

THE ROLE OF DOMESTIC COURTS IN INTERNATIONAL COMMERCIAL ARBITRATION

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ABSTRACT

With the tremendous growth in international trade and investments, international commercial arbitration has become a frequently used mechanism to settle investment/trade/contractual disputes. Most people are of the opinion that resolution of dispute by litigation in court is time consuming and money consuming whereas arbitration may speed the resolution and lower the expenses of disputes. However to ensure the integrity of the arbitral process and protect the public interest, the courts must support and supervise that process. On the other hand, to prevent the confidence of users of the arbitral system from being damaged, the level of judicial control should not be too high. The debate in international commercial arbitration is what scale of judicial intervention should be allowed. While it is argued that arbitration must be free from courts, in order to be effective, it is also accepted that arbitration needs the support of national courts to be effective. Flowing from this contention laws and rules has been formulated to balance the competing interests.

In this paper, the author discusses the key features of international commercial arbitration, theories behind judicial intervention in international commercial arbitration and the role of domestic courts on the major concepts of international commercial arbitration such as; arbitration agreement, the concept of arbitrality, separability, competence-competence, assistance in taking evidence and, recognition and enforcement of arbitral awards by court without which the arbitral process cannot hold.

The author concludes that the increasing growth in international trade and investments require the presence of active international commercial arbitration to settle disputes but since arbitration is private in nature, parties need courts to enforce the arbitration agreement and enforce arbitral awards. That there is need to sensitize domestic courts to support the arbitral process, without which arbitration will remain ineffective, particularly in developing economies.

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1.0 Introduction

With the tremendous growth in international trade and investments, international commercial arbitration has become a frequently used mechanism to settle investment/trade/contractual dispute. Most people are of the opinion that resolution of dispute by litigation in court is time consuming and money consuming whereas arbitration may speed the resolution and lower the expenses of disputes because it often avoids the delay associated with Court Litigation. However to ensure the integrity of the arbitral process and protect the public interest, the courts must support and supervise that process. On the other hand, to prevent the confidence of users of the arbitral system from being damaged, the level of judicial control should not be too high.

2.0 Definition of arbitration

International commercial arbitration is a means by which disputes arising out of international trade and commerce are resolved pursuant to the parties' voluntary agreement, through a process other than a court of competent jurisdiction. The object of arbitration is to obtain a fair resolution of disputes by an impartial tribunal without unnecessary delay or expense; and the parties should be free to agree on how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.² It is a consensual means of dispute resolution by non-governmental decision makers and produces a definitive and binding award which is capable of enforcement through national courts.³

It may also be defined as “the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal)

² Section 1 (a) and (b), Arbitration Act 1991 (England).

³ Cary B. Born, *International Commercial Arbitration in the United States: Commentary and Materials* (The Netherlands: Kluwer law and Taxation Publishers, 1994), p.1.

instead of by a court of law”⁴. Arbitration is only an alternative to litigation and it does not replace the judicial machinery in all aspects, rather it co-exists with it.

An arbitration is international if:⁵ (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or (b) one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; Or (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

3.0 Types of Arbitration

International commercial arbitration can either be *Ad hoc* or institutional.⁶ Parties are entitled to choose the form of arbitration, which they deem appropriate in the facts and circumstances of their dispute. This necessarily involves the consideration & evaluation of the various features of both forms of arbitration and this can be a daunting task, as both forms have their own merits and demerits.

3.1 *Ad hoc* Arbitration

These arbitrations are conducted by parties without the assistance or supervision of an arbitral institution. The parties are required to determine all aspects of the arbitration like the number of arbitrators, manner of their appointment, and procedure for conducting the arbitration, among

⁴ Halsbury's Laws of England (Butterworths, 4th edition, 1991) para 601,332

⁵ Article 1 (3) of the Model law

⁶ G. A. Born, International Commercial Arbitration, (2nd ed. 2001), at p. 1 - 55.

others. Options available to parties wishing to proceed *ad hoc* who are not in need of rules drawn specially for them, or of formal administration and oversight, include; (i) adaption of the rules of an arbitral institution, (ii) incorporating statutory procedures such as the Uganda Arbitration and Conciliation Act⁷ (iii) adopting rules crafted specifically for *ad hoc* arbitral proceedings such as the UNCITRAL Rules (U.N. Commission on International Trade Law) which may be used in both domestic and international disputes,⁸ or select another set of procedural rules. The UNCITRAL rules are not, for instance, as comprehensive as the arbitration rules of the ICC.⁹

3.2 Institutional Arbitration

An institutional arbitration is one in which a specialized institution with a permanent character intervenes and assumes the functions of aiding and administering the arbitral process, as provided by the rules of that institution. It is pertinent to note that these institutions do not arbitrate the dispute, it is the arbitrators who arbitrate, and so the term arbitration institution is inappropriate and only the rules of the institution apply. Some of these institutions include; the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and the American Arbitration Association (AAA).¹⁰ Each of these arbitral institutions, have enacted sets of procedural rules that apply where parties have agreed to arbitration pursuant to such rules.

