



**Nature, Extent, and Role of Parties' Autonomy in the
Making of International Commercial Arbitration
Agreements.**

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The final word count of this thesis is: 87,712 words.

List of Abbreviations:

- A.M.C.: American Maritime Cases
- AAA: Commercial Arbitration Rules
- ABQB: Alberta Court of Queen's Bench
- AC: The Law Reports, Appeal Cases (England)
- Adj.L.R: Adjudication Law Reports
- ADR: Alternative Dispute Resolution
- Aff'd: Affirmed
- AIR: All India Reporter
- ALL E.R.: All England Law Reports
- ALR.: Australian Law Reports
- AMC: American Maritime Cases
- App.: Appeal
- ArbLR: Arbitration Law Reports and Review
- ASA: Association Suisse de l'Arbitrage
- Austrian ZPO: Austrian Code of Civil Procedure
- B.C.J: British Columbia Judgements
- B.L.R.: Business Law Reports/Business Law Review/Building Law Reports
- BANI - Indonesian National Board of Arbitration
- BCDR: Bahrain Chamber for Dispute Resolution
- BCLR: Butterworths Constitutional Law Reports
- BOMLR: Bombay Law Reporter
- BOMLR: Bombay Law Review (India)
- C.D. Cal.: Central District of California
- Ch.: Chancery Division

- CIETAC: China International Economic and Trade Arbitration Commission
- Cir. :Circuit
- CISG: Convention on Contract for the International Sale of Goods
- CLOUT: Case Law on UNCITRAL Texts
- Co.: Company
- ConLJ: construction law journal
- Corp.: Corporation
- Ct.: Court
- D.L.R.: Dhaka Law Reports
- DIAC: Dubai International Arbitration Centre
- DIS Rules: Deutsche Institution für Schiedsgerichtsbarkeit e.V. (German Institution of Arbitration Rules)
- European Convention: 1961 European Convention on International Commercial Arbitration.
- F. Supp.: Federal Supplement (US)
- F.2d/F.3d: Federal Reporter 2nd/3rd Series (US)
- F.Appx.: Federal Appendix
- F.C.: Federal Court (Canada)
- F.C.R.: Federal Courts Reports
- F.T.R.: Federal Trial Reports
- FAA: Federal Arbitration Act
- FCA: Federal Court of Australia
- Fed.: Federal
- Fn.: Footnote
- FTLR: Financial Times Law Reports

- Gaz. Pal.: Gazette du Palais (France)
- Geneva Convention: 1927 Geneva Convention for the Execution of Foreign Arbitral Awards
- Geneva Protocol: 1923 Geneva Protocol on Arbitration Clauses in Commercial Matters
- German ZPO: German Code of Civil Procedure
- HKC: Hong Kong Cases
- HKCFI: Hong Kong Court of First Instance
- HKCU: Hong Kong Cases Unreported
- HKEC: Hong Kong Electronic Cases
- HKIAC Rules: Hong Kong International Arbitration Centre Rules
- HKLR: Hong Kong Law Reports
- IBA Guidelines: International Bar Association Guidelines on Conflicts of Interests in International Arbitration.
- ICC: International Chamber of Commerce
- ICCA: International Council for Commercial Arbitration
- ICDR: International Center for Dispute Resolution
- ICJ: International Court of Justice
- ICSID Convention: Convention on the Settlement of Investment Disputes Between States and Nationals of Other States
- ICSID Rev.-For. Inv. L.J.: ICSID Review. Foreign Investment Law Journal
- ICSID: International Centre for Settlement of Investment Disputes
- ILM: International Legal Materials
- ILR: International Labour Review/International Law Reports
- ILSA: International Law Students Association

- INCOTERMS: International Commercial Terms
- Inter-American Convention/Panama Convention: 1975 Inter-American Convention on International Commercial Arbitration
- Iran-US C.T.R.: Iran-US Claims Tribunal Reports
- J.: Justice
- JCP: Juris-classeur periodique (France)
- JDI: Journal du droit international
- K. B.: Law Reports, King's Bench (UK)
- L.J.: Lord Justice
- LCIA: London Court of International Arbitration
- Lloyd's Rep.: Lloyd's List Reports (after 1951)
- Ltd: Limited
- Model Law: UNCITRAL Model Law on International Commercial Arbitration
- N.E.: North Eastern Reporter (US)
- N.S.W.: New South Wales
- N.S.W.L.R.: New South Wales Law Reports
- N.Y.S./N.Y.2d/N.Y.3d: New York Supplement 2nd/3rd Series.
- NAFTA: North American Free Trade Agreement
- NCPC: French New Code of Procedural Civil
- NJA: Nytt Juridiskt Arkiv (Sweden)
- NJW: Neue Juristische Wochenschrift (Germany)
- NSWSC: Supreme Court of New South Wales
- NY Convention: New York Convention
- NZLR: New Zealand Law Reports

- Ont. Rep.: Ontario Reports
- P.: page
- PRNZ: Procedure Reports of New Zealand
- Rev. Arb.: Revista Brasileira de Arbitragem
- S.Ct.: Supreme Court
- S.D. Miss.: Southern District of Mississippi
- S.D.N.Y. Southern District of New York
- SCC: Supreme Court Cases (India)
- SCMR: Supreme Court Monthly Reports (Pakistan)
- SGCA: Singapore Court of Appeal
- SGHC: Singapore High Court
- SIAC Rules: Singapore International Arbitration Centre Rules
- Swiss PIL: Swiss Private International Law
- U.N. Doc.: United Nations Document
- UKHL: House of Lords
- UKPC: Privy Council
- UN: United Nations
- UNCITRAL: United Nations Commission on International Trade Law
- UNCTAD: United Nations Conference on Trade and Development
- USSR: Union of Soviet Socialist Republics
- Vol: Volume
- VSC: Supreme Court of Victoria
- W.L.R.: Weekly Law Reports
- W.W.R.: Western Weekly Reports (Canada)
- WASC: Supreme Court of Western Australia

- WIPO Rules: World Intellectual Property Organization Arbitration Rules
- WL: Westlaw
- WLR: Weekly Law Reports (England)
- Y.B.: Yearbook
- YCA: ICCA Yearbook Commercial Arbitration
- ZPO: Zivilprozessordnung (code of civil procedure)

List of Codes/Conventions/Rules:

- AAA International Rules.
- Algerian Code of Civil Procedure
- Argentinian National Code of Civil and Commercial Procedure
- Australian Arbitration Act
- Australian International Arbitration Act 1974
- Australian International Arbitration Act 2010
- Austrian ZPO
- Belgian Judicial Code
- British Columbia International Commercial Act
- Bulgarian Law on International Commercial Arbitration
- California Labor Code
- China Arbitration Act 1994
- CIETAC Rules
- Constitution of Islamic Republic of Iran
- Costa Rican Arbitration law 2011
- DIAC rules
- DIS Rules
- Egyptian Constitution 2014
- English Arbitration Act 1996
- European Convention
- Former Egyptian Code of Civil and Commercial Procedure
- Former Saudi Law of Arbitration (Royal Decree No. M/46 of 25/04/1983)
- French Code of Civil Procedure

- Geneva Convention
- Geneva Protocol
- German ZPO
- HKIAC Rules 2013
- Hong Kong Arbitration Ordinance 2013
- IBA Rules of Ethics for International Arbitrators
- ICC Rules 2012
- ICDR Arbitration Rules 2010
- ICSID Convention
- Inter-American Convention
- International Court of Justice Statute
- Italian Code of Civil Procedure
- Japanese Arbitration Law
- Japanese Code of Civil Procedure
- Jordanian Amendment to the Merchandise Maritime Law, Law No. 35 of 1983
- Latvian Civil Procedure Law
- LCIA Rules 2014
- Lebanese New Code of Civil Procedure
- Malaysian Arbitration Act
- Maritime Arbitration Association of the United States Arbitration Rules
- Napoleonic Code (*CODE CIVIL DES FRANCIAS*)
- National Grain and Feed Association
- Netherlands Code of Civil Procedure
- New Zealand Arbitration Act

- Norwegian Arbitration Act
- NY Convention
- Omani Arbitration Law
- Restatement (Second) Conflict of Laws (1971)
- Restatement of the Law Third – The U.S. Law of International Commercial Arbitration, (Council Draft No.3, 2011)
- Romanian Code of Civil Procedure
- Russian Federation Law on International Commercial Arbitration
- Saudi Law Arbitration (Royal Decree No. M/34 of 16/04/2014)
- Scottish Arbitration Act 2010
- SIAC Rules 2013
- Singapore International Arbitration Act 2012
- Spanish Arbitration Act 2011
- Swedish Arbitration Act
- Swiss Code of Civil Procedure
- Swiss International Arbitration Rules 2012
- Swiss Private International Law
- Syrian Arbitration Law
- Tunisian Arbitration Code
- UNCITRAL Arbitration Rules 2010
- UNCITRAL Model Law
- UNIDROIT Principles
- US Federal Arbitration Act
- WIPO Rules

List of Cases and Arbitral Awards:

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- *ABB Lummus Global Ltd v. Keppel Fels Ltd* [1999] 2 Lloyd's Rep. 24.
- *Abuja International Hotels Ltd v. Meridien SAS* [2011] EWHC 87 (Comm) (English High Ct.).
- *Ad Hoc Award of 29 May 1979*, VII YCA 81, (1982).
- *Adams v. Cape Industries plc* [1990] Ch. 433 (CA).
- *AES Ust-kamenogorsk Hydropower Plant LLC v. Ust-kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647 (English Court of Appeal).
- *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, (U.S. S.Ct. 1974).
- *Alghanim v. Alghanim*, 828 F.Supp.2d 636 (S.D.N.Y. 2011).
- *Allsop Automatic Inc. v. Tecnoski snc*, XXII YCA 725, (1997).
- *All-Union Foreign Trade Assoc. Sojuznefteexport v. JOC Oil Ltd.*, Award in USSR Chamber of Commerce and Industry (9 July 1984), XVIII YCA 92, (1993).
- *Al-Naimi v. Islamic Press Agency Inc.* [2000] 1 Lloyd's Rep. 522, 524 (English Court of Appeal).
- *Altain Khuder LLC v. IMC Mining Inc.*, [2011] VSC 1 (Victoria S.Ct.).
- *Amco Asia Corp. v. Republic of Indonesia*, Award on Jurisdiction, ICSID Case No. ARB/81/1/ (25 September 1983), 23 International Legal Materials 351, (1983).
- *Amec Civil Engineering Ltd v. Secretary of State of Transp.* (2005) 21 ConLJ 640.

- *American Diagnostica Inc. v. Gradipore Ltd*, XXIV YCA 574, (N.S.W. S.Ct. 1998) (1999).
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- *Apple & Eve, LLC v. Yantai N. Andre Juice Co.* 499 F.Supp.2d 245, 248 (S.D.N.Y. 2007).
- *Arbitral Award of International Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Case No. 174/2003 of 12 November 2004*, available at (<http://www.unilex.info/case.cfm?pid=2&do=case&id=1078&step=FullText>) (last visited 04/11/2015)
- *Argentine Engineer v. British Company* in ICC Case No. 1110, 15 January 1963, XXI YCA 47, (1996).
- *Arsanovia Ltd v. Cruz City I Mauritius Holdings* [2012] EWHC 3702 (Comm) (English High Ct.).
- *Ashville Inv. Ltd v. Elmer Contractors Ltd* [1988] 3 W.L.R. 867 (English Court of Appeal).
- *Atlantic Underwriting Agencies Ltd. and David Gale (Underwriting) Ltd. v. Compagnia di Assicurazione di Milano SpA*, [1979] 2 Lloyd's Rep. 240.
- *Award in ICC Case No. 10021*, available at (<http://www.unilex.info/case.cfm?pid=2&do=case&id=832&step=FullText>) (last visited 04/11/2015).
- *Award in ICC Case No. 10526*, 126 JDI 1179, (2001).
- *Award in ICC Case No. 11869*, XXXVI YCA 47, (2011).

- *Award in ICC Case No. 1434*, 103 JDI 978, (1976).
- *Award in ICC Case No. 4145*, XII YCA 97, (1987).
- *Award in ICC Case No. 4392*, 110 JDI 907, (1983).
- *Award in ICC Case No. 4996*, 113 JDI 1131, (1986).
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- *Award in ICC Case No. 7375*, 11(2) Mealey's International Arbitration Report A-1, A-26 to A-27, (1996).
- *Award in ICC Case No. 8385*, in J. Arnaldez, Y. Derains, and D. Hascher, "Collection of ICC Awards 1996-2000", (2003).
- *Award in ICC Case No. 8486*, XXIV YCA 162, (1999).
- *Award in ICC Case No. 9987, Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan*, 2(4) International Journal of Arab Arbitration 370, (2010).
- *Award in International Business Machines Corp. v Fujitsu Ltd*, AAA Case No. 13T-117-0636-85, 15 September 1987.
- *Award of February 17 (1984) in ICC Case No. 4237*, X YCA 52, (1985).
- *Bank of America NA v. Diamond State Ins. Co.*, 2002 WL 31720328, (S.D.N.Y. 2002).
- *Barclays Bank plc v. Nylon Capital LLP* [2011] EWCA Civ 826, (English Ct. App.).
- *Bautista v. Star Cruises*, 396 F.3d 1289, (11th Cir. 2005).
- *BHP Power Americas Inc. and King Ranch Power Co. v. Walter F. Baer Reinhold*, XXIII YCA 949, (1998).

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Abstract

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Degree: Doctor of Philosophy

Title: Nature, Extent, and Role of Parties' Autonomy in the Making of International Commercial Arbitration Agreements.

Date: December/2015

Nowadays, arbitration is increasingly defined by its procedural flexibility and suitability to adapt to the needs and circumstances of different parties in different situations. In so being, arbitration employs the agreement to arbitrate as the device through which parties can utilise this procedural flexibility to create an exceptionally party-oriented process. Consequently, the drafting of these agreements and the choices concluded by the parties in them can very much determine whether a particular process is going to produce an efficient and effective outcome or rather frustrate the intentions of the parties and, generally, the objectives of international commercial arbitration.

This thesis looks into the most influential decisions/choices made by the parties during the drafting stage of their arbitration agreements and attempts to underline the best practical and legal techniques to approach these decisions within today's modern regulations of international commercial arbitration.

The thesis begins its analysis by examining the *separate* procedural nature of arbitration agreements in comparison to the substantive nature of ordinary contracts. Such examination revealed that the separability of arbitration agreements produces certain consequences that can potentially uphold arbitration agreements in situations where the main contract was found illegal, non-existent, or invalid, for instance. A clear recognition of the distinct nature of arbitration agreements and the effects of that on the status of arbitration clauses, specifically, can provide the parties, from the very beginning, with rather precise expectations as to the future status of their arbitration agreement.

In focus on the role of parties' autonomy in producing timely awards, it was essential to analyse the different limitations that could restrict this autonomy and, possibly, frustrate the expectations and intentions of the parties. Such analysis revealed that these limitations were limited to incapacity, non-arbitrability, waiver of right to arbitrate, as well as public policy and mandatory rules of law.

Finally, in scrutinising the most influential choices which parties can make in their arbitration agreement to positively and effectively create an intelligent international arbitration settlement, it was found that these choices mainly consisted of the choice of the seat of arbitration, the arbitrators, the language of the arbitration, and the law(s) applicable to the arbitration.

Throughout this thesis, it is argued that through the consensual nature of international arbitration along with the autonomy bestowed upon its parties, the latter can have a better chance of achieving a practically and legally efficient settlement.

Declaration

No portion of the work referred to in the thesis has been submitted in support of an application for another degree or qualification of this or any other university or other institute of learning.

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Dedication

This journey began on my mum's birthday (1st of January) and ended on my dad's birthday (5th of December). It's not just a life-time of hard work and dedication, it's also of great sentimental value to me. This is for you *baba we mama*.

Baba, you're not just my father and my best friend, you've always been my backbone. You gave me strength and taught me to never lie or fear anything. Any written words to describe my love and respect for you would be an understatement. So, I give you this along with my heart.

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Nadia Ramzy

December 2015

Manchester, UK.

1 Chapter I: Introduction

Arbitration has been the preferred mechanism for the settlement of disputes to the international business community for, at least, the past two decades.¹ One of the key attractions of international commercial arbitration is its procedural flexibility.² This flexibility is mainly manifested through the freedom given to the parties of any consensual arbitration. In international arbitration, especially commercial arbitration, the principle of parties' autonomy offers the parties ample flexibility to structure their arbitration in the manner they find best suited to the needs of their disputes.³ This thesis examines the nature, extent and role of parties' autonomy specifically in the making of international commercial arbitration agreements.

Arbitration agreements represent the contractual foundation of any arbitration which mainly constitutes the fundamental difference between any consensual arbitration and litigation.⁴ However, an overlooked importance of the arbitration agreement is the fact that it presents the parties with the instrument through which they can manifest and exercise an extensive part of their arbitral autonomy and tailor the features of their arbitral settlement at an early stage.

As a consequence, the drafting of these agreements can radically affect the process and outcome of any international commercial arbitration. Whether such effect is, however, negative or positive will mostly depend on the drafting skills and the wise choices made by the parties and their counsel in their arbitration agreement. Needless to say, a properly drafted arbitration agreement can positively produce a smooth process and an efficient outcome, a less carefully drafted one will most likely

¹ Survey by Queen Mary, University of London, "*Corporate Choices in International Arbitrations: Industry Perspectives*", (2013), at p.6. Also see, Lalive, at p.293.

² Survey by Queen Mary, University of London, "*Choices in International Arbitration*", (2010), at p.2.

³ M. Donahey, "*The Independence and Neutrality of Arbitrators*", 9(4) *Journal of International Arbitration* 31, (1992), at p.42.

⁴ Berg, at p.144-145.

allow a host of legal and practical complications, while a badly drafted arbitration agreement, can lead to an unenforceable agreement or, even worse, an unenforceable arbitral award.⁵ Therefore, the effectiveness of an international commercial arbitration will, to a large extent, depend on the awareness of the parties and the practicality of the choices they make in their arbitration agreement.

The matter is further emphasized when one considers the international character of commercial arbitration. Generally speaking, an international setting of many commercial arbitrations will expose the parties, not only to greater amount of choices, but also to additional difficulties. This is specifically visible, for instance, with regards to the choice of applicable law(s) and the confusion and complexities of conflict of laws issues in international commercial arbitration.⁶ A further difficulty can sometimes be manifested where the parties and their lawyers neglect the fact that the principle of parties' autonomy does not entitle the parties to unlimited freedom of choice. On the contrary, as much as there is a wide list of aspects that allows parties to exercise their arbitral freedom, there will always be certain types of restrictions to this freedom that will mostly take place in the form of mandatory rules of law and public policy. Ignoring or neglecting these types of restrictions can possibly lead to an invalid or illegal arbitration agreement, or an unrecognized/unenforceable arbitral award.

⁵ Born I, at p.226. Also, see C. Schimithoff, "*Defective Arbitration Clauses*", Journal of Business Law 9, (1975).

⁶ See section 7.1 of this thesis.

1.1 Purpose of the Thesis

This thesis examines and analyses the role and effect of the utilisation of the parties' freedom of choice in an international commercial arbitration. In so doing, the thesis argues that there are certain protocols and choices which, if made wisely by the parties, can lead to a further effective and efficient arbitral settlement and can help the parties avoid a host of legal and practical problems during their arbitral process. This shall take place through evaluating a multitude of aspects which are left to the parties' decision-making and are quite influential on the efficacy of their arbitration. This thesis argues that these aspects are best decided by the parties and their counsel during the drafting of the arbitration agreement in order to create an in-advance safety net that should serve to substantially enhance the effectiveness of any international commercial arbitration settlement.

The thesis, therefore, starts off with the premise that parties' freedom of choice is one of the most fundamental principles in international arbitration. It provides them with the power to tailor their arbitral process to their particular circumstances/needs through an instrument that is the arbitration agreement.

However, before the parties can fully utilise this power (freedom), they must first understand the distinct nature of their arbitration agreement as well as recognize the different limitations that could potentially constrain their freedom.

Although the principle of parties' autonomy in international commercial arbitration is frequently approached by different authorities, a gap still exists as to the theoretical and practical analysis of the preferred protocols for the parties to best utilize their given procedural autonomy. To a dispute settlement mechanism that is largely defined by its consensual nature and is continuously identified as a party-oriented process, this lack can be problematic. This thesis attempts to further the

knowledge of this topic by creating a detailed guideline that can assist counsel and their clients, through the utilisation of the principle of parties' autonomy, to create a slicker and more efficient settlement of their disputes through international commercial arbitration.

On the other hand, many commentators and surveys have established various reasons as to why international business parties refer to arbitration considerably more than other dispute settlement mechanisms.⁷ The various expectations of the parties, regardless of their nature, are the main reason that derives international business parties to pursue the settlement of their disputes through arbitration. Parties expect fair and just results, cost and speed-efficiency, finality of the award, specialised arbitral expertise, monetary awards, possible future relations, confidentiality, and much more.⁸ Although arbitration is capable of offering international business parties all these advantages, such advantages are not achieved automatically just by referring to arbitration. On the contrary, parties need to make sure that these expectations are achievable in reality. This thesis attempts to produce some of the main techniques and parameters that can further improve the utility and success of an international commercial arbitral settlement.

Finally, this thesis attempts to study the regulation of the parties' autonomy principle under two of the most successful instruments in international commercial arbitration. These are the NY Convention and the Model Law. Both books of rules are two of the most influential instruments in international commercial arbitration. One authority explains:

⁷ See, for example, C. Drahozal and S. Ware, "Why do Business Parties Use (or Not Use) Arbitration Clauses", 25(2) Ohio State Journal on Dispute Resolution 433, (2010).

⁸ R. Naimark and S. Keer, "International Private Commercial Arbitrations: Expectations and Perceptions of Attorneys and Business People – A Forced-Rank Analysis", 30 International Business Lawyer 203, (2002), p.206-208.

*The recognition of the importance of international commercial arbitration to the smooth working of international commerce and of the importance of enforcement of the bilateral bargain of commercial parties in their agreement to submit their disputes to arbitration was reflected in both the New York Convention and the Model Law.*⁹

The NY Convention has been described as the most important treaty in international trade law.¹⁰ As the time of writing this thesis, the NY Convention is adhered to by 156 State Parties, making it the most influential legally binding formal instrument in the field of international commercial arbitration.¹¹ Accordingly, the NY Convention occupies a significant section of each chapter of this thesis. The importance and role of the NY Convention to this research is specifically emphasised when one realises the prominence of the parties' autonomy principle under the Convention. This is dealt with throughout this thesis with more details, however, a good example is shown in the fact that the Convention initiates its Articles with requiring each Contracting State to recognise any valid arbitration agreement that the parties have reached.¹² Article II of the NY Convention has been described as '*the decisive threshold under the Convention*'.¹³

In describing the importance and role of the NY Convention, Kofi Anan (Secretary-General of the United Nations at the time) expressed that the Convention:

Has nourished respect for binding commitments, whether they have been entered into by private parties or governments. It has inspired confidence in

⁹ *Comandante Marine Corp. v. Pan Australia Shipping Pty Ltd*, [2006] FCA 192, (Australian Fed. Ct.), at para.192-193.

¹⁰ M. Paulsson, "*The 1958 New York Convention Article II: Fit for Modern International Trade?*", 2(1) BCDR International Arbitration Review 117, (2015), at p.117.

¹¹ For an updated list of Contracting States to the NY Convention, see (http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (last visited 18/09/2015).

¹² Article II(1) of the NY Convention.

¹³ M. Paulsson, "*The 1958 New York Convention Article II: Fit for Modern International Trade?*", 2(1) BCDR International Arbitration Review 117, (2015), at p.118.

*the rule of law. And it has helped ensure fair treatment when disputes arise over contractual rights and obligations.*¹⁴

The Model Law, on the other hand, is a soft-law legal instrument that is created with an objective of indirectly harmonising the legal practice on international commercial arbitration.¹⁵ Indirectly as it provides a standard text which leaves countries with either the option to adopt it as it is, modify it, or simply be inspired by it. Nowadays, the adoption of the Model Law has, therefore, prompted an unprecedented harmonisation between national arbitration laws and has, accordingly, established great success behind creating this Model Law.¹⁶ As of the time of this thesis, legislation based on the Model Law have been adopted in 69 States with a total of 99 jurisdictions.¹⁷ In commenting on the success and role of the Model Law, the UNCITRAL Secretariat at the time explained that:

*The Model Law constitutes a sound basis for the desired harmonization and improvement of national laws. It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a worldwide consensus on the principles and important issues of international arbitration practice.*¹⁸

As to the principle of parties' autonomy, the entire scheme of the Model Law is designed to give wide scope and attention to this principle making it one of the

¹⁴ K. Anan, "Opening Address Commemorating the Successful Conclusion of the 1958 United Nations Conference on International Commercial Arbitration", in UN, "Enforcing Arbitration Awards under the New York Convention: Experiences and Prospects", (1999), at p.2.

¹⁵ S. Eiselen, "The Adoption of UNCITRAL Instruments to Fast Track Regional Integration of Commercial Law", XLL(46) Rev. Arb. 82, (2015), at p.87. The term 'soft law' is generally used to refer to instruments that are not binding but are used for purposes that include harmonising hard law or other binding instruments. *Ibid*, at p.85-86. The Model Law and INCOTERMS are good examples of soft laws.

¹⁶ S. Menon, "Keynote Address" 6, in ICCA Congress Series No. 17, (2013), at p.10.

¹⁷ For an updated list of the states adopting the Model Law, see (http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html) (last visited 19/09/2015).

¹⁸ UN, "UNCITRAL Model Law on International Commercial Arbitration", U.N. Doc. No. (A/C.N.9/309), (1988). Available at (<http://www.uncitral.org/pdf/english/yearbooks/yb-1988-e/vol19-p117-123-e.pdf>) (last visited 19/09/2015), at para.2, p.117.

most significant principles provided for.¹⁹ Therefore, in introducing for the general principles and purpose of the Model Law, the General-Secretary in one of the UN Reports began by stating that:

*Probably the most important principle on which the model law should be based is the freedom of the parties in order to facilitate the proper functioning of international commercial arbitration according to their expectations. This would allow them to freely submit their disputes to arbitration and to tailor the 'rules of the game' to their specific needs.*²⁰

As the most two influential and wide-spread instruments in international commercial arbitration, it is essential that this thesis considers the NY Convention and the Model Law to critically analyse the importance and influence of these two instruments on the parties' arbitral freedom of choice. Moreover, considering the widespread use of these two instruments, many international business parties referring their disputes to arbitration are likely to arbitrate under a jurisdiction that has either adopted the Model Law, is a signatory to the NY Convention, or both. Therefore, it is essential that the parties and their counsel are acquainted with the regulation of parties' autonomy under both instruments.

¹⁹ M. Hoellering, *"The UNCITRAL Model Law on International Commercial Arbitration"*, 20(1) International Lawyer 327, (1986), at p.328. Also see Section 2.5.2.2 (IV) of this thesis.

²⁰ Report of the Secretary-General, *"Possible Features of a Model Law on International Commercial Arbitration"*, U.N. Doc. No. (A/CN.9/207), 1981 (Vol. XII) – 14th Session. at para.17, p.78.

1.2 Delimitation of the Thesis

The topic of the parties' freedom in international commercial arbitration is of a considerably wide nature. It covers issues that cannot possibly be addressed or analysed in one PhD thesis. Given the wide nature of this topic, it would be sensible to delimit the scope of this thesis at an early stage. The following points shall confine the extent of this thesis in an attempt of further enhancing the clarity and preciseness of this research.

- This thesis is only concerned with the parties' autonomy principle and the choices the parties make during the drafting of their arbitration agreement as opposed to after the arbitral procedures have commenced or after the award is issued. For a few reasons the author has decided to limit this research only to the first stage of any arbitration, i.e. the agreement to arbitrate. By and large, in any international arbitration the arbitrators derive their competence from the consent and agreement of the parties. As one authority explained, "*it is the parties' consent that determines the scope, limits and area of certitude of an arbitrator's authority and jurisdiction.*"²¹ It is, accordingly, the arbitration agreement that presents the parties with the canvas through which they can practice their arbitral autonomy considerably more than after the arbitral process has started or, of course, after the award is issued. More importantly, the probability that the parties will be willing to cooperate in agreeing on the different aspects of their arbitration will normally take place before a dispute

²¹ *Watkins-Johnson Co. v. Islamic Republic of Iran*, Award in IUSCT Case No. 429-370-1 of 28 July 1989, 22 Iran-US C.T.R. 218, (1989), at p.296.

arises during the drafting of their arbitration agreement.²² After a dispute arises, both parties may find it difficult to accept any suggestions from one another. This could motivate a party to reject any choice made by the other party just because it is made by a rival rather than a party to an agreement.

- There is a difference, at least to this thesis, between the consent of the parties and the autonomy of the parties in international commercial arbitration. This thesis is mainly concerned with the autonomy of the parties in an international commercial arbitration. The distinction between both concepts is not set in stone and, at least in their origins, both concepts can be justified according to the same theoretical framework, i.e. the freedom of contract. However, this thesis is not concerned with the consent of the parties that created their arbitration agreement, but rather with the freedom of contract that allows them to design or choose the different aspects of their arbitral settlement through their arbitration agreement. In that sense, issues as to the existence or non-existence of the parties' consent to arbitrate will not be addressed by this thesis, other than in chapter four which proposes a consent-test in determining the application of the separability presumption.²³
- Although this thesis carries out a critical examination of the position under both the NY Convention and the UNCITRAL Model Law of the principle of parties' autonomy, it does not perform a comparative study between these two books of rules or between any other national arbitration laws. The

²² Drafting an arbitration agreement can also take place after a dispute has arisen. In this case, the arbitration agreement comes in the form of a submission agreement (as opposed to an arbitration clause in a contract). See Section 3.3 of this thesis.

²³ See Sections 4.4 and 4.5 of this thesis. Of course, this is not to indicate that parties' consent in arbitration is of any less importance. Just as the arbitration agreement is the foundation of any international arbitration, the parties' consent is the foundation of any international commercial arbitration agreement and without it, such agreement would not exist and the parties' ability to design their arbitration cannot exist accordingly. This thesis, therefore, assumes the existence of this consent when addressing the different aspects through which parties can extensively exercise their freedom of choice in arbitration.

diversity of the choices the parties can make in an arbitration with an international setting cannot be sufficiently examined under a limited number of jurisdictions or arbitration rules. On the contrary, this thesis allows for the brief examination of multiple national arbitration laws and international arbitration rules for the purpose of show-casing the variations in the different regulations of parties' arbitral freedom and the diverse implications of each choice they make.

- This thesis assumes the scenario of an international commercial arbitration between two parties. Issues that have to do with multi-party arbitrations and third parties to arbitrations are not within the concern of this thesis.²⁴ Both these issues give rise to questions of consolidation and joinder of arbitrations as well as consent to arbitrate and complications of enforcing the awards of multiparty arbitrations. Having said that, when it comes to the choices made by the parties in their arbitration agreement, the same premises established under this thesis apply to any party to an arbitration regardless of their count.

²⁴ Multiparty arbitrations denote the situation of an arbitration involving more than two parties. Third parties to arbitration are excluded from the arbitration process although they have a legal or financial interest in the parties' main agreement. For example, in an arbitration between a contractor and a subcontractor, the owner, although affected by the result of the arbitration, cannot be included in the arbitration process as another party. See Lew and Mistelis, at p.377-379, M. Platte, "When Should an Arbitrator Join Cases", 18(1) *Arbitration International* 67, (2002), at p.68, and O. Kazutake, "Party Autonomy in International Commercial Arbitration: Consolidation of Multiparty and Classwide Arbitration", 9 *Annual Survey of International and Comparative Law* 189, (2003), at p.191.

1.3 Structure of the Thesis

In order to answer the research questions set above, this thesis is divided into six main chapters as well as an introduction (Chapter one) and a conclusion (Chapter eight). Generally speaking, the thesis is structured chronologically according to its title so as to deal with the nature of the arbitration agreement, the extent/limitations of parties' freedom of choice, and the role of parties' autonomy principle in the making of international arbitration agreements.

The first main chapter (Chapter two) deals with both the theoretical and historical backgrounds of the main concepts analysed by this thesis. This chapter is divided into two sections. The first section is a theoretical overview that examines the theories behind the concepts that this thesis is mainly concerned with. These are mainly the legal nature of arbitration, contractual freedom, and the principle of party autonomy. Section one also defines what is meant by international commercial arbitration. The second section of this chapter is a brief overview of the modern history of the principle of party autonomy and international commercial arbitration, and is, accordingly, divided into two sub-sections.

The second main chapter (Chapter three) is a small introductory chapter to arbitration agreements that is divided into two sections. Within the first, the thesis identifies these agreements, overviews briefly their historical background, and distinguishes between their different types, i.e. arbitration clauses and submission agreements. The second section analyses the different effects (positive and negative) of these agreements on the parties.

The following chapter (Chapter four) represents the beginning of the chronological order of the thesis's title with a special dedication to the distinctive nature of an arbitration agreement. A discussion of the special procedural nature of

the arbitration agreement can only lead to examining the separability presumption. Therefore, the first section of the chapter begins with identifying the separability presumption and explaining the various justifications of its application, and finally, concludes with some overall remarks on the terminology used to refer to separability in general. The chapter then, in section two, moves on to the analytical and critical examination of the regulation of the separability presumption under both the NY Convention and the Model Law. After which the chapter turns to discuss further details on the separability presumption with a start on the consequences of the application of this presumption on the parties and their arbitration agreement. A more extensive section is then dedicated to the main argument of this chapter which claims that the parties' consent that created the main contract is a distinct and separate consent from the one that created the arbitration clause in that contract. Finally, the fourth section of the chapter addresses some of the misconceptions regarding the application of the separability presumption and attempts to reply to them according to what this thesis perceives as the correct understanding of separability in light of the consent-test argument addressed in the third section.

Chapter five then analyses the effect of certain limitations on the parties' freedom to enter an arbitration agreement or to arbitrate certain disputes. The chapter identifies four different types of possible restrictions that may affect this freedom. These are incapacity, non-arbitrability, waiver of right to arbitrate, as well as public policy mandatory rules of law. Chapter five is divided into four sections, accordingly.

Chapters six and seven identify what is conceived by this thesis as the most important aspects through which parties get to exercise their given arbitral autonomy in any international commercial arbitration. These aspects are classified as the seat of

arbitration, the arbitrators, the language of the arbitration, and the laws applicable to their arbitration.

Chapter six examines the best ways for the parties to approach making a choice of the first three aspects and prescribes how and why these aspects are of great influence on the effectiveness and efficiency of the arbitral process and, generally, the outcome of the arbitration.

The final main chapter of this thesis is dedicated to choice of laws issues in relation to parties' autonomy in international arbitration. Chapter seven deals mainly with three scenarios and is divided into three main sections, accordingly. The first analyses the situation where the parties make an express choice of law. In that scenario, parties can either choose a national law or a non-national legal system. Chapter seven evaluates both options. The second scenario is where the parties refrain from making an express choice but make an implied one by choosing a law for their main contract or choosing a seat for their arbitration expressly. Chapter seven analyses both options in two sub-sections, accordingly. Finally, chapter seven examines the situation where the parties fail to make any choice of law in their agreement and looks into the difficulties proposed under this scenario. To this situation, chapter seven proposes a possible solution that is presented in the application of a validation principle.

Finally, chapter eight is dedicated to the conclusion of this thesis.

2 Chapter II: Theoretical and Historical Background

This chapter is concerned with the historical and philosophical backgrounds of the main concepts that this thesis analyses. Accordingly, the chapter is divided into two main sections according to which the first is of a theoretical overview while the second is concerned with modern historical development.

2.1 Theoretical Background

The theoretical section of this chapter is dedicated for the examination of the legal nature of arbitration as well as the concept of freedom of contract and the principle of party autonomy. This section also defines the international and commercial characters of arbitration and looks into the several definitions given to arbitration itself.

2.1.1 Legal Nature of Arbitration

In characterising the juridical nature of arbitration, four main theories appear. These are: the jurisdictional, contractual, hybrid/mixed, and autonomous theories. There is, however, little academic agreement on these theories and no single viewpoint has received universal support. This section looks briefly into these theories to see how they can enhance the argument of this thesis.

2.1.1.1 Jurisdictional Theory

According to the jurisdictional theory, arbitration is essentially adjudicative and an arbitrator has a quasi-judicial role which is very similar to that of a judge. A jurisdictional analysis of the legal nature of arbitration finds that an arbitrator performs public/judicial

functions which a state allows within its territory by way of assignment or tolerance.²⁵ Consequently, the proponents of the jurisdictional theory give particular significance to the law of the seat and tend to limit parties' autonomy.²⁶ According to them, parties can refer to arbitration but only to the extent that is expressly or impliedly allowed under the law of the place of arbitration.²⁷

The jurisdictional theory finds support in the fact that an arbitral award, unless voluntarily enforced by the parties, is not self-executing and will most likely always need to be enforced by national courts.²⁸ Accordingly, at least at the enforcement stage, an arbitration, to the proponents of this theory, stands only by the support of state courts.

2.1.1.2 The Contractual Theory

Unlike the jurisdictional theory, the contractual one places primary emphasis on the role of parties' autonomy in any arbitral process. The contractual school of thought relies on the contractual nature of arbitration and finds that the origin, existence, and continuity of any arbitration depend on the parties' agreement to arbitrate.²⁹ According to the contractual theory, arbitrators are not judges since they do not perform any powers on behalf of the state. Even at the enforcement stage, the supporters of this theory find that, if the parties have not voluntarily enforced the award, it may still be enforced but as a contract.³⁰ For this school of thought, because the arbitration agreement is the reason of the existence of an arbitral award, the latter, like the arbitration agreement, has the character of a contract.³¹

²⁵ S. Triva, "Arbitration and Public Policy: Constitutional Complaint as Means for Setting Aside Arbitral Awards", 7 Croatian Arbitration Yearbook 115, (2000), at p.116-125.

²⁶ F. Mann, "The UNCITRAL Model Law – *Lex Facit Arbitrum*", 2(3) Arbitration International 241, (1986), at p.248.

²⁷ Lew and Mistelis, at p.75.

²⁸ *Del Drago*, Cour d'appel Paris, 10 December 1901, Clunet 314 (1902).

²⁹ Lew and Mistelis, at p.77.

³⁰ Born I, at p.214.

³¹ Samuel, at p.34.

2.1.1.3 The Hybrid/Mixed Theory

In characterising the legal nature of arbitration, a third theory emerged and combined elements from both the jurisdictional and contractual theories.³² According to the hybrid theory, an arbitration derives its existence and effectiveness from the parties' agreement to arbitrate. Still, it has a jurisdictional nature that involves a quasi-judicial role for the arbitrators through the application of procedural rules.³³ Therefore, reconciling the two opposing schools of thought is not surprising as arbitration combines elements that are both jurisdictional and contractual. The mixed theory basically has established a private judicial system that is created by a contract. One of the good effects of adopting the mixed theory is that it facilitates acknowledging the strong connection between the arbitration and the place where the tribunal is seated. It is, therefore, argued that the mixed theory has claimed world-wide dominance.³⁴

2.1.1.4 The Autonomous Theory

Recently, with a growing tendency to detach arbitration from the seat and the law of the seat, a theory has developed to presume that arbitration is of an autonomous character that it evolves in an emancipated regime. According to the autonomous school of thought arbitration is seen as a whole instead of characterising it as either jurisdictional, contractual, or a bit of both.³⁵ In that sense, the focus should be on the use and purpose of arbitration and emphasis should be directed to fulfilling the expectations of its users.³⁶ For the autonomous theory, national laws have developed in order to facilitate the smooth working of arbitration through giving the parties maximum freedom of choice through which their expectations can be fulfilled and the institution of arbitration in general can

³² K. Carlston, "*Theory of the Arbitration Process*", 17(4) Law and Contemporary Problems 631, (1952), at p.635.

³³ Samuel, at p.60.

³⁴ Lew and Mistelis, at p.80. See, however, Born I, where the author finds that the mixed theory offers comparatively little analysis as to the characteristics that arbitration should demonstrate, at p.215.

³⁵ Steingruber PhD, at p.80.

³⁶ *Ibid.*

prosper.³⁷ While some commentators seem to fully agree with this theory,³⁸ others find the doctrinal and practical consequences from its analysis are unclear.³⁹ Regardless, with its not-so-much attachment to the seat and its law, the autonomous theory seems to produce the advantage of being compatible with the different forms of non-national/transnational arbitrations.

2.1.1.5 Comments

As explained above, various schools of thought have adopted various theories to characterise the legal nature of arbitration.⁴⁰ This thesis finds it difficult to adhere to one particular school of thought since all rightly represent a particular/existent character of arbitration. More importantly, there is little practical implication to adhering to a certain school of thought. It has rightfully been argued that the debate on the legal nature of arbitration is purely academic.⁴¹ At least to the purpose of this thesis, the parties' freedom of arbitral choices even under the jurisdictional theory, can still manifest and is a dominant factor through all theories with various levels of restrictions under each theory. In other words, none of these theories seem to completely limit or restrict the parties' freedom of choice in arbitration in the sense that this freedom still constitutes the most prominent feature.

³⁷ Lew and Mistelis, at p.81.

³⁸ *Ibid*, at p.81-82.

³⁹ Born I, at p.216.

⁴⁰ For a detailed treaty on this topic, see E. Gaillard, "*Legal Theory of International Arbitration*", (2010).

⁴¹ Carboneau, at p.624.

2.2 Parties' Freedom of Choice

In international commercial arbitration specifically, freedom of contract lies at the very core of explaining how the law regulates arbitration.⁴² The parties' agreement to arbitrate is meant to provide the rules that regulate the arbitration and govern the arbitral procedures. This is even further emphasised in international commercial arbitration due to the lack of a functional transborder legislative and adjudicatory process.⁴³ This section briefly looks into the theoretical background of the concepts of freedom of contract and party autonomy.

2.2.1 Contractual Freedom

In characterising freedom of contract, Atiyah explains that "*a contract is a thing under the control of the contracting parties, and subordinate to their will.*"⁴⁴ In identifying contractual freedom, Atiyah recognised two elements which constitute this concept. These are the parties' ability to create a mutual agreement, and the non-interference from the government into their freedom of choice.⁴⁵

Mark Pettit Jr, on the other hand, explains that contractual freedom entails the parties three rights. These are the right of exchange, the right of contract, and the right of enforcement.⁴⁶ The right of exchange basically entails the parties to the exchange of property or labour without the interference of others.⁴⁷ The right of contract embraces making an exchange, however, the performance of that exchange may only take place in the future, at least partially.⁴⁸ Finally, the right of enforcement represents the final aspect of contractual freedom. That is to say, when an individual is given the privilege/right to

⁴² T. Carbonneau, "*The Exercise of Contract Freedom in the Making of Arbitration Agreements*", 36 Vanderbilt Journal of Transnational Law 1189, (2003), at p.1193.

⁴³ *Ibid*, at p.1191.

⁴⁴ P. Atiyah, "*The Rise and Fall of Freedom of Contract*", (2003), at p.36.

⁴⁵ P. Atiyah, "*An Introduction to the Law of Contract*", (1981), at p.15.

⁴⁶ M. Petit JR., "*Freedom, Freedom of Contract, and the 'Rise and Fall'*", 79(2) Boston University Law Review 263, (1999), at p.282-287.

⁴⁷ H. Spencer, "*The Principles of Ethics*", (1893), at para.314.

⁴⁸ M. Petit JR., "*Freedom, Freedom of Contract, and the 'Rise and Fall'*", 79(2) Boston University Law Review 263, (1999), at p.284.

contract, it also subscribes to another right and that is the right to that contract being recognised and enforced by the other party and/or the government.⁴⁹ This is so, even if it goes against the freedom of the other party, if it is necessary.

Regardless, contractual freedom is not limitless. As it is explained below, there are quite a few reasons that justify limiting the freedom to contract. For these very same reasons, most of the contractual theories that justify the rationale behind contractual obligation are based.

Most of the reasons behind restricting parties' contractual freedom can be summarised in the need to protect contracting parties as well as the need to protect third parties and society in general.⁵⁰ In displaying examples that relate to this thesis, a restriction of the parties' contractual freedom that targets protection of contracting parties can be manifested in constraining the freedom of infants or individuals who lack mental capacity to enter contracts in general. In relation to entering arbitration agreements, it is common to find national laws imposing special restrictions on the capacity of commercial parties to enter arbitration agreements.⁵¹ As to examples of restrictions in international commercial arbitration that are meant to further protect the interests of third parties and society, these can be manifested in public policy, mandatory rules of law, and non-arbitrability.⁵²

Finally, when it comes to limitations of contractual freedom, sometimes the restriction comes from the contracting parties themselves rather than the government or other private parties. An example from this thesis on that would be the situation where the parties agree to waive their right to arbitrate.⁵³ In this situation, parties limit their freedom (contractual freedom) to enter into arbitration agreements and to arbitrate certain disputes between them. Enforcing the parties' contractual agreement that actually limits their

⁴⁹ *Ibid*, at p. 285.

⁵⁰ *Ibid*, at p.291-298.

⁵¹ See Section 5.1 of this thesis.

⁵² See Sections 5.2(Non-Arbitrability) and 5.4 (Public Policy) of this thesis.

⁵³ See Section 5.3 of this thesis.

contractual freedom is a major element of this freedom as mentioned above. This is simply because “*the freedom to bind oneself into the future and the freedom to rely on the promises of others are more important than the freedom to change one’s mind after making a promise.*”⁵⁴ More importantly, allowing people to escape the liabilities by which they willingly and consciously chose to bind themselves is likely to destroy their abilities to enter into enforceable contracts in the future.⁵⁵ This does not only harm certain values of society but also restricts a person’s freedom indirectly.⁵⁶

2.2.2 The Principle of Party Autonomy

The word ‘autonomy’ is originally derived from politics, however, with the development of interdisciplinary science, much use of it appears in law.⁵⁷ Legally, ‘autonomy’ means ‘eligible civil subject’.⁵⁸ In that context, eligibility refers to one’s will to enact civil justice, make decisions, and manage its own rights and obligations without disruption.⁵⁹

The principle of party autonomy mainly entails free-will in relationships between private parties in the sense that they are legally capable of freely acting without governmental or private interference.⁶⁰ This free-will (party autonomy) entails the parties to create rights and obligations but also entitles them to the freedom of settling their disputes.⁶¹ Since parties are entitled to freely settle their disputes, the principle of party autonomy also means that the parties will have the freedom to choose the applicable

⁵⁴ M. Petit JR., “*Freedom, Freedom of Contract, and the ‘Rise and Fall’*”, 79(2) Boston University Law Review 263, (1999), at p.287.

⁵⁵ C. Fried, “*Contract as Promise: A Theory of Contractual Obligation*”, (1981), at p.7-17.

⁵⁶ One author explains that “*if my doing what I want to do today results in my being unable to do anything that I like to do tomorrow, then my level of freedom over the two-day period is lower than it would be if the choice did not have this consequence.*” W. Draughon, “*Liberty: A Proposed Analysis*”, 5 Social Theory and Practice 29, (1978), at p.37.

⁵⁷ M. Zhaohua, “*Party Autonomy, Private Autonomy, and Freedom of Contract*”, 10(6) Canadian Social Science 212, (2014), at p.212.

⁵⁸ Y. Zhao, “*The Application Scope of the Rule of Autonomy of the Will*”, 2 Political Science and Law Tribune 014, (2004), at p.101.

⁵⁹ *Ibid.*

⁶⁰ H. Liang, “*General Principles to Civil Law*”, (1997), at p.156.

⁶¹ M. Zhaohua, “*Party Autonomy, Private Autonomy, and Freedom of Contract*”, 10(6) Canadian Social Science 212, (2014), at p.212.

laws/rules to this settlement. In that sense, some have acquainted the meaning of the principle of party autonomy with the freedom of choosing the applicable law.⁶²

It is, also, important to note that, while most definitions of the principle of party autonomy refer to the parties' freedom to choose the applicable substantive law, in the field of international commercial arbitration, at least to this thesis, the term 'parties' autonomy' will definitely be used much more generally to refer to the autonomy of the parties to decide on all the aspects of an international arbitral settlement.

The final part of the theoretical aspect of this chapter aims at setting the scene by defining the parameters of the practice to which this thesis is confined. These are the international and commercial characters of arbitration, as well as the meaning of arbitration itself.

2.3 Defining International Commercial Arbitration

The characterisation of arbitration as both 'international' and 'commercial' entails certain aspects. In order to understand these aspects and in a further attempt of confining the extent of this thesis, this section briefly defines both characterisations, specifically in light of the NY Convention and the Model Law, and also looks briefly into the various definitions of arbitration.

⁶² See, for example, E. Friedler, "*Party Autonomy Revisited: A Statutory Solution to a Choice-of-Law Problem*", 37 Kansas Law Review 471, (1988-1989), at p.474, and Lew, "*Applicable Law*", at p.72.

2.3.1 Commercial

Defining the commercial character of international arbitration is not quite straightforward since many jurisdictions have their own concept of commercial law and commercial disputes.⁶³ However, in international arbitration the characterisation of commerciality should be given broad interpretation as to generally and not exclusively include any dispute or underlying transaction that is of a commercial nature.⁶⁴ The involvement of business parties is also of relevance although not necessarily a guiding principle.⁶⁵ Regardless, the importance of confining international arbitration to a commercial character has the effect of limiting its scope to private international law. This is simply due to the historical qualification of the term ‘international arbitration’ which indicates the participation of one or more states and, generally, refers to international investment arbitration in public international law.⁶⁶

The NY Convention, on one hand, distinguishes between commercial and non-commercial arbitrations. Article I(3) of the Convention provides that a Contracting State is allowed to declare “*that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the state making such declaration.*”

The commercial requirement adopted by the Convention was justified by the fact that some jurisdictions (especially civil law ones) have distinguished under their domestic arbitration laws between commercial and non-commercial matters.⁶⁷ It would have, therefore, been impossible for these states to ratify the Convention without this qualification.⁶⁸

⁶³ Lew and Mistelis, at p.51.

⁶⁴ *Ibid*, and Gaillard, at p.35.

⁶⁵ *Ibid*.

⁶⁶ *Ibid*.

⁶⁷ Berg, at p.5.

⁶⁸ One commentary claims that roughly one third of the NY Convention’s Contracting States have made use of this requirement. See Lew and Mistelis, at p.51, and Gaillard, at p.39.

Regardless, in interpreting the scope of a commercial dispute, national courts are urged to adopt a broad interpretation policy.⁶⁹ Accordingly, many national courts of developed jurisdictions have been inclined to generally adopt this requirement very broadly.⁷⁰

Like the NY Convention, the Model Law does not define the term ‘commercial’ in the main body.⁷¹ However, the Model Law drafters included the text of Article 1(1) a footnote that reads:

*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 cooperation, carriage of goods or passengers by air, sea, rail or road.*⁷²

Despite its presence in a footnote, this definition of commerciality is still of authoritative guidance and is an integral part of the Model Law to be relied on in determining the scope of an arbitration agreement.⁷³ It was later on explained that including this footnote is more of an intermediate solution to aid with the interpretation of

⁶⁹ Born I, at p.301.

⁷⁰ This is particularly true in the US. See, for example, *Bautista v. Star Cruises*, 396 F.3d 1289, (11th Cir. 2005), *Francisco v. Stolt Achievement MT*, 293 F.3d 270 (5th Cir. 2002), and Section 1-1 (e) of the Draft Restatement (Third) US Law of International Commercial Arbitration (Tentative Draft No. 2 2012). For examples from other jurisdictions, see *Carters (Merchants) Ltd v. Francesco Ferraro*, Judgement of 20 February, IV YCA 275, (1979), and *Canada Packers Inc. v. Terra Nova Tankers Inc.*, XXII YCA 669, (1997). Having said that, a few courts have yet managed to give a narrow interpretational policy of the ‘commercial’ requirement under the NY Convention. See, for rare examples, *Taieb Haddad & Hans Barrett v. Societe d’Investissement Kal*, Judgement of 10 November 1993, XXIII YCA 770, (1998), *RM Investment & Trading Co. Pvt Ltd (India) v. Boeing Co.*, 1994 AIR 1136 (Indian S.Ct.), and *India Organic Chemicals Ltd v. Chemtex Fibres Inc.*, [1979] 81 BOMLR 49 (Bombay High Ct.).

⁷¹ The titling of the Model Law, nevertheless, contains the words ‘International Commercial Arbitration’. Moreover, Article 1(1) provides that “[t]his law applies to international commercial arbitration . . .”

⁷² Article 1(1) of the Model Law, fn.2.

⁷³ Born I, at p.308.

the term ‘commercial’ instead of leaving the matter to individual states with no guidance as to a uniform interpretation.⁷⁴ Furthermore, giving a wide interpretation to the term ‘commercial’ is another reason for which the drafters of the Model Law intended this footnote to reflect.⁷⁵ The illustrative list of commercial relationships included in the above footnote supports that. Moreover, it is expressly provided in one of the Secretary-General reports on the Model Law that this list, although including almost all types of commercial relationships to arise in the context of an international commercial arbitration, is not exhaustive.⁷⁶

Regardless, the authoritative nature of that footnote has motivated some states to include it in the main text of its national arbitration laws to define the nature of a commercial dispute when adopting the Model Law.⁷⁷

Finally, from the language of this footnote, it seems that the characterisation of commerciality applies only to the parties’ underlying transaction based on the nature of their relationship rather than its purpose and with no regard to the nature and form of the parties’ claims.⁷⁸ The focus on the nature of the transaction rather than the persons involved and adopting an open-ended definition of commerciality is well justified as it meets the expectations and needs of international business parties and it avoids doctrinal traps that may variously exist under national legislation.⁷⁹

⁷⁴ Report of the Secretary-General, “*Analytical Commentary on the Draft Text of A Model Law on International Commercial Arbitration*”, U.N. Doc. No. (A/CN.9/264), (1985), para.16, at p.10.

⁷⁵ UNCITRAL, “*2012 Case Law Digest*”, at p.9-10. Generally speaking, national laws adopting the Model Law have interpreted the term ‘commercial’ broadly. See, for example, *United Mexican States v. Metalclad Corp.*, (2001) 89 B.C.L.R.3d 359 (B.C. S.Ct.).

⁷⁶ Report of the Secretary-General, “*Analytical Commentary on the Draft Text of A Model Law on International Commercial Arbitration*”, U.N. Doc. No. (A/CN.9/264), (1985), para.18, at p.10.

⁷⁷ See, for example, Article 2 of the Egyptian Arbitration Law, Section 1(6) of the British Columbia International Commercial Act, and Section 1 of the Australian Arbitration Act.

⁷⁸ Petrochilos, at p.5.

⁷⁹ Lew and Mistelis, at p.53.

2.3.2 International

The second characterisation of the arbitration with which this thesis is concerned is internationality. The importance of defining the international aspect of commercial arbitration lies in the fact that this international character will lead to the application of quite a different set of rules.⁸⁰ As it is shown below, many jurisdictions have specialised laws/rules for international arbitration in comparison to domestic arbitration.

In establishing the international character of commercial arbitration, three criteria can be mainly determinative. The first is an objective one that focuses on the dispute and/or the underlying transaction. The second is a subjective one that is rather concerned with nationality/domicile/place of business of the parties. And the third is a combination of both.

The objective criterion determines the international character of a commercial arbitration by looking for an international element in the underlying transaction. For example, a cross-border element in the underlying contract. It can also determine this international character where a dispute is referred to an international arbitration institution such as the LCIA, the ICC, or the CIETAC.

A good example of a national arbitration law that adopts a highly effective objective criterion in defining an international commercial arbitration is represented under the revised French Code of Civil Procedure. Article 1504 of the Code provides that “[a]n arbitration agreement is international when international trade interests are at stake.” The French arbitration legislation adopts an abstract objective criterion by exclusively focusing on the international element in a transaction/relationship.⁸¹

The subjective criterion, on the other hand, shifts the focus, in defining the internationality of a commercial arbitration, to the parties instead of their relationship or

⁸⁰ Lew and Mistelis, at p.57.

⁸¹ See, generally, G. Carducci, “*The Arbitration Reform in France: Domestic and International Arbitration Law*”, 28 *Arbitration International* 125, (2012), at p.147-148.

dispute. In so doing, the subjective criterion looks at the nationality, domicile, or place of performance of the parties to determine whether an international element exists.

A representative example of the subjective criterion exists under the Swiss (PIL). Article 167 of the Swiss PIL limits the applicability of this law only to cases where “*at least one of the parties was neither domiciled nor resident in Switzerland at the time of the conclusion of the arbitration agreement.*” The Swiss PIL, accordingly, only focuses on the domicile and residence of the parties making the nationality of the parties irrelevant.⁸²

Finally, the third criterion is a combination of both the objective and subjective ones. The most representative example of this criterion is found in the Model Law. Article 1(3) of the Model Law specifically provides for the situations in which an arbitration is deemed international. By providing for a combination of both criteria, the Model Law creates an effective system that is quite expansive in determining the international character of a commercial arbitration.⁸³ It relies on either the parties’ places of business, the place of arbitration, or the international element in the parties’ underlying commercial relationship.⁸⁴

Unlike the expansive criteria provided under the Model Law, the NY Convention makes no attempt to provide a direct definition of international arbitration.⁸⁵ Generally speaking, the NY Convention does not expressly address the categories of arbitration agreements that are covered by the Convention. The text of the Convention only expressly refers to ‘foreign’ and ‘non-domestic’ awards as these are entitled to the treaty’s protection. Arguably, some commentators claim that the protection offered to ‘foreign’ and ‘non-domestic’ awards under the Convention can be applied, by analogy, to arbitration agreements which produce awards in another State.⁸⁶

⁸² See, generally, B. Berger and F. Kellerhals, “*International and Domestic Arbitration in Switzerland*”, (2010), at para.102.

⁸³ UNCITRAL, “*2012 Case Law Digest*”, at p.8.

⁸⁴ See, generally, Holtzmann, at p.30.

⁸⁵ Gaillard, at p.51.

⁸⁶ See, for an extensive argument on that, Born I, at p.313-320, and Berg, at p.57.

2.3.3 Arbitration

Various commentaries and authorities have attempted to give arbitration broadly similar definitions. For example, according to one commentary, arbitration is “*a process by which parties agree to the binding resolution of their disputes by adjudicators, known as arbitrators, who are selected by the parties, either directly or indirectly via a mechanism chosen by the parties.*”⁸⁷ Another authority defined arbitration to be

*[A] contractual method of resolving disputes. By their contract the parties agree to entrust the differences between them to the decision of an arbitrator or panel of arbitrators, to the exclusion of the Courts, and they bind themselves to accept that decision, once made, whether or not they think it right.*⁸⁸

To this thesis, arbitration is the only binding form of alternative dispute resolution (ADR) where two or more parties choose specifically to settle their present or future disputes through the assignment of a third neutral person or a panel of two or more arbitrators who, at the end of the process, will issue a binding award to which the parties have mutually agreed to abide by previously.⁸⁹ In that sense, arbitration is distinguished from other forms of ADR, such as mediation, conciliation, and expert-determination, by the fact that it is the only binding mechanism of all the latter.

One consistent component of all the various definitions of arbitration is that arbitration consists of a few elements. These are mainly divided to be the resolution of future or current disputes, the involvement of a non-governmental decision-maker(s) that

⁸⁷ M. Mellwrath and J. Savage, “*International Arbitration and Mediation: A Practical Guide*”, (2010), at para.1-015.

⁸⁸ *Methanex Motunui Ltd v. Spellman*, [2004] 1 NZLR 95, at p.98. Also see *Judgement of 21 November 2003*, DFT 130 III 66, (Swiss Federal Tribunal), at p.70, and *Judgement of 17 January 2013*, DFT 4A_244/2012, (Swiss Federal Tribunal).

⁸⁹ As it will be shown, neither the NY Convention nor the Model Law defines arbitration. Both instruments, however, define what an arbitration agreement is. See Section 3.1 of this Thesis.

are chosen by the parties, an outcome that is consisted of a final and binding award, and, finally, the use of adjudicatory procedures to reach that binding award.⁹⁰

2.4 Historical Background

The second section of this chapter briefly looks into the historical background of both the party autonomy principle and the regulation of modern international commercial arbitration, specifically under the NY Convention and the Model Law.

2.4.1 History of the Party Autonomy Principle

The first recognition of the principle of party autonomy in a common law country occurred in the 18th century by Lord Mansfield in *Robinson v. Bland*.⁹¹ The case is considered a landmark case and is claimed to have given birth to the principle of party autonomy in English law. In the opinion of the court, Lord Mansfield stated that “*the parties had a view to the law of England. The law of the place can never be the rule, where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed.*”⁹²

That said, a great deal of the general acceptance of the party autonomy principle in Europe today is claimed to the contribution of Friedrich Carl von Savigny during the 19th century.⁹³ Savigny’s main contribution to this subject was the assumption of general premises through which he derived a concrete conflict rules for international contracts. Savigny started with the general premise of freedom of choice. Although this is not Savigny’s original idea, Savigny’s centerpiece was his assumption that parties should be allowed to assign the law governing their contract. According to Savigny, conflict rules

⁹⁰ J. Delvolve, G. Pointon, and J. Rouche, “*French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration*”, (2009), at para.26, and Born I, p.250-256.

