UNIVERSITY OF KENT AT CANTERBURY
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SOME ASPECTS OF JURISDICTION IN INTERNATIONAL COMMERCIAL ARBITRATION

A THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY AT THE UNIVERSITY OF KENT AT CANTERBURY - ENGLAND

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To my Parents...

To my Mother for her tireless support, her enlightenment, her ceaseless love and devotion who, without her selflessness and encouragement this thesis could not have been achievable.

To my Father, who enriched me with his wisdom, and has touched me with his nobility....for the hero of 'Karama', whose valour, tenacity and patriotism, has given me strength, motivation and determination to accomplish this thesis.

ABSTRACT

International commercial arbitration has demonstrated the level of controversies involved in international commercial transactions and the conflicting interests between developed and the developing States, especially in the context of international investment matters. The diversity of the parties involved in international commercial relations manifests itself in conflicting goals and interests. Due to this, international commercial disputes are intrinsic and inevitable. The subject merits a fresh scholarly study ever more increasingly in the wake of recent proliferation of international commercial dispute mechanisms and in the context of a recent wave of movement towards globalisation and liberation of trade and investment. However, this study is concerned only with some aspects of jurisdiction, one of the major central themes of international commercial arbitration.

The central argument of this thesis is that there should not be competition between national courts and arbitral tribunals in seizing jurisdiction over international commercial disputes; but rather a real harmonious partnership between arbitral mechanisms and national courts. In particular, the emphasis should be upon the responsiveness to the needs of parties to international commercial disputes, and the adoption of liberal approaches towards international commercial arbitration in the era of globalisation of investment.

The aim of this thesis is to contribute towards the effective understanding of international commercial arbitration as a pragmatic legal mechanism for promoting international business in a more balanced, equitable, and beneficial environment, by examining some aspects of jurisdiction in relation to international commercial arbitration, this is explained in (Chapter One) of this thesis.

Therefore, Part I starts by analysing positive and negative aspects of jurisdiction in international commercial arbitration. Positive aspects include the foundations of the arbitral process, represented by the doctrines of severability of the arbitration agreement and competence-competence (Chapter Two). Negative aspects are dealt with as jurisdictional challenges to the arbitral tribunals, and here arbitrability is taken as a case study (Chapter Three). In Part II selected areas are used as case studies to explore a series of themes illustrating jurisdictional issues; such as the jurisdiction of arbitral tribunals under Islamic law (Chapter Four), the jurisdiction of ICSID (Chapter Five) and the granting of interim measures by arbitral tribunals (Chapter Six). Consequently, in Part III a series of recommendations are put forward in respect of what lessons can be learnt, and the implications for promoting effective formats in overriding jurisdictional challenges in international commercial arbitration (Chapter Seven).

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PREFACE

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- The U.S. Securities Exchange Act of 1934.
- The Yemen Arab Republic Constitution of 1970.
- The Yemeni Arbitration Act of 1994.
- The Yemeni Civil Code.

ABBREVIATIONS

AAA	American Arbitration Association
Arb.	Arbitration (The Journal of the Chartered Institute of Arbitrators)
AC	Appeal Cases
All E. R.	All England Law Reports
All Ind. Rep.	All Indian Reports
AJIL	American Journal of International Law
Anglo-Am. L. R.	Anglo-American Law Review
Arab L. Q.	Arab Law Quarterly
Arb. Int'l	Arbitration International
Asian DR	Asian Dispute Review
Aust. L. J.	Australian Law Journal
Berkeley J. Int'l L.	Berkeley Journal of International Law
BIT	Bilateral Investment Treaty
BYIL	British Yearbook of International Law
CIETAC	China International Economic and Trade Arbitration
CMAC	China Maritime Arbitration Commission
CMI	*Comité Maritime International*
COGS	Carriage of Goods by Sea
Colum. J. Transnat'l L.	Columbia Journal of Transnational Law
Cornell J. Int'l L.	Cornell Journal of International Law
Cornell L Rev.	Cornell Law Review
CRCICA	The Cairo Regional Centre for International Commercial Arbitration
Dalloz	*Recueil Dalloz-Sirey*
ECC	European Commercial Cases
ECT	Energy Charter Treaty
Ed.	Editor
E.g.	For example
ETL	European Transport Law
FAA	Federal Arbitration Act
FCN	Friendship, Commerce and Navigation
Fed. Sec. L. Rep.	Federal Securities Law Reports
Fla. Bar. J.	The Florida Bar Journal
FSIA	Foreign Sovereign Immunity Act
FYIL	Finnish Yearbook of International Law
Harv. Int'l L. J.	Harvard International Law Journal
HL	House of Lords
HR	Hague Academy of International Law, *Recueil des cours*
IBRD	International Bank for Reconstruction and Development
ICJ	International Court of Justice

ICJ Rep.	International Court of Justice Reports
ICSID	International Centre for the Settlement of Investment Disputes
ICSID Rep.	International Centre for the Settlement of Investment Disputes Reports
ICSID Rev.-FILJ	(ICSID Review) Foreign Investment Law Journal
Ind. J. Int'l L.	Indian Journal of International Law
Int. A. L. R.	International Arbitration Law Review
Int'l Arb. Rep.	International Arbitration Report
Int'l Bus. L.	International Business Law
Int'l C. Arb. Bull.	International Court of Arbitration Bulletin
ICC	International Chamber of Commerce
ICLQ	International Comparative Law Quarterly
IFLR	International Financial Law Review
Int'l L.	International Law
ILM	International Legal Materials
Iowa L. R.	Iowa Law Review
ILR	International Law Report
Iran-US CTR	Iran-United States Claims Tribunal Reports
ILT	Irish Law Times
Int'l Tax & Bus. L.	International Tax and Business Law
J. Droit Int'l (Clunet)	*Journal de Droit International (Clunet)*
J. Int'l Arb.	Journal of International Arbitration
J. L. & Econ. Dev.	Journal of Law and Economic Development
J. Mar. L. & Com.	Journal of Maritime Law and Commerce
J. Trans. L. & P.	Journal of Transnational Law and Policy
Lab. L. J.	Labor Law Journal
Law & Pol'y Int'l Bus.	Law and Policy in International Business
LCIA	London Court of International Arbitration
Lloyd's Rep.	Lloyds Law Reports
L. Q. Rev.	The Law Quarterly Review
MEER	Middle East Executive Report
NAFTA	North American Free Trade Agreement
NAI	Netherlands Arbitration Institute
Neth. Int'l L. Rev.	Netherlands International Law Review
Neth. Y. B. Int'l L.	Netherlands Yearbook of International Law
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958
No.	Number
N. Y. U. J. Int'l L. & Pol.	New York University Journal of International Law and Politics
N. Y. U. L. Q.	New York University Law Quarterly
OECD	The Organisation for Economic Co-operation and Development
P.	Page
Pace L. Rev.	Pace Law Review

Para.	Paragraph
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PCIJ Rep.	Permanent Court of International Justice Reports
PIL	Private International Law
PP.	Pages
PSC	Production Sharing Contracts
Q. B.	Queen's Bench
Rev. Arb.	*Revue de L'arbitrage*
S. Cal. L. Rev.	Southern California Law Review
Ser.	Series
Supp.	Supplement
Tex. Int'l L. J.	Texas International Law Journal
Tul. J. Int'l & Comp. L.	Tulane Journal of International and Comparative Law
Tul. L. Rev.	Tulane Law Review
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Y. B.	United Nations Commission on International Trade Law Yearbook
U. S.	United States
U. S. C.	United States Code
U. S. S. R.	United Soviet Socialists Republics
U. Pa. J. Int'l Bus. L.	University of Pennsylvania Journal of International Business Law
U. K.	United Kingdom
Vand. J. Transnat'l L.	Vanderbilt Journal of Transnational Law
Va. J. Int'l L.	Virginia Journal of International Law
Vol.	Volume
Wake Forest L. Rev.	Wake Forest Law Review
WIPO	World Intellectual Property Organisation
W. L. R.	Weekly Law Reports
Yearbook Comm. Arb'n	Yearbook of Commercial Arbitration

GLOSSARY

Ab initio	from the beginning.
Ad hoc	for this purpose; for a specific purpose. An *ad hoc* committee, for example, is created with a unique and specific purpose or task and once it has studied and reports on the matter, it stands disbanded. In arbitration, *ad hoc* arbitration signifies non institutional one.
Amiables compositeurs	Clauses in arbitration agreements allowing the arbitrators to act as *amiables compositeurs* permit the arbitrators to decide the dispute according to the legal principles they believe to be just, without being limited to any particular national law. The resulting arbitral awards are frequently based on equity or on the *lex mercatoria* , the arbitrators being authorised, as *amiables compositeurs*, to disregard legal technicalities and strict constructions which they would be required to apply in their decisions if the arbitration agreement contained no *amiable compositeur* clause.
Chambre Arbitrale Maritime	Maritime Arbitration Chamber.
Clause Compromissoire	an arbitration clause.
Compromis	a submission or reference on a specific point, made when a dispute has arisen.
Contrat d'adhesion	contract of adhesion.
Cour d'Appel	Court of Appeal.
Cour de Cassation	Court of Cassation.
Conseil D'Etat Egyptien	Egyptian State Council.
Diwan Al-Mazalim	the Board of Grievances in Saudi Arabia.
Ex aequo et bono	in justice and fairness.
Ex gratia	out of kindness, voluntary.
Ex parte	on or from one side or party only.
Ex post facto	by reason of a subsequent act.
Fiqh	Islamic jurisprudence.
Force majeure	an act of God; an inevitable, unpredictable act of nature, not dependent on an act of man. Used in insurance contracts to refer to acts of nature such as earthquakes or lightning.
Hadd	*Hadd* is the singular of *Hudoud* which are the crimes of murder, injury, adultery, drunkenness, theft and robbery which are specifically provided for in the *Qura'n*.
Haram	any act or deed which is prohibited by Allah and will incur His wrath and punishment.
Idh'an	adhesion.
Ijma'	*Ijma'* refers to the consensus of eminent scholars of Islam in a given age. *Ijma'* comes next to the

	Qura'n and the *Sunna* as a source of Islamic doctrines.
In audita altera parte	having heard from the other party.
In futro	in future.
Inter alia	among other things, for example or including.
Istidlal	deduction and presumption of continuity.
Istihsab	customs and usages.
Istihsan	preference.
Juge des référés	judge sitting in chambers to deal with matters of specific urgency.
Jure gestionis	having made the judgement.
Kompetenz-Kompetenz	Competence-Competence.
Lex arbitri	the law governing arbitration.
Lex contractus	the law of the contract.
Lex fori	the law of the forum.
Lex locus arbitri	the law of the place of arbitration.
Lex specialis	special law.
Lex standi	the standing law.
Lex mercatoria	Law Merchant, a body of oral, customary mercantile law which developed in medieval Europe and was administered quite uniformly across Europe by merchant judges, adjudicating disputes between merchants. In the contemporary world, some (although not all) scholars believe there exists a modern *lex mercatoria*, defined to include certain transnational trade usages and commercial customs recognised internationally by the mercantile community, and possibly extending to certain international conventions and even national laws pertaining to international economic relations. International commercial arbitration is frequently cited as a field in which the modern *lex mercatoria* is operative.
Lis pendens	a dispute or matter which is the subject of ongoing or pending litigation.
Lois de police	law of the police.
Masalih mursala	consideration of public interest.
Medjella	the first codification of Islamic Law under the Ottoman Empire.
Nouveau Code de Procedure Civile	New Civil Procedure Code.
Pacta sunt servanda	the principle that agreements are binding and are to be followed.
Per se	of, in, or by itself or oneself; intrinsically.
Prima facie	at first sight, a rule whereby a particular fact constitutes evidence of a state of affairs, unless contradicted by other stronger, admissible evidence.
Proprio motu	according to precedent.

Qiyas	the reasoning by analogy based on the provisions of the *Qura'n* and *Sunna*.
Qura'n	the Holy Book for Muslims and Allah's words.
Ratione materiae	by reason of the subject-matter.
Ratione personae	determined by the status and dignity of the person or entity as such.
Ratione voluntatis	by consent of the parties.
Réduction du contrat	abatement of contract.
Res judicata	a matter which has already been conclusively decided by a court.
Res nullius	an asset susceptible of acquisition but presently under the ownership or sovereignty of no legal person.
Riba	usury.
Sèige social	registered office.
Shari'a	signifies the entire Islamic way of life, especially the Islamic Law.
Status quo	the existing state; conditions as they are at a given time.
Sui generis	of its own kind.
Sunna	the sayings and deeds of Prophet Mohammed.
Tribunal Civile	Civil Tribunal.
Tribunal Commerce	Commercial Tribunal.

1. CHAPTER ONE

INTRODUCTION

Jurisdiction of arbitral tribunals in international commercial arbitration is to some extent a paradoxical topic, due to the existing sensitivities between national courts and arbitral tribunals. One of the main effects of submitting a dispute to arbitration is, that the parties exclude the jurisdiction of national courts with respect to the same dispute; the other important effect of arbitration is that the winning party can present the arbitral award for enforcement to any court in which the losing party has assets.

Traditionally, the parties have had recourse to international arbitration in order to avoid the jurisdiction of national courts, which they considered neither rapid enough, nor satisfactorily equipped, or in some cases, not competent to handle international commercial cases. As a consequence, they eventually realise later, that for several reasons related to the course of arbitral proceedings or the enforcement of the arbitral award; those national courts reappear at different stages.

Subsequently, a court's jurisdiction may be invoked, for example, to enforce an agreement to arbitrate, to enjoin arbitration or to enforce an arbitral award, even a foreign one. Generally speaking, national courts do not have the official function to work for the benefit of their own countries in the international environment. On the other hand, it may be favouring international arbitration, if national courts appreciate the relevance of their jurisdiction for the interests of their State, and the business community, of their State in international economic relations. It is highly asserted that the rise of international commercial arbitration is mainly due to the fact, that the business community in most countries involved in international trade and investment prefer arbitration to court jurisdiction for a number of reasons, that could not be mentioned here.[1] This study will try to demonstrate, that arbitral tribunals and national courts are not competitive, yet complementary. This is where the significance of this study derives from. Indeed, it seems indeed quite important that these jurisdictional issues should be dealt with in a similar manner in all jurisdictions respectively. For example, jurisdictional rules for

[1] See Redfern, A., & Hunter, M., *Law and Practice of International Commercial Arbitration*, 2nd ed., London, Sweet & Maxwell, 1991, p. 22 et seq.

national court decisions in aid of arbitration should be viewed uniformly. However, this study will demonstrate that the main trend of the doctrine is that the dual jurisdiction of a national court and of an arbitral tribunal to assess a jurisdictional matter, creates, when this issue is pending before both jurisdictions, a case of *lis pendens* which is a procedural institution tending to avoid the two possible contradictory decisions which may acquire a *res judicata* effect.

However, it could be argued that States are the most effective and direct controlling force in determining how arbitration should operate in an international market. Notwithstanding the trend which limits courts' involvement in international arbitration as stated in a recent explanatory note from the United Nations Commission on International Trade Law (UNCITRAL) Secretariat:

"As evidenced by recent amendments to arbitration laws, there exists a trend in favour of limiting court involvement in international commercial arbitration. This seems justified in view of the fact that the parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and, in particular in commercial cases, prefer expediency and finality to be protracted in court." [2]

The purpose of this thesis is to try to promote a better awareness of some of the jurisdictional difficulties, which are often met in international commercial arbitration and which, if allowed to develop, might seriously reduce the utility of international arbitration in settling commercial disputes, and may even jeopardise the future of remarkable arbitral institutions. This study analyses firstly how arbitral tribunals in practice actually determine the jurisdictional issues in the field of international commercial arbitration, and secondly to what extent they consider and follow the various solutions advocated by either legal writers, or proposed by international organisations and conventions. Within the confines of international commercial arbitration, the purpose of this study is three-fold. The first is, to determine the method by which arbitral tribunals determine jurisdictional issues. Secondly, to determine the legal rules actually applied by the arbitral

[2] Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration UNCITRAL Model Law 8, para. 14.

tribunals. Thirdly, to determine the extent to which arbitral practice converges with, and separates from, the theories of the legal writers. The forgoing three different purposes briefly summarise the expected contribution to be provided by the present study.

The methodology followed in this study is; analytical, in the sense of analysing arbitral awards and court decisions where relevant; critical, by criticising different opinions and writings, and comparative by examining arbitral rules of different institutions and national arbitration acts, under several jurisdictions. This study is double pronged: every problem confronted is considered from both the theoretical and the practical points of view. Within the theoretical sphere, there will be a trace of the various solutions proposed by writers and in the resolutions, projects and draft laws developed by the concerned public and private international organisations. Equally, there will be an examination of -if any- relevant provisions to be found in the rules of the better known arbitral institutions and in the major international arbitration conventions. The major part of this study is an in-depth review of decided arbitral awards and an analysis of how arbitral tribunals actually determine jurisdictional issues. The arbitral awards considered within this study are of four kinds. Firstly, the awards of the International Chamber of Commerce (ICC) most of which have been published. Secondly, awards of the International Centre for Settlement of Investment Disputes (ICSID), all of which have already been published. Thirdly, other institutional awards rendered by national or regional institutions. Finally, *ad hoc* awards, again some of which are well known and have been extensively discussed.

Regarding the research done in the course of this study, different types of sources have been looked at in this respect; primary sources include published and unreported arbitral awards, court decisions and texts of arbitral rules, arbitration acts and conventions, secondary sources include main works in the area of this study and numerous number of writings published in specialised journals and reviews, papers submitted to conferences and seminars attended by the researcher.

With regard to the terminology used in this study, it is essential to give definitions of the main subjects covered in the title of this study. The starting point in this regard will be the term 'jurisdiction' which is essential for the purposes of this study. The distinction

between jurisdiction and competence of international arbitral tribunals is rarely discussed in international legal scholarship, judicial or arbitral opinions. Indeed, the two terms are often used interchangeably, indicating that the choice between the two terms is merely a matter of convenience, with no practical legal effects. An arbitral tribunal may have jurisdiction in a certain field, yet lack of competence in a particular case. It could be stated that lack of jurisdiction in a certain field necessarily involves incompetence to determine a particular case within this field.[3] Based on this approach, it could be stated that jurisdiction is a general or abstract concept, whereas competence is a specific or concrete concept; the relationship between the two concepts is symmetric in the sense, that while competence necessarily requires the preceding finding of jurisdiction, a finding of jurisdiction does not necessarily entail competence.[4]

While the term 'competence' is more often, and more appropriately applied to describe international arbitral tribunals' 'jurisdiction' in dealing with specific cases arising under a *compromis*, the term 'jurisdiction' appears to be more appropriate in the context of international commercial arbitration, when it can be used to describe the limitations on the arbitrability of claims. For the purposes of this study the general term 'jurisdiction' will be used to describe such limitations. In this context, it is noteworthy that although the term 'jurisdiction' is more commonly used in international legal terminology than is 'competence', for the purpose of describing an international court's or arbitral tribunal's power to decide as to its own jurisdiction; the term 'competence' is sometimes preferred, as is evidenced by the well established doctrine of 'competence-competence'.

The concept of international commercial arbitration is generally understood to include an out of court resolution of disputes regarding transactions, containing elements connected with two or more countries. The characteristic 'international', therefore, refers not so much to the arbitral process as to the dispute. The term 'international' is used to mark the difference between national arbitration and those, which are purely international. In practice this distinction is important, since according to many national

[3] Fitzmaurice, G., "The Law and Procedure of the International Court of Justice, 1951-4: Questions of Jurisdiction, Competence and Procedure", 34 BYIL (1954) pp. 8-9.
[4] Heiskanen, V., "Jurisdiction V. Competence: Revisiting A Frequently Neglected Distinction", FYIL Vol. V (1994) at 5.

arbitration laws, more freedom may be allowed in international arbitration than is allowed in a national arbitration. There is no uniform definition of when an arbitral dispute is international, as the following overview shows.

With respect to arbitration, the term 'international' is understood in France for example, to relate to the character of the disputed transaction. Arbitration would be considered international if the dispute is regarding a transaction that has some foreign elements.[5] In other jurisdictions on the other hand, arbitration is not considered international if the parties to the dispute are both domiciled or habitually resident in that country, irrespective of the fact that there might be other contacts with foreign countries.[6] Yet other jurisdictions combine the subjective and the objective criteria referred to above, and consider arbitration as being international if one of the parties resides, or is domiciled abroad, or if the disputed transaction has an international character in that it is to be performed, to a significant extent, abroad. [7] The UNCITRAL Model Law of 1985 provides a similar combination of the above criteria, and in addition sets forth that arbitration can be qualified as international simply on the basis of the parties' will.[8] Finally, in some countries, international arbitration is not defined since arbitration carried out under those countries' laws, is regulated in the same manner, irrespective of whether the dispute has a domestic or an international character.

In practice, most international commercial arbitrations involve parties of different nationalities, where the international nature of the transaction is concerned. For the purpose of this study, a dispute is considered as being international, if the underlying legal relationship has a foreign element, such as the domicile or habitual residence of one of the parties, or the place of performance. A dispute is not considered to be international if the underlying transaction has a purely domestic character, not even if it has a potential foreign element in the place where the award might be enforced for example, because the parties have assets abroad.

With regard to the term 'commercial', rather than attempting to make a positive definition of what is commercial, therefore, it seems advisable to exclude certain areas of

[5] See Article 1492 of the French Civil Procedure Code.
[6] See Article 176(1) of the Swiss Private International Law (PIL) Statute.
[7] See Article 832 of the Italian Civil Procedure Code.
[8] See Article 1 of the UNCITRAL Model law of 1985.

law that certainly do not fall within this category. Matters of public law for example, are traditionally considered to fall outside of the area that can be regulated by contractual agreement, and consequently they may be considered to fall outside of the category of international commercial arbitration: this statement, however, has to be qualified in several respects, especially when arbitrability matters are examined. For the purpose of this study, a wide interpretation of the term 'commercial' is applied, so as to include all aspects of international business and investment. It could be stated that due to the traditional scepticism towards ICSID arbitration, many States of the Third World switch to institutional 'commercial' arbitration for the settlement of their 'investment' disputes with their Western investors.[9] However, the term 'commercial' is generally understood to refer to transactions carried out by business entities in the course of their ordinary business. Defining the term 'commercial' has a great impact on the arbitrability of disputes, particularly in civil law jurisdictions, which distinguish between contracts, that are commercial and those that are not. It is noteworthy, that all recent codifications of sovereign immunity law contain description of commercial activities or transactions, since most arbitrations between States and non-State partners cover clear commercial transactions. In most cases the identification of the relevant aspect of the State activity is already decisive for its characterisation as commercial or not. However, there are borderline situations where the classification of the fact, once identified, becomes decisive.[10]

Looking at different jurisdictions it could be stated that there is no uniformity in the definitions of 'commercial' in such jurisdictions, and there is no universally accepted definition of such term. The distinction between commercial disputes and those, which are not, is of great importance, particularly in civil law countries as regarding arbitration, since in these countries only disputes arising out of commercial contracts may be submitted to arbitration. This fact has been recognised at an international level, evidenced by the so-called commercial reservation, which appears in Article I (3) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

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[9] Berger, K.P., *International Economic Arbitration*, Kluwer, 1993, p. 68.

[10] See Schreuer, C.H., *State Immunity: Some Recent Developments*, Cambridge, Grotius Publications Limited, 1988, pp. 24-29.

Classifying a transaction as 'commercial' involves nature, purpose and the subject matter of such a transaction. The additional test of whether this transaction could be performed by a private person also has to be kept in mind. Court practice in this area is far from uniform. In India for example, the question of 'commercial relationship' has been considered by various courts in a number of cases. In **RM Investment Trading Co. Pvt Ltd. v. Boeing Co.**, [11] the Supreme Court of India has concluded the issue with the following observation:

" While construing the expression 'commercial' in Section 2 of the Act it has to be borne in mind that the Act is calculated and designed to subserve the cause of facilitating international trade and promotion thereof by providing speedy settlement of disputes arising in such trade through arbitration and any expression or phrase occurring therein should receive, consistent with its literal and grammatical sense, a liberal construction"

Emphasising the ambit of an activity, which takes the character of the commercial relationship in the context of Article 301 of the Constitution of India, the Supreme Court further noted:

"Trade and commerce do not mean merely traffic in goods, ie exchange of commodities for money or other commodities. In the complexities of modern conditions, in their sweep are included carriage of persons and goods by road, rail, air, and water ways, contracts, banking, insurance, transactions in the stock exchange and forward markets, communication of information, supply of energy, postal and telegraphic services and many more activities-too numerous to be exhaustively enumerated which may be called commercial intercourse".

On the above logic, the Indian Supreme Court ruled that a consultancy service for the promotion of sale is a commercial transaction and any dispute arising thereunder is a

[11] All Ind. Rep. 1994 SC 1136: (1995) CLA Supp 95.

commercial dispute. Therefore, as far as the definition of 'commercial' is concerned, the absence of a formal definition has not hindered an expansive interpretation.[12]

It could be useful in this regard to look at what the UNCITRAL Model law of 1985 states in this regard:

"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; 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" [13]

The forgoing definition naturally excludes certain forms of arbitration. Most obvious, arbitrations made in respect to disputes between sovereign States or State organs, with such arbitrations being based on public international law and rarely involving questions of commercial nature. Similarly, the decisions of the mixed arbitral commissions fall outside the scope of this study.

Having thus defined the various important relevant terms, it only remains to outline the structure of this study. It must be emphasised that this is not a comprehensive treatise on arbitration nor a detailed comparative study of various systems of arbitral rules, but one concerned with a cluster of important issues relating to jurisdiction in international commercial arbitration. The focus rests solely on one important topic of arbitration, that is the jurisdiction of arbitral tribunals in international commercial arbitration. The topics selected for the study highlight the unique difficulties that arise in this context, although much of the discussion is relevant to the process of international

[12] Kwatra, G., "An Emerging Favourable Arbitration Process-Enforcement of Foreign Awards in India", [1999] Asian DR, Vol. 3 pp.14-21 at p. 19.

[13] This statement appears as a footnote to Article 1 (1) of the UNCITRAL Model law of 1985.

commercial arbitration as a whole. This first chapter which provides a preview of the entire study, also exemplifies the general strategy of presentation of the study.

Part I contains an examination of 'positive' and 'negative' aspects of jurisdiction of arbitral tribunals in international commercial arbitration. Positive aspects include the foundation of jurisdiction of arbitral tribunals represented by the notorious doctrines of severability and competence-competence. These two doctrines are described as positive aspects, since they maintain the integrity of the arbitration process in the face of any challenge to the jurisdiction of the arbitral tribunal. Whilst negative aspects include different challenges to such jurisdiction, taking arbitrability as a case study in this respect, with its consequences towards the enforcement of arbitration agreements and arbitral awards. Non-arbitrability is categorised as a negative aspect of jurisdiction in international commercial arbitration, since it could constitute a serious jurisdictional challenge to arbitral tribunals in such arbitration. However, the arbitrability of the disputed matter is a precondition of the validity of the arbitration agreement, and therefore of the jurisdiction of the arbital tribunals, the rules on the arbitrability of the law governing the arbitration agreement must also be taken into consideration.

Part II contains a series of specific areas dealing with the jurisdiction of arbitral tribunals; such jurisdiction is examined under Islamic law, recognising it as an existing legal system with its great importance in the modern world, focusing on its influence in selected Arab countries. The jurisdiction of arbitral tribunals in investment arbitration is also examined in depth under the auspices of ICSID, analysing the relevant articles of the ICSID Convention of 1965. Finally, the jurisdiction of arbitral tribunals in granting interim measures under various arbitral rules and legal systems is examined.

Part III that contains the concluding chapter evaluates the general conclusions made within the study at the end of each chapter. This includes summary of findings reached discovery of new facts and any kind of original contribution made herewith, laying down any recommendation or suggestion for the future.

PART I

JURISDICTION OF ARBITRAL TRIBUNALS IN INTERNATIONAL COMMERCIAL ARBITRATION: POSITIVE AND NEGATIVE ASPECTS

2. CHAPTER TWO

THE FOUNDATION OF JURISDICTION OF ARBITRAL TRIBUNALS IN INTERNATIONAL COMMERCIAL ARBITRATION: POSITIVE ASPECTS

2.1 INTRODUCTION

The jurisdiction of any arbitral tribunal ruling in international arbitration disputes, is based, on two elements; the agreement of the parties to arbitrate the dispute in question, and the exclusion of the jurisdiction of State Courts. In this respect the arbitration agreement is considered to be the ultimate foundation of the arbitral process, and on second, the law which permits the parties to do so, the law in this case confers on the arbitral tribunal the right to render an award that has the same effects as a judicial decision.

It is generally accepted that parties to international commercial disputes have the freedom to resort to arbitration as a contractual or judicial substitute for national court action. Parties to arbitration agreements should have the capacity to enter into such agreements. Otherwise, lack of capacity of parties necessarily results in the incompetence of the arbitral tribunal and invalidates both the main contract and the arbitration clause contained in it, together.

There are two types of arbitration agreements. The first is the submission agreement, which is an agreement to refer existing disputes to arbitrations, known as a *compromis.* The second, the arbitration clause, is an agreement to refer any future disputes to arbitration, and is known as the *clause compromissoire.* These two types of arbitration agreements have been mentioned in Article 7 of the UNCITRAL Model Law of 1985, by stating that:

"An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement".

The arbitration agreement must be valid, adequately clear and unequivocally defined. The validity of an arbitration agreement is of a great importance. The requirement of validity of the arbitration agreement is required by Article V.1 (a) of the New York Convention, which provides that recognition and enforcement of an award may be refused if the arbitration agreement is not valid. A similar provision in the UNCITRAL Model Law of 1985 imposes the same requirement; Article 36(1) (a) (1) of this law provides that invalidity of the

arbitration agreement provides a ground for challenging an award, or for refusing recognition and enforcement of it.

It could be stated that a valid arbitration agreement must be in writing, but in some legal systems there is no particular form required for an arbitration agreement. Under international arbitration conventions, the only requirement of form is that the arbitration agreement should be in writing, as the New York Convention requires. For the purpose of jurisdiction of the arbitral tribunal, the arbitration agreement must be treated independently of the main contract which the arbitration agreement forms part of. This is explained by the well known the severability, or separability doctrine, also referred to as the principle of autonomy of arbitration clauses. Severability of the arbitration agreement is an important issue in both practice and theory. Due to its great practical importance this chapter will treat it in some detail.

The main purpose of the severability doctrine is to give the arbitral tribunal a basis to decide on its own jurisdiction when this jurisdiction is challenged in any way. The power of the arbitral tribunal to rule on its own jurisdiction is embedded in the doctrine of competence-competence (which will also be discussed in this chapter).

The two related doctrines have been developed to maintain the integrity of the arbitration process in the face of any challenge to the jurisdiction of the arbitral tribunal. By accepting both doctrines, international commercial arbitration will be promoted and parties' intentions will be respected. Both doctrines will be discussed at great length and compared to each other, with reference to various legal systems.

2.2 THE SEVERABILITY OF THE ARBITRATION AGREEMENT

2.2.1 INTRODUCTION

As has been previously stated, severability of the arbitration agreement is important in theory and practice, since it raises theoretical debates, and is justified by practical considerations, bearing in mind that the true justification for the severability principle is practical rather than theoretical. Severability, or the autonomy of the arbitration agreement, means that it is separable from the main contracts of which it forms part, in a way that it survives destruction, frustration, and expiry of the main contract. The arbitration agreement may have its separate existence not only when the main contract has come to an end by performance or when it has been executed, but also when it has come to an end as a result of an interrupting event such as *force majeure* or illegality. In this context, **Mustill** and **Boyd** have correctly described the arbitral clause as *"having a life of its own, severable from the substantive contract, and capable of surviving it"*.[1]

An arbitration clause would be deprived of its effect only if it can be established either that the alleged contract containing the arbitration clause was never concluded, or that the arbitration clause itself is invalid.

The severability issue does not arise in submission agreements that are independent arbitration agreements entered into in relation to existing disputes. The issue of severability arises only in cases where the arbitration agreement is a clause contained in a commercial contract, or in an investment agreement. This issue has been widely debated in recent years being justified in 1978 by the then President of the International Court of Justice (ICJ), Judge **Jimenez de Aréchaga** when he wrote that:

"An arbitration clause in a concession would not be affected by the cancellation of the contract. The arbitration clause stands on its own and is separable from the contract: otherwise the purpose of having such a clause in a contract is defeated".[2]

Earlier, the essential principle of severability of the arbitration agreement was addressed and upheld by the ICJ in its judgement upon the **Appeal Relating to the**

[1] Mustill, M. J. & Boyd, S. C., *The Law and Practice of Commercial Arbitration in England*, London, Butterworths, 1982, p. 8.

[2] Aréchaga, E. J., "State Responsibility for the Nationalisation of Foreign Property", Vol. 11 N.Y U. J. Int'l L. & Pol. No. 2 Fall (1978) pp. 179-195 at 191.

Jurisdiction of ICAO (1972).[3] Furthermore, the Arbitration Court attached to the Chamber of Foreign Trade in Berlin adhered to the principle that the arbitration clause constitutes an agreement *sui generis* of its own and is not, as such, automatically affected by the fate of the main contract of which it forms part. [4] The severability doctrine is generally regarded as having highly important impact on the arbitral process, it was stated that: *"Acceptance of [the] autonomy of the international arbitration clause is a conceptual cornerstone of international arbitration."* [5] Other scholars such as **Sornorajah** have further overemphasised the sacred nature of the severability doctrine clearly as being *"a sacrilege to question it"*. [6]

The justification for the doctrine of the severability of the arbitration agreement could be based on various grounds, both theoretical and practical:
Firstly, the severability of arbitration clauses conforms to the parties' intentions. From a purely practical standpoint, the doctrine of severability enables the parties' intention to arbitrate to be satisfied. In a commercial or investment dispute, this should be given a high priority. Denying severability is against the promotion of party autonomy, interpretation of intentions of parties and against the use of arbitration, as a dispute resolution method. This justification has been upheld in the famous **LIAMCO** arbitration where the sole arbitrator Dr. **Mahmassani** held on the question of severability:

"It is widely accepted in international law and practice that an arbitration clause survives the unilateral termination by the state of the contract in which it is inserted and continues in force even after that termination. This is a logical consequence of the interpretation of the intention of the contracting parties and appears to be one of the basic conditions for creating a favourable climate for foreign investment". [7]

When parties enter into a contract containing an arbitration clause, their intention is to have any dispute, including disputes over the validity of the contract, arbitrated. Whether or not an arbitration agreement is 'separable' or independent, is supposed to be a question of the interpretation of the terms of the whole transaction, by considering all of the attendant circumstances, which may be an indication of the intentions of the parties.[8] The doctrine of

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[3] ICJ Rep. (1972) p. 46.
[4] SG 12/74 (Court of Arbitration, Case No. 12, 1974) Yearbook Comm. Arb'n I (1976) p. 127.
[5] Craig, W., Park, W. and Paulsson, J. *International Chamber of Commerce Arbitration*, 2nd ed. 1990, p. 65.
[6] Sornorajah, M., "The Climate of International Arbitration", 8 J. Int'l Arb. 2 (1991) 47 at 57.
[7] 62 ILR p. 140 at 178.
[8] Nussbaum, A, "The Separability Doctrine in American and Foreign Arbitration", 17, N.Y.U.L.Q. (1940) p. 609 at 616.

severability in this respect plays an essential role in the fulfilment of the legitimate reasonable expectations of the parties to have the dispute in the question settled by arbitration. This is both a legal and a moral ground on which the doctrine rests upon.

Secondly, the severability doctrine accords with practicality in that it frees an arbitration clause from the allegation of invalidity of the substantive contract in which it is contained. By accepting the severability doctrine, there will be an avoidance of delay in time and procedure. If one party could deny arbitration to the other party by the allegation that the agreement lacked initial continuing validity, then by such an allegation it could deprive an arbitral tribunal of the competence to rule upon that allegation, upon its constitution and jurisdiction and upon the merits of the disputes then it would be open to any party to an agreement containing an arbitration clause to vitiate its arbitral obligations by the simple expedient of declaring the agreement void.[9] Furthermore, it could be said that the requirements for the recognition of the validity of the arbitration clause and the main contract differ in their legal nature; this point has been asserted by the Foreign Trade Arbitration Commission at the former U.S.S.R. Chamber of Commerce and Industry (FTAC) in **All-Union Foreign Trade Association v. Joc Oil Limited** where the Commission stated that:

"The requirements, laid down for the recognition of the validity of the two contracts, which differ in their legal nature, need not concide. Different also are the consequences of the recognition of these contracts as invalid. An arbitration agreement can be recognised as invalid only in the case where there are discovered in it defects in will (mistake, fraud and so on), the breach of the requirements of the law relating to the content and the form of an arbitration agreement which has been concluded. Such circumstances leading to the invalidity of an arbitration agreement do not exist and neither one of the parties stated its invalidity referring to such circumstances." [10]

Merely, the same point has been asserted in an ICC case where it was held that:

"..the question of validity of the main contract, for reasons of public policy, illegality or otherwise, is one of merits and not of jurisdiction, the validity of the arbitration clause having to be considered separately from the validity of the main contract." [11]

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[9]Schwebel, S. M., *International Arbitration: Three Salient Problem*, Cambridge, Grotius Publications Limited, 1987, p.4.

[10] Reported in Yearbook Comm. Arb'n XVIII (1993) 92 at 98.

[11]First interim award of 1983 in ICC case No. 4145 reported in Yearbook Comm. Arb'n .XII (1987) pp. 97-110 at 100.

The main practical advantage of the severability doctrine, as **Szurski** stated, is that it:

"Constitutes a serious bar for a party who desires delay or wishes to repudiate his arbitration agreement, to subvert the arbitration clause by questioning in court the existence or validity of the arbitration agreement by questioning the validity of the main contract".[12]

The motivating force behind the establishment of the severability of the arbitration clause in international contracts is the desire to uphold the validity of the agreement to arbitrate. It should be made clear that the invalidity of the main contract, which contains the arbitration clause, is not a ground for the refusal of referral to arbitration.

Thirdly, when an agreement containing an arbitration agreement is concluded, from the purely theoretical point of view, two agreements are indeed concluded: the main contract and the arbitration clause in that contract. But this does not require that consent be given twice. It has never been doubtful that consent for the main contract signifies at the same time consent for the arbitration clause even though they are considered to be different legal actions. An arbitration clause is significantly different from the substantive agreement in which it is contained. While the latter outlines the rights, duties and obligations of the parties, the former contains the procedure for resolving disputes that have arisen, or may arise, under the substantive agreement. Thus, one may be described as substantive and the other procedural.[13]

The arbitration clause in this respect should be considered a forum selection clause. In this respect the Indian Supreme Court in **M. Dayanand Reddy v. A. P. Indus. Corp.** observed in that the: *"Arbitration clause does not clarify the rights of the parties under the contract. It relates wholly to the mode of determining the rights."* [14] This point has been emphasised by the Court of Appeal of Genoa in **Fincantieri-Cantieri Navali Italiani SpA and Oto Melara SpA V. Iraq** where the Court stated that:

"We do not see a substantial difference between national and international arbitration as to the nature of the arbitration clause, which pertains...to the intrinsic nature of [arbitration], that is, in our best doctrine, a contract with essentially procedural effects." [15]

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[12] Szurski, T., "Arbitration Agreement and Competence of Arbitral Tribunal", in P. Sanders (ed.) *UNCITRAL's Project for a Model Law on International Commercial Arbitration* (Deventer, The Netherlands: Kluwer Law and Taxation Publishers, 1984). pp. 53, 76.

[13] Chuckwumerjie, O., *Choice of Law in International Commercial Arbitration*, Quorum Books, 1994, p. 30.

[14] All Ind. Rep. 1993, S. C. 2268.

In the **Black Clawson** case an English Court clarified the relationship between the arbitration clause and the main contract:

"There is not one, but two sets, of contractual relations which govern the arbitration of disputes under a substantive contract. First, there is the contract to submit future disputes to arbitration. This comes into existence at the same time as the substantive agreement of which it forms part. Prima facie it will run for the full duration of the substantive agreement, and will then survive for as long as any dispute remains unresolved. Second, there are one or more individual sets of bilateral contractual obligations which are called into existence as and when party asserts against the other a claim falling within the scope of the initial promise to arbitrate, which they have not been able to settle." [16]

The real justification for recognising the severability doctrine is the fact that the arbitration clause has a different subject and reasons to be concluded than the main contract contained in it, the subject of the main contract could be any commercial transaction or to gain profit, on the other hand, the subject of the arbitration clause is to settle disputes by arbitration, the arbitration clause does not contain primary obligations. It does not relate to the performance of the main contract.

This has been clarified in ICC case No. 1512 where the sole arbitrator held successive preliminary awards:

"It is superfluous to stress the independent character of the arbitration clause, and the fact that the nature of the undertaking to arbitrate does not change because it happens to be included in a contract having a different object, such as a contract of sale or of guarantee, rather than in a separate arbitration agreement". [17]

Lord **Diplock**, by analysing the legal characteristics of an arbitration clause in a commercial contract came to the conclusion that an arbitration clause is collateral to the main contract in which it is incorporated, and it gives rise to collateral primary and secondary obligations of its own. Those collateral obligations survive the termination (whether by

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[15] Court of Appeal, Genoa 7 May 1994, reported in Yearbook Comm. Arb'n XXI (1996) pp. 594-601 p. 599.
[16] **Black Clawson International v. Papiewerke Waldhof-Aschaffenburg AG**, 1981, 2 Lloyd's Rep. 446,455 (Q.B).
[17] First Preliminary Award of 18th December 1967, summarised in Yearbook Comm. Arb'n V (1980) p. 171.

fundamental breach, breach of condition or frustration) of all primary obligations assumed by the parties under the other clauses in the main contract.[18]

Fourthly, fulfilling the purposes of a contract does not mean fulfilling the purposes of an arbitration clause contained in that contract, since the arbitration clause is not one of those purposes of the contract. Most claims are brought to arbitration following termination of a contract. It would be nonsense if for some reason the arbitration clause was held to have been terminated. [19]

This is what Lord **MacMillan** in **Heyman v. Darwins Ltd** stressed when he held that:

"The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract".[20]

Fifthly, if severability was not the rule, the court would, contrary to the norm, be drawn into passing upon the substance of the dispute submitted to arbitration. [21] Courts should not interfere with arbitral proceedings before the arbitral award is rendered. The substance of the dispute should be examined only by arbitral tribunal and not by the courts. The severability principle is consistent with the national court's control of arbitral tribunals' decisions with respect to their jurisdiction. Countries that do not accept the severability doctrine would grant their national courts power to examine the substance of disputes already submitted to arbitral tribunals. Courts usually review only the arbitral award, not the merits of the dispute. The real justification behind this point is to maintain the integrity of the arbitral process, preventing interruption of such process. Under the severability doctrine, however, national courts may not control the arbitral tribunal's decisions as to the validity of the main contract, as they would verify arbitral jurisdiction.

Sixthly, some justify severability on the ground of a French contract theory *Réduction du Contrat*, which suggests that if any part of a contract is invalid or void, as in the case of abatement of contracts, that does not necessarily mean that the whole contract is void as a result. This theory contradicts the general rule in Islamic law which states that if a contract is

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[18] **Paal Wilson & Co. Blumental** [1983] 1 All E.R. [HL] 34 p. 50.

[19] Redfern A., & Hunter, M., *Law and Practice of International Commercial Arbitration*, 2nd ed., London, 1991, p. 175.

[20] **Heyman v. Darwins** Ltd, 1942, A.C.356, 374.

[21] Schwebel, S. M., *International Arbitration: Three Salient problems*, Cambridge, Grotious Publications Limited, 1987, p. 6.

void, any provision or clause contained in it is void as well, thus clarifying why the severability doctrine is rejected in Islamic law. [22]

However, the origin of the severability is not really clear, as **Schwebel** notes:

"Whether the rule of severability has entered into the law of arbitration from international law, or into international law from the law of arbitration, is not clear. What is clear is that the one influences the other".[23]

Seventhly, arbitration clauses and agreements are considered to have the same legal effects, rejection of severability doctrine establishes a distinction between arbitration agreements and arbitration clauses, since the arbitral tribunal will have the power to rule on the substance of the main contract in the case of arbitration agreement, and will lack such power in the case of an arbitration clause.

Eighthly, the law applicable to the arbitration clause is not necessarily the same as the law applicable to the substantive agreement; they may be governed by different laws unless the parties have agreed to apply the same law to both agreements. Even where the parties expressly subject the substantive contract to the laws of a particular country, the severability doctrine ensures that the arbitrator does not have to apply such a law in relation to the arbitration agreement. [24] In this respect it could be said that the severability could override the parties' mandate. This is what the U.S.S.R. Maritime Commission in its award No. 24/1984 has held. [25]

The arbitrators in **Dow Chemical France v. Isover Saint Gbain** have ascertained this point:

"The source of law applicable to determine scope and the effects of an arbitration clause providing for international arbitration does not necessarily concide with the law applicable to the merits of a dispute submitted to such arbitration. Although this law or these rules of law may in certain cases, concern the merits of the dispute as well as the arbitration agreement it is perfectly possible that in other cases the latter because of its autonomy is

[22] Al-Sanhury, A., *AlWassit fi charh al Qanun al Madini* Vol. I, p. 545 (in Arabic).
[23] Schwebel, S., *Justice in International Law*, Cambridge, Grotious Publications Limited Cambridge University Press, 1994, p. 201.
[24] Chuckwumerjie, O., *Choice of Law in International Commercial Arbitration*, Quorum Books, 1994 p. 34.
[25] Yearbook Comm. Arb'n. XIV (1989) 209 at 210.

governed not only as to its scope but as to its effect by its own specific sources of law distinct from those that govern the merits of the dispute".[26]

This has been asserted in many ICC awards such as in case No. 4381 (1986)[27], case No. 4131 (1982)[28], case No. 3880 (1983)[29], case No. 5485 (1987)[30] and case No. 8938 (1996).[31]

Ninthly, some that believe in the judicial nature of arbitration suggest that this judicial character is a solid justification for the severability doctrine, since it evidences that international commercial arbitration lacks contractual nature.

[26]Yearbook Comm. Arb'n IX (1984) p. 131.
[27]ICC case No. 4381 *J. Droit Int'l (Cluent)* 1986 pp. 1103, et seq.
[28]ICC case No. 4131 *J. Droit Int'l (Cluent)* 1983 pp. 889-905.
[29]ICC case No. 3880 *J. Droit Int'l (Cluent)* 1983 at 897.
[30] Reported in *Collection of ICC Arbitral Awards 1986-1990* (S. Jarvin, Y. Derains and J. Arnaldez) Kluwer, 1994, pp. 199-216.
[31] Yearbook Comm. Arb'n XXIV (1999) pp. 174-181 at 175.

2.2.2 INTERNATIONAL LEGAL PRACTICE ON SEVERABILITY

The severability doctrine has been approved by most international arbitration rules, international conventions concerning arbitration, international case law, and different national legislation supported by national courts' decisions. As Professor **René-Jean Dupuy** has stated in **TOPOCO v. Libya** in his award of 1975:

"17. It is not only international case law but also municipal case law which upholds the autonomy or the independence of the arbitration clause whenever the local courts are called up to decide questions of private international law relating to international commercial arbitration". [32]

In **Elf Aquitaine Iran v. National Iranian Oil Company** the arbitrator concluded:

"The autonomy of an arbitration clause is a principle of international law that has been consistently applied in decisions rendered in international arbitrations, in the writings of the most qualified publicists on international arbitration, in arbitration regulations adopted by international organisations and in treaties. Also, in many countries the principle forms part of national arbitration law".[33]

The position of severability doctrine in international conventions and rules will be examined by reviewing the related provisions and articles. Some of the provisions support severability explicitly, others implicitly. The ICSID Arbitration Additional Facility Rules for example, expressly embody the doctrine of severability in Article 46, paragraph 1(I):

"Objections to Competence:

(1) The tribunal shall have the power to rule on its competence. For the purpose of this Article, an agreement providing for arbitration under the Additional Facility shall be separable from the other terms of the contract in which it may have been included".

On the other hand, the New York Convention, accepts indirectly the severability doctrine by stating in article II (ii) that *"the term 'agreement in writing' shall include an*

[32] (1979) 53 I.L.R. p. 389 at 410.
[33] Yearbook Comm. Arb'n XI (1986) p. 98.

arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams" and by referring to the nullity of the arbitration agreement in Article III. Accordingly, **van den Berg** [34] finds the New York Convention *"indifferent"* to the doctrine of severability. He refers the question of severability to municipal laws as mentioned in Article V (i). This view is not undisputed. **Schwebel**[35] contends that the Convention sustains severability by implication, as none of the exclusive grounds on which enforcement of an arbitral award may be refused refers to the invalidity of the main contract. Nevertheless, as the applicable law may or may not provide for severability, it is possible that the application of that law may lead to the invalidity of the arbitration agreement as a result of the invalidity of the main agreement.

The European Uniform Law on Arbitration of 1963 affirms severability in categorical terms. Thus, Article 18 paragraph 2 provides that: *"2. A ruling that the contract is invalid shall not entail ipso jure the nullity of the arbitration agreement contained in it".*

Furthermore, Article 18 of the Arbitration Rules of the UN Economic Commission for Europe of 1966, supports severability and affirms the authority of the arbitrators to decide upon the existence or validity of the principal agreement and implies that the arbitrator's decision upon the existence or validity of the principal agreement does not govern the decision on the existence or validity of the arbitration agreement.

The UNCITRAL Model Law of 1985 specifies severability and links it with the competence of the arbitral tribunal to rule on its own jurisdiction in Article 16 which states:

"(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 agreement".

Article 14 of the Rules of the London Court of International Arbitration (LCIA) of 1998 provides the same terms as Article 16 of the UNCITRAL Model Law of 1985. **Kaplan**, Judge of the High Court of Hong Kong, discussed the purpose and effect of Article 16 of the

[34] Van den Berg, A. J., *The New York Convention of 1958*, Kluwer, 1981, p. 145.
[35] Schwebel, S., *International Arbitration: Three Salient Problems*, Cambridge, Grotius Publications Limited, 1987, p. 22.

UNCITRAL Model Law of 1985 in **Fung Sang Trading Ltd v. Kai Sun Sea Products and Food C. Ltd**:[36]

*"Article 16 enshrines the doctrine of separability which English law has partially recognised since **HEYMAN v. DARWINS LTD**, 1942 AC 356".*

Kaplan pointed out that the acceptance of doctrine of separability, which extends to claims of initial invalidity of contracts demonstrated *"that commercial reality is to be preferred to logical purity".*

Article 15 of the International Rules of the American Arbitration Association (AAA) of 1997 specifically recognises that the arbitration clause should be treated as an agreement independent of the other terms of the contract.

The same approach has been taken earlier by the UNCITRAL Arbitration Rules of 1976 in Article 21 that states:

"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".

The Arbitration Rules of the Netherlands Arbitration Institute (NAI) of 1998 asserts severability of the arbitration agreement and at the same time empowers the arbitral tribunal to rule on the validity of the main contract that contains the arbitration agreement. Article 9(5) of the Rules reads as follows:

"5. An arbitration agreement shall be considered and decided upon as a separate agreement. The arbitral tribunal shall have the power to decide on the validity of the contract of which the arbitration agreement forms part or to which the arbitration agreement is related."

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[36](29th October 1991 unreported). In this respect, Lord **McMillan** had a liberal views on this point he stated in **Heyman v. Darwins Ltd.** that the arbitration clause: *"survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purpose of the contract have failed, but the arbitration clause is not one of the purposes of the contract."* All. E. R. [1942] Vol. 1 A. C. at 347. The **Heyman** decision had been consistently applied by the courts of England in **Mackender v. Feldia AG** [1967] 2 Q.B. 590, **Harbour Assurance Co. Ltd. v. Kansa General Int. Insurance Co. Ltd.** [1993] 3 All. E. R. 897 and in **Hurst v. Bryk** [1997] 2 All E. R. 283. It has been applied also in Ireland where the Irish High Court in **Bernard Doyle v. Irish National Insurance Company Plc.** Confirmed severability of arbitration agreement and stayed court proceedings, it further stated that the arbitration clause survived the avoiance of the insurance contract, reported in [1998] Int. A. L. R. N-68.

The old ICC Arbitration Rules of 1988 embraced severability in comprehensive terms in Article 8.4 by providing:

"4.Unless otherwise provided, the arbitrator shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is inexistent provided that he upholds the validity of the agreement to arbitrate. He shall continue to have jurisdiction, even though the contract itself may be inexistent or null and void, to determine the respective rights of the parties and to adjudicate upon their claims and pleas".

The new ICC Arbitration Rules of 1998 deal with severability as an effect of the arbitration agreement, and insert the same provision supporting the severability doctrine, Article 6 (4) follows the same approach taken in Article 8.4 in the former Rules but in slightly different wording.

The severability doctrine has been confirmed by many ICC arbitral awards according to the provisions of the former ICC Rules of 1998. In ICC case No. 4145 (1983) the arbitrators held that:

"The question of validity or nullity of the main contract, for reasons of public policy, illegality or otherwise, is one of the merits and not of jurisdiction, the validity of the arbitration clause having to be considered separately from the validity of the main contract (see Article 8 (4) ICC Rules)".[37]

In its interim award the arbitral tribunal in ICC case No. 7263 (1994) has based its jurisdiction on the severability doctrine and stated that:

"...jurisdiction exists on the basis of the principle of severability of the arbitral clause from the contract as a whole. This principle is specifically incorporated both in Art. 178(3) of the Swiss PILA and in Art. 8(4) of the ICC Arbitration Rules." [38]

This confirmation of severability doctrine has been made in many other ICC cases such as case No. 2694 (1977), [39] case No. 2476 (1976), [40] case No. 4131 (1982),[41] case No. 28 (1993),[42] case No. 7263 (1994), [43] and case No. 7626 (1995).[44]

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[37]ICC case No.4145 (1983) Yearbook Comm. Arb'n XII (1987) at 97.
[38]Yearbook Comm. Arb'n XXII (1997) pp. 92-106 at 100.

2.2.3 NATIONAL LEGAL PRACTICE ON SEVERABILITY

For the purposes of this chapter three national legal systems will be examined at length; English law as a common law country, French law as a civil law country, and American law, with its rich contribution on the related matters in this chapter.

1) English Law:

Under the new Arbitration Act of 1996, the severability doctrine is confirmed in Section (7), which provides that the agreement to arbitrate is a matter of law severable from the main obligation, and stands or falls in its own rights. The new Arbitration Act has made a distinction between severability of arbitration agreement and the power of arbitrators to determine their own jurisdiction, such distinction is stated in Section 30. The Arbitration Act of 1996 affirms the separate status of the arbitration agreement, even if the principal contract was invalid *ab initio*, or did not come into existence.

Before enacting the new Arbitration Act of 1996 the severability doctrine was not clearly accepted by English Courts. The traditional English position was that where the main contract was invalid *ab initio*, the arbitration agreement contained therein is also invalid *ab initio*; in **Dalmia Dairy Industries Ltd. v. National Bank of Pakistan** the Court held that:

"In English law, no arbitrator can have jurisdiction, however wide the wording of the arbitration clause which the parties or alleged parties insert into their contract, to decide a dispute as to the initial existence or validity of the alleged contract in which the arbitration appears." [45]

This position has been confirmed in **Bermer Vulkan v. South India** by Lord **Diplock** who stated that:

"The arbitration clause constitutes a self-contained contract collateral or ancillary to the shipbuilding agreement itself." [46]

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[39] 105 *J. Droit Int'l (Clunet)* 1978 at 985.
[40] *J. Droit Int'l (Clunet)* 1977, 936.
[41] *J. Droit Int'l (Cluent)* 1982 at 889.
[42] Partial award in case No. 7528 (1993) reported in Yearbook Comm. Arb'n 125-131 at 127.
[43] Reported in Yearbook Comm. Arb'n XXII (1997) pp. 92-106.
[44] Final award in case No. 7626 (1995) reported in Yearbook Comm. Arb'n XXII (1997) pp. 132-148 at 137.
[45] [1978] 2 Lloyd's Rep. p. 233 at 286.

Ralph Gibson LJ in **Harbour Assurance Ltd v. Kansa General International Insurance Ltd.** described the position in English law in the following terms:

"The orthodox view in English law has always been, it has been said for the plaintiffs, that if the contract in which the arbitration clause is contained is void ab initio, and therefore nothing, so also must be the arbitration clause in the contract. That is the proposition that nothing can come of nothing, ex nihil nil fit. It has been called in this case the argument of logic".[47]

Another English case, which is always cited to indicate that the arbitration clause is not separable from the main contract, is **Heyman v. Darwins Ltd**, where Lord **Simon** said:

"If one party to the alleged contract is contending that it is void ab initio (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself is also void." [48]

In 1990, the applicability of the doctrine of severability in England was reviewed by **Steyn J** in **Paul Smith Ltd**[49] when he noted that:

"Recision, termination on the ground of fundamental breach, breach of condition, frustration and subsequent invalidity of the contract, have all been held to fall within an arbitration clause, even what was once perceived to be the "rule" that a rectification issue always falls outside the scope of an arbitration clause has given way to the realism of the separability doctrine."

Mustill and **Boyd** have described the then English position as follows:

"The doctrine of the severability of the arbitration clause has not been espoused in the wider form in which it is known in other jurisdictions. But the narrower English form leads in many cases to the same results." [50]

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[46] [1981] 1 All E. R. [HL] p. 289 at 297.
[47] [1993] Q.B. 701 at 707.
[48] [1942] A.C. 356.
[49] [1991] 2 Lloyd's Rep. p. 127
[50] Mustill, M. J. & Boyd, S. C., *The Law and Practice of Commercial Arbitration in England*, London,

2) French Law:

In France, the Code of Civil Procedure is silent on the issue of severability, but severability has been confirmed by different judicial decisions, such as in 1963, where the *Cour de Cassation*, in **Société Gosset v. Société Carapelli**, ruled that the arbitration agreement was severable from the main agreement in international arbitration:
"In matters of international arbitration, the arbitration agreement, concluded separately or included in the legal act to which it is related, always has, except in exceptional circumstances, a complete juridical autonomy excluding it from being affected by an eventual invalidity of the act". [51]

The *Cour de Cassation* in **IMPEX** [52] has taken the same approach, in holding that in international cases the invalidity of the main contract for public policy reasons have no effect on the enforceability of the arbitration clause. In this case, the Court has affirmed that the invalidity of the main contract does not affect the enforceability of the arbitration clause. For domestic cases, it is not clear whether the severability doctrine applies.

A similar example is the French Court decision in **Hecht** [53]in which it was held that:

"In fact in international arbitration the arbitration clause, whether it is entered into separately or it is included in the contract to which it relates, always enjoy full legal autonomy in respect of the same, except cases which have not pleaded in this dispute".

The same opinion was expressed in **Menicucci v. Mahieux**: [54]

"In fact in such a contract the arbitral clause related to international arbitration is valid since it is fully independent.... a part from any reference to any legal system".

The *Cour de Cassation* upheld the severability doctrine in **Société Minterses Lochoises v. Langelands Korn Foderstof**, [55] rejecting an allegation that impossibility of performance constituted the exceptional circumstances under which severability was not applicable. However, the French *Cour de Cassation* has ruled in a recent case, **Banque Worms v. Bellot, és qual., et autre**, that the assignment and transmission of the rights of a

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Butterworths, 1982, p. 7.
[51]Cass. 1er Ch. Civ. 7 mai 1963, 91 Rev. Arb. 1963 p. 60.
[52]**Impex**, Cass. Civ., 18 mai 1972, Rev. Arb. 1972 p. 2.
[53]**Hecht v. Société Buismans**, Court of Appeal, Paris juin 19 (1970) *J. Droit Int'l (Clunet)* 1971 at 833.
[54] Paris Court of Appeal, 13 December 1975, 104 *J. Droit Int'l (Clunet)* (1977) 106.

contract shall affect the arbitration clause contained therein. The Court further stated that such assignment could be made without the prior consent of the parties. The Court stated that such an issue is a procedural not a substantive one, for that the applicable law shall be the procedural not the substantive law. [56]

3) U. S. Law:

In the U.S., the Federal Arbitration Act (FAA) guarantees the enforcement of written arbitration agreements contained in a commercial contract as a valid, irrevocable and enforceable agreement.[57] In **Robert Lawrence Co. Inc. v. Devonshire Fabrics Inc., Mendina J**, for the Court of Appeals for the second Circuit, said that:

"The illegality, breach and repudiation of the main agreement will not affect an arbitration clause, as it is separate from rest of the contract".[58]

According to this leading U.S. decision: *"the mutual promise to arbitrate [generally] from the quid pro quo of one another and constitute a separable and enforceable part of the agreement."*[59]

The U.S. Supreme Court established the severability doctrine under U.S. law with reference to the FAA in the leading case of **Prima Paint Corp. v. Flood and Conklin Manufacturing Co.** [60] The Court held that the arbitration clause is *"separable"* from the contract in which it is embedded, and stated that: *"the question of separability is one of state law".*

The rule established in **Prima Paint** has been applied in **Information Scienses Inc. v. Mohauk Data Science Corp.** [61] and in **Peoples Security Life Insurance Company v. Monumental Life Insurance Co.** [62]. In the latter case, **Russel J** stressed that whether a claim of fraud is within arbitration claim is a question of construction of the arbitration clause.

The U.S. Court of Appeal for the Seventh Circuit has considered the severability doctrine in an international context in **Sauer-Getriebe K.G. v. White Hydraulics, Inc.** [63]

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[55] Judgement of November 12, 1968, Cass. Com. 1968 Bull Civ. No.316 p. 285.
[56] *Cour de Cassation*, 1er Civ, 5 janvier 1999 reported in *Dalloz Affairs* No. 149 jeudi 18 février 1999 at 291.
[57] 9 U.S.C.subsection 2.
[58] 271. F. 2d 402 (1959).
[59] 271 F. 2d 402 (2d Cir. 1959).
[60] 388 U.S. 395 (1967).
[61] 43 NY 2d 198 (1978).
[62] 867 F.2d. 809 (1989).
[63] 715 F.2d 348, 350 (7th Cir.1983).

The Court held that the arbitration agreement and main contract were separate, and applied the doctrine of severability, further stating that:

"The agreement to arbitrate and the agreement to buy and sell motors are separate. Sauer's promise to arbitrate was given in exchange for White's promise to arbitrate and each promise was sufficient consideration for the other."

Furthermore, an American court has ruled that the arbitration clause *"survives the contract's rejection by the debtor in bankruptcy."*, [64] this indicates that rejection of an executory contract does not invalidate the arbitration agreement contained therein. It has been further held in the U.S. that enforcement of an arbitration clause in a void contract is not in violation of U.S. public policy.[65] The **Prima Paint** severability rule has been expanded in the **Republic of Nicaragua v. Standard Fruit Co.** [66] where the Court held that the arbitration provision embedded in a Memorandum of Intent was separable.

[64] **Sonatrach v. Distrigas Corp.** U.S. District Court, District of Massachusetts, 17 March 1987, No. 86-2014 Yearbook Comm. Arb'n XX (1995) pp. 795-804 at 796.
[65] **Belship Navigation Inc. v. Sealift, Inc.** U.S. District Court, Southern District of New York, 27 July 1995, No. 95 Civ 2748 (RPP) Yearbook Comm. Arb'n XXI (1996) pp. 799-807 at 800.
[66] 937 F.2d 469 (9th Cir.1991).

2.2.4 AN APPRAISAL OF THE NATIONAL AND INTERNATIONAL PRACTICE

After having reviewed the position of severability in international and national practice, it is important to distinguish between the nullity of a contract *ab initio* and nullity *ex post facto,* as it never existed at all.

There appears to be only two cases where an arbitration clause contained in an international commercial contract would not be effective. These are:

1) Where the arbitration clause itself was inserted in the main contract as a result of fraud by one of the parties to the contract. Or

2) Where no contract ever existed between the parties.

There are three acts, which should be distinguished from each other; **Jennings** states:

"In the first place, there is the act which may be a convenient expression that could be qualified as non-existent. Secondly, there is the act that, although existing is an absolute nullity or, in English parlance, null and void ab initio ...Thirdly, there is the case whilst the act is not a nullity ab initio, it may be subject to annulment by a court ... Such an act probably has to be referred to an English parlance as voidable".[67]

As for the first case, it is unclear whether the severability of an arbitration clause in a contract alleged never to exist has been accepted in international commercial arbitration. The number of cases discussing initial invalidity is, however, clearly insufficient to make any generalisation, leading to the conclusion that the question of the separability of arbitration clauses in agreements alleged never to have been entered into is presently unresolved in international commercial arbitration. [68]

The House of Lords considered this case by stating in **Heyman v. Darwins**:

"If there has never been a contract at all, there has never as part of it an agreement to arbitrate. The greater includes the less". [69]

In an international case, the sole arbitrator in **Elf Aquitaine v. NIOC** stated that:

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[67] Jennings, R. Y., "Nullity and Effectiveness in International Law", in *Cambridge Essays in International Law*, London, Stevens & Sons, 1965, pp. 66-67.

[68] Svenlov, C.,"What Isn't Aint" The Current Status of the Doctrine of Separability, 8 J. Int'l Arb. 4 1991, pp.37-49 at 43.

[69] [1942] A.C. 356.

"An arbitration clause may not always be operative in cases where it is clearly indicated by the facts and circumstances that there never existed a valid contract between the parties".[70]

Generally speaking, if the main contract was never entered into, the arbitration agreement contained therein must be affected as well.

As for the second category of contracts, where there is no dispute over the existence of them, but they are considered null and void, it depends on the reason of the invalidity of the contract which is considered to be the determining factor in the proper application of the doctrine of severability. It is important in this respect to distinguish between agreements, which have been validly entered into, the continuing validity of which is disputed, and agreements that have never been entered into. In the former category of agreements, the doctrine of severability applies and serves its purposes, since if the agreement was valid until the dispute has arisen; it makes little sense to disallow it at that point. An important English decision clarified this position in **Harbour v. Kansa,** [71] where the court held that the arbitration clause can survive the alleged invalidity or illegality *ab initio* of the underlying contract in which it is contained. Defects, which led to the invalidation of the main contract, do not necessarily affect the arbitration clause contained therein. This is true even for cases where the initial invalidity of the contract is due to fraud in the inducement, or similar allegations relating to the initial invalidity of the main contract.[72]

The Chamber of Foreign Trade dealt with this question in **Veb K. R.D.A. v. Enterprise W. R.F.A.** where the tribunal stated that:

"Even if the license agreement were to be declared null and void, the nullity of the arbitral clause would not automatically follow. In fact, such a clause has the nature of an independent contract even if connected with the license contract. The arbitration agreement applies to all disputes, which arise from the license contract. Therefore, the existence of a ground for invalidity of the license contract is not sufficient to deprive the arbitration clause of its effects".[73]

With respect to the third category, which includes the voidable contract, the position of severability is clearer in that it fully applies. The doctrine of severability as to voidable

[70] Yearbook Comm. Arb'n XI (1986) p. 97 at 102.
[71] [1993] Q.B. 701.
[72] Berger, K., *International Economic Arbitration*, Kluwer, 1993, p. 120.

agreements seems well settled in international commercial arbitration practice. The arbitration clause will survive termination or frustration of the main contract, which contains it.

There are several consequences of accepting the doctrine of severability; these summarised as follows:

1) Neither the actual invalidity nor the alleged invalidity of the main contract deprives the arbitral tribunal of jurisdiction.

2) Neither the actual invalidity nor the alleged invalidity of the arbitration clause affects the main contract.

3) Decisions to an arbitral tribunal's competence will often receive minimal scrutiny. [74] The wider the scope of the doctrine of severability, the more limited are the circumstances where the arbitrator is called upon to examine his or her jurisdiction.

4) The arbitration clause contained in the main contract will survive termination, expiry, frustration and illegality of the main contract.

5) Acceptance of the severability doctrine will give the arbitral tribunal the power to rule on its own jurisdiction; therefore, it provides the foundation for the competence-competence doctrine. It should be pointed out that countries that do not accept the severability doctrine would deny any arbitral tribunal the power to determine its jurisdiction in cases where the validity of the arbitration agreement is in question.

6) The applicable law for each of the main contract and the arbitration clause would not be necessarily the same, unless the parties have an agreement to have the same substantive law. As has been observed in ICC case No. 5832 (1988)[75], naturally, an agreement between the parties as to the substantive law would allow the arbitrators to presume that, in spite of the principle of severability of the arbitration clause, both the contract and the arbitration agreement are subject to the same law.