⁷ Cap 12 of the Laws of Uganda.

⁸ U.N. Comm'n on Int'l Trade Law, UNCITRAL Arbitration Rules, U.N. Doc. No. A/31/17, U.N. Sales No. E. 77.V.6 (1976), reprinted in 15 I.L.M. 702 (1976) [hereinafter UNCITRAL Rules].

⁹ Avraham Azrieli, "Improving Arbitration Under the U.S.-Israel Free Trade Agreement: A Framework for a Middle East Free Trade Zone," 67 *St. John's L. Rev.* 187.

¹⁰ Their websites which provide detailed information are as follows: ICC -- <http://www.iccwbo.org/>; LCIA <http://www.lcia-arbitration.com/lcia/lcia/index.htm>; AAA --<http://www.adr.org/index2.1.jsp>. For brief descriptions of major international arbitration institutions; G. Born, *International Arbitration and Forum Selection Agreements* 44-55 (1999); von Mehren, *Rules of Arbitral Bodies Considered From a Practical Point of View*, 9 *J. Int'l Arb.* 105 (1992); Tiefenbrun, *A Comparison of International Arbitral Rules*, 15 *Boston C. Int'l & Comp. L. Rev.* 25 (1992).

The institutional rules set out the basic procedural framework for the arbitration process. Generally, the rules also authorize the arbitral institution to act as an “appointing authority” in the event the parties cannot agree; set a timetable for the proceedings; help resolve challenges to arbitrators; designate the place of arbitration; help set or influence the fees that can be charged by arbitrators; and in some situations review the arbitral award to reduce the risk of unenforceability.¹¹ These institutions do not arbitrate the dispute, but merely facilitate and provide support and guidance to the arbitrators selected by the parties.

4.0 Basic features of International commercial Arbitration

International commercial arbitration is held in place by four basic features as follows:-

4.1 The Agreement to Arbitrate

International commercial arbitration is founded on the consent of the parties to the dispute. There are two classical forms of arbitration agreements; namely the arbitration clause which refers future disputes to an arbitration. The other is the submission agreement which is usually formulated after a dispute has arisen and the parties agree to arbitrate. The non conventional form is the ‘Standing Offer’ in Bilateral Investment Treaties (BIT’s) between states.¹² By invoking the standing offer in a BIT, when disputes arise; private companies are able to initiate arbitral proceedings against sovereign states. Generally, without a valid arbitration agreement, an arbitral award may not be enforced under the New York Convention.

¹¹ Gary Born, History of International Commercial Arbitration, posted on VLE 21 at pp. 1 – 52.

¹² Redfern and Hunter, Law and Practice of International Commercial Arbitration, page 78.

4.2 The Choice of Arbitrators

The parties have the choice in appointing their own arbitrators, who may be experts in international arbitration and or persons with requisite trade or industrial experience in the subject matter of dispute.¹³ By this, trade usages and conventions are brought to bear on the final awards delivered by such arbitral tribunals.

4.3 The Decision of the Arbitral Tribunal

It takes the form of an award which is final and binding.¹⁴ As compared to judgment of a court, arbitral awards are not subject to formal appeals, though such decisions could be challenged on stated grounds, for example that the tribunal was not established in accordance to the agreement of the parties.

4.3 The Enforcement of the Award

Arbitral awards are enforceable like court judgments. Where a losing party defaults in satisfying an award, the victorious party can enforce it in the court of the country, where the losing party has its assets located. The uniqueness about arbitral awards is that it can be enforced internationally under the New York Convention, unlike a judgment of a court. This makes international commercial arbitration attractive to the international business community.¹⁵

5.0 Judicial intervention in International commercial arbitration

¹³ Article 10 (1) of the Model law

¹⁴ Article 29, 30 and 31 of the UNICITRAL Model Law 1985

¹⁵ Article 35 (1) of the UNICITRAL Model Law 1985 provides that An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced.

The debate in international commercial arbitration is what scale of judicial intervention should be allowed. Parties in arbitration want a prompt, less expensive and final resolution of the dispute, whilst states also want to ensure, that the arbitral process is just and impartial.¹⁶ While it is argued that arbitration must be free from courts, in order to be effective, it is also accepted that arbitration needs the support of national courts to be effective.¹⁷ Flowing from this contention laws and rules has been formulated to balance the competing interests.