⁹¹ 97 Eng. Rep. 717 (1760).

⁹² *Ibid*, at p.718.

⁹³ O. Lando, “*International Encyclopedia of Comparative Law*”, (1976), at p.11-12.

must be neutral, i.e. they must not be attached to particular parties, jurisdictions, or laws as such.⁹⁴ In supporting his theory, Savigny argued that every legal relationship must be governed by the law of the state to which it had the best connection, and therefore, each case was governed by its own circumstances. However, Savigny did not wish to leave the issue completely unpredictable and has provided for a specific assumption in case the intentions of the parties were not made explicit in the contract. In case of doubt, Savigny presumed that the applicable law should be the law of the place of performance and justified that by the fact that this would have probably been the law expected to apply by the parties.⁹⁵ Finally, Savigny believed that where necessary, these objective choice-of-law rules should be put aside whenever mandatory rules and public policies apply.⁹⁶

2.4.2 Development of International Commercial Arbitration under Contemporary Legal Framework

The enforceability of international arbitration agreements is definitely one of the most important prerequisites for a successful arbitration.⁹⁷ For that purpose, major trading countries have, over the past century, entered into many international arbitration conventions to provide for and facilitate the enforcement of international arbitration agreements and awards. These international instruments have, generally speaking, managed to provide an effective and more-flexible mechanism for the resolution of international commercial disputes which have, accordingly, promoted international trade and investment. This section examines in particular the development of the NY Convention and the Model Law.

⁹⁴ M. Reimann, “*Savigny’s Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century*”, 39 Virginia Journal of International Law 571, (1998-1999), at p.594.

⁹⁵ *Ibid*, at p.596.

⁹⁶ F. Juenger, “*A Page in History*”, 35 Mercer Law Review 419, (1981), at p.448-454.

⁹⁷ *David L. Threlkeld & Co. v. Metallgesellschaft Ltd*, 923 F.2d 245, (2d Cir. 1991), at p.248.

2.4.2.1 Historical Development of the NY Convention

In order to understand the historic development of the NY Convention, one must first look briefly into its origins. The origins of the NY Convention are mainly manifested in the Geneva Protocol and the Geneva Convention.

I The Geneva Protocol

The Geneva Protocol was first negotiated, under the auspices of the ICC, by the major trading nations in 1923 and was ultimately ratified by many major trading countries such as Germany, France, the United Kingdom, and many other countries.⁹⁸

Despite the fact that the Geneva Protocol was underappreciated by a few authors,⁹⁹ it played quite a significant role in laying the basis for many significant arbitration principles that were repeatedly used in many international arbitration conventions as well as national arbitration laws. For example, Article I of the Geneva Protocol recognises the presumptive validity of both future and existing arbitration agreements by requiring each Contracting State to recognize such validity. This and other profound arbitration principles are recognized by the Geneva Protocol and have, accordingly, influenced the structure of many future international arbitration conventions and national arbitration laws such as the NY Convention, the European Convention, and the Model Law.

The main problem, however, with the Geneva Protocol was the fact that it was extremely limited by providing that Contracting States only have to enforce awards made on its territory compared to foreign awards made in other countries.¹⁰⁰

⁹⁸ It is important, however, to know that, although the ICC started the negotiation of the Geneva Protocol in 1923, its role was later on taken over by the League of Nations.

⁹⁹ See, for example, H. Gharavi, “*The International Effectiveness of the Annulment of an Arbitral Award*”, (2002), at p.46.

¹⁰⁰ Article III of the Geneva Protocol.

II The Geneva Convention

In 1927 the Geneva Protocol was updated by the Geneva Convention. The latter extended the enforceability of ‘just’ arbitration agreements (as it was under the Geneva Protocol) to cover the enforceability of awards rendered pursuant to arbitration agreements. In an attempt of dealing with the deficiencies of the Geneva Protocol and as opposed to the latter, the Geneva Convention requires recognition and enforcement of foreign arbitral awards made in the territory of any Contracting State (rather than only within the state where the award was made as under the Geneva Protocol).¹⁰¹

Nevertheless, the Geneva Convention came with its own deficiencies. Unfortunately, Article 1 of the Convention placed the burden of proof in recognition proceedings on the person of whom the award was issued in favour.¹⁰² Moreover, the Geneva Convention required that the award creditor showed that the award had become final in the seat of the arbitration before the country of enforcement.¹⁰³ This approach has been referred to as the ‘double exequatur’ and has again proved to be a major difficulty in the process of recognition and enforcement of international arbitral awards.¹⁰⁴

III The NY Convention

Although the Geneva treaties were an improvement, there was still a need in the international business community for a truly international ‘denationalised’ convention to address the settlement of disputes in international trade.

And so in 1953 the ICC prepared the first draft of what is now the NY Convention which focused exclusively on the enforcement of international arbitration awards and aimed at allowing denationalised arbitral processes and arbitral awards not to be governed

¹⁰¹ See Article 1 to Article 4 of the Geneva Convention.

¹⁰² Born I, at p.67.

¹⁰³ Article 1(d) and (e) of the Geneva Convention.

¹⁰⁴ P. Sanders, “*The History of the NY Convention*” 11, in ICCA Congress Series No. 9, (1999), at p.12.

by national laws.¹⁰⁵ The ICC draft was then submitted to the United Nations Economic and Social Council (hereinafter, the “ECOSOC”) to study. In 1955 the ECOSOC came forward with a revised draft.¹⁰⁶ The ECOSOC draft was then sent for comments to a number of governments and organizations.

Both ICC and ECOSOC drafts had then provided for the basis of a three-week conference that was attended by 45 states and was held at the headquarters of the United Nations in New York from May 20 to June 10 (The Conference on International Commercial Arbitration of 1958). The main theme of the ICC draft and the ECOSOC draft was the fact that they focused mainly on the recognition and enforcement of international arbitral awards but there was no serious attention to the enforcement of international arbitration agreements. It was only late in the Conference where it was found that such approach was very limiting and that separating the arbitration agreements to be dealt with in a different protocol was not preferred. Accordingly, when the proposal to extend the treaty from only the recognition of arbitral awards to also include international arbitration agreements was made, it was welcomed by many delegates. This proposal was referred to as the ‘Dutch proposal’ as it was made by the Dutch delegation and although it was described at first as ‘a very bold innovation’,¹⁰⁷ it was eventually adopted and has since formed one of the essential characters of the Convention.¹⁰⁸

On June 10th of 1958 the text of the NY Convention was approved during the conference by a unanimous vote.

¹⁰⁵ ICC, “*Report and Preliminary Draft Convention Adopted by the Committee of International Commercial Arbitration at Its Meeting of 13 March*”, in 9(1) ICC Bulletin 32, (1998), at p.32.

¹⁰⁶ UN, “*Report of the Committee of the Enforcement of International Arbitral Awards*”, U.N. Doc. E/AC.42/4 (1995). Also see, Berg, at p.7.

¹⁰⁷ P. Sanders, “*The History of the NY Convention*” 11, in ICCA Congress Series No. 9, (1999), at p.12.

¹⁰⁸ See, generally, G. Gaja, “*International Commercial Arbitration – The New York Convention – Vol III*”, (1996).

The NY Convention is definitely an improvement on the Geneva treaties.¹⁰⁹ The scope of application of the Convention is broader as it applies to both arbitration agreements and awards. Unlike the Geneva Convention, the NY Convention shifts the burden of proving the validity or invalidity of the awards from the party seeking enforcement to the party resisting it.¹¹⁰ Moreover, the NY Convention has eliminated the ‘double exequatur’ that was required under the Geneva Convention according to which the award had to be confirmed at the seat of arbitration before being recognized abroad.

2.4.2.2 The Model Law

The Model Law has been adopted in a substantial number of jurisdictions and has inspired the language, style, and simplicity of many other national arbitration laws. This section approaches several topics on the Model Law from an analytical and critical prospective such as its definition, legislative history, main purpose, and its stance on party autonomy.

I Definition

The Model Law, in the simplest terms, is a good example for a national arbitration law that targets international commercial arbitrations. It is a suggestion by the UNCITRAL of a potentially good arbitration law to regulate international arbitrations happening on the territory of the state adopting the law with no indication whatsoever of an obligation to adopt this model.

In the process of defining the Model Law, some authors may tend to dismantle its terms by defining each separately and this is where misinterpretations take place. To illustrate, the word ‘Law’, in its accurate meaning, stands for a rule of action prescribed or dictated by a superior which an inferior was bound to obey.¹¹¹ Accordingly, it indicates

¹⁰⁹ UN, “*Summary Record of the Twenty-Fifth Meeting of the United Nations Conference on International Commercial Arbitration*”, U.N. Doc. E/CONF.26/SR.25, (1958), at p.2.

¹¹⁰ Articles III and V of the NY Convention.

¹¹¹ E. Ivamy, “*Mozley & Whiteley’s Law Dictionary*”, (1993), at p.153 where reference is made to Blackstone’s definition of ‘law’.

that there is an obligation on the person at whom the law is addressed, and this is what the Model Law does not possess since it is just a suggested set of rules for each state to adopt or simply ignore. Nevertheless, it will still be illogical to indicate that the choice of the title of the Model Law was not right for this reason simply because, to this thesis's understanding, the obligatory nature of the Model Law begins to take effect from the time a certain state adopts it as its national/international arbitration law, i.e. from the moment it possesses the force of law once a government implements it on its territory. Accordingly, a separation of the term 'Model' and 'Law' before such implementation would only lead to a misinterpretation of the Model Law. And this is why all the countries that have adopted the Model Law have not kept its title but rather changed it to another title that suits its updated obligatory nature.¹¹²

This brings us to the second part which is the term 'Model'. The fact that the creators of the Model Law have decided to add the term 'Model' before the term 'Law' is another reason why a separate definition of each term should not take place. The word 'Model' here refers to an example.

Even though this thesis admires the construction of the Model Law, it, on the other hand, recognizes that it is no more than a good example with better ones to be made in the future. The fact that the Model Law is not perfect or complete could even be seen as an advantage as it allows each country better opportunities to familiarize the Model Law with its own culture, backgrounds, and public policies.

It is safe to say that when the Model Law was created, it gave countries three options. These are to adopt it as it is, to amend some of its provisions, or to just be inspired by its structure. The only two countries that have seen the Model Law's provisions to be ideal, and therefore adopted it as it is, are Bahrain and Azerbaijan. The rest of the countries

¹¹² For example, Egypt has adopted the Model Law, however, its arbitration code is called the "The Arbitration Law in Civil and Commercial Matters No. 27 of 1994".

have either been inspired by the Model Law's provisions (for example, England) or have avoided it completely (for example, Saudi Arabia). And so it was perfectly clear for all countries that this is just a suggestion of a good example of an arbitration law.

II The Legislative History of the Model Law

In 1976 the Asian African Legal Consultative Committee invited the United Nations Commission on International Trade Law to consider the possibility of preparing a protocol to the 1958 NY Convention.¹¹³ However, after a review of the past twenty years' experience with the NY Convention, the Commission was convinced that such protocol was not necessary, but further work to create a model law to modernize and harmonize national arbitration laws, and unite the divergent interpretations of the NY Convention, was much more suitable.¹¹⁴

Moreover, certain defects in many national arbitration laws were also identified to have been sought by the NY Convention but were still persistent in national legal systems.¹¹⁵ As it was stated in the Secretary-General's report:

*To give only a few examples, such provisions may relate to, and be deemed to unduly restrict, the freedom of the parties to submit future disputes to arbitration, or the selection and appointment of arbitrators, or the competence of the arbitral tribunal to decide on its own competence or to conduct the proceedings as deemed appropriate taking into account the parties wishes . . .*¹¹⁶

In 1982, the work on a project in the form of a model law was undertaken by a Working Group and commenced over the course of five sessions. In 1984, a draft model law was produced and circulated to various states, regional organizations, as well as

¹¹³ UN, "Note by the Secretary-General", VIII Y.B. UNCITRAL, U.N. Doc. A/CN.9/127, (1977), at p.233.

¹¹⁴ UN, "A Report of the United Nation Commission on International Trade Law on the Work of its Twelfth Session", U.N. Doc. A/34/17, (1979), at p.20-21.

¹¹⁵ Born I, at p.135.

¹¹⁶ UN, "UNCITRAL Report of the Secretary-General on the Possible Features of a Model Law of International Commercial Arbitration", XIII Y.B. UNCITRAL, U.N. Doc. A/CN.9/207, (1981), at p.77.

several international business and arbitration communities, such as the ICC International Court of Arbitration, for comments.¹¹⁷ In June 1985, the UNCITRAL approved the final draft of the Model Law at a plenary session in Vienna.¹¹⁸ It is essential to mention that due account was given to the NY Convention and the 2010 UNCITRAL Arbitration Rules through the making of this Model Law.¹¹⁹

III Main Purpose of the Model Law

As it is mentioned above, the Model Law is intended to be a model of a national arbitration legislation with the objective of further harmonizing the treatment of international commercial arbitration in different countries. To use the words of the UN Secretary-General's Report: "[t]he ultimate goal of a model law would be to facilitate international commercial arbitration and to ensure its proper functioning and recognition."¹²⁰

Therefore, some commentators have argued that the Model Law was never meant to be all inclusive and complete, on the contrary, it only aims to be a simple suggestion to harmonize arbitral procedure rather than to unify it.¹²¹ The difference between harmonizing and unifying arbitration laws is that harmonization aims at creating similarities between laws whereas unification aims at creating identical laws.

This thesis is of the opinion that the Model Law was never designed to be comprehensive of or to unify arbitration laws. The majority of the language used by the UNCITRAL to describe the main purpose of the Model Law never actually referred to the word 'unification'. Accordingly, any allegation that the Model Law is intended in any way

¹¹⁷ Holtzmann, at p.12-13.

¹¹⁸ UN General Assembly Resolution No. 40/71, "Model Law on International Commercial Arbitration of the UNCITRAL", (1985).

¹¹⁹ M. Hoellering, "The UNCITRAL Model Law on International Commercial Arbitration", 20(1) International Lawyer 327, (1986), at p.328.

¹²⁰ UN, "UNCITRAL Report of the Secretary-General on the Possible Features of A Model Law of International Commercial Arbitration", XIII Y.B. UNCITRAL, (1981), U.N. Doc. A/CN.9/207, at p.77.

¹²¹ For example, H. Seiki, "Judicial Involvement and Intervention in Arbitration Proceedings after the Arbitration Act 1996", PhD thesis, Cardiff University, (2002), at p.24. Also see, D. Cairns, "The Spanish Application of the UNCITRAL Model Law on International Commercial Arbitration", 22 Arbitration International 573 (2006), and F. Davidson, "Arbitration", (2000), at p.5.

to unify national arbitration laws would not only misinterpret its purpose and ultimate goal, but would also misrepresent it.

It is, nevertheless, important to mention that the UN General Assembly Resolution (through which the Model Law was approved), has used the word ‘uniformity’ (not unification) in describing the purpose of the Model Law.¹²² The UN General Assembly Resolution recommended that:

*[A]ll States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of **uniformity** of the law of arbitral procedures and the specific needs of international commercial arbitration practice.*¹²³ [Emphasis added]

One author has, unfortunately, used this as a supporting evidence to argue that the Model Law was meant to unify rather than to harmonize national arbitration laws.¹²⁴ This thesis respectively disagrees with this view. Besides the fact that the word ‘unification’ was still not used to describe the main goal of the Model Law, the fact that there is ‘*desirability to uniformity*’ is nothing more than the last step of a long mile that the Model Law intends to reach by harmonizing arbitral procedures around the world (compared to unifying them). Therefore, harmonization can be seen as a step forward towards uniformity not unification.

¹²² UN General Assembly Resolution No. 40/71, “*Model Law on International Commercial Arbitration of the UNCITRAL*”, (1985), at p.23.

¹²³ *Ibid.*

¹²⁴ O. Al-Hyari, “*Challenging Arbitral Awards under the Model Law and Arab and English Laws*”, PhD Thesis, University of West England, (2009), at p.18.

IV Party Autonomy under the Model Law

The Secretary-General has stated that “*probably the most important principle on which the Model Law should be based is the freedom of the parties . . . to tailor the ‘rules of the game’ to their specific needs.*”¹²⁵ Accordingly, the entire scheme of the Model Law provides for a wide scope of party autonomy as one of the most important pillars upon which this law was founded. The party autonomy principle has been embodied in many of the Model Law’s Articles.¹²⁶

A good example is found in Article 28 of the Model Law which allows the parties in any international commercial arbitration agreement to choose, even tailor their own applicable law, or choose more than one applicable system.

Moreover, one of the key characters of the Model Law is the fact that it allows very limited and clearly defined instances of court intervention in arbitration processes. This is mainly due to the drafters attempt to strike a proper balance between national courts and arbitration. For that, Article 5 of the Model Law was very clear in providing that: “[i]n matters governed by this law, no court shall intervene except where so provided in this Law.”

The Model Law goes on further to specifically provide for the instances in which a court (of a State enacting the Model Law as its national or international arbitration law) can intervene in an arbitration.¹²⁷ Moreover, the Model Law further designates that certain tasks are to be carried out by the court or a named authority.¹²⁸

This approach of the Model Law where courts’ intervention is strictly limited to certain specified instances aims to create a relationship between national courts and

¹²⁵ UN, “*UNCITRAL Report of the Secretary-General on the Possible Features of a Model Law of International Commercial Arbitration*”, XIII Y.B. UNCITRAL, U.N. Doc. A/CN.9/207, (1981), para.17 at p.78

¹²⁶ For example, Articles 1(3)(c), 2(d), 3(1), 10(1), 11(2), 13(1), 17, 19, 20, 21, 22(1), 23(1), 24(1), 25, 26, 28(1), 28(3) . . . etc.

¹²⁷ Articles 9, 27, 34, 35, and 36 of the Model Law.

¹²⁸ See, for example, Articles 11, 13, 14, 16, and 34 of the Model Law.

arbitrations that is more of an assistance/supervisory character to the arbitral process as opposed to a dilatory one.

2.5 Concluding Remarks

Accordingly, the theoretical and historical development of both arbitration and the principle of party autonomy have taken place over several stages before they reached the level of sophistication they currently enjoy. Over the years, the same progress has also taken place specifically in relation to international arbitration agreements. The following introductory chapter examines such development and analyzes the different effects a party endures by entering an arbitration agreement. Such effects will later on justify the parties' duty as well as privilege to participate positively in the shaping and tailoring of their arbitral process.

3 Chapter III: The Agreement to Arbitrate

The agreement to arbitrate is the backbone to any international arbitration process. Not only does it record the consent of the parties to submit their disputes to arbitration but it also excludes the jurisdiction of national courts to solve these disputes.

Any arbitral process, whether national or international, starts with an agreement to arbitrate. The tendency of arbitration, especially internationally, to succeed in its goal to effectively solve any dispute within minimum time and costs can rely significantly on drafting, what this thesis refers to as, an intelligent arbitration agreement. The latter would most importantly represent the parties' autonomy in a highly personalized manner. Such an agreement should not necessarily contain too many details but it will rather include all the significant ones, such as the number and qualification of the arbitrators, the place of the arbitration, the language of the arbitration, the applicable laws/rules, and so on. This agreement would be the true manifestation of parties' freedom of choice in international arbitration.

This chapter represents a brief introduction to arbitration agreements. It begins with reviewing the definition and historical background of the agreements to arbitrate as well as its different types, then it moves on to differentiating between the negative and positive effects of these agreements.

3.1 Definition

This thesis sees the agreement to arbitrate as an arrangement between the parties in the context of their legal relationship to submit all or some of their current or future disputes to arbitration rather than settling these disputes before national courts. It is either a contract or a term in a main contract, though separate in nature and could possibly be governed by a different law than that applicable to the main contract.

As it is shown below, the majority of international conventions and national laws on international commercial arbitration provides a straightforward definition of arbitration agreements. Most of these definitions are broadly similar both in what they provide (and what they do not provide) and in what they guide us in relation to the elements of an arbitration agreement. Since it would be quite a lengthy process to go into too much detail on the various given definitions of these agreements, this section, by way of illustration, only looks into a few examples.¹²⁹

Quite the comprehensive definition is given under Article 7(1) of the Model Law which stipulates that an:

'Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

Another definition is provided by Article 10(1) of the 1994 Egyptian Arbitration Code according to which:

¹²⁹ This section gives examples of definitions under the arbitration law of a civil-law country (Egypt) and a common-law country (England) to show the differences or similarities between countries from two different legal backgrounds.

The arbitration agreement is the agreement by which the two parties agree to submit to arbitration in order to resolve all or part of the disputes which arose or which may arise between them in connection with a defined legal relationship, contractual or non-contractual.

Section 6(1) of the 1996 English Arbitration Act has, on the other hand, provided a brief definition, according to which “*an ‘arbitration agreement’ means an agreement to submit to arbitration present or future disputes (whether they are contractual or not).*”

As for the definition provided by the NY Convention (to which both Egypt and England are Signatory States), Article II(1) of the Convention stipulates that:

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

Looking at the previous definitions, the following is observed. All these definitions give similar broad guidelines as to what elements constitute an arbitration agreement. For instance, that an arbitration agreement deals with either an existing dispute or a future one, that this dispute shall be resolved by arbitration (nevertheless, none of these define arbitration), and that this agreement can take the form of either an arbitration clause or a separate contract. However, none of these definitions provide what exactly constitutes an arbitration agreement, for example, in relation to other agreements submitting disputes to other forms of dispute resolutions. And so, such responsibility is merely left to national courts, arbitral tribunals and commentators.

3.2 A Brief Historical View on International Arbitration Agreements

Historically, national courts used to hold arbitration agreements revocable at will because they ousted the courts of jurisdiction contrary to public policy.¹³⁰ Even in cases where an agreement was held valid and binding, a party could not get specific performance or equitable relief to force its counter party to arbitrate.¹³¹

Over the 19th century, the overall hostility towards arbitration agreements prevailed in US courts as well as English ones.¹³² Countries in many parts of the world refused to recognize the validity of international and domestic arbitration agreements.¹³³ Many developing states in the Middle East, Latin America and Africa saw international arbitration agreements as against national interest and, thus, invalid.¹³⁴

Regardless, agreements to submit existing and future disputes to arbitration whether domestically or internationally are enforced almost universally nowadays and attempts to evade such agreements are discouraged by courts up to the point where strong public policy favors arbitration.¹³⁵

¹³⁰ For some commentary on the common law attitude towards arbitration agreements see, generally, S. Jones, “*Historical Development of Commercial Arbitration in the United States*”, 21(3) Minnesota Law Review 240, (1927), S. Mentschikoff, “*Commercial Arbitration*”, 61 Columbia Law Review 846, (1961), and P. Sayre, “*Development of Commercial Arbitration Law*”, 37 Yale Law Journal 595, (1928).

¹³¹ See, for example, *Tobey v. County of Bristol*, 23 Fed. Cas. 1313, (C.C.D. Mass. 1845), at p.1321-1323, *Red Cross Line v. Atlantic Fruit Co.*, 264 US 109 (1924), *Home Insurance Co. v. Morse*, 87 US 445, (1874), at p.451, and *Rowe v. Williams*, 97 Mass 163, (1887).

¹³² For an American example, see *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978 (2d Cir. 1942). For English examples, see *Kill v. Hollister*, 1 Wilson 129 (K. B. 1746), and *Wellington v. Macintosh*, 2 Atk. 569. (Ch. 1743).

¹³³ See, generally, A. Kassiss, “*The Questionable Validity of Arbitration and Awards under the Rules of the International Chamber of Commerce*”, 6 International Arbitration 79, (1989), and M. Sornarajah, “*The Model Law: A Third World Viewpoint*”, 6(4) Journal of International Arbitration 7, (1989).

¹³⁴ See H. Noan, “*Arbitration in Latin America: Progress and Setbacks - 2004 Freshfields Lecture*”, 21(2) Arbitration International 127, (2005), S. Saleh, “*Commercial Arbitration in the Arab Middle East*”, (1984), and A. El-Ahdab, “*Enforcement of Arbitral Awards in the Arab Countries*”, 11 Arbitration International 169, (1927).

¹³⁵ S. Sterk, “*Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*”, 2 Cardozo Law Review 481, (1980-1981), at p.482, and Born, “*Cases and Materials*”, at p.177-178.

3.3 Types of the Agreements to Arbitrate

Looking at the previous definitions, one can find that the majority of arbitration laws and international arbitration rules have recognized the validity and made a distinction between two types of arbitration agreements, those that deal with current disputes (submission agreements) and those that deal with future disputes (arbitration clauses).

Under most legal systems and international conventions, when the term ‘submission agreement’ is used, it normally refers to agreements to solve current/present disputes through arbitration. On the other hand, the term ‘arbitration clause’ normally refers to a provision in a main contract referring future disputes between the parties of the contract to arbitration. Due to its nature, a submission agreement is usually characterized to be longer and more detailed than an arbitration clause. This is mainly due to the simple fact that a submission agreement deals with existing disputes, i.e. it deals with already known extensive amount of details. Accordingly, the amount of details contained in these agreements are considerably more than those contained in an arbitration clause in a contract that is added to deal with future unknown disputes.

Nonetheless, this is not a universal rule, that is to say, there is no legal restriction on parties not to use a very brief submission agreement (for example, where parties submit their current dispute to an arbitral institution) or a lengthy detailed arbitration clause (for example, where parties commence ad hoc arbitration, normally the clause contains considerably more details than a boiler-plate clause taken from certain institutional rules).¹³⁶

¹³⁶ Redfern and Hunter, at p.86-87. It may be worth noting, however, that in some jurisdictions a clause to submit future disputes to arbitration shall not be operative until it is followed by an executed submission agreement. See, for example, Articles 739-741 of the Argentinian National Code of Civil and Commercial Procedure. Also see N. Blackaby, D. Lindsey, and A. Spinillo, “*International Arbitration in Latin America*”, (2003), at paras.12, 31-32, and p.73, and H. Naon, “*Arbitration and Latin America: Progress and Setbacks - 2004 Freshfields Lecture*”, 21(2) *Arbitration International* 127, (2005), at p.150-153.

3.4 Effects of the Arbitration Agreement

Any valid arbitration agreement produces significant legal effects not only for its parties but also for the arbitrators and national courts. These effects can be divided into two categories, the positive and negative effects. The first type of effects include an obligation on the parties to refer their disputes to arbitration, participate in good faith in the arbitral process once it started, and cooperate equally to make the arbitration effective. The second effect includes an obligation on the parties not to pursue dispute resolution through national courts or any other similar legal forums. This section discusses, in details, both types of effects.

3.4.1 The Positive Legal Effect of the Arbitration Agreement

The most fundamental effect of any arbitration agreement is to require the parties to refer any dispute arising out of their transaction to arbitration. However, this effect should not be understood narrowly since it reflects other obligations as well. The positive effect of an agreement to arbitrate also obligates the parties to cooperate effectively and to act in good faith to produce a successful/effective arbitral process. This section goes into these three dimensions of the positive effect of the arbitration agreement with more details.

The first dimension of the positive effect of an arbitration agreement is for the parties to refer their disputes to arbitration. Ironically, even though this is the most fundamental objective of any arbitration agreement, this obligation is hardly ever expressly mentioned by many international conventions or national laws. Many of these rather

choose to focus on the negative effect of the arbitration agreement or on the remedies of the breach of one and choose to refer to this first dimension implicitly.¹³⁷

It is, however, essential to emphasize that an arbitration agreement does not compel an aggrieved party to refer his claims directly to arbitration. In other words, an agreement to arbitrate does not forbid a party from seeking, initiating, or accepting negotiated solutions to solve a dispute. Rather, an arbitration agreement requires a party to participate cooperatively and with good faith in the arbitration once it is initiated so as to not to pursue settlement of disputes that were agreed to be arbitrated through litigation.¹³⁸

The second dimension of the positive effect of any agreement to arbitrate is for the parties to participate cooperatively in the arbitration process. An arbitration process always starts with the arbitration agreement. And since party autonomy is one of the most essential characters and attractions of any international arbitration, parties can and should use this autonomy through the positive obligation of the arbitration agreement, to tailor this effect to their benefits. So, for example, they can, and almost should, participate/cooperate in constituting the tribunal, paying the arbitrators, agreeing on the arbitral procedures, choosing the arbitral seat and the applicable law, and finally fulfilling the award. That is because, when a party agrees to arbitrate, it impliedly, but definitely, agrees to participate in all these aspects of the international arbitral process.¹³⁹

This thesis finds that this obligation is derived from the fact that the parties' ability to design their own arbitral process is the most fundamental character of international commercial arbitrations. Nonetheless, this autonomy is not merely an advantage of arbitration but also a responsibility. This freedom is mirrored by an implied contractual

¹³⁷ See, for example, Article 1 of the Geneva Protocol, Article II(1) of the NY Convention, and Article 8(1) of the Model Law.

¹³⁸ See A. Dimolitsa, "Arbitration Agreements and Foreign Investments: The Greek State between Contractual Commitment and Sovereign Intervention", 5(4) Journal of International Arbitration 17, (1988) where the author argues that an arbitration agreement is nothing more than another application of the *pacta sunt servanda* principle which mainly requires the existence of good faith in applying arbitration agreements, at p.39.

¹³⁹ Born I, at p.1257-1258.

responsibility of the parties to take part in their arbitral process. To prove that such autonomy is a responsibility as much as an advantage, some jurisdictions have produced this obligation under their national arbitration legislation, even though it does already arise from the parties' agreement to arbitrate. For example, Section 40 of the 1996 English Arbitration Act stipulates that:

(1) The parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings.

(2) This includes

(a) complying without delay with any determination of the tribunal as to procedural or evidential matters, or with any order or direction of the tribunal, and

(b) where appropriate, taking without delay any necessary steps to obtain a decision of the court on a preliminary question of jurisdiction or law.¹⁴⁰

The third dimension of the positive effect of any agreement to arbitrate is the obligation of the parties to perform their responsibilities under the arbitration agreement in good faith. This is because the parties' obligation to act fairly and in good faith is extended to the dispute and its settlement.¹⁴¹ As it is mentioned before, this obligation is no more than a crystallized effect of the general doctrine *pacta sunt servanda* which is recognized internationally under almost all developed legal systems.¹⁴² It may, however, be worth noting that good faith as a doctrine, in general, is quite a controversial concept both judicially and academically. This may be due to the ambiguous nature of its acceptance in several common law jurisdictions. For instance, English courts have been inclined to rely

¹⁴⁰ Also see Sections 34 and 45 of the same Act.

¹⁴¹ L. Levy and V. Veeder, "Arbitration and Oral Evidence", (2004), at p.11 and p.16.

¹⁴² *Himpurna Calif. Energy Ltd v. PT (PERSERO) Perusahaan Listrik Negara*, Final Ad Hoc Award (4 May 1999), XXV YCA 13, (2000), where it was explained that "[t]he fundamental principle of *pacta sunt servanda* forms the bedrock of the civil law of obligations everywhere", at p.58. Also see *China Nanhai Oil Joint Serv. Corp. Shenzhen Branch v. Gee Tai Holdings Co.*, XX YCA 671, (1995).

on the existence of an implied duty of good faith in the performance and negotiations of contracts.¹⁴³ Having said that, it is significant to clarify that, whenever good faith is mentioned, this thesis focuses only on the parties' duty to act in good faith and not on a certain jurisdiction's interpretation or recognition of a duty/doctrine of good faith in general. This is further emphasized as this thesis is not looking specifically at a certain jurisdiction or a certain legal background.

The importance of the obligation to act in good faith lies in the nature of the arbitration agreement itself. Because an agreement to arbitrate is a *sui generis* contractual provision that is designed only to operate once the contracting parties have fallen into dispute, the obligation to act in good faith while regulating the consensual resolution of their dispute is highly emphasized then, especially that when a dispute arises, it reflects a rather hostile environment between the parties which makes cooperating in good faith a necessity.

The contents/aspects of the obligation to act in good faith are, however, not exclusively and clearly listed under any set of rules. In the words of one arbitral tribunal: *"according to good faith, the parties to an international arbitration must in particular facilitate the proceedings and abstain from all delaying tactics."*¹⁴⁴

It has also been held that an obligation to act in good faith under the arbitration agreement includes participating in the constitution of the arbitral tribunal,¹⁴⁵ paying the arbitrators their fees or any required advances,¹⁴⁶ cooperating with the arbitrators with

¹⁴³ See, generally, *Mid Essex Hospital Services NHS Trust v. Compass Group UK and Ireland Ltd.*, [2013] EWCA Civ 200. The same is claimed to apply in Canada, for instance. See, D. Bristow and R. Seth, "Good Faith in Negotiations", 55(4) *Dispute Resolution Journal* 16, (2000), at p.17. See, however, for a recently different approach in England, *Yam Seng Pte Ltd. v International Trade Corporation Ltd.*, [2013] EWHC 111 (QB) where Leggatt J found that a duty of good faith could be implied into contracts as a matter of English law, especially in the majority of commercial contracts.

¹⁴⁴ *Award in ICC Case No. 8486*, XXIV YCA 162, (1999), at p.172.

¹⁴⁵ *Safond Shipping Sdn Bhd v East Asia Sawmill Corp.*, [1993] HKCU 385, and *China Ocean Shipping Co. v. Mitrans Maritime Panama SA*, XX YCA 282, (1995).

¹⁴⁶ *Interim Award in ICC Case Dated 26 March 2002*, 21 ASA Bulletin 802, (2003), *Award in ICC Case No. 10526*, 126 JDI 1179, (2001), *Partial Award in ICC Case No. 10671*, 19 ASA Bulletin 285, (2001).

regard to procedural matters,¹⁴⁷ obeying confidentiality protocols related to the arbitration, and, of course, complying with disclosure requests, orders, and the award.¹⁴⁸ Regardless, all these obligations are variable and are all subject to the parties' autonomy and so can be altered to be narrowed or elaborated through the instrument of the contract and the arbitration agreement.

3.4.2 The Negative Legal Effect of the Arbitration Agreement

The positive and the negative effect of an international arbitration agreement are two faces to one coin. Accordingly, just as a party to an arbitration agreement is obligated to arbitrate all and any dispute(s) arising out of the main contract, that party is also forbidden to litigate these disputes under this agreement.

Unlike the positive effect, the negative effect of an international arbitration agreement is provided for under almost all international conventions and national laws. Article II(1) and II(3) of the NY Convention requires Contracting States to recognize arbitration agreements and to refer the parties to arbitration when one exists. The same approach is adopted under Article 8(1) of the Model Law which imposes an identical obligation to that under Article II of the NY Convention.

There are, however, two aspects of the negative effect of the arbitration agreement. The first is manifested in the obligation not to litigate disputes subject to arbitration, while the second is the exclusivity of arbitration.

The first aspect of the negative effect of the arbitration agreement basically means that parties are not to litigate disputes that are subject to arbitration. This aspect of the negative effect has been held by many national courts to be a mandatory obligation that is

¹⁴⁷ Petrochilos, at p.216.

¹⁴⁸ *Award in ICC Case No. 1434*, 103 JDI 978, (1976).

not subject to courts discretion.¹⁴⁹ Many commentators agree to that effect and argue that it is specifically produced under Article 8(1) of the Model Law which makes this Article a mandatory provision.¹⁵⁰

The second aspect of the negative effect of an arbitration agreement refers to the exclusivity of arbitration.¹⁵¹ Accordingly, a party is not only prohibited from litigating arbitral disputes, but it is also under the obligation not to use any other forum to settle disputes besides arbitration. This means that arbitration exclusivity compels the parties not to proceed with any court procedures parallel to arbitration.¹⁵² Although this aspect of the negative effect is more of an implied effect, some institutional rules include express provisions to that effect.¹⁵³ It is, nevertheless, important to clarify that the exclusivity of arbitration does not entail in any manner that the parties are prohibited from conducting hybrid forms of dispute resolution. Although a negative obligation of an arbitration agreement requires that the parties do not recourse to litigation or conduct parallel court procedures with arbitration, it does not prohibit the parties from agreeing explicitly to conduct other sorts of dispute resolution procedures before, with, or after their arbitration.¹⁵⁴ A key matter, however, in these forms of hybrid forms of dispute resolution is that the parties provide from them expressly either in their arbitration agreement or through a subsequent separate agreement.

¹⁴⁹ *Petrokazakhstan Inc. v. Lukoil Overseas Kumkol BV*, 2005 ABQB 789 (Alberta Q.B.), *Dalimpex Ltd v. Janicki*, (2003) Ont. Rep. LEXIS 132 (Ontario Court of Appeal), *Nanisivik Mines Ltd v. F.C.R.S. Shipping Ltd*, 113 D.L.R. 4th 536 (Canada Fed. Ct. App. 1994), *Southland Corp. v. Keating*, 465 U.S. 1, (U.S. S.Ct. 1984), at p.7, and *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, (U.S. S.Ct 1985), at p.218.

¹⁵⁰ See A. Broches, “*Commentary on the Model Law on International Commercial Arbitration*”, (1990), P. Sanders, “*The Work of the UNCITRAL on Arbitration and Conciliation*”, (2004), and P. Binder, “*International Commercial Arbitration and Conciliation in Model Law Jurisdictions*”, (2005).

¹⁵¹ J. Michaelson and G. Blanke, “*Anti-Suit Injunctions and Recoverability of Legal Costs as Damages for Breach of An Arbitration Agreement*”, 7(4) *Arbitration* 12, (2008), at p.18.

¹⁵² J. Wessel and S. Cohen, “*In Tune with Mantovani: The ‘Novel’ Case of Damages for Breach on An Arbitration Agreement*”, 4(2) *International Arbitration Law Review* 65, (2001), at p.68.

¹⁵³ See, for example, Article 34(6) of the 2012 ICC, and Article 23(5) of the 2014 LCIA Rules.

¹⁵⁴ A hybrid form of dispute resolution generally reflects combining elements of mediation and arbitration to solve a particular dispute. One of the known types of these hybrids is presented in MedArb (Mediation-Arbitration) mechanisms in which the settlement process is consisted of two phases that start with mediation that is followed by arbitration, if mediation failed to secure an agreement by a predetermined deadline. See, generally, W. Ross and D. Conlon, “*Hybrid Forms of Third-Party Dispute Resolution: Theoretical Implications of Combining Mediation and Arbitration*”, 25(2) *Academy of Management Review* 416, (2000).

For that, a party's commencement of litigation on arbitrable claims is to be considered a breach of that agreement, particularly its negative obligation.¹⁵⁵ Such breach entitles the non-breaching party to certain remedies that could include, for example, specific enforcement or suspension/dismissal of litigation and could also expose the breaching party for contractual liability.¹⁵⁶

Therefore, the positive and the negative effects of arbitration agreements complete each other as two faces to one coin. While the positive effect obligates the parties to arbitrate their disputes cooperatively and in good faith, the negative effect acts as a reminder not to breach the agreement to arbitrate by litigating arbitrable disputes.

3.5 Concluding Remarks

Having looked at the definitions, types, and effects of arbitration agreements, one can generally notice that hardly any of the above describes the differences between an arbitration agreement and any other substantive contract. Even though arbitration agreements are of a contractual nature, the types of issues regulated by these agreements are quite distinct from those covered by ordinary substantive contracts.

Generally speaking, an arbitration agreement is concerned with regulating procedural issues that are quite different in nature to the substantive rights and obligations of the parties produced under other types of contracts.¹⁵⁷ In that sense, it has been claimed that an arbitration agreement is only of an ancillary/auxiliary role to the substantive provisions of the main contract.¹⁵⁸ That is to say, instead of providing for substantive rights and obligations, arbitration agreements rather define the process that later on determines

¹⁵⁵ See, for example, *Versatile Housewares and Gardening Systems Inc. v. Thill Logistics, Inc.*, 819 F.Supp.2d 230, (S.D.N.Y. 2011), at p.239.

¹⁵⁶ Born I, at p.1276.

¹⁵⁷ Leboulanger, ICCA Congress 13, at p.14.

¹⁵⁸ *Ibid.* also see, P. Mayer, "The Limits of Severability of the Arbitration Clause" 261, in ICCA Congress Series No.9, (1999), at p.263.

the future of the parties' contractual agreement. One commentator explains by giving an example that,

*[A] clause that provides that one party pay the other a given sum of money if the agreement is nullified must be enforced precisely when the agreement is nullified: it therefore survives nullification of the rest of the agreement unless it is directly affected by the defect which gave rise to nullification.*¹⁵⁹

This distinctive nature of arbitration agreements along with other aspects have resulted in separating the arbitration agreement from the parties' main contract, specifically in the case of an arbitration clause. The following chapter looks into the consequences of separability, specifically in the case of an arbitration clause.

¹⁵⁹ *Ibid.*

4 Chapter IV: The Nature of International Arbitration Agreements

As a general rule, arbitration agreements are of a procedural nature compared to the substantive nature of ordinary substantive contract.¹⁶⁰ One authority explains that “*the arbitration agreement is treated as a procedural contract and not as an element (condition) of a material-legal contract.*”¹⁶¹ Another authority describes arbitration agreements by maintaining that they “*are not mere agreements between individuals, but procedural agreements which are subject to public law.*”¹⁶²

In an indirect way, these characterizations have captured the underlying nature of arbitration agreements being described as ancillary tools that provide specific dispute resolution machinery that is related to, but distinct from, the parties’ main substantive contract. This different procedural nature (along with other aspects) has attributed to its detachment from the substantive main contract. Due to this distinct nature of the arbitration agreement, it is viewed as separate from the main contract containing it. This sort of severability has resulted in creating one of the most important principles in arbitration, i.e. the separability presumption.

It is also self-evident that a submission agreement, as compared to an arbitration clause, is an autonomous agreement to the main contract between the parties.¹⁶³ Although it is related to the main contract in the sense that it is basically created to settle disputes arising out of that contract, it is a separate document that has its own separate existence (in comparison to arbitration clauses that are not physically separate). In that sense, the performance of this submission agreement is completely autonomous from the

¹⁶⁰ *Interim Award in VIAG Case No. SGH-5024 A of 5 August 2008*, 2(2) International Journal of Arab Arbitration 341, (2010), at p.352.

¹⁶¹ *All-Union Foreign Trade Assoc. Sojuznefteexport v. JOC Oil Ltd*, Award in USSR Chamber of Commerce and Industry (9 July 1984), XVIII YCA 92, (1993), at p.97.

¹⁶² *Interim Award in ICC Case No. 4504*, 113 JDI 1118, (1986), at p.1119.

¹⁶³ For the differences between arbitration clauses and submission agreement see Section 3.3 of this thesis.

performance of the main contract between the parties. Accordingly, this chapter focuses exclusively on the separability of an arbitration clause from the substantive main contract containing it.

To that end, this chapter examines the definition and regulation of the separability presumption under the NY Convention and the Model Law. It also looks into the consequences of the application of separability in international commercial arbitration. Then, the chapter proposes a certain analysis in relation to the application of separability that connects it to the consent of the parties to arbitrate. Finally, the chapter addresses a few misconceptions on the application of separability and attempts to reply to some of them.

4.1 The Separability of the Arbitration Agreement

Generally speaking, the interaction between the status of the main contract and the arbitration clause inside can cause a bit of confusion. In attempt of clarifying such confusion, this section looks into the definition of separability, its justifications, and finally the terminology used to refer to it.

4.1.1 Definition

Many commentators and authorities have illustrated on the meaning and definition of the separability presumption. One international arbitral award states that separability means that “*the arbitral clause is autonomous and juridically independent from the main contract in which it is contained. . .*”¹⁶⁴

From a civil law prospective, the famous French *Gosset* case summarised the separability presumption by maintaining that “*in matters of international arbitration, the arbitration agreement . . . always has, except in exceptional circumstances, a complete juridical autonomy excluding it from being affected by an eventual invalidity of that act.*”¹⁶⁵

A few commentators explain that the essence of the separability presumption lies in the fact that the validity of the arbitration clause is not necessarily tied or bound to that of the main contract and vice-versa.¹⁶⁶

According to this thesis, separability simply stands for the continuous validity of the arbitration clause notwithstanding the flaws that affect (or might affect) the parties’ main contract/relationship, unless the parties’ consent that created the arbitration agreement has, separately, been impeached as a result to that flaw. To the same effect, Judge Schwebel explains that “*when the parties to an agreement containing an arbitration clause enter into that agreement, they conclude not one but two agreements, the arbitral twin of which survives any birth defect or acquired disability of the principle agreement.*”¹⁶⁷

¹⁶⁴ *Final Award in ICC Case No. 8938*, XXIV YCA 174, (1999), at p.176.

¹⁶⁵ *Judgement of 7 May 1963, Ets Raymond Gosset v. Carapelli*, JCP Ed. G 1963, II, (French Cour de Cassation civ. 1e), at p.13.

¹⁶⁶ Lew and Mistelis, at p.102.

¹⁶⁷ S. Schwebel, “*International Arbitration: Three Salient Problems*”, (1987), at p.5. Regardless, it is important to mention that this thesis, respectively, disagrees with many of Judge Schwebel’s findings in his book, specifically on the first section “THE SEVERABILITY OF THE ARBITRATION AGREEMENT” from p.1-60. The thesis’s criticism will be addressed in various parts throughout this chapter, however, for a

4.1.2 Justifications

The separability of the arbitration agreement is considered one of the pillars of arbitration in general. It protects its integrity and provides it with the needed stability that attracts most business parties to arbitration over litigation. Accordingly, many justifications can be found for that principle. One can divide these justifications into practical and theoretical ones.¹⁶⁸

The practical justifications lie simply in the fact that separability answers the needs of international trade in general. It satisfies the effectiveness of arbitration as the primal dispute settlement method in international commerce by providing business parties with the security of knowing that their previously established intentions of submitting their disputes to arbitration will not easily be defeated. If the arbitration clause was to be seen as simply a part of the contract, any claim by one of the parties that the contract is invalid or illegal and should be terminated for any reason would directly affect the arbitration clause and the jurisdiction of the arbitral tribunal.¹⁶⁹ On the contrary, commercial parties will ordinarily and reasonably expect their arbitration clause to encompass disputes about the validity, existence, legality, and continuous effectiveness of their main substantive contract and avoid the unpleasant experience of a separate jurisdiction.¹⁷⁰

On the other hand, another justification for the separability presumption can easily be found in situations where parties decide to arbitrate under institutional rules that expressly provide for the separability of arbitration agreements under its provisions.¹⁷¹ In that case, the separability of the arbitration agreement is easily justified on the basis of the

good review of Judge Schwebel's book see A. Samuel, "Book Review", 5 *Journal of International Arbitration* 119, (1988).

¹⁶⁸ Leboulanger, ICCA Congress 13, at p.13.

¹⁶⁹ Lew and Mistelis, at p.102

¹⁷⁰ *Judgment of 27 February 1970*, 6 *Arbitration International* 78 (1990) (German *Bundesgerichtshof*), at p.82.

¹⁷¹ See, for example, Article 6(9) of the 2012 ICC Rules, Article 23(2) of the 2014 LCIA Rules, and Article 23(1) of the 2010 UNCITRAL Arbitration Rules.

parties' express agreement to arbitrate under these institutional rules and their commitment to all the provisions of the institution.

As for the theoretical justifications, the separability presumption relies extensively on the distinctive procedural nature of arbitration agreements. Theoretically speaking, compared to the underlying contract which is mainly concerned with the substantive rights and obligations of the parties, the arbitration agreement is rather concerned with the procedural issues related to the parties' dispute resolution.¹⁷² Accordingly, the arbitration clause is rather concerned with the 'separate' function of resolving disputes, rather than regulating the substantive contractual terms of the parties' commercial bargain. Many arbitrations have, accordingly, relied on that theoretical distinction. For example, in *All-Union Foreign Trade Assoc. Sojuznefteexport v. JOC Oil Ltd*, the arbitral tribunal explained that,

*An arbitration clause, included in a contract, means that there are regulated in it relationships different in legal nature, and that therefore the effect of the arbitration clause is separate from the effect of the remaining provisions of the foreign trade contract.*¹⁷³

4.1.3 Reference to Separability

Before this thesis addresses the topic of separability internationally, a final point on how separability has been referred to must be clarified. Reading on separability reveals that there are two ways used to refer to it. The division came between common law jurisdictions and civil ones. Common law jurisdictions have historically preferred the term separability focusing on the contractual origins of the principle and limiting its effect to

¹⁷² Leboulanger, ICCA Congress 13, at p.13.

¹⁷³ XVIII YCA 92, (1993), at p.92.

have the arbitration clause separate from the underlying contract and nothing else.¹⁷⁴ In contrast, civil law jurisdictions have more often referred to separability using the terms ‘autonomy’ or ‘independence’. In so doing, civil law jurisdictions aimed at reflecting a greater focus on the external legal regime generally used in international commercial arbitration by implying a stronger application of separation between not only the arbitration agreement and the underlying contract but rather separating arbitration agreements from national legal systems.¹⁷⁵

If this thesis were to choose between both terminologies, then ‘separability’ would be much preferable. The term autonomy or independence indicates that the arbitration agreement is rather whole or less related to the underlying contract. In reality, the arbitration agreement is auxiliary to the underlying contract and has more of a supportive and ancillary function.¹⁷⁶ And so, although the arbitration agreement should generally be separated from the contract containing it, it is never entirely independent or ‘autonomous’ from that contract as the term indicates. It has also been noted that the use of the term separability focuses the attention on the parties’ intentions in creating a separate arbitration agreement from their main contract rather than an agreement that is separate from national laws under a certain conception of some external legal rules.¹⁷⁷

To that end, this thesis, also, believes that the use of the term ‘separability presumption’ is even more accurate than to say that separability has rather created a doctrine. The term ‘presumption’ has a clearer/stronger emphasis on the parties’ intentions

¹⁷⁴ See, for example, the American *Prima Paint Corp v. Flood & Conklin Mfg. Co.*, 388 US 395, (1976), at p.402. For an English example, see *Westacre Inv. Inc. v. Jugoisimport-SDPR Holdings Co. Ltd* [1998] 3 All E.R. 570 (Q.B.).

¹⁷⁵ See, for example, *Judgment of 2 September 1993, Nat’l Power Corp. v. Westinghouse*, DFT 119 II 380, at p.384. Also see, Leboulanger, ICCA Congress 13, at p.1 where the author stated that “*there is no other country on our planet where the arbitration agreement is more ‘autonomous’ than in France*”, and Gaillard, at p.197.

¹⁷⁶ In *Westacre Inv. Inc. v. Jugoisimport-SPDR Holding Co. Ltd* [1998] 4 All E.R. 570 (Q.B.) the court stated that “*an agreement to arbitrate . . . is ancillary to the underlying contract for its only function is to provide machinery to resolve disputes as to the primary and secondary obligations arising under that contract. The primary obligations under the agreement to arbitrate exist only for the purpose of informing the parties by means of an award what are their rights and obligations under the underlying contract*”, at p.582.

¹⁷⁷ Born I, at p.351-353.

in the sense that they presume that their arbitration agreement is separate from their underlying contract.

Having mentioned all that, this thesis finds very little to be gained from debates over appropriate labelling. In reality it all goes down to the intentions of the parties using the term and referring to arbitration in their contract. Moreover, there are examples of common law authorities that described the arbitration agreement to be autonomous with the same effect understood generally under common law jurisdictions, and civil law authorities that suggested that the use of the term autonomy can stand for the same typical effect of separability.¹⁷⁸ However, this thesis still finds it essential for the parties in international commercial arbitration to get acquainted with how the separability presumption is addressed in different jurisdictions. Such awareness may help avoiding any sort of misunderstandings regarding the specific nature of arbitration agreements.

4.2 Presentation of the Separability Presumption Nationally and Internationally

The development of the separability presumption nowadays has reached an international level due to the importance of this presumption. Separability is recognized and represented almost universally now under international arbitration conventions and national arbitration regimes. This section examines separability under the NY Convention and the Model Law.

¹⁷⁸ For example, in the English case *Peterson Farms Inc. v. C&M Farming Ltd.*, [2004] 1 Lloyd's Rep. 603 (Q.B.), at p.609, the court stated that “under the doctrine of separability, an arbitration agreement is separable and autonomous from the underlying contract in which it appears. The autonomy of arbitration agreements has become a universal principle in the realm of international commercial arbitration.” Also, in Gaillard, at p.197, the authors add that “it should be emphasized at the outset that the term ‘autonomy’ has a dual meaning. It is sometimes used in its traditional sense, which is to refer to the autonomy or separability of the arbitration agreement from the main contract to which it relates. Sometimes though, the courts . . . refer to the autonomy of the arbitration agreement from all national laws, which is entirely a different concept, related to the issue of the selection of the rules on the basis of which the existence and validity of an arbitration agreement must be assessed.”

4.2.1 The NY Convention

The NY Convention's position on the separability presumption is an item of perturbation. The Convention has not expressly regulated for separability under any of its provisions. However, due to Articles II(1), II(2), and V(1)(a), it might have been assumed that the Convention have provided impliedly for the separability of arbitration agreements. Such confusion has, unfortunately, created a division between commentators. While some find that the Convention is indifferent to the separability presumption, others take the view that it adopts separability by implication.

The first group of commentators who find the Convention to be indifferent to separability basically ground their arguments on the simple fact that the Convention has failed to bring any direct reference to separability.¹⁷⁹ The Convention's clearest position towards separability lies in Article V(1)(a) where it provides that arbitration agreements could end up being subjected to different laws than that of the underlying contract which is one of the main consequences of separability, as shown below.¹⁸⁰ However, under Article V(1)(a), the Convention refers arbitration agreements either to the law chosen by the parties or to the relevant national legal system "*the law of the country where the award was made.*" Nonetheless, the matter of the fact is that this law may or may not provide for the separability of the arbitration agreement.¹⁸¹ Therefore, if the application of that law allows for the invalidity of the arbitration agreement as a result to the invalidity of the main contract (for example),¹⁸² the NY Convention would not only be indifferent to the

¹⁷⁹ See, for example, Berg, at p.145-146, A. Lessing, "*Sauer-Getriebe K.G. v. White Hydraulics Inc.: Applicability of the Federal Arbitration Act to International Commercial Arbitration*", 2 International Tax and Business Law 22, (1984), A. Samuel, "*Book Review*", 5(1) Journal of International Arbitration 119, (1988), C. Svernlöv and L. Carroll, "*What Isn't, Ain't: The Current Status of the Doctrine of Separability*", 8(4) Journal of International Arbitration 37, (1991), and Gaillard, at p.202.

¹⁸⁰ See Section 4.3.1 of this thesis.

¹⁸¹ C. Svernlöv and L. Carroll, "*What Isn't, Ain't: The Current Status of the Doctrine of Separability*", 8(4) Journal of International Arbitration 37, (1991), at p.42.

¹⁸² As indeed was the case in *Sojuznefteexport v. JOC Oil Co.*, S. Ct. Bermuda, 16 July 1987, 2 International Arbitration Report 420, (1987), at p.482.

separability presumption but it could possibly be defeating its purpose, i.e. the protection of the integrity of an arbitration clause in a main contract.

The second group of commentators who take the view that the Convention adopts separability by implication, argue that both Articles II(1) and II(2) imply the separability of arbitration agreements since they attract certain legal rules that only apply to arbitration agreements and not to the underlying contracts (for example, the writing requirements in Art.II(1) and the substantive validity presumption in Art.II(2)).¹⁸³

They also claim that Article V(1)(a) could have the effect of subjecting the arbitration agreement to a law other than that governing the main contract since the provision allows for the application of a specific national law to the arbitration agreement as distinct from the underlying contract either by the choice of the parties or the application of a certain choice of law rule.¹⁸⁴

This thesis finds that the NY Convention has failed in maintaining a clear position on the separability presumption. The thesis also finds it difficult to see the Convention's adoption of separability by implication. Compared to other international arbitration conventions, the NY Convention provides quite a frail stance on separability, if any at all. For example, the 1961 European Convention on International Commercial Arbitration (hereinafter, the 'European Convention')¹⁸⁵ (even though it does not provide for the separability presumption expressly) acknowledges the separability of the arbitration agreement by authorizing arbitral tribunals to consider challenges to the "*existence or the*

¹⁸³ See, for example, S. Schwebel, "*International Arbitration: Three Salient Problems*", (1987), at p.3-6.

¹⁸⁴ "*Commentary on the NY Convention*", at p.52.

¹⁸⁵ The European Convention is a significant regional commercial arbitration treaty that was drafted with the purpose of improving the then-existing international arbitration legal framework which involved parties from European States (particularly East-West Europe). See, generally, D. Hascher, "*European Convention on International Commercial Arbitration of 1961*", XX YCA 1006, (1995), and O. Glossner, "*The Institutional Appointment of Arbitrators: The Special Committee of the European Convention on Commercial Arbitration of Geneva, 21 April 1961*", 12 Arbitration International 95, (1996).

validity of the arbitration agreement or of the contract of which the agreement forms part.”¹⁸⁶

Other international arbitration rules have also managed to refer to the separability presumption even more explicitly. For example, Article 23(1) of the 2010 UNCITRAL Arbitration Rules provides that: “. . . *an arbitration clause that 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 shall not entail automatically the invalidity of the arbitration clause.*”¹⁸⁷

Accordingly, this thesis is of the view that the NY Convention is indifferent of the separability presumption. If the Convention’s drafters intended to consider separability, it would have been a simple task to refer to separability one way or another (just as previewed under other international arbitration instruments). On the contrary, by not mentioning or referring to the separability presumption in any manner, the Convention actually makes it explicit that it leaves this matter to the jurisdiction of the applicable law to the arbitration agreement, whether that was the parties’ choice of law, or the appropriate law according to conflict of laws rules which leaves the door open to several uncertainties concerning the enforceability of the arbitration clause inside a contract.

4.2.2 The Model Law

Unlike the NY Convention, the Model Law explicitly addresses the separability of the arbitration agreement under Article 16(1) which provides for the competence-competence of the tribunal and explicitly identifies an arbitration clause in a contract as independent of the other terms.

¹⁸⁶ Article V(3) of the European Convention.

¹⁸⁷ Also see Article 23(2) of the 2014 LCIA Rules, Article 15(4) of the CIETAC Rules, Article 19(2) of the 2014 ICDR Arbitration Rules, Article 21(2) of the Swiss International Arbitration Rules, and Article 6(9) of the 2012 ICC Rules.

This thesis finds the Model Law's position to be one of the clearest and most direct on its support of the separability presumption. Nevertheless, the Model Law's treatment of the separability presumption is somehow placed under the 'JURISDICTION OF THE ARBITRAL TRIBUNAL' section of the Law, specifically 'The competence of the arbitral tribunal to rule of its jurisdiction'.¹⁸⁸ This issue might cause a slight confusion since it places separability under the competence-competence principle.

Having mentioned that, compared to the NY Convention's position, the Model Law's stand on the separability presumption is solid.

To that end, the Model Law is known internationally only as a good model of a national arbitration law for countries to harmonize and promote its arbitral practices for a better arbitral environment internationally. Accordingly, it is of no virtual importance where the Model Law regulates for the separability presumption as long as it does so explicitly. Additionally, many judicial decisions of jurisdictions adopting the Model Law have been consistent with this analysis, i.e. holding arbitration agreements separable and giving them effect notwithstanding the invalidity of the underlying contract.¹⁸⁹ Additionally, the same applies to many provisions of national arbitration laws for countries adopting the Model Law in different manners.¹⁹⁰

¹⁸⁸ See "UNCITRAL Model Law on International Commercial Arbitration", available at (https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf) (last visited 27/09/2015), at p.8.

¹⁸⁹ See, for example, *Brawn Laboratories Ltd v. Fittydent International GmbH*, XXVI YCA 783, (2001), *Brain Harper v. Kvaerner Fjellstrand Shipping AS*, XVIII YCA 358, (1993), at p.359-369, *Cecrop Co. v. Kinetic Sciences Inc.*, 16 B.L.R. 3d 15 (B.C. S.Ct. 2001), *Ferris v. Plaister*, 34 N.S.W.L.R. 475 (N.S.W. Court of Appeal 1999), and *Campbell v. Murphy* 15 O.P. 3d 444, (Ontario Court of Justice 1993).

¹⁹⁰ See for example, Section 1040(1) of the German ZPO, Article 23 of the 1994 Egyptian Arbitration Law, Article 61(1) of the Tunisian Arbitration Code, and Article 458bis 1(4) of the Algerian Code of Civil Procedure.