7) If the severability doctrine is not accepted, any restriction on arbitration as non-arbitrability will render the main contract invalid, since severability in some cases could not survive the non-arbitrability of the ensuing dispute. [76]

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[73] *J. Droit Int'l (Clunet)* 1980 p. 696 at 697.

[74] Born, G. B., *International Commercial Arbitration in the United States,* Kluwer, 1994, p. 215.

[75] *J. Droit Int'l (Clunet)* 1988 p.1198.

[76] See the previous mentioned decision of *Corte di Apello,* Genoa, 7 May 1994 reported in Yearbook Comm. Arb'n XXI (1996) pp. 594-601 where the Court found that the Italian Courts had jurisdiction over a non-arbitrable dispute involving the Iraqi Ministry of Defence and Italian suppliers, due to Iraq embargo legislation issued by the European Union and Italy.

8) The severability doctrine serves as a basis for enforcing arbitration agreements, by speeding up the arbitral process. If the validity of the arbitration clause is dependent on the validity of the main contract, a party seeking to frustrate or to delay the arbitral process needs only to plead that the main contract is invalid in order to preempt the arbitral tribunal's jurisdiction and to seek a court resolution of that preliminary objection. The severability doctrine is designed to prevent the use of this kind of tactic in obstructing the arbitral process. As **W. W. Park** describes it:

"Separability reduces the potential for abuse by a party wishing to stop an arbitration before it has begun by asserting that the arbitration clause has been rendered invalid by some event discovered subsequent to signing the agreement. The arbitrator is thus able to rule on claims related to fraud in the inducement of the contract invalid". [77]

9) Under the severability doctrine, the lack of consent for the main contract does not necessarily constitute lack of consent for the arbitral clause contained in it. It must, therefore, be proved that the arbitral clause itself is tainted by misrepresentation, duress, fraud or undue influence.[78]

10) A State, through its legislature, may not unilaterally abrogate a contract containing an arbitration clause signed with a non-governmental body.

11) There are three limits, or apparent limits, on the doctrine of severability. First, and plainly, the principle of autonomy does not automatically result in the arbitration clause in every case surviving regardless of the fate of the underlying contract. It will always remain necessary to have regard to the separate question concerning the true construction (or scope) of the arbitration clause. Secondly, when illegality is in issue, it will always be necessary to consider whether any relevant public policy requires that the arbitration clause should be struck down together with the underlying contract. Thirdly, it is likely that there will remain categories of cases, which fall outside any principle of autonomy. [79]

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[77] Park, W. W., *International Forum Selection,* Kluwer, 1995, p. 82.
[78] van den Berg, A. J., *The New York Convention of 1958*, Kluwer, 1981, p. 156.
[79] Gross, P.,"Separability Comes of Age in England: Harbour v. Kansa and Clause 3 of the Draft Bill", 11 Arb. Int'l 1 (1995) at 85.

2.3 THE DOCTRINE OF COMPETENCE-COMPETENCE

2.3.1 INTRODUCTION

The doctrine of competence-competence grants arbitral tribunals the power to rule on their own jurisdiction. The essential elements of competence-competence can be stated as follows. First, the arbitral tribunal has power to rule on its own jurisdiction and decide on its own competence. In this way, the demands of convenience are satisfied. Second, generally if not invariably, such a ruling or decision is provisional in nature. By this limitation, the requirements of logic are asserted.[80]

The term *'Kompetenz-Kompetenz'* is taken from German legal terminology.[81] But in the German legal setting it means something very different from what it stands for in the minds of many non-German legal writers. According to the case law of the German Federal Court, the parties may vest the arbitrators with the power to rule in a binding way on the issue of their own jurisdiction. The last word on this issue may then be for the arbitrators. However, Part IV Section 1040 of the new German Arbitration Act of 1998 which is identical to Articles 16 and 17 of the UNCITRAL Model Law of 1985 indicates that the final decision on the jurisdiction of the arbitral tribunal stays with the courts, while in the pre-existing German law the courts admitted that the parties authorised the tribunal to give the final rule on its jurisdiction. In contrast thereto, a strong trend has come up in France for the arbitral tribunal to monopolise the first word on its own jurisdiction, subject to subsequent court control. It was a rather long-lasting development that led to such a doctrine.[82]

The doctrine has a positive effect which empowers the arbitral tribunal to decide on its jurisdiction, and in certain systems of law, such as French law, also a negative effect, which obliges a State court to decline jurisdiction where are arbitration agreements exist. For the leading trend of the Swiss doctrine, for example, there is no such negative effect indeed, according to Article 186 of the Swiss PIL Statute, the arbitral tribunal is competent to decide on its own jurisdiction. However, this competence is not an exclusive one considering that, according to Article 7 of the Swiss PIL Statute, a Swiss court seized of a dispute subject to an arbitration clause has to decide its jurisdiction unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed, which means that it is empowered to rule on the validity of the arbitration agreement. As Article 186 of the Swiss PIL Statute

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[80] Gross, P.,"Competence of Competence: An English View", 8 Arb. Int'l 2 [1992] pp.205-213.
[81] Ditel, C-E., Dictionary of Legal, Commercial and Political Terms, 1983, Mathew Bender & Company Inc. New York.

does not prevail upon Article 7, the doctrine of competence-competence does not vest in the arbitral tribunal the priority to rule upon its jurisdiction.

The competence-competence doctrine becomes an issue when a party in an arbitration challenges the jurisdiction of the arbitral tribunal. A party resisting arbitration can question, for example, the formal validity of the arbitration agreement, or of the existence for consent. They can also argue that the agreed deadlines to commence arbitration have expired, that the dispute in question is beyond the scope of the arbitration clause, or that the matter is not arbitrable. Any of these cases involve a challenge to the jurisdiction of the arbitral tribunal. Under this doctrine the arbitral tribunal may decide all these matters without invoking the jurisdiction of a national court to determine these issues.

[82] Schlosser, P., "The Competence of Arbitrators and of Courts", 8 Arb. Int'l 2 [1992] pp. 189-204 at 199.

2.3.2 FOUNDATIONS OF THE COMPETENCE-COMPETENCE DOCTRINE

The competence-competence doctrine has been justified on two main grounds:

1) There is a rebuttable presumption that such jurisdictional power has been conferred by the will of the parties when they entered into an arbitration agreement.

2) The competence-competence doctrine has been justified on the following ground in **Elf Aquitaine v. NIOC**, where the sole arbitrator held that:

"The rationale behind the principle of the arbitrators' competence over the competence is a widely recognised need to establish a system of law providing enterprises engaged in activities in other countries under contract with the government of that country or with an institution or company under the control of that government with access to a tribunal or other organ completely independent of the parties and of their respective governments, in the event that disputes that cannot be settled by negotiations should arise".[83]

The arbitrator went on by stating that the principle of competence-competence has been accepted in treaties, by leading scholars, the ICJ, and in arbitral awards. He concluded:

"The sole arbitrator has, therefore, reached the conclusion that even in the absence of the agreement between the parties on his competence to decide on his competence to act as arbitrator in the present case, he has in accordance with consideration of international law such competence".[84]

[83]Yearbook Comm. Arb'n XI (1986) p. 97 at 101.
[84]Yearbook Comm. Arb'n XI (1986) p. 97 at 102.

2.3.3 THE DOCTRINE OF COMPETENCE-COMPETENCE IN INTERNATIONAL PRACTICE

The power of competence-competence has been established for a long time in international law. The Project of the Institute of International Law of 1875, provided that:

"Arbitrators are obliged to decide upon objections to the jurisdiction of the Arbitral Tribunal...If the doubt concerning the jurisdiction depends on the interpretation of the compromis, the parties are presumed to have given the arbitrators power to settle the question, unless otherwise stipulated".

Furthermore, The Hague Convention of 1907, provides in Article 73 that:

"The tribunal is authorised to determine its competence by interpreting the compromis".

With regard to international arbitration the doctrine of competence-competence has been asserted in various international rules and conventions. As in the UNCITRAL Model Law of 1985 where Article 16 explicitly authorises competence-competence doctrine; stating:

"The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement".

Schwebel, has observed that the UNCITRAL Model Law of 1985 provides a link between the doctrines of severability and competence-competence by providing in Article 16 (1), first, that the tribunal may render a decision with respect to questions of the validity or existence of the arbitration agreement (competence-competence) and second, that a decision by the arbitrator that the contract is null and void will not automatically invalidate the arbitration clause (severability).[85]

Furthermore, Article 21 of the UNCITRAL Arbitration Rules of 1976 incorporates the competence-competence doctrine by providing that the arbitral tribunal may rule on allegations of the tribunal's lack of jurisdiction, including questions concerning the existence or validity of the arbitration agreement or arbitration clause.

[85] Schwebel, S. M., *International Arbitration: Three Salient Problems*, Cambridge, Grotius Publications Limited, 1987, p. 18.

Article 15 of the International Arbitration Rules of the AAA of 1997 provides that the tribunal has the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. By the same approach Article 13 of the Arbitration Rules of the European Court of Arbitration of 1997 states:

"The Arbitral tribunal shall rule on the validity and construction of the arbitration agreement and on its own jurisdiction and its ambit in respect of the dispute referred."

The Arbitration Rules of the NAI of 1998 have accepted the competence-competence doctrine; Article 9(4) of the Rules provides the arbitral tribunal with the power to decide any plea in which the arbitral tribunal lacks jurisdiction. Article 9(5), as mentioned earlier, empowers the arbitral tribunal to decide on the validity of the contract of which the arbitration agreement forms part, or to which the arbitration agreement is related.

Under the old ICC Arbitration Rules of 1988, the position was more complex, as stated in Article 8.3. When any question is raised as to the jurisdiction of the arbitral tribunal, a two-stage procedure was followed. At the first stage, if one of the parties raises *"one or more pleas concerning the existence or validity of the agreement to arbitrate"* the ICC's Court must satisfy itself of *"the prima facie existence of such an agreement."* If the ICC's Court is satisfied it may decide that the arbitration shall proceed so that, at the second stage *"any decision as the arbitrator's jurisdiction shall be taken by the arbitrator himself."*[86]

Under the new ICC Arbitration Rules of 1998, competence-competence is one of the effects of the arbitration agreement. Article 6 (2) provides that:

"any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself".

Furthermore, Article 6 (4) of the new ICC Arbitration Rules provides that:

"Unless otherwise agreed, the Arbitral Tribunal shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that is non-existent provided that the Arbitral Tribunal upholds the validity of the arbitration agreement. The Arbitral Tribunal shall continue to have jurisdiction to determine the respective rights of the

[86] Redfern, A., & Hunter, M., *Law and Practice of International Commercial Arbitration*, 2nd ed., London 1991, p. 277.

parties and to adjudicate their claims and pleas even though the contract itself may be non-existent or null and void".

The ICSID Convention of 1965 supports the competence-competence doctrine; Article 41 (1) of the ICSID Convention provides that:

"The tribunal shall be the judge of its own competence".

The principle of competence-competence is well established in international arbitral precedents. The award rendered in ICC case No. 2521 (1975)[87] gives an example:

"Under Article 13 (para.3) of the ICC Rules the arbitrator has jurisdiction to decide on his jurisdiction. This is an essential principle which is generally recognised by arbitration law".

The sole arbitrator in **TEXACO** [88] upheld the doctrine of competence-competence and held that he had competence-competence by virtue of a traditional rule followed by international case law, unanimously recognised by the writings of legal scholars. The arbitrator noted also that this rule had been adopted in a great number of international instruments.

An ICC arbitral tribunal in its final award No. 5485 (1987)[89] held:
"Whereas in international commercial arbitration the arbitrators have the authority to determine their own jurisdiction". This holding has also been confirmed by many other ICC arbitral tribunals such as in case No. 1507 (1970),[90] case No. 2138 (1974), [91] case No. 3896 (1982)[92] and ICC case No.4367 (1984).[93]

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[87] Reported in *Collection of ICC Arbitral Awards 1974-1985* (S. Jarvin & Y. Derains eds.) Kluwer, 1990, pp. 282-285 at 284 (in French).
[88] 17 IL M (1978) pp.1-37.
[89] Reported in *Collection of ICC Arbitral Awards 1986-1990* (S. Jarvin & Y. Derains eds.) Kluwer 1990 pp. 199-216 at 202.
[90] *J. Droit Int'l (Clunet)* 1974 at 913.
[91] *J. Droit Int'l (Clunet)* 1975 at 934.
[92] *J. Droit Int'l (Clunet)* 1983 at 914.
[93] Yearbook Comm. Arb'n XI (1986) at 134.

2.3.4 THE DOCTRINE OF COMPETENCE-COMPETENCE IN NATIONAL PRACTICE

The competence of the arbitral tribunal to rule on its own jurisdiction is also contained in the legislation and case law of several countries including England, France, Belgium, and The Netherlands. In Germany, however, the courts have expressed the view that parties to an arbitration agreement may vest the arbitrators with the authority to rule definitively on the scope of their jurisdiction. In the following the doctrine of competence-competence will be examined in different legal systems:

1) English Law:

In England, for example, the 1996 Arbitration Act has given express power for an arbitrator to rule on his or her own jurisdiction. Prior to the Act, English courts favoured the principle of severability but had been somewhat reluctant to accept the doctrine of competence-competence. Section 30 of the Act states the doctrine of competence-competence as follows:

"Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to:

(a) Whether there is a valid arbitration agreement;

(b) Whether the tribunal is properly constituted; and

(c) What matters have been submitted to arbitration in accordance with the arbitration agreement.

(2) Any such ruling may be challenged by any available arbitral process of appeal or reviews or in accordance with the provisions of this part".

This section is based on Article 16 of the UNCITRAL Model Law of 1985, however, unlike the Model Law, the competence-competence doctrine is not mandatory under the Act, so the parties may agree that the arbitral tribunal does not have this power. By virtue of Section 31, a party wishing to challenge the substantive jurisdiction of the tribunal must do so not later than the time he takes the first step in the proceedings to contest the merits of any matter. An objection that the tribunal is exceeding its jurisdiction during the proceedings is permitted, but must be made as soon as possible after the matter is raised. It has been decided in England that an arbitral tribunal can consider its own jurisdiction even in Countries where

national courts would decide the questions of arbitrability if one party raised them in litigation to enforce or resist the arbitration agreement. [94]

To sum-up, England has adopted a competence-competence rule which enables the arbitral tribunal itself to decide whether it has jurisdiction. The tribunal's decision, however, is preliminary and is subject to a definitive determination by the court.

2) French Law:

In France, where the competence-competence rule is accepted, the arbitral tribunal's jurisdictional authority is comprehensive and allows the arbitral tribunal to rule on various jurisdictional challenges. The doctrine is well-settled under French case law concerning international commercial arbitration.

The competence-competence doctrine was upheld by the *Cour de Cassation* in **Société Impex v. Société P.A.Z.** [95] The *Tribunal Civile de Strasbourg* in this case referred the matter to arbitration, declaring that the arbitrator may judge on his or her own competence to rule on the validity of the contract.

Article 1466 of the *Nouveau Code de Procedure Civile* explicitly authorises the competence-competence doctrine by assigning full authority to the arbitral tribunal to be the judge of its own jurisdiction. Article 1466 of the *Code*, provides the arbitrator with powers that nearly approximate to those afforded to a judge. Under Article 1466 the arbitral tribunal has the power to rule upon issues of both the principle of its authority, such as whether or not the arbitration agreement itself is valid, and the scope of its authority, such as a case where a party alleges that the present dispute is not covered under the arbitration agreement.

Under Article 1458 of the *Code*, where a dispute that has been brought before an arbitral tribunal by virtue of an agreement to arbitrate, is subsequently brought before a civil or commercial court by one of the parties, the court must rule that it lacks jurisdiction to hear the dispute. The court must reach the same result even where the dispute has not yet been referred to the arbitral tribunal, unless the arbitration agreement is with *prima facie* nullity.

In another ruling, the *Cour de Cassation* upheld the competence-competence doctrine in **Bai Line Shipping Co. v. Société Recoti** [96]. In this case, the *Tribunal de Commerce de Paris*, and subsequently the *Cour d' appel de Paris*, both declared their jurisdictional incompetence to render a decision. The *Cour de Cassation* upheld their ruling and stated that under Article 1458 of the *Code*, a court must, absent manifest nullity of the arbitration clause,

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[94] See **Christopher Brown Ltd v. Genossenschaft Oesterreichischer Waldbesitzer etc.** [1954] 1 Q.B. 8.
[95] Cass. 1er Chambre Civile, 18 Mai 1971, Rev. Arb. 1972 at 2.
[96] Judgement of Jan 21, 1992, Cass. Com. Bull Civ. IV, No. 30 p. 25 (Fr).

declare itself incompetent to render a decision on the merits. The *Cour de Cassation* further stated that, under Article 1466 of the *Code*, it was for the arbitrator, not the court, to rule both on the limits of his or her jurisdictional power, and on the merits of the matter of the prescription. Thus, under Article 1466 of the *Code*, the arbitral tribunal may rule upon an allegation of invalidity of the main contract, and consequently the attendant arbitration clause by reason of mistake or lack of consent. True, under French law, like under most other national laws, the State court will have the last word on the arbitral tribunal's jurisdiction, since the decision of the arbitral tribunal in this respect can be reviewed and, as the case may be, set aside by the State jurisdiction. However, the arbitral tribunal has the priority to decide on the issue of its jurisdiction.

Acceptance of the competence-competence doctrine under French law promotes international arbitration by giving force to the parties' intentions and recognising the inherent competence power of the arbitral tribunal. By accepting the doctrine, French law conforms to the fundamental nature of international commercial arbitration, which is to give effect to the intent of the parties.

3) U. S. Law:

In the U.S., the FAA guarantees the enforcement of written arbitration agreements by providing that a written arbitration agreement is a valid, irrevocable and enforceable agreement. The U.S. courts have expressed in the following cases that the power to decide jurisdictional issues, such as the validity of the arbitration clause and the scope of arbitrability, is reserved to the courts. U.S. law does not espouse the doctrine of competence-competence. As **Born** has stated, U.S. courts have adopted divergent approaches to the competence-competence doctrine and the respective roles of the arbitrators and national courts in interpreting arbitration agreements. [97] **Born** further stated that, notwithstanding apparently universal accptance of the seperability doctrine under the FAA, lower U.S. Courts are divided over the extent to which the competence-competence doctrine applies under the FAA. [98]

In the U.S., the term 'arbitrability' is more commonly used when referring to the jurisdiction of arbitrators. The U.S. rule of arbitrability is a mandatory one. The parties cannot avoid it by adopting a contractual choice of law provision that designates the law of a country that grants the arbitral tribunal the power to rule on its jurisdiction. The arbitrability rule was developed by the U.S. Supreme Court in a series of labour arbitration cases known

[97] Born, G., *International Commercial Arbitration in the United States*, Kluwer, 1994, p. 384.
[98] Born, G., *International Commercial Arbitration in the United States*, Kluwer, 1994, p. 219.

as the **Steel Workers Trilogy**. The following four principles can be learned from this trilogy. The first principle is that arbitration is a matter of a contract, and a party cannot be required to submit to arbitration any dispute, which he has not agreed to submit. The second rule is that the question of arbitrability is an issue to be decided by the court, not the arbitrators. The third principle derived from the **Steel Workers Trilogy** is that, in deciding whether the parties have agreed to submit a particular issue to arbitration, a court is not to rule on the merits of the underlying claims. The fourth principle is that, where the contract contains an arbitration clause, there is a presumption of arbitrability. Such a presumption is particularly applicable where the arbitration clause is broad. [99]

[99] Jalili, M.,"Kompetenz-Kompetenz: Recent U.S. and U.K. Developments", 13 J. Int'l Arb. Number 4, December 1996 pp. 169-178 at 175.

2.3.5 AN APPRAISAL OF THE NATIONAL AND INTERNATIONAL PRACTICE

Some conclusions may be made on the doctrine of competence-competence as follows:

1) The doctrine of competence-competence is based on the autonomy of the arbitration clause, to the extent that some suggest that the doctrine of competence-competence is a corollary to the doctrine of severability.

2) Generally, civil law jurisdictions give the arbitral tribunal a very wide competence-competence authority. The American and English courts are more-interventionist.

3) Competence-competence was initially developed to enforce the agreement made by the parties to resolve their disputes by arbitration.

4) The competence of an arbitral tribunal to determine its own jurisdiction has practical significance in that, where parties have solemnly agreed to submit to an arbitral tribunal, the burden of proof of challenges to the jurisdiction not only rests with the challenger, but proof may have to be beyond all reasonable doubt to eliminate the jurisdiction of the tribunal.

2.4 CONCLUDING REMARKS ON CHAPTER TWO

Both doctrines of severability and competence-competence could have significant consequences for issues relating to the law governing arbitration agreements and the enforceability of such agreements.

The following points could be made in this respect:

1) There is often confusion between the doctrines of severability and competence-competence. Severability is concerned with contract interpretation and the question of whether the arbitrators may determine its existence or validity. Competence-competence is concerned with the jurisdictional power of arbitrators versus that of the court, to decide whether there is a valid arbitration agreement.

2) Both doctrines have become a truly international rules of law, especially when it comes to international commercial arbitration. They are essential to a working system of international arbitration. Without them, the arbitral tribunal is at the mercy of any party, which chooses to allege that the principal contract is void or voidable.

3) Both doctrines are subject to the limitations of arbitrability under certain substantive laws.

4) The severability and competence-competence doctrines can significantly reduce any meaningful judicial role in decisions as to the scope of the arbitration agreements, and arbitration obligations.

5) The doctrines of severability and competence-competence cannot be applied in a vacuum. Therefore, no arbitration clause, regardless of its wording, should have the power to prevent a court from exercising jurisdiction to determine whether a contract was ever concluded. If the principal agreement was never entered into, the arbitration agreement contained therein must be affected as well.

6) Applied correctly, the doctrines of severability and competence-competence serve to prevent bad faith attempts, to obstruct the arbitral proceedings. These efforts to prevent such attempts could be faced with numerous problems such as, the exercise of poor craftsmanship in the drafting of arbitration clauses, and overzealous ambition on the part of theorists and practitioners alike. With respect to the latter, these ambitions involve the proper scope of a concept like severability, failing to appreciate, and delineate, with precision, distinct differences between a relevant situation, and as well as paying insufficient attention to the actual construction of arbitration agreements.

7) The rationales of the doctrines of severability and competence-competence are extremely compelling. The parties' agreement will be the best basis for granting the arbitrator the power

to rule on his own jurisdiction, at least when it incorporates rules recognising these doctrines. Practical necessity constitutes another basis for the doctrines. It can be argued that since jurisdictional rulings are often intimately related with the merits, and pre-arbitration litigation over the arbitral tribunals' jurisdiction can cause expense and delay, court resolution of these matters would frustrate the main objective of parties in selecting the arbitral forum.

3. CHAPTER THREE

CHALLENGES TO THE JURISDICTION OF ARBITRAL TRIBUNALS IN INTERNATIONAL COMMERCIAL ARBITRATION: NEGATIVE ASPECTS

3.1 INTRODUCTION

As mentioned earlier the jurisdiction of arbitral tribunals is in every instance dependent upon two factors: the autonomy of the parties and the laws of the competent national jurisdictions, which permit the parties to arbitrate the ensuing dispute.

Challenges to the jurisdiction of the arbitral tribunals in international commercial arbitration may arise in different situations. A party may raise the question whether certain claims, which have been submitted to the arbitral tribunal, are within its jurisdiction. It may be argued that the arbitration agreement is not a written agreement or the dispute is outside the scope of the arbitration agreement, or not arbitrable under the applicable law or the arbitration agreement itself is misunderstood, or misinterpreted by the other party. One of the parties may allege that the claim is time barred or that the arbitration is invalid for any other reason.

In some cases the jurisdiction of arbitral tribunals is challenged on the ground of public policy where some matters are precluded from being submitted to arbitration since such submission violates the public policy or mandatory provisions of the applicable law irrespective of the will of the parties. These kinds of challenges to the jurisdiction of the arbitral tribunal raise questions as to who may decide the challenge, the arbitral tribunal or a competent court, and whether a court may review a determination on jurisdiction by the arbitral tribunal and when it should be reviewed.

In this chapter arbitrability is taken as case study and discussed as a jurisdictional challenge to arbitral tribunals in international commercial arbitration, with a review of the concept of arbitrability under various legal systems and international conventions. The purpose of this chapter is to draw a line between the public interest of the State, which seeks to resolve certain disputes through its courts and the interest of individuals seeking the settlement of their disputes through arbitration. Additionally, this chapter will try to designate certain kinds of disputes that can fall within the scope of arbitration agreements. This will lead us to examine several aspects of arbitrability in different areas, with a study of various

tests of arbitrability and the law governing such issues.

3.2 THE CONCEPT OF ARBITRABILITY

The general concept of arbitrability, when used in it's literal sense, would refer to whether the subject matter of a dispute is capable of settlement by arbitration under the applicable law or not. This concept is the so-called subject-matter arbitrability, and should not be confused with the question of whether the dispute is within the scope of the arbitration agreement, which is called substantive arbitrability, as will be discussed later. Arbitrability is permissibility to settle a dispute by arbitration; it is a decisive requirement for the validity of an arbitration agreement, establishment of jurisdiction, and eventual procedures of setting aside, recognition or enforcement of an arbitral award. Courts use the terms 'arbitrable' and 'arbitrability' to describe two distinct aspects of a claim: (1) whether the claim is within the scope of the parties' agreement to arbitrate and (2) whether the claim is of a type that is susceptible to arbitration as a matter of public policy or under an applicable arbitration statute.[1] The definition of arbitrability may vary from one jurisdiction to another. Thus, the arbitrability of a legal dispute is linked to other question of whether or not the parties would have the power to settle that dispute by an amicable way.

The concept of arbitrability, was discussed at the UN Conference which led to the New York Convention, the participants have tried to reach a compromise between the different approaches of the countries to enable the process of arbitration to play its role in the most efficient way with less interference of the national courts as they try to invalidate the arbitration agreement or delay the arbitral process by claiming that the subject matter of the dispute is non-arbitrable. It was concluded that it is impossible to establish uniform criteria to lay down arbitrable and non-arbitrable matters.

The participants in this UN Conference failed to reach a general ground in laying down those issues, which are arbitrable, and those, which are non- arbitrable, but nevertheless they pointed out the issue of non-arbitrability and recommended not expanding its interpretation of scope. They also refused to link the issue of non-arbitrability with the concept of public policy, insisted on leaving this matter open to be decided by different arbitral tribunals. However, there was common agreement that a matter should be arbitrable if the issue can be settled by agreement of the parties.

Arbitrability is of considerable importance in international commercial arbitration

[1] Holden, M., "Arbitration of State-Law Claims by Employees: An Argument for Containing Federal Arbitration Law", 80 Cornell L. Rev. [1995] at 1697.

especially when arbitral awards are sought to be enforced, since the main concern of arbitrators or any arbitral tribunal is to render an enforceable award, at least under the New York Convention. If the arbitral tribunal renders an award relating to a non-arbitrable dispute matter it could be said that it will be unlikely to be enforced at law.

Generally speaking, arbitrability of a dispute may arise at two different stages of the dispute settlement process:

1- The commencement of the process, as in appealing to a national court to stay the proceedings, depending as on the fact that the dispute is not capable of being settled by arbitration. This is indeed, one of the means so as to delay and obstruct the arbitration at an early stage of the proceedings. The issue of arbitrability may be raised when the jurisdiction of the arbitral tribunal is put in issue before it or a court. It is normal to have the issue of arbitrability invoked by a party at the beginning of the arbitration, before the arbitral tribunal, which will have to decide whether it has jurisdiction or not. The issue of arbitrability can be raised in setting aside proceedings before the State court, usually at the place where the arbitral tribunal has its seat. When a court is asked to stay or compel arbitration the question of arbitrability becomes involved.

Another appeal could be made before a national judge whom enforcement of the arbitration agreement is sought from. It is important to note that arbitrability and its limitations are strongly influenced by the extent of control of arbitral awards by courts.

2- At the recognition and enforcement stage, the question of arbitrability may arise when the arbitral award is sought to be enforced, the recognition and enforcement of an award could be refused on the ground that the subject matter of the dispute is not capable of being settled by arbitration according to the law of the country where the recognition and enforcement are sought. Article 34(2)(b)(i) of the UNCIITRAL Model Law of 1985 provides that an award may be set aside where *"the subject matter of the dispute is not capable of settlement by arbitration under the law of the enacting country"*.

It could be stated that arbitrators cannot decide some types of disputes, different legal systems do not follow the same method in identifying those disputes that are arbitrable and those that are not. In some legal systems disputes which are arbitrable are stated, in others disputes which are non-arbitrable are excluded. While international regulation of arbitrability is rare, most of national legal systems provide for the exclusion of arbitrability with regard to some areas of disputes, often giving such disputes the character of public policy. National

laws differ widely in their limitations of arbitrability even where they provide limitations for the same subject matter or group of persons or institutions.

This leads us to discuss non-arbitrability and the connection between arbitrable and non-arbitrable dispute matters. When an arbitration agreement covers arbitrable and non-arbitrable matters, the intention of the parties must be examined. If their intention is to have all matters arbitrated, the non-arbitrability of some of them may render the entire arbitration agreement null and void. On the other hand, if the intention of the parties to arbitrate arbitrable matters only, the arbitral proceedings in this case will continue. It would hardly be convincing to deny the arbitrability of a dispute in its entirety if only one fraction of the disputed issues appears to be non-arbitrable. In order to declare subject areas non-arbitrable, legislatures, and especially courts must elaborate a working definition of the public interest and explain how a particular subject area is integrated into or excluded from its domain.[2]

When arbitrable and non-arbitrable disputes are simultaneously referred to arbitration and cannot be separated, the agreement would normally have no effect and all these disputes would have to be referred to the courts.[3] Several courts have adopted what has been termed the 'permeation' doctrine, wherein an action to compel arbitration is stayed if non-arbitrable issues are inseparable from the arbitrable ones to an extent that the arbitral findings would have a collateral estoppel effect on the litigation of the non-arbitrable claims.[4] However, the case law leaves little doubt that a dispute, which entails both arbitrable and non-arbitrable issues, must, if at all possible, be resolved in two different forums.[5] Generally, courts sever the arbitrable from the non-arbitrable disputes, compelling arbitration of the former and judicial review of the latter. However, if both arbitrable and non-arbitrable disputes arise out of the same transaction, judicial authorities have questioned the wisdom and practicality of severing the arbitrable disputes.

In some countries the whole arbitration fails if the subject matter of the arbitration includes non-arbitrable matters, which cannot be adjudicated separately as in Spain, conversely in Italy arbitrable matters remain arbitrable even if combined with non-arbitrable

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[2] Carbonneau, T. E. & Janson, F.,"Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability", Tulane J. Int'l & Comp. L. vol.2, [1994] pp. 193-222 at pp. 195-196.

[3] Rubino-Sammartano, *International Commercial Arbitration*, Deventer, Kluwer, 1990, p. 108.

[4] **Dickinson v. Heinold Sec., Inc.,** 661 D. 2d 638, 642-45 (7th Cir.1981), cited in Morgan, E. M., "Contract Theory and the Sources of Rights: An Approach to the Arbitrability Question", 60 S. Cal. L. Rev. [1987] pp.1059-1082 at 1081. The court stated in this case: *"Where the non-arbitrable issues substantially permeate the entire case and make it difficult to separate out the arbitrable issues, the district court has discretion to stay arbitration pending a judicial resolution of the non-arbitrable claims".*

[5] See **University Life Inc. Co. v. Unimarc Ltd.**, 699 F. 2d 846, 805-51 (7th Cir.1983).

matters.[6] In the U.S. the Court in **Dean Witter Reynolds Inc. v. Byrd** [7] disapproved the so-called *"doctrine of intertwining"*, under which courts were given discretion to deny arbitration of arbitrable claims when arbitrable and non-arbitrable claims were intertwined factually and legally, the court held the intertwining doctrine to be invalid, thus requiring arbitration of arbitrable claims without regard to their relationship to non-arbitrable claims.

The arbitrability and the validity of arbitration agreements are involved together, as in France, for example, where under its domestic law, the validity of an arbitration agreement depends upon two factors:

(1) the capacity of the parties to arbitrate.

(2) the arbitrability of the subject matter of the agreement.

In the U.S. as any other arbitration act the FAA's primary objective is to enforce private agreements to arbitrate. Judicial determination of whether a dispute is arbitrable is the focal issue in ruling on a motion to stay proceedings pending arbitration or a petition to compel arbitration. As such, arbitrability stands as a hurdle that must be successfully crossed before the goals of the Act can be achieved.[8]

Although international arbitration is highly favored under French law [9], there may be limitations to the arbitrability of a dispute under the French legal system. Where parties to an international commercial contract have chosen to arbitrate under French law, they will be subject in many instances to the substantive provisions of French domestic public policy. Non-arbitrability will only result where a public policy is directly violated. Under French international arbitration law, in contrast to French domestic arbitration law, arbitrability has been upheld in contracts in which the State and State entities were parties. French law prohibits arbitration agreements in a number of specific areas in which the principle of the autonomy of the will of the parties does not apply and in which the intervention of a court of law is deemed to be indispensable.[10] French law contains an express rule prohibiting the arbitration of public policy matters. Actions concerning trademarks and issues of unfair competition under French substantive law are non-arbitrable, except where the dispute

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[6] Redfern, A. & Hunter, M., *Law and Practice of International Commercial Arbitration*, 2nd ed., London, Sweet & Maxwell, 1991, p. 144.

[7] 105 S. Ct.1238 (1985).

[8] Overby, A. B., "Arbitrability of disputes Under the Federal Arbitration Act", 71 Iowa L. R. [1986] pp. 1137-1160 at 1160.

[9] Carbonneau, T. E., & Janson, F., "Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability", Tulane J. Int'l & Comp. L. Vol. 2 [1994] pp. 193-222 at 218.

[10] Carbonneau, T. E., "The Elaboration of a French Court Doctrine on International Commercial Arbitration: A Study in Liberal Civilian Judicial Creativity" Tul. L. Rev. Vol.55 No.1 Dec.1980 pp. 1-62 at 9.

involves misappropriation.

The famous Article 2060 of the *Code Civile* is the starting point for any discussion on arbitrability in French law: *"it shall not be possible to agree to submit to arbitration questions of the civil status and capacity of persons, of those relating to divorce or judicial separation or disputes concerning public collectivities and foundations and more generally in all the fields which concern public policy"*, this Article needs to be amended to lift any remaining restrictions upon arbitrability.

In order to trace the origin of the current position in French law regarding arbitrability, it is necessary to go back to a 1967 decision of the *Cour de Cassation* in an international matter which situated the intervention of public policy at the level, not of the subject matter of the dispute, but of the arbitral award.[11] The Paris *Cour d'Appel* had the opportunity to consider arbitrability problems in connection with an international arbitration involving a mandatory regulation, the Court stated that: *".... the arbitrability of a dispute in the light of public policy should not be understood as prohibiting the application by arbitrators of mandatory provisions but only the taking of decisions in matters which by their nature come within the exclusive jurisdiction of State Courts, or condoning a breach of public policy..."* .[12] The Paris Court of Appeal in **Labinal** [13] has stated that:

"In international matters, the arbitral tribunal assesses its own jurisdictional authority in regard to the arbitrability of the dispute pursuant to international public policy and has the authority to apply the principles and rules that emerge from it and to sanction instances of non - compliance under the supervision of the court of enforcement".

However, the abolition of Article 2061[14] of the Civil Code is an indication that arbitrability has been widely recognised in France.

It has long been a principle of law that disputes which can arise between two or more parties and which affect their civil rights may be referred to arbitration; claims based on factual disputes and principles of common law have generally acknowledged as inherently arbitrable and unreviewable even for the most notorious error in interpretation or application.

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[11] Rbort Meulemans, 15th June 1967, J. Droit Int'l (Clunet) 1968, p.929.

[12] Paris *Cour d'Appel*, **Almira Films v. Pierrel**, 16th February 1989, Rev. Arb. 1989, p.711.

[13] **Société Labinal v. Société Mors et Westland Aerospace**, *Cour d' appele de Paris*, Rev. Arb. 645 (1993) at 650.

[14] Article 2061 of the French Civil Code stated: *"An arbitration clause shall be void unless the law provides*

On the other hand, criminal matters cannot be referred to arbitration because a crime is an offence against the community as a whole for that, the court must decide on the punishment on behalf of the State and society. No municipal law permits private parties completely to exclude the jurisdiction of national legal systems.[15]

In English law there are very few restrictions on the type of dispute, which is arbitrable. It has been suggested that *"any dispute or claim concerning legal rights, which can be the subject of an enforceable award, is capable of being settled by arbitration".*[16] English case law generally holds that any civil claim may be submitted to arbitration as long as only damages are claimed. Courts, however, have declined to compel arbitration where claims of fraud are involved. Halsbury's Laws puts the matter thus: *"The dispute or difference which the parties to an arbitration agreement agree to refer must consist of a justiciable issue triable civilly. A fair test of this is whether the difference can be compromised lawfully by way of accord and satisfaction."* [17] The problem with this formulation is that an issue may well be arbitrable but not triable civilly.

Furthermore, under English law, arbitration cannot decide disputes related to criminal law issues, family rights, those which fall in the jurisdiction of the admiralty, concern insolvency, or which are in any way contrary to public policy or arise from an illegal contract.[18] Also in French law disputes related to insolvency, industrial property and labour disputes are non-arbitrable.

English law does not contain any limit on the type of disputes, which can be arbitrated. This may stem from two factors: first, public policy issues arise in English arbitration so rarely that the problem has hardly ever been confronted. Secondly, both before and since the passing of the 1996 Arbitration Act, there has, in effect, been a right of appeal on most questions of law of general public importance.[19]

According to Article 177(1) of the Swiss PIL Statute *"Any dispute involving property may be the subject matter of an arbitration".* It could be stated that this Article governs objective arbitrability notwithstanding any mandatory provisions of Swiss domestic or foreign law to

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otherwise."

[15] Redfern, A. & Hunter, M., *Law and Practice of International Commercial Arbitration*, 2nd ed., London, Sweet & Maxwell, 1991, p. 137.

[16] Mustill, M. J. & Boyd, S. C., *Commercial Arbitration*, 2nd ed., 1989, p. 149.

[17] Halsbury's Laws Vol. 2, para 503.

[18] Mustill, M. J. & Boyd, S. C., *Commercial Arbitration*, 2nd ed., 1989, p. 149.

[19] Samuel, A., *Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, U.S. and West Germany Law*, 1989, pp. 131-132.

the contrary; the only barrier is Swiss public policy.

Under the German Arbitration Act of 1998 any dispute involving a financial interest may be the object of an arbitration. However, disputes not concerning financial interest can also be the object of arbitration agreements, provided the law permits the parties to conclude a settlement in the subject matter. Another example of broad scope of arbitrability could be found in the International Commercial Arbitration Act of Iran of 1997 where Article 2(1) states that disputes in international commercial relationships are arbitrable under the Act.

The central theme in non-arbitrability, as Professor **Park**[20] described, is:

"a concern that society will be injured by arbitration of public law claims, courts express a fear that public law issues are too complicated for arbitrators; that arbitration proceedings are too informal; or that arbitrators like foxes guarding the chicken coop, with a pro-business bias that will lead to under enforcement of laws designed to protect the public".

The main concern on the issue of arbitrability is the presumption that public law issues which relate to public interest may not be properly addressed in arbitration, and arbitrators are not in a position to decide on such issues because their main concern is parties' interests, and there is a fear that private interests will prevail over public interests.

By examining different international conventions and arbitration rules, we find that every convention and rules have their own definition for arbitrable matters.

Article 1 of the Geneva Protocol of 1923 defines arbitrable disputes as: *"any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration"*. The Geneva Convention of 1927 required in its Section 1 that arbitrability must be determined by each relevant national system of conflict of laws.

The New York Convention is concerned with *" 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".*[21] The Convention leaves the arbitrability issue open for determination by national courts. A similar provision was omitted from the UNCITRAL Model Law of 1985, apparently because it was thought to

[20] Park, W. W., "National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration" Tul. L. Rev.Vol. 63 [1989] pp.647-709 at 700.
[21] Article II (1) of the New York Convention.

be included in the notion of 'null and void'.[22]

Non-arbitrability could be raised as a ground for refusal of enforcement of arbitral awards within the scope of the New York Convention, Article (V) 2 of the Convention states that:

"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..."

The French Court of Appeal of Reims (Civil Chamber) in **Denis Coakly Ltd. v. Michael Reverdy** [23] noted that under Article V (2) (b) of the Convention *" the public policy governing the enforcement of foreign arbitral awards is not domestic public policy, but the public policy of international law of the State where the decision is invoked".*

It should be noted that if the dispute is not arbitrable under the proper law of the arbitration agreement the arbitration agreement is invalid and enforcement of the award may be refused. But, if the dispute is not arbitrable under the law of the seat, the award is likely to be set aside.

Van den Berg[24] states that Article (V) (2) is superfluous because according to his point of view, arbitrability forms part of the general concept of public policy which is mentioned in the same Article, and laid down as a ground for refusal of recognition and enforcement of an arbitral award as well. On the other hand, **Böckstiegel** [25] states that it is for historical reasons that the Convention mentions arbitrability and public policy in separate sections and according to him it does not seem superfluous. Distinction should be made between arbitrability and public policy, since arbitrability refers to the validity and legality of an arbitration agreement or process, public policy, on the other hand, refers to the laws or standards that the arbitration agreement itself, or the enforcement of the arbitral award, might conflict with. Furthermore, legal restrictions imposed on arbitrability are not always part of public policy; public policy can frustrate enforcement of an arbitral award, while non-arbitrability can frustrate the arbitration process as a whole. However, despite the autonomy

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[22]Holtzmann & Neuhaus, *Guide to the UNCITRAL Model Law*, Kluwer, 1989, p. 304.
[23] Judgment of 23 July 1981, see Yearbook Comm. Arb'n IX (1984) at 400 (France No.6).
[24] van den Berg, A. J., *The New York Arbitration Convention of 1958,* Deventer, 1981, p. 360.
[25] Böckestiegel, K-H "Public Policy and Arbitrability" in *Comparative Arbitration Practice and Public Policy* (General Editor P. Sanders, Kluwer, 1987) p. 183.

of the non-arbitrability defense, it seems clear that some restrictions on the application of the public policy exception must also be excluded to the non-arbitrability defense. [26]

It has been suggested that the New York Convention should be amended to include a list of non-arbitrable subject matters for each Contracting State or a list reflecting judicial and legislative practice in all member countries.[27] However, such a suggestion could not be practical since the New York Convention has been ratified by many countries and the process to invite these countries to ratify such amendments could be very long and faces various obstacles.

The European Convention on International Commercial Arbitration of 1961, which is designed to deal with the problems of establishing and operating procedures for disputes arising out of trading agreements between European Countries, in Article 6 (2) specifically lists the law chosen by the parties as having the first priority in determining arbitrability.

The ICSID Convention of 1965, on the other hand, applies to *"any legal dispute arising directly out of an investment between a Contracting State and a national of another Contracting state"*, but Article 25(1) provides an indirect limitation of arbitrability by describing the kinds of disputes that may be submitted to ICSID.

The 1981 Accords of Algiers between Iran and the U.S. has regulated arbitrability in a different way. These accords provide for exclusive jurisdiction of the Iran-U.S. Claims Tribunal in The Hague for all claims of nationals of one of the two States against the other State and any counterclaim which arises out of the same contract, transaction or occurrence, if such claims and counterclaims were outstanding on the date of the accords. The only exception mentioned are contractual clauses specifically providing for the sole jurisdiction of Iranian Courts.

Article 7 of the UNCITRAL Model Law of 1985 defines arbitration agreements as 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"*.

But, at the same time Article 1 which deals with scope of application of the UNCITRAL Model Law of 1985 states in Section 5 that: *" This law shall not affect any other law of this state (the adopted state) by virtue of which certain disputes may not be submitted to*

[26]Enterría, J., "The Role of Public Policy in International Commercial Arbitration" Law & Pol'y Int'l Bus. Vol. 21 No. 3 (1990) pp. 389-440 at 412.
[27]Nelsor, I., "Problems Concerning the Application and Interpretation of Existing Multilateral Convention on International Commercial Arbitration and Related Matters", (1972) 3 UNCITRAL Y. B. 193 at 244.

arbitration or may be submitted to arbitration only according to provisions other than those of this law".

Berger [28] stated that it is obvious that the UNCITRAL Model Law of 1985 lacks a provision on arbitrability and leaves regulation of this subject matter to the national legislature of the State adopting the law. The Model Law seems geared to discard strong doctrines of arbitrability.

Furthermore, Professor **Sornorajah,** [29] while considering the issue of procedural rules of the Model Law, stated that provisions in the law which seek to delay judicial intervention will cause concern to developing countries, as they will not permit full scope for the arbitrability doctrines which operate in these states.

The NAI Arbitration Rules of 1998 are more clear on this issue, Article 3 (2) states clearly that " *if parties have agreed to arbitration, but the arbitral tribunal finds that a dispute is wholly or partially incapable of settlement by arbitration, the arbitral tribunal is authorised to render its decision wholly or partially in the form of a binding advice".* [30]

As we could not find any limit on the scope of disputes, in the 1998 LCIA Rules, the case is the same in the Rules of the Arbitration Institute of Stockholm Chamber of Commerce of 1999. Both of the Rules do not impose any restrictions on arbitrability of disputes to be settled according to these Rules.

In its turn the China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules of 1994 is more detailed when it comes to the scope of disputes referred to it. Article 2 states that the CIETAC *"independently and impartially resolves, by means of arbitration, disputes arising from international or foreign-related, contractual or non-contractual, economic and trade transactions, including those disputes between foreign legal persons and/or natural persons and Chinese legal persons and/or natural persons, between foreign legal persons and/or natural persons, and between Chinese legal persons and/or natural persons, in order to protect the legitimate rights and interests of the parties*

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[28] Berger, K. P., *International Economic Arbitration,* Kluwer, 1993, p. 190.

[29] Sornorajah, M.,"The UNCITRAL Model Law: A Third World View Point ", 6 J. Int'l Arb.4 Dec.1989. pp. 7 –20 at 19.

[30] According to the introduction to NAI Arbitration Rules 1998 a decision in a binding advice does not have the force of a court judgment. It is merely a decision of a third party, compliance with which was agreed to in advance by the parties. A party who fails to comply with a binding advice is in breach of contract. The other party may then summon him to court for specific performance of the agreement. Unlike an arbitral award, which is mainly examined for compliance with formal requirements, the substance of a decision in a binding advice is also subject to court review. A claim for specific performance will not be honoured if the court finds that the contents of a decision, or the manner in which it was reached, are such that it would amount to a violation of good faith to consider the losing party bound by it.

and promote the development of domestic and international economy and trade."

Article 2 of the Amman Arab Convention on Commercial Arbitration of 1987 states that the Convention applies to *" commercial disputes between natural and juristic persons of any nationality, linked by commercial transactions with one of the contracting States or one of its nationals, or which have their main headquarters in one of these States".* [31] According to this Article the Arab Arbitration Centre has jurisdiction to settle disputes only where a dispute is commercial in the wide sense, even though it deemed to be civil in the countries adopting the civil law system as most Arab countries. In other words, the term 'commercial' expands to include all economic activities where the purpose of which is obtaining profits.

It has been suggested that developing countries should impose very strict limits on arbitrability especially in respect of disputes involving State entities. It is argued that this is the only way for them to retain control over foreign trade and investment where more economically powerful traders and investors may have unfair advantages.[32]

It could be noticed that developing countries have strict limitations on the scope of arbitrability that led us back to the UNCITRAL Model law of 1985. In fact one of the reasons for refusal to adopt the UNCITRAL Model Law of 1985 by developing countries is that it applies to all relationships of a commercial nature whether contractual or not.

Under the UNCITRAL Model Law of 1985 the term 'commercial' is given wide interpretation to cover agreements such exploitation and concessions which are subject to the permanent sovereignty over natural resources of those countries, for example, under Indian Law the agreements for the transfer of technology are non-arbitrable because they implicate national economic policies. [33]

Approaches to arbitrability in India did not remain the same, the Supreme Court in **Renusagar Power Co Ltd v General Electric Co** [34] held that issues arising from the foreign regulations of India did not make the dispute non-arbitrable.

Even though the term 'commercial' is given wide scope it does not cover all contracts as employment contracts. Alberta Court of Queen's Bench in **Borowski v. Heinrich Fielder**

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[31] Published as appendix to El-Ahdab's book.

[32] Sornorajah, M., "The UNCITRAL Model Law: A Third World Point View" 6 J. Int'l Arb. 4 (1989) pp. 7-20 at 16.

[33] Sornorajah, M., "The UNCITRAL Model Law: A Third World Point View" 6 J. Int'l Arb. 4 (1989) pp. 7-20 at 18.

[34] Civil Appeal No.71&71A / 1990-7 October 1993.

Perforiertechnik GmbH [35] held that an employment contract creates a master and servant relationship and not a commercial relationship of the type falling under the Australian International Commercial Arbitration Act Section 4(2), which is equivalent to Article 1 (1) of the UNCITRAL Model law of 1985. Australia does not define arbitrability by statute. In **Tanning Research Labs Inc. v. O'Brein** [36] a case arising under Article II of the New York Convention, the High Court of Australia took the view that any private right or liability determinable by a court of law was capable of being submitted to arbitration.

As mentioned earlier the concept of arbitrability is related to the limitations imposed by the public policy and some disputes cannot be arbitrated because of the direct connection to the public policy. However, arbitrability applies both to the validity of the arbitration agreement and to the arbitral award, while the public policy relates exclusively to the enforcement of awards. Conceptually, the non-arbitrability defence is similar to the public policy defence, and the two often are used interchangeably; non-arbitrability and public policy being used as means by which to defeat the recourse to arbitration.

Arbitrability and public policy overlap in arbitration practice, where a violation of public policy in some jurisdictions may render an agreement non-arbitrable. Moreover, the substantive overlap between non-arbitrability and public policy makes it difficult to understand how the subject matter of an agreement could be arbitrable, and at the same time violate the public policy by its substance. There are many cases in which more than two public policies affect the arbitrability of a dispute. One policy pulls toward arbitration, while a second pulls in the opposite direction. However, in arbitration the public policy is difficult to define because it plays a role in determining the propriety of several things: the meaning of the arbitration clause, the procedures of the arbitration and the content of the award itself.[37]

In international cases arbitrability involves a balancing of competing policy considerations[38]. The legislators and courts in each country must weigh the importance of reserving matters of public interests to the courts against the public interest in the encouragement of arbitration of commercial and investment matters. Accordingly, at the international level, there are some matters, which a State may consider as arbitrable while the

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[35] 10 W. W. R. [1994] 623.

[36] (1990) 169 CLR 332 at 342-343.

[37] Enterría, J., "The Role of Public Policy in International Commercial Arbitration" Law & Pol'y Int'l Bus. Vol. 21 No. 3 (1990) pp. 389-440 at 390.

[38] Redfern, A., & Hunter, M., *Law and Practice of International Commercial Arbitration*, 2nd ed., London, Sweet & Maxwell, 1991, p. 137.

same matters cannot be submitted to arbitration at the domestic level and might also not be considered arbitrable at all by other States. In the **Argentinean bribery** arbitration[39], the sole arbitrator Judge **G.Lagergren** denied jurisdiction of his motion, taking the view that disputes arising out of activities which had involved *"gross violation of good morals and international public policy"* could not be submitted to arbitration, and determined that the law governing the merits of the case is the law which determines whether or not the case is arbitrable, the Judge stated that *"the questions whether the subject matter of the dispute is capable of settlement by arbitration should be governed by Argentine law"*. On the other hand, the Swiss Federal Supreme Court in **Fincantieri - Cantieri Navali Italiani S.p.A. et Oto Melara S.p.A. v .M. et Tribunal Arbitral** [40] has defeated the public policy exception to arbitrability leaving enforceability of the award under the policy of the another State, the case concerned the sale of military equipment to Iraq. In this Swiss arbitration, an agent claimed unpaid commissions from Italian manufacturers, who in turn claimed that the UN' embargo on commercial activities with Iraq, effective both in Italy and Switzerland created a public policy bar to the arbitrability of the dispute. The Court held that non-arbitrability under foreign law would only be respected if such deference were imperatively required by Swiss public policy. In passing the PIL Statute, the Swiss legislature recognised that an award rendered under these circumstances might not be enforceable in a foreign State, it being up to the parties to weigh the risks they ran. The Court stated that:

"Hence, the arbitrability of the dispute does not depend on the material existence of the claim. Thus it cannot be denied for the only reason that mandatory provisions of law or given material public policy make the claim null and void or its execution impossible; it could be denied only as far as the claims are concerned which should have been heard exclusively by a State court, according to provisions of law which were to be taken into consideration for reasons of public policy." [41]

Considering the same subject-matter the Court of Appeal of Genoa in **Fincantieri - Cantieri Navali Italiani S.p.A. et Oto Melara S.p.A. v. Ministry of Defence, Armament**

[39] ICC Award No. 1110 (1963) published in Yearbook Comm. Arb'n XXI (1996) pp.47-53 at 48.
[40] ATF 118 353, 355 (June 23, 1992) (Switzerland) reported in Yearbook Comm. Arb'n XX (1995) pp. 766-770.
[41] Yearbook Comm. Arb'n XX (1995) at 769.

and supply Directorate of Iraq and republic of Iraq[42] interestingly found that the Italian courts had jurisdiction over the case, and the dispute was not arbitrable due to Italian embargo legislation. In this case the Iraqi parties entered into a certain numbers of contracts with the Italian parties for the supply of corvettes for the Iraqi Navy. All contracts contained a clause referring disputes to ICC arbitration in Paris. The UN Security Council declared an embargo against Iraq in August 1990, following the invasion of Kuwait; the European Union and Italy issued embargo legislation shortly thereafter. At that time, most of the corvettes had not yet been built or delivered. The Italian parties commenced proceedings against Iraq in the Court of First Instance of Genoa, alleging frustration of contracts and seeking termination and damages. The Iraqi parties objected to the Court's jurisdiction and maintained that the dispute should have been referred to arbitration as provided for in the contracts. The Court of First Instance granted the Iraqi parties' objection and found that it had no jurisdiction over the case. The Italian parties appealed from this decision. This case draws attention to the fact that a dispute could be considered arbitrable at the time of drafting the arbitration clause, but it could in turn be non-arbitrable at the time of the commencement of the arbitral process.

In the same respect, **Briner** in his Report to the World Intellectual Property Organisation (WIPO) Forum on the Arbitration of Intellectual Property Disputes on 3-4th March 1994, stated that:

"[in respect of arbitrability]...the least restrictive approach should be upheld in this connection. More precisely, one should favour the opinion that an arbitrator should not be concerned with foreign mandatory rules...when determining whether a dispute is arbitrable or not." [43]

Public policy is divided into two categories, domestic or national public policy; where each State may decide in accordance with its own policy which matters may be capable of being settled by arbitration, and matters, which may not. Public policy in this sense comprises a State's *"most basic notion of morality and justice"*[44], consisting of those mandatory rules which are considered as fundamental to a State. **Lew** summarises the relevance of national public policy to international commercial arbitration as follows:

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[42] Court of Appeal, Genoa, 7 May 1994, reported in Yearbook Comm. Arb'n XXI (1996) pp.594-601 at 594.

[43] Briner, R., The Arbitrability of Intellectual Property Disputes With Particular Emphasis on the Situation in Switzerland (WIPO Publication No. 728, 1994, at 66).

"The relevance of national public policy on international commercial arbitration may be left in two situations. First: where, despite the existence of an agreement to submit to arbitration, one party institutes court proceedings. Whether those proceedings should be stayed pending arbitration will depend on the validity of the arbitration agreement. For this purpose, a court will consider whether national public policy legislation denies one of the parties the right to submit to arbitration or has reserved for the exclusive jurisdiction of its national courts disputes of that particular nature. Second: where a national court is requested to enforce a foreign arbitration award. Here for the purposes of recognition and enforcement, the court must again consider the right of the parties to submit to arbitration and the arbitrability of the subject matter of the dispute. Further, a court may not give effect to a foreign award if the procedure followed in the arbitration proceedings or the award per se violate the fundamental public policies of the forum".[45]

The second category is international public policy, which is a controversial concept; it is drawn from the fundamental rules of natural law, the principles of universal justice and the general principles of morality acceptable to a generality of countries. The distinction between domestic and international public policy in international commercial arbitration is of great importance to arbitrability because a breach of international public policy is very difficult to show.[46] It has been noticed that public policy limits to international arbitration in general and to arbitrability in particular have been reduced considerably. It could be concluded that in the modern practice of courts and arbitral tribunals public policy does not seem to be a major obstacle to international commercial arbitration in general and to arbitrability in particular. International public policy is less restrictive than the domestic one in its approach. It refers in general to principles, which a State cannot ignore, although there is no general agreed definition of international public policy. As pointed out by **Böckstiegel**:

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[44] **Parsons & Whittemore Overseas Co. Inc**. 508 F.2d 969, 974.

[45] Lew, J., *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, 1978, p. 556.

[46] An English Court in **Hilmarton v. OTV** (unreported, Commercial Court, May 19, 1999) has laid down a clear distinction between what may be termed 'international' public policy considerations and domestic public policy. It could be concluded out of this case that only if enforcement of an arbitral award conflicts with overriding public policy concerns such as the need to combat drug trafficking, fraud, corruption and terroriism at an international level, will an English Court intervene. Domestic public policy concerns have no role to play at the enforcement stage. See a comment on this case, Brown, E., "Illegality and Public Policy-Enfocement of Arbitral Awards in England: Hilmarton Limited v. Omnium De Traitement Et De Valorisation S. A.", [2000] Int. A. L. R. Issue 1 pp. 31-35.

"Public policy in the context of international arbitration is normally considered from the basis of the New York Convention where it may be a defence against enforcement once the arbitral award is rendered. Thus the issue appears only in the very end of the arbitral procedure. Public policy in relation to arbitrability, however - although it may still be a defence against enforcement - concerns the very beginning and basis of arbitration, namely the arbitration agreement or arbitration clause" .[47]

The concept of transnational or truly international public policy should be examined. This concept differs from the national concept of international public policy; the latter is national by its source and international by its contents, while the former is really international both by its contents and by its source. The concept of transnational public policy governs the actions of both the parties and the arbitrator and so the main function of transnational public policy is to directly and positively influence the decision of the arbitrators, whenever fundamental interests of international trade are involved. A decision ignoring transnational public policy could be incompatible with universal principles of justice; the concept of transnational public policy appears to be an indispensable dynamic factor in the development, through arbitration, of law of international trade. [48] A truly international public policy would incorporate principles sufficiently general to be recognised by a number of legal systems representing a bona fide community of civilised nations.[49]

In **Parsons & Whittemore Overseas Co. Inc.** [50] the U.S. Court of Appeals for the Second Circuit held that the public policy defence should be construed narrowly *"enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum State's most basic notions of morality and justice"*. In another American case **Fertilizer Corp. of India v. I.D.I Management Inc.** [51] the Federal District Court held that: *"the stronger public policy...is that which favours arbitration, both international and domestic...."*.

The Supreme Court of India concluded in a detailed opinion:

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[47] Böckstiegel, K-H "Public Policy and Arbitrability", in *Comparative Arbitration Practice and Public Policy in Arbitration* General Editor P. Sanders ICCA Congress Series No. 3 (Kluwer 1987) pp.177-204 at 178.

[48] Lalive, P., "Transnational (or Truly International) Public Policy and International Arbitration", in *Comparative Arbitration Practice and Public Policy in Arbitration* General Editor P. Sanders ICCA Congress Series No. 3 (Kluwer 1987) pp. 275-318 at 313.

[49] Carbonneau, T. E. & Robert, J., *The French Law of Arbitration* (1983 Mathew Bender) at II: 9-11.

[50] 508 F2d.969, 974 (1974).

"In order to attract the bar of public policy, enforcement of the award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with the recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression 'public policy' in Sect. 7(1) (b) (ii) of the foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) the fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality." [52]

Mandatory laws of the forum have a direct impact on the issue of arbitrability, non-arbitrability said to be the consequence of the law's mandatory nature; it is so mandatory that not only the parties are legally incapable of avoiding it by stipulating their contract to be subject to another governing law, but that the parties may not waive the right to invoke it before a national judge of the State in question.[53] The existence of mandatory rules of a foreign state could exclude the arbitrability of the subject matter in dispute. The question of whether international mandatory rules have an effect on arbitrability should basically be treated similar to the general question of whether mandatory rules have an influence on the choice of the applicable law.

Arbitrators need to take into consideration foreign mandatory rules, when determining the arbitrability of a dispute. Among the mandatory rules of law most frequently encountered one can mention; competition laws, currency controls, environmental protection laws, measures of embargo, blockage, boycott, as well as laws falling in the category of legislation intended to protect parties presumed to be in an inferior bargaining position, such as employees or consumers.[54] At the domestic level, mandatory rules are often incorrectly identified with

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[51] 517F.Supp 948 (1981).

[52] Reported in Yearbook Comm. Arb'n XXI (1996) at 504.

[53] Mayer, P., "Mandatory Rules of Law in International Arbitration", 2 Arb. Int'l 1 (1988) pp. 274-322 at 290.

[54] Mayer, P., "Mandatory Rules of Law in International Arbitration", 2 Arb. Int'l 1 (1988) pp.274-322 at 275. In this respect, the Federal Supreme Court in Abu Dhabi has ruled that disputes arising out of a commercial agency contract may not be referred to arbitration since Article (6) of the Commercial agencies Law give jurisdiction to the courts of the United Arab Emirates in the event of disputes arising out of the performance of the agency/distributorship between the agent/distributor and the principle and also states that any agreement to the contrary may not be relied upon. The Court found that Article (6) permits to public policy and is mandatory application. Extracts of the case reported in [1998] Int. A. L. R. N-103.

domestic public policy. Although rules limiting arbitrability will always be meant as mandatory rules not subject to change by party autonomy, it is important to note, since this is not always seen, that mandatory rules are not necessarily identical with public policy rules. Public policy requires further additional qualifications. Every public policy is mandatory, but not every mandatory rule forms part of public policy.[55]

However, it should be stated that the mandatory rules of the place of arbitration cannot have any binding application as such in an arbitration which does not owe its existence or authority to the law of that place, and whose courts cannot, or are not likely to, intervene.[56]

It is well noticed that there are two different approaches to arbitrability, liberal and strict approaches. The former is based on a wide interpretation of the concept of arbitrability, and the latter which has been adopted by most of the developing countries, deals with a very strict interpretation.

It could be said, that there are three different elements of arbitrability: (i) the existence of the arbitration agreement; (ii) the scope of the arbitration agreement; and (iii) public policy that on occasion may be invoked as a prohibition on the arbitration of certain categories of disputes.

The term 'arbitrability' refers to four different aspects of the same issue at the same time, they are as follows:

1-Subject-matter arbitrability (objective arbitrability).

2-Substantive arbitrability.

3-Procedural arbitrability.

4-Subjective arbitrability.

This study will be concerned with each aspect respectively, with emphasis on the importance of the first and the fourth aspects. The reason for this emphasis is the fact that jurisdiction of arbitral tribunals is as much dependent on the scope of the dispute covered by the arbitration agreement, as on the capacity of the parties to authorise such arbitration, and the fact that the validity of an arbitration agreement depends on both objective and subjective arbitrability.

1) Subject-matter arbitrability:

The notion of arbitrability here is concerned with whether an issue in a dispute between

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[55]Böckstiegel, K-H, Public Policy and Arbitrability in *Comparative Arbitration Practice and Public Policy in Arbitration* (G.E. P. Sanders) ICCA Congress Series No. 3 Kluwer 1987 at 183.

[56]Nygh, P., *Autonomy in International Contracts*, Oxford, Clarendon Press, 1999, p.228.

parties is subject to arbitration, or in other words capable of being settled by arbitration according to the applicable law. When subject-matter or objective arbitrability is involved overlap between the merits of the underlying dispute and the question of the dispute's arbitrability is almost unavoidable.

In **Moses H. Cone** [57] the issue of subject-matter arbitrability was dealt with. It was held in this case that: *" the question of arbitrability must be addressed with a healthy regard for the federal policy favouring arbitration"*, which means that any doubts concerning the scope of arbitrable issues should be resolved in favour of arbitration. In this case the U.S. Supreme Court has clearly stated that the FAA creates a strong presumption of arbitrability, the Court has stated that: *" the FAA establishes that as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favour of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or like a defence to arbitrability"*. [58]This liberal policy of construction applies whether courts are faced with a claim founded on express statutory rights or on judicial created rules.

The doctrine of objective arbitrability is nonetheless a means by which States declare what they consider the outer limits of private arbitration and the proper scope of matters that fall within the exclusive jurisdiction of national courts. Arbitrators should respect the rules on arbitrability of those jurisdictions whose policy interests are directly implicated by the parties commercial transactions.[59]

The critical issue here is to determine the law that governs arbitrability, **Chukwumerije**[60] believes that the objective arbitrability of a subject matter should be determined according to the law of the country whose jurisdiction is most closely connected to the dispute. In fact his point of view makes a lot of sense, because the determination of the law governing objective arbitrability should not be left to be decided by the parties of the dispute. The logic behind this point is that the reliance on the law of the forum could lead to the application of a law totally unconnected to the ensuing dispute in determining arbitrability except in cases where the proper law chosen by the parties is the law of the jurisdiction most closely connected with the dispute.

On the other hand, **Berger** has stated that the issue of objective arbitrability may therefore be considered to be subject to the law applicable to the arbitration agreement, or the main

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[57]**Moses H. Cone Memorial Hosp.v.Mercury Corp.**, 460 U.S.1, 24-25 (1983).
[58]**Moses H. Cone Memorial Hosp.v.Mercury Corp.**, 460 U.S.1, 24-25 (1983).
[59] Chukwumerije, O., *Choice of Law in International Commercial Arbitration*, Quorum Books, 1994, p. 61.

contract, or to the arbitral procedure or to the law of one of the parties, or to the law where the enforcement of the award will probably take place .[61] **Breger**'s statement could cause some confusion in respect of deciding objective arbitrability; this confusion could be avoided by providing substantive rules of private international law instead of conflict of law rules to tackle the problem of objective arbitrability.

To sum up, in determining the arbitrability of a particular subject matter, the following laws might be involved and they should be taken into account:

- the law governing the arbitration agreement, or the main contract, or both.
- the law of the place of arbitration (*the lex locus arbitri).*
- the law of the place of enforcement.
- the law governing the subject-matter in question.

There is an exception to the fact that different laws are involved in determining subject-matter arbitrability. This exception arises when subject matter arbitrability is concerned with adaptation of long-term international economic contracts. In this case arbitrability is determined according to the law of the main contract. Arbitration to adapt long-term international economic contracts is subject to the law of the contract and not to the law of the place of arbitration, in this case the arbitration agreement is considered to be integral part of the contract. The arbitration agreement aims to substitute the award for the contractual agreement, the award becomes an integral part of the contract. The same law, therefore, must govern the contract, the arbitration agreement and the award.[62]

2) Substantive Arbitrability:

This notion of arbitrability is concerned with whether or not an agreement to arbitrate exists, and if it does, whether the parties did or did not agree to arbitrate the particular dispute under review. According to judicial decisions this issue must be decided by courts by a judicial resolution of arbitrability, since it is a matter of contract interpretation,[63] such determination has little to do with the court's view about the substance of the dispute in question. Substantive arbitrability presents the question of deciding whether a dispute is within a valid arbitration agreement.

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[60] Chukwumerije, O, *Choice of Law in International Commercial Arbitration*, Quorum Books, 1994, p. 60.
[61] Berger, K. P., *International Economic Arbitration*, Kluwer, 1993, p. 189.
[62] Stalev, Z.,"Arbitration to adapt long -term international economic contracts to changed circumstances", in *New Trends in the development of International Commercial Arbitration and the role of arbitral and other Institutions,* (P. Sanders General Editor) Kluwer 1987 at 205.
[63] **See Mediterranean Enters, Inc. v. Ssangyoung Corp.**, 708 F.2d 1458, 1463 (9th Cir. 1983); and **Consumer Concepts, Inc., v. Mego Corp.**, 458 F. Supp. 543, 544 (S.D.N.Y. 1978).

In **Wiely & Sons v. Livingstone** [64] ruling on arbitrability the U.S. Supreme Court made an important distinction as to when a court and when an arbitrator should determine matters of arbitrability. The Supreme Court held that a court should decide whether the arbitration provisions of the agreement survived the interchange and other matters of substantive arbitrability.