5.1 Theories behind judicial intervention

The extent, to which court should supervise the arbitral process, if at all, must depend on the essential nature of arbitration. Bernard¹⁸ propounded three theories on that issue in 1937. Under the first theory, the arbitration agreement and the arbitral award are separate, and the latter should be regarded as akin to a court judgment. Under the second theory the award derives from the agreement, so that they are inseparable. Thus the arbitral award is essentially a contract rather than a court judgment. The third theory is a compromise between the first two, and claims that an arbitral award can be regarded as akin to a court judgment only where a court order is needed for its enforcement.¹⁹ These three theories are now respectively known as the "Jurisdictional Theory", the "Contractual Theory" and the "Mixed or Hybrid Theory"²⁰. In the 1960s, a fourth theory developed, known as the "Autonomous Theory". All are discussed below.

¹⁶ Okezie, Chukwumerije, *Judicial Supervision of Commercial Arbitration*, 1999 *Arbitration International*, Vol.15 No.2

¹⁷ Redfern, A, *International Commercial Arbitration: Jurisdiction Denied: The Pyramid Collapse* (1986) JBL 15.

¹⁸ Lew, Julian D. M., *Applicable Law in International Commercial Arbitration*. New York: Oceana Publications, Inc., 1978,51-52.

¹⁹ Lew, Julian D. M., *Applicable Law in International Commercial Arbitration*. New York: Oceana Publications, Inc., 1978,51-52.

²⁰ Hong-lin Yu, 'Total Separation of International Commercial Arbitration and National Court Regime', 5(2) *J. Int'l Arb.* 1988,148; Georgios I. ZEKOS, 'Problems of Applicable Law in Commercial and Maritime Arbitration', 16(4) *J. Int'l Arb.* 1999,177; Gunther J. Horvath, 'The Duty of the Tribunal to Render an Enforceable Award', 18(2) *J. Int'l Arb.* 2001,147-148

5.2.1 Jurisdictional Theory:

This theory suggests that arbitration operates within a framework of law, and a state has the power to control and regulate all the arbitrations happening in its jurisdiction. While the theory concedes that arbitration is based on the agreement of the parties, it insists that matters such as the validity of the arbitration agreement and award, the powers of arbitrators, and the enforceability of awards, all depend on the law of the place of arbitration and the law of the place of enforcement of the arbitral award. An arbitration agreement will be valid and an arbitral award will be enforceable only if both laws, the law of the place of arbitration and the law of the place of enforcement, recognize that the parties have the right to refer the dispute to arbitration, that the arbitrators have jurisdiction over the case concerned, and that the arbitral award is enforceable.²¹

The law permits the parties to have recourse to arbitration because it wants the arbitration to perform a court-like function. The only difference between arbitrators and judges is that arbitrators are appointed by the parties and judges by the state. Since the powers and functions of arbitrators and judges are extremely similar, the arbitral award should be regarded as a sort of judgment, and should have the same effect.²² The theory limits the autonomy of arbitrators and emphasizes the power of the state law, requiring the arbitral award to be consistent with the law of the place of enforcement.

5.2.2 Contractual Theory:

²¹ Han, Jian, *Theory and Practice on Modern International Commercial Law*, Beijing: Law Press, 2000,35.

²² Klein, F. - E.. *Considtions sur l' arbitrage en droit international priv?* Bale: Heilbing & Lichtenhahn, 1955, para. 105-112.

This theory emphasizes the contractual character of arbitration. Its supporters give three main reasons why the essence of arbitration is contractual. First of all, arbitration is based on the agreement of the parties. Where there is no arbitration agreement, no party can force another to arbitrate, except in the rare instances of compulsory arbitration.²³ Secondly, all issues regarding the constitution of the arbitral tribunal can be decided by the agreement of the parties, including the appointment of arbitrators, the time and place of arbitration, among others. The parties may also agree on the arbitral procedure, while domestic arbitration law only provides default rules to deal with situations where the parties have not agreed on such issues.²⁴ Thirdly, the reason why an arbitral award is recognized and enforced is because of the binding force of the arbitration agreement.²⁵

Each party has an obligation to enforce the award; otherwise the other party can apply to the court for enforcement.²⁶ This theory sees domestic law as creating a framework for the arbitration. Thus the court will not enforce an arbitration agreement, if, under the law of the forum, the court has exclusive jurisdiction over the subject matter of the dispute. Nor will it enforce an arbitral award which is in conflict with public policy.

5.2.3 Fixed or Hybrid Theory

This theory asserts that arbitration has both a jurisdictional and a contractual character. In 1952, Sauser-Hall explained this theory in detail²⁷ pointing out that arbitration cannot transcend the

²³ Stone, Morris, 'A Paradox in the Theory of Commercial Arbitration' 21 Arb. J. 1966, 156; Wallace, E. V., Drafting a New York Arbitration Agreement (No. 3, N. Y. Continuing Legal Education), 1967.

²⁴ Eisemann, Frédéric, L'arbitre - partie, in International Arbitration: Liber Amicorum for Martine Domke. Hague: Martinus Nijhoff, 1967, 79.

²⁵ Niboyet, J. P., Trait de droit international privé français, tomes V, VI 2. Paris: Sirey, 1950, para. 1284.