4.3 Consequences of the Separability of the Arbitration Agreement

The importance of the consequences of separability for the parties is that it presents them with a clear understanding from the very beginning as to how, in practice, their arbitration clause is separate from their main contract. Such in-advance perception would prevent the parties from having any misunderstandings regarding the validity and existence of their arbitration clause in relation to that of the main contract, and will, consequently, shape their expectations accurately. This section looks into the main consequences of the application of separability in international arbitration.

4.3.1 Potential Application of a Different National Law to the Arbitration Clause than that of the Underlying Contract

The first consequence of the separability presumption means that the arbitration clause under a substantive contract can and may be governed by a different national law than that governing the main contract. In *Final Award in ICC Case No. 1507*, the tribunal reached the conclusion that: “*an arbitration clause in an international contract may perfectly well be governed by a law different from that applicable to the underlying contract.*”¹⁹¹

Two points should be emphasized here. First, applying two different laws, one to the arbitration clause and one to the main contract, is a possible consequence of the

¹⁹¹ In S. Jarvin and Y. Derians, “*Collection of ICC Arbitral Awards 1974 – 1985*”, (1990), at p.215-216. Also see *Final Award in ICC Case No. 4381*, 113 JDI 1102, (1986), at p.1104, and *Final Award in ICC Case No. 6162*, XVII YCA 153, (1992), at p.160-162.

separability presumption but not a must.¹⁹² In many cases, the same law governs both the arbitration clause and the underlying contract.¹⁹³

The second point has to do with how the parties can employ their autonomy to put this option to their benefit. Applying a different law to the arbitration agreement is sought to safeguard international arbitration agreements against challenges to their validity through challenges to the validity or existence of the main contract. If the parties bore that in mind at the time of drafting their contract and arbitration clause, they may choose to protect the validity of their arbitration clause by choosing a different law to apply to it than that applicable to the main contract.

Regardless, it is important to note that, in many occasions, the parties fail to indicate an express choice of law clause specifically applicable to their arbitration agreement.¹⁹⁴ In that case, the authority in question cannot just assume that the law applicable to the arbitration agreement is the same as that to the main contract.¹⁹⁵ As one French commentator reasons: *“it would therefore be going too far to interpret such [general choice of law] clauses as containing an express choice as to the law governing the arbitration agreement.”*¹⁹⁶

Accordingly, separability gives the parties the freedom/privilege to choose a different applicable law to their arbitration clause than that of the main contract. An option that could provide the parties with the opportunity to avoid the effect which some national substantive laws may inflect on the validity and enforceability of arbitration clauses if the same law applies to both the arbitration clause and the main contract. With the frail stand of the NY Convention on separability, this consequence could possibly serve as an added

¹⁹² See Born I, at p.464.

¹⁹³ *Final Award in ICC Case No. 6840*, in J. Arnaldez, Y. Derians and D. Hascher, *“Collection of ICC Arbitral Awards 1991 – 1995”*, (1997), at p.467 and p.469. Also see *Final Award in ICC Case No. 7453*, XXII YCA 107, (1997).

¹⁹⁴ This is discussed in more details in Section 7.4 of this thesis.

¹⁹⁵ Sometimes, however, a choice of law in the main contract may be interpreted as an implied choice of law for the arbitration agreement. See Section 7.3.2 of this thesis.

¹⁹⁶ Gaillard, at p.222.

bonus to how the parties can avoid the disadvantages that may be imposed by some national arbitration laws regarding the separability of the arbitration agreement.

4.3.2 Potential Application of Different Legal Rules within the Same Legal System

Another consequence of the separability presumption is that, even when one national law applies to both the arbitration clause and the main contract, different substantive legal rules within this same legal system may apply to the arbitration agreement but not to the main contract.

This consequence is manifested under many developed jurisdictions where the national arbitration statutes assign specific rules applicable only to the form and validity of international arbitration agreements but not to any other type of agreements.¹⁹⁷

A number of national court decisions have also reached a similar result, applying a different set of legal rules to uphold the existence and validity of the arbitration agreement against the invalidity of the underlying contract.¹⁹⁸

Although this possibility has received less attention than the application of different national laws to the arbitration agreement and the underlying contract, it is of equal significance.

¹⁹⁷ For example, Article 7(2) of the Model Law, Section 2 of the US FAA, Section 5 of the 1996 English Arbitration Act, and Article 178 of the Swiss PIL all prescribe special rules with regard to the form and validity of the arbitration agreement.

¹⁹⁸ See, for example, *Judgment of 24 March 1976, Hermansson v. AB Asfalbelaeggningar*, 1976 NJA 125 (Swedish S.Ct.), *Harbour Assur. Co. (U.K) v. Kansa Gen. International Ins. Co.* [1992] 1 Lloyd's Rep. 81 (Q.B.) (English High Ct.), *aff'd*, [1993] 2 ALL ER 897 (English Ct. App.), and *Preston v. Ferrer*, 552 U.S. 346, 363 (U.S. S.Ct. 2008).

4.3.3 Effects of Non-Existence, Invalidity, Illegality, or Termination

The interrelation between the parties' arbitration agreement and their underlying contract is not surprising. It remains a fact that the arbitration agreement is a clause of the main contract. Within this interrelation, separability exists to separate between the actual illegality, invalidity, termination, or non-existence of the main contract and that of the arbitration agreement within. In the sense that one will not *necessarily* affect the other unless there is strong evidence to show that the defect of the main contract has gone to the root of the arbitration clause within as well. This consequence works the other way too by *not necessarily* allowing defects of an arbitration clause to affect the status of the underlying contract.

Although there are many other aspects of separability in arbitration, this particular consequence functions the best at protecting the integrity of arbitration agreements and the intentions of reasonable business parties. For that, out of all the other consequences of separability, this particular one is focused upon the most by many international arbitration rules, national arbitration laws, and international and national arbitral decisions.¹⁹⁹ It is also supported by many international institutional arbitration rules.²⁰⁰

However, it is very important to emphasize that the arbitration agreement within a contract is not wholly independent from that contract. As a matter of fact, there are situations where the status of the main contract will affect the arbitration clause within.

¹⁹⁹ See, for example, Section 7 of the 1996 English Arbitration Act, Article 16(1) of the Model Law, and Article 23(1) of the 2010 UNCITRAL Arbitration Rules. Moreover, in *Harbour Assurance Co. (UK) v. Kansa General International Insurance Co. Ltd.*, [1992] 1 Lloyd's Rep. 81, (Q.B.), at p.92-93, the court held that the parties' arbitration clause was separate from their underlying insurance contract and, as a result, the initial illegality of the underlying contract did not affect the arbitration clause. Also see *Interim Award of ICC Case No. 7929*, XXV YCA 312, (2000), at p.316.

²⁰⁰ See, for example, Article 23(1) of the 2014 LCIA Rules, Article 19(1) and (2) of the 2014 ICDR Arbitration Rules, Articles 21(1) and (2) of the 2012 Swiss International Arbitration Rules, and Article 6(9) of the 2012 ICC Rules.

The separability presumption does not mean that the invalidity, illegality, non-existence, or termination of the main contract will never impeach that of the arbitration agreement within. In *Westinghouse v. National Power Corp. (Philippines)* the tribunal stated that: “*there may be instances where a defect going to the root of an agreement between the parties affects both the main contract and the arbitration clause.*”²⁰¹

Accordingly, although this consequence acts and aims at separating the status of the main contract from that of the arbitration clause within, it is not to say that it will always produce that effect. It is highly significant for the parties and their counsel to realize that, although this consequence aims at protecting the validity and enforceability of arbitration agreements, it is not set in stone that it will always do. Different circumstances of different cases can and may prove that even a separate arbitration agreement can still suffer from its own flaws which can render it invalid, illegal, or even non-existent. However, as it is shown below, even in these circumstances, separability still applies by allowing a separate analysis to be carried out on the status and consent of the arbitration agreement (apart from that of the main contract) to see if an arbitration agreement is still valid and enforceable or not.

4.4 Separability and the Parties’ Consent

Whether the parties are consciously aware that, when creating a contract with an arbitration clause within, they are actually creating two very separate agreements, is irrelevant to the fact that they need two separate consents to create these sorts of contracts (i.e. contractual agreements with an arbitration clause within).

This section argues that, because the consent that created the main contract is separate and distinct from the consent that created the arbitration agreement within, the

²⁰¹ *ICC Case No. 6401*, (1992) Mealey’s International Arbitration Report B-1, B-13. Also see, *Elf Aquitaine Iran v. Nat’l Iranian Oil Co.*, Preliminary Ad Hoc Award (14 January 1982), XY YCA 97, (1986), at p.103-104.

application of separability should rely on the existence of the evidence which can support that the parties' consent to arbitrate has not been affected by the flaw that impeached the main contract, and is, therefore, valid and enforceable despite any challenge to the main contract. In other words, the application of separability should rely on the existence of the parties' consent to arbitrate apart from their consent to contract.

Connecting the application of separability to the existence or non-existence of the parties' consent to arbitrate allows analyses of different challenges to the main contract to be examined specifically – and properly – in relation to the arbitration agreement separately. It also prevents challenges to the main contract to defeat the parties' prior intentions to arbitrate their future disputes. On the contrary, it adopts perfectly with any sort of changes that may develop from the moment the parties create their arbitration agreement until the dispute arises. This is because it focuses solely on the parties' consent to arbitrate and any evidence that suggests the existence or non-existence of that consent. And so, it can cope with any fluctuations of that consent over the course of the contractual relationship until the dispute arises and even after that, as it focuses exclusively on the parties' consent to arbitrate apart from the consent to contract.

Regardless, it is important to stress that this is not to argue that if a contract never existed in any way (for example, the parties have never met or have never even had primary negotiations over their contractual relationship, or where a contract has been entered into forcefully), an arbitration agreement would still somehow exist. Since this analysis mainly focuses and always looks for the consent to arbitrate apart from the consent to contract, it applies even to these situations. The only difference is that, in these situations, the consent to arbitrate never existed to begin with and so the arbitration agreement never existed as a result. Applying an analysis that focuses on and separates the consent to arbitrate from the consent to contract does not create an arbitration agreement

even in situations where the parties never assented to arbitrate their disputes, i.e. it does not create arbitrations out of thin air.

The main issue that this chapter refuses to submit to is any sort of direct/automatic reliability on the status of the main contract in determining the existence and/or validity of the arbitration clause within, which is quite a natural and straightforward application of separability.

Consequently, if it only takes a strong evidence to provide that the parties have agreed to arbitrate, one way or another, through the contract or another mean, then it follows that the material existence of the main contract is not really a necessity to prove that there exists an arbitration agreement between the parties to arbitrate their future disputes. What really matters according to this analysis is that there is enough evidence that the parties agreed to arbitrate their disputes. Accordingly, the following section, in support of that analysis, will demonstrate multiple groups of cases in which the non-existence of a martial contract was not enough reason to rule out the existence of an arbitration clause/agreement.²⁰²

4.4.1 Arbitration without a Contract

The fact that an arbitration agreement can exist without necessarily a written contract is not much of a novelty. As a matter of fact, many national and international arbitration rules have explicitly provided for this.²⁰³

Regardless, it is one thing to say that separability can protect the arbitration agreement when the main contract is found illegal, invalid, or terminated. It is a much

²⁰² For other commentators with similar views see, for example, M. Mcneill and B. Juratowitch, “*Agora, Thoughts on Fiona Trust: The Doctrine of Separability and Consent to Arbitrate*”, 24 *Arbitration International* 475, (2008), at p.484, and J. Poudret and S. Besson, “*Comparative Law of International Arbitration*”, (2007), at p.133.

²⁰³ See, for example, Section 7 of the 1996 English Arbitration Act, Article 23(1) of the 2010 UNCITRAL Arbitration Rules, Articles 21(1) of the 2012 Swiss International Arbitration Rules, and Article 6(9) of the 2012 ICC Rules. All these provisions specifically provide that an arbitration agreement shall not become non-existent or invalid even where the main contract did not come to existence.

further step to claim that separability can possibly uphold an arbitration agreement even in cases where the main contract was found non-existent. Actual cases where an arbitration agreement existed despite the non-existence of a main written contract can further support the analysis according to which an arbitration agreement only needs a strong evidence of the parties' consent to arbitrate to exist. Through the demonstration of these cases, it will be obvious that, for the separability presumption to apply and for the arbitration clause to survive the non-existence of the main underlying contract, the only thing that actually matters is the existence of the evidence providing that the parties have agreed to arbitrate their future disputes.

To that end, this section demonstrates three different groups of situations all of which provide a different case of a non-existent contract yet an arbitration agreement still existed. Accordingly, this section is divided to three sub-sections. The first looks into certain unusual circumstances. The second analyzes the case of unfinished contracts, while the third examines the case of pathological arbitration agreements.²⁰⁴

4.4.1.1 Unusual Circumstances

The first set of cases includes situations where the main contract did not exist in quite the traditional manners, yet different types of evidence showed that the parties have intended to arbitrate disputes arising between them.

For example, in the American decision of *BHP Power Americas Inc. and King Ranch Power Co. v. Walter F. Baer Reinhold*, the Kansas District Court compelled arbitration even though the parties have failed to conclude a contract. The arbitration clause was, however, found in correspondence and drafts of a consulting agreement. The Court stated that: "*a binding contract is not required in order to compel arbitration . . . an*

²⁰⁴ The term 'pathological arbitration agreements' was first introduced in 1974 by Frederic Eisemann (then honorary Secretary General of the ICC). This term basically "*denotes arbitration agreements, and particularly arbitration clauses, which contain a defect or defects liable to disrupt the smooth progress of the arbitration*", in Gaillard, at p.262. Also see B. Davis, "*Pathological Clauses: Frederic Eisemann's Still Vital Criteria*", 7 *Arbitration International* 365, (1991).

arbitration clause is treated as a separate agreement severable from the contract in which it is found . . .”²⁰⁵

Another example appears in a multi-party transaction in the American case of *Republic of Nicaragua v. Standard Fruit Co. (SFC)*.²⁰⁶ In this case all parties except SFC signed a memorandum which envisaged negotiations of SFC’s agreement with Nicaragua and contained an arbitration agreement. Parties, including SFC, continued their transaction under the memorandum but never actually concluded the traditional contractual agreement. Moreover, the court noted that the parties referred to the memorandum in correspondence as a contract. The Court of Appeals concluded that it must “*enforce any agreement to arbitrate regardless of where it is found.*”²⁰⁷ The Court also added that non-existence of the main contract is nothing more than a possible defense on the merits to be left to the arbitral tribunal noting that “*arbitrators may apply their own rules of contract interpretation to the question.*”²⁰⁸ It is true that SFC did not sign the memo but it acted upon it through continuing performance under the business transaction and the memo. Accordingly, that was the indication of their consent to the memo and hence to the arbitration agreement.

In ICC Case No. 3779 of 1981,²⁰⁹ three contracts were concluded between the parties, all of the same merchandise. All contracts contained the same conditions, including an arbitration clause referring disputes to arbitration under the ICC Rules. Two contracts were signed by the parties except for one, but all were executed. However, before shipment took place under the third contract, the respondent cancelled complaining about the quality of the merchandise and objected to ICC jurisdiction over the third unsigned contract. The overall business relationship was as such to treat all three contracts as a whole and so

²⁰⁵ In XXIII YCA 949, (1998), at p.953.

²⁰⁶ 937 F.2d 469 (U.S. Ct. of Appeals 9th Cir. 1991).

²⁰⁷ Available at (<https://law.resource.org/pub/us/case/reporter/F2/937/937.F2d.469.88-2585.89-15803.html>) (last visited 12/07/2015), para.33.

²⁰⁸ *Ibid*, para.49.

²⁰⁹ In XI YCA 124, (1984).

consent was deemed to have been given to arbitrate disputes arising out of this relationship even under the unsigned third contract and the arbitral tribunal declared itself to have jurisdiction. And so, this case shows that it only takes a strong evidence of the parties consent and intention to arbitrate for the arbitration agreement to become effective.²¹⁰

Accordingly, where evidence supporting the existence of the arbitration agreement exists somewhere else other than the main contract, it cannot be ignored and an arbitration agreement must be enforced. More importantly, it is much more relevant to focus on the parties' commercial relationship and any evidence that establishes this relationship, than to focus on the material existence of a written main contract as the sole evidence of this commercial relationship. Eventually, an arbitration agreement is meant to refer the parties' disputes to arbitration regardless of where this arbitration agreement is found, as long as there is compelling evidence that it exists.

4.4.1.2 Unfinished Contracts

The second set of cases presents the predicament of unfinished contracts. In this situation, the parties agree to enter into a certain business relationship which involves an agreement to solve any future disputes through arbitration and one or all of them start performing their duties under this relationship before reaching the final version of a written contract.

For example, in *R.G. Carter Ltd v. Edmund Nuttal Ltd*²¹¹ the parties' failure to finalize all their contractual terms was not enough for them to refer to courts. In this case, Judge Thornton stated that:

There is not in existence a bundle of documents sewn together and signed by the parties as . . . the 'contractual bible'. It does not follow from that, of course, that

²¹⁰ M. Mcneill and B. Juratowitch, "Agora, Thoughts on Fiona Trust: The Doctrine of Separability and Consent to Arbitrate", 24 *Arbitration International* 475, (2008), at p.483.

²¹¹ [2000] Adj.L.R. 06/21.

*there is no contract in writing sufficient to entitle adjudication in existence between the parties, or indeed that there is no contract at all.*²¹²

In *RJT Consulting Engineers Ltd v. DM Engineering (Northern Ireland) Ltd*,²¹³ the parties entered into an oral agreement for construction work. The court at first instance found evidence for parties' agreement in writing through documentation like invoices setting out the nature and place of work as well as the names of the clients. Within minutes during meetings with experts and parties as well as examination of the work to be completed and correspondence, reference to arbitration was identified.²¹⁴

Again, this proves that an arbitration agreement does not necessarily need a solid connection to a material written main contract. As long as there is enough evidence to provide that the parties have consensually agreed to arbitrate disputes arising out of their commercial relationship, an arbitration agreement can survive the non-existence of a written contract.

4.4.1.3 Pathological Arbitration Agreements

The third and final group of cases considers the case of pathological arbitration agreements. An arbitration clause could be pathological for many reasons, for example, if it contains defects such as inconsistency, uncertainty, or inoperability for including misleading details or overlooking important information.²¹⁵

²¹² *Ibid.*, at para.12, p3.

²¹³ 9 May 2001, T.C.C. (Liverpool) H.H. Judge Mackay, unreported.

²¹⁴ This decision, however, was set aside by the Court of Appeal. See *RJT Consulting Engineers Ltd v. DM Engineering (Northern Ireland) Ltd*, [2000] EWCA Civ. 270.

²¹⁵ M. Molfa, "Pathological Arbitration Clauses and the Conflict of Laws", 37 Hong Kong Law Journal 161, (2007), at p.162-165. It is, however, important to note that there are not laid rules that specify exclusively the reasons for an arbitration clause to be pathological. Therefore, it will be up to the interpreting authority to determine when and whether an arbitration clause is pathological and if the defect of the agreement is curable according to the proper construction, *ibid* at p.163.

In *Lucky Goldstar International (H.K.) Ltd v. Ng Moo Kee Engineering Ltd*²¹⁶ the contract contained the following arbitration clause:

*[. . .] dispute or difference [. . .] shall be arbitrated in the 3rd Country, under the rules of the 3rd Country and in accordance with the rules of procedure on the International Commercial Arbitration Association [. . .]*²¹⁷

The plaintiff argued that the arbitration agreement should be considered null or inoperative since it referred to a non-existent institution and non-existent rules.²¹⁸ The court found that the parties' intentions were sufficiently clear through this pathological arbitration clause. It held that the fact that the clause referred to a non-existent organization and rules was not enough to render the arbitration agreement inoperative or incapable of being performed since the arbitration could be held in any other country than the third country, which could be chosen by the plaintiff.²¹⁹

In *William Company v Chu Kong Agency Co Ltd & Another*²²⁰, a dispute arose between the parties under a bill of lading that contained the following arbitration clause: “[. . .] all disputes shall, in accordance with Chinese Law, be resolved in the courts of the People’s Republic of China or be arbitrated in the People Republic of China.”²²¹

The clause is another example of a pathological arbitration agreement since it is affected by inconsistency with it referring disputes between the parties to both arbitration and litigation at the same time.

In this case, the plaintiff filed a claim before the High Court under the bill of lading which was issued by the defendant but not signed by the plaintiff. After the dispute has arisen, both parties exchanged correspondence through all of which reference was made to

²¹⁶ [1993] 2 HKLR 73.

²¹⁷ *Ibid.*, at p.73.

²¹⁸ CLOUT Case 57, High Court of Hong Kong, 5 May 1993, at p.280.

²¹⁹ Also see *HZI Research Centre Inc. v. Sun Instruments Japan Co. Inc.*, 1995 US Dist. LEXIS 13707, and *Grossman S.A. v. Forest Laboratories Inc.* 295 N.Y.S. 2d 756, (1968).

²²⁰ [1995] 2 HKLR 139.

²²¹ *Ibid.*, at p.139.

the above clause. Even though under this clause, the claimant was given a choice either to arbitrate or to litigate in China, the plaintiff's choice of litigation in Hong Kong was not a choice in the contract and was, therefore, invalid.²²² It was, therefore, up to the defendant to choose whether to arbitrate or litigate and the defendant opted for a stay of procedures for arbitration and was, accordingly, entitled one.²²³ The Court found that there was enough evidence that the plaintiff has agreed to arbitration from the correspondence that was contemporaneous with or have postdated the arbitration agreement.²²⁴

Even though pathological arbitration agreements do not quite represent the case of a non-existent contract, they can commonly be confused for a non-existent arbitration agreement. However, pathological arbitration agreements are considered by many jurisdictions as sufficient evidence that represents the parties' consent/intentions to arbitrate future disputes.²²⁵ Even where all the details of the arbitration clause are incorrect or inaccurate, it is still considered strong evidence for the parties' explicit intention to arbitrate future disputes. Eventually, the parties can always re-agree on any misleading/missing details of their arbitration agreement as long as their intentions to arbitrate future disputes are explicit and established.

²²² [1993] 2 HKC 377, at 378

²²³ CLOUT Case 44, High Court of Hong Kong, 17 February 1993, at p.274.

²²⁴ Nevertheless, it is worth mentioning that the parties need to be cautious with/from these types of arbitration clauses. Not all jurisdictions are arbitration-friendly as Hong Kong. In India, for instance, the Court in *Wellington Associates Ltd v. Kirti Mehhta*, AIR 2000SC 1379, held that "... agreement that parties may go to suit or may also go to arbitration is not an arbitration agreement."

²²⁵ See, for example, *Paul Smith Ltd v. H&S International Holdings Inc.* [1991] 2 Lloyd's Rep 127, *Tai-Ao Aluminium (Taishan) Co. Ltd v Maze Aluminium Engineering Co. Ltd & Another* [2006] HKEC 407, and *Lucky-Goldstar International (HK) Ltd v NG Moo Kee Engineering Ltd* [1993] 2 HKLR 73.

4.4.1.4 Comments

In light of the above analysis, criticizing separability by assuming that it could possibly provide for arbitration and lead to a binding arbitral award in situations where the parties have never met, is not adequate.²²⁶ Separability may possibly provide for arbitration in situations where the main contract does not exist in the most traditional manners, however, this requires strong evidence to support that the parties have already agreed to arbitrate disputes arising out of their contractual or non-contractual relationship. Regardless, in situations where the parties have never met and no evidence suggests that they have agreed anywhere to arbitrate disputes between them, an arbitration agreement cannot exist, and, thus, even the strongest separability presumption cannot provide for arbitration.

Regardless, the status of a main contract cannot possibly be the sole factor in determining the future validity of an arbitration clause inside it. There are many situations, as shown above, where strong evidence of arbitration agreements is found outside the frame of a written contract. Therefore, it is more reasonable to link the existence and validity of an arbitration clause to any compelling evidence that provides for the parties' consent to arbitrate rather than the mere physical existence of a valid written contract. This way, the interests of reasonable commercial parties' who validly agreed to arbitrate future disputes are protected, so as to the integrity of valid arbitration agreements that explicitly represents the parties' true intentions. As one scholar puts it:

Where contractual negotiations take place against a background of existing liabilities, ongoing, economic activity, commencement of performance or receipt of benefits, the possibility of a binding agreement to arbitrate should not be dismissed a priori only because parties fail to complete all aspects of the principal contract,

²²⁶ See, for example, C. Svernlöv, "What Isn't Ain't: The Current Status of the Doctrine of Separability", 8(4) Journal of International Arbitration 37, (1991), where the author claimed that "carried to its extreme . . . the separability doctrine . . . could give rise to a valid arbitral award even if two parties had never met, so long as one person alleged there was a contract between them containing an arbitration clause", at p.49.

*especially where there is no evidence of objection to arbitration before disputes arise.*²²⁷

4.5 Final Remarks: Addressing Misconceptions

The main premise on which separability relies in justifying its applicability starts from the fact that an arbitration agreement is of a separate procedural nature from that of the main substantive contract.

The best explanation of how an arbitration agreement is of a different nature than that of the main contract containing it was given by Lord Macmillan in *Heyman v. Darwins*²²⁸ where he explained that:

*[N]ot enough attention has been directed to the true nature and function of an arbitration clause in a contract. It is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other hinc inde, but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution. Moreover, there is this very material difference that, whereas in an ordinary contract the obligations of the parties to each other cannot in general be specifically enforced and breach of them results only in damages, the arbitration clause can be specifically enforced by the machinery of the arbitration Acts. The appropriate remedy for breach of the agreement to arbitrate is not damages but its enforcement.*²²⁹

²²⁷ Shakleton, at p.31.

²²⁸ [1942] AC 356.

²²⁹ *Ibid*, at p.373. Having referenced *Heyman v. Darwins*, it is maybe worth-mentioning that this chapter argues against the analysis given by Viscount Simon L.C. in this case. As it will be explained with more details later on this section, this chapter does not find the distinction between void and voidable contracts in applying the separability presumption practical. However, in *Heyman v. Darwins*, Lord Viscount explained

Nonetheless, this different procedural nature of the agreement to arbitrate is not the *only* reason behind applying separability. As explained earlier, there are other practical reasons to justify the existence of the separability presumption in arbitration. Separability is not a mandatory principle of law by which parties are obliged.²³⁰ On the contrary, one of the main justifications on which separability relies is the fact that parties themselves intend for their arbitration agreement to be separable from the main contract containing it. In other words, separability also derives its existence from the intentions of reasonable commercial parties.²³¹

These intentions are registered the minute the parties agree to arbitrate their future disputes and are, therefore, reliable on by any party once a dispute arises. For that very same analysis, in some occasions arbitration agreements are enforced at the request of the party who denies the existence of any contractual relationship.

In *Premium Shipping Ltd v Sea Consortium Pte Ltd*²³² the court enforced an arbitration agreement even though the party who appointed an arbitrator claimed that it was not and never had been a party to the charter party in dispute or the arbitration clause contained within.²³³

In *Teledyne, Inc v. Kone Corp.*,²³⁴ even though the defendant denied the very existence of the main contract, it, nonetheless, thought to refer to the terms of the

that “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 also is void.”, *Ibid*, at p.366. Regardless, the case is generally one of the main authorities supporting the separability presumption in England.

²³⁰ It is important to note that even though separability is provided for by many international arbitration laws and conventions as mentioned before, this sort of regulation is a mere recognition not a dictation. For that, many of the rules recognizing separability provide for the ability of the parties to opt out of it by agreement. See, for example, Article 11 of the Syrian Arbitration Law (“*The arbitral clause is deemed to be an agreement that is independent . . . unless agreed otherwise by the parties.*”), Section 7 of the 1996 English Arbitration Act (“*Unless agreed by the parties, an arbitration agreement which forms . . .*”), and Article 6(9) of the 2012 ICC Rules (“*Unless otherwise agreed, the Arbitral Tribunal shall not cease . . .*”).

²³¹ Samuel, at p.157-158. Also see Report of the Secretary-General, “*Preliminary Draft Set of Arbitration Rules for Optional Use in Ad Hoc Arbitration Relating to International Trade*”, U.N. Doc. A/CN.9/97, (1975), (available at <http://www.uncitral.org/pdf/english/yearbooks/yb-1975-e/vol6-p163-180-e.pdf>) (last visited 28/09/2015), at p.163 and p.175.

²³² [2011] EWHC 540.

²³³ Also see *Malarky Enterprises (U.S.) v. Healthcare Technology (U.K)*, XXIII YCA 949, (1998).

²³⁴ 892 F.2d 1404 (9th Cir. 1989).

arbitration agreement within. The plaintiff, as a result, argued that the defendant cannot refer to an arbitration agreement in a contract which it denies its very existence. In justifying the defendant's position, the Court explained that because the defendant did not make an '*independent challenge*' to the arbitration provision separately, determining whether the contract is valid and enforceable lies within the arbitrator's jurisdiction.²³⁵

4.5.1 Repudiation

Also for the same analysis, it would be difficult to consider that issuing court proceedings by one of the parties is a repudiatory act of the arbitration agreement. In *ABB Lummus Global Ltd v. Keppel Fels Ltd*²³⁶ one of the parties (ABB) issued proceedings in the courts of England and Singapore, as well as a request for arbitration. Upon this action, KF, the other party, contended that issuing court proceedings was a repudiatory breach of the arbitration clause in the main contract. The whole contract was construed in accordance with English law and the place of arbitration was determined to be in London. Clarke J., as he then was, held that, according to section 30(1)(a) of the 1996 Arbitration Act (a tribunal may rule on its own jurisdiction), the repudiation issue was connected to the substantive jurisdiction of the arbitrators. Eventually, the arbitration proceedings were deemed to have commenced once the request for the arbitration was made until the arbitral proceedings are formally terminated.²³⁷

For that, this thesis respectively disagrees with the position taken in *Downing v. Al Tameer Establishment and Anr.*²³⁸ In that case, Potter L.J. considered that an arbitration agreement must be analysed in light of the traditional principles of contract law and that "*in appropriate circumstances, a party may be held to have repudiated by anticipatory*

²³⁵ *Ibid.*, at p.1410.

²³⁶ [1999] 2 Lloyd's Rep. 24.

²³⁷ Also, the fact that one party's actions may seem or indicate that they have refused to perform the contract (containing an arbitration agreement) or that they wish to repudiate it does not mount into an automatic subsequent repudiation of the arbitration agreement within that contract. See, *Heyman v. Dawrins*, [1942] AC 356.

²³⁸ [2002] EWCA Civ 721.

*breach, and/or by an unequivocal rejection of any obligation to arbitrate, before such arbitration has been instituted by the other party to the agreement.”*²³⁹

While an arbitration agreement is considered a separate contract, its true nature and function inside a contract implicate that where a dispute arises over the existence of the main contractual agreement, the arbitration agreement is still separate and functional. In the above case, the defendant, through correspondence, denied the existence of any contractual agreement between the parties and refused to appoint the arbitrators (as provided for by the arbitration agreement). It was, accordingly, held by the Court of Appeal that denial of any contractual relationship along with refusal of appointment of the arbitrators is deemed a repudiation of the arbitration agreement and that such repudiation is considered to be accepted by the other party by commencement of court proceedings.²⁴⁰

It is true that an arbitration agreement is still an ordinary contract with a procedural nature and, therefore, if both parties explicitly and formally agree that they no longer wish to arbitrate their disputes, then such agreement would waive the arbitration agreement. However, a party's refusal or non-cooperation in appointing the arbitrators does not render an arbitration agreement inoperative, and definitely does not amount as a repudiation of the arbitration agreement. As it will be shown later on this thesis, a waiver of right to arbitrate requires an express agreement by the parties to that effect or at least, a counter participation at the legal proceedings in court by the other party(s).²⁴¹

Moreover, in light of the analysis that considers the consent that created an arbitration agreement in a contract to be separate and distinct from the consent that created the main contract containing it, it would take a separate unequivocal explicit repudiation of the arbitration agreement itself to deem a party to have repudiated the arbitration agreement. Accordingly, this thesis refuses to consider that one party's refusal to appoint

²³⁹ *Downing v. Al Tameer Establishment and Anr*, 12 ArbLR 141, (2002), at para.25, p.147.

²⁴⁰ *Ibid*, at p.141.

²⁴¹ See Section 5.3 of this thesis. Also see to that effect, Section 9(3) of the 1996 English Arbitration Act.

the arbitrators along with its contention that any contractual relationship exists to be sufficient reason for the other party to pursue court proceedings.

In other words, if the consent that created the arbitration agreement in a contract is deemed as a separate/distinct consent from that which created the main contract, then only a distinct express repudiation of the arbitration agreement would suffice for the other party to pursue court proceedings. And, for the same reason, a repudiation of the main contract would not amount to a repudiation of the arbitration agreement within.

One of the problems with creating a dependent relationship between the fate of the arbitration clause and the fate of the main contract containing it is that it leads to thinking that separability could provide for arbitration without consent where the main contract is found non-existent or was misrepresented yet the arbitration clause within is still operative and enforceable. This is also one of the reasons why separability is criticised.²⁴² However, separability does not provide for arbitration without the parties' prior consent to arbitrate. According to the above analysis, separability mainly creates a clear distinction between the consent to arbitrate and the consent to contract. Regardless, if the parties' consent to arbitrate never existed, separability cannot and will not provide for arbitration.

4.5.2 The Void/Voidable Distinction

Another reason that motivates criticising separability is the distinction between void and voidable contracts. Most of the commentators and authorities that stand by this distinction tend to criticise the application of separability in cases where the contract is void *ab initio*.²⁴³ They, however, find separability functioning effectively when applied in cases of voidable contracts.²⁴⁴

²⁴² S. Ware, "Employment Arbitration and Voluntary Consent", 25 Hofstra Law Review 83, (1996), where the author writes: "*separability doctrine is legal fiction that deprives arbitration of its consensual nature*", at p.131.

²⁴³ This approach has mainly prevailed in American case-law. See, for example, *Sphere Drake Insurance Ltd V. Clarendon National Insurance Co.*, 263 F.3d 26 (2nd Cir. 2001), *Pollux Marine Agencies v. Louis Dreyfus Corp.*, 455 F. Supp. 211, (S.D.N.Y. 1978), *Burden v. Check Into Cash of Kentucky, LLC*, 267 F.3d 483, 488

The difference between these types of contracts is that in voidable contracts the continued validity of the contract has later on become impeached which gives one of the parties the right to avoid the legal consequences of that contract. However, unless the contract is rescinded by one of the parties, it is valid between both parties.²⁴⁵ The validity of void contracts, on the other hand, never existed from the very beginning, i.e. it is void *ab initio*. In this case, the law does not allow remedies for breach of that contract neither does it recognize the performance by any of the parties.²⁴⁶

The justification for the tendency to refuse the application of separability where contracts are found void *ab initio* is simply found in the Latin phrase *ex nihilo nihil fit*, i.e. nothing comes out of nothing.²⁴⁷

This thesis finds that adhering the application of separability only to voidable contracts and not to void contracts is impractical for many reasons. Principally, such bias defeats almost every reason behind the existence of the separability presumption in international arbitration. First, the distinction between different types of contracts in applying separability is quite artificial. The effect of both void and voidable contracts is eventually identical, i.e. both are invalid and unenforceable. It seems nonsensical to allow an arbitration agreement to survive and another to fail according to a challenge levelled at the main contract. In articulating this argument, the Court in *Three Valleys Municipal Water District v. E.F. Hutton* explained that “[i]n either case, no independent challenge is

(6th Cir. 2001), and *Canada Life Assurance Co. v. Guardian Life Insurance Co.*, 242 F. Supp. 2d 344, 349 (S.D.N.Y. 2003).

²⁴⁴ See, for instance, S. Schwebel, “*International arbitration: Three Salient Problems*”, (1987) where the author explains that “[w]here the [underlying commercial] agreement is invalid or no longer in force, the obligation to arbitrate disappears with the agreement of which it is a part.” *Ibid.* at p.1.

²⁴⁵ S. Williston and R. Lord, “*A Treatise on the Law of Contracts*”, (1990), at p.50.

²⁴⁶ T. Monestier, “*Nothing Comes Out of Nothing . . . Or Does It? A Critical Re-Examination of the Doctrine of Separability in American Arbitration*”, 12 *American Review of International Arbitration* 223, (2001), at p.235.

²⁴⁷ In *Pollux Marine Agencies v. Louis Dreyfus Corp.*, 455 F. Supp. 211, (S.D.N.Y. 1978), the Court explained that “something can be severed only from something else that exists. How can the Court ‘sever’ an arbitration clause from a non-existent charter party?”, at p.219. Also, see M. Mustill and S. Boyd, “*The Law and Practice of Commercial Arbitration in England*”, (1982), at p.7.

made to the arbitration clause itself. In both cases (void and voidable contracts) the contract is unenforceable.”²⁴⁸

Furthermore, the void/voidable distinction frustrates the parties’ intentions and expectations to have their disputes arbitrated. This is more emphasised in international arbitration where parties from different nationalities do not expect that after referring to arbitration they may still end up in a national court room. On the contrary, international parties’ referring to arbitration expect that even disputes regarding the very material existence of the main contract will still go to arbitration.

Additionally, this distinction may allow one party to escape the obligation to arbitrate disputes by claiming that a contract is void, and therefore, the arbitration within is too. In *Sphere Drake Insurance Ltd v. Clarendon National Insurance Co.* the plaintiff sought to have the contract declared void to escape the arbitration agreement in that contract. The Court in that case explained that “[i]f a party alleges that a contract is void and provides some evidence in support, then the party need not specifically allege that the arbitration clause in that contract is void, and the party is entitled to a trial on the arbitrability issue.”²⁴⁹

Finally, and most importantly, this distinction defeats the main premise of the separability presumption of which main effect is that the arbitration agreement and the underlying contract are separable. In other words, one can exist without the other. Yet, the void/voidable distinction fails to take into account that certain challenges of the main contract will not necessarily affect the arbitration agreement within.²⁵⁰

For all that, the void/voidable distinction seems essentially impractical and unnecessary. Therefore, this thesis proposes that, instead of restricting the application of separability to a certain type of contracts, it could be more reasonable to set a rather

²⁴⁸ 925 F.2d 1136 (9th Cir. 1991), at p.1146.

²⁴⁹ 263 F.3d 26 (2nd Cir. 2001), at p.32.

²⁵⁰ R. Smit, “*Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? Or Can Something Indeed Come from Nothing?*”, 13 American Review of International Arbitration 19, (2002), at p.35.

general test that is flexibly applicable to all situations and under all circumstances in order to find out whether separability applies. This is because the void/voidable distinction set quite a restrictive approach to the application of separability without much consideration to the fact that each case has its own realities, exceptions, and circumstances. Where one void contract may render the arbitration agreement within void as well, another may not.

For instance, if one party's signature was forged, such forgery renders the main contract void *ab initio*, and it, consistently, renders the arbitration agreement void too. This is because both the consent that created the main contract and the consent that created the arbitration agreement are separately non-existent.²⁵¹ However, in a contract that is found void because the agent, for instance, failed to comply with the formal requirements of that contract, the very same agent may yet have the authority to enter into an arbitration agreement.²⁵²

Therefore, instead of using the void/voidable distinction, the thesis proposes to refer to the parties' consent test according to which, in order to determine whether the arbitration agreement survives any challenge to the underlying contract, there must be a clear and unmistakable evidence which shows that the parties' consent to arbitrate their disputes clearly exists.²⁵³ In that sense, applying the separability presumption mainly relies on the facts that show that the parties have clearly agreed to arbitration, regardless the status or fate of the underlying contract.

Another aspect that this thesis finds helpful in applying the parties' consent test is to clearly distinguish between three types of challenges or contractual defects. These are:

²⁵¹ In *Fiona Trust & Holding Corp. v. Privalov*, [2007] UKHL 40, the House of Lords stated that where a party claims forgery "*the ground of attack is not that the main agreement was invalid. It is that the signature of the arbitration agreement, as a 'distinct agreement [s7]' was forged*", at p.17.

²⁵² In *All-Union Foreign Trade Assoc. Sojuznefteexport v. JOC Oil Ltd*, XVIII YCA 92, (1993), the main contract did not fulfil the requirement of the Russian law according to which it must be signed by two agents. Regardless, it was yet confirmed that the arbitration agreement in that contract was separable and, accordingly, enforceable.

²⁵³ It may be worth noting that this test is of an objective nature that is applicable to all cases, irrespective of different circumstances and different parties. Reliance on consent in contract law in general exists. See, generally, R. Barnett, "A Consent Theory of Contract", 86(2) Columbia Law Review 269, (1986), and R. Barnett, "Contract is not a Promise, Contract is Consent", 45(3) Suffolk University Law Review 647, (2011-2012).

challenges that solely impeach the substantive underlying contract, challenges that only impeach the arbitration agreement within the main contract, and challenges or defects that influence both the main contract and the arbitration clause/agreement within.

The first two types of challenges are axiomatic and self-evident, however, distinction between them is still of essence since they represent the most straightforward application of the separability presumption in arbitration. That is to say, separability is mainly concerned with the legal rules and facts regarding the validity and existence of an arbitration agreement within a substantive contract apart from the status/fate of that contract. As it is mentioned above, one of the main consequences of separability is that the status of the underlying contract does not necessarily affect that of the arbitration agreement within so as to the status of the arbitration clause does not affect that of the underlying contract.²⁵⁴ Accordingly, distinction between challenges of the main contract and those of the arbitration clause is of importance in order to be able to separate between the effect and extent of both types of challenges on the consent of the parties, and, thus, to be able to apply the test.

The third type of defects, however, can project a few difficulties or, at least, misconceptions. Under the third category, a defect or challenge manages to affect both the main contract and the arbitration clause alike. In this situation, one would directly assume that separability did not apply and thus, originally, the parties' consent test according to which the consent to arbitrate is separate from the consent to contract failed too. Nonetheless, a closer analytical look will show that even in this situation the parties' consent test applied, yet, after testing whether a defect of the main contract has also impeached the parties' consent to arbitrate, it was clear that it has. This is simply explained by the fact that even a separate arbitration agreement can suffer from its own contractual flaws. Eventually, an arbitration clause is an arbitration agreement that, even though separate and autonomous, is still located under (and in some way connected to) a main

²⁵⁴ See Section 4.3.3 of this thesis.

contract. As a result, there will be situations where the arbitration agreement is affected by the change of status of the underlying contract. However, in these situations, it is not right to directly assume that the arbitration agreement is automatically and promptly invalid or non-existent because of the invalidity, non-existent, or termination of the underlying contract. Instead, the parties' consent test must first be run against the situation before deciding whether the arbitration agreement survives or not. In that sense, even in the latter situations, separability applies by at least considering the consent to arbitrate as separate from the consent to contract through carrying out a separate analysis by applying the parties' consent test.

4.5.3 Application of the Consent Test in Commercial Arbitration

Finally, it can be useful to look at the applicability of the proposed test of parties' consent from a practical viewpoint. A closer look at a few cases where the arbitration agreement survived the invalidity of the main underlying contract can provide further comprehension of how the parties' consent test can apply as a general guideline to different cases of different circumstances both at national and international levels.

A good start is with two of the strongest authorities on the separability presumption in the U.S. and the UK. These are *Prima Paint* and *Fiona Trust*.

In *Prima Paint v. Flood and Conklin*,²⁵⁵ the plaintiff filed an action in court for rescission of a consulting agreement on basis of fraudulent in inducement of the contract which contained an arbitration agreement. The plaintiff's main contention was that the defendant has entered into a consulting agreement and has represented itself as solvent and able to perform its contractual obligations where in fact it was insolvent and planned to file for a bankruptcy agreement shortly after executing the consulting agreement. The

²⁵⁵ 388 U.S. 395, (1976).

defendant, however, responded by submitting the issue to arbitration, while the plaintiff sought to stop the defendant from proceeding with arbitration. The Court ruled for the defendant and explained that the claim of fraudulent inducement of contract is aimed at the main contract not at the arbitration agreement and that there is no evidence to support that the parties have intended to withhold this issue from arbitration.²⁵⁶

In *Prima Paint*, even though the plaintiff was misrepresented and deceived by the defendant's ability to carry on its contractual obligations, the plaintiff was not misrepresented regarding the effects and nature of the arbitration agreement in that contract. In other words, where the consent to contract was undeserved and impeached, the consent to arbitrate was perfectly valid and there was no evidence to indicate otherwise. Therefore, separability applied and the arbitration agreement survived the fraud in inducement of the underlying contract.

In *Fiona Trust Holding and Ors v. Privalov and Ors*,²⁵⁷ the plaintiffs commenced court proceedings against the defendants on basis that the latter had paid and received bribes to procure business at the expense of the plaintiffs. The defendants (two of them), on the other hand, had commenced arbitration based on an arbitration agreement that referred disputes 'arisen under' or 'arisen out of' the contract to arbitration. The plaintiffs, however, claimed that, since the contract was induced by bribery, it did not fall within the arbitration agreement. The defendants applied for a stay of court proceedings but the Court at first instance declined and issued an anti-arbitration injunction.²⁵⁸ The defendant appealed and the Court of Appeal allowed their application explaining that, in international arbitration, arbitration agreements should be construed liberally.²⁵⁹ Moreover, a contract

²⁵⁶ *Ibid*, at 406-407.

²⁵⁷ *Fiona Trust Holding Corp & Ors v. Privalov & Ors (No1)*, 22 ArbLR 289, [2007].

²⁵⁸ [2006] ArbLR 25.

²⁵⁹ *Fiona Trust Holding Corp & Ors v. Privalov & Ors (No1)*, 22 ArbLR 289, [2007], at p.290.

that is invalid because it is procured by bribery falls within the competence of the arbitrators.²⁶⁰

Therefore, Fiona Trust is another strong example that supports the analysis of this section according to which if the consent to arbitrate is not impeached with whatever defects that affected the consent to contract, an arbitration agreement survives. This is mainly due to the fact that an arbitration clause in a contract is a separate independent agreement from that contract because the consent that created it is separate and independent from the consent that created the main contract.²⁶¹

4.6 Concluding Remarks

In conclusion, it is very important for the parties' not to confuse the role of an arbitration clause that exists in a contract (or elsewhere). Arbitration agreements are of quite distinct procedural nature than that of the substantive main contract. It may be part of it but it is not an integrated term like the other contractual clauses that relies in defining its status on the status of the main contract.

For ease of understanding the application of separability and its connection to the parties' consent to arbitrate apart from their consent to contract, one can imagine a multi-storey building catching a fire. In this situation, it would be wrong and illegal to directly assume that all the storeys in the building have unswervingly caught fire as well, and, as a result, are completely damaged. Contrarily, in this situation, the rational reaction would be to, at least, carry out an immediate investigation on each story distinctly to see if any has actually caught fire.

An arbitration clause in a contract is similar to a story in a building, it would be inadequate to directly assume that it is invalid or else, once the main contract is impeached

²⁶⁰ *Ibid.*

²⁶¹ For more examples that support this analysis see *Hall v. Prudential-Bache Securities, Inc.*, 662 F. Supp. 468, (1987), at p.471, *Harbour Assurance Co. (UK) v. Kansa General International Insurance Co.*, [1993] 3 All E.R. 897, at p.899, and *Credit Suisse First Boston (Europe) Ltd v. Seagate Trading Co. Ltd.*, [1999] 1 Lloyd's Rep. 784, 796.

with a flaw or is even non-existent. Conversely, carrying out a separate analysis, both from factual and legal perspectives, distinctively to the arbitration agreement (and the consent of the parties that created it), can/may protect an otherwise valid arbitration agreement.

Regardless, the invalidity, illegality, termination, or non-existence of the main contract are not the only possible reasons that could frustrate the intentions of the parties and stop them from arbitrating their disputes. In international commercial arbitration, there are other factors that could restrict or eliminate the parties' freedom all together from achieving their intentions. The following chapter looks into these few restrictions.

5 Chapter V: Extent of Parties' Autonomy in the Making of Arbitration Agreements

The importance of this chapter lies in the fact that the unfamiliarity of what would possibly limit the parties' freedom from entering or making a specific choice in their arbitration agreement can later on affect the enforceability and recognition of both this agreement and the award. Furthermore, an invalid/defective arbitration agreement can only lengthen the parties' dispute settlement through the imposition of both time and cost consuming procedures that goes against the efficiency sought behind referring to international arbitration. In other words, ignoring what may simply be a straightforward precaution at the drafting stage of the arbitration agreement can possibly defeat the purpose and efficiency of an international arbitration and frustrate the intentions of reasonable business parties.

In a thesis that is concerned with the nature, role, and extent of parties' autonomy in international commercial arbitration, a peremptory look into what may or could constrain or abolish this autonomy is significant in determining the precise extent of it. Accordingly, this chapter is mainly concerned with the limitations or restrictions of the autonomy/freedom of the parties in referring their disputes to international arbitration.²⁶²

²⁶² For the sake of understanding the extent and nature of this chapter, it is essential to differentiate at this stage between reasons preventing a party from entering an arbitration agreement (or arbitrating a certain subject matter), and those that shall render an arbitration agreement invalid after having created one (whether such invalidity occurred upon initial inducement or that circumstances have come up to turn an otherwise valid agreement into an invalid/illegal one), for example, fraudulent, duress, and unconscionability. Seeing that this chapter is mainly concerned with what limits or abolish the parties' freedom to enter an arbitration agreement, it will only be concerned with the first category of restrictions. The second category of restrictions does not affect the parties' freedom of entering an arbitration agreement since most of the time the parties enter one, then they, later on, come to realise that their agreement, for some reason, is invalid or illegal.

First, however, an essential distinction must be clarified. This distinction relates to the formal and substantive validity of an international arbitration agreement. The law governing the arbitration agreement, so as to any other national or international laws applicable to the arbitration itself, may set certain formal requirements as a condition for recognizing and enforcing international arbitration agreements. The most-known and universally-accepted of these requirements is the written form.²⁶³ Other formal requirements may be jurisdictional in the sense that, if an arbitration agreement fails to satisfy them, it would still be valid yet the law or rules imposing these jurisdictional requirements will not apply.²⁶⁴

The substantive validity of an arbitration agreement, on the other hand, is practically not any different from the substantive validity of any other contractual agreement. In other words, it is subject to the generally-applicable rules to other contracts, such as, mistake, lack of consideration, fraud, duress, unconscionability, frustration, and impossibility.

Requirements for achieving both the formal and substantive validity of international arbitration agreements need to be satisfied. Therefore, adequate awareness of any legal or non-legal aspect that may possibly influence the validity of an international arbitration agreement needs to be obtained.

This chapter is not concerned with an arbitration agreement's formal validity. It is mainly concerned with any element that may restrict or prevent the parties from creating an

²⁶³ See, for example, Article II(1) of the NY Convention, Article I(2)(a) of the European Convention, Article 25(1) of the ICSID Convention, Article 7 of the Model Law, Article 178(1) of the Swiss PIL, and Section 1031(1) of the German ZPO.

²⁶⁴ For example, Article 1031(5) of the German ZPO requires that arbitration clauses in consumer contracts have to be contained in a separate contract and signed by the consumer. Also, Article 16(2) of the Chinese Arbitration Law requires that the arbitration agreement specifically expresses the parties' intentions to arbitrate their disputes, so as to expressly mention the matters to be arbitrated and the arbitration institution chosen by the parties (hence, allowing only institutional arbitration but not *ad hoc* arbitration). Also see Article 809(2) of the Italian Code of Civil Procedure which provides that: "*The arbitration agreement must appoint the arbitrators or state their number and the method of their appointment*". The same requirement existed under Article 502(3) of the former Egyptian Code of Civil and Commercial Procedure ("*the arbitrators must be appointed by the name in the agreement*").

arbitration agreement or arbitrating any or all of their disputes and risking creating a substantively invalid (or void *ab initio*) arbitration agreement. In other words, the chapter considers the major aspects to which parties need to be highly attentive while creating an international arbitration agreement. These aspects are summarized to be incapacity, non-arbitrability, waiver of right to arbitrate, public policy, and mandatory rules of law.

5.1 Incapacity

The requirement that a party must have capacity to enter into an agreement to arbitrate is not very different than the role of capacity in other areas of law. Even though an arbitration agreement has a separate nature than that of the main contract, most of the defenses applicable to capacity – such as incompetence, minority, and the like – will apply in the context of arbitration agreements.²⁶⁵

Nevertheless, some national laws might still impose special restrictions on the capacity of commercial parties to enter into an arbitration agreement, for example, some legal systems restrict the ability of some government related entities to arbitrate certain disputes.²⁶⁶ Other legal systems may restrict the capacity of parties to arbitrate disputes concerning state properties.²⁶⁷ Accordingly, it is important to verify the ability of any commercial party to enter into an agreement to arbitrate before embarking on any discussions concerning the settlement of disputes under the contract through international commercial arbitration. On the other hand, in some cases one of the parties may fail to disclose its incapacity to refer to arbitration. In situations as such, it is important for the

²⁶⁵ Born, “*Cases and Materials*”, at p.461.

²⁶⁶ In Saudi Arabia, for example, a Council of Ministers’ decision in 1963 prevented public entities from including their international contracts clauses providing for arbitration in a foreign country. This prohibition is articulated under Article 3 of the Arbitration Law of 25 April 1983 (this restriction can, however, be abolished with the approval of the Council of Ministers). Also see *Centroamericanos, SA v Refinadora Costarricense De Petroleos, SA*, 1989 U.S. Dist. LEXIS 5429 (S.D.N.Y. 1989).

²⁶⁷ See, for example, Article 139 of the Constitution of Islamic Republic of Iran which provides that “*the resolution of disputes concerning state property, or the submission of such disputes to arbitration, shall in each case be subject to approval by the Council of Ministers and must be notified to Parliament. Cases in which one party to the dispute is foreign, as well as important domestic disputes, must also be approved by Parliament.*”

sake of the other party's future interests to take all necessary steps to verify the ability/capacity of the other party to enter an international arbitration agreement.²⁶⁸

Capacity is a fundamental requirement that exists under most international conventions and national arbitration laws. Article II of the NY Convention provides for the non-recognition of the arbitration agreement only if it is “*null and void, inoperative or incapable of being performed.*” Also, Article V(1)(a) of the Convention allows a national court to refuse the recognition of an arbitral award if any of the parties to the agreement “*were, under the law applicable to them, under some incapacity.*”

Looking, however, into the above two articles, one can observe that the NY Convention have not expressly addressed the issue of incapacity directly in relation to arbitration agreements (rather just in relation to the arbitral award in Article V(1)(a)). Nevertheless, it is widely accepted that Article II of the Convention is understood to include incapacity, especially in its reference to “*null and void*” arbitration agreements.²⁶⁹

The Model Law follows the NY Convention in addressing the issue of incapacity by allowing states in Article 34(2)(a)(i) and in Article 36(1)(a)(i) to set aside or refuse to recognize an award if the parties were under some incapacity but it does not address incapacity in relation to arbitration agreements either.

The parties' capacity is of great importance to the existence of a valid arbitration agreement, as well as the enforcement of the arbitral award. As a Swiss Federal Tribunal explained,

[T]he question of jurisdiction of the arbitral tribunal also comprises the question of the subjective scope of the arbitration agreement. Whether all parties to the proceedings are bound to it, is a question of their capacity to be a party to the

²⁶⁸ Bernardini, at p.47.

²⁶⁹ *BV Bureau Wijsmuller v United States of America*, 1976 AMC 2514 (S.D.N.Y. 1976). Also see Born, “*Cases and Materials*”, at p.468, and Gaillard, at p.708.

*arbitration proceedings and, thus, a prerequisite for a decision on the merits or the admissibility of the claims.*²⁷⁰

For that, this thesis finds that it is very important for the parties to make sure that they have the required legal capacity to arbitrate certain disputes under all the applicable laws to their arbitration, especially the law applicable to the arbitration agreement and the law of the place of enforcement and recognition of the arbitral award.

5.2 Non-Arbitrability

National laws of many of states provide that certain categories of claims or disputes are not capable of being settled by arbitration.²⁷¹ These disputes are viewed as non-arbitrable thus relieving the states from their general obligation to recognize and enforce an otherwise valid agreement to arbitrate any of those disputes.²⁷²

In other words, non-arbitrability means that, with regard to those specific disputes, the arbitrator has no power/competence/jurisdiction whatsoever to deliver a verdict since, under this certain applicable national law, the parties do not retain their given freedom to exclude the jurisdiction of national courts.²⁷³

Non-arbitrability has deep roots with the history of arbitration. Virtually all national laws treat some categories of claims as incapable of resolution by arbitration. The range of these claims or disputes may vary over the time to be broadened or narrowed. Moreover, the types of claims that are deemed non-arbitrable differ from one state to another.²⁷⁴

²⁷⁰ *Judgement of 4 July 2003*, (Swiss Federal Tribunal) DFT 4P. 137/2002, cons. 3.2.

²⁷¹ See, for example, Article 806 of the Italian Code of Civil Procedure, Article 10(1) of the New Zealand Arbitration Act, Article 3 of the Chinese Arbitration Law, Section 4 of the Malaysian Arbitration Act, Article 737 of the Argentinian National Code of Civil and Commercial Procedure, and Article 487(1) of the Latvian Civil Procedure Law.

²⁷² See Articles II(1) and V(2)(a) of the NY Convention, Article VI(2) of the European Convention, and 5(2)(a) of the Inter-American Convention.

²⁷³ Bernardini, at p.47.

²⁷⁴ One commentator wrote: “*all jurisdictions put limits on what can be submitted to arbitration. Customary law in Homeric Greece as in modern Papua Guinea would allow a dispute arising from a killing to be settled*

Nonetheless, many nations refuse to permit arbitration of matters such as intellectual property,²⁷⁵ domestic relations,²⁷⁶ and labour and employment grievances.²⁷⁷

The non-arbitrability doctrine is of great importance and is based on many significant considerations. The doctrine rests on the idea that certain public rights and interests of third parties require extensive protection that can only be produced by governmental authorities. As a result, agreements to solve disputes on these rights and interests cannot be given effect.²⁷⁸ Additionally, this thesis finds that, although non-arbitrability is different from public policy, both concepts are closely connected and in many ways serve the same purpose, that is to protect certain standards and traditions which are practiced by each individual state. In that sense, although not all public policy restrictions are non-arbitrable rights, all non-arbitrable claims fall within either the domestic or the international public policy domain of each individual state.²⁷⁹

An essentially imperative distinction should be made, however between non-arbitrability and invalidity on the one hand, as well as non-arbitrability and illegality on the other hand. Although both distinctions may prompt quite similar effects on the arbitration agreement, it is still of value for the parties to realise the differences between all three concepts in order to protect the integrity of their arbitration agreement from any possible reason that could risk its enforceability, whether its non-arbitrability, illegality, or invalidity.

by arbitration, but . . . not sacrilege in Greece, nor adultery in parts of Papua New Guinea. . . or in Rome”, D Roebuck and B. Fumichon, “*Roman Arbitration*”, (2004), at p.104-105.

²⁷⁵ For example, Article 786 of Japanese Code of Civil Procedure.

²⁷⁶ For example, Article 2060(1) of the French Civil Code.

²⁷⁷ For example, Section 229 of the California Labor Code, (no arbitration of wage claims).

²⁷⁸ See, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, (U.S. S.Ct. 1985), at p.640, and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, (U.S. S.Ct. 1974), at p.58. Also see the Jordanian Amendment to the Merchandise Maritime Law, Law No. 35 of 1983 which provides that “*Regardless of whatever is contained in any other law, or stipulation which bars the Jordanian courts from maintaining disputes relating to bills of lading or carriage of goods is null and void.*”

²⁷⁹ It is sometimes suggested that “*contractual freedom and . . . mandatory national laws are different side of the same coin, one begins where the other ends.*” B. Cremades and S. Plehn, “*The New Lex Mercatoria and the Harmonization of the Law of International Commercial Transactions*”, 2 Boston University International Law Journal 317, (1984), fn.37, at p.325.

The first distinction is drawn between invalidity and non-arbitrability. An arbitration agreement could be held invalid for reasons of lack of consent, duress, mistake, non-compliance with form requirement, and so on. This means that the agreement is not binding or enforceable upon the parties in any circumstances. However, in the case of non-arbitrability of the subject of the arbitration agreement, the agreement is otherwise valid but it is not to be given effects as applied to a particular dispute or subject matter.²⁸⁰ Moreover, non-arbitrability is concerned with a particular type of disputes (e.g., certain types of consumer protections, criminal disputes, bankruptcy, etc.) rather than the terms of the arbitration agreement.²⁸¹ Another distinction lies in the fact that rules of validity of arbitration agreements are generally derived from applicable principles of contract formation and substantive validity, while rules of non-arbitrability are based on specific statutory enactments directed specifically at arbitration agreements regarding certain categories of disputes.²⁸² An invalid arbitration agreement is invalid even if the parties arbitrated a different dispute. An arbitration agreement of a non-arbitrable subject matter is otherwise valid, if it contained a different arbitrable subject matter.