In a ruling in another case, **United Steelworkers of America v. Warrior and Gulf Navigation Co**,[65] the Supreme Court determined that substantive arbitrability is for the courts to decide. The case involved the interpretation of a collective bargaining agreement which contained a general arbitration clause, but which also provided that matters which are strictly a function of management shall not be subject to arbitration. The Court held that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute, which he has not agreed to submit. The Supreme Court in this case addressed the issue whether any contract is arbitrable; the Supreme Court proclaimed a presumption of arbitrability, by concluding that unless the arbitration clause was not susceptible to an interpretation that covers the asserted grievance, the courts should determine that the dispute is arbitrable.

3) Procedural Arbitrability:

Procedural arbitrability is concerned with whether all the procedural requirements in the main agreement were complied with prior to the final step of arbitration, and whether appropriate procedures have been followed in presenting the dispute to the arbitrator, noncompliance with the contractual requirements for handling disputes often raises questions regarding the enforceability of the arbitration agreement, failure to meet time limits for the filing of arbitration demands raises the question of procedural arbitrability. Matters of procedural arbitrability are usually determined by the arbitrators, unless the parties in their agreement expressly state that such decisions are to be made by the courts. In **Willis-Knigton Medical Center v. Southern Builders, Inc.,** [66] the Court reasoned that *"issues of procedural arbitrability should not be decided by the courts without first having been submitted to the arbitrator"* .

Questions of procedural arbitrability deal with the details of arbitration process, and are integral to the whole of the arbitration process. The procedural issues are intertwined with the

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[64] 376U.S. 543 (1964).
[65] 363 U. S. 574 (1960).
[66] 392 So.2d 505, 508 (La.Ct.App.1980).

merits of the dispute so that it is impossible to separate them, and it is difficult to allocate the procedural issues and the merits of a dispute to two different forums, matter facts of the dispute are not essential in procedural arbitrability. The U.S. Supreme Court in **John Wiely & Sons v. Livingstone**[67] stated that procedural questions, such as whether the preliminary steps of the grievance procedure have been exhausted or excused, ordinarily cannot be answered without consideration of the merits of the dispute. Procedural arbitrability cannot be determined unless the main contract has been interpreted. In **Village of Carpentersville v. Mayfair Construction Co.**[68] the Court concluded that *"procedural questions often cannot be resolved without construing the contract as a whole and the transactions under the contract in light of the customs and practices of the industry ...a task peculiarly within the competence of the arbitrator"*.

Questions of procedural arbitrability are considered to be the interstitial details within the framework of a scheme, which in its over-all aspect is taken for granted as the method of dispute settlement.[69]

In concluding that procedural arbitrability is for the arbitrators to decide, the Court in **RCA v. Association of Professional Engineering Personnel** [70] has stated that " *such a question is itself a matter of contract interpretation for determination by the arbitrator*". It could be stated that this rule should apply to all different aspects of arbitrability, since all arbitrability matters fall into contract interpretation. Following the same approach the court in **Pettinaro Constr. Co. v. Harry C. Patridge, Jr.& Sons, Inc.,**[71]stated that *"the question of what procedure must be followed to initiate the arbitration process is.... a matter of construing the contract and thus within the scope of the arbitration agreement"*. Reaching the same conclusion the Court of Appeals for the Second Circuit in the U.S. has stated in **Livingston v. John Wiely & Sons**[72] that " *To hold matters of procedure to be beyond the competence of the arbitrator to decide, would, we think, rob the parties of the advantages they have bargained for, that is to say, the determination of the issues between them by an arbitrator and not by a court. A contrary decision would emasculate the arbitration provisions of the contract."* Furthermore, the U.S. Supreme Court in **John Wiely &Sons,**

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[67]376 U. S. 543 (1964).
[68] 100 I11.App.3d 128, 426 N.E.2d558 (1981).
[69]Dunau, B., "Procedural Arbitrability - A Question for Court or Arbitrator?" 14 Lab. L. J. (1963) pp. 1010-1018 at 1013.
[70] 368 U.S. 898 (1961).
[71] 408 A.2d 957,963(Del.Ch.1979).
[72] 373 U.S.908 (1963).

Inc. v. Livingston [73] concluded, *"Once it is determined.... that the parties are obliged to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator."* It is obvious that the U.S. Supreme Court in **Wiely** has proclaimed a broad policy favouring arbitrability of issues associated with procedural limitations on arbitration. The Court in this case noted that procedural issues are intertwined with the merits of the dispute by stating that *"questions concerning the procedural prerequisites to arbitration do not arise in a vacuum; they develop in the context of an actual dispute about the rights of the parties to the contract or those covered by it"*. Although **Wiely** concerned a collective bargaining agreement and labour law, it has greatly influenced other judicial decisions on questions of procedural arbitrability arising under commercial contracts, as in **Del E. Webb Construction V. Richardson Hospital Authority** [74] where the Court followed **Wiely** and held that compliance with contractual prerequisites was an issue for the arbitrator to decide.

It has been suggested that questions of procedural arbitrability can be practically divided between those that call for the special competence of an arbitrator and those that fall within the general range of a judge.

A logical resolution of the problem of procedural arbitrability requires careful attention to the language by which parties have bound themselves to arbitrate and the guidelines established by modern statutes for judicial enforcement of those agreements. Assisted by traditional rules of contract construction, it is possible to delineate an ordered scheme for treatment of contractual time limitations and other constraints on arbitration. Procedural noncompliance should prevent arbitration only when a clear bar to the enforceability of the agreement unavoidably mandates a denial of the right to arbitrate; all doubts should be resolved in favour of arbitrability .[75]

For practical reasons, procedural arbitrability should be left to be determined by arbitrators, since judicial determination of it would create opportunities for deliberate delay of arbitration proceedings for the party trying to obstruct the arbitral process.

4) Subjective Arbitrability:

This aspect of arbitrabilty is concerned with the capacity of the parties to disputes to arbitrate and who can arbitrate. This study, therefore will treat capacity of the parties as

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[73] 376 U.S. 543(1964).
[74] 823 F.2d 145 (5th Cir.1987).
[75] Stipanowich, T., "Procedural Arbitrability: The Effect of Noncompliance with Contract Claims Procedures"

another aspect of arbitrability because the issue of capacity is subjective to the respective parties and the fact that both the lack of arbitrability and of the capacity to arbitrate lead to the same result; the arbitration agreement is invalid, and the arbitral tribunal lacks jurisdiction. On the other hand, incapacity could be linked to venue jurisdiction *ratione persona* since the capacity of one of the parties falls within a State national jurisdiction.

Subjective arbitrability depends on the possibility of instituting arbitral proceedings against the other party; such a problem arises in particular if the public administration of a State is concerned, [76] the principle of lacking capacity to arbitrate has to be distinguished from the plea of immunity which is developed in public international law, bearing in mind that both the lack of capacity to arbitrate and the plea of immunity derive their justification from the sovereignty of the State party, this is the reason why they are not sufficiently distinguished in arbitral process. A plea of State immunity was rejected by the arbitrator in the **Solel Boneh** case on the ground that State immunity derived from the principle *par inparem non habe timperium*, he said:

> *"...I do not consider that the doctrine of sovereign immunity has any application whatsoever in arbitration proceedings which are, as in Sweden, conducted independently of the local courts".*[77]

The proper law chosen by the parties to govern their arbitration agreement may differ from the law governing their capacity to arbitrate. Further, the law governing the capacity of the parties to enter into an arbitration agreement may differ from the law governing the subject-matter arbitrability. States should not be given the chance to obstruct the arbitral proceedings by claiming its own incapacity to be a party to the arbitration agreement after having accepted arbitration in the contract as the sole dispute settlement mean, otherwise this could be considered as denial of justice. It was said in the **Benteler** case that: *"the present state of international arbitration law is that a State may not use its national law to contest its own consent to arbitrate."*[78] This certainly accords with the jurisprudence on the denial of justice, and with the approach in recent legislation.

S. Cal. L. R.ev. Vol.40 (1989) pp847-881 at 881.

[76] Böcksteigel, K-H, *Arbitration and State Enterprise-A Survey on the National and International State of Law and Practice*, Deventer, Kluwer Publishers, 1989, p. 17.

[77] **Solel Boneh Int. v. Uganda** (1975) *J. Droit Int'l (Clunet)* 938.

[78] **Benteler v. Belguim** (1983), (1985) E. C. C. 101.

Article V (1) (a) of the New York Convention provides that a State may refuse to recognise or enforce an award when the parties to the agreement were *"under the law applicable to them, under some incapacity"*. The Convention does not provide any guidance as to how the law applicable to the parties could be determined. Article V (1) (a) could be taken to refer to any of a variety of laws: the residence of the parties, their domicile or their nationality. The question may also arise if an action is brought to stay court proceedings and enforce an arbitration agreement. In this context the New York Convention (Article II (3)) would treat the question of capacity as a condition to the validity of the arbitration agreement, and as such the question would also concern the arbitral tribunal, whose jurisdiction depends upon the validity of the arbitration agreement. In each of these cases the prevailing view is that the court should apply the conflict of law rules of the forum to determine what is the applicable law.

Furthermore, Article 34-(2) (a) of the UNCITRAL Model Law of 1985 provides that an award may be set aside if a party to the arbitration agreement was under some incapacity. Thus, under both the New York Convention and the UNCITRAL Model Law of 1985 the capacity of parties to arbitrate is determined by the conflict of law rules of the forum in cases when the issue arises before the court.

This is the case when the issue of capacity is raised before a national court, but what would be the situation if it were raised before an arbitral tribunal? It is presumed that arbitrators are not bound to follow the conflict of rules of the forum that does not prevent them from seeking assistance of national conflict rules. It is believed that they should apply the emerging rules of international arbitral practice by searching international conventions for general trends.

The main problem arises when a State party participating in arbitral proceedings claims its incapacity to be a party to the arbitration agreement. Some national laws prohibit the State or its agencies from entering into arbitration agreements concluded with private individuals, as the case under the Saudi Arbitration Provisions which is examined in chapter four, where the main goal of such provisions is to make State contracts disputes non-arbitrable.

On the other hand, some States lay down procedures that must be followed before a valid arbitration agreement can be concluded, if such procedures are not complied with, the State party can claim that it was not a party to the arbitration agreement in question. In this case another aspect of arbitrability could be raised which is procedural arbitrability. It is

convenient to mention here laws that stand on the borderline between the regulation of contractual capacity and the regulation of contractual terms. For example, under a 1988 decree of the Ruler of Dubai, contracts between public authorities in Dubai and foreign companies must not include clauses providing for arbitration by tribunals based outside Dubai. [79]

The ICC tribunal in **Southern Pacific Properties v. Egypt** [80] addressed this issue. The claimant in this case and the Egyptian Tourism Organisation (EGOTH) entered into a joint venture to develop the plain adjacent to the pyramids plateau into a tourist complex. The agreement provided for ICC arbitration, with the seat of arbitration in Paris. The Egyptian Minister of Tourism appended his signature to the last page of the agreement together with the words *"approved, agreed, and ratified"*. When a dispute arose, Egypt argued that it was not a party to the agreement and that the minister's signature was given in exercise of his supervisory powers over EGOTH. The arbitrators rejected this objection and an award was rendered against Egypt. Egypt then petitioned the Paris Court of Appeal for the award to be set aside on the ground that it was never a party to the arbitration agreement. The Court held that that the notation *"approved, agreed, and ratified"* must be understood in accordance with Egyptian law. Since under Egyptian law this approval did not make the State a party to the agreement and the attendant ICC arbitration clause, Egypt had not consented to the arbitration and the award was annulled .[81]

The Swiss PIL Statute was the first arbitration law to address the problem of State party participation in the arbitral proceedings, Article 177 (2) provides that a State, or an enterprise held by, or an organisation controlled by a State, which is party to an arbitration agreement, cannot invoke its own law in order to contest its capacity to be a party to an arbitration or to arbitrability of a dispute covered by the arbitration agreement. The restriction under Article 177(2) refers also to a plea of immunity from suit. In the context of this Article the controversial issue of the law applicable to arbitrability is no longer significant. In this respect **Brower** states that the parties in such arbitration where a State is involved, in addition to having opted for international arbitration, will have selected as the governing law a jurisprudential corups other than the national law of any country or have prescribed as governing law a combination of some national body of law and another body of law to

[79] See [February 1989] 4(2) Int'l Arb. Rep. 16-17.
[80] 22 ILM (1983) at752.
[81] 23 ILM (1984) at1084.

supplement or modify it.[82]

Some laws forbid State entities to agree to arbitration with foreign parties as in Article 139 of the Constitutional Law of The Islamic Republic of Iran which forbids State entities to agree to arbitration with foreign parties in some cases without the approval of the Iranian Parliament. At the same time Article 2 (2) of the International Commercial Arbitration Act of Iran of 1997 explicitly provides that all persons having the capacity to institute legal proceedings, can refer their disputes to arbitration.

Another example is the Saudi Council of Ministers decree No.58[83], which stated that *" it is prohibited for all government bodies to accept arbitration as a method for settlement of disputes, which may arise between them and contracting individuals and companies"*. This decree was without doubt a reaction to the arbitral award made in the **Aramco** case.[84] Furthermore, Article 3 of the Saudi Arbitration Rules states that:

"Government agencies may not have recourse to arbitration for settlement of their disputes with third parties except with the approval of the President of the Council of Ministers. This provision may be amended by a resolution of the Council of Ministers."

Even though Decree No.58 did not distinguish between national arbitration and international arbitration, there were two exceptions to the rule contained in it. The first exception regards concession contracts of vital interest; the second is concerned with technical disputes.

On 4 April 1983, the Saudi Council of Ministers approved the new Arbitration Act, which was then issued by Royal Decree No.M/46 of 25 April 1983. The Implementation Rules to the new Act were issued by Council of Ministers Resolution No.7/2021/M of 27 May 1985.[85] Article 8 of the Rules permitted a Saudi government entity, with authorisation from the Council of Ministers, to settle a dispute by arbitration. However, it is unclear whether the Council of Ministers' approval for arbitration is required before the original contract between the government and the private party is signed or merely at the time a dispute arises that the parties wish to arbitrate.

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[82]Brower, C. N., "Arbitrating Against Foreign Governments", J. Trans. L. & P. Vol. 6:2 Spring 1997. http://www.law.fsu.edu/journals/transnational/issues/6-2/brow.html.

[83] Dated 25 June 1963, published as appendix to El Ahdab's book.

[84]27 I.L.R. (1963) at 117.

[85]Published as appendix to El Ahdab's book

Article 7 of the Regulation suggests that Council of Ministers' approval may be required prior to signing the contract and that the arbitration provision be written into the contract. Article 8 also may be intended for multiparty arbitration where the Saudi government entity is only one of many parties to the dispute.

In France as well, there is a restriction on the arbitrability of State contract disputes, these disputes should be settled by the French Courts and not by private arbitration. But the French Courts have refused to apply this rule to international arbitrations, as in **San Carlo** [86] and the **Galakis** cases [87] where the French Court respectively stressed that the rule of non-arbitrability of State contract disputes in France does not apply to international arbitration.

The question of the effect of the annulment of one of the parties should be treated; this issue arose in the **SGTM/EPIDC** arbitration. [88] In 1972 SGTM, a private corporation, instituted under a contractual arbitration clause arbitral proceedings in Geneva against EPIDC, which had been established as an agency of the East Pakistan Government. The Government of Bangladesh, which had superseded the former government of East Pakistan when Bangladesh gained independence in 1971, subsequently transferred all EPIDC assets to the newly-formed Bangladesh Industrial Development Corporation (BIDC) and declared all arbitration proceedings to which EPIDC had been party to have terminated. Then, shortly before the arbitration began, the Government dissolved BIDC and vested all its assets in the Government of Bangladesh, and announced that the Government would consider making *ex gratia* payments to creditors of BIDC. The arbitration clause survived, but the respondent did not. The arbitrator, relying on rules of Swiss and Bangladeshi law, held that the Government of Bangladesh had succeeded to EPIDC's liabilities. This decision was overruled in a controversial decision by the Swiss Courts, on the ground that the arbitrator had misapplied Swiss law and was not entitled to extend his jurisdiction to BIDC and the Government of Bangladesh, which were not parties to the arbitration agreement.[89] The Swiss Court decision indicates that a State can avoid an obligation to arbitrate by dissolving the respondent which is an entity belonging to that State. This decision should not be accepted in the modern trend of international arbitration since it contradicts with the principle that rights and duties arising from arbitration agreements are deemed to be transferred together with the control of the

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[86] The Court of Cassation, May 2, 1966 *J. Droit Int'l (Clunet)* 1965, 646.
[87] *J. Droit Int'l (Clunet)* 1966,648.
[88] **Société des Grands Travaux de Marsille v. East Pakistan Industrial Development Corporation** Yearbook Comm. Arb'n V (1980) at 177.
[89] Swiss Federal Tribunal, 5 May 1976, Yearbook Comm. Arb'n V (1980) at 217.

company.

As we have seen, States cannot plead incapacity to arbitrate, since it is contrary to international public policy for a State to prohibit arbitration of State contract disputes, States should be prevented from using the provisions of their national laws to challenge their consent, foreign investors will be suspicious when investing in countries insisting on resolving all contractual disputes under their national laws. Arbitrators should examine the consent of parties, and the principle of party autonomy should be respected as one of the important principles of arbitration. When a State is involved the private parties should ensure that they deal with authorised agents of the State.

3.3 ARBITRABILITY IN ISLAMIC LAW

Rights in Islam are divided into three categories: rights of Allah, people's rights, and rights composed of both rights. The question here is which rights could be subject to arbitration and considered being arbitrable?

Scholars have agreed that matters subject to arbitration must be arbitrable. They agreed that any thing that cannot be subject of conciliation could neither be arbitrable. This principle is embodied in the provisions of different Arab and Islamic States, since Islamic law still determining the question of arbitrability in most of these states as in Saudi Arabia for example.

According to the "*Medjella* of Legal Provisions" which is considered to be the first codification of the *Shari'a* (Islamic Law) under the Ottoman Empire, it is admitted that arbitration is:

(1) Compulsory in disputes leading to a separation of husband and wife.

(2) Authorised with respect to disputes on goods or property.[90]

The *Medjella* covers only civil law matters, and the origins of most civil codes in the different Islamic countries are derived from it, even though it contains a whole section dedicated to arbitration, this section entitled ' Book of the Judicial Organisation and of Procedure'. [91]

The *Qur'an*, the main source of *Shari'a*, excludes certain subjects from the scope of arbitration, such as guardianship over orphans, which must obligatory be referred to courts of law.

As a general rule, arbitration is not authorised in those matters relating to the 'Rights of Allah' or to public order, the field of which is quite large, covering criminal law as well as those patrimonial rights for which a resort to arbitration would be equivalent to an authorised compromise .[92]

Generally speaking, the jurisdiction of arbitrators has a lesser scope than that of a judge and covers only matters subject to compromise and conciliation.

Rules on arbitrability in Islamic law can be summarised as follows:

1- Products deemed *haram* are not arbitrable, e.g. pork, alcohol, *(res nullius).*

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[90] Article 1841 of the *Medjella*.

[91] Section 4 of Book 16 (Articles 1841 to 1851).

[92] El-Ahdab, A., *Arbitration with the Arab Countries*, Kluwer, 1990, p. 39.

2- Rights falling within the jurisdiction of religious courts are not arbitrable, which include *hadd*, and the penalties fixed by the Prophet which are irremissible; for example, theft, adultery, consumption of alcoholic drinks and apostasy. It is always possible to arbitrate on the financial consequences of offences other than *hadd.*

3- The arbitrability of matters relating to personal status such as marriage, affiliation, divorce and the guardianship of minors is subject to controversy between the schools of Islamic jurisprudence .[93]

Shari'a expressly prohibits the taking of interest, or *riba*;[94] the rationale for prohibiting the payment of interest could be summarised as follows:

1- Interest or usury reinforces the tendency for wealth to accumulate in the hands of a few, and thereby diminishes man's concern for his fellow man.

2- Islam does not allow gain from financial activity unless the beneficiary is also subject to the risk of potential loss; the legal guarantee of at least nominal interest would be viewed as guaranteed gain.

3- Islam regards the accumulation of wealth through interest as selfish compared with accumulation through hard work and personal activity.[95]

A practical example showing that interest is non-arbitrable in Islamic law is the ICC arbitration, which has taken place in the former North Yemen Republic. The dispute has arisen between a Yemeni governmental agency and West German company over implementing an agreement for providing services and management of breeding project, the sole arbitrator in this case has refused to grant the German party interest because it contradicts with Article 352 of the Yemeni Civil Code which considers any agreement of taking interest to be void. This Article is considered to be related to public policy and can not be discarded, bearing in mind that the Yemeni Civil Code is based on *Shari'a.* [96]

In contrast, another ICC arbitration held in Algeria, concerned a dispute arising out of an agreement between an Algerian State company and an American company to build a railway

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[93] Saleh, S.," The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East", in Lew, J. (ed.), *Contemporary Problems in International Arbitration* (1989) at 350.

[94] The definition of the word *riba* has been the subject of a protracted jurisprudential debate in the Arab and Muslim World in the twentieth century. It is not surprising that the question of *riba* would come under strong scrutiny: a significant legal problem appears whenever the concept of interest falls in the purview as long as interest rates have not hit unusual ceilings, all transactions conducted in society are valid. But if *riba* is in essence defined as interest, then the whole civil and commercial structure of society becomes tainted with illegality. Mallat, C., "The Debate on *Riba* and Interest in Twentieth Century Jurisprudence" in *Islamic Law and Finance* (Edited by C. Mallat 1988 Graham & Trotman) pp. 69-88 at 69.

[95] Gotanda, J., "Awarding Interest in International Arbitration", AJILVol.90 [1996] pp. 40-63 at 47.

[96] ICC Court of Arbitration award rendered in 26 / 9 / 1985 unreported.

in Algeria. Since the Algerian company did not fulfil its obligations as agreed in the agreement between the two parties, the American company sought to settle the dispute by arbitration. As a result an arbitral tribunal of three arbitrators was set up, which decided to apply Algerian law to both the merits and procedures of the arbitration, since the place of arbitration and execution of the agreement was in Algeria. The arbitral tribunal held the Algerian company liable and responsible for nonperformance of the agreement, and awarded compensation with interest to be paid by it. The Algerian company in turn refused to pay interest, on the grounds that the Algerian law, which is the applicable law, forbids awarding interest; its refusal being based on Article 1 (2) of the Algerian Civil Code, which states that in the absence of any legal provision, the judge should apply Islamic Law first then he or she could apply customs. Since Islamic law, forbids as a general rule awarding interest, the Algerian company insisted on not paying interest; in its judgment the arbitral tribunal did not take this point in account, instead it referred to Articles 182 (2) and 186 of the Algerian Civil Code, which allow awarding interest as a part of compensatory damages. As such the arbitral tribunal held on 18th of December 1985 that since there are provisions allowing awarding interest, Islamic law should not be applied in this respect. [97]

Another example is ICC Case No. 4604 **Parker Drilling Co. v. Sonatrach** [98] the arbitral tribunal in this case declined to award any interest, in accordance with Islamic Law, despite appeals to equity and general business practice, because that the general reference to Islamic law in the Algerian Civil Code meant that interest was not permitted in any context. In a different case a final award was awarded on the 20th of November 1987 [99] which involved a pipeline contractor and an oil company, the arbitrators declined to award interest to the claimant according to the fact as they stated *"The Shari'a Islamic Law expressly forbids any charging of interest because it involves usury, not chargeable in Islamic Law."*

In another ICC case[100] the parties to the dispute in question submitted opinions from experts in Saudi law with reference to the question of whether, an award of interest would be prohibited by the *Shari'a* law, in their final award, the arbitrators held that *Shari'a* did not prohibit the awarding of interest, they stated that:

"However, in order to respect the sensitivities of Shari'a law in this field, we do not consider

[97] ICC Court of Arbitration Award rendered on 18 December 1985, unreported.
[98] Award of January 7, 1985 unreported.
[99] Reported Yearbook Comm. Arb'n XIIII (1989) pp.47-70.

that compensation should be awarded at a commercial rate of interest, but that it should rather be based on a rate which reflects the incidence of annual inflation over the period [at issue]. On this basis we award to claimant, by way of additional compensation for financial damages, simple interest at the rate of 5% per annum over 5 years."

In this respect, it is important to examine the relevant provisions in the Egyptian Civil Code of 1949 since it inspired most of Civil Codes in the Arab countries, the most important principle adopted by the Egyptian Civil Code is posited in Article 227(1): *"The contracting parties can agree on a different rate of interest, whether in return for a delay in payment or in any other situation, on condition that this rate does not exceed 7 per cent. If they agree on an interest that exceed this rate, this interest will be reduced to 7 per cent, and any surplus already paid must be returned."* Furthermore, Article 226 of the Code states that in case of delay after the payment is due, an interest of 4 per cent in civil, and 5 per cent in commercial, transactions will eventually be owed by the defaulting borrower. It is obvious that Article 226 allows 4 per cent interest on compensatory damage.

In the **LIAMCO**[101] arbitration the sole arbitrator refused to award interest of 12% as demanded by the claimant and applied instead the rate of 5% provided for by the applicable Libyan Civil Code for commercial matters, since this rate could not come into conflict with the Islamic *riba* principle which forbids interest rates as an unjustified and usurious means of exploitation.

In an *Ad Hoc* arbitration **Pipeline Contractor (Netherlands/Saudi Arabia) v. Oil Company (U.S./Saudi Arabia)** it has been stated that *"The Shari'a Islamic law forbids usury in any form or manner whatsoever, whether or not it is gained openly or in secret, as it is said in the great Book: 'Allah has permitted the sale of things, but not usury'.... Similarly, the messenger, may the prayers of Allah be upon him, also stated: 'There are seven deadly sins'. They asked the Messenger of Allah, what are they? And He replied: '...and the taking of interest.'"* [102]

In 1994 the Republic of Yemen enacted the New Arbitration Act, according to Article 55 of the New Act the Court of Appeal may set aside an award on its own motion in the following cases:

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[100] Final award in case no. 7063 (1993) published in Yearbook Comm. Arb'n XXII (1997) pp. 87-91.
[101] 20 I.L.M. (1981) at 1.
[102] Yearbook Comm. Arb'n XIIII (1989) at 47, 51.

(a) if the award was made on non-arbitrable question;

(b) if the award is against public order or the provisions of the Moslem *Shari'a.*

Having discussed objective arbitrability in relation to Islamic law and what matters could be arbitrated, the focus will be upon subjective arbitrability, briefly discussing who may enter into arbitration agreement in Islamic law.

In general, capacity is divided into two categories: (i) the capacity to dispose of a right and (ii) the capacity to exercise such a right. The necessary capacity to enter into arbitration agreement in Islamic law is that needed to dispose of one's right. There are many factors, which effect the capacity of natural persons; the most important of which is the age of majority.

Saudi law, which serves as a good illustration of laws based on *Shari'a*, dealt with the question of arbitrability. As a general rule any dispute is arbitrable unless compromise in this dispute is not permitted. Article 1 of the Implementation Rules for the Arbitration Act provides that *"Arbitration is not permitted in matters in which compromise is not permitted, such as divorce for adultery by the woman and any thing relating to public order".*

It should be noted that Saudi law does not distinguish between civil matters and commercial matters, arbitration is not permissible for disputes relating to personal status, except disputes relating to the monetary consequences of rights relating to these disputes.

It is not possible either to refer to arbitration the following categories of disputes:

1-Disputes between partners of a company or between such partners and the company.

2-Disputes relating to commercial agency contracts.

3-Disputes amongst foreign contractors or companies and their Saudi sponsor.[103]

With regard to the capacity to arbitrate, an agreement to arbitrate may only be entered into by persons able to exercise their rights. The guardian of a minor or the administrator of a religious foundation may resort to arbitration if they have obtained the authorisation of the competent court. The same holds true for bankrupt persons.[104]

Another law which has been influenced by *Shari'a* is the New Egyptian Law on Arbitration No.27 of 1994.[105] This law has adopted a wide definition of the term *'commercial arbitration'*; similar to that contained in the UNCITRAL Model Law of 1985, giving the concept 'commercial' an economic meaning. Article 11 of the new law provides that

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[98] See Generally, El Ahdab, A., *Arbitration with the Arab Countries*, Kluwer, 1990, pp. 608-615.

[104] El Ahdab, A., *Arbitration with the Arab Countries*, Kluwer, 1990, p. 612.

[105] Published in the Official Gazette No. 16 (Supplement) of 21 April 1994.

'arbitration is not admitted in those matters which may not be subject to conciliation'. This may raise some difficulties, since there are some matters, which cannot be subject to compromise, and yet can still be resorted to arbitration as administrative contracts; in fact, matters which can be subject to compromise and arbitrable matters are not totally identical. With regard to subjective arbitrability, and according to the same Article, agreements to arbitrate may be entered into by any natural or judicial person having the capacity to dispose of its rights, such as juristic persons of public law, who may enter into an agreement to arbitrate.

3.4 ISSUES OF ARBITRABILITY IN THE PRACTICE OF THE INTERNATIONAL CHAMBER OF COMMERCE (ICC)

There is no mention of the term 'arbitrability' in the ICC literature. It does not appear in the ICC Rules of Arbitration of 1998, as it appears in other rules. However, Article 6 (2) of the ICC Rules of Arbitration of 1998 deals with the concept of substantive arbitrability; stating that in cases where there is no *prima facie* agreement between the parties to arbitrate the arbitration, in the case cannot proceed. According to the same Article, deciding on substantive arbitrability falls within the jurisdiction of the ICC International Court of Arbitration, and the arbitral tribunal should decide on any pleas concerning the existence or validity of the arbitration agreement.

Under the ICC Rules of Arbitration 1998 the plea of non-arbitrability may, in principle, be raised at any time during the arbitration proceedings; there is neither a time limit nor a specific period to raise such a plea in the ICC Arbitration Rules of 1998. This is not the case in the UNCITRAL Arbitration Rules of 1976, where Article 21(3) stipulates a specific time to raise any plea regards the jurisdiction of the arbitral tribunal.

Furthermore, in the AAA International Arbitration Rules of 1997 Article 15(3) states that

"Objections to the arbitrability of a claim must be raised no later than forty-five days after the commencement of the arbitration".

The main concern in ICC Rules of Arbitration of 1998 is to render an enforceable award. Article 35 of the Rules clearly states, *"the Court and the Arbitral Tribunal shall act in the spirit of these Rules and shall make every effort to make sure that the Award is enforceable at law."*

With regard to the law governing arbitrability, the ICC Arbitration Rules of 1998 do not provide any guidance as to which law should govern the issue of arbitrability, Article 17 of the Rules provides that the

" parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate."

It appear from the following recent ICC arbitral awards on the subject, that the arbitrators seek to ensure that the claim before them is arbitrable under all of the laws that may be relevant to the determination of arbitrability. In an unpublished award rendered by an ICC arbitral tribunal sitting in Geneva, it was stated that the arbitrator is free to determine the law that is appropriate to apply in deciding upon an allegation of non-arbitrability. Arbitrations in ICC cases conducted outside Switzerland have commonly adopted the view that issues of arbitrability is to be determined in accordance with the law governing the arbitration agreement, as in ICC case No. 4132 where the arbitral tribunal decided that the law governing the main agreement which contains the arbitration clause should determine the arbitrability issue. [106]

With regard to subjective arbitrability, ICC tribunals have on several occasions as discussed here decided that a State may not invoke its own law to justify its refusal to abide by an arbitration clause that been accepted, as this would be contrary to the principle of good faith that should prevail in international relations.

Certain ICC awards should be examined when discussing the issue of arbitrability. The first award was rendered in 1984 in ICC Case No. 4604[107] which concerned an Italian claimant and an American defendant where nullity of the trade mark licence agreement was alleged, the tribunal expressly held that the issue of arbitrability shall not be determined by way of application of a foreign law, and applied exclusively the *lex arbitri* to determine the issue. The arbitral tribunal excluded the application of the Italian mandatory rules. It stated in particular:

"The question of arbitrability of a dispute shall not be determined by way of application of a foreign law, be it the law applicable to the merits of the dispute or another law designated by connecting factors which would appear more appropriate to the international character of the arbitration".

The second award made in 1990 in ICC Case No. 6162[108] (1990) involved a French claimant and an Egyptian defendant, the contract provided for arbitration in Geneva,

[106]Preliminary Award of September 22, 1983, reported in Yearbook Comm. Arb'n X (1985) at 49.
[107] Published *in J. Droit Int'l (Clunet)* 1985 at 937.
[108] Yearbook Comm. Arb'n XVII (1992) at 153.

Egyptian law were to be applicable, the defendant argued that the arbitrator lacked jurisdiction because under Egyptian law a party was allegedly only permitted to submit a dispute to arbitration if a legal provision expressly allowed it to do so. The arbitral tribunal refused to apply Egyptian law for determining the arbitrability issue, having regard to Article 177(1) of the Swiss PIL Statute.

The third ICC award No. 6379 [109]rendered in 1990 involved an Italian claimant and a Belgian defendant, who had been named exclusive distributor under a contract subject to Italian law. When the claimant served notice of termination, the defendant argued that prior notice had to be given at least 36 months in advance, asking in addition for compensation. The defendant counter attacked by initiating court action in the Belgian State court. The arbitrator disregarded the mandatory Belgian law and decided having regard to the terms of the contract and Italian law.

[109]Yearbook Comm. Arb'n XVII (1992) at 212.

3.5 ARBITRABILITY OF INTEREST IN INTERNATIONAL COMMERCIAL ARBITRATION

Arbitral tribunals have followed various methods in awarding interest, resulting into inconsistent and arbitrary awards. Furthermore, arbitral tribunals have failed to adopt a rational and uniform approach for evaluating interest claims.

In dealing with interest in international commercial arbitration we are concerned with compensatory or legal interest which is considered as part of an award and allowed by most jurisdictions. This study is not concerned with mortary interest, which is interest on an award. The term 'interest' indicates the compensation allowed by law as additional damages for the lost use of money during the time between the accrual of the claim and the date of the actual payment.

One of the aspects which require particular attention is whether interest is a matter of procedural or substantive law, or whether it should be treated as being neither one nor the other, but governed by international *lex mercatoria* norms.[110] This point is of great importance, since the classification of a legal issue as substantive or procedural in international arbitration is a crucial distinction, since different laws mostly govern substance and procedure.

It is believed that in most jurisdictions interest is regarded as a matter of substantive law, with most legal systems regarding interest as being governed by the proper law of the contract, especially when parties have explicitly agreed on interest, and in cases, their agreement should be honoured. In the U.S. and in Germany, for example, laws on interest are considered substantive.[111] In England, however, the question of the arbitrator's power to award interest has been regarded as a procedural, rather than a substantive matter.

In principle, the law applicable to the substance of the dispute is potentially the most important element in determining the arbitral tribunal's approach to awarding interest. The great majority of arbitrators have deemed interest to be a substantive matter, and have applied the interest provisions of the law applicable to the contract. In an *Ad Hoc* UNCITRAL Arbitration between Association of Service Industry Firms and Industry Firm the tribunal found that

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[110] Wetter, J. G., "Interest as an Element of Damages in the Arbitral Process", I.F.L.R. Vol. 5, December 1986 pp. 20-23 at 20.

[111] Under New York Law, the right to interest for breach of contract is a substantive right. Sec. 5001 of New York's Civil Practice Law & Rules sets forth the actions in which interest is revocable.

"interest should be awarded on the amounts due in accordance with the law governing the agreements between the parties" .[112]

In international arbitration most disputes concern at what rate interest should be granted, not whether an interest award should be permitted or not. The rate of interest should be reasonable and realistic, it should be the market rate, and reflect commercial loss; which approximates both the rate of return on investment and the interest cost of borrowing funds [113], as has been stated in ICC Case No. 3903 **Grove-Skanska v. Lockheed Aircraft Int'l AG.**

"in international commercial arbitration it is generally accepted that arbitrators are entitled and indeed expected to award a realistic rate of interest".[114]

In an *Ad Hoc* arbitration the arbitral tribunal has decided that *"the rate of interest must reflect neither a bonus nor a punishment but only commercial loss"* [115].

When interest is treated as an element of damages and as compensation, it is almost always awarded. The link between interest and damages has a long - standing tradition; interest being an item of damages intended as compensation for the temporary withholding of money, and its measure being the cost of such deprivation.

The damage oriented view of interest claims is also acknowledged in many legal systems, such as in Swiss Obligation Law, German Civil Law, and French Civil Code. This view has been confirmed in the ICSID Award of **Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka.**[116]

Finally, several points should be raised when discussing the matter of awarding interest in international commercial arbitration:

1) Resolving interest claims is an expensive and time-consuming process; the arbitrators should be granted the power to award interest if the applicable law permits it.

2) Interest is arbitrable in most countries especially when it is awarded as an element of

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[112] Yearbook Comm. Arb'n XVII (1992) at 11, 26.

[113] Branson, D., & Wallace, R., "Awarding Interest in International Commercial Arbitration: Establishing a Uniform Approach", Va. J. Int'l L. Vol.28, 1988, pp. 919 –947 at 943.

[114] Award of 1981, unreported.

[115] *Ad hoc* Award of July 23rd, 1981 reported in Yearbook Comm. Arb'n VIII (1983) at 89-94.

damages, except in some countries where laws and public policy forbid awarding interest, such as in the Muslim Countries, as discussed earlier. In countries such as England, the arbitrator may award simple or compound interest according to Section 49 of the 1996 Arbitration Act, whilst in other countries, such as Germany, interest must be awarded on the basis laid down in the relevant code.

3) The question of how an arbitral tribunal should award interest in international commercial and investment arbitration is the subject of great uncertainty. Arbitrators would be bound to follow substantive municipal law reflecting public policy on the issue as to whether interest should be awarded.[117]

4) The rate of interest must be reasonable and fair reflecting commercial loss.

5) The arbitral tribunal may award compound or simple interest, as it specified in London Court of International Arbitration Rules (LCIA) 1998 in Article 16.5. Interest, as damages, is ordinarily awarded in the form of simple interest, not compound. The term 'compound' indicates interest on interest, *i.e.*, interest that is paid not only on the principle, but also on any interest earned but not withdrawn during earlier periods.[118] International arbitrators in many cases have shown hostility to awarding compound interest.[119]

6) Most arbitration rules and conventions are silent on the subject of interest as in the UNCITRAL Model Law of 1985 and the ICSID Convention of 1965, with the exception of the LCIA Rules of 1998.

7) The arbitral tribunals must distinguish between contractual interest and interest payable by way of damages; this depends upon the precise terms of the contract and the law which governs that contract, i.e. the proper law, unless there is some provision in the law governing the arbitration *(the lex arbitri)* which forbids the award of interest, as does the law of Saudi Arabia .[120] In contrast, the arbitrators in the ICC Case No.5277 [121] where interest was prohibited according to the applicable law - stated that; *"the prohibition does not extend to damages simply upon the ground that they contain an item for the payment by either party of bank charges"*. However, it was not possible in their view for the prohibition on interest to be circumvented by describing it as a claim for damages for loss of the use of the money,

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[116] ICSID Case No. ARB/87/3 Yearbook Comm. Arb'n XVII (1992) at 106.

[117] Branson, D., & Wallace, R., "Awarding Interest in International Commercial Arbitration: Establishing a Uniform Approach", Va. J. Int'l L. Vol. 28 pp. 919-947 at 946.

[118] *Black's Law Dictionary*, 6th ed., 1990, p. 286.

[119] For example, see **Liamco v. Libya** reported in Yearbook Comm. Arb'n VI (1981) at 248.

[120] Redfern, A., & Hunter, M., *Law and Practice of International Commercial Arbitration*, 2nd ed., London, Sweet & Maxwell, 1991, pp. 403-404.

because they were aware of the fact that the concerned court would not uphold a claim for interest even though it was dressed up in such a way.

[121] Reported in Yearbook of Comm. Arb'n XIII (1988) pp.80-90 at 90.

3.6 ARBITRABILITY OF INTELLECTUAL PROPERTY DISPUTES

There are several different forms of rights or areas of law giving rise to rights, which together make up intellectual property. The term 'intellectual property' covers a variety of rights. It relates, in particular, to patents, plant variety rights, designs and models, copyright, software, integrated circuits, know-how, distinctive signs including trademarks, etc.

According to Article 2(viii) of the Convention establishing the WIPO

"intellectual property shall include the rights relating to:
- literary, artistic and scientific works,
- performances of performing artists, phonograms, and broadcasts,
- inventions in all fields of human endeavor,
- scientific discoveries,
- industrial designs,
- trademarks, service marks, and commercial names and designations,
- protection against unfair competition,
and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields."

Here we are just concerned with three areas of intellectual property, which are copyrights, trademarks and patents. As other claims that involved a public concern, courts were spectacle of submitting copyright, patent and trademark cases to arbitration especially when it comes to the determination of the validity of a particular property right.

The traditional obstacle to using arbitration to resolve intellectual property disputes was a fundamental concern as to arbitrability. This arose from the fact that some intellectual property rights derive from legal protection granted on a national basis by the local sovereign power, which affords the beneficiaries certain exclusive rights to use and exploit the intellectual property in question. The existence, extent, meaning and application of such rights could legally only be definitively investigated, reviewed, explained, expanded, curbed, revoked or confirmed by the authority which issued or granted the right, by another specifically appointed body under that system or, in certain situations where very specific questions of law arose, by the courts of that country. This had the effect that rights and

entitles to intellectual property, and the legal issues which flowed from those rights, could not usefully be referred to or considered by, an arbitral tribunal.[122]

There are four main advantages of using arbitration in intellectual property:

1- Through arbitration the parties can ensure that the case is heard by someone experienced in the applicable copyright, patent or trademark and the relevant technology, rather than submitting it to a judge or jury.

2- Because intellectual property often requires solutions and remedies that call for a continuing relationship between the parties, arbitration can bring up a cooperative approach to the dispute that evaluates the non-legal business considerations of the parties relationship.

3- A new argument, which has been advanced for the use of arbitration in intellectual property disputes is the fact that arbitral awards do not serve as precedent. Thus it is argued, arbitration is well suited for areas in which the relevant legal principles have not yet been developed, as an arbitral award would not have the far reaching legal consequences of a court decision. [123]

4-Intellectual property rights, especially patent's technology, is almost, by definition, a closely guarded secret, one which risks being lost during public court proceedings. The requirements of confidentiality for intellectual property disputes go beyond the normal considerations, which may be found in any commercial dispute, for a party to an intellectual property dispute will often be interested in safeguarding confidential information. Confidentiality is of great importance in intellectual property cases. Both parties and arbitrators need to make provision for secrecy as appropriate in particular intellectual property disputes. This may be in the form of additional contract clauses or a procedural order by the tribunal or in the terms of reference.

Arbitrability is a crucial issue in intellectual property disputes. It is particularly relevant to both the jurisdiction of the arbitral tribunal and the enforcement of arbitral awards under the New York Convention. Generally speaking, disputes regarding intellectual property rights, which are typically national in character, and often, dealt with multinational portfolios will give rise to questions of recognition and enforcement in more than one jurisdiction. [124]

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[122] Final Report on Intellectual Property Disputes Arbitration (The ICC Int'l C. Arb. Bull. 9/No. 1 –May 1988 pp. 37-73 at 38).

[123] Niblett, B.,"The Arbitration of Intellectual Property Disputes", World Forum on the Arbitration of Intellectual Property Disputes (WIPO and the AAA Conference, Geneva 3-4 March 1994).

[124] Final Report on Intellectual Property Disputes Arbitration (The ICC Int'l C. Arb. Bull. 9/No. 1 –May 1988 pp. 37-73 at 41).

One of the main issues arising in connection with arbitration in intellectual property disputes relates to the necessity of a contractual link between the parties in arbitration. Arbitration is only possible when parties have agreed, either before or after the dispute has arisen, to confer jurisdiction over the dispute to an arbitral tribunal. In intellectual property matters in general, disputes often arise as a result of an infringement of a right by a third party which has not entered into an arbitration agreement with the party entitled to exercise the right.

It is quite essential that the arbitration agreement covers the intellectual property dispute. To make sure that the arbitration agreement does that, it is important to use broad language in drafting the arbitration agreement such as "arising out of or related to", to cover non contractual intellectual property claims. Also, it may be helpful to provide explicitly that the issues of arbitrability and validity of the arbitration agreement are subject to arbitration if the purpose is to cut off pre -arbitration recourse to court proceedings.

Obviously, there is a need to establish certainty in the law relating to the arbitrability of the validity of patents, trademarks and other forms of intellectual property created by grant or registration.[125] The ability to arbitrate intellectual property varies from country to another. While there is a wide recognition that arbitrability of intellectual property disputes is desirable, national laws do not reflect this wider recognition. Latin American countries are a good example of countries with a restrictive approach towards the arbitrability of intellectual property disputes. In Brazil, until recently arbitration was not admissible whenever any public authority, such as the Trademark Office or the Registry of Commerce, was involved. However, it has recently enacted a more liberal arbitration law, effective as of 23 November 1996. On the other hand, England could serve as a good example of a more liberal country in this matter. In England neither the Arbitration Acts of 1950 and 1979, nor the Arbitration Act 1996, make a special provision for intellectual property disputes. The U.K. Patents Act 1977 provides for arbitration in certain circumstances. However, there is no reason of principle in English law why an intellectual property dispute should not be referred to arbitration.[126]

The practice shows us that intellectual property disputes gained acceptance and recognition as arbitrable disputes in different countries. In the U.S. recent cases have allowed arbitration of copyrights, patents and trademark disputes; as in **McMahan Securities Co. v.**

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[125] Bridgeman, J., "International Arbitration of Intellectual Property Disputes: The Arbitrability Question", I.L.T., vol.11, No.5, May 1995 pp. 104-106 at104.

[126] For example, an English Court stayed court proceedings in favour of arbitration in a dispute arising out of a

Forum Capital Markets L.P, [127] which considered copyright claims to be arbitrable, and as in **In re Medical Engineering Corporation,**[128] where the Court of Appeals upheld a district court order staying a patent infringement action in favour of arbitration. U.S. Courts have agreed to allow the arbitration of trademarks as in **Alexander Binzel Corp. v. Nu-Tecsys Corp .**[129] In the U.S. Congress has provided for patent arbitration expressly in 35 U.S.C.135 (d), 294, but with qualifications on the effect of arbitral awards. Patent arbitration is also governed by the FAA to the extent it is not inconsistent with Title 35.294 (b). Section 294 concerns disputes regarding patent validity and infringement, while Section 135 (d) concerns interference actions. This legislation reversed judicial holding that patent issues were non-arbitrable, on the other hand, trademarks in the U.S. do not have a statutory support for arbitration. Virtually, all issues concerning U.S. patents, copyright issues, and trademark issues, are properly subject to binding arbitration in the U.S., absent limiting language in an applicable contract or statute. In **Aerojet-General Corp. v. Machine Tool Workers** [130] the U.S. Court of Appeals for the Federal Circuit upheld the arbitrability of trade secrets disputes. In view of this case law, it would appear unlikely that in the U.S. decisions regarding intellectual property will hold public policy as sufficient justification to preclude arbitration of such disputes. The situation is the same in Belgium, Sweden, and Switzerland since those countries all permit the arbitration of patent validity disputes. The Swiss arbitration rules, both domestic and international, provide for the arbitrability of intellectual property disputes.

On the other hand, some countries do not follow the same approach, as in France where Article 50(6) of the Patent Law of July 13th 1978 effectively excludes the arbitrability of such questions by making it clear that a decision to annul a patent has an absolute effect, even on third parties who can apply to court to have the decision set aside. The argument for keeping patent validity disputes out of arbitration is based on the view that a patent is a publicly granted monopoly right, which restricts competition or commercial activity. [131]

The French regime covering arbitration of trademark and patent disputes is intended to be permissive, allowing all arbitration that does not offend the provisions of Civil Code 2059 and 2060. Arbitrability is likely to be denied in disputes over the validity of registered

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patent licence agreement. See **Roussel-Ulcaf v. Searle & Co.** 1 Lloyd's Rep. [1978] 225.

[127] 35F.3d 82, 89 (2d Cir. 1994).

[128] 976 F.2d746 (Fed.Cir.1992).

[129] No. 91-2092, 1992 WL 26932 (N.D Ill.Feb.11, 1992).

[130] 895 F2d 736 (1990).

[131] Samuel, A., *Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, U.S. and West Germany Law* (1989) at 139-140.

intellectual property grants. Within this limit, disputes arising from patents and infringement claims are generally considered to be arbitrable. Similarly, as far as trademarks are concerned, contract disputes ownership issues and infringement claims can be arbitrated. [132] Thus, the general principle is that intellectual property disputes may be settled through arbitration, subject to the qualification that the validity of a patent cannot be submitted to arbitration. In the 1989 **SDP v. DPF** case,[133] the Paris Court of Appeal ruled that " *the contractual and private nature of arbitration prevents the arbitral jurisdiction [from being available] in matters governed by mandatory provisions with a public policy dimension, this being a prerogative of the State Courts".*

One important issue which should be examined when discussing arbitration of intellectual property is the reasoning of arbitral awards, arbitration rules could be silent as to whether or not the award should include a reasoned opinion. Some arbitration rules and acts such as the 1996 English Arbitration Act stipulate that the award shall state the reasons upon which it is based unless the parties have agreed that no reasons are to be given, as the case in the UNCITRAL Model Law of 1985 and the UNCITRAL Arbitration Rules of 1976, on the other hand the ICSID Convention of 1965 calls for a reasoned award without restriction. In general, the parties may agree to a reasoned award under certain arbitration rules; different parties may have different views in this matter.

In the case of patent disputes, for example, a patent owner may not want a reasoned award in order to avoid collateral estoppel in the event that the owner's patent is ruled invalid or not enforceable. Also, a patent's owner may not want a reasoned award, which might provide a road map to an infringer for designing around the patent. On the other hand, the patent owner may want a reasoned prior award as to the validity or enforceability in order to enhance the prospects of persuading the modifying court to uphold the prior award.[134]

It is noteworthy to examine some ICC cases dealing with this topic; the first one to be examined is ICC case No.5480 (1991). The dispute in this case arose from a patent licence agreement concluded in 1979 between an American licenser and a French licensee The case was referred to a sole arbitrator in Los Angeles, according to the arbitration clause in the license agreement. The defendant concluded that the part of the dispute was according to Article 2060 of the French Civil Code, exclusively reserved to French civil courts and hence

[132] Grantham, W., "The Arbitrability of International Intellectual Property Disputes," 14 Berkeley J. Int'l L. (1996) pp. 173-221 at 206.

[133] 20 June 1989, Rev. Arb. 1989, p. 280.

beyond the jurisdiction of the sole arbitrator. Eventually the sole arbitrator held that he was not confronted with a question as to the validity of a French patent, and hence saw no reason whatsoever to suspend the arbitration at issue in order to refer the matter to French civil courts .[135]

The second case is ICC Case No. 6097 (1989) where the dispute arose in connection with two licensing contracts, concluded in 1981 and 1986, for the exploitation of industrial patents by the claimant. On the merits, the claimant alleged violation of the subject matter and of the territorial restrictions of the contracts as well as patent infringement by the defendant. The defendant contested the validity of one patent involved on the ground of insufficient novelty of the technical process involved. Japanese and Swiss laws were applicable, the arbitral tribunal referring to the two applicable national laws affirmed objective arbitrability concluding that neither of the two laws restricted the parties' power to submit such matters to arbitration .[136]

The third case is ICC Case No. 6709 (1991). The relations between the parties to this dispute arose out of an exclusive licensing agreement for France signed in 1978 and a rider of 1984, covering French patents. The defendant asserted that the arbitral tribunal lacked jurisdiction in the field of French patents, as this subject matter lay within the exclusive jurisdiction of the French State Courts. The arbitral tribunal confirmed that French national Courts are given exclusive jurisdiction over disputes involving public policy, but considered the dispute at issue to relate exclusively to the exploitation of French patents and hence beyond doubt arbitrable .[137] On appeal against the award, the Paris *Cour d'Appel* fully upheld the arbitral award stating that those matters were not be reserved to the exclusive jurisdiction of French State Courts.

Finally, the role of the WIPO should be examined; the WIPO Arbitration Centre based in Geneva is a United Nations organisation, which administers the various international treaties such as the Bern Convention governing intellectual property.[138] In late 1994, WIPO opened its Arbitration Centre, which is designed to facilitate and administer arbitration of intellectual property cases. The Arbitration Centre offers several services as offering rules for arbitration, providing aid in drafting arbitration agreements, offering access to skilled experienced

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[134] Plant, D., "Binding Arbitration of U.S Patents", 10 J. Int'l Arb. 3 [1993] pp. 79-93 at 86.
[135] Extracts of the case are published in (1993) The ICC Int'l C. Arb. Bull. 2 72.
[136] Extracts of the case are published in (1993) The ICC Int'l C. Arb. Bull. 2 75.
[137] Extracts of the case are published in The ICC Int'l C. Arb. Bull. (1994) at 69.
[138] WIPO Publication No. 445(E).

arbitrators and administration of arbitrations. Article 2 of the WIPO Arbitration Rules of 1994 on the "*Scope of Application of Rules*" provides that: "*Where an Arbitration Agreement provides for arbitration under the WIPO Arbitration Rules, these Rules shall be deemed to form part of that Arbitration Agreement and the dispute shall be settled in accordance with these Rules...*" There is no mention of the nature of the dispute nor the underlying contract, the Model Clause recommended by WIPO for the submission of future disputes to arbitration also does not limit the subject matter of the dispute to intellectual property issues. [139] According to Article 36 of the WIPO Arbitration Rules of 1994 the arbitral tribunal has the power to hear and determine objections to its own jurisdiction, including any objections with respect to form, existence, validity or scope of the arbitration agreement. According to the mentioned Article the arbitral tribunal has the power to determine on the arbitrability issue. This confirms the general international practice.

The WIPO Arbitration Rules of 1994 were originally based on the UNCITRAL Rules of 1976, were developed by the Secretariat, and refined by a group of international arbitration expert advisors. Several new features and modifications distinguished the WIPO Arbitration Rules of 1994 from the UNCITRAL Arbitration Rules of 1976, and included several provisions directed specifically at intellectual property disputes, a provision on the protection of trade secrets at issue in an arbitration, provisions on the confidentiality of the circumstances of an arbitration, and provisions relating to certain procedural aspects of intellectual property litigation.

[139] See Recommended Contract Clauses and Submission Agreements in WIPO Mediation Rules, WIPO Arbitration Rules, WIPO Expedited Arbitration Rules, WIPO Publication No. 446 (E) Geneva, 1994, pp. 73-77.

3.7 ARBITRABILITY OF COMPETITION ISSUES

Competition law comprises a group of rules aimed at safeguarding the existence of competition, promoting the public interest in promoting or resorting structurally competitive markets, whilst at the same time providing a set of rules to resolve disputes among market operators and to protect consumer interests. The relationship between arbitration and competition is only an illustration of the more general problem of the relationship between arbitration and matters of public policy.

In general, the primary obstacle to the arbitrability of disputes is the exclusive jurisdiction of specialised authorities, concerning competition law matters; there are two types of obstacles to arbitrability, namely:

- obstacles resulting from the system of competition law adopted.
- obstacles arising under arbitration laws.

In practice, there seem to be three standard approaches to the arbitrability of competition issues. The first is to prohibit arbitration, the second requires the parties to be given the option of having the dispute heard by the national courts and the last does not impose any restrictions on the arbitrability of such disputes, leaving judicial control to setting aside and enforcement proceedings.

Four systems of law may be relevant in deciding whether competition issues are arbitrable:

- the law of the country of enforcement;
- the law applicable to the arbitral agreement;
- the law of the place of arbitration; and
- the competition law the application of which is sought.

Restrictions upon arbitrability in competition laws should be examined, only three countries have statutory provisions relating to submission to arbitration of disputes relating to competition:

a. In Austria, Article 124 of the Anti-Cartel Law of 19th October 1988 provides that any agreement with the aim of submitting to arbitration a dispute relating to an unauthorised cartel is void;

b. In Germany, Article 91 of the Law of 1957 relating to restrictions upon competition provides that an arbitration clause is void if it does not allow parties the opportunity to

choose between arbitration and an ordinary judge;

c. In Switzerland, Article 18 of the old law relating to cartels and similar arrangements of 20th December 1985 required that for an arbitration clause to be valid it must provide that parties in every instance are allowed to submit a claim to a State judge, rather than to an arbitral tribunal. This requirement is, however, only applicable in internal arbitration. Article 18.3 of the same law specifically authorises the arbitration of disputes concerning competition in an international context.[140] However, according to the Swiss Cartel Law of 6th October 1993, competition law issues are arbitrable, Article 15 of the Cartel Law requires that, where the validity of restraint of competition is concerned, the matter must be submitted to the Swiss Supervisory Commission which may look into the matter. It is, however, unclear if such a domestic requirement would also be applicable to an international arbitral tribunal.

The leading cases in this field are the American cases examined below, mostly dealing with antitrust claims. One of the important cases is **American Safety Equipment Corp v. J.P Maguirel & Co.**[141] where the Second Circuit put forward five major reasons for why antitrust matters should not be arbitrable:

1- the broad range of public interests affected by private antitrust claims, including that of a competitive economy.

2- the complexity of the issues and extensiveness and diversity of the evidence involved.

3- the questionable propriety of entrusting antitrust matters to commercial arbitrations drawn from the business community.

4- the possibility that an arbitration clause was the result of a contract of adhesion.

5- the enforcement role of private party treble damage actions.

In the same case the Court of Appeals for the Second Circuit declared:

"a claim under the antitrust laws is not merely a private matter.... antitrust violations can effect hundreds of thousands perhaps millions of people and inflict staggering economic damage.... we do not believe Congress intended such claims to be resolved elsewhere than the courts." It argued that just as *"issues of war and peace are too important to be vested in the generals.... decisions as to antitrust regulations of business are too important to be*

[140] Maire, J-P., & Hahn, D., "Competition regulations and evolution of the concept of arbitrability" in *Competition and Arbitration Law*, ICC, 1994, p. 94.

[141] 391 F.2D.821, (1968).

lodged in arbitrators chosen from the business community...." [142]

Even though that the fact that in the U.S. the Courts held that antitrust claims fell within the exclusive jurisdiction of the U.S. Courts and the antitrust claims were non-arbitrable as a matter of law even in the parties had agreed to arbitrate them, none of the antitrust laws or the FAA in the U.S. explicitly permits or prohibits arbitration of antitrust claims. The Supreme Court has held that the FAA *"creates a body of federal substantive law that governs questions of arbitrability relating to interstate and international transactions and that this law governs... in either state or federal court"* .[143]

Historically, English and American courts viewed arbitration with hostility; in the U.S. this was the case until the enactment in 1925 of the FAA, which established a general scheme for enforcing arbitration agreements. In interpreting commercial arbitration agreements enforceable under the FAA, the U.S. Supreme Court has said that as *"a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favour of arbitration"* .[144] For the past thirty years, the American Supreme Court has consistently resolved disputes over the scope of arbitrability in favour of arbitration, as one American District Court has observed, it is clear that *"the trend in Supreme Court rulings is toward arbitrability in an increasing number of cases."* [145] The FAA guarantees the enforcement of written arbitration agreements by including mechanisms through which courts may decide issue regarding both the arbitrability and validity of arbitration clause.

In the following recent decisions, the clear trend has been to expand the judicial view of considering competition issues arbitrable. Two Supreme Court cases that arose in the international business context are key in this regard and have actually played a major role in expanding arbitrability in general.

The first case, a 1974 decision, **Scherk v. Alberto-Culver Co.**[146], involved the arbitrability of claims under Section 10(b) of the Securities Exchange Act of 1934, the Supreme Court found that the agreement between the parties of the dispute a truly international agreement, moreover, the Court found the policy considerations behind exclusive judicial oversight of the securities laws in a domestic setting inapplicable to an

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[142] 391 F.2D.821, (1968).

[143] **Moses H. Memorial Hosp. v. Mercury Const. Corp.,** 460 U.S. 1 (1983).

[144] **Moses H. Memorial Hosp. v. Mercury Const. Corp.,** 460 U.S. 1 (1983).

[145] **Moncrieff v. Merrill Lynch, Pierce, Fenner & Smith & Co.,** 623 F. Supp. 1005, 1008 (E.D Mich. 1985).

international situation. Furthermore, the Court found no principled basis to hold that only U.S. law and courts should settle a controversy *"in the face of a solemn agreement between the parties that such controversies be resolved elsewhere."* The Court held that claims under U.S. Securities laws were arbitrable pursuant to international contracts, even if such claims would not be arbitrable with respect to domestic transactions. The effect of the Court's holding in **Scherk** was to create an important exception to the public policy rules that limited arbitration. Since **Scherk**, courts have afforded new significance to the issue of the arbitrability of international contracts. Although the Court in **Scherk** introduced a balancing test for cases that involved international / domestic policy conflicts, it failed to delineate the circumstances under which an international interest would override domestic policy considerations. Courts have applied the **Scherk** doctrine to various claims but most notably to determinations in antitrust disputes.

The second key case in the expansion of arbitrabilty is the landmark decision in **Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.**[147], the **Mitsubishi** case involved an international commercial relationship between a Japanese manufacturer, Mitsubishi Motors Corp., a Swiss automobile dealer franchiser, Chrysler International, S.A. (CISA), and a Puerto Rican franchisee, Soler Chrysler Plymouth (Soler). Mitsubishi manufactured automobiles in Japan for sale through CISA's network of dealers. Soler bought these automobiles for sale in Puerto Rico. The 1979 contract among Mitsubishi, CISA, and Soler provided for arbitration in Japan of any dispute arising between Mitsubishi and Soler according to the rules of the Japan Commercial Arbitration Association, with the arbitration governed by Swiss law. In 1981 a dispute arose when Soler was refused permission by Mitsubishi and CISA to ship to other markets. Soler's swelling inventory and declining financial position induced Mitsubishi to stop shipping additional automobiles to Soler, and to store more than 960 vehicles in Japan. After Soler disclaimed responsibility for the stored vehicles, Mitsubishi petitioned in U.S Federal Court for an order compelling arbitration. Mitsubishi alleged nonpayment for the stored vehicles, damage to Mitsubishi's warranties and goodwill, expiration of Soler's distributorship, and other breaches. Mitsubishi's alleged and counterclaimed with allegations of, among other things, violations of the Sherman Act which is the foundation of U.S. antitrust law.The District Court ordered arbitration of most of the claims and counterclaims, including the antitrust counterclaims. The Court of Appeals

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[146] 417 U.S 506 (1974).
[147] 473 U.S. 614 (1985).

reversed in part, finding that the antitrust counterclaims were not arbitrable. The Supreme Court affirmed the finding that the arbitration clause encompassed Soler's statutory counterclaims, but reserved the finding that antitrust issues are not arbitrable in an international setting.

The Court then examined what the parties had agreed to arbitrate, taking into account the liberal federal policy favouring arbitration agreements. It pointed out that federal substantive law of arbitration requires that:

"questions of arbitrability must be addressed with a healthy regard for the federal policy favouring arbitration...The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favour of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defence to arbitrability". [148]

The majority opinion in **Mitsubishi** emphasised that neither the Arbitration Act nor the Sherman Act excepted antitrust claims from international arbitration, the majority declined to find an antitrust exception to arbitrability of international disputes when Congress had not expressly made such exception. The **Mitsubishi** Court, however, indicated that the main reason for denying arbitrability of antitrust claims is the important role-played by private litigation in antitrust enforcement. The importance of private litigation need not preclude arbitrability.

While **Mitsubishi** tells arbitrators that they have the power to decide antitrust issues, it also indicates a significant limitation on the power, arbitrators can decide antitrust issues arising in contract cases only if the parties have agreed that the arbitrators shall do so, it has been stated in this case that *".... as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability."* [149]

Furthermore, the Supreme Court held: *"concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensivity to the need of the international commercial system for predictability in the resolution of disputes require that*

[148] 105 S. Ct. at 3354.
[149] 473 U.S. 614 (1985).

we enforce ...arbitration agreement...". [150]

The Court, however, effectively established a presumption of arbitrability and placed the burden on the party resisting arbitration to prove that Congress intended to preclude parties to commercial contracts from waiving the judicial forum by agreeing to arbitrate disputes arising under a disputed statute.

Thus, the broader message of **Mitsubishi** is clear. The Supreme Court does not consider disputes involving claims of statutory violation to be a special subset of the law pertaining to the enforceability of commercial arbitration agreements wherein the strong pro-arbitration message of the FAA is somewhat diluted .[151]

The true significance of **Mitsubishi** lies in the unmistakable message it conveys regarding the changed attitude among the Court's majority as to the appropriateness of enforcing contractual agreements to arbitrate when, in a given dispute, such an agreement results in a recalcitrant party being compelled to submit a question of federal statutory law to the arbitration tribunal.[152] Finally, the Court in **Mitsubishi** has stated that it was necessary for Federal Courts to subordinate domestic notions of arbitrability to the international policy favouring arbitration, if the international tribunals were ever to be tested so as to take their place in the international legal order. The Court in **Mitsubishi** suggested that courts should relax the traditional public policy to accommodate the needs of transnational commerce.

The Supreme Court in **Shearson / American Express, Inc.v. McMahon** [153] held that arbitration of securities claims is required where there exists a pre-dispute agreement to arbitrate. The dispute over arbitrability arose from the apparent conflict between the FAA, requiring enforcement of pre-dispute agreements to arbitrate, and the Federal Securities laws, providing an investor with the right to a Federal forum.

While the Supreme Court's holding in **Mitsubishi** was in the context of an international contract, lower courts have held that the prohibition on the arbitration of domestic antitrust claims is no longer good law, in **Syscomm International Corp. v. Synopotics Communications, Inc.** [154] the Court has stated that it " *believes that in the light of the federal policy favouring arbitration agreements that has fuelled the expansion of the types of*

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[150] 473 U.S. 614 (1985).
[151] Hayford, S., "Commercial Arbitration in the Supreme Court 1983-1995: A Sea Change" Wake Forest L. Rev. Vol. 31 No. 1 Spring 1996 pp. 1-39 at 9.
[152] Hayford, S., "Commercial Arbitration in the Supreme Court 1983-1995: A Sea Change" Wake Forest L.Rev. Vol. 31 No. 1 Spring 1996 pp. 1-39 at 11.
[153] 107 S.Ct.2332 (1987).
[154] 856 F.Supp.135, 139 [E.D.N.Y.1994].

federal statutory claims that may be arbitrated...domestic antitrust claims are arbitrable" .

The Paris *Cour d'Appel* summarised the position under French law with regard to arbitrability of competition matters, the Court in **SDP v. DPF** [155] decided that the arbitrator should not stand aside on the ground that public policy rules were involved:

"Given that competition rules are part of public policy in that they are mandatory ...that consequently the regulations of 1st December 1986 and 20th June 1945 lay down procedures from which it is not possible to depart...that public policy considerations do not prohibit a priori a dispute based on contract or tort from being dealt with by an arbitral jurisdiction..."

The Court drew the conclusion that the arbitrator had jurisdiction to apply competition law but not to set the contract aside in the event of a breach of competition law.

Certain conclusions could be drawn from the case law on arbitrability of competition issues as follows:

1) arbitration is not excluded by the simple fact that mandatory regulations are applicable.

2) questions of competition law do not by their very nature exclude arbitration.

3) the object of arbitration is used as a criterion for judging the arbitrability of the dispute.

4) once the arbitrability of a dispute is recognised, arbitration law does not allow a State judge to control effectively an arbitrator's application of the competition law.

[155] Paris *Cour d'Appel*, 20th June 1989, Rev. Arb. 1989.

3.8 ARBITRABILITY OF MARITIME DISPUTES

Disputes referred to maritime arbitration vary. These disputes include, all disputes which arise from maritime transactions, from shipbuilding contracts, from vessels repairing contracts, from selling and buying vessels, from contracts of affreightment either under charterparties or bills of lading, from marine insurance contracts, from salvage, from vessels finance contracts, from tort liability such as collision, and from average loss, etc.

These disputes may be classified into two categories; first, disputes arising from maritime contracts, such as bills of lading or charterparties, shipbuilding contracts, contracts of maintenance and repair of ships, marine insurance contracts or reinsurance. Secondly, disputes arising from maritime accidents, such as those relating to collisions, salvage and average loss settlements.

Another classification could be the one that distinguishes between the existing disputes and disputes, which may arise in the future. Existing disputes are usually covered by an arbitration agreement separate from the main contract. Future disputes are covered by an arbitration clause contained in the main contract. According to which, the parties agree to settle any dispute arising from the maritime transaction by arbitration. Arbitration agreements are mostly used to settle disputes arising from maritime assistance, salvage, average loss, and collision disputes. Arbitration clauses, on the other hand, cover most disputes arising from maritime contracts. Bills of lading generally incorporate arbitration clauses, and these clauses are contained in charter parties, marine insurance contracts and other contracts.