²⁶ Domke, Martin, Commercial Arbitration, Englewood Cliffs: N. J. Prentice-Hall, 1965, 2.

²⁷ Sauser-Hall, Georges, 'L'arbitrage en droit international privé', in 44-I Anuaire de L'institut de Droit International 1952, Grand: Bureau de la Revue de droit international, 469.

legal system, and there must always be laws which determine the validity of arbitration agreements and the enforceability of arbitral awards. He also considered that arbitration derived from private contracts, and that the appointment of arbitrators and the rules governing the arbitral process should mainly stem from the agreement of the parties. As a result, he believed the jurisdictional and contractual character of arbitration correlative and indivisible.²⁸ Supporters of this theory insist that although the jurisdictional and contractual theories are diametrically opposed, they can work in a concerted way to explain the essence of arbitration. Thus the arbitration agreement is a contract, and its validity should be determined in accordance with contractual principles. If according to the law of the forum, the court has exclusive jurisdiction over the subject matter of the dispute, or if the arbitrators conduct the proceedings in defiance of basic principles of equity, or if the award conflicts with the public policy of the forum, the court in which the enforcement is sought will refuse to recognize or enforce the arbitral award.²⁹

5.2.4 Autonomous Theory

This theory is advanced by Devichi³⁰. It maintains that arbitration is not jurisdictional or contractual, or even mixed, but a completely independent system³¹. In order to determine the essence of arbitration, she considers it is necessary to examine the function and aim of arbitration. This theory views arbitration from a completely different angle from the other three theories. They concentrate on the aspects of arbitration which accord with domestic law and

²⁸ Sauser-Hall, Georges, 'L'arbitrage en droit international prive', in 44-I Anuaire de L'institut de Droit International 1952, Grand: Bureau de la Revue de droit international, 469.

²⁹ Han, Jian, Theory and Practice on Modern International Commercial Law, Beijing: Law Press, 2000,36.

³⁰ Rubellin-Devichi, Jacqueline, L'arbitrage. Nature Jurisdigue Droit interne et droit international pr iv? Paris: Librairie Genei le de Droit et Jurisprudence 1965, pars 14.

³¹ Rubellin-Devichi, Jacqueline, L'arbitrage. Nature Jurisdigue Droit interne et droit international priv? Paris: Librairie Gen file de Droit et Jurisprudence 1965, para. 14.

international law, and how the right of the parties to refer the disputes to arbitration and to determine the arbitral process is limited by the law. By contrast, the autonomous theory concentrates on the issues of the arbitration itself, such as the aim of arbitration, the arbitral proceedings, the function of arbitration and the reason why it can have such functions. Devichi suggests that neither the jurisdictional theory nor the contractual theory can correctly reflect the essence of arbitration, while the fact that they are in fundamental conflict precludes them being combined. She also argues that the three traditional theories all impose limits upon arbitration which would restrict certain advantages which might otherwise lead businessmen to prefer arbitration to litigation, and which would prevent arbitration from developing. The supporters of this theory argue that arbitration was first created and then developed by businessmen, regardless of the law. The law simply affirms arbitration.

The autonomy of the parties to determine both substantive and procedural law is based on neither the contractual nor the jurisdictional character of arbitration, but on the necessity of commercial custom. Similarly, the reason why arbitration agreements and awards are enforceable is not because they are contracts, or because the state in which enforcement occurs gives concessions but because businessmen across the world would not be able to conduct international commercial relations successfully if arbitral awards were not enforceable.

While parties create their own dispute resolution mechanisms as an alternation to court settlement, they sometimes ask a court to provide pre and post-arbitration enforcement³², just as

³² Hirsch, Alain, 'The Place of Arbitration and The Lex Arbitri', 34 Arb. J. 1979,43.

a contract is enforced. Thus, the essential nature of arbitration is contractual, although it could be said that arbitration has a judicial function.

Judicial intervention in arbitration should refrain from interfering with the exercise of the powers entrusted to arbitrators by the parties and rather be confined to assisting the arbitral process when the need arises. Judicial involvement in arbitration is justified on the basis that the powers of arbitrators derive from the agreement between the parties, rather than being conferred by the law or state, so that the courts may often have to employ their inherent powers to fill the inevitable gaps.

There are several arguments against the arbitral process being completely independent of national court systems. First, the judiciary is essential in guaranteeing the integrity of the arbitration process.³³ Secondly, the authority of arbitrators is conferred by agreement and extends no further, so that there must be safeguards against arbitrators exceeding the authority. Thirdly, parties may want insurance against erratic and unpredictable results. Fourthly, states may want to review arbitral decisions to protect weak parties, third parties, or their national interests. In relation to disputes which the parties have agreed to refer to arbitration the court serves two functions. On the one hand, the court provides assistance and support and, on the other, it supervises and controls.