The second distinction to be made is between non-arbitrability and illegality. An agreement to arbitrate would be held illegal if the parties intended to use arbitration for the achievement of an illegal purpose, such as money laundering for instance. This thesis finds that a key point to understand such distinction is to look at the parties' intentions behind the making of their arbitration agreement. That is to say, a non-arbitrable subject matter is non-arbitrable regardless of the parties' intentions. However, it is very difficult (if non-existent) to find cases where the parties were aware that a certain subject matter is non-arbitrable yet they still chose to refer it to arbitration. Illegality, on the other hand, relies on

²⁸⁰ In the NY Convention, Articles II (1) and V(2)(a) ("*subject matter of the difference is NOT capable of settlement by arbitration*"). The Model Law, Article 1(5) ("*certain disputes may NOT be submitted to arbitration*").

²⁸¹ H. Arfazadeh, "*Arbitrability under the New York Convention: The Lex Fori Revisited*", 17 *Arbitration International* 73, (2000), at p.79-80.

²⁸² Born I, at p.949.

the existence of parties with bad intentions behind making their arbitration agreement. It is, again, very rare to find examples where an arbitration agreement was found illegal.

As for the effect of non-arbitrability on the freedom of the parties' in making international arbitration agreements, it is obvious that non-arbitrability could possibly limit the parties' freedom when it comes to arbitrating certain disputes.

However, it is important to bear in mind that the scope of non-arbitrability of disputes is much more limited internationally than it is under national laws. It is significant for international commercial parties to understand that the fact that certain disputes are non-arbitrable according to a particular national law does not mean that the same disputes will be so in an international setting. As a matter of fact, the existence of many international arbitration rules and conventions nowadays motivate a stronger tendency between national laws to promote for international commercial arbitration, not only through the harmonization of its arbitration rules, but also, through restricting the limit of non-arbitrability internationally. For that, many national laws allow different or less non-arbitrability prohibitions for international disputes than its domestic disputes. For example: Article 2060(1) of the French Civil Code prohibits parties from arbitrating disputes relating to divorce or judicial separation, as well as disputes concerning public institutions and public policy matters. Regardless, French courts and commentators concluded that Article 2060(1) does not apply to international arbitration agreements.²⁸³

This thesis, however, finds that the main problem non-arbitrability may cause for international commercial parties seeking arbitration lies in the dilemma of the law applicable to non-arbitrability. Basically, in international commercial arbitration, non-arbitrability raises quite the complex choice of law questions to determine which law

²⁸³ See *Judgment of 20 June 1969, Impex v. Malteria Adriatica*, 1969 Rev. Arb. 95 (Paris cour d'appel), and A. Mourre, "Arbitrability of Antitrust Law from the European and US Perspective", in G. Blank and P. Landolt, "EU and US Antitrust Arbitration: A Handbook for Practitioners", (2011), at p.7-8. Also compare Article 177(1) of the Swiss PIL and Article 354 of the Swiss Code of Civil Procedure.

decides whether a certain dispute is arbitral or not. The problem is manifested in the fact that in an international arbitration, several laws can apply.²⁸⁴ However, selecting only one of these laws to decide whether a subject matter is arbitrable or not, is not an option since it poses a risk of finding an arbitration agreement non-arbitrable under any of the other applicable laws. Moreover, very little agreement between national courts and commentators is reached to resolve this issue.²⁸⁵

Therefore, there are a few precautions which the parties and their counsel have to cover in order to ensure the enforceability and recognition of their arbitration agreement. Obviously, these precautions would start from ensuring that the parties have not included their arbitration agreement a subject matter than is non-arbitrable under any and all of the possible applicable laws to their arbitration. For that, the parties and their lawyers will need to identify, as much as possible, all current and future national laws that are applicable or may apply to their arbitration. However, if an arbitration agreement is already concluded and a dispute has arisen, the arbitrators will have a duty of making sure that the parties are not trying to arbitrate a non-arbitrable dispute and that they actually have competence to decide on the subject matter beforehand.²⁸⁶

Finally, it is important to review how arbitrability has been approached under some of the major arbitration instruments. Starting with the NY Convention, the Convention has considered the issue of arbitrability in two different places. Only in one of them it has mentioned the law that shall govern arbitrability. In Article II(1) the Convention provides that an international arbitration agreement shall be recognized if it concerns “*a subject matter capable of settlement by arbitration.*” Additionally, in Article V(2)(a), the

²⁸⁴ This is further elaborated on in Chapter VII of this thesis.

²⁸⁵ One commentator wrote “[a]greement on the conclusion that there is disagreement seems to be the only common dominator that one can find between arbitrators, courts, and publicists regarding the question which is the applicable law on arbitrability.” K. Bockstiegel, “Public Policy and Arbitrability” 177, in ICC Congress Series No. 3, (1987), at p.184.

²⁸⁶ See, generally, on this topic M. Lehmann, “A Plea for a Transnational Approach to Arbitrability in Arbitral Practice”, 24 Columbia Journal of Transnational Law 753, (2003-2004), J. Peresie, “Reducing the Presumption of Arbitrability”, 22 Yale Law and Policy Review 453, (2004), and M. Berger, “Arbitration and Arbitrability: Towards an Expectation Model”, 56 Baylor Law Review 753, (2004).

Convention provides that a state can refuse enforcement and recognition of an arbitral award if it finds that “*the subject matter of the difference is not capable of settlement by arbitration under the law of that country.*” And so, in this case, the Convention only refers to the law of the place where the award is sought to be enforced and recognized.

Article 1(5) of the Model Law, on the other hand, provides that “*this Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration . . .*”

Both the Model Law and the NY Convention leave defining matters that are not arbitrable to the legislatures of each Contracting/Adopting State. Also, none of the instruments provide indications on what should not be arbitrable or what exactly do they mean by non-arbitrability in general.

To sum up, it is important to understand that the question of whether a particular international dispute is arbitrable or not will be a question of the national applicable law but with specific considerations of the international character of the dispute which, in many ways, will affect the interpretation of the arbitration agreement and its subject matter. Generally, international arbitration agreements are not as restricted as domestic ones regarding the arbitrability of its subject matters. This is because national mandatory rules and public policies in general are moderated when applicable in an international setting, especially in light of the existing competing public policies of other states and the shared international goal of promoting the resolution of international commercial disputes through arbitration.

5.3 Waiver of Right to Arbitrate

Another aspect to which the parties need to pay much consideration is the issue of waiving the right to arbitrate. Generally speaking, a party to any contractual right can, either expressly or impliedly, renounce or disclaim this right by express agreement or conduct.²⁸⁷ The right to arbitrate the parties' dispute is a contractual right like any other contractual right and, thus, parties to an agreement to arbitrate can, by either their explicit agreement or implicitly through their conducts, waive their right to arbitrate. Accordingly, waiver is ultimately related to the consent of the parties.

The topic of waiving parties' arbitration rights is essentially important to this thesis for a few reasons. Obviously, where the parties have explicitly agreed in any manner to waive their rights to arbitrate their disputes, the situation is evidently uncomplicated. However, where parties' behaviours or conduct are interpreted by national courts or arbitral tribunals as waiver of arbitration rights, the situation poses much more difficulties and confusion. To that end and to the context of this thesis, a question arises regarding the type of conduct or behaviours of the parties that could be interpreted as waiver and to the extent to which such behaviours actually represent the parties' true intentions.

The problem is further manifested since waiver of right to arbitration is not specifically regulated for by most international arbitration conventions.²⁸⁸ Moreover, reliance on national arbitration legislation and authorities is not typical, seeing that most of the latter treat the subject of waiver in significantly diverse approaches.

As one of the two main arbitration instruments with which this thesis is concerned, the NY Convention has not touched upon the issue of waiver whether in reference to

²⁸⁷ M. Bonnell, "When is an Arbitration Agreement 'Inoperative'", 11(3) International Arbitration Law Review 111, (2008), at p.115.

²⁸⁸ Born I, at p.871.

establishing it or to its consequences expressly under any of its Articles.²⁸⁹ The Convention does not also set any deadlines/time-limits by which a party needs to invoke the arbitrations agreement.²⁹⁰ Therefore, these questions are completely left to national arbitration legislation and the courts before which the matter is brought.

The Model Law, on the other hand, treats questions of waiver in a completely different manner. Article 8 poses a requirement on national courts to refer parties to arbitration, if one of the parties has requested the enforcement of the arbitration agreement not later than its submission of its first statement on the substance of the dispute.

Two issues are noticed from Article 8 that could raise questions regarding the subject of waiver. First, it is worth noting that Article 8 does not provide for the consequences of failing to invoke the arbitration agreement by the time of submitting the first statement on the dispute's substance. Thus, this raises a question on whether failure to invoke the arbitration agreement by that time is considered a waiver of right to arbitrate. In other words, does filing a statement of defense without reference to arbitration amount in a binding waiver of the right to arbitrate according to Article 8 of the Model Law?

Moreover, Article 8 could bring about a lot of controversies regarding what constitutes a statement on the substance of the dispute. Obviously, courts may interpret this differently from one jurisdiction to another according to how tolerant and welcoming each country is towards international arbitration.

As for the first issue, it may be obvious that non-compliance with Article 8's requirement will result into a binding waiver of the parties' right to arbitrate, however, not many courts would reach this end automatically. Clearly, there will always be cases where, for instance, one of the parties is not aware of Article 8's condition, or where one of the parties have a reasonable excuse for not bringing the arbitration agreement up by that time.

²⁸⁹ D. Schramm, E. Geisinger, and P. Pinsolle, "Article II", in *"Commentary on the NY Convention"*, at p.103.

²⁹⁰ Berg, at p.138.

Therefore, a few Model Law jurisdictions have found that submitting a statement of defense without invoking the arbitration agreement does not necessarily constitute a waiver of right to arbitrate.²⁹¹ More importantly, as a general tendency of many of these jurisdictions, many decisions are of the opinion that waivers generally are to be interpreted narrowly and, if construed as such, there must be a clear and unambiguous evidence that the parties have actually intended to waive their right to arbitrate.²⁹²

As for the second issue on what constitutes a ‘statement on the substance of the dispute’, this would again rely on each court’s interpretation and legal background.²⁹³ Nonetheless, the 2012 Case-Law Digest of the UNCITRAL explains clearly that merely taking a step in judicial proceedings will not prevent a party from its right to invoke an existing arbitration agreement.²⁹⁴ The Digest further explains that “*only where that step amounts to a submission of a statement on the substance of the dispute that the procedural requirement of Article 8 will be engaged.*”²⁹⁵ Again, though such statement still does not quite explain what constitutes a statement on the substance of the dispute, it shows that, even with Article 8(1)’s requirement, the Model Law still generally promotes a liberal interpretation of arbitration agreements through a narrow construction of questions of waiver.

²⁹¹ See, for example, *Globe Union Industries Corp. v. G.A.P. Mktg Corp.*, [1995] 2 WWR 696 (B.C. S.Ct.), *Dynamic Endeavours Inc. v. 3471 B.C. Ltd*, (1993) 81 BCLR 359 (B.C. Ct. App.), *Navionics Inc. v. Flota Maritima Mexicana DA*, [1989] 26 F.T.R. 148 (Canadian Federal Ct.), and *Paladin Agricultural Ltd & Others v. Excelsior Hotel (Hong Kong) Ltd*, [2001] HKCFI 1271.

²⁹² See, for example, *Louis Dreyfus Trading Ltd v. Bonarich International Group Ltd*, [1997] 3 HKC 597 where the court stated that “*it is not the intention of the Model Law to take away the strong new right of Mandatory Stay easily by any casual act of the defendant*” and added that the Model Law requires “*some formal act of consequence on the part of the defendant in the court action*”. *Ibid*, at para.21. (available at <http://www.hklii.hk/eng/hk/cases/hkcfi/1997/312.html>) (last visited 29/09/2015), and *Marconi Communications Inc. v. Vidar-SMS Co. Ltd*, 22 August 2001, Civil No. CV-1293-L (2001). Also see UNCITRAL, “2012 Case Law Digest”, where it is stated that “[r]elying on the pro-arbitration philosophy that underlies the Model Law, courts have tended to interpret the concept of ‘statement on the substance of the dispute’ narrowly”, at p.47.

²⁹³ A. Rau, “*The UNCITRAL Model Law in State and Federal Courts: The Case of ‘Waiver’*”, 6 American Review of International Arbitration 223, (1995), at p.235. Also see *Ruhrkohle Handel Inter GmbH v. The Fed. Calumet*, [1992] 3 F.C. 98, (Federal Ct. App. - Canada) where it is stated that, generally, the application of Article 8(1) “*may vary from one jurisdiction to another*”, at p.105.

²⁹⁴ UNCITRAL, “2012 Case Law Digest”, at p.47.

²⁹⁵ *Ibid*.

Therefore, many courts found that seeking a referral order through a statement of claim,²⁹⁶ discovery requests,²⁹⁷ entering an appearance²⁹⁸ are all not enough to constitute a statement on the substance of the dispute and, thus, are not deemed as waiver.

However, this thesis finds that extra attention/awareness should be granted to any behaviour or conduct that may be interpreted by a national court as a waiver of right to arbitrate. This must be particularly emphasized when it comes to the subject of waiver seeing that most of waiver issues arise from certain behaviours of the parties rather than an explicit agreement on waiver. Moreover, the topic itself is not particularly regulated for clearly under international arbitration instruments. This means that very little harmonisation will exist regarding any questions of waiver, not to mention that most of these questions will be left for national courts interpretations. Accordingly, it will be different from one state to another and will rely on unstable elements such as the tolerance of each state to international commercial arbitration, as well as different legal background.

Additionally, just as there are jurisdictions that will tend to narrowly construe questions of waiver under Article 8, there will be others that will give questions of waiver broad interpretations by allowing it more frequently. For example, in *Pan Australia Shipping Pty Ltd v. The Ship Comandate No.2*,²⁹⁹ the Court at first Instance held that the arbitration agreement between the parties was inoperative because it has been waived when the defendant made an application to the Federal Court for the arrest of a ship (the Boomerang I) that was chartered by the plaintiff.³⁰⁰ This decision was made even though the defendant has already commenced arbitral proceedings in London and the plaintiff participated in that arbitration to the point where it went ahead and appointed an arbitrator.

²⁹⁶ *Paladin Agricultural Ltd & Others v. Excelsior Hotel (Hong Kong) Ltd*, [2001] HKCFI 1271, available at (<http://www.hklii.hk/eng/hk/cases/hkcfi/2001/1271.html>) (last visited 29/09/2015).

²⁹⁷ *Dynamic Endeavours Inc. v. 3471 B.C. Ltd*, 81 B.C.L.R. 359, (1993).

²⁹⁸ *Globe Union Industries Corp. v. G.A.P. Mktg Corp.*, [1995] 2 WWR 696 (BCCA).

²⁹⁹ (2006) 234 ALR 483.

³⁰⁰ *Ibid*, at p.484.

The Court relied on the fact that the writ seeking the arrest of the Boomerang did not expressly invoke the arbitration that was commenced in London.³⁰¹

According to other court decisions, defenses to counterclaims,³⁰² delays in objections of courts' jurisdictions,³⁰³ seeking interim injunctions in courts,³⁰⁴ and commencing litigation on the merits,³⁰⁵ are all cases that constituted waiver of right to arbitrate before the court.

For that, not much reliance can be made on national courts' interpretational approaches of waiver. What matters the most, is for the parties to consistently be aware of how certain behaviours can be legally translated by certain courts. Furthermore, consideration to the interpretational history of jurisdictions involved with their arbitration regarding questions of waiver can be helpful. This sort of in-advance knowledge can foster further protection to their rights and the future realisation of their intentions, whether they still mean to refer their disputes to arbitration, or they have subsequently preferred litigation.

Another aspect which requires the parties' attention is how international arbitration institutions treat the matter of waiver. As a fact, many international commercial parties refer their disputes to arbitration through the realm of an arbitration institution and under its rules.³⁰⁶ Different arbitration institutional rules have treated the matter differently. Some have not addressed it in any way,³⁰⁷ others have stipulated for the situations where the

³⁰¹ This decision was, later on, overturned by the Federal Court, *ibid*, at p.457. It is worth mentioning that in Australia, Section 7(2) of the 1974 International Arbitration Act reflected Article 8(1) of the Model Law. See M. Bonnell, "When is an Arbitration Agreement 'Inoperative'", 11(3) International Arbitration Law Review 111, (2008), at p.114.

³⁰² For example, *Restore International Corp. v. K.I.P. Kuester International Products Corp.*, [1999] B.C.J. No. 257.

³⁰³ For example, *Markel International Co. v. Craft* [2006] EWHC 3150 (Comm) (English High Ct.).

³⁰⁴ For example, *The Property People Ltd v. Housing NZ Ltd*, (1999) 14 PRNZ 66.

³⁰⁵ For example, *Granville Shipping Co. v. Pegasus Lines Ltd*, [1996] 2 F.C.R. 853 (Canadian Fed. Ct.).

³⁰⁶ See on that the small survey on the increase of the number of caseload of leading arbitration institutions from 1993-2011 in Born I, at p.94.

³⁰⁷ The LCIA 2014 Rules, for example, have not addressed the subject of waiver.

parties will be deemed to have waived their right to object,³⁰⁸ and others specifically provide that the right to arbitrate may not be waived.³⁰⁹

Regardless, it is important for the parties to realise that subscribing to any of these international institutional rules will not necessarily affect the way a national court will approach and interpret the parties' conduct regarding questions of waiver. Unfortunately, there will be cases where, even when the parties have agreed to arbitrate according to institutional rules that do not allow waiver, the courts would still not give any weight to these 'no waiver' policies. In *S&R Co. of Kingston v. Latona Trucking, Inc.*³¹⁰ the court held that "*the fact that an arbitration agreement incorporates such a [no waiver] clause would not prevent a court from finding that a party has waived arbitration by actively participating in protracted litigation of an arbitrable dispute.*"³¹¹

In *Doctor's Assocs., Inc. v. Distajo*, the Court explicitly ignored the 'no waiver' policy under the AAA Rules and held that it does not affect the waiver analysis of the court.³¹²

This thesis, however, does not quite grasp the motives behind ignoring a 'no waiver' policy under some institutional rules. Agreeing to arbitrate under the auspices of an arbitration institution means that the parties have agreed to all rules of the institution which turns them into a part of the parties' arbitration agreement. It is not clear why a court would not give effect to the parties' agreement on a 'no waiver' provision in their arbitration agreement.

³⁰⁸ See, for example, Article 39 of the 2012 ICC Rules.

³⁰⁹ See, for example, Rule 52(a) of the AAA Commercial Arbitration Rules, and Article 21(3) of the 2010 ICDR Arbitration Rules.

³¹⁰ 159 F.3d 80 (2d Cir. 1998).

³¹¹ *Ibid*, at p.85. Also see *Home Gas Corp. v. Walter's of Hadley, Inc.*, 532 N.E.2d 681 (Mass. 1989) where it was held that "*'no waiver' clause in arbitration agreement does not prevent finding of waiver of right to arbitrate*". *Ibid*, at p.685.

³¹² 66 F.3d 438 (2d Cir. 1995). Also see, to the same effect, *United Nuclear Corp. v. Gen Atomic Corp.*, 597 P.2d 290 (N.M. 1979) where the court specifically explained that "*[t]he parties are precluded from contracting to exclude the court from jurisdiction over this issue.*" referring to questions of waiver. *Ibid*, at p.308.

Obviously, there will always be situations where a court respects the parties' agreement/intentions of waiving their right of waiver.³¹³ Nonetheless, parties' should always be conscious regarding their conduct and behaviours that may be interpreted, by national courts, to have them waived their right of arbitration. Seeing that the explicit agreement of the parties may not always be respected by national courts, and that there will always be different interpretations of their behaviours according to national courts and their different legal backgrounds, it would be quite valuable that the parties are educated on how certain behaviours may affect (whether negatively or positively) the actual attainment of their intentions behind agreeing to arbitrate their disputes and behind inserting certain provisions into their arbitration agreement. Therefore, it appears that the test here is whether a party's act amounts to a waiver of the other party's right to arbitrate.

Finally, it is worth mentioning that the field of international commercial arbitration cannot quite cope or tolerate many formalistic and rigid rules of waiver or generally technical defaults. This province of the legal practice in international arbitration consistently embraces parties from different jurisdictions, with different procedural expectations and adequate level of sophistication. Any sort of strict application over questions of waiver will not only strip the parties of their true intentions that made them agree to arbitrate in the first place, but will also be the inevitable result of misunderstandings and misinterpretations of an international party's behaviour. Furthermore, such an approach will definitely contradict the objective of the NY Convention in contemplating an effective enforcement of international arbitration agreements in order to facilitate international trade through objective and neutral means of dispute settlement. Besides, a broad interpretation of questions of waiver impliedly contradicts Article II of the Convention which requires Contracting States to recognise

³¹³ See, for example, *Eisenwerk Hensel Bayreuth Dipl. – Ing. Burkhardt GmbH v. Australian Granites Ltd*, XXV YCA 663, (2000), and *Kostakos v. KSN Joint Venture No.1*, 491 N.E.2d 1322 (Ill. App. Ct. 1986) where it was held that “inclusion of [no waiver clause] indicate[s] the parties' intention to favour arbitration and we will not lightly waive this right.” *Ibid*, at p.1326.

international arbitration agreements without allowing idiosyncratic and discriminatory national arbitration rules to deny the parties such effect. Therefore, although the Convention does not treat questions of waiver in any manner, it is still not completely irrelevant to resolving the issue in the sense that national courts need to have the spirit and objectives of the Convention in determining whether the parties' rights to arbitrate have been waived.

5.4 Public Policy and Mandatory Rules of Law

The final section of this chapter examines the effect of both principles of public policy and mandatory rules of law. As it is shown below, not many commentators have successfully and clearly distinguished between both concepts. Many have, unfortunately, confused both concepts with one another thinking that one may belong to the other. This section identifies both concepts and attempts to differentiate between them. This section also examines how restrictive principles of public policy and mandatory rules of law are over the parties' freedom to arbitrate internationally.

The section begins with defining the different types of public policy and attempts to understand how they are applicable in international commercial arbitration. Following that, this section looks into mandatory rules of laws and then compares them to the concept of public policy to understand the differences between them in nature as well as in their applicability in international commercial arbitration.

5.4.1 Public Policy in General

Attempts to define public policy by academics and case law are extensively divergent to be covered in details. Although the concept is quite important under almost all jurisdictions, most of its definitions normally refer to the purpose and function of public policy rather than its exact content.³¹⁴ The following sub-sections look into all the different types of public policy. These are mainly domestic public policy, international public policy, transnational public policy, as well as procedural and substantive public policies.

5.4.1.1 Domestic Public Policy

Public policy is generally employed to protect the “*fundamental moral convictions or policies of the forum.*”³¹⁵ Seeing this as the general definition of public policy, it is naturally straightforward to understand this concept in its domestic form. And, in that sense, it is, to an extent, trouble-free to attempt to define public policy in relation to a certain jurisdiction because it will be easier to identify these fundamental policies, hence the function of public policy, according to this particular jurisdiction’s most sacrosanct values. Public policy, for example, in Islamic jurisdictions is normally described to respect and protect the general spirit of *Sharia* and its sources (the *Quran* and *Sunna*, etc.) and the principle that “*individuals must respect their clauses, unless they forbid what is authorized and authorize what is forbidden.*”³¹⁶

³¹⁴ In the Final Report of the International Law Association (hereinafter, “ILA”) on public policy it was stated that: “*there have been attempts to define the contents of ‘public policy’ and ‘international public policy’ but no precise definition is possible*”. International Law Association, NEW DELHI CONFERENCE (2002), “*Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*”, (Hereinafter, “ILA Final Report”), Recommendation 1(b), point no. 12 at p.4.

³¹⁵ Berg, at p.360.

³¹⁶ A. El-Ahdab, “*General Introduction on Arbitration in Arab Countries*” in J. Paulsson, “*International Handbook on Commercial Arbitration*”, (1984), at p.12. See, for example, Article (2) of the 2014 Egyptian Constitution which provides that “*Islam is the religion of the State and Arabic is its official language. The principles of Islamic Sharia are the main source of legislation*”.

Accordingly, what constitutes public policy will differ from one country to another. Regardless, public policy principles will always be so sacrosanct that states will attempt to protect at all costs with no exceptions.³¹⁷

Even at its domestic setting, attempts to precisely define public policy are still difficult because it is almost impossible to determine its content accurately, and because its content changes by time as well. This is due to the fact that such content will definitely change according to each country's perspective of what constitutes a fundamental principle or a cultural importance. Regardless, the concept of public policy in general is a principle of private international law which as such is a stable concept of most legal systems.³¹⁸ Accordingly, this concept is provided for under almost all national and international arbitration laws/rules. This includes the NY Convention and the Model Law. For that, the NY Convention provides, in Article V(2)(b), that recognition and enforcement of the award may be refused if such recognition and enforcement was found to be contrary to the public policy of the country where the enforcement of the award is sought. Paralleling the NY Convention, the Model Law provides that an award may be set aside or refused recognition and enforcement, if the court of enforcement found the award to be in conflict with the public policy of that state.³¹⁹

5.4.1.2 International Public Policy

Moving on to another form of public policy, the concept of international public policy has been described as milder, more tolerant, or narrower than its domestic sibling.³²⁰ This is to indicate that not every rule or principle that falls within the domestic public policy domain will necessarily fall into its international counterpart.

³¹⁷ Lew, "*Applicable Law*", at p.532

³¹⁸ Lalive, at p.26-261.

³¹⁹ Articles 34(2)(b)(ii) and 36(1)(b)(ii).

³²⁰ K. Böckstiegel, "*Public Policy and Arbitrability*" 177, ICCA Congress Series No. 3, (1987), at p.180.

International public policy is generally confined to significant violations of fundamental principles of a certain jurisdiction.³²¹ One must be cautious, however, in analysing the notion of international public policy since the term itself can be, misleadingly, comprehended to cover some sort of extra-national principles or to suggest a uniform international standard followed by many countries. Regardless, the concept remains to be national in both its scope and origin. This issue was specifically addressed by the ILA in its Final Report on Public Policy where it was stated that:

*[T]he expression 'international public policy' is to be understood in the sense given to it in the field of private international law, namely, that part of the public policy of a State which, if violated, would prevent a party from invoking a foreign law or foreign judgement or foreign award.*³²²

It is very important, accordingly, for the term not to be understood as referring to a set of principles that is common to many states, or as forming part of public international law. The notion of international public policy is mainly used as a qualifying or restricting mechanism by states to narrow down or extenuate the effect of domestic public policy, especially when applied in international settings.³²³

In that sense, the notion of international public policy is quite similar to its domestic sibling seeing that they are both used by states as a device which targets introducing an element of planning into private international law.³²⁴ In other words, they both serve the same purpose except for the fact that one is narrower than the other (that is international public policy being narrower than domestic public policy). Against this background, it is important to understand that although the content and application of both

³²¹ P. Sanders, "Commentary", in ICC, *International Arbitration: 60 Years of ICC Arbitration, A Look at the Future*, (1984), at p.72.

³²² ILA Final Report, Recommendation 1(c) at p.5.

³²³ See H. Sikiric, "ARBITRATION AND PUBLIC POLICY: Arbitration proceedings and Public Policy", 7 Croatian Arbitration Yearbook 85, (2000), at p.87.

³²⁴ A. Zhilsov, "Mandatory and Public Policy Rules in International Commercial Arbitration", 41(1) Netherlands International Law Review 81, (1995), at p.95. Also see A. van den Berg, "Refusals of Enforcement under the New York Convention of 1958: the Unfortunate Few" in "Arbitration in the Next Decade", ICC Bulletin, (1999 Special Supplement), at p.86.

remain to be individually determined nationally,³²⁵ the violation of a certain value or principle might be allowed at an international dimension even though it would not be acceptable in a purely national setting of the same jurisdiction.

Accordingly, because of international public policy being national at heart, the language and structure of Article V(2)(b) of the NY Convention can be read to provide for the application of international public policy, rather than to include only purely domestic one.³²⁶

However, the tension behind the use of this terminology is fathomable.³²⁷ As it is explained above, not only could the use of the term ‘international public policy’ be misleading, but also a few jurisdictions have referred to the concept in a confusing approach. For example, in defining and interpreting international public policy, the Milan Court of Appeal described it as a “*body of universal principles shared by nations of similar civilizations, aiming at the protection of fundamental human rights, often embodied in international declarations or conventions.*”³²⁸ Considering the clear recommendations of the ILA Final Report on Public Policy, the Milan Appeal Court may have had in mind more of a transnational understanding of the concept when it defined international public policy.³²⁹ The truth is, there is nothing international about the source of both national and international public policies.³³⁰ As one commentator explains, “*as international public policy is at the heart of domestic public policy, a rule which is not even a matter of*

³²⁵ See C. Liebscher, “*The Healthy Award: Challenge in International Commercial Arbitration*”, (2003), at p.315.

³²⁶ Born III, at p.3655.

³²⁷ The concept of international public policy was not generally accepted by the drafters of the Model Law since it was found to lack precision. See the Third Working Group Report, UN Doc. A/CN.9/253, para.154. Also see Holtzmann, at p.919. The ILA Committee, however, considers that this concept is now sufficiently accepted and used by several jurisdictions as a good test of recognition and enforceability, specifically for international awards. ILA Final Report, fn. 17 at p.3.

³²⁸ *Allsop Automatic Inc. v. Tecnoski snc*, XXII YCA 725, (1997), at p.726.

³²⁹ A. Sheppard, “*Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*”, 19 *Arbitration International* 217, (2003), at p.220. The concept of transnational public policy is explained in more details under Section 5.4.1.3 of this thesis.

³³⁰ See G. Husserl, “*Public Policy and Ordre Public*”, 25 *Virginia Law Review* 37, (1938-1939), at p.39 where the author described the notion of international public policy in its very nature as “*essentially national.*”

*domestic public policy could not be considered as belonging to international public policy.*³³¹

Regardless, the concept of international public policy, in its accurate implication, is being increasingly adopted both by national legislation and courts' decisions. For example, in Germany, courts distinguished between 'internal' and 'international' public policy and held that the notion of public policy is more restricted when applied in the context of a foreign award.³³² In France, on the other hand, the concept of international public policy was explicitly adopted in section 1502(5) of the French New Code of Procedural Civil (NCPC) where it was provided that an appeal against a decision for recognition and enforcement will be available, "*if the recognition or enforcement is contrary to public international order.*" Finally, in a Hong Kong decision, it was explained that international public policy is set to refer to "*those elements of a State's own public policy which are so fundamental to its notions of justice that its courts feel obliged to apply the same not only to purely internal matters but even to matters with a foreign element by which other States are affected.*"³³³

Examples of international public policy include bribing government officials,³³⁴ smuggling goods in or out of a country,³³⁵ supplying weapons to a terrorist organisation,³³⁶ and agreements to transmit children or women for slavery or labour.³³⁷

³³¹ Gaillard, at p.954.

³³² F. Schwarz and H. Ortner, "The Arbitration Procedure – Procedural Ordre Public and the Internationalization of Public Policy in Arbitration", 133 Austrian Yearbook on International Arbitration, (2008), at p.154.

³³³ *Hebei Import and Export Corp. v. Polytek Engineering Co. Ltd*, XXIV YCA 652, (1999), at p.675.

³³⁴ *Westacre Investments Inc. v Jugoimport-SPDR Holding Co Ltd and Others* [1999] 2 Lloyd's Rep 65, [2000] QB 288 (CA).

³³⁵ *Soleimany v Soleimany* [1998] 3 WLR 811, [1999] QB 785 (CA).

³³⁶ *National Oil Corporation v Libyan Sun Oil Company*, 733 F Supp 800-822 (D Ct Delaware, 1990).

³³⁷ Lew and Mistelis, at p.423-424.

5.4.1.3 Transnational Public Policy

The third and final form of public policy is transnational (or truly international) public policy. Compared to the other forms of public policy, transnational public policy is relatively undemanding and has evolved to encompass as its baseline fairly broad principles. Generally speaking, transnational public policy derives its main values from the basic notion of natural justice and the general principles of fairness and equality.³³⁸ The following sub-sections define transnational public policy, compare it to its international sibling, and analyse its application in international commercial arbitration.

I Definition

Transnational public policy actually refers to the principles which one might mistakenly assume are referred to by the term international public policy, however, there is a clear distinction between both concepts. Transnational public policy mainly comprises of “*fundamental rules of natural law, principles of universal justice, jus cogens in public international law, and the general principles of morality accepted by what are referred to as ‘civilised nations’.*”³³⁹

II Transnational and International Public Policy

The main distinction between transnational and international public policy is that the latter remains always national in its source and inevitably reflects a selfish character (same as domestic public policy). Transnational public policy, on the other hand, represents an international consensus to universal standards and generally accepted norms of conduct that must always be observed in both private and public international relationships/transactions.³⁴⁰ These norms and standards are universally accepted because

³³⁸ F. Mantilla-Serrano, “*Towards a Transnational Public Policy*”, 20 *Arbitration International* 333, (2004), at p.336.

³³⁹ ILA, London Conference (2000), “*Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*”, (hereinafter, “*ILA Interim Report on Public Policy*”), at p.7.

³⁴⁰ M. Buchanan, “*Public Policy and International commercial Arbitration*”, 26(3) *American Business Law Journal* 511, (1988), at p.514.

they are not driven from a certain jurisdiction's fundamental principles but rather from internationally (or regionally) accepted instruments such as, international conventions, mandatory trade usages, rules of *jus cogens* applicable between states, and general codes of conducts accepted by international organizations.³⁴¹

Evidently, international public policy will always be inspired by some supranational purposes and, consequently, may have occasionally, by its object, be of a transnational character but it will always retain a national source.³⁴²

Therefore, Pierre Lalive commented that:

*[T]he fundamental values and interests of a given State can hardly coincide fully with the values and fundamental interests of the international community, just as the national concept of 'international public policy' cannot be identified with that of transnational public policy.*³⁴³

Regardless, the existence of the notion of transnational public policy is a much debated one.³⁴⁴ This could be related to the fact that the content of the concept of transnational public policy could be very difficult to seize since the majority of its sources are not clearly defined, or are not based on 'hard-law'.³⁴⁵

In determining whether a certain principle falls under the consensus of transnational public policy, the ILA Final Report on Public Policy recommended that the *"enforcement court should look at the practice of other courts, the writing of commentators, and other sources"*,³⁴⁶ for instance, examining whether a certain principle is provided for by international conventions such as the 1950 European Convention for the

³⁴¹ G. Silva, *"Transnational Public Policy in International Arbitration"*, PhD thesis, Queen Mary College, University of London, (2007), at p.144.

³⁴² Lalive, at p.277-278.

³⁴³ *Ibid*, at p.313.

³⁴⁴ The extent and details of such debate is not within the scope of this thesis. However, for reasons briefly shown below, the author will explain why this thesis is of the opinion that such notion exists. See, however, Lalive, at p.309-311 for a few examples of early scepticism on the existence of transnational public policy.

³⁴⁵ As opposed to 'soft-law' which represents a type of the sources from which transnational public policy derives its principles. Soft-law in that sense refers to international instruments or provisions that are not in itself laws, but are still generally important in the international legal development framework that they still need to be observed, See M. Shaw, *"International Law"*, (2008), at p.110.

³⁴⁶ ILA Final Report on Public Policy, Recommendation 2(b), at p. 9.

Protection of Human Rights and Fundamental Freedoms.³⁴⁷ Other sources also include the most fundamental maxims of universal justice and the general principles of morality.³⁴⁸

This is, however, not to indicate that transnational public policy standards *have to be* accepted universally. A rational approach to understand the philosophy behind transnational public policy is to see what a reasonable man would accept as a universal law, notwithstanding, nationality, and/or cultural, legal, economic, social, or religious background of a certain jurisdiction. In simpler terms, it consists of what the international community cannot function without even according to the minimum standards of civilization.

III Application of Transnational Public Policy in International Arbitration

In practice, however, it is not necessarily effortless to find a straightforward application of transnational public policy since, compared to the application of other forms of public policy, it is the most narrow/restricted form. To show-case a few examples in the practice of international arbitration, the tribunal in *ICC Case No. 6474* has expressly relied on transnational public policy to determine its jurisdiction in a dispute that involved the application of international law.³⁴⁹

Another even more explicit application of transnational public policy is found in *ICC Case No. 1110*.³⁵⁰ The case involved a governmental bribery between the Argentinian Government and a British company. The sole arbitrator considered that the illegal contract to bribe Argentinian government officials was contrary to public policy of the seat of arbitration (which was France) and that of the place of performance (which was Argentina,

³⁴⁷ *Ibid.*

³⁴⁸ For a much detailed work on the sources of transnational public policy see G. Silva, “*Transnational Public Policy in International Arbitration*”, PhD thesis, Queen Mary College, University of London, (2007), from p.142-156 where the author divides these sources to primary and secondary ones. The present thesis, however, is more concerned with the application and content of transnational public policy, specifically to international arbitration procedures.

³⁴⁹ *Supplier (European Country) v. Republic of X, Partial Award in ICC Case No. 6474*, XXV YCA 279, (2000).

³⁵⁰ *Argentine Engineer v. British Company in ICC Case No. 1110*, 15 January 1963, XXI YCA 47, (1996).

also the *Lex Contractus*). However, in dismissing his jurisdiction over the case, he neither applied the French nor the Argentinian law, but rather grounded his decision on the fact that “[s]uch corruption is an international evil, it is contrary to good morals and to an international public policy common to the community of nations.”³⁵¹

The only reservation on this case is that the sole arbitrator may have ignored the separability and *Kompetenz-Kompetenz* principles in dismissing his jurisdiction. The exact same decision might have had a slightly different impact, at least to this thesis, if the arbitrator had confirmed his jurisdiction before deciding that both the main contract and the arbitration agreement within were null.

In *ICC Case No. 5622*³⁵² the tribunal was faced with a case of international corruption through a brokerage contract. After the tribunal has concluded that the brokerage contract was null and void, it started examining the effect of this nullity on the validity of the arbitration clause within that contract.³⁵³ In doing so, the tribunal decided to look into other similar arbitral precedents. Two approaches were considered,³⁵⁴ the first is to follow the decision of the sole arbitrator in *ICC Case No. 1110* and directly dismiss

³⁵¹ *Ibid*, at p.52. It is important to note, however, that this thesis is utilizing this case only to showcase an explicit employment of transnational public policy in the practice of international arbitration. This thesis does not necessarily stand for the approach of this case where the arbitrator directly dismissed his jurisdiction as the main contract was found null and void because it is in violation of good morals and transnational public policy. As it has been explained before (see Section 4.3.3 of this thesis), separability implies that the invalidity, illegality, or even non-existence of the main contract does not necessarily lead to the same for the arbitration agreement within that contract. Accordingly, an arbitrator following such approach in an international arbitration may create the assumption that he directly defeated the effect of the separability presumption. For that, the decision in *ICC Case No. 1110* is not entirely good law today not due to a less-functionality of the notion of transnational public policy in the international community but because of the existence of a stronger presumption of separability and a clear understanding, as well, of the *Kompetenz-Kompetenz* principle. Having said that, the author believes that there might also be another justification for the arbitrator’s position in that case. It seems to this thesis that the sole arbitrator may have seen this case not as a single illegal contract *per se* but more as an illegal act that disqualified both parties their natural right of pursuing any justice through any form of adjudication. The author reached this conclusion from the statement of the sole arbitrator where he explained that “[p]arties who ally themselves in an enterprise of the present nature must realize that they have forfeited any right to ask for the assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes.” *Ibid*, at p.52.

³⁵² *Broker v. Contractor, Final Award in ICC Case No. 5622*, XIX YCA 105, (1994).

³⁵³ *Ibid*, at p.118.

³⁵⁴ *Ibid*, at p.118-119.

arbitral jurisdiction for violation of internationally accepted morality, and the second is to follow the approach of *ICC Case No. 3916*.³⁵⁵

In the latter case the appointed arbitrator had to review a case that involved a contract between an intermediary and a company to obtain a public contract in a developing state. To obtain such a contract during the years in which the works took place would have been extremely difficult (almost impossible) without the use of the claimant's influence on those who had the right to decide with whom a state should conclude a contract. The arbitrator detained jurisdiction, viewed the merits of the case, and eventually dismissed the claim for the payment of commission.

The tribunal in *ICC Case No. 5622* opted for the second solution, i.e. the tribunal found that it had jurisdiction but then it also found that the contract was contrary to good morals and transnational public policy and was found, consequently, null and void.³⁵⁶

Although on the outside it seems that both approaches lead to the same result, the progress between both approaches is quite important. The second solution is recognized and preferred by doctrine and jurisprudence.³⁵⁷ According to this approach, the nullity of the main contract does not imply *ipso jure* the nullity of the arbitral clause within. This thesis also supports this approach simply because the function of an arbitrator in any arbitration is not only to determine whether a request for arbitration is admissible or not according to the degree of the contractual morality of the main contract. A superior interest of an international arbitrator may rather be to pursue the protection of the integrity of international commercial arbitration. Such an approach would be more effective in protecting the interests of the international community while still observing the fundamental principles of transnational public policy since it will lead to the same result, i.e. the nullity of the illegal contract without impeaching the integrity of international arbitration agreements.

³⁵⁵ *ICC Case No. 3916 of (1982), Iranian Party v. Greek Party*, 111 JDI 930, (1984).

³⁵⁶ *Broker v. Contractor, Final Award in ICC Case No. 5622*, XIX YCA 105, (1994), at p.120.

³⁵⁷ W. Craig, W. Park, and J. Paulsson, "*International Chamber of Commerce Arbitration*", (1984), at p.14.

5.4.1.4 Procedural and Substantive Public Policy

In addition to the previously mentioned forms, the concept of public policy in general also has both substantive and procedural dimensions. The distinction between substantive and procedural public policy is not always clear but is, sometimes, essential. Such distinction is particularly valuable in international commercial arbitration because procedure in that practice covers the entire arbitration to the extent where arbitral procedure actually creates the underlying structure that causes arbitration to be viewed as part of a legal system.³⁵⁸

The difference between both categories of public policy lies in that substantive public policy deals with the merits of the award while procedural public policy is more concerned with how the arbitral tribunal reached its award. According to the ILA Interim Report on Public Policy, “[s]ubstantive public policy . . . goes to the recognition of rights and obligations by a tribunal or enforcement court in connection with the subject matter of the award (as opposed to procedural public policy, which goes to the process by which the dispute was adjudicated).”³⁵⁹

I Substantive Public Policy

By way of example, a court looking to vacate or enforce an international arbitral award would be looking at an issue of substantive public policy, if one of the parties has claimed that the award issued by the tribunal is against a fundamental principle of law. A few courts have used this term to refer to more general values rather than specific legislative provisions. For instance, awarding punitive damages in arbitration is considered to be against substantive public policy under many jurisdictions.³⁶⁰ In *ICC Case No. 5946*³⁶¹ the

³⁵⁸ S. Schwebel and S. Lahne, “Public Policy and Arbitral Procedure” 205, in ICCA Congress Series No. 3, (1987), at p.205.

³⁵⁹ ILA Interim Report on Public Policy, at p.17.

³⁶⁰ The United States is a notable exception in this case since it has been confirmed that a claim for punitive damages is arbitrable under the US Federal Law. See *Willis v. Shearson and American Express Inc.* 569 F. Supp. 821 (DCNC, 1982). However, in *Garrity v. Lyle Stuart Inc.*, 40 N.Y.2d 354 (1976) the New York Court of Appeal held that only state judges have the power to award punitive damages (as opposed to private actors). This decision was partially overruled by *Mastrobuono v. Shearson Lehman Hutton, Inc.* 514 U.S. 52 (1995). In the latter decision, the US Federal Supreme Court held that it is not for the court to focus on

arbitration took place in Geneva and was governed by New York law. Although the arbitration was governed by New York law, a claim for punitive damages was refused since it was against Swiss public policy to issue damages beyond compensatory damages as a punishment of the wrongdoer.³⁶²

Another example of a possible violation of a substantive public policy rule can take place in countries applying the Islamic Law/*Sharia* Law. In Saudi Arabia, for instance, an award would be against substantive public policy of the country, if it was issued by an arbitrator who does not hold a university degree in *Sharia* or Law.³⁶³

By and large, any sort of activity that might be considered as *contra bonos mores*, i.e. contrary to good morals, will, most likely, violate substantive public policy of the majority of nations. Accordingly, agreements that would promote activities such as genocide, human trafficking, terrorism, smuggling, piracy, slavery, drug-trading, corruption, bribery and the like, will be considered illegal and unenforceable under many jurisdictions and will definitely violate substantive transnational public policy as well.³⁶⁴

The same applies to any activity or agreement that may be seen by a certain state as a violation of a national interest or be deemed as an act hostile to foreign relations. In the

whether the chosen substantive law by the parties permits the arbitrators to award punitive damages but rather whether the parties have chosen to submit the issue of punitive damages to arbitration. Seeing that this thesis's subject matter is the parties' arbitral autonomy, the author tends to agree with the *Mastrobuono* decision.

³⁶¹ *Final Award in ICC Case No. 5946*, XVI YCA 96, (1991).

³⁶² *Ibid*, at p.113.

³⁶³ Article 14 of the Saudi Law Arbitration (Royal Decree No. M/34 of 16/04/2014). Also see K. Alnowaiser, "The New Arbitration Law and its Impact on Investment in Saudi Arabia", 29(6) Journal of International Arbitration 723, (2012). According to the older Saudi Law of Arbitration, an award made by non-Muslim arbitrators is against substantive public policy of *Sharia* Law. See A. El-Ahdab, "Saudi Arabia Accedes to the New York Convention", 11 Journal of International Arbitration 87, (1994), at p.91, and A. El-Ahdab, "Arbitration in Saudi Arabia under the New Arbitration Act, 1983 and its Implementation Rules of 1985", 3(3) Journal of International Arbitration 27, (1986). Also see Article 20 of the former Saudi Law of Arbitration (Royal Decree No. M/46 of 25/04/1983).

³⁶⁴ See *Soleimany v. Soleimany* [1999] QB 785, and *European Gas Turbines SA v. Westman International Ltd*, 30 September 1993, (1994) Rev. Arb. 359. Also see the OECD (Organization for Economic Co-operation and Development) Convention on Combating the Bribery of Foreign Officials in International Transactions which was created (7 of December 1997 and came into effect on 15 of February 1999) with the purpose of deterring, preventing, and fighting bribery and corruption of foreign public officials not only on a national level but also on an international one.

famous case of *Parsons & Whittemore*³⁶⁵ the United States Court of Appeal refused to consider an award against the Egyptian party as a violation of public policy just because of the existing tension at that time between Egypt and the USA during the 1967 Arab-Israeli Six Day War. In that case the court specified that the award would be refused enforcement only if the conflicting national policy actually prevented the performance of the contract in Egypt, which was not the case.³⁶⁶

II Procedural Public Policy

As for the procedural violations of public policy, they may be more obvious than the substantive ones.³⁶⁷ Procedural public policy mainly relates to the general principles of due process and natural justice. In more specific terms, it exists to protect the parties' rights to equality and fair opportunities to present their cases before an arbitral tribunal. Consequently, breaches of general principles of due process and natural justice in an even more general context will most likely be considered as a violation of procedural public policy (whether domestically, internationally, or transnationally).

A good example of this can be found in the famous *Dutco* case.³⁶⁸ In that case, the French *Cour de Cassation* set aside an ICC interim award for depriving the multiple parties' equal opportunities in the appointing process of the arbitrators. Although the case mainly concerned the issue of consolidation of arbitration procedures between multiple parties and the separate rights of each party to equally choose an arbitrator, the French *Cour de Cassation* decided to set aside the ICC interim award in which the tribunal refused the defendants' objections against the composition of the tribunal. The Court reasoned its

³⁶⁵ *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier RAKTA and Bank of America* 508 F. 2d 969 (2nd Cir. 1974).

³⁶⁶ *Ibid*, at p.974. To the same effect, see *National Oil Corp. v. Libyan Sun Oil Corp.* 733 F.Supp. 800 (Delaware Ct., 1990) where the court mainly stated that the public policy defence should not be used to protect or promote for the vagaries of international politics since that would defeat the benefits of the NY Convention. *Ibid*, at p.819.

³⁶⁷ See S. Schwebel and S. Lahne, "Public Policy and Arbitral Procedure", in ICCA Congress Series No. 3, (1987), at p.205 where it is actually noted that the fundamental requirements of procedural public policy are rarely controversial and more than often obvious.

³⁶⁸ *BKMI Industrienlagen GmbH & Siemens AG v. Dutco Construction, Cour de Cassation (1er Chambre Civile), Pourvoi N° 89-18708 89-18726, 7 Janaury 1992, XVIII YCA 140, (1993).*

decision on the fact that failure to respect the parties' right to equally appoint the arbitrators is against French international public policy stating that "*equality of the parties in the appointment of arbitrators is a matter of public policy which can be waived only after the disputes has arisen.*"³⁶⁹

This case is of particular importance since it targets quite a sensitive issue for arbitrators. That is the importance of striking a balance between attending to the autonomy of the parties and satisfying equality requirements between the parties in appointing the arbitrators. In this particular case the French *Cour de Cassation* has clearly given more regard to the right of the parties to equally appoint their arbitrators over the specific attention to their autonomy.³⁷⁰

Another example of procedural public policy was given in a German case where it was explained that recognition of the award can be denied "*if the arbitral procedure suffers from a grave defect that touches the foundation of the State and economic functions.*"³⁷¹

Other procedural violations of public policy can be manifested, for example, through the lack of impartiality of the arbitral tribunal,³⁷² a tribunal's obvious disregard of the law,³⁷³ and violation of the parties' right to be heard and the right to a fair trial.³⁷⁴

³⁶⁹ *Ibid*, at p.141.

³⁷⁰ See on this particular topic S. Kroll, "*Siemens – Dutco Revisited? Balancing Party Autonomy and Equality of the Parties in the Appointment Process in Multiparty Cases*", (15/10/2010), available on the Kluwer Arbitration Blog at (<http://kluwerarbitrationblog.com/2010/10/15/siemens-dutco-revisited-balancing-party-autonomy-and-equality-of-the-parties-in-the-appointment-process-in-multiparty-cases/>) (last visited on 06/07/2015). Also see the discussion in O. Kazutake, "*Party Autonomy in International Commercial Arbitration: Consolidation of Multiparty and Classwide Arbitration*", 9 Annual Survey of International and Comparative Law 189, (2003), at p.196 and 199-202. Also see C. Seppala, "*Multiparty Arbitrations at Risk in France*", 12 International Financial Law Review 33, (1993).

³⁷¹ *Judgement of 15 of May 1986*, XII YCA 489, (1987), at p.490. Also see *Judgement of 8 of November 2004*, XXXIII YCA 500, (2008), at p.503.

³⁷² See on that particular issue, D. Bishop and L. Reed, "*Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed arbitrators in International Commercial Arbitration*", 14 Arbitration International 395, (1998). Also see Section 6.2.3 of this thesis where the impartiality and independence of the arbitrators is discussed in more details.

³⁷³ This normally takes place when the tribunal incorrectly interprets the substantive law in deciding a case. However, a few jurisdictions rejected this argument since it is insufficient for refusing the enforcement of the award. See, for instance, *Adams v. Cape Industries plc* [1990] Ch. 433, at p.569 (CA), and *E.g. Andre v. Multitrade*, Cass. Le civ., 23 Feb. 1994 (CA), (1994) Rev. Arb. 83.

³⁷⁴ See, for example, *Judgement of 28 of July 2010*, XXXVI YCA 337, (2011), at para.19, and *Judgement of 24 of November 1993*, XXI YCA 617, (1996). Generally speaking, violations of due process requirements in the arbitral process by one of the parties or the appointed arbitrators are considered violations of procedural public policy. See Section 6.2.1.1 of this thesis.

All matters considered, it is important to understand that each state will attempt to exert control over the arbitral processes taking place on its territory to protect its most fundamental principles of equality and procedural fairness.³⁷⁵ Consequently, these mandatory norms applicable to arbitral procedures will differ from one state to another and could actually differ from one region to another which will result in the existence of different procedural public policies not only nationally, but also regionally, internationally, and transnationally. And so, at this stage it would be essential to understand both the theoretical and practical differences between the general concept of public policy and mandatory rules of law and how both concepts are related/connected to one another in international commercial arbitration.

5.4.2 Mandatory Rules of Law

As it is mentioned before, although arbitration is mainly a consensual process that revolves around the autonomy of the parties, such autonomy is not without limits. States normally try to exert control over this autonomy through a few tools. Besides public policy and non-arbitrability, there is the most debated issue of the application of mandatory rules of law to international commercial arbitration and the ever so argued differences between those rules and public policy. Before analysing such debate, one should first attempt to understand what a mandatory rule of law is.

³⁷⁵ W. Park, “*The Influence of National Legal Systems on International Commercial Arbitration: Recent Developments in English Arbitration Law*”, in T. Carbonneau, “*Resolving Transnational Disputes through International Arbitration*”, (1984), at p.87.

5.4.2.1 Definition

A mandatory rule of law is an imperative provision of law that must be applied notwithstanding any law or rules of law that is/are chosen by the parties or designated by the arbitrators.³⁷⁶ In contract law, for instance, a mandatory rule of law of a certain jurisdiction is applicable by a national court despite the parties' choice of another country's law to govern their contractual relationship.

Another way to understand whether a rule is mandatory or not, is to realise that these rules are not applicable due to the ultimate choice of the relevant conflict of laws rule, but rather because a certain law has defined its sphere to be as such.³⁷⁷ In other words, these mandatory rules of law demand that they be applied even if the body of law to which they belong is not applicable according to the relevant conflict of laws' rule.³⁷⁸

One can also define mandatory rules of law from a different perspective that mainly differentiate between the applications of mandatory rules of law according to who has to apply these rules.

If one, for instance, is looking at a private parties' agreement, mandatory rules of law would basically be those rules which cannot be contracted around by the parties' exercise of their autonomy in their contractual relationship. For that, some commentators explain that mandatory rules of law "*arise outside the contract, apply regardless of what the parties agree to, and are typically designed to protect public interests that the state will not allow the parties to waive.*"³⁷⁹

³⁷⁶ M. Blessing, "Mandatory Rules of Law versus Party Autonomy in International Arbitration", 14 Journal of International Arbitration 23, (1997), at. p.23.

³⁷⁷ A. Barraclough and J. Waincymer, "Mandatory Rules of Law in International Commercial Arbitration", 6 Melbourne Journal of International Law 205, (2005), at p.206.

³⁷⁸ P. Mayer, "Mandatory Rules of Law in International Arbitration", 2 Arbitration International 274, (1986), at p.275.

³⁷⁹ D. Donovan and A. Greenwalt, "Mitsubishi after Twenty Years: Mandatory Rules before Courts and International Arbitrators", in J. Lew and L. Mistelis, "Pervasive Problems in International Arbitration", (2006), p.13.

On the other hand, if one is looking at a national court, a mandatory rule of law would be that which the court must apply even if that court would ordinarily apply some other law under the operation of its own conflict of laws rules.³⁸⁰

Regardless, using the term ‘mandatory rules of law’ liberally is not quite accurate, at least for the purposes of this research. The term, in this loose form, fails to show whether it refers to domestic mandatory rules of law or international ones. The difference between both domestic and international mandatory rules of law is simple but of great importance. Domestic mandatory rules of law are those which the parties cannot escape by contracting out of them in a purely domestic contractual relationship, but in an international setting can be avoided/excluded by choice of law provisions.³⁸¹ International mandatory rules, on the other hand, cannot be escaped of by the parties’ choice of law provisions. It is, however, important to understand that, just as in international public policy, international mandatory rules of law do not automatically hold a supranational character, they are still rules set by states to protect a certain international interest of that state in its international relationships. The importance of the distinction has motivated some authors to specifically use the term ‘international mandatory rules of law’.³⁸² Regardless, this thesis will continue to refer to these rules as mandatory rules of law for reasons of practicality and ease of use. However, in the context of this research and for its purposes, the term ‘mandatory rules of law’ will always refer to their use and effect in an international setting unless explicitly indicated otherwise.

³⁸⁰ G. Bermann, “*Mandatory Rules of Law in International Arbitration*”, 18 *American Review of International Arbitration* 1, (2007), at p.1-2.

³⁸¹ N. Voser, “*Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration*”, 7 *American Review of International Arbitration* 319, (1996), at p.323.

³⁸² H. Noan, “*Choice of Law Problems in International Commercial Arbitration*”, (1992), at p.92. Also see A. Bucher and P. Tschanz, “*International Arbitration in Switzerland*”, (1986), at p.102-105.

Finally, examples of mandatory rules of law may include antitrust, securities, anticorruption, labor, or any statutory protections (such as the Hague Visby Rules, for instance).³⁸³

5.4.2.2 Mandatory Rules of Law in International Commercial Arbitration

For a few reasons, however, the role of mandatory rules of law in international commercial arbitration can create certain complications. First, the role of mandatory rules of law in international arbitration could put the interest of a state and that of a private party in direct conflict. Moreover, it can create conflicts between the interests of a state and another state. Both issues will most likely fall into the hands of the arbitral tribunal to decide upon and resolve. Whether an arbitrator will show alliance to the state or to the private parties, who hired him/her, will depend eventually on how arbitration itself is seen and classified.³⁸⁴ Another view of arbitration that was created as a compromise between both previously mentioned views recognizes arbitration to be a hybrid of these two extremes.³⁸⁵

However, this hybrid theory of what arbitration is does not really answer the question of who an arbitral tribunal should lay its alliance with, the state or the private parties? Or at least, when does it form alliance with each? As a matter of fact, this very theory may actually extenuate the reason why the role of mandatory rules of law “*must be seen as one of the most burning issues in international commerce and trade, as it is in the daily international arbitration practice.*”³⁸⁶ This is explained by the simple fact that an international arbitrator is neither a guardian of the interests of a foreign state, nor a servant of the private parties who hired him/her.

³⁸³ Born II, at p.2635.

³⁸⁴ On the legal nature of arbitration, see Section 2.2 of this thesis.

³⁸⁵ A. Barraclough and J. Waincymer, “*Mandatory Rules of Law in International Commercial Arbitration*”, 6 Melbourne Journal of International Law 205, (2005), at p.207.

³⁸⁶ M. Blessing, “*The Impact of Extraterritorial Application of Mandatory Rules of Law on International Contract*”, (1999), at p.70.

Accordingly, it is not acceptable to expect the arbitrator to ignore mandatory rules of law in favor of responding positively to the parties' autonomy and expectations, nor is it acceptable to ignore the agreement of the parties to apply mandatory rules of law of a foreign country.

The same problem, also, occurs when two or more states counter a conflict of interests when applying mandatory rules of law in international arbitration. This still is important even in international commercial arbitration where disputes occur between two international private parties or the latter and a state. The justification for this is that more than likely, in any international arbitration, various jurisdictions and national laws will get involved in the arbitral process. As it is explained below, even the least complicated international arbitration may still entail the involvement of four different national laws.³⁸⁷ Enforcement of the arbitration agreement and that of the arbitral award may be sought, for example, in various countries. The law of the seat of the arbitration may be sought after for all sorts of procedural issues such as court supervision or interim measures. Even the substantive law of the contract may be viewed by more than one national court if, for instance, the contract is partially or wholly performed in various jurisdictions. Again, when a conflict between the mandatory rules of any of the involved national laws occurs in an international arbitration, it is up to the arbitral tribunal to solve these issues, and again this will rely greatly on how the arbitration itself is considered, i.e. whether it is of a contractual, a jurisdictional nature, or a hybrid of both.

In this thesis's view, the solution to this problem will, to a great extent, rely on the circumstances of each case. However, although it should be the arbitrators' main priority to identify and apply the agreement of the parties, it is very important that a great deal of attention is given, generally, to public policy principles and, specifically, to the mandatory rules of law that are applicable to a certain arbitration. This is mainly because a slight

³⁸⁷ See section 7.1 of this thesis.

disregard of these rules may result in having an unenforceable arbitration agreement or, worse, an unenforceable arbitral award.

5.4.3 Mandatory Rules of Law and Public Policy

Finally, and most importantly, the last issue this section analyzes is the theoretical and practical distinction and interrelation between mandatory rules of law and public policy. This section relies on three aspects in differentiating between the two. The first is of the least importance and relies on terminology. The second is of the most important and relies on the effect each produces when applied in international commercial arbitration. The third may be the most argumentative and relies on the values behind the implementation of each.

5.4.3.1 Terminology

As for the terminology, it seems to this thesis's understanding that the main terminological distinction made between public policy (*lois d'ordre public*) and mandatory rules of law (*lois de police* or, more accurately, *lois d'application immediate*) was first created by French private international law.³⁸⁸ Although it is assumed that the term *lois de police* describes the same phenomenon as the term *lois d'application immediate* and that both terms are usually used interchangeably, one commentator explains that “*the former sets forward the mechanism of application of the rule while the latter stresses its function*”.³⁸⁹ Regardless, the term *lois de police* is the most used by commentators and authorities to refer to mandatory rules of law.³⁹⁰

³⁸⁸ See G. Bermann, “Mandatory Rules of Law in International Arbitration”, 18 American Review of International Arbitration 1, (2007), at p.4.