Maritime arbitration institutions, have specified types of maritime disputes, that should be referred to arbitration under their rules, according to Article 1 of the Rules of Paris *Chambre Arbitrale Maritime*, the *Chamber Arbitrale* is *"competent for the arbitration of disputes arising in connection with navigation, maritime transport and chartering, shipbuilding, fishing, maritime insurance and all activities directly or indirectly related to the foregoing"*.

According to Maritime Arbitration Rules adopted jointly by the *Comité Maritime International* and the ICC (ICC-CMI Rules), the CMI and the ICC: *"have jointly decided, with a view to providing a service to the maritime world at large, to issue rules for the conduct of arbitration disputes relating to maritime affairs including inter alia contracts of chartering, contracts of carriage by sea or of combined transport, contracts of marine*

insurance, salvage, general average, shipbuilding and ship repairing contracts , contracts creating rights in vessels" .

On the other hand, Maritime Arbitration Rules of the Society of Maritime Arbitrators of New York, did not provide for what types of disputes they are designed, but only state in Section 1 that *"the parties shall be deemed to have made these Rules a part of their arbitration agreement whenever in the submission or otherwise, they have provided for arbitration by the Society of Maritime Arbitrators or under its Rules".*

The China Maritime Arbitration Commission (CMAC) which is the sister organisation of CIETAC deals with international maritime disputes. Section 1 of Chapter 1 (Articles 1-7) of the CMAC Rules is concerned with the jurisdiction of the Commission. The Commission deal with maritime disputes including salvage, collision, chartering and the like and *"other maritime disputes submitted for arbitration by agreement by parties".* [156]

Ad Hoc arbitration is commonly used in contract of affreightment and collision disputes, whilst the use of institutional arbitration is frequent in shipbuilding contract and salvage cases, although *ad hoc* arbitration is equally common in disputes under shipbuilding contracts.

Accordingly to Article 22.1 of the UN Convention on the Carriage of Goods by Sea of 1978 (The Hamburg Rules) *"subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that may arise relating to the carriage of goods under this Convention shall be referred to arbitration."*

However, while it is common to include clauses in charter parties and other maritime contracts providing for arbitration of any future controversies that may arise, it is relatively seldom that the parties will agree to arbitrate an existing dispute concerning liability for a collision or other casualty that has already occurred. One reason for this may be that in many such instances so many parties and insurers are involved that it is virtually impossible to obtain the agreement of everyone to arbitrate the issues arising out of the casualty.

An arbitration clause may be incorporated into a bill of lading by reference to a charterparty, though it should be accompanied by a repugnancy clause so as to avoid failure of the whole of the charterparty.[157] **Scrutton** on the other hand, comments that an arbitration clause is incorporated into a bill of lading where:

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[156] See, Connerty, A., "CMAC: The China Maritime Arbitration Commission", [2000] Int. A. L. R. Vol. 3 Issue 1 pp. 7-12.

[157] Tetly, W., *Marine Cargo Claims*, 3rd ed., Montreal, International Shipping Publications, 1988, p. 601.

"(a) there are specific words of incorporation in the bill, and the arbitration clause is so worded as to make sense in the context of the bill, and the clause does not conflict with the express terms of the bill; or
(b) there are general words of incorporation in the bill, and the arbitration clause or some other provision in the charter makes it clear that the clause is to govern disputes under the bill as well as under the charter. In all other cases, the arbitration clause is not incorporated into the bill."[158]

Bills of lading raise the specific problem of tripartite relationships where the arbitration agreement is included in an agreement between two of the three parties and then rendered applicable to the third party by reference to it in a document, which binds the latter party.[159]

Maritime issues are governed by mandatory national laws, such as the Carriage of Goods by Sea (COGS) and Shipping Acts in England and the U.S. and other countries. [160]Nevertheless, most national courts in these countries have consistently allowed arbitrability of maritime disputes, despite hesitation over the mandatory nature of laws regulating carriage of goods by sea issues. Every arbitration that involves a mandatory national law, such as carriage of goods by sea laws, implicates one of the three types of public policy already mentioned: domestic, transnational, or international. In maritime arbitrations the proper public policy standard of review should be international public policy, since maritime commerce, by its very nature, involves international commerce, and due to the international nature of maritime commerce, most maritime arbitrations fall under the range of the New York Convention. Different factors determine which one of the three types is relevant especially the nature of the transaction and the nationality of the parties. The distinction between the three types is of great importance, since the standards of review for annulling or enforcing arbitral awards differ between the three types.

It could be stated that most of maritime disputes referred to arbitration are disputes arising from contracts of carriage of goods by sea, especially cargo disputes. The arbitrability of such disputes should be examined in different legal systems, as in England and the U.S.,

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[158] Scrutton, *On Charterparties and Bill of Lading*, 19th ed., London, Sweet & Maxwell, 1984, pp. 68-71.
[159] See, Houtte, V. V., "Consent to Arbitration Through Agreement to Printed Contracts: The ContinentalExperience", Arb. Int'l Vol. 16 No. 1 [2000] pp. 1-18 esp. 14-15.
[160] See generally, Tetly, W., "Arbitration & Jurisdiction in Carriage of Goods by Sea and Multimodel Transport-Can we have international uniformity?", ETL Vol. XXXIII No. 1-1998 pp. 735-765.

bearing in mind that London and New York are the most popular places for maritime arbitrations. However, most references to arbitration of a maritime dispute can be expected to come within the definition contained in Article 1(1) of the UNCITRAL Model Law of 1985 as involving international issues, and commercial matters. For the purposes of this study and following the broad sense of the term 'commercial' maritime disputes are considered to be subject of commercial disputes.

Under the U.S. law, there are two Acts which govern maritime arbitrations, the FAA 1994 and COGS Act,[161] maritime transactions according to these acts are defined as meaning: *"charter parties, bills of lading of water carriers, agreement relating to wharfage, supplies furnished vessels or repairs to vessels, collisions or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction"*, section 2 of the FAA addresses the arbitrability of maritime disputes by stating that : *"A written provision in any maritime transaction ..... to settle by arbitration a controversy thereafter arising out of such contract.... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."* The FAA demands that American courts should recognise and enforce agreements to arbitrate maritime disputes.

On the other hand, the COGS Act nullifies arbitration clauses that suggest to lessen a carrier's liability, especially if the arbitration will take place in another country, and the cargo owner lacks the fund to proceed the arbitral process in that place, and when the amount in dispute is small.

In practice the U.S. Supreme Court in **Vimar Seguros y Reaseguros v. M.V Sky Reefer** [162] has declared that foreign arbitration clauses in bills of lading subject to COGS Act are valid and enforceable and did not lessen a carrier's liability. The Court rejected the contrary holding of two courts, **State Establishment for Agricultural Product Trading v. M/V Wesermunde**[163] and **Oranges Enterprises, Inc. v. The M/V Khalij Frost** [164] (finding that arbitration clauses in Bills of Lading calling for arbitration in a foreign jurisdiction are unenforceable because Bills of Lading are adhesion contracts and such arbitration clauses violate COGSA) the Court stated *"The Court is also not persuaded by [Vimar and Bacchus] s argument that the arbitration is unenforceable because it constitutes a term of adhesion"*

[161] 46 U. S. C. 1300-1315 (1988).
[162] 115 S.Ct.2322 (1995).
[163] 838 F. 2d 1576 (11th Cir. 1988).

the Court continued *"Moreover, even if this court did find that the Bill of Lading constituted a contract of adhesion, that would not be tantamount to finding the arbitration clause unenforceable."* [165]This holding is one of the recent cases in a series of cases upholding the arbitrability of mandatory national laws in the U.S.. The main issue in this case was whether the dispute is arbitrable or not, not whether the FAA or should have priority. The **Sky Reefer** involved a shipment from Morocco to Massachusetts under a bill of lading calling for arbitration in Tokyo. When the cargo was damaged, the cargo claimant brought suit in Massachusetts, contending that the arbitration clause was invalid under COGS Act s.3 (8). The District Court stayed the action pending arbitration, but certified for interlocutory appeal the question whether S.3 (8) *"nullifies an arbitration clause contained in a bill of lading governed by COGSA"*. The Court of Appeals for the First Circuit decided that the arbitration clause was enforceable for several reasons. Although the court was willing to accept that COGS Act standing alone would invalidate the arbitration clause, FAA S.3 (8) clearly calls for the clause's enforcement. The **Sky Reefer** Court then delineated a distinction between forum selection clauses and arbitration clauses: *"There was no compelling congressional mandate [in forum selection cases] in favor of giving effect to governments to litigate before foreign tribunals...and unlike a foreign forum selection clause, an agreement to arbitrate does not deprive a federal court of its jurisdiction over the underlying dispute..."* [166] In another case an American Court found the COGS Act does not preclude enforcement of the foreign arbitration clause contained in the bills of lading and that this action should be stayed pending the outcome of arbitration.[167]The holding of **Sky Refeer** was supported in another case **Japan Sun Oil Co., Ltd v. M/V MAASDIJK & lino Kaiun Kaisha Ltd.** where the Court found that *"the COGSA does not preclude enforcement of the foreign arbitration clause contained in the Bills of Lading and that this action should be stayed pending the outcome of arbitration."* [168]

In England, there are no legal provisions or cases on the issue of arbitrability of maritime disputes. The position could be known by examining how English Courts deal with choice of forum and law clauses, contained in bills of lading and charter parties. The main concern in

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[164] 1989 U.S. Dist. AMC 1460 (S.D.N.Y 1989).
[165] Yearbook Comm. Arb'n XX (1995) pp. 974-987 at 977.
[166] Yearbook Comm. Arb'n XX (1995) pp. 974-987 at 986.
[167] U.S. District Court, Eastern District of Louisiana, 28 September 1994- Civ. A. No. 94-1383 published Yearbook Comm. Arb'n XII (1997) pp. 884-896.
[168] U.S. Arb. District Court, Eastern District of Louisiana, 28 September 1994, Civ. A. No. 94-1383, reported in Yearbook Comm. Arb'n XII (1997) at 893.

the courts' approach is to protect the cargo owner, and to ensure not to lessen the carrier's liability. In **The Hollandia** [169] a bill of lading provided that all disputes would be brought in the Court of Amsterdam according to The Netherlands Law. The House of Lords examined the foreign law and found that it differs from the English law, since by applying foreign law, this will lessen the carrier's liability, and, therefore, invalidate the choice of forum and choice of law clauses in the bill of lading.

However, English Courts have long allowed the use of forum choice clauses in maritime disputes, bearing in mind the differences, between the forum selection clauses and arbitration clauses, and both in England and the U.S. arbitration and forum clauses are now approached differently. When a conflict arises, the forum selection clause must be scrutinised carefully, and any doubts about whether the dispute is arbitrable must be resolved in favour of arbitrability. In conclusion, while English law is not as clear as American law in allowing the arbitration of maritime disputes it is clear those arbitration clauses in bills of lading and charterparties are enforceable in most cases.

ICC case No. 6149 (1990) should be examined in this context. The case involved a Korean seller who was the claimant and a Jordanian buyer as a defendant, who entered into three sale contracts. The arbitral tribunal found that Sect. 2 of the Jordanian Law No. 35 of 1983 called "Amendment Law to the Merchandise Law" which would deprive the arbitral tribunal of jurisdiction, did not apply to the arbitration agreements in the contracts, and that the arbitration agreements were valid and covered the disputes at issue. The tribunal continued by stating that:

" In the case here under consideration, claimant had already obtained a right to request arbitration with respect to all disputes resulting from the three sale contracts. The application of Sect. 2 of the Jordanian Law no. 35 of 1983 would extinguish such right. There is no reason justifying any subsequent interference of Jordanian law into the equilibrium of the three sales contracts by extinguishing claimant's right to request arbitration." [170]

[169] [1983] 1 A.C. 565.

[170] Interim award in case No. 6149 (1990) reported in Yearbook Comm. Arb'n XX (1995) at 46.

3.9 ARBITRABILITY OF ADHESION CONTRACTS

Contracts of adhesion, are defined as *"contracts where the exercise of the will of one of the parties is in effect limited to adhering to or accepting the contract offered by the other or rejecting it. This arises where inequality of bargaining power exists and the terms of the contract are entirely dictated by one party, not negotiated, or where all the traders in a particular field offer the same or virtually the same terms, so that the customer has to take the terms or leave them".*[171]

The main reason to discuss this issue is the fact that parties to arbitration agreements try to annul arbitration agreements and arbitral awards, by arguing that where the main agreements contain arbitration clauses, they are contracts of adhesion, since they are standardised form contracts drafted by a party with superior bargaining power, and presented to a party whose choice is either to accept or reject the terms without an opportunity to negotiate them, as the case of bills of lading, charterparties, brokerage investment contracts, model production sharing contracts (PSC), franchise agreements, and marine insurance contracts. Their main argument is based, on the fact, that these contracts contradict with the mutuality consent of the parties of the arbitration agreement, and therefore, they are against the party autonomy principle, which is considered as being the cardinal principle of arbitration.[172] Dr **Nassar** summarised conceptual approach to modern contracts as follows:

"No one person's will is supreme: rather, the contractual relationship is regulated, giving both parties equal entitlement to continue the relationship. The aim of contract law should be the protection of the contractual relationship and the balancing of the invôlved interests, not the protection of invalidity acquired position."[173]

Like the French *Contrat d'adhesion*, the Islamic contract of adhesion *(idh'an)* is a contract with compulsory terms, usually in the form of a supply contract between large business enterprises offering goods and services, and the private consumer. The Egyptian

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[171] Walker, D., *The Oxford Companion to Law*, Oxford, Clarendon Press, 1980, p. 24.

[172] As in Egypt where the Supreme Constitutional Court has ruled that Article 18 of the Law Establishing Faisal Islamic Bank is in contrast with Article 68 of the Egyptian Constitution, since Article 18 of the mentioned law states arbitration as the only method of settling any dispute between the Bank and its clients. The Court considered this provision against the party autonomy of the parties. (The Court's ruling is published in the Egyptian Official Gazette December 1994.)

[173] Nassar, N., *Sanctity of Contracts Re-visited*, Nijhoff, 1995, p. 25.

Civil Code, for example, offer the private consumer protection against unjustifiable terms, and particularly against any clauses which exempt him or her from normal rights, in consideration of his or her disadvantaged power.

In **American Safety**[174] the Court reasoned that one of the factors which led to the judicial resolution of antitrust claims is the possibility that an arbitration clause was the result of contract of adhesion, this reasoning was later overruled by the **Mitsubishi** [175]Court, which dismissed the concern over the possibility that contracts giving rise to antitrust disputes, might be adhesion contracts. Absent a showing of any of the specific elements which normally serve to void agreements as contracts of adhesion, the Court reasoned, the mere presence of an antitrust dispute does not warrant invalidation of the selected forum.[176] The Supreme Court have already made it clear in **Southland Corp. v. Kealing**[177] where it found the arbitration provisions in franchise agreements enforceable, despite the adhesive nature of the contract.

In the case of arbitration clauses, a standard contract provision mandating the submission of disputes to arbitration, is ordinarily the gateway to the arbitral process. These clauses are usually contained in the main contract, which govern certain transactions or relationships between parties. These standard terms should be construed in favour of arbitrability as Lord **Diplock** has observed in **Pioneer Shipping Ltd. and Others v.B.T.P. Tioxide Ltd.** ***(The Nema)*** [178] *"...where contracts are entered into which incorporate Standard terms, it is in the interests alike of justice and of the conduct of commercial transactions, that those Standard terms should be construed and treated by Arbitrators as giving rise to legal rights and obligations in all arbitrations in which the events which have given rise to the dispute, do not differ from one another in some relevant respects".* Courts have regularly rejected the argument that standard form contracts containing arbitration clauses are voidable as adhesion contracts. [179] Moreover, the American Supreme Court in **The Breman v. Zapata Off-Shore Co.** [180] has stated that, given current commercial realities, standard choice of forum clauses will control absent a strong showing that they should be set aside.

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174 391 F. 2 D. 821 (1968).
175 473 U.S. 614 (1985).
176 **Mitsubishi**, 105 S. Ct. at 3355.
177 104 S.Ct.852 (1984).
178 [1981] 2 All E.R. 1030.
179 **Finkle and Ross v. A. G. Becker Paribas, Inc.**, 622 F. Supp. 1505 (S.D.N.Y. 1985).
180 407 U. S.1, 15 (1972).

The U.S. Supreme Court has specifically rejected the argument that a choice of forum clause in an adhesion contract offered on a take-it-or-leave-it basis is invalid *perse*, when such a clause serves a legitimate commercial purpose.[181] With regard to the English position it is probably correct to say as **Prebble** did, that:

"English courts would regard adhesion contracts in no different light than any other contract where the issue is one of consent." [182]

As in the case of charterparties where the charter party is usually produced in a standard form contract issued by the ship owner and signed by the charterer, these charterparties, beside other provisions, include arbitration clauses referring any dispute which will arise between the ship owner and the charterer to arbitration. In this case it is difficult to accept the allegations that the charter party is a contract of adhesion, since the main point of having different standard forms of charterparties is to compare between them and to choose the most convenient form that suits the contracting parties, the charterer in this case is not really in a weak position to negotiate the clauses of the charterparties, since he or she have the freedom to choose between different types of charter parties.

The same applies to bills of lading, since the carrier or his/her agent issues these documents; they have to be accepted by the shipper, the bill of lading is a standard form contract, plays a vital role in COGS transactions, since it evidences the contract of carriage, in most of the cases the bill of lading contains an arbitration clause. The issue of arbitration clauses contained in bills of lading has been discussed in **The Sky Reefer**[183] where the District Court ruled that arbitration clauses in bills of lading are not *per se* adhesioned and, even if they were, they are not unconscionable and thus not void as contracts of adhesion. The Supreme Court affirmed the District Court's reasoning with no further comment.

Adhesion itself does not constitute a sufficient basis for invalidating arbitration agreements, especially when agreements contain reasonable terms, since some contracts could contain standardised and non-negotiable terms but these terms are considered to be reasonable and fair. An arbitration agreement is not rendered unenforceable by its adhesive

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[181] **Carnival Cruise Lines Inc. v. Shute** 499 U.S. 585 (1991).
[182] Prebble, "Choice of Law to Determine the Validity and Effect of Contracts: A Comparison of English and American Approaches to the Conflict of Laws", (1973) 58 Cornell L. Rev. 433 at pp. 516-517.
[183] 115 S. Ct. 2322 (1995).

nature where the clause is not inherently unfair or oppressive. [184] Even where courts may be convinced that a certain agreement is adhesive, they are highly unlikely to find the arbitration clause contained in it unenforceable for that reason. In any event, the attempt to monitor adhesion contracts to insure the presence of true consent must inevitably appear somewhat quixotic.[185]

The determination that a contract is one of adhesion does not end the arbitrability inquiry. Contracts of adhesion can be invalidated only if they are not within the reasonable expectations of the parties, or they are unconscionable. This has been stated in **Finkle & Ross v. A. G. Becker Paribas, Inc.** [186] where the Court considered the agreement to be still valid and enforceable because it is not unconscionable, or violative of public policy.

The issue of adhesion could be avoided if a separate arbitration clause has been signed, separately than the main adhesion contract, as is the practice in the commodities industry. It could be stated that contracts of adhesion are an inescapable feature of modern commercial life, and there is nothing illicit about them. Obviously, different legal systems are very likely to survive the use of arbitration clauses in such contracts.

However, there still remains a great deal of truth in the assertion that most contracts are created without the specific assent of each party to all its terms. Consumer protection and trade practice legislation are unlikely to be repealed. The adhesion contract is here to stay. As a matter of practice it is fair to say that most transactions are entered into by parties who are unaware of its terms, or may not even realise that they have entered into a contract, although this is far less likely in international transactions.[187]

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[184] See, e.g, **Simon v. Smith Barney Upham & Co.**, [1988-1989 Transfer Binder] Fed. Sec. L. Rep.
[185] See Rau, A. & Sherman, E., *Arbitration in Contracts of Adhesion*, PROCEEDINGS, 22nd Annual Conference, Society of Professionals in Dispute Resolution [SPIDR] p. 75, 82-83 (1994).
[186] 622 F. Supp. 1505, 1511 (S.D.N.Y. 1985).
[187] Nygh, P., *Autonomy in International Contracts*, Clarendon Press Oxford, 1999, p. 29.

3.10 JURISDICTIONAL ARBITRABILITY: IS THE ARBITRABILITY QUESTION AN ARBITRABLE MATTER?

Authorities differ on whether the courts or arbitral tribunals should decide the question of arbitrability; this issue is related to the jurisdiction of arbitral tribunals and limits of powers of arbitrators. A court or an arbitral tribunal faced with the question of arbitrability must determine whether an arbitral body has the initial competence or jurisdiction to hear the dispute, and whether the parties agreed to arbitrate that dispute. The main dilemma one has to confront when analysing the issue of 'who determines arbitrability?' is the need to balance the interest in fostering arbitration by discouraging dilatory tactics against protecting the interests of third parties or the State. [188]

In the U.S. the following American Case law generally shows us that the American Courts have dealt with issues of arbitrability as questions of law and should be left to the courts to decide. In **Atkinson v. Sinclair Refining Company** [189] the Supreme Court stated that under its decisions *"whether or not"* a party is *"bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties"*, American law seems that it does not adopt the doctrine of competence – competence. In **AT & T Technologies, Inc. v. Communications Workers of America**[190] the Court stated that *"...the question of arbitrability...is undeniably an issue for judicial determination"*, another court has stated in **UAW v. Exide Corp.** that *"a party's agreement to arbitrate is a matter of contract construction and whether a dispute is arbitrable is a question of law for the court"* .[191] In contrast, an American Bar Association committee has stated that *"the function of the arbitrator to decide whether or not an allegation of non - arbitrability is sound could be compared to that of a trial judge who is asked to dismiss a complaint on motion for a directed verdict or for failure to state a cause of action. This analogy indicated that a preliminary decision relating to arbitrability by the arbitrator is an inherent part of his duty"*.[192]

In another case **Republic of Nicaragua v. Standard Fruit Co.** [193] a dispute arose over

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[188] Alfaro, C. E. & Guimary, F.,"Who Should Determine Arbitrability? Arbitration in a Changing Economic and Political Environment" 12 Arb. Int'l 4 [1996] pp.415-428 at 426.
[189] 82 S.Ct. 1318, 1320 (1962).
[190] 475 U.S .643, 648-49 (1985).
[191] 688 F. Supp .174, 180 (E. D. Pa. 1988).
[192] "Arbitrability", 18 LA 942, 950 (1951).
[193] 937 F. 2 d 469 (9th Cir. 1991).

the validity of a Memorandum of Intent executed by the Republic of Nicaragua and the Standard Fruit Co. The Ninth Circuit held that the arbitration provision contained in the Memorandum of Intent was separable and that the District Court should have determined the arbitrability of the contract solely by reference to the arbitration provision The Court stated that the role of court is *"strictly limited to determining arbitrability and enforcing agreements to arbitrate"*. In **Filanto S. p. A. v. Chilewich Intern. Corp .**[194] the Court held that issue of arbitrability of dispute is governed by Federal law.

In a more recent case **First Options of Chicago v. Kaplan**[195] the issue was whether an arbitrator or a court must decide whether a claim is arbitrable. Relying on the established rule that issues of arbitrability are for the courts to decide, the Supreme Court held: *"Courts should not assume that the parties want to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so"*. The Supreme Court stated that contracting parties could divert completely the legal system of any supervisory or regulatory authority over arbitration by stating *"a court must defer to an arbitrator's arbitrability decision when the parties submitted the matter to arbitration"*.[196] The Court stated that *"just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties had agreed about that matter"*.[197] According to this decision the question of arbitrability is for the courts to decide, unless there is a clear and unmistakable evidence provided by the arbitration agreement as construed by the relevant law, that the parties intended that the question of arbitrability shall be decided by the arbitrator. American Courts therefore treat silence or ambiguity about the question of 'who decides arbitrability' differently from the way they treat silence or ambiguity about the question of whether a

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[194] 789 F. Supp. 1229 , 1234 (S.D.N.Y 1992)

[195] 115 S. Ct.1920 (1995). This case has been supported by different U.S. holdings, as in **Barbara Vitzethum, et al. V. Dominick & Dominick** where the Court stated that unless the parties have specifically agreed to arbitrate the arbitrability of claims, the District Court should determine arbitrability independently (U.S. District Court, Southern District of New York, 18th January 1996, 94 Civ. 4938 (AGS) and 95 Civ. 429 (AGS) reported in Yearbook Comm. Arb'n XXII (1997) p. 930, as well as in **NETG v. James Martin** where the U.S. District Court stated that the FAA invests courts with the authority to determine if claims are non-arbitrable; but this issue must be addressed before the matter proceeds to arbitration (U.S. District Court, Northern District of Illinois, Eastern Division, 20th October 1995, No. 93 C 6247, reported in Yearbook Comm. Arb'n XXII (1997) p. 911, and in **Menorah Insurance Company Ltd. v. INX Reinsurance Corporation** where the Court stated *"So we apply the First Option rule: 'Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clear and unmistakable" evidence that they did so."* (U.S. Court of Appeals, First Circuit, 26 December 1995, Nos. 95-1495, reported in Yearbook Comm. Arb'n XXII (1997) p. 920.

[196] 115 S. Ct. 1920 at 1924.

[197] 115 S. Ct. 1920 at 1924.

particular merit-related dispute is arbitrable.[198] Some American Courts distinguish between issues of substantive arbitrability and procedural arbitrability. The Court in **Smith Barney Shearson Inc. v. Boone** [199] held that issues of substantive arbitrability are for the courts to determine, but issues of procedural arbitrability must be decided by the arbitrator. In **Paine Webber, Inc. v. Elahi** [200] the Court stated the fundamental principle that the parties' intent determines the scope of arbitrable issues. The Court further stated: *"The signing of a valid agreement to arbitrate the merits of the subject-matter in dispute presumptively pushes the parties across the 'arbitrability' threshold; we will then presume that other issues relating to the substance of the dispute or the procedures of arbitration are for the arbitrator. But, if the parties clearly and unmistakably provide that an issue is one of 'arbitrability'-i. e. that the issue is a threshold matter that must be determined before any adjudicative power will be granted to the arbitrator- then the Court must respect that clear expression of intent and decide that threshold issue, rather than compelling arbitration".* According to the U.S. Court of appeals for the Tenth Circuit, when an arbitration agreement is ambiguous on the question of arbitrability, and the parties have not expressly delegated the resolution of such ambiguities to the arbitrators, the arbitrability question is for the courts to decide.[201]

Under Section 31 of the English Arbitration Act 1996, an arbitrator may deliver an opinion on his jurisdictional power to hear a certain dispute, but he or she may not issue a final ruling on his/her own jurisdiction, English courts have retained the power to rule on jurisdictional powers. The practice of arbitral tribunals determining their own jurisdiction, is subject to the final decision of the English courts, and has long been settled in English case law. As Mr Justice **Devlin** has stated in **Christopher Brown v. Genossenschaft Osterreichischer Waldbesitzer** [202] that arbitrators

"are entitled to inquire into the merits of the issue as to whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding upon the parties - because that they cannot do- but for the purpose of satisfying themselves as a preliminary matter about whether they ought to go on with the arbitration or not. If it became abundantly clear to them, on looking into the matter, that they obviously had no jurisdiction,

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[198] Hanzman, M. A., "Arbitration Agreements: Analyzing Threshold Choice of Law and Arbitrability Question: An Often Overlooked Task", 70 Dec. Fla. Bar. J. 14 [1996] p. 23.
[199] 14 F. 3d at 1312-13.
[200] 87 F. 3d 5891 St. Cir. 1996.
[201] **Riley Manufacturing Co., Inc v. Anchor Glass Container Corp.**, 157 F. 3d 775 (10th Cir. Sep. 11, 1998).

as, for example, it would be if the submission which was produced was not signed, or not properly executed, or something of that sort, then they might well take the view that they were not going to go on with the hearing at all. They are entitled, in short, to make their own inquiries in order to determine their own course of action, and the result of that inquiry has no effect whatsoever upon the rights of the parties".

The same approach has been followed by the court in **Promvimi Hellas A.E v. Warinco A.G**[203] by stating that *"it is clear law that it is perfectly proper for an arbitral tribunal, when its jurisdiction is challenged, to proceed to hear evidence that may be relevant on that matter and to arrive at a decision on its jurisdiction if it thinks right to do so, although it is clear also that decision in itself does not preclude a Court thereafter from holding that there is no jurisdiction".*

It is a settled rule that under English law parties to an arbitration agreement "cannot oust the court's jurisdiction, and any agreement which purports to do so is illegal and void as being contrary to public policy." [204] Furthermore, arbitrators cannot bind the parties by a ruling on their own jurisdiction, this what has been stated in **Harbour Assurance Co .v. Kansa Gen. Int'l Ins. Co. (Harbour II)** [205] by Lord Justice **Hoffmann** who stated that "it is common ground that in English law an arbitrator cannot bind the parties by a ruling on his jurisdiction, and therefore the validity of the arbitration clause is not an arbitrable issue". This what has been established earlier by the court in **Harbour Assurance Co. v. Kansa General International Insurance Co. (Harbour I)** [206] where the Court stated that "The approach in English law is simple, straightforward and practical. As a matter of convenience arbitrators may consider, and decide, whether they have jurisdiction or not: they may decide to assume or decline jurisdiction.... But it is well settled in English law that the result of such a preliminary decision has no effect whatsoever on the legal rights of the parties. Only the Court can definitively rule on issues relating to the jurisdiction of arbitrators. And it is possible to obtain a speedy declaratory judgment from the Commercial Court as to the validity of an arbitration agreement before or during the arbitration proceedings".

If parties agreed to arbitrate the question of arbitrability, by giving the arbitral tribunal full

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[202] 1 Q.B. [1954] 8.
[203] 1 Lloyd's Rep. [1978] 373, 377 (C.A).
[204] HALSBURY'S LAWS OF ENGLAND 655 (4th ed. reissue 1991).
[205] [1993] Q.B. 701, 721 (C.A).
[206] 1 Lloyd's Rep. [1992] 81, 83 Q. B.

competence to rule on its own jurisdiction, the arbitrability question should be decided solely by the arbitral tribunal without any interference from the courts. It could be said that arbitrability is compatible with the competence - competence doctrine and the question of arbitrability is an arbitrable matter, especially when parties explicitly provide in the main agreement, or a distinct agreement, that arbitrability should be decided by the arbitrable tribunal and that it falls within the jurisdiction of that arbitral tribunal. It would be wrong to agree with authors who consider arbitrability issues as non-arbitrable matters, as **Berger** who stated that arbitrability is not an arbitrability subject matter and that a competence - competence clause is incompatible with the right of recourse to the courts .[207]

If the parties strongly favour arbitration and wish to avoid potential litigation, the parties by special submission or stipulation in the arbitration agreement may authorise the arbitral tribunal either explicitly or implicitly, to rule on questions of arbitrability. Where it is clear that the parties have authorised the arbitral tribunal to determine arbitrability, the courts should not overturn its ruling on the issue of arbitrability. Even where the parties have not clearly authorised the arbitral tribunal to determine arbitrability, the arbitral tribunal does so and the parties generally accept its ruling, it should be presumed that the parties were willing to give the arbitral tribunal the power to rule on the issue of arbitrability.

[207] Berger, K. P., *International Economic Arbitration*, Kluwer, 1993, p. 359.

3.11 THE ARBITRABILITY INQUIRY

Courts and arbitral tribunals follow different tests of arbitrability in order to find whether the dispute in question is arbitrable or not, taking into consideration different aspects of arbitrability, by examining the intentions of the arbitration agreement' parties, and the real aims of any legislation involved.

The first test of arbitrability will be done by examining the existence of the arbitration agreement, to find out if the parties agreed to arbitrate from the very beginning or not, in other words to see if the conditions of substantive arbitrability have been met or not. The existence of an arbitration agreement is a very important element of arbitrability, to avoid any problems in this respect, especially when arbitration clauses are involved, it is quite essential to have a careful drafting of the main agreement which contains the arbitration clause, by expressly incorporating the arbitration clause into the main agreement.

The second test in the arbitrability inquiry is examining the scope of the arbitration agreement, to find out whether the dispute in question falls within the scope of the arbitration agreement or not. In this respect arbitration agreements and clauses should be carefully drafted, to include different types of disputes and claims. They should be varied and wide, since narrow arbitration clauses is likely to cause confusion. It is noticed that judicial tendency to resolve ambiguity in the scope of arbitration agreements is in favour of arbitrability since most arbitration clauses are extremely broad, which lessen the efficiency of this test. A particular dispute will be arbitrable unless the arbitration agreement cannot be interpreted to cover it. The basis for distinguishing between a broad arbitration clause and a narrow clause lies in a presumption that the parties, in using a broad arbitration clause, implicitly intend to arbitrate all future disputes, as the court has stated in **Georgia Power Co. v. Cimarron Coal Corp.** [208] *"The fact that contracting parties agree in general terms to arbitration of disputes indicates a determination that their interests will be better served by arbitration than by resort to the courts if problem arise. The nature of a dispute which thereafter occurs is immaterial"*, on the other hand, by the use of a narrow arbitration clause, the parties intend to narrow the range of arbitrable issues as stated in **Twin City Monorial, Inc. v. Robbins & Myers, Inc.** [209] the *"presumption of arbitrability is lessened when clause*

[208] 526 F.2d 101 (6th Cir. 1975).
[209] 728 F.2d 1069, 1073 (8th Cir. 1984).

is narrow", and as stated in **Bell Canada v. ITT Telecommunications Corp.** [210] that *"use of clearly tailored clause in place of standard broad clause is forceful evidence of intent to limit arbitrable issues"* . In **Marschel v. Dean Witter Reynolds, Inc.**[211] the Court has stated that: *"parties are free to limit scope of arbitration agreement or to designate that certain issues such as limitation defences will not be arbitrable"*. The Court in **Brick v. J.C. Bradford & Co.** [212] stated that *"Many federal courts have determined that arbitration agreements should be liberally construed and any ambiguities as to the scope of such agreement should be resolved in favor of arbitration"*.

If a national law or mandatory rule is involved, the test will be focused on the intention of the legislative body who enacted this law, and whether it was the intention to have the dispute in question considered arbitrable or not, and whether the arbitrability of the dispute will be inconsistent with the purpose of the mandatory rules or not.

Since arbitration is based on the mutual consent of the parties to it, it is vitally important to have arbitrability tested by examining the intentions of the parties themselves, and whether they wished to have the dispute arbitrated or not, intentions of parties should be construed generously in favour of arbitrability of disputes, bearing in mind that the intentions of the parties are a fundamental element of arbitration, taking into consideration the adequacy of the forum handling the dispute. Arbitration agreements, like any other contract, will be construed to accomplish the intent of the contracting parties, as has been stated in **Mitsubishi**[213] that under Federal Law *"as with any other contract the parties' intentions control, but those intentions are generously construed as to issues of arbitrability"*. In determining whether particular disputes are arbitrable, the intentions of the parties should be construed in favor of arbitrability, but courts will nevertheless carefully review arbitration agreements *"in order not to force a party to submit to arbitrate a question, which he did not intend to be so, submitted"* .[214] The Court in **Azriliant v Shearson Lehman / American Express, Inc.** [215] stated that *"In interpreting the boundaries of an agreement to arbitrate, the agreement is treated as a contract, and parties to such an agreement cannot be required to submit to arbitration any matter that they did not agree would be subject to that maner of dispute resolution"*.

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[210] 563 F. Supp. 636, 639 (S.D.N.Y.1983).
[211] 609 So. 2d 718 (Fla. 2d DCA 1992).
[212] 677 F. Supp.1251 (D.D.C. 1987).
[213] 105 S.Ct 3346, 3354 (1985).
[214] **G & N Constr. Co. v. Kirpatovsky**, 181 So. 2d 664, 667 (Fla.3d DCA 1966).

3.12 THE LAW GOVERNING ARBITRABILITY

When the issue of arbitrability arises, arbitrators must first consider what law is to be applied by them in deciding the issue. It seems that the question of the applicable law on arbitrability, is an area of common disagreement between arbitrators and courts. When international commercial arbitration is concerned, the issue of arbitrability may arise under different legal systems and can lead to different solutions in different states.

In deciding the issue of arbitrability, there are several different laws that may be relevant, *i.e.*:

(i) the law governing the arbitration agreement;

(ii) the law governing the contract of which the arbitration agreement is a part;

(iii) the law of the place of arbitration (*lex arbitri*);

(iv) the law of the place of enforcement of the award; or

(v) the law governing the subject matter in question.

In practice, while determining the law governing arbitrability, the arbitrators generally make every effort to make sure that the award is enforceable. Hence, they generally seek to ensure that the dispute before them is arbitrable under all of the laws that may be relevant to the determination of arbitrability.

As mentioned above, in some cases, the issue of arbitrability is determined according to the law governing the validity of the arbitration agreement or clause, since the validity of such clause depends on the arbitrability of the dispute in question, and non-arbitrability results in the nullity of the arbitration clause. The law in this case may or may not be the same as the law governing the main contract of which the arbitration clause is a part. However, the law applicable to the arbitration agreement should be distinguished from the law governing arbitrability, since that the law governing the arbitration agreement applies to limited issues of consent, interpretation, effect and the scope of the arbitration agreement. Under most jurisdictions the law applicable to the arbitration agreement is the one chosen by the parties; in the absence of this choice it is presumed that the applicable law is the law of the place of arbitration. However, when arbitration proceedings are involved, the issue of arbitrability is determined according to the law applicable to the arbitration agreement. An explicit policy statement, in a statute or in controlling judicial decisions, that a particular subject matter may not be arbitrated according to the law governing the arbitral agreement

[215] Fed. Sec. L. Rep. (CCH) par. 93, 393 at 97, 052 (U.S.D.C.S.D.N.Y.Sep.10, 1987).

will likely decide the issue of arbitrability, at least insofar as domestic arbitration is concerned.[216]

The law governing the main contract of which the arbitration clause is a part could be relevant in determining the issue of arbitrability. But this is not always the case, since the principle of severability of the arbitration clause prevails. The arbitration clause has to be judged independently from the main contract and under a law, which may be different from the one that applies to the main contract. Defects, which lead to the invalidation of the main contract, do not necessarily affect the arbitration clause contained therein.

In many countries, arbitral legislation (Article 177(2) of the Swiss PIL Statute) as well as some international arbitration conventions (the Geneva Convention of 1961 Article 6(2) and Article 34(2)(b)(i) of the UNCITRAL Model Law of 1985), apply the law applicable at the place of the arbitration (the *lex arbitri*). AS Dr **Mann** put it:

"The law of the arbitration tribunal's seat initially governs the whole of the tribunal's life and work. In particular, it governs the validity of the submission, the creation and composition of the tribunal, the rules of the conflict of laws to be followed by it, its procedure, the making and publications of its award." [217]

In certain circumstances, it is difficult to see the law of the place of the arbitration, related in any sense to the determination of the issues of arbitrability, especially when the place of arbitration has not been even chosen by the parties, since in international arbitration the place of arbitration usually has no connection with either the parties or the substance of the dispute, and is designated in some cases by an arbitration institution. The place of arbitration may have no real connection with the main contract, very often it is chosen for reasons of convenience.[218] Arbitrators may sit in various places during the process of arbitration, the place of arbitration may not be known until a dispute arises. Thus, it is suggested in such cases, where transaction has no connection with the place of arbitration, the law of such place should not be used in determining arbitrability and that the courts of the place of arbitration should refrain from setting aside awards rendered in such cases on the ground that the dispute

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[216] Craig, W. L., *International Chamber of Commerce Arbitration*, 2nd ed., 1990, p. 93.

[217] Mann, 'Lex Facit Arbitrum', in *International Arbitration: Liber Amicorum for Martin Dmoke* (ed. P.Sanders 1967) p. 165.

[218] See e.g. UNCITRAL Arbitration Rules of 1976 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*

in question is non-arbitrable in accordance with its national laws. In some cases, the choice of the place of arbitration is made to escape from mandatory provisions of another law or to avoid the non-arbitrability of the dispute under the law of the latter country, this might cause problems if one tries to enforce the award in the latter country. The *lex arbitri* resolves the issue of arbitrability either by a rule of conflicts or by a substantive rule of private international law. A rule of conflict states, which law, is applicable to the issue of arbitrability. A substantive rule of private international law addresses the issue by determining itself the criteria according to which arbitrability is to be considered. Where the *lex arbitri* addresses the determination of the arbitrability by a rule of conflicts of law, objective arbitrability has to be determined pursuant to the solution offered by the rule of conflicts of law which may be refer to the law found applicable either to the arbitration agreement, to the main agreement, to both, to the procedure of arbitration, or to the subject matter in question.

With respect to the law of the place of enforcement of the award, the New York Convention, tend to determine the issue of arbitrability according to the law applicable at the place of enforcement of the award, Article V (2) (a) of the Convention states that the recognition and enforcement of an arbitral award may be refused if the subject matter of the dispute is non-arbitrable under the law of the country where recognition and enforcement is sought. In this context a Belgian Court has ruled that *"A current in doctrine and jurisprudence notes that Art. V (2)(a) of the New York Convention expressly refers to the lex fori for the evaluation of the arbitrability of the dispute in the phase of recognition of the award, and considers, in the name of a consistent interpretation of the Convention, that the arbitrability of the dispute must be evaluated under the same law when an objection to jurisdiction is raised before a court."* [219] The Geneva Convention of 1927 refers in Article 1(b) to the law of the country where recognition and enforcement are sought. The same approach is taken by the Riyadh Convention on Judicial Cooperation between Member States of the Arab League of 1983. Article 37 of the Convention states that *"The competent judicial authorities of the contracting State where enforcement is sought cannot examine the subject matter of the arbitration and may only refuse enforcement of the award in one of the following cases: a) The law of the contracting state where recognition or enforcement of the*

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to the circumstances of the arbitration." See also the AAA Rules of Arbitration of 1997 Article 13 (1).

[219] **Société van Hopplynus v. Société Coherent Inc.** (*Tribunal de Commerce* [Court of First Instance] Brussels, 5th October 1994) reported in Yearbook Comm. Arb'n XXII (1997) at 640.

award is sought does not authorise the settlement of the dispute by way of arbitration", according to this Article, it is not enough that the matters are arbitrable in the country where the arbitration took place, it must also be arbitrable in the country where enforcement is sought. It could be suggested that the law of the place of enforcement should not be the law which determines the arbitrability of a dispute, unless in cases when the enforcement has a significant impact in the place of enforcement and touches the legitimate interests of this place. However, applying the law of the place of enforcement in determining arbitrability encourages forum shopping to find jurisdiction with favourable arbitration rules. The issue may not be one so much of conflict of laws, but of the application of mandatory laws and the public policies of the various judicial systems which may be seized of the matter and which will apply local public policy in an internationalist manner.[220] Another issue that one has to take into consideration is whether the arbitral tribunal should apply the foreign policy laws *lois de police* concerning arbitrability, for example the policy laws of the place of enforcement of the arbitral tribunal, as when the latter restrict the arbitrability of the dispute to be decided. This is a quite difficult issue. It is certain that before deciding whether it will or not apply a policy law foreign to the *lex contractus*, the arbitral tribunal will first determine whether, by analysis of its terms and scope, this law is applicable in the particular case. If the answer is affirmative and the provision pertains to international public policy, the arbitral tribunal might decide to apply it. If it is not the case, the application of the provision by the arbitral tribunal is less probable.

Determination of arbitrability could be relevant to the law governing the subject matter in question, this law may or may not be the same as the law governing the main contract of which the arbitration agreement is a part. While parties as a general rule choose the law to govern the subject matter in question, it would be unrealistic to use such law in determining subjective arbitrability, because that would imply that in choosing the proper law to govern the subject matter of the dispute, the parties could effectively confer capacity on themselves.

In the U.S., the Supreme Court in **Moses H. Cone** held that the FAA had, in effect *"created a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act"* [221] because of this mandate, and because that New York Convention did not specify which nation's laws should apply in such reviews, U.S.

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[220] Nygh, P., "Choice of Forum and Law in International Commercial Arbitration", Forum International No. 24 June 1997 at 19.
[221] 460 U. S. at 24.

Courts apply this substantive law in determining arbitrability of disputes.

The question, which addresses itself, is whether the issue of arbitrability, should be governed by the parties' choice, where arbitrability depends on the will of the parties?

Whenever parties expressly select a particular law to govern the issue of arbitrability, their choice should be respected by both judges and arbitrators, unless the law chosen by them has no connection at all with the dispute in question. However, where the parties do not express their intention, the determination of the law governing arbitrability may vary as we have seen.

It could be concluded that the issue of arbitrability should be determined according to the law of the country whose jurisdiction is most closely connected to the dispute. Parties to an arbitration agreement should not be allowed to circumvent the rules on arbitrability in jurisdiction in which their transaction has its closest connection.

3.13 CONCLUDING REMARKS ON CHAPTER THREE

Arbitrability seeks to draw the boundaries between the public interest of the State in the resolution of certain disputes exclusively through the State courts, and the interest of parties anxious to resolve their differences privately through arbitration. The arbitrability doctrine addresses the distinction between State process and the autonomous adjudication of rights, by designating the kind of disputes that can fall within the scope of agreements for private dispute resolution. Arbitrability determines the point at which the exercise of contractual freedom ends and the public mission of adjudication begins. In effect, it establishes a dividing line between the transactional pursuit of private rights and the courts' role as custodians and interpreters of the public interest. The arbitrability question asks whether the asserted dispute can be seen as an embodiment of the objective freedom inherent to the interaction of autonomous wills, but does not inquire whether it is the State in its judicial or legislative guise that has legally affirmed this freedom. Arbitrability is vital to the legitimacy of the arbitral process. Certain remarks could be concluded in this context:

1) Arbitrability is essentially a national problem reflecting the individual concerns of different States, it becomes an international problem when two or more different legal systems are involved.

2) International trade and investment require that, the issue of arbitrability should be given a wide interpretation, a broader substantive scope of arbitrability should be applied, and restrictions on arbitrability should be narrowed.

3) Arbitrability rules reflect a variety of national sensibilities, not always in a wholly rational way. In this sense no country can be said to have rules of greater or lesser quality in the area of arbitrability.

4) The issue of arbitrability should not be impaired by taking into consideration or applying any foreign mandatory rules of law.

5) The issue of arbitrability should not be damaged by the arbitral tribunal's concern as to the enforceability of its award.

6) The issue of arbitrabilty should be denied if indeed the affirmation of arbitrability be regarded as a fundamental violation of public policy, but in any event one should not consider that all matters of public policy are non-arbitrable, distinction must be drawn between touching and violating public policy, taking into consideration that arbitrators are not

guardians of public policy, since the real guardians of public policy are the national courts judges. With the growing acceptance of arbitration, public policy limits to arbitrability tend to considerably lessen, at least in respect of international commercial arbitration, since public policy in its international acceptation is a less restrictive than its domestic counterpart. However, it could be stated that public policy represents a linkage between the international arbitration and the national legal system, in that sense public policy is applied regardless of the place of arbitration, or the law applicable to the merits of the dispute. Since a State court ultimately controls the recognition and enforcement of arbitral awards, in this respect public policy can act as a limit on the denationalisation of international arbitration.

7) Arbitrability should be considered as a general rule in international commercial arbitration. Non-arbitrability is the exception of that rule; with the burden to prove non-arbitrabilty residing with the party who wants to avoid arbitration to settle the dispute in issue, not on the party who wants to proceed the arbitral process.

8) The characterisation of the issue of arbitrability could be considered either as one of the substantive conditions of the validity of the arbitration agreement, or as a ground for enforcement of the arbitral award. However, arbitrability should be distinguished from the issue of validity of the arbitration agreement; arbitrability concerns the question of whether a State that allows arbitration of private disputes in general should make exceptions from that rule for particular issues or under particular circumstances. The reasons for these exceptions when made are beyond the contractual relation of the parties. On the other hand, the validity of an arbitration agreement concerns a matter of contract, whether the parties validly agreed upon an arbitration agreement. The prerequisites for the validity of an arbitration agreement are the arbitrability of the subject matter of the dispute, the capacity of the parties to arbitrate, *i.e.* subjective arbitrability, and the requirements concerning the form and the contents of an arbitration agreement. However, the validity of an arbitration agreement under the law applicable to it does not guarantee the recognition and enforcement of the award in another State. Every court of law shall examine the issue of arbitrability under its own law.

9) Any suggestion to set up an international convention laying down arbitrable and non-arbitrable matters would be unrealistic, since every State should decide upon its own criteria of arbitrability.

10) An arbitrability agreement giving arbitrators sole competence to rule on their jurisdiction, could make sense if contained in a distinct contract that refers to arbitrators any disputes

about jurisdiction arising under a pre-existing agreement.

11) The drafting of the arbitration agreement is of great importance in respect of the arbitrability issue, the scope of arbitration should be varied, and the role of arbitrators should be clearly defined. A broad arbitration agreement normally written to cover entirely different kinds of disputes is unlikely to create confusion, and will result in compulsion of arbitration proceedings, and having all possible disputes arbitrated, this undoubtedly will reduce litigation of issues of arbitrability. On the other hand, the presumption of arbitrability is much weaker with a narrowly drawn arbitration agreement. The use of a narrow arbitration clause should be approached with caution, since a reluctant party may use it to raise arbitrability issues, in order to delay and obstruct the arbitral process.

12) The problem of arbitrability does not arise in compulsory arbitration, in which parties to certain types of disputes are compelled by law to refer to arbitration, except in the context of a constitutional challenge to the governing law or legislation.

13) The wide interpretation of arbitrability will help in reducing the burden of congested national courts, and help to speed up the judicial process; in general courts are pushing cases towards arbitration. In the last decades, a great number of countries have either amended or totally replaced their arbitration laws with new modern arbitration laws, broadening the domain of arbitration, and supporting party autonomy. If this trend continues, and is supported by the courts, the range of arbitrability will continue to increase.

14) Courts determining arbitrability issues, should enforce written agreements to arbitrate, without examining the subject matter of the dispute, or the legal claims in the dispute, unless the party opposing arbitration can prove that the arbitration agreement is voidable on the ground of lacking sufficient and genuine consent of the parties to the arbitration agreement.

15) Arbitration Acts typically do not distinguish between different aspects of arbitrability issues, in describing the judicial role in enforcement of arbitration agreements.

16) Doctrines of arbitrability are designed by courts to ensure that consensual resolution of disputes is confined only to matters, which affect the parties to the dispute.

17) The recent case law in the area of arbitrability reaffirms the voluntary contractual nature of arbitration and its suitability as a means of enforcing a broad range of rights, including those created by statute. Thus, arbitration is now placed on an equal footing with litigation when chosen by the parties an alternative forum for the resolution of disputes. Parties to a valid arbitration agreement are no longer able to avoid or delay the arbitral process by the

mere assertion of statutory claims.

PART TWO

JURISDICTIONAL ISSUES IN CERTAIN SPECIFIC AREAS IN THE CONTEXT OF INTERNATIONAL COMMERCIAL ARBITRATION

4. CHAPTER FOUR

JURISDICTION OF ARBITRAL TRIBUNALS IN ISLAMIC LAW (*SHARI'A*)

4.1 INTRODUCTION

In Chapter Three, the arbitrability of disputes in Islamic law was discussed, as a challenge to the jurisdiction of the arbitral tribunal ruling on the dispute in question. In this Chapter, the scope and extent of powers of arbitral tribunals under Islamic law will be discussed, combined with an examination of arbitration laws of certain Arab Muslim countries. In particular, there will be a focus on three countries; Saudi Arabia, as an example of a country adopting some *Shari'a*[1] rules in a strict way, Kuwait, as a moderate country among Muslim Countries; and Egypt, as a more liberal example, since the Egyptian legal system is based on the civil law system.

The discussion in this Chapter will depend mainly on the *Sunni* jurisprudence, since the *Shiite* doctrine is out of the scope of this thesis. The teachings of the main four *Sunni* schools, the *Shafi'e, Hanbali, Hanafi* and *Maliki* schools will be discussed.

The main aim of this Chapter is to draw the attention of Western scholars to some legal aspects of the submission of commercial disputes to voluntary arbitration when elements of Islamic law are involved, or when such arbitration is taking place in one of the Arab Muslim countries.

The importance of *Shari'a* in international business transactions in general will be discussed, examining its importance in the field of international commercial and investment arbitration, followed by an examination of the concept and sources of commercial arbitration in Islamic law. A combined sociological and psychoanalytical approach is required in order to detect, focus on, and explain the impact of the Islamic traditions on the law and practice of arbitration.[2]

The examination of firstly domestic arbitration in the Muslim countries is useful in the field of international commercial arbitration, since it provides a guideline

[1] The word *Shari'a*, where intended, will be used instead of 'Islamic law' for purposes of clarity. 'Islamic law' can mean any law with an Islamic character, or, if defined more generally, any law in use within the Islamic community, regardless of whether or not it is codified and regardless of its line. *Shari'a*, as used in this thesis, shall specifically refer to the Islamic jurist's law as propounded by the various sects and schools. The two terms are often used interchangeably in writings on the subject.

[2] El-Kosheri, A. S., "Islamic Law", in *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration*, (General Editor Albert Jan van den Berg Kluwer 1996) p. 494.

for arbitral tribunals, and arbitral institutions, in issuing and confirming arbitral awards involving Arab parties capable of easier enforcement in the Arab Muslim countries. In this respect it is reasonable to expect Western practitioners to be familiar with the Islamic legal system, as they would expect their Arab Muslim colleagues to be familiar with Western systems. Had both Arab Muslim and Western parties recognised the cultural impact of contract principles prior to concluding their contractual arrangements, perhaps the extreme measures taken by many Arab Middle eastern States would have been avoided. A better understanding of principles of foreign law and the varying interpretations of law arising from cultural differences could have help promoting more amicable relations. This could only have occurred, however, if Western lawyers had tempered the propensity for zealous representation and contractual manipulation with an understanding of cultural issues.[3]

The jurisdiction of the Arab Centre for Commercial Arbitration established by the Amman Convention of 1987 will also be examined as a regional arbitral institution. This Chapter will end up by concluding certain points regarding the jurisdiction of arbitral tribunals in Islamic law.

[3] McCary, M., "Bridging Ethical Borders: International Legal Ethics with an Islamic Perspective", Tex. Int'l L. J. [Vol. 35:289 2000] pp.289-324 at 309.

4.2 THE IMPORTANCE OF *SHARI'A* IN THE CURRENT WORLD

First of all, it should be pointed out that *Shari'a* principles have influenced the legal systems of most Muslim States, and apply to more than a quarter of the world's population. In some Islamic States, there are situations where *Shari'a* courts will assume jurisdiction in any case, and apply rules of *Shari'a* in a dispute between a foreign contractor and a Muslim party, or an entity within an Islamic State, notwithstanding any prior agreement excluding the jurisdiction of *Shari'a* courts which is considered to be a mandatory jurisdiction.

The judicial system in Islamic law is divided into two types of justice: the first is ordinary justice, where justice follows the ordinary rules of procedure and evidence, the jurisdiction of the judge in this system being fixed by law, and having a general jurisdiction which covers all fields of law. The second is extraordinary justice, the scope of which is not determined by any fixed rules. This system is generally based on the rules of fairness.[4]

The *Shari'a* profile began to tighten in the early seventies when many Arab constitutions declared Islamic law to be a primary source of law, e.g. Egypt (Article 2 of the Constitution of 11 September 1971) [5], Bahrain (Article 2 of the Constitution of 6 December 1973), Qatar (Article 1 of the Provisional Constitution of 2 April 1970), and the United Arab Emarites (Article 7 of the provisional Constitution of 18 July 1971). The old constitution of the Yemen Arab Republic (Constitution of 28 December 1970) had gone so far as to refer to *Shari'a* as the source of all laws.[6]

With regard to the two countries under consideration, Article 2 of the Kuwaiti Constitution provides that the State religion shall be Islam, and the Islamic *Shari'a* shall be a principal source of legislation. Without having a written constitution, Saudi Arabia in this respect adopts the *Qur'an*, the main source of *Shari'a* as its basic law in all aspects. In contrast, the Jordanian Constitution does not refer to *Shari'a* as a source of laws, it only states in Article 2 that *"Islam is the religion of the State"*.[7] However, the Jordanian Civil law as in some other Arab countries is based mostly on *Shari'a*, and the Ottoman *Medjella* is still in force.

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[4] See generally, El-Ahdab, A., *Arbitration with Arab Countries*, Kluwer, 1990, pp. 11-14.
[5] Art. 2 of the Egyptian Constitution was amended to be read as follows: "*the principle of the Islamic Shari'a shall be the principle source of legislation*".
[6] Saleh, S., "Fading Vestiges of *Shari'a* in Commercial Agency/Distributorship (Termination and Compensation)", in Arab L. Q. 1994 Vol. 9 Part 1, pp 91-106 at 91.

Unfortunately, it could be stated that with a few exceptions, Western jurists practising in Muslim countries tend to generally underestimate the importance of *Shari'a*, or simply ignore its existence.[8]

The call for application of *Shari'a* constitutes a trend towards the confirmation of political and cultural independence, and a confirmation of purity and individuality, more than it constitutes a decision to create legislative changes for limited reasons connected with the content of these pieces of legislation.[9] It should be emphasised in this respect, that Islamic law is far wider than Western laws, where enforcement is carried out by the State through its agencies. Islamic law, however, takes the whole of human activity for its domain.[10] Both those activities are enforceable by the State agencies as well as those not subject to enforcement. It is not to be believed however, that Islamic law is a rigid system, although that is a common mistake made possible by the widespread confusion between divinely revealed precepts of mandatory nature, and substantive legal rules identified on account of a science known as *fiqh*.[11]

[7] http://www.kinghussein.gov.jo/documents.html.
[8] For example, one of the main books on international commercial arbitration *Law and Practice of International Commercial Arbitration* by Redfern A., & Hunter, M., 2nd ed., London, Sweet & Maxwell, 1991) does not even mention *Shari'a* and does not consider it as other existing legal systems.
[9] Abulmagd, A. K., "The Application of the Islamic *Shari'a*" in *Arab Comparative and Commercial Law: The International Approach* Vol. II, International Bar Association, First Arab Regional Conference Cairo 15-19 Feb. 1987 Graham & Trotman, pp 28-41at 29.
[10] Anderson, J. N. D., *Islamic Law in the Modern World*, Westpory, Connecticut: Greenwood Press, 1975, p. 4.
[11] Saleh, N., "An Arab View on International Arbitration" a paper presented at the Conference for the Re-Launching of the Euro-Arab Arbitration System 16 June 1998 London.

4.3 THE IMPORTANCE OF SHARI'A IN INTERNATIONAL COMMERCIAL ARBITRATION

Shari'a is relevant to international commercial and investment arbitration in three situations. Firstly, where the parties to a dispute choose to apply rules of Islamic law to the settlement of such dispute, through an agreement to arbitrate made either before or after a dispute arises. Secondly, in the event that a dispute is to be resolved in a country which is governed by Islamic law. Thirdly, in the event that one of the parties to the dispute is a citizen of a country, which is governed by Islamic, law and such a dispute is to be settled by arbitration outside a country governed by Islamic law. *Shari'a* has played an important role in the field of international commercial and investment arbitration, especially when elements of Islamic law are involved in the dispute in question. This depends mainly on the extent to which statute law has been developed, and on the degree of secularisation of the courts. Thus domestically, the role of *Shari'a* in the field of arbitration varies from State to another. [12] It could be said in this respect that due to continuous accession of various Muslim Countries to international arbitration conventions and treaties, the importance of *Shari'a* in international commercial and investment arbitration has been declining in favour of its importance in domestic arbitration.

Shari'a law can become a force in procedural as well as substantive matters in international commercial and investment arbitrations, where an Islamic element is present. In this respect, there are three main benefits to be gained in studying *Shari'a* and domestic arbitration laws of Muslim countries in the field of international commercial and investment arbitration:

1) The knowledge of *Shari'a* and such laws is of great importance in drafting valid and enforceable arbitration clauses and agreements, this will help in avoiding any challenges of non-arbitrability.
2) The knowledge of *Shari'a* and these laws will give arbitrators the required guideline to issue enforceable arbitral awards when they are sought to be enforced in Muslim countries. This knowledge will reduce the use of public policy as a ground to refuse the enforcement of arbitral awards.

[12] Saleh, S., *Commercial Arbitration in the Arab Middle East*, Graham & Trotman, 1984, p. 12.

3) This knowledge will help in harmonization of arbitration laws and in the process of internationalisation of commercial and investment arbitration.

4.4 SOURCES OF ARBITRATION IN ISLAMIC LAW

The sources of arbitration in Islamic law are merely the same as the sources of *Shari'a* itself. However, *Shari'a* as laid down in these textual sources *"is not a corpus of legislation but the living result of legal science"*. [13] While it is true that arbitrators under Islamic law are bound to follow the text of the *Qur'an* and the *Sunna,* this text is usually quite general with respect to legal matters, and when it does provide specific direction is entirely consistent with the principles of fairness and equity. The sources are as follows:

A. The *Qura'n*:

Qura'n is the Holy Book for Muslims and Allah's words, it is considered to be the main source of Islamic law and jurisprudence; arbitration has been mentioned in various verses of it. These verses only contain guidelines relating to arbitration; they do not refer particularly to commercial arbitration. The guidelines set forth in these verses can be summarised in the following points:

(i) Sura IV verse 35 states: *"And if you fear a breach between them [husband and wife] send an arbitrator out of his family and out of her family, if they shall desire conciliation, god will cause them to agree"*.

This verse encourages the appointment of two arbitrators to settle any dispute between husband and wife, the arbitrators should be appointed among their respective families. According to an interpretation of this verse, if arbitration is allowed in settling disputes between a husband and his wife, it should be allowed in the rest of matters and disputes.[14] This verse is considered to be the original rule to allow arbitration between parties to any dispute.[15]

This verse is absolute evidence that arbitrators under Islamic law could be non-Muslims contrary to the predominant view, which argue that arbitrators must be Muslims only. It could be stated in this respect that arbitrators can be non-Muslims since Muslims are allowed to get married to non-Muslim women, as in the case of Christians and Jews. In this case when any dispute arises between a husband and wife, two arbitrators will be appointed, one is Muslim from the husband's family and the other will be a non-Muslim from the wife's family.

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[13] Schacht, J., *An Introduction to Islamic Law*, Oxford, Oxford University Press, 1964, p. 71.

[14] Fatawa Alwolwaljy, vol. II paper 127, a hand-written manuscript held at Alazhar University No. 2033/26872.

(ii) Sura IV verse 59 states: *"O you who believe! Obey Allah and obey the Apostle and those in authority from among you; then if you quarrel about any thing, refer it to Allah and the Apostle, if you believe in Allah and the last day; this is better and very good in the end".*

In this verse Allah orders believers to submit all disputes to the Prophet as a sign of submission to him.

(iii) Sura IV verse 65 states: *"But no! By your Lord! They do not believe (in reality) until they make you a judge of that which has become a matter of disagreement among them, and then do not find any resistance in their hearts as to what you have decided and submit with entire submission".*

Allah in this verse orders Muslims to submit their disputes to the Prophet as a sign of faith and guarantee of acquiescence. Both parties must agree to arbitrate their diputes before the Prophet. [16]

(iv) Sura V verse 51 states: *"So judge [arbitrate] what God has revealed and follow not their vain desires".*

In this verse God orders the prophet to arbitrate between people according to what is written in *Qura'n* not according to their desires.

(v) Sura V verse 45 states: *"But if they come to you, either judge [arbitrate] between them or decline; and if you decline, they shall not hurt you at all. But if you judge [arbitrate], judge between them with equity; for God loves those who judge with equity".*

In this verse there is mention of some arbitration rules, that the arbitrator has the freedom to decline to arbitrate, but if he accepts to arbitrate he should do so with equity and fairness.

(vi) Sura VI verse 152 states: *"and when you speak, then be just though it be (against) a relative and fulfil Allah's covenant; this He has enjoined you with that you may be mindful".*

Another arbitration rule is mentioned here that arbitrators must be impartial, even when their relatives are involved in the dispute brought before them.

B. The *Sunna*:

The *Sunna* is the sayings and deeds of the Prophet; He has recognised arbitration in many incidents. The use of the *Sunna* is sanctioned by the *Qur'an* which provides

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[15] Alkhasaf, *Adab Alkadi,* investigated by Aljassas, p. 584, provision 673.
[16] Abu Jaafer Mohammad Bin Jarir Al Tabari, *Jame' Albayan*, Vol. 5 p. 158.

"whatever the Messenger gives you, take; whatever He forbids you, give over." [17] The *Sunna* confirmed the use of arbitration. [18] In one reported case, He appointed an arbitrator and accepted his decision. [19] He also counselled a tribe to arbitrate a dispute.[20] Indeed, the settlement of disputes through arbitration is actually encouraged in the *Sunna*, where it is related by **Abu Shuraih**, that he said to the Prophet: *"Oh Prophet of God, my people if they disagree on something they come to me. Then I decide the dispute among them and the parties are satisfied with me."* And the Prophet, May God Bless Him and Give Him Peace, said: *"Oh, how excellent is that."* [21] Furthermore, the companions of the Prophet unanimously recognised its validity. This was the case when Caliph **Omar bin Al Khattab** disagreed with a commoner. The Caliph and his opponent chose to put an end to their dispute through the decision of an arbitrator. They both went to his house, stood before him on an equal footing and presented their case, on which the arbitrator gave his final decision, which, they both accepted. [22]

C. The *Qiyas:*

Qiyas is the reasoning by analogy based on the provisions of the Qura'n and Sunna which applies to new problems not foreseen in the Qura'n and Sunna. According to **Ibn Taimiya**, one of the late scholars of the *Hanbali* school: *'The rule in contract is tolerance and validity and one must only forbid or set aside those contracts which are forbidden by virtue of a text or of Qiyas'*.[23] He justifies the validity of arbitration by the text of *Qura'n* and by logic. According to him the arbitration clause is indeed to be considered invalid only if it is contrary to the purpose of the contract, or inconsistent with *Shari'a.*

D. The *Ijma'*:

The *Ijma'* is the consensus of Muslim legal and religious scholars and the third source of Islamic law. It is more explicit with respect to the definition and determination of the field of arbitration, the validity of which never was and never could be disputed in

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[17] Sura LIX, Verse 7.
[18] Reported by Ibn Tala' in his book, *The Awards of the Messenger of Allah,* p. 676.
[19] Abi Abdullah Mohammad Bin Kharaj, known as Ibn Al Talah, *The Judgments of the Prophet,* investigated by Dr. Mohammad Diae Al Azmi, 1978, p. 676.
[20] Ali Haidar, *Durar Al Hukam Fi Charh Majallat Al-Ahkam,* the Book of the judicial organisation, Section 4. The arbitrator in this case was Saad Ben Moath.
[21] Aladab Almofrad, Maktabat Aladab 1979 edition p. 240.
[22] Al-Sarsafi, E., *The Al-Sarsafi Treaties* (in Arabic).
[23] Ibn Taimiya: Al Fatawa, vol. III p. 326.

Islamic law. The companions of the Prophet have consented the validity of arbitration; there was a clear consensus among them upon this matter.[24]

There are other less important sources of Islamic law. These complementary sources find their origin in reason, as basis for rules in the best interest of society and in general notions of justice and equity. They are (preference) *istihsan*, (public interest) *masalih mursala* which is the Islamic principle of societal interest, (deduction and presumption of continuity) *istidlal* and (customs and usages), *istihsab*.[25]

[24] Ali Mohammad Mahmoud bin Ahmad Elaini, *Albinaya Sharh Alhidaya*, vol.7 p.66, 1st ed., 1980, Dar Elfikir.

4.5 THE CONCEPT OF ARBITRATION IN ISLAMIC LAW

Muslim jurists have agreed on the validity of arbitration, but they disagree on the nature of and scope of it. A discussion took place amongst the different schools of Muslim doctrine as to the meaning to be given to arbitration, focusing on whether arbitration should be considered as a simple attempt of conciliation, or whether arbitrators should be empowered to decide upon disputes as proper arbitrators of today.[26]

An observer of Muslim jurists writings in Islamic jurisprudence can easily conclude that there is a controversy between the nature of arbitration and the nature of the role of arbitrators. These different opinions can be summarised as follows:

Firstly, the majority opinion considers arbitration as judiciary and arbitrators as judges, with the arbitral awards being considered to have the same effects as judicial decisions. This is evident by the fact that arbitrators must have the same qualifications and capacity as judges. Supporters of this point of view suggest that the same methods of challenges to judicial decisions apply also to arbitral awards. [27] Article 1848 of the *Medjella* states that the arbitral award rendered by arbitrator has the same effects as judicial decisions in the scope of arbitration.