5.3 Role of domestic courts in International commercial arbitration

The involvement of courts in modern commercial arbitration generally begins even before the arbitral tribunal is established, when the courts are used to protect evidence, to avoid damage.³⁴

³³Lutz, Robert E, 'International Arbitration and Judicial Intervention', 10 Loy. L. A. Int'l & Comp. L. J. 1988, 621.

³⁴ Lew J., at page 367

The courts then enforce arbitration agreements for the arbitral process to start; during the pendency of the arbitration itself, it issues interim orders and at the end of the arbitration, it either recognizes and enforces, or set aside arbitral awards.

Rather than discuss the role of domestic courts at each stage, I shall discuss the role of domestic courts in international commercial arbitration generally, on the major concepts of international commercial arbitration without which the arbitral process cannot hold.

5.3.1 The Arbitration Agreement.

Arbitration is based on a valid agreement to arbitrate. Both the UNCITRAL Model Law and The New York Convention require that arbitration agreement be in writing and signed by the parties.³⁵ This calls for two things from the courts. First, it must determine whether an arbitration agreement is valid and then whether to enforce it. The UNCITRAL Model Law is to the effect that a court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.³⁶ This is also provided for in the Uganda arbitration and Conciliation Act.³⁷

The courts generally have developed a progressive approach in interpreting the validity of arbitration agreements. For example in the case of *Arab African Energy Corp. Ltd v. Olieprodukten Nederland BV*³⁸, the English court held correspondence between two firms stating

³⁵ Article 7 of the UNCITRAL Model Law 1985

³⁶ Article 8 (1)

³⁷ Section 5

³⁸ 485 U.S 271 (1988)

“English law- arbitration, if any, London according to ICC Rules,” as a binding arbitration agreement.³⁹

In determining the validity of arbitration clause, most domestic courts progressively look at the substance, rather than form, thereby enforcing parties’ contractual intentions.⁴⁰ The New York Convention and the Model Law, require courts of contracting states to refer parties to arbitration, where there is a contract for arbitration.⁴¹ The courts generally enforce arbitration agreements, subject only to issues of public policy. For example the courts in British Columbia, Canada have developed a standard that guarantees the autonomy of the forum selected by parties and curtail judicial intervention of party choice.⁴² Again, from the *Mitsubishi versus Solar Chrysler Plymouth Inc*⁴³ and the *Gulfstream Aerospace Corp versus Mayacamas Corp*⁴⁴, the US Supreme Court now seems to compel arbitration, notwithstanding public policy issues, by sustaining appeals where federal courts assume jurisdiction in cases, in spite of arbitration agreements.⁴⁵

Domestic courts play a big role in reinforcing party autonomy by requiring them to refer disputes to arbitration where they have a valid arbitration agreement which has not been mutually abandoned. Where there is a valid arbitration agreement between the parties and one party goes to the court for litigation, if the other party invokes the valid arbitration agreement to the court,

³⁹ Redfern and Hunter at page160.

⁴⁰ ibid

⁴¹ Ibid at page392

⁴² Quintetta Case, Canada Supreme Court Report, Vol.2, 1990.

⁴³ 473 U.S 614 (1985)

⁴⁴ 108 S. Ct.1133(1988)

⁴⁵ Buhring-Uhle, C., Arbitration and Mediation in International Business, chapter 2.

the court should stay any action brought before it if the matter is subject to the arbitration agreement.⁴⁶

The domestic courts strongly encourage the resolution of disputes through arbitration thus promoting the growth of jurisprudence in international commercial arbitration. In this regard, Campbell J. stated in *Boart Sweden AB v. NYA Stromnes AB*⁴⁷ that "the very strong public policy of this jurisdiction [is] that where parties have agreed by contract that they will have the arbitrators decide their claims, instead of resorting to the Courts, the parties should be held to their contract...." *Boart* was subsequently referred to with approval in this regard in *Sandbar Construction Limited v. Pacific Parkland Properties Inc.*⁴⁸ and by the Ontario Court of Appeal in *Automatic Systems Inc. v. Bracknell Corporation*⁴⁹. Enforcement of arbitration agreements is enforcement of the substantive contractual rights of the parties.

In another case of *In Chastain v. Robinson-Humphrey Co*⁵⁰ Specifically focusing on the "assent" of the parties in assessing the enforceability of an arbitration clause, the *Chastain* Court held that "[u]nder normal circumstances, an arbitration provision within a contract admittedly signed by contractual parties is sufficient to require the district court to send any controversies to

⁴⁶ Section 5 of the Arbitration and Conciliation Act of Uganda. In Court of appeal case of Fulgensius Mungereza Versus Pricewatercoopers Africa Central CACA No. 34 of 2001 in which the appellant was appealing inter alia against a lower court's decision to stay proceedings on the basis of an existing arbitration clause in a framework agreement between parties. G.M. Okello JA in his judgement stated that: "The arbitration agreement was freely and voluntarily entered into by the appellant and the respondent. To depart from it, the appellant had to show good reason. Unfortunately, none had been shown. As such the trial judge was therefore justified to order stay of proceedings."