³⁸⁹ T. Guedj, “The Theory of the *Lois de Police*, A Functional Trend in Continental Private International Law – A Comparative Analysis With Modern American Theories”, (4)39 American Journal of Comparative Law 661, (1991), at p.664.

³⁹⁰ This term is originally used in Article 3(1) of the 1804 Napoleonic Code (*CODE CIVIL DES FRANCIAS*). Which can be viewed at (<http://gallica.bnf.fr/ark:/12148/bpt6k1061517/f2.image>) (last visited on 06/07/2015).

Obviously, terminology is not the main concern at this point. It is only made for reasons of clarifications. The most important distinction between both concepts is their effect when applied in international commercial arbitration specifically.

5.4.3.2 Effect

Generally speaking, rules of law may either have a positive or a negative effect, as long as their application is not complimentary (obligatory), i.e. their application does not depend on whether the parties choose not to ignore/avoid them.

Rules of public policy are known to generally apply in international commercial arbitration with a negative effect. This negative effect creates an imposition on the tribunal to refuse the application of a certain law or a certain rule to the contract/agreement in hand because the content of that law or rule conflicts with the main principles and values of the forum, or with transnational public policy.³⁹¹ This negative effect functions, accordingly, as a safety net that protects the forum's legal system from the application of any foreign rules that may produce intolerable results according to this forum's most valued principles and traditions.³⁹² In other words, this negative effect of public policy rules functions as a corrective mechanism of the automatic application of a foreign rule. Such application relies on an objective method of abstract connecting factors that have the least, if none at all, regard to the consequences of the application of that foreign rule on a forum's standards and most valued principles. It is important to understand that it is not the foreign rule itself that is refused, it is rather the consequences of applying that rule that is feared of as it might lead to conflicting or ignoring the forum's most valued principles.

In order to understand how public policy affects a particular case, let us consider a scenario where an arbitral tribunal (or a judge for that matter) is faced with a foreign element in a case at hand. The first reaction, in this situation, would be to look into the

³⁹¹ C. Kessedjian, "Mandatory Rules of Law in International Arbitration: What are Mandatory Rules?", 18 American Review of International Arbitration 147, (2007), at p.152.

³⁹² See F. Masconi, "Exceptions to the Operation of Choice of Law Rules", (1989), pp.13-217.#

forum's conflict of laws rules to determine the applicable substantive law. That is, of course, if the parties have not already chosen one explicitly in their agreement.³⁹³ When a conflict of laws rule designates a law other than that of the forum, the tribunal/court has to examine whether the application of that foreign rule would not violate any fundamental legal principles, i.e. public policy rules of that forum. If the application of this foreign rule on the particular case in hand is found to violate such principles, then the tribunal must refuse the application of this rule and that here is the negative effect of applying a certain rule of law.³⁹⁴

Mandatory rules of law, on the other hand, impose a positive effect on the tribunal to apply these rules directly without the need to conduct a conflict of laws analysis to determine the law applicable to the contract/agreement with a foreign element. And that is the main difference between public policy and mandatory rules of law. Unlike the negative effect, the positive effect of mandatory rules of law compels a tribunal to apply this rule whether it is part of the proper law of the case or not. This is not only due to the nature of these rules, but is rather an implication of the goals and purposes that pushed a legislator to implement this rule in the first place. The positive effect, in that sense, operates to ensure that certain rules are identified as compulsory and, accordingly, are applied to a particular relationship irrespective of the law governing this relationship.³⁹⁵

Accordingly, parties may be able to avoid the application of an undesired rule of public policy by contracting around these rules, for instance, through an appropriate choice of an applicable law or a seat. This escape mechanism, however, would not allow the parties to avoid the application of mandatory rules of law whenever the law to which these

³⁹³ See Section 7.2 of this thesis.

³⁹⁴ A. Zhilsov, "Mandatory and Public Policy Rules in International Commercial Arbitration", (1)42 Netherlands International Law Review 81, (1995), at p.96.

³⁹⁵ Some commentators, however, believe that public policy also holds a positive effect to its rules that functions in the same manners mandatory rules do. See, for example, F. Masconi, "Exceptions to the Operation of Choice of Law Rules", (1989), at p.217, and R.P. van Rooij and M. Polak, "Private International Law in the Netherlands", (1987), at p.237. This thesis respectively disagrees with this approach since it is believed to be the main (if not the only) reason why both concepts are often confused with one another and why it has been considered extremely difficult to attempt to differentiate between the two concepts.

rules belong is applicable or somehow connected to the case. To give an example, in Saudi Arabia an award would be against substantive public policy of the country, if it was issued by an arbitrator who does not hold a university degree in *Sharia* or Law.³⁹⁶ If the parties wish to avoid the application of this rule, all they have to do is to avoid choosing Saudi law as the applicable law or avoid having Saudi Arabia as the seat of arbitration.³⁹⁷ An international mandatory rule on a statutory protection, for example, cannot be contracted around by the parties or avoided as long as they somehow relate to their case.

5.4.3.3 Values

This section is presumed to be the most argumentative distinction between public policy rules and mandatory rules of law since it creates much confusion and is possibly the most difficult to identify. It does not take a lot of analysis to figure out that both concepts have much in common. Some commentators have even gone so far that they understand mandatory rules of law only to be part of public policy stating that “*every public policy rule is mandatory, but not every mandatory rule forms part of public policy*”³⁹⁸ and that “*Mandatory rules of law are a matter of public policy (ordre public), and moreover reflect a public policy so commanding that they must be applied even if the general body of law to which they belong is not competent by application of the relevant rule of conflict of laws.*”³⁹⁹ Others are of the opinion that such distinction is not necessary in practice.⁴⁰⁰

³⁹⁶ Article 14 of the Saudi Law Arbitration (Royal Decree No. M/34 of 16/04/2014).

³⁹⁷ Having said that, it is essential to mention that, while the parties can avoid the application of public policy rules by choosing an appropriate seat or applicable law, they will not be able to avoid the application of other certain public policy rules. That is to say, in an international arbitration, there will always be public policy rules which application cannot be avoided, such as public policy rules of the seat (if the parties have not chosen a seat themselves), and/or public policy rules of the enforcement forum.

³⁹⁸ A. Sheppard, “*Interim ILA Report on Public Policy as a Bar to Enforcement of International Commercial Arbitration*”, (2)19 Arbitration International 217, (2003), at p.231. This thesis respectively disagrees with the first part of this statement for the reasons mentioned above, i.e. the distinction between public policy and mandatory rules of law according to the (negative/positive) effect produced by each. It would be misleading to assume that every public policy rule is mandatory unless, of course, the term ‘mandatory’ is only used as an adjective but not to indicate that every public policy rule is a mandatory rule. However, from the context of the previous statement, this is quite doubtful since the second half clearly indicates that the author was referring to mandatory rules of law rather than a mere use of an adjective.

³⁹⁹ P. Mayer, “*Mandatory Rules of Law in International Arbitration*”, 2 Arbitration International 274, (1986), at p.275.

This thesis finds statements as such to neither be accurate nor correct and, therefore, argues that there is a difference in substance between the two concepts, i.e. there is an important difference between the values protected by each concept and, consequently, the distinction between these two concepts should be clearly identified and acknowledged.

As it has been explained before, public policy can be described as a defense technique employed by the state (or a number of states in the case of transnational public policy) to protect its most fundamental legal principles by refusing the application of any foreign rule that might risk violating these principles/values.

Mandatory rules of law, on the other hand, represent a very specific concrete interest of a state. This interest does not necessarily reflect a fundamental principle of public policy, *but* it could possibly do.⁴⁰¹ One commentator clarifies the difference in substance between both concepts very elegantly by explaining that the notions of public policy and mandatory rules of law are used by a state to protect or represent different concerns/interests of that state.⁴⁰² He specifies that the public policy mechanism is used by a state to protect its most fundamental principles and moral values of justice, while mandatory rules of law are used to ensure the application of the state's administrative-related activities such as social welfare, safeguarding economic order, state's supervision over certain private activities such as insurance and banking, and so on.⁴⁰³ So, for example, rules of competition laws, blockade or boycott, currency controls, environmental protection laws, and wage-earners and commercial agents' protection laws, are all generally cited as mandatory rules of law.⁴⁰⁴

So, there is generally a difference in the values protected by public policy and those represented by mandatory rules of law. There is no denying to the fact that *sometimes*

⁴⁰⁰ C. Kessedjian, "Mandatory Rules of Law in International Arbitration: What are Mandatory Rules?", 18 American Review of International Arbitration 147, (2007), at p.152-153.

⁴⁰¹ A. Zhilsov, "Mandatory and Public Policy Rules in International Commercial Arbitration", (1)42 Netherlands International Law Review 81, (1995), at p.101.

⁴⁰² F. Vischer, "General Course on Private International Law", (1993), at p.165.

⁴⁰³ *Ibid.*

⁴⁰⁴ P. Mayer, "Mandatory Rules of Law in International Arbitration", 2 Arbitration International 274, (1986), at p.275.

mandatory rules of law express a public policy principle. The complication here, however, lies in the difficulty of categorizing when exactly a mandatory rule does so and when it simply represents a very specific interest/policy of the state that is not really classified as a matter of public policy! In other words, is it possible that this interest be of vital importance to the state of its origin and, hence, fall under public policy frame? One commentator suggests that such reasoning is better avoided since it tends to expand the public policy defense which in itself goes against the general tendency in today's legal practice to restrict resort to this device.⁴⁰⁵ He also adds that this method of categorizing whether a rule is created because its source is a matter of public policy or not, is not scientifically accurate.⁴⁰⁶ This thesis could not agree more. This is particularly true when one realizes that *“only formalistic reasons can explain the strict categorization between mandatory norms of public policy nature and imperative norms per se.”*⁴⁰⁷

5.4.4 Comments

And so, to identify clearly the main differences between public policy and mandatory rules of law, the following points must be acknowledged:

- The differences between public policy and mandatory rules of law are not just terminological. They, also, differ in their logic, scheme of application, as well as practical consequences.
- Public policy generally exists to protect a state's most valued principles and moral values in justice against the possible violation of an applicable foreign rule. Mandatory rules of law, in turn, represent a very specific/concrete policy of which a state needs to maintain applicable under any circumstances whenever the forum's law is applicable or connected somehow to a case. Accordingly, mandatory rules of

⁴⁰⁵ A. Zhilsov, “Mandatory and Public Policy Rules in International Commercial Arbitration”, (1)42 Netherlands International Law Review 81, (1995), at p.102.

⁴⁰⁶ *Ibid.*

⁴⁰⁷ G. Naon, “Public Policy and International Commercial Arbitration: The Argentine Perspective”, 3(2) Journal of International Arbitration 7, (1986), at p.10.

law apply unconditionally whenever a relationship falls under its scope whether it includes a foreign element or simply concerns the *lex fori*.

- Based on the above differentiation, mandatory rules of law are considered to be “part of the selection process while ‘ordre public’ is a process of rejection.”⁴⁰⁸
- A case with a foreign element involved will always imply the prior application of a conflict of laws rule, for the judge or the arbitral tribunal, to make sure that the new foreign rules applicable to the case do not violate any public policy rule. If it does, the application of this foreign rule must be rejected. Mandatory rules of law, on the other hand, do not require the preliminary analysis of conflict rules. They apply directly and automatically whether the case involves a foreign element or not and irrespective of the parties implicit or explicit agreement. This has led some authors to claim that the application of mandatory rules of law simply expresses indifference to foreign law.⁴⁰⁹

For all the above reasons, this thesis believes that there are considerable differences between public policy and mandatory rules of law, and that these differences must be identified, acknowledged, and clearly classified for both academic and practical reasons.

To begin with, seeing that there is a notable lack of attempts to cover and examine this issue from both theoretical and practical angles,⁴¹⁰ it is important to analyze this topic and try to understand it clearly. This is of a specific importance in the field of international commercial arbitration since it is given that this practice has no forum. In other words, an arbitrator has no legal order to which international arbitration will be subject. If anything, the arbitrator in an international arbitration may need to examine the existence of mandatory rules of law and rules of public policy under several legal systems all of which

⁴⁰⁸ D. Jackson, “Mandatory Rules and Rules of ‘Ordre Public’”, in P. North, “Contract Conflicts, The EEC Convention on the law Applicable to Contractual Obligations. A Comparative Study”, (1982), at p.62.

⁴⁰⁹ T. Guedj, “The Theory of the Lois de Police, A Functional Trend in Continental Private International Law – A Comparative Analysis With Modern American Theories”, (4)39 American Journal of Comparative Law 661, (1991), at p.66, fn. 27

⁴¹⁰ A. Barraclough and J. Waincymer, “Mandatory Rules of Law in International Commercial Arbitration”, 6 Melbourne Journal of International Law 205, (2005), at p.208.

are connected to the case at hand. And so, for an arbitral tribunal in an international arbitration, nothing really constitutes a foreign rule because there is no forum to begin with. Still, a tribunal is confined to apply any mandatory rule connected to the arbitration and refuse the application of any rule that violates a public policy rule of a certain applicable law to the arbitration, or any transnational public policy rule. Accordingly, depending on whether an arbitrator is capable of making the distinction between public policy and mandatory rules of law, he/she can either enforce a mandatory rule, or simply refuse the application of a rule that violates a certain connected public policy. Any confusion of the nature of both distinct concepts can easily lead to miscellaneous annulments and refusals of recognition of international arbitration agreements and arbitral awards.

This is all not just theoretical pessimism. As a matter of fact, mandatory rules of law issues have been said to arise in the practice of international arbitration in over 50 percent of cases.⁴¹¹ This is a natural implication seeing that international commercial arbitration is becoming the most common form of dispute resolution in the international commercial community. It is claimed that almost 90% of international contracts nowadays include arbitration clauses.⁴¹² This expanded role of arbitration has forced different legal systems that are trying to protect certain policies and interests from the parties' ability (and privilege) of contracting around them to seek their compulsory application through implementing more mandatory rules of law.⁴¹³

However, the most important value behind acknowledging and understanding these differences for this thesis is the possibility that each concept represents a different policy or interest of a state. One rule could represent a fundamental value of a state and another could simply be of an essential administrative background. If the parties and the arbitrators

⁴¹¹ M. Blessing, "Mandatory Rules of Law versus Party Autonomy in International Arbitration", 14 Journal of International Arbitration 23, (1997), at p.24.

⁴¹² A. Guzman, "Arbitrator Liability: Reconciling Arbitration and Mandatory Rules", 49(5) Duke Law Journal 1279, (2000), at p.1281.

⁴¹³ *Ibid*, at p.1282.

are well aware of such distinction, then at least the arbitrators will know exactly where and how to identify each concept and, hence, how to respond accordingly to each. In other words, there will not be any hidden bombs. If, on the other hands, both concepts are confused to be part of one another (mandatory rules being part of public policy) an arbitrator could possibly overlook the existence of an important mandatory rule that does not represent a public order value. This could lead to invalid arbitral awards.

5.5 Concluding Remarks

To sum up, one can definitely acknowledge the existence and effect of the above mentioned restricting factors over parties' autonomy in international commercial arbitration. However, minimizing the restrictive effect of these factors is effortlessly achievable once the parties are sufficiently aware of their existence and the boundaries these factors generally create over parties' autonomy. Regardless, outside the considerably narrow frame of these restrictions, business parties enjoy a significant amount of freedom in international arbitration through which they can perfectly tailor their arbitral settlement to suit the needs and circumstances of their relationship and dispute. The role of parties' autonomy in international arbitration is discussed, accordingly, in the following two chapters.

6 Chapter VI: Role of Parties' Autonomy in the Making of International Arbitration Agreements

One of the core goals of this thesis is to promote the exercise of parties' arbitral autonomy in international commercial arbitration. The importance of parties' actively engaging in the drafting of their international arbitration agreement cannot be over-emphasized. As one commentator warns,

*[t]o all those whose responsibilities include the drafting of arbitration clauses: please express yourselves with at least a minimum of clarity and ensure that you are well acquainted with arbitral institutions. How much more prudent it is to seek the advice of a specialist rather than run the risk of making crude mistakes that can land one in lengthy costly procedures before the arbitration proper has even begun.*⁴¹⁴

Therefore, the clarity and preciseness of the parties' choices are just as important as making them in the first place. All the choices made by the parties in the drafting of their arbitration agreement can drastically influence the style, length, complexity, costs and efficiency of their arbitral settlement. It can, furthermore, determine the level of predictability of the outcome of their settlement as well as the likelihood of the recognition and enforcement of this outcome later on. More importantly, choices and general behaviours of the parties at the negotiation phase of their contractual agreement will be significantly relied upon where there is any attempt, whether before a national court or an arbitral tribunal, to find out what the actual intentions of the parties are/were.

⁴¹⁴ A. Beyly, "The Manager and Arbitration", 3 Journal of International Arbitration 7, (1986), at p.9.

Accordingly, this chapter aims at addressing the main aspects through which parties can and should exercise their autonomy. At the same time, this chapter will analyse the importance behind making certain choices in the arbitration agreement as well as the practical techniques to approach these choices.

As one of the most experienced arbitrators/practitioners in international commercial (and investment) arbitration, Gary Born suggests that a safe formula to draft an arbitration agreement between the parties should include the following elements:

*All disputes, claims, controversies, and disagreements relating to or arising out of this Agreement (including the formation, existence, validity, enforceability, performance, or termination of this Agreement), or the subject matter of this Agreement, shall be finally resolved by arbitration [under the – Rules] by [three arbitrators] [one arbitrator]. The seat of the arbitration shall be [Paris] [London, England] [New York/Washington]. The language of the arbitration shall be English.*⁴¹⁵

From analysing the above formula, one can gather that the following aspects are essential to any international arbitral settlement. These are the choice of laws/rules applicable to the arbitration,⁴¹⁶ the choice of the arbitrators,⁴¹⁷ the choice of the seat of arbitration,⁴¹⁸ and finally, and least importantly, the language of the arbitration.⁴¹⁹ Accordingly, this chapter will examine and analyse the choices of the arbitration seat, the arbitrators, and the language of the arbitration, while Chapter VII will be dedicated to the choice of law(s).

⁴¹⁵ Born I, at p.210.

⁴¹⁶ See Chapter VII of this thesis.

⁴¹⁷ See Section 6.2 of this thesis.

⁴¹⁸ See Section 6.1 of this thesis.

⁴¹⁹ See Section 6.3 of this thesis.

6.1 Seat of Arbitration

The choice of the arbitral seat during the negotiation of any international arbitration agreement is perhaps one of the most overlooked influential aspects over the course of the arbitral procedures.⁴²⁰ As explained below, the importance of a wise choice of an arbitral seat generally has two aspects, one of logistical convenience and the other is of a legal effect. The logistical convenience mainly relates to issues of technical support, cost, and practical facilities in general. The legal effect of the choice of an arbitral seat, however, can very much influence the procedures followed in the arbitral process, the law applicable to the arbitration agreement, and other legal aspects such as the interactions between national courts and the arbitral tribunal. Moreover, any possible grounds for setting aside the award will be sought under the law of the seat of arbitration.⁴²¹

The main problem manifests during the negotiations of the arbitration agreement where parties may unwisely fail to assign a place for their arbitration or, worse, choose one recklessly.

This section examines two aspects of the choice of an arbitral seat in relation to the autonomy of the parties. The first looks into the reasons that justify the importance of a wise choice of a seat, while the second approaches the general guidelines which a reasonable commercial party should consider while making that decision.

However, before addressing the above aspects, it is important to begin with identifying the meaning of a ‘seat of arbitration’ as well as examining how such freedom of choosing one is regulated internationally and nationally.

⁴²⁰ N. Rubins, “*The Arbitral Seat is no Fiction: A Brief Reply to Tastyu Nakamura’s Commentary*”, 16(1) Mealey’s International Arbitration Report 23, (2001), at p.27.

⁴²¹ *Colombiana de Vias Ferreas (Ferrovias) (Colombia) v. Drummond Ltd (US)*, Judgement of 22 April (2004), in XXIX YCA 643, (2004), at p.654-655.

6.1.1 Definition

In defining the meaning of the place or the seat of arbitration, the majority of authorities, both case-law and commentary, confirm that the concept of a seat of arbitration is of a legal construct as opposed to a purely geographical location.⁴²² For example, Section 3 of the 1996 English Arbitration Act provides that this concept “*means the juridical seat of the arbitration*” designated by the parties, or by the arbitral tribunal or arbitral institution on their behalf.

Identifying the concept of the seat by saying that it is a purely legal notion basically affiliates the seat with the legal system and the arbitration law of that place and it is also an essential indication of where the award will be made (thus, that award will need to comply with the law of that place in order for it to be recognized and enforced).⁴²³ In practice, however, the seat of arbitration (with its legal effect) will be the location/country selected by the parties (or another authority on their behalf) as the geographical place of arbitration.⁴²⁴

Regardless, as a legal concept, the seat of arbitration is identified entirely by reference to the parties’ agreement and not by the geographical location of the arbitration (for example, locations of hearings and meetings). For that, many arbitration provisions have differentiated between the seat of arbitration and the geographical location of arbitration.⁴²⁵ As a result, it is completely acceptable for the tribunal and the parties to conduct meetings and hearings in different locations/countries without that causing a

⁴²² See, for example, *Dubai Islamic Bank PJSC v. Paymentech Merchant Services Inc.*, [2001] 1 All ER (Comm) 514, *Karaha Bodas Co. LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, [2003] HKCFI 390 (H.K. Ct. First Instance), *Altain Khuder LLC v. IMC Mining Inc.*, [2011] VSC 1 (Victoria S.Ct.), and *Rizhao Steel Holding Group Co. v. Koolan Iron Ore Pty Ltd*, [2012] WASC 50, (W.A. Ct. App.). For commentaries, see T. Nakamura, “*The Place of Arbitration in International Arbitration – Its Fictitious Nature and Lex Arbitri*”, 15(1) Mealey’s International Arbitration Report 23, (2000), and Born II, at p.2051-2119.

⁴²³ See Section 1-1, Comment [aa] of the Restatement of the Law Third – The U.S. Law of International Commercial Arbitration, (Council Draft No.3, 2011). Also see Article V(1)(a) of the NY Convention, and Section 7.4.1.1 of this thesis.

⁴²⁴ Petrochilos, at p.207.

⁴²⁵ See, for example, Article 20 of the Model law, Articles 16(1) and (2) of the 2014 LCIA Rules, Article 18 of the 2013 SIAC Rules, and Article 18 of the 2010 UNCITRAL Arbitration Rules.

change in the arbitral seat. As a matter of legal practice, the seat of arbitration only changes when the parties explicitly agree to that end.⁴²⁶

Finally, when it comes to the terminology used to refer to this concept, terms such as ‘seat’, ‘venue’, ‘forum’, ‘situs’ and ‘place’ of arbitration have been equally used to refer to the legal localisation of the arbitration procedures in a particular place with possibly the corresponding effect of having the laws of that place determining different legal aspects of the parties’ arbitral settlement.⁴²⁷

To this thesis, there might be relevant importance to the different linguistic terms used in referring to the seat. While all previously mentioned terms practically refer to the same legal concept, the term ‘seat’, for the purpose of protecting the parties’ interests, can prove to be the wisest linguistic choice for the parties’ to use when designating the choice of the seat in their arbitration agreement.⁴²⁸ Other terms such as ‘venue’, ‘situs’, or ‘forum’ are, preferably, to be avoided by the parties since they have much more tendency to connect the legal concept of the seat to its geographical connotation linking the seat rather to the location of the hearings and meetings instead of a legal regime. These terms also tend to confine arbitral meetings and hearings to that specific place. This can cause confusions and would allow misunderstandings especially that hearings and meetings between the parties and the arbitrators can take place in different other locations than that of the seat.⁴²⁹ One commentary actually goes as far as stating that “*an arbitration may take place in its entirety outside the place of arbitration.*”⁴³⁰

⁴²⁶ *PT Gruda Indonesia v. Birgen Air*, [2002] SGCA 12, (Singapore Ct. App.), at para.23.

⁴²⁷ Besides Sections 2 and 3 of the 1996 English Arbitration Act, see Article 176(1) of the Swiss PIL, Article 14 of the 2013 HKIAC Rules (uses the terms ‘seat’ and ‘venue’), and Article 16 of the 2014 LCIA Rules all use the term ‘seat’. On the other hand, Article 1(2) of the Model law, Section 1043 of the German ZPO (uses the term ‘venue’), Article 18(1) of the ICC Rules, Article 13 of the ICDR Rules, and Rule 13 of ICSID Rules all use the term ‘place’.

⁴²⁸ The term ‘place’ of arbitration is also recommended, especially that many international and national arbitration rules refer to the seat using the term ‘place of arbitration’. For example, Article 28 of the Japanese Arbitration Law, Article 5(2)(b)(i) of the 2012 Singapore International Arbitration Act, and Article 39 of the WIPO Rules.

⁴²⁹ This is contemplated by many national and international arbitration rules. See, for example, Article 14(2) of the HKIAC Rules, Article 1043(2) of the German ZPO, and Article 18(2) of the 2012 ICC Rules.

⁴³⁰ G. Kaufmann-Kohler, “*Identifying and Applying the Law Governing the Arbitration Procedure - The Role of the Law of the Place of Arbitration*” 336, in ICCA Congress Series No. 9, (1999), at p.343-344.

In *Shashoua v. Sharma*⁴³¹ the parties concluded a shareholders agreement that was governed by Indian law and included an arbitration clause that provided for ICC arbitration and stated that “*the venue of arbitration shall be London, United Kingdom.*”⁴³² When a dispute arose between the parties, an ICC tribunal was constituted and an award was issued against the defendant. In resisting the enforcement of the award, the defendant argued that English courts had no jurisdiction to grant leave to enforce the award since, to them, India was the actual seat of arbitration because Indian law applied to the shareholders agreement.

This case confirms the sort of confusion that could be caused by referring to the seat using the term ‘venue’. Even though, eventually, the English Court in that case found that parties’ arbitration agreement provided enough evidence that the seat was intended to be in London, such confusion has delayed the enforcement of the award and allowed the defendants to issue court proceedings in India instead of directly arbitrating the disputes in London.⁴³³

Accordingly, the term ‘seat’ avoids the geographical connotation of the place of arbitration, yet implies the possibility of conducting hearings, meetings, and the like, outside the arbitral seat which is a valid option contemplated by the majority of arbitration laws and institutional rules as mentioned above.

6.1.2 Parties’ Autonomy to Select a Seat

To that end, parties’ autonomy to choose their arbitral seat has been, either explicitly or impliedly, provided for by most national and international arbitration rules. The NY Convention has not explicitly provided for the parties’ freedom to selection the arbitral

⁴³¹ [2009] EWHC 957 (Comm).

⁴³² *Ibid.*, at p.957.

⁴³³ To the same effect, also see *Judgment of 3 February 2010*, 2010 SchiedsVZ 336 (Oberlandesgericht Munchen) where the arbitration agreement provided for the arbitral tribunal to meet in Munich. It was later on decided that the seat was, accordingly, not Munich but where the arbitral award was to be made. *Ibid.* Also, see P. Capper, “*When is the ‘Venue’ of an Arbitration its ‘Seat’?*”, (2009), on the Kluwer Arbitration Blog (available at <http://kluwerarbitrationblog.com/blog/2009/11/25/when-is-the-venue-of-an-arbitration-its-seat/>) (last visited 01/10/2015).

seat. However, as was mentioned previously, Article II(1) requires Contracting States to recognize the parties' arbitration agreement and requires that parties' should be referred to arbitration according to their arbitration agreement. In that sense, the obligations imposed under Article II(1) are extended to include any material terms of the parties' arbitration agreement, including the selection of an arbitral seat.⁴³⁴

Article 20(1) of the Model law, on the other hand, explicitly provides for the parties' freedom to designate the place of their arbitration. Failing such agreement, Article 20(1) directs the arbitral tribunal to make that choice but with regards to "*the circumstances of the case, including the convenience of the parties.*"

6.1.3 Importance of Making a Seat Choice

The practical importance of choosing the seat of arbitration is manifested in facilitating hearings and meetings between the parties and the tribunal. A convenient choice of the place of arbitration would also improve upon issues of technical support, accommodation and transportation which will most likely be a matter of concern for the parties, arbitrators, witnesses, and any expert needed for the settlement of the dispute. Although hearings and meetings can be held in different locations than the seat, in practice, it is likely that the parties and the arbitrators will conduct the arbitral settlement at the designated seat. Therefore, the convenience and practicality of the location of a seat can offer a cost-effective settlement and aid accelerating the arbitral process.

Alongside the practicality and convenience of the location of the seat, there are far more important legal aspects to the weight of a wise choice of seat. Most importantly, many international arbitration rules put so much importance on the law of the seat of arbitration. For instance, Article V(1)(d) of the NY Convention provides that recognition

⁴³⁴ Compare that position, however, to the position taken of Article IV(1)(b)(ii) of the European Convention which specifically provides for the freedom of the parties to designate their place of arbitration. An explicit stipulation of the parties' freedom to select the seat is definitely preferable. Nonetheless, Article II(1) of the NY Convention is usually interpreted to accomplish the same effect. See Berg, at p.29-43 and 322-331.

and enforcement of the award may be refused if it is not in accordance with the law of the place where the award was made, which is law of the seat in the majority of cases.⁴³⁵ Therefore, actions to annul the award will almost always be brought before national courts of the seat.

Moreover, in many jurisdictions, the substantive law of the arbitral seat will govern the validity of the arbitration agreement (of course, absent the parties' agreement to an otherwise applicable law).⁴³⁶

Additionally, many jurisdictions adopt a territorial approach in determining the procedural law of an international arbitration seated on its territory. The Model Law is a good example of these jurisdictions. Article 1(2) of the Model Law provides that "*the provisions of this law . . . apply only if the place of arbitration is in the territory of this state.*"

Irrespective of the influence of the Model Law, many jurisdictions' national procedural law applies to govern the procedures of an international arbitration seated on its territory.⁴³⁷ In principle, and always subject to the otherwise agreement of the parties, the procedural law of the seat will govern issues of validity and effect of the arbitration agreement, the constitution of the tribunal, the applicable conflict of laws rules, and other general questions of arbitral procedures.⁴³⁸

Furthermore, national courts of the seat will almost always have the authority to aid an international arbitration taking place on its territory whether by issuing provisional interim measures or assistance with the appointment, challenging, or removal of the

⁴³⁵ See Section 7.4.1.1 of this thesis. Also, to the same effect, see Article 34 and 36 of the Model Law (Section 7.4.1.2 of this thesis).

⁴³⁶ See, for example, Section 48 of the Swedish Arbitration Act. Also see *C v. D* [2007] EWCA Civ 1282 (English Ct. App.), *Final Award in ICC Case No. 14046*, XXXV YCA 241, (2010), and *Citation Infowares Ltd v. Equinox Corp.*, 7 SCC 220, (2009) (Indian S.Ct.). Also see A. Samuel, "The Effect of the Place of Arbitration on the Enforcement of the Agreement to Arbitrate", 8(3) *Arbitration International* 257, (1992).

⁴³⁷ See, for example, Article 1505 of the French Code of Civil Procedures, Section 2 of the 1996 English Arbitration Act, and Article 176(2) of the Swiss PIL. Also see, *JSC Surgutneftegaz v. President and Fellows of Harvard College*, 2005 WL 1863676 (S.D.N.Y.), *aff'd*, 167 F.Appx. 266 (2d Cir. 2006) where the U.S. court explained that "[t]he situs of the arbitration is of critical importance because the law of the jurisdiction in which the arbitration is conducted ordinarily provides the procedural law of the arbitration." *Ibid*, at para.7.

⁴³⁸ K. Iwasaki, "Selection of Situs: Criteria and Priorities", 2 *Arbitration International* 57, (1986), at p.60-61.

arbitrators.⁴³⁹ In other words, the role of the national courts of the seat can possibly have a significant influence on the progress and efficiency of the arbitral process as well as its outcome.

6.1.4 General Criteria in Selecting a Seat

Having established the importance of which the selection of a seat can have on the overall progress of an international arbitral settlement, the following sub-sections aim to present some of the main criteria to which parties should adhere in selecting their seat. The following guidelines should provide the parties with a seat that is of a rather supportive character to their settlement than a frustrating one.

6.1.4.1 Likelihood of Recognition and Enforcement of an Award

To begin with, it is much preferable for the parties to make sure that the country of the seat is a signatory to the NY Convention (or other comparable international instruments that provide for similar pro-arbitration rules). The NY Conventions is ratified by 156 states.⁴⁴⁰ This sort of pervasion means that the acceptance of international arbitration provided by the Convention's goals exists mostly at the jurisdictions that have signed the Convention.⁴⁴¹ Therefore, Contracting States present a much friendlier environment to host international arbitration compared to non-signatories of the Convention. This mean that awards made in a Contracting State are enforceable in 155 other countries. More importantly, the seat will normally be the place where the award is rendered. Consequently, for parties to increase the likelihood of having an enforceable and recognised award, they need to allocate the seat in a Contracting State. Moreover,

⁴³⁹ Born II, at p.1579, 2052-2053, and 2056-2057.

⁴⁴⁰ For a list of all the Contracting States to the NY Convention, see (http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (last visited 01/10/2015).

⁴⁴¹ See Article III of the NY Convention.

Contracting States are obliged by Article II of the Convention to recognize and enforce international arbitration agreements and national courts of these states are obliged, accordingly, to refer parties to arbitration where there is a valid arbitration agreement.

6.1.4.2 National Courts' Attitude at the Seat

Parties and their counsel also need to gain awareness as to the courts' attitude at the seat even if the seat is a signatory to the NY Convention. The attitude of the seat's courts towards international arbitration can drastically alter the effectiveness and efficiency of an arbitral settlement. As one commentary explains,

*If arbitration can be likened to a football game, then the state and courts of the seat are the main referees and organisers of that football game. There is no use having the best players, the best arbitration rules and the best gameplay if the referee does not recognise any goals scored or the organisers do not provide a proper infrastructure or level playing field.*⁴⁴²

It is, therefore, of great significance that the parties select a seat where national courts tend to support, rather than interfere with, the arbitral process. Qualities as such may pose difficulties for the parties to allocate. Therefore, as general indications of arbitration-friendly settings, countries that have adopted the Model law are more likely to have their national courts supporting international arbitration. This is mainly due to the fact that the Model Law includes Articles that encourage national courts to have an ancillary role to international arbitration while prohibiting excessive court intervention at the same time.⁴⁴³

Furthermore, it may be of value to distinguish between the formal legislation adopted by a certain jurisdiction and the actual practice of national courts at this jurisdiction. Both are different in the sense that some jurisdictions may theoretically

⁴⁴² M. Hwang and F. Lee Cheng, "Relevant Considerations in Choosing the Place of Arbitration", 4 Asian International Arbitration Journal 195, (2008), at p.201.

⁴⁴³ For example, Article 5 of the Model Law limits courts' intervention and Article 34 regulates for the exclusive circumstances to set aside the award. Also see, *Mitsui Engineering and Shipbuilding Co. Ltd v. Easton Graham Rush*, [2004] 2 SLR 14.

employ satisfactory legislation, yet the actual practice of national courts does not necessarily cope up with these legislation.

In *PT Perusahaan Dagang Tempo v. PT Roche Indonesia*⁴⁴⁴ the parties entered into distribution agreements, the most recent of which contained a termination clause allowing the parties to terminate upon a six months' notice, as well as an arbitration clause referring parties to arbitration in Jakarta under the Rules of Arbitration of the *Badan Arbitrase Nasional Indonesia* (BANI - Indonesian National Board of Arbitration). In August 1999 the defendant issued a written notice of termination effective on February 2000 to the claimant who had, then, brought an action to the South Jakarta District Court claiming that the defendant could not terminate the agreement without the consent of the other party. The defendant opposed the lawsuit claiming that the court had no jurisdiction and that the parties should be referred to arbitration in Jakarta before BANI. The Court rejected the defendant's objection and accepted jurisdiction on grounds that partial termination was 'an act of tort' which was not arbitrable, hence, fell in the jurisdiction of national courts. The Court explained that only 'technical business issues' were arbitrable and since the dispute only focused of legal issues, it fell into the jurisdiction of the Court.⁴⁴⁵

This is a strong example of national courts' behaviours that should be accorded robust attention when choosing the seat to be avoided. In the above case, the Court has characterised what was clearly a commercial dispute as a tort claim in order to justify its jurisdiction.⁴⁴⁶

⁴⁴⁴ Decision of the District Court of South Jakarta (Pengadilan Negeri Jakarta Selatan) No. 454/Pdt.G/1999/PN.Jak.Sel, 30 May, 2000.

⁴⁴⁵ K. Mills, "Indonesia: the new Arbitration Law of 1999: Indonesia's first comprehensive arbitration law (*Legislative Comment*)", 3(3) International Arbitration Law Review 39, (2000). For similar national courts' behaviours that should be avoided, see *SGS v. Pakistan*, 25 SCMR 1694 ('SGS'), and *Republic of Philippines v. Philippine International Air Terminals Co., Inc.*, [2007] 1 SLR 278 ('PIATCO').

⁴⁴⁶ K. Mills, "Enforcement of Arbitral Awards in Indonesia and Other Issues of Judicial Involvement in Arbitration", 4(3) Transnational Dispute Management 1, (2006), at p.14.

6.1.4.3 Applicable Laws at the Seat

Another important criterion is the procedural and substantive laws at the seat. The law of the seat of arbitration (*lex arbitri*) can have great influence over certain procedural issues in an arbitral settlement as well as the conflict of laws rules applicable to an international arbitration. Moreover, where the parties have chosen a place of arbitration but refrained from choosing explicitly an applicable law, in many situations the *lex arbitri* will apply to their arbitral process.⁴⁴⁷ Accordingly, it is of significant value that the parties have ample knowledge of the law of their chosen seat. It is also particularly important that the parties get acquainted with the mandatory rules of law, principles of public policy, and rules of non-arbitrability of certain disputes at the seat.⁴⁴⁸

In *Dermaajaya Properties Sdn Bhd v. Premium Properties Sdn Bhd and Anor*,⁴⁴⁹ the parties entered into an agreement that contained an arbitration clause referring parties to arbitration in Singapore under the UNCITRAL Arbitration Rules by one arbitrator. A dispute arose between the parties and an arbitrator was appointed to later on issue an interim award against the claimant to deposit a security of 200,000 Singapore Dollars for the respondents' costs. In opposing the award, the claimant appealed to the High Court and contested the arbitrator's jurisdiction to order security for costs under the UNCITRAL Arbitration Rules. These rules did not allow the arbitrator to do so. However, the Model law (which is adopted by Singapore) as well as part II of the International Arbitration Act of Singapore allowed the arbitrator to order security for costs. The Court, contrary to the parties' clear choice of rules in their arbitration agreement, held that:

The Model Law and Pt II applied to the arbitration in question. The inclusion of the UNCITRAL Rules in the agreement did not oust their application. The UNCITRAL Rules did not apply but it was open to the parties to agree that such rules would

⁴⁴⁷ In *Judgement of 12 November 2010*, 2010 NJA 57, (Swedish S.Ct.) the Court held that “[t]he choice of the applicable procedural law normally results from the selection of the place (the seat) of the arbitration”, *Ibid.*, at para.2.

⁴⁴⁸ See Sections 5.2 and 5.4 of this thesis.

⁴⁴⁹ [2002] SGHC 53.

*apply to fill any vacuum in the Model Law and Pt II or to apply such rules on an ad hoc basis.*⁴⁵⁰

Another issue that need to be recognized is whether a national court at a potential seat gives wide or restricted interpretation to the meaning of public policy.⁴⁵¹ While it is safer nowadays to conduct international arbitration in many jurisdictions, some courts may still have an unwise tendency to adopt a wide interpretation of the meaning of public policy. In *Oil and Natural Gas Corp Ltd (ONGS) v. SAW Pipes*,⁴⁵² for example, the Indian Supreme Court held that “*the phrase ‘public policy’ in India used in Section 34 in context is required to be given a wide meaning.*”⁴⁵³

It can also be of great significance if the parties adequately educate themselves with the general principles of the arbitration procedural law of the seat. Certain jurisdictions have implemented very specific rules to the practice of arbitration on its territory. Parties’ neglecting or ignoring complying with some of these rules could render their arbitration agreement and/or award illegal, null, or void. For example, Article 16 of the Chinese 1994 Arbitration Act provides that an arbitration agreement shall contain, among other things, “*a designated arbitration commission.*”⁴⁵⁴ Article 20 of the same Act also provides that if one of the parties decided to challenge the validity of the arbitration agreement before the people’s court, the court shall have jurisdiction to rule.⁴⁵⁵

⁴⁵⁰ [2002] 1 SLR(R) 492, at p.483. This decision was later on, however, overruled by the legislature in Singapore by amending the Singapore International Arbitration Act to allow the parties generally to choose their own rules of procedures in international arbitration taking place in Singapore, as long as it does not contradict any mandatory rules of law at the seat. See the Singapore Ministry of Law Website at (<https://www.mlaw.gov.sg/content/minlaw/en.html>) (last seen 21/07/2015).

⁴⁵¹ See Section 5.4.1 of this thesis.

⁴⁵² (2003) 5 SCC 705.

⁴⁵³ *Ibid.* at para.30. However, as mentioned above, many jurisdictions tend to give a narrow interpretation to the meaning of public policy, especially in the context of international arbitration. See, for example, *Hebei Import and Export Corp v. Polytek Engineering Co Ltd*, [1999] 2 HKC 205, XXIV YCA 652, (1999) where the Hong Kong Court of Final Appeal held that “[i]n order to ensure the attainment of that object without excessive intervention on the part of the courts of enforcement, . . . public policy, have been given a narrow construction.” *Ibid.*, para.58 at p.668. Also see, *Parsons and Whittemore v Societe Generale de l’Industrie du Papier RAKTA and Bank of America*, 508 F.2d 969 (2nd Cir, 1974), and *National Oil Corp v. Libyan Sun Oil Corp*, 733 F.Supp. 800 (1990).

⁴⁵⁴ Articles 10 to 15 of the same Act provide further specific details as to the composition of these commissions.

⁴⁵⁵ A copy of the 1994 Chinese Arbitration Act is available at (http://www.wipo.int/wipolex/en/text.jsp?file_id=182634) (last visited 01/10/2015).

Even more importantly, choice of the arbitral seat will almost always have a great direct or indirect influence on the selection of the arbitrators. Some national arbitral laws will impose capacity, experience, nationality, or even religion requirements.⁴⁵⁶ For example, Article 14(3) of the Saudi Arabian Arbitration Law provides that, among other conditions, an arbitrator shall be “*a holder of at least a university degree in Sharia or law.*”

6.1.4.4 Neutrality of the Seat

In addition to all the above criteria, neutrality of the seat of arbitration should also be a main goal for the parties to seek. Most international commercial arbitral settlements include parties and arbitrators from different jurisdictions. The importance of the neutrality of the seat in a setting as such is highly emphasized, for the least to achieve and maintain equality between the parties.⁴⁵⁷ Defining neutrality in connection to the seat connotes a place that has no strong connection whatsoever to the parties (a place that is not the home jurisdiction of one of the parties, for instance).⁴⁵⁸

However, this approach towards the neutrality of the seat can prove considerable difficulties for the parties. First, finding a seat that has no connection whatsoever to either party can in some cases be impossible. This is particularly accurate in cases where multinational companies with origins of a holding company or the group of companies in too many jurisdictions.⁴⁵⁹ Another complication of an utterly neutral location to the parties is the simple fact that parties may not wish to hold their arbitration in a place to which they find themselves complete strangers.⁴⁶⁰ This thesis, therefore, understands neutrality of the seat to imply a place that can fully offer the parties their rights of due process and equality, or that may not simply pose concerns of impracticality and public safety.

⁴⁵⁶ See, for example, Article 13 of the 1994 China Arbitration Act. See Section 6.2.1 of this thesis.

⁴⁵⁷ P. Lalive, “*On the Neutrality of the Arbitrator and of the Place of Arbitration*”, in “*Swiss Essays on International Arbitration*”, (1984), at p.23.

⁴⁵⁸ *Merrill and Ring Forestry L.P. v. Canada*, 12 December 2007, (a NAFTA arbitration conducted under the 2010 UNCITRAL Arbitration Rules), at para.7.

⁴⁵⁹ A. Sabater, “*When Arbitration Begins without a Seat*”, 27(5) *Journal of International Arbitration* 443, (2010), at p.470.

⁴⁶⁰ M. Hwang and F. Lee Cheng, “*Relevant Considerations in Choosing the Place of Arbitration*”, 4 *Asian International Arbitration Journal* 195, (2008), at p.209.

Having said so, when picking a neutral seat, parties may find it practical to choose a place that they both find its legal and business culture familiar. It may even be quite useful to hire counsel or arbitrators from the same jurisdiction of the seat.⁴⁶¹

Regardless, some of the positive steps to ascertain the neutrality of a seat for both parties would be to allow the arbitral institution (in institutional arbitration) or the arbitral tribunal to make the decision. ICC International Court of Arbitration is one example of an institution that takes all necessary precautions to guarantee that the seat is a neutral state for both parties.⁴⁶² Article 18(1) of the ICC Rules provides that the Court shall choose the place of arbitration, unless parties agreed otherwise. However, in fixing the place of arbitration, the Court cares the most for the neutrality of that place to the dispute between the parties as well as the contents of the file.⁴⁶³

It also may be another practical solution for the parties, in making sure that the seat is neutral, to allow for a floating seat, i.e. the possibility of having the seat at any of multiple choices without having this choice necessarily fixed at the signing of the arbitration agreement.⁴⁶⁴ In *Star Shipping AS v. China National Foreign Trade Transportation Corp (The Star Texas)*,⁴⁶⁵ the arbitration clause provided that “[a]ny dispute arising under the charter is to be referred to arbitration in Beijing or London in defendant’s opinion.”⁴⁶⁶ In this case the Court explained that in the context of international trade, compromises often need to be made by the parties in respect of jurisdiction and this

⁴⁶¹ See, for example, *Ethyl Corp v. Canada*, 28 November 1997, (a NAFTA arbitration conducted under the 2010 UNCITRAL Arbitration Rules), at p.6.

⁴⁶² For more details on the process and policies adopted by the ICC International Court of Arbitration in choosing a seat for the parties, see H. Verbist, “*The Practice of the ICC International Court of Arbitration with regard to the Fixing of the Place of Arbitration*”, 12(3) *Arbitration International* 347, (1996), at p.352-353.

⁴⁶³ See, Article 18 of the 2012 ICC Rules. S. Jarvin, “*The ICC Arbitral Process, Part V: The Place of Arbitration*”, 4 *ICC Bulletin* 2, (1993), at p.21.

⁴⁶⁴ M. Hwang and F. Lee Cheng, “*Relevant Considerations in Choosing the Place of Arbitration*”, 4 *Asian International Arbitration Journal* 195, (2008), at p.200.

⁴⁶⁵ [1993] 2 *Lloyd’s Rep.* 445.

⁴⁶⁶ *Ibid.*, at p.445.

case represented one of these compromises where “[t]he technique adopted is to give the defendant the option to select arbitration in Beijing or London.”⁴⁶⁷

6.1.4.5 Logistical Convenience and Practicality of the Seat

Finally, parties may need to consider the practical convenience of the seat. Logistical and practical convenience of the place of arbitration may not be the most important for the parties since hearings and meetings can be conducted in places completely different from the seat. Still, practical convenience and friendliness of a certain place towards international arbitration can very much be a driving force for selecting a seat.⁴⁶⁸ As one commentary explains, “[t]he folklore of international arbitration is replete with accounts of how places of arbitration were fixed in City X at the insistence of one of the negotiators whose sole reason turned out to be the convenience of airline connections.”⁴⁶⁹

Logistical criteria and practicality of a seat indicate factors that are not relevant to the validity and enforceability of the award or the arbitration agreement, yet may contribute to the effectiveness and efficiency of an international arbitral process by making it more expeditious and cost-efficient.⁴⁷⁰

When identifying whether a particular seat is practically convenient to host an international arbitration, parties should generally consider factors that relate to the ease of access to the seat, origins and cultural familiarity for the parties/counsel/arbitrators, costs of the arbitration in a particular place, the convenience/availability of transportation, administration services, accommodations, and conference rooms.⁴⁷¹

⁴⁶⁷ *Ibid.*, at p.450.

⁴⁶⁸ M. McIlwrath and J. Savage, “*International Arbitration and Mediation: A Practical Guide*”, (2010), at p.33.

⁴⁶⁹ D. Caron and L. Caplan, “*The UNCITRAL Arbitration Rules: A Commentary*”, (2013), at p.89-91.

⁴⁷⁰ A. Sabater, “*When Arbitration Begins without a Seat*”, 27(5) *Journal of International Arbitration* 443, (2010), at p.468.

⁴⁷¹ In a survey carried out by Queen Mary University in 2010, it was found that the aspects of convenience that mattered the most for the parties were “[e]fficiency and promptness of court proceedings is the most important aspect of the convenience of a seat (20%), followed by language (16%), established contacts with specialised lawyers operating at the seat (15%) and the location of the parties (11%). Cultural Familiarity is also an important factor (10%).” at Queen Mary, University of London, “*Choices in International*

Other logistical factors can include the proximity of the disputes. This mainly refers to location of material evidence related to the issues in dispute, or whether a certain property that may be the subject matter of the arbitral award is located at the seat. Other factors could also include past experience on how efficiently international arbitrations were conducted in a particular seat, or whether the predictability of the outcome can be further guaranteed in a particular seat. It is essential for international parties to bear all these factors in mind when choosing a particular seat to enhance the efficiency of their international arbitration. In certain situations, making an impractical choice of the seat can significantly augment the cost and disrupt the pace of the arbitral process.

China, for instance, may not necessarily be a friendly seat of international arbitration. Unfortunately, foreign arbitration institutions cannot operate in China, but even less fortunate, foreign arbitration institutions can hardly ever have the seat of arbitration in China.⁴⁷² As mentioned above, Article 16(3) of the 1994 Chinese Arbitration Act provides that an arbitration agreement must designate an arbitration commission.⁴⁷³ However, Article 10 of the same Act regulates the establishment of these commissions and seems to require that these commissions are to be Chinese.⁴⁷⁴ This means that, if parties are referring to institutional arbitration in China, that institution must be Chinese. Moreover, parties using international institutional arbitration, cannot possibly have their seat in China as their choice of an international institution (such as the ICC, for instance) will not be valid and may render their agreement null, void, or inoperative.

Contrary to the above examples, some jurisdictions have done considerable effort to present themselves as practically-friendly seats of arbitration. For example, the

Arbitration”, (2010), at p.19. (available at <http://www.arbitration.qmul.ac.uk/docs/123290.pdf>) (last visited 23/07/2015).

⁴⁷² J. Tao and C. Von Wunschheim, “*Articles 16 and 18 of the PRC Arbitration Law: The Great Wall of China for Foreign Arbitration Institutions*”, 23 *Arbitration International* 309, (2007), at p.310.

⁴⁷³ The term Arbitration commissions under Article 16 is another term for ‘arbitration institutions’.

⁴⁷⁴ J. Mo, “*Probing the Uniformity of the Arbitration System in the PRC*”, 17(3) *Journal of International Arbitration* 1, (2000), at p.30.

Singapore Ministry of Law exempts arbitrators and counsel conducting international arbitrations seated in Singapore from applying for a work permit.⁴⁷⁵

Another aspect of convenience manifests in administration services such as translation and transcription service. In sustaining the importance of these services, the Singapore International Arbitration Centre, for instance, provides authentication services of any international award rendered in Singapore, regardless of whether it is administered by the SIAC or not.⁴⁷⁶

Other logistical convenience could relate to the ease of entrance to the seat for all disputed parties, lawyers, and arbitrators. This is a particularly important aspect for international arbitration since it probably involves international parties, arbitrators and counsel. Accordingly, if the entry/visa requirements at the seat pose any sort of difficulty or complexity or consume a long time, the arbitral process itself will be affected or prolonged. In the practice of ICC Court of International Arbitration, this aspect is taken into consideration when the Court designates a seat for the parties. As explained in one of the ICC Notes by way of example, “[i]n a dispute between an Iranian party and an Italian party, the Court fixed Paris as the place of arbitration, in light of the fact that Iranian citizens generally can travel more easily to France than to other European countries.”⁴⁷⁷

6.1.4.6 Comments

A clear and wise selection of a seat can bear significant influence on the conduct of the arbitral process as well as the enforceability and recognition of the arbitration agreement and award. The criteria and importance of selecting a wise seat can reveal that the whole process is complex and the decision-making regarding it should not be taken faintly. When making this decision, parties should weigh and measure financial, linguistic, geographical

⁴⁷⁵ M. Hwang and F. Lee Cheng, “*Relevant Considerations in Choosing the Place of Arbitration*”, 4 Asian International Arbitration Journal 195, (2008), at p.210.

⁴⁷⁶ *Ibid*, at p.211.

⁴⁷⁷ H. Verbist, “*The Practice of the ICC International Court of Arbitration with regard to the Fixing of the Place of Arbitration*”, 12(3) Arbitration International 347, (1996), at p.353.

and legal factors. It is, therefore, vital that both parties make a clear selection of a seat during the drafting of their arbitration agreement.⁴⁷⁸ However, making sure that the selected seat is both legally and practically suitable for the needs of the parties' disputes is not the only, or the main, factor that can guarantee or facilitate the parties' international arbitral settlement. Another, even more, important aspect is the selection of the arbitrators. The following section looks into that.

6.2 Selection of the Arbitrators

Just as many other aspects of an international arbitral process, the selection of the arbitrators falls within the domain of the principle of parties' autonomy.⁴⁷⁹ The process of constituting an arbitral tribunal is quite an intrinsic one since, in most international arbitrations, the quality of the arbitral process is only as good as the qualities and skills of the arbitrators conducting it.⁴⁸⁰ It is conceivable that an arbitral process that is carried out skillfully and time-effectively can easily be turned to an extremely lengthy and complicated process in the hands of unprofessional ill-skilled arbitrators.⁴⁸¹

Moreover, the importance of the selection of the arbitrators emanates from the fact that the parties' ability to select their arbitrators is one of the most key attractions in international commercial arbitration.⁴⁸² As discussed below, in a panel of three arbitrators,

⁴⁷⁸ A. Hirsch, "The Place of Arbitration and the Lex Arbitri", 34(3) Journal of Arbitration 43, (1979), at p.48.

⁴⁷⁹ E. Onyema, "Selection of Arbitrators in International Commercial Arbitration", 8(2) International Arbitration Law Review 45, (2005), at p.45.

⁴⁸⁰ Lew and Mistelis, at p.232.

⁴⁸¹ See S. Mentschikoff, "The Significance of Arbitration – A Preliminary Inquiry", 17 Law and Contemporary Problems 698 (1952), where it was stated that "[i]f capable persons are employed in the arbitration process, the result . . . will be good, if they are not, it can be chaotic beyond words and the decision reached can, as a result, have little or nothing to do with the justice of the dispute", at p.706. Also see, for example, *The Award: Final Award in the Arbitration of Andersen v. Andersen*, 10(4) American Review of International Arbitration 451, (1999). This case involved more than 140 members of the Anderson Organisation but was, nevertheless, smoothly resolved with a successful selection of a sole arbitrator. On the other hand, the Arbitration of the Libyan Producers' Agreement took two years to simply screen the appointment of three arbitrators. See, R. Medalie, "The Libyan Producers' Agreement Arbitration: Developing Innovative Procedures in A Complex Multiparty Arbitration", 7(2) Journal of International Arbitration 7, (1990) which was written by the Chairman of the panel of arbitrators of this arbitration (Richard J. Medalie).

⁴⁸² See C. Drahozal and R. Naimark, "Towards a Science of International Arbitration: Collected Empirical Research", (2005) where it was stated that the most frequently cited reason for users to choose arbitration

each party's ability/right to choose an arbitrator can be the single most determinative contribution to the arbitration. Additionally, it is continuously claimed that the parties' right to appoint their own arbitrators is one of the most important reasons behind the continued viability of international commercial arbitration.⁴⁸³ As one experienced practitioner summarizes it: “[j]ust as in real estate, the three key elements are ‘location, location, location,’ so in arbitration the applicable trinity is ‘arbitrator, arbitrator, arbitrator.’”⁴⁸⁴

This section focuses on the importance of the issues that normally concern the parties when selecting their arbitrators. But before one looks into the different particularities that involve the principle of parties' autonomy in the process of selecting the arbitrators, one must briefly investigate the restrictions that may limit this autonomy in that matter.

6.2.1 Restrictions of the Parties' Autonomy to Select the Arbitrators

As it has been demonstrated throughout this thesis, the autonomy of the parties, in general, is not without restrictions. Whether the parties practice their autonomy in arbitration or in the making of any other legal agreement, this autonomy is always subject to a number of restrictions. As it is shown above, in the field of international commercial arbitration, these restrictions are generally limited to incapacity, non-arbitrability, as well as public policy and mandatory rules of law.⁴⁸⁵

was the ability of the parties to choose their arbitrators, at p.25. Also see Queen Mary, University of London, “*Current and Preferred Practices in the Arbitration Process*”, (2012), which showed that 76% of the respondents to the survey preferred parties' selecting unilaterally two arbitrators in a three members tribunal of arbitrators, at p.5.

⁴⁸³ C. Rosenberg, “*The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*”, 29(1) *Arbitration International* 7, (2013), at p.8.

⁴⁸⁴ G. Aksen, “*The Tribunal's Appointment*”, in L. Newman and R. Hill, “*The Leading Guide to International Arbitration*”, (2008), at p.31.

⁴⁸⁵ See Chapter V of this thesis.

This section, however, is not only confined to these restrictions but also examines any other sort of prohibitions that may restrict or detain the choices that the parties can make of their arbitrators. Accordingly, this section is divided into three categories. These are prohibitions related to due process and equality, prohibitions against the number of arbitrators the parties' may agree on, and restrictions on the identities of the arbitrators.

6.2.1.1 Due Process and Equality

On the specific matter of selecting the arbitrators, due process and equality are normally protected through the utilization of minimum requirements as to the independence and impartiality of the party-appointed arbitrators along with other requirements that ensure the proper composition of the tribunal.⁴⁸⁶ These minimum requirements operate as a safeguard to protect the parties and to ensure that eventually the award produced by the arbitrators is enforceable.⁴⁸⁷

Based on that, Article V(1)(d) of the NY Convention addresses the selection of the arbitral tribunal and provides that the composition of the arbitral tribunal must be in accordance with the agreement of the parties or the law of the country where the arbitration is taking place, if such agreement does not exist. Otherwise, the enforceability and recognition of the award might be revoked. Accordingly, incorrect composition of the tribunal is any composition that deviates from the agreement of the parties or the law of the seat (when the parties fail to make such agreement).

Improper composition of the arbitral tribunal may take many forms. The most common example is when one party singly dominates the appointment of the arbitral tribunal. This is normally restricted by many national arbitration legislation as well as

⁴⁸⁶ The independence and impartiality of the arbitrators are discussed below with much more details. See Section 6.2.3 of this thesis.

⁴⁸⁷ T. Landau, "*Composition and Establishment of the Tribunal*", 9 American Review of International Arbitration 45, (1998), at p.47. These requirements also fall within the category of procedural public policy, discussed above. See Section 5.4.1.4.(II) of this thesis.

international arbitration rules.⁴⁸⁸ The reason behind such restriction lies in the fact that it is considered a major violation of due process, equality and procedural fairness in general. Such violation exposes any resulting award to potential annulment and/or non-recognition. Other examples include the appointment of an arbitrator by a different appointing authority than the one agreed upon by the parties, the award of a sole arbitrator instead of the three-member tribunal which the parties agreed on, and the participation of an arbitrator who lacks legal capacity.⁴⁸⁹

Legal capacity is particularly an important requirement since many jurisdictions require, either expressly or impliedly, a person to have legal capacity in order to serve as an arbitrator.⁴⁹⁰ Although priority under Article V(1)(d) is given to the agreement of the parties over the mandatory rules of the law of the seat (when conflicted), it is still highly important to pay attention to the latter. Even when both rules conflict and the tribunal yet makes a decision accordingly, such award will not be recognized at the jurisdiction of the seat. Moreover, where the parties fail to agree on the composition of their tribunal, the mandatory rules of law of the seat must be considered and respected.⁴⁹¹

6.2.1.2 Number of the Arbitrators

As with any other relevant aspect to the selection of the arbitral tribunal, the principle of parties' autonomy is again the center for determining the number of the arbitrators. The general rule under the NY Convention is that the agreement of the parties regarding the composition of the tribunal must be given effect.⁴⁹² The Model law is even more explicit

⁴⁸⁸ See, for example, Article 1028 of the Netherlands Code of Civil Procedure, Section 1034 of the German ZPO, and Article 3 of Annex I of the European Convention Providing a Uniform Law on Arbitration.