The second opinion: taken by some *Maliki* school followers, believe that arbitrators are only agents appointed by the parties of the dispute, and they do not require arbitrators to have the same qualifications as judges, since arbitrators are private judges, and not are public ones.[28]

Lastly, followers of the *Hanafi* school suggest that arbitrators are similar to judges in some aspects and similar to agents in others. Where as arbitrators are considered to be judges since they function independently from the will of the parties, they are also considered to be agents, since they do not begin their roles as arbitrators unless they are appointed by the parties in an arbitration agreement.[29]

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[25] Mahmassani, S., *Falsafat Al-Tashri Fi Al-Islam* (The Philosophy of Legislation in Islam) in Arabic [1961] pp. 83-92.

[26] Al Astal, I., *Altahkeem Fi AlSharee'a Allslameieh* (Arbitration in Islamic Sharia) in Arabic, Al Nahda AlArabia, p. 8.

[27] Abi Zakariya Yahya bin Sharaf Al Nawai Aldemashqi, *Rawdat Al Talibine*, Almaktab Alislami publishing, 1975, vol. 11, p. 122.

[28] Abu Alwaleed Suleiman bin Wareth Albaji, *Almuntaqa*, vol.5, p. 227, Alsaada publishing.

[29] Abi Baker bin Ali Alrazi, *Ahkam Al Qura'n,* Albahiya Egyptian Publisher 1347 (H) edition vol. II p. 232.

Generally, Islamic jurisprudence tends to consider that an arbitrator must have the same qualifications as a judge and must not lose these qualifications during the arbitral process. According to the *Medjella,* a judge must be male, of age, wise, free, Muslim and fair. He must also be capable of being a witness.[30] The *Maliki, Shafii* schools do not accept any exception to the rule that says an arbitrator must be a Muslim, as this rule is based on a *Quranic* rule which states that unbelievers should not be given advantage over the believers.[31] According to this view women cannot be arbitrators since they are not qualified as judges, a testimony of a male witness equals the testimonies of two women. However, the fact of being a woman is not itself a ground for incapacity. A woman's capacity is the same as that of a man and with respect to their property, women have the same rights and duties as men and there is no difference between them in this level. There are certain exceptions, such as; pensions, which are given only to wives and mothers, and in inheritance law, where the share of a man is the double of that of the woman, but the general rule is that of equality of both sexes.[32] Some scholars have adopted the view that women can serve as judges and arbitrators as men, since there is no rationale behind preventing them from doing so, and according to the general rule which states that if a testimony of a person has been accepted, this person is qualified to be a judge in the same matter.[33]

The concept of arbitration as seen by the four major *Sunni* schools can be summed up as follows:

1. The *Hanafi* school:

The *Hanafi* school was founded in Kufa (Iraq) by **Abu Hanifa Naman ibn Thabit** (699-767 AD). The *Hanafi* doctrine holds that arbitration is legal, and accords to the needs of social life. [34] Some *Hanafi* scholars have stated that an arbitrator has the same function as a judge, and that he only appears as a conciliator with respect to

[30] It should be noted that Saudi law for example requires arbitrators to be Muslims. This is not required in other Arabic laws: Indeed, the Act passed in the United Arab Emarites in 1992 does not contain such a requirement (Law No. 11/1992, published in the Official Gazette No. 235 of 13th August 1992). Similarly, the Qatari law (Law No.13/1990, published in the Official Gazette No.13 of 9th January 1990) does not contain such a requirement. It is alleged that by ignoring such a condition an attempt is made to meet the spirit and requirement of arbitration in the recent commercial and industrial developments.

[31] Saleh, S., *Commercial Arbitration in the Arab Middle East*, Graham & Trotman, 1984, p. 36.

[32] Mahmassani, S., *The Legislative Situation in the Arab Countries: its past and present,* 2nd ed. Dar El-Elm Lilmalaien. P. 138.

[33] Almawardi, *Adab Alqadi,* vol. I p. 626.

[34] Ibn Mansour*: Al Fatawa al Hindiya*, Cairo, p. 468.

third parties. Other scholars of the *Hanafi* doctrine hold that arbitration is closer to agencies and compromise.

2. The *Shafi'e* school:

The *Shafi'e* school was founded by **Abdullah Muhammad ibn idris alShafie** (764-819). This school holds that arbitration is legal, but arbitrators have a lesser role and status in comparison to judges, as the formers' appointment may be revoked, whereas judges may not be dismissed as easily.[35]According to this school, parties should approve an arbitral award before getting enforced.[36]

3. The *Maliki* school:[37]

The *Maliki* School was founded by **Malik ibn Anas** (c713-795 AD). This school has an extreme trust in arbitration to the extent that *Maliki* scholars accept that one of the parties may also be an arbitrator, if chosen by the other party. According to this school, the effects of arbitral awards are restricted to the parties of the dispute without effects with respect to third parties.

4. The *Hanbali* school:

The *Hanbali* school was founded by **Ahmad ibn Muhammad ibn Hanbal** (780-855 AD). The *Hanbali* scholars hold that arbitral awards have the same binding nature as decisions made by judges. According to this school an arbitrator must have the same qualifications as a judge.[38]

After reviewing the position of the main *Sunni* schools towards arbitration, it could be said that the last two schools, the *Maliki* and *Hanbali* schools have more trust in arbitration than the other schools. On the other hand, the *Hanafi* and *Shafi'e* schools do not treat arbitrators as judges and do not grant them the same privileges.

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[35] AlMawardi, *Adab AlQadi*, p. 379.

[36] Ibn Abidine, *Rad Al Muhtar*, vol. IV, p. 482.

[37] Ibn Farhum, *Tabsirat Al Hokam*, Cairo 1958 vol I, p. 55.

[38] Ibn Qadama, *AlMughni*, vol. IX 3rd ed. Cairo, 1367 H p. 107.

4.6 JURISDICTION OF ARBITRAL TRIBUNALS IN ISLAMIC LAW

In Islamic law there are three elements of jurisdiction of any arbitral tribunal; they are as follows:[39]

1) The arbitration agreement: this is the foundation of the jurisdiction of any arbitral tribunal, since arbitration differs from the judicial system, as it is based on the consent of parties, and the principle of party autonomy. Arbitrators are appointed and chosen by the parties, whilst judges are appointed by the State. The terms and provisions of the arbitration agreement bind arbitrators.
2) Restrictions imposed by the Ruler of the Islamic State: the ruler of the Islamic State has the power to impose certain restrictions on the powers and jurisdiction of the arbitral tribunal with regard to the substance of the dispute, the place of arbitration, or even the time of arbitration. The Ruler of the Islamic State can exclude jurisdiction of the arbitral tribunal from considering certain types of disputes, even if the concerned parties have already submitted them before the arbitral tribunal.[40]
3) The nature of the role of the arbitrator: this element has a great influence on the jurisdiction of the arbitrator, it depends mainly on the points of view adopted by different schools.

Furthermore, there are certain requirements of arbitration agreements under *Shari'a*: 1) that a dispute should exist, 2) the consent of the parties to refer it to arbitration should also exist, and 3) the appointment of an arbitrator, duly qualified under *Shari'a*, to settle the dispute should be made. According to these conditions, one can claim that arbitration clauses do not exist under *Shari'a*, since it is a prerequisite condition that a dispute should exist to recognise the arbitration agreements, that will contradict with the concept of arbitration clauses which are

[39] Al Astal, I., *Altahkeem Fi AlSharee'a AlIslameieh* (Arbitration in Islamic Sharia) in Arabic, Al Nahda AlArabia, pp. 114-118.

[40] This might not appear sensible to non-Muslims, but it could be justified on the fact that the Head of the State is the head of the three authorities, the judicial, legislative, and the executive one, and since he is empowered to organise the judicial authority he is also empowered to interfere in settling private interests.

agreed upon, before any dispute has arisen and are drafted to settle any future dispute that could arise later.

According to the above argument, a clause in a contract referring future disputes to arbitration would seem to be unenforceable. It is in this context **Saleh** [41] has cited various reasons why an arbitration clause for future disputes would be invalid under *Shari'a* based on general hostility to agreements dependent on unforeseeable, future events. Accordingly, *Shari'a* did not recognise an agreement *in futro*, an agreement to agree, which is essentially what an arbitration clause amounts to. Furthermore, *Shari'a* did not recognise the validity of contracts whose object or purpose was not in existence or at least capable of being accomplished at the time of contracting. He argues that if the object or purpose of an arbitration agreement is the settlement of a dispute, the fact that there is no dispute would be ground for annulment of the contract, or at the very least would make the contract revocable by either party. This argument will be challenged later in an attempt to establish the legality and validity of arbitration clauses in Islamic law.

[41] Saleh, S., *Commercial Arbitration in the Arab Middle East*, Graham & Trotman, 1984, p. 48-50.

4.7 POWERS OF ARBITRATORS IN ISLAMIC LAW

In this context several observations could be stated as follows:

1) An arbitrator has the power to appoint another arbitrator to rule on the dispute on his behalf. In this respect the arbitration agreement should expressively authorise him to do so, otherwise he is not allowed to make such appointment. Article 1845 of the *Medjella* states that an arbitrator cannot do so, unless he is authorised by the parties, since the arbitrator is usually chosen for certain qualifications and skills, or for his reputation and expertise. In this regard it should be noted that there is no limit as to the number of arbitrators.

2) An arbitrator has the power to act as a conciliator to settle the dispute through conciliation and not by arbitration. The arbitrator in this case should be authorised by the parties; if he settles the dispute by conciliation without prior authorisation, his decision will lack binding power upon parties. Parties may agree to the arbitrator settling their dispute *ex aequo et bono*. Such arbitral award is treated as a compromise or transaction as specified in Article 1850 of the *Medjella*.

3) An arbitrator has no power to impose any penalties or sanctions against the parties since these sanctions are vested in the *Shari'a* and other State courts.

4) It is not clear if the arbitrators in Islamic law have the power to rule on their own jurisdiction or not. It could be said that courts would have the final decision on this matter.

5) According to Article 1846 of the *Medjella* the arbitrator is required to adhere to time limits set by the parties for rendering the arbitral award. If the arbitrator fails to do so, the award will cease to be enforceable.

4.8 ARBITRATION CLAUSES IN ISLAMIC LAW

From a realistic point of view we should not be surprised by the absence of an authority in the classical Islamic law sources that envisaged the legality of an arbitration clause. [42] The validity of arbitration clauses was raised due to their alleged aleatory nature, since *Shari'a* forbids any contract or clause, the purpose of which would be aleatory. Islamic jurisprudence does not mention directly the arbitration clause, but Islamic law's position can be concluded by analogy on the basis of contract law in Islamic law. However, arbitration clauses are not part of the specific contracts of Islamic law, which has not elaborated a general theory of contracts.[43] According to Islamic Jurists, a contract is *"the legally sound combination between an offer and acceptance in such a manner that its affect leaves its mark on its subject matter."* [44] A contract is defined in the *Medjella* as being: *"...what the parties bind themselves and undertake to do with reference to a particular matter. It is composed of the combination of offer and acceptance. The conclusion of a contract consists of connecting offer and acceptance together legally in such a manner that the result may be perfectly clear."* [45] However, according to **Al-Sanhury** the contracts named in the Islamic jurisprudence are those that were most widely used at the time, and there is no reason why new contracts, meeting the needs and evolution of human relations, should not be added.[46] Furthermore, none of the Islamic schools have, in practice, restricted the commercial activities of their contemporaneous businessmen and traders simply because they were the first to foresee the legal problems and find a proper solution to them. Jurists were Islamic scholars, philosophers, perhaps even businessmen, and on top of that they were judges, even if some were without benches.[47] The relationship between the parties to any contract has often been described by the Muslim maxim, *"a contract is the Shari'a of the Parties."* In

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[42] El-Kosheri, A. S., "Islamic Law", in *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration*, General Editor Albert Jan van den Berg, Kluwer, 1996, p. 494.

[43] Sanhury, A., *The Sources of Law in Moslem Fiqh*, vol. I p.77. Also see by the same author *The Sources of Law in Muslim Doctrine* (3rd ed. 1968) p. 50.

[44] Al-Zarqa', Ahmad. M., *Al-Madkhal Al'Fiqhi Al-am*, 6th ed., 1959, Vol. 1, pp. 274-275.

[45] Article 1 of the *Medjella.*

[46] Abdul Razzak Al-Sanhury, *The Sources of Law in the Moslem Fiqh*, (in Arabic), Vol 3, at 340.

[47] Zahraa, M., "Negotiating Contracts in Islamic and Middle Eastern Laws", Arab L. Q. [1998] 256-277 p. 277.

Western terminology, this is comparable to the doctrine of *pacta sunt servanda* strengthened by religious precepts.

Muslim jurists distinguish between two categories of clauses contained in main contracts. [48] The first category is the so-called valid clause. A valid clause can either be:

a) a clause required by the main contract, or

b) a convenient clause to the main contract, or

c) a clause, which usually has been inserted in a contract by, parties.

The second category is the void or invalid clause. This void clause can either be:

a) a void clause which does not affect the validity of the main contract and does not bring any benefit to any party. This clause cannot be implemented or performed.

b) a void clause which results in the invalidity of the whole contract, such as clauses containing interest or ensuring additional profit to one of the parties which is equivalent to interest, without a corresponding counterbenefit; clauses which create a double contract hiding interest. [49] Clauses resulting in risk fall within this category, thus clauses are forbidden by *Shari'a* in order to avoid gambling contracts.

According to the norms of Islamic law with respect to contracts, arbitration clauses do not fall within the category of void clauses. Since they are convenient to the main contract, they serve both parties on an equal basis in specifying the method of settling disputes, which arise out of the main contract.

Most of the scholars agree on the validity of arbitration clauses in Islamic law, but the question is do such clauses bind the parties by excluding the jurisdiction of the courts? **Al-Sanhury** [50]indicates that the theory, which distinguished between binding contracts and non-binding contracts, is superficial. According to him there is a basic rule in Islamic jurisprudence under which the Muslims must respect their contractual undertakings, and any agreement containing conditions required by Islamic law, is valid and binding.

It could be stated that, and despite the fact that Islamic jurisprudence does not mention arbitration clauses, these clauses cannot be regarded as invalid clauses; they should be recognised as valid and binding provisions, since they are necessary to the contracts, especially to international commercial contracts; they serve the interest of

[48] Abdel Kader, N., *Itifaq Altahkeem* (The Arbitration Agreement) in Arabic 1st ed. Cairo 1994, p. 96.
[49] Fath AlKadir, vol.5, p. 216.

both parties of the contract, they do not contain any risk, interest or aleatory element, and they do not contradict public order and decency or morality.

Furthermore, arbitration clauses do not contradict the classical requirements of the object of the contract in *Shari'a*, these requirements are:

1) It must be valid *per se*;[51]

2) It must be present or able to present in the future, because impossible subject matters are invalid;

3) It must be valid for the typical legal effect of the contract;

4) It must be owned by the contractor or his/her principal in the case of an agent;

5) It must be identified or be able to be identified, as unknown features of the subject matter might constitute a serious defect which, in certain circumstances, is a cause for invalidating the contract; and

6) It must have a value.

With regard to the independence of arbitration agreements, they are considered to be valid contracts, binding upon the parties unless the arbitration agreement was in violation of the public policy. In this respect it should be pointed out that Islamic law does not distinguish between national and international or transnational public policy. In this context it is useful to state that the cardinal elements of a contract in *Shari'a* are the offer, acceptance and the consent of the parties. The offer and acceptance, which are termed by scholars as the form of the contract, are supposed to satisfy the following requirements:

1) They must be clear;

2) They must be serious;

3) They must match and concord with each other; and

4) They must be conclusive.[52]

Another important element of a contract is the defect-free consent of the parties. In order to define such consent jurists identify certain defects the presence of which in a contract may cause it to be invalid. These defects are:

1) Coercion;

2) Gross misconception of one or more of the features of the subject matter;

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[50] Al-Sanhury, A., *Masader Alqanoon Fi Alfiqh Alislami* (Sources of Law in the Moslem Fiqh), in Arabic vol. I p. 80.

[51] Al-Sanhury, A., *Masader Al-Haq Fi Al-Fiqh Al-Islami*, Dar Ihia' Al-Turath ' Arabi, Beirut, 1953, Vol. 2 pp.25-30.

[52] Al-Zarqa', Ahmad M., *Al-Madkhal Al'Fiqhi Al-am*, 6th edition, 1959, Vol. 1, pp. 303-328.

3) Gross inequality between the benefit of the two parties;

4) Fraud; and

5) Deceit.[53]

According to the above requirements it is difficult to challenge the validity of both arbitration clauses and agreements in Islamic law, since they match with the essential elements of contracts in *Shari'a.*

[53] Al-Sanhury, A., *Masader Al-Haq Fi Al-Fiqh Al-Islami*, Dar Ihia' Al-Turath ' Arabi, Beirut, 1953, Vol. 2 pp 97-207.

4.9 THE JURISDICTION OF ARBITRAL TRIBUNALS IN THE ARAB MIDDLE EAST LEGAL SYSTEMS

As mentioned earlier, the arbitration systems of most Arab countries have been influenced by *Shari'a*. Civil law, Common law, and even Socialist legal systems also influenced these countries.

Until a uniform arbitration system is set up in the Arab world, the influence of *Shari'a* must be studied country by country and case by case. The reason for this is due to the fact that each country, when drafting its national arbitration law, kept the particularities of its customs and social, economic and legal concepts. **Comair-Obeid** suggests a tripartite grouping of Arab countries to illustrate the extent to which *Shari'a* figures into their legal systems. In the first category are countries that largely followed the Western system. This category is comprised of countries such as Lebanon, Syria, and Egypt. In the second group are countries that, while they may have codified their laws, drew them mostly from the *Shari'a*. This category includes Saudi Arabia, Oman, and Yemen. Finally, in the third category are countries that went both ways. These countries westernised their commercial laws, but *"Islamic law still governs the drawing up of contracts, prohibits interest-bearing loans when such loans are not commercial and admits optional clauses modifying the effectiveness of contracts."* This category consists of countries such as Iraq, Jordan, and Libya, where the civil laws are more in accordance with the *Shari'a* than the civil laws of countries in the first category.[54]

In this respect the influence of *Shari'a* could be considered a subjective matter; the capacity of parties for example, is established on *Shari'a* principles in most Arab legal systems. On the other hand, the arbitrability of disputes is variable depending on each country.

The Arab countries, although traditionally governed by, or under the strong influence of the *Shari'a*, have not been slow to modernise their laws and adopt civil codes or regulations, in which arbitration has been adapted to modern requirements, a process facilitated by the fact that Islamic law is familiar with the institution. Of course, such legislation still needs to distinguish at all points between domestic arbitration, which may be firmly controlled by national legislation, and international

[54] Comair-Obeid, N., *The Law of Business Contracts in the Arab Middle East*, p. 119, 1996.

arbitration, which the legislation should allow freer rein.[55] When it comes to international commercial arbitration, it is very important to distinguish between the provisions of domestic law, the practice of judges or the State itself, the practice of such judges is more in favour of arbitration. Courts in Arab Countries have deployed considerable efforts to overcome the lack or unsuitability of existing national laws, often inherited from the colonial period. The main achievement of Arab courts (though in a limited number of cases) is that they have come to acknowledge an international public policy applicable to transactions, distinct from domestic public policy; thus clearly differentiating national arbitration from international arbitration.[56]

The status of international arbitration in the Arab countries has passed three phases:

First: Arab countries were hostile towards arbitration and reluctant to join any arbitral process.

Second: Arab countries started to join international arbitration agreements but tried to avoid resorting to such process and to avoid enforcement of arbitral awards.[57]

Third: in this phase Arab countries have become actually involved in international commercial and investment arbitration by signing a number of multilateral conventions for worldwide participants, such as the New York Convention, and the ICSID Convention of 1965. Unresolved problems still exist, since some of the Arab

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[55] Bedjaoui, M., Final Report of the Proceedings of Euro-Arab Arbitration III, 6 Arab L. Q. 1991, pp79-85.

[56] Kemicha, F., *Future Perspectives on International Commercial Arbitration in the Arab Countries,* in International Arbitration in a Changing World, General Editor Albert Jan van den Berg, ICCA International Arbitration Conference Bahrain 1993, Kluwer 1994 pp.221-238 at 224.

[57] The reason behind this position perhaps is the hostile record against Arab interest laid down by famous arbitral awards as (**Aramco v. Saudi Arabia**) 1963, 27 I.L.R. at 117, (**Petroluem Development Ltd. v. Sheikh of Abu Dhabi**) 1951, 18 I.L.R. at 144, and (**Qatar v. International Marine Oil Company Ltd**) 1953, 20 I.L.R. at 534. The arbitrators in these arbitral tribunals paid no consideration to Islamic values. They, further, lacked basic knowledge of *Shari'a* and its basic principles applicable to commercial transactions. For example, in the **Aramco**'s award the arbitral tribunal stated that: "*...the regime of the mining concession has remained embryonic in Moslem law and is not the same in the different schools. The principles of one school cannot be introduced into another unless this is done by an act of authority*", **Aramco** at 163. This statement is certainly inconsistent with a basic principle of the Islamic judicial system according to which a judge can directly resort to any school of Islamic jurisprudence to find the applicable principles on the subject matter of the dispute in question. In **Abu Dhabi** the arbitrator has stated refering to the applicable law that: "*If* there *exists a national law to be applied, it is that of Abu Dhabi. But not such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Qura'n, and it would be fanciful to suggest that in this premitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments*". In the **Qatar** case the arbitrator has stated: "*I need not set out the evidence before me about the origin, history and development of Islamic law as applied in Qatar or as the legal procedure in this country. I have no reason to suppose that Islamic Law is not administrated there strictly, but I am convinced that this law does not contain any principles which would be sufficient to interepret these particular contracts*".

countries which have acceded to certain international agreements, have not always adapted their legislation, or taken other measures required, in order to harmonise their domestic laws with these new international treaties and conventions.

In general, Arab arbitration laws have been through two historic stages:[58]
The first stage, whereby the first codification of Islamic laws (The *Medjella)* was enacted in 1876 under the Ottoman Empire. The *Medjella* dealt only with civil matters, based on the jurisprudence of the *Sunni Hanafi* School. In the *Medjella* a whole section was dedicated to arbitration.[59] The expounders of the *Medjella* have emphasised the contractual nature of arbitration as laid down in the articles of the *Medjella* itself. According to them an arbitral award has lesser force than a judicial judgement, since court judges should approve arbitral awards before being enforced.
The second stage covers the independence era, where each country has enacted its own legislation as influenced by different systems.

Arab arbitration laws have developed the interpretation of Islamic law norms when it comes to the effects of arbitration clauses; these effects can be summarised in the following points:

1) Parties, when entering arbitration agreements, are considered to be waiving their rights to resort to courts. Most Arab countries have accepted the validity of arbitration agreements and clauses since the dispute in question can be conciliated.[60]
2) The refusal to abide by arbitration agreements is not considered to be a public policy matter in most Arab countries. That means that when a party refuses to abide by an arbitration agreement, and instead refers to a national court to litigate the dispute rather than arbitrating it, the party which insists on compelling arbitration should raise this point at the first session of the hearings before the court begins to examine the subject matter of the dispute.[61]
3) Most Arab arbitration laws have accepted the severability of arbitration clauses.

This study cannot be completed unless the jurisdiction of arbitral tribunals in

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[58] Abdel Kader, N., *Itifaq Altahkeem* (The Arbitration Agreement) in Arabic 1st ed. Cairo 1994 at 100.
[59] Section 4 of Book 16 "Book the Judicial Organisation and of Procedure".
[60] This point is laid down in different national arbitration laws as Art.13/1 of the Egyptian law, Art.4 of Jordanian law, Art. 253 of the Iraqi law, Art. 19 of the Tunisian law and Art.5 of the United Arab Emarites law.
[61] The Egyptian Cassation Court has stated this point in different cases as Appeal No.714 of 42 (26th of April 1982) 33 p.442, and Appeal No.167 (24th of May 1966) 17 p. 1223.

certain legal systems is studied. In this respect the jurisdiction of arbitral tribunals in Saudi Arabia as an example of a strict system adopting *Shari'a*, Kuwait as a moderate system, and Egypt as a more liberal legal system, is examined.

1) **Saudi Arabia:** the Saudi State has inherited a legal system rooted in Ottoman legislation, which included the Regulations of the Commercial Court issued by Royal Decree No. 32 on 1 June 1931. These regulations represent the oldest text in the Arabian Gulf region governing commercial transactions. This Ottoman text is a literal translation of French laws and regulations governing different commercial activities and their procedures.

The Commercial Court Regulations sets out in Articles 493-497 a complete commercial arbitration system, where the enforcement of the arbitral award depends upon the ratification of the Commercial Court. These Regulations did not recognise the validity of an agreement to submit future disputes arising from a specific contract to arbitration.

In 1965 a Companies law was promulgated, Article 232 of this law creating the Committee for the Settlement of Commercial Disputes. However, the Committee refused to recognise arbitration and objected to any arbitral award. There are essentially four formal dispute resolution mechanisms in Saudi Arabia: 1) the *Shari'a* Courts which are normally limited to domestic relations, real estate and criminal matters; 2) the Board of Grievances (*Diwan Al-Mazalem*), which hears disputes between Saudi government agencies and private parties; 3) the Committee for the Settlement of Commercial Disputes, which is used for resolving disputes involving negotiable instruments and other documents of finance; and 4) the Committee for the Resolution of Labour Disputes.[62]

As a result of the economic development of the 1970's, arbitration has been increasingly used in Saudi Arabia as a method for the settlement of commercial disputes, particularly those involving foreign parties under the pressure of the west. This resulted in the promulgation of the 1983 Arbitration Code and the Implementation Rules for the Arbitration Code, issued on 27 May 1985, describing various aspects of arbitration proceedings under the Arbitration Code. Indeed, the Saudi system of commercial arbitration is quite sophisticated if one approaches it with the understanding that Saudi Arabia, like many developing countries, has been quite

[62] Van den Berg, "Saudi Arabia" in *International Handbook of Commercial Arbitration* (P. Sanders, ed. 1984) p. 3.

suspicious of Western systems of dispute resolution, since those systems frequently assisted foreign countries in the unconscionable exploitation of Saudi natural resources. [63]

Prior to the enactment of the Arbitration Code and its Implementation Rules, there were known cases of Saudi courts accepting jurisdiction in a dispute, despite a contractual provision to arbitrate, when one party, unwilling to go to arbitration, commenced a court case, arbitration clauses were regarded as a mere statement of intent that was not binding upon the parties. Frequently, however, the contractual provisions called for arbitration, under other than Saudi Arbitration Rules and the Saudi court was merely seizing jurisdiction. Article 7 of the Arbitration Code states that if the parties agree to arbitration before the occurrence of a dispute (i. e. in their contract), the dispute can only be resolved by arbitration.[64] Article 7 has a double effect: it provides that where there is a prior agreement to arbitrate in future disputes, or where the competent authority has accredited the arbitration document relating to a particular dispute, the substance of the dispute *"may not be heard other than in accordance with this Regulation". This at once establishes (a) that parties may not* resort to the *Shari'a* practice of abandoning or withdrawing from arbitration once it is duly provided for; and (b) that Saudi Arabia does not recognise agreements to arbitrate under any rules other than those it has laid down.[65] The aspects of procedure established by the Saudi Arbitration Code have caused particular concern. First, while the Code recognises the validity of contractual clause calling for arbitration of future disputes, it is not clear how such a clause is to be enforced if one party refuses to cooperate when a dispute arises. Second, commentators are unsure about the extent to which Saudi Law must be applied to the substance of the dispute. Third, the Code does not specify the grounds on which the competent authority may set aside or refuse to execute an award.[66]

The question of jurisdiction in international arbitration is not specifically provided for in the Arbitration Code or in its Implementation Rules. Even though the Arbitration Code does not mention international arbitration, the Saudi courts make a

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[63] Fox, W. F., Jr., *International Commercial Agreements: A Preview on Drafting Negotiating and Resolving Disputes*, 2nd ed., Kluwer, 1992, p. 308.
[64] Turck, N. B., "Resolution of Disputes in Saudi Arabia", 6 Arab L. Q. 1991, pp3-32 at 20.
[65] Ballantyne, W. M., "Arbitration in the Gulf States: "Delocalisation": A short comparative study", 1Arab L. Q. 1985-1986 pp.205-215 at 210.
[66] Sayen, G., "Arbitration, Conciliation and the Islamic Legal Tradition in Saudi Arabia", U. Pa. J. Int'l Bus. L. [Vol. 9:2 1987] pp. 211-255 p. 217-218.

distinction between national and international arbitration. The Saudi Arbitration Code does not prohibit Saudi nationals from resorting to an arbitration-taking place outside Saudi Arabia, which should not be subject to Saudi law.

The jurisdiction of arbitral tribunals depends to a large extent on the arbitration clause in the contract in question. Before 1983 arbitrators could not determine the overall validity of the contract unless there is a conflict with the public law, or a major deviation from the principles in the *Qura'n* and *Shari'a* law.[67] It could be said that the doctrine of competence-competence has not been accepted by the Arbitration Code. Arbitral tribunals under the Saudi law have no competence to rule on jurisdictional matters, and Saudi courts will rule upon such matters.

With regard to the doctrine of severability of arbitration clauses, it appears that it has not been addressed either in the Arbitration Code or in the Implementation Rules. The Arbitration Code provides for two types of arbitration instruments, the arbitration agreement and the arbitration clause. Article 1 of the Arbitration Code states that: *"The parties may agree to arbitrate a specific existing dispute; a prior agreement to arbitrate may also be made in respect of any dispute resulting from the performance of a specific contract"*. Furthermore, Article 6 of the Implementation Rules for the Arbitration Code states that arbitrators can be appointed according to an arbitration agreement or according to an arbitration clause.

The Arbitration Code has been influenced by *Shari'a* in many aspects. For instance with respect to the concept of arbitrability, according to Article 1 of the Implementation Rules of the Arbitration Code, arbitration may only be held on matters which under *Shari'a* can be resolved by conciliation. Saudi law in this respect does not distinguish between civil and commercial matters. Article 3 of the Implementation Rules for the Arbitration Code requires that arbitrators must be Muslims, though they need not be Saudi nationals, and that, the arbitral tribunal must be composed of an uneven number of arbitrators. The Saudi Law therefore adopts the rule, which has been confirmed by the majority of the scholars of Islamic jurisprudence, i.e., an arbitrator must be a Muslim.[68] As **El-Ahdab** put it, *"this*

[67] Hejailan, S., Saudi Arabia, National Reports, in Yearbook Comm. Arb'n IV-V (1979-80) pp.162-173 at 168.

[68] It should be noted in this respect that Saudi Arabia is a member to the Washington Convention of 1965, which allow women to adjudicate as arbitrators or chairpersons without any restriction as to religion. Accordingly, Saudi Arabia as a State may be subject to an arbitral tribunal where two members are women and are not Muslims and may not be able to object to such constitution. However, there may be a risk of enforcement of arbitral awards made by such a tribunal in Saudi Arabia.

condition should not be interpreted as being the expression of religious sectarianism, as one must appoint a person who knows the applicable law, the Shari'a, and a Moslem knows the Shari'a." [69] Furthermore, the Arbitration Code in Saudi Arabia is based on principles consistent with the historical principle providing for judicial review of arbitration decisions prior to their enforcement by the State. According to Article 39 of the Implementation Rules arbitrators are expected to issue an award that is valid and enforceable under provisions of *Shari'a* and applicable regulations. One commentator suggests that foreign legal principles might be applied as long as they are not contrary to Saudi public policy as expressed in provisions of the *Shari'a* and the statutes.[70]

With respect to the qualifications of arbitrators, Article 12 of the Arbitration Code states that arbitrators may be challenged on the same grounds as judges. This indicates that *Shari'a* rules will govern the qualifications of arbitrators. On the other hand, and in contrast to the rule of revocability of arbitrators at any stage of an arbitration proceedings as adopted by the *Hanbali* school, Article 11 of the Arbitration Code emphasises that an arbitrator cannot be removed except by the mutual consent of the disputing parties. Eventually, it could be suggested that the arbitration procedures in Saudi Arabia under its Act are not terribly different in a procedural sense from those of international bodies. It should be noted that since the principle of irrevocability of arbitrators is recognised by the *Maliki* school, this provision is not contrary to *Shari'a* simply because a legislator in the Islamic country is entitled to adopt a principle which is provided for under any of the schools of Islamic jurisprudence. If an arbitrator has been removed after the commencement of his function for reasons for which he is not responsible, he will be entitled to compensation.[71]

2) **Kuwait:** the provisions of the Ottoman *Medjella* were applied in Kuwait before independence, but as soon as Kuwait became independent in 1960 it began to lay down the basis of a modern legal system.

Regarding the influence of *Shari'a* on arbitration in Kuwait, it should be noted that, except for matters relating to the capacity of parties to enter into arbitration, the contribution of Islamic law to commercial arbitration is negligible in Kuwait. Even

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[69] El-Ahdab, A., *Arbitration With the Arab Countries*, Kluwer, 1990, p. 620.
[70] Allam, Saudi Arabia/Arbitration in the Kingdom: The New Implementation Rules, M.E.E.R. August 1985 9 pp. 15-16.
[71] Al-Samaan, Y., "The Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia", Arab L. Q. Vol. (9) 1994 pp. 217-237 at 228.

the qualifications required for arbitrators under *Shari'a* are not relevant in matters of commercial law.[72]

It could be said that there are four different types of arbitration in Kuwait:

1) Voluntary arbitration pursuant to Articles 173-188 of the Code of Civil and Commercial Procedures No. 38/1980.[73]

2) Compulsory arbitration based on the Kuwaiti Judicial Arbitration Act of 1995.[74]

3) Permanent institutional arbitration, which is undertaken by the Chamber of Commerce by virtue of the Chamber of Commerce law of June 28, 1959. In this type of arbitration where the arbitral tribunal is composed of merchants and not jurists, conciliation is used more than arbitration in settling commercial disputes.

4) International arbitration. Kuwaiti law does not distinguish between national and international arbitration, but Kuwait has acceded to the New York Convention on April 28, 1978.

With regard to the jurisdiction of arbitral tribunals under the Code of Civil and Commercial Procedures, it is notable that the arbitral tribunal generally possesses a wide discretion in conducting its proceedings. It is permissible for the arbitral tribunal not to abide by the Code of Civil Procedures except for the basic rights that ensure due process of law as stated in Article 182 of the Code.

Article 173 of the Code of Civil and Commercial Procedures clearly distinguishes between arbitration clauses and arbitration agreements, but it does not mention the severability doctrine. With regard to arbitrability, the same Article states that arbitration may not be conducted in cases where conciliation might not be permissible. Issues relating to public policy are also outside the jurisdiction of arbitral tribunals. Under the Code of Civil and Commercial Procedures, the arbitral tribunal has no competence, and is hardly requested to decide on issues pertaining to the illegality or otherwise of a contract.[75]

Article 173 also states that courts have no jurisdiction over disputes subject to

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[72] Saleh, S., *Commercial Arbitration in the Arab Middle East,* 1984 Graham & Trotman, at 255.

[73] Article 177 of the Code of Civil and Commercial Procedures has been repealed by the Judicial Arbitration Act of 1995.

[74] Law No. 11 dated 28 Feb. 1995 published in the Kuwaiti Official Gazette No. 196 (41st year).

[75] Kassim, A. F., "Arbitration in Kuwait", in *Arab Comparative and Commercial law*, International Bar Association First Arab Regional Conference, Cairo 15-19 Feb. 1987, Graham & Trotman, pp. 269-278 at 272.

an agreement to arbitrate, but this aspect of jurisdiction in Kuwait is not a matter of public policy due to the contractual nature of arbitration.[76]

The other Act regulating arbitration in Kuwait is the Kuwaiti Act on Judicial Arbitration in Civil and Commercial Matters. This Act constitutes a specialised jurisdiction for disputes between ordinary persons and government administrations. Limiting the consensual aspects of arbitration, the Act, is also, a basis for compulsory arbitration, the origin of which is not an agreement, but a statute which requires that certain disputes be referred to the Permanent Arbitration Council created by the Act.[77]

According to this Act, the arbitral tribunal created by it, has an exclusive jurisdiction concerning disputes where 'Ministries, Government Administrations, public establishments and companies'[78] are involved, and when private persons and corporations against these public entities submit a request for arbitration. These disputes are thus mandatory of the jurisdiction of the arbitral tribunal set up by the Act, which has the original and initial jurisdiction instead of national courts.

The Act accepts the competence-competence doctrine, stating in Article 5 that:

"The Arbitral council may settle preliminary questions which are referred to it concerning the dispute and which are of the jurisdiction of the civil and commercial courts. It also settles questions of its own jurisdiction such as those based on the absence of an agreement to arbitrate, the expiry of such an agreement, its invalidity or impossibility to apply it to the subject-matter of the dispute".

The arbitral tribunal should rule on its own jurisdiction before settling the subject matter of the dispute, or it may join these questions, settling them together. The arbitral tribunal also has the power to settle urgent questions relating to the subject matter, unless the parties expressly agreed otherwise.

According to Article 8 of the Act the arbitral tribunal has jurisdiction to repair material errors contained in its award, if they are errors in writing or calculations. It also has the power to interpret the award if it is ambiguous or equivocal.

3) **Egypt:** in general, Egyptian law has been for decades in the shadow of the Islamic jurisprudence, codified in the *Medjella*, which, as mentioned earlier contains *inter*

[76] This is has been confirmed by the Kuwait Court of Cassation in its judgment on 8th June 1983.
[77] El-Ahdab, A., "The Kuwaiti Judicial Arbitration Act 1995", 12 Arb. Int'l 1 [1996] pp.101-107 at 103.

alia, provisions of rules organising arbitration. Prior to issuing Law No. 27/1994 on Arbitration in Civil and Commercial Matters, [79]arbitration in Egypt was governed by Articles 501-513 of the Code of Civil Procedures No. 13 of 1968. The 1994 law has repealed these Articles, although a few of the repealed Code provisions were also mitigated or clarified and re-enhanced. There was obviously a need to change these Articles since they did not recognise institutional arbitration, and considered that arbitration clauses, which did not contain the names of the arbitrators, were void even, if they did not refer to an arbitration of an arbitration centre. The Egyptian domestic courts were faced with a number of lawsuits in which Egyptian parties invoked the nullity of the arbitration clause which had previously been accepted in business transactions with foreign parties, claiming that the said clause did not conform with Article 503(2) of the Egyptian Code of Civil and Commercial Procedures, which required that the choice of arbitrators had to be undertaken by the parties themselves.

The Egyptian Arbitration Law was, in light of its declaration of reasons, explanatory memorandum, preparatory work and the parliamentary discussion, in the opinion of Egyptian academic writers, [80] considered to be a step forward on the way to making arbitration in Egypt easier.

The Egyptian Arbitration Law applies to arbitrations having their venues in Egypt and to those arbitrations taking places outside Egypt, where the parties have agreed to subject themselves to the provisions of the law. It should be noted that the Egyptian law differs from the UNCITRAL Model of 1985, which applies only to arbitrations taking place in the State adopting it.

Article 10 (1) of the Egyptian law recognises arbitration clauses and arbitration agreements; it does not require any particular conditions for the validity of arbitration clauses. According to Article 10(3) the Law allows an arbitration agreement by icorporation or reference. It provides that any reference in the contract to a document containing an arbitral clause shall be considered an arbitration agreement, provided that such reference clearly considers such clauses an integral part of the document. With regard to arbitrability of disputes, the law widens the scope of arbitration to cover any legal dispute regardless of the legal nature of the relationship, which is the subject matter of the dispute. Thus one may refer any dispute to arbitration whether it

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[78] Art. 2(2) of the Law No. 11/1995.

[79] Issued on 18 April 1994 and published in the Official Gazette No. 16 (Supplement) of 21 April 1994. The Law came into force on 22 May 1994.

is contractual, public or private, civil or commercial, and even potential disputes unless the question is one of public policy.[81] Natural or juridical persons may enter into an arbitration agreement. But such persons must also have the capacity to dispose of their rights. With regard to the capacity of administrative and governmental bodies to conclude an arbitration agreement in administrative contracts, the Egyptian Arbitration Law requires the signature of the minister not the director of the department concluding the contract (Law No. 9/1997 amending Law No. 27/1994).[82] On 19 February, 1996, it was decided unanimously at the General Meeting of the *Conseil D'Etat Egyptien* that administrative contracts were not arbitrable under the present position of the Arbitration Act of 1994. On 20 February, 1990, and 13 March, 1990, the Supreme Administrative Court rendered two judgements refusing arbitrability of administrative contracts. However, prior to the Court's ruling, on 17 May, 1989, and also subsequent to it, on 17 February 1993, two sections of Opinion and Legislation had allowed the arbitrability of administrative contracts. The arbitrability of administrative contracts was brought again before the General Meeting on 18 December, 1996. The General Meeting noted that controversy arose due to two contradicting articles in the Law of the *Conseil D'Etat* No. 47 of 1972. However, the issue was resolved by a legislative amendment of Article 1 of the Arbitration Act. On 15 May 1997, Law No. 9 of 1997 Amending Certain Provisions of the Law Concerning Arbitration in Civil and Commercial Matters as promulgated by Law No. 27 of 1994 was published in the Official Journal. Article 1 of this Law reads: *"A second paragraph shall be added to article 1 of the Law Concerning Arbitration in Civil and Commercial Matters as promulgated by Law No. 27 of 1994, reading as follows: With regard to administrative contracts disputes, agreement on arbitration shall be reached with approval of the concerned Minister or the official assuming his powers with respect to public legal persons. No delegation of powers shall be authorised therefor."* In principle arbitration is not allowed on matters, which cannot

[80] Abdel Kader, N., *Itifaq Altahkeem* (The Arbitration Agreement) in Arabic 1st ed. Cairo 1994 p. 7.

[81] Case No. 29/1992 (Award of 28 July 1994) held under the auspices of the Cairo Regional Centre for International Commercial Arbitration (CRCICA) raised interesting issues of arbitrability of the dispute, the arbitral tribunal in this case ruled that the Claimant's submissions concerning the right to litigation and renunciation of the bennefit or prescription were matters of litigation before the courts and not of arbitration, reported in Alam Eldin, M., Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration, Kluwer Law International, 2000, pp. 103-106.

[82] The arbitrability of administrative contracts under the Egyptian law has been raised in Case No. 12/1989 (Award of 4 June 1990) held under the auspices of CRCICA reported in Alam Eldin, M., Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration, Kluwer Law International, 2000, pp. 7-11.

be subject to compromise, or conciliation. The concept of compromise is contained in Article 551 of the Civil Code, which states that a *"compromise cannot be made on any question concerning the status of individuals or public policy, but a compromise may be made with regard to financial interests arising out of the status of individuals or out of penal offence."* According to this Article disputes arising out of trademarks, patents or other industrial property rights, and certain disputes relating to bankruptcy may be the subject of arbitration.

With regard to the severability doctrine, Article 23 of the Egyptian law recognises the arbitration clause as a severable and independent agreement separate from other contractual conditions, stating that, *"The nullity, revocation or termination of the contract shall not affect the arbitration clause, provided that such clause is valid itself"*.

The doctrine of competence-competence is accepted by Article 22. It should be noted in this respect, that the doctrine is mentioned in the law before mentioning the severability doctrine, in contrast with most arbitration laws where severability is considered the base of competence-competence and mentioned always before it, even if they were in one article. According to Article 22, the arbitral tribunal has the jurisdiction to rule on its own jurisdiction, even if the validity of the contract in which the arbitration agreement is embedded, is challenged itself.

The adoption of competence-competence by the Egyptian law indicates, *inter alia*, a trend towards minimising the interference of the State courts upon the arbitral process, which will in turn, ensure an expedited settlement of the disputes, referred to arbitration.[83]

Egyptian law goes further than the UNCITRAL Model Law of 1985, providing that the arbitral tribunal has the competence to rule on its own jurisdiction, including occasion where objections based on the non existence, extinction, or nullity of the agreement to arbitrate, as well as on the fact that the agreement to arbitrate would cover the subject-matter in the dispute. Whilst the UNCITRAL Model Law of 1985 provides in Article 16 (1) only that the arbitral tribunal has jurisdiction to settle all questions relating to the existence or validity of the agreement to arbitrate.

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[83] Abu-Enein, M. I. M., "Reflections on the New Egyptian Law on Arbitration", 11 Arb. Int'l 1 (1995) pp.75-84 at 80.

The plea for lack of jurisdiction of the arbitral tribunal must be raised at the latest when the defence memoranda are submitted. The time period for this plea can be agreed upon by the parties or fixed by the arbitral tribunal.

When one of the parties raises the plea of lack of jurisdiction of the arbitral tribunal within the foreseen time period, the arbitral tribunal may either treat it as a preliminary question, or join it to the merits, in order to rule upon them together.

Egyptian Law in Article 39 provides that the arbitral tribunal does not necessarily have to resort to conflict of law rules, but has the discretion to decide which law is most related to the disputed subject-matter, and hence decides the dispute according to its substantive rules.

The Egyptian Arbitration Law in Article 24 expressly grants the court having initial jurisdiction with respect to domestic arbitration, or the Cairo Court of Appeal with respect to international arbitration, the power to order conservatory measures, either before the commencement of the arbitral proceedings or during the proceedings. The arbitral tribunal's right to order such measures, set out in Article 24, is subject to the agreement of the parties who can also empower the arbitral tribunal to order these measures and require that the parties provide adequate security.

4.10 JURISDICTION OF THE ARAB CENTRE FOR COMMERCIAL ARBITRATION

The Arab Centre for Commercial Arbitration was established by the 1987 Amman Arab Convention for Commercial Arbitration.[84] The Convention has been modelled on the ICSID Convention of 1965, although it is not limited to the resolution of investment disputes. Although the Convention came into force after its ratification by seven States, the Centre has not yet been officially established.[85]

The Centre has jurisdiction to settle disputes only when a dispute is commercial in a wide sense, according to Article 2 of the Convention, [86] which covers all economic activities such as industrial, agricultural, touristic, real estate, intellectual, technical investments, concession and transfer of technology contracts. In other words, the term 'commercial' expands to include all economic activities where the purpose of which is the obtaining of profits.

The Amman Convention provides in Article 2 that the Centre has the jurisdiction to settle disputes between parties who have commercial dealings with a Contracting State or any of its persons, or where they have headquarters therein. The Centre also has jurisdiction to rule upon the following disputes:

- Disputes arising from a specific commercial transaction, provided that one of the parties, at least, is a Contracting State or a person who bears its nationality.
- Disputes between parties who have, or at least one of them has, headquarters in one or more of the Contracting States.
- Disputes between parties, bearing the nationality of the same Contracting State or between one of the parties and the State itself. This means that two parties can be in one Contracting State, and a national of a Contracting State can refer any dispute between him and that State or its entity to the Centre, excluding the jurisdiction of national courts of the Contracting State. In this respect Article 2 is considered to be ambiguous when stating: *"the Convention shall apply to commercial disputes arising between persons, whether natural or corporate, and*

[84] The Amman Arab Convention on Commercial Arbitration has been published in 7 J. Int'l Arb.1 March 1990, pp.146-152.

[85] According to the League of Arab States, the Amman Convention came into force on 22 February 1993, after its ratification by: (1) Jordan 23.9.1988; (2) Tunisia 15.9.1986; (3) Iraq 26.1.1989; (4) Libya 20.1.1989; (5) Yemen (Arab) 8.6.1989, Yemen (Democratic) 10.8.1988 now The Arab Republic Of Yemen; (6) Palestine 27.5.1992; (7) Sudan 22.1.1993.

regardless of their nationalities, who are bound by a commercial transaction with one of the Contracting States or any of its persons or have principal centres of business therein". It has been suggested that it would have been clearer if Article 2 stated that the Amman Convention applied to any commercial dispute arising between a Contracting State or any constituent sub-division or agency thereof, or a national of a Contracting State, on the one hand, and a national of any other State, on the other.[87]

According to Article 3 of the Amman Convention, there must be an agreement between the parties to refer their existing or future disputes to the Centre, settling them by arbitration in accordance with the provisions of the Amman Convention. This agreement should be in writing according to Article 1. Furthermore, Article 3 provides for two different types of agreements; the arbitration agreement for existing disputes, and the arbitration clause for future disputes, recommending the use of the following standard clause:

"All disputes arising out of this Contract shall be settled by the Arab Centre for Commercial Arbitration in compliance with the provisions of the Amman convention on commercial Arbitration".

An agreement referring a dispute to the Centre will exclude the jurisdiction of the judicial authorities in the Contracting States on the relevant dispute on condition that the concerned party raises such a plea, before the court to which the dispute was brought.

Article 24 of the Amman Convention accepts the competence-competence doctrine since the Centre has the jurisdiction to rule on its own jurisdiction and other formal pleas that have been submitted to the Centre. Any plea of such type must be raised before the first hearing, and the Centre must give decision on it before discussing the subject matter of the dispute, with such a decision being final.

According to Article 29 of the Amman Convention the arbitral tribunal may be pursuant to a request from one of the parties, and take any interim or conservatory measure it deems necessary. This power of the tribunal is normally limited to

[86] It should be noted that most of the Arab countries follow the Civil law system where they distinguish between commercial matters governed by a commercial law and civil matters governed by civil law.

properties under the control of one of the parties. If someone else controls the property in respect of which protection is sought, the tribunal has no power over such property. In those circumstances, the party seeking the order for protection must apply to the court.

In the light of recent developments in international commercial arbitration, one may observe that the Amman Convention is likely to be considered of a regional interest, since it requires that the Arab language be used in the submissions and pleadings.[88] Even though the aim of the Convention is to develop *"a unified Arab system for commercial arbitration"*,[89] it is doubtful whether it will promote international arbitration in the Arab region considering certain limitations such as the language. The only way to promote international arbitration in the Arab region is by Arab countries acceding to international conventions, adopting modern arbitration laws, and not by establishing more regional instruments with limited application. The Arab world still needs a multilateral Arab instrument, as well as an effective organisation of inter-Arab arbitration. In this respect the Union of Arab Chambers of Commerce could constitute such an adequate basis. The seat of such institution should be situated in an Arab country, whose legislatures and courts have made clear efforts to comply with the fundamental principles of international commercial arbitration.

Due to generally inefficient legal and judiciary systems in the region, an increased interest in arbitration in commercial circles is visible. However, the proliferation of arbitration rules and centres in the Arab World is a more a sign of weakness than strength. It is far better to strengthen one or two centres in the Arab region, give them national regional and international credibility, than to open many weak and incredible ones.

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[87] Jalili, M., "Amman Arab Convention on Commercial Arbitration", 7 J. Int'l Arb. 1 March 1990, pp.139-152 at 140.

[88] Art. 40(1) of the Amman Convention.

4.11 CONCLUDING REMARKS ON CHAPTER FOUR

1) It is obvious that most Arab countries have been influenced by Islamic law principles. This is evident in that most Arab legislation does not distinguish between international and domestic public policy; they also consider any subject matter that cannot be conciliated as a non-arbitrable matter.

2) The religious and moral tenets of *Shari'a* will not raise any problem and will not provide any unfair results, especially if the arbitration is conducted faithfully according to *Shari'a* and by qualified arbitrators with a notable knowledge of *Shari'a* norms and principles. The rich legal nature of the *Shari'a* embodies many of the same moral and ethical considerations found in the West, including justice, fairness, decency, and courtesy. It could be stated that the current global trends in international commercial arbitration are not vastly different from the principles of arbitration that exist in *Shari'a* and have done so for the last fourteen centuries.

3) *Shari'a* should be recognised as a valid existing legal system. It is time to provide for compatibility with *Shari'a* in all international commercial contracts with Muslim parties and Islamic States, or their entities. The recognition, acceptance, and discussion of Islamic law is particularly important given the rising concern for religious considerations in the legal community and the resurgence of the *Shari'a* in the Arab Muslim countries. *Shari'a* as the domestic public policy of Islamic law, cannot be ignored. However, public policy under *Shari'a* may not be submitted to arbitration as they fall under the exclusive jurisdiction of a judge.

4) A distinction should be drawn between two categories of Arab States in respect of legislation. The first countries adopting *Shari'a* laws in a strict way, the second category includes countries adopting positive laws. The influence of *Shari'a* on the States of the second category varies relatively depending on the state itself.

5) It could be said that Islamic States according to *Shari'a* are allowed through their courts or even through their rulers to impose restrictions upon the jurisdiction of arbitral tribunals conducting arbitration in such countries.

6) Moreover, Arab countries have a cultural background that cannot be reconciled with foreign mould; Arab countries have so far shown a great will to accept

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[89] Preamble of the Amman Convention.

international commercial arbitration. Bearing in mind that according to Islamic legal theory, it is for *Shari'a* to determine the evolution of Muslim Society, and not for society to determine *Shari'a*. Although the Arab legislators had made every possible effort to bring Arab arbitration laws closer to their Western counterparts, a few principles and tenets of a mandatory nature remain unaffected. It could be stated that variances between Western and Arab Muslim cultures continue to play a key role in contemporary legal relations much like they did during the era of state-sponsored expropriation of Western assets. The consideration of cultural differences, including Islamic issues, is necessary to any development of an international commercial arbitration culture.

7) The earlier hostility of some Arab countries against international commercial arbitration was not due to a contradiction between arbitration and the principles of *Shari'a*, but was rather the outcome of unpleasant experience certain countries had encountered in the past.

5. CHAPTER FIVE

JURISDICTION OF ARBITRAL TRIBUNALS UNDER THE AUSPICES OF THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID)

5.1 INTRODUCTION

The International Centre for Settlement of Investment Disputes (ICSID or "the Centre")- created by the 'International Bank for Reconstruction and Development' (IBRD)- was established by the multilateral Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States in 1965 (The Convention).[1] The Centre is located in Washington, D.C., and is affiliated with the World Bank. The purpose of the ICSID Convention is to promote the flow of foreign private capital to developing States by creating an institution and mechanism *"to facilitate the settlement of disputes between States and foreign investors"* [2] which accounts for the special nature of the disputes covered by the jurisdiction of the Centre.

According to the Report, the primary goal of the ICSID arbitral regime is to *"maintain a careful balance between the investors and those of host States"*.[3] This has been asserted by an ICSID award on jurisdiction where the arbitral tribunal stated that: *"The Convention is aimed to protect, to the same extent with the same vigour the investor and the host State, not forgetting to protect the general interests of development and of developing countries."* [4]

The ICSID Convention clearly indicates that the services of ICSID are not available for disputes between private individuals, between States, or between a State and its own nationals.[5] These are not unreasonable limitations, since disputes between private individuals can be settled through domestic systems of law, or specialised

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[1] The English text of the Convention has been published in 4 ILM 524 (1965). A detailed commentary on the Convention by Christoph Schreuer has been published in instalments in the ICSID Rev.-FILJ.
[2] Report of the Executive Directors on the Convention (the Report) para.9, published in 4 IL M 524 (1965).
[3] The Report, para. 13.
[4] **Amco Asia Corp. v. Republic of Indonesia**, ICSID Award on Jurisdiction of 25th September 1983, reprinted in Yearbook Comm. Arb'n X (1985) 61, 66.
[5] Amerasinghe, C. F., "The ICSID and Development through the Multinational Corporation", Vand. J. Transnat'l L. Vol. 9 (1976) pp. 793-815 at 803.

institutions, disputes between the States and their own nationals fall outside the scope of an investment convention, and disputes between States are left to be settled by other international mechanisms, such as the ICJ or the Permanent Court of Arbitration (PCA).

The ICSID itself has a purely administrative function, namely to facilitate arbitral proceedings, it will not itself engage in arbitration activities. This will be the task of arbitral tribunals, constituted in accordance with the provisions of the Convention. The Centre maintains a list of arbitrators and all member States may appoint four persons to such list. The chairman of the Centre appoints ten persons to ensure the representation of the most important economic and legal organisations world - wide.

When a State ratifies the Convention and later enters into an arbitration agreement on the basis of the Convention, the State in this case waives its immunity of jurisdiction and thus may not rely on such immunity to avoid participating in the arbitral process. Equally, the foreign investor loses the right to request the diplomatic protection of his home State in the dispute. [6]

The Convention creates a complete autonomous jurisdictional system. Once the parties to the dispute have fulfilled the jurisdictional requirements required by the Centre, the Centre has jurisdiction which cannot be defeated by the unilateral act of one of the parties, and the Convention ensures that the undertaking of the parties to have recourse to the Centre will be effectively implemented.[7] This is the ratifying States' international treaty obligation. However, ratification of the ICSID Convention is only an expression of a Contracting State's willingness, to make use of ICSID mechanism. Ratification does not constitute an obligation to use ICSID facilities. That obligation can arise only after the Contracting State concerned has specifically agreed to submit to ICSID arbitration a specific dispute or class of disputes.

It should be noted that arbitration under ICSID differs from arbitration under other arbitral institutions, where arbitral tribunals derive their powers solely from the arbitration agreement signed by the parties, whilst in the case of ICSID arbitration, an institutional element is involved, and the arbitral tribunals, once created, derive their

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[6] Article 27 of the Convention.

[7] The Convention also provides for conciliation of investment disputes. The ICSID Secretariat registered the first request for conciliation on October 5, 1982. However, because this chapter exclusively concerned with jurisdictional issues arising in the context of ICSID arbitration, no more

powers from the Convention itself. This is evident in Article 41(1) of the ICSID Convention which provides that the ICSID tribunal will be bound primarily by the provisions in the Convention and not by provisions in any other agreement between the parties to the dispute as would be the case in arbitral proceedings administered by private arbitral institutions such as the ICC. Thus, the jurisdiction of ICSID and the competence of its tribunals are derived from the ICSID Convention.[8]

It should be emphasised that ICSID will be of great importance in the near future taking into consideration the massive number of Bilateral Investment Treaties (BITs) with provisions setting forth the consent of each State party to submit disputes with investors that qualify as nationals of the other State party to arbitration under the ICSID Convention. Comparable provisions may also be found in many multilateral treaties dealing with investment. Examples of these treaties are the North American Free Trade Agreement (NAFTA); the Colonia Investment Protocol of the Common Market of the Southern Cone, or Mercosur; the Cartagena Free Trade Agreement; and the Energy Charter Treaty (ECT) which is also a free trade agreement.

The purpose of this Chapter is to closely examine the meaning of the jurisdictional requirements set out in the ICSID Convention, by an analytical and critical examination of the relevant provisions in the ICSID Convention, in the light of ever growing ICSID jurisprudence on the jurisdictional matters. It will be observed that the practice of ICSID tribunals raises a broad range of issues concerning various aspects of jurisdiction. This study will demonstrate that the jurisdictional limitations of the ICSID Convention do not constitute a real obstacle to ICSID tribunals determining the jurisdiction of the Centre over disputes brought before them.

The chapter will focus on various jurisdictional challenges that could be raised after the submission of the dispute to the jurisdiction of the Centre. All jurisdictional requirements in this context will be examined. The nationality of ICSID' parties will be taken into consideration while examining the capacity of such parties. Two further topics will be looked at with their effects on jurisdictional matters, namely the concepts of foreign control and diplomatic protection.

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will be said about ICSID conciliation facilities unless if there any necessity to mention conciliation practice in the context of ICSID.

[8] It should be observed in this respect that the jurisdiction of the Centre is not absolute and may be waived in certain cases as mentioned in the Preamble of the Convention and Articles 25(4) and 26.

5.2 SUBMISSIONS TO THE JURISDICTION OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID)

According to the Report, the term *'jurisdiction of the Centre'* is used as a convenient expression to mean the limits within which the provisions of the Convention will apply and the facilities of the Centre will be available for arbitration proceedings.[9] On the other hand, the term *'competence'* refers to the narrower issues confronting a specific tribunal, such as its proper composition, or *lis pendens.*[10] Chapter II of the Convention devotes its (Articles 25-27) for the jurisdiction of the Centre. It is stressed that the term *'jurisdiction'* is used in the context of the ICSID Convention to express the special combination of functions of ICSID as an administrative body and the ICSID tribunal that conducts the arbitral proceedings. A precise definition of the scope of the Centre's jurisdiction was avoided in order to establish a self-sufficient and versatile arbitration system.[11]

The use of the term *'jurisdiction'* in relation to the Centre is admittedly open to objection on the clearest ground that the Centre is not in any sense a court but merely an administrative body, under whose auspices arbitral tribunals may be established and proceedings conducted.[12]

The issue of the Centre's jurisdiction has been dealt with in most of the ICSID arbitral awards which are discussed in this thesis. In this respect the Convention establishes a three-stage process for determining the jurisdiction of the Centre and settling disputes arising in this connection. In the first stage, the Convention confers upon the Secretary-General of the Centre a basic screening power to refuse to register an arbitration request, if he finds *"on the basis of the information contained in the request that the dispute is manifestly outside the jurisdiction of the Centre".*[13] A decision of the Secretary-General to refrain from registering an arbitration request is not subject to appeal or to any other review. Where doubt exists, the Secretary-General must register the request and pass any questions on to the arbitral tribunal that

[9] The Report, para.22.
[10] See Delaume G. R., "ICSID Arbitration Proceedings: Practical Aspects", 5 Pace L. Rev. (1985) 563, 577.
[11] Delaume, "ICSID Arbitration Proceedings: Practical Aspects", 5 Pace L. Rev. (1985) 575-6.
[12] Broches, A.,"The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction", Colum. J. Transnat'l L. vol. 5 [1966] pp. 263-280 at 265.
[13] Article 36 (3) of the Convention.

will settle the dispute.[14] Although there is no requirement that the Secretary - General consult with a claimant if this request does not comply with the requirements of the ICSID Convention and the Rules to permit the claimant to give additional information, the Secretary – General does so in practice.[15]

The second stage comes after the Secretary-General's decision to register an arbitration request. This decision does not settle the question of jurisdiction, and a party that contends that the Centre is lacking jurisdiction to settle the dispute may itself present its objection to the arbitral tribunal. In **AMT v. Zaire**, the Tribunal noted the registration of the request in accordance with Article 36(3) and stated: *"Nevertheless, this fact does not prevent the Tribunal from examining the competence of ICSID, because, evidently Article 36(3) does not confer upon the Secretary – General of ICSID, responsible for the registration of Request, notably as concerns verification of the competence of the Centre, the task other than a mere obligation of an extremely light control which in the execution does not, in any sense, bind the Tribunal in any way in the latter's appreciation of its own competence or lack thereof. The Tribunal will still have a number of questions to raise and also to find answers thereto."* [16] Article 41 (1) of the Convention accepts the competence-competence doctrine by providing that that: *"The Tribunal shall be the judge of its own competence"*.[17] The main purpose of Article 41 is to prevent any party from frustrating the arbitral process through a unilateral denial of the tribunal's jurisdiction. Article 41 indicates that an ICSID tribunal constituted according to the Convention's provisions is validly constituted even if the validity of the consent to arbitration is disputed and may turn out to be defective. The exclusive power of an ICSID tribunal to rule on its own jurisdiction does not mean that it may not defer to the decision of a

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[14] Broches, A., "The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States", 136 HR (1972-II) pp.337-410 at 365.

[15] Parra, A., The Screening Power of the ICSID Secretary – General, News from ICSID, Vol. 2, No. 2, Summer 1985, p. 10.

[16] Award, 21st February 1997, 36 ILM 1542 (1997).

[17] The Report points out in this respect:

"38. Article 41 reiterates the well-established principle that international tribunals are to be the judges of their own competence and Article 32 applies the same principle to Conciliation Commissions. It is to be noted in this connection that the power of the Secretary – General to refuse registration of a request for conciliation or arbitration (see paragraph 20 above) is so narrowly defined as not to encroach on the prerogative of Commissions and Tribunals to determine their own competence and, on the other hand, that registration of a request by the Secretary – General does not, of course, preclude a Commission or Tribunal from finding that the dispute is outside the jurisdiction of the Centre."

domestic court if it regards this as appropriate under the circumstances. [18] The tribunal has its independent legal basis in the Convention even if it finds that it does not have competence or if its decision on jurisdiction is eventually annulled for excess of power.[19] Decisions on jurisdiction by ICSID tribunals have the same status as ICSID awards for the purposes of their binding force for domestic courts. Although each ICSID arbitral tribunal is the judge of its own jurisdiction, the Secretary-General of ICSID undertakes a preliminary examination of the jurisdictional requirement of a dispute under the Convention. It could be observed in this respect that the Secretary-General is given such power to avoid any embarrassment to a State party which might result from the institution of proceedings against it in a dispute which was obviously outside the jurisdiction of the Centre on the basis of the information contained in the request submitted to the Centre. It is important in this respect to provide the information required by the ICSID Institution Rule (2) to demonstrate that the dispute is not *"manifestly outside the jurisdiction of the Centre"*.

The third stage comes after the rendering of the arbitral award, where the parties have the option of challenging the arbitral tribunal's decision regarding the jurisdiction of the Centre before an *ad hoc* committee that is authorised to annul the arbitral award. According to Article 52(1) (b) of the Convention, one of the most important grounds for annulling an arbital award is that the tribunal has manifestly exceeded its powers.

Article 25 of the Convention sets three main requirements for the establishment of the jurisdiction of the Centre:

1) The consent of the parties *ratione voluntatis*: this is the most basic requirement for the jurisdiction of the Centre and it has an important impact on the other requirements for the Centre's jurisdiction.

2) Jurisdiction *ratione materiae*: this requires that the dispute must be a legal dispute arising directly out of an investment transaction. Basically, it deals with subject-matter arbitrability in the context of ICSID arbitration.

3) Jurisdiction *ratione personae*: this requirement deals with capacity of the parties; one of the parties to the dispute must be a state that has acceded to the Convention, or

[18] This has been confirmed in **SSP v. Egypt**, Decision on Jurisdiction I, 27th November 1985, 3 ICSID Rep. 129.

[19] Broches, A., Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965, Explanatory Notes and Survey of its Application, 18 Yearbook Comm. Arb'n XVIII (1993) 627, 664.

any of its constituent subdivisions or agencies, and the other party must be a national of another Contracting State. This requirement deals with subjective arbitrability in the context of ICSID.

1) The Consent of the Parties *ratione voluntatis*:

The fact that a State has become a party to the Convention does not obligate that State or an investor, who is a national of another Contracting State, to make use of the facilities of the Centre. No State and no investor can be brought before an arbitral tribunal without being consented thereto, in this respect consent of the parties has been described by the Report as *"the cornerstone of the jurisdiction of the Centre"*. [20]

In this context **Delaume** has described the situation as follows;

"The scope of such consent is within the discretion of the parties. In this connection, it should be noted that ratification of the ICSID Convention is, on the part of a Contracting state, only an expression of its willingness to make use of the ICSID machinery. As such, ratification does not constitute an obligation to use that machinery. That obligation can arise only after the State concerned has specifically agreed to submit to ICSID arbitration a particular dispute or classes of disputes. In other words, the decision of a State to consent to ICSID arbitration is a matter of pure policy and it is within the sole discretion of each Contracting State to determine the type of investment disputes that it considers arbitrable in the context of ICSID".[21]

If the consent is that of a 'constituent subdivision' or of a governmental 'agency', it must be approved by the Contracting State concerned, and this approval must be documented when the request is filled with the Centre, unless the state has notified the Centre that it waives its right of approval. In this respect consent exemplifies the voluntary character of the submission to ICSID, but the terms of the consent must conform with the provisions contained in the Convention, i.e., the consent must be to the settlement of a legal dispute arising directly out of an investment and it should be

[20] The Report, para.23.

[21] Delaume, G. R., "ICSID Arbitration: Practical Considerations", 1 J. Int'l Arb. 2 pp. 101-125 (1984); at 104-105. See also Delaume, G. R., "Consent to ICSID Arbitration" in *The Changing World of International Law in the Twenty-First Century: A Tribute to the Late Kenneth R. Simmonds* (Editors: Norton, J., Anderson, M., Footer, M.) Kluwer, 1998, p. 157.

between a foreign national of a Contracting State and another Contracting State or a State enterprise.

Furthermore, while consent is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring a dispute within its jurisdiction. The jurisdiction of the Centre is limited further by reference to additional requirements, namely the nature of the dispute and the parties thereto. Consent to the jurisdiction of ICSID must be expressed unambiguously by the consenting party and in a manner, which does not require further action. ICSID tribunals should be cautious in claiming jurisdiction based on implied consent.