⁴⁷ (1988), B.L.R 295 (Ont. H.C)

⁴⁸ (1992), 50 C.L.R. 74 (B.C.S.C.)

⁴⁹ (1994), 18 O.R. (3d) 257

⁵⁰ 957 F. 2d 851 (11th Cr. 1992)

arbitration. Under such circumstances, the parties have at least presumptively agreed to arbitrate any disputes, including those disputes about the validity of the contract in general."⁵¹

5.3.2 The Concept of Arbitrability.

This concept relates to disputes that can be settled by arbitration, and normally depends on public policy of states. The New York Convention is applicable to only disputes that are capable of settlement by arbitration.⁵² The courts role is to decide whether a dispute is arbitrable or not. In recent times, some courts have expanded the scope of arbitration to cover subjects like securities and antitrust law, which traditionally are regarded as public policy issues.⁵³ It is obvious that the courts attitude has been influenced by the need to promote international trade as well as attaining some uniformity in international commercial arbitration.⁵⁴ The US Supreme Court led the way in the *Mitsubishi*, followed by the case of *Vimar Seguros S.A. v. M/V Sky Reefer*⁵⁵, where the court enforced arbitration, despite objections that, arbitration clauses in contracts of bills of lading, were not enforceable because it was not freely negotiated.⁵⁶ The US Supreme Court in particular holds the view that parties must be made to respect arbitral agreements whilst the issue of public policy is left to reviewing courts to consider, when it comes to enforcement of awards under the New York Convention.⁵⁷

In yet another U. S Supreme court case of *Scherk Versus Alberto- Culver Co*, court held that in a case involving international commerce, the policies of the Federal Arbitration Act would prevail

⁵¹ Id. At 854

⁵² Article II(1) of New York Convention

⁵³ Buhning-Uhle at page s60

⁵⁴ Redfern and Hunter at page 164

⁵⁵ 115 S. Ct.2322

⁵⁶ Fox William at page 334

⁵⁷ Ibid at page 333

over the policies of the Securities Exchange Act of 1934.⁵⁸ It therefore upheld compulsory arbitration of securities fraud claims arising under section 10 of the 1934 Act. In following arbitration, court noted: “An agreement to arbitrate before a specified tribunal is, in effect a specialized kind of forum selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute. The invalidation of such an agreement in the case before us would.....reflect a “parochial concept that all disputes must be resolved under our laws and in our courts.....We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws and resolved in our courts”.⁵⁹

This is a positive role played by domestic courts that will strengthen award enforcement, since public policy differs from each state, as such, an award once obtained can be potentially enforced, at least in a state.⁶⁰

5.3.3 The Concept of Separability.

This concept means the arbitration agreement contained in a contract exist independently and survive the main contract. Domestic courts have given recognition to this concept which is the source of arbitral tribunal’s authority. The US Supreme Court held in the case of *Prima Paint Corp. v. Flood & Conklin Manufacturing Co*⁶¹ that arbitration clauses as a matter of federal law are “separable” from the contracts in which they are embedded, and that where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud.

⁵⁸ 473 US 614 (1985).

⁵⁹ Scherk 414 US 506 (quoting *M/s Bremen Versus Zapata Off-Shore Co.* 407 US at 9 (1972)

⁶⁰ Samuel Marful-Sau (2009) Can International Commercial Arbitration be effective without national courts? A perspective of courts involvement in International Commercial Arbitration.

⁶¹ 388 U.S. 395 (1967)

The separability doctrine is a legal fiction that, in addition to the container contract, the parties also formed a second contract consisting of just the arbitration clause.

In the English case of *Heyman v. Darwins Ltd.*,⁶² the court held that the arbitration clause will survive to decide the mode of settling the dispute, even when the contract fails. In the *Gosset case*,⁶³ the French Cour de Cassation held that the concept of separability in law remains unaffected by invalid contracts.⁶⁴ In the *SNE v. JOC Oil* case⁶⁵, the Bermuda Court of Appeal held that even though the main contract was void, due to SNE's inadequate signature, the arbitration agreement survived and it was proper for the arbitral tribunal to assume jurisdiction.⁶⁶ In treating arbitration agreement as separate from the framework contract, courts ensure that parties do not deliberately move away from their agreement on the pretext that the framework contract is invalid or null and void.

