence he will submit.

STATEMENT OF DEFENCE

Article 19

1. Within a period of time to be determined by the arbitral tribunal, the respondent shall communicate his statement of defence in writing to the claimant and to each of the arbitrators.

2. The statement of defence shall reply to the particulars (b), (c) and (d) of the statement of claim (article 18, para. 2). The respondent may annex to his statement the documents on which he relies for his defence or may add a reference to the documents or other evidence he will submit.

3. In his statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.

4. The provisions of article 18, paragraph 2, shall apply to a counter-claim and a claim relied on for the purpose of a set-off.

AMENDMENTS TO THE CLAIM OR DEFENCE

Article 20

During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.

PLEAS AS TO THE JURISDICTION OF THE ARBITRAL TRIBUNAL

Article 21

1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

2. The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules 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.

3. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter claim.

4. In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.

FURTHER WRITTEN STATEMENTS

Article 22

The arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.

PERIODS OF TIME

Article 23

The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defence) should not exceed forty-five days. However, the arbitral tribunal may extend the time-limits if it concludes that an extension is justified.

EVIDENCE AND HEARINGS (ARTICLES 24 AND 25)

Article 24

1. Each party shall have the burden of proving the facts relied on to support his claim or defence.

2. The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall

decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defence.

3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.

Article 25

1. In the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof.

2. If witnesses are to be heard, at least fifteen days before the hearing each party shall communicate to the arbitral tribunal and to the other party the names and addresses of the witnesses he intends to present, the subject upon and the languages in which such witnesses will give their testimony.

3. The arbitral tribunal shall make arrangements for the translation of oral statements made at a hearing and for a record of the hearing if either is deemed necessary by the tribunal under the circumstances of the case, or if the parties have agreed thereto and have communicated such agreement to the tribunal at least fifteen days before the hearing.

4. Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined.

5. Evidence of witnesses may also be presented in the form of written statements signed by them.

6. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

INTERIM MEASURES OF PROTECTION

Article 26

1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.

3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

EXPERTS

Article 27

1. The arbitral tribunal may appoint one or more experts to report to it, in writing, on specific issues to be determined by the tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.

2. The parties shall give the expert any relevant information or produce for his inspection any relevant documents or goods that he may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.

3. Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties who shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his report.

4. At the request of either party the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing either party may present expert witnesses in order to testify on the points at issue. The provisions of article 25 shall be applicable to such proceedings.

DEFAULT

Article 28

1. If, within the period of time fixed by the arbitral tribunal, the claimant has failed to communicate his claim without showing sufficient cause for such failure, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings. If, within the period of time fixed by the arbitral tribunal, the respondent has failed to communicate his statement of defence without showing sufficient cause for such failure, the arbitral tribunal shall order that the proceedings continue.

2. If one of the parties, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.

3. If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

CLOSURE OF HEARINGS

Article 29

1. The arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.

2. The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own motion or upon application of a party, to reopen the hearings at any time before the award is made.

WAIVER OF RULES

Article 30

A party who knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object.

Section IV. The award

DECISIONS

Article 31

1. When there are three arbitrators, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.

2. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide on his own, subject to revision, if any, by the arbitral tribunal.

FORM AND EFFECT OF THE AWARD

Article 32

1. In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards.

2. The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay.

3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.

4. An award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made. Where there are three arbitrators and one of them fails to sign, the award shall state the reason for the absence of the signature.

5. The award may be made public only with the consent of both parties.

6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal.

7. If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement within the period of time required by law.

APPLICABLE LAW, AMIABLE COMPOSITEUR

Article 33

1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

2. The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.

3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

SETTLEMENT OR OTHER GROUNDS FOR TERMINATION

Article 34

1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless a party raises justifiable grounds for objection.

3. Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the arbitral tribunal to the parties. Where an arbitral award on agreed terms is made, the provisions of article 32, paragraphs 2 and 4 to 7, shall apply.

INTERPRETATION OF THE AWARD

Article 35

1. Within thirty days after the receipt of the award, either party, with notice to the other party, may request that the arbitral tribunal give an interpretation of the award.

2. The interpretation shall be given in writing within forty-five days after the receipt of the request. The interpretation shall form part of the award and the provisions of article 32, paragraphs 2 to 7, shall apply.

CORRECTION OF THE AWARD

Article 36

1. Within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The arbitral tribunal may within thirty days after the communication of the award make such corrections on its own initiative.

2. Such corrections shall be in writing, and the provisions of article 32, paragraphs 2 to 7, shall apply.

ADDITIONAL AWARD

Article 37

1. Within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

2. If the arbitral tribunal considers the request for an additional award to be justified and considers that the omission can be rectified without any further hearings or evidence, it shall complete its award within sixty days after the receipt of the request.

3. When an additional award is made, the provisions of article 32, paragraphs 2 to 7, shall apply.

COSTS (Articles 38 to 40)

Article 38

The arbitral tribunal shall fix the costs of arbitration in its award. The term "costs" includes only:
(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
(b) The travel and other expenses incurred by the arbitrators;
(c) The costs of expert advice and of other assistance required by the arbitral tribunal;
(d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
(e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
(f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

Article 39

1. The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.

2. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and if that authority has issued a schedule of fees for arbitrators in international cases which it administers, the arbitral tribunal in fixing its fees shall take that schedule of fees into account to the extent that it considers appropriate in the circumstances of the case.

3. If such appointing authority has not issued a schedule of fees for arbitrators in international cases, any party may at any time request the appointing authority to furnish a statement setting forth the basis for establishing fees which is customarily followed in international cases in which the authority appoints arbitrators. If the appointing authority consents to provide such a statement, the arbitral tribunal in fixing its fees shall take such information into account to the extent that it considers appropriate in the circumstances of the case.

4. In cases referred to in paragraphs 2 and 3, when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix its fees only after consultation with the appointing authority which may make any comment it deems appropriate to the arbitral tribunal concerning the fees.

Article 40

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

3. When the arbitral tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms, it shall fix the costs of arbitration referred to in article 38 and article 39, paragraph 1, in the text of that order or award.

4. No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under articles 35 to 37.

DEPOSIT OF COSTS

Article 41

1. The arbitral tribunal, on its establishment, may request each party to deposit an equal amount as an advance for the costs referred to in article 38, paragraphs (a), (b) and (c).

2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.

3. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and when a party so

requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix the amounts of any deposits or supplementary deposits only after consultation with the appointing authority which may make any comments to the arbitral tribunal which it deems appropriate concerning the amount of such deposits and supplementary deposits.

4. If the required deposits are not paid in full within thirty days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.

5. After the award has been made, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.