⁴⁸⁹ P. Nacimiento, S. Kroll, and K. Bockstiegel, *"Arbitration in Germany: The Model Law in Practice"*, (2007), para.92, at p.545-546.

⁴⁹⁰ See, for example, Article 1680 of the 1988 Belgian Judicial Code, Article 1450 of the French Code of Civil Procedure, Article 1023 of the Netherlands Code of Civil Procedure, Article 812 of the Italian Code of Civil Procedure, and Article 768(2) of the Lebanese New Code of Civil Procedure.

⁴⁹¹ As previously discussed, A mandatory rule of law is an imperative provision of law that must be applied notwithstanding any law or rules of law that is chosen by the parties or designated by the arbitrators. See Section 5.4.2 of this thesis.

⁴⁹² Article V(1)(d) of the NY Convention.

when it comes to the determination of the number of the arbitrators. According to Article 10(1) “*parties are free to determine the number of the arbitrators.*”⁴⁹³

Nevertheless, a few jurisdictions have prohibited composing the arbitral tribunal with an even number of arbitrators.⁴⁹⁴ The rationale behind such prohibition is that even-numbered tribunals may present a risk of a deadlock situation from which the arbitrators cannot make any progress and, eventually, cannot resolve the dispute. Moreover, the fear of producing a pure compromise decision motivates many jurisdictions as well as conventions to prohibit even-numbered tribunals.⁴⁹⁵

Many of these jurisdictions, however, instead of simply invalidating the whole of the arbitration agreement referring the parties to an even number of arbitrators, convert these agreements to an agreement of an odd number of arbitrators by stipulating for the appointment of an additional arbitrator.⁴⁹⁶ Regardless, some jurisdictions may invalidate any arbitration agreement that provides for an even number of arbitrators.⁴⁹⁷

Even though all these concerns are perfectly justifiable, this thesis still finds it extremely difficult and unacceptable to disregard the agreement of the parties by either amending it (from an even to an uneven number of arbitrators) or, worse, invalidating it all together. Obviously, this is mainly because such approach will only lead to the violation of

⁴⁹³ Also see UNCITRAL, “2012 Case Law Digest”.

⁴⁹⁴ See, for example, Article 15(2) of the 1994 Egyptian Arbitration Law, Article 55(1) of the Tunisian Arbitration Code, Article 30 of the Chinese Arbitration Law, and Article 1451 of the French Code of Civil Procedure.

⁴⁹⁵ See Article 37(2)(a) of the ICSID Convention which provides that “[t]he tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree”. Also see Article 5(1) of Annex I of the European Convention Providing a Uniform Law on Arbitration which states that “[t]he tribunal shall be composed of an uneven number of arbitrators. There may be a sole arbitrator”.

⁴⁹⁶ See, for example, Article 1026(3) of the Netherlands Code of Civil Procedure which provides that: “[i]f the parties have agreed on an even number of arbitrators, the arbitrators shall appoint an additional arbitrator who shall act as the chairman of the arbitral tribunal”. Also see Section 586(1) of the Austrian ZPO, Article 809 of the Italian Code of Civil Procedure, and Article 5(2) of Annex I of the European Convention Providing a Uniform Law on Arbitration (“If the arbitration agreement provides for an even number of arbitrators an additional arbitrator shall be appointed”).

⁴⁹⁷ See, for instance, Article 15(2) of the Omani Arbitration Law which provides that “[i]f there is a number of arbitrators, their number shall be odd, failing which the arbitration shall be a nullity.”

one of the most important principles in international arbitration, i.e. the principle of parties' autonomy.⁴⁹⁸

Furthermore, national laws prohibiting arbitration agreements of even-numbered tribunals are in tension with both Article II(3) and Article V(1)(d) of the NY Convention, which clearly require giving effect to the parties' agreements regarding the composition of the arbitral tribunal or any other arbitral procedure including agreements of even-numbered tribunals. Therefore, for the purpose of Article V(1)(d) of the NY Convention, a number of national courts have denied recognition of awards made by a different number of arbitrators than that agreed on originally by the parties.⁴⁹⁹

It might be valid that three-person tribunals are the most common in international commercial arbitration,⁵⁰⁰ however, when the parties agree to a two-person tribunal but three arbitrators issue an award instead, there is a high possibility of rendering an unrecognized award by any contracting state for the purpose of Article V(1)(d).

Moreover, the Model Law, which happens to be one of the most commonly adopted arbitration laws by many countries, expressly permits parties' agreements to even-numbered tribunals. According to the drafters of the Model Law,

*Paragraph (1) [of Article 10] recognizes the parties' freedom to determine the number of the arbitrators. Thus, the choice of any number would be given effect, even in those legal systems which at present require an uneven number.*⁵⁰¹

Furthermore, there have been instances where a two-person tribunal have handled arbitration disputes and have successfully managed to get effective dispute resolution

⁴⁹⁸ See, for example, *Judgment of 13 April 1978, Rederi Aktiebolaget Sally v. Srl Termarea*, IV YCA 294-296, (1979).

⁴⁹⁹ See, for example, *Judgment of 27 February 2008*, XXXV YCA 349, (2010), and *Judgment of 21 May 2008*, SchiedsVZ 195-196 (German Bundesgerichtshof).

⁵⁰⁰ Born II, at p.1669.

⁵⁰¹ U.N. Doc. A/CN.9/264, "Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration", at p.26, found at <http://www.uncitral.org/uncitral/en/commission/sessions/18th.html> (last visited on 24/07/2015).

results. A good example is the IBM-Fujitsu arbitration.⁵⁰² The IBM-Fujitsu arbitration involved a multi-billion intellectual property dispute in which the parties have initially agreed to commence their arbitration with three arbitrators but, eventually, chose to proceed with only the two party-appointed arbitrators.⁵⁰³ The dispute was successfully resolved by these two arbitrators.⁵⁰⁴ Accordingly, it may not be quite reasonable to deny the parties the possibility of solving their dispute by appointing an even-numbered tribunal based on merely a speculation that this tribunal may not be able to reach a decision or may face deadlocks, especially when the parties have made an explicit agreement to that effect. Therefore, invalidating or changing the agreement of the parties regarding the composition of their tribunal can only be reckoned as a violation of their explicit agreement.

Regardless, if one of the two options (to invalidate or change the parties agreement to the number of the arbitrators) must be chosen, then, at least to this thesis, amending the agreement of the parties to an uneven-numbered tribunal is a much better option than completely invalidating it. This is simply because, even though changing the original agreement of the parties is still considered a deviation of their originally expressed will, it is yet not a total disregard of their greater autonomy to arbitrate their disputes. However, invalidating the parties' arbitration agreement based on a fear of the risk of not resolving their dispute, does not only disregard their agreement on the number of the arbitrators, but also their agreement to arbitrate as a whole.

To that end, this thesis finds that the umpire system adopted by several common law jurisdictions can propose a practical/rationale solution to the problems posed by

⁵⁰² *Award in International Business Machines Corp. v Fujitsu Ltd*, AAA Case No. 13T-117-0636-85, 15 September 1987, 4(4) *Journal of International Arbitration* 153, (1987).

⁵⁰³ Originally, parties agreed on a three-membered tribunal in which they would choose two arbitrators who would later on choose the chair. IBM appointed John L. Jones, Fujitsu appointed Robert H. Mnookin, and the two party-appointed arbitrators appointed Donald S. Macdonald who had resigned later on and the parties agreed to arbitrate with only the two party-appointed arbitrators. *Ibid*, at p.153-154.

⁵⁰⁴ Also see, R. Mnookin, "Creating Value through Process Design", 11(1) *Journal of International Arbitration* 125, (1994), and R. Mnookin and J. Greenberg, "Lesson of the IBM-Fujitsu Arbitration: How Disputants Can Work Together to Solve Deeper Conflicts", 4(3) *Dispute Resolution Magazine* 16, (1997-1998). Also see C. Buhring-Uhle, "The IBM-Fujitsu Arbitration: A Landmark in Innovative Dispute Resolution", 2 *American Review of International Arbitration* 113, (1991).

choosing even-numbered tribunals without necessarily violating the agreement of the parties.⁵⁰⁵ According to the umpire system, when the arbitration is conducted by two arbitrators and they fail to reach an agreement on the resolution of the dispute, the umpire then becomes the arbitral tribunal and the two arbitrators only serve as advocates.⁵⁰⁶ Accordingly, unlike a third arbitrator or a chairman, the umpire becomes an active member of the tribunal only when the two party-appointed arbitrators cannot reach a unanimous agreement to resolve the dispute.

To this thesis's perception, the umpire system offers a better compromise to those jurisdictions that prohibit even-numbered tribunals out of fear of compromised awards or deadlocks. Mainly because the umpire system does not lead to invalidating the agreement of the parties, nor does it allow for amendments to their agreement. The umpire arbitrator becomes an arbitrator only when the party-appointed arbitrators fail to agree on a settlement. Accordingly, under this circumstance, the umpire saves the agreement of the parties to arbitrate. In other words, it aids ascertaining the autonomy of the parties rather than frustrating it.⁵⁰⁷

6.2.1.3 Other Limitations on the Freedom to Select the Arbitrators

Besides the previously mentioned restrictions on the parties' freedom to select any arbitrator, a few different types of limitations are imposed by national arbitration laws, international arbitration institutions, and even international arbitration conventions. Some of these limitations are implied in order to safeguard the impartiality of the arbitrators and

⁵⁰⁵ See, for example, Section 21 of the 1996 English Arbitration Act, and Section 5 of the U.S. FAA.

⁵⁰⁶ Born II, at p.1671-1673. Also see, *Citland Ltd v. Kachan Oil Indus. Pvt Ltd*, 2 Lloyd's Rep 274, 277 [1980], (QB) (English High Court).

⁵⁰⁷ It is very important to emphasize that the umpire system does not exist automatically once an even-numbered tribunal fails to agree on a settlement. For this system to exist, just as most aspects of an arbitral process, it needs a pre-existent agreement of the parties to that effect. See, for instance, Section 21(1) of the 1996 English Arbitration Act which provides that: "[w]here the parties have agreed that there is to be an umpire, they are free to agree what the functions of the umpire are to be. . ." Accordingly, where the parties have not agreed to have an umpire when the tribunal reaches a deadlock, an umpire cannot be appointed.

the integrity of the arbitral process, while others are no more than parochial interferences with the parties' freedom to select any person as their arbitrators. Discussed below are a few examples of these limitations.

I Limitations on the Nationality of the Arbitrators

Most of the limitations imposed on the nationality of the arbitrators are often made by either international institutional rules or national arbitration legislation but rarely by international arbitration conventions.⁵⁰⁸ As a matter of fact, most international conventions on arbitration reject the prohibitions against the parties' freedom to agree on any aspect regarding the composition of their tribunal, especially those imposed by national arbitration laws on the nationality of the arbitrators and encourage the parties to freely appoint any arbitrator of any nationality.⁵⁰⁹

The reason behind that lies in the fact that most of the limitations imposed by international arbitration institutions are made for the purpose of transforming arbitration to an internationally neutral device of resolving disputes between parties from different countries. Nationality limitations imposed by institutional rules are normally seen as a result of the agreement of the parties, i.e. their agreement to arbitrate under the rules of a particular arbitration institution that imposes such limitations.⁵¹⁰

On the other hand, limitations on the nationality of the arbitrators by national legislation are seen in a completely different way. This is due to the fact that most of these

⁵⁰⁸ See, for example, Section 3 of the former Saudi Arabian Arbitration Regulation of 1985 which provided that "[t]he arbitrator shall be a Saudi national or Muslim expatriate from the free professional section or others". It is also worth mentioning that one of the very few conventions that actually impose a restriction on the nationality of the arbitrators is the ICSID Convention. Article 39 of the ICSID Convention provides that "[t]he majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute, provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties". But even with the prohibition imposed by the ICSID Convention, the agreement of the parties is still the main determining factor of whether the parties can or cannot appoint an arbitrator of the same nationality as of the parties.

⁵⁰⁹ See, for example, Article III of the European Convention, and Article 2 of the Inter-American Convention.

⁵¹⁰ For example, Article 6(7) of the 2010 UNCITRAL Arbitration Rules provides that "[t]he appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties."

national limitations on the nationality of the arbitrators are set as mandatory rules, i.e. they are applicable regardless of the agreement of the parties and regardless of their chosen mechanism of selecting the arbitrators.⁵¹¹ Accordingly, a few commentators find these prohibitions to be retrograde and in violation with many international arbitration conventions.⁵¹² Moreover, when it comes to the limitations imposed on the nationality of the arbitrators, many institutional rules apply such limitations on to the nationality of the presiding arbitrator but not to those of the co-arbitrators (i.e. the party-appointed arbitrators). For example, Article 13(5) of the 2012 ICC Arbitration rules provides that “[t]he sole arbitrator or the president of the arbitral tribunal shall be of a nationality other than those of the parties.”⁵¹³

II Other Limitations on the Identities of the Arbitrators

Other limitations are sometimes imposed by national arbitration laws on the identities of the arbitrators. For instance, in some countries the arbitrator must be a commercial person or must be a person who has been engaged in the trade sector.⁵¹⁴ Other countries may require that arbitrators must be natural persons (as distinguished from corporations or juridical entities), at least in domestic arbitration.⁵¹⁵ Other jurisdictions may require that for

⁵¹¹ The effect and applicability of mandatory rules of law are discussed in more details in Section 5.4.2 of this thesis.

⁵¹² For example, I. Lee, “*Practice and Predicament: The Nationality of the International Arbitrator*”, 31 Fordham International Law Journal 603, (2007-2008), and Born II, at p.1740- 1741.

⁵¹³ Also see J. Fry, S. Greenberg and F. Maza, “*The Secretariat’s Guide to ICC Arbitration*”, (2012), at p.168, and Article 6(1) of the 2014 LCIA Rules which provides that “[w]here the parties are of different nationalities, the sole arbitrator or the presiding arbitrator shall not have the same nationality as any party unless the parties who are not of the same nationality as the arbitral candidate all agree in writing otherwise.”

⁵¹⁴ See, for example, *Pando Compania Naviera S.A. v. Filmto S.A.S.* [1975] 2 All ER 515 (QB). Also, see A. Fina, “*The Party Appointed Arbitrator in International Arbitrations – Role and Selection*”, 15 Arbitration International 381, (1999), at p.390. Also see Rule 7(g) of the Maritime Arbitration Association of the United States Arbitration Rules, and Section 4 of the National Grain and Feed Association. Also see P. Friedland, “*Arbitration Clauses for International Contracts*”, (2007), at p.71.

⁵¹⁵ See, for example, Article 1023 of the Netherlands Code of Civil Procedure.

a person to be an arbitrator, he/she must not have been convicted with any serious crime or bankruptcy, i.e. is capable of fully practicing their civil right.⁵¹⁶

III Contractual Limitations on the Selection of the Arbitrators

Another common form of limitations on the identity of the arbitrators is the ones made through the parties' arbitration agreement. This normally takes place when the parties impose certain contractual requirements regarding the qualifications or the identity of their arbitrators either directly by expressly setting these requirements in their arbitration agreement, or indirectly by incorporating institutional rules that provide for these limitations. Such contractual limitations are normally set to add an extra guarantee to the neutrality of the arbitral process between the parties and are normally of a greater practical importance than that of the prohibitions set by national arbitration laws.

Most of the contractual limitations are also deemed to be a direct practice of the parties' autonomy and are, therefore, highly recognized and given effect by international arbitration rules. Article II of the NY Convention, for instance, requires Contracting States to recognize and enforce any material term of the parties' arbitration agreement. Even more clearly made, the European Convention Providing a Uniform Law on Arbitration provides that “[t]he parties may in the arbitration agreement exclude certain categories of persons from being arbitrators.”⁵¹⁷

These contractual requirements can possibly vary from nationality and religious requirements,⁵¹⁸ language requirements, expertise requirements,⁵¹⁹ and even legal requirements.⁵²⁰

⁵¹⁶ See, for instance, Article 16(1) of the Egyptian Arbitration Law, Article 13 of the 2011 Spanish Arbitration Act, Article 812 of the Italian Code of Civil Procedure, and Article 1451 of the French Code of Civil Procedure.

⁵¹⁷ Article 14(1), Annex 1.

⁵¹⁸ See, for example, the UK Supreme Court decision in *Jivrai v. Hashwani* [2011] UKSC 40 at p.41-42 and p.77-78 where an argument that the UK and the EU employment discrimination legislation forbid this kind of contractual limitation was rejected.

⁵¹⁹ See, for instance, *Rachassi Shipping Co SA v. Blue Star Line Ltd* [1967] 2 ALL ER 301.

⁵²⁰ For example, see *Final Award in ICC Case No. 9797*, 18 ASA Bulletin 514, 517 (2000), and Rule 14(1) of the ICSID Rules.

In principle, all these contractual agreements should and must be enforced since they form a material part of the parties' agreement. This is specifically important because one of the most fundamental reasons for the parties referring their disputes to arbitration lies in the fact that they can orchestrate their arbitral process to the convenience of their dispute, including specifying a particular requirement in their agreement.

6.2.2 Appointment Process of the Arbitrators

Arbitration tribunals are not pre-existent like state courts. Each tribunal, contrariwise, must be selected for each dispute. As it has been mentioned above, the quality and skills of the arbitrators determines the effectiveness and success of the arbitral procedure. Accordingly, exercising the freedom of selecting/appointing the arbitrators wisely is a significant responsibility of the parties that must be given much consideration, if not the most. For all this, the process of selecting and appointing the arbitrators can prove to be complicated and time-consuming.

Regardless, the time and effort spent on selecting and appointing the arbitrators depend to a certain extent on the mechanism adopted to do so. This mechanism will vary according to whether the parties are nominating the arbitrators themselves, whether they have delegated the matter to an arbitral institution, or, failing an agreement whatsoever, have, accordingly, left the matter to national courts. This section examines all these possibilities.

6.2.2.1 Parties' Role in Appointing the Arbitrators

Preferably, it is best for the parties to nominate the arbitrators themselves.⁵²¹ This is mainly justifiable for a few reasons. First, arbitration is generally a party-driven settlement. It is normally chosen by the parties since it allows them to plan their arbitral settlement according to their needs and the circumstances of their disputes. Accordingly, the parties are, allegedly, the most capable of choosing arbitrators that best suit their needs and circumstances. To that extent, they are, at least, better aware of their needs and the circumstances of their disputes than any other appointing authority or a national court. More importantly, the parties' choice of arbitrators permits further confidence in the settlement of their disputes. This implies that the likelihood of a voluntarily acceptance of the final award against one party is further guaranteed.

In addition to the previous, theoretically speaking, the collaboration required to select and appoint a tribunal provides for a certain level of co-operation between the parties, which in itself is a positive step-forward for the settlement of the dispute. In practice, however, this may not be quite possible, especially once a dispute has arisen between the parties. As one commentator explains,

*Practice shows that once a dispute has arisen even parties acting in good faith often have difficulties in agreeing on anything. A perfectly suitable nomination may be rejected merely because it has been suggested by the other party.*⁵²²

Fortunately, there are a few solutions for this problem. One of the most convenient is to refer the nomination of the arbitrators to an appointing authority or an arbitral institution.

⁵²¹ In a 2012 survey by the International School of Arbitration in Queen Mary it was found that 76% of business parties preferred selecting the two party-appointed arbitrators in a three-membered tribunal through the agreement of each unilaterally. Queen Mary, University of London, "*Current and Preferred Practices in the Arbitration Process*", (2012), at p.5. Even when business parties were asked on the preferred methods of choosing the sole arbitrator or the chair in a three-membered tribunal, the majority of 54% of respondents preferred selection by agreement of the parties. This was in comparison to making a choice through an arbitral institution/appointing authority (27%) and by making a choice from an exclusive list of arbitrators (10%). *Ibid*, at p.6.

⁵²² Lew and Mistelis, at p.237-238.

6.2.2.2 Role of Appointing Authorities

Appointing the arbitrators by using an appointing authority is a universal contractual mechanism for the selection of the arbitrators.⁵²³ Generally speaking, appointing authorities play a significant role as a mechanism for selecting the arbitrators where the parties or the co-arbitrators (in case of three-member tribunals) fail to agree on the sole arbitrator or the chairman.

As it is mentioned above, the parties may sometimes find it difficult to collaborate in appointing or selecting their arbitrators. In situations as such, it may be highly beneficial to have a default mechanism that merely exists to insure that, despite the parties' failure to join forces, an arbitral tribunal can nevertheless be constituted. The same applies to circumstances where one of the parties refuses to collaborate with the other in appointing the arbitrators as delaying tactics or to avoid arbitration.

Seeking out an appointing authority manifests a few advantages. These authorities normally maintain quite a bit of experience in appointing skillful and suitable arbitrators for each case. In that sense, appointing authorities could possibly have a better eye as to the most suitable arbitrators for the parties' dispute. Furthermore, using an appointing authority can sometimes consume less time than if carried out by parties, especially after a dispute has arisen. As it is mentioned previously, once there is a dispute, a party may have a tendency to refuse cooperation with the other party and might, accordingly, refuse the counter parties' suggestion for no valid reason or refer to delaying tactics.

All this evidence suggests that the designation of a neutral appointing authority is a valuable approach to start the arbitral process effectively. This is particularly important since failure to provide for an appointing authority puts the arbitral process at the risk of reaching a dead-end or can possibly result in the intervention of national courts.

⁵²³ Born II, at p.1703.

Evidently, any person can be designated as an appointing authority by the parties. Regardless, when parties incorporate a set of international arbitration institutional rules, they also agree to use this institution as the appointing authority.⁵²⁴ However, parties can seek an arbitral institution only to act as their appointing authority without necessarily having this institution administering their arbitration or without the necessity of adopting this institution's rules in their arbitration agreement.⁵²⁵

Obviously, parties' decision to designate an appointing authority for the selection of their arbitrators falls directly within the realm of the principle of party autonomy and, therefore, must be recognized and enforced by any national court.⁵²⁶ This is explained by the fact that when parties delegate the selection of the arbitrators to an appointing authority, they are still exercising their autonomy and right in appointing the arbitrators indirectly. In this situation the appointing authority acts as an agent of the parties in nominating the arbitrators. Therefore, once the appointing authority has completed its mandate by appointing the arbitrators on behalf of the parties, its mandate is terminated.⁵²⁷ In support of recognizing the parties' freedom in designating any appointing authority they deem fit, many jurisdictions have expressly affirmed the parties' freedom to select an appointing authority.⁵²⁸ The Model Law, for instance, provides in Article 11(2) that “[t]he parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this Article”.

Regardless, it is preferable for the parties to have an influential role on their settlement through the selection of their arbitrators. Having said that, once a dispute arises

⁵²⁴ See, for example, Articles 5-9 of the 2014 LCIA Rules, Article 8 of the 2010 UNCITRAL Arbitration Rules, and Article 11-13 of the ICC 2012 Rules.

⁵²⁵ See, for instance, the 2004 Rules of ICC as Appointing Authority, and the Draft Rules/Clause Where the LCIA Acts as Appointing Authority Only.

⁵²⁶ *McMahon v. Shearson/American Express Inc.*, 709 F.Supp. 369, 373 (S.D.N.Y. 1989). Also see *Judgment of 16 April 1984*, 1986 Rev. Arb. 596 (Swiss Federal Tribunal).

⁵²⁷ E. Onyema, “*Selection of Arbitrators in International Commercial Arbitration*”, 8(2) International Arbitration Law Review 45, (2005), at p.50.

⁵²⁸ See, for example, Section 18(1) of the 1996 English Arbitration Act, Article 179(1) of the Swiss PIL, and Article 1508 of the French Code of Civil Procedure.

between the parties, it might be a further practical option to refer this task to an appointing authority.

6.2.2.3 Interviewing the Arbitrators

Selection of the arbitrators is one of the most important decisions that the parties will make for the effectiveness and success of their arbitral process. Accordingly, interviewing potential arbitrators can provide an excellent opportunity to assess them effectively before they are appointed.

Interviewing the arbitrators may prove to be beneficial since it provides the parties with a better knowledge-base upon which they can determine who is best fitting to be their arbitrator beyond the arbitrators' written *curriculum vitae*. This is particularly useful for party appointed arbitrators since selecting an arbitrator by each party can be a bit personal in comparison, for example, to the selection of the chairman or the sole arbitrator.

The only complication that might arise from interviewing the arbitrators is that there is quite a fine line between inappropriate *ex parte* communications between the party and the arbitrator, and attaining enough information to assess whether the arbitrator has the required knowledge, experience, and attitude to certain issues of the parties' dispute.⁵²⁹ And because many arbitrators are very particular about anything that may possibly taint their independence and impartiality, some of them tend to refuse any sort of pre-appointment communications between them and the parties beyond supplying certain general information like their *curriculum vitae*, fees, and availability.⁵³⁰ For that reason any sort of pre-appointment communication between the arbitrators and the parties can be considered quite sensitive, even though the topic of interviewing the arbitrators itself is not at all unethical.

⁵²⁹ See, generally, on this issue, A. Lowenfeld, "The Party-Appointed Arbitrator in International Controversies: Some Reflections", 30 Texas International Law Journal 59, (1995).

⁵³⁰ Lew and Mistelis, at p.233.

What might also add to the sensitivity of the topic of *ex parte* communications between parties and arbitrators in general is the fact that much of the detail on it is regulated to a certain degree by common sense and common practice in arbitration.⁵³¹ In other words, not too many sets of rules have expressly regulated for the topic of pre-appointments consultations/interviews between parties and arbitrators and *ex parte* communications in general. The most known regulations of this topic actually exist in a few relevant codes of ethics such as the IBA Rules of Ethics for International Arbitrators⁵³² and the American Arbitration Association – International Centre for Dispute Resolution Arbitration Rules.⁵³³

Regardless, there are few customary guidelines with which the parties and the arbitrators may become acquainted in order to better inform the process of interviewing the arbitrators, thus ensuring the success, usefulness and safety of this process.

The first general rule which most commentators agree on is that any discussion of the merits of the case/dispute, even if indirectly, should be completely avoided.⁵³⁴ Although, it is important to understand that the main purpose of conducting interviews between the parties and the arbitrators is for the parties and their counsel to evaluate whether a certain arbitrator is competent to solve this case, whether he/she has the time to do so, and whether there would be any reason that may conflict with his/her duties later on as an arbitrator (disclosure of conflicts of interests). Accordingly, a party should be able to neutrally describe the case to the arbitrator but should be very careful not to attempt

⁵³¹ D. Bishop and L. Reed, “*Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*”, 14 *Arbitration International* 395, (1998), at p.423-425.

⁵³² Rules 5(1).

⁵³³ Article 7(2).

⁵³⁴ See, for example, A. de Fina, “*The Party Appointed Arbitrator in International Arbitration – Role and Selection*”, 15 *Arbitration International* 381, (1999), at p.392, and T. Webster, “*Selection of Arbitrators in a Nutshell*”, 19 *Journal of International Arbitration* 261, (2002), at p.262-264.

misrepresenting the opposing party or address any questions about the arbitrator's prospective position regarding any issue of the dispute.⁵³⁵

There are, however, a few methods, in the author's point of view, that can assist controlling an interview with a prospective arbitrator not to get out of the boundaries of propriety. One of the most effective ways is to control the time of the interview. As a matter of common sense, the longer the interview is, the higher the probability that the parties and the arbitrators are discussing matters which may taint the arbitrator's independence and impartiality.⁵³⁶

One commentator gives an example in which the ICC Court refused to accept the appointment of a certain arbitrator chosen by the party just because they have both had spent around 50-60 hours reviewing the case before the arbitrator's nomination.⁵³⁷

Another method to control the appropriateness of an interview between the arbitrator and the party is for the arbitrator to, for instance, set an in-advance list of topics out of which he/she would not discuss any other matter with the parties or their counsel.⁵³⁸ In all cases, it is best if the arbitrator always attempts to take notes of the interview and make these notes available to the other party to review once the arbitration starts.⁵³⁹ This definitely falls within the arbitrator's duty of disclosure and is meant to further protect the independence and impartiality of any arbitrator.

Finally, it is important for the party, while interviewing a prospective arbitrator, to avoid attempting to find out the arbitrator's potential position on any matter of the dispute.

⁵³⁵ D. Bishop and L. Reed, "Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration", 14 Arbitration International 395, (1998), at p.424.

⁵³⁶ In *Employers Ins. of Wausau v. National Union Fire Ins. Co.* 933 F.2d 1481(9th Cir. 1991) it was held that a two hours interview or consultation between the party and the arbitrator does not affect the impartiality of the arbitrator. *Ibid*, at p.1489.

⁵³⁷ D. Hascher, "ICC Practice in Relation to the Appointment, Confirmation, Challenge and Replacement of Arbitrators", 6 ICC Bulletin 4, (1995), at p.7-8.

⁵³⁸ See, for example, the list of topics provided by D. Bishop and L. Reed, "Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration", 14 Arbitration International 395, (1998), at p.424.

⁵³⁹ See, for example, Rule 5(1) of the IBA Rules of Ethics for International Arbitrators which stipulates that in the event that the sole arbitrator or the chairman is approached by one of the parties or their appointed-arbitrators, "he should, in writing or orally, inform the other party or parties, or the other arbitrators, of the substance of the initial conversation."

This is probably still not acceptable even where the party attempts to find out the arbitrator's position of the case by asking for the arbitrator's general position on general legal topics such as the enforcement of written contracts, for instance. Although it is important to mention that, generally speaking, parties can find out a lot about their prospective arbitrators without even the need to communicate with them through their writings, their stand in a published case, and so on.

Eventually, it should be quite essential for both the parties and the arbitrators to get acquainted with these general guidelines before the start of any party-arbitrator interview.

However, out of all the important qualities which international business parties need to ensure their existence, the neutrality and impartiality of the arbitrators are deemed the two most important assets to any international arbitral tribunal. The following sections analyze both qualities in details.

6.2.3 Neutrality of the Arbitrators

Any arbitrator in an international arbitration is subject to imperative requirements of impartiality and independence that are normally required and enforced by international arbitral institutions, international arbitration conventions, and national arbitration laws.⁵⁴⁰

The relationship between the arbitrator and the parties is one that is often based on a contract. Nonetheless, even though this relationship is contractual, the arbitral process is of a juridical nature and such nature imposes practical limits on the parties' freedom when choosing their arbitrators. And so, despite the fact that the freedom of the parties in international arbitration is one of the most sacred principles, it is sometimes justifiable to override this freedom to ensure the integrity of the arbitral process and international arbitration in general.

⁵⁴⁰ As one court stated: “[i]mpartiality is the watchword of all tribunals, including arbitrators”, in *Amec Civil Engineering Ltd v. Secretary of State of Transport*, (2005) 21 ConLJ 640, at p.657.

Generally speaking, arbitration is quite consensual and it often allows the parties much space to practice their autonomy in deciding most of its features. However, when a tribunal issues an award, that award is as binding as a national court's judgment. Moreover, the enforcement of that award lies in the hands of a national court.

In that sense, the state lends its authority to the enforcement of that award. This is why under most national arbitration laws and most leading institutional rules, the parties' choice of a certain arbitrator may be rejected or, worse, subsequently challenged, if such choice raises any credible suspicions on the impartiality or the independence of the selected arbitrator.⁵⁴¹ That is why contemporary obligations of independence and impartiality of international arbitrators are now generally required by variable resources from applicable national laws to international institutional rules as well as arbitration agreements, and are, at least indirectly, affirmed by international arbitration conventions as it is shown below.

Nevertheless, for many reasons, it has not always been simple to establish clear-cut distinctions between independence and impartiality standards. First of all, even though many commentators and authorities have attempted to identify the meaning of both requirements, there still exist a substantial controversy and divergence as to the approaches of which many of these authorities have referred to in order to identify the precise content of both obligations. Moreover, as it is explained below, different national and international arbitration rules have used different formulae in setting the arbitrators' obligations of independence and impartiality. For instance, section 24(1)(a) of the 1996 English Arbitration Act requires that the arbitrators be impartial but refrains from mentioning anything on the arbitrators' obligation to be independent. On the other hand, Article 180(1)(c) of the Swiss PIL requires the arbitrator to be independent.⁵⁴² Another more balanced example can be found in the Model law where Article 12(2) allows challenging

⁵⁴¹ Lew and Mistelis, at p.255.

⁵⁴² Also see Article 501 of the Latvian Code of Civil Procedure which requires that the arbitrator be "*objective and independent*".

an arbitrator if there were any circumstances that raise any justifiable doubts as to the arbitrator's impartiality and independence.⁵⁴³ The fact that some arbitration laws have made preferences towards either the independence or the impartiality requirement, have created confusion as the reason behind such discrepancy.

Before looking into the reason behind such controversy, one must first look into the possible definitions and content of both impartiality and independence obligations.

6.2.3.1 Definitions

Impartiality of the arbitrators requires that the arbitrator neither favors one of the parties nor is biased to any of the issues in dispute.⁵⁴⁴

Independence, on the other hand, requires that the arbitrator is not involved into any sort of actual past or present external relationships with the parties or their counsel which may, or at least appear to, affect or control his/her freedom of judgment.⁵⁴⁵

It is, however, important to note that any definition given to either the impartiality or the independence requirements is nothing but an attempt of variable commentators and authorities to understand the exact meaning of these terms in the practice of international arbitration. Regardless, there is no internationally accepted definition of both requirements. Moreover, both terms are used interchangeably and neither can be used or even understood without the reference and application of the other.⁵⁴⁶

⁵⁴³ Also see Article 1033(1) of the Netherlands Code of Civil Procedure, Article 57(2) of the Tunisian Arbitration Code, Section 1036(2) of the German ZPO, and Article 1685(2) of the Belgian Judicial Code.

⁵⁴⁴ Lew and Mistelis, at p.258, and M. Smith, "*The Impartiality of the Party-Appointed Arbitrators*", 6 *Arbitration International* 320, (1990), at p.323.

⁵⁴⁵ *IUSCT Case of 7 May 2001*, 38 Iran-US C.T.R. 386. 393 (2010).

⁵⁴⁶ Born II, p.1762-1763, and Lew and Mistelis, fn.28, at p.261. As it is explained in one of the challenge decisions of the LCIA, "[t]he concepts of independence and impartiality are often seen as distinct, although the borderline between the two concepts is not always easy to find" in *National Grid plc v. Republic of Argentina*, Decision on the Challenge to Mr. Judd L. Kessler in LCIA Case No. YN 9749 of 3 December 2007, at para.76.

6.2.3.2 Nature

In so far as the definitions above indicate, it appears that partiality of an arbitrator is not a concept that can be verified and evidenced but it is rather a state of mind for an arbitrator and a mentality which must be undoubtedly avoided. Accordingly, impartiality is a subjective inquiry that obliges the arbitrator to conduct the arbitration with a strong ethical component.⁵⁴⁷ This subjective inquiry will only drive the arbitrator to treat the parties equally under equal circumstances, to give both parties sufficient opportunities to present their cases, and to approach the resolution of the dispute from an equidistant perspective.⁵⁴⁸

The independence requirement, on the other hand, is more of an objective nature. That is to say, when one looks into whether a certain arbitrator is independent from the parties, one will seek the absence of any factual (past or present) financial, professional, or personal relationships or any sort of actual connections between the parties and the arbitrator which are likely to result in a subjective bias.⁵⁴⁹

In order to assess the existence of the independence requirement of the arbitrator a few factors must be considered. For instance, one must evaluate the closeness between the arbitrator and the parties, as well as the connection between the arbitrator and any element of concrete dispute between the parties. It could also assist in the determination of whether a certain arbitrator is independent to see if the legal and cultural background of the arbitrator may connect him/her to the parties or the matters in disputes. It is also important to consider that arbitral independence may vary according to who is trying to evaluate its existence, i.e. the parties, the co-arbitrators, the appointing authority, or the arbitral institution. This may indicate that such test is more subjective than objective in nature but

⁵⁴⁷ H. Noan, “*Factors to Consider in Choosing an Efficient Arbitrator*” 286, in ICCA Congress Series No.9, (1999), at p.288.

⁵⁴⁸ P. Lalive, “*Conclusions*”, in ICC, “*The Arbitral Process and the Independence of Arbitrators*”, (1991), at p.121.

⁵⁴⁹ See Born II, at p.1775-1796, and T. Walsh and R. Teitelbaum, “*The LCIA Court Decisions on Challenges to Arbitrators: An Introduction*”, 27(3) *Arbitration International* 283, (2011), at p.293.

it is important to realize that assessing the independence requirement of any arbitrator should always be rendered from the perspective of a reasonable person.⁵⁵⁰

6.2.3.3 Timing

Another efficient technique, through which one can differentiate between the independence and impartiality standards, is the timing at which parties (or appointing authorities or arbitral institutions) are able to assess whether a specific arbitrator is independent and/or impartial.

From the definition and the nature of the impartiality standard, one can assume that it might be difficult to figure out whether an arbitrator is impartial or not before the commencement of the arbitral process. As it is mentioned above, impartiality means that the arbitrator is unbiased for neither the parties nor any of the issues at dispute. It is a subjective test which can only be carried out after the arbitrator has commenced with the conduct of the arbitral process in general. So aspects such as treating the parties equally, allowing them sufficient opportunities, the way the arbitrator solves the disputes, etc., are all aspects through which one can determine whether an arbitrator is partial or impartial. Accordingly, it is not generally possible to judge the impartiality (or partiality) of an arbitrator before he/she starts conducting the arbitral process. And, consequently, one can presume that, being subjective in nature, impartiality is generally better judged *ex post facto*.⁵⁵¹

Independence, on the other hand, is quite an objective standard since it is mainly concerned, as a requirement, with the amount, time, and type of relationships an arbitrator had or has with the parties or any other individual close to them. Assessing the absence of factual connections or relations between the parties and an arbitrator is a procedure that normally takes place before the appointment of an arbitrator and the commencement of the

⁵⁵⁰ S. Bond, "The Experience of the ICC in the Confirmation/Appointment Stage of an Arbitration", in ICC, "The Arbitral Process and the Independence of Arbitrators", (1991), at p. 9-13.

⁵⁵¹ H. Noan, "Factors to Consider in Choosing an Efficient Arbitrator" 286, in ICCA Congress Series No.9 (1999), at p.289.

arbitral process. In other words, it is vital that the parties – or whoever is in charge of the appointment process – find out as much leading information as possible before the appointment begins. Such investigation is to go as far as the arbitrators legal and cultural backgrounds, personal history, prior experience, and any other predictions or criteria that would assist the parties prefiguring how independent an arbitrator is and will be from the parties.

6.2.3.4 Link

Now that the differences between impartiality and independence requirements have been established, it is important to know that both standards are quite connected and interdependent at the same time. This is simply because the subjective requirement of impartiality is far-reaching to encompass the objective requirement of independence.

Even though insuring the impartiality of the arbitrators takes place normally after the commencement of the proceedings from the way the arbitrator conducts the arbitral process, it is also important to make sure before appointment that no evidence exists to indicate that this arbitrator may act partially. Almost always the way to do so before the appointment will be by insuring that the prospective arbitrator is independent. In that sense, if there were any objective circumstances that indicate that a prospective arbitrator lacks independence, such lack of independence will constitute a substantial risk of future lack of subjective impartiality on the conduct of the arbitrator, if he/she was to be appointed. So, in other words, *“a lack of independence is a matter of concern because it indicates the possibility of partiality or bias, which in turn can only be evidenced through showings of external relations or connections.”*⁵⁵²

For that reason, and to further support this perception, some arbitration legislation have chosen to only inquire that an arbitrator be impartial and have refrained from

⁵⁵² Born II, at p.1777.

referring to the independence requirement. One of these laws is the 1996 English Arbitration Act. As explained by the Department Advisory Committee on Arbitration Law:

*It seems to us that lack of independence, unless it gives rise to justifiable doubts about the impartiality of the arbitrators, is of no significance. The latter is, of course, the first of our grounds for removal. If lack of independence were to be included, then this could only be justified if it covered cases where the lack of independence did not give rise to justifiable doubts about impartiality, for otherwise there would be no point including lack of independence as a separate ground.*⁵⁵³

However, with the strong connection between the two standards, it has been justifiably explained through many cases that the requirement of impartiality is a much stronger and more important one than that of independence. This is basically because ensuring that a prospective arbitrator is an independent one, does not offer any future guarantees that he/she will be impartial in settling the dispute.⁵⁵⁴

Regardless, both requirements are indispensable to any arbitration and are a prerequisite on any arbitrator, otherwise an arbitrator maybe in violation of requirements of due process under any national or international arbitration rules. It, therefore, makes sense when some claim that even though arbitration is nowadays shifting more towards litigation, the neutrality of the decision-making process could potentially be the one thing that is making arbitration the preferable method of settling international business disputes.⁵⁵⁵ Ensuring the neutrality of the decision-making process can only be achieved by carefully choosing the arbitrators.

⁵⁵³ UK Department Advisory Committee on Arbitration Law, “*Report on the Arbitration Bill – Chapter Two*”, (published on 28/09/2006), at para.102. (Available at <http://uk.practicallaw.com/5-386-9575>) (last visited 25/07/2015).

⁵⁵⁴ See, for example, *Judgement of 13 June 2007, Rostock Proyectos, SL v. Tecnicas Reunidas, SA*, SAP M 10195/2007 (Madrid Corte Provincial) where it was explained that “*the requirement of independence does not in itself guarantee the impartiality of the arbitrator, as even an independent arbitrator can be partial*”.

⁵⁵⁵ S. Frank, “*The Role of International Arbitrators*”, 12(2) ILSA Journal of International and Comparative Law 499, (2006), at p.501.

Along with the choice of the seat and the choice of the arbitrators, the choice of the language of the arbitration can also assist with the efficiency of the arbitral settlement both cost and length wise. The last section of this chapter briefly looks into that.

6.3 Language of the Arbitration

Another less important aspect for the parties to include their arbitration agreement is the language of their arbitration. The choice of language in an arbitration agreement would determine the language of the arbitration procedures as well as the language of the award.⁵⁵⁶ For a few reasons, a clear in-advance choice of language can save the parties a lot of technical complexities which can increase the chance of rendering a cost and time-effective settlement.

Due to the practical importance of this aspect, many national and international arbitration rules have expressly regulated for it. For example, Article 22(1) of the Model Law specifically provides for the parties' freedom to agree on the language or languages of their arbitration. In a less direct manner, Article IV(2) of the NY Convention provides that, if the parties' arbitration agreement or award is not in the language of the country "*in which the award is relied upon*",⁵⁵⁷ a translation in the language of that country must be produced by the party applying for recognition and enforcement.

It is important that the parties pay attention to certain issues regarding the obligation under Article IV(2). Initially, the translation required under this Article has to be submitted in addition to the original arbitration agreement and award in their original language(s).⁵⁵⁸ The translation on its own cannot substitute these documents. In addition, any translation submitted of these documents must be a translation of the award and the

⁵⁵⁶ Article 22(1) of the Model Law provides that the language chosen by the parties or determined by the arbitrators, in the absence of parties' agreement, "*shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.*"

⁵⁵⁷ This Article, generally, sets an exhaustive set of the formalities to be observed when applying for the enforcement and recognition of an arbitral award.

⁵⁵⁸ *Inter Maritime Management SA v. Russin & Vecchi*, XXII YCA 789, (1997), at p.792.

agreement in their entirety. A submission of only the important parts is insufficient.⁵⁵⁹ However, if the arbitration agreement comes in the form of an arbitration clause inside a contract, there is no obligation to translate the entire contract, rather only the relevant provision containing the arbitration agreement.⁵⁶⁰

Technical problems may arise, however, where the parties ignore specifying the language(s) of the arbitration in their arbitration agreement. Generally, in that situation, making a decision on the language of the arbitration will fall to the arbitral tribunal. This is provided for under several national and international arbitration rules.⁵⁶¹ More than often, arbitrators, when deciding the language of the arbitration, take into consideration the language of the main contract. However, in that situation, it may be worth noting that some institutions provide that, in the absence of the parties' agreement as to what language should be used in the arbitral proceedings, a particular language (usually their own) will govern.⁵⁶² Second and more importantly, in some cases, the main contract between the parties will refer to the use of two languages equally. In situations as such, parties' failing to explicitly refer to the language of their arbitration in the arbitration agreement will result in the conduct of their arbitration in both languages.⁵⁶³ This can extensively lead to several inconveniences, delays, extra-costs, and confusion. Therefore, it is of great significance that the parties clearly provide for the language of their arbitration in their agreement. This specifically is emphasised since a choice of a language at the negotiations phase should not consume much deliberations or thought on side of the parties and their counsel yet making

⁵⁵⁹ *D SA (Spain) v. W GmbH (Austria)*, XXXII YCA 259, (2007), at p.261.

⁵⁶⁰ "Commentary on the NY Convention", at p.193-194.

⁵⁶¹ See, for example, Article 20 of the 2012 ICC Rules, Article 17 of the 2014 LCIA Rules, Article 22(1) of the Model law, and Article 19 of the 2010 UNCITRAL Arbitration Rules.

⁵⁶² See for example, Article 20(1) of the Polish Chamber of Commerce Arbitration Rules (presumption of Polish Language), Article 8(5) of the Hungarian Chamber of Commerce Court of Arbitration Rules of Proceeding (Hungarian), and Article 43 of the DIAC Arbitration Rules (Arabic). Also Born, "*Cases and Materials*", at p.816.

⁵⁶³ See P. Bernardini, "*The Arbitration Clause of an International Contract*", 9 Journal of International Arbitration 45, (1992), at p. 58. Also see, Born, "*Arbitration Agreements*", at p.87. R. Donald and R. Haydock, "*International Commercial Disputes Drafting and Enforceable Arbitration Agreement*", 21 William Mitchell Law Review 941, (1996), at p.966.

that decision can have an enormous practical impact on the conduct of the arbitral proceedings, the composition of the arbitral tribunal and counsel's efficacy.

6.4 Concluding Remarks

In analysing the different aspects through which the role of parties' autonomy can be significantly practiced during the drafting of arbitration agreements, this chapter identified three very important aspects. These were the choice of the seat, the choice of the arbitrators, and the choice of the language of the arbitration. However, beside these three aspects, another significant (and more complicated) choice can very much determine the efficiency of the parties' arbitral settlement, that is the choice of applicable law(s). The choice of applicable law(s) is, therefore, examined and analysed in a separate-following chapter.

7 Chapter VII: Choice of Applicable Laws

In international commercial arbitration, choice of law issues can prove to be quite a complex topic. Although this can be seen as problematic, it is also a fact that is potentially pertinent to any contract of an international character. As one Court explains: “*uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules.*”⁵⁶⁴ This sort of uncertainty and complexities behind choice of law issues contradicts with the ideals and expectations of parties to international arbitrations which mainly comport predictability and efficiency.

In the context of this thesis, it is important to clarify that this chapter does not necessarily attempt to propose a solution to choice of law problems in international commercial arbitration. What this chapter attempts to achieve rather is to accentuate the importance of understanding the actual complexity behind choice of law issues to business parties seeking arbitration. The parties’ clear identification of the problems manifested in choice of law issues can very much motivate them to exercise their arbitral autonomy prudently while drafting their arbitration agreement in order to avoid these problems.

Regardless, to understand the complexity of choice of law issues in international arbitration, one must first look into the possible applicable laws to any international arbitral process and see how parties’ autonomy should/can mitigate such complexity. The following sub-section briefly looks into this.

⁵⁶⁴ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), at p.516-517.

7.1 Difficulty behind Multiplicity of Applicable Laws

To measure the complexity of choice of law issues in international commercial arbitration, a brief demonstration of the potential applicable laws to an international arbitration can be useful. In a single international arbitration, it is possible to have up to four applicable laws. These can vary from the law applicable to the arbitration agreement, the law applicable to the arbitral procedures, the law applicable to the underlying contract and the substance of the parties' dispute, as well as the conflict of laws rules applicable to select all/any of these laws (if an arbitrator opted for one instead of deciding on a law directly). Lord Mustill, in one famous English authority, explained that:

*[M]ore than one national system of law may bear upon an international arbitration. Thus, there is the proper law which regulates the substantive rights and duties of the parties to the contract from which the dispute has arisen. Exceptionally, this may differ from the national law governing the interpretation of the agreement to submit the dispute to arbitration. Less exceptionally it may also differ from the national law which the parties have expressly or by implication selected to govern the relationship between themselves and the arbitrator in the conduct of the arbitration: the "curial law" of the arbitration, as it is often called.*⁵⁶⁵

Knowing this, it is essential for the parties to understand that each of the first three laws can be distinct from the other. Having three different laws possibly applicable to the arbitration agreement, the procedures, and the merits of the contract disputes can either take place through the intentional choice of different applicable laws by the parties or

⁵⁶⁵ *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*, [1993] AC 334, at p.357-358. Also see, *XL Insurance Ltd v. Owens Corning* [2000] 2 Lloyd's Rep. 500, (Q.B.), *Hamlyn & Co. v. Talisker Distillery* [1894] AC 202, and *Black Clawson International Ltd v. Papierwerke Waldhof Aschaffenburg AG* [1981] 2 Lloyd's Rep. 446 (Q.B.).

simply by virtue of applying conflict rules that may, accordingly, assign a different law to each category.⁵⁶⁶ On the other hand, it is rational to assume that different laws apply to different types of issues (procedural versus substantive issues). Ultimately, this is one of the main justifications behind the application of the separability presumption and its consequences (one of which is that a different law could possibly apply to the arbitration agreement than that of the underlying contract) in arbitration.⁵⁶⁷

From a legal viewpoint, the procedural law of the arbitration will generally govern two types of procedures. These are internal and external procedures of the arbitration. While the first applies to procedural standards such as confidentiality, time-limits, fairness, and the like, the second will generally govern the external relationship between the arbitral tribunal and national courts covering issues of provisional matters, appointment and removal of the arbitrators, and annulment of the award for example.⁵⁶⁸ Furthermore, it is also critical to differentiate between the procedural law governing the arbitration (typically the law of the seat) and the procedures applied to the arbitral proceedings. The procedural law of the arbitration is that national law according to which an international arbitration is conducted. In comparison, the procedural rules of the arbitration are those set of rules chosen/agreed upon by the parties or the arbitrators which represent these provisions of the arbitration agreement that govern issues such as the number of the arbitrators, the arbitral seat, and any reference to institutional rules.⁵⁶⁹

⁵⁶⁶ See on that *Union of India v. McDonnell Douglas Corp.* [1993] 2 Lloyd's Rep. 48 (QB) (English High Court), at p.50.

⁵⁶⁷ See Section 4.3.2 of this thesis. Additionally, the distinction between the procedural law, the law of the arbitration agreement and the law of the substance of the dispute can be rationalised through the principle of *depeçage* according to which different aspects of an international contract may have different connections to different states which will eventually implicate the application of different laws. See generally on that C. Gertz, "The Selection of Choice of Law Provisions in International Commercial Arbitration: A Case for Contractual Depeçage", 12(1) Northwestern Journal of International Law and Business 163, (1991), and W. Reese, "Depeçage: A Common Phenomenon in Choice of Law", 73(1) Columbia Law Review 58, (1973).

⁵⁶⁸ See *American Diagnostica Inc. v. Gradipore Ltd*, XXIV YCA 574, (1999) where the court explained in details what the law governing the procedural conduct of the arbitration is meant to be concerned with. *Ibid*, at p.580-581. Also see Born II, P.1598-1599.

⁵⁶⁹ Born II, at p.1603. Also see *Cargill International SA v. Peabody Australia Mining Ltd*, [2010] NSWSC 887 where the court established that "there is a distinction between adoption of procedural rules and the application of the *lex arbitri* and that since the Model Law. . . permits the adoption of rules other than those for which it would in default of an alternative choice have provided, the choice by the parties of the ICC

The law governing the arbitration agreement, on the other hand, will mainly be concerned with the existence, validity (formal and substantive), and interpretation of that agreement. Finally, the substantive law of the arbitration will generally be the law governing the parties' contractual obligations, the substance/merits of their dispute, and/or, more broadly, their entire relationship.

On how choice of law issues in international commercial arbitration can pose complexity, another concern should be noted. While some parties may actually realize that an international arbitration can involve the application of multiple laws, not so many will realize that an international arbitration agreement can singly involve the application of multiple laws. This can project further uncertainty to choice-of-law issues in international arbitration. It is, therefore, important for the parties to realize that their international arbitration agreement produces issues that have to do with formal validity, substantive validity, capacity, arbitrability, and interpretation. Each of these issues can be governed by an independent different law, although not necessarily recommended.

All these previously mentioned laws can significantly influence the efficiency of an international arbitral dispute settlement. However, since this thesis is confined to the drafting of an international arbitration agreement, the main focus will be on the law applicable to this agreement. Having said that, it is essential to note that the main premise introduced under this chapter applies equally to the parties' freedom of choice of any of the other applicable laws. Moreover, the focus on the law applicable to the arbitration agreement is justified when one looks into how the other applicable laws are determined. That is to say, the substantive law applicable to the parties' contractual relationship and dispute is normally determined through the inclusion of a choice of law clause in the main contract. In the majority of cases, parties do make a clear choice of law to their

Rules to apply in their arbitration would not of itself constitute an opting out of the Model Law.”, *Ibid*, at p.83.

international contractual agreement.⁵⁷⁰ The procedural law, as mentioned before, is more than often the law of the seat.⁵⁷¹ However, when it comes to the law applicable to an international arbitration agreement, parties' hardly ever practice their autonomy to explicitly specify that law.⁵⁷² This, unfortunately, adds to the complexity of the choice of law issues in international arbitration.

Therefore, to these difficulties, this thesis finds that, the best and most effective method to avoid or, at least, delimit the confusion behind choice of law issues is for the parties to make a clear explicit choice in their arbitration agreement and underlying contract as to the applicable law(s). Most of the difficulties and intricacy behind choice of law issues in international arbitration, to this thesis, are generated where the parties are silent as to the applicable law(s) and the matter is left for the determination of the arbitrators or a national court.

Accordingly, making an explicit choice can be very effective to the arbitral process. This law does not only determine eventually the outcome of the dispute or at least some significant portion of it, but it could also easily boost the predictability of the dispute resolution process.⁵⁷³ Notwithstanding the fact that a clear-in advance choice of law will help the parties and the arbitrators avoid unnecessary time and expense required for the consideration of conflict of laws issues.

To this effect, this chapter is divided into three main sections. The first looks into the explicit choice of law made by the parties to their arbitration agreement. The second section analyzes the possible implied choices of law by the parties. Finally, the third briefly looks into the situation where the parties have not made any explicit or implied choice as to the applicable law.

⁵⁷⁰ Born, "Arbitration Agreements", at p.87.

⁵⁷¹ *Ibid*, at p.67-70.

⁵⁷² P. Bernardini, "Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause" 197, in ICCA Congress Series No. 9, (1999), at p.197.

⁵⁷³ C. Gertz, "The Selection of Choice of Law Provisions in International Commercial Arbitration: A Case for Contractual Depecage", 12(1) *Northwestern Journal of International Law and Business* 163, (1991), at p.165.

7.2 Parties' Express Choice of Law

Almost all contemporary authorities recognize the principle of parties' autonomy in choosing an applicable law to their arbitration agreement.⁵⁷⁴ This principle enjoys even more powerful status in the field of international commercial arbitration.⁵⁷⁵

This section looks into the regulation of the parties express choice of applicable law to their agreement as well as their procedural freedom under both the NY Convention and the Model Law. The section also analyses both possible choices for the parties as well as the best approaches and standards to look for in an applicable law to an international arbitration agreement.

7.2.1 Regulation of Parties' Express Choice of law in National and International Contexts

Parties' express choice of a law that governs the substantive validity of their arbitration agreements have been explicitly and indirectly regulated by many national and international arbitration rules. This section examines the regulation of the NY Convention and the Model Law to the parties' explicit agreement of the law governing the formation and substantive validity of their arbitration agreement.⁵⁷⁶

⁵⁷⁴ See, for example, *Volt Information Sciences, Inc. v. Stanford University*, 489 U.S. 468, 470, (U.S. S.Ct. 1989) at p.479. It is important to note that the *Volt's* decision was a domestic one. However, the Supreme Court's opinion on this case enjoys more of a broad nature as to the parties' freedom to choose the law applicable to their arbitration agreement. Also see *Union of India v. McDonnell Douglas Corp.* [1993] 2 Lloyd's Rep. 48, (Q.B.) at p.50, and *AES Ust-kamenogorsk Hydropower Plant LLC v. Ust-kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647 (English Court of Appeal), R. Merkin, "Arbitration Law", (2013) where the author explains that the parties' express choice of law "will be regarded as conclusive even if the nominated law has no connection with the underlying contract to which it relates" given the separability of the arbitration agreement from that contract, at para.7.8, and D. Sutton, J. Gill and M. Gearing, "Russell on Arbitration", (2003), para.2-094.

⁵⁷⁵ See, for example, *Interim Award in ICC Case No. 4504*, JDI 1118, (1986), at p.113. Also see *Final Award in ICC Case No. 3572*, XIV YCA 111, (1989), at p.115, and *Final Award in ICC Case No. 6363*, XVII YCA 186, (1992). Also see Section 48 of the 1999 Swedish Arbitration Act, and Section 6 of the 2010 Scottish Arbitration Act.

⁵⁷⁶ This thesis has previously introduced briefly or the law applicable to both matters of capacity and arbitrability. See Sections 5.1 and 5.2 of Chapter V.

7.2.1.1 The NY Convention

Like most national and international arbitration laws, the NY Convention recognizes the parties' right to select the law applicable to their arbitration agreement, however, in an indirect way under Article II and Article V(1)(a).

Article II of the Convention stipulates that each Contracting State shall recognize the parties' agreement to arbitrate and requires national courts of these states to refer the parties to arbitration when seized of an action regarding a matter that falls within the parties' arbitration agreement.⁵⁷⁷ Some commentators claim that Article II's requirement of Contracting States to recognize the parties' arbitration agreement extends to all the material terms of this agreement including the parties' choice of applicable law to this agreement.⁵⁷⁸

Article V(1)(a) recognizes the parties' choice of an applicable law in a less indirect way by providing that the recognition and enforcement of the award might be refused if the parties' arbitration agreement is not valid according to the law chosen by the parties to govern this agreement (failing which, according to the law of the place where the award was rendered). It is generally claimed that the choice of law referred to under Article V(1)(a) refers to both the substantive and procedural law of the jurisdiction in question and not its conflict of laws provision.⁵⁷⁹ Accordingly, the Convention does not approach the parties' freedom to select an applicable law to their arbitration agreement in any direct manner.

On determining the law applicable to the arbitration agreement, Article V(1)(a) sets two very liberal conflict of laws rules. The first is a very primary one and it refers the court or the tribunal to the law chosen explicitly by the parties to be applied to their arbitration

⁵⁷⁷ Article II(1) and (3) of the NY Convention. U. Hass, "New York 1958 Convention on Recognition and Enforcement of Foreign Arbitral Awards" in F. Weigand, "Practitioner's Handbook on International Arbitration", (2002), at p.401.

⁵⁷⁸ See, for example, Born I, at p.562.

⁵⁷⁹ U. Hass, "New York 1958 Convention on Recognition and Enforcement of Foreign Arbitral Awards" in F. Weigand, "Practitioner's Handbook on International Arbitration", (2002), at para.17.

agreement, and although in theory this is an option, in practice, however, parties' rarely ever make an explicit distinct choice of law specifically applicable to their arbitration agreement.⁵⁸⁰ The second conflict rule, as it is explained later on, refers the court or the tribunal, absent the parties' explicit choice, to the law of the place where the award is rendered.⁵⁸¹

Regardless, these two conflict rules are generally created to form a uniform application of conflict of laws rules in jurisdictions of Contracting States and are, therefore, to prevail on all other conflict rules in determining the law applicable to the arbitration agreements.⁵⁸² More importantly, it would not matter if the parties' arbitration agreement would be invalid according to any law other than that chosen by them to apply to their arbitration agreement.⁵⁸³

Finally, the NY Convention sets very minor limitation over the parties' freedom to choose the law applicable to their arbitration agreement. These limitation are not very different to the few discussed previously in this thesis.⁵⁸⁴ As the majority of other national and international laws, these can vary from public policy and mandatory rules of law to non-arbitrability.⁵⁸⁵

In addition, Article II(1) and (2) of the NY Convention impose a writing requirement for an international arbitration agreement to be formally (as opposed to substantively) valid which requires this agreement to be submitted in writing and to be

⁵⁸⁰ Berg, at p.126.

⁵⁸¹ See Section 7.4.1.1 of this Chapter.

⁵⁸² Berg, at p.293.