5.3.4 The Concept of Competence- Competence.

The doctrine of competence-competence is largely based on Article 16 of the UNCITRAL Model Law which provides that:⁶⁷ “The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause”.⁶⁸

⁶² (1942) AC 356

⁶³ May 7. Dalloz (1963) page 545

⁶⁴ Redfern and Hunter at page 194

⁶⁵ (1990) XV Year Book. Commercial Arbitration 31

⁶⁶ Ibid at 302-303

⁶⁷ Article 16 (1)

⁶⁸ Clause (2) of Article (16) provides that plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is

Flowing from the concept of separability, the tribunals are accorded the legal right to determine their own competence. The UNCITRAL and the ICC Rules vest arbitral tribunals with this right which is recognized and enforced by courts.⁶⁹ The central idea is that any objection against a tribunal's jurisdiction should be dealt with, at least initially, by the tribunal itself.

The underpinning of the competence-competence principle is that the tribunal's competence to rule over its own competence is the basic power for the tribunal to work properly, even though the tribunal's decision on this issue might be varied or cancelled by the court. It is observed that if arbitrators could not determine questions as to their own jurisdiction, a recalcitrant respondent could easily frustrate the parties' agreement to have their dispute decided by arbitration or at least create considerable delay by merely contesting the existence or validity of the arbitration agreement in court. Further observation also shows that such a situation would seriously undermine arbitration as an effective means of private dispute resolution and deprive it of its attraction.⁷⁰,

In the case of *Dalmia Dairy Industries Ltd v. National Bank of Pakistan*,⁷¹ the English Court of Appeal confirmed the ICC Rule providing arbitrators powers to decide on their own jurisdiction.

In the *SNE v. JOC Oil* case, the arbitral tribunal assumed jurisdiction on the basis of the

exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

⁶⁹ Article 21 of UNCITRAL Article 6(4) of ICC

⁷⁰ William W. Park (1996), "The Arbitrability Dicta in *First Options v. Kaplan*: What Sort of Kompetenz-Kompetenz- Has Crossed the Atlantic?" *Arbitration Intl*, vol. 12 pp. 137 and 149

⁷¹ (1978)2 Lloyds'Rep.223

competence- competence concept. The Court of Appeal of Bermuda confirmed the tribunal's decision and enforced the award.⁷²

By recognizing the powers of the arbitration tribunal to determine their own jurisdiction where the same is contested, domestic courts reduce on their levels of interference thus promoting international commercial arbitration.

5.3.5 Challenges to Arbitrators.

Arbitrators are enjoined to be independent and impartial in the performance of their duties. Parties in arbitration therefore can challenge arbitrators who fail to observe this duty. The courts are normally called upon to set aside arbitral awards on grounds that the tribunal was partial or bias. In the case of *Szilard v. Szaz*, the Supreme Court of Canada decided that parties to arbitration must enjoy a persistent sense of confidence and the suspicion of a partial arbitrator will render an award being set aside.

Conceptually there is a distinction between impartiality and independence. But under the English Arbitration Act 1996, only "impartiality" is a ground for challenging the appointment of arbitrator. The effect of this missing word is reflected in *AT&T Corporation v. Saudi Cables Corp.*⁷³ where the commercial court rejected a post-award challenge based upon the alleged lack of independence of the Chairman of an ICC Arbitral Tribunal who failed to disclose this status as a non-executive director of a competitor of the claimant that had completed with claimant successfully to obtain the multibillion dollar intentional contract. In another case based on New York Convention, the US district court enforced the award even though the arbitrator appointed

⁷² Redfern and Hunter at page302

⁷³ Q.B. 1999

by plaintiff had been its counsel in at least two other legal proceedings.⁷⁴ The court held that even though the public policy generally favoured “full disclosure of any possible interest or bias, the stronger public policy in favour of the international arbitration must prevail to enforce the award.”⁷⁵

The *AT&T Corporation v. Saudi Cables Corp* case is however in contrast with the US case of *Commonwealth Coatings Corp v. Continental Casualty Co.*⁷⁶ where the Supreme Court set aside an award for the nondisclosure of business connection with a party, by an arbitrator, even though actual bias was not established.⁷⁷

The domestic courts serve as a check on arbitrators, thereby preserving the integrity and confidence in the arbitral process. Domestic courts generally, exercise this supervisory power on good grounds only. For example, courts will generally refuse to uphold a challenge on bias, when the grounds for the objection were known but were not taken promptly. This was the decision in the case of *The Island Territory of Curacao v. Solitron Device Inc.* and *Ghirardosi v. Minister of Highways.*⁷⁸ This spirit is also maintained in the Arbitration and Conciliation Act of Uganda.⁷⁹

5.3.6 Interim measures by the domestic court

⁷⁴ *Fertilizer Corporation of India v. IDI Management Inc.*, 517 F Supp. 948, cited in W. Michael Tupman, “Challenges and Disqualification of Arbitrators in IAC”, *International and Comparative Law Quarterly*, vol. 38, 1989, p. 48.