The necessity for consent is significant not only in the context of jurisdiction of the ICSID, but it demonstrates the essential character of the Convention itself. The paramount importance of consent is emphasised by the fact that while the other jurisdictional factors relating to the nature of the parties and the nature of the dispute may be varied by agreement between the parties, the consent requirement is constant.[22]

The parties are free to characterise the nature of their consent. According to Article 25 (1) consent to the jurisdiction of the Centre must be in writing, although no particular form is prescribed. The writing requirement is reinforced by the Institution Rules, which require that all requests for the institution of proceedings contain documentary proof of the fulfilment of this requirement. [23] It should be noted that it is wisely provided that the State's advance consent given in a treaty shall be regarded as satisfying the requirements of written consent for purposes of the ICSID Convention. As a result of NAFTA, and the ECT, this practice has been given multipartite dimensions.[24]

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[22] Sutherland, P. F., "The World Bank Convention on the Settlement of Investment Disputes", I.C.L.Q. Vol.28 July (1979), pp. 367-400 at 380.

[23] Institution Rule 2(2).

[24] Under Article 1122(1) of NAFTA, the Contracting States have given in advance their consent to arbitrate disputes under ICSID, the Additional Facility or the UNCITRAL Rules. See generally, Gordon, M., "Dispute Resolution under the North American Free Trade Agreement: A Framework to Avoid National Courts" in *The Changing World of International Law in the Twenty-First Century: A Tribute to the Late Kenneth R. Simmonds* (Editors: Norton, J., Anderson, M., Footer, M.) Kluwer, 1998, pp. 179-216. Furthermore, Article 26(3) of the ECT constitutes the host State's unconditional consent to submission of the dispute to international arbitration or conciliation in accordance with provisions of the ECT. The provisions of the ECT specify four different mechanisms of arbitration or conciliation from which the investor may select. The first mechanism in arbitration or conciliation before ICSID as specified in Article 26(4)(a)(i). The second mechanism is arbitration or conciliation before the Additional Facility for the Administration of Proceedings by ICSID as specified in Article 26(4)(a)(ii). The third mechanism arbitration by a sole arbitrator or an arbitral tribunal established under the UNCITRAL Arbitration Rules as specified in Article 26(4)(b). The fourth mechanism is

Consent once given cannot be withdrawn unilaterally; the significance of the fact that consent is irrevocable is well illustrated in **Alcoa v. Jamaica.** In this case there was an agreement between an American corporation (Alcoa) and the Jamaican government, in which the corporation agreed to establish a factory for the production of aluminium in Jamaica, and in exchange the Government agreed to grant the corporation a license for long term bauxite mining and significant tax benefits. The agreement contained an arbitration clause, which referred disputes between the parties to ICSID. Following the enactment of law that increased the tax to be imposed on the mining of bauxite, contrary to the investment agreement, the foreign corporation applied to the jurisdiction of ICSID, Jamaica refused to appear before the ICSID tribunal and argued that it had notified the Centre, prior to the submission of the arbitration request but after the signing of the investment agreement, that it had removed disputes in connection with the exploitation of natural resources from the jurisdiction of the Centre. Jamaica based its claims upon Article 25 (4) of the Convention, which permits States to notify the Centre of classes of disputes that may not be submitted to the Centre. The tribunal dismissed this argument and decided that a State may not unilaterally revoke its consent once it has been given in an investment agreement. The tribunal quoted Article 25 (1) in its award, and stated that the power of notification by virtue of Article 25(4) is valid only with respect to future undertakings, which come into effect following the date of notification to the Centre.[25]

In this respect the Convention contains detailed provisions intended to prevent frustration of proceedings as a result of a refusal of one of the parties to co-operate. This makes consent once given irrevocable, mutual consent has the effect of elevating the agreement between a Contracting State and a national of another Contracting State to have recourse to ICSID arbitration to the level of an international legal obligation, and to that extent the Convention constitutes the foreign investor as a subject of international law.[26] It should be noted that the termination of the investment

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arbitration by the Arbitration Institute of the Stockholm Chamber of Commerce as specified in Article 26(4)(c). Seee generally, Paulsson, J., "Arbitration Without Privity", in *The Energy Charter Treaty An East-West Gateway for Investment & Trade*, (Editor Thomas W. Wälde), Kluwer Law International, 1996, pp. 422-442.

[25] Schmidt, J. I., "Arbitration under the Auspices of the ICSID: Implications of the Decision on Jurisdiction in Alcoa v. Jamaica", 17 Harv. Int'l L. J. [1976] pp.90-109 at 93-94.

[26] Broches, A., The Convention on the Settlement of Investment Disputes between States and Nationals of other States, HR (1972- II) p. 352.

relationship would have no effect upon the permanence of the consent; this matches with the separability principle.[27] This is a logical consequence of the interpretation of the intention of the parties, which creates a favourable climate of foreign investment.

Consent may be given in advance with respect to a defined class of future disputes, or after the dispute has arisen in respect of a particular, existing dispute. Some of the possibilities in this regard were outlined by the Report:

"Consent of the parties must exist when the Centre is seized ...but the Convention does not otherwise specify the time at which consent should be given. Consent may be given, for example, in a clause included in an investment agreement, providing for the submission to the Centre of future disputes arising out of that agreement, or in a compromis regarding a dispute which has already arisen. Nor does the Convention require that the consent of both parties be expressed in a single instrument. Thus, a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing." [28]

In practice, in only two cases has jurisdiction been founded on consents given by both parties with regard to a particular, existing dispute.[29] In the majority of the cases submitted to the Centre, the consent of the parties has instead been recorded in an arbitration clause included in an investment agreement referring to future disputes arising out of that agreement.[30]

Both parties must have given their consent at the time when a request for arbitration is submitted to the Secretary – General of the Centre. Under Article 36(3) of the Convention the Secretary – General is given the right to refuse to register a request for arbitration if he or she finds on the basis of information supplied by the

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[27] The separability of arbitration clause is clearly demonstrated in Article 46(1) of the ICSID Additional Facility Arbitration Rules, which states: *"The Tribunal shall have the power to rule on its own competence. For the purposes of this Article, an agreement providing for arbitration under the Additional Facility shall be separable from the other terms of the contract in which it may have been included."*

[28] The Report, para. 24.

[29] **Swiss Aluminium Ltd. And Icelandic Aluminium Company Ltd. v. Iceland**, ICSID Case No. ARB/83/1; **Compañia del Dasarrola de Santa Elena S.A. v. Costa Rica**, ICSID Case No. ARB/96/1.

[30] Shihata, I.F.I., and Parra, A.R.; "The Experience of the International Centre for Settlement of Investment Disputes", ICSID Rev.-FILJ Vol. 14 No. 2 Fall 1999 pp. 299-361 at p. 302.

requesting party that the dispute is outside the jurisdiction of ICSID.[31] This screening power must be exercised with great care, since there is no appeal from the Secretary – Genaral's decision, a refusal to register a request for ICSID arbitration would be definite bar to the use of ICSID facilities.[32] However, according to Institution Rule 6(1)(b) if the decision is to refuse registration, the refusal must be reasoned. Should the reasons provided indicate a defect that can be overcome, there is nothing to prevent a party from submitting a new request.[33]

In this respect **Broches**[34] finds it difficult to understand why a tribunal should be required to declare itself without competence on the ground that the consent of both parties was expressed in the course of proceedings, even though such consent would be a valid jurisdictional basis for reinstituting the proceedings. Under no condition can the Secretary – General in his or her own capacity approach a non contracting party to urge it to submit to the jurisdiction of the Centre.[35]

Consenting to the jurisdiction of an ICSID tribunal is best seen as a two – stage process. The first stage is that both the host state and the national state of the foreign investor must become party to the ICSID Convention. The precise timing of ratification does not appear to be a crucial issue, as long as it occurs before an arbitration clause is invoked. The very first arbitration held under the auspices of ICSID was between **Holiday Inns** and **Morocco.** [36] In that case, the tribunal held that the national State of a foreign investor need only have ratified the Convention at the

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[31] This provision is not unique to the ICSID Convention, Rule 10 of the Arbitration Institute of the Stockholm Chamber of Commerce Rules of 1999 provides for an initial screening of the request for arbitration before it is communicated to the respondent, it prescribes that *"If it is obvious that the Institute lacks competence over the dispute, the claimants' request for arbitration shall be dismissed."*

[32] The possibility of providing appeal or review of the Secretary-General's decision was debated at length by the Legal Committee on Settlement of Investment disputes. It was proposed that a party dissatisfied with the Secretary-general's decision should have the right to the decision reconsidered by the Centre's Administrative Council, or a committee of the Council, or an *ad hoc* committee similar to those constituted to consider applications to annul ICSID arbitral awards. These proposals were rejected by the Committee to avoid a proliferation of ICSID committees or bodies. (History, II 769-775.

[33] Shihata, I., *The World Bank in a Changing World Selected Essays and LecturesII*, Martinus Nijhoff Publishers, 1995, p. 440.

[34] Broches, A., "The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction", Colum. J. Transnat'l L. Vol.5 [1966] pp.263-280.

[35] In this respect, the Convention differs from the practice of other international tribunals such as the ICJ, which permits a party to a dispute to file an application against a party that did not consent to the jurisdiction of the Court. The application is then put on the Register and the registrar approaches the other party; if the later declines to consent, the Court orders the removal of the application from the list but a permanent public record of the application and of the refusal to consent remain, to the possible embarrassment of the non co-operating party.

[36] Lalive, P., "The First 'World Bank' Arbitration (Holiday Inns v. Morocco)-Some Legal Problems" (1980) 51 BYIL pp. 123-161.

time of application of the arbitration clause, not at the time of its drafting. Neither the host State nor the State of the investor's nationality were parties to the Convention on the date the agreement containing the consent clause was signed. The tribunal noted the date of subsequent ratification by the two States and concluded:

"...it is on the last of those dates... that the parties have consented to submit the dispute to arbitration within the meaning of Article 25(2)(b) of the Convention. From that date neither Party could unilaterally withdraw its consent as provided in Article 25(1)".[37]

The second stage in the process of consent to the jurisdiction of an ICSID arbitral tribunal is the submission of a particular dispute by specific parties.[38] The scope of consent to ICSID is within the discretion of the parties, the decision of a State to submit such consent is a matter of policy and it is within the discretion of each Contracting State. Each Contracting State is free to determine the type of investment disputes that it considers arbitrable in the context of the Convention. According to Article 25(4) of the Convention, any Contracting State may notify ICSID, either at the time of ratification or at any time thereafter, of the class or classes of disputes that it would or would not consider arbitrable under ICSID.[39] As Article 25(4) of the Convention itself makes it clear that such notifications do not constitute consent to ICSID's jurisdiction,[40] nor do they constitute reservations to the Convention.[41] In fact, the debates leading to Article 25(4) indicates that one of the purposes of this article was to avoid reservations.[42] Therefore, such notifications are for purposes of information, they do not bind the Contracting State making the notification, which may withdraw or modify its notification at any time.

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[37]Lalive, P., "The First 'World Bank' Arbitration (Holiday Inns v. Morocco)-Some Legal Problems" (1980) 51 BYIL pp. 123-161 at 146.

[38] Toope, S. J., *Mixed International Arbitration,* Cambridge Grotius Publications Limited 1990, pp.224-225.

[39] Saudi Arabia for example has excluded investment disputes relating to oil pertaining acts of sovereignty from ICSID's jurisdiction. Jamaica in the same context has excluded disputes concerning minerals and other natural resources. Moreover, Papua – New – Guinea has specified that it will only consider submitting those disputes to the Centre, which are fundamental to the investment itself. See Doc. ICSID/8.

[40] This point has been cited in **SPP (ME) Ltd. and SPP Ltd. v. Egypt** as evidence that consent is an indispensable prerequisite to the competence of ICSID tribunal (Decision on jurisdiction II, 14 April 1988, 3 ICSID Rep. 143.

[41] The Report, 31.

[42] History, Vol. II, pp.57-8, 59, 377, 822.

As mentioned earlier, the ICSID Convention left it to the parties to determine the form of their consent, which may be expressed in an arbitration clause, in an investment agreement, or in a simple exchange of letters. Thus, in the **Amco – Asia et al. V. The Republic of Indonesia** [43] case, the arbitration clause was contained in an application submitted in 1986 by the applicant, a U.S. corporation, to the Indonesian Investment Board. The application was approved, during the process the respondent argued that this application did not constitute "express consent in writing" to the ICSID machinery. The tribunal disagreed. It held that: "*...while a consent in writing to ICSID arbitration is indispensable, since it is required by Article 25(1) of the Convention, such consent in writing is not to be expressed in a solemn, ritual and unique formulation. The investment agreement being in writing, it suffices to establish that its interpretation in good faith shows that the parties agreed to ICSID arbitration, in order for the ICSID tribunal to have jurisdiction over them...*" Moreover, ICSID clauses could be contained in Protocol of Agreement. Thus in **Klöckner v. Cameroon** [44] the ICSID clause was contained in the initial Protocol of Agreement, a turnkey contract, and an establishment agreement for the construction of a fertiliser factory.

Consent may also result from the investor's acceptance of a unilateral offer from the Contracting State invoked, where that State has already consented to ICSID arbitration in relevant provisions of its investment promotion legislation or of a bilateral treaty with the Contracting State of which the investor is a national as the case in the Investment Law of Egypt [45] and other States.[46] During the drafting of the

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[43] Excerpted in 24 ILM 1022 (1985).

[44] Case No. ARB/81 reprinted in 23 ILM 351 (1984).

[45] The jurisdiction of the Centre in the case of **SSP v. Egypt** was based on the municipal legislation of Egypt where Article 8 of the Egyptian Law No. 43 provides for referring investment disputes to ICSID. The same Article was the base of jurisdiction in the case of **Manufacturers Hanover Trust v. Egypt and General Authority for Investment and Free Zones** ICSID Case No. ARB/89/1. (Reported in 8 News from ICSID (1991). No. 2 p. 8.

[46] Article 1 of the Investment Code of Mauritania (1989) states that the State's consent to arbitration under the ICSID Convention or Additional Facility Rules extends to any dispute with a foreign investor regarding the *"interpretation or application"* of the provisions of the law, Article 30 of the Law No. 88.004 promulgating the Code on Investments in the central African Republic, May 8, 1998 sets forth the State's consent to conciliation, as well as arbitration. Under the ICSID Convention and the ICSID Additional Facility Rules (See Knieper, The New Investment Code of the Central African Republic: Profound Changes, 4 ICSID Rev.-FILJ 90 (1989). It is understood that two requests for arbitration against Albania were registered on the basis of an investment law providing for ICSID arbitration. See **Tradex Hellas S.A. v. Republic of Albania** (Case ARB/94/2) where the tribunal concluded that its jurisdiction is established on the basis of the 1993 Albanian law of Investment (the award is published in ICSID Rev.-FILJ Vol. 14 No. 1 Spring 1999 pp.197-249, and **Leaf Tobacco A. Michaelides S.A. and Greek Albania Leaf Tobacco & Co. S.A. v. Republic of Albania** (Case ARB/95/1).

Convention **Broches** pointed out that unilateral acceptance of the Centre's jurisdiction constituted an offer that could be accepted by a foreign investor and so become binding on both parties. [47] In fact, and according to the Centre itself (which complies and publishes a multi-volume Investment Laws of the World and Investment Treaties) there are now over one thousand and two hundred bilateral investment treaties concluded. The majority of which provide for ICSID arbitration, and there are several recent investment laws containing similar references. Also, with consent given in such investment laws and treaties, jurisdictional issues promise to be an important part of future developments in ICSID arbitration.[48] Jurisdiction in the first ICSID arbitration to be brought under a BIT was founded upon the 1980 Treaty between the United Kingdom and Sri Lanka. In **Asian Agricultural Products Ltd. v. The Republic of Sri Lanka** the arbitral tribunal with respect to its jurisdiction stated: *"The present case is the first instance which the Centre has been seized by an arbitration request exclusively based on a treaty provision and not in implementation of a freely negotiated arbitration agreement directly concluded between the parties among whom the disputes has arisen."* [49] However, despite references to ICSID in BITs, not all provisions containing such references created jurisdiction for the Centre. It is clear that mere references to ICSID in theses treaties do not give rise to jurisdiction over individual disputes to ICSID.[50] Some BITs in order to allow foreign investors more options have set forth the State's consent to submit disputes with foreign investors to arbitration under the ICSID Convention, the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules of 1976. This attitude would be useful where neither of the States concluding the BIT are at that time members of ICSID. Creation of jurisdiction of the Centre will depend on the precise words used in the treaty. In this context **Broches** makes a distinction between four types of arbitration provisions in BITs. The first type merely states that the dispute; *"shall, upon agreement by both parties, be submitted for arbitration by the Centre"*. Such a clause does not constitute consent to arbitration in the absence of an agreement after the dispute had arisen. The second type, which requires *"sympathetic consideration to a request for the conciliation or arbitration by the Centre"*, does not amount to consent, but according

[47] History of the Convention Vol. II pp. 274-275.
[48] Shihata, I., "Recent developments in ICSID", in News from ICSID Vol. 15, No. 1 winter 1998, at 5.
[49] Award of June 27, 1990 in Case No. ARB/87/3, Yearbook Comm. Arb'n XVII (1992) 106 at 107.
[50] Broches, A., "Bilateral investment Treaties and Arbitration of Investment Disputes" in J. Schultsz and A. J. van den Berg (eds.), *The Art of Arbitration: Liber Amicorum Pieter sanders* (1982) at 63.

to **Broches**, it may imply an *"obligation not to withhold consent unreasonably"*. The third type of clause requires the host State *" to assent to any demand on the part of the national to submit for conciliation or arbitration any dispute arising from the investment"*. Refusal to assent may amount to an international wrong but the clause itself does not create jurisdiction in ICSID. The fourth type of clause creates jurisdiction in the Centre by giving consent in anticipation of the dispute by stating for example: *" Each Contracting party hereby consents to submit to the ICSID for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States any legal disputes arising between that Contracting party concerning an investment of the latter in the territory of the former"*. Even this type of clause in the opinion of some writers does not create jurisdiction in the Centre unless there was a further agreement between the State and the foreign investor submitting disputes to the Centre.[51] Consequently, about one – half of the new cases brought to ICSID over the last several years have been on the basis of such provisions.[52] In view of the proliferation of bilateral investment treaties and other treaties containing references to ICSID, such means of resources soon might become the primary means of establishing ICSID jurisdiction and might lead even to a more rapid growth in the number of cases submitted to the Centre.[53] However, the Convention does not require that the consent of both parties be expressed in a single instrument.[54]

Another matter requiring attention is the question: does consent to ICSID arbitration establish an exclusive remedy? According to Article 26 of the Convention, consent to ICSID arbitration is deemed to be the exclusion of any other remedy unless the parties have provided otherwise. In this regard Article 26 expresses clearly the autonomous nature of ICSID arbitration.

Article 26 makes it explicit that a State can condition its consent on the prior exhaustion of local administrative or judicial remedies. Such conditions are to be found in bilateral investment treaties and individual investment agreements, and some

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[51] Sornorajah, M., "Power and Justice in Foreign Investment Arbitration", 14 J. Int'I Arb. 3 September 1997 103 at 131.
[52] ICSID 1996 Annual Report p. 4.
[53] Lamm, C. B., & Smutny, A. B., " The International Centre for Settlement of Investment Disputes: Responses to Problems and Changing Requirements", Arb. Vol. 64 No.1 [1998] Supplement S22-S28 p. S24.
[54] The Report, para.24.

national investment laws.[55] Consent to the jurisdiction of domestic courts in impairment of the exclusive remedy rule of Article 26 need not be given explicitly. The case law in this respect affirms that ICSID arbitration is an exclusive remedy for dispute resolution. In **Holiday Inns v. Morocco** [56] the tribunal essentially held that unless a state has required *"the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration (Convention Article 26), municipal proceedings will have no effect on ICSID jurisdiction"*, the municipal authorities in this case should defer to ICSID and suspend their own proceedings, not *vice versa.* The main purpose of the local remedies rule is to entitle a State to object to the intervention attempted by another state espousing its national's claim which is linked to the objecting state's legal system.[57] In the **Ambatielos** Case, the arbitrators formulated the local remedies rule as follows: *"[The remedies rule] means that the State against which an international action is brought for injuries suffered by private individuals has the right to resist such an action if the persons alleged to have been injured have not first exhausted all the remedies available to them under the municipal law of that State. The defendant State has the right to demand that full advantage shall have been taken for all local remedies..."* [58] The local remedies rule allows the respondent state the opportunity to remedy the wrong itself, rather than having to face an international claim. The rule, however, is subject to limitations and exceptions; the most notable being that there is no obligation to exhaust local remedies when they do not exist. It should be observed that if an individual claimant can receive indemnity for his loss through local remedies, there should be no reason to resort to international tribunals or his own State to make the case more complicated. In this sense the local remedies rule could serve as a relief for international tribunals of excessive litigation burdens.

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[55] Clause 12 of the 1993 ICSID Model Clauses clarifies the relationship to other remedies under these circumstances: "The consent to the jurisdiction of the Centre recorded in citation of basic clause above shall not preclude either party hereto from resorting to the following alternative remedy: identification of other type of proceeding. While such other proceeding is pending, no arbitration proceeding pursuant to the Convention shall be instituted." 4 ICSID Reports 365. An example of a national investment law is the Law Concerning investment of Yemen of 1991 where Article 70 provides that the investor may select one of several arbitration mechanisms, including ICSID, "without prejudice to the right to resort to Yemeni courts".

[56] See Lalive, P., "The First 'World Bank' Arbitration (Holiday Inns v. Morocco) – Some Legal Problems" (1980), 51 BYIL 123.

[57] Haesler, T., *The Exhaustion of Local Remedies in the Case Law of International Courts and Tribunals,* A. W. Sijthoff-Leyden, 1968, p. 69.

[58] **Ambatielos** Claim (Greece v. United Kingdom), 23 ILR 306 (Arb. Comm. 1956) p. 334.

However, the ICSID Convention does not state what effect exhausting local remedies, as a precondition to arbitration, will have on the arbitral process. It should be observed in this respect that the condition that local remedies must be exhausted before referring to ICSID arbitration might be withdrawn at any time, allowing direct access to ICSID arbitration. However, it is accepted that BITs that require prior recourse to local remedies are not, however, inconsistent with the ICSID Convention.[59] The countries that are still demanding use of local remedies are predominately Latin American. However, since the end of the Cold War and the almost world-wide acceptance of market principles in the economy, the enthusiasm of States for the local remedies rule seems to be diminishing. [60] Under Article 26 it is only *"unless otherwise stated"* that the consent will exclude other remedies. It is not certain, whether the arbitral tribunal will review the fairness of the local process if the foreign investor rejects such a process. The ICSID Convention leaves these questions unanswered for the sake of the parties flexibility in drafting their agreements. It is submitted that parties to an ICSID agreement who condition their consent on exhausting local remedies should include provisions that allow the ICSID tribunal to review the fairness of the local proceedings.

Moreover, the free consent to ICSID jurisdiction and the attendant exclusivity of its remedies can lead to only one logical conclusion. If a party to a pending ICSID arbitration attempts to circumvent the proceedings by applying for judgement from a municipal court, the court should stay its own proceedings and direct the parties to pursue ICSID remedies. This conclusion has led to a further assertion, that ICSID arbitration is a creature of international law.[61] In this respect it should be noted that in the case of any contradiction between the Convention and any national law the Convention prevails over the national law in question. However, a distinction between two categories of States; should be made. The first category is self executing States, such as the U.S., where any international treaty or convention prevails over national

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[59] Parra, A., "Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral investment Treaties and Multilateral Instruments on Investment" Vol. 12 ICSID Rev. -FILJ No.2 (1997) pp.287-364 at 333.

[60] Peter, P., "Exhaustion of Local Remedies: Ignored in most Bilateral Investment Treaties", Neth. Int'l L. Rev. 44 (1997) 233 at 243.

[61] The local remedies rule has been recognised to be a principle of customary international law. See *Norwegian Loans Case* [1957] I.C. J. Rep. 9; *Interhandel Case* [1959] I.C.J. Rep. 6. In the latter case the ICJ stated that: *" The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law."* at 27. In the same case the Court refused to determine the question of arbitrability because local remedies had not been exhausted.

laws except the Constitution. There is no need in such States to enact the international convention into a national legislation. The second category is the non-self executing States as the U.K., where international treaties must be passed to the Parliament to be enacted national laws. A leading authority on the subject of local remedies rule, **Dr Amerasinghe** [62] has addressed the specific relevance of the local remedies to ICSID arbitration. He has observed:

"Where the express waiver is given in a bilateral or multilateral treaty and after or before the dispute arises it is normally irrevocable, although it may be revoked by the agreement of the parties or with the consent of the State of the alien affected. In the case of the ICSID Convention, the express terms of the waiver permit revocation by unilateral act of the respondent or host State at any time before it submits to arbitration under the Convention, which has to be done by a separate act of consent in writing and with the agreement of the other party, after it has become a party to the Convention. Thus, while agreement to arbitrate raises a presumption that there has been an express waiver of the rule of local remedies, that presumption is rebuttable by a unilateral act by the host or respondent state, or by agreement between the alien and the State who are parties to the dispute, provided the revocation is done before or at the time that the consent to arbitration is given by the host or respondent State."

In the same context **Delaume** has noted that:

"exhaustion of local remedies is the only exception set forth in the Convention to the exclusive character of ICSID proceedings. However, the parties are free to provide additional exceptions to the rule. This may be the case in regard to conservatory measures of protection". [63]

It is notable in this respect that the provisional measures in the context of ICSID have a close link with the concept of exclusivity of ICSID and its self-contained system. Article 47 of the Convention provides: *"Except as the parties otherwise agree, the Tribunal may, if it considers the circumstances so require, recommend any*

[62] Amerasinghe, C. F., *Local Remedies in International Law*, Cambridge, Grotius Publications limited, 1990, p. 252.

provisional measures which should be taken to preserve the respective rights of either party." [64]

There has been a debate over the question whether the exclusion of local remedies prevents parties from seeking provisional measures from national courts. Some writers suggest that Article 26 should not be understood as precluding the ordering of such measures by national courts.[65] Others have stated that when parties have consented to arbitration under the ICSID Convention, Article 26 deprived them of any kind of other remedy, whether provisional or otherwise. [66] It could be stated that if ordering such measures was for assurance the execution of eventual ICSID award then such measures should be allowed, since such intervention would not affect the self-contained character of ICSID Convention. In this respect Rule 39(5) of the ICSID Rules of Procedure for Arbitration Proceedings states:

"Nothing in this Rule shall prevent the parties, provided they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to the institution of the proceeding, or during the proceeding, for the preservation of their respective rights and interests."

The French Court of Cassation in **Atlantic Triton** has stated that Article 26 of the ICSID Convention should not be construed as excluding recourse to national courts for provisional measures such as granted in this case *"to assure execution of the eventual award."* [67] It should be observed that the Convention reserves the position under traditional international law in that the Contracting States waive the exhaustion of local remedies unless otherwise stated. The foreign investor may see resort to local remedies before the institution of ICSID arbitration as a waste of time and money. Some went even further by stating that the presence of an arbitration clause excludes the need to exhaust local remedies.[68] **Schwebel** suggests in this

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[63] Delaume, *Transnational Contracts: Applicable Law and Settlement of Disputes*, (1985) Vol. II ch. 15.46.

[64] The word "recommend" was deliberately preferred to the word "prescribe", and consequently it is likely that a recommendation under Article 47 is not binding. History, Vol. 1 at 206.

[65] Gillard, Note, 114 *J.Droit Int'l (Cluent)* 127, 128 (1987).

[66] Friedland, "ICSID and Court-Ordered Provisional Remedies: An Update", 4 Arb. Int'l 161-162 (1988).

[67] Court of Cassation of France, decision of Nov. 18, 1986, 2 ICSID Rev.-FILJ (1987) 182-183.

[68] Schwebel, S. M., and Wetter, J.G., "Arbitration and Exhaustion of Local Remedies" 60 AJIL (1966) pp. 484-501 at 499.

context that when parties provide for international arbitration, they may not be presumed or assumed to contrast for or to contemplate the prior exhaustion of local remedies in a Contracting State or in the State of the nationality of one of the parties, for to require such exhaustion generally would or could mean defeating the purpose, or a purpose, of provision for international arbitration. [69] The ICJ in its opinion on the Applicability of the Obligation to Arbitrate under Section 21 of the UN Headquarters Agreement of 26 June 1947 has stated that:

"It is accepted that a provision of a treaty (or contract) prescribing the international arbitration of any dispute arising thereunder does not require, as a prerequisite for its implementation, the exhaustion of local remedies." [70]

However, the parties are free to provide by agreement for the possibility of having provisional measures ordered by a national court or other local authority, in this respect Clause 14 of the ICSID Model Clauses of 1993 could be inserted in an agreement between the parties.[71]

The Report states with regard to *"Arbitration as exclusive remedy"* that:

"32. It may be presumed that when a State and an investor agree to have recourse to arbitration, and do not reserve the right to have recourse to other remedies or require the prior exhaustion of other remedies, the intention of the parties is to have recourse to arbitration to the exclusion of any other remedy. This rule of interpretation is embodied in the first sentence of article 26. In order to make clear that it was not intended thereby to modify the rules of international law regarding the exhaustion of local remedies, the second sentence explicitly recognises the right of a state to require the prior exhaustion of local remedies".[72]

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[69] Schwebel, S. M., *Justice in International Law: Selected Writings of Stephen M. Schwebel*, Cambridge, Grotius Publications Cambridge University Press, 1994, p. 195.
[70] ICJ Reports 1988, 12 at 42-43.
[71] Clause 14 reads as follows: *"Without prejudice to the power of the Arbitral Tribunal to recommend provisional measures, either party hereto may request any judicial or other authority to order any provisional or conservatory measure, including attachment, prior to the institution of the arbitration proceeding, or during the proceeding, for the preservation of its rights and interests."* 4 ICSID Rep. 365.
[72] The Report, para.32.

The strength of the local remedies rule in the context of investment treaties was demonstrated in the **ELSI Case**[73] which involved a Friendship, Commerce and Navigation (FCN) treaty, the progenitor of the modern bilateral investment treaty. It must be borne in mind that the local remedies rule, as was stated in the **ELSI Case**, could be excluded by appropriately worded formula in investment treaties. The ICJ has observed in this case that the local remedies rule is such a fundamental principle of international law that it cannot be excluded except by express words having that effect, in other words a lack of reference in the bilateral treaty to the exhaustion of local remedies could not imply a waiver of this right for the host State. In the **ELSI** Case a Chamber of the ICJ held that an agreement in a treaty to submit to adjudication by the ICJ entered into before the dispute arose, did not by itself imply a waiver of the rule of local remedies.[74] This conclusion is supported by the fact that many bilateral investment treaties, despite providing for arbitration, still require the exhaustion of local remedies. This local remedies rule is given great importance by some writers, to the extent that it is considered to be a recognition of the judicial sovereignty of the State over issues that fall within its jurisdiction. According to this view, the local remedies rule should not be lightly disregarded, and even if the agreement in question is silent on the matter of the exhaustion of local remedies, it must be assumed that the reference to arbitration is subject to the rule.[75]

Article 26 of the Convention is believed to constitute the first conventional expression of what appears to be the trend of customary international law: that, where a State and a foreign investor agree in a contract to arbitrate disputes relating to that contract, in terms indicating that arbitration is the exclusive remedy, then that remedy only must be exhausted before an international claim may be maintained.[76] This trend is a plausible one, whose principle would appear, *prima facie*, to be sound.[77] The cumulative effect of Article 26 of the Convention is that once consent to arbitration is

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[73] Case Concerning Electronic Sicula SPA [1989] I.C.J. Rep. 15.
[74] ICJ Rep. 1988 at 42.
[75] See Sornarajah, M., *The International Law on Foreign investment*, (1994) at 271.
[76] The Court of Appeal of Rennes followed this approach by vacating an arrest of three ships on the ground that Article 26 of the Convention provides that arbitration shall be the exclusive remedy for parties to an ICSID arbitration agreement. See **Guinea v. Atlantic Triton Co.**, reported in 24 ILM (1985) 340.
[77] Schwebel, S., & Wetter, J. G., "Arbitration and the Exhaustion of Local Remedies", 60 AJIL (1966) pp. 484-501 at 485.

given, a respondent may not proceed in a national court to challenge a claimant's right to have recourse to arbitration. [78]

In practice the exclusion of other remedies is not absolute. The foreign investor may be obligated to exhaust certain local remedies which are required in the enforcement of the arbitration agreement or the arbitral award itself, and these remedies may not be only those of the Contracting State. Where the arbitral process is not governed by the municipal law of the Contracting state, then no local remedies of the Contracting State need be exhausted, arbitration in this case being the sole remedy which the foreign investor must exhaust. While arbitral proceedings between the Contracting State and the foreign investor are in process, an international claim based on violation of the rights of the foreign investor is not maintainable by the State of which the foreign investor is a national, on the ground that the arbitral remedy has not been exhausted, it being equivalent to local remedies for this purpose. Article 26 in this respect exemplifies the autonomous character of ICSID arbitration.

The exclusive remedy rule of Article 26 does not permit turning to domestic remedies instead of ICSID unless this has been otherwise stated between the parties. **Delaume** has explained the role of local courts in this case:

"...If a court in a Contracting State becomes aware of the fact that a claim before it may call for adjudication under ICSID, the court should refer the parties to ICSID to seek a ruling on the subject. Until such a ruling is made, if the possibility exists that the claim may fall within the jurisdiction of ICSID, the court must stay the proceedings pending proper determination of the issue by ICSID. Only in the event of an adverse decision by ICSID, which, for example, may result from the Secretary – General's refusal to register a request for arbitration or from a decision of an ICSID arbitral tribunal that the issue involved does not fall within its competence, may the court in question resume hearing the case, assuming, of course, that it has an independent basis for entertaining jurisdiction over the parties and the subject matter of the dispute". [79]

Consent to ICSID arbitration is considered to be a complete waiver of sovereignty in favour of the jurisdiction of the Centre. In this respect, a distinction

[78] Broches, A., "A Guide for Users of the ICSID Convention", 8 News from ICSID, No. 1 (1991) p. 8.
[79] Delaume, G., "ICSID Arbitration in Practice", 2 Int'l Tax & Bus. Law. (1984) 58 at 68.

should be made between two aspects of sovereign immunity: first immunity from jurisdiction or suit, and second, immunity from execution. It is important to note that while a State cannot assert sovereign immunity against the jurisdiction of the Centre or the enforcement of ICSID awards [80] in the municipal courts of a Contracting State, Article 55 of the Convention provides that nothing in the Convention *"shall be construed as derogating from the law in force in any contracting State relating to immunity of that State or any foreign State from execution"*. The ICSID Convention therefore surrenders measures of execution to domestic rules of immunity.[81] The ICSID Convention does not exclude the application of municipal law theories of sovereign immunity that will commonly frustrate the execution of ICSID awards rendered against States.[82] In the U.S. for example, ICSID awards are treated as State courts awards, in this context U. S. courts have shown a spirit of fairness toward all parties concerned, which is not always present in other countries, at least to the same extent with regard to Article 55 of the Convention, the relevant provisions are of the Foreign Sovereign Immunities Act (FSIA). Furthermore, the provisions of the FAA, including those implementing the New York Convention, as well as those of the ICSID Convention, effectively give States and private parties an equal opportunity to pursue the recognition of arbitral awards.[83] Refusal by the State to comply with an ICSID award would deprive it of credibility in the international community, and would expose that State to various sanctions mentioned in the Convention, such as diplomatic protection, and bringing an international claim against it.

With respect to the role of the State in arbitral process it could be stated generally as **Claude Reymond** [84] notes, that:

"State sovereignty not only fails to constitute an obstacle to the conclusion of arbitration agreements, but indeed, constitutes the very foundation of such

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[80] The term ICSID awards is used for convenience only, since there are no awards rendered by the Centre itself, all awards are rendered by arbitral tribunals conducting their proceedings under the auspices of ICSID.

[81] Tupman, W., M., "Case Studies in the Jurisdiction of the International Centre for Settlement of Investment Disputes", 35 ICLQ [1986] pp. 813-838 at 815.

[82] Toope, *Mixed International Arbitration* pp. 248-249.

[83] Delaume, G. R., "Recognition and Enforcement of State Contract Awards in the United States: A Restatement", AJIL Vol. 91 [1997] p. 476 at 488.

[84] Reymonds, C., "*Souverainete De l' Etat et participation a le'arbitrage*", Rev. Arb. (1985, No.4) (Fr.) pp.543-584.

agreements in the same way that the autonomous will 'autonomic de volonte' principle does for corporations and public persons".

The practice shows us that the commitment of sovereign State to arbitrate a certain dispute should be respected by this State, and any agreement which contains such a commitment should be interpreted in a good faith showing respect to the will of the parties. The tribunal in the **Amco** arbitration, in its answer to the respondent's contention that the consent given by a sovereign State to an arbitration convention amounting to a limitation of its sovereignty must be construed restrictively explaining that any convention should be construed in good faith by respecting the intentions of both parties stated;

"In the first place, like any other conventions, a convention to arbitrate is not to be construed restrictively, nor as matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and to respect the common will of the parties: such a method of interpretation is but the application of the fundamental principle pacta sunt servanda, a principle common, indeed, to all systems of internal law and to international law. Moreover, and this is again a general principle of law, any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of their commitments the parties may considered as having reasonably and legitimately envisaged".[85]

The issue as to whether or not consent to ICSID proceedings constitutes a waiver of jurisdictional immunity before municipal courts may not arise until the recognition and enforcement stage; or in situations where, pursuant to Article 26, the parties agree that their consent to ICSID arbitration does not preclude them from remedies obtainable in the domestic courts.[86] In this respect the municipal courts will act as a support mechanism for the conduct of arbitration proceedings. The effectiveness of the ICSID arbitration process is guaranteed by the assistance of municipal courts. Article 26 of the Convention precludes municipal courts in Contracting States from assuming jurisdiction over a dispute subject to ICSID clauses,

[85] 23 ILM 351, 359 (1984).
[86] Chukwumerjie, O., "ICSID Arbitration and Sovereign Immunity", 18-19 Anglo-Am. L. R. (1989-90) pp. 166-182 at 176.

but, on the other hand, it does not effect the jurisdiction of such courts to recognise, enforce and seize enforcement of ICSID arbitral awards. The parties have the opportunity, at the time they consent to submit disputes to ICSID arbitration, to provide expressly that the Contracting State involved waives immunity from execution in connection with enforcement of an ICSID award.[87] For the purpose of the Convention therefore, consent to ICSID arbitration constitutes an irrevocable waiver of immunity from suit by the State involved. Thus bound, that State is barred from invoking any plea of immunity that would frustrate the proceedings or the recognition of the resulting award. Within the framework of the Convention, immunity from suit is eradicated at the outset.

ICSID arbitration is insulated in all Contracting States against any form of judicial intervention, and issues of immunity from suit are, thus, eliminated at the outset. The situation is different in regard to issues of immunity from execution, since the ICSID Convention does not purport to derogate from the immunity rules obtained in the Contracting States. Even in that case, however, issues of immunity from execution may take a particular coloration when they are viewed not in isolation, but in the overall context of the ICSID machinery.[88] Under the ICSID Convention the Contracting State party to the dispute is deemed to have waived any defence, including immunity from suit, which would interfere with the ICSID machinery and would be inconsistent with the consent given by that State to ICSID arbitration. However, the decision of the Court of Cassation in **SOABI v. Senegal** serves as a reminder that if the parties wish to avoid the pitfalls of immunity rules that may interfere with the execution of ICSID awards. They would be well-advised to address the matter directly by means of appropriate waivers of immunity.[89]

Redfern & Hunter have described the role of municipal courts in supporting the arbitration proceedings in the following statement:

"Arbitral tribunals have no sovereign powers equivalent to those of the State with which to enforce their awards; nor do they always have adequate powers to ensure

[87] In this respect ICSID Model Clause 15 could be inserted in the arbitration agreement it states that: *"The Host State hereby waives any right of sovereign immunity as to it and its property in respect of the enforcement and execution of any award rendered by an Arbitral tribunal constituted pursuant to this agreement."* (4 ICSID Rep. at 366).

[88] Delaume, G. R., "Judicial Decisions Related to Sovereign Immunity and Transnational Arbitration", 2 ICSID Rev.-FILJ (1987) pp 403-423 at 404.

the proper and efficient conduct of arbitration proceedings. For this reason, it has long been recognised that the effectiveness of the arbitral process is dependent upon a defined relationship, often described as a 'partnership' between arbitration and the courts".[90]

Hence, **Luzzato** points out that the issue of sovereign immunity is a very sensitive one in international law, and it would have been difficult for the drafters of the ICSID Convention to exclude its application at the stage of enforcement.[91]

It could be said that the ICSID Convention was really successful in restricting the interference of municipal courts in the ICSID arbitration proceedings. In contrast to the New York Convention once an ICSID award is not annulled, there is no ground for refusing to recognise and enforce the award, not even on the basis of public policy considerations. As **Toope** notes, ICSID arbitral regime was designed to discourage, as far as possible, the intervention of municipal courts in the process of arbitration[92], in this respect **Carbonneau** observes that:

"ICSID arbitration, unless the parties provide otherwise, is completely independent of any national legal provisions and free from the possibility of national court intervention or supervision. ICSID Rules are designed to be comprehensive and detailed enough to function as a self-sufficient body of arbitral regulations, leaving problems arising under the proceedings to be resolved by the arbitral tribunal".[93]

Finally, there are some special consequences of a valid consent under the ICSID Convention, which should be noted:

Firstly, the consent will remain valid even though the main agreement in which it is found is not legally valid, or has been legally terminated; this leads us to the fact that ICSID Convention has accepted the severability doctrine. Accordingly, a finding by an ICSID tribunal in the exercise of its 'competence-competence', that the

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[89] See Delaume, G. R., "Contractual Waivers of Sovereign Immunity: Some Practical Considerations", 5 ICSID Rev.-FILJ No. 2 [1990] pp. 232-255.
[90] Redfern, A., & Hunter, M., *International Commercial Arbitration*, 2nd ed., London, Sweet & Maxwell, 1991, London, p. 231.
[91] Luzzato, "International Commercial Arbitration and the Municipal Laws of States", (1977) 157 HR 9, 99.
[92] Toope, *Mixed International Arbitration*, Cambridge, 1990, p. 234.
[93] Carbonneau, "Arbitral Adjudication: A Comparative Assessment of Its Remedies and Substantive Status in Transnatoional Commerce" (1984) 19 Tex. Int'l L. J. 33, 45.

investment agreement is invalid or no longer in force, does not *ipso jure* entail the invalidity of the arbitration clause.

Secondly, neither party can revoke its consent once given, not even if one or both of the States concerned should denounce the Convention and thus cease to be a contracting State.

Thirdly, Consent to ICSID arbitration is deemed to be an agreement excluding all other remedies, unless an express reservation is made. Both parties to the dispute submitted to ICSID must respect the exclusive character of ICSID's remedies. [94]

Fourthly, the date of the consent tends to fix the mutual rights and obligations of the parties with respect to proceedings under the Convention.

Fifthly, once its consent has been given a State party cannot plead jurisdictional immunity before an ICSID tribunal, but at the same time the Convention does not eliminate the obstacle of sovereign immunity to the enforcement of arbitral awards against Contracting States. However, consent to ICSID arbitration and to the binding character of resulting awards constitutes an irrevocable waiver of immunity from suit.

Sixthly, consent to the jurisdiction of the Centre implies a submission to all relevant rules of the Convention, including the obligation to abide by an award, and to the Centre's rules and obligations.

Seventhly, generally, it can be stated that broad arbitration clauses are to be specific or narrow clauses that may result in the exclusion of certain matters from the scope of the clause and lead to future objection to the jurisdiction of the arbitral tribunal. In the case of ICSID, it should be recalled that States have sometimes argued that consent to arbitration should be construed restrictively, since it constitutes a limitation to the State's sovereignty.

2) Jurisdiction *ratione materiae*:

According to Article 25(1) of the Convention, for ICSID to have jurisdiction

[94] The Convention expressly provides in Article 27 that when an investor and a Contracting State have agreed to submit investment disputes to ICSID arbitration, the State whose national is party to the agreement may not espouse the case of its national, give that national diplomatic protection, or bring an international claim in respect of the dispute. The effect of this Article is limited to the period starting from the date of consent to the redention of an award. If, after an award is rendered, the Contracting State party to the dispute refuse to comply with the award, the right of diplomatic protection will revive, this issue will be discussed further later in this chapter.

ratione materiae over a dispute, not only should the dispute exist between a Contracting State (or any constituent subdivision or agency) and a national of another Contracting State, but the dispute must satisfy as mentioned earlier, the following conditions:

a) it must be a legal dispute; and

b) it must arise directly out of an investment.

a) The dispute must be a legal dispute:

The ICJ has defined disputes in one of the cases as being a *'disagreement on a question of law or of fact'*.[95] In another case the ICJ has defined a dispute as *"a disagreement on a point of law or fact, a conflict of legal views or interests between parties"*.[96] The disagreement between the parties must have some practical relevance to their relationship and must not be theoretical. The dispute must relate to clearly identified issues, go beyond grieve, and must be susceptible of being stated in terms of a concrete claim. The concept of a 'legal dispute' is often used in academic writing and international public law in order to distinguish these disputes from political conflicts. Many BITs restrict the arrangements for settling disputes between the host State and the investor to legal disputes. In some cases only disputes related to obligations of the host State are taken into account. An attempt was made in the U. S. BITs to distinguish between legal and non-legal disputes, where three elements were distinguished: (a) interpretation or application of the investment contract; (b) interpretation or application of the investment authorisation; (c) breach of a right under the BIT.[97] However, there is no consensus amongst writers on international law as to the test by which one can distinguish those disputes, which can be brought before the international courts and those which cannot. A legal dispute is one, which relates to the existence of a legal obligation or the determination of its scope or nature. It follows that generally, an arbitral tribunal examines legal disputes in order to determine the compensation payable following the breach of a legal obligation, as was the case in **AGIP v. Congo** [98], where the parties agreed on the legal duty to pay compensation for the expropriation. That the Government had not yet done so was sufficient ground for the tribunal to hear the claim. Furthermore, in **FEDAX N. V. v.**

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[95] ICJ: *Mavromatis Case*, Decision No. 2, 1924, A Series, at 11.

[96] Case concerning *East Timor*, I.C.J. Rep. 1995, 89, 99.

[97] Peters, P., "Dispute Settlement Arrangements in Investment Disputes", Neth. Y. B. Int'l L. Vol. XXII (1991) 91, at 132.

[98] Award, 30 November 1979, 1 ICSID Rep. 317.

Venezuela the Tribunal was satisfied that a dispute of a legal nature was involved in that case, as it concerned the different views of the parties on questions of legal rights and obligations in connection with the existence of an investment, and the effects this may have on the issue of an obligation to honour certain debt instruments.[99]

It also has been stated, by the ICJ that the mere existence of conflicting interests between the parties, the mere institution of proceedings, or a purely theoretical disagreement on a point of law or fact, is not conclusion of the existence of a dispute.[100]

With regard to the ICSID Convention and during the deliberations of the Board of Governors of the World Bank to adopt the Convention, the Executive Directors of the World Bank explained to the Board that the term 'legal dispute' was used to distinguish between conflicts of rights and 'mere' conflicts of interests.[101] The purpose of this sentence in the Report was to dispel the fears of some developing countries that investors might request a host State to consent to conciliation proceedings with respect to disputes in which the investor did not even claim that any of his legal rights had been impaired.[102] **Delaume**, on the other hand, considers that the term 'legal dispute' should be understood in the sense that: *"...conflicts of interests between the parties such as those involving the desirability of renegotiating the entire agreement or certain of its terms...or factual disputes, such as those concerning accounting or fact-finding investigations...would normally fall outside the scope of the convention."* [103] In this respect it could be noted that the limitation of jurisdiction of the Centre to include only legal disputes was modelled after similar limitations found in Article 36 of the Status of the ICJ.

It is difficult to understand why it was so important to require the dispute to be a legal one, because the provisions of the Convention empower the arbitral tribunal set up under the Convention to decide a dispute solely in accordance with the rules of law as have been agreed between the parties; as Article 42(1) states. A party cannot be prevented from making any claim, but the arbitral tribunal can only settle his legal right to it after due process. If the party does make a claim without a legal basis and the claim is an expression of mere interests, his claim must be dismissed by the

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[99] 37 ILM 1378 (1998) at 1381.
[100] *South West Africa Cases* (P.O). 1962 I.C.J. Rep. at 328.
[101] The Report, para.26.
[102] Broches, A., "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States", HR (1972 –II) pp.337-409 at 363.

arbitral tribunal under the terms of the Convention. As often is the case, many disputes involve claims, some of which have a legal basis, and others do not. This statement is absolutely correct if the tribunal is ought to settle the dispute by arbitration, but what happens if the tribunal is given the mandate by the parties to decide their dispute by *amiable compositeur*, or by applying equity? In this case this statement is in contrast with the parties' choice, since the Convention provides not only for arbitration, but also for conciliation. Conciliation is not judicial but is directed towards an agreed settlement. Article 34 of the Convention provides that it is the conciliation commission's duty to *"clarify the issues in dispute between the parties and to endeavour to bring about agreement between them upon mutually acceptable terms"*. In contrast, Article 42 states that an arbitral tribunal shall decide a dispute in accordance with *"rules of law"*. But even in arbitral proceedings, Article 42(3) gives the parties the possibility to authorise the tribunal *"to decide ex aequo et bono"* rather than in accordance with legal rules encouraging the parties to file claims, which are not founded on purely legal bases. It may, therefore, seem odd that Article 25 requires that the dispute must be a legal dispute even where the parties wish to utilise conciliation, or agree that the arbitral tribunal may decide in accordance with equitable principles.[104] The limitation to legal disputes would seem to bar access to conciliation under ICSID Convention for the purpose of facilitating re-negotiation.

It has been stated that any dispute that requires the application of rules of law and calls for legal solutions should be considered to be a legal one. This point has been stated by an ICSID tribunal in **AMT v. ZAIRE** where the arbitral tribunal was considering the objections to its competence:

"Is it a legal dispute? 'The jurisdiction of the Centre shall extend to any legal dispute..' In this regard, there does not seem to be the least discrepancy between the parties, and the tribunal is of the view that there is clearly a legal dispute and not a dispute of another nature, the dispute requiring the application of rules of law and calling for legal solutions".[105]

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[103] Delaume, G.R., "ICSID Arbitration: Practical Considerations", 1 J. Int'l Arb. 2 101 (1984) at 117.
[104] In the same context **Toope** argues that it would be difficult to assume that an ICSID tribunal would dismiss jurisdiction for the lack of a legal dispute, since submission of the dispute is dependent upon the consent of both parties. (See Toope, S. J., Mixed *International Arbitration*, Cambridge, Grotius publications Limited, p. 229.)
[105] **American Manufacturing & Trading v. Republic of Zaire** published in Yearbook Comm. Arb'n XXII (1997) at.64.

The practical problem with the requirement that the dispute shall be a legal dispute, is that the Secretary – General is forced to make a scrutiny of the claims to ensure that the dispute under consideration is within the jurisdiction of the Centre. That needs hard work, and could lead to dispute with Contracting States. In any event, the standard of scrutiny required from the Secretary – General is not high, because all he or she has to do is to examine whether the dispute is 'manifestly outside the jurisdiction of the Centre' [106] or not. The Secretary – General can do no more than pass the request for arbitration, because the competence to decide on jurisdictional issues lies with the arbitral tribunal and not with the Secretary – General of ICSID. [107] It is clear that, where there is any doubt, the Secretary – General will leave it to the ICSID tribunal to decide on jurisdictional issues. The Legal Committee did not accept a first draft of the Convention, which called for the request to contain *prima facie* evidence that the dispute fell within the jurisdiction, because it seemed to give the Secretary – General "the character of a jurisdictional authority".[108] In essence, the Secretary – General is to have a screening power only and not a jurisdictional one, because there was no support for any review of or appeal from the Secretary – General's decision which the exercise of a judicial power would have entailed. He or she cannot send back the request for more information, and he or she cannot use any information supplied by the respondent on his receipt of the request to make the determination whether to register the request or not, even if the respondent challenges the jurisdiction of ICSID before registration of the request.[109]

It would appear that the request should disclose a legal dispute as being in existence at the time the request is filed. Hence, it would be inadequate that the requirements for the existence of such dispute come to be satisfied after the request was filed. In such a case the arbitral tribunal would, nevertheless, be compelled to declare itself without jurisdiction, because there was no legal dispute. Therefore, the

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[106] Article 36(3) of the Convention. There was only one request, which was refused by the Secretary – General on the ground that the dispute was *"manifestly outside the jurisdiction"* of ICSID, and it was based on the fact that there was no agreement to arbitrate. See **Asian Express International (S) PTE Ltd. v. Greater Colombo Economic Commission**, News from ICSID Vol. 2 No. 2 Summer 1985 at 10.

[107] In **Alcoa Minerals of Jamaica v. Government of Jamaica** (Case No. ARB/74/2) Yearbook Comm. Arb'n IIII (1979) p. 206 the ICSID tribunal examined the question of subject matter *proprio motu* and held that the case involved a legal dispute. The case concerned the violation of a contractual clause in a mining concession not to introduce taxes and the Government of Jamaica refused to participate in the proceedings.

[108] History of the Convention, ICSID, Washington, D.C. 1970, Vol. II, at 774.

Centre advises parties to use a model clause in their investment agreements to the effect that "for purposes of Article 25(1) of the Convention any dispute is a legal dispute". [110] This will help the Secretary – General in the burden of scrutiny.

Some doubts could be raised about the Centre's jurisdiction over disputes about rights and obligations under international law, on the grounds that individuals were not subjects of international law. According to **Amerasinghe**, [111] the purpose of the Convention is to provide effective machinery for the settlement of international investment disputes; it would have defeated this objective if disputes about rights and obligations under international law had been excluded from the Centre's jurisdiction. In the absence of specific exclusion from the concept of legal disputes, it would appear that such disputes are within the Centre's jurisdiction since disputes as to rights and obligations under international law are within this jurisdiction.

This point raises a discussion on the ICSID's international status, whether it is an international body, a mixed one, or not international at all. ICSID as a subdivision of IBRD is an international organ indeed. As **Chukwumerije** suggests the Centre is international in three senses. First, the Centre was created by an international treaty. Second, arbitral tribunals established under the Centre are independent of municipal legal systems. Unlike domestic arbitral tribunals, ICSID tribunals are not subject to the law of the place of arbitration: the arbitration proceedings are conducted in accordance with the provisions of the Convention and the ICSID Arbitration Rules. The procedure for the challenge and annulment of ICSID awards is stipulated in the Convention, and municipal laws play no role in this regard. It is instructive to note that the Convention does not permit ICSID awards to be challenged as grounds of public policy. Finally, the Convention permits ICSID tribunals to apply international law in certain situations as mentioned in Article 42 of the Convention.[112] The more controversial question is whether a specific ICSID arbitral tribunal, is an international tribunal and whether or not the obligations imposed by such a tribunal are international legal obligations. If such a tribunal is held to be international, the

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[109] Nathan, K. V. S. K.,"Submissions to the International Centre for Settlement of Investment Disputes in Breach of the Convention", 12 J. Int'l. Arb. 1 (1995) 34-35.

[110] See ICSID's Model Clauses IV. Doc. ICSID/S/Rev.1 (July 7, 1981): *"The parties hereto agree that, for the purposes of article 25(1) of the Convention, [the dispute] (any dispute in relation to or arising out of the Agreement) is a legal dispute arising directly out of an investment".*

[111] Amerasinghe, C. F., "The jurisdiction of the International Centre for the Settlement of Investment disputes", 19 Ind. J. Int'l L. (1979) at 175.

[112] Chukwumrije, O., "International Law and Article 42 of the ICSID Convention", 14 J. Int. Arb. 3 (1997) pp. 79-101 at pp. 80-81.

practical ramifications are enormous. The applicable substantive law, one would assume, would be international law. The foreign private party would in some manner be transmuted into an international person that could ask for a ruling that the state party was in breach of an investment agreement and responsible for any expropriation. This second claim would be extra-contractual and would sound directly in international law.[113] In this context Article 64 of the Convention could be considered as evidence of the suggestion that the Convention is an international law document since it states that disputes arising between Contracting States on the interpretation and application of the Convention which is not settled by negotiation shall be referred to the ICJ. Of course, this does not mean that the *lex fori* of the tribunals created under the Convention is international law.[114]

The fact that one of the parties to ICSID disputes is a non-signatory to the Convention has raised the proposition that ICSID arbitration is not a pure international arbitration. As **Lew** observes: *"ICSID arbitration is not a pure international arbitration: rather it falls somewhere between public and private international arbitration. It has for this reason been variously described as quasi-international or semi-international arbitration."* [115] However, it could be said, as **Delaume** suggests, that the ICSID Convention establish a "self contained" system, which operates "in total independence from domestic law" even the *lex loci arbitri.*

However, it is generally accepted that the requirement of the dispute to have a legal nature limits the scope of ICSID arbitration to a review of the respective rights and obligations of the parties as set forth in an investment agreement, in light of the laws and regulations relevant to that agreement. Examples of 'legal disputes' are those concerning non- performance, including cases of excuses based on *force majeure* and similar events, the violation of 'stabilisation' clauses, the interpretation of the agreement, including expropriation or nationalisation, and related issues of compensation. In contrast, disputes regarding conflicts of interests between the parties, such as those involving the desirability of renegotiating the entire agreement, or certain of its terms, would normally fell outside the scope of the Convention. The

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[113] Toope, S. J., *Mixed International Arbitration*, Cambridge, Grotius Publications, 1990, p. 233.

[114] During the drafting of the Convention there was considerable concern as to what extent the ICJ would be charged with the Convention's interpretation in matters of jurisdiction in specific cases. (See Broches, A., The Convention on the Settlement of Investment Disputes between Nationals of Other States, 136 HR 331, 368-9 (1972-II).

[115] Lew, J., *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, New York, Oceana Publications, 1978, p. 21.

Convention also does not apply to factual disputes, such as those concerning accounting or fact - finding investigations.[116]

(b) the dispute must arise directly out of a foreign investment:[117]

The concept of investment is paramount to the Convention. However, the Convention does not offer any definition or even description of this basic term. The relevant paragraph of the Report states that the term *'investment'* was left undefined in the Convention *"given the essential requirement of consent of the parties, and the mechanism through which Contracting States can make known in advance; if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4))."* [118] Therefore, the Convention offers no explanation of the concept of investment. It is left to the parties what kinds of investments they wish to bring to ICSID. The drafters of the Convention attempted to avoid a definition that was either too narrow or too broad.[119] The First draft of the Convention defined investment in the following terms: *"(i) "investment" means any contribution of money or other assets of economic value for an indefinite period or, if the period be defined, for not less than five years."* [120] Furthermore, an attempted definition by the Secretariat was presented in the following terms: *"The term "investment" means the acquisition of: (i) property rights or contractual rights (including rights under a concession) for the establishment or in the conduct of an industrial, commercial, agricultural, financial or service enterprise, (ii) participation or shares in any such enterprise; or (iii) financial obligations of a public or private entity other than obligations arising out of short-term banking or credit facilities."*[121] However, it could be held that foreign investment involves the transfer of tangible or intangible assets from one country to another for the purpose of use in that country to generate wealth under the total or partial control of the owner of the assets.[122]

It has been stated in **FEDAX N. V. v. Venezuela** that

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[116] Delaume, G. R., "ICSID Arbitration: Practical Considerations", 1 J. Int. Arb. 2 at 117 (1984).
[117] Foreign direct investment should be distinguished from portfolio investment where there is a movement of money for the purpose of buying shares in a company formed or functioning in another country, the distinguishing element being that, in portfolio investment, there is a division between management and control of the company, and the share ownership in it.
[118] The Report, para.27.
[119] Delaume, G. R., "Convention on the Settlement of Investment Disputes between States and nationals of Other States", 1 Int'l L. (1966) 64,70.
[120] History, Vol. I, p. 116.
[121] History, vol. II p. 844.
[122] Sornarajah, M., *The International Law of Foreign Investment*, Cambridge, Grotius publications Cambridge University Press, 1994, p. 4.

"the term "directly" (Article 25) relates in this Article to the "dispute" and not to the "investment". It follows that jurisdiction can exist even in respect of investments that are not direct, so long as the dispute arises directly from such transaction. This interpretation is also consistent with the broad reach that the term "investment" must be given in light of the negotiating history of the Convention". [123]

The tribunal in **Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic** agreed with the above interpretation adopted in the **Fadex** case; stating that an investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment.[124]

It has been suggested that the requirement that the dispute must arise out of an investment may be merged into the requirement of consent to jurisdiction of the Centre. Presumably, the parties' agreement that a dispute is an 'investment dispute' will be given great weight in any determination of the Centre's jurisdiction, although it would not be controlling.[125]

The only possible indication of an objective meaning that can be gleaned from the Convention is contained in the preamble's first sentence, which mentions the *"need for international co–operation for economic development and the role of private international investment therein"*. This declared purpose of the Convention is confirmed by the Report, which points out that the Convention was *"promoted by the desire to strengthen the partnership between countries in the case of economic development"*.[126] Therefore, it may be argued that the Convention's object and purpose require that there must be some positive impact on development.

However, in the light of the rule of interpretation laid down in Article 31.1 of the 1969 Vienna Convention on the Law of Treaties, the term 'investment' should be interpreted *"in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."* [127]

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[123] 37 ILM 1378, at para. 24 (1998).
[124] ICSID Rev.-FILJ Vol. 14 No. 1 Spring 1999 pp. 251-283 at 275.
[125] Broches, A., "The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction", 5 Colum. J.Transnat'l L. [1966] pp.263-280 at 286.
[126] The Report, para.9.
[127] Convention on the Law of Treaties, 1969, Article 31.1, 8 ILM (1969) 679. This point has been raised by the Republic of Venezuela in **FEDAX N. V. v. Venezuela** Case No. ARB/96/3 reported in 37 ILM 1378 (1998).

However, many countries explain and define the term 'investment' in their own investment promotion legislation; as Article 3 of the Jordanian Investment Promotion Law and Regulations,[128] in most cases a broad definition being given. Definitions in investment promotion treaties may be more useful since the objective of such treaties is the promotion of investment, which is also the primary objective of the Convention. On the other hand, it must be remembered that the particular parties to an investment promotion treaty may have their own ideas about what should be included in, or excluded from, the class of investments to be protected or promoted.[129] Almost all BITs contain definitions of the term investment. In modern BITs, these definitions have very similar features, which may be described in a generalised way.[130] Generally speaking, BITs take advantage of the flexibility provided under the ICSID Convention, and are framed in broad terms such as *"every kind of asset"* and *"claims to contractual performance"*. For example, Article 1(6) of the 1994 ECT defines investment very widely; the acquisition and emergence of any 'right' lawfully acquired in the process of investment, with an economic value results in investment. Meanwhile Articles 609 and 1139 of NAFTA provide a very wide definition of the term 'investment'.[131] To qualify as 'investment' under the NAFTA,

there must be a direct, actual, but not necessarily consummated investment in an enterprise by way of the establishment or the taking of equity, debt or loan or an other legal instrument evidencing an interest that allows the investor to share in the income or profits.[132] Furthermore, the Organisation for Economic Co-operation and Development (OECD), adopts a broader view of the term 'investment'. On the other hand, some BITs adopt what is in effect a relatively narrow definition of 'investment' and hence of concerned investment disputes.[133] Though investments are defined as widely as possible, many BITs confine the benefits of the treaty only to investments approved by the State party to the treaty. This limitation at once creates two categories of foreign investment originating from the same State party; one which is protected by

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[128] http://www.kinghussein.gov.jo/documents.html

[129] Amerasinghe, C. F., "The Jurisdiction of the International Centre for the Settlement of Investment Disputes", 19 Ind. J. Int'l L. [1979] pp.166-227 at 180.

[130] Delaume, g. R., "ICSID and Bilateral Investment Treaties", News from ICSID, Vol. 2/1 (1985) pp. 12,19.

[131] (1993) 32 ILM p. 647.

[132] Herman, L.L., "NAFTA and the ECT: Divergent Approaches with a Core of Harmony", Journal of Energy & Natural Resources Law Vol. 15 No. 2 [1997] pp.129-154 at p.146.

[133] Dolzer, R., & Stevens, M., *Bilateral Investment Treaties*, Martinus Nijhoff publishers (1995) p. 145.

the treaty because it is approved by the State party which receives the investment, and one, which is not because it lacks such approval.[134]

The question, which addresses itself here is, is there any contradiction in limiting the jurisdiction of the Centre to those disputes that arise directly out of an investment, and in leaving the definition of the term 'investment' to different interpretations? It could be observed that the term 'investment' was undefined in the Convention for several reasons. First, by defining the term *'investment'* the scope of the Convention would be limited and this would lead to unnecessary jurisdictional obstacles. Second, the parties are free to define the term 'investment' in their investment agreements or even the State can define the term in its own legislation individually. Third, it is quite difficult to reach a comprehensive definition of the term in the light of modern technology and business booming. Fourth, not defining the term 'investment' complies with the consensual character of the Convention which leaves a large measure of discretion to the parties, and since the consent of both parties is required in order to submit a dispute to the Centre, it is clear that a definition is not required.[135]

This deliberate lack of definition of the term 'investment', has enabled the Convention to accommodate both traditional types of investment, in the form of capital contributions, and new types of investment, including service contracts and the transfer of technology.[136]

In its Annual Report for 1984, the Secretariat strongly defended the decision not to include a definition of *'investment'* within the Convention:

"The absence of a clear definition of the notion of investment in the ICSID Convention, deplored by certain commentators has, in effect, been a wise precaution. It permits the Convention to be adapted to changes in the form of co-operation between investors and host states and to respond to the needs of ICSID users".[137]

However, the parties to the disputes do not enjoy unlimited freedom: the Centre's services would not be available for just any dispute that the parties may wish

[134] Sornarajah, *The International Law on Foreign Investment*, Cambridge, Grotius Publications Cambridge University Press, 1994, pp. 243-44.
[135] Sutherland, P. F., "The World Bank Convention on the Settlement of Investment Disputes", 28 I.C.L.Q. (1979) pp.367-400.
[136] Delaume, "ICSID Arbitration: Practical Considerations", 1 J. Int'l. Arb.2 (1984) pp.101-125 at 117.

to submit to the jurisdiction of the Centre. It was always clear that ordinary commercial transactions would not be covered by the Centre's jurisdiction, no matter how far – reaching the parties' consent might be. The Centre's practice and the terms of the Additional Facility support this interpretation. With regard to the practice, it does not appear from the available practice that the parties to agreements containing ICSID clauses generally find it necessary to specify that the intended transaction is indeed an investment or to describe the features that would make this characterisation plausible.

So far, the question whether the dispute in question, arises from an investment has not created problems. In **Amco v. Indonesia** the argument that there was no *"investment dispute"*, dealt with in the annulment proceedings, was not based on the nature of the underlying transaction but rather on the nature of the host State's act terminating the investment relationship.

In a number of cases, ICSID tribunals examined the question of the existence of an investment on their motion but always reached affirmative results. In **Kaiser Bauxite v. Jamaica** [138] the tribunal noted the essential requirement of consent and concluded that the consent of the parties should be entitled to a great weight in any determination of the Centre's jurisdiction. In dealing with the requirement of having an investment dispute, the tribunal stated: *"Moreover, it seems clear to the Tribunal that a case like the present, in which a mining company has invested substantial amounts in a foreign State in reliance upon an agreement with the State, is among those contemplated by the Convention."* [139] It could be observed from the previous statement that the tribunal has relied on a broad and ordinary definition of the term investment. In another case **LETCO v. Liberia** [140] the tribunal examined all requirements for jurisdiction under Article 25(1) and after examining the activities under the Concession Agreement in question, it concluded:

"There is, therefore, no doubt that, based on the concession Agreement, amounts paid out to develop the concession, as well as other undertakings, this legal dispute has arisen directly from an "investment" as that term is used in the Convention." [141]

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[137] ICSID Annual Report (1984) at 9.
[138] 1 ICSID Rep. 303
[139] Decision on jurisdiction, 6 July 1975, 1 ICSID Reports 303.
[140] 2 ICSID Rep. 349.
[141] Decision on Jurisdiction, 24 October 1984, 2 ICSID Rep. 350.