⁵⁸³ In *Telenor Mobile Communications AS v. Storm LLC*, 524 F.Supp. 2d 332 (decided 2007) (US District Court for the Southern District of New York, US) the Court refused an argument that the arbitration agreement would not have been enforceable according to Ukrainian law since it was valid under the law applicable to it, that is New York Law. *Ibid*, at p.368. Also see, *Yukos Capital SARL v. OAO Samaraneftgaz*, 2012 WL 3055863, (S.D.N.Y.), and *Changzhou AMEC E. Tool and Equipment Co. v. E. Tool and Equipment, Inc.*, 2012 WL 3106620, (C.D. Cal.).

⁵⁸⁴ See Chapter V of this thesis.

⁵⁸⁵ G. Born and P. Rutledge, "*International Civil Litigation in United States Courts*", (2007), at p.718-720, Section 187(2) of the Restatement (Second) Conflict of Laws (1971), and Dicey I, para.16-001-16-064.

signed by the parties or contained in an exchange of letters or telegrams.⁵⁸⁶ Much debate over whether Article II sets a minimum or maximum requirement allowing national laws of Contracting States to impose further stringent rules of formal validity or permit a less demanding form requirement has arisen.⁵⁸⁷ There is a universal tendency, however, in favor of finding Article II as establishing a maximum requirement of formal validity which Contracting States cannot replace or supplement with more demanding formal validity rules.⁵⁸⁸ In that sense, further demanding form requirements for international arbitration agreements are excluded by the Convention's exclusive written form requirement.⁵⁸⁹

Questions regarding the law applicable to the formal validity of an international arbitration agreement are generally infrequent due to the uniform international form requirement under the NY Convention.⁵⁹⁰ Regardless, situations where the Convention does not apply (for example, in a non-Contracting State) or where it does but a national court finds that the Convention's formal requirement do not establish minimum standards can give rise to choice of law questions of formal validity.

Where these questions arise, a starting point would always be to look for the law chosen by the parties to apply to their arbitration agreement, i.e. the law applicable to questions of substantive validity and formation. More than likely, where the parties have made an explicit choice as to the law applicable to the substantive validity of their

⁵⁸⁶ Very similar form requirements are available under Article 1 of the Inter-American Convention, and Article 1(2) of the European Convention.

⁵⁸⁷ See on that, Born I, 617-620, and Samuel, at p.82-84.

⁵⁸⁸ See, for example, D. Pietro and M. Platte, "*Enforcement of International Arbitration Awards: The New York Convention of 1958*", (2001), at p.81, Samuel, at p.82, S. Strong, "*What Constitutes An 'Agreement in Writing' in International Commercial Arbitration? Conflicts between the New York Convention and the Federal Arbitration Act*", 48(1) *Stanford Journal of International Law* 47, (2012), at p.58, and Berg, at p.287. Also see Judgement of 5 July 1994, *DIETF Ltd v. RF AG*, XXI YCA 685, (1996), at p.688, Judgement of 21 December 1990, *NV Carbomet v. Gans Transport BV*, XXI YCA 632, (1990), at p.634, and Judgement of 20 March 1997, *ANC Maritime Co. v. The West of England Shipowners Mutual Protection and Indemnity Association Ltd*, XXIII YCA 654, (1998), at p.655.

⁵⁸⁹ Born I, at p.668.

⁵⁹⁰ Born I, at p.620. Compare, however, Berg, at p.284-287 who argues otherwise.

arbitration agreement, this law will also apply to the formal validity of their arbitration agreement.⁵⁹¹ One award explains that:

*It is a generally accepted principle of private international law that the formation of and the requirements as to the form of a contract are governed by that law which would be the proper law of the contract. . .*⁵⁹²

This thesis finds this approach to be the most practical and consistent to the parties' intentions. Among other things, this approach abolishes a great deal of the uncertainties and complexities that would result from applying two different laws to the same arbitration agreement and to the choice of law analysis generally existent in international arbitration. It also accords with the principle of party autonomy where the parties have chosen a law applicable to their arbitration agreement. That choice of law should apply to all aspects of this agreement.

7.2.1.2 The Model Law

The Model Law resembles the NY Convention to a large extent in its treatment of the question of parties' autonomy to choose an applicable law to their agreement, so as to the Convention's approach to the parties' autonomy restrictions as well. The Model Law addresses both these topics under Articles 34(2)(a)(i) and 36(1)(a)(i). Article 34(2)(a)(i) provides that an arbitral award maybe set aside by the courts if the parties' arbitration agreement "*is not valid under the law to which the parties have subjected it.*"

Article 36(1)(a)(i), on the other hand, subjects this party autonomy to exceptional restrictions manifested in public policies and non-arbitrability grounds.

⁵⁹¹ See *Judgement of 21 September 2005*, XXXI YCA 679, (2006), *Judgement of 11 October 1989*, 134 Rev. Arb. 1990, (French *Cour de Cassation*), and *Judgement of 29 September 1959*, *Goldschmidt v. Cottaropoulos*, 88 JDI 268, (1961).

⁵⁹² *Economy Forms Corp. v. Islamic Republic of Iran*, Award in IUSCT Case No. 55-165-1 of 14 June 1983, 3 Iran-U.S. C.T.R. 42, (1983), at p.47-48.

All in all, although the Model Law has treated the subject in the exact same indirect manner addressed under the NY Convention, the majority of the jurisdictions which have adopted this law have recognized the parties' autonomy in choosing the law governing their arbitration agreement.⁵⁹³

Therefore, both the NY Convention and the Model Law provide, in a way, for the autonomy of the parties to expressly determine the applicable laws. With that sort of permission/privilege, the parties are left to wide variety of choices between national and non-national laws. The following section looks into these possible choices available for the parties.

However, beside the parties' freedom to choose an applicable law, most national and international laws/rules provide specifically for their freedom to choose the applicable procedural rules to their arbitration. The following section looks briefly into parties' procedural freedom.

7.2.1.3 Parties' Procedural Freedom in National and International Contexts

In addition to the parties' right to choose any applicable national law (or non-national legal system) to their arbitration, most national and international arbitration laws/rules provide for the parties' right to choose the procedural rules applicable to their arbitration. As mentioned above, the procedural rules applicable to the arbitration differ from the applicable procedural national law.⁵⁹⁴ While the later can be chosen either expressly by the parties in their arbitration agreement or impliedly through the choice of an arbitral seat,⁵⁹⁵ the procedural rules are those sets of rules chosen by the parties to govern issues such as the number of the arbitrators, the arbitral seat, and any reference to institutional rules.

⁵⁹³ See for example, *Peterson Farms Inc. v. C&M Farming Ltd* [2004] 1 Lloyd's Rep. 603 (Q.B.), and *Recyclers of Australia Pty Ltd v. Hettinga Equip. Ltd* (2000) 175 ALR. 725 (Australian Fed. Ct.).

⁵⁹⁴ See p.240 of this thesis.

⁵⁹⁵ See Section 7.3.1 of this thesis.

Since the parties' choice of the procedural rules is set to be one of the most essential mechanisms through which they can exercise their procedural autonomy, most national and international arbitration rules and conventions have explicitly provided for it.

To that end, the NY Convention provides, in Article V(I)(d), for the parties' procedural autonomy to fashion their arbitral procedures by permitting the non-recognition of awards that are issued where the composition of the arbitral tribunal or the arbitral procedures was not in accordance with the agreement of the parties (or, failing this agreement, the law of the country where the arbitration took place). In so providing, Article V(I)(d) makes the principle of parties' autonomy the sole determinant in procedural matters.⁵⁹⁶

To the same effect, the majority of developed national laws have implemented provisions that guarantee parties the freedom to agree on the procedural rules governing the conduct of their arbitration. As a representative of many national arbitration laws, the Model Law provides, in Article 19(1), that "*the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.*" The same attitude towards the parties' freedom to choose their procedural rules has been implemented by many national arbitration legislation, whether adopting the Model Law or not.⁵⁹⁷

⁵⁹⁶ Petrochilos, at p.355.

⁵⁹⁷ See, for example, Article 182(1) of the Swiss PIL, Article 1509 of the French Code of Civil Procedure, Section 1(b), 33, and 34 of the 1996 English Arbitration Act, Article 19(1), Schedule 1 of the 2012 Singapore International Arbitration Act, Section 1042(3) of the German ZPO, Section 594(1) of the Austrian ZPO, Article 26(1) of the Japanese Arbitration Law, Section 47(1) of the Hong Kong Arbitration Ordinance, Article 19(1) of the Russian Arbitration Law, and Article 19(2) of the Indian Arbitration and Conciliation Act.

7.2.2 Parties' Express Choice of Law

It is possible that the answer to any dispute between the parties is found initially by looking at their contract without the necessity of referring to any law or set of rules. Parties' intentions, the particular aspects of their agreements, and their expectations can very much be established from reading through the purpose of their contract to the extent where the arbitrators can possibly determine the parties' intentions and give these intentions effect without looking into an applicable law.⁵⁹⁸

Yet, as one author rightfully notes, it is not possible to overemphasize the importance of the law or rules applicable to an international contract.⁵⁹⁹ In international arbitration specifically, determining the applicable law/rules has legal, practical, as well as psychological influence on the parties and the outcome of their settlement that it is frequently claimed that nothing is more important than knowing the legal or non-legal set of rules applicable to measure the parties' rights and obligations.⁶⁰⁰ Such importance is even further emphasized when one realizes that all contracts are by necessity incomplete. Even though it is possible to solve disputes arising between the parties by looking into their contract, these contracts are still designed by humans and are not always calculated to foresee and anticipate every possible future problem and specify the legal consequences accordingly. Therefore, where a situation arises that is not covered by the contract's provisions, the chosen applicable law will serve to fill the gap left by the contract. In that sense, making a positive choice to determine the applicable law(s) or legal rules in the parties' agreement can definitely provide a safety-net that serves to afford them a decent amount of predictability as to the settlement of their dispute.

On the other hand, not making an explicit choice as to applicable law can have considerable consequences on the regulation of the parties' relationship as well as the

⁵⁹⁸ Lew and Mistelis, at p.411-412.

⁵⁹⁹ Y. Derains, "The ICC Arbitral Process Part VIII. Choice of the Law Applicable to the Contract and International Arbitration", 6(1) ICC Bulletin 10, (1995).

⁶⁰⁰ Lew and Mistelis, at p.412.

settlement of any future dispute. Parties' inability to agree on the body of law governing their relationship and their arbitration agreement will only mean that the tribunal will have to seek solutions brought by contemporary conflict rules which can produce a great deal of uncertainty. This allows for the possibility of having an undeveloped law applied to the settlement of their dispute which is largely possible in states that tend to undergo significant political changes where needs of certainty and enforceability are not normally satisfied.⁶⁰¹

This section looks into the importance of making an express choice of law or rules by the parties. A few points should be clarified before one begins such analysis. First, it is important to note that naming national laws of specific jurisdictions that are best suitable to regulate international arbitration is not practical, if of no use whatsoever, this thesis finds. This is simply due to the fact that a choice of a particular law will depend substantially on a variety of considerations that are fundamentally connected to the identity of the parties, the nature of their relationship, and any potential applicable law(s). In other words, determining the applicable law is considerably a subjective process that will change from one relationship to the other. Accordingly, while it is not of this section's concern to specify the best and worst applicable laws in international commercial arbitration, it is concerned, among other aspects, with the parameters that lead to a wise choice of an applicable law.

Second, while the substantive law applicable to an international contract might be the most important choice which parties should make, this section's findings are equally applicable to any possible choice of law in an international commercial arbitration. In other words, the section is equally applicable to the parties' choice of the substantive law

⁶⁰¹ Born II, at p.2746.

applicable to their contractual relationship, the law applicable to their arbitration agreement, as well as the procedural law applicable to their arbitration proceedings.⁶⁰²

Finally, parties are normally free to choose between a national law and a non-national law to their arbitration. This section looks into both options by, first, examining the parameters of a wise choice of a national law and, second, examining the possible non-national legal systems and the practicality of opting to one instead of a national law.

7.2.2.1 Parameters of a Wise Choice of a National Law

An overwhelming majority of choices of applicable laws in international commercial arbitration lean towards specifying a national law as opposed to a non-national law.⁶⁰³

However, the fact that the parties have opted for a national law does not mean that they have made a wise choice to their dispute settlement. There are certain traits/qualities which parties need to ensure their existence in the choice of law they make in order to ensure the positive effect of that law. The following are some of these qualities.

I Familiarity and Neutrality

Two of the most important aspects parties need to look for in a choice of law are the neutrality and familiarity of that law to the parties. Although both aspects may seem contradictory, they are relatively achievable. The neutrality of a choice of law implies that the chosen law does not favor one of the parties.⁶⁰⁴ In attempt of choosing a law that is advantageous or favorable to the parties, each may opt for choosing the law of their

⁶⁰² It is, however, important to note that the focus of this chapter is on the law applicable to the parties' arbitration agreement. This thesis has previously examined the parties' choice of an arbitral place. See Section 6.1 of this thesis. As repeatedly mentioned before, a parties' choice of an arbitral seat will most likely determine the procedural law applicable to their arbitration, unless they expressly make a different choice of procedural law. Moreover, parties generally tend to make an express choice of substantive law in their main contract to which this section's analysis also apply.

⁶⁰³ Born II, at p.2749. Also see, S. Voigt, "Are International Merchants Stupid? Their Choice of Law Sheds Doubt on the Legal Origin Theory", 5(1) Journal of Empirical Legal Studies 1, (2008) where the author claims that "82 percent of the contracts underlying the disputes referred to ICC arbitration in 2003 contained a choice-of-law clause specifying the applicable law. In 80.4 percent of these cases (or in 65.93 percent of all cases), the parties opted for a national law", *ibid*, at p.9 based on the ICC, "2003 Statistical Report", 15(1) ICC Bulletin 7, (2004).

⁶⁰⁴ Gaillard, at para.1435, at p.792-793.

domicile or place of business, for instance. This can easily defy the neutrality preference in a choice of law and it could prove to be chimerical since it is difficult to predict the future issues that will arise and constitute a conflict between the parties.⁶⁰⁵ Moreover, even if the parties were able to attain a certain level of predictability, they can never know whether they will ever stand as plaintiffs or defendants, which necessitates a choice of law that pertains a perceived level of neutrality.⁶⁰⁶

Accordingly, a law that is neutral but familiar to the parties can, for instance, be the place where both parties conduct business, and/or a place where reliable and familiar counsel is efficiently provided. The familiarity of a certain law looks at the existing counsel for the purpose of reviewing the parties' initial agreement so as to any potential future issues.⁶⁰⁷ Moreover, a national law of a state that is known to publish its statutes, judicial decisions, and commentaries can easily provide ease of access and familiarity to international business parties.⁶⁰⁸

II Enforceability

An even further emphasized quality of a chosen law is the enforceability provided by that law to the parties' arbitration agreement and any resulting arbitral award. While the enforceability of international arbitration agreements and awards is nowadays significantly supported by many national courts, the adoption of certain international instruments and modern national arbitration laws can further secure such enforceability. These are largely manifested in the NY Convention and the Model law as the two most influential international arbitration instruments nowadays.⁶⁰⁹ It is, therefore, extremely important that the parties opt for a law of a state that has ratified the NY Convention and/or has adopted the Model Law as its arbitration law.

⁶⁰⁵ Born II, at p. 2748.

⁶⁰⁶ S. Voigt, "Are International Merchants Stupid? Their Choice of Law Sheds Doubt on the Legal Origin Theory", 5(1) Journal of Empirical Legal Studies 1, (2008), at p.10.

⁶⁰⁷ Born, "Arbitration Agreements", at p.161.

⁶⁰⁸ *Ibid.*

⁶⁰⁹ See Section 1.1 of this thesis.

Another aspect of enforceability to which the parties need to pay much attention is not to make a choice of law that, in any manner, is inconsistent with the mandatory rules of law applicable to any other aspect of their arbitration.⁶¹⁰ Aspects of arbitrability, capacity, formal and substantive validity of the arbitration agreement, as well as procedural issues should not be governed by inconsistent rules of law that may, eventually, lead to the frustration of the arbitration agreement or the non-recognition/unenforceability of the arbitral award.

Finally, as it is the ultimate purpose of any international arbitration to reach a recognizable and enforceable arbitral award, parties are strongly advised to consider whether a certain national law offers an appellate review for the arbitral award or not. One of the conceived advantages of international commercial arbitration is the absence, in the majority of cases, of appellate review of arbitral awards.⁶¹¹ This feature is meant to reduce the cost and length of both court and arbitral procedures. Accordingly, judicial review of arbitral awards is largely confined to problems with procedural fairness and public policy. Consequently, while not allowing for judicial review of arbitral awards is considered both time and cost effective, it can also mean that widely eccentric or simply injustice awards might be produced and enforced.⁶¹² This only means that parties are to be very aware, from the very beginning, as to whether they wish to allow for this aspect by making an explicit choice of a law that permits judicial review of an arbitral award or simply preclude such feature by consciously opting for a law that narrowly confines judicial review of the award to the very extreme of procedural unfairness and public policy issues.

⁶¹⁰ Born II, at p.2748.

⁶¹¹ Born, "*Arbitration Agreements*", at p.6.

⁶¹² *Ibid.*

III Confidentiality

To this thesis, confidentiality is an attribute which the parties ought to consider carefully when choosing a national law to their international arbitral settlement. While confidentiality is seen as one of the main attractions of international arbitration, it is not necessarily an implied obligation that is directly acquired once parties go to arbitration. National laws approach confidentiality in considerably variable manners. The Model Law, for instance, as a representative for many national arbitration legislation, is intentionally silent on the issue of confidentiality. In reasoning such approach, the Model Law drafters explain that even though the issue of confidentiality (specifically the publication of the award) is controversial, the Model Law does not deal with it as “*the decision may be left to the parties or the arbitration rules chosen by them.*”⁶¹³

However, due to the importance of confidentiality in international arbitrations in general, several Model Law jurisdictions have modified their adopted version of it by expressly providing for the confidentiality of the arbitral proceedings and the publication of the award under their national arbitration acts.⁶¹⁴

There are, nonetheless, two issues regarding confidentiality under national arbitration laws to which the parties need to be extra vigilant. The first relates to the uncomplicated fact that, even though confidentiality in international arbitration is a major point of attraction, it is not expressly recognized under a few national laws, unless the parties explicitly agree to it in their arbitration agreements. For instance, Article 5(1) of the

⁶¹³ UN, “*Report of the Secretary-General: Possible features of a Model Law on International Commercial Arbitration*”, U.N. Doc. No. A/CN.9/207, 19-26 June 1981, at para.11, p.90, (available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL8/102/47/PDF/NL810247.pdf?OpenElement>) (last visited 21/10/2015). Other national arbitration laws are also silent on confidentiality. This applies in the case of the 1996 English Arbitration Act, the FAA, Korean Arbitration Act, the Japanese Arbitration Act, the Malaysian Arbitration Act, etc. See, J. Lew, “*Expert Report of Dr. Julian D.M. Lew (in Esso/BHP v. Plowman)*”, 11 *Arbitration International* 283, (1995).

⁶¹⁴ See, for example, Section 18(1) of the 2013 Hong Kong Arbitration Ordinance which provides that “[u]nless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to (a) the arbitral proceedings under the arbitration agreement, or (b) an award made in those arbitral proceedings.” Also, see Article 24(2) of the 2011 Spanish Arbitration Act, Section 23C of the 2010 Australian International Arbitration Act, Article 353 of the Romanian Code of Civil Procedure, and Section 14B(1) of the New Zealand Arbitration Act.

Norwegian Arbitration Act provides that “[u]nless the parties have agreed otherwise, the arbitration proceedings and the decisions reached by the arbitration tribunal are not subject to a duty of confidentiality.”⁶¹⁵ Considering the importance of confidentiality to many international business parties, it is essential that the parties evaluate the position of any potential applicable national law on it before they make a choice of law.

The second issue relates to the rather complicated situation where some jurisdictions, although not explicitly providing for the non-disclosure of arbitral proceedings and the publication of arbitral awards, refuse to recognize an implied obligation of confidentiality. Jurisdictions as such normally require that the parties expressly agree on the confidentiality of their arbitration in their arbitration agreement for their proceeding to be confidential and for their arbitral award not to be published. In *Esso Australia*, for instance, the court, in rejecting arguments for implied obligations of confidentiality, explained that:

*If the parties wished to secure the confidentiality of the materials prepared for or used in the arbitration and of the transcripts and notes of evidence given, they could insert a provision to that effect in their arbitration agreement.*⁶¹⁶

A different form of what may be perceived as non-recognition of an implied obligation of confidentiality appears in France where the revised French arbitration legislation seems to only expressly provide for the confidentiality of domestic arbitrations as opposed to international ones. Article 1464 of the French Code of Civil Procedure provides that “[s]ubject to other legal provisions, and unless the parties agreed otherwise, the principle of confidentiality applies to arbitral proceedings.” Article 1464 is only

⁶¹⁵ Also see Article 38 of the 2011 Costa Rican Arbitration law which provides that “[u]nless expressly agreed otherwise, the award once it is final, it will be public. It shall contain the name of the arbitrators and lawyers involved . . .”

⁶¹⁶ *Esso Australia Resources Ltd and Others v. The Honourable Sidney James Plowman*, XXI YCA 137, (1996), at p.151. However, since this case, Australia has adopted arbitration legislation that respect the confidentiality of international arbitrations. See Sections 23C-G of the 2010 Australian International Arbitration Act.

applicable to domestic arbitration and does not extend to international ones.⁶¹⁷ The extension of the domestic confidentiality obligation to international arbitration is quite an argumentative issue that is out of this thesis's concern. It is hardly questionable that international business parties choosing French law as their applicable law will need to explicitly include their arbitration agreement an express confidentiality provision, if they wish for their international arbitration to be confidential.⁶¹⁸ Examples such as the former Australian approach and the current French one, along with several similar approaches,⁶¹⁹ means that the parties will need to be extra vigilant as to how a certain national arbitration law regulates the confidentiality of international arbitration before choosing it.

Regardless, as it always is, the governing principle and essential ingredient to the framework of any arbitration is the principle of party autonomy. Therefore, if confidentiality is not wished to affect the parties' choice of applicable law, it is important that they make sure that they include their arbitration agreement a provision as to how private they wish their arbitration to be.⁶²⁰

⁶¹⁷ C. Lago and M. Moya, "Confidentiality under the New French Arbitration Law: Step Forward?", 11 Spain Arbitration Review: revista del Club Español del Arbitraje 79, (2011), at p.93. Also see G. Carducci, "The Arbitration Reform in France: Domestic and International Arbitration Law", 28 Arbitration International 125, (2012), at p.149.

⁶¹⁸ Born II, at p.2799. Also see E. Gaillard, "France Adopts New Law on Arbitration", New York Law Journal 24, (2011).

⁶¹⁹ One Swedish Supreme Court decision, for instance, provided that "a party to arbitration proceedings cannot be deemed to be bound by a duty of confidentiality, unless the parties have concluded an agreement concerning this." In *Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Finance Inc.*, XXVI YCA 291, (2001), at p.298.

⁶²⁰ Having used the word private, it may be worth mentioning that distinguishing between privacy and confidentiality in international arbitration may be of essence. While confidentiality is concerned with the obligation of the arbitrators and the parties not to give away any information regarding the arbitral proceedings and the award, privacy is rather concerned with persons other than the arbitrators and the parties who are to attend the hearings or to know about the arbitration. J. Lew, "Expert Report of Dr. Julian D.M. Lew (in *Esso/BHP v. Plowman*)", 11 Arbitration International 283, (1995), at p.285.

IV Other Qualities

In addition to the above criteria, there are several other qualities that can and should significantly affect the parties' preferences when choosing an applicable law to their international arbitration.

For instance, when choosing a national law, parties must not merely look at the provision of that law but also to the jurisdiction's tendencies and approaches towards the interpretation of the arbitration agreement and the facilitation of arbitral proceedings taking place on its territory. In so doing, parties and their lawyers are to research aspects as the literal interpretation of the language of arbitration agreements versus equity. For example, while civil law jurisdictions are generally known to have a tendency to import general principles of good faith, common law jurisdiction are rather keen on giving effect to the literal language of the parties' agreement.⁶²¹ Spotting these approaches may not always be easily identified. However, one author notes that parties' reliance on experienced international practitioners as well as the nature and circumstances of their relationship can very much narrow their choices.⁶²²

Other aspects, that are to be considered by the parties when choosing a national law, relates to the stability and sophistication of that law. Since international arbitration often involves business parties from different legal backgrounds, these parties will need to make sure that their chosen applicable law is developed, stable, and well-adapted to their commercial dealings.⁶²³ The existence of well-articulated body of commercial and corporate law is normally a positive sign to commercial-sophistication and well-adaption of a national law to host and regulate international arbitrations.

To the same effect, parties ought to avoid national laws that are newly formulated or are not yet practically applied in areas of commercial law. As suggested by one

⁶²¹ Born, "*Arbitration Agreements*", at p.163.

⁶²² *Ibid.*

⁶²³ Born II, at p.2747.

commentator, this will normally include “*many of the recently-emergent states that established market economics during the late 1980s and 1990s.*”⁶²⁴

Choosing a national law, however, is not the only available option for the parties. Another, less popular,⁶²⁵ alternative can be found in non-national legal systems. The following section addresses what non-national legal standards represents as well as whether a choice of such is a wise one.

7.2.2.2 Non-National Legal Systems

Parties to international contracts do not always wish to have their arbitration governed by a national law. Although rare, sometimes international business parties agree to refer their dispute to, what may be identified as, non-national legal systems, general principles of law or *lex mercatoria*. This section examines briefly the nature of these standards and attempts to evaluate whether choosing a non-national legal system can have a positive or a negative effect on the parties’ international arbitral settlement.

I Content

Identifying the nature and content of non-national legal systems is not always a straightforward process due to the vagueness and substantial uncertainty of the constantly-developing broad content of these standards/systems. However, extensive academic treatment of these systems, although in agreement on the ambiguity and uncertainty surrounding them, seem to generally identify these standards in the field of international arbitration as non-national legal rules that are mainly, but not exclusively, represented by general principles of international law, *lex mercatoria* (merchants law), trade usages, and transnational and international principles of commercial contracts (such as the UNIDROIT

⁶²⁴ *Ibid.*, at p.2748.

⁶²⁵ See the empirical study in Section 7.2.2.2, Sub-Section II, of this Chapter.

Principles).⁶²⁶ The following sub-section looks briefly into the content of some of the most common non-national legal standards referred to in international commercial arbitration by business parties.⁶²⁷

A *Lex Mercatoria*

As the most known form of non-national legal systems, the *lex mercatoria* or merchants' law has developed to resolve international commercial disputes and has emerged through the commercial dealings as well as the judicial and arbitral decisions related to these dealings separate from any national legal order.⁶²⁸ Earlier commentators define *lex mercatoria* as a “*spontaneous emanation of customs and principles arising purely out of professional mercantile circles through mercantile activity and dispute resolution.*”⁶²⁹

As with the majority of non-national legal standards, attempts of constituting *lex mercatoria*'s substance are extensively debated.⁶³⁰ Regardless, some commentaries found that it incorporates international commercial rules, general principles of law, and trade usages while not based on any single national legal system.⁶³¹ Others claim that *lex mercatoria* is exclusive to rules derived specifically from mercantile behaviors.⁶³²

In an attempt of creating a non-exhaustive list of the content of the *lex mercatoria*, Lando mentions rules of public international law which are generally applied to private

⁶²⁶ Gaillard, at p.818-820, O. Lando, “*The Lex Mercatoria in International Commercial Arbitration*”, 34(4) International and Comparative Law Quarterly 747, (1985), A. Mehren, “*General Principles of Law in International Commercial Arbitration*”, 101(8) Harvard Law Journal 1816, (1987-1988), and K. Berger, “*The Creeping Codification of the Lex Mercatoria*”, (1999), (available at <http://www.trans-lex.org/100600>) (last visited 31/10/2015).

⁶²⁷ It is important to note that, although the following sub-sections seem to identify each non-national legal system separately, setting boundaries and distinctions between each is not a common matter, at least in academic writings. Many commentaries, when examining the topic of non-national legal standards, tend to treat them all as one category of general commercial legal principles as opposed to national legal systems. See, for instance, M. Moses, “*The Principles and Practice of International Commercial Arbitration*”, (2012), O. Lando, “*The Lex Mercatoria in International Commercial Arbitration*”, 34(4) International and Comparative Law Quarterly 747, (1985), and C. Fassberg, “*Lex Mercatoria – Hoist with its own Petard*”, 5(1) Chicago Journal of International Law 67, (2004). Compare Born II, at p2759-2767.

⁶²⁸ Born II, at p.2760.

⁶²⁹ C. Fassberg, “*Lex Mercatoria – Hoist with its own Petard*”, 5(1) Chicago Journal of International Law 67, (2004), at p.69. Also see B. Goldman, “*The Applicable Law: General Principles of Law – The Lex Mercatoria*”, in J. Lew, “*Contemporary Problems in International Arbitration*”, (1986), at p.113.

⁶³⁰ M. Moses, “*The Principles and Practice of International Commercial Arbitration*”, (2012), at p.64-66.

⁶³¹ *Ibid*, at p.65.

⁶³² C. Fassberg, “*Lex Mercatoria – Hoist with its own Petard*”, 5(1) Chicago Journal of International Law 67, (2004), at p.71.

enterprises as well as to contracts between a government enterprise and a private party, uniform laws which are adopted for the regulation of international trade, general principles of law which are recognized by the majority of the commercial nations such as the *pacta sunt servanda* and acting in good faith rules, standard form contracts and standard form clauses in contracts which have gained some sort of a uniform interpretation by courts of several countries, and so on.⁶³³

Choosing *lex mercatoria* as the substantive law to govern the parties' dispute has been perceived to uphold certain advantages. Referring international disputes to *lex mercatoria* is claimed to provide uniformity in the application of certain international standards that allows the parties to avoid the peculiarities of any particular national law.⁶³⁴ Therefore, the choice of *lex mercatoria* arguably allows the parties to escape unfavorable rules and unpredictable quirks in national laws, as well as the uncertainties of choice of law issues.⁶³⁵ This has generally been reasoned by the fact that the application of any foreign national law provision that mainly targets domestic conditions does not serve the purpose of international business.⁶³⁶

However, this thesis finds that the decision of a complete and sole reliance on the *lex mercatoria* to govern the parties' disputes/transaction is impractical and ill-thought out. The uniformity, as well as many of the *lex mercatoria's* principles that are allegedly offered by it, are currently better offered by many national and international rules that are specifically designed to regulate the disputes of international business parties. This is not to undermine the importance of the *lex mercatoria* and the like of non-national legal systems. On the contrary, this thesis finds that the utilization of these non-nationals laws can be of

⁶³³ O. Lando, "The *Lex Mercatoria* in International Commercial Arbitration", 34(4) International and Comparative Law Quarterly 747, (1985), at p.748-751.

⁶³⁴ Award in ICC Case No. 8385, in J. Arnaldez, Y. Derains, and D. Hascher, "Collection of ICC Awards 1996-2000", (2003), at p.274.

⁶³⁵ See O. Chukwumerije, "Applicable Substantive Law in International Commercial Arbitration", 23(3) Anglo-American Law Review 265, (1994), at p.270, and, generally, M. Mustill, "The New *Lex Mercatoria: The First Twenty-Five Years*", 4(2) Arbitration International 86, (1988).

⁶³⁶ H. Smit, "Substance and Procedure in International Arbitration: The Development of a New Legal Order", 65(6) Tulane Law Review 1309, (1990-1991), at p.1312.

great value to the parties, once referred to as an ancillary tool to a choice of a national law. In so doing, the reference to the *lex mercatoria* or other non-national legal systems can fill in the gaps that a certain chosen applicable national law might have, offering the parties a further enhanced legal system that is well defined to cover every possible problem or question once a dispute arises. *Lex mercatoria* on its own has, therefore, been extensively criticized as too abstract, too imprecise, and filled with gaps.⁶³⁷

Furthermore, choosing *lex mercatoria* as a means of escaping the peculiarities of a certain national law or avoiding the application of choice of laws issues will not necessarily guarantee that to the parties.⁶³⁸ As it is explained previously, the application of certain mandatory rules, public policies, and rules of non-arbitrability is sometimes almost inevitable.⁶³⁹ The application of these rules and policies is meant to protect the integrity and enforceability of international arbitration agreements and awards and is important to be respected by the parties, if they wish to obtain a recognizable arbitral award.

Finally, *lex mercatoria* can lack details and comprehensiveness due to the fact that it is quite challenging to find order in the isolated decisions based on *lex mercatoria*. This can be problematic for any decision maker (be it a court or an arbitral tribunal) since pursuing or even identifying these non-national principles can project great difficulties.⁶⁴⁰ Therefore, reliance on these constantly evolving principles can offer minimal stability for the parties, especially where some of these principles have only been recently developed and have not been tested enough to prove effectiveness.

⁶³⁷ O. Chukwumerije, “Applicable Substantive Law in International Commercial Arbitration”, 23(3) Anglo-American Law Review 265, (1994), at p.274, and Award of February 17 (1984) in ICC Case No. 4237, X YCA 52, (1985), at p.55.

⁶³⁸ Selecting the *lex mercatoria* as a means for the parties to contract out of national public policies is an argument held by few authors. See, for example, T. Carbonneau and F. Janson, “Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability”, 2 Tulane Journal of International and Comparative Law 193, (1994), at p.221-222, and P. McConnaughay, “The Risks and Virtues of Lawlessness: A ‘Second Look’ at International Commercial Arbitration”, 93 Northwestern University Law Review 453, (1999), at p.471-472.

⁶³⁹ See Sections 5.2 and 5.4 of this thesis. Also see Article 1.4 of the UNIDROIT Principles which provides that: “Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international, or supranational origin, which are applicable in accordance with the relevant rules of private international law.”

⁶⁴⁰ Born II, at p.2764, and M. Mustill, “The New Lex Mercatoria: The First Twenty-Five Years”, 4(2) Arbitration International 86, (1988), at p.92.

All in all, this thesis finds that sole reliance on *lex mercatoria* – and non-national legal standards for that matter – is not recommended.

B General Principles of Law

Other non-national legal standards can be seen in general principles of law.⁶⁴¹ Identifying these principles is difficult and controversial as their nature, origins, and applicability is found to trigger several different interpretations, especially in the field of international law.⁶⁴² However, one author explains that these standards offer “*legal principles, behavioural standards, and rule-like norms that may be applied by arbitral tribunals either on a stand-alone basis or together with domestic laws.*”⁶⁴³ These include, but not exclusively, the *pacta sunt servanda* rule and a party’s right to terminate a contract once the other commit a substantial breach of that contract.⁶⁴⁴

The ICJ provides that general principles of law are those recognized by civilized nations and finds them to constitute part of public international law which the Court applies as the main source of law on questions not fully settled by treaty and custom.⁶⁴⁵ They are, therefore, generally intended to refer to those principles common to leading legal systems.⁶⁴⁶

Regardless, for similar criticism to that of the *lex mercatoria*, parties are not encouraged to use choice of law provisions referring to general principles of law. As mentioned above, identifying these principles is found to be fairly difficult and

⁶⁴¹ General principles of law have been described as an element of *lex mercatoria*. See O. Lando, “*The Lex Mercatoria in International Commercial Arbitration*”, 34(4) International and Comparative Law Quarterly 747, (1985), at p. 749. Whether these principles are an element of the *lex mercatoria* is not a concern of this thesis, however, this chapter chooses to separately discuss different types of non-national legal systems for reasons of practicality and convenience.

⁶⁴² B. Cheng, “*General Principles of International Law as Applied by International Courts and Tribunals*”, (2006), at p.2-5.

⁶⁴³ K. Berger, “*General Principles of Law in International Commercial Arbitration: How to Find them – How to Apply Them*”, 5 World Arbitration and Mediation Review 97, (2011), at p.139.

⁶⁴⁴ O. Lando, “*The Lex Mercatoria in International Commercial Arbitration*”, 34(4) International and Comparative Law Quarterly 747, (1985), at p.750.

⁶⁴⁵ Article 38(1)(c) of ICJ Statute. Also see, M. Nolan and F. Sourgens, “*Issues of Proof of General Principles of Law in International Arbitration*”, 3 World Arbitration and Mediation Review 505, (2009), at p.505.

⁶⁴⁶ Y. Derains, “*The Application of Transnational Rules in ICC Arbitral Awards*”, 5(2) World Arbitration and Mediation Review 173, (2011), at p.178.

controversial, especially in international and commercial contexts where they are often seen to be lacking sufficient guidance to be solely relied upon.⁶⁴⁷

C *UNIDROIT Principles*

Another type of non-national legal systems can be seen in the codified sets of regulations adopted by several international organizations, such as the UN and the UNCTAD, as codes of conduct and recommendations on matters relating to the regulation of international commerce or international contracts.⁶⁴⁸ One of the most known codified set of principles internationally is the UNIDROIT Principles which are meant to establish general rules of international commercial contracts, including the interpretation, validity, performance, and negotiations of these contracts.⁶⁴⁹ The official commentary on the Principles explains that these rules are created to represent contract law rules which are common to existing national legal systems and are adaptive to international commercial transactions' requirements.⁶⁵⁰

Although the UNIDROIT Principles are codified and seem to be sufficiently coherent, specific, and organized,⁶⁵¹ they are, by their nature, optional and, by no mean, purport to be applied automatically to any international commercial transaction. As the official commentary on the Principles explains, "*the parties may refer to the principles exclusively or in conjunction with a particular domestic law which should apply to issues not covered by the Principles.*"⁶⁵² These Principles, by no means, represent an international

⁶⁴⁷ Born II, at p.2759.

⁶⁴⁸ One of the recent successful attempts of codifying non-national legal standards is witnessed in the Trans-Lex Principles by the Centre for Transnational law. A full list of these can be found at (<http://trans-lex.org/principles>) (last visited 06/11/2015).

⁶⁴⁹ See UNIDROIT Principles (2004), Articles 2.1.13-2.1.19, 3.1-3.20, 4.8, and 6.1.1-6.2.3. Also see M. Bonell, "*An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*", (2009).

⁶⁵⁰ UNIDROIT, "*The Official Comment to the Preamble of UNIDROIT Principles of International Commercial Contracts*", (2004), at p.3.

⁶⁵¹ Described as such in *Partial Award of ICC Case No. 7110*, 10(2) ICC Bulletin 39, (1999), at p.39.

⁶⁵² *Ibid.*

convention or even a resolution of an international organization.⁶⁵³ They were published by the International Institute for the Unification of Private Law (UNIDROIT), first in 1994 and then revised in 2004, as a restatement of international contract law that represents rules common to the world market.

Nonetheless, as sophisticated and skillfully designed as these Principles are, commercial parties are generally not advised to solely rely on them in their transactions. This is due to the lack of details and sufficient legal precedents accompanying the principles, especially when compared to developed national legal systems on commercial matters.⁶⁵⁴ However, these Principles may prove to be highly efficient when referred to in conjunction with a national legal system. In international arbitral practice, the latter approach has produced a certain level of popularity.⁶⁵⁵

D Custom and Trade Usages

The final category of non-national legal systems to be considered by this thesis is trade usages and custom.⁶⁵⁶ Trade usages normally stand for those established practices that are normally followed in a certain line of international trade for a considerable amount of

⁶⁵³ F. Marella, “Choice of Law in Third-Millennium Arbitrations: The Relevance of the UNIDROIT Principles of International Commercial Contracts”, 36(4) Vanderbilt Journal of Transnational Law 1137, (2003), at p.1141.

⁶⁵⁴ Born II, 2767. Also see K. Berger, “The Lex Mercatoria Doctrine and the UNIDROIT Principles of International Commercial Contracts”, 28 Law and Policy in International Business 943, (1996-1997), at p.945.

⁶⁵⁵ See, for instance, *Partial Award in ICC Case No. 10022*, 12(2) ICC Bulletin 100, (2001) where the UNIDROIT Principles were applied in addition to the chosen national law of Lithuania, *Award in ICC Case No. 10021*, available at (<http://www.unilex.info/case.cfm?pid=2&do=case&id=832&step=FullText>) (last visited 04/11/2015), *Arbitral Award of International Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Case No. 174/2003 of 12 November 2004*, available at (<http://www.unilex.info/case.cfm?pid=2&do=case&id=1078&step=FullText>) (last visited 04/11/2015), *Final Award in ICC Case No. 9479*, 12(2) ICC Bulletin 67, (2001) where the UNIDROIT Principles were applied in addition to New York Law chosen by the parties, *Final Award in ICC Case No. 9029*, 10(2) ICC Bulletin 88, (1999) where the UNIDROIT Principles were applied in conjunction with the applicable Italian law, and *Final Award in ICC Case No. 8223*, 10(2) ICC Bulletin 58, (1999) where the UNIDROIT Principles were referred to although the contract was governed by French law.

⁶⁵⁶ This is not to indicate in any manner that non-national legal systems are exclusive to those listed above. On the contrary, non-national legal systems will generally include a list of standards that are constantly developing which means that this list will continuously expand to include non-exhaustive number of standards. Covering all aspects of non-national legal systems is not the focus of this thesis, however, the above list should give a sufficient prospective as to what they stand for.

time.⁶⁵⁷ These may either be codified, such as the INCOTERMS Rules which are published by the ICC, or uncoded and these are general trade practices which are specific to a particular business sector.⁶⁵⁸

Trade usages may be of particular importance in the field of international commercial arbitration. This is mainly due to the fact (or more like custom) that international business parties are generally expected to be sufficiently aware of trade usages that are widely established in their relevant field of business. To that extent, some conventions as well as codified non-national trade systems have expressly provided that trade usages which are established in a certain branch of business and are known by the parties are to be deemed as part of their contract, regardless of being expressly agreed upon in that contract or not.⁶⁵⁹

Besides being considered as part of the contract (whether being explicitly chosen by the parties or impliedly), trade usages can be used to fill the gaps in the parties' contract and interpret its terms by being employed as an interpretational instrument to interpret the will/intentions of the parties.⁶⁶⁰

Whether these non-national legal systems should be or actually are frequently relied upon by business parties in international arbitration is another issue. The following sections endeavor to briefly evaluate these systems.

⁶⁵⁷ T. Ayoglu, "Application of Trade Usages in International Institutional Arbitration – Some Reflections", 30(3) ASA Bulletin 539, (2012), at p.541.

⁶⁵⁸ C. Schmitthoff, "Interpretation and Application of International Trade Usages", (1981), at p.25, 31-34. Of course, proving the existence of uncoded trade usages is much more difficult than with the codified ones.

⁶⁵⁹ See, for instance, Article 9(2) of the CISG Convention, and Article 1.9 of the UNIDROIT Principles.

⁶⁶⁰ C. Pamboukis, "The Concept and Function of Usages in the United Nations Convention on International Sale of Goods", 25 Journal of Law and Commerce 107, (2005-2006), at p.107. Also see Article 8(3) of the CISG Convention, and Article 4.3 of the UNIDROIT Principles.

II Evaluation

In evaluating the use of non-national legal standards in the practice of international commercial arbitration, three issues should be analyzed. These are: the validity of the parties' choice of non-national legal standards nationally and internationally, whether making such a choice is wise for their international dispute settlement, and how frequent is such choice made in practice. All three issues are briefly analyzed below.

The validity of non-national choice of law clauses fall within the wider sphere of the validity of parties' choice of an applicable law/rules in general which falls within the frame of the parties' autonomy principle. Therefore, the majority of national and international laws/instruments provide that generally parties are free to agree upon the law or rules of law applicable to their contract.

On a national level, Article 28(1) of the Model Law provides that the arbitral tribunal is to decide the dispute in accordance with the 'rules of law' chosen by the parties. The drafting history of the Model Law generally supports interpreting this Article as to give validity for parties' choice of non-national legal systems.⁶⁶¹ Several other national arbitration laws have followed the steps of the Model Law in giving validity to parties' choice of non-national legal systems as the applicable law.⁶⁶²

On an international level, several arbitration institutional rules and international arbitration conventions have given effect and validity to the parties' choice of non-national legal standards in their agreement.⁶⁶³ For example, Article VII(1) of the European Convention provides that, whether the parties have explicitly chosen an applicable law or

⁶⁶¹ O. Lando, *"The Law Applicable to the Merits of the Dispute"*, in P. Sarcevic, *"Essays on International Commercial Arbitration"*, (1989), at p.129 and p.154.

⁶⁶² See, for example, Section 46(1)(b) of the 1996 English Arbitration Act, Article 187(1) of the Swiss PIL, Article 39 of the 1994 Egyptian Arbitration Law, Article 1054 of the Netherlands Code of Civil Procedure, Article 1512 of the 2011 French Code of Civil Procedure, and Article 822 of the Italian Code of Civil Procedure.

⁶⁶³ See, for example, Article 42(1) of the ICSID Convention, Article 21(1) and (2) of the 2012 ICC Rules, Article 22(2) of the 2014 LCIA Rules, Article 33(1) of the DIAC Rules, Article 31 of the HKIAC Rules, and Article 23(1) of the DIS Rules.

failed to do so, the arbitrators shall take into account the terms of the contract as well as trade usages.

Is it, however, practical for parties to exclusively rely on non-national legal systems? As mentioned above, there are substantial difficulties in ascertaining the meaning of several categories of non-national legal systems such as the *lex mercatoria*, general principles of law, and trade usages.⁶⁶⁴ Their constant development and lack of judicial precedents can only add to these difficulties. The lack of judicial authority with the extensive academic debate on their meaning and effect can only leave defining them to inevitable and undesirable uncertainty which goes against the needs of stability and predictability of international commerce and international business parties.⁶⁶⁵

Consequently, at least to this thesis, reference to non-national standards is to be avoided since agreements on them project material risk of rendering these agreements invalid and unenforceable. This is possible as non-national choice of law formulae are considered invalid in a few jurisdictions, thereby precluding the parties from choosing non-national legal systems.⁶⁶⁶ While these examples are rare, it would be safer for the parties to ensure that whatever jurisdiction involved in their arbitral system does allow for non-national choice of law formulae, even safer to avoid such formulae and attempt reliance on a further stable/developed national law. This thesis particularly finds that the use of non-national legal systems is best accompanied with a national choice of law since it functions as gap fillers and serves to create a much more risk-free system to govern the parties' relationship.

Finally, when looking at the evaluation of non-national legal standards, it is useful to examine how much they are actually being relied upon in international arbitration. The following examined empirical studies show that parties very rarely refer their contractual

⁶⁶⁴ Gaillard, at para.1447.

⁶⁶⁵ Born II, at p.2758.

⁶⁶⁶ See, for example, Article 73 of the Tunisian Arbitration Code and Article 38(1) of the Bulgarian Law on International Commercial Arbitration.

relationships to non-national legal systems. This data obviously only relied on cases from contracts that have led to disputes. Furthermore, it can only cover those cases where arbitral awards are published. Along with the confidentiality/privacy of international arbitrations, this can mean that this data cannot be widely representative to international commercial contracts. They can, yet, indicate the level of prevalence of non-national legal systems in international commercial arbitration.

The empirical studies examined under this chapter are mainly carried out by Dasser based on an ICC practice over the years 2000-2009. The studies carried by Dasser found that the use of non-national legal systems were mainly confined to the world of international arbitration as case-load on these systems was mostly found in arbitration rather than in national courts.⁶⁶⁷

A study of ICC Cases between the years 2000-2006 found that only 1-2% of parties have chosen non-national legal standards.⁶⁶⁸ Nonetheless, the study shows that those chosen non-national legal standards were in fact references to the CISG Convention (in more than 20 Case) along with other conventions, EU law, international public law, or equity.⁶⁶⁹ Yet, choosing a non-national legal standard is quite a different issue than choosing a convention that has been enacted by contracting states.⁶⁷⁰ This, specifically, applies to the CISG Convention for, whenever it is chosen by the parties, such choice is often confused with a choice of a non-national legal standard.⁶⁷¹ When parties refer to the CISG Convention, such reference targets the legal rules that have been formally enacted by Contracting States for international sales of goods and supplemented by national law according to conflict rules.⁶⁷²

⁶⁶⁷ F. Dasser, “*That Rare Bird: Non-National Legal Standards as Applicable Law in International Commercial Arbitration*”, 5(2) World Arbitration and Mediation Review 143, (2011), at p.146.

⁶⁶⁸ F. Dasser, “*Mouse or Monster? Some Facts and Figures on the Lex Mercatoria*”, (2008), available at (http://www.homburger.ch/fileadmin/publications/MOUSMON_01.pdf) (last visited 09/11/2015), at p.140.

⁶⁶⁹ *Ibid.*

⁶⁷⁰ K. Berger, “*The Creeping Codification of the New Lex Mercatoria*”, (2010), at p.295.

⁶⁷¹ F. Dasser, “*That Rare Bird: Non-National Legal Standards as Applicable Law in International Commercial Arbitration*”, 5(2) World Arbitration and Mediation Review 143, (2011), at p.145.

⁶⁷² *Ibid.*

Therefore, when the case-law with reference to the CISG Convention was excluded, it was found that, out of 3955, only 22 cases (approximately) involved parties choosing some sort of a non-national legal standard.⁶⁷³ By 2009, an increase in the case-load showing parties choosing non-national legal systems has taken place to move from 22 (in 2006) to a sum total of 37 in 2009.⁶⁷⁴

Moreover, when Dasser examined published arbitral awards, he found that, over the period of 1987 to 2007, only 39 awards worldwide have covered cases where parties have, at least partly or implicitly, chosen non-national legal systems, either alone or with a national law.⁶⁷⁵ Dasser explains that examining only the cases where parties have made an explicit and sole choice of a non-national legal system reduced the number of the above case load to one every five years approximately.⁶⁷⁶

The studies show a lot more details with regard to case-load figures as well as to which exact category of non-national legal system was actually used. The concluding remarks of these studies prove that parties very rarely choose a non-national legal standard and that most of the time they are reluctant to opt for these systems unless it is in conjunction with a national law.

There is almost no evidence whatsoever on reference to the *lex mercatoria* as such, however, the most used non-national legal systems are generally represented by academics as the various manifestations of *lex mercatoria*. This thesis generally finds that the term *lex mercatoria* seem to be far more acknowledged/recognized by academics than it is by practitioners. As continuously mentioned, defining non-national legal systems, especially

⁶⁷³ F. Dasser, “*Mouse or Monster? Some Facts and Figures on the Lex Mercatoria*”, (2008), available at (http://www.homburger.ch/fileadmin/publications/MOUSMON_01.pdf) (last visited 09/11/2015), at p.140.

⁶⁷⁴ F. Dasser, “*That Rare Bird: Non-National Legal Standards as Applicable Law in International Commercial Arbitration*”, 5(2) World Arbitration and Mediation Review 143, (2011), at p.148. Dasser, however, in his earlier study notes that some of the above numbers prescribe choices of public international law which he believes to be excluded from the list of non-national legal systems. He also notes that, since the UNIDROIT Principles are an academic *ratio scripta* rather than a codification of the *lex mercatoria*, these Principles should be excluded too. F. Dasser, “*Mouse or Monster? Some Facts and Figures on the Lex Mercatoria*”, (2008), available at (http://www.homburger.ch/fileadmin/publications/MOUSMON_01.pdf) (last visited 09/11/2015), at p.141.

⁶⁷⁵ F. Dasser, “*That Rare Bird: Non-National Legal Standards as Applicable Law in International Commercial Arbitration*”, 5(2) World Arbitration and Mediation Review 143, (2011), at p.152.

⁶⁷⁶ *Ibid.*

lex mercatoria, seems to project a lot of difficulty and is largely characterized as being vague and lacking certainty. Such characterization seems to follow a steep pattern even in practice. For instance, in one of the earliest and most known cases on non-national legal systems, the contract between the parties seemed to refer to non-national legal systems in a provision stating that “[t]he Ruler [of Abu Dhabi] and the Company both declare that they intend to execute this agreement in a spirit of good intention and integrity, and to interpret it in a reasonable manner.”⁶⁷⁷ In construing the law applicable to that contract and commenting on the previous provision of the contract, the arbitrator found that neither the law of Abu Dhabi, nor the Law of England applies.⁶⁷⁸ He reaches, however, the conclusion that this provision invites and prescribes “the application of principles rooted in the good sense and common practice of the generality of civilized nations – a sort of ‘modern law of nature’.”⁶⁷⁹ This thesis finds that the construction of the wording adopted by the arbitrator in this case does not precisely refer to any particular category(s) of non-national legal system.⁶⁸⁰

In totality, non-national legal systems seem to not quite offer international business parties much reliability or predictability as to how they will be construed by the arbitrators, and whether such construction represents the parties’ intentions. Therefore, avoiding them all together or choosing these systems along with a national law may seem like the wiser choice.

Regardless, making an explicit choice of an applicable law is not always the way parties can choose one, although it is the most recommended. Parties’ intentions/choice can

⁶⁷⁷ Asquith of Bishopston, “Decision in the Matter of an Arbitration Between Petroleum Development Ltd And the Sheikh of Abu Dhabi”, 1(2) International and Comparative Law Quarterly 247, (1952), at p.249.

⁶⁷⁸ *Ibid*, at p.250.

⁶⁷⁹ *Ibid*, at p.251.

⁶⁸⁰ Also see ICC Award in Case No.12111 of 06 January 2003, available at (<http://www.unilex.info/case.cfm?pid=2&do=case&id=956&step=FullText>) (last visited 09/11/2015) where the parties agreed on ‘international law’ as the applicable law but the tribunal went on to construe that law to include *lex mercatoria* and, indirectly, the UNIDROIT Principles. Again, whether choosing ‘international law’ refers to public international law (which seems like the better choice) or to *lex mercatoria* (or any other non-national legal system) will largely depend on the arbitrators’ construction of the parties’ agreement and the wording of that agreement.

also be made impliedly. The following section analyzes the implied choice of law by the parties in their international arbitration agreement.

7.3 Parties' Implied Choice of Law

According to this thesis, an implied choice of law is different from an absent choice. In order to understand the differences between both one must first answer the following question: why would the parties not make a choice of an applicable law to begin with?

The fact is, it is not unusual for the parties to ignore specifying an applicable law for their agreement. Many reasons may possibly justify why parties sometimes either fail or choose not to assign an applicable law. In the majority, it seems that such absence may be due to the fact that when parties are negotiating the commercial terms of their contractual relationship, they are mostly less concerned with the specific aspects of the settlement of their potential future disputes.⁶⁸¹ To a certain extent, this may be acceptable or, at least, expected since it may not be convenient to negotiate the different aspects of a dispute before a conflict actually arises (it may seem as if parties are anticipating the future occurrence of a conflict). One author explains that “*broaching an ante-nuptial agreement and talking of divorce when the couples are about to say ‘I do’ generally is regarded as poor form indeed.*”⁶⁸² There is also the possibility that in negotiating an agreement, it is not always feasible to anticipate all the unforeseen predicaments that might arise in the future and require making a decision by the parties. Moreover, this may simply occur where parties are guided by non-specialists.

Nonetheless, there are situations where the parties will intentionally and willingly choose not to designate an applicable law to their agreement. It may be that they concluded negotiations over all the other aspects of their agreement but, when reaching the stage of

⁶⁸¹ C. Croff, “*The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?*”, 16 International Lawyer 613, (1982), at p.623.

⁶⁸² C. Brower, *Remarks on “International Arbitration”* delivered to a gathering of Fortune 500 general counsel on 30 October 1989 at Laguna Niguel, California, page 8 of the transcript.

choosing an applicable law, they face a barrier. This barrier may take place where both parties are from very different legal and cultural backgrounds that they both find it difficult to agree on a law that is neutral and acceptable for both of them so they leave the matter open rather than not conclude the agreement. This sort of no choice is normally referred to as the implied/negative choice by the parties.⁶⁸³

Once the arbitral tribunal is faced with the situation where it has to determine the applicable law itself, it is very important that a tribunal captures the reasons behind the parties not assigning an applicable law to their agreement. Depending on whether this is ascribed to the carelessness of the parties, or there actually is an implied/negative choice of law made by the parties, the tribunal will make its decision on the applicable law.

In choosing the applicable law, what matter most for a tribunal are the indications of parties' intention. As one commentator explains, in determining the law on behalf of the parties, the tribunal should ask itself "[i]f the parties had to agree on a choice of law, what law (or rules of law) would they have chosen?"⁶⁸⁴ Moreover, in interpreting the parties' intentions, a tribunal should be looking at the circumstances of each case, as well as certain objective factors such as the surrounding facts, the language used in any contractual documents between the parties and the overall of the parties' relationship.⁶⁸⁵ Understanding the reasons behind the absence of the parties' choice of an applicable law can further assist the tribunal in interpreting their intentions.

From the parties' perspective, it is important to realise that not making a choice of law can just have as much influence on eventually determining the applicable law as making an express choice. It is, of course, a much preferable scenario for the parties to make a clear explicit choice of law in their agreement. However, when they do not, it is

⁶⁸³ M. Blessing, "Regulations in Arbitration Rules on Choice of Law" 391, in ICCA Congress Series No. 7, (1996), at p.396. Also, generally, see K. Berger, "Party Autonomy in International Economic Arbitration: A Reappraisal", 4(1) American Review of International Arbitration 14, (1993), and H. Beale, "Chitty on Contracts", (2012) where the author explains the difference between an implied choice and no choice of law, at para.30-054.

⁶⁸⁴ M. Blessing, "Choice of Substantive Law in International Arbitration", 14 Journal of International Arbitration 39, (1997), at p.45.

⁶⁸⁵ Lew and Mistelis, at p.415.

essential to grasp the importance of how their intentions will be manifested to the tribunal based on their behaviours, circumstances, and choices of other aspects. This can, at least, assist the parties with anticipating what sort of law can possibly be assigned by the tribunal and will, accordingly, increase the predictability of their settlement.

Regardless, in determining the parties implied choice of law, the majority of authorities show that there is, unfortunately, quite a multiplicity of competing approaches that only serve to produce uncertainty and confusion. This section attempts to briefly explore some of the divergent conflict of laws approaches followed in determining the parties implied choice of law.

Two choices have been interpreted as implied choices by the parties of an applicable law. These are the choice of a seat and the choice of law in the main underlying contract. Both are examined below.

7.3.1 Parties' Choice of a Seat

In determining the implied choice of law by the parties, some authorities followed an approach based on the seat chosen by the parties in their arbitration agreement. According to this approach, where the parties have not made an explicit choice of an applicable law to their arbitration agreement but did specify a place for their arbitration, the substantive law of that place shall be applied to the validity of the international arbitration agreement.⁶⁸⁶

This approach is also followed by Article V(1)(a) of the NY Convention. Although such approach is criticised and flawed for a few reasons (that are explained later),⁶⁸⁷ this section does not necessarily argue against the direct application of the law of the seat absent the parties' express choice. What is criticised, however, is the implication that the choice of the seat, where the parties have not specified a law, is considered an indication of the parties' intention to have the law of the seat applied to their agreement. Having said

⁶⁸⁶ See W. Craig, W. Park and J. Paulsson, "*International Chamber of Commerce Arbitration*", (2000), para.5.05, Berg, p.124, and Dicey I, at para.16-020.

⁶⁸⁷ See Section 7.4.1.1 of this thesis.

that, under Article V(I)(a) of the Convention, the law of the seat (the law of place where the award was rendered) applies irrespective of whether such application is justified by claiming that it is the most representative of the parties' implied intentions or by any other justification.

Regardless, a few authorities have followed this approach in deciding which law to apply failing the parties' express agreement.⁶⁸⁸

In justifying the tendency to adopt this approach, some courts have explained it by the fact that the procedural nature of an arbitration agreements requires the application of the law governing the procedures of the arbitration, i.e. the law of the seat.⁶⁸⁹ In a decision of the Tokyo High court, it was justified that, “[i]f the parties’ will is unclear we must presume, as it is the nature of the arbitration agreements to provide for given procedures in a given place, that the parties intend that the law of the place where the arbitration proceedings are held will apply.”⁶⁹⁰

However, the most common justification for adopting this approach is that it is supposedly the most representative of the parties' implied intentions. Authorities adopting this approach find that where the parties seat their arbitration in a particular place, they impliedly agree that their arbitration agreement is to be governed by the law of that place.⁶⁹¹ In other words, their choice of a seat represents their intentions for the law of that seat to govern their arbitration agreement. This connection between the choice of the seat and the parties' intentions of an applicable law is what this thesis mainly rejects. As explained earlier, in many occasions the parties choose a particular seat for practicality and

⁶⁸⁸ See, for example, *Citation Infowares Ltd v. Equinox Corp.*, 7 SCC 220, (2009) (Indian S.Ct.), *Sulamerica Cia Nacional de Seguros SA v. Enesa Engenharia SA* [2012] EWCA Civ. 638 (English Ct. App.), *C v. D* [2007] EWCA Civ. 1282, and *Final Award in ICC Case No. 14046*, XXXV YCA 241, (2010). Also see Article 48 of the 1999 Swedish Arbitration Act which provides that: “Where the parties have not reached [a choice of law] agreement, the arbitration agreement shall be governed by the law of the country in which, by virtue of the agreement, the proceedings have taken place or shall take place.”