⁷⁵ *Ibid.*

⁷⁶ 393 US 145 (1968)

⁷⁷ Redfern and Hunter at 248

⁷⁸ *Ibid* at 251-252

⁷⁹ Section 12(3) of the Act provides that a party may challenge an arbitrator appointed by him or her, or in whose appointment that party has participated, only for reasons of which he or she becomes aware after the appointment.

Domestic courts have power and therefore play a role in taking interim measures on application by the party in limited number of instances including an interim injunction or such other measures of protection as may appear to the court to be just and convenient.⁸⁰ The Indian High court in *Olex focas Pvt. Ltd v. Skoda Export Co Ltd*,⁸¹ held that the Court have been vested with the jurisdiction and powers to grant interim relief in appropriate cases. This case was with regard to the protection and preservation of the disputed property.

In another Indonesian case the *Ad hoc* international arbitration acting under the UNCITRAL Rules provided an interim award against the Indonesian State Electricity Corporation.⁸² The claimant alleged that Indonesia is liable for the State entity's non-payment of the award. Within days after the service of the statement of claim, the State entity commenced an action in the Jakarta District Court to enjoin the arbitration proceedings of which the district court issued an injunction against the arbitration, including a prospective fine of US \$ one million per day for any violation of the injunction.

The Arbitration Tribunal reacted by referring to the writings of former President of the International Court of Justice (ICJ), Judge Arechaga, who stated that under international law "the judgment given by a judicial authority emanates from an organ of the State and is just the same as law promulgated by the legislature or a decision taken by the executive". The Tribunal issued a procedural order stating that the injunction was violative of internal law; there was a breach of arbitration agreement and the physical venue was changed to The Hague.

⁸⁰ Article 9 UNCITRAL Model Law 1985.

⁸¹ AIR 2000 Delhi 161.

⁸² *Himpurna California Energy Ltd. v. Indonesia*, and *Patua Poer Ltd. v. Indonesia*, 15

Domestic courts therefore play a great role in assisting arbitration tribunals with sorting out interlocutory issues that are part and parcel of any dispute settlement institution and more so tribunals handling international commercial arbitration. Without court's intervention in this respect, international commercial arbitration would not hold.

5.3.7 Domestic court assistance in taking evidence

Article 27 of the Model law provides that the arbitral tribunal or a party with the approval of the arbitral tribunal may request from competent domestic court assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence. Under the Model Law, the parties are not free to agree to preclude the court's power of taking evidence.

This provision applies only within the state of the seat of arbitration according to Article 1(2) of the Model Law. In fact, the Working Group drafting Article 27 felt that it might be useful to address judicial assistance in aid of foreign arbitrations. It attempted to adapt the international cooperation between states based on the principle of reciprocity to the structure of the Model Law. This attempt finally failed⁸³ and the Model Law consequently remained silent on this issue. Article 27 of the Model Law therefore does not allow requests for judicial assistance from outside the place of arbitration. The scope of Article 27 of the Model Law and their equivalent provisions in the national arbitration laws remain narrow if domestic court's assistance is to be utilized in the promotion of international commercial arbitration.

5.3.8 Recognition and Enforcement of award by domestic courts.

⁸³HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW 737–38 (1989); *Also* Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General (A/CN.9/264) at 131 *et seq*

The fact that arbitration is binding and final can only be affirmed by the courts. The recognition and enforcement of awards by courts creates *res judicata* and issue estoppel.⁸⁴ If a losing party fails to satisfy the award, the victorious party would invoke the powers of the court to enforce the award just like a court judgment. With the signing of the New York Convention, courts are generally inclined to enforce arbitral awards subject only to procedural errors and issues of public policy, particularly where the contract culminating to the award is founded on criminality. For example in the case of *Soleimany v. Soleimany*,⁸⁵ the English court refused to enforce an award on grounds of public policy because the contract of the parties was founded on tax evasion under Iranian laws.

A party is allowed to challenge an award on the ground of uncertainty or ambiguity as to its effect, or where a party is allowed to appeal to the court on a question of law arising out of the award. There is universal consensus supporting domestic courts role in recognizing and enforcing arbitral awards, without which arbitration will lack efficacy. The courts also preserve the integrity of the arbitral process, by setting aside awards on stated good grounds, when such awards are challenged on grounds for example, that a party was not given equal opportunity to advance his case.

6.0 Conclusion

Arbitration is private in nature, as such parties will need courts to enforce the arbitration agreement and also enforce arbitral awards. The reality therefore is that without courts support,

⁸⁴ Redfern and Hunter at 516

⁸⁵ Redfern and Hunter at 542

the arbitral process cannot be effective. This explains why some countries are not attractive to international arbitration, for the simple reason that their courts are not supportive to arbitration.

The increasing growth in international trade and investments requires the presence of active international commercial arbitration to settle disputes which are part and parcel of trade. There is need to sensitize domestic courts to support the arbitral process, without which arbitration will remain ineffective, particularly in developing economies.

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