In **SOABI v. Senegal** [142] the question of the existence of an investment dispute arose indirectly. The jurisdictional dispute turned on the ambit of an ICSID clause contained in one of several agreements between the parties. The parties had concluded two main agreements, the first dealing with the construction of 15,000 low – income housing units over five years, the second dealing with the establishment of a prefabricated industrial concrete plant. Only the second of two agreements contained an ICSID arbitration clause. The Claimant argued successfully that the ICSID clause encompassed the entire operation, including the first agreement on the construction of housing. One of the Government's arguments in support of its contention that the ICSID clause related only to the second agreement, and not being the entire operation, was that there was another contract between the parties, the General Undertaking, providing for settlement by domestic courts. The tribunal rejected this argument, noting that the dispute settlement provision in the General Undertaking related to a very particular type of dispute for a limited period of time only. He added: *"The tribunal observes, finally, that the object of the General Undertaking was limited to construction of a building to be paid for by the client as work progressed, and could thus not be said to be an agreement concerning investment. Disputes arising thereunder could therefore not be investment disputes as required by Article 25 of the ICSID Convention".* [143]

With respect to the Additional Facility terms, the terms are designed to open access to the Centre in certain situations where the Convention's jurisdictional requirements have not been met. This does not mean that proceedings under the *Additional Facility are open for any type* of dispute. An agreement providing for arbitration proceedings under the Additional Facility requires the approval of the Secretary – General.[144] The Secretary – General may give his approval only if he is satisfied that the underlying transaction has features that distinguish it from an ordinary commercial transaction, the transaction must be more than an ordinary transaction.

The Administrative Council attempted to describe the concept of a transaction that is distinguishable from ordinary commercial transactions:

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[142] 2 ICSID Rep. 166.
[143] Award, 25 February 1988, 2 ICSID Reports 219.
[144] Article 4(1) Additional Facility Rules, 1 ICSID Rep. 219.

"Economic transactions which (a) may or may not, depending on their terms, be regarded by the parties as investments for the purpose of the Convention, which (b) involve long term relationships or the commitment of substantial resources on the part of either party, and which (c) are of special importance to the economy of the State party, can be clearly distinguished from ordinary commercial transactions. Examples of such transactions may be found in various forms of industrial co – operation agreements and major civil works contracts".[145]

Where the parties to an agreement have doubts as to whether their transaction qualifies as an investment, and hence whether a submission clause would therefore be appropriate, they have several possibilities. They may make a special statement in their contract designating their project as an investment, possibly adding a brief description of those features that support this characterisation; they may include Clause 3 of the ICSID Model Clauses in the consent agreement, which reads as follows: *"It is thereby stipulated that the transaction to which this agreement relates is an investment."* They may draft a combined jurisdictional clause submitting to the Additional Facility in case the competent ICSID organs determine that the jurisdictional requirements of the Convention have not been met. Finally, they may combine such an ICSID Additional Facility clause with a clause referring to another arbitral institution, such as the ICC, which does not have the requirement that the dispute shall arise out of an investment. The 1994 Energy Charter Treaty, Article 26(4), provides that the investor can choose arbitration from: the ICSID Convention, the ICSID based 'Additional Facility' (if either the home or host State of the investor is not a member of the ICSID Convention), sole arbitrator, an arbitral tribunal constituted according to UNCITRAL Arbitration Rules of 1976, or Stockholm Chamber of Commerce Arbitration Rules. It might be useful to give examples of disputes concerning traditional and modern types of investment. With regard to traditional types of investment one might mention the following transactions:

1) the exploitation of natural resources, such as bauxite mining as in **Alcoa v. Jamaica** or oil exploitation as in **LETCO v. Liberia**.

[145] Comment (iii) to Article 4 of the Additional Facility Rules, 1 ICSID Rep. 220.

2) Industrial investments regarding the production of fibers for exports as in **Gardella v. Ivory Coast** [146] or of plastice bottles for domestic consumption as in **Benvennti & Bonfant v. Congo** [147].

3) Tourism development in the form of the construction of hotels as in **Holiday Inns v. Morocco,**

4) Urban development in the form of housing construction as in **SOABI v. Senegal.**

With regard to modern types of investments, these include; the construction of a chemical plant, as in **Klöckner v. Cameron**, a contract for the conversion of vessels into fishing vessels and the training of crews, as in **Atlantic Triton v. Guinea**, [148] and technical and licensing agreements for the manufacturing of weapons and military equipment as in **Colt Industries v. Korea.**[149] *Furthermore*, the jurisdiction of the Centre has been extended to cover a dispute arising out of a purely management contract, in the **SEDITEX** case.[150] With regard to loan agreements, it could be stated that the term 'investment' covers loan matters. Since investment under the Convention means primarily and mainly the flow of international capital to the host State, loan agreements in this sense should be seen as instruments for economic development. Under NAFTA Article 1139 (d) considers a loan to an enterprise as an investment: *"(i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a state enterprise"*. However, the exclusion of State-enterprise debt from the definition of investment means that such advances are not specifically guaranteed national and most-favoured-nation treatment and other standards accorded to loans made to non-State enterprise. Other modes of investment in State enterprises-such as equity ownership and royalty entitlements- do qualify as investments under the NAFTA, as do all types of debt in non-State enterprises, which are entitled to the full range of protection provided in both Chapter 11 and Chapter 6. It could be stated that the general trend in recent years to encourage the settlement of international or investment disputes by way of arbitration has made some progress in

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[146] Case ARB/74/1.
[147] Case ARB/77/2.
[148] Case ARB/84/1.
[149] Case ARB/84/2.
[150] **La SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m. b. H. v. Government of the Democratic Republic of Madagascar**, ICSID Case No. CONC/82/1, unreported.

the area of international loans.[151] However, it cannot be said that all lenders have shown equal eagerness to follow the general trend and substitute arbitration in their respective loan contracts for other means of settlement.[152] It has been stated in the same context by **E. Lauterpacht** that: *"If wide use is not made of the ICSID machinery it is probably because some classes of large investors (notably, banks) seem reluctant to include suitable arbitration provisions in loan agreements."* [153] It could be stated that all objections which have been raised against the suitability of international arbitration as a mean to solve disputes arising out of international loan agreements have shown themselves to be unfounded. Accordingly, one should no longer be suspicious of international arbitration when looking for an appropriate forum for the resolution of such disputes. To the contrary, international arbitral tribunals should definitely come into consideration as decision-makers in this field.[154]

In **Holiday Inns v. Morocco** for example, the Tribunal found that the Centre's jurisdiction existed over loan contracts that had their origin in agreements separate from the investment; although the respondent argued that these constituted different transactions, the Tribunal emphasised *"the general unity of an investment operation"*.[155] It is also most relevant to note the conclusion of **Delaume** in this respect:

"However, the characterisation of transnational loans as 'investment' has not raised difficulty. The reason is twofold. First, it has been assumed from the origin of the Convention that loans, or more precisely those of a certain duration as opposed to rapidly concluded commercial financial facilities, were included in the concept of 'investment'".[156]

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[151] For example, Section 10.04 of the 1985 General Conditions of the IBRD provides for arbitration in loan agreements. It provides that any controversy between the parties to the loan Agreement or the Guarantee Agreement that has not been settled by agreement of the parties *"shall be submitted to arbitration by an Arbitral Tribunal as hereinafter provided."* Further example of dispute settlement provisions in loan agreements is Section 8.04 of the standard terms and Conditions (STCS) for public loans in March 1994 of the European Bank for Reconstruction and Development (EBRD).

[152] Delaume, G. R., *Legal Aspects of International Lending and Economic Development Financing*, New York, Oceana Publications Inc., 1967, pp. 179-180.

[153] Lauterpacht, E., *Aspects of the Administration of International Justice*, 1991, p.69.

[154] Sandrock, O., " Is International Arbitration Inept to Solve Disputes Arising Out of International Loan Agreements?", 11 J. Int'l Arb. 3 Sep. 1994 33-60 at 56.

[155] Case No. ARB/72/1, Lalive, P. "The First 'World Bank' Arbitration (Holiday Inns v. Morocco)-Some Legal Problems", BYIL Vol. 51, 1980, 123.

In another case an ICSID tribunal in **FEDAX N. V. v. Venezuela** has considered loans as investment within ICSID's jurisdiction, it stated that since promissory notes are evidence of a loan and a rather typical financial and credit instrument, there is nothing to prevent their purchase from qualifying as an investment under the Convention in the circumstances of a particular case such as this. [157]

Finally, an interesting question should be dealt with is what an ICSID tribunal would do if faced with a case of a transaction that is considered to be manifestly not an investment but which had been registered by the Secretary – General. If neither party raised an objection, could the tribunal deny jurisdiction on its own motion?

First of all the fact of registration is no more than acknowledgement on the part of the Secretary – General that the dispute is in his or her opinion not manifestly outside the jurisdiction of the Centre; therefore this registration does not constitute a definite base of jurisdiction of the Centre. The tribunal, which is the judge of its own competence according to Article 41(1) of the Convention, is free to decide whether the dispute is within the jurisdiction of the Centre and to rule on its own jurisdiction. If the respondent does not appear, the tribunal is required by virtue of the Arbitration Rule 42(4) to decide the issue of jurisdiction. The important question is whether with both parties appearing and neither objecting to characterisation of the dispute as one arising directly out of an investment, the tribunal may take the task on itself of determining whether the characterisation is justified. It should be pointed out that the objective meaning of the Convention might constitute a limitation on the freedom of the parties to waive the jurisdictional requirements of the Convention.

3) Jurisdiction *ratione personae:*

In addition to the previous jurisdictional requirements to ICSID arbitration, both disputants must qualify as proper parties. Article 25(1) requires that the dispute must be *"between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by the State) and a national of another state.."* While the requirement appears straightforward, determining whether or not it has been fulfilled has thus far been an important task for several ICSID arbitral tribunals especially when it comes to multinational corporations.

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[156] Delaume, G. R., "ICSID and the Transnational Financial Commuinty", ICSID Rev.-FILJ Vol. 1 (1986) pp. 237-256 at 242.
[157] 37 ILM 1378 (1998) at 1384.

(i) The State Party or its Constituent Subdivisions and Agencies:

For the purpose of the ICSID Convention there would only be two categories of eligible State parties to a dispute which is arbitrable under the auspices of the Centre: one, a Contracting State, and two, a party designated to the Centre by the Contracting State as a constituent subdivision or agency of that State. We now turn to examine the two categories of State Parties:

a) The Contracting State:

The concept of a Contracting State is clearly determined by the Convention. Although the ICSID Convention does not contain a provision explicitly defining a Contracting State, such a provision is found in Article 1 of the Additional Facility Rules, which defines a Contracting State as one for which the ICSID Convention has entered into force. This definition is consistent with the use of the term in the context of the Convention. Contracting States are States that have ratified, accepted and approved the ICSID Convention.[158] According to Article 68 of the Convention, they become Contracting States thirty days after the deposit of their instrument of ratification, acceptance, or approval. This means that it is insufficient that a State, instead of signing, ratifying and depositing its instrument of ratification, merely authorises the *ad hoc* submission to the Centre of a particular dispute to which it is a party. However, there is no indication in the Convention as to how a foreign investor dealing with a governmental official is to make sure that the consent given by that official is that of the government and in the name of the State.

A written notice whereby the State denounces the Convention as set forth in Article 71 may terminate the status as a Contracting State. Such a denunciation is subject to two limitations: it only becomes effective after six months, and it does not effect consent to the jurisdiction of the Centre given prior to the denunciation. According to Article 72 such denunciation shall not affect the rights or obligations under this Convention of that State, or of any of its constituent subdivisions, or agencies, or of any national of that State, arising out of consent to the jurisdiction of the Centre.

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[158] As of April 3, 1998 a 144 Stated have signed the Convention. Of these, 129 States have deposited their instruments of ratification.

Participation in the Convention of the State party to proceedings is an absolute requirement, which is not subject to waiver by agreement between the parties. Therefore, *ad hoc* use of the Convention procedures by States that have not ratified the ICSID Convention is not possible.[159] It has been stated that by ratifying the Washington Convention and agreeing to ICSID arbitration, the state is exercising its sovereignty, and not alienating it.[160]Although the ratification by State parties of the ICSID Convention is clearly an international agreement, the submission of a particular dispute to arbitration is essentially a private act made 'irrevocable' only by the express words of the governing treaty, which is concluded by States, not by private parties.[161] It is obvious under Article 25(4) of the Convention that States, when ratifying the Convention, are free to limit their consent to the jurisdiction of the Centre to certain classes of investment disputes or to exclude other classes.

However, the crucial date for determining the status of a State party is not the date on which a consent clause submitting to ICSID's jurisdiction is produced in writing or embodied in another instrument, but the date on which the Secretary – General considers the request for arbitration. Therefore, it is possible for a non-Contracting State to be a party to a contingent agreement calling for submission of a dispute to ICSID's jurisdiction, and this agreement would take effect automatically as soon as the State becomes a Contracting State.[162]

The Secretary – General, in the exercise of his or her screening powers under Articles 28(3) and 36(3) of the Convention, will determine whether the condition that the State party is a Contracting State is fulfilled. If the State party named in the request is not a Contracting State, he or she will refuse to register the request, since the dispute is manifestly outside the jurisdiction of the Centre. Under Regulation 20 of the Administrative and financial regulations of the Centre, the Secretary – General is required to maintain a list of Contracting states indicating for each, the date on which the Convention came into force in respect to the State, any designation of constituent subdivision or agencies, and any notification that no approval by the State is required for the consent by such an entity to submit to the jurisdiction of the Centre.

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[159] Szas, "The Investment Disputes Convention-Opportunities and Pitfalls (How to Submit Disputes to ICSID)", 5 J. L. & Econ. Dev. 23 (1970) at 30.
[160] Tupman, "Case Studies in the jurisdiction of the International Centre for Settlement of Investment Disputes", 35 I.C.L.Q. (1986) pp.813-838 at 813.
[161] See, Toope, S. J., *Mixed International Arbitration*, Cambridge Grotious Publications Limited 1990.
[162] Amerasinghe, C. F., "The ICSID and Development Through the Multinational Cooperation", 9 Vand. J. Transnat'l L. (1976) p.739 at 805.

Different ICSID tribunals have examined the status of Contracting State. In **Holiday Inns v. Morocco** neither the host State Morocco, nor Switzerland, the State of which the investor was a national, had ratified the Convention when the agreement containing consent to the Centre's jurisdiction was made. Both States ratified the Convention, subsequently, before the institution of the proceedings. Before the tribunal Morocco argued that the claimant's consent was defective because Switzerland was not a Contracting State at the time of consent, Morocco contended that consent to the jurisdiction of the Centre could be given only by the national of a State that had previously ratified the Convention. Morocco did not press the argument that, by the same logic, it will not be a Contracting State for the purpose of the Convention.[163] The tribunal noted the dates at which the two States became Contracting States, and concluded that it was on the last of those dates that the consent to submit the dispute to arbitration became effective and irrevocable. The tribunal was of the opinion that:

"The Convention allows parties to subordinate the entry into force of an arbitration clause to the subsequent fulfilment of certain conditions, such as the adherence of the States concerned to the Convention, or the incorporation of the company envisaged by the agreement. On this assumption, it is the date when the conditions are definitely satisfied, as regards one of the parties involved, which constitutes in the sense of the convention the date of consent by the party...the only reasonable interpretation of the Basic Agreement is to hold that the parties when signing the Agreement envisaged that all necessary conditions for jurisdiction of the Centre would be fulfilled and their consent would at that time become effective." [164]

The fact that the critical date for the status of a Contracting State is not the time of consent but the institution of proceedings is confirmed by subsequent cases. In **Amco v. Indonesia** consent to ICSID arbitration was given in July 1968, but Indonesia only became a party to the Convention on 28 October 1968. The tribunal simply stated that jurisdiction over the Respondent could not be denied since it was a Contracting

[163] Lalive, "The First World Bank Arbitration (Holiday Inns v. Morocco) Some Legal Problems", 51 BYIL 123 (1980) at 142/3.
[164] Lalive, "The First World Bank Arbitration (Holiday Inns v. Morocco) Some Legal Problems", 51 BYIL 123 (1980) at 146.

State.[165] Similarly, in **LETCO v. Liberia** the submission to ICSID's jurisdiction was made on 12 May 1970 but Liberia only became a party to the Convention on 16 July 1970.This was not raised as a problem, and the tribunal simply noted that: *"since Liberia has signed and ratified the Convention, it qualifies as a 'Contracting State' ".*[166] The requirement that the State party to ICSID proceedings must be a Contracting state was contained in all drafts leading to what eventually became Article 25 of the Convention.[167] A State wishing to use the Centre must first assent to the Convention by ratifying it. This step does not entail any particular obligation to use ICSID arbitration that rather makes the Host State a Contracting state. The obligation to use ICSID arbitration occurs only when the *"State concerned has specifically agreed to submit to ICSID arbitration a particular dispute or classes of disputes."* [168]

In practice BITs contain ICSID clauses even before one or both of the parties to the treaty become Contracting States to the Convention. In some cases, BITs simply contain ICSID consent clauses without reference to the fact that one of the parties to the treaty is not a Contracting State of the Convention.[169]Nevertheless, it is clear that such clauses have no effect until both parties to the bilateral investment treaty are Contracting States of the Convention. Some bilateral investment treaties combine a contingent submission to jurisdiction under the Convention, in anticipation of its ratification, by both parties with a submission to the Additional Facility Rules mentioned earlier. Even under the Additional Facility, arbitration can be undertaken only if either the host State or the investor's State of nationality is a Contracting State. The 1993 ICSID Model Clauses offer a combined contingent submission to settlement under the Convention, and to settlement under the Additional Facility in clause 20, if the jurisdictional requirement *ratione personae* of Article 25 of the Convention remain unfulfilled at the time when any proceedings is instituted.[170]

An interesting question could be raised in the case of signing an investment agreement between an intergovernmental organisation composed of Contracting States and private investors. Does the Centre have jurisdiction to compel the

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[165] Decision on Jurisdiction, 25 September 1983, 1 ICSID Rep. 403.
[166] Decision on Jurisdiction, 244 October 1984, 2 ICSID Rep. 351.
[167] History, Vol. I, p. 110-118.
[168] Delaume, "The Convention for Settlement of Investment Disputes Between States and Nationals of Other States", in 2 Transnational Cont., booklet 17 at 5 (1990).
[169] Ziade, N.G., "ICSID and Arab Countries" News from ICSID Vol.512 (1988) p. 7.
[170] 4 ICSID Rep. 368/9.

Contracting State to submit the dispute to the Centre? It could be said in this respect, the Centre would not have jurisdiction over the Contracting States, since the intergovernmental organisation has a separate legal personality from that of its member States, and any agreement between an international organisation and a private investor does not generally create an independent obligation of the member States in front of the investor.

a) **Constituent Subdivisions and Agencies of Contracting States:**

In many States investment agreements are entered into not by the government itself, but by quasi-governmental institutions, such as statutory corporations and public companies, that exercise public functions but are legally distinct from the State. Also, in some States it is not the central government, but a smaller entity such as a province, or even municipality, that deals with foreign investors. Article 25(1) was designed to cover a very wide range of entities with consideration of national peculiarities. It could be said that 'constituent subdivisions' cover any territorial entity below the level of the state itself. With regard to agencies, what matters are the functions performed by such agencies, i.e. if the agency performs public functions on behalf of the Contracting State or one of its constituent subdivisions, that are considered to be agencies in the meaning of the Convention. It is not important whether the agency is a corporation, government – owned or has its separate legal personality. Article 25(1) and (3) of the Convention establishes two special jurisdictional requirements:

"(a) the subdivision or agency must be designated by the host state to the Centre; and
(b) the consent given by the subdivision or agency must be either
(i) specifically approved by the state; or
(ii) one as to which the State has notified the Centre that no such approval is required".

However, a precise definition of the term *"constituent subdivision or agency"* is of subordinate importance, since the Convention requires that the Contracting State must designate any such entity to the Centre.[171] Designation would create a very

[171] The idea of designation arose from a British proposal to create some machinery for enabling investors to identify political subdivisions or agencies (History, Vol. II. at 667, 702).

strong presumption that the entity in question is indeed a "constituent subdivision or agency". Designation would almost certainly preclude the Contracting State or the designated entity from arguing that the Convention's requirements were not fulfilled because the entity was not a "constituent subdivision or agency".[172] Determining the existence of a "constituent subdivision or agency" is left for the jurisdiction of ICSID arbitral tribunals; it falls within the tribunal's power to rule on matters of jurisdiction and competence in accordance with Articles 32 and 41 of the Convention. The Convention does not permit the Contracting State to define an entity for the purposes of jurisdiction. The final determination will be made on an objective basis by the arbitral tribunal.[173] The definition of a company in BITs goes against the traditional notions in international law.

The Contracting State to the Centre must designate the constituent subdivision or agency. The primary purpose of this requirement is to give an investor an assurance that he is dealing with an authorised entity. Investors are given advance notice of which they may deal with. Curiously, the Convention does not tell investors who may commit the State directly.[174] If a person or office is part of the normal state bureaucracy, the investor may rely on an ostensible power to commit the State. Sometimes designation could help any State to exercise control over semi – autonomous entities in their agreements with foreign investors. Designation in this respect must not be taken as conclusive evidence that the entity is qualified as a party to an ICSID dispute, but at the same time failure of designation to the Centre should therefore not defeat jurisdiction if the entity is concerned to be a constituent subdivision or agency of the host State. According to Articles 32(1) and 41(1) which give tribunals the power to be judges of their own competence, ICSID tribunals have the power to decide whether a designated agency or subdivision falls within the term of the Convention. In **Cable Television of Nevis Ltd v. The Federation of St. Christopher (St. Kitts) and Nevis** [175] the ICSID tribunal has denied its own jurisdiction, since it decided that the proper party to the investment agreement NIA is

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[172] Broches, The Convention on the Settlement of Investment Disputes between Statedsand Nationals of Other States, 136 HR 331, (1972- II) p. 354.
[173] Sutherland, "The World Bank Convention on the Settlement of Investment disputes", 28 I.C.L.Q. [1979] pp. 367-400.
[174] Szasz, "The Investment Disputes Convention – Opportunities and Pitfalls (How to submit Disputes to ICSID)", 5 J. L. & Econ. Dev. 23 (1970) at 39.
[175] ICSID Case No. ARB/95/2 reported in ICSID Rev.-FILJ Vol. 13 No.1 Spring [1998] pp. 327-394.

a constituent subdivision or agency of the Federation, which has not been designated as such to ICSID as required by Article 25(1) of the Convention.

The Contracting State must notify the designation to the Centre. Therefore, designation in an agreement with the investor does not suffice this requirement. No entity concerned in this meaning can designate itself. There must be some communication by the host State to the Centre.[176] The designation is not subject to any formal requirements. It needs not to be in a separate document. The notification to the Centre of an agreement with the investor containing the designation is enough. It has been argued that where there is a clear intention to designate, it does not matter how, and through whom, the communication reaches the Centre.[177] In this respect **Broches** goes too far by stating that failure of a formal designation should not defeat jurisdiction if the entity concerned is proved to be a constituent subdivision or agency of a Contracting Sate.[178] With regard to designations or notifications in respect of particular subdivisions or agencies **Szasz** questioned: *"whether such a designation needs to be separately communicated to the Centre, or whether it can merely be incorporated into some instrument concluded between the investor and the government. In view of the wording of the Convention, the former would appear to be the more cautious course".*[179]

It could be observed that designation can take any form under two conditions: designation should be clear and brought to the Centre's knowledge. In this respect any legislation by the Contracting State that clearly includes a designation in the sense of Article 25 should suffice this requirement. This would also apply to a designation in a bilateral investment treaty.

To avoid any jurisdictional difficulties, it is advisable that the Contracting State sends a clear and separate notification of the designation to the Centre. If no designation has been made at the time the agreement is made, the State or the entity may give an undertaking that the designation will be made in due course.[180] In both

[176] Amerasinghe, "The Jurisdiction of the International Centre for the Settlement of Investment Disputes", 19 Ind. J. Int'l L. 166 (1979) pp. 187-9.
[177] Amerasinghe, "The Jurisdiction of the International Centre for the Settlement of Investment Disputes", 19 Ind. J. Int'l L. 166 (1979) p. 188.
[178] Broches, "Convention on the Settlement of Investment of Investment Disputes between States and Nationals of Other States of 1965", Explanatory Notes and Survey of its Application, Yearbook Comm. Arb'n XVIII (1993) 627 at 642.
[179] Szasz, "A Practical Guide to the Convention on Settlement of Investment Disputes", 1 Cornell J. Int'l L. p. 18 (1986).
[180] Delaume, G.R., "ICSID Arbitration in Practice", 2 Int'l Bus. L. (1984) 58, 62.

cases, the entity's consent to ICSID's jurisdiction becomes effective once it has actually been made.

With regard to the time of designation, there is no particular time for the designation of an entity to the Centre, it is desirable that the designation be made by the time the entity signs an agreement that contains a consent clause with the investor, but it is possible for the designation to be made after consent is given, or even after a dispute has arisen. In order to institute proceedings against a constituent subdivision or agency, the designation must have been made. Therefore, the day on which the request for arbitration is made is normally the critical date for the existence of a designation. Rule 2 of the Institution Rules provides:

"(1) The request shall:

(a) designate precisely each party to the dispute of each;

(b) state, if one of the parties is a constituent subdivision or agency of a Contracting state, that it has been designated to the Centre by that State pursuant to Article 25(1) of the Convention..".[181]

A request for arbitration against a constituent subdivision or agency that is unsupported by evidence of a designation of that entity may be rejected by the Secretary – General as manifestly outside the jurisdiction of the Centre by virtue of this screening power under Articles 28(3) and 36(3). The same would apply where such a constituent subdivision or agency wishes to initiate proceedings against an investor.[182]

The proceedings in **Klöckner v. Cameroon** show us that in exceptional circumstances a designation may even be made after the institution of proceedings before the arbitral tribunal.[183] There is no indication in this case that the Secretary – General refused to register the arbitration request for lack of designation at the time. The Convention is silent on whether a designation, once made, may be subsequently withdrawn by the State that has made it. In this case the unilateral withdrawal of designation should be precluded.

According to Article 25(3) consent by constituent subdivision or agency of a contracting state shall require the approval of that State, unless that State notifies the Centre that no such approval is required. Once the designation and approval of

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[181] 1 ICSID Rep. 153.

[182] Amerasinghe, "Jurisdiction *Ratione Personae* under the Convention on the Settlement of Investment Disputes between States and nationals of Other States", 47 BYIL 227 (1974/75) pp. 234-236.

consent by a constituent subdivision or agency has been given, such approval is protected by the prohibition to withdraw consent as stated in Article 25(1). As **Amerasinghe** observes:

"It would seem that the approval would become binding upon the Contracting State and therefore irrevocable when one or both of the parties to the investment agreement have acted or changed their positions in reliance on it. This would mean that certainly an agreement between the investor and the subdivision or agency to submit disputes to the Centre's jurisdiction would render the approval irrevocable in respect of that agreement".[184]

The Convention does not require any particular form for the approval of consent, and it need not be formally communicated to the Centre. In practice, it is desirable that the foreign investor and the constituent subdivision or agency are informed of the approval so that they may rely on the validity of consent.[185] Approval may be contained in a separate agreement between the host State and the investor. Or the approval may be contained in an instrument of designation communicated to the Centre.

The Convention does not specify at what time the host State's approval of consent, given by one of its constituent subdivisions or agencies must be obtained. Approval may be given in advance of consent or thereafter. But it should be kept in mind that the validity of consent by a constituent subdivision or agency depends on its approval. Under Article 25 of the Convention, a constituent subdivision of a federal state, for instance a state of the U.S., could enter into an arbitration agreement with a foreign investor with the approval of the federal government. If it did so, and lost the case, the award could be enforced in any state within the federal state, as if it were the decision of a court in that state.

Finally, an interesting question should be raised: what happens if a subdivision or an agency, consented to the jurisdiction of the Centre, has been abolished by a

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[183] Award, 21 October 1983, 2 ICSID Rep. 9.
[184] Amerasinghe, "The Jurisdiction of the International Centre for the Settlement of Investment Disputes", 19 Ind. J. Int'l L. 166 (1979) at 190-191.
[185] Amerasinghe, "Submission to the Jurisdiction of the International Centre for Settlement of Investment Disputes", 5 J. Mar. L. & Com. 211 (1973/74) at 224.

Contracting State? Does the Contracting State succeed to the rights and obligations of the subdivision or agency?

In answering this question a positive approach should be applied to enable succession rather than prevent it, especially when the State terminates the existence of its subdivision or agency to escape from certain obligations. Under the Convention the question of succession must be treated separately from that of succession to the investment, a municipal law or international law depending on the law applicable to the dispute may govern the agreement, since the succession of such agreement. On the other hand, succession to the consent agreement will depend on international law, since ICSID is an international body and creates jurisdiction in an international tribunal.

(ii) A national of another Contracting State:

One of the main purposes of the Convention is to provide for dispute settlement between states and foreign investors. In this respect it could be said that the Convention treats individuals as subjects of international law. The foreign investor must be a national of a Contracting State; this fact may not be agreed between parties. The investor must be a private foreign national. It may either be a natural or a juridical person.[186] The private character of the investor is essential. States acting as investors have no access to ICSID in that capacity. The idea to give party status also to investor States was raised during the Convention's preparation but was not approved.[187] But what happens if the investor is wholly or partly government-controlled company? The situation is not so clear, since there are many companies, which combine capital from private and governmental sources. However, if wholly government owned companies are accepted as investors for the purpose of the Convention, this could defeat the main goals of the Convention in stressing the importance of the role of private international investment. On the other hand, if the investing company is partly owned by government, this depends on the size of governmental contribution; if the government has the majority it should be treated as a wholly owned company, otherwise there

[186] Although in practice there have only been few ICSID cases in which natural persons were parties. They are; **Ghaith R. Pharaon v. Tunisia** (ICSID ARB/86/1) where the parties reached a settlement and the case discontinued, **Philippe Gruslin v. Government of Malaysia** (News from ICSID Vol. 8/1 p. 5 1991), **Antonie Goetz et al v. Republic of Burundi, Robert Azinian et al v. United Mexican States, Emilio Agustín Maffezini v. Kingdom of Spain** (Case No. ARB/97/7), **Joseph C. Lemire v. Ukraine** (Case No. ARB (AF)/98/1), and **Victor Pey Casado and Another v. Republic of Chile** (Case ARB/98/2).

[187] History, Vol. II, p. 401.

should be no problem in considering a partly government owned company as a private investor.

a) Natural Person:

The idea of granting direct access to the Centre to natural persons was one of the Convention's purposes. This idea copes with the growing recognition of individuals as subjects of international law. The ICSID Convention is unique in affording a natural person direct access to an international jurisdiction in which it may participate on equal footing, in proceedings against a State.

According to Article 25(2)(a) of the Convention and the ICSID Institution Rule 2(1)(d)(ii) a natural person must fulfil two major requirements:

(i) the natural person must be a national of another Contracting State on the date the request for arbitration is submitted.[188]

(ii) The natural person may not be a national of the Contracting State that is a party to the dispute on either the date of the consent or on the date on which the request was registered.[189]

Determination of the nationality of the natural person is very critical; this issue will be discussed after examining the juridical person as a party to the Convention. The nationality is left to be determined by the arbitral tribunal in light of domestic and international law. The rule on nationality for natural persons is stricter than for juridical persons.

With regard to stateless persons, the Convention would not give them access to the Centre, since they do not have the nationality of any contracting state, unless for some reasons such nationality is attributed to them, though the State does not recognise it. The question of statelessness was raised at one of the meetings during the drafting of the Convention, where it was stated that the Convention does not take care

[188] However, since the Secretary – General must screen requests before registering them, the Institution Rules introduce a minor subsidiary requirement that the nationality of the private party on the date of the request be stated in that instrument. This date may also be the date of consent, but it almost surely preceds the date of registration unless special arrangements for immediate registration were made in advance with the Secretary – General. Should that person then lose such nationality in the short interval between the date of the request and its registration, then the jurisdiction of the Centre can later be challenged before the competent tribunal.

[189] In this respect the Institution Rules add the procedural requirement that the lack of such conflicting nationality be asserted in the request according to Institution Rule 2(1)(d)(b) and Note I. The Convention states specifically that this jurisdictional bar cannot be waived. However, other types of dual nationality, involving a Contracting State and a non-Contracting State, constitute no obstacle to jurisdiction.

of the situation of statelessness and the general view was that in the usual case stateless person should not have *locus standi* in proceedings before the Centre.[190]

b) Juridical Person:

The Convention does not define the concept of a juridical person. It could be stressed that a legal personality[191] is a requirement for the application of Article 25(2)(b) and that a mere association of juridical persons would not qualify. It is entirely within the competence of the arbitral tribunal to decide whether an entity is a juridical person to which the nationality requirements of Article 25(2)(b) apply or not. During the drafting of the Convention, it was made clear at the consultative meetings that it was desirable to keep the definition of *"juridical persons"* as neutral as possible in order to take into account the fact that States might differ in the way national laws treat associations, groups, and the like, and also it would be a matter for the host State to decide at the time it consented to ICSID's jurisdiction whether an association or groups should be treating as having personality and therefore a nationality, or whether the individuals framing it should be dealt was not a juridical person having nationality.[192]

Article 25(2)(b) states that in order to provide the Centre with jurisdiction, a juridical person must have had the nationality of any Contracting State other than the State party to the dispute on the date upon which the parties consented to submit the proceedings. If a corporation has the nationality of any Contracting State other than the host State on the date of consent, then the Centre has the necessary jurisdiction, all other jurisdictional factors being equal. Article 25(2)(b) is of special note in that it permits an exception. The parties are entitled to agree in the event that a corporation has the nationality of the host State by way of incorporation, that *"because of foreign control"* it should be treated as a national of another Contracting State. This exception was inserted into the Convention for the compelling reason that States frequently assert that foreign investors conducting business within their territory should do so through the medium of a corporation incorporated under the laws of the host State. Given the existence of such law and the absence of this exception, a large body of

[190] History, Vol. II at 701.
[191] The entity in question must have legal personality under some legal system. Normally this would be the law of the State whose nationality is claimed.
[192] History, Vol.II at 284.

foreign investment would be beyond the Centre's jurisdiction, thereby decreasing the value of the Convention itself.[193]

The Convention fails to specify the manner in which the nationality of a juridical person is to be determined for the purpose of Article 25(2)(b). This is a more complex question than that of determining the nationality of a natural person because a variety of tests have been applied.[194]

The parties may agree upon the nationality of the juridical person between themselves in the interest of certainty. The ICSID has formulated model clauses for this purpose. The arbitral tribunal will accept such agreement provided that it is not unreasonable. An agreement of this kind cannot create a nationality that does not exist. A comparison of Article 25(1) with Article 25(2) of the Convention shows that while consent to the Centre's jurisdiction must be *"in writing"*, there is no such requirement for the agreement on nationality. This would indicate that the standard of formality is somewhat lower for the agreement on nationality than for consent.[195] In the context of the ICSID Convention the juridical person is considered a national, so long as it is not acting as an agency of government in performing an essentially governmental function. This decision would be made ultimately by the arbitral tribunal; the tribunal should treat this matter with great flexibility.

There is a trend among ICSID tribunals to expand the definition of foreign juridical persons widely to provide the protection of the Convention to all parties involved. Thus, ICSID tribunals have moved from a somewhat rigid, narrow approach regarding issues of jurisdiction and national sovereignty to a less stringent one enabling the Centre to resolve a greater number of investment disputes.[196]

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[193] Broches, "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States", 136 HR 331, (1972- II) at 358-359.
[194] Tedeschi, "The Determination of Corporate Nationality", (1976) 50 Austl. L. J. 521.
[195] Lalive, "The First 'World Bank' Arbitration", 51 BYIL 123 (1980) at 140.

5.3 NATIONALITY OF PARTIES TO ICSID DISPUTES

Nationality has been defined in the **Nottebohm** case as a *"legal attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties".*[197] In another ICJ case, Judge **Padilla Nervo**, in the **Barcelona Traction** case, explained the nationality link required in international law:

"For juridical persons as for natural persons, "nationality" expresses a link of legally belonging to a specific State. The requirement for juridical persons as for natural persons, is that the existence of the link of legally belonging to a specific country must, if it is to serve as a plea at the international level, be accompanied by that of a "real" link with the same country." [198] In the following nationality will be examined in respect of both natural and juridical persons.

a) Nationality of Natural Persons:

Natural persons are nationals of one or more States, or they could be stateless. According to Article 25(1) and (2)(a) a natural person should be a national of a contracting state other than the State party to the dispute in question. A State party to the dispute can challenge the jurisdiction of the Centre if it can prove either that the natural person is not a national of a Contracting State, or that he or she is a national of the State party to the dispute. As an international law principle a national cannot sue his State internationally, but the ICSID Convention makes exception to this customary principle of international law. In the case of a stateless person it is clear that such a person cannot invoke the jurisdiction of the Centre. A natural person of dual nationality, who is a national of the State party to the dispute, will not be eligible to come under the jurisdiction of the Centre, even though he or she has no effective link with the state party to the dispute, other than the transaction leading to the dispute.

However, it can be argued that if the State had consented to ICSID arbitration of a dispute with a national of another Contracting State, with prior knowledge that the natural person is also a national of the State party to the dispute, that State should not be allowed to challenge the eligibility of the natural person for arbitration under the Convention, provided there is evidence to prove that the natural person has an

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[196] Lamm, C. B., "Jurisdiction of the International Centre for Settlement of Investment Disputes", 6 ICSID Rev.-FILJ (1991) pp. 462-483 at 473.

[197] [1955] ICJ Rep. at 23.

effective link with other Contracting State, especially if the natural person has renounced the nationality of the State party to the dispute.

What happens if the natural person is accused by the State party to the dispute of obtaining his or her nationality by an act of fraud? Does the arbitral tribunal have the jurisdiction to investigate the circumstances of the alleged nationality of the natural person, which is being challenged by the Contracting State party to the dispute?

It could be observed that in a real challenge from a Contracting State as to the nationality of a foreign investor, an ICSID arbitral tribunal will be bound to investigate the circumstances of the investor's acquisition of the nationality of a Contracting State, in order to satisfy itself that the investor is a genuine national of a Contracting State and that it has jurisdiction over the parties to the dispute. However, if the State party knew that the natural person has acquired his or her nationality by an act of fraud, and even though the State party has recognised the natural person as a national of other Contracting State, it would probably be estopped from claiming that the Centre had no jurisdiction over the dispute.

Obviously the nationality of natural persons will lose its present importance as more States sign and ratify the ICSID Convention. The applicable law in determining the nationality of the natural person is the law of the State whose nationality is claimed[199], and not the law applicable to the dispute in accordance with Article 42, unless that law happens to be also the law of the State whose nationality is claimed. In this context, Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Law, provides that: *"It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international countries, international custom, and the principles of law generally recognised with regard to nationality..."* Furthermore, Article 2 of the same Convention provides that: *"Any question as to whether a person possesses the nationality of a particular state shall be determined in accordance with the law of that State."* In relation to the nationality of natural persons, the ICJ said in the **Nottebohm** case:

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[198] [1970] ICJ Rep. at 254.

[199] In the Nationality Decrees in Tunis and Morocco case [P.C.I.J.] Rep., Ser. B, No. 4, p. 24 (1923) The PCIJ stated: *"Thus, in the present state of international law, questions of nationality are...in principle within the reserved domain [of a State's domestic jurisdiction]."*

"It is...for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality...It is not necessary to determine whether international law imposes any limitation on its freedom of decision in this domain...[But it] is international law which determines whether a State is entitled to exercise protection and seize the Court." [200]

International law does not allocate individuals to States; rather it is for each State to claim persons as its nationals. While a State, by incorporating a company under its municipal law, may thereby raise a presumption that it intends to consider the company a national (in the same way that a State, by conferring on an individual its "citizenship" for municipal law purposes, is thereby presumed to be conferring nationality in international law), this view would lead to companies deemed nationals of certain States in the absence of any action on the part of those States.[201]

The Convention provides that the natural person to be eligible for party status, he or she must not be a national of the host State. As a result, even persons who possess the nationality of another Contracting State are excluded if they possess the host State's nationality at the same time: dual nationals are excluded from the jurisdiction of the Centre if one of their nationalities was that of the host State. The Report dealt with dual nationality in the following terms:

"It should be noted that under clause (a) of Article 25(2) a natural person who was a national of the State party to the dispute would not be eligible to be a party in proceedings under the auspices of the Centre, even if at the same time he had the nationality of other State. This ineligibility is absolute and cannot be cured even if the State party to the dispute had given its consent".[202]

The nationality of the other Contracting State must exist at the time of consent as well as the time the request for arbitration is registered. The nationality of the host State must not exist at either date.

b) Nationality of Juridical Persons:

The nationality of a juridical person is no equivalent to that of a natural person, such nationality is fixed for a specific reasons and would be dependant on the law of the State or rules of the institution that makes the determination of this

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[200] [1955] ICJ Rep. 20-21.

[201] Staker, C., "Diplomatic Protection of Private Business Companies: Determining Corporate Personality for international Law Purposes", BYIL 1990, 160-161.

nationality. A company as a juridical person might have connections with several States through joint ventures, subdivisions, branches representative offices, regional offices, and agents located in those States. It could be presumed that a company has the nationality of the State in which it was formed and incorporated. In this sense the company has an independent legal personality distinct from its members and could have a nationality also distinct from its members. The problem of the "statelessness" of companies could be addressed by a rule, which permits a State, other than the State of incorporation of a company, to be the company's national State, either in addition to or instead of the State of incorporation.[203]

Determination of the juridical person's nationality could be subject to several criteria. The most widely accepted criterion in this respect is the place of incorporation or registration. The place of the headquarter or main office *siège social* is considered to be equally important. These two criteria are the most widely accepted ones when it comes to diplomatic protection. On the other hand, a control test has been suggested, especially in time of war. The Preliminary Draft of the Convention offered two possible criteria for the nationality of a juridical person; nationality under the domestic law of a Contracting State, or a controlling interest of the nationals of such a State.[204] According to **Delaume** it is generally agreed that, within the framework of the ICSID Convention, the nationality of a corporation is determined on the basis of its *sèige social* or place of incorporation.[205] Conversely, **Amerasinghe** is obviously in favour of an extremely flexible approach that would merely require some adequate connection between the juridical person and the State, including control by nationals of that State;[206] this approach makes more sense than the previous one. On the other hand, **Broches** has adopted a more cautious approach: the Convention clearly assumes that the company's place of establishment will or may be held to determine its nationality.[207] This last approach is not clear enough to give a guideline in determining the corporate nationality. In the light of ICSID's practice it could be observed that the test of incorporation or seat, rather than control has been adopted in

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[202] The Report, para.29.
[203] Staker, C., "Diplomatic protection of Private Business Companies: Determining Corporate Personality for International Law Purposes", BYIL pp. 155-174 [1990] at 159.
[204] History, Vol. I at 122.
[205] Delaume, G. R., "ICSID Arbitration and the Courts", 77 AJIL (1983) 784, 793-4.
[206] Amerasinghe, "The International Centre for Settlement of Investment Disputes and Development through the Multinational Cooperation", 9 Vand. J. Transnat'l L. (1976) 793, 804-8.
[207] Broches, *A Bilateral Investment Protection Treaties and Arbitration of Investment Disputes: The Art of Arbitration,* Liber Amicorum Pieter Sanders (Schultz, J. / van den Berg, A. eds.) 63, 70 (1982).

determining the nationality of a juridical person.[208] In **SOABI v. Senegal** the tribunal stated:

"As a general rule, States apply either the head office or the place of incorporation criteria in order to determine nationality. By contrast, neither the nationality of the company's shareholders nor foreign control, other than over capital, normally govern the nationality of a company, although a legislature may invoke these criteria in exceptional circumstances." [209]

The nationality of juridical persons could be agreed on in an agreement between the host State and the investor; such agreement is important but it cannot create a nationality that does not exist. However, unless otherwise provided by the legislation or treaty, the host State may insist that the investor demonstrate its nationality of a Contracting State based on incorporation or *siege social.*

With regard to the applicable law in determining the nationality of a juridical person, the arbitral tribunal in **AMCO** case stated that; *"the concept of nationality is there [in the Convention], a classical one, based on the law under which the juridical person has been incorporated, the place of incorporation and the place of the social seat".* [210] In **Kaiser Bauxite v. Jamaica** the tribunal held that the Claimant was a national of another Contracting State on the basis of the finding that *"Kaisar is a private corporation organised under the laws of the State of Nevada in the United States of America".*[211]

However, it could be observed that the nationality of a natural person is relatively easier to establish than the nationality of a juridical person although an assumption would be made that the nationality of a company is the nationality of the state of incorporation and formation. The tribunal in **Vacum Salt** dealt with the reasons, which might explain the different treatment of natural and juridical persons. The tribunal mentions as a *"quite plausible justification"* that an individual has substantial control over his nationality, whereas a corporation of the host State which was granted foreign status could be deprived involuntarily of all foreign ownership

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[208] As in **Kaiser Bauxite v. Jamaica** (1 ICSID Rep. 303) and **SSP (ME) Ltd. And SSP Ltd v. Egypt** (3 ICSID Rep. 114).
[209] Decision on jurisdiction, 1 August 1984, 2 ICSID Rep. 180-1.
[210] Jurisdictional Decision of September 25, 1983, 23 ILM 351 (1984) at 362.
[211] 1 ICSID Rep. at 303.

through expropriation of the corporations capital. [212] But it should be borne in mind that definitions of juridical person's nationality in national legislation, or in treaties providing for the jurisdiction of the Centre, should be given a great weight in determining the nationality requirements of Article 25(2)(b). Therefore, any reasonable determination of the nationality of juridical persons contained in national legislation or in treaty, should be accepted by an ICSID tribunal. BITs use a variety of criteria to determine the nationality of juridical persons. Many of them use criteria of incorporation or seat; others use the concept of controlling interest, or a combination of the incorporation criterion and of control.

In some cases, juridical persons might have multiple nationalities where they have their places of incorporation, seat and control in different States. If all possible nationalities are of Contracting States no problem would arise, but the situation would be complicated if one of the possible nationalities were that of a non–Contracting State. However, the concurrent possession of the nationality of a non – Contracting State and a nationality of a Contracting State would not exclude the jurisdiction of the Centre.[213]

A juridical person that is admitted to the Centre on the basis of control may be protected by a non–Contracting State whose nationality it has on the basis of incorporation or seat. A non – Contracting State is not bound by the prohibition of diplomatic protection under Article 27(1) of the Convention, which will be discussed later. A host State agreeing to accept *the investor as a national of a Contracting State*, despite its incorporation or seat in a non– contracting State should be fully aware of this risk. The parties may record their agreement as to the nationality of the investor in a clause such as the ICSID Model Clause 7 of 1993.

The critical date of nationality for juridical persons is the date of consent;[214] any change in this nationality after the date of consent is immaterial for jurisdiction.[215] After consent, a juridical person may lose the nationality of the original contracting state and may acquire the nationality of a non – contracting state or that of the host State without losing access to ICSID.

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[212] Broches, "Denying ICSID's Jurisdiction The ICSID Award in Vacum Salt Products Limited", 13 J. Int. Arb. 3 (1996) at. 25.

[213] Amerasinghe, "The Jurisdiction of the International Centre for the Settlement of Investment Disputes", 19 Ind. J. Int'l L. 166 (1979) at 223.

[214] Institution Rule 2(1)(d)(I) provides that the request for arbitration shall indicate the investor's nationality on the date of consent.

5.4 THE CONCEPT OF FOREIGN CONTROL

With regard to the objective requirement of foreign control there seems to be a suggestion that such control is a factual element that may be examined by a tribunal independently of the agreement on nationality. [216] Article 25(2)(b) that deals with this concept reads as follows:

"(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this convention."

The above provision seems to leave the matter of foreign nationality to the State where a company is operating and locally incorporated but under foreign control, the purpose of this provision being to enable settlement of disputes between a State and a national of an other State without the intervention of the latter State. On the other hand, it has been argued that an agreement on nationality would create a strong presumption in favour of foreign control, that should be discarded only if it amounts to an unreasonable selection of nationality that cannot be sustained by any rational interpretation of facts.[217]

ICSID tribunals have examined the concept of foreign control in various cases. In **Amco v. Indonesia**, the tribunal examined the foreign control by looking at the nationality of the immediate controller; it came to the conclusion that the locally incorporated company was under United States control.[218] In **Klöckner v. Cameroon,** the tribunal pointed out that at the time of the agreement, containing the ICSID clause, between the local joint venture company, **SOCAME,** and the host State, *"SOCAME was a Cameroonian company, but subject to the majority control of foreign*

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[215] Amerasinghe, C.F., "The Jurisdiction of the International Centre for the settlement of Investment Disputes", 19 Ind. J. Int'l. L. 166 [1979] at 223.
[216] Gillard, E., "Some Notes on the Drafting of ICSID Arbitration Clauses", 3 ICSID Rev.-FILJ 136 (1988) at 140.
[217] Amerasinghe, C.F., "Interpretation of Article 25 (2) (b) of the ICSID Convention", in: *International Arbitration in the 21st Century: Towards Judicialization and Uniformity?* (Lillich, R. B. /Brower, C.N. eds) 232 Transnational Publishers Inc. Ivrington N.Y. (1994); pp. 232-3, 235, 273-8, 240.

interests." To the tribunal, this was clear from another agreement that stipulated that Klöckner and its European partners would subscribe to 51% of SOCAME's capital.[219]

In another case **SOABI v. Senegal**, the debate was on whether the local company was actually controlled by Panamanian, Swiss or Belgian interests. Flexa, a Panamanian company, was the immediate owner of all of SOABI's shares, but Panama was not a Contracting State. Flexa's nationality was stated as Swiss, but this statement appears to have been incorrect. Eventually, the tribunal concluded that control over Flexa was exercised by nationals of Belgium, a Contracting State and that, consequently, SOABI was under the indirect control of nationals of a Contracting State.[220]

In **LETCO v. Liberia**, the tribunal had no problem in concluding that the locally incorporated company was under French control at the time of consent to ICSID's jurisdiction. The tribunal stated: *"Clearly, the Convention's use of the word "because" in Article 25(2)(b) establishes a need to show that the agreement to treat LETCO as a French national was motivated by the fact that it was under French control. However, in most instances the virtually insurmountable burden of proof in showing what motivated a government's actions might well frustrate the purpose of the Convention. Therefore, unless circumstances clearly indicate otherwise, it must be presumed that where there exists foreign control. The agreement to treat the company in question as a foreign national is "because" of this foreign control. In the case at hand, there is no indication whatsoever that an agreement to treat LETCO as a French national resulted from anything other than the fact it was under French control and we must therefore conclude that the necessary causal relationship exists."*[221] The tribunal in the last paragraph was referring to the casual relationship between foreign control and the agreement on nationality.

In **Vacum Salt v. Ghana**, the question of foreign control was very critical. In this case, there had been a Lease Agreement of 1988 between Vacum Salt and Ghana providing for the development of a salt production and mining facility. The agreement contained an ICSID clause.[222] Vacum Salt was a corporation organised under the 1963 Company Code of Ghana. Ghana objected to ICSID's jurisdiction on the ground that

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[218] Decision on Jurisdiction, 25 September 1983, 1 ICSID Rep. 396-7.
[219] Award, 21 October 1983, 2 ICSID Rep. 15-16.
[220] Decision on Jurisdiction, 1 August 1984, 2 ICSID Rep. 182-3.
[221] Decision on Jurisdiction, 24 October 1984, 2 ICSID Rep. 349-352.
[222] Award, 16 February 1994, 4 ICSID Rep. at 329.

the Claimant *"essentially is a Ghanaian Company"* that *"is not foreign controlled and there has been no agreement between the parties that it should be treated as a national of another contracting State."* [223] Furthermore, the tribunal in **Vacum Salt** discussed the issue whether or not foreign control existed as a matter of fact on the date of consent: *"...the parties' agreement to treat Claimant as a foreign national "because of foreign control" does not ipso jure confer jurisdiction. The reference in Article 25(2)(b) to "foreign control" necessarily sets an objective Convention limit beyond which ICSID jurisdiction cannot exist and parties therefore lack power to invoke some no matter how devoutly they may have desired to do so."* [224] The tribunal continued explaining that: *"38. Nevertheless the word "because of foreign control" has to be given some meaning and effect. These words are clearly intended to qualify an agreement to arbitrate and the parties are not at liberty to agree to treat any company of the host State as a foreign national: They may only do so "because of foreign control". The Tribunal concludes that the existence of consent to an arbitration clause such as paragraph 36(a) of the 1988 lease agreement in circumstances such that jurisdiction could be premised only on the second clause of Article 25(2)(b) raises a rebuttable presumption that the "foreign control" criterion of the second clause of Article 25(2)(b) has been satisfied on the date of consent."* [225] The requirement of the second clause of Article 25(2)(b) was not satisfied on the date of consent. The tribunal concluded that it did *"not find here indication of foreign control of Vacum Salt such as to justify regarding it as a national of an ICSID Contracting State other than Ghana."*

The previous ICSID cases, especially **Vacum Salt**, make it clear that foreign control at the time of consent is an objective requirement, which must be examined by the ICSID tribunal in order to establish jurisdiction for the Centre. Foreign control differs from foreign nationality in that it must actually exist and cannot be construed by the parties or implied from an agreement between the parties whereas foreign nationality could be based on a consent agreement between the parties. However, ICSID Model Clause 7 could be used for this purpose it reads as follows:

[223] Award, 16 February 1994, 4 ICSID Rep. at 331.
[224] Award, 16 February 1994, 4 ICSID Rep. at 342-3.
[225] Award, 16 February 1994, 4 ICSID Rep. at 344.

"It is hereby agreed that, although the investor is a national of the Host State, it is controlled by nationals of name(s) of other Contracting State(s) and shall be treated as a national of [that]/[those] States [s] for the purposes of the Convention."

With regard to the nationality of foreign control it could be noted that Article 25(2)(b) does not specify any nationality requirements. However, it is clear that such control is excluded from the jurisdiction of the Centre when it is exercised by nationals of the host State, or nationals of a non-Contracting State. The drafting history of the Convention in this respect indicates that control should be exercised by nationals of other Contracting States. [226] This point has been asserted by the tribunal in **SOABI v. Senegal** which stated:

"33. The Tribunal is of the opinion that it follows from the structure and purpose of the Convention that the foreign interests which might serve as basis for according "foreign control' to a company established under local law, should be those of nationals of Contracting States." [227]

But what happens in a situation whereby control is exercised by investors of different nationalities? If all investors are nationals of Contracting States there should be no complications, and foreign control will be granted. However, if investors of contracting and non-Contracting States exercise control, there should be an adequate investigation in order to measure the amount of control exercised by the investors from non-Contracting State. If they do not have the majority of interests there should be no problem, but if they have the majority of control, such control should not be treated as a foreign one.

In contrast, **Amerasinghe** suggests that even though nationals of non-Contracting States, or of the host State, may have greater control than nationals of a Contracting State, there would be good reasons for not rejecting an agreement on nationality as long as there is an adequate control by nationals of Contracting States, so that any reasonable amount of control should be accepted.[228] This approach, which has been adopted by ICSID tribunals, could be seen in **Vacum Salt** case, which suggested that control means effective control and not merely participation.

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[226] History, Vol. I, at 869-870.
[227] Decision on Jurisdiction, 1 August 1984, 2 ICSID Rep. 182.

Another point should be discussed which is that of the indirect foreign control and the question of whether only direct control should be taken into consideration to determine the nationality of the foreign controlling party. In addressing this question the tribunal in **Amco v. Indonesia** refused to go beyond the first level of control:

"..for the purpose of Article 25(2)(b) of the Convention, one should not take into account the legal nationality of the foreign juridical person which controls the local one, but the nationality of the juridical or natural persons who control the controlling juridical person itself: in other words, to take care of a control at the second, and possibly third, fourth or xth degree." [229]

The issue of direct and indirect control has been further examined in **SOABI v. Senegal.** In this case the Government argued that SOABI did not meet the requirements of Article 25, since its sole shareholder at the relevant time, had the nationality of a non-Contracting State, which is Panama. The tribunal rejected this argument and stated:

"37. It is obvious that, just as a host State may prefer that investments be channelled through a company incorporated under domestic law, investors may be led for reasons of their own to invest their funds through intermediary entities while retaining the same degree of control over the national company as they would have exercised as direct shareholders of the latter." [230]

The approach adopted in ***SOABI*** has been correctly supported by **Amerasinghe** who stated that:

"it would be acknowledged that the approach taken in SOABI arbitration is more in keeping with the general objective of the Convention, namely to permit the assumption

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[228] Amerasinghe, "The Jurisdiction of the International Centre for Settlement of Investment Disputes", 19 Ind. J.Int'l L. 166 (1979) at 219, 221.
[229] Decision on Jurisdiction, 25 September 1983, 1 ICSID Rep. at 396.
[230] Decision on Jurisdiction, 1 August 1984, 2 ICSID Rep. at 182-3.

of a foreign nationality on the basis of foreign control where the claimant has the nationality of the host state become of incorporation in the host State." [231]

During the Convention's drafting, there was some concern about a change of control over the locally established company, but no definite solution was offered.[232] The host State's decision to treat the locally incorporated company as a foreign national should be made at the date on which the parties have consented to submit to ICSID arbitration, as mentioned in Article 25(2)(b) of the Convention that the company should continue to be under foreign control after the date of consent, the company can be sold to local investors without affecting its foreign status. This is of course in contrast with the position of natural persons who must retain their foreign nationality on the date that a request for arbitration is registered with the Centre as mentioned in Article 25(2)(a).[233] However, the tribunal in **Vacum Salt v. Ghana** has admitted that a change of control after the date of consent could have a series impact on ICSID's jurisdiction.[234] **Klöckner v. Cameroon** is the only case in which a change of control occurred between the date of consent and the institution of the arbitration.

To sum up and in the light of the cases examined above, it can be said that the existence of foreign control is a complex question, requiring taking into consideration many factors such as equity participation, voting rights and management. Hence, the question of foreign control should be dealt with great flexibility.

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[231] Amerasinghe. C. F., "Interpretation of Article 25(2)(b) of the ICSID Convention", in *International Arbitration in the 21st Century: Towards "Judicialization" And Uniformity?* (Richard B. Lillich and Charles N. Brower eds.) [1994] p. 236.

[232] History, Vol. II pp. 287, 445.

[233] As noted by the arbitral tribunal in **SOABI v. The Republic of Senegal** (Yearbook. Comm. Arb'n XVII (1992) at 42) in the case of a juridical person the nationality of such must be decided by reference to the date on which the parties gave their consent to the jurisdiction of the Centre.

[234] Award, 16 February 1994, 4 ICSID Rep. p. 338.

5.5 THE CONCEPT OF DIPLOMATIC PROTECTION WITHIN THE ICSID CONVENTION [235]

One of the main features of the ICSID Convention is that it gives full access to natural persons or private juridical persons to initiate the arbitral process, without the need of the intervention of their States against another State. The Convention in this context provides that when a foreign investor and a host State have consented to submit a dispute to arbitration before the Centre, the investor's national State may not give diplomatic protection or bring an international claim in respect of that dispute, unless the host State fails to comply with the arbitral award.

The provision in question, Article 27 reads as follows:

"(1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.
(2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute."

It should be noted that diplomatic protection is the foundation for making an international claim; since the article is waiving it, no international claim could be submitted.[236] In essence, diplomatic protection is a concept of customary international law, according to which a State espouses the claim of its national against another State, and pursues it in its own name.[237] Private individuals and corporations can

[235] It should be noted that there is no case practice in the ICSID literature regarding diplomatic protection, since it has not created any practical problems so far. Thus, any discussion of the concept of diplomatic protection in the context of ICSID arbitration will be based on general considerations.
[236] It has certainly been established that the State has a procedural right to bring an international claim in order to protect its nationals when they have suffered injury as a result of a violation of international law. And the State may agree to limit the right or even to waive it in its treaty practice with other countries. Bennouna, M., Preliminary Report on Diplomatic Protection, International Law Commission Fiftieth Session Geneva, 20 April-12 June 1998 para. 49.
[237] The PCIJ has confirmed diplomatic protection as a principle of customary international law. It stated that *"it is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through ordinary channels."* **Mavrommatis Palestine Concessions**

considerably benefit from such protection, since international remedies are not always available to them. Diplomatic protection should be distinguished from certain diplomatic and consular activities for the assistance and protection of nationals, as envisaged by Articles 3 and 5 respectively of the Vienna Convention on Diplomatic Protection of 1961, and the Vienna Convention on Consular Relations of 1963.[238]

The classical doctrinal justification for diplomatic protection and international claims is that in resorting to these remedies, a State is in reality asserting its own right to ensure in the person its national respect for the rules of international law.[239] While exercising its right of diplomatic protection the State retains the choice of means, it still needs to be determined on which right the State's action is based; its own right or that of the individual. The answer to this question determines the legal nature of diplomatic protection.[240] If the State of nationality decides to bring a claim, it has a choice of means of settlement of the dispute between it and the territorial State, including amiable composition.[241] In this sense diplomatic protection could be described as a function of the sovereignty of States under international law within the framework of their mutual rights and obligations in the international community. It is traditionally an inter-State practice.[242] As the court said in the **Barcelona Traction Case**, *"whether claims are made on behalf of a State's national or on behalf of the State itself, they are always a claim of the State."* [243]

It was stated in the same case that diplomatic protection as a right *"is necessarily limited to intervention on behalf of its own national because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection."* [244]

In this context the private individual must have the nationality of the protecting State. Article 4 of the Hague Convention on certain questions of nationality

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Case, 1024, P.C.I.J., Ser. A, No.2, p. 12.b Furthermore, the right of diplomatic protection was affirmed by the ICJ in the **Nottebohm** Case in circumstances in which limitations were placed on the link of nationality between individual and a State, upon which the right was said to rest.

[238] See the International Law Commission: 1997 Report para.177.

[239] Broches, A., "The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States", HR (1972- II) at 372.

[240] See Bennouna, M., Preliminary Report on Diplomatic Protection, International Law Commission Fiftieth session Geneva, 20 April-12 June 1998 para. 13.

[241] Bennouna, M., Preliminary Report on Diplomatic Protection, International Law Commission Fiftieth session Geneva, 20 April-12 June 1998, para. 20.

[242] See Joseph, C., *Nationality and Diplomatic Protection The Commonwealth of Nations*, A. W. Sijthoff-Leyden, 1969, p. 1.

[243] [1970] ICJ Rep. at 46.

[244] [1970] ICJ Rep. at 34.

laws of 1930 stated as a rule that; *"A state may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses".* The bond of this nationality must continue from the time of the injury until the claim is made. To have a reasonable justification for the use of diplomatic protection there must have been a wrongful act under international law on the part of the State against which diplomatic protection is to be exercised. The individual or corporation concerned must have exhausted the legal remedies in the State that has allegedly committed the violation.

Diplomatic protection has served as an excuse for intervention in the affairs of certain countries. Judge **Padilla-Nervo** denounced this situation in these terms:

"The history of the responsibility of States in respect to the treatment of foreign nationals is the history of abuses, illegal interference in the domestic jurisdiction of weaker States, unjust claims, threats and even military aggression under the flag of exercising rights of protection, and the imposing of sanctions in order to oblige a government to make the reparations demanded." [245]

Abuses of diplomatic protection led many countries to insist that disputes with foreign investors be settled exclusively before their national courts and subject to their national laws. As a result, many developing countries have expounded some doctrines to reduce the effects of diplomatic protection in the case of this right is used against them.[246] It could be noted in this regard that BITs could be used in avoiding the pitfalls of diplomatic protection. However, diplomatic protection has some advantages; for example, it opens up, possible remedies under international law, which the foreign investor could not pursue directly. The foreign investor in this context may also benefit from the legal, political and military capability of his National State. It is noteworthy in the case of diplomatic protection that the foreign investor will not have any control over the claim. It is exclusively for the National

[245] ICJ Rep. 1970 at 246.

[246] For example, the Latin American Countries have developed the Calvo doctrine, named after an Argentine statesman (1824-1906) which was developed as a defence against the abuses of diplomatic protection. This doctrine considers diplomatic protection as inadmissible interference. According to this doctrine the alien contractually declines diplomatic protection from his State of origin. Accordingly, when a national declines diplomatic protection from his State of nationality, he is not infringing the rights of the State but, rather, merely availing himself of his own right. However, diplomatic protection remains more effective than such doctrines in international practice.

State of the investor that is to say whatever this State determines, the foreign investor must accept.

A violation of Article 27 will not affect the Centre's jurisdiction or the competence of an ICSID tribunal but will give the right to the host State to object to the use of diplomatic protection by another State. An international court or tribunal before which a claim is brought in violation of Article 27 will have to decide jurisdiction.[247] Article 27 applies only to Contracting States. In the case of diplomatic protection invoked by a non-Contracting State, the host State may insist on the exhaustion of local remedies, since Article 26 only applies to relations between Contracting States. Since diplomatic protection is a right of the protecting State and not of the national to be protected, consent to ICSID arbitration by the investor cannot constitute a valid waiver of diplomatic protection. The only exception to the waiver of diplomatic protection is the failure of a host State to abide by an award. It should be noted that there is no reason that prohibition of diplomatic protection should be repeated in a BIT between two parties to the ICSID Convention.

The Report dealt with the exclusion of diplomatic protection as follows:

"33. When a host State consents to the submission of a dispute with an investor to the Centre, thereby giving the investor direct access to an international jurisdiction, the investor should not be in a position to ask his State to espouse his case and that State should not be permitted to do so. Accordingly, Article 27 expressly prohibits a Contracting state from giving diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State have consented to be submitted, or have submitted, to arbitration under the Convention, unless the State party to the dispute fails to honour the award rendered in that dispute." [248]

During the drafting of the Convention, the exclusion of diplomatic protection was variously explained in terms of the obligation to abide by the agreement to

[247] Amerasinghe, C. F., "The Jurisdiction of the International Centre for the Settlement of Investment Disputes", 19 Ind. J. Int'l L. (1979) 166, 226-7.
[248] The Report, para.33.

arbitrate.[249] The Preliminary Draft of the Convention contained a reference to diplomatic protection in its preamble:

"3. Recognising that while such disputes would usually be subject to national legal processes (without prejudice to the right of any State to espouse a claim of one of its nationals in accordance with international law), international methods of settlement may be appropriate in certain cases." [250]

However, after objections by experts from Brazil and from Venezuela, the reference to diplomatic protection in the preamble was omitted in the subsequent first draft and does not appear in the Convention's final text.[251]

One of the main features of diplomatic protection is the requirement that the protected individual or corporation must have the nationality of the protecting State. Practice as well doctrine maintains that it is the link of nationality between a State and an individual that alone gives the State the right to exercise its diplomatic protection on his behalf. [252] This has been stated in an early case determined by the PCIJ which affirmed that: *"in the absence of a special agreement, it is the bond of nationality between the State and the individual, which alone confers upon the State the right of diplomatic protection."* [253] However, diplomatic protection is normally excluded when the individual possesses the nationality of both the claimant and the respondent States.[254] In this respect, the ICSID Convention offers a flexible approach towards questions of nationality. For purposes of the Centre's jurisdiction, the parties may determine the nationality of the foreign investor by agreement under certain circumstances as provided for in Article 25.

The question of nationality becomes critical where diplomatic protection is revived as a consequence of States' failure to abide by and comply with ICSID awards. The suspension of the right to diplomatic protection operates from the

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[249] History, Vol. II. p.74, 80,221.
[250] History, Vol. II, p.187.
[251] History, Vol. II, p.187.
[252] Moreover, when a State intervenes on behalf of an individual, it is not necessarily motivated by a subjective interest based on the nationality link; it is deemed to be acting in the objective interest of the international legal order. See, Bennouna, M., Preliminary Report on Diplomatic Protection, International Law Commission Fiftieth session Geneva, 20 April-12 June 1998, para.36.
[253] The **Panevezys-Saldutiskis Railway** Case, 1939 P.C.I.J. Rep., Ser. A/B, No. 76.
[254] Article 4 of the 1930 Hague Convention on Certain Questions Relating to The Conflict of Nationality Laws provides that: "*A State may not afford diplomatic protection to one of its nationals against a State whose nationality he possesses.*"

moment consent is given to ICSID arbitration and not just from the moment proceedings are instituted. Where the existence of valid consent to ICSID arbitration is disputed, a decision by the Secretary - General should be obtained according to his screening power under Article 36(3), or a decision on jurisdiction by the tribunal under Article 41. If the Secretary - General has decided that the dispute is manifestly outside the jurisdiction, of the Centre or if the tribunal has determined that the Centre does not have jurisdiction, Article 27 does not apply, and any right to diplomatic protection may be exercised.