⁶⁸⁹ See, for example, *Final Award in ICC Case No. 1507*, in S. Jarvin and Y. Derains, “Collection of ICC Arbitral Awards 1974 – 1985”, (1990), at p.215-216.

⁶⁹⁰ *Judgment of 30 May 1994*, XX YCA 745, (1995), at p.747.

⁶⁹¹ See, for example, *Judgment of 28 September 1995*, XXII YCA 762, (1997), at p.765, and *Interim Award in ICC Case No. 7373*, XXIV YCA 149, (1999).

ease of access rather than for legal reasons.⁶⁹² In these situations, it is difficult and inaccurate to link the parties' intentions regarding the applicable law to a country chosen for practical convenience. Moreover, in situations where the arbitral tribunal or the arbitral institution was given the decision of determining the place of arbitration, it would be obscure to link the intentions of the parties to the law of that seat since they have not chosen it to begin with. Therefore, this thesis does not find this approach satisfactory in representing the implied choice/intentions of the parties.⁶⁹³

This thesis, however, finds that the main reason to adopt that approach would be that it is represented by Article V(1)(a) of the NY Convention as the default conflict rule where the parties fail to expressly assign a law.⁶⁹⁴ The NY Convention, in adopting this approach, does not seem to justify it on the assumption that the law of the seat is the most representative of the parties' implied intentions.⁶⁹⁵

This thesis argues that a choice of the seat should not always and directly be used as a device that indicates the parties' intentions to the applicable law. One can easily find examples where the parties have not explicitly made a choice of law in their arbitration agreement, yet their selection of a seat was not considered an implied choice of the law of that seat to apply.⁶⁹⁶ However, when most or all of the surrounding circumstances point to an implied intention to choose the law of the seat, only then the choice of a seat can be used as an indication to the parties' intentions.⁶⁹⁷

⁶⁹² See Section 6.1 of this thesis. Also see O. Lando, "The Law Applicable to the Merits of the Dispute", in P. Sarcevic, "Essays on International Commercial Arbitration", (1991), at 129.

⁶⁹³ For other opposing opinions as well, see generally I. Bantekas, "The Proper Law of the Arbitration Clause: A Challenge to the Prevailing Orthodoxy", 27(1) Journal of International Arbitration 1, (2010).

⁶⁹⁴ The same position is also represented under Article VI(2) of the European Convention. Also see P. Bernardini, "Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause" 197, in ICCA Congress series No. 9, (1999), at p.201.

⁶⁹⁵ Born I, at p.512.

⁶⁹⁶ See, for instance, *Atlantic Underwriting Agencies Ltd and David Gale (Underwriting) Ltd v Compagnia di Assicurazione di Milano SpA*, [1979] 2 Lloyd's Rep. 240, where the arbitration took place in Geneva but was governed by Italian law, and *Mitsubishi Corp v Castletown Navigation (The Castle Alpha)*, [1989] 2 Lloyd's Rep. 383, where the arbitration took place in London but was governed by Japanese law.

⁶⁹⁷ See, for instance, *Deutsche Schachtbau v Shell International Petroleum Co Ltd*, [1990] 1 AC 295 (CA), reversed on different grounds. Similar opinion is found in Dicey I, at para.16-020.

7.3.2 Parties' Choice of Law in Main Contract

In interpreting parties' potential implied choice of law, some authorities have found that a general choice of law clause in the underlying contract can certainly apply to the arbitration clause within, where the parties have not specified an express choice of law to the arbitration agreement.

This approach has been followed by some common and civil law jurisdictions, as well as a few arbitration awards.⁶⁹⁸ In justifying this approach, one commentator explains that “[s]ince the arbitration clause is only one of many clauses in a contract, it would seem reasonable to assume that the law chosen by the parties to govern the contract will also govern the arbitration clause.”⁶⁹⁹

Needless to say, such justification considerably ignores the separability presumption of an arbitration clause. While it is possible in certain situations, where enough evidence indicate that the parties intended for the general choice of law clause in the main contract to govern the arbitration clause as well, it is not correct to generally assume that such clause will always govern the arbitration agreement just because this agreement is one of many clauses in the contract.

Having said that, in practice, it is very rare that the parties will have given much thought to the effect of separability on their arbitration clause, not to mention the possibility of having a different law applied to it than the main contract.⁷⁰⁰ Regardless, this does not justify automatically extending the application of a general choice of law clause in the main contract to the arbitration clause within. Such approach contradicts the basic differences between the ancillary/procedural nature of an arbitration clause from the

⁶⁹⁸ See, for example, *Arsanovia Ltd v. Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm) (English High Ct.), *Award in ICC Case No. 9987, Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan*, 2(4) International Journal of Arab Arbitration 370, (2010), *Judgment of 28 August 2007*, 1991 Hanrei Jiho No. 89 (Tokyo Chiho Saibansho), *M/S Indtel Technical Services Pvt. Ltd v. W.S. Atkins Rail Ltd*, (2008) 10 SCC 308, (Indian S.Ct), and *Aastha Broadcasting Network v. Thaicom Public Co.*, [2011] O.M.P. 528/2011 (Delhi High Ct.).

⁶⁹⁹ Redfern and Hunter, at para.3.12.

⁷⁰⁰ Gaillard, at para.425.

substantive nature of the main contract. Furthermore, it defies the default conflict rule provided by Article V(1)(a) of the NY Convention which designates the law of the seat absent the parties' express agreement, not the law of the underlying contract.

However, this thesis mainly rejects linking a general choice of law clause in the underlying contract to the parties' implied choice of law for their arbitration clause for reasons that have to do with their intentions of choosing the law applicable to each of the underlying contract and the arbitration clause within. Normally, the parties' motives for choosing a law to be applied to their main contract are quite different from their motives for choosing a law or a seat for their arbitration. Generally speaking, the law applicable to the main contract could possibly be the law of one of the parties' home jurisdiction or the law of performance (depending on the parties' choice or the connecting factor used to determine that law through a conflict rule). On the other hand, parties generally tend to designate a place for their arbitration in their arbitration agreement that is particularly neutral to both of them. It is, therefore, difficult to interpret the intentions of the parties as to the law applicable to their arbitration agreement based on their general choice of law clause in their main contract.

For all the above reasons, many other common⁷⁰¹ and civil⁷⁰² law jurisdictions have equally rejected this approach. This is specifically true where the parties have provided both a choice of a place of arbitration as well as a general choice of law clause in their underlying contract. Although both approaches (the application of law of the seat and the application of the law of the underlying contract) suffer from different flaws, when having to rely on one of them in ascertaining the possible implied intentions of the parties, the law of the seat provides a better indication to the parties' implied choice.⁷⁰³

⁷⁰¹ See, for example, *Farrell v. Subway International B.V.*, 2011 WL 1085017 (S.D.N.Y.), and *Westbrook International LLC v. Westbrook Technologies, Inc.*, 17 F.Supp.2d 681 (E.D. Mich. 1998).

⁷⁰² See, for example, *Judgement of 7 April 2011*, 2011 Rev. Arb. 747 (Paris Cour d'appel), *Judgement of 27 October 2000, Bulgarian Foreign Trade Bank, Ltd v. A.I. Trade Fin., Inc.*, XXVI YCA 291, (2001), and *Final Award in ICC Case No. 6162*, XVII YCA 153, (1992).

⁷⁰³ For example, in *XL Insurance Ltd v. Owens Corning* [2000] 2 Lloyd's Rep. 500 (QB) (English High Ct.) the main contract contained a choice-of-law clause that subjected the contract to New York Law. The

In neutrally assessing this approach and how accurate it could possibly represent an implied choice by the parties, it is safe to say that there will be situations where evidence will support that the parties intended for their underlying contract's choice of law clause to cover their arbitration agreement as well. For example, in *ICC Case No. 11869*,⁷⁰⁴ the arbitration agreement was represented under a pathological arbitration clause that provided “*for arbitration in Vienna, Austria in accordance to the rules of arbitration.*”⁷⁰⁵ The main contract itself was, however, governed by English law. The arbitrator, in deciding on his own jurisdiction, applied the English law. It was noted that the choice of law clause was followed immediately after the arbitration clause in the contract.⁷⁰⁶

Other evidence supporting the application of the choice of law clause in the underlying contract to the arbitration clause includes the language of the arbitration clause itself and the overall of the parties' relationship. Born, as an experienced international arbitrator, suggests that the following clauses serve beyond doubt to outspread the applicability of the choice of law clause in the main contract to the arbitration clause. These include, by way of example, “*All of the provisions of this Contract (Article 1-21) shall be governed by the law of State X*”, or “*All of the provisions of this Contract including, for the avoidance of doubt, Article 10 (Arbitration) shall be governed by the law of State X.*”⁷⁰⁷

To sum up, an implied choice of law is where the parties have not specifically made an express choice of law, yet they make another express choice in their arbitration agreement or the main contract as to the seat or the law applicable to their underlying

arbitration clause, however, provided for arbitration in London under the English Arbitration Act. The court held that the validity of the arbitration agreement was governed by the English law not the New York Law. *Ibid*, at p.508. Also see, *Abuja International Hotels Ltd v. Meridien SAS* [2012] EWHC 87 (Comm) (English High Ct.), and *Sulamerica Cia Nacional de Seguros SA v. Enesa Engenharia SA* [2012] EWCA Civ. 638 (English Ct. App.).

⁷⁰⁴ *Award in ICC Case No. 11869*, XXXVI YCA 47, (2011).

⁷⁰⁵ *Ibid*, at p.47.

⁷⁰⁶ *Ibid*, at p.52.

⁷⁰⁷ Born I, at p.580.

contract. Sometimes, however, parties are silent as to express and implied choices. The final section of this chapter briefly examines this situation.

7.4 No Express or Implied Choice of Law

As it is explained earlier, it is not uncommon that the parties make no choice of law specifically to the arbitration agreement.⁷⁰⁸ When that happens, determination of that law is either left to the arbitrators or national courts. Many international and national arbitration laws/rules provide for an applicable law where the parties have failed to designate one.

7.4.1 National and International Treatment of Choice of law absent Parties' Explicit Agreement

Having no express or implied choice of law to the parties' arbitration agreement has unfortunately created multiplicity of competing approaches as to which law applies in this situation. This variety of multiple approaches has created uncertainty, confusion, and increases both the time and expense of any settlement of the dispute. Unfortunately, leading international and national regulations of the subject have, to a certain extent, added to the confusion. The following sub-sections examine such regulation under the NY Convention and the Model Law.

⁷⁰⁸ S. Bond, "*How to Draft an Arbitration Clause (Revisited)*", 1(2) ICC Bulletin 14, (1990), at p.14.

7.4.1.1 NY Convention

Article V(1)(a) of the NY Convention provides indirectly for a universal conflict rule where the parties have not made an explicit choice as to the law applicable to their arbitration agreement. It stipulates that in this situation the recognition and enforcement of the award may be denied, if the arbitration agreement was not valid under the law of the country where the award was made.

For a few reasons, this Article has led to substantial debate and uncertainty. To begin with, the Article refers the validity of an arbitration agreement to the law of the place where the award was made. In the majority of circumstances, this place will be the seat of arbitration, i.e. the place where the arbitrators have issued and signed the award.⁷⁰⁹ Although in practice, parties tend to choose a seat of their arbitration or will, at least, refer to institutional rules which will provide for the mechanism of choosing one, there will be situations where the parties fail to designate an arbitration seat. In situations as such, the default rule set by Article V(1)(a) which refers to the law of the place where the award has been rendered fails. This is simply because it refers to a law of a place that has not been designated yet.

Based on that very same note, a considerable confusion and diversity in commentaries and authorities has taken place as to the stage in which the conflict rule of Article V(1)(a) applies, i.e. whether it is only applicable at the post-award stage or whether it applies by analogy at the pre-award stage as well. A few authorities are of the opinion that this conflict rule applies to the pre-award stage by analogy. However, as mentioned above, it would be impossible to apply the law of the place of the award before the award is issued and before the parties have designated a place of arbitration. Again, this will render this conflict rule under Article V(1)(a) obsolete. Others find that the rule only applies when enforcement of the award is in question but not during any earlier stage, i.e.

⁷⁰⁹ Berg, at p.126.

the enforcement of the arbitration agreement (for example, when a national court considers whether or not litigation should be stayed because of the parties' arbitration agreement).⁷¹⁰

Bernardini suggests applying two different laws depending on whether the issue of the validity of the arbitration agreement is brought before a court at pre-award stages or post-award stages. According to this suggestion, the validity of the arbitration agreement is determined by the court of the *lex fori* when brought at pre-award stages, while determined by the law of seat of arbitration at post-award stages.

This thesis finds this approach to be unsatisfactory and complicated. It will lead to applying two different laws to the same arbitration agreements which could produce contradictory results eventually. Not to mention, such approach definitely contradicts the main goal of the NY Convention which is to create and achieve uniformity between arbitration regimes internationally. In commenting on that approach, Albert van den Berg explained that “*the Convention's text must be considered to constitute a whole.*”⁷¹¹

The same approach is also strongly advised against by Gary Born for reasons similar to the above.⁷¹² Born also criticizes this approach on bases that applying two different laws to the same arbitration agreement could possibly produce the undesirable result of having this agreement valid (or invalid) at one stage and the exact opposite result at another. In proposing a solution, he suggests that the proper resolution to this problem would be to apply a validation principle.⁷¹³ This works by looking through any number of plausible future arbitral seats and giving effect to the arbitration agreement under the law that validates it out of all these plausible laws.

⁷¹⁰ See, for example, *Ferrara SpA v. United Grain Growers Ltd*, 441 F.Supp. 778, (S.D.N.Y. 1977), at p.780-781, *Apple & Eve, LLC v. Yantai N. Andre Juice Co.* 499 F.Supp.2d 245, 248 (S.D.N.Y. 2007). Also see P. Friedland and R. Hornick, “*The Relevance of International Standards in the Enforcement of Arbitration Agreements under the New York Convention*”, 6 American Review of International Arbitration 149, (1995), where the authors claim that “[b]oth the text of the Convention and the travaux suggest strongly that Article V's choice-of-law rules should not be read into Article II, and that disputes under Article II should be resolved based on a potentially different international standard”. *Ibid*, at p.154.

⁷¹¹ Berg, at p.286.

⁷¹² Born I, at p.497.

⁷¹³ Born I, fn.132, at p.496.

This thesis does not quite grasp how this is any different from the previous approach other than validating the arbitration agreement at pre-award stages. Regardless, if, later on, it was found that the law that gave validity to the arbitration agreement through the application of a validation principle at the pre-award stage is different from the law of the seat (at post-award stage), the same undesirable result can still occur (where the arbitration agreement is invalid under the more recent designated law of the seat).

A final observation over the possible complexity produced by Article V(1)(a)'s default conflict of laws rule regards its assignment of the law of the place where the award was made. Although the Convention clearly identifies the law of the place where the award was made as the law applicable to the arbitration agreement where the parties' fail to expressly agree, the Convention does not provide for any test to determine the place where the award is/was made. It could be problematic where the seat of arbitration is different from the place where the award is signed. This is simply because the Convention does not identify which of these two places is determinative in identifying the place where the award is made.

All in all, Article V(1)(a) projects considerable complexities with the undesirable result of possibly applying different laws to the same issues and the same arbitration agreement. This complexity, however, only occurs where the parties have not made an explicit choice of an applicable law to their arbitration agreement or, at least, a choice of a seat of arbitration.

7.4.1.2 Model Law

Absent the parties' explicit choice of applicable law to their arbitration agreement, the Model Law has a similar treatment as provided under the NY Convention. Articles 34(2)(a)(i) and 36(1)(a)(i) provide that the arbitral award could be set aside or refused recognition and enforcement if it is invalid according to the law chosen by the parties, or, absent this explicit choice, "*under the law of this state.*"

Accordingly, the same problems projected by the default rule of Article V(1)(a) of the NY Convention persists with less intensity under the Model Law. As known, the Model Law is nothing more than a good suggestion of a national arbitration law. In that sense, any problem posed by any of the Model Law Articles can possibly be amended or utterly removed when adopted by any jurisdiction. Moreover, in the previously mentioned Article, the Model Law actually directs the parties, courts, and the arbitrators to an actual law of a known country. This will be any state of which national law applies to the arbitration agreement.

7.4.2 Difficulties of an Absent Choice of Law

When the parties fail to designate an express choice of law for their arbitration agreement and circumstances support that other choices of the seat and/or law of the main contract do not narrate an implied choice of law, a question arises as to what law applies in this situation. This section looks briefly into the difficulties behind an absent choice of law situation and the most convenient solution, at least to this thesis.

So why is it essential for the parties to make an explicit choice of law in their arbitration agreement? The process of selecting an applicable law in the absence of an agreed choice of law by the parties can easily be described as difficult and complicated, especially when an arbitrator has to make that choice, as opposed to a national court. When the issue arises before a national court, the court will obviously refer to its own national

conflict of laws rules because it is bound by the conflict rules of its *situs*.⁷¹⁴ The matter is different for arbitrators because, when the parties refrain from making a choice of law, there will be minimal to no guidelines for the arbitrators to follow. Furthermore, arbitrators are not like state judges. They are not bound to follow particular conflict rules of a national law. This leaves the arbitrators with an unfortunate multiplicity of competing approaches on conflict of laws systems that can only cause confusion, expense and uncertainty in for the international arbitral process. More importantly, in situations as such, the tribunal will have to decide whether it shall refer to a conflict of laws system or not. If it would, then which conflict rule to apply and why, as there are a wide unnecessary approaches and practices offered under international arbitration conventions, national laws, and arbitration awards. But, if it would not, then which national law or non-national legal system to apply directly and, again, based on what premises.

7.4.3 A Possible Solution – The Validation Principle

Consequently, because of the dissatisfaction with the historic complexity of conflict rules and the ‘closest connection’ test, which does not quite fit in the international commercial arbitration practice, many modern national legislation, courts, and arbitral awards have increasingly adopted what is referred to as the *favorem validitatis* or the validation principle.

A validation principle looks at all possible applicable laws to the arbitration agreement and provides for the application of the law that will give effect to the parties’ agreement to arbitrate. The validation principle mainly relies in its applicability on the genuine expectations and intentions of international commercial parties to have their agreement enforced as well as the objectives of international arbitration to establish a pro-

⁷¹⁴ O. Chukwumerije, “Choice of Law in International Commercial Arbitration”, (1994), at p.35.

arbitration enforcement regime. In *Hamlyn & Co. v. Talisker Distillery*,⁷¹⁵ (one of the earliest authorities on the validation principle), the House of Lords explained that “*the arbitration clause becomes mere waste paper if it is held that the parties were contracting on the basis of the application of the law of Scotland.*”⁷¹⁶ In this case, the parties agreed for their arbitration to be entirely performed in Scotland by two members of the London Corn Exchange and their umpire.⁷¹⁷ When the dispute arose, the Scottish courts refused to dismiss litigation as Scots law invalidated arbitration agreements that did not nominate the arbitrators. On appeal, the House of Lord held that the arbitration agreement is governed by the English law since it was valid under that law.⁷¹⁸

There are two cornerstones for the realization of the validation principle.⁷¹⁹ The first has to do with the fact that parties, when entering an arbitration agreement, must be acting in good faith.⁷²⁰ That is to say, they must have truly meant to have the validity of their agreement upheld, had there been any future disputes.⁷²¹ This means that, before a tribunal or a national court, the behaviours of the parties must have implied that they intended to have their conflicts solved through arbitration, especially if they have not explicitly assigned a governing law to their arbitration agreement.⁷²²

The second cornerstone of the validation principle has to do with the law applicable to the arbitration agreement. In this situation, following a validation principle, the tribunal

⁷¹⁵ [1894] AC 202, (House of Lords).

⁷¹⁶ *Ibid*, at 215.

⁷¹⁷ *Ibid*, at 203.

⁷¹⁸ *Ibid*, at 214-216.

⁷¹⁹ K. Berger, “*Re-examining the Arbitration Agreement: Applicable Law – Consensus or Confusion?*” 301, in ICCA Congress Series No. 13 (2007), at p.312.

⁷²⁰ Which is one of the effects of an arbitration agreement, as mentioned before. See Section 3.4.1 of this thesis.

⁷²¹ See Decision on Jurisdiction, *Amco Asia Corp. et al. v. Republic of Indonesia*, 23 ILM 351, (1984), at p.359, where it was stated that: “. . . 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 considered as having reasonably and legitimately envisaged”. Also see *Interim Award in ICC Case No. 7929*, XXV YCA 312, (2000), at p.317.

⁷²² As it is clarified previously, a duty of good faith is not generally recognised explicitly under common law jurisdictions as compared to its cornerstone status under many civil legal systems such France, Germany, Switzerland, and Italy. Regardless, this does not affect the context of this thesis as it mainly focuses on the nature of the duty and implications of good faith rather than its recognition under certain jurisdictions.

or the national court shall seek the law of the jurisdiction that upholds the validity of the arbitration agreement. In other words, when facing multiple choices of applicable laws all connected to the arbitration agreement, a tribunal shall choose the law that validates this agreement and ignore the one(s) that invalidate it.⁷²³ This approach is referred to as *'favor negotii'*.⁷²⁴

A validation principle also fits perfectly within the implied choice analysis introduced above.⁷²⁵ The validation principle does not dismiss the application of the law of the seat (where a seat is chosen or assigned) or the law of the main contract. On the contrary, based on interpreting the intentions of the parties to have their arbitration agreement valid and enforced, a validation principle will take into consideration both the law of the seat and the law of the main contract. That is to say, where the law of the main contract invalidates the arbitration clause within, while the law of the seat gives it effect, there is no commercial sense in assuming that the parties have intended for the law of the main contract to apply. In that case, the separability presumption provides sound analysis to refuse the application of law of the main contract and have the law of the seat, which gives effect to the arbitration agreement, applied.⁷²⁶

On the other hand, where the law of the seat invalidates the arbitration agreement while the law of the main contract gives it effect, a validation principle will choose to apply the law governing the main contract and ignore the law of the seat. This is simply because parties cannot be assumed to intend not to have the law of the main contract extended to their arbitration agreement where such limitation will result into the invalidity of their arbitration agreement. Such limitation would only leave them with the expenses

⁷²³ See J. Lew, *"The Law Applicable to the Form and Substance of the Arbitration Clause"* 114, in ICC Congress Series No. 9, (1999), at p.119 where the author explains that: "[t]he mere fact that the choice lies between two systems of law, under one of which the arbitration agreement would be invalid, has been considered as a factor in favor of choosing the other."

⁷²⁴ See *Award in ICC Case No. 4145*, XII YCA 97, (1987), and *Award in ICC Case No. 4996*, 113 JDI 1131, (1986).

⁷²⁵ See Section 7.3 of this thesis.

⁷²⁶ Born I, at p.545.

and uncertainties of international litigation which they had sought to avoid from the very beginning by entering an arbitration agreement.⁷²⁷

The above analysis is consistent with most of the legal systems that have adopted a validation principle.⁷²⁸ The most known is the Swiss PIL. According to Article 178(2), an arbitration agreement is valid whenever it complies with the conditions laid down either by the law chosen by the parties, that governing the substance of the dispute (e.g. the law of the underlying contract), or the Swiss law.⁷²⁹

Several arbitral awards have, also, reached the conclusion that where different potentially-applicable national laws to the arbitration agreement produce different results as to the validity and existence of this agreement, the law to be applied is that of the jurisdiction that will uphold the validity of the arbitration agreements. For instance, in *ICC Award No. 11869*, it was stated that “*arbitration agreements should be interpreted in a way that leads to their validity in order to give effect to the intention of the parties to submit their disputes to arbitration.*”⁷³⁰

National courts have also expressly relied on the validation principle in upholding the validity of international arbitration agreements. For example, one Austrian Court explains that “[w]hen interpreting an [arbitration agreement] the interpretation, which

⁷²⁷ *Ibid.*

⁷²⁸ See Section 458 bis 1(3) of the Algerian Code of Civil Procedure, and Article 9(6) of the 2011 Spanish Arbitration Act.

⁷²⁹ Although Article 178(2) of the Swiss PIL indicates which law to be applied, it does not list the issues to be governed by that applicable law. Also, Article 178(2) of the Swiss PIL does not apply to issues of parties’ capacity to enter into an arbitration agreement, nor does it apply to issues of arbitrability (which is governed exclusively by Article 177 of that Law). E. Geisinger, A. Petti and N. Vosar, “*International Arbitration in Switzerland: A Handbook for Practitioners*”, (2013), at p.29. Also see P. Lalive, “*The New Swiss Law on International Arbitration*”, 4 *Arbitration International* 2, (1988), at p.10. Also see P. Karrer, “*Arbitration – Regional and International Aspect: Arbitration Clauses in Swiss Arbitration Law Favor arbitri reigns supreme, well, almost*”, 14 *Croatian Arbitration Yearbook* 107, (2007), at p.111.

⁷³⁰ *Award in ICC Case No. 11869*, XXXVI YCA 47, (2011), at p.57. Also see *Award in ICC Case No. 7154*, 121 JDI 1059, (1994), and *Partial Award in ICC Case No. 7920*, XXIII YCA 80, (1998).

*leaves the validity of the expressly agreed arbitration agreement . . . unaffected, should be preferred.”*⁷³¹

Also, a 1989 Resolution of the International Law Institute has adopted a validation principle expressly by providing that:

*Where the validity of the agreement to arbitrate is challenged, the tribunal shall resolve the issue by applying one or more of the following: the law chosen by the parties, the law indicated by the system of private international law stipulated by the parties, general principles of public or private international law, general principles of international arbitration, or the law that would be applied by the courts of the territory in which the tribunal has its seat. In making this selection, the tribunal shall be guided by the principle in favorem validitatis.*⁷³²

Therefore, one can conclude that a validation principle is a pro-arbitration tool designed to give maximum effect to the parties' agreement to arbitrate and, generally, their intentions. For that, this thesis finds it to be the most convenient and practical answer to the question of which law to apply to the arbitration agreement, where the parties have failed to make a selection. The validation principle, does not only provide an answer but it provides a general mentality of which courts and tribunals should typically maintain in holding the validity of international arbitration agreements.

⁷³¹ *Judgement of 5 February 2008*, 10 Ob 120/07f (Austrian Oberster Gerichtshof).

⁷³² See Institute of International Law, Santiago de Compostela, “*Resolution on Arbitration Between States, State Enterprises or State Entities and Foreign Entities*”, 12 September 1989, Article 4, XVI YCA 236, (1991), at p.238.

7.5 Concluding Remarks

Choice of law issues constantly arise in international commercial arbitration over the existence, validity, and interpretation of international arbitration agreements, and they continue to produce unfortunate complexities resulting in creating uncertainty for international business parties. This chapter analysed the three different scenarios that involve the parties and the possible choice of applicable laws to their international arbitration and found that the best precaution parties can take to ensure the enforceability and validity of their arbitration agreements is to make a wise choice of applicable law(s) to their arbitration explicitly and from the very beginning.

8 Chapter VIII: Conclusion

In a 2015 survey of Queen Mary School of International Arbitration it was stated that “[t]he dynamic and party-driven nature of international arbitration allows for dispute resolution processes that its users can tailor to their ever-changing needs.”⁷³³ However, for a process that is constantly identified through how much it is party-oriented and through the amount of freedom and flexibility it offers to its parties, there is limited academic commentary to assist international business parties in making the best choices they can and achieve an effective arbitral settlement. This is surprising since, as it is shown throughout this thesis, most modern national and international arbitration laws/rules constantly provide for the parties’ freedom to make choices in their arbitration without describing the best techniques in doing so. Such burden is left completely for practitioners and academics to elaborate on.

This thesis attempted to demonstrate and analyze the possible ways through which international business parties can tailor their arbitral settlement through their *arbitration agreement* in order to achieve a far more efficient and cost/speed-effective process and outcome. Accordingly, the main purpose of this thesis was to analyze the nature, extent, and role of parties’ autonomy in the making of international arbitration agreements in order to discover the best techniques in making arbitral-settlement decisions. In so doing, four main dimensions were analyzed while all being connected through one spine, which is the parties’ freedom of choice or arbitral autonomy.

The first dimension is a foundational one that briefly looked into theoretical and historical backgrounds. The second dimension analyzed the nature of arbitration agreements as the main tool through which parties get to exercise their arbitral freedom. The third dimension examined the limitations of this arbitral freedom in order to fully

⁷³³ Survey by Queen Mary, University of London, “*Improvements and Innovations in International Arbitration*”, (2015), preface.

capture the extent of the freedom of international business parties in arbitration. The fourth dimension examined the role of the parties' autonomy through analyzing the different aspects through which they can tailor their arbitral process. The following findings and analysis were, accordingly, reached:

8.1 Foundational Dimension

While Chapter I was dedicated to the introduction, Chapters II and III focused on the theoretical and historical backgrounds of the research topic. Accordingly, Chapter II looked into the legal nature of arbitration and examined the modern history of the principle of party autonomy and international commercial arbitration, while chapter three focused on the agreement to arbitrate as the main tool through which parties can express their freedom.

An overview of the legal nature of arbitration was briefly analysed only to find out that, while all theories of this legal nature provided for the parties' arbitral autonomy variably, it was of little to no practical implication for this thesis to adhere to a particular one. Moreover, any argument over which theory represented the legal nature of arbitration the best was purely academic.

In order to study the parties' freedom choice, from which this research originated, analysing concepts of contractual freedom and private autonomy was necessarily. Such analysis revealed that the concept of contractual freedom includes three different rights for the parties. These are: the right of exchange, the right of contract, and the right of enforcement.

Finally, the principle of party autonomy was found to connote free-will between private parties so as to be legally capable of acting freely without governmental or private interference. Such freedom which party autonomy entails also denotes the parties' freedom to settle their disputes in the manner they see fit to their needs.

Eventually, the theoretical foundation aimed to set the scene for the research by identifying the international and commercial characters of arbitration and arbitration agreements as well as arbitration in our modern times.

From a historical perspective, this thesis focused mostly on the study of the historical development of the NY Convention and the Model Law. Such study is essential if one was ever to consider reformulating or updating these two books of laws in the future. It was also essential to show-case the flaws that prompted the drafters of both instruments to update them and reformulate them into their current developed structure.

The final stage of the foundational dimension involves an illustrative one that was specifically dedicated to the historical development and definition of arbitration agreements. Chapter III of this thesis focused mostly on the effects a party endures by entering into an arbitration agreement. The analysis of this chapter showed that an arbitration agreement produces two types of effects, the positive and negative ones. The positive effect included obligations on the parties to cooperate effectively in the commencement of their arbitral settlement and to act in good faith. The negative effect, on the other hand, provided for a negative obligation to avoid litigation, or any other dispute resolution mechanism, and to solely arbitrate the disputes that the parties included into their arbitration agreement. The positive effect can definitely be tied to the parties' autonomy principle that, apparently not only allows them to cooperate effectively in making the decisions that tailor and initiate their arbitral settlement, but also obligates them to do so in good faith. The negative effect, accordingly, acts as a supporting mechanism that accentuates the positive one by negating referral to courts or any other dispute settling method.

From the analysis of the arbitration agreement, a question arises as to the nature of this agreement and whether it is a contract like any other contract or whether it is a separate distinct type of contract.

8.2 Distinctive Nature of Arbitration Agreements

Chapter IV examined the distinctive nature of arbitration agreements and analyzed the consequences of it. An arbitration agreement is of a distinctive nature since it regulates procedural matters related to the dispute settlement as opposed to the substantive rights and obligations regulated by the main contract within which it normally exists. Because of this separate function of an arbitration agreement within a contract, the separability presumption exists. Separability entails that an arbitration clause in a main contract is separate and independent from that contract. Not only is it possible for this clause to be governed by a different law than the *lex contractus* but also, challenges to the validity of that contract will not *necessarily* affect the validity of the arbitration clause within. However, there is no safety-valve to determine when separability applies and when it does not. Separability provides that when a contract is challenged, an arbitration clause within is not *necessarily* affected, i.e. it could be affected and it could not. It does not, however, state when exactly does it apply and when it would fail. This thesis found that evidence of the parties' consent to arbitrate – as opposed to their consent to contract – can represent that safety valve.

Chapter IV argued that the applicability of separability, and hence upholding the validity of an arbitration agreement, depends on the existence of the evidence that shows that the parties' consent which created the arbitration agreement (separately) has not been affected as a result of the flaw that has impeached the main contract. In other words, this chapter argued that separability does not only separate the arbitration clause from the main contract but it also separates the consent that created that clause from the consent that created this contract. This argument was established based on the analysis of several cases that went so far as to provide for the existence of an arbitration agreement even in cases

where the main contract never existed to begin with. This can take place in situations of unfinished contracts and in situations where the evidence of an arbitration agreement was located in other places than the contract such as correspondence letters and bills of lading.

Unfortunately, a challenge to the main contract is not the only thing that might possibly stop the parties from arbitrating their disputes. Like any other freedom, parties' arbitral freedom is not limitless. There are certain limitations that could restrict the parties' freedom to arbitrate their dispute.

8.3 Restrictions of Parties Arbitral Freedom

Analyzing the main factors that can restrict parties' freedom of choice in international arbitration can provide international business parties with the data that can help them avoid many of the mistakes that may lead to an invalid arbitration agreement or an unenforceable arbitral award.

A study of these factors in Chapter V revealed that there are four main reasons that could prevent the parties from arbitrating their international commercial disputes. Those are: incapacity, non-arbitrability, waiver of right to arbitrate, as well as public policy and mandatory rules of law.

By looking into the capacity of international business parties, it was found that the requirement of capacity to enter an international arbitration agreement was not very different than the role of capacity in other areas of law. Yet, the importance of paying attention to capacity requirements lies in the fact that some national laws might impose special restrictions over the capacity of commercial parties to enter arbitration agreements. Furthermore, some parties may fail to disclose reasons causing them incapacity to refer to arbitration under applicable national laws. Therefore, the importance of verifying that all arbitrating parties obtain the necessary capacity requirements to enter arbitration agreements according to the applicable law is indispensable.

Besides incapacity, non-arbitrability of certain subject matters can also restrict parties' freedom of arbitrating certain disputes since, regarding these disputes, the arbitrators will have no power to deliver an award. As it was shown, the doctrine of non-arbitrability is based on the necessity of protecting certain public rights and interests of third parties that can only be protected through governmental authorities. Although it was explained that the scope of non-arbitrability is much more limited internationally than it is domestically, parties still need to pay abundant attention as to the arbitrability of the disputes they are referring to arbitration. This is specifically emphasized since there is a great deal of confusion regarding the law applicable to non-arbitrability. That is to say, complex choice-of-law issues arise as to which law determines whether a certain subject matter is arbitrable or not. Regardless, this does not deny the fact that questions of non-arbitrability are questions to be answered by national laws but with a consideration for the international character of the dispute at hand.

Another aspect that most parties do not pay much attention to and could yet prevent them from arbitrating their disputes is the waiver of right to arbitrate. There is no confusion on waiver where parties expressly agree that they are not arbitrating their disputes. Most of the complexities, however, arise where the conduct of one of the parties or both is interpreted as if they have waived their arbitration rights. As it was explained, the problem is particularly accentuated since waiver of right is not regulated for under most international arbitration conventions. Therefore, the matter is completely left to the interpretation of national courts and arbitral tribunals. And since the issue of waiver is hardly regulated for internationally, very little harmonization exists with regards to the conduct of the parties that is interpreted by national courts to indicate their waiver. Consequently, while some courts have broadly interpreted parties' conduct as to have waived the right to arbitrate, other courts have not. Accordingly, awareness to the type of

behaviors (as illustrated in Chapter V) that could lead a competent court to interpret it as waiver is essential in order to avoid any misinterpretations.

The final category of restrictive limitations of parties' international arbitral freedom is manifested in public policy and mandatory rules of law. As discussed in Chapter V, although commonly confused with one another, it is of great importance to establish clear distinction between public policy and mandatory rules of law.

While both concepts maintain a bit of resemblance, there is an essential distinction in substance/values, effects, and the manner through which both concepts are applied. To begin with, mandatory rules of law are imperative provisions of a national law of which application is obligatory notwithstanding the law/rules chosen by the parties or designated by the arbitrators, and irrespective of whether a conflict rule has pointed towards their application. They apply under any circumstance simply because a forum's law is applicable or somehow connected to the case at hand. Public policy, on the other hand, represent a much wider sphere that is rather concerned with fundamental moral convictions, policies, public interests, and most sacrosanct values that a state or a group of nations find extremely valuable and strongly in need of protection. Therefore, while public policy represents values and morals, mandatory rules of law can somehow only embody imperative administrative provisions of which application a state needs to enforce.

To that end, it was concluded that, public policy has more of a negative effect, while mandatory rules of law maintain a positive one. That is to say, rules of public policy generally maintain a negative imposition on courts or tribunals to refuse the application of a certain rule or agreement because the content of that rule/agreement defies the values of a certain forum or those of transnational public policy. Mandatory rules of law, on the other hand, have a positive effect as they impose an obligation on the tribunal or the court to apply these rules, regardless of their content, regardless of their relation to the case at hand, and without the need to conduct a conflict-of-laws analysis. They apply simply because a

certain legislator has implemented these rules to ensure their compulsory application whenever they somehow are involved in any case.

Maintaining this in-advance distinction between public policy and mandatory rules of law will allow any party, arbitrator, or court to distinguish whether a certain rule falls within the public policy domain or mandatory rules of law. Such differentiation is also essential because it will direct international business parties as to which rules they are able to avoid or escape (public policy rules) in comparison to mandatory rules of law which are compulsory, applicable, and cannot be contracted around.

Nevertheless, outside the narrow frame of these restrictions of parties' autonomy in international arbitration, a broad variety of choices that allows the parties to control and tailor their international arbitral process according to their needs is provided for them. These choices are mainly what make international arbitration a party-oriented process that is identified through the freedom of choice it bestows upon its parties.

8.4 Role of Parties' Autonomy

The role of parties' autonomy in international commercial arbitration is analyzed through the examination of variable choices and freedoms they get to practice in the making of their arbitration agreement. These choices are analyzed under Chapters VI and VII of this thesis. These choices/aspects focused on the selection of the seat of arbitration, selection of the arbitrators, selection of the language of the arbitration, and the choice of the applicable laws to the arbitration.

8.4.1 Arbitral Seat

The importance of selecting a suitable seat for any international arbitration cannot be over-emphasized. Such importance has two paramount factors. The first is that it affects the legal infrastructure of any arbitration, and the second relates to logistical convenience and practicality. In analyzing the freedom of parties to select a seat of their arbitration, Chapter VI examined the definition of a seat, the importance of making a choice of a seat, and the general criteria that should guide parties to a suitable seat.

Analysis of what is meant by a seat of arbitration has revealed that the concept of a seat is of a legal construct as opposed to a purely geographical one. A choice of a suitable seat is of great importance to the efficiency and effectiveness of any international arbitration process for many reasons. To start with the least important, any seat would have great influence on the practicality and logistical convenience of an arbitral settlement. In a 2015 survey conducted by the School of International Arbitration at Queen Mary, it was found that some of the most common reasons that made parties gravitate towards a particular seat was the location of organisations or client's employees, and location of legal advisors, experts, accountants, secretaries and hearing staff.⁷³⁴ Furthermore, other reasons included cost, location and quality of hearing facilities, location of the arbitral institutions chosen for the arbitration, as well as transport connections.⁷³⁵

Formal legal infrastructure at the seat is a far more important reason for making a wise choice of one. This is justified when one realises that choosing a seat will most likely form a strong indication as to the procedural law applicable to the arbitration. It was also found that, in a few occasions, the substantive law of the seat will govern the validity of the parties' arbitration agreement. Additionally, national courts of the seat will have a supervisory and ancillary role to the arbitral settlement through issuing interim measures,

⁷³⁴ Survey by Queen Mary, University of London, "*Improvements and Innovations in International Arbitration*", (2015), at p.14.

⁷³⁵ *Ibid.*

assisting with the appointment, challenge, or removal of the arbitrators, and, most importantly, in possibly aiding with the enforcement of the arbitration agreement and/or the award. In the above mentioned survey, it was found that the most important reasons for choosing an arbitral seat (in the following order) was the neutrality and impartiality of the local legal system, the national arbitration law, the track record for enforcing arbitration agreements and arbitral award, and the efficiency of local court proceedings.⁷³⁶

Chapter VI also demonstrated the best approaches parties should follow in making a choice of a seat. These were found to include looking for states that strongly provide for the recognition and enforcement of arbitration agreements and awards. This is normally available in Contracting States of the NY Convention. Parties are also advised to consider the attitude of national courts at the seat towards international arbitration in general. National courts of many jurisdictions can have a reputation for their support of international arbitration taking place in their territories through having a supervisory role and facilitating the progress of international arbitral processes. Parties should also consider the national arbitration law of the seat as, most likely, this will be the procedural law of their arbitration. Furthermore, parties are recommended to seek a seat which provides for neutral legal systems.⁷³⁷ Finally, parties should consider the practicality and logistical convenience of their future seat as it can massively affect the cost and length of the actual proceedings. Locations of hearings and meetings, available council and experts, work entries, cultural familiarity, administration services, accommodation, transport

⁷³⁶ *Ibid.* In 2010, the formal legal infrastructure of the seat, which consisted of the national arbitration law, the track record of the enforceability of international arbitration agreements and awards, and the neutrality and impartiality of the legal system at the seat, was the number one reason that prompted a certain choice of a seat. Survey by Queen Mary, University of London, “*Choices in International Arbitration*”, (2010), at p.18.

⁷³⁷ The neutrality and impartiality of the local legal system at the seat is set to be the number one reason for parties to prefer a particular seat in international commercial arbitration according to the 2015 survey. See Survey by Queen Mary, University of London, “*Improvements and Innovations in International Arbitration*”, (2015), at p.14.

connections, and conference rooms are all factors to be considered before choosing a particular seat.⁷³⁸

8.4.2 Selection of the Arbitrators

The second aspect through which parties get to practice their freedom is the selection of the arbitrators. As it is established, parties' ability to select their arbitrators is set to be one of the most key attractions to arbitration. In examining the parties' freedom to select their arbitrators, Chapter VI looked into the restrictions of this particular freedom, the appointment process through which parties get to choose their arbitrators, and the most important qualities that any party to any arbitration need to seek in the arbitrators.

In analysing the main restrictions of the parties' freedom to select their arbitrators in international arbitration, this thesis divided these limitations into three categories. The first, and the most important, dealt with restrictions that have to do with due process, equality, and procedural fairness. These are mainly restrictions set to insure that the parties' appointed-arbitrators are impartial and independent, as well as to maintain equality between the parties in the sense that no one party singly dominates the appointment process.

In addition to due process and equality restrictions, some jurisdictions prohibit even-numbered tribunals. This thesis argued against such restriction as it is based on irrational justifications according to which an even-numbered tribunal may risk reaching a deadlock situation. Such prohibition defies the principle of parties' autonomy and is ill-justified since, as it was established, even-numbered tribunals have proven to be perfectly capable of settling international disputes just as uneven ones.

⁷³⁸ Based on similar reasons to these discussed above, it was found that the most popular arbitral seats are (in that order) London, Paris, Hong Kong, Singapore, Geneva, New York, and Stockholm. Survey by Queen Mary, University of London, "*Improvements and Innovations in International Arbitration*", (2015), at p.12. Also see Born II, p.2064-2065 where the author identifies a similar list of the most chosen places of arbitration in ICC arbitration in the overwhelming majority of cases from 1995-2012.

The final category of restrictions represented a small percentage and is manifested in certain limitations over the nationality of the arbitrators, limitations on the identity of the arbitrators, as well as contractual limitations set by the parties themselves or through the chosen international arbitration institution. It is significant that the parties pay much consideration to all types of restrictions on the selection of the arbitrators as defying these restrictions will risk the enforceability and recognition of any international arbitration agreement and/or arbitral award.

Moving on, Chapter VI also looks into the appointment process followed by the parties to appoint their arbitrators. In appointing the arbitrators, parties can either do so by themselves, or rely on an appointing authority. Since parties are best aware of their needs and the circumstances of their dispute, they are best to qualify and choose the arbitrators that are suitable to settle their disputes. This is, however, not to undermine the advantages of having an appointing authority. As it is established, appointing authorities are a commonly used to appoint arbitrators in international arbitration. These authorities are advantageous since they probably attain more experience in appointing the arbitrators. Moreover, using an appointing authority can sometimes avert the parties considerable time in the appointment process. In both cases, many seek interviewing potential arbitrators before making a decision. Interviewing potential arbitrators is not only recommended but is actually common practice.⁷³⁹ However, the issue of interviewing the arbitrators is quite sensitive as there is quite a fine line between attaining enough information to assess an arbitrator's viability for the dispute and inappropriate *ex parte* communication. Therefore, it was established that there are very few customary guidelines, if followed by the parties in interviewing their arbitrators, the whole process can be safe and beneficiary. In a 2012 survey it was found that the following topics were deemed inappropriate to discuss in pre-appointment interviews, the arbitrator's position on legal questions related to the case

⁷³⁹ In 2012 it was found that 46% of international commercial arbitration users find pre-appointment interviews appropriate. Survey by Queen Mary, University of London, "*Current and Preferred Practices in the Arbitral Process*". (2012), at p.6.

(84% of respondents found it inappropriate), whether the candidate is a strict constructionist or is influenced by the equities of the case (64%), prior views expressed on a particular legal issue (59%), attitude to a particular procedure (30%), potential nominations for chair (28%), and experience and knowledge of a particular topic (10%).⁷⁴⁰

On the qualities of the arbitrators that any party in any arbitration should seek, the independence and impartiality of the arbitrators were analysed in Chapter VI to be the most important traits. In defining and differentiating between both qualities, it was found that, while impartiality requires that an arbitrator neither favours one of the parties nor is biased to any of the issues in dispute, independence required that the arbitrator not be involved in any sort of actual relationship with any of the parties. And so, impartiality represented a subjective inquiry that obliges the arbitrator to conduct the arbitration with a strong ethical component, while independence was rather an objective inquiry that demanded the absence of any professional, financial, or personal relationship between the arbitrators and any of the parties.

A 2010 study has shown that 50% of commercial parties have been disappointed with their chosen arbitrators for reasons such as, bad decision making/outcome, overly flexible approach that led to failing to control the arbitral process, delays caused by arbitrators, poor reasoning in the award, lack of expertise and knowledge of the subject matter of the disputes, and tardiness in rendering the award.⁷⁴¹ A 2006 study, however, showed that 90% of international business parties relied on the reputation of the arbitrators as the most important factor in choosing them.⁷⁴² Accordingly, parties need to do extensive research on potential arbitrators before they decide to choose any. Factors that may assist

⁷⁴⁰ *Ibid*, at p.7. Also, one recently published article has defined some rules for parties and arbitrators to carry safe pre-appointment interviews. These included: the interview must be in conformity with the IBA Guidelines, the arbitrator must not be paid for doing the interview, the length of the interview must be determined in advance, the content of the interview must be witnessed, etc. See J. Risse and T. Klitch, “*How Much is too Much? Rules for Pre-Appointment Interviews between a Party and a Potential Arbitrator*”, in Global Arbitration News, 23/11/2015, (available at <http://globalarbitrationnews.com/how-much-is-too-much-rules-for-pre-appointment-interviews-between-a-party-and-a-potential-arbitrator-20151116/>) (last visited 27/11/2015).

⁷⁴¹ Survey by Queen Mary, University of London, “*Choices in International Arbitration*”, (2010), at p.26.

⁷⁴² Survey by Queen Mary, University of London, “*Corporate Attitudes and Practices*”, (2006), at p.16.

the parties in choosing their arbitrators should include fairness, practicality, open-mindedness, sufficient expertise, availability, knowledge of applicable laws, languages, and more.⁷⁴³

8.4.3 Language of the Arbitration

The last section of Chapter VI looked into the choice of the language of the arbitration. Although not necessarily the most important aspect of an international arbitration, the language of the arbitration is still an aspect that the parties will need not to overlook. More than often, however, parties will ignore to explicitly assign the language of the arbitration in their arbitration agreement. It is, therefore, advised that the parties, at least, pay attention to the rules of their institution, when referred to, as some assign the language of their own as a default measure where the parties have not agreed on one. Moreover, where the main contract refers to two languages, it is essential that the parties assign the language of their arbitration, otherwise it may be conducted in both language which can allow for a significant increase in the cost, time, and complexity of any international arbitration. Regardless, the parties' right to choose whatever language they wish for their arbitration is provided for under almost all national and international arbitration rules.

8.4.4 Choice of Laws

The final – and most complicated – aspect through which the parties are able to exercise their arbitral freedom is the choice of applicable laws. Because of the importance as well as the difficulties produced by choice of law issues in international commercial arbitration, this thesis has dedicated a whole chapter (Chapter VII) just to examine these issues in relation to the parties' freedom of choice. In so doing, Chapter VII analysed three possible scenarios. The first is when the parties make an explicit choice of applicable law/rules in

⁷⁴³ Survey by Queen Mary, University of London, "*Choices in International Arbitration*", (2010), at p.26.

their arbitration agreement. The second is when the parties make an implied choice of law, and the third is when the parties are completely silent as to the applicable law.

The first scenario examined the parties' express choice of law in their agreement. Such right is identified under most major international and national arbitration rules, including the NY Convention and the Model Law. As it was established, when choosing an applicable law to their arbitration agreement and substance of their dispute, parties can either choose a national law or a non-national legal system. Chapter VII examined both possibilities and established that the safer option is to either choose a national law, or to use a non-national legal system in conjunction with a national law. When choosing a national law, parties should seek certain qualities of the law applying to their agreements. These were analysed to include the familiarity and neutrality of that law, the enforceability provided under this law to international arbitration agreements and future arbitration awards, the regulation of confidentiality under a certain national law, as well as the stability and commercial sophistication of that law.

Regardless, a less popular category from which parties can choose the applicable rules is non-national legal systems. These included, but not exclusively, the *lex mercatoria*, general principles of law, UNIDROIT Principles, as well as trade usages and custom. An evaluation of the suitability of referring to these systems by international business parties was carried out and it was found that not only is actual reference to non-national legal systems in international commercial arbitration rare, but also it is not recommended for international commercial parties seeking stability, certainty, and predictability.

Nevertheless, it is common in international arbitration that the parties ignore or fail to assign applicable laws to their arbitration. In that case, the matter is left to the tribunal or national courts to assign that law. In so doing, it is important that parties' intentions are considered and respected. Sometimes certain choices made by the parties in their main contract or arbitration agreement is set to indicate their intentions to the applicable law.

This is normally the case where the parties are silent to the law applicable to their arbitration but have managed to expressly agree on the law applicable to their main contract or have expressly assigned a seat of their arbitration. In these situations, the law chosen in the main contract or the law of the seat can function as an implied choice of the parties to the law applicable to their arbitration agreement.

The third scenario examined under Chapter VII is when the parties are completely silent as to the law applicable to their arbitration. In this situation multiple difficulties arise as the matter will either be decided by national courts or the arbitrators. Therefore, Chapter VII argued that the best solution for this dilemma is for a national court or the tribunal to apply a validation principle. A validation principle mainly looks at all the possible applicable laws to the arbitration and designates the one that gives validity to the arbitration agreement. This approach relies in its applicability on the genuine intentions of international business parties who can be presumed to have intended for their arbitration agreement to be enforced.

8.5 Concluding Remarks

To this thesis, parties' freedom in international commercial arbitration could possibly be the most influential factor over the effectiveness and efficiency of any international arbitral process and its outcome. It was also argued that the proficient engagement of this freedom can produce skillful arbitration agreements that can later on create a safety net for the parties when a dispute actually arises. The practice of parties' arbitral freedom is considerably converged during the drafting stage of their arbitration agreement, therefore, most of the features of an international arbitration can be decided at this stage, especially where a dispute has not yet arisen as parties will be a lot more willing to cooperate. It is only when a dispute arises that a well-drafted arbitration agreement is found to provide a distinct advantage to its parties and acts to safeguard their interests. To the opposite, an ill-

crafted arbitration agreement can leave the parties adversely exposed once a dispute arises due to lack of attention to the different terms of this agreement during the negotiations process.

The concept of tailoring an international arbitration agreement to the needs of its parties does exist in the practice of international commercial arbitration. As a matter of fact, 43% of commercial users to international arbitration tailor their arbitration agreements to their needs and circumstances.⁷⁴⁴ While 48% of users have been registered to refer to standardized arbitration clauses, it has also been found that these clauses are far less suitable to the needs and circumstances of each dispute.⁷⁴⁵ Although the concept of tailoring one's arbitration clause according to the needs of the disputes exists, very few guidelines/instructions exist as to the best approaches international business parties should employ in making the choices of the different aspects of their international arbitral process. This thesis strived to provide the parameters through which parties should decide on the different aspects of their arbitration agreements. It emphasized the significance of utilizing parties' autonomy in any international arbitration, but accompanies that with a detailed review on the best ways to do so. However, while this thesis encourages international business parties to tailor their arbitration agreement through the adequate utilization of their freedom of choice, it acknowledges that tailored arbitration agreements can expose the parties to pitfalls and missed opportunities, if not carefully drafted. Issues relating to the above elements may be omitted or unwisely chosen which may pose as a defect in the arbitration agreement or simply a lost opportunity that negatively affect the resolution of the dispute.

Nonetheless, utilizing parties' arbitral autonomy through the parameters demonstrated above is not solely enough. Examination of other elements which international business parties need to avoid in drafting their arbitration agreements to

⁷⁴⁴ Survey by Queen Mary, University of London, "*Corporate Attitudes and Practices*", (2006), at p.10-11

⁷⁴⁵ *Ibid*, at p.11.

ensure its validity and enforceability took place, accordingly. These were introduced through the analysis of the different restrictions of parties' autonomy in international arbitration.

This thesis also critically analyzed the position of the NY Convention and the Model Law in the context of its topic. Such analysis revealed that, although both instruments are successful and widely accepted in modern international business law, they still suffer from a few flaws that, to the concern of this thesis, may cause confusion and complexity that may go against the objectives of international commercial arbitration. For example, it was found that the NY Convention has failed to include any direct reference to the separability presumption even though it is one of the main pillars supporting the integrity and validity of arbitration agreements. The Convention has also failed to directly regulate for the effect of incapacity on the freedom of international business parties to draft arbitration agreements and have completely ignored issues of waiver of right to arbitrate although both elements can significantly affect the parties' freedom in international arbitration and are capable of rendering invalid/unrecognized arbitration agreements and awards, if overlooked by the parties. Furthermore, the NY Convention does not provide for the parties right to select their seat of arbitration despite the fact that it is one of the most influential aspects in an international arbitration (unlike the Model Law which explicitly provides for that right in Article 20(1)). Finally, adding to the confusion and complexity of choice of law issues in international arbitration, the Convention provides for a problematic conflict rule where the parties have not chosen an applicable law, referring them to the law of the place where the award was made. As discussed above,⁷⁴⁶ Article V(1)(a) adds massive difficulties to an already complicated situation where the parties have refrained from making an explicit choice of law in their arbitration agreement.

All these provisions were critically analyzed in order to highlight certain problematic issues to parties who may be feeling safe relying on the ratification of a certain

⁷⁴⁶ See Section 7.4.1.1 of this thesis.

jurisdiction of the NY Convention, where in fact the Convention may have failed to regulate, or worse, have added to the complexity, of these issues.

International commercial arbitration is a dispute settlement process that is famous for being a fast effective party-oriented mechanism that is designed to avoid the routine and complexity of national adjudication. Unfortunately, nowadays, international arbitration processes are described as over-lawyered, over-sophisticated, and desperately overloaded with unnecessary detailed regulations that it is sometimes difficult to differentiate it from national courts' procedures.⁷⁴⁷ This thesis finds that a step back to arbitration's original consensual nature and a further reliance on the parties' arbitral freedom of choice can mitigate this plethora of complications that may accompany the settlement of international disputes through arbitration nowadays.

8.6 Areas of Further Research

This thesis attempted to introduce the best methods through which parties can make certain choices in their international arbitration agreements to further enhance the effectiveness and efficiency of their arbitral dispute settlement. The main focus was the parties and their representation. Therefore, the author wishes to look into aspects that relates to the psychology of international commercial parties and the role of psychology in general in international dispute settlement, as well as issues of legal representation and professional conduct in international arbitration. Also, this thesis showed an interest in the restrictions and, generally, the extent of parties' freedom in international commercial arbitration. For that, a further study of the differences between the extent of freedom allowed to commercial parties under institutional arbitration in comparison to ad hoc arbitration is a future plan. Furthermore, the author would also like to study the effectiveness of

⁷⁴⁷ D. Martens and H. Kahlert, "*Back to the Roots of Arbitration*", in Kluwer Arbitration Blog, 26/10/2015, (available at <http://kluwerarbitrationblog.com/2015/10/26/back-to-the-roots-of-arbitration/>) (last visited 28/11/2015)>

boilerplate or standardized arbitration clauses in comparison to tailored ones and examine whether the utilization of parties' autonomy can actually positively influence the successfulness of an international dispute settlement. Last but not least, as this thesis was confined to the practice of parties' autonomy at the making of the arbitration agreement stage, the author would definitely extend this research in the future to both the arbitral proceedings and the pre- and post-award stages.

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Sample of Model Arbitration Clauses

Swiss Chambers of Commerce

Any dispute, controversy or claim arising out of or in relation to this contract, including the validity, invalidity, breach or termination thereof, shall be settled by arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Chambers of Commerce in force on the date when the Notice of Arbitration is submitted in accordance with these Rules.

The number of arbitrators shall be ... (“one” or “three”),

The seat of the arbitration shall be in ... (city in Switzerland, unless the parties agree on a city in another country),

The arbitral proceedings shall be conducted in ... (insert desired language).

Netherlands Arbitration Institute

All disputes arising in connection with the present contract, or further contracts resulting thereof, shall be finally settled in accordance with the Rules of the Netherlands Arbitration Institute (Nederlands Arbitrage Instituut).

Additionally, various matters may be provided for:

- The arbitral tribunal shall be composed of one arbitrator/three arbitrators.
- The place of arbitration shall be (city).
- The arbitral procedure shall be conducted in the language.
- Consolidation of the arbitral proceedings with other arbitral proceedings pending in the Netherlands, as provided in Art. 1046 of the Netherlands Code of Civil Procedure, is excluded.

Arbitration Institute of the Stockholm Chamber of Commerce

Any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

Recommended additions:

- The arbitral tribunal shall be composed of three arbitrators/a sole arbitrator.
- The seat of arbitration shall be [...].
- The language to be used in the arbitral proceedings shall be [...].
- This contract shall be governed by the substantive law of [...].

London Court of International Arbitration

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

London Court of International Arbitration India

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA India Arbitration Rules, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be [one/three].

The seat, or legal place, of arbitration shall be [City and/or Country].

The language to be used in the arbitration shall be [_____].

The governing law of the contract shall be the substantive law of [_____].

Hong Kong International Arbitration Centre

Any dispute, controversy or claim arising out of or relating to this contract including the validity, invalidity, breach or termination thereof, shall be settled by arbitration in Hong Kong under the Hong Kong International Arbitration Centre Administered Arbitration Rules in force when the Notice of Arbitration is submitted in accordance with these Rules.

Under UNCITRAL Rules: Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force and as may be amended by the rest of this clause.

The appointing authority shall be Hong Kong International Arbitration Centre.

The place of arbitration shall be in Hong Kong at Hong Kong International Arbitration Centre (HKIAC).

There shall only be one arbitrator.

UNCITRAL Arbitration Rules

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.

Note – Parties may wish to consider adding:

(a) The appointing authority shall be ... [name of institution or person],

- (b) The number of arbitrators shall be ... [one or three],
- (c) The place of arbitration shall be ... [town and country],
- (d) The language(s) to be used in the arbitral proceedings shall be

International Chamber of Commerce

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

Singapore International Arbitration Centre

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (“SIAC Rules”) for the time being in force, which rules are deemed to be incorporated by reference in this clause.

The Tribunal shall consist of one/three arbitrator(s).

The language of the arbitration shall be country/jurisdiction.

Cairo Regional Centre for Commercial Arbitration

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be decided by arbitration in accordance with the Rules for Arbitration of the Cairo Regional Arbitration Centre.

Chinese International Economic and Trade Arbitration Center

Unless otherwise agreed in writing, all disputes arising from or in connection with this Contract shall be submitted to China International Economic and Trade Arbitration Commission (CIETAC) for arbitration which shall be conducted in accordance with the CIETAC's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties.

Dubai International Arbitration Centre

Any dispute arising out of the formation, performance, interpretation, nullification, termination or invalidation of this contract or arising therefrom or related thereto in any manner whatsoever, shall be settled by arbitration in accordance with the provisions set forth under the DIAC Arbitration Rules (“the Rules”), by one or more arbitrators appointed in compliance with the Rules.