The revival of diplomatic protection is not, however, the only remedy against failure of the State party to the dispute to comply with an award rendered against it. The Convention provides for another remedy in Article 64 in which Contracting States accept the jurisdiction of the ICJ with respect to any dispute arising between Contracting States concerning the interpretation or application of the Convention. Article 41 gives the ICSID tribunal an exclusive power to decide on matters of its jurisdiction in relation to any decision made by the ICJ by virtue of Article 64. However, up to date no case concerning the competence of an ICSID tribunal or any other question arising from the Convention has ever brought to the ICJ.

Any exception for the exclusion of diplomatic protection should be seen in the context of Articles 53 and 54 of the Convention, dealing with the binding effect and enforcement of awards. Diplomatic protection is an alternative and supplement to the judicial enforcement of awards. Under the Convention, diplomatic protection after an award has been rendered is available exclusively for the purpose of its implementation. It does not give another remedy independently of the award. Therefore, if the tribunal has rejected an investor's claim or part of a claim, it cannot be pursued through subsequent diplomatic protection.

Finally, according to Article 27(2) informal diplomatic protection exchanges for the purpose of facilitating the settlement of the dispute are permitted. The intention was not to establish an exception to the waiver of diplomatic protection but rather to avoid that Article 27 would be construed so strictly to prevent the use of diplomatic channels even for an informal contact with the State party to the dispute for that purpose. [255]

[255] Broches, A., "The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States", HR (1972- II) at 375.

5.6 CONCLUDING REMARKS ON CHAPTER FIVE

1) The submission to the jurisdiction of the Centre is not only a matter of agreement between the parties to a dispute, but the jurisdiction and the competence of an ICSID tribunal to exercise jurisdiction *ratione personae* and *ratione materiae* is conferred upon the tribunal not by the arbitration agreement entered into by the parties, but by the Convention itself. In ruling on its own jurisdiction the ICSID tribunal will be bound primarily by the articles of the Convention and not only by provisions of any agreement signed by the parties to the dispute as would be the case in arbitration proceedings conducted by other arbitral bodies. What distinguishes ICSID arbitration from other arbitral institutions is that the jurisdiction of ICSID and the competence of an ICSID award are derived from the ICSID Convention itself as a *lex specialis*. An ICSID tribunal exercises its full competence over a dispute subject only to the Convention, the ICSID Rules, and the parties' choice of substantive law and procedure.

2) Consent of parties to submit disputes to the jurisdiction of the Centre exemplifies the voluntary character of submission to ICSID. In this respect it is of major importance that such consent must correspond with the articles of the Convention, that the consent must be to the settlement of a legal dispute arising directly out of an investment, and the parties must be qualified parties. The parties to a foreign investment agreement can show great care in describing the bounds of their consent to ICSID arbitration to avoid any potential overreaching by ICSID tribunals.

3) One of the significant features of ICSID is its neutrality. This neutrality will encourage foreign investors to use ICSID facilities since they tend to be better protected under ICSID than under legal system of a developing State. It should be noted in this respect that most countries involved in ICSID arbitration are developing countries and in the majority of cases they are defendants and not claimants. It should be pointed out that foreign investors in referring to ICSID could not escape the application of the national laws of the host State, if applicable.

4) ICSID plays a valuable role in its ability to prevent private investment disputes from becoming international disputes between States, especially when a Contracting State offers its diplomatic protection to one of its nationals. However, excluding diplomatic protection within ICSID arbitration makes sense, since a combination of arbitration and diplomatic protection would lead to undesirable results. Thus, the

ICSID institution plays an important role in depoliticizing international economic disputes.

5) In practice, the jurisdictional limitations of the ICSID Convention proved to be little obstacle to tribunals determining the jurisdiction of the Centre over certain disputes. ICSID Convention may be interpreted widely by ICSID tribunals in the sense that jurisdiction will be rarely be declined.

6) The issue of jurisdiction has been used against the developing States. There seems to be an increasing readiness to permit arbitral tribunals to assume jurisdiction, even in situations where the consent of the host State is unclear, especially when corporate nationality is involved. The widening of jurisdiction by expanding notions of corporate nationality and that of arbitration without privity, by virtue of various BITs and the new specific multilateral treaties such as the ECT and the investment provisions of NAFTA, are examples of this readiness to assume jurisdiction over disputes where consent is unclear. Furthermore, the widening of jurisdiction in cases of arbitration without privity is supported by ICSID practice in various cases; as in **SSP v. Egypt**, **AAPL v. Sri Lanka** and **AMT v. Zaire**.

7) The ICSID Convention stresses the importance of the role of private international investment. In this respect States acting as investors have no access to the Centre in that capacity. The investor must be a private individual or corporation.

8) There is a general consensus among ICSID tribunals that, pursuant to a valid arbitration agreement referring to ICSID, the defence of sovereign immunity is not available in ICSID arbitration proceedings. However, in this respect, the approach of various ICSID tribunals differs. Some contend that the national and international law rules, the distinction between the acts of States, are applicable, i.e. the State is not granted immunity for the acts *jure gestionis*, and some contend that no reference to national or international rules is necessary.

9) Clauses referring to ICSID arbitration to resolve disputes have become commonplace in BITs, local investment codes, and individual investment agreements. The widespread use of those clauses indicates that ICSID has contributed materially to the increase in investor's confidence. At the same time host States have benefited from ICSID as a forum which meets their expectations in settling disputes with foreign investors. It should be mentioned in this respect that consent clauses in BITs show that a lack of specificity for issues of applicable law may have serious consequences at the time of a dispute.

10) The exclusive and compulsory character of the arbitration process, which is widely accepted in international law, has been incorporated in the Convention, and affirmed by the practice of ICSID.

11) ICSID tribunals have the competence to rule on their own jurisdiction. In dealing with jurisdictional issues an ICSID tribunal would be faced with three possibilities: first, the tribunal may decide the jurisdictional issue by a separate preliminary decision; second, it may decide on the jurisdictional issue as part of the award on the merits of the dispute; and third, it may take the decision that it lacks the jurisdiction; such a decision is final and no party may appeal against it.

6. CHAPTER SIX

JURISDICTION OF ARBITRAL TRIBUNALS TO GRANT INTERIM MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION

6.1 INTRODUCTION

In order to understand the significance of interim measures (occasionally termed conservatory or provisional measures) particularly within the context of international arbitration, it is essential to be aware of the motives behind arbitration agreements. One of the primary and most significant of these objectives is the desire to avoid foreign national courts and the obstacles created by different legal systems. In addition, since international conventions grant reciprocal enforcement, arbitration offers a more expedient alternative to national courts procedures in its easier enforcement of arbitral awards.

However, in arbitration as well as in litigation, the need could arise for interim measures. The practice indicates that parties to disputes do apply for interim measures from national courts despite the existence of arbitration agreements. Interim measures, as an adjunct of the judicial process, reflect the perennial judicial concern for effective decision making.

The term 'interim measures' in the context of this chapter refers to the seizure of assets (attachment) and interim court orders (injunctions).[1] In attachment proceedings the intention is to preserve the assets which represent the subject matter or which are essential for the enforcement of the arbitral award. On the other hand, interim orders are designed to structure the legal relationship of the parties to the dispute, and to protect property rights at issue in the arbitration.

In the context of international commercial arbitration, interim measures can be obtained either from arbitral tribunals or from national courts during the arbitral process. With this in mind, it should be noted that the unrestricted availability of interim measures from national courts, in spite of the existence of an arbitration agreement, could destroy the merit of privacy of arbitration. In some cases, when a

[1] In general, interim measures include injunctions, *staus quo* orders, seizures, arrests, attachments, garnishments, replevin, sequestration, stays, escrow, bonds, security and orders for the sale of perishable goods. See Riechert, D., "Provisional Remedies in the context of International Commercial Arbitration" 3 Int'l Tax & Bus. Law (1986) 368, 371.

dispute arises before the constitution of the arbitral tribunal, the resort to the national court in this case is unavoidable.

The subject of interim measures in international arbitration is becoming increasingly prominent. It is of substantial practical importance to the efficacy of international arbitration, and at the same time it arouses theoretical points because it facilitates one of the important interactions between arbitration and national judicial systems. It also raises issues of the exclusive powers of arbitrators and courts and how they may interact cooperatively rather than in antagonism.[2] For example, the emergence of arbitration as a means of dispute resolution in intellectual property matters has led to the recognition of the importance of interim measures that protect confidentiality during the arbitration process.[3]

The purpose of this chapter is to examine the powers of arbitral tribunals to order such measures, this will lead to a discussion on the nature, forms of and granting of interim measures in the practice of institutional arbitration and under various national legal systems. Enforceability of interim measures granted by arbitral tribunals should be discussed in the light of national laws and under the New York Convention.

[2] Goldman, B., The Complementary Roles of Judges and Arbitrators in Ensuring that International Commercial Arbitration is Effective, in *SIXTY YEARS OF ICC ARBITRATION: A LOOK AT THE FUTURE* (1984) 257, 279-80.

[3] Baldwin, C. S., "Protecting Confidential and Proprietary Commercial Information in International Arbitration" 31 Tex. Int'l L. J. (1996) 451, 460-465.

6.2 THE NATURE AND FORMS OF INTERIM MEASURES

To fully understand the nature of interim measures it is very important to identify the characteristics and functions of such measures. With regard to their characteristics, regardless their nature, it is generally recognised that interim measures have the following features:

1) Interim measures are temporary in nature, their effects being limited by the purpose of assuring a specified protection until the time of the award;
2) They enjoy a limited authority, considering that they are granted on the basis of a summary proceeding;
3) They are limited by the object of the dispute, since their scope cannot exceed that of legal protection asked for by the parties with their claims on the merits.[4]

The determination of the type of interim measures, which is needed in the case, depends on the functions of such measures. From a functional perspective, one can distinguish between three different types of interim measures:

a) measures that serve to preserve the *status quo* until the final decision on the merits is rendered (preservation order),

b) measures which serve to establish interim regulatory scheme in order to enable the continuing performance of the contract in dispute (regulation order) and,

c) other orders requiring the other party to cease and desist to perform according to the order of the tribunal (performance order).[5]

It is noteworthy that this functional distinction between different interim measures is reflected in Article 2.1 of the ICC Pre-Arbitral Referee Procedure.[6] These Rules have been designed by the ICC to meet the need of having recourse at very short notice and before the constitution of the arbitral tribunal.

A Report of UNCITRAL's Secretary General lists the following categories of interim measures: [7]

a) measures aimed at facilitating the conduct of arbitral proceedings;

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[4] Bernardini, P., "The Powers of the Arbitrator" in *Conservatory and Provisional Measures in International Arbitration*, ICC Publication No. 519 (1993) Paris, at 23.
[5] Berger, K. P., "Form of Order of Interim Relief" a paper presented at the 1998 ICC Joint Symposium (Grant of Interim Relief by Arbitrators and the Interaction with the Courts) 2nd March 1998 London.
[6] ICC Publication No. 482 at 8.
[7] UN DOC A/CN.9/WG.II/W.P.108 (14 January 2000) para. 64, available on UNCITRAL's website www.uncitral.org.

b) measures to avoid loss or damage and measures aimed at preserving a certain state of affairs until the dispute is resolved; and

c) measures to facilitate later enforcement of the award.

The above discussion will lead us to understand the real nature of interim measures and whether they are considered to be procedural orders or arbitral awards. Generally speaking, arbitral determinations may be divided into three categories; merits, jurisdictional, and procedural decisions. Decisions on merits might include interim measures, because in order to make a determination of the measures necessary to the parties' rights for final determination, a tribunal would have to make some determination on the merits, even if practical or provisional. Even jurisdictional decisions could involve interim measures, as in the case of challenging the jurisdiction of the arbitral tribunal itself. In this case the arbitral tribunal may decide on its own jurisdiction to hear the dispute in question, and whether it has the power to order such measures. In the case of the ICJ for example, interim measures are part of the Court's incidental jurisdiction, as mentioned in Article 41 of the ICJ Statute. In addition, it could be suggested as well that while interim measures fall within the third category which are purely procedural decisions, they include orders of the submission of pleadings, orders to determine time periods, orders to produce documents, orders to conduct hearings, orders to determine the language of arbitration, orders to determine evidentiary matters, orders to hear witnesses, orders to appoint independent experts, and orders to proceed in a party's absence.

It has been stated in the **Channel Tunnel Case** by Lord **Mustill** that:

"The purpose of interim measures of protection...is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive on the substance of the dispute, provided that this and no more is what such measures aim to do, there is nothing in them contrary to the spirit of international arbitration." [8]

However, it has been correctly suggested that interim measures should be treated as partial awards.[9] In this respect it should be made clear that it is often

[8] [1993] A.C. 334, 365, per Lord **Mustill**.

[9] Redfern & Hunter, *Law and Practice of International Commercial Arbitration*, 2nd ed., London, Sweet & Maxwell, 1991, p. 380.

difficult to distinguish between interim and partial awards, since the terms 'interim' and 'partial' are sometimes used interchangeably. Both of the terms are final in the sense that it is binding on the parties and disposes of the issues with which it deals. An interim award will usually deal only with classical preliminary issues such as jurisdiction or liability issues, whilst a partial award has a more immediate monetary impact, in that it usually orders a payment on account to be made in respect of a particular claim or claims.

The observation of various arbitration rules will help in determining the nature of interim measures and whether they are interim awards or procedural orders. Under the 1998 ICC Rules of Arbitration Article 23(1) suggests that such measures could take the form of an order, giving reasons or of an award without specifying the type of the award. On the other hand, the 1997 AAA International Arbitration Rules state in Article 21(2) that interim measures may take the form of an interim award. In the same line the UNCITRAL Arbitration Rules of 1976 suggest in Article 26(2) that such measures may be established in the form of an interim award. The 1994 WIPO Arbitration Rules of 1994 in Article 46 (C) state the same form of interim awards to order such measures. In addition, the 1998 NAI Arbitration Rules in Article 38(2) state that the decision or measure shall be made or taken, respectively, in the form of an order of the arbitral tribunal.

It is thus clear from the above examination that the main institutional arbitration rules suggest that interim measures should be treated as interim awards more than procedural orders since, the issues which they deal with goes beyond organising and facilitating the arbitration proceedings and affect the final arbitral award. One of the main differences between interim awards, which are genuine awards, and procedural orders, is that the former are more formal than the latter and can only be reserved through a new formal award. On the other hand, informal procedural orders can be reconsidered by arbitral tribunals at any time of the arbitral process. Hence, it has been suggested that arbitral tribunals prefer to order interim measures through informal procedural orders.[10] Rapidity and flexibility are characteristics of procedural orders, which may be amended or revoked in case of a change of circumstances. A procedural order is not amenable to judicial control. Conversely, compliance of the parties with a procedural order is dependent on their

[10] Berger, K. P., *International Economic Arbitration*, Kluwer, Deventer, 1993, p. 343.

own will because, in the ordinary way, forcible execution of procedural orders by national courts is not possible. The above mentioned reasons guided several ICC arbitrators in making procedural orders rather than arbitral awards as the case in ICC case No. 7489 (1993),[11]especially that scrutiny of a procedural decision by the International Court of Arbitration is superfluous because the scope of the scrutiny is limited to awards.

[11] *Collection of Procedural Decisions in ICC Arbitration 1993-1996*, Dominique Hascher (ed.), Kluwer International, 1997, pp. 48-54.

6.3 LEGAL ENTILTEMENT OF ARBITRAL TRIBUNALS TO GRANT INTERIM MEASURES

The jurisdiction of arbitral tribunals to grant interim measures may derive either from the procedural law governing the arbitration, which is usually the law of the place where the arbitration takes place, or primarily from the arbitration agreement itself. In many cases, the law the parties have chosen in the arbitration agreement suffices to govern all aspects of arbitral proceedings. It is also possible, however, that the law of the place of the arbitration will act either to override some aspects of the parties' agreement, or to supplement that agreement. With regard to the arbitration agreement itself, the more detailed the provisions of such agreement, the less scope there will be for discretion in the arbitral tribunal on how to grant interim measures.

The basic and indispensable prerequisite for any arbitral interim measure is a request by one party to the arbitral tribunal and the *prima facie* competence of the tribunal for the underlying dispute. An interim measure ordered by the arbitral tribunal without request from one of the parties would violate the principle of party autonomy, which governs the arbitral proceedings and forms the inherent limitation of the tribunal's procedural powers and discretion. [12]

Before examining the jurisdiction of arbitral tribunals to order interim measures in the light of international practice, it is important to summarise various limitations, which could constitute a bar for such jurisdiction. There are several inherent limitations in the arbitral process that might prevent arbitral tribunals from granting interim measures; these inherent limitations could be summarised as follows:

1) The first limitation could be the non-establishment of the arbitral tribunal at the outset of the dispute. This limitation applies when a dispute arises and there is not as yet the arbitral tribunal to which the parties can apply in order to obtain an interim measure which is often required precisely at the time the decision to start litigation is taken. In such case the resort to the national courts is merely unavoidable.

2) The second limitation is based on the absence of powers of arbitral tribunals. In this case the arbitral tribunal would be incapable of obtaining from a recalcitrant party the enforcement of an interim measure. While the rules of most international regimes

[12] Berger, K.P., *International Economic Arbitration,* Kluwer, Deventer, 1993, p. 335.

authorise arbitral tribunals to order such measures, arbitral tribunals have no executory authority to enforce the order against assets of a party.

3) A further limitation is due to the fact that an interim measure, to be effective, is quite often ordered by the state court *inaudita altera parte*, a procedure that appears to be in contrast with the principle of due process, which the arbitral tribunal has to respect.[13]

4) Finally, the arbitral tribunal's jurisdiction is usually limited by the arbitration agreement, and cannot be exercised against persons who are not parties to such agreement. An arbitral tribunal could never grant interim measures, which would require that a third party be involved in their enforcement.

Furthermore, there could be some arguments against the use of interim measures in arbitration from the very beginning such as; that essential nature of voluntary arbitration is inconsistent with judicial interference, and that attachment and other coercive pre-award remedies are not normally needed, as most parties comply with arbitration awards, that an arbitral award may be enforced in any signatory country under the New York Convention, and finally that private arbitral parties may contract for security through performance bonds or other methods.

International practice shows us enough support of authority of international tribunals to order interim measures. As the PCIJ explained, the authority to indicate interim measures conferred by its own statute simply reflected:

"the principle universally accepted by international tribunals...to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute."[14]

Article 41 of the Statute of the ICJ reproduces the corresponding Article in the Statute of the PCIJ, which had been recommended by the committee of jurists entrusted with the task of drafting the original Statute. Interim measures in the case of the ICJ are part of the Court's incidental jurisdiction and as such derive from Article 41 of the Statute, rather than from provisions such as Article 36(1) or 36(2) which

[13] Bernardini, P., "The Powers of the Arbitrator" in *Conservatory and Provisional Measures in International Arbitration* ICC Publication No. 519 (1993) Paris p. 21.

deal with substantive jurisdiction. It is obviously necessary for interim measures to have this independent basis in order that they can provide an expeditious remedy, as was intended.[15] The ICJ has supported the authority of the Court in ordering interim measures in many cases. In one of these cases it has stated that:

"It is thus inherent in the authority of a tribunal that, ancillary to the power of judgement, it must have the power to issue incidental orders to ensure that the subject-matter of the suit is preserved intact until judgement." [16]

In the light of the ICJ practice interim measures do not effect the merits of the actual claim; the sole aim is to protect the subject matter of the suit and to prevent an aggravation of the dispute. The ICJ has repeatedly acted on the view that issue of an order indicating interim measures of protection is independent of a previous determination of its jurisdiction on the merits. It has not accepted the view that its jurisdiction on the merits must be probable before it indicates provisional measures.[17] This principle has been affirmed in various ICJ cases as in the **Fisheries Jurisdiction Case** [18] and the **Nuclear Tests Case.**[19] It has been stated that interim measures are designed to facilitate the functioning of the ICJ by ensuring that proceedings are not frustrated, and the execution of any final judgement is not aborted by irremediable change of circumstances.[20] The ICJ has recently dealt with interim measures in **Paraguay v. United States**, where the Court stressed the binding character of interim measures ordered by the Court.[21]

It could be said that the general principle underlying the authority of international tribunals to order interim measures applies with equal force to international arbitral tribunals. As a result, international arbitral tribunals have

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[14] **Electric Co. of Sofia and Bulgaria (Belg. v. Bulg.)** (Interim Measures of Protection) 1939 PCIJ (Ser. A/B) No. 79, 194, 199 (Dec. 5).
[15] Merrills, J. G., "Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice", 44 ICLQ January 1995 at 91. See generally, Goldsworthy, P. J., "Interim Measures of Protection in the Court of International justice" 68 AJIL 1974 pp. 259-277.
[16] Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. Serb. & Mont.), 1993 ICJ Rep. at 375, 376.
[17] Lauterpacht, H., *The Developing of International Law By The International Court*, London, Stevens & Sons Limited, 1958, p. 111.
[18] [1972] ICJ Rep. 18.
[19] [1973] ICJ Rep. 105.
[20] Goldsworthy, P. J., "Interim Measures of Protection in the ICJ" AJIL vol. 68 [1974] pp.258-277 at 276.

repeatedly held that they have authority to order interim measures. The Iran-U.S. Claims Tribunal has exercised its power to take interim measures at the application of claimants on a number of occasions as examined below. The measures taken include orders to municipal courts in Iran and the U.S. to withdraw attachments on goods, restraints on the misuse of trade marks, and requesting a stay of proceedings. The latter action is probably of most interest, since the request of the Tribunal effectively overrides the jurisdiction of the municipal courts of Iran and the U.S. Moreover, the request for a stay of proceedings is an interim measure not specifically provided for in the Tribunal's rules.[22] For example, **in E-Systems, Inc. v. Islamic Republic of Iran**, the Iran-U.S. Claims Tribunal, sitting in full tribunal, held that it had *"an inherent power to such orders as may be necessary to conserve the respective rights of the parties and to ensure that this Tribunal's jurisdiction and authority are made fully effective."* [23] This case is considered the most important one in this context because it was the first case in which the Tribunal requested one of the parties to move for a stay of proceedings in its municipal courts. The decision of the Tribunal in **E-Systems** set the precedent to be followed by the Tribunal in a number of claims.[24]It should be mentioned in this respect that the Iran-U.S. Claims Tribunal is empowered to order interim measures, not under its constitutive instruments, but under Article 26 of the UNCITRAL Arbitration Rules of 1976, which were selected by the Claims Settlement Declaration for the conduct of its proceedings. It should be noted in this respect that the Algiers Declarations make no direct reference to interim measures that the tribunal might order, but Article III, paragraph 2, of the Claims Settlement Declaration makes an indirect reference by providing that the Tribunal *"shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the parties or by the Tribunal to ensure that this agreement can be carried out".*[25] In one of its cases, the Iran-U.S. Claims Tribunal stated that under the tribunal precedents interim

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[21] Case concerning the Vienna Convention on Consular Relations (Para. v. U. S.) Provisional Measures, dispositif, para. 41 (Order of April 9, 1998).
[22] Mapp, W., The Iran-United States Claims Tribunal The first ten years 1981-1991, Manchester University Press, 1993, pp. 281-282.
[23] 2 Iran- U. S. C.T.R. 51, 57 (1983).
[24] See, among many cases, **Questech Inc. v. Iran** 2 Iran-U. S. C.T.R., 96 (1983); **Ford Aerospace v. Iran** 2 Iran-U.S.C.T.R., 281 (1983); **Rockwell International Systems Inc. v. Iran** 2 Iran-U.S.C.T.R., 310 (1983).
[25] See Aldrich, G., *The Jurisprudence of the Iran-United States Claims Tribunal*, Clarendon Press, Oxford, 1996, pp. 137-155.

measures can be granted only if it is necessary to protect a party from irreparable harm to avoid prejudice to the jurisdiction of the Tribunal. [26]

It is important in this respect to examine the UN Convention on the Law of the Sea, done on 10 December 1982 where Article 290 vests the International Tribunal on the Law of the Sea with authority to *"prescribe any provisional measures which it considers appropriate under the circumstances."* [27] The first decision adopted by the International Tribunal for the Law of the Sea concerned a provisional measure in the **M/V Saiga** case, in which it was prescribed that Guinea *"shall refrain from taking or enforcing any judicial or administrative measure"* against the vessel in question. [28] In another case **Southern Bluefin Tuna**[29] the Tribunal acted for the first time on request for provisional measures under paragraph 5 of Article 290 of the Convention.

Furthermore, it could be noted that Article 1716 of the NAFTA requires the signatory countries to provide provisional remedies in intellectual property cases. The Section of the NAFTA on settlement of invesment disputes contains a specific provisions dealing with interim measures in Article 1134: "*A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117. For purposes of this paragraph, an order includes a recommendation*".[30]

It is important to examine the jurisdiction of arbitral tribunals in the light of international arbitral rules of different arbitration institutes. The first rules to be examined will be the 1998 ICC Arbitration Rules where Article 23(1) provides: *"Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The Arbitral Tribunal may*

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[26] Decision in Cases Nos. A4, A7 and A15 (I: F and III) (DEC. 129-A4/A7/A15 (I: F and III) –FT) of 23 June 1997 reported in Y. Com. Arb. XXIII (1998) pp. 469-472.
[27] 21 I.L.M. 1261 (1982).
[28] **The M/V Saiga, Saint Vincent and the Grenadines v. Guinea**, Case No. 1, International Tribunal for the Law of the Sea, 4th December 1997. See also the comment on this case by Oxman, B. H., AJIL Vol. 92 1998, 278-282.
[29] **New Zealand v. Japan; Australia v. Japan**, Order on Provisional Measures (International Tribunal for the Law of the Sea Cases Nos. 3 and 4, August 27, 1990). See also the comment on this case by Kwiatkowska, B., AJIL Vol. 94: 4 [2000] pp. 150-155.
[30] 32 ILM 646 (1993).

make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the Arbitral Tribunal considers appropriate."

According to the above Article the arbitral tribunal's power arises as soon as the file has been transmitted to it, but only then. Such power is exercisable at the request of a party, not of the tribunal's own motion, the tribunal may order any interim measure it deems appropriate. ICC arbitrators have ample liberty with regard to the forum of the procedural decisions they make. This is could be concluded out of the ICC Order No. 8238 (1996)[31] where the decision took the form of minutes drafted and signed by the arbitral tribunal. The granting of such a measure may be made subject to appropriate security being furnished by the applicant. Article 23 replaces Article 8 in the former 1988 ICC Arbitration Rules, curing an important ambiguity in the former Rules by explicitly authorising the arbitral tribunal to order interim or conservatory relief. [32] Furthermore, Article 23(2) of the 1998 ICC Arbitration Rules provides that:

"Before the file is transmitted to the Arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an Arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the Arbitral Tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the Arbitral Tribunal thereof."

The above Article addresses two situations in which a party may seek a court's assistance in obtaining interim measures. The first, in where the file has not yet been transmitted to the Arbitral Tribunal. The second is where the Arbitral Tribunal is already in possession of the file, but the circumstances nevertheless make recourse to

[31] *Collection of Procedural Decisions in ICC Arbitration 1993-1996*, Dominique Hascher (ed.), Kluwer International, 1997, pp. 161-164.

a court *"appropriate"*. Unlike Article 23(1), Article 23(2) does not provide for possible derogation by the parties, although it is difficult to see why such a derogation should give rise to a problem, provided that it is otherwise valid. Under Article 23(2) when interim measures are requested from a judicial authority, the application must be notified to the Secretariat of the ICC Court, which will then inform the arbitral tribunal. However, if this notification is not made, this has no effect on the legitimacy of the interim measures requested from the State court, or the right of the defaulting party to arbitrate.

Article 21 of the 1997 AAA Arbitration Rules similarly provides that:

"1. At the request of any party, the tribunal may take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property."

Clearly, the above provision gives the broadest authority to order interim measures, which could be incorporated into a judicially enforceable interim award.

It could be noted that Article 26 of the 1976 UNCITRAL Arbitration Rules is in accord, it provides that:

"1. At the request of either party, the arbitral tribunal may take any interim measure 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."

Article 26 is of particular importance in international arbitration since it is the progenitor of similar rules promulgated by the leading arbital institutes around the world. [33] It gives the arbitral tribunal the broadest authority, not limited to the safeguarding of property. Accordingly, the arbitral tribunal may take any interim measures *'it deems necessary in respect of the subject matter of the dispute'*.

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[32] Derains & Schwartz, *A Guide to the New ICC Rules of Arbitration* Kluwer, 1998, p. 272.

[33] For example, Article 26 have been adopted by the Hong Kong International Arbitration Centre Rules and by the Inter-American Commercial Arbitration Commission Institutional Arbitration Rules.

The 1998 LCIA Rules contain an especially detailed statement of the arbitrator's authority to grant interim measures. Article 25 specifies that, unless otherwise agreed in writing, the arbitral tribunal shall have the power to:

"...order any respondent party to a claim or counterclaims to provide security for all or part of the amount in dispute, by way of deposit or bank guarantee or in any manner and upon such terms as the Arbitral Tribunal considers appropriate. Such terms may include the provision by the claiming or counter claiming party of a cross-indemnity, itself secured in such manner as the Arbitral Tribunal considers appropriate, for any costs or losses payable under such cross-indemnity may be determined by the Arbitral tribunal in one or more awards."

Similarly, Article 46 of the WIPO Arbitration Rules of 1994 supports the jurisdiction of the arbitral tribunal to order any interim measure it deems necessary, it states:

"(a) At the request of a party, the Tribunal may issue any provisional orders or take other interim measures it deems necessary, including injuctives and measures for the conservation of goods which form part of the subject-matter in dispute, such as an order for their deposit with a third person or for the sale of perishable goods. The Tribunal may make the granting of such measures subject to appropriate security being furnished by the requesting party."

In the same context, Rule 39(1) of ICSID Rules for Procedure for Arbitration Proceedings provides that:

"At any time during the proceeding a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be reserved, the measures the recommendation of which is requested, and the circumstances that require such measures."

Under the above provision a party may request provisional measures at any time during the proceedings, that is, from the moment of instituting proceedings. In actual practice, recommendations for provisional measures can only be made after the

tribunal has been constituted, since it is the tribunal, which must take the recommendations. Arbitration rule 39 (1) requires a party requesting provisional measures to specify the right to be reserved. The cases before ICSID tribunals show that the parties in requesting provisional measures have invoked a number of difficult rights discussed during the Convention's drafting, such as the non-aggravation of the dispute, the non-frustration of the eventual award, and the rights in dispute.

Dealing with interim measures of protection, Articles 38(1) and (4) of the 1998 NAI Arbitration Rules provides respectively that:

"Without prejudice to the power provided in article 37, the arbitral tribunal, at the request of a party, at any point in the proceedings, may provisionally make any decision or take any measure regarding the object of the dispute which it deems useful or necessary."

"The request does not preclude a party from requesting a court to grant interim measures of protection or from applying to the President of the district Court for a decision in summary proceedings."

According to the above provisions the arbitral tribunal may order interim measures outside of summary proceedings. An interim measure of protection can only be issued by the court. Such requests to the court are not excluded by summary arbitral proceedings.

Furthermore, CIETAC Rules of Arbitration provides in Article 13:

"The Arbitration Commission may, pursuant to the request of the parties and in accordance with the Chinese law, apply to the Chinese court in the place where the property of the Respondent in or in the place where the arbitration institution is located for a decision in respect of taking preservative measures."

Clearly, the mentioned Article requires that any interim measure should be taken according to the Chinese law. At the same time, Article 28 of the Chinese Arbitration Law provides that if a disputing party believes that execution of an award become impossible or difficult to enforce, the disputing party may apply to CIETAC for provisional measures of property preservation.

Since in many cases a municipal law may govern the arbitral proceedings, it is of a great importance to examine the jurisdiction of arbitral tribunals to grant interim measures in the light of different national arbitration laws. The starting point of this discussion should be the examination of the UNCITRAL Model Law of 1985, which has been adopted by many countries with or without modifications. The relevant Articles in the Model Law are Articles 9 and 17.

In its turn, Article 9 provides that:

"It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings from a court an interim measure of protection and for a court to grant such measure." [34]

According to the leading commentators on the Model Law *"Article 9 confides the dual principle that, first, a party does not waive its rights to go to arbitration by requesting (or obtaining) interim measures of protection from a national court, and, second, that a national court is not prevented from granting such measures by the existence of an arbitration agreement."* [35]

Article 9 applies irrespective of the place of arbitration and whether or not the place of arbitration is in the territory of the Model Law State, and expresses the principle of compatibility of an arbitration agreement with a request to a court for an interim measure. Additionally, Article 9 is not limited to any particular kind of interim measures. Thus, it applies to measures to conserve the subject matter of the dispute; measures to protect trade secrets and proprietary information, measures to preserve evidence; pre-award attachments to secure an eventual award and similar seizures of assets, measures required from third parties; and enforcement of any interim measures ordered.

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[34] Similar provisions to Article 9 are to be found in Article 26(3) of the UNCITRAL Arbitration Rules of 1976, Article VI (4) of the 1961 Geneva Convention, Article 4 (2) of the 1966 Strasbourg Uniform Law and in a more limited form in Article 23(2) of the 1998 ICC Rules of Arbitration. These provisions have in common that they only address a party's right to seek judicial provisional remedies, and in the case of arbitration rules, that is all they can address. The Model Law explicitly provides that the court to which a request for such remedies is submitted is not barred from granting it by the mere existence of an arbitration agreement. See generally, Broches, A., *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* Kluwer 1990.

[35] Holtzmann, H & Neuhaus, J *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1994) Kluwer, The Hague at 332.

The second relevant provision in the UNCITRAL Model Law of 1985 is Article 17, which deals with the power of arbitral tribunal to order interim measures, it, reads as follows:

"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 measures."

It is necessary at the outset to clarify the relation between Articles 17 and 9. Article 17 confers on the arbitral tribunal a limited power to order interim measures; Article 9 on the other hand does not purport to confer any such power on a court. It merely provides that if a court has such power under its national procedural law, it will not be precluded from exercising it because the parties to the dispute have concluded an arbitration agreement. It is obvious that the scope of Article 9 is somewhat broader than that of Article 17. It has been argued that in the case of any conflict between measures ordered by the court and measures ordered by the tribunal, that the court ordered measures would prevail on a penalty of contempt of court. Another solution was decided that a conflict might arise when a party had requested an order from the arbitral tribunal and the opposing party obtained a conflicting order from a court in another state; in this case the matter should be left for each state to decide according to its principles and laws pertaining to the competence of its courts and the legal effects of court decisions.[36]

The text of Article 17 was modelled on Article 26(1) and (2) of the UNCITRAL Arbitration Rules of 1976. However, there are some differences between the two provisions. First, Article 17 omits the nonexclusive list of examples provided by Article 26 of the Rules: *"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."* A second change from the UNCITRAL Arbitration Rules provision was that the sentence regarding security in Article 17 uses more general language *"appropriate security in connection with such measure"*

[36] Broches, A., *Commentary on the UNCITRAL Model Law on International Commercial Arbitration*, Kluwer, 1990, pp.90-91.

instead of "security for all costs of such measure." Third, the provision in Model Law is explicitly limited to orders directed to the parties, not to third parties. Although this limitation was said to make the Model Law more restrictive than the UNCITRAL Rules provision, it is unlikely that an arbitral tribunal operating under the Rules which are, merely an agreement among parties has the power to order a third party to take any action unless a law permits it. Finally, the Model Law provision is limited to measures that the arbitral tribunal can order excluding any measures that the arbitral tribunal might itself take.[37]

After examining the relevant provisions in the Model Law it is important to discuss the legal entitlement of arbitral tribunals to grant interim measures under a common law jurisdiction which is the English Legal system. In the English procedure, interim measures are most commonly understood as referring to orders such as the Mareva injuction and the Anton Piller order.[38] The following will be a review for the interim measures available under the regime of the 1996 English Arbitration Act, both from the arbitral tribunals and from the courts. As mentioned in S.1 (c) and S.44 (5) of the Act, the general principle of the Act is to require the parties to refer first to the arbitral tribunal, and to the court only when the arbitral tribunal has no power to act or is unable to act effectively.

As to the powers of the arbitral tribunal to order interim measures, the starting provision is Section 38(1) of the Act, which provides that:

"The parties are free to agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings."

This provision gives the parties a very wide discretion, which will depend on the circumstances of each case, and on whether the procedural rules chosen by the parties make provision for the granting of interim measures by the arbitral tribunal. The adoption of, for example, the ICC or LCIA Rules, which confer similar powers on arbitral tribunals, should qualify as the requisite agreement by the parties. In the absence of agreement by the parties, it is necessary to look at the default powers to

[37] See generally, Holtzman & Neuhaus *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, Kluwer, 1994, esp. 530-547.
[38] As to Mareva injuctions and Anton Piller orders generally, see Gee, *Mareva Injunctions and Anton Piller Relief*, 3rd ed., 1995.

grant interim measures vested in the arbitral tribunal by the 1996 Act. There are to be found in Sections 38(4) and (6). Section 38(4) provides that:

"The tribunal may give directions in relation to any property which is the subject of the proceedings or as to which any question arises in the proceedings, and which is owned by or is in the possession of a party to the proceedings-

(a) for the inspection, photographing, preservation, custody or detention of the property by the tribunal, an expert or a party, or

(b) ordering that samples be taken from, or any observations be made of or experiment conducted upon, the property."

In its turn, Section 38(6) provides that:

"The tribunal may give directions to a party for the preservation for the purposes of the proceedings of any evidence in his custody or control."

It could be noted that these provisions contain two main limitations. First, it is self-evident that the tribunal can act only when it has been constituted: before it is constituted a party seeking an interim measure will need to look to the court. Secondly, the powers of the tribunal extend only to making orders affecting the parties to the arbitration. If an order is required having an effect on third parties, it will be necessary to have recourse by the courts.[39]

It is important to discuss Section 39 of the Act, which concerns the power to make provisional awards, including provisional awards for the payment of money as between the parties, or for an interim payment on account of the costs of the arbitration. Section 39 reads as follows:

"(1) The parties are free to agree that the tribunal shall have power to order on a provisional basis any relief which it would have power to grant in a final award.

(2) This includes, for instance, making-

(a) a provisional order for the payment of money or the disposition of property as between the parties, or

[39] Johnson, A., "Interim Measures of protection under the Arbitration Act 1996", [1997] Int. A. L. R. at 10.

(b) an order to make an interim payment on account for the costs of the arbitration.

(3) Any such order shall be subject to the tribunal's final adjudication; and the tribunal's final award, on the merits or as to costs, shall take account of any such order.

(4) Unless the parties agree to confer such power on the tribunal, the tribunal has no such power."

It is obvious that Section 39 of the Act provides that the power to make provisional awards is exercisable by the tribunal only when the parties so agree. It indicates a particular power, which the parties may by agreement confer on the tribunal; but in the absence of specific agreement, the power will not exist. It is unclear, however, whether Section 39 powers are practically useful. The Section uses the language 'order' rather than 'award'. 'Award' appears only in the title of the section. It could, therefore, be argued that any breach of an interim order couldn't be enforced directly by the courts since it is not an arbitral award. It would follow that the only way to enforce the order would be by means of issuing a peremptory order.[40]

Finally, certain aspects of the relevant provisions in the 1996 English Arbitration Act may be summarised as follows:

(1) The 1996 Arbitration Act reflects the principle that it is not incompatible with the arbitral process for the parties to seek the assistance of the courts, but that whenever possible the parties should seek interim measures from the arbitral tribunal.[41]

(2) The Act provides a wide discretion to the parties to confer powers on tribunal to order interim measures, and in the absence of agreement sets out a number of important default powers.

(3) The Act confers significant powers on the court exercisable in support of arbitral process, but the court may only act if, or to the extent that, the tribunal itself is unable to act or cannot act effectively.

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[40] Groves, K., "Virtual Reality: Effective Injunctive Relief in Relation to International Arbitrations", [1998] Int. A. L. R. 188-193 at 188-189.

[41] This principle has been supported recently by the Court of Justice of European Communities where it was held by the Court that when the parites to a contract had excluded the jurisdiction of courts by providing for the reference of dispute to arbitration, a court could nonetheless adjudicate on an application for interim measures, under Article 24 of the Brussels Convention, despite the existence of arbitration agreement. (See **Van Uden Maritime BV v. Kommanditgesellschaft in Firma Deco-Line** Case C-391/95, reported in The Times, Tuesday December 1 1998, 22.)

(4) Under the Act the arbitrators have the power to grant injunctive relief. The extent of their power varies according to the time of its exercise: at the final award stage, or on an interim basis.

(5) The new Act has adopted an original approach with regard to interim measures of protection in arbitration. It established a system of court subsidiarity. The underlying philosophy regards the court as the last resort. To grant interim relief is in the first place allocated to the arbitrator. However, the parties have to opt in for it. The courts only step in under certain preconditions if the court-subsidiarity principle is applied. The preconditions for court-granted interim relief are high. But an *ex parte* Mareva injunction or an Anton Piller order are directly available from the court. Arbitrator-granted interim relief is enforced by the court. But hurdles are set up to keep interim measures as far as possible in the realm of arbitration.

It could be appropriate now to examine the practice in civil law jurisdictions where the traditional position was that granting of interim measures by arbitral tribunals is prohibited, but this position has been replaced by a new trend, where arbitral tribunals are entitled to grant such measures. Hence, the following will be an examination of the French perspective in this respect. Under French law, the following types of interim measures are available; attachments, judicially granted guarantees and injunctions and temporary restraining orders. The *Cour de Cassation* in **Société Horeva v. Société Sitas** has acknowledged that a national court does have the power to order interim measures, notwithstanding the arbitration agreement, unless the parties have expressed an intention to the contrary. [42] It could be noted from this precedent that a clause, whereby the parties have waived or prohibited referral of the case to a national court for ordering interim measures prior to the constitution of the arbitral tribunal, would be legal and would generally be applied in France.[43]

Even if there is an international arbitration agreement, French case law precedents have always recognised that the national courts have a power to order necessary measures.[44] Their intervention is however subject to a strict condition of urgency or a

[42] Cf. Cour de Cassation, 1 èr Ch. civ. 6 mars1990, Rev. Arb. 1990, p. 633.
[43] Pluyette, G., "A French Perspective" in *Conservatory and Provisional Measures in International Arbitration* ICC Publication No. 519 1993 Paris at 75.
[44] Pluyette, G., "A French Perspective" in *Conservatory and Provisional Measures in International Arbitration* ICC Publication No. 519 1993 Paris at 78.

situation of risk. This is based on Article 809 para. 1 of the French Code of Civil Procedure which reads as follows:

"The President [of the Court] may always, even when confronted by a serious dispute, prescribe conservatory measures or measures to return matters to their former state in referee proceedings when said measures are essential, either for preventing an imminent loss or for putting a stop to manifestly illicit disturbance."

In addition, the provision of Articles 48 et seq. of the French Code of Civil Procedure give the national judge the power to order interim measures in cases where real estate is involved. The same applies in the case of personal property, so far as the application of measures of non-disposal of a conservatory nature is concerned.

Interim provision is another interim measure which is very specific to French Law that the national judge may order. Under Article 809 para. 2 of the French Code of Civil Procedure the interim provision is drafted in the following terms:

"In cases where the existence of the obligation cannot be seriously disputed, he (the "juge des reférés") may award a provisional payment to the creditor or order the carrying out of an obligation, even if an obligation to perform is concerned."

In international arbitration, the practice of interim provision has aroused very lively criticism because such intervention by the national court in fact has the effect of supplanting the exclusive jurisdiction of the arbitrators, and depriving the arbitration of any intent, with the creditor having an enforceable title that may correspond to the whole of its claim. So far as interim provision is concerned, French case law could be expressed in the following judgment by the *Cour de Cassation* where it stated:

"But whereas in the absence of an intention to the contrary by parties resorting to international arbitration, the existence of an arbitration agreement-so long as the ad hoc tribunal has not been constituted and therefore cannot be actually seized of the dispute- does not exclude, in the case of an emergency (which had been ascertained in

this case) jurisdiction as an exception by the "juge de référés" for granting an interim provision if the debt is not seriously in doubt." [45]

It is well established under French Law that after the case has been referred to arbitral tribunals there should be no interference or intervention by the national courts in the arbitration proceedings. French arbitration law recognises that arbitral tribunals have the power to order interim measures by interim awards or orders. However, in an international arbitration nothing should prevent the arbitral tribunal from taking such measures if the procedural rules agreed by the parties, by the arbitration rules, or by the arbitrators themselves, do not prohibit this.

According to Article 1460 of the French Code of Civil Procedure the arbitral tribunal has the power to grant interim measures if it is specifically empowered to do so by the arbitration agreement or by the arbitration rules incorporated in such agreement. The arbitral tribunal is unable to assume such powers in the absence of any language to that effect. With regard to the availability of interim measures from the national courts in France, parties to disputes covered by an arbitration agreement may have recourse to national courts for interim measures, including most kinds of injunctions, whether they have already referred the matter to arbitration or not, as long as such measures do not prejudice the outcome of the case on the merits.[46] The only exception to the possibility of seeking interim measures from national courts are when, after the arbitral tribunal has been constituted, the measure sought may have an effect on the merits of the case.

However, in the case of a clause in an arbitration agreement explicitly prohibiting one party from seeking interim measures from national courts while the arbitration is pending, this clause would not be contrary to French public policy, and thus would be valid.[47]

It would be helpful to examine the American position in this respect. In the U.S. there is a wide range of interim measures which fall into two basic categories;

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[45] 6 mars 1990, Rev. Arb. 1990, at 635.

[46] For example, the Tolouse Court of Appeal (2nd Ch. 11 March 1991 **Perez v. Sorba**, juridicta N. 040376) applied this principle. The Court first pointed out *"that the existence of an arbitration clause intended to settle differences or disputes arising in the course of performance of the assignment of equity capital combined with a clause guaranteeing that the liabilities do not preserve the juge de référés having jurisdiction to order conservatory or interim measures whenever urgency so require."*

[47] Buchman, L. B., "France" in *Provisional Remedies in International Commercial Arbitration A Practitioner Handbook* (Edited by Axel Bösch, Associate Editor Joanne Fransworth), 1994 Walter de Gryter, Berlin New York at 269.

attachments and injunctions. As a common law jurisdiction, the courts in the U.S. play a vital role prescribing the position of American law in this respect. The FAA and Uniform Arbitration Act are silent on the arbitrator's powers to order provisional measures. However, there are a few decided cases that discuss arbitral tribunals' power to grant interim measures. These cases seem to take it for granted that arbitral tribunals have such power. The U.S. Supreme Court stated that attachment could be used during arbitral proceedings if it is allowable under applicable law. [48] In **Merril Lynch, Pierce, Fenner & Smith: Inc. v. Dutton** [49] for example, the Tenth Circuit ordered any injunction modified to expire when the issue of preserving the *statue quo* is presented to an arbitral tribunal. In another case, **Sperry Int'l Trade Inc. v. Israel** [50] the Second Circuit Court of Appeals referred an interim award, noting that the party opposing relief had found no authority that supported its assertion that arbitrators could not order provisional remedies. Furthermore, the Court observed that under New York law the arbitrators could order relief that a court might not properly grant. It seems that under US case law that there is little doubt that arbitral tribunals may order interim measures. With regard to the availability of interim measures from the American courts it seems from the following cases that most Federal Courts will grant interim measures in support of the arbitral process, at the same time some courts and many state courts refuse to provide such assistance. However, many Circuit courts of Appeals have permitted the grant of interim measures notwithstanding an arbitration agreement. [51] It has been stated in **Carolina Power and Light Co. v. Uranex** that the availability of provisional remedies encourages rather than obstructs the use of agreements to arbitrate.[52] In **Rogers, Burgun, Shahine & Descher, Inc. v. Dongsan Constr. Co.**, the court has ruled that the: *"fact a dispute is to be arbitrated does not deprive the court of its authority to provide provisional remedies."* [53] Nevertheless, a few lower U.S. courts have held that arbitrators lack the power to

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[48] **Anaconda v. American Sugar Refining Co**. 322 U.S. 42 (1944).
[49] 844 F. 2d 726, 728 (10th Cir. 1988).
[50] 689 F. 2d 301 (2 d Cir. 1982).
[51] See for example, Teradyne, Inc. v. Mosteck Corp. 797 F. 2d 43, 51 (1st Cir. 1986). **Guniiess-Harp Corp. v. Jos. Schlitz Brewing Co.**, 613 F. 2d 468, 472-73 (2d Cir. 1980), **Ortho Pharmaceutical Corp. v. Amgen, Inc.** 882 F. 2d 806, 811-13 (3rd Cir. 1989), and **RGI, Inc. v. Tucker & Assoc. Inc.** 858 F. 2d 227, 230 (5th Cir. 1988), **Performance Unlimited v. Questar Publishing, Inc.** 52 F. 3d 1373 6th Cir. 1995 which demonstrated the need for provisional remedies in copyright disputes that are subject to arbitration, and finally the **Klockner-Humboldt-Deutz Aktiengesellschaft v. Hewitt-Robins Division of Litton Systems, Inc.** 486 F. Supp. 283 (D.S.C. 1978) which illustrated the need for provisional remedies to preserve intellectual property rights in arbitration.
[52] 451 F. Supp. 1044 (N. D. Calif. 1977).

issue provisional relief, at least where the parties have not expressly authorised them to do so.[54]

It could be stated that court ordered interim measures in the U.S. would not conflict with the strong Federal policy in favour of arbitration and enforcement of arbitral awards.[55] Furthermore, it has been stated that the Federal Courts in the U.S. have established the rule that the text of the New York Convention should not be construed to limit the powers of the arbitrators or the courts to provide conservatory measures.[56] The Netherlands Arbitration Act of 1986 provides in Article 1022 (2) that: *"An arbitration agreement shall not preclude a party from requesting a court to grant interim measures of protection, or from applying to the President of the District Court for a decision in summary proceedings in accordance with the provisions of article 289. In the latter case the President shall decide the case in accordance with the provisions of article 1051."* Obviously, the Netherlands Arbitration Act of 1986 states that it is not incompatible with the arbitral process for the parties to seek interim measures from the national courts.

The Swiss PIL Statute of 1986 provides in Article 183 that:

"1. Unless the parties have agreed otherwise, the arbitral tribunal may, at the request of a party, order provisional or protective measures.
2. If the party so ordered does not comply therewith voluntarily, the arbitral tribunal may request the assistance of the competent court. Such court shall apply its own law.
3. The arbitral tribunal or the court may make the granting of provisional or protective measures subject to the provisions of appropriate security.",

The above Article regulates the granting of interim measures in Switzerland. Accordingly, the arbitral tribunal can order interim measures upon the application of one party, insofar as the parties do not agree otherwise. If the party concerned does not freely submit to the ordered measures then the arbitral tribunal can request the assistance of the competent court, the court then applies the particular cantonal law.

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[53] 598 F. Supp. 754, 758 (S.D.N.Y. 1984).
[54] See **Swift Inds., Inc. v. Botany Indus., Inc.**, 466 F. 2d 1125, 1134 (3d Cir. 1972), **Charles Construction Co. v. Derderian** 586 N.E. 2d 992 (Mass. 1992).
[55] Zekos, G., "Court's Intervention in Commercial and Maritime Arbitration under U. S. Law", 14 J. Int'l Arb. 2 (1997) pp. 99-124 at 108.
[56] Ebb, L. F., "Flight of assets from the Jurisdiction 'In the Twinkling of a Telex': Pre-and Post- Award Conservatory Relief in International Commercial Arbitrations" 7 J. Int'l Arb. 1, (1990) 9-36 at 36.

The court cannot refuse its support if the interim measures ordered by the arbitral tribunals are also permissible according to the cantonal law to be applied by the court.

6.4 ENFORCEMENT OF INTERIM MEASURES GRANTED BY ARBITRAL TRIBUNALS

The interim measures ordered by arbitral tribunals do not always require enforcement. This is the case, for example, of an interim measure authorising a party to perform a certain action. However, most of the interim measures ordered by arbitral tribunals require, if they are not voluntarily complied with, the assistance of the national court to be enforced. It has been stated in this respect that the intervention by state courts offers the only effective means for implementing interim measures during arbitration.[57] It has been stated as well that it is increasingly realised in international arbitration circles that the intervention of the courts is not necessarily disruptive of the arbitration. The **Channel Tunnel Case** is a good illustration of such a role.[58] National courts must help ensuring the efficiency of the arbitral process. Before the constitution of the arbitral tribunal, the role of national courts and arbitral tribunals is complementary. After the arbitration has started, the role of national courts is subsidiary. [59]

However, the extent of court intervention in the form of interim measures should run only so far as the rationale for such intervention. Like interim measures generally, judicially rendered interim measures should be issued when necessary to preserve the capacity of the arbitral tribunal to render an effective award, courts should support, not substitute for the tribunal's authority. [60] Furthermore, it could be stated that the interaction of the national courts could be avoided by the issuance of an interim award covering interim measures. This will depend on the arbitration agreement or the arbitral rules to which the parties have made reference to and which contemplate such an authority. It is also important to note whether under such rules an

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[57] Jarvin, S., "Is Exclusion of Concurrent Court's Jurisdiction over Conservatory Measures to be introduced by a Revision of the Contract?" 6 J. Int'l Arb. 1, 1989 p. 171.
[58] Reymonds, C., "The Channel Tunnel Case and the Law of International Arbitration", L. Q. Rev. vol. 109 [1993] 337-342 at 341.
[59] Hunotiau, B., "Order of Interim Relief in Support of Arbitral Proceedings by National Courts in Civil Law Countries", a paper submitted to the ICC Joint Symposium in London on 2nd March 1998.
[60] Donovan, D. F., "Powers of Arbitrators to Issue Procedural Orders, including interim measures of protection and the obligation of parties to abide by such order", a paper presented at the 15th Joint Colloquium on International Arbitration Paris, 30th October 1998.

order concerning interim measures may take the form of an award. If such measures are covered in the form of a partial award there would be no longer a problem of resorting to the national court's assistance for the enforcement of such measures. The partial award could be covered by the New York Convention under Articles IV and V. It has been suggested however that awards containing interim measures have to be regarded as non-binding under the New York Convention.[61] On the other hand, **van den Berg** has stated that the New York Convention must be held, in general, not to preclude provisional remedies. According to him the Convention does not imply that a request for provisional remedies by a party would yield a renunciation of the agreement to arbitrate. [62] Furthermore, many appellate decisions in different countries have ruled that the New York Convention permits interim measures.[63] In this respect, **Gaja** has concluded that pre-award attachment is consistent with the goals of the New York Convention by stating:

"The fact that courts cannot continue proceedings on the merits does not mean that they should also dismiss any request for interim measures of protection. These are generally outside the scope of the arbitrators' competence, and foreign decisions on such matters are seldom recognised. If the Convention did not allow the courts to grant any provisional remedy in the presence of an arbitral agreement covered by the Convention, the arbitral award might be prevented from reaching any practical effect. The purpose of the Convention seems to be better served if an obligation not to grant interim measures is not considered as having been set by Article II." [64]

The Report of UNCITRAL's Secretary General makes a number of arguments in favour of enforceability of interim measures ordered by an arbitral tribunal. It states with respect to the New York Convention: *"The prevailing view, also confirmed by case law in some States, is that the Convention does not apply to interim awards"*. [65] The Report does not give a source for this statement.

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[61] Berger, K. P., *International Economic Arbitration* Kluwer 1993 Deventer at 346.
[62] van den Berg, A. J., *The New York Convention of 1958*, Deventer, 1981, pp. 142-144.
[63] See, e. g., **Scherk Enterprises Aktiegnesellscaft v. Societe des Grandes Marques**, Cass., 1977, 1979 Yearbook Comm. Arb'n IV (1979) p. 286 (Italy) awarding provisional remedies under New York Convention in trademark dispute.
[64] Gaja, G., *International Commercial Arbitration: New York Convention*, 1980, pt. I.B.1.
[65] UN DOC A/CN.9/WG.II/W.P.108 (14 January 2000) para. 83, available on UNCITRAL's website www.uncitral.org.

The problem of enforcement of interim awards under the New York Convention is created by the language of Article V (I) (e), which provides that enforcement may be denied where the award has not yet become binding on the parties. Those against pre-award attachment under the New York Convention generally argue that such interim measures threaten the authority of the Convention and the uniformity of operation envisioned by the drafters. Those in favour of attachment argue that it ensures effective, convenient enforcement of arbitral awards.[66] The general rule in the U.S., for example, is that interim awards are not enforceable. The exception to this rule is where the interim award covers issues "clearly separable" from the issues that remain before the arbitrator. Thus, where an arbitrator fully resolves particular issues which are separable from the final award that will eventually be rendered, American courts enforce such awards and, where the interim award promotes the efficiency of the arbitral process and assists the parties in reaching a prompt resolution of the dispute, they should do so.[67]

The critical provision in the New York Convention is Article II (3) which provides that:

"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."

The fundamental question is whether the command of Article II (3) that the court *'shall refer the parties to arbitration'* means that the court is powerless to order interim measures. Article II (3) has been interpreted by some American courts to mean that state and Federal Courts in the U.S. are barred from issuing provisional remedies in aid of international arbitration.[68] The first American court to consider the issue of pre-award attachment under the New York Convention was the U.S. Court of Appeals for the Third Circuit in **McCreary Tire & Rubber Co. v. CEAT S.p.A.**

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[66] Holmes, A. S., "Pre-Award Attachment under the U. N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards", Va. J. Int'l. L. vol. 21[1981] pp. 785-804 at 791.
[67] Von Mehran, R. B., "Enforcement of Foreign Arbitral Awards in the United States" [1998] Int'l. A. L. R. 198-204 at 202-203.
[68] See **McCreary Tire & Rubber Con. V. CEAT S.p.A.**, 501 F.2d 1032 (3d Cir. 1974), **Metropolitan world Tanker, Corp. v. P. N. Pertambangen Minjakdaugan Bumi Nasional**, 427 F. Supp. 2 (S. D. N. Y. 1975).

where it held that the New York Convention precluded a U.S. Court from granting provisional remedies to a party to a valid arbitration agreement. The Court reasoned that by invoking the judicial process of attachment, a party *"seek to bypass is prohibited by the Convention if one party to the agreement objects."* [69] In criticising the **McCreary** decision a distinguished U.S. lawyer has commented:

"The McCreary decision represents an extreme statement of the position that local provisional remedies are simply and in principle inapplicable in a case subject to arbitration. There is no trace of any consideration of whether, in the circumstances, an attachment might have assisted the eventual enforcement of the award, thus rendering the arbitral process more efficacious. The rationale of the decision appears to preclude any such analysis." [70]

In contrast, the Court of Appeals for the Second Circuit held in **Borden, Inc. v. Meiji Milk Products Co. Ltd.** that a court ordering parties to arbitrate pursuant to Article II (3) of the New York Convention retains subject matter jurisdiction to issue an injunction in aid of arbitration.[71] It appears that U.S. Courts show a tendency in favour of enforcing awards for interim relief. Therefore, it is submitted, as **van den Berg** [72] put it, that the pragmatic approach taken by the U.S. Courts under the FAA is wholly sensible. They do not adhere to a narrow interpretation of what constitutes a dispute; this is also the manner in which the Convention should preferably be interpreted.

In English practice Lord **Mustill** in the **Channel Tunnel Case** has disagreed with this **McCreary** decision and stated that when properly used interim measures serve to reinforce the arbitration agreement, not to bypass it.[73] In the **Rena K**, the Queens Bench Division of the High Court [Admiralty] held that pre-award attachment is appropriate when it appears that the stay of litigation required by Article II (3) of

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[69] 501 F. 2d 1032 (3d Cir.1974).
[70] Hulbert, R.W., The American Position in *Conservatory and Provisional Measures in International Arbitration* (ICC Publication no. 519) Paris 1993 pp. 92, 96. The Court of Appeals for the Fifth Circuit in **E.A.S.T., Inc., v. M/V Alaia** 876 F.2d 1168, 1173 (1989) also has criticised the decision in **McCreary**.
[71] 919 F. 2d 822, 826 (1990).
[72] Van den Berg, "The 1958 New York Arbitration Convention Revisited", a paper presented at the ASA/IBA Conference, Zurich, 28 January 2000 at 20.
[73] 2 W. L. R. 263, 288 (1993).

the New York Convention will be temporary.[74] However, when it comes to the enforcement stage of interim measures ordered by arbitral tribunals, it is questionable whether a state court would provide assistance in respect of interim measures ordered by an arbitral tribunal which are not contemplated by its own law of procedure and whether the state will issue its own order or will issue an order of enforcement of the tribunal's order.

There are still questions to be answered, which will the national courts require as a condition of enforcement of interim measures ordered by arbitral tribunals that they should satisfy the judicial standard for granting interim measures, and whether the judicial standard for reviewing arbitral awards of interim measures is different from the judicial standard for reviewing final arbitral awards? Further, whether the national courts will enforce interim arbitral awards that affect third parties?

These questions could be answered easily if the courts consider such orders as foreign arbitral awards in the meaning of the New York Convention. In this case the court will make sure that such an award satisfies the conditions and the requirements of the Convention. Otherwise, the court will apply its own law to decide on the matter. With regard to awards affecting third parties, generally speaking no court shall enforce such an award unless the law applicable, where the enforcement is sought, allows such an act.

[74] [1978] 3 W.L.R. 431 (Q.B.) at 448.

6.5 CONCLUDING REMARKS ON CHAPTER SIX

1) The concept of competition between the national courts and arbitral tribunals in ordering interim measures should be rejected, and replaced by the concept of complementarily, bearing in mind that the national court is only called to grant an interim measure when the arbitral tribunal is not in the position to take the measure sought. The arbitral process cannot remain effective without a partnership between that process and national courts; interim measures in this respect introduce interactions between arbitral tribunals and the national courts.
2) Those who enter into arbitration agreements must be taken to accept that in some circumstances the arbitral process may be ineffective, in the sense that arbitral tribunals are unable to enforce their ordered interim measures.
3) Interim measures ordered by arbitral tribunals could put the tribunals in a difficult position and expose them to a claim for damages if the measure prove to be unjustified, this raises the question of immunity of arbitrators.
4) In general, national courts are extremely cautious concerning interim measures' requests in aid of arbitration, as the grant of such measures in the absence of their express provision in the pertinent arbitration rules or agreement of the parties, may violate the parties' choice of arbitration as opposed to litigation or national arbitration statutes.
5) No express provisions addressing interim measures are contained in the New York Convention. There is no specific reference to pre-award attachment or other provisional remedies in aid of arbitration. Accordingly, where interim relief is requested, the law of the domestic court of the state in which the attachment or other measure is sought will be controlling as to the applicable procedure and availability of relief. It could be suggested in this respect that the New York Convention should be amended to expressly include interim measures ordered by arbitral tribunals, but this suggestion will be faced with the problem of complicated formalities of new ratification especially that the Convention has been ratified by 125 countries so far. Another suggestion could be drafting a new international convention for enforcement of interim measures ordered by arbitral tribunals.
6) It can be concluded that arbitral tribunals, either through the exercise of powers deemed inherent to the jurisdiction afforded to them by the parties to resolve a

dispute or of powers given to them by statute or by arbitration rules agreed by the parties, frequently, take interim measures either by procedural order or interim award. However, arbitral tribunals have no jurisdiction to make orders of any kind to third parties. The arbitral tribunal cannot enjoin a third party from taking any action; nor can it attach assets of a party to the arbitration in the hands of a third party. Moreover, the interim award mechanism is not a flexible remedy and cannot be used in all circumstances.

PART III
CONCLUSIONS

7. CHAPTER SEVEN

A CONCLUDING APPRAISAL

The objective of this study was to examine the jurisdictional problems faced by international commercial arbitral tribunals and to analyse the solutions adopted by such tribunals, international conventions, national legal systems, and jurists in tackling these problems. The purpose of this concluding chapter is not to recapitulate all the conclusions made in the body of the study. Rather, this chapter is a reflection on the major trends towards jurisdictional issues in international commercial arbitration.

With regard to the foundation of jurisdiction of arbitral tribunals, this study has proved that the two doctrines of severability and competence-competence have become truly international rules in international commercial arbitration. Both doctrines can significantly reduce any meaningful judicial role in the arbitral process. Applied correctly, doctrines of severability and competence-competence serve to prevent bad faith attempts to obstruct the arbitral process. It may be suggested that the development of arbitral procedural law has reached an advanced stage in such respect as to these two doctrines. It has been established that the rationales of the doctrines of severability and competence-competence are eminently compelling in theory and in practice.

Being a vital element to the legitimacy of the arbitral process, arbitrability has been dealt with in the context of this study. Different aspects of arbitrabilty were explored in the light of case law. The study further examined non-arbitrability as a serious challenge to the jurisdiction of arbitral tribunals. This study has proved that international trade and investment require that issues of arbitrability should be given a wide interpretation, a broader substantive scope of arbitrability should be applied, and restrictions on arbitrability should be narrowed. It has been stated that arbitrability should be denied if the affirmation of such is regarded as a fundamental violation of public policy. different categories of public policy were explored regards the latter. It could be stated that issues of arbitrability should not be impaired by taking into consideration any foreign mandatory rules of law, or by the arbitral tribunal's concern as to the enforceability of its award. Arbitrability should be considered as a general rule in international commercial arbitration. Non-arbitrability is the exception to that

rule, the burden to prove non-arbitrability rests on the party that claims it or wants to avoid arbitral proceedings.

This study has asserted that *Shari'a* should be considered as a valid existing legal system, the time has arrived to provide for compatibility with *Shari'a* in all international commercial contracts with Muslim parties. It could be stated in this context that application of the religious and moral tenets of *Shari'a* will not raise any problem and will not provide any unfair results, especially if arbitration is conducted faithfully according to *Shari'a* and by qualified arbitrators with a remarkable knowledge of *Shari'a*'s norms and principles. It has been proved that the earlier hostility of some Muslim countries against international commercial arbitration was not due to a contradiction between arbitration principles and *Shari'a* but, rather was the outcome of unpleasant experience certain countries had encountered in the past in particular as a reaction to the attitude of Western jurists to Islamic law as reflected in the **Abu Dhabi**, **Qatar** and many other cases where Islamic law has been dubbed as the law of the primitive society and considered not well equipped to deal with commercial matters in the modern world. The general theme is that Arab and indeed the other Muslim countries are increasingly being brought into the international legal system, with the recent range of enactment of arbitration laws in various Arab countries based on UNCITRAL Model Law of 1985.

It has been debated that the submission to the jurisdiction of the ICSID Centre is not only a matter of agreement between the parties to a dispute, but the jurisdiction of the Centre is conferred upon by the ICSID Convention itself. In ruling on its own jurisdiction the ICSID tribunal will be bound primarily by the articles of the Convention and not only by the provisions of any other agreement. This study has shown ICSID's important role in depoliticising international economic disputes. The discussion has proved that the jurisdictional limitations of the ICSID Convention proved to be little obstacle to tribunals determining the jurisdiction of the Centre over certain disputes. It has been seen that there is an increasing readiness to permit ICSID tribunals to assume jurisdiction even in situations where the consent of the host State is ambiguous, particularly when corporate nationality is involved. It has been argued that there is a general consensus among ICSID tribunals that pursuant to a valid arbitration agreement referring to ICSID, the defence of sovereign immunity is not available in ICSID arbitration proceedings. The importance of BITs in referring to

ICSID and other regional and international conventions such as the ECT and NAFTA has been studied in depth.

This study has debated whether the concept of competition between national courts and arbitral tribunals in granting interim measures should be rejected, and be replaced by the concept of complementary. It has been proved that the arbitral process cannot remain effective without a real partnership between that process and national courts; interim measures in this respect introduce interactions between arbitral tribunals and national courts. It has been validated that the jurisdiction of an arbitral tribunal to order interim measures flows directly from the arbitration agreement itself not from the arbitration laws or a special substantive law agreement of the parties. The study has shown that legislative solutions regarding the power of the arbitral tribunal to order interim measures are not uniform. The foregoing discussion supports the proposition that interim measures can be enforced under the New York Convention, if they are taken in the form of an interim arbitral award and such an award is permitted under the law applicable to the arbitration usually the arbitration law of the place of the arbitration.

Arbitration is increasingly being accepted by the international commercial community as an efficient and flexible method of dispute resolution. The increased use of arbitration has led to the publication of arbitral awards and the evolution of a considerable body of juridical writing on the subject. The publication of arbitral awards would contribute to the systematic elaboration of rules governing jurisdiction in international commercial arbitration. Juridical writings, which are often cited in arbitral awards, would also play a useful role in this regard. This is evidenced by the increasing trend in many countries to enact modern arbitration laws.

It would seem that the survival of international commercial arbitration as a legitimate system of dispute resolution depends not only on its responsiveness to the needs of the parties to disputes, but perhaps more crucially on adopting a liberal approach by empowering arbitral tribunals a wide jurisdiction in settling ensuing disputes.

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